Nos. 17-40 & 17-42

In the Supreme Court of the United States

DESERT WATER AGENCY, ET AL., *Petitioners*,
v.
AGUA CALIENTE BAND OF CAHUILLA INDIANS, ET AL.,
Respondents;

COACHELLA VALLEY WATER DISTRICT, ET AL.,
Petitioners,
v.
AGUA CALIENTE BAND OF CAHUILLA INDIANS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL WATER RESOURCES ASSOCIATION, WESTERN COALITION OF ARID STATES, AND IRRIGATION & ELECTRICAL DISTRICTS' ASSOCIATION OF ARIZONA IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

The National Water Resources Association ("NWRA") is a federation of state associations and caucuses representing a broad spectrum of water supply interests. With roots that go back to the 1890s, it is the oldest and most active national association concerned with water resources policy and development. Its members include water agencies from Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Its strength is a reflection of the tremendous grassroots participation it has generated on virtually every national issue affecting western water conservation, management, and development.

Members of the Western Coalition of Arid States ("WESTCAS") include more than one hundred municipal entities in Arizona, California, Colorado,

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[1] No counsel for any party authored any part of this brief. No person other than amici curiae, their members, or their counsel made any monetary contribution to its preparation or submission. Amici have provided the required 10-day notice to all counsel of record. Petitioner Desert Water Agency has filed a blanket consent. Amici have obtained the written consent of the other parties, and filed them with this Court.

Idaho, Nevada, New Mexico, Oregon, and Texas. WESTCAS is dedicated to encouraging the development of water programs and requirements that assure adequate supplies of high quality water for those living in the arid regions, while protecting the environment.

The Irrigation & Electrical Districts' Association of Arizona (IEDA) is an Arizona nonprofit association whose members and associate members provide water and electricity to over 60% of the state's citizens, businesses and farms, supplying nearly three fourths of the state's irrigated agriculture. The membership includes an Indian utility authority, a federal agency serving another Indian reservation, and multiple special districts and municipalities whose water service territories abut Indian and other federal reservations.

Members of all amici hold water rights that are affected by the Ninth Circuit's decision, which threatens established water rights throughout the Western States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Federal reserved water rights are an exception to the general rule that recipients of federal land must obtain water rights in accordance with State law. This Court created federal reserved water rights by implication, based on the idea that Congress could not have intended to allow the absence of a water right to destroy something Congress intended to preserve. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). In the *Agua Caliente* decision[2], however, the Ninth Circuit has expanded and reinterpreted this exception in a manner that threatens the Western States' sovereign control over their waters.

The Ninth Circuit's decision will have bad consequences throughout the West, where there is not enough water to fulfill all needs. The decision will take water away from homes and families, which generally have the most junior water rights.

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

The decision will result in antisocial behavior, because it encourages monetary demands by those who have no need for water.

The decision will create widespread uncertainty over water rights, and will force water users to engage in unnecessary litigation.

The Ninth Circuit arrived at its result by incorrectly interpreting this Court's decision in *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), which emphasized the importance of a careful examination of the *need* for the asserted reserved water right, and the dire circumstances that require finding an implied federal water right: "Each time this Court has applied the 'implied-reservation-of-water doctrine,' 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 (emphasis added). Here, there is no need for an implied federal water right, because the purposes of the reservation would not be "entirely defeated". Under California law, the tribe has a right to pump groundwater for use on its land. This

right would appear to satisfy all of the tribe's water needs, if only because the tribe does not pump groundwater but rather purchases water from petitioners.

In *Agua Caliente*, the Ninth Circuit held that the actual need for water *cannot* be considered when a court determines whether there is a federal reserved water right. It held that a federal right exists whenever the purpose of a reservation "envisions" water use. Because every reservation in the arid West surely envisions some use of water, the *Agua Caliente* decision automatically creates a federal water right for every federal reservation of land in the Ninth Circuit. These reservations are not limited to tribes, but cover a vast amount of territory: the federal government owns 46% of the land in the West. *United States v. New Mexico*, 438 U.S. at 699 n.3.

Congress could not have intended this widespread and excessive interference with State control over its water. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language

of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410, 423 (1991), citing and quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171, 179 (1985) (quotation marks omitted).

Amici support the petitions for certiorari filed by Desert Water Agency and Coachella Valley Water District. The petitions for writ of certiorari should be granted.

ARGUMENT

I. THE DECISION WILL HAVE BAD CONSEQUENCES

A. The Decision Takes Water Away From Homes And Families

The arid West does not have enough water to satisfy all its needs. The Western States have developed several legal concepts to resolve conflicts over scarce water. One concept, known as "prior appropriation", can be analogized to a line of people at a well. Those people at the head of the line—the appropriators with the most seniority—get to take all the water they need for their uses. After they have

finished, those next in line can step up and take water they need, as long as the water supply holds out. But if the well runs dry, the people at the end of the line get nothing.

For surface waters, the doctrine might be analogized to a line of users at a river. When the river runs dry, those at the end of the end of the line get nothing.

Whenever a water supply is being fully used, a court that moves someone up in the line necessarily reduces the amount of water available for those in the rest of the line. This Court has recognized that the doctrine of federal reserved water rights, which allows some people to move up in the line, can have harsh results: "When…a river is fully appropriated, 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." *United States v. New Mexico*, 438 U.S. at 705.

Here, the aquifer (the underground layer from which groundwater is pumped) has been in a state of overdraft (more water is being pumped out than is percolating in) since the 1980s. *Agua Caliente*, 849

F.3d at 1266, n.3. When an aquifer is being overdrafted, water levels decline (become deeper), and the water supply can ultimately be depleted. Because of these declining water levels, and because of "an ever-growing concern over diminishing groundwater resources", the tribe filed suit. *Id.* at 1267. If the tribe prevails in the litigation, and the court acts to counter the declining water levels, someone will have to cut back on the amount of water being pumped. Someone will lose water.

Those who stand to lose the most are the homes and families of newly arrived residents. Throughout the West, new residential users tend to stand at the end of line. Although in some cases agricultural use can be curtailed by fallowing fields (farmers grow no crops for a season), residents cannot be fallowed. People must always have water. "The Coachella Valley Groundwater Basin supports 9 cities, 400,000 people, and 66,000 acres of farmland". *Agua Caliente*, 849 F.3d at 1266.

Any reallocation of scarce water resources should be made, as much as possible, under State law by people who have a deep understanding of local

conditions and the problems that reallocation can cause.

B. The Tribe Does Not Need A Federal Water Right

The tribe does not need a federal water right, because it already has a California water right that appears sufficient to satisfy all its present and future needs.

California has a dual system of groundwater rights. An overlying right, "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land…; it is based on the ownership of the land and is appurtenant thereto." *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1240, 99 Cal.Rptr.2d 294, 5 P.3d 853 (2000). "As between overlying owners, the rights, like those of riparians, are correlative; i.e., each may use only his reasonable share when water is insufficient to meet the needs of all". *Id.* (square brackets and quotation marks omitted).

A correlative right can be analogized to a circle of water users surrounding a well and equally sharing the water in the well. Under California's

dual system, if there is any water available after the overlying users satisfy their reasonable needs, the remaining water is apportioned according to the rules of prior appropriation. *Id*. This dual system can be analogized to a circle of overlying users around a well, with a line of appropriative users behind them.

As a land owner, the tribe has overlying rights to the groundwater under the reservation, and has had these rights since the reservation was created. These rights are correlative with other overlying users, and senior to the rights of appropriators. The Ninth Circuit did not identify any tribal need—now, in the past, or in the future—that would not be satisfied by this overlying right. As a result, the tribe has no apparent need for a *federal* right.

Nor does the tribe have any apparent need for a *groundwater* right. The tribe is not pumping groundwater. *Agua Caliente*, 849 F3d. at 1266. It receives its water from the petitioner public water agencies. *Id*.

Regardless of this tribe's needs and motivation, the Ninth Circuit's decision will encourage antisocial behavior across the West by

giving senior water rights to reservations that have no current need for water. Those reservations, if they act in their own economic benefit, will lay claim to their newfound water rights so that they can sell them to someone else. The buyers may indeed be public water agencies, who will supply the water to junior users, in particular to homes and families. But Congress could not have intended to take water away from homes and families for no purpose other than selling it back to them.

II. THE DECISION WILL PRODUCE NEEDLESS UNCERTAINTY AND LITIGATION ACROSS THE WEST

The Ninth Circuit's decision in *Agua Caliente* does not mesh with the groundwater law of California and other Western States. The Ninth Circuit spoke in terms used for appropriative rights: a "right in unappropriated water" that "vests on the date of the reservation and is superior to the rights of future appropriators." *Agua Caliente*, 849 F.3d at 1272. Under California law, however, an appropriative right is *junior* to a correlative overlying right. *City of Barstow*, 23 Cal.4th at 1240. The Ninth Circuit may have intended to say that the

tribe's federal right is senior to other rights, except perhaps those rights that predate the reservation. But *all* overlying rights predate the reservation, because they arose when California became a State in 1850. Any lower court attempting to implement *Agua Caliente* in any state like California that does not apply pure appropriation law to groundwater will be baffled by the decision.

Reserved rights "are federal water rights that preempt conflicting state law". *Agua Caliente*, 849 F.3d at 1272. The Ninth Circuit's decision raises problematic questions about which State laws are "conflicting," and it threatens public and private investments made to provide reliable water supplies and manage groundwater in the public interest. The water-supply infrastructure in California, and throughout the West—which includes of dams, reservoirs, diversion structures, pumps, canals, pipelines, groundwater-recharge systems, and local water-delivery systems—is valuable only insofar as there is water available.

In California, confusion will arise over the role of the paramount California water rule, which is embodied in Article X, section 2 of the California

Constitution. It limits all water rights to the *reasonable* use of water. A water use can become unreasonable when, for example, its private use as a source of sand and gravel would prevent the construction of a reservoir, and when a large amount of water would be wasted to deliver a small amount to a senior rights holder. *Joslin v. Marin Municipal Water District*, 67 Cal.2d 132, 136-141, 60 Cal.Rptr. 377, 429 P.2d 889 (1967). Does this California rule conflict with the federal reserved right? Does the federal right allow for *unreasonable* uses of water?

During the recent drought, California imposed mandatory reductions in water use. *See, e.g.,* drought.ca.gov. Can the holders of federal rights ignore these requirements, and use water profligately during a drought?

In Arizona, confusion will arise because of the conflict between *Agua Caliente* and Arizona groundwater law. Arizona generally applies the "American Rule", which allows users to take whatever amounts of groundwater can be beneficially used without waste. In 1980, however, Arizona created "Active Management Areas" in which groundwater is highly regulated and existing uses

grandfathered. Arizona recognizes a federal reserved right to groundwater where other supplies are inadequate. Which of these, if any, are in conflict with the *Agua Caliente* decision?

Arizona also has special rules that apply to wells within a specified distance from surface waters. These rules recognize that wells can take *surface water* by pumping the groundwater below surface waters—which can cause the surface water to percolate into the ground to replace the withdrawn groundwater. Do these rules conflict with the *Agua Caliente* reserved right?

The confusion generated by *Agua Caliente* will extend even to pure-appropriation States. In New Mexico, for example, *Agua Caliente* may conflict with cases in which groundwater rights have been fully adjudicated, and the State court has determined that there is no water left to be appropriated. Must these cases be re-opened to allow for consideration of the newly found *Agua Caliente* rights?

What about cases in which tribal water rights have specifically been adjudicated? Does *res judicata* apply? Arguments in favor of *res judicata* would undoubtedly be met by the statement, in *Agua*

Caliente, that reserved water rights are "flexible and can change over time." *Agua Caliente*, 849 F.3d at 1272. But if a tribe can sue every few years and assert that its water rights have changed, there will be no end to litigation over water rights.

Finally, there is the question of how the decision affects interstate compacts. Can this newly found right disrupt agreements in which two or more States have resolved their differences about water rights? If those agreements do not specifically provide for reserved groundwater rights, must they be reopened?

Water rights are property rights. "Certainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620, 103 S.Ct. 1382, 1392, 75 L.Ed.2d 318, 334 (1983). "The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country." *Id.* Certainty is so important to property rights that States authorize suits to remove a "cloud on title" and to obtain damages for "slander of title". *See Txo Production Corp. v. Alliance Resources Corp.*, 509

U.S. 443, 447, 113 S.Ct. 2711, 2714, 125 L.Ed.2d 366, 372 (1993) (considering whether punitive damages were excessive in a title suit). Here, the Ninth Circuit has created uncertainty in water rights throughout the West—uncertainty that will have bad consequences on real people.

III. CONGRESS DID NOT INTEND TO MEDDLE WITH STATE WATER RIGHTS WHEN FEDERAL RIGHTS ARE NOT NEEDED

Congress could not have intended this widespread and excessive interference with State control over its water. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. at 460, *quoting Atascadero State Hospital*, 473 U.S. at 242 (quotation marks omitted). "[T]the clear statement principle reflects an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544, 122 S.Ct. 999,

1006, 152 L.Ed.2d 27, 38 (2002) (quotation marks omitted).

Even though federal reserved water rights interfere with the sovereign power of the States to regulate their water, they are not based on any "unmistakably clear" statement by Congress. Instead, they are based on the concept that something Congress intended to accomplish should not be destroyed because of a lack of a water right. In *Winters*, which created the doctrine of implied federal water rights, the absence of a water right would have left the reservation "a barren waste." *Winters*, 207 U.S. at 577. The Ninth Circuit acknowledged that federal reserved water rights were created to protect lands that "would have been useless" without a water right. *Agua Caliente*, 849 F.3d at 1268.

But the Ninth Circuit did not respect this limit on federal reserved water rights. It held that Congress intended to create federal reserved water rights even when they were not necessary: "the question is not whether water stemming from a federal right is necessary…to maintain the reservation; the question is whether the purpose

underlying the reservation envisions water use." *Id.* at 1269. The Ninth Circuit's holding disobeys this Court's decisions limiting reserved water rights.

"The implied-reservation-of-water-doctrine…reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141, 96 S.Ct. 2062, 2071, 48 L.Ed.2d 523, 535 (1976). In *Cappaert*, this Court found that "the purpose of reserving Devil's Hole Monument is preservation of the pool" containing "a peculiar race of desert fish…which is found nowhere else in the world". *Id.* Without a reserved water right, the pool would have dried up and the fish would have died. This Court upheld an injunction "curtailing pumping *only to the extent necessary* to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the [reservation]." *Id.*, emphasis added.

Here, if Ninth Circuit had limited the tribe's federal water right *to the extent necessary* to accomplish the purpose of the reservation, there would apparently be no federal right at all, because the Ninth Circuit has not identified any water need that is not satisfied by the tribe's water rights under

California law. The Ninth Circuit confused a pure-appropriation State, in which ownership of land may convey no rights to water, with those States in which ownership of land automatically carries with it a right to groundwater. Because the absence of a federal water right does not leave many Western lands "a barren waste", as in *Winters*, the *Winters* rationale does not apply to these lands.

In every case in which a federal reserved water right is in question, the court should decide whether the federal right is *necessary* to accomplish the Congressional purpose of the reservation, taking all facts—including the water provided by State law and even by contract—into account. Anything else would violate the requirement that Congress must make its intent "unmistakably clear" when it decides to intrude on the sovereign power of the States.

IV. CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

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