No. 15-55896

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Agua Caliente Band of Cahuilla Indians,

Appellee and Plaintiff,

vs.

Coachella Valley Water District, *et al*., and Desert Water Agency, *et al.*,

Appellants and Defendants.

United States of America,

Appellee and Plaintiff-Intervenor,

vs.

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. Honorable Jesus G. Bernal, Department 1
Case No. 5:13-cv-00883-JGB-SP

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

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CORPORATE DISCLOSURE STATEMENT

Appellants Coachella Valley Water District and Desert Water Agency are public water agencies of the State of California, and neither is a "nongovernmental corporate party" within the meaning Rule 26.1 of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiff Agua Caliente Band of Cahuilla Indians' ("Tribe") Complaint for Declaratory and Injunctive Relief under 28 U.S.C. §§ 1331 (federal question) and 1362 (tribal plaintiff-federal question). The district court had jurisdiction over plaintiff-intervenor United States' Complaint in Intervention under 28 U.S.C. §§ 1331 (federal question) and 1345 (United States plaintiff).

On March 20, 2015, the district court issued an order—amended on March 24, 2015, to reflect formatting changes—granting in part and denying in part the motions for partial summary judgment submitted by plaintiff Tribe, plaintiff-intervenor United States, and the defendant water agencies, Coachella Valley Water District ("CVWD") and Desert Water Agency ("DWA") (collectively "Water Agencies").[1] The district court held that the Tribe has a reserved right in the groundwater underlying its reservation, but that the Tribe does not have an aboriginal right in the groundwater. On March 30, 2015, the Water Agencies filed in this Court a petition for permission to appeal under 28 U.S.C. § 1292(b), which this Court granted. This Court has jurisdiction under 28 U.S.C. § 1292(b).

[1] Reference to "Water Agencies" includes the Water Agencies' directors, who were sued in their official capacities.

STATEMENT OF ISSUES

The questions presented are whether the federal reserved rights doctrine applies to groundwater, and whether the Tribe has a federal reserved water right in the groundwater underlying its reservation.

STATEMENT OF THE CASE

1. The Litigation

On May 14, 2013, the Tribe filed a Complaint for Declaratory and Injunctive Relief against the Water Agencies in federal district court. Excerpts of Record ("ER") 23. The Tribe's complaint alleged that the Tribe has a federal reserved right and an aboriginal right in the groundwater underlying its reservation; that the Water Agencies are impairing the Tribe's reserved and aboriginal rights by importing water into the groundwater basin that is of lesser quality than the native groundwater; and that the Water Agencies are storing water in and pumping water from the "pore space" of the basin, which the Tribe allegedly "owns," without paying compensation to the Tribe. *Id*. The Tribe's complaint requested a declaration that the Tribe has a reserved right and aboriginal right in the groundwater, and a quantification of the amount of water encompassed in the Tribe's rights. ER 40-42 (¶¶ 1-13). The United States was

granted intervention, and filed a complaint in intervention alleging that the Tribe has a federal reserved right in the groundwater. ER 46.

The parties agreed to trifurcate the case. ER 17. Phase 1 would address whether the Tribe has a federal reserved water right and an aboriginal right in the groundwater. *Id.* Phase 2, if reached, would address certain characteristics of the Tribe's claimed rights, *i.e.*, whether the Tribe owns the "pore space" of the basin and whether the Tribe's rights include water of a certain quality; Phase 2 would also address certain affirmative defenses of the Water Agencies such as laches and unclear hands. *Id.* Phase 3, if reached, would quantify the Tribe's rights, in terms of how much water is necessary to satisfy the Tribe's rights. *Id.*

The parties filed cross-motions for partial summary judgment on the Phase 1 issue. The Tribe argued that it has both a reserved right and an aboriginal right in the groundwater, the United States argued that the Tribe has a reserved right in the groundwater, and the Water Agencies in separate motions argued that the Tribe has neither a reserved right nor an aboriginal right in the groundwater.

2. The District Court Decision

On March 20, 2015, the district court issued an order—amended on March 24, 2015, to reflect formatting changes—granting in part and denying in part the plaintiffs' and defendants' motions for partial summary judgment. ER 2. The district court held that the Tribe has a reserved water right in the groundwater, and granted partial summary judgment for the Tribe and the United States on that issue. ER 11. The district court held that the Tribe does not have an aboriginal right in the groundwater, and granted partial summary judgment for the Water Agencies on that issue. ER 14.

On June 10, 2015, this Court granted the Water Agencies' timely petition for permission to appeal under 28 U.S.C. § 1292(b). ER 1.

STATEMENT OF FACTS

1. The Parties

Plaintiff Tribe is a federally recognized Indian tribe that occupies a reservation in California's Coachella Valley; the reservation is located in and around the City of Palm Springs, in Riverside County. ER 26 (¶9). Intervenor United States holds the reservation lands in trust for the Tribe and individual allottees on the reservation. ER 48-49 (¶ 7).

Defendant CVWD is a public agency of the State of California organized and operating under the County Water District Law and the Coachella Merger Law. Cal. Wat. Code §§ 30000-32603, 33100-33162, 33118. Defendant DWA is a public agency of the State of California created and operating under the Desert Water Agency Law. Cal. Wat. Code, App. § 100-1.

The Water Agencies, CVWD and DWA, provide water supplies and service to their customers in the Coachella Valley. ER 138-139 (¶¶ 9, 14, 15). The Water Agencies obtain the water supplies by purchasing water from the State Water Project ("SWP"), which the agencies spread into the groundwater basin of the Coachella Valley. *Id.* The Water Agencies pump the groundwater from the basin as necessary to meet the water needs of their customers. *Id.* Their customers include agricultural users, commercial and industrial users, residential users, and the Tribe itself. *Id.*

2. The Tribe's Reservation

On May 15, 1876, President Ulysses S. Grant issued an executive order setting aside certain lands for the Tribe in San Bernardino County, California, in what is now Riverside County. ER 58. On September 29, 1877, President Rutherford B. Hayes issued an executive order setting aside additional lands for the Tribe. ER 58-59.

The lands reserved for the Tribe consist primarily of certain even-numbered sections in certain townships in Riverside County. ER 58-59. Most odd-numbered sections in the same townships had been previously conveyed to the predecessor of the Southern Pacific Railroad Company, as an incentive for the railroad company's predecessor to build a railroad. 14 Stat. 292, 294, 299 (1866). As a result, the 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). Most of the residents on the reservation are non-Indians, or at least non-members of the Tribe; more than 20,000 people reside on the Tribe's reservation, ER 222, 223, although the Tribe has only 440 members. ER 196.

Most of the Tribe's reservation lands (58%) have been allotted to individual Indians; the remaining lands are tribal trust lands (12.7%), tribal fee lands (.3%) and non-Indian fee lands (29%). ER 139 (¶ 13). Many of the Indian allottees have sold or leased their allotted lands to non-Indians. ER 5. Some of the non-Indian purchasers or lessees purchase water from the Water Districts or pump groundwater for irrigation of commercial golf courses. ER 5, 11 n. 7, 138 (¶ 10).

3. The Mission Indians Relief Act and the Smiley Commission

In 1891, Congress enacted the Mission Indians Relief Act, 26 Stat. 712, which authorized the President to approve reservations for individual bands of the Mission Indians in California. The 1891 Act authorized the Secretary of the Interior to appoint a commission to select a reservation for each band of the Mission Indians, which would become valid when approved by the President and the Secretary of the Interior. 26 Stat. 712.

Pursuant to the 1891 Act, the Secretary appointed the Mission Indians Commission, generally known as the "Smiley Commission," to conduct an investigation of the Mission Indians and recommend the creation of reservations for the Indians. ER 63. In 1891, the Smiley Commission conducted an investigation of the Mission Indians, including the Tribe here, and issued a report recommending the creation of certain reservations, including a reservation for the Tribe. ER 63. On December 7, 1891, the Smiley Commission submitted its report to the Secretary of the Interior, ER 65, and, on December 29, 1891, President Benjamin Harrison issued an executive order approving the Smiley Commission report and its recommendations. ER 74-75.

On July 1, 1892, Congress enacted a statute approving the recommendations. 27 Stat. 61 (1892).[2]

4. The Whitewater River And the Coachella Valley Groundwater Basin

The Whitewater River is the major source of surface water in the Coachella Valley. ER 98-99 (¶ I). The Whitewater River has several major

[2] In *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, 680 F.2d 71 (9th Cir. 1982), the Ninth Circuit held that the Mission Indians Relief Act of 1891 extinguished Indian reservations for the Mission Indians that had been created by executive orders, and authorized the Secretary of the Interior to provide for the creation of new reservations pursuant to procedures established in the 1891 Act. Specifically, *Pechanga* stated that "[i]n general, reservations created by Executive Order were temporary" and "their boundaries changed frequently," *Pechanga*, 680 F.2d at 72 n. 1; "[b]ecause the constantly-changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act," which "empowered the Secretary of the Interior to oversee the establishment of new, more secure reservations," *id*. at 73; and therefore the 1891 Act "worked to extinguish whatever interest the [Pechanga] Band had in the land pursuant to the 1882 Executive Order." *Id*. at 74. Under the procedures established in the 1891 Act for new, more secure reservations, the Secretary was to appoint commissioners to propose reservation sites for the Mission Indians, the selection of the sites would became "valid when approved by the President and the Secretary of the Interior," and the Secretary would then issue patents to the Indian tribes for the lands selected by the commissioners. *Id*. at 73-74. Pursuant to the 1891 Act, the Secretary issued patents for the Tribe's reservation in 1896, 1906, 1911 and 1923. ER 208-221. Thus, *Pechanga* indicates that the Tribe's reservation was established by the patents issued in 1896, 1906, 1911 and 1923, and not by the 1870s executive orders. For convenience, however, the Water Agencies will assume in this brief that the Tribe's reservation was created by the 1870s executive orders, as the Tribe alleges, because the question whether the reservation was created by the executive orders or the patents is not relevant to whether the Tribe has a reserved right to the groundwater.

tributaries, some of which (Tahquitz Creek, Andreas Creek and Chino Creek) flow through or near the Tribe's reservation. ER 99 (¶¶ II, III). The Coachella Valley Groundwater Basin underlies the Whitewater River. ER 151-152. The groundwater is the principal source of municipal water supply in the Coachella Valley. ER 151.

The Tribe does not produce groundwater from its reservation. ER 5, 138 (¶ 9), 193. Instead, the Tribe purchases its water supplies from the Water Agencies, which the Agencies provide by pumping it from the ground. *Id*. The Tribe has admitted, and the trial court concluded, that the groundwater underlying the Tribe's reservation does not "contribute" to the Whitewater River tributaries, specifically the Andreas, Tahquitz and Chino Creeks, that flow on or near the Tribe's reservation. ER 5, 199-200.

5. The Whitewater River Decree

In 1938, the Riverside County Superior Court issued the Whitewater River Decree, which adjudicated all water rights in the Whitewater River and its tributaries. ER 96. The Decree awarded to the United States on behalf of the Tribe the right to divert a specific quantity of Whitewater River tributary water that the United States had "suggested" should be awarded, for "domestic, stock watering, power development and irrigation purposes" on the Tribe's

reservation. ER 115-116 (¶¶ 45, 46), 119-200 (¶¶ IV, V).

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

SUMMARY OF ARGUMENT

Under the reserved rights doctrine, the government—in reserving lands from the public domain for federal purposes, such as Indian purposes—may impliedly intend to reserve water rights for the lands. In *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court narrowly construed the reserved rights doctrine because the doctrine conflicts with Congress' policy of deference to state water law. Under its narrow construction, *New Mexico* held that a federal water right is impliedly reserved only if "necessary" to accomplish the "primary" reservation purposes and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. The Ninth Circuit has held that the limitations on the reserved rights doctrine established in *New Mexico* apply to Indian reserved rights. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983).

The district court below held that *New Mexico* applies only in quantifying a reserved right and not in determining whether the right impliedly exists, and did not apply *New Mexico* in determining that the Tribe has a reserved right in groundwater. On the contrary, *New Mexico* itself and Ninth Circuit decisions make clear that *New Mexico*'s requirements must be met before a reserved right can be found to exist and before the right is quantified.

The Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s requirements and therefore does not impliedly exist. Under California law, all overlying landowners have correlative rights to use groundwater underlying their lands, and their correlative rights attach to the land and are equal to the rights of other overlying landowners. The Tribe, as an overlying landowner of its reservation, has the same correlative right to use groundwater as other overlying landowners. Therefore, the Tribe's claimed reserved right is not necessary to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated," and thus does not impliedly exist under *New Mexico*.

In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court developed the reserved rights doctrine in order that Indian tribes would have prior rights to surface waters under federal law even though non-Indians may

have prior rights under the "first in time, first in right" priority rule of state appropriation laws. Since overlying landowners—including the Tribe—have correlative rights in groundwater that attach to the land, the "first in time, first in right" priority rule that applies to surface waters does not apply to groundwater. Therefore, the rationale of the *Winters* doctrine that applies to surface water does not support its extension to the groundwater here. There is no conflict between the Tribe's primary reservation needs and California law, because the Tribe's primary reservation needs are met under California's doctrine of correlative rights. Federal law should not be construed to create a conflict with state law, by holding that the Tribe has a reserved right in groundwater that is inconsistent with California's doctrine of correlative rights.

Other factors also demonstrate that the Tribe does not have an implied reserved right in groundwater. The historical circumstances surrounding creation of the Tribe's reservation, as revealed by contemporaneous historical documents, indicate that the Tribe was using surface water to meet its needs when its reservation was created, but was not using groundwater. Even today, the Tribe does not directly use or attempt to directly use groundwater, but instead purchases its water supplies from the Water Agencies. Moreover, the Whitewater River Decree of 1938, which adjudicated all water rights in the

Whitewater River and its tributaries, awarded the Tribe the right to use Whitewater River surface water for its reservation needs, and the amount of water awarded to the Tribe is the precise amount that the United States had "suggested" as necessary to meet the Tribe's reservation needs. Also, the groundwater to which the Tribe claims a reserved right does not contribute to or support the surface water on the Tribe's reservation, as the Tribe acknowledges, which further undermines the Tribe's reserved right claim. These factors demonstrate that the Tribe's claimed reserved right to groundwater is not necessary to accomplish the primary reservation purposes and does not impliedly exist under *New Mexico*.

Finally, the consequences and impacts of the Tribe's reserved right claim weigh against the Tribe's claim. If the Tribe has a federal reserved right in groundwater, the Tribe would not be subject to California's constitutional rule requiring that all water rights must conform to the rule of "reasonable and beneficial use"; this constitutional rule, which applies to groundwater, provides for conservation of California's limited water supply commensurate with the need to achieve maximum beneficial use of its limited supply, particularly during periods of extreme drought as California is currently experiencing. Also, the Tribe would not be subject to principles of equality and sharing that apply to

all users of groundwater under California's correlative rights doctrine. Further, the Tribe's reserved right would jeopardize the rights of other groundwater uses in the Coachella Valley, who have putting the groundwater to beneficial use for decades.

ARGUMENT

I. IN *UNITED STATES v. NEW MEXICO,* THE SUPREME COURT NARROWLY CONSTRUED THE RESERVED RIGHTS DOCTRINE BECAUSE OF ITS CONFLICT WITH CONGRESS' POLICY OF DEFERENCE TO STATE WATER LAW. THE DISTRICT COURT ERRONEOUSLY FAILED TO APPLY *NEW MEXICO* IN DETERMINING THAT THE TRIBE HAS A RESERVED RIGHT TO GROUNDWATER.

As we explain, the Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978), adopted a narrow construction of the reserved rights doctrine because of its conflict with Congress' policy of deference to state water law. *New Mexico* held that a water right is impliedly reserved only if it is "necessary" to accomplish the "primary" purposes of the reservation—as opposed to "secondary" purposes—and prevent these primary purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. The district court below held that *New Mexico* applies only in quantifying a reserved right and not in determining whether a reserved right impliedly exists, and declined to apply *New Mexico* in determining that the Tribe has a reserved right in groundwater.

Contrary to the district court's view, *New Mexico* applies in determining whether a reserved right impliedly exists, and the district court erred by failing to apply *New Mexico* in determining that the Tribe has a reserved right in groundwater.

A. Under the *Winters*, or Reserved Rights, Doctrine, the Government May Impliedly Reserve Water to Fulfill the Purposes of Federal Reserved Lands.

Under the reserved rights doctrine, when the government reserves lands from the public domain for specific federal purposes, the government may impliedly reserve water to fulfill the purposes of the reserved lands. *United States v. New Mexico*, 438 U.S. 696, 699-701 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983). As the Supreme Court stated in *Cappaert*, the government, in reserving the lands, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation," and the reserved right "vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138. The reserved rights doctrine is "a doctrine built on implication." *New Mexico*, 438

U.S. at 715. Since reserved water rights are established under federal law, they are not subject to regulation and control under state law. *Cappaert,* 426 U.S. at 145. The government impliedly reserves only the amount of water necessary to meet the "minimal need" of the reservation, "no more." *Id.* at 141.

The reserved rights doctrine originated in the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). There, the Supreme Court held that Congress, in reserving lands for the Indian tribe on the Fort Belknap Reservation in Montana, impliedly reserved water from the Milk River to meet the tribe's reservation needs. *Winters*, 207 U.S. at 576. In *Arizona v. California*, 373 U.S. 546, 599-601 (1963), the Supreme Court expanded this principle by holding that Congress impliedly reserves water in reserving lands for all federal purposes, and not just Indian purposes. The expanded doctrine is generally referred to as the "reserved rights doctrine," and the doctrine as applied to Indian water rights is sometimes referred to as the "*Winters* doctrine."

B. In *United States v. New Mexico*, the Supreme Court Narrowly Construed the Reserved Rights Doctrine Because of Its Conflict with Congress' Policy of Deference to State Water Law, and Held That the Government Impliedly Reserves Water Only if "Necessary" to Fulfill the "Primary" Reservation Purposes and Prevent These Purposes from Being "Entirely Defeated."

In *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court adopted a narrow construction of the reserved rights doctrine because the doctrine conflicts with Congress' policy of deference to state water law. *See In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461 (1988) (*New Mexico* adopted a "narrow construction" of the reserved rights doctrine because of the congressional policy "of deferring to state water law"); *John v. United States*, 720 F.3d 1214, 1226 (9th Cir. 2013) (*New Mexico* adopted a "narrow rule" of the reserved rights doctrine). Before describing *New Mexico*'s narrow construction of the reserved rights doctrine, we briefly describe Congress' policy of deference to state water law, which informs *New Mexico*'s narrow construction of the doctrine.

1. Congress' Policy of Deference to State Water Law

The federal policy of deference to state water law originated in the equal footing doctrine, which holds that the states have sovereign authority over all navigable waters and underlying lands within their borders, subject only to powers constitutionally granted to the federal government. "[B]ased on

principles of sovereignty, [the states] hold the absolute right to all their navigable waters and soils under them, subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LCC v. Montana*, __ U.S. __, 132 S.Ct. 1215, 1226-1228 (2012) (internal quotation marks and citations omitted); *see Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *United States v. Texas*, 339 U.S. 707, 716-717 (1950); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842).

In the late 1800s, Congress enacted various statutes that provided for disposition and settlement of the public domain lands in the western states, principally the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877. The Supreme Court has held that these congressional enactments effected a "severance" of all waters on the public domain lands from the lands themselves, as a result of which the states control allocation and use of the water and the federal government retains ownership and control of the lands. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935); *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937).

Congress has also deferred to state water law in other contexts. In enacting the Reclamation Act of 1902, for example, which authorizes federal construction and operation of water projects to reclaim the arid and semi-arid lands of the western states, Congress required the Secretary of the Interior to comply with state appropriation laws in appropriating water for and distributing water from the projects. *California v. United States*, 438 U.S. 645, 665-667 (1978). As the Supreme Court stated in *California v. United States*—which was a companion decision to the Supreme Court's decision in *New Mexico*, and thus helps inform the *New Mexico* decision—"[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653.

In *California Oregon Power*, the Supreme Court held that Congress' policy of deference applies not only to its program for reclaiming the West's arid lands but also to its reservation of lands for Indian purposes. "Congress . . . has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and *lands of its Indian wards*." *California Oregon Power*, 295 U.S. at 164 n. 2

(citing Act of June 21, 1906, 34 Stat. 325, 375, which provides that federal projects for irrigation of lands for Indian tribes in Utah "shall be constructed and completed and held and operated . . . under the laws of the State of Utah," and Indian Appropriation Act of March 3, 1909, 35 Stat. 781, 812, which "again recognized the supremacy of the laws of Utah in respect of appropriation . . . .") (emphasis added).

Congress' policy of deference to state water law is based not only on principles of federalism but also on "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California*, 438 U.S. at 669; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 53 (9th Cir. 1981).

2. *New Mexico*'s Narrow Construction of Reserved Rights Doctrine

In *New Mexico*, the Supreme Court—taking into account Congress' deference to state water law—adopted a narrow construction of the reserved rights doctrine. Citing its companion decision in *California v. United States*, 438 U.S. 645, 653-670, 678-679 (1978), the Court stated that Congress—in determining "whether federal entities must abide by state water law"—"has almost invariably deferred to state law," and that Congress has departed from

this policy only where water is "necessary to fulfill the *very purposes* for which a federal reservation was created." *New Mexico*, 438 U.S. at 702 (emphasis added). The Court stated that it had upheld federal reserved water rights claims only where 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*." *Id*. at 700 (emphases added). "This careful examination is required," the Court stated, "both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701-702. The Court held that the government must acquire water for "secondary" reservation purposes under state law, "in the same manner as any other public or private appropriator." *Id.* at 702.[3]

Thus, *New Mexico*—narrowly construing the reserved rights doctrine because of its conflict with Congress' deference to state water law—held that a

[3] Although *Cappaert* stated that the reserved rights doctrine does not call for a "balancing of competing interests" between federal and non-federal users, *Cappaert*, 426 U.S. at 138, *New Mexico* stated that the impacts of a federal reserved right on "water-needy state and private appropriators" must be "weighed" in determining "what, *if any*, water Congress reserved for use . . .," *New Mexico*, 438 U.S. at 705 (emphasis added), which indicates that some balancing of interests between federal and non-federal users is relevant.

federal reserved right impliedly exists only if "necessary" to accomplish the "very purposes," *i.e.*, the *primary* purposes, of the reservation and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Even the *New Mexico* dissenting opinion agreed that Congress' deference to state water law must be taken into account in determining the applicability of federal reserved rights. *Id.* at 718 (Powell, J., dissenting) ("[T]he implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law."). As the Ninth Circuit has stated, *New Mexico* adopted a "narrow rule" by holding that "federally reserved waters are limited to the *primary* purposes for which the land was reserved, without which 'the purposes of the reservation would be entirely defeated.'" *John v. United States*, 720 F.3d 1214, 1226 (9th Cir. 2013) (original emphasis).

Under *New Mexico*, several requirements must be met for a reserved right claim to be recognized: (1) the reserved right must be "necessary" to carry out the "primary" purposes of the reservation; (2) the primary purposes would be "entirely defeated" if the right is not impliedly reserved; (3) only the amount of water necessary to carry out the primary purposes is impliedly reserved; and (4) water rights for "secondary" purposes must be obtained under state law.

The Ninth Circuit has held that *New Mexico*'s distinction between "primary" and "secondary" reservation purposes applies in construing Indian reserved rights. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981) ("We apply the New Mexico test here."); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983). Thus, the Tribe has a reserved right in groundwater here only if the right is "necessary" to accomplish the "primary" purposes of the Tribe's reservation and prevent these purposes from being "entirely defeated."

C. The District Court Erroneously Held That *New Mexico* Does Not Apply in Determining Whether a Federal Reserved Right Impliedly Exists.

The district court below held that *New Mexico* applies only in quantifying a federal reserved water right but not in determining whether the reserved right impliedly exists, and accordingly the district court did not apply *New Mexico* in determining that the Tribe has a reserved right in groundwater.[4] Rather than applying *New Mexico*, the district court instead held that the presidential executive orders establishing the Tribe's reservation reserved a water right in all

[4] The district court stated that *New Mexico* does not apply in Phase 1 of this litigation, which addresses the question whether the Tribe has a federal reserved right in groundwater, and that *New Mexico* applies only in Phase 3 of the litigation, which addresses quantification of the Tribe's reserved right. ER 11 (*New Mexico*'s "reasoning simply does not impact Phase I of this litigation.")

appurtenant water, and that, since groundwater is appurtenant water, the Tribe's reserved right includes groundwater. ER 8, 11. The district court did not examine the circumstances of the case—such as the needs of the Tribe or the purposes of the reservation—to determine whether the Tribe's claimed reserved right in groundwater was necessary to accomplish the primary reservation purposes in light of these circumstances and prevent these purposes from being "entirely defeated."[5]

Contrary to the district court decision, *New Mexico* applies in determining whether a reserved right impliedly exists and not just in quantifying the right.

[5] The district court purported to follow the Ninth Circuit's decision in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), which did not involve groundwater. ER 8 ("*Walton* guides the interpretation of the Agua Caliente's reservation's purpose.") In *Walton*, the Ninth Circuit examined the Colville Indian Tribe's actual water needs in concluding that the Tribe had a reserved right in the surface water. The Ninth Circuit stated that the Indians had traditionally depended on the No Name Creek to supply salmon and trout, which were "traditional foods for the Colville Indians," and that the Indians "cultivated No Name Creek's lower reach to establish spawning grounds," but that "irrigation uses depleted the water flow during the spawning season" and thus the Tribe's reservation would be "useless" without a reserved right. *Walton*, 647 F.2d at 45, 47. *Walton* also held that Congress' deference to state water law did not apply because the No Name Creek was "located entirely within the reservation" and thus the tribe's reserved right would have "no impact off the reservation." *Id*. at 53. Since *Walton* examined the needs of the Indians and the purposes of the reservation in concluding that the Indian tribe had a reserved right in surface water, *Walton* does not support the district court's conclusion that the Tribe here acquired a reserved right in groundwater simply by virtue of the government's creation of the Tribe's reservation.

The Supreme Court in *New Mexico* stated that it has "applied" the reserved rights doctrine only after it has "carefully examined" the asserted reserved right and specific reservation purposes and concluded that without the water the specific reservation purposes would be "entirely defeated." *New Mexico*, 438 U.S. at 700. Thus, *New Mexico* determined the circumstances under which the reserved rights doctrine is "applied"—that is, whether a reserved right impliedly exists—and not just how the right is quantified. *New Mexico* stated that the reserved rights doctrine applies in determining "what quantity of water, *if any*," is reserved, *id.* at 698 (emphasis added), and that the needs of state and private appropriators must be weighed in determining "what, *if any*, water" is reserved, *id.* at 705 (emphasis added). Since *New Mexico* applies in determining whether "any" water is reserved, *New Mexico* applies in determining whether a reserved right exists.

If any doubt remains, it is removed by *New Mexico*'s application of the reserved rights doctrine in that case. *New Mexico* held that the primary purposes of the Organic Administration Act of 1897, 16 U.S.C. §§ 473 *et seq.*, were to conserve water flows and provide a continuous supply of timber, and that these primary purposes did not include water for aesthetic, environmental, recreational or wildlife-preservation purposes—and therefore the U.S. Forest

Service did not have a reserved water right for the latter purposes. *New Mexico*, 438 U.S. at 707-717. Thus, *New Mexico* applied its narrow construction of the reserved rights doctrine in determining that a reserved right did not impliedly exist, and not in quantifying the right.

New Mexico adopted its narrow construction of the reserved rights doctrine in order to reconcile the conflict between Congress' deference to state water law and the needs of federal reserved lands. *New Mexico*, 438 U.S. at 701-702. The reconciliation of this conflict relates not only to quantification of a reserved right but also to whether a reserved right impliedly exists, because the existence of the right itself, and not just its quantification, conflicts with Congress' deference to state water law.

Similarly, the Ninth Circuit recently stated that *New Mexico* held that federal reserved rights "*exist* to the extent that the waters are necessary to fulfill the primary purposes of the reservation." *John v. United States*, 720 F.3d 1214, 1231 (9th Cir. 2013) (emphasis added). In a pre-*New Mexico* case, the Ninth Circuit held that whether an Indian tribe has a reserved water right under the *Winters* doctrine 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). Thus, if a reserved right is not necessary to accomplish the primary reservation purpose—taking into account "the situation and needs of the Indians and the purpose for which the lands had been reserved"—the reserved right does not impliedly exist. *Id.*

The United States has argued elsewhere—contrary to the district court decision and its own argument below—that *New Mexico* applies in determining whether a reserved right exists, and not in limiting the right. In opposing petitions for writs of certiorari in another case, the United States argued that "New Mexico does not . . . furnish an 'equitable device' for limiting the exercise of a federal reserved right once it has been determined such a right exists," but "[r]ather, New Mexico concerned only the issue of what circumstances are sufficient to give rise to a federal reserved right in the first place." Brief for United States in Opposition, p. 9, *Wyoming v. United States*, nos. 88-309, 88-492, 88-553 (Oct. Term 1988), http://www.justice.gov/sites/default/files/osg/briefs/1988/01/01/sg880316.txt (last visited Aug. 31, 2015).

Therefore, *New Mexico* applies in determining whether a reserved right impliedly exists and not just in quantifying the right, contrary to the district court decision.

D. The Other Grounds Cited by the District Court Are Without Merit.

The district court cited other grounds for its conclusion that the Tribe has a reserved right in groundwater, none of which, in the Water Agencies' view, have merit.

1. The District Court Erroneously Concluded That the Tribe Has a Reserved Right in Groundwater Because Its Reservation Was Established as a "Homeland," and Failed to Determine the Primary Purposes of the Tribe's Reservation.

The district court held that the Tribe's reservation was established as a "homeland" for the Tribe, and therefore the Tribe has a reserved right in all appurtenant water of the reservation, including groundwater. ER 8, 11.

The district court's conclusion is a *non sequitur*. All Indian reservations are established as "homelands" for the Indian tribes, but the reservation of land as a "homeland" does not address whether the tribe has a reserved right in water, much less groundwater. Rather, under *New Mexico*, the question whether an Indian tribe has a reserved water right depends on whether the right is

"necessary" to accomplish the "primary" reservation purposes and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. If a reserved water right is not necessary to accomplish the primary reservation purposes, an Indian tribe does not have a reserved right regardless of whether its reservation was established as a "homeland."

Since the district court applied a "homeland" analysis rather than *New Mexico*'s requirements, the district court failed to determine the "primary" purposes of the Tribe's reservation—as opposed to the "secondary" purposes—much less whether the Tribe's claimed reserved right was "necessary" to accomplish the primary purposes.[6] Since the district court failed to determine

[6] The primary purposes of the Tribe's reservation, to the extent that water is concerned, would appear to be the provision of water supplies for the Tribe's agricultural and domestic uses, because these are the only water uses mentioned in the Mission Indians Relief Act of 1891 and the 1891 Smiley Commission report, which were enacted and issued, respectively, contemporaneously with creation of the Tribe's reservation. According to the Mission Indians Relief Act, the Secretary of Interior was authorized to approve private facilities to convey water across reservation lands on condition that Indians "shall . . . be supplied with sufficient quantity of water for irrigating and domestic purposes . . . ." 26 Stat. 712, 714 (1891). The Smiley Commission report stated that the Agua Caliente Indians depended for their water supplies on Whitewater River tributaries—the Tahquitz, Andreas and Chino Creeks—for "irrigation" and "domestic use." ER 69-70. Neither the Mission Indians Relief Act nor the Smiley Report mentioned any tribal use of water for purposes other than agricultural and domestic uses. As will be explained later, the Tribe's claimed reserved right in groundwater is not necessary to accomplish these agricultural and domestic uses for various reasons, such as, for example, that the Tribe has a

the primary reservation purposes, the court could not determine whether the Tribe's claimed reserved right in groundwater was necessary to accomplish those primary purposes and prevent them from being "entirely defeated," as required by *New Mexico*. *New Mexico*, 438 U.S. at 700, 702. The district court appeared to assume that since the Tribe's reservation was established as a "homeland"—as all Indian reservations are—no further inquiry is necessary to determine the primary reservation purposes, much less whether the Tribe's claimed reserved right in groundwater is necessary to accomplish these purposes. The district court decision is inconsistent not only with *New Mexico* but also with Ninth Circuit decisions holding that *New Mexico*'s distinction between "primary" and "secondary" reservation purposes applies to Indian reservations, and thus that the "primary" reservation purposes must be identified in determining whether an Indian tribe has a reserved right. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394, 1408-1409 (9th Cir. 1983).[7]

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correlative right to use groundwater under California law to meet its reservation needs, and that the Tribe has an adjudicated right to Whitewater River surface water to meet its reservation needs. *See* pages 33-46, 51-54, *infra*.

[7] The Arizona Supreme Court adopted a "homeland" analysis in holding that Indian tribes in Arizona have reserved water rights in the surface waters of the Gila River system, and the Court did not apply *New Mexico*'s "primary-

2. Contrary to the District Court Decision, the Supreme Court's Decision in *Cappaert v. United States* Does Not Imply That the Reserved Rights Doctrine Applies to Groundwater.

Citing the Supreme Court's decision in *Cappaert v. United States*, 426 U.S. 128 (1976), the district court stated that "federal law, at least by implication, treats surface water and groundwater similarly," and "suggests that [the] limit [of the reserved rights doctrine] should not be drawn between surface water and groundwater resources." ER 9.

Cappaert, rather that implying that federal law treats surface water and groundwater "similarly" for reserved rights purposes, supports the opposite implication. In *Cappaert*, the Supreme Court held that the United States had a reserved right in an underground pool of water in Devil's Hole National Monument in Nevada, and that the United States could enjoin groundwater pumping by a third party that impaired the United States' reserved right in the

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secondary" distinction, because, the Court stated, *New Mexico*'s "primary-distinction" does not apply to Indian reserved rights. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 35 P.3d 68, 76 (Ariz. 2001). The Arizona Supreme Court's decision is contrary to the Ninth Circuit's decisions in *Walton* and *Adair*, which hold that *New Mexico*'s "primary-secondary" distinction applies to Indian reserved rights. *United States v. Washington*, 375 F.Supp.2d 1050, 1065 (W.D. Wash. 2005) (stating that Arizona Supreme Court's "homeland" analysis in *Gila River* is "contrary to Ninth Circuit precedent").

underground pool of water. *Cappaert*, 426 U.S. at 138-146. The Supreme Court characterized the underground pool of water as "surface water," and held that the United States had a reserved right in the "surface water," contrary to the Ninth Circuit below, which had characterized the water as groundwater and held that the United States had a reserved right in the groundwater. *Id.* at 142. In rejecting the Ninth Circuit's characterization of the water as groundwater, the Supreme Court pointedly stated that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Id.*

Thus, the Supreme Court in *Cappaert* did not hold or even imply that the United States had a reserved right in *groundwater*. Rather, the Court held that the United States had a reserved right in *surface* water, and that the United States could protect its reserved right in surface water from diversion by a third party, "whether the diversion is of surface water or groundwater." *Id*. at 143. The Supreme Court's re-characterization of the underground pool of water as surface water rather than groundwater, and its statement that it has never applied the reserved rights doctrine to groundwater, indicate that there may be a significant distinction between surface water and groundwater concerning whether the reserved rights doctrine applies, and that the doctrine does not apply

to groundwater simply because it applies to surface water.[8] If the Supreme Court had believed that there is no distinction between these types of water, the Supreme Court would have simply affirmed the Ninth Circuit's decision that the United States had a reserved right in the groundwater. The district court's view that *Cappaert* implies the absence of a distinction between surface water and groundwater is contradicted by *Cappaert* itself.

3. California's Recently-Enacted Groundwater Statute Does Not Support the Tribe's Reserved Right Claim.

The district court, citing California Water Code section 10720.3, stated that "the California legislature acknowledges the supremacy of federal water rights, and acquiesces in their priority," and therefore "Defendants' arguments regarding federal-state relations run counter to both federal and state law." ER 10. Section 10720.3(d), which is part of California's recently-enacted Sustainable Groundwater Management Act ("SGMA"), Cal. Water Code § 10720 *et seq*., provides that "federally reserved water rights to groundwater

[8] This conclusion is also supported by *Cappaert*'s statement that the reserved rights doctrine "applies to Indian reservations and other federal enclaves, encompassing rights in navigable and nonnavigable *streams*." *Cappaert*, 426 U.S. at 138 (emphasis added; citations omitted). Since groundwater is not a "navigable [or] nonnavigable *stream*," *Cappaert* implies that the reserved rights doctrine does not apply to groundwater.

shall be respected in full," and that "[i]n case of conflict between federal law and state law," "federal law shall prevail."

The district court misconstrued both the import of section 10720.3(d) and the Water Agencies' argument. The Water Agencies fully recognize "the supremacy of federal reserved rights" under the Supremacy Clause of the Constitution, and that any "conflict" between federal law and state law must be resolved in favor of federal law; the Water Agencies' argument is that Congress' policy of deference to state water law is relevant in determining whether a reserved right impliedly exists under federal law in the first instance, as *New Mexico* plainly held. In stating that federal reserved rights in groundwater "shall be respected in full," section 10720.3(d) simply provides that—to the extent that any federal reserved rights in groundwater may have been established in prior congressional enactments or court decrees—SGMA does not affect such rights. The provision does not suggest that federal reserved rights in groundwater are recognized where, as here, they have not been established in congressional enactments or court decrees. On the contrary, the cited provision states that it is "declaratory of existing law." Cal. Water Code § 10720.3(d). Thus, the provision explicitly does not change existing law, and has

no bearing on whether the Tribe has a reserved right under existing law, which is the question here.

II. SINCE THE TRIBE HAS A CORRELATIVE RIGHT TO USE GROUNDWATER UNDER CALIFORNIA LAW, THE TRIBE DOES NOT HAVE A RESERVED RIGHT TO USE GROUNDWATER UNDER FEDERAL LAW.

The Tribe, as an overlying landowner of its reservation, has a correlative right to use groundwater under California law to meet its reservation needs, and has the same correlative right as other overlying landowners. Therefore, the rationale of the *Winters* doctrine—which was to protect Indian water rights from being subordinate to the water rights of non-Indian users—does not apply to the groundwater here. For the same reason, the Tribe's claimed reserved right in groundwater is not "necessary" to fulfill the "primary" purposes of the Tribe's reservation and prevent these purposes from being "entirely defeated," and does not impliedly exist under *New Mexico*.

A. Since the Tribe Has a Correlative Right to Use Groundwater Under California Law, the Rationale of the *Winters* Doctrine Does Not Support Its Extension to the Groundwater Here.

The early miners who hastened to California after the discovery of gold in 1848 developed the custom of diverting water to their mining claims on a "first come, first served" basis, even though the miners did not have riparian rights to

the water and were trespassers on public domain lands owned by the United States. *Jennison v. Kirk*, 98 U.S. 453, 458 (1878); *People v. Shirokow*, 26 Cal.3d 301, 307-308 (1980); *Irwin v. Phillips*, 5 Cal.140, 146-147 (1855). This simple mining custom ripened into a formal doctrine of law, the doctrine of prior appropriation, which prevails in California and other western states today. Under this doctrine, a party has the right to divert, or "appropriate," water in order to serve a "beneficial use." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-754 (1950); *Jennison*, 98 U.S. at 458; *Shirokow*, 26 Cal.3d at 308. Unlike a riparian right, which attaches to the land, an appropriative right exists only as long as the water is diverted to beneficial use, and ceases to exist when the water is no longer diverted to beneficial use. *Gerlach*, 339 U.S. at 744-754; *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1241 (2000); *Shirokow*, 26 Cal.3d at 308. *See generally* S. WIEL, WATER RIGHTS IN THE WESTERN STATES, v. II, §§ 66-83, pp. 68-84 (3d ed. 1911); W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 41-43 (1956); D. GETCHES, WATER LAW IN A NUTSHELL 77-82 (Thomson West 4th ed.).

A central feature of the doctrine of prior appropriation, as its name implies, is that it establishes a rule of priority among appropriators. Under this

rule of priority, the first appropriator of water acquires a prior right to its use as against subsequent appropriators; to be "first in time" is to be "first in right." *Jennison*, 98 U.S. at 458; *Shirkow*, 26 Cal.3d at 307-308; *Irwin*, 5 Cal. at 147; HUTCHINS, *supra*, at 41-49; GETCHES *supra*, at 108-113.

As the West developed and its economy grew, non-Indian settlers began appropriating water for agricultural, municipal and other uses, and—since the non-Indian settlers generally developed their water needs and uses before Indians developed their own needs and uses—they generally acquired prior rights to the water under the "first in time, first in right" priority rule of state appropriation laws. As a result, Indian reservations often lacked adequate water supplies to meet their needs. In response, the Supreme Court developed the *Winters* doctrine, which holds that Indians have prior rights to water under federal law even though others have prior rights under state appropriation laws. In *Winters* itself, the Supreme Court held that the Indian tribe on the Fort Belknap Reservation in Montana had a federal reserved right to the waters of the Milk River in order to irrigate reservation lands, even though non-Indians

had acquired prior rights to the waters under Montana's appropriation laws.[9] The Ninth Circuit has explained this purpose of the *Winters* doctrine, stating:

> In those cases [*Winters* and *Arizona*], if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the 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, it was reasonable to conclude that Congress intended to reserve water for them.

Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir. 1981).

California has developed an entirely different body of law that applies to the use of groundwater than applies to the use of surface water, and the difference between these bodies of law defeats any implication that the Tribe has a reserved right in groundwater. In its landmark decision in *Katz v. Walkinshaw*, 141 Cal. 116, 134-136 (1903), the California Supreme Court held that the doctrine of correlative rights applies to the use of groundwater. Under this doctrine, an overlying landowner—that is, a landowner whose land overlies a groundwater basin—has a correlative right to use groundwater underlying the

[9] As *Winters* stated, the reservation lands "were arid, and without irrigation, were practically valueless." *Winters*, 207 U.S. at 576. Similarly, in *Arizona v. California*, 373 U.S. 546 (1963), the Supreme Court held that Congress impliedly intended to reserve water rights in the Colorado River for the Colorado River Indian tribes because the water was "essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona*, 373 U.S. at 598-599.

land, and the correlative right attaches directly to the land. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1241 (2000); *Pasadena v. Alhambra*, 33 Cal.2d 908, 924 (1949); *Hillside Water Co. v. Los Angeles*, 10 Cal.2d 677, 686 (1938); *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 276-280 (1910); *California Water Service Co.v. Edward Sidebotham & Son*, 224 Cal.App.2d 715, 725 (1964).[10] Since the correlative right attaches to the land, the right is not created by actual use of water or lost by nonuse of water. *Barstow*, 23 Cal.4th at 1240; *California Water Service*, 224 Cal.App.2d at 725. Since all overlying landowners have correlative rights, each overlying landowner is entitled to a "reasonable share" of the groundwater when "water is insufficient to meet the needs of all." *Barstow*, 23 Cal.4th at 1241; *Pasadena*, 33 Cal.2d at 926; *Miller*, 157 Cal. at 279. Therefore, no overlying landowner has a right to deplete the resource and prevent other landowners from using it.

[10] Although most western states hold that overlying landowners have the right to use groundwater underlying their lands and that the right attaches to the land, California is the only western state that recognizes the doctrine of correlative rights as applied to groundwater. *See* Clark, *Groundwater Legislation in Light of the Experience in the Western States*, 22 Mont. L. Rev. 42, 50 (1960) (Chart B on p. 50). Other western states recognize other doctrines as applied to groundwater, such as the doctrine of prior appropriation, the doctrine of "reasonable use," and the doctrine of the English common law, which holds that overlying landowners have absolute ownership of groundwater. *Id*. at 50; D. TARLOCK, LAW OF WATER RIGHTS AND RESOURCES 409 (J. Damico *et al*. eds. 2014).

Miller, 157 Cal.at 276-280; *Tehachapi-Cumming County Wat. Dist. v. Armstrong*, 49 Cal.App.3d 992, 1001 (1975). A correlative right to use groundwater is analogous to a riparian right to use surface water, because both rights attach to the land and are not created by actual use of water or lost by nonuse. *Barstow*, 23 Cal.4th at 1240; *Pasadena*, 33 Cal.2d at 925; *Hillside Water*, 10 Cal.2d at 686.

Since the correlative right attaches to the land and is not created by actual use of water or lost by nonuse, the correlative right in groundwater, unlike the appropriative right in surface water, is not subject to the priority rule of "first in time, first in right" that applies to surface water. *Barstow*, 23 Cal.4th at 1241(the overlying right "is based on the ownership of the land"); *Pasadena*, 33 Cal.2d at 926 (correlative rights are held "in common" and each overlying landowner has "reasonable share" of the groundwater). As Hutchins' book on California water law explains:

> It has been settled . . . that the owner of overlying land who first begins the use of percolating water thereon gains no priority in the use of the water as against other overlying owners solely because he used the water first. The correlative right, like the riparian right, does not depend upon use and is not lost by nonuse . . . .

W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 438 (1956). Similarly, the Ninth Circuit has recognized that the priority of first use that

applies to surface water does not apply to groundwater, stating:

> While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. Under the traditional groundwater doctrines of absolute dominion, the American reasonable use rule, and the correlative rights rule, *the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater . . . .*"

United States v. Oregon, 44 F.3d 758, 769 (9th Cir. 1994) (emphasis added). Thus, the correlative right to use groundwater, unlike the appropriative right to use surface water, is based on principles of equality and sharing, not priority of use.

Here, the Tribe is an overlying landowner of its reservation, because the United States has set aside the reservation for the Tribe's use and occupancy. ER 25 (¶¶ 5, 6). As an overlying landowner, the Tribe has the same correlative right to use groundwater underlying its reservation as other overlying landowners have to use groundwater underlying their lands.[11] Since an

[11] The Tribe argued below that—since the California Supreme Court adopted the correlative rights doctrine in its 1903 decision in *Katz*—California's correlative rights doctrine did not exist when the Tribe's reservation was created by the 1876 and 1877 presidential executive orders, and therefore the Tribe did not have a correlative right under California law when its reservation was created. In fact, California adopted the English common law as its "rules of decision" in 1850 shortly after its admission to statehood, Cal. Civ. Code § 22.2, and the English common law provided that overlying landowners have "absolute ownership" of and "absolute dominium" over groundwater underlying

overlying landowner's right to use groundwater is "analogous" to a riparian right to use surface water, *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240 (2000), and since the federal government has riparian rights under California law, *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 467 (1988), the Tribe plainly has a correlative right to use groundwater under California law.

The reserved rights doctrine is "a doctrine built on implication." *New Mexico*, 438 U.S. at 715. Since the Tribe has the same correlative right to use groundwater under California law as other overlying landowners, there is no basis for an "implication" that Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders creating the Tribe's reservation, intended to reserve a right in groundwater that would exempt the Tribe from the principles of equality and sharing that apply to all other users of groundwater.

The rationale of the *Winters* doctrine is that, as in *Winters* itself, Indians have a prior right to use water under federal law even though non-Indians have

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their lands. *Katz*, 141 Cal. at 132-133; *State of California v. Superior Court*, 78 Cal.App.4th 1019, 1024 n. 4 (2000). *Katz* modified the common law rule by providing that overlying landowners have "correlative rights" rather than "absolute ownership" of groundwater. *Katz*, 141 Cal. at 136. Thus, the Tribe as an overlying landowner had a right to use groundwater under California law when its reservation was created, and had the same right to use groundwater as other overlying landowners.

acquired prior rights under the "first in time, first in right" rule of state appropriation laws. The *Winters* doctrine rationale does not apply to the groundwater here, because the "first in time, first in right" priority rule that applies to surface water does not apply to groundwater. Since the rationale of the *Winters* doctrine does not apply, the doctrine itself does not apply. Contrary to the district court's view that there is no "principled basis" for a distinction between surface water and groundwater, ER 8, there is a principled basis for the distinction, because the rationale of the *Winters* doctrine that applies to surface water does not support the doctrine's extension to groundwater.[12]

The *Winters* doctrine integrates federal reserved rights into state appropriative water rights systems by establishing the priority of a reserved right in relation to appropriative rights acquired under state law; the reserved right acquires priority based on the date that the reservation was created, and

[12] Although California also recognizes appropriative rights in groundwater, an overlying landowner's right is "paramount" to the right of an appropriator, and thus an appropriator's right must "yield" to the overlying landowner's right, unless the appropriator has acquired "prescriptive rights through the adverse, open and hostile taking of nonsurplus waters." *Barstow*, 23 Cal.4th at 1241 (brackets omitted); *Pasadena*, 33 Cal.2d at 926. Neither the Tribe nor the United States has shown or argued that there are any prescriptive rights adverse to the Tribe's correlative right in the groundwater. The United States' rights held in trust for Indians cannot be lost by prescription. *United States v. Pappas*, 814 F.2d 1342, 1343 n. 3 (9th Cir. 1987).

thus has priority over rights subsequently acquired under state law but not rights earlier acquired under state law. *Cappaert*, 426 U.S. at 138. Since a correlative right is not based on priority of use but instead attaches to the land, a federal reserved right in groundwater cannot be integrated into California's system of groundwater regulation in the way that a reserved right in surface water can be integrated into California's system for appropriation of surface water. This provides another basis for concluding that—since the Tribe has a correlative right to use groundwater under California law—the reserved rights doctrine should not be extended to the groundwater here.

B. Since the Tribe Has a Correlative Right to Use Groundwater Under California Law, the Tribe's Claimed Reserved Right Is Not "Necessary" to Accomplish the "Primary" Reservation Purposes and Prevent These Purposes from Being "Entirely Defeated," And Thus Does Not Impliedly Exist Under *New Mexico*.

The Tribe's claimed reserved right in groundwater does not impliedly exist under *New Mexico* for the same reason that the rationale of the *Winters* doctrine does not apply, that is, because the Tribe as an overlying landowner has a correlative right under California law to use groundwater to meet its reservation needs. Since the Tribe has a correlative right under California law, the Tribe's claimed reserved right is not "necessary" to accomplish the "primary" reservation purposes and prevent these purposes from being "entirely

defeated," and thus does not impliedly exist under *New Mexico*. There is no conflict between the Tribe's primary reservation needs and California law, because the Tribe's primary needs are met under California's correlative rights doctrine. Since no conflict exists, federal law should not be construed as "impliedly" creating a conflict, by holding that the Tribe has an implied reserved right that conflicts with California's correlative rights doctrine. Although the Ninth Circuit has held that the "general purpose" of an Indian reservation is a "broad one" and must be "liberally construed," *Walton*, 647 F.2d at 47, this principle of construction does not support an interpretation of federal law that creates a conflict with state law, particularly where, as here, the Tribe's reservation needs are met under state law.

In *New Mexico*, the Supreme Court balanced Congress' deference to state water law and the needs of federal reserved lands in concluding that reserved rights apply only to "primary" reservation purposes and not "secondary" purposes. *See New Mexico*, 438 U.S. at 700, 702. The same balance between Congress' deference to state water law and the needs of federal reserved lands also applies in determining whether the reserved rights doctrine applies to an entire category of water—groundwater—to which, as the Supreme Court has stated, "[n]o cases of this Court have applied the doctrine . . . ." *Cappaert*, 426

U.S. at 142. In the Water Agencies' view, 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*. Such a balance harmonizes federal and state law, rather than construes them as in conflict.

This conclusion is consistent with the principles of federalism that gird the Constitution, which recognize that, particularly in the arid and semi-arid western region, the states are primarily responsible for regulating allocation and use of their sparse water supply. *California v. United States*, 438 U.S. 645, 653-670, 678-679 (1978). As the Ninth Circuit has stated, "[f]undamental principles of federalism require the national government to consult state processes and weigh state substantive law in shaping and defining a federal water policy." *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir. 1983), citing *California v. United States*, 438 U.S. 645 (1978).

The conclusion that the reserved rights doctrine does not apply to groundwater is not an anomaly in the context of federal and state laws regulating use of water. For example, although the federal government has broad power to regulate navigable surface waters under the Commerce Clause,

e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899); *The Daniel Ball*, 77 U.S. 557, 563 (1870), no court has ever suggested that the federal power to regulate navigable surface waters includes the power to regulate groundwater. Similarly, the Clean Water Act, 33 U.S.C. § 1251 *et seq*., which regulates the quality of the nation's waters, does not apply to groundwater, as evidenced by the fact that federal regulations adopted pursuant to the Act provide for regulation of the quality of surface waters, including tributaries and wetlands, but not groundwater. 33 C.F.R. § 328.3(a), -(a)(5). Similarly, the states frequently distinguish between surface water and groundwater in regulating use of water, because of the dissimilarity between these types of water. In California, for example, the State Water Resources Control Board, which administers the state's appropriative water rights system, is authorized to issue permits for appropriation of surface water (including "subterranean streams" that are considered part of the surface water), but is not authorized to issue permits for appropriation or use of groundwater. Cal. Water Code §§ 1200, 1221, 2550. Since federal law and state law distinguish between surface water and groundwater in many contexts, it is not anomalous that the same distinction applies in the reserved rights context.

Indeed, the Tribe's correlative right to use groundwater under California law provides greater protection for the Tribe's reservation needs at least in some respects than its claimed federal reserved right. Since a federal reserved right has priority only over state-based rights acquired after the reservation was created but not state-based rights acquired earlier, *Cappaert*, 426 U.S. at 138, the Tribe's claimed reserved right in Coachella Valley groundwater would be junior and subordinate to the rights of the Southern Pacific Railroad Company and its successors, because the railroad company acquired its rights to alternate sections *vis a vis* the Tribe's "checkerboard" reservation before the Tribe's reservation was created. *See* page 5, *supra*. On the other hand, the Tribe's correlative right to use Coachella Valley groundwater under California law would be in parity with the rights of the railroad company and its successors, because all overlying landowners have equal and correlative rights and none has priority over another. Thus, California law provides greater protection for the Tribe's reservation needs than federal law with respect to rights earlier acquired under California law.

Since the Tribe has an equal and correlative right to use groundwater under California law, this case is unlike *Winters*, *Arizona*, *Walton* and other such cases, where Indian reserved water rights in surface waters were "implied"

because they were necessary to prevent the reservation lands from being "practically valueless," *Winters*, 207 U.S. at 576; *Walton*, 647 F.2d at 46, and were "essential to the life of the Indian people," *Arizona*, 373 U.S. at 599. Since the Tribe has a correlative right under California law, its claimed reserved right in groundwater is not "essential to the life" of the Tribe or its members, or necessary to prevent the reservation lands from being "practically valueless." Neither the Tribe nor the United States contend that—if the Tribe does not have a reserved right in groundwater—the Tribe's reservation will be deprived of adequate water supplies and will fail in its intended primary purposes.

III. THE TRIBE WAS NOT USING GROUNDWATER WHEN ITS RESERVATION WAS CREATED AND IS NOT CURRENTLY USING GROUNDWATER, WHICH FURTHER DEFEATS ANY "IMPLICATION" THAT THE TRIBE HAS A RESERVED RIGHT IN GROUNDWATER.

A. The Tribe Was Not Using Groundwater When Its Reservation Was Created.

The historical circumstances surrounding creation of an Indian reservation, as revealed by contemporaneous historical documents, are relevant in determining whether an Indian tribe has a reserved water right. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). The historical circumstances surrounding creation of the Tribe's reservation by the 1876 and 1877 presidential executive orders, as revealed by contemporaneous historical

documents, indicate that the Tribe was using surface water but not groundwater when its reservation was created, which further defeats any "implication" that the executive orders intended to reserve a right in groundwater.

The Mission Indians Relief Act of 1891, 26 Stat. 712, which authorized creation of the Tribe's reservation, prohibited the conveyance of water across the reservation except on condition that the Tribe is supplied with "sufficient quantity of water for irrigating and domestic uses." 26 Stat. 714. The 1891 Act made no mention of any use of groundwater by the Tribe. Similarly, the Smiley Commission report of 1891 stated that the Tribe's members were using and relying on water supplies from Whitewater River tributaries, but made no mention of any use of groundwater; the report stated that the Indians "have depended largely upon water coming from Toquitch Canyon," had "built a ditch to bring water from the source for their lands," and also "had a supply of water, coming from Andreas Canon." ER 69. The Department of the Interior's Superintendent of Irrigation, George Butler, issued a report in 1903 stating that "[t]here is evidence today that in times past the [Agua Caliente] Indians have built ditches for the conduct and distribution of the waters of the canons of Chino, Tahquitz, and Andreas; and have irrigated lands therefrom . . . ." ER 79. The Special Agent for the California Indians, C. E. Kelsey, issued a report in

1907 stating that the Agua Caliente Indians—as a result of "the cementing of the Tauquitz ditch" and purchase of water supplies—"have all the water they can use for some time." ER 88.

These historical documents indicate that the Tribe was using surface water but not groundwater when its reservation was created, and thus indicate that Presidents Grant and Hayes, in issuing the executive orders creating the reservation, did not "impliedly" intend to reserve a right in groundwater.[13]

B. The Tribe Does Not Currently Produce or Attempt to Produce Groundwater.

The Tribe does not currently produce or attempt to produce groundwater from its reservation. ER 5, ER 138 (¶ 9), 193. Instead, the Tribe purchases its water supplies from the Water Agencies. ER 138 (¶ 9). The Water Agencies

[13] The Tribe argued below that these historical documents, such as the Mission Indians Relief Act and the Smiley Commission report, are irrelevant because they were issued subsequently to creation of the Tribe's reservation by the 1876 and 1877 executive orders. On the contrary, these historical documents were issued contemporaneously with creation of the Tribe's reservation, and described the Tribe's conditions for purposes of creating the Tribe's reservation; thus, the documents are highly relevant in construing the primary reservation purpose. There is no reason to believe that the Tribe's condition, as described in the 1891 Smiley Commission report, was any different from the Tribe's condition when the 1876 and 1877 executive orders were issued.

have never taken any action to prevent the Tribe from producing groundwater. *Id.*

Since the Tribe does not produce or attempt to produce groundwater, the Tribe's claimed reserved right in groundwater is not necessary to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated," and thus does not impliedly exist under *New Mexico*. Simply put, a claimed reserved right that an Indian tribe is not exercising to any substantial degree, if at all, nor attempting to exercise, is, by definition, not necessary to accomplish the primary reservation purpose, regardless of how the primary purpose is defined. Such a claimed right is not "essential to the life of the Indian people," *Arizona*, 373 U.S. at 599, or necessary to prevent the reservation lands from being "practically valueless." *Winters*, 207 U.S. at 576. Since the Tribe purchases its water supplies from the Water Agencies rather than producing groundwater itself, the Tribe would be in the same situation regardless of whether the Tribe's claimed reserved right is upheld or rejected.

Although the Ninth Circuit has held that a reserved right—once deemed to exist—cannot be lost by nonuse, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981); *United States v. Ahtamun Irr. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956), the Tribe's failure to exercise or attempt to exercise its

claimed reserved right demonstrates that the Tribe's claimed right is not necessary to accomplish the primary reservation purpose and thus does not impliedly exist under *New Mexico*.

Since the Tribe does not produce or attempt to produce groundwater, this case is different from other cases in which Indian reserved right claims were upheld, such as *Winters*, *Arizona* and *Walton*, where the Indians did not have access to necessary water supplies and the defendants prevented them from having access to the supplies. In the seminal *Winters* case, upstream non-Indian appropriators constructed dams and reservoirs on the upper Milk River in Montana that prevented water from reaching the Indian tribe's downstream reservation, thus causing the reservation lands to be "practically valueless." *Winters*, 207 U.S. at 576-577. Here, the Tribe makes no claim that its reservation lands are "practically valueless" because the Tribe does not have a reserved right in groundwater. In *Walton*, upstream non-Indian appropriators were taking water that "imperiled the agricultural use of downstream tribal lands and the trout fishery" on which the tribe depended. *Walton*, 647 F.2d at 52. Here, the Tribe makes no similar claim that the Water Agencies are imperiling resources on the Tribe's reservation, or otherwise preventing the Tribe from obtaining necessary water supplies. Thus, this case is

distinguishable from other cases where Indian reserved rights were upheld because they were necessary for Indian reservations to succeed in their intended purposes.

Since the Tribe does not produce or attempt to produce groundwater, the Tribe is asserting a mere theoretical reserved right in groundwater, untethered to the actual needs and circumstances of its reservation. The Tribe's apparent purpose in asserting its theoretical right is to obtain compensation from the Water Agencies for their use of the "pore space" of the groundwater basin that the Tribe allegedly "owns," a purpose that the Tribe candidly and repeatedly acknowledges in its complaint. ER 26 (¶ 8), 27 (¶ 12), 32-33 (¶ 32), 37 (¶ 55), 38-39 (¶ 66), 40 (¶ 75). A federal reserved right exists, however, only as necessary to provide a federal reservation with needed water, not as a basis for obtaining compensation from those who provide water.

IV. THE TRIBE HAS A DECREED RIGHT IN WHITEWATER RIVER SURFACE WATER FOR ITS PRIMARY RESERVATION PURPOSES, AND THUS GROUNDWATER IS NOT "NECESSARY" TO FULFILL THESE PURPOSES UNDER *NEW MEXICO*.

In 1938, the Riverside County Superior Court issued the Whitewater River Decree, which adjudicated all water rights in the Whitewater River and its tributaries. ER 96. Although the United States declined to participate in the

adjudication on grounds that the Superior Court lacked jurisdiction over the United States' claims, the United States nonetheless submitted a "Suggestion" requesting that the Superior Court award to the United States the right to divert specific quantities of water from two Whitewater River tributaries (the Andreas and Tahquitz Creeks) for use on the Tribe's reservation, for purposes of "irrigation," "power, domestic and stock water uses." ER 119-120 (¶¶ IV, V).

The Whitewater River Decree awarded to the United States the right to divert the specific quantities of Whitewater River tributary water for use on the Tribe's reservation that the United States had "suggested" should be awarded, and for the same tribal uses "suggested" by the United States. ER 115-116 (¶¶ 45, 46).[14] Thus, regardless of whether the Whitewater River court had jurisdiction over the United States' claims, the Tribe 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. The Tribe acknowledged in

[14] Specifically, the United States "suggested" that the Whitewater River court award to the United States the right to divert 6 cubic feet of water per second ("cfs") from Andreas Creek and 4.8 cfs from Tahquitz Creek for use on the Tribe's reservation, for "irrigation," "power, domestic and stock water uses." ER 119-120 (¶¶ IV, V). The Whitewater River Decree awarded to the United States the right to divert 6 cfs from Andreas Creek, with a priority date of January 1, 1893, and 4.8 cfs from Tahquitz Creek, with a priority date of April 26, 1884, for use on the Tribe's reservation, for "domestic, stock watering, power development and irrigation purposes." ER 115-116 (¶¶ 45-46).

its complaint that it has "surface rights *decreed* in the name of the United States in trust for the Tribe . . . ." ER 32 (¶ 32) (emphasis added).[15]

Since the Tribe has a decreed right to divert the precise amount of Whitewater River water that the United States represented as necessary to meet the Tribe's needs, the Tribe's claimed reserved right in groundwater is not necessary to accomplish the primary purposes of the Tribe's reservation and prevent these purposes from being "entirely defeated," and does not impliedly exist under *New Mexico*. *New Mexico*, 438 U.S. at 700, 702. A proper balance between Congress' deference to state water laws and the needs of federal reserved lands recognizes that an Indian tribe does not have an "implied" reserved right in groundwater for primary reservation purposes if it has a

[15] The Tribe and the United States argued below that—since the United States declined to participate in the Whitewater River adjudication on grounds that the court lacked jurisdiction over the United States' claims—the Tribe does not have a decreed right in Whitewater River surface water. On the contrary, even though the United States declined to participate, the Riverside County Superior Court—in accordance with the United States' "Suggestion"—awarded the Tribe the right to a specified quantity of Whitewater River surface water, and thus the Tribe has a decreed right in Whitewater River surface water. Indeed, the Tribe acknowledged in its complaint that it has a "decreed" right. ER 32 (¶ 32). If, as the Tribe and the United States argue, the Tribe does not have an decreed right in Whitewater River surface water, the Tribe and the United States would not be able to assert the doctrines of res judicata and collateral estoppel against anyone who may challenge the Tribe's decreed right, and it cannot be imagined that the Tribe and the United States would not assert these defenses if the Tribe's decreed right were challenged.

decreed right in surface waters for the same purposes. *See In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 748 (Ariz. 1999) (holding that a reserved water right exists only where "other waters are inadequate to accomplish the purpose of the reservation").[16]

Significantly, the United States' "Suggestion" in the Whitewater River adjudication claimed that certain Mission Indian tribes—the Cabazon, Augustine and Torros tribes—have reserved rights in the "percolating" groundwater of the Whitewater River, but the United States made no similar claim on behalf of the Agua Caliente Tribe. ER 133 (¶ X). The United States' failure to include the Tribe in its "Suggestion" that certain Indian tribes have reserved rights in groundwater indicates that—even under the United States' view in the Whitewater River litigation—the Tribe does not have an implied reserved right in groundwater.[17]

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[16] Similarly, in *Pyramid Lake Paiute Tribe v. Ricci*, 245 P.3d 1145, 1148-1149 (Nev. 2010), the Nevada Supreme Court denied an Indian tribe's reserved right claim in groundwater on the ground that a previous adjudication of the tribe's reserved right in surface water included its reserved right in groundwater.

[17] The Supreme Courts of Wyoming, Montana and Arizona have addressed whether the reserved rights doctrine applies to groundwater but have reached conflicting decisions. The Wyoming Supreme Court, citing Supreme Court precedent, has held that the reserved rights doctrine does not apply to

V. THE GROUNDWATER IN WHICH THE TRIBE CLAIMS A RESERVED RIGHT DOES NOT CONTRIBUTE TO OR SUPPORT THE SURFACE WATERS ON THE TRIBE'S RESERVATION, WHICH FURTHER UNDERMINES THE TRIBE'S RESERVED RIGHT CLAIM.

The Tribe has admitted that the groundwater in which it claims a reserved right "does not contribute to the surface flows of" the Whitewater River tributaries, that is, the Andreas, Tahquitz and Chino Creeks. ER 199-200. The district court concluded that "[t]he groundwater does not 'add to, contribute to or support' any surface stream from which the Tribe diverts water or is otherwise relevant to this litigation (e.g., the Tahquitz, Andreas, or Chino Creeks)." ER 5.

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groundwater. *In re Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76, 100 (Wyo. 1988), *aff'd by equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406, 407 (1989). The Montana and Arizona Supreme Courts, on the other hand, have held that the reserved rights doctrine applies to groundwater. *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098 (Mont. 2002); *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P.2d 739, 747-748 (Ariz. 1999). None of the Courts' decisions addressed the issues raised here, particularly the question whether an Indian tribe has a reserved right in groundwater where it has a correlative right under state law or a decreed right to surface water sufficient to meet reservation needs. Thus, the decisions have little relevance here. Notably, since California is the only state that applies the correlative rights doctrine to groundwater, *see* note 10, *supra*, the correlative rights doctrine does not apply in Wyoming, Montana or Arizona. For example, Arizona recognizes the doctrine of "reasonable use" as applied to groundwater, but not the doctrine of correlative rights. *Gila River*, 989 P.2d at 743 n. 3; *Bristor v. Cheatham*, 255 P.2d 173, 178-179 (Ariz. 1953).

Since the groundwater in which the Tribe claims a reserved right does not contribute to or support the surface waters on the Tribe's reservation, the groundwater has no effect on the surface waters or the Tribe's use of the surface waters, which further undermines the Tribe's reserved right claim. The balance between Congress' deference to state water law and the needs of federal reserved lands weighs in favor of application of state law where the groundwater underlying the federal lands does not contribute to or support the surface waters on the federal lands.

The district court below, referring to *Cappaert v. United States*, 426 U.S. 128 (1976), which had held that the United States could enjoin groundwater pumping by a third party that impaired the United States' reserved right in the surface waters of Devil's Hole National Monument, stated that "it is undisputed that the groundwater at issue is not hydrologically connected to the reservation surface water, so it sits uncomfortably outside *Cappaert's* explicit holding." ER 15.

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

If the Tribe has a federal reserved right in groundwater, the Tribe would be exempt from California laws that apply to all other users of groundwater,

particularly California laws providing that all water uses must conform to the constitutional rule of "reasonable and beneficial use" and also California laws providing that all overlying landowners have correlative rights in groundwater. Further, the Tribe's reserved right would jeopardize the rights of other users of groundwater who have long relied on the groundwater resource for their own needs. These adverse consequences and impacts are relevant, because, as the Supreme Court stated in *New Mexico*, the impacts on "water-needy state and private appropriators" must be "weighed" in determining "what, if any, water" is impliedly reserved for a federal reservation. *New Mexico*, 438 U.S. at 705; *see id*. at 718 (Powell, J., dissenting) (reserved rights doctrine should be applied with "sensitivity" to "its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law"). These adverse consequences and impacts weigh heavily against the Tribe's reserved right claim.

A. Under the Tribe's Reserved Right Claim, the Tribe Would Be Exempt from California's Constitutional Rule of "Reasonable and Beneficial Use."

California's basic water law, adopted by the people of California as a constitutional amendment in 1928, provides that all water uses in California must conform to the rule of "reasonable and beneficial use," or more simply the

"reasonable use" rule. Cal. Const., Art. X, § 2; *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 443 (1983); *Joslin v. Marin Mun. Wat. Dist.*, 67 Cal.2d 132, 138-139 (1967); *Peabody v. City of Vallejo*, 2 Cal.2d 351, 366 (1935). The reasonable use rule applies to groundwater. *City of Barstow v. Mojave Wat. Agency*, 23 Cal.4th 1224, 1240-1241 (2000). The reasonable use rule requires that "[w]hen the supply is limited, public interest requires that there be the greatest number of beneficial uses which the supply can yield." *Peabody*, 2 Cal.2d at 368. The reasonable use inquiry "depends on the circumstances of each case" and "cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance," including the "paramount" need for "the conservation of water in this state." *Joslin*, 67 Cal.2d at 140. Thus, the reasonable use rule allows California to achieve the maximum beneficial uses of its water resources commensurate with the need to conserve the resources.

If the Tribe has a federal reserved right in groundwater, the Tribe would be exempt from California's reasonable use rule, and thus would have no obligation to participate with other groundwater users in achieving maximum beneficial uses of water resources commensurate with the need to conserve the resources. Such a construction would impair California's ability to manage its

groundwater resources, by allowing the Tribe to use all groundwater deemed necessary for reservation purposes regardless of whether the Tribe's use conforms to the reasonable use rule. It is highly improbable that Presidents Grant and Hayes, in issuing the 1876 and 1877 executive orders creating the Tribe's reservation, "impliedly" intended to exempt the Tribe from requirements of California law that apply to all other users of groundwater, particularly because the Tribe has the same correlative right to use groundwater under California law as other overlying landowners.

Although the Ninth Circuit has stated that Indian reserved rights in surface water may be subject to the rule of "beneficial use," which is measured by the "water duty" for the reserved right, *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 402, 403-404 (9th Cir. 1985), California's constitutional rule requires that a water use must be not only "beneficial" but also "reasonable"; a water use that is "beneficial" may not be "reasonable" in light of other competing beneficial uses of water. *Joslin*, 67 Cal.2d at 142-143. In *Joslin*, for example, the Supreme Court held that the use of water for a commercial gravel-washing operation—although "beneficial"—was not "reasonable" in light of competing municipal water supply needs dependent on the same water resource. *Id*. at 140-141. If the available water supply is

insufficient to accommodate all beneficial uses, the California courts attempt to reach a "physical solution" that reasonably accommodates all beneficial uses. *Peabody*, 2 Cal.2d at 379-380; *Hillside Water Co. v. City of Los Angeles*, 10 Cal.2d 677, 688-689 (1938); *City of Lodi v. East Bay Mun. Util. Dist.*, 7 Cal.2d 316, 341-345 (1936); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal.2d 489, 574 (1935).[18]

Since the Tribe's claimed reserved right in groundwater is based on federal law, the Tribe's claimed right, if upheld, would preclude California's courts and administrative bodies from considering whether the Tribe's claimed right meets the reasonable use rule in light of other beneficial uses, and would limit the ability of California courts to fashion a "physical solution" that reasonably accommodates all beneficial uses. Under its reserved right claim, the Tribe would have a paramount right to use all groundwater necessary to satisfy its reservation needs regardless of the impacts on other beneficial uses, even though the Tribe has the same correlative right to use groundwater under

[18] The doctrine of physical solution is a "common sense approach to water rights litigation." ROGERS & NICHOLS, WATER FOR CALIFORNIA § 404, p. 548 (1967). Under this doctrine, "[s]olution of water rights problems by use of all available information and expertise is attempted in order that the best possible use is made of the waters in their apportionment among contending parties." *Id.* at pp. 547-548.

California law as other overlying landowners. While all other users of groundwater would be subject to the reasonable use rule, the Tribe alone would be exempt from the rule.

Particularly in light of California's current unprecedented drought, California's ability to assess the reasonableness of competing beneficial uses is essential in enabling California to conserve its limited water supplies in order to meet its present and future needs. If the Tribe is exempt from the constitutional rule, the Tribe would have no obligation to participate with other water suppliers and users in conserving California's groundwater resources during the current unprecedented drought.

B. Under the Tribe's Reserved Right Claim, the Tribe Would Be Exempt from California's Correlative Rights Doctrine.

If the Tribe has a reserved right in groundwater, the Tribe would also be exempt from California law providing that all overlying landowners have correlative and equal rights in groundwater and none has priority over another. The Tribe alleges in its complaint that its claimed reserved right is "senior, prior and paramount" to the rights of all other users of groundwater, ER 37 (¶ 59), and that its "senior, prior and paramount" right applies to all groundwater uses necessary for "homeland purposes," which the Tribe broadly defines as "all

present *and future* purposes" of the reservation. ER 38 (¶ 62) (emphasis added). Thus, while all other groundwater users in the Coachella Valley are required to share equally under the correlative rights doctrine, the Tribe would have a "senior, prior and paramount" right to use groundwater for all "present" and undefined "future" reservation purposes before anyone else could use a single drop of groundwater. The Tribe's claim would create an anomaly in the California law of groundwater, because the Tribe's right to groundwater would be based on the principle of priority while all other rights are based on the principle of correlativity. Again, it is highly improbable that Presidents Grant and Hayes "impliedly" intended to create such an anomaly in issuing the 1876 and 1877 executive orders creating the Tribe's reservation.

C. The Tribe's Claimed Reserved Right in Groundwater Would Jeopardize the Rights of Other Users of Groundwater.

If the Tribe has a reserved right in groundwater, the Tribe would have a prior right to use groundwater that other overlying landowners have used and relied on for decades, thus jeopardizing the rights of these other landowners. Many other overlying landowners use the same groundwater resource in which the Tribe claims a reserved right, and recognition of the Tribe's claimed reserved right would potentially affect the availability and reliability of groundwater supplies for these other landowners. ER 137 (¶ 5). The Tribe has

never previously claimed a reserved right in groundwater, even though the Tribe's claimed right is based on executive orders issued two centuries back. Thus, the Tribe's belatedly-asserted reserved right claim would jeopardize the rights of other groundwater users in the Coachella Valley who have long depended on groundwater for their farms, businesses and other enterprises, and would create uncertainty and instability concerning the rights of these other groundwater users. Although the full impact of the Tribe's claimed reserved right on other groundwater users will be deferred to the Phase 3 quantification phase of this litigation, if the case reaches that phase, the fact that the Tribe's claimed reserved right would create uncertainty and instability concerning existing rights weighs heavily against the Tribe's claim that it has such a reserved right. *New Mexico*, 438 U.S. at 705 (stating that impacts on "water-needy state and private appropriators" must be "weighed" in determining "what, if any, water" is impliedly reserved).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court decision and hold that the Agua Caliente Band of Cahuilla Indians does not have a federal reserved right in groundwater.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32 of the Federal Rules of Appellate Procedure, which establishes the form of briefs, and Ninth Circuit Rule 28-4, which provides that a joint brief may include 15,400 words, I hereby certify that the foregoing brief was produced on a computer, is proportionately spaced, has a typeface 14 points or more, and, according to the word count function on the word processing program used, contains 15,305 words.

I declare under penalty of perjury that the foregoing is true and correct, and that this certificate is executed on October 9, 2015.

/S/ Roderick E. Walston
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STATEMENT OF RELATED CASES

There are no pending related cases before this Court.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **JOINT BRIEF OF APPELLANTS COACHELLA VALLEY WATER DISTRICT, *ET AL.*, AND DESERT WATER AGENCY, *ET AL.*** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF System on October 9, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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