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.

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 wate

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 the 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 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 "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) (on 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

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

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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,

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.

government stop the citations and arrests of the Danns and "rescind all notices already made to them, and, 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 and 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 any 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 when 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 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 (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.").

> 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]

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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"). 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 Unite

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 judicially 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

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]

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 groundwater with the exception of water produced as part of CBM development,[164] and another describing the management of CBM produced groundwater,[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 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 & Yellowstone, at *4–6.

167. Id. at *7.

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

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 1 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 "living" 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.

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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 living 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.

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

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 [illegible] The [((al wa)6(tere [(

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 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

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

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]

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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.