Nos. 17-40, 17-42

In The
Supreme Court of the United States

COACHELLA VALLEY WATER DISTRICT, et al.,
Petitioners,

v.

AGUA CALIENTE BAND
OF CAHUILLA INDIANS, et al.,
Respondents.

DESERT WATER AGENCY, 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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(17-40)

Whether, when, and to what extent the federal reserved right doctrine recognized in *Winters v. United States*, 207 U.S. 564 (1908), preempts state law regulation of groundwater.

(17-42)

1. Whether the Ninth Circuit's standard for determining whether a federal reserved water right impliedly exists—that the right impliedly exists if the reservation purpose "envisions" use of water—conflicts with the standard established by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), which the petitioners contend held that a federal reserved water right impliedly exists only if the reservation of water is "necessary" to accomplish the primary reservation purposes and prevent these purposes from being "entirely defeated."

2. Whether the reserved rights doctrine applies to groundwater.

3. Whether the Agua Caliente Band of Cahuilla Indians ("Tribe") has a reserved right in groundwater, and in particular whether the Tribe's claimed reserved right is "necessary" for primary reservation purposes under the *New Mexico* standard in light of the fact that the Tribe has the right to use groundwater under California law.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Coachella Valley Water District, *et al.*, in No. 17-40, and Petitioners Desert Water Agency, *et al.*, in No. 17-42.

PLF is the nation's oldest public interest legal foundation that fights, in state and federal courts throughout the nation, for limited government and the strong protection of private property rights. PLF attorneys have regularly appeared before this Court to defend property rights against overreaching government. *E.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016) (counsel of record for respondent); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (counsel of record for petitioner); *Sackett v. EPA*, 566 U.S. 120 (2012) (counsel of record for petitioners).

The petitions seek review of a decision of the Court of Appeals for the Ninth Circuit that extends the doctrine of federal reserved water rights to groundwater. The ruling does so without any consideration of the effect such expansion may have on the groundwater rights of non-federal water users. PLF is therefore concerned about the harmful impacts

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[1] All parties have consented to the filing of this brief, and counsel of record for all parties received timely notice of the intention to file the brief. Letters demonstrating such consent and notice have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus Curiae PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

that the decision may have on the water rights of landowners throughout the western United States.

INTRODUCTION AND SUMMARY OF REASON FOR GRANTING THE PETITIONS

This Court adheres to the presumption that, when the federal government withdraws land from the public domain, it also reserves water rights sufficient to fulfill the reservation's purposes. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Below, the Court of Appeals held that these federal reserved water rights can extend to groundwater. 17-42 App. 22. In reaching that result, the lower court did not consider how reserved rights would operate under existing state law. 17-42 App. 21-22. This inattention was supposedly justified by the preemptive effect that such rights have on state law. *Id.* The Ninth Circuit therefore did not at all consider whether recognition of a federal reserved right to groundwater might—notwithstanding the right's preemptive power—effect a taking of existing non-federal groundwater rights, and thereby violate the Fifth Amendment's prohibition on the taking of private property for public use without just compensation. The lower court's excessively narrow analysis portends significant disruption to the constitutional administration of water law in the western United States.

The existence of a federal reserved water right depends on *implied* intent. *United States v. New Mexico*, 438 U.S. 696, 699-702 (1978). But the federal government is not presumed to violate the rights of its citizens. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) ("We do not assume unconstitutional legislative intent . . . ."); *Solid Waste*

Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-74 (2001) (adhering to the "assumption that Congress does not casually authorize . . . interpret[ations that] push the limit of congressional authority," an assumption that "is heightened where the . . . interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," such as "States' traditional and primary power over land and water use"). Consequently, if the reservation of a federal water right raises serious questions about the taking of non-federal water rights without just compensation, then such questions present a strong reason *not* to imply an intent to reserve a federal right. The decision below omits this consideration, thereby categorically ascribing to the federal government a callous disregard for its citizens' liberties.

The petitions should be granted to ensure that the worthy aims of federal reservations do not override the property rights of those reservations' neighbors. *Cf.* Sup. Ct. R. 10(c).

FACTUAL AND LEGAL BACKGROUND

The Agua Caliente Band of Cahuilla Indians has dwelt in the Coachella Valley of Southern California since pre-colonial times. 17-42 App. 24. The Tribe's federally created reservation, which dates to the 1870s, comprises a patchwork of parcels situated throughout the Valley's principal towns. 17-42 App. 5. The Tribe or its lessees operate hotels, golf courses, and other commercial enterprises on the reservation. 17-42 App. 30, 42 n.7. The reservation partially overlies the Valley's groundwater basin; for that reason, the Tribe enjoys a state-law right (shared with

other overlying owners) to the basin's groundwater.[2] *See City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 863 (Cal. 2000). In 2013, the Tribe brought an action against the Petitioners to establish, among other things, the existence of a federal reserved water right in the reservation's underlying groundwater. 17-42 App. 8.

The doctrine of federal reserved water rights derives from *Winters v. United States*, 207 U.S. 564 (1908). The case arose out of a dispute between Indians residing on the Fort Belknap Reservation, and neighboring non-Indian water users. The latter had diverted for commercial purposes most of the water that otherwise would have flowed through the reservation, prior to any such Indian diversion. The non-Indian diverters therefore claimed superiority of title under Montana's water law doctrine of prior appropriation. *Id.* at 568-69. This Court rejected that claim by recognizing in the reservation's originating documents an implied water right with a priority date as of the date of the reservation, which antedated and therefore superseded the non-Indian appropriators' claims. *See id.* at 576-77. This implied water right was justified, in the Court's view, because Congress would have had no good reason to reserve land for the Indians without also reserving the right to sufficient water for the reservation's purpose, which for the Fort Belknap Reservation was to encourage the Indians to adopt an agricultural (and thus very water-dependent) way of life. *Id.* at 576.

Over a century later, the *Winters* doctrine still teaches that the federal government, when

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[2] Although the Tribe itself does not pump any groundwater, some of its lessees do. 17-42 App. 30.

withdrawing land from the public domain, impliedly reserves the right to enough water to carry out the necessary purposes of the withdrawn land. *See New Mexico*, 438 U.S. at 699-700 ("Congress . . . impliedly authorized [the President] to reserve 'appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation,' . . . 'only [to] that amount of water necessary to fulfill the purpose of the reservation, no more.'") (quoting *Cappaert*, 426 U.S. at 138, 141) (emphases removed).

Below, the Ninth Circuit held that the Tribe can assert a *Winters* reserved water right in the groundwater underlying the Tribe's reservation. 17-42 App. 22. The Ninth Circuit explained that, given the Coachella Valley's arid climate, the federal government naturally would have intended to reserve some water for the Tribe. 17-42 App. 16-17. Such an intent also reasonably would have extended, in the court's view, to the groundwater beneath the reservation, because it is (i) "appurtenant" to the reservation, and (ii) necessary to satisfy the Tribe's needs in light of the inadequate supply of surface water. 17-42 App. 17-19. That the Tribe's existing state-law groundwater right might make a reserved groundwater right unnecessary was, in the Ninth Circuit's view, an irrelevant point. 17-42 App. 21. The court therefore gave no attention to whether a federal reserved water right to groundwater might effect a taking of non-Tribal water rights. *See id.*

REASON FOR GRANTING THE PETITIONS

The Petitions Present the Significant National Issue of Whether a Federal Reserved Groundwater Right May Be Implied *Regardless* of Whether Such an Implied Right May Violate the Constitutionally Protected Property Rights of Non-Federal Groundwater Users

The Ninth Circuit's decision raises significant and as yet unconsidered takings questions, and thereby presents an issue of national importance meriting this Court's review. *See* Sup. Ct. R. 10(c). Although judicial and scholarly attention to *Winters* and its progeny has been substantial,[3] little consideration has been given to the takings implications of federal reserved water rights.[4] The reason for that inattention owes to the *form* of water right that is usually in play in cases addressing federal reserved water rights.

Typically, such rights have been asserted in contexts where the governing state law is prior appropriation, a doctrine which adheres to the rule of first in time, first in right. *See Cappaert*, 426 U.S. at 139 n.5. For a federal reserved water right, "[t]he priority date is the date the reservation is created," and thus rights "arising thereafter are subordinate" to

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[3] *See* Meg Osswald, *Seeing the Forest for Its Trees: The Case for Individualized Analysis of Implied Federally Reserved Water Rights on National Forests*, 7 Ariz. J. Envtl. L. & Pol'y 1, 2 (2016) ("The federal reserved water rights doctrine presents courts with a daunting task [that] ha[s] been the topic of extensive debate.").

[4] *See* Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 Idaho L. Rev. 369, 370 n.4 (2016) (citing one study that found no instance of a federal reserved water right's destruction of any private right).

the federal right. Charles J. Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 65 (1966). Hence, in the usual *Winters* scenario, a federal reserved water right operates like a background principle of property law.[5] Government regulation that is consistent with such a background principle does not violate the Fifth Amendment's prohibition on the taking of private property for public use without just compensation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992). For that reason, federal reserved water rights cannot infringe appropriative rights acquired *after* a reservation (like those in *Winters*), because any apparent infringement merely reflects a limitation inherent in the title of appropriators who are junior to the reserved (and thereby senior) water right.[6]

But the constitutional fit between a federal reserved water right in groundwater and the rights of other groundwater users is much poorer, because groundwater often is governed by legal regimes other than prior appropriation. In fact, prior appropriation is only one of several state-law systems regulating groundwater. Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 Idaho L. Rev. 265, 269 (2013). For example, some states follow the traditional

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[5] James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 Ecology L.Q. 1, 11 n.51 (2008) ("Indian reserved water rights are relevant to a takings claim involving water rights in the same way as common law principles are relevant to any takings claim. Both may be part of the definition of a property interest claimed to have been taken.").

[6] Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 Idaho L. Rev. 313, 349 n.163 (1992/1993) ("No taking occurs when the federal government asserts its reserved water rights over junior rights.").

English rule of absolute dominion,[7] whereas others follow a riparian-like[8] rule of reasonable use. Gwendolyn Griffith, Note, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 Stan. L. Rev. 103, 107-08 (1980). For its part, California follows a rule of "correlative" rights. *Id*. at 108-09 (citing *Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903)). Under this approach, an overlying owner's right (one to which the Tribe is entitled) is "analogous to that of the riparian owner in a surface stream," in that it is based on the ownership of the land, not priority of use,[9] *City of Barstow*, 5 P.3d at 863 (quoting *Cal. Water Serv. Co. v. Edward Sidebotham & Son, Inc.*, 37 Cal. Rptr. 1, 6 (Ct. App. 1964)), and, unlike the usual prior appropriation rule, cannot be extinguished by desuetude. Griffith, *supra*, at 109. But whether correlative or otherwise, groundwater rights in a non-

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[7] The rule of absolute dominion allows that a person "may abstract the water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbor and, thereby, cause him injury." Dellapenna, *supra*, at 271 (quoting *Langbrook Properties, Ltd. v. Surrey County Council*, [1969] 3 All E.R. 1424).

[8] According to the riparian doctrine, "the owner of land contiguous to a watercourse is entitled to have the stream flow by or through his land undiminished in quantity and unpolluted in quality, except that any riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators." *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982).

[9] The principal difference between a correlative right and other non-appropriative groundwater rights is that the former is limited to the safe yield of the groundwater aquifer in proportion to the overlying landowner's holdings. Dellapenna, *supra*, at 276.

appropriation jurisdiction do not depend on seniority of use. *See id*. at 107-10.

For that reason, the insertion of a federal reserved groundwater right into such a jurisdiction—again, whether absolute dominion, reasonable use, or correlative rights—will frustrate the existing groundwater rights of overlying owners substantially more than in a prior appropriation system.[10] Such a right's assertion in a non-appropriative context will result in competing uses' being deemed unreasonable per se, or in their subordination to the reserved right's full satisfaction.[11] Either outcome puts overlying owners in a substantially weaker position because their rights will no longer be truly correlative (or, for

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[10] *See* Debbie Shosteck, *Beyond Reserved Rights: Tribal Control Over Groundwater Resources in a Cold* Winters *Climate*, 28 Colum. J. Envtl. L. 325, 341 (2003) ("Federal rights to surface water can be readily accommodated in a prior appropriation system [but,] precisely because of the quantifiable and temporal nature of federal rights, they are ill-suited to groundwater regimes that do not follow a prior appropriation system."). *Cf*. Meyers, *supra*, at 68 (noting "the vast difference between the rights of the Indians in an appropriation state and their rights in a riparian state").

[11] Judith V. Royster, Winters *in the East: Tribal Reserved Rights to Water in Riparian States*, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 169, 197-98 (2000). *See* Griffith, *supra*, at 116 ("[I]n times of shortage, Indian uses are satisfied at the expense of non-Indian uses [and the] right of the Indians to a preemptive share imposes a duty upon non-Indians to defer to Indian uses.). *See also* Dale Ratliff, *A Proper Seat at the Table: Affirming a Broad* Winters *Right to Groundwater*, 19 U. Denv. Water L. Rev. 239, 256-57 (2016) (observing that, because federal reserved water rights "need not accommodate other users" and "are not based solely on tribe's current need for water," they necessarily would conflict with the correlative rights of other groundwater users).

that matter, riparian or absolute) as compared to a trumping federal reserved right.[12]

Because of the overriding nature of such a reserved right, it is at least plausible that its assertion as against other overlying owners would result in a total or near-total loss in their own water rights, thereby effecting a regulatory taking[13] under *Lucas*, 505 U.S. at 1031-32 (proscription of all beneficial use effects a taking), or *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (when less than all beneficial use has been proscribed, a taking depends on, among other things, the regulation's economic impact and the property owner's reasonable investment-backed expectations). *Cf.* Dave Owen, *Taking Groundwater*, 91 Wash. U. L. Rev. 253, 278 (2013) ("Groundwater/takings litigation is a growing phenomenon."). The insertion of a federal reserved right "decreases the value of non-Indian investment, both by present use, which decreases the amount of groundwater actually available, and by injecting an

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[12] *See* 17-42 App. 21 ("[S]tate water entitlements do not affect our analysis with respect to the creation of the Tribe's federally reserved water right."). *See also* Griffith, *supra*, at 116 ("Applying the Indian reserved rights doctrine to groundwater adversely affects the rights of non-Indians under existing state law.").

[13] Any diminution in groundwater use might qualify as a per se taking under a physical takings test, although the applicability of that test to water rights is unclear. *Compare Casitas Mun. Water. Dist. v. United States*, 543 F.3d 1276, 1296 (Fed. Cir. 2008), *and Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001) (both applying a physical takings test to the alleged taking of water rights), *with Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 132 (Ct. App. 2006), *and Klamath Irrig. Dist. v. United States*, 67 Fed. Cl. 504, 538 (2005) (declining to apply such a test).

element of uncertainty into the planning of future uses." *See* Griffith, *supra*, at 119. Moreover, such a right "could upset longstanding property right expectations," Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 Nat. Resources J. 611, 622 (2010), by "grant[ing] to Indian tribes the exclusive right to a resource [heretofore] shared by multiple groundwater users," Shosteck, *supra*, at 341.

This Court does not casually impute to the federal government a desire to tread close to the edge of unconstitutionality. *Solid Waste Agency*, 531 U.S. at 172-74. Yet that is precisely what the Ninth Circuit's decision does, by inferring an implied reserved right to groundwater without any concern for its effect on state water rights. The lower court's indifference to those rights runs counter to the well-established federal policy of accommodating state water law.[14] Just as significantly, it ignores the solicitude this Court has shown to non-federal water users, a concern demonstrated by the Court's repeated refusal to infer a federal intent to reserve water already appropriated by non-federal users.[15]

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[14] *See California v. United States*, 438 U.S. 645, 653 (1978) (running through "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States" is a "consistent thread of purposeful and continued deference to state water law by Congress"). *See also* Blumm, *supra*, at 374 n.28 (observing that the assigning of reservation priority dates to federal reserved water rights is consistent with the Congressional policy of accommodating state water systems).

[15] *See New Mexico*, 438 U.S. at 698 ("Congress did not intend . . . to relinquish its authority to reserve *unappropriated* water in the

These deficiencies in the Ninth Circuit's decision threaten disastrous effects throughout the West. Groundwater is an essential resource in that often drought-stricken land.[16] A fair and efficient allocation of the resource is impossible without strong protection for all groundwater rights, including those of non-federal landowners.[17] By undercutting those rights, the Ninth Circuit's decision risks upsetting longstanding water law regimes. Granting the petitions will give the Court the opportunity to avoid this unsettlement and thereby shore up the property rights of the nation's groundwater users.

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future for use on appurtenant lands withdrawn from the public domain for specific federal purposes.") (emphasis added); *Cappaert*, 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve *unappropriated* and thus available water.") (emphasis added).

[16] *See* Barton H. Thompson, Jr., *Beyond Connections: Pursuing Multidimensional Conjunctive Management*, 47 Idaho L. Rev. 273, 273 (2011) ("Groundwater is of immense importance in the United States, particularly in the West where precipitation is highly variable and often scarce.").

[17] *See* Robert A. Pulver, Comment, *Liability Rules as a Solution to the Problem of Waste in Western Water Law: An Economic Analysis*, 76 Cal. L. Rev. 671, 717 (1988) ("Most . . . authorities suggest that appropriators' ownership control over their appropriations be increased . . . ."). *See generally* Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. Davis L. Rev. 1687, 1699 (2015) ("Mainstream economics . . . explain[s] how private property rights promote an efficient allocation of interests in resources and lead to greater social utility.").

CONCLUSION

The petitions for writ of certiorari should be granted.

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Respectfully submitted,

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