

WATER: A HUMAN RIGHT OR A HUMAN RESPONSIBILITY?

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I. SHOULD THE HUMAN RIGHT TO WATER PROTECT ECOSYSTEMS?

In July 2010, the United Nations General Assembly declared that access to clean water and sanitation is a basic human right.¹ This declaration, though, does not expressly address the issue of ecosystem protection.² So, should the Human Right to Water include protection of water quality, essential ecosystem functions, and biodiversity?

An international law guaranteeing a Human Right to Water potentially would apply to all of the diverse cultures of the world.³ Some cultures may view ecosystem protection as separate from, and secondary to, the protection of human populations. Other cultures, however, may see humans as part of a web of life, in which our own strength depends upon the vitality of the rest of the living world.

Each culture and each nation has its own laws that guide human decision-making. For some Indian tribes, taking care of the water for the sake of other living beings has long been recognized

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

2. *See* G.A. Res. 64/L.63, *supra* note 1.

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

as a primary human responsibility.

II. INDIAN TRIBES AND A HUMAN RIGHT TO WATER

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

A. Tribal Reserved Water Rights

Since time immemorial, many different nations of Native American people have lived and thrived across this continent.⁵ Each tribe had its own homeland and languages, and over the millennia, each tribe developed and refined its own customs, so that its people could enjoy the best quality of life in their homeland's particular environment.

When Europeans first began migrating to this continent, they brought many innovative dreams about creating a new kind of future for themselves in a new land. Having escaped a war-torn Europe, where the majority of the people suffered from the whims and the oppression of a powerful few, they envisioned a new type of society in which the rights of the individual would be given strong protection.⁶

These newcomers, however, had a somewhat different attitude towards the people who already lived here. The newly created laws of the newcomers viewed Indian people merely as "occupants" in this land,⁷ and viewed Europeans as an inherently superior race who, by right of "discovery"⁸ and by right of royal

4. *See id.*

5. *See e.g.*, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT 1492-1992 xx (Peter Nabakov ed., 1991) (map depicting Native American Tribes and Culture Areas, circa 1650); EDWARD H. SPICER, THE AMERICAN INDIANS: DIMENSIONS OF ETHNICITY 8-9 (1982) (map depicting American Indian Tribes during the period of first extensive contact with Europeans). Today, there are 565 federally recognized tribes in the United States. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010) (supplemented by 75 Fed. Reg. 66,124 (Oct. 27 2010)).

6. Consider for example, the Bill of Rights to our United States Constitution, which explicitly protects several important individual rights. U.S. CONST. amends. I-X.

7. *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823).

8. *Id.* at 576.

charters issued by monarchs an ocean away, were entitled to claim what land they wanted for themselves.⁹

From the United States Supreme Court's early discussions regarding Indian ownership of the land in its foundational decisions,¹⁰ an important principle emerged: the United States may not claim legal title to the land without first obtaining the consent—usually through treaties—of the Native American people.¹¹ As the United States Supreme Court later explicitly recognized, a “treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.”¹² Thus, when the United States and an Indian tribe agreed in a treaty to reserve certain lands as a homeland upon which the Indian people would continue to live, that tribe was considered to have impliedly reserved sufficient water to meet the purposes of that treaty.¹³

In the western United States, tribal reserved water rights came into direct conflict with a new type of water law called the “prior appropriation doctrine.”¹⁴ Perhaps because of that era's strong emphasis on rugged individualism, and perhaps influenced by the

9. *Id.*

10. See generally *id.*; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). This trilogy of cases forms the foundation of Federal Indian law. Law professor Robert Williams has attributed many of today's problems in the area of Federal Indian law to the fact that the United States has never repudiated its expressly race-based and, by today's standards, shockingly racist foundations.

Amazingly, unlike with the decisions in *Dred Scott* and *Plessy v. Ferguson*, the justices of the Supreme Court continue to cite this trio of archaic, racist judicial precedents from the early nineteenth century in their present-day opinions on vitally important questions of Indian rights to property, self government, and cultural survival. The model of inferior and diminished Indian rights under the Constitution and laws of the United States laid out in these three seminal cases continues to define the Court's approach to all questions of Indian tribal rights.

ROBERT A. WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 49 (2005).

11. See, e.g., *Johnson*, 21 U.S. at 573–74; *Worcester*, 31 U.S. at 544–45. See also *The Northwest Ordinance*, 1 Stat. 51, note a, art. III (1787); *Act Creating the Oregon Territory*, 9 Stat. 323 (1848).

12. *United States v. Winans*, 198 U.S. 371, 381 (1905).

13. See e.g., *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (establishing what often is referred to as the Winters Doctrine); *Arizona v. California*, 373 U.S. 546, 595–601 (1963).

14. See, e.g., *Arizona*, 373 U.S. at 555 (“Under [the prior appropriation doctrine] the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. ‘First in time, first in right’ is the shorthand expression of this legal principle.”).

popular desire to make the most of this new land of opportunity, most western states rejected the principles of the centuries-old European-derived riparian doctrine.¹⁵ Instead of emphasizing a responsibility to protect a water body so that all riparian landowners could enjoy the benefits of the water, the prior appropriation doctrine gave a few individuals powerful and exclusive property rights to the water.¹⁶

Water rights are administered by the states, but tribal reserved water rights are a federally recognized legal right.¹⁷ Unfortunately, as states issued water rights under the prior appropriation doctrine, tribal claims largely were left out—until tribes began asserting their legal rights in court. By that time, however, most of the available water already had been claimed, leaving tribes in the difficult position of trying to take away water from individuals who, with good reason, felt that they already had a legal claim to use the water, and who had vested economic expectations that they could continue to use that water in perpetuity.¹⁸

The practice of ignoring the tribes' paramount claims to water under the reserved rights doctrine has created a terrible situation in which the legal rights to immense quantities of water around the western states are now in question, with Indians pitted against non-Indians fighting for this vital water and for the survival of their respective communities.¹⁹ In these high stakes disputes, the courts, as well as both the state and federal government, have been very reluctant to take water away from non-Indians to restore it to Indian people.²⁰ As a result, even today, many tribes still are

15. See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882) (finding that the prior appropriation doctrine had always governed in Colorado, and that the riparian doctrine was inapplicable within that state).

16. See ROBERT GLENNON, *WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS* 14–18 (2002); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 231–35 (1992).

17. See e.g., *supra* note 13.

18. See e.g., WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY* 3-45 (1998) (“In many cases, the sources of water available to satisfy tribal rights are already fully appropriated and used. Particularly when senior tribal rights have not been adjudicated or otherwise quantified, states are reluctant to reduce uses by junior appropriators in favor of senior tribal uses.”) [hereinafter *W. WATER POL’Y COMM’N*].

19. *Id.* at 3-48 to 3-50.

20. See, e.g., *supra* note 18, WILKINSON; *supra* note 16 at 268. See also, *supra* note 10.

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

B. Water Rights for Fish

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

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

As a result of this focus on human economic needs, though, the prior appropriation doctrine historically did not even consider protection of natural ecosystems. Instead, it has emphasized the protection of those “beneficial uses;”²⁵ of water that create an economic benefit. Furthermore, most of those “beneficial uses,” such as for farming or for mining, require diversion of the water from the water body. In the arid west, the unintended consequence of this emphasis has been the dewatering of many rivers and streams, with devastating impacts on the wildlife and the overall ecosystems that have depended upon these water bodies for eons.²⁶

As this unanticipated problem has become more obvious, the United States and the various western States have taken many steps to try to address this situation. On the federal level, laws such as the Clean Water Act²⁷ and the Endangered Species Act²⁸ focus on

21. See, e.g., W. WATER POL’Y COMM’N, *supra* note 18, at 5-3 (“Most tribes’ rights have not been quantified, much less actually secured and put to use, and often they have not been factored into the basin systems.”). See generally DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER* (1994).

22. See, e.g., W. WATER POL’Y COMM’N, *supra* note 18, at 3-51 (1998).

23. See, e.g., *infra* § II.C.

24. See, e.g., GLENNON, *supra* note 16, at 14–18; WILKINSON, *supra* note 16, at 231–35.

25. “Beneficial use” is a term of art used in the prior appropriations doctrine. See e.g., *Arizona*, 373 U.S. at 555; WILKINSON, *supra* note 16, at 234-35.

26. GLENNON, *supra* note 16, at 14–18; WILKINSON, *supra* note 16, at 231–35.

27. 33 U.S.C. §§ 1251–1387 (2010).

restoring water quality and on protecting those species that have been most severely impacted. On the state level, protection of ecosystems is increasingly recognized as a beneficial use; and newer laws now permit the issuance of in-stream flow water rights,²⁹ although, the priority dates on such water rights typically are so junior that in many cases these constitute merely “paper” rather than “wet” water rights.³⁰

Here in the Pacific Northwest, probably the most powerful water rights protection for the restoration and maintenance of healthy ecosystems comes from tribal reserved water rights. Perhaps, in part, because the United States was under considerable time pressure in the 1850s to execute treaties with the tribes in this region, most of the larger tribes were able to include language in their treaties that explicitly retains their right to continue fishing off-reservation throughout the lands that they were ceding to the United States.³¹ Because of this powerful treaty fishing right, the courts in the early 1980s found that the tribes also impliedly had reserved sufficient water in-stream to maintain these fisheries.³²

28. 16 U.S.C. §§ 1531–1544 (2010).

29. *See, e.g.*, OR. REV. STAT. §§ 537.332–360 (2010) (statute adopted in 1987 that expressly allows the state of Oregon to issue in-stream flow water rights).

30. For example, if a river normally flows at around 500 cubic feet per second (cfs) during the irrigation season, any farmers interested in irrigating from that river long ago would have claimed the water rights up to that full 500 cfs. Later farmers, to try to farm in higher-than-average flow years, likely then would have claimed junior water rights, perhaps up to 1000 cfs. So if an in-stream flow water right were issued in 2011, it would not have any meaning unless there already was a flow of greater than 1000 cfs in the river. To help address this problem, at least one state explicitly permits the conversion of older consumptive use water rights into in-stream flow water rights, while retaining the original priority date. *See, e.g.*, OR. REV. STAT. § 537.348.

31. For example, the Treaty with the Cayuse, Umatilla, and Walla Walla Tribes states that, “the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same” Treaty with the Walla Wallas, &c., 12 Stat. 945, art. 1 (June 9, 1855). *See also* Treaty with the Nisquallys, &c., “Treaty of Medicine Creek,” 10 Stat. 1132, art. 3 (Dec. 26, 1854); Treaty with the Dwámish, &c. Indians, “Treaty of Point Elliot,” 12 Stat. 927, art. 5 (Jan. 22, 1855); Treaty with the S’Klallams, “Treaty of Point No Point,” 12 Stat. 933, art. 4 (Jan. 26, 1855); Treaty with the Makah Tribe, “Treaty of Neah Bay,” 12 Stat. 939, art. 4 (Jan. 31, 1855); Treaty with the Yakamas, 12 Stat. 951, art. 3 (June 9, 1855); Treaty with the Nez Percés, 12 Stat. 957, art. 3 (June 11, 1855); Treaty with the Indians in Middle Oregon, 12 Stat. 963, art. 1 (June 25, 1855); Treaty with the Qui-Nai-Elts, &c., “Treaty of Olympia,” 12 Stat. 971, art. 3 (July 1, 1855 & Jan. 25, 1856); Treaty with the Flatheads, &c., “Treaty of Hellgate,” 12 Stat. 975, art. 3 (July 16, 1855).

32. *See, e.g.*, *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983), *cert. denied*

Under the prior appropriation doctrine, many of these tribal fishery-related water rights now officially are recognized as having a priority date of “time immemorial.”³³ Being “first in time”³⁴ means, essentially, that the in-stream flow water rights necessary to maintain and restore the fish runs have the absolute highest priority date. Needless to say, this legal ruling created a great deal of consternation among many state water rights holders, who had become economically dependent upon diverting this water out-of-stream, but who now were threatened with losing this water to a seemingly new, yet senior water right.

C. *The Umatilla Basin Project Success Story*

The Umatilla Basin lies in northeast Oregon, and is a major tributary to the Columbia River. The Umatilla Indian Reservation, which is the home of the Cayuse, Umatilla, and Walla Walla Tribes,³⁵ encompasses much of the headwaters of this watershed.

Since “time immemorial,” salmon have been central to these tribes’ culture, religion, and economy.³⁶ Because of the diversion of water, primarily to support the new farming economy of the settlers in the lower part of the watershed, the lower Umatilla River had been dewatered for decades;³⁷ and the once-thriving salmon populations here were driven into extinction in the early 1900s.³⁸

With the courts in the 1980s recognizing that tribes have a “time immemorial” priority date for their fish-related in-stream

sub nom. Oregon v. United States, 467 U.S. 1252 (1984).

33. See *e.g.*, *id.* at 1414.

34. See *supra* note 14.

35. The Confederated Tribes of the Umatilla Indian Reservation is comprised of these three tribes. In current times it functions under one tribal government, yet at the same time tribal members still retain their tribal affiliations; so here it is referred to as the “Tribes,” the “Tribe,” or the “CTUIR.”

36. See, *e.g.*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, COLUMBIA BASIN SALMON POLICY § I, Mar. 8, 1995, available at <http://www.umatilla.nsn.us/salmon.pdf> [hereinafter CTUIR COLUMBIA BASIN SALMON POLICY].

37. See, *e.g.*, U.S. DEP’T OF INTERIOR, BUREAU OF RECLAMATION, UMATILLA BASIN PROJECT DRAFT ENVIRONMENTAL STATEMENT 1-2 [hereinafter U.S. BUR. REC., UBP DRAFT ENVTL. STMT.], incorporated by reference into U.S. DEP’T OF INTERIOR, BUREAU OF RECLAMATION, UMATILLA BASIN PROJECT FINAL ENVIRONMENTAL STATEMENT 1-1 [hereinafter U.S. BUR. REC., UBP FINAL ENVTL. STMT.].

38. Antone Minthorn, CTUIR General Council Chairman, Testimony Before the Oregon Senate Committee on Water Policy 2–3 (Dec. 17, 1991) (on file with author).

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

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

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

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

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

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

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

39. See *supra* notes 31–34, and accompanying text.

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

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

42. Minthorn, *supra* note 38, at 3.

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

The leaders of the irrigation community agreed to try this more cooperative approach, and negotiations began. The State of Oregon also supported the Tribes' call for developing a cooperative solution: "The Umatilla Tribes are taking a different approach. It has been called the 'Umatilla Doctrine.' The Tribes assert that Tribal and nontribal economies are interdependent. Hence, development of the Tribes' reserved water rights can be an asset to the overall economy."⁴⁴ The United States Bureau of Reclamation also actively supported this cooperative approach: "Even though the Federal court system has upheld the treaty reserved rights of the tribes, the tribes have taken the position that the water-related problems in the basin can and should be resolved short of litigation."⁴⁵

When people sit down together with a genuine commitment to work through their differences, miracles can happen. Although it took a couple of decades to complete the negotiations and then to implement this cooperative solution, the people of the Umatilla Basin—Indian and non-Indian—were able to resolve this conflict.⁴⁶ Today, the irrigation districts of the Umatilla Basin still receive adequate water to maintain their irrigation-based farming economy. At the same time, salmon now swim once again in the Umatilla River, in levels that are high enough to support harvest of those fish.⁴⁷

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

43. *Id.*

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

45. U.S. BUR. REC., UBP DRAFT ENV. STMT., *supra* note 37, at 1-3, *incorporated by reference into* U.S. BUR. REC., UBP FINAL ENV. STMT., *supra* note 37, at 1-1.

46. Senator Mark Hatfield sponsored the legislation authorizing the Umatilla Basin Project, which embodied this cooperative solution. Umatilla Basin Project Act, Pub. L. No. 100-557, 102 Stat. 2791 (codified at 16 U.S.C. §1274 (1988)).

47. *See e.g.*, Rebecca H. Hiers, *Leadership from the Heart: One Tribe's Example*, 26 J. L. & RELIGION (forthcoming 2011) (discussing this major water rights conflict in the Umatilla Basin, the legal history leading up to this difficult situation, and the role that the Tribes' traditional value of sharing played in resolving this conflict).

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

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

III. ANOTHER WORLD-VIEW

While tribes have worked within the United States' rights-based legal system to regain their access to water, tribal traditions—the ancient unwritten laws that have guided human decision-making since time immemorial—follow a very different paradigm. In fact, the concept of a “right” to “own” water in many ways is contrary to traditional understandings. Instead, human beings are seen as having a special role, and a special responsibility to take care of the land, the water, and our fellow living beings.

A. *Unwritten Laws*

While many cultures utilize written laws, many cultures do not. Instead, in these cultures the laws are unwritten, and are passed down through the generations through stories, traditions, and customs.

Unwritten laws have a special power. They speak to a person's heart, rather than to the mind. The emphasis is not on specific words, but rather on the underlying intent. Instead of being a set of black letter “do's and don't's,” they educate people in a way of feeling and thinking about the world that guides behavior and decisions.

To many Indian people, these unwritten laws contain a sacred promise. As one tribal leader explained:

A long time ago, this land that we live on spoke a law; and we as Indian people are part of that law. Us as Indian people have been given a belief, a religion to follow; and

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

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

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

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

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

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

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

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

B. Water – The Source of All Life

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

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

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

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

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

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

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

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

Cúušnimna inaknúwiyaša náaman láax^w wáwnak^wšáš"
Water keeps all our bodies for us. Čúuš [water] is a part of everything. It is within *natítayt* [the Indian], it is within *tiičám* [the land], and it is within *núsux* (the salmon). It is essential for the survival of all life. Cold, clean, healthy water is the life blood of the land. We drink water to remind us of who we are. Čúuš cleanses and heals our bodies, "*Plix iwá čúuš*" ["Water is medicine"].⁵⁶

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

"From time immemorial, water has been the giver of all life. We must honor and protect it, from the tributaries to the ocean."⁵⁸

...

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

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

55. CTUIR WATER CODE, *supra* note 49, at §1.01.

56. *Id.*

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

58. *Id.* at § III.A.

good clean flowing water, nothing will survive. Instream flows and good water quality must be restored.⁵⁹

Honoring the water, keeping the water clean and healthy, and ensuring that other living beings continue to have access to this water, all are part of the unwritten laws that guide tribal decision-making. From this perspective, the concept of protecting water for humans only, and of taking water away from other living beings to support solely human needs and desires, seems impractical and inappropriate. As one tribal leader explained:

Tiičám, the land, will only give so much. What portion do we give the salmon, if we sell this? What portion do we give to the bear, the hawk and the osprey? What do we give them? This is their water also. It is not just ours.⁶⁰

C. *The Important Role of Human Beings*

Traditional indigenous cultures have many concepts that we do not have words for in the English language.⁶¹ Some leaders of the Confederated Tribes of the Umatilla Indian Reservation have tried to bridge this language barrier by making an effort to explain some of these concepts in more detail. For example, according to one tribal leader, the Indian words⁶² that mean “Indian person” have a far broader meaning than referring just to human beings; and instead are complex terms that include the land, the water, traditional clothing, the Indian language, and more.⁶³ While the land, water, clothing, language, and the rest each have their own names as well, their names, too, include an understanding that all of these items are interconnected. As this tribal leader explained, “To look at the land, the whole thing, there are probably ten items that are inseparable in the Indian’s mind, in my Indian mind.

59. *Id.*

60. Oregon Public Broadcasting, *Umatilla Salmon Project*, OREGON FIELD GUIDE No. 504 (1994), <http://www.opb.org/programs/ofg/segments/view/1158> (statement by Louie Dick, Vice Chairman, CTUIR Bd. of Trustees and Longhouse leader).

61. See, e.g., RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 101–30 (1996).

62. The languages traditionally spoken by these Tribes included Umatilla, Walla Walla, Cayuse, and Nez Perce.

63. 1994 NEPA Scoping Hearing, *supra* note 53 (statement of Louie Dick, Vice Chairman, CTUIR Bd. of Trustees and Longhouse leader).

Water, air, sunlight, me the Indian person, and the land. . . . We are one.”⁶⁴

In our non-Indian culture, we have many laws intended to protect our environment; but what are we protecting the environment from? Ourselves?

In the traditional tribal perspective, Indians view people as having an important, and positive role within the living world. For example, I remember hearing one elder talking about how she and some other women had gone back to a traditional root digging area where they had not been allowed access for many, many years. She described how the roots there were not healthy any more, but instead were all crowded together, and were small and misshapen; and how she realized that the roots needed the Indian people to harvest some of them regularly to keep those roots healthy.

The traditional unwritten laws tend to emphasize both a recognition of the interdependence of creation, and the responsibilities that humans have because of this interdependence. As one tribal leader explained, “The Indian people have always had an inherent responsibility to the land, to the fish, to the water, to all things that walk upon it. For we are only a part of it. That inherent responsibility, . . . we accept when we call ourselves Indian people.”⁶⁵

In this viewpoint, humans are seen as stewards of the land. So instead of focusing on humans having a right to take and exploit water or other natural resources, as though human beings somehow were separate from the rest of life, the Tribes have focused more on understanding the intricate interrelationships in how the world was created, and have emphasized honoring and respecting ecological and other systems—as created. As one tribal member explained: “[T]raditional stewardship principles place an emphasis on protection, non-disturbance, and a recognition of the intrinsic attributes of landscapes, sites, and other tangible materials that exist within a cultural resource context.”⁶⁶

A key part of this special human responsibility is a duty to

64. *Id.*

65. *Id.* (statement of Jeff Van Pelt, Program Manager, CTUIR Cultural Resources Protection Program).

66. Phillip E. Cash Cash, *It Is Good That You Are Listening: The Dynamics of Native American Cultural Resource Management*, J. NW. ANTHROPOLOGY, MEMOIR NO. 6, *supra* note 52, at 118, 119.

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

D. Responsibilities Rather Than Rights

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

Unfortunately, the new non-Indian culture and its written laws conflict in many ways with the Tribes’ traditional unwritten laws. For example, to be able to protect water for the Indian people and to restore the rivers for the salmon and other living beings, tribes are expected to fight for their water rights under the federal reserved water rights doctrine.⁷⁰ In addition, under the states’ prior appropriation doctrine, water rights are viewed as property rights; so Indian people must fight for their “right” to “own” that water.⁷¹ Yet the concept of “owning” the water is repugnant to many Indian people. As one tribal leader commented:

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

67. See *supra* note 60 and accompanying text; *infra* note 84 and accompanying text.

68. See *infra* notes 80–81 and accompanying text.

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

70. See *supra* note 13 and accompanying text.

71. See *supra* note 14–22 and accompanying text.

Blue.⁷²

While every tribe is different, this perspective does not appear to be unique to the tribes of this region. For example, sometime in the mid-1990s I attended a law conference where representatives from the western states, the federal government, and many Indian tribes had gathered together to discuss key water rights issues. One of the panels was devoted to the idea that impoverished tribes, once they successfully were able to reclaim their water rights, might be able to earn some significant income by then selling some of that water back to non-Indians. When the question-and-answer portion of the session was opened to the floor, I remember elders from tribe after tribe from around the west taking the microphone and stating that the concept of owning the water, much less of selling it, was contrary to their beliefs.

The concept of claiming a “right” to water likewise is distasteful to many traditional Indian people. When we talk about rights, we tend to see ourselves as isolated individuals, and tend to focus on our needs in competition against the needs of others. When we talk about responsibilities, in contrast, we tend to see ourselves as part of a larger community, and tend to focus on our reciprocal obligations to others.

Now, however, the land and the water are no longer in a healthy state. As one tribal leader noted, “The Native Americans have always been users of the water. . . . We never disturbed the water. We never had these problems, but once the rest of the users start disturbing the water, you feel the impact the same as the Tribes do.”⁷³ The impacts on the water, and on the salmon, have ripple effects. As another tribal leader said, “If you take the salmon out of the river, the eagles will go, the hawks will go, the coyotes and the wolves and all things that survive on the carcasses of them salmon when they come up to spawn and complete their cycle of life.”⁷⁴ Because of these impacts, the Tribes frequently have made the difficult decision to assert their rights under the non-Indian laws in order to protect the land, the water, and the

72. 1994 NEPA Scoping Hearing, *supra* note 53 (statement of Louie Dick, Vice Chairman, CTUIR Bd. of Trustees and Longhouse leader).

73. *Id.* (statement of Jay Minthorn, CTUIR Bd. of Trustees).

74. *Id.* (statement of Jeff Van Pelt, Program Manager, CTUIR Cultural Resources Protection Program).

native ecosystems. As another tribal leader said:

That water in the river belongs there in the river, for the fish And I feel that the Tribes got to take a stand to protect that water and to get it back. Because if we don't make a stand to protect what is ours, what are we going to have to protect? We're just going to be Indians on a piece of paper. We won't have anything in our minds and our hearts to take care of; and nothing's going to take care of us.⁷⁵

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

I think that it's up to each individual person across the United States, to the north and to the south, and all of the people in the European nations, it's up to all of us to take notice of what is happening to our sources of water. And let us all come together and decide. Make that motion in your mind to talk to others about the water. It's important to life—all life forms.⁷⁶

For an important hearing regarding the Tribes' water rights,⁷⁷ another tribal elder wrote a prayer in the Nez Perce language, and then interpreted that prayer into English:

Our Maker. Listen. Our leaders, our people meet today to talk on things you have created, that was and could be in its last phase, never to return. Our talk is now of trust that we all plan together to save your gift to our rivers, the salmon, that you gave life to as Creator of all life. Our people need your guidance to convince others that the salmon need good running water, and a place to recreate their own kind. This we ask of our Maker.⁷⁸

75. *Id.* (statement of Thomas Morning Owl, CTUIR Tribal member).

76. *Id.* (statement of Emma Sheoships Farrow, CTUIR Tribal member).

77. *See supra* note 53.

78. 1994 NEPA Scoping Hearing, *supra* note 53 (statement of Alphonse Halfmoon, CTUIR Bd. of Trustees).

E. Time-Tested Laws

The traditional unwritten laws helped the Tribes maintain a good quality of life, for as long back as people here remember. As the Tribes' Columbia Basin Salmon Policy states, "Before the Treaty of 1855, our Tribes had a thriving fishing economy. We traded salmon up into Canada, down into California, and far to the East for goods from those regions. We were a wealthy, self-sufficient nation at that time."⁷⁹ As another tribal elder commented:

The Indians survived for thousands of years here. They didn't have to manufacture anything. They kept this country young. [The newcomers] called it "The New World," When you stop and think about it, they did; they kept it new. They had conservation. When you dig roots, you don't dig it all. When you pick berries, you don't pick it all. You leave some for the animals, and to be re-seeded so it will grow again.⁸⁰

These unwritten laws emphasize that all things are interconnected, and that human beings have a responsibility when using resources to do so in a sustainable, rather than an exhaustive manner. As one tribal leader noted, "Our elders teach us, when we take from our mother, the earth, we remember not in what we're taking, but we remember what we're leaving behind."⁸¹

A healthy environment always has been seen as crucial for survival. One tribal member commented, "[O]ne thing Native Americans rely upon is nature taking care of business. Not any government, not any human being, but nature itself taking care of business."⁸² As another tribal leader explained, "When we talk about those Treaty-reserved rights, we're talking about the Tribes' economy. And it's just as important to us as the dollar is to the

79. CTUIR COLUMBIA BASIN SALMON POLICY, *supra* note 57, § II.

80. TAMÁSTSLIKT CULTURAL INSTITUTE, *Cayuse, Umatilla & Walla Homeland Heritage Corridor: Audio/Driving Tour: Northeastern Oregon – Southeastern Washington* (2006), disk 2, track 6, at 5:10 (compact disk that includes excerpts of interviews and oral histories from several elders).

81. 1994 NEPA Scoping Hearing, *supra* note 53 (statement of Jeff Van Pelt, Program Manager, CTUIR Cultural Resources Protection Program).

82. *Id.* (statement of Brian Conner, CTUIR Tribal member).

non-Indian society.”⁸³

The duty to take care of the water and to share it with other living beings applies not only to the present time, but extends to protecting that water for future generations. As the introduction to the Tribes’ Water Code states:

Cúš [water] is tamánwit [Creator’s law] and we must teach and live tamánwit. We must share water with all living things. If we do not share, our greed will harm us. We must not look upon waqíšwit (life) as the šiyápu [non-Indian]. We must take care of the water. Seven generations in the past we had good water. Seven generations in the future we must give back the same that was lent to us by Anilá (the Creator); cold, clean water. So we think of fourteen generations of cold, clean, plentiful water. As we did seven generations back, so should we be able to do seven generations in the future, go to any stream or river and get cold clean water to drink.⁸⁴

Right now, here in the United States, we have at least two very different cultural viewpoints regarding water. The prevailing culture tends to view humans as separate from the rest of the living world, and focuses on ways for human beings to utilize water, while often not even considering the water needs of other living beings.⁸⁵ Many tribal cultures, in contrast, have always viewed humans as having an integral role within the cycles of life, and as having a duty to take care of water in its natural systems, and to share water with our fellow living beings. As one tribal leader said, “[T]hat is our purpose here—to take care of this land. If we don’t take care of this land, then it won’t take care of us. It’s a reciprocal kind of thing—that we need to take care of this land, and it will take care of us.”⁸⁶

Even today, for many Indian people, the sacred unwritten laws still supersede the written laws of the newcomers to this land. As one tribal leader said:

83. *Id.* (statement of William H. Burke, Treasurer, CTUIR Bd. of Trustees and a Chief).

84. CTUIR WATER CODE, *supra* note 49, at §1.01.

85. *See supra* notes 24–26, 37–38 and accompanying text.

86. 1994 NEPA Scoping Hearing, *supra* note 53 (statement of William H. Burke, Treasurer, CTUIR Bd. of Trustees and a Chief).

We're proud to be still in a remnant of our homeland. And our covenant with the Creator for giving us this place to live, and for the animals and the plants here agreeing to sustain us if we would protect them, transcends all of those modern jurisdictions. Clean air, clean water, clean land, a good place to live, those things are things we should all mutually embrace.⁸⁷

IV. NEW APPROACHES FOR A NEW ERA?

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

So, can tribal perspectives assist in this discussion?

A. *Our Rapidly Changing World*

Our world is changing rapidly and dramatically. Only a century ago, most people got around by horse or by foot; and it was only in 1908 that Henry Ford started manufacturing affordable cars.⁸⁹ Back then, the vision of people being able to fly, much less to fly across this large continent—or around the world—must have seemed like just a foolish dream, with the Wright brothers' first airplane flight accomplished only in 1903.⁹⁰ Historically, long-distance communications had to be transported physically, for instance by letter, until the 1860s, with the major breakthrough of the transcontinental and transatlantic telegraph systems that used

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

88. *See supra* note 1 and accompanying text.

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

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

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

Many of these changes, however, have come at a price. In 1950, the human population was around 2.5 billion, but by 2000 it had exploded to over 6 billion.⁹⁸ A shocking number of species of our fellow living beings have been driven into extinction, with more on the brink.⁹⁹ A couple of centuries ago, the fossil fuels that

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

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

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

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

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

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

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

98. DONELLA MEADOWS, JORGEN RANDERS & DENNIS MEADOWS, *LIMITS TO GROWTH: THE 30-YEAR UPDATE* 8 (2004).

99. The degree of species extinction that we are witnessing today is staggering and almost impossible to comprehend fully:

Since no one knows how many species there are, no one can know precisely how many are being lost. But there is no doubt that the number of species is decreasing rapidly. Most biologists do not hesitate to say that a “mass extinction” is under way. Ecologists claim there has not been such an extinction wave since the events

took eons to accumulate in the Earth's surface still lay there largely undisturbed; but since the dawn of the industrial revolution, humans have extracted and burned ever-increasing amounts of these fossil fuels to produce the energy that powers our new lifestyle,¹⁰⁰ with huge quantities of that carbon ending up in the Earth's atmosphere.¹⁰¹ There was a time, even within my memory and experience, when a person could drink from a stream in a wild area, and not have to worry about contracting a disease. A century ago, before the creation of mega-dams, major rivers around this country, like the Colorado River or the Columbia River, ran free;¹⁰² and before deep groundwater pumping was technologically feasible, aquifers such as the Ogallala seemed like an endless supply of clean, pure water.¹⁰³

Those who came before us worked hard and made many sacrifices so that we, their descendants, would have better lives. They succeeded, and we enjoy many luxuries today that they could only dream about. Unfortunately, many of these advances had unintended consequences; and the work left for our generation in

that eliminated the dinosaurs at the end of the Cretaceous age 65 million years ago. . . . Of the large animals that are relatively well studied, scientists now estimate that 24 percent of the world's 4,700 mammal species, an estimated 30 percent of the 25,000 fish species, and 12 percent of the world's nearly 10,000 bird species are in danger of extinction. The same is true for 34,000 of the 270,000 known species of plants.

Id. at 84–86 (citations omitted).

100. In 1800, the annual world coal output stood at 15 million tons; by 1900, it had risen to 700 million tons per year—an increase of over 4,000 percent. In the last two years of the 19th century (1899-1900), the world used more coal than it had in the entire 18th century. RICHARD HEINBERG, *THE PARTY'S OVER: OIL, WAR AND THE FATE OF INDUSTRIAL SOCIETIES* 53 (2003). “Between 1970 and 2000 the world economy burned 700 billion barrels of oil, 87 billion tons of coal, and 1,800 trillion cubic feet of natural gas.” MEADOWS, RANDERS & MEADOWS, *supra* note 98, at 89.

101. “From the years 1750 to 2000, the concentration of [carbon dioxide in the atmosphere] increased by 31%, and that of [methane] rose by 151% These rates of increase are unprecedented. Fossil-fuel burning released on average 5.4 [metric gigatons of carbon per year] during the 1980s, increasing to 6.3 [metric gigatons of carbon per year] during the 1990s.” Intergovernmental Panel on Climate Change, *CLIMATE CHANGE 2001: SYNTHESIS REPORT* 44 (2001), *available at* http://www.grida.no/climate/ipcc_tar/vol4/english/pdf/q1to9.pdf (uncertainty ranges omitted).

102. *See, e.g.*, PHILIP L. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* (1981); GEORGE W. AGUILAR, SR., *WHEN THE RIVER RAN WILD! INDIAN TRADITIONS ON THE MID-COLUMBIA AND THE WARM SPRINGS RESERVATION* (2005); KATRINE BARBER, *DEATH OF CELILO FALLS* (2005); WILLIAM DIETRICH, *NORTHWEST PASSAGE: THE GREAT COLUMBIA RIVER* (1995).

103. *See, e.g.*, GLENNON, *supra* note 16, at 23–27, 32–33.

large part may be to address the unanticipated problems that we inherited.

B. Trying to Codify Unwritten Laws

When the miners and settlers came to the western United States about a century and a half ago, the existing water laws of that time period (primarily the riparian doctrine, with its concept of sharing the water) did not address the types of desires that these newcomers had for using this land that they had just discovered. These intrepid individuals had the courage to discard the water laws of their time, and to create a new set of laws—the prior appropriation doctrine. This innovative understanding of the human relationship to water, that viewed water as an individual private property right, was a revolutionary new concept, and one that met their needs in that era.¹⁰⁴

In this new era that we find ourselves entering, do we need similar courage to re-think the water laws of our time, and to consider whether they still fit our needs of today?

Historically, cultures around the world have had their own water laws and customs that have guided the relationship of humans with water.¹⁰⁵ As increasingly we are faced with harsh realities regarding the consequences—both to humans and to non-humans—of viewing water as individual private property, the ancient wisdom that emphasized taking care of the water and sharing it begins to make a lot of sense.

If the Human Right to Water were to include an explicit protection of ecosystems, what would that law look like?

If it were based upon tribal unwritten laws, it likely would expressly recognize the interdependence of life,¹⁰⁶ and the importance of honoring natural ecosystems and of sharing water with other living beings.¹⁰⁷ It also likely would expressly note the unique role that human beings have in taking care of the water;¹⁰⁸ and given the current degradation of water quality and natural systems, it likely would expressly state that human beings have a

104. See, e.g., *supra* notes 14–16, 24–26 and accompanying text.

105. See, e.g., Richard A. Hughes, *Pro-Justice Ethics, Water Scarcity, Human Rights*, 25 *J. L. & RELIGION* 521, 528–30, 535–36, 539 (2010).

106. See, e.g., *supra* notes 49, 56, 62–64, 74 and accompanying text.

107. See, e.g., *supra* notes 50, 58–60, 66, 80–81, 84 and accompanying text.

108. See, e.g., *supra* notes 48, 69, 75–76, 86–87 and accompanying text.

responsibility to fix these problems as quickly as possible.¹⁰⁹ In addition, it might include a process for making decisions that would protect and restore good quality water and healthy ecosystems for at least the next seven generations.¹¹⁰

Of course, one problem with attempting to codify a whole body of unwritten laws into a concise written law is that written laws must be enforced by force. Written laws are subject to being ignored, having loopholes created, or otherwise being evaded.¹¹¹ Unwritten laws, in contrast, are enforced from the heart—from people understanding the reason behind those laws, and complying with them because they want to do so.

If we truly want to restore and protect our ecosystems, we may need more than a change in laws. Instead, perhaps what we really need is a change of heart.

C. *More Valuable than Money?*

Human knowledge and technology are at an all-time peak in the history of our species. Unfortunately at the same time, however, we have become increasingly disconnected from the rest of the living world.

Because of our wonderful technology, it has become quite easy for us to be quite oblivious to the impacts of our actions. When we flush a toilet, the contents magically disappear. We can push a few buttons, and the temperature of our environment adjusts to meet our desires. We can jump in a car, and within a few hours can travel hundreds of miles. We can instantly communicate, obtain information, or entertain ourselves using a wide variety of battery-operated electronic devices. We do not see the impacts of

109. See, e.g., *supra* note 84 and accompanying text.

110. See, e.g., *id.*

111. See, for example, ROSS, *supra* note 61, at 90–91, discussing this issue in the criminal justice setting:

I frequently watch Aboriginal people shake their heads in disbelief at how often Western countries fall back on imposed ‘Codes of Minimum Behavior’ backed up by the threat of punishment. The [Aboriginal] belief seems to be that unless the spirit of the individual is changed, such codes will only anger them by forcing them to do what they don’t want to do in the first place. Then, once angered, they will try to beat the codes any way they can. Further, they will never go *beyond* the bare, legislated minimums. Most importantly, they are likely to take their anger out on precisely the people whom the codes were meant to protect, using ways that have not yet been legislated.

Id.

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

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

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

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

D. Our Special Responsibility as Human Beings

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

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

responsibility to protect and restore the vitality of the rest of our living world.

We live in such an important and dynamic era; and all of us who are alive today face difficult questions that simply do not have easy answers. Our ancestors, however, had to make similar tough decisions; and fortunately for us, they were willing to work hard and to make many sacrifices to make this world a better place for the generations that followed. Are we willing to do the same?

With the United Nation's recent declaration of a Human Right to Water, maybe people around the world will begin to discuss this question of whether it should include ecosystem protection. For some cultures, like the traditional culture of the Confederated Tribes of the Umatilla Indian Reservation, taking care of the land, the water, and our fellow living beings has always been a key human responsibility.¹¹³ No one culture has all of the answers; but as people begin to envision a new Human Right to Water, perhaps the ancient and time-tested tribal perspectives can be useful.

As the people in the Umatilla Basin found, when people sit down together and share their perspectives and their wisdom, miracles can happen—even in the bitterly contentious arena of western water law.¹¹⁴ While it may not be possible to codify tribal unwritten laws in a way that fully captures their underlying intent,¹¹⁵ just the process of discussing the important role that water plays in the cycles of life, and discussing the special responsibilities that human beings have in this beautiful world of ours, may change our hearts. In the end, a change of heart may be even more powerful than a change in our laws.

113. See *supra* § III.

114. See, e.g., *supra* § II.C.

115. See, e.g., *supra* § III.A. (discussing the unique strengths of unwritten laws).