

1-1-2017

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1262 (9th Cir. 2017)

COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) (holding: (i) the United States impliedly reserved a water right when establishing the Agua Caliente Reservation; (ii) the Tribe’s implied federal reserved water right extended to groundwater; and (iii) the Tribe’s state water entitlements to groundwater did not disqualify its implied federal reserved water right).

The Agua Caliente Band of Cahuilla Indians (“Tribe”) inhabited the Coachella Valley prior to California’s Admission to the Union in 1850. Two Presidential Executive Orders issued in 1876 and 1877 established the majority of the Agua Caliente Reservation. Today, the United States holds a series of lands that are “interspersed in a checkerboard pattern” in trust for the Tribe.

The Coachella Valley contains an arid southwestern desert. Rainfall averages three to six inches per year and the Whitewater River System, the only source of surface water, produces a fluctuating annual supply between 4,000 and 9,000 acre-feet that primarily occurs in winter months. Currently, the Tribe receives surface water from the Whitewater River System consistent with the Whitewater River Decree, a 1983 California Superior Court adjudication that addressed state-law water rights for river system users. The adjudication resulted in a state court order that allotted water for the Tribe’s benefit, primarily because the United States, as holder of partial Agua Caliente Reservation lands in trust, participated in the adjudication on the Tribe’s behalf. However, the adjudication reserves only a minimal amount of water for the Tribe, providing enough to irrigate nearly 360 acres of the reservation’s approximately 31,369 acres. Additionally, the river system peaks in the winter months, which leaves the allotment filled outside of growing season.

This inconsistent and “virtually nonexistent” surface water supply causes the Tribe to predominantly rely on groundwater for all consumptive use on the reservation during the year. Therefore, almost all regional water is sourced from the Coachella Valley Groundwater River Basin, the aquifer underlying the valley. The Tribe, however, does not pump groundwater on its reservation, but purchases groundwater from the Coachella Valley Water District and the Desert Water Agency (“water agencies”).

Over concern for diminishing groundwater resources, the Tribe filed an action for declaratory and injunctive relief against the water agencies in the United States District Court for the Central District of California. The Tribe requested a declaration that it had a “federally reserved right and an aboriginal right to the groundwater underlying the reservation.” The district court later

granted the United States' motion to intervene as a plaintiff to support the Tribe's allegation that it had a reserved right to groundwater.

The parties divided the litigation into three phases. With respect to Phase I, the only phase relevant for this case, the district court held that "the reserved rights doctrine applied to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation." Subsequently, the district court certified its order for interlocutory appeal and the water agencies petitioned the Ninth Circuit Court of Appeals for permission to hear the appeal. The court, on de novo review, addressed the only issue on appeal: whether the Tribe had a federal reserved right to the groundwater underlying its reservation. In so doing, the court approached its analysis in three steps.

First, the court determined whether the United States impliedly reserved water when establishing the Agua Caliente Reservation. This question is two-pronged: (1) whether water is reserved if a reservation's primary purpose anticipates water use; and (2) if so, whether the Agua Caliente Reservation's primary purpose contemplated water use.

The court began its analysis by examining the *Winters* doctrine, and found that it established that "federal reserved water rights are directly applicable 'to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.'" However, the *Winters* doctrine is limited to certain situations; it reserves water necessary to accomplish the purported means of the reservation and reserves water if it is appurtenant to the withdrawn land. Following that understanding, the court differentiated the parties' and the district court's application of the *Winters* doctrine that specifically addressed whether the Tribe's reserved right extended to groundwater from the more overarching issue concerning whether the mere existence of a federal reserved right depended on the Agua Caliente Reservation maintaining an implicit right to use water.

The court then evaluated the first prong when addressing the Tribe's implied reserved right to water. The court invoked *United States v. New Mexico* and reasoned, "the federal purpose for which land was reserved is the driving force behind the reserved rights doctrine." Further, that the *New Mexico* Court patterned a consistent conclusion whenever the reserved water rights doctrine is raised—an insufficient water supply defeats the purposes of the reservation. Therefore, the court adopted *New Mexico's* holding that water is reserved when the reservation's primary purpose foresees water use. The court then evaluated the second prong, whether the Tribe's primary purpose contemplated water use. To answer this question, the court synthesized the Executive Orders establishing the Agua Caliente Reservation and Supreme Court precedent to conclude that "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." Therefore, the United States impliedly reserved water for the Tribe.

Second, the court addressed whether the Tribe's implied reserved water right extended to the Agua Caliente Reservation's underlying groundwater. The court reiterated the *Winters* doctrine requirements and determined that although the Tribe met the first requirement that the reservation's purported means necessitated water use, the second requirement that unappropriated water must be appurtenant to the reservation remained. To find a resolution, the

court reasoned that appurtenance is not limited to surface water and extrapolated from Supreme Court precedent that the United States can protect groundwater and, along that vein, impliedly reserved water may include appurtenant groundwater. Further, the court considered the Tribe's reliance on groundwater when reasoning that the minimal surface water availability conditions the Tribe's survival on groundwater access. From this line of reasoning, the court clarified that the *Winters* doctrine purported to provide sustainable livelihoods to Tribes inhabiting reservations in arid areas, like the Agua Caliente Reservation, and included access to both appurtenant surface water and groundwater. Therefore, the Tribe's implied reserved water right included groundwater.

Third, the court addressed whether the above two holdings withstood the water agencies' arguments that: (1) the Tribe received water pursuant to California's correlative rights doctrine; (2) the Tribe did not need a federal reserved right to groundwater in light of its allotted surface water from the Whitewater River Decree; and (3) the Tribe never drilled for groundwater on its reservation. The court rejected each in turn. First, federal water rights, such as the implied federal reserved water right, preempt state water rights. Second, *New Mexico* did not inquire into the *current* necessity of water, it focused on whether the reservation's *inception* purported such a necessity. Third, lacking historical access to groundwater on the reservation did not foreclose the Tribe's current access to groundwater. Therefore, compounded with the federal primacy of reserved water rights, the Tribe's implied federal water right to groundwater remained intact.

Accordingly, the court affirmed the district court holding that the United States impliedly reserved appurtenant groundwater when creating the Agua Caliente Reservation.

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STATE COURTS

ARIZONA

Silver v. Pueblo Del Sol Water Co., 384 P.3d 814 (Ariz. Ct. App. 2016) (holding: (i) that the Arizona Department of Water Resources' ("ADWR") interpretation of "legal availability" was valid under the statute defining "adequate water supply"; (ii) that ADWR must consider an unquantified federal reserved water right for the purposes of an Adequate Water Supply Designation ("AWSD"); and (iii) that ADWR was not required to separately consider the impact of pumping on a conservation area and the local surface or groundwater).

In 1988, the United States Congress designated roughly thirty-six miles of the San Pedro River basin ("Basin") as a national conservation area ("Conservation Area"), and simultaneously created a federal reserved water right for the Conservation Area "in a quantity sufficient to fulfill the purpose" of protecting the public lands surrounding the River. The Bureau of Land Management ("BLM") manages the Conservation Area. Since 1989, BLM has filed three statements of claim for the Conservation Area covering surface and groundwater.