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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

v.

COACHELLA VALLEY WATER DISTRICT, et al.,

Defendants.

Case No. 5:13-cv-00883-JGB (SPx)
Judge: Hon. Jesus G. Bernal

DEFENDANT DESERT WATER AGENCY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Filed with:
1. Notice of Motion and Motion for Summary Judgment;
2. Sep. Stm. Of Undisputed Facts
3. Declaration of David K. Luker;
4. Declaration of Steven G. Martin;
5. Request for Judicial Notice; and
6. [Proposed] Order.]

Date: February 9, 2015
Time: 9:00 a.m.
Crtrm.: 1

Action Filed: May 14, 2013
Trial Date: February 3, 2015

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STATEMENT OF THE CASE

The Agua Caliente Band of Cahuilla Indians' ("Tribe") complaint against Coachella Valley Water District ("CVWD") and Desert Water Agency ("DWA") alleges that the Tribe has a federal reserved right and an aboriginal right in groundwater underlying its reservation. The United States' complaint in intervention alleges that the Tribe and the allottees on the Tribe's reservation have reserved rights in groundwater that are held in trust by the United States. In this motion, DWA argues that although the Tribe and the allottees have the right to use groundwater under California law, they do not have federal reserved rights in the groundwater and the Tribe does not have aboriginal rights in the groundwater, and therefore the Tribe's and the United States' actions must be dismissed.

1. Defendant Desert Water Agency

DWA is a political subdivision of the State of California, and was created by the Desert Water Agency Law of 1961. Cal. Wat. App. §§ 100-1, *et seq*. DWA provides water supplies to its customers in the Coachella Valley, in and near the City of Palm Springs. Declaration of David K. Luker ("Luker Dec.") ¶ 4. DWA's main source of water supply is groundwater in the Coachella Valley Groundwater Basin, which underlies the Whitewater River. *Id.* DWA and CVWD obtain water supplies from the State Water Project that are imported into the groundwater basin and augment the supplies that the agencies provide to their customers. *Id*. ¶ 15. DWA's customers include the Tribe and the allottees on the Tribe's reservation, who purchase their water supplies from DWA. *Id*. ¶¶ 9, 14.

2. The Tribe's Reservation

On May 15, 1876, President Ulysses S. Grant issued an executive order setting aside certain lands for the Tribe in San Bernardino County, in what is now

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Riverside County. Request for Judicial Notice ("RJN") 65 (Exh. 2).[1] On September 29, 1877, President Rutherford B. Hayes issued an executive order setting aside additional lands for the Tribe. RJN 65-66 (Exh. 2).[2] The Tribe's reservation is located in Coachella Valley, in and near the City of Palm Springs. Luker Dec. ¶ 5.

The lands reserved for the Tribe by the executive orders consist primarily of even-numbered sections in certain townships in Riverside County. *See* notes 1, 2, *supra*. Most odd-numbered sections had been previously conveyed to the Southern Pacific Railroad Company as an incentive to build a railroad. 14 Stat. 292, 294, 299 (1866). Thus, the reservation consists of a "checkerboard pattern" of tribal lands interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971). More than 20,000 people reside on the reservation, RJN 244-245 (Exhs. 14, 15), although the Tribe has only 440 members. Declaration of Steven G. Martin ("Martin Dec.") (Exh. 3) 13 (Tribe's Resp. to DWA Interrog. No. 17).

Most of the reservation lands (58%) consist of allotted lands (both leased and non-leased). Luker Dec. ¶ 13.[3] The remaining reservation lands are tribal trust lands (12.7%), tribal fee lands (.3%) and non-Indian fee lands (29%). *Id.*

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[1] The 1876 executive order reserved for the Tribe all of section 14 and a portion of section 22 of Township 4 South, Range 4 East, of the San Bernardino Meridian, in San Bernardino County, California. RJN 65 (Exh. 2).

[2] The 1877 executive order reserved all even-numbered sections and all unsurveyed portions of (1) Township 4 South, Range 4 East, (2) Township 4 South, Range 5 East, and (3) Township 5 South, Range 4 East, of the San Bernardino Meridian, excepting Sections 16 and 36, which were reserved for schools, and any tract in which title had passed from the federal government. RJN 65-66 (Exh. 2).

[3] Under the General Allotment Act of 1877, 24 Stat. 388, the United States was authorized to issue allotments of land within Indian reservations to individual

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In 1891, Congress enacted the Mission Indians Relief Act, which authorized the President to approve reservations for each band of the Missions Indians in California, including the Tribe. RJN 231 (Exh. 12) (26 Stat. 712). The Act authorized the Secretary of the Interior to appoint a commission to select a reservation for each band of the Mission Indians, which would become valid when approved by the President and the Secretary of the Interior. *Id.* The Act authorized the Secretary to approve private facilities to convey water across the reservation lands for agricultural, manufacturing and other purposes, "upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior." RJN 233 (Exh. 12) (26 Stat. 714).

Pursuant to the Mission Indians Relief Act, the Secretary of the Interior appointed the Mission Indians Commission, generally known as the "Smiley Commission," to conduct an investigation and select a reservation for each band of Mission Indians. RJN 70 (Exh. 3) (Smiley Rep.) The Smiley Commission reported that the Agua Caliente Indian Reservation included nearly 61,000 acres inhabited by about 70 Indians. RJN 104. The report stated that most Indians are located on Section 14, which is "excellent land, and if it had an abundant permanent water supply, no better land could be found in Southern California, for a home." RJN

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members of the tribe, which were to be held in trust for 25 years, after which the United States could issue a patent conveying a fee interest to the allottee. *Mattz v. Arnett*, 412 U.S. 481, 496-497, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The allotment policy was terminated by the Indian Reorganization Act of 1934, although the Act provided that trust allotments then in effect would remain in effect. *Id.* at 496 n. 18. In some cases, Indian allottees have conveyed their allotments to non-Indians, and thus the non-Indians are the allottees. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981). The Mission Indians Relief Act of 1891 specifically applied the allotment policy to the Mission Indians of California. 26 Stat. 712, 713.

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105. The report stated that the Indians use water for "bathing purposes" and "irrigation." *Id*. The report stated that the Indians "have depended largely upon water coming from Toquitch Canyon," and several years earlier "had built a ditch to bring water from the source for their lands." *Id*. Some Indians are located on Section 34, the report stated, which is also "good land," and these Indians obtain their water supplies from Andreas Canyon. *Id*. The report stated that the United States had reached an agreement with an irrigation company under which the irrigation company—in return for the right to transport water across the reservation for irrigation of non-Indian lands—would supply "sufficient water" to "irrigate" the Indian lands and to provide for "domestic use" on such lands. RJN 106. According to the report, "[t]here is much more arable land in this Reservation than the Indians need, and more than they can supply with water, without which it has little value." *Id*.. The report recommended that certain sections in Townships 4 and 5 South, Range 4 East, be set aside as a reservation for the Tribe, and that other lands be restored to the public domain. RJN 107-108.

On December 7, 1891, the Smiley Commission submitted its report and recommendations to the Secretary. RJN 72. On December 29, 1891, President Benjamin Harrison issued an executive order approving the Smiley Commission Report and its recommendations. RJN 172-173. On July 1, 1892, Congress enacted a statute approving the recommendations. 27 Stat. 61 (1892).

3. The Whitewater River and Its Groundwater Basin

The major natural source of surface water in the Coachella Valley is the Whitewater River. RJN 6-7 (Exh. 2) (Decree, *In the Matter of Determination of Relative Rights to Waters of Whitewater River and Its Tributaries* pp. 2-3, ¶ I, no. 18035, Superior Court for Riverside County (Dec. 9, 1938) (hereinafter "Decree"). The Whitewater River rises in the San Gorgonio Mountains in San Bernardino

County, and flows in a southeasterly direction through central Riverside County before reaching the Salton Sea, an artificial body of water situated below sea level. *Id.* The entire flow of the river, except during extreme flood periods, sinks into the desert before reaching the Salton Sea. *Id.* The river has several major tributaries that rise in the San Bernardino and San Jacinto Mountains. RJN 7 (Decree p. 2, ¶¶ II, III). The major tributaries rising in the San Jacinto Mountains include Tahquitz Creek and Andreas Creek. RJN 7 (Decree p. 2, ¶ III).

The Coachella Valley Groundwater Basin underlies the Whitewater River, and is bound on the easterly side by the San Bernardino and Little San Bernardino Mountains and on the westerly side by the Santa Rosa and San Jacinto Mountains. Luker Dec., Exh. 3, p. 55 (CVWD, "Final Report: Urban Water Management Plan," at 3-3 (Dec. 2005)). The groundwater basin is divided into several subbasins, including the Whitewater River subbasin and the Garnet Hill subbasin. *Id.* The Coachella Valley Groundwater Basin has an estimated total storage of 30 million acre feet of native groundwater. *Id.* at p. 54. The groundwater from the basin is shared by defendants DWA and CVWD, and by other cities and numerous private groundwater producers. *Id.* The groundwater in the Coachella Valley Groundwater Basin is the principal source of municipal water supply in the Coachella Valley. *Id.*

4. The Whitewater River Decree

In 1938, the Riverside County Superior Court issued a Decree adjudicating all water rights in the Whitewater River and its tributaries. RJN 4 (Exh. 1) (Decree). The Decree adjudicated the right of the United States to divert and use Whitewater River water for the Tribe's reservation. RJN 59-60 (Decree ¶¶ 45, 46). Specifically, the Decree authorized the United States to divert to the Tribe's reservation (1) 6 cubic feet of water per second ("cfs") from Andreas Creek, with a priority date of January 1, 1893, and (2) 4.8 cfs from Tahquitz Creek, with a

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priority date of April 26, 1884. *Id*. The Decree stated that the United States' diversion of water from these two tributaries is for "beneficial use" on the Tribe's reservation, and specifically for "domestic, stock watering, power development and irrigation purposes" within the reservation. *Id*.

5. The Instant Proceedings

The Tribe alleges in its complaint that it has a federal reserved right in the groundwater in the Upper Whitewater River and Garnet Hill subbasins underlying the Tribe's reservation, Tribe Compl. ¶¶ 6, 61; that its right includes sufficient groundwater "both for all and present and future purposes" of the reservation, *id.* at ¶ 62; and that its right is "senior, prior and paramount" to the rights of other groundwater users. *Id.* at ¶¶ 3, 6, 7, 59, 60-62. The Tribe also alleges that it has an "aboriginal" right in the groundwater with a "time immemorial" priority date. *Id*. at ¶¶ 3, 4-7, 60-63.

The United States alleges in its complaint in intervention that the Tribe has a reserved right in groundwater that is held in trust by the United States; that the Tribe's' reserved rights have a "priority date" prior to, or at least no later than, the date of the executive orders creating the reservation; and that the allottees on the Tribe's reservation also have reserved rights in the groundwater. U.S. Compl. ¶¶ 23, 27, & p. 9.

In this motion for summary judgment, DWA argues that—although the Tribe and the allottees have a right to use groundwater under California law—they do not have federal reserved rights in groundwater, and the Tribe does not have an aboriginal right in the groundwater.

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SUMMARY OF ARGUMENT

1. The Tribe's Reserved Water Right Claim

Although the Tribe has a right to use groundwater underlying its reservation under California law, the Tribe does not have a federal reserved right in the groundwater, for several reasons.

A. Under the reserved rights doctrine, the government—in reserving public lands for a specific purpose, such as an Indian reservation—may "impliedly" intend to reserve a water right for the lands, if the right is "necessary" to accomplish the reservation purpose. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). In *United States v. New Mexico*, 438 U.S. 696, 700, 702, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), the Supreme Court held that Congress' policy of deference to state water law must be taken into account in determining whether the government "impliedly" intends to reserve a water right, and that the government "impliedly" intends to reserve a right only if "necessary" to serve the "primary" reservation purpose and prevent it from being "entirely defeated."

B. Under California law, all overlying landowners have an equal and "correlative" right to use groundwater underlying their lands, and none has priority over another. The Tribe, as an overlying landowner of its reservation, has an equal and correlative right to use groundwater under California law in common with other overlying landowners. Therefore, the Tribe's claimed reserved right in groundwater is not "necessary" to accomplish the primary reservation purpose and prevent it from being "entirely defeated," and therefore does not "impliedly" exist under *New Mexico*, 438 U.S. at 700, 702. The reserved rights doctrine was developed in order that Indian tribes would have prior rights to surface waters under federal law, even though non-Indian appropriators acquired prior rights under the state priority rule of "first in time, first in right"; since the "first in time, first in right" priority rule does not apply to groundwater, the rationale of the reserved rights doctrine does not support its extension to groundwater here. There is no

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conflict between Congress' deference to state water law and the Tribe's reservation needs, because both can be served by state law.

C. A tribal reserved right in groundwater would exempt the Tribe from the requirements of California law that apply to all other users of groundwater, namely that (1) overlying landowners have equal and correlative rights in groundwater and none has priority over another, and (2) all water uses in California, including groundwater uses, must conform to the constitutional standard of "reasonable and beneficial use." Cal. Const., Art. X, § 2. Such a tribal exemption would impair California's system of groundwater regulation, further defeating any "implication" that the Tribe has such an exemption.

D. The Tribe does not produce groundwater from its reservation. Instead the Tribe purchases its water supplies from the defendant water agencies, which they obtain by producing it from their own wells. A claimed reserved water right that is not being exercised to any substantial degree, if at all, is, by definition, not "necessary" to accomplish the reservation purpose and prevent this purpose from being "entirely defeated," *New Mexico*, 438 U.S. at 700, 702, which further defeats any "implication" that the Tribe has a reserved right in groundwater.

E. The historical documents surrounding creation of the Tribe's reservation indicate that the primary purpose of the reservation was, at most, to allow the Tribe to use Whitewater River surface tributaries for the Tribe's agricultural and domestic uses. The historical documents make no mention of the Tribe's use of groundwater. Thus, the reservation of groundwater was not a "primary" reservation purpose under *New Mexico*, 538 U.S. at 700, 702, which further defeats any "implication" that the Tribe has a reserved right in groundwater.

F. In the Whitewater River Decree of 1938, the United States claimed the right to divert specific quantities of water from Whitewater River surface tributaries to the Tribe's reservation in order to meet the Tribe's agricultural and domestic needs, and the Decree granted the United States the right to divert these quantities

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to the Tribe's reservation. Therefore, the Decree authorized the diversion of sufficient surface water supplies to meet the primary reservation purpose, and the Tribe's claimed reserved right in groundwater is not "necessary" to accomplish the primary reservation purpose, *New Mexico*, 438 U.S. at 700, 702, and does not "impliedly" exist for this additional reason.

G. In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the Ninth Circuit upheld an Indian tribe's reserved right claim in surface waters because, in part, the waters were "located entirely within" the tribe's reservation, and thus the tribe's use of the surface waters would not have an "impact off the reservation." *Walton*, 647 F.2d at 53. Here, the groundwater basin underlying the Tribe's reservation is not "located entirely within" the reservation—and instead extends throughout the Coachella Valley, and underlies many public and private lands—and therefore the Tribe's production of groundwater would have an "impact off the reservation."

H. In *Walton*, the Ninth Circuit stated that Congress' policy of deference to state water law is based on the states' needs to "fashion water rights regimes that are responsive to local needs" and the "legal confusion" that would arise "if federal water law and state water law reigned side by side in the same locality." *Walton*, 647 F.2d at 53, *quoting California v. United States*, 438 U.S. 645, 653-654, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). Congress' deference to state water law applies here because, first, the Tribe's claimed reserved right would impair the defendant water agencies' ability to effectively manage the Coachella Valley Groundwater Basin, thus impairing California's ability to fashion a water rights regime "responsive to local needs," and, second, the Tribe's claimed reserved right would create "legal confusion" by allowing federal and state water law to "reign[] side by side" as applied to the same groundwater resource.

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2. The Claimed Reserved Rights of Allottees and Lessees

A. The United States alleges that the allottees of allotted lands on the Tribe's reservation have reserved rights in groundwater. Although an allottee acquires a proportionate share of any reserved right held by the Indian tribe, the Tribe does not have a reserved right in groundwater, and therefore the allottees do not have reserved rights either. The allottees have the right to produce groundwater under California law, and therefore the reserved rights claimed by the United States on behalf of the allottees are not "necessary" to accomplish the reservation purpose and prevent it from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702.

B. Although some lessees on the allotted lands produce groundwater for commercial golf courses, such production is authorized under California law and not federal law. Further, the lessees' production of groundwater for commercial golf courses is not related to the primary purpose for which the Tribe's reservation was created, which was, at most, to reserve water for the Tribe's agricultural and domestic needs. Thus, the lessees' production of groundwater does not form the basis for an "implied" federal reserved right for this additional reason.

3. The Tribe's Aboriginal Water Right Claim

The Tribe does not have an "aboriginal" right in the groundwater. First, the Tribe's aboriginal right claim is inconsistent with the reserved rights doctrine, which holds that an Indian tribe has a reserved right to "unappropriated" water with a priority date based on the date that the reservation was created. *Cappaert*, 426 U.S. at 138. Second, the Supreme Court has held that any aboriginal land claims by the Mission Indians of California, which includes the Tribe, were extinguished by a claims procedure established by Congress in 1851 to resolve land claim disputes in California. 9 Stat. 632 (1851); *Barker v. Harvey*, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901). Since the Tribe's aboriginal water right claim is based on its aboriginal land claim, the Tribe does not have an aboriginal water right.

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ARGUMENT

I. THE TRIBE DOES NOT HAVE A FEDERAL RESERVED RIGHT IN GROUNDWATER.

A. Congress' Policy of Deference to State Water Law Must Be Taken Into Account in Determining Whether a Federal Reserved Water Right "Impliedly" Exists, and Such a Right Impliedly Exists Only if "Necessary" to Fulfill the "Primary" Reservation Purpose and Prevent It From Being "Entirely Defeated."

The federal reserved rights doctrine holds that when the government reserves lands for specific purposes, such as for an Indian reservation, the government, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see United States v. New Mexico*, 438 U.S. 696, 700-705 (1978); *Arizona v. California*, 373 U.S. 546, 599-601; 83 S.Ct.1468, 10 L.Ed.2d 542 (1963); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983). The waters are reserved only if the government impliedly "intended" to reserve the water, and intent is inferred only if the waters are "necessary" to accomplish the purpose of the reservation. *Cappaert*, 426 U.S. at 139. As applied to Indian reservations, a reserved water right is "implied" only if the right is "essential to the life of the Indian people," *Arizona*, 373 U.S. at 599, and necessary to prevent the reservation lands from being "practically valueless." *Winters*, 207 U.S. at 576.

In *United States v. New Mexico*, *supra*, the Supreme Court—recognizing that the reserved rights doctrine conflicts with Congress' policy of deference to state water law—substantially limited the doctrine, holding that Congress' policy of deference to state law must be taken into account in determining whether a reserved

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water right "impliedly" exists.[4] The Court stated that Congress "has almost invariably deferred to state law" in determining "whether federal entities must abide by state law," and has departed from this policy only where water is "necessary to fulfill the *very purposes* for which a federal reservation was created." *New Mexico*, 438 U.S. at 702 (emphasis added). "This careful examination is required," the Court stated, "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." *Id.* at 701-702. The Court stated that it has upheld reserved water rights claims only where it "has carefully examined both the asserted water right and the *specific purposes* for which the land

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[4] The federal policy of deference to state water law originated in the equal footing doctrine, which holds that each state, upon its admission to statehood, acquires sovereign rights and interests in navigable waters, subject to the federal government's paramount authority to regulate and control navigation. *PPL Montana, LCC v. Montana*, __ U.S. __, 132 S.Ct. 1215, 1226-1228, 182 L.Ed.2d 77 (2012); *California v. United States*, 438 U.S. 645, 654-662 (1978); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *United States v. Texas*, 339 U.S. 707, 716-717; 70 S.Ct. 918, 94 L.Ed. 1221 (1950); *Shively v. Bowlby*, 152 U.S. 1, 49-50, 14 S.Ct. 548, 38 L.Ed. 331 (1894). Congress deferred to state water law in enacting various land statutes that effectively "severed" the water on the public domain lands from the lands themselves, as a result of which the states regulate and control the waters and the federal government retains ownership and control of the lands. *Nevada v. United States*, 463 U.S. 110, 123-124, 103 S.Ct. 2906; 77 L.Ed.2d 509 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96, 57 S.Ct. 412, 81 L.Ed. 525 (1937); *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142, 158, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). Congress also deferred to state water law by requiring the federal government to comply with state water laws in operating federal water projects established under Reclamation Act of 1902. *California v. United States*, 438 U.S. at 665-667. Congress has applied its policy of deference to state water laws in the context of Indian water rights. *California Oregon Power*, 295 U.S. at 164 n. 2 (Congress "has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.").

was reserved, and concluded that without the water the purposes of the reservation would be *entirely defeated*." *Id*. at 700 (emphasis added). The Court held that the government must acquire water for "secondary" reservation purposes under state law, in the same manner as public and private appropriators. *Id*. at 702.[5]

In short, *New Mexico* held that Congress' deference to state water law must be taken into account in determining whether a federal reserved water right "impliedly" exists, and that a reserved right impliedly exists only if "necessary" to serve the "primary" purpose of the reservation and prevent this purpose from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Even the *New Mexico* dissenting opinion agreed that Congress' deference to state water law must be taken into account in determining whether a federal reserved water right impliedly exists. *Id*. at 718 (Powell, J., dissenting) ("[T]he implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deferring to state water law.").[6]

The Ninth Circuit has held that the limitations of the reserved rights doctrine expressed in *New Mexico* and *Cappaert*—and in particular *New Mexico*'s

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[5] In *New Mexico*, the Supreme Court held that the primary purpose of the 1897 Organic Act, which provided for reservation of national forest lands, was to conserve water flows and furnish a continuing supply of timber, *New Mexico*, 438 U.S. at 707, and therefore the United States did not have reserved rights to use water in national forests for "secondary" purposes such as maintenance of instream flows and stockwatering. *Id*. at 707-717.

[6] Although *Cappaert* stated that the reserved rights doctrine does not call for a "balancing of competing interests" between upstream users and downstream reservations, *Cappaert*, 426 U.S. at 138, *New Mexico* expressly considered Congress' deference to state water law in determining whether a federal reserved water right exists. *New Mexico*, 438 U.S. at 702. Thus, assuming that an implied federal reserved right exists, the competing claims of upstream users and downstream reservations are not "balanced," but Congress' deference to state water law must be considered in determining whether the federal right impliedly exists.

distinction between primary and secondary reservation purposes—apply to Indian reserved water rights. *Walton*, 647 F.2d at 47; *Adair*, 723 F.2d at 1408-1409.

The Supreme Court has never held or suggested that reserved water rights apply to groundwater. On the contrary, the Supreme Court has stated that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142.[7] [8]

[7] In *Cappaert*, the Supreme Court stated that the water in the underground cavern of Devil's Hole in Nevada was "surface water," and that the United States had the right to protect its rights in the surface waters by seeking to enjoin pumping of groundwater by third persons that reduced the amount of the surface waters. *Cappaert*, 426 U.S. at 143. Therefore, the Court stated, it need not reach the question whether the reserved rights doctrine should be extended to groundwater. *Id.* at 142. Notably, *Cappaert* stated that the reserved rights doctrine "applies to Indian reservations, and other federal enclaves, encompassing rights in navigable and nonnavigable *streams*." *Cappaert*, 426 U.S. at 138 (emphasis added). Since groundwater is not a navigable or nonnavigable "stream," *Cappaert* implied that the reserved rights doctrine does not apply to groundwater.

[8] Some state courts have addressed the question of whether the reserved rights doctrine applies to groundwater but have reached conflicting results. The Wyoming Supreme Court, citing Supreme Court precedent, has held that "the reserved rights doctrine does not extend to groundwater." *In re Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76, 100 (Wyo. 1988). Conversely, the Arizona Supreme Court has held that the reserved rights doctrine applies to groundwater. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 745-748 (Ariz. 1999). The Arizona Court's analysis was misplaced, however, because the Court failed to consider Congress' policy of deference to state water law, as required by *New Mexico*, in determining whether the reserved rights doctrine applies to groundwater. The Arizona Court stated that Congress' deference to state water law is irrelevant because *New Mexico* held that "the reserved rights doctrine is an exception to Congress' deference to state water law." *Id.* at 747. On the contrary, although *New Mexico* stated that the reserved rights doctrine [is] an exception to Congress' deference to state water law, 438 U.S. at 715, *New Mexico* held that Congress' deference must be taken into account in determining whether a reserved right exists. *Id.* at 700-702. In other words, Congress' policy of deference must be considered in determining whether a reserved right exists, but—if the reserved right exists—it is an exception to Congress' policy of deference. The Arizona Court's analysis is

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B. The Tribe Has the Right to Use Groundwater Under California Law, and Thus the Tribe's Claimed Federal Reserved Right is Not "Necessary" to Accomplish the Primary Reservation Purpose and Prevent It From Being "Entirely Defeated."

The reserved rights doctrine originated in the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908), which held that Congress impliedly reserved a water right for the Fort Belknap Indian Tribe in Montana; accordingly, the doctrine as applied in the Indian water rights context is sometimes referred to as the "*Winters* doctrine." The *Winters* doctrine was developed because Indian tribes generally did not have the right to use surface waters appurtenant to their reservations under the state doctrine of prior appropriation, which establishes a priority rule of "first in time, first in right." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-754, 70 S.Ct. 955, 94 L.Ed. 1231 (1950); *People v. Shirokow*, 26 Cal.3d 301, 307-311 (1980). Since non-Indian appropriators generally developed water needs and uses long before Indian tribes developed their own needs and uses, non-Indian appropriators generally acquired prior rights to surface water under the "first in time, first in right" priority rule, as a result of which many Indian reservations had little access to surface water supplies and thus had little value. *Winters*, 207 U.S. at 576. The Supreme Court developed the *Winters* doctrine in order that Indian tribes would have prior rights to appurtenant surface waters under federal law even though non-Indian appropriators had

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thus inconsistent with *New Mexico*. Even so, the Arizona Court's decision does not support the Tribe's reserved right claim here, because the Court stated that whether a reserved water right exists must be determined on a "reservation-by-reservation basis," and that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila River*, 989 P.2d at 748. As we explain in the next part of this brief, the Tribe has the right to use groundwater under California law, and thus "other waters" are adequate to accomplish the reservation purpose.

acquired prior rights under the state priority rule of "first in time, first in right." *Winters*, 207 U.S. at 577; *Arizona v. California*, 373 U.S. 546, 601 (1963).[9] The Ninth Circuit has explained this purpose of the *Winters* doctrine, stating:

> In those cases [*Winters* and *Arizona*], if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it was reasonable to conclude that Congress intended to reserve water for them.

Walton, 647 F.2d at 46.

The California law of groundwater is fundamentally different from the doctrine of prior appropriation that applies to surface waters, and the difference defeats any "implication" that the Tribe has a reserved right in groundwater. Under California law, an overlying landowner has the right to use groundwater beneath his land; the landowner's right attaches directly to the land, and is not acquired by actual use of water or lost by nonuse; the landowner's right is "correlative" with the rights of other overlying landowners, and thus all landowners share equally in times of shortage—and therefore the landowner's right to use groundwater is not subject to the "first in time, first in right" priority rule that applies to surface waters. *City of Barstow v. Mojave Wat. Agency*, 23 Cal.4th 1224, 1240-1241 (2000); *Pasadena v.*

[9] In *Winters*, the Supreme Court held that the Fort Belknap Tribe had a federal reserved right to waters of the Milk River even though non-Indian settlers had acquired prior rights under Montana law, because "[t]he [reservation] lands were arid and, without irrigation, were practically valueless." *Winters*, 207 U.S. at 576; *Walton*, 647 F.2d at 46. In *Arizona v. California*, the Supreme Court held that Congress impliedly intended to reserve water rights in the Colorado River for the Indian tribes situated along the river, because the water was "essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona*, 373 U.S. at 598-599.

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Alhambra, 33 Cal.2d 908, 924 (1949); *Hillside Water Co. v. Los Angeles*, 10 Cal.2d 677, 686 (1938); *Hudson v. Dailey*, 156 Cal. 617, 625 (1909); *Katz v. Walkinshaw*, 141 Cal. 116, 134-136 (1903); *California Wat. Service Co. v. Edward Sidebotham & Son*, 224 Cal.App.2d 715, 725 (1964); *see* D. Getches, "Water Law in a Nutshell," p. 268 (Thomson West 4th ed.). In addition, all water rights in California, including the right to use groundwater, are subject to the State constitutional standard of "reasonable and beneficial use," or more simply the "reasonable use" standard. Cal. Const., art. X, § 2; *Barstow*, 23 Cal.4th at 1240-1241. In short, under California law an overlying landowner has an equal and correlative right to "reasonable use" of groundwater, and the right is not subject to the "first in time, first in right" priority rule that applies to surface waters.

The Ninth Circuit has explained that the "first in time, first in right" priority rule that applies to surface water does not apply to groundwater, stating:

> One of the ways in which the law has traditionally ignored the exhortation of the scientists is by treating ground and surface water as distinct subjects, often applying separate law to each. While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. Under the traditional groundwater doctrines of absolute dominion, the American reasonable use rule, and the correlative rights rule, *the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater* . . . .

United States v. Oregon, 44 F.3d 758, 769 (9th Cir. 1994) (emphasis added).

Since the Tribe is an overlying landowner by virtue of its occupation of the reservation, see Tribe compl. ¶¶ 5, 6, 17, 18, the Tribe has an equal and correlative right under California law to "reasonable use" of groundwater underlying its reservation, and the Tribe's right is not subject to the "first in time, first in right"

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priority rule that applies to surface waters. Therefore, the Tribe's claimed federal reserved right is not "necessary" to accomplish the primary reservation purpose and prevent this purpose from being "entirely defeated, which defeats any "implication" that the Tribe has a federal reserved right in groundwater. *New Mexico*, 438 U.S. at 700, 702. The rationale of the *Winters* doctrine—to protect the rights of Indians to use surface waters even though non-Indian appropriators may have acquired prior rights under the "first in time, first in right" priority rule—does not apply to the groundwater here, because the "first in time, first in right" priority rule does not apply to groundwater. There is no conflict between Congress' policy of deference to state water law and the Tribe's need to acquire water for its primary reservation purpose, because both goals can be achieved by the application of state law. Since no conflict exists, there is no basis for an "implication" that the Tribe has a federal reserved right in groundwater.

Thus, this case is unlike others, such as *Winters*, *Arizona* and *Walton*, where Indian reserved water rights were "implied" because they were "necessary" to satisfy the reservation purpose, *Walton*, 647 F.2d at 46, "essential to the life of the Indian people," *Arizona*, 373 U.S. at 599, and necessary to prevent the reservation lands from being "practically valueless." *Winters*, 207 U.S. at 576; *Walton*, 647 F.2d at 46. Since the Tribe has an equal and correlative right to use groundwater under California law, the Tribe's claimed reserved right is not "necessary" to satisfy the reservation purpose, "essential to the life" of the Tribe or its members, or necessary to prevent the reservation lands from being "practically valueless."

Notably, neither the Tribe nor the United States allege in their complaints that the Tribe's right to use groundwater under California law is inadequate to achieve the primary reservation purpose. Indeed, the Tribe and the United States do not even acknowledge in their complaints that any tribal reserved water right would apply only to the "primary" reservation purpose and not to "secondary" reservation purposes; as noted earlier, the Ninth Circuit, following *New Mexico*,

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438 U.S. at 700, has held that Indian reserved rights apply only to the "primary" reservation purpose and not "secondary" purposes. *Walton*, 647 F.2d at 47; *Adair*, 723 F.2d at 1408-1409. The Tribe's and the United States' failure to make these essential allegations—that the Tribe's claimed reserved right is "necessary" to achieve the "primary" reservation purpose notwithstanding that the Tribe has the right to use groundwater under California law—is fatal to their claims that the Tribe has an "implied" federal reserved right. By failing to make these essential allegations, the Tribe and the United States have failed to allege the necessary elements of a federal reserved right, as such elements were established by the Supreme Court in *New Mexico* and the Ninth Circuit in *Walton* and *Adair*.

C. A Tribal Reserved Right Would Impair California's System of Groundwater Regulation By Exempting the Tribe from California's "Correlative Rights" and "Reasonable Use" Laws, Which Weighs Against an "Implication" of a Reserved Right.

As explained above, California law provides that overlying landowners have equal and correlative rights in groundwater, and that their rights are subject to the constitutional "reasonable use" standard. *City of Barstow v. Mojave Wat. Agency*, 23 Cal.4th 1224, 1240-1241 (2000). Under its reserved right claim, the Tribe would be exempt from these requirements of California law, because its claim is based on federal law. Such a tribal exemption would impair California's system of groundwater regulation by exempting the Tribe from requirements that apply to all other users of groundwater in California, which weighs against any "implication" that the Tribe has a reserved right in groundwater—particularly because the Tribe has the right to use groundwater under California law.

First, under its reserved right claim, the Tribe would be exempt from California law providing that all overlying landowners have equal and correlative rights in groundwater and none has priority over another. Indeed, the Tribe alleges in its complaint that its claimed reserved right is "senior, prior and paramount" to

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the rights of all other users of groundwater, including the defendant water agencies. Tribe Compl. ¶ 59. The Tribe also alleges that its "senior, prior and paramount" right extends to all groundwater uses necessary for "homeland purposes," which the Tribe broadly defines as "all present *and future* [reservation] purposes," *id.* ¶ 62 (emphasis added), including "commercial enterprises," *id.* ¶ 51. Thus, while all other groundwater users in the Coachella Valley are required to share equally under the principle of correlative rights, the Tribe claims a "senior, prior and paramount" right to use groundwater for all "present" and undefined "future" reservation purposes before anyone else can use a single drop of groundwater. Such a sweeping, open-ended tribal water right would impair California's system of groundwater regulation by exempting the Tribe from principles of equal sharing and correlative rights that apply to all other users of groundwater in California, and would jeopardize the rights of other groundwater users in the Coachella Valley who have relied on groundwater for their farms, businesses, and other enterprises. It is highly improbable that Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders, "impliedly" intended to cause such harmful and disruptive effects in the administration of groundwater resources in California.

Second, under its reserved right claim, the Tribe would be exempt from the California constitutional "reasonable use" standard that applies to all uses of water in California, including groundwater uses. Cal. Const., art. X, § 2; *Barstow*, 23 Cal.4th at 1240-1241. The "reasonable use" standard provides that "[w]hen the supply is limited, public interest requires that there be the greatest number of beneficial uses which the supply can yield." *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935). The "reasonable use" inquiry "depends on the circumstances of each case" and "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance," including the "paramount" need for "the conservation of water in this state." *Joslin v. Marin Mun. Wat. Dist.*, 67 Cal.2d 132, 140

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(1967).[10] Thus, the "reasonable use" standard allows California to provide for maximum beneficial use of its limited water resources commensurate with the need to conserve these resources. If the Tribe were exempt from this standard, the Tribe would have no obligation to participate with other groundwater users in achieving "the great number of beneficial uses which the supply can yield." *Peabody*, 2 Cal.2d at 368. Again, it is highly improbable that Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders, "impliedly" intended to exempt the Tribe from requirements of California law that apply to other users of groundwater.

D. The Tribe Does Not Produce Groundwater From Its Reservation, And Therefore Its Production of Groundwater Is Not "Necessary" to Accomplish the Primary Reservation Purpose And Prevent It From Being "Entirely Defeated."

The Tribe does not produce groundwater from its reservation. DWA, Statement of Undisputed Facts ("SUF") No. 1 (Tribe Resp. to Interrog. No. 10). Instead, the Tribe purchases its water supplies from the defendant water agencies, which the agencies obtain by producing it from their own wells. SUF No. 2 (Tribe Resp. to Interrog. No. 15). DWA has never taken any action to prevent the Tribe from producing groundwater. SUF No. 3.

Since the Tribe does not produce or attempt to produce groundwater from its reservation, the Tribe's claimed reserved right is not "necessary" to accomplish the primary reservation purpose and prevent it from being "entirely defeated," *New Mexico*, 438 U.S. at 700, 702, which further defeats any "implication" that the

[10] In *Joslin*, the California Supreme Court held that under the constitutional standard the use of water must be both "reasonable" and "beneficial," and that a "beneficial" use may not necessarily be "reasonable." *Joslin*, 67 Cal.2d at 142-143. In *Joslin*, for example, the Supreme Court held that the use of water for a commercial gravel-washing operation—although "beneficial"—was not "reasonable" in light of competing municipal water supply needs dependent on the same water source. *Id.* at 140-141.

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Tribe has such a reserved right. Simply put, a claimed reserved right that an Indian tribe is not exercising to any substantial degree, if at all, and not attempting to exercise, is—by definition—not "necessary" to accomplish the reservation purpose. Such a claimed right is not "essential to the life of the Indian people," *Arizona*, 373 U.S. at 599, or necessary to prevent the reservation lands from being "practically valueless." *Winters*, 207 U.S. at 576.

The Tribe's failure to produce or attempt to produce groundwater differentiates this case from others where Indian reserved rights were upheld because the tribes did not have access to necessary water supplies and the defendants were preventing the tribes from having access to the supplies. In the seminal *Winters* case, non-Indians constructed dams and reservoirs on the upper Milk River in Montana that prevented water from reaching the Indian tribe's downstream reservation, thus causing the reservation lands to be "practically valueless." *Winters*, 207 U.S. at 576-577. Here, the Tribe makes no claim that its reservation lands are "practically valueless" because of lack of adequate water supplies. In *Walton*, upstream non-Indian appropriators were taking water that "imperiled the agricultural use of downstream tribal lands and the trout fishery." *Walton*, 647 F.2d at 52. The Tribe makes no similar claim here. Since the Tribe does not produce or attempt to produce groundwater—and instead purchases its water supplies from the defendant agencies—this case is distinguishable from other cases where Indian reserved rights were upheld because they were vital to tribal sustenance.

E. The Historical Documents and Circumstances Surrounding Creation of the Tribe's Reservation Do Not Support the Tribe's Reserved Right Claim.

The Ninth Circuit, following the Supreme Court's decision *New Mexico*, 438 U.S. at 702, has held that an Indian tribe has a reserved water right only for the "primary" purpose for which the reservation was created, and that the tribe must

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acquire water for "secondary" purposes under state law. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983). The primary purpose of an Indian reservation is defined by "the documents and circumstances surrounding [the reservation's] creation," as well as the Indians' "need to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 47.

The historical documents surrounding creation of the Tribe's reservation describe the Tribe's diversions of water from Whitewater River tributaries for irrigation of tribal lands, but make no mention of any tribal extraction and use of groundwater. SUF No. 4. The Mission Indians Relief Act of 1891, 26 Stat. 712, which authorized creation of the Tribe's reservation, made no mention of any tribal use of groundwater. SUF No. 5; *see* page 3, *supra*. The Smiley Commission Report issued pursuant to the 1891 Act mentioned the need for federal assistance to provide for "construction of the reservoirs and irrigating ditches" for the Mission Indians, but again made no mention of any tribal use of groundwater. SUF No. 6; *see* pages 3-4, *supra*. On the contrary, the Smiley Commission Report stated that the Agua Caliente Indians "have depended largely upon water coming from Toquitch Canyon," and had "built a ditch to bring water from the source for their lands," and also "had a supply of water, coming from Andreas Canon . . . ." SUF No. 7. The Superintendent of Irrigation of the Department of the Interior, George Butler, issued a report in 1903 stating that "[t]here is evidence today that in times past the [Agua Caliente] Indians have built ditches for the conduct and distribution of the waters of the canons of Chino, Tahquitz, and Andreas; and have irrigated lands therefrom . . . ." SUF No. 8. The Special Agent for the California Indians, C. E. Kelsey, issued a report in 1907 stating that the Agua Caliente Indians—as a result of "the cementing of the Tauquitz ditch" and purchase of water supplies—"have all the water they can use for some time." SUF No. 9.

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None of the foregoing historical documents relating to creation of the Tribe's reservation mention any tribal use of groundwater. These historical documents indicate that the Tribe relied on Whitewater River surface tributaries for water supplies—which provided the Tribe "with all the water [it] can use for some time," *id*.—but make no mention of any tribal use of groundwater. If the Tribe's use of groundwater were a primary reservation purpose, such use would have been mentioned in the historical documents surrounding creation of the reservation. The silence of the historical documents on the subject strongly indicates that the Tribe's use of groundwater was not a primary reservation purpose.

F. The Whitewater River Decree Grants the United States the Right to Divert Sufficient Surface Water Supplies to Satisfy the Primary Reservation Purpose, Thus Negating any "Implication" That the Tribe Has a Reserved Right in Groundwater.

In 1938, the Riverside County Superior Court issued the Whitewater River Decree, which adjudicated all water rights in the Whitewater River and its tributaries, including the United States' rights on behalf of the Tribe. SUF No. 10 (Decree). During the litigation, the United States submitted a "Suggestion" claiming a reserved right to divert specific quantities of water from two Whitewater River tributaries, the Andreas and Tahquitz Creeks, for use on the Tribe's reservation. SUF No. 11 ("Suggestion" ¶¶ IV, V). The Decree awarded the United States the right to divert these specific quantities of water for the Tribe's use. SUF No. 12 (Decree ¶¶ 45, 46); *see* pages 5-6, *supra*.[11]

[11] Although the United States' "Suggestion" stated that the Tribe's rights were "reserved from appropriation by others," RJN 201, the Decree made no mention of any water right "reserved" from appropriation, and instead established "the relative rights based upon *prior appropriation* of the various claimants to the waters of the Whitewater River and its tributaries . . . ." SUF No. 13 (Decree ¶¶ XXV, XXVI) (emphasis added). Since the doctrine of "prior appropriation" is a state law doctrine, the rights awarded to the United States by the Decree are based on California law, not federal law.

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The United States' "Suggestion" claimed the right to divert sufficient water to satisfy the primary purpose of the Tribe's reservation, because the United States otherwise would have violated its fiduciary duty to the Tribe. *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942) (describing United States' "most exacting fiduciary standards" to Indian tribes). Therefore, the Decree, in awarding the United States the right to divert all water claimed by the United States, provided the United States with all water necessary to satisfy the primary reservation purpose. Accordingly, the Tribe's claim for an *additional* reserved right in groundwater is not "necessary" to satisfy the primary reservation purpose and does not "impliedly" exist for this additional reason. Accord, *Pyramid Lake Paiute Tribe v. Ricci*, 245 P.3d 1145, 1148-1149 (Nev. 2010) (holding that Indian tribe's claimed reserved right in groundwater was included in previous adjudication of tribe's reserved right in surface waters).

Indeed, the United States' "Suggestion" claimed that certain Mission Indians—the Cabazon, Augustine and Torros tribes—have reserved rights in the "percolating" groundwater of the Whitewater River but made no similar claim on behalf of the Agua Caliente Tribe, SUF No. 14 ("Suggestion" ¶ X), which further demonstrates that the Tribe does not have a reserved right in groundwater.

G. The Groundwater Underlying the Tribe's Reservation is Not "Located Entirely Within" the Reservation and Its Production Would Have an "Impact Off the Reservation," Which Weighs Against an "Implied" Reserved Right.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the Ninth Circuit, in upholding an Indian reserved right claim in surface waters, held that Congress' policy of deference to state water law did not apply because the reserved right applied to a creek "located entirely within the reservation" and thus the tribe's use of water has "no impact off the reservation." *Walton*, 647 F.2d at 53.

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Here, the groundwater underlying the Tribe's reservation is not "located entirely within" the reservation, and any production of groundwater by the Tribe would have an "impact off the reservation." The Coachella Valley Groundwater Basin underlying the Tribe's reservation is located throughout the entire Coachella Valley and underlies numerous public and private lands in the valley, and is the source of water supplies that the defendant agencies provide to their customers. SUF Nos. 15, 16. The defendant agencies and many landowners in the valley depend upon the groundwater in which the Tribe claims a reserved right, *id*., and thus the Tribe's production of groundwater would potentially affect the availability of groundwater supplies on off-reservation lands. SUF No. 17. This is particularly true because the Tribe's reservation consists of a "checkerboard pattern" in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1185 (9th Cir. 1971). Therefore, the Tribe's reserved right claim is inconsistent with the standard established in *Walton*.

H. A Tribal Reserved Right Would Impair California's Ability to Fashion a Water Rights Regime "Responsive to Local Conditions" and Create "Legal Confusion" by Allowing Federal and State Water Law to "Reign Side by Side in the Same Locality," Which Weighs Against an "Implication" of a Reserved Right.

In *Walton*, the Ninth Circuit stated that Congress' policy of deference to state water law "stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the 'legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.'" *Walton*, 647 F.2d at 53, quoting *California v. United States*, 438 U.S. 645, 653-654, 668-669 (1978). Both components of Congress' policy of deference to state water law apply here.

First, Congress' policy of deference as applied here would allow California to fashion a water rights regime "responsive to local needs." The California

Legislature created CVWD and DWA in 1918 and 1961, respectively, in order that the agencies would develop and manage water supplies, principally groundwater, in the Coachella Valley. Cal. Wat. Code §§ 30000 *et seq*. (creating CVWD); Cal. Wat. App. §§ 100-1 *et seq*. (creating DWA). Under California's Urban Water Management Planning Act ("UWMPA"), Cal. Wat. Code §§ 10610 *et seq*., urban water suppliers in California, including CVWD and DWA, are required to adopt and update Urban Water Management Plans that are subject to approval by the California Department of Water Resources ("DWR"). *Id*. at § 10620. An Urban Water Management Plan must describe the steps that the urban water supplier is taking in managing surface waters and groundwater, and describe the standards and criteria that the supplier is applying in managing these resources. *Id*. at § 10631. Pursuant to UWMPA, CVWD and DWA have adopted Urban Water Management Plans that describe their strategies for managing, regulating and conserving the groundwater resource in the Coachella Valley. SUF No. 18.

If the Tribe has a "senior, prior and paramount" right in groundwater under federal law, as the Tribe claims, Tribe Compl. ¶ 59, the defendant agencies' ability to manage the groundwater basin in conformity with UWMPA would be impaired. Since the Tribe's reserved right would be senior to the rights of other groundwater users, including the defendant agencies, the Tribe would be able to nullify, or veto, any groundwater management strategies adopted by the defendant agencies if, in the Tribe's view, they fail to provide the Tribe with all water that it believes necessary to satisfy its sweeping, open-ended reserved right. By ensuring that its own needs are met before the needs of others are met, the Tribe would be able to prevent the defendant agencies from achieving "the greatest number of beneficial uses that the supply can yield," as required by California's constitutional policy. *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935). Although the defendant agencies are required under UWMPA to adopt Urban Water Management Plans subject to DWR's approval, the Tribe would be under no obligation to participate in

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the preparation of such plans or to seek DWR's approval, because its claimed right is based on federal law. Thus, the Tribe's claimed reserved right would impair the defendant agencies' ability to effectively manage the Coachella Valley groundwater resource for the benefit of all who depend upon the resource, thus impairing the Legislature's ability to fashion a water rights regime "responsive to local needs."

Second, "legal confusion" would arise if "federal water law and state water law reigned side by side in the same locality." While the Tribe claims a "senior, prior and paramount" right to groundwater under federal law, Tribe Compl. ¶ 59, California law provides that all overlying landowners have equal and correlative rights in groundwater and none has priority over another. *City of Barstow v. Mojave Wat. Agency*, 23 Cal.4th 1224, 1240-1241 (2000). Thus, the Tribe's reserved right claim conflicts with California law by allowing the Tribe to claim a "senior, prior and paramount" right while all other overlying landowners possess equal and correlative rights, and would create "legal confusion" by allowing conflicting principles of federal law and state law to "reign side by side" as applied to the same groundwater resource in the Coachella Valley.

II. THE ALLOTTEES AND LESSEES ON THE TRIBE'S RESERVATION DO NOT HAVE RESERVED RIGHTS.

A. The Allottees Do Not Have Reserved Rights.

As noted earlier, most of the Tribe's reservation lands are allotted lands. *See* page 2, *supra*. The United States alleges that the allottees of the allotted lands have reserved rights in groundwater. U.S. Compl. ¶¶ 4, 5, 7, 9, 24, 25 (Doc. 71).[12] An

[12] In the Stipulation to Trifurcate the Case (Doc. 49), the parties agreed that Phase I would be limited to "whether the Tribe has rights to groundwater pursuant to the federal Winters doctrine and/or aboriginal rights to groundwater." (¶ 4.) Since the United States alleges in its complaint that the allottees on the allotted lands of the Tribe's reservation also have reserved rights, the question whether the allottees have reserved rights is also included in Phase I, because Phase I is intended to resolve all issues concerning the existence or non-existence of reserved rights on the Tribe's reservation. In addition, as we explain in our next argument, various

allottee of lands within an Indian reservation has a proportionate share of any reserved water right held by the Indian tribe. *United States v. Powers,* 305 U.S. 527, 533, 59 S.Ct. 344, 83 L.Ed. 330 (1939); *Walton*, 647 F.2d at 50-51 ("ratable share"). Thus, the allottee's rights are derivative of the tribe's rights. The Tribe in this case does not have a reserved right in groundwater, for all reasons explained above, and therefore the allottees do not have reserved rights in groundwater either.

In particular, since the allotted lands on the Tribe's reservation overlie the groundwater basin, just as the reservation overlies the basin, the allottees have the right to produce groundwater under California law, just as the Tribe has this right. *City of Barstow v. Mojave Wat. Agency*, 23 Cal.4th 1224, 1240-1241 (2000); *see* pages 17-18, *supra*. Further, just as the Tribe does not produce groundwater but instead purchases its water supplies from the defendant agencies, SUF Nos. 1, 2, the allottees also do not produce groundwater but instead purchase their water supplies from the defendant agencies. SUF No. 19. For these additional reasons, the reserved rights claimed by the United States on behalf of the allottees are not "necessary" to accomplish the primary reservation purpose and prevent it from being "entirely defeated," *New Mexico*, 438 U.S. at 700, 702, which further defeats any implication that the allottees have "implied" reserved rights.

B. The Leased Lands Do Not Include Reserved Rights.

Various non-Indian lessees who operate commercial resort facilities on allotted reservation lands produce groundwater for golf courses that are part of the resort facilities. SUF No. 20. The lessees' rights to produce groundwater are based

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lessees on the allotted lands produce groundwater for commercial golf courses, and—since the lessees' rights are based on the allottees' rights, which are derivative of the Tribe's rights—the question whether the lessees have reserved rights is also included in the Phase I proceeding, because, again, the Phase I proceeding is intended to resolve all issues concerning the existence or non-existence of reserved rights on the reservation.

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on the allottees' rights, which as explained above are derivative of the Tribe's rights; since the Tribe and the allottees do not have reserved rights, as explained above, the lessees do not have reserved rights either. Rather, the lessees have the right to produce groundwater under California law, and their production of groundwater is and has always been pursuant to California law.

The lessees do not have federal reserved rights in groundwater for another reason, in that their production of groundwater for commercial golf courses is not related to the *primary* purpose of the Tribe's reservation, which, at most, was to provide water for the Tribe's agricultural and domestic needs. As we now explain, this primary reservation purpose is spelled out in (1) the Whitewater River Decree and the United States' "Suggestion" during that litigation, and (2) the historical documents and circumstances surrounding creation of the Tribe's reservation.

First, the Whitewater River Decree and the United States' "Suggestion" indicate that the primary reservation purpose did not include production of groundwater for commercial uses such as resort golf courses. The Decree authorized the United States to divert water for "beneficial use" on the Tribe's reservation, which was defined as "domestic, stock watering, power development and irrigation purposes." SUF No. 21 (Decree ¶¶ 45, 46). The United States' "Suggestion" submitted during the litigation claimed the right to divert water for "irrigation" and "power, domestic and stock water uses." SUF No. 22 ("Suggestion" pp. 4, 5, 6, 13, 15-16, 18). Thus, the Decree and the United States' "Suggestion" make clear that the Tribe's *primary* water needs are those spelled out in the Decree and the "Suggestion"—*i.e.*, "irrigation," "domestic," "power development" and "stockwatering"—and not commercial purposes such as resort golf courses. Neither the Decree nor the United States' "Suggestion" mentioned any tribal need to use water for commercial purposes of any kind. Obviously the Tribe does not have greater reserved rights in groundwater than the rights that the Decree recognized and the United States claimed in the surface waters. Otherwise,

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the Tribe would have the right to use groundwater for commercial purposes but not to use surface waters for the same purposes. Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders, obviously did not impliedly "intend" to create such an absurd anomaly. Although the primary reservation purpose must be "liberally construed," *Walton*, 647 F.2d at 47, a liberal construction would, at most, allow the Tribe to use water for its expanded agricultural and domestic needs, however defined,[13] but not for commercial purposes such as resort golf courses.

Second, the historical documents and circumstances surrounding creation of the Tribe's reservation reaffirm that the primary reservation purpose was, at most, to provide water for the Tribe's agricultural and domestic needs and not for commercial uses such as resort golf courses. The Mission Indians Relief Act of 1891, which authorized the Secretary of the Interior to create the reservation, authorized the Secretary to approve private water conveyance facilities across the Tribe's lands on condition that the Indians are supplied with "sufficient quantity of water for *irrigating and domestic purposes*" upon terms prescribed by the Secretary. 26 Stat. 712, 714 (1891) (emphasis added). Thus, the statute authorizing creation of the Tribe's reservation indicated that the primary reservation purpose in terms of water usage was to provide water for the Tribe's irrigation and domestic uses. This conclusion is supported by contemporaneous historical documents surrounding creation of the Tribe's reservation, which similarly indicate that the Tribe's primary water needs included agricultural and domestic uses but not commercial uses such as resort golf courses.[14]

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[13] In *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), the Ninth Circuit held that an Indian tribe's reserved right under an 1855 treaty to use water for "future use" for "agricultural" purposes "extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation."

[14] The 1891 Smiley Commission Report, described earlier, stated that the United States had authorized an irrigation company to obtain an easement across the

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Therefore, the use of groundwater for commercial golf courses is, at most, a "secondary" reservation purpose and not a "primary" reservation purpose. The Supreme Court and Ninth Circuit have held that water rights for "secondary" reservation purposes must be acquired under state law, in the same manner as public and private appropriators. *New Mexico*, 438 U.S. at 701; *Walton*, 647 F.2d at 47; *Adair*, 723 F.2d at 1408-1409.[15]

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Tribe's lands on condition that it supply sufficient water to "irrigate" the Tribe's lands and provide water for the Tribe's "domestic use." SUF No. 23; *see* page 23, *supra*. In 1888, a federal Indian agent, Joseph W. Preston, issued a report recommending that a land company be allowed to obtain an easement across the Tribe's reservation, in return for the company's promise to grant the Tribe "a permanent water right" for "irrigation" of tribal lands. SUF No. 24. The 1903 Butler report, also described earlier, described the Tribe's water usage practices, stating that the Tribe's members have built "ditches" that conveyed water from creeks to other areas where the water was used to "irrigate" the lands. SUF No. 25; *see* page 23, *supra*.

[15] The non-Indian lessees on the Tribe's reservation do not have a federal reserved right to produce groundwater for resort golf courses for another reason. The Supreme Court has held that state laws apply to non-Indians on Indian reservations if a "particularized inquiry" into federal, state and tribal interests indicates that the balance of interests weighs in favor of the application of state law. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); *Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). The balance of interests weighs in favor of the application of California law to non-Indian lessees who produce groundwater for commercial golf courses, because the non-Indian lessees have the right to produce groundwater under California law and thus there is no conflict between Congress' policy of deference to state water law and the lessees' right to produce the groundwater.

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III. THE TRIBE DOES NOT HAVE AN ABORIGINAL RIGHT IN GROUNDWATER.

A. The Tribe's Aboriginal Right Claim Conflicts With the Reserved Rights Doctrine.

The Tribe's claim that it has an "aboriginal right" in groundwater with a "time immemorial" priority date, Tribe Compl. ¶¶ 4, 58, 59, 63, conflicts with the reserved rights doctrine. This doctrine holds that a federal reservation of lands may, depending on Congress' implied "intent," include an implied right in appurtenant "unappropriated" waters that "vests on the date of the reservation" and is "superior to the right of future appropriators." *Cappaert*, 426 U.S. at 138; *see New Mexico*, 438 U.S. at 700. Thus, a reserved right does not apply to *appropriated* waters, does not vest *prior* to the date of the reservation, and is not superior to the rights of *prior* appropriators. Accordingly, the Tribe's claim of an aboriginal—*i.e.*, pre-reservation—water right with a "time immemorial" priority date is inconsistent with the reserved rights doctrine. The reserved rights doctrine is the sole basis for recognition of Indian water rights that are paramount to state-granted water rights, because if Indian tribes have aboriginal water rights that pre-date the creation of their reservations, the tribes would have aboriginal rights that are paramount to all state-granted rights, and thus there would be no need for the reserved rights doctrine as a basis for recognition of Indian water rights. Therefore, the Tribe does not have an aboriginal right in groundwater.[16]

[16] In *United States v. Adair*, 723 F.2d 1394, 1413-1415 (9th Cir. 1983), the Ninth Circuit held that an 1864 treaty granted the Klamath Indian Tribe in Oregon an aboriginal water right to support its "fishing and hunting rights" with a "time immemorial" priority date. *Adair* is distinguishable here because the Klamath Tribe's rights were based on an 1864 treaty not applicable here. *Adair* is also distinguishable because the Ninth Circuit held only that the tribe had an aboriginal water right for fishing and hunting, and the Tribe does not claim such a right here. If *Adair* were construed as supporting an aboriginal right to appropriate—*i.e.*, divert and use—water that is paramount to the right of prior appropriators, *Adair* would be

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B. Any Tribal Aboriginal Water Right Claim Was Extinguished by the Land Claims Act of 1851.

Any aboriginal water right claim by the Tribe was extinguished by a claims procedure established by Congress in 1851 to resolve land claims disputes in California. After the United States and Mexico signed the Treaty of Guadalupe Hidalgo following the war between the two nations, Congress enacted the Land Claims Act of 1851, which established a procedure to resolve disputes over land claims in California based on pre-war Spanish and Mexican land grants. 9 Stat. 631 (1851); *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 203, 104 S.Ct. 1751, 80 L.Ed.2d 237 (1984). The 1851 statute created a Board of Land Commissioners with authority to hear the land claim disputes, and provided that any claim not presented to the Board within two years would be barred. 9 Stat. 632-633 (1851); *Summa*, 466 U.S. at 203.

In *Barker v. Harvey*, 181 U.S. 481 (1901), several California Indian tribes, including the Mission Indians, brought an action claiming a right of permanent occupancy of their reservation lands based on Mexican land grants. The Supreme Court rejected the Indians' claims because they had not been timely presented to the Board of Land Commissioners, and held that the lands claimed by the Indians are "rightfully to be regarded as part of the public domain and subject to sale and disposal by the federal government." *Barker*, 181 U.S. at 490. The Court stated that the Indians' claims based on "permanent occupancy of land" are ones of "far-reaching effect," because the claims would mean that such lands are not "part of the public domain and subject to the full disposal of the United States," and therefore that anyone who acquired public domain lands from the government would have

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inconsistent with Supreme Court decisions holding that an Indian water right is created when the reservation is established, and that the priority date of the right is the date that the reservation was established. *Cappaert*, 426 U.S. at 138; *New Mexico*, 438 U.S. at 700.

nothing more than a "naked fee . . . burdened by an Indian right of permanent occupancy." *Id*. at 491-492. The Supreme Court subsequently reaffirmed *Barker* in *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 482-486, 44 S.Ct. 621, 68 L.Ed. 1110 (1924), and *Summa*, 466 U.S. at 207-208.[17]

Thus, *Barker* and its progeny hold that any claims by California Indian tribes, including the Mission Indians, to permanent occupancy of their lands were extinguished by the claims procedure established by Congress in 1851. Since the Tribe's aboriginal water right claim is based on its claim to aboriginal ownership of its reservation lands, the Tribe's aboriginal water right claim has been extinguished by the 1851 claims procedure.

CONCLUSION

Defendant Desert Water Agency's motion for summary judgment should be granted.

Dated: October 21, 2014

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[17] Congress subsequently established an Indian Claims Commission to determine the merits of Indian land claims and dispose of such claims "with finality." 60 Stat. 1049 (1946); *United States v. Dann*, 470 U.S. 39, 45, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985). The Indian Claims Commission held in a series of decisions that under the Land Claims Act of 1851 "the United States extinguished Indian title to lands in California." *Thompson, et al. v. United States*, 13 Ind. Cl. Comm. 369, 370 (1964). The Mission Indians subsequently reached a settlement with the United States resulting in a dismissal of their claims in return for payment of compensation. *Id.* at 385-386.

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is Best Best & Krieger LLP, 2001 N. Main Street, Suite 390, Walnut Creek, California 94596. On October 21, 2014, I served the following document(s):

DEFENDANT DESERT WATER AGENCY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

by transmitting via electronic transmission to the person(s) at the e-mail address(es) set forth below by way of filing the document(s) with the U.S. District Court, Central District of California. Federal Rule of Civil Procedure § 5(b)(2)(E)

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