Nos. 17-40 and 17-42

In the Supreme Court of the United States

COACHELLA VALLEY WATER DISTRICT, ET AL.,
PETITIONERS

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS, ET AL.

DESERT WATER AGENCY, ET AL., PETITIONERS

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an Indian tribe's federal reserved water rights under *Winters* v. *United States*, 207 U.S. 564 (1908), can encompass groundwater.

2. Whether *United States* v. *New Mexico*, 438 U.S. 696 (1978), establishes a standard under which federal reserved water rights may be acknowledged only where requiring the United States to acquire water rights under state law would entirely defeat the federal reservation's purposes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a)[1] is reported at 849 F.3d 1262. The opinion of the district court (Pet. App. 24a-51a) is unreported but is available at 2015 WL 1600065.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2017. On April 10, 2017, Justice Kennedy extended the time within which to file the petitions for

[1] Citations to the Pet. App. refer to the appendix to the petition for a writ of certiorari in No. 17-40.

writs of certiorari to and including July 5, 2017. The petition in No. 17-40 was filed on that date, and the petition in No. 17-42 was filed on July 3, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the rights of the Agua Caliente Band of Cahuilla Indians (the Tribe), a federally recognized Indian tribe, to use water underlying its reservation in the State of California. The use of water in the United States originally was governed by the common law of riparian rights, under which an owner of land abutting a stream was entitled to the continued natural flow of the stream and to "complete ownership" of the water lying under the land. See, *e.g.*, 3 *Waters and Water Rights* § 20.04 (Amy K. Kelley ed., 2012) (*Waters and Water Rights*). Over the course of the nineteenth century, the western States and Territories responded to the relative lack of available water by replacing the riparian doctrine, to varying degrees, with a system of appropriative rights that are acquired and maintained by actual use and may be lost through abandonment or forfeiture. See *Colorado* v. *New Mexico*, 459 U.S. 176, 179 n.4 (1982); *Nicoll* v. *Rudnick*, 72 Cal. Rptr. 3d 879, 887 (Cal. Ct. App. 2008) ("[A] party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment.") (brackets in original; citation omitted); see also *Waters and Water Rights* § 11.04.

In the mid-nineteenth century, Congress enacted a series of land-disposal statutes that culminated in the 1877 Desert Land Act, Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (43 U.S.C. 321). That statute "severed, for purposes of private acquisition, soil and water rights on public lands, and provided that such water rights were

to be acquired in the manner provided by the law of the State of location." *Federal Power Comm'n* v. *Oregon*, 349 U.S. 435, 447-448 (1955) (citing *California Or. Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935)); *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945). The Desert Land Act, however, does not apply to lands previously or subsequently reserved for federal purposes. See *Federal Power Comm'n*, 349 U.S. at 448.

In *Winters* v. *United States*, 207 U.S. 564 (1908), this Court held that the establishment of Indian and other federal reservations also impliedly reserves such previously unappropriated, and thus available, waters as are necessary to accomplish the purposes for which the federal reservation was created. *Id.* at 576; see *Cappaert* v. *United States*, 426 U.S. 128, 139 (1976); *Arizona* v. *California*, 373 U.S. 546, 597-602 (1963); *United States* v. *Powers*, 305 U.S. 527, 528 (1939). The Court has recognized that the broad purpose of an Indian reservation is to enable the establishment of a self-sustaining Indian community, *Winters*, 207 U.S. at 576-577; *Arizona*, 373 U.S. at 599-600, and the Court has observed that the reservation of land in arid areas would often be of little use without water rights associated with that land, *Winters*, 207 U.S. at 576; *Arizona*, 373 U.S. at 599-601.

Like riparian rights, federal reserved water rights are not lost by nonuse. See 2 *Waters and Water Rights*, ch. 11 (Robert E. Beck ed., 1991 & Repl. Vol. 2005). Similar to appropriative rights, however, reserved rights in unappropriated water vest no later than the date of the reservation and are superior to subsequently acquired rights. *Cappaert*, 426 U.S. at 145; *United States* v. *Adair*, 723 F.2d 1394, 1413-1417 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). Federal reserved wa-

ter rights are not dependent upon state law or state procedures. See *Cappaert*, 426 U.S. at 145 (citing *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 805 (1976)); see also *United States* v. *New Mexico*, 438 U.S. 696, 702 (1978) (*New Mexico*) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

2. This case involves land that was set aside by the United States for use as an Indian reservation. The reservation was set aside for the Tribe in two executive orders, one signed by President Grant on May 15, 1876, and the other signed by President Hayes on September 29, 1877. C.A. E.R. 57-59; Pet. App. 6a-7a. The Tribe and its members use and reside on the reservation, which comprises approximately 31,396 acres in the Coachella Valley in southern California. Pet. App. 7a. The Tribe has used both surface and groundwater on the lands for domestic, agricultural, stock-watering, and other purposes since before the reservation was established. See, *e.g.*, D. Ct. Doc. 97-2, at 39 (Dec. 5, 2014); C.A. Supp. E.R. 9, 57-58, 61, 67, 88. At the time the land was reserved, federal officials observed that surface water was scarce, but that additional water could be developed from underground sources. *Ibid.*

Several intermittent streams within the Whitewater River stream system traverse the reservation. Pet. App. 7a-8a. In 1936, a California court adjudicated surface water rights in the Whitewater system. Without submitting to that court's jurisdiction, the United States made a special appearance to suggest the Tribe's then-current surface-water use. *Id.* at 9a & n.4. The

state court's decree closely tracked the rights described in the United States' suggestion. C.A. E.R. 119-120. In particular, the decree gave the United States water rights for domestic use, stock watering, power development, and irrigation for use on the reservation. *Id.* at 115, 128-133.

The reservation also overlies a portion of the Coachella Valley groundwater aquifer. Pet. App. 8a, 30a. Petitioners, Coachella Valley Water District (CVWD) and Desert Water Agency (DWA), are public agencies that withdraw water from the aquifer and distribute it to their customers. *Id.* at 26a. For many years, the aquifer has been in a state of "overdraft," meaning that more water is withdrawn than flows in. *Id.* at 8a-9a. Petitioners have attempted to address that shortage in part by injecting water imported from the Colorado River into the aquifer, where it is comingled with the aquifer's natural water supply and withdrawn for delivery to petitioners' customers. *Id.* at 9a, 27a. Overdraft of the aquifer has caused a loss of groundwater in the portions of the aquifer that underlie the reservation. *Id.* at 8a-9a.

Unlike other western states, California recognizes both riparian and appropriative rights in surface waters. Cal. Water Code § 101 (West 2009). Under California law, riparian water rights exist on federal lands located within the State. *In re Water of Hallett Creek Stream Sys.*, 749 P.2d 324, 334 (Cal. 1988). California separately administers groundwater under a "correlative rights" framework. *Katz* v. *Walkinshaw*, 74 P. 766, 772 (Cal. 1903). Under that framework, overlying landowners have the "paramount" right to use groundwater, subject to reasonable apportionment among competing overlying landowners in the event of water shortage and

to the prescriptive rights of other appropriators. *City of Barstow* v. *Mojave Water Agency*, 5 P.3d 853, 863, 868 (Cal. 2000). In 2014, California enacted the Sustainable Groundwater Management Act, Cal. Water Code § 10720 *et seq.* (West 2017), which recognizes that federal reserved water rights to groundwater must be "respected in full" and must prevail over state law in any conflict regarding their adjudication or management. *Id.* § 10720.3(d).

3. In 2013, the Tribe sued to enjoin petitioners' use of water from the aquifer in derogation of its federal reserved water rights, and for declaratory and other relief to protect those rights. Pet. App. 10a. In 2014, the United States intervened in its capacity as owner of the reservation in trust for the Tribe. *Ibid.* The parties agreed to divide the litigation into three phases. *Ibid.* The first phase, at issue here, addresses only the threshold question whether the Tribe's federal reserved water rights encompass groundwater underlying the reservation. *Ibid.* The second phase will address whether the Tribe beneficially owns "pore space" of the groundwater basin underlying the reservation and whether the Tribe's rights to groundwater includes rights to receive water of a certain quality. *Ibid.* The third phase will quantify the Tribe's groundwater rights. *Ibid.*

On the issue whether the Tribe's reserved water rights encompass groundwater, the district court granted partial summary judgment for the Tribe and the United States. Pet. App. 24a-51a. The court explained that, for over a century, this Court has held that when the United States "withdraws its land from the public domain and reserves it for a federal purpose," it

reserves by implication "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Id.* at 32a (quoting *Cappaert*, 426 U.S. at 138). The court concluded that, under the *Winters* doctrine, the United States impliedly reserved water for the Tribe's reservation. *Id.* at 35a-39a.

The district court further explained that no case interpreting *Winters* has drawn a principled distinction between "surface water physically located on a reservation and other appurtenant water sources." Pet. App. 36a. The court concluded that "groundwater provides an appurtenant water source, in the *Winters* sense," *id.* at 37a, and that the United States "impliedly reserved groundwater, as well as surface water, for the [Tribe] when it created the reservation," *id.* at 39a. The court observed that, with a single exception, every court to address the issue has held that *Winters* rights can encompass groundwater resources. *Id.* at 37a-38a.

The district court rejected petitioners' argument that principles of federalism and comity counsel against extending *Winters* rights to California groundwater resources. Pet. App. 40a-41a. The court explained that *Winters* rights are derived from federal law and that the scope of the reserved rights are not determined by balancing it against competing state interests. *Ibid.* The court further observed that California law acknowledges the supremacy of federal reserved water rights in groundwater and acquiesces in their priority. *Ibid.* (citing Cal. Water Code § 10720.3) (West 2017)).

The district court further rejected petitioners' argument that any asserted right to water beyond the Tribe's state-law allocation "is not necessary to prevent the reservation's purpose from being entirely de-

feated," because the Tribe is able to function within California's groundwater allocation framework. Pet. App. 40a. That argument, the court explained, was based on "an unduly restrictive reading" of *New Mexico*. *Id*. at 41a. The court explained that, in *New Mexico*, Congress had set forth specific federal purposes when it created the Gila National Forest in 1897, and those purposes were the only ones for which the government had impliedly reserved water. *Ibid.* Other uses, declared by Congress many years later, were "secondary" and not so crucial as to require a reservation of additional water. *Ibid.* Unlike in *New Mexico*, the court continued, "[i]n this case there are no subsequent enactments that impact the purposes of the Tribe's reservation." *Id.* at 42a. Rather, "[t]he reservation's purposes remain the same as when the government created the reservation —to provide the [Tribe] with a permanent homeland." *Ibid.*

The court concluded that where the United States reserves land as a homeland for Indians, the *Winters* doctrine ensures federal reserved water rights to realize that end. Pet. App. 43a. The court observed that later phases of this litigation would examine the reservation's purpose to determine the scope of the Tribe's *Winters* rights. *Id.* at 42a-43a. The court concluded, however, that the Tribe and the United States were entitled to summary judgment on the first-phase issue of whether the Tribe's *Winters* rights encompass groundwater. *Id.* at 43a.

The district court certified its interlocutory order for appeal under 28 U.S.C. 1292(b). Pet. App. 49a-50a.

4. The court of appeals granted interlocutory review and affirmed. Pet. App. 1a-23a. The court concluded that the United States intended to establish a homeland

for the Tribe by setting aside land for the reservation, and that purpose would be defeated without access to water. *Id.* at 17a-18a. The court further concluded that because the *Winters* doctrine was developed in part to provide sustainable land for Indian tribes in arid parts of the country, and because adequate water supplies in such areas may not exist on the surface, the *Winters* doctrine logically "encompasses both surface water and groundwater appurtenant to reserved land." *Id.* at 19a-20a. Accordingly, the court held, the creation of the reservation "carried with it an implied right to use water from the Coachella Valley aquifer." *Id.* at 21a.

The court of appeals further concluded that *New Mexico* did not alter the *Winters* test for determining whether reserved water rights existed for the reservation. Pet. App. 16a-17a. The court explained that *New Mexico* "added an important inquiry related to the question of *how much* water is reserved" and held that water is reserved only for primary purposes that are "directly associated with the reservation of land." *Ibid.* *New Mexico* did not, however, "eliminate the threshold issue—that a reserved right exists if the purposes underlying a reservation envision access to water." *Id.* at 17a.

The court of appeals rejected petitioners' argument that "the Tribe does not need a federal reserved right to prevent the purpose of the reservation from being entirely defeated" because the Tribe already receives adequate groundwater and surface water under state law. Pet. App. 21a-22a. The court explained that, under this Court's precedents, *Winters* rights derive from federal law, and the existence of a state-law entitlement to use groundwater does not displace *Winters* rights. *Ibid.* Although it recognized that further analysis under the

standard established in *New Mexico* will be considered in later phases of this litigation, the court concluded that the creation of the reservation carried with it an implied federal right to use "some amount" of water from the aquifer. *Id.* at 23a.

ARGUMENT

Petitioners contend (CVWD Pet. 31-37; DWA Pet. 24-31) that the court of appeals erred in holding that the Tribe's federal reserved water rights under *Winters* v. *United States*, 207 U.S. 564 (1908), include groundwater. They further contend (CVWD Pet. 36-37; DWA Pet. 16-23, 34-36) that, under *United States* v. *New Mexico*, 438 U.S. 696 (1978), the question of whether *Winters* rights include groundwater requires consideration of whether adequate water is available under state law. The court of appeals applied the proper legal standard and correctly concluded that the Tribe's *Winters* rights include groundwater. The overwhelming weight of state and federal legal authority is in accord with the court of appeals' decision. The decision below is also interlocutory, and this Court may therefore review the questions presented in these petitions after further litigation defines the scope of the Tribe's federal reserved water rights. Further review is therefore unwarranted.

1. a. When the United States reserves land as an Indian reservation or for other federal purposes, it impliedly reserves previously unappropriated waters necessary to accomplish the purposes for which the federal reservation was established. *Winters*, 207 U.S. at 576; see *Arizona* v. *California*, 373 U.S. 546, 597-602 (1963); *United States* v. *Powers*, 305 U.S. 527, 528 (1939). In *Winters*, the United States sought an injunction to prohibit upstream settlers in Montana from constructing

dams that prevented water from the Milk River from flowing to the Fort Belknap Indian Reservation. 207 U.S. at 565. Although the reservation was created in 1888, the settlers claimed priority under Montana's law of prior appropriation. *Id.* at 568-569. This Court rejected that argument and concluded that when the United States set aside land for the reservation, it impliedly reserved sufficient water to accomplish the reservation's purposes. *Id.* at 577.

In *Cappaert* v. *United States*, 426 U.S. 128 (1976), the Court concluded that federal reserved water rights prohibit groundwater pumping that interferes with the federal rights. *Id.* at 142-143. The reservation in *Cappaert* was of land surrounding a limestone cavern known as Devil's Hole in Nevada, making it part of the Death Valley National Monument. *Id.* at 131-132. The federal proclamation reserving the land noted that Devil's Hole was being reserved to preserve the pool of water therein, which contained a rare species of desert fish. *Id.* at 132-133. The United States sought an injunction prohibiting nearby residents from pumping groundwater, which had the effect of lowering the water level in Devil's Hole and threatening the survival of the rare fish species. *Id.* at 135. This Court held that the injunction entered by the district court, which permitted groundwater pumping only "to the extent that the drop [in the water level in Devil's Hole] does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved," was appropriate. *Id.* at 141; see *id.* at 147.

Nevada had argued in *Cappaert* that federal reserved rights were "limited to surface water." 426 U.S. at 142. The Court found it unnecessary to address that argument because it concluded that the water in Devil's

Hole "*is* surface water." *Ibid.* (emphasis added). The Court held that the United States "can protect its water from subsequent diversion, whether the diversion is of surface or ground water." *Id.* at 143.

In *New Mexico*, the Court clarified that the scope of federal reserved water rights is limited to water that is "necessary to fulfill the very purposes for which a federal reservation was created." 438 U.S. at 702. "Where water is only valuable for a secondary use of the reservation," the Court explained, "there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *Ibid.* The Court concluded that the Gila National Forest had been reserved for two specific purposes—to conserve water flows and to furnish a continuous supply of timber. *Id.* at 707. Congress's later enactment of a statute establishing a federal policy to administer national forests for outdoor recreation and wildlife preservation, the Court concluded, did not expand the United States' reserved water rights in the Gila National Forest, *id.* at 713-714, and the United States was required to obtain water rights under state law for uses that were not a "direct purpose of reserving the land," *id.* at 716.

b. The court of appeals correctly applied those settled legal principles to conclude, in this preliminary phase of litigation addressing only whether *Winters* rights can include groundwater, that the Tribe has reserved rights to use "some amount" of groundwater from the aquifer underlying its reservation. Pet. App. 23a. The court reasoned that the Tribe's federal reserved rights include groundwater because (i) water is necessary to accomplish the reservation's purpose to

provide a permanent homeland for the Tribe; (ii) surface water sources are inadequate to accomplish that purpose; and (iii) groundwater in the aquifer is appurtenant to the reservation. *Id.* at 20a.

The court of appeals' holding is consistent with the overwhelming consensus of state and federal courts to have considered the issue. See, *e.g., Confederated Salish & Kootenai Tribes of the Flathead Reservation* v. *Stults*, 59 P.3d 1093, 1098-1099 (Mont. 2002) (treaty establishing the Flathead Indian Reservation implicitly reserved groundwater); *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739 (Ariz. 1999) (*Gila*) (en banc) (*Winters* doctrine does not differentiate between surface water and groundwater.), cert. denied, 530 U.S. 1250 (2000); *United States* v. *Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) ("the United States may reserve not only surface water, but also underground water"), aff'd on other grounds, 426 U.S. 128 (1976); *State of N.M. ex rel. Reynolds* v. *Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (Pueblo water rights extend to groundwater as an integral part of the hydrologic cycle.); *Colville Confederated Tribes* v. *Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978) ("[*Winters* rights] extend to ground water as well as surface water."), aff'd in part on other grounds, and rev'd in part on other grounds, 647 F.2d 42 (9th Cir. 1981); *Tweedy* v. *Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968) (no reason exists to distinguish surface water from groundwater in applying the *Winters* doctrine); *State of Nev. ex rel. Shamberger* v. *United States*, 165 F. Supp. 600, 601 (D. Nev. 1958) (rights to develop groundwater within a federal reservation are not subject to state law), aff'd on other grounds, 279

F.2d 699 (9th Cir. 1960); *Gila River Pima-Maricopa Indian Cmty.* v. *United States*, 9 Cl. Ct. 660, 699 (1986) ("[t]he *Winters* doctrine * * * includes an obligation to preserve all water sources within the reservation, including ground water"), aff'd, 877 F.2d 961 (Fed. Cir. 1989) (per curiam); *Soboba Band of Mission Indians* v. *United States*, 37 Ind. Cl. Comm. 326, 341 (1976) ("the *Winters* Doctrine applies to all waters appurtenant to the reservations, including wells, springs, streams, and percolating and channelized ground waters"); but see *In re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 99 (Wyo. 1988) (*Big Horn*) (affirming a ruling that federal reserved water rights for the Wind River Indian Reservation did not encompass groundwater), aff'd by an equally divided Court *sub nom. Wyoming* v. *United States*, 492 U.S. 406 (1988) (per curiam).

2. a. Petitioners contend (CVWD Pet. 33-36; DWA Pet. 24-31) that the purpose of *Winters* rights is to give temporal priority to the United States for federal reserved land over subsequent water users, and that those rights do not logically fit within California's correlative rights framework for the administration of groundwater, which is not based on priority. They further contend (CVWD Pet. 24-31; DWA Pet. 22, 29-31) that recognizing federal reserved rights in groundwater will complicate state groundwater administration. See States' Amicus Br. 11-16; Pacific Legal Found. Amicus Br. 9-12; Association of Cal. Water Agencies et al. Amicus Br. 11-15. Those contentions should be rejected.

California water administrators have long recognized Pueblo rights in groundwater, which were appropriated under Mexican law prior to the Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, and

are paramount to state-law rights. See *City of Los Angeles* v. *City of San Fernando*, 537 P.2d 1250 (Cal. 1975). Furthermore, as petitioner DWA acknowledges (Pet. 28 n.5), the California groundwater framework accounts for priority between non-overlying landowners who appropriate groundwater, the rights of whom are subordinate to the rights of overlying landowners. See *City of Barstow* v. *Mojave Water Agency*, 5 P.3d 853, 862-863 (Cal. 2000). Additionally, California law specifically provides that federal reserved rights in groundwater are to be "respected in full" and must prevail over state law in any conflict regarding their adjudication or management. Cal. Water Code § 10720.3(d) (West 2017). The concept of priority is therefore not incompatible with California's system of groundwater administration.

Indeed, numerous States whose regulatory systems petitioners suggest are incompatible with federal reserved rights in groundwater (CVWD Pet. 26-27)—including most States within the Ninth Circuit—have already recognized priority for federal reserved rights in groundwater in various contexts. Indian water rights settlements involving Arizona, California, Idaho, Montana, and Nevada, for example, have expressly included reserved rights to groundwater. See, *e.g.*, White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. No. 111-291, Tit. III, 124 Stat. 3073; Soboba Band of Luiseño Indians Settlement Act, Pub. L. No. 110-297, 122 Stat. 2975; Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059; Chippewa Clee Tribe of the Rocky Boy's Indian Reservation Compact, Mont. Code Ann. § 85-20-601 (West 2015); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, Tit.

I, 104 Stat. 3289, amended by Pub. L. No. 109-221, § 104, 120 Stat. 336.

Furthermore, in *Cappaert*, this Court affirmed an injunction that curtailed groundwater pumping under a state permit to the extent necessary to protect the United States' reserved water rights for the Devil's Hole in Nevada. 426 U.S. at 141. Although the reserved rights were for surface water, *ibid.*, the decision ensured that Nevada would need to account for and defer to priority-based rights in its administration of groundwater. State water administrators thus have been aware for decades that federal reserved rights may affect groundwater administration under state law.

In addition, Idaho and Utah have recognized federal reserved rights in groundwater in non-Indian contexts through bilateral agreements with the United States. See, *e.g.*, Water Rights Agreement between the State of Idaho and the United States for Yellowstone National Park §§ 5.2, 5.5, 5.8 (1992); Natural Bridges National Monument Water Rights Agreement § 2 (2010). Arizona, Colorado, and Wyoming have decreed non-Indian federal reserved rights to groundwater through general stream adjudications. See, *e.g.*, *In re General Adjudication of all Rights to Use Water in the Gila River Sys. & Source*, Order and Partial Decree of Stipulated Water Rights in the San Pedro River Watershed for the Coronado National Memorial, at 1, 3 (Ariz. Super. Ct. 2004); *In re Application for Water Rights of the United States of Am. in Alamosa Cnty.*, Great Sand Dunes National Monument, at 5-6 (Colo. Dist. Ct. 1989); *In re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, Civ. No. 4993, Final Phase II Decree Covering the United States' Non-Indian Claims, at 55-

56, 79-82 (Wyo. 5th Jud. Dist., Nov. 29, 2005). Accordingly, petitioners are wrong to suggest that federal reserved rights to groundwater will disrupt state groundwater administration.

b. Petitioners further contend (CVWD Pet. 31-33; DWA Pet. 35-36) that the United States could not have intended to include groundwater within its federal reserved rights for the reservation because modern technology for pumping groundwater did not exist when the reservation was set aside. The Court should reject that argument. Federal water rights can include future uses as needed to accomplish the purposes of the reservation, and the non-existence of modern groundwater pumping technology at the time the land was reserved for the Tribe is therefore irrelevant. See, *e.g.*, *Arizona*, 373 U.S. at 600 (*Winters* rights reserved to accomplish purpose of reservation include "future as well as the present needs" of the reservation and are not limited by such factors as current uses or population). Moreover, courts have not limited the *Winters* doctrine to historical uses of water or particular sources of water, but have instead limited the scope of *Winters* rights to the intended purposes of the reservation. See, *e.g.*, *Cappaert*, 426 U.S. at 142 (reserved rights do not exceed the amount needed to accomplish reservation purpose); *Arizona*, 373 U.S. at 600-601 (approving irrigable acreage as measure of *Winters* rights); *New Mexico*, 438 U.S. at 702 (reservation of water limited to amount needed for primary purposes).

3. Petitioners contend (CVWD Pet. 36-37; DWA Pet. 16-23, 34-36), that this Court's decision in *New Mexico* required the courts below to consider the adequacy of water provided to the Tribe under state law before recognizing federal reserved rights in groundwater. They

contend (*ibid.*) that if state law provides adequate water to satisfy the purposes of the reservation, then federal reserved rights are unnecessary. No court has adopted that reading of *New Mexico*.[2]

Petitioners' argument is based on language in *New Mexico* that federal reserved water rights are recognized only if "without the water the purposes of the reservation would be entirely defeated." 438 U.S. at 700. But *New Mexico* did not interject state law into answering that question. To the contrary, *New Mexico* reaffirmed the holding in *Cappaert* that the determination of federal reserved rights is not governed by state law, expressly stating that federal law applies to reserve the water necessary to accomplish the purpose of federal reservations, despite the congressional policy of deference to state law in other areas. *Id.* at 701-702; see *Cappaert*, 426 U.S. at 145 ("Federal water rights are not dependent upon state law or state procedures."); *Cohen's Handbook of Federal Indian Law* § 19.03[1] (2012 ed.).[3]

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[2] DWA contends (Pet. 21) that the United States took a contrary position in its brief in opposition to the petition for a writ of certiorari in *Wyoming* v. *United States*, No. 88-309. That is incorrect. The question presented in *Wyoming* assumed the existence of federal reserved rights and addressed the standard for quantifying those rights. In context, the statement that "*New Mexico* concerned only the issue of what circumstances are sufficient to give rise to a federal reserved water right in the first place" characterized the principle that federal rights exist in water necessary to accomplish "primary" purposes but not "secondary" uses. Br. in Opp. at 19, *Wyoming* v. *United States*, *supra* (No. 88-309). It did not suggest that the development of that principle established a new standard for determining whether reserved water rights are implied. *Ibid.*

[3] Petitioners' amici argue from the incorrect premise that state authority to administer groundwater on lands reserved for federal

Under *New Mexico*, federal agencies must acquire rights under state law for water that is "valuable for a secondary use" of a federal reservation, but not for the "very purposes" for which federal land was set aside. 438 U.S. at 702.

The Court in *New Mexico* emphasized that the *Winters* doctrine represents a deliberate departure from Congress's policy of deference to state law in other areas. 438 U.S. at 703. *New Mexico* therefore limited the *extent* of the *Winters* doctrine, holding that water rights are not necessarily implied for "secondary uses" of a federal reservation, while reaffirming the doctrine itself. The court of appeals correctly interpreted *New Mexico* as a limitation on *how much* water was subject to the federal reserved right, but not as a new standard for determining the existence of such a right. Pet. App. 16a.

4. Petitioners contend (CVWA Pet. 18-24; DWA Pet. 32-33) that the court of appeals' decision conflicts with decisions of the courts of last resort in Wyoming and Arizona. Petitioners' reliance on those decisions is misplaced.

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purposes derives from the United States Constitution. See Association of Cal. Water Agencies et al. Amicus Br. 16-19. It is the Constitution, through the Property Clause and the Commerce Clause, that provides the basis for federal reserved water rights. *Cappaert*, 426 U.S. at 139. Congress has not relinquished its plenary authority under the Property Clause to protect reserved federal lands. *Kleppe* v. *New Mexico*, 426 U.S. 529, 538 (1976). State law is therefore preempted to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes" for which the land was reserved. *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (citation omitted).

a. In *In re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, the Supreme Court of Wyoming affirmed a ruling that the federal reserved water rights for the Wind River Indian Reservation did not encompass groundwater. 753 P.2d at 99. The court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Ibid.* The court nevertheless declined to recognize a federal reserved right in groundwater because "not a single case applying the reserved water doctrine to groundwater [had been] cited" by the parties. *Ibid.*

In the nearly three decades since the Supreme Court of Wyoming's decision in *Big Horn,* no court has relied on it or reached a similar result. Indeed, the Arizona Supreme Court expressly declined to follow it. See *Gila*, 989 P.2d at 745 ("We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive."). Relying on *Cappaert* and other authorities, the Arizona Supreme Court held that when the United States establishes Indian reservations on arid land, "[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.* at 747. The Montana Supreme Court adopted the same reasoning to hold that "there is no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation." *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 59 P.3d at 1098. In addition, as described above (pp. 13-14, *supra*), every

other court to have considered the issue has recognized that a *Winters* right can include groundwater.

Although courts and commentators have frequently acknowledged the Wyoming court's contrary result in *Big Horn*, petitioners present no logical rationale supporting that decision. The decision is rightly recognized as an outlier and should not drive this Court's decision whether to grant further review. Indeed, as noted above, the Supreme Court of Wyoming itself recognized in *Big Horn* that the logic that supports the reservation of surface water also supports reservation of groundwater, 753 P.2d at 99, and in a later stage of the *Big Horn* water adjudication, Wyoming decreed certain non-Indian federal reserved rights to groundwater. See *In re General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, Civ. No. 4993, Final Phase II Decree Covering the United States' Non-Indian Claims, at 55-56, 79-82 (Wyo. 5th Jud. Dist., Nov. 29, 2005) (decreeing federal reserved rights to water-producing oil and gas wells on land managed by the Bureau of Land Management pursuant to a stipulation and to groundwater in the Shoshone National Forest); see pp. 16-17, *supra*. Accordingly, even in Wyoming, there is no rigid rule against recognition of federal reserved rights in groundwater, notwithstanding the 1988 decision in *Big Horn*.

b. Petitioners further contend (CVWD Pet. 23-24; DWA Pet. 33) that this Court's review is warranted to address conflicts between the decision below and the Arizona Supreme Court's decision in *Gila*. Those cases do not present any conflict that warrants this Court's attention.

In *Gila*, the Arizona Supreme Court concluded that the proper inference under *Winters* is that the United

States implicitly intended to reserve water "from whatever particular sources each reservation had at hand," and the *Winters* doctrine therefore can encompass groundwater. 989 P.2d at 747. The court further stated that a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." *Id.* at 748. In this case, the court of appeals did not adopt that statement, but it nonetheless reasoned that the Tribe's *Winters* right extends to groundwater because surface water supplies are inadequate to accomplish the reservation's purpose. Pet. App. 20a. The decision below therefore presents no conflict with *Gila*.[4]

CVWD further contends (Pet. 20) that the Arizona court "recognized a federal reserved right only after considering whether the existing state-law water-rights regime * * * sufficed to protect the federal reservation's purpose." But nothing in the Arizona Supreme Court's consideration of the State's "reasonable use" framework suggests that the court regarded such consideration as a factor in determining whether a federal reservation of land includes a reservation of water rights under *Winters*. See *Gila*, 989 P.2d at 748. Like the court of appeals here, the Arizona Supreme Court

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[4] We are aware of no court that has applied *Gila* to conclude that intent to reserve groundwater rights should be inferred only where surface waters are inadequate to accomplish reservation purposes, and at least one federal district court has rejected such a rule. *United States* v. *Washington*, 375 F. Supp. 2d 1050, 1068 (W.D. Wash. 2005), vacated pursuant to settlement *sub nom. United States ex rel. Lummi Indian Nation* v. *Washington*, No. C01-47Z, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007), aff'd *sub nom. United States ex rel. Lummi Nation* v. *Dawson*, 328 Fed. Appx. 462 (9th Cir. 2009).

held that courts "may not withhold application of the reserved rights doctrine purely out of deference to state law" and that *Winters* rights preempt conflicting state-law entitlements. *Id.* at 747. In other words, the court of appeals and the Arizona Supreme Court used the same logic, applied the same test, and reached the same conclusion. There is no need for this Court to resolve any purported conflict with *Gila*.

5. Finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., respecting the denial of the petition for a writ of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

That practice promotes judicial efficiency. As CVWD acknowledges (Pet. 16 n.8), this case is already proceeding into the second phase before the district court. Further factual development in the ongoing litigation will determine whether the scope of the Tribe's *Winters* right requires any alteration of the parties' current uses of groundwater from the aquifer. If petitioners are dissatisfied with the district court's quantification of the Tribe's *Winters* right, they can present all of their claims that have been rejected by the court of appeals to this Court, following a final judgment, in a single petition. See *Major League Baseball Players*

Ass'n v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment.). The Court should not depart from its usual practice of declining to grant certiorari before entry of a final judgment.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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