

March 14, 2018

VIA ELECTRONIC MAIL

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

Re: *IWVGA March 15, 2018 Board Meeting – Agenda Item 10: Pumping Fees*

Dear IWVGA Board Members:

On behalf of our Firm's client, Meadowbrook Dairy ("Meadowbrook"), this letter comments upon Agenda Item 10 of the Indian Wells Valley Groundwater Authority's ("IWVGA") March 15, 2018 Board Meeting, regarding Groundwater Authority Staff's Draft Memorandum entitled, "*Groundwater Pumping Fees to Finance Development and Adoption of a Groundwater Sustainability Plan and IWVGA Administrative Costs*" ("Memo"). We appreciate the opportunity to comment on this item, and we request that this letter be made a part of the public record and attached to meeting minutes.

Preliminarily, we appreciate the IWVGA Staff's recommendation in the Memo to provide more than the minimum required public engagement regarding the possible adoption of a *Water Code* Section 10730 fee. Notwithstanding, the Memo raises a number of questions and concerns. For clarity, and for your ease of reference, our comments below correspond to the applicable headings in the Memo.

"Authority to Impose Fees"

IWVGA Staff recommends in the Memo that the IWVGA adopt a groundwater pumping fee pursuant to *Water Code* Section 10730. The Memo does not, however, address the applicability or implementation of California's Constitutional provisions commonly referred to as Propositions 26 and 218, their implementing statutes and interpretive decisional law with respect to groundwater pumping fees. We request that IWVGA Staff address these questions for the benefit of the public and all pumpers in the basin before the fees are presented to the Board for possible action.

“Public Engagement”

We appreciate the IWVGA Staff’s recommendation to provide meaningful participation to pumpers and the public with respect to the fee proposal, beyond the minimum statutory requirements for public notice. We agree that a proposed public workshop prior to, and distinct from, the required *Water Code* Section 10730 public hearing is a good way, at a minimum, to begin engaging the public.

We also respectfully ask that the Board consider the following concerns and requests:

- The Board should establish its previously discussed *standing* Finance Committee, where fee proposals are discussed in detail in a *public* setting and directly with those IWVGA Board members on the committee.
- The proposed public workshop should be held separate from, and not displace, the April 5th PAC meeting. Instead, both the PAC and the TAC should first be given an opportunity to address this critical issue during one of their regularly scheduled meetings. Members of the PAC and TAC—the Board’s only two existing standing committees—should not be relegated to mere 3-minute comment periods at a single, public workshop. Groundwater pumping fees are exactly the type of critical issue that should be brought before the PAC and TAC for discussion, evaluation and recommendation.
- April 5, 2018, is too soon to hold a workshop (or PAC/TAC meeting) on this issue. Instead, we suggest that it first be explained in greater detail at a meeting of the Board’s yet-to-be established *standing* Finance Committee (particularly to explain the months-long deliberations of the *Ad-Hoc* Finance Committee), after which it should be brought to the PAC and TAC. To afford meaningful participation by pumpers and the public, we request that all data on which the proposed fee is based be provided at least fourteen (14) days prior to these committee meetings (rather than the proposed seven (7) days). After those meetings, a public workshop would be appropriate and more effective (and the proposed seven-day distribution of data would also likely suffice).
- With respect to the “public data” referenced in the Memo, there are two primary issues. First, the statutory language states: “...the [GSA] shall make available to the public[,] data upon which the proposed fee is based.” By contrast, the Memo refers to making “public data available.” Though this apparent distinction may not be intended, it suggests that there will be data

upon which the fee is based that will *not* be provided to the public (i.e. something other than “public data”). We kindly request clarification of what is meant by the reference to “public data” in the Memo and correction of the recommendation to conform to the statutory requirement.

“Impacted Pumpers Identification”

We agree that identifying all pumpers in the basin is a priority objective, including for the development of any fee proposal. No fee, especially a volumetric fee, should (can) be imposed before all pumpers are identified.

“Exempted Pumpers”

The Indian Wells Valley Groundwater Basin is a shared resource supporting many beneficial uses and users of groundwater. Correspondingly, the IWVGA should adhere to a policy that *includes* all beneficial uses and users of groundwater, to the maximum extent allowed by law, in the processes and programs by which sustainability is achieved. Though the current demand and sustainable yield for the Basin are still being studied and evaluated, the IWVGA Board has indicated that it will consider imposing groundwater pumping restrictions as part of the Groundwater Sustainability Plan.

Water Code Section 10730(a) states that: “A [GSA] shall not impose a fee pursuant to this subdivision on a de minimis extractor unless the agency has regulated the users pursuant to this part.” By proposing to exempt de minimis extractors from the proposed *Water Code* Section 10730 fee described in the Memo, is the IWVGA also considering ultimately considering exempting de minimis users from potential future pumping restrictions under the GSP or, in other words, from participating in achieving the shared goal of sustainability?

A failure to include “de minimis” pumpers in shouldering the burden of any proposed fee, including a *Water Code* Section 10730 fee, is unfair, and it would not reflect the shared use of the groundwater basin resource. As a collective group, “de minimis” pumpers in this basin are not yet well defined by the IWVGA. Public comments at PAC and TAC meetings indicate that there are as many as 1,000 “domestic well owners.” These figures indicate that this group likely commands a substantial portion of the basin demand and yield. Likewise, public comments have indicated that these pumpers include a variety of “co-ops” that may include in some cases as many as eight or more connections (not all of which, perhaps, are permitted).

It is also not presently clear whether and to what extent such domestic well owners are considered “de minimis” users under SGMA. A “de minimis extractor” is defined as a person who extracts, for domestic purposes, two acre-feet or less per year.” In other words, in order to qualify as “de minimis,” an extractor must both extract less than two acre-feet per year, and that use must be for domestic purposes. Both of these requirements presently constitute significant data gaps that must be addressed, especially before any volumetric fees are considered or imposed.

“Gap Funding Requirement” and “Calculation of Fees”

Water Code Section 10730(a) states in relevant part that: “A [GSA] may impose fees, including, but not limited to, permit fees and fees on groundwater extraction or other regulated activity, to fund 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.”

The figures and reference materials on which the “Gap Funding Requirement” and “Calculation of Fees” are derived in the Memo raise many questions and concerns. The Memo does not, for example, address or make clear whether or to what extent the specific “Expenditures” that comprise the “Total Gap Funding Required” would be funded by the proposed fee, or whether those expenditures may legally be recovered from pumpers in the form of a *Water Code* Section 10730 fee. The Memo refers to the “Stetson GSP and SDAC Budget” as an entire “Expenditure” line item in the amount of \$3,748,600, but it does not identify which specific items within that large (and possibly overestimated) expense category would qualify within the specific *Water Code* Section 10730 categories. Likewise, the proposed \$802,020 “Reserve” (which is more than half of the described Total Gap Funding Required) is probably excessive, rather than “prudent.” Also, it is not clear whether the “GSP Validation Action” listed as an Expenditure in the Memo would qualify as a permissible cost that may be recovered by a *Water Code* Section 10730 fee. It should also be clarified and confirmed that *Water Code* Section 10730 fees will not be used to pay for items covered by grant funds or in-kind services.

Further, in the event that the IWVGA adopts a *Water Code* Section 10730 fee, the resolution or ordinance by which the fee is adopted should include a sunset provision by which the fee expires no later than upon adoption of the GSP. At that point, the IWVGA could have to re-evaluate the need for such a fee.

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These are some of the variety of issues should be considered and evaluated, including through the committees as described above.

Finally, pursuant *Water Code* Section 10730(b)(2), Meadowbrook requests to be notified by mail of all meetings regarding new or increased fees. Please mail to my attention as follows:

Gresham Savage Nolan & Tilden, PC
Attention: Derek Hoffman, Esq.
550 E. Hospitality Lane, Suite 300
San Bernardino, CA 92408

We sincerely appreciate IWVGA Staff providing the Memo initially in draft form for discussion and public input on March 15th. We recognize that the Memo will likely be revised or changed based upon the Board's discussion and consideration of public comments, and we therefore reserve the right to comment further on this issue. Thank you in advance for considering our comments in this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Derek Hoffman", with a stylized flourish at the end.

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,
Client