No. 15-55896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS,
Plaintiff-Appellee
and

UNITED STATES OF AMERICA,
Intervenor-Plaintiff-Appellee
v.

COACHELLA VALLEY WATER DISTRICT
and DESERT WATER AGENCY, et al.,
Defendants-Appellants

United States District Court for the Central District of California
Hon. Jesus G. Bernal

ANSWERING BRIEF FOR INTERVENOR UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the complaints in this case under 28 U.S.C. §§ 1331, 1345 and 1362. The district court approved the parties' stipulation to trifurcate the issues in this case, and, on March 20, 2015, entered an order disposing of the issues presented in Phase I, granting the plaintiffs partial summary judgment, and *sua sponte* certifying its order for interlocutory appeal under 28 U.S.C. § 1292(b). On June 10, 2015, this Court granted the defendants' timely petition for permission to appeal. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b).

INTRODUCTION

In this case the Agua Caliente Band of Cahuilla Indians ("Tribe") seeks to protect the federal reserved water rights associated with its reservation. In 1908, the Supreme Court in *Winters v. United States*, 207 U.S. 564, 577 (1908), recognized that when land is set aside as a reservation for an Indian tribe and water is necessary for the tribe's use of its reservation lands, a federal water right is reserved. The Agua Caliente Reservation ("Reservation") overlies an aquifer from which Coachella Valley Water District and Desert Water Agency ("Water

Agencies") withdraw and distribute water. The question in this appeal is whether the Reservation includes an implied reservation of rights under the *Winters* doctrine in the underlying groundwater.

The courts have adhered for over a century to the straightforward rule established in *Winters*. The Water Agencies seek to replace that long-established precedent with a wholly different rule. They assert that the relevant question is not whether *water* is needed to achieve the Reservation's purposes, but whether, because water is unavailable under *state* law, a federal water *right* would be necessary to prevent particular Reservation purposes from being defeated. Under the Water Agencies' theory, the district court was required to identify the specific purposes for which the Tribe needs water in order to live on its reservation, and to evaluate the Tribe's access to water for those purposes under state law, before finding that a federal reserved water right was implied in the creation of the Reservation. And they contend that no federal water right was necessary here, because California administers groundwater under a system based on the right of overlying landowners to make "reasonable use" of water beneath their land.

The Water Agencies' novel legal theory conflicts with *Winters* and its progeny, including this Court's precedents applying the *Winters* doctrine. It is also incorrect as a matter of federal supremacy: State law does not govern the administration of water reserved for federal purposes and cannot defeat the United States' reservation of property interests in federal land and water for an Indian tribe.

ISSUE PRESENTED

The Tribe sued the Water Agencies to enjoin their interference with its aboriginal and federal reserved rights to use groundwater underlying its Reservation. The Tribe, and the United States as the holder of legal title to the Reservation in trust for the Tribe, seek declaratory and injunctive relief to protect the Tribe's federal reserved right to use groundwater necessary to satisfy the present and future needs of the Tribe and its members residing on the reservation. The issue presented is:

> Does the Tribe's Reservation include a federal reserved right to use groundwater underlying the Reservation, notwithstanding California's system for administering groundwater?

STATEMENT OF FACTS

A. Background principles

1. Riparian and appropriative water rights

Historically, water rights on federal lands were governed under the common law of "riparian rights," under which every riparian owner was entitled to the continued natural flow of the stream and to "complete ownership" of the water lying under the land. See *United States v. Cappaert*, 508 F.2d 313, 318 (9th Cir. 1974), *aff'd on other grounds*, 426 U.S. 128 (1976) (under common law, proprietor had "unlimited dominion" over all waters beneath property). Although Congress has the power to cede its constitutional authority over federal uses of water to the states, it has not done so with respect to lands reserved for federal purposes. And states cannot destroy the riparian rights necessary to protect federal property. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-03 (1899) ("in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property").

The miners and homesteaders who settled the arid West developed alternative, "prior appropriation" rules that continue to govern water rights in many Western states, including California. Appropriative rights ordinarily are acquired and maintained by actual use, and may be lost through abandonment or forfeiture if water is not put to beneficial use over extended periods of time. *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982); *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 560, 72 Cal. Rptr. 3d 879, 887 (2008) ("a party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment").

In the mid-nineteenth century, Congress enacted a series of statutes that ceded the administration of water on unreserved federal lands to the states, culminating in the enactment of the 1877 Desert Land Act, 19 Stat. 377, 43 U.S.C. § 321, which has been construed to "subject all nonnavigable waters then a part of the public domain to the plenary control of the designated states." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 165 (1935).

2. Federal reserved water rights under the Winters *doctrine*

The statutes subjecting federal lands to state water administration do not apply to lands reserved for federal purposes. *Federal Power Commission v. Oregon*, 349 U.S. 435, 448 (1955). It is well established, therefore that under the *Winters* doctrine, Congress, when reserving federal lands for specific federal purposes, including Indian reservations, implicitly reserves rights in then-unappropriated water sufficient to effectuate the purpose of the reservation independent of any power the state may have acquired to administer waters on federal lands. *Winters*, 207 U.S. at 577; see *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46–47 (9th Cir. 1981) ("*Walton I*") (water rights are impliedly reserved for Indian reservation purposes including a tribe's need to maintain itself under changed circumstances).[1] This doctrine applies to federal reservations generally,

[1] Federal reservations of implied water rights, as well as other rights, for tribes can occur in two circumstances. The federal government can set aside land for an Indian reservation, implicitly reserving an amount of unappropriated water sufficient to effectuate the purposes of the reservation. *Winters*, 207 U.S. at 577; *Colville Confederated Tribes v. Walton I*, 647 F.2 at 46-47. In other situations, tribes retain all rights that they do not clearly cede, *United States v. Winans*, 198 U.S. 371,

including Indian reservations created by executive order and non-Indian federal reservations such as parks, forests, and military installations. See *United States v. Dist. Court in & for Eagle Cty., Colo.*, 401 U.S. 520, 522-23 (1971) (U.S. has authority to reserve waters for the use and benefit of federally reserved lands generally); *Arizona v. California*, 373 U.S. 546, 597-98 (1963) ("*Arizona I*") (same, as to executive-order Indian reservations). Significantly, federal reserved water rights are governed by federal law. The waters reserved are exempt from appropriation under state law; and federal reserved rights do not depend on prior beneficial use and are not forfeited if they are not used. *Cappaert v. United States*, 426 U.S. 128, 145 (1976). The United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. *Id.* at 138. "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is

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381 (1905), and this sort of retention constitutes a reservation of rights, including water rights. See *United States v. Adair*, 723 F.2d 1394, 1413-14 (9th Cir. 1983) (recognizing reserved aboriginal water rights arising from tribe's uninterrupted use and occupation of land and water). This brief uses the term "federal reservation" to encompass both types of implied reservations of water rights.

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." *United States v. New Mexico*, 438 U.S. 696, 703 (1978) ("*New Mexico*").

3. Relevant provisions of California water law

California recognizes the supremacy of federal reserved water groundwater rights over state-law rights. In 2014, the State enacted the Sustainable Groundwater Management Act, Cal. Water Code, Div. 6, Chapter 1, § 10720, et seq., which recognizes that federal reserved water rights to groundwater must be "respected in full" and must prevail over state law in any conflict regarding their adjudication or management. *Id.* § 10720.3(d).

The California water code recognizes both riparian rights and appropriative rights. Cal. Water Code, Div. 1, Chapter 1, § 101. Under California law, riparian water rights exist on federal lands located within the State of California. *Water of Hallett Creek Stream System, et al. v. United States*, 749 P. 2d 324, 334 (Cal. 1988). Although the California Department of Water Resources website (found at http://www.water.ca.gov/groundwater/groundwater_basics/gw_sw_inter

action.cfm) recognizes that surface water and groundwater are connected hydrologically and constitute a single resource, California's system for appropriation of water rights applies different rules to the appropriation of surface water and groundwater. California recognizes both riparian and appropriative rights in surface waters; and applies a "correlative rights" framework to the use of groundwater. See *Katz v. Walkinshaw,* 141 Cal. 116, 137, 74 P. 766, 772 (1903). Under this "correlative rights" framework, overlying landowners have the "paramount" right to use groundwater, subject to reasonable apportionment among competing overlying landowners in the event of water shortage, and the prescriptive rights of other appropriators. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1241, 5 P.3d 853, 863, 868 (2000).

B. Factual Background

1. The Agua Caliente Reservation

The Tribe and its ancestors have occupied and used lands in the Coachella Valley since time immemorial. On May 15, 1876, President Grant issued an executive order describing specific federally owned lands to "be, and the same hereby are, withdrawn from sale and set

apart as reservations for the permanent use and occupancy of the Mission Indians in Southern California." ER 57-58. The Agua Caliente Band was among the Mission Indian bands for which land was reserved in the 1876 executive order. *Ibid.* On September 29, 1877, President Hayes issued a second executive order identifying specific additional sections of land adjacent to the 1876 withdrawal to be "withdrawn from sale and settlement, and set apart as a reservation for Indian purposes for certain of the Mission Indians." ER 58 In the late nineteenth and early twentieth century, the United States issued trust patents to the reservation lands to the Tribe as authorized by the Mission Indian Relief Act of 1891, 26 Stat. 712. Subsequent orders expanded the Reservation, and the United States currently holds approximately 31,396 acres of land in trust as a reservation for the Tribe.

Since before the Reservation was established, the Tribe has used both surface and underground water on its arid lands for domestic, agricultural, stock-watering, and other purposes (Doc. 97-2, p.39; Doc. 110-4, p.8). Federal officials observed at the time the land was reserved that surface water was scarce but that additional water could be developed from underground sources. *Id.*

Several intermittent streams traverse the Reservation, the largest of which is the Whitewater River. In 1936, the Riverside County court issued a decree allocating the relative surface water rights appropriated in the Whitewater River Stream system, in which it decreed water rights for domestic use, stock watering, power development, and irrigation to the United States for use on the Agua Caliente Reservation. ER 115, 128-33. Although the United States was not subject to, and did not submit to, the jurisdiction of the county court in the adjudication of these rights, it made a special appearance to submit a "suggestion" of the Tribe's then-current surface-water use. The court's decree closely tracked the rights described in the United States' suggestion. ER 119-20.

2. The events giving rise to this case

The facts of this case are largely undisputed. The Agua Caliente Band of Cahuilla Indians is a federally recognized Indian tribe. Its members use and reside on the Reservation and various trust allotments, located in the arid Coachella Valley in southern California. Since before the Reservation was established, the Tribe has used and depended on surface-water and groundwater resources on its

Reservation for various economic and cultural purposes, including irrigated agriculture. The Reservation overlies a portion of the Coachella Valley groundwater aquifer, which for many years has been in "overdraft" condition, meaning that outflows from the aquifer exceed inflows. Overdraft of the aquifer has caused a loss of groundwater in the portions of the aquifer that underlie the Reservation. The defendant Water Agencies withdraw and use groundwater from the aquifer, which adversely affects the quantity of groundwater available to the Reservation, infringing on the reserved water rights held by the United States in trust for the Tribe.

3. The proceedings in the district court

On May 14, 2013, the Tribe filed a complaint for declaratory and injunctive relief in this case, alleging that the Water Agencies are infringing on the Tribe's exercise of its aboriginal and federal reserved water rights by pumping water from the aquifer underlying the Reservation. The Tribe seeks a declaration and quantification of its federal reserved and aboriginal water rights and an order enjoining the Water Agencies from interfering with its ability to use its water rights.

The district court granted the United States' motion to intervene as a plaintiff, seeking similar relief, on June 19, 2014.

In the district court, the parties stipulated to a trifurcated process for adjudicating the claims. Phase I addressed the threshold question whether federal reserved water rights in groundwater are a component of the Tribe's Reservation. ER 18. Phase III will address the quantification of the Reservation's groundwater rights. Accordingly, questions as to the scope and quantity of the Tribe's reserved groundwater rights are not relevant to the Phase I Order at issue here. In Phase I, all parties filed summary-judgment motions, and the Order from which the Water Agencies have appealed reflects the district court's disposition of those motions.

4. The district court's decision

As relevant here,[2] the district court granted partial summary judgment for the Tribe and the United States, holding that the United States impliedly reserved needed water, from sources including groundwater underlying the Reservation, when it created the

[2] The district court granted partial summary judgment for the Water Agencies on the Tribe's claim to aboriginal water rights. ER 16. That ruling is not the subject of this interlocutory appeal.

Reservation. ER 15. The district court rejected the Water Agencies' contention that the limitations on the extent of federal reserved water rights addressed in the Supreme Court's decision in *New Mexico, supra*, 438 U.S. 696, are relevant to determining *whether* water rights were implied in the creation of the Reservation, as opposed to determining the *amount* of water reserved. ER 7. The district court therefore broadly construed the Reservation's general purpose to provide a home for Indians, and concluded that the creation of the Reservation implied "at least some water use." ER 8. The court further held that because groundwater resources are appurtenant to the Reservation, the government impliedly reserved groundwater to the extent that groundwater resources are necessary to fulfill the Reservation's purposes. ER 8-9. Finding that this Court has not directly addressed the question whether federal reserved water rights extend to groundwater in light of California's "correlative rights" legal framework for groundwater allocation (ER 15), the district court certified its order for interlocutory appeal.[3] On June 1, 2015, this Court granted the

[3] The district court overstated the purported novelty of the groundwater-reservation question, which is controlled by this Court's

Water Agencies' petition for permission to appeal the district court's interlocutory order.

SUMMARY OF ARGUMENT

The premise of the Water Agencies' appeal is that the Supreme Court's decision in *United States v. New Mexico* fundamentally altered the inquiry for determining whether a reserved water right is implied in the creation of a federal Indian reservation. That premise is incorrect. The Supreme Court's distinction between primary and secondary purposes of a reservation has no relevance to the question in this appeal, which is whether a water right was implied when the United States created the Reservation. That distinction applies, if at all, to the determination of the scope and quantity of water reserved, issues that could arise only in Phases II and III of the district-court proceedings and therefore are not in play in this interlocutory appeal.

No court has held that *New Mexico* altered the fundamental inquiry at issue in this interlocutory appeal. This Court and other

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decision in *Cappaert*, 508 F.2d at 317. Although the district apparently believed that the groundwater at issue is not hydrologically connected to the reservation's surface water, see ER 15, the record demonstrates a connection, as discussed below in section II-B.

courts have many times considered the specific purposes for which a reservation was created in determining how much water was reserved by implication in the creation of a federal reservation – including Indian reservations – but no court has based the determination of whether water was reserved in the first instance on an analysis of the specific water needs of the reservation or the particular purposes for which it was created. Where land is reserved for Indian tribes, water is invariably reserved, because there can be no dispute that water is necessary for the use and enjoyment of a permanent homeland.

Moreover, no decision of a federal court supports a rule that groundwater is not subject to reservation, and state administration of such waters has no relevance to whether a water right is reserved. The district court correctly concluded that the Reservation in this case included water rights in both surface water and groundwater on and underlying the Reservation. As a matter of federal supremacy, state law is preempted to the extent of any conflict with federal law, and state water administration therefore cannot defeat the reservation of a federal reserved water right for the Tribe. In any event, the State of California recognizes the existence of federal reserved groundwater

rights and has codified their supremacy over state-law claims. The district court's interlocutory order therefore must be affirmed.

STANDARD OF REVIEW

This case presents questions of law, which this Court reviews *de novo*. *Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 551 (9th Cir. 2015) ("A district court's grant of summary judgment is reviewed *de novo.; Davis v. City of Las Vegas,* 478 F.3d 1048, 1053 (9th Cir. 2007) (same).

ARGUMENT

I. Deference to state law plays no role in determining whether *Winters* rights arise from the creation of an Indian reservation.

Under the *Winters* doctrine, a reservation of land for a federal purpose implicitly includes available water to the extent it is needed to accomplish the purposes for which the land was set aside. *Cappaert*, 426 U.S. at 138. The reservation thus gives rise to a reserved right in unappropriated water which vests no later than the date of the reservation and is superior to the rights of future appropriators. *Ibid.* The federal water rights reserved are not subject to the requirements of state law. *Colville Confederated Tribes v. Walton* (*Walton II*), 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, and citing *United States v. Adair*, 723 F.2d 1394, 1411 n.19 (9th Cir. 1983)).

"In determining whether there is a federally 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." *Cappaert*, 426 U.S. at 139. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Ibid.* (citing *Arizona I,* 373 U.S. at 599-601; *Winters*, 207 U.S. at 576). Accordingly, where federal lands are reserved for purposes that require water, and water is available to fulfill the needs of the reservation, federal water rights are reserved. *Arizona I*, 373 U.S. at 598 ("In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well.").

The district court explained that the analysis of a claim asserting federal reserved water rights proceeds in two steps, the first of which is to "examine the existence of reserved rights – usually a straightforward inquiry." ER 7. Under this Court's precedents, an inference that water

rights are reserved arises when a reservation is created for purposes that require water. *Id.* (citing *Walton I*, 647 F.2d at 47). The district court noted (ER 7) that the second step, determining the scope and quantity of the water reserved, is often the more difficult part of the analysis. In this case, the parties' stipulated trifurcation of the issues has postponed questions concerning the scope and quantity of the reserved water right to later phases of the litigation. ER 18-19.

The district court correctly observed that the "straightforward inquiry" into the existence of a federal reserved groundwater right for the Reservation requires the court to answer two questions: (1) whether the use of water is necessary to achieve the reservation's purpose (in this case, providing a permanent homeland for an agrarian tribe in a desert environment); and (2) whether groundwater appurtenant to the reservation was available when the reservation was created. ER 8-9 (citing *Walton I*, 647 F.2d at 46).

The Water Agencies contend (Br. 21-22) that this characterization of the relevant inquiry was erroneous, and that the Supreme Court's decision in *United States v. New Mexico*, 438 U.S. at 700-02, established a new and different rule for determining whether federal

reserved rights exist. The Water Agencies are incorrect. First, this Court found in *Adair*, 723 F.2d at 1408, that "*New Mexico* [is] not directly applicable to *Winters* doctrine rights on Indian reservations." Moreover even if *New Mexico* were relevant to tribal reserved rights, that case concerned the *quantity* of water, not the *source* of the water.

In *New Mexico*, the Supreme Court held that because the United States reserves no more than the *amount* of water necessary for the purpose for which the land is reserved, see *Cappaert*, 426 U.S. at 141, the *quantity* of water reserved for the Gila National Forest is limited to the amount needed to achieve the primary purposes of the original land reservation. *New Mexico*, 438 U.S. at 702. The Court held that, in deference to state water administration, additional quantities needed to support "secondary" purposes should be appropriated under state law. *Id.* at 703. The Court therefore affirmed the New Mexico court's determination that the amount of water federally reserved for the forest did not include water needed only for subordinate or later-determined purposes of the forest. 438 U.S. at 718 (statute authorizing creation of national forests implied reservation of water for timber production and running streams, but not for habitat or recreation). *New Mexico*,

therefore, addressed issues regarding the quantity of water reserved to the United States, and not whether there had been a reservation of water in the first instance.

The Water Agencies contend (Br. 20) that the holding in *New Mexico* "limited" the well-established doctrine that federal reserved water rights are implied by the reservation of federal land for a purpose that requires water. They assert that *New Mexico* replaced that straightforward rule with a rule that requires the reviewing court to determine the particular purposes for which water is needed and to determine whether, in light of state water administration, those purposes would be "entirely defeated" without a federal reserved water right. Br. 21-22. Under the Water Agencies' interpretation, a federal water right is "necessary," and therefore is implied, only upon these findings. But *New Mexico* on its face applies only to the determination of *how much* water was reserved for a particular federal reservation. Its reasoning accordingly has nothing to do with whether *any* water was needed, and whether water rights therefore were implied in the creation of the forest.

The Water Agencies incorrectly interpret *New Mexico* to hold that the United States reserves water for its lands only where the "primary" purposes of a federal reservation would be "entirely defeated" without a federal reserved right, and that the district court therefore erred by failing to apply the "primary-secondary" distinction set out in *New Mexico* in determining that the Reservation includes federal reserved water rights. But the Water Agencies' interpretation of *New Mexico*, which would place the United States' reserved water rights "completely at the mercy of state legislatures," *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), is unreasonable and conflicts with both the express language of the *New Mexico* decision itself and this Court's precedents. Accordingly, the district court correctly rejected it.

A. *New Mexico* did not alter the rule that a reserved water right is implied in the creation of a federal reservation where water is needed to accomplish the reservation's purposes.

The Water Agencies assert (Br. 24) that *New Mexico* "narrowed" the established doctrine that when the United States reserves federal land for a federal purpose it impliedly reserves sufficient available water to accomplish that purpose. They contend that in furtherance of the congressional policy of deference to state water law reflected in the

Desert Land Act, the Supreme Court replaced the *Winters* doctrine with a rule that federal water rights are implied only where the "primary" purpose of a land reservation would be "entirely defeated," taking into account the availability of water under state law, absent a federal water right. Even assuming *New Mexico* is relevant to the analysis of water rights reserved for an Indian tribe, this interpretation significantly distorts the holding in *New Mexico.*

Contrary to the Water Agencies' contentions, the Supreme Court in *New Mexico* expressly recognized that the federal reserved water rights doctrine is an exception to Congress's policy of deference to state law. The Court stated 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." *Id.* at 702. This is because "whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, . . . Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for

specific federal purposes." *New Mexico*, 438 U.S. at 698 (citing *Winters*, 207 U.S. at 577; *Arizona I*, 373 U.S. at 597-98 (1963); *Cappaert*, 426 U.S. at 143-46).

New Mexico accordingly reaffirmed the continued vitality of the rule in *Cappaert* that "[i]n determining whether there is a federally 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 was created." 438 U.S. at 139 (citing *Arizona I*, 373 U.S. at 599-601; *Winters*, 207 U.S. at 576). The district court therefore correctly reasoned that where, as here, federal lands are reserved for purposes that require water, and water appurtenant to the reservation is available, federal water rights are reserved, regardless of whether water might otherwise be obtained under state law.

1. Neither this Court nor the Supreme Court has held that the distinction between primary and secondary purposes or the availability of water under state law is relevant to the existence of Winters *rights.*

This Court has not adopted the crabbed interpretation of *New Mexico* on which the Water Agencies' appeal depends. Nor has it

applied the rationale of that case—which concerned quantification of a reserved right—to the issue whether there was a federal reservation of water from a particular source. Turning the *Winters* doctrine on its head, the Water Agencies assert (Br. 15-16) that following *New Mexico*, the existence of a federal reserved water right depends on the manner in which the water available for use on reserved lands is administered under *state* law. They assert (Br. 21) that "the Tribe has a reserved right in groundwater [underlying its Reservation] only if the *right* is 'necessary' to accomplish the 'primary' purposes of the Reservation and prevent these purposes from being 'entirely defeated.'" (Emphasis added).

That is not the law of this Court. In *Walton I*, for example, this Court applied the "*New Mexico* test," 647 F.2d at 47, in quantifying a tribal right, but not in determining the *existence* of such rights. This Court observed that in *Winters* and *Arizona I,* the Supreme Court held that "it was reasonable to conclude that Congress intended to reserve water" where waters were being appropriated by non-Indians at the time the Indian reservations in those cases were created, because the tribes there "were not in a position, either economically or in terms of

their development of farming skills, to compete with non-Indians for water rights." *Walton I*, 647 F.2d at 46. Finding that "the Colvilles were in a similar position when their reservation was created," this Court held that water was reserved when the Colville Reservation was created. *Id.* at 46-47.

In support of an assertion that this Court has held that the distinction between primary and secondary purposes "applies in construing federal reserved water rights," (Br. 21) the Water Agencies recite detailed findings from this Court's decision in *Walton I* (see Br. 22-23 n.5), but neglect to explain that the recited findings addressed *quantification* of the tribe's water rights, not the antecedent question of the *existence* of water rights. This Court's inference that a water right was reserved in *Walton I* was based on a finding that, in reserving land for the tribe, the United States intended to "deal fairly with Indians by reserving waters without which their lands would be useless." *Walton I*, 647 F.2d at 47 (citing *Arizona I*, 373 U.S.at 600). The findings on which the Water Agencies rely to suggest that *Walton I* does not support the district court's conclusion in this case relate to its separate analysis of a non-Indian successor-in-interest's share of the water rights reserved for

the Colville Tribe. And in *Adair*, this Court expressly stated that *New Mexico* is *not* directly applicable to Indian reservations. *Adair*, 637 F.2d at 1408.

The Water Agencies are also incorrect that *New Mexico* applied a "narrow construction" or deferred to state water law in finding that a reserved water right existed for the Gila National Forest. To the contrary, the question presented in *New Mexico* proceeded from the premise that water had been reserved for the forest, and addressed the New Mexico Supreme Court's determination that the *amount* of water reserved was limited by the purposes stated in the enabling legislation for the national forests. See *Mimbres Val. Irr. Co. v. Salopek,* 1977-NMSC-039, 90 N.M. 410, 411-12, 564 P.2d 615, 616-17 (1977), *aff'd sub nom. United States v. New Mexico*, 438 U.S. 696 (1978). The U.S. Supreme Court agreed to review the state supreme court's judgment quantifying the water rights reserved for the forest, *id.*, and affirmed its decision to exclude water needed for certain intended purposes of the forest from the rights reserved (*id.* at 698) on the ground that those were not the "primary" purposes of the forest. The Court thus narrowed the *scope* of the implied right, not the rules governing the existence of

the implied right. The question whether water rights were impliedly reserved was not presented in *New Mexico*, and the Court accordingly did not rule on the requirements for inferring such a right. Accordingly, nothing at issue in *New Mexico* altered the Court's fundamental understanding of the *Winters* doctrine. As the Supreme Court said in *New Mexico*, "[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.

2. A finding that a reserved right does not exist for a particular purpose is not tantamount to a determination that implied rights were not reserved.

The Water Agencies identify several instances (Br. 23-25) in which courts – including this Court – have stated that a reserved water right exists or does not exist for a particular purpose, or have stated that federal reserved water rights exist for the "primary" purpose of a reservation. The Water Agencies assert that these statements demonstrate that courts apply the "narrow rule" of *New Mexico* – which the Agencies contend requires the examination of the Tribe's specific

water needs and an identification of the "primary" purposes of the reservation – to the threshold question of the existence of a federal reserved water right. The purported examples cited in the Water Agencies' brief, however, demonstrate no such thing. For example, the statement in *New Mexico* that a water right "did not exist" for aesthetic purposes merely reflects the principle that the quantity of water reserved when the United States sets federal lands aside is limited to the amount of water necessary to accomplish the purpose of the reservation. The import of the quoted statement is that the water reserved did not include amounts needed for aesthetic and other non-"primary" purposes. It contains no suggestion that the Court in *New Mexico* was reviewing the state courts' undisputed determination that water rights were reserved for the forest in the first instance.

Similarly, the Water Agencies quote a fragment from the United States' brief in opposition in *Wyoming v. United States*, S. Ct. No. 08-903, (at Br. 25), incorrectly asserting that the United States' position in this case conflicts with the position taken in that brief. Like *New Mexico*, the question presented in *Wyoming* assumed the existence of federal reserved rights, and addressed whether the state courts had

applied the proper standard in quantifying reserved water rights. In opposing *certiorari* in that case, the United States responded to arguments that the *New Mexico* decision announced new equitable limitations on the exercise of federal reserved water rights. http://www.justice.gov/sites/default/files/osg/briefs/1988/01/01/sg880316.txt at 19. In that discussion, the United States described the primary-secondary purposes distinction as addressing "what circumstances are sufficient to give rise to a federal reserved water right in the first place," but this discussion, like the other language quoted in the Water Agencies' brief, merely characterizes principle that reserved water rights are limited by the amount of water needed for "primary" but not "secondary" purposes, and does not address the question at issue here, whether *any* water rights were reserved. It explains that *New Mexico* simply holds that implication of a federally reserved water right for the reservation's secondary purposes would be inconsistent with Congress's policy of deference to state law. *Id.* at 20. Like the other materials cited by the Water Agencies (Br. 23-25), the United States' brief in opposition in *Wyoming* is entirely consistent with the district court's analysis in this case. None of the statements cited by the Water Agencies provides

support for the argument that the *New Mexico* primary-secondary distinction has been employed to determine whether a federal water right has been reserved in the first instance, much less whether such a right is reserved for an Indian reservation. As the district court correctly concluded (ER 11), that distinction is relevant only after the court has concluded that federal water rights were reserved, to determine the extent of those rights.

3. No court has held that state law is relevant to the existence of federal reserved water rights.

Finally, no precedent in this Court, either before or after *New Mexico,* holds that deference to state water law is relevant to the existence of federal reserved water rights. To the contrary, this Court has held that "reserved rights are federal water rights and are not dependent upon state law or state procedures," *Walton II*, 752 F.2d at 400 (internal quotation marks and citations omitted). Nor have the Water Agencies have identified a single case in which a court has held that state law is a factor in determining the existence of a federal reserved water right. Instead, the Water Agencies cite examples of decisions addressing the quantity of water reserved for a particular purpose as a separate "reserved water right," and characterize

statements that reserved water rights do not exist for a particular purpose or exist only for the "primary" purpose of a reservation as evidence that *New Mexico*, which the Water Agencies construe to require consideration of state law (see *e.g.,* Br. 27 n.6), applies.

As the district court correctly concluded, however, *New Mexico* did not address the question at issue here. The Court inferred that the United States impliedly reserved only the *quantity* of water necessary for the "primary" purposes identified in the Organic Administration Act of 1897, in which Congress authorized the creation of national forest reserves, and further inferred that Congress expected the United States to acquire under state law any additional water needed for later-identified, "secondary" forest purposes. Only with respect to determining whether the amount of water needed to effectuate particular purposes of the forest did the Court consider whether rights were reserved for specific purposes. And only in considering the amounts needed for purposes other than the "primary" purposes identified by Congress did the Court consider deference to state law. Thus, nothing in *New Mexico* suggests that the distinction between primary and secondary purposes – much less deference to state water

law – is relevant to the analysis of whether the United States reserved water in the first instance, as the district court correctly concluded.

B. The Reservation's general "homeland" purpose gives rise to the inference that water was reserved for the Tribe.

The courts uniformly have concluded that when the United States reserves federal land for use as a permanent homeland for an Indian tribe, the reservation includes not just the land but also water to meet the present and future needs of the tribe residing on the reserved land, independent of any power the state may have acquired to administer waters on federal lands. See *Winters*, 207 U.S. at 577 (creation of Indian reservation exempted water necessary for irrigation from appropriation under the state laws); *Arizona I*, 373 U.S. at 599 (reserved water right implied where water was "essential to the life of the Indian people"). This Court addressed interests in the Agua Caliente Reservation at issue in this case in *United States v. Preston*, 352 F.2d 352, 357 (9th Cir. 1965), explaining that "as soon as a reservation for Indians has been established, there is an implied reservation of rights to the use of the waters which arise, traverse or border upon the Indians' reservation, which rights may be exercised in connection with the Indian lands. This rule applies although the waters

are not mentioned in the treaties, executive orders or other means used to establish the reservations." The rule accordingly is that the need for water to fulfill the purpose of Indian reservations gives rise to the implication that water rights are reserved.

The Water Agencies assert (Br. 26), without supporting authority, that "the reservation of land as a homeland does not address whether the Tribe has a reserved rights [*sic*] in water." They contend that because all Indian reservations are established as homelands for tribes, a water right to serve the present and future needs of the resident tribe is not implied in the creation of an Indian reservation alone. *Id.* Based on this faulty premise, the Water Agencies assert that the district court could not determine whether a water right was reserved in this case without first determining some *other* "primary purposes of the Reservation – as opposed to the secondary purposes" – for which a reserved right was needed. They contend that this Court's precedents require that the Court distinguish between the "primary" and "secondary" purposes of an Indian reservation before determining whether an Indian tribe has a reserved right. And they assert that the pivotal question is whether, in light of state law, the primary purposes

of the reservation would be defeated without a federal water right. Under the Water Agencies' theory, therefore, the courts must defer to state law to determine whether water is necessary to achieve the purposes of federal reservations. The Water Agencies are incorrect.

This Court has rejected direct application of *New Mexico's* "purposes" analysis to Indian reservations. *Adair*, 723 F.2d at 1409. "While the purpose for which the federal government reserves other types of lands may be strictly construed [citing *New Mexico*], the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Id.* at 1408 n.13 (quoting W. Canby, American Indian Law 245–46 (1981)). Moreover, any distinction between primary and secondary purposes with respect to Indian reservations would have no meaningful effect because – as the Water Agencies concede (Br. 52) – Indian reservations are established for a broad, primary purpose: to provide a permanent, livable homeland. The essential premise of the *Winters* doctrine is that this purpose could not be achieved if Indians were required to compete with non-Indian settlers for the water rights necessary to support a

community.[4] Accordingly, *any* specific purpose integral to the provision of a livable homeland is among the "very purposes" for which Indian reservations were created, and reserved rights for *all* such purposes should be inferred. See, *e.g.*, *Gila River,* 35 P.3d at 73-74.

Both *Winters* and *Arizona I* recognize that the broad purpose of an Indian reservation is to enable the establishment of a self-sustaining Indian community. In *Winters*, the Supreme Court rejected the notion that Congress had not intended to reserve waters necessary to make the reservation livable. 207 U.S. at 576-77. The Court acknowledged that water rights are necessary for lands reserved for a homeland purpose even more explicitly *Arizona I*, in which it recognized that the establishment of Indian reservations impliedly reserved water "necessary to sustain life" and "essential to the life of the Indian people and to the animals they hunted and crops they raised." 373 U.S. at 599-600. Similarly, in *Arizona v. California*, 460 U.S. 605 (1983) (*"Arizona*

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[4] Accord *In re the General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 76-77 (Ariz. 2001); *In re: The General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 96-97, 99 (Wyo. 1988), aff'd by an equally divided Court sub nom. *Wyoming v. United States*, 492 U.S. 406 (1989); M*ontana ex rel. Greely v. Confederated Salish & Kootenai Tribes,* 712 P.2d 754, 767-68 (Mont. 1985).

II"), the Court stated that "the creation of the Reservations by the federal government implied an allotment of water necessary to 'make the reservation livable.'" *Id.* at 616; see also *Menominee Tribe v. United States*, 391 U.S. 404, 405-06 (1968) (treaty language establishing reservation "for a home, to be held as Indian lands are held," impliedly reserves hunting and fishing rights on the reservation).

Federal reserved water rights are inferred from the creation of Indian reservations "to provide a homeland for Indians" because that broad purpose "must be liberally construed," and it is reasonable to infer that the United States intended to "deal fairly with Indians by reserving waters without which their lands would be useless." *Walton I*, 647 F.2d at 47 (citing *Arizona I*, 373 U.S.at 600). By contrast, federal proprietary reservations, such as the national forest at issue in *New Mexico*, are generally created for more specific purposes. No decision of this Court has ever held that the "homeland" purpose of an Indian reservation does not give rise to an inference that water was reserved. Nor has any court held that consideration of alternative, state-law water appropriations is relevant to determining a federal reserved water right is implied in the creation of an Indian reservation.

Accordingly, this Court has consistently held that water rights are necessary for the general "homeland" purpose of federal Indian reservations. In *Walton I*, 647 F.2d at 47-48, this Court held that the Colville Tribes' one-paragraph executive order reserved water rights for the purposes of providing a land-based agrarian society and preserving access to fishing runs. This Court stated that "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government." 647 F.2d at 47.[5] See also *Adair*, 723 F.2d at 1408-10 (federal reserved water rights for agriculture and subsistence activities including fishing, hunting and gathering).

Relying on *Adair*, this Court subsequently recognized that the Salish and Kootenai's aboriginal dependence on fishing, and the Hell Gate Treaty recognizing their right to fish on their reservation, clearly

[5] See William C. Canby, Jr., American Indian Law 435 (4th ed. 2004) ("Although the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purpose of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."); Felix S. Cohen, Handbook of Federal Indian Law § 19.03[5][a] (2012 ed.) ("When the documents creating regulations are construed in accordance with the Indian law canon, more is encompassed within the homeland purpose than merely transforming the tribes into agrarian societies.").

implied a reserved water right. *Joint Bd. of Control of Flathead, et al. Ir. Dist. v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988). This approach accords with *New Mexico* and other Supreme Court cases. The Supreme Court has repeatedly recognized that Indian reservations may be established for broad purposes, and has not required any further determination to support an inference that water was reserved.

II. The Tribe's potential rights under California law neither defeat nor replace federal reserved water rights for the Reservation.

A. California's administration of groundwater under a "correlative rights" framework does not deprive the Tribe of federal reserved rights in groundwater underlying its Reservation.

The Water Agencies urge this Court to reverse the district court's order because California law provides that land owners have "correlative rights" in groundwater underlying their property. The Water Agencies make no suggestion that water is not needed for the Reservation. Rather, they contend (Br. 41), that state water law obviates any need for a federal reserved right for the reservation, and in the absence of necessity, such a right cannot be inferred. But binding precedent in this Court holds to the contrary. As discussed above,

Winters holds that the need for water to support the reservation's purposes is the guidepost for determining whether a federal water right is reserved. *Winters* rights are "federal water rights," "governed by federal law," and "are not dependent upon state law or state procedures." *Cappaert*, 426 U.S. at 145; *Walton II*, 752 F.2d at 400. They are "protected by federal law[,]" and secured by the "the powerful federal interest in safeguarding [them] from state encroachment." *Arizona v. San Carlos Apache Tribe*, 463 US. 545, 571 (1983). Moreover, *Winters* rights arise without regard to any alleged equities that may favor competing water users. *Walton II*, at 405. A state-law correlative right is not the equivalent of a *Winters right* and the existence of the state's "correlative rights" framework is irrelevant to the existence of a *Winters* right.

The Water Agencies incorrectly contend (Br. 41) that under *New Mexico,* the district court was required to balance the congressional policy of deference to state water law and the needs of federal lands in determining whether a reserved right in groundwater is implied here. They assert (Br. 42) that "the proper balance in this context recognizes that if an Indian tribe has the same correlative right to use

groundwater as other overlying landowners under state law, a reserved right in groundwater is not necessary to accomplish the primary reservation purposes and does not impliedly exist under *New Mexico*." This purported "balancing" not only overlooks the *Winters* rule that a water right is impliedly reserved if water is needed to accomplish the reservation's purpose, but also allows state law to defeat the Tribe's federally protected rights.

First, because a federal reserved water right is defined by the need for water and not by the source from which it could be produced, there is no principled ground for a determination that federal reserved water rights do not exist in groundwater, regardless of state law rules for administering it. As shown above, the purpose of a *Winters* right is to provide the protection of federal law to water resources reserved by the United States in trust for the benefit of tribes and their members. Accordingly, the Water Agencies' assertion that this Court should apply a "balancing" test in determining whether state or federal law applies to the Reservation's groundwater rights is incorrect and contrary federal supremacy principles.

The United States reserved its common law water rights, free from state administration, when it created the Reservation. *Cappaert*, 426 U.S. at 145. And in any event, the Supremacy Clause "invalidates state laws that interfere with, or are contrary to, federal law," *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt Dist.*, 498 F.3d 1031, 1039 (9th Cir. 2007) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23, 211 (1824)). State-law "correlative rights" are subject to numerous restrictions under state law. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224 (Cal. 2000). Thus even assuming the state's riparian framework governed the reserved rights at issue here, it is preempted to the extent that state-law restrictions are inconsistent with federal law. Accordingly, the Supremacy Clause bars application of the Water Agencies' "balancing" test, as it would allow state law to defeat a property right held by the United States in trust for the Tribe. *Kleppe v. New Mexico*, 426 U.S. at 543. It therefore must be rejected.

B. Binding precedent holds that the *Winters* doctrine applies to groundwater.

In *Cappaert*, 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, 426 U.S. 128 (1976). The issue in *Cappaert*, like the

question here, was whether a federal reserved right to water sufficient for the purpose of a federal reservation supported an order enjoining pumping of groundwater. In *Cappaert,* the United States sued to enjoin groundwater pumping in the vicinity of Death Valley National Monument. The Monument is a federal reservation that includes a deep limestone cavern known as Devil's Hole. Devil's Hole contains a pool of water that the Court found was "part of the 4,500 square mile groundwater system." 508 F.2d at 315. Cappaert owned a ranch located two and one-half miles away and pumped groundwater from the same groundwater system. Cappaert's pumping of the groundwater decreased the water level in the pool, such that it no longer supported a protected species of fish, the preservation of which was among the purposes of the federal reservation. Cappaert admitted pumping from the underlying aquifer that fed the pool in Devil's Hole, but denied that the United States had a legitimate claim to groundwater.

This Court rejected Cappaert's assertion that the government's reserved water right was limited to surface water. The Court held that although *Winters* and subsequent Supreme Court decisions extending the doctrine "involved only surface water rights, the reservation of

water doctrine is not so limited," and enjoined pumping to the extent that it interfered with the United States' reserved water right. *Cappaert*, 508 F.2d at 317.

The Supreme Court affirmed. It held that "since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143. The Court concluded that the United States' federal reserved right extended to the groundwater, finding that the "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert*, 426 U.S. at 142. The Supreme Court affirmed this Court's judgment enjoining the pumping of groundwater. Accordingly, to the extent that groundwater is necessary for the purposes of the Agua Caliente Reservation, binding precedent holds that the groundwater is reserved.

And in any event, this Court's decision in *Cappaert* remains binding precedent in this Circuit. As this Court reiterated in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014), "it is well

settled that we are bound by our prior decisions, [except] where 'the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable'" (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*)). Nothing in the Supreme Court's approach to the issue presented in *Cappaert* undercuts this Court's holding that the reserved water rights doctrine extends to groundwater.[6] Accordingly, this Court's precedent holds that groundwater is reserved to the extent that it is necessary to effectuate the purposes of a federal land reservation such as the Agua Caliente Reservation at issue here.

The district court correctly found that groundwater rights are appurtenant to overlying land as a matter of California law. ER 9 (citing *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1240 (2000)). The Water Agencies have cited no authority for their contrary

[6] Although it is the need for appurtenant water, and not the hydrological connection between surface water and groundwater, that determines whether a water right is reserved, *Cappaert*, 426 U.S. at 143, we note that the district court's statement that it is "undisputed" that the groundwater at issue is not hydrologically connected to the reservation's surface water is inaccurate. In fact, it is undisputed that they *are* hydrologically connected: See, *e.g.* Doc. 84-1 at 5 ("The entire flow of the [Whitewater] river, except during extreme flood periods, sinks into the desert before reaching the Salton Sea.").

proposition that underlying groundwater is not reserved when a federal Indian reservation is created. And because a federal reserved water right is defined by the need for water and not by the source from which it could be produced, there is no principled ground for a determination that federal reserved water rights do not exist in groundwater.

C. The courts that have considered the question uniformly have concluded that federal reserved water rights extend to groundwater.

In *Cappaert*, this Court cited two prior federal-court decisions applying the reserved rights doctrine to groundwater, *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D.Nev.1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960), and *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968). *Shamberger* held that the right to develop groundwater within a federal reservation is not subject to state law. 165 F. Supp. at 608. In *Tweedy,* the federal district court for Montana held that the establishment of a reservation reserved underground waters to the same extent, and with the same limitations, as surface waters: "The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters

as well. The land was arid — water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference." *Tweedy*, 286 F. Supp. at 385.

Likewise, since this Court's decision in *Cappaert,* federal courts in this Circuit and elsewhere consistently have held that federal reserved rights include groundwater rights. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) ("[Winters rights] extend to groundwater as well as surface water"), aff'd in part on other grounds, and rev'd in part on other grounds, 647 F.2d 42 (9th Cir. 1981); *State of New Mexico ex. rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (Pueblo water rights extend to groundwater as an integral part of the hydrologic cycle); *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699 (1986) ("[t]he Winters doctrine . . . includes an obligation to preserve all water sources within the reservation, including groundwater"); *Soboba Band of Mission Indians v. United States*, 37 Ind. Cl. Comm. 326, 341 (1976) ("the Winters Doctrine applies to all waters appurtenant to the reservations, including wells, springs, streams, and percolating and

channelized ground waters"). The Water Agencies have cited no federal-court decision to the contrary.

With a single exception, state supreme courts that have addressed the question also have concluded that the *Winters* doctrine applies to groundwater. Moreover, the only state supreme court to rule to the contrary expressly endorsed the rationale of the state courts that have held that federal reserved rights exist in groundwater. Since that court's ruling, the state supreme courts that have addressed the question, like the federal courts, have consistently held that rights in groundwater may be federally reserved.

In *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), the Wyoming Supreme Court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d at 99. It declined to reverse a lower court decision concluding that groundwater was not reserved, however, on the ground that "not a single case applying the reserved water doctrine to groundwater is cited to us." *Ibid.*

The Arizona Supreme Court expressly declined to follow the Wyoming Supreme Court's equivocal decision in *Big Horn,* and held that groundwater may be reserved for the benefit of Indian reservations under the *Winters* Doctrine. In *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999), the Arizona Supreme Court observed that "[w]e can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive." *Id.* at 745. The Arizona court held that when the United States establishes Indian reservations on arid land, it likewise intends a "reservation of water to come from whatever particular sources each reservation had at hand." *Id.* at 747. The Arizona Supreme Court found instructive that the U.S. Supreme Court in *Cappaert* concluded that a groundwater diversion may be enjoined to protect federally reserved waters: "That federal reserved rights law declines to differentiate surface and groundwater . . . when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected." *Id.* at 747 (citing *Cappaert*, 426 U.S. at 142-43). Using *Winters* and *Cappaert* as "guideposts," the

Arizona Court concluded that "[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.* at 747.

Similarly, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098-99 (Mont. 2002), the Montana Supreme Court held that the treaty establishing the Flathead Indian Reservation implicitly reserved groundwater underlying the reservation. Relying on the reasoning of the Arizona Supreme Court, as well as on this Court's and the Supreme Court's decisions in *Cappaert*, the Montana Court found "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," *id.* at 1098, and concluded that there was "no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights." *Id.* at 1099.

D. Neither actual use, state decreed rights, nor impacts on non-Indian users of the aquifer are relevant to the inference that a *Winters* right exists.

Under the Water Agencies' interpretation of *New Mexico*, a Tribe could claim a federal reserved water right only if its need for water could not be satisfied under the state law. But, because state law can change over time, this theory subjects both the existence and the scope of a federal reserved water right, which is a federal property right, to change at the discretion of the state legislature. It therefore conflicts irreconcilably with the Winters doctrine, under which a federal reserved right in unappropriated water sufficient to achieve the purposes of the reservation vests on the date of the reservation. *Cappaert*, 426 U.S. at 145. It also cannot be reconciled with the Property Clause, which states that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....", U.S. Const. art. IV, § 3, cl. 2, to the extent that any state-law limitation on the existence or extent of the Tribe's water rights is inconsistent with the Winters doctrine. For this reason, the content of state law is irrelevant to the existence of

federal reserved water rights. The Water Agencies' remaining arguments also must be rejected, as explained below.

1. The Tribe's historical use of groundwater is irrelevant to the existence of a federal reserved right.

The Water Agencies assert (Br. 46) that because the Tribe had not developed groundwater when the reservation was created, and because it has relied on others for the development of the groundwater resource since that time, the record here does not support a reservation of groundwater. This argument overlooks a fundamental difference between *Winters* rights and appropriation under state law: Federal reserved rights vest without regard to actual use, and cannot be lost through forfeiture or abandonment. In *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), this Court recognized that the "paramount right of the Indians to the waters" was "not limited to the use of the Indians at any given date but extended to the ultimate needs of the Indians as those needs and requirements should grow." This Court similarly held in *Walton I* that "[t]o identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to

maintain themselves under changed circumstances." 647 F.2d at 47 (footnote and citations omitted).

Indeed, the Supreme Court rejected a similar claim in *Arizona I.* In that case, the state asserted that "the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs.'" 373 U.S. at 600-01. The Court rejected this standard, which required the Court to "guess" how "many Indians there will be and what their future needs will be." *Id.* at 601. The Court concluded that the standard employed for quantification must account for the "future as well as the present needs of the Indian reservations." *Id.* at 600. In both *Walton I* and *Arizona I*, the respective courts concluded that the executive orders establishing the reservations were sufficient evidence that water was implicitly reserved when the reservations were created. *Walton I*, 647 F.2d at 47 and *Arizona I,* 373 U.S. at 598-99.

Generally, at the time Indian reservations were created, "Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights." *Walton I*, 647 F.2d at 46. And after the water is reserved, its development of the resource – in this case, groundwater – is not

required by any particular date, because the reservation of water for an Indian tribe is "intended to satisfy the future as well as the present needs of the Indian Reservations." *Arizona I,* 373 U.S. at 600. Thus, even in the context of quantification, development of a water source at the time of reservation is not relevant.

Finally, the contemporaneous record surrounding the creation of the Agua Caliente Reservation clearly demonstrates that the "purpose" of the Agua Caliente Reservation was to provide the Tribe with a permanent home with water sufficient to meet the Tribe's present and future needs. For example, in August 1877, Indian Agent John Colburn wrote to the Commissioner of Indian Affairs pleading for additional lands for the Agua Caliente, among others. Supp. ER 144. Describing the need for these lands, Colburn uses "permanent home" or "reservation" as a purpose for the Agua Caliente Reservation in four separate paragraphs. The correspondence specifically states that the "first purpose of the Department [of the Interior] is now to secure the Mission Indians permanent homes, with 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." Supp. ER 146. Approximately 45 days later,

President Hayes signed the executive order withdrawing lands "from sale and settlement, and set apart as a reservation for Indian purposes" for the Agua Caliente Tribe. ER 58. Because this record demonstrates that water was necessary for the success of the Reservation, the district court correctly concluded that the executive orders setting aside lands for the Reservation implied "at least some water use." ER 7. As a matter of law, the Orders reserved sufficient water to meet the Tribe's present and future needs.

2. The decree in the Whitewater River Streams System is irrelevant to the existence of a federal reserved right.

In 1938, the State of California purported to adjudicate and decree certain water rights to the United States for use on the Reservation. The Water Agencies assert (Br. 52) that the Tribe therefore has a decreed right to "the precise amount of Whitewater River surface water that the United States represented as necessary to meet the Tribe's needs" and a federal water right is therefore unnecessary and – under the Water Agencies' distorted interpretation of *New Mexico* – nonexistent. But it is undisputed that the state lacked power to adjudicate the United States' reserved rights, as there was at that time

no waiver of federal sovereign immunity from joinder of the United States (or any tribe) in water rights adjudications.[7]

In addressing the effect of a state-law water decree on federal reserved water rights, this Court has held that "[i]t is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved [for Indian tribes] are not subject to appropriation under state law, nor has the state power to dispose of them." *Ahtanum*, 236 F.2d at 328; *see also United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939) (state water laws are not controlling on an Indian reservation); *Walton I*, 647 F.2d at 53, n.17.

Accordingly, because the State of California lacked jurisdiction to adjudicate the federal reserved water rights of the Agua Caliente Tribe in the Whitewater Adjudication, its decree purporting to adjudicate the Tribe's reserved water rights is, as a matter of law, neither applicable to nor controlling in this case. Additionally, contrary to the Water Agencies' suggestion at Br. 54, the inference that the Reservation

[7] The 1952, McCarran Amendment waived the United States' immunity as to comprehensive state water rights adjudications. *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 549 (1983).

includes federal reserved water rights cannot be defeated by the United States' actions in respect to the Whitewater proceeding. It was required neither to participate in that adjudication nor otherwise to seek a state-decreed groundwater right to secure the federal reserved water rights at issue in this case. *Ahtanum Irr. Dist.*, 236 F.2d at 328 (state water right decree could have no effect upon federal reserved water rights, which are not subject to appropriation or disposition under state law).

3. The impacts of a reserved water right for the Tribe on non-Indian users of the aquifer are irrelevant to the existence of Winters *rights.*

Finally, the Water Agencies urge this Court to reverse the district court's conclusion that federal reserved groundwater rights were implied in the creation of the Reservation on the ground that such rights potentially conflict with those of state and private appropriators. Br. 56-62. But this Court has directly rejected such reasoning, and reversal on this ground accordingly is foreclosed.

In *Walton I*, this Court addressed the impacts of "open-ended water rights" such as those at issue in this case, and observed that "[u]ntil their extent is determined, state-created water rights cannot be relied on by property owners." 647 F.2d at 48. It concluded that

"[r]esolution of the problem is found in quantifying reserved water rights, not in limiting their use." *Ibid.* In *Walton II*, this Court explained that impacts on state-created rights are the necessary result of the "tension" between state and federal water administration, and reaffirmed that *Winters* rights arise "without regard to any alleged equities that may favor competing water users." *Walton II*, 752 F.2d at 405. As discussed above, a decision that federal reserved water rights are defeated by state laws and procedures is foreclosed by supremacy principles. And in any event, California's groundwater statute recognizes the supremacy of federal reserved rights over state-law appropriations. Cal. Water Code, Div. 6, Chapter 1, § 10720.3(d). Any potential impacts of the Tribe's exercise of its federal reserved water rights accordingly is wholly irrelevant to this appeal.

CONCLUSION

For the foregoing reasons, the district court's order granting partial summary judgment that a federal water right was reserved in groundwater underlying the Tribe's Reservation should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,656 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2016, I electronically filed the foregoing Answering Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this appeal are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/Elizabeth Ann Peterson