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**DISTRICT OF COLUMBIA BAR ONLY

Rpt 553

January 12, 1996

VIA FEDERAL EXPRESS

Robert Been
State Water Resources Control Board
901 P Street
Sacramento, CA 95810

Re: Protest of Application No. 553 (License No. 659)

Dear Mr. Been:

We represent the Morongo Band of Mission Indians, and at the Band's request respond to the June 23, 1995, Petition for Change [of Use] (the "Petition") to the State Water Resources Control Board (the "Board"), and to the letter of the same date of Mozafar Behzad to Mr. Jim Canady of the Board regarding the Petition (the "Letter").

Background

The Morongo Band of Mission Indians is a federally recognized Indian tribe and the beneficial owner of the Morongo Indian Reservation, located east of Banning, California, and north and south of Interstate 10. The Reservation consists in considerable part of the foothills and mountains to the south of Mt. San Gorgonio.

The parcel allegedly owned by Mr. and Mrs. Ahadpour, which is the subject of the proposed change of use and point of diversion (the "Property"), is surrounded by the Reservation. The only access to the property to the south is by a road which enters and crosses the Reservation on its way toward I-10. For many years the Cabazon County Water District used this road and a claimed pipeline easement across the Reservation under the mistaken belief that they had an easement or easements which entitled them to do so. However, as a result of negotiations and discussions between the Band and the District over the last three years, it has been established that the District does not have a valid easement across the Reservation and, as a result, that the

pipeline and its use, the District's use of the road, are illegal and a trespass against the sovereign rights of the Band.[1]

It is our understanding that the Applicant claims or assumes that the same easement(s) which the Cabazon District claimed also are available to or are owned by them. This contention is mistaken. There is no easement for pipeline or any other uses which is appurtenant to the Property which crosses the Reservation. As a result, the Applicant lacks the right or ability to exercise the right of diversion sought by its Application to the State Board.

If the Applicant feels that the Band is mistaken in this regard, or if the Applicant claims a means of ingress and egress which does not require the use of Reservation property, it should and must be required to demonstrate to the Board and the Band that it is the holder of an easement or other right sufficient to support the use and diversion operations which are the subject of the Application.

The Band's Objections

The Application is legally defective for a number of reasons.

First and most significantly, it ignores and asks the State Board to ignore the Band's reserved water rights. The Morongo Band is a federally recognized Indian tribe and the owner beneficially of the Morongo Reservation.[2] A federally recognized Indian tribe such as the Band

> has a specific legal identity as a unique governmental entity; it is a domestic nation, a distinct political community that exercises powers of independence and self-government.[3]

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[1] As explained at greater length below, the District is in the process of attempting to develop a different source of water supply. Pending the completion of this effort, and without admitting that the District in fact has the right to take water from the proposed new source, the Band has for the present chosen not to require the District to cease use of the illegal pipeline.

[2] See 53 Fed. Reg. 52831 (Dec. 29, 1988).

[3] Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal., 757 F.2d 1047, 1055 (9th Cir. 1985).

As such the Band clearly is not a subdivision or a creature of the State of California. To the contrary, "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' ... and [their] 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States....'"[4] Further, as a result of the unique jurisdictional status of Indian tribes and reservations, state laws may be applied to tribal Indians on their reservations only if Congress "has expressly so provided."[5] No federal law provides that the water use laws of the State of California shall apply to Indian tribes or reservations.

The Band's water and other property rights derive from federal law. The Morongo Band is the holder of a federal reserved water right to the surface flows, the subsurface flows and the groundwater on and under the reservation. "Reserved" water rights are rights created by the federal government for the benefit of federal reservations, including Indian reservations. Whether a reserved right exists depends upon the intent of the federal government in establishing the reservation and, in particular, on whether water must be available for use by the tribe in order to use the reservation in the manner intended by Congress.[6] By virtue of their federal statutory and tribal origins, reserved rights are prior to all non-Indian, state-created water rights to the full extent of the amount of water needed to fulfill the purpose of the reservation.[7]

The purpose of the reservation is also the measure of the amount and kind of water reserved. Where water is necessary to

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[4] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987) (emphasis added).

[5] Id. 480 U.S. at 207.

[6] State of Arizona v. State of California, 373 U.S. 546, 598-99, 83 S.Ct. 1468 (1963); Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir.), cert. denied, 454 U.S. 1092,, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981) ("an implied reservation of water will be found where it is necessary to fulfill the purposes of the reservation").

[7] United States v. Ahtanum Irrigation District, 236 F.2d 321, 327-28, 335 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957) (tribes' reserved rights are prior to the full extent of the amount of water needed to fulfill the purpose of the reservation).

fulfill the purpose for which the reservation was created, the amount of water reserved depends on the amount needed to enable the use of the reservation in the manner contemplated by the federal government.[8] The specifics of an implied reserved water right include when and how the particular amount of water shall be available and the condition (that is, the quality) of the water.[9]

The Morongo Reservation was established by statutes and executive orders enacted and promulgated between the 1870's and 1926. In light of the above discussion, the Band is clearly the holder of federal reserved surface and ground water rights.

The Applicant states that its Petition can and should be granted because, as they put it, "the water is being completely wasted and runs down along Millard Canyon." However, the waters in question clearly are not "wasted." Rather, if and to the extent that they percolate into the watercourse and ultimately to the Potrero or Cabazon aquifers, they recharge the groundwater basins which are the source and basis of part of the Band's reserved rights. And to the extent that surface water flows or subflows reach the Reservation, they too are part of the Band's reserved rights.

Further, if and to the extent that the flows furnish recharge or surface flows to groundwater basins or watercourses which are subject to the laws of the State of California, the showing made by the Applicant clearly is not adequate to warrant the conclusion that "waste" of water does or will occur, as that term has come to be defined under Article 2, Section 10 of the California Constitution and the cases which have construed this

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[8] United States v. New Mexico, 438 U.S. 696, 702, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); Colville Confederated Tribes v. Walton, 647 F.2d at 47. The reserved right is, by definition, a right to a particular use of water, regardless of the quantity necessary to enable the use. Even where the right has been quantified, therefore, the affected tribe has the right to come back and have the amount increased if, for any reason, a greater amount of water was needed to enable the use.

[9] See United States v. Adair, 723 F.2d 1394, 1414-15 (9th Cir. 1983); Colville Confederated Tribes v. Walton, 647 F.2d at 47-48 (recognizing Congress' intent to make water available for use by a "land-based agrarian society" and to permit "natural spawning of ... trout" in a substitute lake-based fishery).

provision and the implementing statutes in the State Water Code.

For the preceding reasons, therefore, the Morongo Band protests the Application on the ground that, if granted, it threatens to and would constitute a trespass against the Band's reserved water rights.

Second, the Application does not adequately describe the changed use which the Applicant would have the Board authorize. Rather, it simply refers to a "commercial" use, which might or might consist in water bottling. There is no description of where the water bottling operation would be located, whether the State Board can expect that the required permits and licenses would be issued by the Department of Health Services, how much water the operation would use, and how the diversions would affect the ecosystem downstream of and surrounding the diversion. Nor does the Application describe the intended point of diversion with specificity. Last, and by no means least, there is no description of how the Applicant could operate a water bottling operation, whether on- or off-site, when it lacks the right to take the water across the Reservation, whether by means of a pipeline or vehicles.

In this regard it is appropriate to point out that this particular source of water supply has already been declared by the U.S. Environmental Protection Agency to be inadequate. Specifically, EPA has recently required the Cabazon County Water District either to cease diversions from this supply or to filter the water, to ensure that it meets federal drinking water standards. This requirement of course is separate from the District's lack of an easement sufficient to continue its water diversion operations. As a result of this requirement, the District has recently attempted to develop a new source of water supply.

The determination by EPA that this source is not suitable for drinking water purposes strongly suggests that the Applicant cannot justify the requested change of use.

Third, although the requested change of use clearly would have serious environmental effects, it is not based on any environmental studies of any kind. The Application apparently contemplates diverting a significant portion or all of the water available in the creek, and it lists numerous threatened species that would be affected this loss of water. In spite of these facts, the Applicant pointedly remarks that it has done no environmental studies. The Application should be refused for this reason alone.

Fourth, and in a similar vein to the point just made, the Application notes that no archaeological studies have been performed about the presence of cultural remains and artifacts at the intended point of diversion. The Morongo Band must be seriously concerned at the callous disregard of the Applicant in this regard. If the Applicant seriously intends to proceed, it should among other things be required adequately to characterize the site archaeologically and culturally and to evaluate the potential impacts in this regard.

The Band is attempting to locate additional information regarding the points made above. When this information is available, we will request your leave to supplement the record so that it better explains and supports the objections noted above.

Thank you for your consideration. If you have any questions or concerns, please feel free to contact the Tribal Chairperson, Mary Ann Andreas, or myself.

Very truly yours,

ALEXANDER & KARSHMER

Richard A. Cross

RAC:sab

cc: Mary Ann Andreas, Tribal Chair, Morongo Band of Mission Indians

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