No. _____

In The
Supreme Court of the United States

DESERT WATER AGENCY, et al.,

Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RODERICK E. WALSTON
Counsel of Record
ARTHUR L. LITTLEWORTH
MICHAEL T. RIDDELL
PIERO C. DALLARDA
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
Tel.: (925) 977-3300
Fax: (925) 977-1870
roderick.walston@bbklaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Under the reserved rights doctrine, the federal government, in reserving lands for federal purposes, impliedly reserves a water right needed to accomplish the reservation purposes. In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court substantially limited the reserved rights doctrine because it conflicts with Congress' deference to state water law, and held that federal water rights are impliedly reserved only as "necessary" to accomplish the primary reservation purposes and prevent them from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. This Court has never decided whether the reserved rights doctrine applies to groundwater.

The Ninth Circuit held that *New Mexico*'s limitations of the reserved rights doctrine apply only in *quantifying* an existing federal reserved right but not in determining whether the right *exists* in the first instance, and that whether a reserved right exists depends on whether the reservation purpose "envisions" use of water. The Ninth Circuit held that the purpose of the Indian tribe's reservation in this case "envisions" use of water, and thus the tribe has a reserved right in groundwater.

The questions presented are:

1. Whether the Ninth Circuit's standard for determining whether a federal reserved water right impliedly exists – that the right impliedly exists if the reservation purpose "envisions" use of water – conflicts

QUESTIONS PRESENTED – Continued

with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), which the petitioners contend held that a federal reserved water right impliedly exists only if the reservation of water is "necessary" to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated."

2. Whether the reserved rights doctrine applies to groundwater.

3. Whether the Agua Caliente Band of Cahuilla Indians ("Tribe") has a reserved right in groundwater, and in particular whether the Tribe's claimed reserved right is "necessary" for primary reservation purposes under the *New Mexico* standard in light of the fact that the Tribe has the right to use groundwater under California law.

LIST OF PARTIES

The petitioners are Desert Water Agency, and Patricia G. Oygar, Thomas Kieley, III, James Cioffi, Craig A. Ewing and Joseph K. Stuart, who are sued in their official capacities as members of the Board of Directors of Desert Water Agency.

The respondents are the Agua Caliente Band of Cahuilla Indians and the United States.

In addition, Coachella Valley Water District and Ed Pack, John Powell, Jr., Peter Nelson, G. Patrick O'Dowd and Castulo R. Estrada, all members of the Board of Directors of the Coachella Valley Water District, were defendants-appellants below.

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The Ninth Circuit decision is reproduced at Appendix 1-22. The decision is officially published at 849 F.3d 1262 (9th Cir. 2017), and unofficially published at 2017 U.S. App. Lexis 4009 (9th Cir. Cal., Mar. 7, 2017).

The district court decision is reproduced at Appendix 23-51. The decision is not officially published, but is unofficially published at 2015 U.S. Dist. Lexis 49998 (C.D. Cal., Mar. 20, 2015).

JURISDICTION

The Ninth Circuit issued its decision on March 7, 2017. This Court, through Justice Kennedy, granted an extension of time to file a petition for writ of certiorari until July 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The presidential executive orders of May 15, 1876, and September 29, 1877, which respectively created and expanded the reservation of the Agua Caliente Band of Cahuilla Indians, are reproduced at Appendix 52-53.

STATEMENT OF THE CASE

1. Factual Background

a. The Parties

Petitioner Desert Water Agency ("DWA") is a public water agency created under California law that provides water to entities and persons within its area of jurisdiction, which is located in the Coachella Valley, in Riverside County, California. DWA's area of jurisdiction includes several cities in the Coachella Valley, including the Cities of Palm Springs, Cathedral City and Rancho Mirage. The other petitioners are members of DWA's Board of Directors, who are sued in their official capacities. Another water agency, the Coachella Valley Water District ("CVWD"), also provides water to entities and persons within its area of jurisdiction, which is also located in the Coachella Valley.

The Respondents are the Agua Caliente Band of Cahuilla Indians ("Tribe") and the United States, which intervened in the action on the side of the Tribe. The Tribe is a federally recognized Indian tribe that occupies a reservation in the Coachella Valley, in Riverside County. The reservation was established by an executive order issued by President Ulysses S. Grant on May 15, 1876, and was expanded by an executive order issued by President Rutherford B. Hayes on September 29, 1877. App. 52-53; ER 58-59.[1] The reservation is located in portions of the City of Palm Springs, California, and surrounding areas. ER 49, 58-59.

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[1] "ER" is a reference to the Excerpts of Record before the Ninth Circuit.

b. The Tribe's Reservation

The Tribe's reservation consists of a checkerboard pattern in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971); App. 5. The checkerboard pattern occurred because the United States, before creating the Tribe's reservation, had conveyed most of the odd-numbered sections in the City of Palm Springs and surrounding areas to a railroad company as an incentive to build a railroad. 14 Stat. 292, 294, 299 (1866). As a result, most of the lands reserved for the Tribe under the executive orders are the even-numbered sections. ER 57-58.

Most of the Tribe's reservation lands (58%) have been allotted to individual Indians, and most of the remaining reservation lands (29%) have been conveyed in fee to non-Indians. ER 139. Only a relatively small percentage of the lands are unallotted tribal trust lands (12.7%), and only a small fraction are tribal fee lands (.3%). *Id*. Many of the Indian allottees have sold or leased their allotted lands to non-Indians, who operate hotels, restaurants and other places of business. ER 138-139.

As a result of the allotments, fee conveyances and leases, most of the residents on the Tribe's reservation are non-Indians, or at least non-members of the Tribe. More than 20,000 people reside on the Tribe's reservation, ER 222, 223, although the Tribe has only 440 members. ER 196.

c. The Groundwater

The principal source of surface water flowing through the Coachella Valley is the Whitewater River and its tributaries, but the principal source of water that DWA and CVWD provide to their customers is the groundwater of the Coachella Valley groundwater basin, which underlies the Whitewater River. ER 136. Since increased population growth in the Coachella Valley has caused a diminishment of the groundwater in the basin, DWA and CVWD import water from the Colorado River into the basin in order to augment the basin's groundwater supplies and prevent overdraft.

Because of the checkerboard pattern of the Tribe's reservation, the groundwater in the basin underlies both tribal and non-tribal lands. ER 137. DWA and CVWD provide water to persons and entities on both tribal and non-tribal lands, and do not distinguish between tribal and non-tribal lands in providing the water. ER 136, 139.

The Tribe does not pump or attempt to pump groundwater for its own use, and instead purchases water from DWA and CVWD. App. 7; ER 138. The water agencies have never denied any request by the Tribe for water. ER 138.

2. Procedural History

In 2013, the Tribe brought an action for declaratory and injunctive relief against CVWD and DWA in the federal district court for the Eastern District of

California, alleging that the Tribe has a reserved right and an aboriginal right in groundwater underlying its reservation. ER 23. The Tribe also alleged that CVWD and DWA, by importing water into the groundwater basin, are impairing the water quality of the Tribe's reserved right, and also that the Tribe "owns" the "pore space" of the groundwater basin underlying the Tribe's reservation, as a result of which the water agencies are required to compensate the Tribe for importing and storing water in the pore space. ER 40-42. The United States intervened on the side of the Tribe. ER 46. The district court had jurisdiction over the Tribe's complaint under 28 U.S.C. § 1331 (federal question) and § 1362 (tribal plaintiff-federal complaint).

The parties agreed to divide the case into three phases. ER 17. Phase 1 will address whether the Tribe has a reserved right and aboriginal right in groundwater. Phase 2, if necessary, will address whether the Tribe "owns" the pore space; whether the Tribe's rights include a water quality component; and whether the Tribe's action is barred by various equitable defenses. Phase 3, if necessary, will quantify the amount of groundwater necessary to satisfy the Tribe's reserved and aboriginal rights.

In the Phase 1 proceeding, the four parties – the Tribe, the United States, CVWD and DWA – filed motions for summary judgment addressing whether the Tribe has a reserved right and aboriginal right in groundwater. The Tribe contended that it has both a reserved right and an aboriginal right; the United States contended that the Tribe has a reserved right;

and CVWD and DWA contended in separate motions that the Tribe has neither a reserved right nor an aboriginal right. On the reserved rights issue, CVWD and DWA contended that the Tribe's claimed reserved right does not meet the standard for reserved water rights established in *United States v. New Mexico*, 438 U.S. 696 (1978), and that the reserved rights doctrine does not apply to groundwater.

The district court partially granted each side's motion, ruling that the Tribe has a reserved right but not an aboriginal right in groundwater. App. 23-51.

CVWD and DWA filed a petition for interlocutory appeal in the Ninth Circuit seeking review of the district court's decision that the Tribe has a reserved right in groundwater, and arguing that the Tribe does not have a reserved right in groundwater for reasons set forth in their motions for summary judgment, as described above. The Ninth Circuit, after granting the petition, affirmed the district court decision. App. 22. The Ninth Circuit held that the limitations of the reserved rights doctrine established in *New Mexico* apply only in quantifying an existing reserved right but not in determining whether a reserved right exists in the first instance; that whether a reserved right exists depends on whether the reservation purpose "envisions" use of water; that the Tribe's reservation purpose "envisions" use of water, and thus the Tribe has a reserved right in "appurtenant" water; and that "appurtenant" water includes groundwater, and therefore the Tribe has a reserved right in groundwater. App. 10-22.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

A. Nationwide and West-Wide Impacts of Questions Presented

This petition presents significant issues of national importance concerning the nature and scope of the reserved rights doctrine. Under the reserved rights doctrine, the federal government, in reserving lands for specific federal purposes, "by implication" reserves water "necessary" to accomplish the reservation purposes. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). As this Court has stated, the reserved rights doctrine is an "exception" to Congress' traditional deference to state laws regulating allocation and use of water. *United States v. New Mexico*, 438 U.S. 696, 715 (1978). The questions presented in this petition concern how broadly the "exception" to Congress' deference to state water law should be construed, and in particular what standard applies in determining whether federal reserved rights impliedly exist and whether federal reserved rights extend to groundwater. These questions implicate significant issues of federalism concerning the proper balance between the needs of federal reserved lands and Congress' traditional deference to state water law.

Although the reserved rights issues in this case arise in the context of federal lands set aside as an Indian reservation, the issues also arise in the context of federal lands set aside for other purposes, such as for national forests, national parks, federal military

installations, federal reclamation and power projects, national monuments, and national wildlife refuge areas, among other purposes. The Ninth Circuit's decision interpreting the reserved rights doctrine did not distinguish between federal lands reserved for Indian purposes and for other purposes, and its decision applies to all federal reserved lands and not just lands reserved for Indian purposes.

The questions presented in this petition are of particular importance in the western states, both because of the scarcity of water supplies in the western states and the sheer quantity of federal reserved lands in the western states. As this Court has stated, in the "arid parts of the West," claims to water for federal reserved lands "inescapably vie with other public and private claims," and "[t]his competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. Of all federal reserved lands in the nation, more than one-half – 54.08% – are located in the western states. General Services Administration, *Federal Real Property Profile* ("GSA Rep."), at 18 (Sept. 30, 2004). The percentage of federal lands in the western states ranges from 30.33% in the State of Washington to 84.48% in the State of Nevada, for an average of 46.93%. *Id*. at 18-19.[2] Further, because federal reservations are normally found

[2] These figures are derived from the General Services Report cited in the text above. The report includes a map identifying the "Western" states as including Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. GSA Rep., at 18. According to petitioner DWA's calculation based on the figures provided in the GSA report on pages

in the uplands of the western states, the percentage of water flow in the reservations is even higher; more than 60% of the average annual water yield in the western states is from federal reservations. *New Mexico*, 438 U.S. at 699 n. 3.

Groundwater is a major source of water supplies throughout the nation, but particularly in the western states, which lack the ample surface water supplies found elsewhere in the nation and are increasingly dependent on groundwater as a major source of supply. In the western states, 53.5 million acre-feet of groundwater are withdrawn each year, and 47.7 billion gallons each day. U.S. Geologic Survey, *Estimated Use of Water in the United States in 2010, Circular 1405*, at 9, 15 (2014). Groundwater is a major source of California's water supplies. Groundwater provides about 30% of California's water supply in an average year, and 40% to 50% of Californians rely on groundwater for at least part of their water supply. Cal. Dep't of Water Resources, *California Groundwater: Bulletin 118* (Update 2003), at 2 (2003).

B. Summary of Questions Presented

The questions presented in this petition are summarized as follows:

18-19, these specified western states have a total of 752,947,840.00 acres; the federal government owns a total of 353,331,837.20 acres in these western states; and thus the federal government owns 46.93% of the lands in these western states.

1. Whether the Ninth Circuit's Standard for Determining Whether a Federal Reserved Right Impliedly Exists Conflicts With the Standard Established by This Court in *United States v. New Mexico*

The first and perhaps most far-reaching question presented in the petition is what standard applies in determining whether a federal reserved water right impliedly exists, and more specifically whether the standard adopted by the Ninth Circuit conflicts with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978).

In *New Mexico*, this Court – narrowly construing the reserved rights doctrine because it conflicts with Congress' policy of deference to state water law – held that federal water rights are impliedly reserved only as "necessary" to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Petitioner DWA contends that *New Mexico* established a strict standard – hereinafter referred to as *New Mexico*'s "necessity standard" – for determining whether a federal reserved water right impliedly exists. Under *New Mexico*'s necessity standard, a federal reserved water right impliedly exists only if the reservation of water is "necessary" to accomplish the "primary" reservation purposes and prevent them from being "entirely defeated." In DWA's view, this inquiry requires consideration of the circumstances of the particular reservation – such as whether groundwater is available under

state law or whether water is available from other sources – to determine whether federal reserved rights are "necessary" for primary reservation purposes.

The Ninth Circuit rejected petitioner DWA's argument, and held that *New Mexico*'s necessity standard applies only in *quantifying* the amount of water necessary to satisfy an existing reserved right but not in determining whether the reserved right impliedly *exists* in the first instance. The Ninth Circuit held that whether a federal reserved right impliedly exists depends on whether the reservation purpose "envisions" use of water.

The Ninth Circuit's broad standard for determining whether a reserved right exists – whether the reservation purpose "envisions" use of water – conflicts with *New Mexico*'s strict necessity standard, which is whether the reservation of water is "necessary" for reservation purposes. Under the Ninth Circuit's broad standard, virtually every federal reservation in the nation – particularly in the western states – would automatically have a reserved water right in surface water and any underlying groundwater, regardless of the circumstances of the reservation. This Court should grant the petition to determine the standard that applies in determining whether a reserved right impliedly exists, and in particular whether the Ninth Circuit's standard conflicts with the standard established by this Court in *New Mexico*.

2. Whether the Reserved Rights Doctrine Applies to Groundwater

This Court has never decided whether the reserved rights doctrine applies to groundwater. *United States v. Cappaert*, 426 U.S. 128, 142 (1976) ("No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.").

The reserved rights doctrine should not be extended to groundwater because its rationale does not support its extension to groundwater. The reserved rights doctrine is an outgrowth of the *Winters* doctrine, which was established by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and which recognized the existence of reserved water rights on Indian reservations. The *Winters* doctrine was developed because non-Indian appropriators had acquired prior rights in surface waters under the state priority rule of first use – "first in time, first in right" – as a result of which the Indian tribes had no access to water for their reservations. The *Winters* doctrine allowed Indian tribes to have prior rights to water for their reservations under federal law even though non-Indian appropriators had prior rights to the water under the state priority rule of first use.

Although the state priority rule of first use applies to surface water, the priority rule does not apply to groundwater. Rather, under California's law of groundwater, overlying landowners have the right to use groundwater underlying their lands as an incident of their land ownership, and no overlying landowner has

priority over another. The Tribe, as an overlying landowner of its reservation, has the same right to use groundwater under California law as other overlying landowners. Thus, the rationale of the *Winters* doctrine – to protect Indian water rights from subordination to non-Indian rights under the state priority rule of first use – does not apply to groundwater, because the state priority rule of first use does not apply to groundwater. Since the reserved rights doctrine is an outgrowth of the *Winters* doctrine, the reserved rights doctrine does not apply to groundwater. This Court should grant the petition to determine whether the reserved rights doctrine applies to groundwater.

3. Whether the Tribe Has a Reserved Right in Groundwater

The third question presented in the petition is whether the Tribe has a reserved right in groundwater under *New Mexico*'s necessity standard, assuming that the necessity standard applies in determining whether a reserved right exists. This question also raises significant issues concerning the reserved rights doctrine, and in particular whether the circumstances of the reservation – such as the availability of water under state law or from other sources – are relevant in determining whether a reserved water right impliedly exists.

Petitioner DWA contends that since the Tribe has the same right to use groundwater as other overlying landowners, the Tribe's claimed reserved right does not meet *New Mexico*'s necessity standard and does

not impliedly exist. This question – whether the Tribe has a federal reserved right in groundwater even though the Tribe has the right to use groundwater under California law – raises significant issues of federalism concerning the role, if any, that state water law plays in determining whether federal water rights are impliedly reserved.

Petitioner DWA also contends that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity standard for other reasons – because the Tribe has a decreed water right to use Whitewater River surface water for its reservation needs, and thus other waters are available for reservation needs; because the Tribe was not historically using groundwater when its reservation was created, which defeats any implication that the presidential executive orders impliedly created a reserved right in groundwater; and because the Tribe does not currently use or even attempt to use groundwater for its reservation needs.

This Court should grant the petition to determine whether the Tribe's claimed reserved right in groundwater meets *New Mexico*'s necessity standard, assuming that the standard applies in determining whether a reserved right impliedly exists.

C. Need for Supreme Court Review Notwithstanding Interlocutory Appeal

This Court should grant the petition even though the questions presented were decided by the Ninth

Circuit in an interlocutory appeal rather than after final judgment. If this case reaches Phase 3, which would involve a quantification of the Tribe's claimed reserved right in groundwater, other users of groundwater in the Coachella Valley whose rights may be affected by the Tribe's claimed reserved right would have to be brought into the litigation as indispensable parties, which would result in a general adjudication of all rights to groundwater in the Coachella Valley. As this Court has stated, "the rights of the several claimants [in adjudications of water rights] are so closely related that the presence of all is essential to the accomplishment of its purposes," and "these cannot be attained by mere private suits in which only a few of the claimants are present. . . ." *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449 (1916). A general adjudication of all rights in groundwater in the Coachella Valley would likely take many years to complete, and would be time-consuming for the litigants and the court. This lengthy and arduous general adjudication process would be obviated if this Court reviews and overturns the Ninth Circuit decision.

We now describe more fully the questions presented in this petition.

II. THE NINTH CIRCUIT'S STANDARD FOR DETERMINING THE EXISTENCE OF A FEDERAL RESERVED RIGHT CONFLICTS WITH THE STANDARD ESTABLISHED BY THIS COURT IN *UNITED STATES v. NEW MEXICO*.

The reserved rights doctrine holds that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 599-601 (1963). "[T]he issue is whether the Government *intended* to reserve unappropriated and thus available water," and "[i]ntent is inferred if the previously unappropriated waters are *necessary* to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139 (emphases added). Thus, a federal reserved right impliedly exists – that is, an implied "intent" exists – only if the reservation of water is "necessary" for reservation purposes. If the reservation of water is not "necessary" for such purposes, there is no implied "intent" to reserve the waters.

In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court narrowly construed the reserved rights doctrine because it conflicts with Congress' policy of deference to state water law. As the California Supreme Court has stated, *New Mexico* adopted a "narrow construction" of the reserved rights doctrine

because of the congressional policy "of deferring to state water law." *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461, 749 P.2d 324 (1988).[3]

Under its narrow construction, *New Mexico* stated that Congress, in determining "whether federal entities must abide by state water law," "has almost invariably deferred to state law," and that Congress has departed from this policy only where water is "necessary to fulfill the very purposes for which a federal reservation was created." *New Mexico*, 438 U.S. at 702. The Court stated that it has upheld reserved rights, as

[3] Congress' policy of deference to state water law originated in the equal footing doctrine, which holds that the states, upon their admission to statehood, acquire sovereignty over all navigable waters and underlying lands within their borders, subject to the federal government's power to regulate navigable waters under the Constitution's Commerce Clause. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 589-590 (2012); *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). In the late 1800s, Congress enacted various statutes, principally the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877, that provided for disposition and settlement of the public domain lands in the western states; this Court has held that the statutes effected a "severance" of the waters on the lands from the lands themselves, as a result of which the states regulate appropriation and use of water on the lands and the federal government retains ownership of the lands. *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935). An example of a federal statute that defers to state water law is the Reclamation Act of 1902, which authorized the construction and operation of water projects in the western states and provides, in section 8, that the Secretary of the Interior must comply with state water laws in operating the projects. *California v. United States*, 438 U.S. 645, 665-667 (1978).

in *Winters*, *Arizona* and *Cappaert*, 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." *Id*. 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. The Court held that the Government must acquire water for "secondary use" on the reservation under state law, "in the same manner as any other public or private appropriator." *Id*. at 702.

Thus, *New Mexico*, balancing the needs of federal reserved lands and Congress' policy of deference to state water law, adopted a strict necessity standard not only for quantifying the amount of water necessary to satisfy a federal reserved right, but also for determining whether a federal reserved right impliedly exists in the first instance. Under *New Mexico*'s necessity standard, a federal water right is impliedly reserved only if the reservation of water is "necessary" to fulfill the "very purposes" – that is, the primary purposes – of the reservation and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Under the necessity standard, a federal reservation of land does not automatically include the reservation of a water right. Rather, whether a water right is reserved depends on the circumstances of the reservation, such as whether water is available under state

law or from other sources to satisfy the primary reservation purposes.

The Ninth Circuit adopted a different standard for determining whether a federal water right impliedly exists. The Ninth Circuit held that *New Mexico*'s necessity standard applies only in *quantifying* the amount of water necessary to satisfy an existing reserved right, and does not apply in determining whether the reserved right impliedly *exists* in the first instance. App. 14-15. Rather, the Ninth Circuit held, whether a federal reserved right impliedly exists depends on whether the reservation purpose "envisions" or "contemplates" use of water. App. 14, 15. As the Ninth Circuit put it, "the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the reservation envisions water use." App. 14. The function of *New Mexico*, the Ninth Circuit stated, is that it "added an important inquiry related to the question of *how much* water is reserved." App. 15 (original emphasis).

The Ninth Circuit's broad standard for determining whether a reserved water right impliedly exists – which focuses on whether the reservation purpose "envisions" use of water – conflicts with *New Mexico*'s strict necessity standard, which focuses on whether water is "necessary" for the reservation purpose. A reservation purpose may "envision" use of water even though water is available under state law or from other sources, but – if water is thus available – a reserved right may not be "necessary" for the reservation

purpose. Under the Ninth Circuit's decision, the circumstances of the reservation, such as the availability of water under state law or from other sources, are irrelevant in determining whether a federal reserved water right impliedly exists. Indeed, a reservation purpose may envision use of water under *state* water law, and under the Ninth Circuit's broad standard the reservation paradoxically would have a federal reserved right that preempts state law.

New Mexico itself applied its necessity standard in determining whether a federal reserved right impliedly exists and not in quantifying the right, which contradicts the Ninth Circuit's conclusion that *New Mexico* applies only in quantifying a reserved right. *New Mexico* held that the U.S. Forest Service did not have reserved water rights for various instream uses, such as aesthetic and recreational uses, in the Gila National Forest in New Mexico, because these were not the primary uses for which national forest lands are reserved. *New Mexico*, 438 U.S. at 707-717. Since *New Mexico* held that the Forest Service did not have reserved rights, the Court did not reach the issue of quantification. *New Mexico*'s distinction between primary and secondary reservation uses presupposes that its necessity standard applies in determining whether a reserved right impliedly exists; if the asserted right is for secondary and not primary uses, as in *New Mexico*, the reserved right does not exist and no issue of quantification arises.

New Mexico stated that its necessity standard was not a new standard, but in fact was the standard that

this Court had applied in upholding reserved rights in *Winters*, *Arizona* and *Cappaert*. *New Mexico* explained that the Court in those cases had upheld reserved rights only after it had "carefully examined" both the asserted reserved right and the specific reservation purposes and concluded that "without the water" the reservation purposes would have been "entirely defeated." *Id*. at 700 & n. 4. None of these decisions – *Winters*, *Arizona* and *Cappaert*, as well as *New Mexico* – suggests that a reserved right exists simply if the reservation purpose "envisions" use of water, as the Ninth Circuit held. No such language appears in any of the decisions. The Ninth Circuit has simply created a new standard for determining whether a reserved right impliedly exists, one that conflicts with the standard applied in *Winters*, *Arizona* and *Cappaert* as well as *New Mexico*.

The United States has argued in another proceeding in this Court that *New Mexico* applies in determining whether a reserved right exists, which is directly contrary to the Ninth Circuit's conclusion that *New Mexico* does not so apply. In opposing the State of Wyoming's petition for writ of certiorari in *Wyoming v. United States* in the 1988 term, the United States argued that "New Mexico does not . . . furnish an 'equitable device' for limiting the exercise of a federal reserved right once it has been determined such a right exists," but "[r]ather, New Mexico concerned only the issue of what circumstances are sufficient to give rise to a federal reserved right in the first place." Brief for United States in Opposition, at 9, *Wyoming v. United*

States, nos. 88-309, 88-492, 88-553 (Oct. Term 1988). The United States' argument in the *Wyoming* proceeding directly contradicts the Ninth Circuit's analysis here.

Under the Ninth Circuit's broad standard for determining the existence of federal reserved water rights, every federal land reservation in the nation would automatically have an implied reserved right in surface water and underlying groundwater as long as the reservation purpose "envisions" use of water. This broad category includes virtually every federal land reservation in the western states, an area that suffers from a chronic shortage of water supplies and in which water is "envisioned" for virtually every parcel of land. The Ninth Circuit's broad standard would impair the western states' authority to administer their water rights systems for surface waters and groundwater, and would create confusion and uncertainty concerning public and private rights in such waters.

The Ninth Circuit held not only that virtually every federal reservation automatically has a reserved right in surface water and groundwater, but also that the reserved right is open-ended and can be expanded beyond current reservation needs. Specifically, the Ninth Circuit stated that reserved rights are not fixed in time but are "flexible and can change over time." App. 20. Under the Ninth Circuit's decision, the rights of groundwater users in the Coachella Valley that have been recognized and exercised for many years or decades would be subject to limitation or defeasance by the Tribe's "flexible" reserved right in groundwater

that may "change over time." The Ninth Circuit decision is utterly unheedful of its impacts on groundwater users in the Coachella Valley who have long exercised and relied on their rights, and does not even mention the impacts. In *New Mexico*, however, this Court held that impacts on public and private water users are highly relevant in determining whether a reserved right impliedly exists; 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 in the national forests." *New Mexico*, 438 U.S. at 705 (emphases added).

Thus, while *New Mexico* adopted a strict necessity standard because of Congress' deference to state water law and the impacts on public and private water users, the Ninth Circuit adopted a broad and virtually limitless standard without even mentioning Congress' deference to state water law or the impacts on public and private water users. While *New Mexico* sought to balance and accommodate the needs of federal land reservations and these other competing needs and interests, no hint of balance and accommodation appears in the Ninth Circuit decision, which did not even mention such competing needs and interests.

III. THE RESERVED RIGHTS DOCTRINE DOES NOT APPLY TO GROUNDWATER.

A. The Rationale of the Reserved Rights Doctrine Does Not Support Its Extension to Groundwater.

This Court has never decided whether the reserved rights doctrine applies to groundwater. Although this question was presented to this Court in *Cappaert v. United States*, 426 U.S. 128 (1976), the Court declined to reach the question, and stated instead that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142. The Ninth Circuit acknowledged that "there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater." App. 4.

The Ninth Circuit stated that the reserved rights doctrine applies to "appurtenant" water, citing this Court's statement in *Cappaert*, 426 U.S. at 138, and concluded that the reserved rights doctrine applies to groundwater because groundwater is "appurtenant" water. App. 19. *Cappaert* also stated, however, that this Court has never decided whether the reserved rights doctrine applies to groundwater, *Cappaert*, 426 U.S. at 142, thus indicating that its reference to "appurtenant" water did not necessarily include groundwater.

Contrary to the Ninth Circuit decision, the reserved rights doctrine is not based on simple ownership of federal reserved lands, and does not automatically apply to all water "appurtenant" to such lands. Rather, *New*

Mexico held that the doctrine is an "exception" to Congress' deference to state water law, *New Mexico*, 438 U.S. at 715, and that Congress' deference to state law is relevant in informing the scope of the "exception." *Id*. at 701-702 ("This careful examination is required . . . because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water."). Thus, the question whether the reserved rights doctrine applies to groundwater depends on how broadly the exception to Congress' deference to state water law should be construed, which requires consideration of both the needs of federal reserved lands and Congress' traditional deference to state water law.

The exception to Congress' deference to state water law should not be extended to groundwater because the rationale of the reserved rights doctrine does not support its extension. The reserved rights doctrine is an outgrowth of the *Winters* doctrine, which was established by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and which recognized the existence of reserved water rights on Indian reservations. In *Winters*, this Court held that Congress – in reserving lands for the Indian tribe that occupied the Fort Belknap reservation in Montana – impliedly reserved a water right for the tribe in the surface waters of the Milk River, which flowed through the tribe's reservation, because the waters were otherwise subject to prior appropriation by non-Indian appropriators under the state priority rule of first use; thus, absent a federal reserved right, the tribe had no access to water for its reservation and its reservation lands were

"practically valueless." *Winters*, 207 U.S. at 576. Under the state priority rule of first use, which applies in the western states, the first appropriator of water for beneficial use has a prior right to the water as against subsequent appropriators; to be "first in time" is to be "first in right." *Jennison v. Kirk*, 98 U.S. 453, 458 (1879); *United States v. Oregon*, 44 F.3d 758, 763 (9th Cir. 1994); W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 130-132 (1956).[4]

In *Arizona v. California*, 373 U.S. 546, 599-601 (1963), this Court expanded the *Winters* doctrine to include all federal land reservations, and the expanded doctrine is generally referred to as the reserved rights doctrine. *Arizona* also applied the *Winters*, or reserved rights, doctrine in upholding reserved water rights for Indian tribes in the Colorado River, because the water was "essential to the life of the Indian people. . . ." *Arizona*, 373 U.S. at 598-599.

Thus, the *Winters* doctrine was developed and applied, as in *Winters* and *Arizona*, because the rights of

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[4] In *Oregon*, 44 F.3d at 763, the Ninth Circuit explained the state priority rule of first use, stating:

> Under an appropriation system, as such systems developed in the West, the first party to divert water for a beneficial use has the right to continue to divert that amount of water without interference from subsequent appropriators as long as the water continues to be put to beneficial use. In case of shortages, the entire share of the most recent appropriator is lost before the share of the next latest appropriator is diminished. Under such a system, the date of appropriation and the amount of water appropriated are the critical facts in the determination of the relative rights of water users.

Indian tribes in surface waters were subordinate to the rights of non-Indian appropriators under the state priority rule of first use, and the Indian tribes' reserved rights were necessary for them to have access to water for their reservations. The Ninth Circuit has explained this rationale of the *Winters* doctrine, stating:

> In those cases [*Winters* and *Arizona*], if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it is reasonable to conclude that Congress intended to reserve water for them.

Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir. 1981).

Although the state priority rule of first use applies to surface waters, the priority rule does not apply to groundwater. As the Ninth Circuit has explained in another case:

> While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. Under the traditional groundwater doctrines of absolute dominium, the American reasonable use rule, and the correlative rights rule, the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. . . .

Oregon, 44 F.3d at 769. In California, overlying landowners have equal and correlative rights to use groundwater underlying their lands as an incident of land ownership; the right attaches to the land, and is not created by actual use of water or lost by nonuse; and no overlying landowner has priority over another based on who uses the groundwater first. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1241, 5 P.3d 853 (2000). Thus, the Tribe, as an overlying landowner of its reservation, has the same correlative right to use groundwater under California law as other overlying landowners, and its right is not subordinate to the rights of others under the priority rule of first use.[5]

Therefore, the rationale of the *Winters* doctrine – to prevent subordination of Indian water rights to non-Indian rights under the state priority rule of first use – does not apply to groundwater in California, because the priority rule of first use that applies to surface water does not apply to groundwater. Since the rationale of the *Winters* doctrine does not apply to groundwater, the doctrine itself does not apply. The same conclusion applies to federal reservations for purposes other than Indian reservations, such as national forests and parks, because the reserved rights doctrine as applied to

[5] Under California law, the priority rule of first use applies as between non-overlying landowners who appropriate groundwater – the first appropriator of groundwater has a prior right as against subsequent appropriators – but the rights of appropriators are subordinate to the rights of overlying landowners. *Barstow*, 23 Cal.4th at 1241.

such purposes is an outgrowth of the *Winters* doctrine.[6] Accordingly, the exception to Congress' deference to state water law should not be extended to groundwater under the reserved rights doctrine, at least unless there is no other source of water available for reservation purposes, which is not the case here.[7]

Further, federal reserved rights, which are based on rules of priority, could not easily be integrated into

[6] Although *New Mexico* did not directly involve the *Winters* doctrine – because the lands in *New Mexico* were reserved for national forests rather than Indian purposes – *New Mexico* made clear that its necessity standard applies to all federal reserved lands, including lands reserved for Indian purposes. After describing the decisions in *Winters* and *Arizona*, which involved Indian water rights, *New Mexico* stated that in those cases, as in other reserved rights cases, the Court had "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. Thus, *New Mexico*'s necessity standard applies to lands reserved for Indian purposes as for other purposes.

[7] Congress may *expressly* create a reserved right in groundwater, as Congress sometimes does in approving Indian water rights settlements that include express reserved rights in groundwater. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW p. 1251, § 19.05[2] (2012). The question presented in this petition is whether a federal reserved right in groundwater *impliedly* exists by virtue of a federal reservation of land, where Congress has not expressly created the right. As *New Mexico* stated, the reserved rights doctrine is "a doctrine built on implication." *New Mexico*, 438 U.S. at 715. Notably, the Indian water rights settlement acts, to the extent they provide for Indian rights in groundwater, commonly provide that the Indians' rights are not superior to state-based rights. *E.g.*, Zuni Indian Tribe Water Rights Settlement Act of 2003, § 8(e), 117 Stat. 782 (Act does not create "vested right" in groundwater that is "superior" to rights in groundwater under state law).

state systems for regulating groundwater, such as those, like California's, that are based on principles of land ownership rather than rules of priority. A federal reserved right "vests" on the date that the reservation is created, and acquires priority in relation to other rights based on the dates that the various rights were acquired or created; a federal reserved right is senior to state-based rights acquired after the date of the reservation's creation, and is junior to earlier-acquired state-based rights. *Cappaert*, 426 U.S. at 138. A major purpose of the reserved rights doctrine, as this Court's decisions in *Winters* and *Arizona* make clear, is to establish the priority of federal reserved rights in relation to state-based rights in surface water. As explained above, however, the state priority rules that apply to surface water do not apply to groundwater. Rather, under the laws of California and other states, overlying landowners have the right to use groundwater as an incident of ownership of land, and no overlying landowner has priority over another based on who uses water first. *Barstow*, 23 Cal.4th at 1240-1241. A federal reserved right based on the priority rule of first use would not fit comfortably in state systems for regulating groundwater that are based on principles of land ownership rather than priority of first use. This incongruity further demonstrates that the exception to Congress' deference to state water law should not be extended to groundwater.

Federal and state laws that provide for regulation of water commonly distinguish between surface water and groundwater, and the distinction is not anomalous

as applied to the reserved rights doctrine. The United States has broad authority to regulate navigable surface waters under its commerce powers, *e.g.*, *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 406 (1940), but no court has suggested that the United States' commerce powers extend to groundwater. Various federal statutes – such as the Rivers and Harbors Act, 33 U.S.C. §§ 400 *et seq*., and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. – provide for regulation of "navigable waters,"[8] but groundwater is not a form of "navigable waters" and is not subject to direct federal regulation under these or other statutes. Most western states, including California, distinguish between surface water and groundwater in regulation of water. In California, for example, California's regulatory water rights agency has permit authority over appropriation of surface waters and subterranean streams, but its permit authority does not extend to groundwater. Cal. Water Code §§ 1200, 1221, 2550. Since the distinction between surface water and groundwater applies in other regulatory contexts, the distinction properly applies in the context of reserved water rights, particularly in light of Congress' policy of deference to state water law.

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[8] The Rivers and Harbors Act prohibits obstructions in "navigable waters," 33 U.S.C. § 403, and prohibits refuse deposits in "navigable waters," *id.* at § 407. The Clean Water Act prohibits discharges of dredged or fill materials into "navigable waters" without a permit, 33 U.S.C. § 1344(a), and prohibits the "discharge of a pollutant" – defined as an addition of a pollutant to "navigable waters," *id*. at § 1362(12) – without a permit. *Id.* at § 1342(a)(1).

B. The Ninth Circuit Decision Conflicts With the Decisions of the Supreme Courts of Wyoming and Arizona.

The Ninth Circuit's decision below conflicts with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), and, to a significant degree, with the Arizona Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999). The conflict between the decisions provides another basis for this Court to review the Ninth Circuit decision.

In *Big Horn*, the Wyoming Supreme Court held flatly that "the reserved water doctrine does not extend to groundwater." *Big Horn*, 753 P.2d at 100. Although the Court stated that the "logic" of the reserved rights doctrine supports its extension to groundwater, *id.* at 99, the Court did not address the argument, raised in this petition, that the rationale of the reserved rights doctrine does not support its extension to groundwater. The Wyoming Supreme Court's decision reflected the traditional distinction between surface water and groundwater that underlies the western states' systems for regulating water, and made clear that the reserved rights doctrine does not apply to groundwater simply because it applies to surface water. This Court's decision in *Cappaert* voiced the same concern, in stating that although the Court had recognized a reserved right in surface water, "[n]o cases of this Court have applied the doctrine of implied reservation of water

rights to groundwater." *Cappaert*, 426 U.S. at 142. The Ninth Circuit's conclusion that the reserved rights doctrine applies to groundwater directly conflicts with the Wyoming Supreme Court's decision in *Big Horn*.

In *Gila River*, the Arizona Supreme Court – although holding that federal reserved rights apply to groundwater – also held that whether a federal reserved right exists depends on the circumstances of the reservation, and in particular that a reserved right does not exist if other waters are available for the reservation needs. Specifically, the Court stated that whether a federal reserved right exists requires "fact-intensive inquiries that must be made on a reservation-by-reservation basis," and that "[a] reserved right in groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila River*, 989 P.2d at 748. The Ninth Circuit's decision conflicts with the Arizona Supreme Court's decision in *Gila River*, because the Ninth Circuit held that a reserved right exists if the reservation purpose "envisions" use of water regardless of the other circumstances of the reservation, App. 14, and regardless of whether "other sources of water" are available for the reservation. App. 13.[9]

[9] The Arizona Supreme Court in *Gila River* also stated that groundwater users could cause "depletion" of groundwater under Arizona's reasonable use doctrine, and thus a reserved right is necessary to ensure availability of water on Indian reservations. *Gila River*, 989 P.2d at 748. Under California's correlative rights doctrine, however, no overlying landowner has the right to impair

IV. THE TRIBE DOES NOT HAVE A RESERVED RIGHT IN GROUNDWATER.

The question whether the Tribe has a reserved right in groundwater raises significant issues concerning the nature of federal reserved water rights, and more specifically whether the circumstances of the reservation are relevant in determining whether a federal reserved right impliedly exists, and if so, what circumstances are relevant.

The most significant issue is whether the existence of a water right under *state* law is relevant in determining whether a federal reserved water right impliedly exists under *federal* law. Petitioner DWA contends that since the Tribe has the same right to use groundwater under California law as other overlying landowners, the Tribe's claimed reserved right in groundwater is not "necessary" under *New Mexico*'s necessity standard and therefore does not impliedly exist. Since the Tribe has the same right to use groundwater under California law as other overlying landowners, the Tribe is not in the same situation as the Indian tribes in *Winters* and *Arizona*, who had no other sources of water and whose reservation lands were "practically valueless" without a federal reserved right. *Winters*, 207 U.S. at 576.

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the rights of other overlying landowners by depleting the groundwater. *O'Leary v. Herbert*, 5 Cal.2d 416, 423, 55 P.2d 834 (1936); *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 276, 107 P. 115 (1910).

The Ninth Circuit rejected petitioner DWA's argument because "state water rights are preempted by federal reserved rights." App. 21. Obviously federal reserved rights preempt state water rights under the Constitution's Supremacy Clause, and DWA does not contend otherwise. Rather, DWA contends that since the Tribe has the right to use groundwater under California law, the Tribe's claimed reserved right does not meet *New Mexico*'s necessity standard and does not impliedly exist under *federal* law, and thus no issue of preemption arises. The Ninth Circuit responded to an argument that DWA did not make, and failed to respond to the argument that DWA made.

Petitioner DWA also contends that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity standard because the Tribe has a decreed right to use Whitewater River surface water for its reservation needs. ER 115-116. The Tribe's decreed right is based on a 1938 decree, the Whitewater River Decree, that adjudicated all water rights in the Whitewater River and its tributaries. *Id.* Indeed, the Tribe's decreed right includes the precise amount of water that the United States had "suggested" during the adjudication proceeding as necessary to meet the Tribe's reservation needs. ER 119-120. The combination of the Tribe's decreed right to use surface water and its right to use groundwater under California law provides ample water for the Tribe's reservation needs.

Additionally, the historical documents surrounding creation of the Tribe's reservation by the 1870s presidential executive orders indicate that the Tribe

was not using groundwater when its reservation was created. ER 69, 79, 88. The Tribe's failure to use groundwater when its reservation was created defeats any implication that Presidents Grant and Hayes, in issuing the executive orders, impliedly intended to create a reserved right in groundwater that conflicts with and overrides California law.

Even today, the Tribe does not use or attempt to use groundwater for its reservation needs, but instead purchases water from DWA and CVWD. ER 138. The Tribe's failure to use or attempt to use groundwater demonstrates that the prosperity and success of the Tribe's reservation does not depend on whether the Tribe has a reserved right in groundwater. Notably, the Tribe's complaint does not allege otherwise. Instead, the complaint alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water into the groundwater basin that the Tribe allegedly "owns." ER 23. Thus, the Tribe seeks money from the water agencies rather than wet water for its reservation needs. The purpose of the reserved rights doctrine, however, as in *Winters* and *Arizona*, is to provide needed water for federal reserved lands, not to obtain compensation from those who provide water.

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CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

RODERICK E. WALSTON
ARTHUR L. LITTLEWORTH
MICHAEL T. RIDDELL
PIERO C. DALLARDA
Attorneys for Petitioners
Desert Water Agency, et al.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee,

v.

COACHELLA VALLEY WATER DISTRICT; ED PACK, in Official Capacity as Member of the Board of Directors of the Coachella Valley Water District; JOHN POWELL, JR., in Official Capacity as Member of the Board of Directors of the Coachella Valley Water District; PETER NELSON, in Official Capacity as Member of the Board of Directors of the Coachella Valley Water District; G. PATRICK O'DOWD, in Official Capacity as a Member of the Board of Directors of the Coachella Valley Water District; CASTULO R. ESTRADA, in Official Capacity as a Member of the Board of Directors of the Coachella Valley Water District; Desert Water Agency; PATRICIA G. OYGAR, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; THOMAS KIELEY, III, in Official Capacity as

No. 15-55896

D.C. No. 5:13-cv-00883-JGB-SP

OPINION

Member of the Board of Directors of the Desert Water Agency; JAMES CIOFFI, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; CRAIG A. EWING, in Official Capacity as Member of the Board of Directors of the Desert Water Agency; JOSEPH K. STUART, in Official Capacity as Member of the Board of Directors of the Desert Water Agency,

Defendants-Appellants.

Appeal from the United States District Court
For the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted October 18, 2016
Pasadena, California

Filed March 7, 2017

Before: Richard C. Tallman and
Morgan B. Christen, Circuit Judges, and
Matthew F. Kennelly,* District Judge.

Opinion by Judge Tallman

COUNSEL

Steven Bane Abbott (argued), Gerald D. Shoaf, and Julianna K. Tillquist, Redwine and Sherrill, Riverside,

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

California, for Defendants-Appellants Coachella Valley Water District, G. Patrick O'Dowd, Ed Pack, John Powell Jr., Peter Nelson, and Castulo R. Estrada.

Roderick E. Walston (argued), Arthur L. Littleworth, Michael T. Riddell, and Steven G. Martin, Best Best & Krieger LLP, Walnut Creek, California, for Defendants-Appellants Desert Water Agency, Patricia G. Oygar, Thomas Kieley III, James Cioffi, Craig A. Ewing, and Joseph K. Stuart.

Catherine F. Munson (argued), Kilpatrick Townsend & Stockton LLP, Washington, D.C.; Steven C. Moore and Heather Whiteman Runs Him, Native American Rights Fund, Boulder, Colorado; Mark H. Reeves, Kilpatrick Townsend & Stockton LLP, Augusta, Georgia; Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, Dallas, Texas; for Plaintiff-Appellee.

Elizabeth A. Peterson (argued), Yosef M. Negose, Daron T. Carreiro, Patrick Barry, John L. Smeltzer, and William B. Lazarus, Attorneys; John C. Cruden, Assistant Attorney General; United States Department of Justice, Washington, D.C.; Christopher Watson and Scott Bergstrom, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; for Intervenor-Plaintiff-Appellee.

OPINION

TALLMAN, Circuit Judge:

> "When the well's dry, we know the worth of water." Benjamin Franklin (1706-1790), Poor Richard's Almanac.

The Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA") (collectively, the "water agencies") bring an interlocutory appeal of the district court's grant of partial summary judgment in favor of the Agua Caliente Band of Cahuilla Indians (the "Tribe") and the United States. The judgment declares that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley. We agree. In affirming, we recognize that there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater. However, because we conclude that it does, we hold that the Tribe has a reserved right to groundwater underlying its reservation as a result of the purpose for which the reservation was established.

I

A

The Agua Caliente Band of Cahuilla Indians has lived in the Coachella Valley since before California entered statehood in 1850. The bulk of the Agua Caliente

Reservation was formally established by two Presidential Executive Orders issued in 1876 and 1877, and the United States, pursuant to statute, now holds the remaining lands of the reservation in trust for the Tribe. The reservation consists of approximately 31,396 acres interspersed in a checkerboard pattern amidst several cities within Riverside County, including Palm Springs, Cathedral City, and Rancho Mirage. *See Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971).

The Executive Orders establishing the reservation are short in length, but broad in purpose. In 1876, President Ulysses S. Grant ordered certain lands "withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California." Exec. Order of May 15, 1876. Similarly, President Rutherford B. Hayes's 1877 Order set aside additional lands for "Indian purposes." Exec. Order of Sept. 29, 1877. These orders followed on the heels of detailed government reports from Indian agents, which identified the urgent need to reserve land for Indian use in an attempt to encourage tribal members to "build comfortable houses, improve their acres, and surround themselves with home comforts." Comm'r of Indian Aff., Ann. Rep. 224 (1875). In short, the United States sought to protect the Tribe and "secure the Mission Indians permanent homes, with land and water enough." Comm'r of Indian Aff., Ann. Rep. 37 (1877).

Establishing a sustainable home in the Coachella Valley is no easy feat, however, as water in this arid

southwestern desert is scarce. Rainfall totals average three to six inches per year, and the Whitewater River System – the valley's only real source of surface water – produces an average annual supply of water that fluctuates between 4,000 and 9,000 acre-feet, most of which occurs in the winter months.[1] *See* CVWD, Engineer's Report on Water Supply and Replenishment Assessment at III-12 (2016-2017); CVWD, Urban Water Management Plan at 3-2, 3-20 (2005). In other words, surface water is virtually nonexistent in the valley for the majority of the year. Therefore, almost all of the water consumed in the region comes from the aquifer underlying the valley – the Coachella Valley Groundwater Basin.[2]

The Coachella Valley Groundwater Basin supports 9 cities, 400,000 people, and 66,000 acres of farmland. *See* CVWD-DWA, The State of the Coachella Valley Aquifer at 2. Given the demands on the basin's

[1] An acre-foot is the volume of water sufficient to cover one acre in area at a depth of one foot. CVWD, 2010-2011 Annual Review at 2. It is equivalent to 325,851 gallons. *Id.* It takes about four acre-feet of water to irrigate one acre of land for a year in the Coachella Valley. *See* U.S. Dep't of Agric., A Review of Agricultural Water Use in the Coachella Valley at 6 (2006). Therefore, at 9,000 acre-feet per year, the river system provides enough water to irrigate around 2,250 acres. At 4,000 acre-feet per year, the system can only irrigate about 1,000 acres. Considering that the Tribe is not the only user of the Whitewater River System, and that its reservation alone accounts for 31,396 acres, even in a peak year the river system provides very little water for irrigation or for human consumption.

[2] The CVWD estimates that surface water accounts for less than five percent of its water supply each year. *See* CVWD, Urban Water Management Plan at 3-20 (2005).

supply, it is not surprising that water levels in the aquifer have been declining at a steady rate. Since the 1980s, the aquifer has been in a state of overdraft,[3] which exists despite major efforts to recharge the basin with water delivered from the California Water Project and the Colorado River. In total, groundwater pumping has resulted in an average annual recharge deficit of 239,000 acre-feet, with cumulative overdraft estimated at 5.5 million acre-feet as of 2010.

The Tribe does not currently pump groundwater on its reservation. Rather, it purchases groundwater from Appellant water agencies. The Tribe also receives surface water from the Whitewater River System, particularly the Andreas and Tahquitz Creeks that sometimes flow nearby. The surface water received from this system is consistent with a 1938 California Superior Court adjudication – the Whitewater River Decree – which attempted to address state-law water rights for users of the river system. Because the United States held the lands in trust, it participated in the adjudication via a "Suggestion" on behalf of the Tribe and the resulting state court order included a water allotment for the Tribe's benefit.[4] The amount of water reserved

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[3] Overdraft occurs when the amount of water extracted from the underground basin exceeds its recharge rate. CVWD, 2010-2011 Annual Review at 2.

[4] In providing this "Suggestion," the government maintained that it was not "submitting the rights of the United States . . . to the jurisdiction of the Department of Public Works of the State of California" and that the court lacked "jurisdiction [to adjudicate] the water rights of the United States." The federal government continues to maintain this position before us.

for the Tribe from this adjudication, however, is minimal, providing enough water to irrigate approximately 360 acres. Further, most of this allotment is filled outside of the growing season because the river system's flow peaks between December and March. Thus, groundwater supplied by the water agencies remains the main source of water for all types of consumption on the reservation throughout the year.

B

Given an ever-growing concern over diminishing groundwater resources, the Agua Caliente Tribe filed this action for declaratory and injunctive relief against the water agencies in May 2013. The Tribe's complaint requested a declaration that it has a federally reserved right and an aboriginal right to the groundwater underlying the reservation. In June 2014, the district court granted the United States' motion to intervene as a plaintiff. The United States also alleges that the Tribe has a reserved right to groundwater.

The parties stipulated to divide the litigation into three phases. Phase I, at issue here, seeks to address whether the Tribe has a reserved right and an aboriginal right to groundwater. According to the parties' stipulation, Phase II will address whether the Tribe beneficially owns the "pore space" of the groundwater basin underlying the Agua Caliente Reservation and whether a tribal right to groundwater includes the right to receive water of a certain quality. Finally,

Phase III will attempt to quantify any identified groundwater rights.

In March 2015, the district court granted in part and denied in part Plaintiffs' and Defendants' cross motions for partial summary judgment with respect to Phase I of the litigation. In its order, the district court held that the reserved rights doctrine applies to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation.[5] The district court then certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted the water agencies' petition for permission to prosecute this appeal.

II

The district court's grant of summary judgment is reviewed de novo. *Tohono O'odham Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A court shall grant summary judgment when, "under the governing law, there can be but

[5] The district court also held that the Tribe does not have an aboriginal right to the groundwater. An aboriginal right is a type of property right that derives from territorial occupancy of land. *See United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641-42 (9th Cir. 1986). However, the Tribe did not appeal this issue, and we do not review it here.

one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

III

Due to the unusual trifurcation of this litigation, we are concerned on appeal only with Phase I – whether the Tribe has a federal reserved right to the groundwater underlying its reservation. This question, however, is best analyzed in three steps: whether the United States intended to reserve water when it created the Tribe's reservation; whether the reserved rights doctrine encompasses groundwater; and, finally, whether the Tribe's correlative rights under state law or the historic lack of drilling for groundwater on the reservation, or the water the Tribe receives pursuant to the Whitewater River Decree, impacts our answers to these questions. We address each in turn.

A

For over one hundred years, the Supreme Court has made clear that when the United States "withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing U.S. Const. art. I, § 8; U.S. Const. art. IV, § 3); *see also Winters v. United States*, 207 U.S. 564, 575-78 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981).

In what has become known as the *Winters* doctrine, federal reserved water rights are directly applicable "to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams." *See Cappaert*, 426 U.S. at 138. The creation of these rights stems from the belief that the United States, when establishing reservations, "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona v. California*, 373 U.S. 546, 600 (1963); *see also id.* at 598-99 ("It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind – hot, scorching sands – and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.").

Despite the longstanding recognition that Indian reservations, as well as other reserved lands, require access to water, the *Winters* doctrine only applies in certain situations: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land. *Winters*, 207 U.S. at 575-78; *Cappaert*, 426 U.S. at 138. Once established, however, *Winters* rights "vest[] on the date of the reservation and [are] superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138.

B

1

Given the limitations in the *Winters* doctrine, we must first decide whether the United States, in establishing the Agua Caliente Reservation, impliedly reserved water. *See United States v. New Mexico*, 438 U.S. 696, 701 (1978). We conclude that it did. And although the parties and the district court focused on the application of the *Winters* doctrine to groundwater specifically, their argument over the creation of a federal reserved right – and, in particular, the relevance of *New Mexico* to that question – depends on whether the Agua Caliente Reservation carried with it a reserved right to water generally. Whether the Tribe's reserved right extends to the groundwater underlying its reservation is a separate question from whether the establishment of the reservation contained an implicit right to use water.

In *New Mexico*, the Supreme Court emphasized that, under the reserved rights doctrine, the government reserves only "that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* (quoting *Cappaert*, 426 U.S. at 141). "Where water is only valuable for a secondary use of the reservation, . . . the United States [must] acquire water in the same manner as any other public or private appropriator." *Id.* at 702. In other words, *New Mexico* established a "primary-secondary use" distinction. Water is impliedly

reserved for primary purposes. It is not, however, reserved for secondary purposes.[6]

The water agencies argue that *New Mexico* requires us – when deciding if a reserved right exists at all – to determine whether water is necessary to fulfill the primary purpose of the Agua Caliente Reservation. If it is not, they argue, then we are to conclude that Congress did not intend any water to be impliedly reserved under a federal water right. Put differently, the water agencies argue that *New Mexico* stands for the proposition that water is impliedly reserved only if other sources of water then available cannot meet the reservation's water demands. According to the water agencies, if other sources of water exist – and the lack of a federal right would not entirely defeat the purpose of the reservation – then Congress intended to defer to state water law and require the United States to obtain water rights like any other private user.

New Mexico, however, is not so narrow. Congress does not defer to state water law with respect to reserved rights. *Id.* at 702, 715. Instead, Congress retains "its authority to reserve unappropriated water . . . for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *Id.* at 698.

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[6] We have previously noted that *New Mexico* is "not directly applicable to *Winters* doctrine rights on Indian reservations." *United States v. Adair*, 723 F.3d 1394, 1408 (9th Cir. 1983). However, it clearly "establish[es] several useful guidelines." *Id.* Thus, we consider its application here.

The federal purpose for which land was reserved is the driving force behind the reserved rights doctrine. "Each time [the] Court has applied the 'implied-reservation-of-water-doctrine,' 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." *Id.* at 700. But the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the reservation envisions water use.

Winters itself established that the purpose of the reservation is controlling. In *Winters*, the Supreme Court addressed whether the federal government reserved water for tribal usage at the Fort Belknap Indian Reservation, which had been reserved by the United States "as and for a permanent home" for several tribes. 207 U.S. at 565. The *Winters* Court observed that the arid tribal reservation would be "practically valueless," and that a civilized community "could not be established thereon," without irrigation. *Id.* at 576. Thus, the Court held that, in creating the reservation, the United States simultaneously reserved water "for a use which would be necessarily continued through years." *Id.* at 577. The reserved right turned on the purpose underlying the formation of the Fort Belknap Reservation.

Though it was decided seventy years after *Winters*, *New Mexico* remains faithful to this construction. In

analyzing the reserved rights doctrine, the Court first sought to determine Congress' intent in creating the Gila National Forest. *New Mexico*, 438 U.S. at 698. After reviewing the congressional act that established the forest, the Court determined that Congress intended only two purposes – "to conserve the water flows, and to furnish a continuous supply of timber for the people." *Id.* at 707 (citation omitted). It did not, however, reserve the forest lands for aesthetic, environmental, recreational, or wildlife-preservation purposes. *Id.* at 708. Thus, the Court deemed the latter uses "secondary," for which the reserved right did not attach, and held that only "to fulfill the very purposes for which a federal reservation was created . . . [did] the United States intend[] to reserve the necessary water." *Id.* at 702.

As such, *New Mexico*'s primary-secondary use distinction did not alter the test envisioned by *Winters*. Rather, it added an important inquiry related to the question of *how much* water is reserved. It also answered that question by holding that water is reserved only for primary purposes, those directly associated with the reservation of land. It did not, however, eliminate the threshold issue – that a reserved right exists if the purposes underlying a reservation envision access to water.

2

Because *New Mexico* holds that water is reserved if the primary purpose of the reservation envisions water use, we now determine the primary purpose of the Tribe's reservation and whether that purpose contemplates water use. To do so, we consider "the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created." *Walton*, 647 F.2d at 47.

The Executive Orders establishing the Tribe's reservation declared that the land was to be set aside for "the permanent use and occupancy of the Mission Indians" or, more generally, for "Indian purposes."[7] *See supra* Part I. While imprecise, such a purpose is not indecipherable. Our precedent recognizes that "[t]he specific purposes of an Indian reservation . . . [are] often unarticulated. The general purpose, *to provide a home for the Indians*, is a broad one and must be liberally construed." *Walton*, 647 F.2d at 47 (emphasis added). Moreover, "[m]ost of the land in these reservations is and always has been arid," and it is impossible to believe that the United States was unaware "that water . . . would be essential to the life of the Indian people." *Arizona*, 373 U.S. at 598-99.

The situation facing the Agua Caliente Tribe is no different. Water is inherently tied to the Tribe's ability

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[7] Additionally, government reports preceding the Executive Orders recognized the need to secure the Tribe "permanent homes, with land and water enough." *See* Comm'r of Indian Aff., Ann. Rep. 37 (1877).

to live permanently on the reservation. Without water, the underlying purpose – to establish a home and support an agrarian society – would be entirely defeated. Put differently, the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose. Thus, we hold that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation.

C

While we conclude that the federal government envisioned water use when it established the Tribe's reservation, that does not end our inquiry. We must now determine whether the *Winters* doctrine, and the Tribe's reserved water right, extends to the groundwater underlying the reservation. And while we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater,[8] we now expressly hold that it does.

Apart from the requirement that the primary purpose of the reservation must intend water use, the other main limitation of the reserved rights doctrine is

[8] We previously held that the *Winters* doctrine applies "not only [to] surface water, but also to underground water." *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974), *aff'd on other grounds*, *Cappaert*, 426 U.S. at 142. But on appeal, the Supreme Court did not reach this question. *See Cappaert*, 426 U.S. at 142. In that case, the peculiarities of the hydrological forms led the Court to conclude as a question of fact that the reserved water in a cavern pool was surface water, not groundwater. *Id.*

that the unappropriated water must be "appurtenant" to the reservation. *See Cappaert*, 426 U.S. at 138. Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only. *Cappaert* itself hinted that impliedly reserved waters may include appurtenant groundwater when it held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.[9]

Further, many locations throughout the western United States rely on groundwater as their only viable water source. *See, e.g.*, *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 746 (Ariz. 1999) (en banc) ("The reservations considered in [*Winters* and *Arizona*] depended for their water on perennial streams. But some reservations

[9] Although the district court found that the groundwater contained in the Coachella Valley aquifer "does not 'add to, contribute to or support' any surface stream from which the Tribe diverts water," that does not mean that the hydrological cycle in the Coachella Valley has been severed. *See* U.S. Geological Surv., Ground Water and Surface Water: A Single Resource, U.S.G.S. Circular 1139 at 9-10 (1998) (recognizing a connection between surface and groundwater even where the water table falls below the stream bed). Further, we note that surface water is used here to replenish groundwater sources. As such, the district court may wish to hear expert opinion on the interconnectedness of the waters in the valley in the later phases of this litigation. Proper factual findings on this issue will allow the district court to fashion appropriate relief during the quantification phase.

lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life."). More importantly, such reliance exists here, as surface water in the Coachella Valley is minimal or entirely lacking for most of the year. Thus, survival is conditioned on access to water – and a reservation without an adequate source of surface water must be able to access groundwater.

The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities, we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land.[10] The creation of the Agua Caliente Reservation therefore carried with it an implied right to use water from the Coachella Valley aquifer.

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[10] The parties do not dispute appurtenance, nor could they. The Coachella Valley Groundwater Basin clearly underlies the Tribe's reservation. *See generally* CVWD, Engineer's Report on Water Supply and Replenishment Assessment (2016-2017).

D

The final issue we must address is the contours of the Tribe's reserved right, including its relation to state water law and the Tribe's existing water rights.

A "reserved right in unappropriated water . . . vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138. Further, reserved rights are not analyzed "in terms of a balancing test." *Id.* Rather, they are federal water rights that preempt conflicting state law. *See Walton*, 647 F.2d at 51-53; *see also New Mexico*, 438 U.S. at 715 ("[T]he 'reserved rights doctrine' . . . is an exception to Congress' explicit deference to state water law in other areas."). Finally, the rights are not lost through non-use. *See Walton*, 647 F.2d at 51. Instead, they are flexible and can change over time. *See id.* at 47-48; *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956).

Despite the federal primacy of reserved water rights, the water agencies argue that because (1) the Tribe has a correlative right to groundwater under California law and (2) the Tribe has not drilled for groundwater on its reservation, and (3) because the Tribe is entitled to surface water from the Whitewater River Decree, the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being entirely defeated. Put differently, the water agencies argue that, because the Tribe is already receiving water pursuant to California's correlative

rights doctrine and the Whitewater River Decree, a federal reserved right is unnecessary.

However, the water agencies' arguments fail for three reasons. First, state water rights are preempted by federal reserved rights. *See Walton*, 647 F.2d at 51; *see also Ahtanum Irrigation Dist.*, 236 F.2d at 329 ("Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them."). Second, the fact that the Tribe did not historically access groundwater does not destroy its right to groundwater now. *See Walton*, 647 F.2d at 51. And third, the *New Mexico* inquiry does not ask if water is currently needed to sustain the reservation; it asks whether water was envisioned as necessary for the reservation's purpose at the time the reservation was created. *See supra* Part III.B. Thus, state water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right.

IV

In sum, the *Winters* doctrine does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created. As such, because the United States intended to reserve water when it established a home for the Agua Caliente Band of Cahuilla Indians, we hold that the district court did not err in determining that the government

reserved appurtenant water sources – including groundwater – when it created the Tribe's reservation in the Coachella Valley.

Finally, we recognize that the district court's failure to conduct a thorough *New Mexico* analysis with respect to whether the Tribe needs access to groundwater was largely a function of the parties' decision to trifurcate this case. We also understand that a full analysis specifying the scope of the water reserved under *New Mexico* will be considered in the subsequent phases of this litigation.

Presumably, however, the water agencies will continue to argue in these later phases that the *Winters* doctrine is dependent upon the Tribe's demonstrated need – that is, need above and beyond what the Tribe is already receiving under state-law entitlements or could receive through a paramount surface water right. And while we express no opinion on how much water falls within the scope of the Tribe's federal groundwater right, there can be no question that water in some amount was necessarily reserved to support the reservation created. Thus, to guide the district court in its later analysis, we hold that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.

Each party shall bear its own costs.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. **EDCV 13-883-JGB** Date March 24, 2015

Title ***Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al.***

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s): None Present	Attorney(s) Present for Defendant(s): None Present

Proceedings: Order GRANTING IN PART and DENYING IN PART Plaintiffs' and Defendants' motions for partial summary judgment

"It is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976).

The Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe") claims to have lived in the Coachella valley, which sits just to the east of the San Jacinto mountains in southern California, since before California was admitted as a State in 1850. The Coachella valley forms part of the Sonoran desert,

where water is scarce. The Agua Caliente sued the Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA"),[1] seeking, among other things, a declaration that their federal reserved water rights, which arise under the doctrine of *Winters v. United States*, 207 U.S. 564 (1908), extend to groundwater. The parties, plus the United States as Plaintiff-intervenor, all filed motions for partial summary judgment. (Doc. Nos. 82, 83, 84, 85.) After considering all the papers, the exhibits submitted with them, and the parties' arguments at the March 16, 2015 hearing, the Court concludes the Tribe's federal reserved water rights may include groundwater, but the Tribe's aboriginal right of occupancy was extinguished long ago, so the Tribe has no derivative right to groundwater on that basis.

I. BACKGROUND

A. Factual allegations

The Agua Caliente have lived in the Coachella valley since before American or European settlers arrived in what is now southern California, and the Tribe has used both surface water and groundwater resources there for "cultural, domestic and agricultural subsistence purposes." (Compl. ¶ 4.) Those uses included "stock watering and agricultural irrigation," and the Tribe raised "abundant crops of corn, barley and vegetables" in the 1850s. (Compl. ¶ 14-15.) President

[1] The Court refers to CVWD and DWA collectively as "Defendants."

Ulysses S. Grant established the Tribe's reservation in an Executive Order issued May 15, 1876, and the reservation was expanded by President Rutherford B. Hayes on September 29, 1877. (*Id*. ¶ 5.) The United States, pursuant to statute, holds the lands of the reservation in trust for the tribe. (*Id*.) The Agua Caliente claim the "establishment of the Reservation pursuant to federal law impliedly reserved to the Tribe and its members the right to surface water and groundwater sufficient to accomplish the purposes of the reservation, including establishing a homeland for the Tribe and its members." (*Id*. ¶ 6.) In the Tribe's view, those reserved rights "are the most senior" in the region, and, accordingly, the Agua Caliente may prevent CVWD and DWA from adversely affecting the quantity and quality of their water. (*Id*. ¶¶ 7, 8.)

Defendants are creatures of California statutes, or individuals sued in their official capacities who control or manage the CVWD or DWA. The CVWD is a county water district, and is responsible for developing groundwater wells in the Coachella valley and extracting groundwater. (Compl. ¶ 10.) The DWA is an "independent special district" created to provide water to the city of Palm Springs and areas that surround it by developing groundwater wells and extracting groundwater. (*Id*. ¶ 12.) Throughout the twentieth century, Californians displaced the Agua Caliente from the Coachella valley, and fueled agricultural expansion in the desert through the increased use of groundwater for commercial irrigation. (Compl. ¶ 23-24.)

The Tribe's pleading further states the groundwater underlying the Coachella valley is in a continual state of "overdraft," which means the outflows from the aquifer exceed the inflows. (Compl ¶ 33.) The CVWD tries to recharge the Coachella valley's groundwater by importing water from the Colorado River, but the Tribe alleges that water is of inferior quality. (Compl. ¶ 47.)

The complaint finally alleges the "Tribe and its members have established a homeland in the Coachella valley, including housing, schools, government offices, and cultural and commercial enterprises," for which the Tribe relies upon its reserved groundwater resources. (Compl. ¶ 51.) The Agua Caliente seek relief in this case to "satisfy the present and future needs of the Tribe and its members" and to protect the Tribe's reserved water rights from overdraft and degradation. (Compl. ¶¶ 52-54.)[2]

B. Procedural history

The Agua Caliente filed this action for declaratory and injunctive relief against both defendants in May 2013. (Doc. No. 1.) In June 2014 the Court granted the United States' motion to intervene as a Plaintiff in its capacity as trustee for the Tribe's reservation. (Doc. Nos. 62, 70.)

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[2] The United States' complaint in intervention asserts claims materially similar to the Tribe's complaint regarding the claim for a declaration of federally reserved water rights. It does not, however, assert a claim regarding aboriginal water rights.

The parties stipulated to trifurcate this action into three phases. (Doc. No. 49.) Phase I seeks to resolve the primarily legal questions regarding the existence of (1) the Agua Caliente's federal reserved rights to groundwater under the *Winters* doctrine, and (2) the Tribe's aboriginal rights to groundwater. Phase II, contingent to a certain extent on Phase I's resolution, will address (1) the ownership of certain "pore space" beneath the reservation; (2) the legal question of whether a right to a quantity of groundwater encompasses a right to water of a certain quality; and (3) some of the equitable defenses asserted by the CVWD and DWA. If necessary, in Phase III the Court will undertake the fact-intensive tasks of quantifying the Agua Caliente's rights to groundwater and pore space, and crafting appropriate injunctive relief.

All four parties have filed motions for summary judgment. The Tribe's motion, (Doc. No. 85), argues federal law recognizes the Tribe's reserved right to groundwater, and that it also holds aboriginal title to land in the Coachella valley to which groundwater rights attach. The United States' motion, (Doc. No. 83), echoes the Tribe's *Winters* rights argument and emphasizes the supremacy of federal water rights over those created by state law, but does not claim tribal aboriginal title on the Agua Caliente's behalf.

CVWD maintains in its motion that (1) Congress extinguished any aboriginal groundwater rights, and (2) *Winters* rights impliedly reserved for the Tribe do not extend to groundwater, and even if they extend to

groundwater, the purposes of the Agua Caliente's reservation will not "entirely fail" without a reserved right to groundwater. (Doc. No. 82.) DWA's motion, (Doc. No. 84), largely parallels that of CVWD; it contends the Tribe has no federal reserved right in groundwater, and the Tribe's aboriginal water rights claim was extinguished by statute long ago.

II. LEGAL STANDARD

A court shall grant a motion for summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Summary judgment is appropriate if "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250. Courts consider cross-motions for summary judgment independently of one another, each on their own merits, in light of all the evidence attached to both motions. *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party," *Anderson*, 477 U.S. at 248; *Scott v. Harris*, 550 U.S. 372, 380 (2007), and the underlying substantive law identifies which facts are material. *Id*. In ruling on a motion for summary judgment, a court construes the evidence in the light most

favorable to the non-moving party. *Scott*, 550 U.S. at 380.

III. FACTS

The facts relevant to Phase I issues, taken from the parties' statements of undisputed facts and requests for judicial notice, are not in dispute. Preceding the creation of the Agua Caliente's reservation, various government officials reported that they intended the reservation to "meet the present and future wants of these Indians, by giving them the exclusive and free possession of these lands [on which] they will be encouraged to build comfortable houses, improve their acres, and surround themselves with home comforts." (*E.g.*, Doc. No. 92-1 ¶ 47.) A "Mission Indian Agent" corresponded that his department's purpose was to "secure the Mission Indians with permanent homes, with land and water enough, that each one who will go upon a reservation may have to cultivate a piece of ground as large as he may desire." (Doc. No. 92-1 ¶ 58; *see also id*. ¶¶ 39-59.)

A series of seven Executive Orders, issued pursuant to statutory authority and dated from 1865-1881, created what is now the Agua Caliente's reservation, although the first two reserved the bulk of the land. (*See* Doc. No. 92-1 ¶ 30.) All the Orders are very short. President Grant stated in the first Order that the land described was "withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California." (*Id*. ¶ 31.)

The subsequent reservations either incorporate the general statement of purpose contained in the first, or simply state the reservation should be used for "Indian purposes." (*See id*. ¶¶ 32-36.)

The groundwater basin which underlies the reservation extends beneath the entire Coachella valley, and the aquifer is in a state of overdraft. (Doc. No. 92-1 ¶ 69.) The groundwater does not "add to, contribute to or support" any surface stream from which the Tribe diverts water or is otherwise relevant to this litigation (e.g., the Tahquitz, Andreas, or Chino Creeks). (Doc. No. 96-1 ¶ 1.) Neither the Tribe nor its allottees produce groundwater, rather, they purchase their water from DWA or CVWD. (Doc. No. 98-9 ¶¶ 1-2, 19.) Some non-Indian lessees who occupy reservation territory do produce groundwater for their use – specifically to water golf courses. (Doc. No. 98-9 ¶ 20.)

In 1938, the California Superior Court for Riverside County entered a decree governing the rights to the water in the Whitewater river system. (Doc. No. 84-5 Ex. 1.) The United States participated in that adjudication via a "Suggestion," (Doc. No. 84-7 Ex. 8), and received a right to divert some surface water from the Tahquitz and Andreas creeks for the Tribe's use (Doc. No. 84-5 Ex. 1 at 61-62). The United States, however, specifically stated in its Suggestion that it was not "submitting the rights of the United States . . . to the jurisdiction of the Department of Public Works of the State of California" and also that the court lacked "jurisdiction of the water rights of the United States." (Doc. No. 84-7 Ex. 8 at 46.)

IV. DISCUSSION

Phase I of this case addresses, by stipulation of the parties, (1) whether the Tribe's federal reserved water rights include groundwater resources, and (2) whether the Tribe may assert aboriginal title to groundwater underlying its reservation. The Court addresses the issues in turn.

A. *United States v. Winters* and federal reserved water rights

1. The law of federal reserved water rights

For over a century, the Supreme Court has held that when the United States "withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[3] *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing U.S. Const. art. I, § 8; U.S. Const. art. IV. § 3); *see also Winters v. United States*, 207 U.S. 564 (1908); *John v.*

[3] Generally, the phrase "public domain" refers to "the land owned by the [federal] Government, mostly in the West, that was available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The government reserves land, literally setting aside "parcels of land belonging to the United States . . . for various purposes, including Indian settlement, bird preservation, and military installations, when it appear[s] that the public interest would be served by withdrawing or reserving parts of the public domain." *Id*. (internal citations and quotation marks omitted).

United States, 720 F.3d 1214; 1225-26 (9th Cir. 2013); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); Felix S. Cohen et al., Cohen's Handbook of Federal Indian Law § 19.03 (2012 ed.) ("Cohen's Handbook"); 1 Waters and Water Rights § 37.02 (Amy K. Kelley ed., 3d ed. 2015). Impliedly reserved water fights "vest[] on the date of the reservation and [are] superior to the rights of future appropriators." *Id*. *Winters* rights arise under federal law, and are thus an exception to the normal rule that assigns water resources regulation to the states. *United States v. New Mexico*, 438 U.S. 696, 701-02 (1978); *Cappaert*, 426 U.S. at 145; Cohen's Handbook § 19.03[1].

The *amount* of water impliedly reserved under the *Winters* doctrine presents a tougher question than whether or not the government reserved water at all. *See Walton*, 647 F.2d at 48. *Arizona v. California*, 373 U.S. 546 (1963), provides the analytical starting point for a quantification of an Indian tribe's *Winters* rights. In *Arizona*, an original proceeding, the Supreme Court agreed with the special master's conclusion that "water was intended to satisfy the future as well as the present needs of the Indian Reservations and . . . that enough water was reserved to irrigate all the practicably irrigable acreage on the reservation." 373 U.S. at 600. Following *Arizona*, the Court explained the federal government only reserves "that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141. And in a subsequent case it drew a distinction between a reservation's primary purpose, for which water is impliedly reserved

under *Winters*, and secondary uses, for which it is not. *New Mexico*, 438 U.S. at 702.

The Ninth Circuit applies *New Mexico*'s primary use-secondary use distinction to guide the implied reserved water rights analysis involving Indian tribes and reservations, although not necessarily to control it. *See United States v. Adair*, 723 F.2d 1394, 1408-09 (9th Cir. 1983) (citing *New Mexico*, 438 U.S at 702); *Walton*, 647 F.2d at 47 (writing in the process of quantifying a tribe's *Winters* rights: "[w]e apply the *New Mexico* test here").[4] The Ninth Circuit has further explained the "general" purpose of an Indian reservation, and thus the purpose for which the federal government impliedly reserves water rights, is to "provide a home for the Indians, [which] is a broad one and must be liberally construed." *Walton*, 647 F.2d at 47 & n.9 ("The rule of liberal construction should apply to reservations created by Executive Order. *See* [*Arizona*, 373 U.S. at 598]. Congress envisioned agricultural pursuits as only a first step in the 'civilizing' process."); *United States v.*

[4] The Court recognizes that the primary use-secondary use distinction may be best suited to contexts where a "primary purpose" of a reservation is more clearly announced, such as federal reservations created pursuant to statute as in *New Mexico*. *See* Cohen's Handbook § 19.03[4] ("The significant differences between Indian reservations and federal reserved lands indicate that the [primary-secondary] distinction should not apply."). Notwithstanding the practical difficulty of identifying a tribe's reservation's primary purpose, the Court must follow Ninth Circuit case law, which explains that *New Mexico*, "while not directly applicable to *Winters* doctrine rights on Indian reservations," at a minimum "establish[es] several useful guidelines." *Adair*, 723 F.2d at 1409.

Ahtanum Irrigation Dist., 236 F.2d 321, 326 (9th Cir. 1956) ("It is obvious that the quantum is not measured by the use being made at the time the treaty was made. The reservation was not merely for present but for future use."). To identify an Indian reservation's purposes, the Ninth Circuit considers "the [reservation's formative] document and circumstances surrounding its creation, and the history of the Indians for whom it was created," as well as the tribe's "need to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 47 (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)); *accord United States v. Washington*, 375 F. Supp. 2d 1050, 1064 (W.D. Wash. 2005), *vacated pursuant to settlement, Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007).

Cases addressing *Winters* rights proceed in two distinct analytical steps. Courts first examine the existence of reserved rights – usually a straightforward inquiry. Then comes quantification, which addresses the *scope* of the government's implication. *See, e.g.*, *New Mexico*, 438 U.S. at 698, 718 (first restating *Winters* rule, then deciding Congress intended to reserve water from the Rio Mimbres "only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law"); *Cappaert*, 426 U.S. at 13846 (addressing whether the government reserved water in connection with the addition of Devil's Hole to the Death Valley National Monument, and then ruling that distant groundwater pumping could be enjoined to protect the federal reservation);

Walton, 647 F.2d at 47 ("We hold that water was reserved when the . . . [r]eservation was created. . . . The more difficult question concerns the amount of water reserved."). The upshot of this well-established framework, especially in light of the parties' agreement to split this case into three phases, is that the Court addresses here only the existence of the Tribe's *Winters* rights; quantification comes later.

2. The federal government impliedly reserved water for the Tribe's reservation

When Presidents Grant and Hayes withdrew portions of the Coachella valley from the public domain by Executive Order to create the Agua Caliente's reservation, they also reserved, by implication, the right to appurtenant water in the amount necessary "to fulfill the purposes of the reservation." *Cf. Walton*, 647 F.2d at 46-47. No case interpreting *Winters* draws a principled distinction between surface water physically located on a reservation and other appurtenant water sources. *See, e.g.*, *Cappaert*, 426 U.S. at 143; *see also* Cohen's Handbook § 19.03[2][a] ("Reserved rights presumably attach to all water sources – groundwater, streams, lakes, and springs – that arise on, border, traverse, underlie, or are encompassed within Indian reservations."). Instead, the relevant legal constraints under *Winters* and its progeny are whether (1) the reserved water is necessary to fulfill the purposes of the reservation and (2) the reserved water is appurtenant to the reserved land. *Walton*, 647 F.2d at 46.

a. The reservation's purpose

The documents contemporaneous with the creation of the Agua Caliente's reservation are vague, which is not surprising because they're approximately 150 years old. But those documents do admit that the reservation intended to provide the Tribe with a home, and intended to do so with some measure of permanence. *Walton* guides the interpretation of the Agua Caliente's reservation's purpose. In *Walton*, like in this case, the President created the reservation by terse Executive Order in the era following the Civil War, 647 F.2d at 47 n.8, and the Ninth Circuit cautioned: "[t]he specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Id*. at 47. The court there held the tribe's reserved rights extended to agricultural uses as well as the "development and maintenance of replacement fishing grounds" due to the economic and religious importance of fishing to the tribe. *Id*. at 48.

Accordingly, the Court must both construe the general purposes of the Tribe's reservation broadly, and take account that *Winters* rights anticipate increased or novel future uses. *See also Ahtanum Irrigation Dist.*, 236 F.2d at 326. Applying those tenets, the Court can safely state that the reservation implied at least some water use; but exactly how much is not a question presented by Phase I of this case.

b. Groundwater is appurtenant to the Tribe's reservation

Any attempt to limit appurtenant water sources to surface water fails as a matter of law and logic. For example, California law recognizes that groundwater rights are inextricably linked to the overlying land. *See City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1240 (2000) ("An overlying right, analogous to that of a riparian owner in a surface stream, is the right of the owner of the land to take water from the ground underneath for use on his land within the basin or watershed; the right is based on ownership of the land and is appurtenant thereto.") (internal quotation marks omitted). And federal law, at least by implication, treats surface water and groundwater similarly. *See Cappaert*, 426 U.S. at 143 (holding the United States can "protect its water from subsequent diversion, whether the diversion is of surface water or groundwater"). Taken together, these authorities suggest that groundwater provides an appurtenant water source, in the *Winters* sense.

With one exception, every court to address the issue agrees that *Winters* rights encompass groundwater resources, as well as surface water, appurtenant to reserved land. *See, e.g.*, *Washington*, No. C01-0047Z, slip op. at 8 (W.D. Wash. Feb. 24, 2003) ("Thus, as a matter of law the Court concludes that the reserved water rights doctrine extends to groundwater even if groundwater is not connected to surface water."); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) ("The Winters case dealt only with the surface water, but the

same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."); *In re Gila River Sys. & Source*, 989 P.2d 739, 747 (Ariz. 1999) ("The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation."); *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002) ("We see no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights in this case."). *But see In re Big Horn River Sys.*, 753 P.2d 76, 99-100 (Wyo. 1988), *aff'd by an equally divided court, Wyoming v. United States*, 492 U.S. 406 (1989).[5]

Appurtenance, as that term is used by the *Winters* doctrine, must provide some legal limitation to impliedly reserved water rights; but persuasive authority suggests that limit should not be drawn between surface and groundwater sources. *Cf. Cappaert*, 426 U.S. at 142-43 (emphasizing the relation between surface water and groundwater in the hydrologic cycle). The

[5] The Wyoming Supreme Court admitted that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," but nevertheless ruled against the extension of *Winters* rights because "not a single case applying the reserved water doctrine to groundwater is cited to us." 753 P.2d at 99. The weight of authority on the issue has shifted.

federal government intended to reserve water for the Tribe's use on its reservation. Rights to the groundwater underlying the reservation are appurtenant to the reservation itself. Accordingly, the Court concludes the federal government impliedly reserved groundwater, as well as surf ace water, for the Agua Caliente when it created the reservation. Whether groundwater resources are necessary to fulfill the reservation's purpose, however, is a question that must be addressed in a later phase of this litigation.

3. Defendants' arguments are largely irrelevant to Phase I issues

The parties agreed to address two discrete questions in Phase I of this case. The first, and the one relevant to much of Defendants' written submissions, asks for clarification of the Tribe's *Winters* rights – namely whether they could extend to groundwater underlying the reservation. DWA and CVWD have argued extensively in their briefing that any *Winters* rights possessed by the Agua Caliente do not extend to groundwater. Their contentions, however, mainly talk past whether *Winters* rights include groundwater, and focus on the quantum of the Tribe's entitlement.

Defendants' arguments largely take two forms. First, Defendants contend that principles of federalism and comity counsel against an extension of *Winters* rights to California groundwater resources. Second, Defendants claim the Tribe is able to function adequately under California's groundwater allocation

framework without resort to *Winters* rights, so an asserted right beyond their current allotment is not necessary to prevent the reservation's purpose from being entirely defeated.[6] Neither argument withstands scrutiny.

It is neither novel nor controversial that *Winters* rights derive from federal law, and thus displace state law when in conflict. *E.g.*, *Cappaert*, 426 U.S. at 138-39. The case law specifically holds that the *Winters* doctrine does not entail a "balancing test" of competing interests to determine the existence or scope of reserved rights. *Id*. Moreover, the California legislature acknowledges the supremacy of federal water rights, and acquiesces in their priority. *See* Cal. Water Code § 10720.3 ("[I] n the management of a groundwater basin or subbasin by a groundwater sustainability agency or by the board, *federally reserved rights to groundwater shall be respected in full.* In case of conflict between federal and state law in that . . . management, federal law shall prevail.") (emphasis added). Therefore, Defendants' arguments regarding

[6] Although greatly simplified by the Court, this argument makes up a large portion of DWA's substantive briefing. For example, DWA argues (1) the Tribe has a correlative right to groundwater under California law, which, like all other groundwater users is subject to a state constitutional standard of reasonable use, so the Tribe may access those resources without a declaration of *Winters* rights just like any other overlying landowner; (2) the Tribe has not drilled wells on its property, so groundwater is not necessary for the reservation; and (3) the United States only requested a certain amount of surface water in the 1938 state court adjudication of the Whitewater system, so that amount is adequate to satisfy the needs of the reservation.

federal-state relations run counter to both federal and state law.

Defendants' additional arguments hinge on an unduly restrictive reading of *United States v. New Mexico*, and a misapprehension of that case's subsequent application by the Ninth Circuit to cases which involve tribal rights. In the *New Mexico* case, the Supreme Court addressed the scope of reserved rights in the Rio Mimbres's water connected to the government's creation of the Gila National Forest. 438 U.S. at 697-98. Congress established that Forest, among many others, pursuant to the Organic Administration Act of 1897, which intended the National Forests to "conserve water flows, and to furnish a continuous supply of timber for the people." *Id*. at 706. The Supreme Court held those two purposes the only ones for which the government impliedly reserved water, notwithstanding later-enacted statutes which promoted other uses of the Forest, like "outdoor recreation" or "wildlife and fish purposes." *Id*. at 714-15. The Court drew on the legislative history of the Multiple-Use Sustained-Yield Act of 1960 to hold the subsequently designated purposes were "secondary," meaning they were not "so crucial as to require a reservation of additional water." *Id*. at 715. As noted above, the Ninth Circuit has held the reasoning of *New Mexico* only "establishes useful guidelines" for tribal reservation cases, and courts should instead focus on the broader command that *Winters* rights encompass "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Adair*, 723 F.2d at 1408-09.

In this case there are no subsequent enactments that impact the purposes of the Tribe's reservation, although to be sure the government augmented the reservation's territory over time. The reservation's purposes remain the same as when the government created the reservation – to provide the Agua Caliente with a permanent homeland. The Ninth Circuit has specifically emphasized such a purpose's elasticity; a tribal reservation's reason for being is not etched in stone, but shifts to meet future needs. See *Walton*, 647 F.2d at 47-48; *Ahtanum Irrigation Dist.*, 236 F.2d at 326.

Despite Defendants' insistent reliance on *New Mexico*, that case's reasoning simply does not impact Phase I of this litigation.[7] Of course, delineating the reservation's purpose will ultimately dictate the

[7] Defendants also argue that individual allottees and lessees of reservation land have no claim to reserved water rights because (1) the Tribe has no such right and (2) resort golf courses, of the kind maintained by some lessees, do not fit Defendants' conception of the Tribe's reservation's purpose. Contentions regarding the derivative rights of allottees and lessees fail for the same reasons their other arguments fail – they are simply not relevant to Phase I of this case. It is well-established that "Indian allottees have a right to use a portion of . . . reserved water." *Adair*, 723 F.2d at 1415. Additionally, "the full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser," *Walton*, 647 F.2d at 51, which logic surely translates to lessees. Thus, for the same reasons Defendants other arguments fail, this one fails as well due to its derivative nature. To the extent Defendants wish to argue that resort golf courses, or any other use, does not fall within the class of permissible uses under the *Winters* doctrine, it may so argue in later phases of this case, which will deal with the scope of the implied reservation.

breadth of the Tribe's *Winters* rights, but the Agua Caliente's reservation, at a minimum, provides the Tribe with a homeland for now and for the future, and *Winters* ensures a federal right to appurtenant water to realize that end.

Accordingly, the Tribe and the United States are entitled to partial summary judgment on the Phase I issue of whether the Tribe's federally reserved water rights encompass groundwater underlying the reservation.

B. The Tribe's claim to an aboriginal groundwater right fails

The Tribe's second claim in this lawsuit asserts an aboriginal right to use groundwater beneath the Coachella valley, with a priority date of time immemorial.[8] Simplified, the Agua Caliente's aboriginal rights argument proceeds thusly: federal law recognizes certain rights connected to original Indian occupancy; lands encompassed by the Treaty of Guadalupe Hidalgo[9] fall under the original occupancy doctrine; the

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[8] The United States' complaint in intervention did not press such a claim and neither did its motion for summary judgment on Phase I issues. The United States' opposition to Defendants' motion for summary judgment, however, argues in favor of such an aboriginal right.

[9] The Treaty of Guadalupe Hidalgo, signed by the United States and Mexico in 1848, ended the Mexican-American War. *See Summa Corp. v. California*, 466 U.S. 198, 202 (1984). Under the terms of the Treaty, Mexico ceded much of what is now considered the American Southwest to the United States, including

Tribe has continually and exclusively occupied the Coachella valley, which was ceded as part of the Treaty of Guadalupe Hidalgo, since centuries before other settlers; so the Agua Caliente possess an aboriginal right to groundwater underlying its reservation. (Tribe's Mot. for Summ. J. at 18-23.) In opposition to the Tribe's aboriginal rights claim, Defendants point out that Congress, via an 1851 statute, required the presentation of land claims in California to a commission for validation, the Tribe did not assert such a claim, so the land the Tribe occupied in the Coachella valley reverted to the public domain. The Tribe's claim to an aboriginal occupancy right fails.

Federal law recognizes a tribe's property right arising out of original territorial occupancy. *See United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641-42 (9th Cir. 1986) ("Indian's aboriginal title derives from their presence on the land before the arrival of white settlers.") (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)); *see also* Cohen's Handbook § 15.04[3] ("A tribe with original Indian title may bring a federal common law action to enforce ownership rights."). Aboriginal property rights which arise under federal law are not "ownership rights," but rather are "right[s] of occupancy granted by the conquering sovereign . . . [and are] therefore necessarily a creature of

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the territory that would later become the states of California, Nevada, and Utah, and parts of Arizona, New Mexico, Colorado, and Wyoming.

the conquering sovereign's law." *Id*. at 642.[10] Chief Justice Marshall, in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), laid down the rule that "the conquering government acquires the exclusive right to extinguish Indian title." *Chunie*, 788 F.2d at 642. Any such divestment of original Indian title is purely a matter of Congressional prerogative. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941). And although the Supreme Court has noted extinguishment could be accomplished by "treaty . . . sword . . . exercise of complete dominion adverse to the right of occupancy, or otherwise," *id*., a federal statute embodies a more typical legislative divestment. *See id*. at 347-48 (discussing in depth the effects of various statutes on competing land claims).

The United States ratified the Treaty of Guadalupe Hidalgo in 1948. California was admitted as a state in 1850. Shortly after California's admission, in order to "protect property rights of former Mexican citizens in the newly-acquired territory and to settle land claims, Congress passed the Act of March 3, 1851, ch.41, 9 Stat. 631," ("Act of 1851"). *Chunie*, 788 F.2d at 644. Three of the Act of 1851's numerous provisions impact this case: section 8 instituted a land claims process for people claiming property rights in California; section 13 imposes a two-year time limit for presenting land claims; and section 16 imposed a "duty [on] the

[10] Like the Ninth Circuit has done past cases, in the absence of any argument that "the Spanish or Mexican law of aboriginal title differs from our own, [the Court] will assume that it does not." *Chunie*, 788 F.2d at 642.

commissioners herein provided for to ascertain and report . . . the tenure by which the mission lands are held, and those held by civilized Indians." *See Barker v. Harvey*, 181 U.S. 481, 483-85 (1901).[11]

Federal courts construe sections 8 and 13 broadly; together they bar Indians who failed to assert original occupancy claims within the statutory two-year window from relying on such a right in future disputes:

> [The Supreme Court], after observing . . . the United States was bound to respect the rights of private property in the ceded territory, said there could be no doubt of the power of the United States, consistently with such obligation, to provide reasonable means for determining the validity of all titles within the ceded territory, to require all claims to lands therein to be presented for examination, and to declare that all not presented should be regarded as abandoned. The Court further said the purpose of the act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted, but required, all claims to be presented to the

[11] The Act of 1851's Section 8 states: "[t]hat each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government shall present the same to the said commissioners. . . ." *Barker*, 181 U.S. at 483. Section 13 holds: "[t]hat all lands, the claims to which have been finally rejected . . . and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." *Id*. at 484.

> commission, and barred all from future assertion which were not presented within the 2 years.

United States v. Title Ins. & Trust Co., 265 U.S. 472, 483 (1924); *see also Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 208 (1984) (explaining that the *Title Insurance* case "applied [the Court's] decision in *Barker* to hold that because the Indians failed to assert their interest within the timespan established by the 1851 Act, their claimed right of occupancy was barred"); *Santa Fe*, 314 U.S. at 351 (discussing *Barker* and *Title Insurance*, and noting "the Act of 1851 was interpreted as containing machinery for extinguishment of claims, including those based on Indian right of occupancy"). The Supreme Court has held repeatedly that, despite the Act of 1851's text, the "land confirmation proceedings were intended to be all-encompassing" and a failure to assert aboriginal title within the terms of the statute would preclude subsequent claims to land. *Chunie*, 788 F.2d at 646 ("Given the line of Supreme Court decisions recognizing the extensive reach of the Act of 1851 . . . the Chumash, claiming a right of occupancy based on aboriginal title, lost all rights in the laid when they failed to present a claim to the commissioners").

In this case, the Tribe alleges they have occupied the Coachella valley since time immemorial. Within the framework established by *Barker* and *Chunie*, that means they held an aboriginal right of occupancy under Mexican law, and then a right of occupancy under United States law following the Treaty of Guadalupe

Hidalgo. The Tribe admits that no claim was filed on its behalf as part of the claims process under the Act of 1851, (Doc. No. 82-3 Ex. 1-10), so like the Indians in *all other cases* interpreting the Act of 1851, the Agua Caliente's aboriginal claim was effectively extinguished after the two-year claims window closed, and its territory subsumed within the public domain.

Citing *Cramer v. United States*, 261 U.S. 219 (1923), the Tribe argues alternatively that even if the Act of 1851 extinguished its aboriginal title, the Tribe re-established such a right by continuous occupancy from 1853 until the creation of its reservation in 1876.[12] (Tribe's Mot. for Summ. J. at 23.) But even if the Tribe did reclaim a title of original occupancy in the 23 years between the time its claim was extinguished and the creation of its reservation, the reservation effectively re-extinguished that right. Reservation, recall, means the United States withdraws laid which it then "set[s] apart for public uses." *Hagen*, 510 U.S. at 966. Aboriginal rights are based on "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area," *Native Vill. of*

[12] One point of clarification is in order: the Tribe's asserted right to groundwater based on aboriginal title must actually connect to its claim for aboriginal title. That is, no such freestanding aboriginal rights to natural resources exist, all derive from a right to occupancy. *See United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938) ("To that end the United States granted and assured to the tribe peaceable and unqualified possession of the laid in perpetuity. Minerals and standing timber are constituent elements of the land itself").

Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012). Accordingly, an aboriginal right of occupancy is fundamentally incompatible with federal ownership.

The Act of 1851 extinguished the Tribe's aboriginal occupancy right, and even if the Tribe reestablished such a right it was not continuous and exclusive and continuous once the United States created the Agua Caliente's reservation. Accordingly, the Tribe cannot assert an original occupancy right, and Defendants are entitled to summary judgment on this issue.

C. Interlocutory appeal under 28 U.S.C. 1292(b)

Usually litigants may only appeal final judgments of district courts. *See* 28 U.S.C. § 1291. Section 1292, however, confers appellate jurisdiction over a limited class of interlocutory decisions by district courts, including decisions which involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b); *see also Couch v. Telescope, Inc.*, 611 F.3d 629, 632-33 (9th Cir. 2010).

Whether *Winters* rights extend to groundwater, in light of California's correlative rights legal framework for groundwater allocation, effectively controls the outcome of this case. The scope of this litigation would, at the very least, shrink dramatically if the issue resolves

the other way, thus "advanc[ing] the ultimate termination" of the case. Substantial ground for difference of opinion exists on the legal question – state supreme courts are split on the issue and no federal court of appeals has passed on it. *See Couch*, F.3d at 633.[13] Additionally, the Supreme Court's decision in *Cappaert* specifically avoided deciding the issue, it chose instead to construe distant groundwater as surface water. In this case it is undisputed that the groundwater at issue is not hydrologically connected to the reservation's surface water, so it sits uncomfortably outside *Cappaert's* explicit holding. And although not one of § 1292(b)'s factors, it's worth noting this decision may be unreviewable as a practical matter due to the likelihood of settlement as the case progresses. *Cf. United States ex rel. Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 4190400, at *1 (W.D. Wash. Nov. 20, 2007).

In accordance with § 1292(b), the Court certifies this Order for interlocutory appeal, should the parties seek review.

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[13] The Ninth Circuit recently explained:

> To determine if a "substantial ground for difference of opinion" exists under § 1292(b), courts must examine to what extent controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point . . . or if novel and difficult questions of first impression are presented."

Couch, 611 F.3d at 633.

V. CONCLUSION

The Court has attempted to address the parties' arguments within the framework set out by their own agreement, which was approved by the Court. The conclusions made in this Order should be read with an eye toward the larger picture of this litigation.

Based on the foregoing discussion of the legal issues presented by Phase I of this case, the Court (1) GRANTS partial summary judgment to the Agua Caliente and the United States on the claim that the government impliedly reserved appurtenant water sources – including underlying groundwater – when it created the Tribe's reservation; and (2) GRANTS partial summary judgment to Defendants regarding the Tribe's aboriginal title claims because the Land Claims Act of 1851, as interpreted by the Supreme Court, effectively extinguished any such right.

IT IS SO ORDERED.

Executive Orders

Relating to

Indian Reservations'

From May 14, 1855
to July 1, 1912

[U.S. Office of Indian affairs]

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1912

EXECUTIVE MANSION, *May 15, 1876.*

It is hereby ordered that the following-described lands in San Bernardino County, Cal., viz:

Portrero. – Township 2 south, range 1 east, section 36;

Mission. – Township 2 south, range 3 east, sections 12, 13, and 14;

Aqua Calienta. – Township 4 south, range 4 east, section 14, and east half of southeast quarter and northeast quarter of section 22;

Torros. – Township 7 south, range 7 east, section 2;

Village. – Township 7 south, range 8 east, section 16;

Cabezons. – Township 7 south, range 9 east, section 6;

Village. – Township 5 south, range 8 east, section 19;

Village. – Township 5 south, range 7 east, section 24,

be, and the same hereby are, withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California, in addition to the selections noted and reserved under Executive order dated 27th December last.

U. S. GRANT.

* * *

EXECUTIVE MANSION, *September 29, 1877.*

It is hereby ordered that the following-described lands in California, to wit, all the even-numbered sections, and all the unsurveyed portions of township 4 south, range 4 east; township 4 south, range 5 east; and township 5 south, range 4 east, San Bernardino meridian, excepting. sections 16 and 36, and excepting also any tract or tracts the title to which has passed out of the United States Government, be, and the same hereby are, withdrawn from sale and settlement, and set apart as a reservation for Indian purposes for certain of the Mission Indians.

R. B. HAYES.

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