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***Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017)**

Rebecca Newsom

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, the Ninth Circuit upheld the Tribe’s federal reserved right to the groundwater underlying its reservation. This decision enforces that the courts will not defer to state water law when there is an established federal reserved water right. Further, the Ninth Circuit expressly extended this right to groundwater.

I. INTRODUCTION

The United States Supreme Court established in *Winters* that land withdrawn from the public by the United States for federal purposes creates an implied reservation of all appurtenant water “to the extent needed to accomplish the purpose of the reservation.”¹ The Supreme Court further established that federally reserved water rights apply to federal enclaves and Indian reservations.²

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the Agua Caliente Band of Cahuilla Indians (“Tribe”) brought action against Coachella Valley Water District and Desert Water Agency (collectively “Agencies”) seeking declaratory judgment of federally reserved rights to groundwater underlying its reservation and injunctive relief to prevent the Agencies from interfering with the Tribe’s groundwater rights.³

The Agencies argued that under *United States v. New Mexico* there is no implied right to groundwater because other sources of water exist to meet the reservation’s water demand, and therefore, since water is not a primary purpose of the reservation, Congress intended deference to state water law.⁴ The Ninth Circuit concluded that the Tribe does have a federal reserved right to the groundwater underlying its reservation.⁵ The Ninth Circuit made this determination by analyzing three issues.⁶ First, the court determined that when the United States created the

1. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (referencing U.S. CONST. art. I, § 8, U.S. CONST. art. IV, § 3) (citing *Winters v. United States*, 207 U.S. 564 (1908))).

2. *Id.* (citing *Cappaert*, 426 U.S. 128, 138).

3. *Id.* at 1267.

4. *Id.* at 1269 (citing *United States v. New Mexico*, 438 U.S. 696 (1978)).

5. *Id.* at 1265.

6. *Id.* at 1267.

Tribe's reservation, it intended to reserve water.⁷ Next, the court determined that the reserved rights doctrine applies to groundwater.⁸ Lastly, the court determined that state water law does not affect the analysis of a federally reserved water right.⁹

II. FACTUAL AND PROCEDURAL BACKGROUND

The Agua Caliente Reservation in the Coachella Valley was established by Presidential Executive Orders issued in 1876 and 1877.¹⁰ Water in the southwestern desert is scarce, and rainfall totals in the Coachella Valley average three to six inches per year.¹¹ The Whitewater River System is Coachella Valley's only real source of surface water, and most of the production of water occurs only in the winter months.¹² Therefore, nearly all of the valley's annual water supply comes from the underlying aquifer, known as the Coachella Valley Groundwater Basin ("the Basin").¹³ "The Coachella Valley Groundwater Basin supports 9 cities, 400,000 people, and 66,000 acres of farmland."¹⁴ However, groundwater pumping from the Basin has not been able to keep up with demands since the 1980s, despite attempts at aquifer recharge.¹⁵ Though groundwater is not currently pumped on the reservation, aside from small amounts of surface water from the Whitewater River System, the Tribe relies on the Basin for its annual water consumption by purchasing water from the Agencies.¹⁶

The Tribe brought an action for declaration of their groundwater rights in May 2013 over the concern of diminishing groundwater resources.¹⁷ In June 2014, the United States intervened as a plaintiff, positing that the Tribe has a reserved right to groundwater.¹⁸ The district court addressed whether the Tribe had a reserved right, and an aboriginal right to groundwater.¹⁹ In March 2015, the district court granted partial summary judgment, and held the reserved rights doctrine applied to groundwater.²⁰ Further, the district court held that appurtenant groundwater was reserved by the United States when it established the

7. *Id.* at 1270.

8. *Id.* at 1271-72.

9. *Id.* at 1272.

10. *Id.*

11. *Id.* at 1266.

12. *Id.*

13. *Id.*

14. *Id.* (citing CVWD-DWA, The State of the Coachella Valley Aquifer at 2).

15. *Id.*

16. *Id.* at 1266-67.

17. *Id.* at 1267.

18. *Id.*

19. *Id.*

20. *Id.*

Tribe's reservation.²¹ The Agencies appealed the district court's decision, and the Ninth Circuit affirmed.²²

III. ANALYSIS

On appeal, the Ninth Circuit addressed whether the Tribe had a reserved right to the underlying groundwater.²³ The Ninth Circuit concluded that the issue required a three-step determination process.²⁴ First, the court analyzed "whether the United States intended to reserve water when the reservation was created."²⁵ Then, the court determined whether the reserved right applies to groundwater.²⁶ Finally, the court analyzed whether state law, historic lack of drilling, or a state-based decree should be factored into the court's determination.²⁷

A. *The Reserved Rights Doctrine*

When the United States "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."²⁸ Further, the Supreme Court has established the Winters Doctrine, in which federally reserved water rights are applied "to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams."²⁹ Waters rights were reserved because without water, the reservation "lands would have been useless."³⁰ However, the Winters Doctrine is limited.³¹ The Winters Doctrine reserves water only if it is necessary for the purpose of the reservation, and the water is appurtenant to the reserved land.³² If the Winters Doctrine applies, the rights "vest on the date of the reservation and are superior to the rights of future appropriators."³³

To determine if the United States intended to impliedly reserve water for the Tribe, the Ninth Circuit first analyzed the Executive Orders establishing the reservation.³⁴ In *New Mexico*, the Supreme Court held that the reserved rights doctrine only applies when the water is necessary

21. *Id.*

22. *Id.* at 1262-63.

23. *Id.* at 1267.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1268. (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing U.S. CONST. art. I, § 8, U.S. CONST. art. IV, § 3)).

29. *Id.* at 1268 (quoting *Cappaert*, 426 U.S. at 138).

30. *Id.* (quoting *Arizona v. California*, 373 U.S. 546, 600 (1963)).

31. *Id.*

32. *Id.* (citing *Cappaert*, 426 U.S. at 138; *Winters v. United States*, 207 U.S. 564, 575-78 (1908)).

33. *Id.* (quoting *Cappaert*, 426 U.S. at 138).

34. *Id.* at 1269.

to fulfill the *primary* purpose of establishing the reservation.³⁵ Thus, the Supreme Court established water is not impliedly reserved for secondary purposes.³⁶ The Agencies argued that the distinction made in *New Mexico*, between primary and secondary sources of water, states a federal reserved right only exists if other sources of water are not available.³⁷ Further, the Agencies argued that if other sources do exist, Congress intended deference to state water law.³⁸ The Ninth Circuit, however, interpreted *New Mexico* differently.³⁹ The court held that *New Mexico* stands for the determination of implied reservation of federal rights resting on the primary purpose of reserving the land, and the water use envisioned at the time of establishment.⁴⁰

The Ninth Circuit considered the Tribe's specific circumstances to determine whether the primary purpose of the reservation contemplated water use.⁴¹ The Executive Orders establishing the reservation stated the land was reserved for "the permanent use and occupancy of the Mission Indians."⁴² Given the arid nature of the land, the Ninth Circuit determined that water use must be tied to the Tribe's ability to live permanently on the land.⁴³ Thus, the Ninth Circuit held that the United States contemplated water as a primary purpose when it established the Reservation, which created a federal reserved right to water.⁴⁴

B. *The Reserved Water Rights Doctrine Applies to Groundwater*

While there is no federal authority expressly holding that the Winters Doctrine applies to groundwater, the Ninth Circuit held that it does.⁴⁵ At issue was whether groundwater is considered "appurtenant" to the reservation.⁴⁶ The Ninth Circuit defined appurtenant water as "those waters which are attached to the reservation."⁴⁷ The Supreme Court has not limited appurtenant water to surface water only.⁴⁸ In *Cappaert*, the Supreme Court held that "the United States can protect its water from subsequent diversion whether the diversion is of surface or

35. *Id.* at 1268-69 (emphasis added) (citing *United States v. New Mexico*, 438 U.S. 696, 701-02 (1978)).

36. *Id.* at 1269.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1270.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1271. (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

47. *Id.*

48. *Id.*

groundwater.”⁴⁹ The Ninth Circuit found that this language impliedly hints at the application of the reserved water right doctrine to groundwater.⁵⁰

The Ninth Circuit reasoned that since surface water in the Valley is so scarce, there is a definite reliance on groundwater.⁵¹ Because survival is conditioned on access to water, a reservation without an adequate source of surface water must be able to access their groundwater.⁵² The court found that the Winters Doctrine was established to maintain sustainable lands for the Indian reservations that were in arid parts of the country.⁵³ Further, the court found that there is no reason to believe that the reserved water rights doctrine is only applicable to appurtenant surface water.⁵⁴ Thus, the creation of the Reservation established an implied right to both surface and groundwater in the Coachella Valley.⁵⁵

C. Relationship Between the Tribe’s Reserved Right and State Water Law

The Ninth Circuit reaffirmed that federally reserved rights preempt state water rights.⁵⁶ In *Cappaert*, the Supreme Court stated that “a reserved right in unappropriated water...vests on the date of the reservation and is superior to the rights of future appropriators.”⁵⁷ However, the Agencies argued that the federally reserved right is not necessary for survival of the Tribe, because the Tribe already receives water through state laws and the Whitewater River Decree.⁵⁸

The Ninth Circuit rejected the Agency’s argument for three reasons.⁵⁹ First, it is well established that federal reserved rights trump state rights.⁶⁰ Thus, the Tribe’s correlative rights under California state law is not a determining factor in this analysis.⁶¹ Next, a Tribe’s inactive exercise of a federal right, does not diminish the right, because a reserved right cannot be abandoned.⁶² Although the Tribe has never drilled for its own groundwater, it has not forfeited this right.⁶³ Lastly, the federal reserved inquiry, established in *New Mexico*, analyzes the purposes for

49. *Id.* (quoting *Cappaert*, 426 U.S. at 143).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1271-72.

56. *Id.* at 1272 (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51-52 (9th Cir. 1981)).

57. *Id.* (quoting *Cappaert*, 426 U.S. at 138).

58. *Id.*

59. *Id.*

60. *Id.* (citing *Walton*, 647 F.2d at 51).

61. *Id.*

62. *Id.*

63. *Id.* (citing *Walton*, 647 F.2d at 51).

establishing the reservation, at the time it was created.⁶⁴ Although the Tribe does not currently need the groundwater to survive, due to other sources, the United States envisioned water use at the formation of the reservation, and therefore, the reserved right exists.⁶⁵

IV. CONCLUSION

This decision is the first controlling federal authority concluding that the federal reserved water rights doctrine applies to groundwater. The case is currently on petition of certiorari by the Agencies to the United States Supreme Court. If the Supreme Court grants review, there will be authority expressly stating whether the Winters Doctrine applies to groundwater. This is an important issue, especially in dry southwestern climates where diminishing groundwater supplies will continue to be a problem. If the Supreme Court affirms the Ninth Circuit opinion, it will establish heavy precedent, that may initiate water rights claims across the country.

64. *Id.*

65. *Id.*