

TRIBAL RIGHTS TO GROUNDWATER:  
THE CASE OF AGUA CALIENTE

BY  
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*In 2017, the United States Court of Appeals for the Ninth Circuit ruled in favor of the Agua Caliente Tribe of Cahuilla Indians in a suit brought by the Tribe against two California state water agencies. In a monumental decision, the Ninth Circuit held that the Tribe had reserved rights to the groundwater underlying its reservation under the Winters doctrine, a century-old legal doctrine which governs reserved water rights on federal reservations of land. Although the core principles of the Winters doctrine are longstanding, many questions concerning the scope of the doctrine have remained unresolved. The holding of Agua Caliente is thus a historic decision, representing the only federal appellate authority explicitly extending the Winters doctrine to groundwater.*

*Agua Caliente is a significant victory for tribal water rights and can even be called groundbreaking. However, this Chapter argues that the Ninth Circuit's ruling was not at all unprecedented. After examining the controlling case law, this Chapter concludes that the Ninth Circuit reached the correct result, as the holding in Agua Caliente aligns with Winters and its progeny. As the Supreme Court did in the Winters case that established the reserved rights doctrine, the Ninth Circuit in Agua Caliente has adhered to an enduring rule of fairness intended to give meaningful effect to the rights of Indians.*

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## I. INTRODUCTION

More than 100 years ago, the United States Supreme Court established what has come to be known as the *Winters* doctrine, named for the seminal case in which the Supreme Court ruled that when the United States created a federal reservation of land for an Indian tribe, it impliedly reserved the amount of water necessary to fulfill the purpose of the reservation.<sup>1</sup> Over the past century, the Supreme Court has continually affirmed this enduring federal reserved rights doctrine, extending it to other types of federal reservations, including national monuments and national forests.<sup>2</sup> One California tribe's push for recognition of its right to sufficient water for its reservation lands under this doctrine has raised important issues that have yet to be resolved definitively concerning the treatment of both groundwater and water quality under *Winters*.

The Agua Caliente Band of Cahuilla Indians (the Tribe or Agua Caliente) have lived in the Coachella Valley since long before California became a state in 1850.<sup>3</sup> President Ulysses S. Grant established the Tribe's reservation by executive order in 1876, and President Rutherford B. Hayes further expanded the reservation by a second executive order issued in 1877.<sup>4</sup> The language of the executive orders and the government reports that preceded them indicate that in establishing the reservation, the United States sought to secure the Tribe "permanent homes, with land and water enough."<sup>5</sup> But the Coachella Valley is an arid desert, with limited surface

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<sup>1</sup> See *Winters v. United States*, 207 U.S. 564, 577 (1908).

<sup>2</sup> See, e.g., *Cappaert v. United States*, 426 U.S. 128, 131, 147 (1976) (holding that the reservation of Devil's Hole as a national monument included with it reserved federal water rights in unappropriated water); *United States v. New Mexico*, 438 U.S. 696, 697–98, 707 (1978) (holding that, in reserving the Gila National Forest, the United States also reserved the use of water where necessary to preserve the purposes of the reservation—conserving water flows and securing a continuous supply of timber).

<sup>3</sup> *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017), *cert. denied*, 138 S. Ct. 469 (2017).

<sup>4</sup> *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883-JGB, 2015 WL 13309103, at \*1 (C.D. Cal. Mar. 24, 2015), *aff'd*, 849 F.3d 1262 (9th Cir. 2017); Exec. Order of May 15, 1876; Exec. Order of Sept. 29, 1877.

<sup>5</sup> *Agua Caliente*, 849 F.3d at 1265–66; COMMISSIONER OF INDIAN AFF. ANN. REP. 37 (1877).

water resources and little rainfall, making access to sufficient water a critical issue for everyone in the region.<sup>6</sup>

The main source of water in the region is the Coachella Valley Groundwater Basin.<sup>7</sup> This basin completely underlies the Tribe's reservation.<sup>8</sup> The groundwater basin supplies 400,000 people living in nine cities in the area and 66,000 acres of farmland.<sup>9</sup> As a result of such high demand, the aquifer has been in a state of overdraft for decades.<sup>10</sup> The Coachella Valley Water District and the Desert Water Agency (collectively, the "water agencies") rely heavily on this aquifer to supply their customers and have attempted to resolve the problem by recharging the aquifer using water imported from the California Water Project and the Colorado River.<sup>11</sup> Following this decision, a water quality study conducted by the U.S. Geological Survey in 2013 found higher levels of contaminants in Coachella Valley aquifers compared to the rest of California.<sup>12</sup> Because the inferior-quality imported water was not pre-treated, the quality of the natural groundwater has degraded.<sup>13</sup>

"Water, including groundwater, has always been critical to Agua Caliente . . . the ancestral Cahuilla people managed water scarcity by developing naturally occurring springs and digging walk-in wells throughout the modern day Coachella Valley."<sup>14</sup> Today, the Tribe is a customer serviced by the water agencies and depends on groundwater supplied by the water agencies to meet its water needs.<sup>15</sup> As both the quality and the quantity of the groundwater diminished, the Agua Caliente repeatedly reached out to the water agencies, expressing concerns that the water agencies did not have a long-term plan to responsibly and sustainably manage the groundwater resource.<sup>16</sup>

In May of 2013, amid growing concerns over the quantity and quality of the groundwater remaining in the basin and after years of corresponding

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<sup>6</sup> *Agua Caliente*, 849 F.3d at 1266.

<sup>7</sup> *Id.*

<sup>8</sup> *See id.* at 1271 n.10; *Agua Caliente*, 2015 WL 13309103, at \*3.

<sup>9</sup> *Agua Caliente*, 849 F.3d at 1266.

<sup>10</sup> *Id.*; *Agua Caliente*, 2015 WL 13309103, at \*2-3.

<sup>11</sup> *Agua Caliente*, 849 F.3d at 1266; David Moon, *Groundwater Included in Treaty Water Rights: 9th Circuit Rules on Reserved Rights for Tribe*, WATER REPORT, Apr. 15, 2017, at 22; Brief of Appellee-Plaintiff at 5, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 613978, at \*5 [hereinafter Brief of Appellee-Plaintiff].

<sup>12</sup> K. Kaufmann, *Desert Groundwater Dirtier Than Most*, DESERT SUN, Jan. 10, 2013, at A1; see Press Release, U.S. Geological Soc'y, California Desert Groundwater Quality: More Inorganic Elements than Statewide; Other Constituents Less (Jan. 9, 2013), <https://perma.cc/2MSQ-MD92>.

<sup>13</sup> Moon, *supra* note 11, at 22.

<sup>14</sup> Brief of Appellee-Plaintiff, *supra* note 11, at 1.

<sup>15</sup> *Agua Caliente*, 849 F.3d at 1266-67. The Tribe is also entitled to an allotment of surface water rights under state law, but this adjudicated right is minimal, providing enough water to irrigate about 360 acres out of a total of approximately 31,396 acres on the reservation. *Id.* at 1266 & n.1.

<sup>16</sup> *See* Moon, *supra* note 11, at 22; Catherine F. Munson & Mark Reeves, *Tribal Rights to Groundwater: Analysis of the Agua Caliente's Water Case*, WATER REPORT, July 15, 2017, at 1.

with the water agencies to try and address the problem, the Agua Caliente filed suit against the water agencies in the United States District Court for the Central District of California.<sup>17</sup> The Tribe asserted both aboriginal and reserved rights to the groundwater, requesting declaratory and injunctive relief to quantify its rights and to enjoin the water agencies from interfering with those rights.<sup>18</sup>

The *Agua Caliente* case presents important questions that have yet to be resolved definitively by the Supreme Court. First, does the *Winters* doctrine extend to groundwater? Second, are reserved rights holders entitled to water of a certain quality in addition to quantity? In answering the first question during the first phase of litigation,<sup>19</sup> the district court ruled that the federal government impliedly reserved groundwater and surface water for the Agua Caliente when it created their reservation.<sup>20</sup> Other questions were reserved for later phases of litigation. Thus, the main issue presented to the United States Court of Appeals for the Ninth Circuit on appeal was whether the *Winters* reserved rights doctrine applies to groundwater, specifically in the context of Indian reservations.<sup>21</sup> The Ninth Circuit affirmed the ruling of the district court, holding that the Tribe has a reserved right to the groundwater underlying its reservation because of the purpose for which the reservation was created.<sup>22</sup> Although there is no other controlling federal appellate authority directly on point on such a critical issue, the Supreme Court denied certiorari.<sup>23</sup> Thus, the case remains ongoing at the district court, with the next phase of litigation before the district court addressing the quantification of the Tribe's reserved water right.<sup>24</sup> The outcome of *Agua Caliente* at this stage represents an important victory for tribes, particularly those who rely on access to groundwater to meet their water needs.<sup>25</sup>

This Chapter argues that the Ninth Circuit's holding in *Agua Caliente* was the correct decision that represents a logical extension of the *Winters* doctrine to groundwater. Part II presents an overview of the *Winters* case

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<sup>17</sup> *Agua Caliente*, 2015 WL 13309103, at \*1; *Agua Caliente*, 849 F.3d at 1266–67.

<sup>18</sup> *Agua Caliente*, 849 F.3d at 1267; Munson & Reeves, *supra* note 16, at 1.

<sup>19</sup> The Tribe and the water agencies agreed to divide the litigation into three phases. *Agua Caliente*, 849 F.3d at 1267. The first phase, addressed by the Ninth Circuit on appeal, focused on “whether the Tribe has a reserved right and an aboriginal right to groundwater.” *Id.* The second phase will address “whether a tribal right to groundwater includes the right to receive water of a certain quality.” *Id.* The third and final phase “will attempt to quantify any identified groundwater rights.” *Id.*

<sup>20</sup> *Agua Caliente*, 2015 WL 13309103, at \*6.

<sup>21</sup> *Agua Caliente*, 849 F.3d at 1267.

<sup>22</sup> *Id.* at 1265.

<sup>23</sup> *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 468, 469 (2017); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 469, 469 (2017).

<sup>24</sup> *Agua Caliente*, 849 F.3d at 1272.

<sup>25</sup> Tribal claims to water rights under the *Winters* doctrine have been contentious, particularly in the Western states where water rights holders have traditionally acquired water based on seniority under the prior appropriation system. CYNTHIA BROUGH, CONG. RESEARCH SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE *WINTERS* DOCTRINE: AN OVERVIEW 2 (2011).

and its progeny to illustrate the scope of the reserved rights doctrine and how it has evolved over time. Part III provides a brief look at different approaches to the *Winters* doctrine by state supreme courts. Part IV analyzes the district court and the Ninth Circuit opinions in light of this precedent and persuasive authority. Part V concludes by arguing that if (or, most likely, when) the issue reaches the Supreme Court in the context of other cases, the Court is likely to reach a similar holding, depending on whether the Court agrees that Indian reservations should be treated differently than other types of federal reservations when determining whether *Winters* rights exist. The Court may still very well reach a more limited outcome, however, perhaps limiting a case like *Agua Caliente* to its facts, avoiding a result that would extend *Winters* to all groundwater.

## II. OVERVIEW OF THE *WINTERS* DOCTRINE

### A. *Winters v. United States*

The *Winters* case involved the Fort Belknap Indian Reservation, which was created in the territory of Montana in 1888.<sup>26</sup> The defendant-appellants in *Winters* were non-Indian settlers, ranchers, and irrigation companies that had acquired lands neighboring the reservation through homesteader and desert land laws.<sup>27</sup> Conflict arose when the defendants built dams to divert water from the Milk River, which bordered the reservation, reducing the amount of water available to the downstream Indians.<sup>28</sup> When the United States brought suit on behalf of the Indians, the defendants presented a number of arguments in their defense.<sup>29</sup> First, they argued that the neighboring land they had purchased had been in the public domain, and that they were therefore subject to Montana law which allowed them to use the waters in the Milk River basin for irrigation.<sup>30</sup> Second, they noted that there were other sources of water available to the Indians on the reservation, and that the federal government therefore never intended to reserve Milk River water for use by the Indians when establishing the reservation.<sup>31</sup> Lastly, the defendants argued that Montana's admission into the United States in 1889 repealed any reservation for the Indians under the "equal footing" doctrine.<sup>32</sup>

The Supreme Court resolved the case by focusing on the agreement of 1888 that had created the Fort Belknap Reservation.<sup>33</sup> In construing the agreement, the Court applied an established canon of construction of Indian law which instructs courts to interpret treaties made between the United

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<sup>26</sup> *Winters v. United States*, 207 U.S. 564, 565 (1908).

<sup>27</sup> *Id.* at 568.

<sup>28</sup> *Id.* at 565, 567.

<sup>29</sup> *See id.* at 565.

<sup>30</sup> *Id.* at 568–69.

<sup>31</sup> *Id.* at 570.

<sup>32</sup> *Id.* at 577.

<sup>33</sup> *Id.* at 575–76.

States and Indians liberally in favor of the Indians.<sup>34</sup> The Court observed that the purpose of the reservation was to promote a pastoral and agricultural lifestyle among the Indians.<sup>35</sup> Yet the lands reserved were arid and “practically valueless” without irrigation.<sup>36</sup> Had the Indians intended to give up their rights to the river, the purpose of the agreement would have been entirely defeated. Emphasizing this point, the Court reasoned:

The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?<sup>37</sup>

Between two conflicting interpretations, one which posited that the Indians gave up their rights to the water and one which argued they had not, the Court chose to uphold the interpretation that supported the purpose of the agreement.<sup>38</sup>

The *Winters* Court then swiftly dismissed the defendants’ “equal footing” argument,<sup>39</sup> reasoning that Congress could not have intended for the admission of Montana to the Union in 1889 to have repealed a reservation created in 1888, thereby destroying the reservation and removing the consideration from the agreement with the Indians merely one year after it was made.<sup>40</sup> The Court also cited two cases to support the proposition that the federal government undeniably has the power to reserve waters and exempt them from appropriation under state law: 1) *United States v. Rio Grande Dam & Irrigation Co.*,<sup>41</sup> which held that the federal government’s jurisdiction over interstate commerce gives it the power to preserve the navigability of watercourses, even against state action, and 2) *United States v. Winans*,<sup>42</sup> in which the Court recognized that treaties with Indians do not

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<sup>34</sup> *Id.* at 576 (“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.”); *see also* *United States v. Winans*, 198 U.S. 371, 380–81 (1905) (“[W]e will construe a treaty with the Indians as that unlettered people understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right without regard to technical rules.” (internal quotation marks and citations omitted)).

<sup>35</sup> *Winters*, 207 U.S. at 576.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 576–77.

<sup>39</sup> The “equal footing” doctrine stems from a principle of constitutional law that all states, upon admission to the Union, enter on equal footing with the original thirteen states. Dennison A. Butler, *Riparian Rights, Navigability, and the Equal Footing Doctrine in Montana*, 38 PUB. LAND & RESOURCES L. REV. 187, 188 (2017). Thus, in *Winters* the defendants argued that Montana, upon admission, obtained sovereignty over the river at issue. *Winters*, 207 U.S. at 577–78.

<sup>40</sup> *Winters*, 207 U.S. at 577.

<sup>41</sup> *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

<sup>42</sup> *United States v. Winans*, 198 U.S. 371 (1905).

represent grants of rights from the federal government to the Indians, but rather a reservation of all rights not expressly ceded.<sup>43</sup>

The *Winters* case thus established that, absent express language to the contrary, federal agreements establishing reservations of land for Indians impliedly reserve enough water to fulfill the purpose of the reservation.<sup>44</sup> At its heart, the *Winters* holding represents a rule of fairness gleaned from basic contract and property principles, which confirms the reservation of pre-existing rights of Indians to established uses of the land.<sup>45</sup> However, the doctrine is not without its limits. Even in construing the Fort Belknap Reservation agreement in favor of the Indians, the *Winters* Court openly acknowledged the “conflict of implications” and focused heavily on ascertaining the *implied* intent of both the Indians and the federal government in creating the agreement.<sup>46</sup>

### *B. Arizona v. California*

Clarification by the Supreme Court on exactly how much water is reserved by the *Winters* doctrine would not come until 1963, in an original action filed by multiple Western States seeking quantification of water rights along the Colorado River.<sup>47</sup> In *Arizona v. California*, the United States asserted reserved water right claims to the mainstream of the Colorado River on behalf of five Indian reservations in Arizona, California, and Nevada.<sup>48</sup> The state of Arizona argued, among other things, that navigable waters could not be reserved in light of the “equal footing” doctrine.<sup>49</sup> Arizona also argued that any amount of water reserved for the tribes should be measured by the “reasonably foreseeable needs” of the Indians.<sup>50</sup> The Court’s special master held that the tribes were entitled to enough water to irrigate the irrigable portions of their lands, and the Court agreed.<sup>51</sup> Similar

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<sup>43</sup> *Winters*, 207 U.S. at 577; *Rio Grande Dam*, 174 U.S. at 703; *Winans*, 198 U.S. at 381 (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

<sup>44</sup> See *Winters*, 207 U.S. at 576–77.

<sup>45</sup> Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481, 482–83 (1985); see also Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 IDAHO L. REV. 369, 374 (2016) (“[Federal] land reservations did not actually create new water rights . . . . A reserved right is a declaration that the landowner intends to hold pre-existing rights. In the case of reserved water rights, the federal landowner is simply halting the disposition of resources it already owns. Thus, a federal reservation right is merely declaratory of pre-existing rights, not a new property right created at the time of the land reservation.” (footnote omitted)).

<sup>46</sup> See *Winters*, 207 U.S. at 576–77. The *Winters* Court did not seem to lack sympathy for the non-Indian irrigators, who had relied on Montana law to establish their water claims. See *id.* at 569. On the contrary, the Court noted that the defendants had made substantial investments in reliance on Montana law. *Id.*

<sup>47</sup> *Arizona v. California*, 373 U.S. 546, 550–51 (1963).

<sup>48</sup> *Id.* at 595.

<sup>49</sup> *Id.* at 596–97.

<sup>50</sup> *Id.* at 596.

<sup>51</sup> *Id.* at 600.

to the dismissal of the equal footing argument in *Winters*, the Court recognized the broad power of the federal government to regulate navigable waters under the Commerce Clause and to regulate government lands under Article IV section 3 of the Constitution, concluding that the United States has the power to reserve water rights for its federal reservations.<sup>52</sup>

Following *Winters*, the *Arizona* Court affirmed that the United States impliedly reserved water rights for the Indian reservations that became effective at the time the reservations were created and thus were entitled to priority.<sup>53</sup> Agreeing that the United States intended to satisfy both the present and future needs of the Indian reservations, the Court then expressly adopted the special master's "practicably irrigable acreage" standard, describing that method as "the only feasible and fair way by which reserved water for the reservations can be measured . . . ."<sup>54</sup> The Court rejected the alternative quantification method proposed by Arizona, as a "reasonably foreseeable needs" standard would focus too heavily on the current Indian population and would involve too much guesswork in predicting the future needs of the reservations.<sup>55</sup>

*Arizona* thus made clear that *Winters* reserved rights vest on the date of the reservation at the latest and encompass enough water to fulfill the purpose of the reservation, considering both the present and future needs of the tribes. Because quantification of these rights must consider future needs, the Court adopted the "practicably irrigable acreage" standard as a reasonable approximation of these tribal reserved rights, at least for agricultural purposes.<sup>56</sup>

### C. *Cappaert v. United States*

In 1976, the Supreme Court addressed the federal government's claims for federal reserved water rights in the context of a national monument. *Cappaert v. United States*<sup>57</sup> concerned Devil's Hole, a deep limestone cavern in Nevada that is part of the Death Valley National Monument.<sup>58</sup> The Cappaerts were ranchers living a few miles from Devil's Hole and pumped groundwater from an underlying aquifer for their ranch.<sup>59</sup> The aquifer was also the source of the water in Devil's Hole, which supported a rare species of desert fish that lived in the cave and spawned only when specific water levels were maintained.<sup>60</sup> After the Cappaerts began pumping groundwater, the water level in the cave began to drop, thereby endangering the desert fish.<sup>61</sup> The United States brought suit against the Cappaerts seeking an

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<sup>52</sup> *Id.* at 597–98.

<sup>53</sup> *Id.* at 600.

<sup>54</sup> *Id.* at 600–01.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 426 U.S. 128 (1976).

<sup>58</sup> *Id.* at 131.

<sup>59</sup> *Id.* at 133.

<sup>60</sup> *Id.* at 133–34.

<sup>61</sup> *Id.* at 133.



injunction that would limit their groundwater pumping, claiming that in establishing the Death Valley National Monument, the United States reserved the unappropriated waters appurtenant to the land for the purposes of the Monument.<sup>62</sup>

Citing a long line of cases that had followed *Winters* and *Arizona*, the Supreme Court restated the reserved rights 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. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.<sup>63</sup>

The Court also stated that the existence of an implied reserved right is dependent upon whether the government intended to reserve water that was unappropriated at the time of the reservation.<sup>64</sup> Intent may be inferred if the previously unappropriated water is necessary to accomplish the purpose of the reservation.<sup>65</sup> The Court further noted that the *Winters* doctrine does not involve an equitable “balancing test” between competing uses of the water.<sup>66</sup>

In this case, the government’s intent to reserve water for the protection of the pool in Devil’s Hole was actually explicit rather than implied.<sup>67</sup> However, the Court went further, citing *Arizona* for the proposition that the “implied-reservation-of-water-rights” doctrine reserves “only that amount of water necessary to fulfill the purpose of the reservation, no more.”<sup>68</sup> Applying that principle to Devil’s Hole, the Court observed that the purpose of the reservation, according to the proclamation establishing the national monument, was preservation of the pool’s “unusual features of scenic, scientific, and educational interest,” with the desert fish being one of the scientific features.<sup>69</sup> The Court found that the level of the pool could be permitted to drop only to the extent that the drop did not impact the desert fish and approved the district court’s narrowly tailored injunction.<sup>70</sup> The Court did not prohibit groundwater pumping by the Cappaerts entirely, but only to the extent necessary to preserve an adequate water level in the pool, reflecting the “minimal need” of the reservation.<sup>71</sup>

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<sup>62</sup> *Id.* at 135.

<sup>63</sup> *Id.* at 138.

<sup>64</sup> *Id.* at 139.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 138–139 (using *Winters* itself as an example, as the interests of the defendant homesteaders represented substantial financial investments that were certainly not unimportant interests).

<sup>67</sup> *Id.* at 140.

<sup>68</sup> *Id.* at 141.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Notably, when confronted with the argument that the reserved rights doctrine is limited to surface water and thus did not apply to the water in the cave pool in Devil's Hole, the Supreme Court avoided answering the question directly, stating that the underground pool water was actually surface water.<sup>72</sup> Rather than explicitly extending *Winters* rights to groundwater, the Court held instead that the United States "can protect its water from subsequent *diversion*, whether the diversion is of surface or groundwater."<sup>73</sup> In so holding, the Court made no mention of the Ninth Circuit's opinion which had held that the United States *can* reserve rights to groundwater.<sup>74</sup>

*Cappaert* thus confirmed that the reserved rights doctrine extends to all types of federal reservations, while emphasizing that the amount of water reserved reflects only the minimal needs of the reservation. However, *Cappaert* revealed a hesitancy by the Court to extend the reserved rights doctrine to groundwater.

#### D. *United States v. New Mexico*

Two years after *Cappaert* was decided, the Supreme Court addressed the scope of the reserved rights doctrine in the context of a stream adjudication for the Rio Mimbres River, in which the United States asserted reserved water rights for the Gila National Forest.<sup>75</sup> In *United States v. New Mexico*, the Court described the question of quantification of water rights under the reserved rights doctrine as one of implied intent, not power.<sup>76</sup> Referring to the *Winters* rule as the "implied-reservation-of-water doctrine," the Court repeatedly emphasized that application of the doctrine rests on implied rather than express government intent.<sup>77</sup> The Court observed that the reserved rights doctrine stands in stark contrast to the history of express congressional intent in the field of federal-state jurisdiction over the allocation of water, in which Congress has almost always required federal entities to defer to state law.<sup>78</sup> In light of this congressional history, the Court distinguished between "primary" and "secondary" uses of federal reservations:

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

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<sup>72</sup> *Id.* at 142.

<sup>73</sup> *Id.* at 143 (emphasis added).

<sup>74</sup> *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) (citing *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968)).

<sup>75</sup> *United States v. New Mexico*, 438 U.S. 696, 697-98 (1978).

<sup>76</sup> *Id.* at 698.

<sup>77</sup> *See id.* at 699-700.

<sup>78</sup> *Id.* at 701-03 (noting the practice of federal agencies to acquire water that is not "essential" to the purposes of the reservation by state law).

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>79</sup>

In sum, reserved rights encompass only the amount of water necessary to fulfill the *primary* purpose of the reservation.

By placing this limit on the *Winters* doctrine, the Court emphasized the arid condition of the West, where “claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.”<sup>80</sup> The Court further noted that when a river is fully appropriated, as is the case with the Rio Mimbres River, the assertion of federal reserved water rights “will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.”<sup>81</sup> The Court determined that these conditions “must be weighed in determining what, if any, water Congress reserved for use *in the national forests*.”<sup>82</sup>

In this case, the United States had asserted reserved rights to a minimum instream flow in the Rio Mimbres River for “aesthetic, environmental, recreational and fish purposes” as well as stockwatering purposes in the Gila National Forest.<sup>83</sup> The Court held, however, that the “limited purposes for which Congress authorized the creation of national forests . . . provide[d] no support for this claim.”<sup>84</sup> These “limited purposes” are outlined in the Organic Administration Act<sup>85</sup>:

No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States[.]<sup>86</sup>

The majority of the Court read this provision very narrowly, gleaning only two purposes for which Congress intended national forests to be reserved: 1) to conserve water flows, and 2) to furnish a continuous supply of timber for the people.<sup>87</sup> Because the Organic Administration Act further specified that preserved water flows would be used for “domestic, mining, milling, or irrigation purposes,” the Court reasoned that the Government’s current claims for recreation and wildlife uses would defeat the primary

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<sup>79</sup> *Id.* at 702.

<sup>80</sup> *Id.* at 699 & n.3 (noting that federally owned land, excluding Indian reservations and other trust properties, amounts to an average of 46% of the land in Western States, and that more than 60% of the average annual water yield in the Western States arises from federal reservations).

<sup>81</sup> *Id.* at 705.

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at 704 (internal quotation marks omitted).

<sup>84</sup> *Id.* at 705.

<sup>85</sup> 16 U.S.C. §§ 473–482, 551 (2012).

<sup>86</sup> *Id.* § 475; *New Mexico*, 438 U.S. at 706–07.

<sup>87</sup> *New Mexico*, 438 U.S. at 707–08.

purpose for which Congress created the national forests by reserving significant quantities of water for purposes inconsistent with the listed goals.<sup>88</sup>

Although Congress later intended for national forests to be administered for broader purposes in passing the Multiple-Use Sustained-Yield Act<sup>89</sup> (including recreation and wildlife purposes), the Court held that the 1960 Act was not meant to effect an additional reservation of water for the secondary purposes there established.<sup>90</sup>

In sum, the Court emphasized that the *Winters* reserved rights doctrine is one that is “built on implication and is an exception to Congress’ explicit deference to state water law in other areas.”<sup>91</sup> Because *Winters* rights represent an exception to the rule, the doctrine must be applied very carefully, meaning that courts examining government intent in creating reservations must give effect to primary purposes of the reservation rather than secondary purposes. In *New Mexico* itself, the Court avoided construing the primary purpose of the federal reservation of national forest lands broadly, instead arriving at a very narrow construction.<sup>92</sup>

### *E. Summary of Supreme Court Precedent*

*Winters*, *Arizona*, *Cappaert*, and *New Mexico* thus laid the foundation for identifying and quantifying federal reserved water rights, which applies not only to Indian reservations but any federal reservation of land. *Winters* itself began with a rule of fairness rooted in basics of property law and a canon of construction meant to construe agreements liberally in favor of Indians. Yet, as the subsequent cases made clear, the *Winters* doctrine is one based on implied intent and limited by the purpose of the reservation. Although *Arizona* provides that *Winters* rights encompass both the present and future needs of the reservation, *Cappaert* and *New Mexico* described the

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<sup>88</sup> *Id.* at 711–12. In defending this reading, the Court also compared to the broader language Congress used to conserve scenery and wildlife in establishing the national parks, as well as congressional directives to conserve minimum stream flows in specific forests and to establish wildlife sanctuaries with the consent of state legislatures. *See id.* at 709–10.

<sup>89</sup> *See* Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–31 (2012) (“It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of [the Organic Administration Act of 1897].”).

<sup>90</sup> *New Mexico*, 438 U.S. at 715. In a footnote, however, the Court left open the question as to whether the Multiple-Use Sustained-Yield Act authorized subsequent reservations of national forests to which a broader doctrine of reserved water rights might apply. *Id.* at 715 n.22.

<sup>91</sup> *Id.* at 715.

<sup>92</sup> *Id.* at 720 (Powell, J., dissenting). Justice Powell, in his dissent, would have found three purposes in the Organic Administration Act, as opposed to the two found by the majority: “1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.” *Id.* In giving effect to the first purpose, Justice Powell would have found it conceivable that Congress also sought to preserve wildlife rather than only “inanimate components” such as timber and flora. *Id.* at 723–24.

doctrine as applied to federal lands as one reflecting “minimal need” that restricts the amount reserved to “only that amount of water necessary to fulfill the purpose of the reservation, no more.”<sup>93</sup> *New Mexico* in particular involved a further limitation on the doctrine, establishing a primary versus secondary use test which the Court then applied very narrowly in construing the purpose of the establishment of the national forests.<sup>94</sup> Moreover, the Supreme Court has never explicitly held that *Winters* rights extend to groundwater, clearly avoiding the question when the opportunity to address it arose in *Cappaert*. Guided by this precedent, state courts and other federal courts have taken different approaches to applying the *Winters* doctrine to groundwater.<sup>95</sup>

### III. STATE SUPREME COURTS APPLYING THE *WINTERS* DOCTRINE TO GROUNDWATER

Two state supreme courts have had occasion to address the scope of the *Winters* doctrine in the context of general stream adjudications. The first was the Wyoming Supreme Court in a case concerning the quantification of water rights in the Big Horn River System.<sup>96</sup> In *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, the Wyoming Supreme Court found that the Wind River Indian Reservation was established solely for an agricultural purpose, rejecting a broader interpretation of the treaty between the United States and the tribes that would have found use as a “permanent homeland” to be the purpose of the reservation.<sup>97</sup> When called upon to extend *Winters* rights to groundwater, the Wyoming Supreme Court conceded that “[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater,” acknowledging that surface and groundwater are hydrologically connected.<sup>98</sup> Nonetheless, the Wyoming Supreme Court declined to apply the *Winters* doctrine to groundwater, as no case in support of such an extension had been cited.<sup>99</sup> The Wyoming court hesitated to break ground in an area where the Supreme Court had avoided the issue.<sup>100</sup>

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<sup>93</sup> *Cappaert v. United States*, 426 U.S. 128, 141 (1976); *New Mexico*, 438 U.S. at 700.

<sup>94</sup> *See New Mexico*, 438 U.S. at 702, 715 (distinguishing between primary and secondary uses for the reservation and applying the doctrine accordingly).

<sup>95</sup> *See, e.g., Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) (reasoning that the same “implications” for applying the doctrine to surface water would also apply to groundwater); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 695 F.2d 559, 561 (Fed. Cir. 1982) (finding that groundwater was an intended source of irrigation for the Gila River Reservation).

<sup>96</sup> *See In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys. (Big Horn)*, 753 P.2d 76, 83 (Wyo. 1988), *abrogated by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998).

<sup>97</sup> *Id.* at 96.

<sup>98</sup> *Id.* at 99 (citing *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) (“[W]hether the [necessary] waters were found on the surface of the land or under it should make no difference.”)).

<sup>99</sup> *Id.* (“[N]ot a single case applying the reserved water doctrine is cited to us.”).

<sup>100</sup> *See id.* (noting that the Ninth Circuit had applied *Winters* to groundwater in *Cappaert*).

In stark contrast, the Arizona Supreme Court reached practically the opposite conclusion in a series of opinions concerning the general stream adjudication for the Gila River System, holding that federal reserved rights may apply to groundwater if necessary to accomplish the purpose of the reservation.<sup>101</sup> In *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila III)*, the Arizona Supreme Court acknowledged that some reservations in arid regions lack perennial streams, and thus the pumping of groundwater is necessary to sustain life.<sup>102</sup> In such circumstances, the court found, it was implausible that the federal government would not have reserved the necessary water.<sup>103</sup> Under this approach, the reserved rights doctrine may apply to groundwater after fact-intensive inquiries into the resources that each reservation had at hand at the time of the reservation.<sup>104</sup> In *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila IV)*, the Arizona Supreme Court then accepted that the purpose of the Indian reservations at issue was to provide the tribes with permanent homelands.<sup>105</sup> While an admittedly broad purpose, the court found this construction faithful to the Indian law canons of construction and “necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency.”<sup>106</sup> The Arizona Supreme Court further held that the primary-secondary use distinction established in *New Mexico* does not apply to Indian reservations directly in light of the trust relationship between the United States and the Indians as well as the federal goal to promote Indian self-sufficiency.<sup>107</sup> The court noted that even if the *New Mexico* test applied, the broad construction of a permanent homeland as the purpose of the reservation would remain the “primary” purpose and thus provide the same result.<sup>108</sup>

#### IV. APPLYING THE *WINTERS* DOCTRINE TO GROUNDWATER IN *AGUA CALIENTE*

##### A. *The District Court's Opinion*

It is against this backdrop of more than a century of federal precedent that the Agua Caliente, the United States as plaintiff-intervenor, and the

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<sup>101</sup> *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila III)*, 989 P.2d 739, 745–47 (Ariz. 1999); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila IV)*, 35 P.3d 68, 71, 79 (Ariz. 2001). For extended discussion, see Debbie Shosteck, *Beyond Reserved Rights: Tribal Control over Groundwater Resources in a Cold Winters Climate*, 28 COLUM. J. ENVTL. L. 325, 331–37 (2003).

<sup>102</sup> *Gila III*, 989 P.2d at 746.

<sup>103</sup> *Id.* at 746.

<sup>104</sup> *Id.* at 748.

<sup>105</sup> *Gila IV*, 35 P.3d at 76.

<sup>106</sup> *Id.* Note also that the Arizona Supreme Court in *Gila IV* rejected the “practically irrigable acreage” quantification standard established by the Supreme Court in *Arizona* in favor of a “multi-faceted approach” that would take the unique features of each reservation into account. *Id.* at 77, 79–80.

<sup>107</sup> See *id.* at 74, 77.

<sup>108</sup> *Id.*

Coachella Valley Water District and the Desert Water Agency litigated the first phase of *Agua Caliente* in the United States District Court for the Central District of California.<sup>109</sup> At the heart of the matter was whether *Winters* rights extend to groundwater and, if so, whether groundwater was necessary to fulfill the purpose of the Tribe's reservation.<sup>110</sup> Relying on *Winters* and *Arizona*, along with several other Ninth Circuit and state and lower federal court opinions, the Agua Caliente emphasized that federal reserved rights are fully vested from the date of the reservation, are not dependent on state law, and cannot be lost through non-use.<sup>111</sup> These points were crucial in this particular case, as the Agua Caliente had been purchasing groundwater from the water agencies rather than making their own diversions by pumping groundwater themselves.<sup>112</sup> The Agua Caliente also advocated for a broad reading of the executive orders that created their reservation, maintaining that the purpose of the Tribe's reservation was to provide a "permanent homeland for the Agua Caliente people."<sup>113</sup> While acknowledging the lack of federal appellate law explicitly extending the *Winters* doctrine to groundwater, the Tribe argued that the critical question in applying the doctrine was "whether a reservation required water, not whether that water flowed above the ground or percolated beneath it."<sup>114</sup>

The water agencies relied primarily on *Cappaert* in arguing that the reserved rights doctrine does not apply to groundwater, contending that the Supreme Court would not have avoided extending the doctrine to the cave water in *Cappaert* unless federal reserved water rights apply differently to surface and groundwater.<sup>115</sup> The water agencies also read *New Mexico* as reflecting a "strong sensitivity to traditional notions of federal deference to state water law," and thus *New Mexico* restricts reserved water rights to instances in which the purposes of the reservation would be entirely defeated without the reserved rights.<sup>116</sup> In other words, the water agencies argued that the question is not "whether the United States reserved enough water to achieve the purpose of the reservation, but rather whether a federal reserved water right was necessary."<sup>117</sup>

Based on this reading, the water agencies offered a number of reasons why a reserved right to groundwater was not necessary to prevent the purpose of the Tribe's reservation from being entirely defeated. The water agencies argued that the Tribe's claim for groundwater did not meet *New Mexico's* "necessity" test because the Tribe possesses correlative rights to

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<sup>109</sup> See *Agua Caliente*, No. EDCV 13-883-JGB, 2015 WL 13309103, at \*1 (C.D. Cal. Mar. 24, 2015), *aff'd*, 849 F.3d 1262 (9th Cir. 2017).

<sup>110</sup> *Id.*

<sup>111</sup> Munson & Reeves, *supra* note 16, at 3–4.

<sup>112</sup> *Agua Caliente*, 2015 WL 13309103, at \*3.

<sup>113</sup> Munson & Reeves, *supra* note 16, at 4.

<sup>114</sup> *Id.*

<sup>115</sup> See *Agua Caliente*, 2015 WL 13309103, at \*6–7; Munson & Reeves, *supra* note 16, at 4.

<sup>116</sup> Munson & Reeves, *supra* note 16, at 4.

<sup>117</sup> *Id.*; see also Joint Reply Brief of Appellants Coachella Valley Water District, et al., and Desert Water Agency, et al., at 1–8, *Agua Caliente v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 2851612, at \*1–8 [hereinafter Joint Reply Brief].

both surface water and groundwater under California law and because the Tribe had not produced or attempted to produce groundwater on the reservation.<sup>118</sup> The water agencies also advanced a number of policy arguments, contending that tribal use of groundwater would not only have adverse off-reservation impacts for surrounding landowners and other water users in the region, but also impede California's ability to manage its groundwater resources.<sup>119</sup>

In restating the *Winters* doctrine, the district court confirmed that impliedly reserved water rights generally vest on the date of the reservation and are superior to the rights of future appropriators.<sup>120</sup> Turning to the identification of the reservation's purpose, the district court relied on the guidance of *Colville Confederated Tribes v. Walton*,<sup>121</sup> a Ninth Circuit opinion that also concerned an Indian reservation created by "terse" executive order.<sup>122</sup> In *Walton*, the Ninth Circuit had reasoned that the specific purposes of an Indian reservation were often unarticulated, and therefore "the general purpose, to provide a home for the Indians, is a broad one that must be liberally construed."<sup>123</sup> Thus, although the series of executive orders creating the Agua Caliente Reservation were admittedly short and provided only that the reservation was for "the permanent use and occupancy of the Mission Indians" or for "Indian purposes," the district court could "safely state that the reservation implied at least some water use."<sup>124</sup>

Addressing the application of the doctrine to groundwater, the district court found that "[n]o case interpreting *Winters* draws a principled distinction between surface water physically located on a reservation and

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<sup>118</sup> See Joint Reply Brief, *supra* note 117, at \*16, \*23, \*29.

<sup>119</sup> See *id.* at \*34–38. The water agencies' policy arguments reflect a not uncommon concern over long un-asserted reserved rights potentially disrupting the prior appropriation system under state law. In most cases, federal reserved rights vest on the date of the reservation and, because the legal agreements that created Indian reservations typically pre-date non-Indian settlement of the surrounding lands, tribes typically have seniority. See BROUGHER, *supra* note 25, at 2. In some cases, tribal reserved rights to water even pre-date the date of the reservation. See *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983) (affirming that the Klamath Tribe is entitled to a reservation of water with a priority date of time immemorial). Further, unlike water rights acquired under state law, *Winters* rights may never be lost through non-use. BROUGHER, *supra* note 25, at 2–3 (citing *Winters*, 207 U.S. 564 (1908); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[1] (Nell Jessup Newton et al. eds., 2012)). As a result, opponents of the doctrine fear that long unused *Winters* rights may disrupt state allocation and management of water resources by allowing tribes with seniority to come in at any time and assert reserved rights that have never been adjudicated or quantified. See Brief for State of Nevada et al. as Amici Curiae Supporting Petitioners at 10–15, *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, Nos. 17-40, 17-42 (Aug. 7, 2017), 2017 WL 3485656, at \*10–15 [hereinafter Brief for State of Nevada]. It should be noted, however, that because the Supreme Court stated the *Winters* rule more than 100 years ago, it is difficult to argue that tribal rights in themselves have caused the controversy. Rather, one could argue that state programs that have historically managed water without openly acknowledging or otherwise accounting for reserved rights have created expectations by other water users for the same water.

<sup>120</sup> *Agua Caliente*, 2015 WL 13309103, at \*6–7.

<sup>121</sup> *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

<sup>122</sup> See *Agua Caliente*, 2015 WL 13309103, at \*5 (citing *Walton*, 647 F.2d at 47 n.8).

<sup>123</sup> *Walton*, 647 F.2d at 47.

<sup>124</sup> *Agua Caliente*, 2015 WL 13309103, at \*3, \*5.



other appurtenant water sources.”<sup>125</sup> Rather, *Winters* reserved rights have only two limitations: whether “1) the reserved water is necessary to fulfill the purposes of the reservation and 2) the reserved water is appurtenant to the reserved land.”<sup>126</sup> The district court further stated that, with the sole exception of the Wyoming Supreme Court, every court that has addressed the issue in recent years has agreed that *Winters* rights encompass groundwater appurtenant to the reserved land.<sup>127</sup> Because the groundwater at issue in this case underlies the Tribe’s reservation, the district court held that the federal government impliedly reserved groundwater, as well as surface water, for the Agua Caliente when it created the reservation.<sup>128</sup> Moreover, the district court expressly rejected the water agencies’ reading of *New Mexico* as “unduly restrictive,” observing that the Ninth Circuit has held that *New Mexico*’s primary-secondary use distinction is not controlling in the context of Indian reservations, but only established “useful guidelines.”<sup>129</sup> Instead, courts should “focus on the broader command that *Winters* rights encompass ‘only that amount of water necessary to fulfill the purpose of the reservation, no more.’”<sup>130</sup> The court thus granted partial summary judgment for the Tribe as to the first phase of the case.<sup>131</sup>

### B. The Ninth Circuit’s Opinion

Nearly two years after the district court entered its order, the Ninth Circuit agreed that the *Winters* reserved rights doctrine applies to groundwater and that the Tribe has a reserved right to the groundwater underlying its reservation.<sup>132</sup> The Ninth Circuit also agreed that the limitations of the *Winters* doctrine are the purpose of the reservation and the appurtenance of the water.<sup>133</sup> On appeal, the water agencies renewed the argument that *New Mexico* stands for the proposition that water is impliedly reserved only if the lack of a federal right would entirely defeat the purpose of the reservation, with Congress having intended to defer to state water law in all other cases.<sup>134</sup> Like the lower court, the Ninth Circuit rejected this view

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<sup>125</sup> *Id.* at \*5 (citing *Cappaert*, 426 U.S. at 143; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 119, at § 19.03[2][a] (“Reserved rights presumably attach to all water sources—groundwater, streams, lakes, and springs—that arise on, border, traverse, underlie, or are encompassed within Indian reservations.”)).

<sup>126</sup> *Id.* (citing *Walton*, 647 F.2d at 46).

<sup>127</sup> *Id.* at \*6 (citing *Washington*, No. C01-0047Z, slip op. at 8 (W.D. Wash. Feb. 24, 2003); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968); *Gila III*, 989 P.2d 739, 747 (Ariz. 1999); *Confederated Salish & Kootenai Tribes v. Stults*, 59 P.3d 1093, 1099 (Mont. 2002); *but see Big Horn*, 753 P.2d 76, 99–100 (Wyo. 1988)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*7.

<sup>130</sup> *Id.* (quoting *United States v. Adair*, 723 F.2d 1394, 1408–09 (9th Cir. 1984)).

<sup>131</sup> *Id.* at \*11 (granting partial summary judgment in favor of the Tribe on the federal reserved right to groundwater claim, but granting partial summary judgment in favor of the water agencies on the aboriginal rights claim).

<sup>132</sup> *See Agua Caliente*, 849 F.3d 1262, 1265 (9th Cir. 2017).

<sup>133</sup> *Id.* at 1268.

<sup>134</sup> *Id.* at 1269.

as too narrow, stating that “Congress does not defer to state water law with respect to reserved rights.”<sup>135</sup>

The Ninth Circuit emphasized that the federal purpose for which land was reserved is the driving force behind the reserved rights doctrine, stating that the “question is not whether water stemming from a federal right is necessary at some selected point in time to maintain the reservation[, but rather] whether the purpose underlying the reservation envisions water use.”<sup>136</sup> The Ninth Circuit stated that *Winters* itself established that the purpose of the reservation is controlling, pointing to the *Winters* Court’s focus on the treaty that created the Fort Belknap Reservation.<sup>137</sup> Comparing *Winters* to *New Mexico*, the Ninth Circuit reasoned that *New Mexico* remained faithful to the original test, with *New Mexico*’s primary-secondary use distinction answering the question of *how much* water is reserved and for what purposes.<sup>138</sup> After acknowledging *New Mexico*’s primary-secondary use distinction, the Ninth Circuit then examined the language of the executive orders and the documented history relevant to those orders and determined that the primary purpose underlying the establishment of the reservation was “to provide a home for the Tribe,” in light of Ninth Circuit precedent requiring liberal construction of the reservation’s formative documents as well as the arid land comprising the reservation.<sup>139</sup>

Addressing the remaining doctrinal limitation of appurtenance, the Ninth Circuit then took an approach similar to the district court, finding “no reason to cabin the *Winters* doctrine to appurtenant surface water” and stating that the appurtenance requirement “simply limits the reserved right to those waters which are attached to the reservation,” without limiting the right to surface water only.<sup>140</sup> The Ninth Circuit further reasoned that “many locations throughout the western United States rely on groundwater as their only viable water source,” as is certainly the case in the Coachella Valley region; in such locations, a reservation without an adequate source of surface water must be able to access groundwater.<sup>141</sup> The Ninth Circuit thus held that the Agua Caliente have reserved water rights that include groundwater from the Coachella Valley aquifer, and the Tribe’s correlative water rights under state law did not impact the extent of the reserved rights.<sup>142</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1269–70.

<sup>139</sup> *Id.* at 1270 (citing *Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *Arizona*, 373 U.S. 546, 598–99 (1963)).

<sup>140</sup> *Id.* at 1271.

<sup>141</sup> *Id.* (citing *Gila III*, 989 P.2d 739, 746 (Ariz. 1999)).

<sup>142</sup> *Id.* at 1271–72.

*C. Discussion*

While grounded in sound reasoning, the Ninth Circuit's opinion represents a far more expansive application of the *Winters* doctrine than Supreme Court precedent, being the first federal appellate court opinion to extend the *Winters* doctrine to groundwater explicitly.<sup>143</sup> An obvious difference between the Ninth Circuit opinion and the Supreme Court line of *Winters* cases is that the Ninth Circuit applied *New Mexico* by finding a very broad purpose for the creation of the Agua Caliente Reservation. This is an important point, as application of the *Winters* doctrine seems to turn largely on how the court characterizes the purpose of the reservation, with courts that find broad purposes more likely to arrive at an outcome more favorable to tribes.<sup>144</sup> Like the Arizona Supreme Court in *Gila IV*, the Ninth Circuit definitively embraced the concept of a "permanent homeland" as the primary purpose of an Indian reservation, a construction extremely favorable for tribes, as such a broad purpose could naturally encompass a number of different water uses beyond domestic and agricultural use.<sup>145</sup> Importantly, it is a construction that allows for tribes to alter their historic water uses in response to changing conditions of modern society.<sup>146</sup>

The Supreme Court has never found a comparably broad purpose in any of its reserved rights cases, but broad purposes have never been asserted in past Supreme Court cases addressing reserved rights specifically in the context of Indian reservations. In *Winters*, the Government had asserted an agricultural purpose underlying the agreement.<sup>147</sup> *Arizona* similarly focused

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<sup>143</sup> Although the Ninth Circuit opined that *Winters* rights apply to groundwater in the *Cappaert* case, that holding was not precedential following the Supreme Court's opinion that the water at issue in *Cappaert* was not groundwater. See *New Mexico*, 438 U.S. 696, 700 & n.4 (1978) (asserting that "[a]s the Court [in *Cappaert*] concluded, the pool was reserved specifically to preserve its scientific interest").

<sup>144</sup> See, e.g., *Walton*, 647 F.2d at 47 (applying *New Mexico* in looking at the reservation's purpose, and asserting that "[t]he specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed."); *United States v. Adair*, 723 F.2d 1394, 1409–11 (9th Cir. 1983) ("[T]he right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive . . . The [Tribe] is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses . . . Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." (citations omitted)).

<sup>145</sup> Compare *Agua Caliente*, 849 F.3d at 1270 ("Water is inherently tied to the Tribe's ability to live permanently on the reservation."), with *Big Horn*, 753 P.2d 76, 98–99 (Wyo. 1988) (limiting permitted water uses based on the sole agricultural purpose of reservation).

<sup>146</sup> See *Gila IV*, 35 P.3d 68, 76 (Ariz. 2001) ("Other right holders are not constrained in this, the twenty-first century, to use water in the same manner as their ancestors in the 1800s . . . Just as the nation's economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose. . . . The permanent homeland concept allows for this flexibility and practicality."). Note, however, that reserved water rights in the tribal context generally seem to allow changes in use over time regardless of the permanent homeland concept. See BROUGHER, *supra* note 25, at 4. But some courts, like the Wyoming Supreme Court, have restricted changes in use. See, e.g., *Big Horn*, 835 P.2d 273, 279 (Wyo. 1992).

<sup>147</sup> See *Winters*, 207 U.S. 564, 576 (1908).

on irrigation.<sup>148</sup> In this light, the Ninth Circuit's approach remains true to the original *Winters* inquiry, which requires consideration of the federal government's implied intent.<sup>149</sup> In *Gila IV*, the Arizona Supreme Court noted the difficulties in ascertaining implied government intent in this context, the most significant being 1) that the historical search for a reservation's purpose tends to focus only on the federal government's motives rather than tribal intent, and 2) historical documents typically do not accurately represent the true reasons for which Indian reservations were created (e.g., most obviously, to open tribal lands to non-Indian settlement).<sup>150</sup> Additionally, despite the command of the Indian law canons of construction to interpret treaty language and other legal agreements with Indians as the Indians themselves would have understood them and to construe ambiguities in favor of Indians, some courts have still declined to make broad interpretations in favor of Indians in the absence of express treaty language.<sup>151</sup> The Ninth Circuit's opinion instead applies the canons of construction faithfully, as the Supreme Court did in *Winters*.<sup>152</sup>

The central difficulty in harmonizing the Ninth Circuit's opinion in *Agua Caliente* with Supreme Court precedent arises from the Supreme Court's starkly different approach to discerning government intent in *New Mexico*. For the *New Mexico* Court, a key feature of the *Winters* doctrine was that it is built on implication, constituting an exception to the rule that Congress will expressly defer to state water law in other areas, at least in the context of federal land management.<sup>153</sup> The *New Mexico* Court seemed keenly aware of the fear that water allocations determined under state management systems might be thrown into disarray by the sudden assertion of federal reserved rights not subject to loss through non-use.<sup>154</sup> Indeed, opponents have argued against expansion of the reserved rights doctrine on the grounds that the doctrine interferes with "investment-backed expectations" made in reliance on principles rooted in the prior appropriation system that prevails in Western water law.<sup>155</sup> The Ninth Circuit, on the other hand, provided no discussion of potential adverse impacts on off-reservation users

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<sup>148</sup> *Arizona*, 373 U.S. 546, 595–96 (1963).

<sup>149</sup> *See Winters*, 207 U.S. at 577.

<sup>150</sup> *Gila IV*, 35 P.3d at 75.

<sup>151</sup> *See, e.g., Big Horn*, 753 P.2d at 96–97 (agreeing with the district court that the reference to "permanent homeland" in the treaty establishing the Indian reservation did not define the purpose of the reservation, but rather merely set aside the lands).

<sup>152</sup> *See Winters*, 207 U.S. at 576 (acknowledging that ambiguities "will be resolved from the standpoint of the Indians").

<sup>153</sup> *See supra* notes 77–78 and accompanying text.

<sup>154</sup> However, the *New Mexico* Court did leave open the question as to whether the later 1960 Act of Congress might have authorized a "subsequent reservation . . . to which a broader doctrine of reserved water rights might apply." *New Mexico*, 438 U.S. 696, 715 n.22 (1978). *See also* Charles J. Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 389 n.22 (1978) (noting that "Indian Reservations in the Lower Colorado River Basin were decreed nearly one million acre feet of water in *Arizona v. California* . . . but the decreed rights did not have a noticeable effect on the supply of non-Indian users" (citation omitted)).

<sup>155</sup> *See* Brief for State of Nevada, *supra* note 119, at \*10–15.

or state management of groundwater resources that might result from ruling that groundwater may be included in federal reserved water rights, perhaps because no equitable balancing is required.<sup>156</sup>

While the Ninth Circuit cited *New Mexico* and acknowledged *New Mexico's* primary-secondary use distinction, the Ninth Circuit found such a broad purpose underlying the reservation that the primary-secondary distinction was essentially of no effect, instead providing only a “guideline.”<sup>157</sup> Of course, in the context of Indian reservations, the court must interpret treaty or executive order language that is more often than not vague or otherwise generalized. When construing an Act of Congress with far more specific language in *New Mexico*, the majority of the Court arrived at an extremely narrow purpose, essentially reading part of the provision, “to improve and protect the [national] forest,” out of the statute.<sup>158</sup> In *Agua Caliente*, there were contemporaneous government reports indicating that the federal government intended to provide the Tribe with enough land to encourage tribal members to “build comfortable houses, improve their acres, and surround themselves with home comforts” and to “secure the Mission Indians permanent homes, with land and water enough.”<sup>159</sup> The district court and the Ninth Circuit agreed that the purpose underlying the reservation, based on this history and the aridity of the region, was to provide a “permanent homeland.”<sup>160</sup> The *New Mexico* Court, in contrast, focused much more on applying the doctrine carefully in light of competing uses for water.<sup>161</sup> Had the *New Mexico* Court been tasked with interpreting the executive orders that established the Agua Caliente Reservation, would the result in *Agua Caliente* have been the same? Despite the narrow approach to the doctrine that the Court used in *New Mexico*, the answer may actually be “yes.”

Both *Cappaert* and *New Mexico* are distinguishable from the other *Winters* cases on the grounds that *Cappaert* and *New Mexico* involved application of the reserved rights doctrine to federal lands that were reserved for federal purposes. *Winters* and *Arizona* applied specifically to Indian reservations, where the lands were subject to the right of use and occupancy by Indian tribes; these lands were reserved by those Indian peoples for purposes which necessarily envision tribal self-sufficiency, if the

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<sup>156</sup> Because the parties in *Agua Caliente* trifurcated the litigation proceedings, the district court has yet to make a thorough *New Mexico* inquiry into the quantification of the amount of water impliedly reserved for the Agua Caliente Reservation. Again, however, *Winters* and *Arizona* suggest that no equitable balancing of the competing uses is required in determining whether a reserved right exists in the first instance. *Winters* itself involved defendants who had made substantial investments on homestead lands in reliance on the protection of state law, but the Court ruled that the power and implied intent of the federal government to reserve rights to water prevailed nonetheless. See *Winters*, 207 U.S. at 568–69, 573, 576–77.

<sup>157</sup> See *Agua Caliente*, 849 F.3d 1262, 1269–70, 1269 n.6 (9th Cir. 2017).

<sup>158</sup> See *New Mexico*, 438 U.S. at 720–21 (Powell, J., dissenting) (rejecting the majority’s interpretation of the relevant statute).

<sup>159</sup> *Agua Caliente*, 849 F.3d at 1265–66.

<sup>160</sup> See *id.* at 1270, 1272.

<sup>161</sup> See *New Mexico*, 438 U.S. at 705.

legal agreements that established the reservations are to be interpreted as the Indians themselves would have understood them.<sup>162</sup> Although the *Arizona* Court stated that courts do not use an equitable balancing test to weigh the interests of affected parties in determining whether a federal reserved right exists, *Cappaert* and *New Mexico* both suggest that the quantification inquiry may take competing interests into account.<sup>163</sup> While the *Cappaert* and *New Mexico* approach is certainly justifiable in the area of federal land management, assigning a high level of importance to “competing uses” may not be appropriate in resolving tribal claims in light of the trust relationship between the United States and federally recognized tribes.<sup>164</sup>

Rather than applying the *New Mexico* test so broadly, perhaps the Ninth Circuit ought to have distinguished *New Mexico* outright on this basis, firmly declaring that *New Mexico* did not concern Indian reservations and therefore should not apply to them given the unique features that make them different from other federal reservations. Then, the court could have reached the same result in applying only *Winters* and *Arizona*, using the same reasoning but without needing to concern itself with labeling the “permanent homeland” concept as the “primary” purpose of the reservation. *Winters* and *Arizona* alone would certainly support the “permanent homeland” concept and the Ninth Circuit’s reasoning, as *Arizona* definitively stated that the *Winters* doctrine encompasses the future needs of the tribe.<sup>165</sup> As noted above, the Ninth Circuit has, in the past, acknowledged the idea that *New Mexico* is not directly applicable to Indian reservations.<sup>166</sup>

Thus, a significant question remains as to just how much both *New Mexico* and *Cappaert* control the determination and quantification of reserved water rights on Indian reservations, precisely because both were decided in different contexts.<sup>167</sup> Nonetheless, until the Supreme Court definitively states that *Cappaert* and *New Mexico* do not apply in the context

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<sup>162</sup> See *Winans*, 198 U.S. 371, 380 (1905) (“And we have said we will construe a treaty with the Indians as ‘that unlettered people’ understood it . . . .”); *Agua Caliente*, No. EDCV 13-883-JGB, 2015 WL 13309103, at \*3, \*5 (C.D. Cal. Mar. 24, 2015), *aff’d*, 849 F.3d 1262 (9th Cir. 2017); *Gila IV*, 35 P.3d 68, 76 (Ariz. 2001).

<sup>163</sup> *Arizona*, 373 U.S. at 597; *Gila IV*, 35 P.3d at 73; see also Meyers, *supra* note 154, at 387–88 (“The opinion makes clear that intent to reserve water can be an issue and that the issue is resolved in terms of the need for a water right to accomplish reservation purposes.”).

<sup>164</sup> See *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (“The Secretary’s duty was not to determine a basis for allocating water between the District and the Tribe in a manner that hopefully everyone could live with for the year ahead . . . . It was not his function to attempt an accommodation . . . . The United States, acting through the Secretary of Interior, has charged itself with moral obligations of the highest responsibility and trust.” (internal quotation marks omitted)).

<sup>165</sup> *Arizona*, 373 U.S. at 600; see also *Winters*, 207 U.S. 564, 576–77 (1908) (deciding that, given the needs of the Tribe, the government’s reservation of water was “for a use which would be necessarily continued through the years”).

<sup>166</sup> *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1984).

<sup>167</sup> See *id.* (explaining that *Cappaert* involved a national monument and *New Mexico* involved a national forest, and thus were “not directly applicable to *Winters* doctrine rights on Indian reservations,” but still helped to “establish several useful guidelines”); *Gila IV*, 35 P.3d at 76–77 (agreeing with the district court that the rule applied in the *New Mexico* case “is a little different for entrusted lands, Indian reservations”).

of Indian reservations, it is uncertain whether the Ninth Circuit's approach to applying *New Mexico* is correct, even if its reasoning otherwise points to the correct result.

#### V. CONCLUSION

Unfortunately, because the Supreme Court denied certiorari in *Agua Caliente*, the scope of the reserved rights doctrine may not receive clarification in this area for some time. One can only speculate as to the reasons the Court decided not to review the Ninth Circuit's decision. It could be that the Court simply agrees that federal reserved rights include groundwater when such water is necessary to fulfill the primary purpose of the reservation and thus declined to review the decision.

Or perhaps the Court actually does *not* favor extending the doctrine to groundwater but would have had difficulty justifying such a decision in light of the persuasive facts in this case, where the only viable water source in the Tribe's arid homeland was groundwater from an aquifer completely underlying its reservation.<sup>168</sup> The Court did exhibit hesitancy to extend the doctrine to groundwater in *Cappaert*, in the context of federal land management, perhaps out of a respect for state law and state groundwater management that was articulated more clearly in *New Mexico*. Given the constraints of *Cappaert* and *New Mexico*, which emphasize that reserved rights reflect "minimal need," if the Court disagrees and confirms that those two cases apply to Indian reservations, the Court would be very likely to take a narrow approach to a case like *Agua Caliente*, perhaps affirming but limiting the rights to groundwater to the specific facts of the case. But the Court has never articulated equitable concerns regarding competing uses for water in the context of Indian reservations, and courts have taken approaches much more favorable to tribes where the federal government must act as trustee for sovereign tribal entities.<sup>169</sup>

Because *Cappaert* and *New Mexico* do not harmonize well with extensive tribal rights to groundwater, the key to continued victories for tribes will be rigorous advocacy of the "permanent homeland" concept, which envisions and allows for changing water uses over time. Although this concept is well supported by *Winters* and *Arizona* alone, *New Mexico* in particular cautions against broad readings of government documents, at least in the context of other federal reservations made for public purposes; instead, it characterizes the *Winters* doctrine as a very narrow exception to the general rule that federal government should defer to state water law. Thus, proponents of the homeland concept for Indian reservations would benefit most from distinguishing these types of reservations from national forests and monuments.

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<sup>168</sup> See Collins, *supra* note 45, at 493 (essentially predicting the result in *Agua Caliente*).

<sup>169</sup> See, e.g., *Gila IV*, 35 P.3d at 74, 76–77; *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. at 256.

Overall, *Agua Caliente* represents an extension of the *Winters* doctrine to groundwater and is an important decision for tribes. Further, although the decision represents a significant extension of the doctrine, it is not an unprecedented outcome. Rather, the *Agua Caliente* decision is supported squarely by Supreme Court precedent, particularly *Winters* and *Arizona*. Significant questions remain as to the precise scope of *Winters* reserved rights in this area, but the Ninth Circuit's application of the doctrine in *Agua Caliente* remains true to the spirit of *Winters*, which interpreted the purpose of a tribe's reservation liberally in favor of the Indians.