

WESTCASS PRESENTATION
AGUA CALIENTE v. CVWD, DWA

FEDERAL RESERVE RIGHTS

What are they?

In 1908, the United States Supreme Court created an exception to Congress' policy of deferring to State Water laws regarding supplies where Federal Reservations except were the State law conflicted with Federal Law or policy.

Winters v. United States, 207 US 564 (1908)

In 1888, the US entered into a Treaty with two Indian tribes, creating the Fort Belnap Reservation on the Milk River in Montana; the purpose was to convert the Indians from hunter-gatherers to farmers. It took about 10 years to get the reservation up and running to the point where irrigation water from the Milk River was needed and by that time non-indian ranchers and farmers upstream were taking most of the water in the river.

Montana water law at the time was based on "prior appropriation" which awarded senior rights to the first users on a water source; under state law, the upstream ranchers and farmers had senior rights to the tribe/reservation but the Supreme Court held that in creating the reservation in 1888, water rights to the river were reserved by Implication, because, although the Treaty did not mention water rights, Congress must have intended to reserve water rights for the reservation because otherwise the reservation would have been valueless. The reservation of rights according to the Court were exempt under state law; later cases established that the priority of such rights dated from the date the reservation was established were therefore senior to all diversions commenced after that date. The Supreme Court in Winters also held that the reservation of rights extended to waters necessary in developing the reservation "through years", i.e., they could be used to address future needs on the reservation. Later cases by the Supreme Court also established that such reserved rights are not lost through non-use.

Important Points

1. The Reserved right doctrine was created as an exception to Congress' policy of deferring to state law; and
2. The Doctrine was created in the context of a surface water case; the doctrine has never been applied by the Supreme Court to groundwater;

This second point is important in the West where the federal government owns 46% of ALL land and groundwater is a significant if not major portion of supplies.

Additional Supreme Court Decisions

The Supreme Court has only addressed reserved rights in two cases since the Winters decision, Cappaert v. United States in 1976 and U.S. v. New Mexico in 1978.

Cappaert v. United States, 426 US 128

In Cappaert, the Cappaerts had a large Nevada cattle ranch that included a number of groundwater wells for irrigation of pasturage. A few miles away, the federal government had established the Devil's Hole National Monument for the purpose of protecting the endangered Desert Pupfish which lived and in fact was only found in an underground pool in a cavern on the Monument. A certain water level in the pool was essential to the survival of the fish but increased pumping of the Cappaert wells after creation of the National Monument had reduced those levels to a point where the fish were facing extinction and the US brought suit to enjoin or at least reduce groundwater production by the Cappaert wells.

On Appeal, the Ninth Circuit Court held that the federal government's reserved rights extended to groundwater and ordered the Cappaert's pumping to be reduced. On Appeal to the Supreme Court the latter upheld the pumping reductions but, in doing so, noted that it [the Supreme Court] had never applied the reserved rights doctrine to groundwater; that water in the pool in the cavern was in fact surface water rather than groundwater; and that reserved rights applied only to the least amount of water necessary for a federal reservation to be viable.

In so ruling, the Supreme Court passed up a perfect opportunity to extend the reserved right doctrine to groundwater.

United States v. New Mexico, 438 US 696 (1978)

Two years after Cappaert, the Supreme Court, in a surface water case, re-emphasized that its reserved rights doctrine was to be narrowly rather than broadly construed because the doctrine was an exception to Congress' policy of deferring to state water laws except in cases of conflict. The Court held that federal reserved rights would be found to exist by implications ONLY where absolutely necessary to carry out the primary purposes of a federal reservation. I'll refer to this point as the "necessity issue" in New Mexico.

Whether the New Mexico opinion refers to the NECESSITY for federal reserved rights to make water available as opposed to the amount of water needed is a key issue in our case, along with the issue whether the doctrine applies to groundwater in the first place.

I will get to the facts in our case in a minute but first let me focus on the necessity issue as related to the existence of reserved rights.

The "Necessity" Issue

In California, state water rights are based on property ownership or lack thereof. Owners of riparian land have riparian rights; those owning property over a groundwater basin

have overlying rights. In each case, the rights are not temporal in nature, i.e., they are not based on time of first use but rather are based on property ownership and are equal and correlative meaning all owners of similarly situated have equal rights to a share of the water supply and if there is not enough, everyone gets cut back on a prorated basis. THERE IS NO SENIORITY. Those who do not own land on overlying a water source can “appropriate” excess water not needed by the riparian or overlying owners for beneficial uses elsewhere. Such rights are temporal, i.e., as between appropriators, first in time, first in right, but appropriative rights are junior to riparian and overliers rights.

Federal reserved rights are easily integrated within appropriative rights systems because both are temporal in nature but trying to apply federal reserved rights to a non-temporal, correlative rights system just does not work-it’s like putting a square peg in a round hole-and because reserved rights include water rights for future needs, it could lock up a groundwater supply.

AGUA CALIENTE FACTS

Now, to our facts. The Agua Caliente’s have lived in the upper Coachella Valley and the adjacent San Jacinto mountains for millennia. The Tribe has never produced and relied on groundwater as a source of supply, taking their water supplies from creeks flowing out of the mountains and constructing ditches and irrigations systems to move stream water to areas where needed to irrigate crops and for domestic purposes.

In about 1870, the Federal Government gave the even numbered sections in the area that later became the Reservation to the railroad as incentive to build a railroad line through the area. The Reservation was formed mainly by Presidential Executive Orders in 1875 and 1876, using the odd numbered sections. This is still the case and the Reservation, including allotted lands, totals to about 31,000 acres.

Underlying the area and most of the Coachella Valley is the Coachella Valley Groundwater Basin which is fed primarily by runoff and snowmelt from the adjacent mountains. It is a very large basin, containing something over 30million acre feet in storage but has become overdrafted as agricultural activity and population increased in the valley. CVWD and DWA have been working to offset and eliminate the overdraft by importing and recharging Colorado River water into the groundwater basin. There is no other source or supply; the cost of extending the state water project pipeline system into the valley is prohibited, at least at present. It is a current water management plan anticipates that the overdraft will be eliminated within the next few years.

With respect to water quality, the native groundwater in the basin is very good with TDS levels of around 100 to 150 TDS per liter. Colorado River Water by comparison ranges between 300 and 400 ppm. The use of Colorado River Water to recharge a groundwater basin does have a slight negative impact on the water quality. On the other hand, as mentioned above, it is the

only source of supply and it is either a “pollutant” for clean water act regulatory purposes and it is in compliance with the Federal Safe Drinking Water Act requirements for waters served by public agencies. As an aside, the TDS in the Colorado River water results largely, if not entirely, from agg drainage upstream, primarily in Colorado, where the Bureau of Reclamation has massive projects providing water to farmers and ranchers, water that results in agg drainage which increases the salinity levels in the River.

Litigation

In 2013, the Tribe filed a Complaint in Federal court alleging that the overdraft of the Coachella Valley groundwater basin is the result of poor water management on the part of CVWD and DWA which threatens the Tribe’s ultimate supply and that the degradation of the groundwater quality also adversely affects the Tribe’s rights. The United States joined as co-plaintiff in 2015.

The District Court Judge Jesus Bernal, agreed to divide the case into three Phases: first would be a determination of whether the reserved rights doctrine applies to groundwater; secondly, the court would determine whether the Tribe “owns” the “core space” or storage capacity in the groundwater basin and whether it is entitled to pursue its water quality allegations; lastly, the question or amount or quantification would be determined.

On Cross-Motions for Summary Judgment, Judge Bernal found that even though state law provides the Tribe with overlying rights to the groundwater, the reserved rights doctrine applies to groundwater as well as surface waters (i.e., to any “appurtenant water source”) and that federal law (i.e., the court’s created reserved rights doctrine) trumps state law. Bernal ruled that the Supreme Court’s “necessity” rule in the U.S. v. New Mexico case applies only to the amount of water needed, not to whether the federal reserved rights are necessary to make the water available in the first place.

On Appeal, the Ninth Circuit Court of Appeals agreed with Judge Bernal and, in response to our argument that since rights to groundwater are already held by the Tribe under state law, there is no “necessity” for federal reserved rights, the court simply said that federal law prevails over state law.

CURRENT STATUS

We are now in the process of preparing and filing a Petition for a Writ of Certiorari to the U.S. Supreme Court, asking that Court to take the case and review the Trial Court and Ninth Circuit Court of Appeals rulings.

We are hopeful the Supreme Court will take the case, primarily because of inconsistent ruling between three state Supreme Courts and the Ninth Circuit regarding application of the reserved rights doctrine to groundwater. The Wyoming Supreme Court has ruled that the

doctrine does not apply to groundwater. The Arizona Supreme Court, on the other hand, ruled that it does apply to groundwater but ONLY if there is no other water source available to meet the needs of a federal reservation; the Montana Supreme Court has held that the doctrine applies to groundwater but it is not clear whether it was following the Arizona restriction or not. Lastly, with the Ninth Circuit Court ruling that the doctrine does apply to groundwater.

The Supreme Court created the doctrine and it is only the Supreme Court that can decide this issue (whether the doctrine applies to groundwater) and we believe it will accept the case. If we get that far, we believe that the Supreme Court will rule that “necessity” goes to the existence of reserved rights, not just to the amount of water needed; such a ruling would be consistent with the court’s acknowledgment of Congress’ policy of deference to state water law as well as with the Supreme Court’s language in the New Mexico case narrowing the extent of the doctrine. Since California law makes groundwater available to the Tribe, there is no necessity for federal reserved rights.

Meanwhile, Judge Bernal had suspended the second and third Phases of the Trial pending resolution of the Appeal to the Ninth Circuit Court. He has now lifted his “Stay” and ordered us to proceed with the second Phase regarding storage and water quality rights. We are doing so but hopefully we will receive word by late September that the Supreme Court will accept our Appeal.