Appeal No. 15-55896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

BRIEF OF APPELLEE AGUA CALIENTE BAND OF CAHUILLA INDIANS

Catherine F. Munson
Kilpatrick Townsend & Stockton LLP
607 14th Street N.W., Suite 900
Washington, D.C. 20005
Tel: (202) 824-1435

Steven C. Moore
Heather Whiteman Runs Him
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel: (303) 447-8760

Mark H. Reeves
Kilpatrick Townsend & Stockton LLP
Enterprise Mill, Suite 230
1450 Greene Street
Augusta, GA 30901
Tel: (706) 823-4206

Adam H. Charnes
Kilpatrick Townsend & Stockton LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Tel: (214) 922-7106

Attorneys for Appellee-Plaintiff
Agua Caliente Band of Cahuilla Indians

CORPORATE DISCLOSURE STATEMENT

The Agua Caliente Band of Cahuilla Indians is a federally recognized Indian tribe. It is not a nongovernmental corporate party, and therefore it is not within the scope of entities required to file a corporate disclosure statement by FRAP 26.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF JURISDICTION

Agua Caliente is satisfied with the Appellee Water Districts' Jurisdictional Statement.

ISSUES PRESENTED

1. The *Winters* doctrine provides that the United States' establishment of an Indian reservation impliedly includes the reservation of water necessary to accomplish the reservation's current and future purposes. This Court held in *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), *aff'd by Cappaert v. United States*, 426 U.S. 128 (1976), that "the United States may reserve not only surface water, but also underground water." *Id.* at 317. Is this statement binding as a matter of stare decisis or correct as a matter of law?

2. The United States established the Agua Caliente Reservation as a permanent home for Indians in the Southern California desert. In so doing, did it impliedly reserve water, including groundwater, necessary to accomplish the purposes of the reservation?

3. When the United States reserves water for a reservation, it immediately obtains a fully vested, federal property right in the reserved water. *See, e.g.*, *Arizona v. California*, 373 U.S. 546, 600 (1963). Can subsequent developments in state water law or reservation water use obviate the United States' reserved water right?

STATEMENT OF THE CASE

I. Factual Background

A. The establishment of the Agua Caliente Reservation as a permanent home for the Agua Caliente people.

Agua Caliente is a federally recognized Indian tribe with a reservation consisting of approximately 31,396 acres of land within the boundaries of Riverside County, California – a reservation carved out of Agua Caliente's aboriginal territory. 81 Fed. Reg. 5019-02 (Jan. 19, 2016); Supplemental Excerpts of Record (SER) 1-17. Water, including groundwater, has always been critical to Agua Caliente. Before their first contact with Europeans, the ancestral Cahuilla people managed water scarcity by developing naturally occurring springs and digging walk-in wells throughout the modern day Coachella Valley. *See* SER 18-106.

While Agua Caliente has occupied the lands comprising its reservation and the surrounding territory since time immemorial, the United States formally set aside the bulk of the present day Agua Caliente Reservation for the Tribe's permanent use and occupancy through two executive orders issued on May 15, 1876 and September 29, 1877. Excerpts of Record (ER) 58-59. The executive orders creating and expanding the Agua Caliente Reservation marked the culmination of prolonged efforts by the United States to provide for Agua Caliente

in the face of ever increasing encroachment and depredation by white settlers. *See generally* SER 107-160.

The homeland that the federal government envisioned for Agua Caliente depended upon access to an adequate supply of water. As Special Agent John Ames observed in 1874, when discussing the need for the United States to reserve lands for Agua Caliente and other Mission Indians in Southern California:

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

SER 121. Others echoed Agent Ames' observations, including Mission Indian Agency head D.A. Dryden, who lamented in 1875 that "[t]he one pressing want of these people [including Agua Caliente] now is land, on which they can cultivate their gardens …." SER 124.

Agent Dryden envisioned the Agua Caliente Reservation serving as a permanent homeland where Agua Caliente could be self-sustaining. He explained that it would "meet the present and future wants of these Indians, by giving them exclusive and free possession of these lands … [t]hey will be encouraged to build comfortable houses, improve their acres, and surround themselves with home comforts." SER 125.

After years of such reports from Special Agents Ames and Dryden and others, President Grant issued the 1876 executive order setting aside lands recommended by Agent Dryden "for the permanent use and occupancy" of Agua Caliente and other Southern California tribes. ER at 58. It became immediately apparent, however, that the lands set aside were insufficient to serve as a permanent Agua Caliente homeland. SER 127-135. Thus, in July 1877, Commissioner of Indian Affairs John Smith instructed newly appointed Mission Indian Agent J.E. Colburn to make "strenuous efforts … at the earliest possible date" to identify and reserve "every available foot of vacant arable land" for the "permanent occupation" of the Agua Caliente and other Southern California tribes. SER 139-142. Shortly thereafter, Agent Colburn declared that his "first purpose" was to "secure the Mission Indians permanent homes, with land *and water* enough, that each one who will go upon a reservation may have to cultivate a piece of ground as large as he may desire." SER 143-147 (emphasis added).

Agent Colburn proceeded to identify and recommend for inclusion in the Agua Caliente Reservation some thirty-five additional sections of land in the vicinity of the lands already reserved for Agua Caliente by President Grant. SER 148-152. He believed that the additional sections included "a thousand acres more or less that could be cultivated if water could be brought upon it." SER 151. Approximately one month after receiving Agent Colburn's report, President Hayes

issued the 1877 Executive Order setting aside "for Indian purposes" much of the land Agent Colburn had identified. ER at 59. Shortly thereafter, federal agents noted that there was "very little running water" of the surface, but affirmed the existence of "water … so near the surface that it can be easily developed." SER 196.

Upon the issuance of the 1877 Executive Order, the Agua Caliente Reservation comprised more than 30,000 acres set aside for the Tribe's permanent use and occupancy.[1] ER 58-59. Patents for the Reservation were subsequently issued to Agua Caliente and its members. SER 197-206.

B. The aquifer is in overdraft.

The water that has sustained Agua Caliente since time immemorial is now in peril. The aquifer underlying the Reservation is in overdraft and has been for many years.[2] As of 2010, Appellant Coachella Valley Water District (CVWD) estimated the cumulative overdraft of the aquifer as more than 5.5 million acre-feet (AF) and the continuing annual overdraft at an average of approximately 239,000 AF. SER

[1] The United States acquired and withdrew additional lands for Agua Caliente in later years. SER 161-192.

[2] An aquifer is in overdraft when "more water is used each year than can be replaced by natural or artificial means." SER 208.

207-208. Groundwater levels underlying the Reservation have declined, despite efforts to recharge the aquifer with imported Colorado River water.[3]

The Water Districts rely heavily on groundwater to supply their customers, including Agua Caliente. CVWD pumps more than 100,000 AF of groundwater from the aquifer underlying the Agua Caliente Reservation each year, and Desert Water Agency (DWA) pumps approximately 43,000 AF of groundwater from the aquifer annually. SER 210; 214; ER 34. All of the water delivered by CVWD to domestic water service customers on the Reservation is groundwater, and groundwater makes up 75%-85% of the water that DWA provided to the Agua Caliente Reservation from 2011-2013. SER 217-230. Based on these percentages, DWA and CVWD provide well in excess of 10,000 acre feet of groundwater to the Agua Caliente Reservation on an annual basis, and those figures do not account for additional groundwater produced by non-tribal, on-Reservation pumpers. SER 219-220; 226; 232.

II. Procedural History

Agua Caliente sued DWA, CVWD, and their respective directors in their official capacities (collectively, the Water Districts) in May of 2013. ER 23. In its

[3] DWA and CVWD's suggestion that they spread State Water Project (SWP) water into the aquifer is patently incorrect. *See* Appellants' Br. 5. They in fact use Colorado River water for their groundwater recharge efforts. SER 211, 214-215. The degradation of the aquifer resulting from the introduction of this lower quality water is to be addressed in a later phase of this case.

Complaint, Agua Caliente seeks a declaration and quantification of its federal reserved water rights, often referred to as *Winters* rights, a declaration and quantification of its aboriginal water rights, and other relief not relevant to the pending appeal. ER 40-42. Agua Caliente and the Water Districts stipulated to the trifurcation of the case, with Phase 1 addressing the purely legal threshold questions of whether Agua Caliente has (1) a reserved right to groundwater pursuant to the *Winters* doctrine and (2) an aboriginal right to groundwater. ER 18; SER 233-252.

The United States subsequently intervened in the case as a plaintiff, in support and as trustee of Agua Caliente. ER 46-56. Its complaint seeks a declaration and quantification of Agua Caliente's federal reserved water rights, as well as other relief not relevant to this appeal. *Id*.

The parties filed cross-motions for partial summary judgment on the Phase 1 issues in October 2014. ER 268. After briefing and a hearing, the district court granted each sides' motions in part and denied them in part, holding that (1) the *Winters* doctrine applies to groundwater; (2) the purpose of the Agua Caliente Reservation was "to provide the Agua Caliente with a permanent homeland"; and

(3) the United States reserved water, including groundwater, for Agua Caliente in an amount to be determined in Phase 3.[4] ER 2-16.

Per the parties' stipulation, the court deferred until Phase 3 any ruling pertaining to the amount of water reserved for Agua Caliente. It noted that no such ruling was necessary to answer the Phase 1 question of whether the United States reserved *any* groundwater for the Agua Caliente Reservation. ER 8 ("[T]he Court can safely state that the reservation implied at least some water use; but exactly how much is not a question presented by Phase I of this case."). Consistent with its other rulings and the parties' stipulation, the court held that several of the Water Districts' arguments, many of which are advanced in this appeal, went to the quantification of Agua Caliente's reserved water right rather than the right's existence and that those arguments would be addressed in Phase 3. ER 10-11.

The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this Court granted the Water Districts' timely petition for permission to appeal. ER 1.

[4] Judge Bernal granted the Water Districts' motions as to Agua Caliente's claim for declaration of an aboriginal water right, and Agua Caliente did not seek an interlocutory appeal of that ruling. ER 12-14.

SUMMARY OF THE ARGUMENT

A federal reservation of land impliedly includes the reservation of water necessary to accomplish the purposes of the reservation. The Supreme Court established this doctrine in *Winters v. United States*, 426 U.S. 128 (1908), and what is now known as the *Winters* doctrine has been applied and reaffirmed repeatedly and consistently for more than a century. A *Winters* right is a fully vested and perfected federal property right in reserved water that exists from the date of a reservation's establishment.

The district court correctly concluded, like every other court that has considered a similar question, that water is necessary to accomplish the purposes of the Agua Caliente Reservation. It found that the Reservation's purpose was to serve as a permanent home for the Agua Caliente people. Because water is unquestionably necessary to accomplish that purpose, the United States impliedly reserved water for Agua Caliente when it established the Reservation.

The district court also correctly concluded that the *Winters* doctrine applies to groundwater. Forty years ago, this Court held that "the United States may reserve not only surface water, but also underground water." *Cappaert*, 508 F.2d at 317, *aff'd at* 426 U.S. 128. The *Cappaert* holding, which has never been abrogated or retracted, controls this question here and is entirely consistent with the logic and rationale of the *Winters* doctrine. Moreover, it accords with nearly every other case

involving federal reserved rights to groundwater; only one outlier state court decision holds otherwise. The court below correctly held that the United States can reserve groundwater to meet the needs of a federal reservation.

The court below did not determine the amount of water reserved for Agua Caliente. It did not do so because Agua Caliente and the Water Districts stipulated, with the court's approval, to delay the fact-intensive inquiry into the quantification of Agua Caliente's reserved water right until after the court rules on the threshold legal question of whether the United States reserved groundwater for Agua Caliente at all. In light of this stipulation, the court's declining to rule on the quantum of Agua Caliente's federal reserved water right – and its concomitant decision not to address arguments by the Water Districts on those issues – was a reasonable exercise of its inherent case management authority. To resolve the issues presented in Phase 1, the district court only needed to determine (1) whether water is necessary to fulfill the purpose of the Agua Caliente Reservation and (2) whether the *Winters* doctrine applies to groundwater. It did just that, and its holdings on those questions are squarely in line with precedent.

None of the Water Districts' criticisms of the district court's order is valid. As an initial matter, the Water Districts fundamentally mischaracterize the critical inquiry under *Winters* and its progeny. They repeatedly argue that this case turns on whether a federal reserved water *right* is necessary to accomplish the purposes

of the reservation. The relevant question, however, is not whether a federal reserved water right is necessary; it is whether *water* is necessary. *See United States v. New Mexico*, 438 U.S. 696, 701 (1978). Case law repeatedly shows that if water is necessary to accomplish the purposes of the reservation, it is reserved. Courts do not ask whether a reserved right, *per se*, is necessary. When the decisive question is properly posed, the Water Districts' arguments fail.

The Water Districts' first argument – that the district court failed to properly apply *New Mexico* – hinges principally upon their mischaracterization of the relevant inquiry. It also relies on a misreading of *New Mexico*. *New Mexico* did not, as the Water Districts contend, abandon decades of Supreme Court and Ninth Circuit precedent applying the federal reserved rights doctrine. Moreover, this Court explicitly has recognized that *New Mexico*, which involved the reservation of water for a national forest with specific, statutorily enumerated purposes, is "not directly applicable to *Winters* doctrine rights on Indian reservations." *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1984).

Even if *New Mexico* applied here, the district court's order did not run afoul of its teachings. On the contrary, the district court's approach was strikingly similar to the one taken by this Court in its *Walton* decisions, decided after *New Mexico*, affirming the existence of a reserved right in part because water was necessary to achieve the reservation's purpose of "provid[ing] a homeland for the

Indians to maintain their agrarian society." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). The court below similarly determined that (1) the Agua Caliente Reservation was intended to serve as a permanent home for the Agua Caliente people; (2) water is necessary to fulfill this purpose; and (3) the United States reserved water, including groundwater, necessary to accomplish that purpose. None of these conclusions is contrary to *New Mexico* or inconsistent with the principles underlying *Winters*.

The Water Districts' second principal argument – that Agua Caliente has water rights under state law and thus cannot have a federal reserved right – also relies on a mischaracterization of the relevant inquiry and the nature of *Winters* rights. Water was and is necessary to accomplish the purposes of the Agua Caliente Reservation. The United States thus reserved water for Agua Caliente when it established the reservation in the 1870s. Subsequent developments, whether in state law or on the Agua Caliente Reservation, cannot obviate or diminish Agua Caliente's fully vested federal property right in reserved water. Accordingly, the potential present day availability of water under state law is irrelevant to the existence of Agua Caliente's federal reserved water right. Finally, any state law water rights that Agua Caliente may have – whether under the correlative rights doctrine, through state court decrees, or from any other source –

are objectively inferior and inadequate, and in any event cannot substitute for a federal reserved right.

The Water Districts' remaining arguments fail for similar reasons. Agua Caliente's production of groundwater or alleged lack thereof is irrelevant because federal reserved water rights cannot be lost through nonuse. *See Walton*, 647 F.2d at 48, 51. And the effects of Agua Caliente's reserved right on other water users or on the Water Districts' ability to control the Tribe's water use are immaterial because the reserved right is a federal one that is not subject to diminution by state law principles or balancing of competing equities. *See, e.g.*, *Cappaert*, 426 U.S. at 139-39; *Arizona*, 373 U.S. at 597; *Walton*, 647 F.2d at 48.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *Tohono O'odham Nation v. City of Glendale*, 804 F.3d 1292, 1297 (9th Cir. 2015). The district court can grant summary judgment on any claim or defense or any part of a claim or defense. *Id.* The decision to trifurcate proceedings and to delay resolution of certain issues and arguments until a later phase of the litigation is reviewed for an abuse of discretion. *See, e.g.*, *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 998 (9th Cir. 2001); *Hilao v. Estate of Marcos*, 103 F.3d 767, 781 (9th Cir. 1996); *see also GCB Comms., Inc. v. U.S. So. Comms., Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011).

ARGUMENT

I. The *Winters* doctrines' characteristics are well settled.

The *Winters* doctrine, sometimes referred to as the federal reserved rights doctrine, lies at the core of this case. It provides that where water is necessary to accomplish the purposes of a federal reservation, the United States impliedly reserves such water concomitantly with the reservation of land. *See, e.g.*, *New Mexico*, 438 U.S. at 702; *Arizona*, 373 U.S. at 599-600; *Walton*, 647 F.2d at 46-47. The doctrine has been clarified and reaffirmed by numerous federal and state appellate decisions over more than a century, and it is now firmly entrenched and well settled law.

The foundational *Winters* case involved the Fort Belknap Indian Reservation's right to use water from the Milk River. *See Winters*, 207 U.S. at 566. The United States contended that the entire flow of the river was necessary to accomplish the reservation's purpose of serving as "a permanent homeland and abiding place" for its Indian residents. *Id.* at 565, 567. Accordingly, when upstream parties began diverting water from the river, the United States sued to enjoin those parties from interfering with the federal water right. *Id.* at 567. The defendants argued that (1) they had acquired valid, state law rights to the river's waters after the creation of the reservation but before the Indians began using the water in question; (2) their rights were senior and superior to any Indian rights; (3) other

water was available within the reservation to meet the Indians' needs; and (4) a ruling recognizing the asserted federal right would render the defendants' lands valueless and destroy communities of "thousands of people." *Id.* at 568-70.

The Supreme Court rejected all of the *Winters* defendants' arguments. It noted that the United States, in establishing the reservation, intended to facilitate its Indian residents' transition "to become a pastoral and civilized people." *Id.* at 576. The Court further recognized that to become "a pastoral … people," the reservation's Indians would need to take up agriculture on lands that "were arid, and, without irrigation, were practically valueless." *Id.* Finally, the Court noted that the United States' authority to reserve water, in addition to land, and to exempt that water from state water laws "could not be … denied." *Id.* at 577.

The Supreme Court accordingly held that (1) the Indians of the Fort Belknap Reservation had rights to the water of the Milk River to the extent necessary to irrigate their reservation; and (2) that water was reserved and held by the United States as of the date of the reservation's establishment "for a use which would be necessarily continued through years." *Id.* at 576-77. This holding – that the United States' reservation of land includes the contemporaneous reservation of water necessary to accomplish the purposes of the reservation – gave rise to what is now known as the *Winters* doctrine.

The Supreme Court reaffirmed the *Winters* doctrine decades later in *Arizona v. California*, a case that involved the adjudication of water rights in the Colorado River. Over numerous objections by the State of Arizona, the Court upheld a special master's ruling "as a matter of fact and law that when the United States created [Indian] reservations or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." *Arizona*, 373 U.S. at 595-96. The Court found it "impossible to believe" that the United States would create Indian reservations "unaware … that water from the river would be essential to the life of the Indian people …." *Id.* at 599. It held that "the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created" and that "the water was intended to satisfy the [reservations'] future as well as the present needs." *Id.* at 600. *Arizona* thus clarified and reaffirmed that the establishment of an Indian reservation immediately gives rise to a fully vested right to the water necessary to satisfy the reservation's current and future needs.

Since *Arizona*, a number of decisions from the Supreme Court, this Court, and various state and lower federal courts have applied and further clarified key aspects of the *Winters* doctrine. Based on this case law, it is now understood that *Winters* rights are (1) federal rights that are not subject to state law; (2) permanently set aside and fully vested at the time a reservation is established; and

(3) intended to accommodate changing use over time and cannot be lost through nonuse.

A. Federal reservations of water are not subject to state law.

Numerous appellate decisions have instructed that federal reservations of water create federal rights that are not subject to restriction, limitation, or diminishment by state law doctrines and concepts. As the Supreme Court held in *New Mexico*, "the 'reserved rights doctrine' is … an exception to Congress' explicit deference to state water law in other areas." 438 U.S. at 715; *see also Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.'" (quoting *Cappaert*, 426 U.S. at 145)); *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1984); *Cappaert*, 508 F.2d at 320; *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm. 326, 487 (1976) ("The Winters Doctrine … is paramount to the California law, including the California doctrines of riparian rights, appropriation, and percolating ground waters ….").[5] This makes sense as a practical matter. Federal reserved water rights that were

[5] The Water Districts cite *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), for the proposition that federal law defers to state water law in the context of Indian land reservations. *See* Appellants' Br. 19. *California Oregon* did not involve *Winters* rights and did not hold that such rights are subject to state law. The footnote cited by the Water Districts referred to instances in which federal legislation called for deference to state water law. *New Mexico* explicitly distinguished the *Winters* doctrine from such cases.

subject to divestment or limitation based on changing state laws or circumstances could not ensure permanent access to water "intended to satisfy the future as well as present needs of the Indian Reservations." *Arizona*, 373 U.S. at 600. Accordingly, federal reserved water rights must be superior to state law and subsequently acquired state law rights.

While federal courts have repeatedly affirmed the superiority of federal reserved rights over state law, the point's settled status is perhaps best illustrated by the numerous state laws and state court decisions recognizing that state law and rights must yield to federal reserved Indian water rights. The Supreme Court of Montana has recognized that federal reserved rights often conflict with state law water rights and state law principles, notably because "[r]eserved water rights are established by reference to the purposes of the reservation rather than to actual, present use of the water." *Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 762 (Mont. 1985). When conflicts arise between federal reserved rights and state law, "state courts are required to follow federal law with regard to those rights." *Id.* at 765-66.

The Supreme Court of Arizona likewise has recognized that state laws providing all overlying landowners with an equal right to access groundwater for beneficial uses are inconsistent with and must yield to *Winters* rights because "[a] theoretically equal right to pump groundwater, in contrast to a *reserved* right,

would not protect a federal [Indian] reservation from a total future depletion of its underlying aquifer by off-reservation pumpers." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys.*, 989 P.2d 739, 749 (Ariz. 1999), *cert denied*, 530 U.S. 1250 (2000). Because the state groundwater rights system did not adequately protect federal reserved rights, the Arizona Supreme Court properly held that "[h]olders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights …." *Id.* at 750.

Sounding the same note as the Supreme Courts of Montana and Arizona, the State of California itself recently acknowledged that federal reserved rights to groundwater could conflict with its state laws and explicitly conceded that in such cases, "federally reserved rights to groundwater shall be respected in full" and "federal law shall prevail." Cal. Water Code § 10720.3(d) (2014). This statute affirms what should be indisputable: *Winters* rights are superior to and not subject to diminishment, limitation, or abrogation by state law doctrines.[6]

B. Federal reserved water rights are permanent and fully vested from the moment a reservation is established.

This Court and the Supreme Court have held that *Winters* rights are federal property rights that vest fully and immediately upon the establishment of a federal

[6] While the Water Districts concede on appeal that federal reserved water rights "are not subject to regulation and control under state law," Appellants' Br. 16, they persist in arguing that state law rights and doctrines obviate Agua Caliente's reserved rights in this case. *See* discussion, *infra.*

reservation. *See, e.g.*, *Cappaert*, 426 U.S. at 138 (the United States "acquires a reserved right in unappropriated water which vests on the date of the reservation"); *Arizona*, 373 U.S. at 600 ("[T]he United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created."); *Walton*, 647 F.2d at 48 ("[T]he Tribe has a vested property right in reserved water …."); *Cappaert*, 508 F.2d at 320. While a right holder's use of reserved water may change and expand over time, the right itself is static. All water necessary "to satisfy the future as well as the present needs" of a reservation is reserved, as a fully vested federal property right that is superior to later-established state law rights, the moment the reservation is established. *Arizona*, 373 U.S. at 600.

C. Winters rights necessarily contemplate changing and expanding Indian water use and cannot be loss through nonuse.

Because the United States has a fully vested property right in the water necessary to meet a reservation's current and future needs from the moment that it establishes the reservation, it naturally follows that *Winters* rights are not limited to the source or amount of water in use at any particular time and cannot be lost through nonuse. On the contrary, a fundamental tenet of the *Winters* doctrine is that a reservation's use of reserved water can and almost certainly will change and grow over time, but the water right remains unchanged. This has been clear from the doctrine's inception.

In *Winters*, substantial tribal diversion and use of water did not begin until years after the establishment of the Fort Belknap Reservation. 207 U.S. at 565-66. Neither that fact, nor the intervening diversion and use of water by state right holders, gave the Supreme Court pause in declaring the existence of a federal reserved right. More recently, the Supreme Court explicitly addressed what was implicit in *Winters*, holding that "water was intended to satisfy the future as well as the present needs of the Indian Reservations and … enough water was reserved to irrigate all the practicably irrigable acreage on the reservations" even though all such land was not irrigated at the time of the reservations' establishment or at the time of the Court's decision. *Arizona*, 373 U.S. at 600. If water is reserved to satisfy future, as yet unrealized uses, a right holder's failure to make use of that water at any particular point in time logically cannot result in its forfeiture.

Other courts have echoed *Winters* and *Arizona* by holding that (1) Indian tribes need not make full use of their reserved water immediately or at any particular time; (2) *Winters* rights are not lost through nonuse; and (3) use of reserved water may ebb, grow, and change over time without the right itself being affected. *See, e.g.*, *Walton*, 752 F. 2d at 404 (federal reserved rights cannot be lost due to nonuse); *Adair*, 723 F.2d at 1416 ("[T]he full measure of this [federal reserved] right need not be exercised immediately. …[W]ater may be used by Indian allottees for present and future irrigation needs."); *Walton*, 647 F.2d at 47-

48 (developments "making the historically intended use of the water unnecessary do not divest the Tribe of the right to water"); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 326 (1956) ("It is obvious that the quantum [of reserved water] is not measured by the use being made at the time the … reservation was made."); *Confederated Salish*, 712 P.2d at 765 ("Indian reserved water rights may include future uses. Most reservations have used only a fraction of their reserved water." (internal cits. omitted)). These aspects of the *Winters* doctrine are critical to its functionality. Water is reserved once, upon the establishment of a reservation, in an amount necessary to ensure that the reservation's purposes can be accomplished in the future. The reserved right holder's use of water may grow, decrease, or change in nature through time, but its vested, federal property right in reserved water remains unchanged.

II. The United States reserved water, including groundwater, that is necessary to fulfill the purposes of the Agua Caliente Reservation.

The district court correctly held that the United States impliedly reserved water necessary to accomplish the Agua Caliente Reservation's purpose of providing a permanent home for the Agua Caliente people. This holding represents the most basic and straightforward application of the *Winters* doctrine imaginable. Indeed, Agua Caliente is unaware of any case holding that the United States did not reserve water concomitantly with the establishment of an Indian reservation.

The district court also correctly held, based on prior decisions of this Court and nearly every other court to address the issue, that the *Winters* doctrine applies equally to groundwater and surface water. ER 8-9. Accordingly, it held that Agua Caliente's "federally reserved water rights encompass groundwater underlying the reservation." ER 11.

Having determined that the United States reserved some amount of water, including groundwater, for Agua Caliente, the district court properly declined to go further. The quantification of Agua Caliente's reserved right is reserved for Phase 3 of the case pursuant to a court-approved stipulation between Agua Caliente and the Water Districts, and arguments pertaining to that issue were not properly before the court. This division of the case was a reasonable exercise of the district court's discretion, and it was consistent with the approach taken in a number of prior federal cases that separately examine the existence and extent of federal reserved water rights.

A. The district court correctly concluded that water is necessary to accomplish the purposes of the Agua Caliente Reservation, so water impliedly was reserved at the time of the Reservation's establishment as a matter of law.

Unappropriated water is reserved – and a fully vested, federal property right immediately arises – upon the establishment of a federal reservation when it is necessary to accomplish the reservation's purposes. Accordingly, the critical question for determining whether a federal reserved water right exists is whether

the reservation needs water. *See, e.g.*, *New Mexico*, 438 U.S. at 701; *Cappaert*, 426 U.S. at 139, 143; *Walton*, 647 F.2d at 46. If water is necessary to fulfill the reservation's purposes, it is reserved. *Id.*

This Court has held that identifying the purpose of an Indian reservation requires an analysis of "the document and circumstances surrounding its creation, and the history of the Indians for whom it was created." *Walton*, 647 F.2d at 47. It has also cautioned that "[t]he specific purposes of an Indian reservation … were often unarticulated" and that their "general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Id.* *Walton* involved a one-paragraph executive order stating that the Colville Reservation was "set apart as a reservation for said Indians." *Id.* at 47 n.8 (internal quotation omitted). From that terse executive order, this Court concluded that "one purpose for creating [the Colville] reservation was to provide a homeland for the Indians to maintain their agrarian society." *Id.* at 47. Because water was obviously necessary to satisfy that homeland/agrarian purpose, this Court concluded without further analysis that the establishment of the Colville Reservation included a federal reservation of water sufficient, *inter alia*, to permit irrigation of all of the reservation's practicably irrigable acreage. *Id.* at 47-48. It then remanded the case to the district court to determine the precise amount of water reserved. *Id.* at 53.

Other decisions show a similar approach. In *Winters* and *Arizona*, the Supreme Court noted that the reservations in question, like the Agua Caliente Reservation, were established in hot, arid regions and that the United States, "intend[ing] to deal fairly with the Indians," must have intended to reserve "the water necessary to sustain life." *Arizona*, 373 U.S. at 598, 600; *see also Winters*, 207 U.S. at 576. In *Walker River*, this Court reviewed correspondence among federal agents regarding the establishment of the Walker River Indian Reservation and quickly determined that "[i]t would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive." *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339 (9th Cir. 1939). In *Adair*, this Court had "no difficulty" affirming the existence of a federal reserved water right based on a treaty's references to encouraging Indian agriculture. *See* 723 F.2d at 1410. And in *Gila River*, the Supreme Court of Arizona found that a federal reserved water right necessarily existed where Indian reservations were established "as a permanent home and abiding place for the Indian people." *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys.*, 35 P.3d 68, 76 (Ariz. 2001) (*en banc*).

While all of these cases support the existence of a federal reserved water right for the Agua Caliente Reservation, *Walton* is particularly relevant. Following *Walton*'s instruction, the court below properly considered the documents creating

the Agua Caliente Reservation and other contemporaneous historical evidence to ascertain the purpose of the reservation and to determine whether that purpose requires water. *See* ER 5, 8. Specifically, the court looked at the two executive orders setting aside the bulk of the Agua Caliente Reservation and at contemporaneous correspondence between federal officials discussing the need for the Reservation.[7] *See id.* at 5. The first executive order indicated that land was "set apart … for the permanent use and occupancy" of the Agua Caliente people. ER 58; *see also* ER 5. A subsequent executive order set aside additional lands for Agua Caliente "as a reservation for Indian purposes." ER 58-59. These orders are substantively indistinguishable from the executive order in the *Walton* case, which this Court held gave rise to a federal reservation of water. *Compare* ER 58-59 *with Walton*, 647 F.2d at 47 n.8.

[7] Footnote 2 of the Water Districts' brief argues that the Agua Caliente Reservation established by the 1870's executive orders was subsequently extinguished and that the current Reservation was not established until the Secretary issued patents for the land pursuant to the Mission Indians Relief Act (MIRA). *See* Appellants' Br. 8 n.2. This argument was not presented below and is therefore waived. *Barstad v. Dep't. of Corr. of Wash.*, 609 Fed. App'x 427, 428 (9th Cir. 2015) ("We do not consider arguments that were not presented to the district court."); *see also* ER 5 (stating that the Agua Caliente Reservation was established by executive orders). The Water Districts further waive any reliance on this argument by correctly conceding that it "is not relevant to whether the Tribe has a reserved right to the groundwater." *Id.* Because the argument is waived and concededly irrelevant, Agua Caliente will not address it beyond noting that it is inaccurate as a matter of fact and law. *See, e.g.*, SER 253-255 (noting errors in the Smiley Commission's report and indicating that lands reserved by executive orders prior to MIRA remained "under reservation").

The district court also reviewed contemporaneous correspondence from federal officials indicating an intent to establish reservations to "'meet the present and future wants of these Indians'" and on which they would "'be encouraged to build comfortable houses, improve their acres, and surround themselves with home comforts.'" ER 5 (quoting SER 125). Additional correspondence espoused an intent to "'secure the Mission Indians with permanent homes, with land *and water* enough, that each one who will go upon a reservation may have to cultivate a piece of ground as large as he may desire.'" ER 5 (quoting SER 146) (emphasis added).

Based on its review of the pertinent executive orders and contemporaneous correspondence, the court below found that the Agua Caliente Reservation was "intended to provide the Tribe with a home, and intended to do so with some measure of permanence." ER 8. Explicitly comparing this purpose to the one found to give rise to a federal reserved water right in *Walton*, the district court could "safely state that the reservation implied at least some use of water," the precise amount of which remains to be determined. ER 8 (quoting *Walton*, 647 F.2d at 47). And because water is necessary to achieve the purpose of establishing a permanent home for Indians, the court correctly concluded that Agua Caliente has a federal reserved right to any water appurtenant to its reservation. *See* ER 8, 11.

The district court's analysis and holding are fully consistent with all prior case law addressing the *Winters* doctrine and the reservation of water for Indian

reservations. The Agua Caliente Reservation, like all Indian reservations, was set aside for the purpose of providing a permanent home for Indian people. It is axiomatic that water is essential to accomplishing this purpose, and an unbroken line of cases from *Winters* to *Walton* establishes that this purpose gives rise to a federal reserved water right. *See also United States v. Preston*, 352 F.2d 352, 353 & 357 (9th Cir. 1965) (confirming the reservation of waters for the Agua Caliente Reservation) . The district court correctly held that the United States impliedly reserved unappropriated, appurtenant water when it established the Agua Caliente Reservation as a permanent home for the Agua Caliente people.

B. Winters rights apply to all water sources, including groundwater.

The district court also correctly held that when the United States establishes a federal reservation and impliedly reserves water, it makes no difference whether the water in question is surface or groundwater. Nearly every court to consider the question has so held, including this Court, and the rationale underlying the *Winters* doctrine fully supports this conclusion.

The *Winters* doctrine is based on the assumption that the United States "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona* 373 U.S. at 600. Accordingly, "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude … that the United States

intended to reserve the necessary water." *New Mexico*, 438 U.S. at 701. This rationale applies equally to surface and groundwater; where water is necessary to accomplish the purposes of a reservation, it makes no difference whether that water flows above the ground or percolates beneath it. *See, e.g.*, *Tweedy v. Tex. Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) ("[T]he same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well."); *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 because those rights are necessary to the purpose of an Indian reservation."); *Cohen's Handbook of Federal Indian Law* ("Cohen") § 19.03[2][a]-[b] at 1212-15 (Nell Jessup Newton ed., 2012). Indeed, in many cases groundwater may be the only consistently available source of water that can make reserved lands habitable or otherwise suitable for their intended purpose. *See, e.g.*, *Gila River*, 989 P.2d at 746 ("[S]ome reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water."); Cohen, § 19.03[2][b] at 1213-14.

Because the purpose of the *Winters* doctrine – to recognize a reservation of water where water is necessary to accomplish the purposes of a federal land reservation – applies with equal force to both surface and groundwater, it is

unsurprising that courts have almost unanimously held that the *Winters* rights encompass both. Notably, this Court held in *Cappaert* that "the United States may reserve not only surface water, but also underground water." *Cappaert*, 508 F.2d at 317. *Cappaert* involved federal reserved water rights associated with Devil's Hole Pool, a subterranean pool added to the Death Valley National Monument to preserve a rare pupfish that lived there. *Id.* at 317-18. When groundwater pumping by nearby landowners (the Cappaerts) caused a decline in the pool's water level, the United States sought an injunction on the grounds that the pumping was interfering with its reserved water right. *Id.* at 317. The Cappaerts argued that the reserved rights doctrine was limited to surface water, and thus inapplicable. *Id.* This Court disagreed, explicitly holding that the reserved rights doctrine applies equally to surface and groundwater. *Id.*

The Water Districts presumably will argue that this Court's decision in *Cappaert* is irrelevant because the Supreme Court ultimately concluded that Devil's Hole Pool was surface water rather than groundwater. *See* 426 U.S. at 142-43. Such an argument is wrong. The Supreme Court did not overrule or abrogate this Court's holding on the *Winters* doctrine's applicability to groundwater, and nothing in the two decisions is irreconcilable. The Supreme Court simply found it unnecessary to reach the question decided by this Court. Accordingly, the panel decision in *Cappaert* remains good law in this Circuit, controls this question, and

requires affirmance of the district court's holding that the United States can reserve groundwater. *See Biggs v. Sec'y of Cal. Dep't of Corr.*, 717 F.3d 678, 689 (9th Cir. 2013) (prior panel decision remains binding unless "clearly irreconcilable with intervening Supreme Court precedent" (internal quot. omitted)); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless *overruled* by the court itself sitting en banc, or by the Supreme Court." (emphasis added)); *see also, Garrett v. Univ. of Ala. Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292-93 (11th Cir. 2003); *In re Quality Stores, Inc.*, 354 B.R. 840, 843 (W.D. Mich. 2006) (where the Supreme Court affirms an appellate court decision on other grounds without vacating or reversing, the appellate court's decision remains binding).

This Court's conclusion that federal reservations of water include groundwater is entirely consistent with *Cappaert* and other Supreme Court precedent. Supreme Court decisions addressing federal reserved water rights consistently and sensibly focus on the need for water, not its location. *See New Mexico*, 438 U.S. at 701 (holding that the United States intended to reserve water "[w]here water is necessary"); *Cappaert*, 426 U.S. at 143; *Arizona*, 373 U.S. at 600; *see also John v. United States*, 720 F.3d 1214, 1231 (9th Cir. 2013) ("[T]he federal reserved water rights doctrine does not typically assign a geographic location to implied federal water rights."). Indeed, *Cappaert* emphasized that "the

implied-reservation-of-water-rights doctrine is based on *the necessity of water* for the purpose of the federal reservation" and held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface *or groundwater*." *Cappaert*, 426 U.S. at 143 (emphases added); *see also United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1158-59 (9th Cir. 2010) (forbidding state groundwater allocations that adversely affected tribe's federal water rights).

The practical implications of the Supreme Court's holding in *Cappaert* and recognition of a reserved right to groundwater are essentially identical. Both results can limit off-reservation pumpers' use of groundwater, and both results equally effectuate the federal government's intent to ensure that necessary water is available to accomplish the purposes of a federal reservation. So while the Supreme Court has not yet joined this Court and numerous lower courts in definitively holding that the *Winters* doctrine applies to groundwater, the logic and reasoning of its opinions are entirely consistent with such a conclusion.

Even aside from *Cappaert*, the overwhelming majority of relevant case law holds that the *Winters* doctrine makes no distinction between surface and groundwater. In addition to the court below, at least two other federal district courts within the Ninth Circuit and the federal Indian Claims Commission have held that the United States can reserve groundwater. *See Preckwinkle v. CVWD*, No. 05-cv-626 at **27-28 (C.D. Cal. Aug. 30, 2011) (holding, in a case involving

CVWD, that Agua Caliente members have federal reserved rights to groundwater); *United States v. Washington*, 2005 WL 1244797 at *3 (W.D. Wash. May 20, 2005) ("[R]eserved *Winters* rights on the Lummi Reservation extend to groundwater ...."); *Soboba Band*, 37 Ind. Cl. Comm. at 487 ("The Winters Doctrine applies to all unappropriated waters in, on, and pertinent or appurtenant to the Soboba Indian Reservation, including ... percolating and channelized ground water."). At least two state supreme courts have reached the same conclusion. *See Stults*, 59 P.3d at 1098-99; *Gila River*, 989 P.2d at 747.

Gila River is particularly instructive. After a detailed review of relevant case law, the *en banc* Arizona Supreme Court concluded that:

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Gila River, 989 P.2d at 747. The Arizona Supreme Court's reasoning is consistent with case law, including this Court's *Cappaert* decision, and with common sense. It recognized the inherent irrationality in the argument advanced by the Water Districts in this case – that the United States "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless" when a reservation happened to be established appurtenant to a

reliable source of surface water, but had no interest in the survival of those Indians who had the misfortune of finding themselves on reservations that needed groundwater. *Arizona*, 373 U.S. at 600; *see Gila River*, 989 P.2d at 746 ("We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life."). If the *Winters* doctrine is to have any meaning for a significant number of tribes, its focus must remain on the need for water rather than whether the necessary water is found on the ground or beneath it.

In fact, only one court – the Supreme Court of Wyoming – has ever adopted the Water Districts' position and held that the United States did not reserve groundwater. *See In re the Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988). Even that Court, however, acknowledged that "[t]he logic which supports a reservation of surface water … also supports reservation of groundwater." *Id.* at 99. The Wyoming Court declined to reach what it recognized as the logical outcome simply because "not a single case applying the reserved water doctrine to groundwater is cited to us." *Id.* at 99. As the foregoing discussion of the numerous cases recognizing federal reserved rights to groundwater shows, the Wyoming Court's concern is no longer valid, assuming that it ever was.

The court below correctly held that "[n]o case interpreting *Winters* draws a principled distinction between surface water physically located on a reservation and other appurtenant water sources." ER 8. In fact, many cases recognize that no such distinction exists. The binding precedent of the panel decision in *Cappaert* provides that the *Winters* doctrine applies to groundwater, and its holding is in accord with the overwhelming majority of persuasive authority and the rationale underlying federal reserved water rights. The *Winters* doctrine establishes a federal water right to ensure that necessary water is available to accomplish the purposes of a federal reservation. It is not concerned with distinctions, often drawn from state law, about whether the necessary water lies on or under the reservation. This Court should affirm the district court's ruling on this point of law.

C. The district court's decision to address certain arguments in later phases of the case was consistent with the parties' stipulation and constituted a proper exercise of case management authority.

As discussed *supra*, the court below held that (1) the Agua Caliente Reservation was established to provide a permanent home for Indians, (2) water was necessary to accomplish this purpose, and (3) the United States impliedly reserved the necessary, appurtenant water when it established the reservation. *See* ER 8-9. It did not delve into specific uses of reserved water or otherwise address arguments pertaining to the precise quantum of water reserved because those arguments go to quantification of the right, a fact-intensive issue that the parties

agreed to defer until a later phase of the case, after a ruling on the threshold legal question of whether the United States impliedly reserved water for Agua Caliente. *See* ER 4, 10-11; *see also* ER 18-19; SER 233-252.

Despite stipulating to the trifurcation of the case and the deferral of all quantification-related issues, the Water Districts now contend that the district court committed reversible error by declining to identify each specific purpose for which water was reserved and by not using specific terms selectively mined from the *New Mexico* decision, a case that involved quantification of a reserved water right. *See* Appellee's Br. at 23-30; discussion, *infra*. They are incorrect.

The district court's trifurcation decision, and all concomitant decisions regarding what issues properly fall within each phase of a divided case, involves an exercise of its inherent case management authority that is reviewed for an abuse of discretion. *See, e.g.*, *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001); *O'Neill v. United States*, 50 F.3d 677, 687 (9th Cir. 1995). While Agua Caliente addresses the Water Districts' mischaracterization of *New Mexico* in depth below, for present purposes it suffices to note that (1) the district court's analysis of the existence of a federal reserved water right faithfully followed this Court's post-*New Mexico* case law and (2) its decision to trifurcate the case and address the existence of a reserved right before quantifying it comports with the practice frequently used in reserved rights cases. *See, e.g.*, *Arizona*, 373 U.S. at 600-01

(separately addressing the existence and quantification of reserved rights for Indian reservations); *Walton*, 647 F.2d at 46-47 (affirming that the United States reserved water for the Colville Reservation to fulfill its purpose of providing a permanent home for Indians and remanding to the district court to determine the scope of the reserved water right); *Gila River*, 989 P.2d at 742 (separately addressing the *Winters* doctrine's applicability to groundwater and the standard for quantifying reserved water). The notion that the district court's deferral of certain arguments constituted an abuse of discretion or reversible error should be rejected out of hand.

III. The Water Districts' criticisms of the district court's order are meritless.

The Water Districts offer two principal lines of argument on appeal. First, they contend that *New Mexico* significantly narrowed the *Winters* doctrine, curtailing the scope of the rights that it recognizes and calling for increased deference to state law in its application. This new, cabined version of the *Winters* doctrine, they contend, does not support the existence of a federal reserved water right for the Agua Caliente Reservation. Second, and relatedly, they argue that subsequent factual and state law developments – most notably including the evolution of California's correlative rights doctrine for apportioning groundwater rights – have diminished or obviated Agua Caliente's need for a reserved water right to the point that such a right cannot exist under *New Mexico*. These

arguments mischaracterize the law and are inconsistent with controlling precedent from the Supreme Court and the Ninth Circuit as well as the overwhelming weight of persuasive authority.

A. The Water Districts mischaracterize the Winters doctrine's central inquiry and the Supreme Court's New Mexico opinion.

1. The decisive inquiry for the existence of a federal reserved water right is whether water is necessary to accomplish the purposes of the reservation.

The Water Districts' arguments rely largely on their mischaracterization of the standard for determining whether a federal reserved water right exists under *Winters* and its progeny. A federal reserved water right exists "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created …." *New Mexico*, 438 U.S. at 701. The operative question, therefore, is *whether the reservation requires water*. If so, it has a federal reserved right to water. *See id.*; *see also Cappaert*, 426 U.S. at 139 (a federal reserved water right exists "if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created").

Throughout their brief, the Water Districts subtly attempt to reframe the *Winters* inquiry. Instead of focusing on whether water is necessary for the Agua Caliente Reservation, they incorrectly assert that water is only reserved where "*the reserved right* [is] 'necessary' to carry out the 'primary' purposes of the reservation." Appellants' Br. 22 (emphasis added); *see also, e.g.*, *id.* at 28-29

("[U]nder *New Mexico*, the question … depends on whether the [reserved] right is 'necessary' …."); *id.* at 35. By reframing the question in this manner, they set the stage for arguments that concede the reservation's need for water – which should end the inquiry – while asserting that no reserved right exists because Agua Caliente can obtain the necessary water from other sources, including state law correlative or decreed surface rights.

While these sorts of arguments have been raised since *Winters* itself, no court has ever denied the existence of a federal reserved water right merely because a reservation might be able to access water without such a right. *See Winters*, 207 U.S. at 573 ("It is alleged that there are a large number of springs on the reservation and several streams from which water can be obtained …."); *see also Gila River*, 989 P.2d at 747-48 (rejecting the argument that a state law correlative right to pump groundwater obviated a federal reserved right to such water); Cohen § 19.01[2] at 1207 (explaining that state law riparian rights do not obviate federal reserved rights). The contemporaneous availability of water outside the context of a federally reserved water right simply does not control whether the United States reserved water when it established a federal reservation.

The Court should not credit the Water Districts' effort to alter the fundamental question posed in *Winters* rights cases. The decisive inquiry is what

the Supreme Court has said it is: whether water is necessary to accomplish the purposes of the reservation.

2. *New Mexico* did not abrogate decades of precedent addressing federal reserved rights and the district court applied it properly.

The Water Districts also rely extensively on an erroneous, overbroad reading of the Supreme Court's decision in *New Mexico*. That case did not, as they contend, mark a sea change in *Winters* doctrine jurisprudence. Rather, as the Supreme Court took care to note, it logically flowed from *Winters*, *Arizona*, and *Cappaert*. *See New Mexico*, 438 U.S. at 700 & 700 n.4.

New Mexico reaffirmed the longstanding rule that the United States reserves all water that is necessary to accomplish the purposes of a federal reservation. While the Water Districts contend that *New Mexico* "adopted a narrow construction of the reserved rights doctrine," Appellants' Br. 20, the Supreme Court said that it had "repeatedly" asked the same questions "each time" it examined federal reserved water rights. *New Mexico*, 438 U.S. at 700. The Supreme Court plainly did not share the Water Districts' view that *New Mexico* marked a stark departure from decades of precedent.

New Mexico did clarify that water is reserved only for the purposes for which a reservation is established. *See id.* at 700-02; *Adair*, 723 F.2d at 1408 ("*New Mexico* … clarified the scope of the reserved water rights doctrine.");

Walton, 647 F.2d at 47. It is important to bear in mind, however, the context in which the Supreme Court made this clarification. *New Mexico* addressed the quantification of federal reserved water rights for the Gila National Forest, a statutorily created, non-Indian reservation. *See* 437 U.S. at 705-11. The Court's opinion included a detailed review of the relevant statutory language and legislative history, as well as subsequently enacted statutes, showing that Congress created the national forests for specific, limited purposes. *Id.* It is certainly reasonable to conclude, as *New Mexico* did, that where Congress enumerates specific purposes for a federal reservation, it intends to reserve water only for those purposes, and not for others. *Id.* at 716. This is at most a minor evolution of the federal reserved water rights doctrine, however; it does not substantially revise a long settled body of law.

Relying on their overstatement of *New Mexico*'s holding, the Water Districts argue that the district court committed reversible error by failing to apply a *New Mexico*-based distinction between primary and secondary reservation purposes in determining the existence of Agua Caliente's reserved water right. Appellants' Br. 24-28. This is incorrect for at least two reasons.

First, and contrary to the Water Districts' assertion, *New Mexico* and its primary/secondary purpose distinction addressed the quantification of a right previously declared to exist, as opposed to the existence of a federal reserved right.

In *New Mexico*, prior case law had determined "that the United States had reserved water rights in 'quantities reasonably necessary to fulfill the purposes of the Gila National Forest.'" *Mimbres Val. Irr. Co. v. Salopek*, 564 P.2d 615, 616-17 (N.M. 1977), *aff'd sub nom United States v. New Mexico*, 438 U.S. 696 (1978) (quoting 376 U.S. 340, 350 (1964)). The Gila National Forest's reserved right to some amount of water being settled, *New Mexico* examined the Forest's purposes to determine the amount of water reserved – just as the district court indicated it will do in Phase 3 of this case. ER at 11. Rather than constituting reversible error, then, the district court's decision to refrain from delving more deeply into the purposes of the Reservation until the quantification phase mirrors what transpired in *New Mexico*.

Second, even if *New Mexico*'s primary/secondary purpose distinction was relevant to the existence of federal reserved water rights, this Court has recognized that it is "not directly applicable to *Winters* doctrine rights on Indian reservations." *Adair*, 723 F.2d at 1408; *see also Confederated Salish*, 712 P.2d at 767; Cohen § 19.03[4] at 1217 ("The significant differences between Indian reservations and federal reserved lands indicate that the distinction should not apply."); W. Canby, *American Indian Law* 245-46 (1981). This is because "[t]he specific purposes of an Indian reservation were often unarticulated," and "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed" with an eye

toward the Indians' "need to maintain themselves under changed circumstances." *Walton*, 647 F.2d at 47. Courts addressing Indian reserved rights can make use of *New Mexico*'s "useful guidelines," but they are not strictly beholden to a primary/secondary purpose quantification test that is often unworkable in the Indian reservation context. *Adair*, 723 F.2d at 1408.

Walton provides a paradigmatic example of the proper approach. A post-*New Mexico* decision, *Walton* did not analyze and distinguish primary and secondary purposes in determining whether the United States reserved water for an Indian reservation. *See Adair*, 723 F.2d at 1410 (noting that the *Walton* Court derived the Colville Reservation's dual homeland and fishing purposes from "a one-paragraph Executive Order that stated only that the land would be set apart as a reservation for said Indians" (internal quotation omitted)). Instead, it recognized what is self-evident – when land, particularly land in a hot, arid region, is set aside as a permanent place for people to live, it needs water. *See Arizona*, 373 U.S. at 599; *Winters*, 207 U.S. at 576; *Walton*, 647 F.2d at 47-48.[8]

As discussed *supra*, the district court's analysis – particularly its assessment of the purpose of the Agua Caliente Reservation and the Reservation's need for water – followed *Walton*. It noted that the executive orders establishing the

[8] While *Walton* stated that it would "apply the *New Mexico* test," it did not apply the primary/secondary distinction on which the Water Districts rely. *Walton*, 647 F.2d at 47-48.

Reservation, like the one in *Walton*, were "terse" and did not offer great detail about the Reservation's specific purposes. ER at 8. Nevertheless, heeding *Walton*'s admonition that "'[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed,'" the court could "safely state that the reservation implied at least some water use." ER 8 (quoting *Walton*, 647 F.2d at 47). Because water is necessary to fulfill the purpose of the Reservation, the court concluded that a federal reserved water right exists as a matter of law. *See New Mexico*, 438 U.S. at 701; *Arizona*, 373 U.S. at 599-600; *Walton*, 647 F.2d at 47. These holdings flow directly from, and represent a proper application of, *Winters*, *Arizona*, and *Walton*.

Pursuant to the parties' stipulation, the only issues that the district court resolved in Phase 1 were (1) whether the United States reserved *any* water for Agua Caliente and (2) whether the United States can reserve groundwater. If the answer to both of these questions is affirmative – as the district court held – then Agua Caliente has a reserved right to some amount of water that includes groundwater, and the quantification of that right will be determined in Phase 3. The district court noted that the Water Districts remain free to present their arguments for limitations on Agua Caliente's federal reserved water right at the proper time; it merely found those arguments irrelevant to the narrow questions regarding the existence of the right that the parties agreed to litigate in Phase 1. *See* ER 11 n.7.

Its analysis and holdings are squarely in line with Ninth Circuit and Supreme Court precedent and should be affirmed.

B. The potential existence of state law water rights does not obviate Agua Caliente's federal reserved water right.

The Water Districts also argue that a reserved water right is unnecessary, and therefore does not exist under *New Mexico*, because Agua Caliente allegedly can satisfy its water needs through state law water rights. Once again, the Water Districts misstate the critical *Winters* inquiry by arguing that the Agua Caliente Reservation does not need a reserved water right, as opposed to addressing the question of whether the Reservation needs water. They further misunderstand the fundamental nature of federal reserved water rights.[9]

When the United States establishes an Indian reservation, it contemporaneously reserves and immediately acquires a vested property right in all unappropriated water necessary to sustain the reservation and accomplish its purposes then and in the future. The federal property right in reserved water does not dissipate decades later due to changes in state law, the availability of water from another source, or any other post-establishment development. In *Winters*, for example, the Supreme Court had no difficulty declaring a federal reserved right to

[9] Agua Caliente addressed the Water Districts' misstatement of the relevant *Winters* inquiry in Part III, A.1, *supra*. The Water Districts' arguments based on Agua Caliente's alleged state law water rights are particularly dependent on that mischaracterization.

the waters of the Milk River despite off-reservation water users' contention that springs and streams within the reservation could meet the Indians' water needs. *See* 207 U.S. at 573; *see also Gila River*, 989 P.2d at 747-48 (holding that a right to pump groundwater under state law did not obviate a federal reserved right). And in *Walton*, this Court held that a federal reserved water right persists even where "subsequent acts mak[e] the historically intended use of the water unnecessary." 647 F.2d at 48.

Moreover, federal reserved water rights have several characteristics that make them superior to the state law rights identified by the Water Districts. The United States' federal property right in reserved water can only be diminished or limited by Congress. *See Walton*, 647 F.2d at 50-51; *see also Arizona*, 373 U.S. at 600; *Cappaert*, 426 U.S. at 138. This holds true even where the right goes unused, where intervening developments render the intended use of the reserved water impossible or unnecessary, or where surrounding landowners put the water to their own beneficial uses. *See Walton*, 647 F.2d at 48; *see also Winters*, 207 U.S. at 569-70; *Adair*, 723 F.2d at 1415 n.24 & 1416; *Confederated Salish*, 712 P.2d at 764-65. A federal reserved water right is not subject to state law, and federal reserved rights may exist and be put to uses that are not recognized under state law. *See Adair*, 723 F.2d at 1410-11 & 1411 n.19 ("The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state prior

appropriation law is not controlling as federal law provides an unequivocal source of such rights."); *see also Cappaert*, 426 U.S. at 145; *Walton*, 647 F.2d at 48-49. The state law rights that the Water Districts contend obviate the need for and existence of Agua Caliente's *Winters* right share few if any of these characteristics.

1. State law correlative rights do not obviate Winters rights.

The Water Districts first argue that Agua Caliente does not need, and therefore does not have, a federal reserved water right because it has a correlative right to use groundwater under California law. Such a right is far inferior to a *Winters* right. Correlative rights are variable, unreliable, and subject to reduction or limitation to accommodate other right holders' use of water. *See City of Barstow v. Mohave Water Agency*, 5 P.3d 853, 863 (Cal. 2000); *Katz v. Walkinshaw*, 141 Cal. 116, 146 (1902) ("Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right … are to be settled by giving to each a fair and just proportion."). The Water Districts concede that a correlative rights holder can be prevented from putting water to a beneficial use on its land if state authorities deem another, competing use more "reasonable." Appellants' Br. 62-63.

State law correlative rights thus are subject to limitation, both as to the quantity and use of water, based on state law principles and administrative determinations. In essence, they involve equitable balancing of competing water

uses. As the Supreme Court and Ninth Circuit have repeatedly indicated, however, "balancing of equities is not the test" for determining the existence, scope, and use of federal reserved water rights. *Cappaert*, 426 U.S. at 139 n.4; *see also Arizona*, 373 U.S. at 597 (rejecting the application of equitable apportionment to Indian reservations' *Winters* rights); *Walton*, 752 F.2d at 405 (*Winters* rights "arise without regard to equities that may favor competing water users"); *see also* ER 10. Unlike federal reserved rights, correlative rights can be lost through adverse possession. *See City of Barstow*, 5 P.3d at 863, 868. Correlative rights simply are not an adequate substitute for federal reserved water rights.

The Water Districts' argument is further undermined by the fact that correlative rights did not exist until 1902, decades after the United States established the Agua Caliente Reservation and reserved water for it. *See Walkinshaw*, 141 Cal. 116. The Water Districts in essence contend that California Supreme Court divested the United States and Agua Caliente of a vested federal property right by creating state law correlative rights. That is impossible, as settled law provides that Indian rights can only be diminished through express federal legislation. *See, e.g.*, *Adair*, 723 F.2d at 1411 n.19; *Walton*, 647 F.2d at 50 ("[T]ermination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent ….").

The correlative rights doctrine's creation by judicial edict highlights yet another problem with the Water Districts' argument. State water laws can and do change over time. They changed when the California Supreme Court elucidated the correlative rights doctrine, and they could change again in the future, with unpredictable effects. Such uncertainty and variability is wholly inconsistent with the notion of a permanent, vested federal property right in reserved water that forms the core of the *Winters* doctrine.

The Water Districts' argument resembles one made in *Gila River*, where state parties argued that a reserved right to groundwater was unnecessary because Arizona law provided all overlying landowners "an equal right to pump as much groundwater as they can put to reasonable use upon their land." *Gila River*, 989 P.2d at 747-48. The *en banc* Arizona Supreme Court rejected this assertion on the grounds that "a theoretical equal right to pump groundwater" did not provide the same protection as a federal reserved right. *Id.* at 748. In particular, the Court noted that the state law overlying right would not prevent the depletion of the aquifer by off-reservation pumpers. *Id.* That this exact scenario has been ongoing for years in this case further underscores the inadequacy of California state law for protecting Agua Caliente's federal reserved rights.

A correlative right is variable and uncertain, subject to limitation and control under state law and, in some cases, subject to loss through competing prescriptive

uses. Such a right in no way ensures permanent access to the water necessary to meet the Agua Caliente Reservation's needs now and in the future. It is significantly different from and inferior to the fully vested federal property right to a specific quantum of reserved water that the *Winters* doctrine provides, and the district court correctly rejected the notion that it could substitute for or obviate Agua Caliente's *Winters* rights.

2. The state law right decreed in the Whitewater River Adjudication does not obviate Agua Caliente's federal reserved right.

The Water Districts' assertion that Agua Caliente's federal reserved right is obviated by an alleged state law decreed right to certain water from the Whitewater River shares many of the same flaws as their correlative rights argument. It relies on the same misstatement of the *Winters* inquiry, tacitly conceding that the Agua Caliente Reservation requires water while arguing that a "reserved right to groundwater is not necessary." Appellants' Br. 56. It relies on the same misguided notion that a subsequently recognized state law right – in this case, a right decreed by a state administrative agency and a court that lacked jurisdiction over the United States' water rights, *see id.* at 55, and over groundwater rights generally, *see* SER 256-259 – could abolish the United States' reserved water right and replace it with something objectively inferior. These arguments are untenable for reasons previously discussed. *See also Ahtanum*, 236 F.2d at 328 ("It is too clear to require

exposition that the state water right decree could have no effect upon the rights of the United States.").

The Water Districts also disingenuously imply that the "Suggestion" of rights submitted by the United States in the Whitewater adjudication was intended to address the full water rights of the Agua Caliente Reservation. While the Reservation comprises more the 31,000 acres, the Suggestion states that the water in question would irrigate only about 360 acres. *See* ER 120, 128-133. Furthermore, in accordance with a stipulation by the parties involved, the Whitewater Adjudication excluded groundwater rights. *See* SER 256-259.[10]

There is no sound basis for contending that an alleged state law right, decreed by a state court that lacked jurisdiction over federal water rights or state groundwater rights and providing for the irrigation of less than two percent of the Agua Caliente Reservation, somehow replaces or obviates the federal reservation of all water necessary to accomplish the purposes of the entire Agua Caliente Reservation indefinitely. The Water Districts' argument is specious, and the district court rightly rejected it. ER 10.

[10] The Water Districts' citation of *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 245 P.3d 1145 (Nev. 2010), is misleading. While the Nevada Supreme Court did hold that a "previous adjudication" barred a tribe from subsequently asserting a reserved right to groundwater, that previous adjudication was a federal case brought by the United States to adjudicate "the full implied-reservation-of-water-rights that were due the Pyramid Lake Indian Reservation." *Id.* at 1147-48 (internal quotations omitted). The "previous adjudication" at issue in *Pyramid Lake* is hardly comparable to the Whitewater River adjudication.

C. The Water Districts' remaining arguments are meritless.

1. Agua Caliente's historic groundwater use and present-day groundwater production are irrelevant to the existence of its federal reserved water right.

Once again invoking their incorrect characterization of the *Winters* inquiry, the Water Districts argue that a reserved right to water is not necessary to the Agua Caliente Reservation because (1) the Agua Caliente people were not using groundwater when the United States established the reservation and (2) Agua Caliente does not currently produce groundwater. *See* Appellants' Br. 49-54. These arguments are unavailing.

Agua Caliente's use of groundwater at the time of the reservation's establishment is wholly irrelevant to the existence of a federal reserved right.[11] *Winters* rights are not intended to freeze a tribe in time, reserving only the amount and type of water in use when the United States establishes a reservation. On the contrary, *Winters* rights are "intended to satisfy the future as well as the present needs of the Indian Reservations." *Arizona*, 373 U.S. at 600; *see also Walton*, 647 F.2d at 47 ("[W]ater was reserved to meet future as well as present needs …."); *Ahtanum*, 236 F.2d at 326; *Gila River*, 989 P.2d at 748. Particularly in the context of Indian tribes, who were commonly relocated onto reservations, the reservation

[11] Agua Caliente disputes the factual assertion that it made no use of groundwater at the time that the United States established the Agua Caliente Reservation, *see* Factual Background, *supra*, but the Water Districts' argument fails as a matter of law regardless.

of water to meet future needs necessarily contemplates the utilization of new water sources. "Any other construction of the rule in the *Winters* case would be wholly unreasonable." *Ahtanum*, 236 F.2d at 326. The Water Districts' argument is just that.

The Water Districts also miss the mark in asserting that Agua Caliente cannot have a reserved right because it does not currently produce groundwater within its reservation. The United States reserved water for the Agua Caliente Reservation when it established the Reservation in the 1870s. Agua Caliente's current production of groundwater, *vel non*, does not affect the existence of Agua Caliente's federal reserved water right. That right was fixed and fully vested the moment that the United States established the Reservation, and it cannot be lost by nonuse as a matter of law. *See, e.g.*, *Colville*, 647 F.2d at 51 (holding that a federal reserved water right cannot be lost through nonuse); *see also Adair*, 723 F.2d at 1416 (a reserved water right "need not be exercised immediately"); *Confederated Salish*, 712 P.2d at 765 ("Most reservations have used only a fraction of their reserved water.") Moreover, it is undisputed that the Agua Caliente Reservation requires water and the overwhelming majority of water used on the Reservation is

groundwater. *See* SER 217-230. Groundwater plainly is necessary for the Agua Caliente Reservation regardless of whether Agua Caliente itself is pumping it.[12]

2. Potential conflicts with state law or water use by other landowners do not destroy Agua Caliente's federal reserved water right.

The Water Districts' brief closes with a series of arguments bemoaning the effects that Agua Caliente's federal reserved groundwater right allegedly will have on the State of California and off-reservation water users. These arguments have been made and rejected repeatedly in cases involving federal reserved water rights. They are unpersuasive, irrelevant, and directly contradict binding precedent.

The Water Districts first contend that the Court should deny Agua Caliente's reserved right because it would be exempt from California's requirement that all water in the state be put to reasonable and beneficial use. Appellants' Br. at 60-65. It is true that Agua Caliente's reserved water rights and use of those rights are not subject to California's rules. Reserved rights are not controlled by state law, and "permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland

[12] The Water Districts' allegation that Agua Caliente "is asserting a mere theoretical reserved right to groundwater, untethered to the actual needs and circumstances of its reservation" is specious. Appellant's Br. 54. The purpose of this lawsuit is to declare and quantify Agua Caliente's vested federal property right in reserved water necessary to accomplish the Reservation's purpose of providing a permanent home to the Agua Caliente people. The right that Agua Caliente asserts is a concrete, preexisting, need-based right; this litigation simply will quantify the right and eliminate any surrounding uncertainty.

for the survival and growth of the Indians." *Walton*, 647 F.2d at 49; *see also New Mexico*, 438 U.S. at 715 ("[T]he reserved rights doctrine … is an exception to Congress' explicit deference to state water law in other areas." (internal quotation omitted)); *Cappaert*, 426 U.S. at 145 ("Federal water rights are not dependent upon state law or state procedures."); *Adair*, 723 F.2d at 1411 n.19; *Gila River*, 35 P.3d at 71 ("Federal water rights are different from those acquired under state law."); Cohen, § 19.01[2] at 1206-07.

That reserved water rights are not subject to state laws, however, does not justify ignoring those rights. *See id.*; *Gila River*, 989 P.2d at 747 ("It is apparent from the case law that we may not withhold application of the reserved rights doctrine purely out of deference to state law."). If *Winters* rights could be disregarded merely because they are exempt from state law, they would not exist. The Water Districts' argument is irreconcilable with settled federal law.

Moreover, the contention that paramount, federally reserved rights to groundwater are irreconcilable with California law simply does not withstand scrutiny. California already recognizes pueblo rights, the holders of which have groundwater rights paramount to those of other overlying landowners, and it is generally accepted that federal reserved rights can coexist with riparian-style rights

such as California's correlative right to groundwater.[13] *See generally City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975); Cohen § 19.01[2] at 1206-07.

The Water Districts also argue that Agua Caliente's reserved rights should be disregarded because their declaration could limit other parties' groundwater use. Appellants' Br. 65-66. This is a common complaint, and has been since *Winters*, where recognition of the Fort Belknap Reservation's federal reserved water right imperiled off-reservation settlements consisting of "thousands of people." 207 U.S. at 569-70. Courts, treaties, and statutes have repeatedly affirmed the existence of federal reserved water rights despite such alleged concerns, and this case should be no different. *See* Cohen, § 19.03[1] at 1211. Possible limitation of junior, inferior rights is not a basis for denying the existence of a federal reserved water right.

The Supreme Court and the Ninth Circuit have repeatedly rejected the notion that courts should take into account the effect of a federal reserved right on junior, off-reservation water users. In *Walker River*, this Court rejected an estoppel argument by parties who had expended substantial resources reclaiming lands near the Walker River Indian Reservation, declaring that "settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below." 104 F.2d at

[13] While pueblo rights are not identical to federal reserved rights, they show that senior, paramount rights to groundwater are not unworkable in California.

339. In *Cappaert*, the Supreme Court emphasized that federal reserved water rights cases "do not analyze the doctrine in terms of a balancing test." 426 U.S. at 138. And this Court recognized in *Walton* that "open-ended water rights are a growing source of conflict and uncertainty in the West. Until they are determined, *state-created water rights cannot be relied on by property owners*." 647 F.2d at 48 (emphasis added).

Concomitantly with its acknowledgement that open-ended, reserved water rights are problematic for state law rights holders, the *Walton* court declared that "[r]esolution of the problem is found in quantifying reserved water rights, not in limiting their use." 647 F.2d at 48. The same holds true here. By bringing this lawsuit, Agua Caliente has followed *Walton*'s directive. It seeks the quantification of its federal reserved right and an end to any associated uncertainty, both for itself and other water users. The Water Districts offer no valid reason why Agua Caliente is not entitled to the relief it seeks.

CONCLUSION

The United States reserved water, including groundwater, for Agua Caliente when it established the Agua Caliente Reservation 140 years ago. While the precise quantum of Agua Caliente's federal reserved right remains to be determined, the right's existence is unquestionable. The court below addressed narrow, threshold legal questions, and it decided them in accordance with the

settled precedent of the Supreme Court, the Ninth Circuit, and the overwhelming majority of persuasive authority.

The Water Districts ask this Court to radically alter the *Winters* doctrine and to apply it in an unprecedented fashion. They ask it to determine that the United States established an Indian reservation – a place intended to serve as a permanent home for Indian people – without reserving the water necessary to sustain its inhabitants. No court has ever so held. They alternatively ask the Court to determine that if the United States did reserve water for Agua Caliente, subsequent developments in state law and changing circumstances have obviated any federal reserved right. No court has ever done so. This Court should not be the first. Instead, it should affirm the existence of Agua Caliente's federal reserved right to groundwater and remand this case to the district court to proceed with Phases 2 and 3 of the litigation.

Respectfully submitted this 12th day of February, 2016.

s/ Catherine F. Munson
Catherine F. Munson
Kilpatrick Townsend & Stockton, LLP
607 14th Street N.W., Suite 900
Washington, D.C. 20005
Tel: (202) 824-1435
cmunson@kilpatricktownsend.com

Steven C. Moore
Heather Whiteman Runs Him
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel: (303) 447-8760
smoore@narf.org
heatherw@narf.org

Adam H. Charnes
Kilpatrick Townsend & Stockton, LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Tel: (214) 922-7106
acharnes@kilpatricktownsed.com

Mark H. Reeves
Kilpatrick Townsend & Stockton, LLP
Enterprise Mill, Suite 230
1450 Greene Street
Augusta, GA 30901
Tel: (706) 823-4206
mreeves@kilpatricktownsed.com

Attorney for Appellee-Plaintiff
Agua Caliente Band of Cahuilla Indians

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with 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 proportionally spaced typeface using Microsoft Word 2010's Times New Roman 14-point font.

Dated this 12th day of February, 2016.

s/ Catherine F. Munson
Catherine F. Munson

Attorney for Appellee-Plaintiff
Agua Caliente Band of Cahuilla Indians

STATEMENT OF RELATED CASES

There are no known related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellee Agua Caliente Band of Cahuilla Indians 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 February 12, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, a true and correct copy of the Brief of Appellee Agua Caliente Band of Cahuilla Indians was also sent by United States mail, first-class postage prepaid, to each of the following:

Roderick E. Walston
Michael T. Riddell
Steven G. Martin
Best Best & Krieger LLP
2001 N. Main Street, Suite 390
Walnut Creek, CA 94596

Steven B. Abbott
Gerald D. Shoaf
Julianna K. Tillquist
Redwine and Sherrill
1950 Market Street
Riverside, CA 92501-1704

Elizabeth Ann Peterson, Attorney
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795

s/ Catherine F. Munson
Catherine F. Munson