APPEAL NO. 15-55896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Agua Caliente Band of Cahuilla Indians,
Plaintiff-Appellee,
and
United States of America,
Intervenor-Appellee,
vs.
Coachella Valley Water District, *et al.*,
Defendants-Appellants.

United States District Court for the
Central District of California
Hon. Jesus G. Bernal, Department 1
Case No. 5:13-cv-00883-JGB-SP

BRIEF *AMICUS CURIAE* OF THE SOUTHERN CALIFORNIA TRIBAL CHAIRMEN'S ASSOCIATION, NUMEROUS INDIAN TRIBES, AND OTHER TRIBAL ORGANIZATIONS IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Southern California Tribal Chairman's Association is a not-for-profit corporation established in 1972 for a consortium of 19 federally-recognized Indian tribes in Southern California. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus California Association of Tribal Governments (CATG) is a public-benefit corporation chartered as a non-profit corporation under Title 54 of the Hoopa Valley Tribe Non-Profit Corporation Tribal Code. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

All other *amici* are not corporations and therefore not subject to the corporate disclosure requirements of Federal Rule of Appellate Procedure 26.1 and Ninth Circuit Rule 29(c)(1).

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INTERESTS OF *AMICI*

Amici are federally-recognized Indian tribes and tribal organizations. Each *Amici* Tribe holds reserved rights to water under the *Winters* doctrine, and many Tribes rely substantially or exclusively on groundwater for domestic, commercial, municipal and light industrial purposes on reservations or other trust lands. These uses confirm that groundwater is critical to ensuring that Indian reservations are "'a permanent home and abiding place,'" *Winters v. United States*, 207 U.S. 564, 565 (1908) (quoting bill of complaint), and "livable," *Arizona v. California*, 373 U.S. 546, 599 (1963), for Indian tribes.

Counsel for Appellants Coachella Valley Water District and Desert Water Agency ("Water Districts") and Appellees Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe") and the United States have consented to the filing of this brief.[1]

STATUTORY AND RELATED PROVISIONS

The texts of the pertinent acts, legislative history and settlement agreements, compacts, and decrees are reproduced in the addendum to this brief.

[1] No party or its counsel authored any part of this amicus curiae brief, which was authored exclusively by the *amici curiae's* counsel. No party other than *amici curiae* contributed money to fund preparation and submission of the brief.

ARGUMENT

I. INTRODUCTION.

The issue in this interlocutory appeal is whether the groundwater under the Agua Caliente Reservation must be completely excluded from the resources available to fulfill Agua Caliente's federal right to water before any determination of the extent of the Tribe's need for water is made. The court below held not, ruling that "the federal government impliedly reserved groundwater, as well as surface water, for the Agua Caliente when it created the reservation," and deferring "[w]hether groundwater resources are necessary to fulfill the reservation's purpose" for later determination in this case. ER 9. The Appellant Water Districts claim this was error, arguing that groundwater resources are irrelevant to Agua Caliente's federally-reserved water rights and that groundwater is available to the Tribe only under state law. *See, e.g.*, Joint Br. of Appellants Coachella Valley Water Dist., *et al.*, and Desert Water Agency, *et al.*, Dkt. 24-1 at 9-13.

Appellants' formulation has it exactly backwards. The purpose of the Indian reserved rights doctrine is to meet the water needs of the reservation, and that purpose plainly implies sufficient water to meet those needs, including groundwater when necessary. All but one of the courts to consider the issue have so held. The Water Districts' contrary argument, that under federal law groundwater is completely excluded from the resources available to meet the

Tribe's needs—before those needs are even determined—effectively reserves all groundwater to the State for control by the State. The reserved rights doctrine cannot be bent in this fashion.

The Water Districts' argument is also rejected by numerous congressionally-approved Indian water rights settlements that rely on federal groundwater rights to meet tribal needs, many of which expressly characterize those rights as reserved rights or *Winters* rights. Those settlement agreements, and the statutes and court decrees approving their terms, quantify the tribes' need for water in a manner consistent with the vast majority of courts that have ruled that reserved rights include groundwater. In practical terms, those settlements also show that in many instances, the purposes of the reservations can be fulfilled only if groundwater is available to meet tribal needs, and that when this is the case, it can be done in an agreement that also accommodates non-Indian interests. For these reasons, this Court should reject the Water Districts' attempt to completely exclude groundwater from any determination of tribal needs (and rights) under federal law, and the district court decision should be affirmed.

II. THE DISTRICT COURT'S DECISION CORRECTLY APPLIES PRINCIPLES OF THE INDIAN RESERVED RIGHTS DOCTRINE.

Decisions of the Supreme Court and this Court make clear that the *Winters* doctrine reserves water sufficient to meet an Indian reservation's present and future needs and exempts that water from appropriation under state law. *Arizona*, 373

U.S. at 599-601; *Winters*, 207 U.S. at 577-78; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-49, 51-53 (9th Cir. 1981). And as the district court found, "[n]o case interpreting Winters draws a principled distinction between surface water physically located on a reservation and other appurtenant water sources." ER 8 (citing *Cappaert v. United States*, 426 U.S. 128, 143 (1976); *Cohen's Handbook of Federal Indian Law* § 19.03[2][a], at 1213 (Nell Jessup Newton, ed. 2012) [hereinafter, *Cohen's Handbook*]). Instead, "the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation." *Cappaert*, 426 U.S. at 143; *see also Arizona*, 373 U.S. at 598-99 (stating that "[i]t is impossible to believe that" the government was unaware that water was "essential" when it established Indian reservations in the desert); *Winters*, 207 U.S. at 576 (Indians did not "give up the waters which made [the reservation] valuable or adequate"); *Walton*, 647 F.2d at 46 ("Where water is needed to accomplish those purposes, a reservation of appurtenant water is implied."). Most importantly, these principles enable a tribe that has little or no surface water available to it to still get water from available groundwater sources. By contrast, the rule advanced by the Water Districts would deny a tribe with no available surface water any federal right to water. Such a result is irreconcilable

with the fundamental principle that Indian water rights are impliedly reserved under federal law to fulfill the purposes of the reservation.[2]

The Water Districts' response, that a tribe that needs groundwater to fulfill the purposes of its reservation can obtain groundwater rights under state law, would subordinate tribal water needs to state law. Whatever right the tribe may have to water under state law, such a result is directly contrary to the settled rule that Indian water rights are held under federal law and preempt any conflicting state law. In *Winters*, the Supreme Court made that clear by rejecting the argument that water use by tribes on a reservation is governed by the principles of state law, and by ruling instead that federal law reserves sufficient waters to the Tribe for its future needs and preempts state law doctrines that otherwise would have limited those rights.[3] 207 U.S. at 568, 577-78; *see also Cappaert*, 426 U.S. at 145 ("Federal water rights are not dependent upon state law or state procedures . . . .").[4]

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[2] The Water Districts' argument is also administratively infeasible. Where the "'[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle,'" *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (alteration in original) (citing C. Corker, *Groundwater Law, Management and Administration*, National Water Commission Legal Study No. 6, p. xxiv (1971)), the boundary between surface water and groundwater is difficult to even ascertain, much less monitor and maintain.

[3] In so holding, *Winters* follows a long line of Supreme Court decisions barring the application of state law to Indians and their property rights on Indian reservations. *E.g., Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding that laws of the state of Georgia have no application on Cherokee lands protected by treaty); *Johnson v.*

III. INDIAN RESERVED RIGHTS INCLUDE GROUNDWATER, AS NEARLY ALL COURTS TO CONSIDER THE QUESTION HAVE HELD.

As discussed in Agua Caliente's brief, numerous courts have ruled that federal reserved rights include rights to groundwater when necessary to fulfill the purposes of the reservation. Br. of Appellee Agua Caliente Band of Cahuilla Indians, Dkt. 30, at 28-35. The doctrinal basis for these rulings is set out in the Arizona Supreme Court's exhaustive and carefully reasoned decision in *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (*Gila III*), 989 P.2d 739 (Ariz. 1999). Under that ruling federal reserved rights may include rights to groundwater, *id*. at 746-48, and tribal reserved right

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M'Intosh, 21 U.S. 543, 604-05 (1823) (holding that private land purchases from Indian tribes are invalid, as the federal government has exclusive power to purchase Indian lands); *see also Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247-48, 253 (1985) (Indian lands can only be acquired by clear Congressional action, such as pursuant to unambiguous language in a treaty or act of Congress); *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) (holding county personal property tax inapplicable to reservation Indians); *see also* 18 U.S.C. § 1162(b) and 28 U.S.C. § 1360(b) (giving the consent of Congress to California and several other states to exercise civil and criminal jurisdiction over Indians on reservations within the state, but prohibiting "the alienation, encumbrance, or taxation of any real or personal property, including water rights belonging to any . . . Indian tribe").

[4] California law expressly acknowledges federal reserved rights to groundwater and the preemptive force of federal law, providing that "federally reserved water rights to groundwater shall be respected in full" and "[i]n case of conflict between federal and state law in that adjudication or management, federal law shall prevail." *See* Cal. Water Code §10720.3(d) (2015).

holders enjoy greater protection from groundwater pumping than do holders of state created rights, *id*. at 750. Consistent with that decision, the district court in this case and other courts have ruled that reserved rights include ground water. ER 8-9, 15-16; *Gila River Pima-Maricopa Indian Cmty. v. United States*, 9 Cl. Ct. 660, 699 (1986), *aff'd* 877 F.2d 961 (Fed. Cir. 1989) ("[g]round water under the Gila River Reservation impliedly was reserved for the Indians" when that reservation was created); *The Confederated Salish & Kootenai Tribes of the Flathead Reservation 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."); *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."); *see also Park Ctr. Water Dist. v. United States*, 781 P.2d 90, 91, 95 & n.13, 96 (Colo. 1989) (en banc) (holding the United States entitled to reserved water right for the entire flow of artesian well on public land and assuming without deciding that "the doctrine of federal reserved water rights applies to groundwater in the same way as it does to surface water").[5]

[5] This Court concluded in *United States v. Cappaert* that "[a]lthough these Supreme Court cases involved only surface water rights, the reservation of water

The sole exception to these holdings is the Wyoming Supreme Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 99-100 (Wyo. 1988), *aff'd by an equally divided court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989).[6] But even there, the Wyoming Supreme Court recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 99. While the court held "that the reserved water doctrine does not extend to groundwater," it did so by relying on the absence of precedent on the question. *Id.* at 99-100. Notwithstanding this decision, commentators agree with the majority view. *See Cohen's Handbook* § 19.03[2][b], at 1213-14 (explaining groundwater "is available to satisfy tribal water rights," and "hydrology, logic, and, often, economics all prescribe that it is available to satisfy the tribal right").

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doctrine is not so limited" and ruled that the "United States may reserve not only surface water, but also underground water." 508 F.2d 313, 317 (9th Cir. 1974), *aff'd,* 426 U.S. 128 (1976). The Supreme Court affirmed that decision, though it found that the underground pool at issue was surface water. 426 U.S. at 142, 147 (1976). Yet the Court made clear that "since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. The Court affirmed the injunction against pumping by neighboring landowners under state law that interfered with the federal reserved right. *Id.* at 136-38.

[6] An affirmance by an equally divided Court carries no precedential weight. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 484 (2008); *Neil v. Biggers*, 409 U.S. 188, 191-92 (1972).

IV. CONGRESS HAS APPROVED NUMEROUS INDIAN WATER SETTLEMENTS THAT QUANTIFY AND RECOGNIZE TRIBAL RIGHTS TO GROUNDWATER, INCLUDING RESERVED RIGHTS.

Congress has approved numerous Indian water rights settlements that recognize and confirm tribes' rights to groundwater.[7] These settlements implement the principles established in the court decisions described in Part III above on terms that satisfy Indian and non-Indian water needs.

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[7] The Ak-Chin Indian Community water rights settlement act, Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409 (1978), *as amended*, Pub. L. No. 98-530, 98 Stat. 2698 (1984), *as amended*, Pub. L. No. 102-497, § 10, 106 Stat. 3258 (1992), *as amended*, Pub. L. No. 106-285, 114 Stat. 878 (2000), one of the first Indian water rights settlements approved by Congress, was prompted by the threat of litigation made by the Department of Justice to protect the Community's rights to groundwater, which was being depleted by off-reservation pumping. H.R. Rep. No. 95-954, at 4-6 (1978). The Interior Solicitor specifically requested that Justice "assert as the position of the United States that the decisions in *Winters v. United States* . . . and *Cappaert v. United States* . . . demonstrate that the reserved rights of the Ak-Chin Indian Community include both surface water and ground water on the reservation." *Id.* at 15 (letter from H. Gregory Austin, Solicitor, U.S. Dep't of the Interior, to Peter R. Taft, Ass't Atty. Gen., Land and Nat'l Res. Div., U.S. Dep't of Justice (Dec. 13, 1976)). A Senate report and statements by Members of Congress during debate on the legislation confirm that claims to federal reserved groundwater rights were taken seriously. *See* S. Rep. 95-460, at 4 (1977) ("It is likely that the United States would be held liable for its failure to provide water and for allowing ground water beneath the reservation to be mined by nearby non-Indian farmers to the extent that the supply has been severely [diminished]"); 124 Cong. Rec. H12063-64 (daily ed. May 2, 1978) (statement of Rep. Udall) (the Community has "the basis for requesting an injunction against any further pumping by the non-Indians"); 124 Cong. Rec. H19489-90 (daily ed. June 29, 1978) (statement by Rep. Roncalio) (noting the Community has "substantial, valid claims to the use of water based upon the decision of the Supreme Court in Winters").

Several of these settlements expressly recognize that Indian reserved rights to water include groundwater. The Soboba Band of Luiseño Indians Settlement Act is illustrative. By its terms, Congress approves a settlement confirming the Band's "prior and paramount right, superior to all others" to pump 9,000 acre-feet per year (AFY)[8] of groundwater on the Soboba Reservation, a southern California reservation not far from Agua Caliente.[9] The U.S. District Court decreed to the Band the "prior and paramount right, superior to all others" to pump 9,000 AFY of groundwater from the reservation.[10] The Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, pt. IV, § 10701(a), 123 Stat. 1396 (2009), confirms a settlement providing for the Navajo Nation's reserved right, with an

[8] An acre-foot is 325,851 gallons—enough water to cover an acre with one foot of water.

[9] The Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, § 4, 122 Stat. 2975 (2008); Soboba Band of Luiseño Indians Settlement Agreement, art. 4, ¶4.1(A) (2008), *available at* http://repository.unm.edu/handle/1928/21884. Similarly, the Act further states that "such water rights shall be held in trust by the United States in perpetuity, and shall not be subject to forfeiture or abandonment." Soboba Band of Luiseño Indians Settlement Act § 9(b)(1)(B). While the Band may lease the tribal water right, no contract may "provide for permanent alienation of any portion of the [tribal water right]." *Id.* § 9(b)(2)(B)(ii). The Band will limit the exercise of its water right for 50 years according to a schedule. Soboba Band of Luiseño Indians Settlement Agreement, art. 4, ¶4.3(A).

[10] Judgment and Decree, *United States v. Metro. Water Dist. of S. Cal.*, Case. No. CV 00-04208 GAF, at 1 (C.D. Cal.) (Jan. 27, 2009).

1868 priority date,[11] to divert up to 2,000 AFY of groundwater from Navajo lands in the San Juan River Basin in New Mexico.[12] To the same effect, the Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, § 4, 104 Stat. 3059 (1990), approves a settlement confirming the Shoshone-Bannock Tribes' right—under the "Winters doctrine"—to divert 159,200 AFY of groundwater.[13] The court decree approving the settlement also identifies the source of the Tribes' groundwater rights as the "Winters Doctrine."[14]

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[11] A reserved water right vests as of the date of the establishment of the reservation and is not lost as a result of nonuse. *Arizona v. California*, 373 U.S. 546, 600 (1963); *Colville Confederated Tribes v. Walton*, 642 F.2d 42, 46 (9th Cir. 1981).

[12] San Juan River Basin in New Mexico - Navajo Nation Water Rights Settlement Agreement (2010) ¶3.1 & App. 1 at ¶¶ 2, 7 (stating that the parties "have negotiated and agree to the terms and conditions contained in the partial final decree"), *available at* http://repository.unm.edu/handle/1928/21828; Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, *New Mexico ex rel. State Eng'r v. United States*, No. CIV-75-184, at 2 (stating that the Nation's "reserved rights . . . are held in trust by the United States for the Navajo Nation," "have a priority date of June 1, 1868 and are not subject to abandonment, forfeiture or loss for nonuse."); *id.* at 18 (describing the Navajo Nation's "reserved right" to divert up to 2,000 AFY of groundwater for beneficial use on certain lands).

[13] 1990 Fort Hall Indian Water Rights Agreement ¶¶6.1, 7.1.2, 7.1.3, 7.2.1, 7.2.2, *available at* http://repository.unm.edu/handle/1928/21775. The tribal water rights have a priority date of June 14, 1867, the date of the establishment of the Reservation. *See id.* ¶¶4.19, 7.1.2.v, 7.1.3.v, 7.2.1.v, 7.2.2.v. The Act states that "nonuse of the Tribal water rights shall in no event be construed or interpreted as any forfeiture, abandonment, relinquishment, or other loss of all or any part of the Tribal water rights." Fort Hall Indian Water Rights Act § 6(g).

[14] Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, *In re SRBA*, Case No. 39576, at 15-17, 35-41 (Aug. 2, 1995).

Consistent with the Montana Supreme Court's ruling that the reserved rights doctrine encompasses groundwater, *Stults*, 59 P.3d at 1099, the Crow Tribe Water Rights Settlement Act of 2010, Pub. L. No. 111-291, tit. IV, § 404(a), 124 Stat. 3097 (2010), approves a Compact between the State of Montana and the Crow Tribe that "allocates reserved water rights to the Crow Tribe for both current and future uses."[15] The Crow Tribe's rights include, subject to certain protections for existing state-based and other water uses, the right to 500,000 AFY of the flow of the Bighorn River or of groundwater within the Bighorn River Basin, and all groundwater within certain other basins of the reservation.[16] The Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, §§ 2(4), 7(a), 114 Stat. 737 (2000), similarly confirms the Shivwits Band's right in perpetuity to pump and use 100 AFY of groundwater on its reservation with a 1916

[15] Order Approving Compact, *In the Water Court of Montana, Crow Tribe of Indians – Montana Compact*, Case No. WC-2012-06, at 9 (Mont. Water Ct. May 27, 2015).

[16] Crow Tribe-Montana Compact, Mont. Code Ann. § 85-20-901, art. III(A)-(E) (2015). The Compact also provides that the Crow Tribe can also divert a total of 47,000 AFY from surface flow, groundwater, or storage within certain drainages within the Ceded Strip—an area of Crow land recognized under the Treaty of Fort Laramie of September 17, 1851—provided that existing state-law-based water rights are protected. *Id.* § 85-20-901, arts. I, III(F).

priority date, the year the reservation was created. The court decree approving the settlement identifies it as "a federal reserved water right."[17]

Congress also recognized tribes' rights to use substantial quantities of groundwater in several statutes ratifying settlements with tribes in Arizona before and after the Arizona Supreme Court's decision in *Gila III*, which held that the reserved rights doctrine includes groundwater. The Gila River Indian Community Water Rights Settlement Act of 2004—enacted five years after *Gila III* was decided—confirms the Community's rights to 653,500 AFY, including 156,700 AFY of underground water.[18] The White Mountain Apache Tribe Water Rights

[17] Judgment and Decree, *In re: The General Determination of Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Virgin River in Washington, Iron, and Kane Counties in Utah*, Civ. No. 800507596 (81-7), at 7 (May 2, 2003). It also states that the water right is held in trust by the United States for the benefit of the Shivwits Band. *Id.* at 4-6. The Act provides, "The Shivwits Water Right shall not be subject to loss by abandonment, forfeiture, or nonuse." Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, § 7(d), 114 Stat. 737 (2000).

[18] Gila River Indian Community Water Rights Settlement Act of 2004, Pub. L. No. 108-451, tit. II, §203(a), 118 Stat. 3499 (2004); Amended and Restated Gila River Indian Community Water Rights Settlement Agreement, ¶4.1 (Dec. 21, 2005), *available* at http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/Appendix_A_Settlement_Agreement.pdf. Water rights under the Settlement Agreement may not be sold, leased, or transferred except where expressly authorized, and such water rights are held in trust by the United States on behalf of the Community. Amended and Restated Gila River Indian Community Water Rights Settlement Agreement, ¶¶4.1, 4.7; Gila River Indian Community Water Rights Settlement Act § 204(a)(2).

Quantification Act of 2010 approves a settlement that gives the Tribe the "permanent right to Divert Groundwater from any location within the Reservation"[19] up to 74,000 AFY of diversion (and 27,000 AFY depletion).[20] Similarly, the Zuni Indian Tribe Water Rights Settlement Act of 2003 ratifies a settlement confirming the Tribe's right to use up to 1,500 AFY of groundwater from specified lands for restoration activity on the Zuni Heaven Reservation and to provide water for a sacred lake.[21]

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[19] White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. No. 111-291, § 304(a), 124 Stat. 3073 (2010); Amended and Restated White Mountain Apache Tribe Water Rights Quantification Agreement ¶ 6.1 (Nov. 1, 2012) [hereinafter WMAT Agreement], *available at* http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/AmendedandRestatedWaterRightsQantificationAgreement.PDF. The water rights are held in trust by the United States on behalf of the Tribe and "shall not be subject to forfeiture or abandonment." WMAT Agreement ¶4.2.

[20] *Id.* ¶¶4.1.1 to 4.1.3, 4.3. The water rights can be exercised with surface water as well as groundwater. *Id.* ¶¶ 4.1.1 to 4.1.3. A small portion of the water rights must be exercised after the year 2100. *Id.* ¶4.1.3.

[21] Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, §§ 4(a), 8(e), 117 Stat. 782 (2003) (ratifying the settlement agreement and recognizing the Tribe's right to use 1,500 AFY of groundwater); Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin ¶¶1.7, 5.3 (June 1, 2002), *available at* http://repository.unm.edu/bitstream/handle/1928/21893/ZuniHvn2002SA%26exhs.pdf?sequence=1&isAllowed=y (describing the Tribes' right to use 1,500 AFY of groundwater for restoration activities and the parties' agreement to not challenge that right). The water rights are held in trust by the United States in perpetuity on behalf of the Tribe and "shall not be subject to forfeiture or abandonment." Zuni Settlement Agreement ¶8.2.

A number of congressionally-ratified settlements approved before *Gila III* also allocate tribal groundwater rights. The Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 approves a settlement allocating 23,250 AFY of groundwater to the Community pumped from certain portions of the Reservation.[22] Similarly, the Fort McDowell Indian Community Water Rights Settlement Act of 1990 approves a settlement that supplies 36,350 AFY of water from various sources, including groundwater, to resolve, *inter alia*, the Community's reserved water rights claim to groundwater.[23] Also, the Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA) as amended in 2004[24] allocate 13,200 AFY of groundwater to the Tohono O'odham Nation.[25]

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[22] Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, § 11(f), 102 Stat. 2549 (1988), *as amended*, Pub. L. No. 102-238, § 7, 105 Stat. 1908 (1991); Salt River Pima-Maricopa Indian Community Agreement ¶¶6.1, 6.2 (Feb. 12, 1988) [hereinafter SRPMIC Agreement], *available at* http://repository.unm.edu/handle/1928/21834. The Community has the right to pump up to 32,640 AFY and in some instances up to 33,250 AFY of groundwater. *See* SRPMIC Agreement ¶¶8.4(b), 11.7, 13.

[23] *See* Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, § 402(b), 104 Stat. 4480 (1990), *as amended*, Pub. L. No. 104-434, § 109(c), 108 Stat. 4526 (1994), *as amended*, Pub. L. No. 109-373, 120 Stat. 2650 (2006); Fort McDowell Indian Community Water Settlement ¶¶6, 6.1, 7.1-7.2 (Jan. 15, 1993), *available at* http://repository.unm.edu/handle/1928/21797. The water rights are held in trust by the United States on behalf of the Community and are "are not subject to forfeiture or abandonment due to non-use." Fort McDowell Indian Community Water Settlement ¶¶22.7(d), 22.9.

[24] Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA), Pub. L. No. 97-293, tit. III, §307(a)(1)(A)-(B), 96 Stat. 1261, *as amended*, Pub. L. No. 102-

Still other congressionally-approved settlements confirm tribal rights to use groundwater in Montana and New Mexico. The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999[26] approves a settlement quantifying the Tribe's right, with priority dates of 1888 and 1916, to divert and use—with certain protections for existing state-based water users—2,615 AFY of groundwater from certain creek and drainage basins, and providing the Tribe with the right to develop additional groundwater on the reservation.[27] The Taos Pueblo Indian Water Rights Settlement Act[28] confirms a settlement allocating groundwater for municipal uses

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497, § 8, 106 Stat. 3255 (1992), *as amended*, Pub. L. 108-451, tit. III, 118 Stat. 3536 (2004), *as amended* Pub. L. No. 110-148, 121 Stat. 1818 (2007). The final Settlement Agreement conforming to these amendments was signed in 2006. Tohono O'odham Settlement Agreement, at 1, 15, 52-54A (2006), *available at* http://repository.unm.edu/bitstream/handle/1928/21843/TON2006SA.pdf?sequence=1&isAllowed=y.

[25] *See also id.* ¶4.1. The water rights are held in trust by the United States on behalf of the Nation, *id.*, and SAWRSA provides that the Nation's water rights shall not be affected by their nonuse, Southern Arizona Water Rights Settlement Amendments Act of 2004 § 309(f).

[26] Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement, Pub. L. No. 106-163, tit. I, § 101(a), 113 Stat. 1782 (1999).

[27] Chippewa Cree Tribe-Montana Compact, Mont. Code Ann. § 85-20-601, arts. III(A)-(C), IV (2015). The United States will hold the Tribal water right in trust for the benefit of the Tribe, and "non-use of all or any of the Tribal Water Right described in Article III shall not constitute a relinquishment, forfeiture or abandonment of such rights." *Id.*, art. IV(A)(1), (3)(b).

[28] Pub. L. No. 111-291, tit. V, § 509(a), 124 Stat. 3122 (2010).

and protecting the Pueblo's Buffalo Pasture, a "culturally sensitive and sacred wetland currently impacted by groundwater development" on Pueblo land.[29] And the Jicarilla Apache Tribe Water Rights Settlement Act confirms the Tribe's unlimited right to withdraw and use groundwater on the reservation, provided that it does not deplete either the San Juan River or the Rio Chama stream systems.[30]

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[29] *H.R. 3254, Taos Pueblo Indian Water Rights Settlement Act of 2009; and H.R. 3342, Aamodt Litigation Settlement Act of 2009: Hearing Before the Subcomm. on Water and Power of the H. Comm. on Natural Res.*, 111th Cong. 11 (2009) (testimony of Michael L. Connor, Comm'r, Bureau of Reclamation, U.S. Dep't of the Interior). By limiting certain non-Indian groundwater diversions and constructing a recharge project diverting surface water, the settlement operates to restore the groundwater systems on which the Buffalo Pasture depends. Abeyta Water Rights Adjudication: Settlement Agreement Among the United States of America, Taos Pueblo, The State of New Mexico, et al. (Dec. 12, 2012) ¶¶ 3.2, 5.3, 6.2.4, 6.2.5, 6.3, 6.5, 7.1, 7.3, 9.1.4, 11.2.2, *available at* http://repository.unm.edu/handle/1928/23230. The Act provides that the Pueblo's rights are to be held in trust by the United States on behalf of the Pueblo and "shall not be subject to forfeiture, abandonment, or permanent alienation." Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111-291, tit. V, § 504(a), 124 Stat. 3122 (2010).

[30] *See* Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, § 5(b), 106 Stat. 2237 (1992), *as amended* Pub. L. No. 104-261, § 2, 110 Stat. 3176 (1996), *as amended* Pub. L. No. 105-256, § 10, 112 Stat. 1896 (1998) (ratifying and incorporating Settlement Contract); Contract Between the United States and the Jicarilla Apache Tribe ¶(2)(a)(iii)-(iv) (Dec. 8, 1992), *available at* http://repository.unm.edu/handle/1928/21866 (providing that nothing in the Settlement Contract is to be construed to limit the Tribe's right to withdraw groundwater when such use and withdrawal does not deplete either the San Juan River stream system or the Rio Chama stream system). The Act provides that the Tribe's water rights under the Settlement Contract may not be alienated permanently, and "[t]he nonuse of the water supply secured herein by a subcontractor of the Tribe shall in no event result in a forfeiture, abandonment, relinquishment, or other loss of all or any part of the rights exercised by the Tribe

Other settlement acts provide tribes with water to replace groundwater beneath their reservation where aquifers had been depleted by non-Indian groundwater pumping. The Ak-Chin Indian Community Settlement Act of 1978 provides water for irrigation to support the Community's farming enterprise and to replace groundwater lost due to off-reservation pumping.[31] The San Carlos Apache Tribe Water Rights Settlement Act of 1992 approves a settlement allowing the city of Globe to continue its withdrawals from the Cutter Aquifer, which straddles the Reservation, in exchange for the City providing some of its allocation of Central Arizona Project water to the Tribe.[32] The water settlements of the

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under the Settlement Contract." Jicarilla Apache Tribe Water Rights Settlement Act, § 7(b), (e). The partial decree approving the settlement decreed to the Tribe the reserved right to withdraw and use up to 40,000 AFY of surface or groundwater from the San Juan River Basin with an 1880 priority date, provided such rights may be exercised if water is not delivered under the Settlement Contract, plus the further right to withdraw and use groundwater subject to the limits described above regarding depletions. Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe, *New Mexico ex rel. State Eng'r v. United States*, No. CIV 75-184, at 2-4, 16 (11th Jud. Dist., San Juan Cnty., NM Feb. 22, 1999).

[31] Act of July 28, 1978, Pub. L. No. 95-328, §§ 1(b), 2(b)-(c), 92 Stat. 409 (1978); *see also supra* n. 7. Amendments enacted in 1984 reduced the water delivery requirement to 75,000 AFY plus up to an additional 10,000 AFY if available and less 3,000 AFY in times of shortage. Act of Oct. 19, 1984, Pub. L. No. 98-530, § 2(a)-(c), 98 Stat. 2698 (1984).

[32] San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, tit. XXXVII, § 3710(c), 106 Stat. 4740 (1992), *as amended*, Pub. L. No. 103-435, § 13, 108 Stat. 4566 (1994), *as amended*, Pub. L. No. 104-91, tit. II, § 202, 110 Stat. 7 (1996), *as amended*, Pub. L. No. 104-261, § 3, 110 Stat. 3176 (1996),

Soboba Band of Luiseño Indians and the Zuni Indian Tribe also provide replacement water for groundwater losses due to non-Indian diversions.[33]

All of these settlements underscore that, as a practical matter, tribes must rely on groundwater to meet their needs, especially tribes that have limited alternative sources of supply. To be sure, each tribe's needs are different; each settlement depends on the factual circumstances of the particular reservation and negotiations,[34] and not surprisingly the settlement acts often disclaim any

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as amended, Pub. L. No. 105-18, § 5003, 111 Stat. 158 (1997); San Carlos Apache Tribe Water Rights Settlement Agreement, ¶¶4.1, 13 (Mar. 30, 1999), *as amended*, Amend. Nos. 1-3, *available at* http://repository.unm.edu/handle/1928/21840; *San Carlos Apache Tribe Water Rights Settlement Act of 1991: Joint Hearing Before the S. Sel. Comm. on Indian Affairs and the H. Comm. on Interior and Insular Affairs*, 102d Cong. 168-69 (1991) (written statement of Robert Hickman, Mayor, Globe, Arizona). The Tribe's water rights are held by the United States in trust for the Tribe. San Carlos Apache Tribe Water Rights Settlement Agreement, *as amended* ¶4.

[33] *See supra* pp.10, 14; H.R. Rep. No. 110-649, at 7-8 (2008) (explaining that efforts by a metropolitan water district to build a tunnel to bring drinking water to Southern California pierced underground faults and fissures, causing groundwater to flood the tunnel and springs, creeks, and wells on the Soboba Reservation to dry up); *Zuni Indian Tribe Water Settlement Act: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 68 (2002) (written appendix, Stetson Engineering) (noting that the Sacred Lake and most reservation springs had become dry with the loss of associated wetlands due to surface water depletions, dams, and regional groundwater pumping).

[34] *See* discussion of *Gila III*, *supra* p. 6-7. For example, some settlements involve tribal rights to surface flows or water in federal storage projects without making reference to groundwater. *See, e.g.*, Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, tit. I, §§ 102(C), 103, 104 Stat. 3289 (1990), *as amended*, Pub. L. No. 109-221, § 104, 120 Stat. 336 (2006)

precedential effect on other tribal claims or settlements.[35] But if, as the Water Districts contend, federal law did not provide for tribal groundwater rights, and tribes were compelled to rely on state law for such needs, these settlements would have been unattainable.

(providing funds for the Tribe to acquire land and water rights from a reclamation project and other sources in order to fulfill the Tribe's water rights). Others provide funding for water-delivery infrastructure along with rights to both surface water and groundwater. *E.g.*, Aamodt Litigation Settlement Act, Pub. L. 111-291, tit. VI, §§ 602(14), 611, 613, 621,124 Stat. 3134 (2010) (authorizing regional water system to supply water to the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque in New Mexico and a New Mexico county utility); Aamodt Settlement Agreement § 2.1.2 (Apr. 19, 2012) (awarding each Pueblo a quantity of consumptive Pueblo First Priority Water Rights from surface water and groundwater).

[35] For example, the Shivwits Water Rights Settlement Act § 13(b) provides, "Nothing in this Act shall be construed or interpreted as a precedent for the litigation of reserved water rights or the interpretation or administration of future water settlement Acts." Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No. 106-263, § 13(b), 114 Stat 737 (2000). The Taos Pueblo Indian Water Rights Settlement Act § 512 similarly provides that nothing in the Settlement Agreement or Act "shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims, or entitlements to water of any other Indian tribe." Taos Pueblo Indian Water Rights Settlement Act, Pub. L. No. 111-291, tit. V, § 512, 124 Stat. 3122 (2010).

While a number of settlements expressly characterize a tribe's groundwater rights as reserved rights, *see*, *supra* pp. 9-13, a few settlements disclaim any effect on the question whether Indian reserved rights encompass groundwater, *e.g.*, Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, § 303(e), 96 Stat. 1274 (1982); Southern Arizona Water Rights Settlement Amendments Act of 2004, Pub. L. No. 108-451, § 316(a)(1), 118 Stat. 3536 (2004).

V. THIS COURT SHOULD NOT ADOPT A NEW RULE THAT DEVIATES FROM THE MAJORITY RULE OF COURTS AND OF INDIAN WATER RIGHTS SETTLEMENTS.

The Appellants' proposal to eliminate groundwater as a resource available to satisfy Indian reserved rights under federal law—regardless of the tribe's need for water—is contrary to the overwhelming majority of judicial decisions and settled congressional practice. For over four decades Congress has approved Indian water settlements allocating tribal rights to groundwater and recognizing those rights by providing water to replace lost groundwater. Those settlements were negotiated by the parties, and approved by Congress, under the legal framework established by the majority rule that federal reserved rights include groundwater. The Water Districts' argument would abandon that legal framework, subject tribal groundwater use to the exclusive control of state law, and deprive many Indian and non-Indian communities of the sort of settlement benefits produced in that legal framework. The Water Districts offer no compelling reason for the Court to abandon that legal framework, and there is none.[36]

[36] The district court's ruling does not prevent the Water Districts from advancing their arguments regarding the extent of the Tribe's need for groundwater to satisfy the full measure of its reserved rights in the quantification phase of the case. *See* ER 9-11.

CONCLUSION

For the reasons discussed above, the district court's decision should be affirmed.

Dated: February 18, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32 of the Federal Rules of Appellate Procedure, which establishes the form of briefs, and Ninth Circuit Rule 29, which governs the form of briefs submitted by *amici curiae*, I hereby certify that this brief:

1. complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 29(d), which provides that the length of an amicus brief may be half the maximum length of a principal brief, or 7,000 words, because it contains 6,235 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and
2. complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionately spaced typeface, using Microsoft Word 2007, in 14-point Times New Roman font.

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate is executed on February 18, 2016.

Dated: February 18, 2016

/s/ Colin C. Hampson
Colin C. Hampson

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2016, I electronically filed the foregoing Brief *Amicus Curiae* of the Southern California Tribal Chairmen's Association, Numerous Indian Tribes, and Other Tribal Organizations in Support of Appellees and Urging Affirmance with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 18, 2016

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