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6 MORONGO BAND OF MISSION INDIANS

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9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 In Re Matter of License No. 659,
11 Morongo Band of Mission Indians

TESTIMONY OF
BARBARA KARSHMER

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14 1. I am an attorney licensed to practice law in the State of California and before all
15 the federal courts in California, as well as before the United States Supreme Court. I graduated
16 from UCLA School of Law in 1973 and have specialized in Federal Indian Law since 1975. I
17 have represented the Morongo Band of Mission Indians (hereinafter "Morongo Band" or "Tribe")
18 since the late 1970's and through my law firm became their General Legal Counsel in the early
19 1980's. I served as the Tribe's General Legal Counsel until the end of 2010 when I became semi-
20 retired.

21 2. The Morongo Band is a sovereign Indian nation. California state civil regulatory
22 laws do not apply on the Morongo Indian Reservation. (See *California v. Cabazon and Morongo*
23 *Bands of Mission Indians* (1987) 480 U.S. 202.

24 3. Notwithstanding the State Water Resources Control Board's (hereinafter
25 "SWRCB") lack of jurisdiction on the Reservation, the Tribe has been attempting to work with
26 the SWRCB on various state Licenses and to work with neighboring local governments on
27 regional water planning issues to insure that there will be water available to meet the Tribe's
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1 long-term municipal water supply requirements for those residing and doing business on the
2 Morongo Indian Reservation.

3 4. Through the more than thirty (30) years during which I have been representing the
4 Morongo Band, I have observed that protecting its Reservation land and water rights always been
5 the highest priority of the Tribe. The Tribe has always taken measures to protect its land and
6 water rights, including the water rights at issue in this proceeding.

7 5. About twenty years ago, the Tribe determined that it was not in its best interests to
8 continue to grant rights of way for pipelines and other conveyance facilities that have utilized the
9 Tribe's most valuable lands to primarily serve other residents of Southern California, not the
10 Tribe. The Tribe decided that these lands were best used for economic and other development to
11 sustain the Tribe and its members in the long term.

12 6. Around that same time, the Tribe also began to purchase fee lands within the
13 exterior boundaries of and adjacent to their Reservation because it was finally in an economic
14 position to do so. The title to these lands has all been transferred to the United States to be held
15 in the name of the United States in trust for the Morongo Band of Mission Indians, as title to land
16 is normally held within all Indian reservations. The Tribe uses, administers, and governs the land
17 and water rights on a day-to-day basis.

18 7. In Millard Canyon alone, the Tribe purchased more than 1800 acres of land and
19 appurtenant water rights as it has become available. Title to that land is now held in the name of
20 the United States in trust for the Morongo Band. This included the land sometimes referred to as
21 the "Ahadpour property," the Wildbear Ranch, land from Cabazon Water District, and a variety
22 of other properties. See attachments hereto.

23 8. Because Millard Canyon is landlocked and has no public access road, it can only
24 be accessed with the permission of the Tribe. Consistent with its overall policies, the Tribe does
25 not grant rights of way across the Reservation for such access, although the Tribe has allowed
26 landowners to access their property for personal use, but not for commercial endeavors.

27 9. On June 27, 1995, the Ahadpours filed a Petition to Change their use of the water
28 in License 659 to "Commercial" in order "to use the water for drinking through a bottling system

1 or other type” of water marketing. See, Petition for Change, dated 6-23-1995 (on the bottom of
2 which is hand written “OK to Accept. RJB 10/12/95”). (Exh. 11.) Although the Tribe received a
3 notice of that Petition for Change, it never received from the SWRCB any notice or other
4 indication of any kind that the License potentially was subject to revocation as a result of the
5 Ahadpours’ alleged failure to use the water subject to the license.

6 10. The Tribe filed a timely Protest to the Ahadpours’ Petition for Change on License
7 659 through which the Ahadpours sought to make commercial use of that water. One of the
8 bases for the protest filed by the Tribe, which was described in detail in a letter to Robert Been
9 dated January 12, 1996 accompanying the Protest, was that the Ahadpours had no legal access to
10 either their land or the water, so that granting their Petition for Change would be futile. (Exh.
11 12.) The Protest explained that the Ahadpours were relying for their access on an alleged road
12 and pipeline easement that had been used by the Cabazon Water District. However, it had
13 previously been determined that no valid easement had ever existed for Cabazon Water District or
14 anyone else to cross the Reservation to access Millard Canyon. Thus, the Tribe argued, due to
15 their inability to legally access their land or water, the Ahadpours’ Petition for Change should be
16 denied.

17 11. Despite the Tribe’s Protest and the Ahadpours’ lack of access to the water for
18 “Commercial” purposes, four months later, on April 15, 1996, the SWRCB sent the Ahadpours a
19 letter setting out various environmental impacts that the SWRCB required be addressed by them
20 in regard to their Change Petition for License 659, including a rare plant and rare animal survey,
21 and an archaeological survey. (Exh. 13.) Despite the fact that the SWRCB must have known that
22 the costs of the required surveys likely would be considerable, the SWRCB’s letter said nothing
23 about License 659 being subject to revocation for alleged lack of use.

24 12. On April 24, 1997, Richard Cross, an attorney on my staff, spoke to Mr. Been of
25 the SWRCB who said that neither the SWRCB nor the Ahadpours had taken any further action on
26 the Change Petition. Mr. Cross reminded Mr. Been that the Ahadpours had no legal easement
27 across the Morongo Reservation. Mr. Been agreed that unless the Ahadpours could show an
28 easement which would allow them to divert and transport their water across the Reservation, their

1 Petition for Change should be denied. Mr. Been said that he planned to contact the Ahadpours
2 the following month to ask on what grounds they claimed an easement. Mr. Been said that
3 depending on his review of the file and their response, he would either dismiss the Change
4 Petition or refer it to the SWRCB's attorneys. Mr. Been said nothing about License 659 being
5 subject to revocation for alleged lack of use. As far as I can determine, nothing more was heard
6 by my law firm or the Tribe from Mr. Been thereafter.

7 13. On November 16, 1999, I spoke with Craig Wilson of the SWRCB regarding the
8 Ahapours' 1995 Petition for Change. According to him, the Ahadpours had been asked to
9 provide various environmental reports which they never provided. He said that he would
10 probably contact them within a couple of months and see if they wanted to proceed with the
11 application or abandon it. He said that if they wanted to proceed, they would have to provide the
12 requested environmental reports and the tribe's already-filed Protest would then be considered. I
13 reminded him about the Ahadpours' lack of access to the water and that we had advised his
14 predecessors of this fact. He said that he would check on all of this in a few months and contact
15 us at that time. Mr. Wilson made no mention whatsoever that License 659 was subject to
16 revocation for alleged lack of use. I heard nothing further from Mr. Wilson.

17 14. On July 9, 2001, the Division of Water Rights received notice of assignment of
18 License 659 from the Ahadpours to Great Spring Waters of America. (Exh. 14.)

19 15. In 2002, the Morongo Band acquired the lands and water rights that were
20 transferred from the Ahadpours to Great Spring Waters of America. (Exh. 15.)

21 16. On November 1, 2002, my office sent the SWRCB a notice of the assignment of
22 License 659 from Great Springs Waters of America to the Morongo Band of Mission Indians.
23 This was sent by Certified Return Receipt Mail and the receipt showed that it was received by the
24 SWRCB. (Exh. 16.)

25 17. During 2001, the Tribe also purchased the lands and water rights previously held
26 by Cabazon Water District, as well as that District's facilities, in Millard Canyon and its pipelines
27 crossing several sections of the Reservation. (Exh. 17.) Licenses 174 and 660 were transferred to
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1 the Tribe as part of that acquisition. Title to that land and the appurtenant water rights are
2 currently held by the United States in Trust for the Morongo Band.

3 18. On April 28, 2003, the SWRCB sent a Notice of Proposed Revocation of License
4 659 to Great Spring Water of America, Inc., not to the Morongo Band who held title to the
5 License. (Exh. 18.)

6 19. On or about July 11, 2003, I traveled to Sacramento along with Stephen Johnson
7 of Stetson Engineers to meet with Samantha Olson of the SWRCB to attempt to resolve this
8 matter amicably because Morongo had been the owner of the water rights for less than a year,
9 there was a relatively small amount of water involved, and no one but Morongo had access to the
10 water at issue. Our attempts to resolve the matter amicably were rebuffed.

11 20. On September 5, 2003, I sent Peter Silva in the Division of Water Rights a request
12 for an extension of time on the proposed revocation hearing date in order to seek legal counsel for
13 the Morongo Band with expertise in state water law issues. (Exh. 19.) That request was granted.

14 21. No one except the Morongo Band can gain legal access to the water in Millard
15 Canyon, including the water subject to License 659, because there are no public roads providing
16 access to Millard Canyon. The only way that Millard Canyon can be accessed is to use dirt roads
17 to cross the lands of the Morongo Indian Reservation, which lands cannot legally be crossed
18 without a right-of-way or permit granted by the Tribe. The Tribe is not willing to grant non-
19 members easements or rights-of-way to provide access into Millard Canyon, although it
20 informally allows landowners in Millard Canyon to access their lands for personal use.

21 22. The Tribe is very concerned about land use, water use, and water quality within its
22 reservation boundaries. As a result, it petitioned the SWRCB for a change on Licenses 174, 660,
23 and 659 so that it could consolidate its water usage and places of use to meet the long term
24 municipal needs of the Reservation. Those Petitions were filed on January 24, 2006, and a Notice
25 related to those Petitions was issued on February 3, 2011. There were no protests filed to those
26 Petitions except by Coachella County Water District and Desert Water Agency. Those two
27 agencies dismissed their protests shortly after they were filed because the Tribe voluntarily agreed
28 to provide them with copies of their annual statements of use. Although the Petitions for Change

1 of use and place of use were granted on December 28, 2011 for Licenses 174 and 660, the
2 Petition for Change regarding License 659 was not granted even though it was indistinguishable
3 from the others and, like the two Petitions that were granted, was not the subject of any protest.

4 23. The Morongo Band did everything in its power to comply with California law on
5 these water issues, notwithstanding the fact that California civil regulatory law does not apply on
6 the Morongo Indian Reservation.

7 24. The SWRCB allowed the Ahadpours many years to decide whether to perform the
8 environmental studies necessary to obtain approval for their Petition for Change without taking
9 action to revoke License 659 for alleged non-use of the water. Six years after filing their Petition
10 for Change, and after doing nothing to comply with the requirements imposed by the SWRCB as
11 a condition to granting that Petition, the Ahadpours transferred License 659 to Great Springs
12 Waters of America, Inc., and the SWRCB approved that transfer of that License.

13 25. Only after License 659 was transferred to the Morongo Band did the SWRCB seek
14 to revoke that License, despite the fact that the SWRCB never took action against the Licensees
15 who were responsible for the alleged non-use. Instead of providing official notice in 1996 that
16 License 659 was subject to revocation due to alleged lack of use of the water, the SWRCB first
17 allowed the Tribe to expend substantial efforts and funds to protest the Ahadpours' Petition for
18 Change without the SWRCB taking official action to revoke that License 659 due to alleged non-
19 use of the water by the Ahadpours and prior Licensees. Then, the SWRCB required the
20 Ahadpours to expend substantial funds to prepare various environmental reports if the Ahadpours
21 wanted their Petition for Change to move forward, ignoring the fact that the SWRCB thought the
22 License might be subject to revocation for alleged lack of use.

23 26. The fact that the SWRCB allowed License 659 to be transferred to Great Springs
24 Waters of America without any notice that the License was subject to revocation due to alleged
25 lack of use of the water by the Ahadpours and by Licensees decades prior to them further led the
26 Tribe to believe that its purchase of the property would include the appurtenant water rights
27 covered by License 659.

28 27. Relying on the fact that the SWRCB failed to take action to revoke License 659 for

1 alleged non-use when it was owned by Southern Pacific, then by the Ahadpours and later by
2 Great Spring Waters of America, Inc., the Tribe reasonably concluded that License 659 was valid
3 when it purchased the Ahadpour property. This conclusion was further bolstered by the fact that
4 the SWRCB approved the change of title to License 659 from Great Springs Water of America,
5 Inc. to the Morongo Band without providing notice to the Tribe at that time that License 659
6 might be subject to revocation as a result of alleged non-use by the Ahadpours or any prior
7 License holders.

8 28. As a result of the SWRCB's prior actions and inaction related to License 659, the
9 Tribe expended significant funds to obtain and protect the water rights conferred by that License.
10 Although the SWRCB staff may have occasionally commented about alleged lack of use or need
11 for further documentation of use, the fact that the SWRCB took no action to revoke the license
12 for such alleged lack of use is what is relevant. Because no action was taken, the Tribe
13 reasonably concluded that the SWRCB made a conscious determination based on the information
14 before them that there was no basis for revoking License 659.

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