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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550(b))

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. Lancaster, Diamond Farming Co. v. Palmdale Water Dist., Superior Court of California, County of Riverside, Case No. RIC 353 840, RIC 344 436, RIC 344 668

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4408

Case No. BC 391869
Assigned to Hon. Jack Komar

(Santa Clara Case No. 01-05-CV-049053)

LANDOWNERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE UNITED STATES' MOTION *IN LIMINE* TO ESTABLISH LEGAL ENTITLEMENT TO A FEDERAL RESERVED RIGHT AND TO LIMIT THE SCOPE OF EVIDENCE NECESSARY AT TRIAL

Date:	May 13, 2013
Time:	To be determined
Dept.:	To be determined
Judge:	Hon. Jack Komar
Filing Date:	July 11, 2005 (coordination)
Trial Date:	May 28, 2013 (Phase IV)

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INTRODUCTION

The United States' Motion in Limine Concerning Reserved Water Right Claim seeks to reshape its burden of proof to establish the fact and amount of its claimed Federal Reserve right. The United States' Motion seeks to avoid the United States' burden of proof concerning the amount of water available for the purposes of the reservation, the purposes of the reservations themselves, and the minimum amount of water necessary to serve that purpose. The Motion also improperly seeks to accumulate all of such reservations into one "general" reservation for military purposes. The Court should not allow the United States, through its Motion in Limine, to ignore key limitations on its acquisition of property and water under its Federal Reserved right reservations, limitations to protect valid existing rights which were put in place to prevent uncompensated takings of vested property interests at the time of reservation. To the extent reserved rights do not apply to lands that the United States acquired from others and the legal authority cited in the Motion is inconsistent with precedent concerning the water right priorities of serial federal reservations, the Court should deny the Motion in its entirety.

STANDARD FOR MOTION IN LIMINE

A motion in limine is one made at the threshold of trial to exclude evidence thought to be inadmissible or prejudicial by the moving party. *FMC Corp. v. Plaisted & Cos* (1998) 61 Cal.App.4th 1132, 1168. Although not expressly authorized by statute, the considerations of a motion in limine is recognized as part of the trial Court's inherent power to administer justice and to conduct the proceedings efficiently and effectively. Clemens *v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451; *Lemer v. Boise Cascade, Inc.* (1980) 107 Cal.App.3d 1, 9-12.

The purpose of a motion in limine is to "avoid the obviously futile attempt to 'unring the bell' when highly prejudicial evidence is offered and then stricken at trial." *Clemens, supra*, 193 Cal.App.3d at 451; *Hyatt v. Sierra Boat Company* (1978) 79 Cal.App.3d 325, 337. Motions in limine also serve to permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial and to minimize sidebar conferences and

disruptions. *Kelly v. New W. Fed. Sav.* (1996) 49 Cal.App.4th 659, 670. Finally, by resolving critical evidentiary issues at the outset, they enhance efficiency of the trial process. *Ibid.* The scope of evidence subject to a motion in limine includes any evidence which could be objected to at trial. *Clemens*, *supra*, 93 Cal.App.3d at page 451; see also Evidence Code section 352.

> The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. (Citation) The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the [court]." (Citation) [¶] Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements. [Citations omitted.] [Emphasis added.] *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669-670.

OBJECTION TO MOTION IN LIMINE

The identified landowners hereby object to the United States' Motion in Limine on the grounds that it is a disguised dispositive motion otherwise provided for by the Code of Civil Procedure. The Court need only look to the relief sought as set forth on page 1, commencing with line 14, and concluding on page 2 at line 5 of the United States' motion to clearly understand that the motion does not seek to challenge, test or otherwise exclude inadmissible evidence, but is intended to instead modify the United States burden of proof, seek a pretrial determination of an ultimate fact and issue, i.e., the claimed Federal Reserved right, without admitted evidence, tested upon cross-examination, and resolve through the process of trial. As made clear by the Court in *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 158, the "motion in limine" of the United States is an impermissible abuse of the process contemplated and permitted by a permissible motion in limine.

The United States' Motion in Limine stands the purpose of a "Motion in Limine" upon its head. Rather than test the admissibility of evidence which is anticipated would be offered by an opposing party, the United States instead, seeks to reshape its burden of proof to establish the fact and amount of its claimed Federal Reserve right. The motion is itself a not transparent effort to secure the relief contemplated by a motion pursued pursuant to Code of Civil Procedure section 437c. The motion circumvents the temporal and procedural limitations and burden shifting requirements of that statutory scheme. "What in limine motions are not designed to do is to replace the dispositive motions prescribed by the Code of Civil Procedure." As noted in the Court in *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1593.

> "Appellate courts are becoming increasingly wary of this tactic. (Citation). 'To have the sufficiency of the pleading or the existence of triable issues of material fact decided in the guise of a motion in limine is a perversion of the process.' The disadvantages of such shortcuts are obvious. They circumvent procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial. (Citation). Adherence to the statutory processes would avoid all these risks. Furthermore, these irregular procedures can result in unnecessary reversals." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1594).

STATEMENT OF FACTS

A. The United States' Aggregated Reserved Right Claim.

According to its February 22, 2013 revised discovery responses, the United States claims, in this action, an aggregated federal reserved right of 11,683 acre-feet per year. (United States' Revised Response to Court's Discovery Order for Phase IV Trial, p. 9:7 (posted Feb. 22, 2013)(on-line at www.scefiling.org/document/document.jsp?documentId=77536) ("Revised U.S. Discovery Response").) This amount is over ten percent of the basin's total safe yield of 110,000 acre-feet per year, as determined by the Court after the Phase Three trial. (Statement of Decision Phase Three Trial, pp. 9-10, dated July 13, 2011 (on-line at www.scefiling.org/document/document.jsp?documentId=49786).) The United States' federal reserved right claim

includes 10,717 acre-feet per year for Edwards Air Force Base and 966 acre-feet per year for Air Force Plant 42. (Revised U.S. Discovery Response, p. 9:10-20.)

The United States' motion seeks to limit the evidence necessary for it to win its claimed reserved water right to "(a) proof of federal ownership; (b) demonstration of the military purposes at EAFB [Edwards Air Force Base] and the [Air Force Plant] 42; and (c) a showing of the amount of water necessarily reserved for current and future military purposes." (Notice of Motion and Motion *In Limine* To Establish The United States' Legal Entitlement To A Federal Reserved Water Right And To Limit The Scope Of Evidence Necessary At Trial ("U.S. Motion"), pp. 2-3.) The motion seeks to establish that the United States is legally entitled to a single reserved water right that does not depend on any other party's water rights or water use and is defined solely by the United States' projected need for water. The motion thus seeks to establish a single reserved water right with a super-priority over all other water rights.

B. The United States' Eight Separate Reservations.

According to the United States' discovery responses, it reserved from the public domain property relevant to this case in eight separate administrative actions between 1934 and 1955.

The first reservation, accomplished via Executive Order No. 6588, dated February 6, 1934, reserved approximately 132 sections of land – 84,480 acres – "as a bombing and gunnery range" and stated it was "subject to valid existing rights." (USAF001653.)[1]

Second, Executive Order No. 6910, dated November 26, 1934, reserved "all of the vacant, unreserved and unappropriated lands of the public domain" within 12 Western states, including California, temporarily "pending determination of the most useful purpose to which such land may be put" [under a 1934 act], "and for conservation and development of natural resources." (USAF001654-USAF001655.) The executive order also stated it "is subject to existing valid rights." (USAF001655.)

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[1]Documents with the stamp "USAF" were produced by the United States with its discovery responses and are available on the Court's Web site at www.scefiling.org/filingdocs/289/58180/usdoj/. Pages USAF001653-USAF001658, USAF001661, USAF001663-USAF001664 and USAF001666 are attached to the Declaration of Bob Joyce filed herewith.

Third, Executive Order No. 7707, dated September 11, 1937, amended Executive Order No. 6910 and reserved approximately 116 sections of land – 74,240 acres – which the order stated were "temporarily withdrawn from settlement, location, sale, or entry, and reserved for use of the War Department for military purposes." (USAF001656.) The order states that it is "[s]ubject to . . . all valid existing rights . . . ." (USAF001656.)

Fourth, Executive Order No. 7740, dated November 15, 1937, amended Executive Order No. 6910, reserved 480 acres "for use of the War Department for military purposes" and stated it was "[s]ubject . . . to all valid existing rights . . . ." (USAF001657.)

Fifth, Executive Order No. 8450, dated June 26, 1940, superseded Executive Orders Nos. 6588, 7707 and 7740, reserved 245 sections of land – 156,800 acres – "for the use of the War Department as a bombing and gunnery range" and stated that the reservation was "subject to valid existing rights." (USAF001658.)

Sixth, Public Land Order 613, dated October 19, 1940, reserved 564.46 acres "for use of the Department of the Air Force in connection with an air force base" and stated it was "[s]ubject to valid existing rights." (USAF001661.)

Seventh, Public Land Order 646, dated May 10, 1950, reserved 20,901.82 acres "for use of the Department of the Air Force as an air force base" and stated that it was "[s]ubject to valid existing rights." (USAF001663-1664.)

Eighth, the 1955 Public Land Order 1126 reserved 120 acres "for use of the Department of the Air Force for military purposes in connection with Edwards Air Force Base" and stated that it was "[s]ubject to valid existing rights." (USAF001666.)

C. The United States' Inclusion Of Acquired Lands In Property Asserted As Basis Of Its Claimed Reserved Right.

The United States' motion indicates that its claimed reserved right would apply to about 125,000 acres that it acquired from others, including overlying landowners. (Memorandum In Support Of Motion In Limine To Establish The United States' Legal Entitlement To A Federal Reserved Water Right And To Limit The Scope Of Evidence Necessary At Trial, pp. 5, 9 ("U.S. Memorandum").) Edwards Air Force Base ("Edwards") covers more than 307,000 acres

and Air Force Plant 42 ("Plant 42") includes approximately 5,800 acres. (Revised U.S. Discovery Response, pp. 13:4-5, 16:1.)

ARGUMENT

I. The Court Should Deny The United States' Motion Because It Is Inconsistent With The Reservations Themselves, A Related Act Of Congress And Authority Concerning Reserved Rights' Priorities

When the United States reserves property from the public domain for a specific purpose, any related water rights derive from the United States's implied intent to appropriate available water: "The implied-reservation-of-water doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more . . . ." (*Cappaert v. United States* (1976) 426 U.S. 128, 141.) That doctrine's fundamental basis is the recognition that the United States could not have intended to reserve its property from the public domain for a specific purpose without reserving enough water to implement that purpose. (*Winters v. United States* (1907) 207 U.S. 564, 575-578; *Arizona v. California* (1963) 373 U.S. 546, 598-601; *United States v. New Mexico* (1978) 438 U.S. 696, 699-700.) In *Cappaert, supra,* the United States Supreme Court stated the issue to be determined as follows:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

(*Id.* at p. 139.)

The United States' claimed super-priority and aggregated reserved right, however, is inconsistent with the intent explicitly stated in its reservations, with a related Act of Congress and applicable United States Supreme Court decisions.

A. The Court Should Deny The United States' Motion Because It Is Contrary To Each Reservation's Statement That Is "Subject To Valid Existing Rights."

As discussed in the Statement of Facts (see pp. 2-3 above), each of the United States' eight separate reservations stated that it was "subject to . . . valid existing rights." (USAF001653-001658, 001661, 001663-001664, 001666.) The United States' present motion does not mention this key element of each of its reservations. It is not possible to reconcile the

United States' explicit recognition and acceptance of "valid existing rights" in its reservations with its current position that the Court should decide – *without a trial* – that it is entitled to a reserved water right that has priority over all other water rights in the basin. If a key basis for a reserved right is the intent that the United States expressed in its reservation and the United States expressed, in its relevant reservations, an explicit intent to subject those reservations to "valid existing rights," then the United States must prove at trial what those pre-existing rights were and how its claimed reserved water right would be consistent with those pre-existing rights. This requirement is crucial in groundwater basins, where California law dictates that overlying landowners hold correlative water rights to use the basin's available water supply and other parties' rights apply to surplus water. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-1241 ("*Mojave*").) The Court therefore should deny the United States' motion so that the United States must prove how its claimed reserved right would be consistent with the preexisting "valid rights" to which its reservations are explicitly subject.

Moreover, accepting the United States' claim for super-priority 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, in prosecuting World War I, 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 pp. 404-406.) The language in all eight of the United States' reservations subjecting them to "valid existing rights" should ensure that the United States would not face massive takings liability. Accepting the United States' reserved-right claim, however, effectively would requisition 10% of the basin's safe yield for the United States' military purposes. If the Court were to grant the United States' pending motion, that decision would be subject to a constitutional challenge as an uncompensated taking similar to the taking

that occurred in *International Paper, supra.* The Court should avoid this constitutional problem by respecting the eight reservations' explicit recognition of "valid existing rights."

B. The Court Should Deny The United States' Motion Because It Is Inconsistent With The Eight Reservations' Different Statements Of Purpose And Related Legislation.

The Court should respect the reservations' explicit statements of their various purposes and decline the United States' invitation to amalgamate them into a single "military" purpose. In *United States v. New Mexico, supra*, the United States Supreme Court has emphasized the importance of a federal reservation's specific purposes, holding that the reserved right applies only to the primary purpose and not secondary purposes. (*United States v. New Mexico, supra,* 438 U.S., at p. 700-702 (emphasis added); see also *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 459-467 (United States can hold riparian rights in streams running through federal reservations to serve their secondary purposes)("*Hallett Creek*").) As discussed above (pp. 4 and 5), the United States' eight reservations state several different purposes, with over 150,000 acres being reserved in 1940's Executive Order 8450 "as a bombing and gunnery range." (USAF001658.) This purpose presumably requires little water.

The United States' motion, however, asserts that its eight reservations and their different purposes should be amalgamated to support a single reserved right that supports a general "military purpose." (U.S. Memorandum, pp. 18-22.) This argument not only fails to explain why the United States would state several different purposes within a limited number of years for multiple separate reservations, but also does not reflect the actual terms of the 1935 Act of Congress on which the United States relies.

The United States cites the Act of August 12, 1935, but that Act shows that the United States' arguments are incorrect. The Act's sections one and two authorized the Secretary of War to establish "the location of such additional permanent Air Corps stations and depots as he deems essential . . . for the effective peace-time training of the General Headquarters Air Force and the Air Corps components of our overseas garrisons" and to acquire property for those stations and depots. (49 Stat. 610-611.) The Act's section three then authorized the Secretary to "construct, install, and equip" various "buildings and utilities," including "water." (49 Stat.

611.) The Act's section three, however, then also stated the following: "*The Secretary of War is further authorized to acquire by gift, purchase, lease, or otherwise . . . such bombing and machine-gun ranges* as may be required for the proper practice and training of tactical units." (49 Stat. 611 (emphasis added).) In other words, the 1935 Act of Congress that the United States cites actually *codified* the distinction between air bases and bombing and gunnery ranges that is reflected in the eight reservations here. The United States' motion, however, seeks to erase this distinction. That motion therefore is inconsistent with the United States Supreme Court's decisions that emphasize a close examination of individual reservation's purposes in deciding what reserved water rights may be associated with them.

The order from the Superior Court of Maricopa County, Arizona concerning Fort Huachuca that the United States cites further shows the importance of specific reservations and indicates that the United States' motion should be denied. In that order, the Arizona court indicates that the reservations were for "military purposes," quoting that phrase several times. (Declaration In Support Of Motion *In Limine* To Establish The United States' Legal Entitlement To A Federal Reserved Water Right And To Limit The Scope Of Evidence Necessary At Trial, exh. 19, p. 2 (http://www.scefiling.org/document/document.jsp?documentId=79070).) This focus on a reservation's specific language shows that this Court must do the same and must credit each reservation's statement that it was "subject to valid rights." The Arizona court also decided that it could not provide the parties with further guidance concerning the quantity of any reserved right to be determined later by the special master. (*Id.* at pp. 2-3.) This Court similarly should not truncate its consideration of the United States' claimed right by granting its motion and establishing – *before trial* – not only the reserved right's existence, but also its super-priority and its accumulation of water demands on both lands that the United States acquired from others and lands that it reserved in eight separate reservations.

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C. The Court Should Deny the United States' Motion Because It Is Inconsistent With Precedent Concerning The Water-Right Priorities Of Serial Federal Reservations.

The United States Supreme Court has emphasized the importance of treating each reservation separately, holding that they have distinct water-right priorities. In *United States v. New Mexico, supra*, the Court discussed the effect of a 1960 reservation on water rights under an original 1897 reservation and stated that intervening water rights would be superior to the later reservation: "Even if the [later 1960 reservation] expanded the reserved water rights of the United States, of course, the rights would be subordinate to any appropriation of water under state law dating to before 1960." (*United States v. New Mexico, supra*, 438 U.S., at pp. 706-708, 713 fn. 21.) Similarly, in *Cappaert*, the Court described a reservation's water-right effect:

> [T]he Government, by implication, reserves *appurtenant water then unappropriated* to the extent needed to accomplish the purpose of the reservation. In so doing, *the United States acquires a reserved right in unappropriated water which vests on the date of the reservation* and is superior to the rights of future appropriators.
>
> (426 U.S., at p. 138 (emphasis added).)

For example, in *Cappaert,* the Court explained how the private landowner parties in that case had not obtained groundwater rights under Nevada law until 17 years after President Truman's 1952 designation of Devil's Hole as part of a national monument. (*Id.* at p. 139 fn. 5.)

These rules concerning individual reservations' water-right priorities are necessary because the reserved right can have very significant impacts on other water users: "When . . . a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." (*United States v. New Mexico, supra*, 438 U.S., at p. 705.) That logic applies here, where this Court already has held that the basin is overdrafted. (Statement of Decision Phase Three Trial, pp. 5-6, dated July 13, 2011 (on-line at www.scefiling.org/document/document.jsp?documentId=49786).)

The United States' motion, however, seeks to render this law concerning the reserved right's priority irrelevant by claiming a right that has priority over all other rights in this basin. (U.S. Memorandum, pp. 22-24.) The United States' theory is that the United States Supreme

Court's holdings concerning the reserved right's priority relative to other water rights are irrelevant. It argues that the Court's holdings that the right applies only to "unappropriated water" are irrelevant in relation to California groundwater rights because those rights are correlative and not distributed by appropriative priority. (*Id.* at pp. 22-24.) It also argues that its sovereign authority over its property grants it the right to control whatever water is available to that property. (*Id.* at pp. 16-18.) These arguments are inconsistent with governing authority.

The California Supreme Court's most recent decision concerning groundwater rights describes that system of rights as follows:

> An overlying right, analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto . . .
>
> In contrast to owners' legal priorities, we observe that the right of the appropriator depends on the actual taking of water . . . Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed. When there is surplus, the holder of prior rights may not enjoin its appropriation. Proper overlying use, however, is paramount and the rights of an appropriator, being limited to the amount of the surplus, must yield to that of the overlying owner in the event of a shortage, unless the appropriator has gained prescriptive rights . . . .

(*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-1241 (citations, quotations and footnotes omitted)("*Mojave*"); see also *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1000-1001.)

A reserved right fits into California groundwater law as described in *Mojave* because that law provides for demonstrations of unappropriated water, just as in the appropriation systems that the United States claims are so different from this case. (U.S. Memorandum, pp. 22-24.) The United States Supreme Court has emphasized the need to integrate the reserved right into state water law (*United States v. New Mexico, supra*, 438 U.S., at pp. 698-702), so this Court must do so under the rules summarized in *Mojave.* California law therefore does not indicate that this Court must grant the United States a super-priority over all other rights in this basin because its claimed right somehow cannot be integrated with those other rights.

Similarly, federal decisions that the United States cites to support its arguments actually contradict them. (See U.S. Memorandum, pp. 14-15, 17 (citing *California v. United States* (9th Cir. 1956) 235 F.2d 647, and *United States v. Anderson* (9th Cir. 1984) 736 F.2d 1358).)

California v. United States concerned the water rights of Camp Pendleton, a military base located along the Santa Margarita River that the United States assembled through a combination of a reservation and the acquisition of private property through condemnation and purchase. (*California v. United States, supra*, 235 F.2d, at p. 652.) The Ninth Circuit held that, while the United States had sovereign authority over the base, its "sovereign rights" did not govern the allocation of water rights in the river running through the base:

> The government, as regards all claimants to water outside the enclave, is not in the position of sovereign, but in the position of a lower riparian which is compelled to make beneficial use within the watershed and for other than proper riparian uses must show an appropriation according to law.

(*Id.* at p. 656.)

Because the Ninth Circuit decided that Camp Pendleton's water rights were governed by correlative riparian-right rules, not a "sovereign" priority, *California v. United States* refutes the United States' argument that California's correlative overlying-right rules somehow grant its claimed reserved right a super-priority over all other rights in the basin.

In *Anderson,* the Ninth Circuit held that, where lands had been part of an initial reservation for a Native American tribe, had been conveyed into separate ownership and then had been reacquired by the tribe, but had lost their water rights before reacquisition, those lands held water-right priorities only as of the date that the tribe reacquired them, not the date of the initial reservation. (*Anderson, supra*, 736 F.2d, at p. 1363.) *Anderson* demonstrates that lands reserved separately do not generate an aggregated reserved right that benefits from the most senior priority possible. The United States acknowledges that *Anderson* resulted in reserved rights with separate priorities (U.S. Memorandum, p. 15, fn. 12), but does not reconcile the contradiction between that result and its claimed super-priority and aggregated reserved right.

These Ninth Circuit decisions indicate that a reserved right must be integrated with water rights that exist under state law and does not float above them. This conclusion is

consistent with the United States Supreme Court's guidance about serial federal reservations' priorities in *United States v. New Mexico, supra*, 430 U.S., at p. 713 fn. 21. This conclusion means that the Court should not lump all of the United States' eight distinct reservations into one aggregated reserved right with a super-priority over all other water rights in the basin and therefore should deny the United States' pending motion.

II. The Court Should Deny The United States' Motion Because Reserved Rights Do Not Apply To Lands That The United States Acquired From Others.

Property that the United States acquires from others necessarily was not reserved from the public domain by the United States. Instead, that property probably most frequently was severed from the public domain into the ownership of someone other than the United States, via a land patent or similar conveyance. (See *Moore v. Smaw* (1861) 17 Cal. 199, 224-226.) Such property also could have been part of a Mexican rancho that was conveyed into private ownership even before California became part of the United States. (See *id.* at pp. 211-212 (describing Mexican land grant at issue).) Any time the United States acquires property from others, the key factor defining a reserved right – the reservation – does not exist. Air Force employees recognized in a 2000 Air Force Law Review article that reserved water rights have not been extended to property the United States acquires from others: "The Federal Reserved Rights Doctrine has not been extended to apply to acquired land." (Lt. Col. Michael J. Cianci, Jr. et al., "The New National Defense Water Right – An Alternative to Federal Reserved Water Rights For Military Installations" (2000) 48 A.F.L. Review 159, 169 ("Cianci").) The Court should follow this logic by denying the United States' motion, for several reasons.

A. Extending The Reserved Right To Lands The United States Acquired From Others Would Contradict A Fundamental Rule Of Property Law.

"It is axiomatic that a deed cannot convey more than is owned by the grantor." (3 Miller & Starr, *Cal. Real Estate* (3d ed. 2011) § 8.58, p. 8-161; see *Stanley v. Shierry* (1958) 158 Cal.App.2d 373, 376; *Qualls v. Lake Berryessa Enterprises, Inc.* (1999) 76 Cal.App.4th 1277, 1284.) The landowners from whom the United States acquired the more than 100,000 acres that its motion now seeks to cover with an aggregated, super-priority reserved right of

11,683 acre-feet per year did not hold any such rights. If those lands overlied the Antelope Valley groundwater basin, those landowners presumably held a correlative overlying right to share in using the basin's water. (See *Mojave*, *supra*, 23 Cal.4th, at pp. 1240-1241.) Those landowners could not have conveyed to the United States any water rights with priorities senior to their own rights. The United States does not attempt to explain how those landowners could have done so. This omission in itself requires the Court to deny the United States' motion.

B. Extending The Reserved Right To Acquired Land Would Contradict United States Supreme Court Decisions Interpreting The Desert Land Act Of 1877.

In the 1860s and 1870s, Congress enacted laws to adjust the United States' land-settlement laws to account for the arid conditions in the American West. (See *California Oregon Power Co. v. Beaver Portland Cement Co. et al.* (1935) 295 U.S. 142, 153-156 ("*California Oregon*"); *Leo Sheep Co. v. United States* (1979) 440 U.S. 668, 670-677.) The Desert Land Act of 1877 was one such law and authorized private acquisition of federal land through a process that involved applying water to it. (See 43 U.S.C. § 321; *Hallett Creek, supra*, 44 Cal.3d, at pp. 462-463.) That act, however, limits the rights to water on that land:

> That the right to the use of water by the person so conducting the same, on or to any tract of desert land . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.
>
> (43 U.S.C. § 321.)

The United States Supreme Court has held that the Act severed the water from the land available under the Act: "If this language is to be given its natural meaning . . . it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." (*California Oregon, supra*, 295 U.S., at p. 158; see also *Hallett Creek, supra*, 44 Cal.3d, at pp. 463-466.) The Court further held that the Act also left the available water subject to the laws of the states in which public domain lands were located. (*California Oregon*, *supra*, 295 U.S., at p. 162; see also *Anderson, supra,* 736 F.2d, at pp. 1362-1363 ("The Supreme Court

has determined that a homesteader acquires no federal water rights incident to the transfer of public lands into private ownership").) The Court has integrated these rules with the reserved-right law by holding that the Act does not apply to federally-reserved lands. (See *Cappaert, supra*, 426 U.S., at p. 144-145; *Hallett Creek, supra*, 44 Cal.3d, at pp. 468-469.)

The fact that the Desert Land Act severed land ownership from water rights *under federal law*, however, does not mean that the states were prohibited from recoupling them *under state law*. California of course decided that, *under state law*, owning land in itself involves certain water rights including overlying rights. (See *Mojave, supra*, 23 Cal.4th, at pp. 1240-1241.) Other states left land and water rights decoupled. (See, e.g., *Cappaert, supra*, 426 U.S., at p. 140 fn. 5 (describing water-right acquisition under Nevada law).)

Allowing the federal reserved right to cover lands that the United States acquired from others would contravene the Desert Land Act by allowing the United States to essentially void its past decisions to allow state law to govern water rights associated with private lands and recover the priority it forswore under that Act in order to encourage the development of the West. This result would not only be inequitable, but it also would erase the bright-line division between reserved lands and lands that the United States subjected to the Desert Land Act.

C. Extending The Reserved Right To Properties That The United States Acquired From Others Could Make Moot Key Limits On That Right.

As discussed above (p. 14), the United States Supreme Court has recognized that the reserved right must be integrated carefully into Western water law because of that right's potential to impose "a gallon-for-gallon reduction" on others' ability to use scarce water resources. (*United States v. New Mexico, supra*, 438 U.S., at p. 705.) Granting the United States' motion and allowing the reserved right to cover the United States' acquired land could make moot the rules that the Court created to achieve this integration.

First, the distinction between a reservation's primary and secondary purposes could collapse. The United States Supreme Court has established the distinction between a reservation's primary and secondary purposes as key in determining any such right's volume

(*United States v. New Mexico*, *supra*, 438 U.S., at p. 702), but the United States' argument could make the distinction unimportant because the reservation could be unimportant.

Second, the limitation on the volume of water reserved to serve a reservation's primary purposes could collapse because the United States could continually add to a reservation and its water demands. The United States' pending motion demonstrates this risk. According to its memorandum, after its initial 1934 reservation of "a seven-by-fourteen-mile strip of public land to be used as a bombing and gunnery range," the United States then purchased or condemned about 120,000 acres – about 187 square miles – from others. (U.S. Memorandum, pp. 4-5.) Later, in the 1950s, the United States created Air Force Plant 42 entirely on about 5,000 acres acquired from others. (U.S. Memorandum, p. 9.) Now the United States seeks to aggregate all of this property and all of the property that it reserved from the public domain under a single super-priority reserved right. There is nothing in the United States' motion that indicates what rules would limit its acquisition of further property and water under its reserved right.

III. The Court Should Deny The United States' Motion Because It Does Not Demonstrate That All Of The Property For Which The United States Claims A Reserved Right Is Within The Basin.

"The party alleging the existence of water rights has the burden of proof." (*Cal. Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 737.) While overlying landowners can satisfy this burden simply by proving their land ownership (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 298), the matter is more complicated for other water rights. For a reserved right, the burden of proof includes the burden of proving that the reserved property overlies the relevant basin because the United States Supreme Court has held that the right applies to "*appurtenant* water then unappropriated to the extent needed to accomplish the purpose of the reservation." (*Cappaert, supra*, 426 U.S., at p. 138 (emphasis added); see also *id.*, at p. 147; *United States v. New Mexico*, *supra*, 438 U.S., at pp. 698-700.)

The United States' motion, however, seeks to limit its burden of proof at trial to elements that include only "(a) proof of federal ownership; (b) demonstration of the military purposes at EAFB [Edwards Air Force Base] and the [Air Force Plant] 42; and (c) a showing of the amount of water necessarily reserved for current and future military purposes." (U.S.

Motion, pp. 2-3.) In other words, the United States' claimed reserved right apparently would allow the United States to export any amount of water covered by that right from the basin for any "military" use notwithstanding the potentially severe impact on overlying landowners and other water users within the basin. The United States argues its desired limitations on its burden of proof are justified partly because it has sovereign authority over the property it owns (U.S. Memorandum, pp. 16-18), but its claimed right would extend far beyond federal property to control of the basin's water supply for the benefit of not only the federal property within the basin, but also apparently federal property outside of the basin. The Court should not allow such a result, which would contradict United States Supreme Court precedent limiting reserved rights to water "appurtenant" to reserved land.

CONCLUSION

For the reasons stated above, the signatory landowner parties respectfully request that the Court deny the United States' motion *in limine.*

Dated: April 19, 2013

Respectfully submitted,

LeBeau – Thelen, LLP

By: _____

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PROOF OF SERVICE

ANTELOPE VALLEY GROUNDWATER CASES
JUDICIAL COUNCIL PROCEEDING NO. 4408
CASE NO.: 1-05-CV-049053

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is: 5001 E. Commercenter Drive, Suite 300, Bakersfield, California 93309. On April 19, 2013, I served the within **LANDOWNERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE UNITED STATES' MOTION IN LIMINE TO ESTABLISH LEGAL ENTITLEMENT TO A FEDERAL RESERVED RIGHT AND TO LIMIT THE SCOPE OF EVIDENCE AT TRIAL**

■ **(BY POSTING)** I am "readily familiar" with the Court's Clarification Order. Electronic service and electronic posting completed through www.scefiling.org ; All papers filed in Los Angeles County Superior Court and copy sent to trial judge and Chair of Judicial Council.

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: **Department 1**
(213) 893-1014

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Appellate & Trial Court Judicial Services
(Civil Case Coordinator)
Carlotta Tillman
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Fax (415) 865-4315

☐ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of business.

☐ **(OVERNIGHT/EXPRESS MAIL)** By enclosing a true copy thereof in a sealed envelope designated by United States Postal Service (Overnight Mail)/Federal Express/United Parcel Service ("UPS") addressed as shown on the above by placing said envelope(s) for ordinary business practices from Kern County. I am readily familiar with this business' practice of collecting and processing correspondence for overnight/express/UPS mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service/Federal Express/UPS in a sealed envelope with delivery fees paid/provided for at the facility regularly maintained by United States Postal Service (Overnight Mail/Federal Express/United Postal Service [or by delivering the documents to an authorized courier or driver authorized by United States Postal Service (Overnight Mail)/Federal Express/United Postal Service to receive documents].

■ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that the foregoing was executed on April 19, 2013, in Bakersfield, California.

Lequetta Hansen
LEQUETTA HANSEN