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TOWARD A TRIBAL ROLE IN GROUNDWATER MANAGEMENT

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This Article considers the Agua Caliente groundwater litigation a decade since its inception. It recounts the most recent developments in the case, notably the move to mediation and the strategic work that brought the water districts to the table. The Article places this monumental case in context: in the history of colonization and tribal-state relations, the present climate crisis, and the State of California's groundwater management regime. The Article ultimately outlines the present opportunity to reimagine the role of tribes in groundwater management.

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I. INTRODUCTION

In 2013, the Agua Caliente Band of Cahuilla Indians (Agua Caliente) sued the Coachella Valley Water District and the Desert Water Agency, groundwater management agencies serving the greater Palms Springs region.[2] The Tribe accused the water agencies of decades of irresponsible management resulting in irreparable damage to the Coachella Valley Groundwater Basin and injury to the Tribe's water rights. The water agencies did not refute the accused actions. They were indeed responsible for the overdraft of the primary water source of the Coachella Valley. But they refused to stop, and they refused to settle because they did not believe a federal court would recognize a tribal claim to groundwater. They were wrong.

Agua Caliente brought this case at a critical time. The aridification of the American West is one of the many dire faces of the global climate crisis. While this Article is primarily concerned with one monumental water rights case, I write with the understanding that these cases are part of a national dialogue with enormous stakes. The recognition of tribal sovereignty will be critical to how this country—and all the nations therein—navigate the existential threat of climate change.

As Felix Cohen observed in 1953, Native nations in the United States are like the miner's canary: they mark "the shifts from fresh air to poison gas in our political atmosphere. . . reflect[ing] the rise and fall in our democratic faith."[3] In our modern climate crisis, Cohen's analogy still holds water. Climate change threatens communities across our continent through rising sea levels, extreme weather, aridification, changing food networks, and intolerable temperatures. However, Native peoples are uniquely vulnerable due to factors including geographic location and histories of removal, unique ties to the land and local ecology that underpin spiritual and cultural traditions, colonization and poverty, and historically limited legal and political power.[4]

Native people in the United States often live in poor, rural communities with small local economies and limited infrastructure. These socioeconomic factors contribute to climate vulnerability and impede adaptability.[5] Meanwhile, climate change undermines food security and cultural survival by threatening Native foods, traditional ecological resources, and land-based practices.[6] Alaska Native villages are poised to literally fall into the sea, and whole communities must be relocated.[7] In the Southwest, climate change manifests as increasing aridity and drought.

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[2] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. 13-883 (C.D. Cal. Filed May 14, 2013).

[3] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

[4] RANDALL S. ABATE & ELIZABETH ANN KRONK, CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3-4 (2013); DANIEL R. WILDCAT, INTRODUCTION: CLIMATE CHANGE AND INDIGENOUS PEOPLES OF THE USA, IN CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS 1-2 (2013).

[5] K. Cozzeto et al., *Climate Change Impacts on the Water Resources of American Indians and Alaska Natives in the U.S.*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 65-66 (2013).

[6] Kathy Lynn et al., *The Impacts of Climate Change on Tribal Traditional Foods*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS 38-43 (2013).

[7] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION (2009) (discussing the thirty-one

Sand dunes encroach on Navajo and Hopi lands, Hualapai land is becoming too dry to sustain its cattle industry, and increasing salinity and temperature is killing the biodiversity of the Pyramid Lake Paiute Tribe's namesake lake.[8] Across the country, water resources are changing, and these changes place Native nations at risk. Like the proverbial canary in the coalmine, the climate developments in Indian country indicate a crisis facing the United States.

Tribes are not passive observers amid major climatic change. Legal action is one of many modes of response. To be sure, the Agua Caliente Band of Cahuilla Indians is not especially representative of the poor rural communities facing the brunt of climate change. As Part I of this paper will explain, the Agua Caliente reservation is home to a large urban non-Native population and significant wealth. Nonetheless, Agua Caliente faces the same increasingly existential problems of drought and aridity as the rest of the Southwest. Moreover, the Tribe's modern economic status makes the long, intensive litigation that characterizes water rights feasible. Determination, legal strategy, and financial resources were all essential to the decisions that affirmed tribal groundwater rights.

This Article recounts the case that established a *Winters* right to groundwater in the Ninth Circuit.[9] It traces the *Agua Caliente* litigation from its inception to the present, demonstrating the significant stakes and complexity of tribal water rights claims.[10] While past publications have discussed earlier stages of litigation, this piece is the first to consider the strategic breakthrough that ushered in settlement negotiations. Ultimately, this Article regards *Agua Caliente* as a landmark case, one that has changed the landscape of tribal water rights in the American West and situated the Tribe to model a new form of leadership in groundwater management. Moreover, it identifies an opportunity for the State of California to make good on its promise to pursue better relationships with Native nations.[11]

Part I begins with brief historical and ecological context of the Agua Caliente Band of Cahuilla Indians. To appreciate the significance of the Tribe's legal claims, one must first consider the Tribe's historic, cultural, spiritual, and physical relationships with the land and its water resources. Part II recounts the ambiguous status of groundwater under the *Winters* doctrine prior to *Agua Caliente.* Part III follows the case from its initiation in 2013, through intermediate wins and losses, to the present-day status of ongoing mediation. I argue that the move to mediation

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villages identified as facing imminent threat of erosion and flooding); *see generally, Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (considering the Native Village of Kivalina's claims that major energy companies were liable for the village's impending destruction); CHRISTINE SHEARER, KIVALINA: A CLIMATE CHANGE STORY (2011).

[8] K. Cozzeto, supra note 5, at 69.

[9] *Winters v. United States*, 207 U.S. 564 (1908).

[10] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F.3d 1262, 1265 (9th Cir. 2017).

[11] *See* 2019 California Executive Order N-15-19 (formally apologizing for genocide and dispossession of Native people); *Statement of Administrative Policy: Native American Ancestral Lands,* OFFICE OF THE GOVERNOR, (Sept. 25, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf (embracing tribal self-determination and announcing policy of co-management); *Governor Newsom Proposes $100 Million to Support Tribal-led Initiatives that Advance Shared Climate and Conservation Goals,* OFFICE OF THE GOVERNOR (Mar. 18, 2022), https://www.gov.ca.gov/2022/03/18/governor-newsom-proposes-100-million-to-support-tribal-led-initiatives-that-advance-shared-climate-and-conservation-goals (introducing a budget proposal to invest $100 million of state funds in tribal-led initiatives).

should be understood as a significant turning point. Finally, Part IV considers broader implications for western tribes and California water policy. I ultimately assert that a settlement for the Agua Caliente Tribe could hail a new era of water politics in California, one in which tribes and the state collaborate in a sovereign-to-sovereign partnership.

II. BACKGROUND

A. The Cahuilla People of the Coachella Valley

The Agua Caliente Band of Cahuilla Indians are descendants of the Cahuilla people who have occupied and cultivated the Coachella Valley since time immemorial. As Chief Francisco Patencio recounted in his 1939 *Stories and Legends of the Palms Springs Indians*, Cahuilla cosmology features an intimate connection to this geography.[12] Chief Patencio addressed a future generation, speaking "to those who never hear their Indian songs; to those who may forget; to those who have part Indian blood," and he told Cahuilla history from a Cahuilla perspective. [13] He told his readers that the Cahuilla are a people who made a home at the site of creation: "When the sunlight came, all of the people, except the Indians, left the place of the first creation."[14] When all the other people spread across the Earth, the Cahuilla remained and learned to thrive in the desert environment.[15] As this creation story demonstrates, the Cahuilla people have unique spiritual and cultural claims to the land of Southern California.[16]

Cahuilla civilization developed numerous cultural and technological adaptations to flourish in the demanding landscape. The virtue of reciprocity[17] and an ecological ethic[18] guided social organization and laws responsive to the demands of desert survival.[19] The dry environment has always featured temperature extremes: the summers routinely hit 125 degrees Fahrenheit, and winter temperatures drop below freezing.[20] Surface water is unreliable.[21] At times, Cahuilla

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[12] FRANCISCO PATENCIO & MARGARET BOYNTON, STORIES AND LEGENDS OF THE PALM SPRINGS INDIANS, xiii (1943).
[13] *Id.* at xiv.
[14] *Id.* at xiii.
[15] *Id.* at 7.
[16] For more information on Cahuilla ancestral lands and ecology, see *Mona de Crinis, Cahuilla Territory,* ME YAH WHAE (2022) https://aguacaliente.org/documents/Cahuilla_Territory.pdf. *See also, Agua Caliente Band of Cahuilla Indians,* CALIFORNIA NATIVE AMERICAN HERITAGE COMMISSION, https://nahc.ca.gov/cp/tribal-atlas-pages/agua-caliente-band-of-cahuilla-indians/.
[17] LOWELL JOHN BEAN, MUKAT'S PEOPLE: THE CAHUILLA INDIANS OF SOUTHERN CALIFORNIA, 174 (1972).
[18] *Id.* at 165. The ecological ethic is a way of living premised on the assumption that man is one of many cooperating beings with reciprocal relationships and obligations to maintain an ecological equilibrium. Any action on the part of humans affects other parts of the system. *Id.*
[19] Cahuilla people promulgated their laws through an oral musical tradition. *Id.* at 121.
[20] *Id.* at 29.
[21] This is particularly so after the Great Fort Tejon Earthquake of 1857 effectively rerouted the Kern River, drawing this major freshwater resource away from Cahuilla land. *See,* Mona de Crinis, *An Everlasting Bond,* ME YAH WHAE, 2015, at 25-26 https://flipbook.pub/me-yah-whae/spring-2015/?page=24. *See also,* BEAN *supra* note 17, at 29-30.

territory featured lakes, rivers, streams, and flash floods.[22] In other years, drought was the status quo.[23]

The scarcity of water required strategic settlement and innovation. As anthropologist Lowell John Bean documented in *Mukat's People: The Cahuilla Indians of Southern California,* the Cahuilla people historically built irrigation systems to channel river water into villages both for household use and agriculture.[24] They identified natural wells, where groundwater gathered near the surface.[25] In places where groundwater lay farther from the surface, Cahuilla villages dug their own wells. These "walk-in wells" featured stairs cut into the ground, descending ten to thirty feet, depending on the level of groundwater.[26] Cahuilla people also constructed "lakelets" around these wells, designed to cultivate useful plants.[27]

Bean estimates that the Cahuilla civilization maintained a population of 5,000-6,000 people prior to European contact.[28] By 1850—due to disease, violence, and dispossession wrought by successive waves of Spanish, Mexican, and American colonization—the Cahuilla population reduced significantly, to as low as 2,500-3,000 people.[29] The United States claimed Cahuilla land under the Treaty of Guadalupe Hidalgo in 1848.[30] Settlers from across the world were streaming to California for the Gold Rush, and the newly annexed territory was poised for statehood.[31] When California joined the Union in 1850, three federally appointed Indian commissioners surveyed the new state with instructions to settle land claims and set aside reservations for Native peoples through negotiated treaties.[32] Cahuilla leaders signed the Treaty of Temecula, which promised a reservation and provisions of cattle, horses, and steel in exchange for the Cahuilla people's ceding their tribal lands to the United States.[33] However, Congress failed to ratify any of these treaties,

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[22] BEAN *supra* note 17, at 29.
[23] *Id.* at 30.
[24] *Id.* at 73.
[25] *Id.* at 32.
[26] *Id.*; First Amended Complaint at 6, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. 13-883 (C.D. Cal. July 17, 2020).
[27] BEAN, *supra* note 17 at 32.
[28] *Id.* at 76.
[29] Bean notes that 2,500-3,000 is a conservative estimate. *Id.*
[30] Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207, reprinted in 9 Bevans 791. For the text of the treaty, *see Treaty of Guadalupe Hidalgo (1848),* NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo#:~:text=This%20treaty%2C%20signed%20on%20February,Oklahoma%2C%20Kansas%2C%20and%20Wyoming.
[31] *California Admission Day September 9, 1850,* CAL. DEPT. OF PARKS AND RECREATION, https://www.parks.ca.gov/?page_id=23856.
[32] *See generally* ROBERT F. HEIZER, THE EIGHTEEN UNRATIFIED TREATIES OF 1851-1852 BETWEEN THE CALIFORNIA INDIANS AND THE UNITED STATES GOVERNMENT (1972). Heizer describes the federal efforts to settle Native land claims as "a farce from beginning to end." *Id.* at 5.
[33] *Id.* at 58-59. The language of the treaty is available online, in a digitized copy of Heizer's manuscript. Robert F. Heizer, *The Eighteen Unratified Treaties of 1851-1852 Between the California Indians and the United States Government,* UNIVERSITY OF CALIFORNIA, BERKELEY DIGITAL COLLECTIONS, https://digitalassets.lib.berkeley.edu/anthpubs/ucb/text/arfs003-001.pdf.

sealed them away under an injunction of secrecy, and then sat idly by as settlers seized Cahuilla land.[34]

After years of settler occupation had impoverished the Tribe and disrupted its water and agricultural practices, the federal government finally took action.[35] On May 15, 1876, President Ulysses S. Grant issued an executive order establishing the Agua Caliente Indian Reservation, for the broad purpose of maintaining a homeland.[36] The following year, President Rutherford B. Hayes issued an executive order expanding the reservation.[37] Today, the Agua Caliente Reservation includes over 30,000 acres, making the Tribe the largest single landowner in Palm Springs.[38] See Figure 1 below for a current representation of their tribal land.

[34] Indeed, the Senate not only unanimously repudiated the treaties it had itself commissioned, it also sealed the treaties and associated documents under an injunction of secrecy that would not be lifted until 1905. BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE 168 (2016).
[35] Complaint at 7, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, No. 13-883 (C.D. Cal. May 14, 2013).
[36] *Agua Caliente*, 849 F.3d at 1265.
[37] *Id.*
[38] VISION AGUA CALIENTE, https://www.visionaguacaliente.com/history/ (last visited March 24, 2023).

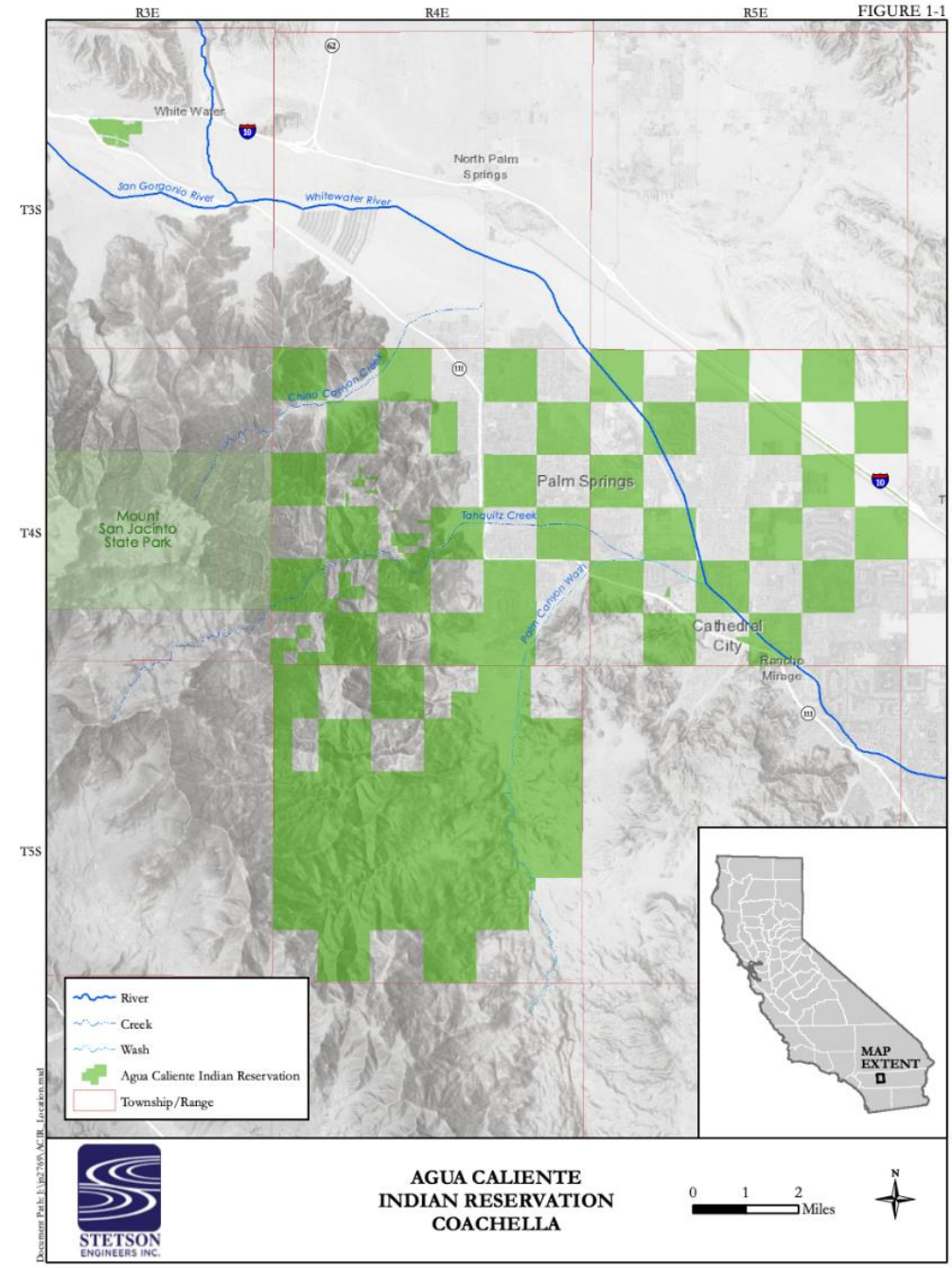

Figure 1.
The Agua Caliente Indian Reservation[39]

[39] *Annual Groundwater Conditions Report for the Agua Caliente Reservation*, AGUA CALIENTE WATER AUTHORITY (2020) https://www.acwaterauthority.org/documents/2020GroundwaterConditionsReportFinal.pdf.

B. Aquifer Overdraft and the Impetus for Litigation

Tourism transformed the Agua Caliente Reservation and the Coachella Valley in the twentieth century.[40] By the 1950s, Palm Springs was a tourist destination characterized by hot springs, manmade pools and spas, golf courses, and glam hotels for Hollywood notables.[41] As the Palm Springs region grew in popularity, the Tribe capitalized on the inflow of people and money by leasing reservation land.[42] However, the development of the tourism and retirement industries has also had a devastating effect on the Valley's hydrology, one compounded by climate change.

The half million people living in the greater Palm Springs region rely on groundwater from the Coachella Valley Groundwater Basin.[43] Today, the Coachella Valley averages only three to six inches of rainfall a year.[44] Surface waters (streams, lakes, reservoirs, etc.) are simply insufficient to sustain the human population. Practically all the water consumed in the region comes from an aquifer system below the surface.[45] This enormous groundwater basin lies under the Agua Caliente Reservation. It has been in a state of overdraft for decades, and now faces irreversible effects.[46] The groundwater basin loses approximately 441,000 acre-feet of water annually, primarily due to pumping for regional use.[47] It naturally recharges 280,000 acre-feet each year.[48] Although the local water agencies have been artificially recharging the aquifer with 51,000 acre-feet of Colorado River water, this rate of pumping still leaves a deficit of 110,00 acre-feet of overdraft each year.[49] As of 2010, the basin reached a cumulative overdraft of 5.5 million acre-feet.[50] Over decades of sustained overdraft, the basin has shrunk, irreversibly decreasing groundwater storage capacity for the Valley.[51] Since 1975, the aquifer ceiling has dropped at least

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[40] Janice Kleinschmidt, *The Storied History of Palm Springs,* PALM SPRINGS LIFE (Dec. 23, 2022), https://www.palmspringslife.com/storied-history-of-palm-springs/.
[41] *Id.*
[42] *See* "What is an Indian Land Lease," *Palm Springs Agency,* BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/regional-offices/pacific/palm-springs-agency (describing in general terms the leasing of Agua Caliente land); Rosalie Murphy, *Half of Palm Springs Sits on Rented Land. What Happens if the Leases End?* THE DESERT SUN (Sept. 22, 2016), https://www.desertsun.com/story/money/real-estate/2016/09/22/palm-springs-agua-caliente-land-lease/87944598/ (reporting that nearly 20,000 people and businesses lease land from the tribe and tribal members, and estimating that the leased land is worth over $2.4 billion). *See also,* Rosalie Murphy, *This Tribal Leader Transformed a California City. At 95, She Has No Regrets*. THE DESERT SUN (Sept. 22, 2016), https://www.desertsun.com/story/money/real-estate/2016/09/22/agua-caliente-leasing-council-history/88835196/ (describing the development of tribal land leases from the perspective of tribal members).
[43] *Groundwater,* DESERT WATER AGENCY, https://dwa.org/about-us/water-supply/groundwater/#:~:text=Nearly%20all%20of%20the%20water,it%20requires%20very%20little%20treatment (stating that nearly all the water used in the Coachella Valley comes from the groundwater basin).
[44] *Agua Caliente*, 849 F.3d at 1266.
[45] *Groundwater*, supra note 43.
[46] Complaint, *supra* note 26, at 14 (claiming that the low levels of water have irreparably reduced the capacity of the aquifer).
[47] Complaint, *supra* note 26, at 11. 441,000 is the total estimated outflow. Outflow is primarily from pumping, though some water is lost through evapotranspiration and subsurface outflow.
[48] *Id.*
[49] *Id.* at 12.
[50] *Agua Caliente*, 849 F.3d at 1266.
[51] Complaint, *supra* note 26, at 14.

thirty-four feet.[52] Total groundwater storage space has decreased by approximately 633,000 acre-feet.[53]

The artificial recharge itself may also be injurious to the aquifer and its users. The Coachella Valley Groundwater Basin is naturally recharged by mountain snowmelt, resulting in groundwater of impeccable quality.[54] The Colorado River water used for artificial replenishment is markedly inferior. Impurities and sediments picked up by the river make their way into the pristine groundwater, resulting in measurable increases in total dissolved solids.[55] According to the Tribe, this strategy for mitigating the effects of overdraft exacts a second harm, one that is evident to everyday water users.[56] Moreover, this reliance on artificial recharge is part of a much broader pattern of unsustainable, reckless overuse of Colorado River water.[57]

The Coachella Valley Water District and the Desert Water Agency are responsible for pumping the water beneath the Agua Caliente Reservation. These two agencies, authorized by the state to distribute water for the region, indicated at the outset of this litigation that they had no intention of addressing the overdraft.[58] Nor do they refute that artificial recharge reduces the quality of water.[59]

Prior to the lawsuit, the Tribe reached out to the agencies multiple times to address these problems and their impact on the Tribe's reserved water right.[60] It was only when those invitations for cooperation were ignored that the Tribe took legal action to assert its reserved right and remedy the urgent state of overdraft.

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[52] Catherine Schluter, Note, *Indian Reserved Rights to Groundwater: Victory for Tribes, for Now*, 32 GEORGETOWN ENVT'L. L. REV. 729, 733 (2020).

[53] United States' Notice of Motion, Motion, and Memorandum in Support of Motion to Reconsider the Court's April 19, 2019 Order, at 6, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al,* No. 5:13-00883 (C.D. Cal. July 16, 2019).

[54] Interview with John Plata, General Counsel, Agua Caliente Band of Cahuilla Indians, and Catherine Munson, Partner, Kilpatrick Townsend, in Palm Springs, Cal. (Mar. 23, 2022).

[55] Complaint, *supra* note 26 at 12. Total dissolved solids (TDS) can be used as a measure of water quality. TDS affects taste and the "hardness" of water. High TDS alone is not a health concern, though the resulting hard water does wear on appliances and pipes more quickly than low TDS water. TDS can correlate with the presence of contaminates that are harmful to health. Generally, the World Health Organization discusses TDS in terms of water palatability. *Guidelines for Drinking-Water Quality*, WORLD HEALTH ORGANIZATION 228 (2011) https://apps.who.int/iris/bitstream/handle/10665/44584/9789241548151_eng.pdf. *See also, Total Dissolved Solids in Drinking Water*, WORLD HEALTH ORGANIZATION 1-2 (2003) https://cdn.who.int/media/docs/default-source/wash-documents/wash-chemicals/tds.pdf?sfvrsn=3e6d651e_4..

[56] Interview with John Plata & Catherine Munson, *supra* note 54.

[57] A long history of overuse paired with twenty-three years of drought have left the Colorado River in crisis. At the time of writing, California and the other six Colorado River basin states are still struggling to agree upon a new compact to sustainably share the river water. *See* Rong-Gong Lin II & Ian Jams, *Colorado River Crisis is So Bad, Lakes Mead and Powell Are Unlikely to Refill in Our Lifetimes*, LOS ANGELES TIMES (Feb. 5, 2023) https://www.latimes.com/california/story/2023-02-05/colorado-river-reservoirs-unlikely-to-refill-experts-say.

[58] Complaint, *supra* note 26 at 12.

[59] *Id.*

[60] Interview with John Plata & Catherine Munson, *supra* note 54.

III. TRIBAL WATER RIGHTS BEFORE *AGUA CALIENTE*

A. The Winters Doctrine

Since its initial articulation in 1908, the *Winters* doctrine has facilitated the recognition of tribal water rights.[61] In *Winters v. United States*, the United States sued a group of Montana ranchers on behalf of the tribes of the Fort Belknap Indian Reservation. These ranchers had settled on the Milk River upstream from the reservation, and they built dams to divert river water to benefit their ranches at the expense of the tribes.[62] Bound by its trust responsibility to the Gros Ventre and Assiniboine Tribes, the United States intervened to defend the tribes' reserved water rights and assert their senior claim to the Milk River.

The United States established the Fort Belknap Indian Reservation in 1888 with the intention that the tribes would "become a pastoral and civilized people."[63] Although there was no explicit mention of reserved water, a water reservation must be inferred. After all, the reservation's purpose to sustain an agricultural livelihood could only be met through a corresponding reservation of water—"[t]he lands were arid, and, without irrigation, were practically valueless."[64] Given this environmental reality, the *Winters* Court found that Congress must have impliedly reserved water for the tribes,[65] and that this federal right cannot be abrogated by state water laws.[66] *Winters* has come to stand for the proposition that whenever the federal government reserves land, it impliedly reserves whatever water is necessary to fulfill the purpose of the reservation.[67]

Some fifty years later, the Court addressed the question of quantity in *Arizona v. California.*[68] Reviewing tribal claims to Colorado River water, the Court first reiterated the *Winters* rule: when the federal government reserves land for Indians, it necessarily reserves water rights for those Indians effective as of the date the reservation was created.[69] Next, the Court considered the amount of water reserved and found that "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[70] The Court explicitly rejected a proposed alternative standard of "reasonably foreseeable needs."[71] The Court highlighted the fact that reservations are intended to satisfy the present and future needs of the tribes—future needs that cannot be easily estimated.[72] *Arizona v. California* also set to rest the concern that *Winters* only applied to reservations established directly by Congress. The *Winters* doctrine applies to all

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[61] *Winters v. United States*, 207 U.S. 564 (1908).
[62] *Id.* at 565.
[63] *Id.* at 576.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 577.
[67] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES, 206-07 (2012).
[68] Arizona v. California, 373 U.S. 546 (1963).
[69] *Id.* at 600.
[70] *Id.* at 600-601.
[71] *Id.*
[72] *Id.* at 601.

reservations, regardless of whether the federal government established them by treaty, statute, or executive order.[73]

These two cases form the foundation of the water rights doctrine for federally recognized tribes. They set out Congress's authority to reserve water for federal lands and the rule that Congress implicitly reserves water sufficient to satisfy the purpose of each reservation. They also offer "practicably irrigable acreage" as the measure of those rights for agricultural lands. These rights effectively preempt competing claims under state law, typically by asserting superior priority dates within the structure of state prior appropriation schemes.[74] While the majority of western states use prior appropriation to determine water rights,[75] one should note that California manages a hybrid system of appropriative and riparian rights.[76] Nonetheless, federally reserved rights preempt state laws just the same in California.[77]

Tribes can bring these suits to assert their water rights, but the United States must be a party. While tribes are the beneficial owners of trust land and corresponding water rights, the United States government remains the true owner under American law.[78] The 1952 McCarran Amendment waived sovereign immunity for all suits concerning ownership and management of federal water rights, ensuring that tribes and states could always bring these lawsuits and successfully join the United States as an indispensable party.[79] Since reserved water rights cannot be lost through non-use or limited by historic use, tribes can bring suits today to realize rights conferred centuries ago.[80]

In 1981, the Ninth Circuit added an additional tenet to the *Winters* doctrine in *Colville Confederated Tribes v. Walton*.[81] In addition to the "practicable irrigable acreage" standard for

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[73] *Id*. at 598.

[74] Karen Crass, *Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering,* 1 U. DENV. WATER L. REV. 109, 114 (1997).

[75] In general, the United States can be divided into two geographical groups with two distinct forms of water rights. In the West, states use prior appropriation – your claim to water depends on when and how much you first started using and whether you have used that quantity continually. In the East, states use riparian rights – the water you can use is based on the land you own. PEVAR, *supra* note 67, at 207-09.

[76] "California operates under a 'dual' or hybrid system of water rights which recognizes both doctrines of riparian rights and appropriation rights." *Abatti v. Imperial Irrigation District (2020)* 52 Cal.App.5th 236, 255. (quoting *United States v. State Water Resources Control Bd. (1986)* 182 Cal.App.3d 82, 101.This hybrid system is overlayed by two principles: the rule of reasonable use and the public trust doctrine. In California, no one owns water as absolute property. Rather, they own a right to use water subject to the public trust. *Abatti* at 256. The State of California claims ownership over all groundwater in California, in order to supervise and regulate water use. *City of Santa Maria v. Adam (2012)* 211 Cal.App.4th 266, 278 . Today, this hybrid model is made manageable by the California State Water Resources Control Board, which navigates competing claims and issues permits for water use. *The Water Rights Process*, WATER RESOURCES CONTROL BOARD, https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html (last visited May 10, 2022).

[77] *Agua Caliente*, 849 F.3d at 1272.

[78] *See* "Scope of Federal Authority over Indian Affairs," in *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 5.02 (2019).

[79] 43 U.S.C. § 666 (1952).

[80] *See* "Relation between Indian and State Water-Law Systems," in *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 19.01 (2019).

[81] *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (1981).

quantification expressed in *Arizona v. California, Walton* introduced a second measure for reserved water. According to *Walton,* when reservations are established for the purpose of maintaining traditional practices (i.e. protecting a fishery), the federal government impliedly reserves water for the tribe to continue those practices.[82] As a tribe in the Ninth Circuit, Agua Caliente can rely on *Walton* as a second means of measuring their reserved water rights.

The *Walton* articulation of the *Winters* doctrine should not be confused with aboriginal rights—those rights premised on exclusive and continuous use, that need not be formally acknowledged by Congress to be asserted.[83] Aboriginal rights are limited to the rights of occupancy, or in other words, Native peoples' rights to live on the land and enjoy its natural resources according to custom.[84] They are the rights retained by tribes in spite of conquest, and they can be abrogated by any explicit act of Congress.[85] In contrast, *Winters* rights are tied to the affirmative establishment of reservations and the federal government's intentions for those reservations. *Agua Caliente* includes distinct *Winters* and aboriginal claims.[86]

B. Groundwater Precedent

Agua Caliente is not the first to consider federally reserved groundwater. Rather, it is the first time a federal circuit court has explicitly ruled that *Winters* covers groundwater for tribal water claims. Other cases have approached the issue, though less directly. In fact, *Walton* referred to an entire hydrological system "consisting of an underground aquifer and the creek" on the Colville Reservation.[87]

In *Cappaert v. United States,* the Ninth Circuit found an implied reservation of groundwater for Death Valley National Park.[88] This 1974 case examined the *Winters* doctrine in a slightly different context—that of federal land reserved for national monuments rather than tribes. In *Cappaert,* the Ninth Circuit found that in making Death Valley a national monument, the federal government implicitly reserved water rights for the purpose of protecting the desert pupfish habitat in the underground pool at Devil's Hole.[89] However, the United States Supreme Court affirmed the Ninth Circuit's ruling without embracing its reasoning.[90] At the outset of its opinion, the Court noted the Ninth Circuit "holding that the implied-reservation-of-water doctrine applied to

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[82] *Walton*, 647 F.2d at 48.
[83] United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 354 (1941); Sac and Fox Tribes of Indians of Oklahoma v. United States, 315 F.2d 896, 903 (Ct. Cl, 1963); *see* PEVAR, *supra* note 67 at 25.
[84] *See* "Aboriginal Hunting, Fishing, and Gathering Rights," in *COHEN'S HANDBOOK ON FEDERAL INDIAN LAW* § 18.01 (2019).
[85] *Id.;* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 283 (1955) (asserting that Congress' extinguishing aboriginal rights is not a taking under the Fifth Amendment, such that the federal government is under no obligation to compensate the loss of those interests).
[86] Complaint, *supra* note 26, at 3 & 6.
[87] *Walton*, 647 F.2d at 45.
[88] Cappaert v. United States, 508 F.2d 313 (9th Cir. 1974). This case applied the *Winters* doctrine in a slightly different context – that of federal land reserved for national monuments rather than Indian tribes.
[89] *Id.* at 317.
[90] Cappaert v. United States, 426 U.S. 128, 138-39 (1976).

groundwater as well as to surface water."[91] However, the Court refrained from endorsing this holding, remarking that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater."[92] Instead of affirming the Ninth Circuit's reasoning and recognizing reserved rights to groundwater, the Court characterized the underground pool as "surface water."[93] In this way, the Court upheld the injunction protecting the pupfish habitat without making an affirmative ruling on whether the *Winters* doctrine applied to groundwater.

Two federal district courts have entertained tribal rights to groundwater. In 1968, the District of Montana remarked that in tribal water cases, "whether the waters were found on the surface of the land or under it should make no difference."[94] Despite this language, the District of Montana failed to find a reserved groundwater right for the Blackfeet Indian Reservation.[95] The court reasoned that the tribe's *Winters* right was already satisfied by a former decree concerning surface water, and the tribe failed to present evidence that the needs of the reservation had changed.[96] Several decades later, the Western District of Washington explicitly applied *Winters* to groundwater in a case brought by the Lummi Nation.[97]

Three state supreme courts have considered the issue. Wyoming was the first to review tribal claims to groundwater in a case concerning the Wind River Indian Reservation. In 1988, the Wyoming Supreme Court held that *Winters* did not apply to groundwater, based on the total absence of successful groundwater cases.[98] The court acknowledged *Tweedy v. Texas Co.*, the District of Montana decision, and *Cappaert,* but found that none ultimately stood for a *Winters* right to groundwater.[99] Since that decision, two other state supreme courts have ruled in the opposite way. In 1999, the Arizona Supreme Court applied *Winters* to groundwater in a massive case involving the many tribes of the Gila River system.[100] In 2002, Montana followed Arizona's lead and found a federally reserved groundwater right for the Confederated Salish and Kootenai Tribes.[101]

Finally, it is worth noting that many tribal water rights settlements include groundwater. As the law professors' amicus brief to the *Agua Caliente* case reports, "nearly half of the almost 30 settlements of tribal water rights have addressed tribal rights to groundwater" as of 2016.[102] To be sure, these settlements treat groundwater in various ways. The law professors' brief highlights

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[91] *Id.* at 137.
[92] *Id.* at 142.
[93] "Here, however, the water in the pool is surface water." *Id.*
[94] Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968).
[95] *Id.* at 386.
[96] *Id.*
[97] United States v. Washington, 375 F. Supp. 2d 1050, 1058 (W.D. Wash. 2005).
[98] In re Big Horn System, 753 P.2d 76, 99-100 (Wyo. 1988).
[99] *Id.*
[100] In re Gila River System, 989 P.2d 739, 745 (Ariz. 1999); *see* Debbie Shosteck, *Beyond Reserved Rights: Tribal Control over Groundwater Resources in a Cold Winters Climate,* 28 COLUM. J. ENVT'L L. 325, 334 (2003).
[101] Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults, 59 P.3d 1093, 1099 (Mont. 2002).
[102] Brief of the Amici Curiae Law Professors in Support of Plaintiff/Appellee and Affirmance of the Dist. Court's Order at 13, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896).

settlements that quantify tribes' rights to groundwater or otherwise set out terms for tribal groundwater production.[103]

In sum, the status of groundwater in the *Winters* doctrine prior to *Agua Caliente* was undetermined but promising. Although the Supreme Court was silent on the issue, the Ninth Circuit demonstrated its readiness to explicitly read reserved groundwater rights into *Winters.* Given this history, a well-resourced Tribe from the California desert was an ideal plaintiff to bring this case and push the law.

IV. *AGUA CALIENTE*: AN EXPLICIT RIGHT TO GROUNDWATER

A. An Overview

In 2013, the Agua Caliente Band of Cahuilla Indians sued the Coachella Valley Water District and the Desert Water Agency for injuring the Tribe and its members by overdrafting the Coachella Valley Groundwater Basin, degrading the groundwater quality, and therefore infringing on the Tribe's reserved water rights.[104] The Tribe made claims to both aboriginal rights and federally reserved rights. The aboriginal claim was based on the Tribe's presence in the Coachella Valley since time immemorial and their historic use of the Valley's groundwater resources.[105] The reserved water rights claim adhered to the *Winters* conditions set out in the prior section. When the federal government established the reservation in the 1870s, it did so with the purpose of maintaining an agrarian homeland for the Agua Caliente Indians.[106] Since the reservation is located in the desert, reserved water is necessary to fulfill that purpose.[107] Thus, the federal government impliedly reserved water sufficient to satisfy the purpose of the reservation. Since surface water is scarce and unreliable in the desert environment, surely the federal government reserved water from the only reliable source: the underground basin.

The Tribe called for declaratory and injunctive relief. They asked for an affirmation of the Tribe's senior right to water and the use of the pore space underlying the reservation.[108] They asked for a declaration that the water agencies' practices of overdraft and artificial recharge impermissibly interfered with the Tribe's rights by degrading their reserved water both in terms of quantity and quality.[109] They called for injunctive relief to stop these practices.[110]

At the outset of the litigation, the parties agreed to trifurcate the issues into three phases.[111] First, the court would determine whether a reserved right to groundwater was cognizable under

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[103] *Id.*
[104] Complaint, *supra* note 26, at 2.
[105] *Id.* at 3-4.
[106] *Id.* at 6.
[107] *Id.* at 7.
[108] *Id.* at 16.
[109] *Id.*
[110] *Id.* at 17.
[111] Order Granting in Part and Denying in Part Plaintiff's and Defendants' Motions for Partial Summary Judgment at 3, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. 13-883 (C.D. Cal. March 24, 2015).

Winters and whether the Tribe could assert aboriginal claims. Second, the court would review the Tribe's claim to pore space underlying the reservation as well as whether the Tribe has a right to water quality. Third, the court would quantify the Tribe's reserved water right. This trifurcation was a strategic decision on the part of the Tribe to create natural points for settlement.[112] In tribal water rights cases, settlement is the widely preferred outcome.[113] Settlements allow parties to plan water development and management project so that they can find solutions that benefit all stakeholders.[114]

B. Phase 1

In Phase 1, the Central District of California found that the Tribe could bring a *Winters* claim for the groundwater. In a ruling on motions for summary judgment, the district court announced that in a *Winters* analysis, "[a]ny attempt to limit appurtenant water sources to surface water fails as a matter of law and logic."[115] The court went on to remark that such a distinction would be arbitrary in light of the current scientific understanding of the hydrologic cycle.[116] The Tribe could prevail on its claim of reserved groundwater rights, with a priority date from the establishment of the reservation.[117]

However, the court rejected the Tribe's claim to aboriginal rights. The court reasoned that the California Land Act of 1851,[118] passed at the dawn of California statehood, effectively terminated all aboriginal title in the state.[119] Since the Tribe failed to bring aboriginal claims in the 1850s, they were precluded from bringing such claims now.[120] The Tribe decided not to appeal the issue while proceeding with the *Winters* claim.

The water agencies appealed the ruling to the Ninth Circuit, and the Ninth Circuit affirmed the district court decision.[121] The appellate court broke the issue into three parts: (1) whether the federal government intended to reserve water when it created the Agua Caliente Reservation, (2) whether that reservation could encompass groundwater, and (3) whether any additional factors, including state law, historic use, or prior litigation would negate the answers to the first two inquiries.[122] In the first matter, the court found it "impossible to believe" that the United States could have established the reservation without reserving water.[123] The court declared: "Water is

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[112] Interview with John Plata & Catherine Munson, *supra* note 54.
[113] Erin B. Agee, Note, *In the Federal Government We Trust? Federal Funding for Tribal Water Rights Settlements and the Taos Pueblo Indian Water Rights Settlement Act,* 21 CORNELL J.L. & PUB. POL'Y 201, 211 (2011).
[114] Interview with John Plata & Catherine Munson, *supra* note 54.
[115] Order of March 24, 2015, *supra* note 111 at 5.
[116] *Id.* at 6.
[117] *Id.*
[118] Pub. L. No. 31-41, 9 Stat. 631 (1851). §8 of the Act requires every person claiming land in California to present their claim to a board of commissioners. §13 asserts that all rejected claims and all claims not brought will essentially be forfeited and those lands will become public lands. *Id.*
[119]Order of March 24, 2015, *supra* note 111 at 8.
[120] *Id.*
[121] *Agua Caliente*, 849 F.3d at 1271.
[122] *Id.* at 1267.
[123] *Id.* at 1270.

inherently tied to the Tribe's ability to live permanently on the reservation. Without water, the underlying purpose—to establish a home and support an agrarian society—would be entirely defeated."[124] As for the second inquiry, the court identified nothing in the *Winters* doctrine limiting reserved rights to surface water.[125] Moreover, it recognized the ecological realities that necessitated a reservation of groundwater.[126] The court declared: "we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land."[127] As for the third inquiry, the court found no additional factors particular to the case that could undermine that finding.[128]

With this groundbreaking ruling, the Court of Appeals explicitly extended the *Winters* doctrine to encompass groundwater for the Ninth Circuit.

C. Phase 2

In the second phase, the district court was supposed to consider the Tribe's claims to the pore space below the reservation and water quality. It was also supposed to determine the appropriate legal standard for quantification in anticipation of Phase 3. None of these things happened. Instead, the defendants persuaded the district court to dismiss the case for lack of standing.

In April 2019, six years into the case, the district court granted a motion for summary judgment on the grounds that the Tribe failed to produce evidence of an injury and thus lacked standing to proceed.[129] The court asserted that "to satisfy the injury-in-fact requirement for standing to quantify its *Winters* right, the Tribe must provide evidence that Defendants' actions actually or imminently harm the Tribe's ability to use sufficient water to fulfill the purposes of the reservation."[130] According to the court, the state of overdraft was not sufficient to show any harm to the Tribe's water rights.[131] The court dismissed the overdraft harm as speculative since the Tribe was not actively pumping groundwater.[132] Likewise, the court found that the Tribe had failed to produce evidence that the undisputed changes in water quality impeded the Tribe's ability to use its reserved water.[133] Essentially, harm to water quality is not a justiciable injury unless it actually precludes specific uses. The court remarked that the demonstration of injury to the environment or

[124] *Id.*
[125] *Id.* at 1271.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 1272.
[129] Order on Motions for Summary Judgement at 11, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. 13-883 (C.D. Cal. April 19, 2019).
[130] *Id.* at 14.
[131] *Id.* at 15.
[132] *Id.*
[133] *Id.* at 18.

to the water itself is not enough—the Tribe must show injury to the plaintiff to fulfill the requirements of standing.[134]

The court used the standing argument to effectively sidestep the entire inquiry into the existence and quantity of the Tribe's reserved water right. While the court acknowledged that non-use could not negate federally reserved water rights, it asserted that non-use can affect standing.[135] Essentially, the court accepted the defendants' argument that they had never prevented the Tribe from producing groundwater, and that the Tribe offered no basis to believe it would pump the disputed groundwater in the future.[136]

This reasoning ignores the practical consequences of overdraft. The defendants' longstanding practice of overdraft has irreversibly damaged the aquifer.[137] Continued overdraft will do further harm to the resource. These facts alone should qualify as an actual injury to the Tribe's reserved water right. In different circumstances, with a larger aquifer not in overdraft, the agencies' pumping might not infringe on the Tribe's rights. But even in those circumstances, it would be prudent for the court to allow the Tribe to proceed with quantification such that the Tribe could make use of those rights. To be sure, prudence does not dictate the law. But impracticable results should give judges pause. The Tribe's intention to use its reserved water and sustain the aquifer for future generations, combined with the water agencies destructive practices, should be more than sufficient to establish a cognizable injury.

The Tribe's abstention from groundwater production should not be understood as proof that the agencies have not interfered with the Tribe's reserved rights. As the United States' motion for reconsideration forcefully illustrates, the agencies' actions prevent the Tribe from using its right.[138] According to the United States: "the defendants . . . have made it impossible for the Tribe to use any water without worsening the existing depletion of the available water supply. There is no surplus; there is no excess from which to pump. There is only deficit: currently at 90-feet below the natural level."[139] In this way, the defendants have undeniably interfered with the Tribe's reserved water rights by placing the tribe in an "injurious dilemma."[140] If the Tribe takes any action to utilize its resource, it risks irreparable harm to that resource. Any rational actor concerned with sustaining their resource for future use would be deterred.

The Phase 2 ruling contradicts the reasoning of Supreme Court precedent. The Supreme Court held in *Nebraska v. Wyoming* that a deficit can constitute an injury in the context of competing water rights.[141] The Court stated that "where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial termination."[142] In *Nebraska v. Wyoming*, the Court used this reasoning to deny a motion to dismiss for lack of injury. The same logic should

[134] *Id.*
[135] *Id.* at 12.
[136] *Id.* at 11.
[137] United States' Motion for Reconsideration, *supra* note 53 at 6.
[138] *Id.* at 9.
[139] *Id.*
[140] *Id.* at 6.
[141] Nebraska v. Wyoming, 325 U.S. 589, 610 (1945).
[142] *Id.*

apply to *Agua Caliente*. When there is simply insufficient water for all the claimants, the courts ought to be in the business of resolving competing claims.

Moreover, the alternative is absurd. The court would have the Tribe invest in the infrastructure to produce groundwater and start pumping—without a determined limit. Without quantification, neither the Tribe nor the water agencies would have any reliable estimate of the reserved water right. Without the threat of a court ordering quantification, the water agencies will never come to the table to negotiate a fair settlement. Quantification is key to making water rights wet because it "transforms the *Winters* rights from a 'notion' of an entitlement to a contract for a specified amount of water which tribes can use for their benefit or as a tool for negotiation."[143] Rather than offering the Tribe this critical bargaining chip, the court insists that the Tribe must first utilize the depleted water resource. Unfettered pumping on the part of the Tribe would certainly harm the existing groundwater producers and everyone who relies on the aquifer because such a scenario would likely be disastrous for the whole hydrological system. To put it starkly, the court asks the Tribe to ruin its own resource if it hopes to receive judicial recognition of its right.

Applied generally, this ruling would prevent poorer tribes from ever realizing their reserved rights. As mentioned before, a major advantage of water rights settlements is the opportunity for tribes to obtain the infrastructure necessary to access their water. By requiring tribes to invest in water development projects *before* the legal recognition of their rights, the court effectively sets a wealth cut-off: wealthy tribes can pursue quantification if they are willing to make the preliminary investments, but poor tribes will be barred by the standing issue.

Unfortunately, the district court denied the United States' motion for reconsideration.[144]

D. The Move to Mediation

The Tribe listened to the court's ruling and responded strategically. On August 6, 2019, the Tribal Council enacted Ordinance No. 55, establishing the Agua Caliente Water Authority "to protect, manage, and regulate the Tribe's Groundwater."[145] The Ordinance also denounced the non-tribal water agencies' imposition of production and replenishment fees on tribal land as an affront to tribal sovereignty.[146] In the several years since its creation, the Water Authority has worked to identify groundwater producers on tribal land and bring them into compliance with tribal water regulations.[147] The Water Authority issues permits and collects groundwater production fees.[148] It will also manage the Tribe's groundwater wells, the installation of which began in 2020.[149]

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[143] Karen Crass, *Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. DENV. WATER L. REV. 109, 118 (1997).
[144] Order Denying Plaintiff Intervenor's Motion for Reconsideration at 3, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. 13-883 (C.D. Cal. August 14, 2019).
[145] Agua Caliente Band of Cahuilla Indians, Ordinance No. 55 at 4 (2019).
[146] *Id.* at 3.
[147] Interview with Margaret Park, Agua Caliente Water Authority, in Palm Springs, Cal. (Mar. 23, 2022).
[148] *Id.*
[149] First Amended Complaint, *supra* note 26 at 14.

On September 24, 2019, the Tribal Council passed Resolution No. 44-19, directing the Water Authority to store 20,000 acre-feet of the Tribe's reserved groundwater, to alleviate the state of overdraft.[150] In this resolution, the Tribal Council also announced its estimation that the Tribe was entitled to at least 60,000 acre-feet of groundwater per year to fulfill the purposes of the reservation.[151]

On July 17, 2020, the Tribe filed its first amended complaint, updating the court on these developments and articulating specific, immediate injuries resulting from the defendants' behavior. This new complaint emphasized: (1) the extra cost of operating deeper wells to pump water from a depleted aquifer,[152] (2) how the defendants' practices necessarily interfere with the Tribe's efforts to store and preserve the aquifer under Resolution No. 44-19,[153] and (3) the Desert Water Agency's impermissible imposition of replenishment fees on tribal groundwater production.[154]

The court welcomed the Tribe's strategic move. The defendants opposed the Tribe's motion to amend and supplement its complaint, citing the Tribe's motivations as bad faith. According to the defendants, the Tribe acted in bad faith because it only started producing groundwater for the purpose of reversing the summary judgment order.[155] The court disagreed. Judge Bernal proclaimed: "Taking extrajudicial action to make a formerly nonjusticiable action justiciable is not bad faith. It is strategic. The Court told the Tribe that it could not pursue quantification of its water rights because it was not using the water, so the Tribe started to use the water."[156] The Tribe's legal team interpreted the court's acceptance of the amended brief as a signal that the Tribe had overcome its standing problem.[157]

Apparently, the defendants had the same interpretation. When the Tribe won its motion to amend the complaint, the water agencies finally communicated an interest in settlement. On October 1, 2020, the parties entered a joint stipulation to stay the case pending private mediation.[158] The parties have been in mediation ever since. Mediation is a long and complicated process due to the complexity of quantification, the significant stakes of the matter, the number of interested parties, and the need for Congressional approval.[159] Despite the long road ahead and the uncertain outcome, the Tribe's legal team characterizes the move to mediation as a victory.[160] The water agencies finally recognized that they would have to reckon with the Tribe's superior water rights.

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[150] Resolution No. 44-19, Agua Caliente Band of Cahuilla Indians, Tribal Council (2019).
[151] *Id.*
[152] First Amended Complaint, *supra* note 26 at 14.
[153] *Id.* at 15.
[154] *Id.* at 16.
[155] Minutes (in Chambers) by Judge Jesus G. Bernal: Order (1) Granting-in-part and Denying-in-part the Tribes Motion for Leave to Amend, at 6, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al*, No. 5:13-cv-00883 (C.D. Cal. July 8, 2020).
[156] *Id.*
[157] Interview with John Plata & Catherine Munson, *supra* note 54.
[158] Joint Stipulation to Stay Case Pending Private Mediation, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al*, No. 5:13-cv-00883 (C.D. Cal. October 1, 2020).
[159] Interview with John Plata & Catherine Munson, *supra* note 54.
[160] *Id.*

The move to mediation should be celebrated as the first step to settlement. In the realm of water rights, tribes typically undergo years of litigation followed by extensive negotiation to achieve a settlement.[161] Settlement is the ultimate victory. Academic observers and practitioners alike regard settlement as the preferred outcome, such that litigation may be considered the means to settlement rather than a solution in and of itself.[162] In a civil justice system where at least two-thirds of all cases result in settlement,[163] water rights cases are uniquely suited for resolution by settlement due to both the complexity of quantification and the desirability of related infrastructure projects.[164]

A future *Agua Caliente* settlement and all the law enunciated on the path to mediation matter. The shadow of groundwater litigation now looms over state agencies across the Ninth Circuit. To paraphrase Robert A. Kagan: the power of American legalism cannot be measured in litigation rates, just as the significance of nuclear weapons cannot be measured in the frequency of nuclear war.[165] With the law on their side, a determined minority can utilize the threat of legal action to transform government behavior.[166] Water districts, state bureaucrats, and legislators should be paying attention.

V. THE FUTURE OF GROUNDWATER MANAGEMENT IN CALIFORNIA

Agua Caliente v. Coachella Valley Water District already stands for the proposition that the *Winters* doctrine applies to groundwater. If the Tribe and the water agencies reach a settlement, the case may mean much more. This final section considers the future of groundwater management in light of *Agua Caliente* and California's professed intention to improve relations with Native nations. Groundwater management offers a prime opportunity for California to demonstrate its good will and welcome a new era of state-tribal cooperation.

California is a drought-prone state experiencing exacerbated aridification due to climate change. Statewide, Californians rely on groundwater for approximately half of all agricultural and urban water uses.[167] The Coachella Valley Groundwater Basin is emblematic of the history of statewide overdraft. In 1960, California was already overdrafting its groundwater resources at a rate of four million acre-feet per year.[168] By 1990, sustainability efforts reduced the statewide rate

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[161] Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CAL. L. REV. 1133, 1134 (2010).
[162] *Id.* at 1158-59; Erin B. Agee, *supra* note 113, at 203.
[163] Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL L. STUD. 111, 111 (2009). Eisenberg and Lanvers examined federal civil cases to come up with a settlement rate of 66.9%. They note that conventional wisdom points to a higher rate, something around 90-95%. This conventional wisdom may reflect particular types of civil cases, such as personal injury, where the average is in fact over 90%. *Id.* at 143.
[164] See Part III, section A.
[165] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE, at 16 (2019).
[166] *Id.*
[167] Maria O'Brien & Sarah M. Stevenson, *Don't Let the Well Run Dry: Management and Use of Groundwater in Times of Scarcity, in* PROCEEDINGS OF THE ROCKY MOUNTAIN LAW SIXTY-FIRST ANNUAL INSTITUTE, at 31 (2015).
[168] Ronald Kaiser & Frank F. Skillern, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 Tex. Tech L. Rev. 249, 278 (2001)

of overdraft to two million acre-feet per year.[169] Today, chronic overdraft remains a problem, one that requires a bold, systematic response.

In 2014, the state passed the Sustainable Groundwater Management Act (SGMA) to facilitate sustainable planning at the local level.[170] SGMA is California's first statewide policy governing groundwater, and it authorizes the state to oversee and intervene in local management.[171] However, SGMA cannot outright prohibit pumping nor alter the prior appropriation system.[172] In practice, SGMA identifies medium and high-priority basins and establishes groundwater sustainability agencies to oversee those basins. The groundwater sustainability agencies are responsible for developing and implementing groundwater sustainability plans, namely, to mitigate overdraft in the coming decades.[173] These plans are supposed to prevent situations like the ongoing overdraft of the Coachella Valley Groundwater Basin.

Since the state has no authority to compel tribes to participate in SGMA projects, the Act invites the voluntary participation of tribes. Tribes are explicitly authorized under state law to "participate fully in planning, financing, and management." [174] SGMA anticipated federally reserved rights to groundwater, noting "[i]n an adjudication of rights to the use of groundwater, and in the management of a groundwater basin . . . federally reserved water rights to groundwater shall be respected in full. In case of conflict between federal and state law in that adjudication or management, federal law shall prevail."[175] In the language of the statute, the state formally recognizes the unique status of tribes as it attempts to build a role for tribes in state water policy. The Act appears to entertain intergovernmental partnership at the local level. In the California Department of Water Resources' 2018 guidance document for "Engagement with Tribal Governments," the Department instructs local groundwater sustainability agencies to coordinate with tribal representatives, to include tribes as interested parties or as participants under joint powers agreements or memoranda of understanding.[176]

From Agua Caliente's perspective, meaningful intergovernmental partnerships have yet to materialize. When asked about SGMA, a representative of the Agua Caliente Water Authority commented that, presently, the state treats tribes the same as other stakeholders.[177] In other words, tribes fit into the SGMA framework like municipalities and other local groups. Such a vision of Native nations as local government fundamentally mistakes the political status of tribes. However,

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[169] *Id.*
[170] CAL. WATER CODE §§10720 – 10737.8 (2015).
[171] *O'Brien & Stevenson*, *supra* note 167, at 35.
[172] *Id.*
[173] *Sustainable Groundwater Management Act,* CAL. CAL. DEP'T OF WATER RES. https://water.ca.gov/programs/groundwater-management/sgma-groundwater-management (last visited May 10, 2022).
[174] CAL. WATER CODE §10720.3(c) (2015).
[175] CAL. WATER CODE §10720.3(d) (2015).
[176] *Id.* at 3.
[177] Interview with Margaret Park, *supra* note 147.

the Agua Caliente Water Authority believes that the relationship could change once tribes assert their reserved groundwater rights.[178]

As water becomes increasingly important to the communities of the American West, the possibility for a revolution in management emerges. After all, the need for more sustainable practices was the catalyst for the *Agua Caliente* case. As more groundwater rights become quantified, local agencies will have no choice but to work with tribes. Moreover, the need to accommodate tribal water rights could enable the state to shake up historic water practices. Since tribal water rights come with all the force of federal preemption, claims like that of the Agua Caliente Band of Cahuilla Indians could offer the political impetus to remodel California's water policy for the twenty-first century.

This policy opening is particularly timely, given the efforts of the Newsom administration to rectify relations with Native nations. California has a long and bloody record in dealing with Native peoples.[179] Genocide lies at the foundation of America's Golden State.[180] When the federal treaties with Native nations were shamefully buried away by Congress, California settlers undertook murderous campaigns against Indigenous communities.[181] As Benjamin Madley documents, between 1846 and 1880, the Native American population in California dropped from about 150,000 to 17,000.[182] While disease, dislocation, and starvation undoubtedly played a significant role in that drastic decline, California settlers openly committed massacres to eradicate Native people.[183] In the infamous words of the first governor of California, there was "a war of extermination."[184]

In 2019, Gavin Newsom made history as the first governor to acknowledge this history and formally apologize on behalf of the State of California.[185] In the executive order, Newsom reaffirmed California's professed respect for tribal sovereignty and desire to work cooperatively with tribal governments.[186] This promise builds off former Governor Edmund G. Brown Jr.'s 2011 executive order, which created the position of Governor's Tribal Advisor and tribal consultation program.[187] Newsom's executive order also created the Truth and Healing Council, including a Truth and Healing Fund to support tribal participation in the Council's mission to produce studies and recommendations on state-tribal relations.[188] In 2020, Newsom signed Assembly Bill 3099, a legislative effort to address the crisis of missing and murdered Indigenous women and the

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[178] *Id.*
[179] BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846-1873, at 3 (2016).
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] CA. EXEC. ORDER No. N-15-19 (2019).
[185] *Id.*
[186] *Id.*
[187] CA. EXEC. ORDER No. B-10-11 (2011).
[188] *Id.*; See CALIFORNIA TRUTH & HEALING COUNCIL, https://tribalaffairs.ca.gov/cthc/.
This work also includes collection and preservation of Native oral histories. *Id.*

problems of Public Law 280.[189] More recently, in 2022, Newsom introduced a budget proposal to invest $100 million in tribal-led projects to address climate and conservation.[190] These efforts all demonstrate a political willingness to listen to Native nations and improve relations. If Governor Newsom and the State of California want to continue this work, water management offers an opportunity.

California should anticipate the post-*Agua Caliente* shift in the balance of power and renew its efforts to work collaboratively with tribes in the realm of sustainable water use. To do so effectively, the State must first reframe its relationship with tribal nations when it comes to groundwater policy. Tribes are not ordinary stakeholders, but sovereign nations whose political status must be recognized in any initiative toward joint policymaking. Such recognition must go beyond mere words; rather, it should inform the very structure of environmental management. The State currently recognizes tribes' political distinction in the language of the SGMA, but it must incorporate that recognition in its practices of policymaking, regulation, and enforcement. Instead of inviting tribes to work with local state agents for local planning within the State's policy, the State should invite tribes for consultation and collaboration at the outset of policymaking.

Shallow cooperation—where government agencies pay lip-service to tribal sovereignty without offering a meaningful role for tribes in decision-making—is common in the management of natural resources. Co-management programs are plagued by the assumption that collaboration requires integrating Native people into existing settler institutions of state management.[191] This assumption necessarily subordinates Native perspectives and priorities to those of the state. To illustrate: SGMA was designed to achieve a particular conception of sustainability. By inviting tribal participation in the local implementation phase, long after those goals were determined, and long after the policy was put together, SGMA does not invite tribal input on the meaning or goals of sustainable management. Paul Nadasdy characterizes this common phenomenon as the reduction of political and normative problems into technical problems: tribes are welcomed to help carry out the management process, not to question or transform that process.[192]

If California wants to demonstrate its dedication to tribal nations, it should break out of this tired model of consultation and local delegation. Instead, the state might take inspiration from interstate compacts.[193] The sovereign-to-sovereign relationship underlying interstate water

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[189] CAL. PENAL CODE § 11070 (2021).

[190] *Governor Newsom Proposes $100 Million to Support Tribal-led Initiatives that Advance Shared Climate and Conservation Goals*, OFFICE OF THE GOVERNOR, (Mar, 18, 2022) https://www.gov.ca.gov/2022/03/18/governor-newsom-proposes-100-million-to-support-tribal-led-initiatives-that-advance-shared-climate-and-conservation-goals.

[191] Paul Nadasdy, *The Anti-politics of TEK: The Institutionalization of Co-management Discourse and Practice*, 47 ANTHROPOLOGICA, 216 (2005). For my prior commentary on co-management schemes, *see* Alexandra Fay, *"True Co-Management": Critical Approaches to Indigenous Food Sovereignty*, 41 YALE L. & POL'Y REV. 233 (2023).

[192] Nadasdy, *supra* note 191 at 216.

[193] *See* John D. Leshy, *Interstate Groundwater Resources: The Federal Role*, 14 HASTING W. NW. J. ENVT'L L. & POL'Y 1475 (2008). In other legal contexts, Indian law observers have suggested the adoption of compacts as means to negotiate overlapping state and tribal interests while recognizing tribal sovereignty. *See e.g.*, Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L. J. 1 (2022); Noelle N. Wyman, Note, *Native Voting Power: Enhancing Tribal Sovereignty in Federal Elections*, 132 YALE L. J. 861 (2023).

compacts is a closer match to state-tribal relations than that exemplified by SGMA. Presently, most interstate compacts concern only surface water.[194] However, observers have suggested the expansion of these compacts to cover groundwater as well.[195] After all, neither surface nor groundwater respects political borders. To be sure, agreements between equal parties with disparate interests are challenging. California's record with interstate compacts is far from pristine – at this time, California remains the sole holdout preventing the adoption of a new Colorado River Compact.[196]

In a time of climate crisis, when California has turned its progressive sensibilities towards addressing historical wrongs and building a more inclusive political community, perhaps we have arrived at a place of interest convergence.[197] As the coalmine becomes increasingly toxic and tribes across the country suffer disproportionately from the climate crisis like the proverbial canary, efforts toward truly co-equal cooperative management offer a more just and promising path forward.

Even in the absence of state action, tribes can and should assume positions of power in sustainable groundwater management. Cases like *Agua Caliente* are admittedly expensive—prohibitively so for many tribes. Nonetheless, tribes and their allies can take the first steps toward meaningful co-management.

VI. CONCLUSION

The *Agua Caliente* groundwater litigation illustrates the challenge and complexity of making water rights wet. The Agua Caliente Tribe won a victory for tribes across the Ninth Circuit when the Court of Appeals explicitly included groundwater under the *Winters* doctrine. Yet, the fraught second phase of the case emphasized the burden on tribes to realize their federally reserved rights. Now, with a tribal water authority in place and settlement negotiations in progress, the Tribe may soon be poised to model a new kind of relationship with state and local water management actors. If California wants to lead the way into a better era of state-tribal relations, groundwater management offers an opportunity to rethink the structure of co-management and empower Native nations in the face of climate change.

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[194] Rocky Mountain Mineral Law Institute, *supra* note 167, at 13; John D. Leshy, *supra* note 193 at 1482.
[195] *See* Rocky Mountain Mineral Law Institute, *supra* note 167, at 13; Leshy, *supra* note 193 at 1482.
[196] Felicia Fonseca & Suman Naishadham, *California is Lone Holdout in Colorado River Cuts Proposal,* AP NEWS, (Jan. 31, 2023) https://apnews.com/article/politics-colorado-river-california-climate-and-environment-2ef8db8071dd911e84e7f345583206ed.
[197] *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma,* 93 HARV. L. REV. 518, 523 (1980).