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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

DESERT WATER AGENCY'S REPLY TO AGUA CALIENTE BAND OF CAHUILLA INDIANS' OPPOSITION TO DESERT WATER AGENCY'S MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

Many of the Tribe's and the United States' arguments in their opposition memoranda overlap. In this reply, DWA will address the Tribe's and the United States' arguments concerning the Tribe's "homeland," the Tribe's correlative right under California law, the Tribe's failure to produce groundwater, and the impact of the Tribe's claimed reserved right on state water law and state-based water rights. DWA will address the Tribe's and the United States' remaining arguments in its reply to the United States' opposition to DWA's motion for summary judgment.[1]

I. THE TRIBE'S "HOMELAND" ARGUMENT IS WITHOUT MERIT.

The Tribe, citing the Arizona Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in Gila River System and Source,* 989 P.2d 739, 748 (Ariz. 1999), argues that the primary purposes of its reservation are to establish a "permanent homeland" and provide an "agricultural base" for the Tribe, and that "groundwater is necessary to fulfill [these] purposes." Tribe Opp. 19-25. The Tribe's argument is a *non sequitur*. Even assuming that the primary reservation purposes are to establish a "permanent homeland" and provide an "agricultural base," it does not follow that the Tribe's claimed reserved right in groundwater is "necessary" to accomplish those purposes.

In fact, the historical documents surrounding creation of the Tribe's reservation and the modern circumstances of the reservation indicate that the Tribe's claimed reserved right in groundwater was not, and is not, necessary to

[1] As used herein, "Tribe Opp." refers to the Tribe's opposition to DWA's motion for summary judgment (Doc. 98); "U.S. Opp." refers to the United States' opposition to DWA's motion (Doc. 94); "DWA Mem." refers to DWA's memorandum in support of its motion for summary judgment (Doc. 84-1); and "DWA Opp. to U.S." refers to DWA's opposition to the United States' motion for summary judgment (Doc. 96).

accomplish the primary reservation purposes, even as the Tribe defines these purposes. The historical documents indicate that the Tribe obtained its water supplies by diversions from Whitewater River tributaries but that the Tribe was not using or otherwise relying on groundwater. DWA Mem. 22-24. No mention is made in the historical documents of any tribal use of groundwater. *Id.* Thus, the Tribe relied on Whitewater River surface water but not groundwater for its needs during the period when its reservation was created—and the Tribe and the United States do not contend otherwise.[2] Additionally, the 1938 Whitewater River Decree—which is discussed more fully in DWA's reply to the United States' opposition—granted the United States the right to divert all Whitewater River surface water for use on the Tribe's reservation that the United States represented as

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[2] The Tribe and the United States argue that the historical documents cited by DWA, particularly the Mission Indians Relief Act of 1891 and the Smiley Commission Report of 1891, are irrelevant in construing the Tribe's reservation purposes, because they were issued subsequently to the 1876 and 1877 executive orders that created the reservation. Tribe Opp. 23 n. 6; U.S. Opp. 13-14. The Tribe alleged in its complaint, however, that the 1891 Act "acknowledged and confirmed" the Tribe's water rights, Tribe Compl. ¶ 6, and that "in February 1907, Departmental orders added additional lands" to the reservation. Tribe Compl. ¶ 17. Thus, the 1891 Act shows Congress' *explicit* intent concerning the Tribe's reservation purposes, and is highly relevant in construing those purposes. Similarly, the Smiley Commission Report was intended to effectuate the reservation purposes by contemporaneously examining the conditions of the Indians residing on the reservation, and thus is also highly relevant in construing the reservation purposes.

The Tribe and the United States do not contend that these historical documents are inaccurate in showing that the Tribe was not producing groundwater during the period when its reservation was created. On the contrary, although DWA stated in its Statement of Undisputed Facts (SUF) that "[t]he historical documents surrounding creation of the Tribe's reservation describe the Tribe's diversion of water from Whitewater River tributaries for irrigation of tribal lands, but make no mention of any tribal extraction or use of groundwater," DWA SUF No. 4 (Doc. 84-2), the Tribe, in response, does not dispute the fact, but instead claims it is "irrelevant." Tribe's Evidentiary Objections to DWA's Uncontroverted Facts, No. 4 (Doc. 98-10).

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necessary for the Tribe's reservation needs. DWA Mem. 24-25. Even today, the Tribe does not produce or attempt to produce groundwater, and instead purchases its water supplies from the defendant agencies. DWA Mem. 21-22. In short, the Tribe was not producing groundwater when its reservation was created, is not producing or attempting to produce groundwater today, and has an adjudicated right to use sufficient surface water to meet its needs. Under these circumstances, the Tribe's claimed reserved right in groundwater cannot be considered necessary to accomplish the primary reservation purposes and thus does not impliedly exist.[3]

Indeed, a federal district court in the Ninth Circuit rejected an identical "homeland" argument made by the Tribe here, and held that the Arizona Supreme Court's decision upholding a similar "homeland" argument in *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 35 P.3d 68 (Ariz. 2001), is "contrary to Ninth Circuit precedent" as established in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). *United States v. Washington*, 375 F.Supp.2d 1050, 1065 (W.D. Wash. 2005). The court stated:

> Plaintiffs urge the Court to find a homeland purpose in the Treaty of Point Elliot, including impliedly reserved water rights to "support the evolving homeland domestic, municipal and commercial needs of the Nation." [¶] However, no federal court has ever found an impliedly reserved water right by first looking to the modern day activities of the Indian nation. *But see Gila River V*, 35 P.3d at 76. This Court finds that the "homeland purpose" adopted in *Gila River V* is contrary to the

[3] The Tribe does not assert that the production of groundwater by allottees and lessees on the Tribe's reservation for commercial golf courses is part of the "homeland" purposes and is "necessary" to accomplish such purposes. In its motion, DWA argued that the production of groundwater by the allottees and lessees for commercial golf courses is not a primary reservation purpose, or necessary to accomplish such a purpose. DWA Mem. 30-32.

> "primary purpose" doctrine under federal law. . . . More importantly, Plaintiffs' "homeland" purpose theory conflicts with clear Ninth Circuit precedent. *Walton II* acknowledged that "one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society." 647 F.2d at 47-48. However, *this language does not constitute a determination of primary purpose for which water was reserved. Id.* . . . Although compelling in analysis and result, *Gila River V* is *contrary to Ninth Circuit precedent.*

Id. at 1065 (emphases added).

The Tribe argues that the "source or type of water" necessary to satisfy a federal reserved right—in terms of whether the water is surface water or groundwater—is immaterial. Tribe Opp. 5. In *Cappaert v. United States,* 426 U.S. 128 (1976), however, the Supreme Court appeared to regard the distinction between surface water and groundwater as highly significant if not critical concerning whether a water right is impliedly reserved. The Court held that an underground body of water was surface water rather than groundwater—even though the Ninth Circuit below had characterized it otherwise—and 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. The Court's statement that it has applied the reserved rights doctrine to surface water but not groundwater—and its rejection of the Ninth Circuit's characterization of the water as groundwater—indicates that a significant distinction may exist between surface water and groundwater in terms of the reservation of a water right; otherwise, the Court would have simply stated that the distinction between these two types of water is immaterial. The Supreme Court has often held that the United States has authority under its commerce and property powers to regulate surface waters, *e.g., Arizona v. California*, 373 U.S. 546, 597-598 (1963) (commerce and property power); *United*

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States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899) (commerce power); *The Daniel Ball,* 77 U.S. 557 (1870) (same), but has never suggested that the United States' commerce and property powers authorize it to regulate groundwater. Thus, the source of the water, in terms of whether it is surface water or groundwater, is significant if not determinative concerning whether a water right is reserved.[4]

II. SINCE THE TRIBE HAS A CORRELATIVE RIGHT TO USE GROUNDWATER UNDER CALIFORNIA LAW, ITS CLAIMED RESERVED RIGHT IS NOT NECESSARY TO ACCOMPLISH THE PRIMARY RESERVATION PURPOSES.

In its motion, DWA argued that the Tribe has a correlative right to use groundwater under California law, and thus the Tribe's claimed reserved right is not "necessary" to accomplish the primary reservation purposes and does not impliedly exist under the Supreme Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978). DWA Mem. 15-19.[5] The Tribe and the United States argue that the

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[4] The Tribe and the United States argue that—since the Supreme Court in *Arizona* and the Ninth Circuit in *Walton* held that Indian tribes have reserved rights for "future as well as present needs," *Arizona,* 373 U.S. at 600; *Walton*, 647 F.2d at 47—the Tribe has a reserved water right for all "future" uses of its reservation. Tribe Opp. 24; U.S. Opp. 15. The scope of the Tribe's claimed reserved right is not relevant here, and will be addressed in the Phase 3 proceeding, if the case reaches that phase. It should be noted, however, that *Arizona* and *Walton* made these statements only in the context of holding that an Indian reserved water right is measured by the "practically irrigable acreage" of the reservation, rather than the acreage actually being irrigated when the reservation was created. *Arizona*, 373 U.S. at 599-600; *Walton*, 647 F.2d at 47. *Arizona* and *Walton* did not hold that a federal reserved right applies to all "future" water uses, including non-agricultural uses unrelated to agricultural uses existing when the reservation was created. As one court has stated, "no federal court has ever found an impliedly reserved water right by first looking to the modern day activities of the Indian nation." *United States v. Washington*, 375 F.Supp.2d 1050, 1065 (W.D. Wash. 2005).

[5] The Tribe and the United States assert that DWA, in arguing that the Tribe has a correlative right under California law, is arguing that state law "preempts or supersedes" a federal reserved right, Tribe Opp. 1, and "supplant[s]" and "nullifies" federal reserved rights, U.S. Opp. 8, 9. Contrary to the Tribe's and the United

Tribe's correlative right is not adequate to accomplish the primary reservation purposes for various reasons. Tribe Opp. 14; U.S. Opp. 7.

First, the Tribe argues that its correlative right under California law is not adequate because the right can be "lost if unused." Tribe Opp. 14. On the contrary, an overlying landowner's correlative right to use groundwater under California law is "based on the ownership of the land and is appurtenant thereto," and therefore the correlative right attaches to the land and is not "lost if unused," as the Tribe asserts. *See City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240 (2000); *Pasadena v. Alhambra*, 33 Cal.2d 908, 925-926 (1949); *California Water Service Co. v. Edward Sidebotham & Son*, 224 Cal.App.2d 715, 725 (1964); DWA Mem. 16-18. Thus, the Tribe has a correlative right to use groundwater under California law even though it does not exercise, and has not exercised, its right.[6]

Second, the Tribe argues that its correlative right under California law is not adequate because other groundwater pumpers could "deplete" the groundwater resource. Tribe Opp. 14. Although the common law of groundwater authorizes an overlying landowner to use all groundwater underlying his land even though this may "deplete" the groundwater resource, *Miller v. Bay Cities Water Co.,* 157 Cal.

States' straw man argument, DWA argues that—since the Tribe has a correlative right to use groundwater under *California* law—its claimed federal reserved right is not "necessary" to accomplish the primary reservation purpose and does not impliedly exist under *federal* law.

[6] Under California law, an overlying landowner's right—although "correlative" with the rights of other overlying landowners—is "paramount" to the rights of an appropriator, and thus an appropriator's rights must "yield" to the landowner's rights, unless the appropriator has acquired "prescriptive rights through adverse, open and hostile taking of nonsurplus waters." *Barstow*, 23 Cal.4th at 1241; *Pasadena*, 33 Cal.2d at 926. The Tribe and the United States have not cited any instance of an appropriator who has acquired prescriptive rights adverse to the Tribe through "adverse, open and hostile taking of nonsurplus waters."

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256, 276 (1910), California's correlative rights doctrine modified the common law by providing that each overlying landowner has a "proportionate share" of the groundwater, and thus no landowner has the right to pump groundwater that causes "depletion" of the resource; therefore, any overlying landowner who threatens to cause such depletion can be enjoined from pumping groundwater. *Miller*, 157 Cal. at 276; *Pasadena,* 33 Cal.2d at 920, 924; *Katz v. Walkinshaw*, 141 Cal. 116, 134-136 (1903); *Tehachapi-Cumming County Water Dist. v. Armstrong*, 49 Cal.App.3d 992, 1001 (1975); *California Water Service Co.,* 224 Cal.App.2d at 724. If necessary, a court can provide a "physical solution" of the groundwater resource to protect the rights of all overlying landowners. *Pasadena*, 33 Cal.2d at 933; *California Water Service*, 224 Cal.App.2d at 731-732. Therefore, an overlying landowner does not have the right to "deplete" the groundwater resource.[7]

Third, the Tribe argues that its correlative right under California law is inadequate because the Tribe does not have a "senior" right as against other landowners under California law, as the Tribe would have under its reserved right

[7] In arguing that a groundwater pumper could "deplete" the groundwater resource, the Tribe cited the Arizona Supreme Court's decision in *Gila River*, which upheld a federal reserved right in groundwater because "off-reservation pumpers" could cause a "total future depletion" of the groundwater resource. *Gila River*, 989 P.2d at 748; Tribe Mem. 14. Arizona, however, recognizes the doctrine of "reasonable use" of groundwater—which holds that a landowner has the right to use all groundwater necessary to serve reasonable and beneficial uses on the overlying lands even if this may deplete the resource—and California recognizes the doctrine of "correlative rights," which holds that an overlying landowner has a "proportionate share" of groundwater and thus does not have the right to "deplete" the resource and cause injury to other landowners. Compare, *e.g., Gila River*, 989 P.2d at 743 n. 3 (describing Arizona's "reasonable use" doctrine), and *Bristor v. Cheatham*, 255 P.2d 173,178-179 (Ariz. 1953) (same), with *O'Leary v. Herbert*, 5 Cal.2d 416, 423 (1936) (describing California's correlative rights doctrine), and *Miller*, 157 Cal. at 276 (same). Thus, *Gila River* does not support the Tribe's argument that other groundwater users could "deplete" the groundwater resource under California law.

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claim. Tribe Opp. 14. However, the Tribe's claimed "senior" right in groundwater is not necessary to accomplish the primary reservation purpose where, as here, the Tribe has a "proportionate share" of the groundwater under California's correlative rights doctrine and thus has the same right to use groundwater as other overlying landowners. Since the Tribe has a "proportionate share" of the groundwater under California law, the Tribe's right is not subordinate to non-Indian rights, as in other cases where Indian reserved rights were upheld, such as *Winters v. United States*, 207 U.S. 564, 576 (1908), *Arizona v. California*, and *Walton*.

As DWA explained in its motion, if the Tribe has a "senior" reserved right in groundwater under federal law, the Tribe would be exempt from the requirements of California law—particularly the requirements of "reasonable and beneficial use" and correlative rights—that apply to all other users of groundwater, and which ensure the conservation and maximum beneficial use of California's limited water resources and also ensure that all overlying landowners have equal and correlative rights and none has priority over another. DWA Mem. 19-21. Indeed, the Tribe itself would have the right to "deplete" the groundwater resource, because the Tribe would have a senior right to use groundwater for reservation purposes under federal law regardless of the impacts on other groundwater users. *Id.* These adverse public policy impacts weigh heavily against any "implication" that the Tribe has a reserved right in groundwater. *Id.*

III. SINCE THE TRIBE DOES NOT PRODUCE OR ATTEMPT TO PRODUCE GROUNDWATER, ITS CLAIMED RESERVED RIGHT IN GROUNDWATER IS NOT NECESSARY TO ACCOMPLISH THE PRIMARY RESERVATION PURPOSES.

In its motion, DWA argued that since the Tribe does not produce or attempt to produce groundwater, the Tribe's claimed reserved right in groundwater is not "necessary" to accomplish the primary reservation purposes. DWA Mem. 21-22. The Tribe and the United States argue that—since the Tribe purchases its water

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supplies from the defendant water agencies, which obtain the supplies by producing groundwater—the Tribe depends on the groundwater, even though it is produced by the defendant agencies rather than the Tribe. Tribe Opp. 22; U.S. Opp. 12-13.

Contrary to the Tribe's and the United States' argument, the Tribe's failure to produce or attempt to produce groundwater, and its reliance on the defendant agencies' water supplies, demonstrate that the Tribe's claimed reserved right is not "necessary" to accomplish the primary reservation purpose, because the Tribe will have available water supplies even if its claim is rejected. For that reason, rejection of the Tribe's reserved right claim would not cause the primary reservation purpose to be "entirely defeated," *New Mexico*, 438 U.S. at 700, or the reservation lands to be "practically valueless," *Winters*, 297 U.S. at 576, as in other cases where Indian reserved rights were upheld, such as *Winters*, *Arizona* and *Walton*. The Tribe would be in no different position today, or than historically, regarding availability of water supplies, because the Tribe will have available water supplies regardless of the outcome of its claim.[8] Neither the Tribe nor the United States argue that the Tribe will lack available water supplies if its claim is rejected, or explain why the Tribe has failed to produce groundwater rather than purchasing its supplies from the defendant agencies.

Since the Tribe does not produce or attempt to produce groundwater, the Tribe is, in effect, asserting a mere theoretical reserved right in groundwater, untethered to the actual needs and circumstances of its reservation. The Tribe's

[8] Since the Tribe would not suffer actual harm if its reserved right claim is rejected, the Tribe may not have constitutional standing to assert its claim. Under Article III of the Constitution, a party has standing to assert a claim only if the party has suffered "injury in fact" that is "concrete and particularized" and "actual or imminent," and the injury is "caused" by the defendant's conduct and may be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2008).

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apparent purpose in pursuing its theoretical claim is to enable the Tribe to claim compensation from the defendant water agencies for their use of the "pore space" of the groundwater basin that the Tribe allegedly "owns," a purpose that the Tribe candidly and repeatedly acknowledges in its complaint. Tribe Compl. ¶¶ 8, 12, 32, 55, 66, 75. A federal reserved right, however, exists only as necessary to provide a federal reservation with needed water, not as a basis for seeking compensation from those who provide water.

In the *Gila River* case, the Arizona Supreme Court stated 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 (emphasis added). Although the Arizona Court wrongly concluded that a federal reserved right applies to groundwater, as we have argued, DWA Opp. to U.S. 16-17 (Doc. 96), the Court properly concluded that *any* federal reserved right exists only where "other waters" are inadequate to accomplish the reservation purpose. Here, "other waters" are available to serve the primary purposes of the Tribe's reservation, because the Tribe obtains its water supplies from the defendant agencies rather than producing or attempting to produce groundwater itself. "Other waters" are also available because the Tribe has a correlative right to use groundwater under California law, DWA Mem. 15-19, and also because the 1938 Whitewater River Decree granted the United States all Whitewater River water that the United States represented as necessary to meet the Tribe's reservation needs. *Id.* at 24-25. Since "other waters" are available to accomplish the Tribe's primary reservation purposes, the Tribe's claimed theoretical reserved right in groundwater is not "necessary" to accomplish the primary reservation purposes and does not impliedly exist even under the Arizona Supreme Court's decision in *Gila River*.

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IV. THE IMPACT OF THE TRIBE'S CLAIMED RESERVED RIGHT ON STATE WATER LAWS AND STATE-BASED WATER RIGHTS IS RELEVANT, AND WEIGHS AGAINST THE TRIBE'S CLAIM.

In its motion, DWA argued that the Tribe's reserved right claim, if upheld, would impair California's system of groundwater regulation by exempting the Tribe from the requirements of "reasonable and beneficial use" and correlative rights that apply to all other overlying landowners under California law. DWA Mem. 19-21. DWA also argued that the Tribe's claim, if upheld, would impair the defendant water agencies' ability to effectively manage the groundwater resource in the Coachella Valley for the benefit of the public, including other users of groundwater, and would create "legal confusion" by allowing federal and state water law to "reign side by side in the same locality." *Id.* at 26-28.

The Tribe and the United States argue these impacts are irrelevant, because a federal reserved right prevails over state laws regardless of the impacts on state water laws and state-based water rights. Tribe Opp. 16-19; U.S. Opp. 3-4, 7. On the contrary, the Supreme Court in *New Mexico* held that the impact of a reserved right claim on state water laws and state-based water rights is highly relevant in determining whether the reserved right exists. The Court stated that "[w]hen . . . a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators," and that "[t]his reality … *must be weighed in determining what, **if any,** water Congress reserved for use in the national forests*." *New Mexico*, 438 U.S. at 705 (emphases added). *New Mexico*'s conclusion that the impact of a claimed reserved right on state and private appropriators must "weighed" in determining "what, if any" water has been reserved, contradicts the Tribe's and the United States' argument that this impact is irrelevant.

Here, the Tribe's claimed reserved right would exempt the Tribe from the constitutional standard of "reasonable and beneficial use" that applies to all water users in California, including users of groundwater, and provides for conservation and maximum beneficial use of the State's limited water supply. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1241 (2000); *Joslin v. Marin Muni. Wat. Dist.*, 67 Cal.2d 132, 140 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 368 (1935); DWA Mem. 20-21. Also, since the Tribe alleges that its reserved right would be "senior, prior and paramount" to the rights of others, Tribe Compl. ¶ 59, the Tribe would have the right to deplete the groundwater resource for its own needs before anyone else could use a single drop of groundwater. DWA Mem. 19-20. In short, the Tribe would be exempt from its obligation under California law to participate with others in the conservation and maximum beneficial use of California's limited groundwater supply, and its claim would undermine the integrity of California's groundwater laws by allowing the Tribe to potentially deplete the resource to the detriment of others. DWA Mem. 19-20. These adverse public policy impacts are relevant under *New Mexico*, and weigh heavily against the Tribe's reserved right claim.

CONCLUSION

DWA's motion for summary judgment should be granted.

Respectfully submitted,

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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 January 9, 2015 I served the following document(s):

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