

**LESSONS FOR ARIZONA FROM CALIFORNIA'S AGUA
CALIENTE LITIGATION ON TRIBAL GROUNDWATER RIGHTS**



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MAY 21, 2021

FOUR-PART STRUCTURE OF TODAY'S PRESENTATION



Part 1: Background on Coachella Valley Aquifer, Local Water Agencies and Agua Caliente Reservation

Part 2: Key Court Holdings and Developments in California's Agua Caliente Litigation

Part 3: Inconsistencies Between 2019 Agua Caliente Court Holding and PIA Standard Adopted by United States Supreme Court

Part 4: Potential Implications of California's Agua Caliente Litigation for State of Arizona

PART 1: BACKGROUND ON COACHELLA VALLEY AQUIFER AND LOCAL WATER AGENCIES



- › The Coachella Valley Aquifer is located in southeast/south-central California and currently provides water supply to 400,000 people across nine cities and irrigation to tens of thousands of acres of farmland.
- › Since the mid-twentieth century, the aquifer has been declining due to population growth, development and droughts (in which surface water supply has been limited).
- › Since 1975, the elevation of the aquifer has dropped at least 35 feet and **annual overdraft** (the difference between the amount of water extracted versus the rate of replenishment) is estimated **at 240,00 acre-feet (AF)**.
- › The two largest water agencies that extract water from the Coachella Valley Aquifer are the **Coachella Valley Water District** and the **Desert Water agency**.

PART 1: CREATION OF AND HISTORICAL WATER USE ON AGUA CALIENTE RESERVATION



- › Agua Caliente Band of Cahuilla Indians have lived in Coachella Valley since time immemorial, long before California became a state in 1850.
- › In 1876 President Ulysses S. Grant established the Agua Caliente Reservation by executive order and in 1877 the Agua Caliente Reservation was expanded by an executive order issued by President Rutherford B. Hayes. These executive orders state that the United States sought to secure the Tribe “**permanent homes, with land and water enough.**”
- › Coachella Valley is an arid region with limited surface water resources and little rainfall, and main source of water in region is Coachella Valley Aquifer.
- › Until quite recently, the Agua Caliente Band received all of its water from the Coachella Valley Water District and/or the Desert Water Agency. In past few years, Tribe installed its own groundwater wells for golf course irrigation.

PART 2: THE THREE PHASES OF AGUA CALIENTE LITIGATION



- › Beginning in 1996, Agua Caliente Tribe attempted negotiations with Coachella Valley Water District and Desert Water Agency over need for improved management of Coachella Valley Aquifer to address and solve chronic overdraft.

- › In **2013**, the Agua Caliente Tribe files lawsuit against the Coachella Valley Water District and Desert Water Agency in U.S. District Court for the Central District of California (in Fresno, California). The lawsuit seeks recognition and quantification of *Winters* federally reserved tribal rights to the Coachella Valley Aquifer.

- › U.S. District Court establishes **three phases** to the litigation:
 - Phase One: Determining Existence of Tribal *Winters* Right to Coachella Valley Aquifer
 - Phase Two: If Tribal *Winters* Groundwater Right Exists, Determining Appropriate Methodology for Quantifying Right
 - Phase Three: Actual Quantification of Tribal *Winters* Groundwater Right

PART 2: RULING IN PHASE ONE OF AGUA CALIENTE LITIGATION



- › In **2015**, at the conclusion of the phase 1 trial, the district court held that Agua Caliente Tribe did have federally reserved *Winters* rights to groundwater under the reservation. It held “no case interpreting *Winters* draws a principled distinction between surface water physically located on a reservation and other appurtenant water sources.”
- › In **2017**, the Ninth Circuit Court of Appeals affirmed the district court’s ruling in phase 1, holding that it saw “no reason to cabin the *Winters* doctrine to appurtenant surface water” and noting that “many locations throughout the western United States rely on groundwater as their only viable water resource.”
- › Coachella Valley Water District and Desert Water Agency appealed the 2017 Ninth Circuit phase 1 ruling to the U.S. Supreme Court but cert was denied. The **State of Arizona** (along with other states) filed an amicus brief urging the U.S. Supreme Court to grant review on the grounds that the Ninth Circuit holding could disrupt the terms of previous groundwater adjudications.

PART 2: PHASE 2 OF THE AGUA CALIENTE LITIGATION



- › In **2019**, the federal district court held: “The fact that the Tribe does not lose its reserved right by **non-use** does not mean the Tribe automatically has **standing** to adjudicate the scope of the that right.” The 2019 ruling added: “The Tribe does not present evidence it is currently unable to use sufficient water to fulfill the purpose of the reservation nor does it present evidence that its need for water will increase in the future such that its use will conflict with Defendants’ use. Thus, the Tribe has not provided evidence of **actual or imminent injury** such that it has **standing** for this Court to adjudicate its **quantification** claim.”
- › In **early 2020**, the Agua Caliente Tribe was granted leave to file an **Amended Complaint** that added additional factual allegations regarding “harm” caused by overdraft (relating to costs associated with Tribe’s recent installation and operation of deeper groundwater extraction wells). The court has not yet ruled on whether the harm alleged in the Amended Complaint cures the standing issue.
- › In **late 2020**, the **federal district court stayed the litigation for one year to allow the parties to engage in settlement negotiations**. The question of whether the Tribe’s Amended Complaint solves the standing issue (so Tribe can now seek quantification) remains unclear at this point.

PART 3: INCONSISTENCIES BETWEEN 2019 “HARM” HOLDING AND PIA STANDARD FOR *WINTERS* RIGHTS QUANTIFICATION



- › In its 1963 decision in *Arizona v. California*, the U.S. Supreme Court adopted the **PIA (Practicable Irrigable Acreage) Standard** for quantifying *Winters* rights. Under the PIA Standard, the focus is on the identification of tribal lands susceptible to irrigated farming, and the amount of water needed to farm such lands/acreage. Under the PIA Standard, not a prerequisite to quantification for a tribe to first establish past or imminent harm due to lack of quantification.
- › 2019 federal district court ruling in Agua Caliente litigation makes no mention of longstanding PIA Standard for quantifying *Winters* rights, nor does 2019 ruling attempt to reconcile “harm” requirement for standing with PIA Standard.
- › 2019 federal district court ruling in Agua Caliente litigation appears to have conflated the harm/standing test for the “**taking**” (5th amendment) of quantified *Winters* rights with a harm/standing test for **quantification** of *Winters* rights.

PART 4: POTENTIAL IMPLICATIONS OF CALIFORNIA'S AGUA CALIENTE LITIGATION FOR THE STATE OF ARIZONA



- › In 1999, in *Re General Adjudication of All Rights to Use Water in Gila River System (Gila III)*, the Arizona Supreme Court held that some tribal reservations in arid regions lack surface streams and thus the pumping of groundwater is necessary to sustain life. In *Gila III*, the Arizona Supreme Court found in such circumstances it was implausible that the federal government would not have reserved the necessary water. The scarce surface water available on the Agua Caliente Reservation meets the conditions described in *Gila III*.
- › The State of Arizona's effort to have the U.S. Supreme Court reverse the Ninth Circuit's 2017 ruling in the Agua Caliente litigation (recognizing *Winters* rights to Coachella Valley Aquifer) is at odds with Arizona Supreme Court's holding in *Gila III*.
- › If the State of Arizona or water agencies in Arizona assert the absence of tribal groundwater rights on reservations where there is little or no surface waters, this position may conflict with the Arizona Supreme Court's decision in *Gila III*.
- › Notwithstanding *Gila III*, the State of Arizona or water agencies in Arizona may attempt to prevent quantification of *Winters* groundwater rights by reliance on the 2019 "harm/standing" holding in the Agua Caliente litigation.

PART 4: POTENTIAL IMPLICATIONS OF CALIFORNIA'S AGUA CALIENTE LITIGATION FOR THE STATE OF ARIZONA



CERTAINTY IN QUANTIFICATION: COMPARISON OF PIA STANDARD WITH 2019 RULING IN AGUA CALIENTE LITIGATION

- › Under PIA Standard, quantification of tribal water rights is fixed permanently regardless of future changes in tribal water needs. This creates **certainty** for tribes and non-tribal water users.
- › Under 2019 ruling in Phase Two of the Agua Caliente litigation, tribal standing to obtain quantification of water rights may change over time depending on the needs of the tribe (or harm suffered by the tribe). This creates **uncertainty** for tribes and non-tribal water users.