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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**	Judicial Council Coordination Proceeding No. 4408 [Assigned to the Honorable Jack Komar, Judge Santa Clara County Superior Court, Dept. 17] Santa Clara Court Case No. 1-05-CV-049053 UNITED STATES' RESPONSE TO LANDOWNERS MOTION *IN LIMINE* TO ESTABLISH UNITED STATES' BURDEN OF PROOF FOR ANY RESERVED WATER RIGHTS

The Landowners group has moved the Court for an order requiring the United States to prove the amount of "surplus water" available at the time of each reservation or land acquisition, prove how much water is needed to fulfill the purpose of the reservation of each individual parcel reserved, and prove the "primary purpose" for each reservation. The Landowners also assert that the United States cannot assert a single right covering the entirety of Edwards Air

Force Base (EAFB) and a single right for entirety of Air Force Plant 42. The Landowners Motion asserts that reserved water rights may not exist for acquired lands. Finally, the Landowners assert that the United States must prove that the reserved land overlies the Antelope Valley Groundwater Basin, and that the United States has the burden of proving the amount of water necessary to fulfill the purpose of the reservation and acquisition. While the United States does not dispute that it must demonstrate that its land overlies the groundwater basin, or that it must demonstrate "the amount of water necessary to fulfill the purpose of the reservation, no more," *Cappaert v. United States*, 426 U.S. 128, 141 (1976), the reservations and acquisitions, the Landowners are in error in all other respects. The basis for a reservation of water for acquired lands was dealt with in the United States' Memorandum in Support of Motion *In Limine*, and will not be further addressed herein. *See* United States' 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 at 12-18.

SUMMARY OF ARGUMENT

In a riparian system, the United States' reservation of water is not dependent on the existence of "surplus water" at the time of a particular reservation or acquisition. The landowners misunderstand the nature of federal reserved water rights, and thus err in arguing that the United States must demonstrate the existence of appropriable surplus water at the time of each reservation or acquisition of land. Similarly, the Landowners incorrectly assert that the United States may not assert a single reserved water right for EAFB and another for Plant 42, but instead must demonstrate a series of discrete appropriations. Because federal reserved water rights are in the nature of an apportionment of a shared resource, and not merely a state law based appropriation, the United States may assert a single claim for each enclave, and need not

demonstrate the existence of surplus water at the time of each acquisition. The notion of priority has no meaning in the context of this riparian system. Landowners' attempt to ascribe state law based limitations onto the United States' claims fails.

ARGUMENT

A. Federal Reserved Water Rights are an Apportionment of Water Not an Appropriation Under State Law.

In the context of the riparian/correlative system applicable to the Antelope Valley Aquifer, the federal reserved water rights create a federal right to a reasonable share of the water as defined by the needs to fulfill the purpose of the enclave. The Supreme Court has suggested that federal reserved water rights can be conceptualized as an apportionment of water. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 684 (1979). *Fishing Vessel* arose in the context of tribal rights to a "fair share" of fishing runs – which could be analogized to reasonable use of groundwater in California's riparian system. *Id*. In concluding that the treaty did not allow either treaty or non-treaty fishermen to deprive the other of a "fair share", the Court analogized to federal reserved water rights. Reserved water rights, the Court stated, "were merely implicitly secured to the Indians by treaties reserving land – treaties that the Court enforced by ordering an apportionment to the Indians of enough water to meet their subsistence and cultivation needs." *Id*. In other words, federal reserved water rights are in the nature of an apportionment of a shared resource.

B. Federal Reserved Water Rights are, in substantial part, a unique quasi-riparian water right with a federal law nexus.

The federal reserved water rights doctrine, first set forth in *Winters v. United States*, 207 U.S. 564 (1908), was originally framed in terms of riparian use rights. Carl Rasch, the Assistant U.S. Attorney who presented the *Winters* case to the trial court, made riparianism the centerpiece

of his legal argument. *See* John Shurts, Indian Reserved Water Rights: The *Winters* Doctrine in Its Social and Legal Context, 1880s-1930s 87-88 (2000).[1] The significant difference from simple overlying rights, however, is that the federal rights are not subject to diminishment by correlative reduction or failure to continually apply the water to beneficial use. *See In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 747-50 (Ariz. 1999)("Gila River") ("[a] theoretically equal right [for the government] to pump groundwater, in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers."). The Court in *Gila River* makes clear that it could not simply defer to Arizona's "reasonable use" doctrine where such deference would defeat the federal water rights. *Id.* at 747. Rather the United States "may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right." *Id*. *See also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands). These differences exist because unlike state law based riparian water rights, federal reserved water rights are created by an exercise of the United States constitutional authority under the Commerce, Property, or General Welfare Clauses, or under its treaty or war powers, and thus made superior pursuant to the Supremacy Clause. Because the federal apportionment of water may occur in a riparian system of groundwater allocation, *see Gila River*, neither "priority" or "surplus water" are relevant to the United States' reserved water right.

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[1] The basic features of federal reserved water rights are antithetical to the prior appropriation doctrine. *See* Charles F. Wilkinson, *Perspectives on Water and Energy in the American West and in Indian Country*, 26 S.D. L. Rev. 393, 396 (1981). Unlike prior appropriation water rights that require that a fixed quantity of water be diverted and put to some beneficial use to perfect a right, a federal reserved water right requires no diversion or prior use to perfect, are difficult to quantify because they must include future use. In addition, the priority, if relevant, ties to the date of reservation or acquisition, rather than first actual use.

Viewing federal reserved water right as an apportionment, the reserved water rights merge easily with a riparian legal system such as California's,[2] preserving the relative rights of other water users while fulfilling the federal purpose. Under California law, an overlying right to groundwater is "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." *Calif. Water Serv. Co. v. Sidebotham*, 224 Cal. App. 2d 715, 725 (1964). As with surface water riparians, water supply shortages among overlying rights are shared among those with correlative overlying rights; "each may use only his reasonable share when water is insufficient to meet the needs of all." *Id.*; *See also City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 279 (2012). Where overdraft exists, overlying landowners have no more than a correlative, and shrinking, right in the available supply.

The United States' reservation of necessary water from the Antelope Valley aquifer based on the dedication of federal land to a specifically defined federal purpose effects an apportionment of water to the government without impacting overlying landowners' legal rights to withdraw groundwater from the remaining available supply. The creation of new rights to withdraw ground water, including the federal reserved water right, does not change the right of overliers to draw their correlative share from the remaining available supply.

The existence of surplus water is no more relevant to the creation of a federal reserved water right than it would be to the United States' right to withdraw groundwater as a simple overlying landowner. To the extent that the federal reservation of water contributes to any

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[2] In fact, California is one of the few riparian or dual-system states in which federal reserved water rights have been recognized. *See Arizona v. California*, 373 U.S. 546, 600 (1963), decree entered, 376 U.S. 340 (1964).

shortage going forward, the other riparian water rights remained in the same correlative position to each other, maintaining the right to a correlative share of the legally available water. Because those overlying landowners have no property right to a set amount of water, the United States has taken no property interest, and need not show the existence of surplus water in order to reserve an apportionment of the shared resource to the United States. Similarly, the date of reservation or acquisition is also irrelevant. Rights of overlying landowners to withdraw water are not based upon priority of appropriation, but simply on land ownership and reasonable use *Sidebotham*, 224 Cal. App. 2d at 725. Apportionment of water to the United States does not disrupt any priority of use, or need to fit within a priority system. For this reason, a document by document proof of "surplus water" or the date of reservation or acquisition is irrelevant and unnecessary to the analysis of either the existence or amount of the reserved water right.

C. Reliance on Caselaw Grounded in Prior Appropriation Doctrine Law is Misplaced in a Riparian Doctrine Context.

Because the federal reserved water rights are in the nature of an apportionment of water against the riparian system, cases discussing "unappropriated" water and "priority" based on prior appropriation doctrine states are inapposite, and Landowners reliance on these cases is misplaced. Cases relied upon by the Landowners arose in states which apply the prior appropriation doctrine. *See e.g. Cappaert*, 426 U.S. at 138 (finding that the United States "reserves appurtenant water then unappropriated" in Nevada); *Desert Irrigation, Ltd. v. Nevada*, 944 P.2d 835, 837 n. 1 (Nev. 1997) (noting that Nevada is a prior appropriation state); *United States v. New Mexico*, 438 U.S. 696, 715 (1978)(finding Congress intended that water in the national forests in New Mexico would be reserved to preserve timber or to secure favorable water flows.); N.M. Const. art. XVI, §2 (declaring the prior appropriation doctrine). In appropriation doctrine states, water rights are property rights with fixed and certain priorities and

quantities that cannot be diminished by subsequent appropriators. *See generally* Wells A. Hutchins, Water Rights Laws in the Nineteen Western States, Vol. I 437-47 (1971). Although federal reserved water rights are not an appropriation under state law, the Court in *Cappaert* and *New Mexico* had to integrate the reserved water rights into state systems with fixed rights based on prior appropriation. *See Cappaert*, 426 U.S. at 140, n.5. Thus the limitation to "unappropriated" water in the context of prior appropriation indicates that federal reserved water rights cannot simply take preexisting and fixed property rights to which they are junior under the prior appropriation system. As discussed above, no such taking can occur in the context of overlying rights to withdraw groundwater.

Furthermore, the United States is not an "appropriator" under state law to which notions of "surplus water" apply. Appropriative rights are based on the actual taking of water for non-overlying use, such as exportation from the basin or watershed. *See Santa Maria*, 211 Cal. App. 4th at 502. The basis of the United States claim is not a state law appropriation developed by the taking of water for non-overlying uses.[3] The water use for EAFB and Plant 42 is for uses appurtenant to the federal enclaves. Both EAFB and Plant 42 overlie the groundwater basin, and are within the adjudication boundary. For these reasons, the concept of "surplus water" and state law based appropriation are not applicable and do not support the imposition of any burden on the United States to show such water existed at the time of any reservation or acquisition for a particular purpose.

[3] Nor do the Landowners suggest that the United States has a potential prescriptive right, which would be a necessary corollary of appropriation.

D. A Single Reserved Water Right Claim for Each Enclave is Appropriate Where the Reservations and Acquisitions Were for a Common Purpose, and Effected an Apportionment of Water.

Landowners' argument that the United States cannot make single cumulative claims for each of the federal enclaves is unsupportable in the context of a reservation of groundwater from the Antelope Valley Aquifer. As established by the United States Memorandum in Support of its Motion *In Limine*, both EAFB and Plant 42 were established for military purposes. Despite insignificant differences in language between reservation documents, the purpose for each reservation, and for the acquisitions of additional associated lands is consistent across the creation of EAFB and Plant 42. As explained herein, the timing of the various reservations and acquisitions and the amount of water needed to fulfill the purpose of each individual parcel are also irrelevant because the reservation and acquisition of land – whether in 1934 or 1954 - effects an apportionment of water from the common resource. Thus in the context of this basin, the reservations and acquisitions, completed some 50 years ago for single, unified purposes, comprise single units that support unified claims. For these reasons, the United States need only prove a cumulative claim for each enclave.

E. A Review of Each Individual Reservation or Acquisition Document is Unnecessary Because the Purpose of All of the Reservations and Acquisitions Related to Each Enclave were for the Creation of Military Bases.

Landowners suggest that it is necessary to examine each reservation or acquisition in order to determine nuanced "primary purpose" for each reservation. As described in the United States' Memorandum in Support, both EAFB and Plant 42 have clear, enclave-wide purposes evidenced by the documents and history beginning in the 1930's. There is no basis for relegating any bona fide purpose of a reservation to secondary status absent a clear indication from the reserving documents. In *New Mexico*, the Supreme Court stated:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 702 (emphasis added); *but see id*. at 715 (Congress did not intend to reserve water for the secondary purposes of the forest established by MUSY). *New Mexico* did not indicate that courts are free to determine that a congressional (or executive) purpose for a federal reservation may be discounted when applying the implied reservation doctrine. Instead, the Court in *New Mexico* found that the purposes the United States claimed were not purposes found in the Organic Act. *Id*. at 707-08. Further, although these purposes had been expressed in Multiple Use Sustained Yield Act ("MUSY"), "[t]he House Report accompanying [MUSY] indicate[d] that recreation, range, and 'fish' purposes are 'to be supplemental to, but not in derogation of, the purposes for which the national forests were established' in the Organic Administration Act of 1897." *Id.* at 714 (quoting H.R. Rep. No. 86-1551, at 4 (1960); *see also id.* at 715. Thus, in *New Mexico*, the Court found that Congress had expressly relegated the uses claimed by the United States to a "supplemental" or secondary status. *Id.* at 714-15. *New Mexico* provides no authority for courts to relegate any bona fide "purpose" of a reservation to secondary status where there is no expression of congressional (or executive) intent to do so.

The Landowner group's reliance on *Gila River*, and *Confederated Salish and Kootenai Tribes v. Stultz*, 59 P.3d 1093 (Mont. 2002) to support its argument that federal reserved water rights are limited by the terms of each individual transaction that formed the federal enclave is misplaced. It is clear that a fuller citation to the language in *Gila River* demonstrates that the

Court was not discussing individual transactions or reservation documents, but the larger purpose of the reservation or enclave. The Court stated:

> We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a 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.

Gila River, 989 P.2d at 747. The language relied upon relates to entire federal enclaves, or reserves, not to a parcel by parcel breakdown. EAFB and Plant 42 were clearly established to fulfill broad military purposes and the authority the Landowners' cite does not support the unnecessary burden they seek to impose on the United States to have an excruciating examination of each reservation or acquisition document.

CONCLUSION

For the reasons set forth herein, and in the United States' Memorandum in Support of its Motion *In Limine*, the United States respectfully requests that the Landowners Motion *In Limine* be denied except as to the specific issues conceded to by the United States herein.

RESPECTFULLY SUBMITTED this 19th day of April 2013.

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