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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES**

15 **Coordination Proceeding Special Title**  
16 **(Rule 1550(b))**

17 **ANTELOPE VALLEY GROUNDWATER**  
18 **CASES**

19 **Included Actions:**

20 **Los Angeles County Waterworks District**  
21 **No. 40 v. Diamond Farming Co., Superior**  
22 **Court of California, County of Los Angeles,**  
23 **Case No. BC 325 201;**

24 **Los Angeles County Waterworks District**  
25 **No. 40 v. Diamond Farming Co., Superior**  
26 **Court of California, County of Kern, Case**  
27 **No. S-1500-CV-254-348;**

28 **Wm. Bolthouse Farms, Inc. v. City of**  
**Lancaster, Diamond Farming Co. v.**  
**Lancaster, Diamond Farming Co. v.**  
**Palmdale Water Dist., Superior Court of**  
**California, County of Riverside, Case No.**  
**RIC 353 840, RIC 344 436, RIC 344 668**

**JUDICIAL COUNCIL COORDINATION**  
**PROCEEDING NO. 4408**

**Case No. BC 391869**  
**Assigned to Hon. Jack Komar**

**(Santa Clara Case No. 01-05-CV-049053)**

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

**Date: May 13, 2013**  
**Time: To be determined**  
**Dept.: To be determined**  
**Judge: Hon. Jack Komar**  
**Filing Date: July 11, 2005 (coordination)**  
**Trial Date: May 28, 2013 (Phase IV)**

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## INTRODUCTION

The fundamental basis for a federal reserved water right is the implication that, when the United States reserves property from the public domain for a particular federal purpose, it also intends to reserve the minimum amount of water necessary to serve that purpose. This implication depends on the nature and terms of the individual reservation by the United States. In order for the United States to establish one or more federal reserved rights in this basin, the United States must make several factual showings, including:

- (1) The amount of water available at the time of each reservation;
- (2) The location of each reservation as overlying the basin;
- (3) Each reservation's primary purpose; and
- (4) 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.

The Court should issue an order establishing that the United States has the burden of proof in the Phase IV trial on these issues.

## STATEMENT OF FACTS

### **A. The United States' Aggregated Reserved Right Claim**

According to its February 22, 2013 revised discovery responses, the United States claims, in this action, an aggregated federal reserved right of 11,683 acre-feet per year. (United States' Revised Response to Court's Discovery Order for Phase IV Trial, p. 9:7 (posted Feb. 22, 2013)(on-line at [www.scefilng.org/document/document.jsp?documentId=77536](http://www.scefilng.org/document/document.jsp?documentId=77536)) ("Revised U.S. Discovery Response").) This amount is over ten percent of the basin's total safe yield of 110,000 acre-feet per year, as determined by the Court after the Phase Three trial. (Statement of Decision Phase Three Trial, pp. 9-10, dated July 13, 2011 (on-line at [www.scefilng.org/document/document.jsp?documentId=49786](http://www.scefilng.org/document/document.jsp?documentId=49786)).) The United States' federal reserved right claim includes 10,717 acre-feet per year for Edwards Air Force Base and 966 acre-feet per year for Air Force Plant 42. (Revised U.S. Discovery Response, p. 9:10-20.)

1                   **B.       The United States' Eight Separate Reservations**

2                   According to the United States' discovery responses, it reserved from the public domain  
3 property relevant to this case in eight separate administrative actions between 1934 and 1955.

4                   The first reservation, accomplished via Executive Order No. 6588, dated February 6,  
5 1934, reserved approximately 132 sections of land – 84,480 acres – "as a bombing and gunnery  
6 range" and stated it was "subject to valid existing rights." (USAF001653.)<sup>1</sup>

7                   Second, Executive Order No. 6910, dated November 26, 1934, reserved "all of the  
8 vacant, unreserved and unappropriated lands of the public domain" within 12 Western states,  
9 including California, temporarily "pending determination of the most useful purpose to which  
10 such land may be put" under a 1934 act], "and for conservation and development of natural  
11 resources." (USAF001654-USAF001655.) The executive order also stated it "is subject to  
12 existing valid rights." (USAF001655.)

13                   Third, Executive Order No. 7707, dated September 11, 1937, amended Executive Order  
14 No. 6910 and reserved approximately 116 sections of land – 74,240 acres – which the order  
15 stated were "temporarily withdrawn from settlement, location, sale, or entry, and reserved for  
16 use of the War Department for military purposes." (USAF001656.) The order states that it is  
17 "[s]ubject to . . . all valid existing rights . . . ." (USAF001656.)

18                   Fourth, Executive Order No. 7740, dated November 15, 1937, amended Executive  
19 Order No. 6910, reserved 480 acres "for use of the War Department for military purposes" and  
20 stated it was "[s]ubject . . . to all valid existing rights . . . ." (USAF001657.)

21                   Fifth, Executive Order No. 8450, dated June 26, 1940, superseded Executive Orders  
22 Nos. 6588, 7707 and 7740, reserved 245 sections of land – 156,800 acres – "for the use of the  
23 War Department as a bombing and gunnery range" and stated that the reservation was "subject  
24 to valid existing rights." (USAF001658.)

25 \_\_\_\_\_  
26                   <sup>1</sup>Documents with the stamp "USAF" were produced by the United States with its discovery responses and  
27 are available on the Court's Web site at [www.scefilings.org/filingdocs/289/58180/usdoj/](http://www.scefilings.org/filingdocs/289/58180/usdoj/). Pages USAF001653-  
28 USAF001658, USAF001661, USAF001663-USAF001664, USAF001666, USAF004852, USAF004858 and  
USAF004884 are attached to the Declaration of Ryan S. Bezerra filed herewith. Pages USAF004853-004883  
appear to comprise two megabytes each, so they are not being reposted with that declaration.



1 Sixth, Public Land Order 613, dated October 19, 1940, reserved 564.46 acres "for use of  
2 the Department of the Air Force in connection with an air force base" and stated it was  
3 "[s]ubject to valid existing rights." (USAF001661.)

4 Seventh, Public Land Order 646, dated May 10, 1950, reserved 20,901.82 acres "for use  
5 of the Department of the Air Force as an air force base" and stated that it was "[s]ubject to valid  
6 existing rights." (USAF001663-1664.)

7 Eighth, the 1955 Public Land Order 1126 reserved 120 acres "for use of the Department  
8 of the Air Force for military purposes in connection with Edwards Air Force Base" and stated  
9 that it was "[s]ubject to valid existing rights." (USAF001666.)

10  
11 **C. The United States' Inclusion Of Acquired Lands In Property  
Asserted As Basis Of Its Claimed Reserved Right**

12 The United States claims a reserved right for over 100,000 acres that it acquired from  
13 others, including overlying landowners. (As argued in the landowners' accompanying motion,  
14 we contend this land cannot support a reserved right.) According to the United States'  
15 discovery responses, Edwards Air Force Base ("Edwards") covers more than 307,000 acres and  
16 Air Force Plant 42 ("Plant 42") includes approximately 5,800 acres. (Revised U.S. Discovery  
17 Response, pp. 13:4-5, 16:1.) According to the documents that the United States has produced,  
18 large parts of Plant 42 and Edwards consist of property that the United States acquired from  
19 other landowners. A 1960 Air Force document produced by the United States entitled "Air  
20 Force Plant No. 42, Report of Excess Real Property to General Service Administration"  
21 indicates that the United States acquired, for Plant 42, at least 5,083.51 acres in 21 separate  
22 acquisitions, including 4,552.07 acres from the County of Los Angeles in one acquisition.  
23 (USAF004884.) A 1971 audited summary of land within Edwards states that it includes  
24 123,090.15 acres as acquired in "FEE." (USAF004852.) The United States produced  
25 supporting pages that list acquisitions for various "SEGMENTS" of Edwards. (USAF004852-  
26 004883.) For example, the page depicting "SEGMENT '7'" of Edwards identifies 89 separate  
27 acquisitions totaling of 4,236.89 acres. (USAF004858.)

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**ARGUMENT**

**I. The Court Can And Should Establish The Content Of The United States' Burden Of Proof Via This Motion *In Limine***

"The party alleging the existence of water rights has the burden of proof." (*Cal. Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 737.) Evidence Code section 115 defines a burden of proof as follows: "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court . . . ." While overlying landowners can satisfy this burden simply by proving their land ownership (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4<sup>th</sup> 266, 298), the matter is more complicated for other water rights. For example, an appropriator has the burden of proving an intent to appropriate water and apply water to beneficial use, "an open, physical demonstration of the intent," and the actual application of the water to a beneficial use. (*Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 598.) Determining the rules applicable to the parties' cases and the resulting content of their burdens is an appropriative use of a motion *in limine*. (*Samuels v. Mix* (1999) 22 Cal.4<sup>th</sup> 1, 5-6; cf. *Peterson v. Superior Court* (1995) 10 Cal.4<sup>th</sup> 1185, 1189-1190, 1210 (*in limine* ruling that the doctrine of strict liability did not apply to hotel premises).) This Court similarly should define the United States' burden of proof with its ruling on this motion *in limine*.

**II. The United States Must Meet Its Burden Of Proof In Relation To Each Reservation And Cannot Assert A Single Right That Accumulates All Of Them**

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

1 In determining whether there is a federally reserved water right implicit in a  
2 federal reservation of public land, the issue is whether the Government intended  
3 to reserve unappropriated and thus available water. Intent is inferred if the  
previously unappropriated waters are necessary to accomplish the purposes for  
which the reservation was created.

4 (*Id.* at p. 139.)

5 In *Cappaert*, the Court described how, in that case, President Truman had issued a 1952  
6 proclamation withdrawing a 40-acre tract as a component of the Death Valley National  
7 Monument in order to protect the subterranean pool in Devil's Hole and the unique pupfish that  
8 lived in the pool. (*Id.* at pp. 131-132.) Based on this federal intent, the Court affirmed the  
9 district court's injunction concerning groundwater pumping that affected the pool:

10 [A]s the District Court has correctly determined, the level of the pool may be  
11 permitted to drop to the extent that the drop does not impair the scientific value  
12 of the pool as the natural habitat of the species sought to be preserved. The  
13 District Court thus tailored its injunction, very appropriately, to minimal need,  
curtailing pumping only to the extent necessary to preserve an adequate water  
level at Devil's Hole, thus implementing the stated objectives of the  
[presidential] Proclamation.

14 (*Cappaert, supra*, 426 U.S., at p. 141.)

15 In *United States v. New Mexico, supra*, the Court emphasized the importance of the  
16 specific purposes of a federal reservation, holding that the reserved right applies only to a  
17 reservation's primary purpose and not to its secondary purposes:

18 Each time this Court has applied the "implied-reservation-of-water doctrine," *it*  
19 *has carefully examined both the asserted water right and the specific purposes*  
20 *for which the land was reserved*, and concluded that without the water the  
purposes of the reservation would be entirely defeated . . .

21 This careful examination is required both because the reservation is implied,  
22 rather than expressed, and because of the history of congressional intent in the  
23 field of federal-state jurisdiction with respect to allocation of water . . . Where  
24 water is necessary to fulfill the very purposes for which a federal reservation  
25 was created, it is reasonable to conclude, even in the face of Congress' express  
deference to state water law in other areas, that the United States intended to  
reserve the necessary water. Where water is only valuable for a secondary use  
of the reservation, however, there arises the contrary inference that Congress  
intended, consistent with its other views, that the United States would acquire  
water in the same manner as any other public or private appropriator.

26 (438 U.S., at p. 700-702 (emphasis added); see also *In re Water of Hallett Creek Stream*  
27 *System* (1988) 44 Cal.3d 448, 459-467 (United States can hold riparian rights in streams  
28 running through federal reservations to serve their secondary purposes)(*"Hallett Creek"*).)

1 An individual reservation's primary purpose then determines the volume of the right,  
2 which applies to "only that amount of water necessary to fulfill the purpose of the reservation,  
3 no more . . . ." (*Cappaert, supra*, 426 U.S., at p. 141; see also *United States v. New Mexico*,  
4 *supra*, 438 U.S., at pp. 700-702, part fn. 4 (describing review of federal intent in prior cases).)

5 An individual reservation's date determines its water-right priority and therefore how  
6 much water is available for the reservation. According to *Cappaert*, by reserving land from the  
7 public domain for a particular federal purpose:

8 [T]he Government, by implication, reserves *appurtenant water then*  
9 *unappropriated* to the extent needed to accomplish the purpose of the  
10 reservation. In so doing, *the United States acquires a reserved right in*  
11 *unappropriated water which vests on the date of the reservation* and is superior  
12 to the rights of future appropriators.

13 (426 U.S., at p. 138 (emphasis added).)

14 For example, in *Cappaert*, the Court explained how the private landowner parties in that  
15 case had not obtained groundwater rights under Nevada law until 17 years after President  
16 Truman's 1952 designation of Devil's Hole as part of a national monument. (*Id.* at p. 139 fn. 5.)

17 The Court has emphasized the importance of an individual reservation's date by stating  
18 that, where the United States had made more than one relevant reservation, intervening state-  
19 law water rights would be superior to the later reservation:

20 Even if the [later 1960 reservation] expanded the reserved water rights of the  
21 United States, of course, the rights would be subordinate to any appropriation of  
22 water under state law dating to before 1960.

23 (*United States v. New Mexico, supra*, 438 U.S., at p. 713 fn. 21.)

24 These rules concerning individual reservations are necessary because, as the Court has  
25 recognized, the reserved right can have very significant impacts on other water users:

26 When . . . a river is fully appropriated, federal reserved water rights will  
27 frequently require a gallon-for-gallon reduction in the amount of water available  
28 for water-needy state and private appropriators.

(*United States v. New Mexico, supra*, 438 U.S., at p. 705.)

29 That logic applies here, where this Court already has held that the basin is overdrafted.  
30 (Statement of Decision Phase Three Trial, pp. 5-6, dated July 13, 2011 (on-line at  
31 [www.scefilings.org/document/document.jsp?documentId=49786](http://www.scefilings.org/document/document.jsp?documentId=49786)).)

Moreover, the constraint on the water-right priority that the United States can assert for each of its reservations is necessary to protect the United States from takings liability. In *International Paper Co. v. United States* (1931) 282 U.S. 399, the United States Supreme Court held that the United States was liable for a taking where, for purposes of prosecuting World War I, it had requisitioned all water flowing in a power company's canal from the Niagara River, directed the power company to use all of that water to generate electricity for particular users and denied water to a paper company that previously had taken water from the canal. (*Id.* at pp. 404-406.) If the United States' reservation of its own property could take water from those who already had rights to that water, then it would face takings liability just as it did in *International Paper*.

State courts that have recognized federal reserved rights in groundwater also have emphasized the importance of individual reservations to their analysis:

To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

(*Confederated Salish and Kootenai Tribes of the Flathead Reservation et al v. Stults* (Mont. 2002) 312 Mont. 420, 430, 59 P.3d 1093, 1099 (quoting *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (Ariz. 1999) 195 Ariz. 411, 420, 989 P.2d 739, 747 ("Gila River").)

The rules that the Court has established to govern a reserved right's exercise depend on the terms of its unique supporting reservation. This Court therefore should order that the United States' burden of proof for the Phase IV trial is based on each of its distinct reservations at issue in this case.

### **III. The United States' Burden Of Proof Concerns The Amount Of Available Water, Whether Each Reservation Overlies The Basin, Each Reservation's Primary Purpose And The Minimum Amount Of Water Necessary To Serve That Purpose**

The United States Supreme Court's decisions concerning federal reserved rights define several elements that the United States must prove to establish such a right.

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

4           As discussed above (see pp. 4-7), the Supreme Court's decisions state that the reserved  
5 right appropriates to the United States "appurtenant water then unappropriated to the extent  
6 needed to accomplish the purpose of the reservation," creating "a reserved right in  
7 unappropriated water which vests on the date of the reservation . . . ." (*Cappaert, supra*, 426  
8 U.S., at p. 138; *United States v. New Mexico, supra*, 438 U.S., at p. 713 fn. 21.) For example,  
9 the federal Ninth Circuit Court of Appeals held that, where lands had been part of an initial  
10 reservation for a Native American tribe, had been conveyed into separate ownership and then  
11 had been reacquired by the tribe, but had lost their water rights before reacquisition, those lands  
12 held water-right priorities only as of the date that the tribe reacquired them, not the date of the  
13 initial reservation. (*United States v. Anderson* (9<sup>th</sup> Cir. 1984) 736 F.2d 1358, 1363 ("We treat  
14 these lands in a manner analogous to that of a newly created federal reservation . . . .").)  
15 Moreover, the reservations at issue in this case themselves require that the United States prove  
16 how much water was available above existing rights at the time of those reservations.

17           As discussed in the Statement of Facts (see pp. 2-3 above), each of the United States'  
18 eight reservations stated that it was subject to "valid existing rights." This condition on each  
19 and every reservation not only is consistent with the rule that a reserved water right applies  
20 only to water that is unappropriated as of the date of the reservation, but also demonstrates the  
21 United States' intent in making each of those reservations. The language of the eight  
22 reservations at issue here demonstrates that the United States did not intend to supersede any  
23 water rights that existed as of the time of each reservation.

24           Under California law, those rights included the overlying landowners' priority right to  
25 use the basin's safe yield. An owner of property overlying a groundwater basin owns a right to  
26 a correlative share of the basin's supply. (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-137;  
27 *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925; *City of Barstow v. Mojave*  
28 *Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224, 1240-1241 ("Mojave").) Because overlying rights are  
based on land ownership and are not predicated on water use (*Tehachapi-Cummings County*

1 *Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1001-1002), they vest with land  
2 ownership, so the rights of the Antelope Valley's overlying landowners vested under California  
3 law as private ownership in the Valley was established. The United States cannot  
4 constitutionally take the water available to such rights for its own purposes without paying just  
5 compensation. (*Dugan v. Rank* (1963) 372 U.S. 609, 624-626 (United States dam impounds  
6 water subject to riparian rights); *Tehachapi-Cummings, supra*, 49 Cal.App.3d, at pp. 1001-1002  
7 (riparian and overlying rights are analogous).) Unless there were no private landowners in the  
8 basin at the time of each federal reservation – which is highly unlikely, given that the first  
9 reservation occurred in 1934 – "valid existing rights" already existed under California law at  
10 the time of each reservation. The United States' burden of proof therefore includes the burden  
11 of proving that there was surplus water available at the time of each reservation on which it  
12 relies in seeking a reserved right.

13 **B. The United States Has The Burden Of Proving That The**  
14 **Reserved Land For Which It Seeks Any Reserved Right**  
**Overlies The Basin**

15 The reserved right derives from the United States' power to control its property, so it  
16 applies only to those water supplies that are appurtenant to the reserved property. (*Cappaert,*  
17 *supra*, 426 U.S., at p. 138; *United States v. New Mexico, supra*, 438 U.S., at pp. 698-700.)  
18 Where the United States seeks to appropriate water for use elsewhere, it must comply with the  
19 relevant laws of the state in which the water is located. (*United States v. New Mexico, supra*,  
20 438 U.S., at pp. 701-702; see generally *California v. United States* (1978) 438 U.S. 645, 670-  
21 679 (United States appropriations of surface water).) The United States' burden of proof in this  
22 case therefore includes proving that the land reserved in each of its relevant reservations  
23 actually is appurtenant to the basin's water supply, which presumably would mean that the  
24 reserved land overlies the basin.

25 **C. The United States Has The Burden Of Proving Each**  
26 **Reservation's Primary Purpose**

27 A reserved right is available only to serve a federal reservation's primary purpose:

28 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

1 Congress' express deference to state water law in other areas, that the United  
2 States intended to reserve the necessary water. Where water is only valuable for  
3 a secondary use of the reservation, however, there arises the contrary inference  
4 that Congress intended, consistent with its other views, that the United States  
would acquire water in the same manner as any other public or private  
appropriator.

5 (*United States v. New Mexico*, *supra*, 438 U.S., at p. 702; see also *Hallett Creek*, *supra*,  
6 44 Cal.3d, at pp. 459-467.) Determining a reservation's primary purpose requires a "careful  
7 examination" of "both the asserted water right and the specific purposes for which the land was  
8 reserved . . . ." (*United States v. New Mexico*, *supra*, 438 U.S., at p. 700, part. fn. 4.)

9 This examination is particularly important in this case because the United States'  
10 various reservations state various and shifting purposes. Those purposes include "a bombing  
11 and gunnery range," "military purposes," "in connection with an air force base" and "for  
12 military purposes in connection with Edwards Air Force Base." (USAF001653-001658,  
13 001661, 001663-001664, 001666.)

14 Reservations that occurred in 1934, 1937 and 1940 demonstrate the importance of  
15 examining different reservations' different primary purposes. In 1934's Executive Order No.  
16 6558, the United States reserved approximately 132 sections – 84,480 acres – "as a bombing  
17 and gunnery range . . . ." (USAF001653.) In 1937's Executive Order No. 7707, the United  
18 States temporarily reserved approximately 116 sections – 74,240 acres – "for use of the War  
19 Department for military purposes." (USAF001656.) Finally, Executive Order No. 8450,  
20 signed in 1940, superseded Executive Orders Nos. 6558 and 7707, reserved approximately 245  
21 sections – 156,800 acres – reverted back to the purpose of "use of the War Department as a  
22 bombing and gunnery range . . . ." (USAF001658.) These reservations demonstrate that the  
23 United States meant something different when it used the term "bombing and gunnery range"  
24 versus the term "military purposes," particularly because the reservations all occurred within  
25 six years and within the Franklin D. Roosevelt administration. It is the United States' burden to  
26 prove what the primary purpose of each of those shifting reservations was.

27 In order to satisfy the Supreme Court's requirement that a reservation's purpose be  
28 carefully determined (*Cappaert*, *supra*, 426 U.S., at pp. 131-133, 139-141; *United States v.*



1 *New Mexico, supra*, 438 U.S., at p. 700 fn. 4), the United States' burden must include proving  
2 the primary purpose of each of the reservations for which it asserts a federal reserved right.

3 **D. The United States Has The Burden Of Proving The Minimum**  
4 **Amount Of Water Necessary To Serve Each Reservation's**  
5 **Primary Purpose**

6 "The implied-reservation-of-water doctrine . . . reserves only that amount of water  
7 necessary to fulfill the purpose of the reservation, no more." (*Cappaert, supra*, 426 U.S., at p.  
8 141.) Where the Supreme Court has found a reserved right, "it has . . . concluded that without  
9 the water the purposes of the reservation would be entirely defeated." (*United States v. New*  
10 *Mexico, supra*, 438 U.S., at p. 700.) For example, in *Cappaert*, the Supreme Court found that  
11 the reserved right had vested before the private party obtained its groundwater-pumping permit  
12 from the State of Nevada, but then affirmed a District Court injunction that was "tailored . . . to  
13 minimal [federal] need, curtailing pumping only to the extent necessary to preserve an adequate  
14 water level at Devil's Hole . . . ." (*Cappaert, supra*, 426 U.S., at pp. 140 fn. 6, 141; see also  
15 *Gila River, supra*, 195 Ariz, at p. 420, 989 P.2d, at p. 739 ("A reserved right to groundwater  
16 may only be found where other waters are inadequate to accomplish the purpose of a  
17 reservation").) For each reservation on which the United States relies to support a claimed  
18 reserved right, it therefore has the burden to prove what the minimal amount of water is that is  
19 necessary to serve that reservation's primary purpose.

20 To the extent that the United States relies on its past or existing water use to support its  
21 reserved right claim, its burden of proof includes the burden of proving that water use and of  
22 proving what portions of it served a reservation's primary purpose versus the reservation's  
23 secondary purposes. Only such evidence would allow the Court to distinguish the minimum  
24 amount of water that the United States has used to serve a reservation's primary purpose, which  
25 purpose determines the volume of any right that would be based on that reservation. (*United*  
26 *States v. New Mexico, supra*, 438 U.S., at p. 702; see also *Hallett Creek, supra*, 44 Cal.3d, at  
27 pp. 459-467.)

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2 **IV. The United States' Properties That Overlie The Basin Have  
Overlying Rights**

3 To the extent that the United States cannot satisfy its burden of proof for any water right  
4 that it claims for any of its reservations, the United States still would have overlying rights for  
5 its properties that overlie the Antelope Valley basin. The California Supreme Court has held  
6 that the United States has the same rights to appurtenant water sources as any landowner,  
7 whether or not it has a reserved right to serve uses on its lands. (*Hallett Creek, supra*, 44  
8 Cal.3d 448, at pp. 459-467 (United States holds riparian rights in surface streams as an owner  
9 of adjacent land); see also *Mojave, supra*, 23 Cal.4<sup>th</sup>, at p. 1240 (riparian and overlying rights  
10 are generally analogous); *California v. United States* (9<sup>th</sup> Cir. 1956) 235 F.2d 647, 652, 655-  
11 656 (riparian rights, rather than "sovereign rights," apply to Camp Pendleton, located on the  
12 Santa Margarita River).) The California courts have recognized that overlying rights are  
13 sufficient to serve a sovereign government's governmental activities. (See *Tehachapi-  
14 Cummings, supra*, 49 Cal.App.3d, at pp. 1000-1001 fn. 6 (state prison).) Whatever the  
15 outcome of the federal reserved right portion of the Phase IV trial, the United States almost  
16 certainly will hold overlying rights like other landowners.

17 **CONCLUSION**

18 For the reasons stated above, the landowner parties who file this motion respectfully  
19 request that the Court order that the United States has the burden of proving the following in  
20 the Phase IV trial:

- 21 (1) The amount of water available at the time of each reservation;  
22 (2) The location of each reservation as overlying the basin;  
23 (3) Each reservation's primary purpose; and  
24 (4) The minimum amount of water necessary for each reservation's primary  
25 purpose, which includes distinguishing the water necessary for that purpose  
26 from the water necessary for a reservation's secondary purposes.

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1 Dated: March 28, 2013

Respectfully submitted,

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4  
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