



Supreme Court Declines to Review Ninth Circuit Decision Applying Federal Reserved Water Rights Doctrine to Groundwater

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The 2012-2016 [drought](#) in California and parts of other western states may have [ended](#), but availability of water will continue to present [issues for Congress to consider](#). While state, rather than federal, law typically governs allocations of water resources within a state, there are exceptions where federal law does affect water allocation. The [federal reserved water rights doctrine](#), for example, holds that when the federal government reserves federal lands for a particular purpose (such as for a tribal reservation or national monument), it impliedly reserves a right to water necessary to accomplish the purposes for which the reservation was created. Since 1908, when the Supreme Court established the doctrine in [Winters v. United States](#), courts have applied it to surface waters; a March 2017 [decision](#) of the U.S. Court of Appeals for the [Ninth Circuit](#) (Ninth Circuit) held, apparently for the first time, that the doctrine can encompass groundwater as well. On November 27, 2017, the Supreme Court [declined to review](#) this decision, which thus, for now, sets a potentially important precedent within the Ninth Circuit for other groundwater resource issues and disputes.

The case [Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District](#) originated when a tribe sued local water agencies in 2013 in federal district court in California, alleging that the water agencies were adversely affecting the quantity and quality of water available to them by over-drafting an aquifer. Among other claims, the tribe sought a declaration that it had a federally reserved right to the groundwater underlying the reservation, which was established in the 1870s. The United States [intervened](#) to defend its ownership, tribal trust, and sovereign interests in the water rights and the tribe's reservation. In 2015, the district court [ruled](#) in favor of the tribe and the United States on the threshold claim that the government impliedly reserved appurtenant water sources—including underlying groundwater—when it created the tribe's reservation. (Subsequent phases of the [Agua Caliente Band](#) case are still being litigated. They involve whether the tribe owns the “pore space” or “storage space” of the groundwater basin

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underlying the reservation, whether it has rights to water of a certain quality, and the quantification of any identified groundwater rights.)

The water agencies brought an [interlocutory](#) (i.e., mid-litigation) appeal. The Ninth Circuit affirmed the district court's holding, [stating](#) that “while we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater, we now expressly hold that it does.” The court explained:

The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities, we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water.

The water agencies petitioned the Supreme Court for a writ of certiorari in July 2017. They [argued](#), among other things, that the court should “narrowly construe the reserved rights doctrine because it conflicts with Congress’ policy of deference to state water law.” Ten states (Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming) filed a [brief](#) as amici curiae in support of the water agencies’ petition, on similar grounds. In response, the [tribe](#) and the [United States argued](#) not only that the court had applied the proper legal standards and arrived at the correct conclusions, but furthermore that “[t]he decision below is also interlocutory, and this Court may therefore review the questions presented in these petitions after further litigation defines the scope of the Tribe’s federal reserved water rights.” The Supreme Court denied certiorari; per standard practice, it did so without explanation or comment.

In light of this decision and the Supreme Court’s denial of a writ of certiorari, [some](#) commentators [anticipate](#) that other tribes may be more likely to sue for groundwater rights or to assert stronger positions in negotiations with water agencies. [Others](#) argue that the effect of the decision on water disputes is less certain and could depend on the interaction between the *Winters* doctrine and state water law. Importantly, the *Winters* doctrine of federal reserved rights [also applies](#) to reservations that are not directly related to tribal interests, such as national monuments. Accordingly, future litigation could also explore whether groundwater rights are necessary to accomplish the purposes for which these other types of reservations were created, such as environmental protection.

The outcome of any such lawsuits could depend on their timing and location. In terms of timing, the *Agua Caliente Band* holding that the federal reserved water rights doctrine applies to groundwater is now the law of the circuit in the Ninth Circuit. However, as the [United States](#) and the [tribe](#) noted in their briefing to the Supreme Court, the water agencies may get the opportunity to file new petitions with the Supreme Court on this issue after subsequent stages of the litigation have concluded. If the Supreme Court took such an appeal, its ruling could affect any ongoing litigation and potentially reopen the issue of whether the *Winters* doctrine extends to groundwater rights. With respect to location, the potential exists for courts outside the Ninth Circuit to come to different conclusions about the application of the *Winters* doctrine to groundwater. The Ninth Circuit encompasses a large [geographic area](#) where both arid areas and federal lands are common, making it particularly important for federal law on water rights. However, aridity and large federal landholdings also characterize [other federal appellate circuits](#), including the Eighth and Tenth Circuits, so lawsuits claiming federal reserved groundwater rights could arise there as well.

Much remains unsettled about water resource management, including the federal government’s role. The decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* appears to expand, at least in the Ninth Circuit, the scope of federal preemption of state water law by expressly including groundwater. This, in turn, could implicate water resource disputes, particularly in light of [groundwater depletion](#) for [agricultural irrigation](#) and [other purposes](#), as well as the [scientific consensus](#) that, as one report stated: “[u]nder climate change, reliable surface water supply is expected to decrease due to increased variability of river flow,” likely making groundwater an increasingly important resource in

many areas. While the *Agua Caliente Band* case breaks new ground, it remains to be seen what legal and practical issues the case will bring to the surface. Whatever the outcome in the courts, however, Congress has **constitutional authority** over the nature and extent of federal water law and could alter this legal landscape with future legislation.
