IMPLEMENTING THE HUMAN RIGHT TO WATER IN THE WEST

CONFERENCE REPORT

WILLAMETTE UNIVERSITY

COLLEGE OF LAW

CENTER FOR SUSTAINABLE COMMUNITIES

SALEM, OREGON USA

FEBRUARY 3 – 5, 2011

DEDICATION

This work is dedicated to all of the people who labor each day to bring clean water to the poorest of the poor.

May your days be filled with the joys of the Spirit and the knowledge that you are God's hands on earth.

Ken Bered.

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ACKNOWLEDGEMENTS

The "Implementing the Human Right to Water in the West Conference" was the result of 16 months of dedicated and tireless efforts by the Conference Committee: John Clyde, James Culliton, Tom Dimitre, and Sarah Hunt. They designed the conference, recruited speakers, panelists and participants, and worried over all of the details in a million conference calls and e-mails. Their work was organized, supported, and tirelessly prodded by our fantastic conference administrator, Reyna Meyers.

2012, for taking personal responsibility for the publication of this Conference Report and the accompanying conference papers; and Sean Mazorol, Editor-in Chief of the Willamette Law Review, 2010-2011.

To all of those named and unnamed, thank you.

Susan Lea Smith,
Conference Chair

EXECUTIVE SUMMARY

2010 was a landmark year for the international human right to water and sanitation. In July, the United Nations General Assembly recognized the right to safe and clean drinking water and sanitation as a human right essential for the full enjoyment of life and all other human rights. The

use those hard-won rights to protect ecosystems and evinced some suspicion about the human right to water concept. Gabriel Eckstein, the opening keynote speaker, identified key issues in elaborating the human right to water. He also left the conference with the open question about how we are going to pay for infrastructure investments that must be made to continue to provide virtually universal access to water in the United States.

The heart of the conference, however, was the work done by all participants in work groups. Each work group addressed one of the four threads explored during the conference: (1) the definition of the international human right to water and sanitation, (2) defining the human right to water in the West to include essential ecosystem protection and preservation of subsistence livelihoods, (3) the extent to which existing law and policy in the West assures the human right to water, and (4) creating effective governance and the role of economics in assuring the human right to water. In each group, the participants identified the key questions that must be answered and discussed those questions. This report attempts to capture some of the richness of those deliberations in the Part IV work group reports.

Part II contains a Conference Summary that highlights key points discussed during the conference.

1. The internationally recognized human right to water and sanitation is not currently enforceable through domestic law within the United States.

2. American states, including the Western states, are free to adopt a human right to water and sanitation, and to define that right as they desire.

3. The human right to water and sanitation as articulated in the UN Human Rights Council is narrowly conceived to require only access to "safe drinking water." At a minimum, that right should be defined to include reasonable and affordable access to water of sufficient quantity and quality for personal uses (drinking, cooking, and hygiene) to allow an individual to live in dignity.

4. Whether the human right to water and sanitation should be more expansively defined in some manner to include ecosystems or livelihoods. The conference reached a consensus that elaboration of that right to include subsistence livelihoods would involve difficult line-drawing. The participants were divided about

PART I
CONFERENCE SUMMARY

science, and engineering. The papers received were intended to provide the intellectual foundation for conference discussions and were available to conference participants prior to the conference.

In the Fall of 2010, the conference committee issued conference invitations to a broad array of scholars, policymakers, and stakeholders. To ensure that all voices were heard, Willamette University assumed all expenses associated with the conference other than meals.

A distinguished group of plenary speakers and panelists set the stage for discussion by providing conference participants with diverse and sometimes conflicting perspectives.

To foster active participation, participants were requested to select one of four small working groups. Each group focused on one or two key questions. Working groups ranged from 10 – 20 participants.

First, each working group determined issues to discuss in order to address the group's key questions. Arguably, the conference's most important work was articulating the issues and questions surrounding implementation of the human right to water—trying to get the questions right. Next, each group heard presentations of conference papers most relevant to their key questions. Then each group discussed issues and addressed

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the nature and scope of that right as a matter of federal common law. Indeed, some American courts have even expressed their reluctance to utilize international decisions in determining the content of federal law.

• Even if recognized as customary international law, the international human right to water might not affect state control and management of water allocation in the United States. Several federal water statutes such as the Federal Reclamation Act, the Federal Power Act, and the Clean Water Act expressly reserve management and control of water allocation to the states. As a result, in matters covered by those express statutory provisions, federal courts cannot fashion federal common law inconsistent with state management and control of water allocation.

2. American states, including the western states, are free to adopt a human right to water and sanitation and to define that right as they desire.

• Although the human right to water and sanitation is not enforceable as a matter of federal law, western states are not precluded from adopting a human right to water as part of their constitutional law, statutory law, or regulatory law. For example, the California legislature attempted unsuccessfully to enact a bill (AB1242) in 2009 to establish a human right to water. It did not become law, however, because the Governor of California vetoed the bill.

• Western states are currently free to define the human right to water and sanitation as they desire. If the human right to water and sanitation is ultimately recognized as part of customary international law and incorporated into federal common law, by virtue of the supremacy of federal law, the internationally defined right would provide the floor of protection accorded to the human right to water. However, western states would retain their soverign ability to provide greater prnrn 2 8.61 0 Td ( )eGu57e67r ater and sanitation rights (ar- tain cuw)7lrate y

personal uses (drinking, cooking, and hygiene) to allow an individual to live with dignity.

• The human right to water and sanitation must include water for personal uses such as cooking and hygiene. Without clean water for hygiene and cooking purposes, many millions of children will continue to die of preventable water-borne diseases. Limiting the right only to water necessary for drinking is futile and wholly inappropriate.

• Access must be affordable. Even in a relatively wealthy nation such as the United States, that there are people who cannot afford clean water. In 2000, the U.S. Census Bureau estimated that nearly two million people in the United States lacked access to clean drinking water. Many people were without water because they could not afford service fees charged by water utilities. World-wide, it is estimated that 900 million people lack access to clean water for personal uses.

• Affordable access does not mean free access. It is appropriate for governments to charge fees for water supply, treatment, and distribution costs. However, service charges should be tiered to provide free or low cost access to enough water for personal use. Upper tiers might impose the marginal cost of providing the water or even charge for the value of the water itself.

• At a minimum, governments should provide a "life-line" of free water for personal uses to households that are unable to afford water service charges. These life-lines are critical for maintaining health, educational opportunity, and family stability. For example, residents of California have lost custody of their children because water service had been cut off to their homes when they could not pay the water bill.

• National governments must take responsibility for assuring that state and local governments can afford infrastructure improvements. Millions lack access to water and sanitation because of insufficient infrastructure. In many rural communities in developing countries there is no infrastructure to provide access to clean water, even for distribution on a community basis. In other communities, water service providers are unable to maintain and upgrade their water treatment and distribution infrastructure without charging rates unaffordable to many in the community. In the United States, federal programs that previously assisted state and local governments in financing

food. These activities often require

human uses as well as critical ecosystem needs before agriculture and industry might be an appropriate device to enhance protection of critical ecosystems. A priority system such as South Africa's, which places human personal uses and ecosystem needs before use of water for agriculture and industry, could be used as a model.

• Conference participants differed on whether the legal concept of the human right to water would improve protection

allocating water is wholly consiste

1909, the Oregon state legislature abolished the common law system of riparian rights. It established prior appropriation as the basis of water allocation and limited riparian landholders to the amount of water they historically diverted. Landholder priority was based on their date of diversion. This system subjected riparian landholders to limits on their reasonable use by limiting their use to historical diversions. It also eliminated the rights of later riparian landholders to any water in the event that the rights of earlier diverters could not be satisfied. These changes occurred without compensation as did similar changes in North Dakota, South Dakota, Kansas, and Washington. State legislatures in states such as Wisconsin, Florida, and Arizona have imposed administrative permit systems limiting water allocations without compensation. In other states, such as California and Hawaii, legislatures and courts have limited historical water allocations by subjecting them to the public trust doctrine.

6. The conference discussed whether water is a human right or a commodity. Conference participants agreed that it is a human right and that fees for water can be imposed consistent with that right. Overall, the participa3-9(:59)0.0 7.02 that it that this po human right and a commodity depending upon the nature its use.

• Public or community rights in water include a human right to water for personal uses, but those public rights reach beyond the human right to water.

• Charges for water service are not inconsistent with the human right to water so long as water for personal uses remains affordable to all.

• Public or community rights in water arguably include (1)

• Once public rights to water are satisfied in accordance with the community's values, water may be treated as an economic good—efficiently transferred from lower to higher uses through the market system.

7. The conference discussed whether existing law in western states is adequate to protect the human right to water if that right is limited to drinking, cooking, and hygiene.

• The laws affecting the human right to water include water allocation systems, water quality laws, and public utility regulations. Water allocation laws, typically known as "water law," are formulated on a state-by-state basis. Water quality laws include the federal Clean Water Act, which prohibits discharges that render water dangerous to human health, and the federal Safe Drinking Water Act, which requires that public drinking water systems meet stringent quality standards. The federal Clean Water Act and state counterparts also regulate discharges from sanitation systems to prevent contamination of surface water and groundwater. While states may impose even more stringent standards than these federal laws, they are not allowed to substitute less stringent standards. In addition, state public utility laws assure that those engaged in providing water and sanitation services provide service to all households within their territory at just and reasonable rates.

• Water allocation laws provide preferences for domestic use and municipal use that can be expected to satisfy personal uses (ensuring the human

• Over time, however, existing laws may fail to protect the human right to water. Water stress in the western states is expected to increase due to climate change and population pressure. Routine water shortages are predicted to increase, and drought events are expected to become more severe. Under these circumstances, western states need to establish which water uses should be given priority rather than simply rely on the first in time, first in right prior appropriation doctrine. Because of their critical connection to human life and human health, the personal uses protected by the human right to water should be given preference over all other water uses.

The conference participants encourage western states to review their existing water laws to ensure that the human right to water is given full legal protection and effectively implemented.

Susan Lea Smith, Conference Chair

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PLENARY SESSION REPORT

Reporters: Andrew Reinen and Anthony Geltosky

THURSDAY, FEBRUARY 3RD

Professor Susan Lea Smith, Conference Chair opened the conference with an inter-faith prayer.

INTRODUCTORY REMARKS

Dean Symeon Symeonides, Willamette University, related his

right to water. She also hoped to share insights gained at the conference through the Conference Report, which will be presented to the UN Independent Expert on the Human Right to Water and Sanitation. Professor Smith also introduced the co-moderators of each working group.

Setting the Stage: First Plenary Panel

Three distinguished scholars and activists set the stage for conference discussions:

• Professor Elizabeth "Betsy" Burleson: Visiting Professor; University of Oregon, Professor; formerly from University of

Dr. Bruce Aylward discussed his experience working in South Africa with the World Commission on Dams, a hub of the movement to actualize a human right to water. As an economist, Dr. Aylward understood the economic pull of water as commodity. Economic study demonstrated that even destitute South Africans are willing to pay for water when access comes at a price. However, South Africa ultimately decided not to charge for access to water, placing human and ecosystem needs as highest priorities. The changes revolutionized both water and human rights. Other industrializing nations have endorsed the South African method.

Professor Reed Benson was skeptical about whether pursuit of a human right to water is feasible in the American West and whether it is the most pressing water issue facing the West. He admitted that he is a reluctant and apologetic skeptic and conceded that his skepticism is rooted in his own ignorance regarding the human right to water. He discussed two key water issues presently affecting the West: wasteful agricultural practices and high per-capita municipal water consumption. Professor Benson explained that it is difficult to change water policy in the West because of entrenched water interests. Current policy protects existing users and does not protect ecosystems and people that rely on those ecosystems. He stated that not much could be done because our present water law is a system of entitlements; rights to use water are not limited by amount or impact. The prior appropriation system of "first in time, first in right" is just one of the problems with existing water law. Professor Benson also listed reclamation contracts, municipal water statutes, and exemptions for domestic wells as distorting legal priorities for water.

From a sustainability perspective, Professor Benson was wary of creating a human right to water because it is yet another system of entitlements. Expanding entitlements may harden existing entitlements and will move us away from adaptation. He suggested a possible solution modeled after the public trust doctrine, which balances rights with public values. However, he was skeptical because the public trust doctrine has not gained much traction outside of California and Hawaii.

Professor Smith suggested that western states are trapped between two paradigms: a utilitarian approach and hardened property rights that cannot be transgressed without compensation that no government can afford to pay. As a consequence, water is not getting to the right places. The human right to water is a new

recognition are astounding. Economic studies indicate that the return on water supply and sanitation investments is several times the cost. The large capital cost is the most significant impediment; however, waste is a substantial problem. In the western United States, both individuals and inefficient water distribution

Professor Kibel noted that the public trust doctrine embodies a "negative right" to have the government refrain from acting in a particular manner. He acknowledged that the public trust in California has been interpreted to forbid the state government from authorizing water diversions that compromise ecosystems. Professor Kibel explained that this conception of the public trust as negative right contrasts with the human right to water which is generally regarded as a positive right, imposing a duty on the government to act in such a manner as to assure access to water and sanitation.

Professor Kibel reported that the public trust doctrine also provides that the public has certain rights and access to natural "public trust" resources, including instream flows of water. Professor Kibel suggested that the source of the public trust doctrine can be traced back to Roman law. For example, the Magna Carta (13th century common law) limited the British Crown's power to place fish weirs on certain tributaries and imposed fiduciary responsibilities on the Crown with the public as beneficiaries.

Professor Kibel directed attention to the National Audubon case, which established that the public trust doctrine imposes an affirmative duty to continuously supervise the use of public trust resources and to protect those resources whenever feasible.[1] National Audubon recognized that the public trust doctrine also applies to non navigable waterways if diversions would impair the public interest in navigable waterways.

Professor Kibel also spoke about the recent use of the public trust doctrine to allocate water resources in the Bay Delta, which is the second largest collection of diversions in California. The following is a summary:

> In the 2009 California "Delta Reform Act" the legislature deployed the public trust doctrine in an innovative and controversial way. The Act ordered the state water board ("Board") to develop new criteria to protect the Delta instream water flows, which are a critical part of California's water supply, but which also impact sensitive ecosystems (including endangered fisheries). According to the Board's interpretation, the Act created a two step

1. National Audubon Society v. Superior Court, 33 Cal. 3d. 419 (1983).

process. First, the Board would determine instream flow criteria based on scientific information. However, these criteria were for informational purposes only and no existing water rights would be modified by virtue of the criteria. Second, the Board would enforce the public trust by adjusting water rights where necessary to achieve flow criteria to the extent "feasible." Modification of existing water rights would then occur through separate adjudications.

In 2010, the Board issued quantitative findings establishing that the instream flow necessary to protect public resources was roughly 75% for various time periods and several rivers. The Board has not yet completed the second step of the analysis; step two considers feasibility and balancing of public trust resources with other concerns. However, litigation ensued immediately after the report came out.

Professor Kibel projected that litigation in the Bay Delta will be much messier than National Audubon because of the complexity, multiple resources, and myriad of users. Professor Kibel suggested that the litigation may have been poorly timed; allowing the Board to consider feasibility under the new administration of Democratic Governor Jerry Brown would have created a greater opportunity for consensus building around a reasonable allocation for instream flow than the litigation will produce.

Mr. Grainey primarily spoke about water rights in relation to energy. He provided specific examples of success stories in Oregon. He began by explaining that the "size of the pot" of energy choices affects the human right to water in two ways. First, energy affects water supply because a large amount of water is required to produce energy from traditional sources. Second, traditional energy uses increase greenhouse gases and exacerbate climate change, which in turn affects water supply. He reasoned that impacts on a water supply naturally affect the ability to assure the human right to water, which is both a moral and a legal issue.

Mr. Grainey opined that part of the solution is to make better energy choices; we need affordable and reliable sources of energy because clean water cannot be provided without energy. As examples of what can be done, Mr. Grainey outlined Oregon's

initiatives to increase renewable energy sources: heavy investment in wind energy, setting power plant emission standards, encouraging biofuels, and providing incentives such as tax credits. Anticipating that critics would point out that renewable energy is heavily subsidized, Mr. Grainey noted that fossil fuels have been subsidized historically, and they remain heavily subsidized.

Professor Finkleman posed the question of whether the Anglo-American legal tradition has ever viewed access to water as a human right. Professor Finkelman argued that historically our legal tradition has not considered access to water to be a human right. However, he noted that in the future it could become a right. Using slavery as an example, Professor Finkleman illustrated that in the past, the law has adapted to meet changing views of human rights.

Professor Finkelman traced the roots of water law back to the Magna Carta, which directly addressed property rights. He stated that Anglo-American water law was formulated under the climatic conditions of England and the eastern United States, both of which are very wet. England was wet, yet the American colonies received even more rainfall and had greater water reserves than England. As populations moved west in the United States, they encountered another great reserve of water—the Great Lakes. These geophysical incidents created a legal tradition that did not value water conservation.

Generally, a landowner had a right to use water on his land limited only by a restriction to refrain from injuring the rights of those downstream. As America progressed through the Industrial Revolution, which required water to power machinery, water rights also evolved. Dams became more prevalent, and the rights of those downstream eroded.

The discovery doctrine ignored claims to water rights presented by Indians. The Indians see water as a spiritual mechanism, a view the Supreme Court has never embraced. Conversely, Anglo-Americans considered water as a commodity serving an economic purpose. American law reflects the latter approach.

Although the historical treatment of water poses a challenge for those embracing a human right to water, the law can be

changed. It is within our power to change the perspective of the law about the human right to water.

Professor Dannenmaier disagreed with Professor Finkelman; from Professor Dannenmaier's perspective, the evolution of the common law implicitly affirmed the human right to water. He reasoned that the raison d'être of the common law is to protect the use of water, which is essential to human survival.

Human rights encompass economic rights, social rights, civil rights, and other secondary rights. These rights are both affirmative and negative rights under which the government must refrain from transgressing and affirmatively protect and realize. These rights are both individual and collective, and should be considered integrally bound together. The human right to water is one of these rights.

The common law tacitly implies a human right to water as a method of survival. It does not imply a right to delivery or to specify a particular amount or particular quality. Rather, the common law implies a right to water as sustenance. Although the human right to water has not been specifically litigated in the United States, the implicit right to water as sustenance can provide a claim and an argument in favor of a human right to water.

Privatization of water delivery services need not be viewed as a threat to supply and access; it can be seen merely as a means of delivery.

SATURDAY, FEBRUARY 5TH

FINAL PLENARY SESSION: PRESENTATION AND DISCUSSION OF WORKING GROUP REPORTS

Reports were discussed by all participants at the final plenary session.

W G #1:

Defining and Enforcing the International Human Right to Water
Presented by Professor Gwynn Skinner

PLENARY SESSION R

The group also examined the state of current western water law. At first glance, the law is neutral with respect to water rights, favoring neither domestic nor commercial purposes. However, deeper analysis reveals western water law, as applied, creates a priority system favoring capitalist or industrial and agricultural uses over domestic use. This prevents attainment of the human right to water. A minority of states provide domestic preferences under varying circumstances.

The group lastly considered impediments and solutions. The group recommended western water law should adapt to meet changing human needs, provide legal protections, and assure government efficiency. These concerns should be adapted in a synthesis of local, state, and federal law. In extreme circumstances, such as drought, human need should be placed first. Any prospective choices made by states must consider effects on the movement as a whole. As a protective measure, municipalities (often given great deference) may have to scale back and encourage conservation before invoking a highest priority.

PLENARY SESSION RESPONSE TO GROUP 3 REPORT

Comments to the Group 3 report noted:

- The definition of human right to water used by group 3 includes water for domestic purposes, which are drinking, bathing, and cooking.
- Group 2 considered the matter somewhat differently—allocation of water should determine where people may live, rather than the other way around. Otherwise, there will be cities all over deserts.
- Reasonable conditions must be placed on the human right to water. For example, the government might appropriately withhold subsidies if cities do not meet certain conservation standards. We cannot impose an obligation on the government to provide water under all circumstances because that would represent an infinite drain on limited resources.

WORKING GROUP #4

Governance and the Economics of Implementing dies lumn

Presented by James Culliton

Group #4 was charged with exploring two topics. First, they discussed the role of economics in implementing the human right to water, particularly with respect to water conservation and water supply. Second, the group explored a question of governance: how should we design institutions to implement the human right to water?

The group identified key considerations that would inform a more perfect water allocation strategy:

1) Data information, collection, and dissemination.

Additional information would inform a better understanding of the connection between ground water and se8 10.5 0 088 Ty oi.-fTj ET EMC /P <

PART III
WORKING GROUP REPORTS

Working Group #1
Defining and Enforcing the International Human Right to Water
Final Working G

Other participants:

• Reagan Desmond, Professor, Oregon State University at Cascades

• Dr. Charlie Clements, J.F. Kennedy School of Government, Harvard University

• Mark Kevin Williams , Attorney, Pueblo, Colorado

• Susan Lea Smith, Professor, Willamette University College of Law

DISCUSSION QUESTIONS

Working group # 1 distilled the proposed questions down to three key discussion questions:

1. How should the international human right to water be defined?
2. How should the international human right to water be implemented and enforced?
3. What is the significance of the international human right to water to the western United States?

The original proposed discussion questions and the group's discussion formulating the three key questions are attached.

SUMMARY: HOW SHOULD THE INTERNATIONAL HUMAN RIGHT TO WATER BE DEFINED?

The definition of the international human right to water was agreed upon rather quickly. The final definition was influenced by two concerns: Is the right a positive or a negative right? Should the right to water be a treaty right or a right based in customary international law (CIL)?

The group agreed:

The international human right to water should be defined as:

- Humans have the right to reasonable access to water that is affordable, accessible, safe, and sufficient;
- The amount of water per person shall be the minimum amount necessary to live in dignity;
- The minimum amount necessary shall be the amount required for daily physiological (drinking), hygiene, and cooking needs.

The group also agreed that this right obligates regional countries sharing water resources to enter into compacts to ensure sustainability and adequate appropriation of water in order to serve national priorities, including fulfillment of the human right to water.

The discussion that led to the consensus of the definition above was as follows:

The right to access water.

Mr. Clements first suggested that the right to water does not mean that the government is obligated to provide water wherever persons reside. For example, the government need not provide water to peoples living in the middle of the desert distant from water resources or to nomadic peoples who constantly relocate. However, after further discussion about peoples who live in remote areas not by choice, this idea was refined to include the concept of the government providing water at certain designated places.

Mr. Clements also sparked discussion regarding the scope of an individual's right to water, does an individual have a right in basins and ecosystems located within other countries? For example, does an individual in the United States have a right in the water of the Amazon River basin?

The amount of water to live with dignity.

There was significant discussion about the amount of water the government would be required to provide: Would water for a family farm be included in the right? Would water for crops for market or personal consumption be included?

Mr. Clements suggested that water used to raise food should not be included because people may pay for food; therefore, water for food should be paid for and not provided for under the international human right definition. This led to a discussion about a tiered water system. The government should be required to provide water for the basic needs, but water for crops or to fill a recreational pool should be paid for by the individual. Water for crops extends beyond an individual's water rights. The committee decided not to address the collective water rights.

What is affordable?

Given that impoverished people will not be able to pay for water, the group discussed the amount of water the government should be required to give them. Because individual needs vary between cultures, the language used in the group's definition was phrased to allow for some elasticity. Some elasticity in the definition is prudent in order to respect cultural differences when

definition asking governments to recognize that investment in water for their citizenry should be one of the highest priorities for human security. It is a nine to one investment if you invest in water infrastructure.

Water as a weapon.

One member of the committee mentioned this topic and it was well received. Water should not be used as a weapon in conflicts between nations or by governments against citizens. Water should not be used as a weapon of force. Another member of the committee mentioned that this was already customary international law and a violation of Geneva Convention. "Whether from the standpoint of national budget or foreign aid, governments and NGOs should be cognizant of the significance of the investment in water infrastructure and security."

Enforcement and the Protocol.

The group considered the idea of a protocol whereby countries could sign and agree to be subject to the jurisdiction a of third party committee. This idea was brought up with the understanding that this may turn away some countries, and other countries would agree with the treaty but not the protocol (jurisdiction). The group also discussed whether or not enforcement should include the use of force and whether to include a provision that multilateral lending institutions should be discouraged from making loans to countries who are failing the water requirements. There was hesitation to incorporate this because the IMF and World Bank have already resisted such action and support could be lost from countries that would otherwise join. The Committee concluded that soft enforcement such as citizen participation and bad media and bad press would be relied upon to force people to comply. In the end the Committee adopted the following language: "Rights holders should be engaged with the duty bearers in the planning and evaluation of water services," and "compliance with this treaty will be monitored by a committee to evaluate progress toward implementation to receive complaints from other nations (as well as citizens of non-compliance and a universal periodic review

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Migration.

Water would never reach a river. This is a notional idea; I did not see it on the radar in America. A local farmer in the U.S., when asked, never heard of the concept. When you start talking about the right to trade services (e.g. restrictions on exported water, bottled water), then the amount of water used overseas becomes an issue as well. The idea does not have much traction. People in Australia say they should not be farming in arid lands because they do not have enough water to go around and should not be exporting because of water scarcity. This is primarily an emotional reaction. The virtual water analogy is not particularly useful. Exporting water rich crops is an issue though.

2) Gary Chamberlain, Water as a Fundamental Human Right and the Rights of Water: A New Water Ethos

This issue first arose because of the concern of students buying bottled water in Belize. Students purchased bottled water although the water in Belize is potable. The next time they used a water filter, but only for a while. Then Chamberlain just told them he was filtering the water. Chamberlain also confronted the issue through the privatization of water (which includes bottled water). This is the genesis for the book.

The book questions if there is a way that religion limits the use of water by examining the ethical issues of water use. In some religious texts, water is treated as sacred. Chamberlain wanted to go beyond looking at water as a political, legal, or economic issue. Is there something in the religious tradition that acts as impetus to treat water with a certain level of respect?

The book examines the notion of a natural right to water. This later becomes a minor theme (i.e. contemporary understanding of rights, etc.). Before, in the Greek and Roman traditions there was a focus on animal rights, etc. Nash (another author) examines this.

Cormack Cullien argues that nature has certain rights. He questions what people must forgo if nature had rights.

Chamberlain argues that Catholic social teachings should be expanded to look at social and environmental teachings. In the writings, there is a communitarian ethic, and some people are broadening that sense of community. People have a right to participate in the decisions that affect them. Therefore, Catholic

social teaching can be broadened to include environmental issues. There is a Catholic religious order that is trying to make the right to water more specific. Chamberlain thinks there is a theology behind "Deep Green Christianity." Can Christians appropriate the idea that nature is sacred without being heretical? Chamberlain believes it is possible.

So what does this mean? Look at the number of dams being removed in the U.S. It is increasing in order to allow streams to return to their natural flow. However, what was its natural flow? What does the re-flooding of the area mean?

QUESTIONS AND COMMENTS

Williams: The resilience theory in law; how far can you push an ecosystem to where it cannot return to its natural state? Even if you bring the dam down you do not have what was there. Even if the dam is gone, it will not go back to what it used to be. There is a tipping point of no return.

Chamberlain: Most people are tied to religious traditions, so is it possible to use those traditions to manage water?

Hunt-Vasche: In past research, Hunt-Vasche argued that Christians, who are instructed to love neighbors, God, and enemies, should care for the ecosystems as part of that command. Nature is an expression of God. So, as part of loving God, take care of nature. Hunt-Vasche couched this in terms of an evangelical environmental Christian theory.

Rochford: The idea of conservation of water, and that water should be used appropriately, is part of the whole ethic of being a stewardship.

Skinner: Are you thinking of water as having a right in and of itself, independent of humans?

Chamberlain: Humans have certain rights. Animals have rights. Water has rights because it is water, because the whole earth is dependent on it. By blocking its rights, you are preventing the water from fulfilling its purpose.

Clements: The Ecuadorian constitution gives nature a right in and of itself.

Skinner: Ecosystems have a right to flourish and survive? I have a difficult time seeing water having its own right to exist completely separate from the rest of nature.

Chamberlain: The ecosystem has the right to its own integrity. Other realities such as minerals and water have rights as well, a derivative right. Also note, in other traditions, water is not inanimate. It is not a stretch to claim that water has its own rights.

3) Tsanga Tabi Marie, Implementing Human Right to Water in Europe

[Marie had originally planned to present her paper, but was unable to attend due to the weather on the East Coast. At her request, the Conference arranged for Dan Miller, a Willamette law student, to present an overview of the paper.]

DISCUSSION:

Skinner: "Water poverty" is a useful way to look at this, but does this mean that it is looked at as a commodity, as opposed to a human right? What are the implications of looking at it that way?

Rochford: In Australia, the Constitution says that water shall not be privatized, but that does not necessarily mean that water infrastructure cannot be privatized. It is characterized as a

depending on the use: for drinking water, maybe a right; for large farm, maybe a commodity. There is a continuum. It does not have to be one or the other.

Rochford: The problem with privatization is what happens to a community without a sustainable base (e.g. indigenous communities, remote communities). A user paid model will result in underprivileged communities becoming less sustainable. So, do you have a right to live where you want to live, or are you required to move to a city where life is more sustainable?

Skinner: Is the commodity the right paradigm to continue? Is it most feasible or does it need to change wholly?

Desmond: That depends on which culture you are coming from.

Chamberlain: In Islam, it is forbidden to buy, sell, trade water.

Hunt-Vasche: Water should be expensive for some uses (i.e. filling a swimming pool), but less so for others (i.e. a vegetable garden). I think commodization is useful and can help in some areas.

Rochford: Unintended consequences can occur. Local water authorities' income decreases when water users are not permitted to do certain things with water (i.e. water one's land), so people install their own water sources. Therefore, since the authorities have to maintain their source of income, the authorities prohibit catching rainwater.

4) Liber Martin, Considerations Concerning the Human Right to Water and Its Recognition by the United Nations General Assembly

[Mr. Martin was unable to attend the Conference. Dr. Chamberlain summarized this article.]

Martin does an interesting job showing the historical movement to the right to water. First, there was a sense of common use, negative right, prohibition of interference with access. Martin calls it a minimum right. Water allocation then

becomes a public service, which then moves into a completely new phase of human rights.

Martin then proposes an interesting argument: for people in developing countries, it is very important that the legality of the human right to water exists, but the political effort to enforce the right is absent. In the western world, there is a reluctance to talk about water as a human right, but there is the political efficacy to make it happen.

QUESTIONS AND COMMENTS

Chamberlain: There has been an enormous inflation of rights recently. Martin sounds very cautious about a right to water. Has not there been an enormous inflation of rights?

Skinner: Yes, I think there has been. In the last 120 years, so many things are now developing as rights. Maybe Martin is skeptical about how important it is. U.N. rights are positive rights, progressive rights. Ultimately, this is an issue of poverty.

Chamberlain: This whole notion of rights is a predominantly western concept. It was a foreign concept in Japan where there is a less individualistic approach. Western rights are not a familiar language.

Clements: This communication breakdown is akin to charitable giving before WWII, which then was an unknown concept.

Skinner: Some scholars say the growth of rights can be bad because it dilutes the essence of what rights are. Other societies have used "for the good" rhetoric to support their bad policies by disregarding peoples' individual rights.

5) Rebecca H. Hiers, Water: A Human Right or a Human Responsibility?

This is an interesting view of the definition of the right to water. To what extent do we incorporate first peoples or Native Americans perspectives? We should ensure we have a lens wide

15. Does the U.S. have any duties enforceable as a matter of international law to contribute to the attainment of the internationally defined human right to water in other countries?

• Hunt-Vasche: Discuss how the right to water is intertwined with already enforceable rights (e.g. women's rights, the rights of minors).

ENFORCEMENT AND IMPLEMENTATION

° Does an international human right to water really exist? Is it binding? In what way is it binding?

° How should the right to water be implemented?

° How have various agencies addressed implementation?

° How should the right to water be enforced?

° How have various agencies already addressed the issue of enforcement?

° To what extent is the internationally defined human right to water enforceable in the United States as customary international law or under any treaty we have signed?

° Does the United States have any duties enforceable as a matter of international law to contribute to the attainment of the internationally defined human right to water in other countries?

• Hunt-Vasche: Discuss how the right to water is intertwined with already enforceable rights (e.g. women's rights, the rights of minors).

THE UNITED STATES AND THE WEST

° Should the U.S. recognize the internationally defined human right to water to make it federally enforceable domestic law?

° Is there any principle of international law that would interfere with the U.S. or western states defining the human right to water more broadly for domestic purposes?

° What can the U.S. and western states learn from the experience of other nations in implementing the human right to water?

° Chamberlain: What difference does an international human right to water make to the U.S.?

° Smith/Chamberlain: Is the right to water an economic issue? Since it is the poorest people that are going to be affected by a lack of water, should it be couched in economic terms?

° What was the basis for the U.S. abstaining in the General Assembly vote, but joining the consensus in the U.N. Human

lands, the federal government is now fully subject to state law with respect to water.

° Schwarzenegger's veto of AB1214, which establishes a human right to water, was probably because the California Water Control Board and smaller utilities opposed the bill. The bill would impose requirements on them.

° Arizona v. California, 531 U.S. 1 (2000). The interstate case between the two states applies federal common law. Brett Birdsong's article on the Colorado River Basin will be enlightening.

° Interstate water is all Federal. How far could that extend? Congress, through the Reclamation Act and the Power Act, deferred to state regulation of water allocation. It also waived sovereign immunity of the United States to allow adjudication of federal water rights through the McCarren Amendment. The federal government is unlikely to treat water allocation within states as a federal issue and enact federal water allocation regulation. However, what if Michigan starts sending water to Texas? There is the power, but Congress will not exercise it. Legislators from western states have armed the relevant committees in Congress and tried to assure that there will never be federal legislation of water. There are dormant Commerce Clause cases such as Spores v. Nebraska where federal courts assert jurisdiction. The courts assert power saying that it is now a federal interest. Professor Smith's sense is that there will never be federal power exercised over water allocation through federal common law apart from limited categories such as reserved rights and interstate conflicts. If federal water allocation occurs, it will be through enacted statutes. State water law policies drive the system. The key is getting the states to talk about what are the priority uses of water. Takings also factor into the discussion. Congress must sanction interstate compacts. One way to see federal common law would be if freshwater becomes

there must be a gap left open by the statute. Unfortunately, there are gaps presently because everything is exhaustively covered by statute.

° The human right to water is best to be implemented by treaty as long as Congress ratifies the treaty.

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SUMMARY OF PAPER PRESENTATIONS

Emily Grubert, University of Texas at Austin, Energy Resource Extraction, Water Resources, and a Human Right to Water in West

What are the implications for energy development by declaring a human right to water in the western United States? This paper focuses on the developing coal and coalbed methane resources in the Powder River Basin (PRB) of Wyoming and Montana. Both processes use large volumes of water.

Usually, burning natural gas for electricity is less environmentally damaging than burning coal. The impact on water in the extraction process in the PRB might be less for coal than the extraction process for coalbed methane. Producing coalbed methane requires rapid water withdrawal to depressurize the methane adsorbed in the coal. This process produces large amounts of water which must then be disposed of.

Coal production in the PRB accounts for 40% of total production in the U.S. Wyoming is very dry and the coal is low in sulfur, so coal production often has less opportunity to contaminate water in the PRB than in other basins. Coal and coalbed methane production requires water removal as part of the process. However, in the case of the PRB, coal production yields more energy per unit of water withdrawn than does natural gas. In the case of the coalbed methane, a lot of water is being removed, but PRB coalbed methane is not a major source of US supply – about 1 year's worth. In addition, coal in the west burns cleaner than coal in east so the environmental impact of burning PRB coal is in many respects less than burning other U.S. coals.

Regarding to the human right to water, there is an inherent problem when removing water for future generations. Production of energy now may eliminate the opportunity for future humans to use drinking water. On the other hand, not doing this could lessen energy supply for people currently alive. In one theoretical situation, if energy is not extracted, it could take away electricity from pumps that supply drinking water to people living now in areas where treating and moving water is highly energy intensive, such as in California.

The discharged water creates a large impact on things related to water. Some of the discharged water could be treated to potable

standards, but the water discharged is not measured as a withdrawal. It is useful for livestock but is not useful for soil. The sodium content relative to the calcium and magnesium content causes the soil to swell. This causes irreversible damage to farmland.

Grubert's research shows that a broad definition of the human right to water, a definition beyond bathing and drinking water, starts to have dangerous and difficult implications. Such a broad view opens the human right to water to significant challenges and possibly moves it away from the original intent behind the right itself. Many of the other rights that a broad definition would address, Grubert believes, are or should be addressed through other human rights. Defining the human right to water too broadly could create a nightmare situation where, for example, individuals sue coal producers because they are depleting the resources of humans 400 years in the future. Defining the right narrowly prevents excessive litigation.

In the PRB, coal production is probably less damaging to water per unit energy extracted than is coalbed methane. In addition, alternative coal resources are often more damaging to water resources than PRB coal while alternative natural gas resources are less damaging than PRB coalbed methane. Coal from the PRB is a much larger contributor to the US energy supply than coalbed methane from the PRB.

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Vanslow: This paper provided useful insights into the tradeoffs between various human rights issues that need to be addressed.

Jennie Bricker, Entitlement, Water Resources, and the Common Good

Creation of a human right to water raises concerns because it appears to extend the individualistic approach to water distribution. We need to start with a discussion on what kind of right we are proposing. An individual right normally means the right of an individual against the government or others, or standing as an individual equally with our peers. Individual rights are equated with civil rights. What we are discussing here is really a property right, a right to a thing.

In the U.S., we have started to think about property rights the way we think about civil rights. The author believes property rights have to relate to the common good. This is the author's exploratory thinking and not well established doctrine. We should contrast the concept of individual rights and property rights.

In Oregon, for example, water rights are encompassed in individual property rights law. Perhaps property rights should be tailored to support the common good rather than the individual. We made a mistake creating property rights only about the individual and not the common good. For example, when I am the

towards individualism. Other civil rights, the right to vote and others, are not really individual but community-based. We should step back and consider the common good.

Vanslow: A property right seems to have to be something that is identifiable and tangible. When we are thinking in terms of basic sustenance for humans, what water to which are humans entitled a right? If there is, for example, no water flowing in an area, what is the water right? I don't understand how it can be a property right if we cannot identify it.

Achterman: That is particularly interesting in light of the discussion regarding the cost of delivering water.

Howell: In Africa, some communities have wells five hundred feet deep. They have sharing patterns and not property rights. These sharing patterns have been fought over. Everyone is counted on to participate.

Achterman: This really does go to the property right versus the individual right.

Paul Stanton Kibel, The Public Trust Navigates California's Bay Delta

My paper, which was presented earlier in the plenary session, covers the California public trust doctrine and its application in protecting in-stream flows. Water rights in California, whatever they are, are tied to the public trust in general, not the individual. The public trust is garnering attention again because of takings claims. It is very difficult to have a successful takings claim against something covered by the public trust. It is important to note, the public trust does not create any absolute rights. It does create a right to process, however.

There is reason for concern about the human right to water being hijacked by those wanting to firm up their property rights. Property rights have a real danger of being misappropriated. In this respect, the discussion of including livelihood in the definition of the human right to water is important. For example, are all of the contactors, plumbers etc. involved in the development of urban

results were terrible and set the stage for federal legislation. In 1974, Congress passed the Safe Drinking Water Act as the first federal safety regulations for water. The act applied to all utilities.

Howell chose the City of Portland as a case study. It only took 30 years from the founding of Portland for the water in the Willamette River to become too polluted for drinking. However, 26 miles outside of Portland was the Bull Run River. Portland's water system starts in the Bull Run watershed. The forest around Bull Run was set aside in 1892 by Presidential Proclamation, which theoretically includes no grazing and no homesteading or human habitation. Theodore Roosevelt renewed the proclamation during his administration. In the protected area around the Bull Run watershed, no humans are allowed unless they are federal forest service employees or with the water bureau. Cattle grazing is not allowed. This makes the Bull Run water amongst the most pure and unique in the world. It includes two dams for summer storage.

Portland's water supply is unfiltered surface water. The supply is one of only six big, unfiltered surface water supplies in the Unites States. Seattle, Tacoma, San Francisco, Boston, and New York possess the other five. Rain predominantly supplies the system, which is comprised of 102 square miles and is completely closed to public access. Bull Run is a gravity fed system, which is highly efficient. The system includes in-town reservoirs.

One issue Portland had to overcome was the drawdown of the storage reservoirs, which can lead to turbidity events from rain or snowfall. According to EPA regulations, turbid water cannot be delivered. To deal with this issue, and avoid putting in a filtration system, Portland installed the Columbia Southshore Wellfield as a backup. This allows Portland to switch from Bull Run water reservoirs to ground water in case of a turbidity event. There have only been six turbidity events since the opening of the reservoir.

In 1993 in Milwaukie, Wisconsin, an event occurred involving cryptosporidium, which would come to affect the Portland water system. A large storm hit Milwaukie and caused a huge overflow. Sewage backed up into the water intake for the city. One of the water filtration systems failed. Turbidity levels were shown to be well above normal. 400,000 people became ill

• Sustaining subsistence livelihoods dependent on fishing, agriculture and animal husbandry?

• Allowing households to produce food for their own domestic consumption?

• Sustaining livelihoods more broadly? Are there any limits to such a broadly defined right?

• Considering the potential for spiritual or religious values of water and aboriginal practices as part of the right to water?

General sense of the group:

Western water law should recognize a human right to sufficient quality, quantity, and affordability of water for drinking, cooking, and sanitation. The definition of the human right to water should be narrow. A broader definition presents problems. The committee recognizes that there are other water issues that pertain to other human rights, but they are outside the scope of this discussion.

The group agreed to exclude sustaining livelihoods (bullets 2, 3, and 4) from the human right to water because the scope is too broad. Many livelihoods depend on water, such as plumbers, yet a line must be drawn. The Committee was unable to define which livelihoods are truly water-dependent. The quantity of water necessary to support livelihoods is potentially unlimited. It is not that the other values are unimportant, but other rights such as constitutional free exercise of religion and the adequate standard of living already protect many of these.

The group had mixed opinions on inclusion of sustaining ecosystems and ecosystem services in the definition. Some members of the group believed they should be included because ecosystem services are essential to providing people with water. Protecting a municipal watershed, like Bull Run, is directly linked to the human right to water because it provides affordable drinking water for the long term. Other members were concerned that including ecosystems and ecosystem services generally is overly broad. Sustaining ecosystems is one of many tools or requirements for delivering water for drinking, cooking and sanitation, but should not be included in the definition of a human right to water.

SUMMARY

Gruber: No, it should not be broadened. They are important values, but they should be addressed in other areas. In addition, if you start to include a bigger temporal scale, do you incorporate future rights? (Refer to question 4). Regarding bullet 5, religion could be used as a façade to get water in different ways. Also, there are other protections for religion without needing to include bullet 5 in the right to water.

Dimitre: We start at the right to sustain life—the right to drink water. We all agree that much. It is already a right that exists. It just hasn't been addressed. Our lives are tied to ecosystems enough that the ecosystems should be included. If you do not have ecosystem maintenance then you cannot sustain life. Therefore, ecosystems should be part of the human right to water.

Achterman: Close to where Tom Dimitre is, I struggle with broadening it to include sustaining livelihoods. If we can focus the right to water on the right to sustain human life, we are focused enough. Ecosystem sustainability should be included. You cannot separate the ecosystem from the drinking water. It is difficult to draw a workable line regarding sustaining livelihoods.

Funk: Regarding sustenance farming, most people who are producing food are not producing enough to sustain themselves. They get food in other ways.

Vanslow: We address sustaining ecosystems in other forms. Ecosystems are not forsaken, but are addressed by other laws like the endangered species act, etc.

Howell: The human right to water is a right to life.

Question 2:
Is the human right to water guaranteed in the western United States? If so, is the guarantee being met?

General sense of the group:

The human right is not guaranteed now in the western United States, but it is essentially being met.

SUMMARY

Achterman: Legally, the answer is no, there is no guarantee, and so no, it's not being met. The appropriative system doesn't guarantee it. Yet, clean, safe water is available in most of the western United States, whether it is guaranteed or not.

Should everyone be entitled to an X amount of water? If so, and someone uses more, then they should have to pay for it. A system like this eliminates a lot of these issues and drives conservation.

Gruber: Not universally guaranteed, but almost being met universally.

Dimitre: We could argue that it's constitutionally guaranteed. In addition, we haven't defined sufficient water quality. How much water is guaranteed, and what level of cleanliness is guaranteed? The right to water is first use, and other uses come after.

Achterman: Gruber's point is true – clean, safe drinking water and sanitation is generally available in most of the western U.S., whether or not it's legally guaranteed. The real question, in the presence of increasing population, is defining a standard that will be important as our needs grow.

Question 3:

Given definition above for the human right to water, who holds that right and whom does it obligate?

General sense of the group:

It is an individual right that obligates the government; however, the individual right is limited in times of scarcity by the need to meet all community members' rights to water (proportional sharing).

SUMMARY

Achterman: We have defined this as an individual right and a governmental obligation.

Funk: From the perspective of Julie Bricker's paper, it's a community right, not individually held. It's a reciprocal, shared right. A reasonable use doctrine should apply.

Achterman: It's a reciprocal right. So, the individual right is based on how much the community has. It's a right to a share. If there's plenty of water, everybody gets a reasonable amount every day before anyone gets more. This is riparian Roman law. It's a shared interest in a common good and you have to adjust to everyone's needs. This worked fine for drinking and sanitation. This broke down during the industrial revolution when we started using water for other things.

Question 4:
What is the temporal scale of the human right to water?

General Sense of the Group:
Future generations' needs should be considered, including the scale of those needs (considering population growth and distribution).

SUMMARY

Funk: The essence of sustainability is perpetual sustainability. We should be working towards sustaining the right to water in perpetuity.

Gruber: We should consider at least a few generations. We should work towards perpetual sustainability, but in practice, it's not possible. If water rights obligate the government, not all generations should be equal. Future generations may be richer with more technology. We cannot define all the future as needing the same protection as we need protection today because then the future is infinitely valuable, so cost-benefit analysis becomes impossible. We cannot sacrifice all the needs of people today for the needs of people in distant generations. The temporal scale should have the goal of complete sustainability to benefit people now over people in future generations.

Vanslow: We shouldn't have a discussion on the perpetual future without attempting to better define what future it is we're trying to sustain.

Question 5:
If the human right to water is recognized, how (e.g. constitutional, common law, legislation, regulation) should that right be integrated with:

- Water allocation laws based on prior appropriations?
- Water quality, drinking water and endangered species laws?
- Navigability, shipping, and hydrocommerce?

General sense of the group:
The group agreed that the human right to water should be integrated with water allocation and regulations by making the human right to water a priority or preferential use. With the

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Gruber: Support structures addressing other water issues need to be there since we defined it so narrowly. Our narrow definition is really up there with the right to life.

ATTACHMENT 1

LIST OF PROPOSED DISCUSSION QUESTIONS

1. Should the international right to water be defined more broadly than sufficient quality and quantity for cooking and bathing?

2. Should the U.S. or western states define the human right to water more broadly than domestic water supply and sanitation to include protection of water quality and water allocations essential to:

- Sustaining ecosystems and ecosystem services upon which we depend?
- Sustaining subsistence livelihoods dependent on fishing, agriculture and animal husbandry?
- Allowing households to produce food for their own domestic consumption?
- Sustaining livelihoods more broadly? Are there any limits to such a broadly defined right?

• Bret Birdsong, Professor, University of Nevada at Las Vegas, Mapping the Human Right to Water on the Colorado River

Other participants:

• Dave Bowser, Yazbeck, Cloran, Bowser PC
• Lisa Hubbard, Moscow, Idaho
• Elizabeth Dickson, Hurley, Re, PC
• Alex Jones, Willamette University College of Law

DISCUSSION QUESTIONS

1. Does the human right to water include delivery and quality?
2. How does the current law facilitate and impede these rights?
3. Do we need to change the law and how?

SUMMARY OF PAPER PRESENTATIONS:

Catherine Howells, Water Rules: A Brief History of Water Rights and Sharing

In Mesopotamia, the watershed was dynamic, moving cities when the rivers moved. Mesopotamia had strong irrigation systems. Wells located in houses appear to have been for domestic use. Society believed water related to culture and technology. The king was responsible for providing access to good water. In Greece, towns were located near reliable springs available to the public, but the Greeks also used rainwater cisterns and wells. Greece also had intercity waterburials and an oath not to cut irrigation during war. The right to public use of water resources was assumed. In Rome, public water was free as also water

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California would obtain all the water, and looked to the Compact to prevent that result. The upper basin states and Arizona wanted to provide for future development while California was looking to support booming development.

The Compact protects prior uses in the upper basin, around 2.2 million acre feet. What will happen to rights issued since the Compact if the river changes and not enough is left for the Lee Ferry delivery? Most believe the Upper Basin will have to cut off.

So what happens to the upper basin uses? There is no word on it in the law of the river. How could it be adjusted? Dams. The River has become a system of canals. Plus, it produces a great deal of electricity. Now the ecology is a mess, a reality given voice through the Endangered Species Act. There are lawsuits up and down the river.

that practicably irrigable acreage is not the only way to quantify Indian reserved rights. They may be entitled to domestic use, development use, and municipal uses of water in addition to irrigation water.

The Navajo are now trading their reserved water rights for a Federal project to pipe water from the Colorado and San Juan rivers, plus almost unlimited rights to groundwater. However, this has been done on a quasi-human rights theory.

QUESTIONS AND COMMENTS

Benson: Can Denver can get more water? Use it or lose it?

Birdsong: There is a wall in the Colorado River compact between the upper and lower basins. We can't use upper water for a lower city. The compact basically pretends that the Colorado River is two rivers.

Kibel: At what point does the sustainable water trade for wiping out a species become germane? It is not a simple question. The Colorado River may provide more human water if we don't care about wiping out a few fish nobody eats.

Birdsong: That's not necessarily the problem. Using water for energy and industrial uses and agriculture may be what is killing the fish, not basic human right to water values.

Kibel:

Laura A. Schroeder, Domestic Groundwater Exceptions

Prior appropriation protects right to life, which is found in Constitutions of all Western states.

Adjudications never deal with domestic uses because it is an assumed right. Codes reference that all existing uses are continued, adding in exempt uses. This can be interpreted as an admission that domestic uses are part of the right to life.

Under prior appropriation we only have the right to drink and survive.

Mining and agriculture are uses that are subject to appropriation. Oregon allowed permit for life support in Oregon. The deal was to get a water right exception for domestic use.

Howells suggested agriculture

Schroeder: Once you go beyond drinking, the right to life is not implicated.

Finkelman: There can be no more new housing in the city?

Schroeder: Correct. For additional water, I have to go back to the city.

Dannenmaier: Isn't there a high return rate?

Schroeder: I don't know what it is.

Birdsong: Are exempt uses adequate for the human right in the West?

Schroeder: Sure.

Birdsong: The West is the most urbanized region in US, but if 80% are not protected, this works for ranchers but not most people.

Schroeder: That's right. I represent a lot of municipalities. Most have more permits than they've proved.

Birdsong: But if there is a shortage. . .

Schroeder: They have a lot of flexibility within 50 thousand people.

Dannenmaier: You would say water for domestic uses is more than required by the human right to water?

Schroeder: Yes.

Dannenmaier: What about 200 people in an unincorporated area?

Schroeder: The right is private. Their city functions in proprietary interest. Municipal use is so tied to delivery that the right to life can't be separated.

Schroeder: I think it is not a taking unless a certificate of use is filed.

Benson: You need to turn some dirt. Once you put the water to use, you file and have a property right.

Schroeder:

Is it a problem that food production is lowered?

Urbanization, commoditized agriculture, are these part of the human right? Is it local and personal use that is protected only?

The right has been based on capitalism and commoditization. Environmental concerns are left in its wake.

One answer is higher efficiency.

Can we all agree that we can't prevent access to drinking water?

Water costs money. Delivering potable water to urban areas costs much more per gallon than to an alfalfa field.

In El Paso, you can have X amount at low rate, beyond that the rate skyrockets.

How do we fold market economics into the right to water? Market economics can provide incentives to maximize use.

Do we say you have right to water, or capitalism: the right to buy as much as you want? If you have no plumbing in El Paso, do you have access to water? Outside of legal structure, do you still have a right to water? On the Navajo reservation, they must drive an hour to get water. Do they have access to water?

Given capitalism and given prior appropriation, what template can we place within those concepts to ensure some access to water?

Do we base the right on U.N. standards or is it simply natural law? Native Americans had water issues: cisterns. Every member had access. The Navajo now say the right means pipelines. We have to accept that the right exists.

Is it simply a negative right? I can take a bucket to the river, or is it about affirmative government duty to build infrastructure?

ANSWERS TO QUESTIONS PRESENTED

We analyzed western water law regarding the human right to access sufficient water to meet fundamental human needs. With this in mind, we address the following questions:

1. What are the values that the Human Right to Water seeks to ensure?

A human right to water includes access to water to meet basic human needs. This is a negative obligation upon the state.

WORKING GROUP # 4
Governance and the Role of Economics in Implementing the Human Right to Water
FINAL WORKING GROUP REPORT

Moderators

Don Negri, Professor of Economics, Willamette University College of Liberal Arts

James Culliton, Staff Attorney, North American Energy Standards Board

Joe Bowersox, Professor and Director, Center for Sustainable Communities, Willamette University College of Liberal Arts

Josh Newton, Partner, Karnopp, Petersen LLP

Rapporteurs:

Mike Freese, Willamette University College of Law

McKenna Krueger, Willamette University College of Law

Papers Presented:

- Rose Francis & Laurel Firestone, Implementing the Human Right to Water in California's Central Valley

- Camille Pannu, Damming Democracy: Drinking Water & Exclusion in California's Central Valley

- Dena Marshall & Janet Neuman, Seeking a Shared Understanding of the Human Right to Water in Indian Water Rights Agreements in the Pacific Northwest

- Gregory A. Hicks & Devon G. Peña, Customary Practice and Community Governance in Implementing the Human Right to Water – The Case of the Acequia Communities of Colorado's Rio Culebra Watershed

- Michael W. Grainey, Global Warming and Its Impact on Water Supply – The Energy Implications of Climate Change and the Effects of Our Energy Choices

• David Zetland, Water Rights and Human Rights: The Poor Will Not Need Our Charity If We Need Their Water

• Bret C. Birdsong, Mapping the Human Right to Water on the Colorado River

Other Participants

• Gabriel Eckstein, Professor, Texas Wesleyan University School of Law

• Gary Lockwood, Attorney

• Terrance Green, Willamette University College of Law

The group acknowledged that this intricate web of public and private institutions, and the infrastructure they support, met the HRW for the overwhelming majority

the flow of surface water is often well-documented, neither the connection between surface water and groundwater, nor the placement, size and recharge rate of most groundwater aquifers had been reliably established. In terms of demand, participants recognized that, although surface withdrawals are often closely monitored, very little information existed about how much water is pumped from the subsurface.

Even in the absence of perfect supply-demand data, the group understood that economics should play an important role in administering the HRW. There was recognition that water may not be well-suited to economic analysis because it is not merely an article of commerce. The group seemed to coalesce around the idea that water is a quasi-commodity whose status is dependent upon its applied use. After many examples were discussed, the group found that bridging the gap between understanding water as an economic good and understanding water as an unalienable right is the principal challenge to arriving at a definition of a HRW.

Some in the group focused narrowly on allowing a given community to decide what role economics should play in water allocation. Others focused more broadly, and decided that water should be priced to send a conservation signal given the prospect of increasing water scarcity. Within this latter group, however, there was recognition that permitting water to be priced as any other market commodity could lead to the denial of a HRW for those least able to pay. The question arose as to whether pricing should occur at the point of diversion or the point of delivery.

For pricing at the point of delivery, which would encompass most municipal and domestic uses, the group recognized that the existing public utility model serves well. In such contexts, the cost of providing the infrastructure needed to transport water from source to tap is distributed among all customers. Existing tiered pricing structures, which increase the commodity cost as use increases, were understood to be effective. Although discussed, there was no consensus reached on whether the initial block of usage should be free or not. There was recognition that many, if not all, municipalities and utilities have programs that provide service to those unable to pay. An issue was raised, and universally supported, that water utilities should have access to government-subsidized capital markets and rural community grants in order to build and maintain delivery infrastructure.

For pricing at the point of diversion, with the understanding that states currently give water away freely, participants recommended a change in policy. Specifically, they recommended that the states charge for the continued use of commercial and agricultural water rights. There was appreciation for the fact that municipal and domestic users should be exempted from this obligation. For charged usage, there was an understanding that the price should reflect the opportunity cost of water in the regional market, with full consideration of certain externalities such as capital costs, delivery, infrastructure, pollution and geography. Such pricing would enable the commercial or agricultural right-holder to either use, or sell the water, presumably within the same watershed.

LUNCHEON SPEAKERS

Congressman Earl Blumenauer:

Personally feels that the single most important issue in water law is how we approach and deal with water supply and access. The impact of climate change makes water supply and access the most immediate effect.

Our current position is precarious due to successes of having populations living in cities. The emergence of urbanization, economic development, and interconnectivity is putting us on an unsustainable path on many levels. The massive engineering accomplishments that were heralded as significant achievements of civilization are now putting whole ecosystems at risk. River basins are at risk, agricultural practices are depleting fossilized water, and great rivers no longer reach the sea on a continuing basis.

However, we have encouraging developments as people begin to make a positive difference. Starting back with Teddy Roosevelt and continued by the Nixon Administration and the Clean Water Act. Today, we are watching people engage in this issue internationally; it is not enough, but it is good to see the engagement of the issue. We are watching the realization that some practices that are not sustainable. We have reached the tipping point where people realize it is so bad that we are going to do something about it. It is encouraging to see the federal government enact policy changes, but what is more encouraging is to see bipartisan support for these types of legislation.

We still have 1 billion people without access to clean drinking water, more than 2 billion people without access to clean sanitization. We are truly in a race with time, half the people who are currently sick are sick needlessly due to water borne illnesses. The "McDonaldization" of the global diet is truly disquieting. If everybody is going to consume the diet of the typical American there simply is not enough beef and it would completely overwhelm our ability to export such quantities of water disguised as cattle.

We are starting to recognize that there is a tremendous capacity to use simple economics to change this equation. People complain about gas prices fail to realize that they pay $26 a gallon for a bottle of water they could get from the tap for free. Robert Mann from the University of Oregon has developed a chart about

the water requirements per KW of different types of energy. What is happening in Phoenix and Las Vegas is that along with the housing bubble bursting, their dependence of water is unsustainable.

In Congress, hopefully we will be able to unravel the different policies that intersect with water – foreign policy, energy, land use, disaster preparedness, tax, and agriculture. Being able to use water more efficiently for agriculture will not only save the water resource but will be more profitable for those farming. By stopping the fortification of coastlines and rivers we can make them more disaster resistant. These are not a series of zero-sum tradeoffs, they are win-win situations.

Since I've gone to Congress we have been trying to get the federal government more involved. The patchwork of rules and regulations that govern how we use water in this country is a disaster and doesn't work very well and each passing year makes it clear that we are not up to the challenges. Its not going to happen this Congress but we are moving in the direction where it does make sense to look at more national water policy just simply because it doesn't make sense for New Mexico and Texas to go to war over the Colorado River.

We have enough water in this country to satisfy our needs. With relatively minor adjustments we can reach the point where people can understand that there is a win-win that a national policy can bring. The flipside is that failure to do that is a prescription for disaster, shortage, litigation and ultimate failure

Part of what we need to do across the country is to invest in quantifying what we currently have. I think making a labor intensive commitment to knowing what we have is important. There is enough value tied up in water resource that can be unlocked if we use it properly and currently it is used by people who use it out of habit as opposed to efficiency. In Oregon, we developed the first comprehensive plan and have a public process for the stakeholders to deal with goals and objectives and it worked remarkably well. However, we didn't keep it fresh. We are reaching a point in this country where people realize we are on borrowed time and borrowed money on a host of issues. Use the Farm Bill to put money into farmers and ranchers who use the resources more efficiently. This doesn't have to be as hard as we make it.

problem. At the end of the process we found we had more interests than conflicts.

We manage our resources by the good neighbor approach and

participants had discerned a conference consensus that the human right to water should be explicitly recognized and incorporated into existing water allocation systems. They were interested in participating in active legislative advocacy on behalf of the human right to water. There is no better measure of success–if we collectively create a better system for implementing the human right to water in part because of this conference, then our time and effort will have been well spent.