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Agua Caliente: A Case Study and Toolkit for Securing Tribal Rights to Clean Groundwater

Dana A. Bass*

For many generations we lived in two worlds; one anchored in the ancient traditions passed down through songs and stories, the other appropriated from strangers who had come among us. While adaptation enabled us to survive, we learned that only through self-determination would we be able to shape our own destiny.¹

In 2013, the Agua Caliente Band of Cahuilla Indians sued the Coachella Valley Water District and Desert Water Agency after nearly two decades of voicing its concerns to the agencies over their unsustainable groundwater management practices. Specifically, the Agua Caliente disapproved of the agencies' overdraft mitigation techniques, which involve artificially replenishing the region's groundwater basin with lower-quality water imported from the Colorado River. In a case of first impression, the Ninth Circuit held that the Agua Caliente had a reserved right to the groundwater attached to its reservation.

The opinion is significant not only for the Agua Caliente, but for all tribes that would like more control over their groundwater resources. Further, the Agua Caliente's fight for clean groundwater, and more broadly, for respect as a sovereign nation, reflects the challenges that many native nations face. For this reason, Part I of this Note closely examines the Agua Caliente's struggle to assert more control over its groundwater resources.

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1. Mildred L. Browne, *Agua Caliente Band of Cahuilla Indians*, AGUA CALIENTE CULTURAL MUSEUM, <https://perma.cc/F99F-BKML> (last visited Dec. 14, 2017). Mildred L. Browne is a member of the Agua Caliente Band of Cahuilla Indians and has been the chairwoman of the Board of Directors of the Agua Caliente Cultural Museum since its formation in 1991.

Given the new political and legal landscape this decision creates, and given the potential opportunities for tribes to assert new rights to groundwater because of this decision, Part II of this Note considers the tools tribes may use to best realize their groundwater management goals. In examining these tools, which include legal assessment and quantification, litigation, negotiated settlements, intergovernmental participation, and community education and activism, the Note emphasizes that parties of any water dispute involving tribes must act in accordance with an expanded environmental justice framework that recognizes the attributes unique to the Native American experience. Ultimately, a study of the Agua Caliente's struggle for clean groundwater shows that perseverance, creativity, and dedication can be the greatest tools for self-determination.

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INTRODUCTION

In March 2017, the Ninth Circuit held that the Agua Caliente Band of Cahuilla Indians (the Agua Caliente or Tribe) had a reserved right to the groundwater attached to its reservation.² In the broadest sense, the Ninth Circuit's opinion is about environmental justice, the recognition of tribal sovereignty, and the right to self-determination. In the narrowest sense, which is

2. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist. (Agua Caliente II)*, 849 F.3d 1262, 1264 (9th Cir.), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

hardly narrow at all, this decision is about which actors can control California's groundwater resources as those resources become increasingly scarce.³

The Ninth Circuit's opinion highlights the power imbalances that have existed between the western states and Native nations throughout history, and the court's decision begins to remedy those imbalances. While the decision marks a milestone for tribes seeking to gain more control over the natural resources to which they have legal entitlement, the court's favorable judgment does not guarantee favorable results. Historically, despite judicial recognition of tribes' water rights, the "promise of new water flowing across Indian lands" in the American West has been largely unfulfilled.⁴ Despite their legal—or "paper"—rights to water, tribes have often had difficulty obtaining the actual—or "wet"—water owed to them, which has prevented them from using that water beneficially, or, in the case of the Agua Caliente, from maintaining the quantity and quality of that water.⁵

As water becomes scarcer, as competing uses strain California's finite water supplies, and as California transitions to a new groundwater management scheme, judicial recognition of tribes' rights to control their groundwater resources may become an increasingly important—and urgent—tribal objective. Yet litigation is not the whole story. Although the Ninth Circuit's opinion omitted this history, the Agua Caliente had tried for nearly two decades to negotiate with the local water agencies about how to best manage their shared groundwater resources before pursuing litigation. This Note examines the Agua Caliente's fight for clean groundwater, and in doing so explores how tribes can best achieve their groundwater management goals. This Note also emphasizes the need for all parties in water disputes involving tribes to act in accordance with an expanded framework of environmental justice principles that encompasses the attributes unique to the Native American experience.

Part I details the dispute that led to the Ninth Circuit's decision and explains the decision's legal and practical implications for groundwater management in the West. Part II then encourages tribes to consider the roles that legal assessment

3. Groundwater makes up 38 to 46 percent of California's water supply and serves as a critical buffer against drought and climate change. *Groundwater*, CAL. DEP'T OF WATER RESOURCES, <https://www.water.ca.gov/Water-Basics/Groundwater> (last visited Dec. 13, 2017).

4. DANIEL MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* 108 (2002).

5. *Id.* ("If the linchpin of the [water] settlement strategy is the delivery of wet water to Indian people, then the success of the settlement policy is yet to be demonstrated."). McCool explains that "wet" water has multiple definitions. For example, some consider water "wet" only when it is deliverable through infrastructure, or only when it remains undisturbed in its natural watercourse. *Id.* at 101. Others consider water "wet" whenever a water right is backed by statute, even if the water itself is not being utilized by the rights-holder. *Id.* at 101–02. This Note simply assumes that water is "wet" whenever tribes can realize their water management goals by leveraging their "paper" rights. *See id.* at 101–02, 108; Daniel McCool, *Negotiating Water Settlements: Ten Common Themes*, in *INDIAN WATER IN THE NEW WEST* 89, 95 (Thomas R. McGuire et al. eds., 1993); *see also* David H. Getches, *Indian Water Rights Conflicts in Perspective*, in *INDIAN WATER IN THE NEW WEST*, *supra*, at 7, 7–8 (highlighting the disconnect between water rights and the ability to access that water).

and quantification, litigation, negotiated settlements, intergovernmental cooperation, and grassroots activism could play in advancing tribal objectives, and how these tools have helped, or could help, the Agua Caliente and other tribes in pursuing their groundwater claims.

I. A CASE STUDY: THE LONG FIGHT OF THE AGUA CALIENTE

The Agua Caliente's fight for clean groundwater is worth focusing on for a few reasons. First, the Tribe's struggle for groundwater rights, and more broadly, for respect as a sovereign nation, reflects the challenges that many native nations face. Second, the Agua Caliente has become a leader in the tribal environmental justice movement, using its strong financial position to fund litigation that many other tribes would have liked to bring, but could not afford. In examining the Agua Caliente's story, this Note highlights the Tribe's achievements and suggests ways in which other tribes may follow the Tribe's example to achieve their goals.

This Part first provides an overview of the Agua Caliente's ties to the Coachella Valley and the history of groundwater management in the region. It then explains the disputes that led the Agua Caliente to litigate, and examines the legal and practical significance of the Agua Caliente's ultimate legal victory in the Ninth Circuit.

A. *The Coachella Valley and the Agua Caliente*

The Coachella Valley (Valley) in Southern California forms part of the Sonoran Desert, and is located near the center of Riverside County just east of the San Jacinto Mountains. The West Valley's economy is propelled by golfing, spas, and resorts,⁶ and also is home to the Agua Caliente.⁷ The East Valley is more agricultural, known for its production of dates, citrus, grapes, and bell peppers.⁸ The Coachella Valley is experiencing a surge of population growth, which is expected to continue.⁹

While many people call the Coachella Valley their home, none have lived there longer than the Agua Caliente and its sister tribes,¹⁰ whose roots in the

6. See COACHELLA VALLEY WATER DIST., COACHELLA VALLEY WATER MANAGEMENT PLAN 2010 UPDATE: FINAL REPORT ES-1 (2012) [hereinafter CVWD, MANAGEMENT PLAN UPDATE], <https://perma.cc/YWY6-JFQE>.

7. The West Valley includes the cities of Palm Springs, Cathedral City, Rancho Mirage, Indian Wells, and Palm Desert, a portion of the City of Indio, and the unincorporated communities of Sun City and Thousand Palms. The East Valley includes the cities of Coachella, Indio, and La Quinta, and the unincorporated communities of Bermuda Dunes, Mecca, Oasis, Thermal, and Vista Santa Rosa.

8. *Agricultural Irrigation and Drainage*, COACHELLA VALLEY WATER DISTRICT, <http://www.cvwd.org/166/Agricultural-Irrigation-Drainage> (last visited Dec. 14, 2017).

9. CVWD, MANAGEMENT PLAN UPDATE, *supra* note 6, at ES-1.

10. Within the Coachella Groundwater Basin and its watershed, the Agua Caliente has the largest reservation, situated on the northern portion of the Basin, while the Torres-Martinez Tribe has the second-largest reservation, situated on the southern portion of the Basin. COACHELLA VALLEY REG'L WATER

Valley date back at least five thousand years.¹¹ Despite five millennia in the Coachella Valley, however, it took only a single generation for the tribes to lose most of their land. Settlers took much of their land during the 1850s for ranching, farming, and missionary work.¹² This process of appropriation continued in the 1860s and 1870s, when the federal government granted land on each side of the Southern Pacific Railroad right-of-way to the railroad company with the hope of encouraging development.¹³ The government's plan worked, in large part due to an ample supply of water from the Coachella Valley Groundwater Basin (Basin), which has been directly responsible for the region's historic and continued economic prosperity.¹⁴

Today, the Agua Caliente's land is a relic of the expanse it once was. Established in 1876 through an executive order by President Ulysses S. Grant, the Agua Caliente's reservation, located in and around Palm Springs, consists of just 32,000 acres, much of it a haphazard checkerboard of plots.¹⁵ Despite its past hardships, the Tribe has shown great resiliency as a sovereign state, and over time has amassed great wealth through the operation of its casinos, spas, golf course, and concert venue enterprises.¹⁶

B. History of Coachella Valley Water Management and the Agua Caliente's Concerns

By the early 1900s, local officials recognized groundwater as a precious and finite resource that needed to be managed if the Coachella Valley region was to prosper. As agriculture in the East Valley caused sharp declines in groundwater levels, securing more water and recharging the Basin soon became a state priority.¹⁷

In 1918, the California legislature created the Coachella Valley Water District (CVWD), an agency formed to oversee the development and use of the

MGMT. GRP., 2014 COACHELLA VALLEY INTEGRATED REGIONAL WATER MANAGEMENT PLAN 2-56 fig.2-14 (2014) [hereinafter CVRWGM, 2014 PLAN], http://www.cvrwmg.org/docs/2014_02_25_CVRWGM-2014CoachellaValleyIRWMPan_Chapters_090247.pdf.

11. *Cultural History*, AGUA CALIENTE BAND OF CAHUILLA INDIANS, <http://www.aguacaliente.org/content/History%20and%20Culture/> (last visited Dec. 13, 2017).

12. Ann Greer, *Building a Future, Preserving a Past*, PALM SPRINGS LIFE (Feb. 27, 2013), <https://www.palmspringslife.com/building-a-future-preserving-a-past/>.

13. Browne, *supra* note 1. Specifically, the federal government granted land belonging to the tribes to the railroad company in a checkerboard pattern, which explains the current organization of tribal reservations. *Id.* at fig.1.

14. See COACHELLA VALLEY WATER DIST., THE STORY OF THE COACHELLA VALLEY WATER DISTRICT 9 (2018), <http://www.cvwd.org/DocumentCenter/View/3909>.

15. Browne, *supra* note 1.

16. See *id.*; see also *Agua Caliente Seeks to Diversify*, ROSE INST. OF STATE & LOCAL GOV'T, CLAREMONT MCKENNA COLLEGE (Apr. 15, 2010), <http://roseinstitute.org/agua-caliente-seeks-to-diversify/>.

17. CVWD, MANAGEMENT PLAN UPDATE, *supra* note 6, at ES-1, ES-2. In the West Valley, water on the surface percolates through the sand and gravel and makes its way into the aquifer. In the East Valley, however, several impervious layers of clay interfere with percolation.

Valley's water. CVWD's first task was to acquire as many water rights in the region as it could to ensure continuous water supply.¹⁸ Its first officers fulfilled this purpose, first by securing every unclaimed water right to the Whitewater River, which served as an important water source for Basin recharge, and later by securing a contract for the construction of the Valley's first water-spreading and recharge facility near Palm Springs, which helped boost the Valley's water store.¹⁹ By the 1930s, CVWD shifted its focus from the Whitewater to the Colorado River. In 1934, CVWD, in coordination with the federal government, made plans to construct the Coachella Branch of the All-American Canal, which would transport water from the Colorado River to the Coachella Valley.²⁰ Construction began in 1938, with the first Colorado River water delivered to East Valley's farmers in 1949.²¹ The impact of the imported water was immediate. By the 1960s, groundwater levels in the "East Valley had returned to their historic high levels."²²

In contrast to the agricultural East Valley's replenished water levels, groundwater levels in the West Valley declined with the advent of urban growth. To address this problem, the California legislature formed the Desert Water Agency (DWA) in 1961 for the purpose of importing State Water Project (SWP) water into the Palm Springs and Desert Hot Springs areas.²³ Later that decade, CVWD and DWA entered into contract with the state of California to obtain 61,200 acre-feet per year of SWP water.²⁴ To avoid the \$150 million cost of constructing an aqueduct to bring the water to the Valley, the agencies instead entered into agreements with the Metropolitan Water District of Southern California (Metropolitan) to exchange the agencies' SWP water for Metropolitan's Colorado River water.²⁵

In 1973, CVWD and DWA began giving Metropolitan their annual SWP water allocations in exchange for Metropolitan's Colorado River water, which was used for the purpose of recharging the West Valley, and which could be delivered via the All-American Canal.²⁶ Yet while the West Valley's groundwater levels stabilized, the East Valley's groundwater levels again declined in the 1980s.²⁷

18. *Id.* at ES-3.

19. *Id.* This facility, the Whitewater River Recharge Facility, increases the supply of groundwater by artificially replenishing, or recharging, the Basin with imported water that percolates into the ground from man-made ponds.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

Given the constant precarious relationship between supply and demand and the Basin's continual state of overdraft,²⁸ which occurs when outflows exceed inflows, CVWD built a series of groundwater recharge facilities to replenish the Basin's dwindling water resources. Four of these facilities operate today, injecting water from the Colorado River into the Basin.²⁹ Figure 2, below, illustrates CVWD's artificial replenishment techniques.

Both the water agencies and local tribes have long recognized the harms of overdraft: it can create water shortages, cause land subsidence and water degradation, and lead to increased extraction costs as wells must be drilled deeper and pumps must be built stronger.³⁰ Thus, CVWD and DWA, the Agua Caliente, and its sister tribes all agree that overdraft must either be prevented by extracting less groundwater or mitigated through artificial replenishment techniques.

The agencies and tribes disagree, however, over whether the agencies are replenishing the Basin in an ethical and sustainable manner. The Agua Caliente and its sister tribes are concerned that the high-quality, low-saline water in the Basin is being replenished with lower-quality water from the Colorado River, which contains high concentrations of total dissolved solids, as well as nitrates, pesticides, and other contaminants including perchlorate.³¹ The Agua Caliente has repeatedly asked the agencies to replenish the Basin with higher-quality water from a different source, or alternatively, to pretreat the Colorado River water before recharge.³²

The heart of the dispute becomes clear when one understands the environmental and spiritual value the Agua Caliente and its sister tribes place on the region's water. Originally, the Agua Caliente called the Palm Springs area "Sec-he," for "boiling water,"³³ and drew its drinking, bathing, and healing water

28. *See id.* at ES-4.

29. *See id.* at ES-3; CVRWMG, 2014 PLAN, *supra* note 10, at 2-8. These recharge facilities are located upgradient in relation to the Agua Caliente reservation, and upgradient to the Torres-Martinez reservation. Both tribes are concerned that replenishing the Basin with Colorado River water is degrading the high quality of the Basin's natural waters.

30. CVWD, MANAGEMENT PLAN UPDATE, *supra* note 6, at ES-4; CVRWMG, 2014 PLAN, *supra* note 10, at 2-10.

31. Letter from John R. Shordike, Alexander & Karshmer, to Tom Levy, Gen. Manager, Coachella Valley Water Dist. 6 (Apr. 5, 2000), <https://perma.cc/MC28-K948>.

32. Both the 2002 and 2010 CVWD plans note that drinking water impacts from the Colorado River recharge are "significant" and that since the 1970s, total dissolved solids in the upper valley aquifer have increased by 278 percent. CVWD, MANAGEMENT PLAN UPDATE, *supra* note 6, at 5-5; COACHELLA VALLEY WATER DIST., COACHELLA VALLEY FINAL WATER MANAGEMENT PLAN: SEPTEMBER 2002, at 3-25-3-26 (2002), <http://www.cvwd.org/ArchiveCenter/ViewFile/Item/358>. Further, in 2009, the U.S. Geological Survey Groundwater Ambient Monitoring and Assessment Program study found perchlorate in twelve of the thirty-five wells tested, with two of those wells testing at a value above the threshold level. DARA A. GOLDRATH ET AL., U.S. GEOLOGICAL SURVEY, GROUND-WATER QUALITY DATA IN THE COACHELLA VALLEY STUDY UNIT, 2007: RESULTS FROM THE CALIFORNIA GAMA PROGRAM 39 tbl.8 (2009). Two of the samples exceeded the California Department of Public Health's maximum contaminant level threshold. *Id.* The samples were collected within the boundaries of the CVWD.

33. *Cultural History*, *supra* note 11.

from the area's natural hot springs.³⁴ Viewed as a connecting point between the earthly realm and the spiritual underworld, inhabited by "nukatem," or ancient sacred beings, the hot springs and their surrounding waters continue to play an integral role in the Agua Caliente's rich ceremonial life.³⁵

The Agua Caliente first raised objections to CVWD's replenishment practices³⁶ in 1996, characterizing the agency's practices in a letter as "inappropriate" "replenishment of the reservoir with inferior water."³⁷ This letter was met with no response. In 2000, the Tribe again wrote to CVWD, protesting the agency's "continued . . . fail[ure] to address Tribal interests and environmental concerns . . . regarding its members' water supply and . . . quality."³⁸ Again, this communication was met with no response. The Tribe reached out to CVWD a third time in 2002, with written comments on the agency's draft water management plan. The Tribe took issue with CVWD's "focus[] on quantity, with little regard for maintaining the current high quality of the groundwater,"³⁹ and proposed alternatives to the agency's replenishment practices, which it claimed would have resulted in rate increases of just one-tenth of one cent per gallon of water used.⁴⁰ The comments also expressed the Tribe's desire to be "more involved as an active partner in protecting groundwater quality in the Valley."⁴¹

According to the Tribe, the agencies also "consistently . . . ignored" requests from both the federal government and the Tribe for access to the agency's groundwater data, and continued to dismiss their concerns over replenishment.⁴² When the Tribe finally received a response to its inquiries, CVWD stated that although the Colorado River water failed to satisfy the EPA's recommended secondary standards for contaminants having the potential to cause skin or tooth discoloration and other aesthetic effects, as a state agency

34. *Id.*

35. *Id.*

36. Aquifers can be replenished, including through artificial recharge. Artificial replenishment can take place via a pipe system, but note that it can also take place by use of man-made percolation ponds. *Infiltration – The Water Cycle*, U.S. GEOLOGICAL SURVEY, <https://water.usgs.gov/edu/water-cycleinfiltration.html> (last modified Dec. 15, 2016), <https://perma.cc/3ZXW-VQ48>).

37. Letter from Bureau of Indian Affairs, U.S. Dep't of Interior, to Tom Levy, Gen. Manager, Coachella Valley Water Dist. 2 (Apr. 9, 1996), <https://perma.cc/MC28-K948>.

38. Letter from John R. Shordike, Alexander & Karshmer, *supra* note 31, at 1.

39. Letter from Art Bunce, Law Offices of Art Bunce, to Steve Robbins, Assistant Gen. Manager, Coachella Valley Water Dist. 1 (Aug. 8, 2002), <https://perma.cc/MC28-K948>.

40. *Id.* at 5–9.

41. *Id.* at 10.

42. Letter from Bureau of Indian Affairs, U.S. Dep't of Interior, to Steve Robbins, Gen. Manager, Coachella Valley Water Dist. 1 (Aug. 2, 2002), <https://perma.cc/MC28-K948>; *see also* Letter from John R. Shordike, Alexander & Karshmer, *supra* note 31, at 1, 3 (requesting groundwater data from CVWD); Letter from Thomas J. Davis, Tribal Planning, Building & Engineering, to Dan Parks, Coachella Valley Water Dist. 1 (Dec. 16, 2003), <https://perma.cc/MC28-K948> (expressing concern over the replacement of high-quality groundwater with lower-quality water from the Colorado River).

CVWD “lack[ed] [the] federal ability” to enforce the federal standard.⁴³ Effectively, CVWD indicated that the standard would be ignored.⁴⁴ In 2009 and 2011, the federal government wrote to CVWD, stating its disappointment in the agency’s lackluster responses to tribal concerns.⁴⁵

In sum, the Agua Caliente tried to engage with CVWD and DWA for nearly twenty years, to no avail. In 2012, as the Tribe made last-ditch efforts to negotiate with the agencies, CVWD and DWA told the Tribe that there was “little to discuss” and that “any attempt to resolve the disagreement through the negotiation process likely would be unproductive.”⁴⁶

Despite the Tribe’s legitimate interests, Jeff Grubbe, Chairman of the Agua Caliente, explained that the water agencies have repeatedly misled the public, characterizing the Tribe as greedy, and also, despite the Tribe’s official status as a “key partner” in the Basin’s water management, treated the Tribe more like a “key customer.”⁴⁷ For its part, the agencies have stressed their view that the Tribe’s request to recharge the Basin with higher-quality water would have a “profound impact . . . on rates and affordability of water in [the] region,” and express wariness towards the Tribe, which they claim has not disclosed its true intentions for the water.⁴⁸

Persuasion having failed, the Tribe filed a lawsuit in 2013 against the two agencies in order to assert its right to the Basin’s groundwater. The Tribe hoped that judicial recognition of a tribal right to groundwater would provide the Agua Caliente with more concrete control over a portion of the Basin’s groundwater resources, which in turn would allow it greater control over the Basin’s groundwater replenishment techniques.

43. AGUA CALIENTE BAND OF CAHUILLA INDIANS, WATER ISSUES 3 (2013), <https://perma.cc/MC28-K948>. CVWD is not obligated to meet the EPA’s recommended water quality standards for states, since they are merely recommendations. See COACHELLA VALLEY WATER DIST., FINAL PROGRAM ENVIRONMENTAL IMPACT REPORT FOR COACHELLA VALLEY WATER MANAGEMENT PLAN AND STATE WATER PROJECT ENTITLEMENT TRANSFER 13-15-12 (2002).

44. See COACHELLA VALLEY WATER DIST., *supra* note 43, at 13-15-12–13-15-13.

45. See Letter from Bureau of Indian Affairs, U.S. Dep’t of Interior, to Steve Robbins, Gen. Manager, Coachella Valley Water Dist. 1–2 (Sept. 28, 2011), <https://perma.cc/MC28-K948>; Letter from Bureau of Indian Affairs, U.S. Dep’t of Interior, to Steve Robbins, Gen. Manager, Coachella Valley Water Dist. 1, 5 (Feb. 26, 2009), <https://perma.cc/MC28-K948>.

46. Letter from Gerald D. Schoaf, Redwine & Sherrill, to Keith M. Harper & Steven C. Moore (Nov. 13, 2012), <https://perma.cc/MC28-K948>; Letter from Roderick E. Walston, Best, Best & Krieger, to Keith M. Harper & Steven C. Moore (Nov. 12, 2012), <https://perma.cc/MC28-K948>.

47. Ian James, *In Court Battle over Groundwater Rights, Tribe’s Leader Demands Water Treatment*, DESERT SUN (Aug. 5, 2017), <http://www.desertsun.com/story/news/environment/2017/08/05/court-battle-over-ground-water-rights-tribes-leader-demands-water-treatment/538548001/>.

48. *Id.* Despite the agencies’ doubts, the Agua Caliente maintains that legal recognition of their right to groundwater will give the Tribe more authority to help manage the region’s groundwater in a sustainable manner.

C. The Lawsuits

The Agua Caliente filed for injunctive and declaratory relief against CVWD and DWA in May 2013, and in 2014, the United States intervened in support of the Tribe, citing its responsibilities under the federal trust doctrine.⁴⁹ Through this lawsuit, the Tribe sought to stop the agencies from continuing their replenishment practices, and asked the court to declare that the Tribe was entitled to groundwater rights.⁵⁰

The parties agreed at the outset of litigation that the district court lawsuit would take place in three phases. In Phase I, the court would determine whether the Agua Caliente had a federally reserved right to groundwater.⁵¹ In Phase II, contingent on the existence of a federally reserved right, the court would determine whether the Agua Caliente owned certain “pore space” (the space between the grains of rock or of the cracks in the rock that can fill with water) beneath its reservation, whether the right to a certain quantity of water encompassed a right to water of a certain quality, and whether any equitable defenses asserted by CVWD and DWA had merit.⁵² Lastly, in Phase III, if necessary, the court would quantify the Agua Caliente’s rights to groundwater and pore space, and craft the appropriate injunctive relief.⁵³

Phase I of the litigation ended in 2015, with the district court holding that the Agua Caliente had a federally reserved right to groundwater under the 1908 Supreme Court precedent *Winters v. United States*.⁵⁴ The water districts appealed to the Ninth Circuit, which affirmed the district court on de novo review.⁵⁵

To reach its conclusion, the Ninth Circuit, like the district court, recognized the following principles from the Supreme Court’s *Winters* decision, which established that tribes had federally recognized rights to *surface* water: first, that the federal government impliedly reserved water rights to tribes at the time of tribal reservation establishment;⁵⁶ second, that those rights were reserved to carry out the purposes for which those lands were set aside;⁵⁷ and third, that those rights would take priority over any rights later perfected under state law.⁵⁸ The

49. The federal trust doctrine, a cornerstone of federal Indian law, imposes obligations on the federal government to protect the interests of Indian tribes. For more information on the federal trust doctrine and its development, see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3) (2012).

50. *Agua Caliente II*, 849 F.3d 1262, 1267 (9th Cir.), *cert. denied*, 138 S. Ct. 468 (2017) (mem.).

51. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist. (Agua Caliente I)*, No. EDCV 13-883-JGB, 2015 U.S. Dist. LEXIS 49998, at *7 (C.D. Cal. Mar. 20, 2015). The Agua Caliente also claimed they had a right to groundwater under the aboriginal rights doctrine, but this claim did not succeed. *Id.* at *33–34.

52. *Id.* at *7.

53. *Id.*

54. *Id.* at *21.

55. *Agua Caliente II*, 849 F.3d at 1265, 1267.

56. *Winters v. United States*, 207 U.S. 564, 576–77 (1908); *Agua Caliente II*, 849 F.3d at 1268.

57. *Winters*, 207 U.S. at 576–77; *Agua Caliente II*, 849 F.3d at 1268.

58. *Winters*, 207 U.S. at 577–78; *Agua Caliente II*, 849 F.3d at 1268.

Ninth Circuit also followed two Supreme Court precedents from the 1970s, *Cappaert v. United States* and *United States v. New Mexico*, to hold that these reserved water rights were limited to the “amount of water necessary to fulfill the purpose of the reservation.”⁵⁹

The Ninth Circuit rejected the agencies’ argument that *New Mexico* stood for the narrow proposition that water could be reserved impliedly only if other sources, at present, could not meet the reservation’s water demands.⁶⁰ The court held instead that the real inquiry needed to focus on the federal government’s “purpose,” which it called “the driving force behind the reserved rights doctrine.”⁶¹ And the court ruled that the federal government’s “purpose” needed to be construed liberally in favor of the tribes.⁶² Thus, although President Grant’s executive order establishing the Agua Caliente reservation was “short in length,” the court found it “broad in purpose,” and concluded that the United States intended to reserve water, “appurtenant to the withdrawn land” for the Tribe.⁶³ The court explained that the creation of these implied rights stemmed from the belief that the United States intended to deal fairly with Native Americans when establishing their reservations, by reserving for them the waters without which their homes would be useless.⁶⁴

The court further held, in an extremely significant part of its opinion, that the reserved rights doctrine encompassed groundwater.⁶⁵ The court noted that *New Mexico* never distinguished surface water from groundwater, and rejected the agencies’ argument that the U.S. government had no authority to reserve groundwater, a resource traditionally controlled exclusively by the states.⁶⁶ Quoting language from *Cappaert*, which held that the “United States [could] protect its water from . . . diversion, whether the diversion [was] of surface or groundwater,” the Ninth Circuit made a logical jump to conclude that if “the United States [could] protect [itself] against groundwater diversions, it follow[ed] that [it could] protect the groundwater itself.”⁶⁷

Finally, the Ninth Circuit considered whether state law and existing tribal water rights or sources could nullify a tribe’s *Winters* rights. The court concluded that they could not, since federal water rights trump state water rights, and since

59. *Agua Caliente II*, 849 F.3d at 1268–69 (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)); *United States v. New Mexico*, 438 U.S. 696, 700, 702 (1978) (quoting *Cappaert*, 426 U.S. at 141) (narrowing *Cappaert* by holding that only the amount of water necessary to fulfill the *primary* purpose of the reservation would be allowed).

60. *Agua Caliente II*, 849 F.3d at 1269.

61. *Id.*

62. *Id.* at 1270.

63. *Id.* at 1265, 1268.

64. *Id.* at 1270.

65. *Id.* at 1270–72.

66. *Id.* at 1269.

67. *Id.* at 1271 (quoting *Cappaert v. United States*, 426 U.S. 128, 143 (1976)).

federal water rights more generally cannot be invalidated by non-use or other appropriations under state law.⁶⁸

In sum, the Ninth Circuit affirmed the district court's decision, stating explicitly that: (1) the United States intended to reserve water to the Agua Caliente at the time of its reservation's creation; (2) the reserved rights doctrine encompassed groundwater; and (3) other considerations, such as state water rights and usage, had no bearing on these rights.⁶⁹

While the water agencies sought certiorari in the United States Supreme Court,⁷⁰ the case was remanded to the district court for Phase II litigation, which would determine whether the Agua Caliente owned pore space, whether the *Winters* right also addressed water quality, and the viability of CVWD and DWA's equitable defenses.⁷¹ On remand, the district court rejected the water agencies' attempt to delay Phase II, pointing out that the case, filed over four years ago, had already been stalled for two years since the court's recognition of the tribe's right to groundwater due to appellate review and that "[d]uring those two years, the water agencies . . . continued to pump groundwater [from the aquifer], [continued to] damage[] the water quality of the aquifer by pumping lower quality Colorado River water, and continued to exclude the [T]ribe from its rightful role in groundwater management."⁷² The Supreme Court has since denied certiorari, leaving in place the Ninth Circuit's ruling.⁷³

D. Significance of the Decisions

The Ninth Circuit's affirmance of the district court's Phase I decision is significant not only locally for the Agua Caliente, but for all tribes in the West and specifically for the future of groundwater management in California.

On a local level, the Phase I victory represented new judicial recognition of the Agua Caliente's sovereignty and right to self-determination. This recognition validated the Tribe's special relationship to the natural environment and will facilitate the Tribe's ability to better protect the interests of its people. Jeff Grubbe, Chairman of the Tribe, explained that the Agua Caliente's deep concern for the groundwater arose from both the Tribe's ancient connection with the land, as well as its modern need to protect a crucial resource. The Agua Caliente had created a "homeland in the Coachella Valley, including housing, schools,

68. *Id.* at 1272.

69. *Id.*

70. See Petition for a Writ of Certiorari at 1, *Agua Caliente II*, 849 F.3d 1262, 1267 (9th Cir. 2017) (No. 15-5896), 2017 WL 2876294, at *1.

71. *Agua Caliente II*, 849 F.3d at 1273.

72. *Agua Caliente Band Moves Forward with Next Phase of Water Case*, INDIANZ (June 8, 2017), <https://www.indianz.com/News/2017/06/08/agua-caliente-band-moves-forward-with-ne.asp> (quoting Order Granting Plaintiff's Motion to Lift Stay and Proceed with Phase II at 6, *Agua Caliente I*, No. EDCV 13-883-JGB (C.D. Cal. June 5, 2017), ECF No. 173).

73. *Agua Caliente II*, 138 S. Ct. 468, 469 (2017) (mem.); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 469, 469 (2017) (mem.).

government offices, and cultural and commercial enterprises,” all of which rely on the groundwater.⁷⁴ The Tribe’s Phase I victory will allow it to “have a seat at the table” with the water agencies in managing their shared groundwater resources.⁷⁵

More broadly, the decision could shift the way groundwater is managed in the West, where the motto “access to water is power” has always rung true.⁷⁶ That over 40 percent of California’s groundwater lies beneath tribal lands,⁷⁷ that thirty-five tribes and five tribal associations signed on as amici curiae for the Tribe,⁷⁸ and that ten western states wrote briefs in support of the agencies⁷⁹ all suggest the significance of *Agua Caliente*’s precedential effect.

The states ultimately fear that the decision will disrupt the “longstanding and settled [state-regulated] appropriation regime” with “new, unaccounted-for federal reserved groundwater rights claims . . . suddenly asserted for the first time” and that “the new claims could push out people who have already built communities or businesses around their water rights.”⁸⁰ Further, the states describe the decision as “literally a watershed opinion [that] wash[es] away the authority and control that states have traditionally exercised over groundwater resources.”⁸¹ In sum, they are afraid that existing groundwater users will lose their established rights, upon which they have relied, or will be subject to newfound restrictions in times of scarcity.⁸² The *Agua Caliente*, on the other hand, asserts that no such things will happen, and that the decision allows tribes, as sovereign nations, to better manage the shared groundwater resources that tribes and states both use.

74. Complaint for Declaratory and Injunctive Relief at 14, *Agua Caliente I*, No. EDCV 13-883-JGB (C.D. Cal. May 14, 2013), ECF No. 1.

75. James, *supra* note 47.

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

77. See Tara Lohan, *California Tribes Push Back on Water Issues*, NEWS DEEPLY: WATER DEEPLY (June 7, 2016), <https://www.newsdeedly.com/water/community/2016/06/07/california-tribes-push-back-on-water-issues>.

78. Brief Amicus Curiae of the S. Cal. Tribal Chairmen’s Assoc. et al. in Support of Appellees and Urging Affirmance, *Agua Caliente II*, 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 764747. Law professors from across the country who specialize in federal Indian law also signed on as amici curiae. Brief of Amici Curiae Law Professors in Support of Plaintiff/Appellee and Affirmance of the District Court’s Order at app. A, *Agua Caliente II*, 849 F.3d 1262 (9th Cir. 2017) (No. 15-55896), 2016 WL 764748.

79. Brief of the States of Nevada et al. as Amicus Curiae in Support of Petitioners, *Agua Caliente II*, 138 S. Ct. 468 (2017) (Nos. 17–40, 17–42), 2017 WL 3485656. In addition to Nevada, the states that signed on to the brief included Arizona, Arkansas, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming.

80. Daniel Rothberg, *How a California Groundwater Case Could Affect Nevada and the West*, NEV. INDEP. (Aug. 21, 2017), <https://thenevadaindependent.com/article/how-a-california-groundwater-case-could-affect-nevada-and-the-west>.

81. *Id.*

82. *See id.*

While it is unclear at this time how much groundwater the Agua Caliente and other tribes are entitled to (quantification of the Agua Caliente's groundwater rights will occur in Phase III of the litigation), the decision creates uncertainty as to how California's new scheme for managing the state's groundwater will play out in the coming years. Under the Sustainable Groundwater Management Act (SGMA), a three-bill package signed into law in 2014,⁸³ 127 medium- and high-priority groundwater basins,⁸⁴ as identified by the state, must be sustainably managed by local agencies to prevent chronically low groundwater levels, seawater intrusion, degraded water quality, land subsidence, and depleted interconnected surface water.⁸⁵ By June 2017, the Act required the formation of groundwater sustainability agencies (GSAs) made up of cities, counties, and water districts.⁸⁶ The Act further requires GSAs to complete groundwater sustainability plans (GSPs) in critically overdrafted basins by 2020,⁸⁷ and to complete plans in all other designated basins by 2022.⁸⁸ Within twenty years of GSP adoption, all medium- and high-priority basins must achieve sustainability.⁸⁹

The state has identified the Coachella Valley Groundwater Basin as a medium-priority basin under SGMA,⁹⁰ and because CVWD and DWA developed a groundwater management plan in 2002 and subsequently updated it, the agencies do not need to create another GSP.⁹¹ While SGMA provides that tribes and other holders of federally reserved rights are not required to participate in SGMA's system,⁹² the Department of Water Resources predicts that GSAs "will be better served to cultivate a voluntary and mutually beneficial working relationship with such a tribe on a government-to-government basis," since "[s]ustainably managed groundwater basins benefit everyone."⁹³

83. CAL. WATER CODE §§ 10720–10737.8 (2017). The following three bills make up SGMA: Assemb. 1739, 2013–14 Leg., Reg. Sess. (Cal. 2014), S. 1319, 2013–14 Leg., Reg. Sess. (Cal. 2014), S. 1168, 2013–14 Leg., Reg. Sess. (Cal. 2014).

84. These basins account for nearly 97 percent of the state's groundwater supply. SUSTAINABLE GROUNDWATER MGMT. TEAM, MEETING NOTES FOR THE APRIL 28, 2016 GROUNDWATER SUSTAINABILITY PROGRAM 5 (2016), <http://water.ca.gov/tribal/docs/2016/Notes%20April%2028%202016%20-%20DWR%20SGMA%20.pdf>.

85. CAL. WATER CODE § 10721(v), (x).

86. *Id.* §§ 10723, 10735.2.

87. *Id.* § 10720.7(a)(1).

88. *Id.* § 10720.7(a)(2).

89. *Id.* § 10727.2(b)(1).

90. CAL. DEP'T OF WATER RES., CASGEM GROUNDWATER BASIN PRIORITIZATION RESULTS SORTED BY PRIORITY 15 (2014), http://www.water.ca.gov/groundwater/casgem/pdfs/lists/SRO_Priority_05262014.pdf.

91. Already, CVWD and DWA make up the GSA. *See* Memorandum of Understanding Regarding Governance of the Indio Sub-Basin Under the Sustainable Groundwater Management Act (2017), <http://www.cvwd.org/DocumentCenter/View/3584>; *see also* CAL. WATER CODE § 10733.6.

92. *See* CAL. WATER CODE § 10720.3(c).

93. CAL. DEP'T OF WATER RES., GUIDANCE DOCUMENT FOR THE SUSTAINABLE MANAGEMENT OF GROUNDWATER: ENGAGEMENT WITH TRIBAL GOVERNMENTS, at attachment 1 (2018).

Anecita Agustinez, the tribal policy advisor for the California Department of Water Resources, emphasized that “you can’t have groundwater management unless you have tribal participation,” since many tribes “live on significant rivers and watersheds.”⁹⁴ She believes that the Tribe’s lawsuit is “very significant,” because it could potentially encourage other tribes in California (there are one hundred federally recognized tribes in California) to file similar claims to groundwater.⁹⁵ Thus, the Ninth Circuit’s decision and the ongoing *Agua Caliente* litigation not only create uncertainty, but also potentially create opportunity for tribes to continue asserting their rights more strongly in the SGMA process.

Given this new political and legal landscape, and the potential opportunities for tribes to assert rights to groundwater in the wake of the *Agua Caliente* decision, the rest of this Note considers the tools tribes may use to best realize their groundwater management goals, while also emphasizing the importance of adopting an environmental justice framework to work within California’s SGMA process and beyond.⁹⁶

II. STRATEGIES TO REALIZE GROUNDWATER RIGHTS THROUGH AN ENVIRONMENTAL JUSTICE FRAMEWORK

Environmental justice analysis “illuminate[s] the social and systemic . . . nature of the problems” faced by poor people and communities of color, as well as the necessity of a clean environment for achieving social and economic justice.⁹⁷ An environmental justice framework is thus essential when discussing the *Agua Caliente* case, since tribal communities have, throughout modern history, suffered disproportionately from environmental burdens and social injustices.⁹⁸

Whereas “traditional” environmental justice focuses primarily on the disproportionate impacts of environmental decision making,⁹⁹ tribal environmental justice is different in at least two respects. The first difference is that tribes are sovereign states. Therefore, any environmentally just outcome involving Native Americans must necessarily be “consistent with the promotion

94. Brett Walton, *California Indian Tribe Pursues Rights to Groundwater*, CIRCLE OF BLUE (July 28, 2015), <http://www.circleofblue.org/2015/world/california-indian-tribe-pursues-rights-to-groundwater/>.

95. *Id.*

96. Part II omits a discussion of legislative advocacy. See Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 STAN. ENVTL. L.J. 151, 162 (1992) (citing DAVID GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 674, 701 (2nd ed. 1986)) (“In view of the wide differences among tribes in the cultural and economic importance of water, varied climates, and competing non-Indian demands, a blanket [legislative] solution to all tribes’ reserved water rights claims would be difficult.”).

97. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY* L.Q. 619, 633–34 (1992).

98. *See id.*

99. *See, e.g.*, ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 123 (3d ed. 2000).

of tribal self-governance.”¹⁰⁰ The second difference is that tribes’ spiritual connections to the landscapes in which they live are often crucial aspects of their self-determination. That is, when claims involve Native Americans, all parties must recognize that there is a special interrelationship between the land, Native American identity, tribal sovereignty, and tribal self-determination.¹⁰¹ Just outcomes for tribal communities will only be realized through an environmental justice framework that accounts for these unique features of tribal communities. Given this understanding, the following subparts explain different strategies that tribes can consider adopting in their struggles to realize their groundwater management goals in light of the *Agua Caliente* decision,¹⁰² with a particular focus on the tools and strategies the *Agua Caliente* has successfully utilized, or could utilize in the future to achieve the just outcomes they desire.

A. Legal Assessment and Quantification

Before a tribe can achieve its groundwater management goals, it must first educate itself about the different avenues available to protect its water resources, and then it must quantify its rights.¹⁰³ Stephen Quesenberry, an Indian law attorney, notes succinctly that,

Until these rights are quantified, they remain vulnerable to the competing water needs of local governments and private entities. Unless tribes assess for themselves their current and potential future demand for water and determine how this demand correlates to their rights to water under federal and state laws, their ability to protect these rights from encroachment by other water users will be severely compromised.¹⁰⁴

Further,

100. Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 *TRANSNAT’L L. & CONTEMP. PROBS.* 343, 347 (2017); see also Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, in *JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS* 161, 163 (Kathryn M. Mutz et al. eds., 2002) (arguing that tribal sovereignty creates unique hurdles to environmental justice); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 *U. COLO. L. REV.* 1625, 1631–32 (“[I]n Indian Country a vision of environmental justice must. . . include the tribal right of self-government.’ [It must involve]: ‘making the law, implementing the law, and resolving disputes.’ [Since] injustice . . . was primarily caused by the federal government’s failure to acknowledge tribes’ sovereign power and by decades of paternalistic federal management policies, which had allowed reservation resources to be exploited without adequate compensation or mitigation.” (footnotes omitted) (quoting Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 *VT. L. REV.* 567, 572 (1999))).

101. See Kronk Warner, *supra* note 100, at 351; Tsosie, *supra* note 100, at 1656–57.

102. For a broad definition of environmental justice that incorporates principles unique to Native Americans, see *DELEGATES TO THE FIRST NAT’L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (EJ)* (1991), <http://www.ejnet.org/ej/principles.pdf>.

103. Stephen V. Quesenberry et al., *Tribal Strategies for Protecting and Preserving Groundwater*, 41 *WM. MITCHELL L. REV.* 431, 434 (2015); see also John B. Weldon, Jr., *Non-Indian Water Users’ Goals: More Is Better, All Is Best*, in *INDIAN WATER IN THE NEW WEST*, *supra* note 5, at 79, 81.

104. Quesenberry et al., *supra* note 103, at 434.

From the tribal perspective, once reserved rights are quantified, tribes can move toward beneficially utilizing their fair share of the waters traversing their reservations. Quantification transforms the *Winters* rights from a “notion” of an entitlement to a contract for a specified amount of water which tribes can use for their benefit or as a tool for negotiation with states and other interested users.¹⁰⁵

Thus, tribes must understand the water use and quality issues affecting their water sources, must understand the technical and legal issues that may arise in those contexts, and must understand the different avenues available to them to protect those sources. To achieve this aim, quantification must be done either through formal litigation or through the more flexible process of negotiated settlements, both of which are described below.

The Agua Caliente, thus far, has done everything in its power to educate itself about its groundwater resources, and should continue doing so, in light of the water agencies’ apathy toward the Agua Caliente’s water quality concerns and reluctance to hand over their water quality data.¹⁰⁶ Further, the Tribe has done everything in its power thus far to quantify its right to groundwater. This necessarily required litigation, since CVWD and DWA refused to take part in negotiations.¹⁰⁷

B. Litigation

Litigation can be an effective way to obtain the legal right to a quantifiable amount of water. Nonetheless, it is important to recognize that litigation, on its own, will rarely get tribes the “wet,” or actual, water they seek, given that litigation provides only a “paper,” or legal, right to water but usually does not provide tribes with the water infrastructure, or funding for infrastructure, that tribes need to achieve their aims. And many scholars agree that litigation has more negative than positive effects.¹⁰⁸ Thus, although litigation may be necessary, it should never be tribes’ exclusive approach, since legal victories, on their own, “do[] not change the political and economic power relations . . . that led to the environmental threat[s] in the first place.”¹⁰⁹

For tribes seeking to vindicate their water rights, litigation carries considerable risks and drawbacks. First, litigation is cost prohibitive¹¹⁰ and can

105. Crass, *supra* note 76, at 118 (footnotes omitted).

106. The Tribe should continue to collect data to support its case, since the Tribe and agencies have very different interpretations of what is “safe” and what is high- and low-quality water. For instance, the agencies, as well as some water engineers, take the stance that pretreatment would be a waste of money, since the aquifer already has natural arsenic and chromium 6 in the water, which must be treated upon extraction. In the words of one water engineer, “why would you wash white clothes before gardening?” Telephone Interview with Glenn Reynolds, CEO, Water Solutions, Inc. (Oct. 3, 2017).

107. See Letter from Gerald D. Schoaf, Redwine & Sherrill, *supra* note 46; Letter from Roderick E. Walston, Best, Best & Krieger, *supra* note 46.

108. See, e.g., McCool, *supra* note 5, at 89.

109. Cole, *supra* note 97, at 649.

110. See Brienza, *supra* note 96, at 166–67.

take years or even decades. This timeframe raises the risk that if the litigation is prolonged, the water at issue may not physically exist anymore, rendering the case moot.¹¹¹ Second, the inherently adversarial nature of litigation can often lead to an “exaggerat[ion] [of] the differences between . . . parties’ objectives,”¹¹² and can foster a mentality of retaliation rather than creative problem solving. Third, judges may not be the best actors to quantify rights, given the complexity of water rights and given how much time and resources may have to be spent addressing judicial issues only peripheral to the tribe’s main interests.¹¹³ Lastly, rulings may create harmful unintended precedent.¹¹⁴

Despite these potential limitations, litigation recognizing tribes’ rights to groundwater will be effective in providing the legal ticket needed to “get a seat at the table,” giving tribes leverage they will need in later water negotiations or agreements when engagement efforts through traditional administrative channels have failed.¹¹⁵ Further, as the *Agua Caliente* litigation has demonstrated, going to court creates the possibility of favorable precedent advancing broader tribal interests.

For instance, though litigation has been costly, it has paid off for the *Agua Caliente*: it gained the tribe the “paper” right to groundwater when administrative channels failed, and won that right for other tribes who could not afford to litigate. Had it not been for the wealth of the *Agua Caliente*, litigation over tribal groundwater rights in the Coachella Valley may never have been possible.¹¹⁶

111. *Id.* at 151, 167 (“You must realize that a tribe through the federal court system can acquire judgment after twenty or thirty years to water that no longer exists. This will not deliver one drop of wet water to our reservation.”) (citing John Narcho, Papago Water Commission, Papago Tribe of Arizona).

112. BONNIE G. COLBY ET AL., *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST* 31 (2005).

113. Brienza, *supra* note 96, at 168–69 (arguing that negotiations allow tribes to move immediately to substantive issues).

114. For example, the *Big Horn* cases from the Wyoming Supreme Court set harmful precedent for Wyoming tribes, as the decisions marked a departure from what had been a well-established trend of courts broadly interpreting a tribe’s *Winters* rights as covering enough water for economically and culturally beneficial, rather than just agriculturally beneficial, uses. In *Big Horn I*, for instance, the court severely restricted the *Winters* rights by imposing state regulation on tribal water and placing a prohibition of the export of water off the reservation. . . . Affirmed by the U.S. Supreme Court, *Big Horn I* essentially sanctioned a trend toward ‘shrinking’ the *Winters* right, thereby placing tribes on notice that adjudication for their legal entitlement to western water was risky at best.

Crass, *supra* note 76, at 116 (footnotes omitted) (citing *In re The General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I)*, 753 P.2d 76, 96 (Wyo. 1988)). Further, “[t]he *Big Horn III* case proved devastating to tribes when the Wyoming Supreme Court limited the *Winters* right further by stating that Indians could not change their future water right without regard to state water law.” Crass, *supra* note 76, at 117 (citing *In re The General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III)*, 835 P.2d 273, 282 (Wyo. 1992)).

115. See COLBY ET AL., *supra* note 112, at 159–60.

116. See Phil Willon, *Richard Milanovich Dies at 69; Agua Caliente Band Chairman*, L.A. TIMES (Mar. 13, 2012), <http://beta.latimes.com/local/obituaries/la-me-richard-milanovich-20120313-story.html>. The *Los Angeles Times* reported that “the *Agua Caliente* tribe poured more than \$49 million into California political campaigns from 2000–10, enough for the Fair Political Practices Commission to label the tribe

Nearby tribes, including the Torres-Martinez Desert Cahuilla Indians, have substantially similar interests in maintaining the health of the Basin's groundwater, but never could have brought this suit for itself due to its prohibitive cost.¹¹⁷ Thus, despite litigation's risks, the Agua Caliente showed that this tool can play an important role in establishing and quantifying tribal rights.

C. Negotiated Settlements

Whether used in conjunction with litigation or as a freestanding tool, negotiated settlements between tribes, state and federal governments, and other water rights holders have helped tribes assert their water rights and obtain tangible results like infrastructure.¹¹⁸ While negotiation is not always successful,¹¹⁹ most scholars agree that negotiated settlements may be a more effective tool than litigation, since they can, "provide an opportunity to build upon [parties'] similarities."¹²⁰

Generally, negotiated settlements take place to quantify water rights, to set terms and timelines that parties can agree to, and to identify funds and development plans for the infrastructure necessary to transform paper rights into wet water.¹²¹ More specifically,

[M]ost [negotiated] settlements ratify agreements and compacts that have been reached by stakeholders; authorize [the] reallocation and delivery of water from existing projects; and authorize [the] construction and funding [of] new water projects In addition to providing access to water, most settlements have resulted in tribal development funds into which the Secretary of the Interior makes scheduled payments for the purpose of economic development and to cover various costs of managing water projects.¹²²

First proposed in 1978 by President Jimmy Carter to resolve water rights disputes outside of the court system, the use of negotiated settlements in lieu of,

as one of the top 10 'wealthy special interests' in the state." *Id.* The vast majority of this money supported ballot measures to expand gambling, the industry that helped the Tribe initially amass its wealth.

117. Telephone Interview with Scott Williams, Attorney, Berkey Williams LLP (Nov. 20, 2017). Williams points out that, at least in part, the Torres-Martinez Desert Cahuilla Indians could not capitalize in the same way the Agua Caliente could, due to their location away from the main interstate highway, I-10. Like the Agua Caliente, the Torres-Martinez has for years been an unsuccessful stakeholder in its dealings with CVWD and DWA, and has similar concerns regarding groundwater quality beneath its reservation due to the upgradient position and proximity of the replenishment facilities in relation to its reservation. See CVRWGMG, 2014 PLAN, *supra* note 10, at 4-37, 5-6, 5-7.

118. Brienza, *supra* note 96, at 167-172 ("Some Indian leaders feel that they should litigate first to have their rights affirmed and quantified, in order that they might sit with greater political power at the head of the bargaining table.").

119. McCool, *supra* note 5, at 100-01.

120. COLBY ET AL., *supra* note 112, at 31.

121. CHARLES V. STERN, CONG. RESEARCH SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 6 (2017).

122. *Id.* at 23.

or in addition to, litigation has many perks: negotiated settlements ensure fewer jurisdictional difficulties, are better able to accommodate the various parties,¹²³ and encourage creative compromises, all at a lower cost and generally on a shorter timeframe.¹²⁴ While the main topic of negotiations has generally been quantification, negotiated settlements can also include provisions that aim to protect and restore the environment.¹²⁵

The negotiation process is often precipitated by strong incentives to settle, such as litigation or administrative decisions threatening parties' interests.¹²⁶ Parties are identified and then must prepare for negotiations, undergoing "detailed technical, legal, economic, and political analyses to establish their position[s]," which often includes hiring attorneys, engineers, and other experts.¹²⁷ Once agreed upon, the settlement must go through public comment, and then, must be officially recognized and approved by the federal government as overseer. The settlement is submitted to Congress, which must then ratify the settlement into law. In instances where Congress does not approve a settlement, however, the Secretary of the Interior, the U.S. Attorney General, or a federal judge may ratify the settlement.¹²⁸

While negotiated settlements can be an attractive option for tribes like the Agua Caliente, tribes must be aware of the process's difficulties. First, like litigation, negotiated settlements can be costly and time-consuming.¹²⁹ Second, they do not guarantee "wet" water. According to Daniel McCool, a political science professor at the University of Utah, "if the linchpin of the settlement strategy is the delivery of wet water to Indian people, then the success of the settlement policy is yet to be demonstrated."¹³⁰ On multiple occasions, for instance, the federal government has failed to keep its promises to finance tribal infrastructure projects, and tribes often lack the resources to litigate for

123. Tribal and non-Indian stakeholders often share mutual goals, including: (1) reliable access to water; (2) effective management of water resources; (3) improved community and intergovernmental relations; (4) economic development, (5) conflict resolution; and (6) an ability to plan for the future. COLBY ET AL., *supra* note 112, at 31.

124. Brienza, *supra* note 96, at 171.

125. STERN, *supra* note 121, at 23; *see, e.g.*, Snake River Water Rights Act of 2004, S. 2605, 108th Cong. § 9(b) (2004) (including a salmon management and habitat restoration program); Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, § 207, 104 Stat. 3294, 3312 (1990) (establishing a fish recovery program under the provisions of the Endangered Species Act, consistent with the tribe's historic reliance on fish).

126. COLBY ET AL., *supra* note 112, at 57.

127. *Id.* at 63.

128. STERN, *supra* note 121, at 9.

129. *See, e.g.*, COLBY ET AL., *supra* note 112, at 146–52 (discussing the Klamath River dispute, which lasted for decades).

130. MCCOOL, *supra* note 4, at 108. McCool examined the total awards of water in sixteen Indian settlements as well as the new diversions resulting from those awards (in acre-feet per year). *See id.* at 107. Only three of the sixteen settlements resulted in any new diversions, with those diversions amounting to much less than the original award. *Id.* In total, tribes saw only 72,000 acre-feet per year in new diversions, or merely 2.5 percent of the 2,814,865 acre-feet per year awarded. *Id.*

enforcement.¹³¹ While the Agua Caliente could likely afford to litigate for enforcement, and also has the means to help fund its desired infrastructure, litigating would, once again, take up a substantial and undesirable amount of time for the Tribe, which aims to urgently protect the quality of its groundwater.

There are also non-legal impediments to successful negotiations, which highlight the necessity of adopting an environmental justice framework. Often, as the Agua Caliente has experienced, parties may be hesitant to compromise or work together due to past disputes,¹³² and may also have different understandings of the resources over which they are negotiating, informed by their different cultures, motivating interests, and communication styles.¹³³

For instance, parties to a negotiation must often overcome stereotypes and prejudice. One helpful strategy to counteract stereotypes is to “bring it [all] out into the open.”¹³⁴ According to one Native American negotiator, parties should “insist on immediate clarification[s] of stereotypes and ask for the other side to point th[em] out, as well.” The negotiator elaborated:

[I]f the Indians are saying, “. . . the white men are just greedy and liars,” and we know that such a statement is not true of everyone, then we ask the other side to point this out. Ask for the Indians to point out the stereotypes as they occur, and for each side to explain historic inhibitions and the reasons for these stereotypes.¹³⁵

Further, since “it is not clear that all parties are beginning with the same ‘mutually held norms or principles,’”¹³⁶ it is important to parse out these

131. Brienza, *supra* note 96, at 187.

132. During negotiations, parties must also be aware of both the possibility of delay tactics and also that “[f]ear of deception . . . during the discussions” can cause “tension, disillusionment, and suspension of belief.” *Id.* at 179. Sometimes, non-Indian parties will “adopt . . . adversarial posture[s] and pronounce a powerful and blatant threat in the midst of the talks,” which can generate real concern. *Id.* at 181; *see also* McCool, *supra* note 5, at 101 (“Given the significance of the issue, it will take a sincere commitment from all parties to preserve the comity and mutual respect that are prerequisites to successful water rights settlements.”).

133. Brienza, *supra* note 96, at 182; *see also* John A. Folk-Williams, *Parties and Permanence: Alternative Dispute Resolution Principles*, in *INDIAN WATER IN THE NEW WEST*, *supra* note 5, at 147, 156 (“The implementation process for Indian water agreements is lengthy and complex, frequently requiring the parties to test each other’s understanding of and commitment to the language and spirit of the settlement. In addition, the parties will continue to be neighbors permanently and will inevitably encounter further differences, often relating to the interpretation of specific settlement provisions.”); Austin Nuñez & Mary G. Wallace, *Solutions or Symbols? An Indian Perspective on Water Settlements*, in *INDIAN WATER IN THE NEW WEST*, *supra* note 5, at 35, 38 (“The values and beliefs that underlie Indian water differ markedly from the values and beliefs that underlie western water law. In the West, water is a commodity to be used for economic and personal gain. Water is viewed primarily as a means for providing a supply of products, whether it be hay, copper, or energy production. The prior appropriation doctrine is designed to maximize water use. In the West, many still view water freely flowing in a stream as ‘wasted water.’ Under this system of water appropriation, entire ecological systems . . . have been sacrificed to meet the demands of human consumption.”).

134. Brienza, *supra* note 96, at 175.

135. *Id.* (quoting Suzan Shown Harjo, Address at the Symposium on Indian Water Policy in a Changing Environment (Nov. 1981), in *INDIAN WATER POLICY IN A CHANGING ENVIRONMENT: PERSPECTIVES ON INDIAN WATER RIGHTS* 137, 140 (Patricia Zell ed., 1982)).

136. *Id.* at 176.

differences for effective communication. For example, the meanings of the word “water” should be clarified, including the meanings to each party in the literal, symbolic, cultural, and metaphysical senses.¹³⁷ In other instances, it may be beneficial to clarify the different assumptions the parties have about silence and responses, since for Native Americans, “a silence that may follow a . . . statement . . . [may,] indeed, [be] part of the statement itself.”¹³⁸

Lastly, it is important for all parties to consider what the conflict is truly about, outside of simple quantification. For many tribes, including the Agua Caliente, federal rights are “the sole compensation for all the land they have lost,” and obstruction to those rights may be considered “betrayal[s]” and “reminder[s] of past colonialism and genocide.”¹³⁹ To deal with these difficulties, parties may consider using a third-party mediator.¹⁴⁰

Once the Agua Caliente’s right to groundwater has been quantified in Phase III of its litigation, the Tribe should participate in a negotiated settlement with the federal government, CVWD, and DWA. The purpose of these negotiations would be not only to flesh out the Tribe’s quantitative water rights, but also to provide for both improving the quality of the groundwater and for funding and planning the infrastructure needed to achieve higher water quality—a facility that would pretreat the Colorado River water, or infrastructure that would import cleaner water for replenishment.¹⁴¹

The negotiation process, once initiated, will likely be long and difficult for the Agua Caliente, whose priorities are different from those of the agencies. Depending on the administration in power, government ratification and federal infrastructure funds may also be difficult to secure. In this sense, the Agua Caliente is at an advantage relative to other tribes, since it is willing to bear some of the cost of a high-quality water solution.¹⁴²

While it is unclear how much a pre-replenishment treatment facility would cost, or in the alternative, the feasibility and cost of bringing higher-quality water to the aquifer via a different water source, CVWD and DWA have claimed that the Tribe’s proposals would raise each of its ratepayers’ rates by at least \$450 annually.¹⁴³ If the agencies are right, then the Agua Caliente’s objectives, no matter how environmentally responsible, might not be politically palatable. If negative health effects from Colorado River replenishment could be established, however, the Agua Caliente’s requests for cleaner water could become more politically feasible.

137. *Id.* at 175.

138. *Id.* at 178.

139. *Id.* at 176.

140. *Id.* at 177–78.

141. *Cf.* Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Pub. L. No. 101-618, § 205, 104 Stat. 3294, 3312 (1990) (establishing a water supply management program for the Truckee River).

142. *See* James, *supra* note 47.

143. COACHELLA VALLEY WATER DIST., COACHELLA VALLEY WATER QUALITY FACT SHEET, <http://www.cvwd.org/DocumentCenter/View/2472>.

D. Intergovernmental Participation

Tribes should also consider engaging with local agencies in settings less formal than litigation proceedings and negotiated settlements. This engagement has not always been easy, as this Note has shown in the case of the Agua Caliente, and attempts at “establishing state-tribe relations” have been riddled with “antagonistic . . . state-tribal jurisdictional battles, [a] lack of understanding about navigating respective government bureaucracies, and a lack of widespread dialogue about the potential benefits of governmental cooperation.”¹⁴⁴ Specifically, states and local agencies may be wary to engage with tribes due to their perceptions that they will lose “jurisdictional control, [their] tax base[,] and land,” while tribes may be wary of forming a relationship given their attenuated history with state and federal governments.¹⁴⁵ This mutual distrust may lead to inflexible opposition to the other party’s stances, or avoidance of communication altogether.¹⁴⁶ In the case of the Agua Caliente, the absence of real communication (at least on the government’s part) precipitated expensive and lengthy litigation.

More and more governments are realizing the importance of cooperation, however. For instance, the National Congress of American Indians, the oldest and largest national organization of American Indian and Alaska Native tribal governments, has acknowledged that “[r]ecent policy trends toward increased devolution of federal programs, and the constrained resources available at all levels of government, highlight the need for and benefits of intergovernmental coordination between tribes and states,” and that “[e]ffective tribal-state relationships are essential to building a better tomorrow for all Americans.”¹⁴⁷ And in California, there has been some progress. Within the Department of Water Resources, the Office of the Tribal Policy Advisor consults with tribal governments about water affairs and provides guidance for how tribes and local agencies should engage with each other in relation to SGMA and more generally.¹⁴⁸

In light of the Tribe’s federally reserved right to groundwater, the Agua Caliente should continue its efforts to work with local governments, however strained the relationships, and should participate as a stakeholder in the SGMA process, despite having no obligation to do so. With its newfound seat at the table from Phase I’s litigation result, the Tribe could take the lead in the SGMA process, thereby helping other tribes better realize their sovereignty.

144. SUSAN JOHNSON ET AL., GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES vii (2d ed., 2009).

145. *Id.* at vii–viii.

146. *Id.* at viii.

147. *State/Tribal Relations*, NAT’L CONGRESS OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations> (last visited Dec. 14, 2017).

148. *Tribal Policy*, CAL. DEP’T OF WATER RESOURCES, <https://www.water.ca.gov/About/Tribal-Policy> (last visited Dec. 13, 2017).

While it seems like it would be in tribes' best interests to participate in the SGMA system, it is not clear whether or not the Agua Caliente has decided to work with CVWD and DWA in the SGMA system, given their turbulent relationship and current litigation.¹⁴⁹

E. Community Education and Activism

Not all tribal strategies to obtain wet water, however, must be as high-level, costly, or time-consuming as litigation, negotiated settlements, and formal avenues of intergovernmental participation. While all of these strategies are forms of activism, activism can also be more inclusive. For instance, in addition to exercising legal muscle, which often involves the participation of the highest-ranking tribal members, other members can band together, including with members of other tribes, to educate the larger community about their cultures and values.

Not only can tribes' educational activities foster a sense of belonging and solidarity within their own communities, but they can also foster greater understanding and support for tribes' objectives within the larger community. This education can take place anywhere and at any time: in the community, in the classroom, on websites, or through a variety of social media platforms like Facebook, Twitter, and YouTube. Environmental attorneys Pearl Kan and William Parkin recently wrote that "the response of ordinary people to environmental justice issues, including their ability to identify with, express outrage toward, and bring national attention to what starts out as a localized environmental justice issue," can be positive for groups experiencing environmental injustices in the form of greater political clout.¹⁵⁰ They offer the events of Flint, Michigan's water contamination and the Dakota Access pipeline protests as examples of how ordinary people can elevate environmental justice issues to create broader political awareness in the nation.¹⁵¹

While most tribal water rights issues will likely not rise to that level of publicity, small local changes in community mindset through local education can have meaningful impacts. Through community engagement and activism, as well as the other strategies discussed, tribes will continue to be heard more loudly and clearly. Already, the Agua Caliente is active in educating its local community. For instance, the Tribe is collaborating with the Palm Springs Unified School District to create an elementary and middle school Native American Studies curriculum to launch in the district in the coming years. According to Chairman

149. While memoranda of understanding are posted between the agencies and other stakeholders on the GSA's website, none has been posted for the Agua Caliente. See *Sustainable Groundwater Management Act*, COACHELLA VALLEY WATER DISTRICT, <http://www.cvwd.org/357/Sustainable-Groundwater-Management-Act> (last visited Apr. 25, 2018) (containing links for electronic versions of memoranda of understanding relating to GSAs).

150. Pearl Kan & William Parkin, *The Struggle Continues: Environmental Justice During Changing Times*, TRENDS, May–June 2017, at 15, 16.

151. *Id.* at 15–16.

Grubbe, the curriculum will likely cover “a wide range of aspects of Native American and Agua Caliente history, culture, traditions, lifestyles, and modern-day government and economics.”¹⁵² Further, the Tribe has plans to build a large-scale cultural center in Palm Springs, which will greatly expand the Agua Caliente Cultural Museum.¹⁵³ All of this should help convey the Tribe’s messages to the larger community, augmenting their calls for environmental justice.

CONCLUSION

The Ninth Circuit’s decision, while a step in the right direction, is not a final victory for tribes. Instead, as can be seen from the Agua Caliente’s long struggle with CVWD and DWA, it is only the continuation of an ongoing fight for tribes to realize their groundwater management goals. In order for tribes, including the Agua Caliente, to get what they ultimately want—sustainable and clean water—they will have to continue thinking carefully about what strategies will benefit them.

Already, the Agua Caliente has taken steps to quantify their rights through litigation, and the Tribe has a strong, active voice in its community. And despite CVWD and DWA’s reluctance to work with the Agua Caliente in the past, intergovernmental participation in the SGMA system, as well as negotiated settlement, will likely become inevitable once the agencies recognize, through court order, the Tribe’s legitimate and rightful claim to a specified amount of groundwater. If these approaches prove unsuccessful, the Tribe could enlist other strategies to achieve its aims, or as much of its aims as is politically feasible.

For instance, if the federal government and local agencies will not agree to pay for a pre-treatment facility or other infrastructure to deliver a different water source to the Valley for aquifer replenishment, the Tribe could ask for more rigorous treatment of the water upon extraction, or more conservation and efficiency measures to prevent overdraft in the first place. While conservation and efficiency measures would likely be amenable to all parties to some extent, more intense extractive treatment of the water would not address the cultural concerns the Tribe has with replenishing the aquifer with Colorado River water.

Further, if the quantity of the Agua Caliente’s water right was large enough, another strategy, albeit one that would likely cause enormous tension with the local agencies, would be to claim that amount of water, set up the infrastructure needed to extract that water, and sell that water back to the agencies at a price sufficient to fund the Tribe’s desired infrastructure (the pre-treatment facility or

152. *News and Events: PSUSD, Agua Caliente Partner to Develop School District-Wide Native American Studies Curriculum*, AGUA CALIENTE BAND OF CAHUILLA INDIANS (Oct. 30, 2017), <http://www.aguacaliente.org/content/News%20and%20Events/?showStoryID=116>.

153. Barrett Newkirk, *Agua Caliente Tribe Announces It Will Build Large Cultural Center and Spa in Downtown Palm Springs*, DESERT SUN (Oct. 7, 2017), <https://www.desertsun.com/story/life/entertainment/events/2017/10/07/agua-caliente-tribe-build-large-cultural-center-and-spa-downtown-palm-springs/736332001/>.

infrastructure delivering water from another source). While this strategy would give the Tribe great economic power, it would also likely damage its reputation and any working relationships with the local agencies, given the Tribe's assurances to the public and the water agencies that it would not take this route.

The Ninth Circuit's decision is sure to have ripple effects across Indian country, and I hope that the Agua Caliente's story and strategies help to inform other tribes seeking to vindicate their groundwater management goals, and their environmental justice goals more generally. Above all, the Agua Caliente's struggle for clean groundwater has shown that perseverance, creativity, and unwavering dedication can be the greatest tools for self-determination.

We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.