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Richard Griffin

AGUA CALIENTE AND THE ARGUMENT FOR ABORIGINAL RIGHTS TO GROUNDWATER

Richard Griffin, J.D. Candidate, Stanford Law School, expected 2017
Claudia Antonacci, JD Candidate, Stanford Law School, expected 2017

I. INTRODUCTION

Agua Caliente raises pressing issues at the intersection of Federal Indian law and water law that have yet to be conclusively resolved by the U.S. Supreme Court. Among these issues are whether federal reserved water rights apply to groundwater and the scope and circumstances under which aboriginal water rights, with a priority date of time immemorial, may be claimed. This piece explores in depth the Agua Caliente's claim to aboriginal rights to groundwater, and how the district court ruled on this claim in its March 20, 2015 ruling on summary judgment.

II. BACKGROUND ON FEDERAL INDIAN WATER RIGHTS

Although the law of Indian water rights remains in flux, water rights potentially available to federally recognized tribes fall into two categories: (1) federal reserved, or *Winters*, water rights and (2) aboriginal, or *Winans*, water rights. Both types are at issue in *Agua Caliente*, and while this post primarily discusses the Agua Caliente Band's aboriginal water rights claim, an overview of both types of rights provides useful background.

First, tribes may be entitled to federal reserved water rights. The U.S. Supreme Court first recognized reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), which concerned the Fort Belknap Indian reservation in Montana. The Milk River flows through the Fort Belknap reservation, and, at the time of the case, a number of non-Indian Montanans had obtained state appropriative rights to the river's water. The federal government sought to restrain these state-sanctioned users from diverting water upstream of the reservation, and the question arose whether the Indian reservation possessed water rights through which it could restrain other appropriators. In response to this question, the Court held the reservation did possess water rights because, in setting aside the Fort Belknap Indian reservation, the federal government reserved water sufficient to fulfill the purpose of the reservation. In other words, if by treaty the United States reserved land to provide a tribal agricultural homeland, the resulting Indian reservation and its occupants would possess federal reserved water rights to the quantity of water necessary to fulfill that agricultural purpose. Later courts, such as *Arizona v. California*, 373 U.S. 546 (1963), clarified that these rights apply to waters appurtenant to the reservation and have a priority date commensurate to the date of the treaty or other federal action reserving the lands.

In addition to reserved water rights, tribes have invoked aboriginal water rights carrying a priority date of time immemorial. The key Supreme Court case

supporting such rights is *United States v. Winans*, 198 U.S. 371 (1905). While *Winans* was not a water rights case, it contains a principle of Indian law applicable to water rights, namely that treaties and other federal actions are not a grant of rights *to* the Indians, but rather a grant of rights *from* them. Thus, according to *Winans*, tribes retain rights that they did not explicitly cede in a treaty or other agreement. In the case of *Winans,* these retained rights included hunting and fishing.

The central case recognizing the *Winans* principle with respect to water rights is *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). There, the Ninth Circuit held the Klamath Tribe of Oregon possessed aboriginal title to certain lands, hunting, and fishing rights, and "by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland." *Id.* at 1413. While the Klamath Tribe ceded title to most of its ancestral lands by treaty, the Tribe retained exclusive use and occupancy rights. Relying on *Winans*, the *Adair* court found that there was "no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself." *Id.* at 1414. Thus, the court held, the Tribe possessed a continuing water right on the Klamath Reservation to support its hunting and fishing lifestyle. This right, the court explained, carried a priority date of "time immemorial." *Id.*

III. RESERVED AND ABORIGINAL RIGHTS IN *AGUA CALIENTE*

The Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe") is a federally recognized tribe with a reservation in southern California's Coachella Valley. The Tribe has used and occupied the land constituting and surrounding their current reservation for generations. The Tribe's ancestral homeland in the Coachella Valley forms part of the Sonoran Desert, where water is scarce, particularly in California's current drought. In 2013, the Agua Caliente sued the Coachella Valley Water District and the Desert Water Agency seeking, among other requests, a declaration that the Tribe possesses both federal reserved and aboriginal rights to the Valley's groundwater. This lawsuit began in the United States District Court for the Eastern District of California.

The parties to the suit agreed to break the action into three phases. Phase I, which was decided in March 2015, addressed two primary legal questions: (1) whether the Agua Caliente held federal reserved rights to groundwater under the *Winters D*octrine, and (2) whether the Tribe held aboriginal rights to groundwater. The court held the Tribe's federal reserved water right included a right to groundwater. The court found the reservation's purpose was to provide a tribal homeland, and thus the Tribe possessed a federal reserved water right sufficient to fulfill that purpose. The court reasoned that this right extended to the groundwater beneath the Tribe's land as an appurtenant source of water. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, Case No. EDCV 13-883-JGB, 2015 WL 1600065 (E.D. Cal., Mar. 20, 2015) at 7-10 (hereinafter "*Agua Caliente*"). Because the extension of the *Winters* doctrine to groundwater has not been settled by the U.S. Supreme Court, this constitutes a major victory for the Tribe.

The Eastern District, however, denied the Tribe's aboriginal rights claim. This section recounts the parties' arguments in this case.

A. THE PARTIES' ARGUMENTS

The aboriginal rights arguments in *Agua Caliente* centered on federal statutes enacted in the wake of California joining the United States. In 1848, Mexico ceded land that would become the State of California to the United States in the Treaty of Guadalupe Hidalgo. Shortly thereafter, in 1850, California was admitted to the Union and became a state. And just one year later, the U.S. Congress passed the Act of 1851, which sought to protect the property rights of former Mexican citizens and to settle land claims in California. The Act required those claiming property rights to file their claims within two years.

Coachella argued that the 1851 Act required all claims to land to be submitted, and that the Agua Caliente's failure to submit a claim within the two-year period set forth in the Act meant that any claims to the land were extinguished in 1853. Likewise, Coachella argued that the record lacked sufficient factual support for Agua Caliente's aboriginal groundwater rights claim. In particular, Coachella emphasized the lack of evidence that Agua Caliente reservations had any wells in use, but rather that they only used surface water.

Agua Caliente countered that the 1851 Act did not extinguish their aboriginal rights. Agua Caliente did not dispute that they failed to file a claim in the two-year window of the Act. Instead, they argued that the Act, which on its terms pertained to "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government," Plaintiff's Brief at 20 (citing An Act to Ascertain and Settle the Private Land Claims in the State of California, 9 Stat. 631 (March 3, 1851)), did not apply to them because their claim to land did not stem from the Spanish or Mexican government. Rather, they claimed aboriginal rights based on use and occupation since time immemorial, and did not rely upon title derived from the Spanish or Mexican government. To buttress this argument, Agua Caliente also pointed to an 1853 Act passed by the U.S. Congress to transfer California lands in which the United States retained a proprietary interest to the United States. Because this 1853 Act included an exception for "land in the occupation or possession of any Indian tribe," the Tribe argued that this provision explicitly recognized as valid the kind of aboriginal title that they asserted. In making this argument, Agua Caliente also attempted to distinguish a series of U.S. Supreme Court cases finding aboriginal rights to be extinguished by the Act of 1851. It did so on the ground that those U.S. Supreme Court cases addressed "Indian land rights that fell within the purview of the 1851 Act," but that Agua Caliente's land rights did not fall within the purview of the 1851 Act.

Likewise, because an 1850 law passed by the U.S. Congress created a treaty commission for the purpose of clearing aboriginal title claims of non-missionized Indians, Agua Caliente argued that they did not fall within the scope of the Act of 1851. The Act of 1851, their argument went, did not apply to Indians outside the zone of missionization because the 1850 Act covered their claims. Agua Caliente also noted that they had negotiated a treaty with the United States in 1852 that set aside a reservation, but that they were not notified of the U.S.

Senate's failure to ratify the treaty for some time.

Finally, Agua Caliente argued that even if their aboriginal land rights had been extinguished by the 1851 Act, they subsequently reestablished title by continuing their exclusive use and occupancy of the land and water on their ancestral lands.

B. THE COURT'S RULING

The court's ruling on summary judgment granted the Agua Caliente federal reserved rights to groundwater, but denied the claim for aboriginal groundwater rights. It rejected both of Agua Caliente's aboriginal rights arguments, finding that the Tribe's failure to file a claim in accordance with the Act of 1851 extinguished any aboriginal water rights. Moreover, the court held that even if the 1851 Act did not extinguish these aboriginal rights, the establishment of a reservation in 1876 "effectively re-extinguished that right." *Agua Caliente* at 13.

Although the court did not explicitly address Coachella's argument that no factual support demonstrated groundwater use in the relevant time period, the court did note that aboriginal rights to groundwater are not founded upon use of groundwater itself, but rather derive from a right to occupancy. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, Case No. EDCV 13-883-JGB, 2015 WL 1600065 (E.D. Cal., Mar. 20, 2015) at 13 fn. 12 ("[N]o such freestanding aboriginal rights exists, all derive from a right to occupancy."). Accordingly, proof of actual groundwater use was not necessary.

The court's decision to deny aboriginal rights to Agua Caliente relies fairly heavily on U.S. Supreme Court precedent regarding the Act of 1851. Although the argument that an aboriginal right does not stem from Spanish or Mexican authority and that property rights not stemming from Spanish or Mexican authority are not covered by this Act appears persuasive on its face, past U.S. Supreme Court decisions have interpreted the Act of 1851 as requiring tribes claiming aboriginal land rights to have filed a claim pursuant to the Act to preserve their occupancy rights. The main case finding otherwise, *Cramer v. United States*, 261 U.S. 219 (1923), upon which Agua Caliente relied heavily, contains some language favorable for the Tribe. *See, e.g., id.* at 231 ("The Indians here concerned... and their claims were in no way derived from the Spanish or Mexican governments."). Nevertheless, while the U.S. Supreme Court has not affirmatively stated that all aboriginal land claims in California fall within the ambit of the Act of 1851, the Ninth Circuit in *U.S. ex rel Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986), effectively interpreted the line of U.S. Supreme cases as doing just that. The *Chunie* court distinguished *Cramer* on the ground that the tribe in that case did not occupy the land in question at the time of the Act of 1851. Interestingly, the Eastern District did not address Agua Caliente's argument about the 1850 treaty commission, so the court's exact perception of that argument remains unclear. Nevertheless, the Eastern District did not find it persuasive enough to rule in the Tribe's favor on the aboriginal water rights claim.

The Eastern District's assertion that the creation of a reservation for the Tribe in 1876 reservation extinguished aboriginal rights, however, appears inconsistent with prior case law on aboriginal water rights. As put forward in

Winans, reservations are not a reservation of rights *to* tribes, but rather a reservation of rights *from* them—a reservation of those not granted. Accordingly, the Ninth Circuit in *Adair*, 723 F. 2d at 1414, noted, concerning the aboriginal water rights it found to exist for the Klamath Tribe, "[t]he rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights." The Eastern District here, citing *Hagen v. Utah*, 510 U.S. 399, 412 (1994) instead explained that reservation means "the United States withdraws land which it then 'set[s] apart for public uses.'" The Eastern District used this statement to support the assertion that "an aboriginal right of occupancy is fundamentally incompatible with federal ownership." *Agua Caliente* at 13. This assertion, of unclear origin or legal underpinning, contradicts *Adair*, which recognized a continued aboriginal right of occupancy on a federal reservation. *Adair*, 723 F. 2d at 1414.

IV. CONCLUSION

First, in our estimation, the Eastern District should have refrained from foraying into the counterfactual that the Tribe might have reclaimed its aboriginal title between the Act of 1851 and the 1876 establishment of its reservation. Alternatively, just as the Ninth Circuit did in *Adair*, the court could have conducted a robust interpretation of the executive order that established the reservation in 1876 to determine whether or not it reserved any remaining aboriginal rights. We feel that it is a legal error to conclude that a reservation automatically extinguishes any aboriginal rights that may exist without even examining the text of the order establishing the reservation. However, because the Tribe has elected not to appeal the aboriginal rights portion of this ruling, the order and its flawed reasoning will remain on the books.

Case law surrounding the presence of aboriginal water rights remains murky. Although Agua Caliente ultimately prevailed on their reserved water rights claim in this case, recognition of aboriginal rights can be crucial to tribes, primarily when 1) a federal reserved rights claim is not available; or 2) the priority date guaranteed by a reserved right is not early enough to preserve a tribe's access to water. Given the lack of clarity in aboriginal water rights, erroneous decisions in this arena are not surprising. Appellate courts should work to make the law here more clear when the opportunity to do so arises to provide better guidance to lower courts attempting to make sense of the confusing state of the doctrine.

Although this piece has focused on the legal underpinnings of aboriginal rights, it is worth acknowledging that, from the perspective of basic fairness, these legal underpinnings are themselves seriously flawed. During this time period, eighteen tribes in California negotiated treaties with the United States that were never ratified. No one bothered to notify the tribes of this fact. Combined with the Act of 1851, these actions left many California tribes homeless. On top of this, these tribes had to endure state-sanctioned attempts to get rid of the Indian population. There are some tools within the law, such as aboriginal water rights, that can be used to advance tribal interests, but that does not change this country's history of using the law itself to subjugate the people who have lived here the longest, a history that is still present in certain strains of modern legal

doctrine.

V. REFERENCES

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