No. _____

IN THE

Supreme Court of the United States

COACHELLA VALLEY WATER DISTRICT, ET AL.,
Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS, AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW T. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
Los Angeles, Cal. 90067
(310) 553-6700

BARTON THOMPSON, JR.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2600

STEVEN B. ABBOTT
GERALD D. SHOAF
REDWINE AND SHERRILL, LLP
3890 11th Street, Ste. 207
Riverside, Cal. 92501
(951) 684-2520

WALTER DELLINGER
(Counsel of Record)
wdellinger@omm.com
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
DEVON E. LASH
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Attorneys for Petitioners

QUESTION PRESENTED

Since *Winters v. United States*, 207 U.S. 564 (1908), this Court has held that when the federal government reserves public land for a federal purpose—such as establishing an Indian reservation or a national park—the government implicitly reserves a federal "reserved right" to surface water that prevents subsequent non-reservation users from depriving the reservation of water resources necessary to fulfill the reservation's purpose.

In *Cappaert v. United* States, 426 U.S. 128 (1976), this Court recognized but declined to resolve the question whether or under what circumstances *Winters* reserved rights apply to groundwater. Since then, state and federal courts have answered that question differently. The Wyoming Supreme Court has held that *Winters* rights do not apply to groundwater. The Arizona Supreme Court has held that *Winters* rights *can* apply to groundwater, so long as existing state law does not offer adequate protection and no other water is available. The decision below conflicts with *both* these prior decisions, holding that *Winters* rights fully preempt state law, and thus apply to groundwater regardless of existing state-law protections.

The question presented is:

Whether, when, and to what extent the federal reserved right doctrine recognized in *Winters v. United States*, 207 U.S. 564 (1908), preempts state-law regulation of groundwater.

PARTIES TO THE PROCEEDING

The Petitioners, defendants below, are Coachella Valley Water District ("CVWD") and Anthony Bianco, John Powell, Jr., Peter Nelson, G. Patrick O'Dowd, and Castulo R. Estrada, in their official capacities as members of the Board of Directors of CVWD.*

The Desert Valley Water Agency ("DWA") and Patricia G. Oygar, Thomas Kieley, III, James Cioffi, Craig A. Ewing, and Joseph K. Stuart, in their official capacities as members of the Board of Directors of DWA, were also defendants below, and have also filed a petition for a writ of certiorari.

This brief refers to the defendants below collectively as the Water Agencies.

Respondents are the Agua Caliente Tribe of Cahuilla Indians (the "Tribe"), the plaintiff below, and the United States of America, as intervenor-plaintiff.

---

* Anthony Bianco succeeded Ed Pack as a CVWD Director in 2016. Mr. Pack was a Director at the time of the district court proceedings and Ninth Circuit appeal, and was thus listed in those courts' caption in his official capacity.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 849 F.3d 1262, and is reprinted in the Appendix to the Petition ("App.") at 1a-23a. The district court's opinion granting respondents partial summary judgment, and certifying its order for immediate appeal under 28 U.S.C. § 1292(b), is unpublished but is reported at 2015 WL 1600065 and is reprinted at App. 24a-51a.

JURISDICTION

The court of appeals issued its decision on March 7, 2017. App. 1a. On April 10, 2017, Justice Kennedy granted the Water Agencies' application for an extension of time to file this petition until July 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

EXECUTIVE ORDERS INVOLVED

The executive orders establishing the Tribe's reservation are reprinted at App. 52a-53a.

INTRODUCTION

As a general matter, regulation of non-navigable water falls exclusively to the States. Beginning in *Winters v. United States*, 207 U.S. 564 (1908), however, this Court recognized that when the federal government withdraws lands from the public domain and reserves it for a federal purpose—for example, to

establish an Indian reservation, or a national park—the government in some circumstances is held to have implicitly reserved a *federal* right to water sufficient to meet the federal reservation's needs.

Winters involved a federal reserved right to *surface* water—the Court held that when the federal government established the Indian reservation at issue there, it implicitly reserved to that reservation a federal right to surface water that could override other users' state-law rights. This case presents the distinct question whether *Winters* extends to *groundwater*, and, if so, the circumstances under which *Winters* rights preempt state groundwater regulation.

This Court recognized in *Cappaert v. United States*, 426 U.S. 128 (1976), that the application of *Winters* to groundwater is an open question, but resolved that case without deciding it. Since then, an intractable conflict has developed between state courts of last resort: the Wyoming Supreme Court has concluded that *Winters* does not extend to groundwater at all, while the Arizona Supreme Court concluded that *Winters* applies to groundwater, but only where the applicable state law would not adequately protect federal interests and no other water is available to meet the reservation's need.

Courts and commentators have long acknowledged this conflict in authority, and have lamented the uncertainty created by the lack of guidance from this Court. The Ninth Circuit's decision below extends and exacerbates this acknowledged conflict. The court of appeals not only rejected Wyoming's rule and held that *Winters* applies to groundwater, it

also rejected Arizona's inquiry into the nature of state water law and the availability of other water sources. The court instead held that *Winters always* applies as a matter of federal preemption, regardless of how the State allocates groundwater rights. This differential treatment of the preemptive effect of federal reserved rights is intolerable, and is made all the more so because the Ninth Circuit's approach conflicts with that of the highest court of a State within that Circuit.

The question presented, moreover, is exceptionally important. This Court has long recognized that water scarcity is one of the most pressing problems facing the Western United States—which is also the area where the reservations subject to the decision below are concentrated. The decision below directly implicates this problem by altering the groundwater rights crucial to Western States' water management. The practical impact of the Ninth Circuit's ruling is that Indian reservations throughout the West, as well as other forms of federal reservations (e.g., national parks and monuments), would have preemptive federal rights that override the vigorous and ongoing state and local efforts to ensure the future availability of groundwater in the West. Such a disruption to state attempts to efficiently manage scarce and precious resources should not be recognized without this Court's review.

This case presents the ideal vehicle through which to resolve the decisional conflict. As the district court recognized in certifying its resolution of the question presented for immediate appeal, the purely legal question 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," and is cleanly presented here. App. 49a. The Ninth Circuit, moreover, answered the question incorrectly—*Winters* rights generally do not apply to groundwater, and they certainly do not displace state laws, like California's, that already protect the reservation from the possibility of groundwater depletion by non-reservation users.

Certiorari should be granted.

STATEMENT OF THE CASE

A. State Regulation Of Water Rights

1. In the mid-nineteenth century, Congress ceded control of "all non-navigable waters then a part of the public domain ... to the plenary control of the designated states." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *see also California v. United States*, 438 U.S. 645, 657-58 (1978). As a result, "soil and water rights on public lands" were severed, and "water rights were to be acquired in the manner provided by the law of the State of location." *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955) (emphasis omitted). States, in other words, have plenary control over non-navigable public waters, including groundwater, within their borders.

2. There are a variety of state-law approaches to the apportionment of water rights.

a. When it comes to surface water, most Eastern States use a riparian regime, under which water

rights are based on a property's appurtenance to the water source. Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions*, 91 Cornell L. Rev. 1203, 1207 (2006). This case, however, concerns the scope of federal reserved rights, and the vast majority of Indian reservations, and of federally owned land generally, is located in the Western States.[1]

Western States generally use a system known as "prior appropriation" to allocate surface water rights. Under a prior appropriation regime, the first party to "appropriate" and use any amount of water obtains a priority right to that amount of water as against subsequent appropriators, which can be lost only by non-use. *See, e.g.*, *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 560-61 (2008). "In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976), and the party with priority is entitled to its entire allotment of water before more junior rights holders get any.

b. "Water law," however, "has historically treated surface and sub-surface water separately." A. Dan Tarlock, *Law of Water Rights and Resources* § 4:37 (2016). Thus, while Western States predominantly use prior appropriation rules to govern *sur-*

[1] *See United States v. New Mexico*, 438 U.S. 696, 699 (1978) (noting the "sheer quantity of reserved lands in the Western States"); https://www.nps.gov/nagpra/documents/RESERV.PDF (map of Indian reservations).

face water, not all Western States apply a prior appropriation regime to groundwater.

For example, while Arizona applies prior appropriation rules to surface water, it has adopted what is known as the "reasonable use" doctrine for groundwater. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source ("Gila")*, 989 P.2d 739, 743 (Ariz. 1999). California, in contrast, allocates groundwater to overlying owners under a regime known as "correlative rights." *Katz v. Walkinshaw*, 141 Cal. 116 (1903) (adopting correlative rights for groundwater).

Reasonable Use. Temporal priority is irrelevant in a reasonable use system; what matters is land ownership. As applied to groundwater, reasonable use "permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply." *Gila*, 989 P.2d at 743 n.3. As a result, if an overlying landowner can put all of the available water to a "reasonable use" on his own land, he can entirely deplete the water source without liability. *See Brady v. Abbott Labs.*, 433 F.3d 679, 682 (9th Cir. 2005) (Arizona law).

Correlative Rights. As with reasonable-use regimes, correlative-rights systems are based on land ownership, not priority. In California, an "overlying" landowner has the inherent right to withdraw groundwater "that he can beneficially use on his land." *Tehachapi-Cummings Cnty. Water Dist., v. Armstrong*, 49 Cal. App. 3d 992, 1001 (1975). Correlative rights are not created by use and are not lost

through non-use, and concepts of "priority" are irrelevant to the rights of overlying landowners. *See* Tarlock, *supra*, § 4:14 ("There is no temporal priority among overlying pumpers").

Crucially, however, and unlike the "reasonable use" approach, a correlative right is limited in times of scarcity by the "safe yield" and the claims of other overlying landowners. *Id.*; *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 279 (2012). That is, correlative rights are "mutual and reciprocal," and in times of scarcity "each [user] is limited to his proportionate fair share of the total amount available based upon his reasonable need." *See Tehachapi-Cummings*, 49 Cal. App. 3d at 1001 (collecting cases); *see also City of Santa Maria v. Adam*, 248 Cal. App. 4th 504, 511 (2016). Further, each owner's proportionate share "is predicated not on his past use over a specified period of time, nor on the time he commenced pumping, but solely on his current reasonable and beneficial need for water." *Tehachapi-Cummings*, 49 Cal. App. 3d at 1001. Under this system, no overlying landowner can be deprived of his groundwater access by another.[2]

B. The *Winters* Doctrine And Federal Reserved Rights

Despite the fact that Congress ceded general authority over non-navigable public waters to the

---

[2] In California, if overlying owners are not using the entire safe yield of an aquifer, others can appropriate the surplus groundwater. But when there is inadequate yield to meet all groundwater uses, the correlative rights of overlying owners take precedence. *See Adam*, 211 Cal. App. 4th at 279.

States, this Court has long recognized that the federal government retains the power to withdraw lands from the public domain for specific federal purposes, and in doing so to reserve rights to water on those lands in certain circumstances. *See United States v. New Mexico*, 438 U.S. 696, 699 (1978). This "reserved rights" doctrine applies to Indian reservations and to federal lands such as national parks, military bases, and wildlife refuges. *See id.* at 699; *Cappaert*, 426 U.S. at 138-39; *Arizona v. California*, 373 U.S. 546, 601 (1963).

The doctrine stems from this Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). There, the Indian tribes on the Fort Belknap Indian Reservation in Montana—established by Congress in 1888—brought suit because their water supply was threatened by settlers who had diverted the river upstream of the reservation and claimed rights to the water under Montana's prior appropriation laws. *Id.* at 567. The Court concluded that when Congress established the reservation, it had implicitly reserved to the reservation a right to sufficient water from the river to meet the reservation's needs, and that the reservation's surface water rights thus trumped those of senior users who, despite coming to the area after the reservation was created, would otherwise have priority under state law. *Id.* at 576. This Court held that this reservation of water rights was implicit in Congress's establishment of the reservation because it was impossible to believe that Congress intended to leave the tribes without any water for irrigation; if the government had not reserved a federal right to water, the lands would be

"practically valueless" and "civilized communities could not be established thereon." *Id.* at 576.

Under *Winters* and its progeny, a federal reserved water right is a priority right to water sufficient to accomplish the primary purposes of the reservation that "vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138; *see New Mexico*, 438 U.S. at 700 (reserved right is implied when "the specific purposes for which the land was reserved" would be "entirely defeated" without a right to the water at issue). A *Winters* right, in other words, is akin to a prior appropriative right from the date the reservation was established, rather than from the date the water source was first appropriated (as would be the case under state law). Thus, *Winters* rights are superior only to "the rights of future appropriators," and do not displace the state-law rights of other users that were established before the reservation was created. *Cappaert*, 426 U.S. at 138.[3]

The *Winters* doctrine is therefore a targeted response to a problem faced by tribal reservations (and other federal lands) subject to state *prior appropriation* laws—*viz.*, the possibility that senior users would completely deprive those lands of water and render them "practically valueless." *Winters*, 207 U.S. at 576. Reserved rights are tailored to address that problem and to protect tribal and federal interests in such a system—a reserved right is a priority

[3] Unlike a prior appropriate right, however, "reserved rights are not lost by nonuse." Michael C. Blumm, *Waters and Water Rights* § 37.01.a.01 (2017).

right that vests permanently as of the date the reservation was created, but does not displace rights that precede that date.

It is unsurprising, then, that each of this Court's reserved-rights decisions have applied that doctrine only to reserve surface water otherwise governed by a prior appropriation regime. This Court has never applied that doctrine to groundwater, *Cappaert*, 426 U.S. at 142, let alone to groundwater governed by a system in which temporal priority is irrelevant.

C. The Tribe And The Coachella Valley Water System

1. The Tribe's reservation is located in California's Coachella Valley. ER25.[4] In 1871, before the reservation was created, Congress granted most of the odd-numbered sections of land in the Valley to a railroad. *See* Act to Incorporate the Texas Pacific Railroad, and to aid in the Construction of its Road, and for other Purposes, 16 Stat. 573, 576 (1871). The reservation was created largely by two executive orders shortly thereafter, which reserved portions of the remaining even-numbered sections. In 1876, President Grant issued an executive order stating that specified land was "withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California," which included the Tribe. App. 7a, 52a. In 1877, President Hayes issued a second executive or-

[4] "ER__" refers to the excerpts of record filed with the Ninth Circuit. "Doc. __" refers to the district court docket in this case.

der expanding the Tribe's lands, and stated that he was doing so "for Indian purposes." App. 7a, 53a.

Today, the reservation totals approximately 31,396 acres of land, interspersed in a checkerboard pattern with the previously conveyed, privately owned lands across several cities, including Palm Springs, Cathedral City, and Rancho Mirage. App. 7a. The Tribe currently has 440 members, ER196, and has been able to "support the Tribal government and the Tribal community" through various business ventures, including "two hotels, two casinos, a golf resort, and the premier concert theater in Southern California, The Show."[5] The United States holds the reservation lands in trust for the Tribe. App. 6a-7a.

2. The Whitewater River is the major source of surface water in the Coachella Valley. ER98-99. Three of the river's many tributaries—the Tahquitz, Andreas, and Chino Creeks—flow through or near the Tribe's reservation. ER99. In 1938, the California Superior Court entered a decree, known as the Whitewater River Decree, allocating surface water flow in the Whitewater River system. ER31-32. The water that the decree allotted to the United States on behalf of the Tribe closely tracked the amount the United States had requested as the amount "required to be diverted" for irrigation on the Tribe's lands. ER115-16; ER120.

The Coachella Valley Groundwater Basin underlies the Valley, and therefore the Tribe's reservation.

---

[5] http://www.aguacaliente.org/content/Tribal%20Enterprises/.

The parties agreed, and the district court specifically found, that 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)." App. 30a-31a; ER199-200 (admissions of Tribe).

3. The historical documents describing the Tribe's use of water when the reservation was established focus on the Tribe's use of surface water. A report prepared for a U.S. Indian Agent in 1894, for example, states that the "Indians at this place have for many years ... used the waters of Chino, Taquitch, and Andreas Canyons, three streams having their sources on the eastern slope of the San Jacinto Mts., to irrigate their lands." Doc. 82-3, Ex. 22 at 139. The report makes no mention of any use of groundwater. Similarly, the Indian Irrigation Service's Superintendent of Irrigation, George Butler, stated in a 1903 report to the Commissioner of Indian Affairs that "in times past the Indians have built ditches for the conduct and distributions of the waters of the canons [sic] of Chino, Tahquitz, and Andreas, and have irrigated lands therefrom." ER79. That report, despite thoroughly assessing the available water options for the Tribe, also makes no mention of groundwater of any kind. ER79-86; *see also* ER69 (Smiley Commission Report dated December 19, 1891, stating that "the Indians have depended largely upon water coming from Toquitch Canyon" and had "built a ditch to bring water from the source for their lands"); ER69 (the Indians also had a "supply of water, coming from Andreas Can[yon]").

Indeed, as commentators have observed, and as the Tribe's complaint acknowledges, the technology to conduct meaningful pumping of groundwater did not even exist until the 1930s. ER30; Debbie Shosteck, *Beyond Reserved Rights: Tribal Control Over Groundwater Resources In A Cold Winters Climate*, 28 Colum. J. Envt'l L. 325, 337 (2003); *see also* Gwendolyn Griffith, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 Stan. L. Rev. 103, 105 n.7 (1980); Charles J. Meyers, *Federal Groundwater Rights: A Note On* Cappaert v. United States, 13 Land & Water L. Rev. 378, 386 (1978). Even as to more primitive approaches to accessing groundwater, a government survey map from 1855-56 reflects that there were no wells on or near the areas now occupied by the Tribe. Doc. 82-3, Ex. 18.

4. Today, the Tribe does not pump groundwater on its reservation, although it has the same rights to do so as any other landholder under California law. App. 9a. Instead, the Tribe purchases its water from the Water Agencies, which serve the Tribe and many other customers throughout the Valley. *Id.*

The Water Agencies have made significant efforts to maintain the supply of water while meeting the needs of all of their customers. The Water Agencies purchase water from the California State Water Project ("SWP"), a state-wide project that redistributes water from northern California to more arid regions of the State. ER174. By agreement, the Water Agencies exchange their rights to SWP water for water from the Colorado River, which they then recharge into the Coachella Valley aquifer, where it

becomes part of the groundwater supply that they provide to their customers. ER174; Doc. 84-3 ¶ 15.

The Water Agencies have also been working cooperatively with other local entities and interested parties to promote the efficient and safe management of groundwater in the Valley. In 2002, for example, CVWD imposed aggressive new conservation requirements on users. CVWD Final Water Management Plan (Sept. 2002).[6] Further, the Water Agencies have participated in efforts to comply with California's 2014 Sustainable Groundwater Management Act ("SGMA"), which requires local authorities to work together to more efficiently manage groundwater levels and achieve various sustainability and quality targets. *See* Rebecca L. Nelson et al., *Local Groundwater Withdrawal Permitting Laws in the South-Western U.S.: California in Comparative Context*, 54 Groundwater 747, 748-49 (2016).[7]

The Coachella Valley aquifer is currently in a state of "overdraft," meaning that the amount of water being extracted from the aquifer exceeds the amount being recharged. App. 8a-9a & n.3. Although that means the overall level of water in the aquifer is decreasing over time, there is no evidence, or even allegation, that the Water Agencies have ever been unable to adequately supply their customers, including the Tribe.

---

[6] http://www.cvwd.org/DocumentCenter/View/1193.

[7] Similar regulation and permitting efforts that supplement common-law rules governing groundwater to prevent depletion of groundwater resources have been established in other Western States for years. Nelson, *supra*, at 749.

D. Proceedings Below

1. The Tribe filed this suit against the Water Agencies in May 2013, and the United States intervened in June 2014 in its capacity as trustee for the Tribe and individual allottees on the reservation. App. 27a. The Tribe and United States, seeking a declaratory judgment and injunctive relief, contended (as relevant here) that there is a federal reserved right in the groundwater underlying the reservation. The Tribe has stipulated that it is not seeking any additional rights to surface waters in the Valley. Doc. 49 ¶ 7.

The parties agreed to divide the case into three phases. Phase I addresses the threshold issue of whether the Tribe has rights to groundwater under *Winters*. Phase II will, if necessary, resolve subsidiary legal questions, such as whether any right the Tribe has includes a water-quality component and whether the Tribe owns the so-called "pore space" underlying its lands. Phase III will quantify any identified groundwater rights. App. 10a.

2. On March 20, 2015, the district court granted the Tribe summary judgment on the Phase I question whether the Tribe has a reserved right to the groundwater at issue. The district court concluded that the *Winters* doctrine applies to all water, including groundwater, that is appurtenant to a federal reservation. App. 37a-38a.

The district court also certified its Phase I order for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed proceedings pending appeal. App. 49a-

50a.[8] The district court explained that the question 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." App. 49a. Further, the court concluded that "[s]ubstantial ground for difference of opinion exists on this issue," because since this Court "specifically avoided deciding" it in the 1976 *Cappaert* decision, "state supreme courts are split on the issue and no court of appeals has passed on it." App. 49a-50a. Further still, the district court explained, the dispositive question whether *Winters* extends to groundwater is squarely presented here, because although *Cappaert* chose "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." App. 50a. Finally, the district court explained that, if it did not certify the issue for interlocutory appeal, "this decision may be unreviewable as a practical matter due to the likelihood of settlement as the case progresses." *Id.*

3. The court of appeals affirmed. The court acknowledged that "there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater," but concluded that there was "no reason to cabin" the doctrine to surface water. App. 6a, 20a. The Ninth Circuit reasoned that the only relevant question to whether a

---

[8] In light of the decision below, and over the Water Agencies' objection, the district court on June 5, 2017, lifted the stay as to Phase II subsidiary issues. The parties are currently negotiating the scope of, and schedule applicable to, Phase II.

Winters right exists, in either surface water or groundwater, is "whether the purpose underlying the reservation envisions water use" and whether the water source at issue is "appurtenant" to the reservation. App. 15a. Because "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," the "United States implicitly reserved a right to water when it created the Agua Caliente Reservation," and that right extended to appurtenant groundwater in the Coachella Valley aquifer. App. 18a, 20a.

Notably, the court of appeals rejected the argument that the existence or scope of *Winters* rights depends on the existing state-law water rights regime or on whether other water was available. The court considered it irrelevant that "the Tribe is already receiving water pursuant to California's correlative rights doctrine and the Whitewater River Decree," because "state water rights are preempted by federal reserved rights." App. 21a-22a. Otherwise said, the Ninth Circuit held that "state water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right," and that a reserved right—which would preempt any and all "conflicting state law"—should be recognized regardless of whether "other sources of water then available" are sufficient to "meet the reservation's water demands." *Id.*

This petition followed.

REASONS FOR GRANTING THE WRIT

The decision below extends and exacerbates a pre-existing conflict among state courts of last resort over whether, when, and to what extent federal reserved rights apply to groundwater. This petition presents an ideal vehicle for resolving that exceedingly important question. The court of appeals also answered the question incorrectly.

Certiorari should be granted.

I. THE DECISION BELOW EXTENDS A SQUARE AND INTRACTABLE CONFLICT OVER WHETHER, WHEN, AND TO WHAT EXTENT THE *WINTERS* DOCTRINE APPLIES TO GROUNDWATER

While the Court has recognized since *Winters* that federal reserved rights may exist in surface water, the Court has also acknowledged that the surface-water rules do not necessarily apply to groundwater. In *Cappaert*, the Court noted that whether reserved rights apply to groundwater is an open question, and that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." 426 U.S. at 142. The Court declined to decide that question, however, concluding as a factual matter that the water at issue in *Cappaert* was surface water. *Id.*

Since *Cappaert*, a well-recognized conflict has developed among state courts of last resort over whether *Winters* rights apply to groundwater, and both courts and commentators have noted that the lack of guidance from this Court has contributed to uncertainty over the proper allocation of water

rights in the Western United States. The Ninth Circuit's decision in this case extends that longstanding conflict, which only this Court can resolve.

A. A Direct, Acknowledged Conflict Has Existed Among State Courts Of Last Resort Over The Question Presented

1. The Wyoming Supreme Court has held that federal reserved rights *do not* extend to groundwater. In 1988, that court addressed the question whether the Wind River Indian Reservation was implicitly granted reserved rights to surface and groundwater when it was created in 1868. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76, 100 (Wyo. 1988), *aff'd on other grounds by an equally divided Court*, 492 U.S. 406 (1989). The Wyoming Supreme Court held that the reservation did have a reserved right to surface water under *Winters*, *id.* at 91, but that "the reserved water doctrine does not extend to groundwater," *id.* at 100. The Wyoming court emphasized this Court's hesitance to extend the doctrine to groundwater in *Cappaert*, and relied on the fact that no other court had ever applied the *Winters* doctrine to groundwater. *Id.*

2. Just over a decade later, the Arizona Supreme Court considered and expressly rejected the Wyoming approach. The Arizona court acknowledged that the Wyoming Supreme Court in *Big Horn* had "declined to find a reserved right to groundwater." *Gila*, 989 P.2d at 745. The Arizona court disagreed with the Wyoming Supreme Court because it did "not find its reasoning persuasive." *Id.*; *see also Confederated Salish & Kootenai Tribes of the Flat-*

head Reservation v. Stults, 59 P.3d 1093, 1098-99 (Mont. 2002) (adopting Arizona Supreme Court's conclusion that federal reserved rights apply to groundwater).

The Arizona Supreme Court thus concluded that the *Winters* doctrine would extend to groundwater. The court, however, recognized two important, related limitations on that rule. *First*, the court held that a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila*, 989 P.2d at 748; *see also Salt River Valley Water Users' Ass'n v. Guenther*, 2009 WL 3866060, ¶ 26 (Ariz. Super. Ct. Apr. 8, 2009) (rejecting federal reserved right to groundwater where tribe failed to show "that other sources of [water] supply are inadequate to satisfy the purposes of the Reservations").

Second, the court recognized a federal reserved right only after considering whether the existing state-law water-rights regime—in Arizona's case, the "reasonable use" approach to groundwater rights, *see supra* at 6—sufficed to protect the federal reservation's purpose. The *Gila* court concluded that Arizona law did not suffice because, although the tribe had a "theoretically equal right to pump groundwater" so long as it could put that water to a reasonable use on its own land, Arizona's "reasonable use" regime, unlike a federal reserved right, "would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers." 989 P.2d at 748; *see id.* at 743 & n.3 (explaining that a single user can legally drain an aquifer under reasonable-use system). This concern, the

court explained, was not merely theoretical—the tribes had established that some "Indian reservations have been entirely 'dewatered' by off-reservation pumping." *Id.* at 748. Thus, the court concluded that the tribe's existing state water rights would not "adequately serve to protect" the tribe. *Id.*

3. The district court in this case recognized this decisional conflict, explaining that this Court "specifically avoided deciding" the question whether federal reserved rights apply to groundwater in *Cappaert*, and that "state supreme courts are split on the issue and no court of appeals has passed on it." App. 49a-50a. The United States, too, acknowledged the conflict below, noting that the "Arizona Supreme Court expressly declined to follow the Wyoming Supreme Court's" decision. U.S. C.A. Br. 49. And indeed, the conflict over the question presented has long been recognized by other courts and commentators. *See, e.g.*, *United States v. Washington, Dep't of Ecology*, No. 2:01CV00047, at 7 (W.D. Wash. Feb. 24, 2003), ECF 304 ("state courts are split" over this question); *Confederated Salish & Kootenai Tribes v. Clinch*, 992 P.2d 244, 251 (Mont. 1999) (Rodeghiero, J., dissenting) ("uncertainty exists as to whether groundwater is included within the reserved water rights doctrine"); Shosteck, *supra*, at 331 ("Since *Cappaert*, two state supreme courts have taken on the issue of federal reserved rights to groundwater, reaching opposite results."); Liana Gregory, *"Technically Open": The Debate over Native American Reserved Groundwater Rights*, 28 J. Land Resources & Envtl. L. 361, 363 (2008) ("There is a split among state supreme courts concerning the ability to reserve groundwa-

ter."); Joanna (Joey) Meldrum, *Reservation and Quantification of Indian Groundwater Rights in California*, 19 Hastings W. N.W. J. Envtl. L. & Pol'y 277, 294 (2013) (Arizona decision was "[c]ontrary to the court in Wyoming").

Thus, even before the decision below, the "inconsistency of these decisions, coupled with the absence of any decisive statement by the U.S. Supreme Court, has left the issue of reserved rights to groundwater in a continuing state of uncertainty." Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 Nat. Resources J. 611, 621 (2010); *see also In re Adjudication of Existing and Reserved Rights to the use of Water*, 2001 WL 36525512, at *13-14 (Mont. Water Ct. Aug. 10, 2001) (lack of guidance "with respect to reserved water rights in groundwater has led to inconsistent rulings on the subject").

B. The Decision Below Entrenches And Extends The Decisional Conflict As To The Question Presented

The decision below entrenches and extends this existing decisional conflict.

1. The Ninth Circuit's conclusion that the *Winters* doctrine applies to groundwater, *see supra* at 16-17, obviously cannot be reconciled with the Wyoming Supreme Court's holding that there is no federal reserved right in groundwater. That conflict over the scope of federal reserved rights is entrenched and intolerable, and itself suffices to warrant certiorari.

2. The Ninth Circuit's decision also conflicts with that of the Arizona Supreme Court (i.e., the highest court of a State within the Ninth Circuit), in two respects.

First, the Arizona Supreme Court concluded that a "reserved right to groundwater *may only be found* where other waters are inadequate to accomplish the purposes of a reservation." *Gila*, 989 P.2d at 748 (emphasis added). The Ninth Circuit specifically and expressly rejected that conclusion, holding that *it does not matter* "if other sources of water" can "meet the reservation's water demands." App. 14a-15a.

Second, the Arizona Supreme Court focused on whether state law "would adequately serve to protect" the reservation, and held that Arizona law would not because the reservation's state-law rights could be subject to "total future depletion" by other users. *Gila*, 989 P.2d at 748. The Ninth Circuit, in contrast, declared that "state water entitlements *do not affect our analysis* with respect to the creation of the Tribe's federally reserved water right." App. 22a (emphasis added). Thus, the court of appeals held it irrelevant that "the Tribe is already receiving water pursuant to California's correlative rights doctrine and the Whitewater River Decree," App. 21a-22a, and concluded that a reserved right to groundwater "exists if the purposes underlying a reservation envision access to water," App. 17a. That would mean, of course, that every reservation would have a *Winters* right in every instance, because every reservation needs access to water.

The differing approaches between the Ninth Circuit and Arizona Supreme Court are outcome-determinative in this case. Had the Ninth Circuit applied the Arizona Supreme Court's approach, the Water Agencies would have prevailed. Unlike Arizona's reasonable-use approach, California's correlative-rights system *does* protect the Tribe in the event of a shortage, ensuring the Tribe *is* treated just the same as any other overlying landowner. *Supra* at 6-7; *infra* at 34-35.

3. There is thus a three-way, outcome-determinative conflict as to the question whether, when, and to what extent a federal reserved right to groundwater exists. The disparity in treatment among tribes and other federal reservations in Wyoming, Arizona, and elsewhere in the Ninth Circuit should not be allowed to persist. Worse, because Arizona is within the Ninth Circuit, a different rule now applies to Arizona reservations depending on whether suit is brought in state or federal court. That is an intolerable state of affairs that can be resolved only by this Court.

Certiorari should be granted.

II. THE PETITION PRESENTS A RECURRING ISSUE OF WIDESPREAD IMPORTANCE AND IS THE IDEAL VEHICLE TO RESOLVE IT

1. The question presented is exceedingly important.

a. This Court has recognized "that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colo. River Water*

Conservation Dist. v. United States, 424 U.S. 800, 804 (1976). The decision below directly implicates that ongoing question of extreme national importance. The effect of the Ninth Circuit's decision is that federal reservations—e.g., Indian reservations and national parks—within that court's vast jurisdiction have preferential rights to groundwater over state and local water districts, as well as other users with rights under state law. The wide-ranging impact of the decision below is obvious: not only are the vast majority of Indian reservations—and federal lands more generally—located in the West, *see supra* at 5 & n.1, but questions concerning the proper allocation of water rights have for decades been (and continue to be) an acute focus of state, regional, and local water managers in the arid West. *See New Mexico*, 438 U.S. at 699.

Indeed, Western States have developed complex legal regimes and permitting systems for groundwater to protect groundwater basins from ever-increasing demands on water resources. *See* Nelson, *supra*, at 748-49. By granting Indian reservations, national parks, and other federal reservations new, preemptive federal rights in groundwater that are entirely exempt from state regulation, the decision below will drastically complicate, and potentially entirely defeat, these state and local efforts to manage groundwater resources efficiently. *See* Griffith, *supra*, at 119 (reserved rights to groundwater would "bifurcate[] responsibility for allocation decisions between federal courts and state legislatures, thwarting state attempts at regulation"); Tarlock, *supra*, § 1:1 ("Federal proprietary rights [for Indian reser-

vations and for retained public lands] are still not well integrated into state water allocation systems and are a continuing source of federal-state tension in the West.").

Take California as an example. California's Sustainable Groundwater Management Act requires water agencies to create sustainability plans that avoid a parade of problems that inadequate management of groundwater may create or fail to prevent, including long-term groundwater depletion, land subsidence (the gradual settling or sinking of the Earth's surface), and adverse impacts on connected surface water. *See, e.g.*, Nelson, *supra*, at 748. Among other things, SGMA requires local agencies to eliminate any overdrafts within 20 years, and authorizes them to use a variety of tools to limit extraction of groundwater. *Id.* All of these requirements, however, depend on state and local water authorities' control over groundwater regulation. The Ninth Circuit's ruling undermines local agency control over how groundwater rights are allocated, because (according to the Ninth Circuit) if there happens to be an Indian reservation or other federal reservation overlying a relevant aquifer, that federal land carries preemptive rights.

Nor is this problem limited to California. Arizona, Colorado, Nevada, New Mexico, Texas, and Utah—"close cousins [to California] in terms of climate and general legal structures"—have all introduced groundwater permitting systems before California. *See* Nelson, *supra*, at 748-49. In fact, every State "has some regulations on the extraction and use of groundwater." *See* Blumm, *supra*, § 23.02.

States that have enacted such schemes have done so because of "a perceived crisis in the state's water law caused by an extraordinary shortage of water relative to demand, a shortage that was perceived as likely to be recurring or even permanent." *Id.* Federal law should not be held to interfere with such crucial state and local regulatory efforts without this Court's imprimatur.

b. The decision below will be especially disruptive in States, like California, Oklahoma, and others,[9] in which priority is irrelevant to the allocation of groundwater rights. *Winters* rights do not fit comfortably within a state-law regime, like California's, in which "[t]here is no temporal priority among overlying pumpers." Law of Water Rights and Resources § 4:14. State and local officials would reasonably have assumed that the existence and nature of a reserved right would necessarily turn "on the groundwater regime followed by each individual state." Leonard, *supra*, at 622; *see also* Shosteck, *supra*, at 338-40 (2003) (predicting that this Court "will likely reject the idea of a reserved right to groundwater" because "[a]s long as Indian rights are treated evenhandedly under state law, the Court would determine that no federal rule is necessary"). The Ninth Circuit's decision upends these reasonable expectations, and will require California and other States

---

[9] *See Okla. Water Res. Bd. v. Tex. Cnty. Irr. & Water Res. Ass'n, Inc.*, 711 P.2d 38, 42 (Okla. 1984) (recognizing correlative rights to groundwater under Oklahoma law); *accord Sorensen v. Lower Niobrara Natural Resources Dist.*, 376 N.W.2d 539, 546 (Neb. 1985); *Barclay v. Abraham*, 96 N.W. 1080 (Iowa 1903); Vt. Stat. Ann. tit. 10, § 1410.

with similar groundwater-rights systems—i.e., systems without an existing concept of priority among overlying landowners—to rethink their approaches to groundwater management. *See also infra* at 33-34.

Indeed, given "the increasing reliance on groundwater throughout the region," the manner in which the *Winters* doctrine applies to groundwater—and especially to "ground-water in a non-appropriation based system of groundwater management"—"remains one of the most important unresolved issues" regarding the scope of the doctrine. Dale Ratliff, *A Proper Seat at the Table: Affirming A Broad* Winters *Right to Groundwater*, 19 U. Denv. Water L. Rev. 239, 240 (2016). Uncertainty over the existence of federal reserved rights in groundwater itself interferes with state and local efforts to efficiently manage groundwater resources, which requires complex long-term planning. *Cf.* John Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 Nat. Resources. J. 63, 83-84 (1988) (emphasizing the challenges that undetermined and "outstanding claims" pose to state and local efforts to regulate water (quotation omitted)).

2. The scope of federal reserved rights in groundwater is also a frequently recurring issue. "Disputes about the nature of Indian rights in water resources are widespread throughout the western United States." Folk-Williams, *supra*, at 63; *see also* Cynthia Brougher, *Indian Reserved Water Rights Under the* Winters *Doctrine: An Overview* i, Cong. Res. Serv. RL32198 (2011) ("Indian reserved water

rights are often litigated or negotiated in settlements and related legislation"); Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399, 401 (2006) (noting that "[m]ost Indian tribes have not quantified their reserved rights to water and potential tribal claims are large").

The relative dearth of published judicial decisions on the subject is a result of the fact that nearly all these disputes end in settlement after water rights are identified. Litigating a water dispute to final judgment "can take decades to complete," and the high costs of litigation have led most water disputes to be resolved through negotiated settlements, Folk-Williams, *supra*, at 69, which of course provide no "doctrinal certainty for future litigants," Leonard, *supra*, at 630. As just noted, this legal uncertainty also imposes significant costs on state and local officials seeking to establish systems and policies to efficiently manage water resources. This case presents the Court a rare opportunity for the "expedient resolution of the pressing legal question[] regarding federal reserved rights" presented in this case. *Id.* at 629.

3. This case presents an ideal vehicle through which to resolve that question, for several reasons.

First, unlike in *Cappaert*, there is no impediment to this Court reaching the question presented and resolving the decisional conflict. The district court's certification of its summary judgment order cleanly presents the pure legal question of whether, when, and to what extent, *Winters* rights extend to groundwater and preempt state law. Further, un-

like the body of water at issue in *Cappaert*, "it is undisputed that the groundwater at issue is not hydrologically connected to the reservation's surface waters," App. 50a, so there would be no basis for the Court to resolve this case on a different ground.

Second, and relatedly, the answer to the question presented is outcome-determinative as to the Tribe's water claims. If this Court were to adopt the Wyoming Supreme Court's approach, there would be no federal reserved right to groundwater, and the Water Agencies would be entitled to summary judgment. If this Court were to adopt the Arizona Supreme Court's approach, summary judgment for the Water Agencies would likewise be required because California's correlative rights fully protect the Tribe against depletion of the aquifer by other users.

Third, the procedural posture of this case—an interlocutory appeal from a federal district court under § 1292(b)—is likely the only type of vehicle that will ever allow this Court to consider the question presented. The pure legal question presented here is unlikely to be presented after a final judgment because, as explained earlier, the length and complexity of reserved water rights litigation usually results in a settlement after water rights are identified, thus depriving this Court of the ability to review and develop the legal rules that apply in this area. *See supra* at 29. Further, while state courts may issue interlocutory decisions determining whether and how federal reserved rights apply to groundwater—as in the Arizona Supreme Court's decision in *Gila*—this Court normally has no jurisdiction to review inter-

locutory decisions from state courts. *See* 28 U.S.C. § 1257(a).

This Court does, however, have jurisdiction to consider interlocutory appeals in *federal* courts under § 1292(b). *See* 28 U.S.C. § 1254. Indeed, the district court below certified its summary judgment order precisely because it presented the threshold, contested legal question whether, when, and to what extent federal reserved rights apply to groundwater, and the district court recognized that this question "may be unreviewable as a practical matter due to the likelihood of settlement as the case progresses." App. 50a. This Court is unlikely to confront a better vehicle to resolve the question presented.

The petition should be granted.

III. THE NINTH CIRCUIT'S DECISION IS INCORRECT

The court below erred in extending the reserved rights doctrine to groundwater without limitation. Certainly, the Ninth Circuit erred in concluding that federal reserved rights apply irrespective of existing state-law water entitlements.

1. The federal reserved rights doctrine should not apply to groundwater at all, at least as to federal reservations established in the nineteenth and early-twentieth centuries. The decision whether to imply a federal reserved right to a particular water source is "a question of implied intent." *New Mexico*, 438 U.S. at 698. The inquiry into whether the government intended to reserve a federal water right is a "careful" one, "both because the reservation is implied, rather than expressed, and because of the his-

tory of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 700-02.

That focus on implied intent precludes extending the *Winters* doctrine to groundwater, at least in the circumstances here. "When the vast majority of reservations"—including the Tribe's—"were set aside in the mid- to late-nineteenth century," the technology to pump meaningful amounts of groundwater did not exist. Shosteck, *supra*, at 337; *see also supra* at 13. It is thus implausible to infer that the government intended to ensure that reservations would be able to pump groundwater; it makes no sense to infer that the United States intended to ensure that tribes would be able to do something that was *not even possible at the time*. *See also* Griffith, *supra*, at 113 ("doubt remains, however, whether an intent to reserve groundwater can possibly be implied when, at the time of the reservation, neither the Indians nor the federal government knew of the existence or importance of the resource"). Indeed, the implausibility of the federal government's intent to reserve the Tribe groundwater is borne out by the historical record in this case, which is replete with references to the Tribe's use of *surface* water but contains no reference at all to use of *groundwater* by the Tribe. *Supra* at 12.[10]

---

[10] The Tribe and the United States asserted below that the Tribe used various walk-in wells around the time the reservation was created. But a 1855-56 government survey map shows that there were *no* groundwater wells in the relevant area, Doc. 82-3, Ex. 18, and the Tribe has admitted that it is not aware of any wells actually being present in that area, Doc. 82-2 at 2.

The Ninth Circuit answered this objection with a non-sequitur, holding that non-use does not destroy *Winters* rights. App. 21a. That is true *when* Winters *rights exist*, but the question here is whether they exist in the first place—a question that turns on the United States' presumed intent to reserve groundwater rights to the Tribe. There is simply no basis, in law or fact, to presume such an intent here.

2. In any event, the court below erred in concluding that federal reserved rights to groundwater categorically exist as to federal reservations within all States, including correlative-rights States, for at least two reasons.

a. As an initial matter, the whole point of federal reserved rights—which this Court has *only* recognized as to surface water in prior appropriation regimes—is to grant the federal reservation temporal priority over otherwise senior users who start using water after the date the reservation was established. *See supra* at 8-10. That doctrinal formulation makes no sense when—as in Arizona's "reasonable use" regime or California's correlative-rights system—temporal priority does not matter to state-law water rights. If the effect of a *Winters* right is to grant an Indian reservation priority over users who would otherwise have priority under state law, then there is no need for a *Winters* right when no user would

---

Even if the Tribe had historically accessed groundwater with hand-dug wells, use of such primitive technology would have yielded water only for "trivial domestic uses," and would not have suggested a need to reserve a unique federal groundwater right. Meyers, *supra*, at 386.

have priority over the reservation. At the very least, federal reserved rights do not fit naturally into a non-priority-based legal system, which suggests that such rights were never intended to apply—and should not be applied—in States that have adopted such a regime.

b. The Arizona Supreme Court held that federal reserved rights apply even in a "reasonable use" State, but even if that decision were correct, it would have no application to a correlative-rights State like California.

The purpose of the *Winters* doctrine has always been to protect tribal reservations from depletion of the water they need for survival. In *Winters* itself, for example, a reserved right was necessary because state-law users with priority were diverting the tribes' water supply and threatening to render their lands "practically valueless." 207 U.S. at 576. That is why the Arizona Supreme Court in *Gila* held that a federal reserved right was necessary under Arizona's "reasonable use" system—non-reservation users under that system were authorized to deplete the aquifer and thus leave the reservation without access to groundwater. *See supra* at 20-21.

That is not true in a correlative-rights system like California's. The Tribe here has the very same right to groundwater in the Coachella Valley aquifer that every other overlying landowner has, and the very same protections against depletion. *Tehachapi-Cummings*, 49 Cal. App. 3d at 1001. If the Tribe exercises its existing state-law rights, it is simply not possible under California law for other users to deplete the aquifer and render the Tribe's land "practi-

cally valueless," and there is therefore no cause to displace state-law rights that already adequately protect the Tribe.

In fact, rather than ensuring fair treatment of the Tribe, creating a reserved right to groundwater in a correlative-rights State would absolutely *privilege* the Tribe over all other users—a result entirely inconsistent with the principle underlying the *Winters* doctrine. The purpose of federal reserved rights has always been to provide a priority right that vests on the date a reservation is created, ensuring that the tribe is not put at a disadvantage, but *without* displacing more senior rights held by other users. *Cappaert*, 426 U.S. at 138; *id.* at 139 (question is whether "the Government intended to reserve *unappropriated* and thus available water" (emphasis added)); *supra* at 8-10. Yet the necessary consequence of recognizing a federal reserved right in a correlative-rights State would be to privilege the federal reservation *over every other user*, even while the correlative-rights system is meant to assure that all users are treated equally.

The Ninth Circuit's only justification for categorically disregarding the Tribe's existing correlative right was that "state water rights are preempted by federal reserved rights." App. 22a. That statement is correct *when a federal right exists*, but it is irrelevant to the predicate question whether a federal right exists at all. Absent express statutory preemption, federal preemption is warranted only when state law would conflict with, or serve as an obstacle to, federal law. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009). Yet for the reasons explained,

there is no conflict between federal and state law in a correlative-rights regime, so preemption is unwarranted. Indeed, that is especially so when it comes to displacing state water law, an area in which this Court's cases have recognized a "consistent thread of purposeful and continued deference to state water law by Congress." *California,* 438 U.S. at 668.

c. Finally, even in non-correlative-rights States, the Arizona Supreme Court's approach would at the very least require determining whether the federal reservation had adequate access to other water before implying a federal groundwater right. *See supra* at 20. The Arizona rule is consistent with this Court's decision in *New Mexico*, which explained that implying a federal reserved right—and thereby preempting state law—is "reasonable" only "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created." 438 U.S. at 701. Thus, the Arizona Supreme Court correctly concluded that, even when state law would otherwise not protect the federal reservation from depletion, a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila*, 989 P.2d at 748. The Ninth Circuit, in contrast, erroneously held that the availability of alternative water sources is irrelevant to whether a federal reserved right exists, *see supra* at 23, which provides yet another ground for reversal.

At bottom, what the Tribe is seeking, and what the Ninth Circuit granted, is a federal reserved right to groundwater that the Tribe does not need, and that there is no reason to believe the federal gov-

ernment would have granted. Given Congress's and this Court's longstanding policy of deference to state water law whenever possible, there is simply no reason to extend the *Winters* doctrine to cases such as this, needlessly displacing state regulation of water and needlessly enmeshing federal courts in complex local disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW T. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
Los Angeles, Cal. 90067
(310) 553-6700

BARTON THOMPSON, JR.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2600

STEVEN B. ABBOTT
GERALD D. SHOAF
REDWINE AND SHERRILL, LLP
3890 11th Street, Ste. 207
Riverside, Cal. 92501
(951) 684-2520

WALTER DELLINGER
(Counsel of Record)
wdellinger@omm.com
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
DEVON E. LASH
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

July 5, 2017

APPENDIX

APPENDIX A - COURT OF APPEALS OPINION

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

No. 15-55896

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

OPINION

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 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

SUMMARY**

Water Rights / Tribal Rights

The panel affirmed the district court's partial summary judgment in favor of the Agua Caliente Band of Cahuilla Indians and the United States, which declared that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley.

The Tribe filed this action for declaratory and injunctive relief against water agencies, and the par-

---

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

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ties stipulated to divide the litigation into three phases. Phase I, at issue in this interlocutory appeal, addressed whether the Tribe has a reserved right to groundwater.

Under the doctrine in *Winters v. United States*, 207 U.S. 564 (1908), federal reserved water rights are directly applicable to Indian reservations.

The panel held that the *Winters* doctrine does not distinguish between surface water and groundwater. The panel held that the United States, in establishing the Agua Caliente reservation, impliedly reserved water. The panel further held that because the United States intended to reserve water when it established a home for the Agua Caliente Band of Cahuilla Indians, 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. The panel also held that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.

The panel rejected the water agencies' arguments concerning the contours of the Tribe's reserved water rights. The panel held that state water rights are preempted by federal reserved rights. The panel also held that the fact that the Tribe did not historically access groundwater did not destroy its right to groundwater now. Finally, the panel held that the Tribe's entitlement to state water did not affect the analysis with respect to the creation of the Tribe's federally reserved water right.

COUNSEL

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

---

[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).

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 for the Tribe from this adjudication, however, is minimal, providing enough water to irrigate approxi-

---

[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.

mately 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 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:

---

[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.

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 nonnavigable 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

[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.

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.

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

[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).

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 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.

---

[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

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 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 via-

---

reserved water in a cavern pool was surface water, not groundwater. *Id.*

[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.

ble 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 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

[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).

Reservation therefore carried with it an implied right to use water from the Coachella Valley aquifer.

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 cor-

relative 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.

APPENDIX B - DISTRICT COURT OPINION

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):	Attorney(s) Present for Defendant(s):
None Present	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,

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

barley and vegetables" in the 1850s. (Compl. ¶ 14–15.) President 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.)

The parties stipulated to trifurcate this action into three phases. (Doc. No. 49.) Phase I seeks to re-

---

[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.

solve 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 in-

tended 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. 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 rights "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].

---

[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).

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

[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

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. 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.

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.

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 138– 46 (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]

---

[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*

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 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 surface 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

---

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.

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 fed-

---

[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.

eral 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 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, delineat-

---

[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 rea-

ing the reservation's purpose will ultimately dictate the 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 doc-

---

sons 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.

[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.

trine; the 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 the conquer-

---

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

ing 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 commissioners herein provided for to ascertain and report . . . the tenure by

[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.

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 com-

[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.

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

---

[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 free-standing 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 land in perpetuity. Minerals and standing timber are constituent elements of the land itself.").

The Act of 1851 extinguished the Tribe's aboriginal occupancy right, and even if the Tribe re-established 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.

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

---

[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.

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.

APPENDIX C - EXECUTIVE ORDERS

1. The Executive Order of President Grant, dated May 15, 1876, Government Printing Office, Executive Orders Relating To Indian Reserves, From May 14, 1855, to July 1, 1902 (1902), provides:

EXECUTIVE MANSION, *May 15, 1876.*

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

Portero.—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.

2. The Executive Order of President Hayes, dated Sept. 29, 1877, Government Printing Office, Executive Orders Relating To Indian Reserves, From May 14, 1855, to July 1, 1902 (1902), provides:

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.