No. 15-55896

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Agua Caliente Band of Cahuilla Indians,
Appellee and Plaintiff,
v.
Coachella Valley Water District, *et al*., and Desert Water Agency, *et al.,*
Appellants and Defendants.

United States of America,
Appellee and Plaintiff-Intervenor,
v.
Coachella Valley Water District, *et al*., and Desert Water Agency, *et al.,*
Appellants and Defendants.

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

JOINT REPLY BRIEF OF APPELLANTS COACHELLA VALLEY WATER DISTRICT, *ET AL.*, AND DESERT WATER AGENCY, *ET AL.*

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ARGUMENT[1]

I. IN *UNITED STATES v. NEW MEXICO*, THE SUPREME COURT ESTABLISHED A NECESSITY TEST FOR DETERMINING WHETHER A FEDERAL RESERVED WATER RIGHT IMPLIEDLY EXISTS, WHICH APPLIES TO THE TRIBE'S RESERVED RIGHT CLAIM IN GROUNDWATER.

A. *New Mexico*'s Necessity Test Applies in Determining Whether a Reserved Right Impliedly Exists.

This appeal raises the question whether the Supreme Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), requires a determination of whether a federal reserved right impliedly exists before quantifying the right, or instead whether *New Mexico* applies only in quantifying the right. *New Mexico* held that water is reserved only as "necessary" to fulfill the "very purposes," *i.e.*, the primary purposes, of federal reserved lands and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. The Water Agencies argue that the *New Mexico* test—which this brief will refer to as the necessity test—applies in determining whether a reserved right impliedly exists and not just in quantifying the right. Wat. Ag. Br. 20-23.

[1] As used in this brief, "Tribe Br." refers to the brief of the Agua Caliente Band of Cahuilla Indians ("Tribe"); "U.S. Br." to the United States' brief; "Wat. Ag. Br." to the brief of appellants Coachella Valley Water District and Desert Water Agency (collectively "Water Agencies"); "Law Pr. Br." to the *amicus* brief of the Law Professors; and "Tr. Ch. Br." to the *amicus* brief of the Southern California Tribal Chairmen's Association, *et al*. ("Tribal Chairmen").

Appellees Tribe and the United States and the *amici* argue, as the district court held, ER 11, that *New Mexico*'s necessity test applies only in quantifying a reserved right and not in determining whether it exists. Tribe Br. 23-28, 36, 41-42; U.S. Br. 17-22, 27-28; Law Pr. Br. 2-3. They argue that a federal reservation of lands, itself, automatically includes the reservation of a water right, and *New Mexico* is relevant only in determining the amount of water necessary to satisfy the right. *Id.*[2]

[2] The Tribe and the United States argue, semantically, that whether a federal water right is reserved depends on whether "water" is necessary for reservation purposes, not whether the "right" is necessary. Tribe Br. 10; U.S. Br. 2. The distinction between the "water" and the "right" is not relevant or helpful in determining whether the Tribe has a reserved right in groundwater. If the need for "water" alone triggered a reserved right, then every Indian reservation, and indeed every federal land reservation, would have a reserved right, because "water" is always necessary for reservation purposes. In *New Mexico*, however, the Supreme Court held that whether reserved rights exist depends on additional factors, namely whether the claimed "right" is necessary to satisfy the "primary" reservation purpose and prevent this purpose from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. The nomenclature of the reserved *rights* doctrine is that the "right" is reserved, not the "water." The Supreme Court has used the words "water" and "right" interchangeably in describing reserved water rights, thus indicating that the distinction between the words is not material. *New Mexico*, 438 U.S. at 700 ("Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water *right* and the specific purposes for which the land was reserved, and concluded that without the *water* the purposes of the reservation would be entirely defeated.") (emphasis added); *compare Cappaert v. United States*, 426 U.S. 128, 138 (1976) ("the Government, by implication, reserves appurtenant *water* …."), *with id*. at 139 ("[W]hen the Federal Government reserves land, by implication it reserves *water rights* ….") (emphasis added).

The appellees' and *amici*'s argument misconstrues *New Mexico*. There, the Supreme Court stated that it has "*applied*" the reserved rights doctrine only where the Court concluded that "without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700 (emphasis added). Since the Court has "applied" the reserved rights doctrine only under the circumstances described by the Court, these circumstances are relevant in determining whether the right impliedly exists. The Court stated that the issue in the case was "what quantity of water, *if any*," the United States had reserved for the national forest in that case. *Id*. at 698 (emphasis added). Since the issue was whether "any" water had been reserved, the Court plainly addressed whether the right was impliedly reserved and not just the amount of water necessary to satisfy the right.

More significantly, *New Mexico* applied its necessity test in determining whether the United States had a reserved water right in that case, contrary to the United States' argument that *New Mexico* only determined the "amount of water" necessary to satisfy the United States' reserved right. U.S. Br. 20-22, 27-29. The Supreme Court in *New Mexico* stated that the primary purposes of the Organic Administration Act of 1897, 16 U.S.C. §§ 473, *et seq*., which authorized the reservation of national forest lands, were to conserve water flows

and provide a continuous supply of timber, but not to provide water for aesthetic, environmental, recreational or wildlife-preservation purposes; therefore, the Court held, the U.S. Forest Service had a reserved right for the former purposes, which were primary, but not for the latter purposes, which were secondary. *New Mexico*, 438 U.S. at 707-717. The Court held that the United States must acquire water for secondary purposes under state law, in the "the same manner as any other public or private appropriator." *Id*. at 702.[3] Since *New Mexico* held that the U.S. Forest Service had a reserved right for some purposes but not for other purposes, depending on whether the purposes were primary or secondary, *New Mexico* made clear that a federal reservation of land does not automatically reserve a water right, and that whether a water right is reserved depends on whether the water is necessary for primary reservation purposes.

Other case authority also demonstrates that *New Mexico* applies in determining whether a reserved right impliedly exists. In *Cappaert v. United States*, 426 U.S. 128, 139 (1976), the Supreme Court stated earlier that "[i]n

[3] California law authorizes the United States, as a riparian user, to use water for secondary reservation purposes on reserved lands. *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 467 (1988) (holding that United States has riparian rights under California law on reserved lands).

determining whether *there is* a federal reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water," and that "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation itself was created." (Emphasis added.) In *John v. United States*, 720 F.3d 1214 (9th Cir. 2013), the Ninth Circuit stated that *New Mexico* "*rejected a federal claim to water rights* for 'aesthetic, environmental, recreational, or wildlife-preservation purposes,' because those were not the primary purposes for which the national forest lands at issue had originally been reserved." *John v. United States*, 720 F.3d 1214, 1226 (9th Cir. 2013) (emphasis added). The Ninth Circuit in *John* also stated that reserved rights "*exist* to the extent that the waters are necessary to fulfill the primary purposes of the reservation." *Id*. at 1231 (emphasis added). In a pre-*New Mexico* case, the Ninth Circuit held that whether an Indian tribe has a reserved right depends on the government's implied "intention" in establishing the reservation, and that in determining the "intention" the court must "tak[e] account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved." *United States v. Walker River Irr. Dist*., 104 F.2d 334, 336, 338 (9th Cir. 1939). *Cappaert, John* and *Walker River* make clear, as

New Mexico itself made clear, that a federal reservation of land does not automatically reserve a water right, and that whether a water right is reserved depends on whether the right is necessary for primary reservation purposes.

The Tribe and the United States argue that the Water Agencies' argument would require the courts to identify each purpose of a federal land reservation to determine whether a water right is reserved for each purpose. Tribe Br. 36; U.S. Br. 28-29. In fact, that is precisely what *New Mexico* held that the courts must do, and what *New Mexico* did in that case. *New Mexico*, 438 U.S. at 700, 702.

The United States argues that "no court has based the determination of whether water was reserved in the first instance on an analysis of the water needs of the reservation or the particular purposes for which it was created." U.S. Br. 16. On the contrary, the Ninth Circuit has held that whether water is impliedly reserved for an Indian reservation depends on an analysis of the Indian tribe's needs and the purposes of the reservation. *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983) (determining that Indian tribe's right to hunt, fish and gather was a "primary purpose" of the reservation, and thus tribe had reserved right for such purpose under *New Mexico*); *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 338 (9th Cir. 1939) (stating that court must "tak[e] account of the circumstances, the situation and needs of the Indians

and the purpose for which the lands had been reserved" in determining whether Indian tribe had reserved right).[4]

The Tribe argues that the Ninth Circuit, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), applied *New Mexico* only in quantifying the Colville Indian tribe's reserved right and not in determining whether the right existed, thus indicating that *New Mexico* does not apply in determining whether a reserved right exists. Tribe Br. 43. In fact, no issue was raised in *Walton* concerning whether the tribe had a reserved water right. The defendants argued only that the allottees on the tribe's reservation, including non-Indian purchasers of the allotments, did not acquire a proportionate share of the tribe's reserved right in the surface waters of No Name Creek, and defendant-

[4] The United States also cites the Ninth Circuit's decision in *United States v. Preston*, 352 F.2d 352 (9th Cir. 1965), which held that the complaint had failed to state facts that would give the district court jurisdiction, and stated, in dictum, that *Winters* had held that "as soon as a reservation by Indians has been established, there is an implied reservation of rights to the use of the waters …." *Preston*, 352 F.2d at 357; U.S. Br. 33. First, the statement is pure dictum because the Court ordered the action, which was for recovery of attorneys fees, dismissed for want of jurisdiction, and was not a merits determination of a water rights adjudication. Second, since *Preston* was decided before the Supreme Court's decisions in *Cappaert* and *New Mexico*, *Preston* did not take into account the Supreme Court's modern jurisprudence concerning the reserved rights doctrine as established in *Cappaert* and *New Mexico*. The dictum would be inconsistent with *New Mexico* if it is read to suggest that a water right is automatically reserved as soon as a reservation is established.

intervenor State of Washington conceded that the tribe had a reserved right and argued only that it had jurisdiction to prevent the use of waters "in excess of the amounts" of the reserved right. *See* Opening Br. of Boyd Walton, *et al.,* at 2, 7-47, and Opening Br. of State of Washington at 18-19, *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).[5] Thus, *Walton* does not indicate that *New Mexico*'s necessity test is inapplicable in determining whether a reserved right exists.

B. *New Mexico* Narrowly Construed the Reserved Rights Doctrine Because It Conflicts with Congress' Deference to State Water Law.

The Water Agencies argue that *New Mexico* narrowly construed the reserved rights doctrine because the doctrine conflicts with Congress' policy of deference to state water law, and therefore Congress' deference to state water law applies in determining whether the reserved rights doctrine extends to groundwater. Wat. Ag. Br. 17-20.

The Tribe and the United States argue that the reserved rights doctrine is an "exception" to Congress' deference to state water law, and thus Congress' deference to state water law is irrelevant concerning whether the reserved rights

[5] The briefs are included in the Addendum, as Exhibit 1.

doctrine applies to groundwater. Tribe Br. 17; U.S. Br. 23. Obviously the reserved rights doctrine is an exception to Congress' deference to state water law, as *New Mexico* itself explained. *New Mexico*, 438 U.S. at 715. Nonetheless, *New Mexico* expressly considered Congress' deference to state water law in narrowly construing the reserved rights doctrine, and in distinguishing between primary and secondary reservation purposes. *New Mexico*, 438 U.S. at 700-702.[6] Thus, even though the reserved rights doctrine is an exception to Congress' deference to state water law, Congress' deference is relevant in determining the scope of the doctrine, and in determining whether the doctrine extends to groundwater.

The Tribe and the United States argue that *New Mexico* did not adopt a "narrow construction" of the reserved rights doctrine, contrary to the Water Agencies' argument. Tribe Br. 40-41; U.S. Br. 22-23, 27. In fact, the Ninth Circuit has stated that *New Mexico* adopted a "narrow rule" of the reserved rights doctrine. *John v. United States*, 720 F.3d 1214, 1226 (9th Cir. 2013).

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[6] *New Mexico* stated that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law" [citation], but that "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water." *New Mexico*, 438 U.S. at 702.

The California Supreme Court has stated that *New Mexico* adopted a "narrow construction" of the doctrine because of the congressional policy "of deferring to state law." *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461 (1988).

C. *New Mexico*'s Narrow Construction of the Reserved Rights Doctrine Applies to Indian Reserved Rights Based on the *Winters* Doctrine.

The Tribe and the United States argue that—even assuming that *New Mexico*'s narrow construction of the reserved rights doctrine applies in determining whether a reserved water right exists—*New Mexico*'s narrow construction does not apply to Indian reserved rights based on the *Winters* doctrine, as the doctrine was established by the Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). Tribe Br. 42-44; U.S. Br. 20.

The Tribe's and the United States' argument is inconsistent with *New Mexico*, which cited and relied on *Winters* as the basis for its narrow construction of the reserved rights doctrine. *New Mexico* stated that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700.

In support of this statement, *New Mexico* cited its decision in *Winters*, which, *New Mexico* stated, had concluded that "without water to irrigate the lands," the Fort Belknap Reservation would be "practically valueless" and "[t]he purpose of the Reservation would thus be 'impaired or defeated.'" *Id*. at 700 n. 4 (brackets omitted), citing and quoting *Winters*, 207 U.S. at 577. Since *New Mexico* cited and relied on *Winters* for its narrow construction of the reserved rights doctrine, *New Mexico*'s narrow construction of the doctrine applies to Indian reserved rights based on the *Winters* doctrine.

The Tribe's and the United States' argument is also inconsistent with the Supreme Court's decision in *Cappaert v. United States*, 426 U.S. 128 (1976). In *Cappaert*, the Supreme Court stated that "[t]he [implied reservation of water rights] doctrine applies to *Indian reservations* and other federal enclaves, encompassing water rights in navigable and nonnavigable streams." *Cappaert*, 426 U.S. at 138 (emphasis added). Since the reserved rights doctrine applies to Indian reservations, *New Mexico*'s narrow construction of the doctrine applies to Indian reserved rights.

The Tribe's and the United States' argument is also inconsistent with the Ninth Circuit's decisions in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), and *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983),

both of which involved Indian reserved rights. In *Walton,* the Ninth Circuit, after describing *New Mexico*'s distinction between primary and secondary reservation purposes, stated that "[w]e apply the New Mexico test here." *Walton*, 647 F.2d at 47. In *Adair*, the Ninth Circuit stated that although *Cappaert* and *New Mexico* did not involve Indian reserved rights, *Cappaert* and *New Mexico* "establish[ed] several useful guidelines" in considering Indian reserved rights, one of which is that reserved water rights may be "implied" only where necessary to serve the "very purposes" of the reservation and not for "secondary use" on the reservation. *Adair*, 723 F.2d at 1408-1409, citing *New Mexico*, 438 U.S. at 702. *Adair* then applied *New Mexico* in holding that the Indian tribe's right to hunt, fish and gather was a "primary purpose" of the reservation, and that the tribe had a reserved right for this purpose. *Id.* at 1409.

Thus, *New Mexico*, *Cappaert*, *Walton* and *Adair* make clear that *New Mexico*'s narrow construction of the reserved rights doctrine applies to Indian reserved rights based on the *Winters* doctrine, and applies to the Tribe's reserved right claim here. Contrary to the Tribe's and the United States' hyperbolic assertion that the Water Agencies are arguing that *New Mexico* "abrogate[d] decades of precedent," Tribe Br. 40, "replaced" the *Winters* doctrine, U.S. Br. 23, and established a "new and different rule," U.S. Br. 19,

New Mexico simply clarified and narrowed the circumstances under which a water right is impliedly reserved under the *Winters* doctrine.

D. *New Mexico*'s Necessity Test Applies Notwithstanding that Indian Reservations Are Established as "Homelands" for Indian Tribes.

The Tribe and the United States argue that the Tribe's reserved rights claim is supported by the Ninth Circuit's statement in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), that the purpose of the Colville Indian tribe's reservation was to provide a "homeland" for the tribe and that this "homeland" purpose must be "liberally construed." *Walton*, 647 F.2d at 47; Tribe Br. 10-11, 24-26, 43-44; U.S. Br. 25-26.

Walton's "homeland" analysis does not support the Tribe's reserved right claim in groundwater, apart from the fact that *Walton* raised no issue concerning whether the reserved rights doctrine applies to groundwater. It is axiomatic that Indian reservations are established as "homelands" for Indian tribes and that their reservation purposes must be liberally construed, as *Walton* and other cases have held. Nonetheless, *New Mexico*'s necessity test still applies in determining whether an Indian tribe has a reserved right in water—or in this case groundwater—regardless of how liberally the "homeland" purposes are construed. As explained above, *New Mexico*, in narrowly construing the

reserved rights doctrine, cited and relied on *Winters* as the basis for its narrow construction of the doctrine. *New Mexico*, 438 U.S. at 700 n. 4. Thus, even though the Tribe's reservation was established as a "homeland"—as all Indian reservations are established—*New Mexico*'s narrow construction of the reserved rights doctrine still applies to the Tribe's reserved right claim.

E. The United States' Argument Is Inconsistent with Its Argument in Opposing the Certiorari Petition in *Wyoming v. United States*.

The Water Agencies asserted that the United States' argument—that *New Mexico* does not apply in determining whether a reserved right impliedly exists—is inconsistent with the United States' argument in its opposition to the State of Wyoming's petition for certiorari in *Wyoming v. United States* during the Supreme Court's 1988 term, which argued that *New Mexico* does not "limit[] the exercise of a federal reserved right once it has been determined that such a right exists," and that "New Mexico concerned only the issue of what circumstances are sufficient to give rise to a federal reserved right in the first place." Wat. Ag. Br. 27.

The United States asserts that its opposition to Wyoming's petition addressed only "the amount of water needed for 'primary' but not 'secondary' purposes," and did not address "whether *any* water rights were reserved." U.S.

Br. 30 (original emphasis). On the contrary, the plain language of the United States' argument in opposition to Wyoming's petition—that *New Mexico* "concerned only the issue of what circumstances are sufficient to give rise to a federal reserved right in the first place"—addressed whether a reserved right impliedly exists "in the first place," and had nothing to do with "the amount of water" necessary to satisfy an existing reserved right. The United States has simply changed its position from when it opposed Wyoming's petition.[7]

II. THE TRIBE'S CLAIMED RESERVED RIGHT IN GROUNDWATER DOES NOT MEET *NEW MEXICO*'S NECESSITY TEST AND DOES NOT IMPLIEDLY EXIST.

The Tribe and the United States have failed to produce any evidence, or point to any evidence in the record, demonstrating that the Tribe's claimed reserved right in groundwater is necessary for reservation purposes, as required by *New Mexico*. The Ninth Circuit has held, however, that a reserved right

[7] The Tribe and the *amici* argue that the Water Agencies are attempting to prematurely address the quantification issue at this stage of the litigation, rather than deferring the quantification issue until a later stage, assuming it is still germane. Tribe Br. 35-37; Law Pr. Br. 17. Their argument fails because it assumes the correctness of their argument that *New Mexico* applies only in quantifying a reserved right. This Court has granted interlocutory review of the issues raised in the Water Agencies' petition for interlocutory appeal, one of which is whether *New Mexico* applies in determining whether the Tribe has a reserved right. The Water Agencies are properly addressing the issues raised on this appeal, and are not attempting to prematurely address the quantification issue.

claimant must produce "evidence" indicating that the claimed reserved right is "necessary" for reservation purposes, and that a reserved right claim fails in the absence of such evidence. *United States v. Alpine Land & Reservoir Co*., 697 F.2d 851, 859 (9th Cir. 1983) (holding that United States does not have reserved rights for instream flows in a national forest because the United States' "evidence . . . fell far short of a demonstration that the instream flow was necessary to fulfillment of the purposes of the forest").

Apart from the Tribe's and the United States' failure to produce any evidence supporting their reserved right claim, the Water Agencies contend that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity test and does not impliedly exist for several reasons. Wat. Ag. Br. 35-59.

A. The Tribe Has a Correlative Right to Use Groundwater Under California Law for Primary Reservation Purposes.

First, the Water Agencies contend that the Tribe's claimed reserved right does not meet *New Mexico*'s necessity test because the Tribe has a correlative right to use groundwater under California law for its primary reservation purposes, and thus the Tribe's claimed reserved right is not necessary to fulfill these purposes and prevent them from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702; Wat. Ag. Br. 35-49. As the district court noted, the

question of "[w]hether *Winters* rights extend to groundwater, in light of California's correlative rights legal framework for groundwater allocation effectively controls the outcome of this case." ER 15.

The Tribe and the United States argue that the Tribe's correlative right under California law is irrelevant, because a federal reserved right is "not subject to state law," Tribe Br. 17; state law cannot "obviate" a reserved right, *id*. at 45, or "defeat" such a right, U.S. Br. 16; and state law "is preempted to the extent that state-law restrictions are inconsistent with federal law," *id*. at 42. Similarly, the *amici* argue that Indian reserved rights "trump" state law, Law Pr. Br. 1; that Indian reserved rights "are based on federal law that preempts state law pursuant to the Constitution's Supremacy Clause," *id*. at 14; and that the Water Agencies' argument would "subject tribal groundwater use to the exclusive control of state law," Tr. Ch. Br. 21, contrary to the "settled rule that Indian water rights are held under federal law and preempt any conflicting state law," *id*. at 5.

The Water Agencies do not contend that state law can override or defeat a federal reserved right, or that a state law that conflicts with a federal reserved right is not preempted under the Constitution's Supremacy Clause. Rather, the Water Agencies contend that a claimed reserved right does not impliedly exist

under *federal law* if it does not meet *New Mexico*'s necessity test, and that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity test for various reasons, particularly because the Tribe has a correlative right to use groundwater under California law. Wat. Ag. Br. 35-49. Thus, the Water Agencies' argument is not that state law defeats the Tribe's reserved right in groundwater, but that the Tribe does not have a reserved right in groundwater under federal law itself. The appellees' and *amici*'s argument mischaracterizes the Water Agencies' argument and rebut an argument that the Water Agencies do not make—a classic example of a straw man argument.

More broadly, the Tribe, the United States and the *amici* argue that state law plays no role regarding water rights on reserved federal lands. Tribe Br. 45-50; U.S. Br. 51-52; Law Pr. Br. 14. The United States, for example, argues that the United States has exclusive jurisdiction over federal lands under the Property Clause of the Constitution, art. IV, § 3, cl. 2, and thus "the content of state law is irrelevant concerning the existence of federal reserved rights." U.S. Br. 51-52. In *New Mexico*, however, the Supreme Court held that as a result of Congress' policy of deference to state water law, state water laws apply on federal reserved lands for uses not satisfied by a reserved right for primary reservation purposes. *New Mexico*, 438 U.S. at 702 (holding that where water is

necessary for a "secondary use" of the reservation, the United States must "acquire water in the same manner as any other public or private appropriator"). Therefore, state water laws play a significant role on federal reserved lands, contrary to the appellees' and *amici*'s arguments. *Accord, California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935) (holding that congressional land statutes "sever" water from public domain lands, thus allowing states to regulate water use on such lands); *California v. United States*, 438 U.S. 645, 662-663 (1978) (holding that federal reclamation projects must comply with state water rights laws); Wat. Ag. Br. 17-20.

The Tribe argues that its claimed reserved right is "superior" to its correlative right under California law because a reserved right cannot be lost by nonuse, Tribe Br. 46; can be put to uses not recognized under state law, *id*. at 46-47; and is not subject to state law limitations relating to quality and use of water, *id*. at 47. Under *New Mexico*, however, whether a water right is impliedly reserved depends on whether the right is necessary to fulfill the primary reservation purposes, *New Mexico*, 438 U.S. at 700, 702, and not on whether the reserved right is superior to a state-based right. If a claimed reserved right is not necessary to fulfill the primary reservation purposes, the

right does not impliedly exist under *New Mexico* regardless of whether it is superior to a state-based right.

In fact, the Tribe's claimed reserved right is not superior to its state-based correlative right in all respects cited by the Tribe, because the Tribe's state-based correlative right attaches to the land and cannot be lost by nonuse. Wat. Ag. Br. 39, 43 n. 12. The Tribe's state-based correlative right is actually superior to its claimed reserved right in at least one respect, in that its state-based correlative right, unlike its claimed reserved right, is not subordinate to earlier-acquired rights in groundwater. Wat. Ag. Br. 48. Although the Water Agencies pointed out this attribute of the Tribe's correlative right in their opening brief, *id.*, the Tribe did not respond.

As noted above, the Tribe argues that its claimed reserved right is superior to its state-based right because its reserved right can be put to uses not recognized under California law. Tribe Br. 46-47. The Tribe does not, however, identify any proposed uses that would not be permitted under California law. Since California law provides that all water uses must conform to standard of "reasonable and beneficial use," Cal. Const., Art. X, § 2; Wat. Ag. Br. 60-64, the Tribe's argument apparently means that the Tribe has a reserved right to use water for non-reasonable, non-beneficial uses. It is highly

unlikely that Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders creating the Tribe's reservation, impliedly intended to allow the Tribe to use water for non-reasonable, non-beneficial uses impermissible under California law.

The Tribe argues that its state-based correlative right is inadequate because state law may change over time. Tribe Br. 49. In fact, California's correlative rights doctrine has been in existence for more than a century—since the California Supreme Court's landmark decision in *Katz v. Walkinshaw*, 141 Cal. 116 (1903)—and it is highly unlikely that California will change this long-established doctrine of groundwater law in the future, particularly because any such change would result in dislocation of existing rights that have been recognized and exercised for decades. The California Supreme Court recently rejected proposals to change the California law of groundwater, and instead reaffirmed the rights of overlying landowners. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1250 (2000) ("[A]lthough it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests, the solution's general purpose cannot simply ignore the priority rights of the parties asserting them.") California's recently-enacted groundwater law, the Sustainable Groundwater Management Act ("SGMA"),

Cal. Water Code §§ 10720 *et seq*., expressly provides that it does not alter existing rights in groundwater. Cal. Water Code § 10720.5(b) ("[N]othing in this part . . . determines or alters surface water rights or groundwater rights under common law . . . .").[8] There is no basis for the Tribe's contention that its correlative right under California law is inadequate because California may change its law of groundwater.[9]

As the Ninth Circuit has explained, the western states treat surface water and groundwater as "distinct subjects, often applying separate law to each." *United States v. Oregon*, 44 F.3d 758, 769 (9th Cir. 1994). California law distinguishes between groundwater and surface water in terms of how they are regulated, by establishing a statutory permit system for appropriation of surface

[8] The appellees and *amici* argue that SGMA recognizes the Tribe's reserved right claim. Tribe Br. 19; U.S. Br. 8, 16-17, 58; Tr. Ch. Br. 6. The Water Agencies addressed this argument in their opening brief, arguing that SGMA does not recognize the Tribe's claimed reserved right. Wat. Ag. Br. 33-35.

[9] The Tribe claims that the Water Agencies are arguing that the California Supreme Court's decision in *Katz v. Walkinshaw*, which adopted the correlative rights doctrine, "divested" the Tribe of its federal reserved right in groundwater. Tribe Br. 48. The Water Agencies make no such argument. *Katz* held that the common law of absolute ownership had never been applied in California, and instead that the conditions in California require that a different rule be followed. *Katz*, 141 Cal. at 121-132. Thus, *Katz* did not change the law, but simply settled the law as to which rule applied in California. Moreover, as the Water Agencies have argued, the Tribe had no reserved rights in groundwater anyway.

water and providing that overlying landowners have a common law right to use groundwater underlying their lands. Wat. Ag. Br. 47. Since state laws distinguish between groundwater and surface water in terms of how they are regulated, it is not anomalous that the reserved rights doctrine also distinguishes between groundwater and surface water.

B. The Tribe Has a Decreed Right to Use Whitewater River Surface Water for Its Primary Reservation Purposes.

The Water Agencies argue that the Tribe's claimed reserved right does not meet *New Mexico*'s necessity test because the Tribe has a decreed right in Whitewater River surface water for its reservation needs, based on the Whitewater River Decree of 1938, and that the Decree awarded to the Tribe the amount of water that the United States had "suggested" should be awarded. Wat. Ag. Br. 54-57.[10]

The Tribe and the United States argue that the state court that issued the Whitewater River Decree did not have jurisdiction to adjudicate the Tribe's reserved right, because the United States did not consent to the state court's

[10] The Tribe's decreed right amounts to approximately 8,000 acre-feet per year. ER 32. An acre-foot of water is enough water to fill an acre to a foot-deep level, or approximately 326,000 gallons of water. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 861 n. 3 (9th Cir. 2004).

jurisdiction. Tribe Br. 50-51; U.S. Br. 55-57. They cite the Ninth Circuit's decision in *United States v. Ahtanum Irr. Dist*., 236 F.2d 321, 328 (9th Cir. 1956), which held that a state court adjudication of water rights cannot limit the United States' rights when the United States made no appearance and did not consent to the state court adjudication. Tribe Br. 51; U.S. Br. 56.

The Tribe and the United States miss the point of the Water Agencies' argument. The relevant point is not whether the state court that issued the Decree had jurisdiction to adjudicate the United States' rights, but rather that the Decree awarded to the United States the precise amount of water that the United States "suggested" as necessary to meet the Tribe's needs—and thus the decreed rights granted to the United States were sufficient to meet the Tribe's primary reservation needs and the Tribe's claimed reserved right in groundwater is not necessary for such needs.[11]

[11] In fact, it appears that the United States has waived its sovereign immunity from the state court's adjudication of the United States' water rights in the Whitewater River Decree. In 1952, Congress enacted the McCarran Amendment, which provides consent to join the United States in any action "for the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666. The Ninth Circuit has held that the McCarran Amendment has retroactive application. *State Engineer v. S. Fork Band of Te-Moak Tribe*, 339 F.3d 804, 812-813 (9th Cir. 2003) (stating that "there are sufficient indications from Congress that the Amendment should be applied retrospectively," and therefore that the Amendment "waives the United States's immunity from suit .

Moreover, the state court that issued the Whitewater River Decree plainly had jurisdiction to *grant* to the United States the water right that the United States "suggested" should be awarded, unlike *Ahtanum*, where the state court *limited* the United States' rights in a proceeding in which the United States did not appear and did not participate. Otherwise, the United States and the Tribe would be unable to assert the defense of res judicata in any action challenging the United States' decreed rights in the surface water. Indeed, the Tribe alleges in its Complaint that it has a "decreed" right in Whitewater River surface water, ER 32 (¶ 32), which contradicts its argument that the state court had no jurisdiction over the Tribe's right. ER 32 (¶ 32). The Tribe and the United States cannot have it both ways, asserting that the Decree is valid for res judicata purposes but not for reserved rights purposes.[12]

. . for the administration of water rights acquired before the law came into effect"). As a result of the McCarran Amendment, the Whitewater River Decree appears to apply retroactively to the United States.

[12] The Tribe asserts that the United States suggested an award of enough water to irrigate "only about 360 acres" of the Tribe's 31,000 acre reservation. Tribe Br. 51. In fact, the United States' suggestion listed the number of acres of the Tribe's reservation that "can be supplied" from the Whitewater River tributaries, and, under a column headed "Irrigable Acres in Land," listed the Tribe's acres as "[m]ore than 360." ER 120. Thus, the passage cited by the Tribe did not indicate the United States' intent to limit the number of acres on the Tribe's reservation that should be supplied with water, but instead indicated

The Tribe argues that the Tribe's decreed right in Whitewater River surface water is irrelevant, because the availability of other waters to meet the Tribe's reservation needs has no bearing on whether the Tribe has a reserved right. Tribe Br. 39 ("[N]o court has ever denied the existence of a federal reserved water right merely because a reservation might be able to access water without a reserved right."). Under *New Mexico*, however, the availability of other waters to meet primary reservation purposes is highly relevant in determining whether a reserved right impliedly exists; if other waters are available, a reserved right is not necessary for these purposes and does not impliedly exist. In the *Gila River* decision extensively cited by the Tribe, the Arizona Supreme Court, although holding that the Indian tribe had a reserved right in groundwater under the circumstances of the case, stated that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 748 (Ariz. 1999). Since other waters are available to meet the Tribe's primary reservation purposes—namely Whitewater River surface waters, in which the Tribe has a decreed right—the Tribe's claimed reserved

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the number of irrigable acres on the Tribe's reservation that were capable of being supplied with water.

right in groundwater is not necessary to fulfill the primary reservation purposes and does not impliedly exist under *New Mexico*.

C. Historically, the Tribe Was Not Using Groundwater When Its Reservation Was Created.

The Ninth Circuit has held that in "identify[ing] the purposes for which" an Indian reservation is created, "we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). As the Water Agencies have argued, the historical reports surrounding creation of the Tribe's reservation indicate that the Tribe was not using groundwater when its reservation was created by the 1876 and 1877 executive orders. For example, the Smiley Commission report described the Tribe's reliance on local surface water and made no mention of any use of groundwater. Wat. Ag. Br. 49-51. These historical circumstances are relevant in showing that the presidential executive orders creating the Tribe's reservation did not impliedly intend to reserve a right in groundwater, and that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity test. *Id.*

In response, the Tribe and the United States argue that a reserved water right vests without regard to actual use and cannot be lost by nonuse; is intended to meet future reservation needs as well as needs when the reservation was

created; and is intended to grow and expand as necessary to meet future reservation needs. Tribe. Br. 52; U.S. Br. 52-55. These factors may be relevant in defining the characteristics of a reserved right once it is determined to exist, but are not relevant in determining whether the reserved right impliedly exists in the first instance. If an Indian tribe was not historically using groundwater when its reservation was created, the inference arises that Congress or the President, in creating the reservation, did not impliedly intend to reserve a right in groundwater, and that any claimed reserved right in groundwater does not meet *New Mexico*'s necessity test.[13]

[13] The United States asserts in its Factual Background that the Tribe was using groundwater when its reservation was created, citing reports stating that the Indians dug "walk-in wells" in the sand in order to access underground water "so near the surface that it can be easily developed." U.S. Br. 10, citing Doc. 97-2, p. 39, and Doc. 110-4, p. 8. There is no evidence, however, that walk-in wells cited by the United States were located within the Tribe's current reservation boundaries. The Tribe admitted that it is "unable to admit or deny" that hand dug walk-in wells did not exist within the current boundaries of the Tribe's reservation. Water Agencies' Supp. ER (Doc. 82-3) 18. The 1856 map showed no such wells within the reservation's current boundaries. Tribe's Supp. ER (Doc. 85-17) 94. Even if the Tribe had dug walk-in wells, the wells would only have tapped subterranean streams flowing near the surface, or underflow, which are considered part of the surface waters, and would not have tapped percolating groundwater, more commonly referred to simply as "groundwater," which is involved here. The courts have distinguished between subterranean flows and percolating groundwater, stating that subterranean streams "flow[] through definite and known channels" and are considered part of the surface waters, while percolating groundwater has "no general course or definite limits" and is "diffused over its [the earth's] surface," and is not

D. The Tribe Does Not Produce or Attempt to Produce Groundwater.

The Water Agencies argue that the Tribe's claimed reserved right does not meet *New Mexico*'s necessity test because the Tribe does not produce or attempt to produce groundwater. Wat. Ag. Br. 51-54.

The Tribe argues that its failure to produce or attempt to produce groundwater is not relevant, because a federal reserved right cannot be lost by nonuse. Tribe Br. 12, 20-22. That an existing reserved right cannot be lost by nonuse does not, however, indicate that the right impliedly exists in the first instance. The Tribe's failure to produce or attempt to produce groundwater creates an inference that its claimed reserved right is not necessary to fulfill primary reservation purposes and does not impliedly exist. If the groundwater were necessary to fulfill the primary reservation purposes, the Tribe presumably would produce or at least attempt to produce it. *See United States v. Walker River Irr. Dist.,* 104 F.2d 334, 340 (9th Cir. 1939) ("The extent to which the use of the stream might be necessary could only be demonstrated by experience.").

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considered part of the surface waters. *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486, 494 (1899); *see Los Angeles v. Pomeroy,* 124 Cal. 597, 624, 626 (1899); *North Gualala Wat. Co. v. State Wat. Res. Cont. Bd.*, 139 Cal.App.4th 1577, 1592-1598 (2006); KINNEY, A TREATISE ON THE LAW OF IRRIGATION § 49, pp. 70-71 (1894).

The Tribe argues that the fact that the Water Agencies provide water to the Tribe by pumping it from the ground indicates that the water is necessary for reservation purposes, "regardless of whether Agua Caliente itself is pumping it." Tribe Br. 54. Thus, the Tribe claims credit for the Water Agencies' own production of groundwater as the basis for the Tribe's claimed reserved right. In effect, the Tribe argues, paradoxically, that the Water Agencies' production of groundwater under *state* law for the Tribe's reservation needs establishes the basis for a tribal reserved right under *federal* law that overrides and preempts state law. Such a paradoxical and illogical argument is not remotely supported by *New Mexico*'s necessity test.

E. The Groundwater in Which the Tribe Claims a Reserved Rights Does Not Contribute to or Support the Surface Waters on the Tribe's Reservation.

The Water Agencies argued in their opening brief that the groundwater in which the Tribe claims a reserved right does not contribute to or support the surface waters on the Tribe's reservation. Wat. Ag. Br. 58-59. Neither the Tribe nor the United States respond to the argument.

The *amicus* Law Professors argue that "all water is interrelated within the hydrologic cycle," and thus a reserved right in surface water necessarily includes a reserved right in groundwater. Law Pr. Br. 11. Although there is

often a hydrological connection between surface water and groundwater, as in *Cappaert v. United States*, 426 U.S. 128, 142 (1976), often there is not a hydrological connection. Here, the Tribe concedes that the groundwater in which it claims a reserved right "does not contribute to the surface flows" of the Whitewater River and its tributaries. ER 199-200. The district court below stated that "it is undisputed that the groundwater at issue is not hydrologically connected to the reservation's surface waters . . . ." ER 15. The absence of a hydrological connection between the surface water and groundwater further undermines the Tribe's reserved right claim.

III. THERE IS A LOGICAL AND PRINCIPLED BASIS FOR DISTINGUISHING BETWEEN GROUNDWATER AND SURFACE WATER IN APPLYING THE RESERVED RIGHTS DOCTRINE.

The Tribe and the United States argue that there is no logical or principled basis for distinguishing between groundwater and surface water in applying the reserved rights doctrine, because the doctrine focuses on the needs of the reserved lands and not the source of the water. Tribe Br. 31, 35; U.S. Br. 41. As the Water Agencies have pointed out, however, the Supreme Court in *Cappaert v. United States*, 426 U.S. 128 (1976), distinguished between surface water and groundwater, stating that while it has consistently recognized reserved rights in surface water, "[n]o cases of this Court have applied the

doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142; Wat. Ag. Br. 31-33. In fact, there is a logical and principled basis for distinguishing between groundwater and surface water in applying the reserved rights doctrine, for several reasons.

A. The Rationale of the *Winters* Doctrine Does Not Apply to the Tribe's Claimed Reserved Right in Groundwater.

First, and most importantly, the rationale of the *Winters* doctrine does not support the Tribe's claimed reserved right in groundwater. Wat. Ag. Br. 37-38, 42-44. The *Winters* rationale is that Indians have prior rights to surface waters for reservation purposes under federal law, even though non-Indian appropriators have prior rights to the waters under the state priority rule of "first in time, first in right." *Id.* The *Winters* rationale does not apply here because the Tribe has the same correlative right to use groundwater under California as other overlying landowners, and the Tribe's correlative right is not subject to the "first in time, first in right" priority rule that applies to surface waters. *Id*. Although the Water Agencies made this argument in their opening brief, Wat. Ag. Br. 37-38, 42-44, the Tribe and the United States have not responded.

The Ninth Circuit has recognized that state water laws distinguish between groundwater and surface water, and that the priority rule of "first in

time, first in right" that applies to surface waters does not apply to groundwater. *United States v. Oregon,* 44 F.3d 758, 769 (9th Cir. 1994). In *Oregon*, the Ninth Circuit stated that "[o]ne of the ways in which the law has traditionally ignored the exhortation [that all waters are interrelated in one continuous hydrologic cycle] of scientists is by treating ground and surface water as distinct subjects, often applying separate law to each," and thus "the priority of first use of the groundwater is irrelevant in establishing the relative rights of users of the groundwater." *Id*. (citations omitted); Wat. Ag. Br. 41.

Since the *Winters* rationale does not apply here, Congress' policy of deference to state water law applies. Here, there is no conflict between tribal needs and state law—unlike *Winters*, where there was such a conflict—because California's correlative rights doctrine fully protects the Tribe's reservation needs. Since there is no conflict between the Tribe's needs and California law, federal law should not be construed as creating a conflict by recognizing a tribal reserved right in groundwater that conflicts with California law.

B. Congress' Deference to State Water Law Particularly Applies Because of the Unique Circumstances of this Case, in that the Groundwater Underlies Interspersed Tribal and Non-Tribal Lands and the Tribe's Extraction and Use of Groundwater Would Have Off-Reservation Impacts.

Congress' policy of deference to state water law applies with particular force in this case because of the unique circumstances of the Tribe's reservation. The Tribe's reservation includes only certain even-numbered sections in certain townships and ranges, and thus the Tribe's reservation consists of a "checkerboard pattern" of lands, in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971); Wat. Ag. Br. 6. Since tribal and non-tribal lands are interspersed, the groundwater in which the Tribe claims a reserved right underlies both tribal and non-tribal lands. If the Tribe has a reserved right in groundwater, the exercise of that right would affect groundwater outside the reservation boundary, and would affect the rights of other users of groundwater.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the Ninth Circuit held that Congress' deference to state water law did not apply to the Colville Indian tribe's reserved right in surface waters in that case, because the waters were located wholly within the reservation boundary and the tribe's use of the surface waters would have no off-reservation impacts.

Describing Congress' deference to state water law, *Walton* stated that Congress' deference "stems in part from the need to permit western states to fashion water rights regimes that are responsive to local needs, and in part from the 'legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.'" *Walton*, 647 F.2d at 53, *citing and quoting California v. United States*, 438 U.S. 645, 653-654, 668-669 (1978). *Walton* stated that Congress' deference to state water law did not apply because the No Name Creek in which the Colville tribe had a reserved right was "located entirely within the reservation" and thus the tribe's use of water would have "no impact off the reservation." *Walton*, 647 F.2d at 53. Here, the groundwater in which the Tribe claims a reserved right underlies interspersed tribal and non-tribal lands; thus, the groundwater is not "located entirely within the reservation," and the Tribe's use of the groundwater would have an "impact off the reservation." Thus, Congress' deference to state water law fully applies here, unlike in *Walton*.

The Tribe's reservation is also unique because the overwhelming majority of people residing on the Tribe's portion of the reservation lands are non-Indians, or at least not members of the Tribe. Twenty-nine percent of the Tribe's reservation lands have been sold to non-Indians, another 58% have been

allotted to individual Indians, and only 12.7% remain as tribal trust lands. ER 139 (¶ 13); Wat. Ag. Br. 6. Moreover, many of the Indian allottees have sold or leased their allotted lands to non-Indians. ER 5. As a result, more than 20,000 people reside on the Tribe's reservation, even though the Tribe has only 440 members. ER 196, 222, 223; Wat. Ag. Br. 6. Thus, not only are tribal lands interspersed with non-tribal lands, but also the overwhelming majority of the people residing on the tribal lands who would directly benefit from a tribal reserved right in groundwater are non-Indians, or at least not members of the Tribe.

IV. THE CONSEQUENCES AND IMPACTS OF THE TRIBE'S RESERVED RIGHT CLAIM WEIGH AGAINST THE CLAIM.

The Water Agencies argue that the consequences and impacts of the Tribe's reserved right claim weigh against the claim. Wat. Ag. Br. 59-66. If the Tribe has a reserved right in groundwater, the Tribe would have the right to use groundwater even though such use does not comply with California law requiring that all water uses conform to the standard of "reasonable and beneficial use." Cal. Const., Art. X, § 2; *Joslin v. Marin Mu. Wat. Dist.,* 67 Cal.2d 132, 138-139 (1967); Wat. Ag. Br. 60-64. The Tribe's claimed reserved right would impair the rights of public and private users of groundwater, who have exercised and depended on their rights for decades. Wat. Ag. Br. 65-66.

The Tribe, the United States and the *amicus* Law Professors argue that these consequences and impacts are irrelevant because the existence of a reserved right does not depend on a balancing of equities between tribal and non-tribal needs. Tribe Br. 54-57; U.S. Br. 40-42, 57-58; Law Pr. Br. 15-17. On the contrary, *New Mexico* stated that the impacts of a claimed federal reserved right on "water-needy state and public appropriators" must be "weighed" in determining "what, if any, water" is impliedly reserved by a federal reservation of land. *New Mexico*, 438 U.S. at 705. Even the dissenting opinion in *New Mexico* stated that the reserved rights doctrine should be applied with "sensitivity" to "its impacts upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." *Id*. at 718 (Powell, J., dissenting). Thus, *New Mexico* held that the consequences and impacts of a claimed federal reserved right on state water laws and the rights of other water users are relevant in determining whether the right impliedly exists and in quantifying the right.

As a practical matter, the real-world impacts of a claimed Indian reserved right on the rights of other water users should logically apply in determining whether the reserved right exist and in quantifying the right. Otherwise, a reserved right claim by an Indian tribe could result in the reservation of most if

not virtually all of the water of an entire river system, resulting in dislocation and uncertainty of water rights that have been recognized and exercised for years or decades. These consequences and impacts are particularly significant in the arid and semi-arid western region of the nation, where water is chronically in short supply and a high percentage of land is federally owned. *See New Mexico*, 438 U.S. at 699 n. 3 (describing percentage of federally-owned land apart from Indian reservations in western states).

V. CONGRESSIONAL STATUTES APPROVING INDIAN WATER RIGHTS SETTLEMENTS THAT ADDRESS RIGHTS IN GROUNDWATER ARE NOT RELEVANT OR PRECEDENTIAL CONCERNING WHETHER THE TRIBE HAS AN IMPLIED RESERVED RIGHT IN GROUNDWATER.

The *amici* argue that Congress has approved many Indian water rights settlements that include Indian tribes' rights in groundwater, and that these congressional statutes support the Tribe's claimed reserved right in groundwater. Law Pr. Br. 5, 12-14; Tr. Ch. Br. 3, 9-20.

Obviously if Congress enacts a statute approving an Indian water rights settlement agreed to by contending parties that includes an Indian tribe's right to use groundwater, the Indian tribe has the right to use the groundwater and the Water Agencies do not contend otherwise. The Indian tribe's right to use the groundwater in such instances, however, is based on a congressional statute

expressly approving an agreement recognizing the right, not on the "implication" that the right has been reserved by a reservation of land. The reserved rights doctrine—described by the Supreme Court as the "implied-reservation-of-water doctrine," *New Mexico*, 438 U.S. at 700; *Cappaert*, 426 U.S. at 141—is based on an implication that water is reserved as part of a federal reservation of lands. *See New Mexico*, 438 U.S. at 715 (the reserved rights doctrine is "a doctrine built on implication"). Thus, the reserved rights doctrine does not come into play when Congress approves a water rights settlement to which the contending parties have agreed.[14]

Moreover, the settlement acts cited by the *amici* include disclaimers stating that the settlements shall not be construed as establishing a precedent

[14] A statute approving a water rights settlement does not retroactively reserve groundwater, as argued by *amici*. *Cf. Chocktaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (noting that in Indian treaty contexts, rights "cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."). Rather, the statutory rights stem from Congress' power to "change the form of [Indian] trust assets" that were reserved many years ago, and in good faith "provide [trust beneficiaries] with property of equivalent value." *United States v. Sioux Nation*, 448 U.S. 371, 416 (1980) referring to exchange of lands). Even Indian rights advocates acknowledge that settlement acts are a waiver and exchange of implied Winters rights for guaranteed quantities and allocated funds for development and management of water projects—and the rights only pertain to the specific needs and conditions of the tribe involved. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 19.05[2] (2012).

concerning federal reserved water rights, or the Indian tribes' reserved rights in groundwater.[15] These settlement acts are irrelevant here for this additional reason.

[15] For example, some of the settlement acts, as reflected in the Compacts, provide that the settlements shall not establish a "precedent" for "the litigation of reserved water rights." Chippewa Cree Tribe-Montana Compact, Mont. Code Ann. 85-20-601, art. V(B)(1) (1999); Crow Tribe-Montana Compact, Mont. Code Ann. 85-20-901, art. V(B)(1) (2010). One settlement act provides that it does not "establish[] the applicability or inapplicability to groundwater of any doctrine of Federal reserved rights." Southern Arizona Water Rights Settlement Amendments Act of 2004, 118 Stat. 3569, § 316(a) (2004). Another settlement act provides that it "shall [not] be construed to create an express or implied Federal reserved water right." Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, 104 Stat. 3323, § 210(b)(10) (1990). Another settlement act provides that it does not establish a "standard" for quantification of the rights. Soboba Band of Luiseno Indians Settlement Act, 122 Stat. 2983, § 9(d) (2008). Other settlement acts provide that they do not "quantify" Indian reserved rights. *E.g.*, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, 102 Stat. 2559, § 13 (1988); Fort Hall Indian Water Rights Act of 1990, 104 Stat. 3063-3064, § 11(a); Zuni Indian Tribe Water Rights Settlement Act of 2003, 117 Stat. 797, § 8(f) (2003); San Carlos Apache Tribe Water Rights Settlement Act of 1992, 106 Stat. 4751, § 3710. The settlement agreements themselves include disclaimers stating that the agreements shall not be construed as establishing precedents; the Aamodt settlement agreement, for example, provides that it "shall not be construed to establish precedent or resolve any question of law or fact," and that the agreement is based on "a negotiated settlement" by the parties. Aamodt Settlement Agreement, p. 3. The relevant pages of some of the settlement agreements containing the disclaimers are included in the Addendum as Exhibit 2.

VI. THE NINTH CIRCUIT, STATE SUPREME COURT AND TRIAL COURT DECISIONS CITED BY APPELLEES AND *AMICI* DO NOT SUPPORT THE TRIBE'S RESERVED RIGHT CLAIM.

A. The Ninth Circuit's Decision in *Cappaert* Does Not Establish a Binding or Meaningful Precedent Concerning the Issue Here.

The Tribe, the United States and the *amicus* Law Professors argue that the Ninth Circuit's decision in *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974), which was affirmed by the Supreme Court on other grounds, *Cappaert v. United States*, 426 U.S. 128 (1976), established a "binding precedent" that the reserved rights doctrine applies to groundwater, and thus the Tribe has a reserved right in groundwater. Tribe Br. 30-32; U.S. Br. 42-45; Law Pr. Br 6-8.

The Ninth Circuit's decision in *Cappaert* does not establish a binding or meaningful precedent concerning the reserved right issue here. In *Cappaert*, the Ninth Circuit held that the water in that case was groundwater and that the United States had a reserved right in the groundwater. *Cappaert,* 508 F.2d at 317. The Supreme Court, however, recharacterized the water as surface water and held that the United States has a reserved right in the surface water. *Cappaert*, 426 U.S. at 142. The Court stated that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Id.* By recharacterizing the water as surface water and stating that it had never decided whether the reserved rights doctrine applies to groundwater, the

Supreme Court plainly intended to avoid deciding the issue and instead reserved the issue for future decision in a future case, effectively removing the basis for the Ninth Circuit decision. Although the Supreme Court did not directly overrule the Ninth Circuit decision on the issue, the Supreme Court so effectively undercut the Ninth Circuit's decision that the two opinions are "clearly irreconcilable" on the issue. *Gomez v. Campbell-Ewald Co*., 768 F.3d 871, 875 (9th Cir. 2014); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Thus, the Ninth Circuit's decision did not establish a binding or even meaningful precedent.

Further, since the Ninth Circuit's decision in *Cappaert* was rendered in 1974, prior to the Supreme Court's 1978 decision in *New Mexico*, the Ninth Circuit obviously did not apply *New Mexico*'s narrow interpretation of the reserved rights doctrine in deciding whether the United States had a reserved right. The Ninth Circuit's decision did not establish a binding or meaningful precedent for that additional reason.

The district court below stated that "no federal court of appeals has passed on" the issue of whether the reserved rights doctrine applies to groundwater. ER 15. The district court properly assumed that the Ninth Circuit's decision in

Cappaert did not establish a binding precedent, and that the district court was not bound by the decision. Neither is this Court bound.

B. The State Supreme Court Decisions Cited by the Appellees and *Amici* Are Not Persuasive Concerning the Issue Here.

As the appellees and *amici* note, three state supreme courts have ruled on whether the reserved rights doctrine applies to groundwater—the Montana Supreme Court in *Confederated Salish & Kootenai Tribes v. Stults,* 59 P.3d 1093 (Mont. 2002) ("*Salish & Kootenai*"); the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source,* 989 P.2d 739 (Ariz. 1999) ("*Gila River*"); and the Wyoming Supreme Court in *Adjudication of All Rights to Use Water in the Big Horn System,* 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"). The Montana Supreme Court in *Salish & Kootenai* and the Arizona Supreme Court in *Gila River* ruled that the reserved rights doctrine applies to groundwater, and the Wyoming Supreme Court in *Big Horn* ruled that it does not. As the district court noted below, the "state supreme courts are split on the issue." ER 15. The appellees and *amici* argue that *Salish & Kootenai* and *Gila River* were properly decided, and that *Big Horn* was not. Tribe Br. 29, 33-34, 49; U.S. Br. 48-50; Law Pr. Br. 9-10; Tr. Ch. Br. 6-8.

These state supreme court decisions are not binding on this Court, and are relevant only to the extent that they are persuasive concerning the issue raised here. The *Salish & Kootenai* and *Gila River* decisions cited by the appellees and *amici* did not address whether a federal reserved right exists in groundwater under the circumstances of this case, and thus neither decision is persuasive concerning the issue on this appeal.

In *Salish & Kootenai*, the Montana Supreme Court held that "there is no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary for the purpose of the reservation," and the distinction between surface water and groundwater "should make no difference." *Salish & Kootenai*, 59 P.3d at 1098. As argued earlier, there is a logical and principled basis for distinguishing between groundwater and surface water in applying the reserved rights doctrine, *see* pages 31-36, *supra*, and the Montana Supreme Court did not consider this argument in concluding that no such distinction exists. Moreover, the Montana Supreme Court did not consider the issue, raised on this appeal, whether an Indian tribe has a reserved right in groundwater under circumstances where the right does not meet *New Mexico*'s necessity test, such as, for example, where the tribe has a state-based correlative right to use groundwater and a decreed

right to use surface waters for reservation purposes. Since the Montana Supreme Court did not consider the issue raised here, its decision is not persuasive concerning the issue.

In *Gila River*, the Arizona Supreme Court, in holding that the reserved rights doctrine applies to groundwater under the circumstances of that case, expressly did not consider Congress' policy of deference to state water law, stating that federal reserved rights are an "exception" to Congress' policy of deference. *Gila River*, 989 P.2d at 747. Although federal reserved rights are an "exception" to Congress' policy of deference, Congress' policy of deference is relevant in determining whether the "exception" applies in the context of groundwater. *See* pages 8-9, *supra*. More importantly, *Gila River* did not consider whether, as here, an Indian tribe has a reserved right in groundwater under circumstances where the tribe has a state-based correlative right to use groundwater for its reservation needs; unlike California, Arizona does not recognize the correlative rights doctrine.[16] Since *Gila River* did not consider the issue raised here, *Gila River* is not persuasive concerning the issue.

[16] California is the only western state that recognizes the doctrine of correlative rights as applied to groundwater. Wat. Ag. Br. 39 n. 10. Arizona recognizes the doctrine of "reasonable use" as applied to groundwater, which holds that a landowner has the right to use all groundwater necessary to serve reasonable

Even so, *Gila River* held that whether a reserved right exists must be determined on a "reservation-by-reservation basis," *Gila River*, 989 P.2d at 748, which contradicts the Tribe's and the United States' argument that a federal reservation of lands automatically includes a reserved right in groundwater. *Gila River* also stated that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation," *id*. at 748, which contradicts the Tribe's argument that the availability of other waters is irrelevant concerning whether the Tribe has an implied reserved right in groundwater. Tribe Br. 39. Thus, although *Gila River* did not address the issue raised on this appeal, *Gila River* contradicts some of

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and beneficial uses on the overlying lands, even if this may deplete the groundwater resource. *Gila River*, 989 P.2d at 743 n. 3; *Bristor v. Cheatham*, 255 P.2d 173, 178-179 (Ariz. 1953). *Gila River* stated that the Indian tribe's right to use groundwater under Arizona's reasonable use doctrine is not adequate to fulfill reservation purposes, because the right "would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers." *Gila River,* 989 P.2d at 748. Under California's correlative rights doctrine, however, unlike Arizona's reasonable use doctrine, all overlying landowners have a "proportionate share" of the groundwater and thus no overlying landowner has the right to "deplete" the resource. *Miller v. Bay Cities Water Co*., 157 Cal. 256, 276 (1910); *Pasadena v. Alhambra*, 33 Cal.2d 908, 924 (1949); *California Water Service Co. v. Edward Sidebotham & Son*, 224 Cal.App.2d 715, 724 (1964); *Tehachapi-Cumming County Wat. Dist. v. Armstrong*, 49 Cal.App.3d 992, 1001 (1975). If necessary, a California court can provide a "physical solution" that manages the groundwater resource to protect the rights of overlying landowners and prevent depletion of the resource. *Pasadena*, 33 Cal.2d at 933; *California Water Service*, 224 Cal.App.2d at 731-732.

the Tribe's and the United States' arguments in support of the Tribe's reserved right claim.

In *Big Horn*, the Wyoming Supreme Court, in holding that the reserved rights doctrine does not apply to groundwater, stated that no court had held that the doctrine applies to groundwater. *Big Horn*, 753 P.2d at 99-100. Although the Wyoming court acknowledged that the Ninth Circuit in *Cappaert* had held that the doctrine applies to the groundwater, the court stated that the Supreme Court in *Cappaert* had instead held that the water "was not groundwater but surface water." *Id.* at 99. The Wyoming court thus indicated that the Ninth Circuit's decision in *Cappaert* does not establish a meaningful precedent, contrary to the Tribe's and the United States' argument that the Ninth Circuit's decision in *Cappaert* establishes a binding precedent here. The Wyoming court also stated that the "logic" that supports the reservation of surface water also supports a reservation of groundwater, because "the two sources are often interconnected." *Id*. This "logic" does not support the Tribe's reserved right claim in groundwater here, because the groundwater is not "connected" with the surface waters on the Tribe's reservation, as the Tribe acknowledges. Wat. Ag. Br. 58-59. More importantly, no issue was raised in *Big Horn* concerning whether the Indian tribe had a reserved right in groundwater under

circumstances where, as here, the tribe has a state-based correlative right to use groundwater and a decreed right to use surface water for its reservation needs. Thus, whatever the logic of applying the *Winters* doctrine to groundwater in the *Big Horn* case, the logic and rationale of the *Winters* doctrine does not support its application to groundwater in this case. *See* pages 31-36, *supra*.

C. The Trial Court Decisions Cited by the Appellees and *Amici* Are Unpersuasive Concerning the Issue Here.

The Tribe, the United States and the *amici* argue that certain trial court decisions support the Tribe's reserved right claim. Tribe Br. 32-33; U.S. Br. 46-48; Law Pr. Br. 8-10; Tr. Ch. Br. 7.

Three of the cited decisions were issued prior to the Supreme Court's decision in *New Mexico*. *Shamberger v. United States*, 165 F.Supp. 600 (D. Nev. 1958); *Tweedy v. Texas Co*., 286 F.Supp. 383, 385 (D. Mont. 1968); *Soboba Band of Mission Indians v. United States,* 37 Ind. Cl. Comm. 326 (1976). Thus, the decisions did not consider whether reserved rights apply to groundwater under *New Mexico*'s necessity test, which is the issue raised here.

Three other cited decisions stated that the Supreme Court in *Cappaert* held that the reserved rights doctrine applies to groundwater. *Colville Confederated Tribes v. Walton*, 460 F.Supp. 1320 (E.D. Wash. 1978); *State of*

New Mexico ex rel. Reynolds v. Aamodt, 618 F.Supp. 993 (D. N.M. 1985); *Gila River Pima-Maricopa India*n Community *v. United States*,. 9 Cl. Ct. 660 (1986). As we have explained, the Supreme Court in *Cappaert* did not hold that the reserved rights doctrine applies to groundwater. Wat. Ag. Br. 31-33. Also, *Aamodt* involved pueblo rights, not reserved rights.

The two other cited decisions provided only conclusory statements that the reserved rights doctrine applies to groundwater, without any analysis of the issue. *United States v. Washington*, 375 F.Supp.2d 1050, 1068 n. 8 (W.D. Wash. 2005), *vacated* 2007 WL 4190400 (W.D. Wash. 2007); *Preckwinkle v. CVWD*, No. 05-cv-00626 (C.D. Cal. Aug. 30, 2011)[17]; Tribe Br. 32-33; Law Pr. Br. 8-9. A conclusory statement unsupported by analysis is not persuasive.

Thus, none of the cited trial court decisions are persuasive concerning the issue on this appeal.

[17] *Preckwinkle* did not adjudicate a water right; instead, it dismissed plaintiff's challenge to the water district's replenishment assessment for want of jurisdiction over an indispensable party.

CONCLUSION

This Court should reverse the district court decision and hold that the Agua Caliente Band of Cahuilla Indians does not have a reserved right in groundwater.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 11,925 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in proportionally spaced typeface in 14-point font or larger in a plain, roman style.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2016, in Walnut Creek, California.

/S/ Roderick E. Walston
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