

“TECHNICALLY OPEN”:  
THE DEBATE OVER NATIVE AMERICAN RESERVED  
GROUNDWATER RIGHTS

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I. INTRODUCTION

The challenge of providing water to all people in the arid Western states becomes increasingly more difficult as the population in these states continues to grow exponentially.<sup>1</sup> Meanwhile, drought constantly threatens the already strained sources, forcing communities to confront the shortage through conservation efforts and mandated restrictions. Even so, Native American tribes who have called this land home for hundreds of years seek to stake a claim in the fight for economically valuable water rights in the West. Unfortunately, entering so late into the game of water appropriation means that less water is available since many sources are already fully appropriated.

In the West, groundwater often serves as a primary source of water for residents; so naturally, Native American tribes are seeking to appropriate groundwater sources. However, at the present time, no federal doctrine supports the appropriation of groundwater through reservation by Native American tribes, and the Supreme Court has not yet confronted the issue. Courts of two states in the West, Arizona and Wyoming, have both decided the issue—one held groundwater sources were reservable, while the other held groundwater was not reservable. Thus, whether Native Americans can claim groundwater for reservations through the traditional means of accomplishing such appropriation is left unanswered in several Western states where surface water is scarcest. It appears possible that Native Americans may be left without water for their already economically depressed reservations.

Groundwater reservation raises several issues: first, the seeming economic unfairness and discrimination against tribes who have no economic livelihood to purchase water, coupled with the simultaneous requirement for them to support themselves on their reservations; second, the effect of groundwater reservation on already fully appropriated and strained wells and aquifers, and the possibility of litigation by private water right holders affected by the potentially large quantities of water granted to tribes; third, the groundwater question affects the ability of states to settle federal reserved water rights claims, and potentially limits settlement options; and fourth, intertwined in the groundwater reservation issue,

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<sup>1</sup> Utah, for example, has seen a growth of nearly one million residents since 1990.

For more information regarding population growth in the United States and specifically in the Western States, see [http://factfinder.census.gov/servlet/SAFFPopulation?\\_submenuId=population\\_0&\\_sse=on](http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on) (Last visited March 24, 2008).

the possibilities for utilizing alternative methods of quantification of water in order to obtain a more accurate amount of water owed to the tribe.

As the West becomes more and more populated, the issue of groundwater reservation takes on an increased urgency since current inhabitants already struggle to maintain their appropriated water rights while simultaneously facing the demands of the inevitable development of the West. Throughout the struggle, the federal government is obligated to consider the rights of Native Americans who occupied the land long before the creation of current water struggles. Ultimately, the future of Native American reserved water rights rests on the ability to reserve groundwater in order to help reservations progress with society and technology.

## II. BACKGROUND

### A. *Native American Reserved Water Rights*

Common law has long interpreted contracts involving Native Americans in favor of the Indian tribe, under the assumption that it is fair to interpret the contract in favor of the party who possesses less bargaining strength or knowledge and understanding of the contract against them.<sup>2</sup> Additionally, this presumption is supported by the belief of protectionism by the federal government towards Native Americans.<sup>3</sup> The landmark case of *Winters v. U.S.* held that in documents concerning the rights of Indians, the interpretation should be granted in favor of Indians, due largely to their inability to defend themselves against the language of the government.<sup>4</sup>

In *Winters*, the Supreme Court stated that implied in the creation of an Indian reservation are the rights of the reservation to the water necessary to maintain and survive on the land given to it by the government, even if these rights were not explicitly stated in the language of the document creating the reservation.<sup>5</sup> Subsequently, the Supreme Court determined the amount of water available for appropriation by reserve right was "the water. . . intended to satisfy the future as well as the present needs of the Indian Reservations and. . . that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."<sup>6</sup> The Supreme Court has additionally clarified that "a reserved right in unappropriated water. . . vests on the date of the reservation and is superior to the rights of future appropriators."<sup>7</sup> This priority date is inevitably earlier than most current appropriations, and enables the tribe to obtain sufficient water to support the reservation. However, the *Supreme Court has only explicitly applied the Winters*

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<sup>2</sup> *Winters v. United States*, 207 US 564, 576 (1908).

<sup>3</sup> *Id.* at 577.

<sup>4</sup> *Id.* at 576.

<sup>5</sup> *Id.*

<sup>6</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>7</sup> *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976).

*Doctrine to surface water sources*, and the reservation of groundwater remains technically undecided.

*B. The Groundwater Issue in Native American Reserved Rights*

There is a split among state supreme courts concerning the ability to reserve groundwater. The Arizona Supreme Court has held:

[A] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.<sup>8</sup>

Thus, Arizona noted that because Indians are granted water for the purpose of maintaining their reservation, both presently and in the future, it is necessary in some cases for the tribe to utilize groundwater; and the court permitted the reservation of water rights in groundwater under the limitations specified in the adjudication.

In contrast, in *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, the Wyoming Supreme Court acknowledged the logic supporting the reservation of groundwater for use by Indian tribes, but they declined to apply the *Winters* doctrine to groundwater because of the U.S. Supreme Court's failure to speak directly to the issue.<sup>9</sup>

Traditionally, separate laws controlled groundwater and surface water; however, the Supreme Court has indicated groundwater may be subject to reservation because of the hydrologic connection between sources.<sup>10</sup> In *Cappaert v. U.S.*, the Supreme Court noted: "since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," thus indicating the Supreme Court's understanding of the interconnected hydrological nature of surface and groundwater.<sup>11</sup>

The reserved water rights doctrine is a federal doctrine, and as discussed earlier, "[is] established by reference to the purposes of the reservation, rather than to the actual, present use of the water... [and] [t]he basis for an Indian reserved

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<sup>8</sup> *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. and Source*, 989 P.2d 739, 748 (Ariz. 1999). [hereinafter *Gila River III*].

<sup>9</sup> *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 99-100 (Wyo. 1988). [hereinafter *Big Horn*].

<sup>10</sup> *Cappaert*, 426 U.S. at 142.

<sup>11</sup> *Id.* at 143.

water right is the treaty, federal statute, or executive order setting aside the reservation.”<sup>12</sup> On the other hand, state appropriative water rights are based on actual use and are governed by state law.<sup>13</sup> However, the nature of State water rights is nonetheless important, specifically, in determining if the same substantive laws govern surface and groundwater. It is a compelling argument favoring the federal reservation of groundwater sources if States govern groundwater and surface water under the same regulations, although not a requirement. In *Cappaert*, the Supreme Court looked to the statutory laws of the state governing appropriation of surface and groundwater sources in formulating their decision.<sup>14</sup>

### III. ANALYSIS

#### A. Supreme Court’s Decision in *Cappaert*

The Supreme Court’s most notable encounter with the topic of groundwater reservation occurred in 1976, in *Cappaert*, establishing the groundwork for the ensuing litigation involving Native American reserved water rights. *Cappaert* involved Devil’s Hole, a cavern located on federal land in Nevada that was home to a unique species of desert fish.<sup>15</sup> Pumping at a nearby ranch, of the same hydrologic source that fed Devil’s Hole, had reduced the water level of Devil’s Hole.<sup>16</sup> The Ninth Circuit court held “[i]n our view the United States may reserve not only surface water, but also underground water.”<sup>17</sup> However, the Supreme Court affirmed the decision of the lower court, but declined to fully endorse the above statement and instead only recognized the interconnected hydrology between surface and groundwater sources.<sup>18</sup>

The Supreme Court acknowledged the statutory Nevada state law relationship between groundwater and surface water, and considered it in the decision: “[i]t appears that Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both.”<sup>19</sup> This indicates a possible preference of the Supreme Court to utilize state law in assessing a federal water right.

The Supreme Court affirmed the district court determination that the purpose of Devil’s Hole was to preserve a pool of water home to a scientifically valuable species of fish, and the water level of the pool should not drop to a level detrimental to the fish.<sup>20</sup> In its decision, the Court stated “since the implied-

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<sup>12</sup> *Confederated Salish and Kootenai Tribes v. Clinch*, 158 P.3d 377, 379 (Mont. 2007).

<sup>13</sup> *Id.* at 380.

<sup>14</sup> *Cappaert*, 426 U.S. at 142.

<sup>15</sup> *Id.* at 128.

<sup>16</sup> *Id.*

<sup>17</sup> *U.S. v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974).

<sup>18</sup> *See Cappaert*, 426 U.S. 128.

<sup>19</sup> *Id.* at 142. *See also* NEV. REV. STAT. § 533.010 *et seq.* (1985).

<sup>20</sup> *Cappaert*, 426 U.S. at 141.

reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”<sup>21</sup> Though the Supreme Court clearly recognizes the hydrologic connection between reserved surface water rights found on a federal monument and nearby groundwater sources,<sup>22</sup> the Court has expressly declined to directly state that groundwater alone was reservable for a federal purpose.

### B. Wyoming, Big Horn River

The *Big Horn* decision involved the general adjudication of the Big Horn River, and discussed the water rights available to the Shoshone and Arapahoe tribes.<sup>23</sup> The Wyoming Supreme Court discussed the *Cappaert* decision and stated: “[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater.”<sup>24</sup> However, although the Wyoming court looked to *Tweedy v. Texas Co.*, which stated, “whether the [necessary] waters were found on the surface of the land or under it should make no difference,” it ultimately elected not to recognize the reservation of groundwater.<sup>25</sup> Additionally, Wyoming continues to utilize different laws to govern surface water and groundwater, respectively.<sup>26</sup> The Wyoming court refused to extend the reaches of the *Winters* Doctrine to groundwater due to the lack of controlling law in support.<sup>27</sup>

Interestingly, the case was appealed to the Supreme Court, which affirmed the decision *per curiam*, with a split court and without a written opinion.<sup>28</sup> This reluctance indicates the Supreme Court’s unwillingness to explicitly extend the *Winters* doctrine to groundwater sources, and also demonstrates the split of beliefs regarding the subject.

### C. Arizona, Gila River

The Arizona Supreme Court adopted the same legacy of reasoning applied by the *Big Horn* court, noting the terse history of language involving groundwater reservation.<sup>29</sup> The court acknowledged some reservations created in the arid desert states in the West were without even perennial streams, and it must have

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<sup>21</sup> *Id.* at 143.

<sup>22</sup> John D. Leshy, *The Federal Role in Managing the Nation’s Groundwater*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL’Y. 1, 3 (2004).

<sup>23</sup> *Big Horn*, 753 P.2d at 85-86.

<sup>24</sup> *Id.* at 99.

<sup>25</sup> 286 F.Supp. 383, 385 (D. Mont. 1968).

<sup>26</sup> See WYO. STAT. ANN. §§ 41-3-902, 906 (2007).

<sup>27</sup> *Big Horn*, 753 P.2d at 99.

<sup>28</sup> *Wyoming v. U.S.* 492 U.S. 406, 407 (1989).

<sup>29</sup> *Gila River III*, 989 P.2d at 746.

been within the intent of Congress to imply groundwater reservation for the use of the reservation. The Arizona court states:

We find a similar guidepost in *Arizona v. California*, where the Court declared it “impossible to believe” that those who created the Colorado River Indian Reservation “were unaware that most of the lands were of the desert kind-hot, scorching sands-and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”<sup>30</sup>

The Arizona Court continues by rejecting the oft-stated argument for denying groundwater reservation—because it was not an accessible source when the reservations were created, by relying on the statement from *Winters* that “federal reserved water rights are by nature a preserve intended to ‘continue through years.’”<sup>31</sup> The Arizona court emphasized that the “continuation” of reserved rights implies the ability to employ new technology or utilize other sources if current sources were depleted.<sup>32</sup>

Arizona’s statutory regulation of water relies on a bifurcated system of water rights:

Rights associated with water found in lakes, ponds, and flowing streams—surface water—have been governed by the doctrine of prior appropriation. . . . On the other hand, underground water has been governed by the traditional common law notion that water percolating generally through the soil belongs to the overlying landowner, as limited by the doctrine of reasonable use.<sup>33</sup>

However, despite the bifurcated system, Arizona recognized the importance of providing water to reservations located in areas without surface water.<sup>34</sup> The court stated, “[i]t is apparent from the case law that 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.”<sup>35</sup> This is more progressive than the groundwater reservation in a state with laws recognizing the hydrological connection between groundwater and surface water.

Ultimately, the Arizona Supreme Court appealed to logic and fairness in stating federal reserved rights applied to groundwater. However, the ability to reserve groundwater sources is limited to reservations without a surface water

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<sup>30</sup>*Id.* at 746 (citing *Arizona v. California*, 373 U.S. 546, 599 (1963)).

<sup>31</sup>*Id.* at 748 (citing *Winters v. U.S.*, 207 U.S. 564, 577 (1908)).

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

<sup>33</sup>*Id.* at 743.

<sup>34</sup>For a more in depth discussion of the Gila River adjudication, *see generally* Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007).

<sup>35</sup>*Gila River III*, 989 P.2d at 747.

source adequate to support the needs of the reservation.<sup>36</sup> Additionally, the holding was created in a vacuum, without application to a specific demand or tribe, leaving the issue of quantification or possible challenges undecided.<sup>37</sup> While the Arizona court is progressive in creating just Native American policy, the limitation in the holding indicates the continued reluctance to fully support the unfettered extension of the *Winters* doctrine to groundwater. The court relied on the fairness-based stance, emphasizing the belief that a reservation is useless to Native Americans without water. This holding, although limited, is important in the context of arid Western states and providing direction for reservations without any viable surface water options.

#### *D. Additional Cases*

As mentioned in the discussion of the history of groundwater reservation relied upon in Wyoming and Arizona, a handful of other cases confront the issue of groundwater reservation. However, these cases provide little useful dicta or insight as to their decision to make such a monumental holding, and generally passed over the issue without much discussion.

For example, in *U.S. v. Washington*, the district court in western Washington boldly stated: “the reserved water rights doctrine extends to . . . groundwater even if groundwater is not connected to surface water.”<sup>38</sup> The *Washington* court extended the progression of groundwater reservation by acknowledging the holding from Arizona, but determined that groundwater reservation should not be limited to reservations lacking adequate surface water sources.<sup>39</sup> However, it is interesting to note that western Washington does not face the same challenges for supplying residents with water because of the State’s copious water supply. The abundance of water makes the issue less controversial and water less valuable, factors that may have effected the decision of the district court. Nonetheless, although not in the arid Western states, the district court in Washington pushed the decision beyond necessity and fairness or hydrological connection, and determined groundwater reservation as a matter of law.

#### *E. The Future of the Debate*

After close analysis of the major cases involving groundwater reservation, there is no clear common law path for the debate to follow. It is evident from the behavior on the state level, that the holding in *Cappaert* did not settle the issue of groundwater reservation. The two state supreme court decisions offer contrasting policy considerations for their decisions. Wyoming declined to hold that groundwater was reservable on the grounds of tradition and a lack of clear

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<sup>36</sup> *Id.* at 748.

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

<sup>38</sup> *U.S. v. Washington*, 375 F.Supp.2d 1050, n. 8 (W.D. Wash. 2005).

<sup>39</sup> *Id.* at 1068.

acceptance by the Supreme Court, a view that might be readily adopted by courts unwilling to accept the possible complications and negative implications of reserving groundwater. On the other hand, Arizona appealed to logic and sought to interpret the intent of Congress in other decisions, pushing the debate forward on the grounds of fairness, but nonetheless limiting the holding. However, both states' decisions rest on tenuous foundations, leaving other states to reexamine the same foundations as relied upon by both Wyoming and Arizona. Additionally, the district court in *Washington* casually accepted groundwater as reservable without offering much justification for the decision or acknowledging the apparent significance of the holding.<sup>40</sup>

Some legal articles make note of the ambiguity towards the reservation of groundwater sources by Native American reservations, and the significance of the question. Most of these articles mention the *Cappaert* decision with certainty as to its effect on groundwater reservation, briefly mentioning the decision and stating the holding as allowing Native American reservations to reserve groundwater.<sup>41</sup> However, a closer examination of the case indicates the extreme reluctance of the Supreme Court to make such a holding, and inferring such is inappropriate, given the subsequent decisions of state courts and their inability to interpret *Cappaert*.

One commentator has stated that groundwater, though not officially reservable, should be considered settled law.<sup>42</sup> The author cites the trend of state statutory law recognizing surface and ground water sources as interconnected and thereby governable by the same laws, as well as the recognition of the interconnected nature of surface and groundwater sources by federal agencies, including the United States Geographical Survey.<sup>43</sup>

The judicial trend is an acceptance of the fairness towards the tribes in reserving groundwater, but a failure to fully support the decision without the backing of the approval of the Supreme Court. In order to protect the economic vitality of Native American reservations, it is vital for the Supreme Court to support the reservation of groundwater.

#### *F. Quantification Standard Used*

Another issue related to the implications of whether or not to permit the federal reservation of groundwater is the standard used to determine the amount of water granted to the tribe. The traditional standard used in determining the minimum amount of water necessary to support a reservation is the Practicably Irrigable Acreage ("PIA") standard, which permits enough water as would be

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<sup>40</sup> *Id.*

<sup>41</sup> For example, see Shaunda A.K. Liu, Comment, *Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native American Homesteaders*, 25 U. HAW. L. REV. 85, 110 (2002).

<sup>42</sup> Rob Dubuc, *Snake Valley to Las Vegas: Keep Your Pipes Out of Our Aquifer*, 27 J. LAND RESOURCES & ENVTL. L. 151, 178-79 (2007).

<sup>43</sup> *Id.*



necessary to irrigate all of the irrigable land located on a reservation.<sup>44</sup> However, often in situations where tribes are seeking to appropriate groundwater, the reservation land is not conducive to agriculture. For example, extremely arid or mountainous land is likely to be both devoid of ample surface water sources and not easily irrigated or suitable for agricultural purposes. Thus, not only are tribes on these reservations unable to obtain sufficient water quantification based on the lack of irrigable acres, they are unable to utilize the most realistic sources of water available to them.

In another Gila River adjudication case, the Arizona Supreme Court listed several reasons why the PIA standard is not necessarily the most effective measure of the quantity of water rights, especially for tribes with reservations with topography unsuitable for agriculture.<sup>45</sup> The *Gila River V* court utilized the “permanent homeland” theory, and emphasized that this theory “allows for flexibility and practicality. . . the purpose of a federal Indian reservation is to serve as a permanent home and abiding place to the Native American people living there.”<sup>46</sup> The court offered several factors to consider for establishing the amount of reserved water necessary to support the “permanent homeland” of the Indians on the reservation, including: the tribe’s history, the daily affairs of the tribe, the geography, topography and natural resources of the reservation, the economic basis for the requested water, the past water use, and the future needs and population of the tribe.<sup>47</sup> The Arizona court determined the “permanent homeland theory” was a more accurate determination of the water needs of a reservation.<sup>48</sup> Adopting a more reasonable method of water quantification is beneficial both for tribes seeking groundwater sources, and for states wary of permitting appropriation of precious groundwater sources. The homeland theory enables tribes on non-irrigable reservations to appropriate an accurate amount of water needed to support the reservation, while limiting the unnecessarily high amount of water awarded to tribes with a large number of irrigable acres. The permanent homeland theory creates a more fair policy, preventing some tribes from appropriating huge quantities of unusable water, but still granting tribes the water necessary for economic survival. Adopting a more realistic quantification system is an integral element of extending the *Winters* doctrine to groundwater, because none of the cases permitting the reservation of groundwater have quantified the amount available, and traditional standards could generate water amounts unrealistic for the sources in question.<sup>49</sup>

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<sup>44</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>45</sup> *In re the Gen. Adjudication of all Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 78 (Ariz. 2001) [hereinafter *Gila River V*].

<sup>46</sup> *Id.* at 76.

<sup>47</sup> *Id.* at 79-80.

<sup>48</sup> *Id.* at 81.

<sup>49</sup> Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23, 28-29 (2006).

#### IV. POLICY ARGUMENTS SUPPORT ALLOWING NATIVE AMERICANS TO RESERVE GROUNDWATER

The looming question of the ability to reserve groundwater is a matter of fairness to the Indian tribes seeking to appropriate sources. Ultimately, the federal government has a duty to provide Native Americans the water necessary to support their reservations. Water is an essential element in creating and maintaining economically viable reservations. Denying Native Americans the right to reserve groundwater is another example oppressing a group of Americans with a long history of discrimination and economic depression. Congress is obligated to protect and provide for Native Americans, and provide them with the resources to maintain a reservation that will help tribes survive in modern society. A reservation created in a location without necessary surface water, should be permitted to utilize whatever water resources are available, including groundwater. Native American tribes are typically unable to select the location of their reservations, and the reservation land is typically more limited than the vast territories historically occupied by most tribes, especially nomadic tribes. Historically, Native American tribes established domicile in areas in which water was readily available, because it was impossible for a tribe to survive without sufficient water. Thus, forcing a modern tribe to live in a location without adequate water sources is inconsistent with the nature of the tribe, and is unjust to deny water to a tribe on the grounds of lack of surface water on a reservation not selected by the tribe.

Ever the same, it is difficult to predict the holding of the Supreme Court if directly faced with the issue. The Supreme Court has hitherto avoided deciding the particular issue of reserved groundwater rights in *Cappaert* and in *Wyoming*, but it is aware of the potential for the issue to present itself. Speculatively, the Supreme Court is concerned about the implications of creating the policy of reserving groundwater, just as the state courts are hesitant to tackle the politics associated with valuable water rights. One possible reason for the Supreme Court's reluctance for deciding the issue of groundwater reservation is the desire to allow the individual states to determine the issue of groundwater reservation based on the state water laws, understanding the water located within the state as property of each state. However, allowing each individual state to decide the issue of groundwater reservation creates considerable discrepancies between the individual states, and adds to the oppression of Native Americans. Leaving the decision to the States favors tribes located in states permitting groundwater reservation, while disadvantaging tribes located in non-groundwater reservation states. In order to promote fairness and uniformity among states, the question of groundwater reservation needs to be decided in a federal context, either by the Supreme Court, or statutorily by Congress.

Perhaps the most compelling argument for permitting the reservation of groundwater for tribes is that the purpose of creating a reservation was to provide an environment conducive to the physical and economic survival of Native Americans. Tribes contend that the reservations given to them were designated

for the purpose of providing a place for the tribe to live, sustain, and support itself physically and economically. More specifically, tribes granted reservations within the last several decades have been granted the reservations with the specific purpose of commercial development and creation of income for tribe members. For example, tribes are often interested in benefiting from proximity to well traveled roads, or creating incentives for visitors to the reservation. However, without water, the possibilities of creating an economically viable reservation are nearly impossible. Thus, logically, following the tradition of Indian law, groundwater should be reservable for tribes seeking water.

#### V. NATIVE AMERICANS MAY HAVE OTHER OPTIONS IF GROUNDWATER CANNOT BE RESERVED

Naturally, there are arguments in opposition to extending the *Winter's* doctrine to groundwater. For example, at the time most reservations were created, utilizing groundwater resources was not possible for the tribes inhabiting the land, and thus, impermissible for tribes to utilize sources with a priority date for a time when they would not have been able to access the water in question. Opponents argue allowing the reservation of groundwater unfairly entitles Native American reservations to utilize water that would not have been available to them at the time the reservation was created. However, as noted earlier, the Arizona court reasoned that reserved water rights also implied to change as technology progressed,<sup>50</sup> perhaps rebutting this argument.

The strongest argument in opposition is that allowing reservations to utilize groundwater sources through a reserved right claim displaces right holders who have already appropriated water from the sources in question. Allowing for the large quantities of water necessary to support a reservation to be reserved from groundwater sources severely impacts current appropriations, forcing the state to either pump more water than sustainable from the source or sever existing water rights, leading to possible litigation both by environmental groups and private parties affected by the reservation. The threat of litigation is certainly a significant factor in the reluctance to extend the *Winter* doctrine to groundwater.

In her symposium article in the *Kansas Journal of Law and Public Policy*, while ultimately agreeing that the judicial trend appears to be moving in the direction of reservation of groundwater, Judith Royster emphasizes several criticisms of the limitation of the Arizona Supreme Court decision to only permit groundwater reservation when surface water sources are "inadequate."<sup>51</sup> Royster asserts that the *Winters* doctrine, while the most widely accepted and traditionally used outlet, is perhaps not the most appropriate or singular tool for insuring adequate water for Native American reservations because of the ambiguous and

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<sup>50</sup> *Gila River III*, 989 P.2d at 748 (citing *Winters v. U.S.*, 207 U.S. 564, 577 (1908)).

<sup>51</sup> Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 KAN. J.L. & PUB. POL'Y. 489, 490-93 (2006).

inconsistent case precedent has generated.<sup>52</sup> She suggests alternative approaches to asserting Native Americans' rights to groundwater, including the "Shoshone Rights," which derive from *United States v. Shoshone Tribe* (1938) and extend tribal rights to "resources" contained within the soil of the reservation.<sup>53</sup> Royster also examines the possibility of exercising traditional state laws for obtaining groundwater for native American reservations, although establishing that the variation in state laws make them an unreliable avenue for developing applicable policy.<sup>54</sup>

If the Supreme Court were to decline to extend the *Winters* doctrine to groundwater, Native Americans would be forced to utilize other options for obtaining water. First, if a tribe is unable to sustain itself on its reservation due to insufficient surface water, the Bureau of Indian Affairs should purchase water for the tribes through state appropriation laws. A tribe seeking to appropriate water could work through state laws in order to utilize rights or purchase options it might have. For example, if a tribe has a reserved surface water source on an undesirable section of the reservation, it could apply for a change application, or sell the water rights from the surface source and purchase water from the desired groundwater source. Second, the denial of federally reserved water rights could lead to innovative and cooperative settlement agreements between states and Native American tribes. In accordance with recognized Native American law, States could work with tribes in collaborative agreements involving water appropriation. Discussion and collaboration between states and tribes might lead to successful development opportunities, and promote a variety of different solutions for tribes to become involved in economic or beneficial opportunities.<sup>55</sup> Additionally, states could work with tribes to create water-use plans in order to ensure sustainable use of potentially strained sources.<sup>56</sup>

Despite the mixed case precedent, the trend appears to be shifting towards permitting the federal reservation of groundwater. This trend, combined with the sentiment of fairness towards Indian tribes, leads to the conclusion that if the Supreme Court were faced with the issue, it would permit the federal reservation of groundwater sources for Native American reservations. The fruited plains

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<sup>52</sup> *Id.* at 494.

<sup>53</sup> *Id.* at 495.

<sup>54</sup> *Id.* at 498-501.

<sup>55</sup> For a discussion involving a major river adjudication and the options presented for accounting for the rights of Native American tribes also seeking to use the source see generally Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007). See also Anne MacKinnon, *Historic and Future Challenges in Western Water Law: The Case of Wyoming*, 6 WYO. L. REV. 291 (2006) (An analysis of the subsequent impacts of the Wyoming Supreme Court decision limiting Native American reserved rights suggests settlements and various other solutions are more successful than mass adjudications).

<sup>56</sup> For an example of an Arizona settlement with the Papago tribe and their water management plan see PETER W. SLY, *RESERVED WATER RIGHTS: SETTLEMENT MANUAL* 27 (Island Press 1988).

associated with Native American reservations are simply not the reality for states in the arid west, and inhabitants of the inhospitable southwest are deserving of the same rights and opportunities as Native Americans with ample surface water and irrigable land. Tribes populating the arid West have long been forced to survive under the challenges of the environment; however, the confinement to a reservation, especially one lacking a surface water source, and then subsequently denying the tribe the right to appropriate water from a groundwater source is simply unjust. A shift in the nature of Native American reserved water rights both in the method of appropriation and in the ability to reserve groundwater sources benefits tribes in need of water, and sets fair policy towards strained state water sources.

## VI. CONCLUSION

The necessary progression of the *Winters* doctrine is to extend water reservation for Native American tribes to groundwater. Enabling tribes to reserve groundwater priority dated to the creation of their reservation is the next step in ensuring the survival of Native Americans and the preservation of their heritage in an increasingly technologically-driven society. Water is the essential element of a reservation, and permitting groundwater to be utilized by the tribe is the only fitting option considering fairness and protectionism of Native Americans.