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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., and DESERT WATER AGENCY, et al.,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

COACHELLA VALLEY WATER DISTRICT, et al., and DESERT WATER AGENCY, et al.,

Defendants.

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

DESERT WATER AGENCY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (PHASE 2)

[Filed concurrently with:

1. Not. of Motion For Summary Judgment;
2. Statement of Undisputed Facts;
3. Declaration of Mark Krause;
4. Declaration of Martin Krieger;
5. Declaration of Miles Krieger;
6. Request for Judicial Notice; and
7. [Proposed] Order.]

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Time: 9:00 a.m.
Ctrm: 1

Action Filed: May 14, 2013
Trial Date:

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I. THE AGUA CALIENTE BAND OF CAHUILLA INDIANS DOES NOT "OWN" THE STORAGE SPACE OF THE AQUIFER UNDERLYING ITS RESERVATION.

A. The Tribe Apparently Claims Ownership of the Pore Space as a Basis for Seeking Compensation Against the Water Agencies.

The Agua Caliente Band of Cahuilla Indians ("Tribe") alleges that it owns the pore space of the aquifer where its federally reserved water is stored, and that Desert Water Agency ("DWA") and Coachella Valley Water District ("CVWD") (sometimes collectively referred to as "Water Agencies") are utilizing the pore space without paying compensation to the Tribe. Tribe's Complaint, at 4 (¶ 10), 5 (¶ 12) (Doc. 1). Thus, the Tribe apparently claims ownership of the pore space as a basis for seeking compensation from the Water Agencies for their importation and storage of water in the pore space that the Tribe allegedly owns.

The Tribe also asserts that it has "prior and paramount ownership" of sufficient pore space to store its federally reserved right in groundwater. Tribe's Complaint, at 15 (¶ 55), 16-17 (¶ 66), 18 (¶ 75) (Doc. 1). DWA assumes that the Tribe does not claim ownership of the pore space simply as a basis for the Tribe to store its federally reserved water, and that the Tribe claims ownership of the pore space as a basis for seeking compensation against the Water Agencies. Otherwise, the Tribe's ownership claim would not give rise to a justiciable controversy, because DWA does not contend that the Tribe does not have the right to utilize the pore space to store its federally reserved water. Under Article III of the Constitution, a party does not have standing to maintain an action unless the party alleges that it has suffered a "concrete and particularized" injury that is "caused" by the defendant's action and that can be "redressed" by a favorable decision, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). If the Tribe is merely asserting the right to store its federally reserved water

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in the pore space, the Tribe's claim would raise no justiciable controversy and the Tribe would not have Article III standing to maintain its claim under *Lujan*. Therefore, DWA will assume in this brief that the Tribe's ownership claim is based on its claim for compensation against the Water Agencies.

The Tribe's claimed ownership of the pore space is expressly not based on its federal reserved right in groundwater, and exists independently of that right. Joint Report, at 5-6 (Doc. 120). The Tribe states that "Agua Caliente's pore space claim is not premised on or in any way dependent upon groundwater rights," and, "[o]n the contrary, Agua Caliente owns the pore space beneath its Reservation regardless of whether it also has a federal reserved groundwater right." *Id*. As will be explained, the Tribe does not own the pore space of the aquifer regardless of whether its ownership claim is based on its reserved right or not.[1]

In this brief, DWA will use the term "storage space" rather than "pore space" to refer to the portion of the aquifer that the Tribe allegedly owns. Although the term "pore space" is used to describe the subsurface area where minerals are located, *e.g., Starrh and Starrh Cotton Growers v. Aera Energy LLC,* 153 Cal.App.4th 583, 592, 63 Cal.Rptr.3d 165 (2007); *Mosser v. Denbury Resources, Inc.*, 112 F.Supp.3d 906, 919 (D. N.D. 2015), the term "storage space" is used to describe the subsurface area where groundwater is located. *Central & West Basin Water Replenishment Dist. v. Southern California Water Co.*, 109 Cal.App.4th 891, 904-905, 135 Cal.Rptr. 486 (2003). Groundwater is not considered a "mineral" for purposes of federal laws regulating minerals, such as gold, silver, coal, salt, stone, and like minerals. *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 614, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978). Therefore, the term "storage space" is the appropriate term that applies here.

[1] DWA will assume in this brief that the Tribe has a reserved right in groundwater, even though it asserts otherwise in its petition for writ of certiorari in the U.S. Supreme Court.

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B. A Federal Reserved Right in Groundwater Does Not Include Ownership of the Storage Space of the Aquifer.

Under the reserved rights doctrine, a reserved water right authorizes "use" of "water" appurtenant to federal reserved lands. *United States v. New Mexico*, 438 U.S. 696, 700, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); *Cappaert v. United States*, 426 U.S. 128, 138, 141, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). Since a reserved right consists of the right to use water, the right does not include ownership of the water itself, or of the geologic formation where water flows or is otherwise found, such as the storage space of an aquifer.

A foundational principle of water law is that a water right is a "usufructuary" right, in that the holder of the right has the right to use water but does not own the corpus of the water. *People v. Shirokow,* 26 Cal.3d 301, 307, 162 Cal. Rptr. 30 (1980); *Rancho Santa Margarita v. Vail*, 11 Cal.2d 501, 554-555, 81 P.2d 533 (1938). This foundational principle applies to groundwater. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1237, 99 Cal.Rptr.2d 294 (2000) ("Both riparian and overlying rights are usufructuary only, and … convey no right of private ownership in public waters."); *California v. Superior Court*, 78 Cal.App.4th 1019, 1024-1027, 93 Cal.Rptr. 276 (2000) ("[M]odern water law focuses on the concept of water rights rather than water ownership," *id*. at 1025, and "the current state of the law is that a riparian (or overlying) owner, or an established appropriator, has the right to take and use water from, e.g., a flowing stream, but the flowing water is not owned." *Id.* at 1024.) The same foundational principle applies to federal reserved water rights, because, as indicated above, a reserved right authorizes "use" of "water" but does not include ownership of water, or of the geologic formation where the water is found.

Thus, the Tribe's reserved right does not include ownership of the storage space of the aquifer. In any event, the Tribe does not base its ownership claim on its reserved right in groundwater. Joint Report, at 6 (Doc. 120).

C. Under State Common Law, the Storage Space of a Groundwater Basin Is a Public Resource Available to Those Who Have Rights to Store and Extract Groundwater, and Is Not Owned by Those Who Have Such Rights.

Since the Tribe does not base its ownership claim on its reserved water right, the Tribe apparently bases its claim on the common law doctrine of "cujus est solum ejus est usque ad coelom et ad inferos," or more simply the "cujus est solum" doctrine, which means "to whomever the soil belongs, he owns also to the sky and the depths." *United States v. Causby*, 328 U.S. 256, 260-261, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (describing doctrine); *Board of County Commissioners v. Park County Sportsmen's Ranch,* 45 P.3d 693, 696 n. 1 (Colo. 2002) (same); S. Harrison, *Disposition of the Mineral Estate on United States Public Lands: A Historical* Perspective, 10 Pub. Land. L. Rev. 131, 132-133 (1989) (same).

In *Causby*, however, the Supreme Court held that the cujus est solum doctrine "has no place in the modern world," and the Court rejected the property owner's claim of absolute ownership of the air space above his property. *Causby*, 328 U.S. at 260-261.

Most states, including California, have rejected the cujus est solem doctrine as applied to groundwater. In *Katz v. Walkinshaw*, 141 Cal. 116 (1903), the California Supreme Court rejected the property owner's claim of "absolute ownership of the percolating water" underlying his land, *id.* at 129[2]—a claim based on the cujus est solum doctrine—and held instead that the property owner's right to percolating groundwater is subject to the "doctrine of reasonable use," *id.* at 134, as

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[2] Water below the ground is considered either a subterranean stream—which flows through definite and known channels, and is considered part of the surface waters—or percolating groundwater, commonly known simply as "groundwater," which does not flow in definite and known channels but instead has "no general course or definite limits." *Los Angeles v. Pomeroy*, 124 Cal. 597, 626, 57 P. 585 (1899); *N. Gualala Water Co. v. State Water Resources Control Bd.,* 139 Cal.App.4th 1577, 1590-1596, 43 Cal.Rptr. 821 (2006).

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modified by the principle that the rights are "correlative," *id*. at 136. The Court held that the doctrine of "absolute ownership" was developed in England, where "rainfall is abundant," and does not apply in California and like states because of "scarcity of water in this country." *Id*. at 127-128.[3]

Rather than applying the cujus est solum doctrine to groundwater, most states, including California, have instead held that a groundwater basin is a public resource available to those who have rights to store and extract groundwater, and is not "owned" by those who have such rights.

In *Central & West Basin Water Replenishment Dist. v. Southern California Water Co*., 109 Cal.App.4th 891, 904-905 (2003), the California Court of Appeal squarely held that the "storage space" of a groundwater basin is a "public resource." *Central & West Basin*, 109 Cal.App.4th at 904; accord, *Water Replenishment Dist. v. City of Cerritos*, 202 Cal.App.4th 1063, 1065-1066, 135 Cal.Rptr. 895 (2012). The court held that—since a groundwater basin is a public resource—groundwater pumpers are not entitled to a "pro rata share" of the storage space "in proportion to" their allocated rights to extract the groundwater. *Central & West Basin*, 109 Cal.App.4th at 912-913. The court held that the right to use water, including groundwater, is a "usufructuary" right, which is subject to the standard of "reasonable and beneficial use," but that there is "no private ownership of groundwater. *Id*. at 905. Thus, "[w]ater rights holders have the right to take and use the water, but they do not own the water …." *Id*.

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[3] In the *Katz* decision cited in the text above, the California Supreme Court reheard and clarified its earlier decision in the same case that had specifically held that the "cujus est solum doctrine"—which holds that percolating groundwater "belongs to the landowner as completely as do the rocks, ground, and other material of which the land is composed"—does not apply to percolating groundwater in arid states like California. *Katz v. Walkinshaw*, 141 Cal. 116, at 6, 10-11, 16 (1902). The earlier *Katz* decision, which was issued on November 7, 1902, and the *Katz* rehearing decision, which was issued on November 28, 1903, are both reported in the same volume and page numbers of the official reports, at 141 Cal. 116.

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1 Other states have reached the same conclusion. In *Board of County*
2 *Commissioners v. Park County Sportsmen's Ranch,* 45 P.3d 693 (Colo. 2002), the
3 Colorado Supreme Court, *en banc*, held that an overlying landowner cannot obtain
4 damages against those who import water into an underlying aquifer for purposes of
5 recharge and storage. *Id.* at 700-701. Citing the cujus est solum doctrine, *id.* at 696
6 n. 1, the Court acknowledged that "[a]t common law a grant of land carries with it
7 all that lies beneath the surface down to the center of the earth." *Id.* at 700-701.
8 The Court held, however, that "there are also limitations on property owners'
9 subsurface rights," *id.* at 701, in that "all water in Colorado [is] a public resource"
10 and the "holders of water rights decrees [have] the right of passage for their
11 appropriated water through and within the natural surface and subsurface water-
12 bearing formations." *Id.* The Court rejected the property owners' argument that
13 they had "absolute ownership of everything below the surface of their properties,"
14 and stated that the principle of "absolute ownership" of subsurface rights "has no
15 place in the modern world." *Id.* (citation and internal quote marks omitted).
16 In *Chance v. BP Chemical, Inc.,* 670 N.E.2d 985 (Ohio 1996), the Ohio
17 Supreme Court reached the same conclusion in rejecting the property owner's
18 argument that "the owner of land has absolute ownership of all the subsurface
19 property." *Chance*, 670 N.E.2d at 992. The Court stated:
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> [W]e do not accept appellants' assertion of absolute ownership of everything below the surface of their properties. Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property, we find that there are also limitations on property owners' subsurface rights. We therefore extend the reasoning of [citation], that absolute ownership of air rights is a doctrine which "has no place in the modern world," to apply as well to ownership of subsurface rights.

26 *Id.* at 992.
27 In *West Maricopa Combine, Inc. v. Arizona Dep't of Water Resources*, 26
28 P.3d 1171, 1176 (Ariz. 2001), the Arizona Supreme Court reached the same

1 conclusion, and stated that "[t]he intention was to make the use of water, as much
2 so as practicable, within the reach of all, and to guard against monopoly by private
3 ownership."

4 In *In re Application U-2*, 413 N.W.2d 290, 298 (Neb. 1987), the Nebraska
5 Supreme Court reached the same conclusion, stating that "[t]he protected right of
6 landowners is the right to the use of the ground water, and does not reach the
7 ownership of the water itself," and that "[g]round water is owned by the public."

8 In analogous cases, the California Supreme Court has held that—under the
9 principle of recapture—the City of Los Angeles has the right to import water from
10 Owens Valley and Mono Lake basin and spread the imported water into the San
11 Fernando groundwater basin for purposes of storage and replenishment, without
12 paying compensation to those who own the lands through which the water is
13 imported and spread. *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199,
14 263-264, 123 Cal.Rptr. 1 (1975); *City of Los Angeles v. City of Glendale*, 23 Cal.2d
15 68, 76-77, 142 P.2d 289 (1943). The *Glendale* Court stated that California's policy
16 is to permit "the use of natural surface facilities, stream beds, dry canyons and the
17 like, for the transportation of water, and it would be "harsh" to compel the City "to
18 build reservoirs when natural ones were available." *Glendale*, 23 Cal. at 77. The
19 *San Fernando* Court stated that "[t]he purpose of giving the right to recapture
20 returns from delivered imported water over overlying rights … is to credit the
21 importer with the fruits of his expenditures and endeavors in bringing into the basin
22 water that would not otherwise be there." *San Fernando*, 14 Cal.3d at 261.
23 According to *San Fernando*, "[t]he fact that spread water is commingled with other
24 ground water is no obstacle to the right to recapture the amount by which the
25 available conglomerated ground supply has been augmented by the spreading." *Id.*
26 at 263-264.

27 Numerous public water agencies in California import and store water in
28 groundwater basins without the consent of the overlying landowners as part of

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conjunctive use programs that provide for coordinated management and use of interconnected surface water and groundwater. For example, the Metropolitan Water District of Southern California ("MWD") operates numerous underground storage programs without consent of overlying landowners, including the Upper Coachella Groundwater Storage Program, among others. Statement of Undisputed Facts ("SUF") 1, 2. Under the Tribe's ownership theory, MWD and other public water agencies that store water in groundwater basins as part of their conjunctive use programs would be required to pay compensation to those who own the lands where the water is stored. Such a consequence would impair the ability of public water agencies in California to administer conjunctive use programs that provide for maximum use of California's limited surface water and groundwater supply.[4]

As noted earlier, the Tribe does not base its ownership claim of the aquifer's storage space on its federal reserved right in groundwater. Joint Report, at 5-6 (Doc. 120). The Tribe has not identified the source of its ownership claim, or indicated whether its claim is based on federal law or state law. No federal statutory law or federal common law addresses the ownership of the storage space of an aquifer, or provides that an overlying landowner owns the storage space of an underlying aquifer. Thus, the Tribe apparently bases its ownership claim on the

[4] The State of Arizona also recognizes that groundwater storage space is a public resource, even when such storage space exists beneath a tribal reservation. For example, to satisfy certain water rights laws and settlements, the Arizona Water Banking Authority ("AWBA") and the Gila River Indian Community ("Community") have entered into an agreement providing for, among other methods, the option of storing imported surface water beneath the Community's reservation that the Community may pump during times of insufficient surface water deliveries from the Central Arizona Project. SUF 23. To utilize this method, the Community is required to obtain an underground storage facility permit from the Arizona Department of Water Resources ("ADWR"), a state agency, while AWBA is required to obtain a water storage permit from ADWR. SUF 24. Thus, the State of Arizona exercises control of subsurface storage space beneath the Community's reservation.

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doctrine of cujus est solum, which as noted earlier is a common law doctrine that holds that a landowner owns everything "to the sky and the depths." *Causby*, 328 U.S. at 260-261; *see* page 4, *supra*. The cujus est solum doctrine, however, to the extent it exists, is a doctrine of state common law. Thus, to the extent the Tribe bases its ownership claim on the principle that it owns everything below the surface of its reservation, the Tribe appears to be asserting a claim based on state common law. As explained above, state common law rejects the cujus est solum doctrine as applied to groundwater, and instead holds that a groundwater basin is a public resource available to those who have rights to store and extract groundwater and is not "owned" by those who have such rights. *E.g., Central & West Basin*, 109 Cal.App.4th at 904. Thus, the Tribe appears to be asserting a claim based on state common law, but state common law rejects the claim.

D. Under the Principle of "Borrowing," This Court Should Adopt, as the Federal Rule, the State Common Law That Holds That a Groundwater Basin Is a "Public Resource."

The U.S. Supreme has held that federal law may adopt, or "borrow," state law for purposes of establishing a federal rule of decision, if there is no federal rule and state law does not conflict with federal law. *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 422, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). As the Supreme Court stated in *American Electric*:

> Recognition that a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the federal law. Absent a demonstrated need for a federal rule of decision, the Court has taken the prudent course of adopting the readymade body of state law as the federal rule of decision unless Congress strikes a different accommodation.

American Electric, 564 U.S. at 422 (citations and internal quote marks omitted).

This Court should take the "prudent course" of adopting, as the federal rule, the "readymade body" of the common law of California and other states that holds that a groundwater basin is a public resource available to those who have the right to store and extract groundwater, because there is no "demonstrated need" for a separate federal rule of decision. Congress has not adopted a federal rule that a groundwater basin is owned by those who have rights in groundwater. Thus, there is no conflict between federal law and state common law holding that a groundwater basin is a public resource. No federal interest supports the creation of a federal rule that conflicts with the state rule. Since no conflict exists and no federal interest supports a separate federal rule, this Court should adopt the state common law as the federal rule of decision.

E. The Unique Circumstances of the Tribe's Reservation Support the Conclusion That the Tribe Does Not Own the Storage Space of the Aquifer, and That This Court Should "Borrow" State Common Law Holding That a Groundwater Basin Is a Public Resource.

The unique circumstances of the Tribe's reservation further support the conclusion that the Tribe does not own the storage space of the aquifer, and that this Court should borrow the principle of state common law holding that a groundwater basin is a public resource.

The Tribe's reservation consists of a checkerboard pattern, in which the Tribe's lands are interspersed with non-tribal lands. SUF 3. Because of the checkerboard pattern, the aquifer underlying the Tribe's reservation also underlies the lands of other overlying landowners. SUF 4. Under California law, the other overlying landowners have correlative rights to use the groundwater as an incident of land ownership. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 891, 1240-1241 (2003). Thus, many overlying landowners, and not just the Tribe, have a lawful right to store and extract the groundwater. Under the Desert Water Agency

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Law, DWA also has the right to store and extract groundwater to meet the needs of its customers. Cal. Water Code App. §§ 100-1 *et seq*., *id*. at § 100-15 (¶¶ 5, 8, 17); SUF 5. (Notably, DWA's customers include the Tribe and many inhabitants on the Tribe's reservation. SUF 6.) Since many overlying landowners, as well as DWA, have the right to store and extract groundwater, the storage space of the aquifer is necessarily a public resource available to those who have such rights, and is not owned by or apportioned among those who have such rights. No person who has the right to store and extract groundwater can obtain compensation from any other person who has such rights. No principle of federal law suggests otherwise.

Because of the checkerboard pattern of the Tribe's reservation, it would be virtually impossible under the Tribe's ownership theory to determine which parts of the aquifer underlie the Tribe's reservation and are "owned" by the Tribe, and which parts underlie the lands of other overlying landowners and are a public resource under California law. And, since the groundwater in the aquifer is commingled, in that no physical barrier prevents migration of water stored in the tribal part of the aquifer to the non-tribal part of the aquifer, or *vice versa*, SUF 7, it would be absolutely impossible to determine which parts of the groundwater are stored in the tribally-"owned" portion of the aquifer and which parts are stored in the publicly-owned portion. The practical difficulties of administering a groundwater basin that is partly owned by the Tribe and partly owned by the public demonstrate the fallacy of the Tribe's ownership claim, and support the conclusion that this Court should borrow the principle of state common law holding that a groundwater basin is a public resource.

Taken to its logical extreme, the Tribe's argument that it owns the storage space of the aquifer where its federally reserved water is stored would mean that the Tribe would be required to pay compensation to the Southern Pacific Railroad Company (SPRR) and its successors, to the extent that the Tribe's federally reserved water migrates to the storage space underlying the lands of SPRR and its

successors. SPRR acquired ownership of the odd-numbered sections of the checkerboard under an 1866 congressional statute, Act of July 27, 1866, 14 Stat. 292, at 294, 299, which was prior to the 1870s executive orders that created the Tribe's reservation on the even-numbered sections. A federal reserved water right has priority over subsequently-acquired water rights but is subordinate to earlier-created rights. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (a federal reserved right "vests on the date of the reservation and is superior to the rights of future appropriators"). Since SPRR's rights were acquired before the Tribe acquired its rights, SPRR's rights are senior to the Tribe's rights, and thus the Tribe would be required under its own theory to compensate SPRR and its successors for allowing the Tribe's federally reserved water to migrate into their storage space. This further demonstrates the flaw in the Tribe's theory that an overlying landowner, such as the Tribe, must be compensated when others use the storage space of the underlying aquifer.[5]

F. The Cases Cited by the Tribe Do Not Support Its Claimed Ownership of the Storage Space of the Aquifer.

The Tribe asserts that its claimed ownership of the storage space of the aquifer is supported by the decisions in *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115, 58 S.Ct. 794, 82 L.Ed. 1213 (1938), *United States v. 43.42 Acres of Land*, 520 F.Supp. 1032 (W.D. La. 1981), and *Starrh and Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal.App.4th 583, 592 (2007). Joint Report (Doc. 192), at 3. In fact, none of the cited decisions supports the Tribe's ownership argument.

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[5] The Department of the Interior ("Interior"), through the Bureau of Land Management, has issued rights-of-way permits to CVWD to construct, operate and maintain water spreading facilities on federal property overlying the groundwater basin in order to recharge the basin. SUF 25. Interior and CVWD have reached an agreement authorizing CVWD to "spread … imported Colorado River Water for percolation and to provide stormwater protection." SUF 26.

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1. The Cases Cited by the Tribe Are Inapposite Because They Apply to Minerals, Which Are Governed by Different Laws Than Apply to Groundwater.

The cases cited by the Tribe are inapposite because they do not apply to groundwater and instead apply to minerals, which are governed by entirely different laws than apply to groundwater. Minerals are considered part of the mineral estate, and consist of minerals located above or beneath the ground such as metals (*e.g.*, gold, silver, copper), oil and gas, coal, stone, salt and like minerals. S. Harrison, *Disposition of the Mineral Estate on United States Public Lands: A Historical Perspective*, 10 Pub. Land. L. Rev. 131, 132-133 (1989). *Shoshone Tribe* involved timber and minerals such as gold, oil, coal and gypsum, 304 U.S. at 113-114; *43.42 Acres* involved salt, 520 F.Supp. at 1045-1046; and *Starrh* involved migration of wastewater produced by production of oil, 153 Cal.App.4th at 588. None of the cases cited by the Tribe involved groundwater.

Although state laws applicable to the mineral estate vary from state to state, such state laws are fundamentally different from state laws applicable to groundwater. Most state laws regulating the mineral estate were originally based on the cujus est solum doctrine, described earlier, which holds that the landowner owns everything "to the sky and to the depths." *See* page 4, *supra*. As noted earlier, however, the Supreme Court and other courts have held that the cujust est solum doctrine "has no place in the modern world." *Causby*, 328 U.S. at 260-261; *Sportsmen's Ranch*, 45 P.2d at 701; *see* pages 4-7, *supra.* Under the modern common law of most states, the surface property owner owns the subsurface pore space that holds the mineral estate, unless the mineral estate has been severed from the surface estate, in which case the mineral estate is the "dominant" estate and the holder of the mineral estate has the right to use surface lands as reasonably necessary to operations relating to the mineral estate. *E.g., Mosser v. Denbury Resources, Inc.*, 112 F.Supp.3d 906, 919 (D. N.D. 2015); *Phillips Petroleum Co. v.*

Cowden, 241 F.2d 586, 590 (5th Cir. 1957); *Entek GRB v. Stull Ranches, LLC*, 885 F.Supp.2d 1082, 1088 (D. Colo. 2012); *Scranton Coal Co. v. Graff Furnace Co*., 289 F. 305, 307-398 (3d Cir. 1923).

The mineral estate does not include groundwater, and groundwater is regulated by entirely different laws than apply to the mineral estate. Under California's law of groundwater, as noted earlier, an overlying landowner has a correlative right to use groundwater underlying his land as an incident of land ownership, and all overlying landowners share equally in times of shortage, *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1242 (2000); the overlying landowners' rights are usufructuary and subject to reasonable use restrictions, but do not include ownership of groundwater, *id.*; and the groundwater basin itself is a "public resource" available to those who have rights to store and extract groundwater. *Central & West Basin*, 109 Cal.App.4th at 904; *see Sportsmen's Ranch*, 45 P.3d at 700-701; *Chance*, 670 N.E.2d at 991-992. These principles of state common law apply to groundwater but not to the mineral estate.

In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), the Supreme Court squarely held that groundwater is not considered a mineral under the Mining Act of 1872, 17 Stat. 91, which is the basic federal law that regulates mining of minerals, and that the laws regulating groundwater are entirely different from the laws regulating minerals. *Andrus*, 436 U.S. at 614-615. The Court stated that although water is a mineral "in the broadest sense of that word" as used in federal mining law, "the notion that water is a 'valuable mineral' under that law is simply untenable." *Id.* at 614. The Court stated that Congress has "affirmed the view that private water rights on federal lands were to be governed by state and local law and custom," and that "[i]t defies common sense to assume that Congress, when it adopted this policy, meant at the same time to establish a parallel federal system for acquiring private water rights, and that it did so *sub silentio* through laws designated to regulate mining." *Id.* The Court stated that its decision was

reinforced by "practical consequences," in that otherwise there would be "two overlapping systems for acquisition of private water rights," one system based on the "appropriation doctrine prevailing in most of the Western states," and "an entirely different theory" as applied to minerals. *Id.* at 615. *Andrus* plainly demonstrates that the laws regulating groundwater and minerals are entirely different, and that the laws regulating minerals do not apply to groundwater. Since the cases cited by the Tribe apply to minerals and not to groundwater, they are inapposite here.

2. *Shoshone Tribe* Is Also Inapposite Because It Is Based on an 1868 Treaty That Does Not Apply Here.

Shoshone Tribe is inapposite for the additional reason that it interpreted an Indian tribe's rights under a treaty that is inapplicable here. There, the Supreme Court held that an 1868 treaty between the United States and the Shoshone Tribe reserved a large swath of lands (more than 3 million acres) in several states (Colorado, Utah, Idaho and Wyoming) for the tribe's sole occupancy and use. *Shoshone Tribe*, 304 U.S. at 113. The treaty provided that the tribe shall have the "absolute and undisturbed use and occupation" of the reserved lands, and that "no persons . . . shall ever be permitted to pass over, settle upon, or reside in" that territory. *Id.* The Supreme Court held that the treaty granted to the tribe the right to mineral and timber resources that were "constituent elements of the land itself," and that "[f]or all practical purposes, the tribe owned the land." *Id.* at 116. The Court concluded that the tribe was entitled to compensation from non-Indians who acquired rights to use the mineral and timber resources. *Id.* at 115.

The 1868 treaty does not apply here, even by analogy. Since the 1868 treaty reserved a large swath of lands in several states for the tribe's sole occupancy and use, it was reasonable to conclude that the treaty granted to the tribe ownership of the mineral and timber resources on the reservation. Here, by contrast, the 1870s

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executive orders that created the Tribe's reservation created a checkerboard reservation, in which the Tribe's lands are interspersed with non-tribal lands. SUF 3. Most of the lands on the Tribe's portion of the checkerboard (57.6%) have been allotted to Indians, SUF 8, who have in many cases sold or leased their lands to non-Indians for commercial or residential purposes, such as to operate hotels, restaurants and golf courses. SUF 9. The lands on the non-tribal portions of the checkerboard are owned by non-Indian overlying landowners, who have correlative rights under California law to store and extract groundwater. *Barstow*, 23 Cal.4th at 1240-1241. Thus, the checkerboard consists of a mixture of tribal and non-tribal lands that share the same groundwater resource. This case is vastly different from *Shoshone Tribe*, where the treaty granted to the Shoshone Tribe sole occupancy and use of a large swath of lands in several states and precluded anyone from being permitted to "pass over, settle upon, or reside" on the lands. *Shoshone Tribe* provides no support for the Tribe's ownership claim.

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3. *43.42 Acres* and *Starrh* Contradict Rather Than Support the Tribe's Ownership Claim Because They Are Expressly Based on State Law.

The *43.42 Acres* and *Starrh* decisions do not support and instead contradict the Tribe's ownership claim, because the decisions were expressly based on state law rather than federal law. In *43.42 Acres*, the federal district court expressly applied Louisiana law in holding that the value of the pore space created by removal of subsurface minerals belonged to the overlying landowner and not the holder of the mineral estate. *43.42 Acres*, 520 F.Supp. at 1045-1046. In *Starrh*, the California Court of Appeal expressly applied California law in holding that a landowner could maintain a trespass action against an oil company that had caused migration of wastewater into the landowner's mineral estate. *Starrh*, 153

Cal.App.4th at 592. Thus, both decisions were based on state law rather than federal law.

As noted earlier, state common law holds that a groundwater basin is a public resource available to those who have the right to store and extract groundwater. *Central & West Basin*, 109 Cal.App.4th at 904; *Sportsmen's Ranch*, 45 P.3d at 700-701; *Chance*, 670 N.E.2d at 991-992; *see* pages 4-9, *supra*. Since *43.42 Acres* and *Starrh* are expressly based on state law and state law holds that a groundwater basin is a public resource, *43.42 Acres* and *Starrh* demonstrate that the storage space of the aquifer in the instant case is a public resource and is not owned by the Tribe. The Tribe cannot have it both ways, arguing that *43.42 Acres* and *Starrh* support the Tribe's ownership claim under state law but that state law holding that groundwater is a public resource does not apply to the Tribe's claim. The *43.42 Acres* and *Starrh* decisions provide no support for the Tribe's ownership claim.

II. THE TRIBE'S RESERVED RIGHT DOES NOT INCLUDE A WATER QUALITY COMPONENT.

The Tribe alleges that its reserved right in groundwater includes a water quality component, and that the Water Agencies, by importing Colorado River water into the groundwater basin to recharge the basin, are violating the water quality component because the imported water contains higher levels of total dissolved solids ("TDS") than the native groundwater. Tribe's Complaint, at 13 (¶ 47), 19 (¶ 5) (Doc. 1).

Contrary to the Tribe's argument, a federal reserved right consists of the right to use water of a certain *quantity* but does not include the right to use water of a certain *quality*. The Supreme Court has applied the reserved rights doctrine only as a basis for ensuring that a federal reservation has a right to water of a certain quantity but not of a certain quality. *Cappaert v. United States*, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-doctrine … reserves only that *amount* of

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water necessary to fulfill the purpose of the reservation, no more.") (emphasis added); *United States v. New Mexico*, 438 U.S. 696, 705 ("[T]he question posed in this case [is] what quantity of water, if any, the United States reserved."); *Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) (determining "the quantity of water intended to be reserved" for the Colorado River Indian tribes). In *Arizona*, the Supreme Court held that reserved rights for Indian reservations created for agricultural purposes are measured by the *amount* of water necessary to irrigate the "practically irrigable acreage" of the reservation. *Arizona,* 373 U.S. at 600.

Similarly, the Ninth Circuit has held that a reserved water right consists of the right to use water of a certain quantity, but has not held or suggested that the right extends to water of a certain quality. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) ("[T]he more difficult question concerns the amount of water reserved."); *United States v. Adair*, 723 F.2d 1394, (9th Cir. 1983) ("[T]he Government and the Tribe intended to reserve a quantity of water flowing through the reservation."); *John v. United States*, 720 F.3d 1214, 1226 (9th Cir. 2013) ("[A]pplications of the federal reserved water rights doctrine have focused on the amount of water needed for a specific federal reservation ...."); *Sturgeon v. Frost*, __ F.3d __, 2017 WL 4341742, *8 (9th Cir. Oct. 2, 2017) (majority opinion) ("A reserved water right is the right to a sufficient *volume* of water for use in an appropriate federal purpose.") (original emphasis)).

The Federal Circuit has held that the federal government, in reserving water rights for Indian tribes, does not have a fiduciary duty to ensure "adequate water quality" for the tribes' reservations. *Hopi Tribe v. United States*, 782 F.3d 662, 668-669 (Fed. Cir. 2015). The Federal Circuit's decision indicates that the 1870s presidential executive orders that created the Tribe's reservation did not include a water quality component as part of the Tribe's reserved right in groundwater.

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Even if *arguendo* the Tribe has a reserved right to water of a certain quality, the Tribe's right applies only to the extent that a particular level of water quality is necessary to accomplish the primary purposes of its reservation. A reserved right consists of the right to use water "necessary" to accomplish primary reservation purposes. *New Mexico*, 438 U.S. at 702. Thus, if a particular level of water quality is not necessary to accomplish the primary reservation purposes, a reserved right does not include a water quality component. In cases where the courts have held that Indian tribes have rights to water of a certain quality, such as rights established in consent decrees, the courts have upheld the tribes' right to water quality only where lack of water quality was impairing reservation purposes. *United States v. Gila Valley Irrigation Dist.*, 920 F.Supp. 1444, 1454 (D. Ariz. 1996) (Indian tribe has right to water of minimum salt levels under a consent decree because of "unlikelihood of successful commercial cultivation of salt-sensitive and moderately salt-sensitive crops using Gila River water at its current levels of quality"); *Hopi Tribe*, 782 F.3d at 669 (citing *Gila Valley*); *United States v. Anderson*, 591 F.Supp. 1, 5 (E.D. Wash. 1982) (Indian tribe has right to water of certain temperature because "[t]he quantity of water needed to carry out the reserved fishing purposes is related to water temperature …").

Here, the Tribe has not alleged that the Water Agencies' importation of allegedly lower quality Colorado River water is impairing the primary purposes of the Tribe's reservation, or is having any other adverse effects on the Tribe's rights. The Tribe has alleged only that the imported water contains "higher levels" of TDS than the native groundwater, which has resulted in "further degradation of groundwater quality." Tribe's Complaint, at 13 ¶ 47 (Doc. 1). The Tribe has not alleged, however, that the allegedly higher TDS levels are impairing the primary purposes of the Tribe's reservation, or impairing the Tribe's water rights in any concrete way, or exceeding water quality standards established under federal or

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state water quality laws, such as the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq*., or California's Porter-Cologne Act, Cal. Water Code §§ 13000 *et seq*. It is wholly immaterial whether the imported water contains higher TDS levels than the native groundwater unless the higher TDS levels have these kinds of adverse effects on the Tribe's actual right to use water, and the Tribe has made no allegation that the higher TDS levels are having such adverse effects. Indeed, it would be difficult for the Tribe to make any such allegation, because (1) the imported water is commingled with native groundwater, and thus the higher TDS levels of the imported water are diluted in the groundwater that is extracted, SUF 27, and (2) the Tribe does not make any current use of groundwater, because it does not pump or attempt to pump groundwater and instead purchases water from the Water Agencies. SUF 21.[6]

The Tribe does not have Article III standing to maintain its water quality claim unless it alleges and can demonstrate that the Water Agencies' importation of water "causes" the Tribe to suffer a "concrete and particularized" injury that will be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Since the Tribe has not alleged that the higher TDS levels of the imported water are adversely affecting the purposes of the Tribe's reservation or otherwise adversely affecting its water rights in any concrete way, the Tribe has failed to make the necessary allegations to establish that it has Article III standing to pursue its water quality claim. Thus, the Tribe's water quality claim should be dismissed for lack of Article III standing.

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[6] DWA contends that the Water Agencies' importation of water does not violate any alleged water quality component or impair the Tribe's primary reservation purposes, because the imported water meets federal and state water quality standards established in various federal and state water quality laws, and further that the imported water in some respects improves rather than degrades the quality of groundwater. These issues will be addressed in Phase 3.

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Finally, the Tribe has remedies under California law to prevent the Water Agencies from importing lesser quality water that would cause harm to the Tribe's water rights. Under California's law of nuisance, a property owner has the right to obtain injunctive relief and damages against anyone who interferes with the "use and enjoyment" of the property, if the interference is "unreasonable" and "substantial." Cal. Civ. Code §§ 3479, 3480; *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal.4th 893, 937-938, 920 P.2d 669 (1996). Thus, if the Water Agencies are causing "unreasonable" and "substantial" harm to the Tribe's enjoyment of its property by importing lower quality water, the Tribe has remedies under California's nuisance law to obtain injunctive relief and damages. Even apart from California's nuisance law, a water user has the right to obtain injunctive relief and damages against any person who causes harm to the user's water rights. *Tulare Irrigation Dist v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal.2d 489, 533-535 (1935); *Pasadena v. Alhambra*, 33 Cal.2d 908, 930-931 (1949). Thus, the Tribe has this additional remedy under California law if the Water Agencies are causing harm to the Tribe's water rights by importing lower quality water. In *New Mexico*, the Supreme Court held that a reserved water right applies only to the extent "necessary" to fulfill the primary reservation purposes. *New Mexico*, 438 U.S. at 702. Since California law provides remedies to protect the Tribe's rights in groundwater, the Tribe's claimed reserved right to water of a certain quality is not "necessary" to protect primary reservation purposes and thus does not impliedly exist under *New Mexico*.[7]

In sum, this Court should dismiss the Tribe's water quality claim on grounds that (1) the Tribe's reserved right does not include a water quality component, (2)

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[7] As noted earlier, the Department of the Interior has authorized CVWD to spread imported Colorado River water into the groundwater basin in order to recharge the basin. See note 5, *supra*.

even if the Tribe's reserved right includes a water quality component, the Tribe has not alleged that the Water Agencies' importation of water impairs the primary reservation purposes, (3) the Tribe lacks Article III standing to make its claim, and (4) the Tribe has remedies under California law to prevent groundwater degradation that causes harm to its rights.

III. THE STANDARD FOR QUANTIFYING THE TRIBE'S RESERVED RIGHT IN GROUNDWATER IS THAT NECESSARY TO ESTABLISH A "HOMELAND" FOR THE TRIBE, WHICH REQUIRES CONSIDERATION OF SEVERAL FACTORS RELATING TO THE TRIBE'S MODERN NEEDS.

A. A "Homeland" Standard, and Not the "Practicably Irrigable Acreage" Standard, Applies in Quantifying the Tribe's Reserved Right in Groundwater.

A reserved water right includes only the amount of water necessary to fulfill the primary reservation purposes. *New Mexico*, 438 U.S. at 702. Thus, the standard for quantifying the Tribe's reserved right in groundwater is the amount of groundwater necessary to fulfill the primary purposes of the Tribe's reservation. The Ninth Circuit in the instant case identified the primary purposes of the Tribe's reservation as the need to "establish a home" and provide support for an "agrarian society" for the Tribe. *Agua Caliente Band v. Coachella Valley Water Dist., et al.*, 849 F.3d 1262, 1270 (9th Cir. 2017).[8]

The Supreme Court has held that the standard for quantifying water rights for Indian reservations is the amount of water necessary to "make the reservation livable" and to "satisfy the future as well as the present needs of Indian Reservations," and that—at least as applied to Indian reservations created primarily

[8] The Smiley Report, which was prepared by a commission established by the Secretary of the Interior to investigate the needs of the Mission Indians of California, concluded that the Agua Caliente Indians used water from Whitewater River tributaries for "irrigation" and "domestic use." Smiley Rep., at 32, 33 (Doc. 84-6); SUF 14.

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for agricultural purposes—this amount is that necessary to irrigate the "practicably irrigable acreage" ("PIA") of the reservation. *Arizona v. California*, 373 U.S. 546, 600 (1963). Similarly, the Ninth Circuit has held that the purpose of Indian reservations is to establish a "home" for the Indians, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981), and that, under *Arizona*, the PIA standard applies in quantifying reserved rights for Indian reservations created primarily for agricultural purposes. *Id*. at 48. The Ninth Circuit in *Walton* also held that consideration must be given to the Indians' "need to maintain themselves under changed circumstances." *Id.* at 47. In an analogous case, the Supreme Court interpreted a treaty allocating fishing rights as reserving sufficient water for Indians to provide them with a "livelihood—that is to say, a moderate living." *Washington v. Washington State Fishing Fishing Vessel Ass'n*, 443 U.S. 658, 686, 199 S.Ct. 3055, 61 L.Ed.2d 823 (1979).[9]

Although the PIA standard generally applies in quantifying reserved rights for Indian reservations created primarily for agricultural purposes, the PIA standard is anachronistic as applied in quantifying the Tribe's reserved right in groundwater, because the Tribe no longer uses water for agricultural purposes to any significant degree, if at all. SUF 18. The fact that the Tribe no longer uses water for agricultural purposes distinguishes this case from the Supreme Court's and Ninth Circuit's decisions in *Arizona* and *Walton*, respectively, because the Indian tribes in those cases—the Colorado River Indian Tribes in *Arizona* and the Colville Tribe in *Walton*—were not only historically using water for agricultural purposes but were

[9] In *United States v. Adair*, 723 F.2d 1394, 1409-1410 (9th Cir. 1983), the Ninth Circuit held that a reserved right for an Indian reservation created primarily for fishing and hunting purposes includes sufficient water for fishing and hunting. In this case, the Tribe's reserved right does not include water for fishing and hunting, because the Tribe's reservation was not primarily created for such purposes and the Tribe does not currently use water for such purposes.

continuing to use water for such purposes when their reserved rights were quantified. Thus, the PIA standard was not anachronistic as applied to the Indian tribes in those cases. The PIA standard is anachronistic as applied to the Tribe here, however, because there is no reasonable nexus between the Tribe's modern reservation needs—which are non-agricultural—and the amount of practicably irrigable acreage on its reservation. In *Walton*, the Ninth Circuit held that the standard for quantifying Indian reserved rights must take into account any "changed circumstances" of the Indian tribe's reservation, *Walton*, 647 F.2d at 47, and the "changed circumstances" of the Tribe's reservation are that the Tribe no longer uses water for agricultural purposes. Since the PIA standard is anachronistic as applied to the Tribe's reserved right in groundwater, the PIA standard does not apply in quantifying the Tribe's right.

The proper standard for quantifying the Tribe's reserved right in groundwater is not the PIA standard, but instead is the amount of groundwater necessary to meet the Tribe's modern needs under the "changed circumstances" of its reservation. *Walton*, 647 F.2d at 47. In determining the Tribe's modern needs under changed circumstances, consideration should be given not to the amount of groundwater necessary for agricultural purposes but instead the amount of groundwater necessary to establish a "home" for the Tribe, *Agua Caliente Band*, 849 F.3d at 1270; *Walton*, 647 F.2d 47, to make the reservation "livable," *Arizona*, 373 U.S. at 600, and to enable its members to enjoy a "moderate living," *Washington Fishing Vessel*, 443 U.S. at 686. DWA will refer to this standard as the "homeland" standard. In short, the homeland standard applies in quantifying the Tribe's reserved right in groundwater. As we will now explain, the homeland standard requires consideration of several factors relating to the Tribe's modern needs.

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B. The "Homeland" Standard Requires Consideration of Several Factors Relating to the Unique Circumstances of the Tribe and Its Checkerboard Reservation, Because These Factors Directly Relate to the Tribe's Modern Needs.

The homeland standard requires consideration of several factors relating to the unique circumstances of the Tribe and its checkerboard reservation, because these factors directly relate to the Tribe's modern needs. Since these factors must be considered in applying the homeland standard, these factors are part of the homeland standard itself that applies in quantifying the Tribe's reserved right in groundwater.

1. The Tribe Has a Relatively Small Membership.

The most significant factor in quantifying the Tribe's reserved right in groundwater is that the Tribe has a relatively small membership. The Tribe had only about 70 members when its reservation was created. Smiley Rep. 31 (Doc. 84-6); SUF 13. Thus, when the Tribe's reservation was created, it was contemplated that a very small amount of water would be necessary for its reservation needs. Even today, the Tribe has a very small membership, consisting of only 440 members. Tribe Response to DWA's Interrogatory No. 17 (Doc. 84-4); SUF 20. Since the Tribe has a relatively small membership, a relatively small amount of groundwater is necessary to make the reservation "livable," *Arizona*, 373 U.S. at 600, and to provide the Tribe's members with a "moderate living." *Washington Fishing Vessel*, 443 U.S. at 686. The Tribe's small membership greatly limits the amount of groundwater necessary to meet the Tribe's modern needs.

The fact that the Tribe has a relatively small membership also further demonstrates that the PIA standard does not properly apply in quantifying the Tribe's reserved right in groundwater, because there is no reasonable nexus

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between the modern needs of the Tribe's relatively small membership and the large amount of potentially irrigable acreage on the Tribe's large reservation, a reservation that according to the Tribe includes more than 31,396 acres. Tribe's Complaint, at 3 (Doc. 1).

2. The Tribe's Reserved Right Is Limited By the Need to Maintain the Safe Yield of the Groundwater Basin.

Another factor that applies in quantifying the Tribe's reserved right is the need to maintain the "safe yield" of the groundwater basin, which is the amount of groundwater that must be left in the basin in order to prevent depletion of the groundwater resource, taking into account the natural conditions affecting recharge of the basin, such as rainfall. *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 929, 207 P.2d 17 (1949) (limiting rights of all groundwater pumpers based on need to preserve "safe yield" of basin to prevent "depletion" of groundwater). Thus, the Tribe's reserved right does not include the right to extract more groundwater from the basin than is necessary to maintain the "safe yield" of the basin. Otherwise, the Tribe would have the right to extract such a large amount of groundwater as to cause depletion, or even destruction, of the groundwater resource. A reserved right does not include the right to deplete or destroy the water resource that is the source of the right.

3. The Tribe Has a Correlative Right to Use Groundwater Under California Law to Meet Its Reservation Needs.

Under California law, all overlying landowners have correlative rights to use groundwater underlying their lands. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1241 (2000). The Tribe, as an overlying landowner of its reservation, has a correlative right to use groundwater under California law, and has the same right as other overlying landowners.

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In *United States v. New Mexico*, 438 U.S. 696, 702 (1978), the Supreme Court held that a reserved right includes only the amount of water "necessary" to satisfy primary reservation purposes. Under *New Mexico*'s "necessary" standard, the Tribe's reserved right in groundwater includes only that amount of groundwater necessary to meet the Tribe's homeland needs that is over and above the amount of groundwater that the Tribe has under its correlative right, because only that amount of groundwater is "necessary" to satisfy the Tribe's homeland purposes under *New Mexico*. Therefore, whatever the amount of groundwater the Tribe otherwise has under its reserved right, that amount should be reduced by the amount of groundwater available to the Tribe under its correlative right.

4. The Tribe Has a Decreed Water Right to Use Whitewater River Surface Water For Its Reservation Needs.

The Arizona Supreme Court has held that "[a] reserved right in groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *In re General Adjudication of All Water Rights in Gila River and Source*, 989 P.2d 739, 748 (Ariz. 1999). Under *Gila River*, if other waters are available for the Tribe's reservation needs, the Tribe's reserved right in groundwater should be reduced to that extent.

The Tribe has other sources of water available for its reservation needs. Specifically, the Tribe has a decreed right to use surface water from two Whitewater River tributaries, the Andreas and Tahquitz Creeks, based on the Whitewater River Decree of 1938. Decree, at 65-66 (Doc. 84-5); SUF 15. The Decree awarded to the United States the right to divert a specific quantity of water from these two creeks for "beneficial use" on the Tribe's reservation, which was defined as "domestic, stock watering, power development and irrigation purposes." *Id.*; SUF 16.[10] The amount of water that the Decree awarded to the United States

[10] Specifically, the United States was authorized to divert for beneficial use on the Tribe's reservation 6.00 cubic feet per second (cfs) from Andreas Creek, with a

for use on the Tribe's reservation is precisely the amount of water that the United States had "suggested" as necessary to meet the Tribe's reservation needs. United States' "Suggestion," at 12-17 (Doc. 84-7); SUF 17.

Under *New Mexico*'s "necessary" standard, the amount of groundwater otherwise included in the Tribe's reserved right should be reduced by the amount of Whitewater River surface water included in the Tribe's decreed right, because only that amount of groundwater is "necessary" to fulfill the primary purposes of the Tribe's reservation. Otherwise, the Tribe would have a double water right to meet the same reservation needs, consisting of both a reserved right in groundwater and a decreed right in surface water. The purpose of the *Winters* doctrine is to provide Indian tribes with sufficient water to meet their primary reservation needs, not to provide them with more water than is necessary for such needs, particularly in light of the impacts on other users of groundwater.

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5. The Tribe Does Not Pump, or Attempt to Pump, Groundwater, and Instead Purchases Water From the Water Agencies.

The Tribe does not currently pump groundwater underlying its reservation, or attempt to do so. SUF 21. Instead, the Tribe purchases water from DWA and CVWD. SUF 22. Thus, the Tribe does not currently rely on its pumping of groundwater to support its reservation needs, and the needs of the Tribe's members are not dependent on the Tribe's pumping of groundwater. The Tribe's members will have the same "moderate living" standard, *Washington Fishing Vessel*, 443 U.S. at 686, regardless of whether the Tribe pumps groundwater. The fact that the Tribe makes no effort to pump groundwater further limits the quantity of groundwater encompassed in the Tribe's reserved right. The Tribe's failure to pump or attempt to pump groundwater also demonstrates that the Water Agencies

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priority of January 1, 1895, and 4.80 cfs from Tahquitz Creek, with a priority of April 25, 1884. Decree, at 65-66 (Doc. 84-5); SUF 16.

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have not "caused" the Tribe to suffer a "concrete and particularized" injury that would be "redressed" by a favorable decision, and thus that the Tribe lacks Article III standing to pursue its claim against the Water Agencies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

6. The Tribe's Reservation Consists of a Checkerboard Pattern, in Which Tribal Lands Are Interspersed With Non-Tribal Lands.

The Tribe's reservation, unlike most Indian reservations, consists of a checkerboard pattern, in which the Tribe's lands are interspersed with non-tribal lands on a section-by-section basis. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 184, 1185 (9th Cir. 1971); SUF 3. Thus, the groundwater underlying the Tribe's lands also underlies non-tribal lands, and the Tribe's economic interests are interrelated with the economic interests of the surrounding non-tribal areas. Because of the checkerboard pattern, groundwater pumping by the Tribe will have an impact on other pumpers of groundwater on immediately adjacent lands. The interrelationship of tribal and non-tribal economic interests and the impacts on non-tribal pumpers of groundwater should be considered in quantifying the Tribe's reserved right in groundwater.

7. Most of the Tribe's Reservation Lands Are Allotted, and the Allotted Lands Are Used for Commercial Purposes Unrelated to the Tribal Members' Need For a "Moderate Living."

Most of the Tribe's reservation lands (57.6%) have been allotted to members of Tribe. SUF 8. Only a relatively small percentage of the reservation lands (12.7%) are unallotted tribal trust lands, SUF 19, and only a very small percentage (.4%) are tribal fee lands. SUF 19. Many of the Indian allottees have leased or sold their allotted lands to non-Indians for commercial or residential purposes, such as to operate hotels, restaurants and golf courses. SUF 9. The operation of such

commercial establishments for non-Indian patrons and guests is not related to the Tribe's modern homeland needs. The Tribe's homeland needs relates to the need of the Tribe's members to have a "moderate living," *Washington Fishing Vessel*, 443 U.S. at 686, and not to the needs of commercial establishments operated and supported by thousands of non-Indian lessees and guests.

8. A Significant Portion of the Tribe's Reservation Lands Are Owned in Fee by Non-Indians.

A significant portion of the Tribe's reservation lands (29.4%) consists of lands owned in fee by non-Indians. SUF 19. The Tribe's homeland needs do not include the needs of non-Indian owners of fee lands.

9. The Tribe's Rights in Groundwater Are Junior in Priority to the Railroad Company's Rights.

As noted earlier, the Tribe's reserved right in groundwater is junior in priority to the rights of the Southern Pacific Railroad Company (SPRR) and its successors, because SPRR acquired its rights in the odd-numbered sections of the checkerboard before the Tribe acquired its reserved right in the even-numbered sections. *See* pages 11-12, *supra*. The fact that the Tribe's rights are junior in priority to the rights of SPRR and its successors relates more to the priority than the quantity of the Tribe's reserved right, but the priority of SPRR and its successors is relevant in determining the circumstances under which the Tribe can pump groundwater as part of its reserved right.

C. Other Factors Apply in Quantifying All Federal Reserved Water Rights, and These Factors Apply in Quantifying the Tribe's Reserved Right in Groundwater.

Apart from the unique circumstances of the Tribe's checkerboard reservation described above, other factors also apply in quantifying federal reserved water rights, including reserved rights for Indian reservations, and these other factors apply in quantifying the Tribe's reserved right in groundwater.

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1. A Major Factor That Applies in Quantifying Reserved Water Rights Is the Impact on Other Water Users and Congress' Deference to State Water Law.

First, and most importantly, the Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978), held that in quantifying reserved water rights, consideration must be given to the impact of such rights on other users of water and Congress' policy of deference to state water law. The Court stated that "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 "*[t]his reality … must be weighed in determining what, if any, water Congress reserved for use* …." *Id.* at 705 (emphasis added); accord, *Arizona v. California*, 460 U.S. 605, 621, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).[11]

The *New Mexico* Court stated that it has upheld reserved rights only after it has "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700 & n. 4, This "careful examination" is required, the Court stated, "both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701-702.

Even the *New Mexico* dissenting opinion agreed that the reserved rights doctrine "should be applied with sensitivity to its impact upon those who have

[11] The Court's statement in *New Mexico* that these impacts must be "weighed" in determining "what, if any, water" is reserved modifies the Court's earlier statement in *Cappaert* that the reserved rights doctrine does not call for a "balancing of competing interests." *Cappaert*, 426 U.S. at 138-139.

obtained water rights under state law and to Congress' general policy of deference to state water law." *Id*. at 718 (Powell, J., dissenting).[12]

Thus, the quantification of the Tribe's reserved right in groundwater requires consideration of the impacts of the Tribe's reserved right on the rights of other users of groundwater and on Congress' deference to state water law.

2. A Reserved Water Right Includes Only the "Minimal" Amount of Water Necessary to Fulfill the Primary Reservation Purposes.

In *Cappaert*, the Supreme Court held that the reserved rights doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more," and that the district court had "very appropriately" tailored its injunction to the "minimal need" of the reserved lands. *Cappaert,* 426 U.S. at 141; *see New Mexico*, 438 U.S. at 700 n. 4 (stating that *Cappaert* had held that district court appropriately tailored its injunction to "minimal need" of reservation). Therefore, the Tribe is entitled only to the minimal amount of groundwater necessary to fulfill the Tribe's primary reservation purposes, "no more."

[12] The principles established in *New Mexico* apply to lands reserved for Indian purposes. *New Mexico*, 438 U.S. at 700 & n. 4 (stating that Supreme Court had applied principles in upholding Indian reserved rights in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1909), and *Arizona v. California*, 373 U.S. 546 (1963)); *Walton*, 647 F.2d at 47 (describing *New Mexico*'s distinction between primary and secondary reservation purposes, and stating "[w]e apply the New Mexico test here"); *Adair*, 723 F.2d at 1408-1409 (same).

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CONCLUSION

This Court should grant Desert Water Agency's motion for summary judgment.

Respectfully submitted,

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