

1-1-2016

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### Custom Citation

W. James Tilton, Conference Report, The Winters Doctrine: Is it Just About Quantity?, 19 U. Denv. Water L. Rev. 307 (2016).

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## The Winters Doctrine: Is it Just About Quantity?

## THE *WINTERS* DOCTRINE: IS IT JUST ABOUT QUANTITY?

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### I. INTRODUCTION

Many in the United States take water for granted. It is a commodity that typically comes out of a faucet clean and at a low cost. However, not everyone in the United States has this amenity. In rural areas, residents commonly rely on wells drawing out water that is not pure for consumption. Many Native Americans, residing in their sovereign nations within the United States, lack access to clean water for drinking, bathing, cooking, and other every day uses. There is a question of how these Native Americans can ensure their water is of the quality other United States citizens take for granted.

It seems that only drastic events make water a discussion at the dinner table; events like the Gold King Mine spill, where three million gallons of metal-polluted water spilled forth from an abandoned mine turning the picturesque clear water of the Animas River yellow-orange. Both the Southern Ute Tribe and the Navajo Nation are directly downstream of the polluted Animas River in southern Colorado and across the border in New Mexico. The Animas is a tributary of the San Juan River, which flows through over 200 miles of the Navajo Nation. These tribes rely on the river to grow food, for drinking water, and for their modern municipal and industrial needs. How are Native American tribes to ensure the reserved water they have a right to use is of the quality they expect and need to sustain themselves? This Article discusses the notion that some inherent right to quality may arise from the *Winters* doctrine. It also considers other means for federally recognized tribes to ensure their water is of a useable quality.

### II. WATER QUALITY IN *WINTERS* DOCTRINE

Under *Winters*, the United States Supreme Court held that Congress set aside land for the Native American tribes to live on, and, along with the land, Congress impliedly reserved water. Congress' implied reservation of water for the land, and any other reserved federal land, was based on the amount of water necessary to fulfill the reservation's need when it was established. Presently, courts acknowledge both reserved Native American water for growing crops and water for traditional tribal uses, such as hunting and fishing.

Some legal scholars believe that *Winters* may apply to the quality of water as well. In the *Winters* opinion, Justice McKenna wrote, "in furthering and advancing the civilization and improvement of the Indians. . . it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity *and undeteriorated in quality*," allowing for the tribes to argue an inherent right to both water quantity and water quality.

The Hopi Tribe in northeastern Arizona recently made an argument for

their right to water quality. The United States Court of Appeals for the Federal Circuit ("Court") heard the case. In *Hopi Tribe* the Court held that the United States did not have a fiduciary duty, under *Winters*, to ensure the quality of Native Americans' water supply. The Hopi Tribe brought the action seeking monetary relief because of high arsenic concentrations in their water supplies. Arsenic is a naturally occurring contaminant found in rock and soils. The Hopi Tribe wanted funds to improve their infrastructure and ability to provide clean water to the reservation. The Hopi Tribe argued that the United States had an affirmative duty to ensure water quality on the reservation. They argued this duty existed based on the *Winters* doctrine and the Act of 1958, holding in trust Hopi lands as described in 1882.

The Court denied the Hopi Tribe's argument for two reasons. First, the Hopi Tribe's argument that the United States had a fiduciary duty to act did not persuade the Court. No language in the Act of 1958, or the Executive Order of 1882, gave weight to this argument. Second, the Court took issue with *why* the contaminant was in the water. The Hopi Tribe could not drink their water because of arsenic contamination, but this contamination is natural. Natural erosion, as opposed to third-party actions, resulted in the unsafe amount of arsenic in the reservation water. The Court acknowledged that in a situation where an upstream user affects the water quality, the United States might have a duty to act. The Court held, however, that the United States had no fiduciary responsibility to improve the water quality when the contamination occurred naturally.

The Court did not find a connection between water quality and *Winters* doctrine in *Hopi Tribe*, but nevertheless there is still an argument for an inferred connection between the *Winters* doctrine and water quality standards. The Court's decision in *Hopi Tribe* left room for Native Americans to argue for a right to water quality under *Winters*. The Court's dicta in *Hopi Tribe* seems to assert that the United States does have a duty to act when a third-party diminishes the water quality, as opposed to harmful, naturally occurring minerals. The United States District Court for the District of Arizona ("District Court") found such a duty in *United States v. Gila Valley Irrigation District*. The District Court identified two reasons why the Apache Tribe's water was tainted. First, upstream irrigators diverted the entire flow of the stream. When the irrigators returned the water to the stream it carried with it salts from the irrigated lands. Second, upstream water users pumped groundwater in excess, particularly when flows in the Gila River were low. Groundwater has higher salinity than surface water, so the water coming back into the Gila River at low flow had a higher salinity than what naturally occurs. The upstream users, through these two acts, raised water salinity to an unusable level for the Apache Tribe's salt-sensitive crops. On appeal, the Ninth Circuit affirmed the District Court's decision that: (1) the landowners' diverted water was strictly for agricultural irrigation use; (2) the district court's interpretation of the Globe Equity consent decree of June 29, 1935, Article VIII in all of its parts; and (3) that the "lower valley diverters in Gila Crossing District were not entitled to priority call as against upstream diverters."

The *Gila Valley* case contrasts the *Hopi Tribe* case. When interpreted together, it is likely that upstream users are liable for the polluted water that a

tribe uses downstream. Further, the United States has a duty to ensure water quality only when it has a fiduciary duty to the tribe. However, when natural causes lead to water pollution, the United States has no duty to provide the tribe with clean water, even when a fiduciary duty exists.

### III. ANOTHER MEANS OF ENSURING CLEAN WATER

To be sure, no federal court has stated a clear rule regarding an implied right to water quality under *Winters*. However, Native American tribes have other means of ensuring their water is of the quality necessary for agricultural and other purposes. The Clean Water Act allows for the Environmental Protection Agency to treat tribes as states. A Native American tribe, to be treated as a state, has to show that it has a governing body with governmental powers, that it will perform functions related "to the management and protection of water resources," and that the tribe is capable of such authority. The tribes that qualify gain the benefit of receiving assistance from the United States to restore water quality where contaminated.

Once the United States recognizes the Native American tribe as a state under the Clean Water Act, the tribe is able to set its own standards on water quality. The tribe's water quality standards must be reasonable and enforceable against upstream water users. This power gives federally recognized Native American tribes the ability to set their own enforceable water quality standards, and provides the federal government with assistance in ensuring water quality improvements in the United States.

There are several barriers that prevent tribes from taking advantage of this statute. One barrier is acquiring the necessary capital to sustain a governing body that can handle the responsibilities that come with governmental powers. Further, tribes bring projects under this statute that are likely costly, even with federal assistance. The statute imposes an additional barrier in that only federally recognized tribes may exercise governmental authority over water quality. State governments and the Federal government do not always recognize the same tribes. Therefore, while tribes may seek federal assistance to ensure water quality on their reservations, state-imposed hurdles prevent many tribes from being able to request that assistance.

### IV. CONCLUSION

Despite what some legal scholars believed as far back as twenty years ago, the courts have yet to decide a case that addresses whether *Winters* applies to a right to water quality. Professor Judith Royster has suggested that if the courts find Native American tribes have a right to water quality it will likely be closely tied to the quantity of water. While *Winters* remains open regarding water quality, there are other avenues for federally recognized tribes to ensure their water is of a necessary quality under the Clean Water Act. Those means, however, are not without obstacles.

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