SEEKING A SHARED UNDERSTANDING OF THE HUMAN RIGHT TO WATER: COLLABORATIVE USE AGREEMENTS IN THE UMATILLA AND WALLA WALLA BASINS OF THE PACIFIC NORTHWEST

DENA MARSHALL & JANET NEUMAN†

When stakeholders work collaboratively to make decisions about the usage of shared waterways, they often reach agreement by developing and implementing creative, resilient working arrangements with one another.[1]

Water was created first, life and land were created next, the land promised to take care of all life, all life promised to take care of the land. A long time ago the Indian people also promised to protect the land and have the responsibility to care for her . . . Water is the origin of, and essential, for the survival of all life.[2]

I. INTRODUCTION

Considering two examples from the American Pacific Northwest, this article uses the lens of the human right to water in international customary law to examine factors leading to successful collaborative water use agreements between the Confederated Tribes of the Umatilla Indian Reservation and their river basin partners, including irrigators, federal, state and local entities.[3] In particular, we

† Ms. Marshall is a Principal at Marshall Mediation and Ms. Neuman is a Professor of Law at Lewis & Clark Law School. She is also Of Counsel at Tonkon Torp LLP in Portland, Oregon, where she is a member of the firm's Water Law practice group. We gratefully acknowledge the invaluable contributions of Paula Burgess, Suzy Driver, Daniel Hester, Todd Jarvis, Brent Leonhard, Eric Quaempts, Aaron Skirvin, and Aaron Wolf. We are indebted to them for their thoughtful guidance and review throughout the research and writing process.

1. *See* Aaron Wolf, *Shared Waters: Conflict and Cooperation*, 32 ANN. REV. ENVIRON. RESOUR. 3.1, 3.4–3.5 (2007) ("A systematic search for interstate violence [revealed] one true water war in history, 4500 years ago . . . [and a] much richer record of explicit, legal cooperation with 3600 water-related treaties.").

2. TRIBAL PLANNING OFFICE, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION COMPREHENSIVE PLAN 20, 2010 [hereinafter "COMPREHENSIVE PLAN"], *available at* http://www. umatilla.nsn.us/Comprehensive%20Plan.pdf.

3. The term "collaborative use agreement" does not currently appear in the literature on

examine the successful Umatilla Basin Project and the anticipated Walla Walla Water Exchange Project. We propose that the foundation for reaching such agreements rests on a shared understanding of the human right to water and a shared long-term commitment to developing strong leadership, communication and trust among stakeholders in the basin.

Because we are applying principles of international law to a setting in the western United States, it is worth noting the legal relationship between the tribes, the states, and the federal government with regards to Indian reserved water rights. In general, reservation of water for Indian reservations is based on the Constitution's Property Clause and the Indian Commerce Clause, granting Congress the authority "to regulate Commerce. . .with the Indian Tribes[4] and on the Executive treaty power to enter treaties with foreign nations and Indian tribes "with the advice and consent of the Senate,"[5] or by an executive order made pursuant to a delegation by Congress of authority to the President.[6] In general, tribal lands are held in trust by the federal government and protected from state interference under the supremacy clause.[7] Thus, the relationship between the federal government as trustee for the tribes and tribal governments is complex and sometimes uncertain. By extension, the relationship between separate sovereign states and tribal governments is also complex and sometimes antagonistic. In Oregon, the state has sought to navigate the complexity by adopting a policy of negotiation, and authorizing the director of the Oregon Water Resources Department to negotiate water rights agreements with all federally recognized Indian tribes in Oregon.[8] The department works with Oregon's nine federally recognized tribes on a government-to-government basis to address water issues of mutual concern with an approach based on two principles: (1) the department should endeavor to identify and help protect existing tribal rights to the use of water; and (2) it should

this subject. We use this term to refer to an agreement reached by diverse stakeholders through a collaborative process in order to achieve mutual benefit from the use of a limited resource such as water. See discussion *infra* IV.

4. *See* UNITED STATES CONSTITUTION, art. IV, § 3, cl. 2 and art. I, sect. 8, cl. 3.

5. *Id.* at art. II, § 2, cl. 2.

6. *Id.*

7. U.S. CONST. art. VI, cl. 2 ("The laws of the United States… and all Treaties made….shall be the supreme law of the land; and the judges of every state shall be bound thereby.").

8. RICK BASTASCH, THE OREGON WATER HANDBOOK 141 (2006) (citing OR. REV. STAT. § 539.300–539.350 (2005)).

forge partnerships with tribes to share responsibility for water and watershed management.[9] With this framework in mind, and understanding the international trends discussed in the following sections, we can begin to understand the negotiation environment for collaborative use agreements in the Umatilla and Walla Walla basins.

Part I provides an overview of the human right to water as it has been described in international instruments. Part II correlates the international concept to western Indian water rights. Part III discusses the current trend toward negotiating Indian water agreements and examines several elements of successful agreements. Part IV explores the successes of the Umatilla Basin Project and the anticipated Walla Walla Water Exchange Project, considering the interplay of a human right to water and Indian water rights. Part V presents our conclusions and recommendations for practitioners in the field.

II. RECOGNITION OF A HUMAN RIGHT TO WATER

A. International Instruments Calling for a Human Right to Water

All human beings have an inherent right to have access to water in quantities and of a quality necessary to meet their basic needs. This right shall be protected by law.[10]

Water is the only scarce resource for which there is no substitute, over which there is poorly developed international law, and the need for which is overwhelming, constant, and immediate.[11]

Numerous international instruments acknowledge, either explicitly or impliedly, a human right to water for consumption and sanitation; many expand the concept to include sufficient water for personal, domestic, and subsistence farming uses as well as cultural and spiritual needs; and several, such as the Dublin Principles, contrast the concepts of water as a human right against water as an economic good.[12] Presumably, we can all agree on the human right to

9. *Id.* (citing OREGON WATER RESOURCES DEPARTMENT, REPORT TO GOVERNOR'S OFFICE OF LEGAL COUNSEL, ACTIVITIES OF THE WATER RESOURCES DEPARTMENT UNDER EXECUTIVE ORDER 96–30 (2006)).

10. *See* Peter Gleick, *The Human Right to Water,* 1 WATER POLICY, ISSUE 5, 487, 487–503 (1999) (proposed language for an internationally recognized human right to water), *available at* http://www. pacinst.org/ reports/basic_water_needs/human_right_to_water.pdf.

11. *See* Aaron Wolf, *Criteria for Equitable Allocations: The Heart of International Water Conflict,* 23 NATURAL RESOURCES FORUM, ISSUE 1, 3 (1999).

12. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 582–83 (6th ed. 2003). An international treaty can be binding on a country in two ways, through

clean drinking water, but what about agricultural water or water for recreation, or casino fountains in Las Vegas? There is clearly a hierarchy along the spectrum of water as a right and water as an economic good where each water use falls, depending on the use to which the water will go. Considering the universality of the human experience with water, the debate about acknowledging a human right to water is ongoing and fierce, and is often cast as a conflict between "water as a human right" and "water as an economic good." Most of the proclamations discussed below lack express support from the United States, because this government has argued that supporting these proclamations would infringe United States sovereignty.[13] We propose that even where the United States is reluctant to support an international declaration acknowledging water as a human right, domestic multi-stakeholder collaborative use agreements involving the federal government reflect a broadly held and deeply shared understanding of water as both a human right and an economic good. Two such efforts are reflected in the Umatilla Basin Project and the proposed Walla Walla Basin Project in northeastern Oregon and southeastern Washington, and are discussed below in Section IV.

The Declaration on the Rights of Indigenous Peoples, adopted in 2007 by the United Nations General Assembly,[14] is the most directly applicable source of international law acknowledging the right to water for Native Americans.[15] Among other things, this Declaration

ratification, the most common method, or through customary international practice. Ratification is an affirmative step reflecting a state's consent and intent to be bound. A signature can construe consent, but a more authoritative act is usually required. However, international law does not require a country to explicitly agree to an idea for it to be bound. *See also* U.S. CONST. art. II, § 2. The United States Constitution requires the ratification of treaties by senate and congressional approval to make the treaty binding on U.S. citizens. The Constitution also requires that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* at art. VI.

13. E-mail from Aaron Wolf, Ph.D Dep't of Geosciences, Oregon State Univ., to Dena Marshall (Jan. 20, 2011) (on file with author) (The United States resists the binding obligations of declaring water a human right precisely because it sees the declarations as an infringement of sovereignty. He asks, "If someone in one's country does not have access to water (even in poverty-stricken countries), is the government legally guilty of a human rights violation? Could the government be prosecuted in an international venue?").

14. U.N. Charter art. 10 ("The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.").

15. Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/296, U.N. GAOR,

declared the rights of indigenous people to own, use, develop and control the resources that they have traditionally owned, occupied or used;[16] and to determine and develop priorities and strategies for the development or use of their resources.[17] In UN General Assembly General Comment 15 to the Declaration, the specific rights for indigenous peoples are mirrored and expanded to include all peoples: "[entitling] everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[18] General Comment 15 further describes an obligation on countries to "ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous people."[19] While the Declaration applies to the rights of Native Americans, General Comment 15 expands the scope to include all peoples and specifically balances farming with traditional livelihoods. We propose it is within this overlap of a shared understanding of the human right to water that the Confederated Tribes of the Umatilla Indian Reservation and their river basin partners have worked toward collaborative use agreements in northeastern Oregon.

For decades, the question of a human right to water has been a consistent theme in international discussions. In 1948, on the heels of World War II, the United Nations crafted the Universal Declaration of Human Rights (UDHR), stating "[e]veryone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, [and] housing . . ."[20] The framers of the UDHR likely considered water to be implicitly included as one of the "component elements" contributing to health and well being—as fundamental as air.[21] The following year, in the Geneva Convention, the global community acknowledged the need to provide prisoners of war "with sufficient food and potable water."[22]

107th Sess., U.N. Doc. A/RES/61/296, art. 18 (Sept. 13, 2007). This declaration was adopted in 2007 by the General Assembly. After initially voting against the Declaration, the United States announced its support for it on December 16, 2010. For further discussion on the impact of the Declaration, *see* Indian Law Resource Center Op-Ed, *available at* http://www.indianlaw.org/ content/un-declaration-sets-new-agenda-us-indian-relations.

16. *Id.* at art. 26.

17. *Id.* at art. 32.

18. *Id.* at ¶¶ 2 & 3.

19. *Id* at ¶ 7.

20. Universal Declaration of Human Rights, art. 25(1). G.A. Res. 217 (III) A,U.N. Doc. A/RES/217, art. 25 (Dec. 10, 1948).

21. Gleick, supra note 12.

22. Convention Relative to the Treatment of Prisoners of War, art. 20, Aug. 12, 1949, 75

In 1977, the United Nations hosted the first global water conference in Mar del Plata, Argentina, with the report arising from the conference proclaiming that all people have "the right of access to drinking water."[23] In 1981, the UN General Assembly ratified the Convention on the Elimination of All Forms of Discrimination Against Women, requiring states to ensure that women have the right to "enjoy adequate living conditions, particularly in relation to . . . water supply."[24] The 1989 Convention on the Rights of the Child established the expectation for countries to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water."[25] The General Assembly restated the right to water in the Montreal Charter of 1990, "[g]iven that access to water is a condition for survival, we affirm that all persons have the right to sufficient water supplies for meeting their essential needs."[26]

Two years later, the General Assembly's 1992 Dublin Statement announced "it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price."[27] Agenda 21, arising out of the 1992 United Nations Conference on Environment and Development, established the

U.N.T.S. 287 ("The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water . . .") [hereinafter GENEVA CONVENTION]; Additional Protocol I to the Geneva Convention, art. 54, June 10, 1977, 1125 U.N.T.S. 4. ("It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs . . . drinking water installations and supplies and irrigation works . . . .").

23. *Report Of The United Nations Water Conference, Mar Del Plata*, pmbl., U.N. Doc. No. E/Conf.70/29, U.N. Sales No. E.77.II.A.12 (1977) ("All persons have a right to have access to drinking water.").

24. Convention on the Elimination of All Forms of Discrimination Against Women, art. 14, Sept. 30, 1981, 1249 U.N.T.S. 13, *available at* http://www.hrweb.org/legal/cdw.html.

25. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, Art. 24(2)(c) (requiring States to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water"), *available at* http://www2.ohchr .org/english/law/crc.htm.

26. The Montreal Charter on Drinking and Sanitation, Montreal, Can., June 18–20, 1990, *available at* http://www.sie-isw.org/images/stories/SIE/Le_SIE/charte_montreal.pdf.

27. International Conference On Water and the Environment, Dublin, Ireland, Jan. 26–31 *The Dublin Statement On Water And Sustainable Dev't,* P.4, U.N. Doc. A/CONF.151/PC/112 (1992) (*also stating*: "[m]anaging water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources."); *See also* International Conference on Population And Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, Ch. 2, p. 2, U.N. Doc. A/CONF.171/13/Rev.1 (1994) ("[People] have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.").

objective of ensuring adequate supplies of water of good quality for all populations.[28] Four years later, The Habitat Agenda of 1996 emphasized the promotion of "efficient and rational use of water to meet basic needs."[29] The next year in 1997, the General Assembly directed special attention to providing "sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation."[30] In the same year, the General Assembly adopted the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses ("1997 Convention") outlining the guidelines for agreements made between watercourse states when allocating use of shared waters.[31] Incorporated into the 1997 Convention were human rights principles of equity and sovereignty,[32] the "obligation not to cause significant harm" to other watercourse users,[33] a "general obligation to cooperate"—on the basis of sovereign equality, territorial integrity, mutual benefit and good faith[34]—and an agreement to resolve conflicts over uses with special regard to "the requirements of vital

28. United Nations Conf. On Env't And Dev., Rio de Janiero, Braz., June 3-14, 1992, *Report Of The United Nations Conf. On Env't And Dev*., ¶ 3.8(p), U.N. Doc. A/CONF.151/26/Rev.1, U.N Sales No. E.93.I.8 (1992, *reaffirmed* 2002) ("Governments . . . should establish measures that will directly or indirectly: (p) [p]rovide the poor with access to fresh water and sanitation . . .") [hereinafter AGENDA 21].

29. HABITAT AGENDA GOALS & PRINCIPLES, COMMITMENTS & THE GLOBAL PLAN OF ACTION § 43(j), http://www.unhabitat.org/downloads/docs/1176_6455_The_Habitat_Agenda.pdf. ("Promoting the efficient and rational use of natural resources - including water – to meet basic needs . . .").

30. *See* Convention on the Law of the Non-Navigational of Uses of International Watercourses: Rep. of the 6th Comm. Convening as the Working Group of the Whole, April 11, 1997, U.N.G.A., 51st Sess., Agenda Item 144, U.N. Doc. A/51/869 (1997) [hereinafter, "1997 UN Water Convention"].

31. *See* G.A. res. 51/229, U.N. Doc. A/RES/51/4229 (1997). The 1997 Convention is not yet in force. However, because the International Court of Justice referred to them in the Gabcikovo case, some scholars have argued that the principles are in fact incorporated into common law. *See e.g.,* STEVEN MCCAFFREY THE LAW OF INTERNATIONAL WATERCOURSES NON-NAVIGATIONAL USES, 189 – 197 (Oxford Univ. Press 2001). We support Professor McCaffrey's analysis and argue that the human rights principles of equity, sovereignty, obligation not to do harm, cooperation, and the respect for vital human needs, are integral to the successful implementation and maintenance of all water agreements, domestic and international. Two foundational principles in human rights law are the principles of equity and sovereignty. The human rights principle of equity relates to the right of equal access to opportunities and resources for all people. The principle of sovereignty relates to the right to exercise independent authority over a territory, resource, or person.

32. *See* G.A. Res. 51/229, art. 5, U.N. Doc. A/RES/51/4229 (July 8, 1997).

33. *See id.* at art. 7

34. *See id.* at art. 8

human needs."[35]

The year 2000 ushered in a new era of international goal-setting with eight Millennium Development Goals (MDGs), all of them linked directly or by implication to water, set by the UN to galvanize efforts to meet the needs of the world's poorest citizens by the year 2015.[36] For example, the Right to Development Resolution, passed in February 2000, reaffirms the right to clean water as a fundamental human right, pressing national governments and the international community alike to promote the right.[37] As noted above, the United Nations Committee on Economic, Social, and Cultural Rights in 2002, issued General Comment 15 in 2002, which further describes an obligation on countries to "ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous people."[38]

In 2003, the United Nations deemed the year the "International Year of Freshwater,"[39] encouraging all international actors to increase awareness of freshwater issues and to promote action at the local, national, regional and international levels. Four years later, as noted above, in 2007, the General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which among other things, declared the rights of indigenous people to participate in decision-making matters

35. *See id.* at art. 10. *See also*, MCCAFFREY, *supra* note 33 at 231. The above principles have been played out in the International Court of Justice (ICJ), which has begun to hear an increasing number of disputes between countries regarding transboundary watercourses. Despite the relatively few cases to date, the ICJ decisions confirm certain fundamental principles, in particular those of community of interest in international watercourses, equitable utilization, the no-harm rule, and prior notification concerning potential harm to other states.

36. *See* United Nations Millenium Declaration, G.A. Dec. 55/2, § 3, ¶ 19, U.N. Doc. A/55/L.2 (Sept. 6, 2000).

37. *See* The Right to Development, G.A. Res. 54/175, U.N. GAOR, 54th Sess., ¶ 12(a) U.N. Doc. A/RES/54/175, sect. 12(a) (Feb. 15, 2000), (stating that "in the full realization of the right to development, the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.").

38. Comm. On Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15, U.N. CESCR, 29th Sess., ¶ 7, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter General Comment 15].

39. G.A. Res. 55/196, ¶¶ 1, 4, U.N. Doc. A/RES/55/196 (Feb. 1, 2001) (proclaiming "the year 2003 as the International Year of Freshwater," and "[encouraging] all Member States, the United Nations system and all other actors to take advantage of the Year to increase awareness of the importance of freshwater and to promote action at the local, national, regional and international levels.").

which would affect their rights;[40] to develop their own economic systems and engage freely in traditional economic activities;[41] to maintain and strengthen their spiritual relationship with their traditionally owned or occupied waters;[42] to own, use, develop and control the resources that they have traditionally owned, occupied or used;[43] and to determine and develop priorities and strategies for the development or use of their resources.[44] Shortly afterwards, the UN declared that 2008 was the International Year of Sanitation,[45] setting a goal for the year 2015 of reducing by half the proportion of people who are unable to reach or afford safe drinking water and who do not have access to basic sanitation. At that time, the Assembly also encouraged the full involvement of all relevant stakeholders at all levels, including indigenous people, in the implementation of the International Decade for Action, or, "Water for Life".[46] In the same year, the International Law Commission of the General Assembly adopted the Draft Articles on the Law of Transboundary Aquifers, which set forth principles of sovereignty, equitable and reasonable use, general obligations to cooperate, the encouragement of bilateral and regional agreements, the protection of ecosystems, and guidelines for monitoring and management of water activities.[47]

40. *See* Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, U.N. GAOR, 107th Sess., U.N. Doc. A/RES/61/295, art. 18 (Sept. 13, 2007).

41. *Id.* at art. 20 ¶ 1.

42. *Id.* at art. 25.

43. *See id.* at art. 26.

44. *Id.* at art. 32 ¶ 1.

45. G.A. Res. 61/192, at 2, U.N. Doc. A/RES/61/192 (Feb. 6, 2007) ("Convinced that progress can be achieved through active commitment by all States, including at the national and local levels . . . Decides to declare 2008 the International Year of Sanitation."), *available at* http://www.undemocracy.com/A-RES-61-192.pdf. *See also* PETER GLEICK ET AL., THE WORLD'S WATER 2008 – 2009: BIENNIAL REPORT ON FRESHWATER RESOURCES 58 (2008) ("Because sanitation is as critical as water supply for protecting human health, the World Summit on Sustainable Development in 2002 expanded this target to include improving access to basic sanitation . . . Beyond this explicit mention, adequate and safe water and sanitation are implicitly linked to the achievement of almost every other [Millennium Development Goal].").

46. *See* G.A. Res. 64/198, ¶ 7, U.N Doc. A/RES/64/198 (Feb. 25, 2010) (The General Assembly stresses the "importance of the full involvement of all relevant stakeholders . . . including indigenous people . . . in the implementation of the Decade . . . ."). *See also*, G.A. Res. 58/217, ¶ 5, U.N. Doc. A/RES/58/217 (Feb. 9, 2004) (The General Assembly "[calls upon] the relevant United Nation bodies, specialized agencies, regional commissions and other organizations of the United Nations system to deliver a coordinated response, utilizing existing resources and voluntary funds, to make 'Water for Life' a decade for action").

47. *See* G.A. Res. 63/123, ¶ 2, U.N. Doc. A/RES 63/123 (Jan. 15, 2009) [hereinafter DALTA]. The Columbia River Basin contains international transboundary aquifers because the basin and its aquifers cross the border between the United States and Canada. The Walla

Thus, when the General Assembly voted to declare the human right to water and adopted the Sanitation and Clean Drinking Water Resolution on July 27, 2010 by a vote of 122-0, it was only the most recent of numerous statements calling for recognition of a human right to water.[48] Such calls for action will continue to mount as the international community and domestic lawmakers grow increasingly aware of the devastating impacts of climate change on existing water regimes and developable water resources, and the increasing divide between the global "haves" and "have-nots," exacerbates already serious questions of equity and fundamental human rights.

B. Implications of Recognizing a Human Right to Water

Besides these hortatory declarations by the UN General Assembly, what does it really mean to recognize a human right to water? At the individual level, the institutional recognition of a human right to water underscores the tremendous importance of water to individual survival, basic health, and quality of life.[49] On a national level, adequate water and sanitation are critical to nations' public health, and thus to economic development and full participation in the global community.[50] On a global scale, international law can play an invaluable role in preventing conflicts by establishing conditions that are conducive to cooperation among states sharing freshwater resources.[51] Furthermore, as water markets continue to grow and water privatization becomes a global reality, nations and the communities that comprise them must not only have assurances of clean drinking water and sanitation, but also a reasonable degree of what we call *water sovereignty*—the right to develop and manage

Walla sub-basin contains domestic transboundary aquifers because the basin and some of its aquifers cross the border between Oregon and Washington.

48. *See* Press Release, Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, U.N Press Release GA/10967 (July 26, 2010).

49. *But see* Wolf, *supra* note 13, at 2 (stating that "[t]hese general principles of customary law, codified and progressively developed by advisory bodies and private organizations, are termed "soft law," and are not intended to be legally binding, but can provide evidence of customary law and may help crystallize that law. While it is tempting to look to these principles for clear and binding rules, it is more accurate to think in terms of guidelines for the process of conflict resolution.").

50. *See generally* Janet Neuman, *Chop Wood, Carry Water: Cutting to the Heart of the World's Water Woes,* 23 J. LAND USE & ENVTL L. 203 (2008).

51. *See* Stephen McCaffrey, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 21 (2003).

their own water resources to appropriately meet the needs of their people.[52]

In developed countries such as the United States, universal access to clean drinking water and adequate sanitation has been largely accomplished, delivering with it all the attendant benefits of economic development and self-determination. The United States abstained from voting on the Drinking Water and Sanitation Declaration, but this does not mean that the U.S. can ignore the exhortations of the international community. Even in this country, some populations are less well-served than others, including Indian reservations, where many Indian Tribes do not have full access to the water resources necessary to support needed economic development and self-sufficiency. Thus many Tribes are limited in the full exercise of their water sovereignty.

The remainder of this paper considers examples from the Pacific Northwest, showing how the Confederated Tribes of the Umatilla Indian Reservation have reached toward greater water sovereignty through collaborative water use agreements. We suggest that one of the lessons to be gleaned from these examples is the importance of a shared understanding of the human right to water and a shared long-term commitment to developing strong leadership, communication and trust among stakeholders in the basin as two key components to the agreements' success. These recent agreements have attracted national and international attention, and may establish valuable guidance for implementing the human right to water through basin-wide agreements.[53]

52. A literature search reveals references to the term water sovereignty, as a concept to describe the level of full access and control over water resources. *See generally,* Kent Hughes Butts, *The Strategic Importance of Water,* 27 PARAMETERS 65 (1997); Christopher Kukk & David Deese, *At the Water's Edge: Regional Conflict and Cooperation Over Freshwater,* 1 UCLA J. INT'L. L & FOREIGN AFF. 21 (1996). At the same time, we also recognize that some commentators might prefer the term "water security" to describe a necessary measure of control over water as a vital resource, believing it is inappropriate to use the term "sovereignty" to describe power over a fugitive resource, but we believe the term water sovereignty conveys a more complete sense of self determination than does water security. The United Nations expressed the same idea in a different way in 2002, declaring that "[w]ater should be treated as a social and cultural good and not primarily as an economic good." GENERAL COMMENT 15, *supra* note 40, at ¶ 11.

53. The Walla Walla basin experience parallels the future of water in the Canterbury area of New Zealand where a similar type of local water management proposal is under development, the Canterbury Water Management Strategy (CWMS). In April 2010, representatives of the Walla Walla Pilot Project were invited to present at New Zealand's biannual irrigation industry conference to share Walla Walla basin accomplishments on-the-

C. Applying the International Concept to Indian Water Rights

As discussed above, the human right to water as a component of international law exists principally as emerging customary international law, creating expectations for states parties to protect and promote certain rights within domestic boundaries. The current international discussion of a human right to water turns the attention inward, creating expectations for state parties to protect and promote certain rights within their domestic boundaries.[54] The recent calls for recognizing a domestic right to water have primarily focused on the developing world, where nearly 900 million people lack access to safe drinking water, more than 2.6 billion lack basic sanitation, and waterborne diseases kill millions of people every year—including 1.5 million children under age five.[55] Even in the United States, some places and populations are still at a disadvantage in terms of drinking water and sanitation, Indian reservations being a striking example. The Indian Health Service (IHS) estimates that "[s]afe and adequate water supply and/or waste disposal facilities are lacking in approximately 15% of American Indian and Alaska Native homes, compared to 1% of homes of the U.S. general population."[56] The IHS also reports a backlog of 3,300 sanitation facility construction projects

ground, as well as policy-level success in bringing together stakeholders with a collective commitment to flow from flexibility. *See Partnership Vice Chair Ed Chvatal, Jr. to Present on Local Water Management,* WALLA WALLA WATERSHED MANAGEMENT PARTNERSHIP (Walla Walla, Wash.), Apr. 2010, at 4, *available at* www.wallawallawatershed.org/newsletter/770-april-2010/download [hereinafter WWWMP]; *see also Optimal Water Management Stems From Community Responsibility,* IRRIGATION NEW ZEALAND (Christchurch, N.Z.) Apr. 2010, at 6, *available at* http://www. irrigationnz.co.nz/news-media/in-the-news/optimal-water-management-stems-from-community-responsibility/; *see generally Transboundary Freshwater Dispute Database*, INST. FOR WATER AND WATERSHEDS, OREGON STATE UNIV., http://www.transboundarywaters.orst.edu/database/. (Last Visited April 28, 2011).

54. Indeed, it is internationally recognized that effective transboundary water management must begin at the national level, with the necessary coordination between different ministries and water-related institutions, as well as sufficient financing and political commitment. UN-WATER THEMATIC PAPER, TRANSBOUNDARY WATERS: SHARING BENEFITS, SHARING RESPONSIBILITIES 6 (UN-IDfA ed., Sept. 2008), *available at* http://www.unwater.org/downloads/UNW_TRANSBOUNDARY.pdf.

55. U.N. Human Rights Council, *Report of the IE on the issue of human rights obligations related to access to safe drinking water and sanitation*, U.N. Doc. A/HRC/12/24 (July 1, 2009). The General Assembly noted these figures with alarm at the time of the 2010 Resolution. *See also* U.N. Secretary-General, *Human rights obligations related to access to safe drinking water and sanitation*, U.N. Doc. A/65/254, (Aug. 6, 2010).

56. *HIS Fact Sheet,* INDIAN HEALTH SERVICE, *available at* http://info.ihs.gov/SafeWater.asp. (Last Visited April 25, 2011).

for these populations, at an estimated cost of $2.9 billion.[57] And even when Indian homes are served by a public water system, "[t]he level of noncompliance at public water systems in Indian [C]ountry is both significant and markedly higher than at comparable public water systems outside of Indian [C]ountry."[58] Thus, within the United States, Indian reservations are among the "least-served" and vulnerable populations; in line with developing international law, the federal government should target these communities for improved water equality and empowerment.[59]

More importantly, even where minimal needs for drinking water and wastewater removal are met, many Indian tribes do not have full access to the water resources necessary to support needed economic development and self-sufficiency. Thus, many tribes are limited in the full exercise of their water sovereignty. In the western United States, the issue of Indian water rights further complicates the task of providing water for important cultural, economic and daily activities on Indian reservations. In order to develop water resources, a tribe must first establish its legal right to use the water.

The origins of Indian water rights in the western United States date to the early history of Euro-American settlement. As non-Indian settlers moved west during the 1800s, they encountered the indigenous populations of Native Americans who had lived in the region for centuries. Some tribes followed the seasons across large land areas—fishing, hunting, and gathering food and other material needed to support life. Some tribes engaged in agriculture—with and without irrigation. Whatever the particular customs and means of support for any given tribe, all of them depended to varying degrees on water and aquatic ecosystems for their sustenance, culture, and traditions.

The early non-Indian settlers were miners and farmers who simply moved in among the native populations. But as the newcomers' appetite for land grew voraciously and conflicts with the Indians increased, the official United States government policy

57. *Id.*

58. *Background Paper for Candidate National Enforcement Priority: Indian Country Drinking Water*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (Jan. 2010), *available at* http://www.epa.gov/compliance/resources/publications/data/planning/ priorities /fy2011candidates/fy2011candidateindiandrinkingwater.pdf.

59. Author's note: these statistics reflect a nationwide survey and may not accurately portray the exact conditions of tribal reservations in the Pacific Northwest, and in particular the Umatilla tribes.

became one of removal—moving the Indians to reservations in order to free up more territory for settlement. The government primarily intended that the Indians give up "wandering" to settle down as farmers.[60] One of the challenges of this hoped-for metamorphosis, however, was the aridity of much of the reservation lands. This feature gave rise to the doctrine of Indian reserved water rights, declared by the United States Supreme Court in 1908 in the case of *Winters v. United States*.[61]

Winters involved the Fort Belknap Indian Reservation on the Milk River in Montana, established by an 1888 treaty negotiated and executed by the United States federal executive branch and the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians, and later ratified by Congress. The federal government and the Indians began to irrigate reservation land with water from the Milk River, but several years later, upstream settlers also began diverting the river, preventing the water from reaching the reservation. The United States filed suit on behalf of the tribes to prevent the settlers from interfering with the flow of water to the reservation. The Supreme Court found in favor of the Indians, holding that the treaty establishing the Fort Belknap Reservation reserved not just the land for the Indians' use, but also sufficient water to accomplish the purpose of the reservation. The Court explained its holding as follows:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. . . . The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it

60. *See, e.g.,* Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. Q. NO. 3, 342-50 (Spring 2005) (describing the government's goal of shifting the Indians from hunting and fishing to farming).

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

> valuable or adequate? . . . The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the government did reserve them we have decided, and for a use which would be necessarily continued through years.

Thus was born the doctrine of Indian reserved water rights. All Indian reservations implicitly include the right to the amount of water necessary to fulfill the reservations' purpose. The purpose is determined from the treaty or other instrument establishing the reservation, legal documents which carry the force of federal law under the Supremacy Clause.[62] Most treaties expressed the purpose of transforming the Indians into farmers—whether or not they had farmed before—and the reserved water rights for those purposes are quantified using a standard of "practicably irrigable acreage."[63] In every case, however, the treaties also expressed the goal of providing a permanent homeland for the Indians, and a few Tribes have been successful in obtaining decrees declaring reserved water rights designed and quantified to fulfill that more general purpose.[64]

Although the *Winters* case is generally recognized as the source of Indian water rights that are reserved at the time a reservation is created, Indian water rights can also reach back much further in time, depending on the language of particular treaties. In the Pacific Northwest, where the Indians have depended heavily on fishing, hunting, and gathering for subsistence and cultural purposes for

62. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.").

63. Arizona v. California, 460 U.S. 605 (1983) (affirming the use of the PIA standard to quantify reserved water rights for agricultural purposes). For an insightful discussion of the limitations of the PIA standard*, see* Martha Franks, *The Uses of the Practicably Irrigable Standard in the Quantification of Reserved Water Rights,* 31 NAT. RES. J. 530 (1991).

64. *In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 201 Ariz. 307, 313 (2001) (finding the purpose of the Indian reservation to be creation of a permanent homeland, and outlining the parameters of a quantification formula to fulfill that purpose); *see also* Barbara Cosens, *The Measure of Indian Water Rights: Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RES. J. 836 (2002) ("On November 26, 2001, the Arizona Supreme Court introduced an element of sanity and equity into the reserved water rights arena by concluding that Indian reservations were actually established for the purpose of providing a home for Indians. More startling than the ruling itself is the fact that it took 93 years from the recognition of Indian reserved water rights by the U.S. Supreme Court for a state court to reach this conclusion.").

millennia, the Tribes successfully negotiated in their treaties reservations of rights to fish, hunt, and gather throughout their aboriginal territories.[65] The courts have upheld these treaty provisions and have recognized Indian water rights with priority dates of "time immemorial" for these types of reserved water rights.[66]

Looking at this peculiar western American history of Indian water rights through the lens of international human rights instruments reveals some interesting parallels. For example, the international instruments stress the fundamental importance of water to the ability of indigenous people to use and enjoy their lands and maintain the integrity of their territories and culture. This principle applies as well to Native American tribes, this country's only indigenous population in the lower 48 states. Ensuring the human right to water is especially critical to protecting and promoting the Tribes' sovereignty and self-determination within the "melting pot" of the United States.

Economic survival in arid environments requires that indigenous communities have enough water for both cultural and economic purposes.[67] These needs go beyond minimal water supplies for drinking and sanitation. For example, fishing and hunting remain fundamental activities for many tribes—for subsistence purposes, spiritual and cultural continuity, and economic development—and these pursuits in turn depend on healthy rivers and lakes.[68] Irrigated agriculture is also important on many reservations, mirroring the international emphasis on assuring water for all populations to support food production. As noted, it was a dispute over irrigation water that gave birth to legal recognition for Indian reserved rights more than a century ago.[69]

Although Indian reserved water rights were first recognized in 1908,[70] and several tribes have since sought to quantify and protect

65. *See generally* JOSEPH DUPRIS ET AL, THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER 25–40 (2006).

66. *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905); United States v. Adair, 723 F. 2d 1394 (9th Cir. 1983), *cert den sub nom;* Oregon v. United States, 467 U.S. 1252 (1984).

67. See generally Aaron Wolf, Indigenous Approaches to Water Conflict Negotiations and Implications for International Waters, 5 INT'L NEGOTIATION 2 (2000).

68. David Getches & Sarah B. Van de Wetering, *Protecting Indigenous Rights and Interests in Water, in* IN SEARCH OF SUSTAINABLE WATER MANAGEMENT: INTERNATIONAL LESSONS FROM THE AMERICAN WEST AND BEYOND 102, 111 (Douglas S. Kennedy ed. 2005).

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

70. *Id.* (United States Supreme Court declaring that all Indian reservations carry federal reserved water rights, entitling them to the amount of water necessary to fulfill the purposes of

their reserved rights through adjudication, many such rights remain as unsatisfied claims. In many cases, the Indians' "paper rights" have not yet been officially decreed and quantified, much less reduced to "wet water."[71] In recent decades, as further described in the next section, many Indian Tribes have negotiated settlements of their water rights claims or other collaborative water use agreements in order to move closer to actual development and use of water.[72] Learning from those

the reservation.); *see generally* WATER LAW IN A NUTSHELL, *supra* note 6, at 308–44.

71. The United States Department of Justice acknowledges "establishing tribal water rights often is a crucial step in building the capacity of tribes to develop economically and to build vibrant homelands . . . The Indian Resources Section, working with tribes, has settled or achieved entry of a final decree of such claims in a number of major water rights adjudications. These settlements recognize and protect the water rights and often provide much-needed resources for tribes to develop and use those rights." *Other Major Water Rights Settlements,* U.S. DEP'T OF JUSTICE, http://www.justice.gov/enrd/ 4531.htm. (Last visited April 28, 2011).

72. Since 1978, nineteen Indian water rights settlements have passed congressional review and been enacted. As of this writing, three more are currently pending review in the Senate. *See, e.g.,* Claims Resolution Act of 2010, H.R. 4783, Pub.L. 111-291, 124 Stat. 3064 (2010) (includes Congressional approval of four tribal water rights settlements with the Crow, White Mountain Apache, Aamodt, and Taos Tribes); Ak-Chin Indian Water Rights Settlement Act, Pub.L. 95-328, 92 Stat. 409 (1978), *amended*, Pub.L. 98-530, 98 Stat. 2698 (1984), *amended*, Pub. L. 102-497, 106 Stat. 3258 (1992); Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Enhancement Act of 1999, Pub.L. 106-163, 113 Stat. 1778 (1999); Blackfeet Water Rights Settlement Act of 2010, *pending* (Committee on Indian Affairs hearing held, Jul. 22, 2010); Colorado Ute Indian Water Rights Settlement Act of 1988, Pub.L. 100-585, 102 Stat. 2973 (1988), *amended* Pub.L. 106-554, 114 Stat. 2763A-258; Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub.L. 101-618, 104 Stat. 3289 (1990); Fort Hall Indian Water Rights Act of 1990, Pub.L. 101-602, 104 Stat. 3059 (1990); Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub.L. 101-628, 106 Stat. 4480 (1990), *revised*, S.2464 (2006); Jicarilla Apache Tribe Water Settlement Act of 1992, Pub.L. 102-441, 106 Stat. 2237 (1992); Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub.L. 102-374, 106 Stat. 1186 (1992); Pechanga Band of Luiseno Mission Indians Water Rights Settlement Act, *pending*, S. 2956 (Committee on Indian Affairs. Ordered to be reported with an amendment in the nature of a substitute favorably, Nov. 18, 2010); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub.L. 100-512, 102 Stat. 2549 (1988); San Carlos Apache Tribe Water Rights Settlement Act, Pub.L. 102-575, 106 Stat. 4740 (1992), *tech. amend.,* Pub.L. 103-435, 108 Stat. 4572 (1994); San Luis Rey Indian Water Rights Settlement Act of 1988, Pub.L. 100-675, 102 Stat. 4000 (1988); Seminole Indian Land Claims Settlement Act of 1987, Pub.L. 100-228, 101 Stat. 1556 (1987); Shivwits Band of the Paiute Tribe of Utah Water Rights Settlement Act of 2010, Pub.L. 106-263 (2010); Soboba Band of Luiseno Indians Settlement Act, Pub.L. 110-297, 122 Stat. 2976 (2008); Southern Arizona Water Rights Settlement Act, Pub.L. 97-293, 96 Stat. 1274 (1982), *tech. amend.,* Pub. L. 102-497, 106 Stat. 3256 (1992); Snake River Water Rights Act, S.2605 (2004); Truckee-Carson-Pyramid Lake Water Rights Act, Pub.L. 102-575, 106 Stat. 4650 (1992); Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub.L. 103-434, 108 Stat. 4526 (1994); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub.L. 108-34, 117 Stat. 782 (2004).

efforts, the Confederated Tribes of the Umatilla Indian Reservation are now actively working to settle their Treaty-reserved water rights in the Umatilla and Walla Walla River Basins, pursuing a collaborative approach to achieve balance between consumptive water uses and the protection and restoration of in-stream flows.[73]

The remainder of this paper first compares the general limitations of litigation and the benefits of negotiation as means of reaching workable water use agreements. The paper then examines examples of how the Confederated Tribes of the Umatilla Indian Reservation have reached toward greater water sovereignty through negotiated collaborative water use agreements. We suggest that important lessons to be gleaned from these examples are the importance of a shared fundamental understanding of the human right to water and a shared long-term commitment to developing strong leadership, communication and trust among stakeholders in the basin. These are two key components to an agreement's success. These recent agreements have attracted national and international attention, and provide valuable guidance for implementing the human right to water through basin-wide agreements.

III. REACHING AGREEMENTS ON WATER

A. Limitations of Adjudication

In the McCarran Amendment Era, tribes must resort to extrajudicial means of restoring streamflows necessary to fulfill the purposes of their reservations.[74]

Indian reserved water rights are very powerful and valuable in

73. COMPREHENSIVE PLAN, *supra* note 4, at 94 ("The Confederated Tribes are actively working on the settlement and adjudication of its Treaty-reserved water rights in the Umatilla River Basin . . . Umatilla Basin non-Indian partners and State of Oregon support is solid for moving rapidly forward to a negotiated settlement of the Umatilla Basin water rights . . . Achieving a water rights settlement will necessitate outreach to the Tribal membership to address balancing the need for consumptive water uses and protection and restoration of Umatilla River flows, and other settlement terms…"). In 2008, the Tribal Government signed a settlement agreement with the United States, temporarily ending its involvement in federal district and circuit court challenges against the National Marine Fisheries Service. Known as the "Salmon Accords," the settlement provides BPA and federal funding directly to the Confederated Tribes to implement salmon, lamprey and other fish and watershed recovery and restoration work in Snake and Columbia river watersheds. *Id.*

74. Michael Blumm et. al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled,* 36 ENVTL L. 1157, 1158 (2006).

the abstract, but many western tribes have had difficulty turning this abstract value into tangible gain through litigation. Under the McCarran Amendment, most litigation of tribal water rights occurs in state courts within the context of state general stream adjudications.[75] One example of the difficulties of obtaining meaningful judicial decrees from the state general stream adjudication process can be found in the *Adair* cases of the Klamath Basin in southwestern Oregon. In *Adair II,* the court held that the Klamath Tribe was entitled to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864. . . . unless, of course, no lesser level will supply them with a moderate living."[76] Several years later, in *Adair III*, the court confirmed that the Klamath Tribes' reserved water rights included water necessary to support the Tribes' gathering rights, as well as their hunting, fishing, and trapping rights, and that the priority date for those rights was time immemorial.[77] Despite the favorable judicial outcomes for tribal water rights, the Klamath Tribes have yet to convert the decreed paper rights into actual wet water through the adjudication process.

Another example of the constraints of using adjudication to effectively realize Indian reserved rights is the Big Horn River Adjudication in Wyoming.[78] The Eastern Shoshone and Northern Arapaho Indians live on Wyoming's Wind River Reservation, established by treaty in 1868. In 1977, the state began a general stream adjudication of the rights in the Big Horn Basin, including the rights for the Wind River Reservation.[79] Over several years, the state sought to determine the Indian water rights, and in 1982, a special

75. The McCarran Amendment, 43 U.S.C. 666 (66 Stat. 560; adopted July 10, 1952) waives the sovereign immunity of the United States where there is a suit designed to establish the rights to a river or other source of water, or the administration of such rights, and the United States appears to own or be in the process of acquiring rights to any such water. The effect is to permit State courts to adjudicate Federal water rights claims under State law. *See Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/laws/lawsdigest/watrigh.html. (Last visited April 27, 2011).

76. United States v. Adair (*Adair II*), 723 F.2d at 1414 (9th Cir. 1983).

77. United States v. Adair (*Adair III*), 187 F. Supp. 2d 1273, 1275 (D. Or. 2002), *vacated*, United States v. Braren, 338 F.3d 971 (9th Cir. 2003).

78. *In re* The General Adjudication Of All Rights To Use Water In The Big Horn River Sys. State of Wyoming v. Owl Creek Irrigation Dist., 753 P.2d 76 (1988). The Big Horn case was the first state court quantification of Indian reserved rights.

79. *Id.* at 84.

master recommended to the state court that the reservation's purpose was to establish a permanent homeland for the Indians.[80] In support of that purpose, the master quantified water rights for numerous uses, including irrigation, livestock watering, fish and wildlife, esthetics, domestic, municipal, industrial, and commercial uses.[81] This list of uses represents the full range of water use for economic development and self-determination, just as non-Indian water supplies can also be used for any of these purposes.

The Wyoming courts, however, disagreed with the special master, finding that the Wind River Reservation's purpose was "purely agricultural" and thus the water right should be quantified only for that purpose, using the "practicably irrigable acreage" standard.[82] The court was not swayed by the treaty language establishing a permanent homeland or by the evidence that the formerly nomadic Tribes intended to attempt farming while at the same time continue their traditional fishing and hunting practices.[83] Eventually, the U.S. Supreme Court affirmed the quantification of the Wind River rights on the basis of the practicably irrigable acreage standard.[84] Thus, at the end of several years of litigation, the tribes of the Wind River Reservation "were left with a substantial amount of water for an agricultural purpose that they did not wish to pursue,"[85] but with no water to support fisheries, wildlife habitat, instream flows, and general economic development, all of which were extremely important to them.

Thus it is not surprising that some Tribes have turned away from the courts as a way of enforcing their water rights. The domestic judicial forum does not allow tribes to pursue full water sovereignty, but instead forces them to accept a view of their water rights based on outdated thinking about Native Americans.

B. Benefits of Negotiation

Shared interests along a waterway seem to consistently outweigh water's conflict-inducing characteristics.[86]

80. *Id.* at 85 (referring to special master's report, signed Dec. 15, 1982).
81. *Id.*
82. *Id.* at 96.
83. *See id.* at 99.
84. *See id.* at 101–109.
85. Blumm et al., *supra note* 77, at 1174.
86. Wolf, *supra* note 3, at 3.7.

Increasingly frustrated with the inability of current institutions and legal rules to solve modern problems of water allocation and management in the West, parties are now turning to the negotiation table in an effort to fashion a new approach to resolving water conflicts.[87] The current interest in non-litigated dispute settlement is predicated on the belief that "de-legalizing" the process will lead to similar or better outcomes at lower costs. Negotiation often offers the best means to arrive at solutions to improve water governance and allocation in the West. Increasingly, Indian Tribes are turning to negotiated settlements and other collaborative water use agreements to turn their rights into actual water.[88]

Negotiating water rights settlements can be attractive for many reasons. For instance, parties may save substantial time and money by avoiding litigation—particularly litigation that does not effectively resolve the key issues, as in the Big Horn Adjudication. Furthermore, interested parties can participate directly in the decision-making process, rather than relying on a neutral, "disinterested" third party decision-maker, such as a judge, with the result that parties feel a greater sense of ownership of process and work product.[89] Negotiated solutions that are the work product of all parties allow party representatives to promote acceptance and implementation of the decision with their constituencies. In addition, the benefits of negotiation can extend beyond the particular dispute at issue, as positive and productive interactions between the negotiating parties develop a pattern that can lead to broader and more constructive—rather than destructive—relationships. (Conversely, litigation can damage the relationship even beyond the particular lawsuit). A negotiated approach can include discussions of issues that go beyond strict interpretation and application of parties' legal rights, allowing stakeholders to craft broader and more flexible solutions that satisfy

87. A number of scholars have commented on the trend of turning to negotiation to resolve water disputes. *See*, *e.g.,* Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-wide Problem Solving*, 33 ENVTL. L. 949 (2003).

88. *Id.* at 962 ("Reasons for resort to a collaborative process include: 1) the inadequacy of litigation for resolution of resource allocation problems, 2) ability to use the factual complexity of water supply and demand to expand availability and protection of the water resource, and 3) the need for participation by a broader range of interests."). *See also* Criteria and Procedures for the Participation of Federal Government in Negotiations of Indian Water Rights Claims, 55 FED. REG. 48, 9223-9225 (Mar. 12, 1990) (federal policy favoring negotiated settlements of Indian water rights).

89. Getches & Van de Wetering, *supra* note 70.

more of the parties' underlying interests. In all of these ways, a negotiated agreement is a better vehicle for protecting and enhancing parties' sovereign prerogatives.

When negotiated agreements reach beyond a fixed dispute between limited parties to embrace larger basin-wide water use agreements, even more possibilities open up for creative solutions. A broad collaborative process that involves a consensus-building effort and values public participation can achieve long-lasting water management changes.[90] Such a process can include governmental and nongovernmental entities, as well as local groups and interested individuals who are not parties to the litigation. The scope of a broader process allows governmental agencies and other parties to consider alternatives that could not be accomplished by one entity acting alone.

Including agencies in the negotiation process can also help secure state and federal funding. Such funding has been a key element in the ultimate success of most Indian water rights agreements. It has allowed tribes to secure not only paper water rights but also "wet water" delivered through irrigation systems and pipelines for consumptive uses. Federal funding is usually part of a settlement package, and therefore the agreement reached by various parties in negotiation must be approved and monies appropriated by Congress.[91] At the same time, non-Indians have gained assurance that they can continue using water rights that are junior to tribal water rights. Agency participation ensures that the government will honor its obligations—not just to respect the tribes' minimal legal rights—but also the obligation to help fulfill these rights. Multi-party agreements can emphasize the commonalities among the parties and take advantage of shared resources and expertise. Ultimately, a broad collaborative process that involves a consensus-building effort and values public participation can achieve long-lasting water management changes and can even result in new water governance structures.[92]

90. Christina Simokat, *Comparing Collaborative and Traditional Conflict Management in Environmental Issues*, MEDIATE.COM (July 2008), http://www.mediate.com/articles/simokatC3.cfm#.

91. Getches & Van de Wetering, *supra* note 70, at 111.

92. Daniel McCool. *Indian Water Rights Settlements: The Prerequisites of Successful Negotiation*, 2 POL'Y STUD. J. (Issue 2) 227 (1993) (discussing the elements common to successful negotiations: "a) Alternative Strategies: the [parties] must know the advantages and disadvantages of the alternatives to negotiation; b) Funding for Implementation: the negotiated

C. Elements of Successful Agreements

Fundamental to building lasting agreements is a shared sense of respect and trust among parties, which is often rooted in many years of building relationships, understanding one another, and experiencing challenges together and overcoming them.[93] Successful agreements seem to share certain characteristics; one such list is set out in the footnote below.[94] Many other writers have analyzed a variety of agreements using these and other criteria,[95] and we do not intend to re-plow that ground. Instead, we focus on the importance of a shared understanding of a human right to water as a crucial—albeit implicit—foundational element underlying all of these other criteria.

For instance, Bonnie Colby includes "cultural and community

settlement must secure the funding necessary for implementation; c) Participation: all affected parties participate in the negotiation process; d) Consensual: all negotiations must be voluntary; e) Procedure: all [parties] must agree upon the procedure for both the negotiation and the implementation of the final agreement"); *see also* Simokat, *supra* note 89.

93. Michael J. Clinton, Remarks at the Western States Water Council and the Native American Rights Fund Symposium: Settlement of Indian Reserved Water Rights Claims (Sept. 1–3), *in* 33 NAT. RESOURCES J. 665, 667 (1993).

94. *See, e.g.,* Bonnie G. Colby, *What Makes Water Settlements Successful?, in* TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 171 (John E. Thorson et al., eds., 2006) (examining several water settlements for common characteristics including: well-defined, measurable objectives; clear documentation protocols; fair distribution of costs among parties; positive net benefits; incentive compatibility; cost-effective implementation; financial feasibility; cultural and community sustainability; environmental sustainability; compliance provisions; flexibility; improved problem-solving capacity among stakeholders; enhanced social capital).

95. The authors also surveyed several people who were personally involved in the successful negotiation of water rights settlements and collaborate use agreements in the Pacific Northwest. We posed the question, "What are the key elements of a successful water rights settlement?" and we received the following responses:

> "Successful agreements in natural resources issues depend on the personal elements: to be able to understand an issue from someone else's point of view; "walk the mile in their moccasins"; step back and think big, be interested in the whole needs of the community; bring the heart to the table and be willing to listen; bring in outside resources and context; invest the time it takes to build enough trust, talk enough, bump up against the same wall and finally see a way through."

Telephone Interview with Paula Burgess, former Natural Resources Manager to Governor John Kitzhaber. (Oct. 7, 2010).

"Key elements are time and leadership." Telephone Interview with Aaron Skirvin, Director, Water Resources Department, CTUIR (Sept. 22, 2010).

"Settlements will work so long as all parties acknowledge the right to some of what they are using and some of what they are entitled to." Personal Communication from Suzy Driver, Indian Law Attorney, Dorsay & Easton, (Sept. 28, 2010).

sustainability" and "flexibility" as two elements of successful water settlements. When Indian water rights are involved, a successful agreement must go beyond the strict historical conception of reserved rights to recognize the broad cultural importance of water to Indian Tribes. This means appreciating both traditional cultural connections with water *and* providing water that can be used for community support and economic development in the 21st century and into the future. In addition, there should be a shared understanding of a human right to water. This recognition must go beyond just acknowledging a quantifiable legal water right to encompass the crucial significance of water to tribal culture, tradition, identity, territorial integrity, self-determination, and sovereignty.

Colby also lists "positive net benefits" and "fair distribution of costs among parties" in her criteria for success. Perhaps this is stating the obvious, but these elements require that negotiating parties seek win-win outcomes, rather than win-lose outcomes, which are the inevitable result of litigation. Returning to the Big Horn example, the Wind River Reservation lost—while the non-Indian farmers won—when the Court awarded the tribes only water for agriculture, leaving them unable to determine their own water future.

Finally, Colby's list also includes "improved problem-solving capacity among stakeholders" and "enhanced social capital" as elements of successful agreements. We submit that improved problem-solving capacity and enhanced social capital can be developed over time through building relationships and trust among stakeholders. This may occur through shared communal experiences, challenges, and as one commentator noted, "banging your head into the same wall just enough times."[96] Together, these interactions can play a strong role in enhancing future relationships among negotiating parties.

The next section applies these somewhat abstract contentions to a more concrete discussion in the specific context of the Confederated Tribes of the Umatilla and their negotiated agreements in the Umatilla and Walla Walla River Basins.

96. Brent Leonhard, Assistant General Counsel, Confederated Tribes of the Umatilla Indian Reservation. Telephone interview, November 22, 2010.

IV. LESSONS FROM THE PACIFIC NORTHWEST: OVERLAPPING INTERNATIONAL AND DOMESTIC RIGHTS

To be Indian people, we must have rivers with fish. And we understand that to be farmers, our neighbors must have water to irrigate crops . . . All the work to restore the river has helped to restore jobs, restore salmon, and restore spirituality to the tribe.[97]

In Oregon, as in the international arena, water conflicts are often best resolved when the affected parties sit down together and reach an equitable agreement, focusing on the benefits they derive from the water in question, rather than their competing, specific rights to it. One scholar has noted that the settlement era is "in effect, a second treaty-making era. The first treaty-making era was concerned with land; this one involves water."[98] The current round of negotiations seeks to determine the water necessary for Indians and non-Indians both to live *together* within river basins, and to live *independently* with dignity, purpose, and sovereignty, regardless of the limits of the parties' quantifiable water rights. We suggest that the prospect of successful, durable resolutions to water conflicts will improve to the extent that the parties explicitly acknowledge their shared universal relationship to water, and seek to optimize water sovereignty for all.

In discussing these agreements, we also note a correlation with several principles in international law, contained in the abovementioned 1997 Convention, General Comment 15, Declaration on the Rights of Indigenous Peoples, Draft Articles on the Law of Transboundary Aquifers, and the Right to Water and Sanitation Resolution. From the 1997 Convention, we note a correlation

97. Peg Herring, *Uniting the Umatilla,* OR.'S AGRIC. PROGRESS, Fall 2006 (quoting Alanna Nanegos, member of the Confederated Tribes of the Umatilla Indian Reservation), *available at* http://oregonprogress.oregonstate.edu/fall-2006/uniting-umatilla

98. Daniel McCool, *Indian Water Rights Settlements: Negotiating Tribal Claims to Water*, 107 J. OF CONTEMP. WATER RES. AND EDUC. 28, 31 (1997), *available at* http://www.ucowr.org/ updates/pdf/ V107_A5.pdf.

between principles of these agreements with the Convention's principles of equitable and reasonable utilization and participation in decision-making matters;[99] the obligation not to cause significant harm;[100] and the acknowledgement of a priority for vital human uses of water.[101] From Comment 15, we note a correlation between the recommendations in these agreements with Comment 15 recommendations to supply sufficient and continuous water for personal and domestic uses;[102] assurances for providing safe water;[103] and, to protect indigenous peoples' access to water resources on their ancestral lands.[104]

From the Declaration of the Rights of Indigenous Peoples, we note a correlation between the acknowledgments in these agreements and the Declaration acknowledgments of the rights of indigenous people to participate in decision-making in matters which would affect their rights;[105] to own, use, develop and control the lands, territories and resources that they have traditionally owned, occupied or used;[106] and to determine and develop priorities and strategies for the development or use of their lands, territories and resources.[107] From the Draft Articles on the Law of Transboundary Aquifers, we correlate the emphasis on regional agreements, regular exchange of

99. *See* 1997 UN WATER CONVENTION, *supra* note 32, at art. 5.

100. *Id.* at art. 7.

101. *See id.* at art. 10.

102. GENERAL COMMENT 15, *supra* note 40, at ¶ 12(a) (the international community acknowledges the need for sufficient and continuous availability of clean water for domestic and personal uses). As discussed above, this value is reflected in the 1855 Treaty agreements of the Walla Walla, Umatilla, Cayuse and Nez Perce, establishing the reservations and reserving the off-reservation right to "fish and hunt and all usual and accustomed places." The need for sufficient availability of water is also reflected in the 1908 U.S. Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908), entitling tribes to as much water as they need to fulfill the purposes of their reservations. While the *Winters* decision has been interpreted to establish the reserved rights doctrine, we also note Justice McKenna's more specific comments describing the federal government's claim on behalf of the tribes acknowledging "it is essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and un-deteriorated in quality." *Id.* at 564.

103. GENERAL COMMENT 15, *supra* note 40, at ¶ 12(b).

104. *Id.* at ¶ 16(d). Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous people to design, deliver and control their access to water. Under the Convention, States parties have the obligation to accord sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation.

105. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 17, at art. 18.

106. *Id.* at art. 26.

107. *Id.* at art. 32.

data and information, protection and preservation of the ecosystem, monitoring and management.[108] And from the Human Right to Water and Sanitation Resolution, we note a correlation with the Resolution that governments should provide financial resources, capacity-building and technology transfer.[109] These correlations are important to consider because they illustrate a unique parallel between the local efforts of basin stakeholders in a relatively small corner of the world in Oregon and Washington, and the international efforts of the world's national governments to reach agreement on the collaborative use of limited water resources. More specifically, the correlations illustrate an alignment of purpose—where stakeholders come together over water, they can often reach creative, collaborative, durable solutions that embody fundamental human rights principles.

A. The Confederated Tribes of the Umatilla Indian Reservation: Water Sovereignty and First Foods

Prior to Euro-American settlement, the Umatilla, Cayuse, and Walla Walla Indians occupied a vast territory of about 6.4 million acres of land in what is now northeastern Oregon and southeastern Washington. As conflicts with incoming white settlers mounted during the 1800s, the pressure on these Tribes increased to forfeit their land, just as it did across the West. In the case of the Umatilla Indian Reservation, such settler-tribal conflict was particularly intense where the Oregon Trail descended out of the Blue Mountains to the Umatilla River, depositing settlers into the middle of the Umatilla Indian territory.[110] In 1855, the three Tribes entered into a treaty with the United States whereby they relinquished most of their ancestral lands in exchange for a reservation along the upper Umatilla River and reserved rights for continued hunting, fishing and gathering at their traditional and accustomed places beyond the reservation boundary.[111]

108. *See* DALTA, *supra* note 49, at arts. 8, 9, 12, 13, 14.

109. Water and Sanitation Resolution, *supra* note 47, at ¶ 2.

110. E-mail from Daniel Hester, General Counsel, Confederated Tribes of the Umatilla Indian Reservation, to author (January 25, 2011) (on file with author) (calling this area of conflict "ground zero" for the Umatilla Reservation).

111. Emotionally charged water rights negotiations continue today, but now they are carried out in conference rooms and congressional hallways. For a rich historical perspective on the treaty negotiations, *see generally* JOSEPH DUPRIS, THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER 25–40 (2006) (Recounting treaty negotiations at the Walla Walla Council in June 1855):

During the next several decades, the settlers developed irrigated agriculture in the Umatilla Basin downstream from the Reservation, with the aid of federally funded dams and reclamation projects. The same story played out on the other side of the Columbia River in the Tribes' ceded lands along the Walla Walla River, in what is now Washington State. While non-Indian agriculture thrived, the fisheries and the Tribes' livelihood were decimated. Dams built on the Umatilla and Walla Walla blocked fish passage, and irrigation diversions dried up the rivers, depriving the fish of migration and spawning habitat.[112]

The tragedy of the loss of the rivers was not just about fish, however. The Confederated Tribes of the Umatilla Reservation view water as a fundamental component of their relationship to their land, and thus to their sovereignty. This view is reflected in the Tribes' 2010 Comprehensive Plan:

> The Walla Walla Treaty Council in June of 1855 was one of the most flamboyant, best attended (with more than 5,000 Indians from a variety of tribes, mostly Nez Perce, Yakama, Walla Walla, Cayuse, Palouse, and Umatilla), and best recorded treaty councils in US history . . . At Walla Walla the Indians displayed a suite of diplomatic skills – strategic silences, bluffs, obfuscation, delay, threats, and eloquence – to stem the advantages that favored US negotiators, I.I. Stevens and his counterpart from Oregon, General Joel Palmer . . . Obstacles to successful communication were formidable. Audiences exceeded 1,000. Speeches were in the open air, with interruptions and long pauses. After each sentence, the interpreter spoke to two Indians who shouted forth the message to others who might comprehend it – one in the Nez Perce, the other in the Walla Walla language . . .
>
> Objections were fierce and forceful. Walla Walla Chief Peopeo Moxmox, 'Yellow Bird' to his people and 'Yellow Serpent' to the wary whites, tore into the Stevens-Palmer arguments. He spoke of deception ('You have spoken in a roundabout way. Speak straight.'), reputation ('I know the value of your speech from having experienced the same in California, having seen treaties there.'), religion ('Why should you fear to speak on Sunday?'), pomposity ('Now how are we here as a post?'). A few days later he would protest being addressed 'as if I were a feather.' He spoke of environmental ethics ('Goods and Earth are not equal; goods are for using on the earth. I do not know where they have given lands for goods'). Events were not going Stevens' and Palmer's way . . .
>
> Stevens and Palmer were reeling under the spirited verbal attack of the Walla Walla, Cayuse and Umatilla. Parts of this done deal were unraveling . . . By the end of the following week, the Stevens-Palmer two reservation plan had become a three-reservation plan. They made hasty provisions for a Umatilla Reservation (that would include the Cayuse and Walla Walla) as well as one for the Yakama and one for the Nez Perce."

112. In addition to irrigated agriculture, a gristmill operated by W.S. Byers and later by his wife, Sophie, also resulted in the de-watering of the Umatilla River just above the City of Pendleton. This grist mill led to the 1917 Oregon Supreme Court decision *Byers v. We-Wa-Ne*, 86 Or. 617, 169 P. 121 (1917).

> The Tribes will always exercise our national sovereignty and preserve our traditional cultural ways in harmonious existence with our homeland . . . We will live in balance with the land and use our natural resources only when traditional and cultural teachings dictate use . . . Water is the giver of life, food, and the spirit.[113]

Water is woven into the fabric of Tribal spirituality, and it is also a pillar of tribal economy: "Economic assets of the tribes include: Clean, cold, fast flowing water for healthy salmon, lamprey, mussels and other water life."[114] The inherent cultural significance of water to the Tribes is further demonstrated by the doctrine of "First Foods." The Tribes express their relationship to natural resources with the First Foods hierarchy, comprising water, salmon, deer, roots (cous), and berries. The First Foods framework is considered part of the "Creator's Law" and is a pillar of the Tribes' cultural and spiritual beliefs, establishing the relationships between water, ecosystems, and humans and defining the order in which the earth and its inhabitants care for each other. A representative of the Tribes describes the power of First Foods as follows:

> In Creation stories and belief, it's the order in which the foods promised to take care of Indian people. When the Creator asked, 'Who will take care of the people?' Salmon said 'I will' and the other fish lined up behind him, then the deer made a promise, and so on. Ecology always requires some reciprocity. In the case of the First Foods, that reciprocity is manifest in respect for the 'Creator's law,' which requires recognition of the First Foods through respectful celebration, then to go out and harvest, take care of, and share the foods after their respective feasts. In fact, when people serve at traditional meals, they are often told: 'Be careful, you're carrying a law.'[115]

113. COMPREHENSIVE PLAN, *supra* note 4, at 42.

114. *Id.* at 58.

115. *First Foods First,* CONFEDERATED UMATILLA JOURNAL 22 (Mar. 2008) (quoting Eric Quaempts, Director of Department of Natural Resources, Confederated Tribes of the Umatilla Indian Reservation).

The use and knowledge of First Foods was part of the tribal culture long before European contact, and its reach extended far beyond the reservation boundaries. For this reason, all of the First Foods are explicitly addressed in the Treaty, which guaranteed to the Cayuse, Umatilla, and Walla Walla Indians water rights as well as rights to fish, hunt, gather roots and berries, and graze livestock. Significantly, these rights were not limited to the Reservation, but extended to the 6.4 million acres of Treaty ceded land within the Columbia River Basin that had comprised the aboriginal territory of the Tribes.[116]

> Our sovereignty also extends to Tribal off-reservation rights in our prehistoric domain which is a vast region including the Columbia Basin, the Blue Mountains, and beyond. Off-reservation rights attach to our usual and accustomed fishing grounds and stations; burial sites; other sacred sites, to lands where tribal members hunt, gather roots and berries and pasture stock; to usual and accustomed trade routes and commerce . . . .[117]

More recently, and in an effort to educate tribal members and their non-Indian river basin partners about the interconnectedness of First Foods and river basin survival, the Confederated Tribes of the Umatilla Indian Reservation have developed natural resources practices and policies around First Foods. The Tribes' Comprehensive Plan incorporates the First Foods Mission:

> To protect, restore, and enhance the First Foods—water, salmon, deer, cous, and huckleberry—for the perpetual cultural, economic, and sovereign benefit of the Confederated Tribes of the Umatilla Indian Reservation. We will accomplish this utilizing traditional, ecological and cultural knowledge and science to inform population and habitat management goals and actions, and natural resource policies and regulatory mechanisms. . . . Acknowledging the importance of First Foods to the community and ensuring their sustainability are critical to the Tribe's cultural continuity in an ever-changing world.[118]

Recently, through a series of collaborative presentations,

116. *See* Treaty of 1855, *supra* note 58.

117. COMPREHENSIVE PLAN, *supra* note 4, at 43.

118. *Id.* at 80–81.

information exchange, and cultural and educational outreach activities, the Tribes have begun to coordinate with other basin stakeholders such as state and federal agencies, watershed councils, irrigators, and other Basin tribes to support the First Foods. These activities are intended to build relationships, trust, and a shared understanding of water and the First Foods approach. In effect, these efforts strengthen the critical foundation of a shared understanding of the human right to water, thus creating the conditions for successful collaborative use agreements.

B. Through First Foods, Moving Toward a Shared Understanding

A critical step toward reaching collaborative use agreements over water involves a shared personal experience among stakeholders that creates a transformation in the parties' relationships. Such an experience may be anything, from a shared field trip along a watercourse, to a communal meal, to a spiritual journey. Here, one of the authors was privileged to participate in a traditional First Foods ceremonial meal, conducted on November 15, 2010, in Pendleton, Oregon; here she shares her personal experience at the ceremony.[119] The meal was conducted in honor of the Oregon Watershed Enhancement Board Annual Meeting, to welcome conferees to the Tribes' land, and to share the cultural and spiritual experience of First Foods. On the first day of the conference, Eric Quaempts, Director of the Confederated Tribes' Department of Natural Resources, gave a lecture on First Foods. He explained their importance to tribal culture and history, the 1855 tribal treaty, tribal natural resources policies, and tribal negotiation and outreach principles in the region. In the evening, over three hundred conferees and tribal members arrived at the longhouse on the Umatilla Indian Reservation to join each other in a carefully planned meal involving ceremonial drumming, singing, ritual food preparation and serving, and a shared experience.

Participants represented state and federal agency staff, policy makers, tribal members and non-Indians, members of local watershed councils and irrigation districts, representatives of regional industries, and scientists. They may have been friendly strangers, or have had long and profound histories with each other. Not knowing anyone around me, I took the first open seat I saw at the long table. Listening to men's singing and drumming, we stood while men served the

119. Author Dena Marshall was a guest at this ceremony.

men's foods (salmon and deer) and then women served the women's foods (cous and berries). At the leader's announcement, we sat at the table and tasted each of the First Foods, one at a time, beginning and ending with a sip of water. Water, we were reminded, existed at the beginning and remains at the end of the creation of the world.

> That serving order does four very important things; it has the tribe's creation belief; it speaks to cultural continuity; all the foods are protected under the Treaty of 1855; and, it incorporates ecology. Those are very powerful and elegant groupings of related species. What it's saying is this is your relationship to the landscape and these foods, and you have to take care of them for them to be sustainable.[120]

After feasting on an enormous meal, tribal members and non-Indians, conference participants and reservation residents, rolled out of the longhouse for the evening. At that moment, I felt a personal sense of closeness, goodwill, and new opportunities toward the people around me. Looking forward to the conference work sessions ahead in the following days, I felt confident that our next steps would be productive.

The educational experience of learning about the principles establishing the framework for tribal negotiations and policies in water issues, followed by the personal experience of sharing a ritual meal, combined into a transformational experience for the author and for others in the room.[121] As a result of the shared experience of learning about First Foods, eating a ritual meal together, and engaging in collaborative problem-solving during the conference, participants reflected the same collaborative problem-solving approach that parties to sustainable water use agreements strive to achieve. After experiencing First Foods, the author has a deeper appreciation for the universality of the human experience with water, and more specifically, for the Umatilla Tribes' bond with water as a fundamental component of their cultural and spiritual responsibility to

120. "Culture and Natural Resources Unite on Umatilla Reservation." Jack McNeel, *Indian Country Today*, June 28, 2009 (quoting Eric Quaempts, Director Department of Natural Resources CTUIR).

121. This observation was supported by personal communications with six other conferees, including tribal and non-tribal members, who all acknowledged a general "shift in energy" in the room, and a feeling that "everything just worked perfectly," during the First Foods ceremony.

the earth, and thus to their sovereignty.

This rich background informs the Tribes' approach to the water problems in the Umatilla and Walla Walla River Basins. Some years ago, the Tribes reached an agreement with their non-Indian neighbors to restore flows to the Umatilla River, while leaving the specific question of Indian water rights off the table. Now, the tribes are working to negotiate a similar agreement on the Walla Walla River, but here the question of Indian water rights quantification is at the crux of the process. These two projects provide an opportunity to consider how the concept of an international human right to water correlates to the Tribes' own views of water, and how both principles can help underpin successful basin-wide agreements that bring together Indian water rights and other water interests.

C. The Umatilla Basin Project[122]

I see relief, and joy, at the success of the Umatilla basin project—everyone won.[123]

Humans have moved water around throughout history. The ancient Mesopotamians made extensive use of canals to bring water to the city of Babylon, making its renowned Hanging Gardens possible. Experts believe ceramic pipes discovered in the Indus valley supplied water to cities there around 3,000 B.C.[124] And it is well known that the Chinese and the Romans developed advanced water supply systems in ancient times. In modern times, advances in science and engineering have allowed water to be moved over ever-greater distances to bring agriculture to the deserts of the western United States, Israel, and China.[125] Provided the money is available to pay for the facilities and their operation and maintenance, water can be pumped over virtually any obstacle.[126] This section reviews

122. The Umatilla Basin Project Act, Pub. L. 100-557, 102 Stat. 2791 (1988), successfully allocated federal funds to help protect Tribal fisheries, without actually quantifying the water rights. The Lummi, Nez Perce, and Warm Springs Tribes of the Columbia Basin have also negotiated tribal water rights settlements, but this article focuses on the Umatilla example. *See, e.g.,* Lummi Indian Nation v. State of Washington, 235 F.3d 443 (9th Cir. 2000).

123. Telephone Interview with Aaron Skirvin, Director, Water Resources Department, CTUIR (Sept. 22, 2010).

124. Stephen McCaffrey, THE LAW OF INTERNATIONAL WATERCOURSES, NON-NAVIGATIONAL USES 8–9 (2001).

125. *Id.*

126. *Id.*

the Umatilla Basin Project and the anticipated Walla Walla Exchange project, two water projects coordinated in large part by the Confederated Tribes of the Umatilla Indian Reservation in northeastern Oregon.

The Umatilla River, flowing through northeastern Oregon and into the mighty Columbia River, runs through ancestral lands of the Confederated Tribes of the Umatilla Indian Reservation, is home to endangered salmon and steelhead fish, and nourishes thousands of acres of non-Indian irrigated agricultural land.[127] By the 1980's, the Umatilla River was vastly over-appropriated, going nearly completely dry in the summertime. "It was not just that fish [salmon] were extinct. Much of the river itself was extinct for almost half the year [when the river dried up for months each summer]."[128] For decades, tensions around the use of the river grew until finally, in 1988, irrigators and Tribes, with the support of federal agencies and the Oregon congressional delegation, reached an agreement to leave Umatilla River water in the river while pumping water out of the Columbia River into the irrigation ditches of the Umatilla Basin.[129] The Project is more accurately described as one where three of the Umatilla Basin's four irrigation districts exchanged their right to divert water directly from the Umatilla River and, in the case of one district, its storage rights in McKay Reservoir, for Columbia River water on a bucket-for-bucket basis.[130] The result of the Project was the restoration of salmon runs that had been extirpated some eighty years before. This "Exchange Project" is a collaborative use agreement that resuled in restored flow to the Umatilla River for fish, and at the same time provided enough water for irrigators to meet their agricultural needs. In the Umatilla Basin Project, Indian water rights were explicitly and intentionally left off the table and this proved to be a valuable tool for reaching agreement in the basin.

Thus, after seventy years of conflict between tribes and irrigators in the Umatilla Basin over how best to use water from the Umatilla River, twenty years of negotiations and cooperation created a landmark collaboration to restore water to the river that would sustain both salmon and crops. The Tribes and irrigators saw they had more

127. *See generally* Janet Neuman, *Run River Run: Mediation of a Water Rights Dispute Keeps Fish and Farmers Happy – For a Time*, 67 U. COL. L.R. 259, 262–64 (1996).

128. Herring *supra* note 99.

129. Neuman, *supra* note 129, at 272.

130. Herring, *supra* note 99.

in common than they had first realized. "We had both been promised the same thing, the same water. We could fight each other or we could join together and find a solution to our common problem."[131] It was a risk to everyone involved, but both groups chose to work together as cooperators. Although the Tribes' treaty rights were a powerful leverage, tribal leaders chose not to use them. "We said we would leave legal issues off the table and look only for a voluntary solution. We would spend the money to restore the water, not to pay lawyers to fight with our neighbors. We would choose negotiation, not litigation."[132]

The success of the Umatilla Basin Project has had its costs. The project depends on federal earmarks of $46 million appropriated over twelve years, the availability of water from the Columbia River, and the continued trust and cooperation of the basin stakeholders.

> The Umatilla Project won't work everywhere. The hatchery supplementation is expensive; the water exchange is expensive. It is not a naturally sustaining system; it depends on technology that depends on money. But the political model of community cooperation can be used in other places.[133]

The success of the Umatilla Basin Project is evidenced by the return of water and salmon to the Umatilla.

> This story of struggle . . . shows the possibilities of new kinds of partnerships and alliances . . . and it shows that Plateau Indians like the Umatilla have the power to assert their vision of' what a river is supposed to be. For Mid-Columbia River Indians have known for millennia that the first of the sacred foods is not nusux: salmon, but chiis: water.[134]

Because it is a regional agreement, involves all interested stakeholders on equal footing, and is dedicated to establishing a reasonable means for water usage and sharing with the acknowledgement of competing needs, the Umatilla Basin Project

131. *Id.*

132. *Id.*

133. *Id.*

134. Christopher Shelley, *The Resurrection of a River: Re-watering the Umatilla*, CENTER FOR COLUMBIA RIVER HISTORY (1999), *available at* http://www.ccrh.org /comm/river/docs/ubasin.htm.

embodies nearly all of the abovementioned principles of international human rights law in the 1997 Convention, General Comment 15, Law on Transboundary Aquifers, Declaration on the Rights of Indigenous Peoples, and the Drinking Water and Sanitation Declaration. The Umatilla Basin project embodies the UN principles of equitable and reasonable utilization and participation;[135] the obligation not to cause significant harm;[136] and the acknowledgement of a priority for vital human uses of water.[137] The Project provides for the supply of sufficient and continuous water for personal and domestic uses; provides assurances for providing safe water; and protects indigenous peoples' access to water resources on their ancestral lands. The decades-long process to reach agreement honored the rights of indigenous people to participate in decision-making in matters which would affect their rights;[138] to own, use, develop and control the lands, territories and resources that they have traditionally owned, occupied or used;[139] and to determine and develop priorities and strategies for the development or use of their lands, territories and resources.[140] The legal and non-legal successes of the Umatilla Basin Project also illustrate the successes of the principles of participation, equity, and conservation embodied in the Law of Transboundary Aquifers, which came into force several years after the Umatilla Basin Project Act was enacted. This Law emphasizes regional agreements, regular exchange of data and information, protection and preservation of the ecosystem, monitoring and management.[141] And finally, with the resultant award of substantial federal funding, the Umatilla Basin Project ensured that the government would provide financial resources, capacity building and technology transfer.[142]

D. The Proposed Walla Walla Basin Project

> *A new way of managing water is being proposed in the Walla Walla Basin. This approach is not based on regulatory control, but rather on cooperation, local responsibility, and inspiring*

135. Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. Doc. A/RES/51/49, at 4 (May 21, 1997).

136. *Id.* at art. 5.

137. *Id.* at art. 6.

138. Declaration on the Rights of Indigenous Peoples, *supra* note 14, at art. 6.

139. *Id.* at 8.

140. *Id.* at 9.

141. DALTA *supra* note 49, at 5–7.

142. Water and Sanitation Resolution, *supra* note 47, at ¶ 2.

> *people to go beyond what regulation can deliver. It refutes the either-or notion of fish vs. farms, and instead supports the idea that water can be managed so that people, rivers, farms and fish can all continue to share this valuable resource long into the future.*[143]

After a near century of no spring Chinook or salmon fishing in the Walla Walla River, the Confederated Tribes of the Umatilla Indian Reservation last Sunday opened a fishing opportunity for tribal members on the South Fork Walla Walla River.[144]

Not far from the Umatilla River, and running back and forth across the Oregon-Washington state line flows the Walla Walla River. The Walla Walla runs through much of the Umatilla Tribes' traditional lands and territories. Like the Umatilla River, the Walla Walla River flows into the Columbia, and it is home to endangered species of anadromous fish runs. Also like the Umatilla, the Walla Walla River is over-appropriated and heavily taxed by competing needs from agriculture, ranching, fisheries, and environmental concerns. For these reasons, the tribes and their basin partners have recently begun to explore opportunities to increase stream flow in the Walla Walla, which would restore critical habitat for salmon, improve flow for irrigation, and reduce tensions in the region.[145] Already, tribal fish restoration efforts have shown significant success, not just for the fish returning to the river but also for the high level of tribal, agency and local stakeholder cooperation.[146] Together with the U.S. Army Corps of Engineers, Bonneville Power Administration, State of Washington, State of Oregon, and local entities, the Confederated Tribes of the Umatilla aim to replicate the successes of the Umatilla Basin Project. Unlike the Umatilla Basin Project however, the question of settling Indian instream flow rights lies at the center of the Walla Walla process as a potential mechanism for protecting exchange water as it flows across state lines from Oregon into Washington.

143. WASH. DEP'T OF ECOLOGY, PUB. 08-11-061, Proposal For A Pilot Local Water Management Program In The Walla Walla Basin 4 (2008).

144. Harold Shepherd, *Years-Long Umatilla Tribes Fish Restoration Efforts Lead To Tribal Fishery On Walla Walla River,* CENTER FOR WATER ADVOCACY (2010), http://www.centerforwater advocacy.org/ news/view/148278/?topic=22775.

145. *Id.*

146. *Id.* ("Due to the success of the Walla Walla salmon restoration program to date, the high level of tribal, agency and local stakeholder cooperation and the fact that two remaining critical projects are yet to be completed . . . the 1,200 fish return in 2010 is only a fraction of what can be accomplished in the Walla Walla basin.").

The proposed Walla Walla Basin Project (WWBP) is a project to pump water from the Columbia River back to the headgates of the three irrigation districts in the Walla Walla Basin for a bucket-for-bucket exchange so as to restore instream flows and salmon runs in the Walla Walla River. Because the river runs across state lines, the process necessarily involves bi-state collaboration, which brings some complexities that were not present in the Umatilla Basin Project process. One important complexity is the estimated high project cost of $500 million, a ten-fold increase from the cost of the Umatilla Basin Project. The stakeholders in the Basin, including the Confederated Tribes of the Umatilla Indian Reservation, are working with the US Army Corps of Engineers in an effort to reduce the cost of the project.[147]

Another important complexity now is the question of Indian water rights. Where the Umatilla Basin Project is fully implementable in Oregon, and Umatilla River water can be protected instream for the length of the project, the anticipated Walla Walla Exchange Project would follow the river into Washington, where water rights in the Walla Walla River have been quantified differently, and the water may not be protected instream.[148] One option for protecting this water is to settle the Umatilla Tribes' water rights in federal court. [149] However, for all the reasons discussed previously, litigation is not necessarily an effective strategy for fully resolving water rights disputes and obtaining wet water. Furthermore, in recent years, judicial determination of Indian water rights in federal court has been a wild card, as the courts, including the Supreme Court, have begun to pull away from endorsing broad claims to Indian water rights. Seeking the aid of the courts could in fact be troubling for the potential success of the Walla Walla Project.

147. E-mail from Daniel Hester, General Counsel CTUIR, to author (Jan. 25, 2011) (on file with author) [hereinafter Hester].

148. Both Washington and Oregon can adjudicate water rights within their respective states. Washington's Water Code provides for adjudications of water rights through a superior court adjudication process. *See* WASH. REV. CODE §§ 90.03.110-245 (2009). Oregon has a similar state-based adjudication process that is conducted before its district courts. *See* OR. REV. STAT. ch. 539 (2009).

149. In *Washington v. Oregon*, 297 U.S. 517, 521–22 (1936), the U.S. Supreme Court held that because neither Oregon nor Washington was a party to the other state's adjudication, neither state was bound by the other's adjudication. The CTUIR have expressed their desire to implement options that are less disruptive to existing state-based water right holders in order to protect by-pass flows and future additional flows originating from Oregon and Washington. *See* WWWMP, *supra* note 55.

With good reason, the Umatilla Tribes would rather pursue a negotiated solution. As discussed above, a negotiated solution reached through local efforts and exhibiting broad support also has a better prospect of receiving federal funding than a litigated result because it represents a consensus-based agreement which is unlikely to be challenged as the agreement progresses through Congress. Other existing and potential legal options and approaches for achieving bi-state flow protection in the Walla Walla River include entering an interstate compact,[150] congressional apportionment,[151] voluntary agreements not to divert,[152] quantification of tribal reserved water rights in state adjudication,[153] and purchasing water rights.[154] Some combination of all of the above may in fact be necessary to fully realize the entire project. But in the meantime, interested parties are engaged in local efforts in the Walla Walla Basin to build consensus, begin putting projects on the ground, and work toward federal funding and support.

In 2008, the Walla Walla Watershed Management Partnership, a regional community-based group in the Walla Walla Basin, comprised of representatives from conservation and irrigation districts, Tribes, municipalities and counties, state agencies, and

150. The U.S. Supreme Court has often encouraged states to determine their shares of interstate waters by a compact rather than through litigation. However, negotiating a compact is a time-consuming and complicated process, and would likely be very controversial. *See e.g.,* Hinderlider v. La Plata Co., 304 U.S. 92 (1938).

151. Congress can pass legislation apportioning interstate waters under the Commerce Clause of the U.S. Constitution. *See* Kaiser Aetna v. United States, 444 U.S. 164, 173-74 (1979). However, this is very rarely done. There appear to be only two instances of clearly established congressional water apportionment. *See* Boulder Canyon Project Act, Pub. L. No. 642, 45 Stat. 1057 (1928); Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Title II), Pub. L. No. 101-618, 104 Stat. 3289 (1990).

152. Such agreements would essentially be contracts where water right holders would agree to stop diverting water, in exchange for consideration, in order for the water to stay in the Walla Walla River.

153. The Oregon portion of the Walla Walla River was adjudicated in 1912 and the Washington portion of the Walla Walla River was adjudicated in 1928. Neither of these states were parties to the other state's adjudication. Federal and Tribal reserved water rights were not adjudicated in either of these state proceedings. The United States, as trustee to a tribe, can sue a state in federal court to adjudicate treaty-reserved water rights on behalf of that tribe. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

154. *WWWMP*, *supra* note 55. Purchasing both senior and junior water rights would leave more water in the River, although not necessarily any more than by purchasing senior water rights alone. A water acquisition strategy of this nature will only succeed if there is agency support and adequate resources to regulate water users to the satisfaction of these trust in-stream flow water rights under the priority system. This will require an active effort by a water master and the willingness to take enforcement action when necessary.

community groups, submitted a radical proposal to the Washington Department of Ecology for managing the Walla Walla Basin. The message to the State was, in effect, "we can do it ourselves." As a result, the Washington State Department of Ecology made an unprecedented offer. Ecology would support flexible, local management of water in the Basin, provided that: (a) stream flows and water quality are enhanced and maintained to support fish, and (b) conflicts that might arise around flexible water use are handled within the Basin.[155] Then, on May 5, 2010, the Washington Department of Ecology's Columbia River Policy Advisory Group endorsed the agency's proposal to obligate $40 million toward the non-federal construction costs of the Walla Walla Stream Flow Restoration Project.[156] American Rivers, Washington Environmental Council, and Trout Unlimited provided letters of endorsement for the Project and for the $40 million award for funding.[157] All four Washington and Oregon senators sent letters to the Senate Environment and Public Works Committee requesting that the Walla Walla Stream Flow Restoration Project be authorized for construction.[158] In addition, both members of Congress representing the Walla Walla Basin requested authorization for the Walla Walla Basin Project in letters to the House Transportation and Infrastructure Committee, which has jurisdiction over the Water Resources Development Act. [159]

The Walla Walla Basin Water Management Initiative and Partnership is an example of a successful implementation of the principles of the Declaration of the Rights of Indigenous Peoples and the Law of Transboundary Aquifers. Since its beginning, the Walla Walla Basin Water Management Initiative has provided local water users with flexibility in exercising their existing water rights in exchange for augmenting and protecting stream flows and water quality within the Basin.[160] The Water Management Initiative

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*.

159. Those requests were subsequently withdrawn due to the House Republican leadership rule against earmarks—which extended to the WRDA bill that would authorize individual projects. Hester, *supra* note 150.

160. At least two legislative reports have described progress toward developing the Water Management Initiative: 2006 Report to the Legislature: Walla Walla Water Management Initiative, Pub. No. 07-11-001, Wash. Dep't of Ecology (Jan. 2007); Progress on Watershed Planning and Setting Instream Flows – 2007: Report to the Legislature, Pub. No.

includes a locally governed water management system that would provide a degree of local autonomy and responsibility for water management, giving those with the most at stake greater influence over their own destiny, while at the same time protecting other transboundary rights.

Most importantly, the Initiative and the Report that grew out of it reflects the Walla Walla Basin community's ability to work together, their passion for self-governance, and the confidence in their ability to deliver flows for fish through cooperative and voluntary approaches. This passion is reflected in The Walla Walla River Watershed Vision, titled the "Land of Many Waters:"

> The Walla Walla Watershed is a healthy river system capable of equitably sustaining its cultures and communities, including Tribal First Foods, agriculture, recreation, industry, and the amenities that enrich the lives of all residents. This vision requires a river system that is dynamic, with interacting ecological processes that maintain healthy stream and riparian habitats in which native species thrive. This vision involves and is fostered by community members who display a high regard of mutual respect, reflect both public and private interest, and willingly accept responsibility for their actions.[161]

The early phases of the Walla Walla negotiations thus reflect many of the international principles relating to a human right to water: principles of equity, participation, territorial integrity, and protection of vital human needs;[162] the principles of access for farming and securing the livelihoods of indigenous people;[163] the rights of indigenous peoples to maintain and strengthen their spiritual relationship with their traditionally owned or occupied lands,

08-06-002, Wash. Dep't of Ecology (June 2008).

161. *Walla Walla Watershed Management Partnership Proposal for a Pilot Local Water Management in the Walla Walla Basin*, 2010, Executive Summary. (On file with the author). *Previously available at* http://www.wallawallawatershed.org. *See also* Comments of Michael J. Clinton, at Western States Water Council and the Native American Rights Fund on Sept. 1-3, 1992, in Albuquerque, NM ("Take an important lesson from Colorado-Ute. You must go back home and heal the animosity, bigotry, and racism that exist in your local communities. Those feelings exist not just between Indians and non-Indians. They are between neighboring communities, neighboring water users, neighboring tribes, the environmental communities, and other local interest groups. That is where settlements have to come together.").

162. 1997 UN WATER CONVENTION, *supra* note 32.

163. GENERAL COMMENT 15, *supra* note 40.

territories or waters;[164] and principles of access to safe drinking water and sanitation.[165]

VI. CONCLUSION: A SHARED UNDERSTANDING OF THE RIGHT TO WATER

It's a story that's bigger than fish. It is a commitment to community and environment.[166]

The authors did not participate in either the Umatilla or the Walla Walla negotiations, and we are not tribal members or insiders who purport to know the Tribes' thinking on these agreements. Therefore, we have hazarded this discussion on the agreements' underlying meanings with some trepidation. However, looking at the agreements from an outsider's perspective, we still feel comfortable suggesting that one of the keys to their success is a shared respect for water sovereignty, which has developed over a long period of time, through the development of strong leadership, relationships and trust among stakeholders in the basin. Furthermore, we suggest that the more this understanding is shared by all parties, the more effective and durable such agreements will be.

After surveying international instruments acknowledging the human right to water, we correlated these principles of customary international human rights law to western Indian water rights. We discussed the current trend toward negotiating Indian water agreements and examined several elements of successful agreements. We discussed the insight of the Pacific Northwest Tribes' First Foods tradition, both as a codification of the right to water, and as a powerful tool for building trust, relationships, and progress toward sustainable water agreements.

We note a strong local emphasis on partnerships, local collaboration, self-regulation, and "in-house" dispute resolution in the Umatilla and Walla Walla Basins in northeastern Oregon. Reaching agreements in this manner is surely more time consuming, more complex, and more dependent on extra-institutional, person-to-person interactions, but it can result in longer-lasting cooperation and a higher level of commitment to the agreements reached.[167] We also

164. DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 17.

165. WATER AND SANITATION RESOLUTION, *supra* note 47.

166. Herring, *supra* note 99 (quoting Gary Reed).

167. *See, e.g.,* Zoltan Grossman, *Unlikely Alliances: Treaty Conflicts and Environmental Cooperation between Native American and Rural White Communities*, 29 AMERICAN INDIAN

note a strong correlation between the structure, terms, and principles of the Umatilla Basin Project and Walla Walla Watershed Management Partnership Initiative with several articles and principles embodied in the Law on Transboundary Aquifers and Declaration on the Rights of Indigenous Peoples, as well as the 1997 Convention, General Comment 15, and the Drinking Water and Sanitation Declaration.

We suggest that parties working toward collaborative water agreements honor the concept of water sovereignty. The two most significant limiting factors on economic development are capital and water,[168] and negotiators must look for commonalities and seek solutions that provide all parties with some measure of both of those elements. We encourage practitioners to be mindful of sovereignty principles, place-based identity, and the effectiveness of local alliances, in order to design durable agreements.[169] Since state and federal courts are increasingly less supportive of recognizing Indian water rights fully,[170] "do-it-yourself" negotiated solutions may provide the most hopeful prospect. The best of such agreements will embody a shared understanding of the human right to water, and a shared commitment to building trust, leadership, and communication within the basin, thus optimizing the parties' water sovereignty.

CULTURE AND RESEARCH JOURNAL 4, 26–27 (2005) ("Bottom-up relations are certainly more difficult and complex, but "people-to-people" ties can result in deeper and longer-lasting cooperation.") *available at* http://academic.evergreen.edu/g/grossmaz/Unlikely%20Allia nces .pdf.

168. LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 35 (1991).

169. *See e.g.,* Grossman, supra note 169, at 28 ("People-to-people relations are not simply an alternative to government-to-government relations, but each can form a parallel track that strengthens the other.").

170. BURTON *supra* note 173, at 38 ("State courts are indeed ready and willing to adopt somewhat restrictive views of Indian reserved rights – at least insofar as tribal jurisdiction and marketing power are concerned – and the U.S. Supreme Court does not seem prepared to stop them.") (referring to *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), compelling Indians to defend their reserved rights in state court, *and also* to the 1988 Supreme Court implied support of the Wyoming Supreme Court decision to remove Indian reserved rights to groundwater, directly contradicting the Supreme Court's decision in *Cappaert v. United States*, 426 U.S. 128 (1976), acknowledging a hydrologic connection between groundwater and surface water, extending reserved rights to groundwater on reservation land).