

Scott S. Slater  
Attorney at Law  
310.500.4600 tel  
310.500.4602 fax  
[sslater@bhfs.com](mailto:sslater@bhfs.com)

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Amy M. Steinfeld  
Attorney at Law  
805.882.1409 tel  
805.965.4333 fax  
[asteinfeld@bhfs.com](mailto:asteinfeld@bhfs.com)

**VIA EMAIL (APRILN@IWVWD.COM)**

Indian Wells Valley Groundwater Authority (“IWVGA”), Board of Directors  
c/o April Keigwin, Clerk of the IWVGA Board  
500 W. Ridgecrest Blvd.  
Ridgecrest, CA 93555

RE: Comments on Agenda Items 3, 7, 11, and 12

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, “Mojave”) we provide comments on the following items on the Board Agenda for December 17, 2020: (i) Agenda Item 3 (Closed Session Capitol Core Presentation on State Water Project Importation Purchase Options); (ii) Agenda Item 7 (Board Review and Approval of 2021 IWVGA Budget); (iii) Agenda Item 11 (Board Consideration and Possible Approval of Variance Requests); and (iv) Agenda Item 12 (Public Hearing and Board Consideration to Adopt Ordinance 05-20 Amending Ordinance No. 02-18 “Establishing Groundwater Extraction Fees and the Rules, Regulations and Procedures for their Imposition”).

**I. Agenda Item 3: Closed Session Capitol Core Presentation on State Water Project Importation Purchase Options**

It is premature to pursue the purchase of a State Water Project entitlement, as explained in Mojave’s October 29, 2020 comments on Special Meeting Agenda Item 4. First, the Replenishment Fee has not gone into effect and therefore the IWVGA cannot answer two fundamental and foundational questions: how much water is needed and what price can the IWVGA afford?

During the meetings that led up to adoption of the Replenishment Fee, IWVGA staff and decision-makers often repeated the explanation that collection of the Replenishment Fee was necessary for the agency to understand how large a water right entitlement should be secured. Given that the Replenishment Fee has not yet been collected, it is therefore premature to pursue the purchase of a water right entitlement because the necessary amount of the entitlement is undetermined.

Moreover, it is speculative how much the IWVGA will collect in Replenishment Fee receipts if and when it takes effect. Therefore, it is highly uncertain how much, if anything, the IWVGA could afford to pay pursuant to a binding contract. As the Board is aware, the Groundwater Sustainability Plan (“GSP”), which is foundational to the Replenishment Fee, has not yet been approved by the California Department of Water Resources (“DWR”). DWR could require material changes to the GSP that undermine the Replenishment Fee or require substantial changes to thereto. Likewise, Mojave and other stakeholders

2049 Century Park East, Suite 3550  
Los Angeles, CA 90067  
main 310.500.4600

objected strenuously to the substantive and procedural flaws in the Replenishment Fee and its adoption process. The Replenishment Fee is now the subject of at least two lawsuits, creating substantial uncertainty as to its legal viability and procedural soundness.

Given the uncertainty over the fate of the ill-formulated Replenishment Fee and the uncertainty as to how much water is actually needed, it is premature to pursue acquisition of a water right entitlement, especially without a plan to actually deliver water to the Basin.

## **II. Agenda Item 7: Comments on Board Review and Approval of the 2021 IWVGA Budget**

The 2021 IWVGA budget would benefit from additional detail and clarity. First, we recommend that the budget titled "GSP Development" clarify whether the "Assessment Pumping Fee" in the "Revenues" column references the fees collected pursuant to the Extraction Fee, the Replenishment Fee, or both. We also request clarification whether the budget includes all anticipated 2021 expenses, given that the budget appears to significantly underestimate 2021 expenses. For example, consultant expenses in the item labeled "Stetson" are estimated to total \$5,000 per month (\$60,000 for all of 2021), whereas, Stetson's recent invoices have averaged approximately \$100,000 per month. Even if the "SDAC support," "Weather Station Maintenance," "Monitoring Well Maintenance," and "Pump Fee Support" items are intended to be included in Stetson's 2021 expenses, which should be clarified in the budget, total *annual* budgeted Stetson expenses for all of 2021 would total only \$91,000, which is less than its recent average *monthly* bills. Similarly, the 2021 budget appears to omit other significant likely costs, including audit expenses, banking fees, insurance costs, PAC and TAC meeting costs, water marketing expenses, or any administrative expenses. The budget therefore appears unrealistic and fails to account for likely future expenses.

Similarly, the budget titled "Administration" should be clarified. For example, the "Revenues" column includes a "Fee" line item without any projected fee revenue. How will the nearly \$2 million in projected administrative expenses be funded? The IWVGA should explain whether a new fee will be proposed and if not, how the projected \$1,748,186 budget shortfall will be covered. Additionally, the purpose and need for certain of the line items should be clarified. For example, what will be funded with the \$120,000 allocated to "Meetings and Prep" or the \$340,000 allocated to "Navy/COSO Royalty Fund Coord"?

Likewise, the shortfall in the "Well Mitigation" budget is concerning. How will the projected \$255,619 budget shortfall be covered? The assumptions underlying the "Well Mitigation" and "Replenishment" budgets should also be clarified, including the basis for the revenue projections, particularly given the uncertainties associated with Replenishment Fee collections described above in our comments on Agenda Item 3.

Finally, we reiterate our prior requests that the IWVGA begin adhering to accountancy best practices and immediately form a Finance Committee to increase fiscal oversight and transparency. As in prior months, the receipts attached to the December agenda packet demonstrate a startling lack of oversight and contain numerous questionable expenses, including reimbursements for personal care products such as Neosporin, peroxide, and hand sanitizer and home cleaning supplies such as Bounty, Scotch Brite, Dawn, trash bags, and Lysol wipes.

## **III. Agenda Item 11: Comments on Board Consideration and Possible Approval of Variance Request Per Ordinance No. 04-20 by Mojave Pistachios**

The December 17, 2020 Staff Report for Item 11 recommends approval of components 2 (hour meter as secondary meter requirement) and 4 (extension of deadline for submitting meter testing results) of Mojave's request for variance and "conditional approval" of components 1 (re meter type) and 3 (re

alternative meter testers) “pending further evaluation by the Water Resources Manager.” Mojave appreciates the Board’s consideration of its November 9, 2020 variance request and stands ready to answer any additional questions that the Water Resources Manager may have regarding Mojave’s water meters, all of which meet industry standards for agricultural uses and are similar to the meters already approved in other variance requests, and the additional contractors proposed for addition to the list of “Approved Contractors for Meter Testing,” all of whom have the necessary expertise for meter testing.

**IV. Agenda Item 12: Comments on the Adoption of Ordinance 05-20 Amending Ordinance No. 02-18 re Extraction Fees**

The IWVGA proposes to re-adopt the \$105/acre-foot (“AF”) Extraction Fee pursuant to Ordinance No. 05-20, which would amend Ordinance No. 02-20, adopted in July 2020, and Ordinance No. 02-18 adopted in 2018. The stated rationale for this action is to “address the alleged deficiencies in Ordinance No. 02-20” raised in the “multiple lawsuits . . . challenging the validity of the Revised Fee based on procedural and substantive grounds.”

As the Board is aware, Mojave identified numerous substantive and procedural deficiencies in Ordinance No. 02-20. The Board adopted Ordinance No. 02-20 without modifications over Mojave’s objections, refusing to address any of the previously identified inadequacies. The deficiencies Mojave raised persist. Therefore, Mojave continues to oppose the adoption of the Extraction Fee on the following previously identified substantive and procedural grounds.

A. It is unclear that the IWVGA has achieved compliance with the procedural requirements of Water Code section 10730(b).

Previously, Mojave objected to Ordinance No. 02-20 on the basis that the IWVGA failed to comply with the Sustainable Groundwater Management Act’s (“SGMA”) requirement that “at least 20 days prior to the [fee adoption] meeting” the agency provide the public with the data upon which the proposed fee is based. (Water Code § 10730(b)(3).) Here, the December 17, 2020 Staff Report claims this issue will be rectified because the data package for Ordinance 05-20 “was made available to the public on November 24, 2020.” Yet, we were unable to locate the data package on the IWVGA’s website on either Tuesday, November 24, 2020 or Wednesday, November 25, 2020, and the IWVGA did not provide the data package to us by email, as is customary with agendas and supporting materials. Therefore, it is unclear that the IWVGA has actually achieved compliance with Water Code section 10730(b). We ask the agency to clarify when the data package was actually released to the public and explain why it was not provided to stakeholders by email.

B. The Extraction Fee remains deficient because it will be adopted pursuant to Water Code section 10730, but will fund items that trigger compliance with Water Code section 10730.2.

The IWVGA adopted Ordinance No. 02-20 under Water Code section 10730, which provides the legal basis for fees limited to payment for the costs of a groundwater sustainability program, including preparation, adoption, and amendment of a GSP, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve. (Water Code § 10730(a).) By letters submitted in June and July 2020, Mojave objected to the adoption of Ordinance No. 02-20 because the ordinance approved budget items outside the scope of Water Code section 10730 and allowable only under the authority of Water Code section 10730.2. Mojave explained that the projects and management actions to implement a GSP must be funded by a fee adopted under Water Code section 10730.2, applicable to fees for “groundwater management” costs. Mojave identified the following Extraction Fee budget items as improper for adoption under Water Code section 10730:

- “Stetson – Imported Water Coordination for GSP;”
- “Stetson – Allocation Process Development;”
- “Stetson – Pumping Verification;”
- “Stetson – Sustainable Yield Report;”
- “Stetson – Fallowing Program Development;”
- “Stetson – Water Importation Marketing Analysis for GSP;”
- Any other “Additional Tasks,” to the extent these costs are related to GSP implementation;
- “Legal Costs,” to the extent these costs are to defend challenges to the GSP implementation actions;
- “IWVGA Support Costs,” to the extent these costs are related to GSP implementation; and
- “IWVGA Administrative Costs,” to the extent these costs are related to GSP implementation.

Mojave explained that the above items must be funded by a fee adopted pursuant to the authority in Water Code section 10730.2, which provides strict procedures to maintain compliance with numerous Constitutional requirements, including: (1) identifying the parcels upon which the fee shall be imposed, (2) calculating the fee to be imposed for each parcel, (3) providing written notice by mail of the proposed fee to the record owner of each parcel, the amount of the fee to be imposed upon each parcel, the basis upon which the amount of the proposed fee was calculated, and the reason for the fee, together with the date, time, and location of a public hearing on the proposed fee or charge, (4) conducting a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee to the record owners of each identified parcel, and (5) considering all protests against the proposed fee at a public hearing, and (6) if written protests against the proposed are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge. (Cal. Const., Art. XIII D, Sec. 6(a).) The IWVGA did not comply with any of these procedural requirements in adopting the Extraction Fee pursuant to Ordinance No. 02-20. As such, Mojave contends Ordinance No. 02-20 was illegally adopted and the Extraction Fee must be set aside.

Ordinance No. 05-20 suffers from the same deficiencies identified above and in prior comment letters. Namely, it will be adopted pursuant to Water Code section 10730, but will fund the same budget line items Mojave previously identified as improper for a fee adopted pursuant to that section. The December 17, 2020 Staff Report argues that the line items need not be funded by a fee adopted pursuant to Water Code section 10730.2 on the basis that “most” of the tasks identified “began before GSP adoption”—implicitly admitting that some of the line items will fund post-GSP groundwater management actions. Mojave continues to oppose adoption of the Extraction Fee because it fails to comply with Water Code section 10730.2.

C. The Staff Report continues to provide insufficient information to evaluate whether certain budget items are ineligible for financing through a fee adopted under Water Code section 10730.

Previously, Mojave objected to adoption of the Extraction Fee under Ordinance No. 02-20 on the basis that the IWVGA provided insufficient information to the public regarding the budget items to be funded by the

fee. This lack of information frustrated public evaluation of whether certain budget items were eligible to be financed through a fee adopted under Water Code section 10730. Therefore, the IWVGA failed to meet its obligation to provide sufficient information to allow stakeholders to assess whether the proposed fee complied with SGMA.

This previously identified flaw was not rectified in the December 17, 2020 Staff Report and data package. The line items described in the data package are the same, in pertinent part, to the prior data package. Likewise, the December 17, 2020 Staff Report fails to explain the nature of each of the line items, obfuscating the issue further by admitting that some of the costs to be funded by the revised Extraction Fee adopted under Ordinance No. 05-20 were or will be incurred after adoption of the GSP.

D. The Ordinance No. 05-20 Extraction Fee adoption findings do not address the applicability of relevant California Constitutional requirements.

Mojave previously alerted the IWVGA that any fee imposed to recover costs associated with the preparation of a GSP, such as the Extraction Fee, must meet an exemption to the definition of a “tax” under article XIII C, section 1(e) of the California Constitution (“Proposition 26”) or be adopted by supermajority voter approval. The agency adopting the fee bears the burden of proof under the preponderance of evidence standard that the fee is not a tax. Simply stating that the fee is a “regulatory fee” without further analysis is not sufficient to meet the IWVGA’s burden of proof. Absent such analysis and proof, the Extraction Fee is a tax under California law, requiring supermajority voter approval and cannot be imposed administratively as the IWVGA is attempting.

Mojave objected to the adoption of the Extraction Fee under Ordinance No. 02-20 on the basis that nowhere in its adoption findings did IWVGA address the applicability of the California Constitutional requirements for the imposition of fees (see Cal. Const., Arts. XIII C [Proposition 26] and XIII D [Proposition 218].) Mojave asserted that where IWVGA did not make findings that adoption of the Extraction Fee is exempt from the requirements of Proposition 26 and/or Proposition 218 and the procedural and substantive requirements set forth therein should have been complied with, but were not. (Cal. Const., Art. XIII C, Sec. 1(e)(7) [“local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax”].)

Ordinance No. 05-20 is similarly deficient. The Ordinance fails to address the applicability of the California Constitutional requirements for the imposition of fees and the IWVGA has failed to meet its burden of proof to demonstrate that the Extraction Fee is exempt from the requirements of Propositions 26 and/or 218.

E. The Extraction Fee remains invalid because it is predicated on the allocations illegally-adopted pursuant to the “Sustainable Yield Allocation”.

In its prior comments, Mojave identified that the calculation of the Extraction Fee was deficient because it was based on the “Sustainable Yield Allocation” developed and adopted by the IWVGA after completion and adoption of the GSP. Under this Sustainable Yield Allocation, set forth in Exhibit 3 of the July 2020 data package (attachment titled “Sustainable Yield Allocation”), the United States Navy would be allowed to continue current pumping of 1,450 AFY and certain other pumpers, including “De Minimis Wells,” the City of Ridgecrest, Kern County, Indian Wells Valley Water District, Inyokern CSD, mutual water companies, and domestic users in the town of Trona would be allowed to use the portion of the Basin’s sustainable yield allocated to the Navy, but not used by the Navy. Mojave explained that reliance on the Sustainable Yield Allocation is flawed for reasons including that a federal reserved water right cannot be transferred off a federal reservation (i.e., the Navy base) and gifted to or exercised by non-federal entities. As demonstrated in Mojave’s prior comments, this scheme lacks legal support.

This deficiency has not been rectified in the December 2020 data package, which also relies on the same table contained in the July 2020 Exhibit 3. The table, formerly named “Sustainable Yield Allocation,” has been confusingly renamed “Table of Current Estimated Pumping Subject to Fee” in the December 2020 data package, perhaps in an attempt to avoid Mojave’s prior comment. This new name is misleading because two of the entities on the table, the Navy and Small Mutuals, are purportedly exempt from the Extraction Fee, as explained in the Staff Report, whereas many pumpers subject to the Extraction Fee, like Mojave and others are omitted from the table.

F. It remains unclear which pumpers are subject to the Extraction Fee and the basis for this determination.

Mojave’s comments previously identified that it was unclear which groundwater users would be subject to the Extraction Fee and the basis for this determination.

This deficiency persists. The December 17, 2020 Staff Report explains that the “[e]stimated groundwater subject to the fee is 10,000 A/F annually” and cites to the table now titled “Table of Estimated Pumping Subject to Fee” and formerly titled “Sustainable Yield Allocation.” In turn, the Staff Report explains that the calculation of the \$105 fee is based on the 10,000 AF of annual pumping supported by this table. The table, however, omits numerous groundwater pumpers in the Basin. Mojave, for example, is absent from the table, yet has been paying the Extraction Fee since originally adopted in 2018.

Ordinance No. 05-20 should be amended to identify which pumpers are subject to the fee and on what basis. It should also definitively answer the question—for how long will the fee be assessed?

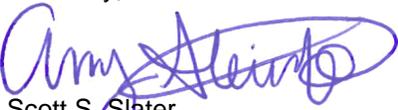
G. Mojave reiterates its request for a refund of the excess Extraction Fees paid after September 1, 2020.

Based on the deficiencies identified above, Mojave reiterates its prior request for a refund of the excess Extraction Fees paid under protest (i.e., the difference between the \$30/AF and \$105/AF fees) after the September 1, 2020 effective date of Ordinance No. 02-20 to the present. Mojave remitted a total Extraction Fee payment of \$44,897.37 at \$105/AF for its pumping in September and October 2020. At \$30/AF, the total bill should have been \$12,827.82, amounting to an overpayment of \$32,069.55.

## V. Conclusion

We thank you for your attention to our comments on these items and urge the IWVGA to address each comment prior to action at the December 17, 2020 Board meeting.

Sincerely,



Scott S. Slater  
Amy M. Steinfeld