VOLUME 25 ISSUE 4
ISSN 1478-5277

The journal of WATER LAW

case law • environmental law • control and enforcement • economic regulation • policy development •

CONTENTS

LAWTEXT PUBLISHING

CASE COMMENTARY

THE FUTURE OF NATIVE AMERICAN RESERVED WATER RIGHTS

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Agua Caliente Band of Cahuilla Indians v Coachella Valley Water District
849 F.3d 1262 (9th Circuit 2017)

The western expansion of the United States in the 1800s went hand in hand with the creation of reservations for Native American tribes through treaties with the federal government.[2] These treaties typically used language that is arcane by today's standards, and while they recognised a certain measure of tribal sovereignty, these treaties were not especially favourable to tribes. One element not addressed by most treaties is the question of water rights.[3] As a result, water rights have come to be defined by the courts, which have found there to be an implied reserved water right for tribes when no water rights were expressly reserved.[4]

The doctrine of tribal reserved water rights has evolved from the case of *Winters v United States*,[5] decided in 1908, through *Agua Caliente Band of Cahuilla Indians v Coachella Valley Water District*,[6] the latest word on the subject decided on 7 March 2017. In *Agua Caliente*, the Ninth Circuit Court of Appeals, which has jurisdiction over nine large western states that are home to many Native American tribes, put the brakes on the nearly 110-year expansion of reserved water rights doctrine. This case commentary will address the decision in *Agua Caliente* and discuss its context and implications.

THE INCEPTION OF TRIBAL WATER RIGHTS IN THE UNITED STATES

The *Winters* doctrine is derived from the1908 US Supreme Court case and is commonly viewed as the legal basis for establishing federal reserved water rights for Native American tribes. When the Fort Belknap Indian Reservation was established in Montana in 1888, it designated land for several Native American tribes, with the Milk River as one of the reservation's boundaries.[7] The reservation comprised a fraction of the tribes' former territory, where tribal members wandered as 'a nomadic and uncivilized people', according to the court in the language of the time.[8] In order 'to change those habits and to become a pastoral and civilized people', tribal members needed water rights to serve their farms, livestock and homes.[9] However, they received none.

Precipitating the litigation, homesteaders (early settlers) in this western frontier territory sought to divert the flow of the Milk River for their own uses.[10] The United States sued on behalf of the tribe to enjoin the diversion of water away from the reservation. The decision came down to whether the tribe had impliedly reserved surface water rights for its use, even though no water rights had been explicitly reserved in the 1888 document establishing the reservation.

The Supreme Court applied 'a rule of interpretation of agreements and treaties with the Indians [whereby] ambiguities occurring will be resolved from the standpoint of the Indians'.[11] Concluding that the government could not have intended to leave the tribal reservation 'a barren waste', the court found the government reserved surface water rights for the tribe by implication.[12] Therefore, the Supreme Court prohibited the diversion of the flow of the Milk River away from tribal land, although it did not quantify the amount of water the tribe had rights to in the Milk River. Thus, the *Winters* doctrine was born, establishing precedent for the implied reservation of surface water rights to serve reservation lands.

The *Winters* doctrine has been addressed in a handful of key decisions since the case was decided in 1908.[13] The doctrine has traditionally been construed to apply to Native American claims to surface water rights and, until recently, it was not clear if it also applied to groundwater. Whether *Winters* rights could apply to groundwater was

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2 In United States literature and law, Native American communities continue to be commonly referred to as 'Indians' and their rights as 'Indian rights'. To avoid confusion in this international journal with water rights in the country of India, we will use the terms Native American or tribal to describe our subject matter, except when quoting from other sources.

3 R T Anderson *Indian Water Rights and the Federal Trust Responsibility* (2006) *46 Natural Resources Journal* 399, 408 ('Congress never … addressed water resource development by Indians on tribal lands in any comprehensive manner').

4 ibid.

5 207 US 564 (1908).

6 849 F.3d 1262 (9th Cir 2017) http://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/07/15-55896.pdf.

7 207 US 565–66.

8 ibid 576.

9 ibid.

10 ibid 566–70 (discussing the background of the case).

11 ibid 576.

12 ibid 577.

13 Although it is beyond the scope of this Commentary to describe the treatment of the doctrine between *Winters* and *Agua Caliente*, a good summary of intervening case law is found in R T Anderson *Indian Water Rights, Practical Reasoning, and Negotiated Settlements* (2010) 98 *California Law Review* 1133, 1136–44. See also J B Weldon Jr, L M McKnight 'Future Indian water settlements in Arizona: the race to the bottom of the waterhole?' (2007) 49 Arizona Law Review 441, 443–46; A Cordalis, D Cordalis 'Indian water rights: how Arizona v. California left an unwanted cloud over the Colorado River Basin' (2014) 5 *Arizona Journal of Environmental Law and Policy* 333, 335–51.

the central question presented in the recent *Agua Caliente* case.

THE *AGUA CALIENTE* CASE

The lawsuit initiated by the Agua Caliente Band of Cahuilla Indians sought to test the boundaries of the *Winters* implied water rights doctrine. The Agua Caliente Band, with the backing of the United States federal government, asserted that its water rights could extend to groundwater, presenting a question of first impression in the federal court.[14]

In the Coachella Valley in California where the Agua Caliente Band resides, '[r]ainfall totals average three to six inches per year'.[15] '[S]urface water is virtually nonexistent in the valley for the majority of the year' and 'almost all of the water consumed in the region comes from the aquifer underlying the valley'.[16] When the Agua Caliente Reservation was established by executive orders issued in 1876 and 1877, water rights were not expressly included.[17]

Concerned about overuse of the groundwater aquifer on which the tribe depends, the Agua Caliente Band sued the Coachella Valley Water District and the Desert Water Agency to establish and quantify its asserted groundwater rights.[18] The case was divided into three phases, with the first phase to determine whether the Agua Caliente could assert a claim to groundwater, and in later phases to determine how the right, if recognised, would be defined and quantified.[19] When the district court held the tribe could assert a reserved right to groundwater, the water agencies appealed.

The Ninth Circuit made clear that it was 'concerned on appeal only with … whether the Tribe has a federal reserved right to the groundwater underlying its reservation'.[20] Under the circumstances of the case, the court concluded that the creation of the Agua Caliente Reservation 'carried with it an implied right to use water from the Coachella Valley aquifer' which 'clearly underlies the Tribe's reservation'.[21] In its ruling, the Ninth Circuit reinforced important limitations. It held that:

> Despite the longstanding recognition that Indian reservations … require access to water, the *Winters* doctrine only applies in certain situations: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land.[22]

The court explained that: 'Appurtenance limits the reserved right to those waters which are attached to the reservation'.[23] Appurtenance was not disputed in the case because the Agua Caliente Band sought rights only to groundwater underlying its reservation. The quantification of any such reserved right was left for a later phase of litigation.

Although *Agua Caliente* could be construed as an expansion of *Winters* doctrine to apply to groundwater, the court made clear its ruling applied only in limited circumstances. The court was careful to apply its ruling to groundwater underlying the reservation only. Therefore, *Agua Caliente* does not stand for the proposition that a tribe may assert implied reserved rights to groundwater far from reservation lands. In fact, the Ninth Circuit seems to have shut the door to any such notion by emphasising that *Winters* rights, even if applicable to groundwater in some situations, must be limited to water attached to and underlying the reservation and can be granted only to the extent necessary to accomplish the purpose of the reservation.

THE DIRECTION OF TRIBAL RESERVED WATER RIGHTS DOCTRINE

Rightly construed, given the limitations it imposed, *Agua Caliente* did not open the floodgates to claims for impliedly reserved tribal groundwater rights. Indeed, the Ninth Circuit limited reserved groundwater rights to groundwater beneath the reservation. However, this will not stop some tribes from disregarding the limits expressed in *Agua Caliente* and pursuing expansive groundwater claims. This is already occurring.

The Havasupai Tribe of Arizona recently launched an effort to claim water rights to streams, seeps and springs on its reservation and on land within Grand Canyon National Park.[24] It was unusual enough that the Havasupai Tribe asserted rights to water within a national park in a case in which it did not involve the United States as a party. What was even more striking about the Havasupai Tribe's case, however, was its effort, according to the complaint, to 'prohibit any withdrawal of groundwater' from wells over a vast plateau in northern Arizona, up to 80 miles away from its reservation. In court filings, attorneys for the Havasupai Tribe pointed to *Agua Caliente* as a precedent for their claims, even though *Agua Caliente* clearly limited any such potential rights to groundwater 'underlying the reservation'.

The case brought by the Havasupai Tribe was recently dismissed by the Arizona District Court for failing to join the United States as an indispensable party, with leave to amend if the tribe can convince the federal government to join.[25] Even though the case was dismissed, it serves as a striking example of how quickly tribes will attempt to use *Agua Caliente* to assert vast rights to control and prohibit the use of groundwater far away from reservation lands. Expanding the *Winters* doctrine so far beyond the limits expressed in *Agua Caliente* by asserting geographically

14 849 F.3d at 1270 ('[W]e are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater'). The issue of whether tribal water rights could extend to groundwater has been explored in eg J V Royster 'Indian tribal rights to groundwater' (2006) 15(3) *Kansas Journal of Law and Public Policy* 489. The author there concluded: 'Use of the *Winters* doctrine to assert groundwater rights … is not an ideal approach'; see ibid 494.

15 849 F.3d at 1266.

16 ibid.

17 ibid 1265.

18 ibid 1267.

19 ibid.

20 ibid.

21 ibid 1271–72 and n 10.

22 ibid 1268.

23 ibid 1271.

24 The case is *Havasupai Tribe v Anasazi Water Co, et al*, Case No. 3:16-cv-08290-GMS, in the United States District Court for the District of Arizona, Phoenix Division. The authors of this Commentary represent three of the defendants in that case and share their observations based on their personal knowledge of the proceedings. Court documents may be obtained through Public Access to Court Electronic Records at www.pacer.gov, subject to the payment of fees.

25 Order dated 18 April 2017 in Case No 3:16-cv-08290-GMS, 2017 WL 1384297 (District of Arizona 2017).

enormous groundwater claims would make implied reserved water rights unworkable; *Winters* would collapse as a viable doctrine. Unchecked, the expansion of the doctrine would undermine the established system of groundwater use, where groundwater is typically not subject to appropriation. Allowing tribes blanket authority to shut down distant, off-reservation wells could have devastating consequences for businesses, homeowners, municipalities, tourists and others who rely on groundwater. Within the limits expressed by the court in *Agua Caliente*, the doctrine can survive. However, if those limits are ignored, making off-reservation groundwater throughout the western United States subject to appropriation and restriction by distant tribes, the doctrine will fail after 110 years of productive application.

The approach taken by the Agua Caliente Band and copied to some extent by the Havasupai Tribe is itself a new direction in the establishment of tribal water rights. More commonly, tribal water rights are established based on court decrees in comprehensive water rights adjudications or by settlements approved by the United States Congress.[26] Appendix A to this Commentary contains a list of tribal water rights settlements, decrees and adjudications (some of which are ongoing) establishing water rights for tribes within the State of Arizona to date, as compiled by the authors. None of these settlements arose from a lawsuit by a tribe against groundwater users far from reservation lands. If the approach of the Agua Caliente Band and Havasupai Tribe takes hold, it will represent the fragmentation of water rights adjudications and the attempted establishment of rights through piecemeal litigation.

Since water use in the western United States involves numerous users and sometimes thousands of claimants to integrated water sources, the attempted resolution of rights through piecemeal litigation against subsets of water users is not conducive to the effective management of water resources. For that reason, the US Supreme Court stands by a 'clear federal policy' against 'piecemeal adjudication of water rights in a river system'.[27] The Court has 'recognized that actions seeking the allocation of water … are best conducted in unified proceedings'.[28]

By avoiding legislatively approved settlements or adjudications among all stakeholders, and attempting instead to establish reserved water rights against only a subset of water users, tribes would fragment claims and rights in a competitive water use environment. Water users excluded from the tribes' litigation, including state and federal governments, would not be bound by court rulings in cases in which they are not parties, creating situations in which some water users would be subject to tribal water rights claims, while their neighbours would not.[29] These efforts should be turned back by the courts in favour of a return to more inclusive means for determining and allocating water rights in the arid western United States. At the very least, the limitations imposed by the Ninth Circuit in *Agua Caliente* must be recognised and enforced.

APPENDIX A

Water Rights of Arizona Tribes

Arizona Tribe	*Source of Water Right*
Ak-Chin Indian Community of Papago Indians of the Maricopa Ak-Chin Reservation	Ak-Chin Indian Water Rights Settlement Act of 1978; Pub.L 95-328, 92 Stat 409 (1978), as amended, Pub.L 98-530, 98 Stat 2698 (1984), as amended, Pub.L 102-497, 106 Stat 3258 (1992), as amended, Pub.L 106-285, 114 Stat 878 (2000)
Cocopah Indian Tribe	Final Consolidated Decree, *Arizona v California*, 547 US 150 (2006), and previous decrees entered in that action, including 376 US 340 (1964), 383 US 268 (1966), 439 US 419 (1979), 466 US 144 (1984) and 531 US 1 (2000)
Colorado River Indian Tribes	Final Consolidated Decree, *Arizona v California*, 547 US 150 (2006), and previous decrees entered in that action, including 376 US 340 (1964), 383 US 268 (1966), 439 US 419 (1979), 466 US 144 (1984) and 531 US 1 (2000)
Fort McDowell Indian Community	Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub.L 101-628, 104 Stat 4469, 4480 (1990), as amended Pub. L. 109-221, § 104, 120 Stat 2650 (2006)
Fort Mojave Indian Tribe	Final Consolidated Decree, *Arizona v California*, 547 US 150 (2006), and previous decrees entered in that action, including 376 US 340 (1964), 383 US 268 (1966), 439 US 419 (1979), 466 US 144 (1984) and 531 US 1 (2000)
Fort Yuma Quechan Indian Tribe	Final Consolidated Decree, *Arizona v California*, 547 US 150 (2006), and previous decrees entered in that action, including 376 US 340 (1964), 383 US 268 (1966), 439 US 419 (1979), 466 US 144 (1984) and 531 US 1 (2000)
Gila River Indian Community	Gila River Indian Community Water Rights Settlement Act (Title II of the Arizona Water Settlements Act of 2004), Pub.L No 108-451; 118 Stat 3478, 3504 (2004) Globe Equity No 59 Decree in *United States v Gila Valley Irr. Distr.* (District of Arizona 1935)
Hopi Tribe	Participation in the ongoing General Adjudication of all Rights to Use Water in the Little Colorado River System and Source, Apache County (Arizona) Superior Court, Case No CV6417-201

continued

26 See Cordalis and Cordalis (n 13) 352–56 (discussing tribal water rights settlements): 'The benefits of pursuing settlements have proved over time to be meaningful for tribes'. ibid 353.

27 *Colorado River Water Conservation District v United States* 424 US 800, 819 (1976).

28 ibid.

29 See eg *Carlson v Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir 1975): 'No decision made in an action in which the United States is not a party can bind the United States'.

Water Rights of Arizona Tribes *(continued)*

Arizona Tribe	*Source of Water Right*
Hualapai Tribe	Bill Williams River Water Rights Settlement Act of 2014, Pub.L 113-223, 128 Stat 2097 (2014)
Navajo Nation	Northwestern New Mexico Rural Water Projects Act (Navajo-Gallup Water Supply Project/ Navajo Nation Water Rights), Pub.L No 111-11; 123 Stat 991, 1367 (2009) Participation in the ongoing General Adjudication of all Rights to Use Water in the Little Colorado River System and Source, Apache County (Arizona) Superior Court, Case No CV6417
Salt River Pima-Maricopa Indian Community	Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub.L 100-512, 102 Stat 2549 (1988), as amended, Pub.L 102-238, 105 Stat 1908 (1991); 1910 Kent Decree
San Carlos Apache Indian Tribe	San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub.L No 102-575, 106 Stat 4600, as amended, Pub.L No 103-435, § 13, 108 Stat 4566 (1994), as amended, Pub.L No 104-91, § 202, 110 Stat 7 (1996), as amended, Pub.L No 104-261, 110 Stat 3176 (1996), as amended, Pub.L No 105-18, § 5003, 111 Stat 158 (1997), as amended, Pub.L No 108-451, 118 Stat 3573 (2004) (Title IV of Arizona Water Rights Settlement Act of 2004) Globe Equity No 59 Decree in *United States v Gila Valley Irr. Distr.* (District of Arizona 1935)
San Xavier and Schuk Toak Districts, Tohono O'odham Nation (formerly Papago)	Southern Arizona Water Rights Settlement Act Pub.L 97-293, 96 Stat 1274 (1982), as amended Pub.L 102-497, 106 Stat 3256 (1992)
Tohono O'odham Nation	Southern Arizona Water Rights Settlement Act, Pub.L 97-293, 96 Stat 1261 (1982); as amended, Pub.L 102-497, 106 Stat 3255, 3526 (1992), Title III of the Arizona Water Settlements Act of 2004 Pub.L No 108-451; 118 Stat 3535 (2004)
White Mountain Apache Tribe	White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub.L 111-291, Title III, 124 Stat 3064, 3073 (2010)
Yavapai-Apache Nation	Participation in the ongoing General Adjudication of all Rights to Use Water in the Gila River System and Source, Maricopa County (Arizona) Superior Court and related cases
Yavapai-Prescott Indian Tribe	Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub.L No 103-434, 108 Stat 4526 (1994), as amended, Pub.L 104-91, § 201, 110 Stat 7 (1996)
Zuni Indian Tribe	Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub.L No 108-34, 117 Stat 782 (2003)