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August 19, 2020

VIA EMAIL (APRILN@IWVWD.COM)

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

RE: Comments in Opposition to the Proposed Indian Wells Valley Groundwater Basin Replenishment Fee

Dear Members of the IWVGA Board of Directors:

We provide these comments in strong opposition to the Indian Wells Valley Groundwater Basin Replenishment Fee (Replenishment Fee) on behalf of our clients Mojave Pistachios, LLC, the Nugent Family Trust, and Sierra Shadows Ranch. We ask that the IWVGA reject the adoption of the Replenishment Fee for the reasons set forth in this letter and our January 8, 2020, June 3, 2020, June 18, 2020, July 15, 2020, August 6, 2020 letters, which are incorporated by reference herein. For the Board's convenience, we enclose our August 6, 2020 letter on this topic. We also join and incorporate the comments made by other groundwater users, including the August 19, 2020 comments of Meadowbrook Dairy.

The Replenishment Fee must be rejected because it is procedurally and substantively deficient and violates the requirements of the California Constitution and the Sustainable Groundwater Management Act (SGMA) for the following reasons:

- We are informed by IWVGA staff that the public is prohibited from attending the August 21, 2020 hearing in person due to the COVID pandemic. The Replenishment Fee Notice lists only the physical hearing location that will be closed to the public and fails to provide instructions for the public to access the hearing by electronic or telephonic means. The Notice therefore violates Article XIIID, section 6(a)(1) of the California Constitution, which requires notice of a publicly accessible hearing location.

- The IWVGA impermissibly erected extra-legal barriers to public protest, including an "original signature" requirement not found in law. (See Cal. Const. Art. XIIID, § 6(a)–(b); Water Code § 10730.2.) It is illegal and fundamentally unjust to require the public to participate in the hearing electronically, while prohibiting electronic submission of protests. This onerous procedural hurdle serves no purpose other than to chill public participation and stifle protest.

- Moreover, the Replenishment Fee Notice is procedurally deficient because it fails to accurately disclose instructions for in-person delivery of protests. It states that protests may be delivered to the August 21, 2020 hearing, but this hearing will be closed to the public. Therefore, there is a substantial likelihood that numerous protests will remain uncounted.

- We are informed that the Replenishment Fee Notice was mailed to each property owner overlying the Basin, as reflected on the Assessor's tax rolls for each county. The IWVGA, however, proposes to exempt hundreds, or even thousands, of property owners from payment of the fee (e.g., "de minimis" users, property owners served by "small mutuals," etc.). It is illegal to count parcels owned by water users that will be exempt from the Replenishment Fee in the majority protest procedure because these parcels are not "parcels upon which a fee or charge is proposed for imposition." (Cal. Const. Art. XIIID, § 6(a)(1).)

- The IWVGA has failed to fully and consistently describe the purpose and duration of the Replenishment Fee, leaving stakeholders in the dark. For example, the Replenishment Fee Notice describes the fee as a five-year fee to fund the purchase of imported water, but also inconsistently states that the fee will be charged until "import supplies are secured *and brought into the basin*," which will take substantially longer than five years due to the timeline for infrastructure construction, which will require substantial environmental review. The Replenishment Fee cannot be adopted while numerous questions have not been accurately and consistently answered, including:
    - What is the purpose of the fee?
    - Will the fee fund both the purchase water rights and construction of infrastructure to import water to the basin?
    - If the fee will not fund infrastructure construction, how will the import projects be funded and who will pay?
    - What is the duration of the fee – i.e., for how long will the fee be imposed?
    - On which water users will the fee be imposed and how might this change over time (e.g., if the Navy ramps up production)?
    - Why is this fee thousands of dollars more expensive on a per acre-foot basis than any other post-Groundwater Sustainability Plan fee adopted or proposed by any Groundwater Sustainability Agency across the state?

- The Replenishment Fee rests on a flawed theory that the Navy's federal reserved right can be "carried over" and utilized off the federal reservation for non-federal purposes. This notion is wholly without support in law.[1] It also runs counter to the facts. Whereas the Replenishment Fee Notice states that certain water users will be exempted from the fee "through Navy pronouncement," the Navy has expressly stated that it "did not direct, ask or imply that the IWVGA should transfer" the Navy's water right to any third party. (July 16, 2020 Statement of Navy Commander Benson.) In other words, the Navy denies that it has ever issued the "pronouncement" relied upon by the IWVGA.

[1] As explained in our June 18, 2020 comment letter, among several legal deficiencies is that the "Navy's reserved right," whatever it is, cannot be transferred to non-federal entities. The right, however it is quantified, is both appurtenant to and limited by the four corners of the reservation. By law a federal reserve right extends only to the federal land withdrawn from the public domain and to the primary purpose of the federal reservation. (See, e.g., *Cappaert v. United States* (1976) 426 U.S. 128, 138; *Agua Caliente Band of Cahuilla Indians v. Coachella Water Dist.* (9th Cir. 2017) 849 F.3d 1262, 1268–69.) Likewise, in California, for a water right to be transferable, there must be both a willing transferee and transferor and it must not cause injury to any legal user. Where these criteria are met, paperwork must be drawn up to effectuate the transfer. None of these pre-requisites have, or will ever, be met.

- The "federal reserve right transfer" shell game is also illegal under Proposition 218, which requires that the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. The purported "transfer" of the Navy's federal reserve rights to certain groundwater users will allow those users to obtain "free" water, while the remaining water users are being asked to subsidize sustainability projects to be funded by the fee. In short, the Replenishment Fee is unconstitutional and violates Proposition 218's proportionality requirement where it will be selectively imposed on some—but not all—water users. It is illegal to grant some users free water while the farming community and other water users are being asked to pay full freight.

In conclusion, the proposed Replenishment Fee suffers from fatal procedural and substantive flaws. SGMA provides a 20-year sustainability horizon, yet the IWVGA is engaged in a race to shut down farmers' water use. The Replenishment Fee development process has largely occurred behind closed doors, with the IWVGA Board now picking winners and losers through selective implementation of this draconian fee. At bottom, the Replenishment Fee effectuates a taking of farmers' overlying water rights, providing farmers with the hollow "option" to re-purchase the water at a cost of $2,130 per acre-foot—a sum which will then be used to subsidize other pumpers that are not required to pay a dime for their water use. The fee is unconstitutional, represents a complete departure from the letter and spirit of SGMA, was developed without providing major stakeholders any voice or input, and lacks any mechanism for adequate fiscal oversight. The IWVGA Board must therefore reject the adoption of the fee and work with all stakeholders to craft a fee that is legally compliant, transparent, clearly defined, and that properly spreads the burden of shortage across all water users in the basin.

Sincerely,

Scott S. Slater
Amy M. Steinfeld

Enclosure

cc: Kern County Board of Supervisors, clerkofboard@kerncounty.com
Inyo County Board of Supervisors, cquilter@inyocounty.us
San Bernardino County Board of Supervisors, COB@sbcounty.gov
Indian Wells Valley Water District Board of Directors, apriln@iwvwd.com
City of Ridgecrest Councilmembers, rcharlon@ridgecrest-ca.gov

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August 6, 2020

VIA EMAIL (APRILN@IWVWD.COM)

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

RE: Request to Correct Procedural Deficiencies in Replenishment Fee Notice & Protest Procedure

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC, the Nugent Family Trust, and Sierra Shadows Ranch, we are writing to raise several deficiencies in the Notice of Public Hearing on a Basin Replenishment Fee (Replenishment Fee Notice) that must be corrected pursuant to Article XIIID, section 6(a)–(b) of the California Constitution. The Replenishment Fee Notice must then be recirculated to the owners of the properties on which the fee is proposed and the August 21, 2020 Replenishment Fee adoption hearing must be rescheduled in accordance with the procedural requirements set forth in Article XIIID of the California Constitution.

First, the Replenishment Fee Notice is problematic because it requires submission of an "original signature" by each protestant. This purported requirement is not found in law (see Cal. Const. Art. XIIID, § 6(a)–(b); Water Code § 10730.2), and given the ongoing COVID pandemic, serves as an illegitimate barrier to public protest and participation in the Replenishment Fee adoption process. Particularly given the extenuating circumstances presented by a global pandemic and the adverse impact that this colossal fee will have on the local farming community, the IWVGA should accept electronic protest submissions and the Replenishment Fee Notice should be updated to clarify that electronic submissions will be accepted.

Second, the Replenishment Fee Notice should be updated to include instructions for delivery of protests in the event that the August 21, 2020 IWVGA Board hearing is not open to the public, as has been the case with the last four IWVGA Board meetings held in April, May, June, and July of this year. In fact, on August 5, IWVGA staff confirmed that given the ongoing severity of COVID in California, the August 21, 2020 hearing will likely again be closed to the public. Therefore, at a minimum, if the IWVGA Board refuses to reschedule the hearing for a later date at which the public can participate in person, the Replenishment Fee Notice should be updated to provide instructions for in-person delivery of protests, if protests cannot be filed at the hearing as stated in the notice.

Relatedly, in light of the COVID pandemic, the Replenishment Fee Notice should be revised to include the virtual location (e.g., web address) at which the Replenishment Fee hearing will be available to the public electronically. The Replenishment Fee Notice must also be updated to explain how the public may participate telephonically or through other electronic means. (See Cal. Const. Art. XIIID, § 6(a)(1).)

Additionally, pursuant to Article XIIID, section 6(a)(1), the IWVGA should make available to the public the list of parcels upon which the IWVGA has determined that the Replenishment Fee should be imposed. The Replenishment Fee Notice states that "Federal Interests and De Minimis users," along with "residents in IWVGA registered small mutual and the Inyokern Community Services District are exempted" from the Replenishment Fee. Therefore, parcels owned by these users cannot be counted in the majority protest procedure—i.e., because these parcels are not "parcels upon which a fee or charge is proposed for imposition." (Cal. Const. Art. XIIID, § 6(a)(1).) We ask the IWVGA to make available the list of parcels on which the fee is proposed to be imposed to verify that parcels owned by exempted water users will not be counted in the protest procedure.

Further, the Replenishment Fee Notice must be updated to explain the basis for the amount of the fee proposed. (Cal. Const. Art. XIIID, § 6(a)(1).) The Notice puzzlingly explains, on the one hand, that the fee "will cover the estimated imported water purchase costs of $2,112 per acre foot extracted and $17.50 per are foot extracted to cover the estimated costs to mitigate damages to the IWVGA registered shallow wells because of the ongoing overdraft while import supplies are secured and brought into the Basin," but also that "it is estimated to take five years to fund the purchase [of imported water] at which time the charge will cease and the infrastructure construction phase will begin." Which is it? Will the $2,112 per acre-foot component of the Replenishment Fee be charged until imported water is "brought into the Basin," or for approximately five years until "infrastructure construction" begins? The Replenishment Fee Notice must be updated to specify the amount and basis of the fee, as required under Article XIIID, section 6.

Finally, the Replenishment Fee Notice must be revised to accurately set forth the basis for the IWVGA's decision to exempt "residents in IWVGA registered small mutual and the Inyokern Community Services District." The Replenishment Fee Notice states that these owners are exempted from the fee "though Navy pronouncement that its water needs include off-Stations demands for its workforce, and their dependents." Navy officials, however, have directly contradicted this stated rationale. For example, at the July 16, 2020 meeting of the IWVGA Board, Navy Commander Benson explained:

> The IWVGA alone made the decision to use the Navy's pumping data to estimate the federal reserved water right. Additionally, the IWVGA made the allocation decisions to transfer the IWVGA estimated federal reserved water right. <u>The Navy didn't direct, or ask, or apply that the IWVGA should transfer the estimated federal reserved water right balance</u>.

Therefore, the Replenishment Fee Notice cannot rely on "Navy pronouncement" as the basis for the convoluted federal reserve right carryover scheme that is foundational to the IWVGA's identification of the parcels on which the fee is proposed for imposition. The Notice must therefore be updated to provide a new explanation. (Cal. Const. Art. XIIID, § 6(a)(1).)

We request that the IWVGA revise the Replenishment Fee Notice to correct the identified issues. The Notice must then be recirculated to the record owners of the parcels on which the Replenishment Fee is proposed for imposition. (Cal. Const. Art. XIIID, § 6(a).) The August 21, 2020 hearing must also be rescheduled for a new date that is not less than 45 days after mailing of the revised notice. (Cal. Const. Art. XIIID, § 6(a)(2).) Thank you for your attention to these important issues.

Sincerely,

Scott S. Slater
Amy M. Steinfeld