WATER: A HUMAN RIGHT OR A HUMAN RESPONSIBILITY?

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I. Should the Human Right to Water Protect Ecosystems?

In July 2010, the United Nations General Assembly declared that access to clean water and sanitation is a basic human right. This declaration, though, does not expressly address the issue of ecosystem protection. So, should the Human Right to Water include protection of water quality, essential ecosystem functions, and biodiversity?

An international law guaranteeing a Human Right to Water potentially would apply to all of the diverse cultures of the world. Some cultures may view ecosystem protection as separate from, and secondary to, the protection of human populations. Other cultures, however, may see humans as part of a web of life, in , Pendleton, Oregon. Before

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^{1.} G.A. Res. 64/L.63, U.N. Doc. A/RES/64/L.63 Rev.1 (July 26, 2010). See also Press Release, Security Council, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation, U.N. Press Release GA/10967 (July 28, 2010).

^{2.} See G.A. Res. 64/L.63, supra note 1.

^{3.} See id. (calling upon, but not requiring states and international organizations to take action).

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as a primary human responsibility.

II. INDIAN TRIBES AND A HUMAN RIGHT TO WATER

This recent United Nations declaration is part of what appears to be a growing international discussion regarding human access to clean water.⁴ In the United States, Indian tribes have been striving to regain access to water for their homelands for more than a century.

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charters issued by monarchs an ocean away, were entitled to claim what land they wanted for themselves. 9
From the United States Supreme Court's early discussions

regarding Indian ownership of

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popular desire to make the most of this new land of opportunity, most western states rejected the principles of the centuries-old European-derived riparian doctrine. Instead of emphasizing a responsibility to protect a water body so that all riparian landowners could enjoy the benefits of the water, the prior appropriation doctrine gave a few individuals powerful and exclusive property rights to the water. In this new land of opportunity, most western states rejected the principles of the centuries-old European-derived riparian doctrine.

Water rights are administered by the states, but tribal reserved water rights are a federally recognized legal right. Unfortunately, as states issued water rights under the prior appropriation doctrine, tribal claims largely were left out—until tribes began asserting their legal rights in court. By that time, however, most of the available water already had been claimed, leaving tribes in the difficult position of trying to take away water from individuals who, with good reason, felt that they already had a legal claim to use the water, and who had vested economic expectations that they could continue to use that water in perpetuity. 18

The practice of ignoring the tribes' paramount claims to water under the reserved rights doctrine has created a terrible situation in which the legal rights to immense quantities of water around the western states are now in question, with Indians pitted against non-Indians fighting for this vital water and for the survival of their respective communities.¹⁹

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waiting to have their water rights honored,²¹ and still suffer from severe water shortages even for many basic human needs.²²

B. Water Rights for Fish

Trying to regain access to the water necessary simply to meet basic human needs has been an extremely difficult struggle for Indian tribes, just in and of itself. Many tribes, however, have worked with equal determination to restore water for other living beings—such as for fish and wildlife.²³

Once again, though, the prior appropriation doctrine has been a major stumbling block. The individuals who first invented the prior appropriation doctrine certainly did not intend to harm the rivers of this beautiful and bountiful new country. Their focus was on mining, farming, or other economic activities that would help them earn money so that they could build a prosperous new life for themselves and their families.²⁴

As a result of this focus on human economic needs, though, the prior appropriation doctrine historically did not even consider protection of natural ecosystems. Instead, it has emphasized the protection of those "beneficial uses;" 25

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flow water rights claims,³⁹ the Tribes now had the ability to demand reallocation of the water in this watershed back to instream flows. As a result, however, the Umatilla Basin irrigators might lose their water supply to over 53,000 acres of farmland.⁴⁰

The growing conflict between tribal reserved water rights and non-Indian water rights in the Umatilla Basin first began to ignite in the late 1970s. As Oregon's Senator Mark Hatfield later recounted, regarding a hearing he had held in Pendleton, Oregon:

These [water] disputes were somewhat typical of other water conflicts throughout the western United States, in that, I was lucky to get out of that hearing room alive. The tension between all sides . . . was so high, I was almost certain that a small war would break out right there in the room.⁴¹

The Confederated Tribes of the Umatilla Indian Reservation, however, viewed the people of the Umatilla Basin—both Indian and non-Indian—as now being interdependent economically; so that a typical "win-lose" legal battle would harm everyone. As one tribal leader stated:

Our Tribes were faced with a dilemma. Salmon, which are at the heart of our culture and our economy, were being driven into extinction. The laws of the United States protect these fish and our treaty rights. If we were to exercise our treaty rights, however, the local non-Indian economy would suffer. We did not want to see that happen either.⁴²

The Tribes chose, instead, to aggressively pursue a strategy of working cooperatively to find resolution.

One alternative would have been to fight it out in the courts and to put aside our concerns over the impacts that the exercise of our water rights would have on our

^{39.} See supra notes 31-34, and accompanying text.

^{40.} U.S. BUR. REC., UBP DRAFT ENVTL. STMT., supra note 37, at 3-29, incorporated by reference into U.S. BUR. REC., UBP FINAL ENVTL. STMT., supra note 37, at 3-1.

^{41. 142} CONG. REC. S8639-40 (July 24, 1996) (statement of Sen. Mark O. Hatfield).

^{42.} Minthorn, supra note 38, at 3.

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neighbors. Our Tribes' policy, however, is to negotiate rather than to litigate. While we will fight for our rights if necessary, we look to conflict only as a last resort. We prefer to work cooperatively and to develop solutions which give benefits to everyone.⁴³

The leaders of the irrigation community agreed to try this more cooperative approach, and negotiations began. The State of Oregon also supported the Tribes' call for developing a cooperative solution: "The Umatilla Tribes are taking a different approach. It has been called the 'Umatilla Doctrine.' The Tribes assert that Tribal and nontribal economies are interdependent. Hence, development of the Tribes' reserved water rights can be an asset to the overall economy." The United States Bureau of Reclamation also actively supported this cooperative approach: "Even though the Federal court system has upheld the treaty reserved rights of the tribes, the tribes have taken the position that the water-related problems in the basin can and should be resolved short of litigation."

When people sit down together with a genuine commitment to work through their differences, miracles can happen. Although it took a couple of decades to complete the negotiations and then to implement this cooperative solution, the people of the Umatilla Basin—Indian and non-Indian—were able to resolve this conflict. Today, the irrigation districts of the Umatilla Basin still receive adequate water to maintain their irrigation-based farming economy. At the same time, salmon now swim once again in the Umatilla River, in levels that are high enough to support harvest of those fish. 47

The Confederated Tribes of the Umatilla Indian Reservation invested a tremendous amount of energy, resources, and time into

^{43.} Id.

^{44.} OR. WATER RES. DEP'T, UMATILLA BASIN REPORT, Aug. 1988, at 32.

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developing and implementing the Umatilla Basin Project. This project, however, does not bring any water onto the Reservation for human needs. Its purpose, from the tribal water rights perspective, has been solely to allow the lower Umatilla River to flow again. So why would the Tribes devote so much effort, and so much of their limited resources, to restoring water for the sake of reviving an ecosystem?

From the perspective of a culture that views ecosystem protection as separate from, and secondary to the protection of human populations, the Tribes' set of priorities may seem difficult to understand. Tribal culture, however, has another world-view.

III. ANOTHER WORLD-VIEW

While tribes have worked within the United States' rightsbased legal system to regain their access to water, tribal

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this belief is our Indian promise to take care of this land. This land provides for us our foods. This land provides for us the water that the salmon need to be in. All of these foods and salmon are part of our lifestyle, our everyday life since time began. This is how it is for us as Indian people. This is our belief. This is our promise that we made when time began. And for us today, as Indian people, we are keeping this promise.⁴⁸

The Confederated Tribes of the Umatilla Indian Reservation have worked to adapt to the new surrounding culture that relies so heavily upon written laws. Even so, some tribal written laws include references to the fundamental concepts of the unwritten laws. For example, the Tribes' Water Code, before getting into the black letter law, begins with an introduction that refers explicitly to the traditional unwritten law (tamánwit); and discusses the foundational understanding that everything is interconnected and interdependent:

The world of the šiyápu [non-Indian] is linear where life begins and ends in a series of separate events. The world of the natítayt [Indian] is circular and continuous. Natítaytwít is tamánwit (religion/law), it is láqayxit (light), it is ha#ášwit (air/breath), it is táatpas (dress/clothing), it is iníit (dwelling/house), it is tkwátat (food), it is sinwit (speech), it is tii ám (land), it is úuš (water) and it is the natítayt (Indian). All are one and inseparable. Tamánwit is both religion and law. It is the respect of all aspects of Indian life and it is the way of life.⁴⁹

Seeing the world as interdependent includes recognizing the roles that both humans and non-humans play in the web of life and within the cycles of life. Humans have an important role, and important responsibilities. As one tribal elder observed:

^{48.} WE ARE KEEPING THIS PROMISE: THE SALMON CORPS (CTUIR 1996) (statement of Armand Minthorn, CTUIR Board of Trustees member and Longhouse leader).

^{49.} CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION WATER CODE §1.01 (2005), available at http://www.umatilla.nsn.us/WaterCode.pdf. [hereinafter CTUIR WATER CODE].

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The air, water, earth, as well as the trees, vegetation, and animals, are all cultural resources to the tribes. They are not resources at our disposal, things to be used and discarded or manipulated. They were placed here by the Creator a part of the whole, with their own role and value as important as our own, to be respected because of the mutual dependency we have on each other and the fact they as we are from the Creator. 50

While unwritten, these laws are powerful guides for traditional Indian people. These unwritten laws emphasize the understanding that everything is interdependent, and that humans have an important role to play in honoring the rest of creation.⁵¹

B. Water – The Source of All Life

Within the Tribes' culture, water has a place of special honor. Water is recognized as the source of all life. Most feasts at the Longhouse⁵² begin and end with a sip of water to honor the importance of water for all living beings. As one tribal elder said:

When I was growing up, I listened to my older people talking about water. They said, if you don't have water, you're not going to live because water is your life. . . . This is the way we have our religious services. We have to have our holy water before we eat.⁵³

As another tribal leader explained: "[T]he sweathouse is a

^{50.} Michael S. Burney, American Indian Consultation Regarding Treaty Rights and Cultural Resources: A Response from the Imatalamۇma [Umatilla], Weyíiletpuu [Cayuse], and Walúulapam [Walla Walla] of Northeastern Oregon (1991), in IT'S ABOUT TIME, IT'S ABOUT THEM, IT'S ABOUT US: A DECADE OF PAPERS, J. OF NW. ANTHROPOLOGY, MEMOIR NO. 6, at 27, 29 (Burney & Van Pelt ed. 2002) (quoting remarks of Ben Bearchum) [hereinafter J. NW. ANTHROPOLOGY, MEMOIR NO. 6].

^{51.} This understanding that everything is interdependent also leads to placing a strong value on sharing with other human beings. See, e.g., Hiers, supra note 47, at \S II.C.

^{52.} The Longhouse is a large building used for religious ceremonies, feasts, and celebrations

^{53.} Proposed Boundary Changes for Irrigation Districts Within the Umatilla Project, Oregon: National Environmental Policy Act Scoping Hearing Before the U.S. Bureau of Reclamation and the Confederated Tribes of the Umatilla Indian Reservation Bd. of Trustees, CTUIR Dep't of Natural Res. as Cooperating Agency (Jan. 15, 1994) (statement of Inez Spino Reeves, CTUIR Tribal member) [hereinafter 1994 NEPA Scoping Hearing]. For background on this hearing see Hiers, supra note 47, at § IV.D.

sacred place. The water cleans your body. The water also cleans your mind, if you have an elder there to teach you. That's what water is to an Indian." ⁵⁴ The very first words of the Tribes' Water Code state that, "Pےx iwá úuš" (or "Water is medicine"). 55 As the introduction to the Water Code goes on to discuss:

Cúušnimna inaknúwiyaša náaman áax^w wáwnak^wšaš" Water keeps all our bodies for us. úuš [water] is a part of everything. It is within natitayt [the Indian], it is within tii ám [the land], and it is within núsux (the salmon). It is essential for the survival of all life. Cold, clean, healthy water is the life blood of the land. We drink water to remind us of who we are. Cúuš cleanses and heals our bodies, "Płíx iwá úuš" ["Water is medicine"].

Not just within the Umatilla Basin, but throughout the Tribes' ceded lands, the Confederated Tribes of the Umatilla Indian Reservation have worked hard to try to protect the remaining salmon runs, and to restore the salmon to those watersheds where they have been driven into extinction.⁵⁷ A key part of this effort has been to restore the good quality water that the salmon need. As the Tribes stated in their Columbia Basin Salmon Policy:

"From time immemorial, water has been the giver of all life. We must honor and protect it, from the tributaries to the ocean."5

Water is one of our most sacred gifts from The Creator, and is an essential part of our religion. Water is the lifeblood in the veins of the Pacific Northwest. Without

^{54. 1994} NEPA Scoping Hearing, supra note 53 (statement of Louie Dick, Vice Chairman, CTUIR Bd. of Trustees and Longhouse leader).

^{55.} CTUIR WATER CODE, supra note 49, at §1.01.

^{57.} See, e.g., CTUIR COLUMBIA BASIN SALMON POLICY, supra note 36. The CTUIR has been engaged in many efforts to protect and restore the salmon runs throughout their ceded lands, including working jointly with the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe and the Confederated Tribes of the Warm Springs Reservation through the Columbia Inter-Tribal Fish Commission; working cooperatively with many governmental agencies, quasi-governmental entities, private organizations and businesses; and when necessary by participating in litigation.

^{58.} Id. at § III.A.

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share the land, water, and other resources with our fellow living beings.⁶⁷ Also, use of a particular resource must be sustainable, rather than exhaustive, so that the resource will continue to be available in the future.⁶⁸

D. Responsibilities Rather Than Rights

The pressure of the new surrounding culture, which tends to view human needs as paramount, has created many dilemmas for Indian people. The duty to take care of the water now has grown into a duty to work within the non-Indian culture to try to protect the water and those living beings that depend upon the water for their own survival and quality of life. For example, one tribal member said: "Salmon can't get up here on their fins and say what they want; a cup of water can't get up here and talk . . . we've got to talk for the salmon and for the water, that is our duty." ⁶⁹

Unfortunately, the new non-Indian culture and its written laws conflict in many ways with the Tribes' traditional unwritten laws. For example, to be able to protect water for the Indian people and to restore the rivers for the salmon and other living beings, tribes are expected to fight for their water rights under the federal reserved water rights doctrine. In addition, under the states' prior appropriation doctrine, water rights are viewed as property rights; so Indian people must fight for their "right" to "own" that water. Yet the concept of "owning" the water is repugnant to many Indian people. As one tribal leader commented:

Now we, as Indian people, are one of those that have to violate our religious law in order to live under the Red, White and Blue. They say that you cannot say anything about this land because you do not own title and deed. . . . And the Indian law says that we cannot own that. It is Creator's. And now we are told to make a decision on water, on allocation. And now I have to violate my religious law again to live under the Red, White and

^{67.} See supra note 60 and accompanying text; infra note 84 and accompanying text.

^{68.} See infra notes 80-81 and accompanying text.

^{69.} CTUIR COLUMBIA BASIN SALMON POLICY, supra note 36, at § III.A. (quoting Brian Conner).

^{70.} See supra note 13 and accompanying text.

^{71.} See supra note 14-22 and accompanying text.

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native ecosystems. As another tribal leader said:

That water in the river belongs there in the river, for the fish And I feel that the Tribes got to take a stand to protect that water and to get it back. Because if we don't make a stand to protect what is ours, what are we going to have to protect? We're just going to be Indians on a piece of paper. We won't have anything in our minds and our hearts to take care of; and nothing's going to take care of

Some tribal elders have encouraged Indian people to talk with, and to work together with people from the different non-Indian cultures on this common need to protect our water. As one tribal elder said:

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E. Time-Tested Laws

The traditional unwritten laws helped the Tribes maintain a good quality of life, for as long back as people here remember. As

We're proud to be still in a remnant of our homeland. And our covenant with the Creator for giving us this place to live, and for the animals and the plants here agreeing to sustain us if we would protect them, transcends all of those modern jurisdictions. Clean air, clean water, clean land, a good place to live, those things are things we i. -1 T2it.Putu2ity embrace.

IV. NEW APPROACHES FOR A NEW ERA?

Those of us who are alive today were born into a rapidty changing world, with both wonderful and dangerous changes happening 2it.around us. The United Nation's recent declaration concerning the Human Right to Water⁸⁸ signals a growing recognition that it may be time to re-think some of our water laws to adapt to our new conditions. Even just thinking 2bout making changes, though, may require us to take a hard look at our underlying 2ssumptions regarding our role in the world. In this new era, human beings have unique capabilities, and unique responsibilities to protect and reitore this planet's ecosystems.

So, can tribal perspectives 2ssist in this discussion?

A. Our Rapidty Changing World

Our world is changing rapidly and dramatic2ity. Onty a century ago, most people got around by horse or by foot; and it was onty in 1908 that Henry Ford started manufacturing 2ffordable cars. Back then, the vision of people being able to fly, much less to fly across this large continent—or around the world—must have seemed like just a foolish dream, with the Wright brothers' first 2irplane flight accomplished onty in 1903. Hitoric2ity, long-distance communications had to be transported physic2ity, for instance by letter, until the 1860s, with the major breakthrough of the transcontinental and transatlantic telegraph systems that used

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^{87.} TAMÁSTSLIKT CULTURAL INSTITUTE, supra note 80, at disk 2, track 8, at 5:28 (statement of Roberta Conner, Director, Tamástslikt Cultural Institute).

^{88.} See supra note 1 and accompanying text.

^{89.} Model T, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/387041/Model-T (last visited Feb. 10, 2011).

^{90.} Wilbur and Orville Wright, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/1071950/Wright-brothers (last visited Feb. 10, 2011).

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Morse Code. ⁹¹ The telephone—with the ability actually to speak directly to a person over a long distance—was not widely used in the United States until the early 1900s; ⁹² and cell phones did not become commercially viable until the 1980s. ⁹³ In 1969, the first humans walked on the moon; ⁹⁴ yet today, our planet is encircled by orbiting satellites that collect and relay information on an almost instantaneous basis. ⁹⁵ People could barely even imagine computers a century ago, ⁹⁶ and I remember the first computer that I ever worked on back in 1980 that was run on punch-cards; ⁹⁷ yet now, more information than even the largest library in the world could hold is literally at our fingertips. Never before in the history of humankind have we had so much knowledge and so much power.

Many of these changes, however, have come at a price. In 1950, the human population was around 2.5 billion, but by 2000 it had exploded to over 6 billion. A shocking number of species of our fellow living beings have been driven into extinction, with more on the brink. A couple of centuries ago, the fossil fuels that

^{91.} Telegraph, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/585850/telegraph (last visited Feb. 10, 2011).

^{92.} Telephone, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/585993/telephone (last visited Feb. 10, 2011).

^{93.} Mobile Telephone, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/1482373/mobile-telephone (last visited Feb. 10, 2011).

^{94.} Apollo 11, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/1556747/Apollo-11 (last visited Feb. 10, 2011).

^{95.} See Satellite Telecommunications, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/524891/satellite-communication (last visited Feb. 10, 2011).

^{96.} See Computer: Invention of Modern Computer, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/130429/computer (last visited Feb. 10, 2011).

^{97.} See Computer: Digital Computer, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/130429/computer (last visited Feb. 10, 2011). Though it now seems unbelievable, before the days of computer screens and keyboards, much less before the mouse or even touch-screens, people ran computer programs by manually punching holes into cards that then were fed into the computer to read.

^{98.} DONELLA MEADOWS, JORGEN RANDERS & DENNIS MEADOWS, L

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any of our actions, only the benefits to ourselves. The "environment" does not seem real to us; and protecting it seems like a choice, rather than a necessity.

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The true reality, in our human-created world, is our need for money. Having money is a high priority, because without it, we do not have the clean water, food, clothing, and shelter that we need to survive, much less many other things that make life enjoyable. Money may have started out as a convenient tool for promoting trade, but it has become a necessity upon which our security and happiness now seems to depend.

For millennia, though, many cultures have recognized the risks of placing too much importance on money. For example, in an ancient Greek myth the mischievous god, Bacchus, tells King Midas that he can have any wish granted that he desires. Midas asks that everything he touches be turned into gold; only to discover when he becomes thirsty and reaches for a cup of water, that the water turns into gold; and when he becomes hungry, as soon as he touches his food it turns into a lump of gold. If he had hugged his wife or his children, they would have turned into gold statues. At the end of the day, thirsty, hungry, and perhaps a bit wiser, he pleads with Bacchus to take back this fatal gift, and to free him from this curse of gold. 112

Today, almost every decision that we make regarding water has significant financial implications. So should our decisions be guided primarily by an emphasis on making money? Or should we be guided by a recognition that water is the source of all life, and that life is the greatest treasure that we have?

D. Our Special Responsibility as Human Beings

As human beings, we have a unique capability to take care of the life systems of this planet, that in turn take care of us. With our advanced knowledge, we understand better now than ever before in the history of humankind just how interconnected life on this small planet really is. With our advanced technologies, we have the ability to fix the problems that we have inherited, and to create new technologies that do not have the unintended harmful consequences of earlier innovations. With this capability comes a special role for human beings within this world, and a special

112. See, e.g., EDITH HAMILTON, MYTHOLOGY 411–12 (1942).