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# Not All *Agua Is Caliente*: Proposing the *Winters* Groundwater Test

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Comment\*

# Not All *Agua* is *Caliente*: Proposing the *Winters* Groundwater Test

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## I. INTRODUCTION

“When the well’s dry, we know the worth of water.”<sup>1</sup> Nodding to water’s—specifically *groundwater’s*—value to inhabitants of the arid American West, the Ninth Circuit Court of Appeals in early 2017 held the *Agua Caliente* Band of Cahuilla Indians had impliedly reserved a federal right to groundwater underlying their land.<sup>2</sup> The court rea-

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1. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist. (Agua Caliente)*, 849 F.3d 1262, 1265 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017), and *cert. denied*, 138 S. Ct. 469 (2017) (quoting BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1746)).

2. *Id.* at 1271–72.

soned its decision with the well-established *Winters* doctrine, under which the Supreme Court has recognized for more than a century that when the federal government agreed to reserve land from public purchase, it impliedly reserved enough surface water to accomplish the reservation's purpose.<sup>3</sup> *Agua Caliente* rippled through western water law communities, however, because it marked the first federal circuit court decision to recognize a federal reserved right to groundwater.<sup>4</sup>

Soon after the 2017 *Agua Caliente* decision, appellants in the case joined attorneys generals from seventeen western states to petition the Supreme Court for review.<sup>5</sup> The Court denied certiorari in November 2017<sup>6</sup> and, for now, the *Agua Caliente* decision joins the *Winters* doctrine as binding law in nine states and two U.S. territories.<sup>7</sup> It remains possible, if not likely, however, that the Court will grant certiorari to review *Agua Caliente* in the future because the case was trifurcated at the district court level, meaning stages two and three

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3. *Id.* at 1268 (citing *Winters v. United States*, 207 U.S. 564, 575–78 (1908); *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).
  4. See Zeslie Zablan, *Tribal Rights to Groundwater: The Case of Agua Caliente*, 48 ENVTL. L. 617 (2018) (describing the decision as “historic” and “groundbreaking”). For articles generally agreeing with the holding of the Ninth Circuit’s decision, see Richard Griffin & Claudia Antonacci, *Agua Caliente and the Argument for Aboriginal Rights to Groundwater*, 19 U. DENV. WATER L. REV. 316 (2016); Womble et al., *Indigenous Communities, Groundwater Opportunities*, SCI. MAG., 453–55, Aug. 2018; Steve Dubb, *Agua Caliente Indians Victory Could Alter Water Practices in Western States*, NONPROFIT Q. (Dec. 6, 2017), <https://nonprofitquarterly.org/2017/12/06/agua-caliente-indians-victory-alter-water-practices-western-states/> [<https://perma.unl.edu/7XWL-92EN>]; see also Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 KAN. J.L. & PUB. POL’Y 489 (2006); DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FED. INDIAN L. 828 (7th ed. 2017) (stating “[the reserved rights doctrine] is one of the most vital Indian sovereignty issues today, and gives rise to questions about how the modern era Supreme Court cases concerning jurisdiction over non-Indians should be applied.”). For views critical of *Agua Caliente* and its holding, see Micheline Fairbank & Debbie Leonard, *State Groundwater Management and Federal Reserved Rights: What’s Next?*, ABA WATER RES. COMM. NEWSL., Mar. 2018; Ian James, *Supreme Court Won’t Hear California Water Agencies’ Appeal in Tribe’s Groundwater Case*, THE DESERT SUN (Nov. 27, 2017), <https://www.desertsun.com/story/news/environment/2017/11/27/supreme-court-wont-hear-water-agencies-appeal-tribes-groundwater-case/897469001/> [<https://perma.unl.edu/8SX8-DDXA>] (quoting the director of a California water management board for the proposition that *Agua Caliente* “could completely change water management in our area.”).
  5. Brief of the States of Nevada, Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming as Amicus Curiae in Support of Petitioners, *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, 2017 WL 3485656 (U.S.) (Nos. 17-40, 17-42).
  6. *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 468 (Nov. 27, 2017); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 469 (2017).
  7. Fairbank & Leonard, *supra* note 4, at 7.

are yet to be completely litigated.<sup>8</sup> The Supreme Court may choose to review *Agua Caliente* on appeals from the second or third stages of litigation.

This Comment argues that the Ninth Circuit rightly decided *Agua Caliente* because the *Winters* principles that support a reserved right to surface water also support a reserved right to groundwater. Although the court reached the appropriate conclusion, it did so by an always-never approach to *Winters* groundwater that is out of step with Supreme Court doctrine.

Instead of the *Agua Caliente* approach, this Comment proposes a three-prong *Winters* Groundwater Test for analyzing claims of federal reserved groundwater. Part II traces the *Winters* doctrine through its hundred-plus years development. Part III discusses why the court rightly decided *Agua Caliente* but poorly analyzed it. Part IV proposes the *Winters* Groundwater Test, as informed by Supreme Court precedent. Finally, Part V provides an overview of how courts and the Supreme Court should view the *Winters* Groundwater Doctrine that is quickly emerging.

## II. THE WINTERS DOCTRINE

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

Federal reserved water rights have been ruled by the *Winters* doctrine since 1908.<sup>9</sup> The doctrine's namesake case arose from a dispute over instream flow rights to the Milk River in Montana.<sup>10</sup> In 1888, Congress had reserved the Fort Belknap Reservation's land "as an Indian reservation as and for a permanent home and abiding place for the Gros Ventre and Assiniboing bands or tribes of Indians."<sup>11</sup> But by 1900, defendants in the case had also claimed land along the Milk River, settling upstream from the Reservation and building large dams and irrigation systems to divert a significant volume of the River's water.<sup>12</sup> The Gros Ventre and Assiniboing Tribes filed suit, claiming defendants violated their right to the Milk River's uninterrupted flow,<sup>13</sup> which they needed to fulfill the Reservation's purpose—

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8. *Agua Caliente*, 849 F.3d at 1267.

9. *Winters v. United States*, 207 U.S. 564 (1908). For a discussion of the federal government's power to create federal law-based property rights in groundwater via the United States Constitution's Commerce Clause, see John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 14 HASTINGS W. NW. J. ENVTL. L. & POL'Y 1323, 1324 (2008).

10. *Winters*, 207 U.S. at 564.

11. *Id.* at 565–68.

12. *Id.* at 567.

13. *Id.*

to irrigate 30,000 acres of cropland and ensure the “home and abiding place” they reserved by their 1888 agreement with Congress.<sup>14</sup>

The Supreme Court of the United States decided the case by interpreting Congress’s 1888 agreement with the tribes.<sup>15</sup> Noting the Gros Ventre and Assiniboing Tribes inhabited the land and used its appurtenant surface water long before the land’s reservation was formally recognized by Congress,<sup>16</sup> the Court applied a common canon of interpretation that resolves all treaty ambiguities in favor of Native Americans.<sup>17</sup> Nothing in the agreement with Congress mentioned water,<sup>18</sup> but at the time the land was formally reserved, it was the American government’s policy to break up Native Americans’ tribal lives and replace them with agricultural lifestyles.<sup>19</sup> In arid Montana, the Fort Belknap Reservation would have been “practically valueless” for agriculture if water had not been reserved in tandem with the Reservation’s land.<sup>20</sup> Was it reasonable to believe the tribes gave up their rights to “command of the lands and the waters,” which were readily available<sup>21</sup> and made the Reservation adequate for its purpose?<sup>22</sup> The Court held it was not.<sup>23</sup> Thus, *Winters* established a rule of law that, unless the text of a reservation treaty expressly disavowed any reservation of water rights, the treaty implicitly reserved for its land sufficient water to fulfill the reservation’s purpose.<sup>24</sup>

## B. Development of the *Winters* Doctrine

After *Winters*, the Supreme Court did not decide another federal reserved water rights case for more than fifty years. Then, in *Arizona v. California*,<sup>25</sup> the Court clarified how to quantify *Winters* water

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14. *Id.* at 565.

15. *Id.* at 575.

16. *Id.* at 566–67.

17. *Id.* at 576–77; accord *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Worcester v. Georgia*, 31 U.S. 515, 551–54 (1832); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978).

18. *Winters*, 207 U.S. at 576.

19. *Id.* (“It was the policy of the Government, it was the desire of the Indians, to change [uncivilized] habits and to become a pastoral and civilized people.”).

20. *Id.*

21. *Id.* (noting ample water flowed appurtenant to the Fort Belknap Reservation, not only in the Milk River, adjacent to the reservation, but also 2,900 inches of water in streams and springs flowing along the land’s surface).

22. *Id.* (“If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators.”).

23. *Id.* at 576–77.

24. *Id.* For a broader discussion of the *Winters* rule, see Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077 (1984).

25. *Arizona v. California*, 373 U.S. 546 (1963).

rights.<sup>26</sup> When the United States, as trustee for Native Americans in Arizona, California, and Nevada, asserted water rights to the Colorado River's instream flow, a special master of stream adjudication allocated to the tribes a reserved right sufficient to irrigate as much of their reservations' land as was practicably irrigable.<sup>27</sup> Because the reservations' purposes were to provide land for agriculture, the special master reasoned the reservation had implicitly reserved enough water as would practicably be needed to irrigate its acres of agriculture.<sup>28</sup> Arizona challenged the special master's quantification method, however, arguing the tribes' water rights should be limited to the "reasonably foreseeable needs" of their reservations.<sup>29</sup> The Court rejected Arizona's proposed measuring standard because a quantification of water based on how many people lived on the reservation today and into the future could "only be guessed."<sup>30</sup> Instead, the special master's method was "the only feasible and fair way" to quantify federal reserved water rights.<sup>31</sup>

Six years after *Arizona*, the Court found a reserved water right within the Death Valley National Monument in Nevada.<sup>32</sup> The Cappaerts owned a seven million dollar ranch adjacent to the Monument and pumped groundwater from beneath it.<sup>33</sup> The United States sued to enjoin the Cappaerts from pumping groundwater because the pumping had caused the water level in one of the Monument's limestone caverns to drop, thereby threatening an endangered species of pupfish.<sup>34</sup> In establishing the Monument by statute, the federal government claimed Congress had implicitly reserved enough appurtenant surface *and* groundwater to support the Monument's purpose, which included protection of the pupfish.<sup>35</sup>

Looking to the Monument's purpose, the Court found that pupfish's protection was included in the reservation's purpose, which was stated in Congress's operative statute as preserving "unusual features of scenic, scientific, and educational interest."<sup>36</sup> The pupfish lived in an underground pool of scientific feature; so despite no express mention of the pupfish in the Monument's operative statute, the

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26. *Id.* at 600-01.

27. *Id.* For further discussion on the practicably irrigable acreage standard, see Jennele Morris O'Hair, *The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future*, 10 *BYU J. PUB. L.* 263 (1996).

28. *Arizona*, 373 U.S. at 601.

29. *Id.* at 596.

30. *Id.* at 601.

31. *Id.*

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

33. *Id.* at 133.

34. *Id.*

35. *Id.* at 133-35.

36. *Id.* at 141.

federal government had impliedly reserved for the pupfish enough water to ensure its survival.<sup>37</sup>

Effectively, the Court enjoined the Cappaerts from pumping any groundwater that would diminish the Monument's protected underground pool below a level that could sustain the pupfish. However, the Court's opinion included language that significantly limited the scope of federal reserved water rights. It declared the federal government "can protect its water from subsequent diversion, whether the diversion is of surface or groundwater,"<sup>38</sup> but the non-reservation diverter need only provide enough water to satisfy the "minimal need" of the reservation's purpose.<sup>39</sup>

After *Cappaert*, the Court next considered federal reserved water rights when New Mexico challenged a federal claim of instream flow rights from the Rio Mimbres River for the benefit of the Gila National Forest.<sup>40</sup> Congress reserved the National Forest via an Organic Administration Act,<sup>41</sup> but the Act only expressed the reservation's purpose as "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . ."<sup>42</sup> The Court determined the Act's express and specific purpose limited the National Forest's impliedly reserved water rights significantly, establishing the preservation of instream flows for "aesthetic, environmental, recreational and fish purposes"<sup>43</sup> was not a "primary purpose" of the reservation.<sup>44</sup>

By engaging a primary purpose analysis, the Court intended to strictly construe the scope of federal reserved water rights implied under the *Winters* doctrine.<sup>45</sup> The Court noted Congress generally has

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37. *Id.*

38. *Id.* at 143.

39. *Id.* at 141.

40. *United States v. New Mexico*, 438 U.S. 696 (1978).

41. Forest Service Organic Act of 1897, 16 U.S.C. § 475 (2018).

42. *New Mexico*, 438 U.S. at 706.

43. *Id.* at 704.

44. *Id.* at 711–12. Note that at least two state courts have found *New Mexico* applicable to Native American reservations. See *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 766–67 (Mont. 1985); *In re Adjudication of All Rights to Use Water in the Gila River System (Gila IV)*, 35 P.3d 68, 74 (Ariz. 2001) (en banc) (arguing the primary purpose test only applies to non-Indian federal reservations with rights quantified only to meet their original purposes). However, because the majority of courts and scholars have incorporated *New Mexico* in their analyses of Native American reservations' water rights, this Comment will do so as well.

45. *New Mexico*, 438 U.S. at 702 ("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

shown a deference to states' regulation of water law, including most federal projects.<sup>46</sup> In thirty-seven statutes, Congress has even expressly recognized its intent for states to administer their own systems of water law for water within their borders.<sup>47</sup> It would constitute judicial overreach, the Court argued, to imply all rights in water to the federal government absent clear evidence of Congressional intent.<sup>48</sup> Justice Lewis Powell concurred, arguing the "implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law."<sup>49</sup>

In 1989, Justice Powell's sensitivity doctrine nearly became the rule for a majority opinion.<sup>50</sup> In reviewing a Wyoming decision, Justice Sandra Day O'Connor authored a majority opinion that would have considered a "sensitivity" analysis during the quantification process.<sup>51</sup> Under her analysis, a reservation land's impliedly reserved right to water would be diminished by the amount that the reservation's future purposes would be of marginal economic value compared to the state's ability to put it to use.<sup>52</sup> Each gallon of federal reserved *Winters* water would have been subject to an inquiry: is it reasonably likely that future projects will require this water for productive uses?<sup>53</sup> But the sensitivity doctrine in its strictest form remained unpublished when Justice O'Connor recused herself from the case, and

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the United States would acquire water in the same manner as any other public or private appropriator.").

46. *Id.* at 701 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").
47. *Id.* at 701 n.5.
48. *Id.* at 701. *But see id.* at 718–25 (Powell, J., dissenting) (agreeing with the majority's sensitivity to state interests, but arguing the majority has too narrowly identified the Organic Administration Act's primary purpose and stating, "I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.").
49. *Id.* at 707 (Powell, J., dissenting).
50. Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683 (1997).
51. *Id.* at 702.
52. Wyoming v. United States, Opinion, 2d Draft at 18, No 88-309 (U.S. 1989) (recirculated June 12, 1989) (O'Connor, J.) (unpublished document) (on file with the Library of Congress, Manuscript Division), *reprinted in* Mergen & Liu, *supra* note 50, at 741–60.
53. Wyoming v. United States, Dissenting Opinion, 2d Draft at 10, No 88-309 (U.S. 1989) (recirculated June 23, 1989) (Brennan, J.) (unpublished document) (on file with the Library of Congress, Manuscript Division), *reprinted in* Mergen & Liu, *supra* note 50, at 741–60 ("The Court thus cuts loose the quantification of Indian water rights from their moorings in congressional or Executive intent and makes them subject to an equitable weighing of needs . . . Today's decision . . . strikes at the heart of the *Winters* right itself.").



the Court instead affirmed the Wyoming Supreme Court's decision by an equally divided decision.<sup>54</sup>

### III. THE WINTERS DOCTRINE APPLIED TO GROUNDWATER

#### A. Growing Trend of Recognizing Federal Reserved Groundwater Rights

Although the United States Supreme Court has never directly confronted the question, the growing trend among state and federal courts is to recognize a federal reserved right to groundwater in some cases.<sup>55</sup> In 1988, the Wyoming Supreme Court adjudicated a case of water rights along the Big Horn River System, in which Native Americans on the Wind River Indian Reservation claimed federal reserved groundwater rights so they could irrigate agricultural crops planted in the reserved land.<sup>56</sup> The court agreed with the tribe's claims, concluding "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater."<sup>57</sup> However, because it could find no precedential authority for recognizing a reserved groundwater right,<sup>58</sup> the Wyoming Supreme Court elected not to recognize one.<sup>59</sup>

The Montana and Arizona Supreme Courts each expressly disagreed with *Big Horn's* judgement and recognized a reserved right to groundwater.<sup>60</sup> When reservation lands in arid regions lack other

54. *In re* General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn), 753 P.2d 76 (Wyo. 1988), *aff'd mem.*, 492 U.S. 406 (1989).

55. *See id.*; *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila III*), 989 P.2d 739 (Ariz. 1999) (en banc), *cert. denied sub nom.*, Phelps Dodge v. United States, 530 U.S. 1250 (2000); *Gila IV*, 35 P.3d 68 (2001) (en banc); Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults, 59 P.3d 1093, 1099 (Mont. 2002); Tweedy v. Tex. Co., 286 F. Supp. 383, 385 (D. Mont. 1968); United States v. Wash. Dep't of Ecology, 375 F. Supp. 2d 1050, 1058 (W.D. Wash. 2005); *see also* Gila River Pima-Maricopa Indian Cmty. v. United States, 695 F.2d 559, 561 (Fed. Cir. 1982) (rejecting tribal rights to water in the Salt River because "Gila River water and groundwater constituted the intended sources for irrigation of the Gila River Reservation"). Note the McCarran Amendment of 1952 authorized joinder of the federal government in lawsuits to adjudicate tribal reserved rights to water in a stream system. *See* 43 U.S.C.A. § 666 (2007).

56. *Big Horn*, 753 P.2d at 96.

57. *Id.* at 99.

58. *Id.* at 99–100. Note that the Ninth Circuit, in *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974), found a reserved right to groundwater, but the Supreme Court expunged the decision when it narrowly affirmed *Cappaert v. United States*, 426 U.S. 128, 142 (1976).

59. *Big Horn*, 753 P.2d at 99 ("[N]ot a single case applying the reserved water doctrine is cited to us."). At least one scholar has described the court's analysis as "decidedly weird." *See* Leshy, *supra* note 9, at 1325.

60. *Gila III*, 989 P.2d at 746; *Gila IV*, 35 P.3d at 78; *Confederated Salish*, 59 P.3d at 1099.

methods for obtaining water, the Arizona Supreme Court acknowledged they cannot survive without the rights to pump groundwater.<sup>61</sup> Treaties historically reserved these lands to provide the Native Americans there with “homelands,”<sup>62</sup> which were “necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency.”<sup>63</sup> Thus, so long as other waters were not adequate, the tribe must have reserved for itself groundwater to accomplish the reservation’s primary purpose.<sup>64</sup>

Scholars have generally also agreed that the *Winters* doctrine recognizes a federal reserved right to groundwater in some cases. In his seminal *Handbook of Federal Indian Law*, Felix Cohen argued there was no reason not to include appurtenant groundwater within the *Winters* doctrine, just as surface water was included.<sup>65</sup> Another scholar noted that by now, “little, if any doubt remains that Indian tribes have groundwater, as well as surface water rights.”<sup>66</sup> Thus, the still-growing majority view among courts and scholars is that the *Winters* doctrine applies to surface water and groundwater alike.

## B. *Agua Caliente*

Although numerous courts and scholars argued in some cases to recognize federal reserved rights to groundwater, the Ninth Circuit’s 2017 *Agua Caliente* decision marked the first decision by a federal circuit court to formally recognize such a right.<sup>67</sup> The Agua Caliente Band of Cahuilla Indians (Agua Caliente Band) had lived for centuries

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61. *Gila III*, 989 P.2d at 746; see also *Tweedy v. Tex. Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968) (“The land [on the Blackfeet Indian Reservation] was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it would make no difference.”).

62. *Gila IV*, 35 P.3d at 76. At least one court in addition to the Arizona Supreme Court has adopted the homeland purpose approach to quantification. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–48 (9th Cir. 1981) (holding “one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society”). Barbara A. Cosens and Jessica Lowrey each argue compellingly for why more courts should follow *Gila IV* and adopt the homeland standard for quantification. See Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RES. J. 835 (2002); Jessica Lowrey, *Home Sweet Home: How the Purpose of the Reservation Affects More than Just the Quantity of Indian Water Rights*, 23 COLO. J. INT’L ENVTL. L. & POL’Y 201 (2012).

63. *Gila IV*, 35 P.3d at 76.

64. *Gila III*, 989 P.2d at 96; accord *Confederated Salish*, 59 F.3d at 1099.

65. See FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 19.03(2)(a), at 119 (1942).

66. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 9.41, at 9.80–80.1 (5th ed. 2002); see also *Leshy*, *supra* note 9, at 1325 (noting Congress itself has acted on an assumption that Native Americans have a reserved right to groundwater by approving settlements of water rights that provide for groundwater and surface water use).

67. *Agua Caliente*, 849 F.3d at 1262.

in what is now California's Coachella Valley.<sup>68</sup> Recognizing this longstanding relationship to the land, Presidents Grant and Hayes in 1876 and 1877 ordered 31,396 acres of land formally reserved for the Agua Caliente Band to be "withdrawn from sale and set apart"<sup>69</sup> for "Indian purposes."<sup>70</sup> The two executive orders sought to encourage Native Americans to "build comfortable houses, improve their acres, and surround themselves with home comforts."<sup>71</sup> The United States sought to formally reserve for the Agua Caliente Band "permanent homes, with land and water enough."<sup>72</sup>

Water had always been essential for the Agua Caliente Band to sustain their homes in California's arid Coachella Valley.<sup>73</sup> With three inches of average rainfall and an over appropriated Whitewater River System, the Coachella Valley provided the Agua Caliente Band and other appropriators insufficient surface water.<sup>74</sup> The only significant source of water near the Agua Caliente Band was the Coachella Valley Groundwater Basin (Basin),<sup>75</sup> and in recent years the Band had purchased groundwater from two state water agencies that primarily manage the Basin: the Coachella Valley Water District and the Desert Water Agency (collectively, State Water Agencies).<sup>76</sup> But because the agencies also sold Basin groundwater to support nine cities, four hundred thousand people, and sixty-six thousand acres of farmland,<sup>77</sup> the Basin experienced significant overdraft since the 1980s.<sup>78</sup>

In May 2013, the Agua Caliente Band sued the State Water Agencies, seeking declaratory and injunctive relief.<sup>79</sup> They claimed a federal reserved right to pump groundwater directly from the Basin,<sup>80</sup> alleging it was necessary to fulfill the reservation land's purpose.<sup>81</sup> The United States District Court for the Central District of California split the litigation into phases to determine three issues: (1) whether

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68. *Id.* at 1265.

69. Exec. Order of May 15, 1876, in 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 821 (1904).

70. Exec. Order of Sept. 29, 1877, in Kappler, *supra* note 69, at 822.

71. *Agua Caliente*, 849 F.3d at 1265 (quoting 1875 COMM'R INDIAN AFF., ANN. REP. 224).

72. *Id.* (quoting 1877 COMM'R OF INDIAN AFF., ANN. REP. 37).

73. *Id.* at 1266.

74. *Id.* at 1266–67.

75. *Id.* at 1266.

76. *Id.*

77. *Id.* (noting that overdraft pumping from the Coachella Valley Groundwater Basin has resulted in an average "recharge deficit of 239,000 acre-feet, with cumulative overdraft estimated at 5.5 million acre-feet as of 2010").

78. *Id.* In response to this concern, the California Water Project sought to augment the groundwater pumping by recharging the Basin with water from the Colorado River. *See id.*

79. *Id.* at 1266–67.

80. *Id.* at 1267.

81. *Id.* at 1270.

the Agua Caliente Band was owed a federal reserved right to the groundwater appurtenant to its reservation land; (2) whether the Band was entitled to a minimum quality of water; and (3) whether the Band had the right to store water for future use in the pore space beneath its reservation land.<sup>82</sup> In March 2015, the district court granted the Agua Caliente Band's motion for summary judgment in the first stage, concluding as a matter of law that the Band was entitled to a federal reserved right to the groundwater underlying its reserved land.<sup>83</sup> The district court then certified an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit.<sup>84</sup>

The Ninth Circuit affirmed the district court's grant of summary judgment,<sup>85</sup> agreeing the Agua Caliente Band had impliedly reserved a federal right to groundwater underlying its reserved land.<sup>86</sup> The court's decision followed two steps. First, it analyzed whether the orders forming the reservation implicitly contemplated any reservation of surface water under the *Winters* doctrine.<sup>87</sup> Second, it considered whether the *Winters* doctrine should also apply to groundwater.<sup>88</sup>

The court answered both inquiries in the affirmative. First, it would have defeated the reservation's underlying purpose of establishing a home and supporting an agrarian society for the court to not find water implicitly reserved with the land.<sup>89</sup> Second, there was no reason not to extend the *Winters* doctrine to groundwater, as "[t]he *Winters* doctrine does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created."<sup>90</sup>

### C. *Agua Caliente's* Always-Never Approach

Although the Ninth Circuit rightly decided to recognize the Agua Caliente Band's federal reserved right to groundwater in this case, it did so by an overly simplistic always-never approach that is inconsis-

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82. *Id.* at 1267 (reviewing the procedure of Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. EDCV 13-883-JGB, 2015 WL 1600065, at \*2 (C.D. Cal. Mar. 20, 2015)).

83. *Agua Caliente Band*, 2015 WL 1600065, at \*10.

84. *Agua Caliente*, 849 F.3d at 1267.

85. *Id.* at 1273.

86. *Id.* at 1272.

87. *Id.* at 1268–70 (“[W]e must first decide whether the United States, in establishing the Agua Caliente Reservation, impliedly reserved water.”).

88. *Id.* at 1270–73 (“While we conclude that the federal government envisioned water use when it established the Tribe's reservation, that does not end our inquiry. We must now determine whether the *Winters* doctrine, and the Tribe's reserved water right, extends to the groundwater underlying the reservation.”).

89. *Id.* at 1270.

90. *Id.* at 1272.

tent with the Supreme Court's *Winters* doctrine. The court found that because there was no practical reason to distinguish between surface water and groundwater in their use on reservations, once a claimant like the Agua Caliente Band could establish that its reservation of land implied some use of water, it would always be entitled to groundwater.<sup>91</sup> Effectively, per *Agua Caliente's* always-never approach, a reservation entitled to water is also *always* entitled to groundwater, and a reservation not entitled to any water is *never* entitled to any groundwater.<sup>92</sup>

The Ninth Circuit's always-never approach is inconsistent with *Winters* doctrine precedent, however, because the Supreme Court has applied three limitations to claims of *Winters* water that could provide instances where an appropriator is entitled to surface water but not groundwater.<sup>93</sup> First, to successfully claim *Winters* water, a party must show that the primary purpose for which the land was reserved could require the provision of that water source.<sup>94</sup> For example, if a reservation land required water to provide a habitat in which fish could grow, that purpose could only require and make use of surface water but not groundwater. The second prong of a successful *Winters* water claim requires the party to show land conditions that make the provision of a water source actually necessary.<sup>95</sup> But if available surface water met the reservation purpose's needs, the party would have no viable claim to groundwater. Third, any claimant of federal reserved groundwater rights must show that the state system would not otherwise provide adequate water.<sup>96</sup> A claimant would not receive groundwater in a system where the state's law would provide adequate surface water.

As the foregoing examples demonstrate, each of the three *Winters* principles stretch the Ninth Circuit's always-never approach.<sup>97</sup> Under each principle, there are examples of reservations that could qualify for surface water, but not groundwater. This nuanced approach reflects the Supreme Court decisions encapsulated in the three prongs of the *Winters* Groundwater Test. The following section details the burdens for each prong of the *Winters* Groundwater Test and provides examples of claimants' characteristics that would meet and fail each burden.

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91. *Id.* at 1268–73.

92. *Id.*

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

94. *Id.* at 565.

95. *Cappaert v. United States*, 426 U.S. 128, 135 (1976).

96. *United States v. New Mexico*, 438 U.S. 696, 715 (1978).

97. *See Agua Caliente*, 849 F.3d at 1267.

IV. PROPOSING THE *WINTERS* GROUNDWATER TEST

## A. Primary Purpose Prong

Like other theories of contract interpretation,<sup>98</sup> the *Winters* doctrine seeks to effectuate the parties' intent at the time they agreed to reserve the land.<sup>99</sup> To do this, the first prong of the *Winters* Groundwater Test conducts a textual analysis of the reservation's forming documents to ascertain the parties' intents. At the time the parties formally created the reservation, did they intend a primary purpose that could have required the use of groundwater?

This threshold inquiry originates from *New Mexico*, where the Court held that unless the parties' "primary purpose" in forming the reservation could have required the right to appropriate surface water, no *Winters* right would be implied.<sup>100</sup> Because the Organic Administration Act, by its terms and historical context, had reserved the Gila National Forest only for a primary purpose of protecting forests,<sup>101</sup> the federal government could not claim an instream flow right in the Rio Mimbres River for secondary purposes.<sup>102</sup> Unless the parties intended a primary purpose for the reservation for which a source of water could be required, that water would not be retroactively implied.<sup>103</sup> Instream flow rights were not impliedly reserved because they could not be reasonably required for logging.<sup>104</sup>

The parties who formed the Agua Caliente Reservation could have necessitated groundwater for its primary purpose because agriculture could necessitate groundwater.<sup>105</sup> In executive orders, Presidents Hayes and Grant acknowledged a reservation of land to the Agua Caliente Band to be used "for the permanent use and occupancy of the Mission Indians."<sup>106</sup> During the 1870s, the federal government was focused on securing for Native Americans land from which they could transform tribal lifestyles to lives as "civilized" farmers.<sup>107</sup> This could

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98. See, e.g., 11 WILLISTON ON CONTRACTS § 31:4 (4th ed.) ("Except in cases of ambiguity, or when no written memorial or memorandum is made of the contract and none is required by a law in the nature of a Statute of Frauds, the object in interpreting or construing a written contract is to ascertain the meaning and intent of the parties as expressed in and determined by the words they used . . .").

99. *Winters v. United States*, 207 U.S. 564, 575 (1908).

100. *New Mexico*, 438 U.S. at 711–12.

101. *Id.*

102. *Id.* at 704.

103. *Id.* at 715.

104. *Id.*

105. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir. 2017).

106. Exec. Order of May 15, 1876, *supra* note 69, at 821; Exec. Order of Sept. 29, 1877, *supra* note 70, at 822.

107. See S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 71–88 (1973); see also *Agua Caliente*, 849 F.3d at 1267 (quoting 1875 COMM'R INDIAN AFF., ANN. REP. 224 for the proposition that the federal government sought to incentivize the Band to

only be accomplished if the Agua Caliente Band had “permanent homes, with land and water enough” to grow row crops.<sup>108</sup> Therefore, the Agua Caliente Reservation was formed for the primary purpose of creating a land on which the Agua Caliente Band could produce profitable row crops,<sup>109</sup> a use that could necessitate groundwater.<sup>110</sup>

Not all reservations’ primary purposes could necessitate groundwater, however. The federal government in *New Mexico* would have been rebuffed if it would have retroactively claimed a reserved right to pump groundwater because there, it was not reasonably necessary that the harvesting or growth of timber could necessitate a supply of groundwater—any connection would have been too attenuated.<sup>111</sup> Similarly, the relationship between groundwater and other primary purposes would also be insufficiently direct, as seen in preservation of a fish habitat,<sup>112</sup> general environmental conservation,<sup>113</sup> and most recreation.<sup>114</sup> Because these reservation purposes could never have reasonably necessitated groundwater at the time the reservation was formally created, the parties could not have intended groundwater to then be impliedly reserved, and *Winters* will not retroactively supplement their intents.

## B. Actual Need Prong

The second prong of the *Winters* Groundwater Test also seeks to evince the parties’ intent at the time they formally created the reservation. A canon of treaty interpretation requires that treaties between the federal government and Native Americans be interpreted liberally in favor of the Native Americans, particularly when there are ambigu-

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“build comfortable houses, improve their acres, and surround themselves with home comforts.”)

108. *Agua Caliente*, 849 F.3d at 1265–66 (quoting 1877 COMM’R INDIAN AFF., ANN. REP. 37).

109. *Id.*

110. ANTHONY D. TARLOCK & JASON A. ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 2:10 (2018) (noting the frequent use of groundwater withdrawals for irrigation in American agriculture).

111. *See* *United States v. New Mexico*, 438 U.S. 696, 715 (1978).

112. *See, e.g.,* *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–48 (9th Cir. 1981); *see also* Katheryn A. Bilodeau, *The Elusive Implied Water Right for Fish: Do Off-Reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?*, 48 IDAHO L. REV. 515 (2012) (discussing treaty rights to fish).

113. *See, e.g.,* *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996), *aff’d*, 117 F.3d 425 (9th Cir. 1997). *But see* Amy Choyce Allison, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 WASH. L. REV. 1193 (2002) (arguing for a *Winters* doctrine that recognizes reserved right to water of sufficient quality when the reservation’s purpose was to procure a fishery).

114. *See, e.g.,* *New Mexico*, 438 U.S. at 704.

ities in the document's text.<sup>115</sup> The *Winters* doctrine builds on this theory by ruling it would be unreasonable to believe the Native Americans and federal government both intended to reserve land that would be "practically valueless" for Native Americans' use without irrigation.<sup>116</sup> In most cases, the Native Americans had occupied the land for centuries, so it would be unreasonable to believe they intended to reserve land that would be valueless to them.<sup>117</sup> Therefore, to ascertain Native Americans' intent in agreeing to formally reserve land, courts can look to the land's conditions over time, inquiring whether the conditions have historically been such that the Native Americans must have impliedly intended to reserve groundwater sufficient to accomplish the reservation's purpose.<sup>118</sup>

In applying this actual need analysis to claims of reserved surface water, the Supreme Court has examined the land's conditions, paying particular attention to whether water is appurtenant to the land and necessary given the reservation land's climatic conditions.<sup>119</sup> For example, the Court in *Winters* premised its decision on a recognition that in many arid parts of the West, a group's survival and fulfillment

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115. *Winters v. United States*, 207 U.S. 564, 576 (1908) ("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).

116. *Winters*, 207 U.S. at 576.

117. *Id.* For the proposition that a treaty with Native Americans represents a reservation by the Tribe of all rights not expressly ceded to the federal government, not merely a grant of rights from the federal government to the Native Americans, see *Winans*, 198 U.S. 371; accord *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678, 680–81 (1979). Because the 1888 agreement with Congress represented the tribes' reservation of land that was already theirs, the *Winters* Court noted it was even less plausible the tribes would have ceded the water necessary to sustain their land. *Winters*, 207 U.S. at 577.

118. See, e.g., *Winters*, 207 U.S. at 577; *Arizona v. California*, 373 U.S. 546, 550–51 (1963); *Cappaert v. United States*, 426 U.S. 128, 135 (1976); *New Mexico*, 438 U.S. at 699. Note, however, that a tribe's non-use does not destroy its vested right to reserved water. See *Arizona*, 373 U.S. at 546. Rather, the historical use standard goes to the parties' intent when they formed the reservation, asking whether they intended to reserve groundwater as a potential source to fulfill the reservation's purpose. *Id.*

119. See *Gila III*, 989 P.2d 739, 746 (Ariz. 1999) (en banc) ("The reservations considered in [*Winters* and *Arizona*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life.").



of its reservation's purpose depended on its access to water.<sup>120</sup> In subsequent decisions, the Court has invariably begun its analysis by analyzing the geographic conditions of the reserved land, inquiring whether water ran through or along the reservation land and whether it would be necessary to fulfill the reservation's purpose.<sup>121</sup> After all, it would only have been reasonable for the parties to reserve land if they also reserved sufficient water on the land to meet the "minimal needs"<sup>122</sup> of the land occupants' "present and future needs."<sup>123</sup>

Because the Coachella Valley Groundwater Basin directly underlies the Agua Caliente Reservation in California's arid Coachella Valley, the Agua Caliente Band must have intended to reserve groundwater to produce agriculture there.<sup>124</sup> Like surface water that is deemed appurtenant to land because it flows across or proximately alongside it,<sup>125</sup> water flows to the Coachella Valley Groundwater Basin across—or even through—the Agua Caliente Band's reserved land.<sup>126</sup> And in the Coachella Valley, where annual precipitation is no more than three to six inches,<sup>127</sup> an agriculture-based land reservation must have intended to reserve the water within its boundaries. Therefore, the Agua Caliente Reservation also meets the second prong of the *Winters* Groundwater Test.

In contrast to the Agua Caliente Band, claimants to *Winters* groundwater will be unable to meet the second prong if their reserved land is generally in a wet climate and not overlying any appurtenant aquifers. For example, the southern Oregon coast is home to the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.<sup>128</sup> But the groups could almost never show the need necessary to justify reserved rights to groundwater because they receive roughly sixty inches of precipitation annually.<sup>129</sup> Similarly, in places like much of the

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120. *Winters*, 207 U.S. at 577.

121. *Arizona*, 373 U.S. at 550–51; *Cappaert*, 426 U.S. at 135; *New Mexico*, 438 U.S. at 699.

122. *Cappaert*, 426 U.S. at 139.

123. *Arizona*, 373 U.S. at 600–01.

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

125. *Appurtenant*, Black's Law Dictionary (10th ed. 2014) (defining appurtenant as "annexed to a more important thing").

126. *See Agua Caliente*, 849 F.3d at 1266–67.

127. *Id.* at 1266.

128. *Overview of the Nine Tribes*, OR. DEP'T HUM. SERV., <https://www.oregon.gov/DHS/ABOUTDHS/TRIBES/Pages/Tribes.aspx> [<https://perma.unl.edu/XCU6-3CE6>] (last visited Mar. 12, 2019).

129. *Climate of Oregon*, W. REG'L CLIMATE CTR., <https://wrcc.dri.edu/narratives/OREGON.htm> [<https://perma.unl.edu/Z29R-78ZN>] (last visited Mar. 31, 2019); *see also, e.g., North Bend FAA Airport, Oregon (356073): Period of Record Monthly Climate Summary*, W. REG'L CLIMATE CTR., <https://wrcc.dri.edu/cgi-bin/cliMAIN.pl?ornort> [<https://perma.unl.edu/WC9Q-KGXP>] (last visited Mar. 31, 2019); *Regional Temp. and Precipitation Table*, NAT'L WEATHER SERV. FORECAST OFFICE,

northern Idaho panhandle and western Montana, where there are few reliable aquifers,<sup>130</sup> groups could not show they actually need groundwater that is appurtenant to their reservation. By failing to show this, it is less likely they reasonably intended to reserve groundwater for their reservation's purpose.

### C. Sensitivity Prong

While the *Winters* Groundwater test's first and second prongs examine the reservation's forming documents and land conditions to ascertain the intended primary purpose for the reserved land, the third prong provides an analysis based on considerations of surrounding legal systems. If the legal structures that govern the surrounding state's administration of groundwater would provide an adequate supply of groundwater to accomplish the reservation's intended primary purpose, then there is no reason for the court to formally require a federal administration of federal reserved groundwater rights.

Throughout the *Winters* doctrine's development, the Court has maintained that any claim to federal reserved water should be considered with sensitivity to the role of states as primary administrators of water resources within their borders.<sup>131</sup> *Winters* acknowledged a "conflict of implications" in finding Congress had implicitly taken away from Montana the role of administering water rights to the Rio Mimbres River when Congress many times before had expressly reserved for states the right to administer their water.<sup>132</sup> In *New Mexico*, the Court further raised the bar for preempting states' presumed administration of water, citing Congress's broad deference to state water law in thirty-seven statutes and states' reliance interests in autonomous administration of their own systems.<sup>133</sup> And before Justice O'Connor's recusal and opinion in the Court's most recent *Winters* matter, a majority stood ready to institute a strict analysis of sensitivity to states' roles as water regulators.<sup>134</sup> The Arizona Supreme Court thus sum-

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U.S. NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Dec. 1, 2018), <https://w2.weather.gov/climate/> [<https://perma.unl.edu/8RJE-WUQ7>].

130. Womble et al., *supra* note 4, at 454.

131. *See, e.g.*, *Winters v. United States*, 207 U.S. 564, 576–77 (1908); *United States v. New Mexico*, 438 U.S. 696, 715 (1978); *see also id.* at 718–25 (Powell, J., dissenting) (stating he "would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.").

132. *See Winters*, 207 U.S. at 576–77. The Court expressed sympathy for the state's water law, citing the investments made by defendants in reliance on a state appropriation right. *Id.* at 569.

133. *New Mexico*, 438 U.S. at 701 n.5 (quoting a statute that expresses Congress' policy to "recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers . . . and its interests and rights in water utilization and control.").

134. *Wyoming v. United States*, Opinion, 2d Draft at 18, No 88-309 (U.S. 1989) (recirculated June 12, 1989) (O'Connor, J.) (unpublished document) (on file with the

marized the sensitivity prong when it held a federal right to groundwater would only be recognized if it could be shown that the underlying state system would not provide “adequate” water to accomplish the reservation’s primary purpose.<sup>135</sup>

The Agua Caliente Band’s claim demonstrated the facts necessary to meet the sensitivity prong.<sup>136</sup> California historically operated a correlative rights regime of groundwater appropriation, meaning land ownership alone created the right to pump groundwater from any aquifer underlying a person’s land and put it to beneficial use.<sup>137</sup> Each of the overlying landowners to an aquifer were required to share the resource equitably as tenants in common.<sup>138</sup> In times of scarcity, each user would be limited to a proportionate share of the aquifer’s safe yield.<sup>139</sup> This system allowed the Agua Caliente Band’s neighbors an equal right under state law to pump from the Coachella Valley Groundwater Basin.<sup>140</sup> And as the water table lowered because of the demand brought by four hundred thousand users and sixty-six thousand acres of irrigated farmland,<sup>141</sup> the Agua Caliente Band was limited from pumping the groundwater to which it was entitled under federal law.<sup>142</sup> Because the state’s provision of water was inadequate,<sup>143</sup> the Agua Caliente Band was entitled to claim a federal reserved right to groundwater, which displaced state law.

Other state systems of water law administration could avoid preemption, however. Scholars have noted that one system of water law that could neatly complement and provide for *Winters* water rights is prior appropriation.<sup>144</sup> The system of prior appropriation sets the su-

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Library of Congress, Manuscript Division), *reprinted in* Mergen & Liu, *supra* note 50, at 741–60.

135. *Gila III*, 989 P.2d at 746.

136. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1267 (9th Cir. 2017).

137. *Katz v. Walkinshaw*, 141 Cal. 116 (Cal. 1903); *see generally* Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 IDAHO L. REV. 265, 280 (2013) (“[W]e find outside of California, at most, only limited recognition of correlative rights in the sense of proportional sharing.”).

138. *Katz*, 141 Cal. at 116.

139. *Id.* at 126–27.

140. *Agua Caliente*, 849 F.3d at 1272; *see also* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L & POL’Y REV. 169, 187 (2000) (stating that under the doctrine of correlative rights, an “owner has a right to use not a specific quantity of water, but that amount of water that is reasonable under the circumstances, taking account of the correlative reasonable use rights of all other [owners] on the water course.”).

141. *Agua Caliente*, 849 F.3d at 1266.

142. *Id.* at 1271.

143. *Id.*

144. *See, e.g.*, Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 U. COLO. L. REV. 481 (1985); Judith V. Royster, *Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes*, 47 IDAHO L. REV. 255 (2011).

periority of each appropriator's water right by the date they used the water for a beneficial use.<sup>145</sup> Because groups like the Agua Caliente Band have appropriated water for beneficial use since at least 1876—and likely for centuries before then, subject to historical records<sup>146</sup>—their priority would be superior to nearly every other state right.<sup>147</sup> Some courts have already incorporated *Winters* surface water rights in state prior appropriation systems, setting the priority dates as the time the reservation was formally recognized or, in some cases, as time immemorial.<sup>148</sup> Thus, when the state system provides adequate water to meet the reservation's purpose, as shown in prongs one and two, prong three would not be met under the *Winters* Groundwater Test.

Despite objections that the *Winters* Groundwater Test's third prong would harm Native American interests by subjecting them to state law,<sup>149</sup> the sensitivity prong would in fact achieve positive policy objectives for Native American interests, incentivizing states to accommodate their unchanged *Winters* claims<sup>150</sup> and providing uniform environmental stewardship of a common, sensitive resource. First, the sensitivity prong does nothing to limit Native Americans' right to appropriate enough water to meet their land's primary purpose,<sup>151</sup> so it should provide them with significant bargaining power over states. Scholars have noted that in many cases, settlements are more likely to achieve positive outcomes for Native Americans than litigious adjudications,<sup>152</sup> and this prong will only encourage states to provide the

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145. See generally WATERS AND WATER RIGHTS § 18.03 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009); Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights Through Integrating Tributary Groundwater: Colorado's Experience*, 47 IDAHO L. REV. 5 (2010); Veronica A. Sperling & David M. Brown, *Outline of Colorado Groundwater Law*, 1 U. DENV. WATER L. REV. 275, 286–94 (1998). A majority of western U.S. states today employ some form of prior appropriation system of groundwater law. See Royster, *supra* note 144, at 258.

146. Exec. Order of May 15, 1876, *supra* note 69, at 821; Exec. Order of Sept. 29, 1877, *supra* note 70, at 822.

147. CYNTHIA BROUGHER, CONG. RESEARCH SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE WINTERS DOCTRINE: AN OVERVIEW 2 (2011); accord Cohen, *supra* note 65, at 119.

148. *United States v. Adair*, 723 F.2d 1394, 1415 (9th Cir. 1983).

149. See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1272, 1267 (9th Cir. 2017); see also Royster, *supra* note 144, at 268 (“In extreme cases, state uses may entirely dewater an aquifer beneath reservation lands.”).

150. Note the sensitivity prong in this test does not affect the amount of water owed to reservations. Rather, it merely affects *who* administers the water. *Agua Caliente*, 849 F.3d at 1267.

151. *Id.*

152. BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 80 (2005); Michael R. Moore, *Native American Water Rights: Efficiency and Fairness*, 29 NAT. RES. J. 3 (1989); Debbie Shosteck, *Beyond Reserved Rights: Tribal Control over Groundwater Resources in a Cold Win-*

means for Native Americans within their boundaries to access their entitlement to adequate water. If the state's offer is inadequate, then the courts will find the sensitivity prong met.

Because groundwater is a finite resource limited by climate and demand, Native Americans and states also have significant incentives to work together to steward the water on which they depend.<sup>153</sup> In the Coachella Valley, both state and Native American appropriators will lose out when the federal government steps in to administer the Agua Caliente Band's groundwater rights because this will prevent California from continuing its robust water planning efforts. With the federal and state governments separately regulating the Coachella Valley Groundwater Basin, state water agencies cannot successfully implement uniform stewardship and planning.<sup>154</sup> When the state can provide adequate water to meet federal reserved groundwater rights, both state and Native American interests win.<sup>155</sup>

## V. CONCLUSION

*Agua Caliente* reached the right judgment.<sup>156</sup> As a growing trend of courts and a majority of scholars have recognized in recent years, it makes sense to apply the *Winters* doctrine to claims of federal reserved groundwater in some cases.<sup>157</sup> Therefore, although the Ninth Circuit was first among federal circuit courts to recognize a *Winters* groundwater right,<sup>158</sup> courts throughout the country should look to *Agua Caliente's* sound conclusion.

But in applying the *Winters* doctrine to claims of groundwater rights, courts should reject the Ninth Circuit's inventive always-never approach and instead adopt the *Winters* Groundwater Test, as detailed in this Comment. The test is manageably simple, providing for only three prongs of objective inquiries; the emphasis is on parties' *reasonable*, not *subjective*, intents,<sup>159</sup> and claimants can only meet the sensitivity prong if state water provisions are *actually*, rather than *speculatively*, inadequate.<sup>160</sup> Courts therefore have an objective model which they can systematically follow. Additionally, the Supreme Court is likely to follow this model because it is based entirely on prin-

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*ters Climate*, 28 COLUM. J. ENVTL. L. 325 (2003); Womble et al., *supra* note 4, at 455.

153. Womble et al., *supra* note 4, at 454.

154. *Agua Caliente*, 849 F.3d at 1266; *see also* O'Hair, *supra* note 27, at 273 (discussing the competition between non-federal water users and federal Indian and non-Indian water users for a finite supply of federal reserved water).

155. COLBY ET AL., *supra* note 152, at 80.

156. *Agua Caliente*, 849 F.3d at 1262.

157. *See infra* Part III.A.

158. *Agua Caliente*, 849 F.3d at 1262.

159. *See infra* Parts IV.A and III.B.

160. *See infra* Part IV.C.

ciples the Court has enunciated for over one hundred years since *Winters*. If the Court decides to review *Agua Caliente* or another groundwater case in the near future, it need not reinvent the wheel to apply *Winters* to groundwater. Rather, it can look to the three prongs it has implicitly enumerated, encapsulated in the *Winters* Groundwater Test.