No. 17-40

IN THE
Supreme Court of the United States

COACHELLA VALLEY WATER DISTRICT, ET AL.,
Petitioners,
v.
AGUA CALIENTE BAND OF CAHUILLA INDIANS, AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Since this Court expressly left open the question of whether *Winters v. United States*, 207 U.S. 564 (1908), applies to groundwater, *see Cappaert v. United States*, 426 U.S. 128 (1976), a decisional conflict has developed over that question. Pet. 19-24. Even before the decision below, courts and commentators had recognized that the "inconsistency of these decisions, coupled with the absence of any decisive statement by the U.S. Supreme Court, has left the issue of reserved rights to groundwater in a continuing state of uncertainty." Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights*, 50 Nat. Resources J. 611, 621 (2010). The decision below only exacerbates the problem, "represent[ing] the highwater mark of uncertainty and disruption for the States with respect to the management of groundwater resources." States' Br. 2.

As the ten State amici note, moreover, the question of whether and to what extent *Winters* rights apply to groundwater is "exceedingly important and often recurring," but is "only rarely properly situated for this Court's review." *Id.* at 3. This case presents the Court with an ideal vehicle to resolve that question, *id.*, which the Ninth Circuit decided incorrectly.

The petition should be granted.

A. There Is A Longstanding Decisional Conflict Over The Question Presented

1. Respondents recognize that the decision below—like the Arizona Supreme Court's earlier decision in *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739

(Ariz. 1999) *("Gila")*—is irreconcilable with *In re Gen. Adjudication of All Rights to Use Water in the Big Horn System,* 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"). They contend, however, that *Big Horn* is an outlier, so there is no real uncertainty as to the question presented.[1] That would come as a surprise to the courts and commentators—not to mention the amici States—that have long recognized the legal uncertainty resulting from this conflict. Pet. 21-22; States' Br. 2. And it would certainly come as a surprise to the numerous tribes, States, and other parties to the settlement agreements highlighted in respondents' briefs. Tribe Br. 17; U.S. Br. 15. Even a casual review of these settlements demonstrates why this Court's review is essential.

Take, for example, the Fort Hall settlement in Idaho, 104 Stat. 3059 (1990) (approving settlement). That agreement emphasizes that the "parties are *unable to agree on whether the reserved water rights doctrine extends to ground water*," and that the grant of such rights "shall not be used as precedent for any

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[1] Respondents cite federal and state trial court decisions that they say extend *Winters* rights to groundwater. U.S. Br. 13-14; Tribe Br. 16 n.8. But most of those decisions predate *Big Horn* and *Gila*, and many do not even address reserved rights to groundwater. *See, e.g.*, *State of Nev. ex rel. Shamberger v. United States*, 165 F. Supp. 600, 601 (D. Nev. 1958) (question decided under the Federal Power Act, 16 U.S.C. § 796, not *Winters*); *State of N.M. ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (addresses pueblo groundwater rights, not *Winters* rights); *Gila River Pima- Maricopa Indian Cmty. v. United States*, 9 Cl. Ct. 660, 678 (1986) (groundwater protected under Indian Claims Commission Act, not *Winters*).

other federal reserved water right claim."[2] Several of the other cited settlements similarly make clear that they recognize no reserved rights beyond the parties.[3] And respondents even cite one settlement in Nevada that *expressly disclaims* creating any federal reserved rights as part of the settlement. *See* Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, 104 Stat. 3289, 3323 ("Nothing in this title shall be construed to create an express or implied Federal reserved water right.").[4]

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[2] Fort Hall Indian Water Rights Agreement § 11.2, http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1018&context=nawrs (emphasis added).

[3] *See* The Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Water Rights Settlement and Water Supply Enhancement Act of 1999, 113 Stat. 1782, 1782 (1999) (settlement with Montana) ("Nothing in this Act shall be construed or interpreted as a precedent for the litigation of reserved water rights"); *accord* White Mountain Apache Tribe Water Rights Quantification Act of 2010, 124 Stat. 3073, 3091 (settlement with Arizona); The Gila River Indian Community Water Rights Settlement Act, 118 Stat. 3478, 3531 (2004) (Arizona); Soboba Band of Luiseño Indians Settlement Act, 122 Stat. 2975, 2983 (2008) (California).

[4] Respondents also cite a decree granting the United States certain limited non-Indian reserved groundwater rights in Wyoming, suggesting that even Wyoming might recognize such rights. U.S. Br. 21; Tribe Br. 17 n.10. Wyoming itself disagrees. States' Br. 2. And respondents fail to mention that this decree (i) approved a *settlement submitted to the court in 1982*, years before *Big Horn*, Lawrence J. MacDonnell, *Rethinking General Stream Adjudications*, 15 Wyo. L. Rev. 347, 365 & n.110 (2015), and (ii) expressly states that it may not "be construed … as precedent for the existence or quantification of federal reserved water rights [i]n any other proceeding," *In re General Adjudication of All Rights to Use Water in the Big*

These settlements, in other words, sometimes granted reserved rights in groundwater and sometimes did not, but the parties *always* recognized and expressly noted the legal uncertainty underlying that determination—uncertainty that drives disputes in the first place, and that undermines efficient bargaining to resolve them once they arise. Only this Court can resolve the confusion.

2. The decision below also conflicts with the Arizona Supreme Court's decision in *Gila*, which held that a federal reserved right in groundwater should be recognized only when state law does not adequately protect the federal reservation. Pet. 20-21. Arizona itself agrees. States' Br. 2. Respondents' contrary contention is mistaken.

a. Both respondents contend that the question of state law was irrelevant to *Gila*'s analysis, Tribe Br. 18; U.S. Br. 21, but in fact it was critical. *Gila* recognized that, under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), "where federal rights are at issue, a state court *may adopt state law as the rule of decision* if to do so would not frustrate or impair a federal purpose." 989 P.2d at 747 (emphasis added). The court rejected state law *only* because Arizona's "reasonable use" rule would "defeat federal water rights," concluding that it "would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers." *Id.* at 748.

Horn River Sys., Civ. No. 4993, Final Phase II Decree Covering the United States' Non-Indian Claims, at 92 (Wyo. 5th Jud. Dist., Nov. 29, 2005).

The court below, however, held that "state water entitlements *do not affect* [the *Winters*] analysis," making it irrelevant whether "the Tribe is already receiving water pursuant to California's correlative rights doctrine," Pet. App. 21a-22a (emphasis added). That decision is irreconcilable with *both* the Arizona and Wyoming Supreme Court decisions, only bolstering the already overwhelming need for certiorari.

b. The Tribe (but not the United States) also asserts that any conflict with *Gila* is not outcome-determinative because its California correlative right provides "no better" protection than Arizona law provided. Tribe Br. 19. The Tribe contends that an aquifer can be drained in California—as in Arizona—citing the current state of overdraft in the Coachella Valley. *Id.* at 20.[5] Not so: in times of scarcity, "each [user] is limited to his proportionate fair share of the total amount available based upon his reasonable need." *Tehachapi-Cummings Cnty. Water Dist., v. Armstrong*, 49 Cal. App. 3d 992, 1001 (1975); *see* Pet. 6-7. If the Tribe believed others were over-drafting the aquifer in violation of its correlative rights, it could have sued to enforce those rights and stop the overdraft. It has never done so.

The Tribe also argues that "in some instances" other users' "prescriptive" rights—i.e., rights acquired by adverse possession—might trump correlative rights in California. Tribe Br. 20. Wrong. Ad-

[5] CVWD has instituted a water management plan that has already reduced the overdraft and will eradicate the overdraft completely by 2022. Doc. 200-2, at 22.

verse possession is *inapplicable against federal and Tribal property*. *See Jourdan v. Barrett*, 45 U.S. (4 How.) 169, 184-85 (1846) (federal property); *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 241 n.13 (1985) (Indian property) (citing cases); *see also Guerra v. Packard*, 236 Cal. App. 2d 272, 284 (1965) (California law precludes "acquisition of a prescriptive right against a governmental body").

In short, under California law—and unlike in Arizona—no user can deprive a federal reservation of equal access to groundwater. Thus, under *Gila*, the Tribe would not be entitled to a *Winters* right in groundwater. Pet. 24.

The result is a three-way conflict, including between the Ninth Circuit and a court of last resort in a state within that Circuit. The decision below makes a longstanding decisional conflict even worse.

The petition should be granted.

B. This Case Is An Ideal Vehicle To Resolve The Important And Recurring Question Presented

"[T]his case presents a clean vessel to resolve" the question presented, which "is exceedingly important and often recurring, but only rarely properly situated for this Court's review." States' Br. 3; *see* Pet. 24-31. Respondents' arguments to the contrary are unpersuasive.

1. Federal reserved rights to groundwater are frequently litigated. Pet. 28-29. It is true that such cases most often settle, but that is all the more rea-

son to grant certiorari—parties have for decades negotiated under a cloud of uncertainty, *supra* at 2-4, and this is the rare case presenting this Court an ideal vehicle to resolve the confusion, Pet. 29-31.

Respondents do not seriously dispute that the question here is cleanly presented and outcome-determinative, but they do contend that the interlocutory posture counsels against certiorari. Tribe Br. 24; U.S. Br. 23. Not so. This Court routinely grants certiorari in cases certified for interlocutory appeal,[6] which by definition present clean, outcome-determinative legal questions that two courts have determined should be resolved before final judgment, *see* 28 U.S.C. § 1292(b).

Indeed, reserved rights are normally adjudicated (if at all) in interlocutory state court proceedings over which this Court lacks jurisdiction, and then settle before final judgment. Pet. 29-31; *see also* Pet. App. 50a (§ 1292(b) certification warranted because question presented "may be unreviewable as a practical matter" absent immediate appeal). This case, over which the Court unquestionably has jurisdiction, is the best vehicle for resolving the conflict this Court is likely to see for years.

2. The question presented is also self-evidently

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[6] *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 772 F.3d 158, 162 (3d Cir. 2014), *aff'd* 136 S. Ct. 1562 (2016); *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1650 (2015); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1164 (2014); *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 592 (7th Cir. 2012), *aff'd*, 134 S. Ct. 870 (2014); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 114 (2013).

important. As a general matter, "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). The question here is especially crucial because federal lands constitute 46% of all lands in the arid Western States. *See United States v. New Mexico*, 438 U.S. 696, 699 n.3 (1978). Even focusing only on Indian tribes,[7] "[m]ost Indian tribes have not quantified their reserved rights to water and potential tribal claims are large." Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399, 401 (2006). The Ninth Circuit's ruling means that all federal lands appurtenant to groundwater now have an automatic federal reserved right to that water, regardless whether state law satisfies their needs.

That result is especially problematic because many groundwater basins in the West have been fully appropriated for decades. States' Br. 11. Recognizing a new federal reserved right that preempts state law in all circumstances "will result in the over-allocation of the system" and "injure existing groundwater users." *Id.* at 12. The impact of the decision below is "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *New Mexico*, 438 U.S. at 705.

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[7] The Tribe asserts that the Ninth Circuit's ruling does not apply to all federal reservations, Tribe Br. 8-9, but the United States does not make that meritless concession, and the decision below recognized that its rule would apply "to Indian reservations *and other federal enclaves*." Pet. App. 12a (emphasis added; quotation omitted).

The result for a State like Nevada, in which 86.5% of land is federally owned, *id.* at 699 n.3, will be particularly extreme, States' Br. 12.

This is enough to warrant certiorari, and respondents dispute none of it. They instead focus on CVWD's additional observation (Pet. 27-28) that the decision below will be especially disruptive in correlative-rights states like California. Tribe Br. 23; U.S. Br. 14-17. Again, however, this is self-evidently true: California employs a correlative-rights regime in which priority is irrelevant, and the Ninth Circuit's decision means that every Indian tribe, national park, army base, and federal monument in California now has priority over virtually every other correlative user. The Tribe bizarrely asserts that "[r]egulation of groundwater is not at issue in this case," Tribe Br. 3, but the Tribe's central claim is that it has a federal water right that displaces state law, and grants the Tribe (and every other federal reservation) substantial water beyond what state law provides. Any suggestion that this result would not have a significant effect on state groundwater management is implausible.

Respondents suggest it anyway, arguing that California does at times recognize priority. Their best example, however, is pueblo rights, which are possessed only in Los Angeles, San Jose, and San Diego, and do not apply to groundwater sources, like the Coachella Valley aquifer, that do not feed a "surface source." Michael C. Blumm, *Waters and Water Rights* § 21.03 (2017). They also cite appropriative rights, but such rights are subordinate to the correlative rights of overlying landholders. *See City of*

Barstow v. Mojave Water Agency, 5 P.3d 853, 863 (Cal. 2000). And they again cite prescriptive rights, which do not apply for the reasons already explained. *Supra* at 5-6. Any of these limited enclaves are dwarfed by the new priority right now possessed by every federal reservation in the Ninth Circuit.

Respondents last note that California's SGMA provides that federal reserved rights to groundwater must be recognized. Tribe Br. 12-13; U.S. Br. 15. It is not surprising that SGMA recognizes reserved rights to the extent they preempt state law. The question here is whether they do. Certiorari should be granted to resolve that fundamental question.

C. The Ninth Circuit's Decision Is Wrong

Finally, contrary to respondents' contentions, Tribe Br. 26-35; U.S. Br. 14-19, the decision below is wrong.

1. Respondents do not dispute that the ultimate question in determining whether a reserved right exists is the government's "implied intent" to reserve such a right at the time a reservation was created. *New Mexico*, 438 U.S. at 698. And as the petition shows, Pet. 32, the technology to pump meaningful amounts of groundwater did not exist at the time the Tribe's reservation was established. "In such cases it is unlikely that, as a factual matter, a reservation of groundwater occurred." Conference of Western Attorneys General, *American Indian Law Deskbook* § 8:12 (2017); *see* Pet. 31-33.

The government responds that a reservation of water can expand to account for "future uses," U.S. Br. 17, but that is a non sequitur. The point is not

that a reserved use can expand, but that there is no basis for concluding that there was an intent to reserve in the first place.

The Tribe offers a series of similarly unresponsive arguments, Tribe Br. 27-28, and contends that the Tribe had access to "hand-digging wells" at the time of the reservation, Tribe Br. 28-29. But hand-dug wells yielded water only for "trivial domestic uses" and could not threaten to deplete an aquifer, providing no basis to believe the government would have perceived a need to reserve a unique federal groundwater right to protect a tribe. Charles J. Meyers, *Federal Groundwater Rights: A Note On* Cappaert v. United States, 13 Land & Water L. Rev. 378, 386 (1978).

2. There also is no basis to recognize a special federal reserved right in a correlative-rights state, like California, where priority is irrelevant and no overlying landowner can disadvantage another. Pet. 33-37.

Respondents principally argue that state-law rights are irrelevant because *Winters* rights preempt them, Tribe Br. 30; U.S. Br. 18-19, but that assumes the answer to the question presented. State law governs unless it conflicts with, or serves as an obstacle to, federal law. *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009); *Kimbell Foods*, 440 U.S. at 728-29. The Tribe says that California law does not protect the federal interest because it does not ensure federal reservations "permanent access to a quantity of water sufficient to meet the Reservation's needs." Tribe Br. 31-33. But that is not the federal interest *Winters* protects. Rather, *Winters* holds that the

federal government "intended to deal fairly with the Indians," and thus is assumed to have protected the federal reservation against post-reservation appropriators who could otherwise render "their lands … useless" without a reserved right. *Arizona v. California*, 373 U.S. 546, 600 (1963); *see Winters*, 207 U.S. at 576. The proposition that *Winters* protects an absolute and permanent right to water is refuted by *Winters* itself, which recognizes that a *senior* appropriator's rights trump the federal reservation's, even if the senior appropriator could deprive the federal reservation of water completely. Pet. 34.

Respondents' rule turns *Winters* on its head, granting federal reservations priority over other users even when the reservation cannot be disadvantaged by those other users under existing state law. Pet. 35. That position finds no support in *Winters* or its progeny, and the Ninth Circuit erred in adopting it. Pet. 33-37.

The petition should be granted, and the decision below reversed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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