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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 on Agenda Item 8 (Board Consideration and Adoption of Pumping Verification Reports) to be heard on August 20, 2020 and Agenda Item 18 (Public Hearing and Board Consideration and Adoption of Resolution 05-20 Regarding a Transient Pool and Fallowing Program and Adoption of Related CEQA Findings) to be heard on August 21, 2020

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, "Mojave") and Sierra Shadows Ranch (Sierra Shadows) we provide these comments on Agenda Item 8 regarding the Pumping Verification Report to be heard on August 20, 2020 and Agenda Item 18 regarding the Transient Pool and Fallowing Program to be heard on August 21, 2020. We also refer you to our separate August 19, 2020 comment letter in opposition to the Replenishment Fee (Agenda Item 17 to be heard on August 21, 2020).

I. Agenda Item 8: Comments on the Pumping Verification Report

On behalf of Mojave, we object to the patently punitive, retaliatory, and illegal exclusion of Mojave from the Pumping Verification Report and ultimately the Transient Pool. According to the Staff Report for Item 8, the purported justification for Mojave's exclusion was "the lack of needed and timely data" due to Mojave's May 2020 response to the IWVGA's Pumping Verification Questionnaire (Questionnaire), which was due on March 1, 2020. This rationale provides insufficient basis for the IWVGA to leverage a multi-million dollar penalty on Mojave for several principal reasons.

First, the IWVGA had ample opportunity to incorporate Mojave's Questionnaire into the Pumping Verification Report, and ultimately the Transient Pool. Therefore, the IWVGA was in no way prejudiced by Mojave's submission of the Questionnaire in May 2020. The IWVGA had nearly three entire months to incorporate Mojave's data into the Pumping Verification Report and yet chose not to. In fact, the IWVGA was repeatedly provided several opportunities to correct the omission, which at first seemed an oversight:

- By the letter dated May 26, 2020 we provided notice to the IWVGA and Stetson Engineers (Stetson) that Mojave's answers to the Questionnaire would be provided later that week.

- By letter dated May 29, 2020 we then submitted Mojave's answers to the Questionnaire to the IWVGA and Stetson. Nonetheless, the Draft Pumping Verification Report issued by Stetson on June 3, 2020 omitted Mojave from the Report.

- Upon discovering this error, we sent a June 8, 2020 email to Joseph Montoya of Stetson in response to Mr. Montoya's invitation for comment on the draft Pumping Verification Report. In our June 8, 2020 email, we notified Mr. Montoya of the omission, provided our two May 2020 letters including the answers to the Questionnaire, and asked for confirmation that Mojave would be included in the revised Pumping Verification Report. We never received a response from Mr. Montoya, despite the fact that new information submitted by other pumpers was rightfully incorporated into the Pumping Verification Report in response to comments on the draft Report.

- When the materials for the June 18, 2020 IWVGA Board meeting were released we discovered that Mojave had again been excluded from the Transient Pool and Fallowing Program on the basis that Mojave "did not submit the required Pumping Verification Questionnaire," despite our three prior letters and emails. Therefore, we clarified in our June 18, 2020 comment letter and in our oral comments at the June 18 meeting that Mojave had in fact submitted the Questionnaire. See, e.g., June 18, 2020 Comment Letter at p. 7 ("The Transient Pool structure is also deficient because it fails to justify Mojave's exclusion. The Report on the Transient Pool and Fallowing Program wrongfully claims that Mojave "did not submit the required Pumping Verification Questionnaire." In fact, the questionnaire was submitted to the IWVGA and Stetson in May 2020. Additionally, the questionnaire was re-submitted to Stetson on June 8, 2020, upon learning that Mojave had been erroneously excluded from the Draft Pumping Verification Report. We request that this immediately be remedied.").

- After receiving no substantive response to our June 18, 2020 comments, we submitted a second email on July 13, 2020, this time addressed to Mr. Montoya and Mr. Johnson of Stetson, Ms. Nordenstrom, the Clerk of the IWVGA Board, and Mr. Markman, the IWVGA's legal counsel. This email again outlined the history detailed above and asked for confirmation that Mojave would be added to the Pumping Verification Report and Transient Pool, now that the IWVGA and Stetson had the benefit of 1.5 months to incorporate the answers to Mojave's Questionnaire into the Transient Pool Report. Again, this email was met with silence.

The IWVGA has not identified a single policy, regulatory, or factual circumstance of any kind to exclude the known data from consideration. The administrative act of failing to acknowledge and account for known, actual water use by a multi-million dollar going agricultural concern and excluding Mojave from the Pumping Verification Report and Transient Pool—when there was nearly three months and multiple IWVGA public meetings to correct the situation—is unconscionable. Clearly and unambiguously, despite ample opportunity, the IWVGA willingly exercised its discretion to punitively omit Mojave from the Pumping Verification Report and ultimately from the Transient Pool.

What at first blush appeared to be an administrative oversight can now clearly be seen as the taking of a property entitlement without due process of the law. The IWVGA's wrongful decision to exclude Mojave from the Pumping Verification Report—and ultimately from the Transient Pool—amounts to an arbitrary multi-million dollar penalty. Take, for example, Mojave's portion of the Transient Pool previously modeled by the IWVGA in Model Scenario 6. Under this Scenario, Mojave would have held 4,292 acre-feet (AF) of the Transient Pool, **which amounts to a value in excess of 9 million dollars**, based on the Replenishment Fee of $2,130/AF. Even with a smaller Transient Pool than modeled under Scenario 6, the IWVGA's wrongful decision amounts to the arbitrary adoption of a multi-million dollar penalty—or the deprivation of a multi-million dollar property right—without due process.

The penalty is illegal because Mojave was never provided with the requisite notice. **Specifically, the Questionnaire fails to notify the respondent that failure to submit the Questionnaire on March 1, 2020 is grounds for exclusion from the Pumping Verification Report and Transient Pool**. In other words, the IWVGA failed to disclose to Mojave or any other pumper that the failure to respond by a certain date carried within it a forward forfeiture of the right to participate in a program not yet formulated, let alone finalized.[1] Without the requisite notice, the IWVGA's multi-million dollar penalty violates basic principles of procedural due process that cannot withstand constitutional scrutiny.

Mojave, like the other farmers in the Indian Wells Valley, has been pumping groundwater to irrigate its orchards. However, the IWVGA has not treated Mojave in a similar manner. For example, the IWVGA's refusal to accept Mojave's June 8, 2020 comments on the draft Pumping Verification Report, despite being given ample opportunity, is arbitrary because the IWVGA accepted new information from other pumpers in response to Stetson's June 3, 2020 request for comment on the draft Pumping Verification Report. It is not that the IWVGA contends that the information is incorrect. The agency's intention is clear; Mojave is being singled out for entirely punitive purposes. The IWVGA's disparate treatment of Mojave is arbitrary and capricious.

For these reasons, we believe the IWVGA's decision to exclude Mojave from the Pumping Verification Report, and ultimately the Transient Pool, is illegal, violates state and federal procedural and substantive due process protections, and is wholly without evidentiary support of any kind.

II. Agenda Item 18: Additional Comments on Transient Pool and Fallowing Program Report

The August 21, 2020 Report on the Transient Pool and Fallowing Program (Report) suffers from the same flaws identified in our June 18, 2020 comments, which we attach to this letter and incorporate by reference. (See Attachment 1.) We summarize these issues and others below and ask that the IWVGA Board defer adoption of the Report until such time as the identified deficiencies are corrected.

First, the Transient Pool makes decisions regarding the priority of competing uses that has no basis in common law. In actuality, the priorities within the Transient Pool are at best whimsical and at worst were completely invented to further the objectives of Supervisor Gleason, the former Base Commander that has commandeered the IVWGA to meet his often-stated agenda: give all available groundwater to the Navy. The Transient Pool, as proposed, would provide participants only a meager one-time allocation sufficient for only a few years of continued production. At the same time, the IWVGA proposes to allocate other water users, including the Navy, the City of Ridgecrest, Kern County, Indian Wells Valley Water District, Inyokern CSD, "Small Mutuals," "de minimis" well owners, all or the majority of their current pumping needs on an annual basis. Agriculture should be treated the same as these other water users. This unequal scheme is problematic under SGMA, lacks any rational basis, fails to respect common law water rights, and violates the federal and state constitutions.

Second, the IWVGA should remove the condition that acceptance of a Transient Pool allotment or participation in the Fallowing Program "include a release of any and all claims against the IWVGA and its members on a form approved by counsel for the IWVGA." Why should a pumper be required to release any and all legal claims against the agency to be able to exercise its overlying water rights through the Transient Pool? The condition is unconscionable and inappropriate. There is no nexus between participation in the Transient Pool and the release of legal claims that could possibly justify the IWVGA's strong arm tactics. Nowhere in the State are other Groundwater Sustainability Agencies asking pumpers to

[1] Instead, the Questionnaire vaguely explains only that: "A party's failure, especially a willful failure, to timely provide this information *could* significantly impact that party's legal ability to access the BASIN groundwater and the developing transient pool." (Emphasis added.)

release all legal claims as a prerequisite to the continued exercise of water rights recognized under the law. The condition is nothing more than a tactic to bully farmers into signing away their legal rights. The condition is also illustrative of the fact that the IWVGA knows it is on tenuous legal ground—a release of legal claims would otherwise be superfluous.

Third, for the reasons identified in our comments on the Pumping Verification Report, Mojave, which is recognized as a "qualified base period pumper," should be added back into the Transient Pool and the Report should be updated accordingly.

Additionally, as explained in or prior comments, failure to prepare an Environmental Impact Report (EIR) prior to adoption of the Transient Pool and Fallowing Program violates the California Environmental Quality Act (CEQA). The IWVGA cannot avoid CEQA review on the basis that adoption of the Transient Pool and Fallowing Program—or any other GSP implementation action—is a ministerial action or on the basis that it is exempt from CEQA review pursuant to a statutory or categorical exclusion. The Transient Pool and Fallowing Program is one of a group of connected actions to implement the Groundwater Sustainability Plan (GSP) over which the IWVGA has discretionary decision-making authority and that, collectively, will have potentially significant environmental impacts that must be studied prior to adoption in an EIR. As a GSP implementation action, the Transient Pool and Fallowing Program is subject to CEQA and must be analyzed together with each interrelated GSP implementation action such as the Sustainable Yield Report and Determination, the Sustainable Yield Allocation (i.e., the allocation of the Navy's 7,650 acre-foot "federal reserve right" to non-federal pumpers), and the Replenishment Fee. See Water Code § 10728.6 ("a project that would implement actions taken pursuant to a [GSP]" is subject to CEQA); 14 Cal. Code Regs. § 15378(a) (under CEQA, "project" is defined as "the whole of an action" that has "a potential for resulting" in a direct or reasonably foreseeable indirect physical change to the environment). Failure to analyze each of the interrelated GSP implementation actions together constitutes segmentation, which is prohibited under CEQA.

The Transient Pool and Fallowing Program will have potentially significant environmental impacts associated with widespread fallowing resulting from the IWVGA's strategic elimination of agriculture, including impacts on air quality, human health, greenhouse gas (GHG) emissions, biological resources, aesthetics, and local economies. These impacts are detailed in our July 15, 2020 comments on the Sustainable Yield Report and Determination, which are attached hereto and incorporated by this reference. (See Attachment 2.)

The Transient Pool and Fallowing Program and the other GSP implementation actions are not, as the IWVGA now claims, ministerial projects because these decisions do not simply require conformance with a fixed standard or objective measurements. Rather, they require exercise of personal judgment by the Board as to the wisdom and manner of carrying out the interrelated projects. There is nothing in SGMA that requires the IWVGA to: (i) grant the entire sustainable yield of the Indian Wells Valley Groundwater Basin to the Navy; (ii) dole out the 80+ percent of the sustainable yield that the Navy does not use to chosen water users; and (iii) grant a meager allocation to certain agricultural producers and then, when that meager allocation has been utilized, charge agricultural producers exorbitant fees designed, quite simply, to force farmers to leave the basin. The claim that the Transient Pool and Fallowing Program and the related GSP implementation actions are ministerial actions is entirely bereft of legal support. We ask the Board to immediately commence preparation of an EIR to evaluate the potentially significant impacts of the GSP implementation actions, including adoption of the Transient Pool and Fallowing Program, the Sustainable Yield Determination, the Sustainable Yield Allocation, and the Replenishment Fee.

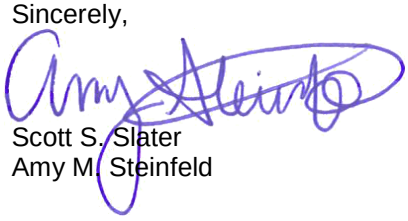
We therefore ask the Board to postpone adoption of the Transient Pool and Fallowing Program, and all other un-adopted GSP implementing actions, until such time as the IWVGA prepares an EIR to examine

the environmental impacts of the actions, including those related to fallowing, and adopts mitigation measures to mitigate all significant impacts.

III. Conclusion

For the reasons outlined above, in our prior comment letters, and for the reasons identified by others, we urge the IWVGA Board to decline to adopt the Pumping Verification Report and the Transient Pool and Fallowing Program.

Sincerely,



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Enclosures

ATTACHMENT 1

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June 18, 2020

VIA EMAIL (APRILN@IWVWD.COM)

Indian Wells Valley Groundwater Authority (IWVGA), Board of Directors
c/o April Nordenstrom, Clerk of the IWVGA Board
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RE: Comments on Agenda Items 8, 9, 10, 11, and 12 Regarding the Reporting Policy for New Groundwater Extraction Wells, Groundwater Extraction Fee, Sustainable Yield Report, Replenishment Fee Report, and Transient Pool and Fallowing Pool Report

Dear Members of the IWVGA Board of Directors:

We provide these preliminary comments on the agenda items for the June 18, 2020 Board meeting regarding the Reporting Policy for New Groundwater Extraction Wells, Groundwater Extraction Fee, Sustainable Yield Report, Replenishment Fee Report, and Transient Pool and Fallowing Pool Report on behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, "Mojave") and Sierra Shadows Ranch ("Sierra Shadows").

It is not possible to provide detailed comments on each of these agenda items prior to the Board's June 18th meeting because the full Board packet was only belatedly released on June 17, leaving only 24 hours to provide comments on the numerous agenda items. It is astonishing that the Board would release these documents that are so critically important to so many one day before the meeting. We reserve the right to submit further comments on these actions, and any related items, prior to the Board's next meeting.

Broadly, Mojave and Sierra Shadows object to the IWVGA's use of the Sustainable Groundwater Management Act ("SGMA") as a ploy to target agriculture in the Indian Wells Valley for the now openly expressed intention of removing any competition with the United States Navy ("Navy") for native water. When land use changes enacted by general plan amendment didn't achieve the goal of eradicating agriculture in the Indian Wells Valley, the IWVGA turned to SGMA to effectuate this goal. Yet SGMA was not designed to affect water rights, much less allow uncompensated takings of water rights for the benefit of the Navy and other public water users. For more detailed comments on this issue, please refer to our January 8, 2020 comment letter to the IWVGA Board on the Public Review Draft of the groundwater sustainability plan ("GSP") for the Indian Wells Valley Basin ("Basin") and our June 3, 2020 comment letter to the California Department of Water Resources ("DWR") on the final GSP, which are attached hereto and incorporated by reference.

In sum, the IWVGA is bereft of common sense or the creativity necessary to actually attempt to solve groundwater challenges. Instead of pursuing a strategy to optimize available groundwater, share shortages, and pursue supplemental water, it has systematically sought to achieve its draconian objective by implementing five steps to marginalize and exclude agricultural producers from using groundwater to irrigate crops on overlying parcels. First, the IWVGA strategically marginalized farming's voice in the IWVGA governance process by denying any agricultural representative a seat at the table on the IWVGA Board and denying a meaningful role for the farming community, or other water users not represented on the IWVGA Board, on the advisory committees to the Board. What limited input Mojave was allowed to have on the advisory committees to the Board was not meaningful and was ignored, lending only the superficial appearance of stakeholder input. Second, the IWVGA ignored comments by agricultural producers, including Mojave, which identified numerous fundamental errors in the GSP and related actions. Third, the IWVGA seeks to preclude Mojave, Sierra Shadows, and all other agricultural producers, from exercising their overlying groundwater rights—property rights— by denying these property owners an annual groundwater pumping allocation, which will be given only to a handful of lucky pumpers, mostly members and associate members of the IWVGA, through the IWVGA's convoluted federal reserve right "carryover extraction" scheme. Fourth, the IWVGA now intends to completely and wrongfully exclude Mojave from the "Transient Pool" groundwater allocation and to only provide Sierra Shadows a one-time "Transient Pool" groundwater allocation—intended to last until 2040—that will satisfy only a few years of Sierra Shadows' irrigation demands. At the same time, the IWVGA proposes to increase the existing groundwater extraction fee from $30 per acre-foot ("AF") to $225 per AF. This increase, which is purportedly necessary to fund the IWVGA's egregious expenses associated with the GSP (that supposedly total a whopping $6,982,905), has the potential to render farming operations economically unviable. Fifth, once the meager (or nonexistent, in the case of Mojave) "Transient Pool" allocation is exhausted, all pumping is prohibited unless overlying rights holders pay the IWVGA *another* $2,130 per AF "Replenishment Fee," hammering the nail in the coffin of any remaining economically viable farming operations.

Together, this strategy is designed to effectuate the unconscionable result of eliminating agriculture for the express purpose of taking overlying owners' water rights for the benefit of public agencies—many of which are IWVGA member agencies—and the Navy—without compensation. Such an outcome was not contemplated by SGMA's drafters and runs afoul of SGMA, the California and Federal Constitutions, and other state laws, including the California Environmental Quality Act ("CEQA").[1]

I. Agenda Item 8: Preliminary Comments on Reporting Policy for New Groundwater Extraction Wells

The Reporting Policy for New Groundwater Extraction wells is vague and should be clarified to explain that it does not apply to reconstruction or replacement of existing wells. It should also be better explained how this policy will be implemented in concert with Kern County's groundwater well regulations and whether the policy is consistent with those imposed by other GSAs in Kern County. Are similar policies enforced by other GSAs in Kern County? If not, how will the patchwork of well construction regulations be enforced?

The policy purports to allow the IWVGA to disapprove the construction of any new groundwater wells that may cause "Material Injury," defined by the IWVGA to include: "impacts to the Basin caused by pumping or storage of groundwater that causes material physical harm to the Basin, any Subarea, or any Producer/Party, including, but not limited to, overdraft, degradation of water quality by introduction of

[1] As discussed further below, the IWVGA apparently does not intend to comply with CEQA, prior to adopting these actions which will put agriculture out of business, creating significant environmental impacts associated with widespread fallowing, such as impacts on air quality, human health, and biological resources.

contaminants to the aquifer by a Party and/or transmission of those introduced contaminants through the aquifer, liquefaction, land subsidence, and other material physical injury caused by elevated or lowered groundwater levels." The definition of "Material Injury" is so broad and all-encompassing as to be practically meaningless and fails to provide a valid standard by which the IWVGA can deny applications for new groundwater wells. For example, the definition suggests that well construction shall be denied based on conditions of "overdraft." Will construction of all new wells be denied under the policy on the basis that DWR has designated the Basin as critically overdrafted?

Perhaps most troubling, the policy is inconsistent with the authorities granted to groundwater sustainability agencies ("GSAs") pursuant to Water Code section 10726.4. Under this authority, GSAs may limit construction of new groundwater wells, only where "consistent with the applicable elements of the city or county general plan, unless there is insufficient sustainable yield in the basin to serve a land use designated in the city or county general plan." (Water Code § 10726.4(a)(2).) The policy fails to evaluate or address general plan consistency requirements.

II. Agenda Item 9: Preliminary Comments on Groundwater Extraction Fee

IWVGA's proposed extraction fee increase cannot pay for the projects and management actions specified in its proposed budget under Water Code Section 10730. A fee adopted under Water Code section 10730 can only be used to pay for the enumerated items. Specifically, the fee may only pay for:

> the costs of a groundwater sustainability program, including, but not limited to, preparation, adoption, and amendment of a groundwater sustainability plan, and investigations, inspections, compliance assistance, enforcement, and program administration, including a prudent reserve

(Water Code § 10730(a).) This section does **not** permit a GSA to use a fee to pay for any **projects** and management actions. Fees used to fund projects and management actions must be adopted pursuant to the authority and procedures outlined in Water Code section 10730.2.

The budget provided in the Staff Report specifies numerous tasks that qualify as projects and management actions plainly identified in the GSP. (See GSP, Section 5; Staff Report, Item No. 9, p. 4.) Specifically, the budget includes money for: Brackish Water Study Coordination; Imported Water Coordination for GSP; Allocation Process Development; and Fallowing Program Development. Because these budget items constitute projects and management actions in the GSP, the IWVGA cannot pay for these items through its existing fee adopted pursuant to Water Code section 10730. Rather, these items must be paid for through a legally adopted fee under Water Code section 10730.2.

Further, the Staff Report and associated documents provide insufficient information to evaluate whether any other budget items are ineligible to be financed through a fee adopted under Water Code section 10730. The IWVGA must provide sufficient documentation associated with each budget item in order to provide pumpers with the ability to assess whether the proposed fee increase complies with SGMA.

The IWVGA also failed to provide adequate notice of the data supporting the proposed fee increase. Water Code section 10730(b) describes the process to adopt or increase a fee. The GSA must "[p]rior to imposing or increasing a fee, hold at least *one public meeting*, at which oral or written presentations may be made as part of the meeting." The GSA must provide notice of the meeting, consistent with Government Code section 6066, except that the GSA must make available to the public the data upon which the proposed fee is based, "at least 20 days prior to *the meeting*." (Water Code § 10730(b)(2) & (3) (emphasis added); see also Staff Report, Item No. 9, p. 2.)

Critically, IWVGA is required "at least 20 days prior to *the meeting*" to provide the public with the data upon which the proposed fee is based. (Water Code § 10730(b)(3) (emphasis added).) The clear intent of Water Code section 10730(b) is to require IWVGA to release data supporting the fee prior to the first public meeting where the GSA will receive public comment on the fee. It is not sufficient to have the data on the proposed fee available prior to the final adoption hearing, the data must be available for twenty days before the first meeting on the proposed fee increase to ensure adequate public participation. (See Staff Report, Item No. 9, p. 7.) Thus, IWVGA was required to make available the data for the proposed fee at least twenty days prior to the Board's June 18, 2020 meeting—on or before May 29, 2020.

IWVGA staff instead released Ordinance No. 02-20 and the associated staff report containing the limited data available on the proposed fee increase on June 17, 2020, only 24 hours in advance of the Board's June 18, 2020 meeting. To comply with the Water Code, the IWVGA must postpone the initial public hearing on the fee until after July 7, 2020.

IWVGA, therefore, cannot adopt this fee increase at its July 16, 2020 meeting as staff proposes. (See Staff Report, Item No. 9, p. 7.) Ordinance No. 02-20 cannot be adopted unless and until it complies with the procedural requirements contained in Water Code section 10730(b) and the applicable California Constitutional requirements for the imposition of fees. (See Cal. Const., art. XIII C ["Proposition 26"].)

Finally, the Staff Report for this item claims that "Water Code section 10725.2(a) authorizes the IWVGA to 'perform any act necessary or proper to carry out the purposes of this part' [SGMA]." (Staff Report, Item No. 9, p. 1.) This section does not give the IWVGA carte blanche authority to ignore the express Constitutional and statutory requirements to adopt a legally compliant fee.

III. Agenda Item 10: Preliminary Comments on Sustainable Yield Report

The Sustainable Yield Report concludes that all groundwater users in the Basin, except "De Minimis Extractors" as defined in Water Code section 10721(e) and "Federal Extractors," including the Bureau of Land Management and the Navy, "are beneficially impacted by IWVGA's overdraft mitigation and augmentation projects and therefore it is not necessary to establish allocations for any extractor." The report concludes that "the Basin's entire sustainable yield is subject to a Federal Reserve interest and is therefore beyond the jurisdiction of the Authority to regulate pursuant to Water Code § 10720.3," and on that basis determines that allocations should not be awarded to any pumpers. Accordingly, the report concludes that all groundwater extractors, other than De Minimis Extractors and Federal Extractors "are extracting water beyond the sustainable yield and will be subject to the costs for overdraft mitigation and augmentation projects, unless an extractor obtains a court order showing they have quantifiable production rights superior to the Navy's." Therefore, "all pumping should be treated equally."

The big picture problem, of course, as discussed in Sections IV (Agenda Item 11) and V (Agenda Item 12), is that Mojave, Sierra Shadows, and other agricultural users are <u>not</u> being treated equally. Rather, the entire burden of "overdraft mitigation and augmentation projects" are being selectively foisted on agriculture under the guise that thousands of acre-feet per year ("AFY") of non-federal pumping should be exempt from payment of the Replenishment Fee by virtue of a "transfer" of the Navy's federal reserve right. This is an arbitrary and capricious effort to confiscate private property for the benefit of public agencies and the Navy. The funding burden will therefore fall squarely on the shoulders of agricultural producers, which will subsidize water the production by all other categories of users. The "federal reserve right transfer" scheme also raises the thorny question—if all of the Basin's 7,650 AFY sustainable yield belongs to the Navy, how does the IWVGA have jurisdiction to regulate and dole out the vast majority of this sum to a chosen few non-federal pumpers?

The Sustainable Yield Report is also flawed because it unabashedly admits that it was "drafted for the sole purpose of determining the colorable legal claims to the Basin's sustainable yield, which has been established as 7,650 af," whereas SGMA expressly prohibits GSAs from determining or altering water rights. (Water Code § 10720.5(b) ("Nothing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights."); see also *id*. § 10720.1(b) ("…It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater.") (emphasis added).)

The Sustainable Yield Report also quibbles with the historical pumping data provided by Mojave in response to the Groundwater Extraction Reporting for Pumping Verification Questionnaire 1 as untimely. We note that this information was provided to Stetson and the IWVGA in May 2020, providing sufficient time for its incorporation in the report released on June 17, 2020. Additionally, as noted in the Sustainable Yield Report, pumping demand information was also reported to the IWVGA on Mojave's well registration forms.

At the same time, the Sustainable Yield Report takes the Navy's assertions at full face value, awarding the Navy the Basin's full sustainable yield, despite the fact that the Navy's current production is less than 2,000 AFY, and on a declining trend. (See Sustainable Yield Report, Figure 1.) The disparity in treatment speaks volumes. The Indian Wells Valley is a "company town" and the IWVGA does whatever the Navy wants.

Finally, as set forth in the attached comment letters, the GSP failed to support its conclusion that the Basin's sustainable yield is 7,650 AFY (e.g., based on flaws in the GSP's analysis of Basin recharge) and ignores the vast amount of available groundwater in storage. Instead of spending nearly $7 million to ignore stakeholder input and shoehorn existing studies into a preconceived outcome, the IWVGA should have created a publicly-available model that includes the best-available science.

IV. Agenda Item 11: Preliminary Comments on Replenishment Fee Report

The Replenishment Fee Engineer's Report recommends adoption of a $2,130 per AF Basin Replenishment Fee. This Replenishment Fee, however, will not be borne equally by Basin groundwater users, despite the Sustainable Yield Report's promise that all non-de minimis and non-federal pumpers "will be subject to the costs for overdraft mitigation and augmentation projects." Rather, in a sleight of hand, the IWVGA proposes that certain pumpers, "that have permission to extract unused portions of the Navy's estimated Federal Reserve Water Right interest," will also be exempt from payment of the Replenishment Fee. The lucky parties that the IWVGA is proposing to be "supplied" with water by the Navy—and will therefore be exempt from payment of the Replenishment Fee—include de minimis users (800 AFY; 100% of current pumping), the City of Ridgecrest (373 AFY; 100% of current pumping), Kern County (18 AFY; 100% of current pumping), Indian Wells Valley Water District (4,390 AFY; approximately 67% of current pumping), Inyokern CSD (102 AFY; 100% of current pumping), small mutual (300 AFY; 100% of current pumping), and Trona "DM" (217 AFY; 100% of current pumping). In short, these non-federal parties will receive free water supplies at the expense of the entire farming community.

This scheme is deeply flawed. Among several legal deficiencies is that the "Navy's reserved right," whatever it is, cannot be transferred to non-federal entities. The assertion is absurd. The right, whatever it may be, 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 ("This Court has long held that when the Federal Government withdraws its land from the public domain

and reserves it for a federal purpose, the Government . . . acquires a reserved right in unappropriated water which vests on the date of the reservation . . . In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."); *Agua Caliente Band of Cahuilla Indians v. Coachella Water Dist.* (9th Cir. 2017) 849 F.3d 1262, 1268–69 (explaining that the Supreme Court has emphasized that, under the doctrine of federal reserved rights, the government reserves "only 'that amount of water necessary to fulfill the purpose of the reservation, no more'" and that the United States must "'acquire water in the same manner as any other public or private appropriator'" where "'water is only valuable of a secondary use of the reservation'" (quoting *United States v. New Mexico* (1978) 438 U.S. 696, 701, 702)).)

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 contention is a charade. The Engineer's Report fails to identify any legal basis for the transfer of a federal reserve right to a non-federal entity operating on non-federal lands, and there is none. Moreover, even if a federal reserve right could be transferred outside of the federal reserve to a non-federal entity, which it cannot, the IWVGA provides no evidence that injury would not occur.

The "federal reserve right transfer" shell game is also problematic 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 a handful of lucky groundwater users will essentially allow those users to obtain "free" water, while other unlucky Basin users are asked to subsidize implementation of the projects identified in the GSP, such as the acquisition of supplemental water supplies. This federal water transfer scheme violates Proposition 218 and undermines the constitutionality of the proposed Replenishment Fee.

The Engineer's Report also contains two erroneous statements concerning Mojave that should be corrected. First, page 18 suggests that Mojave has not met its reporting and payment obligations under Ordinance 02-18. This is demonstrably false. Mojave's reporting and payments are up-to-date. Second, the Engineer's Report insinuates that Mojave only paid its fees "upon notice that the Board was about to considering [sic] removing their representative from the PAC and TAC." Again, this is demonstrably false.

Until April 2020, Mojave was an active member of the TAC as a representative for large agriculture. In this role, Mojave provided extensive comments and suggestions on groundwater technical issues, including technical memoranda, sustainability criteria, and management goals and objectives. In addition to participating in the subcommittees of the IWVGA, Mojave provided ongoing technical support and significant financial funding to the Indian Wells Valley Brackish Groundwater Feasibility Program in an effort to build a bridge to sustainability through treatment of locally produced groundwater.[2] On April 16, 2020, however, the IWVGA Board summarily, and without proper notice, removed Mojave from the membership of the PAC and the TAC.

[2] In addition, Mojave has provided over $100,000 in funds to support the Indian Wells Valley Brackish Water Study Group. Indian Wells Valley Water District, Searles Valley Minerals, and Coso Geothermal also contribute funds to this group. Mojave has also funded scientific studies, the purchase of monitoring equipment, and payment of other costs incurred by the TAC or PAC. Additionally, Mojave worked collaboratively with local groundwater producers to develop a white paper, supported by parties that represent over 80 percent of groundwater production in the Basin, on groundwater management in the Indian Wells Valley under SGMA. The paper presented an approach to achieve sustainability and compliance with SGMA along with long-term viability for the local community and economy.

The Board's purported rationale for its action was Mojave's non-payment of a portion of its groundwater extraction fees in late 2019 and early 2020. Yet, as acknowledged in the April 16, 2020 Staff Report on the agenda item pertaining to Mojave's removal from the PAC and TAC, Mojave's representative had already agreed to make payment of all fees due (i.e., prior to the publication of the April 16, 2020 Staff Report recommending removal of Mojave from the PAC and TAC). See IWVGA Staff Report on Agenda Item No. 6 (Apr. 16, 2020). Although speakers at the April 16, 2020 Board meeting acknowledged that other groundwater users in the Basin had also been late in paying their groundwater extraction fees like Mojave, only Mojave was singled out for removal from the PAC and TAC. That the Board's action was clearly punitive is underscored by the fact that Mojave had already agreed, prior to publication of the Staff Report, to pay the groundwater extraction fees, nonpayment of which supposedly furnished the basis for the IWVGA's action.

Finally, we note that Proposition 218 imposes a host of procedural requirements, including notice requirements, on the IWVGA, which bears the burden of demonstrating compliance. Given the serious infirmities in the "federal reserve right" transfer scheme, which is foundational to the Replenishment Fee, and the other issues identified herein, we ask that the IWVGA refrain from mailing the required Proposition 218 notices at this time. Given that commenters had less than 24 hours to review the Engineer's Report, we ask that the IWVGA wait to mail Proposition 218 notices until after its July 2020 Board meeting to allow sufficient time to incorporate this and other public comment on the Engineer's Report.

V. Agenda Item 12: Preliminary Comments on Transient Pool and Fallowing Pool Report

The Sustainable Yield Report concludes that "all pumping [other than by de minimis and federal users] should be treated equally." But of course, the water users relegated to the Transient Pool and Fallowing Program *are not* being treated equally. These users are being given a meager one-time allocation, such as in the case of Sierra Shadows, or no allocation at all, such as in the case of Mojave. In contrast, other luckier water users, such as the City of Ridgecrest, Kern County, Indian Wells Valley Water District, Inyokern CSD, and others, will be allocated all, or nearly all of their current pumping needs on an annual basis. This scheme is problematic under SGMA, lacks any rational basis, fails to respect common law water rights, and violates the federal and state constitutions. Additionally, as explained above, failure to prepare an EIR prior to adoption of the Transient Pool and Fallowing Program will violate CEQA.

The Transient Pool structure is also deficient because it fails to justify Mojave's exclusion. The Report on the Transient Pool and Fallowing Program wrongfully claims that Mojave "did not submit the required Pumping Verification Questionnaire." In fact, the questionnaire was submitted to the IWVGA and Stetson in May 2020. Additionally, the questionnaire was re-submitted to Stetson on June 8, 2020, upon learning that Mojave had been erroneously excluded from the Draft Pumping Verification Report. We request that this immediately be remedied.

Finally, as raised in Mojave's prior comments on the GSP, CEQA analysis is required before the IWVGA approves the Transient Pool and Fallowing Program, as well as the Replenishment Fee, all of which are projects subject to CEQA as they will have significant environmental impacts associated with widespread fallowing resulting from the IWVGA's strategic elimination of agriculture, including impacts on air quality, human health, land use, and biological resources. Given that Mojave will not be awarded any portion of the Transient Pool, it will need to pay $2,130 per AF for any water it produces. This exorbitant fee will render farming economically unviable.

The climate of the Indian Wells Valley is harsh, with winds that create dust problems for the whole Valley, grounding planes and endangering the health of residents. Fallowing of Mojave's farming operations, alone, would result in the death of 215,000 living pistachios trees and create dust problems that would potentially take years and hundreds of thousands of dollars to mitigate. If the IWVGA Board refuses to

avoid these impacts by granting Mojave any allocation, these impacts must be analyzed as required under CEQA.

Mojave is not alone in being unable to shoulder the burden of a $2,130 per AF fee. Therefore, implementation of the Replenishment Fee, Transient Pool, and Fallowing Program are likely to cause massive changes in land use across the Basin. Preparation of an environmental impact report ("EIR") will therefore be required, given the associated significant environmental impacts that are likely to occur with widespread fallowing. The EIR must describe the proposed project, its environmental setting, its objectives, identify and analyze significant effects on the environment, state how those impacts can be mitigated or lessened, and identify alternatives to the project. (*Federation of Hillside and Canyon Assocs. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1197; CEQA Guidelines §§ 15123–28, 15130.) The IWVGA's adoption schedule must therefore be amended to accommodate sufficient time for the preparation of an EIR.

VI. Conclusion

Given the Board's belated release of these numerous documents that are so critically important to so many one day before the meeting, these are only our initial comments on the agenda items for the June 18, 2020 Board meeting regarding the Reporting Policy for New Groundwater Extraction Wells, Groundwater Extraction Fee, Sustainable Yield Report, Replenishment Fee Report, and Transient Pool and Fallowing Pool Report. We intend to provide further comments on these items and request they be considered.

Sincerely,

Scott S. Slater
Amy M. Steinfeld

Enclosure

Attachment: Mojave's June 3, 2020 comment letter to DWR on the GSP

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June 3, 2020

VIA ONLINE SUBMISSION (SGMA.WATER.CA.GOV/PORTAL/)

Craig Altare, Supervising Engineering Geologist
Sustainable Groundwater Management Program
California Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

RE: Comments on the Groundwater Sustainability Plan for the Indian Wells Valley Groundwater Basin

To Mr. Altare:

This comment letter on the Final Draft Groundwater Sustainability Plan (Plan) for the Indian Wells Valley Groundwater Basin (Basin) is respectfully submitted on behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, "Mojave"). We write to you to request that you reject the Plan adopted by the Indian Wells Valley Groundwater Authority (IWVGA) as a pretext to redistribute native groundwater from overlying landowners to the United States Navy's NAWS China Lake facility (Navy), an entity that does not participate in and is not subject to the Plan.

To date, Mojave has exerted every reasonable effort to exhaust its administrative remedies, acted in good faith, and participated in every step of the planning process. We have attached hereto and incorporate by this reference Mojave's January 8, 2020 comment letter to the IWVGA Board on the Public Review Draft of the Plan. (See Attachment 1.) Before filing that comment letter, Mojave actively participated in the development of the Plan for the Basin, including through submission and presentation of comments at meetings of the IWVGA Board of Directors (Board) and through participation in meetings of advisory committees to the Board, including the Technical Advisory Committee (TAC) and the Policy Advisory Committee (PAC).

Unfortunately, despite Mojave's extensive participation in the Plan development process, the Plan ultimately adopted by the IWVGA Board on January 16, 2020 is deficient in several critical aspects and conflicts with the express directives of the Sustainable Groundwater Management Act (SGMA). Therefore, as outlined below, the Department of Water Resources (DWR) must disapprove the Plan and require IWVGA to rectify the inadequacies identified herein. (23 Cal. Code Regs. § 355.2(e)(3).)

The object of the Plan is best summed up in the January 16, 2020 "Legal Statement," presented at the hearing on the Plan by the IWVGA's legal counsel, as it openly acknowledges that the allocation of water under the Plan is based upon a priority test established to sequester water for the Navy's existing and future water needs—by denying access to that groundwater to all others under the Plan. Although the

Navy is not subject to the Plan, it is the IWVGA's intention to provide the Navy with an absolute priority over other beneficial uses in the Basin. In short, the Plan allocates all the water the Navy may ever need by removing that quantity from the sustainable supply and prevents it from being pumped by any other user, with the balance of what is left over to be shared among all other beneficial uses.

> We have advised the JPA that water used or contemplated to be used by the Federal Government in connection with the operation of China Lake Naval Weapons Test Center is beyond the jurisdiction of the JPA's regulatory authority. *Under the process outlined by the GSP, the JPA will make a technical determination of the potential scope of this (Navy) water use.* ***The remaining water,*** *if any, will be available for all water users. The JPA will then set the fees necessary to replenish the water used beyond the safe yield by all users except the Navy*. (January 16, 2020 IWVGA "Legal Statement" (emphasis added).)

Thus, on its face, this express acknowledgement by counsel to the IWVGA concedes that the *sole factor* in establishing first priority in allocating all available groundwater was that it was needed by the Navy; nothing else matters. There is no analysis of the Navy's purposes of use, their relative efficiency, regardless of whether they are wasteful, or there are potential operating alternatives.

Mojave objects to the Plan, and the IWVGA's Plan adoption for several principal reasons. First, the IWVGA failed to comply with SGMA's requirement that it must substantively address Mojave's comments on the draft Plan, by contending it need not respond to legal comments at all and then improperly characterizing many of Mojave's comments as "legal" in nature and as "beyond the scope" of the Plan adoption process.

Second, the IWVGA singled out a group of stakeholders, predominately those engaged in the cultivation of agriculture, denying this group procedural and substantive due process in the development of the Plan.

Third, the Plan's Management Action No. 1 and the underlying modeling scenarios prioritize claims to water and allocate available water supplies among water right holders in a manner that is inconsistent with well-established principles of common law water rights and therefore contravene SGMA's express prohibition on determining or altering common law water rights. Finally, the assumptions set forth in the Plan and the modeling scenarios developed to-date, to the extent that they can be discerned, lack scientific or factual support.

I. Background on Mojave's Operations, Mojave's Participation in the Plan Development Process, and the IWVGA's Arbitrary Exclusion of Mojave from Participation in Plan Implementation

Mojave's grievance ends with IWVGA's plan to prioritize the Navy's water use above all others. It begins with its ownership and control of lands overlying significant acreage in the Basin and its investment backed expectation of pumping groundwater from the Basin for the irrigation of high value crops on overlying land under efficient water use practices. Use of water for the cultivation of agriculture is enshrined in California law as among the highest and best uses of water in the State. (Water Code § 106; see also Plan at 5-10 (citing Water Code § 106).) Mojave's water use practices compare favorably with the custom, standard and habit of similarly situated users as required to maintain a vested right. (*Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 581, 585; Water Code §100.5.)

The IWVGA Plan cites no evidence of any kind that the applied water practices of Mojave are inefficient, let alone unreasonable, nor can it. Mojave uses the least amount of water possible while following best farming practices for pistachios. Specifically, Mojave uses drip hose, pressure compensating emitters,

water monitoring, and even use deficit irrigation, a practice whereby Mojave uses less than full tree water demand at key times of the year when it does not hurt the trees' production, but does save water and have other benefits. Mojave is committed to using the most modern and efficient irrigation system and actively participates in the California Pistachio Research Board, which supports cutting-edge research. Pictures of Mojave's agricultural operations and irrigation systems are included in Attachment 2.

Collectively, Mojave owns 83 legal parcels of land overlying the Basin and farms approximately 1,600 acres of pistachios. (See Attachment 3.) All of Mojave's farmed acreage was acquired and put into service for the cultivation of agriculture *prior to the adoption of SGMA*. Each of these parcels overlies the Basin and holds overlying water rights that are fully vested (see *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240) and the overlying right is not limited by past water use practices (*Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 87). In addition to pumping groundwater for overlying agricultural use, Mojave also has a small domestic well, which serves a farm office.

Agriculture is a permitted use of Mojave's lands and all its farmed acreage was placed into cultivation in accordance with applicable state law and local ordinances. At full maturity, the lands placed into production prior to the adoption of SGMA will require approximately 7,000 acre-feet per year (AFY) of water under efficient irrigation practices.

To date, Mojave's cumulative investment-backed expectation is approximately $32 million and its operation is a going concern that produces pistachios for commercial sale, pays over $100,000 per year in property taxes,[1] and supports the local economy by purchasing locally and using local contractors whenever available and by giving to community groups. Mojave firmly believes in the role that agriculture will play as a long-term asset to the local economy.

Mojave's shared interest in achieving long-term Basin sustainability is self-evident and it has participated earnestly and cooperatively throughout the entire Groundwater Sustainability Agency (GSA) formation and Plan adoption process. For example, Mojave was a signatory member of the Indian Wells Valley Cooperative Groundwater Management Group, a long-standing local data-sharing group comprised of the major groundwater producers and government agencies in the Indian Wells Valley. This group contributed much of the historical groundwater production information and stream flow data to the IWVGA.

Likewise, in 2015, Mojave formed the Mojave Mutual Water Company and sought membership on the GSA through a Joint Powers Authority or other agreement pursuant to Water Code section 10723.6(b). Mojave pursued a collaborative relationship between stakeholders to foster collaboration and compromise.

The members of the IWVGA Board represent less than 35 percent of the water use in the Basin. Searles Valley Minerals, the major industrial user, has no representation. Agriculture is likewise without a representative on the Board. Kern County only pumps a tiny fraction of the water used in the Basin and, while claiming to represent agriculture, has continually and vociferously only advocated for the Navy's water use. Although Mojave was one of the most significant stakeholders in the Indian Wells Valley and it was promised a voice on the IWVGA Board by Kern County, Mojave's request to serve on the IWVGA was denied—as was all agriculture. When this avenue for participation was denied, a committee modeled after the Kern County Planning Commission was promised as a way to put all of the policy decisions in the hands of the TAC and the PAC, with the IWVGA Board only able to approve or return recommendations with comments. Again, this was not implemented. Instead, the PAC and TAC became afterthoughts, serving as tokens with little input into the Board's decisions.

[1] Mojave paid $99,199.23 in property taxes for 2018 and $101,988.55 in 2019.

Whatever general support agriculture might have expected to receive from a popularly elected Board did not occur here. In fact, the Kern County representative on the IWVGA, Supervisor Mick Gleason, a former Navy Captain and Commanding Officer of China Lake NAWS, became the chief protagonist in the plot to railroad agriculture out of the Indian Wells Valley for the benefit of his former employer.[2] Supervisor Gleason's objective—to protect the Navy at any cost—and his belief that agriculture has no future in the Indian Wells Valley—were apparent in many of his public comments, including that:

> The satisfaction I will get from [finalizing the Plan] will be significant because we give it to the Navy and say "you have no worries, we don't have a threat to our base because we have a sustainment plan." (October 1, 2019.)[3]

> All I know is, from my perspective, [the Navy's "formal declaration of encroachment" is] a game-changer. Because the strategic imperative is now changed. We need to preserve the Navy's mission in the Indian Wells Valley. And that has implications that dwarf other decisions. . . . Now the strategy is emphatically and clearly and empirically that our job is to preserve the Navy base and to preserve the Navy mission because it is being encroached upon. Before, when we did not have that clear articulation of encroachment, we thought it was [encroachment] but we weren't sure. The Navy had to take a position. Now they are taking a position. That means that now from my perspective that I need to take that position. . . . (March 8, 2019.)[4]

> I think the agricultural community has seen its heyday . . . . With SGMA (Sustainable Groundwater Management Act) and recent decisions in water allocations, and politics in Sacramento, agriculture has seen better days. (April 6, 2018.)[5]

Other members of the IWVGA Board also made clear that the Navy's desires were paramount. Director Ron Kicinski, representing the Indian Wells Valley Water District, for example, acknowledged that the Navy was in the "driver's seat" of the Plan development process:

> When the Navy came out formally and said they are considering groundwater an encroachment issue that is something we've got to solve, otherwise they are going to say it's encroachment on the mission of the base. And them being the major economic driver of the area, that means a lot . . . they are the major economic driver and they are in the driver's seat. When they say encroachment . . . it means a lot to what we are

[2] Even prior to SGMA, Kern County tried to take advantage of a replanting of diseased rootstock to halt Mojave Pistachios agricultural operations with an emergency ordinance. This was in addition to a rezoning effort aimed at reducing agriculture in the Indian Wells Valley.
[3] See "Gleason reflects on time in office, cites reason for not running," The Ridgecrest Daily Independent (October 1, 2019).
[4] See "Gamechanger: Gleason reacts to Navy encroachment letter," The Ridgecrest Daily Independent (March 8, 2019).
[5] See "Gleason muses on MALDEF settlement," The Ridgecrest Daily Independent (April 6, 2018).

> going to do, how we are going to do it and how fast we need to do it. The point is we can't fail. (February 22, 2019.)[6]

Despite the IWVGA's openly-announced hostility to agriculture and even though Mojave's efforts to have a seat on the GSA were rebuffed, Mojave continued to pursue a positive and working relationship with all stakeholders in the Indian Wells Valley. Mojave earnestly pursued conversations early on with the Kern County Board of Supervisors and the Indian Wells Valley Water District in attempts to find cooperative and collaborative agreement on how to comply with SGMA in the Indian Wells Valley. Even after IWVGA decision-makers failed to reciprocate or make any effort in good faith to engage in meaningful dialogue, Mojave actively participated in the PAC until April 2020 as a representative for large agriculture, providing constructive input, through voluntary data sharing, and serving as a member of several subcommittees. Mojave was pleased to be able to contribute to community outreach plans, to provide feedback on well registration policy recommendations, and to give comments on technical information developed by the GSA.

Until April 2020, Mojave was also an active member of the TAC as a representative for large agriculture. Mojave provided extensive comments and suggestions on groundwater technical issues, including technical memoranda, sustainability criteria, and management goals and objectives. In addition to participating in the subcommittees of the IWVGA, Mojave provided ongoing technical support and significant financial funding to the Indian Wells Valley Brackish Groundwater Feasibility Program in an effort to build a bridge to sustainability through treatment of locally produced groundwater.

In addition, Mojave has provided over $100,000 in funds to support the Indian Wells Valley Brackish Water Study Group. This group is evaluating the use of brackish groundwater resources to supplement shallow, fresh, groundwater supplies. Indian Wells Valley Water District, Searles Valley Minerals, and Coso Geothermal also contribute funds to this group. Mojave has also funded scientific studies, the purchase of monitoring equipment, and payment of other costs incurred by the TAC or PAC. Additionally, Mojave worked collaboratively with local groundwater producers to develop a white paper, supported by parties that represent over 80 percent of groundwater production in the Basin, on groundwater management in the Indian Wells Valley under SGMA. The paper presented an approach to achieve sustainability and compliance with SGMA along with long-term viability for the local community and economy.

On April 16, 2020, however, the IWVGA Board summarily, and without notice, removed Mojave from the membership of the PAC and the TAC. The Board's purported rationale for its action was Mojave's non-payment of a portion of its groundwater extraction fees in late 2019 and early 2020. Yet, as acknowledged in the April 16, 2020 Staff Report on the agenda item pertaining to Mojave's removal from the PAC and TAC, Mojave's representative had already agreed to make payment of all fees due (i.e., prior to the publication of the April 16, 2020 Staff Report recommending removal of Mojave from the PAC and TAC). See IWVGA Staff Report on Agenda Item No. 6 (Apr. 16, 2020). Although speakers at the April 16, 2020 Board meeting acknowledged that other groundwater users in the Basin had also been late in paying their groundwater extraction fees like Mojave, only Mojave was singled out for removal from the PAC and TAC. That the Board's action was clearly punitive is underscored by the fact that Mojave had already agreed, prior to publication of the Staff Report, to pay the groundwater extraction fees, nonpayment of which supposedly furnished the basis for the IWVGA's action. As of this writing, membership on the PAC and TAC does not require timely payment of fees and the IWVGA has no policy requiring or permitting expulsion of PAC and TAC members for late payment. Simply put, the IWVGA Board's actions are not supported by any evidence, let alone substantial evidence and the culmination of a multi-year process

[6] See "Navy to GA: Groundwater 'No. 1 encroachment issue,'" The Ridgecrest Daily Independent (February 22, 2019).

designed to silence dissenting opinions that oppose the Plan's discrimination against agriculture and requiring agriculture to bear almost all responsibility for the curtailment required to implement the Plan.

II. The IWVGA Failed to Respond Substantively to Mojave's January 8, 2020 Comments on the Public Review Draft of the Plan

The IWVGA failed to respond substantively to any of Mojave's comments on the Plan. In response to all comments in seven entire sections of Mojave's January 8, 2020 comment letter, the IWVGA dismissively responded: "Comment related to legal positions and not specifically relevant to the GSP." (Plan Appendix 1-F (GSP Comment and Responses Matrix) at 43–44.) IWVGA asserted the preceding response, for example, to Mojave's comments that agricultural water users should be included in the permanent allocation system and that all users—not just agricultural producers—should share proportionately in the shortage to avoid prioritizing access to water in a manner that infringes on the water rights of one class of water users to subsidize another class of users. (*Id*.) IWVGA's remaining responses to Mojave's comments were: "Comment noted" (applicable to every comment in four sections of Mojave's comment letter), "The best available information was used at the time the analyses for the GSP were conducted" (applicable to every comment in four sections of Mojave's comment letter), and "Comment addressed in Section 5.2.1.5" (applicable to one section of Mojave's comment letter). (Appendix 1-F at 43–44.) For example, rather than respond to Mojave's comments that the Plan should more clearly explain how the allocation system would work, how the federal government would be treated under the allocation system, and why the "Transient Pool Allocation" given to agricultural users would not be transferrable, the IWVGA cursorily "noted" the comments without any attempt to further clarify the Plan or address Mojave's concerns in a single response to comments. (*Id*.)

Then, at the IWVGA's January 16, 2020 hearing on the Plan, IWVGA legal counsel made the following "legal statement" pertaining to various comments, including those submitted by Mojave, that the agency characterized as "legal" in nature:

> The Water Resources Manager has referred to legal counsel legal comments received in connection with public comment to the GSP. We have advised the JPA as follows.
>
> The GSP is a technical document that describes the physical conditions of the basin and sets out the process for managing adverse impacts. It is not intended as a determination of water rights of pumpers in the Basin. It is also not a legal brief.
>
> We have advised the JPA that water used or contemplated to be used by the Federal Government in connection with the operation of China Lake Naval Weapons Test Center is beyond the jurisdiction of the JPA's regulatory authority. Under the process outlined by the GSP, the JPA will make a technical determination of the potential scope of this water use. The remaining water, if any, will be available for all water users. The JPA will then set the fees necessary to replenish the water used beyond the safe yield by all users *except the Navy*.
>
> The legal comments we have reviewed are beyond the scope of this portion of the GSP process. Many of these comments present an analysis of the JPA's statutory authority or the interaction between state and federal law. Others legal issues concern objections to actions that the JPA has yet to take. Finally, several comments are based on the false

> presumption that the JPA is making a determination regarding water rights.
>
> Each of these legal comments is beyond the scope of the GSP currently before the JPA board. While the JPA has no desire to curtail responses to the GSP, we have advised that responding to these legal arguments is not productive to the current GSP adoption. (January 16, 2020 IWVGA "Legal Statement" (emphasis added).)[7]

California Code of Regulations Section 355.4(b)(4) and (10) require that the Plan determine whether the beneficial uses of groundwater in the basin and the affected land use and property interests have been considered and whether there has been a response to credible technical and policy issues raised by stakeholders. The identification of beneficial use, land use designations, and the character of property interests all involve a mix of legal, policy and technical disciplines. IWVGA cannot duck its responsibilities by labeling a comment "legal." Moreover, IWVGA's Legal Statement makes clear, the legal/policy determination was to prefer the Navy and any disagreement with that legal/policy determination was "not productive."

Not only did IWVGA shirk its responsibility under SGMA, it acted contrary to the requirements of its own Communication and Engagement Plan (Plan Appendix 1-E). Even if the duty to respond was limited to technical and policy matters alone, the Plan's exclusion of agricultural use from the permanent allocation system raises valid "policy issues" to which a response is warranted. (See 23 Cal. Code Regs. § 355.4(b)(10).) Nowhere does the Plan consider that charging farmers $2000 per acre-foot (AF) for the right to pump groundwater is equal to a penalty designed to cause fallowing of land.

In short, SGMA requires GSAs to "consider the interests of all beneficial uses and users of groundwater," such as "[a]gricultural users, including farmers" like Mojave. (Water Code § 10723.2.) Moreover, SGMA commands that GSAs "shall encourage the active involvement of diverse social, cultural, and economic elements of the population within the groundwater basin prior to and during the development and implementation of the groundwater sustainability plan." (*Id*. § 10727.8(a); see also 23 Cal. Code Regs. § 354.10.) Under the SGMA regulations, failure to adequately consider and respond to stakeholder comments or to fully consider impacts on overlying uses and users of groundwater is grounds for finding a Plan inadequate. (23 Cal. Code Regs. §§ 355.2(e)(3), 355.4(b)(4), (10).) Likewise, the IWVGA's Communication and Engagement Plan sets forth objectives including "making use of local knowledge, creating improved outcomes, building trust, reducing conflict, increasing credibility, building partnerships, promoting stakeholder buy-in and broader public awareness, understanding, knowledge, and support for all voices and perspectives;" "includes the promise that the public's contribution will influence the decision;" and promotes "communicat[ion] to all how their input affected the decision." (Plan Appendix 1-E at 4–5.)

The IWVGA's approach to incorporating public feedback into the Plan fell short of SGMA's requirements and its own Communication and Engagement Plan. Therefore, if the IWVGA fails to rectify this deficiency, Mojave respectfully requests that DWR make a finding that the Plan is inadequate under Section 355.2(e)(3) of the SGMA regulations because the Plan contains significant inadequacies with respect to the criteria set forth in Section 355.4(b)(4) and (10), which ask "Whether the interests of the beneficial uses and users of groundwater in the basin, and the land uses and property interests potentially affected by the use of groundwater in the basin, have been considered" and "Whether the Agency has adequately responded to comments that raise credible technical or policy issues with the Plan."

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[7] The IWVGA's "Legal Statement" is published on the IWVGA website at: https://static1.squarespace.com/static/5a70e98dd55b41f44cbb2be0/t/5e3a181057d9ac59f4b41cd1/1580865552782/Legal+Statement.pdf.

III. Throughout the Plan adoption process, the IWVGA Failed to Provide Meaningful Opportunities for Diverse Stakeholder Engagement, Violating Mojave's Right to Procedural Due Process and SGMA's Mandates.

Under SGMA, the IWVGA was required to consider the interests of all beneficial uses and users of groundwater in the Plan development process, including interests of Mojave, among other overlying groundwater rights holders with vested property rights. (Water Code § 10723.2.) The vested rights of overlying landowners include the right to produce groundwater for beneficial use on overlying lands. These vested property rights entitle overlying landowners to due process that is of a wholly different character than a mere customer of a water utility, for example.

As SGMA recognizes, the expertise of stakeholders, including overlying owners, is critical in ensuring that the IWVGA used the best available information and science throughout the Plan development process. The IWVGA's process for public engagement and involvement, however, was lacking in several respects. The IWVGA's "black box" approach included development of modeling scenarios in closed session meetings and reliance on a model not made available to stakeholders during the Plan adoption process.

With respect to the latter, the IWVGA does not own or even control the groundwater flow model on which the Plan is based. Instead, the United States Navy (Navy), which sits as an "ex-officio" member of the IWVGA, owns and controls the model. This arrangement is made even more peculiar by the fact that the Navy is not subject to the management under SGMA and is immune from regulation by the IWVGA under the Plan. The Navy allowed the IWVGA to request that the Desert Research Institute (DRI), which developed the model for the Navy, run the model simulations upon which the Plan is based. The Navy model has not been peer reviewed and despite repeated requests, it was not made available to stakeholders, although Appendix 3-H of the Plan did provide "Draft" model documentation. (See Plan Appendix 3-H (Indian Wells Valley GSP Model Documentation).)

In its January 8, 2020 comments on the Public Review Draft of the Plan, Mojave renewed its prior requests that the Navy model be made available to Mojave and all stakeholders in the Basin. The IWVGA failed to respond to this request, instead characterizing all comments in the relevant section as "related to legal positions and not specifically relevant to the GSP." (Plan Appendix 1-F (Plan Comment and Responses Matrix) at 43.) Clearly, a public request for disclosure of a model or technical data underlying the Plan is not a "legal position" unrelated to the Plan. (See, e.g., 23 Cal. Code Regs. §§ 352.4(f) (setting forth the standards for groundwater and surface water models used for a Plan), 355.4(b)(10) (asking whether the GSP adequately responded to comments that raise "technical or policy issues with the Plan").)

The IWVGA's reliance on the Navy's model might be viewed in a different light if the Navy were an independent and disinterested stakeholder. Unfortunately, this model—which provides the technical foundation for the Plan itself—is owned by the stakeholder that will obtain the largest groundwater allocation—by reservation—under it. Nondisclosure of the model to the public under such circumstances, therefore, raises a host of serious questions about the propriety of reliance on a model developed by and for the stakeholder that stands to benefit most by its application.

Additionally, although summary information regarding various modeling scenarios was presented at meetings of the IWVGA Board, the underlying assumptions for each scenario were insufficiently documented and explained to the public. Similarly, the IWVGA did not clearly articulate how the modeling scenarios would inform the Plan and the management actions to be taken thereunder. These issues frustrated meaningful public participation in the Plan development process and denied stakeholders procedural due process.

In its January 8, 2020 comments on the Public Review Draft of the Plan, for example, Mojave renewed its prior requests that the assumptions for each modeling scenario under consideration be detailed and promptly provided to the public along with a clear explanation of how the IWVGA incorporated the modeling scenarios into the Plan and implementation of Plan Management Action No. 1. Again, the IWVGA concluded that no response to this comment—or any of the comments in this section of the comment letter— was warranted on the basis that it was "related to legal positions and not specifically relevant to the GSP." Plan Appendix 1-F (GSP Comment and Responses Matrix) at 43. This is false. The public has a right to understand the factual and technical underpinnings of the Plan. (See, e.g., 23 Cal. Code Regs. § 355.4(b)(1) (asking "[w]hether the assumptions, criteria, findings, and objectives, including the sustainability goal, undesirable results, minimum thresholds, measurable objectives, and interim milestones are reasonable and supported by the best available information and best available science.").) The IVWGA should not have shrugged off comments requesting such information "not specifically relevant to the [Plan]."

Finally, Mojave notes that the Public Review Draft of the Plan was only available for public review as of December 11, 2019, leaving the IWVGA little time to consider and incorporate public comments. Additionally, as noted in Mojave's January 8, 2020 comment letter, between December 11 and 27, 2019, new copies of the Public Review Draft of the Plan were uploaded to the IWVGA's website, making it unclear whether the Public Review Draft of the Plan had been changed.

IV. Plan Management Action No. 1 Fails to Ensure Consistency with Common Law Water Rights Principles, Substantive Due Process, or Provide an Adequate Basis for the IWVGA's Determinations.

As explained above, SGMA requires the IWVGA to consider the interests of all beneficial uses and users of groundwater, including holders of overlying groundwater rights such Mojave. (Water Code § 10723.2.) SGMA also expressly forbids the IWVGA from determining or altering water rights. (*Id*. § 10720.5(b) ("Nothing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights."); see also *id*. § 10720.1(b) ("…It is the intent of the Legislature to preserve the security of water rights in the state to the greatest extent possible consistent with the sustainable management of groundwater.") (emphasis added).)

Despite SGMA's clear requirements, Management Action No. 1 (Implement Annual Pumping Allocation Plan, Transient Pool and Fallowing Program), and the underlying modeling scenarios considered by the Board attempt to determine the water rights of the users in the Basin and unlawfully eviscerate the overlying rights of Mojave, as discussed in more detail below. As of this writing, based on the modeling scenarios discussed in Section IV.I of this letter, Mojave stands to receive enough water to pump groundwater for less than 1 year; without any access to other water supplies—unless it agrees to pay a penalty masquerading as a replenishment fee to obtain water from a yet-to-be identified source at an unidentified time. Failing to pay the penalty, presently estimated to be between $1,500 and $2,000 per AF will result in the fallowing of more than 1,000 acres of presently planted acreage.

Section 5 of the Plan explains that only certain users that produced groundwater during the Base Period, defined as January 1, 2010 through December 31, 2014, will receive an Annual Pumping Allocation. (Plan at 5-5 to 5-6.) The remaining groundwater users—which the Plan terms "groundwater pumpers with inferior rights"—will not be given an Annual Pumping Allocation. (*Id*. at 5-6.) On what legal basis may the IWVGA determine Mojave's overlying rights are qualitatively "inferior"? No basis exists under the law for them to assume the responsibility of adjudicating the relative priority of water rights held by those persons subject to the Plan.

Instead, the inferior right holders will be "eligible" to receive some unspecified share of a 51,000 AF "Transient Pool Allocation," which is a "limited non-transferable one-time allocation of water to be used prior to 2040." (*Id*.) Any water production in excess of either an Annual Pumping Allocation or a Transient Pool Allocation will be subject to a yet-undetermined "Augmentation Fee" "in an amount that is determined to be sufficient for the acquisition of supplemental water supplies." (*Id*.) Additionally, those groundwater users that are assigned a Transient Pool Allocation may be enrolled in a "Fallowing Program," under which the user can elect to "sell their Transient Pool Allocation back to the IWVGA." (*Id*.)

The Plan explains that "with the implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program, [Basin] groundwater production is anticipated to reduce to around 12,000 AFY plus any agricultural pumping as part of the Transient Pool program in the first year of implementation." (Plan at 5-7 (emphasis added); see also *id*. at 5-6 (only pumpers assigned a Transient Pool Allocation (i.e., agricultural pumpers) may be enrolled in the Fallowing Program).) Again, the Plan reflects that the IWVGA has determined and adjudicated that agricultural pumpers hold "inferior rights" and will not receive any Annual Pumping Allocation, but must share in some portion of the Transient Pool Allocation or else "elect" to participate in the Fallowing Program. (*Id*.)

A. The IWVGA's Actions Violate Mojave's Right to Substantive and Due Process.

SGMA grants the IWVGA provisional powers to sustainably manage groundwater. But these powers are not limitless. If government wields its power in an "abusive, irrational or malicious fashion" it can cause grave harm and a substantive due process violation. (*Sinaloa Lake Owners Assoc. v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1408.) The touchstone of a substantive due process claim is a vested property right. Mojave's overlying right fulfills that requirement. (See *Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 416.)

Here there is a need for a Plan and the sustainable long-term management of groundwater. The statute provides the GSA with a 20 year planning horizon to achieve sustainability. (Water Code § 10727.2(b).) The statutory definition of "Sustainable Yield" is found in Water Code section 10721(w):

> "Sustainable yield" means the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result.

Notably, not present in this definition is a requirement in SGMA or common law that requires that IWVGA adopt a Plan requiring that the Basin be managed in a manner that limits extractions to the recharge rate without regard to consequences. But this is what the Plan seeks to accomplish by eliminating agricultural use in utter disregard to the consequences of its action.

Instead the IWVGA must look to the direction provided by Water Code section 10721(x) and the avoidance of the designated "undesirable results" and make use of the available 20 years to achieve its objective rather than inflict the economic devastation on an entire class of users that includes Mojave.

Owners of real property overlying the Basin with vested property rights and the physical ability to extract water for crops planted prior to the adoption of SGMA will receive a zero allocation under the Plan. Meanwhile, the Plan "will assign" to the Navy—an entity not subject to the Plan—a priority right to as much as 85 percent of the Basin's available water supplies (6,530 AFY of 7,350 AFY), despite the fact that the Navy is an "ex-officio" member of the IWVGA that is not subject to regulation under the Plan. The City of Ridgecrest, which is provided with water by the Indian Wells Valley Water District—both members of the IWVGA—will also receive the benefit of priority rights ahead of agriculture. However, the Plan makes no

effort to distinguish between the Indian Wells Valley Water District's domestic customers, exterior irrigation uses, and industry.

The coincidence of priority in allocation being ascribed to governance of the IWVGA is not overcome by a credible showing of any physical measurable impact that would constitute an "undesirable result" if the proposed curtailment is not put into effect. The Plan does not examine whether reasonably feasible mitigation is available to avoid any potential undesirable results. Projected lowering of the water table over the planning horizon threatens no beneficial uses and there is no evidentiary basis that establishes a causal connection between the continuation of groundwater pumping and avoidable undesirable results of any kind that is sufficient to permanently wipe agriculture from the landscape of the Indian Wells Valley.

B. The Exclusion of Agricultural Pumping from the Annual Pumping Allocation System runs Contrary to SGMA's Mandates Because it Requires Water Rights Determinations by the IWVGA, Prioritizing Some Uses Above Others Based Upon Considerations Inconsistent with Common Law.

The Plan reveals that the IWVGA has already determined that certain groundwater users hold "inferior rights" and that these inferior rights holders will not be granted Annual Pumping Allocations. This is an application of a priority system among competing claimants to water based upon the perceived relative value of the claimants' water rights. In making such priority determinations, the Plan violates SGMA's mandate that the Plan shall not determine or alter water rights. (Water Code §§ 10720.5(b), 10720.1(b).) Therefore, DWR should remand the Plan to the IWVGA to rectify its illegal water rights priority determinations and attempt to alter the water rights held by agricultural pumpers.

For example, the Plan recognizes that groundwater users "with inferior rights" will be excluded from receiving an Annual Pumping Allocation. (Plan at 5-6 ("The IWVGA recognizes that the safe yield is significantly lower than current pumping and some groundwater pumpers with inferior rights will not be granted any Annual Pumping Allocations.") (emphasis added).) Among these "inferior" rights holders, apparently, are agricultural pumpers, which are excluded from the Annual Pumping Allocation system and relegated to the one-time Transient Pool allocation. (*Id*. at 5-7 ("with the implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program, [Basin] groundwater production is anticipated to reduce to around 12,000 AFY plus any agricultural pumping as part of the Transient Pool program in the first year of implementation.").)

On the other end of the spectrum, the IWVGA has already made preconceived determinations as to which groundwater users hold "superior" rights. For example, the Plan sets forth determinations that "NAWS China Lake groundwater production is considered of highest beneficial use" and that "the City [of Ridgecrest] and Kern County overlying groundwater production rights are superior to all other overlying rights because public entity rights may not be prescribed against." (Plan at 5-10.)[8] The Plan then explains that: "The beneficial uses of other groundwater users, including agricultural and industrial users, will subsequently be evaluated based on water rights priorities. . . . Current groundwater production that has existed and has been continuous prior to the establishment of NAWS China Lake will be given a priority

[8] The Plan does not explain to what extent the City of Ridgecrest and Kern County hold overlying rights in the Basin. In supplying water to the public, municipal water providers act as appropriators even if they provide water service to customers overlying the same basin from which they draw their water supply. (See, e.g., *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 456; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 81–82 (public water district was an appropriator when it took groundwater from the basin at issue to serve customers overlying the basin).) Therefore, the City of Ridgecrest and Kern County only enjoy overlying water rights with respect to the use of water on overlying parcels owned by these agencies (e.g., city parks). (See *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001 n.6.)

over more recent pumping that has occurred since the [Basin] has been documented to be in overdraft conditions."[9] (*Id*. at 5-10 to 5-11.) The IWVGA, however, has apparently already determined that agricultural pumpers hold "inferior rights" based on the exclusion of agricultural pumpers from the Annual Pumping Allocation system. (See *id*. at 5-6 to 5-7.)

This is precisely the work of a Court in adjudicating water rights between and among competing claimants. However, the Plan attempts to make the case that the "Annual Pumping Allocations are not a determination of water rights in that they do not prohibit the pumping of groundwater" because all groundwater pumpers would continue to possess the right to pump groundwater, provided they pay the Augmentation Fee. (Plan at 5-4.) The claim fails for at least three reasons. First, the Plan explicitly admits that allocation-setting is based on the IWVGA's water rights determinations, with "inferior" rights holders denied an Annual Pumping Allocation. (*Id*. at 5-6.) Second, the Plan reveals that the Augmentation Fee will be set at such a level "that the costs associated with the Augmentation Fee will result in voluntary pumping reductions and the implementation of additional conservation measures to lower demands." (*Id*. at 5-4.) In other words, Management Action No.1 would involve a de facto determination of water rights because only certain types of groundwater users would be forced to reduce their exercise of water rights due to the economic viability of continued groundwater production in the face of Augmentation Fees. Third, in the absence of an appropriator having established prescriptive rights in a court of competent jurisdiction, all overlying owners, including Mojave, hold prior and paramount rights superior to all appropriators as a matter of law. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240–41.)

To avoid making water rights determinations in violation of SGMA, the Annual Pumping Allocation Plan set forth in Management Action No. 1 should be amended to grant proportional allocations to all groundwater users in the Basin that are subject to the IWVGA's jurisdiction. Allocations should be proportional to each user's existing and anticipated uses, taking into account each user's investments in the Valley. Allocations should also allow for ramp down of water use over the SGMA planning horizon and should account for the large amount of water in storage in the Basin.

The large total volume of groundwater held in storage, completely untapped below the first 200 feet of groundwater, is never considered by IWVGA in their Plan. The Basin can support pumping at current levels for decades without causing "undesirable results." The Plan fails to even consider the possibility that pumping could be continued and conditions monitored while an augmentation strategy was pursued.

Proportional allocations would have the added benefit of encouraging water conservation, as compared to the Plan's proposed Annual Pumping Allocation system, which would seem to allocate to certain users with "superior" rights (according to the IWVGA) all of the water utilized during the base period. Maintaining pumping levels for a number of years under a monitoring program to avoid undesirable results is consistent with SGMA's 20 year horizon for achieving sustainability. Shutting down agriculture because the Navy whispers "boo"—by claim of encroachment—is not.

[9] The Plan does not clearly explain how the production rights of these agricultural and industrial users that began production prior to the establishment of the Navy's NAWS China Lake facility will be treated vis-à-vis the Navy. Federal law is clear that a federal reserved water right is superior only to the rights of future appropriators. (See, e.g., *Cappaert v. United States* (1976) 426 U.S. 128, 138 ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government . . . acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.") (emphasis added).)

C. The Plan is Vague and Should be More Explicit as to the Basis for Granting Water Users an Allocation.

The Plan should be more explicit about which groundwater users the IWVGA has determined will—and will not—share in the Annual Pumping Allocation Plan. The Plan explains that the IWVGA "will assign each qualified groundwater pumper . . . an Annual Pumping Allocation of the safe yield, if any, after consideration of:

1) Federal Reserve Water Rights (FRWR);
2) California water rights;
3) Beneficial use priorities under California Law;
4) Historical groundwater production; and,
5) Municipal requirements for health and safety." Plan at 5-5 (emphasis added).

However, the Plan demonstrates that the IWVGA has already made the preconceived determination that agricultural pumpers will not receive Annual Pumping Allocations and will instead be limited to some unspecified share of the one-time 51,000 AF "Transient Pool Allocation." (Plan at 5-7.) Virtually every groundwater adjudication that has taken place in California over the past 70 years has undertaken a similar exercise of considering the relative claims and establishing a hierarchy of water, placing burden on junior and inferior rights to fund the cost of replenishment. The point is, the IVWGA is not a court. The claims of the parties have not been heard by a court and subjected to the right of cross-examination. The Navy says it is so, and the IVWGA complies.

The Plan should be revised to make explicit the IWVGA's determinations as to which users are "in," and which are "out" of the Annual Pumping Allocation Plan. The Plan should also explain exactly how the five factors set forth above were considered (and will be considered) in determining which water users receive an allocation. Identity of the user is not now, nor has it ever been the sole factor in prioritizing relative rights. And under no circumstances should the IWVGA be empowered to apportion water in the manner it proposes under the Plan.

D. Management Action No. 1 is Flawed because it Requires Groundwater Users Excluded from the Annual Pumping Allocation Plan to Unlawfully Subsidize Users Awarded an Allocation.

The Plan explains that groundwater production in excess of either an Annual Pumping Allocation or a Transient Pool Allocation (capped at 51,000 AF) will be subject to a yet-undetermined "Augmentation Fee" "in an amount that is determined to be sufficient for the acquisition of supplemental water supplies." (Plan at 5-6.) In order to continue operations in the Basin, those groundwater users excluded from the Annual Pumping Allocation Plan will need to pay Augmentation Fees once their Transient Pool allocation is used up. Pursuant to certain of the modeling scenarios developed by the IWVGA, this could happen within the course of one year.

Therefore, the groundwater producers excluded by the IWVGA from participation in the Annual Pumping Allocation Plan would be responsible for payment of the majority of the Augmentation Fees. This, in turn, would result in the excluded users subsidizing the acquisition of supplemental water supplies in the Basin, which will benefit all groundwater producers, not just those that financed the acquisition of the supplemental supplies through payment of Augmentation Fees.

The IWVGA Board has given no consideration to the amount Mojave—or any other water users excluded from the Annual Pumping Allocation system—can afford to pay, or what any agricultural operation can sustain. IWVGA decision-makers have publicly stated that the Augmentation Fee could be in excess of $1,500 to $2,000, a fee that is entirely unrealistic for any agricultural operation to afford. The Augmentation

Fee is based on purely speculative, back-of-the-napkin estimations devoid of factual support and is, once again, a legal pretext to tax agriculture into submission in favor of the Indian Wells Valley Water District and the Navy.

Structuring Management Action No. 1 in such a way as to require certain classes of groundwater users (i.e., those excluded from the Annual Pumping Allocation Plan) to subsidize other classes of users runs afoul of the constitutional requirement that fees shall bear a reasonable relationship to the payor's burdens on, or benefits received from the governmental activity. (Cal. Const., art. XIII C, § 1 ("The local government bears the burden of proving by a preponderance of the evidence that . . . the amount [of a levy, charge, or other exaction] is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."); Cal. Const., art. XIII D, § 6(b)(3) ("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."); *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 ("To qualify as a nontax 'fee' under article XIII C, as amended, a charge must satisfy *both* the requirement that it be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity,' *and* the requirement that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.'") (emphasis in original).)

Again, the solution to rectify this specific constitutional infirmity is to revise Management Action No. 1 so that each groundwater user is awarded a proportional Annual Pumping Allocation, as described above. This revision would ensure that a small class of users would not be required to subsidize the development of imported water supplies. Proportional allocations would also encourage each user to conserve water to avoid paying Augmentation Fees.

E. The Plan Fails to Provide a Reasoned Basis for the Rejection of Proportional Allocations Based Upon the Cumulative Requirements of all Beneficial Uses in Combination with Reasonable Measures Narrowly Tailored to Avoid Undesirable Results During the Planning Horizon.

Article X, section 2 of the California Constitution and the California common law calls for the management of groundwater in a manner that optimizes the reasonable and beneficial use of water. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288; *California American Water Company v. City of Seaside* (2010) 183 Cal.App.4th 471, 480.) SGMA allows a GSA 20 years to attain sustainability. (Water Code § 10727.2(b).) The Plan ignores the directive of maximizing use within the framework established by SGMA.

It rejects a proportional allocation system among all beneficial uses under reasonable efficiency under the ruse of assumptions unsupported by credible evidence. For example, the Plan makes the claim that "[e]conomically viable agricultural operations cannot be sustained with a greatly reduced water supply (pumping allocation)," (Plan at 5-8), but fails to acknowledge that the result of entirely excluding agricultural pumpers from the Annual Pumping Allocation Plan would be to eviscerate the economic viability of agricultural operations in the Basin. Management Action No. 1 should be amended to grant agricultural pumpers an Annual Pumping Allocation that is proportional to their existing and anticipated use, taking into account each user's investments in the Valley.

Likewise, the Plan makes the unsupported claim that "domestic and municipal users would not be able to meet basic health and safety requirements under a proportional reduction allocation." (Plan at 5-8 to 5-9.) This claim is unsupported by evidence or explanation. There is no differentiation as to the water required for human consumption and basic sanitation. Therefore, as Mojave raised in its January 8, 2020 comments, the Plan should be updated to include an analysis that demonstrates that a proportional

allocation system would be insufficient to meet "basic health and safety requirements." The Plan should also analyze and explain what those requirements are.

The Plan makes the argument that "proportional reductions to reach the Current Sustainable Yield are infeasible because the majority of individual groundwater users would not have a large enough allocation to maintain an acceptable quality of life and the drastic community changes would impact the support of NAWS China Lake." (Plan at 5-8.) Again, the Plan fails to provide support for the finding that a proportional allocation system is infeasible and does not explain what is meant by "an acceptable quality of life," "drastic community changes," and "the support of NAWS China Lake."

The California Supreme Court has previously declared that the Legislature, let alone the IWVGA, cannot limit vested inchoate appurtenant water rights for nonuse. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 530-531.) Whatever authority that may exist to address unexercised overlying rights in the context of a comprehensive groundwater adjudication post-SGMA (Cal. Code Civ. Proc. § 830(b)(7)), those rules do not apply to exercised rights such as Mojave's and do not extend to IWVGA in the adoption of a GSP. If the Plan intends to use the taxing power to take the overlying rights of Mojave and others for the benefit of the Navy, compensation must be paid—either by the federal government that enjoys the confiscation of property or by the IWVGA that does its bidding by regulation.

The Plan should be edited to address these deficiencies and should also explain why "the support of NAWS China Lake" is a relevant factor, given that the Plan indicates that the Navy will be exempt from the payment of any fees or water use restrictions. (See Plan at 5-5 (the Navy will be exempt from payment of fees, has not provided an accounting of its water right, and the Base Period is not applicable to the Navy), 5-10 (the Navy's groundwater production will not be restricted or regulated).)

Contrary to the Plan's unsupported claims of harm, a proportional allocation system would indeed be feasible. Moreover, the system could be structured so that each groundwater user's proportional allocation is tradable, thereby ensuring that water will go to the highest and best use, while encouraging conservation among beneficial uses. Trend is not destiny and SGMA grants the IWVGA the time to pursue corrective potential strategies over the decimation of farming as a way of life. It would also encourage broad community investment in developing new water supplies, whether it be direct potable reuse or the delivery of imported water.

F. <u>The Plan Should More Clearly Explain and Justify Treatment of the Navy.</u>

The Plan should be updated to explain how the Navy will be treated under Management Action No. 1 and to explain the basis for this super-priority preferential treatment not previously recognized in any tribunal anywhere. IWVGA legal counsel's statement at the January 16, 2020 hearing on the Plan indicated that the IWVGA "will make a technical determination of the potential scope of [the Navy's] water use" and "[t]he remaining water, if any, will be available for all water users."

Yet, the Plan is unclear on the scope of the Navy's water use. It includes the contradictory assertions that "NAWS China Lake has not provided a final accounting of its FRWR," that in June 2019, (Plan at 5-5), the Navy estimated that its water "requirement" was 6,530 AFY (i.e., the vast majority of the 7,650 AFY safe yield), and that notwithstanding this 6,530 AFY "requirement," the Navy "requested" that the IWVGA "use 2,041 AFY as a reasonable estimate of current and future annual groundwater production on the installation," (*id*. at 5-9). Additionally, the Plan explains that the January 1, 2010 through December 31, 2014 Base Period will not be used to evaluate groundwater production for the Navy, (*id*. at 5-5), that the Navy, along with other federal agencies, are exempt from Augmentation Fees, and that the IWVGA "does not have legal authority to restrict, assess, or regulate production for NAWS China Lake; therefore, NAWS China Lake groundwater production is considered of highest beneficial use," (*id*. at 5-10). Accordingly,

under the Plan, the ex-officio IWVGA Board member and possessor of the model—the Navy—finds itself the beneficiary of a super-priority right to groundwater without any financial obligation whatsoever to support the ongoing costs of "sustainable management" for its unilateral benefit.

The Plan's determination that the Navy's groundwater production "is considered of highest beneficial use" is a legal conclusion that does not follow from the IWVGA's inability to regulate the Navy. Moreover, it is contrary to foundational principles of water rights law, under which it is clear that the priority of a federal reserved water right is determined by the date the federal reservation was established, that the federal reserved water right only enjoys priority vis-à-vis subsequent appropriators, and that the right extends only to the *primary purpose* of the federal reservation. (*Cappaert v. United States* (1976) 426 U.S. 128, 138 ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government . . . acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.") (emphasis added); *Agua Caliente Band of Cahuilla Indians v. Coachella Water Dist.* (9th Cir. 2017) 849 F.3d 1262, 1268–69 (explaining that the Supreme Court has emphasized that, under the doctrine of federal reserved rights, the government reserves "only 'that amount of water necessary to fulfill the purpose of the reservation, no more'" and that the United States must "'acquire water in the same manner as any other public or private appropriator'" where "'water is only valuable of a secondary use of the reservation'" (quoting *United States v. New Mexico* (1978) 438 U.S. 696, 701, 702)).)

Moreover, given the Plan's conclusion that the IWVGA "does not have legal authority to restrict, assess, or regulate production for NAWS China Lake," (Plan at 5-10), the Plan should be updated to answer the following questions:

- The basis for the IWVGA's determination that the Base Period should not be used to evaluate groundwater production for the Navy if it is used to determine the beneficial use of all overlying landowners;
- Whether the Navy will provide a final accounting of its FRWR;
- Given the Navy's conflicting estimates and the IWVGA's decision not to evaluate the Navy's water use relative to the Base Period, the basis for the Navy's Annual Pumping Allocation (if any);
- The legal basis for the IWVGA to grant an Annual Pumping Allocation to the Navy, given that the IWVGA cannot regulate the Navy's water use and has no recourse in the event the Navy exceeds its allocation;
- How the Plan meets the requirements of SGMA to be enforceable if it cannot address the Navy's water use in excess of its allocation or the assumed quantity of production;
- The legal basis for granting an allocation to the Navy, but not to certain overlying rights holders, including those that commenced production prior to the establishment of the Navy;
- How the IWVGA will respond if the Navy exceeds its Annual Pumping Allocation;
- Whether the IWVGA will further reduce other Annual Pumping Allocations due to exceedances by the Navy; and
- How the Navy's water use will be measured and accounted for (i.e., given that the IWVGA cannot regulate the Navy, how will the IWVGA ensure that it obtains water use data from the Navy and properly accounts for its water use?).

Absent clear answers to these questions, the IWVGA deal with water use by the federal government outside of the allocation context. In other words, the IWVGA should grant Annual Pumping Allocations only to water users that are subject to regulation by the IWVGA. If the Navy is concerned about "encroachment" its remedy is to voluntarily join in the planning effort and support sustainability through agreement. Instead the Navy has overtly signaled to the IWVGA that it must shield the Navy from any of the rigors of a judicial allocation process and on the basis of its identity alone—thereby declaring that when it comes to groundwater, what the Navy wants, the Navy gets.

G. The Plan "Takes" the Water Rights of Overlying Landowners, Including Mojave's.

The Plan unequivocally takes fully vested overlying water rights and makes them available for use by the Navy. (See *Casitas Mun. Water Dist. v. United States* (Fed. Cir. 2008) 543 F.3d 1276 ("*Casitas*"); *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Cl. 246.) Mojave is an overlying landowner with overlying water rights. The water available to Mojave for reasonable and beneficial use will be taken by the Plan and made available for use by the Navy and other users like the Indian Wells Valley Water District. There is little doubt—as reflected by the Plan—that it prioritizes the use of water by the Navy and the Water District and constitutes a public use. Like the required forbearance of water foisted upon an existing appropriator under environmental regulation in *Casitas,* in the instant case the Plan makes water available for the Navy and the Water District and effectuates a "physical taking." "This is no different than the government piping the water to a different location. It is no less a physical appropriation." (*Casitas*, 543 F.3d at 1294.)

H. The Fallowing Program Contemplated by the Plan is Inadequate to Compensate Agricultural Water Users for their Investments.

Management Action No. 1 provides that all groundwater users assigned a Transient Pool Allocation (e.g., agricultural producers) would be eligible for enrollment in a Fallowing Program. (Plan at 5-6.) Under the Fallowing Program, eligible groundwater pumpers could "elect to sell their Transient Pool Allocation back to the IWVGA." (*Id*.) The Plan explains that the IWVGA and participating groundwater pumpers "may also explore alternative uses for the fallowed land, which may include use as enhanced habitat or grazing lands. (*Id*. at 5-7.) The Plan estimates that the IWVGA's costs incurred pursuant to the Fallowing Program will be approximately $9 million. (*Id*. at 5-11.)

The Plan should be updated to explain how the value of the Transient Pool Allocations purchased pursuant to the Fallowing Program would be determined. Additionally, the Plan should explain why the IWVGA anticipates $9 million to be sufficient to fund the Fallowing Program. As explained above, Mojave, has expended approximately $32 million on their agricultural properties overlying the Basin. Therefore, it appears that the budget for the Fallowing Program should be significantly expanded to protect participating water users' investment-backed expectations and adequately compensate agricultural producers.

I. The Plan Should Include Additional Detail on the Transient Pool Allocation and Provide a Justification for why Shares of the Transient Pool are Non-transferrable.

As presently formulated, Management Action No. 1 includes a 51,000 AF Transient Pool Allocation, which the Plan explains will be allocated among all of the groundwater users not given an Annual Pumping Allocation (i.e., all agricultural pumpers, among others). (Plan at 5-6.) Each user's share of the Transient Pool is non-transferrable. (*Id*.)

The Plan should be updated to explain the basis and rationale for the IWVGA's determination that shares of the Transient Pool Allocation should be non-transferrable. Ensuring transferability of all allocations, including Transient Pool Allocations would ensure that water goes to the highest and best use.

More fundamentally, the Plan must be revised to explain the scientific and policy rationale for setting the Transient Pool Allocation at 51,000 AF, as opposed to some other number. From an economics standpoint, 51,000 AF is woefully insufficient to allow agricultural production to continue until imported water is available in the Basin, which the Plan estimates will not occur until approximately 2035. (Plan at 5-7.) Therefore, agricultural pumpers and others denied Annual Pumping Allocations will be heavily impacted by payment of Augmentation Fees. The Plan should include an analysis of the impacts of

Management Action No. 1 on agricultural pumpers and other water users that are excluded from the Annual Pumping Allocation Plan.

Additionally, the Plan should explain how much of the 51,000 AF each user will be granted and whether the Board intends to adopt (or has already incorporated) Model Scenario 6 ("Scenario"), presented at the August 15, 2019 Board meeting (Agenda Item 10.B) into the Plan. Under this Scenario, like the Transient Pool Allocation described in the Plan, each non-domestic user would be assigned a portion of a pool volume[10] that could be used variably until 2040, but total pumping could not exceed an assigned portion. The Scenario assumes that each of the non-domestic group continues to pump at current levels over a "cliff" period until each user's assigned portions are depleted. For Mojave Pistachios, that "cliff" period would last only eight months at current pumping levels. In other words, if the Board were to implement this Scenario, or a similar scenario, through Management Action No. 1, within the course of a year, Mojave Pistachios would be prohibited from exercising its overlying water rights.

Such a proposal would amount to a taking of Mojave's overlying water rights in contravention of SGMA's express protection of common law water rights. As overlying users, Mojave is entitled to protection of their overlying rights. Any proposal that would result in the elimination of agricultural and industrial producers must be rejected as inconsistent with both SGMA and well-established principles of California groundwater rights law.

Moreover, the allocation of the limited pool volume modeled in the Scenario and set forth in the Plan represents only approximately three to four percent of an assumed (and likely grossly understated) 1.5 million AF of usable water in storage. Considering the severe economic consequences on members of the agriculture and industry group, this amount is unreasonable. Specifically, as explained above, the proposed allocation fails to provide sufficient water to allow Mojave to continue their operations in the short term and until imported water is available. The proposed allocation does not provide sufficient water for this transition and would eviscerate Mojave's investments in the Indian Wells Valley that now total approximately $32 million.

J. Management Action No. 1 Requires Analysis in an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA).

The Plan explains that implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program "may be subject to environmental regulations and could require the preparation of environmental studies." (Plan at 5-11.) Yet, the Plan indicates that Management Action No. 1 will be implemented during summer of 2020, which leaves insufficient time for the environmental review process. (*Id*. at 5-12.)

The Plan should be updated to reflect that the adoption of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program is a "project" under CEQA and the implementation schedule should be updated to provide sufficient time for environmental review and public participation.

CEQA is triggered when a public agency "approves" a project that is subject to CEQA. (Pub. Res. Code § 21080.) "Approval" is defined as any decision that commits the agency to a "definite course of action in regard to a project." (14 Cal. Code Regs. ["CEQA Guidelines"] § 15352.) The term "project" is defined broadly to include any activity that: (i) may cause a direct (or reasonably foreseeable indirect) physical environmental change; and (ii) is directly undertaken by a public agency, supported in whole or in part by a

[10] Under the Scenario, the pool volume was 63,836 AF, whereas the total Transfer Pool volume set forth in the Plan is only 51,000 AF. The Plan should explain the basis for the reduction in the pool volume, along with the rationale for setting the Transfer Pool volume at 51,000 AF.

public agency, or involves the issuance by a public agency of some form of discretionary entitlement or permit.[11] (See Kostka and Zischke, Practice Under the California Environmental Quality Act § 4.5, citing Pub. Res. Code § 21065 and CEQA Guidelines § 15378.) There is no doubt that Management Action No. 1 is subject to CEQA—it is an activity that may cause environmental impacts (e.g., impacts on air quality, land use, or biological resources due to land fallowing) and is approved by the IWVGA—a public agency. Therefore, the Plan must be updated to reflect that the IWVGA will conduct CEQA review on Management Action No. 1 prior to its adoption.

The Indian Wells Valley is a harsh climate and has tremendous spring winds that create dust problems for the whole Valley, grounding planes and endangering the health of residents. Shutting down Mojave's farming operations will result in the death of 215,000 living pistachios trees and create dust problems that would potentially take years and hundreds of thousands of dollars to mitigate. If the IWVGA Board refuses to avoid these impacts by granting Mojave a permanent water allocation, these impacts must be analyzed as required under CEQA.

Given the massive changes in land use across the Basin and the associated significant environmental impacts that are likely to occur with implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program, an EIR is required. The EIR must describe the proposed project, its environmental setting, its objectives, identify and analyze significant effects on the environment, state how those impacts can be mitigated or lessened, and identify alternatives to the project. (*Federation of Hillside and Canyon Assocs. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1197; CEQA Guidelines §§ 15123–28, 15130.) The implementation timetable set forth in Section 5 of the Plan must be amended to accommodate sufficient time for the preparation of an EIR analyzing the impacts of Management Action No. 1.

Finally, the Plan evidences a pre-commitment problem. The Plan explains that the IWVGA will separately determine each groundwater pumper's Annual Pumping Allocation and/or Transient Pool Allocation following adoption of the Plan. (Plan at 5-12.) Yet, the Plan demonstrates that the IWVGA has already determined that agricultural pumpers will be excluded from the Annual Pumping Allocation Plan. See Plan at 5-6. CEQA forbids pre-commitment by the lead agency to the various approvals constituting the Project. (See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116; *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150.) Pre-commitment to approving a project also violates "the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures…." (*In re Collie* (1952) 38 Cal.2d 396, 398.)

V. The Plan Underestimates the Amount of Water in Storage and Recharge and Consequently Fails to Recognize the Opportunity for Continued Beneficial Use of Groundwater Over the 20 Year Planning Horizon and Beyond.

As Mojave noted in several prior comments to the IWVGA, prior to setting any allocations, it is necessary to develop an accurate and supportable estimate of the total amount of usable groundwater in storage in the Basin. However, Mojave is concerned that the assumptions made to date regarding the amount of usable water in storage in the Basin and Basin recharge, to the extent they can be discerned, lack scientific support.

The IWVGA cherry-picked the scientific literature to downplay the range of both groundwater in storage and annual recharge estimates. Certain estimates peg the recharge amount at over 30,000 AFY.

[11] "Public agency" is defined as any "state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Pub. Res. Code § 21063.) The IWVGA is a "public agency." (See Water Code §§ 10721(j), (n).)

Moreover, prominent local hydrogeologists have concluded that, even at current extraction rates, thousands of years of water exist within the Basin. Yet, these datapoints were ignored because they did not serve the IWVGA's political agenda. Simply put, the science is not there to support the IWVGA's Plan, even though millions of dollars have been spent on its preparation.

A. The Plan Underestimates the Amount of Water in Storage.

Indian Wells Valley is a geologic basin that has been infilled with up to 6,500-feet of unconsolidated sediments. These sediments contain groundwater under perched, unconfined to semi-confined, and confined conditions. The total volume of groundwater storage is a function of the total volume of the aquifer, including the sediment grains and water in the pore space, and the percentage of that volume that contains available groundwater.

There are two basic methods for calculating the volume of groundwater storage: analytical calculations using sediment volume and specific yield, and numerical calculations using the structure of the groundwater flow model (DRI, 2016).

The Plan notes (at page 3-25) with respect to total basin storage that three sources were considered:

- Kunkel and Chase (1969) 720,000 AF under 64,000 acres in 1954 in 100 feet of aquifer
- Dutcher and Moyle (1973) 2,200,000 AF under 70,800 acres in 1921 in 200 feet of aquifer
- USBR (1993) 1,020,000 AF to 3,020,000 AF under 59,200 acres in 100 to 300 feet of aquifer

It should be noted that all of the above estimates are for limited areas (59,200 to 70,800 acres) in the overall Basin (382,000 acres). If the analysis within each of these studies is expanded to the entire Basin, then the volume of water in storage increases significantly.

Further, The DRI model contains the most up to date information available on the basin shape, the hydrostratigraphy, the groundwater levels, and the water quality (both brackish and fresh), and specific yield distribution in all areas, layers, and zones. Regardless of what the historical "estimates" showed, the DRI model should be used to estimate the volume of water contained in the basin as of 2019. DRI has all the information it needs to estimate water volumes in all model layers, in all basin areas, for all water quality criteria.

Questions that should be answered include:

- What is the total volume of the basin within the model domain?
- What is the total volume of water (all qualities) within the basin within the model domain?
- How much water is in Layer 1 of the model?
- How much water is in Layers 2–3 of the model?
- How much water in in Layers 4–6 of the model?
- How much of the water within these layers is fresh versus brackish?
- Where are the fresh versus brackish resources located within the basin volume?

The DRI model is being utilized to determine changes in storage and loss in storage, but the fundamental questions of how much water is in the basin (within the model domain) have not been answered.

B. The Plan Fails to Support Recharge Estimates.

With respect to recharge, Section 3 of the Plan provides:

> The average annual recharge developed by DRI is 7,650 AF per year (McGraw et al, 2016; Garner et al, 2017). The recharge zones identified by DRI are shown in Figure 3-11. The total area of recharge is about 770 square miles. The area and estimated annual recharge in each zone are shown in Table 3-3.

(Plan at 3-13.) Likewise, the Plan includes the following "selected" recharge estimates in Table 3-4:

Table 3-4: Natural Recharge Estimates from Selected Recharge Studies (AFY).

Recharge Study	Natural Recharge Estimate (AFY)
Brown and Caldwell (2009)	8,900
Epstein et al. (2010)	5,800 to 12,000
Todd Engineers (2014)	6,100 to 8,900
USGS Basin Characterization Model (Draft, 2018)	8,680 (1981-2010) 5,980 (2000-2013)
Desert Research Institute (McGraw et al. 2016)	7,650

(Plan at 3-16.) However, the Plan fails to explain on what basis were these natural recharge estimates were "selected." Moreover, the Plan does not explain why the recharge estimates from the 2014 Todd Report were cherry picked to omit estimates of recharge from irrigation return flows and to account for distribution system leakage. (*Id*.)

Additionally, no explanation is provided as to why the DRI recharge estimate (7,650 AFY) was used as opposed to any of the other "selected" studies. (See Plan at 3-21 to 3-23 (7,650 AFY used as the sustainable yield).) Furthermore, no explanation is provided as to why only natural recharge is included, when the Plan acknowledges that agricultural use is 50 percent of total water use and recharge from irrigation as well as distribution system leakage must be considered in recharge estimates (i.e., return flows).

With respect to the DRI recharge estimate, the estimate is based on the loss of storage of approximately 25,000 AFY over many years from sediments assumed in the DRI model to have an average specific yield of 22 percent. This value is very high for the sediments present in the Basin, especially where the groundwater is semi-confined and confined. Use of a more reasonable value for specific yield would lower the volume of water lost from storage, resulting in a much higher estimate of recharge.

VI. The Analysis of Undesirable Results must be Updated to Incorporate the Best Available Science and Information

SGMA requires development of a Plan to meet SGMA's sustainability goal, which means avoiding statutorily defined, significant and unreasonable undesirable results through implementation of projects and management actions. (Water Code §§ 10727, 10727.2, 10721(u), (v), (x).)

In turn, DWR's SGMA regulations require that the Plan establish minimum numeric thresholds which represent a point in the Basin that, if exceeded, may cause undesirable results. (23 Cal. Code Regs. § 354.28(a).) Among other things, the Plan must also explain which information and criteria were relied upon by the IWVGA to justify each minimum threshold, explain how the minimum thresholds will avoid undesirable results, and explain how the established minimum thresholds may affect the interests of

beneficial uses and users of groundwater. (23 Cal. Code Regs. § 354.28(b).) Each of these minimum thresholds must be evaluated and established on the basis of the best available science and information. (See *id*.)

The Plan, however, poorly defines undesirable results and fails to clearly articulate when they are significant and unreasonable. Even when the Plan does try to articulate what is significant and unreasonable, the articulation is based on weak and biased scientific analysis, particularly with regard to water in storage, recharge estimates, and domestic well impacts.

The IWVGA's Plan development process focused more on proposals that would eliminate overlying groundwater use by non-domestic users than on evaluating and considering the best available scientific information to develop thresholds, projects and management actions to avoid undesirable results and achieve Basin sustainability. One primary driver for proposals to eliminate agricultural and industrial uses of groundwater seems to be the Board's focus on impacts to shallow groundwater wells. (See, e.g., Plan at 3-30, Appendix 3-E; August 15, 2019 IWVGA Board Meeting Agenda Item 10b.) However, the analysis suggests that this threat is theoretical and unsupported (i.e., speculative, at best). Without an accurate and supportable analysis of the amount of usable water in storage and recharge to the Basin, defects cascade throughout the Plan's discussion of undesirable results, including impacts to shallow wells. Even if the Plan accurately represented the threat to shallow wells, a physical solution exists to mitigate impacts to users of shallow wells.

It would be entirely unreasonable, and contrary to SGMA's mandate, to implement draconian restrictions on overlying agricultural water use that would eliminate the entire agriculture industry in the Basin, when it is possible to take discrete physical actions (e.g., deepening existing wells) as part of a monitoring and mitigation program.

VII. Conclusion

The myriad of defects in the Plan stem from the IWVGA's exclusion of stakeholders from meaningful participation in the Plan development process. Plan development should have involved a grassroots effort, with due process afforded to all water users. From the beginning, the IWVGA Board should have been comprised of representatives of all major stakeholder groups in the Basin, including rural domestic pumpers, industrial users, and agriculture. Instead, the IWVGA used its token advisory committees—the PAC and TAC—as a smokescreen to hide their true intention—protecting the Navy from experiencing *any water shortage* at all costs, even if it means the destruction of the entire agricultural economy in the Indian Wells Valley. Supervisor Navy Captain Gleason spearheaded the effort early on to do whatever he deemed necessary to protect the Navy and decided agriculture was the easiest target. Millions were spent shoehorning the purported "science" into the preconceived outcomes, rather than developing a sound scientific model for the Basin upon which a fair and legally compliant Plan could have been developed.

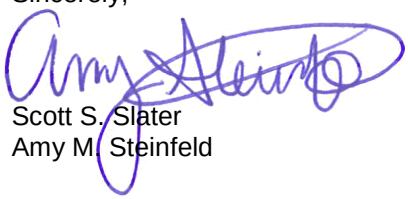
The legislative intent behind SGMA—to bring sustainable groundwater management to our State to protect future generations of Californians—is clear. Yet, there is no evidence that the California Legislature sought to countenance the wholesale devastation of farmers, their families, and the local economy that they sustain by the adoption of SGMA—especially where there are vast groundwater resources and no immediate threat of undesirable results. Unfortunately, the IWVGA has taken this misguided path as a license to protect the Navy regardless of the consequences.

Agriculture is a vital component of California's economy. The Legislature granted the IWVGA 20 years to monitor conditions and mitigate as required, while inspiring the ingenuity and financing required to augment supply, stretch our precious resources further, and then, if necessary, to fairly distribute the burden of shortages. The Plan's chief defect is that it takes aim at farming, when all water users should be asked to

bear the burden of shortages. Farmers should not be forced to take the fall so that other users are spared the need to cut back.

Although our objection to the Plan as approved is strong, we are optimistic that the deficiencies identified herein can be rectified. Despite the IWVGA's recent efforts to exclude Mojave from participating in the Plan implementation process, Mojave remains committed to working towards a collaboratively-established and implemented sustainable management Plan—one that is based upon best available science with the objective of respecting private property rights while achieving the Constitutional mandate to maximize the reasonable and beneficial use to water. On behalf of our client, we urge DWR to reject the Plan and direct the IWVGA to correct its present course and embrace the notion that these objectives are not inconsistent.

Sincerely,



Scott S. Slater
Amy M. Steinfeld

Enclosures

cc: Indian Wells Valley Groundwater Authority, apriln@iwvwd.com
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

Attachment 1: Mojave's January 8, 2020 comment letter to the IWVGA Board on the Public Review Draft of the Plan

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January 8, 2020

VIA E-MAIL 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 on the Public Review Draft Groundwater Sustainability Plan

Dear Members of the IWVGA Board of Directors:

This comment letter on the Public Review Draft Groundwater Sustainability Plan (Plan) for the Indian Wells Valley Groundwater Basin (Basin) is respectfully submitted on behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, "Mojave"). The purpose of these comments is to provide input on the Plan and on the Plan development process, more generally. This letter supplements Mojave's prior comments, including those presented at meetings of the IWVGA Board of Directors (Board) and at meetings of advisory committees to the Board, including the Technical Advisory Committee (TAC) and the Policy Advisory Committee (PAC). Mojave reserves the right to supplement these comments as the Board revises the Plan or otherwise takes action.

Mojave objects to the proposed Plan for three principal reasons. First, to-date, many stakeholders, particularly those engaged in the cultivation of agriculture, have been denied procedural and substantive due process in the IWVGA's development of the Plan. Second, Management Action No. 1 and the underlying modeling scenarios prioritize claims to water and allocate available water supplies among water right holders in a manner that is *inconsisten*t with well-established principles of common law water rights and therefore contravene the Sustainable Groundwater Management Act's (SGMA) express prohibition on determining or altering common law water rights. Last, the assumptions set forth in the Plan and the modeling scenarios developed to-date, to the extent that they can be discerned, lack scientific or factual support. In the spirit of collaboration, this letter provides recommendations to rectify the concerns and deficiencies identified herein.

I. Background on Mojave's Operations

Mojave owns and controls lands overlying significant acreage in the Basin and pumps groundwater from the Basin for the irrigation of high value crops on overlying land under efficient water use practices. Use of water for the cultivation of agriculture is enshrined in California law as among the highest and best uses of water in the State. Water Code § 106; see also Plan at 5-10 (citing Water Code section 106).

Mojave uses the least amount of water possible while following best farming practices for pistachios. Specifically, Mojave uses drip hose, pressure compensating emitters, water monitoring, and even use deficit irrigation, a practice whereby Mojave uses less than full tree water demand at key times of the year when it does not hurt the trees' production, but does save water and have other benefits. Mojave is

committed to using the most modern and efficient irrigation system and actively participates in the California Pistachio Research Board, which supports cutting-edge research. Pictures of Mojave's agricultural operations and irrigation systems are included in Attachment A.

Collectively, Mojave owns 83 legal parcels of land overlying the Basin and farms approximately 1,600 acres of pistachios. See Attachment B. All of Mojave's farmed acreage was acquired and put into service for the cultivation of agriculture *prior to the adoption of SGMA*. Each of these parcels overlies the Basin and holds overlying water rights, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, and the overlying right is not limited by past water use practices. *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 87. Agriculture is a permitted use of Mojave's lands and all its farmed acreage was placed into cultivation in accordance with applicable state law and local ordinances. At full maturity, the lands placed into production prior to the adoption of SGMA will require approximately 7,000 acre-feet per year (AFY) of water under efficient irrigation practices.

To date, Mojave's cumulative investment-back expectation exceeds $25 million and its operation is a going concern that produces pistachios for commercial sale, pays over $100,000 per year in property taxes,[1] and supports the local economy by, for example, obtaining fencing and irrigation parts from the local hardware store, frequenting local restaurants, purchasing fuel locally, and using local contractors whenever available. Mojave's owners also donate extensively to local community and veteran groups, youth livestock programs, local schools, and the hospital, among other organizations. Mojave also supported the local community after last year's earthquakes. It firmly believes in the role that agriculture will play as a long-term asset to the local economy.

Mojave's shared interest in achieving long-term Basin sustainability is self-evident and it has participated earnestly and cooperatively throughout the entire Groundwater Sustainability Agency (GSA) formation and Plan adoption process. For example, Mojave was a signatory member of the Indian Wells Valley Cooperative Groundwater Management Group, a long-standing local data-sharing group comprised of the major groundwater producers and government agencies in the Indian Wells Valley. This group contributed much of the historical groundwater production information and stream flow data to the IWVGA.

Likewise, in 2015, Mojave formed the Mojave Mutual Water Company and sought membership on the GSA through a Joint Powers Authority or other agreement pursuant to Water Code section 10723.6(b). Mojave felt that a congenial relationship between stakeholders would foster collaboration and compromise.

When Mojave's efforts to have a seat on the GSA were spurned by the future members of the IWVGA, Mojave continued to pursue a positive and working relationship with all stakeholders in the Indian Wells Valley. Mojave actively participates in the PAC as a representative for large agriculture by providing constructive input, through voluntary data sharing, and as a member of several subcommittees. Mojave was pleased to be able to contribute to community outreach plans, to provide feedback on well registration policy recommendations, and to give comments on technical information developed by the GSA.

Mojave is also an active member of the TAC as a representative for large agriculture. Mojave has provided extensive comments and suggestions on groundwater technical issues, including technical memoranda, sustainability criteria, and management goals and objectives. In addition to participating in the subcommittees of the IWVGA, Mojave has given technical support and significant financial funding to the Indian Wells Valley Brackish Groundwater Feasibility Program in an effort to build a bridge to sustainability through treatment of locally produced groundwater.[2] Mojave also worked collaboratively with local

[1] Mojave paid $99,199.23 in property taxes for 2018 and $101,988.55 in 2019.
[2] Of note, Mojave has provided over $100,000 in funds to support the Indian Wells Valley Brackish Water Study Group. This group is evaluating the use of brackish groundwater resources to supplement shallow,

groundwater producers to develop a white paper on Groundwater Management in the Indian Wells Valley under SGMA. The paper presented an approach to achieve sustainability and compliance with SGMA along with long-term viability for the local community and economy.

II. Failure of The IWVGA to Provide Meaningful Opportunities for Diverse Stakeholder Engagement Violates Mojave's Right to Procedural Due Process and Fails to Satisfy the Requirements of SGMA.

Under the requirements of SGMA, the IWVGA must consider the interests of all beneficial uses and users of groundwater in the Plan development process. Water Code § 10723.2. Specifically, SGMA mandates that the IWVGA consider the interests of Mojave, among others, as overlying groundwater rights holders with vested property rights. Water Code § 10723.2(a). The vested rights of overlying landowners include the right to produce groundwater for beneficial use on overlying lands. These vested property rights entitle overlying landowners to due process that is of a wholly different character than a mere customer of a water utility.

The Department of Water Resources' (DWR) SGMA regulations require that the IWVGA document in a communication section of the Plan the opportunities for public engagement and active involvement of diverse stakeholders in the Basin. 23 Cal. Code Regs. § 354.10. The expertise of stakeholders is critical in ensuring that the IWVGA is using the best available information and science throughout the Plan development process.

However, to date, the IWVGA's process for public engagement and involvement has been lacking in several respects. First, the IWVGA's development of modeling scenarios through closed session meetings contravenes SGMA's public participation requirements. IWVGA does not own or even control the groundwater flow model on which the Plan is based. Instead, the United States Navy (Navy), which sits as an "ex-officio" member of the IWVGA, owns and controls the model. This arrangement is made even more peculiar by the fact that the Navy is not subject to the management under SGMA and is immune from regulation by the IWVGA under the Plan. The Navy has allowed the IWVGA to request that the Desert Research Institute (DRI), which developed the model for the Navy, run the model simulations upon which the Plan is based. The Navy model has not been peer reviewed and despite repeated requests, it has not been made available to stakeholders. Mojave renews its prior requests that the Navy model be made available to all stakeholders in the Basin. The situation *might* be viewed in a different light if the Navy were an independent and disinterested stakeholder. Unfortunately, this model—which provides the technical foundation for the Plan itself—is owned by the stakeholder that will obtain the largest groundwater allocation under it.

Although summary information regarding various modeling scenarios has been presented at meetings of the Board, the underlying assumptions for each scenario have been insufficiently documented and explained. Similarly, the IWVGA had not clearly articulated how the modeling scenarios have informed or will ultimately inform the Plan and the management actions to be taken thereunder. These issues frustrate meaningful public participation in the Plan development process and deny stakeholders procedural due process. Therefore, Mojave renews its prior requests that the assumptions for each modeling scenario under consideration be detailed and promptly provided to the public, along with a clear explanation of how the IWVGA has incorporated, or intends to incorporate, the modeling scenarios into the Plan and implementation of Plan Management Action No. 1.

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fresh, groundwater supplies. Indian Wells Valley Water District, Searles Valley Minerals, and Coso Geothermal also contribute funds to this group. Mojave has also funded scientific studies, the purchase of monitoring equipment, and payment of other costs incurred by the TAC or PAC.

Additionally, Mojave notes that the Public Review Draft of the Plan was only available for public review as of December 11, 2019, leaving little time to consider and incorporate public comments. Likewise, as explained above, key foundational information underlying the Plan sections (e.g., model assumptions and the model itself) has not been made available to the public. Given the different versions of Plan sections available on the IWVGA's website, we ask that the Board provide the red-line changes between each available version as soon as is feasible to allow sufficient time for public review and collaboration in advance of the January 31, 2020 deadline for providing the Plan to DWR.

III. Plan Management Action No. 1 Should be Reformulated to Ensure Substantive Due Process, Consistency with Common Law Water Rights Principles, and Provide an Adequate Basis for the IWVGA's Determinations.[3]

As explained above, SGMA requires the IWVGA to consider the interests of all beneficial uses and users of groundwater, including holders of overlying groundwater rights such Mojave. Water Code § 10723.2. SGMA also expressly forbids the IWVGA from determining or altering water rights. Water Code § 10720.5(b) ("Nothing in this part, or in any groundwater management plan adopted pursuant to this part, determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights."); see also Water Code § 10720.1(b) ("…It is the intent of the Legislature to *preserve the security of water rig*hts in the state to the greatest extent possible consistent with the sustainable management of groundwater.") (emphasis added).

Despite SGMA's clear requirements, Management Action No. 1 (Implement Annual Pumping Allocation Plan, Transient Pool and Fallowing Program), and the underlying modeling scenarios considered by the Board attempt to determine the water rights of the users in the Basin and would unlawfully eviscerate the overlying rights of Mojave, as discussed in more detail below.

Section 5 of the Plan explains that only certain users that produced groundwater during the Base Period, defined as January 1, 2010 through December 31, 2014, will receive an Annual Pumping Allocation. Plan at 5-5 to 5-6. The remaining groundwater users not given an Annual Pumping Allocation will be "eligible" to receive some unspecified share of a 51,000 acre-foot (AF) "Transient Pool Allocation," which is a "limited non-transferable one-time allocation of water to be used prior to 2040." *Id*. at 5-6. Any water production in excess of either an Annual Pumping Allocation or a Transient Pool Allocation will be subject to a yet-undetermined "Augmentation Fee" "in an amount that is determined to be sufficient for the acquisition of supplemental water supplies." *Ibid*. Additionally, those groundwater users that are assigned a Transient Pool Allocation may be enrolled in a "Fallowing Program," under which the user can elect to "sell their Transient Pool Allocation back to the IWVGA." *Ibid*.

The Plan explains that "with the implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program, [Basin] groundwater production is anticipated to reduce to around 12,000 AFY plus any agricultural pumping as part of the Transient Pool program in the first year of implementation." Plan at 5-7 (emphasis added); see also *id*. at 5-6 (only pumpers assigned a Transient Pool Allocation (i.e., agricultural pumpers) may be enrolled in the Fallowing Program). In other words, the Plan indicates that *agricultural pumpers will not receive any Annual Pumping Allocation*, but must share in some portion of the Transient Pool Allocation or else elect to participate in the Fallowing Program. *Ibid*.

[3] The comments we provide herein are on the December 2019 Public Review Version of the Plan, downloaded from the IWVGA website on December 27, 2019. Since that date, it appears that the IWVGA has removed the individual PDFs of each section of the December 2019 Public Review Version of the Plan from its website, making it unclear whether the December 2019 Public Review Version of the Plan was changed between December 27, 2019 and the date of this comment letter. The apparent changes to the IWVGA website during the comment period raise confusion over which version of the Plan is operative.

A. IWVGA's Actions Violate Mojave's Right to Substantive and Due Process.

SGMA grants IWVGA provisional powers to sustainably manage groundwater. But these powers are not limitless. If government wields its power in an "abusive, irrational or malicious manner" it can cause grave harm and a substantive due process violation. *Sinaloa Lake Owners Assoc. v. Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1408. The touchstone of a substantive due process claim is a vested property right. Mojave's overlying right fulfills that requirement. *Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 416.

Generally, to determine whether substantive due process rights have been violated, the court will look at factors including:

- The need for the governmental action;
- The relationship between the need and the action;
- The extent of the harm inflicted; and
- Whether the action was taken in good faith or for the purpose of causing harm.

Here there is a need for a Plan and the sustainable long-term management of groundwater. The statute provides the GSA with a 20 year planning horizon to achieve sustainability. Water Code § 10727.2(b). The statutory definition of "Sustainable Yield" is found in Water Code §10721(w):

> "Sustainable yield" means the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result.

Notably, not present in this definition is a requirement in SGMA or common law that requires that IWVGA adopt a Plan requiring that the Basin be managed in a manner that limits extractions to the recharge rate. But this is what the Plan seeks to accomplish by eliminating agricultural use in utter disregard to the consequences of its action.

Instead the IWVGA must look to the direction provided by Water Code section 10721(x) and the avoidance of the designated "undesirable results" and make use of the available 20 years to achieve its objective rather than inflict the economic devastation on an entire class of users that includes Mojave.

Owners of real property overlying the Basin with vested property rights and the physical ability to extract water for crops planted prior to the adoption of SGMA will receive a **zero** allocation under the Plan. Meanwhile, the Plan "will assign" to the Navy—an entity not subject to the Plan—a priority right to as much as 85 percent of the Basin's available water supplies (6,530 AFY of 7,350 AFY), despite the fact that the Navy is an "ex-officio" member of the IWVGA that is not subject to regulation under the Plan. The City of Ridgecrest, which is provided with water by the Indian Wells Valley Water District—both members of the IWVGA—will also receive the benefit of priority rights ahead of agriculture. However, the Plan makes no effort to distinguish between the Indian Wells Valley Water District's domestic customers, exterior irrigation uses, and industry.

The coincidence of priority in allocation being ascribed to governance of the IWVGA is not overcome by a credible showing of any physical measurable impact that would constitute an "undesirable result" if the proposed curtailment is not put into effect. The Plan does not examine whether reasonably feasible mitigation is available to avoid any potential undesirable results. Projected lowering of the water table over the planning horizon threatens no beneficial uses and there is no evidentiary basis that establishes a causal connection between the continuation of groundwater pumping and avoidable undesirable results of any kind that is sufficient to permanently wipe agriculture from the landscape of the Indian Wells Valley.

B. The Plan is Vague and Should be More Explicit as to Which Users will be Granted an Allocation.

The Plan should be more explicit about which groundwater users the IWVGA has determined will—and will not—share in the Annual Pumping Allocation Plan. The Plan explains that the IWVGA "will assign each qualified groundwater pumper . . . an Annual Pumping Allocation of the safe yield, if any, after consideration of:

1) Federal Reserve Water Rights (FRWR);
2) California water rights;
3) Beneficial use priorities under California Law;
4) Historical groundwater production; and,
5) Municipal requirements for health and safety." Plan at 5-5 (emphasis added).

However, the Plan demonstrates that the IWVGA has already made the preconceived determination that agricultural pumpers will not receive Annual Pumping Allocations and will instead be limited to some unspecified share of the one-time 51,000 AF "Transient Pool Allocation." Plan at 5-7. The Plan should be revised to make explicit the IWVGA's determinations as to which users are "in," and which are "out" of the Annual Pumping Allocation Plan. The Plan should also explain exactly how the five factors set forth above were considered (and will be considered) in determining which water users receive an allocation.

C. As Presently Formulated, the Allocation System is Contrary to SGMA's Mandates Because it Requires Water Rights Determinations by the IWVGA, Prioritizing Some Uses Above Others Based Upon Considerations Inconsistent with Common Law.

The Plan provides that some, but not all, groundwater users will receive Annual Pumping Allocations. It explains: "The IWVGA recognizes that safe yield is significantly lower than current pumping and some groundwater pumpers with inferior rights will not be granted any Annual Pumping Allocations." Plan at 5-6. In other words, the Plan reveals that the IWVGA will determine which groundwater users hold "inferior rights" and these "inferior rights" holders will not be granted Annual Pumping Allocations. This is an application of a priority system among competing claimants to water based upon the perceived relative value of the claimants' water rights.

Indeed, the IWVGA has already made preconceived determinations as to which groundwater users hold "superior" rights. For example, the Plan sets forth determinations that "NAWS China Lake groundwater production is considered of highest beneficial use" and that "the City [of Ridgecrest] and Kern County overlying groundwater production rights are superior to all other overlying rights because public entity rights may not be prescribed against." Plan at 5-10.[4] The Plan then explains that: "The beneficial uses of other groundwater users, including agricultural and industrial users, will subsequently be evaluated based on water rights priorities. . . . Current groundwater production that has existed and has been continuous prior to the establishment of NAWS China Lake will be given priority over more recent pumping that has

[4] The Plan should explain to what extent the City of Ridgecrest and Kern County hold overlying rights in the Basin. In supplying water to the public, municipal water providers act as appropriators even if they provide water service to customers overlying the same basin from which they draw their water supply. See, e.g., *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 456; *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 81–82 (public water district was an appropriator when it took groundwater from the basin at issue to serve customers overlying the basin). Therefore, the City of Ridgecrest and Kern County only enjoy overlying water rights with respect to the use of water on overlying parcels owned by these agencies (e.g., city parks). *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001 n. 6.

occurred since the [Basin] has been documented to be in overdraft conditions."[5] *Id*. at 5-10 to 5-11. However, it appears that the IWVGA has already determined that agricultural pumpers hold "inferior rights," based on the Plan's revelation that agricultural pumpers will not share in the Annual Pumping Allocation system. See, e.g., Plan at 5-7.

In making such determinations as to inferior and superior water rights, the Plan violates SGMA's mandate that the Plan shall not determine or alter water rights. Water Code §§ 10720.5(b), 10720.1(b).[6]

To avoid making water rights determinations in violation of SGMA, the Annual Pumping Allocation Plan set forth in Management Action No. 1 should be amended to grant proportional allocations to all groundwater users in the Basin that are subject to the IWVGA's jurisdiction. Allocations should be proportional to each user's existing and anticipated uses, taking into account each user's investments in the Valley. Allocations should also allow for ramp down of water use over the SGMA planning horizon and should account for the large amount of water in storage in the Basin.

Proportional allocations would have the added benefit of encouraging water conservation, as compared to the Plan's proposed Annual Pumping Allocation system, which would seem to allocate to certain users with "superior" rights (according to the IWVGA) all of the water utilized during the base period.

D. Management Action No. 1 is Flawed because it Requires Groundwater Users Excluded from the Annual Pumping Allocation Plan to Unlawfully Subsidize Users Awarded an Allocation.

The Plan explains that groundwater production in excess of either an Annual Pumping Allocation or a Transient Pool Allocation (capped at 51,000 AF) will be subject to a yet-undetermined "Augmentation Fee" "in an amount that is determined to be sufficient for the acquisition of supplemental water supplies." Plan at 5-6. In order to continue operations in the Basin, those groundwater users excluded from the Annual Pumping Allocation Plan will need to pay Augmentation Fees once their Transient Pool allocation is used up. Pursuant to certain of the modeling scenarios developed by the IWVGA, this could happen within the course of one year.

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[5] The Plan does not clearly explain how the production rights of these agricultural and industrial users that began production prior to the establishment of NAWS China Lake will be treated vis-à-vis NAWS China Lake. Federal law is clear that a federal reserved water right is superior only to the rights of future appropriators. See, e.g., *Cappaert v. United States* (1976) 426 U.S. 128, 138 ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government . . . acquires a reserved right in unappropriated water which vests on the date of the reservation and is *superior to the rights of future appropriators*.") (emphasis added).

[6] The Plan attempts to make the case that the "Annual Pumping Allocations are not a determination of water rights in that they do not prohibit the pumping of groundwater" because all groundwater pumpers would continue to possess the right to pump groundwater, provided they pay the Augmentation Fee. Plan at 5-4. The claim fails for at least three reasons. First, the Plan explicitly admits that allocation-setting is based on the IWVGA's water rights determinations, with "inferior" rights holders denied an Annual Pumping Allocation. *Id*. at 5-6. Second, the Plan reveals that the Augmentation Fee will be set at such a level "that the costs associated with the Augmentation Fee will result in voluntary pumping reductions and the implementation of additional conservation measures to lower demands." *Id*. at 5-4. In other words, Management Action No.1 would involve a de facto determination of water rights because only certain types of groundwater users would be forced to reduce their exercise of water rights due to the economic viability of continued groundwater production in the face of Augmentation Fees. Third, in the absence of an appropriator having established prescriptive rights in a court of competent jurisdiction, all overlying owners, including Mojave, hold prior and paramount rights superior to all appropriators *as a matter of law*. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240–41.

Therefore, the groundwater producers excluded by the IWVGA from participation in the Annual Pumping Allocation Plan would be responsible for payment of the majority of the Augmentation Fees. This, in turn, would result in the excluded users subsidizing the acquisition of supplemental water supplies in the Basin, which will benefit all groundwater producers, not just those that financed the acquisition of the supplemental supplies through payment of Augmentation Fees.

Structuring Management Action No. 1 in such a way as to require certain classes of groundwater users (i.e., those excluded from the Annual Pumping Allocation Plan) to subsidize other classes of users runs afoul of the constitutional requirement that fees shall bear a reasonable relationship to the payor's burdens on, or benefits received from the governmental activity. Cal. Const., art. XIII C, § 1 ("The local government bears the burden of proving by a preponderance of the evidence that . . . the amount [of a levy, charge, or other exaction] is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."); Cal. Const., art. XIII D, § 6(b)(3) ("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."); *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 ("To qualify as a nontax 'fee' under article XIII C, as amended, a charge must satisfy *both* the requirement that it be fixed in an amount that is 'no more than necessary to cover the reasonable costs of the governmental activity,' *and* the requirement that 'the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.'") (emphasis in original).

Again, the solution to rectify this specific constitutional infirmity is to revise Management Action No. 1 so that each groundwater user is awarded a proportional Annual Pumping Allocation, as described above. This revision would ensure that a small class of users would not be required to subsidize the development of imported water supplies. Proportional allocations would also encourage each user to conserve water to avoid paying Augmentation Fees.

E. <u>The Plan Fails to Provide a Reasoned Basis for the Rejection of Proportional Allocations Based Upon the Cumulative Requirements of all Beneficial Uses in Combination with Reasonable Measures Narrowly Tailored to Avoid Undesirable Results During the Planning Horizon.</u>

California common law calls for the management of groundwater in a manner that optimizes the reasonable and beneficial use of water. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 288; *California American Water Company v. City of Seaside* (2010) 183 Cal.App.4th 471, 480. SGMA allows a GSA 20 years to attain sustainability. Water Code § 10727.2(b). The Plan ignores the directive of maximizing use within the framework established by SGMA.

It rejects a proportional allocation system among all beneficial uses under reasonable efficiency under the ruse of assumptions unsupported by credible evidence. For example, the Plan makes the claim that "[e]conomically viable agricultural operations cannot be sustained with a greatly reduced water supply (pumping allocation)," Plan at 5-8, but fails to acknowledge that the result of entirely excluding agricultural pumpers from the Annual Pumping Allocation Plan would be to eviscerate the economic viability of agricultural operations in the Basin. Management Action No. 1 should be amended to grant agricultural pumpers an Annual Pumping Allocation that is proportional to their existing and anticipated use, taking into account each user's investments in the Valley.

Likewise, the Plan makes the unsupported claim that "domestic and municipal users would not be able to meet basic health and safety requirements under a proportional reduction allocation." Plan at 5-8 to 5-9. This claim is unsupported by evidence or explanation. There is no differentiation as to the water required for human consumption and basic sanitation. Therefore, the Plan should be updated to include an analysis

that demonstrates that a proportional allocation system would be insufficient to meet "basic health and safety requirements." The Plan should also analyze and explain what those requirements are.

Finally, the Plan makes the argument that "proportional reductions to reach the Current Sustainable Yield are infeasible because the majority of individual groundwater users would not have a large enough allocation to maintain an acceptable quality of life and the drastic community changes would impact the support of NAWS China Lake." Plan at 5-8. Again, the Plan fails to provide support for the finding that a proportional allocation system is infeasible and does not explain what is meant by "an acceptable quality of life," "drastic community changes," and "the support of NAWS China Lake." If the Plan intends to take the overlying rights of Mojave and others for the benefit of NAWS China Lake, compensation should be paid—either by the federal government that enjoys the confiscation of property or by the IWVGA that does its bidding by regulation.

The Plan should be edited to address these deficiencies and should also explain why "the support of NAWS China Lake" is a relevant factor, given that the Plan indicates that NAWS China Lake will be exempt from the payment of any fees or water use restrictions. See Plan at 5-5 (NAWS China Lake will be exempt from payment of fees, has not provided an accounting of its water right, and the Base Period is not applicable to NAWS China Lake), 5-10 (NAWS China Lake's groundwater production will not be restricted or regulated).

Contrary to the Plan's unsupported claims of harm, a proportional allocation system would indeed be feasible. Moreover, the system could be structured so that each groundwater user's proportional allocation is tradable, thereby ensuring that water will go to the highest and best use, while encouraging conservation among beneficial uses. Trend is not destiny and SGMA grants the IWVGA the time to pursue corrective potential strategies over the decimation of farming as a way of life. It would also encourage broad community investment in developing new water supplies, whether it be direct potable reuse or the delivery of imported water from the City of Los Angeles by negotiation or in reparation for the disruption of the historical groundwater inflow into the Basin from the Owens Valley. It is in the public interest that we have a strong Navy. It is also in the public interest that it pay its expenses.

F. <u>The Plan Should More Clearly Explain and Justify Treatment of NAWS China Lake.</u>

The Plan must be updated to explain how NAWS China Lake will be treated under Management Action No. 1 and to explain the basis for this super-priority preferential treatment not previously recognized in any tribunal anywhere. The Plan includes the contradictory assertions that "NAWS China Lake has not provided a final accounting of its FRWR," that in June 2019, the Navy estimated that NAWS China Lake's water "requirement" was 6,530 AFY (i.e., the vast majority of the 7,650 AFY safe yield), and that notwithstanding this 6,530 AFY "requirement," the Navy "requested" that the IWVGA "use 2,041 AFY as a reasonable estimate of current and future annual groundwater production on the installation." Plan at 5-5, 5-9. Additionally, the Plan explains that the January 1, 2010 through December 31, 2014 Base Period will not be used to evaluate groundwater production for NAWS China Lake, that NAWS China Lake, along with other federal agencies, are exempt from Augmentation Fees, and that the IWVGA "does not have legal authority to restrict, assess, or regulate production for NAWS China Lake; therefore, NAWS China Lake groundwater production is considered of highest beneficial use." *Id*. at 5-5, 5-10. Accordingly, under the Plan, the ex-officio IWVGA Board member and possessor of the model—NAWS China Lake—finds itself the beneficiary of a super-priority right to groundwater without any financial obligation whatsoever to support the ongoing costs of "sustainable management" for its unilateral benefit.

The Plan's determination that NAWS China Lake's groundwater production "is considered of highest beneficial use" is a legal conclusion that does not follow from the IWVGA's inability to regulate NAWS China Lake. Moreover, it is contrary to foundational principles of water rights law, under which it is clear

that the priority of a federal reserved water right is determined by the date the federal reservation was established, that the federal reserved water right only enjoys priority vis-à-vis subsequent appropriators, and that the right extends only to the primary purpose of the federal reservation. *Cappaert v. United States* (1976) 426 U.S. 128, 138 ("This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government . . . acquires a reserved right in unappropriated water which vests on the date of the reservation *and is superior to the rights of future appropriators*.") (emphasis added); *Agua Caliente Band of Cahuilla Indians v. Coachella Water Dist.* (9th Cir. 2017) 849 F.3d 1262, 1268–69 (explaining that the Supreme Court has emphasized that, under the doctrine of federal reserved rights, the government reserves "only 'that amount of water necessary to fulfill the purpose of the reservation, no more'" and that the United States must "'acquire water in the same manner as any other public or private appropriator'" where "'water is only valuable of a secondary use of the reservation'").

Additionally, although the Plan is somewhat unclear on this point, it appears that the IWVGA intends to award an Annual Pumping Allocation to NAWS China Lake, given the determination that its groundwater production is "of highest beneficial use." If this is not the case, the Plan should state what its rationale is.

Moreover, given the Plan's conclusion that the IWVGA "does not have legal authority to restrict, assess, or regulate production for NAWS China Lake," the Plan should be updated to answer the following questions:

- Whether NAWS China Lake will be granted an Annual Pumping Allocation;
- The basis for the IWVGA's determination that the Base Period should not be used to evaluate groundwater production for NAWS China Lake if it is used to determine the beneficial use of all overlying landowners;
- Whether NAWS China Lake will provide a final accounting of its FRWR;
- Given the Navy's conflicting estimates and the IWVGA's decision not to evaluate NAWS China Lake's water use relative to the Base Period, the basis for NAWS China Lake's Annual Pumping Allocation (if any);
- The legal basis for the IWVGA to grant an Annual Pumping Allocation to NAWS China Lake, given that the IWVGA cannot regulate NAWS China Lake's water use and has no recourse in the event NAWS China Lake exceeds its allocation;
- How the Plan meets the requirements of SGMA to be enforceable if it cannot address NAWS China Lake's water use in excess of its allocation or the assumed quantity of production;
- Given the IWVGA's lack of authority to regulate NAWS China Lake, whether the grant of an allocation by the IWVGA is properly regarded as a taking of private property (overlying water rights) for the benefit of the federal government without compensation in violation of the United States Constitution;
- The legal basis for granting an allocation to NAWS China Lake, but not to certain overlying rights holders, including those that commenced production prior to the establishment of NAWS China Lake;
- How the IWVGA will respond if NAWS China Lake exceeds its Annual Pumping Allocation;
- Whether the IWVGA will further reduce other Annual Pumping Allocations due to exceedances by NAWS China Lake; and
- How NAWS China Lake's water use will be measured and accounted for (i.e., given that the IWVGA cannot regulate NAWS China Lake, how will the IWVGA ensure that it obtains water use data from NAWS China Lake and properly accounts for the Navy's water use?).

Absent clear answers to these questions, Mojave recommends that the IWVGA deal with water use by the federal government outside of the allocation context. In other words, the IWVGA should grant Annual Pumping Allocations only to water users that are subject to regulation by the IWVGA.

G. The Plan "Takes" the Water Rights of Overlying Landowners, Including Mojave's.

The Plan unequivocally takes fully vested overlying water rights and makes them available for use by NAWS China Lake. The proposed action is both a regulatory and a physical taking. See *Casitas Mun. Water Dist. v. United States* (Fed. Cir. 2008) 543 F.3d 1276 ("*Casitas*"); *Tulare Lake Basin Water Storage Dist. v. United States* (2003) 59 Fed.Cl. 246. Mojave is an overlying landowner with overlying water rights. The water available to Mojave for reasonable and beneficial use will be taken by the Plan and made available for use by NAWS China Lake and other users like the Indian Wells Valley Water District. There is little doubt—as reflected by the Plan—that it prioritizes the use of water by NAWS China Lake and the Water District and constitutes a public use. Like the required forbearance of water foisted upon an existing appropriator under environmental regulation in *Casitas,* in the instant case the Plan makes water available for NAWS China Lake and the Water District and effectuates a "physical taking." "This is no different than the government piping the water to a different location. It is no less a physical appropriation." *Casitas*, 543 F.3d at 1294.

H. The Fallowing Program Contemplated by the Plan is Inadequate to Compensate Agricultural Water Users for their Investments.

Management Action No. 1 provides that all groundwater users assigned a Transient Pool Allocation (e.g., agricultural producers) would be eligible for enrollment in a Fallowing Program. Plan at 5-6. Under the Fallowing Program, eligible groundwater pumpers could "elect to sell their Transient Pool Allocation back to the IWVGA." *Ibid*. The Plan explains that the IWVGA and participating groundwater pumpers "may also explore alternative uses for the fallowed land, which may include use as enhanced habitat or grazing lands. *Id*. at 5-7. The Plan estimates that the IWVGA's costs incurred pursuant to the Fallowing Program will be approximately $9 million. *Id*. at 5-11.

The Plan should be updated to explain how the value of the Transient Pool Allocations purchased pursuant to the Fallowing Program would be determined. Additionally, the Plan should explain why the IWVGA anticipates $9 million to be sufficient to fund the Fallowing Program. As explained above, Mojave, has expended in excess of $25 million on their agricultural properties overlying the Basin. Therefore, it appears that the budget for the Fallowing Program should be significantly expanded to protect participating water users' investment-backed expectations and adequately compensate agricultural producers.

I. The Plan Should Include Additional Detail on the Transient Pool Allocation and Provide a Justification for why Shares of the Transient Pool are Non-transferrable.

As presently formulated, Management Action No. 1 includes a 51,000 AF Transient Pool Allocation, which the Plan explains will be allocated among all of the groundwater users not given an Annual Pumping Allocation (i.e., all agricultural pumpers, among others). Plan at 5-6. Each user's share of the Transient Pool is non-transferrable. *Ibid*.

The Plan should be updated to explain the basis and rationale for the IWVGA's determination that shares of the Transient Pool Allocation should be non-transferrable. Ensuring transferability of all allocations, including Transient Pool Allocations would ensure that water goes to the highest and best use.

More fundamentally, the Plan must be revised to explain the scientific and policy rationale for setting the Transient Pool Allocation at 51,000 AF, as opposed to some other number. From an economics standpoint, 51,000 AF is woefully insufficient to allow agricultural production to continue until imported water is available in the Basin, which the Plan estimates will not occur until approximately 2035. Plan at 5-7. Therefore, agricultural pumpers and others denied Annual Pumping Allocations will be heavily impacted by payment of Augmentation Fees. The Plan should include an analysis of the impacts of Management

Action No. 1 on agricultural pumpers and other water users that are excluded from the Annual Pumping Allocation Plan.

Additionally, the Plan should explain how much of the 51,000 AF each user will be granted and whether the Board intends to adopt (or has already incorporated) Model Scenario 6 ("Scenario"), presented at the August 15, 2019 Board meeting (Agenda Item 10.B) into the Plan. Under this Scenario, like the Transient Pool Allocation described in the Plan, each non-domestic user would be assigned a portion of a pool volume[7] that could be used variably until 2040, but total pumping could not exceed an assigned portion. The Scenario assumes that each of the non-domestic group continues to pump at current levels over a "cliff" period until each user's assigned portions are depleted. For Mojave Pistachios, that "cliff" period would last only eight months at current pumping levels. In other words, if the Board were to implement this Scenario, or a similar scenario, through Management Action No. 1, within the course of a year, Mojave Pistachios would be prohibited from exercising its overlying water rights.

Such a proposal would amount to a taking of Mojave's overlying water rights in contravention of SGMA's express protection of common law water rights. As overlying users, Mojave is entitled to protection of their overlying rights. Any proposal that would result in the elimination of agricultural and industrial producers must be rejected as inconsistent with both SGMA and well-established principles of California groundwater rights law.

Moreover, the allocation of the limited pool volume modeled in the Scenario and set forth in the Plan represents only approximately three to four percent of an assumed (and likely **grossly understated**) 1.5 million AF of usable water in storage. Considering the severe economic consequences on members of the agriculture and industry group, this amount is unreasonable. Specifically, as explained above, the proposed allocation fails to provide sufficient water to allow Mojave to continue their operations in the short term and until imported water is available. The proposed allocation does not provide sufficient water for this transition and would eviscerate Mojave's investments in the Indian Wells Valley that now exceed $25 million.

J. The Plan Must be Updated to Reflect that Management Action No. 1 is Subject to the California Environmental Quality Act (CEQA).

The Plan explains that implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program "may be subject to environmental regulations and could require the preparation of environmental studies." *Id*. at 5-11. Yet, the Plan indicates that Management Action No. 1 will be implemented during summer of 2020, which leaves insufficient time for the environmental review process. *Id*. at 5-12.

The Plan should be updated to reflect that the adoption of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program is a "project" under CEQA and the implementation schedule should be updated to provide sufficient time for environmental review and public participation.

As the Board is likely aware, CEQA is triggered when a public agency "approves" a project that is subject to CEQA. Pub. Res. Code § 21080. "Approval" is defined as any decision that commits the agency to a "definite course of action in regard to a project." CEQA Guidelines § 15352. The term "project" is defined broadly to include any activity that: (i) may cause a direct (or reasonably foreseeable indirect) physical environmental change; and (ii) is directly undertaken by a public agency, supported in whole or in part by a

[7] Under the Scenario, the pool volume was 63,836 AF, whereas the total Transfer Pool volume set forth in the Plan is only 51,000 AF. The Plan should explain the basis for the reduction in the pool volume, along with the rationale for setting the Transfer Pool volume at 51,000 AF.

public agency, or involves the issuance by a public agency of some form of discretionary entitlement or permit.[8] See Kostka and Zischke, Practice Under the California Environmental Quality Act § 4.5 at 158–59, citing Pub. Res. Code § 21065 and CEQA Guidelines § 15378. There is no doubt that Management Action No. 1 is subject to CEQA—it is an activity that may cause environmental impacts (e.g., impacts on air quality, land use, or biological resources due to land fallowing) and is approved by the IWVGA—a public agency. Therefore, the Plan must be updated to reflect that the IWVGA will conduct CEQA review on Management Action No. 1 prior to its adoption.

Given the massive changes in land use across the Basin and the associated significant environmental impacts that are likely to occur with implementation of the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program, an EIR is required. The EIR must describe the proposed project, its environmental setting, its objectives, identify and analyze significant effects on the environment, state how those impacts can be mitigated or lessened, and identify alternatives to the project. *Federation of Hillside and Canyon Assocs. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1197; CEQA Guidelines §§ 15123–28, 15130. The implementation timetable set forth in Section 5 of the Plan must be amended to accommodate sufficient time for the preparation of an EIR analyzing the impacts of Management Action No. 1.

Finally, the Plan evidences a pre-commitment problem. The Plan explains that the IWVGA will separately determine each groundwater pumper's Annual Pumping Allocation and/or Transient Pool Allocation following adoption of the Plan. Plan at 5-12. Yet, the Plan demonstrates that the IWVGA has already determined that agricultural pumpers will be excluded from the Annual Pumping Allocation Plan. See Plan at 5-7. CEQA forbids pre-commitment by the lead agency to the various approvals constituting the Project. See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116; *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150. Pre-commitment to approving a project also violates "the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures…." *In re Collie* (1952) 38 Cal.2d 396, 398.

IV. The Best Available Scientific Information Demonstrates that the Plan Dramatically Underestimates the Amount of Water in Storage and Recharge Estimates and Consequently Fails to Recognize the Opportunity for Continued Beneficial Use of Groundwater Over the 20 Year Planning Horizon and Beyond.

As Mojave has noted in prior comments, prior to setting any allocations, it is necessary to develop an accurate and supportable estimate of the total amount of usable groundwater in storage in the Basin. However, Mojave is concerned that the assumptions made to date regarding the amount of usable water in storage in the Basin and Basin recharge, to the extent they can be discerned, lack scientific support.

A. The Plan Underestimates the Amount of Water in Storage.

Indian Wells Valley is a geologic basin that has been infilled with up to 6,500-feet of unconsolidated sediments. These sediments contain groundwater under perched, unconfined to semi-confined, and confined conditions. The total volume of groundwater storage is a function of the total volume of the aquifer, including the sediment grains and water in the pore space, and the percentage of that volume that contains available groundwater.

[8] "Public agency" is defined as any "state agency, board, or commission, any county, city and county, regional agency, public district, redevelopment agency, or other political subdivision." Pub. Res. Code § 21063. The IWVGA is a "public agency." Water Code §§ 10721(j), (n).

There are two basic methods for calculating the volume of groundwater storage: analytical calculations using sediment volume and specific yield, and numerical calculations using the structure of the groundwater flow model (DRI, 2016).

The Plan notes (at page 3-26) with respect to total basin storage that three sources were considered:

- Kunkel and Chase (1969) 720,000 AF under 64,000 acres
- Dutcher and Moyle (1973) 2,200,000 AF under 70,800 acres in 1921 in 200 feet of aquifer
- USBR (1993) 1,020,000 AF to 3,020,000 AF under 59,200 acres in 100 to 300 feet of aquifer

It should be noted that all of the above estimates are for limited areas (59,200 to 70,800 acres) in the overall Basin (382,000 acres). If the analysis within each of these studies is expanded to the entire Basin, then the volume of water in storage increases significantly. Further, The DRI model contains the most up to date information available on the basin shape, the hydrostratigraphy, the groundwater levels, and the water quality (both brackish and fresh), and specific yield distribution in all areas, layers, and zones. Regardless of what the historical "estimates" showed, the DRI model should be used to estimate the volume of water contained in the basin as of 2019. DRI has all the information it needs to estimate water volumes in all model layers, in all basin areas, for all water quality criteria.

Questions that should be answered include:

- What is the total volume of the basin within the model domain?
- What is the total volume of water (all qualities) within the basin within the model domain?
- How much water is in Layer 1 of the model?
- How much water is in Layers 2-3 of the model?
- How much water in in Layers 4-6 of the model?
- How much of the water within these layers is fresh versus brackish?
- Where are the fresh versus brackish resources located within the basin volume?

The DRI model is being utilized to determine changes in storage and loss in storage, but the fundamental questions of how much water is in the basin (within the model domain) have not been answered.

B. Recharge

With respect to recharge, Section 3 of the Plan provides:

> The average annual recharge developed by DRI is 7,650 AF per year (McGraw et al, 2016; Garner et al, 2017). The recharge zones identified by DRI are shown in Figure 3-10. The total area of recharge is about 770 square miles. The area and estimated annual recharge in each zone are shown in Table 3-3. Plan at 3-13.

Likewise, the Plan includes the following "selected" recharge estimates in Table 3-4:

Table 3-4: Natural Recharge Estimates from Selected Recharge Studies (AFY).

Recharge Study	Natural Recharge Estimate (AFY)
Brown and Caldwell (2009)	8,900
Epstein et al. (2010)	5,800 to 12,000

Todd Engineers (2014)	6,100 to 8,900
Desert Research Institute (McGraw et al. 2016)	7,650

However, the Plan fails to explain on what basis were these natural recharge estimates were "selected." Do recharge studies that demonstrate significantly higher recharge exist?[9]

Additionally, no explanation is provided as to why the DRI recharge estimate (7,650 AFY) was used as opposed to any of the other "selected" studies. See Plan at 3-20 and 3-21 to 22 (7,650 AFY used as the sustainable yield). Furthermore, no explanation is provided as to why only natural recharge is included, when the Plan acknowledges that agricultural use is 50 percent of total water use and recharge from irrigation as well as distribution system leakage must be considered in recharge estimates (i.e., return flows).

With respect to the DRI recharge estimate, the estimate is based on the loss of storage of approximately 25,000 AFY over many years from sediments assumed in the DRI model to have an average specific yield of 22 percent. This value is very high for the sediments present in the Basin, especially where the groundwater is semi-confined and confined. Use of a more reasonable value for specific yield would lower the volume of water lost from storage, resulting in a much higher estimate of recharge.

V. Likewise, the Analysis of Undesirable Results must be based on the Best Available Science and Information

SGMA requires development of a Plan to meet SGMA's sustainability goal, which means avoiding statutorily defined, significant and unreasonable undesirable results through implementation of projects and management actions. Water Code §§ 10727, 10727.2, 10721(u), (v), (x). SGMA defines undesirable results to include any of the following:

> (1) chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and groundwater recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods;
>
> (2) significant and unreasonable reduction of groundwater storage;
>
> (3) significant and unreasonable seawater intrusion;
>
> (4) significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies;
>
> (5) significant and unreasonable land subsidence that substantially interferes with surface land uses; or
>
> (6) depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water.

[9] See, e.g., studies referenced in the Todd Report that reference much higher recharge estimates (e.g., on the order of 25,000+ AFY).

Water Code § 10721(x). In turn, DWR's SGMA regulations require that the Plan establish minimum numeric thresholds which represent a point in the Basin that, if exceeded, may cause undesirable results. 23 Cal. Code Regs. § 354.28(a). Among other things, the Plan must also explain which information and criteria were relied upon by the IWVGA to justify each minimum threshold, explain how the minimum thresholds will avoid undesirable results, and explain how the established minimum thresholds may affect the interests of beneficial uses and users of groundwater. 23 Cal. Code Regs. § 354.28(b). Each of these minimum thresholds must be evaluated and established on the basis of the best available science and information. See *id*.

However, the Plan poorly defines undesirable results and fails to clearly articulate when they are significant and unreasonable. Even when the Plan does try to articulate what is significant and unreasonable, the articulation is based on weak and biased scientific analysis, particularly with regard to water in storage, recharge estimates, and domestic well impacts. In fact, the definition of what the Plan constitutes "significant and unreasonable" appears arbitrary and capricious.

To date, the IWVGA's Plan development process has been more focused on proposals (e.g., Management Action No. 1 and related modeling scenarios) that would eliminate overlying groundwater use by non-domestic users than on evaluating and considering the best available scientific information to develop thresholds, projects and management actions to avoid undesirable results and achieve Basin sustainability. One primary driver for proposals to eliminate agricultural and industrial uses of groundwater seems to be the Board's focus on impacts to shallow groundwater wells. See, e.g., Plan at 3-29; August 15, 2019 Board meeting agenda Item 10.B. However, the best available scientific information demonstrates that this threat is theoretical and unsupported (i.e., speculative, at best). Even if it were not, a physical solution exists to mitigate impacts to users of shallow wells.

As explained above, the IWVGA's analysis is not based on an accurate and supportable analysis of the amount of usable water in storage and recharge to the Basin. Failure to correct this analysis will cause a cascade of defects throughout the Plan's discussion of undesirable results, including impacts to shallow wells.

It would be entirely unreasonable, and contrary to SGMA's mandate, to implement draconian restrictions on overlying agricultural water use that would eliminate the entire agriculture industry in the Basin, when it is possible to take discrete physical actions (e.g., deepening existing wells) as part of a monitoring and mitigation program.

VI. Conclusion

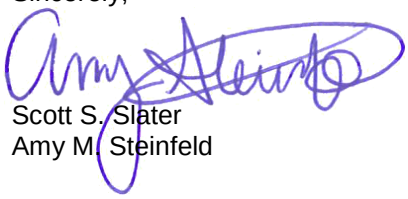
It is true that that the California Legislature wanted to bring sustainable groundwater management to our State to protect future generations of Californians. Yet, there is no evidence that it sought to countenance the wholesale devastation of farmers, their families, and the local economy that they sustain by the adoption of SGMA.

George Washington once wrote that "Agriculture is the most healthful, most useful, and most noble employment of man." It is also a vital component of California's thriving economy. The Legislature granted the IWVGA 20 years to monitor conditions and mitigate as required, while inspiring the ingenuity and financing required to augment supply and stretch our precious resources further still; and then, as may be necessary, to fairly distribute the burden of shortages. The IWVGA need not take aim at farming, as is contemplated by the implementation of this Plan.

It is obvious that our objection to the Plan as written is strong. Nevertheless, we are committed to working towards a collaboratively-established sustainable management Plan—one that is based upon best

available science with the objective of respecting private property rights while achieving the Constitutional mandate to maximize the reasonable and beneficial use to water. On behalf of our client, we urge you to correct the present course and embrace the notion that these objectives are not inconsistent.

Sincerely,



Scott S. Slater
Amy M. Steinfeld

Attachment A: Photographs of Mojave's Agricultural Operations and Irrigation Systems in the Indian Wells Valley

Attachment B: Mojave's Overlying Parcels

APN	Parcel Name	Owner	Year acquired	Beneficial Use
056-072-05	Cooley	MOJAVE PISTACHIOS LLC	2012	Agriculture
056-072-16	Cooley	MOJAVE PISTACHIOS LLC	2012	Agriculture
056-095-48	Coyote Trail	MOJAVE PISTACHIOS LLC		Agriculture
056-113-45	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-46	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-48	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-53	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-54	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-55	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-56	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-291-19	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-292-01	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-292-02	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-292-04	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-113-28	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-113-29	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-340-18	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-340-19	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-095-08	Leroy	Al & Linda Leroy (leased by Mojave Pistachio LLC)		Agriculture
064-460-01	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-02	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-03	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-04	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-05	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-06	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-07	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-08	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-09	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-10	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-11	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-12	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-14	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-15	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-16	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture

APN	Parcel Name	Owner	Year acquired	Beneficial Use
064-460-17	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-32	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-33	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-34	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-35	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-082-39	Switzer	William Switzer (leased by Mojave Pistachio LLC)		Agriculture
064-082-40	Switzer	William Switzer (leased by Mojave Pistachio LLC)		Agriculture
064-082-42	Switzer	William Switzer Trust (leased by Mojave Pistachio LLC)		Agriculture
064-082-17	Yo Young	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-084-13	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-14	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-15	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-16	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-132-44	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-45	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-46	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-48	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-49	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-50	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-51	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-53	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-54	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-55	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-56	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-57	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-150-36	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-440-20	Yo Young	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-230-04	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-17	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-18	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-20	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-21	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-293-02	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-293-03	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped

APN	Parcel Name	Owner	Year acquired	Beneficial Use
056-380-12	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-380-13	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-095-46	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-47	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-05	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-43	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-460-31		Nugent Family Trust	2013	Agriculture
064-082-11		Nugent Family Trust	2013	Agriculture
064-082-61		Nugent Family Trust	2013	Agriculture
064-082-62		Nugent Family Trust	2013	Agriculture
064-082-63		Nugent Family Trust	2013	Agriculture
064-082-64		Nugent Family Trust	2013	Agriculture
064-133-05		Nugent Family Trust	2013	Agriculture
064-133-06		Nugent Family Trust	2013	Agriculture
064-082-13		Nugent Family Trust	2013	Agriculture

Attachment 2: Photographs of Mojave's Agricultural Operations and Irrigation Systems in the Indian Wells Valley

Attachment 3: Mojave's Overlying Parcels

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056-113-45	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-46	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-48	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-53	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-54	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-55	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-113-56	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-291-19	Leliter 220	MOJAVE PISTACHIOS LLC	2013	Agriculture
056-292-01	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-292-02	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-292-04	Leliter 220	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-113-28	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-113-29	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-340-18	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
056-340-19	Leliter 360	MOJAVE PISTACHIOS LLC	2011	Agriculture
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064-460-04	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-05	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-06	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-07	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-08	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-09	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-10	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-11	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-12	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-14	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
064-460-15	Office 80	MOJAVE PISTACHIOS LLC	2012	Agriculture
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064-082-42	Switzer	William Switzer Trust (leased by Mojave Pistachios LLC)		Agriculture
064-082-17	Yo Young	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-084-13	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-14	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-15	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-084-16	Siebenthal 160	MOJAVE PISTACHIOS LLC	2011	undeveloped
064-132-44	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
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064-132-46	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-48	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-49	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-50	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-51	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-53	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-54	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-55	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-56	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-132-57	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-150-36	West Airport	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-440-20	Yo Young	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-230-04	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-17	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-18	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-20	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-291-21	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-293-02	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-293-03	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped

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056-380-12	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-380-13	Neal Ranch	MOJAVE PISTACHIOS LLC	2014	undeveloped
056-095-46	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-47	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-05	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
056-095-43	W of H395	MOJAVE PISTACHIOS LLC	2013	undeveloped
064-460-31	Sacco	Nugent Family Trust	2013	Agriculture
064-082-11	Roman	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-082-61	Means	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-082-62	Means	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-082-63	Means	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-082-64	Means	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-133-05	Stark	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-133-06	Stark	MOJAVE PISTACHIOS LLC	2013	Agriculture
064-082-13	Stark	MOJAVE PISTACHIOS LLC	2013	Agriculture

ATTACHMENT 2

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July 15, 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 on Agenda Items 8 and 9 Regarding Adoption of the Increased Groundwater Extraction Fee and the Sustainable Yield Determination

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, Mojave) and Sierra Shadows Ranch (Sierra Shadows) we provide these comments on Agenda Item 8 (Groundwater Extraction Fee) and Item 9 (Resolution 06-20 and CEQA Findings Adopting the Sustainable Yield Report) for the July 16, 2020 Board meeting. We also join and incorporate the comments made by other groundwater users, including the June 17, July 13, and July 15 comments made by Meadowbrook and the June 18 comments submitted by Searles Valley Minerals. We ask that the Board refrain from adopting any of the items implementing the Groundwater Sustainability Plan (GSP), including Agenda Items 8 and 9, until the comments raised by Mojave, Sierra Shadows, and others are fully addressed.

As noted in our prior comments, the IWVGA's practice of belatedly releasing agenda packages makes it difficult or impossible to provide detailed public comment and inhibits public participation. As in June, when the full Board packet was released only 24 hours in advance of the Board meeting, the partial July Board packet did not become available for public review until 48 hours before the meeting and the final packet was still not available at the time this comment letter was submitted on the afternoon of July 15. We therefore reserve the right to submit further comments related to the issues identified herein.

I. Agenda Item 8: Comments on Increased Groundwater Extraction Fee

The $7,059,574 Groundwater Extraction Fee budget is exorbitant, particularly when compared to the budgets of other groundwater sustainability agencies throughout the state, and reveals a complete lack of financial oversight and management on the part of the Board. A multi-million dollar budget overrun is unacceptable and the $7 million price tag is unconscionable.

Procedurally, it is inappropriate for the Board to proceed to a second reading and adoption of Ordinance No. 02-20 at the July 16 Board meeting. A second reading is inappropriate because much of the information and data on the Groundwater Extraction Fee initially provided to the public on June 17, 2020 has changed significantly. Also, as raised in our prior comments, the data package should have been

provided to the public 20 days in advance of the June 18, 2020 public meeting at which the first reading of the ordinance took place. See Water Code § 10730(b).

Substantively, the Groundwater Extraction Fee is deficient because it will be used to fund implementation of the GSP. Fees for GSP implementation, including projects and management actions, may only be adopted pursuant to Water Code section 10730.2, which requires compliance with the procedural requirements set forth in subdivisions (a) and (b) of Section 6 of Article XIII D of the California Constitution. Water Code § 10730.2(c). Fees for GSP implementation cannot be adopted under Water Code section 10730 as proposed.

The following Groundwater Extraction Fee budget line items are related to GSP implementation and therefore cannot be incorporated in the Groundwater Extraction Fee to be adopted pursuant to 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
- "IWVGA Administrative Costs," to the extent these costs are related to GSP implementation

The budget should also be updated to clarify which tasks are funded by the "City of Ridgecrest Reimbursable Costs," "County Loan," and "IWVWD Loan" and explain whether these costs are appropriate for inclusion in the Groundwater Extraction Fee.

The staff report and data package should also be updated to explain why the calculation of the Groundwater Extraction Fee is purportedly based on the "Sustainable Yield Allocation," developed after completion of the GSP. As raised in our prior comments and our comments below, the Sustainable Yield Allocation (i.e., the allocation of the Navy's 7,650 acre-foot "federal reserve right" to non-federal pumpers) is fundamentally flawed and is premised on the false notion that a federal reserve right can somehow be transferred off a federal reservation and gifted to non-federal entities. The Sustainable Yield Allocation should therefore not be utilized as a basis for the Groundwater Extraction Fee.

The Groundwater Extraction Fee staff report and data package should also clarify which groundwater users will be required to pay the Fee and the basis for this determination. Will groundwater pumpers subject to the Replenishment Fee be required to pay both the Replenishment Fee and the Extraction Fee? Will pumpers be required to pay the Extraction Fee when utilizing a Transient Pool allotment?

In sum, the IWVGA must remove all budget components related to GSP implementation from the Groundwater Extraction Fee budget, revise the supporting data package and Staff Report as identified above, and provide the revised data package and text of the adopting ordinance to the public at least 20 days prior to the public meeting required to be held before the hearing on adoption of the Groundwater Extraction Fee. Water Code § 10730(b). The Extraction Fee cannot be legally adopted at the July 16, 2020 Board meeting pursuant to the substantive and procedural requirements of SGMA.

II. Agenda Item 9: Comments on Sustainable Yield Report and Determination

We ask the Board to decline to adopt the Report on the Indian Wells Valley Groundwater Basin's Sustainable Yield of 7,650 acre-feet (Sustainable Yield Report) or to issue the determination that the Navy is entitled to the entire 7,650 AFY sustainable yield (Sustainable Yield Determination) for the following reasons.

First, as set forth in our prior comment letters, the GSP fails to substantiate the conclusion that the sustainable yield of the Basin is 7,650 AFY due to the flaws in the GSP's Basin recharge analysis and the fact that the GSP ignores the vast amount of available groundwater in storage. The poor science in the GSP, which ignores more recent and robust data, does not support the conclusion that the Basin's sustainable yield is truly limited to 7,650 AFY.

Second, the Sustainable Yield Report is premised on a faulty legal foundation. The stated purpose of the report—"determining the colorable legal claims to the Basin's sustainable yield"—is expressly prohibited by SGMA, which prohibits GSAs from issuing water rights determinations. See, e.g., Water Code §§ 10720.5(b); 10720.1(b).

Third, there is no factual or legal support for the Sustainable Yield Report's conclusion that the Navy is entitled to the entire 7,650 AFY sustainable yield of the Basin. The Groundwater Extraction Fee data package explains that, at present, the Navy pumps approximately 1,450 AFY. Moreover, at the June 2020 Board meeting, Commander Benson explained that the Navy "agreed to their allocation of 2,041 acre-feet." There is no basis for granting the Navy the entire sustainable yield of the Basin where the Navy now produces less than 20 percent of the sustainable yield and admits that an allocation of approximately 27 percent of the sustainable yield will suffice in the future.

Fourth, the Sustainable Yield Report falsely states that "all groundwater extractors in the Basin, with the exclusion of De Minimis Extractors and Federal Extractors, will be subject to the costs for overdraft mitigation and augmentation projects." Although this should be the case, it is not what the IWVGA proposes. Rather, the IWVGA posits, without factual or legal support, that some chosen water users should be able to use a portion of the Navy's 7,650 AFY "federal reserve right" for free, while other water users must pay a $2,230 per acre-foot Replenishment Fee. This is an arbitrary and capricious effort to confiscate private property for the benefit of public agencies and the Navy. This scheme is illegal and raises numerous thorny questions that have yet to be answered, such as:

- What is the factual and legal basis for the determination that de minimis well owners, the City of Ridgecrest, Kern County, the Inyokern Community Services District, "Small Mutuals," and "Trona DM" are entitled to continue pumping at current levels without payment of the Replenishment Fee?
- What is the factual and legal basis for the determination that the Indian Wells Valley Water District is entitled to pump 4,390 AFY without payment of the Replenishment Fee?
- Which water users will be cut back if the Navy increases production over 1,450 AFY, and on what basis?
- Why are some water users being asked to bear the burden of subsidizing overdraft mitigation and augmentation projects, while others can continue pumping at current levels without being asked to share in shortages or increase efficiency?
- Assuming the Basin's entire sustainable yield belongs to the Navy (which it does not), what authority does the IWVGA have to carve up and dole out the vast majority of the sustainable yield to non-federal pumpers?

Fifth, the version of the Sustainable Yield Report attached to the July Board packet continues to object to the pumping data submitted by Mojave as "not timely." The fact is that Mojave's pumping data has been

repeatedly provided to the IWVGA, not just on Mojave's well registration forms, but also in answer to the IWVGA "Pumping Verification Questionnaire." By the letter dated May 26, 2020, we provided notice to the IWVGA and Stetson Engineers that Mojave's answers to the Pumping Verification Questionnaire would be provided later that week. By letter dated May 29, 2020 we then submitted Mojave's Pumping Verification Questionnaire to the IWVGA and Stetson. Nonetheless, the Draft Pumping Verification Report issued by Stetson on June 3, 2020 omitted Mojave from the Transient Pool. Upon discovering this error, we provided written notice of the omission along with copies of our two May 2020 letters including the answers to the Pumping Verification Questionnaire, and asked for confirmation that Mojave would be included in the revised Pumping Verification Report. We never received a response. We followed up again with the IWVGA and Stetson on July 13, 2020. We are still awaiting a response. The IWVGA has now had nearly eight weeks to review and incorporate the data submitted in Mojave's Pumping Verification Questionnaire in the Sustainable Yield Report, the Pumping Verification Report, and any other reports issued by the agency.

Sixth, the staff report for Agenda Item 9 indicates that "[a] matrix of comments and staff responses has been provide[d] along with the Final Draft of the Report." This matrix of comments and responses was still not available for public comment at the time this comment was submitted and it is not clear whether the Sustainable Yield Report dated June 18, 2020 that was provided in the July agenda package is the "Final Draft" referenced in the staff report. The IWVGA should postpone consideration of this item until the public has had a full opportunity to review and comment on all materials related to this item.

Finally, the IWVGA cannot avoid CEQA review on the basis that the Sustainable Yield Determination is a ministerial action or on the basis that it is exempt from CEQA review pursuant to a statutory or categorical exclusion. The Sustainable Yield Determination is one of a group of connected actions to implement the GSP over which the IWVGA has discretionary decision-making authority and that, collectively, will have potentially significant environmental impacts that must be studied prior to adoption in an environmental document, such as an environmental impact report (EIR). As a GSP implementation action, the Sustainable Yield Determination is subject to CEQA and must be analyzed together with each interrelated GSP implementation action such as the Transient Pool and Fallowing Program, the Sustainable Yield Allocation (i.e., the allocation of the Navy's 7,650 acre-foot "federal reserve right" to non-federal pumpers), and the Replenishment Fee. Water Code § 10728.6 ("a project that would implement actions taken pursuant to a [GSP]" is subject to CEQA); 14 Cal. Code Regs. § 15378(a) (under CEQA, "project" is defined as "the whole of an action" that has "a potential for resulting" in a direct or reasonably foreseeable indirect physical change to the environment). Failure to analyze each of the interrelated GSP implementation actions together constitutes segmentation, which is prohibited under CEQA.

As discussed above, the Sustainable Yield Report and Determination—i.e., the determination that the Navy is entitled to 100 percent of the Basin's sustainable yield—is foundational to the IWVGA's decision that some water users may continue to pump for free, while others bear the costs of "overdraft mitigation and augmentation projects." At the June 18, 2020 Board meeting, IWVGA staff and decision-makers acknowledged that the collective result of the GSP implementation actions proposed by the Board will result in agricultural producers leaving the Indian Wells Valley *en masse*. For example, IWVGA Counsel Hall explained:

> As we've mentioned earlier, we don't think Ag can absorb the cost of imported water, especially based on what's going on in the State of California with SGMA in this basin. If they can great, but we've had to make our best guess and we don't think they will be in the permanency in buying augmented supplies.

Likewise, Mr. Johnson explained that the Transient Pool is expected to extend the life of overlying agricultural operations for only a few years:

> I'll be honest with you, one of the recommendations we got came right from Chairman Gleason was, does it really make sense when you're looking at the Ag folks to ramp them down on the pumping because as you ramp them down they're not gonna have enough water to operate their agricultural operations. So you're basically slowly strangling them by ramping them down on the water supply. And the suggestion was that the same amount of water, why don't we just totalize that during the ramp down period and create a pool, give it to the agricultural pumpers, and as we give it to the pumpers, let them choose how many acres they want to operate, how they want to use that water and they can use it anyway they want. So they can use the water up, farming all of their acreage for three to four years or they could cut back a little bit and do it for five to six years. Basically, give them the choice to use that allocation, allotment I should say, to use that pool water anyway they choose.

Despite the express acknowledgments that the GSP implementation actions will cause a mass exodus of farming from the Basin within a matter of years, and notwithstanding our prior comments, the Board still has not acknowledged the need for CEQA compliance to assess the numerous potentially significant environmental impacts associated with fallowing thousands of acres of agricultural land—an outcome that IWVGA staff *admits* is not speculative.

The Sustainable Yield Determination and the other GSP implementation actions are not, as the IWVGA now claims, ministerial projects because these decisions do not simply require conformance with a fixed standard or objective measurements. Rather, they require exercise of personal judgment by the Board as to the wisdom and manner of carrying out the interrelated projects. There is nothing in SGMA that requires the IWVGA to: (i) grant the entire sustainable yield of the Basin to the Navy; (ii) dole out the 80+ percent of the sustainable yield that the Navy does not use to chosen water users; and (iii) charge agricultural producers exorbitant fees designed, quite simply, to cause farmers to leave the Basin. The claim that the Sustainable Yield Determination is a ministerial action is beyond the pale. We ask the Board to immediately commence preparation of an EIR to evaluate the potentially significant impacts of the GSP implementation actions, including adoption of the Sustainable Yield Determination, the Sustainable Yield Allocation, the Transient Pool and Fallowing Program, and the Replenishment Fee.

As documented in our prior comments and as recognized in the GSP, the climate of the Indian Wells Valley is harsh, with winds that create dust problems for the whole Valley, grounding planes and endangering the health of residents. See, e.g., GSP at p. 3-11 (Indian Wells Valley has an "arid, high desert climate characterized by hot summers, cold winters, and irregular and sparse precipitation" as well as "high winds"). Fallowing of Mojave's farming operations, alone, would result in the death of 215,000 living pistachios trees and create dust and other environmental impacts that would potentially take years and hundreds of thousands of dollars to mitigate. Yet Mojave's operations represent only a fraction of the agricultural production in the Indian Wells Valley—there are many thousands of additional acres that farmers will be forced to leave vacant if the IWVGA adopts the proposed actions to implement the GSP.

There is widespread acceptance that fallowing of agricultural lands, particularly in arid environments such as the Indian Wells Valley, creates the potential for significant environmental impacts, including impacts on air quality, human health, greenhouse gas (GHG) emissions, biological resources, aesthetics, and local economies. Among other things, these studies document that:

- Fallowing of agricultural land causes measurable soil loss in quantities sufficient to degrade air quality. (See, e.g., B.S. Sharratt, "Fugitive dust from agricultural land affecting air quality within the Columbia Plateau, USA," 116 WIT Transactions on Ecology and the Environment 281 (2008);[1] see also Imperial Irrigation District Water Conservation and Transfer Project FEIR/EIS [acknowledging potentially significant impacts associated with fugitive dust and PM10 emissions from fallowing].[2])
- During wind events, such as those experienced in the Indian Wells Valley, even very small amounts of soil loss caused by fallowing can lead to exceedances of particulate matter (PM10) concentrations above standards imposed by regulatory agencies. (See *id*.)
- There are numerous health effects of particulate matter emissions, such as those caused by fallowing, including premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing. (U.S. EPA, "Health and Environmental Effects of Particulate Matter (PM);"[3] J.O. Anderson, "Clearing the air: a review of the effects of particulate matter air pollution on human health," 8 Journal of Medical Toxicology 166 (2012);[4] IARC Monographs, Outdoor Air Pollution (Volume 109) (2015).[5])
- Fallowing agricultural lands creates the potential for increased pesticide and herbicide use to control weeds on fallowed lands. (See Imperial Irrigation District Water Conservation and Transfer Project FEIR/EIS.[6]) In turn, increased pesticide and herbicide use has the potential for significant impacts on biological resources, such as native plant communities and wildlife, and water quality.
- Fallowing of agricultural land has the potential to result in the loss of carbon dioxide sequestering capacity if fallowed lands are not properly retired and soil conservation techniques are not utilized. (See Imperial Irrigation District Water Conservation and Transfer Project FEIR/EIS.)
- Fallowing agricultural lands creates the potential for aesthetic impacts associated with the loss of farmlands. (Cf. S.M. Swinton, et al. "Ecosystem services and agriculture: cultivating agricultural ecosystems for diverse benefits," 64 Ecological Economics 245 (2007)[7] [acknowledging that agriculture provides aesthetic ecosystem services]; B.T. Van Zanten, et al. "A comparative approach to assess the contribution of landscape features to aesthetic and recreational values in agricultural landscapes," 17 Ecosystem Services 87 (2016).[8])
- Fallowing lands used for the cultivation of agriculture creates regional economic impacts. For example, a recent economic analysis of California's 2014 drought found that the fallowing of approximately 410,000 acres of agricultural land in the Central Valley, in 2014 alone, resulted in the loss of an estimated 6,722 direct jobs and 15,183 indirect jobs and the loss in $800 million in lost economic output. (R. Howitt, et al., "Economic Analysis of the 2014 Drought for California Agriculture," Center for Watershed Sciences, U.C. Davis (July 2014).) Other economic impacts include reduced tax revenues associated with the loss of opportunity for economic utilization of properties currently used for crop production.
- The environmental and economic impacts associated with permanent fallowing of agricultural lands also raise environmental justice concerns related to increased environmental and economic impacts on rural and disadvantaged communities. (See, e.g., K.D. Harris, "Environmental Justice

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[1] Available at: https://pdfs.semanticscholar.org/b112/63d62120dff1cf4b74a48785faf06abffac3.pdf.
[2] See: https://www.iid.com/home/showdocument?id=1843 (Section 3.10, Master Response on Air Quality Issues Associated with Fallowing).
[3] See: https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm.
[4] Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3550231/.
[5] Available at: https://publications.iarc.fr/538.
[6] See: https://www.iid.com/home/showdocument?id=1843 (Section 3.10, Master Response on Air Quality Issues Associated with Fallowing).
[7] Available at: https://www.sciencedirect.com/science/article/abs/pii/S0921800907005009?via%3Dihub.
[8] Available at: https://www.sciencedirect.com/science/article/abs/pii/S2212041615300619.

at the Local and Regional Level Legal Background," State of California Department of Justice (2012).[9])

Mitigation measures, including the long-term rehabilitation of native plants, will be required to address the environmental impacts caused by fallowing. The environmental impacts of these mitigation measures must be studied. For example, the re-establishment of native plants will require water use, which must be analyzed. Mitigation will also be costly and will require potentially lengthy commitments from local and state agencies. A mitigation cost analysis should therefore be undertaken and the responsible party for each mitigation measure should be identified in the EIR.

Likewise, in addition to the environmental and associated economic impacts identified above, the GSP implementing actions also create the potential for significant land use effects, including conflicts with Kern County land use policies, such as those that promote agriculture. The EIR should therefore include a land use analysis that examines conflicts with existing policies and the potential for future zoning changes necessitated by the IWVGA's implementing actions.

Not surprisingly, given the environmental and related economic impacts outlined above, there are various examples of EIRs that have concluded that fallowing of agricultural land will cause potentially significant impacts, including the Imperial Irrigation District Water Conservation and Transfer Project EIR/EIS, cited above.

Similarly, here, preparation of an EIR is appropriate given the potentially significant environmental impacts of the GSP implementation actions. We therefore ask the Board to postpone adoption of the GSP implementing actions, including adoption of the Sustainable Yield Report/Determination, Transient Pool and Fallowing Program, the Sustainable Yield Allocation, and the Replenishment Fee until such time as the IWVGA prepares an EIR to examine the environmental impacts of the actions, including those related to fallowing, and adopts mitigation measures to mitigate all significant impacts.

III. Conclusion

For the reasons outlined above, in our prior comment letters, and for the reasons identified by others, we urge the IWVGA Board to decline to adopt Agenda Items 8 and 9 related to the Groundwater Extraction Fee and the Sustainable Yield Report.

Sincerely,

Scott S. Slater
Amy M. Steinfeld

[9] Available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf.