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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 **UNITED STATES' OPPOSITION TO AGWA'S MOTION *IN LIMINE***

The Antelope Valley Groundwater Agreement Association ("AGWA") has moved this Court *in limine* for an order "establishing the United States' burden of proof for any water rights associated with federal reservations of property." *See* [AGWA] *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* (hereinafter the "AGWA Mtn."),

filed January 24, 2014, at 2. The United States does not deny that it has the burden of proof in establishing its federal reserved water right. However, AGWA is incorrect in its description of the elements of the water right that must be proven.[1] First, there is no requirement to show that the water used is for a primary or a secondary purpose. For the groundwater pumped on its exclusive jurisdiction lands (i.e., most of groundwater pumped at Edwards Air Force Base (EAFB)), the government does not have to make any showing that the water is used for the purposes of the original reservations or acquisitions. For the remaining lands at EAFB and Air Force Plant 42 (AFP 42), the government need only show that water is needed to serve a military purpose. Nor is it necessary to demonstrate "the amount of water available at the time of each reservation." AGWA Mtn. at 2. In a groundwater basin where the overlying landowner rights are correlative, the concept of "amount of water available" has no meaning.

Rather, as the United States explains in more detail in its concurrently filed pre-trial brief, the United States must show: (1) that certain lands at EAFB are subject to the federal government's exclusive jurisdiction; (2) that certain lands outside the exclusive jurisdiction at EAFB were reserved; (3) that certain lands outside the exclusive jurisdiction at EAFB and the land at AFP 42 were acquired; (4) that for these non-exclusive lands, the reservations and acquisitions were for a singular military purpose; (5) that water is implicitly necessary to satisfy the military purpose on the reserved and acquired, non-exclusive lands; (6) that the amount of the federal reserved water right presented at trial is reasonable in light of past, current and reasonably foreseeable future uses on the federal lands.

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[1] AGWA alleges that the United States must make the following factual showings:

> (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 Motion at 2.

1. The purpose of water used on the exclusive jurisdiction lands is irrelevant.

In its Motion for Summary Adjudication as to the existence of federal reserved rights, filed November 13, 2013, and its Reply to the United States' Opposition to Motion for Summary Adjudication, filed January 3, 2014, AGWA completely ignored the fact that the majority of EAFB, including the populated areas at the North and South base, are areas of exclusive federal jurisdiction. In its Motion in Limine, AGWA again ignores the government's exclusive jurisdiction and argues for a burden of proof that includes a showing of each reservation's primary purpose and distinguishing so-called secondary uses from primary uses. On the exclusive jurisdiction lands, however, the use of the water is irrelevant to the analysis of the reserved water right.

As the United States has previously shown, 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). *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."). As the Court noted in its recent Order on AGWA's Motion for Summary Adjudication the at p. 4, "[w]hen the stated ceded control of the land which then was reserved by executive order, it ceded all power of control."[2]

The power of control extends to the water on the exclusive jurisdiction lands. By acquiring complete sovereignty, the United States is conferred exclusive power over its property and resources, including water. *California v. United States,* 235 F.2d 647, 655-56 (9th Cir. 1956)("[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 authority makes any examination of the purpose of use of water on the

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[2] Order After Hearing On January 27, 2014, re: Motion by Cross-Complainant Antelope Valley Groundwater Agreement Association ("AGWA") for Summary Adjudication re Federal Reserve Right (hereinafter the "Sum. Adj. Order").

exclusive jurisdiction lands irrelevant. "[I]t is not open to the courts, on a question of jurisdiction, to inquire what may be the actual use to which any portion of the reserve is temporarily put." *Benson v. United States*, 146 U.S. 325, 331 (1892).

In examining the federal government's exclusive jurisdiction over lands comprising U.S. Marine Base Camp Pendleton, the federal district court noted that "courts, except in cases where rights were specifically reserved, have sustained the norm that the acquisition of land by the Government for military purposes with the consent, expressed or implied, of a State, gives the Government exclusive jurisdiction, whether the land is used for the purposes of the acquisition or not." *United States v. Fallbrook Public Utility Dist.*, 108 F. Supp. 72, 86 -87 (D.C.Cal. 1952). Even "upon a showing that a portion of the lands is used for agricultural purposes . . . , it is outside the purview of State regulation or control." *Id*. at 87. Thus, it does not matter what the water uses are on the military lands under exclusive federal jurisdiction. The water, whatever may be the use, is reserved.

2. AGWA incorrectly argues that the government cannot assert a single right to water based on a military purpose.

Even on the land that is not subject to the federal government's exclusive jurisdiction, there is only one purpose of the enclaves – to fulfill the military's mission. The western area of EAFB, approximately 40% of the land comprising EAFB, and all of AFP 42, is land that is not under the government's exclusive jurisdiction. This land was reserved from the public domain or acquired from state or private parties. AGWA asserts that the United States has the burden to prove "what the primary purpose of each of those shifting reservations was. . . ." AGWA Mtn. at 6.

First of all, AGWA's premise is incorrect. The reservations of land within EAFB that are not under exclusive jurisdiction do not contain variable language concerning the purpose of the reservations.[3] These reservations uniformly describe the purpose of the withdrawal and

[3] 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

reservation as a military purpose, or more specifically as an Air Force base. Therefore, there is no need to distinguish a primary purpose from a secondary purpose. Every reservation in this area is for a military purpose.

The remainder of EAFB and all of AFP 42 were acquired from private parties or the State of California. Here too, there is no need to distinguish a primary from a secondary purpose. The private lands now comprising EAFB were generally acquired under the authority of the Act of August 12, 1935, Pub. L. No. 74-263, 49 Stat. 610, wherein Congress approved the creation of "permanent . . . Air Corps stations and depots" facilities.[4] In addition, Air Force Plant 42 was deeded to the United States under the Congressional authorization for military construction and acquisition found in Pub. L. No. 82-155, 65 Stat. 336 (1951).[5] The facility was acquired with the intent of the "Air Force to make substantial improvements to this [AFP 42] property and to retain it as a permanent installation." USAF023762-65.

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other purposes." All of the subsequent reservations of lands to form the western portions of EAFB specifically list as a purpose a broad "military purpose" or an air force base. Public Land Order No. 480, dated June 2, 1948, withdrew 489.76 acres for "military purposes." Public Land Order 646, dated May 10, 1950, reserved 20,901.82 acres "for use of the Department of the Air Force as an air force base." Public Land Order 1126, dated April 15, 1955, reserved 120 acres "for use of the Department of the Air Force for military purposes in connection with Edwards Air Force Base." Public Land Order No. 480, dated June 2, 1948, withdrew 489.76 acres for "military purposes." Public Land Order No. 2270, dated February 21, 1961, withdrew 230 acres for "military purposes."

[4] *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.

[5] "[T]he 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).

Thus, contrary to AGWA's assertions, there was no "shifting" purpose for these acquisitions. All of EAFB and all of AFP 42 were established for the singular purpose of fulfilling military needs and objectives.[6]

3. The United States does not need to prove how much water was "available" at the time of reservation.

AGWA makes a further argument that "the United States [must] prove how much water was available above existing rights at the time of those reservations." AGWA Mtn. at 7. AGWA admits that this argument was briefed in its Motion for Summary Adjudication as to the existence of federal reserved rights in the Basin, and AGWA's Reply to the United States' Opposition to Motion for Summary Adjudication. *Id.* In the order denying AGWA's motion, the Court held that

> Moving party (AGWA) contends that the language in the executive orders creating the reservations for military purposes provides that the reservations are subject to existing rights and that those rights must be the rights of overlying owners to the reasonable and beneficial use of water under their land (water rights) and therefore those rights stand equally with and limit the rights of the federal government. AGWA's interpretation is incorrect.

Sum. Judg. Order at 3. The Court notes that for the exclusive jurisdiction land ceded by the State of California, the United States is insulated from state law and therefore the rights of overlying landowners cannot defeat a federal reservation of water. *Id*. Even in the lands not subject to exclusive jurisdiction (western EAFB and AFP 42), however, state law does not prevent the United States' reservation of water. The cases relied upon by AGWA, C*appaert v. United States* 426 U.S. 128 (1976) and *United States v. New Mexico,* 438 U.S. 696 (1978), for the proposition that the reserved right doctrine reserves to the United States' unappropriated water to the extent

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[6] Accordingly, there is no merit to AGWA's related argument that "[f]or each reservation on which the United States relies to support a claimed reserved right, it therefore has the burden to prove what the minimal amount of water is that is necessary to serve that reservation's primary purpose." AGWA Mtn. at 6. There are no distinctions between the purposes of the reservations, and therefore no distinction in determining the water needed for the military purpose. 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.

needed to accomplish the purpose of the reservation, were decided in prior appropriation states. *See e.g. 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 Const. art. XVI, § 2 of the Constitution (declaring the prior appropriation doctrine). Under state law of prior appropriation, water rights are property rights with fixed and certain priorities and quantities that cannot be diminished by subsequent appropriators. 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. *See In re Waters of Long Valley Creek Stream System v. Ramelli,* 25 Cal. 3d 339, 350, 599 P.2d 656, 662 (1979). As the United States has previously shown, a federal reservation of water does not impact overlying landowners' legal rights to withdraw groundwater from the remaining available supply. The federal reserved water right does not change the right of overliers to draw their correlative share from the remaining available supply. Consequently, the United States may reserve sufficient water to accomplish the purpose for which the land was reserved, and this power "'is not denied and could not be.'" Sum. Judg. Order at 3 (quoting *Winters v. United States,* 207 U.S. 564 (1908)).

In conclusion, the AGWA Motion in Limine should be denied, and the United States should be allowed to proceed to trial to show: (1) that certain lands at EAFB are subject to the federal government's exclusive jurisdiction; (2) that certain lands outside the exclusive jurisdiction at EAFB were reserved; (3) that certain lands outside the exclusive jurisdiction at EAFB and the land at AFP 42 were acquired; (4) that for these non-exclusive lands, the reservations and acquisitions were for a singular military purpose; (5) that water is implicitly necessary to satisfy the military purpose on the reserved and acquired, non-exclusive lands; (6) that the amount of the federal reserved water right presented at trial is reasonable in light of past, current and reasonably foreseeable future uses on the federal lands.

RESPECTFULLY SUBMITTED this 31st day of January 2014.

/s/ R. Lee Leininger
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