

Do tribes have special groundwater rights? Water agencies appeal to Supreme Court in landmark case

Photos by Zoe Meyers and Jay Calderon | Published July 6, 2017

The U.S. Supreme Court has never ruled on whether Indian tribes hold special rights to the groundwater beneath their reservations, and the court will now have a chance to settle the question in a case that could redraw the lines in water disputes across the country.

The case revolves around whether the Agua Caliente Band of Cahuilla Indians has a federally established “reserved right” to groundwater on its reservation in Palm Springs and surrounding areas in the desert.

Two water districts have been fighting the tribe in court for four years, and on Wednesday the districts filed petitions to appeal to the Supreme Court. The Desert Water Agency and the Coachella Valley Water District are challenging a decision by the Ninth Circuit Court of Appeals, which ruled the tribe has a right to groundwater that was established when the federal government created the reservation in the 1870s.

Managers of the water agencies argue the aquifer is a public resource and the tribe has the same rights under California law as all other landowners to use water pumped from the aquifer.

“This case is important because it’s about the shared resource,” said James Cioffi, president of DWA’s board of directors. “We think it’s our duty to maintain the ownership of the water for everyone.”



Desert Water Agency President James Cioffi discusses a Supreme Court appeal in the Agua Caliente tribe's landmark groundwater case. *Ian James and Zoe Meyers*

Cioffi pointed out that the agency has long provided water to the Agua Caliente tribe for its hotels, casinos and golf courses. He said the motivations behind the tribe's lawsuit remain unclear.

“Certainly it's not about access to the water because they along with everyone else in this community has access to all the water they want,” Cioffi said. “We have been partners with the tribe on a lot of their projects and will continue to do so.”

He and other board members at the water agencies say they worry that if the tribe prevails, its privileged rights could drive up water costs for customers and complicate efforts to manage groundwater.

The Coachella Valley Water District's legal team said in their 47-page [petition to the Supreme Court](#) that water scarcity is one of the most pressing problems facing the western U.S. and that if the appeals court's ruling is allowed to

stand, Indian reservations “would have preemptive federal rights that override the vigorous and ongoing state and local efforts to ensure the future availability of groundwater in the West.”

The Supreme Court hears a small number of the cases that are petitioned for review, and the court is expected to announce in the fall whether it will take up the Agua Caliente case.

The Indian Canyons golf resort is on the Agua Caliente Indian Reservation in Palm Springs, Calif., Wed. July, 5, 2017.

(Photo: Zoe Meyers/The Desert Sun)

The tribe sued the water agencies in May 2013, seeking to assert rights to a portion of the area’s groundwater.

The tribe accuses the agencies of imperiling the aquifer by allowing its levels to decline over the years and by using saltier, less pure Colorado River water to replenish the aquifer. The agencies defend their efforts to combat groundwater overdraft and insist that Colorado River water meets all drinking water standards.

Agua Caliente Chairman Jeff Grubbe has said the case is about securing a “seat at the table” for the tribe to have a voice in decisions about how the aquifer is managed.

The water agencies’ officials have questioned Grubbe’s comments, saying the tribe is welcome to participate in managing the aquifer as one of the community’s stakeholders.

“When you say you ‘want a seat at the table,’ what does that mean? Because they already have it,” said John Powell, Jr., president of CVWD’s board.

“They have just as much a seat as anybody else, if they want it.”

Grubbe wasn’t available to comment on the water agencies’ petitions to the

Supreme Court this week. He has said previously that the tribe is taking a long-term view and wants to see the aquifer managed sustainably. He has also suggested the agencies should instead treat the imported water before allowing it to seep down to the aquifer.

Leaders of Native American tribes across the West have been closely watching the case.

A list of 35 tribes and five tribal organizations joined the lawsuit last year, backing the Agua Caliente in a “friend-of-the-court” brief. They said Congress has approved “numerous Indian water rights settlements that recognize and confirm tribes’ rights to groundwater.”

CVWD has spent more than \$1.1 million on legal bills to date, and DWA has spent more than \$1.5 million – a combined total of nearly \$2.7 million.

Powell said if the water districts lose, he fears that would create uncertainty and “dampen economic activity.” He said if the agencies are eventually barred from using Colorado River water to recharge the aquifer, they could be forced to treat the water – which he said would be expensive and unnecessary.

Water from the Colorado River rushes into a groundwater recharge facility near Palm Springs, Calif., Wed. July, 5, 2017.

(Photo: Zoe Meyers/The Desert Sun)

If the tribe wins, the case would continue with other phases to determine whether the tribe owns storage space in the aquifer, whether its rights include a water-quality component and how much groundwater the tribe would be entitled to.

An adjudication process for divvying up groundwater between the tribe and all other water users in the valley would be a very costly, lengthy process, Powell said.

“Everybody’s going to be fighting for their piece of the pie. And we don’t need to do that. People don’t need to fight for water. The beauty of the Coachella Valley is that we don’t need to do that, and yet we’re heading in that direction,” Powell said. “It would be extremely damaging to the Coachella Valley, and that’s what we’re trying to avoid.”

The Agua Caliente tribe relies on the water districts to pump groundwater for its reservation, where thousands of homes are built on leased tribal land. The reservation spreads across more than 31,000 acres in a checkerboard pattern that includes parts of Palm Springs, Cathedral City, Rancho Mirage and the Santa Rosa and San Jacinto mountains.

The tribe, which has more than 400 members, owns the Spa Resort Casino in Palm Springs and the Agua Caliente Casino Resort Spa in Rancho Mirage, and has plans for new subdivisions as well as [another casino](#) in Cathedral City.



**On a large patch of vacant land on the corner of Date Palm and Hwy 111 a new casino is in the works by the Agua Caliente Band of Cahuilla Indians, April 11, 2017.
(Photo: Jay Calderon/The Desert Sun)**

The case has elicited a range of opinions among residents. Outside a Ralphs supermarket on reservation land, retiree Bob Valdez said he thinks it’s

wasteful for the water districts to be spending so much money fighting the lawsuit.

“Some agencies just get carried away with power,” Valdez said, adding that he thinks the tribe’s position makes sense.

Walking out of the CVS Pharmacy, Lamelle Edington said he agreed that the tribe should have a right to groundwater.

“It’s their water. They should be able to get what they want out of it first. They should get paid for it, too,” said Edington, who lives in Desert Hot Springs.

Other people said they don’t want to see the tribe gain control over water.

“I think they’re trying to be greedy,” said Michael Berzenye, a Palm Springs resident. “They want royalties off of something that should be a public resource.”

DWA’s lawyers made a similar point in their 100-page [petition to the Supreme Court](#). They noted that in its legal complaint, the tribe “alleges that DWA and CVWD are required to compensate the Tribe for importing and storing water into the groundwater basin that the Tribe allegedly ‘owns.’”

“Thus, the Tribe seeks money from the water agencies rather than wet water for its reservation needs,” DWA said in its petition.

Water from the Colorado River fills percolation ponds to replenish groundwater near Palm Springs, Calif., Wed. July, 5, 2017.

(Photo: Zoe Meyers/The Desert Sun)

Groundwater vs. surface water

The agencies [announced plans to appeal](#) to the Supreme Court in March after the appeals court sided with the tribe.

The case is pushing the courts to define more clearly the boundaries between state-administered water rights and federal water rights, and to sort out how groundwater fits into laws drawn up more than a century ago, before the widespread use of mechanical pumps that enabled people to easily tap underground water supplies.

Groundwater and surface water have long fallen under separate, different water-rights systems.

With surface water, California and other western states use a “first-in-time, first-in-right” system in which the first party to use water from a stream or river obtained a priority right. With groundwater, in contrast, California law says landowners have a right to pump water from beneath their property, and no one holds priority rights.



Chairman Jeff Grubbe discusses the tribe's lawsuit over water rights. *Marilyn Chung/The Desert Sun*

One of the questions in the Agua Caliente case centers on state and federal courts' varying interpretations of a 1908 Supreme Court decision, *Winters v.*

United States, which affirmed that Indian tribes are entitled to sufficient water supplies for their reservations.

The Ninth Circuit Court of Appeals said the Winters doctrine applies to both surface water and groundwater on federally reserved land – including Indian reservations as well as other lands set aside by the government, such as national forests, national parks and military bases.

CVWD said in its petition that in the Winters case, the tribes on the Fort Belknap Indian Reservation in Montana sued because their water supply was “threatened by settlers who had diverted the river upstream of the reservation and claimed rights to the water.”

CVWD said the purpose of the Winters doctrine “has always been to protect tribal reservations from depletion of the water they need for survival.”

The water district argued that the Agua Caliente tribe’s case is different and that federal reserved rights shouldn’t apply to groundwater at all.

“What the Tribe is seeking... is a federal reserved right to groundwater that the Tribe does not need,” CVWD said in its petition.

[RELATED: Appeals court sides with Agua Caliente tribe in landmark water case](#)

The U.S. Department of Justice signed on to the lawsuit in support of the tribe in 2014, saying the federal government has an interest in ensuring water rights for the tribe.

Michael Campana, a professor of hydrogeology and water resources at Oregon State University, said when reservations were created for tribes, one of the aims was to make sure they would be self-sufficient. And for reservations with scant water available from streams or rivers, he said, being self-sufficient usually means relying on water from wells.

“My feeling is that the tribes are entitled to the groundwater,” Campana said. “I would like to see their rights upheld.”

Other tribes are watching

If the tribe prevails before the Supreme Court, other tribes across the country would gain legal backing to assert rights to groundwater, which could in turn strengthen their positions in negotiations or court cases.

Campana said in that scenario, he’d expect to see more negotiations between tribes, states and other agencies over water – and more lawsuits, too.

A victory for the Agua Caliente tribe would set an important precedent that other tribes could rely on when they make similar claims, said Daniel Cordalis, a Navajo lawyer who lives in Northern California’s Humboldt County and has worked on water cases for the Yurok and Navajo tribes.

Many tribes are working toward water rights settlements, with various claims pending before the Secretary's Indian Water Rights Office, an Interior Department office charged with negotiating and overseeing settlements.

“There are a lot of tribes out there trying to figure out how to assert their water rights and kind of just waiting in line to do so. So there’s a big backlog,” Cordalis said. “It’s hard to get your water rights quantified and decreed.”

If the Agua Caliente tribe wins, he said, “this case is going to reverberate through all of them, every single one.”

Cordalis said he hopes the court sides with the tribe so the law will reflect the fact that surface water and groundwater are connected – and that “they need to be treated as a single resource.”

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In many areas of California, aquifers have been badly depleted due to heavy

pumping.

State officials responded during the drought in 2014 by approving the Sustainable Groundwater Management Act, which calls for local agencies to adopt plans for sustainable water use.

Cities and water districts have been taking steps this year to establish locally-controlled “groundwater sustainability agencies.”

As sovereign nations, Indian tribes [aren't subject to the groundwater law](#) and aren't required to participate.

Sarah Krakoff, a law professor at the University of Colorado, said if the Agua Caliente tribe prevails, that could “force the kind of dialogue, about how to collaborate on sustainable development of groundwater resources, that the tribes and the states just haven't really had to have up until now.”

In its petition to the Supreme Court, the Coachella Valley Water District argued that if the appeals court decision stands, it will “drastically complicate, and potentially entirely defeat, these state and local efforts to manage groundwater resources efficiently.”

Groundwater levels have declined over the years in much of the Coachella Valley as water has been pumped from the aquifer for expanding subdivisions, golf courses, resorts and farms.

Homes face an artificial lake at the Lake Mirage Racquet Club in Rancho Mirage.

(Photo: Jay Calderon/The Desert Sun)

The water agencies have used water from the Colorado River to partially offset those declines, and the water table has risen around groundwater replenishment ponds in Palm Springs and La Quinta. The biggest declines in the aquifer's levels – in some areas 90-100 feet or more since the 1950s –

have occurred away from those ponds in the middle of the valley.

The water agencies say they have viable long-term plans to combat groundwater overdraft, including a plan to replenish the aquifer with Colorado River water at a facility in Palm Desert.

[READ MORE: The Agua Caliente Checkerboard](#)

Some residents agree with the water districts that if the tribe gets preferential rights, that would hurt ratepayers.

“The lawsuit can be withdrawn or settled or left in the courts. Do we really want an outsider telling us how to use our water?” said Andy Vossler, president and CEO of Landmark Golf, which manages golf courses. “If the lawsuit is left in the courts, it will be in the courts for many years to come.”

He said he hopes it’s possible to avoid more costly litigation.

Officials at the two water agencies say they’ve long had a good working relationship with the Agua Caliente tribe, supplying water and meeting its infrastructure needs.

Desert Water Agency’s office building stands on reservation land that was sold to the agency decades ago. The property is adjacent to the Agua Caliente tribal headquarters, separated by a chain-link fence.

Cioffi said DWA would be open to negotiating, but there’s a substantial sticking point: “We’re not in a position to negotiate away the shared water right that we all have.”

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