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File No. 65352-00001

April 19, 2024

VIA TRUEFILING

The Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter in Support of Petition for Review of
Mojave Pistachios, LLC v. Superior Court of Orange County
Supreme Court Case No. S284252

Dear Honorable Chief Justice Guerrero
and Honorable Associate Justices:

Searles Valley Minerals Inc., respectfully submits this amicus letter in support of the Petition for Review ("Petition") filed by Petitioners Mojave Pistachios, LLC and Paul G. Nugent and Mary E. Nugent, Trustees of the Nugent Family Trust dated June 20, 2011 (collectively, "Mojave Pistachios").[1] Searles authored this letter and made a monetary contribution to fund the preparation and submission of this letter. No other person or entity, other than the amicus curiae, Searles, or their counsel, authored this letter or made a monetary contribution intended to fund the preparation or submission of this letter.

As the Court of Appeal recognized in its published opinion, "[t]he issues raised in this writ proceeding are of widespread interest and importance. Litigation challenging the actions of groundwater sustainability agencies under [the Sustainable Groundwater Management Act, or "SGMA"] may impact thousands of water users throughout the state for years to come. Whether the 'pay first' rule applies in litigation challenging SGMA fees is a novel question, the answer to which could impact groundwater extractors throughout the state; it has yet to be addressed by any appellate decision. Accordingly, writ review is warranted." (*Mojave Pistachios, LLC v. Superior Court* (2024) 88 Cal.App.5th 605, 625.)

[1] Searles Valley Minerals, Inc. ("Searles") is a party to cases related to this case.

The Petition raises legal questions and facts justifying relief from this Court to protect against the threat of irreparable harm to Mojave Pistachios and to countless other groundwater users in California, including Searles.

INTRODUCTION AND INTEREST OF AMICUS CURIAE SEARLES

Searles is a minerals recovery and manufacturing company located in the town of Trona in the northwestern part of the Mojave Desert in California.

Searles' operations are crucial to our national health and security infrastructure. For example, Searles has been the only United States-based company, and one of only three companies in the world, that produces an ingredient critical to the Type 1 pharmaceutical glass for vaccine vials, including COVID-19 vaccine vials. Without the ability to pump groundwater, Searles would be unable to provide this critical ingredient for vaccine vial manufacturing.

Additionally, Searles is the sole supplier drinking water and water for public health and safety to the economically disadvantaged communities of Trona, Argus, Pioneer Point, and Westend (collectively, "Trona Communities"). There are nearly 1,800 residents and several local businesses that wholly rely upon Searles' groundwater rights for their potable water. The Trona Communities have no other water supply except for the groundwater that Searles pumps from the Basin.

Since 1873, the Trona Communities have grown with and continue to depend upon the jobs and other services provided by Searles and its predecessors. Searles continues to provide not just local employment to hundreds of persons, but community facilities such as stores, recreation halls, theaters, and even a railroad. Without Searles' minerals recovery manufacturing operations, the Trona Communities would cease to exist, and hundreds of people and their families would be displaced from their homes and community.

Searles' groundwater use dates back more than a century, and is the oldest continuing groundwater use in the Indian Wells Valley Groundwater Basin ("Basin"). Searles' operations are completely dependent upon Searles' groundwater rights in the arid Mojave Desert. There is no other available water supply.

Searles' groundwater rights predate, and are senior and paramount to, all other claimed groundwater rights in the Basin. Searles has relied upon groundwater to supply drinking water to the Trona Communities and to operate Searles' minerals recovery and manufacturing company since at least the early 1930s. Searles has been delivering groundwater to the Trona Communities through a wholly-owned subsidiary at least since

its Certificate of Public Convenience from the California Public Utilities Commission in 1944.

Repeated threats and lawsuits by the Indian Wells Valley Groundwater Authority ("Authority" or "local agency") to shut off the water supply to not only Mojave Pistachios, but also to Searles and its subsidiary's domestic water customers, justify the review requested by Mojave Pistachios.

PROCEDURAL POSTURE

The lengthy history of this case is outlined in the Petition. In short, the Petition seeks review of the Court of Appeal's published opinion upholding the trial court's order sustaining a demurrer to Mojave Pistachio's lawsuit challenging the Authority's "Annual Pumping Allocation" and other "Implementing Actions," as defined below. Like Mojave Pistachios, Authority did not allocate groundwater to Searles. Searles has also challenged the local agency's actions, which violate common law groundwater rights and constitute an unlawful taking under the federal and state Constitutions.

THE PETITION RAISES ISSUES JUSTIFYING RELIEF

The Authority is the local agency that is supposed to lawfully manage the Basin's groundwater supply under the Sustainable Groundwater Management Act ("SGMA") (Wat. Code, § 10720 et seq.), and must do so consistent with groundwater rights. Authority, however, ignored groundwater rights—including Searles' priority rights—and instead adopted a groundwater sustainability plan. The plan was controversial, and the Authority adopted a fee that charges $2,130 per acre-foot (AF) to pump groundwater. Some landowners in the Basin were exempt from the fee and were given an annual allocation of groundwater to pump without having to pay the fee.

The fee amount is unprecedented and believed to be the highest groundwater replenishment fee in California history. Authority's failure to recognize groundwater rights in imposing the fee and implementing the groundwater plan was due to Authority's erroneous interpretation of applicable law and Authority decisions beyond its limited power under SGMA.

A. SGMA does not permit the Authority to impose a fee inconsistent with groundwater rights.

California enacted SGMA in 2014 to bring groundwater in California under "sustainable management" by 2040. (Wat. Code, § 10721.) **Under SGMA, the legislature prohibited groundwater sustainability agencies, including the Authority, from making determinations with respect to vested water rights**. (Wat. Code,

§§ 10720.1, subd. (b), 10720.5, 10726.8, subd. (b), 10738). Only the judiciary has the power to determine water rights. (Wat. Code, § 1720.5, subd. (c), Code Civ. Proc., § 830 et seq.) Senate Bill 1372 clarified in new Water Code section 10738, which specifically applies to the Basin, that "[t]he approval of a groundwater sustainability plan … shall not be construed to be a determination … that the allocation of groundwater pumping rights in the plan are consistent with groundwater rights law."

SGMA does not authorize a groundwater sustainability plan to determine, let alone take, a party's groundwater rights under the guise of a fee. Rather, SGMA operates in addition to, and does not alter or interfere with, pre-existing water rights. Authority, through its plan, has effectively made an impermissible determination of groundwater rights through its actions which prevents Mojave Pistachios and Searles from exercising their water rights, and in Searles' case its prior and paramount groundwater rights, or even seeking to establish those rights in court proceedings as provided in SGMA.

B. Authority's lawsuits seek to completely cutoff the groundwater supply.

Authority has not only repeatedly threatened Mojave Pistachios with legal action to entirely eliminate its groundwater use, but followed through with its threats when, on March 22, 2024, Authority filed a preliminary injunction in the related case of *Indian Wells Valley Groundwater Authority v. Mojave Pistachios, LLC, et al.*, Orange County Superior Court Case No. 30-2022-012394, seeking a preliminary injunction to shut down Mojave Pistachios and its operations. Authority has already filed a lawsuit against Searles to cutoff its groundwater supply including the drinking water supply for the Trona Communities. (See *Indian Wells Valley Groundwater Authority v. Searles Valley Minerals Inc.*, Orange County Superior Court Case No. 30-2022-01239487.) There is no reasonable dispute that the harm faced by Searles is similar to and perhaps even greater than the harm now faced by Mojave Pistachios. Searles will continue to seek available legal remedies to protect its groundwater rights and the Trona Communities' drinking water supply and this Court granting the Petition will assist the lower court and all parties including Searles to reach a proper resolution to the important issues raised by the Petition.

C. Application of the "pay first" rule effectively prevents parties from exercising or even establishing groundwater rights without paying fees.

Authority's fee requires Mojave Pistachios, Searles and other parties to pay $2,130 each and every time it pumps one acre foot of groundwater. Searles pumps more than 2,000 acre feet of water each year, ultimately totaling millions of dollars in annual fees. Despite Searles' prior and paramount rights to the Basin's groundwater, Authority denied Searles its groundwater right to continue using groundwater without paying the fee.

Authority's enactment of the fee effectively determined that Searles has no groundwater rights and cannot use groundwater unless Searles pays millions of dollars each year to the Authority. If Searles does not pay the millions of dollars due each year, Authority will proceed in court to shut off Searles wells which are the only water supply for Searles operations but also for the Trona Communities drinking water. SGMA does not contemplate, let alone authorize, this harsh outcome. Authority's actions are (a) legally improper under the Water Code and SGMA, which provide that groundwater rights disputes are for the courts to decide, not the Authority; and (b) are factually incorrect in that they ignore Searles' first-in-time priority right to the Basin's groundwater.

The domestic use of water has long been recognized as the highest use of water. (Wat. Code, § 106.) Searles' provision of drinking water to the Trona Communities for their domestic use, therefore, is the highest use of the Basin's groundwater. Authority declined to provide Searles with an annual pumping allocation and instead levied, without factual or legal support, the unprecedented fee on Searles (and Mojave Pistachios), but not on selected others.

D. The Petition raises important legal questions, primarily, whether Authority's actions effectively determining groundwater rights are in violation of SGMA and the federal and state constitutions.

SGMA is only nine years old and until the published Court of Appeal opinion in this case, California's courts have not yet interpreted issues presented here. As the Court of Appeal opinion recognizes, SGMA plays an important role in groundwater management in California, and therefore its proper implementation is of paramount importance and widespread significance to the public and all persons and entities throughout the state depending upon groundwater. Searles agrees with the Court of Appeal opinion that states that the matters raised in the Petition will impact actions of groundwater sustainability agencies and affect thousands of water users throughout the State for years to come.

The Petition should be granted to resolve whether the Authority can *de facto* adjudicate groundwater rights, as it has here, resulting in a nullification of groundwater rights including Searles' prior and paramount rights, establish an unprecedented fee to pump groundwater that indisputably and unconstitutionally singles out Mojave Pistachios and Searles, and then invokes the "pay first" rule to effectively prevent any legal challenge because the exorbitant fees cannot be paid. This question is not exclusive to this case, but rather, a question broadly applicable to resolve the courts' jurisdiction and authority to decide groundwater rights under SGMA. Other courts will undoubtedly face

this question as groundwater sustainability plans continue to be implemented across the state.

E. Review should be granted to decide whether local agencies can determine groundwater rights by granting disputed allocations of water to some users in a groundwater basin while denying other users any allocation.

SGMA prohibits Authority from altering, disturbing, or making a "binding determination of the water rights." (Wat. Code, §§ 10720.5, subd. (b), 10726.8, subd. (b).) Despite this prohibition on determining water rights, the lower court acknowledged that the fee was based on Authority's determination that Mojave Pistachios was not (and Searles was not) entitled to any "Annual Pumping Allocation," which in turn was premised on Authority's conclusion that the Navy's China Lake facility should have priority water rights.

The enactment of the fee is based on Authority's unilateral decision that the Navy has priority water rights. It is a water rights determination, establishing that Mojave Pistachios and other parties, like Searles, do not have rights to the Basin's groundwater and must pay the exorbitant fee, while the Navy and certain other recipients of annual allocations are not required to pay the fee for using groundwater.

The Court of Appeal agreed with Authority's contentions that the "pay first, litigate later" doctrine in section 32 of article XIII of the California Constitution requires Searles to pay the fee, request a refund, and then sue for a refund in order to challenge not only the fee but also annual pumping allocations.[2] That is not what SGMA prescribes. If anything, SGMA recognizes that local agencies are not to take actions that determine or ignore water rights, and that courts are to determine those rights. Thus, there can be no legal duty to "pay first, litigate later" for a party seeking a determination of its groundwater rights.

Authority, although it could have done so, did not include an explicit pay first requirement in is fee ordinance. Nor does SGMA mandate the payment of contested fees pending resolution in a comprehensive groundwater adjudication. Instead, SGMA states a fee challenger "may" pay fees under protest before challenging the fee. (Wat. Code, § 10726.6, subd. (e).) Section 10726.6, subdivisions (d) and (e), state that "[a]ny person

[2] There is a division in case law whether the "pay first, litigate later" requirement in the state constitution applies to local agencies. Some cases hold that the constitutional provision does not apply to local agencies, while other cases interpret the "pay first, litigate later" rule under the constitution as if it does apply to local agencies or should apply as a matter of public policy.

may pay a fee imposed . . . Except as otherwise provided in this section, actions by a groundwater sustainability agency are subject to judicial review pursuant to Section 1085 of the Code of Civil Procedure." Had the legislature wanted to make a "pay first" requirement, it would have done so. Courts cannot insert "shall" for "may" when the legislature has not done so. (*Morin v. ABA Recovery Service, Inc.* (1987) 195.Cal.App.3d 200, 205; see also *People v. Superior Court* (1991) 235 Cal.App.3d 1261, 1271 [changing statutory language to "shall" is "not within the legitimate function of an appellate court"]; *Hogya v. Superior Court* (1997) 75 Cal.App.3d 122, 132 ["The word 'shall' is used in laws, regulations, or directives to express what is mandatory. 'May,' on the other hand, is usually permissive."].)

The published Court of Appeal opinion was the first in California to enforce a "pay first, litigate later" rule under SGMA. That public policy rule, however, should not apply here, where the local agency actions prohibit parties from exercising rights to groundwater or at least seeking a judicial declaration of those rights without first having to pay such fees.

CONCLUSION

No local governmental agency has the power, nor should be able, to extort a person or entity into paying unlawful fees or risk losing water at least while groundwater rights are subject to a pending adjudication proceeding. The trial court should ultimately decide the parties' respective groundwater rights, but in the meantime both Mojave Pistachios and Searles are faced with Authority's lawsuits to shutdown groundwater wells before the lower court can make the groundwater rights determinations and even before the trial court decides whether Authority's actions are legally valid. By granting Mojave Pistachios' Petition, the parties below can have the opportunity to present argument to this Court, which can further assist the lower courts in deciding groundwater rights cases. For these reasons, Searles respectfully submits this letter in support of the Petition.

Respectfully submitted,

Jeffrey V. Dunn
of BEST BEST & KRIEGER LLP

PROOF OF SERVICE

I, Dawn R. Forgeur, CCLS, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 500 Capitol Mall, Suite 2500, Sacramento, California 95814. On April 19, 2024, I served a copy of the within document(s):

Searles Valley Minerals Inc.'s Amicus Curiae Letter
in Support of Petition for Review of
Mojave Pistachios, LLC v. Superior Court of Orange County
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 19, 2024, at Sacramento, California.

Dawn R. Forgeur, CCLS