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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF LOS ANGELES**

16 Coordination Proceeding 17 Special Title (Rule 1550 (b)), 18 ANTELOPE VALLEY 19 GROUNDWATER CASES	20 Judicial Council Coordination 21 Proceeding No. 4408 22 [Assigned to the Honorable Jack Komar, 23 Judge Santa Clara County Superior Court, 24 Dept. 17] 25 Santa Clara Court Case No. 1-05-CV-049053 26 UNITED STATES' PRE-TRIAL BRIEF 27 FOR PHASE 5 TRIAL REGARDING 28 THE FEDERAL RESERVED WATER RIGHT
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29 The United States respectfully submits this pre-trial brief addressing the issues, facts and
30 witnesses to be presented in the Phase 5 trial of this adjudication.

31 In the *Order After Hearing On January 27, 2014, re: Motion by Cross-Complainant*
32 *Antelope Valley Groundwater Agreement Association ("AGWA") for Summary Adjudication re*
33 *Federal Reserve*, the Court "determine[d] that in fact there is a federal reservation for military

1 purposes for all ten executive orders but there is no evidence presented to establish what quantity
2 of water is necessarily reserved for military purposes nor what is used for secondary purposes, if
3 any.” *Id.* at 2-3.

4 Because the Court has ruled on the existence of the reserved water right, the United
5 States will not recite the principles of the reserved water right doctrine. Two foundational cases
6 included in the Court’s analysis, however, are useful in establishing the scope of a federal
7 reservation. In *Cappaert v. United States*, 426 U.S. 128 (1976), the U.S. Supreme Court
8 determined that the scope of the federal reserved water right for the Devil's Hole National
9 Monument was for the amount of water (both surface and groundwater) necessary to maintain
10 the level of an underground pool of water necessary to preserve its scientific value. The Court
11 looked not only to the language of the 1952 Presidential Proclamation that established Devil's
12 Hole, but also to the American Antiquities Preservation Act, pursuant to which the Proclamation
13 was issued, and the Act establishing the National Park Service, which was particularly
14 mentioned in the Proclamation. In other words, to ascertain the purpose of the reservation¹, the
15 Court looked not just to the impetus for establishing the reservation - to protect an endangered
16 fish - or the particular language of the document that made the reservation, but also the
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19 ¹ As explained in prior briefing, the power to reserve water extends to acquired lands as well as
20 lands reserved from the public domain. A federal reserved water right “does not depend solely
21 on a formal reservation of land from the public domain, but rather on Congress' exercise of a
22 constitutional authority such as the Property or Commerce Clauses, coupled with the Supremacy
23 Clause.” 6 U.S. Op. Off. Legal Counsel 328, 332-33 (1982). The federal power to reserve water
24 extends to lands that are not reserved from the public domain, but rather acquired for specific
25 purposes. In *Arizona v. California*, 373 U.S. 546, 598 (1963), the Supreme Court clearly
26 recognized that the federal government’s reservation of water is not restricted to federal lands
27 reserved from the public domain. After acknowledging the broad powers of the United States to
28 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). 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).

1 underlying constitutional and legislative authority to make the reservation and to carry out the
2 federal purposes involved.

3 Similarly, in *United States v. New Mexico*, 438 U.S. 696 (1978), in deciding on the scope
4 of the federal reserved water right for the Gila National Forest, the Supreme Court not only
5 considered the document that established the reservation, but also reviewed the political history
6 of the establishment of the national forests to include limitations Congress placed on the
7 executive branch and various statutes enacted for the purpose of reserving federal land for
8 national forests. Based on this history and legislative direction, the court limited the scope of the
9 federal reserved water right to only that amount "necessary to preserve the timber or to secure
10 favorable water flows for private and public uses under state law." *New Mexico* at 718. The
11 court rejected a federal reserved water right for other purposes, such as aesthetic, recreational,
12 fish-preservation, and stockwatering purposes, which were not within the "limited purposes for
13 which Congress authorized the creation of national forests. . . ." *Id.* at 705.

14 The scope of a reservation for military purposes is broader. At its roots, a reservation for
15 military purposes goes beyond the constitutional clauses (the Commerce Clause, Art. I, s 8,
16 which permits federal regulation of navigable streams, and the Property Clause, Art. IV, s 3,
17 which permits federal regulation of federal lands) that form the basis of a reserved right for a
18 National Monument or a National Forest. Beginning with the Preamble of the United States
19 Constitution, the nation was established in order to, among other things: "insure domestic
20 tranquility, provide for the common defense, promote the general welfare, and secure the
21 blessings of liberty. . . ." The Constitution goes on to enumerate several powers for the Congress
22 and the President that form the basis for establishing and managing military reservations for
23 military purposes.² Accordingly, the primary purpose of a military reservation is to carry out
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25 ² See e.g.,

26 The Congress shall have power to lay and collect taxes, duties, imposts and
27 excises, to pay the debts and provide for the common defense.... [t]o declare
28 war.... raise and support armies.... provide and maintain a navy.... make rules for
the government and regulation of the land and naval forces.... provide for calling
forth the militia to execute the laws of the union, suppress insurrections and repel

1 those responsibilities enumerated in the Constitution. Generally stated, these include ensuring
2 the common defense, protecting against invasion and ensuring domestic tranquility. "It is for the
3 protection and interests of the states, their people and property, as well as for the protection and
4 interests of the people generally of the United States, that forts, arsenals, and other buildings for
5 public uses are constructed within the states." *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525,
6 541 (1885). To narrowly interpret the purpose of military enclaves, and therefore the scope of a
7 federal reserved water right, would violate these Constitutional principles.

8 Courts have instructed that "[m]ilitary purposes' is a general description" *Sharpe v.*
9 *United States*, 112 F. 893, 897 (3d Cir. 1902). The federal Court of Claims interpreted the phrase
10 in a case examining property leased by the Veterans' Administration for a military purpose.
11 "Military purposes" the court concluded "was intended to describe the use to be made of the
12 premises and not to be restrictive." *Royce, Inc. v. United States*, 126 F. Supp. 196, 203 (Ct. Cl.
13 1954). In *United States v. Fallbrook Pub. Utility Dist.*, 109 F. Supp. 28, 65 (S.D. Cal. 1952), an
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15 invasions.... provide for organizing, arming, and disciplining, the militia, and for
16 governing such part of them as may be employed in the service of the United
17 States.... exercise exclusive legislation...over all places purchased by the consent
18 of the legislature of the state in which the same shall be, for the erection of forts,
19 magazines, arsenals, dockyards, and other needful buildings.... And [t]o make all
20 laws which shall be necessary and proper for carrying into execution the
21 foregoing powers, and all other powers vested by this Constitution in the
22 government of the United States, or in any department or officer thereof.
23 U.S. Constitution, Article I, Section 8, Clauses 1 and 11 - 18.

21 The President shall be commander in chief of the Army and Navy of the United
22 States, and of the militia of the several states, when called into the actual service
23 of the United States; he may require the opinion, in writing, of the principal
24 officer in each of the executive departments, upon any subject relating to the
25 duties of their respective offices....
26 U.S. Constitution, Article II, Section 2.

26 The United States shall guarantee to every state in this union a republican form of
27 government, and shall protect each of them against invasion; and on application
28 of the legislature, or of the executive (when the legislature cannot be convened)
against domestic violence.
U.S. Constitution, Article IV, Section 4.

1 action brought to quiet title to the water rights for Marine base Camp Pendleton, the Court
2 decreed a water right to the United States for use for: “military purposes, to-wit: to supply the
3 domestic, municipal and quasi-municipal requirements of its armed forces, and the civilian
4 personnel performing duties in connection with said armed forces” *Id.* at 65; see also *United*
5 *States v. Fallbrook Public Utility Dist.*, 110 F. Supp. 767 (D.C.Cal. 1953) (findings, conclusions
6 and judgment pursuant to decision in 109 F. Supp. 28), partially rev’d on other grounds,
7 *California v. United States*, 235 F.2d (9th Cir. 1956).³ In other words, “military purpose” is a
8 broad descriptive term covering the activities of the military, and is not restricted to a narrow
9 particular use.

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

17 Fort Huachuca began as a remote cavalry outpost to protect settlers and is now a major
18 military installation and the home of the U.S. Army Intelligence School, the Army Network and
19 Enterprise Technologies Command, the 9th Army Signal Command, and the Army Electronic
20 Proving Ground. In declaring that reserved rights exist on the military installation, Judge
21 Ballinger stated “the Court is convinced that the Fort Huachuca reservation for ‘military uses’ is
22 not static and includes water rights required to satisfy contemporary, direct, indirect and quasi-

24 ³ The court in *Fallbrook* decreed the water rights to the United States based on state law,
25 finding that use for military purposes is a beneficial use of water. 109 F. Supp at 65. If military
26 purposes is an adequate basis for a determination of beneficial use, it should be an adequate
27 basis for a federal reserved water right which provides the water necessary to carry-out the
28 enclave’s designated purpose.

1 municipal needs that arise in conducting military and military-related functions important to
2 local and national security.” *Gila River*, contested case No. W1-11-605 (Maricopa Cnty. Super.
3 Ct., Ariz.)(Sept. 7, 2011)(order granting Special Master’s motion to adopt Apr. 4, 2008 Report
4 Regarding Fort Huachuca)(attached as Exh. No. 19 to the United States’ Motion in Limine for
5 Phase IV trial, filed March 29, 2013). Similarly, the water necessary to satisfy the military
6 purposes at Edwards Air Force Base and Plant 42 must be sufficient to satisfy all the military
7 needs and the important national security functions these installations serve now and in the
8 future.

9 That water is reserved for future purposes cannot be disputed. In *Arizona v. California*,
10 373 U.S. 546, 600 (1963), the Supreme Court approved the Master's conclusion that the quantity
11 of water intended to be reserved was for "the future as well as the present needs of the Indian
12 Reservations. . . ." In that same opinion, the Court also stated:

13 The Master ruled that the principle underlying the reservation of water rights for
14 Indian Reservations was equally applicable to other federal establishments such as
15 National Recreation Areas and National Forests. We agree with the conclusions of
16 the Master that the United States intended to reserve water sufficient for the future
17 requirements of the Lake Mead National Recreation Area, the Havasu Lake
National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila
National Forest.

18 *Id.* at 601.^{2/} “[R]eserv[ing] water sufficient for the future requirements,” therefore, is a
19 fundamental characteristic of any federal reserved water right, including Edward Air Force Base
20 and Plant 42’s reserved water right.

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23 ^{2/}The Supreme Court's recognition that future uses of water might be considered is also apparent
24 in *United States v. The Dist. Court in and for Water Div. No. 5*, 401 U.S. 527 (1971). In dicta,
25 the court listed various federal reservations within the geographical area covered by that water
26 rights adjudication, to include: "The Department of the Navy administers certain naval petroleum
27 and oil shale reserves which, if ever developed, would require water to accomplish the federal
purpose for which the reservations were made." *Id.* at 529. *See also Sierra Club v. Lyng*, 661 F.
28 Supp. 1490 n.10 (D.Colo.,1987) (concluding that federal reserved water rights under the
Wilderness Act “includes any future wilderness area water needs.”)

1 Both Fort Huachuca and Edwards Air Force Base illustrate the inherent uncertainty in
2 having to predict future military needs and water use from a fixed point in time. Cavalry patrols
3 in the Arizona desert could not presage the needs of a modern army, and the needs of a training
4 range in 1940 could not predict the needs of a modern Air Force. Similarly, there will be
5 uncertainty regarding the military mission and water demands ten, twenty, and one hundred
6 years in the future. That uncertainty cannot prevent this Court from addressing projected future
7 demand, but should guide the Court in deciding a sufficient quantity of water to be reserved for
8 future use.

9 In sum, because of the courts historical deference to the Armed Forces' use of defense
10 installations for military purposes; because "military purposes" is a broad purpose enabling
11 military installations to grow and evolve to satisfy the military needs of today and in the future;
12 and because a narrow interpretation of water use for military purposes would entirely defeat the
13 purposes of the enclaves, the Court should view the evidence with the understanding that
14 military uses at Edward Air Force Base and Plant 42 must be construed liberally, and the amount
15 of water needed to satisfy past, present and future military uses should be broadly-interpreted.

16 At trial, the United States intends to present evidence of the historic formation of the
17 military enclaves through reservation and acquisition, and the geographical area of the federal
18 government's exclusive jurisdiction. The Court will also be presented with a brief history of the
19 military missions at these installations, and the amount of water that was used to fulfill the
20 missions. Finally, testimony will be presented with evidence that water is necessary to fulfill the
21 military purpose of the facilities and that the amount of the federal reserved water right presented
22 at trial is reasonable in light of past, current and reasonably foreseeable future uses on the federal
23 lands.

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RESPECTFULLY SUBMITTED this 31st day of January 2014.

/s/ R. Lee Leininger
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STATES OF AMERICA