ROBERT G. DREHER,
Assistant Attorney General
Environment & Natural Resources Division
LEE LEININGER, Trial Attorney
JAMES DUBOIS, Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, Colorado, 80202
Tel: (303) 844-1464
Fax: (303) 844-1350
Email: lee.leininger@usdoj.gov
Email: james.dubois@usdoj.gov

Attorneys for Cross-Defendant United States of America

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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 IN OPPOSITION TO AGWA'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The members of the Antelope Valley Groundwater Agreement Association ("AGWA") move the Court for Summary Adjudication, requesting adjudication "as to the establishment and existence of a "federal reserved right" to the native groundwater of the Basin." AGWA Mem. in Support at 2. The United States agrees that there are no triable issues of material fact regarding the existence of the federal reserved water right. As a matter of law, the federal reserved water right exists and Summary Adjudication on the issue may be entered. The issue of the amount to be decreed to the federal reserved water right, however, presents triable issues of fact that will be determined in Phase V of the trial proceedings in this matter.

Based on the undisputed facts and applicable law, the United States has federal reserved water rights for Edwards Air Force Base (EAFB) and Air Force Plant 42 (Plant 42), in an amount to be determined at trial. The United States has reserved and acquired lands specifically for military purposes, and for a large segment of that land, has been ceded exclusive jurisdiction. The federal reserved water rights doctrine (1) applies to the lands reserved and acquired by the government for the facilities, and (2) is inherent in the United States' exclusive jurisdiction over large parts of Edwards Air Force Base. The exclusive jurisdiction ceded by the State includes the right to water on and underlying these federal lands. The land reservations and acquisitions were specifically for military purposes, and water is necessary to fulfill these purposes.

Contrary to AGWA's arguments, the reservation of water for military purposes effects an apportionment of the Basin groundwater supply to the United States that is distinct and separate from any correlative rights the United States may have as the owner of nearly 300,000 acres overlying the aquifer. Moreover, because this apportionment of water occurs within the context of a riparian, correlative system, the implied reservations of water for these federal facilities neither "take" water rights of other overlying landowners, nor are inconsistent with the limitations on the underlying reservations.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The United States agrees with AGWA's assertions that Edwards Air Force Base and Air Force Plant 42 contain a mixture of acquired lands and lands reserved from the public domain, but there are a total of ten (10) pertinent reservations documents, not eight as asserted by AGWA. It addition, and relevant to the establishment and existence of the federal reserved water right for Edwards Air Force Base, it is uncontested that the State of California ceded exclusive jurisdiction to the United States over a large portion of Edwards Air Force Base, including the North and South Airfields.

A. Edwards Air Force Base.

When the War Department began to utilize the Rogers and Rosamond lakebeds and surrounding area in the 1930s, the land was a patchwork of public domain, homesteads, and railroad ownership. The first withdrawal for military purposes occurred on February 6, 1934 when President Franklin D. Roosevelt issued Executive Order 6588 reserving a seven-by-fourteen-mile strip of public land to be used as a bombing and gunnery range. *See* Exh. No. 1 (USAF001653). A tent encampment was erected, and by 1935 the facility included a mess hall, a radio building, storage and armament structures, and a new well to provide water for potable and other purposes. *See* Exh. No. 2 (Request for Funds for a Well) (USAF022905-22920). In August of 1935, Secretary of War Dern in a letter to California Representative Stubbs acknowledged the congressman's "interest in the National Defense" and his efforts to authorize the acquisition of private lands within the area reserved as a bombing range. *See* Exh. No. 3 (USAF023125-127). Within the approximately 82,000 acres of land defining the borders of the reservation, it was necessary to acquire 38,994 acres in private hands for full use and safety of the range facility. *Id.* With the passage of the Act of August 12, 1935, Pub. L. No. 74-263, 49 Stat. 610, Congress approved the creation of "permanent . . . Air Corps stations and depots"

facilities.[1] Under this authority, the War Department purchased or condemned all private lands to form Edwards Air Force Base.

In 1937, Executive Orders 7707 and 7740 withdrew and reserved approximately 72,720 acres for "military purposes" at Muroc. *See* Exh. No. 4 (USAF001656), Exh. No. 5 (USAF001657). The Army Appropriations Act for Fiscal Year 1938, 46 Stat. 452, provided the funding for the purchase of private property at Muroc and the War Department began the acquisition process. Purchase and conveyance of 59,419 acres from the Southern Pacific Railroad lands occurred by deed in March 1938. *See* Exh. No. 6 (USAF004191-4193). For unwilling sellers, condemnation suits were filed accompanied by Declarations of Takings. *See e.g.*, Exh. No. 7 (USAF001748-1750). By July 1939, approximately 60,000 acres needed to complete the Muroc bombing facility had been purchased or condemned. By the end of 1939, nearly 100,000 acres had been consolidated into military control for the Army Air Corp.

It was quickly evident that Muroc's remote location, excellent flying weather, railroad facilities and the broad, concrete-hard lakebed were ideal for the purpose of aircraft testing. On June 20, 1940, President Roosevelt signed Executive Order 8450, superseding the earlier executive orders and withdrawing and reserving all lands of Muroc for use of the War Department as a bombing and gunnery range. *See* Exh. No. 8 (USAF001658). With the threat of war on the horizon, the air field continued to grow. The Corps of Engineers initiated the construction of new housing and administrative facilities and utilities on the western shore of Rogers Dry Lake in September 1940. *See* Exh. No. 9 (USAF019539-19540). A 6,500 ft concrete runway with apron and taxiways was laid out, and construction began. *Id.* In April 1942, Muroc Air Field became the Army Air Field Materiel Center, initiating its long career as a center for military flight testing.

In 1946, the Army produced a draft Master Plan for the Muroc Army Air Field. This plan contained recommendations to enlarge the installation to the current boundary of Edwards

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[1] *See* Section 2 of the Act: "To accomplish the purposes of this Act, the Secretary of War is authorized to . . . purchase [private lands] by agreement or through condemnation proceedings." 49 Stat. 611.

Air Force Base; the additional land deemed necessary to accommodate the Army Air Forces' future flight-test needs. *See* Exh. No. 10 (USAF019563-19567). Approximately 190 square miles of additional private and public land adjoining the base on the north, west, and south would be required. It also provided for safety air clearance zones, a new housing area located a secure distance from flying activities, and for moving the railroad crossing Rogers Dry Lake. *Id.* The Master Plan was eventually approved in January 1952.

A number of Public Land Orders (PLO) were issued withdrawing and reserving the public parcels in the expansion area. PLO 480 withdrew 489.76 acres on June 2, 1948 for "military purposes"; PLO 613 withdrew 564.46 acres on October 19, 1949 "in connection with and air force base"; PLO 646 withdrew 20,901.82 acres on May 10, 1950 "as an air force base"; PLO 1126 withdrew 120 acres on April 15, 1955 for "military purposes"; and PLO 2270 withdrew 230 acres on February 21, 1961 for "military purposes."[2] *See* Exh. No. 11 (USAF 023436-37; 001660-61; 001662-66; 023438-39). In addition, acquisition of private lands in the expansion area continued until 1958, when the final piece of private land was procured. The condemnation suits generally claimed the reason for the taking as the "[e]xpanding needs and requirements for the Department of the Air Force and for other military purposes incident thereto." *See e.g.* Exh. No. 12 (USAF003330-3359).

Also of significance to the authority of the United States to reserve water for Edwards Air Force Base is the State of California's ceding of exclusive jurisdiction to the United States for approximately two-thirds of the Base, including the developed lands containing the South and North Base areas. By letter dated April 16, 1943, Secretary of War Stimson notified California Governor Warren that the United States was exercising its right under the laws of the State to

[2] As explained more fully below, the variable use of descriptive terms in these and other reservation documents demonstrates that such terms were not intended to be narrowly construed limitations, but rather flexible terms describing the more general military use.

assume exclusive jurisdiction over lands within California "acquired by the United States for military and certain other purposes." *See* Exh. No. 13 (USAF012619-621; 012640-12653).[3]

B. Air Force Plant 42.

In addition to the Army's operations at the Muroc, a dirt landing strip near Palmdale, California was used by Army aviation units as early as January 1935 as a bivouac site for squadrons that were training at the nearby bombing and gunnery range. The facility soon became the Palmdale Airport and was used for commercial as well as military activities. Exh. No. 14 (USAF023617) (excerpt from Plant 42 history). After the war, the Palmdale Army Air Field was closed. The installation was declared a surplus facility in 1946 and was transferred by quit-claim deed to Los Angeles County for use as a municipal airport. However, "under the provisions of [the quit-claim] deed, the United States Government has the right to recapture not only the original 950 acres but all the additional acreage that has been acquired by the County of Los Angeles as additions to the original airport. . . ." *See* Exh. No. 15 (USAF023762-65). The airport lands were recapturable due to the declared Korean War emergency. In addition it was the intent of the "Air Force to make substantial improvements to this property and to retain it as a permanent installation." *Id*. Consequently, the decision was made to purchase the lands in fee simple rather than have the facility revert to the County at the termination of the declared emergency.

The planned Palmdale Test Facility is now owned by the federal government and leased to military aircraft manufacturers. Congressional authorization for the military construction and acquisition was approved in 1951, *see* Pub. L. No. 82-155, 65 Stat. 336 (1951), and on February 2, 1954, the United States secured this important military installation by purchase of 4552 acres

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[3] Letters from the Secretary of War regarding notification of vesting of exclusive jurisdiction were located in the California State Archives in files labeled "Governor Earl Warren, Federal Land File". While the April 16, 1943 letter indicated that it was signed, the actual signature of Secretary Stimson appears on a nearly identical letter to the Governor dated May 28, 1945.

from the County of Los Angeles. *See* Exh. No. 16 (USAF023766-770). Today, Plant 42 consists of approximately 4870 government-owned acres.

III. ARGUMENT

A. The Reserved Water Rights Doctrine Applies to the Reservation of Water at Both Edwards Air Force Base and Air Force Plant 42.

1. Overview of the implied federal reserved water rights doctrine.

The United States' rights to water for EAFB and Plant 42 exist under federal law, based on the implied federal reserved water rights doctrine. The judicially-created federal reserved water rights doctrine provides that when the federal government dedicates its land for a particular purpose, it also reserves by implication, sufficient water to accomplish the purposes for which the land was reserved. *See, Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 601 (1963); *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 715 (1978). *See also* 4 Robt. E. Beck, *Waters and Water Rights* § 37 (1996). The U.S. Supreme Court succinctly explained the doctrine of the implied federal reservation of water as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the 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.

Cappaert, 426 U.S. at 138.[4]

The principles of dedication of land to a particular federal purpose and the need for water are grounded in both riparianism and federal powers under the constitution, and are evident

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[4] While the availability of "unappropriated water" was relevant in applying the federal reserved water rights doctrine in a prior appropriation context, such as those involved in *Cappaert* or *New Mexico*, as explained below, the presence or absence of "unappropriated water" is not relevant to the existence of a reservation of water under the riparian/correlative system for ground water at issue in this case.

throughout the one hundred year history of the doctrine of reserved water rights. The federal reserved water rights doctrine's roots are found in the case of *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), where the Supreme Court recognized Congress' power under the Commerce Clause to regulate the navigability of waters and thereby reserve an adequate flow of water for the beneficial uses of federal property. *See id.* at 703 ("in the absence of specific authority from congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.")(emphasis added.).

Relying on *Rio Grande*, the Court in *Winters v. United States*, 207 U.S. 564 (1908) held that the federal government has authority to claim water apart from state law, and that the federal government implicitly had reserved water for lands withdrawn for Native American use. The Court reasoned that Congress must have intended to reserve the water when it created the Indian homeland because without it, the arid land would be practically useless to the Indians. Given the necessity for water to effect the federal purpose, "the power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." 207 U.S. at 577 (citing *Rio Grande*, 174 U.S. at 702-03, and *United States v. Winans*, 198 U.S. 371 (1905)).

In 1963, the Supreme Court in *Arizona v. California*, unequivocally extended the doctrine beyond Indian lands to include national recreation areas, wildlife refuges, and national forests. 373 U.S. at 598. After acknowledging the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under the Property Clause, the Court stated, "[w]e have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property." *Id.* at 597-598 (emphasis added). By conjunctively including federal "property," in addition to reservations, the Court recognizes that the power to reserve water for federal enclaves is broad. It includes all

federal lands, whether reserved from the public domain or acquired from private entities, dedicated to specific purposes.[5]

The next time the Supreme Court examined the federal reserved water rights doctrine it reiterated that "[r]eservation of water rights is empowered by the Commerce Clause, art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, art. IV, § 3, which permits federal regulation of federal lands." *Cappaert v. United States*, 426 U.S. at 138; *see also United States v. City and Cnty. of San Francisco*, 310 U.S. 16, 30 (1940) (regulation of federal land is an "exercise of the complete power which Congress has over particular public property entrusted to it"). In other words, a federal reserved water right "does not depend solely on a formal reservation of land from the public domain, but rather on Congress' exercise of a constitutional authority such as the Property or Commerce Clauses, coupled with the Supremacy Clause." 6 U.S. Op. O.L.C. 328, 332-33 (1982) (Memorandum for the Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice). Since *Arizona*, federal and state courts have extended the doctrine to many different types of federal enclaves. *E.g., Arizona*, 373 U.S. at 601 (1963) (finding reserved water rights for a National Recreation Area and National Wildlife Refuges); *Cappaert v. United States*, 426 U.S. 128 (1976) (reservation of Devil's Hole as a national monument reserved federal water rights in unappropriated water); *United States v. Idaho*, 959 P.2d 449 (Idaho 1998) (holding that executive order Public Water Reserve No. 107 reserved water to protect springs needed for stockwatering from private monopolization.); *see In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 745 (1999) ("*Gila River*")("The [reserved rights] doctrine applies not only to Indian reservations, but to other federal enclaves, such as

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[5] The judicially created doctrine does not distinguish between lands reserved from the public domain and lands acquired from private entities. Once the land is federal property dedicated to a particular use, and that use by necessity requires water, a federal reserved water right is formed. *See United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (where the Ninth Circuit held that reserved water rights attached to lands reacquired from private ownership and located within the boundaries of the Spokane Indian Reservation.)

national parks, forests, monuments, military reservations, and wildlife preserves.") (citing *Cappaert*, 426 U.S. at 138-39).[6]

2. The United States has Exclusive Jurisdiction over the majority of EAFB, and the power to reserve necessary water underlying the land.

In addition to the Commerce and Property Clauses of the Constitution, the United States' exclusive jurisdiction over the military installation under article I, § 8, Clause 17 of the Constitution provides authority for the reservation of groundwater under EAFB. As discussed in the Background, section 1, *supra*, the State of California ceded exclusive jurisdiction over all lands comprising the Muroc Army Air Field in 1943 to the United States. *See* Exh. 17.[7] Exclusive jurisdiction, once exercised, is jurisdiction *in toto*. Nothing less than the U.S. Constitution provides the authority for the principle that land ceded by the State for use as a military installation is subject to the United States' exclusive jurisdiction. Clause 17, § 8, article I of the Constitution states that the Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

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[6] A reservation of water for the purposes of the federal enclave extends to the amount of water needed to fulfill both the present and future uses of the enclave. *See Arizona*, 373 U.S. at 600 (holding that the quantity of water intended to be reserved must satisfy the future as well as the present needs of the Indian reservation); *Sierra Club v. Lyng*, 661 F. Supp. 1490 n.10 (D.Colo.,1987) (concluding that federal reserved water rights under the Wilderness Act "includes any future wilderness area water needs."); *Federal Reserved Water Rights*, 86 Interior Dec. 553, 573 (1979) ("reserved water rights encompass both existing uses and future water requirements necessary to fulfill the purposes of the reservation."). The right also extends to water in the ground. The "reserved water rights doctrine applies not only to surface water but to groundwater." *In re the General Adjudication of all Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 748 (1999) (holding that where other waters are inadequate to accomplish the purpose of a reservation, groundwater may be reserved).

[7] The map of federal jurisdiction is submitted for illustrative purposes. It is an approximation of the federal lands comprising EAFB at the time of Secretary Stimson's notice of exclusive jurisdiction in 1943.

Exercise of jurisdiction under U.S. Const., art I, § 8, cl. 17, conveys "complete sovereignty" upon the United States. *S. R. A., Inc. v. Minnesota*, 327 U.S. 558, 562-563 (1946). Exclusive jurisdiction "assumes the absence of any interference with the exercise of the functions of the Federal Government and . . . debars[s] the State from exercising any legislative authority . . . , in relation to the property . . . within the territory." *Silas Mason Co. v. Tax Comm'n of State of Wash.*, 302 U.S. 186, 197 (1937). *See also West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co.*, 918 F.2d 713, 714-15 (8th Cir. 1990)("[A]s a federal enclave, Congress has exclusive jurisdiction over Ellsworth Air Force Base and that in order to defer this exclusive jurisdiction to the State, Congress must clearly and unambiguously express as its purpose the deferral of such jurisdiction.").

By acquiring complete sovereignty, the United States is conferred exclusive power over its property and resources, including water.[8] In examining the effect of exclusive jurisdiction on a military base, the Ninth Circuit Court of Appeals stated 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. The process of the state courts could not run therein unless by consent. The executive and administrative bodies and regulations had no control therein. State law, substantive and procedural, had no force over persons or objects within the boundaries.
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> [The United States'] rights within the borders [of Marine Base Camp Pendleton] were sovereign, paramount and supreme. This principle applied to the use of water appurtenant to the land . . . . This sovereign authority was essential and was granted by the Constitution.

California v. United States, 235 F.2d 647, 655-56 (9th Cir. 1956) (emphasis added). When California ceded jurisdiction over the lands of Muroc Army Air Field to the United States in

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[8] The exclusive jurisdiction granted was not intended to require Congress to exercise all powers itself, but was meant to exclude any question of state power over the area. *See Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109-10 (1953); *Stoutenburgh v. Hennick*, 129 U.S. 141, 147-48 (1889); *Thompson v. Carroll*, 63 U.S. (22 How.) 422, 432-33 (1860).

1943, the State did not expressly reserve jurisdiction over the water resources found on and under the lands. Nor has the Congress expressed its deferral to the State over the water resources necessary to fulfill Edward Air Force Base's military purpose. Consequently, the State has no legislative authority over the Base's water resources on the exclusive jurisdiction lands and the federal government retains all necessary authority to reserve the water underlying Edwards Air Force Base for its military needs.

It is notable that AGWA entirely ignores this 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. 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.

3. Water is necessary to fulfill the military purposes of Edwards Air Force Base and Plant 42.

A final step in deciding whether as a matter of law the United States is entitled to the recognition of the establishment and existence of a federal reserved water right is a determination that water is necessary to fulfill the purpose of the federal enclave. *See Cappaert*, 426 U.S. at 141 (ruling that Congress impliedly reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more.") That water is necessary to fulfill the military and military-related functions at these installations has not been, and cannot reasonably be disputed.[9]

[9] History demonstrates that the purpose for the withdrawal and acquisition of lands for EAFB and Plant 42 was for military purposes related to aviation, and any attempts to fabricate a narrow purpose for the enclaves must be rejected . An implied-reservation-of-water is created if, after the court "has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 701. Here the history of congressional and executive actions, together with the contemporaneous actions that were

Edwards Air Force Base is, in effect, a quasi-municipal facility that requires water for its residents as well as its military applications. Plant 42 requires water for its large-scale industrial fabrications, as well as its workers' domestic needs. "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." *New Mexico*, 438 U.S. at 702.[10] At trial, the United States will demonstrate the amount of water necessary to fulfill the current and reasonably foreseeable future military uses at Edwards Air Force Base and Plant 42. But, it is indisputable that some amount of water is necessary, and therefore reserved. *See* Exhs. 18 and 19: transcript excerpts from Deposition of Brigadier General Michael Thomas Brewer, March 6, 2013, pp 11,86-87; Deposition of Lieutenant Colonel Gene Franklin Cummins, March 7, 2013, pp 11-13, 39-40.

B. Federal Reserved Water Rights are an Apportionment of Water That May Occur in a Riparian System of Correlative Rights.

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

AGWA argues that "[u]nless there were no private landowners in the Basin at the time of each federal reservation, the native yield of the Basin" was already apportioned correlatively and no water could exist for federal reservation. AGWA Mem. in Support at 7. In other words, from the moment the first private ownership of land was established in the Basin, AGWA argues that the "full amount of the Basin's safe yield" to groundwater was correlatively apportioned to the

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actually occurring on the ground demonstrate that the purpose of the reservation and acquisition of EAFB was for a permanent military base, particularly for aviation uses.

[10] The fact that as a landowner in the Antelope Valley the United States has a right to pump a correlative share of water under state law, or that both facilities use water that is provided from outside sources, is of no legal consequence.[10] Water that may be available under state law, either through purchase or pumping, does not negate the necessity for a reserved water right under federal law.

private landowner, only to be reduced by the correlative rights of subsequent private landowners. *Id.* Because the majority of federal reservations were "subject to valid existing rights," an implied reservation of water could not exist without "necessarily violat[ing] the landowners' existing rights to groundwater." *Id*.

AGWA's argument fails for a number of reasons. First, it flies in the face of Supreme Court decisions that analogize federal reserved water rights to a reasonable apportionment of a shared resource. *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. *Id*. In concluding that the Indian 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. 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.

AGWA suggests the Court 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. This argument would stand the concept of reasonableness on its head; one dormant overlying landowner could prevent the United States' from fulfilling its water needs on federal property designated for federal purposes. This not only violates Supreme Court instruction that "enough water" is apportioned to the government when it sets aside land for a federal purpose, but also state law concept of reasonable use. *See* Cal. Const. Art. 10, § 2 ("The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of

water."); *City of Barstow v. Mojave Water Agency* (2000) 99 Cal.Rptr.2d 294, 23 Cal.4th 1224, 1241 5 P.3d 853 ("Any person having a legal right to surface or ground water may take only such amount as he reasonably needs for beneficial purposes."). Such an argument was rejected, at least implicitly, by the California Supreme Court in *In re Waters of Long Valley Creek Stream System v. Ramelli,* 25 Cal.3d 339, 350, 599 P.2d 656, 662 (1979), where the appellant landowner's assertion that his future overlier right to an unquantified amount of water was "vested" was ruled "without merit." The overlying landowner had only "a correlative overlying right to share in using the basin's water." *Id.*

In contrast to AGWA's first-settler-takes-all argument, by viewing the federal reserved water right as an apportionment, the reserved water rights merge easily with a riparian legal system such as California's. In fact, 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).

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."). 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.

The United States' reservation of necessary water, however, does not impact overlying landowners' legal rights to withdraw groundwater from the remaining available supply. Indeed, 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. To the extent that the federal reservation of water removes and reserves a quantity of water from the Basin safe yield, the other riparian water rights remain in the same correlative position to each other, maintaining the right to a correlative share of the remaining 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.

Therefore, 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, as shown above, the riparian interests of overlying landowners' do not burden or encumber the federal lands. 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.[11] A reservation "subject to valid existing rights" does not affect the United States' ability to reserve and apportion water from the common source.

Finally, AGWA's reliance on *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988) is misplaced. First, in *Hallett Creek*, the Court noted that there were two different methods by which the United States may acquire water rights: (1) reservation under federal law, and (2) pursuant to state law, for "secondary" purposes. The language in the opinion regarding the United States' riparian rights only related to federal claims to water that were made under state law. In *Hallett Creek*, the United States explicitly made claims for water under state riparian law as the riparian landowner. The case simply determines that the United States had not relinquished any riparian rights to land which it had retained. Accordingly the court determined that riparian water rights exist on federal land. Moreover, the holding, at least implicitly, argues against AGWA's assertion that the federal reserved water right cannot be for a fixed amount, and instead must be defeasible by correlative reduction. The Court notes that there is no suggestion in *New Mexico* that Congress intended water rights, once acquired by the United States, to be subject to defeasance by subsequent claimants – even riparian rights acquired under state law. 44 Cal. 3d at 470. The Court would not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Id.* (citing *Clark v Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947)).

IV. CONCLUSION

AGWA's motion for summary adjudication on the non-existence of a federal reserved water right should be rejected. The United States' reservation of necessary water from the Antelope Valley aquifer based on the dedication of federal land at Edwards Air Force Base and Air Force Plant 42 effects an apportionment of water to the government. This reservation of

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[11] For this reason, AGWA's reliance on *International Paper v. United States*, 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.

water is a partition of a shared resource, and does not constitute a "taking" because overliers have no vested right to a fixed amount and have, "a correlative overlying right to share in using the basin's water." *See In re Waters of Long Valley Creek Stream System v. Ramelli*, 25 Cal.3d 339, 350, 599 P.2d 656, 662 (1979). Thus, there is no legal impediment to the United States' reservation of water to fulfill the military purposes at the federal enclaves.

RESPECTFULLY SUBMITTED this 27th day of December 2013.

/s/ R. Lee Leininger
R. LEE LEININGER
JAMES J. DuBOIS
ATTORNEYS FOR THE UNITED STATES OF AMERICA