MICHAEL T. FIFE (State Bar No. 203025)
BRADLEY J. HERREMA (State Bar No. 228976)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, California 93101
Telephone No: (805) 963-7000
Facsimile No: (805) 965-4333

Attorneys for: Gene T. Bahlman, Thomas M. Bookman, B.J. Calandri, John Calandri, John Calandri as Trustee of the John and B.J. Calandri 2001 Trust, Son Rise Farms, Calmat Land Company, Sal and Connie L. Cardile, Efren and Luz Chavez, Consolidated Rock Products, Del Sur Ranch LLC, Steven Godde as Trustee of the Forrest G. Godde Trust, Lawrence A. Godde, Lawrence A. Godde and Godde Trust, Robert and Phillip Gorrindo, Gorrindo Family Trust, Laura Griffin, Healy Farms, Healy Enterprises, Inc., John Javadi and Sahara Nursery, Juniper Hills Water Group, Gailen Kyle, Gailen Kyle as Trustee of the Kyle Trust, James W. Kyle, James W. Kyle as Trustee of the Kyle Family Trust, Julia Kyle, Wanda E. Kyle, Maritorena Living Trust, Jose and Marie Maritorena, Richard H. Miner, Barry S. Munz, Terry A. Munz and Kathleen M. Munz, Eugene B. Nebeker, R and M Ranch, Inc., Richard and Michael Nelson, Robert Jones, John and Adrienne Reca, Mabel Selak, Jeffrey L. & Nancee J. Siebert, Dr. Samuel Kremen and Tierra Bonita Ranch Company, Triple M Property FKA and 3M Property Investment Co., Vulcan Materials Co. and Vulcan Lands Inc., Willow Springs Company, Donna Wilson, **collectively known as the Antelope Valley Groundwater Agreement Association ("AGWA")**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANTELOPE VALLEY GROUNDWATER CASES Included Actions: Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California County of Los Angeles, Case No. BC 325 201 Los Angeles County Waterworks District No. 40 v. Diamond Farming Co. Superior Court of California, County of Kern, Case No. S-1500-CV-254-348 Wm. Bolthouse Farms, Inc. v. City of Lancaster Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water Dist. Superior Court of California, County of Riverside, consolidated actions, Case No. RIC 353 840, RIC 344 436, RIC 344 668	Judicial Council Coordination Proceeding No. 4408 **Santa Clara Case No. 1-05-CV-049053** Assigned to The Honorable Jack Komar **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION AND MOTION FOR SUMMARY ADJUDICATION OF ISSUES** **[CCP § 437c(f)]** **DATE: January 27, 2014** **TIME: TBD** **DEPT.: TBD**

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

I. INTRODUCTION

The undisputed material facts demonstrate that the members of the Antelope Valley Groundwater Agreement Association ("AGWA") are entitled to Summary Adjudication on the legal issue of whether the claimed federal reserved water rights of the United States may extend to the native yield of the Basin.

The United States claims a federal reserved water right for Edwards Air Force Base ("Edwards") and Air Force Plant 42 ("Plant 42") in the Antelope Valley Adjudication Area ("AVAA"), and claims that it reserved a right to withdraw 11,683 acre-feet per year from the Basin to fulfill all present and future military purposes at Edwards and Plant 42. The United States has taken the position that it possesses federal reserved rights to water within the Basin that are "prior and paramount to the rights of all other parties." (United States' Answer to First Amended Cross-Complaint, dated April 13, 2007, at 3:19-20.)

The undisputed facts show that the reservations of land from the public domain creating Edwards and Plant 42 state that all such reservations are subject to valid existing rights at the time of reservation. Overlying groundwater rights vest by virtue of ownership of property overlying the Basin, and under principles of California water law, the overlying landowner's right is to a correlative share of the full amount of the native yield. The reservations at issue cannot withdraw a portion of the native yield from the pooled yield to which all overlying landowners' correlative rights apply, without necessarily exceeding the express limitations of the reservations.

Based on the undisputed facts, the United States can have no "reserved right" to native water in the Basin; rather, the United States may succeed to a correlative right like other overlying landowners within the Basin. Under Code of Civil Procedure section 437c(f), AGWA requests the Court issue an order adjudicating that no triable issue of material fact exists as to the establishment and existence of a "federal reserved right" to the native groundwater of the Basin, and, as a matter of law, said cause of action is without merit. For the reasons stated herein, AGWA's Motion is well taken, and should be granted in its entirety.

II. STATEMENT OF UNDISPUTED MATERIAL 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, at 9:7 ("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 (July 13, 2011), pp. 9-10.) 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.)

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 that the reservation was "subject to valid existing rights." (USAF001653.)

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.)

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.)

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21 East Carrillo Street
Santa Barbara, CA 93101-2706

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 claims a reserved right for over 100,000 acres that it acquired from others, including predecessor in interest overlying landowners. According to the United States' discovery responses, 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.) According to the documents that the United States has produced, large parts of Plant 42 and Edwards consist of property that the United States acquired from other landowners. A 1960 Air Force document produced by the United States entitled "Air Force Plant No. 42, Report of Excess Real Property to General Service Administration" indicates that the United States acquired, for Plant 42, at least 5,083.51 acres in 21 separate acquisitions, including 4,552.07 acres from the County of Los Angeles in one acquisition. (USAF004884.) A 1971

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21 East Carrillo Street
Santa Barbara, CA 93101-2706

audited summary of land within Edwards states that it includes 123,090.15 acres as acquired in "FEE." (USAF004852.) The United States produced supporting pages that list acquisitions for various "SEGMENTS" of Edwards. (USAF004852- 004883.) For example, the page depicting "SEGMENT '7'" of Edwards identifies 89 separate acquisitions totaling of 4,236.89 acres. (USAF004858.)

III. AGWA'S BURDEN OF PRODUCTION ON MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

AGWA, as the moving parties, have the initial burden of production to make a prima facie showing that there are no trial issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850. A prima facie showing is one that is sufficient to support the position of the party in question – "No more is called for." (25 Cal. 4th at 851.) When the moving party is a defendant or cross-complainant, the burden of production is met either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense to that cause of action. (*Id*.) A cause of action "cannot be established" if the undisputed facts presented by the defendant prove the contrary of the plaintiff's allegations as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal. App. 4th 1591, 1597.) Once the defendant meets this burden, the burden of production shifts to the plaintiff to prove the existence of a triable issue of fact regarding that element of a cause of action or that defense. If the plaintiff is unable to do so, the defendant is entitled to judgment or adjudication as a matter of law. (*Saelzler v. Advanced Group 400* (2001) 25 Cal. 4th 763, 780-781.)

Here, based on the facts contained in the Statement of Undisputed Material Facts and as a matter of law, the United States cannot establish that the scope of its federal reserved rights are not limited by the reservation instruments subjecting the reservation to "valid existing rights," and thus limited to a correlative share of the Basin, and do not reserve a separate portion of the native yield "off the top" to which the correlative rights of other overlying landowners do not apply.

IV. SUMMARY JUDGMENT MUST BE ENTERED IN FAVOR OF AGWA AS TO THE UNITED STATES' CAUSE OF ACTION FOR A FEDERAL RESERVED RIGHT TO NATIVE YIELD OF THE BASIN

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

AGWA is entitled to a determination via Summary Adjudication that the any federal reserved rights of the United States to the waters of the Basin are subject to the valid existing overlying water rights associated with overlying property in private ownership at the time the United States reserved property within the Basin from the public domain, and that the United States is not entitled, pursuant to its rights in the reserved lands, to any priority right beyond the correlative right of an overlying landowner.

A. The United States' Burden of Proof

The United States Supreme Court's decisions concerning federal reserved rights define several elements that the United States must prove to establish such a right. The Supreme Court's decisions state that the reserved right appropriates to the United States "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation," creating "a reserved right in unappropriated water which vests on the date of the reservation . . . ." (*Cappaert v. United States* (1976) 426 U.S. 128, 138; *United States v. New Mexico* (1978) 438 U.S. 696, 713 fn. 21.) For example, the federal Ninth Circuit Court of Appeals 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. (*United States v. Anderson* (9th Cir. 1984) 736 F.2d 1358, 1363 ("We treat these lands in a manner analogous to that of a newly created federal reservation . . . .").) Moreover, the reservations at issue in this case themselves require that the United States prove that water was available beyond existing rights at the time of those reservations.

As discussed in the Statement of Facts above, each of the United States' eight reservations stated that it was subject to 'valid existing rights." This condition on each and every reservation not only is consistent with the rule that a reserved water right applies only to water that is unappropriated as of the date of the reservation, but also demonstrates the United States' intent in making each of those reservations. The language of the eight reservations at issue here demonstrates that the United States did not intend to supersede any water rights that existed as of the time of each reservation.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

Under California law, those rights included the overlying landowners' priority right to use the Basin's native yield. An owner of property overlying a groundwater basin owns a right to the use of a correlative share of the Basin's supply. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-137; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240-1241 (*Mojave*).) Because overlying rights are based on land ownership and are not predicated on water use (*Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001-1002), they vest with land ownership, so the rights of the Antelope Valley's overlying landowners vested under California law as private ownership in the Valley was established. Accordingly, any federal reserved right would be subject to all overlying rights existing at the time of the reservation, each of which entitles the owner of such property to a correlative share of the Basin's supply. (*Katz v. Walkinshaw* (1903) 141 Cal. 116.)

The United States cannot constitutionally take the water available to such rights for its own purposes without paying just compensation. (*Dugan v. Rank* (1963) 372 U.S. 609, 624-626 (United States dam impounds water subject to riparian rights); *Tehachapi-Cummings,* 49 Cal.App.3d, at 1001-1002 (riparian and overlying rights are analogous).) Unless there were no private landowners in the Basin at the time of each federal reservation, the native yield of the Basin was apportioned correlatively pursuant to "valid existing rights" under California law at the time of each reservation. The United States' burden of proof therefore includes the burden of proving that there was water available beyond valid existing rights at the time of each reservation on which it relies in seeking a reserved right.

B. The United States Can Only Possess Correlative Rights to the Extent the Reservations were Subject to Valid Existing Rights

AGWA is entitled to Summary Adjudication and a determination that the United States possesses a correlative right like other landowners within the Basin. As explained above, landowner rights to groundwater vest by virtue of ownership of property overlying the Basin, and the right is to a correlative share of the full amount of the Basin's native yield, under principles of California water law. If the reservations withdrew a portion of the corresponding correlative share of groundwater in the Basin from the public domain, then the reservation necessarily violated the landowners' existing rights to groundwater, which is expressly prohibited by the

terms of the reservations.

As discussed in the Statement of Undisputed Facts above, each of the United States' eight separate reservations stated that each was "subject to . . . valid existing rights." (USAF001653-001658, 001661, 001663-001664, 001666.) It is not possible to reconcile the United States' claim that it is entitled to a reserved water right that has priority over all other water rights in the basin with the language of the reservations. 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 any United States' federal reserved right arising at the time of reservation must be subject to valid existing rights under the system of California water law, where overlying landowners hold correlative water rights to use the basin's native yield. (*Mojave*, 23 Cal.4th at 1240-1241.) The Court should rule on the basis of the undisputed facts that the United States' rights must be consistent with the preexisting "valid rights" to which its reservations are explicitly subject.

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. (282 U.S. at 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 determine that the United States' rights are to be apportioned from the native safe yield apart from the correlative share of overlying landowners, 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'

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

explicit recognition of "valid existing rights" and ruling that all of the United States' reserved rights are correlative rights on par with other landowners in the Basin.

C. California Groundwater Law Does not Provide for a "Super-Priority" Federal Reserved Right

The United States Supreme Court has emphasized the need to integrate the reserved right into state water law (*United States v. New Mexico*, 438 U.S. at 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.

The United States has previously argued that, under California's riparian/overlying water-right system, any reserved right is "in the nature of an apportionment of a shared resource" that leaves other parties "to draw their correlative share from the remaining available supply." (See April 19, 2013 United States' Response To Landowners' Motion In Limine To Establish United States' Burden Of Proof For Any Reserved Water Rights, at 2:25-27, 3:21-22, 5:20-22.) This argument's implication appears to be that a reserved right should allocate to the United States a block of water that is not subject to any reduction and that reduces the water available to all other parties under all conditions. This argument, however, is contradicted by the California Supreme Court's decision in *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448 (*Hallett Creek*).

In *Hallett Creek*, the California Supreme Court held that the United States, like other landowners, holds riparian rights in surface waters adjacent to its reserved lands that can serve those lands' secondary purposes that cannot support a reserved right under *United States v. New Mexico* (1978) 438 U.S. 696. In *Hallett Creek*, the Court reviewed a decision of the State Water Resources Control Board ("SWRCB") that found that the United States held a reserved right for the Plumas National Forest "to divert and use up to 95,000 gallons of water annually for firefighting and roadwatering during timber harvesting." (*Hallett Creek*, 44 Cal.3d at 455.) The Court stated that the reserved right was not the first-priority right: "The United States reserved right was given a second priority, junior to M.A. Clement and J.C. Bailey, each of whom was

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

awarded a first priority in the amount of 30 gallons per day." (44 Cal.3d at 455, fn. 4.)

Over the SWRCB's opposition, the Court then held that the United States holds riparian right like other landowners because, for reserved lands' secondary purposes, the United States acquires water rights like any other party. The Court quoted *United States v. New Mexico*'s statement that, for a reservation's secondary purposes, the United States "would acquire water in the same manner as any other public or private appropriator." (*Hallett Creek,* 44 Cal.3d, at 458.) (quoting *United States v. New Mexico,* 438 U.S. at 702).) The Court then stated:

> The only available method of acquiring water under New Mexico law was appropriation. California, however, is one of the few states which recognizes both appropriative and riparian rights . . . The United States asserts that it has the same riparian water rights under California law as any other "ordinary proprietor." (*Hallett Creek,* 44 Cal.3d at 458.)

In holding that the United States held riparian rights, the Court stated:

> Although the State of New Mexico recognized only appropriative rights, the underlying principle of deference to state law logically extends to any water right recognized under local law – including riparian rights. Indeed, in a case concerning federal water rights at Camp Pendleton, California, the Ninth Circuit Court of Appeals specifically held that under California law the United States had riparian rights in "acquired" lands, i.e., lands acquired by the federal government from a nonfederal owner by purchase, condemnation, gift or exchange. (*Hallett Creek*, 44 Cal.3d at 462.)

Finally, the Court affirmed the procedures established to govern the United States' assertion of unexercised riparian rights following Hallett Creek's adjudication, which required the United States to apply to the SWRCB before exercising those rights. (44 Cal.3d at 472.)

Nothing in the California Supreme Court's *Hallett Creek* decision suggests that California's riparian/overlying water-right system causes a federal reserved right to be an apportionment of water that, however established, is fixed and reduces the water available to all other parties. *Hallett Creek* does not suggest that, in California's riparian/overlying system, the federal reserved right occupies a super-priority. *Hallett Creek* contradicts a claim that the references to "appropriations" in *United States v. New Mexico* and other reserved-right cases

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

indicate that the United States need not prove the availability of water in riparian/overlying systems because *Hallett Creek* interprets those references as simply referring to whatever kinds of water rights are available under any given state's law. (*Hallett Creek*, 44 Cal.3d at 458, 462.)

V. CONCLUSION

For all of the reasons stated herein, AGWA respectfully requests that its Motion be granted in its entirety, and that the Court rule that any federal reserved right of the United States does not entitle it to a paramount right – beyond a correlative right of any overlying landowner in the Basin – to the native yield of the Basin as a matter of law.

Dated: November 13, 2013

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____
MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

BROWNSTEIN HYATT FARBER SCHRECK, LLP
21 East Carrillo Street
Santa Barbara, CA 93101-2706

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA

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

On November 13, 2013, I served the foregoing document described as:

AGWA Memo of Points & Authorities In Support of Motion and Motion for Summary Adjudication of Issues

on the interested parties in this action.

By posting it on the website by 5:00 p.m. on November 13, 2013.

This posting was reported as complete and without error.

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

Executed in Santa Barbara, California, on November 13, 2013.

LINDA MINKY
TYPE OR PRINT NAME

SIGNATURE