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Mr. Don Zdeba
IWVGA Acting General Manager
don.zdeba@iwvwd.com

Re: **Searles Valley Minerals's Comments To Public Review Draft**

Dear Mr. Zdeba:

We are attorneys for Searles Valley Minerals. We have the following comments to section 5.2.1 (Annual Pumping Allocation Plan, Transient Pool and Fallowing Program). Camille Anderson will be sending additional comments by Searles Valley Minerals to the document as a whole.

1. **Searles's pre-Navy water rights for industrial use should be respected.**

The Plan recognizes that extraction allocations under Water Code section 10726.4(a)(2) should be consistent with federal and state water rights. That section provides, "A limitation on extractions by a groundwater sustainability agency shall not be construed to be a final determination of rights to extract groundwater from the basin or any portion of the basin." The Plan claims that its Annual Pumping Allocations do not determine water rights because they do not prohibit the pumping of groundwater, but the imposition of a significant Augmentation Fee for pumping over the Allocation has the effect of significantly burdening the exercise of water rights. Therefore, the Allocations should be consistent with water rights.

Searles has provided evidence of its pre-Navy appropriations, and will do so again in connection with the Plan's implementation process. An appropriation that pre-dates the reservation of land for the Navy base has priority over the Federal Reserved Right. (See *Cappaert v. United States* (1976) 426 U.S. 128, 138.) The Plan seems to say that because of sovereign immunity, this priority should be reversed: "The IWVGA does not have legal authority to restrict, assess, or regulate production for NAWS China Lake; therefore, NAWS China Lake groundwater production is considered of highest beneficial use." (page 5-10) But this does not follow. Sovereign immunity is a matter of enforcement and does not affect the IWVGA's obligation to respect priorities established by federal law.

Therefore, Searles should receive an Allocation in the full amount of its pre-Navy appropriation.

2. Searles Domestic Water Company's municipal use priority is separate from Searles's pre-Navy water rights.

The list of groundwater pumpers for domestic use on page 5-10 should include Searles Domestic Water Company, which supplies water for municipal and domestic use in the Searles Valley. The priority for this use does not depend on whether Searles Valley Minerals has a pre-Navy water right for its industrial use. Therefore, Searles Domestic Water Company should receive an allocation equal to its use during the Base Period, in addition to the allocation for Searles's pre-Navy water right.

3. The Water District should not receive any preference based on serving water to the Navy workforce.

On page 5-10, the Plan quotes the Navy's response that "[s]ince the Navy mission at China Lake requires its workforce, the full Navy water requirements are the combination of the on-Station requirements and those of the Navy workforce and their dependents off-Station." Searles is pleased that the Plan does not claim that the Federal Reserved Right extends to production by third parties to serve Navy personnel off-Station, which Searles believes is not supported by any legal authority.

4. The IWVGA does not have authority to impose an Augmentation Fee.

The statutes referred to in section 5.2.1.8, Legal Authority, do not authorize the imposition of an Augmentation Fee. Specifically, Water Code section 10725.4 authorizes *investigations* to propose and update fees, and not the fees themselves. Nothing in SGMA authorizes discriminatory fees to enforce an allocation plan.

5. The Plan does not provide sufficient justification for the limited amount in the Transient Pool nor for its non-transferability.

The Plan states that the purpose of the Transient Pool is to "facilitate coordinated production reductions and to allow groundwater users to plan and coordinate their individual groundwater pumping termination." (page 5-6) But the Plan provides no explanation why the Transient Pool is limited to 51,000 acre-feet, in view of the large amount of groundwater in storage and the economic dislocations that the Allocation will cause. The Plan also does not explain why the Transient Pool water is not transferable. Making the water transferable would allow parties wishing to exit the Basin to be partially compensated for their investment at a negotiated price, while providing other parties with water to support their operations until imported water is available.

6. The anticipated timing of the approval and implementation of the allocation ordinance is inconsistent with Section 10728.6 of the Water Code and the California Environmental Quality Act ("CEQA") requirements.

The Plan states that the Annual Pumping Allocation Plan, Transient Pool and Fallowing Program *may* be subject to environmental review. This statement is misleading as it offers the possibility that such implementation would be exempt from those environmental requirements. Section 10728.6 of the Water Code expressly states that the exemption from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code applicable to the preparation and adoption of a groundwater sustainability plan (GSP) does not apply to "a project that would implement actions taken pursuant to a plan." Further, an activity qualifies as a "project" subject to CEQA if that activity is undertaken, funded, or approved by a public agency and may cause either a direct, or reasonably foreseeable indirect, physical change in the environment. (Pub. Resources Code, § 21065; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171.) It is difficult to imagine how the implementation of this management action would not cause a "direct, or reasonably foreseeable indirect, physical change" in the basin. Therefore, Sections 5.2.1.5 and 5.2.1.7 of the Plan must be amended to reflect an affirmative commitment by IWVGA to conduct an environmental review prior to the adoption of an allocation ordinance and an accordingly more realistic implementation timeline.

7. This Management Action No.1 is based on incomplete and inaccurate data and thus its implementation must be deferred until the monitoring network is better developed.

The Plan states in Section 5.2.1.7 that Management Action No.1 would be presented to IWVGA Board for consideration and approval at its June 2020 meeting. This not only is contrary to CEQA requirements, but also ignores the numerous acknowledgements throughout the Plan of serious data gaps which put into question the accuracy of the basin's sustainable yield, water budget, sustainability goal and threshold estimates upon which IWVGA relies in implementing this Management Action No. 1 and the other management actions and projects. The Plan expressly states in several sections that data tracking is fairly recent (mostly since SGMA came into effect; e.g., page ES-15) and that many of the "historical" data points are based on a single measurement recorded at the time of well installation (e.g., see page ES-16.) It is advisable that management actions, including without

limitation Management Action No. 1, be deferred until such time as better monitoring data is in put place but no earlier than the first Plan update is due to DWR, i.e., at least until 2025.

Very truly yours,

Thomas S. Bunn, III

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cc: Camille Anderson (anderson@svminerals.com)

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