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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 **REPLY TO OPPOSITION TO MOTION IN LIMINE OF AGWA TO ESTABLISH UNITED STATES' BURDEN OF PROOF FOR ANY RESERVED WATER RIGHTS** Trial Date: February 10, 2014 Time: 9:00 a.m. Dept: Room 222

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I. INTRODUCTION

The Antelope Valley Groundwater Agreement Association ("AGWA") hereby responds to the United States' Opposition to Motion in Limine of AGWA to Establish United States' Burden of Proof For any Reserved Water Rights ("U.S. Opposition"), filed February 3, 2014.

The U.S. Opposition seeks to eliminate basic elements the United States' burden of proof concerning the primary purposes of the reservations, the specific purposes of each of the reservations themselves—as opposed to a vague, general "military purpose"—and the minimum amount of water necessary to serve those purposes. The Court should decline the United States' invitation to summarily argue that it is legally entitled to a single reserved water right that is defined solely by the United States' current and projected need for water, in contrast to all reserved right authorities. For the reasons below, the Court should grant AGWA's motion in limine requesting an order that the United States must establish the basic elements of federal reserved rights to meet its burden of proof.

II. LEGAL ARGUMENT

A. The United States Presents a Flawed Interpretation of U.S. Exclusive Jurisdiction to Avoid Demonstrating a Basic Element of Federal Reserved Rights

Under the United States' logic, the United States Supreme Court's holdings concerning the reserved right's purposes are irrelevant because a portion of the land at Edwards Air Force Base is under the United States' exclusive jurisdiction. (See U.S. Opposition, at 3:2-10.) According to the United States, its sovereign authority over its property grants it the right to control whatever water is available to that property, regardless of what the purpose of the reservation was and what water the United States currently uses water for on the military lands under exclusive federal jurisdiction. (U.S. Opposition, at 4:4-13.) The United States wants to take this argument even further and claim that its exclusive jurisdiction within the boundaries of the reservation enables it to reach off of the reservation in order to limit the amount of water available to landowners many miles away from the reservation and to subordinate the priority of the water rights of those landowners under state law. Essentially, the United States is arguing that its exclusive jurisdiction over a portion of its property gives it a water right free of any

geographic, temporal or legal limitations. This argument goes too far, and is inconsistent with all governing authority on federal reserved rights.

It is a basic element of federal reserved rights that when the United States withdraws lands from the public domain and reserves them for a federal purpose, it implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. (*State of Alaska v. Babbitt* (9th Cir. 1995) 72 F.3d 698, adhered to, 247 F.3d 1032 (9th Cir. 2001).) Federal reserved water rights derive from the stated intent or purpose of the reservation of land for a federal purpose. (*In re Application for Water Rights of U.S.* (Colo. 2004) 101 P.3d 1072.) Fundamentally, then, the United States must as a prerequisite to its claim for federal reserved rights demonstrate the purposes of the reservation of water, and the amount of water necessary to meet those purposes.

Furthermore, in determining the scope of impliedly reserved water rights, a court may look only to the primary purpose of the reservation at the time the land was first reserved by the federal government and may not consider other purposes later given to the reservation. (See *New Mexico*, 438 U.S. at 713–15.) None of the authorities have held that due to the United States' exclusive jurisdiction, the purposes of the use within the federal enclave are irrelevant. To the contrary: the primary purposes of the reservation and whether or not the water is necessary to meet those purposes are key defining factors of the scope of the reserved right.

The United States relies on *California v. United States*, which concerned the water rights of Camp Pendleton, a military base located along the Santa Margarita River, which the United States assembled through a combination of a reservation and the acquisition of private property through condemnation and purchase. (*California v. United States* (9th Cir. 1956) 235 F.2d 647, 652.) The Ninth Circuit held that, while the United States had sovereign authority over the base, its "sovereign rights" did not govern the allocation of water rights in the river running through the base:

> To hold that the "use" of the corpus of the water coming onto the enclave for any purposes the government agents required, whether beneficial or not, and that the "needs," present and future, claimed by government attorneys were the measure of the vested property rights, would be to adjudge that California not only ceded the sovereignty over the enclave, but thereby bargained, sold and delivered a vested water right adverse to all other claimants in all

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> the flow of the stream at that time. But California did not own such a water right and could not grant it.
>
> The government, as regards all claimants to water outside the enclave, is not in the position of sovereign, but in the position of a lower riparian which is compelled to make beneficial use within the watershed and for other than proper riparian uses must show an appropriation according to law.

(*Id.* at p. 656.)[1]

The factual circumstance of Camp Pendleton is directly analogous to that of Edwards Air Force Base and the United States has made no attempt to distinguish it. In fact, the United States' continual citation to the case demonstrates its applicability here. However, because the Ninth Circuit decided that Camp Pendleton's water rights were not governed by a "sovereign" priority even though it enjoys exclusive jurisdiction over its property, and instead were akin to lower riparian rights, *California v. United States* does not support the United States' argument that since it has exclusive jurisdiction over its reserved lands, it need not demonstrate the purpose of the water used on its land.

West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co. (8th Cir. 1990) 918 F.2d 713, which did not involve federal reserved water rights, examined whether by virtue of the Continuing Appropriations Act, Fiscal Year 1988, Pub.L. No. 100–202, § 8093, 101 Stat. 1329, 1329–79 (1987), Ellsworth Air Force Base was required to follow the utility franchise territories prescribed by South Dakota law in procuring its electrical service. (918 F.2d at 714.) The court held that the Continuing Appropriations Act was "…insufficient to defer the exclusive grant of federal jurisdiction." (918 F.2d at 715.) The case does not support the proposition that where the United States has reserved land, it need not follow the purposes for which it was reserved, and use water for those purposes.

While true that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property, (918 F.2d

[1] In its Order denying AGWA Motion for Summary Adjudication, the Court *cited State of California v. Superior Court* (2000) 78 Cal. App. 4th 1019, for the proposition that the State owns all water in the State in the sense that it has the power to regulate and supervise its uses. While the State of California owns the corpus of the groundwater in California in a manner that empowers it to supervise and regulate water use, water rights holders have a right to "take and use water". (*Central and West Basin Water Replenishment District v. Southern California Water Co.* (2003) 109 Cal.App.4th 891, 905.) This right to take and use water is regarded and protected as against others as a real property right. (*Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 598.)

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at 719), AGWA's Motion in Limine does not seek to subject the federal enclave to state regulation. Rather, AGWA merely requests that the Court establish that the United States must demonstrate the purposes for which it created the enclave under federal law, as such a right is determined by the withdrawal and reservation of the applicable land **for a federal purpose.** (See *Cappaert v. United States* (1976) 426 U.S. 128, 138; *United States v. New Mexico* (1978) 438 U.S. 696, 700.)

B. The United States Cannot Assert a Single Aggregated Right to Water Based on a General "Military Purpose"

The Court should respect the reservations' explicit statements of their various purposes and decline the United States' invitation to amalgamate them into a single "military" purpose. In *United States v. New Mexico*, the United States Supreme Court emphasized the importance of a federal reservation's specific purposes, holding that the reserved right applies only to the primary purpose of the reservation and not any secondary purposes. (*United States v. New Mexico* (1978) 438 U.S. 686, at 700-702; see also *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 459-467 (United States can hold riparian rights in streams running through federal reservations to serve their secondary purposes) ("*Hallett Creek*").) The United States' ten reservations state several different purposes, with over 150,000 acres being reserved in 1940's Executive Order 8450 "as a bombing and gunnery range." (USAF001658.) This purpose presumably requires little water. Further, AGWA understands, based on the Phase 3 testimony of Gerald Boetsch, Brigadier General Michael Brewer, and James E. Judkins, that the land within the boundaries of Edwards Air Force Base is used for both military and non-military purposes such as NASA, Muroc School District, and a golf course.

The United States' motion, however, asserts that its ten reservations, as well as the numerous acquisitions from private landowners, and their different purposes should be amalgamated to support a single reserved right that supports a general "military purpose." This argument not only fails to explain why the United States would state several different purposes within a limited number of years for multiple separate reservations, but also does not reflect the actual terms of the 1935 Act of Congress on which the United States relies.

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The United States cites the Act of August 12, 1935, (U.S. Opposition, at 5:1-7), but that Act shows that the United States' arguments are incorrect. The Act's sections one and two authorized the Secretary of War to establish "the location of such additional permanent Air Corps stations and depots as he deems essential . . . for the effective peace-time training of the General Headquarters Air Force and the Air Corps components of our overseas garrisons" and to acquire property for those stations and depots. (49 Stat. 610-611.) The Act's section three then authorized the Secretary to "construct, install, and equip" various "buildings and utilities," including "water." (49 Stat. 611.) The Act's section three, however, then also stated the following: "The Secretary of War is further authorized to acquire by gift, purchase, lease, or otherwise . . . such bombing and machine-gun ranges as may be required for the proper practice and training of tactical units." (49 Stat. 611 (emphasis added).)

In other words, the 1935 Act of Congress that the United States cites codified the distinction between air bases and bombing and gunnery ranges that is reflected in the ten reservations here. The United States attempts to erase these distinctions, and its arguments are therefore inconsistent with the United States Supreme Court's decisions that emphasize a close examination of individual reservation's purposes in deciding what reserved water rights may be associated with them. (*Adair*, 723 F.2d at 1408–09.)

In determining the scope of impliedly reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation. (See *New Mexico*, 438 U.S. at 713–15.) That is exactly what the United States invites the Court to do here, without citing a single authority: include other purposes later given to the reservation within a general umbrella of "military purposes." "If Congress or the President wishes to obtain more water for federal lands after the initial reservations, they must use the state appropriation machinery or condemn the desired water." (*Navajo Development Co., Inc. v. Sanderson* (Colo. 1982) 655 P.2d 1374, 1379.)

The United States has claimed that it property acquired through purchase or condemnation is to be analyzed in the same manner as reserved property. In its briefing the United States cites to a single case to support this proposition: *United States v. Anderson*, 736 F.2d 1358 (9th Cir.

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1984). This case considered a variety of scenarios with respect to land re-acquired by an Indian tribe in Washington State after the land was sold into private ownership. The Ninth Circuit found that land which had originally been tribal land and which had not lost its water rights when it was privately held would retain its priority as of the original date of the reservation. (*Id.* at 1361.) However:

> We hold that those perfected water rights appurtenant to homesteaded lands will not have a priority as of the date of reacquisition of the property by the Tribe; instead, they will carry a priority as determined under state law. Homesteaded lands where the water right has not been perfected or the rights have been lost, will have a priority date as of the date of reacquisition, rather than an original, date-of-the-reservation priority.

(*Id.*) In other words, *Anderson* only allowed a reserved right as to lands that were originally subject to a reserved right and that did not lose its water rights when the land passed into private ownership. For all other lands, the Court found no reserved right. Contrary to the United States assertion, this case does not support the concept that reserved rights and rights in acquired lands can be aggregated into a single reserved right. It rather supports the opposite interpretation that reserved rights and rights in acquired lands must be treated separately.

C. The United States Must Prove How Much Water Was Available to Meet the Purposes of the Reservations

The United States makes a startling claim in its Opposition that it need not prove surplus water was available to meet the purposes of the individual reservation at the time of each reservation. This case is unique in that the reservation instruments at issue state they are "subject to valid existing rights" at the time of reservation, and none of the federal reserved water right cases outside the appropriation context concern reservations with similar limitations. However, under California law, riparian and overlying rights are vested property rights which are annexed to the soil and "part and parcel" of the riparian and overlying land. (*Los Angeles County Flood Control Dist. v. Abbot* (1938) 24 Cal.App.2d 728, 733.) 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. Under

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California law, it is well-established that overlying landowners' correlative rights extend to the entire native yield of a groundwater Basin. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 294.) If there was no surplus water available when the United States made each of its reservations, then any removal of an amount of water from the Basin's native yield necessarily impairs "valid existing rights."

The United States cites *In re Waters of Long Valley Creek Stream System v. Ramelli* (1979) 25 Cal.3d 339 for the holding that an appellant landowner has no "vested" future right to an unquantified amount of water. But that case addressed the extent to which the State Water Resources Control Board ("State Water Board") has the power to define and otherwise limit prospective riparian rights when, pursuant to the statutory adjudication procedure set forth in Water Code section 2500 et seq., it determines all claimed rights to the use of water in a stream system. (25 Cal.3d at 344.) The *In re Waters of Long Valley Creek Stream System* court did not hold that overlying rights to a correlative share of the supply are not vested, or that they are not "valid existing rights." (See 25 Cal.3d at 344-45.)

Accepting the United States' claim to have excepted a portion of the Basin's native yield from the correlative rights of overlying landowners (as well as any municipal appropriators) would embed a serious constitutional takings issue in the Court's final judgment. Absent a showing of availability of water surplus to the water necessary for the reasonable and beneficial use of overlying landowners who held an overlying correlative right at the time of the reservation, the United States' reservations would effectively remove water from the Basin that was already used by other parties.

III. CONCLUSION

Based on the arguments contained in AGWA's Motion in Limine and the arguments in this Reply, AGWA requests that the Court grant its Motion in Limine and grant an order establishing the basic burden of proof elements for the United States to establish a federal reserved right.

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Dated: February 5, 2014

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By:_____

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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: 1020 State Street, Santa Barbara, California 93101.

On February 5, 2014, I served the foregoing document described as:

REPLY TO OPPOSITION TO MOTION IN LIMINE OF AGWA TO ESTABLISH UNITED STATES' BURDEN OF PROOF FOR ANY RESERVED WATER RIGHTS

on the interested parties in this action.

By posting it on the website by 5:00 p.m. on February 5, 2014.

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 February 5, 2014.

LINDA MINKY
TYPE OR PRINT NAME

Linda Minky
SIGNATURE