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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 UNITED STATES' OPPOSITION TO DESERT WATER AGENCY'S MOTION FOR SUMMARY JUDGMENT

[Filed with:
1. DWA's Request for Judicial Notice
2. Declaration of Steven G. Martin in support of Request for Judicial Notice.]

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ARGUMENT

Many of the United States' and the Tribe's arguments in their opposition memoranda overlap. In this reply, DWA will address the United States' and the Tribe's arguments concerning the *New Mexico* decision, the Whitewater River Decree, and the Tribe's aboriginal right claim.[1] DWA will address the United States' and the Tribe's remaining arguments in its reply to the Tribe's opposition to DWA's motion for summary judgment.[2]

I. THE UNITED STATES AND THE TRIBE MISCONSTRUE THE SUPREME COURT'S DECISION IN *NEW MEXICO*.

In its motion for summary judgment, DWA argued that the Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978), held that Congress' policy of deference must be taken into account in determining whether a federal water right is

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[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), and "DWA Mem." refers to DWA's memorandum in support of motion (Doc. 84-1).

[2] The Tribe and the United States make certain additional arguments in their opposition to DWA's motion that DWA addressed in its previous Phase 1 memoranda, and DWA will not repeat its arguments here. Specifically, the United States argues that a federal reservation of land necessarily includes the reservation of a water right, U.S. Opp. 3, 6, 7, and DWA addressed this argument in its opposition to the Tribe's motion for summary judgment, at pages 1-4 (Doc. 95). In addition, the United States argues that the California Supreme Court's decision in *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461 (1988), supports its argument, U.S. Opp. 8-9, and DWA addressed this argument in its opposition to the United States' motion for summary judgment, at pages 8-10 (Doc. 96).

Regarding the rights of allottees and lessees on the Tribe's reservation, the United States, the Tribe and DWA agree that the rights of the allottees and lessees are derivative of the Tribe's reserved rights, if any. Tribe Opp. 27-28; U.S. Opp. 19-21; DWA Mem. 28-32. DWA fully set forth its argument concerning the rights of the allottees and the lessees in its memorandum in support of summary judgment, at pages 28-32 (Doc. 84-1), and DWA will not repeat its argument here.

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1 impliedly reserved, and that a federal right is impliedly reserved only if "necessary"
2 to accomplish the "primary" reservation purpose and prevent this purpose from
3 being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702; DWA Mem. 11-13.
4
5 The United States and the Tribe argue that DWA has misconstrued *New*
6 *Mexico*. First, they argue that *New Mexico* did *not* hold that Congress' policy of
7 deference to state water law must be taken into account in determining whether a
8 federal water right is impliedly reserved. U.S. Opp. 6; Tribe Opp. 8-9. Contrary to
9 their argument, *New Mexico* expressly held that—because Congress "has almost
10 invariably deferred to state law" in addressing "whether federal entities must abide
11 by state water law," citing *California v. United States*, 438 U.S. 645, 653-670, 678-
12 679—a federal reserved right applies only to the "very purposes for which a federal
13 reservation was created," as opposed to "secondary use[s]." *New Mexico*, 438 U.S.
14 at 701-702. *New Mexico*, taking into account Congress' deference to state water
15 law, held that the United States did not have a reserved water right for instream and
16 stockwatering uses in national forests. *Id.* at 707-717. As the California Supreme
17 Court has stated, *New Mexico* adopted a "narrow construction" of the reserved
18 rights doctrine because of the congressional policy "of deferring to state water law."
19 *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461 (1988). Thus, *New*
20 *Mexico* plainly held that Congress' policy of deference must be taken into account
21 in determining whether a federal reserved right is necessary to accomplish the
22 primary reservation purpose and thus impliedly exists.
23 The Tribe asserts that the phrase "entirely defeated" does not appear in the
24 holding in *New Mexico*, or in cases applying *New Mexico*. Tribe Opp. 10. On the
25 contrary, *New Mexico* stated that the Supreme Court, in upholding federal reserved
26 water rights in past cases, "has carefully examined both the asserted water right and
27 the specific purposes for which the land was reserved, and concluded that without
28 the water the purposes of the reservation would be *entirely defeated*." *New Mexico*,

438 U.S. at 700 (emphasis added). In *Katie John v. United States*, 720 F.3d 1214 (9th Cir. 2013), the Ninth Circuit stated that *New Mexico*—in adopting a "narrow rule" concerning federal reserved water rights—"held that federal reserved waters are limited to the *primary* purposes for which the land was reserved, without which the 'purposes of the reservation would be *entirely defeated*.'" *Katie John,* 720 F.3d at 1226 (first emphasis original; second emphasis added). Thus, the phrase "entirely defeated" appears both in the *New Mexico* holding and in the Ninth Circuit's decision in *Katie John* describing the *New Mexico* holding.

The United States and the Tribe argue that *New Mexico* addressed only the "quantification" of a federal reserved right and not whether a federal right is impliedly reserved, and therefore *New Mexico* is relevant only in the Phase 3 proceeding and not the Phase 1 proceeding. U.S. Opp. 10; Tribe Opp. 9-10. On the contrary, *New Mexico* addressed whether the claimed right in that case had been impliedly reserved, and did not address the quantification of the right. The Supreme Court held that water for instream and stockwatering uses are not primary purposes for which national forests have been reserved, and thus that federal water rights have not been impliedly reserved for such purposes. *New Mexico*, 438 U.S. at 707-717. Since the Court held that the rights had not been reserved, the Court did not quantify the rights. More importantly, *New Mexico* established the standard for determining whether a federal water right is impliedly reserved, stating that the right is impliedly reserved only if it is "necessary" to accomplish the "primary" reservation purpose and prevent this purpose from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702.

The United States and the Tribe argue that the restrictions on federal reserved rights established in *New Mexico* do not apply to Indian reserved right claims, because Indian reserved rights must be liberally construed. U.S. Opp. 11 n. 2; Tribe Opp. 10. On the contrary, the Ninth Circuit has held that the restrictions on

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reserved rights established in *New Mexico*—particularly that a reserved right applies only to "primary" reservation purposes and not "secondary" purposes—apply to Indian reserved right claims. *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). Even before *New Mexico*, the Supreme Court in *Cappaert v. United States*, 426 U.S. 128 (1976), limited the reserved rights doctrine as applied to Indian reserved rights, holding that the doctrine—which "applies to Indian reservations and other federal enclaves," 426 U.S. at 138—authorizes the reservation of water only as necessary to meet the "minimal needs" of the reserved lands, "no more." *Id.* at 141. Thus, the restrictions on federal reserved rights established in *Cappaert,* and the more stringent restrictions established in *New Mexico*, apply to Indian reserved right claims.

The Tribe argues that a federal reserved right is an "exception" to Congress' policy of deference to state water law, citing *Cappaert, New Mexico* and other cases. Tribe Opp. 8-9. Although a federal reserved right—once it is implied—is an "exception" to Congress' deference to state water law, Congress' deference to state water law must be taken into account in determining whether a federal reserved right can be implied, as *New Mexico* held.

II. THE UNITED STATES' AND THE TRIBE'S RESERVED RIGHT CLAIM IS INCONSISTENT WITH THE WHITEWATER RIVER DECREE, WHICH GRANTED THE UNITED STATES THE RIGHT TO USE SURFACE WATERS FOR RESERVATION PURPOSES.

In its motion, DWA argued that the Whitewater River Decree of 1938 granted the United States all Whitewater River tributary water that the United States represented was necessary to accomplish the Tribe's reservation purposes, and thus the Tribe's claimed reserved right in groundwater is not "necessary" to accomplish these purposes. DWA Mem. 24-25. The United States and the Tribe argue that the Riverside County Superior Court that issued the Decree did not have

1 jurisdiction over the United States—and thus the United States is not bound by the
2 Decree—because the United States' "Suggestion" stated that the United States was
3 "not submitting the rights or claims of the United States to the jurisdiction" of the
4 California Public Works Department ("PWD"), which initiated the water rights
5 adjudication. "Suggestion," p. 1 (RJN 197); U.S. Opp. 17-18; Tribe Opp. 3.
6
7 The United States and the Tribe miss the point of the Decree as relevant here.
8 Even though the United States stated that it was "not submitting" its rights and
9 claims to the PWD's jurisdiction, the United States nonetheless described in detail
10 the amount of Whitewater River tributary water that the United States claimed was
11 necessary to meet the Tribe's reservation needs, "Suggestion," pp. 3-5, 12-17 (RJN
12 199-201, 208-213), and the United States "respectfully suggested" that the PWD
13 "take account of such [claimed] rights in its said determination or judgment and
14 cause the same to be made subject thereto." *Id.* at p. 18 (RJN 214). Following the
15 United States' "Suggestion," the Whitewater River Decree granted the United
16 States the precise quantity of water that the United States represented as necessary
17 to meet the Tribe's reservation needs. Whitewater River Decree, ¶¶ 45, 46 (RJN
18 59-60). Since the United States described the amount of surface water necessary to
19 satisfy the Tribe's reservation needs, and since the Decree granted the United States
20 this precise amount of water, the Tribe's claimed reserved right in groundwater is
21 not "necessary" to accomplish the primary reservation purpose and prevent this
22 purpose from being "entirely defeated." Thus, it is immaterial whether the
23 Riverside County Superior Court had jurisdiction over the United States and
24 whether the United States is bound by the Decree.
25 As a result of the Whitewater River Decree, "other waters"—consisting of
26 the United States' rights in Whitewater River surface waters granted by the
27 Decree—are available to satisfy the Tribe's reservation purposes, and the Arizona
28 Supreme Court in the *Gila River* case held that a reserved right does not impliedly

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1 exist under *New Mexico* if "other waters" are adequate to serve the reservation
2 purposes. *In re General Adjudication of All Rights to Use Water in Gila River*
3 *System and Source*, 989 P.2d 739, 748 (Ariz. 1999).
4
5 In fact, the Whitewater River Decree adjudicated the United States' rights in
6 Whitewater River surface waters and the United States is bound by the Decree,
7 contrary to the United States' and the Tribe's argument otherwise. Since the United
8 States "suggested" that a specified quantity of water be awarded to the United
9 States on behalf of the Tribe, and since the Decree awarded that amount of water to
10 the United States, the Decree effectively adjudicated the rights of the United States
11 and the United States is bound by the Decree.[3] If the result were otherwise, the
12 United States and the Tribe would not have any adjudicated rights in the
13 Whitewater River, and the United States and the Tribe would be unable to assert the
14 defenses of res judicata and collateral estoppel against anyone who challenged the
15 United States' and the Tribe's rights—and it cannot be imagined that the United
16 States and the Tribe would not assert these defenses if their rights were challenged.
17 Additionally, the United States' argument would create uncertainty among *all* water
18 rights adjudicated in the Whitewater River Decree, because *all* adjudicated rights
19 would be subject to the United States' and the Tribe's unadjudicated rights. These
20 harmful consequences of the United States' argument, which the United States may
21 not have fully considered, weigh heavily against its argument.
22
23
24 [3] The instant situation is vastly different from *United States v. Ahtanum Irrigation*
25 *Dist.*, 236 F.2d 321 (9th Cir. 1956), cited by the United States, U.S. Opp. 18, where
26 the Ninth Circuit held that the United States was not bound by a 1925 state court
decree adjudicating rights in Ahtanum Creek in the State of Washington, because
27 the United States had "decided against" appearing in the suit and "was not a party
28 to the suit." *Ahtanum*, 236 F.2d at 328.

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Indeed, the Tribe asserted in its complaint that the Decree "*decreed* in the name of the United States in trust for the Tribe" the Tribe's "surface rights" in Whitewater River water, Tribe Compl. p. 10, ¶ 32 (emphasis added), thus acknowledging that the Decree adjudicated the United States' rights and that the United States is bound by the Decree. Similarly, California's State Water Resources Control Board recently concluded that—as a result of the Whitewater River Decree's "comprehensive adjudication" of all water rights in the Whitewater River—the United States possesses a water right license in the Whitewater River on behalf of the Morongo Band of Mission Indians, and that under the McCarran Amendment, 43 U.S.C. § 666, the United States has waived its sovereign immunity from an action challenging its license. State Water Resources Control Board, "Proposed Revocation of License 659 (Application 553) of the Morongo Band of Mission Indians," at 5 (Dec. 7, 2012).[4] Thus, the Decree plainly adjudicated the United States' and the Tribe's rights in the Whitewater River. The Tribe and the United States are trying to have it both ways, by claiming that the United States and the Tribe have "decreed" rights under the Decree but that neither is bound by the Decree.

III. THE TRIBE DOES NOT HAVE AN ABORIGINAL WATER RIGHT.

DWA addressed the Tribe's argument that it has an aboriginal water right in DWA's opening memorandum in support of its motion for summary judgment, at pages 33-35 (Doc. 84-1), and in its opposition to the Tribe's motion for summary judgment, at pages 14-20 (Doc. 95), and DWA will not repeat its argument here.

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[4] The State Board's decision concerning the United States' water right license in the Whitewater River is attached as Exhibit 1 to DWA's Request for Judicial Notice filed concurrently with this memorandum. Under the McCarran Amendment, the United States waives its sovereign immunity in any state court proceeding for "adjudication of rights to the use of water of a river system or other sources," or for the "administration of such rights." 43 U.S.C. § 666(a).

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The United States make some additional arguments in support of the Tribe's aboriginal water rights claim, however, U.S. Mem. 21-28, which warrant an additional response.

First, the United States argues that the Land Claims Act of 1851, 9 Stat. 631 (RJN 226), did not extinguish the Tribe's claimed aboriginal right for several reasons, specifically because (1) the intent to extinguish aboriginal title must be plainly and unambiguously expressed in the treaty or statute and no such plainly-expressed intent appears in the 1851 Act, U.S. Mem. 22-23); (2) as a result of the Treaty of Temecula, which the United States negotiated with the Tribe in 1852 but which was not ratified, no one "thought" that the Tribe's aboriginal rights claims had been extinguished by the 1851 Act, U.S. Mem. 23-24; and (3) the extinguishment of aboriginal title is inconsistent with the Mission Indians Relief Act of 1891, which requires the United States to defend Indian title based on "the original grants from the Mexican government," U.S. Mem. 24.[5]

The United States' arguments are inconsistent with Supreme Court decisions holding that Indian aboriginal claims to lands in California were extinguished by the 1851 Act, and thus that such lands are public domain lands subject to disposal by the United States. *Barker v. Harvey,* 181 U.S. 481, 490-491 (1901); *United States v. Title Ins. & Trust Co*., 265 U.S. 472, 482-486 (1924); *Summa Corp. v. California ex rel. State Lands Comm'n,* 466 U.S. 198, 207-208 (1984); *see Thompson, et al. v. United States,* 13 Ind. Cl. Comm. 369, 370 (1964); DWA Opp. 16-17, 19-20. As the Indian Claims Commission stated in *Thompson,* "under the Private Land Claims Act of 1851, . . . the United States extinguished Indian title to

[5] The Mission Indians Relief Act of 1891 is not relevant to the Tribe's aboriginal right claim, because the Tribe's aboriginal claim is not based on "the original grants from the Mexican government," but instead is based on the Tribe's longstanding occupancy of its reservation lands. Tribe Compl. ¶ 4.

1 lands in California." *Thompson,* 13 Ind. Cl. Comm. at 370. In *Barker*, the Supreme
2 Court held that the 1851 Act extinguished aboriginal land claims in California
3 regardless of whether the claims were based on Mexican land grants, *i.e.,* "founded
4 on the action of the Mexican government," or instead were based on "a right of
5 permanent occupancy." *Barker*, 181 U.S. at 491. Thus, *Barker* and its progeny
6 make clear that the 1851 Act extinguished Indian aboriginal title claims in
7 California, regardless of the basis of the claims.[6]
8
9 The United States argues that it has "preemptive federal power" to reserve a
10 water right with a pre-reservation priority date, U.S. Mem. 22, 26, and that the
11 United States exercised this power when it negotiated the Treaty of Temecula with
12 the Tribe, by reserving a water right for the Tribe with a pre-reservation priority
13 date, presumably based on the year, 1852, when the treaty was negotiated. U.S.
14 Mem. 23. In effect, the United States argues that the Tribe has a *reserved* right with

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15 [6] The United States argues that *Barker* and its progeny are distinguishable because
16 the decisions held only that, under the 1851 Act, a party challenging a federally-
17 confirmed Mexican land grant must challenge the grant "in the same federal patent
proceedings conducted under the Act." U.S. Mem. 25. No such limitation appears
18 in *Barker* or its progeny, however. In any event, the United States' argument is
19 irrelevant because—regardless of whether a Mexican land grant can only be
challenged in patent proceedings conducted under the 1851 Act—*Barker* and its
20 progeny expressly held that the 1851 Act extinguished Indian aboriginal land
21 claims in California, whether the claims were based on Mexican land grants or on
rights of permanent occupancy. *Barker*, 181 U.S. 491.
22 The United States argues that *Barker* and its progeny apply only to
23 extinguishment of land claims and not water rights claims. U.S. Mem. 26. The
Tribe's aboriginal water right claim, however, is based on its claim of permanent
24 occupancy of its reservation lands, Tribe Compl. ¶ 4, and, since *Barker* and its
25 progeny held that the Indians of California do not have aboriginal rights in lands
based on claims of permanent occupancy, the Indians also do not have aboriginal
26 water rights based on such claims. In fact, the Indian Claims Commission rejected
27 not only the Mission Indians' "claim for loss of lands" but also the Mission Indians'
"claim for the taking . . . of . . . water rights in the lands claimed by the petitioners."
28 *Thompson,* 13 Ind. Cl. Comm. at 378.

a pre-reservation priority date of 1852, rather than an *aboriginal* right with a "time immemorial" priority date, as the Tribe claims. The Senate did not, however, ratify any treaties that the United States negotiated with California Indians, including the Treaty of Temecula. *Indians of California v. United States*, 98 Ct. Cl. 583, 585 (1942); Cohen, FEDERAL INDIAN LAW p. 59, § 1.03(5) (2012 ed.). Therefore, the Treaty of Temecula did not reserve a water right for the Tribe, and the Tribe does not have a reserved right with a pre-reservation priority date.

More significantly, the United States' argument that it has "preemptive federal power" to reserve a water right with a pre-reservation priority date, and that it reserved such a right here, is flatly inconsistent with the reserved rights doctrine. Under the doctrine, the priority of a federal reserved right is based on the date that the reservation was created, not based on an earlier date. *Cappaert*, 426 U.S. at 138; *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); *Hackford v. Babbitt*, 14 F.3d 1457, 1462 (10th Cir. 1994). In *Cappaert*, for example, the Supreme Court stated that a federal reserved right "vests on the date of the reservation and is superior to the rights of *future* appropriators," *Cappaert*, 426 U.S. at 138 (emphasis added), thus making clear that a federal reserved right does not vest on a pre-reservation date and is not superior to the rights of *prior* appropriators. Therefore, a federal reserved right does not have a pre-reservation priority date. The United States is attempting to expand the reserved rights doctrine beyond limits ever recognized by any court, by asserting that a reserved right has a pre-reservation priority date rather than, as the courts have consistently held, a priority date based on the date of the reservation.[7]

---

[7] The United States argues that its power to reserve a water right with a pre-reservation priority date is supported by the Ninth Circuit's decision in *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939). U.S. Mem. 26. In *Walker River*, the Ninth Circuit held that the Indian tribe's reservation in that case was created in 1859—when the Commissioner of the General Land Office issued a

In *New Mexico*, the Supreme Court imposed significant limitations on federal reserved rights because of the impacts of such rights on state water laws and state-based water rights. *Katie John*, 720 F.3d at 1266 (*New Mexico* established a "narrow rule" of reserved rights); *Hallett Creek*, 44 Cal.3d at 461 (*New Mexico* adopted a "narrow construction" of the reserved rights doctrine because of the congressional policy "of deferring to state water law"). The United States cannot circumvent the limitations on reserved rights established in *New Mexico* by claiming that the Tribe has a pre-reservation priority date, which would allow the Tribe to have priority over water rights recognized under California law even before the Tribe's reservation was created.

CONCLUSION

DWA's motion for summary judgment should be granted.

Respectfully submitted,

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letter to the Surveyor General "instructing him to reserve for Indian purposes the two tracts described and indicated on an enclosed map"—and therefore the reservation was not created by the President's subsequent issuance of an executive order in 1874 reserving the lands, because the executive order "merely gave formal sanction to an accomplished fact." *Walker River*, 104 F.2d at 338. Thus, *Walker River* held that the reservation was created when the Commissioner issued his letter in 1859—and thus the reservation had an 1859 priority date—and that the reservation was already "an accomplished fact" when the President subsequently issued an 1874 executive order reserving the lands. *Walker River* did not hold or suggest that the tribe's reserved right had a pre-reservation priority date.

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WALNUT CREEK, CA 94596

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 REQUEST FOR JUDICIAL NOTICE

[Filed with:
1. DWA's Reply to United States' Opposition to DWA's Motion for Summary Judgment
2. Declaration of Steven G. Martin in support of Request for Judicial Notice.]

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

Action Filed: May 14, 2013
Trial Date: Feb. 3, 2015

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REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rules of Evidence 201(b) and 201(c), defendant Desert Water Agency ("DWA") requests that the Court take judicial notice of the following documents, which are submitted in support of DWA's Reply to the United States' Opposition to DWA's Motion for Summary Judgment ("DWA's Reply Brief"). The number of each document below correlates to the exhibit number of the document as it appears in DWA's Reply Brief.

1. Morongo Band of Mission Indians, Proposed Revocation of License 659 (Application 553) (Cal. State Water Res. Control Bd. Dec. 7, 2012), *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/morongo_mission_indians/docs/120712rulingonmotion.pdf (last visited Dec. 30, 2014).

The Declaration of Steven G. Martin, filed concurrently herewith, provides authentication of the document.

Federal Rule of Evidence 201(b) authorizes this Court to take judicial notice of facts that are "not subject to reasonable dispute because [they] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." "The court: (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Civ. P. 201(c). Judicial notice is appropriate for documents from public governmental agencies and the statutes, laws and cases within those document. *See Del Puerto Water Dist. v. United States Bureau of Reclamation*, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (noting California State Water Resources Control Board decisions "are of a type appropriate for judicial notice");

Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380, 385 (9th Cir. 1953); *United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir. 2008) ("[j]udicial notice is appropriate for records and reports of administrative bodies."); *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1133-1134 n. 14 (9th Cir. 2008) (taking judicial notice of Bureau of Land Management's Planning Handbook); *Veliz v. Cintas Corp.*, 2009 U.S. Dist. LEXIS 36328, at * 11 n.3 (N.D. Cal. Apr. 23, 2009) (taking judicial notice of Department of Labor Wage & Hour Field Operations Handbook); *Lamar v. Micou,* 114 U.S. 218, 223 (1885) ("the law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice"); *Schultz v Tecumseh Products*, 310 F.2d 426, 433 (6th Cir. 1962) ("courts are required to take judicial notice of the statute and case law of each of the states"); *Continental Technical Services, Inc. v. Rockwell Int'l Corp.,* 927 F.2d 1198, 1199 (11th Cir. 1991) ("federal courts take judicial notice of the laws of every state in the Union").

Because the facts contained in the document attached to this Request for Judicial Notice as Exhibit "1" are a governmental agency's decision and not subject to reasonable dispute, this Court should take judicial notice of the document.

Dated: January 9, 2015

BEST BEST & KRIEGER LLP

By: */s/ Roderick E. Walston*
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

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v.

COACHELLA VALLEY WATER DISTRICT, et al.,

Defendants.

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Judge: Hon. Jesus G. Bernal

DECLARATION OF STEVEN G. MARTIN IN SUPPORT OF DEFENDANT DESERT WATER AGENCY'S REQUEST FOR JUDICIAL NOTICE

[Filed with:
1. DWA's Reply to United States' Opposition to DWA's Motion for Summary Judgment
2. DWA's Request for Judicial Notice]

Date: February 9, 2015
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Crtrm.: 1

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DECLARATION OF STEVEN G. MARTIN

I, STEVEN G. MARTIN, declare as follows:

1. I am an attorney with the law firm of Best Best & Krieger LLP, counsel for Defendant Desert Water Agency. I have personal knowledge of the matters set forth herein, and if called upon to do so, could and would competently testify to the contents of this declaration.

2. Attached as Exhibit "1" to the Desert Water Agency's Request for Judicial Notice filed concurrently with this declaration is a true and correct copy of a document titled "Proposed Revocation of License 659 (Application 553) of the Morongo Band of Mission Indians" dated December 7, 2012, discussing the State of California's State Water Resources Control Board's determination that the United States waived sovereign immunity during adjudication of the Whitewater River Stream System, which I downloaded on December 30, 2014, from the State Water Resources Control Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/morongo_mission_indians/docs/120712rulingonmotion.pdf.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on December 30, 2014, at San Diego, California.

Steven G. Martin

Exhibit "1"

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

DEC 07 2012

To: Enclosed Mailing List

PROPOSED REVOCATION OF LICENSE 659 (APPLICATION 553) OF THE MORONGO BAND OF MISSION INDIANS

This letter addresses in part the Morongo Band of Mission Indians' (Morongo Band) May 10, 2012 Motion to Dismiss or, in the Alternative, To Decline To Revoke License 659 (Motion to Dismiss). In the motion, the Morongo Band informed the State Water Resources Control Board (State Water Board) for the first time that on June 29, 2005, the Morongo Band conveyed legal title to License 659 to the Bureau of Indian Affairs (BIA) to be held in trust for the benefit of the Morongo Band. Based on the BIA's ownership interest in the license, the Morongo Band asserts that the BIA is an indispensable party to this proceeding, and therefore this proceeding must be dismissed because the BIA cannot be joined due to its sovereign immunity.

The Morongo Band's motion to dismiss this proceeding on indispensable party grounds is denied. As discussed in more detail below, the statutes requiring dismissal of a proceeding if an indispensable party cannot be joined do not apply to administrative proceedings. Moreover, the United States has waived sovereign immunity with respect to the administration of License 659 under the McCarran Amendment (43 U.S.C. § 666).

I will reopen the hearing, however, to the extent necessary to allow the BIA to participate in order to ensure compliance with Water Code section 1675, which requires the State Water Board to provide the licensee with notice and an opportunity for a hearing before revoking a license.

In its Motion to Dismiss, the Morongo Band also argues that the doctrine of laches bars revocation, that this proceeding should be dismissed on due process grounds, and that License 659 should not be revoked as a matter of public policy. This letter does not address these arguments, which will be addressed in the State Water Board's final decision in this proceeding.

Factual and Procedural Background

As set forth in the hearing notice for this proceeding, the State Water Board's predecessor issued License 659 to Southern Pacific Land Company on January 31, 1928. The license authorizes the direct diversion of 0.16 cubic foot per second from springs arising in Millard Canyon year-round for purposes of Irrigation.

Beginning in 1922, the State Water Board's predecessor and the Riverside County Superior Court conducted a comprehensive adjudication of all the claimed rights to appropriate water from the Whitewater River and its tributaries, including Millard Creek. The adjudication culminated with the issuance of a court decree in 1938, which confirmed Southern Pacific Land Company's right to divert as authorized under License 659. (Enforcement Team Exhibit 7 [abstract of claims]; Enforcement Team Exhibit 50, p. 61 [decree].)

Ownership of License 659 changed hands several times before the Morongo Band acquired both the license and the land authorized to be served by the license from Great Spring Waters of America, Inc. (Great Spring Waters) in 2001. (Morongo Band Exhibit 15.) By letter dated November 1, 2002, the Morongo Band informed the Division of Water Rights (Division) that it had acquired License 659. (Morongo Band Exhibit 16.) The Division issued a Notice of Proposed Revocation of License 659 on April 28, 2003, and the Morongo Band requested a hearing. (The Notice of Proposed Revocation was addressed erroneously to Great Spring Waters, but the Morongo Band was on the mailing list and received a copy of the notice.)

The hearing in this proceeding has been subject to extensive delays. The hearing was originally scheduled for October 14, 2003. The Morongo Band requested a continuance, and the hearing was rescheduled for April 30, 2004. The hearing was delayed again pending resolution of litigation initiated by the Morongo Band concerning whether the Morongo Band would be deprived of a fair hearing in light of the fact that members of the Enforcement Team provide advice to the State Water Board on unrelated matters. Ultimately, the litigation was resolved by the California Supreme Court, which issued a decision upholding the State Water Board's hearing procedures in February 2009. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731.)

Conveyance to the BIA

While the litigation was pending, the Morongo Band conveyed the land authorized to be served by License 659 to the BIA to be held in trust for the benefit of the Morongo Band. (Motion to Dismiss, Exhibit C [grant deed describing property conveyed]; Enforcement Team Exhibit 16 [copy of license describing authorized place of use].) The original deed, which was dated June 29, 2005, was lost and replaced by a deed dated December 19, 2007. (Motion to Dismiss, Exhibit C.) The United States accepted the first conveyance on June 29, 2005, and accepted the second conveyance on February 17, 2008. (*Ibid.*) Although the property description contained in the deed does not mention water rights, the Morongo Band contends that License 659 is appurtenant to the land, and therefore legal title to the license was transferred to the BIA along with the land.

When a license is transferred to a new owner, the State Water Board's regulations require the license holder to notify the State Water Board immediately. Section 831 of the Board's regulations provides: "When rights under an application, permit, or license are transferred, a statement to that effect, signed by the previous owner, shall be filed immediately with the board, referring to the number of the application and stating the name and address of the new owner. Thereafter, notices and correspondence concerning the application, permit, or license will be sent to the new owner . . . ." (Cal. Code Regs., tit. 23, § 831.) Notwithstanding this regulation, the Morongo Band did not notify the State Water Board that legal title to License 659 had been transferred to the BIA until the Morongo Band filed its Motion to Dismiss in May of this year.

Notice of Hearing and Related Proceedings

On October 12, 2011, the Division sent the parties a courtesy notice that the hearing would be scheduled in early 2012. On November 14, 2011, and January 6, 2012, the Morongo Band submitted letters making several procedural requests. The Chief of the Hearing Unit responded to these requests by email dated January 10, 2012. The Morongo Band renewed one of its requests by letter dated January 24, 2012.

On January 26, 2012, the State Water Board issued a formal notice that the hearing had been rescheduled for April 25, 2012. The hearing was rescheduled again for May 21, 2012 to accommodate one of the Morongo Band's witnesses. The deadline to submit notices of intent to appear was March 14, 2012, and the deadline to submit written direct testimony and exhibits was April 30, 2012.

In March of 2012, the Morongo Band filed two motions, raising a number of procedural objections to the hearing notice and the Notice of Proposed Revocation. The Morongo Band's letter and motions were addressed in a ruling dated April 26, 2012. None of the Morongo Band's letters or motions mentioned the BIA's interest in License 659 or raised the indispensable party issue.

Motion to Dismiss for Failure to Join Indispensable Party and Hearing

The Morongo Band did not file its Motion to Dismiss until May 10, 2012, after the parties had submitted notices of intent to appear and their written testimony and exhibits, and just eleven days before the hearing. The motion was not filed in time to be fully considered before the hearing. Rather than delay the hearing in order to consider the motion, the State Water Board elected to proceed with the hearing on May 21, 2012, as scheduled. The Morongo Band participated in the hearing. The only other party that participated in the evidentiary portion of the hearing was the Enforcement Team.

A representative from the BIA attended the hearing and presented a policy statement. In the policy statement, the BIA confirmed that it now holds title to the land served by License 659, and any appurtenant water rights. The BIA also asserted that there is a "serious legal issue" concerning whether the license could be revoked without appropriate notice to the BIA. The hearing record does not indicate whether the BIA was informed of the pending revocation proceeding in time to participate in the hearing. In the Morongo Band's Notice of Intent to Appear, which was filed on March 14, 2012, the Morongo Band indicated that it intended to "sponsor" an individual from the BIA, who would provide a policy statement at the hearing, but it is possible that the Morongo Band had not yet communicated with the BIA about the hearing and the possibility of presenting a policy statement.

Title to License 659 Probably Was Transferred to the BIA

As a threshold issue, the Morongo Band's argument that title to License 659 was transferred to the BIA to be held in trust for the benefit of the Morongo Band has merit. Federal law authorizes the BIA to accept both land and water rights in trust for Indian tribes. (25 U.S.C. § 465 ["The Secretary of Interior is authorized to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians"]; 25 U.S.C. § 2202 [Section 465 applies to all tribes].)

As stated above, the deed that conveyed title to the land served by License 659 from the Morongo Band to the BIA does not mention water rights, but, absent any evidence to the contrary, title to the

license transferred to the BIA as an appurtenance to the land. Unlike riparian rights, appropriative rights are severable from the land. As a general rule, however, appropriative rights are considered appurtenances to the land on which they are used, and they are conveyed with the land by operation of law unless expressly reserved in the grant deed or there is other evidence of contrary intent. (*Stanislaus Water Company v. Bachman* (1908) 152 Cal. 716, 724; *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 557-561; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 295; see also Cal. Code of Regs., tit. 23, § 833 ["When an application, permit, or license stands upon the records of the board in the name of the owner of the place of use the right will be considered appurtenant to the land unless there is evidence to the contrary. It will generally be presumed that the water right passes with a transfer of the land unless expressly excepted."].)

The Indispensable Party Statutes Are Not Applicable to Administrative Hearings

Based on the BIA's ownership interest in the license, the Morongo Band argues that the BIA is an indispensable party in this proceeding, and therefore this proceeding must be dismissed because the BIA cannot be joined due to its sovereign immunity. In support of this argument, the Morongo Band cites to several federal cases that held that the United States was an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure in a suit that could affect land held by the United States in trust for an Indian tribe. Under Rule 19(b), a party is considered indispensable if the party cannot be joined in an action, and the court determines that dismissing the case is preferable to proceeding in the party's absence. (*Salt River Project Agricultural Improvement and Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1179.)

With limited exceptions not applicable here, Rule 19(b) applies to civil actions in federal district courts. (Fed. Rules Civ. Proc., rules 1, 81 (28 U.S.C.).) Similarly, the California state law counterpart to Rule 19(b), section 389 of the California Code of Civil Procedure, applies to civil actions in state courts. (See Code Civ. Proc., § 22 [defining "action" as a proceeding in a court of justice].) Rule 19(b) and section 389 do not apply to administrative proceedings before the State Water Board, and the laws that do apply to proceedings before the Board do not include a comparable provision requiring joinder of indispensable parties. (See generally Cal. Code Regs., tit. 23, § 648; Gov. Code, § 11400 et seq.) Accordingly, the Morongo Band's Motion to Dismiss on indispensable party grounds is denied.

Sovereign Immunity Is Not a Bar to the BIA's Participation due to the McCarran Amendment

The Morongo Band's indispensable party argument separately fails because the BIA cannot assert sovereign immunity as a defense to the State Water Board's exercise of its regulatory authority over License 659. The United States has waived sovereign immunity under the McCarran Amendment (43 U.S.C. § 666(a).) with respect to the administration of License 659.

The McCarran Amendment provides in relevant part: "Consent is given to join the United States in any suit: (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." (43 U.S.C. § 666(a).)

Pursuant to the McCarran Amendment, the United States can be joined as a party in any comprehensive state adjudication of the rights to a stream system if the United States claims a

right to use water from the stream. In addition, once a water right has been adjudicated within the meaning of section 666(a)(1), then under section 666(a)(2) sovereign immunity is waived with respect to any subsequent proceeding to administer the right. (See *U.S. v. Hennen* (1968) 300 F.Supp. 256, 261, 263-264 [water right acquired by United States in 1963 had been adjudicated as part of comprehensive stream adjudication conducted between 1917 and 1929, and therefore United States had waived sovereign immunity from suit in Nevada state court to amend decree to authorize additional diversions]; see also *Federal Youth Center v. District Court in and for County of Jefferson* (1978) 195 Colo. 55, 59-62, 575 P. 395, 398-400 [once a right has been adjudicated within the scope of section 666(a)(1), sovereign immunity is waived with respect to any suit to administer the right pursuant to the water law administration procedures of the state, including procedures derived from statutes, judicial decisions, and administrative regulations].)

State jurisdiction under the McCarran Amendment extends to water rights held by Indian tribes, and to water rights held by the United States in trust for Indian tribes. (*Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 565-570 [rights held by Indian tribes]; *Colorado River Water Conservation District v. United States* (1976) 424 U.S. 800, 809-813 [Indian reserved rights held by United States in trust for tribes].)

In this case, License 659 was adjudicated as part of a comprehensive adjudication of the appropriative rights to the Whitewater River Stream System. Therefore, the United States has waived sovereign immunity under the McCarran Amendment with respect to the instant proceeding to determine whether the right has been forfeited for non-use.

The BIA Should Be Afforded the Opportunity to Participate in the Hearing

Although the Morongo Band's indispensable party argument lacks merit, the BIA should be afforded the opportunity to participate in the hearing in order to ensure compliance with Water Code section 1675. Section 1675, subdivision (b) provides that the State Water Board "may revoke a license after due notice to the licensee and after a hearing, when a hearing is requested by the licensee . . . ." Section 1675, subdivision (c) defines a licensee to include the "heirs, successors, or assigns of the licensee."

Since 2005, the BIA likely has been the holder of title to License 659, but the State Water Board did not provide notice of the proposed revocation or notice of the hearing to the BIA. Of course, the State Water Board could not have provided notice to the BIA because neither the Morongo Band nor the BIA provided timely notice to the Board that title to the license had been transferred to the BIA in 2005. Nonetheless, to ensure compliance with section 1675, the BIA will be permitted to request that the hearing be reopened to the extent necessary to allow the BIA to participate.

It bears emphasis that the BIA's participation is optional. The BIA may decide that its participation is not necessary in light of the fact that the BIA's interest in the license is aligned with the Morongo Band's interest, and the Morongo Band vigorously represented its interest in the hearing.

Hearing Logistics

In the interest of efficiency and fairness to the parties, including the Morongo Band, the existing hearing record will be preserved. If the BIA would like to participate in this hearing, the BIA should carefully review the existing hearing record, including: (1) the hearing notice and enclosure entitled "Information Concerning Appearance at Water Right Hearings," (2) the exhibits that have been submitted by the parties, and (3) the hearing transcript. These documents are available on the

Board's website at the following address:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/morongo_mission_indians/
If after reviewing the existing record the BIA would like the hearing to be reopened to allow the BIA to present additional evidence, the BIA must submit a Notice of Intent to Appear by 12:00 noon on February 20, 2013. A copy of the Notice of Intent to Appear form is available at the following address:
http://www.waterboards.ca.gov/waterrights/publications_forms/forms/docs/noi_exhibit_list.pdf.

The BIA will be permitted to present direct testimony and exhibits, to conduct non-duplicative cross-examination of any of the witnesses who have already testified, to present rebuttal testimony or exhibits, and to submit a closing brief. If the BIA submits a Notice of Intent to Appear, the BIA should indicate the manner in which the BIA intends to participate. In the event that the BIA would like to cross-examine any of the witnesses who have already testified, the BIA should identify the witnesses and provide a brief summary of the proposed line of questioning.

If the hearing is reopened at the BIA's request, the parties will be notified of the supplemental hearing date and any deadlines for exhibits or other materials that must be submitted in advance of the hearing.

Official Notice of Documents Pertaining to Water Availability

Another outstanding procedural issue that needs to be addressed is the Enforcement Team's request for the hearing officer to take official notice of reports of licensee for the period 1988 through 1999 for License 660 (Application 554), which authorizes the diversion and use of water from the same source as License 659. (R.T. pp. 264-265.)

As the hearing officer, I will take official notice of the fact that the holder of License 660 reported diversion and use of water under License 660 for the period of 1988 through 1999 as shown on the reports of licensee that were submitted to the State Water Board for that period. Official notice will be taken pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the Board to take official notice of matters that may be judicially noticed and any generally accepted technical or scientific matter within the Board's field of expertise) and Evidence Code section 452, subdivision (h) (authorizing judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy). Copies of the reports of licensee are enclosed for the parties' information.

If you have any questions about this letter, you may contact Kathleen Groody, Environmental Scientist, at (916) 341-5354 or kgroody@waterboards.ca.gov, or you may contact Dana Heinrich, Staff Attorney IV, at (916) 341-5188 or dheinrich@waterboards.ca.gov.

Sincerely,

Charles R. Hoppin
Chairman

Enclosure

Mailing List

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CERTIFIED MAIL #7003 0500 0003 1321 6298 UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS Southern California Agency 1451 Research Park Dr., Suite 100 Riverside, CA 92507-2154	**CERTIFIED MAIL #7003 0500 0003 1321 6281** UNITED STATES OF AMERICA DEPARTMENT OF THE INTERIOR BUREAU OF INDIAN AFFAIRS c/o Kevin Bearquiver Pacific Regional Office 2800 Cottage Way Sacramento, CA 95825

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CERTIFICATE OF SERVICE

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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):

DESERT WATER AGENCY'S REPLY TO UNITED STATES' OPPOSITION TO DESERT WATER AGENCY'S MOTION FOR SUMMARY JUDGMENT;

DEFENDANT DESERT WATER AGENCY'S REQUEST FOR JUDICIAL NOTICE;

DECLARATION OF STEVEN G. MARTIN IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

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)

Catherine F. Munson, Esq. Kilpatrick Townsend & Stockton LLP 607 Fourteenth Street NW, Suite 900 Washington, DC 20005 Tel: (202)-508-5844 Fax: (202) 585-0007 cmunson@kilpatricktownsend.com kharper@kilpatricktownsend.com	Pro Hac Vice Attorneys for Plaintiff Agua Caliente Band of Cahuilla Indians
Thierry R. Montoya	Attorneys for Plaintiff Agua

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Executed on January 9, 2015 at Walnut Creek, California.

/s/ Irene Islas
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