Nos. 17-40, 17-42

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.

DESERT WATER AGENCY, ET AL.,
Petitioners,
v.
AGUA CALIENTE BAND OF CAHUILLA INDIANS AND
UNITED STATES OF AMERICA,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENT AGUA CALIENTE BAND OF CAHUILLA INDIANS

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QUESTION PRESENTED

In *Winters v. United States*, 207 U.S. 564 (1908), this Court held that when the United States reserves public land for the creation of an Indian reservation, it implicitly reserves appurtenant water needed to accomplish the purpose of the reservation. The basis for the implication is that the United States, when creating the reservation, "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).

The question whether the *Winters* doctrine applies to groundwater is rarely litigated. The Wyoming Supreme Court answered the question "no" nearly 30 years ago, but only because it mistakenly believed that no other court had applied *Winters* to groundwater. The Arizona Supreme Court said "yes" 18 years ago, as did the Ninth Circuit in the decision below and the handful of other courts to address the question over the last half century. On the facts of this case—where it is undisputed that surface water is virtually non-existent—the decisions by the Ninth Circuit and the Arizona Supreme Court are wholly consistent. Further, no court has followed the Wyoming Supreme Court's barebones decision, which itself conceded that "[t]he logic" of *Winters* "supports reservation of groundwater." The ruling below, which recognizes the reserved right without addressing its scope or quantification, is hardly groundbreaking.

The question presented is:

Whether the *Winters* reserved rights doctrine applies to groundwater appurtenant to an Indian reservation.

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INTRODUCTION

When establishing Indian reservations, the United States "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). Beginning with *Winters v. United States*, 207 U.S. 564 (1908), this Court repeatedly has held that the United States' establishment of a reservation impliedly includes "a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

When the United States established a reservation for respondent Agua Caliente Band of Cahuilla Indians (Agua Caliente) in the Coachella Valley during the 1870s, it reserved appurtenant water. The purpose of the reservation—to provide a permanent homeland for the Agua Caliente people in the desert of southern California—unquestionably requires, and would be entirely defeated without, water.

On the Agua Caliente Reservation, however, "surface water is virtually nonexistent … for the majority of the year" and annual "[r]ainfall totals average three to six inches." CVWD Pet. App. 7a–8a. Agua Caliente therefore has a strong interest in the future availability and viability of the groundwater resources appurtenant to its Reservation. Those resources are in peril.

For decades, under the deficient stewardship of petitioners Coachella Valley Water District (CVWD) and Desert Water Agency (DWA), the aquifer underlying the Reservation has been in overdraft,

meaning that more groundwater is being removed from the aquifer than is replenished. Through 2010, the cumulative overdraft exceeded 5.5 million acre-feet (AF) of water—some 1.8 trillion gallons.[1] CVWD Pet. App. 9a. Driven by concerns about the ongoing depletion of the aquifer as well as the degradation of groundwater quality caused by petitioners' importation of lower quality Colorado River water for groundwater recharge, Agua Caliente filed suit in 2013. The action sought, *inter alia*, a declaration that the United States reserved groundwater when it established the Reservation in the 1870s and a quantification of the amount of groundwater reserved. The United States, also a respondent here, intervened in support of Agua Caliente's *Winters* claims in 2014.

As a result of the parties' stipulation, the district court trifurcated the proceedings. The first phase—the only one litigated to date—addressed whether the United States reserved groundwater for Agua Caliente. The amount of water reserved and related issues, including water quality, will be determined in subsequent phases. In Phase 1, both courts below held that the United States impliedly reserved appurtenant water, including groundwater, when it established the Reservation.

Petitioners, in separate petitions, challenge these interlocutory determinations. But this case does not warrant this Court's review. First, no significant split of authority exists among the lower courts. With

[1] An acre-foot is the amount of water required to cover an acre of land in one foot of water; it equates to 325,851 gallons. CVWD Pet. App. 6a n.1.

one exception, every court to consider the issue has held that the *Winters* doctrine applies to groundwater, recognizing that the implied reservation of water is based on the reservation's need for water rather than whether the necessary water is found above or beneath the reserved land. Even the lone contrary case, decided nearly 30 years ago and never followed by any other court, acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753 P.2d 76, 99 (Wyo. 1988), *aff'd on other grounds by an equally divided Court*, 492 U.S. 406 (1989). Rather than deepening an intractable split, as petitioners contend, the decision below reinforced the strong weight of existing authority and solidified *Big Horn*'s status as an isolated, unpersuasive, and aged outlier.

Second, the *Winters* doctrine's applicability to groundwater is not a frequently recurring issue that demands this Court's attention. The issue is rarely litigated, with tribal water rights claims usually resolved through congressionally approved settlements that frequently include groundwater. Further, petitioners overstate the breadth of the decision below, which addresses only water reserved for Indian reservations and sets no precedent for other federal reservations.

Third, there is no evidence to support petitioners' hyperbolic assertions that the decision below will impair or destroy state and local regulation of groundwater. Regulation of groundwater is not at issue in this case. And, in any event, no such adverse

effects have resulted from *Winters* in the context of surface waters over the last century. Such problems have not arisen in Arizona or Montana, whose state supreme courts applied *Winters* to groundwater reserved for Indian tribes many years ago. Nor have such difficulties arisen from the numerous congressionally approved Indian water rights settlements recognizing federal reservations of groundwater. And—contrary to petitioners' assertion that *Winters* is incompatible with California's common law of groundwater—*Winters* rights are no more difficult to integrate and accommodate than priority-based pueblo, appropriative, and prescriptive groundwater rights, all of which California law has long recognized. Petitioners' concerns are meritless.

The petitions should be denied.

STATEMENT OF THE CASE

I. The Agua Caliente Reservation

President Grant established the Agua Caliente Reservation in 1876 "for the permanent use and occupancy of the Mission Indians in southern California." CVWD Pet. App. 52a. The next year, President Hayes enlarged the Reservation "for Indian purposes." *Id.* at 53a.

These executive orders followed years of federal efforts to ameliorate the distressed condition of southern California's native population. Contemporaneous correspondence shows that the United States recognized Agua Caliente's critical need to have its own land *and* a water supply to make a home on that land. Special Agent John Ames wrote in an 1873 report to the Commissioner of Indian Affairs that:

> The great difficulty … arises not from any lack of unoccupied land … but from lack of well-watered land. Water is an absolutely indispensable requisite for an Indian settlement…. It would be worse than folly to attempt to locate them on land destitute of water, and that in sufficient quantity for purposes of irrigation….

D. Ct. Dkt. 85-19 at 20. In 1877, Mission Indian Agent James Colburn declared that the Department of the Interior's "first purpose" was "to secure the Mission Indians permanent homes, with land and water enough" that each one could reside on a reservation and "cultivate a piece of ground as large as he may desire." *Id.* at 55. When recommending expansion of the Agua Caliente Reservation, Colburn noted that much of the additional land "could be cultivated if water could be brought upon it." *Id.* at 61.

A few years later, Indian Agent J.G. Stanley noted that the Agua Caliente Reservation had "very little running water, but water is so near the surface that it can be easily developed." D. Ct. Dkt. 97-2 at 39. Agent Stanley's report comports with historical evidence that, prior to the 20th century water table decline, Cahuilla people in the Coachella Valley accessed groundwater through hand dug, walk-in wells.[2] *See, e.g.*, D. Ct. Dkt. 85-18 at 18-19; *id.* 85-11 at 55-56; *id.* 85-15 at 7. The need for water, including

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[2] While no evidence of walk-in wells has been discovered within the current Reservation, CVWD Pet. 32 n.10, the Cahuilla people's development and use of such wells in the 19th century is well-established. *See* citations in text.

groundwater, was fully understood when the United States established the Agua Caliente Reservation.

As in the 1870s, very little surface water exists on the Agua Caliente Reservation today. Naturally occurring "surface water is virtually nonexistent in the valley for the majority of the year." CVWD Pet. App. 8a. Two tributaries of the Whitewater River provide small seasonal flows on the Reservation that peak between December and March. *Id.* at 7a–10a.

Contrary to CVWD's assertions, and as counsel for petitioners acknowledged during oral argument below,[3] the limited surface flows in the Whitewater River and its tributaries contribute to the groundwater, establishing a hydrologic connection between the two water sources.[4] *Id.* at 19a n.9. As explained by the Ninth Circuit, petitioners' surface spreading of imported water for groundwater recharge further demonstrates the irrefutable hydrologic connection. *Id.*

II. Federal and State Groundwater Rights

A. *Winters* Rights

Federal law recognizes that the United States' reservation of land for an Indian tribe impliedly includes reservation of appurtenant, unappropriated

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[3] *See* oral argument at 22:38–23:31, 35:46–36:29, and 43:53–44:48, video at:
https://www.youtube.com/watch?v=7ffvePbyL4E&t.

[4] While the district court's opinion incorrectly stated that the lack of a hydrologic connection between the relevant groundwater and surface water is undisputed, the parties stipulated only that groundwater does not contribute to surface flows. CVWD Pet. App. 30a, 50a. CVWD's repeated references to the district court's misstatement should be disregarded.

water necessary to accomplish the purposes of the reservation—in this case, to provide a permanent home for the Agua Caliente people. *Winters* rights are based on and controlled by federal law and the statutes and executive orders establishing the federal reservation. *Cappaert*, 426 U.S. at 145; *Arizona*, 373 U.S. at 597. The reservation of water occurs and vests when the land is reserved. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 600. It is forward-looking, encompassing enough water to accommodate both the reservation's present and future needs. *Arizona*, 373 U.S. at 600; *Winters*, 207 U.S. at 577. The reservation is senior and superior to subsequently acquired state law rights and is not subject to diminution or expansion based on use, nonuse, the needs of others, or post-reservation development of state water law. *See, e.g.*, *Cappaert*, 426 U.S. at 138, 145; *Arizona*, 373 U.S. at 597–98; *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1379–80 (Col. 1982) (*en banc*). Federal reservations of water are an exception to the general policy of federal deference to state control over non-navigable waters. *United States v. New Mexico*, 438 U.S. 696, 698, 715 (1978); *Cappaert*, 426 U.S. at 138, 145.

The *Winters* doctrine focuses on whether water is required to accomplish the purposes of a reservation—not whether water is available to the reservation under state law at any particular point in time. Otherwise, the existence of a reserved water right would fluctuate based on the evolution of state water law, third-party water use, and other factors. Such a notion is incompatible with this Court's precedent holding that *Winters* rights are controlled by federal law and vested "as of the time the Indian

Reservations were created." *Arizona*, 373 U.S. at 597, 600; *Cappaert*, 426 U.S. at 138, 145.

The scope of a reserved water right, like its existence, is based on the reservation's need for water. If water is necessary to accomplish the purposes of the reservation, water is impliedly reserved. The amount of water reserved is "that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141; *Arizona,* 373 U.S. at 600–01; *New Mexico*, 438 U.S. at 700 n.4. An Indian reservation's need for some water—the issue litigated in Phase 1 of this trifurcated case and currently before this Court—is obvious. But the amount of water reserved—an issue to be litigated in Phase 3—presents a "more difficult question." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981).

While this Court has extended the *Winters* doctrine to non-Indian reservations, such reservations are not at issue here. Indian reservations are distinct in purpose and legal status from other types of federal reservations. *Cohen's Handbook of Federal Indian Law* §19.03[4] (Nell Jessup Newton ed., 2012) (*Cohen*). Under the Indian canons of construction, laws intended to benefit "Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979). Accordingly, while the purposes of Indian reservations are often poorly articulated, they must be "liberally construed." *Walton*, 647 F.2d at 47 & n.9 (citing

United States v. Winans, 198 U.S. 371, 381 (1905)); *United States v. Adair*, 723 F.2d 1394, 1408 n.13 (9th Cir. 1984); *see also Winters*, 207 U.S. at 576–77; William C. Canby, Jr., *American Indian Law* 502 (6th ed. 2015) (Canby). The purposes of other federal land reservations—which are usually expressly enumerated by Congress—are not entitled to such broad construction. *See New Mexico*, 438 U.S. at 705–09; *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 73–74 (Ariz. 2001) (*en banc*); Canby, *supra*, at 502. Courts' differing treatment of Indian reservations under the *Winters* doctrine refutes petitioners' claim that the Ninth Circuit's decision here will result in "virtually every federal land reservation in the nation … automatically hav[ing]" reserved groundwater. DWA Pet. 22.

Although this Court has never explicitly applied the *Winters* doctrine to groundwater, its precedents support that result. In *Cappaert*, the United States sued to enjoin off-reservation landowners from groundwater pumping that threatened a subterranean pool in the Death Valley National Monument. The district court granted the injunction, and the Ninth Circuit affirmed, holding that the *Winters* doctrine encompassed groundwater. *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974). This Court affirmed, but concluded that the subterranean pool was in fact surface water, so it was unnecessary to decide whether the federal government could reserve groundwater under *Winters*. *Cappaert*, 426 U.S. at 142–43. Nevertheless, *Cappaert* held that (1) "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," and (2) the

United States "acquired by reservation water rights in unappropriated appurtenant water"—*i.e.*, the appurtenant groundwater—"sufficient to maintain the level of the pool." *Id.* at 143, 147. These holdings lead directly to the conclusion that the *Winters* doctrine applies to groundwater. *Id.* at 143; *see also Confederated Salish & Kootenai Tribes of Flathead Reservation v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002).

B. California Groundwater Rights

California groundwater law has changed substantially since the United States established the Reservation in the 1870s. At that time, state law recognized a landowner's absolute dominion over underlying groundwater; a landowner was free to capture and use all groundwater under his land even if doing so damaged adjacent property. 2 *Waters and Water Rights* 21-8 (Amy K. Kelley ed., 3d ed. 2017) (*Waters*); *Hanson v. McCue*, 42 Cal. 303, 309 (1871).

In 1903, 27 years after the United States first reserved water for Agua Caliente, California adopted the correlative rights doctrine. *See Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903). Correlative rights allow overlying landowners to pump as much water as they can put to reasonable and beneficial use on their land so long as sufficient water is available. *See* Eric L. Garner, *et al.*, *Institutional Reforms in California Groundwater Law*, 25 Pac. L.J. 1021, 1024–25 (2004). When a basin becomes overdrafted, the correlative rights doctrine theoretically limits each user's future pumping to a proportional share of the aquifer's safe yield. *Id.* at 1023–29. In practice, however—and as shown by the case at bar, where the subject aquifer is over 5.5 million AF in

cumulative overdraft—the correlative rights system often allows the overdraft and depletion of unadjudicated aquifers. *Id.* at 1022 ("California groundwater law … is perhaps best summarized as the right to pump as much water as possible until one is sued."); *see id.* at 1021–23, 1028–29. In contrast to a reservation of water under *Winters*, correlative rights do not ensure permanent access to the full amount of water needed to accomplish any particular purpose.

While petitioners place great weight on correlative rights, arguing that they obviate the need for any federal reservation of groundwater, "[g]roundwater law in California is in fact considerably more complex than [an] analysis of … correlative rights suggests." 2 *Waters*, *supra*, at 21-18. In addition to the correlative rights of overlying landowners, California law recognizes at least three additional types of groundwater rights—pueblo, appropriative, and prescriptive—that petitioners ignore completely. *See City of Santa Maria v. Adam*, 149 Cal. Rptr. 3d 491, 501–02 & n.3 (Cal. Ct. App. 2012), *cert. denied*, 134 S. Ct. 98 (2013) (describing various groundwater rights in California); *see also* 2 *Waters*, *supra*, at 21-18 to -28. And contrary to petitioners' repeated assertions that "priority is irrelevant to the allocation of groundwater rights" in California, CVWD Pet. 27,[5] pueblo, appropriative, and prescriptive groundwater rights all rely on temporal priority. *See City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 870 (Cal. 2000) (discussing priority of various state-law groundwater rights and

[5] *See also* CVWD Pet. 6–7, 10; DWA Pet. 12–13, 27–28.

rejecting a trial court adjudication that failed to distinguish between rights of varying priority).

Pueblo rights, which are held by municipal successors to Spanish and Mexican pueblos, grant their holder a temporally prior and paramount right to certain waters to the full extent needed to satisfy municipal needs. *Adam*, 149 Cal. Rptr. 3d at 502 n.3. Pueblo rights apply to groundwater and trump correlative rights. *Id.*; 2 *Waters*, *supra*, at 21-18 to -19. Appropriative rights arise when non-overlying landowners capture surplus groundwater not being used by overlying landowners. They are inferior in priority to overlying rights and rely on temporal priority as against other appropriators. *Adam*, 149 Cal. Rptr. 3d at 502; *see City of Pasadena v. City of Alhambra*, 207 P.2d 17, 28–30 (Cal. 1949) (*en banc*). When a user takes groundwater from an overdrafted basin, however, that use can ripen into a prescriptive right. *Adam*, 149 Cal. Rptr. 3d at 502. Prescriptive rights are superior to overlying rights that were unexercised during the prescriptive period. *Id.* at 502, 519; *see also Hi-Desert Cnty. Water Dist. v. Blue Skies Country Club, Inc.*, 28 Cal. Rptr. 909, 915 (Cal. Ct. App. 1994). Thus, "[w]hile overlying owners' rights are not dependent upon use and are not lost by non-use, loss of the right to an invading prescriptive user is fairly easy in case of non-use." 2 *Waters*, *supra*, at 21-15 to -16.

In 2015, California's Sustainable Groundwater Management Act (SGMA) took effect. *See* Cal. Water Code §§ 10720, *et seq.* Petitioners assert that recognition of the rights asserted by Agua Caliente will frustrate SGMA initiatives, such as the elimination of overdraft through local groundwater

management plans. CVWD Pet. 26. Petitioners' view is not shared by the California Legislature; rather than viewing federal groundwater rights as anathema to state management, SGMA explicitly recognizes the supremacy of such rights and invites tribes to participate in groundwater management. *See* Cal. Water Code § 10720.3(c)–(d).

III. Proceedings Below

After years of voicing concerns to petitioners about the declining quantity and quality of groundwater underlying its Reservation, Agua Caliente filed suit in 2013. The suit sought, *inter alia*, a declaration that the United States reserved groundwater for the Agua Caliente Reservation, a quantification of the groundwater reserved, a declaration and quantification of any water quality standard applicable to the reserved water, and injunctive relief. The United States intervened in support of Agua Caliente's water claims in 2014.

Early on, the parties stipulated to trifurcate the litigation. *See* D. Ct. Dkt. 49. Phase 1 addressed whether Agua Caliente has a reserved right to groundwater. Phase 2 will address the standard for quantifying the amount of groundwater reserved, whether the reservation guarantees a certain water quality, and whether Agua Caliente owns subterranean pore space underlying the Reservation.[6] Phase 3 will address fact-intensive questions regarding the purpose of the Reservation, the amount of water reserved, the quality of such

[6] Phase 2 initially included the applicability of certain equitable defenses raised by petitioners that have since been resolved in respondents' favor through summary judgment.

water, the amount of pore space owned by the Tribe, and the fashioning of appropriate injunctive relief.

All parties filed cross-motions for summary judgment in Phase 1, and the district court granted each side's motions in part. As relevant to the petitions, the district court held that "the federal government impliedly reserved groundwater, as well as surface water, for the Agua Caliente when it created the reservation." CVWD Pet. App. 39a. The court emphasized that the extent to which "groundwater resources are necessary to fulfill the reservation's purpose … is a question that must be addressed in a later phase …." *Id.* Recognizing that the *Winters* doctrine's applicability to groundwater is critical to the case, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). CVWD Pet. App. 49a–50a.

The Ninth Circuit accepted the interlocutory appeal and affirmed. Noting that its inquiry was limited by the trifurcation of the case, the Ninth Circuit addressed three questions: (1) whether the United States intended to reserve water when it established the Reservation; (2) whether the *Winters* doctrine encompasses groundwater; and (3) whether Agua Caliente's alleged state law water rights or historic lack of on-reservation groundwater production affected the analysis. *Id.* at 11a–12a. Cognizant that the *Winters* doctrine "only reserves water to the extent it is necessary to accomplish the purposes of the reservation, and it only reserves water if it is appurtenant to the withdrawn land," *id.* at 13a, the Ninth Circuit held that "the *Winters* doctrine does not distinguish between surface water and groundwater" and that "the creation of the Agua

Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer." *Id.* at 22a–23a. The petitions followed.

REASONS FOR DENYING THE PETITIONS

I. This Case Does Not Warrant This Court's Review.

A. The asserted split of lower court authority is shallow and stale.

No significant, intractable split of lower court authority demands this Court's review of this case. With a single, decades-old exception, every federal and state court to address the question has held that the *Winters* doctrine encompasses groundwater. *See* A. Dan Tarlock, *Law of Water Rights and Resources* § 9.42 (July 2017 update) ("[L]ittle, if any, doubt remains that Indian tribes have groundwater as well as surface water rights.").

1. The entire weight of authority declining to apply *Winters* to groundwater consists of a solitary decision by the Wyoming Supreme Court nearly 30 years ago—a decision that petitioners conceded below "ha[s] little relevance here." Joint 9th Cir. Br. of Appellants at 58 n.17. Even that decision explicitly recognized that the "logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater"; the Wyoming court simply refused to break what it incorrectly considered new ground, noting that "not a single case applying the reserved water doctrine to groundwater is cited to us."[7] *Big*

[7] In fact, earlier cases had applied *Winters* to groundwater. *See*, *e.g.*, *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968)

Horn, 753 P.2d at 99. The Wyoming court's decision has been unanimously rejected by other courts and by many commenters, and no court has ever followed its holding. *See Cohen*, *supra,* § 19.03[2][b].

Against the outlying Wyoming decision stand the decision below and several others uniformly holding that the *Winters* doctrine encompasses groundwater, as well as a number of congressionally approved Indian water rights settlements that include groundwater. After *Big Horn*, the Supreme Courts of Arizona and Montana explicitly included groundwater within tribal *Winters* rights. *See Stults*, 59 P.3d at 1099 (seeing "no reason to … exclud[e] groundwater from the Tribe's federally reserved water rights"); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 748 (Ariz. 1999) (*en banc*) ("[T]he federal reserved water rights doctrine applies not only to surface water but to groundwater."). Numerous lower federal courts and tribunals have agreed, both before and after *Big Horn*.[8] These decisions are in

("whether the [necessary] waters were found on the surface of the land or under it should make no difference").

[8] *See Preckwinkle v. Coachella Valley Water Dist.*, No. 5:05-cv-00626-VAP, Dkt. 210, at 25–28 (C.D. Cal. Aug. 30, 2011); *United States v. Wash. Dep't of Ecology*, No. 2:01-cv-00047-TSZ, Dkt. 304, at 8 (W.D. Wash. Feb. 24, 2003); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 9 Cl. Ct. 660, 699 (1986), *aff'd*, 877 F.2d 961 (Fed. Cir. 1989); *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm. 326, 487 (1976); *Tweedy*, 286 F. Supp. at 385.

accord with congressionally approved settlements affirming Indian groundwater rights.[9]

In short, the "split" alleged by petitioners is superficial at best. Indeed, given that the Wyoming court's only rationale—that no other court had applied *Winters* to groundwater—was wrong when issued and is manifestly no longer correct, it is unclear whether even that court would still adhere to *Big Horn*. In fact, many of the eventual *Big Horn* decrees included reserved rights to groundwater.[10] This Court's review is unnecessary.

2. Attempting to conjure a deeper split, petitioners argue that Arizona's *Gila* decision adopted a different standard than either the

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[9] *See, e.g.*, Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, §§ 2(a)(5)(A) & 4, 122 Stat. 2975, 2976–77 (2008) (affirming the tribe's "prior and paramount right, superior to all others, to pump 9,000 acre-feet" of groundwater); Gila River Indian Cmty. Water Rights Settlement Act of 2004, Pub. L. No. 108-451, §§ 201–215, 118 Stat. 3478, 3499–3535 (2004) (approving a settlement, available at http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/Appendix_A_Settlement_Agreement.pdf, affirming the Community's right to 156,700 AF of groundwater); Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, § 4, 104 Stat. 3059, 3060 (1990) (approving a settlement, available at http://digitalrepository.unm.edu/nawrs/19/, recognizing substantial tribal groundwater rights based on the *Winters* doctrine); *see also* Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 Kan. J.L. & Pub. Pol'y 489, 501 (2006) (noting that "more than half" of Indian water settlement acts since 1978 address tribal rights to groundwater).

[10] *See, e.g.*, Final Phase II Decree Covering the United States' Non-Indian Claims, *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys. & All Other Sources*, Civ. No. 4993 (Wyo. Nov. 29, 2005) (approving stipulated resolution).

Wyoming court or the court below. As relevant to the petitions, however, *Gila* is entirely consistent with the decision below in holding that the *Winters* doctrine encompasses groundwater.

To be sure, *Gila* does suggest that groundwater may be used to satisfy *Winters* rights only as a last resort—*i.e.*, when sufficient surface water is unavailable. But it is unclear whether *Gila* intends this preference as a condition on the existence of the right or instead as a rule of allocation and quantification. In any event, that issue is not present in this case, where all parties agree and the court below recognized that surface water is available only intermittently and not in quantities sufficient to meet the needs of the Reservation. *See* CVWD App. 8a n.1, 20a. As a result, to the extent that there is any tension between the Ninth Circuit and *Gila*, it cannot be resolved in this case and therefore does not justify certiorari.

Further, *Gila* does not hold, as CVWD claims, that a federal reservation of groundwater can exist only where "existing state law does not offer adequate protection" to a reservation's water needs. CVWD Pet. i. The discussion cited by CVWD merely explained, in response to arguments for the application of state law, why Arizona state-law protections were inferior to those of *Winters* rights. The *Gila* court never suggested, much less held, that the existence of a federal reservation of groundwater depends on a showing that state-law protections are less complete, and no court has ever held that a *Winters* right's existence turns on the extent of a tribe's state-law water rights.

The notion that the existence of a *Winters* right depends on the protection afforded to tribal water rights by state law at the time of quantification—which often occurs decades after the reservation's establishment—is incompatible with the *Winters* doctrine, which is undeniably based on federal law. *Winters* provides for the one-time establishment and vesting of a permanent reserved right. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 600. As read by petitioners, *Gila* would allow states to legislate federal *Winters* rights out of or into existence at any time by modifying state groundwater law. The Arizona court did not so hold, nor has any other court.[11]

Even if *Gila* had so held, the question of whether adequate state law protections could obviate a *Winters* right is not presented here, where California law provides no better protection to Agua Caliente than Arizona law provided to tribes in that state. Petitioners assert that state law correlative rights provide an adequate substitute for *Winters* rights, implying that such rights will always be available to meet Agua Caliente's needs because they are "not created by actual use of water or lost by nonuse," DWA Pet. 28, and "no overlying landowner can be deprived of his groundwater access by another." CVWD Pet. 7; *see also* DWA Pet. 33 n.9. These and

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[11] This Court does not countenance state efforts to restrict federal reserved Indian water rights, indicating that "any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive … a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983).

similar carefully worded statements give an impression of a secure, enduring state-law water right that simply does not exist in California.

First, the persistent overdraft of the Coachella Valley aquifer flatly belies any claim that California law prevents aquifer depletion. California law may limit further depletion of an already overdrafted aquifer once the aquifer is adjudicated and groundwater pumping is limited, but it does not prevent depletion of the aquifer in the first instance. And in an adjudicated, overdrafted basin, state-law correlative rights do not ensure any specific quantity of water; they certainly do not provide the priority right to the full amount of water required to meet the reservation's present and future needs that exists under federal law. *See* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 169, 197 (2000) ("Tribal reserved rights cannot be subject to correlative use … without destroying the paramount nature of those rights and allowing state law to trump federal rights.").

Second, even were correlative rights as powerful as petitioners allege, it is far from clear that federal Indian reservations in California would possess such rights. California law allows overlying rights to be limited by or lost to prescriptive rights where a party openly and adversely pumps water from an overdrafted basin under a claim of right for a period of five years and overlying owners do not exercise self-help by pumping groundwater during that period. *See Adam*, 149 Cal. Rptr. 3d at 502; *Orange Cty. Water Dist. v. City of Riverside*, 10 Cal. Rptr. 899, 904 (Cal. Ct. App. 1961); *Cal. Water Serv. Co. v.*

Edward Sidebotham & Son, Inc., 37 Cal. Rptr. 1, 6–7 (Cal. Ct. App. 1964); *see also* 2 *Waters*, *supra*, at 21-15 to -16 ("[L]oss of this [overlying] right to an invading prescriptive user is fairly easy" under California law.). Under this regime, it is quite likely that off-reservation water users would have prescriptive rights to water underlying federal Indian reservations in California in at least some instances. Such rights would have priority over the reservations' overlying rights under state law and could displace those rights entirely. *See, e.g.*, *Orange Cty.*, 10 Cal. Rptr. at 904 (prescriptive rights "are as a matter of law paramount to the rights of overlying landowners"). California law does not provide anything approaching the level of protection to groundwater access available under *Winters*.

B. This issue recurs infrequently and seldom requires judicial intervention.

Contrary to CVWD's unsupported assertions, the question of whether the *Winters* doctrine encompasses groundwater is rarely litigated. The century-plus since this Court decided *Winters* has seen only a handful of decisions addressing the issue, all of which involved Indian reservations. Nor is there any evidence that the allegedly unsettled nature of the question has engendered controversy. As CVWD concedes, "nearly all" groundwater disputes involving tribes "end in settlement." CVWD Pet. 29. And these settlements, like every court decision save *Big Horn*, frequently include groundwater in quantified *Winters* rights. *See supra*, n.9.

C. There is no evidence or reason to believe that applying the *Winters* doctrine to groundwater will frustrate state and local management efforts.

Petitioners and some *amici* speculate that the Ninth Circuit's decision will "drastically complicate, and potentially entirely defeat … state and local efforts to manage groundwater resources efficiently." CVWD Pet. 25; *see also* State Amicus Br. 11–16. CVWD further speculates that these adverse consequences will be felt especially acutely in California and other states that have adopted complex water management or permitting systems, CVWD Pet. 25–26, while DWA asserts that priority-based federal reserved rights "would not fit comfortably" in state systems where groundwater regulation is "based on principles of land ownership rather than priority of first use." DWA Pet. 30.

These contentions are entirely unsupported and refuted by decades of experience.

There is no evidence that *Winters* rights to groundwater will be disruptive in California. CVWD contends that the decision below is incompatible with SGMA, which "depend[s] on state and local water authorities' control over groundwater regulation." CVWD Pet. 26. SGMA itself refutes any such claim. It provides that "in the management of a groundwater basin … federally reserved water rights to groundwater shall be respected in full." Cal. Water Code § 10720.3(d). SGMA also explicitly authorizes tribes "to participate in the preparation or administration of a groundwater sustainability plan or groundwater management plan" and to exercise their inherent regulatory and enforcement powers to

assist in implementation of such plans. *Id.* § 10720.3(c). In drafting SGMA, the California Legislature squarely contemplated—and wholly respected—federal reservations of groundwater for tribes.

CVWD's assertion (CVWD Pet. 26) that priority-based *Winters* rights are unworkable in California because they would "undermine[] local agency control over how groundwater rights are allocated" similarly fails scrutiny. Local agencies do not control the allocation of pueblo, appropriative, or prescriptive rights, yet such priority-based rights have not "entirely defeat[ed]" groundwater regulation in California. Nor is there evidence that California groundwater management efforts have been frustrated by the Soboba Band of Luiseno Indians' "prior and paramount right" to 9,000 AF of groundwater pursuant to that tribe's settlement agreement with local water districts that Congress approved in 2008. *See supra* n.9. Petitioners offer no reason why Agua Caliente's rights are incompatible with a system that already accommodates other priority-based rights such as pueblo, prescriptive, appropriative, and settlement-based groundwater rights.

Nor do petitioners offer any evidence of *Winters* rights, whether to groundwater or surface water, proving unworkable in other states. This Court recognized federal reserved rights to surface water more than a century ago, yet there is no evidence that such rights have produced dire consequences for state and local water management and planning. Nor is there evidence of chaos in Montana or

Arizona, whose supreme courts recognized Indian reserved rights to groundwater many years ago.

Petitioner CVWD baldly asserts that "[s]tate 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 … state." CVWD Pet. 27 (internal quotation omitted); *see also* State Amicus Br. 11. In fact, any such assumption would be patently unreasonable in light of this Court's straightforward declaration that "[f]ederal water rights are not dependent upon state law or state procedures," *Cappaert*, 426 U.S. at 145, and the fact that no court has ever declined to find a federal reservation of water based on state law principles.

D. At this interlocutory stage, this case is a poor vehicle for addressing any putative inconsistency with *New Mexico* and other facets of petitioners' questions presented.

1. Petitioners' questions presented go well beyond the *Winters* doctrine's applicability to groundwater, and this interlocutory appeal presents a poor vehicle to address those additional issues. This is particularly true of the assertion that the Ninth Circuit's decision conflicts with *New Mexico*.

DWA contends that under *New Mexico*, a court assessing a *Winters* claim must address "whether water is available from other sources" at the time a federal reserved water right is asserted. DWA Pet. 10–11. The Ninth Circuit—in keeping with every other decision ever to address the reserved rights of an Indian reservation—did not address that question in determining whether a *Winters* right exists,

focusing instead on whether water is necessary to accomplish the purposes of the Agua Caliente Reservation. CVWD Pet. App. 15a. DWA argues that this merits certiorari. It does not.

DWA's *New Mexico* argument is premature at best. By stipulation of the parties, this case is trifurcated; this appeal follows Phase 1. Both courts below recognized that a full *New Mexico* analysis—including detailed delineation of the primary purpose of the Agua Caliente Reservation and the amount of water necessary to accomplish that purpose, also issues that DWA faults the Ninth Circuit for not addressing—will be addressed in the remaining phases. The Ninth Circuit explicitly noted that "the district court's failure to conduct a thorough *New Mexico* analysis … was largely a function of the parties' decision to trifurcate this case" and that "a full analysis specifying the scope of the water reserved under *New Mexico* will be considered in the subsequent phases …." CVWD Pet. App. 23a.

To find the mere existence of a reservation of water, the Ninth Circuit needed only to determine, as this Court did in *Winters* and *Arizona*, that some water is necessary to accomplish the purposes of an Indian reservation. It did that and no more. It was careful to "express no opinion on how much water" was reserved for the Agua Caliente Reservation, ruling only that "water in some amount" was necessary to "support the reservation." *Id.* And because, as the Ninth Circuit found, reliable sources of surface water do not exist on the Reservation, it naturally follows that the water reserved must include groundwater. *Id.* at 19a–21a.

2. This case also presents a poor vehicle to address CVWD's concerns about the effect of *Winters* rights on "state-law regulation of groundwater." CVWD Pet. i. This case is not about regulation of groundwater. The parties have litigated whether a federal reservation of groundwater for the Agua Caliente Reservation exists; the court below determined that it does. Questions of administration and regulation of such a right are legally distinct and not properly before this Court.

II. The Ninth Circuit's Decision is Correct.

A. The United States impliedly reserved water when it established the Agua Caliente Reservation because the Reservation needs water; whether the water is found above or below the ground is irrelevant.

The court below correctly held that "the *Winters* doctrine does not distinguish between surface water and groundwater." CVWD Pet. App. 22a. From its inception, the *Winters* inquiry has hinged on a federal reservation's need for water and the necessary water's appurtenance to the reservation.[12] *See New Mexico*, 438 U.S. at 700–01 & n.4; *Cappaert*, 426 U.S. at 139; *Arizona*, 373 U.S. at 598–600; *Winters*, 207 U.S. at 576–77. The Ninth Circuit recognized as much, holding that *Winters* implies a reservation of water "only … to the extent it is necessary to accomplish the purpose of the reservation." CVWD Pet. App. 13a.

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[12] The appurtenance of groundwater to the Agua Caliente Reservation is undisputed. CVWD Pet. App. 20a n.10.

Petitioners assert that the Ninth Circuit erred because "the rationale of the *Winters* doctrine does not apply to groundwater." DWA Pet. 28; CVWD Pet. 31, 33. This contention makes no sense. As this Court explained, the rationale of *Winters* is that it is "impossible to believe" that the United States would create a reservation to serve as a home for Indian people—particularly one in a hot, arid, place such as the Coachella Valley—without "reserving … the waters without which their lands would have been useless." *Arizona*, 373 U.S. at 598–600. And as the *Gila* court explained, this rationale applies equally to reservations that rely on surface water and groundwater—it is "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." 989 P.2d at 746. *Winters* does not turn on whether the necessary water is above or below ground, and no decision save *Big Horn* has ever so held. Any distinction between surface and groundwater is simply irrelevant to the controlling question of need. *See Cohen* § 19.03[2][b] ("No reason has been advanced to exclude groundwater, while hydrology, logic, and, often, economics all prescribe that it is available to satisfy the tribal right."); *Stults*, 59 P.3d at 1098–99; *Gila*, 989 P.2d at 747.

CVWD also argues that the *Winters* doctrine should not apply to groundwater because the doctrine is based on the United States' implied intent to reserve water, but there is no explicit evidence of federal intent to reserve groundwater for Agua Caliente. CVWD Pet. 31–32. CVWD goes on to argue that because the United States was unaware of future groundwater pumping technologies when it

established the Agua Caliente Reservation, there is "no basis, in law or fact, to presume" that the United States intended to reserve groundwater for Agua Caliente. *Id.* at 32–33.

This argument fails on several levels. First, because the *Winters* doctrine is built on an *implied* intent, any putative lack of explicit evidence of federal intent to reserve groundwater is wholly irrelevant. *Arizona*, 373 U.S. at 598–99 (rejecting the argument that the "lack of evidence showing that the United States … intended to reserve water" prevented the recognition of a *Winters* right); *see also New Mexico*, 438 U.S. at 699 ("Congress has seldom expressly reserved water …."); *Gila*, 35 P.3d at 75.

Second, as explained *supra*, the doctrine implies a reservation of water because water is necessary. *Cappaert*, 426 U.S. at 139 ("Intent is inferred if the … waters are necessary …."). The need for water—particularly where surface water flows are intermittent, unreliable, or nonexistent—does not depend on whether necessary water is found above or below ground.

Third, no court has ever limited the amount of water reserved for a tribe under *Winters* based on the tribe's technological capability to access or use the water. The special master in *Arizona* explicitly rejected the argument that federal reserved water rights should be limited by "[r]eference to past standards,"[13] and courts adjudicating tribal fishing and hunting rights have held that tribes are entitled

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[13] Report of Special Master Elbert P. Tuttle, *Arizona v. California*, O.T. 1981, No. 8, Orig., p. 98 (Feb. 22, 1982), *available at* http://lawcollections.colorado.edu/allfile/201518.pdf.

to make use of modern technology when exercising reserved rights. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987); *United States v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *Winters* itself concluded that the United States intended to "leave [Indians] the power to change to new" circumstances, to advance their "civilization and improvement … and to encourage habits of industry … among them." 207 U.S. at 567, 577. These decisions are consistent with Indian reservations' broadly construed purpose of providing a permanent home and the opportunity for "growth of the Indians and their way of life." *Walton*, 647 F.2d at 49; *see also id.* at 47 n.9 (explaining that Congress had a "vision of progress" for Indian reservations that "implies a flexibility of purpose").

Fourth, the record refutes CVWD's assertion that "neither the Indians nor the federal government knew of the existence" of groundwater at the time of the Reservation's establishment. CVWD Pet. 32 (internal quotation omitted). The historical record shows that Cahuilla people accessed groundwater by hand-digging wells, and correspondence contemporaneous to the Reservation's establishment notes the presence of water "so near the surface that it can be easily developed." *Supra* at 5. Ample basis exists, in law and fact, to imply that the United States intended to reserve appurtenant, unappropriated water—including groundwater—necessary to accomplish the purposes of the Reservation.

B. State law rights to use water cannot obviate or supplant a federal reserved right, and California law does not adequately protect Agua Caliente's water in any event.

Both petitioners argue that the Ninth Circuit at least erred in applying the *Winters* doctrine to groundwater in California. This is so, they claim, because California law ensures Agua Caliente access to water and a federal reserved right cannot comfortably co-exist with the state-law correlative rights regime, which is not based on priority. CVWD Pet. 33–35; DWA Pet. 29–31. This argument incorrectly assumes that state law governs federal reservations of water. But as the Ninth Circuit explained, "state water entitlements do not affect … the creation of [a] federally reserved water right." CVWD Pet. App. 22a; *see Cappaert*, 426 U.S. at 145; *Arizona*, 373 U.S. at 597. And once they are created, "[f]ederal water rights are not dependent upon state law …." *Cappaert*, 426 U.S. at 145; *see New Mexico*, 438 U.S. at 715; *Arizona*, 373 U.S. at 597 ("Indian claims … are governed by the statutes and Executive Orders creating the reservations.").

The possible existence of a present-day correlative right to use groundwater under California law does not obviate the need for—and thus the existence of—a federal reserved right for several reasons. First, the existence *vel non* of a federal reservation of water does not turn on "whether water stemming from a federal right is necessary at some selected point in time." CVWD Pet. App. 15a. Rather, a *Winters* right "intended to satisfy the future as well as the present needs of the Indian Reservations," *Arizona*, 373 U.S.

at 600, "vests on the date of the reservation," *Cappaert*, 426 U.S. at 138, "for a use which would be necessarily continued through years." *Winters*, 207 U.S. at 577. The availability of water under state law today is entirely irrelevant to the question of whether water was necessary—and thus impliedly reserved—when the United States established the Agua Caliente Reservation in the 1870s.[14] And once the United States reserves water for an Indian reservation, the federal water right is governed by federal law and cannot be revoked or destroyed by state law. *Cappaert*, 426 U.S. at 145; *Arizona*, 373 U.S. at 597–98.

Second, in asserting that California's correlative rights system obviates the need for a federal reserved right, petitioners mischaracterize the state-law rights at issue. As discussed *supra*, neither current California law nor California law at the time of the Reservation's establishment ensure(d) permanent access to a quantity of water sufficient to meet the Reservation's needs. The correlative rights system greatly differs from a *Winters* right both

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[14] That water was reserved upon the Reservation's establishment in the 1870s answers the *amici* states' erroneous assertion that "newly-created" federal reserved rights will injure state-law groundwater users. State Amicus Br. 12. If the water right decreed in this case was "newly created," it would be junior to those of current users and the arguments raised by the states would be moot. But the water right at issue was established and vested 140 years ago; the fact that others have moved to the Coachella Valley and made use of water reserved for Agua Caliente in the interim cannot destroy the Reservation's vested federal water right. *See, e.g.*, *Winters*, 207 U.S. at 570, 577–78; *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339 (9th Cir. 1939).

because it does not guarantee access to the volume of water needed to meet the Reservation's needs and because it is subject to loss through prescription. Even if current California law provided the same protections as a *Winters* right, there is no guarantee that it would always do so. State law could change again, as it has on prior occasions, or drought, overdraft, or other factors could simply limit the amount of water available for correlative use. Such an uncertain, variable state-law right is a wholly inadequate substitute for a *Winters* right. The Ninth Circuit correctly held that whatever rights state law may provide at any particular moment in time, they are neither the equal of, nor an adequate substitute for, a permanent, federal reservation of necessary water.[15]

Third, petitioners' argument mischaracterizes the *Winters* doctrine by asserting that its "whole point" is establishing a rule of temporal priority. CVWD Pet. 33; *see* DWA Pet. 28–30. While *Winters* does establish a right with temporal priority, it also establishes a right to volume priority—*i.e.*, it assures that a federal reservation will have access to the amount of water necessary to accomplish its purposes. It is indisputable that California law does not provide volume protection for Agua Caliente's

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[15] DWA and its *amici* contend that the Ninth Circuit held that "the reserved right is open-ended and can be expanded beyond current reservation needs." DWA Pet. 22; State Amicus Br. 9–10; Nat'l Water Res. Ass'n, *et al.* (NWRA) Amicus Br. 15. This is partially incorrect. When a reservation is established, water is reserved in the amount necessary to accomplish both its present and future purposes, but the right is not "open-ended." *See* CVWD Pet. App. 12a; *see also Arizona*, 373 U.S. at 600–01; *Walton*, 647 F.2d at 48.

water rights, and thus that state-law rights are inferior to federal reserved rights.

C. The Ninth Circuit's decision does not conflict with *New Mexico*.

DWA argues at length that the decision below runs afoul of *New Mexico*, which held that Congress reserves "only that amount of water necessary to fulfill the purpose of the reservation, no more." 438 U.S. at 700. DWA views *New Mexico* as a significant narrowing of the *Winters* doctrine, and it asserts that the Ninth Circuit failed to follow *New Mexico*'s "narrow construction" in determining that the United States reserved water for the Agua Caliente Reservation. DWA Pet. 16–19. DWA's assertions are incorrect.

Far from creating a new, narrow construction of *Winters*, *New Mexico*'s holding that water is reserved only in the amount necessary to accomplish the purposes of a federal reservation followed a well-worn path.[16] 438 U.S. at 700. *New Mexico* emphasized that this Court has looked to the purposes of a federal reservation and limited the scope of the reserved right to the reservation's needs "[e]ach time" it has applied the *Winters* doctrine. *Id.*

The limitations that this Court has placed on the scope of a reserved right were not lost on the Ninth Circuit. It explicitly recognized that "the *Winters* doctrine only applies in certain situations: it only

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[16] Despite characterizing *New Mexico* as narrowing the *Winters* doctrine, DWA concedes that "*New Mexico* stated that its necessity standard was not a new standard, but in fact was the standard that this Court has applied in upholding reserved rights in *Winters*, *Arizona* and *Cappaert*." DWA Pet. 20–21.

reserves water to the extent it is necessary to accomplish the purpose of the reservation ….” CVWD Pet. App. 13a. And it faithfully applied *New Mexico*, concluding that the Reservation requires water, so water was reserved for it, but only to the extent necessary to accomplish the Reservation’s purposes. *Id.* at 23a. In the Ninth Circuit’s words, “[w]ater is inherently tied to the Tribe’s ability to live permanently on the reservation. Without water, the underlying purpose … would be entirely defeated.” *Id.* at 18a. These conclusions are wholly unremarkable. No court has ever held that an Indian reservation did not require water.

Despite the Ninth Circuit’s clear enunciation and application of the correct *Winters* standard, the state *amici* erroneously insist that the court adopted a new, more lenient standard that will mandate the finding of a federal reserved right “irrespective of the reservation’s intended purpose or the federal reservation’s need for groundwater….” State Amicus Br. 9. DWA similarly contends (DWA Pet. 19–20) that the Ninth Circuit strayed from this Court’s precedent by stating that a reserved right exists when “the purpose of the reservation envisions water use.” CVWD Pet. App. 17a. These assertions are irreconcilable with the opinion below. *Id.* at 17a–18a. The Ninth Circuit found that the Reservation’s “primary purpose … was to create a home for the Tribe” and that purpose “would be entirely defeated” without water. *Id.* at 18a. Based on those findings, it held that “the United States implicitly reserved a right to water when it created the Agua Caliente Reservation.” *Id.* And it emphasized that the amount of water reserved was only the amount “necessary to accomplish the purpose of the reservation”—with “a

full analysis specifying the scope of the water reserved under *New Mexico* [to] be considered in the subsequent phases of this litigation" by stipulation of the parties. *Id.* at 13a, 23a. This is a direct, accurate application of the standards delineated by this Court, and it does not require further review.[17]

[17] Petitioners' *amici* present two arguments—that recognition of a federal reserved right to groundwater runs afoul of the clear statement rule (State Amicus Br. 16–18; NWRA Amicus Br. 16–19) and constitutes an unconstitutional taking without compensation (Pac. Legal Found. Amicus Br., *passim*)—that were not raised by petitioners or litigated below. These arguments are not properly before the Court and should not be considered. *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for a writ of certiorari.

Respectfully submitted.

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