

RIDGECREST AREA ASSOCIATION OF REALTORS, INC.

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RIDGECREST, CA 93555
(760) 499-1098

April 24, 2018

IWV Groundwater Sustainability Agency
Attn: Board of Directors

Dear Members of the GSA Board,

To clarify any recent concern regarding support for growth in the Indian Wells Valley, the Ridgecrest Area Association of Realtors would like to share its Mission Statement as follows:

“The Ridgecrest Area Association of Realtors mission is to serve our members and the public, promote the preservation of real property rights and the growth of the real estate industry of the Indian Wells Valley.”

This letter is not to be construed as an endorsement of proposed policy regarding pumping fees. We recommend other alternatives be pursued.

Sincerely,

Debbie Dibble
2018 President
Ridgecrest Area Association of Realtors

Carol Wilson
Director
GSA Policy Advisory Committee Representative

May 16, 2018

VIA ELECTRONIC MAIL

Indian Wells Valley Groundwater Authority
Board of Directors
c/o Clerk of the Board

Re: *IWVGA May 17, 2018 Board Meeting – Meadowbrook Dairy Comment Letter on
Agenda Item 7 Regarding Proposed Groundwater Fee Ordinance and Resolution*

Dear IWVGA Board Members:

On behalf of our Firm's client, Meadowbrook Dairy ("Meadowbrook"), we submit this comment letter to the Indian Wells Valley Groundwater Authority ("IWVGA") regarding Item 7 of the agenda¹ for the May 17, 2018 IWVGA Board meeting, pertaining to: (1) proposed "*Ordinance No. 2-18 – Establishing the Rules, Regulations And Procedures For the Imposition And Collection Of Groundwater Fees*" ("Proposed Ordinance") and the accompanying proposed "*Resolution Establishing a Groundwater Extraction Fee*" ("Proposed Fee Resolution"). Please include this letter in the record and file it with the minutes of the May 17, 2018 Board meeting.

The Proposed Ordinance and Proposed Fee Resolution represent the IWVGA's most recent iteration of a proposed *Water Code* Section 10730 fee that would be charged to certain (but not all) groundwater producers on a volumetric basis to fund the IWVGA, the development of the Groundwater Sustainability Plan ("GSP") for the Indian Wells Valley Groundwater Basin ("Basin") and other IWVGA processes, functions and projects. Each iteration of the proposed fee has raised significant legal, equitable and practical issues among groundwater producers and members of the public. Please see

¹ We note that that a lengthy, detailed "Supplemental Agenda" package containing multiple substantive changes and materials was distributed by the IWVGA Clerk of the Board at 3:02 p.m. on May 16th – less than 24 hours before the May 17th IWVGA Board meeting. This followed another late circulation at 1:22 p.m. the same day that include extensive missing agenda packet materials, including the "Data Package" for the Proposed Fee Resolution and the supporting attachments to the proposed DRI contract for Item 8. These late distributions on the eve of IWVGA Board meetings is burdensome and unfair to the public, and deprives the already-short timeframe for the public to review and evaluate Board meeting materials.

Indian Wells Valley Groundwater Authority

Re: IWVGA May 17, 2018 Board Meeting – Meadowbrook Dairy Comment Letter on
Agenda Item 7 Regarding Proposed Groundwater Fee Ordinance and Resolution

May 16, 2018

Page 2

Meadowbrook's comment letters to the IWVGA dated April 4th and March 14th, which we incorporate here by reference.

The Proposed Ordinance and Proposed Fee Resolution fail to remedy the previously stated issues. Instead, the Proposed Ordinance and Proposed Fee Resolution perpetuate most of those same issues and include additional legal flaws in violation of SGMA and the California Constitution that must be resolved before the IWVGA adopts these items or any version of them.

Meadowbrook recognizes the need for the IWVGA to conduct investigations and to obtain sufficient and reliable data to support the GSP. Meadowbrook is also not opposed to paying a fair, reasonable and legally-complaint groundwater fee for SGMA implementation purposes. The Proposed Ordinance and Proposed Fee Resolution, however, fall short in each of those respects and are primarily designed to enforce compliance rather than achieve data collection.

The Proposed Ordinance and Proposed Fee Resolution Do Not Comply with SGMA's Provisions Regarding Reporting Groundwater Use.

The Proposed Ordinance and Proposed Fee Resolution require, among other things that *effective August 1, 2018*, all groundwater extractions from the Basin must be measured according to a method approved by the Water Resources Manager and reported *monthly* by the Groundwater Extractor to the Authority in accordance with the Proposed Fee Resolution.

These requirements violate SGMA because they can only be imposed through an adopted GSP (which has not occurred in this Basin) and because SGMA does not authorize GSAs to impose monthly reporting requirements. The provisions in SGMA providing for registration of groundwater extraction facilities and methods of groundwater extraction measurement and reporting are set forth in Chapter 5 of Part 2.74 of the *Water Code*. Relevant provisions within this chapter provide:

- "A [GSA] may exercise any of the powers described in this chapter in implementing this part, in addition to, and not as a limitation on, any existing authority, if the [GSA] adopts and submits to [DWR] a [GSP] or prescribed alternative documentation in accordance with Section 10733.6." [Section 10725(a).]

- “A [GSA] may require, through its [GSP], that the owner or operator of a groundwater extraction facility within the GSA file an annual statement with the GSA setting forth the total extraction in acre-feet of groundwater from the facility during the previous water year.” [Section 10725.8(c).]

The Proposed Ordinance and Proposed Fee Resolution cannot require monthly reporting of groundwater extraction under SGMA. Consequently, the provisions in the Proposed Ordinance and Proposed Fee Resolution regarding the imposition penalties, interest, charges and other actions arising from non-compliance with monthly reporting requirements cannot legally be enforced. Also, from a practical standpoint, monthly reporting would impose unreasonable accounting burdens on groundwater producers and would substantially increase accounting efforts and costs for the IWVGA (which would likely result in even higher fees for groundwater producers).

The Proposed Ordinance and Proposed Fee Resolution Contain Inconsistencies and Gaps that Would Make Compliance Difficult for Groundwater Extractors

As just a few (non-exhaustive) examples:

- Rules and regulations must be sufficiently detailed to enable compliance. The title of the Proposed Ordinance indicates that it establishes “*The Rules, Regulations and Procedures For the Imposition and Collection of Groundwater Extractions (sic) Fees*”. The Proposed Ordinance, however, leaves out most details and thereby makes compliance difficult if not impossible for groundwater extractors.
- The Proposed Ordinance affords significant discretion to the Water Resources Manager, the General Manager (and in one instance, an unspecified “Manager”), which creates uncertainty and difficulty for persons seeking to achieve compliance. For example, these items provide that the Water Resources Manager and in some instances, the General Manager, would review and approve Groundwater Extraction Facility registrations and methods of measurement based upon “any other information that the Authority’s General Manager deems to be prudent and necessary” and with authority to deny registrations that “do not meet the Manager’s² approval.”

² It is not clear which “Manager” this refers to.

- The Proposed Ordinance states in Section 9 that Groundwater Extraction Facilities constructed after the effective date of the Proposed Ordinance must comply with “the Authority’s Groundwater Extraction Resolution” prior to the extraction of groundwater from the Basin, but does not define or reference a “Groundwater Extraction Resolution.” The Proposed Ordinance refers to an “Extraction Fee Resolution,” but Section 9 is not clear whether it is intended to refer to the Extraction Fee Resolution or some other “Groundwater Extraction Resolution”.
- Adopting “rules and regulations” by ordinance would require, under the equal dignities rule, that any necessary amendments to this ordinance must also be adopted by ordinance. This makes the amendment process more burdensome and time consuming.

Clarity and consistency are critical in any rules and regulations regarding the imposition and collection of groundwater extraction fees. The Proposed Ordinance and Proposed Fee Resolution require additional clarity and detail.

The Proposed Fee Resolution Perpetuates the Same Legal Deficiencies Contained in the Prior Proposed Fee Iterations

Meadowbrook’s prior comment letters identified many legal, equitable and practical issues with prior iterations of the IWVGA’s proposed *Water Code* Section 10730 fees. Unfortunately, it appears that many of those issues are not addressed or acknowledged in the Proposed Ordinance the Proposed Fee Resolution. Without restating all of the issues contained in the prior letters (which are instead incorporated by reference and we urge this Board to review), some examples of critical issues that remain unresolved are:

- The Proposed Fee Resolution imposes a local tax that fails to comply with California’s Constitutional requirements generally known as Propositions 26 and 218.
- The Proposed Fee Resolution fails to provide legal justification for the proposed fee under Propositions 26 or 218 (or even mention these Constitutional requirements). The Propose Fee Resolution does not, for example, identify which if any exemption applies that would allow the proposed fee to evade its status as a local tax that must comply with Proposition 26’s majority voter approval requirements. If the IWVGA

considers the proposed fee to meet one of the exemptions, we request that the IWVGA specifically identify that exemption now.³

- The Proposed Fee Resolution and the proposed volumetric fee of \$3.50 per tenth of an acre-foot (or in other words, \$35 per acre-foot) over a 24-month period is again based upon a “Data Package” that contains extensive and fundamental data gaps and extremely high estimated costs. Data gaps include identifying pumpers and total pumping in the Basin, and accurately projecting and allocating costs. The lack of transparent, reliable data upon which any proposed volumetric or other type of fee is based is a significant legal and fairness concern that has been extensively raised and repeated by groundwater pumpers and members of the public. The “Indian Wells Valley Groundwater Basin Well/System Listing” that was provided as part of the IWVGA “Supplemental Agenda” for this meeting identifies hundreds of groundwater wells for which no data is provided regarding groundwater production data and other information.
- Neither the Proposed Ordinance nor the Proposed Fee Resolution (or their content) was presented to or vetted by the TAC or the IWVGA Policy Advisory Committee (“PAC”). Instead, the TAC and the PAC, along with the public, were given less than 24-hours’ notice of the Proposed Ordinance and the Proposed Fee Resolution through the May 16th late-afternoon circulation of the “Supplemental Agenda” packet for the May 17th IWVGA board meeting. This is certainly not meaningful participation.
- The Proposed Ordinance and Proposed Fee Resolution are premature and fail to account for ways to most effectively utilize the over \$2.1 million awarded in Proposition 1 grant funding.

Like many other groundwater producers in the Basin, Meadowbrook is not opposed to paying a fair, reasonable and legally-complaint groundwater fee for SGMA implementation purposes. Meadowbrook also recognizes the need for sufficient and reliable data to support the GSP. We are, however, truly disappointed with the

³ During the April 5, 2018 IWVGA Board Workshop, IWVGA’s General Counsel acknowledged that any fee proposed by the IWVGA must comply with the Constitutional requirements for local fees and taxes, but then stated that our concerns regarding the lack of any reference to those requirements in the April 5th Workshop Data Package and accompanying staff reports were “premature”. Given the IWVGA’s rapidly approaching August 1, 2018 target effective date for the currently proposed fee, these concerns are certainly not premature, nor were they premature on April 5th.

Indian Wells Valley Groundwater Authority

Re: IWVGA May 17, 2018 Board Meeting – Meadowbrook Dairy Comment Letter on
Agenda Item 7 Regarding Proposed Groundwater Fee Ordinance and Resolution

May 16, 2018

Page 6

manner in which this Proposed Ordinance and Proposed Fee Resolution are being presented to groundwater producers and the public in the Indian Wells Valley.

Meadowbrook urges the IWVGA Board not to adopt the Proposed Ordinance or the Proposed Fee Resolution until the issues detailed in Meadowbrook's prior comment letters (April 4th, March 14th) and in this letter are addressed and resolved. We also reserve the right to raise additional concerns and objections to the Proposed Ordinance and the Proposed Fee Resolution.

Finally, we request that the IWVGA Board consider incorporating a concept that would "credit" back to groundwater extractors all overpayments of volumetric fees that are determined to have occurred as groundwater production data, and cost information, are refined and actualized. In other words, as additional data becomes available that impacts the amount of a volumetric fee that would have been charged had the data been previously available, then fees previously paid based upon prior data should be adjusted and overpayments credited or refunded.

Thank you for your consideration.

Sincerely,



Derek R. Hoffman, Attorney for
GRESHAM SAVAGE
NOLAN & TILDEN,
A Professional Corporation

DRH:MDD

cc: S. Johnson, R. Strand, A. Christensen, D. Zdeba, J. Worth, K. Lemieux, P. Hall,
PAC Members, TAC Members, Client