No. _____

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

PETITION FOR A WRIT OF CERTIORARI

MATTHEW T. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
Los Angeles, Cal. 90067
(310) 553-6700

BARTON THOMPSON, JR.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2600

STEVEN B. ABBOTT
GERALD D. SHOAF
REDWINE AND SHERRILL, LLP
3890 11th Street, Ste. 207
Riverside, Cal. 92501
(951) 684-2520

WALTER DELLINGER
(Counsel of Record)
wdellinger@omm.com
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
DEVON E. LASH
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Attorneys for Petitioners

QUESTION PRESENTED

Since *Winters v. United States*, 207 U.S. 564 (1908), this Court has held that when the federal government reserves public land for a federal purpose—such as establishing an Indian reservation or a national park—the government implicitly reserves a federal "reserved right" to surface water that prevents subsequent non-reservation users from depriving the reservation of water resources necessary to fulfill the reservation's purpose.

In *Cappaert v. United* States, 426 U.S. 128 (1976), this Court recognized but declined to resolve the question whether or under what circumstances *Winters* reserved rights apply to groundwater. Since then, state and federal courts have answered that question differently. The Wyoming Supreme Court has held that *Winters* rights do not apply to groundwater. The Arizona Supreme Court has held that *Winters* rights *can* apply to groundwater, so long as existing state law does not offer adequate protection and no other water is available. The decision below conflicts with *both* these prior decisions, holding that *Winters* rights fully preempt state law, and thus apply to groundwater regardless of existing state-law protections.

The question presented is:

Whether, when, and to what extent the federal reserved right doctrine recognized in *Winters v. United States*, 207 U.S. 564 (1908), preempts state-law regulation of groundwater.

PARTIES TO THE PROCEEDING

The Petitioners, defendants below, are Coachella Valley Water District ("CVWD") and Anthony Bianco, John Powell, Jr., Peter Nelson, G. Patrick O'Dowd, and Castulo R. Estrada, in their official capacities as members of the Board of Directors of CVWD.*

The Desert Valley Water Agency ("DWA") and Patricia G. Oygar, Thomas Kieley, III, James Cioffi, Craig A. Ewing, and Joseph K. Stuart, in their official capacities as members of the Board of Directors of DWA, were also defendants below, and have also filed a petition for a writ of certiorari.

This brief refers to the defendants below collectively as the Water Agencies.

Respondents are the Agua Caliente Tribe of Cahuilla Indians (the "Tribe"), the plaintiff below, and the United States of America, as intervenor-plaintiff.

---

* Anthony Bianco succeeded Ed Pack as a CVWD Director in 2016. Mr. Pack was a Director at the time of the district court proceedings and Ninth Circuit appeal, and was thus listed in those courts' caption in his official capacity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

EXECUTIVE ORDERS INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. State Regulation Of Water Rights 4

B. The *Winters* Doctrine And Federal Reserved Rights 7

C. The Tribe And The Coachella Valley Water System 10

D. Proceedings Below 15

REASONS FOR GRANTING THE WRIT 18

I. THE DECISION BELOW EXTENDS A SQUARE AND INTRACTABLE CONFLICT OVER WHETHER, WHEN, AND TO WHAT EXTENT THE *WINTERS* DOCTRINE APPLIES TO GROUNDWATER 18

A. A Direct, Acknowledged Conflict Has Existed Among State Courts Of Last Resort Over The Question Presented 19

TABLE OF CONTENTS
(continued)

Page

B. The Decision Below Entrenches And Extends The Decisional Conflict As To The Question Presented 22

II. THE PETITION PRESENTS A RECURRING ISSUE OF WIDESPREAD IMPORTANCE AND IS THE IDEAL VEHICLE TO RESOLVE IT 24

III. THE NINTH CIRCUIT'S DECISION IS INCORRECT 31

CONCLUSION 37

APPENDIX A:
Court of Appeals Opinion
(9th Cir. Mar. 7, 2017) 1a

APPENDIX B:
District Court Opinion
(C.D. Cal. Mar. 24, 2015) 24a

APPENDIX C:
Executive Orders 52a

TABLE OF AUTHORITIES

Page(s)

CASES

Barclay v. Abraham,
96 N.W. 1080 (Iowa 1903) 27

Brady v. Abbott Labs.,
433 F.3d 679 (9th Cir. 2005)..... 6

Cal. Or. Power Co. v. Beaver Portland Cement Co.,
295 U.S. 142 (1935)..... 4

California v. United States,
438 U.S. 645 (1978)..... 4, 36

City of Santa Maria v. Adam,
211 Cal. App. 4th 266 (2012)..... 7

City of Santa Maria v. Adam, 248 Cal. App. 4th 504 (2016)..... 7

Colo. River Water Conservation Dist. v. United States,
424 U.S. 800 (1976)..... 5, 24

Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults,
59 P.3d 1093 (Mont. 2002)..... 19

Confederated Salish & Kootenai Tribes v. Clinch,
992 P.2d 244 (Mont. 1999) 21

Federal Power Comm'n v. Oregon,
349 U.S. 435 (1955)..... 4

In re Adjudication of Existing and Reserved Rights to the use of Water,
2001 WL 36525512 (Mont. Water Ct. Aug. 10, 2001) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source,
989 P.2d 739 (Ariz. 1999) .....*passim*

In re Gen. Adjudication of All Rights to Use Water in the Big Horn System,
753 P.2d 76 (Wyo. 1988) 19

Katz v. Walkinshaw,
141 Cal. 116 (1903) 6

Nicoll v. Rudnick,
160 Cal. App. 4th 550 (2008)..... 5

Okla. Water Res. Bd. v. Tex. Cnty. Irr. & Water Res. Ass'n, Inc.,
711 P.2d 38 (Okla. 1984) 27

Salt River Valley Water Users' Ass'n v. Guenther,
2009 WL 3866060 (Ariz. Super. Ct. Apr. 8, 2009)..... 20

Sorensen v. Lower Niobrara Natural Resources Dist.,
376 N.W.2d 539 (Neb. 1985)..... 27

Tehachapi-Cummings Cnty. Water Dist., v. Armstrong,
49 Cal. App. 3d 992 (1975) 6, 7, 34

United States v. New Mexico,
438 U.S. 696 (1978).....*passim*

United States v. Washington, Dep't of Ecology, No. 2:01CV00047 (W.D. Wash. Feb. 24, 2003) 21

Wyeth v. Levine,
555 U.S. 555 (2009)..... 35

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

16 Stat. 573 (1871) 10

28 U.S.C. § 1254 31

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1257(a) 31

28 U.S.C. § 1292(b) 1, 15, 30, 31

Vt. Stat. Ann. tit. 10, § 1410 27

OTHER AUTHORITIES

A. Dan Tarlock, *Law of Water Rights and Resources* (2016) 5, 7, 25

Charles J. Meyers, *Federal Groundwater Rights: A Note On* Cappaert v. United States, 13 Land & Water L. Rev. 378 (1978) 13, 33

CVWD Final Water Management Plan (Sept. 2002) 14

Cynthia Brougher, *Indian Reserved Water Rights Under the* Winters *Doctrine: An Overview*, Cong. Res. Serv. RL32198 (2011) 28

Dale Ratliff, *A Proper Seat at the Table: Affirming A Broad* Winters *Right to Groundwater*, 19 U. Denv. Water L. Rev. 239 (2016) 28

Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 Nat. Resources J. 611 (2010) 22, 27, 29

TABLE OF AUTHORITIES
(continued)

Page(s)

Debbie Shosteck, *Beyond Reserved Rights: Tribal Control Over Groundwater Resources In A Cold Winters Climate*, 28 Colum. J. Envt'l L. 325 (2003) 13, 21, 27, 32

Gwendolyn Griffith, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 Stan. L. Rev. 103 (1980).....13, 25, 32

Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions*, 91 Cornell L. Rev. 1203 (2006)..... 5

Joanna (Joey) Meldrum, *Reservation and Quantification of Indian Groundwater Rights in California*, 19 Hastings W. N.W. J. Envtl. L. & Pol'y 277 (2013)..... 22

John Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 Nat. Resources. J. 63 (1988).....28, 29

Liana Gregory, *"Technically Open": The Debate over Native American Reserved Groundwater Rights*, 28 J. Land Resources & Envtl. L. 361 (2008)..... 21

Michael C. Blumm, *Waters and Water Rights* (2017).....9, 26, 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Rebecca L. Nelson et al., *Local Groundwater Withdrawal Permitting Laws in the South-Western U.S.: California in Comparative Context*, 54 Groundwater 747 (2016).....14, 25, 26

Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399 (2006)..... 29

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 849 F.3d 1262, and is reprinted in the Appendix to the Petition ("App.") at 1a-23a. The district court's opinion granting respondents partial summary judgment, and certifying its order for immediate appeal under 28 U.S.C. § 1292(b), is unpublished but is reported at 2015 WL 1600065 and is reprinted at App. 24a-51a.

JURISDICTION

The court of appeals issued its decision on March 7, 2017. App. 1a. On April 10, 2017, Justice Kennedy granted the Water Agencies' application for an extension of time to file this petition until July 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

EXECUTIVE ORDERS INVOLVED

The executive orders establishing the Tribe's reservation are reprinted at App. 52a-53a.

INTRODUCTION

As a general matter, regulation of non-navigable water falls exclusively to the States. Beginning in *Winters v. United States*, 207 U.S. 564 (1908), however, this Court recognized that when the federal government withdraws lands from the public domain and reserves it for a federal purpose—for example, to

establish an Indian reservation, or a national park—the government in some circumstances is held to have implicitly reserved a *federal* right to water sufficient to meet the federal reservation's needs.

Winters involved a federal reserved right to *surface* water—the Court held that when the federal government established the Indian reservation at issue there, it implicitly reserved to that reservation a federal right to surface water that could override other users' state-law rights. This case presents the distinct question whether *Winters* extends to *groundwater*, and, if so, the circumstances under which *Winters* rights preempt state groundwater regulation.

This Court recognized in *Cappaert v. United States*, 426 U.S. 128 (1976), that the application of *Winters* to groundwater is an open question, but resolved that case without deciding it. Since then, an intractable conflict has developed between state courts of last resort: the Wyoming Supreme Court has concluded that *Winters* does not extend to groundwater at all, while the Arizona Supreme Court concluded that *Winters* applies to groundwater, but only where the applicable state law would not adequately protect federal interests and no other water is available to meet the reservation's need.

Courts and commentators have long acknowledged this conflict in authority, and have lamented the uncertainty created by the lack of guidance from this Court. The Ninth Circuit's decision below extends and exacerbates this acknowledged conflict. The court of appeals not only rejected Wyoming's rule and held that *Winters* applies to groundwater, it

also rejected Arizona's inquiry into the nature of state water law and the availability of other water sources. The court instead held that *Winters always* applies as a matter of federal preemption, regardless of how the State allocates groundwater rights. This differential treatment of the preemptive effect of federal reserved rights is intolerable, and is made all the more so because the Ninth Circuit's approach conflicts with that of the highest court of a State within that Circuit.

The question presented, moreover, is exceptionally important. This Court has long recognized that water scarcity is one of the most pressing problems facing the Western United States—which is also the area where the reservations subject to the decision below are concentrated. The decision below directly implicates this problem by altering the groundwater rights crucial to Western States' water management. The practical impact of the Ninth Circuit's ruling is that Indian reservations throughout the West, as well as other forms of federal reservations (e.g., national parks and monuments), would have preemptive federal rights that override the vigorous and ongoing state and local efforts to ensure the future availability of groundwater in the West. Such a disruption to state attempts to efficiently manage scarce and precious resources should not be recognized without this Court's review.

This case presents the ideal vehicle through which to resolve the decisional conflict. As the district court recognized in certifying its resolution of the question presented for immediate appeal, the purely legal question whether "*Winters* rights extend

to groundwater, in light of California's correlative rights legal framework for groundwater allocation, effectively controls the outcome of this case," and is cleanly presented here. App. 49a. The Ninth Circuit, moreover, answered the question incorrectly—*Winters* rights generally do not apply to groundwater, and they certainly do not displace state laws, like California's, that already protect the reservation from the possibility of groundwater depletion by non-reservation users.

Certiorari should be granted.

STATEMENT OF THE CASE

A. State Regulation Of Water Rights

1. In the mid-nineteenth century, Congress ceded control of "all non-navigable waters then a part of the public domain ... to the plenary control of the designated states." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *see also California v. United States*, 438 U.S. 645, 657-58 (1978). As a result, "soil and water rights on public lands" were severed, and "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, 448 (1955) (emphasis omitted). States, in other words, have plenary control over non-navigable public waters, including groundwater, within their borders.

2. There are a variety of state-law approaches to the apportionment of water rights.

a. When it comes to surface water, most Eastern States use a riparian regime, under which water

rights are based on a property's appurtenance to the water source. Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions*, 91 Cornell L. Rev. 1203, 1207 (2006). This case, however, concerns the scope of federal reserved rights, and the vast majority of Indian reservations, and of federally owned land generally, is located in the Western States.[1]

Western States generally use a system known as "prior appropriation" to allocate surface water rights. Under a prior appropriation regime, the first party to "appropriate" and use any amount of water obtains a priority right to that amount of water as against subsequent appropriators, which can be lost only by non-use. *See, e.g.*, *Nicoll v. Rudnick*, 160 Cal. App. 4th 550, 560-61 (2008). "In periods of shortage, priority among confirmed rights is determined according to the date of initial diversion," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976), and the party with priority is entitled to its entire allotment of water before more junior rights holders get any.

b. "Water law," however, "has historically treated surface and sub-surface water separately." A. Dan Tarlock, *Law of Water Rights and Resources* § 4:37 (2016). Thus, while Western States predominantly use prior appropriation rules to govern *sur-*

[1] *See United States v. New Mexico*, 438 U.S. 696, 699 (1978) (noting the "sheer quantity of reserved lands in the Western States"); https://www.nps.gov/nagpra/documents/RESERV.PDF (map of Indian reservations).

face water, not all Western States apply a prior appropriation regime to groundwater.

For example, while Arizona applies prior appropriation rules to surface water, it has adopted what is known as the "reasonable use" doctrine for groundwater. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source ("Gila")*, 989 P.2d 739, 743 (Ariz. 1999). California, in contrast, allocates groundwater to overlying owners under a regime known as "correlative rights." *Katz v. Walkinshaw*, 141 Cal. 116 (1903) (adopting correlative rights for groundwater).

Reasonable Use. Temporal priority is irrelevant in a reasonable use system; what matters is land ownership. As applied to groundwater, reasonable use "permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply." *Gila*, 989 P.2d at 743 n.3. As a result, if an overlying landowner can put all of the available water to a "reasonable use" on his own land, he can entirely deplete the water source without liability. *See Brady v. Abbott Labs.*, 433 F.3d 679, 682 (9th Cir. 2005) (Arizona law).

Correlative Rights. As with reasonable-use regimes, correlative-rights systems are based on land ownership, not priority. In California, an "overlying" landowner has the inherent right to withdraw groundwater "that he can beneficially use on his land." *Tehachapi-Cummings Cnty. Water Dist., v. Armstrong*, 49 Cal. App. 3d 992, 1001 (1975). Correlative rights are not created by use and are not lost

through non-use, and concepts of "priority" are irrelevant to the rights of overlying landowners. *See* Tarlock, *supra*, § 4:14 ("There is no temporal priority among overlying pumpers").

Crucially, however, and unlike the "reasonable use" approach, a correlative right is limited in times of scarcity by the "safe yield" and the claims of other overlying landowners. *Id.*; *City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 279 (2012). That is, correlative rights are "mutual and reciprocal," and in times of scarcity "each [user] is limited to his proportionate fair share of the total amount available based upon his reasonable need." *See Tehachapi-Cummings*, 49 Cal. App. 3d at 1001 (collecting cases); *see also City of Santa Maria v. Adam*, 248 Cal. App. 4th 504, 511 (2016). Further, each owner's proportionate share "is predicated not on his past use over a specified period of time, nor on the time he commenced pumping, but solely on his current reasonable and beneficial need for water." *Tehachapi-Cummings*, 49 Cal. App. 3d at 1001. Under this system, no overlying landowner can be deprived of his groundwater access by another.[2]

B. The *Winters* Doctrine And Federal Reserved Rights

Despite the fact that Congress ceded general authority over non-navigable public waters to the

---

[2] In California, if overlying owners are not using the entire safe yield of an aquifer, others can appropriate the surplus groundwater. But when there is inadequate yield to meet all groundwater uses, the correlative rights of overlying owners take precedence. *See Adam*, 211 Cal. App. 4th at 279.

States, this Court has long recognized that the federal government retains the power to withdraw lands from the public domain for specific federal purposes, and in doing so to reserve rights to water on those lands in certain circumstances. *See United States v. New Mexico*, 438 U.S. 696, 699 (1978). This "reserved rights" doctrine applies to Indian reservations and to federal lands such as national parks, military bases, and wildlife refuges. *See id.* at 699; *Cappaert*, 426 U.S. at 138-39; *Arizona v. California*, 373 U.S. 546, 601 (1963).

The doctrine stems from this Court's decision in *Winters v. United States*, 207 U.S. 564 (1908). There, the Indian tribes on the Fort Belknap Indian Reservation in Montana—established by Congress in 1888—brought suit because their water supply was threatened by settlers who had diverted the river upstream of the reservation and claimed rights to the water under Montana's prior appropriation laws. *Id.* at 567. The Court concluded that when Congress established the reservation, it had implicitly reserved to the reservation a right to sufficient water from the river to meet the reservation's needs, and that the reservation's surface water rights thus trumped those of senior users who, despite coming to the area after the reservation was created, would otherwise have priority under state law. *Id.* at 576. This Court held that this reservation of water rights was implicit in Congress's establishment of the reservation because it was impossible to believe that Congress intended to leave the tribes without any water for irrigation; if the government had not reserved a federal right to water, the lands would be

"practically valueless" and "civilized communities could not be established thereon." *Id.* at 576.

Under *Winters* and its progeny, a federal reserved water right is a priority right to water sufficient to accomplish the primary purposes of the reservation that "vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138; *see New Mexico*, 438 U.S. at 700 (reserved right is implied when "the specific purposes for which the land was reserved" would be "entirely defeated" without a right to the water at issue). A *Winters* right, in other words, is akin to a prior appropriative right from the date the reservation was established, rather than from the date the water source was first appropriated (as would be the case under state law). Thus, *Winters* rights are superior only to "the rights of future appropriators," and do not displace the state-law rights of other users that were established before the reservation was created. *Cappaert*, 426 U.S. at 138.[3]

The *Winters* doctrine is therefore a targeted response to a problem faced by tribal reservations (and other federal lands) subject to state *prior appropriation* laws—*viz.*, the possibility that senior users would completely deprive those lands of water and render them "practically valueless." *Winters*, 207 U.S. at 576. Reserved rights are tailored to address that problem and to protect tribal and federal interests in such a system—a reserved right is a priority

[3] Unlike a prior appropriate right, however, "reserved rights are not lost by nonuse." Michael C. Blumm, *Waters and Water Rights* § 37.01.a.01 (2017).

right that vests permanently as of the date the reservation was created, but does not displace rights that precede that date.

It is unsurprising, then, that each of this Court's reserved-rights decisions have applied that doctrine only to reserve surface water otherwise governed by a prior appropriation regime. This Court has never applied that doctrine to groundwater, *Cappaert*, 426 U.S. at 142, let alone to groundwater governed by a system in which temporal priority is irrelevant.

C. The Tribe And The Coachella Valley Water System

1. The Tribe's reservation is located in California's Coachella Valley. ER25.[4] In 1871, before the reservation was created, Congress granted most of the odd-numbered sections of land in the Valley to a railroad. *See* Act to Incorporate the Texas Pacific Railroad, and to aid in the Construction of its Road, and for other Purposes, 16 Stat. 573, 576 (1871). The reservation was created largely by two executive orders shortly thereafter, which reserved portions of the remaining even-numbered sections. In 1876, President Grant issued an executive order stating that specified land was "withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in southern California," which included the Tribe. App. 7a, 52a. In 1877, President Hayes issued a second executive or-

[4] "ER__" refers to the excerpts of record filed with the Ninth Circuit. "Doc. __" refers to the district court docket in this case.

der expanding the Tribe's lands, and stated that he was doing so "for Indian purposes." App. 7a, 53a.

Today, the reservation totals approximately 31,396 acres of land, interspersed in a checkerboard pattern with the previously conveyed, privately owned lands across several cities, including Palm Springs, Cathedral City, and Rancho Mirage. App. 7a. The Tribe currently has 440 members, ER196, and has been able to "support the Tribal government and the Tribal community" through various business ventures, including "two hotels, two casinos, a golf resort, and the premier concert theater in Southern California, The Show."[5] The United States holds the reservation lands in trust for the Tribe. App. 6a-7a.

2. The Whitewater River is the major source of surface water in the Coachella Valley. ER98-99. Three of the river's many tributaries—the Tahquitz, Andreas, and Chino Creeks—flow through or near the Tribe's reservation. ER99. In 1938, the California Superior Court entered a decree, known as the Whitewater River Decree, allocating surface water flow in the Whitewater River system. ER31-32. The water that the decree allotted to the United States on behalf of the Tribe closely tracked the amount the United States had requested as the amount "required to be diverted" for irrigation on the Tribe's lands. ER115-16; ER120.

The Coachella Valley Groundwater Basin underlies the Valley, and therefore the Tribe's reservation.

---

[5] http://www.aguacaliente.org/content/Tribal%20Enterprises/.

The parties agreed, and the district court specifically found, that the "groundwater does not 'add to, contribute to or support' any surface stream from which the Tribe diverts water or is otherwise relevant to this litigation (e.g., the Tahquitz, Andreas, or Chino Creeks)." App. 30a-31a; ER199-200 (admissions of Tribe).

3. The historical documents describing the Tribe's use of water when the reservation was established focus on the Tribe's use of surface water. A report prepared for a U.S. Indian Agent in 1894, for example, states that the "Indians at this place have for many years ... used the waters of Chino, Taquitch, and Andreas Canyons, three streams having their sources on the eastern slope of the San Jacinto Mts., to irrigate their lands." Doc. 82-3, Ex. 22 at 139. The report makes no mention of any use of groundwater. Similarly, the Indian Irrigation Service's Superintendent of Irrigation, George Butler, stated in a 1903 report to the Commissioner of Indian Affairs that "in times past the Indians have built ditches for the conduct and distributions of the waters of the canons [sic] of Chino, Tahquitz, and Andreas, and have irrigated lands therefrom." ER79. That report, despite thoroughly assessing the available water options for the Tribe, also makes no mention of groundwater of any kind. ER79-86; *see also* ER69 (Smiley Commission Report dated December 19, 1891, stating that "the Indians have depended largely upon water coming from Toquitch Canyon" and had "built a ditch to bring water from the source for their lands"); ER69 (the Indians also had a "supply of water, coming from Andreas Can[yon]").

Indeed, as commentators have observed, and as the Tribe's complaint acknowledges, the technology to conduct meaningful pumping of groundwater did not even exist until the 1930s. ER30; Debbie Shosteck, *Beyond Reserved Rights: Tribal Control Over Groundwater Resources In A Cold Winters Climate*, 28 Colum. J. Envt'l L. 325, 337 (2003); *see also* Gwendolyn Griffith, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 Stan. L. Rev. 103, 105 n.7 (1980); Charles J. Meyers, *Federal Groundwater Rights: A Note On* Cappaert v. United States, 13 Land & Water L. Rev. 378, 386 (1978). Even as to more primitive approaches to accessing groundwater, a government survey map from 1855-56 reflects that there were no wells on or near the areas now occupied by the Tribe. Doc. 82-3, Ex. 18.

4. Today, the Tribe does not pump groundwater on its reservation, although it has the same rights to do so as any other landholder under California law. App. 9a. Instead, the Tribe purchases its water from the Water Agencies, which serve the Tribe and many other customers throughout the Valley. *Id.*

The Water Agencies have made significant efforts to maintain the supply of water while meeting the needs of all of their customers. The Water Agencies purchase water from the California State Water Project ("SWP"), a state-wide project that redistributes water from northern California to more arid regions of the State. ER174. By agreement, the Water Agencies exchange their rights to SWP water for water from the Colorado River, which they then recharge into the Coachella Valley aquifer, where it

becomes part of the groundwater supply that they provide to their customers. ER174; Doc. 84-3 ¶ 15.

The Water Agencies have also been working cooperatively with other local entities and interested parties to promote the efficient and safe management of groundwater in the Valley. In 2002, for example, CVWD imposed aggressive new conservation requirements on users. CVWD Final Water Management Plan (Sept. 2002).[6] Further, the Water Agencies have participated in efforts to comply with California's 2014 Sustainable Groundwater Management Act ("SGMA"), which requires local authorities to work together to more efficiently manage groundwater levels and achieve various sustainability and quality targets. *See* Rebecca L. Nelson et al., *Local Groundwater Withdrawal Permitting Laws in the South-Western U.S.: California in Comparative Context*, 54 Groundwater 747, 748-49 (2016).[7]

The Coachella Valley aquifer is currently in a state of "overdraft," meaning that the amount of water being extracted from the aquifer exceeds the amount being recharged. App. 8a-9a & n.3. Although that means the overall level of water in the aquifer is decreasing over time, there is no evidence, or even allegation, that the Water Agencies have ever been unable to adequately supply their customers, including the Tribe.

---

[6] http://www.cvwd.org/DocumentCenter/View/1193.

[7] Similar regulation and permitting efforts that supplement common-law rules governing groundwater to prevent depletion of groundwater resources have been established in other Western States for years. Nelson, *supra*, at 749.

D. Proceedings Below

1. The Tribe filed this suit against the Water Agencies in May 2013, and the United States intervened in June 2014 in its capacity as trustee for the Tribe and individual allottees on the reservation. App. 27a. The Tribe and United States, seeking a declaratory judgment and injunctive relief, contended (as relevant here) that there is a federal reserved right in the groundwater underlying the reservation. The Tribe has stipulated that it is not seeking any additional rights to surface waters in the Valley. Doc. 49 ¶ 7.

The parties agreed to divide the case into three phases. Phase I addresses the threshold issue of whether the Tribe has rights to groundwater under *Winters*. Phase II will, if necessary, resolve subsidiary legal questions, such as whether any right the Tribe has includes a water-quality component and whether the Tribe owns the so-called "pore space" underlying its lands. Phase III will quantify any identified groundwater rights. App. 10a.

2. On March 20, 2015, the district court granted the Tribe summary judgment on the Phase I question whether the Tribe has a reserved right to the groundwater at issue. The district court concluded that the *Winters* doctrine applies to all water, including groundwater, that is appurtenant to a federal reservation. App. 37a-38a.

The district court also certified its Phase I order for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed proceedings pending appeal. App. 49a-

50a.[8] The district court explained that the question whether "*Winters* rights extend to groundwater, in light of California's correlative rights legal framework for groundwater allocation, effectively controls the outcome of this case." App. 49a. Further, the court concluded that "[s]ubstantial ground for difference of opinion exists on this issue," because since this Court "specifically avoided deciding" it in the 1976 *Cappaert* decision, "state supreme courts are split on the issue and no court of appeals has passed on it." App. 49a-50a. Further still, the district court explained, the dispositive question whether *Winters* extends to groundwater is squarely presented here, because although *Cappaert* chose "to construe distant groundwater as surface water," in "this case it is undisputed that the groundwater at issue is not hydrologically connected to the reservation's surface water." App. 50a. Finally, the district court explained that, if it did not certify the issue for interlocutory appeal, "this decision may be unreviewable as a practical matter due to the likelihood of settlement as the case progresses." *Id.*

3. The court of appeals affirmed. The court acknowledged that "there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater," but concluded that there was "no reason to cabin" the doctrine to surface water. App. 6a, 20a. The Ninth Circuit reasoned that the only relevant question to whether a

---

[8] In light of the decision below, and over the Water Agencies' objection, the district court on June 5, 2017, lifted the stay as to Phase II subsidiary issues. The parties are currently negotiating the scope of, and schedule applicable to, Phase II.

Winters right exists, in either surface water or groundwater, is "whether the purpose underlying the reservation envisions water use" and whether the water source at issue is "appurtenant" to the reservation. App. 15a. Because "the primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose," the "United States implicitly reserved a right to water when it created the Agua Caliente Reservation," and that right extended to appurtenant groundwater in the Coachella Valley aquifer. App. 18a, 20a.

Notably, the court of appeals rejected the argument that the existence or scope of *Winters* rights depends on the existing state-law water rights regime or on whether other water was available. The court considered it irrelevant that "the Tribe is already receiving water pursuant to California's correlative rights doctrine and the Whitewater River Decree," because "state water rights are preempted by federal reserved rights." App. 21a-22a. Otherwise said, the Ninth Circuit held that "state water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right," and that a reserved right—which would preempt any and all "conflicting state law"—should be recognized regardless of whether "other sources of water then available" are sufficient to "meet the reservation's water demands." *Id.*

This petition followed.

REASONS FOR GRANTING THE WRIT

The decision below extends and exacerbates a pre-existing conflict among state courts of last resort over whether, when, and to what extent federal reserved rights apply to groundwater. This petition presents an ideal vehicle for resolving that exceedingly important question. The court of appeals also answered the question incorrectly.

Certiorari should be granted.

I. THE DECISION BELOW EXTENDS A SQUARE AND INTRACTABLE CONFLICT OVER WHETHER, WHEN, AND TO WHAT EXTENT THE *WINTERS* DOCTRINE APPLIES TO GROUNDWATER

While the Court has recognized since *Winters* that federal reserved rights may exist in surface water, the Court has also acknowledged that the surface-water rules do not necessarily apply to groundwater. In *Cappaert*, the Court noted that whether reserved rights apply to groundwater is an open question, and that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." 426 U.S. at 142. The Court declined to decide that question, however, concluding as a factual matter that the water at issue in *Cappaert* was surface water. *Id.*

Since *Cappaert*, a well-recognized conflict has developed among state courts of last resort over whether *Winters* rights apply to groundwater, and both courts and commentators have noted that the lack of guidance from this Court has contributed to uncertainty over the proper allocation of water

rights in the Western United States. The Ninth Circuit's decision in this case extends that longstanding conflict, which only this Court can resolve.

A. A Direct, Acknowledged Conflict Has Existed Among State Courts Of Last Resort Over The Question Presented

1. The Wyoming Supreme Court has held that federal reserved rights *do not* extend to groundwater. In 1988, that court addressed the question whether the Wind River Indian Reservation was implicitly granted reserved rights to surface and groundwater when it was created in 1868. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76, 100 (Wyo. 1988), *aff'd on other grounds by an equally divided Court*, 492 U.S. 406 (1989). The Wyoming Supreme Court held that the reservation did have a reserved right to surface water under *Winters*, *id.* at 91, but that "the reserved water doctrine does not extend to groundwater," *id.* at 100. The Wyoming court emphasized this Court's hesitance to extend the doctrine to groundwater in *Cappaert*, and relied on the fact that no other court had ever applied the *Winters* doctrine to groundwater. *Id.*

2. Just over a decade later, the Arizona Supreme Court considered and expressly rejected the Wyoming approach. The Arizona court acknowledged that the Wyoming Supreme Court in *Big Horn* had "declined to find a reserved right to groundwater." *Gila*, 989 P.2d at 745. The Arizona court disagreed with the Wyoming Supreme Court because it did "not find its reasoning persuasive." *Id.*; *see also Confederated Salish & Kootenai Tribes of the Flat-*

head Reservation v. Stults, 59 P.3d 1093, 1098-99 (Mont. 2002) (adopting Arizona Supreme Court's conclusion that federal reserved rights apply to groundwater).

The Arizona Supreme Court thus concluded that the *Winters* doctrine would extend to groundwater. The court, however, recognized two important, related limitations on that rule. *First*, the court held that a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila*, 989 P.2d at 748; *see also Salt River Valley Water Users' Ass'n v. Guenther*, 2009 WL 3866060, ¶ 26 (Ariz. Super. Ct. Apr. 8, 2009) (rejecting federal reserved right to groundwater where tribe failed to show "that other sources of [water] supply are inadequate to satisfy the purposes of the Reservations").

Second, the court recognized a federal reserved right only after considering whether the existing state-law water-rights regime—in Arizona's case, the "reasonable use" approach to groundwater rights, *see supra* at 6—sufficed to protect the federal reservation's purpose. The *Gila* court concluded that Arizona law did not suffice because, although the tribe had a "theoretically equal right to pump groundwater" so long as it could put that water to a reasonable use on its own land, Arizona's "reasonable use" regime, unlike a federal reserved right, "would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers." 989 P.2d at 748; *see id.* at 743 & n.3 (explaining that a single user can legally drain an aquifer under reasonable-use system). This concern, the

court explained, was not merely theoretical—the tribes had established that some "Indian reservations have been entirely 'dewatered' by off-reservation pumping." *Id.* at 748. Thus, the court concluded that the tribe's existing state water rights would not "adequately serve to protect" the tribe. *Id.*

3. The district court in this case recognized this decisional conflict, explaining that this Court "specifically avoided deciding" the question whether federal reserved rights apply to groundwater in *Cappaert*, and that "state supreme courts are split on the issue and no court of appeals has passed on it." App. 49a-50a. The United States, too, acknowledged the conflict below, noting that the "Arizona Supreme Court expressly declined to follow the Wyoming Supreme Court's" decision. U.S. C.A. Br. 49. And indeed, the conflict over the question presented has long been recognized by other courts and commentators. *See, e.g.*, *United States v. Washington, Dep't of Ecology*, No. 2:01CV00047, at 7 (W.D. Wash. Feb. 24, 2003), ECF 304 ("state courts are split" over this question); *Confederated Salish & Kootenai Tribes v. Clinch*, 992 P.2d 244, 251 (Mont. 1999) (Rodeghiero, J., dissenting) ("uncertainty exists as to whether groundwater is included within the reserved water rights doctrine"); Shosteck, *supra*, at 331 ("Since *Cappaert*, two state supreme courts have taken on the issue of federal reserved rights to groundwater, reaching opposite results."); Liana Gregory, *"Technically Open": The Debate over Native American Reserved Groundwater Rights*, 28 J. Land Resources & Envtl. L. 361, 363 (2008) ("There is a split among state supreme courts concerning the ability to reserve groundwa-

ter."); Joanna (Joey) Meldrum, *Reservation and Quantification of Indian Groundwater Rights in California*, 19 Hastings W. N.W. J. Envtl. L. & Pol'y 277, 294 (2013) (Arizona decision was "[c]ontrary to the court in Wyoming").

Thus, even before the decision below, 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: The Potential Impact on Renewable Energy Development*, 50 Nat. Resources J. 611, 621 (2010); *see also In re Adjudication of Existing and Reserved Rights to the use of Water*, 2001 WL 36525512, at *13-14 (Mont. Water Ct. Aug. 10, 2001) (lack of guidance "with respect to reserved water rights in groundwater has led to inconsistent rulings on the subject").

B. The Decision Below Entrenches And Extends The Decisional Conflict As To The Question Presented

The decision below entrenches and extends this existing decisional conflict.

1. The Ninth Circuit's conclusion that the *Winters* doctrine applies to groundwater, *see supra* at 16-17, obviously cannot be reconciled with the Wyoming Supreme Court's holding that there is no federal reserved right in groundwater. That conflict over the scope of federal reserved rights is entrenched and intolerable, and itself suffices to warrant certiorari.

2. The Ninth Circuit's decision also conflicts with that of the Arizona Supreme Court (i.e., the highest court of a State within the Ninth Circuit), in two respects.

First, the Arizona Supreme Court concluded that a "reserved right to groundwater *may only be found* where other waters are inadequate to accomplish the purposes of a reservation." *Gila*, 989 P.2d at 748 (emphasis added). The Ninth Circuit specifically and expressly rejected that conclusion, holding that *it does not matter* "if other sources of water" can "meet the reservation's water demands." App. 14a-15a.

Second, the Arizona Supreme Court focused on whether state law "would adequately serve to protect" the reservation, and held that Arizona law would not because the reservation's state-law rights could be subject to "total future depletion" by other users. *Gila*, 989 P.2d at 748. The Ninth Circuit, in contrast, declared that "state water entitlements *do not affect our analysis* with respect to the creation of the Tribe's federally reserved water right." App. 22a (emphasis added). Thus, the court of appeals held it irrelevant that "the Tribe is already receiving water pursuant to California's correlative rights doctrine and the Whitewater River Decree," App. 21a-22a, and concluded that a reserved right to groundwater "exists if the purposes underlying a reservation envision access to water," App. 17a. That would mean, of course, that every reservation would have a *Winters* right in every instance, because every reservation needs access to water.

The differing approaches between the Ninth Circuit and Arizona Supreme Court are outcome-determinative in this case. Had the Ninth Circuit applied the Arizona Supreme Court's approach, the Water Agencies would have prevailed. Unlike Arizona's reasonable-use approach, California's correlative-rights system *does* protect the Tribe in the event of a shortage, ensuring the Tribe *is* treated just the same as any other overlying landowner. *Supra* at 6-7; *infra* at 34-35.

3. There is thus a three-way, outcome-determinative conflict as to the question whether, when, and to what extent a federal reserved right to groundwater exists. The disparity in treatment among tribes and other federal reservations in Wyoming, Arizona, and elsewhere in the Ninth Circuit should not be allowed to persist. Worse, because Arizona is within the Ninth Circuit, a different rule now applies to Arizona reservations depending on whether suit is brought in state or federal court. That is an intolerable state of affairs that can be resolved only by this Court.

Certiorari should be granted.

II. THE PETITION PRESENTS A RECURRING ISSUE OF WIDESPREAD IMPORTANCE AND IS THE IDEAL VEHICLE TO RESOLVE IT

1. The question presented is exceedingly important.

a. This Court has recognized "that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colo. River Water*

Conservation Dist. v. United States, 424 U.S. 800, 804 (1976). The decision below directly implicates that ongoing question of extreme national importance. The effect of the Ninth Circuit's decision is that federal reservations—e.g., Indian reservations and national parks—within that court's vast jurisdiction have preferential rights to groundwater over state and local water districts, as well as other users with rights under state law. The wide-ranging impact of the decision below is obvious: not only are the vast majority of Indian reservations—and federal lands more generally—located in the West, *see supra* at 5 & n.1, but questions concerning the proper allocation of water rights have for decades been (and continue to be) an acute focus of state, regional, and local water managers in the arid West. *See New Mexico*, 438 U.S. at 699.

Indeed, Western States have developed complex legal regimes and permitting systems for groundwater to protect groundwater basins from ever-increasing demands on water resources. *See* Nelson, *supra*, at 748-49. By granting Indian reservations, national parks, and other federal reservations new, preemptive federal rights in groundwater that are entirely exempt from state regulation, the decision below will drastically complicate, and potentially entirely defeat, these state and local efforts to manage groundwater resources efficiently. *See* Griffith, *supra*, at 119 (reserved rights to groundwater would "bifurcate[] responsibility for allocation decisions between federal courts and state legislatures, thwarting state attempts at regulation"); Tarlock, *supra*, § 1:1 ("Federal proprietary rights [for Indian reser-

vations and for retained public lands] are still not well integrated into state water allocation systems and are a continuing source of federal-state tension in the West.").

Take California as an example. California's Sustainable Groundwater Management Act requires water agencies to create sustainability plans that avoid a parade of problems that inadequate management of groundwater may create or fail to prevent, including long-term groundwater depletion, land subsidence (the gradual settling or sinking of the Earth's surface), and adverse impacts on connected surface water. *See, e.g.*, Nelson, *supra*, at 748. Among other things, SGMA requires local agencies to eliminate any overdrafts within 20 years, and authorizes them to use a variety of tools to limit extraction of groundwater. *Id.* All of these requirements, however, depend on state and local water authorities' control over groundwater regulation. The Ninth Circuit's ruling undermines local agency control over how groundwater rights are allocated, because (according to the Ninth Circuit) if there happens to be an Indian reservation or other federal reservation overlying a relevant aquifer, that federal land carries preemptive rights.

Nor is this problem limited to California. Arizona, Colorado, Nevada, New Mexico, Texas, and Utah—"close cousins [to California] in terms of climate and general legal structures"—have all introduced groundwater permitting systems before California. *See* Nelson, *supra*, at 748-49. In fact, every State "has some regulations on the extraction and use of groundwater." *See* Blumm, *supra*, § 23.02.

States that have enacted such schemes have done so because of "a perceived crisis in the state's water law caused by an extraordinary shortage of water relative to demand, a shortage that was perceived as likely to be recurring or even permanent." *Id.* Federal law should not be held to interfere with such crucial state and local regulatory efforts without this Court's imprimatur.

b. The decision below will be especially disruptive in States, like California, Oklahoma, and others,[9] in which priority is irrelevant to the allocation of groundwater rights. *Winters* rights do not fit comfortably within a state-law regime, like California's, in which "[t]here is no temporal priority among overlying pumpers." Law of Water Rights and Resources § 4:14. State and local officials would reasonably have assumed that the existence and nature of a reserved right would necessarily turn "on the groundwater regime followed by each individual state." Leonard, *supra*, at 622; *see also* Shosteck, *supra*, at 338-40 (2003) (predicting that this Court "will likely reject the idea of a reserved right to groundwater" because "[a]s long as Indian rights are treated evenhandedly under state law, the Court would determine that no federal rule is necessary"). The Ninth Circuit's decision upends these reasonable expectations, and will require California and other States

---

[9] *See Okla. Water Res. Bd. v. Tex. Cnty. Irr. & Water Res. Ass'n, Inc.*, 711 P.2d 38, 42 (Okla. 1984) (recognizing correlative rights to groundwater under Oklahoma law); *accord Sorensen v. Lower Niobrara Natural Resources Dist.*, 376 N.W.2d 539, 546 (Neb. 1985); *Barclay v. Abraham*, 96 N.W. 1080 (Iowa 1903); Vt. Stat. Ann. tit. 10, § 1410.

with similar groundwater-rights systems—i.e., systems without an existing concept of priority among overlying landowners—to rethink their approaches to groundwater management. *See also infra* at 33-34.

Indeed, given "the increasing reliance on groundwater throughout the region," the manner in which the *Winters* doctrine applies to groundwater—and especially to "ground-water in a non-appropriation based system of groundwater management"—"remains one of the most important unresolved issues" regarding the scope of the doctrine. Dale Ratliff, *A Proper Seat at the Table: Affirming A Broad* Winters *Right to Groundwater*, 19 U. Denv. Water L. Rev. 239, 240 (2016). Uncertainty over the existence of federal reserved rights in groundwater itself interferes with state and local efforts to efficiently manage groundwater resources, which requires complex long-term planning. *Cf.* John Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 Nat. Resources. J. 63, 83-84 (1988) (emphasizing the challenges that undetermined and "outstanding claims" pose to state and local efforts to regulate water (quotation omitted)).

2. The scope of federal reserved rights in groundwater is also a frequently recurring issue. "Disputes about the nature of Indian rights in water resources are widespread throughout the western United States." Folk-Williams, *supra*, at 63; *see also* Cynthia Brougher, *Indian Reserved Water Rights Under the* Winters *Doctrine: An Overview* i, Cong. Res. Serv. RL32198 (2011) ("Indian reserved water

rights are often litigated or negotiated in settlements and related legislation"); Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399, 401 (2006) (noting that "[m]ost Indian tribes have not quantified their reserved rights to water and potential tribal claims are large").

The relative dearth of published judicial decisions on the subject is a result of the fact that nearly all these disputes end in settlement after water rights are identified. Litigating a water dispute to final judgment "can take decades to complete," and the high costs of litigation have led most water disputes to be resolved through negotiated settlements, Folk-Williams, *supra*, at 69, which of course provide no "doctrinal certainty for future litigants," Leonard, *supra*, at 630. As just noted, this legal uncertainty also imposes significant costs on state and local officials seeking to establish systems and policies to efficiently manage water resources. This case presents the Court a rare opportunity for the "expedient resolution of the pressing legal question[] regarding federal reserved rights" presented in this case. *Id.* at 629.

3. This case presents an ideal vehicle through which to resolve that question, for several reasons.

First, unlike in *Cappaert*, there is no impediment to this Court reaching the question presented and resolving the decisional conflict. The district court's certification of its summary judgment order cleanly presents the pure legal question of whether, when, and to what extent, *Winters* rights extend to groundwater and preempt state law. Further, un-

like the body of water at issue in *Cappaert*, "it is undisputed that the groundwater at issue is not hydrologically connected to the reservation's surface waters," App. 50a, so there would be no basis for the Court to resolve this case on a different ground.

Second, and relatedly, the answer to the question presented is outcome-determinative as to the Tribe's water claims. If this Court were to adopt the Wyoming Supreme Court's approach, there would be no federal reserved right to groundwater, and the Water Agencies would be entitled to summary judgment. If this Court were to adopt the Arizona Supreme Court's approach, summary judgment for the Water Agencies would likewise be required because California's correlative rights fully protect the Tribe against depletion of the aquifer by other users.

Third, the procedural posture of this case—an interlocutory appeal from a federal district court under § 1292(b)—is likely the only type of vehicle that will ever allow this Court to consider the question presented. The pure legal question presented here is unlikely to be presented after a final judgment because, as explained earlier, the length and complexity of reserved water rights litigation usually results in a settlement after water rights are identified, thus depriving this Court of the ability to review and develop the legal rules that apply in this area. *See supra* at 29. Further, while state courts may issue interlocutory decisions determining whether and how federal reserved rights apply to groundwater—as in the Arizona Supreme Court's decision in *Gila*—this Court normally has no jurisdiction to review inter-

locutory decisions from state courts. *See* 28 U.S.C. § 1257(a).

This Court does, however, have jurisdiction to consider interlocutory appeals in *federal* courts under § 1292(b). *See* 28 U.S.C. § 1254. Indeed, the district court below certified its summary judgment order precisely because it presented the threshold, contested legal question whether, when, and to what extent federal reserved rights apply to groundwater, and the district court recognized that this question "may be unreviewable as a practical matter due to the likelihood of settlement as the case progresses." App. 50a. This Court is unlikely to confront a better vehicle to resolve the question presented.

The petition should be granted.

III. THE NINTH CIRCUIT'S DECISION IS INCORRECT

The court below erred in extending the reserved rights doctrine to groundwater without limitation. Certainly, the Ninth Circuit erred in concluding that federal reserved rights apply irrespective of existing state-law water entitlements.

1. The federal reserved rights doctrine should not apply to groundwater at all, at least as to federal reservations established in the nineteenth and early-twentieth centuries. The decision whether to imply a federal reserved right to a particular water source is "a question of implied intent." *New Mexico*, 438 U.S. at 698. The inquiry into whether the government intended to reserve a federal water right is a "careful" one, "both because the reservation is implied, rather than expressed, and because of the his-

tory of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 700-02.

That focus on implied intent precludes extending the *Winters* doctrine to groundwater, at least in the circumstances here. "When the vast majority of reservations"—including the Tribe's—"were set aside in the mid- to late-nineteenth century," the technology to pump meaningful amounts of groundwater did not exist. Shosteck, *supra*, at 337; *see also supra* at 13. It is thus implausible to infer that the government intended to ensure that reservations would be able to pump groundwater; it makes no sense to infer that the United States intended to ensure that tribes would be able to do something that was *not even possible at the time*. *See also* Griffith, *supra*, at 113 ("doubt remains, however, whether an intent to reserve groundwater can possibly be implied when, at the time of the reservation, neither the Indians nor the federal government knew of the existence or importance of the resource"). Indeed, the implausibility of the federal government's intent to reserve the Tribe groundwater is borne out by the historical record in this case, which is replete with references to the Tribe's use of *surface* water but contains no reference at all to use of *groundwater* by the Tribe. *Supra* at 12.[10]

---

[10] The Tribe and the United States asserted below that the Tribe used various walk-in wells around the time the reservation was created. But a 1855-56 government survey map shows that there were *no* groundwater wells in the relevant area, Doc. 82-3, Ex. 18, and the Tribe has admitted that it is not aware of any wells actually being present in that area, Doc. 82-2 at 2.

The Ninth Circuit answered this objection with a non-sequitur, holding that non-use does not destroy *Winters* rights. App. 21a. That is true *when* Winters *rights exist*, but the question here is whether they exist in the first place—a question that turns on the United States' presumed intent to reserve groundwater rights to the Tribe. There is simply no basis, in law or fact, to presume such an intent here.

2. In any event, the court below erred in concluding that federal reserved rights to groundwater categorically exist as to federal reservations within all States, including correlative-rights States, for at least two reasons.

a. As an initial matter, the whole point of federal reserved rights—which this Court has *only* recognized as to surface water in prior appropriation regimes—is to grant the federal reservation temporal priority over otherwise senior users who start using water after the date the reservation was established. *See supra* at 8-10. That doctrinal formulation makes no sense when—as in Arizona's "reasonable use" regime or California's correlative-rights system—temporal priority does not matter to state-law water rights. If the effect of a *Winters* right is to grant an Indian reservation priority over users who would otherwise have priority under state law, then there is no need for a *Winters* right when no user would

---

Even if the Tribe had historically accessed groundwater with hand-dug wells, use of such primitive technology would have yielded water only for "trivial domestic uses," and would not have suggested a need to reserve a unique federal groundwater right. Meyers, *supra*, at 386.

have priority over the reservation. At the very least, federal reserved rights do not fit naturally into a non-priority-based legal system, which suggests that such rights were never intended to apply—and should not be applied—in States that have adopted such a regime.

b. The Arizona Supreme Court held that federal reserved rights apply even in a "reasonable use" State, but even if that decision were correct, it would have no application to a correlative-rights State like California.

The purpose of the *Winters* doctrine has always been to protect tribal reservations from depletion of the water they need for survival. In *Winters* itself, for example, a reserved right was necessary because state-law users with priority were diverting the tribes' water supply and threatening to render their lands "practically valueless." 207 U.S. at 576. That is why the Arizona Supreme Court in *Gila* held that a federal reserved right was necessary under Arizona's "reasonable use" system—non-reservation users under that system were authorized to deplete the aquifer and thus leave the reservation without access to groundwater. *See supra* at 20-21.

That is not true in a correlative-rights system like California's. The Tribe here has the very same right to groundwater in the Coachella Valley aquifer that every other overlying landowner has, and the very same protections against depletion. *Tehachapi-Cummings*, 49 Cal. App. 3d at 1001. If the Tribe exercises its existing state-law rights, it is simply not possible under California law for other users to deplete the aquifer and render the Tribe's land "practi-

cally valueless," and there is therefore no cause to displace state-law rights that already adequately protect the Tribe.

In fact, rather than ensuring fair treatment of the Tribe, creating a reserved right to groundwater in a correlative-rights State would absolutely *privilege* the Tribe over all other users—a result entirely inconsistent with the principle underlying the *Winters* doctrine. The purpose of federal reserved rights has always been to provide a priority right that vests on the date a reservation is created, ensuring that the tribe is not put at a disadvantage, but *without* displacing more senior rights held by other users. *Cappaert*, 426 U.S. at 138; *id.* at 139 (question is whether "the Government intended to reserve *unappropriated* and thus available water" (emphasis added)); *supra* at 8-10. Yet the necessary consequence of recognizing a federal reserved right in a correlative-rights State would be to privilege the federal reservation *over every other user*, even while the correlative-rights system is meant to assure that all users are treated equally.

The Ninth Circuit's only justification for categorically disregarding the Tribe's existing correlative right was that "state water rights are preempted by federal reserved rights." App. 22a. That statement is correct *when a federal right exists*, but it is irrelevant to the predicate question whether a federal right exists at all. Absent express statutory preemption, federal preemption is warranted only when state law would conflict with, or serve as an obstacle to, federal law. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009). Yet for the reasons explained,

there is no conflict between federal and state law in a correlative-rights regime, so preemption is unwarranted. Indeed, that is especially so when it comes to displacing state water law, an area in which this Court's cases have recognized a "consistent thread of purposeful and continued deference to state water law by Congress." *California,* 438 U.S. at 668.

c. Finally, even in non-correlative-rights States, the Arizona Supreme Court's approach would at the very least require determining whether the federal reservation had adequate access to other water before implying a federal groundwater right. *See supra* at 20. The Arizona rule is consistent with this Court's decision in *New Mexico*, which explained that implying a federal reserved right—and thereby preempting state law—is "reasonable" only "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created." 438 U.S. at 701. Thus, the Arizona Supreme Court correctly concluded that, even when state law would otherwise not protect the federal reservation from depletion, a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila*, 989 P.2d at 748. The Ninth Circuit, in contrast, erroneously held that the availability of alternative water sources is irrelevant to whether a federal reserved right exists, *see supra* at 23, which provides yet another ground for reversal.

At bottom, what the Tribe is seeking, and what the Ninth Circuit granted, is a federal reserved right to groundwater that the Tribe does not need, and that there is no reason to believe the federal gov-

ernment would have granted. Given Congress's and this Court's longstanding policy of deference to state water law whenever possible, there is simply no reason to extend the *Winters* doctrine to cases such as this, needlessly displacing state regulation of water and needlessly enmeshing federal courts in complex local disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW T. KLINE
O'MELVENY & MYERS LLP
1999 Avenue of the Stars,
Los Angeles, Cal. 90067
(310) 553-6700

BARTON THOMPSON, JR.
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, Cal. 94025
(650) 473-2600

STEVEN B. ABBOTT
GERALD D. SHOAF
REDWINE AND SHERRILL, LLP
3890 11th Street, Ste. 207
Riverside, Cal. 92501
(951) 684-2520

WALTER DELLINGER
(Counsel of Record)
wdellinger@omm.com
BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANTON METLITSKY
DEVON E. LASH
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

July 5, 2017