

## IMPLEMENTING THE HUMAN RIGHT TO WATER IN CALIFORNIA'S CENTRAL VALLEY: BUILDING A DEMOCRATIC VOICE THROUGH COMMUNITY ENGAGEMENT IN WATER POLICY DECISION MAKING

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### I. INTRODUCTION

Consider this: even one of the wealthiest states in the wealthiest nation on the planet has not fully implemented the human right to water. This state is California, a place which holds a special position in our collective consciousness as the land of “milk and honey,” producing tremendous agricultural bounty that feeds the nation and the globe.<sup>1</sup> Yet despite boasting the eighth-largest economy in the world, with a state GDP of \$1.9 trillion, approximately one million Californians lack reliable access to safe, affordable drinking water on a daily basis.<sup>2</sup>

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1. Laurel Firestone, Alice Kaswan, & Sandra Meraz, Symposium, *Environmental Justice: Access to Clean Drinking Water*, 57 HASTINGS L.J. 1367, 1385 (2006). (Remarks by Sandra Meraz) [hereinafter Meraz Remarks] (“[T]he land of milk and honey which is California--now the land of pollution and destruction and contamination. . . . Tulare County is the richest county, yet it's the poorest county, because it doesn't give its communities back anything but pollution.”). See Paola Ramos, Latino Issues Forum, *Promoting Quality, Equity, and Latino Leadership in California Water Policy: An Introduction to Water Issues Impacting Latino Communities in California*, 14 (June 2003).

2. See CAL. DEP'T OF PUB. HEALTH (CDPH), DIV. OF DRINKING WATER AND ENVTL. MGMT. (DDWEM), ANN. COMPLIANCE REP. OF PUB. WATER SYS. IN CAL., 5, Appendix C (Aug. 18, 2009), available at <http://www.cdph.ca.gov/certlic/drinkingwater/Documents/DWdocuments/2007%20Compliance%20Report%20Amended%20Aug%2018%202009.pdf>; CDPH, DDWEM, ANNUAL COMPLIANCE REPORT: PUBLIC WATER SYSTEMS IN CALIFORNIA, CALENDAR YEAR 2006, 18, available at <http://www.cdph.ca.gov/certlic/drinkingwater/>

The agricultural sector is a cornerstone of California's economic strength, producing \$39 billion worth of goods and services each year and occupying more than a quarter of the state's landmass.<sup>3</sup> The vast majority of these farming receipts come from the Central Valley, which possesses some of the most fertile farmland in the world and produces a literal cornucopia of citrus, strawberries, grapes, lettuce, almonds, and milk, just to name a few.<sup>4</sup> Unfortunately, this bounty comes with a steep price: the Valley's aquifers suffer from widespread nitrate and pesticide contamination as a result of more than half a century of intensive industrial agricultural practices.<sup>5</sup> The Valley is densely populated

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Documents/DWdocuments/AnnualComplianceReport2006.pdf;

CAL. DEP'T OF HEALTH SERV., DRINKING WATER PROGRAM, ANN. COMPLIANCE REP. FOR CAL. PUB. WATER SYS., CALENDAR YEAR 2005, 13-14, available at <http://www.cdph.ca.gov/certlic/drinkingwater/Documents/DWdocuments/AnnualComplianceReport2005.pdf> (total persons served drinking water with contaminants in excess of the Maximum Contaminant Level (MCL) in California, in violation of state and federal Safe Drinking Water Acts); *Numbers in the News, 2009 California Economy Rankings*, CENTER FOR CONTINUING STUDY OF THE CALIFORNIA ECONOMY (Dec. 2010), <http://www.ccsce.com/PDF/Numbers-Dec10-CA-Economy-Rankings.pdf> (California's GDP still the world's eighth-largest in 2009), Marc Lifsher, *California economy still world's eighth-largest, despite recession*, LOS ANGELES TIMES, Dec. 2, 2010, [http://latimesblogs.latimes.com/money\\_co/2010/12/california-economy-ranking.html](http://latimesblogs.latimes.com/money_co/2010/12/california-economy-ranking.html); *Sorry Arnold, California isn't sixth any more: State's economy drops to 8th-largest in world, despite conventional wisdom*, ASSOCIATED PRESS, (Jan. 12, 2007), [http://www.msnbc.msn.com/id/16600877/ns/business-us\\_business/](http://www.msnbc.msn.com/id/16600877/ns/business-us_business/). See also Scott Kraft, *In tiny Seville, trouble on tap*, LOS ANGELES TIMES, Nov. 7, 2010, at A41, available at <http://articles.latimes.com/2010/nov/07/local/la-me-seville-water-20101107> ("More than 1 million people in California live in places where tap water isn't reliably safe to drink, and about a third of them are in small, mostly Latino towns such as Seville in the San Joaquin Valley."); Julia Scott, *Nitrate contamination spreading in California communities*, CALIFORNIA WATCH (May 13, 2010), <http://californiawatch.org/nitrate-contamination-spreading-california-communities>.

3. CAL. ENVTL. PROT. AGENCY, REG'L WATER QUALITY CONTROL BD., CENT. VALLEY REGION (CVRWQB), IRRIGATED LANDS REGULATORY PROGRAM LONG-TERM PROGRAM DEV., STAFF REPORT 11 (July 2010) [hereinafter ILRP STAFF REPORT], available at [http://www.swrcb.ca.gov/centralvalley/water\\_issues/irrigated\\_lands/long\\_term\\_program\\_development/draft\\_program\\_eir\\_july2010/peir\\_app\\_a.pdf](http://www.swrcb.ca.gov/centralvalley/water_issues/irrigated_lands/long_term_program_development/draft_program_eir_july2010/peir_app_a.pdf); Ramos, *supra* note 1, at 14.

4. Lisa M. Hamilton, *Water Vanishes on Western Farms*, THE ATLANTIC, Feb. 3, 2010, at <http://www.theatlantic.com/food/archive/2010/02/water-vanishes-on-western-farms/35133/>. See *State Fact Sheets: Cal.*, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., (March 30, 2011), <http://www.ers.usda.gov/statefacts/ca.htm>; Ramos, *supra* note 1, at 14; ILRP STAFF REPORT, *supra*, note 3, at 10 ("California's Central Valley has been one of the most productive agricultural regions in the world for more than 60 years."); Ramos, *supra* note 1, at 15 ("Agriculture is particularly important to the Central Valley, where it represents 21% of all income, and 25% of all employment.").

5. See COMMUNITY WATER CENTER, NITRATE CONTAMINATION OF DRINKING WATER AND THE HEALTH OF SAN JOAQUIN VALLEY RESIDENTS, 2 (February 2011), available at

with irrigated crop farms, nurseries, and large-scale confined animal feeding operations (CAFOs or “factory farms”), including more than 1600 milk cow dairies.<sup>6</sup> Wastewater discharges from these operations have transformed the groundwater below into a toxic stew of nitrates, pesticides, and pesticide byproducts, many of which persist for decades, even after their use has been discontinued.<sup>7</sup> This is the same water that more than 50% of the Central Valley human population relies upon for domestic usage, including drinking, cooking, and bathing.<sup>8</sup> In the arid San Joaquin Valley, which covers the southern half of the Central Valley,

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<http://www.communitywatercenter.org/files/PDFs/2011%20Nitrate%20Health.pdf> [hereinafter CWC Nitrate White Paper]; Ramos, *supra* note 1, at 20-21, 45; ALEX N. HELPERIN, DAVID S. BECKMAN, & DVORA INWOOD, CALIFORNIA’S CONTAMINATED GROUNDWATER: IS THE STATE MINDING THE STORE? 41, 42, 44-45, 47, 48-49, 59 (Dana Foley ed.) (April 2001), available at <http://www.nrdc.org/water/pollution/ccg/ccg.pdf>; ERIK OLSON, WHAT’S ON TAP?: GRADING DRINKING WATER IN U.S. CITIES, EARLY RELEASE CALIFORNIA EDITION v, viii, 51, 52, 59 (Dana Nadel Foley ed.) (October 2002), available at [http://www.nrdc.org/water/drinking/uscities/pdf/whatsontap\\_ca.pdf](http://www.nrdc.org/water/drinking/uscities/pdf/whatsontap_ca.pdf); ENVIRONMENTAL WORKING GROUP, NATIONAL DRINKING WATER DATABASE—FULL REPORT [hereinafter EWG Report], available at <http://www.ewg.org/tap-water/fullreport>; C.H. Pickett, L.S. Hawkins, J.E. Pehrson, & N.V. O’Connell, *Herbicide Use in Citrus Production and Ground Water Contamination in Tulare County*, PEST MANAGEMENT ANALYSIS AND PLANNING PROGRAM, at 1 (April 1990), <http://www.cdpr.ca.gov/docs/pestmgmt/pubs/pm9001.pdf>; ILRP Staff Report, *supra* note 3, at 10 n.7 (“Intensive agriculture describes a system characterized by high inputs of capital, labor, and/or heavy usage of technologies such as pesticides and fertilizers relative to land area.”).

6. See ILRP STAFF REPORT, *supra* note 3, at 10, 13 (noting that as of 2007, the Central Valley was home to over 34,000 farms growing irrigated crops, and 7.5 million acres of irrigated crop land); Waste Discharge Requirements General Order for Existing Milk Cow Dairies, CVRWQB, Order No. R5-2007-0035, at 2 (May 3, 2007), available at [http://www.swrcb.ca.gov/rwqcb5/board\\_decisions/adopted\\_orders/general\\_orders/r5-2007-0035.pdf](http://www.swrcb.ca.gov/rwqcb5/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf); CWC Nitrate White Paper, *supra* note 5, at 4 (“In 2008, the San Joaquin Valley contained almost 1.6 million dairy cows and calves, and 161,000 beef cattle.”). See *Thirsty for Justice: A People’s Blueprint for California Water*, THE ENVIRONMENTAL JUSTICE COALITION FOR WATER (EJCW) 73 (June 2005), <http://www.ejcw.org/Thirsty%20for%20Justice.pdf>; Helperin, *supra* note 5, at 41.

7. SEE BRAD HEAVNER, TOXICS ON TAP: PESTICIDES IN CALIFORNIA DRINKING WATER SOURCES 6-7, 10-15 (1999), available at <http://pesticidereform.org/downloads/tap.pdf>; Helperin, *supra* note 5, at 27-53; Olson, *supra* note 5, at v, viii, 51-59; Ramos, *supra* note 1, at 20-21; Carolina Balazs, Rachel Morello-Frosch, Alan Hubbard, & Isha Ray, *Social Disparities in Nitrate-Contaminated Drinking Water in California’s Central Valley* 3, 5 (forthcoming) [hereinafter *Social Disparities*]; *Thirsty for Justice*, *supra* note 5, at 72, 76; EWG Report, *supra* note 5.

8. CVRWQB, GROUNDWATER QUALITY PROTECTION STRATEGY: A “ROADMAP” FOR THE CENTRAL VALLEY REGION 8 (August 2010), available at [http://www.swrcb.ca.gov/rwqcb5/water\\_issues/groundwater\\_quality/2010aug\\_gwq\\_protect\\_strat\\_approve\\_d.pdf](http://www.swrcb.ca.gov/rwqcb5/water_issues/groundwater_quality/2010aug_gwq_protect_strat_approve_d.pdf).

groundwater provides up to 95% of the domestic supply.<sup>9</sup> Not every inch of the Valley floor rests on polluted aquifers—these contaminants move in plumes as a complex function of hydrogeology and human activity—but a significant percentage of Valley residents are paying the price for degradation of this resource.<sup>10</sup> This burdensome distinction rests disproportionately on low-income communities of color.<sup>11</sup>

Historical settlement patterns stemming from farm labor migration, lack of public transportation, racially exclusionary covenants, and discriminatory planning and public investment policies, among other factors, have resulted in a persistent and widespread pattern of small, under-resourced and under-served communities of color in rural, unincorporated areas of the Valley.<sup>12</sup>

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9. Social Disparities, *supra* note 7, at 5; CWC Nitrate White Paper, *supra* note 5, at 2. *See also* *Thirsty for Justice*, *supra* note 6, at 76 (observing that groundwater supplies 95% of drinking water to California residents in rural areas); Ramos, *supra* note 1, at 21, 25. *See* Carolina Balazs, Snapshot of a Waterscape: Drinking Water Systems in the San Joaquin Valley, 3 (Oct. 22, 2010) (chapter of Ph.D. dissertation in preparation, University of California, Berkeley) [hereinafter Snapshot of a Waterscape] (“The Central Valley is generally divided into two regions: the Sacramento Valley, which covers the northern half of the Central Valley, and the [San Joaquin Valley] which covers the southern half of the Central Valley. The two valleys meet in the Delta, where the Sacramento and San Joaquin rivers meet.”).

10. *See* Heavner, *supra* note 7, at 12, 15; Ramos, *supra* note 1, at 16:

The inadequate treatment of water may also have adverse economic effects on a community. These include economic loss due to disablement of ill people who cannot perform their work, the loss of education of developmentally disabled or ill school children, increased healthcare costs, and the creation of a polluted environment impacting economic activities such as tourism . . . .

*see also* DEB MARTIN, RURAL COMMUNITY ASSISTANCE PARTNERSHIP, AFFORDABILITY AND CAPABILITY ISSUES OF SMALL WATER AND WASTEWATERS SYSTEMS: A CASE FOR REGIONALIZATION OF SMALL SYSTEMS 2, <http://www.rcap.org/sites/default/files/rcap-files/Regionalization%20Great%20Lakes%20RCAP%20final.pdf> (last visited April 2, 2011); EWG Report, *supra* note 5.

11. *See* Social Disparities, *supra* note 7, at 5-6, 16-17, 19; *see also* Snapshot of a Waterscape, *supra* note 9, at 4; Ramos, *supra* note 1, at 11, 16, 37, 42-43, 46; *Thirsty for Justice*, *supra* note 6, at 71, 72, 73, 76.

12. *See* COUNTY OF TULARE GENERAL PLAN, General Plan Policy Summary, Section 2.D.3 (Dec. 1971), [http://generalplan.co.tulare.ca.us/documents/gp\\_issues\\_summary/02-Water-LiquidWasteMgmt.pdf](http://generalplan.co.tulare.ca.us/documents/gp_issues_summary/02-Water-LiquidWasteMgmt.pdf) (last visited April 2, 2011). (“Public commitment to communities with little or no authentic future should be carefully examined before final action is initiated. These non-viable communities would, as a consequence of withholding major public facilities such as sewer and water systems, enter a process of long-term natural decline as residents depart for improved opportunities in nearby communities.”) (emphasis added); *see also* Caroline Farrell, *SB 115: California’s Response to Environmental Justice—Process Over Substance*, 1 GOLDEN GATE U. ENVTL. L.J. 113, 124 (2007) (“The 1971 General Plan contains a provision stating that communities that do not have a viable or authentic future will be denied public services, with the expectation that these communities will enter a period of

These communities are located close to the farms that are the economic engine of the region, but as a result, they also suffer some of the highest levels of groundwater contamination.<sup>13</sup> Many of these same communities are gripped with poverty and struggling to improve poor public service infrastructure, including water services distribution and treatment.<sup>14</sup> The most impoverished residents of these communities are forced to choose between buying bottled water to avoid the nitrate- and pesticide-contaminated water flowing from their faucets or exposing themselves and their loved ones to the risk of cancer, reproductive problems, and other health impacts so that they can afford other necessities, such as food and medicine.<sup>15</sup> Agricultural contamination of the Valley's groundwater therefore has

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'natural decline' and wither away. Many of the communities considered not to have an authentic future are predominantly low-income Latino communities."); Ramos, *supra* note 1, at 15; *Thirsty for Justice*, *supra* note 6, at 71; Social Disparities, *supra* note 7, at 5-6; Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 937, 940-41 (2010); Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, UCLA L. REV. 1095, 1115-18 (2008); Conversation with Kara Brodfuehrer, Staff Attorney, California Rural Legal Assistance, Dec. 13, 2010. Many of these communities originated as settlements for low-income, politically marginalized farm workers, including Caucasian dust bowl refugees, Asian immigrants, and African Americans; today, they are largely populated by Latino farm-worker families. See DOUGLAS B. GWYNN, YOSHIO KAWAMURA, EDWARD DOLBER-SMITH, & REFUGIO I. ROCHIN, THE CALIFORNIA INSTITUTE FOR RURAL STUDIES (CIRS), CALIFORNIA'S RURAL POOR: TRENDS, CORRELATES, AND POLICIES, 8-14 (Feb. 1989), <http://www.cirsinc.org/Documents/Pub0289.7.PDF>; ISAO FUJIMOTO, CIRS, BUILDING CIVIC PARTICIPATION IN CALIFORNIA'S CENTRAL VALLEY, BOOK ONE, GETTING TO KNOW THE CENTRAL VALLEY, 5-6, 12, 14, 19-20, 22 (Sept. 1998), <http://www.cirsinc.org/Documents/Pub0998.1.PDF>; Anderson, *supra* note 12 at 937.

13. See Ramos, *supra* note 1, at 15, 25, 36; *Thirsty for Justice*, *supra* note 6, at 72, 73; Snapshot of a Waterscape, *supra* note 9, at 4; Helperin, *supra* note 5, at 47; Social Disparities, *supra* note 7, at 5, 16-17.

14. See *Thirsty for Justice*, *supra* note 6, at 72; Laurel Firestone, Alice Kaswan, & Sandra Meraz, Symposium, *Environmental Justice: Access to Clean Drinking Water*, 57 HASTINGS L.J. 1367, 1378 (2006) (remarks by Laurel Firestone) [hereinafter Firestone Remarks].

15. See CWC Nitrate White Paper, *supra* note 5, at 4-10 (discussing health outcomes associated with nitrate contamination of drinking water and the disproportionately high incidents of those outcomes in Tulare County, where 20-30% of small systems serve water with nitrate over the legal MCL); see also CWC, *Dibromochloropropane (DBCP) fact sheet* (2009), [http://www.communitywatercenter.org/files/trainingmaterials/CWC\\_GFS\\_DBCP.pdf](http://www.communitywatercenter.org/files/trainingmaterials/CWC_GFS_DBCP.pdf) (last visited April 2, 2011) (discussing health outcomes associated with consumption of drinking water with high levels of the pesticide DBCP). Many communities, with which CWC has worked, such as Seville and Tooleville, have median household incomes around \$14,000-16,000 per year, according to surveys done by Self Help Enterprises. Based on interviews by CWC staff with residents in these communities, it is not uncommon for families to spend 6-10% of their household income on water alone.

significant negative environmental justice implications.

## II. THE RELATIONSHIP BETWEEN ENVIRONMENTAL JUSTICE AND HUMAN RIGHTS

Environmental justice is the prevailing or accepted term for describing the disproportionate impacts that environmental pollution has on the health and well-being of low-income communities and communities of color as compared with other populations.<sup>16</sup> Accordingly, environmental justice communities are those “communities bearing the greatest share of environmental and social problems associated with polluting industries.”<sup>17</sup>

This is evident in the Central Valley, where many rural, low-income, largely Latino communities are both “disproportionately affected by exposure to drinking water contaminants”<sup>18</sup> and bear “a disproportionate burden of environmental health risks from other sources.”<sup>19</sup> These risks include air pollution created by routine spraying of pesticides on the crops near their homes and occupational hazards from laboring in the farms directly where these chemicals are applied.<sup>20</sup>

From the perspective of the global water justice movement, groundwater contamination in the Central Valley’s rural, low-

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16. David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGY L.Q.* 443, 444 (2006).

17. See Monsma, *supra* note 16, at 489.

18. Social Disparities, *supra* note 7, at 6, 16-17, 19.

19. Ramos, *supra* note 8, at 32.

20. *Thirsty for Justice*, *supra* note 6, at 80. See also Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 *STAN. ENVTL. L.J.* 338, 339 (1996) (“Manifestations” of “environmental racism in the United States” include the “use of dangerous pesticides in industrial agriculture.”); BAY AREA ENVIRONMENTAL HEALTH INITIATIVE, ET AL., UNITED STATES OF AMERICA, SUBMISSION TO THE UNITED NATIONS (U.N.) UNIVERSAL PERIODIC REVIEW, NINTH SESSION OF THE WORKING GROUP OF THE UPR, HUMAN RIGHTS COUNCIL 2, 3-4, 7 (Nov. 2—Dec. 3, 2010) [hereinafter Submission to U.N. UPR] (“It is well-established that U.S. communities of color and low-income communities are disproportionately burdened by environmentally harmful human activities and their individual and cumulative adverse health consequences . . . .”) (submitting to the U.N. that a number of U.S. environmental justice issues are themselves human rights violations) (emphasis added).

income communities constitutes a human rights abuse.<sup>21</sup> Human rights are “the basic standards without which people cannot live in dignity as human beings”<sup>22</sup> and are premised on the philosophy that there exists a “fundamental nucleus of values” around which “different cultures, juridical expressions and institutional models” converge.<sup>23</sup> There is growing acknowledgment in international law and policy circles of the existence of a human right to water, despite the fact that it is not (yet) codified explicitly in any treaties.<sup>24</sup> The water justice movement draws on both

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21. See Maude Barlow, *Advice for Water Warriors*, YES! MAGAZINE ONLINE, Nov. 8, 2008, available at <http://www.yesmagazine.org/planet/advice-for-water-warriors>. In fact, when the U.N. Independent Expert on the right to water and sanitation conducted her recent fact-finding mission to the United States in early March 2011 “to examine the way in which the human right to water . . . is being realized in the United States[,]” she visited the Central Valley during her tour and met with and listened to the drinking water challenges being faced by residents from local communities. Press Release, United Nations Human Rights, Catarina de Albuquerque, U.N. Independent Expert on the right to water and sanitation, Mission to the United States of America from 22 February to 4 March 2011, (Mar. 4 2011) [hereinafter Independent Expert End-of-Mission Press Release], available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10807&LangID=E>. Although her formal report to the United Nations is still forthcoming at the time of publication, the press release issued at the immediate conclusion of her mission expresses concerns about racially and socioeconomically discriminatory impact, water quality, and affordability in this region. See *id.*; see also Mark Grossi, *Tulare Co. water draws UN critique*, FRESNO BEE, Mar. 5, 2011, at A3, available at <http://www.fresnobee.com/2011/03/04/2297039/tulare-county-water-draws-un-critique.html#storylink=misearch>; Mark Grossi, *U.N. studies Tulare Co. town's tainted water: International attention to be focused on Valley town's water woes*, FRESNO BEE, Mar. 1, 2011, available at <http://www.fresnobee.com/2011/03/01/2292513/sevilles-water-probed-by-un.html#storylink=misearch>; Mike Hazelwood, *U.N. expert told of Seville water issues: Official studying water rights around world*, VISALIA TIMES-DELTA, Mar. 2, 2011, at A1, available at <http://www.visaliatimesdelta.com/apps/pbcs.dll/article?AID=2011103020317>.

22. Dinara Ziganshina, *Rethinking the Concept of the Human Right to Water*, 6 SANTA CLARA J. INT'L L. 113, 117 (2008) (internal quotation marks and alterations omitted).

23. See Mary Ann Glendon, *Justice and Human Rights: Reflections on the Address of Pope Benedict to the UN*, 19 EUR. J. INT'L L. 925, 925-26 (2008) (quotation marks omitted).

24. See Comm. on Econ. & Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15*, 29th Sess., Nov. 29, 2002, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter G.C. 15]; U.N. HUMAN RIGHTS COUNCIL (H.R.C.), OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (O.H.C.H.R.), REPORT BY THE OFFICE OF THE HIGH COMMISSIONER ON THE SCOPE AND CONTENT OF THE RELEVANT HUMAN RIGHTS OBLIGATIONS RELATED TO EQUITABLE ACCESS TO SAFE DRINKING WATER AND SANITATION UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, U.N. Doc. A/HRC/6/3 (Aug. 2007) [hereinafter OHCHR Rep.]; G.A. Res. 64/292, ¶ 1, U.N. Doc. A/RES/64/292 (July 28, 2010) [hereinafter G.A. Res.]; U.N. Hum. Rts. Council Res. 15/9, ¶ 3, U.N. Doc. A/HRC/RES/15/9 (Sept. 30, 2010) [hereinafter H.R.C. Res. 15/9]; U.N. Hum. Rts. Council Res. 16/L.4, ¶ 1, U.N. Doc. A/HRC/RES/16/L.4 (Mar. 18, 2011) [hereinafter H.R.C. Res. 16/L.4].

environmental justice and human rights as conceptual tools in the struggle to achieve universal access to safe drinking water, but it is worth noting that the two concepts are analytically distinct. The human right to water refers to a substantive right to the underlying environmental resource—and this universal right extends to all people by virtue of being human—whereas environmental justice refers to disproportionate environmental impact on a discrete population group.<sup>25</sup> This impact could take the form of the imposition of an environmental burden, such as inequitable exposure to *unsafe* drinking water, or the deprivation of an environmental benefit, such as inequitable access to a sufficient *quantity* of drinking water.<sup>26</sup> In the discourse of water justice practitioners, however, environmental injustice and environmental human rights violations converge, because it is politically marginalized populations around the world who overwhelmingly fall victim to this human rights abuse—lack of sufficient access to safe, affordable drinking water.<sup>27</sup> In other words, the groups

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25. Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 89 n.75 (2005) (identifying this intellectual distinction between “environmental rights, which focus on the environmental standards that apply to *all people*” and “environmental justice, which focuses on the disproportionate nature of the harm” on discrete categories of people); Kristen Martila Gast, Note, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 253, 270 (2004) (“[E]nvironmental justice focuses on the intersection between environmental harm and historically disadvantaged groups.”).

26. See, e.g., Andrea Waye, *An Environmental Justice Perspective on African-American Visitation to Grand Canyon and Yosemite National Parks*, 11 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 125, 126 (2005) (“While the environmental justice movement initially focused on the inequitable distribution of environmental burdens, the focus has recently been extended to include the inequitable distribution of environmental benefits, especially in the natural resources context.”); see *id.* at 126 n.10 (“[E]nvironmental inequity is not solely the result of the pollution burdens that first galvanized the environmental justice movement. Our natural environment also bestows many benefits on those able to use and enjoy it. Failure to provide equitable access to . . . natural resources can also constitute injustice.”) (quoting JUSTICE AND NATURAL RESOURCES xxxi (Kathryn M. Mutz et al., eds., 2002) (alterations omitted)).

27. See Osofsky, *supra* note 25, at 101, 104-05, 107; Timothy J. Schorn, *Drinkable Water and Breathable Air: A Liveable Environment As a Human Right*, 4 GREAT PLAINS NAT. RESOURCES J. 121, 124 (2000) (“Environmental degradation, its resulting negative impact on quality of life, and the ultimate violation of a person’s human rights are more strongly felt by those who exist at the lower rungs of the international socio-economic ladder. People living in lesser-developed areas are more apt to live in conditions of environmental disarray.”). See also Press Release, *Water and Sanitation: A Human Right for all, even slum-dwellers and the homeless*, United Nations Human Rights (Mar. 22, 2011), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10875&LangID=E> (“Time and again, we see that those without access to water and sanitation are also those who



around the planet who are not fully realizing their human right to water are largely the world's environmental justice communities.<sup>28</sup>

### A. *The Human Right to Water in International Law*

#### 1. *A Human Right to High-Quality Water*

As most recently articulated in a July 2010 resolution by the United Nations (U.N.) General Assembly, there is a human right to water recognized in international law, and it consists of “the right to *safe and clean* drinking water and sanitation that is essential for the full enjoyment of life and all [other] human rights[.]”<sup>29</sup> One of the contours of this human right to water is that it encompasses not just quantity, but also quality.<sup>30</sup> “Providing low-quality water would vitiate the fundamental rationale that undergirds the right to water[.]” as “[a]ny quantity of water is meaningless if its quality causes it to be unfit for use or consumption.”<sup>31</sup> Both logic and developing international law support this proposition. The U.N. Human Rights Council (HRC) has issued a subsequent resolution

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are marginalized, excluded, or discriminated against. Their inadequate access to safe water and sanitation is not simply an unfortunate by-product of their poverty, but rather a result of political decisions that exclude them . . .”).

28. See Submission to U.N. UPR, *supra* note 20, at 5. This breathes life into Professor Gerald Torres' assertion that “environmental justice is not [just] the result of mere parochial concerns, even though domestically most of its power comes from the local expression of injustice. Rather, it is part of a global concern with issues of fairness and equitable access to the resources of the earth.” Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J. L. & COM. 597, 621 (1996).

29. G.A. Res., *supra* note 24, at ¶ 1 (emphasis added).

30. See Ling-Yee Huang, Note, *Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water*, 20 FLA. J. INT'L L. 353, 369 (2008) (“A human right to water incorporates two primary aspects, accessibility and adequacy.”); Malgosia Fitzmaurice, *The Human Right to Water*, 18 FORDHAM ENVTL. L. REV. 537, 545 (2007) (“[N]ot only does this provision characterize the right as fundamental, it also specifies that it is not only water, but healthy water to which humans have a right.”) (internal quotation marks omitted); Amy Hardberger, *Whose Job is it Anyway?: Governmental Obligations Created by the Human Right to Water*, 41 TEX INT'L L.J. 533, 535 (2006) (“All water supplied or accessed must be of an acceptable quality to protect public health.”); Erik B. Bluemel, Comment, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 994 (2004) (“[Water] pollution, if severe enough, can constitute a violation of the right to water.”). It bears noting, however, that quantity and quality are not the only contours of a human right to safe drinking water. Other commonly accepted contours of this right include physical accessibility, affordability, and even reliability of supply. See G.C. 15, *supra* note 24, at ¶¶ 10-12; OHCHR Rep., *supra* note 24, at pp.13-16; H.R.C. Res. 15/9, *supra* note 24, at ¶ 9(b); H.R.C. Res. 16/L.4, *supra* note 24, at ¶5(a).

31. Hardberger, *supra* note 30, at 541 (emphasis added).

“affirm[ing]” that the human right to water is, among other things, “inextricably related to the right to the highest attainable standard of physical and mental health . . . .”<sup>32</sup> As Professor Erik Bleumel once observed:

[T]he right to health . . . requires the assurance of environmental hygiene. In turn, ensuring environmental hygiene requires States to ‘prevent threats to health from unsafe and *toxic water conditions*,’ including protection of water resources from contamination . . . . The right to health thus ensures not only access to clean and safe water to drink, but also . . . *the protection of existing bodies of water from contamination*.<sup>33</sup>

Along a similar vein, General Comment No. 15, issued by the U.N. Committee on Economic, Social, and Cultural Rights (ECOSOC), includes a significant water quality component.<sup>34</sup> This 2002 document was “the first recognition by a United Nations human rights body of an independent and generally applicable human right to water.”<sup>35</sup> It interprets the human right to water as imposing an obligation on states to “protect” the resource,

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32. H.R.C. Res. 15/9, *supra* note 24, at ¶3. According to Richard Glick, the International Covenant on Civil and Political Rights (ICCPR) “establishes the Human Rights Committee to examine and facilitate the compliance of state parties with Political Covenant norms.” Richard D. Glick, *Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights*, 19 HARV. ENVTL. L. REV. 69, 93 (1995).

33. Bluemel, *supra* note 30, at 969 (quoting G.C. 15, *supra* note 24, and U.N. Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, 22nd Sess., Agenda Item 3, at 3-5, 11-13, 15, U.N. No. E/C.12/2000/4 (2000)) (emphasis added).

34. ECOSOC is “a body of 18 independent experts that monitors the implementation of the [International Covenant on Economic, Social, and Cultural Rights (ICESCR)] in member states.” George McGraw, Note, *Water for Life: The Challenge Posed by the Un-codified Human Right to Water in International Law*, 1(1) THE UNIV. FOR PEACE L. REV. 39, 42 (2010). “General Comments issued by ECOSOC are non-binding interpretations of ICESCR rights and obligations, but may be relied upon by various international bodies when deciding whether a State has met its obligations under ICESCR. . . . The value of the General Comment [15] lies in relating the right to water to various international human, economic, social, and cultural rights instruments.” Bluemel, *supra* note 30, at 971-72. *See also* Ziganshina, *supra* note 22, at 115 (“General Comment No. 15[] . . . is a non-binding but authoritative interpretation of Articles 11 and 12 of the ICESCR[] . . . and interprets the human right to water to be an economic and social right.”).

35. Stephen C. McCaffrey and Kate J. Neville, *Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries*, 21 GEO. INT’L ENVTL. L. REV. 679, 682 (2009).

including “adopting the necessary and effective legislative and other measures to restrain[] . . . third parties from . . . polluting . . . water resources[,]”<sup>36</sup> and it encourages States to adopt strategies and programs “to ensure that there is sufficient and *safe* water for present and future generations[,]” such as by “reducing and eliminating contamination of watersheds . . . by substances such as . . . harmful chemicals . . . .”<sup>37</sup>

Unsafe levels of industrial pollution, including agricultural pollution, leave water resources “unfit for direct human consumption and use.”<sup>38</sup> The human right to water thus, at least in theory, requires States to address “the dilemma between industrial development and water quality[,]” because the right entails “adequate supplies of *safe* water[,]” thereby obligating governments “not only to ensure access to water, but also to enact environmental regulations to protect the water supply.”<sup>39</sup> Setting aside for the moment the question of whether there is in fact an *enforceable* international human right to water, and assuming that these instruments are authoritative interpretations of this right,

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36. U.N. Committee on Economic, Social, and Cultural Rights’ General Comment No. 15, ¶ 23 (2002). *See also* Bluemel, *supra* note 30, at 973 (explaining that the “[o]bligation[] to protect the right to water[,]” which is a component of an international human right to water, “require[s] that States implement permitting procedures or other regulatory systems to control private-actor behavior that might interfere with the right to water[,]” such as pollution of the water source).

37. G.C. 15, *supra* note 24, at ¶ 28 (emphasis added). “As a matter of international law, state action includes the acts of the federal, state, and local governments of the United States. . . . The various governmental organs of the United States and its subdivisions are involved, directly or indirectly, in the regulation of matters concerning clean water[.] . . .” Glick, *supra* note 32, at 91.

38. Bluemel, *supra* note 30, at 982 (referencing bauxite mountain-top mining in India that has polluted downstream waters and destroyed the drinking water source for thousands of indigenous residents). It should be noted, furthermore, that activities that pollute aquifers relied upon by communities for drinking water further deplete the available *quantity* of potable water, exacerbating the growing water scarcity crisis in California. *See* Heavner, *supra* note 7, at 14:

Contamination of water supplies will further exacerbate water shortages around California. As removing pesticides from a contaminated water body is often prohibitively expensive [if not impossible], the most common response to pesticide contamination of water supplies has been to abandon the polluted sources and search for new ones. With water already in short supply [and groundwater overdraft on the rise], California communities cannot afford to take this approach any longer.

*See also* Huang, *supra* note 30, at 354, 358; McGraw, *supra* note 34, at 39, 41, 49; Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 7 (1992); Jason Astle, *Between the Market and the Commons: Ensuring the Right to Water in Rural Communities*, 33 DENV. J. INT’L L. & POL’Y 585, 585 (2005).

39. Bluemel, *supra* note 30, at 983 (emphasis added).

ongoing agricultural contamination of Central Valley aquifers clearly rises to the level of a human rights violation, as the plethora of acutely toxic and carcinogenic contaminants in the public drinking water supply, including nitrates and pesticides, pose both short-term and long-term threats to public health.<sup>40</sup> The fact that this health risk falls disproportionately on economically, socially, and politically marginalized communities makes the violation that much more egregious.<sup>41</sup> If the human right to water establishes a minimum baseline for all humans, namely, access to water that is “protected at a level and in a manner consistent with the human rights standard[,]” surely the Central Valley’s severely degraded aquifers in rural, low-income communities fall below that baseline.<sup>42</sup>

## 2. *The Current Legal Status of the Human Right to Water*

Once a welfare-based human right to a resource is acknowledged, however, this acknowledgment immediately raises questions of duty and obligation, such as who must provide for this right and to whom the right is owed, and it is at this juncture where the issue of enforceability rears its head and the framework of

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40. See Ramos, *supra* note 1, at 25-26, 31; Olson, *supra* note 5, at 51; Social Disparities, *supra* note 7, at 4; *Thirsty for Justice*, *supra* note 6, at 72; Helperin, *supra* note 5, at 45, 50; Osofsky, *supra* note 25, at 94; Huang, *supra* note 30, at 358; McCaffrey, *supra* note 38 at 14. See also LAUREL FIRESTONE, CWC, GUIDE TO COMMUNITY DRINKING WATER ADVOCACY 129-46 (Jan. 2009) (Community Health Guide providing overview of health impacts of common drinking water contaminants in the Central Valley), available at <http://www.communitywatercenter.org/downloads.cfm?content=Tools>.

41. “A human right by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be deprived without a *grave affront to justice*, something which is owing to every human being simply because he is human.” Schorn, *supra* note 27, at 127 (quoting Maurice Cranston, WHAT ARE HUMAN RIGHTS? 36 (1973)) (emphasis added; alterations omitted). Individuals whose lives are directly and negatively impacted by the rife anthropogenic contamination in this region know well that it is a “grave affront to justice” that the Central Valley’s most economically and socially vulnerable residents are forced to raise their children and live their lives in a poisonous environment. See *id.* at 127 (observing that this “affront to justice” is all the more acute when “the quality of air and water that you consume has a good deal to do with where you are born”). The Central Valley’s cancer rates are some of the highest in the state of California. See CWC Nitrate White Paper, *supra* note 5, at 8-11. Meanwhile, despite widespread grassroots protest, the California Department of Pesticide Regulation has just registered a highly-carcinogenic soil fumigant for strawberry crops, called methyl iodide. See, e.g., Garance Burke, *Methyl Iodide Approved For Use In California*, HUFFINGTON POST, Dec. 1, 2010, available at [http://www.huffingtonpost.com/2010/12/01/methyl-iodide-approved-fo\\_n\\_790748.html](http://www.huffingtonpost.com/2010/12/01/methyl-iodide-approved-fo_n_790748.html). This poisonous substance is a *known* groundwater contaminant. See *id.*

42. See Bluemel, *supra* note 30, at 972.

international human rights law loses steam.<sup>43</sup> “While rights do not theoretically depend on states for their existence, states bind themselves to protect these rights internationally through treaty and custom.”<sup>44</sup> It is this latter step that gives legal teeth to a human right, making it enforceable by the individual against the State in an international forum.

Thus far, no States have agreed to bind themselves to an explicit and independent right to water in an international treaty. In the last decade, there has been a surge of non-binding “soft law” instruments articulating the existence of this right,<sup>45</sup> beginning with ECOSOC’s General Comment No. 15 in 2002.<sup>46</sup> This was followed by a report released by the Office of the High Commissioner for Human Rights in 2007,<sup>47</sup> and then a resolution by the HRC establishing an independent expert to investigate the implementation of this right within U.N. member States in 2008.<sup>48</sup> These actions have culminated in the recent 2010 resolutions by the General Assembly and the HRC, respectively, formally declaring the existence of a human right to water.<sup>49</sup> Specifically,

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43. See, e.g., Hardberger, *supra* note 30, at 535 (noting that as a nature of being a *right*, if there is a human right to water, “someone must be entitled to demand water, and someone must be obligated to provide it.”); Schorn, *supra* note 27, at 126 (“If a right exists, then individuals have standing to assert a claim. If they can assert a claim, then someone, presumably the state, has the responsibility or obligation to respond to and meet that claim.”).

44. McGraw, *supra* note 34, at 41.

45. *Id.* at 43.

46. G.C. 15, *supra* note 24.

47. OHCHR Report, *supra* note 24.

48. U.N. Hum. Rts. Council Res. 7/22, ¶¶ 2-4, U.N. Doc. A/HRC/RES/7/22 (Mar. 20, 2008) [hereinafter H.R.C. Res. 7/22], available at [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_22.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf).

49. G.A. Res., *supra* note 24; H.R.C. Res. 15/9, *supra* note 24. See also H.R.C. Res. 16/L.4, *supra* note 24, at ¶ 1 (welcoming the recognition of this right in the foregoing resolutions). We leave for others to debate whether these developments amount to the full-fledged development of customary international law. Compare, e.g., Marko Divac Oberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 902-03 (2006), and Richard B. Bilder & Benjamin B. Ferencz, Book Review 89 AM. J. INT’L L. 673, 674 (1995), (reviewing BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD (1991)). We note, however, that international lawyer Catarina de Albuquerque, who was initially appointed in 2008 by the H.R.C. as an “independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation,” H.R.C. Res. 7/22, *supra* note 48, at ¶ 2 (emphasis added), has recently been converted to “special rapporteur on the human right to safe drinking water and sanitation[.]” H.R.C. Res. 16/L.4, *supra* note 24, at ¶ 2 (emphasis added), and that she is carefully building a case for the evolution in customary international law. See Independent Expert End-of-Mission Press Release, *supra* note 21

the General Assembly resolution:

1. Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;
2. Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all;
3. Welcomes the decision by the Human Rights Council to request that the independent expert on human rights obligations related to access to safe drinking water and sanitation submit an annual report to the General Assembly, and encourages her to continue working on all aspects of her mandate . . . .<sup>50</sup>

It bears noting, however, that the General Assembly constitutes a forum for international dialogue, not a legislative organ, and the 2010 resolution does not carry the force of law with respect to U.N. member States.<sup>51</sup> Rather, this resolution serves as a normative expression of idealized and contemporary “international legal principle” that will inevitably guide and inform subsequent developments in the law and help “reshape perceptions of when and how particular values are realistically actionable as claims of

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(highlighting the Senator Paul Simon Water for the Poor Act of 2005, 22 U.S.C §2152h, as the first U.S. federal law to reflect a “commitment to incorporate the normative content of the human right to water”).

50. G.A. Res., *supra* note 24 (emphases in original).

51. *See, e.g.*, Gregory K. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 879, 880 (1983). “General Assembly Resolutions remain too unreliable to regard as definitive sources. . . . [The General Assembly] serves a valuable function as a forum for the expression of . . . deeply held sentiments. But its strengths as an international political body are also its weaknesses as a legislative body. If member nations knew they would be bound by their votes, many Resolutions would never be passed, and the General Assembly’s unique function as the voice of world opinion would be undermined.” *Id.* at 899. *See also* McGraw, *supra* note 34, at 43 (“[T]hese international bodies . . . cannot create binding legal standards themselves; they can only try to clarify states’ *existing* obligations.”) (emphasis in original); Independent Expert End-of-Mission Press Release, *supra* note 21 (observing that member states’ willingness “join[] . . . global consensus” by signing on to the recent resolutions by the G.A. and the H.R.C. “represents a *political* commitment” (emphasis added)).

legal right.”<sup>52</sup> To the extent that this resolution “interprets pre-existing substantive international norms, it may be helpful for understanding and applying them[,]”<sup>53</sup> and, to the extent that it “restates existing international norms, it may have an evidentiary value for establishing these.”<sup>54</sup> As international lawyer and scholar Marko Divac Öberg observes, however, the resolution does not of its own force “have any [formal] impact on the state of the law.”<sup>55</sup>

Nevertheless, “[i]n practice it can be hard to draw the line between what, on the one hand, is merely interpretative or declaratory and what, on the other hand, is truly creative.”<sup>56</sup> This tension is illustrated by the interplay between the recent resolutions adopted by the General Assembly and the HRC.<sup>57</sup> The General Assembly resolution does not specify whether the human right to water is an independent right that has yet to be codified or merely a dependent right flowing “by necessary implication” from other preexisting and pre-codified international human rights.<sup>58</sup> Following quickly on its heels, however, the HRC resolution provides a seeming clarification, describing the right to water as a dependent right “derived from” and “inextricably related to” specific international human rights codified in two separate and binding international treaties; namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural, and Social Rights (ICESCR).<sup>59</sup>

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52. See Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 557 (2009); Kerwin, *supra* note 51, at 880; Bilder, *supra* note 49, at 674. See also Peter H. Gleick, *The Human Right to Water (and Sanitation)*, THE HUFFINGTON POST (Aug. 4, 2010), [http://www.huffingtonpost.com/peter-h-gleick/the-human-right-to-water\\_b\\_671175.html](http://www.huffingtonpost.com/peter-h-gleick/the-human-right-to-water_b_671175.html) (“[T]he purpose of UN resolutions and interpretations is to expand informal interpretations of international law, as appropriate.”).

53. Öberg, *supra* note 49, at 896.

54. *Id.*

55. *Id.*

56. *Id.*

57. G.A. Res., *supra* note 24; H.R.C. Res. 15/9, *supra* note 24.

58. See generally GA Resolution, *supra* note 24. See McCaffrey & Neville, *supra* note 35, at 682.

59. International Covenant on Civil and Political Rights, 999 U.N.T.S. 85 (Mar. 23, 1976), available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), at 49, 999 U.N.T.S. 3 (Jan. 3, 1976), available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>. See H.R.C. Res. 15/9, *supra* note 24, at ¶ 3 (tying the right to water to the ICCPR’s rights to life and dignity—Articles 6 and 10—and to the ICESCR’s rights to an adequate standard of living and the highest attainable standard of physical and mental health—Articles 11 and 12). See also Press Release, UN united to make

Much scholarly attention will undoubtedly be given in the coming years to the enforceability of the human right to water and the enforcement implications of the HRC having placed a foot in each camp, since the obligations created by positioning the right to water within the ICESCR are “much softer and more attenuated” than those created by positioning the right within the ICCPR.<sup>60</sup> To the extent that a domestic or international court of law accepts the HRC’s assertion that the right to water derives from these preexisting treaties, and thus accepts the right’s immediate *enforceability* against U.N. member States, it would nevertheless appear that pursuant to either treaty, *enforcement* of the right may be subject to a State’s resource constraints.<sup>61</sup> This is where we suspect international litigation is most likely to hit a wall, for very few courts are willing to delve into such fundamentally political questions as to how the legislative and executive branches of government choose to allocate limited resources.<sup>62</sup>

For this reason, we do not believe that litigating the human right to water is the most effective tool available for achieving its full implementation, in practice and on the ground. Environmental justice communities “must be given the tools to redress violations of their human dignity in *the most direct and effective way possible*.”<sup>63</sup> It is not clear to us that international litigation of the human right to water in various international judicial tribunals and commissions fits this definition.<sup>64</sup> This is in part based on our

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the right to water and sanitation legally binding (Oct. 1, 2010) (interpreting the H.R.C.’s follow-up resolution as “clos[ing] the gap” left by the G.A. resolution by making the right to water and sanitation “justiciable and enforceable”) (quoting U.N. Independent Expert Catarina de Albuquerque), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>.

60. See McCaffrey & Neville, *supra* note 35, at 683.

61. See Glick, *supra* note 32, at 100; Bluemel, *supra* note 30, at 976; Fitzmaurice, *supra* note 30, at 549-50; McCaffrey & Neville, *supra* note 35, at 683; McCaffrey, *supra* note 38 at 13.

62. See Mazibuko, et al. v. City of Johannesburg, et. al. 2010 (3) BCLR 239 (CC) (S. Afr.) (ruling on the South African domestic constitutional provision conferring a right to water and holding that determinations regarding a minimum sufficient daily quantity of water in satisfaction of this right implicate budgetary allocations and are thus best left to the legislative and executive branches of government, both for institutional and democratic reasons), *available at* <http://www.saflii.org/za/cases/ZACC/2009/28.html>; See also Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT’L ENVTL. L. REV. 149, 191-92, 195 (2005).

63. McGraw, *supra* note 34, at 49 (emphasis added).

64. See McCaffrey & Neville, *supra* note 35, at 680 (“[W]ithout the development of financial and institutional capacity to provide water services, the right to water is of only



observation that because “[h]uman rights are usually defined as rights held by citizens against their state[.]” analyzing the right to safe drinking water through the *legal lens* of human rights fosters the expectation that *governments* are the entities with “primary responsibility for ensuring the realization” of this right, undermining the agency of impacted communities themselves in the process to secure a safe and sustainable drinking water source.<sup>65</sup>

### B. *The Human Right to Water as a Social Justice Tool*

The success of the water justice movement does not hinge on whether and how the human right to water may be enforced against U.N. member States. Open questions regarding the right’s enforceability do not detract from its existence. Human rights are “pre-political”—they are not created by nor do they depend on recognition by the State. As the Catholic Pope articulated in a recent address, “human rights arise from a natural order whose laws can be discovered through study and experience[.]”<sup>66</sup> The fact is, the language of human rights resonates with impacted community residents who do not have access to safe drinking water, and, for us, this is sufficient evidence that the human right

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limited value. The legal requirement to provide a service is of little use if the government does not have the ability to fulfill those responsibilities, and thus an exclusive focus on human rights in legal terms (through the constitution or international human rights law) is unlikely to solve the problem of inadequate water access[.] . . .”); *see also* Luke W. Cole, *Foreword: A Jeremiad on Environmental Justice and the Law*, 14 STAN. ENVTL. L.J. ix, xii-xiii (1995) [hereinafter *Jeremiad on Environmental Justice and the Law*] (“[O]ne measure of a movement’s success is the codification of its goals[.] . . . . But without a broad social movement to back up those laws, to insist on their enforcement, to push for their strengthening, to defend against their evisceration, the laws mean little.”).

65. Hardberger, *supra* note 30, at 541. As Amy Hardberger has acknowledged:

[t]he duty to provide water *cannot lie entirely with government*. As the human right to water evolves, the role of individual citizens must also play a part in the realization of these goals. Although this topic is rarely discussed, some ideas can be deduced from existing documents. Human rights provide a mechanism for a citizen to enforce a violation of a right against a state; *however, this does not negate the responsibilities [impacted community residents] have towards themselves and each other*.

*Id.* at 566 (emphases added). *See also id.* at 568 (“One of the important effects of a rights-based approach is the empowerment of the individual. It would be counterintuitive to assume that the government is entirely responsible for delivery and maintenance of water without any assistance from the people.”); Osofsky, *supra* note 25, at 82-83; Huang, *supra* note 30, at 360; Bluemel, *supra* note 30, at 986. *See discussion, infra*, notes 106-108 and corresponding text.

66. Glendon, *supra* note 23, at 927.

to water does exist, in our collective hearts and minds, if not yet in the halls of domestic and international courts and legislatures.<sup>67</sup>

The human right to water has real symbolic power as a tool for raising community consciousness.<sup>68</sup> Whether this tool is empowering, however, depends on the rhetorical manner in which this entitlement is framed—that is, whether the onus is placed on government (to dispense this entitlement to passive recipients) or on communities (to stand up and assert this entitlement for themselves). The former is subtly disempowering, while the latter has the opposite effect.<sup>69</sup> Realization of the human right to water is not so much something that benevolent public officials or civic-minded farmers can dole out; rather, it is something the beneficiaries themselves must boldly grab and demand, and this is the operating assumption that informs our work. We use “the discourse of justice” and human rights “constructively as a tool to engage [the] communities” with whom we partner.<sup>70</sup>

### III. IMPLEMENTING THE HUMAN RIGHT TO WATER IN THE CENTRAL VALLEY

To explore what implementation of the human right to water might mean and how it can be achieved, we offer our experience working for the Community Water Center (CWC) as a case study. CWC is a nonprofit organization whose mission is to achieve universal access to safe, clean, and affordable drinking water in the Central Valley. CWC was at the forefront of a collaborative statewide effort in 2009 successfully persuading elected

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67. This is the perspective on human rights of a social justice advocacy organization, which contrasts sharply with a more traditionally litigation-oriented perspective, namely that “[i]nternational human rights are individual rights that are enforceable against state governments,” to be distinguished from mere “morals or standards that carry no legal weight.” See Francis, *supra* note 62, at 184.

68. See Huang, *supra* note 30, at 359; Fitzmaurice, *supra* note 30, at 553; McCaffrey & Neville, *supra* note 35, at 699; Monsma, *supra*, note 16, at 450, 485-90.

69. See Astle, *supra* note 38, at 605 (“[A] rights based approach to development [must] include[] educating people about their rights and empowering them to take control of their lives.”).

70. McCaffrey & Neville, *supra* note 35, at 694. See also Barlow, *supra* note 21 (using the rhetoric of human rights as an analytical tool, separate and apart from its technical-legal significance, to strengthen and validate the importance of her message that effective development necessitates not just prioritizing “the most vulnerable and marginalized communities[,]” but also putting their voices at the center by involving them in both the design and implementation of “development strategies” which impact them).

representatives in the California legislature to pass a bill that would have codified the existence of a human right to water in this state.<sup>71</sup> Unfortunately, Governor Arnold Schwarzenegger exercised his veto power to prevent this bill's adoption.<sup>72</sup> While we will persist in our collaborative efforts to formalize this right in California, regardless of the success of that effort, CWC continues to work toward achieving universal safe drinking water, even in the absence of a clearly codified and enforceable legal entitlement recognizing a human right to water. Based on our learned experience through ongoing interactions with impacted community residents, allied civil society organizations,<sup>73</sup> local and state public officials, and interested members of the private sector, CWC is striving to develop an approach to achieve sustainable water justice and, concomitantly, full implementation of the human right to water. This approach does not depend on formal acknowledgment by domestic or international governing bodies of the existence of such a right.

*A. The Four Components of a Fully-Implemented Human Right to Water*

CWC has identified four components to achieving universal access to safe, affordable drinking water. Each of these components are necessary, but not sufficient on their own, to ensure successful implementation of the human right to water.

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71. See The Human Right to Water Act, Assembly Bill 1242 (2009) (vetoed by the Governor 2009), available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_1242&sess=PREV&house=B&author=ruskin](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_1242&sess=PREV&house=B&author=ruskin). This bill was passed by both the California Assembly and the California Senate before it was ultimately vetoed by the Governor. It stated:

This bill would declare that it is the established policy of the state that every human being has the right to clean, affordable, and accessible water for human consumption, cooking, and sanitary purposes, that is adequate for the health and well-being of the individual and family. The bill would require all relevant state agencies, including the Department of Water Resources, State Water Resources Control Board, and State Department of Public Health, to employ all reasonable means to implement this state policy.

*Id.*

72. *The Governor's Veto Message to AB1242*, OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION (October 12, 2009), [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1201-1250/ab\\_1242\\_vt\\_20091012.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1201-1250/ab_1242_vt_20091012.html).

73. See Barlow, *supra* note 21 (emphasizing the importance of "careful collaborative cooperation" with other civil society organizations as an important ingredient in the success of the water justice movement thus far).

### 1. Physical Infrastructure

First, a community water system must have adequate physical infrastructure, such as wells, pipes, storage tanks, treatment facilities, and water service delivery technology, all of which require access to sufficient funding.<sup>74</sup> This is perhaps the most obvious and straightforward component, and the one most focused on by government funding programs and international water charities.<sup>75</sup> That focus is not unjustified, as this component is the most expensive to implement and often requires far more funding than many smaller, economically-depressed communities, have the capacity to raise through local service delivery revenues.<sup>76</sup> It is important to note, however, that even the most expensive new pipes are only as good as the water flowing through them, and treatment plants are useless when the community can't afford to keep them in operation.<sup>77</sup> Therefore, while physical infrastructure

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74. See Martin, *supra* note 10, at 2; Olson, *supra* note 5, at 54; Social Disparities, *supra* note 7, at 18; Stephen P. Gasteyer, *Tapping Untapped Potential: The Role of Technical Assistance Providers in Building Financing, Implementation, and Management Capacity for Water Services*, RURAL COMMUNITY ASSISTANCE PARTNERSHIP (2004), <http://www.rcap.org/sites/default/files/rcap-files/Tapping%20Untapped%20Potential.pdf>.

75. See G.A. Res., *supra* note 24, at ¶ 2 (calling upon “States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries ...”); U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), GRANTS AND OTHER FUNDING UNDER THE SAFE DRINKING WATER ACT (SDWA), [http://water.epa.gov/grants\\_funding/sdwa/index.cfm](http://water.epa.gov/grants_funding/sdwa/index.cfm) (last visited Mar. 5, 2011); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, SAFEGUARDING THE WORLD’S WATER: 2008 REPORT ON USAID WATER SECTOR ACTIVITIES (2009), available at [http://pdf.usaid.gov/pdf\\_docs/PDACN272.pdf](http://pdf.usaid.gov/pdf_docs/PDACN272.pdf).

76. See Martin, *supra* note 10, at 2; Social Disparities, *supra* note 7, at 18; *Thirsty for Justice*, *supra* note 6, at 78; Gasteyer, *supra* note 74, at 1-2. The U.S. EPA estimated that \$334.8 billion dollars would be needed to meet the drinking water infrastructure needs in the United States over the next 20 years. 2009 DRINKING WATER INFRASTRUCTURE NEEDS SURVEY AND ASSESSMENT: FOURTH REPORT TO CONGRESS, U.S. EPA (EPA 816-R-09-001, March 2009), available at <http://water.epa.gov/infrastructure/drinkingwater/dwns/index.cfm> (last visited Mar. 5, 2011). See also CDPH, SAFE DRINKING WATER STATE REVOLVING FUND FINAL INTENDED USE PLAN SFY 2009-2010 (2009), available at <http://www.cdph.ca.gov/services/funding/Documents/SRF/2009/SFY2009-2010IUPforFFYs2008-2009DWSRFallotment.pdf>; CDPH, SAFE DRINKING WATER STATE REVOLVING FUND: SEPTEMBER 2009 FINAL SRF PROJECT PRIORITY LIST (2009) (listing \$451,038,865 worth of drinking water infrastructure projects to address critical drinking water needs in California, an underestimate of the true costs given that it is only inclusive of those systems that actually applied for funding), available at [http://www.pacinst.org/reports/water\\_bond/does\\_bond\\_help\\_those\\_who\\_need.pdf](http://www.pacinst.org/reports/water_bond/does_bond_help_those_who_need.pdf).

77. The community of Tooleville in Tulare County was able to replace and upgrade its distribution system, but it still relies on only two wells for its water supply, both of which are contaminated with nitrate. For more information on Tooleville’s struggles to secure safe

is a significant challenge to implementing the human right to water and clearly deserves both attention and resources, even with unlimited access to money and technology, a community is only one quarter of the way towards securing a reliable supply of safe and affordable water.

## 2. Source Water Protection

Second, there must be a reliable resource of clean, healthy water available, such as a river or an aquifer, which necessitates source water protections in place to safeguard water quality and quantity.<sup>78</sup> As the population expands, there is ever-increasing pressure on finite water resources, and human history demonstrates that unchecked private activity will eventually deplete and destroy this commons.<sup>79</sup> At our current pace, no matter what technology is available or how much is spent on new infrastructure, if community drinking water sources are not protected, we will inevitably continue to discover the presence of new drinking water toxins,<sup>80</sup> and wells and reservoirs will eventually dry up.<sup>81</sup>

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drinking water, see “Don’t Drink the Water”, available at <http://www.youtube.com/watch?v=Mecr2UShGEA> (last visited Mar. 5, 2011). In the community of Lanare in Fresno County, the service district was forced to shut down its state-of-the-art arsenic treatment plant after the costs of operating the plant put the system over \$100,000 in debt. The water system has gone into receivership, and meanwhile, residents are now back to receiving water containing arsenic levels three times greater than the MCL set by state and federal drinking water standards.

78. See Barlow, *supra* note 21 (“[F]ighting for equitable water in a world running out means taking better care of the water we have, not just finding supposedly endless new sources.”); Olson, *supra* note 5, at ix (“Source water protection is an essential component of drinking water protection.”).

79. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), available at <http://www.sciencemag.org/content/162/3859/1243.full.pdf>. See Richard A. Hughes, *Pro-Justice Ethics, Water Scarcity, Human Rights*, 25 J.L. & RELIGION 521, 523 (2009-2010).

80. For example, many communities in the Central Valley are beginning to discover the chemical, 1,2,3-trichloropropane (1,2,3-TCP) in their drinking water systems. 1,2,3-TCP is a highly toxic carcinogen, even at very small concentrations in drinking water. It was created as an unnecessary byproduct during the manufacture of two soil fumigants (nematocides) under the trade names of D-D and Telone (or Telone II), which were widely used by farms and agribusiness in California from the 1950s through the 1970s. Use of those pesticides has been discontinued, but California’s Department of Pesticide Regulation (DPR) continues to register new pesticides without requiring that manufacturers first demonstrate that a scientific method exists for detecting those chemicals in groundwater, let alone that such contamination will not in fact occur. Just this year, DPR registered methyl iodide, another soil fumigant for strawberries, despite the fact that this chemical is a known carcinogen and known groundwater contaminant. See 1,2,3-Trichloropropane, CDPH, <http://www.cdph.ca.gov/certlic/drinkingwater/Pages/123TCP.aspx> (last visited Mar. 7, 2011) (providing hyperlink to Excel spreadsheet listing water system monitoring results for 1,2,3,-TCP for the entire state of California for the period 2002-2009); CALIFORNIA OFFICE OF ENVIRONMENTAL HEALTH

Yet, particularly when consumers have no idea where the water out of their tap comes from, it is easy for regulatory agencies to cave to pressure from powerful political lobbies and fail to set requirements or guidelines for protection of those sources. While communities can engage in local voluntary efforts like wellhead protection programs,<sup>82</sup> for the most part individual community water systems do not have authority to set requirements or restrictions on potentially harmful land uses and activities affecting

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HAZARD ASSESSMENT, PUBLIC HEALTH GOALS FOR CHEMICALS IN DRINKING WATER, 1,2,3-TRICHLOROPROPANE, 1, 3, 31, 33 (Aug. 2009), available at [http://www.oehha.ca.gov/water/phg/pdf/082009TCP\\_phg.pdf](http://www.oehha.ca.gov/water/phg/pdf/082009TCP_phg.pdf); California State Water Resources Control Board, Division of Water Quality, GAMA Program, Groundwater Information Sheet, 1,2,3-Trichloropropane (TCP), 3-5 (Nov. 17, 2009), available at [http://www.swrcb.ca.gov/water\\_issues/programs/gama/docs/coc\\_tcp123.pdf](http://www.swrcb.ca.gov/water_issues/programs/gama/docs/coc_tcp123.pdf); U.S. Department of Health & Human Services, Public Health Service, National Toxicology Program, Report on Carcinogens, Eleventh Addition, 1 (2005), available at <http://ntp.niehs.nih.gov/ntp/roc/toc11.html> (hyperlinking to chapter on TCP), available at <http://ntp.niehs.nih.gov/ntp/roc/eleventh/profiles/s182tcp.pdf>; U.S. EPA, Federal Facilities Restoration and Reuse Office, Emerging Contaminant Fact Sheet, 1,2,3-Trichloropropane (TCP), 1 (Sept. 2009) available at <http://www.clu-in.org/download/contaminantfocus/epa505f09010.pdf>; New Jersey Department of Environmental Protection, Letter Re: Docket ID No. EPA-HQ-OW-2007-1189, Drinking Water Contaminant Candidate List 3—Draft, 6 (May 21, 2008), available at <http://www.state.nj.us/dep/dsr/dw/CCL3%20letter%20final.pdf>; Centers for Disease Control, Agency for Toxic Substances & Disease Registry, 1,2,3 Trichloropropane: Public Health Statement, 62, 67 (Sept. 1992), available at <http://www.atsdr.cdc.gov/PHS/PHS.asp?id=910&tid=186>; *Factsheet: Methyl Iodide, CALIFORNIANS FOR PESTICIDE REFORM*, <http://www.pesticidereform.org/downloads/Methyl%20Iodide%20Lawsuit%20Factsheet.pdf> (last visited April 2, 2011); Burke, *supra* note 41. See also Ramos, *supra* note 1, at 21, 25-26; *Thirsty for Justice*, *supra* note 6, at 71-72.

81. This is especially true in the Central Valley, where intensive agricultural practices are causing untold damage to groundwater quality, residential development is rapidly expanding, and the farmers who have long-standing rights to federally-subsidized surface water flowing through the irrigation canals have an increasing incentive to sell that water to distant cities and turn to groundwater pumping to water their crops instead. See John Gibler, *Water Heist: How Corporations Are Cashing in On California's Water*, PUBLIC CITIZEN 1-2, 12-13 (Dec. 2003), [http://www.citizen.org/documents/Water\\_Heist\\_lo-res.pdf](http://www.citizen.org/documents/Water_Heist_lo-res.pdf); Hamilton, *supra* note 4; Patrick Hoge, *Central Valley housing boom plays role in the big heat, experts say*, SAN FRANCISCO CHRONICLE, Jul. 26, 2006, available at [http://articles.sfgate.com/2006-07-26/bay-area/17302718\\_1\\_hot-weather-energy-committee-energy-efficiency-programs](http://articles.sfgate.com/2006-07-26/bay-area/17302718_1_hot-weather-energy-committee-energy-efficiency-programs).

82. See U.S. EPA, Survey Of Local Groundwater Wellhead Protection Efforts In California (171-R-92-023) (2009), available at <http://nepis.epa.gov/Exe/ZyNET.exe/20011DEQ.txt?ZyActionD=ZyDocument&Client=EPA&Index=1991%20Thru%201994&Docs=&Query=171R92023%20or%20california%20or%20wellhead%20or%20protection&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=pubnumber^%22171R92023%22&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=pubnumber&IntQFieldOp=1&ExtQFieldOp=1&XmlQuery=&File=D:\ZYFILES\INDEX%20DATA\91THRU94\TX T\00000017\20011DEQ.txt&User=ANONYMOUS&Password=anonymous&SortMethod=hj-&MaximumDocuments=10&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=plf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1> (last visited Mar. 6, 2011).

their source water quality and quantity.<sup>83</sup> The inequity of this situation is striking, because small drinking water systems in this region are far more likely to face groundwater contamination due to their relative proximity to intensive agricultural activities, and they simultaneously face greater challenges in affording the sophisticated treatment equipment required to remove these toxins.<sup>84</sup> In the Central Valley, residents rely on the Regional Water Quality Control Board, a subdivision of the state environmental protection agency, to impose requirements on pollution sources to protect water quality. Therefore, one vital component of ensuring that all residents in the Valley can secure safe drinking water for themselves and their communities is ensuring that the Regional Board regulates agricultural practices and other private sector activity effectively.<sup>85</sup>

### 3. Institutional Capacity

Third, the community and its water service provider must have the institutional capacity, commonly referred to as technical-managerial-financial capacity, or TMF, to operate and maintain the system affordably.<sup>86</sup> Even if a system has a safe water source and workable infrastructure, local residents may still find themselves without safe, affordable drinking water if their water provider lacks the capacity to operate the system effectively.<sup>87</sup> Institutional

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83. Most community water systems are operated by nongovernmental entities or small special districts without the power to set general land use restrictions. *But see* U.S. EPA, Sole Source Aquifer Protection Program, available at <http://water.epa.gov/infrastructure/drinkingwater/sourcewater/protection/solesourceaquifer.cfm> (last visited Mar. 6, 2011) (explaining how systems can petition to require EPA to review certain proposed projects within designated source water protection areas to ensure critical water supplies are protected).

84. *See Thirsty for Justice*, *supra* note 6, at 73, 78; Martin, *supra* note 10, at 2; Gasteyer, *supra* note 74, at 1.

85. Firestone Remarks, *supra* note 14, at 1379.

86. *See, e.g., Capacity Development Program*, CDPH, <http://www.cdph.ca.gov/certlic/drinkingwater/pages/tmf.aspx> (last visited Mar. 7, 2011).

87. *See* Martin, *supra* note 10, at 2; *Thirsty for Justice*, *supra* note 6, at 73; Social Disparities, *supra* note 7, at 11 (linking water system size with “potential differences in regulatory capacity” in statistical model). In the rural community of Ducor in Tulare County, for example, residents were served brown water for months merely because the operator failed to flush the system regularly. *See* Firestone Remarks, *supra* note 14, at 1377; FIRESTONE, GUIDE TO COMMUNITY DRINKING WATER ADVOCACY, *supra* note 40, at 26-27. *See* note 76, *supra* (discussing the community of Lanare). *See also* U.S. EPA, National Characteristics of Drinking Water Systems Serving Populations Under 10,000 (EPA 816-R-99-010) (1999) (finding that systems serving 25-500 persons have many more drinking water violations per 1,000 people than do any other size category of system), available at <http://www.epa.gov/safewater/smallsystems/pdfs/smallsys.pdf> (last visited Mar. 7, 2011).

capacity boils down to a water provider's ability to keep the water system running safely and efficiently. This includes the ability to conduct planning studies for system upgrades and the ability to apply for available grants and loans, which are frequently necessary because revenues from water service provision to small, low-income communities often will not cover the cost of improvements due to lack of economies of scale.<sup>88</sup> It also means being able to develop rate structures that are affordable and budgets that cover the costs of ongoing operation and maintenance while building cash reserves.<sup>89</sup> For small, low-income communities, it is often extremely difficult to address this component without creating joint operation, management and funding mechanisms with neighboring communities and municipalities. In the long term, this may lead to full consolidation into a larger system that can benefit from an increased economy of scale.<sup>90</sup>

#### 4. Community Power

The fourth and final component is that the community itself must have the political power to hold decision makers accountable—not just the water service provider, but also local, regional, and state government officials.<sup>91</sup> This is the most vital component to full implementation of the human right to water, as it is the vehicle not just for securing the other three components, but also for ensuring that they are sustained. Without community power, financial investment in water infrastructure is often granted to other, more politically powerful interests, passing over those

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88. See Social Disparities, *supra* note 7, at 18; Martin, *supra* note 10, at 2; Gasteyer, *supra* note 74, at 1-2; *Thirsty for Justice*, *supra* note 6, at 78.

89. See, e.g., note 77, *supra* (discussing the community of Lanare).

90. "One of the much-touted solutions to [the] problem" of struggling small community waters systems is regionalization, which involves "restructuring or combining small water and wastewater systems, creating economies of scale." Martin, *supra* note 10, at 2. "Regionalization can mean many things, ranging from the physical interconnection or consolidation of two or more systems, to administrative solutions such as cooperative purchasing, contract operations or billing, and numerous other cooperative ventures." *Id.*

91. See McCaffrey & Neville, *supra* note 35, at 702 (paraphrasing the work of Odeh Al Jayyousi, who concludes that "good governance for water management" requires not just "competence and effectiveness in management and operation of water systems[,] but also "democratic participation in decision making[,] subcomponents of which are "public accountability; effective oversight; . . . and transparency in decision-making.") (emphasis added); Bluemel, *supra* note 30, at 977; Ramos, *supra* note 1, at 41-43; *Thirsty for Justice*, *supra* note 6, at 77.



communities that need it most.<sup>92</sup> Regulatory agencies charged with protecting water resources prioritize the interests of industries and leave the least powerful to bear the costs of ensuing pollution. The most politically and economically marginalized California residents are left to fend for themselves in small water systems, without the institutional capacity to improve or sustain effective and affordable operations. In essence, it is the absence of community power that has resulted in the reality of the Central Valley today.<sup>93</sup> Only by changing this fundamental power imbalance can we hope to eradicate water injustice in the Valley.<sup>94</sup> It is this component to which we devote the remainder of our discussion.

*B. Sustainable Implementation is a Process, Not an End Goal*

Community power is the most human aspect of the human right to water, and for this reason, perhaps the most difficult. In the short run, successful implementation could be achieved if the first three components are in place—namely, source water protections, money and technology, and trained system operators—all of which could be provided to the community as “supply side” solutions from outside and above.<sup>95</sup> In the long run, however, true *water justice* requires sustainability, and this necessitates that impacted residents become empowered to assert themselves in the water policymaking arena and to influence decisions about water resources and water services that impact their community.<sup>96</sup> Historically marginalized communities must develop a political voice—one that is heard and heralded by decision makers. Like many scholars and activists before us, CWC firmly believes that lack of political voice is at the heart of most environmental human rights violations and the greatest source of environmental

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92. See *Does the 2010 Water Bond Help Those Who Need It Most?*, PACIFIC INSTITUTE (2010), [http://www.pacinst.org/reports/water\\_bond/does\\_bond\\_help\\_those\\_who\\_need.pdf](http://www.pacinst.org/reports/water_bond/does_bond_help_those_who_need.pdf) (last visited Dec. 17, 2010).

93. See generally Camille Pannu, *Damming Democracy: Drinking Water & Exclusion in California's Central Valley*, WILLAMETTE JOURNAL OF INTERNATIONAL LAW & DISPUTE RESOLUTION (Forthcoming 2011).

94. See Torres, *supra* note 28, at 604 (noting the impact of “[t]he interlocking consequences of state and private action, especially across institutions that have not historically seen themselves as concerned with or having an impact on issues of distributive justice”).

95. See McCaffrey & Neville, *supra* note 35, at 698.

96. See *Thirsty for Justice*, *supra* note 6, at 69.

injustice.<sup>97</sup> For this reason, we do not believe that drilling wells or donating money to charity alone will solve drinking water disparities in the Central Valley, let alone the world.<sup>98</sup> The root cause—lack of sociopolitical influence—is central to the solution. Unquestionably, money and physical infrastructure are necessary, but they are not sufficient, and the current, widespread myopic focus on supply side strategies may actually undermine the most important component of community power, and with it, sustainability.<sup>99</sup> Unfortunately, the General Assembly's recent resolution declaring the existence of a human right to water does not skirt this tension carefully, as it explicitly encourages rich countries to donate money and technology to poor countries in furtherance of fulfilling the human right to water, while simultaneously failing to emphasize the importance of involving, engaging, or empowering the very people who are affected by the

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97. See Cole, *supra* note 64, at xv (“[O]ne of the roots of environmental justice” is “the making of decisions by people not affected by those decisions”); Torres, *supra* note 28, at 606 (discussing environmental justice lawyer and scholar Luke Cole’s theory that “[t]he ‘maldistribution of environmental burdens[]’ . . . flows from the lack of political power . . .” of “the communities who are resisting one type of environmental imposition or another.”); Ramos, *supra* note 1, at 46; *Thirsty for Justice*, *supra* note 6, at 69; Ismail Davids, Foundation for Contemporary Research, *FCR Public Lecture Series, NGOs: ‘Oiling the Wheels of Participation’* 5 (July 2006), available for download at [http://www.fcr.org.za/publications/list-of-publications/ngo-s-oiling-the-wheels-of-participation\\_ismail-davids.pdf/view](http://www.fcr.org.za/publications/list-of-publications/ngo-s-oiling-the-wheels-of-participation_ismail-davids.pdf/view); Osofsky, *supra* note 25, at 105; Gast, *supra* note 25, at 257, 258; Glick, *supra* note 32, at 72; Popovic, *supra* note 20, at 339, 355; Monsma, *supra*, note 16, at 444 (quoting ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 4 (Westview Press 1990)); *id.* at 454-55; Susan Booyesen, *With the ballot and the brick: the politics of attaining service delivery*, 7(1) *PROGRESS IN DEVEL. STUDIES* 21, 21 (2007) available at <http://pdj.sagepub.com/content/7/1/21.full.pdf>; See also Firestone Remarks, *supra* note 14, at 1378 (“[O]ne of the big problems is that water boards, counties, and regulators are not held accountable for doing their job--enforcing the law, providing safe clean water[.] . . .”).

98. See McCaffrey & Neville, *supra* note 35, at 698.

99. See generally DAMBISA MOYO, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* (Farrar Straus & Giroux 2009). See also Bluemel, *supra* note 30, at 973 (arguing for a “change[] [in] the terms of the discourse from one of charity to one of entitlement” so that “communities and vulnerable groups will be empowered to take part in decision-making processes”); Xin Wei i Ngiam, *Taking poverty seriously: What the poor are saying and why it matters*, 2(1) *CRITICAL DIALOGUE* 31, 34 (2006) (arguing that framing the need to address safe drinking water disparities in terms of a “duty” toward the “less privileged” is both “patronizing” and “paternalis[tic.]”), available at [http://www.cpp.org.za/publications/critical\\_dialogue/vol2no1\\_2006/xin.pdf](http://www.cpp.org.za/publications/critical_dialogue/vol2no1_2006/xin.pdf); *id.* at 32 (“[M]oral and political sophistication . . . has . . . been appropriated by . . . the discourse of the World Bank and other developmental NGOs who roll out checklists of quick fixes for ‘poverty’ . . . . [I]f agency is the capacity for intentional, self-directed action, then for them, poverty is a noun without agency.”). McGraw, *supra* note 34, at 50 (observing that “[m]any organizations believe that global financial, technological, and infrastructure advancements can reasonably support [the] effort[]” to implement the human right to water).

implementation decisions those resources may facilitate.<sup>100</sup>

CWC believes that developing true sociopolitical accountability between impacted residents and decision makers is the only means of achieving *sustainable* change in the communities with which we partner, because eventually donor funds dry up, trained operators move on to better-paying jobs, and there is always pressure on government by some percentage of the private sector to loosen source water protections for private material gain. Thus, unlike the first three components of a human right to water, this last one requires continued vigilance from within; it cannot be donated or imposed.<sup>101</sup> Ultimately, therefore, the human right to water is not an end goal that can be achieved and set aside as a mission accomplished. Rather, it is an ongoing process—a process in which disadvantaged communities that are perpetually at the risky end of the water service delivery pipe must remain engaged in order to carve out a permanent seat at the decision making table next to industry lobbyists, engineers, and public officials.<sup>102</sup>

### C. Community Empowerment Through Direct Engagement

If environmental justice communities exist in large part because of the socioeconomic and political marginalization of their

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100. See generally G.A. Res., *supra* note 24. It bears noting that the H.R.C.'s subsequent resolution goes a long way toward filling this gap, encouraging U.N. member States "[t]o ensure full transparency of the planning and implementation process in the provision of safe drinking water and sanitation and the active, free and meaningful participation of the concerned local communities and relevant stakeholders therein[.]" and "[t]o pay particular attention to persons belonging to vulnerable and marginalized groups, including by respecting the principles of non-discrimination and gender equality[.]" H.R.C. Res. 15/9, *supra* note 24, at ¶ 8(b), (c). CWC hopes that should U.N. member States develop a formal treaty codifying the human right to water, such instrument will incorporate the H.R.C.'s participatory provisions.

101. Guinier, *supra* note 52, at 551 ("[S]ocial change is only sustainable if it succeeds in changing cultural norms, is institutionalized through policy decisions and the oversight of administrative actors, and develops an internal and external constituency of accountability.") (emphasis added).

102. See The Honorable Cruz Reynoso, *Foreword* to Paola Ramos, Latino Issues Forum, Promoting Quality, Equity, and Latino Leadership in California Water Policy: An Introduction to Water Issues Impacting Latino Communities in California 6 (June 2003) ("Overcoming California's water challenges will undoubtedly require a change in how water policies are made and who is making them. As Latinos, we will have to take our place at the table."); *Thirsty for Justice*, *supra* note 6, at 61 ("Without a place at the table, low-income communities and communities of color are denied access to important decision-making opportunities that affect their water supplies, the regulations that protect water quality and quantity, and sources of funding to improve local water infrastructure.").

residents, and if sustainable implementation of the human right to water requires an ongoing process by which these communities hold water policy decision makers accountable, then the critical question becomes how to achieve this historically-deficient ingredient of accountability. The Community Water Center's theory is that the answer lies in community empowerment through direct engagement. We certainly did not invent this concept,<sup>103</sup> but through our work on the ground in impacted communities, we are fleshing out what community engagement actually means in practice.<sup>104</sup>

There is plenty of discussion in academic and policy literature,<sup>105</sup> and even in international instruments like the General Assembly and HRC resolutions,<sup>106</sup> about the need to build capacity in environmental justice communities and about the virtues of including residents from these communities as participants in decision making. To the extent that public participation is touted as the answer to environmental and social injustices, however, much of the focus remains on the agency and obligations this instills in

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103. See Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE L. REV. 449, 455 (1995) (“[T]he public-participation process is seen as a vehicle for organizing communities, and the participation itself is seen as a means to community empowerment. By bringing people together to realize, then exercise, their collective strength, practitioners of the power model try to get at some of the roots of communities’ problems: powerlessness.”), available at [http://www.crpe-ej.org/crpe/images/stories/resources/25\\_LegalServicePubPartEJ\\_29ClearinghouseReview449-1995.pdf](http://www.crpe-ej.org/crpe/images/stories/resources/25_LegalServicePubPartEJ_29ClearinghouseReview449-1995.pdf); see also, McCaffrey & Neville *supra* note 35, at 697-98; Scott Kuehn, *Expanding Public Participation is Essential to Environmental Justice and the Democratic Decisionmaking Process*, 25 ECOLOGY L.Q. 647, 648 (1999); Davids, *supra* note 97, at 5.

104. See Firestone Remarks, *supra* note 14, at 1376 (“[I]t . . . comes down to making sure that communities have the resources and the sophistication and the political strength to be effective in influencing decisionmaking. The real job for the environmental justice movement is still in developing that power on the community level. . . . [W]hat really matters is the work that people are doing on the ground, and really working with communities to try to make a difference in actual decisionmaking.”).

105. See, e.g., Ramos, *supra* note 1, at 45 (“[B]y their very nature and structure, current water planning and policy-making processes [in California] exclude most people and prevent them from being meaningful participants. It is crucial to *build capacity* and leadership in Latino (and other minority/low-income) communities so that their water-related concerns can be effectively articulated and addressed.”) (emphasis added); McCaffrey & Neville, *supra* note 35, at 681, 692, 700; McGraw, *supra* note 34, at 49.

106. See G.A. Res., *supra* note 24, at ¶ 2 (calling upon “States and international organizations to provide . . . capacity building and technology transfer[.] . . .”) (emphasis removed); H.R.C. Res. 15/9, *supra* note 24, at ¶ 8(b) (calling upon states to “ensure . . . the active, free and meaningful participation of the concerned local communities and relevant stakeholders” in the planning and implementation of water service provision); see *id.* at ¶ 8(c) (calling upon states to “pay particular attention to persons belonging to vulnerable and marginalized groups”).

other actors besides the community residents themselves; usually, the target audience appears to be benevolent government officials.<sup>107</sup> CWC believes that some of the focus should shift to civil society, and specifically, the communities themselves.<sup>108</sup> We posit that, at least here in the Central Valley, impacted communities already possess the power to inject themselves into decision making processes, to assert their authentic needs onto the policy agenda, and ultimately to bring about real improvements in their daily lives.<sup>109</sup> At CWC, we strive to help communities recognize, build, and use this power to rebalance the scales of water injustice.

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107. See, e.g., McCaffrey & Neville, *supra* note 35, at 680, 681, 693-698, 700. The authors stake out their position as follows:

*Capacity* is a dynamic characteristic of a *government* that reflects not only its financial and technical resources, but also its ability to harness resources beyond its direct control. These resources include the perception of the government as an effective and responsible public agent, as well as political will, and support from influential constituencies. . . . [W]e argue that *one option for strategic development of increased [governmental] capacity* is through local community engagement and empowerment in water provision systems.

*Id.* at 697 (emphasis added). See also *id.* at 697-98 (“The fostering of greater *government capacity*--for example, through public participation and empowerment--is therefore a necessary component of the right to water.”) (emphasis added); *id.* at 693 (“[G]overnments may be able to increase *their capacity* to fulfill water rights by incorporating communities into the process of implementing international and [domestic] rights[.]” including “developing more collaborative relationships with community leaders.”) (emphases added); *id.* at 700 (“*Governments* struggling to use top-down mechanisms to provide water services to underserved, economically vulnerable communities, could instead strengthen the channels of public participation in these processes--thereby alleviating suspicion of government bodies, increasing the political rights and perceptions of ownership of vulnerable populations, and increasing *their capacity* to develop effective water provision systems.”) (emphases added).

George McGraw identifies citizen empowerment and capacity-building to provide members of the public with “the tools to redress violations of their human dignity” as “the central idea behind the legal codification of human rights[.]” but he maligns the multitude of States that do not engage in *state-driven* initiatives and dismisses the utility or significance of members of organized civil society fulfilling this role in the government’s stead as a mere “relegat[ion]” of what is ultimately the government’s duty. See McGraw, *supra* note 34, at 49 (noting that there is a dearth of NGOs capable of performing this service) (emphasis added).

108. This is the crux of why CWC does not endorse international litigation of the human right to water as the solution to the right’s implementation. See discussion, *supra*, at note 65 and corresponding text.

109. See Firestone Remarks, *supra* note 14, at 1379-80

[W]e see our role as being a tool for communities to strengthen their own voice and strengthen their own power around these issues. These are structural power problems that have caused these situations to continue. . . . I think that’s really where we come in. The community does have the power to do that, and I think training and giving legal, technical assistance, or just signing letters ‘Attorney at Law,’ goes a long way.

*D. CWC's Approach to Community Empowerment in the Central Valley*

*1. The Foundation: Education and Engagement with Impacted Residents*

Building political power must start with an individual resident in an individual community. Therefore, CWC first and foremost grounds its work directly in local communities that currently lack access to safe, affordable drinking water, providing outreach and education to increase local understanding of drinking water challenges.<sup>110</sup> Many community residents are drawn in to community-based activism by drinking water because it directly affects both their pocketbooks and the health and safety of their families.<sup>111</sup> CWC starts by helping these residents understand how to find out if their water is safe and what can be done in the short term to access safe drinking water. An important next step, however, is educating them on how to navigate local and regional water bureaucracies, both to hold decision makers accountable for the causes of these problems and to ensure that action is taken toward long-term solutions.<sup>112</sup> It is at this juncture that the discourse of justice and human rights is perhaps at its most powerful.

CWC next supports local residents as they build power within their own community, such as by helping form community-based

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110. "Many communities are unaware of the extent of contamination because of poor monitoring, complicated bureaucracies, and the lack of regulations protecting groundwater quality." *Thirsty for Justice*, *supra* note 6, at 76. See also Ramos, *supra* note 1, at 8 ("It is imperative that the Latino community become aware of critical water issues, including water quality, infrastructure, and governance, and thereby empowers itself to advocate for water policies that benefit all Californians.")

111. See Francis, *supra* note 62, at 196 ("If it is ever possible to mobilize the population around a salient political issue and effectively pressure elected officials to change the course of democratic governance, surely *access to water* can serve as motivation.") (emphasis added). Once community residents become involved and develop experience participating and expressing their voices in decision making processes, however, we have found that they become empowered to assert themselves into the public life of their communities in other respects as well, such as advocating for more street lights in rural areas or pushing for improvements in education policy through their local school district. See McCaffrey & Neville, *supra* note 35, at 694 (positing that "capacity is dynamic and can be developed through strategic political action").

112. See, e.g., Guide to Community Drinking Water Advocacy, *supra* note 40 (providing a comprehensive guide in both English and Spanish to all aspects of community drinking water advocacy with fact sheets on many of these topics).

organizations or providing training sessions at local community meetings on subjects like residents' rights to attend public meetings and demand information from their water service provider in a language they can understand. CWC also provides basic technical information on topics such as safe drinking water laws, as well as legal assistance when necessary and appropriate to help support these community-driven efforts.<sup>113</sup>

Information dissemination flows in both directions, however. CWC learns a great deal through this sustained and direct engagement with impacted community residents about the challenges they face in securing safe and affordable drinking water, as well as the relative efficacy of attempted drinking water solutions.<sup>114</sup> CWC leverages this knowledge to inform development of its water justice advocacy messages and policy recommendations to county, regional and state levels of government. These messages and recommendations are geared toward systemic change that addresses the root causes of unsafe and unaffordable drinking water, including the creation of new and better mechanisms and practices within public agencies and institutions to foster meaningful involvement by disadvantaged communities in the decisions that affect them. It cannot be emphasized enough, however, that the foundation for this advocacy is CWC's sustained grassroots engagement with impacted communities, which continually informs both the policy positions we adopt and the strategies we use to promote them.

## *2. Strength in Numbers: Building a Broader Coalition of Impacted Communities*

A single community cannot alone tackle the root causes of unsafe and unaffordable drinking water in the Valley. The process of restructuring existing power dynamics that impact drinking water requires the creation of a more collective power, whereby affected individuals from diverse communities come together to confront common challenges. Addressing larger problems—such as widespread groundwater contamination from non-point sources

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113. *See id.* at 41-127. *See also* Firestone Remarks, *supra* note 14, at 1379-80; Cole, *supra* note 64, at ix, xi; Torres, *supra* note 28, at 597, 598.

114. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. Q.* 619, 668 (1992) (“[T]he educational process should be two-way: a lawyer must not only educate her clients, but also be educated by them.”).

like irrigated agriculture and the relative inaccessibility of funding sources for water planning and infrastructure for under-resourced community water systems—cannot be addressed solely on an individual community basis. These issues require sustained engagement at the regional and state level and far greater influence than any one individual community can exercise alone. Therefore, CWC helps coordinate a coalition of representatives from more than seventeen different impacted communities in the San Joaquin Valley, called *Asociacion de Gente Unida Por El Agua (AGUA)*.<sup>115</sup> As CWC works with individuals to address their own particular community challenges, we encourage them to become part of the regional movement for water justice by participating in AGUA.<sup>116</sup>

AGUA convenes for regular monthly meetings, during which local community members take turns leading the meetings, recording minutes, and dispensing advice and support to representatives from other communities facing similar challenges. AGUA meetings also provide a forum to inform community members about water policy advocacy opportunities and processes and to provide training on skills such as speaking with media correspondents and testifying at public hearings. AGUA thus serves as a training ground for developing participatory and leadership skills. These skills help arm community members, and especially those from marginalized population groups like low-income Latinos from farming communities, with the confidence to articulate their concerns as well as proposed solutions to their local water boards, county supervisors, media correspondents, regulatory agency staff, and the state legislature, and even to serve on decision making bodies themselves.<sup>117</sup>

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115. Translated from Spanish to English, the name of this coalition is: “Association of People United for Water.”

116. Interestingly, however, occasionally this works the other way around, as when an AGUA member recruits a peer to attend an event in the state capitol, and that person returns to his or her own community more empowered to tackle challenges at home, such as by speaking up before the local water board or the County Board of Supervisors.

117. For example, Sandra Meraz, one of the founding AGUA members and a community leader in Alpaugh, was appointed to the Central Valley Regional Water Quality Control Board in 2007 and reappointed in 2010.



### 3. *Strength in Stability: Steadfast Persistence and Issue-Oriented Expertise*

Finally, building sustained power for communities around drinking water issues requires persistent, long-term engagement. CWC strives to build on the experience and expertise we have developed over time through direct interaction with impacted communities and to serve as a stable, enduring base for engagement on community drinking water challenges. In the short term, a discrete and emotionally-laden issue, like the pending state registration of a carcinogenic pesticide such as methyl iodide, which risks further contaminating our primary source of drinking water, makes it relatively easy to motivate affected community residents to volunteer their time and engage with the decision makers. When these concentrated passions ebb, however, as they inevitably must, it is CWC's sustained persistence with decision makers at every level that keeps the water justice struggle on the policymaking agenda. This is how we are gradually building a permanent seat at the table where important decisions about drinking water get made, and it is why we believe that some form of professionalized, institutionalized center, like CWC, so long as it is rooted in direct community engagement, is a necessary ingredient in the sustainable implementation of the human right to water.<sup>118</sup>

### 4. *Philosophical Struggles Within CWC's Approach*

CWC is a relatively young organization, founded in 2006, and our approach continues to develop, evolve and mature with each passing year. While we are clear in purpose, we grapple with a number of inherent philosophical tensions within our model of community empowerment as a means of achieving universal access to safe, affordable drinking water. We discuss these issues

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118. Full-time staff also permit CWC to serve as a stable resource, keeping tabs on water-related developments in local communities, the county, the Central Valley, and the state and building institutional expertise on issues that impact drinking water quality and affordability, water provider governance, and public participation. *See generally, e.g.*, Guide to Community Drinking Water Advocacy, *supra* note 40. *See also* Davids, *supra* note 97, at 3-4.

Facilitating community participation in local government is arguably one of the primary roles NGOs can play. . . through assisting communities to organise, providing training and support to existing structures of representation . . . , acting as a watchdog over local government activities, as well as providing public education and raising awareness about citizens' rights to participate in local government.

below to acknowledge the complexity of this work and to underscore that although there are some guiding principles, there is not just one correct model for community engagement and community empowerment.

*a. A Delicate Balance Between Voice and Representation*

Within CWC's work, the AGUA coalition is the primary vehicle for connecting residents from impacted communities with regulatory officials and policy makers, and its coordination is, in many ways, the single-most important function that CWC serves. The communities AGUA members represent "have for too long been denied a voice" in policy decisions affecting drinking water quality in the Central Valley.<sup>119</sup> "One of the central tenets of the [environmental justice] movement is 'We speak for ourselves.'"<sup>120</sup> Bringing AGUA members into the same room as the decision makers allows that to happen. Furthermore, CWC has observed that both elected officials and media correspondents are particularly attuned to authentic concerns voiced directly by community residents rather than filtered through representatives such as CWC staff, however well-intentioned. Even from a purely strategic standpoint, therefore, directly connecting elected representatives and reporters with AGUA members furthers the objectives of increasing public awareness regarding the Valley's water justice struggles and encouraging structural improvements through changes in law and policy.

CWC has also learned, however, that in certain settings, the target audience is much more receptive to absorbing the water justice message when it is spoken in a language with which they are familiar. We refer here to professional stakeholders, including regulatory officials, agency staff, water engineers, agricultural industry representatives, and even the more politically-involved farmers themselves. For this reason, CWC's role is not just supportive and facilitative: when appropriate, we engage as a direct participant as well.

A prominent example is our involvement in integrated regional water management planning processes (or IRWMPs) in the southern San Joaquin Valley. IRWMPs are ongoing collaborative stakeholder processes to develop water projects and

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119. Cole, *supra* note 64, at xvii.

120. *Id.*

priorities in the region. They are largely dominated by engineering and consulting firms representing local water management agencies and staff from larger cities and irrigation districts. Effective participation in these venues requires both a grasp of the technical language being spoken and regular attendance in order to ensure that the IRWMP's priorities and projects reflect the interests of disadvantaged communities in the Valley. These realities present significant barriers to meaningful contributions by volunteer community members. Therefore, consistent involvement in IRWMPs to advocate on behalf of impacted communities has been an important niche that CWC staff have attempted to fill.<sup>121</sup>

This latter point is densely packed with implications. Unquestionably, persistence is a critical component to carving out a permanent place for water justice communities at the decision making table, not just within IRWMPs but also in the larger water "policyscape" of the Central Valley.<sup>122</sup> This is one of the strengths of an institutionalized civil society organization like CWC, whose full-time, paid staff can afford to attend meetings and participate in conference calls day after day, month after month, reiterating the water justice message and developing a certain familiarity with regulatory officials and other stakeholders. In this context, CWC frequently synthesizes the voices of our many impacted community partners, but we are not just conduits or facilitators. We also engage in "tactical judgments" informed by our own professional experience and institutional and socioeconomic biases, which do not always directly parallel that of the average AGUA member.<sup>123</sup> The touchstone for taking on this representational role in more professionalized fora is CWC's direct involvement and continual interaction with those community residents who are affected by our work, a process through which we are continually being reminded (and reminding ourselves) to place impacted community members at the forefront of the water

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121. CWC is what Professor Lani Guinier might refer to as a "role literate participant." See Guinier, *supra* note 52, at 556. CWC knows "how to make [itself] known among a watchful public[.]" how to make its message heard by the media, and ultimately, how to help "organize a campaign to change the law." *Id.*

122. Zach Willey, *Behind the Schedule and Over Budget: The Case of Markets, Water, and Environment*, 15 HARV. J.L. & PUB. POL'Y 391, 392 (1992). See Meraz Remarks, *supra* note 1, at 1383 (discussing her community of Alpaugh in Tulare County); *Thirsty for Justice*, *supra* note 6, at 64 (quoting Dr. Henry Clark, a committee member of the Cal/EPA Advisory Committee on Environmental Justice and director of West County Toxics Coalition).

123. See Guinier, *supra* note 52, at 557.

justice movement. Absent that frequent contact, whatever agency CWC possesses in attempting to speak for environmental justice communities evaporates.

We are acutely aware, however, of the tension and even hypocrisy inherent in the decision to engage with professionalized stakeholders in impacted residents' stead. There is a delicate balance between pragmatic decisions about effectiveness in the shorter term (in which case sending a CWC staff person to IRWMP meetings makes the most sense), and changing embedded power relationships in the longer term, which necessitates deconstructing embedded racial, ethnic, socioeconomic and linguistic stereotypes (in which case supporting a community partner to participate directly in IRWMP meetings makes the most sense). Changing power dynamics requires changing relationships, and this can only happen through repeated interactions over time.<sup>124</sup>

International water justice activist Saranel Benjamin criticizes professionalized civil society organizations for perpetuating the exclusion of impacted community residents from elite forms of participation in "policy intervention and negotiations[,]” which she identifies as being restricted to those with political access and pushing grassroots activists “to the periphery of public participation.”<sup>125</sup> A significant component of CWC’s work does in fact involve assisting impacted community residents and community-based groups to navigate and take full advantage of state-led participatory opportunities themselves. In some respects, however, CWC may be guilty of Benjamin’s charge, for example when a CWC staff member participates directly in a forum like an

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124. See Richard Ballard, *Participation, Democracy and Social Movements*, 4(1) CRITICAL DIALOGUE 17, 18 (2008), available at [http://www.cpp.org.za/publications/critical\\_dialogue/vol4no1\\_2008/art3.pdf](http://www.cpp.org.za/publications/critical_dialogue/vol4no1_2008/art3.pdf) (summarizing IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 125 (Oxford University Press 2000)); Guinier, *supra* note 52, at 551 (“[S]ocial change involves denaturalizing prior assumptions, a process that must be continuously monitored under the watchful eye of engaged political and social actors.”).

125. See Saranel Benjamin, *Reclaiming Voices of Dissent: Social Movements challenging contemporary forms of Public Participation*, 2(1) CRITICAL DIALOGUE (2005), available at [http://www.cpp.org.za/main.php?include=publications/critical\\_dialogue/vol2no1\\_2005/chapt1.html&menu=\\_menu/pubs.html&title=Critical%20Dialogue%20-%20Public%20Participation%20in%20Review](http://www.cpp.org.za/main.php?include=publications/critical_dialogue/vol2no1_2005/chapt1.html&menu=_menu/pubs.html&title=Critical%20Dialogue%20-%20Public%20Participation%20in%20Review); see also *id.* (“Restricting participation to policy making and intervention within prescribed institutional forms restricts the number of civil society actors to those who have the resources to access these institutional forms of intervention.”); *id.* (critiquing “well-resourced” NGOs that are “cavort[ing] in institutionalised forms of public participation” and “claiming to represent the interests of the public”).

IRWMP in lieu of an impacted community resident. In our defense, of course, is the fact that we are not disconnected from our community partners. Direct engagement involves repeated personal contact with individual residents and community-based groups in our efforts to help tackle particular communities' more localized, concrete drinking water challenges. This engagement helps us maintain a finger on the pulse of what is needed, what is wanted, and what really seems to work in practice in terms of solutions to drinking water challenges in the Valley's environmental justice communities. These issues of voice and representation are nevertheless something we continuously grapple with as we refine our approach to community engagement and implementing the human right to water in this region. Ultimately, however, we consider CWC's roll as an advocate in these settings to be only one tool available to communities in the larger task of changing power dynamics in drinking water decision-making. This representative advocacy cannot substitute for direct involvement by communities themselves, because community member participation is critical to the enterprise of community empowerment.

*b. Picking the Turf for Participatory Engagement*

Few would, and few do, contest the assertion that, at least in theory, public participation in governmental decision making is a good thing. In fact, quite the opposite—many social justice activists and scholars tout community participation as a vehicle for resolving environmental injustice.<sup>126</sup> The most challenging criticism leveled, however, is that even where governmental decision makers open up spaces for dialogue with members of the public, they don't actually listen.<sup>127</sup> This is a valid concern. Too

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126. See, e.g., Kuehn, *supra* note 103, at 648 (“A central tenet of the environmental justice movement is the right to self-determination and meaningful participation in the decisions that affect one’s life.”); *Thirsty for Justice*, *supra* note 6, at 69 (“Water justice requires a participatory system of water governance and new forms of management and regulation that are truly community-based.”).

127. See Cole, *supra* note 103, at 453 (“The participatory model . . . seeks to take advantage of every opportunity afforded by that [administrative-permit] process to make client voices heard *and, one hopes, listened to*, by decision makers.”) (emphasis added); *id.* at 455 (“Adherents of the power model believe that the system is stacked against the public and that no amount of participation in itself will change the relations of power that give rise to environmental degradation. A supporter of the power model might say, ‘*More access to the system without power within that system means nothing.*’”) (emphasis added); *Thirsty for Justice*, *supra* note 6, at 61 (emphasizing the importance of “[w]ater agencies and institutions .

frequently, for example, agency bureaucrats hold a public hearing in the middle of the weekday in the state capitol, hundreds of miles from impacted communities. This may fulfill minimum legal requirements for public participation,<sup>128</sup> but, in reality, inputs from the members of the public who do manage to attend are not incorporated into the final agency decision. The hearing amounts to a mere formality, a checked box, in the larger process of developing a predetermined policy outcome.<sup>129</sup>

This raises the issue of influence, or what Professor Alice Kaswan calls “political justice,” which is to be distinguished from procedural justice (the foregoing hearing):

[T]he goal is not just about having fair procedures . . . . It’s also about being heard. It’s about a community having the political power to influence the decisions in which they’re participating. It’s about the institutions which are listening—really listening and paying attention to those concerns. . . . I like to think of [procedural justice] as

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. . . *meaningfully* engag[ing] community groups and bring[ing] affected constituencies into the decision-making process.”) (emphasis added); Ballard, *supra* note 124, at 17, 19 (asserting that institutionalized participatory structures reflect a “state strategy of managing, containing and channeling articulations from the grassroots[,]” which fosters an environment where the state “[l]isten[s] to some voices” while “not listening” or even “silencing” others); McCaffrey & Neville, *supra* note 35, at 693-694 (identifying the importance to the participatory enterprise that the “government act in good faith and . . . engage seriously with communities rather than just make token gestures of concern and inclusion.”). *See also id.* at 704 (observing that governmental commitments to public participation need to be “[g]enuine”); Ballard, *supra* note 124, at 19 (noting that even if a decision maker is “genuinely interested in hearing from the grassroots,” if the only channels of participation encouraged or permitted are the state’s formal, official participatory structures, “then these inputs from the people are at its behest and on its terms.”).

128. Cole, *supra* note 103, at 450.

129. *See* Farrell, *supra* note 12, at 125; *Thirsty for Justice*, *supra* note 6, at 68 (“The general public and community leaders are typically invited to the decision-making table to endorse decisions that have already been made, or after much of the planning, analysis, and discussions have taken place, or never at all.”). Additionally, EJCW has observed that:

[e]ven when guidelines are clearly written and training is provided, water agencies and institutions fail to commit the resources, staffing, or time to bring affected communities into the decision-making process. . . . [This reflects state agencies’] continued reluctance to elevate environmental justice to equal footing with other program areas

. . . .

The excuses that agencies lack the time, staff, and funding to incorporate meaningful community participation and outreach sound hollow as millions of dollars finance dam-expansion studies and water districts continue to operate with untold millions in reserve.

*Thirsty for Justice*, *supra* note 6, at 65, 69.

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going even further, to a deeper-seeded, more substantive political justice.<sup>130</sup>

Some social justice scholars argue that institutionalized participatory structures, like the public hearing, are restrictive, exclusionary, elitist, and hollow, and simply cannot facilitate the kind of political justice to which Professor Kaswan refers.<sup>131</sup> They advocate instead for grassroots social movements to engage with decision makers on their own terms in “popular spaces” of alternative civic engagement.<sup>132</sup> A classic example might be a march or a protest outside the public building where a critical decision is being made.

CWC believes that, at least in the context of Central Valley politics, both forms of participation are strategically necessary in order to achieve real influence.<sup>133</sup> Therefore, on the one hand, we

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130. Laurel Firestone, Alice Kaswan, & Sandra Meraz, Symposium, *Environmental Justice: Access to Clean Drinking Water*, 57 HASTINGS L.J. 1367, 1369 (2006) (remarks by Professor Alice Kaswan) [hereinafter Kaswan Remarks] (emphases added).

131. Benjamin, *supra* note 125, at 1, 2; *But see* McCaffrey & Neville, *supra* note 35, at 694 (“[I]nstitutionalized forms of public participation offer . . . a way past the barriers” and “challenges” of implementing the right to water in “resource-scarce” environments) (emphasis added).

132. Davids, *supra* note 97, at 2 (describing “provided spaces” that are “regulated and institutionalised [by governments] through a set of policies and laws” as “structured participation or participation by invitation” that “takes place within parameters set by the state and is invariably regulated and systematised to neatly fit within broader government operating frameworks[,]” as compared with “popular spaces, which refer to arenas in which people come together at their own initiative, whether for solidarity or to protest government policies or performance, or simply to engage government on terms that are not provided for within provided spaces”) (emphasis added) (internal quotation marks omitted). *See also* Ballard, *supra* note 124, at 19 (juxtaposing “informal” or “invented spaces” of participation “constituted by the participants themselves” against “formal participatory processes” and “officialised structures”) (internal quotation marks omitted).

133. Thus, CWC strives both to “open[] up an analytic space for productive dialogue” and to facilitate “politically potent action by the people themselves.” *See* Guinier, *supra* note 52, at 557 (internal quotation marks omitted). As Luke Cole explained in a slightly different context,

Although some might see the power model [social movements in popular spaces] as the antithesis of the participatory model [institutionalized participation in provided spaces], the two models . . . are actually complementary. A strong community group and a creative legal services advocate can use both models—the insider and the outsider strategy—to achieve the desired outcome in the permitting process. Gaining information about a project through the participatory model gives organizers in the power model more leverage with decision makers. Putting pressure on decision makers through the power model makes them more receptive to hearing alternatives put forward by those pursuing the participatory model.

persistently advocate for adjustments and improvements to “provided” participatory structures.<sup>134</sup> For example, CWC strives to make public meetings more accessible to the working poor and non-English speaking communities by pressuring hosting agencies to move the venues closer to impacted communities, schedule meetings in the evenings, and provide translation services. We also help transport low-income community members to venues when necessary and publicize these types of participatory opportunities in advance, such as by distributing flyers within impacted communities. These efforts are geared toward both supporting and improving existing participatory structures, which we believe are crucial venues for ensuring sustained influence on decisions affecting drinking water.

At the same time, when we perceive that community members’ voices are being disregarded in a decision that directly affects them, and that their message is not being “really listen[ed]” to in conventional participatory structures, we may opt to engage with decision makers on our own terms.<sup>135</sup> For example, we may assist impacted community residents, or even the AGUA coalition, to conduct a joint protest and press conference outside the relevant agency’s headquarters. This alternative participatory strategy can have transformative effects not just on the target audience, but on the participants themselves, awakening in them a consciousness of their own strength and political influence and culturing a sense of entitlement to justice— and fulfilled human rights— that may not have been previously instilled.<sup>136</sup>

When we choose this strategy, however, we are careful to articulate trenchant demands and recommendations and to direct

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Cole, *supra* note 103, at 458. Realization of the human right to water ultimately requires both top-down assistance and bottom-up demands and action—impacted communities “working together with their governments” in an iterative process. Hardberger, *supra* note 30, at 568.

134. Davids, *supra* note 97, at 2.

135. Without building a stronger voice for impacted communities and carving out a permanent space at the decision making table, it is “difficult to make meaningful inputs in the current ‘provided spaces,’” as no matter how loudly a community resident may shout in a public hearing, his or her voice can be disregarded if the decision makers do not feel accountable to the resident. Davids, *supra* note 97, at 7; Kuehn, *supra* note 103, at 648. (“True public participation and environmental justice cannot be realized until the communities that are impacted by environmental regulations have a voice in the process equal to that of regulated industry.”).

136. Cole, *supra* note 103, at 455 (1995) (“By bringing people together to realize, then exercise, their collective strength, practitioners of the power model try to get at some of the roots of communities’ problems: powerlessness.”).



this message to a specific individual or set of individuals with real power to grant that which we seek, such as the state governor or the members of a regulatory agency's governing board. In choosing alternative means of engagement, we are mindful that the purpose is quite literally to force the decision maker and any opposing stakeholders to understand that they *must* negotiate with us—the Central Valley water justice movement—in order to move forward with their policy or program effectively.<sup>137</sup> To do so, we must demonstrate to the target audience that concessions in our favor are absolutely necessary—both to protect the human rights of farm laborers and other disadvantaged Central Valley residents and to promote the long-term health of the regional economy<sup>138</sup>—and that the changes we seek will not unreasonably burden other stakeholders. This informs both the content and the packaging of our message and our advocacy.

That does not mean, however, that we shy away from saying the things that opposing interests do not want to hear.<sup>139</sup> Just because we frequently utilize state-supported participatory structures and processes—and in either case attempt to speak in a language that public officials can understand—does not alter the fact that the substance of what we're pushing for challenges the status quo and threatens entrenched political interests. Successful implementation of the human right to water necessitates fundamental change in long-entrenched power structures here in the Central Valley, and this is not always welcome information to those who currently benefit from the existing political and economic system.<sup>140</sup>

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137. McCaffrey & Neville, *supra* note 35, at 701 (“[T]he support of powerful constituents may be needed to maintain power.”); Benjamin, *supra* note 125 (observing that social justice activists “don’t object fundamentally to the uses of institutionalised forms of public participation, but rather they see that some form of reliance on formalised participation in such institutions[] . . . is inherently incapable of fundamentally transforming social relations.”) (internal quotation marks omitted).

138. Many of our community partners are intimately linked with the agricultural industry in the Central Valley, through their own employment or that of a close family member, so they form an integral part of the social and economic fabric of this region. Even the largest industrial farms depend on members of these environmental justice communities for their labor, and vice versa. We believe that negotiated solutions that promote both community health and a vibrant agricultural economy are, when possible, in everyone’s best interest.

139. To put it bluntly, just because we are engaging on their turf doesn’t mean we accept all of their terms. *But see* Ballard, *supra* note 124, at 19 (“[P]articipation [within provided spaces] is being conducted on the state’s terms rather than the terms of the community.”).

140. *See* Kaswan Remarks, *supra* note 130, at 1368; Benjamin, *supra* note 125, at 4.; Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 3

## IV. CONCLUSION

Ultimately, we fear that the Central Valley is merely the tip of the proverbial iceberg. The industrial agricultural practices used here may be more intensive than in most other regions of the country and the world, but they are not necessarily unique.<sup>141</sup> Knowledge about groundwater contamination is only as comprehensive as the water quality monitoring that a system operator conducts. Water justice advocates around the world who are serious about implementing the human right to water need to ask themselves hard questions about the most effective methods for tackling this challenge, methods that will truly serve the best interests of communities affected by polluted source waters or inequitable allocation of limited supplies.

Here in the Central Valley, the Community Water Center is developing an approach that we believe will achieve lasting change—one which acknowledges that successful implementation is a process rather than an end goal. We have identified four key ingredients: physical infrastructure, source water protections, institutional capacity, and community power. But it is this last ingredient of community empowerment, which encapsulates an environmental justice community's ability to hold water policy decision makers accountable that is critical to sustainability. It is our observation that drilling wells and donating money, though important, will not alone lead to lasting improvements in drinking water quality in the absence of political voice and a permanent seat at the decision making table for impacted communities. We are developing an approach to community engagement as a means of empowering communities in the Central Valley, and we have attempted to outline in this paper what this process actually looks like in practice, on the ground. Integral to any such approach, however, is the acknowledgement and understanding that solutions must be context-appropriate and developed with a foundation in the communities that are striving for water justice.<sup>142</sup>

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HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 449, 451 (1996). (arguing that at the end of the day, environmental justice struggles "are struggles about political and economic power[] and the exercise of that power").

141. See *Social Disparities*, *supra* note 7, at 4; EWG Report, *supra* note 5.

142. Cf. Astle, *supra* note 38, at 605. Jason Astle warns us that our "communal model," which is "designed on principles of empowerment and self-reliance," will not function properly in all circumstances, and specifically in certain rural communities on the African continent, as our model "does not address the deeper cultural obstacles inherent in village life

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or the impact that corruption has on the basic trust required to maintain a community resource.” *Id.* at 602.