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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES

Included Actions:

Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California County of Los Angeles, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California, County of Kern, Case No. S-1500-CV-254-348 Wm. Bolthouse Farms, Inc. v. City of Lancaster Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water Dist. Superior Court of California, County of Riverside, consolidated actions, Case No. RIC 353 840, RIC 344 436, RIC 344 668

Judicial Council Coordination Proceeding No. 4408

Santa Clara Case No. 1-05-CV-049053
Assigned to The Honorable Jack Komar

AGWA's REPLY TO UNITED STATES OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION

[CCP § 437c(f)]

DATE: January 27, 2014
TIME: TBD
DEPT.: TBD

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I. INTRODUCTION

The United States does not dispute that there are no triable issues of material fact in regard to the effect of the limiting language within the instruments reserving land within the Antelope Valley in order to create Edwards Air Force Base ("Edwards") and Air Force Plant 42 ("Plant 42"). The United States has produced no authority demonstrating that the effect of that limiting language does not limit its rights pursuant to those reserving instruments in the manner that the Antelope Valley Groundwater Agreement Association ("AGWA") has posited. In fact, in its Response in Opposition to AGWA's Motion for Summary Adjudication of Issues ("Opposition"), the United States hardly addresses the effect of the limiting language, and mischaracterizes California groundwater law, giving the impression of claims to outlandish quantities of groundwater.

Regardless of the United States' mischaracterization of the result of AGWA's position as to the limiting language, overlying groundwater rights vest by virtue of ownership of property overlying the Basin at the time of acquisition of such overlying property, and under principles of California water law, the overlying landowner's right is to a correlative share of the full amount of the native yield. The reservations at issue cannot withdraw a portion of the native yield from the pooled yield to which all overlying landowners' correlative rights apply, without necessarily exceeding the express limitations of the reservations.

If, as the United States claims, the federal reservations created a "prior and paramount" right to a portion of the native yield, which cannot be diminished and is exempt from the correlative limitations of the rights of all overlying landowners, then it necessarily diminished overlying landowners' vested correlative groundwater rights. Based on the undisputed facts, the United States can have no "reserved right" to native water in the Basin; rather, the United States may succeed to a correlative right like other overlying landowners within the Basin. None of the authorities discussed by the United States holds otherwise. The United States' claim that the purpose of the language "subject to valid existing rights" in the reservations was merely to acknowledge that the property was encumbered by liabilities that rested on the land at the time of

reservation would render such language meaningless, and the reservations would raise questions of takings liability.

II. ARGUMENT

A. The Reserving Instruments Explicitly Limit the Reservation to Respect Existing Valid Rights

The United States does not argue that the reservations at issue are not limited, but instead, as described below, argues that their limitations do not extend to the protection of overlying landowners' rights to the use of the entire native yield of the Basin. The United States asserts that when it reserved its land "subject to valid existing rights," the government "merely acknowledged that the United States' property was encumbered by the same liabilities that rested on the land at the time of the reservation." (Opposition, at 15:13-16.) But the United States cites only to a single case from 1881 to support this broad assertion, *French v. Gapen* (1881) 105 U.S. 509, 523, and nowhere in that case does the phrase "valid existing rights" appear. In fact, the case is inapposite here, as *French v. Gapen* involved the nature or extent of the property rights of a state in a canal and its appurtenances, and the state's right to alienate its ownership of a canal so as to defeat the property rights of others. (105 U.S. at 524-25.) The Court must interpret the words of the reservation instruments themselves subjecting them to "valid existing rights" to mean what they say. Since the plain words of the reservations themselves clearly limit the rights of the government in relation to those of landowners at the time, the United States can only avoid this qualifier by creating a legal fiction that landowners' rights to the native supply are somehow not valid, vested and existing rights within the scope of the reservations' limitations.

B. The United States Mischaracterizes California Groundwater Law and the Limitations on the Reservations at Issue

It is not possible to reconcile the reservations' explicit recognition and accommodation of "valid existing rights" with the United States' position that the Court should decide – as a matter of law – that it is entitled to a "paramount and prior" reserved water right regardless of the effect on overlying water rights in the Basin, as the vested rights of landowners would necessarily be impacted by the United States' proposed interpretation of the reserved right. If a foundational element of a reserved right is the intent expressed in the reservation, and the United States

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expressed in its relevant reservations an explicit intent to subject those reservations to "valid existing rights," then the United States cannot now ignore those pre-existing rights to the entirety of the native yield.

An overlying owner has a water right that is generally analogous to a riparian surface water right. (*United States v. 4105 Acres of Land* (1946) 68 F.Supp. 279, 288.) Riparian and overlying rights are vested property rights which are annexed to the soil and "part and parcel" of the riparian and overlying land. (*Los Angeles County Flood Control Dist. v. Abbot* (1938) 24 Cal.App.2d 728, 733.) The correlative right vests by operation of the purchase of the land alone, and remains with the land unless divested by prescription or severance. (See generally, *Wright v. Best* (1942) 19 Cal.2d 368.) Because overlying rights are based on land ownership and are not predicated on water use, (*Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001-1002), they vest with land ownership, and the rights of the Basin's overlying landowners vested under California law as private ownership in the Basin was established.

Under California law, it is well-established that overlying landowners' correlative rights extend to the entire native yield of a groundwater Basin. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 294; see also, *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 279, 299; *Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-137.) The full amount of the overlying right to the native supply of the Basin is that amount required for the landowners' "present and prospective" reasonable beneficial use upon the land. (*Mojave*, 23 Cal.4th at 1240.)

Accordingly, any federal reserved right arising from the reserving instruments at issue would be subject to all overlying rights existing at the time of the reservation, each of which entitles the owner of such property to a correlative share of the Basin's supply. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 136-37.) The United States has taken the position that its reservations created rights to water within the Basin that are "prior and paramount to the rights of all other parties." (United States' Answer to First Amended Cross-Complaint, dated April 13, 2007, at 3:19-20.) If the reservations withdrew a portion of the corresponding correlative share of groundwater in the Basin from the public domain, then the reservation necessarily violated the

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landowners' existing rights to groundwater, which is expressly prohibited by the terms of the reservations.

The United States argues that the reservation of a portion of the native yield of the Basin for military purposes, a portion that is not subject to correlative reduction, would not violate the limitation in each of the relevant reservations stating that they are subject to valid existing rights, because overliers have no vested right to a fixed amount of water under the correlative rights system. (See Opposition, at 15:10-12.) But overlying landowners' correlative rights to groundwater are vested solely by virtue of ownership of overlying property; use of water is only an exercise of the overlying right. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1251 [the establishment of an overlying right is dependent on land ownership over groundwater, and the right is *exercised* by extracting and using that water].)

The United States cites *In re Waters of Long Valley Creek Stream System v. Ramelli* (1979) 25 Cal.3d 339 for the holding that an appellant landowner has no "vested" future right to an unquantified amount of water. But that case addressed the extent to which the State Water Resources Control Board ("State Water Board") has the power to define and otherwise limit prospective riparian rights when, pursuant to the statutory adjudication procedure set forth in Water Code section 2500 et seq., it determines all claimed rights to the use of water in a stream system. (25 Cal.3d at 344.) The *In re Waters of Long Valley Creek Stream System* court did not hold that overlying rights to a correlative share of the supply are not vested, or that they are not "valid existing rights." Instead, the court held only that once riparian rights were determined via adjudication, any future claims to riparian rights based on land ownership were foreclosed because of the adjudication. (See 25 Cal.3d at 344-45.)

The United States mischaracterizes the result of AGWA's position as an attempt to "abandon the concept of reasonable use and declare that all water—whether actually used or not—was correlatively apportioned to the first private landowner and nothing was available to reserve." (Opposition, at 13:19-20.) However, unlike an appropriative right, which requires the application of water to a beneficial use as a condition precedent to the vesting of the water right, the overlying right attaches to any parcel of land if it overlies a groundwater basin, and is not

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dependent upon use. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 278-29.) Thus, the issue of reasonable use as determinative of the correlative right is a red herring.

While no overlying landowner is entitled to waste water by unreasonable use, it does not therefore follow that the United States could acquire a "prior and paramount" right to the native yield of the Basin because landowners at the time were limited by the doctrine of reasonable beneficial use. The United States' hypothetical that a "dormant" landowner should not be able to "prevent the United States from fulfilling its water needs," (Opposition, at 13:21-22), only further demonstrates the United States' mischaracterization of overlying rights, since the establishment of an overlying right does not depend upon the extent of use pursuant to the right. (*Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, 84.)

The additional case law cited by the United States to support its arguments is inapplicable in this context, and does not support the position that the reservations are not subject to existing landowner rights to the native supply of the Basin, or that landowner rights are not vested at the time of acquisition of the property. For example, the United States cites *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n* (1979) 443 U.S. 658, a case that did not concern reserved water rights at all, but in which the court only analogized fishing runs with reserved water rights as an example of a shared resource. (443 U.S. at 661.) The issue before this Court is also distinguishable from that in *Stupak-Thrall v. United States* (1994) 843 F. Supp. 327, 331 (W.D.Mich.,1994) a United States District Court opinion from Michigan.[1] *Stupak-Thrall* involved the rights of the government to enforce regulations prohibiting houseboats and sailboats on a lake, not the matter of a reservation of rights in California groundwater. As stated above, AGWA does not claim that the exercise of correlative rights cannot be limited at some point in time consistent with the policy of reasonable and beneficial use under Article X, section 2 of the California Constitution, for example. The mere fact that a correlative right may be subject to some limitation, however, does not mean that a portion of the correlative right to the overall yield may be eliminated by a federal reservation that is restricted in its scope.

[1] This decision was upheld by a three judge panel of the Sixth Circuit, (*Stupak-Thrall v. United States* (6th Cir. 1995) 70 F.3d 881), but the circuit court split 7-7 on the question after an en banc hearing (89 F.3d 1269 (6th Cir. 1996)), leaving the District Court's decision intact, but without controlling law in the Circuit.

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The United States further asserts that federal reserved rights are not subject to diminishment by correlative reduction, citing *In re General Adjudication of All Rights to Use Water in Gila River System and Source* (Ariz. 1999) 989 P.2d 739 (*Gila River*). This case, which involved an implied federal reserved right for an Indian reservation, contains no discussion of what the limitation on the reservations in this case ("subject to valid existing rights") means. The court in *Gila River* held that holders of federal reserved water rights could invoke federal law to protect their groundwater from subsequent diversion to the extent such protection was necessary to fulfill the reserved rights, even if the holders would enjoy greater protection than holders of overlying state law water rights. (*Gila River*, 989 P.2d at 748.)[2]

The *Gila River* court clarified that it was only ruling in the abstract, however, and did not opine on any particular reservation: "To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." (989 P.2d at 748.) Here, looking to the reservation instruments creating Edwards and Air Force Plant 42, the reservations themselves expressed an intent to limit the rights to respect the existing valid rights of landowners at the time, which was not at issue in *Gila River*. As the *Gila River* court only ruled in abstract, its decision does not inform the specific limitations of the reservation instruments in this case.

Accepting the United States' claim to have excepted a portion of the Basin's native yield from the correlative rights of overlying landowners would embed a serious constitutional issue in the Court's final judgment. Over 80 years ago, the United States Supreme Court held that, where the United States requisitions for military purposes water subject to a private party's preexisting water right, it must pay takings compensation. In *International Paper Co. v. United States* (1931) 282 U.S. 399, the Court held that the United States was liable for a taking where, as part of its wartime efforts, it requisitioned all water flowing in a power company's canal, directed that company to use all of that water to generate electricity for particular users and denied water to a paper company that previously had taken water from the canal. (*Id.*, at 404-406.)

[2] The United States' reliance on *United States v. Rio Grande Dam & Irrig. Co.* (1899) 174 U.S. 690 to make this point is inapposite, as the case merely affirmed that New Mexico could legislate to destroy the right of the United States, as the owner of lands bordering the Rio Grande, to the continued flow of its waters. (174 U.S. at 703.)

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The United States seeks to distinguish *International Paper* on the grounds that the case involved a fixed and defined right to a specific flow or water, which the United States distinguished from an overlying landowner's correlative rights, since those rights were never "fixed" and quantified. (Opposition, at 15:25-16:2, n. 11.) But as explained above, the fact that the quantity of correlative rights is not "fixed" at a certain amount does not mean such landowner rights are not "vested" rights that may be subject to takings claims. The United States cannot constitutionally take the water available to overlying rights holders for its own purposes without paying just compensation. (*Dugan v. Rank* (1963) 372 U.S. 609, 624-626 (United States dam impounds water subject to riparian rights); *Tehachapi-Cummings*, 49 Cal.App.3d, at 1001-1002 (riparian and overlying rights are analogous).)

III. CONCLUSION

For the reasons stated in AGWA's Motion for Summary Adjudication and in this response to the United States' Opposition, the Court should grant AGWA's Motion for Summary Adjudication. The Court may rule as a matter of law that the reservations creating the federal rights claimed are "subject to existing valid rights" of overlying landowners' rights to the correlative supply of the Basin's entire native yield.

Dated: January 3, 2013

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PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 21 E. Carrillo Street, Santa Barbara, California 93101.

On January 3, 2014, I served the foregoing document described as:

AGWA's REPLY TO UNITED STATES OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION

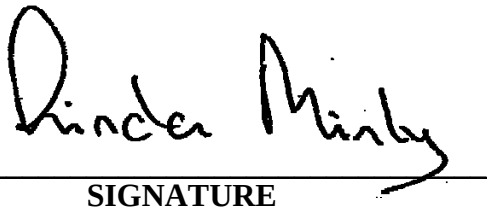
on the interested parties in this action.

By posting it on the website by 5:00 p.m. on January 3, 2014.

This posting was reported as complete and without error.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed in Santa Barbara, California, on January 3, 2014.



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