Appeal No. 15-80053

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Agua Caliente Band of Cahuilla Indians,

Plaintiff-Respondent,

and

United States of America,

Plaintiff-Intervenor-Respondent,

vs.

Coachella Valley Water District, *et al*,

Defendants-Petitioners.

United States District Court for the
Central District of California
Hon. Jesus G. Bernal, Department 1
Case No. EDCV-13-883-JGB

PLAINTIFF-RESPONDENT AGUA CALIENTE BAND OF CAHUILLA INDIANS' ANSWER TO PETITION FOR PERMISSION TO APPEAL

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DISCLOSURE STATEMENT

Plaintiff-Respondent Agua Caliente Band of Cahuilla Indians is not a nongovernmental corporate entity.

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On March 20, 2015, the United States District Court for the Central District of California issued an order declaring that the United States impliedly reserved groundwater for the Agua Caliente Band of Cahuilla Indians when it established the Agua Caliente Reservation in 1876-77. *See* Order at 8. In so doing, the district court acted in accordance with binding precedent from this Court and the overwhelming weight of authority from other courts addressing Indian reserved water rights. While the question addressed by the district court is important, it is neither novel nor difficult, and there is not a substantial basis for difference of opinion as to its proper resolution. It certainly does not merit an interlocutory appeal, particularly when, as here, such an appeal would needlessly protract the litigation rather than materially advancing its termination. Accordingly, the Court should deny Coachella Valley Water District's (CVWD) and Desert Water Agency's (DWA)[1] petition for permission to appeal under 28 U.S.C. § 1292(b).

BACKGROUND

In the instant lawsuit, the Agua Caliente Band of Cahuilla Indians seeks a declaration of its federally reserved[2] and aboriginal rights to groundwater

[1] References to CVWD and DWA include their respective directors, who are named as defendants in the underlying action exclusively in their official capacities.

[2] In brief, the federal reserved rights doctrine, also sometimes called the *Winters* doctrine, provides that when the United States expressly reserves land for a federal purpose, such as the establishment of an Indian reservation, it impliedly reserves unappropriated, appurtenant water that is necessary to accomplish the purposes of the reservation. *See, e.g.*, *Arizona v. California*, 373 U.S. 546, 598-601 (1963); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981).

underlying its Reservation and an injunction requiring CVWD and DWA (collectively, the water districts) to modify or discontinue practices that adversely affect both the quantity and quality of that groundwater. Additionally, Agua Caliente seeks a declaration of its ownership interest in pore space underlying its Reservation and a declaration that its water rights include water of a certain quality. Agua Caliente also seeks a quantification of its water rights, pore space ownership, and the water quality standard applicable to its rights.

Due to the inherent complexity of quantifying water rights, pore space ownership, and a water quality standard, Agua Caliente and the water districts agreed, with the district court's approval, to divide the litigation into three phases. Phase 1 involved determination of the threshold legal issues of (1) whether Agua Caliente has a federally reserved right to groundwater, which hinged on the legal question of whether the federally reserved rights doctrine applies to groundwater, and (2) whether Agua Caliente has an aboriginal right to groundwater. *See* Order at 3. Phase 2 involves distinct and independent legal questions of (1) whether Agua Caliente beneficially owns the pore space underlying its reservation and (2) whether Agua Caliente's groundwater rights include a water quality component. *Id.* It potentially will also include certain affirmative defenses raised by the water districts. *Id.* Finally, after all of the preliminary legal issues are decided in the first two phases, Phase 3 will address the fact-intensive issues of quantification of Agua

Caliente's groundwater rights and pore space rights, the applicable water quality standard, and the shaping of appropriate injunctive relief. *Id.*

The district court decision giving rise to the water districts' petition addressed only the Phase 1 legal issues, holding that (1) the federally reserved rights doctrine does apply to groundwater and Agua Caliente has a federally reserved groundwater right in an amount to be quantified in Phase 3; and (2) Agua Caliente does not have an extant aboriginal right to groundwater. *See id.* at 8-10, 13. As the district court was careful to emphasize, its ruling was limited to the existence of Agua Caliente's federally reserved right to groundwater; the "tougher question" of the amount of groundwater reserved remains for Phase 3. *Id.* at 5-6. And before that question is addressed, the district court must still address the distinct, Phase 2 legal issues pertaining to pore space ownership and water quality.

STANDARD OF REVIEW

As a general rule, parties may appeal only from final orders that "end the litigation on the merits and leave nothing for the court to do but execute the judgment." *Couch v. Telescope, Inc.*, 611 F.3d 629, 632 (9th Cir. 2010) (internal quotation and citations omitted). 28 U.S.C. § 1292(b), the statute upon which the water districts rely in seeking permission to pursue an interlocutory appeal, provides a "narrow exception" to this final judgment rule. *Couch*, 611 F.3d at 633. Because of the general policy against piecemeal appeals, § 1292(b) is meant to be

used sparingly and strictly construed. *See Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 351 F.2d 552, 553 (1st Cir. 1965); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (stating that interlocutory appeals pursuant to § 1292(b) are appropriate "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation" (citation omitted)).

Pursuant to § 1292(b), an interlocutory appeal *may* be appropriate where (1) the order appealed from involves a controlling question of law; (2) there is substantial ground for difference of opinion as to the proper resolution of the controlling legal question; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *Id.* The district court issuing the order first must certify that all of these conditions are satisfied – as has happened here. The appellate court, however, also "must determine whether the district court has properly found that the certification requirements … have been met." *Couch*, 611 F.3d at 633 (internal quotation omitted). The party pursuing an interlocutory appeal bears the burden of proof on this issue. *Id.*; *see also Koehler v. Bank of Bermuda*, 101 F.3d 863, 865 (2d Cir. 1996) (describing § 1292(b) as "a rare exception to the final judgment rule that generally prohibits piecemeal appeals.")

Even if all of the requisite conditions for an interlocutory appeal are satisfied, the appellate court has wide discretion to decline to the appeal. Indeed,

the Supreme Court has held that a circuit court can decline a § 1292(b) interlocutory appeal "for any reason, including docket congestion." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

ARGUMENT AND ANALYSIS

The district court's order is not appealable under § 1292(b). The legal ruling that the water districts ask this Court to review – that the United States may impliedly reserve groundwater as well as surface water necessary to accomplish the purposes of a federal reservation – is directly in line with this Court's own precedent and the overwhelming weight of lower court authority. It certainly does not engender "substantial grounds for difference of opinion." Additionally, an appeal at this juncture would not materially advance the ultimate termination of the case because the parties still would need to litigate other claims that have been reserved for Phase 2.

Even if a § 1292(b) appeal were jurisdictionally appropriate, the Court should exercise its discretion to deny an appeal at this juncture. There are additional, purely legal issues that will be subject to summary disposition in Phase 2, and it is quite conceivable that one or more parties will seek this Court's view on those issues before the case proceeds to the more fact-intensive Phase 3. It would make for a more efficient use of judicial and party resources and avoid unnecessary protraction of the litigation if this Court first allowed the district court to address

all of the foundational legal issues before making a single decision as to which, if any, merit immediate review.

I. An interlocutory appeal is improper because there is no substantial ground for difference of opinion over the legal question addressed in the water districts' petition.

The water districts seek an interlocutory appeal to challenge the district court's holding that the reserved rights doctrine applies to groundwater. This Court has already addressed this question, however, as have numerous state and lower federal courts. And all of the relevant decisions save one – an unpersuasive opinion from the Supreme Court of Wyoming that explicitly conceded its own illogic – are consistent with the district court's ruling in this case. As this authority shows, the legal question raised in the water districts' petition is not one on which there is substantial grounds for difference of opinion. Accordingly, the petition should be denied.

In *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), *aff'd*, 426 U.S. 128 (1976), this Court addressed the precise question raised in the water districts' petition. In that case, the United States sought to enjoin groundwater pumping by the owners of land located near the Devil's Hole Pool. In support of its requested injunction, the United States argued that its express reservation of the pool – the sole habitat of the endangered Devil's Hole pupfish – as part of the Death Valley National Monument included "an implied reservation of enough groundwater to

assure preservation of the pupfish in that pool." *Id.* at 317. The *Cappaert* defendants, like the water districts in this case, "contend[ed] that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water." *Id.* While recognizing that Supreme Court cases to that point in time involved only surface water, this Court held that "the reservation of water doctrine is not so limited" and that "the United States may reserve not only surface water, but also underground water." *Id.* This express holding refutes the water districts' claim that "neither the Supreme Court *nor any federal appellate court* has held that the federal reserved rights doctrine applies to groundwater." Petition at 14 (emphasis added). And because it is a directly on point holding from this Court, it is all that is needed to dispose of the water districts' petition.

The water districts give this Court's holding in *Cappaert* exceedingly short shrift, mentioning it only in a footnote and implying that it was somehow invalidated by the Supreme Court's affirmance. *See* Petition at 15 n.6. On the contrary, the Supreme Court's opinion reinforces this Court's holding. After concluding that the *expressly* reserved Devil's Pool constituted surface water, the Supreme Court went on to hold that United States *impliedly* reserved unappropriated, appurtenant groundwater to the extent necessary to accomplish the purpose of the explicit reservation – *i.e.*, the preservation of the pool's scientific value as a home for endangered pupfish. *See Cappaert*, 426 U.S. at 132 (describing

the express reservation of the pool) & 147 (holding that the express reservation of the pool impliedly included rights in unappropriated, appurtenant groundwater necessary to maintain the pool). Necessarily then, the Supreme Court's *Cappaert* decision recognizes that an implied reservation of water can include groundwater, just as this Court held.

The water districts emphasize the Supreme Court's declaration that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Id.* at 142. This emphasis is misplaced. The Court's comment referred to its prior jurisprudence; it did not indicate that the Court was not addressing the issue in its *Cappaert* decision. On the contrary, the Court declared in the same paragraph that the implied reservation doctrine "is based on the necessity of water for the purpose of the federal reservation" and that the United States accordingly "can protect its water from subsequent diversion, whether the diversion is of surface *or groundwater*." *Id.* at 143 (emphasis added).

Even if one reads the Supreme Court's *Cappaert* opinion as applying exclusively to surface water, however, it still does not save the water districts' petition. The Supreme Court affirmed this Court's *Cappaert* decision. In so doing, it did not reject or overrule this Court's holding on the reserved rights doctrine's applicability to groundwater; at most, it avoided the question entirely. The Supreme Court's decision not to address a legal question decided by this Court

neither invalidates this Court's holding nor gives rise to substantial ground for difference of opinion as to its correctness.[3] *See, e.g.*, *Mastro v. Rigby*, 764 F.3d 1090, 1094-95 (9th Cir. 2014) (explaining that when the Supreme Court affirms a decision of this Court on other grounds that are not "clearly irreconcilable" with this Court's original decision, the Ninth Circuit's ruling remains good law).

While this Court's decision in *Cappaert* independently suffices to defeat the water districts' petition, it does not stand alone. Other federal courts that have addressed the issue have concluded unanimously that the reserved rights doctrine applies to groundwater. *See, e.g.*, Order, *Preckwinkle v. CVWD*, No. 05-cv-626 at **26-28 (C.D. Cal. Aug. 30, 2011) ("[R]eserved water rights include rights to both surface water and groundwater."); *United States v. Washington Dept. of Ecology*, 2005 WL 1244797, at *3 (W.D. Wash. May 20, 2005) (holding that "reserved *Winters* rights … extend to groundwater"); *Tweedy v. Tex. Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) ("[T]he same implications which led the Supreme Court to

[3] The district court indicated that this case falls outside of the rule in *Cappaert* due to the lack of a hydrologic connection between the groundwater at issue and any surface water. *See* Order at 14. This is incorrect for two reasons. First, there is no legal or scientific basis for concluding that the United States can reserve groundwater that is "hydrologically connected" to surface water, but not other groundwater. Second, while Agua Caliente has conceded that the groundwater at issue in this case "'does not contribute to the surface flows' of Andreas Creek, Tahquitz Creek, or Chino Creek," it has not conceded the absence of a hydrological connection between surface and groundwater on and beneath the Agua Caliente Reservation. *See* DWA's Statement of Genuine Disputes of Material Facts 1, District Court Doc. No. 96-1, attached hereto as Appendix 1. That surface flows contribute to groundwater, thereby establishing a hydrological connection, is undisputed. *See, e.g., In re Waters of Whitewater River*, District Court Doc. No. 84-5 at 6 (of 72), attached hereto as Appendix 2 (relevant portion cited in DWA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Doc. 84-1 at 4-5).

hold that surface waters had been reserved would apply to underground waters as well."); *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm. 326, 487 (1976) ("[T]he *Winters* Doctrine applies to all unappropriated waters … including … percolating and channelized ground water."). With one exception, the same is true of state appellate courts. *See Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098 (Mont. 2002) ("[T]here is no distinction between surface water and groundwater for purposes of determining what water rights are reserved …."); *In re Water in the Gila River Sys.*, 989 P.2d 739, 747 (Ariz. 1999) (*en banc*) ("[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."). This overwhelming authority establishes that, contrary to the water districts' contention, the question presented in the proposed appeal is neither novel nor controversial.

Against this overwhelming authority stands a single, outdated, unpersuasive opinion from the Supreme Court of Wyoming. *See In re Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988). As an initial matter, the existence of a single, non-binding decision that is not in keeping with the weight of authority does not suffice to create a substantial ground for difference of opinion. *See Couch*, 611 F.3d at 634 ("More fundamentally, the presence of a single, non-binding [state

attorney general opinion] is not a 'substantial' ground for disagreement as to the controlling law."). *Big Horn* can be disregarded for this reason alone.

Even if a single differing opinion could sometimes suffice to establish a substantial ground for difference of opinion, the Wyoming Court's *Big Horn* opinion would not. While *Big Horn* conceded that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports a reservation of groundwater," the Court refused to follow its own logic due to a lack of precedent on the issue. *In re Big Horn*, 753 P.2d at 99-100. As the Supreme Court of Arizona observed in rejecting *Big Horn*, a decision based principally on "hesitation … to break new ground" is "not … persuasive." *See Gila River*, 989 P.2d at 745 ("That no previous court has come to grips with an issue does not relieve a present court … of the obligation to do so."). Furthermore, as the district court in this case correctly noted, the authority that the Wyoming Court could not find is now readily available. *See* Order at 8, n.5.

In addition to the foregoing, directly on point authority, additional Ninth Circuit case law supports the district court's decision and rebuts any claim of substantial grounds for difference of opinion. For example, this Court quite recently recognized that "the federal reserved water rights doctrine allows the United States to exert rights over water that is 'physically interrelated' with the reserved land," including even waters that are not physically within a reservation's

boundaries. *John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013), *cert. denied*, *Alaska v. Jewell*, 134 S. Ct. 1759 (2014). This Court further explained that the reserved rights doctrine "include[s] within its potential scope all the bodies of water on which the United States' reserved rights could at some point be enforced – *i.e.*, those waters that are or may become necessary to fulfill the primary purposes of the federal reservation at issue." *Id.* at 1231. It is impossible to square the affirmation of reserved rights in "all bodies of water" and all waters "physically interrelated" with reserved lands with the notion that reserved rights cannot apply to groundwater that literally percolates within those lands.

In addition, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), this Court explicitly noted and approved a district court's ruling applying the federally reserved rights doctrine to uphold the Colville Tribes' pumping of groundwater to maintain in-stream flows during trout spawning season. *Id.* at 46-47. As with *John*, it would be impossible to reconcile this Court's approval of groundwater pumping in *Walton* with the notion that reserved rights cannot apply to groundwater.

Still other Ninth Circuit decisions hold that the purposes of Indian reservations – and the extent of waters impliedly reserved to achieve those purposes – are to be broadly construed to the benefit of Indians. For example, in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984), this Court held that the strict

construction of reserved rights applicable to most federal reservations under *United States v. New Mexico*, 438 U.S. 696 (1979) is not appropriate in the context of Indian reservations. *Adair*, 723 F.2d at 1408 n.13. And the Court further affirmed in *Walton* that the purposes of Indian reservations are to be "broadly construed." *Walton*, 647 F.2d at 46-47. Even if there were room to question the applicability of the reserved rights doctrine to groundwater, these cases call for any doubts to be resolved in favor of finding reserved rights for Indian reservations.

Taken together, all of the foregoing authority establishes an extraordinarily firm footing for the district court's holding that the federal reserved rights doctrine applies to groundwater. There is not a substantial basis for difference of opinion on this legal issue, and the Court accordingly should deny the water districts' petition for interlocutory review under § 1292(b) for this reason alone.

II. An interlocutory appeal is improper because it would not materially advance the ultimate termination of the litigation in light of the separate, independent claims to be litigated in Phase 2.

The water districts' proposed interlocutory appeal is also jurisdictionally deficient because it would not materially advance the ultimate termination of the litigation. Regardless of whether or how the Court addresses the proposed appeal, the case will continue below, quite possibly for an extended period of time.

As explained above, this case has been divided into three phases. Phase 1, which the district court's order summarily resolved, dealt with legal questions

pertaining to the existence of Agua Caliente's federally reserved and aboriginal rights to groundwater. Now, the case below will proceed to Phase 2, which involves separate and distinct legal issues including whether Agua Caliente owns geological pore space underlying the Agua Caliente Reservation and whether Agua Caliente's water rights include a water quality component.[4] The pore space claim in particular is based on the Supreme Court's holding that Indian tribes own all "constituent elements of the land" constituting their reservations, and is thus entirely independent of the Phase 1 water rights issues. *United States v. Shoshone Tribe of Indians of Wind River Reservation*, 304 U.S. 111, 116 (1938). And just as the quantification of Agua Caliente's water rights is reserved for Phase 3, factual questions pertaining to the precise contours of any water quality right and pore space ownership are likewise reserved for that final phase. Accordingly, regardless of whether or how this Court addresses the water districts' proposed appeal, a second phase of litigation below will certainly be necessary, and a third, fact-intensive phase will be required if Agua Caliente and the United State prevail on either of the principal Phase 2 legal questions.

The water districts' petition glosses over Phase 2, and the little discussion that it does provide relies on mischaracterization. *See* Petition at 7, 18. Contrary to

[4] Phase 2 will also address an equitable defense that one or both of the water districts have raised. This defense is tied to the Phase 1 issues, and it admittedly could be obviated by an interlocutory decision from this Court reversing the district court's ruling.

the water districts' claim, this case would not be dismissed even if the Court took up an interlocutory appeal and decided it adversely to Agua Caliente and the United States. At a minimum, the question of pore space ownership would persist and would not be mooted by a decision from this Court reversing the district court's groundwater ruling. Because the decision that the water districts hope to get from this Court would not obviate the need for one or even two additional phases of litigation, the termination of the litigation would not be advanced and an interlocutory appeal is impermissible at this juncture.

The inevitable need for the district court to separately address Phase 2 also undercuts the water districts' absurd contention that an immediate interlocutory appeal is the only thing that can prevent this case from exploding into a general groundwater basin adjudication. *See* Petition at 19. As an initial matter, Agua Caliente has not requested a full basin adjudication, and no such adjudication is necessary to resolve Agua Caliente's claims.[5] And even if the case somehow were to expand into a full basin adjudication, that would not and could not occur until the district court addresses quantification of Agua Caliente's rights in Phase 3. This fact both underscores the reality that an immediate interlocutory appeal will not materially advance the termination of this litigation and, as explained *infra*,

[5] Even if the water districts sought to expand the current, limited litigation into a full basin adjudication, there is considerable reason to doubt whether the district court would allow them to do so.

militates in favor of delaying consideration of any interlocutory appeal until after Phase 2.

III. Even if an interlocutory appeal were legally permissible, the Court should not grant permission to appeal at this time.

Even where an interlocutory appeal is jurisdictionally permissible, the Court has broad discretion as to whether to accept it. *See, e.g.*, *Livesay*, 437 U.S. at 474. In this case, considerations of judicial economy and efficiency militate strongly in favor of denying an interlocutory appeal at this juncture and reconsidering the matter at the conclusion of Phase 2, after the district court has had the opportunity to address additional purely legal questions that will significantly shape final phase of the case.

As explained above, this case will continue, and additionally, vigorously disputed legal issues will be addressed before the fact-intensive, third phase of the case begins. Indeed, even if the Court entertained this appeal, it is quite conceivable that another interlocutory appeal would be sought at the close of Phase 2, before the litigation of significant factual matters in Phase 3. If an interlocutory appeal will ever be appropriate in this case, it would be at the conclusion of Phase 2, when the Court could address any or all of the district court's legal rulings before the parties proceed to the fact-intensive Phase 3. For this reason, considerations of judicial economy and efficiency call for the Court to exercise its discretion to deny an interlocutory appeal at this juncture.

CONCLUSION

The interlocutory appeal requested by the water districts is both improper and imprudent. It is improper, as a matter of law, because it does not implicate a legal issue on which there is substantial grounds for difference of opinion and because it would not materially advance the termination of this case. It is imprudent because there are substantial, purely legal issues – which are largely unrelated to the Phase 1 issues decided to date – left to be resolved in Phase 2 of the case before the parties and the district court take up complex factual issues in Phase 3. Because one or both parties likely will seek an additional interlocutory appeal after Phase 2, efficiency and judicial economy strongly support the deferral of any interlocutory appeal until that time, when this Court could address any preliminary legal rulings that it deemed worth of interlocutory consideration in a single proceeding. For all of these reasons, the water districts petition should be denied.

Respectfully submitted this 13th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 13, 2015.

I certify that all participants in the case are registered CM/ECF and that service will be accomplished by the appellate CM/ECF system.

s/ Catherine F. Munson
Catherine F. Munson