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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

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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

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.

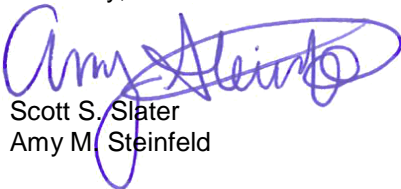
Not surprisingly, given the environmental and related economic impacts outlined above, there are various examples of EIRs that have concluded that fallowing of agricultural land will cause potentially significant impacts, including the Imperial Irrigation District Water Conservation and Transfer Project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



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