IMPLEMENTING THE HUMAN RIGHT TO WATER IN THE COLORADO RIVER BASIN

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I. INTRODUCTION

During the summer of 2010, voicing deep concern that an estimated 884 million people lack access to safe drinking water and a total of more than 2.6 billion people do not have access to basic sanitation, the United Nation's General Assembly determined that water is a human right essential to the full enjoyment of life.[1] The Assembly resolution received 122 votes in favor and zero votes against, while 41 countries including the United States abstained from voting.[2] The UN action concerning water highlights a major disparity regarding access to adequate water supplies on a global scale. Japan, for example, uses innovative technologies and water management policies to provide water and sanitation to the public, promote hygiene, and treat wastewater.[3] The Utoro community near Kyoto, Korea, on the other hand has been living for several generations without adequate access to water and sanitation from the public network and water.[4] When floods occur in Utoro, as took place in 2009, the lack of sewage and proper evacuation of grey water results in contamination of the environment, posing serious health concerns.[5]

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1. *General Assembly Declares Access to Clean Water and Sanitation is a Human Right*, UN NEWS CENTER, July 28, 2010, www.un.org/apps/news/story.asp?NewsID= 35456 &Cr =sanitation&Cr1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

Unlike countries that cannot afford to provide adequate water supplies to the public, the United States illustrated its continuing inability to resolve the conflict between public and private rights regarding water by abstaining from the vote on the resolution. Unfortunately, the inability of the U. S. government to recognize water as a fundamental human right resulted in political divisions and competition for water in the Western part of the country, which grows daily with ever-increasing demands on water resources for human consumption, agriculture, commercial and industrial uses.[6] The energy industry, for example, has painted a seductive picture about tar sands, oil shale, uranium and other traditional resources that are encased in rock and buried on federal lands in the Colorado River Basin.[7] The search for energy in the arid climates of the southwestern United States, however, promises to put increased pressure on already over-allocated rivers and streams, which include the Colorado River.[8]

At the same time, the population of the Basin is rapidly expanding, putting increased pressure on water and energy needs in the region.[9] Indeed, the upper basin states are fast approaching the day when all of their allocations under intra-state water agreements and laws, such as the 1922 Colorado River Compact, are depleted,[10] which will further pressure the states to take bold action to prioritize uses for their water. Finally, adding to water scarcity in the Basin is the looming specter of climate change that results in reduced snowpack and depleted river flows. [11]

Many of these problems are the result of the history of water use and management in the West which is characterized by a reluctance of state and federal agencies and the general public to

6. *See generally* Harold Shepherd, *Is the Failure to Acknowledge Tribal Interests Fueling the Water Crises?,* RURAL CONNECTIONS, May 2010.

7. *See e.g.,* Dan Glick, *Fossil Foolishness, Utah's Pursuit of Tar Sands and Oil Shale,* WESTERN RESOURCE ADVOCATES ii-iii (2010), *available at* http://www .westernresourceadvocates.org/ land/utosts/fossilfoolishness.pdf; Harold Shepherd, *Energy Projects Threaten Utah's Water Resources*, DESERT NEWS May 9, 2010.

8. *See generally* Glick, *supra* note 7.

9. *League of Women Voters of Utah Water Study*, LEAGUE OF WOMEN VOTERS 3 (2009), http://www.lwvutah.org/ AirWaterIssues/ lwvutWaterStudy_10-10-19.pdf.

10. Lawrence J. MacDonnell, *Water on the Rocks Oil Shale Water Rights in Colorado*, WESTERN RESOURCE ADVOCATES 35–36 (2009), http://www.westernresourceadvocates.org /land/wotrreport/wotrreport.pdf.

11. *Id.*

come to terms with the finite nature of water.[12] In part, as a result of such attitudes, some experts conclude that the global water crises will continue to remain humanities the most important challenge over the next century,[13] and the terms "human rights" and "water," at least outside of the United States, have appeared together in an increasing number of contexts.[14]

The lack of acceptance and implementation of the human right to water in the West illustrates the need for an expansive approach to the concept of the "right to water." This approach may be implemented through satisfying the water needs of native tribes and tribal communities which are often quantified not simply by daily potable-hygiene requirements, but by ecosystem-based allocations and environmental justice principles sufficient to support subsistence and commercial resource economies.[15] Further, agencies should recognize the ability of using treaty water rights to not only satisfy tribal and non-Indian water right disputes, but to address the public interest in the protection of fish and wildlife habitat and the human right to water.

II. WATER IN THE WEST BACKGROUND

When Brigham Young arrived in what is now Utah, he knew that the only way to forge a viable civilization in this arid land was to create a system of irrigation and an intelligent distribution of the state's limited water resources.[16] Young knew that water was life, especially in the desert, and he paved the way to the diversion of water in the late 1800s and early 1900s to feed a growing Salt Lake City and establish farming communities throughout the state.[17] What emerged, as water historian Marc Reisner states, was the "'foundation of the most ambitious desert civilization the world

12. Shepherd, *Is the Failure to Acknowledge Tribal Interests Fueling the Water Crises?*, *supra* note 6, at 13.

13. *Id.* at 16.

14. *See e.g.*, *General Assembly Declares Access to Clean Water and Sanitation is a Human Right*, RAPAPORT MAGAZINE, Jan. 27, 2011 (Kalahari Bushmen were granted access to drinking water wells on their ancestral lands in Botswana. Soon after, a panel of five appellate court judges over turned the High Court judgment and prevented them from accessing a water well).

15. *See generally* Shepherd, *Is the Failure to Acknowledge Tribal Interests Fueling the Water Crises?*, *supra* note 6, at 15.

16. Glick, *supra* note 7, at 11.

17. Glick, *supra* note 7, at 11.

has ever seen.'"[18]

Yet, the "can do" attitude and ambitions of western settlers not only seems to have lost its luster but has down-right backfired on those who depend on water in the West for livelihood, cultural practices, and recreation.[19] While Utah law, for example, requires sufficient unappropriated water for the proposed appropriation,[20] the state has already doled out 180,000 rights to reach surface water by tapping rivers and ground water by digging wells and there is not enough water to honor them all.[21] In addition, agency programs limit the amount of water upper basin states such as Colorado and Utah have available for development.[22]

More importantly, development of energy resources such as uranium, oil and gas, and oil shale in Colorado, Utah, and Wyoming, threatens to harm the area's already limited water supply.[23] In a 2008 environmental analysis covering oil shale development in Colorado, Utah, and Wyoming, the Department of the Interior's Bureau of Land Management (BLM) concluded that such development would likely transform communities in western Colorado from agricultural-based to industrial economies.[24] Another study, commissioned by water providers in northwestern Colorado, estimates the growth in water demand needed to support increased extraction and production of energy in four sectors in northwest Colorado, including natural gas, coal, uranium, and oil shale.[25] That report concludes water demands for oil shale could be as much as 378,000 acre-feet per year, an amount that is approximately 25% more than the city of Denver uses annually.[26] By decreasing water availability, large-scale energy development in the Colorado River Basin would affect existing uses established

18. *Id.* (quoting MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (Viking Penguin 1986)).

19. *See generally* Glick, *supra* note 7 (discussing the negative impacts of development of dirty fuels on water supply).

20. *See* UTAH CODE ANN. § 73-3-8(1)(a)(i) (2010).

21. Written Testimony of Harold Shepherd, Red Rock Forests, in the Matter of Change Application a35402 (Water Rights 89-74, 89-128, and 89-1513) and a35874 (Water Right 09-462) (March 1, 2010), http://www.uraniumwatch.org/dwr_greenriverhearings_2010/rrf_supplement.100301.pdf.

22. *See* Glick, *supra* note 7, at 36.

23. *See Id.*

24. *Id.* at v.

25. *Id.* at vi.

26. *Id.* at iv.

under more junior water rights.

Another issue related to the movement of energy companies into the Basin is presented by the Colorado River Compact, which authorizes the States of Arizona, California, and Nevada to enter into an agreement calling for the apportionment of 7,500,000 acre-feet annually to the lower basin for exclusive beneficial consumptive use in perpetuity.[27] Due to potential limits imposed by the Compact, rights junior to 1922 but senior to the oil shale rights could become subject to a call if oil shale resulted in an over-development of the upper basin states' compact entitlement.[28]

Regardless of such ominous predictions about the water future of the Southwest and the Basin, state water managers appear determined to continue the ambitious attitude of non-Indian settlers by publicly emphasizing that, under the terms of the interstate treaties that govern the river, the upper basin states still retain enough water supply from the Colorado River to continue to grow.[29] That attitude is best illustrated by several Western Slope communities in Colorado who recently sued the City of Denver to prevent it from securing new rights to feed growth and development from the already over tapped Colorado River.[30] During the trial, Colorado Conservation District Manager, Eric Kuhn, who was a witness for the communities, testified that the amount of water the State can reliably count on from the Colorado River Compact is no more than 150,000 acre feet—considerably less than half of what would be needed for the 2.9 million people projected to arrive in the state over the next quarter century.[31] Attorneys for the State were quick to label Kuhn's remarks as being too "pessimistic."[32] Just before the trial, however, an attorney for the Plaintiffs secured a copy of an internal document prepared by the State only eight days earlier, which showed that Colorado had almost exactly the same amount of water available for development as Kuhn suggested, and only about one-tenth of what the State, up until then, publicly said was available.[33]

27. 43 U.S.C. § 617 (1928); *see* Arizona v. California, 373 U.S. 546, 556 (1963).

28. Matt Jenkins, *How Low will it go? Colorado May Face a Dry and Difficult Future of Fighting for Water*, HIGH COUNTRY NEWS, March 2, 2009, at 6.

29. *Id.* at 3.

30. *Id*. at 4–5.

31. *Id.* at 4.

32. *Id*.

33. *Id.*

Water managers, however, are not entirely to blame for the current false sense of security about the future of water and development in the Basin which is also the result of a series of circumstances that led to an optimistic future water outlook. In 1924, for example, just two years after the Colorado Compact was signed, a government hydrologist calculated that the actual flow of the river was 10 percent less than the Compact negotiators assumed.[34] Then, in 1965, a water engineer named Royce Tipton estimated that the river's reliable flow was really about 14 percent less and subsequent reports found that long-term flows were 22 percent less.[35] About the time the Tipton report was completed, however, things turned wet and stayed that way through the late '90s.[36] Perhaps not coincidently, that wet period was the beginning of the Rocky Mountain boom days, which meant that there was more than enough water to accommodate the growth spurt, at least for the next 35 years.[37] Even after a drought has endured the past decade in the Southwest, many Colorado River Compact states are the fastest growing states in the nation in recent years, and more growth is on the horizon— the Governor's office of Planning and Budget, for example, projects that Utah's population will grow from 2,833,337 in 2010 to 5,368,567 in 2050, mostly along the Wasatch Front.[38]

Adding to the slow decay of the water supply in the Southwest is the onset of climate change, which will almost certainly result in a decrease in average flows for the Colorado River Basin.[39] Climate change, for example, is expected to change the mix of precipitation toward more rain and less snow that would affect the origin and timing of runoff, leading to less runoff from spring snowmelt and more runoff from winter rainfall, particularly in high-latitude or mountainous areas."[40]

Based on the fact that most of the Southwest's usable water

34. *Id.* at 3.

35. *Id.*

36. *Id.*

37. *Id.*

38. *League of Women Voters*, *supra* note 9, at 2 (citing Governor's Office of Planning and Budget (2009) Utah Water Study).

39. *See* DANIEL R. CAYAN, MICHAEL D. DETTINGER, IRIS T. STEWART, CHANGES IN SNOWMELT RUNOFF TIMING IN WESTERN NORTH AMERICA UNDER A 'BUSINESS AS USUAL' CLIMATE CHANGE SCENARIO 217–218 (2004).

40. *See id.*

comes from snowpack, a hotter and drier climate in the Southwest could result in less water in any form, a smaller snowpack, and probably higher human usage to counter the hotter, drier weather.[41] That is because Lakes Powell and Mead and other upper basin states' reservoirs typically fill in late spring and early summer from the slow snowmelt while the water level in these reservoirs starts to be drawn down beginning in late summer through the rest of the year and into the next spring.[42] "Little snow or more precipitation falling as rain, therefore, does not allow for timely storage" in the reservoirs or for efficient seasonal allocation.[43]

Although the timing of run-off has not been a problem yet because Lakes Mead and Powell provide the backup capacity that ensures that enough water is available due to rare El Nino events that usually fill Lake Powell, the reservoirs are half empty after nearly a decade of drought.[44] The water supply for the Basin is so close between supply and demand that if it continues to experience 80–85 percent runoff on the Colorado River, as in recent years, Mead and Powell could drain within the next decade and the system will become bankrupt.[45] Further, continued reductions of water levels in Basin reservoirs could trigger the Lower Basin states' rights to make a legal call on the river and demand that the Upper Basin not take any of its Compact water until the 10-year average once more rises above 75 million acre-feet.[46]

III. HUMAN RIGHTS AND WATER IN THE WEST

Few other ethnic groups represent both the promise and failure of implementing human rights in the West than native communities. Although the historic versions of violence and genocide perpetrated against native peoples in the western United States have mostly dissolved, violations of justice, due process, and concepts of fundamental fairness still continue particularly in the area of tribal water interests.[47] Although the courts have held

41. *League of Women Voters*, *supra* note 9 at 2 (citing Utah Division of Natural Resources 2009 Spring Runoff Conference).

42. *Id.* at 2–3.

43. *Id.*

44. JENKINS, *supra* note 28, at 6.

45. *Id.*

46. *Id.*

47. *See generally* Harold Shepherd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 ENVTL. L. 901, 914 (2001);

that the principle of impliedly reserving water rights applies to all reservations, regardless of whether such reservations were created by treaty, statute, or executive order,[48] they are steadily eroding the tribal ability to protect trust resources, tradition, and culture by incorporating limits on federal reserved water rights into decisions addressing tribal reserved rights.[49]

Similarly, federal agencies have substantially failed to support such rights, and, indeed, spent much of their time whittling away at tribal water rights and environmental justice principles.[50] The evolution of water management under the federal Reclamation Act of 1902,[51] for example, created a conflict of interest for the government that continues to significantly affect native communities. A case in point is the federal Bureau of Reclamation (Reclamation), which encouraged appropriation of water and development of water projects by non-Indians at the same time that it was supposed to be preserving such water for the needs of tribes.[52] While Indian water rights, therefore, are protected on paper, and are occasionally enforced by the Department of Justice, tribes historically had little support from Reclamation or Congress. As a result, without political power to obtain budgetary appropriations for their own reclamation programs, tribes are largely unable to realize the same access to water as the non-Indian community.

One of the most vivid examples of the damage to native communities from federal water-management activities is the Salt River Reclamation Project located in Arizona, which encompasses the Salt River Pima-Maricopa Indian Community, established by Congress in 1879.[53] The reservation community has yet to receive the substantial amounts of subsidized water delivered to those located outside the reservation, including the cities of Phoenix and

Harold Shepherd, *State Court Jurisdiction over Tribal Water Rights: A Call for Rational Thinking*, 17 J. ENV. LAW & LITIG. 343 (2002).

48. *See* United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939); *see also* Arizona v. California, 373 U.S. 546, 600–601 (1963).

49. Shepherd, *State Court Jurisdiction over Tribal Water Rights*, *supra* note 48, at 363.

50. *See generally*, Shepherd, *supra* note 48.

51. 43 U.S.C. §391 (1994).

52. *See* LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW 2, 23, 47 (1991).

53. *See* Pyramid Lake Piaute Tribe of Indians v. Morton, 354 F. Supp. 252, 255 (D.D.C. 1972).

Scottsdale.[54] In fact, according to the tribes, with the sole exception of the Pima-Maricopas, every other agricultural district within the project's boundaries has been getting cheap Colorado River water.[55] This means that, until the Tribe finally took its case to court, the cost of farming its lands was $130 per acre compared to $40 per acre "literally across the street."[56]

The lack of attention to tribal water rights in the development of state and federal water policies takes many forms. Under the Columbia River Water Management Project (CWRMP), for example, the Washington State legislature directed the Department of Ecology (Ecology) to secure adequate water supplies from the River for irrigation, municipal, industrial, and instream flows.[57] The WRMP's reference to instream flows, however, is over shadowed by the legislature's declaration "that a Columbia river basin water supply development program is needed, and directs the Department of Ecology to *aggressively* pursue the development of water supplies . . ."[58] The interests of tribes in the protection of subsistence and cultural practices in the state, therefore, are getting lost in the fervor to divert water for consumptive uses. Recently, for example, Reclamation applied to Washington State for 82,500 acre-feet of water from Lake Roosevelt near the Colville Tribe Reservation, in part, to bolster municipal and industrial supplies and provide supplemental water to farmers.[59] As part of the CWRMP and in order to insure support from affected tribal governments, the state signed agreements with the Confederated Tribes of the Colville Reservation and Spokane tribal governments in which the state agreed to provide annual payments to the Tribes in exchange for their support for the project.[60]

Although the applicable tribal governments officially support the drawdown of Grand Coulee reservoir, some of the members of

54. *See* James Bishop, *Tribes Win Back Stolen Water*, HIGH COUNTRY NEWS, June 15, 1992.

55. *Id.*

56. *Id.*

57. WASH. REV. CODE § 90.90.005 (2006).

58. WASH. REV. CODE § 90.90.005(2) (emphasis added).

59. State of Washington, Department of Ecology, Permit to Appropriate Public Waters of the State of Washington, Application Numbers S3-305506 & S3-30486 (December 1, 2008) (on file with author).

60. WASH. DEP'T OF ECOLOGY, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE LAKE ROOSEVELT INCREMENTAL STORAGE RELEASES PROJECT 2–3 (2008).

the local community, including "Visions for Our Future" (VFOF), an environmental conservation organization made up of members of the Colville Tribe, joined others in challenging the Lake Roosevelt Project in federal court claiming that the Bureau violated the National Environmental Policy Act (NEPA)[61] by failing to conduct timely environmental analysis of such impacts and to draft a full Environmental Impact Statement (EIS).[62] VFOF joined the Plaintiffs in challenging the drawdown due to alleged violations of federal regulations requiring that the NEPA process occur "early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made"[63] and that this should have occurred before the Bureau applied for and then received water rights from the state for the water in question.[64]

As in the case of the VFOF litigation, the federal government's trust duty to Indian tribes potentially enhances the obligation of federal agencies in relation to management of water. This is based on the fact that, while NEPA arises only in the context of "major federal actions,"[65] the trust obligation applies to any federal action potentially impacting tribal interests.[66] Therefore, when tribal water rights are affected, the trust duty requires the Secretary of the Interior to "ensure to the extent of his power" that all available water is used to satisfy the Tribe's interest.[67]

Disproportionate impacts related to the development of water resources to the Winnemem Wintu Tribe of Northern California began back in 1933 when California adopted the Central Valley Project Act of 1933.[68] That project directed the construction of Shasta Dam and which was evocated by the government's acquisition of tribal lands, sacred sites, ancestral villages, and burial grounds along the lower McCloud River that would be

61. 442 U.S.C. §§ 4321–4370e (1994 & Supp. III 1997).

62. Ctr. for Envtl. Law and Policy v. Bureau of Reclamation, 715 F. Supp. 2d. 1184, 1187–88 (E.D. Wash, 2010).

63. *See* 40 C.F.R. § 1502.5.

64. *Ctr. For Envtl. Law and Policy*, 715 F.Supp.2d at 1188–89.

65. 40 C.F.R. § 1502.3 (1978).

66. *See generally* 42 U.S.C. § 4332(2)(c) (1970).

67. Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 256 (D.D.C. 1972), *opinion supplemented by*, 360 F.Supp. 669 (D.D.C. 1973), *rev'd by*, 499 F.2d 1095 (D.C. Cir. 1974).

68. 16 U.S.C.A. § 460q (1965).

flooded by the construction of Shasta dam.[69] Promises by the U.S. government to compensate tribal members for the 4,400 plus acres of allotment land inundated by the dam and to provide a cemetery for the relocation of 183 burials however, were never fulfilled.[70] Regardless of such impacts to the water and cultural resources of the Winnemem, Reclamation recently proposed to raise Shasta Dam another six feet, which would sacrifice more of the free flowing McCloud River, destroy more than 780 acres of land along the part of the River that still flows free, drown more tribal sacred sites, and flood McCloud Canyon impacting wildlife and forests upon which the Winnemem depend for subsistence and traditional uses.[71]

In addition, Pacific General Electric recently filed an application for re-licensing of the McCloud-Pit Hydroelectric Project (MPHP) located on the McCloud River near the Winnemem Wintu Village,[72] which has pitted the cultural and subsistence rights of the Tribe and the needs of aquatic habitat against privatization of water rights and bureaucratic governmental regulation of water resources. Specifically, the Tribe mounted a campaign for the "restoration of chinook salmon to the McCloud River in order to reestablish its spiritual and subsistence relationship with these sacred fish.[73] To this end, and as provided by the Federal Power Act,[74] the Winnemem Wintu requested that the U.S. Forest Service utilize the information contained in a Biological Opinion issued by the National Marine Fisheries Service related to the MPHP (OCAP BiOp)[75] to modify Forest

69. *See* Central Valley Project Indian Lands Acquisition Act of 1941, 55 Stat 612 (1941).

70. Complaint for Declaratory and Injunctive Relief, Winnemem Wintu Tribe v. U.S. Dep't of Interior et. al., 725 F.Supp. 2d (E.D. Cal. 2010) (No. CIV. 2:09-cv-01072-FCD EFB) (hereinafter Winnemem Wintu Complaint).

71. Winnemem Wintu Complaint, at 11–13.

72. *See* FED ENERGY REGULATORY COMM'N, DRAFT ENVIRONMENTAL IMPACT STATEMENT, MCCLOUD-PIT HYDRO-ELECTRIC PROJECT, FERC No. 2106 1 (July, 2010) [hereinafter MPHP DEIS].

73. Stephen C. Volker, Attorney for Winnemem Wintu Tribe, Letter to United States Forest Service Re: Forest Service Final Section 4(e) Conditions and Draft Project Implementations Guides for McCloud-Pit Hydroelectric Project, FERC no. 2106 (December 29, 2011) (on file with author).

74. 16 U.S.C. §§ 791(a)–828(c). Section 4(e) of the FPA requires FERC to solicit and accept conditions promulgated by the agency responsible for the land where the project would be built which in the case of the MPHP is the U.S. Forest Service.

75. Nat'l Marine Fisheries Serv, SW Region, BIOLOGICAL OPINION AND CONFERENCE

Service flow regime conditions below McCloud Dam[76] in order to protect Chinook salmon and other fish species.[77] According to the Tribe, without incorporating the recommendations in the OCAP BiOp, the Forest Service's flow regime conditions "will not provide sufficient cold water flows to support endangered salmonids in the McCloud River."[78]

Tribes throughout the West and others have made similar charges that the federal government, operating as guardian and trustee, bargained away tribal water resources under terms that were often seriously lopsided in favor of non-tribal water users.[79] In a lawsuit against the Interior brought by the Pyramid Lake Paiute Tribe in the early seventies, for example, the Court agreed with the Tribe's claim that a regulation promulgated by the Department delivered more water to a local irrigation district than required by applicable court decrees and statutes.[80]

Further, federal courts have become less responsive to tribes in water-rights claims.[81] In commenting on a determination by the Wind River Indian Reservation tribes not to appeal an adverse decision of the Wyoming State Supreme Court on water rights, for example, Charles Wilkinson, who is Moses Lasky Professor of

OPINION ON THE LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT (July 4, 2009) [hereinafter OCAP BiOp].

76. Specifically, the Forest Service's Condition 19 states:

> Maintain specified minimum streamflows in project reaches in accordance with the provisions described in the Forest Service filing. The minimum instantaneous 15-minute streamflow shall be at least 80 percent of the prescribed mean daily flow for those minimum streamflows less than or equal to 10 cfs, and at least 90 percent of the streamflows required to be greater than 10 cfs. Should the mean daily flow as measured be less than the required mean daily flow but more than the instantaneous flow, licensee shall begin releasing the equivalent under-released volume of water within seven days of discovery of the under-release.

See MPHP DEIS § 2.2.4, 42.

77. Stephen C. Volker, *supra* note 74.

78. *Id.*

79. *See* LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW 2, 23, 47. (1993).

80. *See e.g*. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 254 (D.D.C. 1972), *opinion supplemented by*, Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F. Supp. 669 (D.D.C. 1973), *rev'd by*, Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, Pyramid Lake Paiute Tribe of Indians v. Morton, 420 U.S. 962 (1975); *see also* BURTON, *supra* note 79, at 2, 23, 47.

81. Katherine Collins, *Water: Fear of Supreme Court Leads Tribes to Accept an Adverse Decision*, HIGH COUNTRY NEWS, Oct. 19, 1992, *reprinted in* CHAR MILLER, WATER IN THE WEST, 251–52 (2000).

Law at the University of Colorado, stated that the Tribe's case is "very compelling . . . [and] supported by a century of western water law. But this U.S. Supreme Court, with the recent appointments, is, in its own way, probably the most radical court we've had since the late nineteenth century—in terms of overturning and moving away from existing, settled principles . . ."[82] Wilkinson writes that as:

> the first symbolic act of a campaign that would continue for nearly the whole century, in 1911 Bureau of Reclamation officials entered the Gros Ventre-Assiniboine Reservation at Fort Belknap, the very reservation at issue in *Winters*.[83] They dammed Peoples Creek which drained most of the reservation, they diverted the flow and by canals sent the water to non-Indian irrigators in the Malta District, 150 miles away.[84]

In a reflection of the increasingly conservative U.S. Supreme Court over the past few decades, tribal litigators have faced resistance to tribal rights and a refusal to recognize the centuries-old foundations of Indian law.[85] The situation in the courts becomes all the more alarming when attempting to find litigants that have had less success than tribes in the current Supreme Court. Since 1986, the year William Rehnquist became Chief Justice, convicted criminals won reversals in 36 percent of all cases before the Court, while the Court reversed only 23 percent of the Indian cases.[86] In addition, states won jurisdiction over Indians in Indian country in 54 percent of the cases in the Rehnquist Court, while winning only 38 percent of the same cases in the previous Burger Court.[87]

The futility of tribes attempting to protect human rights and water resources that potentially impact federal lands and other natural resources before the current U.S. Supreme Court is

82. *Id.*

83. *Id.*

84. Charles Wilkinson, *West's Grand Old Water Doctrine Dies*, HIGH COUNTRY NEWS, Aug. 12, 1991, *reprinted in* CHAR MILLER, WATER IN THE WEST 23 (2000).

85. *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist court's pursuit of states' rights, color-blind justice, and mainstream values*, 86 MINN. LAW. REVIEW. 267, 280–281 (2001).

86. *Id.* at 281.

87. *Id.* at 285.

illustrated by the Court's hostile attitude toward existing precedent related to tribal interests in cultural resources and water rights. In 1978, in order to protect sites that are spiritually significant to tribes from encroachment by development and extraction activities, for example, Congress passed the American Indian Religious Freedom Act (AIRFA).[88] "Believing they finally had the means to prevent desecration of a vision quest area located in an old growth forest in northern California, the tribes took the Forest Service to court" a decade after passage of the act to stop the building of a logging road there.[89] Regardless of the clear language of the Act, and although the tribes won in both district court and the Court of Appeals, in 1988 the Supreme Court overturned the lower court decisions, stating that road construction would not prohibit the Tribe from practicing their religious rights.[90] Similarly, in the water-rights arena, the Supreme Court, in *In Re Big Horn River,* refused to find that water had been reserved to maintain tribal interests in fisheries or mineral development.[91]

Finally, the negotiations taking place in the context of the Colorado River Compact are no exception to the lack of attention on the part of government officials to basic principles of fairness and human rights. Optimistic predictions of available water for growth and development in the Basin are not only based on over estimating available water but on the Compact Commission's failure to include the water rights of the Navajo Nation and other tribes.[92]

The slight to tribes in the Compact occurred even though an 1850 treaty with the Navajo Nation, reinforced by a 1908 Supreme Court ruling, guaranteed water rights necessary for a permanent homeland. In 2003, the Navajo Nation sued the U.S. Department of the Interior seeking to force the U.S. government to, at last, quantify its rights.[93]

88. 42 U.S.C. § 1996 (1978).

89. HAROLD SHEPHERD, COMPROMISING DEMOCRACY, THE RISE AND FALL OF THE SECOND CONQUEST OF WESTERN RANGELANDS 133 (2007).

90. *Id.*

91. 753 P.2d at 76, 98 (Wyo. 1988), *aff'd by*, 492 U.S. at 406 (1989).

92. Shepherd, *supra* note 7, at 11.

93. Shepherd, *supra* note 7, at 13.

IV. IMPLEMENTING THE HUMAN RIGHT TO WATER IN THE WEST

Whether the human right to water can be implemented in the Western United States must, in the first instance, be addressed by determining whether such a right actually exists. For precedent directly related to human rights law, one must turn to international law where human rights originated in relation to "the abusive treatment of concentration camp prisoners by Nazi medical doctors,"[94] and later developed into a prohibition on torture of prisoners and other individuals in captivity.[95] Today, fundamental human rights violations have been generally expanded to include apartheid, slavery, genocide, and all recognized torts when committed by a state actor.[96]

Due to a general failure of the American judicial system to recognize human rights as legally enforceable, U.S. citizens who litigate to protect such rights, usually fair better in international forums. At its sixty-seventh session, held from August 2 to August 19, 2005, for example, the Committee for the Elimination of Racial Discrimination in Geneva heard a preliminary basis request submitted by the Western Shoshone National Council, the Timbisha Shoshone Tribe, the Winnemucca Indian Colony, and the Yomba Shoshone Tribe asking the committee to act under its early warning and urgent action procedure on the situation of the Western Shoshone indigenous peoples in the United States.[97] The petitioners contended that the federal Bureau of Land Management (BLM) interfered with the their use and occupation of their ancestral lands by imposing grazing fees, trespass and collection

94. *See, e.g.*, Roberto Andorno, *Global Bioethics and Human Rights*, 27 MED. & L. 1, 2–3 (2008).

95. *See* Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1773 n.66 (2008).

96. *See* Khulumani v. Barclay Nat'l Bank Ltd, 504 F.3d 254, 273 (Katzmann, J., concurring).

97. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R> Report No 75/02, OEA/Ser.L./V./II.117, doc. 1 rev. 1 ¶ 5 (2002), *available at* http://www.cidh.org/annualrep/2002eng/usa.11140b.htm (last visited February 10, 2011). The Indian Claims Commission (ICC) is the quasijudicial body established by the United States for the purpose of determining Indian land-claims issues. The United States argued that the ICC awarded the Western Shoshone $26 million in compensation for the loss of their lands based upon 1872 land values, which has been held in trust by the Secretary of Interior until a distribution plan can be agreed upon between the government and the Western Shoshone. On the other hand, the Petitioner's argued that the BLM purporting to have appropriated the lands as federal property through unfair procedures before the ICC.

notices, horse and livestock impoundments, restrictions on hunting, fishing and gathering, as well as arrests on the petitioners' attempts to graze their livestock on public land in Nevada and by permitting or acquiescing in gold-prospecting activities within Western Shoshone traditional territory.[98]

BLM, on the other hand, argued that the matters raised by the petitioners involved lengthy litigation of land-title and land-use questions that have been, and remain subject to careful consideration by all three branches of the United States government.[99] Specifically, BLM claimed that the Danns and other Western Shoshone lost any interest in their traditional territory in 1872 as a result of encroachment by non-Indians, and as determined after proceedings before the ICC.[100]

Ultimately, the committee sided with the Petitioners and concluded that the U.S. position that the Tribe's legal right to ancestral land was extinguished through gradual encroachment—notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy that land and their natural resource in accordance with their traditional and tenure patterns, was not justified. The Committee further noted that BLM's position was based on processes before the ICC "which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests," as stressed by the Inter-American Commission on Human Rights.[101]

Based on those findings, the Committee filed an "Early Warning and Urgent Action Procedure" against the U.S. government based on it's conclusion that it "has received credible information alleging that the Western Shoshone indigenous peoples are being denied their traditional right to land, and that measures taken and even accelerated lately by the State party in relation to the status, use and occupation of these lands may cumulatively lead to irreparable harm to these communities."[102] Among the recommendations the Committee made was that the

98. *Id.*

99. *Id.*

100. *Id.*

101. Committee for the Elimination of Racial Discrimination, 68th Sess., Geneva, Feb. 20–March 10, 2006, *Early Warnings and Urgent Action Procedure Decision* 1 (68), U.S., UN Doc CERD/C/USA/DEC/1, at 2, ¶ 6 (April 11, 2006).

102. *Id.* at 2, ¶ 7.

government stop the citations and arrests of the Danns and "rescind all notices already made to that end, inflicted on Western Shoshone people using their ancestral lands."[103]

Human rights litigation brought in U.S. federal courts similarly address actions taken by U.S. corporations or governmental agencies acting abroad. A series of decisions in *Bowoto v. Chevron,*[104] for example, arose from a suit filed in 1999 by natives of Nigeria, seeking to recover for allegedly brutal attacks against environmental human rights protestors by the Nigerian Government Security Forces ("GSF") who were operating under the authority of Chevron Nigeria Ltd. (CNL) at the Chevron Parabe oil platform, and at the villages of Opia and Ikenyan from May, 1998 through January, 1999.[105]

In first phase of the *Bowoto* case, the federal District Court of the Northern District of New York concluded that even though CNL was a subsidiary of Chevron and plaintiffs presented evidence of a link between the conduct of Chevron in the United States ("CUSA") and the attacks in Nigeria, the company could not be held directly liable for the events.[106] Instead, the Court concluded that conduct was, if anything, "merely preparatory," and not a "direct cause" of the attacks.[107]

Similarly, the Court found that the Plaintiffs' RICO 1962(c) claim could not proceed under an agency theory in the context of the "conduct" or "effects" test because they failed to present evidence that the incidents at Parabe, Opia and Ikenyan benefited CUSA.[108] Further, the Court concluded that because there is not sufficient jurisprudence recognizing a violation of right to life, liberty, security of person and peaceful assembly to compare to this case and determine whether the alleged conduct has been universally condemned as violating that right, and granted defendants' motion for summary judgment as to that cause of action.[109]

The Court, however, found that the Plaintiffs' claims of cruel,

103. *Id.* at 1–2, ¶ 4.

104. 481 F.Supp.2d 1010 (N.D. Cal. 2007).

105. *See id.* at 1012.

106. *Bowoto*, 312 F.Supp.2d at 1240.

107. *Id.* at 1015.

108. *Id*. at 1018.

109. *See* Bowoto v. Chevron Corp., 557 F.Supp.2d 1080, 1095–96 (N.D. Cal. 2008).

inhuman and degrading treatment were sufficient to survive a motion for summary judgment[110] because the prohibition of cruel, inhuman and degrading treatment has been widely recognized in numerous sources of international law.[111] In this regard, the Court in *Bowoto* determined that "[t]here is no widespread consensus regarding the elements of cruel, inhuman and degrading treatment," but that it must consider whether the conduct alleged had been "'universally condemned as cruel, inhuman, or degrading.'"[112] Based on the fact, therefore, that the Plaintiffs alleged that during the raid on the Parabe platform several protestors were, held in "inhuman conditions," severely beaten, and subjected to severe physical abuse, the facts alleged were sufficiently egregious to survive summary judgment.[113]

Finally, in another small victory for the Plaintiffs, in dismissing Chevron's request to collect $485,000 in attorney fees and expenses, the *Bowoto* Court's order recognized that:

> awarding costs to defendants in this case would have a 'chilling effect . . . on future civil rights litigants.' At root, this case was an attempt by impoverished citizens of Nigeria to increase accountability for the activities of American companies in their country. Plaintiffs' ultimate failure at trial does not detract from the fact that this was a civil rights case. The threat of deterring future litigants from prosecuting human rights claims in the future is especially present in a case such as this, where

110. *Id*.

111. *Id.* at 192; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (1986) ("A state violates international law if . . . it practices, encourages or condones ... cruel, inhuman, or degrading treatment"); *see also* Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res. 217A(III), 3 U.N. GAOR Supp. No. 16, U.N. Doc. A/810 (1948) ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); United Nations Convention Against Torture, etc., art. 16, S. Treaty Doc. No. 100-20, 23 I.L.M. 1027 (1984) ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1."); ICCPR, March 23, 1976, art. 7, 999 U.N.T.S. 171. Other courts have also recognized an international norm prohibiting cruel, inhuman and degrading treatment. *See* Doe v. Qi, 349 F.Supp.2d 1258, 1322 (N.D. Cal. 2004); Tachiona v. Mugabe, 216 F.Supp.2d 262, 281 (S.D.N.Y. 2002); Jama v. I.N.S., 22 F.Supp.2d 353, 363 (D.N.J. 1998); Xuncax v. Gramajo, 886 F.Supp. 162, 187 (D. Mass. 1995); *but see* Forti v. Suarez-Mason, 694 F.Supp. 707, 712 (N.D. Cal. 1988) (recognizing a proscription against cruel, inhuman and degrading treatment but refusing to apply the norm absent a universally agreed upon definition).

112. *Bowoto*, 557 F.Supp.2d at 1093–94 (citing *Doe*, 349 F.Supp.2d at 1322).

113. *See id.* at 1094–95.

> plaintiffs have paltry resources and defendants are large and powerful economic actors.[114]

Similarly, human rights violations have appeared in federal courts in the context of tort claims. In *In re South African Apartheid Litigation*, the Plaintiffs sued several corporations located in the United States on behalf of "themselves and all black South African citizens (and their heirs and beneficiaries) for the corporation's part in violations of the law of nations."[115] In that case, the Court found that while

> 'the text of the [ATCA] seems to reach claims for international human rights abuses occurring abroad' [the fact that there] may not be a definitive statutory analysis, read in concert with judicial rejection of forum non conveniens as a bar to adjudication of torts in violation of the law of nations based on extraterritorial acts' permits this Court to entertain ATCA claims based on extraterritorial conduct.[116]

114. Bowoto v. Chevron Corp., No. C99-02506 SI, 2009 WL 1081096 (N.D.. Cal. 2009) (citing Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999)).

115. 617 F.Supp.2d 228, 241–42 (S.D.N.Y. 2009); *see generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (At the time Congress enacted the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, or otherwise known as the Alien Tort Statute ("ATS"), three torts were recognized at common law as violations of the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." (quoting William Blackstone, 4 Commentaries *68). Since then, the law of nations has broadened in scope to cover any tort as long as the norm alleged (1) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*, (2) is based upon a norm of international character accepted by the civilized world, and (3) is one that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.); *accord* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174–75 (2d Cir. 2009); *accord* Filartiga v. Pena-Irala, 630 F.2d 876, 876 (finding that the ATCA confers jurisdiction concerning "universally accepted norms of the international law of human rights, regardless of the nationality of the parties"). In *South Africa Apartheid Litigation*, specifically, the Plaintiffs alleged that they suffered discriminatory employment practices, employment retaliation geographic segregation, arbitrary arrest and detention, torture, rape, forced exile, arbitrary arrest and arbitrary denationalization, and the extrajudicial killing of family members at the hands of the apartheid regime that governed South Africa from 1948 to 1994 for their political beliefs. *South Africa Apartheid Litigation*, 617 F. Supp. 228, 241–42 (S.D.N.Y. 2009).

116. *South Africa Apartheid Litigation*, 617 F.Supp.2d at 247 (citing Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100, 105 n.10 (2d Cir. 2000) (noting that forum non conveniens analysis is necessary only if the court is "`a permissible venue with proper jurisdiction over the claim'") (quoting PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)).

Similarly, the courts have found that the ATCA confers jurisdiction concerning "universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[117]

In largely rejecting the Plaintiffs' claims, the *South Africa* Court illuminated why litigants in the United States often get bogged down in their efforts to assert human rights principles. The Court, for example, found that the Plaintiffs "advance two international legal instruments as the source of their claim: the International Convention on the Suppression and Punishment of the Crime of Apartheid ('the Apartheid Convention'), and the Rome Statute of the International Criminal Court (ICC)[118]—the Apartheid Convention, *despite near-universal condemnation of apartheid*, Western European and North American countries have neither signed nor ratified the treaty."[119]

There are, however, signs that the federal government's position on human rights is changing, including President Obama's December 16, 2010 announcement that his administration will support the United Nation's Declaration on the Rights of Indigenous Peoples.[120] The Declaration states that indigenous peoples' free, prior, and informed consent is required before their land, religious and cultural rights can be impacted[121] and that they have the right to the conservation and protection of the environment.[122]

117. *Id.* at 245–246.

118. *Id.* at 250; *see* Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res 2068 (XXVIII) A (Dec. 6, 1973), 13 I.L.M. 50, 1015 U.N.T.S. 243 (1976); Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90.

119. *South Africa Apartheid Litigation*, 617 F. Supp. 2d at 25–251.

120. *See* Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples. http://www.state.gov /documents/organization/153223.pdf. (Last visited March 22, 2011).

121. *Id.* at art. 10; United Nations Declaration on the Rights of Indigenous Peoples Adopted by General Assembly, G.A. Rex. 61/295, U.N. Doc A/RES/61/295 at 13, (Sept. 13, 2007) [*hereinafter* Rights of Indigenous Peoples] ("Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.").

122. Rights of Indigenous Peoples. at art. 11

("1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and

Similarly, the United States joined over a hundred other nations in signing and ratifying the International Convention on the Elimination of All Forms of Racial Discrimination, which recognizes that a country may not deprive citizens of their nationality on the basis of race[123] and generally accepted regional and international legal materials have endorsed this prohibition.[124]

Likely in response to the U.S. failure to endorse the UN's human right to water resolution, the Water for the World Act (WWA) passed the Senate during the summer of 2010.[125] The Act places water in the forefront of America's development priorities, seeking to reach 100 million people around the world with sustainable access to clean water and sanitation over the next six years.[126] The WWA is intended to achieve the goal of reaching 100 million people with sustainable access to clean water and sanitation by: 1) targeting underdeveloped countries with focused initiatives to improve access to clean water and sanitation; 2) fostering global cooperation on research and technology development, including regional partnerships among experts on clean water; 3) strengthening the federal government's infrastructure for implementing clean water and sanitation programs effectively; and 4) ensuring that water receives priority

performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. Article 11 Rights of Indigenous Peoples.").

123. *See* Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, U.N. Doc. A/RES/2106 (Jan. 19, 1966), 5 I.L.M. 350, 356 (Jan. 4, 1969). Every member state of the United Nations with the exception of the United States and Somalia has also ratified the Convention on Rights of the Child, which also recognizes this norm. *See* United Nations Convention on the Rights of the Child, 1577 U.N.T.S. 3, art. 8, § a, 28 I.L.M. 1448, 1460 (Sept. 2, 1990).

124. *See* European Convention on Nationality, 37 I.L.M. 44, 48 art. 4(c) (Nov. 6, 1997) ("[N]o one shall be arbitrarily deprived of his or her nationality"); *accord* American Convention on Human Rights art. 20, 9 I.L.M. 99, 107 (Nov. 22, 1969) ("No one shall be arbitrarily deprived of his nationality or of the right to change it."). The United States has signed the American Convention on Human Rights but has not yet ratified it. *See* Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319, 1322 n.23 (2006); *see also* 2 No. 1 Hum. Trs. Brief 51 (1994) Nadia Ezzelarab & Brian Tittemore (round table discusses U.S. ratification of Inter-American Convention on Human Rights, Human Rights Brief, noting that the United States' failure to ratify the treaty stemmed from objections concerning the death penalty and abortion).

125. Senator Paul Simon Water for the World Act of 2010, S. 624, 111th Cong. (as passed by Senate, Sept. 20, 2010).

126. *Id.* at § 5(2)(B).

attention in foreign policy efforts.[127] The WWA represents the U.S. contribution to the United Nations Millennium Development Goal on water, which calls for a 50 percent reduction within six years of the proportion of the world population that does not have access to safe water and sanitation.[128]

Further, starting with the Clinton administration, the Executive Branch issued a series of orders reflecting its policy on "environmental justice"[129] standards. Executive Order 12898, for example, provides:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.[130]

Similarly, Executive Order 13175 acknowledges tribal sovereignty, jurisdiction and other rights by calling for consultation and coordination with Indian tribal governments in relation when such rights are potentially implicated by government

127. *See generally id.* The WWA was intended to build on the progress achieved through the Water for the Poor Act of 2005 (WPA), P.L. 109-121, which made access to safe water and sanitation for developing countries a specific policy objective of the United States Foreign Assistance Program. The WPA was sponsored by the late Paul Simon, who more than a decade ago, wrote the book, TAPPED OUT, which warned of the world's looming clean water crisis. PAUL SIMON, TAPPED OUT: THE COMING WORLD CRISES IN WATER AND WHAT WE CAN DO ABOUT IT (2d ed. 2002).

128. United Nations Millennium Declaration, G.A. Res. 55/2 U.N. Doc. A/RES/55/2, at art. IV (Sept. 18, 2000).

129. *See generally* EPA.GOV, http://www.epa.gov/environmentaljustice/ (last visited February 6, 2011) (Environmental Justice is generally defined by the EPA as: "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work").

130. Exec. Order No. 12898, 58 Fed. REg. 7629, 7629 (February 11, 1994).

actions.[131]

V. LEGAL STRATEGIES

The lack of direct attention given to human rights by Congress and the resulting failure to recognize such rights by U.S. courts does not necessarily mean that such rights or policies in relation to water interests have never been or cannot be implemented. Indeed, the basis of legal precedent for implementation of human rights to water exists throughout federal and state laws, and policies have to some extent been developed indirectly by state and federal courts and administrative agencies.

A. Federal Law

Title VI of the Civil Rights Act of 1964 is perhaps the closest federal statute to reflect the human rights concept, which states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[132] Title VI is most often applied to prohibit recipients of federal financial assistance (e.g., states, universities, and local governments) from discriminating on the basis of race, color, or national origin in their programs or activities.[133] The Act allows persons to file administrative complaints with the federal departments and agencies that provide financial assistance alleging discrimination

131. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (Executive Order 13175 recognizes that "the right of Indian tribes to self-government and supports tribal sovereignty and self-determination." Sec. (2)(C) directs federal agencies to, among other things: "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." § 3(a); *see also* U.S. Dep't of Fish and Wildlife Secretarial Order # 3206 (issued by the Secretary of the Interior and the Secretary of Commerce pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531, as amended by the federal-tribal trust relationship, and other federal law. "Specifically, the Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights.").

132. 42 U.S.C. § 2000(d).

133. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, TITLE VI AND ENVIRONMENTAL JUSTICE AT EPA (Nov. 10, 2010), http://www.epa.gov/civilrights/t6andej.htm.

based on race, color, or national origin by recipients of federal funds.[134] Under Title VI, federal agencies have a "responsibility to ensure that [their] funds are not being used to subsidize discrimination based on race, color, or national origin."[135] That prohibition against discrimination has been a statutory mandate since 1964, and federal agencies such as the Environmental Protection Agency have had Title VI regulations since 1973.[136] EPA's Office of Civil Rights is responsible for the Agency's administration of Title VI, including investigation of complaints.[137]

In addition, federal case law recognizes the federal government's trust responsibility to federally recognized Indian tribes and subsistence rights of native communities.[138] Generally, the trust concept is interpreted as a "guardian and ward" relationship between the federal government and tribes, requiring the government to take certain measures in relation to tribal assets.[139] Those actions include everything from ensuring fair exchange of monies and goods to the management of natural resources both on and off reservation lands for the benefit of Indians.[140] One of the key judicial decisions addressing the trust duty to tribes is *United States v. Mitchell*, which provides that certain federal statutes can be interpreted to impose a trust duty on the federal government.[141] That duty was created by the statutory language that called for a detailed management role by the executive branch.[142] Therefore, "[a]ll of the necessary elements of

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, UTAH L. REV. 1471, 1502 (1994).

139. *Id.*

140. *Id.* at 1499. This special relationship has been traced to the American Revolution and the U.S. Constitution when, to avoid costly conflicts with tribes, Indian affairs were kept in the hands of the federal government. *Id.* at 1498–99.

141. U.S. v. Mitchell, 463 U.S. 206, 224 (1983).

142. *Id.* at 225. The Court said:

> [W]here the federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. (*quoting* Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980)); Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980)) (alteration in original).

a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[143]

Finally, federal courts have enforced the government's mandate to provide subsistence priority for Native Alaskan's on navigable waters. In *Native Village of Quinhagak v. United States*,[144] the Plaintiffs established a tradition of subsistence fishing for rainbow trout in the navigable portion of rivers in the Togiak National Wildlife Refuge.[145] Since the federal government refused to administer the ANICLA subsistence priority, the Plaintiffs were subject to state regulation which only allowed incidental take of rainbow trout so they filed suit against the United States.[146] Concluding that the harm to Quinhagak cultural identity was real and provided a basis for preliminary federal regulation under ANILCA, the Ninth Circuit granted the preliminary injunctive relief.[147] Notable was the Court's application of human rights phraseology in reaching its conclusion including its finding that the Villages "needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living"[148] and "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence."[149] Moreover, the subsistence priority in favor of Native Alaskan's was further strengthened by the subsequent Court opinions that confirm federal jurisdiction over the reserved waters of the refuge.[150]

B. State Law

To some extent, the recognition of basic human needs can be found in the Water Codes of most of the states located within the Colorado River Basin, which require the relevant water

143. *Mitchell*, 463 U.S. at 225 (alteration added).

144. 35 F.3d 388 (9th Cir. 1994).

145. DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 304 (University of Alaska Press, 2d ed. 2002).

146. *Id*. The basis of naming the federal government as defendants was the fact that the rivers are presumably located in Togiak Nation Wildlife Refuge. *Id.* at 305 n.301.

147. *Id*. at 305.

148. *Native Village of Quinhagak*, 35 F.3d at 394 (citing 16 U.S.C.A. § 3111(1) (2010)).

149. *Id.*

150. CASE & VOLUCK, *supra* note 145, at 305 n.301.

management agency to make decisions based on private and public water needs including to federal reserved water rights,[151] treaties,[152] interstate contracts,[153] and existing rights holders.[154] Most new sources of water for energy development projects in the Colorado River Basin will require changing existing water rights from agricultural to industrial uses.[155] Because most existing water rights in the Basin are for agriculture, before agreeing to allocate water from agricultural use to industrial use, state water codes require water managers to consider many factors including the effects on rural communities. Any proposed use of water that has a clear potential to be detrimental to the public welfare should not be approved without supporting evidence to the contrary.[156]

A fundamental right under the U.S. Constitution as well as many state constitutions is the due process of law; many state constitutions mirror language under the U.S. Constitution, which provides that "no person shall . . . be deprived of life, liberty or property without due process of law."[157] Similarly, some state constitutions specifically recognize basic rights including the right to protect traditional and cultural resources for native communities.[158] Hawaii's Constitution, for example, provides that the "State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people"[159] and that the "state affirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are decedents of Native Hawaiians who in habitat the Hawaiian Islands prior to 1778."[160]

Moreover, Montana's Constitution provides that "[a]ll surface, underground, flood, and atmospheric waters within the

151. Robert E. Beck & Michael C. Blumm, *Federal Reserved Water Rights*, *in* WATERS AND WATER RIGHTS § 37.03 (1991).

152. *Id.* at §37.02.

153. Robert E. Beck & Douglas L. Grant, *Effect on State Laws and Private Rights, in* WATERS AND WATER RIGHTS, *supra* note 151 at § 46.04.

154. *See e.g.*, UTAH CODE ANN. § 73-3-8(1)(a)(ii) (2007).

155. Glick, *supra* note 7, at 2.

156. *Id*. at § 73-3-8(1)(b)(i).

157. U.S. CONST. amend. V.

158. *See* HAW. CONST. art XI, § 7.

159. *Id.*

160. HAW. CONST. art XII, §7.

boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[161] In *Tongue & Yellowstone Irrigation District*,[162] a coalition of conservation organizations and irrigation districts claimed that the Montana Board of Oil and Gas Conservation (MBOGC) violated Article IX when the agency issued a Record of Decision (ROD) that paved the way for the use of 58 million cubic yards of water in the development of Coal Bed Methane in southeastern Montana.[163] The *Tongue & Yellowstone* litigants additionally claimed that two state statutes, one prohibiting the "wasting" of ground water with the exception of water produced as part of CBM development,[164] and another describing the management of CBM produced ground[165] were unconstitutional as applied by the MBOCG to the CBM process.[166]

While the Court found that the wasting of water appeared to be protected by the state constitution, it did not concur with the Plaintiffs' position that this was a fundamental right because "there should be a balancing of the rights infringed and the governmental interest to be served by the infringement."[167] The court also rejected the litigants' claim that the activities of MBOGC denied them equal protection under Article II, §4 of the state constitution due to the creation of two classes—one of "water users who must get a permit from the DNRC for beneficial use of water, and the other [of] CBM producers who do not need a permit to produce and waste water."[168] The Court concluded that this argument presupposes that the disposal of all CBM-produced water is a waste and is not subject to administrative regulation. "However . . . permits are required for managed irrigation and for MPDES discharge permits. Further, the Court is unconvinced that the disposition of CBM-produced water, except as to evaporation pits,

161. MONT. CONST. art IX, § 3, cl. 3.

162. Tongue & Yellowstone Irrigation Dist. v. Mont. Bd. of Oil and Gas Conservation, No. BDV–2003–579, 2010 Mont. Dist. LEXIS 116 (D. Mont. Mar. 5, 2010).

163. *Id.* at 2–3. CBM gas is trapped in coal seams. With the production of the gas, a large amount of groundwater is released and pumped to the surfaces. It is the disposal of this groundwater that was the topic of the *Tongue & Yellowstone* case.

164. MONT. CODE ANN. § 85-2-505(1)(e) (2011).

165. *Id.* at § 82-11-175(2).

166. *Tongue & Yellowston*,, at *4–6.

167. *Id.* at *7.

168. *Id*. at *18 (alteration added).

is a waste of that water."[169]

On the other hand, in addressing similar language under the Alaska Constitution,[170] the state supreme court recognized that the "Constitution can offer broader protections than corresponding provisions of the United States Constitution."[171] In this regard, the Alaska Constitution provides that:

> All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation for fish and wildlife.[172]

The implications of the Alaska Constitution to human and water rights are the subject of a recent appeal to the Third Judicial District for the Superior Court by citizens attempting to protect instream flow water rights in the Chuitna River located in south central part of the state.[173] In *Chuitna Citizen's Coalition v. DNR*,[174] the coalition claims that DNR violated the State Constitution and water code in relation to the agency's decision to require a coalition of conservationists in Alaska to file separate instream flow reservations for the same river and declined to grant the applicants the requested priority date.[175] The Coalition maintains that DNR's evaluation of their instream flow application and dismissal of their appeal deprived them of their right to an instream flow reservation including economic, subsistence, commercial and sport resources[176] and that they had a constitutionally protected interest in retention of the original

169. *Id.*

170. The Alaska Constitution provides "no person shall…be deprived of life, liberty or property without due process of law." ALASKA CONST. art I, §7 (alteration added).

171. State Dep't of Natural Res. v. Green Peace, Inc., 96 P.3d 1056, 1064 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970)).

172. ALASKA CONST. art VIII, § 13.

173. Appellant's Opening Brief, Chuitna Citizens Coalition v. Irwin, No. 3AN-10—4918 CI (June 23, 2010).

174. *Id.*

175. *Id.* at 12.

176. *Id.* at 14.

priority date over any potential conflicting water uses.[177] In general, the coalition argues that:

> Because meaningful access to the judicial system is a fundamental right under the Alaska Constitution,[178] and the DNR's regulations require Chuitna Citizens to exhaust administrative remedies before it may appeal to the courts; the DNR's administrative exhaustion requirements also must satisfy the due process guaranties of the Alaska and U.S. Constitutions.[179] Meaningful access to court cannot be guaranteed, as required by the Alaska and U.S. Constitutions, if Chuitna Citizens is required to exhaust the DNR's administrative remedies, but is denied procedural due process throughout the DNR's proceeding.[180]

The Coalition's use of the terms "fundamental right" in relation to due process in the context of a water right dispute may be interpreted as an attempt to encourage the Court to accept water as a fundamental human right under the Alaska Constitution. Indeed, as the Alaska Supreme Court stated in *Greenpeace*:

> [n]atural resources are of prime importance to the public. Water is a key natural resource, listed in article VIII, sections 2 and 13 of the Alaska Constitution. Likewise, concepts of fairness underlying the right to procedural due process are important.[181]

177. *Id.* at 14–15. "Under the principle of 'prior appropriation,' when more than one application for water use competes for the same flow of water, whichever application was received by the administering agency earliest will be senior to the later application, and the junior user cannot use any water that would adversely affect the senior user." *See* Robert E. Beck & Owen L. Anderson, *Elements of Prior Appropriation, in* WATERS AND WATER RIGHTS § 12.01.

178. *Id.* at 11 (citing Public Employees' Retirement System v. Gallant. 153 P.3d 346, 350 (Alaska 2007) (recognizing the right of "litigating" as a fundamental right)); Peter v. Progressive Corp., 986 P.2d 865, 872 (Alaska 1999); *see also* Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1379 (Alaska 1988); Bush v. Reid, 516 P.2d 1215, 1219–21 (Alaska 1973)).

179. *See* Stein v. Kelso, 846 P.2d 123, 126 (Alaska 1993).

180. Appellant's Opening Brief, Chuitna Citizens Coalition, *supra* note 173, at 11–12.

181. State v. Greenpeace, Inc., 96 P.3d 1056, 1062–63 (finding the DNR violated an organization's due process rights when it lifted a stay of a temporary water use Permit with only a one-day notice).

As with federal courts, however, the closest that the courts in Alaska have come to finding some kind of fundamental right to water is in the context of subsistence uses. In *Tulkisarmute Native Cmty. Council v. Heinze*,[182] residents of the town of Tuluksak who depend on the Tuluksak River and its tributaries to provide subsistence resources filed suit contending that mining permit extensions authorized by the Alaska Department of Natural Resources (DNR) violated applicable regulations and the Alaska Constitution.[183] The Alaska Supreme Court held that the DNR acted outside its authority in extending permits because TDL did not show "'diligent effort toward completing the appropriation.'"[184] The court concluded "that DNR abused its discretion by failing to address fish and wildlife concerns adequately."[185]

Finally, based on its anti-privatization goal, the Public Trust Doctrine[186] can be another means of implementing the human right to water. A case in point is the Hawaii Water Code, which reflects the intention that water be held for the benefit of the public trust by stating that the "springs of water, running water and roads shall be free to all, on lands granted in fee simple and provided that this shall not be applicable to wells and water courses which individuals have made for their own use."[187] In addition, in *Tongue & Yellowstone,* the Montana Supreme Court determined that the Record of Decision (ROD) violated Article IX because it authorized evaporation of water from waste water pits in violation of the beneficial use standards of the state water code.[188] In reaching this conclusion, the Court rejected the agency's argument that the "public trust doctrine applies only to the recreational use of surface water [because] [t]he constitutional provision specifically refers to all waters of the state."[189] South Dakota has also adopted

182. 898 P.2d 935 (Alaska 1995).

183. *Id.* at 938.

184. *Id.* at 952–53 (quoting ALASKA ADMIN. CODE tit. 11, § 93.120).

185. *Id.* at 953.

186. The Public Trust Doctrine generally, provides that "natural resources are viewed as being held by the state in a fiduciary capacity, for the benefit of members of the general public. . . ." WATERS AND WATER RIGHTS § 30.02.

187. HAW. REV. STAT. § 7-1 (2010).

188. Tongue & Yellowstone Irrigation Dist. v. Mont. Bd. of Oil and Gas Conservation, No. BDV–2003–579, 2010 Mont. Dist. LEXIS 116, at *17-18 (D. Mont. Mar. 5, 2010).

189. *Id.* at *17.

the public trust doctrine in its laws regulating water usage by eliminating private landowners' common law rights to access water unrestricted on their lands.[190] Specifically, the state's water code declares that the public has a paramount interest in the use of all the water of the state and that the government must determine what surface and underground water can be converted to public use or controlled for public protection.[191] Further, the South Dakota Supreme Court recognizes the responsibility of water management agencies under this public trust doctrine as broader than "mere compliance by [agencies] with their legislative authority. . . ."[192] "[T]he use of water for domestic purposes, [therefore], is the highest use of water, and takes precedence if such use is consistent with the public interest pursuant to SDCL 46-1-2."[193]

South Dakota public trust doctrine was re-enforced in the Spring of 2010 when the First Judicial Circuit Court of Charles Mix County ruled that a Combined Animal Feeding Operation (CAFO) producing tens of thousands of piglets a year is not a "domestic use" operation and its Iowa owners must apply for a commercial water permit if they want to use water pumped from a well.[194] The Yankton Sioux Tribe and several of its members went to court after the South Dakota Water Rights Management Board ruled that the CAFO, where sows at the farrowing complex produce about 70,000 piglets each year that are raised in Iowa and needs approximately 17,000 gallons of water per day, was a domestic water user and did not need a water right permit to divert ground water.[195] In overturning the Board's decision, the Court recognized that the South Dakota legislature never intended that a commercial entity should have the same status as a family farm or similar operation which uses water for drinking, cooking, performing laundry duties, watering pets and watering a small number of domestic livestock.[196] This case illustrates that

190. *See* S.D. CODIFIED LAWS § 46-1-1 (2010).

191. *Id.*

192. Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004) (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (1983)).

193. Fraser v. Water Rights Comm'n, 294 N.W.2d 784, 789 (S.D. 1980).

194. Memorandum Decision and Order, In the Matter of the Petition for Declaratory Ruling Regarding the Applicability of Domestic Water Use for Longview Farm LLP's Well, Civ. 09-63 (June 24, 2010) (on file with author).

195. *See* Stephanie Woodard, *Hog Farm Applies for Water Permit*, INDIAN COUNTRY TODAY, Aug. 18, 2008, at 10; *see also Judge: Iowa Farmers Need Permit for South Dakota Hog Farm*, RAPID CITY JOURNAL, July 2, 2010.

196. *See* Woodard, *supra* note 195.

existing laws like the Public Trust Doctrine sometimes retain sufficient criteria to implement the human right to water and that Courts will enforce them.

C. Tribal Water Rights

Perhaps the best legal avenue for implementing the human right to water in the western United States is through the authority held by federally recognized Indian tribes.

The origins of the federal reserved rights doctrine can be traced to the landmark United States Supreme Court decision in *Winters v. United States*.[197] When the federal government acquired western lands after the Treaty of Guadalupe Hidalgo and the Louisiana Purchase, little was known of the area, which was largely considered non-irrigable due to low annual precipitation.[198]

In *Winters*, the United States brought suit on behalf of the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation to halt upstream diversions by non-Indians who had been using the water since 1900.[199] The Fort Belknap Reservation was established under the terms of an 1888 treaty that generally described the purpose of the reservation as the provision of a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits, but did not mention water rights.[200] The non-Indian diverters contended that their diversions, which were prior in time to those by the Indians, gave them a right superior to that of the Indians.[201] The Supreme Court, however, disagreed and rejected the contention that "the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government . . . . 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."[202]

After *Winters* came a period in which the federal courts refined the definition of sovereignty in relation to tribal reserved

197. SHEPHERD, *supra* note 89, at 128 (citing Winters v. United States, 207 U.S. 564 (1908)).

198. *Id.*

199. *Winters*, 207 U.S. 564.

200. *Id.* at 565, 567.

201. *Id.* at 568–69.

202. *Winters*, 207 U.S. at 576–77.

water rights and initially quantified such rights based upon the principle of practicably irrigable acreage (PIA).[203] Under that test, an Indian tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation and the water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation . . . ."[204]

Ultimately, that approach developed into what has become known as the "permanent homeland" concept, which originated in *In Re General Adjudications of All Rights to use Water in the Gila River System and Source*.[205] In that case, the Arizona Supreme Court ultimately rejected the PIA as the sole standard for determining the "essential purpose" of the tribal reservation and instead found that such purpose "is to provide Native American people with a 'permanent home and abiding place' that is a 'livable environment.'"[206] In reaching this conclusion, the Court found that the general purpose of providing a home for Indians must be broadly construed to provide tribes with the ability to achieve self-determination and economic self-sufficiency, and that limiting tribes to a PIA standard denies them the opportunity to evolve.[207]

Similarly, experts in Indian and natural resources law have recognized the ramifications of protecting water and other interests that are much broader in question through the application of tribal treaty rights. In his book *Crossing the Next Meridian: Land, Water and the Future of the West*, Charles Wilkinson writes,

> The events that most directly triggered the beginnings of modern comprehensive reform . . . originated from the most unlikely source of all: the Indian tribes, who nearly everyone had assumed would quietly fade off into oblivion. That was certainly the attitude of state wildlife officials who, during the 1950s and 1960s, were faced with the combination of booming population—especially the droves of sportfishers who took to the rivers in search of the tackling-busting steelhead—and steadily decreasing runs. It became ever more apparent that

203. *Arizona v. California*, 373 U.S. 546, 600 (1963), *disavowed on other grounds by California v. United States*, 438 U.S. 645 (1978).

204. *Id.*

205. 35 P.3d 68, 76 (Ariz. 2001).

206. *Id.* at 74 (citations omitted).

207. *Id.* at 76.

there were not enough anadromous fish to go around.[208]

The treaties became essential to tribal subsistence, and survival became one means of reminding the federal government of the rights of native communities to fish harvest and sufficient water necessary to sustain aquatic habitat.

After the states placed limits on fishing, and when the salmon runs continued to drop in the Columbia River, tribal leaders staged protests in the 1960s that served as templates for the civil rights movement in the southern part of the United States thereafter. Unable to gain the same visibility that the African American community achieved with civil disobedience, however, the tribes, instead, went to court and in the 1970s obtained a series of successful and far-reaching judicial opinions in federal court history.[209]

During the last two decades of the twentieth century, over fifty major Indian water-rights lawsuits and settlement agreements were ongoing in state and federal courts, administrative hearings, and at negotiating tables across the United States.[210]

Still, tribal water right settlement agreements are often not only the best means of reaching finality with regard to such claims, but by piggybacking federal reserved water-right claims onto tribal water-right settlement agreements, water resources and fish habitat on both tribal and federal lands can be protected. In concluding that the Confederated Tribes of the Umatilla "hold valid existing water rights, for example, the Office of the Solicitor has encouraged the tribes, state, and other stakeholders to move forward in resolving the water issues in the Umatilla basin of northeastern Oregon."[211]

The Bush administration indicated an intention to establish "a mechanism for heading off disputes" in the tribal water-rights area,

208. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE AMERICAN WEST 203 (1992).

209. SHEPHERD, *supra* note 89, at 138.

210. Steve Hinchman, *West Faces a Time Bomb*, HIGH COUNTRY NEWS, Aug. 27, 1990, *reprinted in* CHAR MILLER, WATER IN THE WEST: A HIGH COUNTRY NEWS READER 246 (2000).

211. SHEPHERD, *supra* note 89, at 134. The Solicitor's opinion was inspired by the state supreme court decision in *Byers v. We-wa-ne*, 169 P. 121 (1917), which purported to substantially limit such rights.

including an emphasis on negotiation rather than litigation.[212] Further, at it's August 14, 2001 meeting, the Western Governors' Association adopted a resolution sponsored by Oregon Governor John Kitzhaber that provides that the "Western Governors continue to support negotiated rather than litigated settlement of Indian water rights disputes."[213]

The Solicitor's Office, the WGA, and tribes are not the only ones advocating that Congress and the states focus resources on tribal water-right settlements.[214] There is ample precedent for reaching consensus on water-use issues in a manner that balances the interests of Indian tribes and local water users. In 1997, the Warm Springs Tribe and the State of Oregon signed a Water Rights Settlement Agreement to permanently determine the "scope and attributes of the federally reserved Indian water rights, and collectively of all Persons claiming water rights under the Treaty, for lands within the [Tribes'] reservation."[215]

Although federal courts have become less responsive to tribes in water-rights claims, this does not mean that states and others who may be affected by tribal water rights negotiations should walk away from the table. Even today, tribal water rights remain one of the last vestiges for protecting tribal and public interests in water quality and quantity. In *In re General Adjudication of All Rights to Use Water in Gila River System and Source,*[216] the Arizona Supreme Court stated that irregardless of conflicting state laws, federal law authorized the government to reserve a right to groundwater under Indian reservations, if and to the extent that groundwater may be necessary to accomplish the purposes of a

212. *See* The Administration's Settlement Policy and the Implementation of Settlements, Presentation by Bill Meyers, United States Solicitor, at the Symposium on the Settlement of Indian Reserved Water Rights Claims (Oct. 11, 2001). *See also* Working Group in Indian Water Settlements, 55 Fed. Reg. 9223, 9223 (Mar. 12, 2001) (urging that "disputes regarding Indian water rights should be resolved through negotiated settlement rather than litigation").

213. Western Governors' Association [WGA], *Negotiated Indian Water Rights Settlements*, WGA Policy Resolution 10–18 (2010) (on file with author), *available at* http://www.westgov.org/policies..

214. The American Bar Association's Section of Environment, Energy, and Resources recently added its voice to those calling on Congress and the administration to continue to give priority to and adequately fund tribal water right settlements. *See* David J. Hayes, Promoting Water Settlements, Trends, *Environment, Energy, and Resources Newsletter*, vol. 33, no. 2:3 (2001) (on file with author).

215. *See* Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement 4 (Nov. 17, 1997) (on file with author).

216. 989 P.2d 739, (Ariz. 1999).

federal reservation.[217] *Minnesota v. Mille Lacs Band of Chippewa Indians*[218] held that tribes' fishing, hunting, and gathering rights were not terminated by an executive order removing Chippewa Indians from lands previously ceded; the Tribe had not relinquished such rights by entering into an 1855 treaty, and such rights were not extinguished when the state was admitted to the union.[219]

Further, in most federal district court cases involving tribal treaty rights versus state rights, it is the tribes that prevail.[220] The Ninth Circuit has recognized reserved rights in connection with maintenance of flows necessary for fish runs in streams running through or bordering an Indian reservation.[221] Moreover, active litigation on tribal cases can hold all other affected applications for water rights and restrict all related non-Indian development for as long as the litigation continues.[222] At the same time, satisfaction of tribal water rights rarely significantly impacts local water needs as illustrated by a recent agreement between the federal government and the Gila River Indian Community that is the largest Indian water settlement in U.S. history, affecting the rights of a dozen Arizona tribes.[223]

Even though the water included in the agreement is equivalent to the total need for future growth in the cities of Phoenix and Tucson, through the use of leasing tribal water and other options, the agreement does not substantially hamper the cities' needs or even signify the end of urban growth.[224]

Such leases are already making it possible for growth and development in other areas of the Southwest including the Ak-Chin Indian Community, which provides all the water for Del Webb's Anthem development north of the Sacramento Valley in California, and the Salt River Pima-Maricopa Indian Community,

217. *Id* at 747.

218. 526 U.S. 172 (1999).

219. *Id* at 193–94, 202.

220. *See* Michelle Tirado, *A "Usual and Accustomed" Spot: The Fights for Treaty Rights Often Begins in District Courts*, AMERICAN INDIAN REPORTS, Oct. 2001, at 18 (on file with author).

221. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

222. *See* BURTON, *supra* note 79, at 126, 131.

223. *See* Harold S. Shepherd, *State Court Jurisdiction Over Tribal Water Rights*, 17 J. ENVTL. L. LITIG. 343, n.220 (2002) (citing Shaun McKinnon, *Tribes Gain Water, Voice in State Future: Indians to Get Historic Settlement*, THE ARIZONA REPUBLIC (March 24, 2002)).

224. *Id*.

which leases water to the Arizona cities of Phoenix and Scottsdale.[225] The protection of existing water uses through non-Indian use of tribal reserved water that has been quantified but is presently unused by the tribes has become a common component of tribal water-rights agreements.[226] With a settlement agreement in hand, farmers, cities, industries, native communities, and others having need for water would know, possibly for the first time, how much water is available for agriculture, growth, fish, and other needs—and who controls such water.

One of the most prominent examples of how tribal agreements may not only be applied to provide assurances to non-Indian agricultural interest, but to protect stream flows needed for fisheries, is the adjudication of the Snake River and its tributaries. The Snake River Basin Adjudication (SRBA) was the result of a 1993 agreement between State of Idaho and Idaho Power Inc. that settled a lawsuit over water rights on the River and included a requirement for Idaho to proceed with the SRBA, which, in turn provides the Nez Perce with an opportunity to file a claim in the Idaho Water Court.[227] The Nez Perce filed a claim asserting that the treaties of 1855 and 1863 granted the tribe off-reservation instream flows, including most of the flow in the Snake River, and that the tribe retained a priority date of "time immemorial."[228] The implications of the tribal demands, therefore, were formidable including the potential abdication of no less than virtually every other existing use of water within the Snake River basin.[229]

As such, the incorporation of the tribal claims into the SRBA encouraged the parties to mediate the tribe's claims against the United States for breach of the government's fiduciary duty as trustee of the tribe's interests and the states' and non-Indian water users roles and obligations under the federal environmental laws against the United States, including the Endangered Species[230] and

225. *Id.*

226. Such "water marketing" has arisen primarily in the context of the Colorado River adjudication, where the states are becoming more willing to seek additional supplies of Colorado River water. *Id.*

227. Jerry R. Rigby, Snake River Water Rights: The Nez Perce Agreement, THE WATER REPORT, Aug. 15, 2005, at 18 (on file with author).

228. *Id.*

229. SHEPHERD, *supra* note 89, at 136.

230. 16 U.S.C. § 1531 (2006).

Clean Water Acts.[231] Ultimately, the SRBA parties reached a settlement which may not have occurred if not for the fact that water quantities that the federal government claimed were needed to protect fish and water quality would have resulted in similar impacts to the state and individual water rights as the quantity of water claimed by the Tribe.[232] The turning point in the negotiations occurred when the non-Indian water-right holders discovered that if they prevailed against the tribe in the adjudication process, they would likely eventually have to leave undiverted the same water claimed by the in order to fulfill a biological opinion requiring instream flows for endangered species in the Snake River.[233]

The genius of the Snake River adjudication and others like it is not so much that it provides water to agricultural interests while satisfying tribal water rights, but by also satisfying the need for water to protect fishery habitat, it managed to meet a public need for the protection of endangered species and water quality. Indeed, all these needs were met during the term of an administration and Congress that were both openly hostile, not only to such interests, but to corroborative efforts to reach consensus on environmental or tribal concerns. The settlement, therefore, illustrates that such agreements can not only provide for the protection of public interests in water and other natural resources both on and off federal lands, but can also offer certainty and security to landowners and other state water-right holders.

More importantly, some experts believe that the Indian treaty fishing and hunting rights can be interpreted not only to protect endangered species, but to increase their numbers beyond what the federal statutes can provide. Coggins and Modrcin state:

> Indian treaty rights to hunt and fish are not fundamentally inconsistent with federal wildlife statutes, and that courts should seek harmonization of the interest. To achieve a rational balancing, it is necessary first to find that Indians are within the definition of 'persons' bound by the new laws. Courts should hold that the federal wildlife statutes have a dual effect: They override or modify treaty rights to the extent necessary for

231. 33 U.S.C. § 1251 (2006).

232. Rigby, *supra* note 229, at 18–19.

233. *Id*.

> conservation of the species; and they impose upon federal officials an affirmative duty, in the nature of a trustee's responsibility, of implementing the statutes so that any benefits to be derived from the taking of protected species go first to treaty Indians.[234]

At least in a legal sense, therefore, there is precedent indicating that many federal environmental statutes and tribal treaty rights are not only consistent, but like those of the New Mexico pueblos and the Nez Perce tribe of Idaho, can turn from conflict to hope.

VI. TRIBAL WATER RIGHTS AND THE COLORADO RIVER BASIN

The potential of tribal water and other legal rights to provide for protection of fishery and other resources that depend on sufficient and clean water that goes beyond that of even some of the strongest federal environmental statutes can be one of the most effective strategies for implementing the human right to water not only for tribes and their members but for the general public as well. A strict interpretation of the treaty between the United States and the Navajo Nation and the ruling in *Winters v. United States* shows that the Tribe's rights likely trumps all others because they were affirmed before the Compact came into existence.[235]

Based on the fact, however, that the Navajo Nation was left out of the equation when water was allocated between the states under the Colorado River Compact, most of the water in these areas has been allocated to non-Indian users.[236] The disproportionate impact of water allocation for the Navajos and other tribes in the West has not at least gone unnoticed by some in the federal government. Several years ago, for example, the Interior's Report of the Working Group on the Endangered Species Act and Indian Water Rights proposed several measures to ensure that tribal water rights are not unfairly hampered by application of the federal Endangered Species Act (ESA).[237] In an effort to

234. George Cameron Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 415 (1979).

235. 207 U.S. 564, 576–78 (1908); Treaty with the Navajo, June 1, 1868, 15 Stat. 667.

236. Shepherd, *Tribal Interests, supra* note 6, at 15.

237. Final Report and Recommendations of the Working Group on the Endangered Species Act and Indian Water Rights, 65 Fed. Reg. 41,709-01 (July 6, 2000) (Working Group Report) (on file with author).

address looming conflicts caused by unrecognized treaty water rights in water management decisions related to the ESA, the Working Group Report recommends limiting future distribution of water rights to non-Indians when endangered species and tribal water rights may be impacted in order to prevent the appropriation of water needed for survival of listed species even before tribal rights can be exercised.[238]

Although, to date the Department of Interior has not taken action to implement the Recommendations, the Secretary of the Interior and the Secretary of Commerce (Secretaries) took other measures that potentially avoid disproportionate impacts to tribes from implementation of the Endangered Species Act, the federal-tribal trust relationship, and other federal law.[239]

> Specifically, [Secretarial Order 3206] clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce . . . when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights.[240]

The potential consequences to non-Indian water interests for failure of state and federal agencies to figure tribal rights into the Colorado River Water Compact could get worse when and if tribal water claims are finally asserted. The Navajo Nation "could claim up to 800,000 acre-feet of water from the Colorado River, which could have dramatic impacts on storage in Lake Powell and the Upper Basin State water allocations."[241] Consequently, in almost every case, "the filing of tribal claims represents the point of no return, because they automatically label all other water related concerns in the affected area as 'junior appropriators.'"[242] The hope that the Navajo and other tribal water right claims present for reducing conflict over decreasing water supplies in the Basin,

238. *Id.*

239. Secretarial Order # 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997), *available at* http://www.fws.gov/midwest/Tribal/documents/6-5-97SecOrder3206.pdf.

240. *Id.*

241. Shepherd, *Tribal Interests*, *supra* note 6, at 15.

242. *Id.*

however, is based on an understanding by such tribes that the *Winter*'s doctrine is merely court-made law and not backed by any statute or treaty.[243] At the risk of appearing, ultimately, in front of an increasingly unsympathetic U.S. Supreme Court, most "tribal leaders are pursuing negotiations to assert their water rights rather than litigating."[244]

VII. CONCLUSION

Conflicts over water are on the rise in the arid West and the Colorado River Basin and experts predict that due to rapidly diminishing sources of clean and clear water for human consumption and use, such conflicts will increase over the next several decades.[245] Those disputes are due, in part, to the fact that governmental agencies and courts in the United States still lag behind other countries in recognizing water as a fundamental human right. That failure is most pronounced in state and federal policies and management practices that often disproportionately impact water resources upon which Indian tribal governments and their members depend for economic, subsistence and cultural pursuits. Such practices take place regardless of legal precedent that imposes a trust duty on federal agencies when managing water resources and that, expressly, grants tribes and their members, time immemorial water rights.

Although U.S. courts and agencies have yet to officially recognize water as a human right, this does not mean that they are not implementing such rights under the federal and state constitutions and administrative policies, the public trust doctrine, and other indirect avenues. Ironically, the native community, which is most affected by human right violations in relation to water needs in the Western United States including the Colorado River Basin presents the greatest promise for implementing those same rights. Tribal treaty rights and sovereign status combined with the federal trust relationship, and state and federal environmental justice policies provide tribes located in the Colorado River Basin with the means to not only protect their own interests in water, but those of the general public in a manner that often exceeds those of even the most potent federal environmental

243. *Id.*

244. *Id.* at 15–16.

245. *See* Shepherd, *Tribal Interests*, *supra* note 6, at 16.

statutes.

As such, if water managers are really serious about preventing further conflict caused by inevitable water shortages in the Basin, they, together with the courts, need to look to both new and existing tools. Perhaps courts and governmental agencies making decisions that impact water availability in the Basin could recall their original mandate, which is to uphold civil and constitutional rights, emphasize environmental justice principles, and enforce basic concepts of fairness.