IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-55896

AGUA CALIENTE BAND OF CAHUILLA INDIANS,
Plaintiff/Appellee,
and

UNITED STATES OF AMERICA,
Intervenor-Plaintiff/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. EDCV-13-883-JGB

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFF/APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER

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INTEREST OF AMICI CURIAE

The amici curiae submitting this brief, listed in Appendix A, are law professors who teach and write in the fields of federal Indian law and water law.[1] Through our teaching and scholarship, we promote the understanding of Indian and federal reserved water rights, as well as the water laws of the various states. This case presents a fundamental question about the nature and scope of water rights reserved by Indian tribes and by the federal government on behalf of Indian tribes, specifically, whether those rights may include rights to groundwater.

The appellants rely heavily on state law to urge this court to reverse the district court's well-reasoned determination that Indian reserved rights extend to groundwater. Indian reserved rights are recognized under federal law and, pursuant to the Supremacy Clause, trump rights and rules created under state law. Reversing the district court would be an inappropriate limitation of the federal reserved rights doctrine and inconsistent with longstanding precedent considering the creation of such reserved rights to be solely a matter of federal law. Indeed, the relief sought by appellants is sweeping - a blanket rejection of Indian reserved rights to groundwater. This court should affirm the district court so that the lower court may

[1] No counsel for any party authored this brief in whole or in part, nor did any party or any party's counsel contribute money that was intended to fund preparing or submitting this brief. Additionally, no person contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this brief.

proceed to quantify the extent of the Tribe's rights, and so the parties can engage in settlement discussions, as occurs in most Indian water rights cases.

ARGUMENT

I. INTRODUCTION

Over a century ago, the Supreme Court recognized the rights of Indian tribes to use the land, water, and resources of the United States since time immemorial. *United States v. Winans*, 198 U.S. 371 (1905). And, the Supreme Court has steadfastly recognized and protected the implied rights of tribes to the waters of their reservations for more than a century. *Winters v. United States*, 207 U.S. 564, 576 (1908); *Arizona v. California*, 373 U.S. 546, 599-600 (1963). This court has done the same. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 325-26 (9th Cir. 1956); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) [hereinafter *Walton II*].

Accordingly, when the United States set aside public land as an Indian reservation, it reserved water to provide a permanent homeland for the Indian tribe residing on those lands. The recognition of these water rights, reserved by the federal government on behalf of Indian tribes to fulfill the purposes for which the tribes were located on certain lands, has evolved into a foundational rule of law known as the *Winters* doctrine. *See Cohen's Handbook of Federal Indian Law* §

19.02, at 1207 (Nell Jessup Newton ed., 2012) [hereinafter, *Cohen's Handbook*]; William C. Canby, Jr., *American Indian Law in a Nutshell* 495-96 (6th ed., 2015). Indeed, as this court has recognized, in some cases the tribes themselves reserved the water rights and that reservation was later confirmed by treaty or other federal law. *United States v. Adair*, 723 F.2d 1394, 1413-15 (9th Cir. 1983) (recognizing water right to maintain lake levels, with a time immemorial priority date); *see also Winans*, 198 U.S. at 381 (describing a treaty as "not a grant of rights to the Indians, but a grant of right[s] from them, a reservation of those not granted").

Although the *Winters* doctrine is rooted in federal Indian law, it has spawned a broader federal reserved rights doctrine, which the Supreme Court has applied to recognize water rights that are necessary to fulfill the primary purposes of any land reserved by the federal government. *See Arizona*, 373 U.S. at 601 (upholding the special master's determination that the principle underlying the *Winters* doctrine is "equally applicable to other federal establishments"); *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976) (upholding an injunction prohibiting the pumping of groundwater near a national monument to protect the water rights reserved upon the creation of the monument); *United States v. New Mexico*, 438 U.S. 696, 698-700 (1978) (addressing the scope of the reserved right to water associated with a national forest). Unlike the rights associated with non-Indian federal reservations, Indian reserved rights are to be broadly construed in light of the canons of

construction requiring liberal interpretation of treaties, statutes, and executive orders relating to Indian tribes, and the trust relationship between tribes and the federal government. *See, e.g.*, *Cohen's Handbook* § 19.03[4], at 1217-18 (describing extension of *Winters* doctrine to other federal lands and explaining why the Supreme Court's narrowing of the doctrine applicable to federal lands under *New Mexico* should not apply to Indian lands). Furthermore, Indian reservations were not a mere set-aside of public lands, but were created for the purpose of providing a permanent homeland for tribal peoples. *See id.*; Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Res. J. 835, 848 (2002) (discussing the difference between Indian and other federal reservations).

Here, the district court applied the *Winters* doctrine precedent and determined that by setting aside land for the Agua Caliente Band of Cahuilla Indians (the "Tribe"), via executive orders issued in 1876 and 1877, the federal government reserved for the Tribe rights to the waters appurtenant to those lands. Excerpts of Record at 9 (District Court Order of March 24, 2015 [hereinafter Order]). Because the district court's order represents a faithful interpretation of the time-honored *Winters* doctrine, we urge this court to affirm.

II. *WINTERS* RIGHTS MAY INCLUDE A RIGHT TO GROUNDWATER

In asserting its rights to water under the *Winters* doctrine, the Tribe sought a specific declaration that its reserved rights include a right to groundwater. *Id.* at 2 (Order), 38-39 (Tribe's Complaint). Relying on "law and logic," the district court found no reason to distinguish between surface and groundwater for purposes of determining "[a]ppurtenance, as that term is used by the *Winters* doctrine." *Id.* at 8, 9 (Order). This court's precedent, the precedent of an overwhelming majority of courts that have considered the matter, and the treatment of tribal water rights in congressionally approved settlements all support the district court's ruling that *Winters* rights may extend to groundwater. This court should reject the inflexible rule sought by the appellants.

A. This Court has Recognized Groundwater Rights under the *Winters* Doctrine.

The district court's order noted that no federal appellate court has ruled on whether the *Winters* doctrine encompasses groundwater rights, particularly in light of California law. *Id.* at 14, 15 (Order). In addition, the court distinguished the Supreme Court's holding in *Cappaert*, suggesting that the Court "specifically avoided deciding the issue." *Id.* at 15 (Order). Although no federal court has yet recognized a right to groundwater as a right reserved to a tribe in California, this court recognized federal reserved rights to groundwater in its *Cappaert* decision.

In *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), *aff'd*, 426 U.S. 128, the federal government sought to protect the desert pupfish, which resided in Devil's Hole, a cavern withdrawn via a 1952 presidential proclamation and included within Death Valley National Monument. *Id.* at 317. At the time the case was before this court, Devil's Hole included an underground pool of water, which was part of a "4,500 square mile groundwater system from which the Cappaerts [were] pump[ing] their water." *Id.* at 315-16. The water level of the pool dropped precipitously as a result of this pumping so the United States sought an injunction to prevent further destruction of the lone habitat of the desert pupfish. The United States argued that the proclamation setting aside Devil's Hole also impliedly reserved groundwater sufficient to preserve that habitat. *Id.* at 317.

In reviewing the government's contention, this court rejected any separation of groundwater from the reserved rights doctrine, stating that "the United States may reserve not only surface water, *but also underground water*." *Id.* (emphasis added). This court proceeded to interpret the presidential proclamation and decide that such a reservation of underground water fulfilled the proclamation's "fundamental purpose" of preserving the pupfish habitat. *Id.* at 318. Insulating these federally-reserved water rights from interference by other appropriators and Nevada state law, this court upheld an injunction limiting the pumping of groundwater by the Cappaerts. *Id.* at 318-22.

On appeal, the Supreme Court affirmed this court's opinion, although the Court suggested that the water at issue in Devil's Hole was surface water, not groundwater. *Cappaert*, 426 U.S. at 142. Nonetheless, the Supreme Court did *not* explicitly overrule or disagree with this court's holding and, in fact, did not meaningfully distinguish between surface water and groundwater for purposes of protecting reserved rights or applying the reserved rights doctrine. *Id.* ("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 of surface or groundwater*") (emphasis added); *Id.* at 147 (holding that, via the 1952 presidential proclamation, the United States "acquired by reservation water rights in unappropriated *appurtenant* water" to fulfill the preservation purposes of the Proclamation) (emphasis added).

While the Supreme Court's holding was silent on this court's statement that reserved rights may also include groundwater, that holding does not "undercut the theory or reasoning underlying [this court's statement] in such a way that the cases are clearly irreconcilable," which is the standard set by this court for determining whether higher court precedent is controlling. *Miller v. Gammie*, 335 F. 3d 889, 900 (9th Cir. 2003) (en banc). Therefore, because it is not "clearly irreconcilable" with the Supreme Court's opinion, this court's prior ruling regarding groundwater

remains "good law." *Mastro v. Rigby*, 764 F.3d 1090, 1094-95 (9th Cir. 2014); *see also United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1159 (9th Cir. 2010) (protecting the Pyramid Lake Paiute Tribe's water rights from diminishment, regardless of whether such diminishment was "by allocation of surface or groundwater").

Thus, this court need look no further than its own precedent to uphold the district court's determination that groundwater is encompassed by the *Winters* doctrine and included in rights reserved by the federal government for Indian tribes.

B. Inclusion of Groundwater in *Winters* Rights is the Majority Rule.

Every court except one that has considered the question agrees that Indian reserved rights extend to groundwater when necessary to fulfill the purposes of the reservation. These have included both federal district courts, *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) (reasoning that the "same implications" that led to *Winters* "would apply to underground waters" and that where, like *Winters*, water would fulfill the reservation's purposes, "whether the waters were found on the surface of the land or under it should make no difference"), *United States v. Washington*, 375 F. Supp. 2d 1050, 1068, n. 8 (W.D. Wash. 2005) (recognizing prior holding that reserved rights include right to groundwater regardless of any connection between such water and surface water), *vacated*

pursuant to settlement sub nom., United States ex rel. Lummi Nation v. Washington, 2007 WL 4190400 (W.D. Wash. 2007), and state supreme courts, *In re Gila River Sys. and Source*, 989 P.2d 739, 745, 747-48 (Ariz. 1999) (relying on "guideposts" from *Cappaert* and *Winters* to determine that water rights reserved by United States were intended "to come from whatever particular sources each reservation had at hand" and refusing to subject those rights to Arizona law), *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093, 1099 (Mont. 2009) (seeing "no reason" to exclude groundwater from federally reserved tribal rights).

The lone dissenting voice from this chorus of judicial support is the Wyoming Supreme Court, which, as the first court to issue a direct ruling on the matter, based its decision to reject Indian reserved rights to groundwater only on the failure of the parties to cite "a single case applying the reserved water doctrine to groundwater." *In re Big Horn River Sys.*, 753 P.2d 76, 99-100 (Wyo. 1988) (noting this court's holding in *Cappaert*, but broadly interpreting the Supreme Court's holding that the water at issue was surface water and distinguishing *Walton II* and *Tweedy*). Even so, the court agreed that existence of a reserved right to groundwater is supported by the same "logic which supports a reservation of surface water to fulfill the purpose of the reservation." *Id.* at 99. The Wyoming Supreme Court's reliance on a perceived lack of precedent to avoid considering

whether Indian reserved rights include groundwater is, in the words of the Arizona Supreme Court, not "persuasive." *In re Gila River*, 989 P.2d at 745.

Express judicial recognition of a federally reserved right to groundwater is also consistent with the treatment of similar natural elements constituent in the land. For example, the Supreme Court has recognized that the reservation of land by the federal government for the Shoshone Tribe included timber and minerals as constituent elements of the land. *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938). Only if the federal government expressly retained these elements for itself in the document reserving the land would they remain entirely within federal ownership. *Id.* No such express federal retention of groundwater has been made and, like trees and minerals, groundwater is inseparable from the land surrounding it. *See*, *e.g.*, Excerpts of Record at 8 (Order) (although not controlling on the federal law governing this case, the district court found it instructive that even "California law recognizes that groundwater rights are inextricably linked to the overlying land.") (citation omitted). Thus, tribes have a strong claim to ownership of groundwater constituent to their federally reserved lands. *See* Judith Royster, *Indian Tribal Rights to Groundwater*, 15 Kan. J. L. & Pub. Pol'y 489, 495-98 (2006). Such claims are consistent with, although separate from, rights to groundwater recognized under the *Winters* doctrine. *Id.* at 497.

Hydrology also supports similar judicial treatment of surface water and groundwater in the context of federally reserved rights. The evolution of hydrogeology has led to the "truth that all water is interrelated within the hydrologic cycle." 2 *Water & Water Rights* § 18.03(a.01) (Amy K. Kelley, ed., 3d ed. 2015). Courts, particularly in the Western states, have worked to develop management schemes that recognize this interrelationship. *Id.* § 18.03(a). The Colorado Supreme Court, in perhaps the leading prior appropriation jurisdiction, has long recognized a presumption under Colorado law that "all ground water is tributary to the surface stream unless proved or provided by statute otherwise." *Park County Board of Commissioners v. Park County Sportsmen's Ranch*, 45 P.3d 693, 702 (Colo. 2002) (citing *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951)). The United States Supreme Court has also cited the interrelationship between surface and groundwater when it recognized the right of the United States "to protect its water from subsequent diversion, whether . . . of surface or groundwater" in *Cappaert*. 426 U.S. at 142-43. This court did the same in protecting tribal rights from the negative effects of other state law groundwater allocations in *Orr Water Ditch Co.* 600 F.3d at 1158-59.

There is consequently substantial support for the majority rule of including groundwater within federally reserved rights. As the district court here correctly noted, "[t]he weight of authority on the issue has shifted" away from the solitary

opinion of Wyoming Supreme Court. Excerpts of Record at 9, n. 5 (Order). Indeed, as the leading Indian law treatise has concluded, "[n]o reason has been advanced to exclude groundwater, while hydrology, logic, and, often, economics all prescribe that it is available to satisfy the tribal right." *Cohen's Handbook* § 19.03[2][b], at 1214.

C. Tribal Water Rights Settlements Include Rights to Groundwater.

Just as courts have recognized tribal rights to groundwater in the context of their reserved rights, a number of Indian water rights settlements approved by Congress include provisions recognizing Indian reserved rights to groundwater. Such settlements generally deal with all Indian, federal, and state rights and arise out of complex litigation in federal courts or state courts under the McCarran Amendment. Important to these settlements is the ability of the parties to deal with claims to all sources of water in a flexible, if uncertain, legal regime. *See* Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1156-60 (2010). Removing groundwater from the ambit of Indian reserved rights as a matter of law could hinder the ability to reach creative settlements among tribal, state, and federal parties.

Between 1978 and 2012, Congress passed 27 statutes enacting various settlements of tribal water rights. *Indian Water Rights: Promoting the Negotiation and Implementation of Water Settlements in Indian Country: Hearing before the S.*

Comm. on Indian Affairs, 112th Cong. 39 (2012) (statement of Professor Judith Royster, Director, University of Tulsa School of Law Native American Law Center). Although each of these settlements is unique in its own right, the negotiation and settlement process allows tribes to prioritize important rights and avoid the uncertainty of litigation, particularly as it relates to their rights to groundwater. *Id.* at 41.

Thus, the settlement of the Ak-Chin Indian Community quantifies the Community's right to a certain amount of groundwater, Pub. L. No. 95-328, § b(1) 92 Stat. 409 (1978), while the settlement of the Tohono O'odham's rights simply limited the Tribe's pumping of groundwater to certain amounts in certain districts. Pub. L. No. 108-451, § 307(a)(1), 118 Stat. 3478 (2004). The settlement agreement entered into by and between the State of Montana and the Northern Cheyenne Tribe recognized a distinction between the Tribe's rights to both alluvial and non-alluvial groundwater. Mont. Code Ann. §85-20-301, art. II, § A.4, *ratified* Pub. L. No. 102-375, 106 Stat. 1186 (1992). In all, nearly half of the almost 30 settlements of tribal water rights have addressed tribal rights to groundwater. Royster, *Indian Tribal Rights to Groundwater*, 15 Kan. J. L. & Pub. Pol'y at 501; *see also* 2 *Waters & Water Rights* § 37.04(c)(1) (detailed review of various Indian water settlements).

The inclusion of both surface water and groundwater rights in these settlements is consistent with the comprehensive nature of tribal reserved rights. In

addition, these settlements argue against the judicial creation of an artificial separation between tribal rights to surface water and those to groundwater. A majority of the courts considering the issue, including this court in *Cappaert*, have refused to restrict the *Winters* doctrine in such a manner. Because the district court recognized that the *Winters* doctrine encompasses reserved rights to groundwater and that recognition accords with this court's prior decisions, the view of the vast majority of other courts, and the treatment of tribal rights to groundwater in intergovernmental settlements, this court should affirm the lower court's order.

III. INDIAN RESERVED WATER RIGHTS ARE BASED ON FEDERAL LAW THAT PREEMPTS STATE LAW PURSUANT TO THE CONSTITUTION'S SUPREMACY CLAUSE

Just as the law of this court is clear about the inclusion of groundwater in federally reserved water rights, this court's precedent also establishes the federal law basis for such rights. In *Adair*, for example, this court recognized that, in order to ensure the Klamath Tribe's continued right to hunt and fish, the Tribe had reserved and the federal government had confirmed the reservation of a non-consumptive (*i.e.*, in-stream flow) water right to the Tribe. 723 F.2d at 1410-11. Because this right, like all other federally reserved rights, was created under federal law, it was prohibited neither by the laws of Oregon nor the "common law of prior appropriations." *Id.* at 1411. The *Adair* court drew support for its determination from the Supreme Court's decisions in both *New Mexico* and

Cappaert. *Id.* at 1411, n.19 ("a careful reading of [*New Mexico*] confirms that the water rights recognized were defined by federal, not state, law") (citations omitted). In fact, the Supreme Court described the federal nature and primacy of federally reserved rights when announcing the *Winters* doctrine. *Winters*, 207 U.S. at 577 ("[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.") (citations omitted).

In *Arizona*, the Supreme Court, relying on the federal law bases of water rights reserved to Indian tribes, refused to balance those rights with the rights of other water users on the Colorado River through equitable apportionment. 373 U.S. at 597 (equitable apportionment is not appropriate because "the Indian claims here are governed by the statutes and Executive Orders creating the reservations.") Similarly, in *Cappaert*, the Court made explicit that the *Winters* doctrine, even in the context of a non-Indian federally reserved right, does not require any "balancing of competing interests." 426 U.S. at 138. Instead, as instructed by *Winters*, the only question is "whether the Government intended to reserve . . . water." *Id.* at 139. Later in *New Mexico*, however, Chief Justice William H. Rehnquist recognized that federally reserved rights "will frequently require a gallon-for-gallon reduction" in the amount of water available for other water users under state law, 438 U.S. at 705, and Justice Lewis F. Powell, in dissent, called for

consideration of federally reserved rights with "sensitivity" to those effects. *Id.* at 718 (Powell, J., dissenting). Although appellants rely on this language to suggest that this court must consider the "consequences and impacts" of the Tribe's reserved rights on state law water rights, *see* Appellants' Br. at 59-66, the nature of the *Winters* doctrine instructs otherwise.

The prioritization of federally reserved rights is based in *Winters* itself. There, the Supreme Court rejected the claims of non-Indian water users that federally reserved rights would interfere with their water rights, which, while junior to the federally reserved rights, had been lawfully established under and exercised in accordance with Montana law. *Winters*, 207 U.S. at 568-70; *see also Ahtanum Irrigation Dist.*, 236 F.2d at 327 (determining, as in *Winters*, that "the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers."). Thus, an original and core principle of the *Winters* doctrine has been that, once recognized, federally reserved rights are not reduced, diminished, or otherwise affected by their potential effect on competing state law water rights. *See Cohen's Handbook* §19.03[1], at 1211 ("[f]rom its inception, then, the *Winters* doctrine contemplated that junior non-Indian users could forfeit their water when tribes asserted their reserved rights.")

Here, like the non-Indian water users in *Winters*, appellants claim that "the Tribe's reserved right would jeopardize the rights of other users of groundwater

who have long relied on the groundwater resource for their own needs." Appellants' Br. at 60. Even if accepted as true, appellants' concerns are entirely irrelevant. Instead, the only issue pending before this court is the existence of the Tribe's reserved right, which the district court properly considered in light of the now 108-year-old precedent of *Winters*.

IV. CONCLUSION.

The district court ably and accurately considered the Tribe's reserved rights. In doing so, the court properly analyzed those rights in accordance with precedent from the Supreme Court addressing non-Indian-related federally reserved rights, such as in *New Mexico* and *Cappaert*, and the manner in which this court has subsequently applied that precedent to Indian reserved rights, as in *Walton II* and *Adair*. The district court properly refused to invent an artificial distinction between groundwater and surface water under the *Winters* doctrine and correctly rejected the proposed subjugation of the federal rights recognized by that doctrine to issues presented only by California law. In accordance with the posture of this case, the lower court also properly deferred consideration of questions related to the scope of the Tribe's right to an appropriate later phase of the litigation. For each of these reasons, the district court's order presents a faithful application of the *Winters* doctrine's recognition of the Tribe's reserved rights, including a right to groundwater, and therefore should be affirmed.

Respectfully submitted this 18th day of February, 2016.

s/Monte Tyler Mills

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APPENDIX A

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,322 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count was obtained by the word processor used to compile this brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, and set in 14-point, Times New Roman font.

Respectfully submitted this 18th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2016, I electronically filed the foregoing Brief of Amici Curiae Law Professors in Support of Plaintiff/Appellee and Affirmance of the District Court Order with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this appeal are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/Monte Tyler Mills