

GROUNDWATER CASE

Water agencies aim for Supreme Court

Decision could set major precedent on tribes' rights

IAN JAMES
THE DESERT SUN

The Coachella Valley's largest water agencies will appeal to the U.S. Supreme Court to settle the question of whether the Agua Caliente Band of Cahuilla Indians has a federally established right to groundwater beneath the tribe's reservation.

The Coachella Valley Water District and the Desert Water Agency announced Wednesday that they plan to submit their petition for a review by the Supreme Court in June or July. The agencies' board members decided to take the case to the high court three weeks after a federal appeals court ruled the tribe holds a "reserved right" to groundwater.

The case is likely to set an important precedent for tribes across the country.

Leaders of the water agencies said they're pursuing the appeal to protect the general public's right to water and defend their position that the aquifer beneath the California desert is a shared public resource.

"We believe that the water belongs to everyone, all of it," said James Cioffi, president of the Desert Water Agency's board. "We've always maintained that this is a shared resource."

John Powell, Jr., president of the CVWD board, said the agencies are appealing "on behalf of all the water users in the Coachella Valley."

"Granting control of the groundwater to the Tribe could seriously affect the future of this valley," Powell said in a statement.



JAY CALDERON/THE DESERT SUN

Please see COURT, 6A Water from the Colorado River flows to groundwater replenishment ponds near Palm Springs.

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JAMES CIOFFI Desert Water Agency board president

Court

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The Supreme Court is expected to decide in the fall whether to accept the case or decline to review it.

The Agua Caliente tribe sued the two water agencies in May 2013, seeking to assert rights to a portion of the area's groundwater and to gain greater influence in decisions about how the aquifer is managed. The tribe has accused the agencies of imperiling the aquifer by allowing its levels to decline over the years and by using saltier, less pure Colorado River water to offset the amounts drawn out.

The water agencies have defended their efforts to manage the supply of groundwater and have insisted that water from the Colorado River meets all drinking water standards.

The March 7 ruling by the Ninth Circuit Court of Appeals was the first ever to directly address the question of whether water rights reserved by the federal government apply to groundwater as well as surface water. The appeals court upheld a 2015 ruling in which a judge backed the tribe's claim that it holds a federally granted "reserved right" to groundwater beneath its reservation in Palm Springs and surrounding areas.

The three-judge panel said in the opinion, which was written by Circuit Judge Richard C. Tallman, that the creation of the Agua Caliente Reservation in the 1870s "carried with it an implied right to use water from the Coachella Valley aquifer."

The water districts have challenged that position, arguing the tribe shouldn't have special rights above all other water users.

Managers of the two



PHOTOS BY JAY CALDERON/THE DESERT SUN
Water from the Colorado River flows near Highway 111 and Windy Point in Palm Springs on Wednesday toward the percolation ponds where it will recharge the aquifer.

agencies say they're concerned about the tribe's motives in the lawsuit.

"We don't know how much water the Agua Caliente want or what they would do with it," Cioffi said, "but they have said that they are an entrepreneurial organization."

The Agua Caliente tribe relies on the water districts to pump groundwater for its reservation, where thousands of homes are built on leased tribal land. The agencies also supply water to the tribe's hotels, casinos and golf courses.

The reservation spreads across more than 31,000 acres in a checkerboard pattern that includes parts of Palm Springs, Cathedral City, Rancho Mirage and the Santa Rosa and San Jacinto mountains. The tribe, which has more than 400 members, owns the Spa Resort Casino in Palm Springs and the Agua Caliente Casino Resort Spa in Rancho Mirage, and has plans for new housing subdivisions.

Leaders of the Agua Caliente tribe did not respond to a request for comment about the water agencies' announcement.

Agua Caliente Tribal Chairman Jeff Grubbe has said the case is about securing a "seat at the table" for the tribe to have a voice in water management decisions.

If the court rules in favor of the Agua Caliente or declines to review the matter, the case would then return to federal court to settle other questions about the tribe's rights, including issues of water quality and how much groundwater the tribe is entitled to.

If the tribe prevails before the Supreme Court, other tribes across the country would also gain legal backing to assert rights to groundwater, which could in turn strengthen their positions in negotiations or court-administered adjudications divvying up water supplies.

The U.S. Department of Justice has signed on as a party to the lawsuit in support of the tribe.

Leaders of Native American tribes across the West have also been closely watching the case. A list of tribes joined the case last year, backing the Agua Caliente in a "friend-of-the-court"

brief. They include the Morongo Band of Mission Indians in California, the Spokane Tribe of Indians in Washington and the Pyramid Lake Paiute Tribe in Nevada, among others.

The Supreme Court hears a small number of the cases that are petitioned for review and usually focuses on cases in which there is a conflict in the law that needs to be resolved.

"There's definitely some conflict in the law here, and the issue's very important. But that alone doesn't guarantee Supreme Court review," said Leon Szeptycki, executive director of Stanford University's Water in the West program. "The Supreme Court will really be deciding whether the conflict is ripe enough for them to review, or whether they'd like to wait and see the courts develop the issue more, or see this case get litigated to a final judgment before they step in."

Sarah Krakoff, a professor at the University of Colorado Law School, said the case will be an important one to watch but she can't offer any prediction as to what the court might decide if it takes up the case.

The Ninth Circuit's decision rests on solid reserved rights and Indian law principles," Krakoff said in an email. "But it is the first case to hold that a tribe's reserved water right includes groundwater, and the (Supreme) Court does not have Justices with deep backgrounds in water law or western issues."

In arguments laid out in court documents, the two sides have cited details of the reservation's establishment in 1876 through an executive order by President Ulysses S. Grant, as well as a subsequent order by President Rutherford B. Hayes in 1877 setting aside additional lands for the tribe.



Coachella Valley Water District board members, from left, Castulo Estrada, John Powell Jr. and Jim Barrett talk during the board's public meeting about water rate increases in Palm Desert on June 14.



Agua Caliente tribal chairman Jeff Grubbe pauses near a stream in the Indian Canyons during an interview about the Coachella Valley's aquifer and the tribe's lawsuit.

Both sides also referred to a 1908 Supreme Court decision, *Winters v. United States*, which affirmed that Indian tribes are entitled to sufficient water supplies for their reservations.

The Ninth Circuit Court of Appeals said in its opinion that 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." The court said the doctrine applies to both surface water and groundwater on reserved land.

The judges also pointed out that many areas of the western United States rely on groundwater as their only viable water source.

If the tribe wins the case, the Coachella Valley could eventually join a list of 23 other California groundwater basins that have been adjudicated by courts. In such cases, a judge typically determines how much groundwater may be pumped from an aquifer by various parties.

The decision by the appeals court left various questions unresolved, including how the tribe's federally granted rights will be prioritized as California moves toward implementing the 2014 Sustainable Groundwater Management Act, under which local agencies are tasked with developing long-term plans to combat sustainable water use.

The most stringent requirements of the law are

focused on areas deemed to be in "critical overdraft." In the Coachella Valley, state regulators have listed three aquifer sub-basins - Indio, Mission Creek and San Geronimo Pass - as being "medium" priority. A fourth groundwater sub-basin, Desert Hot Springs, is classified by the state as being a lower priority.

Several local agencies, among them the Coachella Valley Water District and Desert Water Agency, have filed notices with the state to begin the process of becoming the designated "groundwater sustainability agencies" in areas where they supply water. It's unclear what role the tribe may play in that process.

Groundwater levels have declined over the years in much of the Coachella Valley as water has been pumped from the aquifer for expanding subdivisions, golf courses, resorts and farms. The water agencies have used imported water from the Colorado River to partially offset those declines, and the water table has risen around groundwater recharge ponds in Palm Springs and La Quinta.

The biggest declines in the aquifer's levels - in some areas 90-100 feet or more since the 1950s - have occurred away from those ponds in the middle of the valley.

The two water agencies say they have viable long-term plans to combat groundwater overdraft, including a plan to begin replenishing the aquifer with water from the Colorado River at a facility in Palm Desert.

Grubbe has argued the water districts have significantly degraded the quality of the groundwater by allowing Colorado River water, which has higher levels of dissolved salts and minerals, to seep down to the aquifer. He has suggested the agencies should instead treat the imported water before allowing it to flow into the underground drinking water supply.

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