

NINTH CIRCUIT HOLDS THAT FEDERAL RESERVED WATER RIGHTS EXTEND TO GROUNDWATER

Prepared by:
L. William Staudenmaier
Snell & Wilmer L.L.P.

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Ninth Circuit Holds that Federal Reserved Water Rights Extend to Groundwater

Posted on March 10, 2017 by L. William Staudenmaier

On March 7, 2017, the Ninth Circuit Court of Appeals issued its decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, Case No. 15-55896. In this decision, the Court unequivocally held that under the well-established “Winters doctrine,” federal reserved water rights for an Indian reservation extend to groundwater when access to groundwater is necessary to fulfill the primary purpose of the reservation. Despite noting that it was “unable to find controlling federal appellate authority explicitly holding that the Winters doctrine applies to groundwater,” the Court concluded that it does. Opinion at 17.

In reaching this conclusion, the Court reviewed the history of the Winters doctrine and the major cases that have shaped the doctrine over the last 100 years. Based on this review, the Court identified two “main limitation[s] of the reserved rights doctrine”: (i) “the requirement that the primary purpose of the reservation must intend water use,” and (ii) “the unappropriated water [to be reserved] must be appurtenant to the reservation.” *Id.* at 17-18. The Court quickly dispensed with the second of these limitations, noting that “[t]he parties do not dispute appurtenance, nor could they. The Coachella Valley Groundwater Basin clearly underlies the Tribe’s reservation.” *Id.* at 19, n. 10. The Court spent substantially more time addressing the first issue—whether the primary purpose of the Tribe’s reservation impliedly required access to water.

Unfortunately, the Court used somewhat vague, and potentially inconsistent, language to describe the scope of this standard. The Court began its analysis by noting that “the Winters doctrine . . . only reserves water to the extent it is necessary to accomplish the purpose of the reservation” *Id.* at 12. The Court then described the “primary-secondary use” standard created by the United States Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978), under which water is impliedly reserved to satisfy the primary purposes of a reservation, but not for secondary purposes. *Id.* at 13. However, the Court concluded that “New Mexico’s primary-secondary use distinction did not alter the test envisioned by Winters. Rather, it added an important inquiry related to the question of how much water is reserved.” *Id.* at 15 (emphasis in original). After applying New Mexico in this way, the Court then restated the “threshold issue” as “a reserved right exists if the purposes underlying a reservation envision access to water.” *Id.* at 16 (emphasis added).

At first blush, this may appear to be a new, more relaxed standard for determining whether a reserved water right exists – i.e., did the purposes of the reservation “envision access to water” rather than is water “necessary” to satisfy the primary purpose of the reservation. The Court, however, soon returned to a more familiar standard, concluding that “[w]ater 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.” *Id.* at 17 (emphasis added). Based on this conclusion, the Court held that “the United States implicitly reserved a right to water when it created the Agua Caliente Reservation.” *Id.*

After reaching this holding, the Court next addressed a number of arguments asserted by two California water district defendants. First, it held that the “appurtenance” requirement “simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only.” *Id.* at 18. In support of this conclusion, the Court then cited a 1999 Arizona Supreme Court opinion, *In re the General Adjudication of All Rights to Use Water In the Gila River System & Source*, 989 P.2d 739, 746 (Ariz. 1999) (“Gila III”). In *Gila III*, the Arizona court noted that “some reservations lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water.” *Id.* In such circumstances, the Arizona court held that reserved water rights can extend to groundwater, and the Ninth Circuit agreed. *Agua Caliente Opinion* at 19.

Finally, the Ninth Circuit also rejected a second argument advanced by the water district defendants: that the Tribe’s existing state law-based water rights (to both surface water and groundwater) negated any “necessity” for the *Agua Caliente* Tribe to secure a reserved right to groundwater. The Court dispensed with this argument by noting that “state water rights are preempted by federal reserved rights,” and therefore “state water entitlements do not affect our analysis with respect to creation of the Tribe’s federally reserved water right.” *Id.* at 21.

While the Ninth Circuit reached a definitive conclusion regarding whether the *Winters* doctrine extends to groundwater (it does), this case is far from over. In what the Court termed an “unusual

trifurcation” of the litigation, the parties agreed to address only this first, basic question in Phase I of the proceedings. Yet to be addressed is the equally important question of how much groundwater the Tribe may be entitled to under its reserved right. That issue will be addressed in Phase III of the case (Phase II addresses whether the Tribe owns the “pore space” of the underlying aquifer, and whether the Tribe has a right to groundwater of a certain quality).

Quantification of federal reserved water rights is always a complex and fact-intensive process. Foreshadowing this future phase of the case, the Ninth Circuit closed its opinion with the following: “While we express no opinion on how much water falls within the scope of the Tribe’s federal groundwater right, there can be no question that water in some amount was necessarily reserved to support the reservation created. Thus, to guide the district court in its later analysis, we hold that the creation of the Agua Caliente Reservation carried with it an implied right to use water from the Coachella Valley aquifer.” *Id.* 21-22. Only time will tell what the district court will do with this guidance.

