No. 17-42

In The Supreme Court of the United States

DESERT WATER AGENCY, et al.,

Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER DESERT WATER AGENCY

RODERICK E. WALSTON
Counsel of Record
ARTHUR L. LITTLEWORTH
MICHAEL T. RIDDELL
WENDY WANG
MILES KRIEGER
BEST BEST & KRIEGER LLP
2001 North Main Street, Suite 390
Walnut Creek, CA 94596
Tel.: (925) 977-3300
Fax: (925) 977-1870
roderick.walston@bbklaw.com
Attorneys for Petitioner Desert Water Agency

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE STANDARD THAT APPLIES IN DETERMINING WHETHER A FEDERAL RESERVED WATER RIGHT IMPLIEDLY EXISTS IN SURFACE WATER OR GROUNDWATER.

The first question presented in Desert Water Agency's (DWA) petition in No. 17-42 – which is not presented in Coachella Valley Water District's (CVWD) petition in No. 17-40 – concerns the standard for determining whether a federal reserved water right impliedly exists in either surface water or groundwater. The question is whether the Ninth Circuit's standard for determining whether a reserved right impliedly exists – which considers whether the primary reservation purposes "envision" use of water – conflicts with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), which, DWA contends, considers whether the reservation of water is "necessary" for primary reservation purposes. Pet. 16-23. This question is distinct from the second question presented in DWA's petition, also presented in CVWD's petition, which is whether the reserved rights doctrine applies to groundwater. Pet. 24-31.

On the first question, DWA contends that whether the reservation of water is "necessary" for primary reservation purposes – and thus whether a reserved right impliedly exists under *New Mexico* – requires examination of the historical and other circumstances of the

reservation, to determine whether Congress impliedly intended to reserve water.

Respondents Agua Caliente Band of Cahuilla Indians (Tribe) and the United States contend that a reserved right impliedly exists if water is "needed" for the reservation, and that the historical and other circumstances of the reservation are irrelevant in determining whether the water is reserved. Tribe Br. 7-9, 19, 30-34; U.S. Br. 17-19.[1] Respondents phrase the standard slightly differently than the Ninth Circuit, in that respondents' standard is whether water is "needed" and the Ninth Circuit's standard is whether water is "envisioned." Under either standard, virtually every federal reservation in the nation, particularly in the western states, would automatically have a reserved right in surface water and groundwater, because water is "needed" and "envisioned" for virtually every reservation, particularly in the western states.

The reserved rights doctrine is "a doctrine built on implication," that is, Congress' implied intent. *New Mexico*, 438 U.S. at 715. Thus, whether a federal water right is reserved does not depend simply on whether

[1] The United States re-characterized the first question presented in DWA's petition as whether a reserved right exists only if "requiring the United States to acquire water rights under state law would entirely defeat the federal reservation's purpose." U.S. Br. (I). In fact, DWA contends that whether a reserved right exists depends on whether reservation of water is "necessary" for primary reservation purposes, and that this question requires examination of the historical and other circumstances of the reservation to determine whether Congress impliedly intended to reserve water. Pet. 18.

water is needed, as respondents contend, but depends on whether Congress impliedly *intended* to reserve water. This inquiry requires examination of the factors that normally apply in determining Congress' intent, such as the historical context and surrounding circumstances of Congress' action. For example, this Court has examined contemporaneous historical evidence in determining whether Congress intended to diminish Indian reservations, *Hagen v. Utah*, 510 U.S. 399, 416-421 (1994); in determining whether Congress intended to reserve lands for Indian purposes, *e.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-288 (1955); *see United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338-339 (9th Cir. 1939); and in determining the purposes for which federal lands are reserved, *New Mexico*, 438 U.S. at 707-711; *Cappaert v. United States*, 426 U.S. 128, 140 (1976). The same examination of relevant historical and other circumstances is necessary to determine whether Congress impliedly intended to reserve water.

In preemption cases, this Court considers the relevant facts and circumstances pertaining to Congress' enactments, such as the legislative history and the historical context, in determining whether Congress intended to preempt state law. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-530 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-236 (1947). The same inquiry is required in determining whether Congress impliedly intended to reserve a water right that preempts state water law.

Thus, the reserved rights doctrine is not a common law doctrine automatically triggered by Congress' reservation of lands, as respondents' argument appears to suggest. Rather, the doctrine is based on Congress' implied intent, and the contextual factors that normally apply in determining Congress' intent also apply in determining whether Congress impliedly intended to reserve water.

The respondents contend that the availability of an adequate water right under state law is irrelevant in determining whether a reserved water right exists. Tribe Br. 10-12, 30-32; U.S. Br. 14-16, 17-19. On the contrary, the availability of an adequate state-based water right is highly relevant in determining whether Congress impliedly intended to reserve water. If the reservation has an adequate state-based water right, there would be less need for Congress to reserve water for reservation purposes, and thus less basis for inferring that Congress impliedly intended to reserve water. Since the states traditionally regulate water rights in our federal system and Congress generally defers to state water law, Pet. 17 n. 3, Congress does not necessarily intend to create a conflict between federal law and state law by reserving a water right that conflicts with state water law, if the reservation has an adequate water right under state law. Certainly there is no basis for inferring that Congress automatically reserves a water right in such situations.

This Court has held that state water laws apply in some cases to the rights of the United States and its Indian wards. *California v. United States*, 438 U.S. 645,

665, 667 (1978) (federal agencies must comply with state water laws in appropriating water for and distributing water from federal reclamation projects); *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142, 164 n. 2 (1935) (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 the lands of its Indian wards"). Thus, it is not improbable that Congress may require that a federal reservation, even though it needs water, must acquire its water rights under state law.[2]

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[2] The instant case provides an example of where the Government, in reserving lands, may not have intended to reserve a water right because the reservation had an adequate water right under state law. The Tribe, as an overlying landowner of its reservation, has a correlative right under California law to use groundwater for its reservation needs, and has the same correlative right as other overlying landowners. Pet. 28, 34. Thus, the Tribe's reservation needs, to the extent dependent on groundwater, can be fully satisfied under California law. Moreover, the Tribe had the right to use groundwater under California law when its reservation was created by the 1870s executive orders. Pet. 35-36. Further, the Tribe was not using groundwater when its reservation was created. *Id.* Under these circumstances, it is unlikely that Presidents Grant and Hayes, in issuing the executive orders that created the Tribe's reservation, impliedly "intended" to reserve a water right in groundwater that conflicted with and preempted California law.

The United States asserts that the Tribe "has used . . . groundwater on the lands" prior to the reservation's creation. U.S. Br. 4. The United States' reference was to hand dug walk-in wells by early Indians, apparently members of other tribes, on lands other than those reserved for the Tribe. The Tribe has admitted that it is unaware of any wells on the Tribe's reserved lands. Appellants' Supp. ER 4.

Therefore, DWA does not contend that state water law "obviates" federal reserved rights, as the Tribe repeatedly asserts. Tribe Br. 11, 19, 30, 31. Rather, DWA contends that the availability of an adequate water right under state law is a highly relevant factor, among other factors, in determining Congress' intent.

Respondents assert that this Court, in applying the reserved rights doctrine in *Winters v. United States*, 207 U.S. 564 (1908), and other cases, has considered only whether water was "needed" for reservation purposes. Tribe Br. 6-8, 26-27; U.S. Br. 10-12, 16. Contrary to their argument, this Court has never applied the reserved rights doctrine where the reservation of water was *not* necessary for reservation purposes in light of the historical and other circumstances of the reservation. In *Winters* and *Arizona v. California*, 373 U.S. 546 (1963), this Court held that Indian tribes had reserved rights in surface waters because non-Indian settlers had acquired prior rights to the waters under state priority rules of first use. *Winters*, 207 U.S. at 568-569; *Arizona*, 373 U.S. at 599-600; Pet. 25-27. In *Cappaert*, this Court held that a presidential proclamation's reservation of water in Devil's Hole was "explicit, not implied," *Cappaert*, 426 U.S. at 140, and upheld an injunction preventing groundwater pumping that impaired the United States' reserved right by depleting the water. *Id*. at 141. In *New Mexico*, this Court held that the Forest Service did *not* have reserved rights to instream flows in national forests because such flows were not necessary to satisfy the primary reservation purposes. *New Mexico*, 438 U.S. at

705-717. These decisions do not support respondents' argument that a federal reservation of land automatically includes a reserved water right regardless of the historical and other circumstances of the reservation.

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE RESERVED RIGHTS DOCTRINE APPLIES TO GROUNDWATER.

A. There Is a Logical and Principled Basis for a Distinction Between Surface Water and Groundwater as Applied to the Reserved Rights Doctrine.

The second issue raised in DWA's petition is whether the reserved rights doctrine applies to groundwater. Pet. 24-31. Respondents argue, as the Ninth Circuit held (Pet. App. 19), that there is no principled basis for a distinction between surface water and groundwater as applied to the reserved rights doctrine, and that the doctrine applies to all "appurtenant" water regardless of whether it is above or beneath the ground. Tribe Br. 26-27; U.S. Br. 21.

In fact, there is a logical and principled basis for a distinction between surface water and groundwater as applied to the reserved rights doctrine. Most states, including California, distinguish between surface water and groundwater in terms of how they are regulated, and thus the United States' rights and interests may be adequately protected under state laws as applied to *groundwater* even though not adequately protected

under state laws as applied to *surface* water. Pet. 24-31. An appropriative right in surface water under state law is based on priority of first use, in that the first appropriator has priority over subsequent appropriators. Pet. 27-29. By contrast, an overlying right in groundwater under state law is *not* based on priority of first use; rather, overlying landowners have equal and correlative rights regardless of who uses groundwater first. Pet. 25-27. Thus, an Indian reservation's state-based appropriative right in *surface* water would be subordinate to the rights of non-Indian appropriators if, as commonly happens, the non-Indian appropriators initiated their uses first, but the reservation's state-based overlying right in *groundwater* would not be subordinate to the rights of other overlying landowners under the same circumstances. Pet. 28-29. The Tribe, as an overlying landowner, has the same right to use groundwater under California law as other overlying landowners, and the Tribe's right is not subordinate to the rights of other overlying landowners simply because the other landowners used groundwater first. Pet. 28, 34-35. Because of this fundamental difference between state laws that apply to surface water and groundwater, there is a logical and principled basis for distinguishing between these two bodies of water in determining whether Congress impliedly intended to reserve water rights that preempt state laws.

B. The Tribe Has an Adequate Water Right Under California Law.

Respondents argue that the Tribe does not have an adequate water right under California law because the Tribe's correlative right may be subject to "temporal priority" of pueblo rights, appropriative rights, and prescriptive rights. Tribe Br. 11-12, 20; U.S. Br. 14-15. Assuming that pueblo rights have priority over the Tribe's correlative right because pueblo rights were acquired prior to the Tribe's correlative right, pueblo rights would also have priority over the Tribe's claimed reserved right for the same reason; federal reserved rights have priority over subsequently-acquired rights but not over earlier-acquired rights. *Cappaert*, 426 U.S. at 138 (a reserved right "is superior to the rights of future appropriators"). Regarding appropriative rights, all appropriative rights in groundwater are subordinate to the rights of overlying landowners, *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 863 (Cal. 2000), and thus are subordinate to the Tribe's overlying right. Regarding prescriptive rights, the United States' rights held in trust for Indians cannot be lost by prescription. *Sweeten v. United States*, 684 F.2d 679, 682 (10th Cir. 1982); *United States v. Pappas*, 814 F.2d 1343 n. 3 (9th Cir. 1987).

The Tribe argues that other landowners who have correlative rights may "deplete" the groundwater and thus impair the Tribe's correlative right. Tribe Br. 10-11, 20. Under California's correlative rights doctrine, no overlying landowner has the right to "deplete" the

groundwater and thus impair the rights of other overlying landowners. *Miller v. Bay Cities Water Co.*, 107 P. 115, 124 (Cal. 1910); *Pasadena v. Alhambra*, 207 P.2d 17, 27-28 (Cal. 1949).

The Tribe argues that California's law of groundwater may change. Tribe Br. 32. Although state water laws have generally evolved in response to changing public needs, it is highly unlikely that California will significantly change its correlative rights doctrine in a way that causes dislocation of correlative rights that have been recognized and exercised for more than a century. Even if such an unlikely change were to occur, Congress would have statutory remedies to protect the Tribe's rights and needs. Although the Tribe asserts that state-based correlative rights "do not ensure any specific quantity of water," Tribe Br. 20, all water rights, including correlative and reserved rights, are subject to the vicissitudes of nature, such as drought and other conditions, and cannot "ensure" a specific quantity of water.

In fact, the Tribe's correlative right provides better protection of its reservation needs than its claimed reserved right, in that the Tribe's correlative right is equal with the rights of other overlying landowners but its claimed reserved right is subordinate to certain such rights. Specifically, the Tribe's reservation is part of a checkerboard in which tribal lands are interspersed with non-tribal lands on an alternating, section-by-section basis. Pet. App. 5. In 1866, prior to the 1870s executive orders that established the Tribe's reservation on the even-numbered sections of the

checkerboard, Congress enacted a statute granting ownership of the odd-numbered sections of the checkerboard to the Southern Pacific Railroad Company (SPRR), as an incentive for SPRR to build a railroad. Act of July 27, 1866, 14 Stat. 292, at 294, 299. Since SPRR acquired its right on the odd-numbered sections before the Tribe's reservation was created on the even-numbered sections, SPRR's right is paramount to the Tribe's claimed reserved right, because reserved rights are subordinate to earlier-created rights. *Cappaert*, 426 U.S. at 138. But SPRR's right is not paramount to the Tribe's correlative right under California law, because the correlative rights of overlying landowners are equal and none has priority over another. *Barstow*, 23 Cal.4th at 1241.

C. The Congressionally-Approved Indian Water Rights Settlement Agreements Are Irrelevant.

Respondents cite several negotiated settlement agreements approved by Congress that authorize Indian tribes to use groundwater, and argue that the settlement agreements demonstrate that Indian tribes have reserved rights in groundwater. Tribe Br. 17, 21; U.S. Br. 15-17. The question raised here is not whether Indian tribes have rights in groundwater where Congress has *expressly* approved negotiated settlement agreements that grant such rights, but whether the Tribe has an *implied* reserved right in groundwater under the reserved rights doctrine, which is a "doctrine built on implication." *New Mexico*, 438 U.S. at 715. The

fact that Indian tribes have rights in groundwater under settlement agreements that have been negotiated by the stakeholders and approved by Congress, provides no basis for concluding that Congress automatically reserves rights in groundwater whenever it reserves lands for Indian purposes or other purposes. Indeed, if Congress automatically reserves rights in groundwater whenever it creates Indian reservations, there would be no need for settlement agreements that expressly grant such rights to Indian tribes.

III. THIS COURT SHOULD REVIEW THE NINTH CIRCUIT DECISION EVEN THOUGH IT INVOLVED AN INTERLOCUTORY APPEAL.

Respondents argue that this Court should decline to review the Ninth Circuit decision because it involves an interlocutory appeal. Tribe Br. 3-4, 24-26; U.S. Br. 23-24. On the contrary, the Ninth Circuit's decision is appropriate for review even though it involves an interlocutory appeal. The issues presented in the petition – the standard for determining whether a reserved water right exists, and whether the reserved rights doctrine applies to groundwater – are pure issues of law that have nationwide and West-wide impacts. These purely legal issues are unencumbered by the need for further factual development. The subsidiary issues that will be addressed in later phases of this litigation, including the quantification issue, will shed no light on these threshold legal issues. The quantification phase itself will involve costly and extensive litigation that may last several years and require the joinder of

numerous additional parties whose rights may be affected, and this Court's immediate review of the Ninth Circuit decision would, depending on the outcome, enable the lower court and the parties to avoid this costly and extensive litigation. For these reasons, this petition presents issues of "such imperative public importance" as to justify this Court's immediate review. Sup. Ct. R. 11.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

RODERICK E. WALSTON
ARTHUR L. LITTLEWORTH
MICHAEL T. RIDDELL
WENDY WANG
MILES KRIEGER
Attorneys for Petitioner
Desert Water Agency