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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' REPLY BRIEF TO LANDOWNERS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE UNITED STATES' MOTION *IN LIMINE***

I. Landowners' Objection to the United States' Motion in Limine is Without Merit.

Landowners assert that the United States' Motion *in Limine* is procedurally improper and should be dismissed. Landowners' Memorandum of Points and Authorities in Opposition to the United States' Motion in Limine ("Landowners' Resp. Mem.") at 2. As set forth in the United

States' Memorandum in Support of Motion in Limine ("U. S. Mem. in Support"), courts have inherent power to control its litigation, including extending motions in limine to include determinations of whether, as a matter of law, a party's case may be maintained. *See* U.S. Mem. in Support at 1, n.1. Moreover, the case relied upon by Landowners makes this very point, even where such motions appear to encroach on dispositive motions. While reciting the potential drawbacks of such use of these motions, the court goes on to conclude "[i]n spite of the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have the inherent power to use them in this way. . . . Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court." *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1595 (2008) (citations omitted).

II. Recognition of the Existence of the Reserved Water Rights Asserted for EAFB and Plant 42 is Consistent with the Reservation and Acquisition Documents and is Distinct From Cases Arising in Prior Appropriation Systems.

A. The Term "Subject to Valid Existing Rights" in the Reservation Documents Does not Preclude Recognition of a Federal Reserved Water Right for EAFB

Landowners argue that because each of the documents reserving public lands for inclusion into Edwards Air Force Base contains a variation of the words "subject to valid existing rights," no reservation of water could have occurred. Landowners' Resp. Mem. at 6-7. This argument fails to recognize the nature of any "existing rights" to water, and misses the point that any correlative rights to make reasonable use of groundwater did not prevent the reservation of water by the United States. When the United States 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. *See e.g. French v. Gapen*, 105 U.S. 509, 523 (1881). However, riparian interests of other overlying landowners' do

not burden or encumber the federal lands. 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). The overlying right to groundwater has no set priority and no right to a specific amount of water, and thus does not create a legal burden on other landowners.[1]

In *Stupak-Thrall v. United States*, 843 F.Supp. 327, 331 (W.D.Mich.,1994), the plaintiff landowner argued that the reservation of a wilderness area "subject to valid existing rights" prohibited the federal agency administering the wilderness from imposing restriction on the plaintiff's riparian rights, and that any such regulation was a taking of private property. In rejecting this claim, the court noted that "[r]iparian rights are not, however, absolute rights. . . . [r]iparian rights are not absolute but come encumbered with the possibility of being limited or regulated under the "reasonable use" doctrine." *Id*. at 331, 333. Such is the nature of all riparian rights including those in California; they come encumbered with the possibility of being limited. Neither the federal reservation of land nor of groundwater takes away or changes any "existing rights" the overliers may have had at the time of the reservations and acquisitions because those rights were never fixed and entitled to a specific amount of water.[2] A reservation "subject to

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[1] Accordingly, Landowners are incorrect in asserting that the United States must prove at trial what "existing rights" existed at the time of any particular reservation. The "existing rights" of overliers are riparian rights that do not have priority, or a fixed volume associated with them.

[2] For this reason, Landowners' reliance on *International Paper v. U.S.*, 282 U.S. 399(1931) is inapposite. In that case International Paper had a fixed and defined right to a specific flow of water that was a real property right under the laws of New York. *Id*. at 176. Actions of the United States denied the use of that property right by exercise of eminent domain. *Id*. at 177.

valid existing rights" does not affect the United States' ability to reserve and apportion water from the common source. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 684 (1979) (where the Court opined that federal reserved water rights are in the nature of an apportionment of a shared resource).

Consequently, the Landowners' attempt to raise the specter of a constitutional takings issue "in the Court's final judgment" is a red herring and irrelevant to the existence of reserved water rights for EAFB and Plant 42. As explained in the U.S. Response Memorandum, the reservation of water is a partition of a shared resource, and does not constitute a "taking" because overliers have no vested right to a fixed amount.[3] *See In re Waters of Long Valley Creek Stream System v. Ramelli,* 25 Cal.3d 339, 350, 599 P.2d 656, 662 (1979) (where appellant landowner's argument that his future overlier right to an unquantified amount of water was "vested" was ruled "without merit.") It is unnecessary to either raise or resolve any issues of taking for purposes of the motions *In Limine*, or for the final judgment in this case.

B. The Reservation Documents, Acquisition Documents and History Support the Claimed Reserved Water Right.

The Landowners assert that the variable language of the reservation documents implies that the reservation of lands for EAFB was for something less than a Base for military purposes. Landowners' Resp. Mem. at 8. This is incorrect. As explained in the U.S. Memorandum in Support and Response Memorandum, the reservation and acquisition documents, together with the history of EAFB fully support the fact that the purpose of the reservations and acquisitions of the lands at EAFB were for the creation of a military base for aviation. U.S. Mem. in Support at 18-20; U.S. Resp. Mem. at 8-9. Landowners unsupported assumption that the term "bombing

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[3] Here, the United States agrees with Landowners that those landowners have, at most, "a correlative overlying right to share in using the basin's water." Landowners' Resp. Mem. at 14.

and gunnery range" implies that little water is required is inconsistent with the intent of both the reservation and acquisitions as reflected by the actual circumstances that have been in place on the ground since the late 1930's. U.S. Mem. in Support at 3, 18-19. Moreover, the Landowners assumption that the 1935 Act supports their assertions is incorrect. There is no basis for assuming or concluding that separate provisions authorizing permanent Air Corp stations and authorizing bombing and gunnery ranges are mutually exclusive entities. Such terms as "military purposes" or "bombing range" must be deemed to intend to "describe the use to be made of the premises and not to be restrictive." *Royce, Inc. v. United States*, 126 F. Supp. 196, 203 (Ct. Cl. 1954). An inclusive reading of the statute is consistent with "a healthy deference to legislative and executive judgments in the area of military affairs. *See Rostker v Goldberg*, 453 U.S. 57, 66 (1981). As use at EAFB has demonstrated since the late 1930's, these concepts overlap. While bombing and gunnery ranges necessarily indicate that large areas are needed for airspace for flight operations – such as EAFB has – the term does not simply represent empty land. U.S. Mem. in Support at 18-20. From the beginning, the facilities at EAFB, whether referred to as a bombing range or as an Air Force base, have constituted a military base, with housing, personnel, hangars, etc. that make up the permanent facilities. For this reason it is wrong to make the bald statement that the 1935 Act codified a distinction of any meaningful kind, where history and experience show otherwise.

C. Because the federal reserved water rights are not appropriative rights under state law, landowners reliance on *New Mexico* and concepts from state prior appropriate law are misplaced.

The Landowners argue that the United States' Motion in Limine should be denied because a separate priority should attach to each reservation or acquisition. They further argue that a grant of a single federal reserved water right would create a "super-priority over all other

water rights." Landowner's Resp. Mem. at 4. But as explained above and in the United States Response Memorandum, "priority" is not relevant to the recognition or creation of a federal reserved water right in a riparian system. U.S. Resp. Mem. at 6. Because the rights of overliers are not fixed, and do not operate on a priority system, the concept of priority is not meaningful. For this reason, the instant case is distinct from *United States v. New Mexico*, 438 U.S. 696 (1978). While priority might matter to New Mexico or other states with prior appropriation systems, it has no relevance in the context of a riparian system and the correlative rights of overlying landowners. *See* U.S. Resp. Mem. at 6-7. Thus *United States v. Anderson*, 736 F. 2d 1358, 1361 (9th Cir. 1984), where the plaintiff sought an adjudication of water rights in Washington state where prior appropriation and priority was an issue, does not support Landowners' contention that the United States cannot have a reserved right in California's riparian legal regime. (*Anderson* does, however, support the United States' claim that a reserved water right can attach to acquired, and not just reserved, lands. *See* U.S. Mem. In Support at 14-15.)

Similarly, Landowners reliance on *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224 (2000) is based not upon any priority of use of the overlying landowners, but on a discussion of appropriation by non-overlying water users. Federal reserved water rights are not appropriations under state law and determinations of reserved water rights are not governed by state law, but by federal law. *Cappaert v. United States*, 426 U.S. 128, 145 (1976). Moreover, Landowners reliance on *California v United States*, 235 F. 2d 647 (9th Cir. 1956) is also misplaced. *California* was a surface water rights case in which the United States sought to enjoin use by upstream riparians and appropriators. The United States claimed only surface water rights for Marine Base Camp Pendleton that it acquired with the land, and those it had gained by prescription, not federal reserved water rights. Indeed, this case preceded the Supreme

Court decision in *Arizona v. California*, 373 U.S. 546, 601 (1963), which extended the reserved rights doctrine beyond Indian reservations to other federal enclaves. Thus, aside from the recognition of the effect of exclusive jurisdiction on the absolute right and ability to use and control water within the military base, discussed below, the case has no relevance to the reserved water rights claims at issue here.

III. The Landowners misconstrue the Desert Land Act and the effect it has on the United States' reservation of water from acquired lands.

Landowners assertion that the extension of reserved water rights to acquired land would violate the Desert Lands Act of 1877 is also in error. The Desert Lands Act of 1877 applied to public lands open to appropriation and disposal. *See Calif. Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935). The Act severed private land ownership from rights to appurtenant water and paved the way for States to apply their own system of establishing water rights on homesteaded lands and other private property. *Id.* The Landowners appear to construe the Act as requiring state law to govern when the United States acquired private parcels at EAFB and Plant 42 for military purposes. The Landowners are mistaken. While the Desert Land Act may have decoupled water from land when a private party acquires ownership from the federal government, it has no bearing on the creation of a reserved right in land owned by the government. The United States Supreme Court has unambiguously declared that "the 'reserved rights doctrine' . . . is an exception to Congress' explicit deference to state water law in other areas." *United States v. New Mexico*, 438 U.S. 696, 715 (1978). See also *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (Ariz. 1999)("To the contrary [of the state parties' argument], the

Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law." Internal citations omitted).[4] State law is simply not controlling here.

IV. The exclusive jurisdiction of the United States in the majority of Edwardss Air Force Base establishes a clear constitutional basis for its reserved water right.

It is notable that the Landowners entirely ignore a clear constitutional basis for the federal reserved water right at EAFB. The exclusive jurisdiction the United States exercises under U.S. Const., art I, § 8, cl. 17 over the majority of the land at the Air Force Base cannot be ignored. *See* U.S. Mem. In Support at 17-19. When the Ninth Circuit Court of Appeals examined the exclusive jurisdiction California ceded to the United States for Camp Pendleton it concluded that "[b]y federal law, [the] United States held paramount and exclusive control and jurisdiction over the land and water which at any time is upon the land within the limits of this enclave." *California*, 235 F.2d at 655 (9th Cir. 1956). This authority applies here, too, and enables the government to set aside and reserve water for EAFB.

V. The reservation of water is appurtenant to the entirety of EAFB, whether individual tracts or uses occur outside the basin boundaries.

Landowners argument that the United States reserved water right for EAFB or Plant 42 would allow it to export water from the Antelope Valley for any military purpose is specious. Landowners' Resp. Mem. at 16. The reservations of water pertains only to water from the aquifer underlying each federal enclave, and the purpose of use is specific to each enclave. That both EAFB and Plant 42 overlie the Antelope Valley Aquifer has been repeatedly demonstrated in this proceeding. Thus the water underlying the two enclaves is "appurtenant" to those enclaves.

Federal reserved water rights exist independently of state law and state procedures. *Cappaert*, 426 U.S. at 145; *New Mexico*, 438 U.S. at 715. Landowners attempts to shoehorn the

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[4] Landowners' assertion that recognition of reserved water rights for acquired land would somehow erase the distinction between "primary" and "secondary" purposes is also without merit. Landowners' Resp. Mem. at 15-16. The land for EAFB, whether acquired by reservation or acquisition, was acquired for the singular military purpose of an air base.

reserved water rights into state law are misplaced. The federal reserved water right is not simply a state law based overlying right subject to the same limitations as other overliers. The rights are federal in nature and appurtenant to the enclave, not merely the portion of the enclave actually overlying the aquifer. Thus, so long as the use of the water is for military purposes on the base, use could occur outside the boundaries of the aquifer.

WHEREFORE, for the reasons set forth herein, and in the United States' Memorandum in Support of Motion in Limine and the United States' Response Memorandum in Support of Motion in Limine, this Court should grant the relief requested in the United States' Motion in Limine.

RESPECTFULLY SUBMITTED this 3rd day of May 2013.

/s/ R. Lee Leininger
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