IGNACIA S. MORENO, 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 MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO ESTABLISH THE UNITED STATES' LEGAL ENTITLEMENT TO A FEDERAL RESERVED WATER RIGHT AND TO LIMIT THE SCOPE OF EVIDENCE NECESSARY AT TRIAL

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I. INTRODUCTION

The United States respectfully submits this memorandum of points and authorities in support of its Motion in Limine to establish the United States' legal entitlement to a federal reserved water right.[1] The United States is entitled to an Order recognizing that it has reserved water from the Antelope Valley Aquifer for military uses at Edwards Air Force Base (EAFB) and Air Force Plant 42 (Plant 42). These installations were withdrawn and acquired by the United States government for the purpose of establishing facilities to serve military purposes and national defense needs. Water is necessary for these military installations in order to fulfill the purpose for which the United States obtained and set aside the land. Under the federal reserved water rights doctrine, water was impliedly reserved in an amount sufficient to meet these federal purposes.

In this motion, the United States seeks (1) a ruling on the United States' legal entitlement to a reserved water right, (2) to limit or eliminate the need for evidence at trial related to the volume or location of annual pumping from the Antelope Valley aquifer at the time of the

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[1] "'*In limine* motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial.'" *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.*, 171 Cal. App. 4th 939, 951 (2009) (quoting *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1593 (2008)). In addition, a "court has inherent equity, supervisory and administrative powers, as well as inherent power to control litigation and conserve judicial resources." *Lucas v. County of Los Angeles*, 47 Cal. App. 4th 277, 284 - 285 (1996). This inherent power extends to determinations of whether as a matter of law a party's case may be maintained based on the evidence already produced in discovery. *Cf. Edwards v. Centex Real Estate Corp.*, 53 Cal.App.4th 15, 27 (1997)(ruling that an *in limine* motion based on the evidence already produced in discovery may "operate[s] as a general demurrer to [the] complaints or a motion for judgment on the pleadings.")

reservations or land acquisitions[2], and (3) to limit the evidence the United States must produce at trial to (a) proof of federal ownership; (b) demonstration of the military purposes at EAFB and the Plant 42; and (c) a showing of the amount of water necessarily reserved for current and future military purposes.

II. SUMMARY OF ARGUMENT

Through various executive orders, public land orders, purchases and condemnations, the EAFB and Plant 42 enclaves were reserved from the public domain or acquired from private parties. Pursuant to the reserved water rights doctrine, when the federal government dedicates its land for a particular purpose, it also reserves sufficient water to accomplish the purpose of the enclave. The power to reserve water necessary to accomplish the particular purposes of federal land extends to both reserved and acquired land, so long as the land is acquired for a particular purpose and water is necessary to fulfill that purpose. The power to reserve water is also inherent in the United States' exclusive jurisdiction over major portions of EAFB. In the instant case, the purpose of EAFB and Plant 42 is for the creation and maintenance of a military base, and water is necessary to fulfill that purpose. Water was available for reservation at the time the land for EAFB and Plant 42 were acquired and/or reserved, and water was reserved in the amount necessary to support the past, present and future activities at these federal facilities to serve vital military and national defense purposes.

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[2] As discussed in detail below in section IV.5., the right to withdraw ground water acquired by the United States as part of the creation of EAFB and Plant 42 obviates any need to show the state of aquifer withdrawals at the time of establishment of these federal enclaves.

III. BACKGROUND

1. Edwards Air Force Base.

The history of Edwards Air Force Base and the military's use of Rogers and Rosamond lakebeds begins in September 1933 when a detachment from March Field, Riverside Calif., arrived to lay out and maintain a bombing and gunnery range for the Army Air Corps. *See* Exh. No. 1 (1944 Muroc Air Base History)(USAF022898-022904).[3] 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). The bombing and gunnery range, named the Muroc Air Field, soon transformed into a flight training center where squadrons of bombers would land on the lakebed, bivouac beside their planes, and make sorties to the adjacent bombing range. *See* Exh. No. 1 (USAF022899-022900). During World War II, several military units were established at the rapidly-growing airfield. The 80th and 81st Fighter Groups, as well as the 305th Bombardment Group, and Guard units conducted operational unit training at the air field prior to deployment in the war.

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. In April 1942, Muroc Air Field became the Army Air Field Materiel Center, initiating its long career as a center for military flight testing. Ever since, the Base has played a significant role in

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[3] Reference to numbers with the prefix "USAF" are Bates-labeled documents that were produced by the United States in its discovery responses and are available on the Court's Web site at www.scefiling.org/filingdocs/289/58180/usdoj/. For ease of reference, the United States submits copies of the documents as exhibits to the concurrently filed Declaration in Support of Motion in Limine.

the development of virtually every aircraft to enter the Air Force inventory since World War II.[4] It has been the site of many aviation breakthroughs including the test of the nation's first military jet, the XP-59A Airacomet; Chuck Yeager's flight that broke the sound barrier in the Bell X-1; test flights of the North American X-15; and the first landings of the Space Shuttle.[5] In the 1950s, the Base added the USAF Experimental Rocket Engine Test Station to its operations to provide a safe and remote site for contractors to test new and developmental rocket engines. The dawning of the aerospace era added the National Aeronautics and Space Administration (NASA) High-Speed Flight Station to the list of missions at the installation. *Id.* Today, Edwards houses the Air Force Flight Test Center, Air Force Materiel Command; U.S. Air Force Test Pilot School and NASA's Dryden Research Center; and the Air Force Research Laboratory (AFRL).[6] It continues to be a key facility in the progression of the aerospace revolution from turbojet, supersonic, hypersonic, stealth, to yet-to-be tested or conceived-of aero technologies. Edwards Air Force Base has proven to be an irreplaceable national asset.

When the War Department began to utilize the 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

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[4] On December 7, 1949, the Department of the Air Force issued a General Order (No. 105) which redesignated Muroc Air Force Base as Edwards Air Force Base in honor of Captain Glen W. Edwards, a chief test pilot killed in the flight test of the YB-49 flying wing on June 5, 1948.

[5] *See* HISTORIC AMERICAN ENGINEERING RECORD (1995), EDWARDS AIR FORCE BASE, NORTH BASE (Muroc Flight Test Base), HAER No. CA-170 (hereinafter the "EAFB Historic Record"). This document is over one hundred pages long and therefore is not submitted as an exhibit. It is available at *http://www.loc.gov/pictures/item/ca2142/*

[6] The Air Force Test Center (AFTC) provides Department of Defense wide support for weapon-system development and operational testing and evaluation for a broad range of aircraft and weapons systems. The Test Pilot School is where Air Force pilots, navigators and engineers learn how to conduct flight tests and generate the data needed to carry out test missions. The Dryden Flight Research Center is NASA's primary center for atmospheric flight research and operations. The Air Force Research Laboratory (AFRL) is the sole Air Force entity charged with developing spacecraft and rocket propulsion technologies.

be used as a bombing and gunnery range. *See* Exh. No. 3 (USAF001653). 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. 4 (USAF023125). 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.[7] Under this authority, the War Department purchased or condemned all private lands to form Edwards Air Force Base.

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. 5 (USAF004191-4193). For unwilling sellers, condemnation suits were filed accompanied by Declarations of Takings. *See e.g.*, Exh. No. 6 (USAF001748). 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.

In 1937, Executive Orders 7707 and 7740 withdrew and reserved approximately 72,720 acres for "military purposes" at Muroc. *See* Exh. No. 7 (USAF001656), Exh. No. 8 (USAF001657). On June 20, 1940, President Roosevelt signed Executive Order 8450, superceding 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. 9 (USAF001658).

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[7] *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.

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 in September 1940. *See* Exh. No. 10 (USAF019539-19540). A 6,500 ft concrete runway with apron and taxiways was laid out, and construction began. *Id.*

On July 23 1942, the Muroc Bombing and Gunnery Range was redesignated Army Air Base, Muroc Lake, California (popularly known as Muroc Army Air Base). *See* EAFB Historic Record at 17. Its mission by this time primarily was pilot training. But, Muroc and its missions continued to expand. In April of 1943, the Muroc Dry Lake was selected as the site for Materiel Center Flight Test Site, the new facility eventually becoming the North Base area of Edwards Air Force Base, to test experimental models of the nation's first jet propulsion airplane. *Id*. at 17-18. In January 1945, the California Institute of Technology Research and Development Service Sub-Office received approval to establish the nation's first large-thrust rocket motor test station on land adjoining the Materiel Command Flight Test Base at the north end of the Muroc Dry Lakebed. *Id*. at 27-28.

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 Air Force Base; the additional land deemed necessary to accommodate the Army Air Forces' future flight-test needs. *See* Exh. No. 11 (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."[8] *See* Exh. No. 12 (USAF 023436-37; 001660-61; 001662-64; 001665-66; 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. 13 (USAF003330-3359).

Also of significance in the history of 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 assume exclusive jurisdiction over lands within California "acquired by the United States for military and certain other purposes." *See* Exh. No. 14 (USAF012619-621; 012640-12653).[9]

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[8] 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.

[9] 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.

2. 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. 15 (USAF023617)(excerpt from Plant 42 history).

Military interest in the Palmdale Airport lead to requisition and renaming of the facility as the Palmdale Army Air Field during World War II. The War Department constructed a 6,000 foot concrete runway, a 5,000 foot auxiliary runway, and a hangar, and acquired 950 acres in fee simple. In December 1942, the Commanding Officer of Muroc Army Air Base received authorization to form base detachments at Palmdale for the purpose of operating satellite airfields. The Palmdale Army Air Field soon developed into a full-blown training facility for squadrons rotating through the area and using the Muroc bombing ranges.[10] *Id.* (USAF0023618-625).

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.

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[10] On June 1, 1944, the 412th Fighter Group and its only subordinate squadron, the 445th, relocated to Palmdale Army Air Field. The move was to facilitate the unit's growth and operational independence yet still retain in close proximity to the Flight Test Base and to continue to enjoy the area's isolation and superb flying conditions. The 412th soon expanded to include the 29th Fighter Squadron (July 21,1944) and the 31st Fighter Squadron (August 19, 1944). Exh. No. 15 (USAF023619-23622)

. . ." *See* Exh. No. 16 (USAF023762-65). The recapture clause enabled the government to occupy the facility during a national emergency.

At the dawn of the Cold War, aircraft industry development accelerated. Many of the aircraft developers were located in the Los Angeles basin, and industry and the government quickly recognized that testing of high-performance aircraft in heavily populated areas was a problem. As a solution, in the early 1950s, the Department of the Air Force "proposed to acquire the Palmdale Airport, designate it as an industrial facility and utilize it for the final assembly and flight testing of jet fighter type aircraft. . . ." *Id*. Although the airport lands were recapturable due to the declared Korean War emergency, 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 was to be 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 from the County of Los Angeles. *See* Exh. No. 17 (USAF023766-770). Today, Plant 42 consists of approximately 4870 government-owned acres. It is operated under the Air Force Material Command (AFMC). Aerospace contractors at Air Force Plant 42 share a common runway complex and either lease building space from the Air Force or own their own building outright. There are eight separate production sites specially suited for advanced technology and/or "black" program projects.

IV. ARGUMENT

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

The United States obtained water rights for EAFB and Plant 42 based on the implied federal reserved water rights doctrine. The federal reserved water rights doctrine provides that when the federal government dedicates its land for a particular purpose, it also reserves, either expressly or 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.[11]

In the seminal reserved water rights case of *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court held that when Congress approved the treaty establishing the Fort Belknap Indian reservation, it also, by implication, reserved the water necessary to achieve the reservation's purpose. Since *Winters*, the Supreme Court has extended the doctrine to federal

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[11] 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.

enclaves other than Indian reservations. *E.g., Arizona v. California*, 373 U.S. 546, 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 national parks, forests, monuments, military reservations, and wildlife preserves.") (citing *Cappaert*, 426 U.S. at 138-39).

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).

2. The reserved water rights doctrine applies to federal lands reserved from the public domain and acquired from private entities.

In the exercise of its constitutional authority under the Commerce, Property, or General Welfare Clauses, or under its treaty or war powers, the United States has the power to reserve water for federal lands whether that land was reserved from the public domain, or acquired by purchase or condemnation. In *Arizona*, 373 U.S. at 598, the Supreme Court clearly recognized that the federal government's reservation of water is not restricted to federal lands reserved from the public domain. 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). This includes the power to reserve water for property the United States has acquired from private entities for specific purposes.

Although EAFB and Plant 42 include land acquired from private ownership for the specific purpose of military facilities as well as lands reserved from the public domain, the existence of a federal reserved water right does not depend on a technical examination of whether the individual land comprising the federal enclaves was formerly public domain or private. The crucial questions are (1) whether the land was acquired or reserved for a particular federal purpose, and (2) whether water is necessary to accomplish the federal purpose for which the federal property was withdrawn or acquired.

The principles of dedication of land to a particular federal purpose and the need for water are grounded, in part, in both riparianism and federal powers under the constitution, and are evident 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* 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. How the Indian Reservation was created, whether reserved from the public domain or acquired from another source, was not the focus. Rather, 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)).

When, 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, it did not rely on the reservation of land as a necessary condition coincident with the reservation of water. Rather, it declared that water is reserved to the United States for its reservations and "its [federal] property." 373 U.S. at 597-598. 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).

Two years after *Cappaert*, in *United States v. New Mexico*, 438 U.S. 696, 698-99 (1978), the Court recognized that the doctrine applies to any land that has been set aside as a national forest. National Forests may be created from either reserved or acquired lands. *See* 16 U.S.C. § 521; *Belville Min. Co. v. United States*, 999 F.2d 989, 1007 n.9 (6th Cir. 1993) ("the Federal Government established the National Forests and acquired forest land for them for the purpose of timber production and the protection of navigable waters and environs.")(internal citation and quotation marks omitted)(emphasis added).

Supreme Court case law, therefore, demonstrates that federal power to reserve water extends to lands that are not reserved from the public domain, but rather acquired for specific purposes. Subsequent to and based on the formative Supreme Court cases, 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. *See United States v. Anderson*, 736 F.2d

1358 (9th Cir. 1984).[12] In a somewhat different context, Congress has expressly reserved water for the purpose of federal reservations which include substantial acquired lands. Congress established the San Pedro Riparian National Conservation Area in Arizona with an express reservation of water, notwithstanding that most of the land had to be acquired by exchange, purchase, or donation. *Arizona-Idaho Conservation Act of 1988*, Pub. L. No. 100-696, §101, 102 Stat. 4571 (codified at 16 U.S.C. §460xx). In addition, the Wild and Scenic Rivers Act of 1968 contains an express assertion of federal reserved water rights even though rivers and adjacent land areas designated pursuant to the Act contain both reserved and acquired lands. *See* 16 U.S.C. § 1284(c).

As the cases and legislation show, the federal reserved water rights doctrine is "equally applicable to water necessary to fulfill the primary purposes of a federal statutory scheme where the lands in question have been acquired by the federal government from private ownership, rather than reserved from the public domain, and dedicated to particular federal purposes, such as a national forest, park, or military base." 6 U.S. Op. O.L.C. at 333. This 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.[13]

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[12] In *Anderson*, the lands at issue were originally part of the Reservation and then were opened up for homesteading. Later, the Tribe reacquired the homesteaded lands pursuant to a 1968 Act of Congress. *Id.* at 1361. The Court relied upon the reacquisition itself, not the original reservation, to establish the basis for a reserved water right. "We treat these lands in a manner analogous to that of a newly created federal reservation and find that the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe." *Id*. at 1363.

[13] With respect to EAFB and Plant 42, the United States demonstrates in section 4 *infra* that the lands for these two enclaves were reserved and/or acquired for the specific purposes of a military

3. 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. 18.[14] 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; . . . .

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*

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base. As discussed in section 4 herein, the military purposes of the facility have always demanded personnel and infrastructure requiring water. It is incontrovertible that at the time of the formation of EAFB and Plant 42, there was no other water source available to supply necessary operations other than the Antelope Valley Groundwater Basin aquifer, and without water from the aquifer, the land could not be used for the purposes intended for the enclave.

[14] 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.

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.[15] 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 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

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[15] 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).

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 for Edwards Air Force Base's needs.

4. 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 attempts to fabricate a narrow purpose for the enclaves should 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. Thus, the second step in deciding if an implied water right exists is determining the federal purposes to be served by the executive and legislative actions setting aside EAFB and Plant 42. Here the history of congressional and executive actions, together with the contemporaneous actions that were 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.

The initial reservation of land that eventually formed EAFB occurred on February 6, 1934 through President Roosevelt's Executive Order No. 6588. The stated purpose of reservation was a "bombing and gunnery range." Subsequent actions and reservation documents quickly make clear, however, that the purpose of the reservation was not narrowly intended to merely be empty land on which to drop ordinance. In the Act of August 12, 1935, 49 Stat. 610, Congress granted authority for the acquisition of a permanent facility at this site. Congress directed that the creation of permanent stations

> shall be suitably located to form the nucleus of the set-up for concentrations of General Headquarters Air Force units in war and to permit, in peace, training and effective planning, by responsible personnel in each strategic area . . . .

Id. The 1937 and 1940 Executive Orders use "military purposes" and "bombing and gunnery range" interchangeably within a span of only three years. Subsequent executive orders and public land orders adding land to the base describe the purposes as "military purposes," PLO 480, PLO 1126, PLO 2270; "in connection with and air force base" PLO 613; "as an air force base" PLO 646. In addition, the condemnation actions also describe the purposes of the acquisition as "[e]xpanding needs and requirements for the Department of the Air Force and for other military purposes incident thereto," and similar proclamations. Exh. No. 13 (USAF003330-3359). 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.

Use of Plant 42 for military purposes is also clearly evident from the congressional legislation authorizing its acquisition and construction. The Senate in 1951 passed a bill for "the provision for adequate airfields, forts, camps, stations, depots, bases, and other facilities needed to meet the operational requirements of the approved forces and to permit the utilization of the newer types of equipment now coming off the production lines." Pub. L. No. 82-155, 65 Stat. 336 (1951). Plant 42 was authorized under this legislation to serve military purposes and its role as a military design, production and testing aerospace facility.

To the extent there is any ambiguity related to the language loosely defining the purpose of the reservations and acquisitions at EAFB and Plant 42, the history of "military purposes" removes any doubt that a crabbed and narrow definition of the purpose of the reservations and acquisitions is not warranted. Military purpose was a commonly used -- and largely generic --

description in creation of military installations. Since the early days of the republic, the executive branch has created military installations without defining their scope. *See e.g., Grisar v. McDowell*, 73 U.S. 363, 381 (1867) (confirming the executive's power to reserve land adjacent to San Francisco bay in 1850 for "military purposes."); *Scott v. Carew*, 196 U.S. 100, 114 (1905)(in denying a preemption argument for land at the abandoned Fort Brooke, Florida, the Court stated: "Its permanence would depend largely on the developments of the future. . . . It was until the post was abandoned an appropriation of the land for military purposes.").

Courts have instructed that "'[m]ilitary purposes' is a general description . . . ." *Sharpe v. United States*, 112 F. 893, 897 (3d Cir. 1902). The federal Court of Claims interpreted the phase in a case examining property leased by the Veterans' Administration for a military purpose. "Military purposes" the court concluded "was intended to describe the use to be made of the premises and not to be restrictive." *Royce, Inc. v. United States*, 126 F. Supp. 196, 203 (Ct. Cl. 1954). In *United States v. Fallbrook Pub. Utility Dist*., 109 F. Supp. 28, 65 (S.D. Cal. 1952), an action brought to quiet title to the water rights for Marine base Camp Pendleton, the Court decreed a water right to the United States for use for: "military purposes, to-wit: to supply the domestic, municipal and quasi-municipal requirements of its armed forces, and the civilian personnel performing duties in connection with said armed forces . . . ." *Id.* at 65; see also *United States v. Fallbrook Public Utility Dist*., 110 F. Supp. 767 (D.C. Cal. 1953) (findings, conclusions and judgment pursuant to decision in 109 F. Supp. 28), partially rev'd on other grounds, *California v. United States*, 235 F.2d (9th Cir. 1956).[16] In other words, "military purpose" is a

[16] The court in *Fallbrook* decreed the water rights to the United States based on state law, finding that use for military purposes is a beneficial use of water. 109 F. Supp at 65. If military purposes is an adequate basis for a determination of beneficial use, it should be an adequate

broad descriptive term covering the activities of the military, and is not restricted to a narrow particular use.

The Supreme Court has instructed that courts should exercise "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981). This deference extends to resources and materials necessary for the proper function of the military. For example, in striking down application of a Nevada law requiring the Navy to obtain state permits for wells on a federally reserved naval ammunition depot, a district court stated, "[i]n these troubled days, particularly, a court should hesitate to impede the lawful and logical functions of the Department of the Navy, exercised in what has been stipulated is a major installation in the program of that Department for the defense of the Nation." *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600, 611 (D. Nev. 1958).

A military installation, once established for military purposes, may expand to fulfill evolving military needs. Edwards Air Force Base is a prominent example of a military installation with evolving military purposes, from an initial bombing and gunnery range to training facility to flight test center. In a case very similar to this one, the existence of federal reserved water rights for U.S. Army Fort Huachuca (in Arizona) was recently recognized by the presiding judge in the on-going general adjudication of all rights to use water in the Gila River watershed in Arizona (in which the United States was joined pursuant to the McCarran Amendment).

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basis for a federal reserved water right which provides the water necessary to carry-out the enclave's designated purpose.

Fort Huachuca began as a remote cavalry outpost to protect settlers and is now a major military installation and the home of the U.S. Army Intelligence School, the Army Network and Enterprise Technologies Command, the 9th Army Signal Command, and the Army Electronic Proving Ground. In declaring that reserved rights exist on the military installation, Judge Ballinger stated "the Court is convinced that the Fort Huachuca reservation for 'military uses' is not static and includes water rights required to satisfy contemporary, direct, indirect and quasi-municipal needs that arise in conducting military and military-related functions important to local and national security." *Gila River,* contested case No. W1-11-605 (Maricopa Cnty. Super. Ct., Ariz.)(Sept. 7, 2011)(order granting Special Master's motion to adopt Apr. 4, 2008 Report Regarding Fort Huachuca)(attached as Exh. No. 19). Similarly, water for Edwards Air Force Base and Plant 42 is also reserved to satisfy their military purposes and the important national security functions they serve now and in the future.

5. Water was available for reservation at the time the United States withdrew or acquired the lands for EAFB and Plant 42.

At least one party has previously asserted that the federal reserved water right is limited to "unappropriated" water in the Antelope Valley, and that no such water existed at the time of withdrawal. *See Case Management Statement of Copa De Oro Land Company,* Dckt. No. 5794, filed January 13, 2013, at 5-6. This argument is based on an inference wrongly drawn from cases discussing federal reserved water rights in a prior appropriation context that is inapplicable here. *See e.g.Cappaert,* 426 U.S. at 138 (finding that the United States "reserves appurtenant water then unappropriated" in Nevada); *Desert Irrigation, Ltd. v. State of Nevada,* 944 P.2d 835, 837 n. 1 (1997) (noting that Nevada is a prior appropriation state); *New Mexico,* 438 U.S. at 715 (finding Congress intended that water in the national forests in New Mexico would be reserved to preserve timber or to secure favorable water flows.); New Mexico Const. art. XVI, § 2 of the

Constitution (declaring the prior appropriation doctrine) (declaring the prior appropriation doctrine).

Under state law in appropriation doctrine states, water rights are property rights with fixed and certain priorities and quantities that cannot be diminished by subsequent appropriators. Although federal reserved water rights in such contexts do not, strictly speaking, involve appropriation under state law, they must be administered in relation to such rights, and so the Court in *Cappaert* and *New Mexico* addressed how to integrate them into the state system based on appropriation law. The limitation to "unappropriated" water in this context indicates that federal reserved water rights cannot simply take preexisting and fixed property rights to which they are junior under the prior appropriation system. While this limitation may be appropriate in a strict prior appropriation context, it is inapplicable to a water allocation system based on land ownership and correlative rights under a riparian system where the scope of any right to withdraw water is not fixed or certain.

Here, prior appropriation concepts and limitations to "unappropriated" water are not relevant because other overlying land owners' rights to withdraw water are not "fixed" and certain, or limited to quantities "unappropriated" at the time such rights initially arise. Under state law, an overlying right to groundwater is "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." *Calif. Water Serv. Co. v. Sidebotham,* 224 Cal.App.2d 715, 725 (1964). As with surface water riparians, water supply shortages among overlying rights are shared among those with correlative overlying rights; "each may use only his reasonable share when water is insufficient to meet the needs of all." *Id.*; *City of Santa Maria v. Adam,* 211 Cal. App. 4th 266, 279 (2012). Where overdraft exists, overlying landowners always had a right to a correlative,

albeit shrinking, right in the available supply.[17] Notions of "unappropriated" water are therefore irrelevant to the reservation of water in this correlative/riparian ground water system.

6. 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 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 cannot reasonably be disputed. 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.

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.[18] 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. "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.

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[17] There are ways in which the federal reserved water right differs from its state-law based counterpart. For example, 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) ("[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."). However, these differences are beyond the scope of the present motion and are not addressed here.

[18] In addition to pumping from the aquifer, EAFB purchases State Project water from the Antelope Valley-East Kern Water Agency (AVEK), and Plant 42 purchases water from the City of Palmdale.

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.

V. CONCLUSION

For the reasons stated above, the United States respectfully requests the Court order that the United States is entitled to a federal reserved water right for the U.S.A.F. Edwards Air Force Base and Air Force Plant 42 subject only to proof at trial of federal ownership, demonstration of military purposes, and the quantity of water necessary to fulfill current and future military purposes.

RESPECTFULLY SUBMITTED this 29th day of March 2013.

/s/ R. Lee Leininger
R. LEE LEININGER
ATTORNEY FOR THE UNITED STATES OF AMERICA

PROOF OF SERVICE

I, Amber Petrie, declare:

I am a resident of the State of Colorado and over the age of 18 years, and not a party to the within action. My business address is U.S. Department of Justice, Environment and Natural Resources Section, 999 18th Street, South Terrace - Suite 370, Denver, Colorado 80202.

On March 29, 2013 I caused the foregoing document(s) described as: **MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO ESTABLISH THE UNITED STATES' LEGAL ENTITLEMENT TO A FEDERAL RESERVED WATER RIGHT AND TO LIMIT THE SCOPE OF EVIDENCE NECESSARY AT TRIAL** to be served on the parties via the following service:

[X] BY ELECTRONIC SERVICE AS FOLLOWS by posting the document(s) listed above to the Santa Clara website in regard to the Antelope Valley Groundwater matter.

[ ] BY MAIL AS FOLLOWS (to parties so indicated on attached service list): By placing true copies thereof enclosed in sealed envelopes addressed as indicated on the attached service list.

[ ] BY OVERNIGHT COURIER: I caused the above-referenced document(s) be delivered to FEDERAL EXPRESS for delivery to the above address(es).

Executed on March 29, 2013 at Denver, Colorado.

/s/ Amber Petrie
Amber Petrie
Legal Assistant