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

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

RE: Comments on Agenda Item 7 (Meter Compliance Update and Staff Recommendation on Changes to the Policy), Item 8 (Resolution 07-20 re Reporting Policy for all New Groundwater Extraction Wells), Item 9 (Optimized Use of Recycled Water), Item 10 (Allowing Valuation and Potential for Transfer Market in the Transient Pool), and Item 13 (Monthly Financial Report)

Dear Members of the IWVGA Board of Directors:

On behalf of Mojave Pistachios, LLC and the Nugent Family Trust (collectively, "Mojave") we provide these comments on the following Agenda Items: (1) Agenda Item 7 regarding a Meter Compliance Update and Staff Recommendation on Changes to the Policy; (2) Agenda Item 8 regarding approval of Resolution 07-20 Establishing a Reporting Policy for all New Groundwater Extraction Wells in the Basin; (3) Agenda Item 9 regarding Board Consideration and Discussion of an Optimized Use of Recycled Water; (4) Agenda Item 10 regarding Board Consideration and Discussion on a Allowing Valuation and Potential for a Transfer Market in the Transient Pool; and (5) Agenda Item 13 regarding the Monthly Financial Report.

**I. Agenda Item 7: Comments on the Meter Compliance Update and Staff Recommendation on Changes to the Policy**

The staff report for Agenda Item 7 notes that in response to the IWVGA's September 22, 2020 letter regarding the requirements of Ordinance 01-20, "Staff has received inquiries from non de minimis extractors pumping relatively small amounts of water containing questions/concerns about compliance including the ability to pay the cost of purchasing, installing, and testing new metering and recording equipment." Staff recommends "revisiting the Ordinance in consideration of the issues and concerns brought to Staff's attention and seeks Board discussion and direction."

**Comment:** While Mojave agrees that certain elements of the Ordinance warrant further consideration, the staff report is unclear what issues have been identified and therefore will be discussed at today's hearing. Therefore, Mojave is unable to provide specific comments on the issues that will be raised before the Board. Mojave requests that the IWVGA provide a further opportunity for public comment before adopting any amendments to Ordinance 01-20 and that the deadlines set forth in the September 22, 2020 letter be extended at least 30 days after any future Board action to amend Ordinance 01-20.

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Mojave asks the IWVGA Board to implement the following changes to Ordinance 01-20 and Resolution 02-20:

- Amend Ordinance 01-20 to reflect that an hour meter need not be installed if electric demand for each well can be tracked by separate means (e.g., where electricity to each well is separately metered);
- Amend the list of “Acceptable Meters” set forth in Appendix A of Resolution 02-20 to include other meters that meet industry standard for agricultural uses, including meters produced by Water Specialties McCrometer, Inc.; and
- Include Cal-West Rain, Inc. in the list of IWVGA-approved list of meter testers and installers.

## **II. Agenda Item 8: Comments on Resolution 07-20 Establishing a Reporting Policy for all New Groundwater Extraction Wells in the Basin**

Resolution 07-20 Establishing a Reporting Policy for all New Groundwater Extraction Wells in the Basin (“Resolution 07-20”) purports to allow the IWVGA to regulate the construction of “new groundwater extraction wells,” defined to include “construction of new wells, enlargement of existing wells and reactivation of abandoned wells,” along with construction of “replacement” wells. First, Resolution 07-20 would require applicants to submit to the IWVGA “any and all County well applications and/or well permit requests before commencing work on the new groundwater extraction well.” Second, the IWVGA would review well permit applications to assess “the potential of the new groundwater extraction well(s) to cause Material Injury to the Basin and/or to other current Basin Producers,” where “Material Injury” is defined as “impacts to the Basin caused by the pumping 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 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. Material physical harm does not include economic injury that results from other than direct physical causes, including any adverse effect on water rates, lease rates, or demand for water. If fully mitigated, Material Injury shall no longer be considered to be occurring.” After the IWVGA’s “Material Injury” review, “Authority staff will make a recommendation to the Board and other interested regulators regarding the new groundwater extraction well application/well permit request.”

**Comment:** First, SGMA does not grant the IWVGA any well permitting authority unless officially delegated to the IWVGA by the three counties overlying the Basin. (Water Code § 10726.4(b) [“This section does not authorize a groundwater sustainability agency to issue permits for the construction, modification, or abandonment of groundwater wells, except as authorized by a county with authority to issue those permits.”].) Therefore, the IWVGA’s purported addition of a material injury analysis to the well permitting process is inappropriate and violates SGMA. Second, SGMA does not compel Kern, Inyo, or San Bernardino Counties to provide well permit applications to the IWVGA. (*Id.* [“A groundwater sustainability agency [GSA] may request of the county, and the county shall consider, that the county forward permit requests for the construction of new groundwater wells, the enlarging of existing groundwater wells, and the reactivation of abandoned groundwater wells to the groundwater sustainability agency before permit approval.”].) It is therefore also inappropriate and contrary to SGMA to mandate that a well permit applicant submit their application to the IWVGA when SGMA does not compel counties to do the same. Likewise, SGMA does not grant a GSA the authority to determine whether “Material Injury” is occurring or require mitigation of “Material Injury,” as defined in Resolution 07-20, as a condition of well permit issuance.

Mojave also objects to Resolution 07-20 for the reasons set forth in Mojave’s June 18, 2020 comment letter, which is hereby incorporated by reference. As explained therein, the definition of “Material Injury” is

overly broad and does not provide a valid standard by which the IWVGA could attempt to deny an application for a new groundwater well or influence a county to deny an application. The definition, for example, includes "overdraft." Will the IWVGA seek to deny construction of all new wells or enlargement of existing wells on the basis that DWR has designated the Basin as "subject to critical conditions of overdraft?" If more than 7,650 acre-feet per year (AFY) is pumped in any given year, does the IWVGA consider overdraft to be occurring and will it attempt to prohibit construction of a replacement well?

Additionally, as Mojave previously identified, Resolution 07-20 does not address compliance with SGMA's mandate that any actions to regulate, limit, or suspend extractions from groundwater wells "shall be consistent with the applicable elements of the city or county general plan." (Water Code § 10726.4(a)(2).)

Finally, Mojave objects to Resolution 07-20 because the IWVGA's proposed definition of "new groundwater extraction wells" is overly broad and extends to "enlargement of existing wells," "reactivation of abandoned wells," and construction of a "replacement well." Existing wells and replacement wells should be exempt from Resolution 07-20.

### **III. Agenda Item 9: Comments on "Optimized Use of Recycled Water"**

The program to be adopted pursuant to Agenda Item 9 is proposed to implement Project No. 2 of the GSP to "Optimize Use of Recycled Water." The program involves the use of the City of Ridgecrest's wastewater treatment facility "to mitigate the needs for imported water and reduce water costs for participants of the program." According to the staff report for Agenda Item 9:

The Program would work as follows. The Authority would extend to large permanent users of groundwater such as Searles Valley Minerals and the Indian Wells Valley Water District the opportunity to participate in the Program. Participants in the program will fund the cost of developing a recycled water project. In exchange, they will be excused from paying a replenishment fee on an amount of water proportional to their participation in the Program. . . . For example, the Program is expected to produce approximately 2,000 acre feet of water per year. It is expected that there will be up to two participants in the Program, Indian Wells Valley Water District and Searles Valley Minerals. Accordingly, if both parties participate in the Program they would each be responsible for one half of the cost of the Program and, in exchange, they would be entitled to avoid payment of replenishment fees for 1,000 acre feet per year of their groundwater production. The initial cost of the program will be based on the cost of producing a design for the recycled water system which staff estimates would be approximately \$500,000. These payments will be made monthly based on production in the same general manner as the replenishment fee. Staff estimates that this phase of the program will take approximately 18 months. The expected per acre foot charge for the Program based on the design costs of \$500,000 divided by the total amount of groundwater production not subject to the replenishment fee during the design period, 3,150 AF total (2,100 AF per year x 1.5 years) comes to a total \$158.75 per acre foot ( $3,510/\$500,000 = \$158.75$ ). This pumping will be subject to the \$17.50 well mitigation portion of the Replenishment Fee but because this is an alternative water supply it will not be subject to the rest of the Replenishment Fee.

Staff recommends that the Board “provide direction to staff to bring back to the board a contract for the recycled water with the City and a resolution adopting the Program.”

**Comment:** Mojave supports opportunities to optimize the use of recycled water, but objects to the IWVGA’s proposals that, like its other programs, favor only certain water users. Further, this program does not purport to actually produce recycled water, only to cover the “cost of producing a design for the recycled water system,” but includes no information as to when the recycled water program would be online, how recycled water would be distributed, and whether this water would be served directly to customers or used to recharge the groundwater basin. Again, as raised in Mojave’s prior comments, it is manifestly unjust that select water users granted an Annual Pumping Allocation should be allowed to pump some or all of their allocation for free, and then to have an opportunity to avoid most of the Replenishment Fee by paying only \$158.75 per acre-foot, while other water users must pay the \$2,130 per acre-foot Replenishment Fee. Through its allocation scheme, the IWVGA has illegally picked winners and losers in violation of SGMA, the California and United States Constitutions, and common law water rights.

#### **IV. Agenda Item 10: Comments on Following Valuation and Potential for a Transfer Market in the Transient Pool**

If adopted, Agenda Item 10 would amend the GSP and the Transient Pool and Following Program by:

- Capping the purchase of Transient Pool water from any one participant to 1,000 AFY “to prevent a burden on Authority cash flow;”
- Adopting “a policy that transient pool water rights may be freely transferred between individual members of the transient pool based on mutual agreement of those parties;”
- “[P]ermitt[ing] transient pool water to be transferred to nonmembers of the transient pool provided that the recipient of the water put the water to agricultural use on Basin lands currently in production;”
- Developing and requiring “a waiver of liability with the expectation that any participant in the transient pool (including non-transient pool members that receive a transfer of water from the transient pool) will execute a completed waiver of all liability against the Authority for any claims arising out of the adoption and implementation of the Groundwater Sustainability Plan;” and
- Limiting the Following Program “to a period of 10 years after which the Authority may consider whether to extend the Program.”

**Comment:** As reflected in Mojave’s prior comments on the GSP and the Transient Pool and Following Program, Mojave has always advocated for the transferability of Transient Pool allotments and its position is that the GSP and the Transient Pool and Following Program, as adopted, fail to provide any justification for the non-transferability of Transient Pool allotments.

Although the proposal to allow transfer of Transient Pool allotments is an improvement, there are serious flaws in the IWVGA’s new proposal. First, conditioning participation in a Transient Pool transfer on a waiver of liability is illegal for many reasons including that it is an unconstitutional condition. (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1159–60.) It is both inappropriate and illegal to ask a water user to sign away their legal rights to challenge the GSP and its implementation to receive a transfer of Transient Pool water.

Second, it is inappropriate *just two months* after adoption of the Transient Pool and Following Program, to now attempt to cap participation in the Following Program to 1,000 AFY. This is a bait and switch. It also emphasizes the point raised by Mojave and others throughout summer of 2020—instead of rushing forward to adopt items like the Replenishment Fee and the Transient Pool and Following Program, the IWVGA should have slowed down and considered important questions like: how will the Following Program be funded? Given the ever-shifting changes in the Transient Pool and Following Program, a potential buyer

would not have sufficient certainty to invest in the purchase of “Transient Pool” rights, which were illegally established in the first place.

Finally, Mojave objects to the process the staff report *admits* was used to determine Transient Pool shares and Annual Pumping Allocations. The staff report for Item 10 admits: “Each party’s share of the Transient Pool was determined pursuant to the same principals of water law used to establish the Annual Pumping Allocations.” In other words, the IWVGA admits that it made determinations about the water rights held by each pumper granted a Transient Pool allotment and each pumper granted an Annual Pumping Allocation and implicitly admits that it made a priority determination as between these users, with more senior right holders (according to the IWVGA) receiving Annual Pumping Allocations, more junior right holders (again, according to the IWVGA) receiving a Transient Pool allotment, and inferior right holders (also according to the IWVGA) receiving neither an Annual Pumping Allocation or a Transient Pool allotment.

This decision-making process violated SGMA and Mojave’s constitutional rights. See, e.g., 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.”]; *id.* § 10726.8(b) [“Nothing in this part shall be construed as authorizing a local agency to make a binding determination of the water rights of any person or entity . . .”]; 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.”].

#### V. Agenda Item 13: Comments on Monthly Financial Report

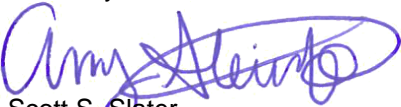
**Comment:** Mojave requests further transparency in the IWVGA’s monthly financial report. As the September 2020 Financial Report is formulated, it is impossible to understand the income and expenditures for the month of September, among other important information. Mojave therefore requests that the monthly financial report provided in each IWVGA Board packet be reformulated to show:

- All revenue for the prior month, itemized by each individual source of revenue (e.g., Extraction Fee, Prop 1 Grant, etc.).
- All expenditures for the prior month, itemized by each individual expenditure.
- An updated budget, including any variance from the budget, reported monthly.
- A monthly financial statement, including income statement, balance sheet, and check register.

#### VI. Conclusion

We thank you for your attention to our comments on Agenda Items 7–10 and 13 and urge the IWVGA to address them prior to adoption.

Sincerely,



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