No. _____

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**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the reserved rights doctrine, the federal government, in reserving lands for federal purposes, impliedly reserves a water right needed to accomplish the reservation purposes. In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court substantially limited the reserved rights doctrine because it conflicts with Congress' deference to state water law, and held that federal water rights are impliedly reserved only as "necessary" to accomplish the primary reservation purposes and prevent them from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. This Court has never decided whether the reserved rights doctrine applies to groundwater.

The Ninth Circuit held that *New Mexico*'s limitations of the reserved rights doctrine apply only in *quantifying* an existing federal reserved right but not in determining whether the right *exists* in the first instance, and that whether a reserved right exists depends on whether the reservation purpose "envisions" use of water. The Ninth Circuit held that the purpose of the Indian tribe's reservation in this case "envisions" use of water, and thus the tribe has a reserved right in groundwater.

The questions presented are:

1. Whether the Ninth Circuit's standard for determining whether a federal reserved water right impliedly exists – that the right impliedly exists if the reservation purpose "envisions" use of water – conflicts

QUESTIONS PRESENTED – Continued

with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), which the petitioners contend held that a federal reserved water right impliedly exists only if the reservation of water is "necessary" to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated."

2. Whether the reserved rights doctrine applies to groundwater.

3. Whether the Agua Caliente Band of Cahuilla Indians ("Tribe") has a reserved right in groundwater, and in particular whether the Tribe's claimed reserved right is "necessary" for primary reservation purposes under the *New Mexico* standard in light of the fact that the Tribe has the right to use groundwater under California law.

LIST OF PARTIES

The petitioners are Desert Water Agency, and Patricia G. Oygar, Thomas Kieley, III, James Cioffi, Craig A. Ewing and Joseph K. Stuart, who are sued in their official capacities as members of the Board of Directors of Desert Water Agency.

The respondents are the Agua Caliente Band of Cahuilla Indians and the United States.

In addition, Coachella Valley Water District and Ed Pack, John Powell, Jr., Peter Nelson, G. Patrick O'Dowd and Castulo R. Estrada, all members of the Board of Directors of the Coachella Valley Water District, were defendants-appellants below.

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The Ninth Circuit decision is reproduced at Appendix 1-22. The decision is officially published at 849 F.3d 1262 (9th Cir. 2017), and unofficially published at 2017 U.S. App. Lexis 4009 (9th Cir. Cal., Mar. 7, 2017).

The district court decision is reproduced at Appendix 23-51. The decision is not officially published, but is unofficially published at 2015 U.S. Dist. Lexis 49998 (C.D. Cal., Mar. 20, 2015).

JURISDICTION

The Ninth Circuit issued its decision on March 7, 2017. This Court, through Justice Kennedy, granted an extension of time to file a petition for writ of certiorari until July 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The presidential executive orders of May 15, 1876, and September 29, 1877, which respectively created and expanded the reservation of the Agua Caliente Band of Cahuilla Indians, are reproduced at Appendix 52-53.

STATEMENT OF THE CASE

1. Factual Background

a. The Parties

Petitioner Desert Water Agency ("DWA") is a public water agency created under California law that provides water to entities and persons within its area of jurisdiction, which is located in the Coachella Valley, in Riverside County, California. DWA's area of jurisdiction includes several cities in the Coachella Valley, including the Cities of Palm Springs, Cathedral City and Rancho Mirage. The other petitioners are members of DWA's Board of Directors, who are sued in their official capacities. Another water agency, the Coachella Valley Water District ("CVWD"), also provides water to entities and persons within its area of jurisdiction, which is also located in the Coachella Valley.

The Respondents are the Agua Caliente Band of Cahuilla Indians ("Tribe") and the United States, which intervened in the action on the side of the Tribe. The Tribe is a federally recognized Indian tribe that occupies a reservation in the Coachella Valley, in Riverside County. The reservation was established by an executive order issued by President Ulysses S. Grant on May 15, 1876, and was expanded by an executive order issued by President Rutherford B. Hayes on September 29, 1877. App. 52-53; ER 58-59.[1] The reservation is located in portions of the City of Palm Springs, California, and surrounding areas. ER 49, 58-59.

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[1] "ER" is a reference to the Excerpts of Record before the Ninth Circuit.

b. The Tribe's Reservation

The Tribe's reservation consists of a checkerboard pattern in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1185 (9th Cir. 1971); App. 5. The checkerboard pattern occurred because the United States, before creating the Tribe's reservation, had conveyed most of the odd-numbered sections in the City of Palm Springs and surrounding areas to a railroad company as an incentive to build a railroad. 14 Stat. 292, 294, 299 (1866). As a result, most of the lands reserved for the Tribe under the executive orders are the even-numbered sections. ER 57-58.

Most of the Tribe's reservation lands (58%) have been allotted to individual Indians, and most of the remaining reservation lands (29%) have been conveyed in fee to non-Indians. ER 139. Only a relatively small percentage of the lands are unallotted tribal trust lands (12.7%), and only a small fraction are tribal fee lands (.3%). *Id*. Many of the Indian allottees have sold or leased their allotted lands to non-Indians, who operate hotels, restaurants and other places of business. ER 138-139.

As a result of the allotments, fee conveyances and leases, most of the residents on the Tribe's reservation are non-Indians, or at least non-members of the Tribe. More than 20,000 people reside on the Tribe's reservation, ER 222, 223, although the Tribe has only 440 members. ER 196.

c. The Groundwater

The principal source of surface water flowing through the Coachella Valley is the Whitewater River and its tributaries, but the principal source of water that DWA and CVWD provide to their customers is the groundwater of the Coachella Valley groundwater basin, which underlies the Whitewater River. ER 136. Since increased population growth in the Coachella Valley has caused a diminishment of the groundwater in the basin, DWA and CVWD import water from the Colorado River into the basin in order to augment the basin's groundwater supplies and prevent overdraft.

Because of the checkerboard pattern of the Tribe's reservation, the groundwater in the basin underlies both tribal and non-tribal lands. ER 137. DWA and CVWD provide water to persons and entities on both tribal and non-tribal lands, and do not distinguish between tribal and non-tribal lands in providing the water. ER 136, 139.

The Tribe does not pump or attempt to pump groundwater for its own use, and instead purchases water from DWA and CVWD. App. 7; ER 138. The water agencies have never denied any request by the Tribe for water. ER 138.

2. Procedural History

In 2013, the Tribe brought an action for declaratory and injunctive relief against CVWD and DWA in the federal district court for the Eastern District of

California, alleging that the Tribe has a reserved right and an aboriginal right in groundwater underlying its reservation. ER 23. The Tribe also alleged that CVWD and DWA, by importing water into the groundwater basin, are impairing the water quality of the Tribe's reserved right, and also that the Tribe "owns" the "pore space" of the groundwater basin underlying the Tribe's reservation, as a result of which the water agencies are required to compensate the Tribe for importing and storing water in the pore space. ER 40-42. The United States intervened on the side of the Tribe. ER 46. The district court had jurisdiction over the Tribe's complaint under 28 U.S.C. § 1331 (federal question) and § 1362 (tribal plaintiff-federal complaint).

The parties agreed to divide the case into three phases. ER 17. Phase 1 will address whether the Tribe has a reserved right and aboriginal right in groundwater. Phase 2, if necessary, will address whether the Tribe "owns" the pore space; whether the Tribe's rights include a water quality component; and whether the Tribe's action is barred by various equitable defenses. Phase 3, if necessary, will quantify the amount of groundwater necessary to satisfy the Tribe's reserved and aboriginal rights.

In the Phase 1 proceeding, the four parties – the Tribe, the United States, CVWD and DWA – filed motions for summary judgment addressing whether the Tribe has a reserved right and aboriginal right in groundwater. The Tribe contended that it has both a reserved right and an aboriginal right; the United States contended that the Tribe has a reserved right;

and CVWD and DWA contended in separate motions that the Tribe has neither a reserved right nor an aboriginal right. On the reserved rights issue, CVWD and DWA contended that the Tribe's claimed reserved right does not meet the standard for reserved water rights established in *United States v. New Mexico*, 438 U.S. 696 (1978), and that the reserved rights doctrine does not apply to groundwater.

The district court partially granted each side's motion, ruling that the Tribe has a reserved right but not an aboriginal right in groundwater. App. 23-51.

CVWD and DWA filed a petition for interlocutory appeal in the Ninth Circuit seeking review of the district court's decision that the Tribe has a reserved right in groundwater, and arguing that the Tribe does not have a reserved right in groundwater for reasons set forth in their motions for summary judgment, as described above. The Ninth Circuit, after granting the petition, affirmed the district court decision. App. 22. The Ninth Circuit held that the limitations of the reserved rights doctrine established in *New Mexico* apply only in quantifying an existing reserved right but not in determining whether a reserved right exists in the first instance; that whether a reserved right exists depends on whether the reservation purpose "envisions" use of water; that the Tribe's reservation purpose "envisions" use of water, and thus the Tribe has a reserved right in "appurtenant" water; and that "appurtenant" water includes groundwater, and therefore the Tribe has a reserved right in groundwater. App. 10-22.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

A. Nationwide and West-Wide Impacts of Questions Presented

This petition presents significant issues of national importance concerning the nature and scope of the reserved rights doctrine. Under the reserved rights doctrine, the federal government, in reserving lands for specific federal purposes, "by implication" reserves water "necessary" to accomplish the reservation purposes. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). As this Court has stated, the reserved rights doctrine is an "exception" to Congress' traditional deference to state laws regulating allocation and use of water. *United States v. New Mexico*, 438 U.S. 696, 715 (1978). The questions presented in this petition concern how broadly the "exception" to Congress' deference to state water law should be construed, and in particular what standard applies in determining whether federal reserved rights impliedly exist and whether federal reserved rights extend to groundwater. These questions implicate significant issues of federalism concerning the proper balance between the needs of federal reserved lands and Congress' traditional deference to state water law.

Although the reserved rights issues in this case arise in the context of federal lands set aside as an Indian reservation, the issues also arise in the context of federal lands set aside for other purposes, such as for national forests, national parks, federal military

installations, federal reclamation and power projects, national monuments, and national wildlife refuge areas, among other purposes. The Ninth Circuit's decision interpreting the reserved rights doctrine did not distinguish between federal lands reserved for Indian purposes and for other purposes, and its decision applies to all federal reserved lands and not just lands reserved for Indian purposes.

The questions presented in this petition are of particular importance in the western states, both because of the scarcity of water supplies in the western states and the sheer quantity of federal reserved lands in the western states. As this Court has stated, in the "arid parts of the West," claims to water for federal reserved lands "inescapably vie with other public and private claims," and "[t]his competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. Of all federal reserved lands in the nation, more than one-half – 54.08% – are located in the western states. General Services Administration, *Federal Real Property Profile* ("GSA Rep."), at 18 (Sept. 30, 2004). The percentage of federal lands in the western states ranges from 30.33% in the State of Washington to 84.48% in the State of Nevada, for an average of 46.93%. *Id*. at 18-19.[2] Further, because federal reservations are normally found

[2] These figures are derived from the General Services Report cited in the text above. The report includes a map identifying the "Western" states as including Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. GSA Rep., at 18. According to petitioner DWA's calculation based on the figures provided in the GSA report on pages

in the uplands of the western states, the percentage of water flow in the reservations is even higher; more than 60% of the average annual water yield in the western states is from federal reservations. *New Mexico*, 438 U.S. at 699 n. 3.

Groundwater is a major source of water supplies throughout the nation, but particularly in the western states, which lack the ample surface water supplies found elsewhere in the nation and are increasingly dependent on groundwater as a major source of supply. In the western states, 53.5 million acre-feet of groundwater are withdrawn each year, and 47.7 billion gallons each day. U.S. Geologic Survey, *Estimated Use of Water in the United States in 2010, Circular 1405*, at 9, 15 (2014). Groundwater is a major source of California's water supplies. Groundwater provides about 30% of California's water supply in an average year, and 40% to 50% of Californians rely on groundwater for at least part of their water supply. Cal. Dep't of Water Resources, *California Groundwater: Bulletin 118* (Update 2003), at 2 (2003).

B. Summary of Questions Presented

The questions presented in this petition are summarized as follows:

18-19, these specified western states have a total of 752,947,840.00 acres; the federal government owns a total of 353,331,837.20 acres in these western states; and thus the federal government owns 46.93% of the lands in these western states.

1. Whether the Ninth Circuit's Standard for Determining Whether a Federal Reserved Right Impliedly Exists Conflicts With the Standard Established by This Court in *United States v. New Mexico*

The first and perhaps most far-reaching question presented in the petition is what standard applies in determining whether a federal reserved water right impliedly exists, and more specifically whether the standard adopted by the Ninth Circuit conflicts with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978).

In *New Mexico*, this Court – narrowly construing the reserved rights doctrine because it conflicts with Congress' policy of deference to state water law – held that federal water rights are impliedly reserved only as "necessary" to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Petitioner DWA contends that *New Mexico* established a strict standard – hereinafter referred to as *New Mexico*'s "necessity standard" – for determining whether a federal reserved water right impliedly exists. Under *New Mexico*'s necessity standard, a federal reserved water right impliedly exists only if the reservation of water is "necessary" to accomplish the "primary" reservation purposes and prevent them from being "entirely defeated." In DWA's view, this inquiry requires consideration of the circumstances of the particular reservation – such as whether groundwater is available under

state law or whether water is available from other sources – to determine whether federal reserved rights are "necessary" for primary reservation purposes.

The Ninth Circuit rejected petitioner DWA's argument, and held that *New Mexico*'s necessity standard applies only in *quantifying* the amount of water necessary to satisfy an existing reserved right but not in determining whether the reserved right impliedly *exists* in the first instance. The Ninth Circuit held that whether a federal reserved right impliedly exists depends on whether the reservation purpose "envisions" use of water.

The Ninth Circuit's broad standard for determining whether a reserved right exists – whether the reservation purpose "envisions" use of water – conflicts with *New Mexico*'s strict necessity standard, which is whether the reservation of water is "necessary" for reservation purposes. Under the Ninth Circuit's broad standard, virtually every federal reservation in the nation – particularly in the western states – would automatically have a reserved water right in surface water and any underlying groundwater, regardless of the circumstances of the reservation. This Court should grant the petition to determine the standard that applies in determining whether a reserved right impliedly exists, and in particular whether the Ninth Circuit's standard conflicts with the standard established by this Court in *New Mexico*.

2. Whether the Reserved Rights Doctrine Applies to Groundwater

This Court has never decided whether the reserved rights doctrine applies to groundwater. *United States v. Cappaert*, 426 U.S. 128, 142 (1976) ("No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.").

The reserved rights doctrine should not be extended to groundwater because its rationale does not support its extension to groundwater. The reserved rights doctrine is an outgrowth of the *Winters* doctrine, which was established by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and which recognized the existence of reserved water rights on Indian reservations. The *Winters* doctrine was developed because non-Indian appropriators had acquired prior rights in surface waters under the state priority rule of first use – "first in time, first in right" – as a result of which the Indian tribes had no access to water for their reservations. The *Winters* doctrine allowed Indian tribes to have prior rights to water for their reservations under federal law even though non-Indian appropriators had prior rights to the water under the state priority rule of first use.

Although the state priority rule of first use applies to surface water, the priority rule does not apply to groundwater. Rather, under California's law of groundwater, overlying landowners have the right to use groundwater underlying their lands as an incident of their land ownership, and no overlying landowner has

priority over another. The Tribe, as an overlying landowner of its reservation, has the same right to use groundwater under California law as other overlying landowners. Thus, the rationale of the *Winters* doctrine – to protect Indian water rights from subordination to non-Indian rights under the state priority rule of first use – does not apply to groundwater, because the state priority rule of first use does not apply to groundwater. Since the reserved rights doctrine is an outgrowth of the *Winters* doctrine, the reserved rights doctrine does not apply to groundwater. This Court should grant the petition to determine whether the reserved rights doctrine applies to groundwater.

3. Whether the Tribe Has a Reserved Right in Groundwater

The third question presented in the petition is whether the Tribe has a reserved right in groundwater under *New Mexico*'s necessity standard, assuming that the necessity standard applies in determining whether a reserved right exists. This question also raises significant issues concerning the reserved rights doctrine, and in particular whether the circumstances of the reservation – such as the availability of water under state law or from other sources – are relevant in determining whether a reserved water right impliedly exists.

Petitioner DWA contends that since the Tribe has the same right to use groundwater as other overlying landowners, the Tribe's claimed reserved right does not meet *New Mexico*'s necessity standard and does

not impliedly exist. This question – whether the Tribe has a federal reserved right in groundwater even though the Tribe has the right to use groundwater under California law – raises significant issues of federalism concerning the role, if any, that state water law plays in determining whether federal water rights are impliedly reserved.

Petitioner DWA also contends that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity standard for other reasons – because the Tribe has a decreed water right to use Whitewater River surface water for its reservation needs, and thus other waters are available for reservation needs; because the Tribe was not historically using groundwater when its reservation was created, which defeats any implication that the presidential executive orders impliedly created a reserved right in groundwater; and because the Tribe does not currently use or even attempt to use groundwater for its reservation needs.

This Court should grant the petition to determine whether the Tribe's claimed reserved right in groundwater meets *New Mexico*'s necessity standard, assuming that the standard applies in determining whether a reserved right impliedly exists.

C. Need for Supreme Court Review Notwithstanding Interlocutory Appeal

This Court should grant the petition even though the questions presented were decided by the Ninth

Circuit in an interlocutory appeal rather than after final judgment. If this case reaches Phase 3, which would involve a quantification of the Tribe's claimed reserved right in groundwater, other users of groundwater in the Coachella Valley whose rights may be affected by the Tribe's claimed reserved right would have to be brought into the litigation as indispensable parties, which would result in a general adjudication of all rights to groundwater in the Coachella Valley. As this Court has stated, "the rights of the several claimants [in adjudications of water rights] are so closely related that the presence of all is essential to the accomplishment of its purposes," and "these cannot be attained by mere private suits in which only a few of the claimants are present. . . ." *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449 (1916). A general adjudication of all rights in groundwater in the Coachella Valley would likely take many years to complete, and would be time-consuming for the litigants and the court. This lengthy and arduous general adjudication process would be obviated if this Court reviews and overturns the Ninth Circuit decision.

We now describe more fully the questions presented in this petition.

II. THE NINTH CIRCUIT'S STANDARD FOR DETERMINING THE EXISTENCE OF A FEDERAL RESERVED RIGHT CONFLICTS WITH THE STANDARD ESTABLISHED BY THIS COURT IN *UNITED STATES v. NEW MEXICO*.

The reserved rights doctrine holds that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 599-601 (1963). "[T]he issue is whether the Government *intended* to reserve unappropriated and thus available water," and "[i]ntent is inferred if the previously unappropriated waters are *necessary* to accomplish the purposes for which the reservation was created." *Cappaert*, 426 U.S. at 139 (emphases added). Thus, a federal reserved right impliedly exists – that is, an implied "intent" exists – only if the reservation of water is "necessary" for reservation purposes. If the reservation of water is not "necessary" for such purposes, there is no implied "intent" to reserve the waters.

In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court narrowly construed the reserved rights doctrine because it conflicts with Congress' policy of deference to state water law. As the California Supreme Court has stated, *New Mexico* adopted a "narrow construction" of the reserved rights doctrine

because of the congressional policy "of deferring to state water law." *In re Water of Hallett Creek Stream System*, 44 Cal.3d 448, 461, 749 P.2d 324 (1988).[3]

Under its narrow construction, *New Mexico* stated that Congress, in determining "whether federal entities must abide by state water law," "has almost invariably deferred to state law," and that Congress has departed from this policy only where water is "necessary to fulfill the very purposes for which a federal reservation was created." *New Mexico*, 438 U.S. at 702. The Court stated that it has upheld reserved rights, as

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[3] Congress' policy of deference to state water law originated in the equal footing doctrine, which holds that the states, upon their admission to statehood, acquire sovereignty over all navigable waters and underlying lands within their borders, subject to the federal government's power to regulate navigable waters under the Constitution's Commerce Clause. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 589-590 (2012); *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). In the late 1800s, Congress enacted various statutes, principally the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877, that provided for disposition and settlement of the public domain lands in the western states; this Court has held that the statutes effected a "severance" of the waters on the lands from the lands themselves, as a result of which the states regulate appropriation and use of water on the lands and the federal government retains ownership of the lands. *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935). An example of a federal statute that defers to state water law is the Reclamation Act of 1902, which authorized the construction and operation of water projects in the western states and provides, in section 8, that the Secretary of the Interior must comply with state water laws in operating the projects. *California v. United States*, 438 U.S. 645, 665-667 (1978).

in *Winters*, *Arizona* and *Cappaert*, only after it "has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id*. at 700 & n. 4. This "careful examination" is required, the Court stated, "both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." *Id.* at 701-702. The Court held that the Government must acquire water for "secondary use" on the reservation under state law, "in the same manner as any other public or private appropriator." *Id*. at 702.

Thus, *New Mexico*, balancing the needs of federal reserved lands and Congress' policy of deference to state water law, adopted a strict necessity standard not only for quantifying the amount of water necessary to satisfy a federal reserved right, but also for determining whether a federal reserved right impliedly exists in the first instance. Under *New Mexico*'s necessity standard, a federal water right is impliedly reserved only if the reservation of water is "necessary" to fulfill the "very purposes" – that is, the primary purposes – of the reservation and prevent these purposes from being "entirely defeated." *New Mexico*, 438 U.S. at 700, 702. Under the necessity standard, a federal reservation of land does not automatically include the reservation of a water right. Rather, whether a water right is reserved depends on the circumstances of the reservation, such as whether water is available under state

law or from other sources to satisfy the primary reservation purposes.

The Ninth Circuit adopted a different standard for determining whether a federal water right impliedly exists. The Ninth Circuit held that *New Mexico*'s necessity standard applies only in *quantifying* the amount of water necessary to satisfy an existing reserved right, and does not apply in determining whether the reserved right impliedly *exists* in the first instance. App. 14-15. Rather, the Ninth Circuit held, whether a federal reserved right impliedly exists depends on whether the reservation purpose "envisions" or "contemplates" use of water. App. 14, 15. As the Ninth Circuit put it, "the question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation; the question is whether the purpose underlying the reservation envisions water use." App. 14. The function of *New Mexico*, the Ninth Circuit stated, is that it "added an important inquiry related to the question of *how much* water is reserved." App. 15 (original emphasis).

The Ninth Circuit's broad standard for determining whether a reserved water right impliedly exists – which focuses on whether the reservation purpose "envisions" use of water – conflicts with *New Mexico*'s strict necessity standard, which focuses on whether water is "necessary" for the reservation purpose. A reservation purpose may "envision" use of water even though water is available under state law or from other sources, but – if water is thus available – a reserved right may not be "necessary" for the reservation

purpose. Under the Ninth Circuit's decision, the circumstances of the reservation, such as the availability of water under state law or from other sources, are irrelevant in determining whether a federal reserved water right impliedly exists. Indeed, a reservation purpose may envision use of water under *state* water law, and under the Ninth Circuit's broad standard the reservation paradoxically would have a federal reserved right that preempts state law.

New Mexico itself applied its necessity standard in determining whether a federal reserved right impliedly exists and not in quantifying the right, which contradicts the Ninth Circuit's conclusion that *New Mexico* applies only in quantifying a reserved right. *New Mexico* held that the U.S. Forest Service did not have reserved water rights for various instream uses, such as aesthetic and recreational uses, in the Gila National Forest in New Mexico, because these were not the primary uses for which national forest lands are reserved. *New Mexico*, 438 U.S. at 707-717. Since *New Mexico* held that the Forest Service did not have reserved rights, the Court did not reach the issue of quantification. *New Mexico*'s distinction between primary and secondary reservation uses presupposes that its necessity standard applies in determining whether a reserved right impliedly exists; if the asserted right is for secondary and not primary uses, as in *New Mexico*, the reserved right does not exist and no issue of quantification arises.

New Mexico stated that its necessity standard was not a new standard, but in fact was the standard that

this Court had applied in upholding reserved rights in *Winters*, *Arizona* and *Cappaert*. *New Mexico* explained that the Court in those cases had upheld reserved rights only after it had "carefully examined" both the asserted reserved right and the specific reservation purposes and concluded that "without the water" the reservation purposes would have been "entirely defeated." *Id*. at 700 & n. 4. None of these decisions – *Winters*, *Arizona* and *Cappaert*, as well as *New Mexico* – suggests that a reserved right exists simply if the reservation purpose "envisions" use of water, as the Ninth Circuit held. No such language appears in any of the decisions. The Ninth Circuit has simply created a new standard for determining whether a reserved right impliedly exists, one that conflicts with the standard applied in *Winters*, *Arizona* and *Cappaert* as well as *New Mexico*.

The United States has argued in another proceeding in this Court that *New Mexico* applies in determining whether a reserved right exists, which is directly contrary to the Ninth Circuit's conclusion that *New Mexico* does not so apply. In opposing the State of Wyoming's petition for writ of certiorari in *Wyoming v. United States* in the 1988 term, the United States argued that "New Mexico does not . . . furnish an 'equitable device' for limiting the exercise of a federal reserved right once it has been determined such a right exists," but "[r]ather, New Mexico concerned only the issue of what circumstances are sufficient to give rise to a federal reserved right in the first place." Brief for United States in Opposition, at 9, *Wyoming v. United*

States, nos. 88-309, 88-492, 88-553 (Oct. Term 1988). The United States' argument in the *Wyoming* proceeding directly contradicts the Ninth Circuit's analysis here.

Under the Ninth Circuit's broad standard for determining the existence of federal reserved water rights, every federal land reservation in the nation would automatically have an implied reserved right in surface water and underlying groundwater as long as the reservation purpose "envisions" use of water. This broad category includes virtually every federal land reservation in the western states, an area that suffers from a chronic shortage of water supplies and in which water is "envisioned" for virtually every parcel of land. The Ninth Circuit's broad standard would impair the western states' authority to administer their water rights systems for surface waters and groundwater, and would create confusion and uncertainty concerning public and private rights in such waters.

The Ninth Circuit held not only that virtually every federal reservation automatically has a reserved right in surface water and groundwater, but also that the reserved right is open-ended and can be expanded beyond current reservation needs. Specifically, the Ninth Circuit stated that reserved rights are not fixed in time but are "flexible and can change over time." App. 20. Under the Ninth Circuit's decision, the rights of groundwater users in the Coachella Valley that have been recognized and exercised for many years or decades would be subject to limitation or defeasance by the Tribe's "flexible" reserved right in groundwater

that may "change over time." The Ninth Circuit decision is utterly unheedful of its impacts on groundwater users in the Coachella Valley who have long exercised and relied on their rights, and does not even mention the impacts. In *New Mexico*, however, this Court held that impacts on public and private water users are highly relevant in determining whether a reserved right impliedly exists; the Court stated that "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators" and "[t]his reality . . . must be *weighed* in determining what, *if any*, water Congress reserved for use in the national forests." *New Mexico*, 438 U.S. at 705 (emphases added).

Thus, while *New Mexico* adopted a strict necessity standard because of Congress' deference to state water law and the impacts on public and private water users, the Ninth Circuit adopted a broad and virtually limitless standard without even mentioning Congress' deference to state water law or the impacts on public and private water users. While *New Mexico* sought to balance and accommodate the needs of federal land reservations and these other competing needs and interests, no hint of balance and accommodation appears in the Ninth Circuit decision, which did not even mention such competing needs and interests.

III. THE RESERVED RIGHTS DOCTRINE DOES NOT APPLY TO GROUNDWATER.

A. The Rationale of the Reserved Rights Doctrine Does Not Support Its Extension to Groundwater.

This Court has never decided whether the reserved rights doctrine applies to groundwater. Although this question was presented to this Court in *Cappaert v. United States*, 426 U.S. 128 (1976), the Court declined to reach the question, and stated instead that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142. The Ninth Circuit acknowledged that "there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater." App. 4.

The Ninth Circuit stated that the reserved rights doctrine applies to "appurtenant" water, citing this Court's statement in *Cappaert*, 426 U.S. at 138, and concluded that the reserved rights doctrine applies to groundwater because groundwater is "appurtenant" water. App. 19. *Cappaert* also stated, however, that this Court has never decided whether the reserved rights doctrine applies to groundwater, *Cappaert*, 426 U.S. at 142, thus indicating that its reference to "appurtenant" water did not necessarily include groundwater.

Contrary to the Ninth Circuit decision, the reserved rights doctrine is not based on simple ownership of federal reserved lands, and does not automatically apply to all water "appurtenant" to such lands. Rather, *New*

Mexico held that the doctrine is an "exception" to Congress' deference to state water law, *New Mexico*, 438 U.S. at 715, and that Congress' deference to state law is relevant in informing the scope of the "exception." *Id*. at 701-702 ("This careful examination is required . . . because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water."). Thus, the question whether the reserved rights doctrine applies to groundwater depends on how broadly the exception to Congress' deference to state water law should be construed, which requires consideration of both the needs of federal reserved lands and Congress' traditional deference to state water law.

The exception to Congress' deference to state water law should not be extended to groundwater because the rationale of the reserved rights doctrine does not support its extension. The reserved rights doctrine is an outgrowth of the *Winters* doctrine, which was established by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and which recognized the existence of reserved water rights on Indian reservations. In *Winters*, this Court held that Congress – in reserving lands for the Indian tribe that occupied the Fort Belknap reservation in Montana – impliedly reserved a water right for the tribe in the surface waters of the Milk River, which flowed through the tribe's reservation, because the waters were otherwise subject to prior appropriation by non-Indian appropriators under the state priority rule of first use; thus, absent a federal reserved right, the tribe had no access to water for its reservation and its reservation lands were

"practically valueless." *Winters*, 207 U.S. at 576. Under the state priority rule of first use, which applies in the western states, the first appropriator of water for beneficial use has a prior right to the water as against subsequent appropriators; to be "first in time" is to be "first in right." *Jennison v. Kirk*, 98 U.S. 453, 458 (1879); *United States v. Oregon*, 44 F.3d 758, 763 (9th Cir. 1994); W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 130-132 (1956).[4]

In *Arizona v. California*, 373 U.S. 546, 599-601 (1963), this Court expanded the *Winters* doctrine to include all federal land reservations, and the expanded doctrine is generally referred to as the reserved rights doctrine. *Arizona* also applied the *Winters*, or reserved rights, doctrine in upholding reserved water rights for Indian tribes in the Colorado River, because the water was "essential to the life of the Indian people. . . ." *Arizona*, 373 U.S. at 598-599.

Thus, the *Winters* doctrine was developed and applied, as in *Winters* and *Arizona*, because the rights of

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[4] In *Oregon*, 44 F.3d at 763, the Ninth Circuit explained the state priority rule of first use, stating:

> Under an appropriation system, as such systems developed in the West, the first party to divert water for a beneficial use has the right to continue to divert that amount of water without interference from subsequent appropriators as long as the water continues to be put to beneficial use. In case of shortages, the entire share of the most recent appropriator is lost before the share of the next latest appropriator is diminished. Under such a system, the date of appropriation and the amount of water appropriated are the critical facts in the determination of the relative rights of water users.

Indian tribes in surface waters were subordinate to the rights of non-Indian appropriators under the state priority rule of first use, and the Indian tribes' reserved rights were necessary for them to have access to water for their reservations. The Ninth Circuit has explained this rationale of the *Winters* doctrine, stating:

> In those cases [*Winters* and *Arizona*], if water had not been reserved, it would have been subject to appropriation by non-Indians under state law. Because the Indians were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights, it is reasonable to conclude that Congress intended to reserve water for them.

Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir. 1981).

Although the state priority rule of first use applies to surface waters, the priority rule does not apply to groundwater. As the Ninth Circuit has explained in another case:

> While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. Under the traditional groundwater doctrines of absolute dominium, the American reasonable use rule, and the correlative rights rule, the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. . . .

Oregon, 44 F.3d at 769. In California, overlying landowners have equal and correlative rights to use groundwater underlying their lands as an incident of land ownership; the right attaches to the land, and is not created by actual use of water or lost by nonuse; and no overlying landowner has priority over another based on who uses the groundwater first. *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240-1241, 5 P.3d 853 (2000). Thus, the Tribe, as an overlying landowner of its reservation, has the same correlative right to use groundwater under California law as other overlying landowners, and its right is not subordinate to the rights of others under the priority rule of first use.[5]

Therefore, the rationale of the *Winters* doctrine – to prevent subordination of Indian water rights to non-Indian rights under the state priority rule of first use – does not apply to groundwater in California, because the priority rule of first use that applies to surface water does not apply to groundwater. Since the rationale of the *Winters* doctrine does not apply to groundwater, the doctrine itself does not apply. The same conclusion applies to federal reservations for purposes other than Indian reservations, such as national forests and parks, because the reserved rights doctrine as applied to

[5] Under California law, the priority rule of first use applies as between non-overlying landowners who appropriate groundwater – the first appropriator of groundwater has a prior right as against subsequent appropriators – but the rights of appropriators are subordinate to the rights of overlying landowners. *Barstow*, 23 Cal.4th at 1241.

such purposes is an outgrowth of the *Winters* doctrine.[6] Accordingly, the exception to Congress' deference to state water law should not be extended to groundwater under the reserved rights doctrine, at least unless there is no other source of water available for reservation purposes, which is not the case here.[7]

Further, federal reserved rights, which are based on rules of priority, could not easily be integrated into

[6] Although *New Mexico* did not directly involve the *Winters* doctrine – because the lands in *New Mexico* were reserved for national forests rather than Indian purposes – *New Mexico* made clear that its necessity standard applies to all federal reserved lands, including lands reserved for Indian purposes. After describing the decisions in *Winters* and *Arizona*, which involved Indian water rights, *New Mexico* stated that in those cases, as in other reserved rights cases, the Court had "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700, & n. 4. Thus, *New Mexico*'s necessity standard applies to lands reserved for Indian purposes as for other purposes.

[7] Congress may *expressly* create a reserved right in groundwater, as Congress sometimes does in approving Indian water rights settlements that include express reserved rights in groundwater. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW p. 1251, § 19.05[2] (2012). The question presented in this petition is whether a federal reserved right in groundwater *impliedly* exists by virtue of a federal reservation of land, where Congress has not expressly created the right. As *New Mexico* stated, the reserved rights doctrine is "a doctrine built on implication." *New Mexico*, 438 U.S. at 715. Notably, the Indian water rights settlement acts, to the extent they provide for Indian rights in groundwater, commonly provide that the Indians' rights are not superior to state-based rights. *E.g.*, Zuni Indian Tribe Water Rights Settlement Act of 2003, § 8(e), 117 Stat. 782 (Act does not create "vested right" in groundwater that is "superior" to rights in groundwater under state law).

state systems for regulating groundwater, such as those, like California's, that are based on principles of land ownership rather than rules of priority. A federal reserved right "vests" on the date that the reservation is created, and acquires priority in relation to other rights based on the dates that the various rights were acquired or created; a federal reserved right is senior to state-based rights acquired after the date of the reservation's creation, and is junior to earlier-acquired state-based rights. *Cappaert*, 426 U.S. at 138. A major purpose of the reserved rights doctrine, as this Court's decisions in *Winters* and *Arizona* make clear, is to establish the priority of federal reserved rights in relation to state-based rights in surface water. As explained above, however, the state priority rules that apply to surface water do not apply to groundwater. Rather, under the laws of California and other states, overlying landowners have the right to use groundwater as an incident of ownership of land, and no overlying landowner has priority over another based on who uses water first. *Barstow*, 23 Cal.4th at 1240-1241. A federal reserved right based on the priority rule of first use would not fit comfortably in state systems for regulating groundwater that are based on principles of land ownership rather than priority of first use. This incongruity further demonstrates that the exception to Congress' deference to state water law should not be extended to groundwater.

Federal and state laws that provide for regulation of water commonly distinguish between surface water and groundwater, and the distinction is not anomalous

as applied to the reserved rights doctrine. The United States has broad authority to regulate navigable surface waters under its commerce powers, *e.g.*, *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 406 (1940), but no court has suggested that the United States' commerce powers extend to groundwater. Various federal statutes – such as the Rivers and Harbors Act, 33 U.S.C. §§ 400 *et seq*., and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. – provide for regulation of "navigable waters,"[8] but groundwater is not a form of "navigable waters" and is not subject to direct federal regulation under these or other statutes. Most western states, including California, distinguish between surface water and groundwater in regulation of water. In California, for example, California's regulatory water rights agency has permit authority over appropriation of surface waters and subterranean streams, but its permit authority does not extend to groundwater. Cal. Water Code §§ 1200, 1221, 2550. Since the distinction between surface water and groundwater applies in other regulatory contexts, the distinction properly applies in the context of reserved water rights, particularly in light of Congress' policy of deference to state water law.

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[8] The Rivers and Harbors Act prohibits obstructions in "navigable waters," 33 U.S.C. § 403, and prohibits refuse deposits in "navigable waters," *id.* at § 407. The Clean Water Act prohibits discharges of dredged or fill materials into "navigable waters" without a permit, 33 U.S.C. § 1344(a), and prohibits the "discharge of a pollutant" – defined as an addition of a pollutant to "navigable waters," *id*. at § 1362(12) – without a permit. *Id.* at § 1342(a)(1).

B. The Ninth Circuit Decision Conflicts With the Decisions of the Supreme Courts of Wyoming and Arizona.

The Ninth Circuit's decision below conflicts with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), and, to a significant degree, with the Arizona Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999). The conflict between the decisions provides another basis for this Court to review the Ninth Circuit decision.

In *Big Horn*, the Wyoming Supreme Court held flatly that "the reserved water doctrine does not extend to groundwater." *Big Horn*, 753 P.2d at 100. Although the Court stated that the "logic" of the reserved rights doctrine supports its extension to groundwater, *id.* at 99, the Court did not address the argument, raised in this petition, that the rationale of the reserved rights doctrine does not support its extension to groundwater. The Wyoming Supreme Court's decision reflected the traditional distinction between surface water and groundwater that underlies the western states' systems for regulating water, and made clear that the reserved rights doctrine does not apply to groundwater simply because it applies to surface water. This Court's decision in *Cappaert* voiced the same concern, in stating that although the Court had recognized a reserved right in surface water, "[n]o cases of this Court have applied the doctrine of implied reservation of water

rights to groundwater." *Cappaert*, 426 U.S. at 142. The Ninth Circuit's conclusion that the reserved rights doctrine applies to groundwater directly conflicts with the Wyoming Supreme Court's decision in *Big Horn*.

In *Gila River*, the Arizona Supreme Court – although holding that federal reserved rights apply to groundwater – also held that whether a federal reserved right exists depends on the circumstances of the reservation, and in particular that a reserved right does not exist if other waters are available for the reservation needs. Specifically, the Court stated that whether a federal reserved right exists requires "fact-intensive inquiries that must be made on a reservation-by-reservation basis," and that "[a] reserved right in groundwater may only be found where other waters are inadequate to accomplish the purpose of the reservation." *Gila River*, 989 P.2d at 748. The Ninth Circuit's decision conflicts with the Arizona Supreme Court's decision in *Gila River*, because the Ninth Circuit held that a reserved right exists if the reservation purpose "envisions" use of water regardless of the other circumstances of the reservation, App. 14, and regardless of whether "other sources of water" are available for the reservation. App. 13.[9]

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[9] The Arizona Supreme Court in *Gila River* also stated that groundwater users could cause "depletion" of groundwater under Arizona's reasonable use doctrine, and thus a reserved right is necessary to ensure availability of water on Indian reservations. *Gila River*, 989 P.2d at 748. Under California's correlative rights doctrine, however, no overlying landowner has the right to impair

IV. THE TRIBE DOES NOT HAVE A RESERVED RIGHT IN GROUNDWATER.

The question whether the Tribe has a reserved right in groundwater raises significant issues concerning the nature of federal reserved water rights, and more specifically whether the circumstances of the reservation are relevant in determining whether a federal reserved right impliedly exists, and if so, what circumstances are relevant.

The most significant issue is whether the existence of a water right under *state* law is relevant in determining whether a federal reserved water right impliedly exists under *federal* law. Petitioner DWA contends that since the Tribe has the same right to use groundwater under California law as other overlying landowners, the Tribe's claimed reserved right in groundwater is not "necessary" under *New Mexico*'s necessity standard and therefore does not impliedly exist. Since the Tribe has the same right to use groundwater under California law as other overlying landowners, the Tribe is not in the same situation as the Indian tribes in *Winters* and *Arizona*, who had no other sources of water and whose reservation lands were "practically valueless" without a federal reserved right. *Winters*, 207 U.S. at 576.

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the rights of other overlying landowners by depleting the groundwater. *O'Leary v. Herbert*, 5 Cal.2d 416, 423, 55 P.2d 834 (1936); *Miller v. Bay Cities Water Co*., 157 Cal. 256, 276, 107 P. 115 (1910).

The Ninth Circuit rejected petitioner DWA's argument because "state water rights are preempted by federal reserved rights." App. 21. Obviously federal reserved rights preempt state water rights under the Constitution's Supremacy Clause, and DWA does not contend otherwise. Rather, DWA contends that since the Tribe has the right to use groundwater under California law, the Tribe's claimed reserved right does not meet *New Mexico*'s necessity standard and does not impliedly exist under *federal* law, and thus no issue of preemption arises. The Ninth Circuit responded to an argument that DWA did not make, and failed to respond to the argument that DWA made.

Petitioner DWA also contends that the Tribe's claimed reserved right in groundwater does not meet *New Mexico*'s necessity standard because the Tribe has a decreed right to use Whitewater River surface water for its reservation needs. ER 115-116. The Tribe's decreed right is based on a 1938 decree, the Whitewater River Decree, that adjudicated all water rights in the Whitewater River and its tributaries. *Id.* Indeed, the Tribe's decreed right includes the precise amount of water that the United States had "suggested" during the adjudication proceeding as necessary to meet the Tribe's reservation needs. ER 119-120. The combination of the Tribe's decreed right to use surface water and its right to use groundwater under California law provides ample water for the Tribe's reservation needs.

Additionally, the historical documents surrounding creation of the Tribe's reservation by the 1870s presidential executive orders indicate that the Tribe

was not using groundwater when its reservation was created. ER 69, 79, 88. The Tribe's failure to use groundwater when its reservation was created defeats any implication that Presidents Grant and Hayes, in issuing the executive orders, impliedly intended to create a reserved right in groundwater that conflicts with and overrides California law.

Even today, the Tribe does not use or attempt to use groundwater for its reservation needs, but instead purchases water from DWA and CVWD. ER 138. The Tribe's failure to use or attempt to use groundwater demonstrates that the prosperity and success of the Tribe's reservation does not depend on whether the Tribe has a reserved right in groundwater. Notably, the Tribe's complaint does not allege otherwise. Instead, the complaint alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water into the groundwater basin that the Tribe allegedly "owns." ER 23. Thus, the Tribe seeks money from the water agencies rather than wet water for its reservation needs. The purpose of the reserved rights doctrine, however, as in *Winters* and *Arizona*, is to provide needed water for federal reserved lands, not to obtain compensation from those who provide water.

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CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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