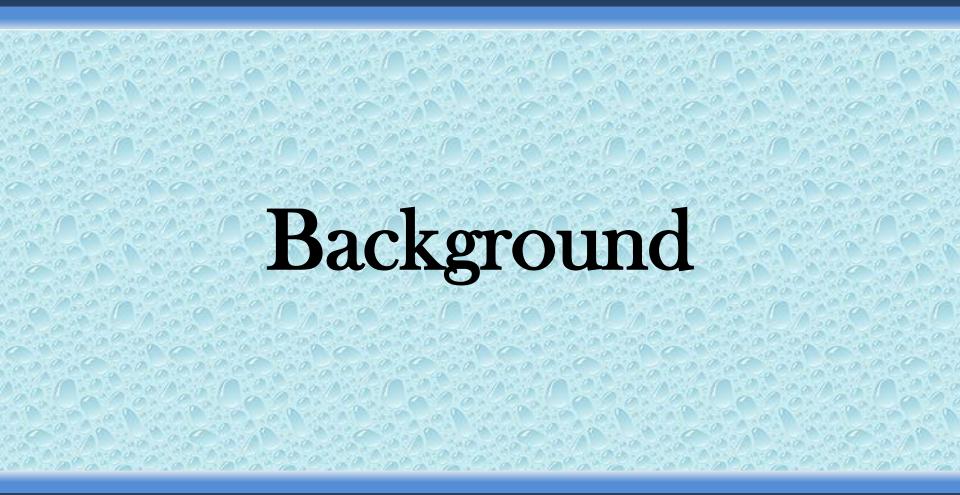
Agua Caliente Band of Cahuilla Indians v.

Coachella Valley WD and Desert Water Agency

Association of Western State Engineers August 28, 2017

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Factual Background

- ❖ 100 miles east of Los Angles; 60,000 acres of irrigated agriculture; resort communities with over 100 golf courses.
- Agua Caliente Indian Reservation was created by Executive Orders in 1876 and 1877. The reservation is a checkerboard of even numbered sections of land in and around Palm Springs.
- ❖ When the reservation was created, the Agua Caliente Band used surface flows from streams for its water needs. Surface water rights were decreed to the Tribe in a state court general adjudication with the priority and amount requested by the United States.

Factual Background

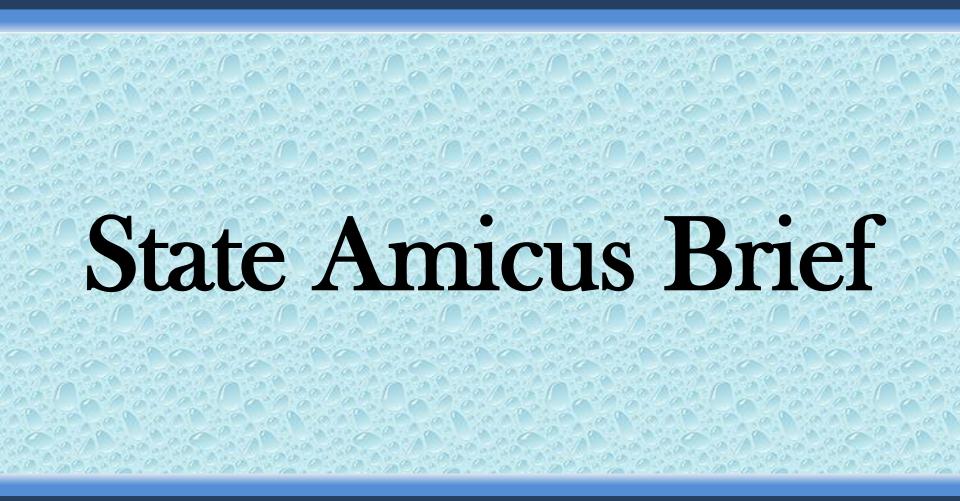
- ❖ The groundwater basin has not been adjudicated. Since 1972, CVWD and Desert Water Agency have recharged the groundwater basin with approximately three million acre-feet of imported Colorado River water at spreading ponds upstream from Palm Springs. These continuing efforts along with an active water management plan are projected to end groundwater overdraft conditions in the next five years.
- ❖ The developed portions of the reservation do not pump groundwater; instead they receive domestic water service from either Desert Water Agency or CVWD.

The Reserved Rights Doctrine

- ❖ 1907: Winters v. United States. The U.S. Supreme Court held that when the government reserves public land for a federal purpose, it impliedly reserves a federal "reserved right" to surface water necessary for the reservation's purposes that is senior to subsequent non-reservation users.
- ❖ 1976: *Cappeart v. United States*, the Court faced the question of whether or under what circumstances the reserved rights doctrine applies to groundwater, but decided the case on different grounds without settling the question.
- ❖ State supreme courts have split on the issue. Wyoming held the reserved rights doctrine does not extend to groundwater while Arizona held that reserved rights do extend to groundwater, but only if other supplies are not adequate, and state law does not protect the groundwater basin from being entirely depleted.

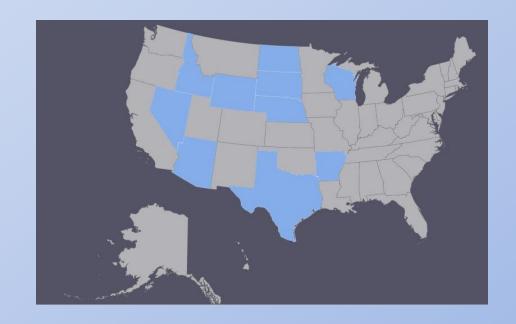
The Agua Caliente Lawsuit

- ❖ The Agua Caliente Band of Cahuilla Indians sued the water agencies in federal district court in 2013, claiming aboriginal groundwater rights, federal reserved groundwater rights, and ownership of the pore space beneath the reservation. The United States intervened in the case in 2014, claiming federal reserved rights in groundwater for the reservation.
- ❖ District Court: reserved rights "may extend to groundwater."
- Ninth Circuit Court of Appeals: The reserved rights doctrine extends to groundwater, and those rights exist if some use of water was contemplated at the time of reservation. Also, State law is completely preempted and is thus irrelevant to question of reserved rights.



10 State Coalition Amicus Curia Brief in Support of Supreme Court Review

❖ August 7, 2017, Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin and Wyoming filed an Amicus Curiae Brief supporting the Coachella Valley Water District and Desert Water Agency's Petitions for Writ of Certiorari.



States' Question Presented

In light of the fundamental differences in how the States regulate surface water versus groundwater, as well as this Court's past "narrow construction" of the reserved rights doctrine because of the congressional policy of "deferring to state water law," does the implied federal reserved water rights doctrine recognized in *Winters v. United States*, 207 U.S. 564 (1908) always preempt state-law regulation of groundwater?

Two Main Arguments

The Ninth Circuit's Expansion of the Federal Reserved Water Rights Doctrine Unsettles the Scope of the State's Authority over Groundwater resources; and

The Federal Government's Implied Reservation of Groundwater Rights is Inconsistent with the Clear Statement Rule.

Water in the West

State's historically have had autonomy in managing its water resources.

- ❖ Mining Act of July 26, 1866;
- ❖ Desert Land Act, March 3, 1877;
- ❖ Mining Act of July 9, 1879;
- * Reclamation Act of June 17, 1902.

However, the exception being *Winters* or Federal Reserved Water Rights.

- **❖** Winters v. United States, 207 U.S. 564 (1908);
- * Arizona v. California, 373 U.S. 546 (1963);
- * Cappaert v. United States, 426 U.S. 128 (1976); and
- **❖** *United States v. New Mexico*, 438 U.S. 696 (1978).

Unsettling Water Law in the West

- * The Ninth Circuit expanded Federal Reserved Water Rights:
 - ❖ By including not only *surface* water, but *groundwater* appurtenant to reserved lands.
 - ❖ By finding that they "are flexible and can change over time."
- * The Ninth Circuit explained that so long as a federal reservation "envisions" or "contemplates" <u>any</u> use of water, groundwater use is implicitly reserved, whether such water was reasonably available or anticipated at the time of the reservation or not.
- ❖ And the Ninth Circuit found that state water law is entirely preempted by federal law.

What does that mean?

- ❖ The decision disrupts the long historical differential treatment of surface water and groundwater by most States, informed by the fact that never before has any court recognized an unqualified reserved right in groundwater disconnected from any consideration of the protections already offered by the State.
- The Supreme Court's guidance in New Mexico, the primary purpose(s) of the reservation should inform whether a reserved groundwater right exists at all, not just the quantity of the right.
- And, these are two separate questions: Just because the primary purpose of a federal reservation may have included a need for surface water, is a different question from whether the purpose included a need for groundwater.

Clear Statement Rule

- ❖ If Congress intends to preempt a power traditionally exercised by a state, that intent must be made "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).
- ❖ States have traditionally exercised plenary power over all non-navigable waters within their borders. Kansas v. Colorado, 206 U.S. 46, 93, (1907); California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

Application of Clear Statement Rule

- The States' argued that courts may not presume that Congress considered, let alone intended, to displace the States' traditional authority over groundwater when:
 - ❖ (1) not only is the enabling act creating the reservation silent about water rights, but also
 - ❖ (2) it was not even feasible, much less contemplated, that groundwater would be used.

Potential Implications

Reach of the Decision

- ❖ The Ninth Circuit's decision did not quantify the amount of the reserved groundwater right. It merely stated that one exists. Quantification will happen later.
 - **❖** Water level?
 - ❖ Withdrawal rate or volume?
 - **❖** Any impact?
 - **❖** Pore space?
 - Quality?
- ❖ The decision is broad enough to include all types of federal reservations, not just Indian reservations.
- ❖ Federal reservations implicated: National Parks, National Forests, National Monuments, Wild and Scenic designations, Wildlife Refuges, National Recreation Areas, Wilderness Areas, Military Reservations.

Application of the Right

- ❖ The scope and nature of federal reserved water rights are functions of the purpose of the individual land reservation, dependent on the intent of the federal government (non-Indian). This requires scrutiny of the legislation, executive order, or public land order establishing the reservation.
- For (at least) non-Indian federal reservations, there is no right except to satisfy the "primary purposes" of a reservation, and water for secondary reservation purposes must be secured pursuant to state law.
- ❖ Application could depend upon the groundwater administrative scheme followed by a particular state: correlative rights, reasonable use, prior appropriation.
- ❖ The United States could assert its claims to reserved groundwater water rights in a variety of contexts: state permitting or adjudication processes, general adjudications (state courts/expensive/laborious and time consuming), NEPA, federal court actions, and U.S. Supreme Court actions.

Forest Service Example

- ❖ More than 192 million acres of public land are managed as national forests and grasslands.
- * Forest Service groundwater directive is a possible example of what the U.S. might assert as a federal reserved groundwater right.
 - * "Apply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act." Section 2567.

Forest Service Example

- The Proposed Directive seeks to give the USFS an administrative and approval role on all applications for groundwater withdrawal <u>on adjacent lands</u> which may adversely impact USFS groundwater rights. The term "adjacent" is not defined in the Directive.
 - ❖ Example: 90% of the Salt and Snake River Basins in western Wyoming is owned by the Federal Government. Is the other 10% private ownership along inhabited river bottom land "adjacent" to those federal lands?
 - ❖ Groundwater withdrawals from adjacent land could potentially impact USFS groundwater rights, or "groundwater dependant ecosystems," because groundwater originates largely on the federal land.
 - ❖ Timing and extent of adverse impacts?
- ❖ The Proposed Directive states that surface and groundwater shall be considered a single hydraulically interconnected resource unless it can be demonstrated that they are not.
 - ❖ Places burden on would be appropriators to prove that surface water and ground water are not hydrologically connected. Stream flows?

Examples of Previous Groundwater Claims

- ❖ National Forests: "that quantity of water, including groundwater located wholly, <u>partly</u> on, underneath, or otherwise appurtenant to those reserved lands constituting part of the Shoshone and Bighorn National Forests, that may be required in the future to fulfill any or all of the following purposes of the aforesaid national forests: range, wildlife, fish, and outdoor recreation."
- ❖ National Park: "That quantity of groundwater required to maintain Yellowstone National Park in its natural state."

