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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor,	CASE NO. 5:13-cv-00883-JGB-SP **UNITED STATES' REPLY IN SUPPORT OF PHASE I MOTION FOR SUMMARY JUDGMENT**

v.

COACHELLA VALLEY WATER DISTRICT, et al.,

Defendants.

BEFORE: Judge Jesus G. Bernal
DATE: February 9, 2015
DEPT: Courtroom 1
TIME: 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

ARGUMENT

I. The Agua Caliente Reservation is a Tribal Homeland for which Water was Reserved.

Courts have repeatedly recognized that water is necessary to effectuate the homeland purpose of an Indian reservation. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981).[1] The right to such water, and the point at which the right arises, are long-settled questions of federal law:

> [A]s soon as a reservation for Indians has been established, there is an implied reservation of rights to the use of the waters which arise, traverse or border upon the Indians' reservation, which rights may be exercised in connection with the Indian lands.

United States v. Preston, 352 F.2d 352, 357 (9th Cir. 1965) (relying on *Winters v. United States*, 207 U.S. 564 (1908)); *see also John v. United States*, 720 F.3d 1214, 1225-26 (9th Cir. 2013), *cert. denied Alaska v. Jewell*, 134 S. Ct. 1759 (2014); *Walton*, 647 F.2d at 46-47.

Defendants mistakenly characterize this rule as requiring a "factual determination" beyond the fact that the reservation was established.[2] Not so. "This rule applies although the waters are not mentioned in the treaties, executive orders

[1] CVWD concedes the homeland purpose of the Agua Caliente Reservation, Dkt. 92 at 16, and therefore, should agree that water is necessary to accomplish that purpose.

[2] *See, e.g.*, Dkt. 92 at 2-5.

or other means used to establish the reservations." *Preston*, 352 F.2d at 357. It applies because Indian reservations require water, the right to which pre-empts the state-law-based rights of subsequent water users under the Supremacy Clause of the Constitution.[3] Moreover, water is reserved "as soon as a reservation for Indians has been established." *Id.* As a matter of law, the right to take such water is not subject to state law, or to subsequent divestment through the retroactive application of state law. *See United States v. Adair*, 723 F.2d 1394, 1411 n.19 (9th Cir.1983) (describing "federal, not state law" as the source of *Winters* rights); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.'") (*quoting Cappaert v. United States*, 426 U.S. 128, 145 (1976)); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934) (state water laws are not controlling on an Indian reservation).[4]

Recognition of the Agua Caliente Reservation vested rights to an as-of-yet undetermined quantity of water needed to fulfill its purpose as a tribal homeland.

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[3] DWA concedes this. Dkt. 96 at 2.

[4] *See also In re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988). In that case, the California Supreme Court allowed the United States to claim both a reserved right to water in Hallett Creek *and* riparian rights (which are analogous to California's collateral rights doctrine). *Id.* at 334; *see also* United States' Motion for Summary Judgment (Dkt. 83) at 23. The import of this decision is that riparian rights – or state law overlying rights to groundwater – are not substitutes for the federal reserved right that is impliedly reserved when lands are set aside for a federal purpose.

See Preston, 352 F.2d at 353 & 357 (confirming the reservation of waters for "the Agua Caliente reservation embracing 30,000 acres of land in Riverside County, California."). This reservation and the associated water rights predate Defendants' very existence.[5]

II. Agua Caliente's Water Is Not Yet Geographically Constrained, and may be Quantified to Include the Waters of the Underlying Aquifer.

As the Ninth Circuit recently observed, federal reserved water rights are not typically limited to a particular location or water source on the reservation when they are reserved:

> The federal reserved water rights doctrine does not typically assign a geographic location to implied federal water rights. The rights are created

[5] The Agua Caliente Reservation, and the water rights that arose "as soon as" it was established, *Preston*, 352 F.2d at 357, predate California's common-law creation of overlyer rights by at least a half-century. They also predate other subsequent state-law-based developments that Defendants cite in an effort to call the Tribe's federal reserved water rights into question. *See* Dkt. 96 at 3-10 (referencing twentieth and twenty-first century state court decisions and legislation that helped to develop California's as-of-yet unsettled approach to groundwater allocation); and Dkt. 92 at 8, 9 & 15 (citing California groundwater cases from 1949, 1975, 1985, 2000; an article from 1986; and a portion of the legislative digest for California's groundwater statute, the express statutory language of which acknowledges the existence and primacy of federal reserved rights to groundwater). Moreover, the express language of California's groundwater statute is clear and unambiguous: "federally reserved water rights to groundwater shall be respected in full" and "[i]n case of conflict between federal and state law in [groundwater] adjudication or management, federal law shall prevail." Cal. Water Code § 10720.3(d). Accordingly, there is no need to consider its legislative history. *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 903 (9th Cir. 2001) ("If the statute's meaning is clear, we will not consider legislative history.").

> when the United States reserves land from the public domain for a particular purpose, and they exist to the extent that the waters are necessary to fulfill the primary purposes of the reservation. The United States may enforce this implied right in a particular, appurtenant body of water, and it is at this point that the right takes on a geographical dimension. The existence of the right, therefore, has no physical location separate and distinct from the waters on which the right can be enforced. For purposes of this case, then, we must include within its potential scope all the bodies of water on which the United States' reserved rights could at some point be enforced—i.e., those waters that are or may become necessary to fulfill the primary purposes of the federal reservation at issue.

John, 720 F.3d at 1231.[6] For purposes of Phase I of this case, the Court must include within the potential scope of Agua Caliente's water rights, "all the bodies of water on which the . . . reserved rights could at some point be enforced. *Id.* Groundwater is included within this scope.

[6] *See also Adair*, 723 F.2d at 1408 n.13 (citing W. Canby, American Indian Law 245-46 (1981) (purpose of federal non-Indian reservation may be strictly construed, but "the purposes of Indian reservations are necessarily entitled to broader interpretation"). As discussed in the United States' Opposition to CVWD's Motion for Summary Judgment, Dkt. 93 at 4-5, and the United States' Opposition to DWA's Motion for Summary Judgment, Dkt. 94 at 11 n.2, the primary/secondary purposes test is not directly applicable to Indian reservations.

III. Defendants Fail to Distinguish the Abundant Case Law Demonstrating that the *Winters* Doctrine Extends to Groundwater.

To prevail in Phase I, Defendants must establish that the groundwater in dispute, as a matter of law, is not a "bod[y] of water on which the United States' reserved rights could at some point be enforced." *John,* 720 F.3d at 1231. Indeed, Defendants made this argument initially,[7] but have since retreated from this flawed legal theory in the face of overwhelming contrary authority, including the nine federal cases and two state supreme court cases cited in the United States' opening brief, all demonstrating that the reserved rights doctrine can and does extend to groundwater. *See* Dkt. 83 at 7-12. Instead, Defendants now assert a different, yet similarly flawed argument that, because the Supreme Court has not addressed the issue (with which it has not been confronted), this Court should not follow the Ninth Circuit and majority of other federal and state cases that have recognized a reserved right to groundwater. Defendants are mistaken.

The Ninth Circuit has already addressed Defendants' argument regarding the lack of Supreme Court case law: "Although these Supreme Court cases involved

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[7] *See* CVWD Answer (Dkt. 39) at 13 and DWA Answer (Dkt. 40) at 11 ("The reserved rights doctrine, on which the Tribe's claim to the groundwater is based, does not extend to groundwater."); Dkt. 54 at 5 ("the purpose and logic of the reserved rights doctrine does not supports its extension to groundwater"); CVWD Br. (Dkt. 82-1) at 14 (arguing that the reserved rights doctrine "should not be applied to groundwater in general.").

only surface water rights, *the reservation of water doctrine is not so limited*." *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) (emphasis added). Defendants fail to address the Ninth Circuit's conclusion that "the United States may reserve not only surface water, but also underground water." *Id.* Instead, Defendants mischaracterize the *Cappaert* Supreme Court ruling as "reluctan[t]" to recognize the Ninth Circuit legal doctrine (Dkt. 96 at 14) and as "refus[ing] to adopt the Ninth Circuit's legal reasoning" (Dkt. 92 at 6). These arguments are incorrect: the only relevant difference between the opinions was a factual one in which Supreme Court characterized the water at issue as surface water.[8]

Indeed, the Supreme Court could have overturned the Ninth Circuit's groundwater ruling or its legal reasoning, and was even urged to do so, not only by Cappaert, but also by 13 states filing multiple *amici curiae* briefs. *See* 1975 WL 173691; 1975 WL 173696; 1975 WL 173697. But the Court did not adopt their arguments, choosing instead to leave the Ninth Circuit's groundwater ruling intact, and affirming the Ninth Circuit's other rulings.

Defendants' attempts to distinguish applicable case law by highlighting irrelevant factual differences make their arguments even less persuasive. In

[8] Thus, the Supreme Court in *Cappaert* did not address groundwater, other than holding that "the United States can protect its water from subsequent diversion, whether the diversion is of surface *or groundwater*." 426 U.S. at 143 (emphasis added). This language only bolsters the Tribe's and United States' arguments in this case.

response to *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) ("[*Winters* rights] extend to groundwater as well as surface water"), for example, CVWD asserts that *Walton* dealt only with surface water. CVWD is wrong: *Walton* expressly stated that "these actions include rights to both surface and ground waters." *Id.* at 1323. DWA asserts that *Walton* is distinguishable because the water at issue there was entirely within the reservation; even if true, this argument was rejected in *John*, 720 F.3d at 1230 (holding that reserved water rights are not limited to waters within the borders of federal reservations).

Likewise, in an effort to distinguish *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) ("the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well"), Defendants argue only that the case pre-dates *Cappaert* and *New Mexico*. CVWD does not explain why this is relevant, nor offer any analysis as to why *Tweedy* might be wrong, and DWA addresses *Tweedy* only by misconstruing *New Mexico*. Defendants also fail to recognize that *Tweedy* was relied upon and cited favorably by the Ninth Circuit in *Cappaert*, 508 F.2d at 317.

Regarding Interlocutory Judgment No. 41, *United States v. Fallbrook Pub. Util. Dist.*, Case No. 1247-SD-C (S.D. Cal. 1962) ("IJ41") (reserved groundwater rights held in trust by the United States for three California Indian reservations), *aff'd*, 347 F.2d 48, 61 (9th Cir. 1965), Defendants argue that the *Winters* doctrine

extended to reservation groundwater there only to the extent the groundwater added, contributed to, or supported the Santa Margarita River or its tributaries. In that case, however, the court specifically retained jurisdiction over "the use of any waters, surface or ground, by the Indians on the . . . Cahuilla [Reservation]." IJ41 at 22. Further, the court expressly stated that "this Court does have jurisdiction over the use of any waters insofar as the United States of America, on behalf of any Indians, asserts rights to such waters which were adjudged in . . . Interlocutory Judgment No. 41." *See* Interlocutory Judgment 33, *United States v. Fallbrook Pub. Util. Dist.*, Case No. 1247-SD-C (S.D. Cal. 1962).

Defendants also challenge *Preckwinkle v. Coachella Valley Water Dist.*, Case No. 5:05-cv- 626, ECF No. 210 (C.D. Cal. Aug. 30, 2011), arguing that the decision was not an adjudication on the merits. Defendants miss the point for three reasons. First, a final judgment on the merits is not necessary for a case to be persuasive or even binding.[9] Second, a reserved right to groundwater was a necessary part of that decision. Finally, the court in *Preckwinkle* could not have been clearer: "Plaintiffs' reserved water rights give them a federally recognized right to use a certain amount of groundwater in the [Coachella Valley] Water District's Area of Benefit." *Id.* at 28. Despite Defendants's attempts to limit

[9] *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

Preckwinkle, it involved one of the same Defendants (CVWD) in the same Court, and resulted in a ruling that the same Indian reservation at issue here has an implied reserved right to groundwater.

Then there are the decisions that Defendants chooses to ignore. Defendants do not address the 2003 Order from *United States v. Washington*, cited in the United States' opening brief, which held that "as a matter of law the Court concludes that the reserved water rights doctrine extends to groundwater even if groundwater is not connected to surface water." Dkt. 83 at 7. Defendants note that two other rulings from that case were vacated pursuant to settlement – as the United States also recognized in its opening brief – but Defendants fail to acknowledge that the 2003 groundwater ruling was not vacated. *See* Dkt. 83 at 7 n.5.

CVWD fails to address *Gila River Pima-Maricopa Indian Community v. United States*, 9 Ct. Cl. 660, 699 (1986) ("[t]he *Winters* doctrine . . . includes an obligation to preserve all water sources within the reservation, including groundwater"). DWA addresses the case, but only by misconstruing *Cappaert* and ignoring that the case also relied on *Winters* and *Arizona v. California*, in addition to *Cappaert*, for it groundwater ruling. 9 Ct. Cl. at 699 n.61. And Defendants fail to effectively distinguish *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098 (Mont. 2002) (treaty establishing the

Flathead Indian Reservation implicitly reserved groundwater underlying the reservation).

Finally, in response to *In re Gila River System*, 989 P.2d 739, 747 (Ariz. 1999) ("[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground"), Defendants argue that the Plaintiffs have not shown that surface waters are inadequate to fulfill the Tribe's needs. Defendants cite no other authority for their contention, and their argument does not comport with the Ninth Circuit's recent ruling in *John* that reserved water rights are not geographically limited upon the creation of a reservation. 720 F.3d at 1231. Moreover, even if there were merit to Defendants' argument regarding adequacy of surface water, they have the burden of establishing this point. This issue of adequacy of surface water, however, depends upon the quantification of the Tribe's water right, which will not occur until Phase III of this litigation. As a result, Defendants cannot meet their burden at this time. Because the right at issue vested when the Reservation was established, and because it was not geographically limited upon the creation of the Reservation, at issue now is only the question of whether the reserved water rights doctrine may ever extend to groundwater – a question the Ninth Circuit and other federal and state cases have determined is a legal question, which the courts have overwhelmingly answered in the affirmative.

IV. DWA's Remaining Unmeritorious and Self-Contradictory Claims.

DWA makes a variety of other arguments in the context of seeking to distinguish the case law set forth above, each of which is unavailing. First, DWA's contentions regarding the Whitewater Decree lack merit for the reasons stated in the United States' Opposition to DWA's Motion for Summary Judgment. *See* Dkt. 94 at 17-18.

Second, much of DWA's reasoning is self-contradictory. For example, on one hand, DWA contends that recognizing groundwater as a potential source from which federally reserved water may be drawn would frustrate California groundwater administration. Dkt. 96 at 2-3. Yet DWA specifically acknowledges and discusses California groundwater law that unequivocally recognizes groundwater as such a source. *See* Dkt. 96 at 7-8 (discussing Cal. Water Code § 10720.3 (West)).

Third, although DWA, unlike CVWD, does not concede the homeland purpose for the Agua Caliente Reservation, it concedes that the reservation needs water. *See* Dkt. 95 at 5-6 (arguing that state law satisfies the reservation's water needs).[10] This concession, coupled with the undeniable application of federal, rather than state law, contradicts DWA's contention that the federal reserved water

[10] DWA's Response to the Tribe's Motion for Summary Judgment is referenced here because it is incorporated in DWA's Response to the United States' Motion for Summary Judgment.

rights at issue do not exist. *See Preston*, 352 F.2d at 353, 357.

Finally, DWA's contention that this Court must defer to state law before it can determine whether water was reserved for the Agua Caliente Reservation, *see* Dkt. 96 at 6-7, fails as a matter of law. *New Mexico* did not create a state law exception to the federal reserved water rights doctrine – nor could the dissenting opinion have done so, as DWA contends. *See* Dkt. 96 at 6. The doctrine is based upon the United States' constitutional power to reserve land and water for federal purposes; [11] it is governed by the statutes and Executive Orders creating the reservations; and is not subject to, or modified by, state law. *See Arizona v. California*, 373 U.S. 546, 597 (1963).

CONCLUSION

For these reasons, as well as those stated in the United States other Phase I Summary Judgment briefs, which are expressly incorporated herein, and in the Tribe's Phase I Summary Judgment filings, expressly adopted and incorporated herein for the purposes of this phase of the litigation, the United States respectfully requests that this Court grant its Phase I Motion for Summary Judgment.

[11] This power includes the ability to reserve water for pre-reservation uses and to recognize time immemorial rights that have not been extinguished. *See Adair*, 723 F.2d at 1412-15.

Dated: January 9, 2015

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

CASE NO.
5:13-cv-00883-JGB-SP

UNITED STATES' STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT AND LEGAL OBJECTIONS IN RESPONSE TO OPPOSITIONS TO MOTIONS FOR SUMMARY JUDGMENT

v.

COACHELLA VALLEY WATER DISTRICT, et al.,

Defendants.

BEFORE: Judge Jesus G. Bernal
DATE: February 9, 2015
DEPT: Courtroom 1
TIME: 9:00 a.m.

Pursuant to the Court's Standing Order and L.R. 56-2, and for the purposes of Phase I Summary Judgment briefing in this case only, the United States joins in, and hereby adopts and incorporates, the responses and objections filed today by the Agua Caliente Band of Cahuilla Indians (the "Tribe") with its Replies to Defendants' Briefs in Opposition to Plaintiffs' Motions for Summary Judgment on Phase I issues. By doing so, the United States is not bound by any referenced discovery responses and reserves the right to respond and object to future discovery in this case as appropriate

Dated: January 9, 2015

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