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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
)

) **NOTICE OF MOTION AND MOTION IN
) LIMINE TO ESTABLISH UNITED
) STATES' BURDEN OF PROOF FOR ANY
) RESERVED WATER RIGHTS;
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT THEREOF**

) Trial Date: February 10, 2014
) Time: 9:00 a.m.
) Dept: Room 222
)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 10, 2014, at 9:00 a.m., in Department 222 (Old Department 1) of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, the Antelope Valley Groundwater Agreement Association ("AGWA") will, and hereby does move, this court in limine for an order establishing the United States' burden of proof for any water rights associated with federal reservations of property.

AGWA files this motion pursuant to Code of Civil Procedure sections 187 and 404.7, California Rules of Court, rules 3.504(c) and 3.1113(f), and the Court's Case Management Order for Phase 5 and Phase 6 Trials, dated October 25, 2013.

This motion is based on the grounds that the applicable United States Supreme Court decisions establish the following elements that the United States must prove to establish a federal reserved water right associated with any property that the United States has reserved from the public domain for a specific purpose:

(1) Each reservation's primary purpose;

(2) The minimum amount of water necessary for each reservation's primary purpose, which includes distinguishing the water necessary for that purpose from the water necessary for a reservation's secondary purposes;

(3) The amount of water available at the time of each reservation; and

(4) The location of each reservation as overlying the Basin.

This motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Ryan C. Drake, and all other pleadings and papers on file herein, and as such evidence and oral argument as may be presented at or before the time of the hearing of this motion.

Dated: January 24, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

MICHAEL T. FIFE
BRADLEY J. HERREMA
ATTORNEYS FOR AGWA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The key concept of a federal reserved water right is the implication that, when the United States reserves property from the public domain for a particular federal purpose, it also intends to reserve the minimum amount of water necessary to serve that purpose. This implication depends on the nature and terms of the individual reservation by the United States.

In order for the United States to establish one or more federal reserved rights in the Antelope Valley Groundwater Basin (“Basin”),¹ the United States must make several factual showings, including:

- (1) Each reservation’s primary purpose;
- (2) The minimum amount of water necessary for each reservation’s primary purpose, which includes distinguishing the water necessary for that purpose from the water necessary for a reservation’s secondary purposes;
- (3) The amount of water available at the time of each reservation; and
- (4) The location of each reservation as overlying the Basin.

AGWA seeks an order from the Court establishing that the United States has the burden of proof in the Phase V trial on these issues.

II. LEGAL ARGUMENT

A. The Court Can and Should Establish the United States’ Burden of Proof Via This Motion in Limine

Determining the rules applicable to the parties’ cases and the resulting content of their burdens is an appropriate use of a motion in limine. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 5-6; cf. *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1189-1190, 1210 (in limine ruling that the doctrine of strict liability did not apply to hotel premises).) “The party alleging the existence of water rights has the burden of proof.” (*Cal. Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 737.) Evidence Code section 115 defines a burden of proof as

¹ AGWA files this Motion in Limine without knowledge as to how the Court may rule on AGWA’s Motion for Summary Adjudication regarding the existence of federal reserved rights, filed on November 13, 2013 and which will be heard on January 27, 2014. If the Court grants AGWA’s Motion for Summary adjudication before the hearing on this Motion in Limine, AGWA will withdraw this Motion in Limine.

1 follows: “‘Burden of proof’ means the obligation of a party to establish by evidence a requisite
2 degree of belief concerning a fact in the mind of the trier of fact or the court” Here, where
3 the United States has alleged the existence of a federal reserved water right, which as explained
4 below requires proof beyond mere ownership of land (unlike overlying rights), the Court should
5 define the United States’ burden of proof for determination of the existence and scope of federal
6 reserved water rights with its ruling on this motion in limine.

7 **B. The United States Must Meet its Burden of Proof in Relation to Each**
8 **Reservation and Its Primary Purpose**

9 1. *The United States Cannot Assert A Single Right That Aggregates All Of*
10 *The Reservations*

11 “The implied-reservation-of-water doctrine...reserves only that amount of water
12 necessary to fulfill the purpose of the reservation, no more....” (*Cappaert v. United States* (1976)
13 426 U.S. 128, 141.) The implied-reservation-of-water doctrine’s fundamental basis is the
14 recognition that the United States could not have intended to reserve its property from the public
15 domain for a specific purpose without reserving sufficient water to implement that purpose.
16 (*Winters v. United States* (1907) 207 U.S. 564, 575-578; *Arizona v. California* (1963) 373 U.S.
17 546, 598-601; *United States v. New Mexico* (1978) 438 U.S. 696, 699-700.) In *Cappaert, supra*,
the United States Supreme Court stated the applicable framework as follows:

18
19 In determining whether there is a federally reserved water right
20 implicit in a federal reservation of public land, the issue is whether
21 the Government intended to reserve unappropriated and thus
22 available water. Intent is inferred if the previously unappropriated
23 waters are necessary to accomplish the purposes for which the
24 reservation was created. (426 U.S. at 139.)

25 In *Cappaert*, the Court recounted that President Truman issued a 1952 proclamation
26 withdrawing a 40-acre tract as a component of the Death Valley National Monument in order to
27 protect the subterranean pool in Devil’s Hole and the unique pupfish that lived in the pool. (*Id.*, at
28 131-132.) Based on this federal intent, the Court affirmed the district court’s injunction
concerning groundwater pumping that affected the pool, to the extent necessary to preserve an

adequate water level at Devil’s Hole, thus implementing the stated objectives of the 1952 Presidential proclamation. (*Cappaert, supra*, 426 U.S. at 141.)

Federal courts emphasize the importance of the specific purposes of a reservation when determining the existence and scope of any implied federal reserved water right. In *United States v. New Mexico* (1978) 438 U.S. 696, the Supreme Court reviewed the specific purpose of the reservation at issue, holding that the reserved right applies only to a reservation’s primary purpose and not to its secondary purposes:

Each time this Court has applied the “implied-reservation-of-water doctrine,” it 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....

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water....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 700-702 (emphasis added).)

An individual reservation’s primary purpose, then, determines the volume of the federal reserved right, which applies to “only that amount of water necessary to fulfill the purpose of the reservation, no more....” (*Cappaert, supra*, 426 U.S. at 141; see also *United States v. New Mexico, supra*, 438 U.S. at 700-702, fn. 4 (describing review of federal intent in prior cases and stating a reserved right is available only to serve a federal reservation’s primary purpose).) Determining a reservation’s primary purpose requires a “careful examination” of “both the asserted water right and the specific purposes for which the land was reserved....” (*United States v. New Mexico, supra*, 438 U.S. at 700, fn. 4.)

This examination is particularly important in this case, because the United States’ various reservations state various and shifting purposes. For example, the reservation instruments at issue

1 include the following purposes: “a bombing and gunnery range,” “military purposes,” “in
2 connection with an air force base” and “for military purposes in connection with Edwards Air
3 Force Base.” (USAF001653-001658, 001661, 001663-001664, 001666.)² The fact that various
4 reservations use different language to describe their purposes demonstrates that the United States
5 meant something different when it used the term “bombing and gunnery range” versus the term
6 “military purposes.” It is the United States’ burden to prove what the primary purpose of each of
7 those shifting reservations was, that will inform how much water is needed to meet that purpose,
8 as explained below.

9 C. **The United States Has The Burden Of Proving The Minimum Amount Of**
10 **Water Necessary To Serve Each Reservation’s Primary Purpose**

11 Where the Supreme Court has found a reserved right, “it has...concluded that without the
12 water the purposes of the reservation would be entirely defeated.” (*United States v. New Mexico*,
13 *supra*, 438 U.S. at 700.) For example, in *Cappaert*, the Supreme Court found that the reserved
14 right had vested before the private party obtained its groundwater-pumping permit from the State
15 of Nevada, but then affirmed a District Court injunction that was “tailored...to minimal [federal]
16 need, curtailing pumping only to the extent necessary to preserve an adequate water level at
17 Devil’s Hole....” (*Cappaert, supra*, 426 U.S. at 140, fn. 6, 141.)

18 For each reservation on which the United States relies to support a claimed reserved right,
19 it therefore has the burden to prove what the minimal amount of water is that is necessary to serve
20 that reservation’s primary purpose. To the extent that the United States relies on its past or
21 existing water use to support its reserved right claim, its burden of proof includes the burden of
22 proving that water use and of proving what portions served a reservation’s primary purpose and
23 secondary purposes. Only such evidence would allow the Court to distinguish the minimum
24 amount of water that the United States has used to serve a reservation’s primary purpose, which
25 purpose determines the volume of any right that would be based on that reservation. (*United*
26 *States v. New Mexico, supra*, 438 U.S. at 702.)

27 _____
28 ² Documents with the stamp “USAF” were produced by the United States with its discovery responses and
are available on the Court’s website at www.scefiling.org/filingdocs/289/58180/usdoj/.

1 **D. The United States Has The Burden Of Proving How Much Surplus Water**
2 **Was Available At The Time Of Each Reservation**

3 As discussed above, the Supreme Court's decisions state that the reserved right provides
4 the United States appurtenant water then unappropriated to the extent needed to accomplish the
5 purpose of the reservation, creating a reserved right in unappropriated water that vests on the date
6 of the reservation. (*Cappaert, supra*, 426 U.S. at 138; *United States v. New Mexico, supra*, 438
7 U.S. at 713, fn. 21.) The reservations at issue in this case themselves require that the United
8 States prove how much water was available above existing rights at the time of those
9 reservations. As discussed in AGWA's Motion for Summary Adjudication as to the existence of
10 federal reserved rights in the Basin (Nov. 13, 2013), and AGWA's Reply to the United States'
11 Opposition to Motion for Summary Adjudication (Jan. 3, 2014), each of the United States'
12 reservation instruments removing land for Edwards Air Force Base and Air Force Plant 42 from
13 the public domain stated that the individual reservation was subject to "valid existing rights."
14 This condition on each and every reservation demonstrates the United States' intent in making
15 each of those reservations: that the United States did not intend to supersede any water rights that
16 existed as of the time of each reservation.

17 Unless there were no private landowners in the Basin at the time of each federal
18 reservation – which is highly unlikely, given that the first reservation occurred in 1934 – "valid
19 existing rights" already existed under California law at the time of each reservation. The United
20 States' burden of proof therefore includes the burden of proving that there was surplus water
21 available at the time of each reservation on which it relies in seeking a reserved right.

22 **E. The United States has the Burden of Proving That the Reserved Land for**
23 **Which it Seeks Any Reserved Right Overlies the Basin**

24 The reserved right derives from the United States' power to control its property, so it
25 applies only to those water supplies that are appurtenant to the reserved property. (*Cappaert,*
26 *supra*, 426 U.S. at 138; *United States v. New Mexico, supra*, 438 U.S. at 698-700.) The United
27 States' burden of proof in this case therefore includes proving that the land reserved in each of its
28 relevant reservations actually is appurtenant to the Basin's water supply, i.e., that the reserved
land overlies the Basin.

1 **III. CONCLUSION**

2 For the reasons stated above, AGWA respectfully requests that the Court order that the
3 United States has the burden of proving the following in the Phase V trial:

4 (1) Each reservation's primary purpose;

5 (2) The minimum amount of water necessary for each reservation's primary purpose,
6 which includes distinguishing the water necessary for that purpose from the water necessary for a
7 reservation's secondary purposes.

8 (3) The amount of water available at the time of each reservation; and

9 (4) The location of each reservation as overlying the Basin.

10
11
12 Dated: January 24, 2014

BROWNSTEIN HYATT FARBER SCHRECK, LLP

13
14 By: 

15 MICHAEL T. FIFE
16 BRADLEY J. HERREMA
17 ATTORNEYS FOR AGWA
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2 **PROOF OF SERVICE**

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4 **STATE OF CALIFORNIA,
COUNTY OF SANTA BARBARA**

5
6 I am employed in the County of Santa Barbara, State of California. I am over the age of
7 18 and not a party to the within action; my business address is: 1020 State Street, Santa Barbara,
8 California 93101.

9 On January 24, 2014, I served the foregoing document described as:

10 **NOTICE OF MOTION AND MOTION IN LIMINE TO ESTABLISH UNITED STATES'
11 BURDEN OF PROOF FOR ANY RESERVED WATER RIGHTS; MEMORANDUM OF
12 POINTS AND AUTHORITIES IN SUPPORT THEREOF**

13 on the interested parties in this action.

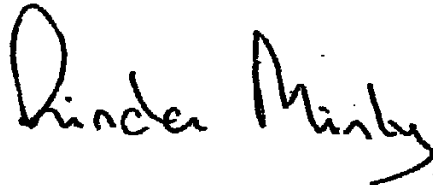
14 By posting it on the website by 5:00 p.m. on January 24, 2014.

15 This posting was reported as complete and without error.

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

18 Executed in Santa Barbara, California, on January 24, 2014.

19
20
21 **LINDA MINKY**
22 **TYPE OR PRINT NAME**

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SIGNATURE