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## *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District: A Tribe's Successful Fight for Federally Reserved Water Rights*

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## NOTES

### **AGUA CALIENTE BAND OF CAHUILLA INDIANS V. COACHELLA VALLEY WATER DISTRICT: A TRIBE'S SUCCESSFUL FIGHT FOR FEDERALLY RESERVED WATER RIGHTS**

*Alyssa Lankford\**

#### *Introduction*

*When the well's dry, we know the worth of water.*

– Benjamin Franklin<sup>1</sup>

The Ninth Circuit began its landmark opinion in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* with this quote, not merely for stylistic appeal, but to highlight the importance of the issue discussed in the case: the allocation of water rights. The world currently faces a global water crisis, with drinkable water supplies diminishing each day.<sup>2</sup> The Western United States provides a gleaming example of this crisis, where the arid environment has all but eliminated surface water resources and left the land in a permanent drought.<sup>3</sup> Given the impact of the water crisis on industries and individuals alike, parties increasingly turn to courts to answer the crucial question: who possesses rights to the remaining water?

The answer to this question implicates multiple parties, including state water agencies, the federal government, and Indian tribes. States normally create and enforce their own water law, with the federal government granting them great deference in most issues.<sup>4</sup> However, the doctrine of

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1. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017).

2. *See generally Water Scarcity*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/threats/water-scarcity> (last visited Sept. 24, 2017).

3. *See generally* Dennis Dimick, *5 Things You Should Know About California's Water Crisis*, NAT'L GEOGRAPHIC (Apr. 6, 2015), <http://news.nationalgeographic.com/2015/04/150406-california-drought-snowpack-map-water-science/>; *United States v. New Mexico*, 438 U.S. 696, 699 (1978).

4. CYNTHIA BROUGH, CONG. RESEARCH SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE *WINTERS* DOCTRINE: AN OVERVIEW (2011).

federal reserved water rights, which recognizes that the federal government impliedly reserves water upon creating tribal reservations,<sup>5</sup> “represents a limited exception to the general rule that individual states govern water rights.”<sup>6</sup> Often referred to as the “*Winters* doctrine,” due to the historic Supreme Court case first discussing this issue, these federally reserved rights carry with them a type of seniority over state water rights.<sup>7</sup>

While state and federal courts have upheld the doctrine of federal reserved water rights for the past century, many questions remain regarding how to apply the doctrine today. One such question concerns whether a tribe’s federally reserved water rights, if established, extend beyond surface water to also encompass groundwater.<sup>8</sup> In *Agua Caliente*, the Ninth Circuit became the first federal appellate court to address this issue. However, given the implications of the court’s decision on competing water rights, it most likely will not be the last. Ambiguity surrounding the *Winters* doctrine has left interested parties geared for litigation to preserve their increasingly precious water rights in the face of extreme shortages in arid parts of the country.<sup>9</sup>

This Note will examine the doctrine of federal reserved water rights, known commonly as the *Winters* doctrine, with a focus on the recently-decided Ninth Circuit case, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*. Part I will provide the origin of tribes’ federally reserved water rights through discussion of three Supreme Court cases on the doctrine, starting with *Winters v. United States*. Part II will discuss *Agua Caliente* in detail, highlighting the factual scenario leading to the litigation, as well as the Ninth Circuit’s novel application of the *Winters* doctrine to groundwater. Part III will analyze the Ninth Circuit’s decision, with emphasis placed on its determination regarding the role of *United States v. New Mexico* in establishing the Tribe’s federally reserved water right. Part III will also consider whether the court appropriately extended the *Winters* doctrine to groundwater. Finally, Part IV will focus on the impact of *Agua Caliente* on competing water rights.

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5. See generally *Winters v. United States*, 207 U.S. 564 (1908).

6. FRANCIS C. AMENDOLA ET AL., 94 C.J.S. WATERS § 360 (2017).

7. BROUGHER, *supra* note 4.

8. *Cappaert v. United States*, 426 U.S. 128, 142 (1976).

9. BROUGHER, *supra* note 4.

*I. The Legacy of the Doctrine of Federal Reserved Water Rights*

Both the Commerce Clause and Property Clause of the United States Constitution empower the federal government to reserve water rights for specific purposes.<sup>10</sup> While the doctrine of federal reserved water rights applies to other federal enclaves, the application of the doctrine often implicates tribal reservations.<sup>11</sup> The landmark Supreme Court decision, *Winters v. United States*, emphasizes the importance of the relationship between tribes and federally reserved rights. In *Winters*, the federal government sued on behalf of the tribes living on the Fort Belknap Indian Reservation to keep a group of settlers from obstructing the water of the Milk River from reaching the reservation.<sup>12</sup> On May 1, 1888, the federal government established the Fort Belknap Reservation “as and for a permanent home and abiding place of the Gros Ventre and Assiniboing [tribes]”<sup>13</sup> in an attempt to transform them from nomads to agriculturalists.<sup>14</sup> However, to achieve this goal on the reservation’s “dry and arid” lands, the tribes, in conjunction with the federal government, argued the necessity of allowing the “[Milk] river [to] flow down the channel uninterruptedly and undiminished in quantity . . . .”<sup>15</sup>

Hoping to build dams on the Milk River to better utilize its water,<sup>16</sup> the settlers based their argument on the 1888 treaty establishing the reservation, arguing the treaty “‘ceded, sold, transferred, and conveyed’ to the United States all of the lands embraced in [the tribes’ former larger land holding], except Fort Belknap Indian reservation.”<sup>17</sup> From the settlers’ perspective, the tribes no longer held title to the greater part of the land, which included the parts of the Milk River on which they had settled.<sup>18</sup> They therefore argued that after the 1888 treaty, the federal government owned the land and “[threw it] open to settlement” for individuals like themselves.<sup>19</sup> In their prayer for relief, the settlers emphasized the valueless nature of their lands without access to the Milk River, stating that a lack of water would

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10. *Cappaert*, 426 U.S. at 138.

11. BROUGHER, *supra* note 4.

12. *Winters v. United States*, 207 U.S. 564, 565 (1908).

13. *Id.*

14. *Id.* at 566-67.

15. *Id.*

16. *Id.* at 565.

17. *Id.* at 567.

18. *Id.* at 568.

19. *Id.*

inevitably force the dissolution of the communities and defeat “the purpose and object of the government in opening said lands for settlement . . . .”<sup>20</sup>

Writing for the Court, Justice McKenna focused on the May 1888 treaty in order to decipher the purpose of establishing the reservation.<sup>21</sup> In doing so, he recognized that the creation of the reservation intended to transform the Tribes from nomads to “a pastoral and civilized people.”<sup>22</sup> However, the arid nature of the land, without water to support it, made it virtually valueless.<sup>23</sup> Because the Tribes could not accomplish the purpose of the reservation without access to and use of the Milk River, Justice McKenna found in favor of the Tribes and the federal government, holding that “the United States intended to reserve sufficient water for the needs of agriculture on the reservation.”<sup>24</sup> This decision created the doctrine of federal reserved water rights, or, the *Winters* doctrine: “[W]hen the Federal Government 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.”<sup>25</sup>

Over the next seventy years, the *Winters* doctrine remained relatively intact, with only one prominent case discussing the quantification of federally reserved water rights.<sup>26</sup> Despite the passage of time, the *Winters*’ test for determining whether the federal government impliedly reserved water rights when creating federally designated lands remained solid precedent. Between 1976 and 1978, however, the Supreme Court issued two decisions that broadened and subsequently narrowed the scope of the *Winters* doctrine.<sup>27</sup>

In *Cappaert v. United States*, the Supreme Court decided whether the status of Devil’s Hole as a national monument included impliedly reserved

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20. *Id.* at 570.

21. *Id.* at 575.

22. *Id.* at 576.

23. *Id.*

24. Raphael J. Moses, *The Federal Reserved Rights Doctrine—From 1866 Through Eagle County*, 8 NAT. RESOURCES LAW. 221, 230 (1975).

25. *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also* BROUGHER, *supra* note 4.

26. *See generally* *Arizona v. California*, 373 U.S. 546 (1963) (deciding the quantification of water rights is no more than the amount necessary to fulfill the purposes of the reservation).

27. 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 5:36 (2d ed. 2007) (Federal Implied Reserved Water Rights – *Cappaert* and New Mexico).

federal water rights.<sup>28</sup> Though not addressing a tribe's water rights, the case implicated the *Winters* doctrine because Devil's Hole was designated as a federal enclave. In 1952, President Truman made Death Valley "a national monument 'for the preservation of the unusual features of scenic, scientific, and educational interest therein contained.'"<sup>29</sup> The proclamation included Devil's Hole as part of the monument, given the cavernous pool's unique presence of a rare species of fish.<sup>30</sup> In making the national monument, President Truman declared that the presence of the fish made the pool "of such outstanding scientific importance" that it required "special protection."<sup>31</sup>

Almost twenty years after President Truman designated the pool as part of the national monument, defendant-petitioners began pumping groundwater to support their nearby ranch, unknowingly pulling from an aquifer that sourced Devil's Hole.<sup>32</sup> As a result, the water level in Devil's Hole decreased, placing the rare species of fish at risk of extinction.<sup>33</sup> After unsuccessfully litigating extensive state administrative proceedings, the federal government sought an injunction limiting the Cappaerts' groundwater pumping.<sup>34</sup>

While deciding whether President Truman had impliedly reserved a federal water right when creating the national monument, the Supreme Court in *Cappaert* reaffirmed the *Winters* doctrine, stating:

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. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.<sup>35</sup>

Because President Truman specifically stated "the pool . . . should be given special protection" when designating Devil's Hole as a national

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28. *Cappaert*, 426 U.S. at 131.

29. *Id.* at 132.

30. *Id.*

31. *Id.*

32. *Id.* at 133.

33. *Id.* at 133-34.

34. *Id.* at 134-35.

35. *Id.* at 139.

monument, the Court found a federally reserved water right that trumped state-created rights.<sup>36</sup>

One of the most significant aspects of *Cappaert* was the Court's discussion of whether the *Winters* doctrine applied to groundwater, marking the first time the Supreme Court had addressed that question.<sup>37</sup> The Court determined that because "[the] doctrine is based on the necessity of water for the purpose of the federal reservation," the federal government could protect its water "*whether [it was] surface or groundwater.*"<sup>38</sup> However, because the Court concluded Devil's Hole contained surface water, the precedential value of its extension of *Winters* to groundwater remained uncertain.<sup>39</sup>

While the Court interpreted the *Winters* doctrine expansively in *Cappaert*, just two years later, it seemingly reversed course. In *United States v. New Mexico*, the federal government claimed reserved water rights from the Rio Mimbres for recreation, stockwatering, and wildlife preservation of a national forest.<sup>40</sup> The Supreme Court started its opinion by following the decision in *Cappaert*, emphasizing that because "the President [has] the power to reserve portions of the federal domain for specific federal purposes," Congress had "impliedly authorized him to reserve 'appurtenant water [then] unappropriated to the extent needed to accomplish the purpose of the reservation.'"<sup>41</sup>

The *New Mexico* Court, however, ultimately diverged from the expansive *Cappaert* holding. Instead, it relied on *Arizona v. California*, which quantified the amount of reserved water at no more than what was "necessary to fulfill the purpose of the reservation,"<sup>42</sup> to create a primary-secondary distinction for federally reserved water rights:

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36. *Id.* at 140, 145.

37. *Id.* at 142.

38. *Id.* at 143 (emphasis added).

39. *Id.* at 142-43; see also CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK § 8.12 (2018 ed.) [hereinafter AMERICAN INDIAN LAW DESKBOOK] ("Miscellaneous issues- Groundwater") ("[T]he Supreme Court held that a reserved right can be protected from adjacent groundwater diversions. However, the reserved water right in *Cappaert* was in an underground pool, which the Court characterized as 'underground surface water, and not groundwater.'").

40. 438 U.S. 696, 698 (1978).

41. *Id.* at 699-700 (emphasis omitted) (quoting *Cappaert*, 426 U.S. at 138).

42. *Id.* at 700 (internal quotation omitted); see also *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.<sup>43</sup>

The Court supported its finding of a primary-secondary distinction by analyzing the Organic Administration Act of 1897, which established that the federal government reserves national forests “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.”<sup>44</sup> Additionally, the Court looked to the Multiple-Use Sustained Yield Act of 1960 for Congress's stated policy that national forests be administered “for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>45</sup>

Although the Multiple-Use Sustained Yield Act proved Congress had expanded the purposes of national forests after the inception of the Organic Administration Act, the Court, the Court declined to establish federally reserved water rights for these purposes because the Act provided “no indication that [Congress] believed the new purposes to be so crucial as to require a reservation of additional water.”<sup>46</sup> Accordingly, the Supreme Court refused to recognize a federally reserved water right for stockwatering on the Rio Mimbres, given its status as a secondary purpose in the creation of the national forest.<sup>47</sup> The Court effectively required an express reservation of water to establish federally reserved rights, rather than using the *Winters* doctrine to determine whether water was impliedly reserved to fulfill the purposes of the federally reserved lands.<sup>48</sup>

After two Supreme Court decisions on the *Winters* doctrine in a two-year period, federal case law concerning impliedly reserved water rights remained unchanged until the Ninth Circuit decided *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*.

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43. *New Mexico*, 438 U.S. at 702.

44. *Id.* at 707; see also COGGINS & GLICKSMAN, *supra* note 27.

45. *New Mexico*, 438 U.S. at 713.

46. *Id.* at 715.

47. *Id.* at 717.

48. COGGINS & GLICKSMAN, *supra* note 27.

## *II. Expanding Federally Reserved Water Rights to Groundwater*

While the Agua Caliente Tribe's occupation of the Coachella Valley predates California's statehood, two presidential executive orders in 1876 and 1877 formally created the reservation.<sup>49</sup> The executive orders reserved the land for "the permanent use and occupancy of the Mission Indians in southern California," and set aside additional land in 1877 for "Indian purposes."<sup>50</sup> These orders followed government reports urging the creation of reservations to allow tribes to settle and build homes on the land.<sup>51</sup> Between these reports and the executive orders, the federal government intended to "secure the Mission Indians permanent homes, with land and water enough."<sup>52</sup>

The nature of the Coachella Valley's desert environment caused many issues for establishing sustainable living conditions.<sup>53</sup> Due to the minimal rainfall and seasonally-fluctuating water levels produced by the Whitewater River System, the area contains very little surface water.<sup>54</sup> As a result, the Coachella Valley Groundwater Basin, an aquifer beneath the valley, is the main source of water for the region.<sup>55</sup> This life-sustaining water basin does not only provide water to the Agua Caliente Tribe, but also to "9 cities, 400,000 people, and 66,000 acres of farmland."<sup>56</sup> As demand for the groundwater grows, the aquifer's water level declines, despite efforts to elevate water levels through groundwater pumping.<sup>57</sup>

Historically, the Tribe received minimal water from the local river system under the Whitewater River Decree and fulfilled all other water needs by purchasing it from the defendant water agencies.<sup>58</sup> While this agreement worked initially, the steadily declining groundwater levels increased tensions regarding the use and control of the water.<sup>59</sup> Accordingly, the Agua Caliente Tribe filed suit against the local water agencies in May of 2013 to determine if it possessed a federally reserved

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49. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017).

50. *Id.* (internal quotation omitted).

51. *Id.*

52. *Id.* at 1265-66 (internal quotation omitted).

53. *Id.* at 1266.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1267.

right to the groundwater in the aquifer.<sup>60</sup> Because multiple issues arose from the suit, the parties elected to divide the litigation into three phases, focusing only on the first phase in the immediate case. The first phase addressed the Tribe's potential federally reserved right to groundwater, leaving later phases to address quality and quantification of any potential rights.<sup>61</sup>

In March of 2015, the district court granted partial summary judgment to the Tribe by holding "that the reserved rights doctrine applies to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation."<sup>62</sup> Without deciding Phase II and III of the litigation, the district court granted an interlocutory appeal, giving rise to the precedential Ninth Circuit decision.<sup>63</sup>

On appeal, the Ninth Circuit analyzed the Tribe's claim of federally reserved rights to groundwater in three steps. The first step focused on whether the federal government impliedly reserved water when creating the reservation.<sup>64</sup> After reaffirming the *Winters* doctrine, the court turned to whether the Tribe had any right to the area's water, much less the groundwater, at issue.<sup>65</sup> The primary-secondary distinction in *New Mexico* was central to this question. The defendant water agencies believed the holding in *New Mexico* "that water is impliedly reserved only if other sources of water then available cannot meet the reservation's water demands" mandated an additional inquiry to determine whether a reserved right exists.<sup>66</sup> In their view, "if other sources of water exist—and the lack of a federal right would not entirely defeat the purpose of the reservation—then Congress intended to defer to state water law . . . ."<sup>67</sup>

The court, however, disagreed with the water agencies' narrow interpretation of *New Mexico*. In its view, the *New Mexico* decision remained true to the *Winters* doctrine, as the primary-secondary distinction only affected the amount of water reserved.<sup>68</sup> Ultimately, because the primary-secondary distinction focused on quantification of a federally reserved right, "it did not [] eliminate the threshold issue—that a reserved

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1268.

66. *Id.* at 1269.

67. *Id.*

68. *Id.* at 1270.

right exists if the purposes underlying a reservation envision access to water.”<sup>69</sup>

Accordingly, the court sought to determine the purpose of the reservation and the role of water in fulfilling that purpose.<sup>70</sup> The executive orders creating the reservation merely stated the federal government’s desire to allow “permanent use and occupancy” of the land by the Tribe.<sup>71</sup> From these documents, the court recognized that “[t]he general purpose, to provide a home for the Indians, is . . . broad . . . and must be liberally construed.”<sup>72</sup> Noting the importance of water in sustaining the Tribe’s ability to live in such an arid environment, the court determined that the federal government established the reservation “to create a home for the Tribe” and that “water was necessarily implicated in that purpose.”<sup>73</sup> Therefore, a federally reserved water right existed from the creation of the reservation.<sup>74</sup>

After determining the Agua Caliente Tribe had a federally reserved water right, the court tackled the second step of their analysis: whether that right extended to groundwater. To do so, the court focused on the “appurtenance” requirement in *Winters*.<sup>75</sup> In its view, the appurtenance requirement only “limit[ed] the reserved right to those waters which are attached to the reservation,” rather than restricting the rights to solely surface water.<sup>76</sup> The court supported this proposition with two sources. First, the *Cappaert* Court’s discussion on federal protection of groundwater eluded that “[i]f the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.”<sup>77</sup> Second, due to the lack of surface water in the western United States and the need for that water in creating sustainable living conditions, the inclusion of groundwater under *Winters* must occur if surface water proves inadequate.<sup>78</sup> Because of the reality facing tribes in arid parts of the country, the court extended the *Winters* doctrine to appurtenant

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69. *Id.*

70. *Id.*

71. *Id.* at 1265 (internal quotation omitted).

72. *Id.* at 1270 (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981)).

73. *Id.*

74. *Id.*

75. *Id.* at 1271.

76. *Id.*

77. *Id.*

78. *Id.*

groundwater, meaning the Agua Caliente Tribe's reserved water right encompassed the Coachella Valley aquifer.<sup>79</sup>

Finally, in the third step of its opinion, the court addressed how the Tribe's federally reserved right to both surface and groundwater related to state-created water rights. The state water agencies argued that the Tribe's state-created correlative rights and the water it received from the Whitewater River Decree showed state law adequately protected the purpose of the reservation, making a federally reserved right unnecessary.<sup>80</sup> The defendants' arguments did not prevail, however, as the court found federally reserved water rights preempt state water law.<sup>81</sup>

In sum, the Ninth Circuit affirmed the district court's finding that the Agua Caliente Tribe obtained a federally reserved water right through the establishment of their reservation.<sup>82</sup> Most importantly, because *Winters* "[did] not distinguish between surface water and groundwater," the Ninth Circuit became the first federal appellate court to extend these federally reserved water rights to groundwater.<sup>83</sup>

### *III. Support for the Ninth Circuit's Decision in Agua Caliente*

At its core, *Agua Caliente* focused on two important issues: whether the Tribe had a federally reserved water right under *Winters* and whether that right encompassed groundwater. Through its analysis, the Ninth Circuit accurately interpreted *New Mexico* in finding a federally reserved water right for the Tribe and appropriately extended the *Winters* doctrine to encompass groundwater.

#### *A. The Agua Caliente Tribe's Federally Reserved Water Right*

Before discussing the groundwater issue, the Ninth Circuit addressed whether the Tribe even possessed a federally reserved water right. In opposition to this notion, the defendant water agencies' main argument focused on the primary-secondary distinction in *New Mexico*, which they believed allowed for a federally reserved right only if other sources of water proved inadequate for serving the purpose of the reservation.<sup>84</sup> Therefore, "if other sources of water exist—and the lack of a federal right would not

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79. *Id.* at 1271-72.

80. *Id.* at 1272.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1269.

entirely defeat the purpose of the reservation—then Congress intended to defer to state water law . . . .”<sup>85</sup> The Ninth Circuit found *New Mexico* unpersuasive as to whether a federally reserved water right exists, leaving the primary-secondary distinction analysis for quantifying any existing water rights in Phase III.<sup>86</sup>

The Ninth Circuit properly refused to alter the *Winters* doctrine in light of *New Mexico* for two reasons. First, the primary-secondary distinction raised in *New Mexico* focuses on quantification of reserved water rights, which does not occur in this case until Phase III of the litigation. Although the distinction in *New Mexico* discusses the “purpose” requirement from *Winters*, the classification of primary or secondary purposes implies that a federally reserved water right must already exist under *Winters*. Because the federally reserved right exists, courts can then use the *New Mexico* distinction to determine the scope or quantity of the water right by labeling the purposes as primary or secondary. In essence, the *New Mexico* distinction serves as an additional step focusing on quantification that comes after a court has recognized a federally reserved water right. The issue presented in *New Mexico* supports the conclusion that the primary-secondary distinction serves as an additional inquiry on quantification, asking “what *quantity of water*, if any, the United States reserved out of the Rio Mimbres when it set aside the Gila National Forest . . . .”<sup>87</sup> Ultimately, as the Ninth Circuit held, the primary-secondary distinction “did not . . . eliminate the threshold issue—that a reserved right exists if the purposes underlying a reservation envision access to water.”<sup>88</sup>

Second, even if the *New Mexico* distinction altered the *Winters* doctrine beyond giving guidelines on quantifying federally reserved rights, the Ninth Circuit’s analysis in *Agua Caliente* mirrors the Court in *New Mexico*. In *New Mexico*, the Court used prior legislative acts, such as the Organic Administration Act of 1897, to show the federal government established national forests “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.”<sup>89</sup> The Court determined that although Congress enacted the Multiple-Use Sustained-Yield Act of 1960, which broadened the purposes of national forests, Congress did not indicate “the new purposes to be so crucial as to require a reservation of additional

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85. *Id.*

86. *Id.* at 1270.

87. *United States v. New Mexico*, 438 U.S. 696, 698 (1978) (emphasis added).

88. *Agua Caliente*, 849 F.3d at 1270.

89. *New Mexico*, 438 U.S. at 707 (internal quotation omitted).

water.”<sup>90</sup> Accordingly, the Court found a federally reserved water right to sustain only the primary purposes of national forests.<sup>91</sup>

Following this same analysis, the Ninth Circuit in *Agua Caliente* assessed the purpose of the reservation in determining whether a federally reserved water right exists.<sup>92</sup> From the executive orders stating the federal government established the reservation for “the permanent use and occupancy of the Mission Indians”<sup>93</sup> in southern California, the court determined that “water . . . would be essential to the life of the Indian people.”<sup>94</sup> Unlike *New Mexico*, where conflicting legislative acts gave rise to the possibility for primary and secondary purposes, the executive orders and government reports surrounding the establishment of the reservation in *Agua Caliente* clearly intended one primary purpose: to “create a home for the Tribe.”<sup>95</sup> For these reasons, the Ninth Circuit properly concluded that the Agua Caliente had a federally reserved water right under the *Winters* doctrine and its subsequent cases, including *New Mexico*.

#### *B. The Extension of Winters to Groundwater*

Along with properly finding the Agua Caliente Tribe had a federally reserved water right, the Ninth Circuit appropriately extended the *Winters* doctrine to groundwater. To begin, an assessment of cases covering the *Winters* doctrine shows a trend of multiple courts including groundwater in tribes’ federally reserved rights.<sup>96</sup> This trend began with *Cappaert*, where although the Supreme Court did not explicitly rule on the groundwater issue, it put forth the notion that the federal government had control over implied water rights whether surface or groundwater.<sup>97</sup>

Following *Cappaert*, the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System and*

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90. *Id.* at 715.

91. *Id.* at 718.

92. *Agua Caliente*, 849 F.3d at 1270.

93. *Id.* at 1265 (internal quotation omitted).

94. *Id.* at 1270 (quoting *Arizona v. California*, 373 U.S. 546, 589-99 (1963)).

95. *Id.* (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981)).

96. AMERICAN INDIAN LAW DESKBOOK, *supra* note 39; *see, e.g., In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila III)*, 989 P.2d 739 (Ariz. 1999); *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968). *But see In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988).

97. *Cappaert v. United States*, 426 U.S. 128, 143 (1976).

*Source* decided a factually-similar case to *Agua Caliente*.<sup>98</sup> The case contained six parts, all of which focused on general stream adjudication.<sup>99</sup> This part of the litigation (*Gila III*) discussed the groundwater question, with the trial court finding that federal rights should extend to groundwater.<sup>100</sup> While affirming this holding, the Arizona Supreme Court discussed the main arguments against extending federally reserved rights to groundwater, countering with well-founded rationales as to why these arguments were not persuasive. Because the Ninth Circuit's holding in *Agua Caliente* raises these same arguments, the Arizona Supreme Court's opinion in *Gila* provides an important starting point.

The state water agencies in *Gila III* began their opposition to extending *Winters* to groundwater by urging the Arizona Supreme Court to not "apply a federal doctrine so disjunctive to established doctrines of [Arizona law]," given the United States Supreme Court had not explicitly done so.<sup>101</sup> However, the *Gila III* court, while recognizing the impact of its holding, felt it was not "writ[ing] on a blank slate," but rather building on principles set forth in *Winters*, *Cappaert*, and *Arizona*.<sup>102</sup>

To begin, the Arizona Supreme Court looked to *Winters*, where the Supreme Court realized the necessity of an implied reservation of water due to the Fort Belknap Reservation's inability to sustain an agricultural lifestyle without it.<sup>103</sup> The *Gila III* court highlighted that, like the Fort Belknap Reservation, other reservations "depend for present or future survival substantially or entirely upon pumping of underground water."<sup>104</sup> From the court's view, whether the water came from a stream or river, as it did in *Winters*, or from underground, the federal government must have intended to reserve "water necessary to sustain life."<sup>105</sup> Therefore, the court determined that "if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from *whatever particular sources each reservation had at hand*."<sup>106</sup> Ultimately, the *Gila III* court slightly limited its holding by only finding a

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98. *Gila III*, 989 P.2d at 741.

99. *Id.* at 742.

100. *Id.* at 742-43.

101. *Id.* at 745.

102. *Id.* at 745-46.

103. *Id.* at 746 (citing *Winters v. United States*, 207 U.S. 564, 569 (1908)).

104. *Id.*

105. *Id.*

106. *Id.* at 747 (emphasis added).

right to groundwater where surface water could not fulfill the purpose of the reservation.<sup>107</sup>

The arguments and holding from *Gila III* bolster the Ninth Circuit's decision in *Agua Caliente*. From a logistical standpoint, if a federally reserved water right exists because the purpose of the reservation could not be fulfilled without water, it therefore follows that those rights should encompass any available water. Specifically, if a federally reserved water right exists in a land with little to no surface water, as in *Gila* and *Agua Caliente*, the refusal to extend *Winters* to groundwater would in effect eliminate or make useless a tribe's federally reserved water right. Like *Gila III*, the Ninth Circuit in *Agua Caliente* found that "survival is conditioned on access to water—and a reservation without an adequate source of surface water must be able to access groundwater."<sup>108</sup>

A further reading of the *Gila III* opinion also gives guidance on why deference to state water law could inhibit federally reserved water rights. It is well-established that "[reserved water] rights are paramount to water rights later perfected under state law."<sup>109</sup> However, courts narrowly construe the *Winters* doctrine to preserve states' rights in this area.<sup>110</sup> To balance these competing interests, courts must use the following assessment to determine whether to defer to state law: "Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose."<sup>111</sup> Accordingly, the state water agencies in *Gila III* argued that due to the state's riparian water system, which "provides all overlying landowners an equal right to pump as much groundwater as they can put to reasonable use," no need existed to reserve additional groundwater.<sup>112</sup> Therefore, deference to state water law would not "frustrate or impair"<sup>113</sup> federally reserved rights.<sup>114</sup>

However, the *Gila III* court again disagreed, pointing to the nature of federally reserved water rights. Because federally reserved water rights intend "to satisfy the future as well as the present needs of the Indian

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107. *Id.* at 750.

108. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017).

109. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[1], at 1210 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].

110. AMENDOLA ET AL., *supra* note 6.

111. *Gila III*, 989 P.2d at 747 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979)).

112. *Id.* at 747-48.

113. *Id.* at 747 (quoting *Kimbell Foods*, 440 U.S. at 728-29).

114. *Id.* at 748.

Reservations,”<sup>115</sup> the current equal right to pump groundwater does not prevent future overuse of groundwater to which tribes hold federally reserved rights.<sup>116</sup> After finding Arizona’s “reasonable use” doctrine had allowed consumption of “far more groundwater than nature [could] replenish,” the *Gila III* court “[could not] conclude that deference to Arizona’s law—and to the opportunity it extends all landholders to pump as much groundwater as they can reasonably use—would adequately serve to protect federal rights.”<sup>117</sup>

Like Arizona, California’s water system operates on a type of correlative rights framework.<sup>118</sup> When specifically looking at groundwater, the state of California utilizes a riparian water system that, like Arizona, allows for groundwater pumping for any water landowners can put to “reasonable use.”<sup>119</sup> Accordingly, like the system the Arizona Supreme Court addressed in *Gila III*, under California’s water system, “if the quantity of water in the basin were deemed insufficient, the Tribe would receive only its ‘proportionate fair share’ of water based ‘on [its] current reasonable and beneficial need for water.’”<sup>120</sup> From this framework, a possibility exists that the Tribe’s proportionate fair share of water under California water law might not be enough to “fulfill the purpose of the reservation.”<sup>121</sup> Therefore, because state law might not be able to adequately protect the Agua Caliente Tribe’s federally reserved water right into the future, deference to state water law impairs the purpose of those rights and should not occur.

Overall, while state court decisions like *Gila III* do not bind federal courts, their analyses support the growing trend to extend the *Winters* doctrine to groundwater, as the Ninth Circuit did in *Agua Caliente*.

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115. *Id.* (quoting *Arizona v. California*, 373 U.S. 546, 600 (1963)).

116. *Id.*

117. *Id.*

118. Dale Ratliff, *A Proper Seat at the Table: Affirming a Broad Winters Right to Groundwater*, 19 U. DENV. WATER L. REV. 239, 243 (2016).

119. *The Water Rights Process*, CAL. ST. WATER RESOURCES CONTROL BOARD, [https://www.waterboards.ca.gov/waterrights/board\\_info/water\\_rights\\_process.shtml](https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.shtml) (last visited Jan. 5, 2018). See generally *Katz v. Walkinshaw*, 74 P. 766 (Cal. 1903).

120. Ratliff, *supra* note 118, at 257 (quoting *Tehachapi-Cummings Cty. Water Dist. v. Armstrong*, 122 Cal. Rptr. 918, 924 (Cal. Ct. App. 1975)).

121. Ratliff, *supra* note 118, at 257.

#### *IV. The New Era of Federally Reserved Water Rights*

Because federally reserved rights under the *Winters* doctrine “are paramount to water rights later perfected under state law,”<sup>122</sup> the extension of this doctrine to groundwater by the Ninth Circuit in *Agua Caliente* impacts not only tribes and water agencies in California, but all entities involved in water distribution across the nation. On a local scale, while interested parties understand tribes’ federally reserved rights trump state water rights, it is unclear how this holding will impact California’s groundwater allocation system.<sup>123</sup>

To begin, California’s unique water law system utilizes prior appropriation for surface water, meaning “the first party to use water from a stream or river obtain[s] a priority right.”<sup>124</sup> However, for groundwater, California follows a riparian system and “reasonable use” requirement previously described in Part III. Despite these state water law principles, because federally reserved water rights are superior to state-created water rights,<sup>125</sup> the Tribe effectively has gained the only priority right over all other groundwater users governed by the state’s riparian system.<sup>126</sup>

The priority groundwater rights of tribes stemming from the Ninth Circuit’s decision brought mixed reviews. Many tribal leaders, including Agua Caliente Tribal Chair Jeff Grubbe, praised the Ninth Circuit’s ruling for making the reservation’s federally reserved right “settled law.”<sup>127</sup> From the Tribe’s view, the case focused on giving the Tribe “a seat at the table” to make decisions about the aquifer, including whether to treat the imported Colorado River water and how to utilize their priority right.<sup>128</sup>

While local tribes celebrate the favorable Ninth Circuit ruling, state and local water agencies have expressed serious concerns about the Tribe’s new priority right to groundwater. Because “many areas of the western United

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122. COHEN’S HANDBOOK, *supra* note 109, § 19.03[1], at 1210.

123. Ian James, *Supreme Court Won’t Hear California Water Agencies’ Appeal in Tribe’s Groundwater Case*, DESERT SUN (Palm Springs, Cal.) (Nov. 27, 2017), <http://www.desertsun.com/story/news/environment/2017/11/27/supreme-court-wont-hear-water-agencies-appeal-tribes-groundwater-case/897469001> [hereinafter James, *Supreme Court Won’t Hear Appeal*].

124. *Id.*

125. COHEN’S HANDBOOK, *supra* note 109, § 19.03[1], at 1210.

126. James, *Supreme Court Won’t Hear Appeal*, *supra* note 123.

127. *Id.*

128. *Id.*

States rely on groundwater as their only viable water source,”<sup>129</sup> allowing tribes priority could have both economic and environmental impacts on local water use. According to the Desert Water Agency (DWA), “[t]he Agua Caliente does not have any pipes, pumps, infrastructure or expertise in water management,”<sup>130</sup> meaning it could propose economically insensitive solutions to potential issues. For example, when assessing the Agua Caliente Tribe’s concern regarding the untreated Colorado River water entering the aquifer, Coachella Valley Water District (CVWD) experts’ only solutions yield costs of up to \$450 more per year to the average consumer.<sup>131</sup> Despite these costs, the Tribe continues to question the use of Colorado River water without providing other cost-efficient alternatives.<sup>132</sup>

*Agua Caliente* also raised questions regarding how local consumers will obtain groundwater for routine utilities. DWA warned that not only could the Tribe unilaterally set the price for water sold to fulfill public utility needs, requiring the DWA and CVWD to raise consumers’ rates, but that “Coachella Valley residents could find themselves solely reliant on imported water supplies to satisfy their household needs.”<sup>133</sup> Because the Tribe’s priority right will likely limit the water agencies’ access to groundwater, consumers could face “substantial cutbacks in water delivered to customers, higher rates, potential building moratoriums and damage to the region’s economy.”<sup>134</sup>

The impact of the *Agua Caliente* holding is even broader than the previously mentioned local concerns. Observers saw this wide-reaching impact before the Ninth Circuit decided the case, as approximately forty tribes and tribal organizations filed an amicus brief supporting the Agua Caliente Tribe.<sup>135</sup> Likewise, ten different states supported the water districts through an amicus brief, writing that all states “[have] an obvious stake in the preservation, maintenance and allocation of their most precious natural

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129. Ian James, *Water Agencies Aim for Supreme Court*, DESERT SUN (Palm Springs, Cal.), Mar. 30, 2017, at A06 [hereinafter James, *Water Agencies Aim for Supreme Court*].

130. *Water Rights Lawsuit*, DESERT WATER, <https://dwa.org/about-us/other/lawsuits/100-water-rights-lawsuit> (last visited Jan. 5, 2018).

131. Jim Barrett & Dave Luker, *Valley Voice: If Suit Succeeds, Tribe Profits and You Lose Rights*, DESERT SUN (Palm Springs, Cal.) (May 25, 2013), <https://www.cvwd.org/DocumentCenter/View/2466>.

132. *Id.*

133. *Water Rights Lawsuit*, *supra* note 130.

134. *Id.*

135. James, *Supreme Court Won’t Hear Appeal*, *supra* note 123.

resource.”<sup>136</sup> Ultimately, the Ninth Circuit’s historic decision has given tribes “legal backing to assert rights to groundwater, which could in turn strengthen their positions in negotiations or court-administered adjudications divvying up water supplies.”<sup>137</sup>

### *Conclusion*

Federally reserved water rights for Indian tribes have been an important, yet somewhat contentious, area of law since the advent of the *Winters* doctrine in 1908. Many federal and state cases have focused on the scope and nature of these rights, all leading to the Ninth Circuit’s landmark decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*. In *Agua Caliente*, the Ninth Circuit’s decision to extend the doctrine of federal reserved rights to groundwater correctly interpreted precedent, including *United States v. New Mexico*, while balancing both policy concerns and the division of responsibilities between the states and federal government. Through the Ninth Circuit’s decision, the Agua Caliente tribe gained a priority right to groundwater, bringing with it many triumphs for tribes and concerns for state water agencies. As the global water crisis continues and litigation increases over who possesses rights to the remaining water, the answer, while still uncertain, now clearly indicates one party: tribes.

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136. *Id.*

137. James, *Water Agencies Aim for Supreme Court*, *supra* note 129.