COMMENT

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Solid Grounds for Tribal Groundwater: A Look at Implied Rights to Groundwater Quality

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INTRODUCTION

Tribes have a tremendous amount of groundwater rights that have yet to be quantified under the doctrine of federal reserved water rights.[1] Asserting tribal water rights may not have been necessary in the past, but now as populations surge in the West, tribes may need to protect their reservations, and any potential rights, from problematic state water practices.[2]

State water users, particularly in the arid West, are increasingly relying on aquifers to supplement the use of surface water during dry periods.[3] Over-allocated water systems, along with sustained droughts have put additional pressure on groundwater resources.[4] Over-pumping aquifers can often lead to deteriorated water quality from saltwater intrusion into aquifers,[5] and recharging aquifers with surface water can lead to impaired drinking water quality or damage to salt-sensitive

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1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.01[1], at 1204 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]; *see also* Stephen V. Quesenberry et al., *Tribal Strategies for Protecting and Preserving Groundwater*, 41 WM. MITCHELL L. REV. 431, 434 (2015) [hereinafter Quesenberry] (describing unquantified tribal water rights to groundwater in California).

2 *See* Quesenberry, *supra* note 1, at 436. *See also* Jonathan M. Hanna, *Native Communities and Climate Change: Legal and Policy Approaches to Protect Tribal Legal Rights*, 1 (U. of Colo. Nat. Res. L. Cir. 2007); David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?,* 20 STAN. ENVTL. L.J. 3, 60−65 (2001); Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 KAN. J.L. & PUB. POL'Y 489, 489 (2006) (some tribes depend entirely on groundwater for their water source).

3 Groundwater in the United States accounts for roughly one-fifth of the total water supply, including water used in agriculture, domestic use, mining, and industry. Joan F. Kenny et al., *Estimated Use of Water in the United States 2005*. U.S. GEOLOGICAL SURVEY CIRCULAR 1344 (2009); *see also* Benjamin R. Vance, *Total Aquifer Management: A New Approach to Groundwater Protection,* 30 U.S.F. L. REV. 803 (1996); Jay R. Lund & Thomas Harter, *California's groundwater problems and prospects,* CALIFORNIA WATER BLOG, (Jan. 01, 2013), http://californiawaterblog.com/2013/01/30/californias-groundwater-problems-and-prospects/ (discussing California); Allison Evans, *The Groundwater/Surface Water Dilemma in Arizona: A Look Back and a Look Ahead Toward Conjunctive Management Reform*, 3 PHOENIX L. REV. 269 (2010) (discussing Arizona); CLIMATE CHANGE IMPACTS IN THE UNITED STATES: WATER RESOURCES 76−78, *available at* http://nca2014.globalchange.gov/downloads (describing the effects of climate change on groundwater availability across the United States).

4 *See supra* text and accompanying footnotes at note 3.

5 Vance, *supra* note 3, at 804−05, 808−09 (describing the process of over-drafting aquifers and the resulting groundwater crises; *see also* Allison Mylander Gregory 11 STAN. ENVTL. L.J. 229 1992 *Groundwater and Its Future Use: Competing Interests and Burgeoning Markets*; Lund & Harter, *supra* note 3 (addressing groundwater problems in California).

crops.[6] This can carry attendant cost to desalinate water—a potentially high bill to pay.[7] The problem is, most states do not have robust regulations to protect groundwater resources much less groundwater quality, and such types of protections are outside of the scope of federal regulations.[8]

However, some tribes may not be at the mercy of inadequate state water codes if they have federally reserved water rights, as the article will argue. Tribes with such rights may be in the unique position to protect groundwater resources and enjoin state water practices that impair groundwater quality.

Protecting groundwater quality rests on cases that have developed the doctrine of federal reserved water rights. (Part I). In essence, the doctrine recognizes the power of the United States to impliedly reserve the amount of water necessary to fulfill the purpose of a federal reservation of land and exempt the water from state appropriation and law.[9] However, courts must remember that the doctrine originated in the context of water rights for Indian reservations and, as such, carries distinct canons of construction when interpreting treaties to determine the purpose of an Indian reservation. (Part II).

As this Article argues, the purpose of an Indian reservation should be a permanent home for a tribes, which includes both present and future needs of the tribe to make the land livable and valuable. (Part III). Groundwater quality, by this extension, is an anticipated aspect of the quantity necessary to support a permanent, livable and valuable homeland, irrespective of state sovereignty interests, like controlling water resources and practices within the state. (Conclusion).

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6 2 Waters and Water Rights § 18.06 (Amy K. Kelley ed., 3rd. LexisNexis/Mathew Bender 2015); James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDLs?*, 18 NAT. RESOURCES & ENV'T. 63 (2004).

7 *See, e.g.*, United States v. Gila Valley River District (Gila II), 920 F. Supp. 1444, 1447−48 (D. Ariz 1994) *aff'd* 117 F.3d 425 (9th Cir. 1997).

8 *See* RODGERS ENVIRONMENTAL LAW 2 ENVTL. L. (West) § 4:17 Water quality standards—State law (judicial review) (2013) [hereinafter RODGERS]. States often point to their water codes when defending adequate protection of groundwater. *See In re* General Adjudication of All Rights to Use Water in Gila River (Gila III), 989 P.2d 739, 747−49 (Ariz. 1999). Federal statutes that govern water quality, like the Clean Water Act, 33 U.S.C. §§ 1251−1387, 86 Stat. 816 (1972), and the Safe Water Drinking Act, 42 U.S.C. § 300f, 88 Stat. 1660 (1974), are silent on the matter of saltwater intrusion.

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

I
DEFINING THE CONTOURS OF THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

While there is no controlling authority that expressly acknowledges a tribe's right to groundwater of a certain quality, the doctrine of federal reserved water rights does not preclude such a claim. In order to understand the claim's logic, it is important to first understand the basic tenants of the doctrine and the origin of the doctrine in *Winters v. United States*. Second, it is equally as important to untangle case precedent following *Winters* that has confused two branches of the doctrine as it applies to Indian reservations—so called "*Winters* rights"—and other federal reservations of land.

A. Federal Reserved Water Rights Doctrine

The federal reserved water rights doctrine holds that when the federal government reserves land, it also impliedly reserves an amount of water necessary to accomplish the purpose of the reservation of land.[10] The federal water right receives a priority date that attaches to the date of the reservation of land.[11] This essentially means in times of water shortage, if a federal water right is "older" than a state water right, the federal water right must be satisfied first. Stated in other words, a junior state water right may not harm a senior federal water right by diminishing the quantity or quality of the water.[12]

The federal reserved water rights doctrine also carves out a special exception from state water practices. While the allocation of water resources is typically the purview of the states, the doctrine recognizes the federal government's power to reserve water and exempt that amount from state appropriation and law.[13] Therefore, federal water rights are governed by federal law not state law.[14] For example, a state

10 *Winters*, 207 U.S. at 576; Cappaert v. United States, 426 U.S. 128, 138, 141 (1976); Arizona v. California, 373 U.S. 546, 599 (1963).

11 The priority date for Indian reservations can vary and depends on whether the federal government reserved the water for uses or purposes that existed prior to the establishment of the reservation. COHEN'S HANDBOOK, *supra* note 1, § 19.03[3], at 1215.

12 *Winters*, 207 U.S. at 567; COHEN'S HANDBOOK, *supra* note 1, § 19.03[9].

13 *Winters*, 207 U.S. at 577 ("The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be.") (citing United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 702 (1899); United States v. Winans, 198 U.S. 371 (1905)).

14 *See* United States v. New Mexico, 438 U.S. 696, 714 (1978); Cappaert v. United States, 426 U.S. 128, 145 (1976); Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976) ("the volume and scope of particular reserved rights . . . [remain]

water law that deems water to be abandoned after a period of nonuse would have no effect on a federal reserved water right that has never been used.[15]

The doctrine of federal reserved water rights now includes all types of federal reservations of land, including Indian reservations and lands reserved for public use, like national forests and national monuments.[16] However, as the doctrine has evolved some courts have failed to recognize the legal distinctions between Indian reservations and non-Indian reservations.[17]

Courts that apply non-Indian case precedent to determine Indian reserved water rights, fail to remember that treaties, as an agreement with sovereign nations, are distinct from Congressional acts that reserve land for public use. Forgetting this distinction is to the detriment of tribes, as non-Indian case precedent can drastically reduce the scope of water rights for Indian reservations.[18] This practice of blurring the treatment of federal reservations must stop, as it is not true to the underlying principles of the federal reserved water rights doctrine. Courts should be reminded of the doctrine's origin in *Winters v. United States*, and the underlying, and distinct, principles that the *Winters* Court used to find an implied reservation of water for an Indian reservation.

B. Winters *Rights*

In *Winters v. United States*,[19] the Supreme Court first considered impliedly reserved federal rights to water. The federal government sought to enjoin state water appropriators in Montana from diverting the Milk River near the Fort Belknap Indian Reservation.[20] Congress

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federal questions") (quoting United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971)).

15 *See, e.g.*, United States v. City & Cty. of Denver, By & Through Bd. of Water Comm'rs, 656 P.2d 1, 34 (Colo. 1982) ("Federal reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation.").

16 *Arizona*, 373 U.S. at 601 (1963) (recognizing national parks); United States v. New Mexico, 438 U.S. 696 (1978) (deciding reserved rights for a national forest system); Cappaert v. United States, 426 U.S. 128 (1976) (extending reserved rights to a national monument).

17 *See* COHEN'S HANDBOOK, *supra* note 1, § 19.03[4], at 1217.

18 *See* COHEN'S HANDBOOK, *supra* note 1, § 19.03[4], at 1217.

19 207 U.S. 564 (1908).

20 *Id.* at 565.

established the reservation as part of an agreement with several Indian tribes[21] in 1888, just one year prior to granting Montana statehood.[22] As was federal policy at the time, the nomadic tribes agreed to cede large tracts of land to the United States in order to establish more permanent homes and become an agrarian people.[23] However, the smaller tract of land that became the reservation was arid and no longer included the Milk River.[24] Without irrigation, the land was "practically valueless."[25]

State water users argued that all water in the Milk River was subject to state appropriation for two reasons. First, when the tribes ceded their land, they also impliedly ceded their right to irrigate the Reservation from the Milk River.[26] Second, even if the United States had impliedly reserved water for the tribes, that right was effectively repealed when the federal government granted Montana statehood and the State received title to all navigable waters.[27] The Court found both assumptions untenable.[28]

The Court quickly dispensed with the argument that statehood wiped out existing federal water rights. It concluded that the federal government had the undeniable power to reserve water necessary for the purpose of a federal reservation of land, thus exempting that amount from state appropriation and law.[29] Even though such a ruling could have negative consequences to state title to water, the Court reasoned it was more dangerous to assume[30] that the United States in granting

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21 The reservation included the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians. *Id.* at 567.

22 *Id.* at 575, 577.

23 *Id.* at 577. For a description of the federal policy at the time of allotment, see COHEN'S HANDBOOK, *supra* note 1, § 1.04, at 71−74.

24 *Winters*, 207 U.S. at 576.

25 *Id.*

26 *Id.*

27 *Id.* at 577. This argument rests on the equal footing doctrine argument. For more on how the equal footing doctrine has affected state appropriation systems, see Amy Choyce Allison, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 WASH. L. REV. 1193, 1195 (2002).

28 *Winters*, 207 U.S. at 577.

29 *Id.* ("The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be.") (citing United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 702 (1899); United States v. Winans, 198 U.S. 371 (1905)).

30 The *Winters* Court recognized that there were competing inferences that must be made, but "that which makes for the retention of the waters is of greater force than that which makes for their cession." *Id.* at 576.

Montana statehood had simultaneously taken from the Indian tribes the means of continuing their old nomadic practices but yet did not leave them the "power to change" to new ones.[31] Sensitivity to the State's interest in water did not move the Court to hold otherwise.[32]

The Court further refused to assume that the Indian tribes had given up their rights to water merely because the agreement did not expressly provide for that right.[33] Ambiguities in agreements with tribes are to be resolved from the standpoint of the Indians, reminded the Court.[34] This canon of construction "should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."[35] Ultimately, the Court concluded that the United States had intended to reserve the amount of water necessary to fulfill the purpose of the reservation.[36]

The Court left undisturbed the Ninth Circuit opinion, from which the case was certified, that the purpose of the reservation was to establish a "permanent home and abiding place."[37] While the purpose of the reservation was not at issue, the Court referred to the treaty and the underlying agreement as providing the tribes the "power to change" to a "pastoral and civilized people" and make the land valuable for such a civilized society.[38]

While the Court's primary holding is clear—that the federal government has the power to impliedly reserve an amount of water necessary to fulfil the purpose of the reservation—the underlying principles are also important in the context of Indian reservations. Namely that (a) ambiguities in treaties should be resolved in favor of tribes as they would have understood the agreement; (b) the underlying

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31 *Id.* at 576−77 ("The Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock, or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?").

32 *Id*. at 576.

33 *Id.* at 576−77.

34 *Id.* at 576.

35 *Id.* at 577.

36 *Id.*

37 *Id.* at 566−67; Winters v. United States 143 F. 740, 744 (9th Cir. 1906) ("In order to obtain the means and enable them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization, the agreements were entered into. It was for that purpose, and other reasons mentioned in the different articles of the treaty, that the Indians ceded and relinquished to the United States all their right, title and interest in and to all the lands.").

38 *Winters*, 207 U.S. at 576, 577.

purpose of an Indian reservation is a to create a valuable, habitable homeland; and (c) sensitivity to state water users is not a limiting factor on the scope of the water right if it defeats the purpose of the reservation.[39] These principles are important to keep in mind as the federal reserved water rights doctrine evolved in both Indian and non-Indian contexts following *Winters*.

C. The Winters *Principles Left Behind*

While courts have uniformly upheld "*Winters* rights" for Indian reservations, there appears to be more discordance in the law than ever.[40] Courts vary wildly when determining the scope and extent of *Winters* rights, which is tied to the purpose of a reservation.[41] Some courts broadly construe the purpose of an Indian reservation and award an amount of water necessary for the needs of the tribe as a "homeland." Other courts narrowly construe the purpose and award only the amount of water necessary for the "very purpose" of the Indian reservation, often found to be agriculture. Part III discusses these discordant approaches in further detail.

The discordance in the law seems to come from the doctrine's evolution in the context of non-Indian reservations. Courts that have extended *Winters* rights to non-Indian federal reservations of public land like national forests have found it necessary to reign in the extent of the water rights, so as to be sensitive the realities of water-needy states.[42] Other courts have relied on this non-Indian case precedent to also limit an award for Indian reservations.[43]

These courts fail to note that federal reservations of land for public use is distinct from land set aside for tribes. In so doing, in the context of Indian reservations, these courts neglect to acknowledge the underlying principles of *Winters* that supported the original opinion in the first place: tribes have expectations at the time of a treaty, and an implied reservation of water helps make a land valuable and habitable

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39 *Id*. at 576−77.

40 *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61 (1994).

41 *Compare In re* Gila River Sys. & Source (Gila III), 989 P.2d 739 (Ariz. 1999) with *In re* Big Horn River Sys. (Big Horn), 753 P.2d 76 (Wyo. 1988).

42 *See* Cappaert v. United States, 426 U.S. 128, 131, 138 (1976) (national monument); Arizona v. California, 373 U.S. 546, 596 (1963) (Indian reservations, national forests, national recreation areas, and national wildlife refuges).

43 *In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 100 (Wyo. 1988) (limiting a federal reserved water right for an Indian reservation to irrigation purposes).

for tribes; states interests are not a factor.[44] To forget these principles has the effect of equating Indian reservations, where a nation of people live, to reservations of public land for public uses.

II
DETERMINING THE EXTENT OF *WINTERS* RIGHTS IN SURFACE WATER

In order to recognize that *Winters* rights include a right to water unimpaired in quality, courts must distinguish between Indian and non-Indian reservations.[45] These two types of federal reservations of land carry corresponding principles that guide a determination of the reservation's purpose, and, therefore, the potential extent of that right.[46]

One is narrow and limits the amount of water to merely what is necessary to fulfill the "very purpose" of the reservation.[47] The other is more expansive and only applies in the context of Indian water rights; that approach awards an amount of water necessary to fulfill a "homeland purpose."[48]

The courts that have carelessly cross-pollinated opinions from non-Indian contexts to Indian contexts have needlessly diminished water rights for Indian reservations.[49] The "very purpose" approach, which arose in a federal public land context, has had the effect of some courts narrowing the purpose of an Indian reservation to the very purpose of agriculture and will not include other possible purposes such as commercial or domestic needs.[50] However, Indian reservations should be afforded a more liberal interpretation of purpose than that of other federal lands.

The following sections describe (1) the sentiment behind the "very purpose" analysis as originating in the context of a national forest and a water-strapped state; (2) the detrimental effect on *Winters* rights when courts have applied the "very purpose" analysis to Indian reservations;

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44 *See supra* text accompanying notes 28–31.

45 *See* COHEN'S HANDBOOK, *supra* note 1, § 19.03[4], at 1217.

46 *See, e.g.*, *Big Horn*, 753 P.2d at 94.

47 *See, e.g.*, Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978).

48 *See* Colville Confederated Tribes v. Walton (Walton II), 647 F.2d 42, 47 (9th Cir. 1981*), rev'd on other grounds* 752 F.2d 397, 405 (9th Cir. 1985).

49 *See, e.g.*, United States v. Washington (Lummi), 375 F. Supp. 2d 1050 (W.D. Wash. 2005); *Big Horn*, 753 P.2d 76.

50 *See, e.g.*, *id.* at 96–99; *Lummi*, 375 F. Supp. 2d at 1065.

(3) and finally, why courts can and should only apply a homeland purpose to Indian reservations to determine the extent of a *Winters* right.

A. The Very Purpose of Non-Indian Reservations

The Supreme Court in *United States v. New Mexico*,[51] issued the last Court decision on federal reserved water rights doctrine and a placed serious constraint on the doctrine's potential reach. The *New Mexico* Court limited the amount of water impliedly reserved for Gila National Forest to only the amount necessary to satisfy the "very purpose" of the forest, which the Court determined to be for harvesting timber.[52] The United States argued the purpose of the national forest system also included aesthetic, recreational, and fish-preservation purposes; therefore, it had intended to reserve minimum instream flows to fulfill those purposes.[53] The Court disagreed, and found that those purposes were "secondary."[54] Such secondary purposes, determined the Court, did not comport with the sensitivity Congress had toward "water-needy states and private appropriators" when setting aside public lands.[55]

In recognition of Congress's sensitivity to a state's water needs, the Court thereby limited the possible water right to only the amount necessary so as not to "entirely defeat" the forest's primary purpose of providing timber.[56] Water necessary for the secondary purposes of aesthetic, recreational, and fish-preservation purposes, would be subject to state law as any other appropriator.[57]

The holding in *New Mexico* appears to be a heavy-handed constraint on the growth of federal reserved water rights doctrine and, by implication, on *Winters* rights. As Justice Brennan's dissent noted, the opinion has a one-dimensional understanding of a forest by not

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51 438 U.S. 696, 696 (1978).

52 *Id.* at 706−08 (interpreting an 1897 act establishing the national forest system for the purpose of protecting the forests, and furnishing "a continuous supply of timber").

53 *Id.* at 705.

54 *Id.* at 701−02.

55 *Id.*

56 *Id.* at 701−02 (quoting Cappaert v. United States, 426 U.S. 128, 141 (1976) (internal citations omitted).

57 *Id.* ("Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.").

awarding water necessary to sustain a forest's *viability*.[58] If the Court can apply such a view to a forest's viability, even if the forest is used just for timber, what is to stop the Court from applying such a narrow view to the viability of Indian reservations as well?

With this very real possibility in mind, a court determining water rights for Indian reservations is not bound to the *New Mexico* holding as the decision should be read in context. Most notably, the Court's supporting cases do not purport to limit the purpose of *Indian* reservations.[59] If anything, the supporting cases limit only non-Indian reservations, such as federal enclaves and national monuments.[60] The supporting case that involved Indian reservations, established an implied reservation of water for Indian reservations without referring to the purpose at all.[61]

Moreover, recognizing Congress's sensitivity to "water-needy" states may make sense for acts creating federal public lands, but not for treaties with tribal nations. Congress created Indian reservations often by ratifying treaties as *agreements* with tribes to cede tribal rights in exchange for peace and a permanent home.[62] The states generally had no role in treaties.[63] And, as *Winters* established, the separate interests of state sovereigns in water are not to be a consideration when courts interpret treaties.[64]

Finally, and of fundamental importance, while reservations of land for Indian tribes are at the exclusion of non-Indians,[65] reservations of

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58 *See id.* at 719. (Brennan, J., dissenting) ("The forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.").

59 Two cases interpret the purpose of non-Indian federal reservations: *Cappaert*, 426 U.S. 128 (finding *Winters* rights for a national monument); United States v. Dist. Court for Eagle County, 401 U.S. 520, 522−23 (1971) (recognizing federal reserved water rights in federal enclaves).

60 *See supra* note 51, at 719.

61 Arizona v. California, 373 U.S. 546, 598−99 (1963) ("it is impossible to believe that when Congress enacted the great Colorado Indian Reservation . . . they were unaware that most of the lands were of the desert kind—hot, scorching sands—and the water would be essential to life of the Indian people and the animals they hunted and the crops they raised").

62 COHEN'S HANDBOOK, *supra* note 1, § 1.03[1], at 23−27. Historically, congressional ratification of a treaty was the primary mechanism for establishing an Indian reservation. *See id.* at § 1.03[1].

63 *Id.*

64 *See id.* at § 1.03[1].

65 *Id.*

public land are for the inclusion of all. To conflate the two "reservations" reduces the livelihood of sovereign nations to that of sustaining timber in a national forest.

B. The Very Purpose as Applied to Indian Reservations

Even though some jurists have acknowledged a distinction between Indian and non-Indian reservations in the federal reserved water rights doctrine,[66] the holding in *New Mexico* has found its way into determinations of *Winters* rights, further confusing the doctrine as applied to Indian reservations.[67]

Courts following the *New Mexico* guideline tailor the scope of Indian reserved water rights to primary purposes—usually to agricultural purposes.[68] In fact, courts have awarded a reserved right tied to an agrarian purpose in virtually every litigation of water rights.[69] Other purposes of a reservation, such as municipal or commercial purposes, are often secondary purposes subject to state appropriation laws.[70] The laser focus of this primary/secondary distinction often results in a diminished possible amount for a *Winters* right and subjects necessary "secondary" purposes to state law.

In *United States v. Adair* the Ninth Circuit recognized water rights for the Klamath Indian Reservation for the primary purpose of hunting, fishing, and gathering.[71] In so finding, the court stated that "water rights may be implied only 'where water is necessary to fulfill the very purposes for which a federal reservation was created,' and not where it is merely 'valuable for a secondary use of the reservation.'"[72] The court

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66 *See* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

67 COHEN'S HANDBOOK, *supra* note 1, § 19.03[4]. *See, e.g.*, Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 767 (Mont. 1985) (interpreting Indian water rights the Montana court applied non-Indian water right case precedent and noted, "There are no special canons of construction for interpreting the documents that create federal reserved water rights. The purposes for which the federal government reserves land are strictly construed.").

68 COHEN'S HANDBOOK, *supra* note 1, § 19.03[4]. *See, e.g.*, *In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 96–99 (Wyo. 1988); United States v. Washington (Lummi), 375 F. Supp. 2d 1050, 1066 (W.D. Wash. 2005). *See also* Arizona v. California, 373 U.S. 546, 600 (1963).

69 COHEN'S HANDBOOK, *supra* note 1, § 19.03[4].

70 *See* United States v. Washington (Lummi), 375 F. Supp. 2d 1050 (W.D. Wash. 2005).

71 United States v. Adair, 723 F.2d 1394, 1397 (9th Cir. 1983).

72 *Id.* at 1408–09. In *United States v. Washington (Lummi)*, the court denied the Lummi Nation's claims to water for purposes of grazing in addition to agriculture and domestic uses as part of the purpose of a homeland. 375 F. Supp. 2d 1050 (W.D. Wash. 2005). The court held the homeland theory must fail as a matter of law. *Id.* at 1065. The appropriate inquiry

acknowledged that *New Mexico* was not directly applicable to *Winters* rights, but that it served as a useful guideline.[73]

While the *New Mexico* "guideline" may have resulted in a favorable water right award for the Klamath Tribe in *Adair*, it generally has not benefited other tribes. For example, in *In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn)*, the Wyoming Supreme Court limited the implied reservation of water for the Shoshone Reservation to irrigation only.[74] Water for other purposes, such as fisheries, grazing, mining, wildlife and aesthetics, were not the "primary purposes" contemplated at the time of the treaty, concluded the court.[75]

Similarly, in *United States v. Washington (Lummi)*, a federal district court cited the rationale in *Adair*, *New Mexico*, and *Cappaert* to limit the Lummi Nation's implied reservation of water to the very purpose for which the reservation was established.[76] The Tribe urged the court to find a broad homeland purpose in the Treaty of Point Elliot in order to "support the evolving domestic, municipal and commercial needs of the Nation."[77] However, the court declined to do so and stated that such future use was not contemplated at the time the reservation was established.[78]

Primary and secondary purposes analysis is now an inextricable feature of the federal reserved water right doctrine, but that need not cripple *Winters* rights. The problem for *Winters* rights is not that a reservation does not have a primary purpose. The problem is that rigidly interpreting a treaty so as to confine the purpose of an Indian reservation to primarily an agriculture strays too far from the inherent concept of *Winters* rights.

As mentioned in Part II.B., describing *Winters* rights, treaties with tribes are to be construed liberally and resolve any ambiguities in favor of tribes as they would have understood the agreement at the time.[79] It

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under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established. These implied *Winters* rights are necessarily limited in nature. *Id.*

73 *Adair*, 723 F.2d at 1408.

74 *In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 100 (Wyo. 1988).

75 *Id.* at 98−99.

76 *Lummi*, 375 F. Supp. 2d at 1064−66.

77 *Id.* at 1065.

78 *Id.* at 1066.

79 Winters v. United States, 207 U.S. 564, 576 (1908).

is improbable to think that a tribe would have understood it was giving up its right to water for the future use of its people and only contemplated irrigating crops on their land.[80] Such a rigid treaty interpretation is incompatible with the environmental realities of the many reservations in arid parts of the country.[81] Rigid interpretation does not allow sovereign nations any flexibility in use of their water[82] or, in the words of the *Winters* Court, "the power to change."[83]

Furthermore, an Indian reservation should not be left valueless by a legal interpretation that allows state water practices to deprive them of full use of the water. State law may not adequately protect important "secondary" purposes of water.

C. The Homeland Purpose for Indian Reservations

Courts should return to the rationale behind *Winters* and make a principled determination that the purpose of an Indian reservation is to provide a homeland, so that the reservation is livable and valuable over the generations.[84]

To determine the purpose of an Indian reservation, courts should employ the Indian canons of construction to liberally resolve any ambiguous treaty language in favor of tribes as they would have understood the agreement at the time.[85] Doing so will generally result in a finding that the purpose of an Indian reservation is primarily to provide a permanent home, not solely to develop agriculture.[86] Under

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80 *See, e.g.*, *In re* Gila River Sys. & Source (Gila IV), 35 P.3d 68, 80 (Ariz. 2001).

81 *Id*. at 78−79 (Ariz. 2001).

82 It is true that once a tribe receives a quantified right, they can apply for a change in use. Arizona v. California, 439 U.S. 419, 422 (1963). However, even that practice has been called into question based on the "primary purpose" of the reservation. *See, e.g.*, *In re* Big Horn River Sys. (Big Horn II), 835 P.2d 273, 276, 278 (Wyo. 1992) (denying the Wind River Tribes' attempt to transfer a portion of their quantified right for irrigation to instream flow).

83 Winters v. United States, 207 U.S. 564, 577 (1908).

84 *See* Colville Confederated Tribes v. Walton (Walton II), 647 F.2d 42 (9th Cir. 1981), rev'd on other grounds 752 F.2d 397, 405 (9th Cir. 1985). While the *Winters* Court did not determine the purpose of the Ft. Belknap Indian Reservation, it noted the treaty was an agreement to become a "pastoral and civilized people." *Id.* at 577; *see also supra* text accompanying notes 38−42.

85 *See* Yakima v. Confederated Tribes, 502 U.S. 251, 269 (1992) ("When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.'").

86 *See Walton II*, 647 F.2d at 47 ("Providing for a land-based agrarian society, however, was not the only purpose for creating the reservation."); Arizona v. California (Arizona II), 460 U.S. 605, 616 (1983) (stating that implied in the establishment of the reservation is an

this concept, tribes' federally reserved water is quantified by activities associated with a homeland, including agriculture, livestock, fisheries, municipal and industrial uses, and aesthetics.[87]

In *Walton II,* the court interpreted an Executive Order establishing the Colville Reservation, which had not expressly provided for a particular purpose, and found that the "primary homeland" purpose of the reservation included both agriculture and traditional fisheries.[88] In so finding, the court stated "the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed."[89] Congress's "vision of progress implies a flexibility of purpose,"[90] and a court should consider the tribe's "need to maintain themselves under changed circumstances."[91] Therefore, the ultimate purpose of a *Winters* right, reasoned the court, is to make reservation land livable and valuable.[92]

The Arizona Supreme Court was the first court to not only recognize a homeland purpose but to also employ a homeland standard as the method for quantifying *Winters* rights. In *In re General Adjudication of all Rights to Use Water in the Gila River System and Source (Gila IV)*,[93] the court rejected an agricultural purpose and instead concluded the purpose of any Indian reservation is a homeland.[94] The quantification analysis, therefore, should skip past any determination of purpose and instead focus on a reservation-by-reservation determination of the quantity needed for the reservation in question.[95] In quantifying the award, the court suggested looking to various factors, including the needs, wants, plans, cultural background, and geographic setting of the reservation.[96]

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allotment of water necessary to "make the reservation livable"); *In re* Gila River Sys. & Source (Gila IV), 35 P.3d 68, 76 (Ariz. 2001) (finding that the purpose of all Indian reservations is to "provide a permanent home and abiding place") (quoting Winters v. United States, 207 U.S. 564, 564 (1908)).

87 The United States asserted these activites as included in the purpose of the Wind River Reservation. *See In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 98−100 (Wyo. 1988).

88 *Walton II*, 647 F.2d at 47−48.

89 *Id.* at 47.

90 *Id.* at 47 n.9.

91 *Id.* at 47.

92 *Id.* at 49−50.

93 35 P.3d 68 (Ariz. 2001).

94 *Id.* at 76, 78−79.

95 *Id.*

96 *Id.*

Understanding an Indian reservation as having a homeland purpose helps release a court from constricted, agrarian-centric rulings. Such a liberal reading of treaties then frees courts to remember a tribe's expectation of a water is to fulfill the needs of a reservation throughout time. This includes perhaps a tribe's expectation that their water remains unimpaired in quality, in order to have their land remain livable and valuable.

III
THE PATH FOR *WINTERS* RIGHTS TO GROUNDWATER QUALITY

This section explores the possible direction of *Winters* rights as it extends to groundwater and water quality of both surface water and groundwater. The first step is recognizing that a federal reserved water right to surface water likely applies to groundwater with the same logic. This appears to be a likely path for the doctrine as a whole and for *Winters* rights. The second step in exploring the fullness of the doctrine is to notice that water quality may actually be an inherent feature of the amount of water that is reserved in order to fulfill the purpose of a federal reservation. The final step to recognizing *Winters* rights to groundwater quality, is remembering that the purpose of an Indian reservation is to make it a livable and valuable homeland for current and future inhabitants; therefore, the quality of groundwater resources should necessarily be protected, especially when state water practices do not adequately protect them.

A. First Step: Groundwater as a Logical Extension of Winters

While the Supreme Court has not ruled that *Winters* extends to groundwater, it appears only a matter of time before the Court catches up with the growing legal and scientific consensus. As a recent 2010 Ninth Circuit opinion stated, "[S]urface water contributes to groundwater and groundwater contributes to surface water. The reciprocal hydraulic connection between groundwater and surface water has been known to both the legal and professional communities for many years."[97]

The closest the Court came to recognizing a reserved right to groundwater was in its 1979 decision, *Cappaert v. United States*.[98] *Cappaert* involved an injunction restricting a rancher's groundwater

97 United States v. Orr Ditch Co., 600 F.3d 1152, 1158 (9th Cir. 2010).

98 United States v. Cappaert, 426 U.S. 128 (1976).

pumping to the extent necessary to preserve a rare species of pupfish in the national monument Devils Hole.[99] In upholding the injunction, the Supreme Court declined to extend the federal reserved water rights doctrine to groundwater, reasoning that the water in Devils Hole was really just surface water.[100] At the same time, however, the Court noted the association between surface water and groundwater were integral parts of the same hydrologic cycle.[101] "[W]hether the diversion is of surface or groundwater" the Court held that the rancher could not pump water so as to impair the survival of the pupfish, the very purpose of the federal monument's creation.[102]

A growing number of courts have extended federal reserved rights to groundwater by understanding the sentiment behind *Cappaert*.[103] Even the Wyoming Supreme Court, acknowledged the "logic" of extending the *Winters* rights to groundwater but declined to be the first court to do so.[104] Other state courts, like the Arizona Supreme Court, have been bolder[105] and gathered assurances from the "guideposts" of *Winters* and *Cappeart* that *Winters* rights extends to groundwater.[106]

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99 *Id.* at 322.

100 *Id*. at 142 (1976). The Ninth Circuit opinion on appeal expressly extended the federal reserved water rights doctrine to groundwater. United States v. Cappaert, 508 F.2d 313, 317 (9th Cir. 1974) ("In our view, the United States may reserve not only surface water but also underground water.") (relying in part on Winters v. United States, 207 U.S. 564 (1908) and Arizona v. California (Arizona I), 373 U.S. 546,(1963)).

101 *Id.*

102 *Id.* at 143.

103 *See* Colville Confederated Tribes v. Walton (Walton I), 460 F. Supp. 1320, 1326 (E.D. Wash. 1978), *aff'd* 647 F.2d 42) ("[*Winters* rights] extend to groundwater as well as surface water."). (citing *Cappaert*, 426 U.S. at 142-43; Tweedy v. Texas Co., 286 F.Dupp. 383, 385 (D. Mont. 1968)). (". . . the same implications which led the . . . [*Winters*] 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 should make no difference."); New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (citing *Cappaert* for the proposition that Pueblo water rights extend to groundwater as an integral part of the hydrological cycle).

104 *In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 99−100 (Wyo. 1988), *aff'd by an equally divided court*, 492 U.S. 406 (1988) ("The logic which supports reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater.").

105 *In re* Gila River Sys. & Source (Gila III) 989 P.2d 739, 745 (Ariz. 1999) ("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 the issue does not relieve the present court, fairly confronted with the issue, of the obligation to do so.").

106 *Id.* at 747, 749 ("The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether [the water]is necessary to accomplish the purpose of the reservation.").

The court's conclusion is notable considering that two-thirds of the Arizona is federal land and such a ruling would impact state water users greatly.[107]

With a growing number of courts ruling affirmatively on the matter, it seems more likely that a *Winters* right to groundwater can be upheld. Finding an implied reserved right to groundwater is one step closer to finding a right to groundwater quality, and fits squarely within the founding principles of the *Winters* doctrine.

B. Second Step: Water Quality as an Attribute of Water Quantity for Winters *Rights*

Water quality may actually be an attribute of the amount of water impliedly reserved in order to fulfill the purpose of a federal reservation. Awarding a water right for either surface water or groundwater need not be a set amount, but rather can be a flexible amount and account for the needs of the reservation. If state water users are over-drafting groundwater, or otherwise causing saltwater intrusion into a reserved groundwater right, then that right is diminished in quantity and quality and requires protection.

1. Surface Water Quality

Federal reserved water rights, as compared to state water rights, can have special considerations for water quality in calculating the quantity of the right. For state water rights, water quality is considered under state regulations with set standards,[108] leaving the typical focus of a state water right to be decreed for a set amount. Federal reserved water rights, by contrast, may be able to fluctuate in the award amount because protecting purpose of the reservation is the most crucial consideration.[109] As such, some courts have ordered flexible injunctive relief so as to protect certain attributes of water quality, like temperature, water level, or salinity, if it fulfills the purpose of a federal reservation of land.[110]

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107 *Id.* at 744.

108 *See* RODGERS, *supra* note 8, § 4:17.

109 *See* United States v. Gila Valley River District (Gila II), 920 F. Supp. 1444, 1447–48 (D. Ariz 1994), *aff'd* 117 F.3d 425 (9th Cir. 1997); United States v. Cappaert, 426 U.S. 128, 141 (1976); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) *aff'd in part, rev'd in part*, 736 F.2d 1358, 1361 (9th Cir. 1984).

110 *Cappaert*, 426 U.S. at 141; *Anderson*, 591 F. Supp. at 5.

For example, the Supreme Court in *United States v. Cappaert*[111] protected an amount of water necessary to protect the "scientific value" of waters in a national monument. [112] The Court affirmed an injunction restricting a rancher's groundwater pumping to the extent necessary to ensure the survival of a rare pup fish in Devils Hole National Monument.[113] The amount necessary to protect the pupfish did not mean the quality of the water could not be impacted at all.[114] Rather, the Court ordered that "adequate levels" should be preserved by an "appropriately tailored" amount of water.[115]

A federal district court in Washington held that *Winters* rights reserve the amount of water necessary to maintain an instream flow of a certain temperature.[116] *United States v. Anderson*[117] involved the Spokane Indian Reservation, created for the purpose of preserving the Tribe's access to fishing on Chamokane Creek.[118] Evidence showed that the creek must be maintained at sixty-eight degrees to allow the local fish population to thrive.[119] Thus to keep the temperature of the creek down, and thereby protect the Spokane's ability to fish, the court ordered the State to administer the creek with fluctuating diversion rates.[120] By inference, fixed diversion rates would not appropriately regulate the temperature of the reservation's water.[121]

A federal district court in Arizona went so far as to expressly protect a tribe's right to water quality from actual harm. In *Gila II*, the court protected, and the Ninth Circuit upheld, the quality of surface water reaching the San Carlos Apache Tribe Reservation.[122] The Apache Tribe had traditionally used their decreed senior rights to irrigate a salt-

111 426 U.S. 128 (1976).

112 *Id.* at 141.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Anderson*, 591 F. Supp. at 5.

117 591 F. Supp. 1 (E.D. Wash. 1982) *aff'd in part, rev'd in part*, 736 F.2d 1358, 1361 (9th Cir. 1984).

118 *Anderson*, 591 F. Supp. at 5, 14.

119 *Id.* at 5.

120 *Id*. at 14.

121 *Id*. at 14.

122 United States v. Gila Valley River District (Gila II), 920 F. Supp. 1444, 1447−48 (D. Ariz 1994) *aff'd* 117 F.3d 425 (9th Cir. 1997).

sensitive crop.[123] Upstream farmers with junior water rights were over-pumping groundwater and allegedly causing saltwater to seep into the river and salinized the river.[124] The court held that the farming practices effectively deprived the Apache Tribe of their water right since the water quality affected crop viability to such a degree.[125] The court held that injunctive relief to limit the groundwater pumping was warranted.[126]

The above cases demonstrate that state water practices may be enjoined if they diminish the quality of surface water necessary to fulfill the purpose of a reservation. This is because the quality of surface water can be inherent to the amount of water necessary to fulfill the purpose of a reservation. Special protections may be required to guard against state practices that diminish water quality and defeat the purpose of a reservation. If the purpose of an Indian reservation is a homeland, certain protection for water quality may be required so as not to jeopardize the future of the inhabitants.

2. Groundwater Quality

While the body of law recognizing a federal reserved water right to groundwater quality is sparse, there may be an intriguing work-around. A court could protect a right to groundwater quality indirectly by decreeing a large quantity of groundwater. However, this would be more likely, and the award much larger, if courts recognize a homeland purpose for Indian reservations.

In *United States v. Washington (Lummi)*, the United States sought to exclude all uses of groundwater by non-Indians, particularly the withdrawal of too much water that would cause saltwater intrusion into an aquifer beneath the Lummi Reservation.[127] This claim required the court to consider the quantity of groundwater that the Tribe was actually entitled to withdraw by examining the primary purpose of the

123 *Gila II*, 920 F. Supp. at 1447−48, 50. The water right was a decreed right, and therefore there was no analysis of the purpose of the Reservation.

124 *Id*.

125 *Id.* at 1449−50 (the effect of groundwater pumping was "difficult to overstate").

126 *Id.* at 1453, 1455−56 ("the parties are in a better position to consider . . . measures of the realistic improvement of water quality in light of the Court's findings and conclusions").

127 United States v. Washington (Lummi), 375 F. Supp. 2d 1050, 1059 (W.D. Wash. 2005) (vacated pursuant to settlement by United States v. Washington, 2007 WL 4190400 (W.D. Wash. 2007)); *see also* Complaint, *Lummi*, 375 F. Supp. 2d 1050 (No. C01-0047Z). The same court in a prior decision had recognized the Lummi Reservation held *Winters* rights to groundwater. *See Lummi*, 375 F. Supp. 2d at 1058.

Treaty of Point Elliot.[128] The court declined to find a homeland purpose for the treaty, and so limited the groundwater award to agricultural purposes.[129] Had the court not done so, a larger homeland award could have resulted in an amount large enough to protect the aquifer from all other uses.

As *Lummi* shows, if a court holds that a reservation's purpose is anything other than a homeland, this may decrease the possible award. However, the larger the groundwater award, the more possible it may be to exclude interference with the groundwater quality.

C. Final Step: State Law May Not Adequately Protect Winters *Rights in Groundwater*

States can be expected to push back on any assertion of an implied right to groundwater quality out of fear of unfettered allocations of *Winters* rights. State appropriators would likely argue that an implied right to groundwater quality would result in too large of an award, possibly the entire amount of water in an aquifer, and that Congress would have not intended such an outcome.[130] Furthermore, any right to quality would be a secondary purpose and, therefore, should be governed by state law. Conceivably such regulations would adequately protect any federally reserved groundwater from possible impairments.

However, the *Winters* principles are firm in that courts do not defer to state law, or the needs of state water users, when determining the scope of federal reserved water rights.[131] As discussed above, federal law defines the scope and extent of federal reserved water rights. While

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128 *Id.* at 1058, 1059 (finding that the Treaty of Point Elliot "reserved for the present use and occupation" of the Lummi Nation the land and its resources).

129 *Id.* at 1065−66.

130 *See, e.g.*, *Lummi*, 375 F. Supp. 2d at 1058.

131 *See* Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976) ("the volume and scope of particular reserved rights . . . [remain] federal questions") (quoting United States v. District Court for Eagle County, 401 U.S. 520, 526 (1971)); COHEN'S HANDBOOK, *supra* note 1, § 19.03[1], at 1211; Colville Confederated Tribes v. Walton (Walton I), 752 F.2d 397, 465 (9th Cir. 1985); *but see In re* Big Horn River Sys. (Big Horn), 753 P.2d 76, 111−12 (Wyo. 1988) (citing United States v. New Mexico, 438 U.S. 696 (1978) for the sensitivity doctrine).

state regulations may equally protect for all groundwater users,[132] federal reserved water rights may require broader protections.[133]

Furthermore, where state law is inadequate to protect a reserved right, or is in conflict with fulfilling the purpose of a federal reservation, more protective measures may be required. In *In re General Adjudication of All Rights to Use Water in Gila River (Gila III)* the Supreme Court of Arizona[134] held that the San Carlos Apache Tribe was entitled to protection from any off-reservation pumping that "significantly diminishes" the amount of water available to satisfy the purpose of their reservation.[135] Arizona water code provisions afforded equal protection to all overlying landowner's right to pump groundwater, including the Tribe.[136] However, the court found that the codes did not prevent overconsumption of groundwater and therefore could not adequately protect federal rights.[137] So as not to defeat the purpose of the reservation, the court declined to defer to state law and indicated that broader protections would be necessary to maintain sufficient water to accomplish the purpose of the reservation.[138] The court clarified that this broader protection did not mean a requirement of "zero impact," and relied on *Cappaert* to find that the protected amount should be "appropriately tailored to minimal need."[139] The court concluded it could not defer to state law where doing so would defeat the federal water rights.

Protecting *Winters* right to groundwater quality does not mean there is a zero tolerance for impacts; some impact from state water practices is to be expected. However, such state water practices may not impair

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132 *See* RODGERS, *supra* note 8, § 4:17 Water quality standards—State law (judicial review) (2013). States often point to these water codes when defending adequate protection of groundwater. *See* In re General Adjudication of All Rights to Use Water in Gila River (Gila III), 989 P.2d 739, 747−49 (Ariz. 1999).

133 *In re* Gila River Sys. & Source (Gila III) 989 P.2d 739 (Ariz. 1999).

134 *Id.* The *Gila III* court found the rationale the court in *In re All Rights to Use Water in the Big Horn River System (Big Horn)*, 753 P.2d 76 (Wyo. 1988) used to decline to rule on the issue "unpersuasive." "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." *Gila III*, 989 P.2d at 747.

135 *Id.*

136 *Id.* at 747−49.

137 *Id.* at 750. Federal claimants receive the benefit of federal law when state and federal law conflict. *Id.* at 745 (citing Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 571 (1983)).

138 *Id.* at 747, 750 ("We may not withhold application of the reserved rights doctrine purely out of deference to state law. Rather, we may not defer to state law where to do so would defeat federal water rights.").

139 *Id.*

a *Winters* right so as to defeat the purpose of a reservation. State law and sensitivities may not be a factor in whether or not those practices should be tolerated.

CONCLUSION

In the evolution of the federal reserved water rights doctrine, there are grounds for Indian tribes to secure quality groundwater for their community for future generations. To do so, courts must shake off the shackles of non-Indian case precedent requiring a narrow views of what the purpose of an Indian reservation can be. Courts must remember to that the door is still open to rely on the founding principles of *Winters*, and find that the purpose of an Indian reservation is to create a habitable, valuable homeland for present and future needs of a nation. Nations must be able to protect their water from state water practices, regardless of state interests, if those practices impair the groundwater quality necessary for that purpose of their Indian reservation.