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DISTRICT, FRANZ DE KLOTZ, ED PACK,
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capacities as members of the Board of
Directors of the COACHELLA VALLEY
WATER DISTRICT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS, Plaintiff, vs. COACHELLA VALLEY WATER DISTRICT, et al. Defendants.	ED CV 13-00883 JGB-(SPx) Action Filed May 14, 2013 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CVWD'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT
UNITED STATES OF AMERICA Plaintiff-in-Intervention	Hearing: February 9, 2015 Time: 9:00 a.m. Courtroom 1

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Defendants COACHELLA VALLEY WATER DISTRICT and FRANZ DE KLOTZ, ED PACK, JOHN POWELL, JR., PETER NELSON and DEBI LIVESAY, in their Official Capacities as Members of the Board of Directors of the Coachella Valley Water District, (hereafter "CVWD") respectfully submit this memorandum of points and authorities in support of their motion for summary judgment, or in the alternative, for partial summary judgment.

I.
INTRODUCTION AND SUMMARY OF ARGUMENT THAT AGUA CALIENTE RESERVATION HAS NO ABORIGINAL OR RESERVED RIGHTS TO GROUNDWATER

At issue in this phase of the case is whether the Agua Caliente Reservation has rights to groundwater under two separate federal law doctrines: (1) aboriginal rights and (2) reserved rights implied from the creation of the reservation, which are often referred to as "*Winters* rights." No one disputes that under California common law the Reservation lands have overlying rights (which allow beneficial use of groundwater on lands overlying the groundwater basin) and those rights are not at issue in this case. Also not at issue are the rights the California Superior Court previously decreed to the Reservation for the use of waters from surface streams. (Doc. 1, ¶ 30; Doc. 49, ¶ 7.) As explained below, the Reservation does not have water rights to groundwater under either federal law doctrine. Any aboriginal rights in groundwater were extinguished in 1853 by Section 13 of the 1851 California Land Commission Claims Act. 9 Stat. 633. The Supreme Court has never

extended the doctrine of reserved water rights to groundwater, and no basis for extending the doctrine exists here, where the federal government's focus at the time of reserving the lands and patenting them in trust was on developing surface waters to satisfy the needs of the reservation for irrigation and domestic uses and where the reservation has groundwater rights under California law on a correlative basis with its neighbors.

II.
STATEMENT OF THE CASE

A. THE RELEVANT PLEADINGS

The Agua Caliente Band of Cahuilla Indians ("Tribe") filed its Complaint for Declaratory and Injunctive Relief on May 14, 2013 (Doc. 1) against CVWD and Desert Water Agency and its defendant directors (hereafter "DWA"). CVWD answered on July 8, 2013 (Doc. 39) and DWA answered on July 9, 2013 (Doc. 40.)

The United States filed a Complaint in Intervention on June 25, 2014 (Doc. 71) against the same defendants. DWA (Doc. 72) and CVWD (Doc. 73) separately answered the complaint in intervention on July 16, 2014.

The Tribe claims "aboriginal rights to groundwater from the Upper Whitewater and Garnet Hill sub-basins of the Coachella Valley … in an amount sufficient to meet the aboriginal uses of the Tribe and its members." (Doc. 1, ¶58.) CVWD denied this allegation, and further asserted as a Third Affirmative Defense

that any such claim was extinguished by the California Land Commission Claims Act of 1851. (Doc. 39.) The United States makes no claim of aboriginal rights.

Both the Tribe and the United States assert claims for reserved rights to groundwater for the reservation. CVWD denied these claims and asserted as a Second Affirmative Defense that the reserved rights doctrine does not extend to groundwater. (Doc. 2, p. 13; Doc. 73, p. 6.)

Pursuant to stipulation and order of the court, Phase I of the case will "address the threshold issues of whether the Tribe has rights to groundwater pursuant to the federal *Winters* doctrine and/or aboriginal rights to groundwater." (Doc. 49, ¶ 4.) The Court has entered orders (1) establishing a briefing schedule for Phase I summary judgment motions (Doc. 69) and (2) approving the parties' stipulation that "any document disclosed or produced by any party in discovery shall be presumed to be authentic" and to extend the page limits for the summary judgment briefing. (Doc. 78.)

B. FACTUAL BACKGROUND

1. The Parties

The Agua Caliente Band of Cahuilla Indians is a federally recognized Tribe. (Doc.1, ¶ 9.) The United States sues in its own right and as trustee for the Tribe and individual Allottees on the Reservation. (Doc. 71, ¶7.) CVWD is a public agency of the State of California organized and operating under the County Water District Law and the Coachella Merger Law. Cal. Wat. Code §§ 30000-32603, 33100-33162,

33118. DWA is a special district created and operating under the Desert Water Agency law. Cal. Wat. Code., App. § 100-1 (West).

2. History of the Reservation Lands

The Tribe has resided in California's Coachella Valley for hundreds of years. Statement of Undisputed Fact "SUF" 1. In 1848, Mexico ceded California and other lands to the United States by the Treaty of Guadalupe Hidalgo. SUF 2. Following California's admission to the Union, Congress, on March 3, 1851, enacted an "Act to Ascertain and Settle Lands Claims in the State of California." 9 Stat. 631. SUF 3 . No claim was submitted by the Tribe or on its behalf within the two year period prescribed by the Act. SUF 4. Any rights of the Tribe to lands were thereby extinguished and the lands became part of the public domain under Section 13 of the Act on March 3, 1853. SUF 6.

In 1864, Congress authorized the President to set apart "not exceeding four tracts of land" for purposes of Indian Reservations. Act to Provide for the better Organization on Indian Affairs in California, § 2, 13 Stat. 39,40 (1864). SUF 7.

Before a reservation could be set aside for the Agua Caliente, Congress granted the odd-numbered sections in the Coachella Valley to a railroad. Act to incorporate the Texas Pacific Railroad, and to aid in the Construction of its Road, and for other purposes, § 9, 15 Stat. 573, 576 (1871). SUF 8. In 1876 and 1877, Presidents Grant and Hayes respectively issued executive orders to set aside lands

from the public domain for the Tribe as part of the reservation for Mission Indians. SUF 9, 10.

In 1891, Congress enacted the Mission Indians Relief Act, which established a process to create permanent reservations for the Mission Indians. 26 Stat. 712-14. A Commission recommended a permanent reservation for the Tribe. SUF 16. President Harrison then issued an Executive Order approving the recommendation to set aside additional lands as part of the Agua Caliente Reservation in 1891. SUF 20 . Trust patents issued in 1896 and 1906, covering lands encompassed by the 1891 Executive Order. SUF 21, 22. In 1907, the Mission Indians Relief Act was amended to allow trust patents to issue for lands covered by the prior Executive Orders, 34 Stat. 1022-23, and trust patents for those lands were issued in 1911 and 1923. SUF 23, 24, 25.

3. The U.S. Focus On Developing Surface Supplies for the Reservation

The primary purpose of the creation of the Agua Caliente Reservation was to provide a permanent, secure and territorially well defined homeland to provide protection from further incursions by non-Indians. SUF11, 26. The Government intended that surface water from Andreas and Tahquitz Creeks, and to some extent from Chino Creek and the Whitewater River, would be provided for irrigation and domestic uses to carry out that purpose. SUF 27, 28, 29; SUF 13, 17, 18, 19.

Section 8 of the Mission Indians Relief Act authorized the Secretary of the Interior to authorize grants of rights of way for conveyance of water across reservation land on condition that the Indians owning or occupying the property receive sufficient water for irrigation and domestic purposes. 26 Stat. 714 (1891). The Commissioner of Indian Affairs Instructions to the Smiley Commission (appointed by the Secretary of the Interior as directed by the Act) included a statement that the Commission should "…make such suggestions and recommendations regarding…irrigation as your observations may seem to require." SUF 15.

The Smiley Commission Report dated December 19, 1891, at pages 32-33 stated that "…the [Agua Caliente] Indians have depended largely upon water coming from Toquitz Canyon. …This supply fails for two or three months, nearly every year, and cannot be depended on." The Report continues on to describe a recommended arrangement with the Bear Valley Irrigation Company for a supply of surface water to the Indians for irrigation and domestic purposes from Andreas and Tahquitz Creeks in return for rights to Andreas Canyon Water and surplus water from Tahquitz Canyon, stating "This will be a permanent supply and a better supply than the Indians ever had… ." SUF 17

Various reports describe Tahquitz and Andreas Creeks, particularly Tahquitz Creek, as the major source of water for irrigation and domestic uses by the Agua

Caliente Tribe. These include Henry Ryan's Report in January, 1894, to Indian Agent Estudillo that

> The Indians at this place have for many years, even from a time prior to the American occupation of this State, used the waters of Chino, Taquitch, and Andreas Canyons, three streams having their sources on the eastern slope of the San Jacinto Mts., to irrigate their lands.

SUF 28 h.

Superintendent of Irrigation Butler's August 22, 1903 Report to the Commissioner of Indian Affairs asserted

> There is evidence to date that in times past the Indians have built ditches for the conduct and distribution of the waters of the canyons of Chino, Tahquitz, and Andreas; and have irrigated lands therefrom in Sections 2, 10, and 11 of T.5, S.R. 4, E., and Sections 7, 10, 14, 15, 34 and 35 of T.4, S.R. 4, E.

SUF 29 d.

Additional reports verify that Tahquitz Creek and Andreas Creek were the principal source of water supply for the Agua Caliente Tribe during that period. SUF 27. There is nothing in the Government's records to indicate that during the era the Reservation was created by Executive Orders and the lands patented in trust under the 1891 Mission Indians Relief Act, as amended, the Government impliedly intended to reserve rights to groundwater for use by the Tribe. The Government's efforts to supply water for use on the Reservation were focused on surface water. SUF 28, 29.

III.
STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedures authorizes parties to move for summary judgment. Pursuant to Rule 56, the court "*shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a) (italics added). Thus, summary judgment is "mandate[d] . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is "an integral part of the Federal Rules as a whole," and *not* "a disfavored procedural shortcut." *Id.*, at 327, quoting Fed. R. Civ. P. 1.

The moving party must support its assertion that a fact cannot be genuinely disputed either by citing to parts of the record or showing that an adverse party cannot produce admissible evidence. Fed. R. Civ. P. 56 (c). In the latter case, the moving party bears the burden of "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325; *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F. 3d 1099, 1106. "[A] party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact." Advisory Committee notes re: 2010

Amendment to FRCP 56, Subdivision (c). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23.

Once a moving party has carried its burden of production by pointing out an absence of evidence to support an essential element, the nonmoving party must produce evidence to support its claim. *Nissan Fire & Marine,* 210 F. 3d at 1103; *El v. Crain,* 560 F. Supp. 2d 932, 936, 57 A.L.R.6th 685 (C.D. Cal. 2008), *aff'd in part, vacated in part*, 399 Fed. Appx. 180 (9th Cir. 2010) (unpublished). Moreover, it is not enough for the nonmoving party to simply show some facts are in dispute; the facts must be *material* facts, and the dispute must be *genuine. Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

IV.
THE TRIBE DOES NOT HAVE ABORIGINAL RIGHTS TO GROUNDWATER

The Tribe claims "aboriginal rights" to groundwater. This claim fails legally and factually.

Aboriginal rights are a right of occupancy that is sometimes referred to as "Indian title." The Supreme Court described the right as follows:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we

> use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Tee-Hit-Ton Indians v. U. S., 348 U.S. 272, 279, 75 S. Ct. 313, 99 L. Ed. 314 (1955).

A. CONGRESSIONAL EXTINGUISHMENT OF ABORIGINAL RIGHTS IN CALIFORNIA

The claim of aboriginal rights fails legally because Congress extinguished any such rights. The 1848 Treaty of Guadalupe Hidalgo ended the Mexican-American War and resulted in Mexico ceding to the United States a large area that became the Southwest United States, including the State of California. 9 Stat. 922. Articles VIII and VIX of that Treaty required the United States to recognize the property rights of Mexican citizens in the areas ceded which required that a process be established. 9 Stat. 929-30.

On March 3, 1851, Congress enacted "An Act to Ascertain and Settle the Land Claims in the State of California." 9 Stat. 631 ("the Act")[1]. The Supreme Court described the Act as follows:

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[1] For further background on the Act, and its effect on aboriginal title, see Flushman and Barbieri, Aboriginal Title: The Special Case of California, 17 Pac L.J. 391, 399-400 (1986). The article notes that in addition to the Treaty obligations, the chain of events started by the 1848 Gold Rush and its massive population influx added significant and urgent incentive to provide certainty with respect to land titles in California. The specter of Indian claims to rights of occupancy to nearly 25 million (footnote continued)

> To fulfill its obligations under the Treaty of Guadalupe Hidalgo and to provide for an orderly settlement of Mexican land claims, Congress passed the Act of March 3, 1851, setting up a comprehensive claims settlement procedure. Under the terms of the Act, a Board of Land Commissioners was established with the power to decide the rights of "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government…."Act of Mar. 3, 1851, §8, ch. 41, 9 Stat. 632. The Board was to decide the validity of any claim according to "the laws, usages and customs" of Mexico, § 11, while parties before the Board had the right to appeal to the District court for a *de novo* determination of their rights, § 9 [citation omitted], and to appeal to this Court, §10. Claimants were required to present their claims within two years, however, or have their claims barred. § 13; see *Botiller v. Dominguez, supra.*

Summa Corp. v. California ex rel. State Lands Com'n, 466 U.S. 198, 203, 104 S. Ct. 1751, 80 L. Ed. 2d 237 (1984). Section 13 of the Act specifically provided that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States." 9 Stat. 633.

The United States Supreme Court has repeatedly held and acknowledged that extinguishment of aboriginal rights was the result of a failure to file a claim within the time prescribed by the Act. The first of these cases involved a band of Mission Indians, the Agua Caliente Band No. 1 in the Warner Ranch area of San Diego County (as opposed to the Plaintiff, known as "Agua Caliente No. 2," in the Palm

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acres within the State was a problem that had to be dealt with and "spelled the doom of any attempt to treat California Indians' claims to property ownership with the consideration that was accorded … in other parts of the United States." *Id.*

Springs area). *Barker v. Harvey*, 181 U.S. 481, 496-97, 21 S. Ct. 690, 45 L. Ed. 963 (1901).

In *Barker*, the Court held that the purpose of the 1851 Land Claims Act was to bring stability to land titles in California and to determine what portion of the territory ceded by Mexico was a part of the public domain. *Barker,* 181 U.S. at 490. The Court held that the Act created a mechanism for extinguishment of aboriginal rights of California Indians and concluded that a failure of the Indians to present their claims of aboriginal occupancy as required by the Land Claims Act constituted an abandonment (*i.e.*, extinguishment) of the claim which left the area in question as part of the public domain. *Id.,* at 490-91. "As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land, within the language of the statute 'part of the public domain of the United States.'" *Id.,* at 490.

The Court reaffirmed this holding in *United States v. Title Insurance and Trust Company,* 265 U.S. 472, 482-86, 44 S. Ct. 621, 68 L. Ed. 1110 (1924), and in *United States v. Santa Fe Pacific Railway Co.,* 314 U.S. 339, 350, 62 S. Ct. 248, 86 L. Ed. 260 (1942), the Court noted that the 1851 Act was the method chosen by Congress as a mechanism to extinguish unverified claims to private property in California "including those based on Indian right of occupancy."

The Tribe has admitted in discovery responses no petition for recognition of the Plaintiff's aboriginal title was presented by plaintiff or on its behalf to the

Commission. SUF 4. Any aboriginal rights were therefore extinguished by operation of the Act on March 3, 1853.

B. THE ABORIGINAL RIGHTS CLAIM FAILS FOR WANT OF PROOF

Occupancy necessary to establish aboriginal possession is a question of fact. *United States v. Santa Fe Pac. R. Co.* 314 U.S. 339, 345, 62 S. Ct. 248, 86 L. Ed. 260 (1941). Although the Tribe alleges that "Hand-dug walk in wells as deep as thirty feet were features of the Cahuilla settlements in the northern half of the Valley" (Doc. 1, ¶16), the Tribe in response to discovery requests stated that it "is unable to admit or deny at this time whether any hand-dug wells of the type referenced in paragraph 16 of the Complaint existed within the current boundaries of the Tribe's Reservation." SUF 5. The absence of wells on the Agua Caliente Reservation is verified by the Government's 1855-56 Map of Indian Rancherias, Fields and Wells recorded in US Government Land Survey 1855-56. This map depicts "fields" close to the Agua Caliente and Rincon and Andreas Canyon locations but depicts no wells in those vicinities. SUF 28 e. Historic documents involving the Agua Caliente Reservation, primarily the Government's own records, are replete with references to the use of surface water for irrigation and domestic uses on the Reservation, but contain no references to the use of groundwater by the Agua Caliente Tribe. SUF 27, 28, 29.

The claim of aboriginal rights therefore fails factually because the Tribe cannot show the continuity of possession that is an essential element of a claim for aboriginal rights.

V.
THE RESERVATION DOES NOT HAVE RESERVED RIGHTS TO GROUNDWATER

Both the United States and the Tribe assert that Reservation lands have reserved rights to groundwater. However, the Supreme Court has never held that the reserved rights doctrine extends to the implied reservation of groundwater rights. A review of the history of the doctrine and the principal decisions of the Supreme Court show that the doctrine should not be applied to groundwater in general and specifically as to this Reservation, and that the traditional policy of deference to state water should control instead.

A. CONGRESSIONAL POLICY OF DEFERENCE TO STATE LAW OF WATER RIGHTS

The general rule is that state water law should control disputes over water resources, and that the federal government will proceed to acquire water rights under state law. *California v. United States,* 438 U.S. 645, 653-63, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978). This rule follows from a longstanding policy of Congress to defer to state law in connection with the appropriation and use of water on federal lands, which the Supreme Court has repeatedly acknowledged. *Broder v. Natoma Water & Mining Co.,* 101 U.S. 274, 276, 25 L. Ed. 1356 (1879); *California Oregon*

Power Co. v. Beaver Portland Cement Co., 295 US 142, 154, 55 S. Ct. 725, 79 L. Ed. 1356 (1935); *California v. U.S.*, 438 U.S. at 657-58. Reasons ascribed by the Supreme Court to Congress for the policy of deference include (1) promoting the development of the arid west by deferring to local rules and customs (primarily the rules of prior appropriation) that had developed based on necessity and which were inconsistent with federal common law, *California Oregon Power Co.,* 295 U.S. at 153-57, and (2) a desire to avoid confusion between inconsistent federal and state water laws, *California v. U.S.,* 438 U.S. at 668-69, 679. The Court in *California v. United States* cited numerous Congressional enactments, reports and debates in support of these conclusions:

> A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality. Congress also intended to "follo[w] the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water" [citing 35 Cong. Rec. 6678 (1902)]. As representative Mondell noted after reviewing the legislation discussed in Part II of this opinion [*i.e.*, the acts of 1862, 1866, 1870, 1877, 1890 and 1891]: "Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard."

California v. U.S., 438 U.S. at 668-69.

> Since it is clear that the States have control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years. S. Rep. No. 755 82d Cong., 1st Sess., 3, 6 (1951).

Id., at 678-79.

In light of the general rule of deference to state law, any analysis of the water rights issues here should begin with California law regarding groundwater rights. California law accords overlying groundwater rights to the Reservation lands, on an equal basis with the neighboring sections of lands that were patented to the railroad and private parties.

> An overlying right, "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." [Citation omitted.] One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable beneficial use.

City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224, 1240; 99 Cal.Rptr. 2d 294; 5 P.3d 853 (2000).[2] As between overlying owners, the rights, like those of riparians, are correlative – each may use only his reasonable share when water is insufficient to meet all overlying needs. *Id.,* at 1241. Overlying landowners are superior in right to those who seek to appropriate unused or surplus water for non-

[2] The seminal cases establishing overlying rights date to the early 20th Century. *Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (1903); *Burr v. Maclay Rancho Water Co.*, 160 Cal. 268, 116 P. 715 (1911); Wells Hutchins, The California Doctrine of Correlative Rights, in California Water Law, 431-54 (1956).

overlying uses such as devotion to public use distribution through a domestic waterworks system or for export for use on lands outside of the basin.[3] *Id.,* at 1241.

It is now settled that federal reservations in California have the same water rights as private landowners. In addressing the question of whether federal forest reserves have state law water rights, the California Supreme Court held that "…under California Law riparian water rights exist on federal lands within the State of California." *In Re Water of Hallett Creek Stream System,* 44 Cal. 3d 448, 467, 243 Cal. Rptr. 887, 749 P.2d 324 (1988). As overlying rights are analogous to riparian rights, it would follow that federal reservations enjoy overlying rights as well. No case has held to the contrary. Thus, the lands of the Reservation enjoy overlying groundwater rights.

B. THE NARROW EXCEPTION OF THE RESERVED RIGHTS DOCTRINE

1. The Doctrine

It would seem that under the Congressional policy of deference to state water law there is no basis for application of the doctrine of federal reserved water rights in *any* case. However, the Supreme Court has created a narrow exception to the general rule. The doctrine of federal reserved rights, also known as "*Winters*

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[3] Those who recharge a basin with imported water, such as CVWD and DWA, have a paramount right to recapture an equal volume of water from the basin. *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 255-64, 123 Cal. Rptr. 1, 537 P. 2d 1250 (1975).

Rights," was created by the United States Supreme Court in the case of *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908). There, the Indian Tribes faced the loss of much needed irrigation water to senior appropriators under Montana's "prior appropriation" rules (first one to use water gains the senior right). Diversions from the Milk River by irrigators upstream of the Fort Belknap Reservation which began after the Reservation was created, but before use by the Indians began, threatened to severely reduce the water available to the Indians. The suit was filed by the United States as Trustee for the Assiniboine and Gros Ventre Tribes which occupied the Reservation to enjoin the upstream diversions. To avoid application of the State's prior appropriation rules, the United States urged a number of theories including the one that was ultimately accepted by the trial court, that the Treaty between the United States and the Indians *impliedly* reserved senior water rights for the Indians (the Treaty did not mention water rights) with a priority date as of creation of the Reservation, based on the theory that the water was essential to the success of the Reservation's purpose. On that basis, the trial court enjoined the upstream diversions which had started after the Reservation was established.

The Supreme Court upheld the trial court's decree based on the implied reserved rights theory. *Winters,* 207 U.S. at 575-77. The *Winters* opinion did not clearly define "reserved rights" beyond holding that they are created by implication in appropriate cases. *Winters* involved a reservation created by treaty. The Court has subsequently extended the implied reservation doctrine to Indian reservations

created by executive order, and for other federal establishments such as National Recreation Areas, National Forests and National Wildlife Refuges, *Arizona v. California*, 373 U.S. 546, 598, 601, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963).

Later courts have added definition to the character of the reserved rights. Reserved rights are junior to state law rights already in existence at the time of the reservation, but will be senior in priority to later acquired rights. *Cappaert v. United States,* 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976). When lands are subsequently added to the reservation, the priority date for the reserved rights for the addition is the date of the addition. *Arizona v. California,* 460 U.S. 605, 641, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983) (no retroactive priority date for expansion of Cocopah Reservation). Reserved rights are neither lost nor lose priority through non-use. *United States v. Conrad*, 156 F. 123, 130 (D. Mont. 1907), *aff'd*, 161 F. 829 (9th Cir. 1908); *United States v. Ahtamun Irr. Dist.*, 236 F. 2d 321, 326 (9th Cir. 1956); *Colville Confederated Tribes v. Walton*, 647 F. 2d 42, 51 (9th Cir. 1981).

2. The Doctrine Has Not Been Extended to Reserved Rights to Groundwater.

In *Cappaert*, the "reserved" water was surface water in an underground pool in a national monument that was set aside to protect an endangered Desert Pupfish which only bred on a shelf in the pool. The pool was fed by groundwater that was being diverted by pumping on an adjacent ranch; that pumping threatened to lower the level in the pool below the shelf which would have precluded

procreation by the fish. 426 U.S. at 131-34. *Cappaert* did not hold that the Government had a reserved right to the groundwater itself, but held that it did have a right to seek protection of the surface water in the pool to which its reserved rights applied. *Id.,* at 142. In *Cappaert*, the Supreme Court emphasized that "the implied-reservation-of-water-rights doctrine reserved only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.,* at 141.

Cappaert involved groundwater only indirectly; the Supreme Court, noting that in the case below the Ninth Circuit Court of Appeals had held that the doctrine applied to groundwater, declared that "…[n]o cases of this Court have applied the doctrine of implied reservation of rights to groundwater," and noted squarely that "[h]ere, however, the water is surface water." *Id.,* at 142. If the doctrine did extend to groundwater, there would have been no need for the Court to have noted the distinction. Thirty-eight years later, the Supreme Court still has not applied its reserved rights doctrine to groundwater. The Ninth Circuit has similarly exercised caution in holding that groundwater extractions can be limited to protect decreed reserved rights in surface water where a hydraulic connection is shown. *United States v. Orr Water Ditch Co.*, 600 F. 3d 1152, 1158-59 (9th Cir. 2010). That leaves groundwater free from application of reserved rights doctrine with its most senior priorities except in cases where the groundwater is hydrologically connected to, contributes to and supports surface waters. In this case, there is no claim that

groundwater production needs to be limited to protect reserved rights in surface water supplies.

3. There Is No Basis for Implying a Reserved Right to Groundwater for the Agua Caliente Reservation.

In *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978), the Supreme Court provided valuable clarification of the rules for application of its reserved rights doctrine in an opinion that immediately followed the opinion in the *California v. United States*. The *New Mexico* case involved a state court adjudication of the right to the use of waters of the Rio Mimbres. The United States had set aside the Gila National Forest where the river originates and the United States claimed that its rights included water for a number of uses including recreation, aesthetics, wildlife preservation and cattle grazing, purposes which the New Mexico State Court found were not included in the purposes for which the land had been withdrawn from public entry.

In affirming the decision of the New Mexico Supreme Court, the United States Supreme Court acknowledged the Congressional policy of deferring to state water law but declared that an implied exception to that policy existed in cases where "…without the water the very purpose of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700. In doing so, the Court underscored the importance of identifying the purposes of the reservation in order to determine whether the implied exception should govern:

> The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorized him to reserve "appurtenant water then unappropriated *to the extent needed to accomplish the purpose of the reservation*." *Cappaert*, *supra*, at 138 (emphasis added). See *Arizona v. California, supra,* at 595-601; *United States v. District Court for Eagle County,* 401 U.S. 520, 522-523 (1971); *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 805 (1976). While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, *supra*, at 141. See *Arizona v. California*, *supra,* at 600-601; *District Court for Eagle County*, *supra*, at 523. Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purpose for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. [Citations.] Where water is necessary to fulfill the very purposes for which the federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. 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.

Id., at 700-02.

Thus, application of the reserved rights doctrine, requires an identification and analysis of (1) the primary purposes of the reservation, and (2) a determination

that the purposes of the reservation would "entirely fail" without the water that is the subject of the reserved rights request.

a. Purposes of the Reservation

Plaintiff has essentially alleged in its Complaint that the purposes for which the reservation was created were to establish a "homeland" for the Tribe (Doc. 1 ¶¶ 6, 18) and provide for agricultural, "subsistence farming." (Doc. 1 ¶¶ 4, 18.) These purposes are well-documented, and with greater precision, in the Government's records including reports by the Tribe's Indian Agents to the Commissioner of Indian Affairs, by the latter to the Secretary of Interior and in the Congressional Record. SUF 26. These documents all reflect that the primary purpose for creation of the Agua Caliente Reservation was to provide permanent, secure and well defined boundaries for the reservation to prevent further incursions by non-Indians into the Tribe's historic geographic "homeland." This purpose has been recognized by the Ninth Circuit Court of Appeals:

> Because the constantly changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act, ch. 65, 26 Stat. 712 (1891). See *Arenas v. United States* 322 U.S. 419, 421 (1944). The 1891 Act empowered the Secretary of the Interior to oversee the establishment of new, more secure reservations.

Pechanga Band of Mission Indians v. Kacor Realty, Inc., 680 F. 2d 71, 73 (9th Cir. 1982).

"A primary purpose of the 1891 Act was to replace the old, constantly changing reservations with new, more secure ones." *Id.* at 74.

Whether subsistence agriculture was a separate purpose or was simply a sub-part of the "homeland" purpose does not matter because groundwater was not regarded as necessary to carry out subsistence agriculture, as explained below, so a reserved right to groundwater for that purpose cannot be implied.

b. The Reservation Will Not Entirely Fail Without a Reserved Right to Groundwater.

In the *New Mexico* case, the Supreme Court emphasized that its exception to the congressional policy of deference to state water law arises, by implication, in cases where "…without the water the purposes of the reservation would be entirely defeated." *New Mexico,* 438 U.S. at 700. Such a showing cannot be made here.

During the era the Reservation was created, the Tribe relied on surface water supplies, primarily from Tahquitz Creek for irrigation and domestic uses. SUF 27. Historic documents involving the Agua Caliente Reservation, primarily the Government's own records, are replete with references to the use of surface water for irrigation and domestic uses on the Reservation but contain no references to the use of groundwater by the Agua Caliente Tribe. SUF 27, 28.

There is no historic evidence to support an argument that groundwater was necessary to carry out the purposes of the reservation, and hence no basis for implying a reserved right to groundwater here. SUF 27, 28, 29.

There is an additional reason for not implying a reserved right to groundwater – California law already provides the reservation with an overlying right to

groundwater. In *Winters*, the court created the doctrine to protect the tribe against the rule of prior appropriation under Montana law that would have left the tribes there with no water. Here, the law of California provides overlying rights to the Reservation, which are correlative to other overlying landowners and senior to appropriators, providing the reservation with a reasonable share of the supply of the groundwater basin. This weighs very heavily against an argument that purposes of the reservation would be entirely defeated if no reserved right to groundwater were recognized, for the Tribe does have access to groundwater, and on a correlative basis with the other private landowners in the desert.[4]

V.
CONCLUSION

The Tribe's claim for aboriginal rights to groundwater fails. The Tribe admits that a claim for recognition of its aboriginal rights was not presented by it or on its behalf to the Land Claims Commission in compliance with the 1851 Land Claims Act. Any aboriginal rights to groundwater were thereby extinguished by operation of law on March 4, 1853. The Tribe is also unable to show continuous possession to support a claim for aboriginal rights to groundwater for its current Reservation.

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[4] As the railroad land grants in 1871 were prior to the earliest of the Executive Orders and trust patents for the Reservation, the reserved rights doctrine would not elevate the Reservation in priority above the pre-existing overlying rights of the railroad lands. In contrast, California law makes the overlying rights of the reservation correlative, rather than junior, to the railroad lands.

Plaintiff cannot meet the Supreme Court's requirements for application of the reserved rights doctrine to groundwater in this case. The Government's and other documentation establishes that groundwater was never intended to be used, nor ever was used, to carry out the purposes of the Reservation, including agricultural irrigation. The Government's intent to rely solely on surface supplies to carry out the purposes of the Agua Caliente Reservation is established by the Government's records.

In the field of allocation and use of water on federal lands, Congress' primary policy is to defer to state water laws. In this case, even if that Congressional policy permits the implied exception described by the Supreme Court in the *New Mexico* case, that exception is not available herein because the "necessity" requirement is absent. The availability of groundwater to the Tribe under California's water laws negates the "necessity" requirement.

All claims for relief for each plaintiff are premised on the existence of a reserved right to groundwater, and in the case of the Tribe, an aboriginal right as well. (Doc. 1, ¶¶ 59-66, 69-75; Doc. 71, ¶¶ 23-25, 27-28.) A finding in favor of the defendants on both of those issues therefore disposes of all claims in the case, and entry of judgment is appropriate. The motion for summary judgment should therefore be granted.[5]

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[5] Defendants have moved alternatively for partial summary judgment, if the court (footnote continued)

Dated: October 21, 2014

Respectfully Submitted,

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finds that one of the claimed water rights cannot be disposed of by motion under Rule 56.