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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL DISTRICT

ANTELOPE VALLEY GROUNDWATER CASES Included Actions: Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Los Angeles, Case No. BC 325201; Los Angeles County Waterworks District No. 40 v. Diamond Farming Co., Superior Court of California, County of Kern, Case No. S-1500-CV-254-348; Wm. Bolthouse Farms, Inc. v. City of Lancaster, Diamond Farming Co. v. 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 No. 4408 Santa Clara Case No. 1-05-CV-049053 Assigned to Hon. Jack Komar **TRIAL BRIEF RE: FEDERAL WATER RIGHTS** [Phase 5 Trial] Date: February 10, 2014 Time: 9:00 a.m. Dept.: Old Dept. 1A, Los Angeles

I. INTRODUCTION

TEJON RANCHCORP and TEJON RANCH COMPANY ("Tejon") submit this Trial Brief in opposition to the United States' claim that the overlying rights in the Antelope Valley Area of Adjudication (AVAA) are subordinated to the United States' federal reserve right.

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We summarize in part A the reservations at issue. In part B we discuss the case law interpreting the phrase "subject to valid existing right" and similar phrases found in the reservations and other documents by which the federal government acquired the land.

II. DISCUSSION

A. SUMMARY OF RESERVATIONS.

The United States claims a superior and paramount right to the groundwater resources of the AVAA based, in part, on the following reservations and grant deed:

1. **Executive Order 6588** (February 6, 1934). By Executive Order 6588, President Roosevelt withdrew approximately 132 sections of land "subject to valid existing rights, for use by the War Department as a bombing and gunnery range." (US 1653.)

2. **Executive Order 6910** (November 26, 1934). By Executive Order 6910, President Roosevelt temporarily withdrew all public land in the western states, including California "subject to existing valid rights."

3. **Executive Order 7707** (September 11, 1937). By Executive Order 7707, President Roosevelt revoked Executive Order 6910 as to certain specified lands in California and temporarily reserved 116 sections of land for use by the War Department for "military purposes," "[s]ubject to . . . all valid existing rights . . .." (US 1656.)

4. **Executive Order 7740** (November 15, 1937). By Executive Order 7740, President Roosevelt revoked a portion of the land set aside by Executive Order 6910 as to 480 acres of land and reserved such land for use by "War Department for military purposes," [s]ubject to . . . all valid existing rights. . .." (US 1657.)

5. **Executive Order 8450** (June 20, 1940). By Executive Order 8450, President Roosevelt withdrew 245 sections of land (156,800 acres) for use of the War Department for a "bombing and gunnery range," "subject to valid existing rights . . .." Executive Order 8450 expressly superseded Executive Order 6588, 7707 and 7740. (US 1658.)

6. **Public Land Order 480** (June 2, 1948). By Public Land Order 480, the Acting Secretary of the Interior withdrew 490 acres of land "for use of the Department of the Army for military purposes," "[s]ubject to valid existing rights . . .." The Order expressly modified Executive Order No. 6910 of 1934. (US 23437.)

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7. **Public Land Order 613** (October 1949). By Public Land Order 613, the Acting Secretary of the Interior reserved 564 acres of land and for use by the Department of the Air Force in connection with an air force base "[s]ubject to valid existing rights . . .." (US 1661.)

8. **Public Land Order 646** (May 10, 1950). By Public Land Order 646 the Acting Secretary of the Interior reserved 20,902 acres of land for use of the Department of the Air Force as an air force base, "[s]ubject to valid existing rights. . ..". (US 1663.)

9. **Public Land Order 1126** (April 15, 1955). By Public Land Order 1126 the Acting Secretary of the Interior reserved 120 acres of land for "military purposes in connection with Edwards Air Force Base," "[s]ubject to . . . valid existing rights." (US 1666.)

10. **Public Land Order 2270** (February 21, 1961). By Public Land Order 2270 the Acting Secretary of the Interior reserved 230 acres of land for "military purposes in connection with Edwards Air Force Base," "[s]ubject to . . . valid existing rights." (US 23439.)

11. **Plant 42**. The Department of Air Force acquired approximately 4,870 acres of land from the Los Angeles Airport Authority by grant deed "subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights and ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of the courts." (US 1669.)

In summary, each reservation of land for Edwards Air Force Base (EAFB) and the grant deed for Plant 42 were made subject to existing rights. We now discuss the significance of this straightforward language that the United States calls ambiguous and meaningless.

B. THE FEDERAL WATER RIGHT IS SUBORDINATE TO EXISTING RIGHTS OF OVERLYING LANDOWNERS.

1. The Phrase "Subject To Valid Existing Rights" And Derivations Thereof is an Express Limitation on the Scope Of The Federal Reservations.

The phrase, "subject to valid existing rights," and variations of this phrase, when used in federal reservations or withdrawals of land, is always meant as a limitation on the scope of the federal reservation or withdrawal with respect to the rights of others. While the phrase has been

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described in some authorities as being ambiguous, the phrase is not without meaning. Unquestionably the phrase acts to protect property rights from federal impairment. Commonly, the phrase is viewed as precluding the government from effecting a taking. (*See Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979) (under the Federal Land Policy and Management Act, which provides that all actions by the Secretary of Agriculture under the Act "shall be subject to valid existing rights," valid existing rights of access may be regulated but such regulations cannot be so restrictive as to constitute a taking); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (citing *Utah v. Andrus* with approval); *Stupak-Thrall v. United States,* 89 F.3d 1269, 1270 (6th Cir. 1996) (concurring opinion stating, "**All authorities are in agreement that the 'subject to valid existing rights' language was essentially designed to restrain agencies from effecting a taking**," citing, inter alia, *Symposium on Valid Existing Rights*, 5 J. Min. L. & Pol'y 381 (1989-90), emphasis added).

In *Stupak-Thrall v. United States*, an evenly-divided Sixth Circuit sitting en banc affirmed the District Court's judgment upholding Forest Service wilderness regulations prohibiting certain activities in the Sylvania Wilderness.[1] *Stupak-Thrall*, 89 F. 3d at 1269. As explained in the dissenting opinion by Circuit Judge Boggs, the regulations were promulgated under the Michigan Wilderness Act (MWA), which "conferred on the Forest Service, in relation to the Sylvania Wilderness, all of the broad powers to regulate that the Forest Service had under the Wilderness Act, but provided that these powers were only to be exercised 'subject to valid existing rights.'" *Id.* at 1273-1274. The regulations at issue prohibited the use of sail boats and house boats and the use of non-burnable disposable food and beverage containers in the Sylvania Wilderness. *Id.* at 1274. An owner of lake-front property was challenging the regulations on the ground that her riparian rights to use the lake, including for sailing, were "valid existing rights"

[1] In *Stupak-Thrall,* seven members favored affirming the District Court's judgment, and seven favored reversal. By custom, the judgment of the District Court was affirmed by the equally divided vote. *Stupak-Thrall*, 89 F. 3d at 1269. Because there was no majority opinion, neither the concurring opinion by Circuit Judge Moore nor the dissenting opinion by Circuit Judge Boggs has precedential value. *Id.*

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that could not lawfully be impaired by Forest Service regulations under the MWA. Three of the Circuit Judges voting to affirm the District Court's judgment upholding the regulations joined in a concurring opinion by Circuit Judge Moore, in which she wrote:

> Congress, of course, can always take property, provided it pays just compensation (and provided it does not violate due process), but Congress here has instructed the Forest Service not to do so. As a result, the remedy for an overreaching Forest Service regulation, rather than compensation, is an injunction. **In other words, the 'subject to valid existing rights' language appears to be Congress's 'promise' to private property owners that, at a minimum, it will not take their property, even with just compensation.**

Stupak-Thrall, 89 F. 3d at 1270 (concurring opinion, emphasis added).

The dissenting opinion, by Circuit Judge Boggs, joined by three of his colleagues, expressed an opinion that the phrase "subject to valid existing rights" not only precludes takings of property, but also prohibits any invasion of any valid existing property right. The dissent in *Stupak-Thrall* would hold that the regulation is invalid "to the extent it invades the riparian rights of Stupak-Thrall under Michigan law." *Stupak-Thrall* at 1305 (dissent). Circuit Judge Bogg's discussion of the plain meaning of the phrase "subject to valid existing rights" is instructive:

> Section 5 of the MWA grants to the Forest Service the power to regulate various new wilderness areas in Michigan, including the Sylvania Wilderness, in accordance with the Wilderness Act. However, this power is "subject to valid existing rights." The statute could not be clearer -- the Forest Service cannot regulate in a way that invades or destroys "valid existing rights." It seems beyond cavil to me that the phrase "valid existing rights" refers to property rights, most of which are created by state law, protecting them from invasion or disparagement by the Forest Service.
>
> The meaning of "subject to" is actually highly definite. The most appropriate meanings given by Black's Law Dictionary are "subordinate" and "subservient." *Black's Law Dictionary* 1278 (5th ed. 1979). . . .
>
> Black's Law Dictionary defines a "right" in two senses, an abstract sense and a concrete sense. Obviously, because the word "right" in Section 5 of the MWA is modified by the word "existing," a concrete meaning for the word "right" is plain on the face of the statute. In this case the most appropriate meaning of the word "right" is "an interest or title in an object of property." *Black's Law Dictionary* 1189 (5th ed. 1979). . . .
>
> The word "existing" limits those rights protected from invasion by Forest Service regulations to those rights that predate the enactment of the MWA.

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Stupak-Thrall at 1285 (dissent)

Thus, *Stupak-Thrall* appears to stand for the proposition that the phrase "subject to valid existing rights," in the context of the MWA, means, at a minimum, that the government is prohibited from effecting a taking of property rights by regulations adopted pursuant to the MWA. Here, because the United States' reservations of land for government use were explicitly made subject to valid existing rights, those land reservations may not be interpreted in any way that effects a taking.

The authorities the United States cited in its brief opposing the Antelope Valley Groundwater Agreement Association's motion for summary adjudication, are not to the contrary. The United States quoted from the district court's opinion in *Stupak-Thrall* (not the opinions issued in connection with the Sixth Circuit's review of the appeal in that case quoted above), for the unremarkable proposition that riparian rights of lake access are not absolute, and are subject to regulation. (*See* United States' Response in Opposition to AGWA's Motion for Summary Adjudication of Issues, dated December 27, 2013, at p. 15.) But the district court did not hold that the MWA, which gave the Forest Service regulatory authority, "subject to valid existing rights," authorized the taking of property rights. As noted above, the riparian rights at issue in that case were not riparian water rights in a stream or underground aquifer, but instead were riparian rights of access and use of a lake. Those riparian rights were creatures of Michigan law. The district court noted that "[u]nder Michigan law, local governments have the power to regulate riparian activities on lakes within their jurisdictions." (*Stupak-Thrall v. United States*, 843 F. Supp. 327, 331 (W.D.Mich., 1994).) Thus, the riparian rights were always subject to regulation under Michigan law, but not to taking without just compensation.

Nor does the *French v. Gapen* case the United States cited support the position that the United States is entitled to effect a taking of water rights of overlying owners. If *French* stands for anything in the present dispute, it supports the position of the overlying owners that by reserving land for government use, subject to valid existing rights, the United States did not affect in any way the rights of the other overlying owners, such as by granting to the United

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States a new, superior right to water in the AVAA. The United States cited *French* for the proposition that by making its reservations "subject to valid existing rights" the government "merely acknowledged that the United States' property was encumbered by the same liabilities that rested on the land at the time of the reservation." (*See* United States' Response in Opposition to AGWA's Motion for Summary Adjudication of Issues, dated December 27, 2013, at p. 15.) The Supreme Court in *French* was not addressing a federal reservation of land, but instead the State of Indiana's sale of a canal. At issue was the post-sale status of certain rights granted by the state before the sale. In that case, Indiana conveyed a canal, noting in a statute that the conveyed interests were subject to "all existing rights and equities against the State" on account of various transactions pertaining to the canal. Previously, the State had agreed to pay certain contractors on the canal over time through water rents collected on the canal, and to compensate a mill owner, whose mills had been damaged through loss of water through diversion, by allowing him to draw water indefinitely. The Supreme Court held that after the conveyance the contractors and the mill owner retained the same rights to receive payment of the rents and to draw water that they had before the conveyance. *French v. Gapen*, 105 U.S. 509, 524. In other words, the Supreme Court viewed "subject to valid existing rights" as preserving those rights exactly as they were before the sale.

Perhaps not surprisingly, "valid existing rights" has been described as meaning "something less than a vested right." *Stockley v. United States*, 260 U.S. 532, 544 (1923) (where an order of the President of the United States withdrawing public lands was expressly made "subject to existing valid claims," the purpose of the exception "evidently was to save from the operation of the order [homestead] claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into title"); *Aleknagik Natives, Ltd. v. United States*, 806 F.2d 924, 926-927 (9th Cir. 1986) ("legitimate expectations" may be recognized as valid existing rights; "valid existing rights" does not necessarily mean vested rights, present possessory rights, or even a future interest); *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1342-1343 (9th Cir. 1990) (following *Aleknagik Natives, Ltd.*).

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Having established that the phrase "subject to valid existing rights" contained in the Executive Orders of President Roosevelt and Public Orders of the Asst. Secretary of the Interior is not meaningless or superfluous, we next turn to several other arguments raised by the United States to avoid the express limitation of the government's authority.

2. Interpretation of the Phrase "Subject To Valid Existing Rights" by the Department of Defense or Any Other Administrative Agency is Irrelevant.

The United States has argued that under the holding of *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (1984) 467 U.S. 837, this court must defer to any interpretation of the phrase "valid existing rights" by the Department of Defense or some other governmental agency. The United States' reliance on *Chevron* is misplaced for several reasons. The *Chevron* court gave deference to the EPA's interpretation of the Clean Air Act Amendments of 1977 through EPA's duly promulgated regulations. *Chevron* at 866. By contrast, here, there exists neither Congressional act nor duly promulgated rule-making by an administrative agency. Rather, we are dealing with the interpretation of a commonly–used phrase found in executive orders of the President and public land orders. As such, the internal opinions, policy statements or interpretation deserves no deference whatsoever. For example, in *Christensen v. Harris County* (2000) 529 U.S. 576, 586-589, the Supreme Court declined to defer to an agency's internal interpretation not arrived at by a formal adjudication or by notice-and-comment of rule-making. Opinion letters, policy statements, agency manuals, guidelines and internal opinion letters which lack the force of law, fail to warrant *Chevron*-style deference. Indeed, to defer to the agency's position would permit the agency to create a new regulation from whole cloth, under the guise of interpretation. *Christensen v. Harris County* (2000) 529 U.S. 576, 586-589

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3. Exclusive Federal Jurisdiction and Right to Water Ends at the Boundary of the Enclave.

The United States argues that since the State of California ceded jurisdiction over EAFB and Plant 42, the United States has a paramount right to the water supplies within the AVAA and is entitled to whatever water it need for military purposes now, or in the future. The Ninth Circuit Court of Appeal rejected this very argument in the case of *California v. United States*, 235 F.2d 647 (9th Cir. 1956) ("*Pendleton I*"), holding that federal jurisdiction and the United States' federal right to water ends at the border of the enclave. Outside the enclave the United States is on equal footing with all other water users in the AVAA.

In *Pendleton I*, the United States brought an action against some 3,000 defendants to quiet title to non-navigable water claimed to be appurtenant to land acquired between 1941 and 1943 for various purposes of the army and navy referred to as Camp Pendleton, or simply the enclave. (*Id.* at p. 652.) The 135,000 acres of land comprising Camp Pendleton was acquired by a combination of purchase, condemnation and executive order. (*Id.* at p. 652.) The Santa Margarita River, an intermittent non-navigable stream, traverses Camp Pendleton to a point of confluence with the Pacific Ocean. "A cardinal fact in the case is that in 1941 the State of California ceded to the United States general sovereignty over the territory, land and water, embraced in the enclave." (*Id.* at p. 653.)

The State of California and Santa Margarita Mutual Water Company sought review of an order of the district court which entered judgment in favor of the federal government. (See *United States v. Fallbrook Public Utility Dist.*, D.C. 110 F.Supp. 767 (1953).) The lower court judgment, among other things, purported to cut off the rights of the State as sovereign to resolve the water rights outside the enclave and the rights of the State as proprietor of water rights above the enclave, the right of Santa Margarita Mutual to divert surplus waters, and the rights of all

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other litigants and the world. (*Id.* at p. 654.) The Ninth Circuit reversed and remanded for further proceedings. The Court held that the United States had no paramount right to the water supply outside the enclave. Although the State had ceded jurisdiction of the land and water within the enclave, the State had not ceded jurisdiction of the land and water outside the enclave. The district court erred by giving credence to the United States' claim of "military necessity" and by seriously misconstruing the "sovereign rights of the United States." (*Id.* at p. 654-655.)

Despite the "steady beating of war drums" in the government's brief, the Court quickly disposed of the "military necessity" argument.[2] The United States argued that when the State ceded sovereignty to the enclave for military purposes and future military needs, the United States obtained the right to use *all water which in the state of nature flowed to the enclave* for military necessities. (*Id.* at p. 655.) The Ninth Circuit disagreed, reasoning that since the United States had no original sovereignty over the State, no federal sovereign rights existed outside the enclave. (*Id.* at p. 655.) Thus, the Court concluded that if the United States needs more water rights that those presently appurtenant to the enclave for present and future "military necessity," the government can acquire those rights by paying just compensation. (*Id.* at p. 655.) "[T]he principles of property law should not be warped in order to provide for contingencies yet to come." (*Id.* at p. 655.)

The question of 'sovereign rights' of the United States pervaded this entire case. (*Id.* at p. 655.) The Court affirmed that the federal government had sovereign rights within the enclave (*Id.* at p. 656) and recognized that since the State had ceded jurisdiction over the enclave, the United States held paramount and exclusive control over the land and water within the enclave. Indeed, the Watermaster of the State had no authority inside the enclave. (*Id.* at p. 656.) The

[2] The Court also noted: "The government brief blares out like a trumpet the 'military necessity' in the use of Pendleton against the 'aggressors.'" (*Id.* at p. 655.)

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United States claimed that that since it had exclusive jurisdiction, its rights to the water flowing in the creek were paramount to all other water users and without limitation. (*Id.* at p. 655.) The Ninth Circuit disagreed with the United States and reversed.

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

(*Id.* at p. 656.)

The Court held that since the State had not ceded jurisdiction to the land and water outside the enclave, the United States had no paramount right to the common water supply outside of the enclave. (*Id.* at p. 656.)

> We must not fall into the fallacy of believing that, because the United States, by its sovereignty, made use of the corpus of water which entered the enclave as it chose, it thereby acquired property rights in the flow against upper riparians or appropriators under municipal law.

(*Id.* at p. 656.) The Court further held that the United States' sovereignty terminated at the edge of the enclave, and that outside the enclave the United States was subject to state water law principles.

> The federal government, as regards all claimants to water outside the enclave, is not in the position of sovereign, but in the position of a lower riparian which is compelled to make beneficial use within the watershed and for other than proper riparian uses must show an appropriation according to law.

(*Id.* at p. 656.) The court reversed and remanded the case due to "misconceptions of the law of the enclave by the trial court and the application of the theory of sovereignty to the subversion of vested and inchoate private rights."

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4. EAFB, Like Pendleton, Sits in the Position of a Lower Riparian.

The United States argues that the phase "subject to valid existing rights" is limited to the valid existing rights inside the enclave, and not a limitation outside the enclave. We have found no authority standing for this proposition. So long as the United States' position is consistent, however, it is a distinction without a difference.

If the scope of the reservations is confined to the enclave, then the reservations, by definition, have no impact on land and water outside the enclave. In this instance the United States has a federally-based right and exclusive jurisdiction to the water underlying the federal enclave. (See *Pendleton I.*) The Court will recall from the testimony of Dr. June Oberdorfer in both the Phase II and Phase III trials, that EAFB sits hydro-geologically in the position of a lower riparian in the AVAA, much like Camp Pendleton on the lower Santa Margarita River. Recharge flows from the foot of the San Gabriel Mountains, north toward the dry lake beds. Pre-development (1915), groundwater flow recharged the aquifer underlying EAFB. (See Exhibit 4, Phase II, Ex. I-13 .) Since at least 1951, however, most all of the natural recharge has been intercepted by water users in the Palmdale and Lancaster areas. (See Exhibit B, Phase II, Ex. I-15, 16.) For the past several decades, EAFB has been pumping from storage. (Exhibit C, Phase II R.T., pp. 10-17) The United States may pump whatever water underlies the enclave. However, since the exclusive jurisdiction of the United States ends at the boundary of the enclave, the United States has no claim to water outside the enclave or any right to insist that others reduce pumping in order to restore natural recharge to EAFB. (See *Pendleton I*, at p. 656.)

If, on the other hand, the scope of the federal reservations extends outside the enclave, then the reservations are "subject to the valid existing rights" of all water rights holders within the AVAA. In this instance overlying rights holders have the highest priority rights in the AVAA. Whatever right the United States may have to the water outside the enclave, such right

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does not subordinate the rights of overlying landowners, since subordination of existing overlying rights would constitute a "taking" of valid existing rights, an act expressly prohibited by the reservations. In short, the United States can exercise its federal right and pump from storage the remaining water underlying EAFB, or it can exercise its state-based right and share correlatively in the safe yield of the AVAA.[3]

III. CONCLUSION

Sovereignty has its limits. The enclave is an island. Inside the enclave the United States is king and sovereign. Outside the enclave the United States stands on equal footing with all other water users in the AVAA.

Dated: February 4, 2014

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[3] The United States' overlying rights must be adjudicated at the same time as all other rights to the common supply. (See *Pendleton I* at p. 663 [United States non-federal rights to Santa Margarita must be adjudicated along with all other riparians and appropriators at the same time.].)

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