US Court Of Appeals Affirms Application Of Winters Doctrine Of Aboriginal Reserved Water Rights To Groundwater

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***Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, Case No. 15-55896, United States Court of Appeals for the Ninth Circuit (Tallman, Christen and Kennelly JJ.), 7 March 2017**

The United States Court of Appeals for the Ninth Circuit affirmed a California District Court decision that an Indian tribe's federally reserved water rights, which vested at the time of the creation of their reservation in the 1870s, extended to groundwater. The Court held that the *Winters* doctrine makes no distinction between surface water and groundwater. The United States intended to reserve water when it established the reservation, and the lower court made no error in finding that appurtenant water sources (including groundwater) were reserved. The creation of the Tribe's reservation carried with it an implied right to use water from the valley's aquifer.

The Agua Caliente Band of Cahuilla Indians (the "Tribe") assert that they have occupied the Coachella Valley of California, part of the Sonaran desert, since before the arrival of European settlers. A reservation was established by the Executive Order of President Ulysses S. Grant in 1876, and expanded a year later during the Hayes administration. The reservation consists of approximately 31,000 acres interspersed in a checkerboard pattern near cities like Palm Springs, California.

Prior to the creation of the reservation, the Tribe had been encouraged by government officials to build permanent homes in the area. Indian agents had identified an urgent need for reserve land to "build comfortable houses, improve their acres and surround themselves with home comforts". The United States sought to protect the Tribe and "secure the Mission Indians permanent homes, with land and water enough".

The Coachella Valley is an arid desert, with less than six inches of rainfall per year. Surface water is virtually non-existent in the valley for the majority of the year, and almost all of the water consumed in the region comes from the aquifer underlying the

valley. Since the 1980s, the groundwater underlying the Coachella Valley has been in a continual state of overdraft.

The appellants Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA) are creatures of California statute. The CVWD is a county water district that is responsible for developing groundwater wells and extracting groundwater. The DWA is a special water district created to provide water to the city of Palm Springs. The Tribe purchases groundwater from the CVWD and the DWA. Further, the Tribe receives some surface water from the Whitewater River System, as a result of a court order in 1938, but the amount of water is minimal. Groundwater is the main source of water on the Tribe's reservation.

In this proceeding, the Tribe sought a declaration that the establishment of the Reservation in the 1870s impliedly reserved to them the right to surface water and groundwater sufficient to accomplish the purposes of the Reservation, which included establishing a homeland for the Tribe. They sought a declaration that their federal reserved water rights, pursuant to the *Winters* doctrine, extends to groundwater. The *Winters* doctrine provides that 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. Such implied water rights vest on the date of the reservation and are superior to the rights of future appropriators. In this proceeding, the Tribe also asserted water rights based upon their Aboriginal right of occupancy. The proceeding was divided into three phases:

- Phase I was to resolve the legal issues of whether the Tribe's rights under the *Winters* doctrine extends to groundwater, and whether they have Aboriginal rights to groundwater;
- Phase II was to address the ownership of certain "pore space" beneath the Reservation, whether the right to a quantity of groundwater also involves a right to water of a certain *quality*, and a determination of various equitable defences; and,
- Phase III was to involve quantifying any rights to groundwater and crafting the appropriate remedy.

The United States of America intervened in the proceeding and took a similar position to the Tribe about the scope of *Winters* rights and also emphasized the supremacy of federal water rights.

In March 2015, as part of Phase I of the proceeding, the United States District Court for the Central District of California granted a summary judgment declaring that the Tribe's federally reserved water rights extend to groundwater pursuant to the Winters doctrine. The Court found that there is no principled distinction between surface water and groundwater for the purposes of the doctrine. However, the District Court dismissed the Tribe's claim to water rights based upon Aboriginal occupancy on the grounds that all such Aboriginal rights had been extinguished by a federal statute passed in 1851 following the Mexican-American War. The decision of Justice Bernal was summarized in our e-Newsletter of 23 July 2015.

The Ninth Circuit affirmed the decision of the District Court. The panel noted that there is no controlling federal appellate authority addressing whether the *Winters* doctrine

applies to groundwater. The issues in this appeal only dealt with the District Court's decision in Phase I of the proceeding, which would be reviewed on a *de novo* basis. The Ninth Circuit held that three issues arise: (1) whether the United States intended to reserve water when it created the Tribe's reservation; (2) whether the reserved rights doctrine encompasses groundwater and (3) whether the Tribe's rights under California law or the 1938 court order, or the historic lack of drilling for groundwater by the Tribe, have any bearing upon the result.

The Ninth Circuit answered the first question in the affirmative. The Court reviewed the *Winters* doctrine and its application to Indian reservations. It has been held that the United States "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless". In this case, the reservation of land for the Tribe in the 1870s carried with it a reserved right to water generally. A reservation for land in an arid environment would be practically valueless without irrigation. The executive orders from the 1870s contemplated that the land would be set aside for the permanent use and occupancy of the Tribe. The Court held:

... Water is inherently tied to the Tribe's ability to live permanently on the reservation. Without water, the underlying purpose — to establish a home and support an agrarian society — would be entirely defeated. Put differently, 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. Thus, we hold that the United States implicitly reserved a right to water when it created the Agua Caliente Reservation.

On the second issue, the Ninth Circuit agreed with the District Court that the Winters doctrine applies to groundwater. The limits on the doctrine relate to the purpose of the reservation, and that the unappropriated water be appurtenant to the reservation. The doctrine does not limit the right to surface water only. In many locations in the western United States, such as the Coachella Valley, groundwater is the only viable water source. There is no basis for restricting the Winters doctrine to appurtenant surface water.

In regards to the third issue, the Court rejected the arguments of the appellants on three grounds. First, state water rights are preempted by federal reserved rights. Second, the fact that the Tribe did not historically access groundwater does not destroy its right to groundwater now. Third, the caselaw does not mandate that water is currently needed to sustain the reservation; it asks whether water was envisioned as necessary for the reservation's purpose.

The Ninth Circuit noted that the District Court had failed to conduct a full analysis, based upon *United States v. New Mexico* (1978), with respect to whether the Tribe needs access to groundwater. Such issues will likely be considered in the next phases of the proceeding.

The appeal was therefore dismissed without costs.

https://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/07/15-55896.pdf

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