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# "For Indian Purposes": Exploring the Role of Water as a Cultural Resource in Securing a Right to Groundwater for the Agua Caliente Band of Cahuilla Indians

## **Cover Page Footnote**

J.D. Candidate, University of Colorado Law School, 2015. The author would like to thank Professor Kristen Carpenter of the University of Colorado Law School and Steve Moore of the Native American Rights Fund for their guidance as well as the staff of the Seattle University American Indian Law Journal for their editorial assistance.

# **“FOR INDIAN PURPOSES:” EXPLORING THE ROLE OF WATER AS A CULTURAL RESOURCE IN SECURING A RIGHT TO GROUNDWATER FOR THE AGUA CALIENTE BAND OF CAHUILLA INDIANS**

Courtney Cole\*

## **I. INTRODUCTION**

This paper examines the role of water as a cultural resource in bolstering claims by American Indian tribes to reserved groundwater rights. Though federal Indian law has long acknowledged the right of tribes to use surface water on their reservations through the so-called *Winters* doctrine, courts have been less willing to recognize a tribal reserved right to groundwater. In a time of severe water scarcity, particularly in the American Southwest, this issue is at the forefront of tribal water claims, including a case brought recently by the Agua Caliente Band of Cahuilla Indians. The Agua Caliente and their ancestors, who have inhabited southern California’s Coachella Valley for millennia, utilized groundwater for traditional cultural, domestic, and subsistence agricultural purposes. More recently, however, a dramatic increase in the Valley’s population and a series of poor municipal decisions have overdrawn and contaminated the Coachella Valley Aquifer. Without a right to the groundwater, the Agua Caliente are currently unable to enjoin local regulatory agencies from further compromising the source of water they all share. This paper argues that highlighting the role of groundwater as a tribal cultural resource may assist the Agua Caliente in securing a right to water in the Coachella Valley Aquifer.

This paper proceeds as follows. Part II describes the historical use of groundwater by the Agua Caliente Band of Cahuilla Indians and the present-day status of the Coachella Valley Aquifer, which underlies the Agua Caliente Reservation. Part III explains the *Winters* doctrine and its extension to groundwater, details the ways in which courts have defined the purposes of Indian reservations in order to quantify tribal reserved water rights, and explores the legal options available for protecting water as a tribal cultural resource. Part IV applies the *Winters* doctrine to the Agua Caliente and examines *Winters*’ role in protecting the cultural use of groundwater on the Agua Caliente Reservation as their homeland. Finally, part V concludes by discussing the implications of this analysis for tribes in southern California and beyond that may one day seek recognition of their reserved rights to groundwater.

## **II. THE COACHELLA VALLEY AND THE AGUA CALIENTE BAND OF CAHUILLA INDIANS**

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\* J.D. Candidate, University of Colorado Law School, 2015. The author would like to thank Professor Kristen Carpenter of the University of Colorado Law School and Steve Moore of the Native American Rights Fund for their guidance as well as the staff of the Seattle University American Indian Law Journal for their editorial assistance.

According to Cahuilla bird songs – the oral literature of the Cahuilla people, from whom members of the Agua Caliente Band are descended – the Cahuilla have occupied the region now known as the Coachella Valley since time immemorial.<sup>1</sup> Recent archaeological excavations mirror these stories, revealing evidence of human habitation in the area as early as 3,000 BCE.<sup>2</sup> The Coachella Valley is a 45-mile-long stretch of southern California desert flanked on all sides by mountains.<sup>3</sup> Elevations on the Valley floor range from 1600 feet above sea level at its northwestern end, near the City of Palm Springs, to 250 feet below sea level at the Salton Sea.<sup>4</sup> Most precipitation falls during the winter months, and some mid-summer storms may produce flash floods, but the Valley regularly receives less than five inches of rain per year and temperatures reach over 100 degrees Fahrenheit.<sup>5</sup>

Prior to the arrival of non-Indians, the Cahuilla people prospered in this arid environment by sustainably harvesting water from the Coachella Valley's canyons, springs, and aquifer.<sup>6</sup> The Coachella Valley Aquifer lay under the ancestral territory of the Cahuilla, about 600 square miles centered on present-day Palm Springs, and today underlies the Agua Caliente Reservation, which consists of approximately 31,396 acres carved from that ancestral territory.<sup>7</sup> Pre-contact Cahuilla adapted to drought cycles by developing groundwater wells for use in times of scarcity.<sup>8</sup> Their walk-in wells, for example, were dug by hand and often reached thirty feet in depth.<sup>9</sup> The Cahuilla also drew water from naturally occurring springs, which, though common year round, varied in location.<sup>10</sup> Permanent Cahuilla villages were often sited near sources of water, which was essential to many aspects of Cahuilla life.<sup>11</sup> Water was used for personal

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<sup>1</sup> Agua Caliente Cultural Museum, *Since Time Immemorial*, 1, <http://www.accmuseum.org/Since-Time-Immemorial> (last visited May 21, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> Natalia Reyes, *The Coachella Valley*, THE DAILY CALIFORNIAN, May 4, 2014, <http://www.dailycal.org/2014/05/04/coachella-valley>.

<sup>4</sup> Coachella Valley Resource Conservation District, *Coachella Valley*, <http://www.cvconservation.org/coachellavalley.html> (last visited Dec. 17, 2014).

<sup>5</sup> National Oceanic and Atmospheric Administration, National Climatic Data Center, *1981-2010 Climate Normals for Palm Springs, California*, <http://www.ncdc.noaa.gov/cdo-web/datatools/normals> (last visited Nov. 21, 2014).

<sup>6</sup> Complaint for Declaratory and Injunctive Relief at 5, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. ED CV 13-00883-JGB-SPX (C.D. Cal. E.D. May 14, 2013) [hereinafter Complaint].

<sup>7</sup> Agua Caliente Band of Cahuilla Indians' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Phase I Issues at 1, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. ED CV 13-00883-JGB-SPX (C.D. Cal. E.D. May 14, 2013) [hereinafter Motion for Summary Judgment].

<sup>8</sup> *Id.*

<sup>9</sup> Complaint, *supra* note 6, at 6.

<sup>10</sup> Lowell John Bean, MUKAT'S PEOPLE: THE CAHUILLA INDIANS OF SOUTHERN CALIFORNIA 31 (1972).

<sup>11</sup> Motion for Summary Judgment, *supra* note 7, at 1.

consumption, food processing and preparation, personal hygiene, medicinal uses, spiritual and ceremonial uses, production of household items (including pottery and basketry), construction of dwellings, and agricultural practices.<sup>12</sup>

Groundwater, particularly from the area's hot mineral springs, played an important role in the spiritual life of the ancestral Cahuilla.<sup>13</sup> Both the Agua Caliente Band and the City of Palm Springs derive their names from the famous Agua Caliente Hot Spring.<sup>14</sup> Cahuilla oral literature tells of the Spring's creation in the beginning by a powerful elder who fashioned it as a perpetually enduring place to heal.<sup>15</sup> As was later retold by Agua Caliente elder Francisco Patencio:

The head man, *Tu-to-meet*, was tired and sick and lame, so he took his *whó-ya-no-hut* (staff of power), which he struck in the ground. He twisted it around, and caused the water of a spring to come out – now Palm Springs Hot Spring. He named it *Sec-he*, meaning boiling water, which is up to the earth and on the earth, which is to be for ever, never to dry up, never to go away, but to be there for ever and always for the sick.<sup>16</sup>

The first Cahuilla to live in the area dared not dwell near the Hot Spring.<sup>17</sup> In the same way a stranger is treated with a cautious sense of distance, it was considered a sentient and unfamiliar entity.<sup>18</sup> Although the people came to bathe in its warm mineral waters, the Spring was treated with the respect of a living being.<sup>19</sup> If the Spring's waters were to be utilized or disturbed in any way, food and prayers were offered to it within the *kishumna'a*, or ceremonial house.<sup>20</sup> By doing so, the Hot Spring could be used without any harm coming to the people.<sup>21</sup> Bathing in the Spring eventually played a central feature in traditional Cahuilla life.<sup>22</sup> As instructed by *Menil*, the Cahuilla Moon Maiden, bathing once in the morning and once towards evening was practiced.<sup>23</sup>

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<sup>12</sup> *Id.* at 2 n. 1 (internal citations omitted).

<sup>13</sup> See Agua Caliente Cultural Museum, *Agua Caliente Band of Cahuilla Indians*, <http://www.accmuseum.org/About-the-Tribe> (last visited May 21, 2015).

<sup>14</sup> Agua Caliente Cultural Museum, *Dream of the Blue Frog*, 1, <http://www.accmuseum.org/Dream-of-the-Blue-Frog-Intro> (last visited May 21, 2015).

<sup>15</sup> *Id.*

<sup>16</sup> Agua Caliente Cultural Museum, *supra* note 14, at 4.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Agua Caliente Cultural Museum, *supra* note 14, at 1.

<sup>23</sup> *Id.*

The Hot Spring's importance, however, was not limited to its material gifts.<sup>24</sup> It also represented a meeting place between the physical world and a supernatural underworld imbued with *i'va'a* (power) – the basic generative force from which all things were created.<sup>25</sup> Beneath the waters was a subterranean realm populated by powerful sacred beings called *nukatem*, remnants from the beginning of time with the ability to accomplish both good and evil.<sup>26</sup> Cahuilla shamans utilized this space in order to consult with the *nukatem* and the knowledge they obtained was used to cure the sick.<sup>27</sup> The Spring's powerful curative properties became known to the outside world in the 1850s, and individuals suffering from pulmonary and tubercular conditions were quickly drawn to its waters.<sup>28</sup>

The non-Indian presence in the Coachella Valley grew during the 1870s with the extension of rail lines into the area.<sup>29</sup> In response, most of the present-day Agua Caliente Reservation was set aside through two executive orders.<sup>30</sup> Their issuance, in fact, marked the culmination of a prolonged effort by the United States and various federal Indian agents to provide for the Agua Caliente, along with the other Indians of southern California, in the face of ever-increasing encroachment by white settlers.<sup>31</sup> Agent D.A. Dryden, head of the Mission Indian Agency, envisioned that the Reservation would serve as a permanent homeland for the Agua Caliente.<sup>32</sup> He explained that “by giving them exclusive and free possession of these lands . . . [t]hey will be encouraged to build comfortable houses, improve their acres, and surround themselves with home comforts.”<sup>33</sup> The homeland that the federal government foresaw for the Agua Caliente was necessarily dependent on access to an adequate supply of water.<sup>34</sup> As Agent John Ames wrote in 1874:

The great difficulty . . . arises not from any lack of unoccupied land, but from lack of well-watered land. Water is an absolutely indispensable requisite for an Indian settlement, large or small. It would be worse than folly to attempt to locate them on land destitute of water . . .<sup>35</sup>

After years of reports from Agents Dryden, Ames, and others, President Ulysses S.

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<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1.

<sup>28</sup> Agua Caliente Cultural Museum, *supra* note 1, at 5,7.

<sup>29</sup> Complaint, *supra* note 6, at 7.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2.

<sup>35</sup> Complaint, *supra* note 6 at 3.

Grant issued an executive order on May 15, 1876 reserving lands “for the permanent use and occupancy” of the Agua Caliente and other Mission Indians in southern California.<sup>36</sup> It quickly became apparent to those in the area, however, that the lands set aside were insufficient as tribal homelands.<sup>37</sup> In July of 1877, newly appointed Mission Indian Agent J.E. Colburn received instructions from the Commissioner of Indian Affairs to “at the earliest possible date” make “strenuous efforts” to identify and reserve “every available foot of vacant arable land” for the “permanent occupation” of the Agua Caliente and other Southern California tribes.<sup>38</sup> Agent Colburn subsequently recommend for inclusion in the Agua Caliente Reservation some thirty-five additional sections of land near those withdrawn in 1876. On September 29, 1877, President Rutherford B. Hayes issued an executive order setting the additional lands aside “for Indian purposes.”<sup>39</sup>

White settlement, and consequent water use, in the Coachella Valley increased dramatically during the twentieth century.<sup>40</sup> In particular, significant groundwater extraction began after World War II during a period of rapid regional population growth.<sup>41</sup> Between 1940 and 1950, the population of Riverside County, within which the Agua Caliente Reservation is located, grew by over 60 percent.<sup>42</sup> In response, two state agencies, the Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA), were created to supply water to the citizens of the Coachella Valley for both domestic and agricultural purposes. Today, the CVWD extracts more than 100,000 acre feet of water per year from the Coachella Valley Aquifer and the DWA extracts approximately 43,000 acre feet.<sup>43</sup> The Aquifer is currently in a state of overdraft<sup>44</sup> and has been for many years.<sup>45</sup> In 2010, the CVWD estimated that the overdraft totaled more than 5.5 million acre feet and was continuing at an average of approximately 239,000 acre feet per year.<sup>46</sup> In an attempt to decrease the overdraft, both the CVWD and the DWA inject the Aquifer with imported Colorado River water at a rate of approximately 51,000 acre feet per year.<sup>47</sup> This water, however, is of significantly lesser quality than that existing in the Aquifer, containing a higher percentage of total dissolved

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

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 4.

<sup>40</sup> Complaint, *supra* note 6, at 8.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 4-5.

<sup>44</sup> An aquifer is in a state of “overdraft” when “more water is used each year than can be replaced by natural or artificial means.” Motion for Summary Judgment, *supra* note 7, at 4.

<sup>45</sup> *Id.*

<sup>46</sup> Motion for Summary Judgment, *supra* note 7, at 4at 4-5.

<sup>47</sup> Complaint, *supra* note 6, at 11.

solids, nitrates, pesticides, and other contaminants.<sup>48</sup> Thus, the water underlying the Agua Caliente Reservation is decreasing in both quantity and quality each year.

Since 1996, the Agua Caliente Band of Cahuilla Indians and others, including the United States, have urged the CVWD and DWA to take action to stop the overdraft of the Coachella Valley Aquifer.<sup>49</sup> The Band has repeatedly asked the agencies to recognize its reserved water rights and work collaboratively to improve their shared stewardship of the Coachella Valley's water resources.<sup>50</sup> Responses, however, have been dismissive both of the Band's rights and of any possibility of collaboration.<sup>51</sup> Committed to protecting the Aquifer not only for its members, but for all residents of the Valley, Agua Caliente brought suit against the CVWD and DWA in federal court in May of 2013.<sup>52</sup> The Band has requested that the court declare its priority water rights, and enjoin the agencies from continuing to overdraft the Aquifer and degrade the quality of existing groundwater.<sup>53</sup>

### III. TRIBAL RESERVED WATER RIGHTS

The legal basis for the Agua Caliente Band of Cahuilla Indians' suit against the CVWD and DWA is the doctrine of federal reserved water rights. The doctrine was established by the Supreme Court in 1908, and has since been interpreted by both federal and state courts to apply to surface water as well as groundwater. Reserved rights are quantified based on the purposes for which a reservation was created, which a court may determine is to serve as a tribal homeland.

#### A. *The Winters Doctrine*

It has long been settled that the creation of an Indian reservation impliedly reserves a right to the use of water sufficient to fulfill the purposes of the reservation.<sup>54</sup> This principle was established by the Supreme Court in the seminal case of *Winters v.*

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<sup>48</sup> Agua Caliente Band of Cahuilla Indians, *Coachella Valley Aquifer*, <http://www.coachellacleanwater.org/aquifer/> (last visited Nov. 21, 2014).

<sup>49</sup> See Agua Caliente Band of Cahuilla Indians, *Water Issues: Correspondence Between the Agua Caliente Band of Cahuilla Indians and the United States, Desert Water Agency, and Coachella Valley Water District, 1996-2012*, [http://www.coachellacleanwater.org/downloads/Water%20Issues%20-%20Part%20II\\_Reduced.pdf](http://www.coachellacleanwater.org/downloads/Water%20Issues%20-%20Part%20II_Reduced.pdf) (last visited May 21, 2015).

<sup>50</sup> Agua Caliente Band of Cahuilla Indians, *supra* note 48.

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

<sup>52</sup> See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. ED CV 13-00883-JGB-SPX (C.D. Cal. E.D. May 14, 2013).

<sup>53</sup> Agua Caliente Band of Cahuilla Indians, *supra* note 48.

<sup>54</sup> *Winters v. United States*, 207 U.S. 564, 595-96 (1908). See generally FELIC COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03 (Nell Jessup Newton ed., 2005). See also, e.g., *Cappaert v. United States*, 426 U.S. 128, 138-43 (1976); *Arizona v. California*, 373 U.S. 546, 598-600 (1963).



*United States*<sup>55</sup> and is thus known as the *Winters* doctrine. *Winters* involved water rights associated with the Fort Belknap Indian Reservation in Montana, which was created by the United States in 1888 as “a permanent home and abiding place” for tribes in the territory.<sup>56</sup> Relevant legislation designated the Milk River as the Reservation’s northern boundary, but made no mention of rights to use of the water.<sup>57</sup> Portions of the Reservation potentially suitable for agriculture were “of dry and arid character, and, in order to make them productive, require[d] large quantities of water for the purpose of irrigating them.”<sup>58</sup> To make use of that acreage, Indians living on the Fort Belknap Reservation began diverting water from the Milk River in 1898.<sup>59</sup> When settlers upstream also began diverting, the United States sued to enjoin their interference with the Indians’ water rights.<sup>60</sup> The settlers contended that they had acquired vested rights by appropriating water after the Reservation was established but before the Indians began doing so.<sup>61</sup> The *Winters* Court rejected this argument, however, and held that when the Fort Belknap lands were reserved, water rights for the Indians were also reserved by necessary implication.<sup>62</sup> The Court recognized that the Reservation was but a small part of a much larger area previously occupied by the Indians and thought it unreasonable to assume that they would reserve lands for agricultural purposes without also reserving the water to make those uses possible.<sup>63</sup>

The Supreme Court affirmed the *Winters* doctrine in the landmark case of *Arizona v. California*.<sup>64</sup> There, the Court was charged with determining whether water rights had accrued to five tribes along the Colorado River when their reservations were established by executive order.<sup>65</sup> The *Arizona* Court found it “impossible to believe” that the President would have created the reservations “unaware that most of the lands were of the desert kind . . . and that water from the river would be essential to the life of the Indian people . . . and the crops they raised.”<sup>66</sup> Accordingly, the Court held that the United States had reserved water rights for the tribes effective at the time the reservations were created and that the water was intended to satisfy “the future as well as the present needs of the Indian Reservations.”<sup>67</sup> Emphasizing the fact that reserved rights must encompass both current and future needs, the Court concluded that water

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<sup>55</sup> 207 U.S. 564 (1908).

<sup>56</sup> *Id.* at 565.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 566.

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

<sup>60</sup> *Id.* at 657.

<sup>61</sup> *Id.* at 568-69.

<sup>62</sup> *Id.* at 567-77.

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

<sup>64</sup> 373 U.S. 546 (1963).

<sup>65</sup> *Id.* at 595-96.

<sup>66</sup> *Arizona v. California*, 373 U.S. at 599.

<sup>67</sup> *Id.* at 600.

was reserved in an amount sufficient “to irrigate all of the practicably irrigable acreage on the reservations.”<sup>68</sup>

### ***B. Winters Rights to Groundwater***

Both federal and state courts have held that the *Winters* doctrine applies equally to surface water and groundwater.<sup>69</sup> The Court of Appeals for the Ninth Circuit addressed the applicability of *Winters* rights to groundwater in *United States v. Cappaert*,<sup>70</sup> which was subsequently affirmed by the Supreme Court.<sup>71</sup> At issue in *Cappaert* was whether the United States could invoke reserved water rights associated with Devil’s Hole, a limestone pool within the Death Valley National Monument that served as habitat for the endangered pupfish, to prevent surrounding landowners from extracting groundwater through wells.<sup>72</sup> The United States argued that groundwater pumping lowered the level of Devil’s Hole, threatening its pupfish population.<sup>73</sup> The Ninth Circuit, finding that the purpose of Devil’s Hole’s reservation was to protect pupfish, held that the United States “implicitly reserved enough groundwater to assure [their] preservation” and that it could invoke its reserved rights to enjoin other landowners from pumping groundwater in amounts that adversely affected them.<sup>74</sup> The Supreme Court, in affirming the Ninth Circuit’s judgment, reiterated that the United States could enjoin groundwater pumping that interfered with its reserved water rights.<sup>75</sup> The *Cappaert* Court held that “since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation . . . the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”<sup>76</sup>

Other federal courts have similarly supported the extension of *Winters* rights to groundwater. In *Tweedy v. Texas Company*, the surface owners of land within the Blackfeet Indian Reservation brought suit against the parcel’s mineral lessee alleging that his groundwater extraction for the purposes of oil and gas development infringed

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

<sup>69</sup> See, e.g., *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974), *aff’d by* 426 U.S. 128 (1976); *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093, 1098-99 (Mont. 2002); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739, 746-47 (Ariz. 1999). See also David H. Getches et al., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 780 (6th ed. 2011).

<sup>70</sup> *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974).

<sup>71</sup> *Cappaert v. United States*, 426 U.S. 128 (1976).

<sup>72</sup> 508 F.2d at 315-316.

<sup>73</sup> *Id.* at 316.

<sup>74</sup> *Id.* at 317-320.

<sup>75</sup> 426 U.S. at 143.

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

upon their reserved water rights.<sup>77</sup> The District Court for the District of Montana held that the creation of the Blackfeet Reservation reserved underground waters to the same extent, and with the same limitations, as surface waters.<sup>78</sup> The court noted that although *Winters* dealt only with surface water, “the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.”<sup>79</sup>

State courts, with one exception, have also concluded that the *Winters* doctrine applies to groundwater. The Arizona Supreme Court, relying on *Winters*, held in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* that when the United States establishes Indian reservations on arid land, it likewise intends a “reservation of water to come from whatever particular sources each reservation had at hand.”<sup>80</sup> The court also found the fact that the United States Supreme Court declined in *Cappaert* to differentiate surface from groundwater in the context of diversion instructive.<sup>81</sup> Using *Winters* and *Cappaert* as “guideposts,” the Arizona Supreme Court concluded that “[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.”<sup>82</sup> Similarly, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults*, the Montana Supreme Court held that the treaty establishing the Flathead Indian Reservation implicitly reserved groundwater underlying the Reservation.<sup>83</sup> Relying on the authorities noted above, including *Cappaert*, the court found “no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation.”<sup>84</sup>

The sole outlier is a 1988 decision by the Wyoming Supreme Court, *In re All Rights to Use Water in the Big Horn River System*, in which it refrained from recognizing claims of reserved rights to groundwater.<sup>85</sup> There, the court acknowledged that “[t]he

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<sup>77</sup> *Tweedy v. Texas Company*, 286 F. Supp. 383, 383-85 (D. Mont. 1968).

<sup>78</sup> *Id.* at 385.

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

<sup>80</sup> *In Re General Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 746-47 (Ariz. 1999).

<sup>81</sup> “That federal reserved rights law declines to differentiate surface and groundwater . . . when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.” *Id.* at 747 (citing *Cappaert*, 426 U.S. at 142-43).

<sup>82</sup> *Id.* at 747.

<sup>83</sup> *Confederated Salish and Kootenai Tribes of the Flathead Reservation v Stults*, 59 P.3d 1093, 1098-99 (Mont. 2002).

<sup>84</sup> *Id.* at 1098.

<sup>85</sup> *In Re All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100 (Wyo. 1988).

logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater,” but at the time no court had expressly extended *Winters* to groundwater and the court refused to be the first to confirm such rights.<sup>86</sup> The Arizona Supreme Court later declined to follow this approach:

We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so. Moreover, as the *Big Horn* court acknowledged, we do not write on a blank slate.<sup>87</sup>

### C. Defining the Purposes of a Reservation

Under the *Winters* doctrine, tribal water rights are reserved to carry out the particular purposes for which an Indian reservation was established. In *Winters* itself, the Supreme Court found that the tribes were entitled to water for agricultural uses because the government’s purpose in creating the Fort Belknap Reservation, consistent with the general purpose of federal reservation policy, was to transform the tribes into agrarian societies.<sup>88</sup> As the Court began to apply the reserved rights doctrine to federal lands other than Indian reservations, however, the purposes-of-the-reservation limitation was transferred to federal enclaves.<sup>89</sup> In *United States v. New Mexico*, which involved water rights associated with the Gila National Forest, the Court distinguished for the first time between the primary and secondary purposes for which federal lands were reserved.<sup>90</sup> The *New Mexico* Court held that water is impliedly reserved only for the primary purposes of federal reservations.<sup>91</sup> If the government needs water for the secondary purposes, those water rights must be acquired under state law.<sup>92</sup>

The Supreme Court has not ruled on whether the *New Mexico* distinction between primary and secondary purposes applies to tribal water rights<sup>93</sup>, but state courts have weighed in. Based on the substantial differences between federal enclaves and Indian lands, the Arizona Supreme Court rejected the application of *New Mexico*’s primary-versus-secondary-purposes approach to tribal water rights, holding that the

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<sup>86</sup> *Id.* at 99-100.

<sup>87</sup> In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 989 P.2d at 745.

<sup>88</sup> 207 U.S. at 576.

<sup>89</sup> See, e.g., *Cappaert*, 426 U.S. at 141.

<sup>90</sup> *United States v. New Mexico*, 438 U.S. 696 (1978).

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

<sup>92</sup> *Id.* at 702.

<sup>93</sup> See, e.g., Judith V. Royster & Michael C. Blumm, NATIVE AMERICAN NATURAL RESOURCES LAW, 413 (2d ed. 2008).

purpose of Indian reservations is to provide tribes with a homeland.<sup>94</sup> The court noted that the needs of a reservation, based on its purpose as a homeland, should be established by considering tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (with a caution that it should never be the only factor considered) present and projected reservation population.<sup>95</sup> The Wyoming Supreme Court, in contrast, has rejected the homeland concept for the Wind River tribes.<sup>96</sup> Despite recognizing that the relevant treaty “clearly contemplates” activities other than agriculture, the court held that the primary purpose of the reservation was agricultural.<sup>97</sup> The court thus found that the tribes were entitled to water to fulfill the agricultural purpose of the Wind River Reservation, which included not only irrigation rights, but also such “subsumed” uses as livestock watering, and municipal, domestic, and commercial uses.<sup>98</sup> The court expressly rejected a number of other purposes for the reservation, however, including mineral development, industrial development, wildlife preservation, aesthetics, and fisheries.<sup>99</sup>

#### ***D. Protecting Water as a Tribal Cultural Resource***

In applying the *Winters* doctrine, a majority of federal and state courts quantify tribal water rights based on the number of reservation acres that are “practically irrigable.”<sup>100</sup> Though this standard often results in rights to a substantial amount of water, it limits the proposed uses a court may consider in quantifying a tribe’s water right to those pertaining to agriculture. This fails to account for the role of water as a tribal cultural resource, which contravenes the internationally recognized human rights of indigenous peoples.<sup>101</sup> Water is central to the existence, continuity, and culture of all indigenous peoples.<sup>102</sup> Its myriad uses are intrinsically tied to the distinctiveness of indigenous peoples and, as such, their sovereignty over it is acknowledged as a human right under international customary law. Indigenous peoples’ right to water is recognized most directly in the 2007 United Nations Declaration on the Rights of Indigenous

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<sup>94</sup> In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 76-77 (Ariz. 2001).

<sup>95</sup> *Id.* at 79-80.

<sup>96</sup> In re All Rights to Use Water in the Big Horn River System, 753 P.2d 94-95.

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

<sup>98</sup> *Id.* at 99.

<sup>99</sup> *Id.* at 98-99.

<sup>100</sup> *Arizona v. California*, 373 U.S. at 600. See also Barton H. Thompson et al. LEGAL CONTROL OF WATER RESOURCES 1088-89 (5th ed. 2013).

<sup>101</sup> See generally David H. Getches, *Indigenous Peoples’ Rights to Water Under International Norms*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 259 (2005).

<sup>102</sup> S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 49 (2001).

Peoples (UNDRIP).<sup>103</sup> The UNDRIP identifies the right of indigenous peoples to “own, use, develop and control”<sup>104</sup> their water resources and to set “priorities and strategies”<sup>105</sup> as to how those resources will be managed. This affords protection for traditional methods of water use, including use for cultural purposes. In fact, the UNDRIP explicitly recognizes indigenous peoples’ right to “practice and revitalize their cultural traditions and customs”<sup>106</sup> and to “maintain and strengthen their distinctive spiritual relationship with their . . . waters[.]”<sup>107</sup>

Though the UNDRIP is non-binding, a trend toward domestic recognition of the indigenous human rights asserted therein has emerged.<sup>108</sup> The United States, which became a signatory in 2010, has indicated that the UNDRIP “has both moral and political force” and that it expresses “aspirations that [the nation] seeks to achieve[.]”<sup>109</sup> The United States has also emphasized its commitment to “serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals.”<sup>110</sup> In light of that pledge, the UNDRIP’s protections for cultural water use by indigenous peoples should be incorporated into the system through which tribal water rights are recognized in the United States.

The homeland purpose standard developed by the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, introduced in part III(C), could facilitate the recognition of water as a tribal cultural resource. Based on the premise that the purpose of an Indian reservation is to provide the tribe with a homeland, the *Gila River* court held that tribal reserved water rights should be quantified based on factors pertaining to that purpose – including tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (though it should never be the only factor considered) present and projected reservation population.<sup>111</sup> Expounding on the tribal history and culture factor, the court stated that water uses with “particular cultural significance” should be

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<sup>103</sup> G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see also Walter R. Echo-Hawk, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 162 (2013).

<sup>104</sup> United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 103, ART. 26.

<sup>105</sup> *Id.*, ART. 32.

<sup>106</sup> *Id.*, ART. 11.

<sup>107</sup> *Id.*, ART. 25.

<sup>108</sup> See Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 211-15 (2014).

<sup>109</sup> Office of the Spokesman, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEPT. OF STATE, 1 (Dec. 2010) <http://www.state.gov/documents/organization/184099.pdf>.

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79-80.

respected, and that “the length of time a practice has been engaged in, its nature (i.e. religious or otherwise), and its importance in a tribe’s daily affairs” may all be relevant to the inquiry.<sup>112</sup> The court also noted that:

Deference should be given to practices requiring water use that are embedded in Native American traditions. Some rituals may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.<sup>113</sup>

The homeland purpose standard, therefore, empowers courts to protect the right to groundwater that may have been reserved for a tribe specifically for cultural use.

#### IV. TOWARD A RESERVED RIGHT TO GROUNDWATER FOR THE AGUA CALIENTE

Applying the doctrine presented in part III, the district court could find that the Agua Caliente Band of Cahuilla Indians has a federal reserved right to water in the Coachella Valley Aquifer. If it does so, the court will be called upon to quantify that right in the next phase of the Band’s litigation against the CVWD and DWA. Here, the Agua Caliente should advocate for quantification of their reserved water right using the homeland purpose standard established in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* if they are interested in having groundwater available for cultural use in the future.

##### A. *The Agua Caliente Have a Federal Reserved Right to Groundwater*

Under the *Winters* doctrine, it is likely that a right to water in the Coachella Valley Aquifer was reserved for the Agua Caliente Band at the time its reservation was created. As discussed in part II, the executive orders that established most of the Agua Caliente Reservation explicitly set lands aside “for Indian purposes”<sup>114</sup> and “for the permanent use and occupancy”<sup>115</sup> of the Band. Furthermore, correspondence surrounding the creation of the Reservation repeatedly referenced preserving the existing homes of southern California’s Indians, providing for their future by placing them in permanent possession of lands, and ensuring that they were given the land and water necessary to sustain themselves into the future.<sup>116</sup> In particular, the order that Mission Indian Agent J.E. Colburn received to identify and secure “every available foot

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<sup>112</sup> *Id.* at 80.

<sup>113</sup> *Id.* at 79.

<sup>114</sup> Motion for Summary Judgment, *supra* note 7, at 4.

<sup>115</sup> *Id.*

<sup>116</sup> Motion for Summary Judgment, *supra* note 7 at 17.

of vacant arable land” for the tribes’ “permanent occupation” confirms that these issues were at the forefront of the United States’ considerations in creating the Agua Caliente Reservation.<sup>117</sup> It is clear, therefore, that the United States intended the Reservation to serve as a permanent homeland for members of the Band and that groundwater is *necessary to fulfill that purpose*.<sup>118</sup>

***B. The Agua Caliente’s Groundwater Right May Be Quantified Using the Homeland Purpose Standard***

Of the options currently available for quantifying a reserved water right, the homeland purpose standard is best able to account for the role of groundwater as a tribal cultural resource. Established by the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, the homeland purpose standard relies upon a “fact-intensive inquiry . . . made on a reservation-by-reservation basis”<sup>119</sup> in order to determine the amount of water necessary to fulfill a reservation’s purpose as a tribal homeland. As reviewed in part III(D), the court identified several factors that should be part of this inquiry: tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (though it should never be the only factor considered) present and projected reservation population.<sup>120</sup> Obviously, the tribal history and culture factor is most relevant to concerns regarding the preservation of groundwater as a tribal cultural resource. In describing that factor, the *Gila River* court stated that “practices requiring water use that are embedded in Native American traditions” should receive deference.<sup>121</sup> “Some rituals,” the court noted, “may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.”<sup>122</sup>

This guidance may be particularly relevant to the Agua Caliente, whose ancestors utilized groundwater in the Coachella Valley for spiritual and ceremonial purposes for thousands of years (see part II). The current extent of the Band’s interest in groundwater as a cultural resource is not clear. However, if the Agua Caliente would

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<sup>117</sup> *Id.* at 18.

<sup>118</sup> Having drawn this conclusion, the district court recently held that the Band’s federally reserved water rights encompass groundwater underlying the Reservation. See Order Granting in Part and Denying in Part Plaintiffs’ and Defendants’ Motions for Partial Summary Judgment at 10, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. ED CV 13-00883-JGB-SPX (C.D. Cal. E.D. May 14, 2013).

<sup>119</sup> *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79.

<sup>120</sup> *Id.* at 79-80.

<sup>121</sup> *Id.* at 79.

<sup>122</sup> *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79.



like to have groundwater<sup>123</sup> available to them in the future specifically for cultural use, they should advocate for quantification of their reserved water right based on the homeland purpose standard.

## V. CONCLUSION

In one sense, the situation at Agua Caliente is not unique. Communities throughout southern California and across the American Southwest are increasingly finding their aquifers overdrafted, contaminated, or both – threatening their water supplies for domestic, recreational, and agricultural use. Fortunately, however, the Agua Caliente's experience is shared in another sense. Many tribes in the region have over millennia developed ways of life that are intricately connected to and dependent upon groundwater. If these tribes have reservation lands, it is likely that they were set aside as tribal homelands even if such a purpose was not made explicit. Therefore, under the *Winters* doctrine, they may be able to secure reserved rights quantifiable using the homeland purpose standard and thus ensure that groundwater is available to sustain their cultures for future generations. In addition, these tribes may be able to provide water to their non-Indian neighbors and, as the Agua Caliente have done, partner with them to promote sustainable groundwater management practices from which the entire community could benefit.

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<sup>123</sup> Because the homeland purpose standard has yet to be applied, the quantity of groundwater in which it would result is currently unknown. See Charles Carvell, *Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes*, 85 N.D. L. REV. 1, 35-36 (2009).