

**IMPLEMENTING
THE HUMAN RIGHT TO WATER
IN THE WEST**

CONFERENCE REPORT

WILLAMETTE UNIVERSITY

COLLEGE OF LAW

CENTER FOR SUSTAINABLE COMMUNITIES

SALEM, OREGON USA

FEBRUARY 3 – 5, 2011

DEDICATION

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

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

Kenbe red.

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ACKNOWLEDGEMENTS

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

Generous financial support allowed us to bring together an incredibly talented group of participants willing to spend three days laboring on this report. Some financial support was drawn from the first Faculty Research Fellowship grant awarded by the Center for Sustainable Communities awarded to Professor Susan Smith in 2009. However, Willamette University College of Law, under the enlightened leadership of Dean Symeon Symeonides, underwrote the vast bulk of the conference costs.

The success of the working group concept, central to the conference’s design, was wholly dependent on the facilitative skills and expertise provided by working group moderators: Gail Achterman, Joe Bowersox, Reed Marbut, Don Negri, Josh Newton, Gwynn Skinner, and the members of the Conference Committee.

The editorial board and members of the Willamette Law Review and the Willamette Journal of International Law and Dispute Resolution (WJILDR) made critical contributions to the success of the conference. Journal members edited and published the vast bulk of conference papers, served as rapporteurs for the plenary sessions and working groups, and provided logistic support for the conference. Special thanks are due to Tara Harsch, the Symposium Editor of the Willamette Law Review, for coordinating the publication of the first volume of conference papers virtually at the same moment as the conference and coordinating the law review volunteers handling the logistics of the conference; Terrence Green, the Editor-in-Chief of the WJILDR, for publishing the second volume of conference papers emerging from the conference; Josh Weber, the Editor-in-Chief, and Jennilyn Aston, Managing Editor, of the Willamette Law Review, 2011-

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To all of those named and unnamed, thank you.

Susan Lea Smith,
Conference Chair

TABLE OF CONTENTS

Dedication	2
Acknowledgements.....	3
Table of Contents.....	5
Executive summary.....	6
Part I: Conference summary.....	9
Conference design.....	10
Conference discussion and deliberations.....	12
Part II: Plenary sessions report.....	23
Part III: Working group reports.....	40
Group 1: Defining and Enforcing the International Human Right Water.....	41
Group 2: Defining the Human Right to Water in the West: Protecting Ecosystems and Livelihoods.....	63
Group 3: How Western Water Laws Currently Secure the Human Right to Water.....	82
Group 4: Governance and the Role of Economics in Implementing the Human Right to Water.....	97
Conclusion.....	105

ATTACHMENTS

A. Abstracts of conference papers.....	107
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EXECUTIVE SUMMARY

2010 was a landmark year for the international human right to water and sanitation. In July, the United Nations General Assembly recognized the right to safe and clean drinking water and sanitation as a human right essential for the full enjoyment of life and all other human rights. The General Assembly resolution was followed closely by the United Nations Human Rights Council's declaration in September 2010 that the right to safe drinking water and sanitation is a binding legal obligation under a number of existing human rights treaties, solidifying the right as an enforceable and binding legal obligation under existing international law.

However the human right to water and sanitation may be defined or elaborated at the international level, ultimately it must be implemented through national, state, and local law and policy. Thus, in February 2011, water professionals, scholars, policymakers, and stakeholders gathered to begin discussions of the issues associated with implementing the human right to water in the western United States. The gathering gave interested parties in the western United States an opportunity to participate in the international discussion and began to foster a more focused regional dialogue on the human right to water in our particular context.

Over two dozen academic papers prepared for the conference served as an intellectual foundation for the conference's work. Most papers were presented in plenary and workgroup sessions during the conference and discussions about those papers are contained in either Part III Plenary Session Reports or Part IV Work Group Reports. In addition, conference papers are summarized in Appendix A along with citations to where the full text may be found.

Plenary presentations framed many of the issues. Congressman Earl Blumenauer discussed the federal role in water resources management, indicating that the most useful role the federal government could play was using subsidies to encourage agricultural water conservation efforts. Secretary-Treasurer Jodie Calica of the Confederated Tribes of the Warm Springs discussed the penultimate priority of water rights held by the Native-American tribes throughout the Columbia basin under the prior appropriation legal system. He declared the intent of the tribes to

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

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

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

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

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

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

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

whether the right should be defined to include protection of essential ecosystems.

5. Whether Anglo-American law originally recognized a human right to water. This discussion is significant because it bears on whether the human right to water can be recognized and implemented in a way that changes existing water allocations without the government incurring liability for compensation under the Fifth Amendment of the United States Constitution. Conference participants were divided on this question.

6. Whether water is a human right or a commodity. Conference participants agreed that it is a human right and that fees for water can be imposed consistent with that right. Overall, the participants agreed that this polarized discussion misses the point: water is both a human right and a commodity depending upon the use being made of the water.

7. Whether existing law in western states is adequate to protect the human right to water if that right is limited to drinking, cooking, and hygiene. Conference participants agreed that existing law is adequate at the moment, but as water scarcity grows more profound, it may become inadequate.

Most of our discussions focused narrowly on water as opposed to sanitation. However, that emphasis simply captures our regional reality of water scarcity and conflict over water supplies. We recognize the importance of sanitation in the international context, but given the universal availability of sanitation in the western United States, it did not play a prominent role in our discussions.

Conference participants were also surprised about the wide consensus on an appropriate definition of the human right to water and suggested that legislative efforts to include it as a super-preference within the prior appropriation system should begin.

Although the conference gathered a broad cross-section of those interested in water resources issues, the conference participants acknowledge that this is just the beginning of the regional dialogue. They encouraged Willamette University to continue sponsoring discussions on this topic.

Susan Lea Smith, Conference Chair

2011]

RIGHT TO WATER: CONFERENCE REPORT

9

PART I
CONFERENCE SUMMARY

THE CONFERENCE DESIGN

The conference was designed to bring together a substantial group of scholars, policymakers, and stakeholders to discuss issues associated with implementing the human right to water in the western United States and to foster an on-going dialogue on those issues.

To assure that the discussions could be shared with a wider audience, the working conference was designed to create a report considering:

- How should the international human right to water be defined?
- How has the international human right been implemented in other nations?
- How should the human right to water be defined in the western United States?
- Does or should the regional understanding of the human right to water include a right to water necessary for subsistence livelihoods highly dependent on the use of water such as agriculture or commercial fishing?
- Does or should the regional understanding of the human right to water include a right to water necessary for the protection of ecosystems upon which human beings rely?
- How does the western United States currently implement the human right to water?
- How should the western United States implement the human right to water—what is the appropriate role of economic incentives in implementation of the right?
- What are the appropriate governance mechanisms to assure implementation of the human right to water?

The conference discussions and this conference report are one method by which interested parties in the western United States have been able to participate in the international discussion on the human right to water. The discussions and report seek to inform others about our regional problems and perspectives and have fostered a focused regional dialogue on the human right to water.

The conference committee began preparations in the Fall of 2009; in May 2010 the committee issued a call for papers to academics and practitioners in diverse disciplines associated with water and human rights, including law, economics, politics,

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

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

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

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

First, each working group determined issues to discuss in order to address the group's key questions. Arguably, the conference's most important work was articulating the issues and questions surrounding implementation of the human right to water—trying to get the questions right. Next, each group heard presentations of conference papers most relevant to their key questions. Then each group discussed the issues they had identified. Finally, the groups drafted reports addressing their issues and answering their key questions. Moderators of the working group sessions presented the reports during the final plenary session to allow the entire conference to discuss working group deliberations and conclusions.

Rapporteurs provided by the Willamette Law Review and the Willamette Journal of International Law and Dispute Resolution captured conference discussions, both in the working groups and plenary sessions. After the conference concluded, the conference chair circulated reports on the working groups and plenary sessions to all conference participants for comment. The chair also circulated the conference summary for comment. This final conference report benefitted enormously from insightful comments provided by participants after the conference.

The Willamette Law Review and the Willamette Journal of International Law and Dispute Resolution are publishing the conference papers in this and two other volumes.

A. Significant Discussions and Deliberations

It is impossible to convey the entire substance of conference discussions or fully describe the deliberations that occurred in both working groups and plenary sessions. However, the following report attempts to capture the most important discussions and deliberations.

The conference participants represented a wide variety of disciplines, viewpoints, and interests. Participants included engineers, medical doctors, economists, political scientists, students, and lawyers associated with private firms, non-governmental organizations, government, and academia. A broad range of contemporary American ideological perspectives found a voice at the conference, including libertarian, conservative, neo-liberal, socialist, and everything in between.

This summary, the plenary group report, and the working group report seek to convey the perspectives expressed, illuminate the debates that occurred, and identify areas where the participants discovered consensus.

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

• **The international right to water and sanitation is binding and enforceable as to State parties to various international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), but the United States is not a party.** While some conference participants questioned whether the 2010 UN General Assembly and Human Rights Council actions are sufficiently definitive, most conference participants understood the 2010 UN Human Rights Council resolution to recognize that the international right to water and sanitation is binding and enforceable as to state parties to various international instruments such as ICESCR.

• **The human right to water and sanitation is probably not yet customary international law but could attain that status relatively soon.** The 2010 Human Rights Council resolution states that a variety of multilateral treaties and other international instruments have language entailing obligations by member States regarding access to water and sanitation. The ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the

Convention on the Rights of Persons with Disabilities all impose such obligations on member States. Arguably, the international human right to water and sanitation has been recognized and protected by international law long before the 2010 UN General Assembly resolution and the 2010 Human Rights Council resolution. But it appears that explicit recognition of the right is limited to Comment 15 interpreting the ICESCR and the two recent UN actions. The explicit recognition of the human right to water and sanitation has probably been too recent for the right to have ripened into customary international law. However, in recent years significant rights, such as the right to family, have ripened into customary international law quite rapidly. Given the level of international concern and the unanimous support of the UN Human Rights Council, the human right to water may enjoy similarly rapid recognition as customary international law.

• **The United States is likely not currently required to honor the human right to water and sanitation because it has refused to become a party to international treaties that form the basis for that right and the right has not yet ripened into customary international law.** The 2010 UN Human Rights Council resolution that recognizes the human right to water and sanitation is “derived from” the right to an adequate standard of living included in the ICESCR and “inextricably related to the right to the highest attainable standard of physical and mental health” contained in the ICESCR, as well as “inextricably related” to the right to life and human dignity embedded in other international instruments. Since the United States has not ratified or acceded to the ICESCR (or other international conventions and instruments that might recognize the human right to water and sanitation), it does not have obligations as a member State. Therefore, until either (1) the human right to water is recognized as customary international law or (2) the United States ratifies the ICESCR and Congress enacts implementing legislation, it is not bound to honor the human right to water and sanitation. Federal courts in the United States are unlikely at this time to recognize the human right to water and sanitation as part of the federal common law, which is the device by which that right would become enforceable in the United States. Even assuming that right does eventually become customary international law, American courts are not necessarily bound to use international decisions to establish

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

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

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

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

- **Western states are currently free to define the human right to water and sanitation as they desire.** If the human right to water and sanitation is ultimately recognized as part of customary international law and incorporated into federal common law, by virtue of the supremacy of federal law, the internationally defined right would provide the floor of protection accorded to the human right to water. However, western states would retain their sovereign ability to provide greater protection than the international minimum.

3. The human right to water and sanitation as articulated in the UN Human Rights Council is narrowly conceived to require only access to “safe drinking water.” At a minimum, that right should be defined to include reasonable and affordable access to water of sufficient quantity and quality for

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

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

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

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

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

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

these infrastructure expenditures have been dramatically cut. Increased national investment in water infrastructure is necessary.

- Access may differ based on the situation, and **the access required is only reasonable access.** In a region where no infrastructure exists, even for community distribution, individuals cannot expect that the government will immediately provide individual household distribution. However, governments should work towards the goal of providing household distribution of clean water and sanitation facilities in individual households.

- **Access must be to a sufficient amount of water** to meet personal uses in a culturally appropriate manner that allows the individual to live with dignity. The amount of water required depends upon custom and cannot be prescribed as a universal amount such as 50 liters per day. For example, additional water may be required for sanitation where the custom is washing. Additional water may also be required for individuals who live in households relying on flush toilets; however, this water need not be of the same quality as water for personal uses.

- **Access must be to water of sufficient quality** that the water is safe for personal uses such as drinking, cleaning, and hygiene. Governments should avoid imposing regulatory requirements on drinking water supplies unrelated to assuring that water supplies are safe. For example, specifying a particular type of treatment technology rather than allowing the water supplier to meet a performance standard may impose undue burdens and costs.

4. The conference considered whether the human right to water and sanitation should be more expansively defined to include ecosystems or livelihoods.

- **Human life depends upon maintaining aquatic ecosystems and the ecosystem services they provide.** These services include pollutant filtering, groundwater recharge, flood control, fish and wildlife habitat, and carbon storage and sequestration. In order to sustain the integrity of these critical ecosystems, water must be left in streams and wetlands must be maintained. Arguably, the human right to water and sanitation should include water of sufficient quality and quantity to maintain those critical ecosystems and ecosystem services upon which human life depends.

- **Similarly, in some regions, kitchen gardening and subsistence farming are primary sources of livelihoods and**

food. These activities often require irrigation water. Arguably, the human right to water and sanitation should include access to water of sufficient quality and quantity to allow kitchen gardens and subsistence farming. The extension to livelihoods is particularly justified given the connection the United Nations Human Rights Council has forged between the human right to water and sanitation and an adequate standard of living.

- **Conference participants rejected the notion of expanding the definition of the human right to water and sanitation to include water use for subsistence livelihoods because of the danger of abuse by those seeking to engage in large-scale agricultural enterprises or commercial fishing.** Conference participants recognized that Americans engage in and depend on subsistence farming for their livelihood in many regions of the United States. Even in a developed country such as the United States, expansion of the human right to water to include subsistence farming might be warranted. Some conference participants were concerned that inclusion of livelihoods in the definition of the human right to water and sanitation actually weakens the human right to water and sanitation. Expansion of the right to include livelihoods might allow claims of entitlement by virtually any person whose livelihood was related to water. Other participants believe that principled lines can and should be drawn between water for subsistence farming/gardening and water for commercial farming/recreational gardening. Overall, there was a strong sense that the right should not be defined to include water use for subsistence livelihoods.

- **Conference participants recognized that ecosystems critical to human life receive inadequate protection under existing law.** Conference participants recognized that human life depends upon maintaining the integrity of ecosystems in order to sustain the essential ecosystem services they provide. Conference participants also recognized that existing laws in the United States, as currently implemented and enforced, fall short of protecting critical in-stream flows; protecting wetlands; and providing water quality adequate to protect fish, other aquatic life, and the people who consume them.

- **Conference participants explored the possibility of using an expanded human right to water as a tool to secure improved protection of critical ecosystems and essential ecosystem services.** Recognition of a human right to water that prioritized

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

• **Conference participants differed on whether the legal concept of the human right to water would improve protection of aquatic ecosystems.** Conference participants recognized that western states have a number of legal tools available to protect in-stream flows, including (1) constraining consumptive uses by the core limitation on prior appropriation of beneficial use, (2) enforcing common law prohibitions against waste, (3) using the public trust doctrine to compel the government to protect public rights in water, (4) creation of in-stream water rights, (5) recognition that public ownership of water allows reasonable regulation in the public interest of a government issued right to use water or "water right," and does not require compensation, and (6) reexamination of whether water rights are property entitled to Fifth Amendment just compensation requirements. Regulatory requirements under the Clean Water Act and the Endangered Species Act can also be used to protect in-stream flows. Additionally, private conservation trusts organized to protect in-stream flows have shown that purchasing or leasing private water rights can protect some of the most critical in-stream flows. Similarly, Native American tribes have treaty rights and reserved water rights that they use to protect in-stream flows. These legal devices have been effective to varying degrees in the American West, but they have required enormous expenditures of time and resources with uncertain results.

• **Western states may be prepared to recognize a narrowly defined human right to water and sanitation but may not be ready to reconsider whether the prior appropriation system is the best system to set priorities for use of public water.** The prior appropriation system originated more than 150 years ago in western mining camps. The fundamental challenge in western states has been adapting the prior appropriation doctrine with its absolute "first in time, first in right" priority system to the realities of the 21st century. Western states have adapted the prior appropriation doctrine by creating municipal preferences, domestic well exclusions, and other exceptions. Recognition of a "super-preference" for a narrowly-defined human right to water in

allocating water is wholly consistent with this trend. However, western states may not be prepared to recognize a right if the definition is expanded to include ecosystems.

5. The conference discussed whether Anglo-American law originally recognized a human right to water. This discussion is significant because it bears on whether the human right to water can be recognized and implemented in a way that changes existing water allocations without the government incurring liability for compensation under the Fifth Amendment of the United States Constitution.

- **American water law scholars at the conference disagreed whether Anglo-American law has previously recognized a human right to water.** For example, in the plenary sessions Professor Finkelman outlined research concluding that a human right to water has never been recognized in our law. Professor Dannenmaier, on the other hand, cited a number of cases suggesting that the right to use water for sustenance has always been embedded in our law.

- **The historical treatment of the human right to water may have Fifth Amendment Takings Clause implications.** This debate about historical recognition affects whether state legislatures and courts may recognize a human right to water, and change water allocations based on that right without compensating those whose water use allocations (or “water rights”) are impaired by the changes. If a regulation is consistent with pre-existing principles of property and nuisance law, it does not deprive the water-right holder of property without just compensation.

- **The human right to water may be embedded in existing water law systems in a variety of ways.** The right can be conceived of as the key foundation justifying state ownership of water, as a permissible expression of the state’s authority to allocate water as it deems fit, or as incident to its public trust duties. Each of these concepts may be sufficient for a state to recognize the human right to water and implement that right by changing existing water allocations without compensation to existing water users.

- **There are historical examples in the United States where state courts and legislatures have made fundamental changes in water allocation laws without being required to compensate those whose water allocations were affected.** For example, in

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

6. The conference discussed whether water is a human right or a commodity. Conference participants agreed that it is a human right and that fees for water can be imposed consistent with that right. Overall, the participants agreed that this polarized discussion misses the point: water is both a human right and a commodity depending upon the nature of its use.

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

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

- **Public or community rights in water arguably include (1) water to protect essential ecosystem services and to preserve the integrity of aquatic ecosystems, (2) water for aesthetic, spiritual, and religious purposes, and (3) water necessary to provide subsistence livelihoods.** However, the notion of a human right to water suggests an individual right whereas not all of the other rights are so individualized.

- **Public or community rights need not be recognized under the rubric of the human right to water.** There are other legal doctrines that may and should be used to protect those rights.

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

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

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

- **Water allocation laws provide preferences for domestic use and municipal use that can be used to satisfy personal uses protected by the human right to water.** Domestic use and municipal use preference are actually over-inclusive and are not well-tailored to protect the most critical personal uses. Indeed, they may impair protection of critical personal uses by allowing extremely low priority uses such as golf course irrigation and swimming pool filling.

- **With limited exceptions, these laws are currently adequate to assure that people in the western United States enjoy water and sanitation services far beyond that necessary to meet the human right to water.** The exceptions are (1) small public water systems often struggle and sometimes fail to meet safe drinking water standards, (2) in some respects, the Clean Water Act fails to eliminate discharges that individually or cumulatively pose a risk to human health, and (3) public utility regulators do not assure that the poor will receive water and sanitation services.

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

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

Susan Lea Smith, Conference Chair

2011]

RIGHT TO WATER: CONFERENCE REPORT

23

PART II
REPORT ON PLENARY SESSIONS

PLENARY SESSION REPORT

Reporters: Andrew Reinen and Anthony Geltosky

THURSDAY, FEBRUARY 3RD

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

INTRODUCTORY REMARKS

Dean Symeon Symeonides, Willamette University, related his personal experiences growing up on an island in Greece and dealing with water scarcity; he emphasized that rain and water made him happy and joyful.

Professor Robin Morris Collin, Director, Sustainability Certificate Program, Willamette University, outlined the anticipated impacts of climate change on water availability in Oregon based on the Executive Summary of the Oregon Climate Change Impact Study. She spoke of the importance of water; specifically she addressed its affect on humans and ecosystems. Professor Morris Collin recommended *Moral Ground—Ethical Action for a Planet in Peril*, edited by Kathleen Dean Moore, as a source of ethical inspiration.

Professor Susan Lea Smith, Director, Law & Government Certificate Program, Willamette University, emphasized that the goal of the conference was to bring people together to discuss the human right to water and western water laws. She explained that the plenary sessions are a prelude to working group discussions, in which conference participants explore issues in implementation of the human right to water in the western United States. Professor Smith expressed her desire that the conference proceedings help the international community understand the West's unique water laws, and the experiences of other countries may teach western states how to change their laws to better implement the human

2011]

RIGHT TO WATER: CONFERENCE REPORT

25

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

Setting the Stage: First Plenary Panel

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

- **Professor Elizabeth “Betsy” Burleson:** Visiting Professor; University of Oregon, Professor; formerly from University of South Dakota School of Law and soon to be at Pace University in New York;
- **Dr. Bruce Aylward:** Ecosystem Economics; Operations Manager, Deschutes River Conservancy; former Senior Advisor, World Commission on Dams; and
- **Professor Reed Benson:** University of New Mexico School of Law; former Executive Director of WaterWatch.

SUMMARY:

Professor Burleson shared her international lawmaking experiences and perspective on the human right to water. She gave various examples of how the international community and international treaties have approached the human right to water. Professor Burleson identified vocabulary differences as a key obstacle to talking about water rights in the international context. She noted that a hot issue is whether water is a human right or a commodity. Each term is loaded: the connotations vary by group. Professor Burleson hoped that in 2012, international treaties and documents will be integrated to achieve a more cohesive international policy towards the human right to water. She also mentioned that sanitation is one of the biggest issues facing developing countries; the impact is greatest on women and young girls. Increasing access to sanitation would free up girls and allow them to consistently attend school.

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

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

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

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

paradigm, which recognizes a moral imperative to allocate water to provide access for essential uses. It may break the impasse between utilitarian and property rights advocates.

SUMMARY OF KEYNOTE ADDRESS OF
PROFESSOR GABRIEL ECKSTEIN
Texas Wesleyan School of Law;
Director, International Water Law Project

The human right to water is a global issue largely unnoticed in the United States. Champions of the human right to water are now introducing the issue to a wider audience.

Within the human right to water movement there are several competing interpretations of what the human right to water entails. Advocates of a capitalistic economic approach argue privatization and commoditization of water will best direct water to where it is needed. Other people advocate for a human rights approach to water allocation. A human rights approach has several difficulties. First, a rights approach may not be broad enough to prioritize water uses appropriately. Human rights focus on rights fundamental to *human* life and dignity; other species and critical ecosystem uses may not be sufficiently protected. Second, positive human rights such as the human right to water and sanitation are the responsibility of governments rather than individuals and corporations. Third, the remedies for violating this right are uncertain. When the government fails to protect civil and political rights, the courts provide recourse. But we do not know what the recourse is if a government fails to provide adequate water.

The following issues are central to debating the human right to water:

- 1) Should the human right to water obligate the government to provide water directly to the tap?
- 2) Should the human right to water include an unlimited supply or a moderated amount?
- 3) Should the human right to water require a certain standard of water purity?
- 4) Should the human right to water universally apply to all people, regardless of country, culture, and geographic regions?

These challenging issues can be addressed. The first step is to recognize access to water as a human right. The benefits of

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

The United States must address water issues through a national water policy. This policy must address several issues. First, Americans should have access to water. Census figures indicate that two million Americans lack access to water and sewage in their homes. Second, the United States does not have sufficient information on the extent of aquifers and water supply and the federal government should invest in research and monitoring to fill these data gaps. Third, the costs associated with maintaining our water supply, distribution, and treatment infrastructure must be budgeted. Although it is difficult, the United States must resolve these issues and prioritize a water agenda. Lastly, the United States must join in the international debate concerning the human right to water.

FRIDAY, FEBRUARY 4TH

Continuing the Discussion: Second Plenary Panel

In the second plenary panel, the four panelists identified key questions about implementation of the human right to water in the West. John Clyde introduced:

- Professor Paul Kibel, Golden Gate University Law School;
 - Mike Grainey, former Director, Oregon Department of Energy;
 - Professor Paul Finkelmann, Albany University Law School;
- and
- Professor Eric Dannenmeier, Indiana University Law School.

Professor Paul Kibel presented a case study of the application of the public trust doctrine; California applied the doctrine in the Bay Delta to address non-consumptive in-stream uses of water impact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SATURDAY, FEBRUARY 5TH

FINAL PLENARY SESSION: PRESENTATION AND DISCUSSION OF WORKING GROUP REPORTS

Reports from each of the working groups were presented and discussed by all participants at the final plenary session.

WORKING GROUP #1:

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

Working Group #1 was charged with defining and discussing enforcement of the international human right to water. The group considered the nature of the right, protection of ecosystems under the definition, the domestic and international role of government, and the role, if any, spirituality and religion may play in defining the right. The group constructed a working definition for the international right to water, and developed a plan for implementation and enforcement of the right.

The group proposed that the following elements define the international human right to water:

- reasonable access to affordable and safe water to live in dignity
- the amount guaranteed shall be the necessary amount for drinking, cooking, and hygiene
- adequate infrastructure must be developed to provide water
- ecosystems must not be destroyed in the process of providing access to water

The group's findings and recommendations were as follows:

The first step towards enforcement of the right is for the United Nations to issue a more precise definition of the human right to water and sanitation. In order to garner international support, the definition should be announced in an international declaration. Next, the United Nations Human Rights Council should form a committee to implement the right, hear complaints, and offer assistance. Countries sharing trans-boundary waters should form or reform their treaties with their neighbors to share water in a manner that ensures sustainability and the human right to water. All countries would be obligated to protect these rights and make achieving them a highest priority.

The United States should engage in national planning to assure implementation of the right. Each state should develop and implement a "lifeline" policy for those in need of water. These lifeline systems would be enforced by federal statute. Each state shall properly fund a regulatory structure to provide oversight over the scheme.

PLENARY SESSION RESPONSE TO THE GROUP 1 REPORT:

Comments on the Group 1 report noted:

A federal “lifeline” policy needs to be formulated in a manner that meets the Tenth Amendment limitation on federal action affecting state government operations.

The definition should perhaps address whether the human right to water is an individual right, collective right, or perhaps both.

Assuring policy transparency and public access to information about water needs to be an integral part of the human right to water.

The human right to water must accommodate people living in different areas; there are places where access is difficult. As formulated by Group 1, there is a duty to provide access and that access must be “reasonable.” Reasonable access includes culturally appropriate access. Governments may adapt the access provided to meet different physical, cultural, and social conditions.

WORKING GROUP #2***Defining the Human Right to Water in the West: Protecting Livelihoods and Ecosystems:***

Presented by Gail Achterman

Working Group #2 was charged with examining whether the human right to water in the western United States should be more broadly defined to protect livelihoods and ecosystems.

The group formulated four discussion questions:

1) How do you define the right to water?

The consensus among the group was that water law should include the right to sufficient access to water for drinking, cooking, and hygiene.

The consensus was that the definition should not be expanded to include water for livelihoods, including water-dependent subsistence livelihoods. The definition should be kept narrow

2011]

RIGHT TO WATER: CONFERENCE REPORT

35

because a broader definition presents line-drawing problems that would be difficult to resolve.

The group split on whether sustaining ecosystems and ecosystem services should be included in the human right to water. Some members thought ecosystem protection was essential to providing water services to people. However, other group members felt that defining the right to water to include protection of ecosystems was overly broad and that sustaining ecosystems is only one of many tools that can be used to provide for clean water.

2) If the right to water exists, is it currently guaranteed under the laws of the western United States, and is that guarantee being met?

The group determined that the right to water is not guaranteed, but it is generally being met in the western United States.

3) Who holds the right? Who does it obligate?

The group considered it is an individual right that obligates the Government, but the individual right has to be limited in times of scarcity to meet needs of all; it is a reciprocal right, not an absolute right.

4) What is the temporal scale of the right?

The group believed the temporal scale was multigenerational. The right should not be solely applied to the present; future users must be considered.

5) If the right is recognized, how should it be integrated within our existing legal system?

The group agreed that the human right to water should be integrated with water allocation laws and regulations by making the right a priority or preferential use. The right would have to be quantified and would trump all other water rights. If the definition is narrow, such as the UN's drinking, cooking, and hygiene definition, it will not have a big impact on other water uses. Under the narrow definition, the amount of water reserved for human rights is minimal in comparison to other uses.

6) Apart from the legal methods, what new tools (social, technical, economic) could meet human rights uses?

Ms. Achterman provided several examples of tools: data collection and management, improved water management and delivery, markets and pricing to send the right price signals, and public education. The group also discussed the idea of giving people a free base amount of water and increasing rates for uses over that base level.

7) How can the human right to water be balanced or integrated with other human rights?

The group's discussion here was limited. Balancing needs to occur, but it is not a hard problem if the focus is on fundamental needs rather than a broader definition.

PLENARY SESSION RESPONSE TO GROUP 2 REPORT:

No substantive comments were made concerning the Group 2 report.

WORKING GROUP #3

How Existing Western Water Law Protects the Human Right to Water

Presented by John Clyde

Working Group #3 was charged with discussing how existing western water law protects the human right to water and examining whether existing law provides adequate protection.

To accomplish this task, the group also defined the human right to water. Succinctly stated, the human right to water includes sufficient water to meet fundamental human needs, including access and delivery for human consumption. Access is particularly important and raises key concerns. If not handled properly, inappropriate consumption can lead to ecosystem damage.

The group proposed the human right to water be included under the prior appropriation doctrine as a high priority—perhaps the highest. Left unconstrained, giving the human right to water highest priority could lead to abuse. The group believed that abuse can be avoided by placing limitations on the access to water, such as reasonable access. But, the group was not certain what forms those limitations should take.

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

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

PLENARY SESSION RESPONSE TO GROUP 3 REPORT

Comments to the Group 3 report noted:

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

WORKING GROUP # 4

Governance and the Economics of Implementing the Human Right to Water: Water Conservation and Water Supply

Presented by James Culliton

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

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

1) Data information, collection, and dissemination.

Additional information would inform a better understanding of the connection between ground water and service water. Mr. Culliton emphasized that we do not currently understand many watersheds; even among those we have mapped, there may be deficiencies affecting our understanding.

2) Effective participation through public utilities, municipalities, and cooperatives.

3) Appropriate level for water governance.

The group believed that it might not be possible to have an overarching structure that would be more effective than the current patchwork. The way the present system has organically developed may be more effective than imposing a more logical system.

4) Governance should be place-specific (i.e. “subsidiarity” in international parlance).

The principle of subsidiarity, driving decisions down the most appropriate level, may be an effective strategy when talking about water governance.

5) “Rich Context”:

The group recognized that there are different ways to value water including, but not limited to, commodification. Mr. Culliton emphasized that any sort of water governance should be flexible. He criticized the inflexibility of current Western water law. A new system should take into account changes in use of water, population patterns, and ecological changes.

Group # 4 also suggested that water should be properly priced, perhaps on a marginal cost basis.

PLENARY SESSION RESPONSE TO GROUP 4 REPORT

The question of pricing water invoked debate from the entire group participating in the conference. The debate centered on how, and to what extent, water should be priced and treated as a commodity. Professor Achterman stressed that there are other components to the human right to water that cannot be captured by treating water as a commodity, for example, spiritual values. Professor Dannenmaier added that in-stream uses, spiritual uses, aesthetic uses, and ecosystem services are not commodities in any sense.

The group then focused its discussion on whether delivery of water for personal uses (understood as drinking, cooking, and hygiene) should be commoditized. Professor Dannenmaier also suggested the human right to water means water for those uses is not a commodity and emphasized the use of market systems to price and deliver water to reflect its scarcity. The general consensus of the group was that delivery of water for personal uses should not be understood as delivery of a commodity, but water for uses beyond personal uses should be considered a commodity.

PART III
WORKING GROUP REPORTS

2011]

RIGHT TO WATER: CONFERENCE REPORT

41

WORKING GROUP # 1
Defining and Enforcing the International Human Right to Water
FINAL WORKING GROUP REPORT

Moderators:

Gwynne Skinner, Professor, Willamette University College of Law

Sarah Hunt-Vasche, Attorney, Salem, Oregon

Rapporteurs:

Joseph W. Lucas

Erica Rodriguez

Papers Discussed or Presented:

• **Francine Rochford**, La Trobe University, *Australia: Implementation of the Human Right to Water—Comparative Approaches*

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

• **Gary L. Chamberlain**, Seattle University, *Water as a Fundamental Human Right and the Rights of Water: A New Water Ethos*

• **Rebecca H. Hiers**, *Water: A Human Right or a Human Responsibility?*

• **Meg Good**, *Implementing the International Human Right to Water in Australia*

• **Tsanga Tabi Marie**, *Implementing Human Right to Water in Europe*

Other participants:

- **Reagan Desmond**, Professor, Oregon State University at Cascades
- **Dr. Charlie Clements**, J.F. Kennedy School of Government, Harvard University
- **Mark Kevin Williams**, Attorney, Pueblo, Colorado
- **Susan Lea Smith**, Professor, Willamette University College of Law

2011]

RIGHT TO WATER: CONFERENCE REPORT

43

DISCUSSION QUESTIONS

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

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

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

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

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

The group agreed:

The international human right to water should be defined as:

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

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

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

The right to access water.

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

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

The amount of water to live with dignity.

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

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

What is affordable?

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

45

determining the amount of water needed to live with dignity. The term “hygiene” is also culturally defined.

Positive or negative right?

The committee concluded that the right is both positive and negative. The discussion began with access. When access is provided it would be both a positive and negative right. Positive in that the government would be required to provide reasonable access to the water and negative because the government could not take steps to block access or deplete the water. There was also discussion about whether the requirement would be progressive or immediate. A progressive right would lead to governments to create excuses, such as financial inability to provide water, in order to avoid fulfilling their duties. The group decided that the right would be immediate.

Treaty right or customary international law?

Members of the group believe there are treaties already in place that support water as a human right. However, Gwynne Skinner suggested that the right to water should have its own treaty or convention to make it even clearer. The committee agreed that the international human right to water does deserve its own treaty. Gary Chamberlain mentioned that there is or was a movement for Article 31 of the UN Declaration of Human Rights to provide for a right to water. This, however, would not be enough because the Declaration is not legally binding.

At one point the group proposed the following as a preamble:

“While we take the position that customary international law requires governments to refrain from blocking access to water, we recognize that governments’ affirmative duty to provide affordable, accessible, safe, and sufficient water has not yet ripened into customary international law.”

Water as a commodity, the rights of other governments.

The group discussed whether governments of countries with more than enough water to provide for their citizens should be required to help those countries who, because of geography, do not have enough water. In addition, the group considered whether a country without enough water should be required to buy it, and whether other countries should be obligated to provide a fair price.

Gwynne Skinner analogized this to the Food Security Treaty. Gary Chamberlain pointed out that perhaps there might not be such a thing as excess water because water is essential to a particular ecosystem. Ms. Reagan Desmond inquired whether that policy would lead to insufficient water conservation practices and whether the policy is one the group would want to promote.

The group also discussed whether there should be a worldwide convention that focuses on the states' obligations to each other. The idea for two separate conventions was formed—one treaty regarding the international human right to water and a separate treaty or convention regarding care capacity, management of water, trans-border issues, relationship between countries, and commerce concerns. Anticipated areas of concern for the second treaty include: cloud seeding, damming, and conduct of one country affecting another country. While the second treaty would regard water as a commodity, the first treaty would be focused on water as a human right.

The group also considered that perhaps countries should not be obligated to help other countries provide water to their peoples. Countries that do not have enough water were identified as at risk for being held hostage by countries with an abundance of water. As a result, the second clause of the definition requires countries to cooperate and negotiate. The group identified cooperation between countries as a potential problem; countries may need to engage in negotiations, mediation, and arbitration to solve the problems in the future.

SUMMARY: HOW TO IMPLEMENT AND ENFORCE THE INTERNATIONAL HUMAN RIGHT TO WATER?

Sustainability.

The discussion then moved toward sustainability. As originally proposed, part of the definition included sustainability, but some members of the committee believed this term was too undefined. The committee was not in a position to define the term at this point. Members thought the flexibility of the definition was perhaps a positive in that it allowed for elasticity and cultural difference to immerse in the implementation of the right. Some found it important to keep the word in the definition because with it we would ensure that there is a tie to the ecosystem. To

reconcile the two points of view it was suggested that we have a separate sentence defining sustainability or at least what we mean by sustainability. Another suggestion was to add a phrase like the following: “culturally acceptable or generally acceptable sustainability and environmental responsibility.” This was not adopted. In the end, the committee adopted a short sentence that would follow the definition of the human right to water.

Lifeline.

The group concluded that there should be a federal mandate for water as a lifeline. This means that water could not be completely shut off if a user was not able to pay. In addition, the committee thought it important to tie funding to water policy improvement. Therefore, the following language was adopted: “Clean water funds would flow to a state only if it passes a statute prioritizing the human right to water as highest priority as to water policy.” There was a more extensive discussion regarding the nexus between the funding and to which statute the funding would be tied. For example, funding for water improvement could not be attached to a transportation bill.

Several members of the committee stated that many people who need water do not think of it as the highest priority. Should we somehow get those people thinking about water? Should there be an educational aspect to the definition? Should governments be doing something more to help the people focus on their need for water?

The mechanism to supply water.

The Committee wished to take the focus off the citizenry; placing the burden on the government to provide water. Some countries spend money on arms when they should be spending it elsewhere (i.e. water). Should the government be required to provide water to the home or provide a place for the poor to shower? The group proposed that governments should provide water at the home because without it families would not be able to flush a toilet.

Water as an investment.

This topic garnered considerable discussion from the committee. The group quickly adopted an addendum to the

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

Water as a weapon.

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

Enforcement and the Protocol.

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

Corporate Responsibility.

One member of the group suggested that we have a section regarding corporate responsibility on water, but the committee found that countries (governments) would sign the treaty and the treaty would not bind businesses. Moreover, some countries would not sign because of this section. Therefore, the suggestion was made to make governments responsible for policing businesses. Interestingly, Oregon's policy on businesses and their fiduciary duties can include environmental issues. This was something that the committee thought would be a great addition to the treaty, but hard to implement. Finally, the following language was adopted: "Corporations should be cognizant that they have their own obligations under other U.N. resolutions, treaties, etc."

Declaration vs. Treaty.

One member suggested that instead of creating a treaty immediately, the better way to proceed would be to first create a Declaration in order to gather more international support. Another member of the committee questioned whether a declaration would be any different than a resolution. However, with the declaration, the international community wouldn't mistake the Committee's position. A Declaration would show countries what the international human right to water would look like. It would be a good first step in the direction of securing this right. However, with the Declaration only a progressive right would be established, not the immediate right that would be present under treaty. How is a progressive right any different from the presently existing water rights materials?

State v. Federal obligation vis-à-vis treaties.

Several times throughout the two days of group work, the Committee discussed the relationship between the United States federal government and state governments concerning the obligations under a treaty or customary international law. This was more for the purpose of clarification and did not guide the drafting of the definition or implementation practices of the human right to water.

Migration.

The group briefly discussed this subject. The committee agreed to have a short clause recognizing that as migration patterns change, countries experiencing increased migration are entitled to special assistance in order to provide the right to water. This would only include cross-border migrations.

SUMMARY OF PAPER PRESENTATIONS

1) Francine Rochford, *Implementing the Human Right to Water in the West – Comparative Approaches*

Australia experienced a pattern of scarcity followed by extreme abundance.

In the past ten years, there has been a massive change in Australian water policy and law. The federal government (Australia) attempts to return allocation and irrigation entitlements. The Murray Darling Basin plan was proposed, formulated, and promulgated, but led to large-scale outcry by the irrigators. The basin is a huge area and sparsely populated. This basin is largely tied to rural areas. During the drought, some communities had a zero water entitlement for a number of years.

Recently, there were huge floods in Queensland, so now Australia has entered a period of abundance. In the 1800s, the decision was made to collect water in reservoirs during periods of abundance to alleviate those periods of drought. The government created infrastructure to enable farming of sparse areas. Australians are very much dependent on the infrastructure. The market allocation of water is an established policy. When water is called back, the viability of the system itself is affected. The privatization of water ownership contracts water rights.

When looking at the idea of human right to water:

1. Who is entitled to a right to water?
2. To what extent are people in rural areas entitled to same rights as those in urban areas?
3. What is the right? The right to drinking water? The right to irrigation water?
4. Who has to pay? It is considered justifiable that all water users have to pay for water, yet in the case of irrigation

2011]

RIGHT TO WATER: CONFERENCE REPORT

51

infrastructure, this includes both your own personal infrastructure as well as the infrastructure such as dams, etc.

QUESTIONS AND COMMENTS

Chamberlain: Around pp.21-30, where author is beginning to compare Australia's situation to Colorado River Basin, to what extent is federal regulation being implemented?

Rochford: It extends to the Murray Darling basin, which covers about 70% of agricultural land. Ideally, it should all be managed at the basin. During the federation debates in the 1890s, there was a real chance that the Commonwealth would administer the basin, but ultimately the states regulated water administration until allowing the federal government to intervene. The federal government compensated the states financially. This is a constitutional issue because during the war, the states gave the federal government the right to income taxation, and the federal government never gave it back. This left the states financially deficient. The federal government now bribes the states. The federal government provides money, and the states allow the federal government to regulate the water. The state makes water plans, and those plans must adhere to federal rules.

Chamberlain: Around p. 9, the author mentions restoring natural flows and cultural flows for indigenous peoples; is that actually happening?

Rochford: It is happening in the *planning*. The determination of cultural flows is not as set as in other areas (e.g. American Indian rights to natural flows). The idea of cultural flows has not advanced past the point of consultation with indigenous people.

Desmond: Rochford mentions water exportation through livestock and crops. Please elaborate? How accepted of an idea is that? How much research has been done in the area?

Rochford: This is an economic concept and not a particularly useful one. The water commission has not taken it up. One major problem when talking about water as an economic commodity is that livestock are grown on irrigated land and grown free range.

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

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

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

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

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

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

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

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

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

QUESTIONS AND COMMENTS

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION:

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

Rochford: In Australia, the Constitution says that water shall not be privatized, but that does not necessarily mean that water infrastructure cannot be privatized. It is characterized as a requirement to take into account low-income user, and not as a social obligation.

Skinner: There are similarities between healthcare and water. Should it be treated as a commodity or a human right? There is also an analogy between electricity and phone service (which are commodities) and water.

Hunt-Vasche: American legal culture has for a while treated rights as a commodity (e.g. entitlements to damages when free speech rights are infringed). Water as a right might differ

2011]

RIGHT TO WATER: CONFERENCE REPORT

55

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

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS AND COMMENTS

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

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

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

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

Skinner: Some scholars say the growth of rights can be bad because it dilutes the essence of a right. Other societies have used “for the good” rhetoric to support their bad policies by disregarding peoples’ individual rights.

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

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

57

enough to be as broad as possible and consider as many perspectives as possible.

Attachment 1:

This illustrates the process whereby the working groups created their discussion questions. The group began with the following list of proposed discussion questions:

1. How do we define the “international human right to water?”
2. How are issues of quantity and quality addressed in the right?
3. Does an international human right to water really exist? Is it binding?
4. Does each person have a right to have their country affirmatively provide them with water of sufficient quantity and quality? Alternatively, is it a right only to access?
5. What obligations to do other countries have toward those persons in countries who do not have enough or appropriate quality of water?
6. How have various agencies (internationally and abroad) already defined the human right to water?
7. How should the right to water be implemented?
8. How have various agencies addressed implementation?
9. How should the right to water be enforced?
10. How have various agencies already addressed the issue of enforcement?
11. Is the international human right to water already customary international law?
12. To what extent is the internationally defined human right to water enforceable in the United States as customary international law or under any treaty we have signed?
13. What was the basis for the U.S. abstaining in the General Assembly vote, but joining the consensus in the U.N. Human Rights Council? Were US concerns focused on enforceability of the right in the U.S. or on the definition of the right?
14. Should the U.S. recognize the internationally defined human right to water to make it federally enforceable domestic law?

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

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

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

The working group discussed which of these questions and what other issues were key issues for participants. From that discussion, Skinner identified three key questions into which these salient issues might be grouped. This discussion is captured below:

DEFINITION OF THE RIGHT TO WATER

- How do we define the “international human right to water?”
 - Skinner: Is the right to water a negative or a positive right?
 - Skinner: Does the ecosystem itself have rights? Does the water itself have rights?
 - Skinner: Is the right to water a treaty right or customary international law?
 - Smith: Is the right to water defined too narrowly?
- How are issues of quantity and quality addressed in the right?
- Does each person possess a right to have their country affirmatively provide them with water of sufficient quantity and quality? Alternatively, is it a right only to access?
- What obligations do other countries have toward those persons in countries who do not have enough or appropriate quality of water?
 - Williams: Discuss cloud seeding and the enforcement of “downstream” rights.
 - Desmond: Does treating water as a commodity help or hurt the international right to water?
 - Clements: Discuss the idea of a convention to the right to water.

2011]

RIGHT TO WATER: CONFERENCE REPORT

59

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

ENFORCEMENT AND IMPLEMENTATION

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

- How should the right to water be implemented?

- How have various agencies addressed implementation?

- How should the right to water be enforced?

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

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

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

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

THE UNITED STATES AND THE WEST

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

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

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

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

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

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

Rights Council? Were U.S. concerns focused on enforceability of the right in the U.S. or on the definition of the right?

- Our hands are not necessarily clean, which might have an effect on how we view other countries.

- In the U.S., it is a poverty issue (e.g. people in Klamath Basin).

- What is the “right to water?” The right to turn on a spigot, or the right to pay for it?

- This is essentially about the most vulnerable people. Therefore, there water to households should be considered a “lifeline” similar to not being able to cut off gas in New England even if bills are not paid, because it is a “lifeline” and cutting it off would endanger the household.

- The City of Bend is discussing providing a base level amount for a flat rate or free, and then paying more for extra.

- Tiered rates are frequently used, but free is unusual.

- Bottled water creates the equivalent of gated communities because then they don’t need to worry about the public water.

MISCELLANEOUS QUESTIONS/TOPICS

- Does religion have anything to say about the right to water?

- Researching cloud seeding, if China takes the water out of the weather pattern, what happens to “downstream” countries?

- Regarding implementation, the right has been tied to a person’s right to make a living.

- Mexico and the Colorado River are a trans-boundary. The focus of the human right to water is on the state’s obligation to deliver to the people.

- Will international decisions ripen into customary international law?

- Ricardo Patrella, an author, is trying to get each nation to have its own convention.

- What is the relationship between the federal government and state governments in water regulation? Right now, the federal government defers to state regulation of water allocation. While there is federal common law in relation to water, it focuses on peculiarly federal topics such as federal reserved rights, Indian reserved rights, and interstate disputes. On non-reserved federal

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

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

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

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

◦ International customary law influences federal common law. Courts do not directly have jurisdiction over international customary law, but through creating federal common law influenced by international customary law. Therefore, international customary law only becomes the law when it is incorporated by federal common law. However, for common law,

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

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

63

WORKING GROUP # 2
*Defining the Human Right to Water in the West:
Protecting Livelihoods and Ecosystems*
FINAL WORKING GROUP REPORT

Moderators

Gail Achterman, Chair, Oregon Transportation Commission
Tom Dimitre, Attorney

Rapporteurs:

Joe Dunne , Willamette University
Nicole Rose-Russell , Willamette University

Papers Discussed or Presented:

• **Catherine Howells and Brandon Triglia**, Professor, Portland State University, *What's clean enough? Drinking Water Regulations and Cost-Benefit Analysis*

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

• **Jennie L. Bricker**, Partner, Stoel Rives, *Entitlement, Water Resources, and the Common Good*

• **Paul Stanton Kibel**, Professor, Golden Gate University, *The Public Trust Navigates California's Bay Delta*

Other Participants

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

• **Glenn Vanslow**, Pacific NW Water Rights Association

• **Chris Funk**, Willamette University College of Law

• **Alexis Young**, Willamette University College of Law

DISCUSSION QUESTIONS

1. Should the U.S. or western states define the right to water more broadly than sufficient quality, quantity, and affordability of water for drinking, cooking, and sanitation:

- Sustaining ecosystems and ecosystem services upon which we depend for water?
- Sustaining subsistence livelihoods dependent on fishing, agriculture and animal husbandry?
- Allowing households to produce food for their own domestic consumption?
- Sustaining livelihoods more broadly? Are there any limits to such a broadly defined right?
- Considering the potential for spiritual or religious value of water and aboriginal practices as part of the right to water?

2. In the Western U.S., is the human right to water guaranteed? If so, is the guarantee being met?

3. Using the definition above for the human right to water, who then holds that right and whom does it obligate?

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

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

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

6. What new tools or approaches (technical, economic or social), if any, can be used to facilitate water reallocation and management to meet human rights uses?

7. How can or should the human right to water be balanced or integrated with other human rights?

SUMMARY OF PAPER PRESENTATIONS

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

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

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

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

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

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

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

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

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

COMMENTS ON PAPER:

Kibel: The temporal scale is much different with groundwater than surface water. Do the religious and other issues just relate to surface water or groundwater as well?

Gruber: Groundwater is a major part of surface water. Many tribal and religious issues should not be included in the human right to water. There are other ways to get there through 1st Amendment protection or other approaches. Defining the human right to water more narrowly prevents litigation.

Smith: Can the discharged water be re-injected?

Gruber: It is not economically feasible to re-inject the water back into the aquifers.

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

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

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

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

In Oregon, for example, water rights are encompassed in individual property rights law. Perhaps property rights should be tailored to support the common good rather than the individual. We made a mistake creating property rights only about the individual and not the common good. For example, when I am the owner of Blackacre, if property rights are only individual, then all regulation is construed as intrusive on my rights. If, however, property rights are about the common good, my property comes with the notion that my rights are already subject to certain regulations related to the common good. The right of ownership is subject to the common good including environmental protection.

Can we reframe the questions? Instead of 'I am a human and I have the right to water,' perhaps we are really asking a question about water distribution and the right to equal sharing of resources.

QUESTIONS AND COMMENTS

Smith: The international perception of water is that it is not an individual property right. That perception is a western notion. In the west, we think of it as an individual property right. Though it may be bad law to provide compensation for regulatory takings, U.S. courts say if you take someone's property, you have to pay,

even if it is in the common good. We have tried for years to create public rights in various ways. What we have found is that we fall short dramatically of protecting ecosystems. The question then becomes: is there a new paradigm that doesn't tie the water rights to property, but to people? This may help people understand that they are dependent on these systems. Can we shift the current western system of thinking? Can we get people who are rights-oriented to understand ecosystems?

Howell: There is a Spanish model that is community based - the acequia. Also, Rome had a model that was community based. There was public water and you had to buy the water from the public. In order to have private water, one collected it by collecting rain.

Vanslow: Talking about temporal scale, constitutional questions and water rights, the words of the constitution have not changed, but the meanings of the words have changed with time. I am struggling with every question in my mind; there is a yes or no, but I cannot draw a line. I think every individual ought to have access to water for sustenance, but then you start moving to farming and corporate farming and all of these things warrant protection, and I don't know where the line is. "Temporally." Is that everyone alive today? If it includes future generations, we need to establish a projection of what that future looks like. We cannot effectively address an infinite future.

Gruber: With the question of farming, in many cases, a large corporate farm may be able to provide more food with less water and so are we going to allocate away their water for individual food farming needs?

Kibel: Even if you accept the common good theory, doesn't one have some interest in their property? Is it just a degree of individualization? Is it black and white? Common good or private interest? Isn't there a continuum?

Bricker: I am concerned with the overly individualistic aspect of private property ownership. What should be questioned is the right of exclusion, which is fairly new. It's part of the current trend

2011]

RIGHT TO WATER: CONFERENCE REPORT

69

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

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

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

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

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

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

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

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

sprawl included in the right to livelihood? On the other side, fisherman who has a real interest in in-stream protection and a more direct connection to livelihood discussion, are they included in the scope?

We already have tools. The California Constitution already says wasteful water use is unconstitutional, but this law is not really used or enforced. One new suggestion is to create a reasonable use standard and instruct the state water board to use the standard for enforcement. This is a possible tool.

QUESTIONS AND COMMENTS:

Achterman: Regarding integration of the human right to water into other law, if it's a community resource, then using common law could address this whole reasonable beneficial use concept. We could address a lot of these needs if we could just take this "without waste" seriously.

Smith: How can we do something else that resonates more politically with people? I think of this paradigm as changing the game politically. We already have public ownership; we should be able to say what can be done. However, water rights are regarded as individual property rights that cannot be regulated without raising the specter of compensation for takings.

Howells: I think it's beginning to change as we become more urbanized than rural. Water can be emotional but it is not as emotional for urban people.

Catherine Howells, *What's Clean Enough? Drinking Water Regulation and Cost*

Safe, clean, public drinking water has only been around for 100 years. Cholera was rampant prior to the discovery of water chlorination, although not specifically on the West Coast. The discovery of how to treat water-borne illnesses caused these diseases to virtually disappear. However, it was not until 1974 that federal regulation for safe drinking water occurred.

In 1973, Consumer Reports released data on water samples from the Mississippi River in New Orleans, which included runoff of the whole river from the agricultural center of the U.S. The

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

Howell chose the City of Portland as a case study. It only took 30 years from the founding of Portland for the water in the Willamette River to become too polluted for drinking. However, 26 miles outside of Portland was the Bull Run River. Portland's water system starts in the Bull Run watershed. The forest around Bull Run was set aside in 1889 by Presidential Proclamation, which theoretically includes no grazing and no homesteading or human habitation. Theodore Roosevelt renewed the proclamation during his administration. In the protected area around the Bull Run watershed, no humans are allowed unless they are federal forest service employees or with the water bureau. Cattle grazing is not allowed. This makes the Bull Run water amongst the most pure and unique in the world. It includes two dams for summer storage.

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

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

In 1993 in Milwaukie, Wisconsin, an event occurred involving cryptosporidium, which would come to affect the Portland water system. A large storm hit Milwaukie and caused a huge overflow. Sewage backed up into the water intake for the city. One of the water filtration systems failed. Turbidity levels were shown to be well above normal. 400,000 people became ill and 54 people died because of the waterborne disease.

The federal government responded and the EPA quickly drafted LT2. LT2 is the Long Term 2 Enhanced Surface Water Treatment Rule. The rule has a zero tolerance for cryptosporidium. Open finished drinking water reservoirs must now be buried or treated. Treatment options are filtration or UV systems.

The cost of compliance with LT2 is enormous. For Portland, it would mean \$400 million for the buried reservoirs and an additional \$100 million for the UV treatment plant, which only treats cryptosporidium. The water rates for Portland residents will go up 17% per year for the near future. The cost results in water rates starting to reach thresholds of affordability for the poor.

The Portland Water Bureau responded by proving the absence of cryptosporidium in Portland's water. Portland recognized the affordability problem. Over the past year, the water bureau has engaged in very aggressive testing for cryptosporidium. Portland performed large-scale testing including scat testing in thousands of samples. No cryptosporidium oocysts have been found in any testing.

The water bureau applied for a variance to the LT2 requirement of the Safe Drinking Water Act—the only time this has been done. The EPA has said it will not grant it the variance, but Portland is continuing to work for the variance.

This decision by Portland signals a huge transition toward more regional decision making in regards water. The Australian model is similar. In that model, there are federal guidelines with a regional decision making process.

Caution is important. The United States has become a germaphobic nation. There are more problems with our water supplies. No one will be able to afford the cleanup of the pharmaceuticals now in the water. We cannot assume that everyone can afford to pay for increased water costs.

DISCUSSION SUMMARY

Question 1:

Should the U.S. or western states define the right to water more broadly than sufficient quality, quantity, and affordability of water for drinking, cooking, and sanitation, including additionally:

- Sustaining ecosystems and ecosystem services upon which we depend for water?

- Sustaining subsistence livelihoods dependent on fishing, agriculture and animal husbandry?
- Allowing households to produce food for their own domestic consumption?
- Sustaining livelihoods more broadly? Are there any limits to such a broadly defined right?
- Considering the potential for spiritual or religious values of water and aboriginal practices as part of the right to water?

General sense of the group:

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

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

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

SUMMARY

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

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

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

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

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

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

Question 2:

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

75

General sense of the group:

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

SUMMARY

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

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

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

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

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

Question 3:

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

General sense of the group:

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

SUMMARY

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

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

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

Question 4:

What is the temporal scale of the human right to water?

General Sense of the Group:

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

SUMMARY

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

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

77

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

Question 5:

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

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

General sense of the group:

The group agreed that the human right to water should be integrated with water allocation and regulations by making the human right to water a priority or preferential use. With the narrow definition of the human right to water, impacts to other uses would be negligible.

SUMMARY

Achterman: How can the right be integrated into existing legal systems? One way is to recognize prioritized uses. Human domestic drinking and sanitation could be a priority use.

Contractually, up until now it has been addressed by collaborative sharing agreements. Some very formal, some not. Formally, some allocate between municipal and agricultural uses (e.g. northern Colorado), where the agreement changes depending on the forecast. In the middle are rotation agreements in smaller communities—sharing the supply. Most informally, there are landowners who have a loose, non-written agreement with the city.

Vanslow: If the proposed human right to water is a prior appropriated right, we could carve out bullet one (of Q1) as the ultimate prior appropriation, then all the other uses are dealt with under current law.

Question 6:

What new tools or approaches (technical, economic or social), if any, can be used to facilitate water reallocation and management to meet the human rights uses?

General Sense of the Group

Many tools and approaches are available to facilitate water reallocation and management to meet the human rights uses. The group noted the need for: better data collection and management; improved water management and delivery; using markets, pricing and taxation; and public education about water and water consumption.

SUMMARY*Data Collection/Management*

Achterman: We can get much better allocation for all uses if we get better data collection. We can do a better job at forecasting water availability. Example: Wikiup reservoir in the Deschutes, which delivers water to land north of Madras, it used to be that a farmer had to call for waterflow a week ahead of time. The weather changed over the week, and by the time it got there, it wasn't needed, and just spilled back into the water 90 miles later. If we have real time supply and demand information, with better monitoring, you wouldn't have to take it out of the river. There is a huge amount of opportunity to use real time data collection and technology to prevent waste

Gruber: Even more than data collection on the demand side, we need to prioritize data collection on the supply side and fund collecting data on groundwater and stream gauges. Our current gauges are not real time and just "backcalculate." Example: in Maui, the stream gauge situation is awful. They used to have about 100 gages collecting data. Now, they only have about ten. They turned all the others off because they were underfunded. If we don't fund data collection, we shouldn't be spending so much money on litigation over allocation and should be wary of inaccurate numbers in allocation studies.

Also, we should measure what's coming out of groundwater wells.

2011]

RIGHT TO WATER: CONFERENCE REPORT

79

Water Markets

Achterman: Consider market-based pricing tools. Consider using municipal dollars to reallocate and conserve stream flows. Powerful market-based pricing tools can restore environmental flows and maintain agricultural needs to meet the human rights need.

Education

Gruber: Generally, people do not understand the effort that goes into making water consumable. If more people knew about our different water quality standards, and what quality of water is appropriate for different uses, we would be better off.

Taxation/Pricing Signals

Vanslow: The price of bottled water is actually rather high. If you raise the rate of bottled water, people will consume more out of the tap.

Achterman: Our water bills only include delivery and treatment cost – its purely operational. If you charged money for the actual water right, for use of the water, you could increase the cost of non-essential water, and would raise enough money to fund data collection and water infrastructure.

Question 7:

How can or should the human right to water be balanced or integrated with other human rights?

General Sense of the Group:

We have narrowly defined the human right to water so that the narrow definition is not likely to negatively affect other rights.

Achterman: We have consistently said that water rights have to be balanced with other rights.

Vanslow: We have narrowly defined the right to water, so that narrow definition is not likely to negatively affect other rights.

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

ATTACHMENT 1

LIST OF PROPOSED DISCUSSION QUESTIONS

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

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

- Sustaining ecosystems and ecosystem services upon which we depend?

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

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

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

3. If the human right to water, defined narrowly or broadly, is recognized, how (e.g. legislation, markets) should that right be integrated with:

- Water allocation laws based on prior appropriative water rights?

- Water quality laws and drinking water laws, which are not rights-based?

4. What new tools (technical, economic or social), if any, can be applied to facilitate water? Reallocation to higher value or human rights uses?

5. Is the internationally defined human right to water guaranteed in Oregon water allocation, water quality, and drinking water law,—and should it be?

WORKING GROUP # 3***How Western Water Laws Currently Secure the Human Right to Water*****FINAL WORKING GROUP REPORT****Moderators:**

Reed Marbut, Professor, Willamette University College of Law; Of Counsel, Karnopp, Petersen LLP

Jonathan S. Clyde, Attorney, Clyde, Snow & Sessions

Rapporteurs:

Joshua Weber, Willamette University College of Law

Jennelle Milam, Willamette University College of Law

Papers Discussed or Presented:

• **Laura A. Schroeder, Therese A. Ure and Sarah R. Lilijefelt**, Attorneys, Schroeder Law Offices, *Domestic Groundwater Exceptions*

• **Catherine Howells**, Professor, Portland State University, *Water Rules: A Brief History of Water Rights and Sharing*

• **Gary Minda**, *The Struggles for a Right as a Human Right*

• **William F. Cloran**, *The Ownership of Water in Oregon*

• **Harold Shepherd**, *Implementing the Human Right to Water in the Colorado River Basin*

• **Paul Stanton Kibel**, Professor, Golden Gate University, *The Public Trust Navigates California's Bay Delta*

• **Paul Finkelman**, Professor, Albany Law School, *Why Access to Water was Never a "Right"*

• **Eric Dannenmaier**, Professor, Indiana University. *The Human Right to Water at Common Law*

2011]

RIGHT TO WATER: CONFERENCE REPORT

83

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

Other participants:

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

DISCUSSION QUESTIONS

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

SUMMARY OF PAPER PRESENTATIONS:**Catherine Howells, *Water Rules: A Brief History of Water Rights and Sharing***

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

The Industrial Revolution complicated the situation. New uses and new technologies arose.

Spain colonized California, bringing rules for arid and desert areas from Spanish and Moorish law. The Spanish acequias system gave the community the basic right to use water for personal use including limited livestock use. The rules required a separate grant for land irrigation. The community made allocation decisions during times of shortage. Now these acequias rules are in conflict with prior appropriation laws in New Mexico. The

strength of acequia system lies in localized control of community resource for community need.

In California, the gold rush occurred just after California became part of the United States. Technological advances and the thirst of the mining and agricultural industries led to moving large amounts of water around the state without regard to what the land needed.

QUESTIONS AND COMMENTS

Finkelman: If we're talking about human rights, can you make the fact that Los Angeles has provided water for many people and immigrants an example of doing a great job of providing water to people?

Howell: Should they all be living in the desert, pulling water out?

Benson: Most Americans are urban.

Harold Shepherd, *Implementing the Human Right to Water in the Colorado River Basin*

The right to water already exists in some places by constitution or statute. For example, in Hawaii, the state must regulate water for the benefit of people (constitutional) and protect "all rights traditional and currently exercised for subsistence, cultural, and religious purposes" of native Hawaiians. In Montana, the constitution declares water to be the property of state for its people. In Alaska, because of native people and subsistence livelihoods, anyone can apply for an in-stream right. A current case considers whether due process protects appropriation dates. South Dakota recognizes the public trust doctrine and this public trust overlay prioritizes domestic use.

The Tribes in the west have used treaty rights as a strategy to implement protection of ecosystems. In the recent settlement for Nez Perce water rights in the Snake River adjudication, non-tribal users realized that they couldn't prevent allocation to in-stream flows. The non-tribal users were going to be fighting the battle under the Endangered Species Act if they overcame the Tribes' water allocation requests because the Tribes' requests sought to protect the fish. Ultimately, the settlement protected both the tribal

2011]

RIGHT TO WATER: CONFERENCE REPORT

85

interest and the public interest in endangered fish. However, the tribal right is stronger because it protects harvest population, not just existence.

QUESTIONS AND COMMENTS

Birdsong: The *Nez Perce* case is important because of the close link between human use and environmental use.

Kibel: The Hawaiian Constitution protects traditional uses, but the Hawaiian native population is integrated with the general population. Isn't this just going back to the English first users, static rule? It seems a much different case than a one-use religious right.

Shepherd: Use in Hawaii is close to environmental uses also. In protecting those uses, you're protecting the things that rely on it.

The Alaska natives want right to kill whales even though protected. This is not the same as environmental protection. Are we really balancing environment with right to water?

Shepherd: The definition of subsistence in Alaska is very broad. It includes economic, social, religious and cultural uses.

Bret Birdsong, *Mapping the Human Right to Water on the Colorado River*

The Colorado River is over-appropriated. Cities from Denver to Los Angeles use the Colorado River, some 28-30 million people. Soon, the population of the "peopleshed" of the river will reach 40 million people.

Climate change models are unanimous that things are likely to be worse – this is the one place nearly all models agree about. The areas within the Colorado River basin will experience faster runoff, leading to more severe and longer dry seasons as well as longer droughts.

The primary law controlling water allocation in the Colorado River is the Colorado River Compact of 1922. At the time, it was made, southern California was booming while other Colorado River states remained very undeveloped. Those states worried that

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

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

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

What does the human right to water have to say about this? Nothing. Maybe. Chubs and other fish don't have the clear link to human subsistence (contra *Nez Perce*). However, 80% of the water is being used for commodity agriculture, not for subsistence agriculture, while Las Vegas gets a tiny amount for human use.

Power, of course, is a big issue, because utilities can point to a dollar value.

In theory, Mexico gets 1.5 million acre feet. Overall, we've allocated more than 17 million acre feet and the flow is likely around 14 million acre feet. This has great environmental impacts and raises some human concerns because the River usually doesn't get to the delta.

As for the Navajo reservation, the Colorado River Compact simply ignores Indian reserved water rights. In general, under all water compacts, Indian reserved water rights are supposed to be part of the individual state apportionments.

There are 8000 homes on the Navajo reservation with no water. The Winters Doctrine, which established Indian reserved water rights, is a human rights notion in that water is considered reserved automatically.

How do we define Indian reserved rights? They have been defined in terms of practicably irrigable acreage.

In the lower Colorado River, there is some significant reserve of water. The Navajo have difficulty accessing that reserve and they haven't sought to quantify their reserve. Their reserved water rights could be huge or very small. The state of Arizona has said

2011]

RIGHT TO WATER: CONFERENCE REPORT

87

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

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

QUESTIONS AND COMMENTS

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

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

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

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

Kibel: That may be natural result of human economy. We need electricity or water uses.

Dickson: Can the state sell unused water?

Birdsong: Yes, with limits. No transfers can be made between the upper and lower basins. But, Indian reserved rights can be transferred or sold.

Laura A. Schroeder, *Domestic Groundwater Exceptions*

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

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

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

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

Howells suggested agriculture came west on its own, but it followed mining that was here. People had to eat while mining.

Before water codes, there was no need to recognize domestic uses. They're not there in adjudication. The codes implicitly codify common law exemptions. However, these exemptions are only for groundwater. Why? Probably because there was no need for groundwater codes earlier.

Nevada got rid of the group domestic. If you want group domestic, PUC controls, not exempt use.

Oregon allows 15,000 gallons per household, which is clearly not based on the human right to life.

Washington has exempted domestic use. Is stockwatering under exempt use? In one case, a farmer claimed domestic use for 500 cattle. The state answered yes. The environmentalists said no. This issue is not yet settled.

In Idaho, the exempt users and uses are homes, organized camps, campgrounds, livestock, and a ½ acre garden.

In New Mexico, there is no domestic exemption, but standards relaxed for domestic permitting, which is a problem in court.

In Utah, there is no domestic exemption. All appropriation goes through same process.

QUESTIONS AND COMMENTS

Dannenmaier: What is meant by "survival?" Does this include cows?

2011]

RIGHT TO WATER: CONFERENCE REPORT

89

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

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

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

Dannenmaier: Isn't there a high return rate?

Schroeder: I don't know what it is.

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

Schroeder: Sure.

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

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

Birdsong: But if there is a shortage. . .

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

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

Schroeder: Yes.

Dannenmaier: What about 200 people in an unincorporated area?

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

Benson: The right to life belongs to those living in a municipality but the entity responsible for providing it is the city. The city doesn't have the right?

Weber: It is like an irrigation district.

Schroeder: You could look at it that way.

Benson: The city has a fiduciary relationship with its citizens.

Dannenmaier: If it is like a fiduciary, why shouldn't right be exercised through the city. Why shouldn't city be entitled to the right on behalf of them?

Schroeder: The city can argue: I have 800 citizens with no water. The state needs to change the rules.

Benson: Then, in a capitalist system, the city must buy. What is the individual citizen's right, in or out of the city? What is the inalienable right of the individual, in or out of the city? Access? Convenient Access? A well? A pipe into the house?

Schroeder: The right to not have government prevent you from accessing the water. Compare with the *Irrigon* case. The rules remain: there is an admin rule for human need. It is recognition of constitutional right.

Dickson: A permit is a property right. So, depriving someone of their entitlement is a taking of property.

Dannenmaier: Is it a taking?

Schroeder: Yes. It can be regulated, not taken. In Oregon, a permit is a step toward obtaining a certificate. The permit is right of use. The certificate is the property interest—it must be perfected.

Dannenmaier: The more cities step in, the more constitutional takings are implicated.

2011]

RIGHT TO WATER: CONFERENCE REPORT

91

Birdsong: There is no question that water rights in some instances are property takings.

Benson: Most takings cases revolve around what rises to property. Reasonable use cases (e.g. *Grimes*) if waste, not property. Once it is property level, all courts are holding property. What are regulations takings? Some courts say occupation.

Dannenmaier: The key is unlike riparian correlative. Once you establish reasonable beneficial use, it is a right. Anything suggesting otherwise is a taking.

Dirkson: In Oregon, an emergency state taking is not. They own the water.

Dannenmaier: “Reasonable” is always contextual. What if it is no longer reasonable to irrigate? Rights based approach is a way to rethink what is reasonable. Under state law, is it understood to be subject to public trust? Public interest underlies water use. If we no longer think it is reasonable, can we get around it?

All: No!

Dirkson: Let’s say the Columbia is plugged. No taking?

Dannenmaier: The state draws a line in the sand when nature changes the circumstances.

Benson: In a drought, the senior appropriator wins.

Dannenmaier: What if the junior is only trying to drink?

All: Senior Wins!

Schroeder: It should be drinking only, and not subject to appropriations.

Jones: Is regulating a permit rather than a certificate a taking?

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

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

Schroeder: Although, in Nevada we buy and sell permits. We even buy and sell applications.

DISCUSSION SUMMARY

The law west of the 100th Meridian is prior appropriation plus the unique meld of water laws in California. Generally, prior appropriation gives the first in time a protected right. Unlike England and the eastern United States, the water source can be distant from the place of use. The law of prior appropriation was influenced by timing of the law's development: a time dominated by giants of industry and capitalism. Government became a sponsor rather than foe of business. The underlying agenda was profit.

If prior appropriation is a capitalist invention, how do we get from there to an equitable human right?

Is the equitable right the right to treated water: free from chromium, arsenic, giardia? When we think clean, we mean out of the tap. In the United States, the standard for clean is treated municipal water.

Can we decouple water access from delivery and quality of delivered water? First question, can I have the water flowing by, or go get it? Does our system of allocation law allow for providing a basic amount of water for human needs?

Alternatively, is the first question more basic: potable, or for drinking and other purposes? Perhaps the question is natural use (e.g. drinking consumption, a garden, and a couple of pigs) or artificial (e.g. irrigation).

There is a debate whether beneficial use means that a person, say a tribe, needs *natural* use on a river over-appropriated by *beneficial* use.

There are examples of this, but they tend to come from eastern jurisdictions. The western codes, generally relating to groundwater

but overflowing into surface, gives exempted uses. However, in Oregon, the rule is that the senior right gets the water.

In a “declared drought” first in time does not get the water – the emergency overrides the appropriation doctrine. When there is over-appropriation, what possibilities are there for a domestic use to get an appropriator shut down? The answer depends on the state. In Idaho, it is constitutional. It is legislated in Utah, with the caveat that during declared shortages, you can pull back water for domestic, but you have to compensate. In Oregon, the only way is the well, which is a de facto carve out. However, it is supposed to be regulated, but state doesn’t regulate them. No one has ever had a domestic well turned off, though by statute they might.

Is it a right to access water, or a right to prevent the government from denying access? The question regards the scope of the right.

This group is comprised of water law authorities, not human rights authorities. We don’t actually know what the contours of the right are internationally, or what they may be in the future. The better question may be: to what extent are the values served by western water law?

Two important questions: First, access, second, delivery/quality/amount—and the correlated question of sanitation. Most international law grows from local ideas up, and then the law is shaped and imposed downward.

This leaves access as the threshold question. In Armenia, free water replaces personal and domestic, and it includes swimming rights and fishing rights. That is considered fundamental. Then a property interest is needed to access the water.

Legal access and physical access are much different things.

In Oregon, we have a land use planning obsession. If you’re not inside the urban growth boundary, you can’t get city water. This means that you have to drill a well, which technically could be shut off by appropriation.

What does appropriation mean in cases of actual shortage or predicted shortage?

We all know the shortage is coming. How do we rethink use to postpone or avoid shortage? The Colorado River is an example. The law gets amended to allow for the realities of Las Vegas’ needs by adjusting to promote conservation.

Where are the barriers in the law to meeting human needs and human rights? Already the rivers are over-appropriated, and as water becomes scarcer, there will be a greater gap between water present and water available. Also, more river systems will be in play.

Do Los Angelenos who've just moved in have the same right to water as, for example, a villager in the Sudan who has lived there for generations?

Historically, the right to water was the right to live; the right to not die. Agriculture has always been a separate right.

Is it the right to live where you are, or anywhere you might want to go live?

What do we do about conservation, new users, or newcomers?

Georgia and the City of Atlanta began relying on the reservoir, but downstream the other states have rights to it.

South Dakota defines domestic as the highest and best use. A Concentrated Animal Feeding Operation (CAFO) with 70,000 livestock is not domestic use. How does highest and best use relate to appropriation priority? If the CAFO was there first, would later domestics be shut down?

Domestic exemption is not a temporal priority, even though some statutes say it is. Oregon does not account for it, and there will be lawsuits if they ever try.

Is there a shift in what is practical? Settlement happened based on transportation and water access under the Homestead Act, the Desert Lands Act, and the Reclamation Act. The issue was how do we get the West settled. Now it is done. Further, the growth of urban west changes the needs.

Property builds certainty.

In the Deschutes high desert, almost all of the water is appropriated, but it is a very seasonal run primarily dedicated to agriculture. Meanwhile, urbanization is happening. The experiment is to move it around by leaving some appropriated rights in the river while pumping them out of the ground elsewhere.

The Deschutes settlement is attempting to avoid Colorado prices and avoid Klamath courts, and it is bringing parties to the table. As of now, the water is sufficient. There is more for fish, everyone. Even the golf course is getting water. Though land is being taken out of agricultural production, it's voluntary.

2011]

RIGHT TO WATER: CONFERENCE REPORT

95

Is it a problem that food production is lowered?

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

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

One answer is higher efficiency.

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

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

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

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

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

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

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

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

ANSWERS TO QUESTIONS PRESENTED

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

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

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

Western state water law does not regulate the positive obligations of delivery, quality, and quantity.

2. How does western water law facilitate or impede the exercise of this right?

Western water law's prior appropriation doctrine protects reasonable beneficial uses of water. The human right to water is a beneficial use. Because exempt uses for domestic use are part of the priority system, western water law may block the right to water. In rare cases when there has been a direct conflict between junior domestic use and senior agricultural use, the domestic use has been denied.

Western water law should recognize the priority of domestic use, subject to reasonable use that does not impede the rights of others or harm the environment.

2011]

RIGHT TO WATER: CONFERENCE REPORT

97

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

Moderators

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

James Culliton, Staff Attorney, North American Energy
Standards Board

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

Josh Newton, Partner, Karnopp, Petersen LLP

Rapporteurs:

Mike Freese, Willamette University College of Law

McKenna Krueger, Willamette University College of Law

Papers Presented:

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

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

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

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

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

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

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

Other Participants

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

• **Gary Lockwood**, Attorney

• **Terrance Green**, Willamette University College of Law

• **Jeff Jorgensen**, Willamette University College of Law

• **Paul Graham**, General Counsel to the Oregon Public Utility Commission

• **Reed Benson**, Professor, University of New Mexico School of Law

SUMMARY OF DISCUSSION AND DELIBERATIONS

In recognition of the fact that an undefined human right to water (HRW) would affect governance and economics discussions, participants attempted to reach consensus on a working definition. After a consensus definition was not reached in short order, participants agreed to accept that a human right to water exists. That right includes reasonable access to sufficient clean water for sustenance (drinking, cooking, and hygiene) without necessarily requiring payment and communal integration.

Participants took notice of the fact that in the western U.S., the provision of water to the human population in a given locality is subject to the jurisdiction of multiple federal, state, and local governmental agencies. The most prominent examples cited were: a) state water departments, which allocate ground and surface water through the provision of permits; b) state and federal departments of environmental quality, which establish and monitor water quality standards; and c) state public utility agencies, which regulate the rates charged by investor-owned utilities. There was further recognition that local co-operatives, large and small municipalities, citizen-driven basin management programs (such as the Deschutes River Conservancy), and shared communal governance systems (such as *acequias*) each operated within this structure in certain regions.

The group acknowledged that this intricate web of public and private institutions, and the infrastructure they support, met the HRW for the overwhelming majority of the population. However, it also recognized that there are marginal situations where the existing framework failed. Among other issues, attendees cited a lack of effective participation in water governance decisions, inefficient enforcement mechanisms, and a lack of recognition that water is subject to differing cultural values as contributing factors to these failures.

In consideration of such instances, the group agreed that the notion of subsidiarity would be an effective governance tool. The group recognized the challenge inherent in using broad political boundaries to effectively administer a geographically-determined resource. Self-governance, to the greatest degree practicable, within a larger framework of broad default policies, was the consensus solution. Such place-specific autonomy would allow stakeholders to determine the proper means to achieve universal access to clean water in sufficient quantities, while accommodating competing demands for allocation, incorporating varied customs and values, and considering the regional ecology.

The group took special note of the fact that water was not only subject to multiple uses, but multiple meanings and values, even within a small community. There was consensus that any decision-making structure must empower all members of the affected community by affording them the ability to effectively participate. Attendees agreed that the collection and dissemination of pertinent and accurate information, for example, relating to water quality, was essential to the legitimacy of any decisions made.

Attendees further recognized that, since water is not an inexhaustible resource, any structures or decisions made must remain flexible to accommodate changed circumstances. A cautionary example cited was the fact that, in the western U.S., states have granted water permits in perpetuity, provided that some water is drawn at least once every five years. Attendees agreed that this system is too inflexible in the face of ever-changing supply/demand dynamics and evolving social policies. In its place, attendees preferred a permit renewal system that would provide better linkage between water rights and water governance.

As part of any recurring assessment, participants agreed that better information was needed relating to the supply and demand of water. In terms of supply, the group understood that, although

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

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

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

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

2011]

RIGHT TO WATER: CONFERENCE REPORT

101

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

LUNCHEON SPEAKERS

Congressman Earl Blumenauer:

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

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

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

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

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

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

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

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

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

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

The notion that we are going to be able to allocate over 600 gallons of water so someone can have a BigMac is probably not going to be sustainable in the US, let alone India, China, Indonesia, or Brazil. When we look at these changes we have an opportunity for farmers to make more money. Sugar for example, we pay twice the world price for while keeping it away from people who could produce it more economically. But in order for us to make the change we are spending that money to clean up the everglades. There is a huge price that we are paying for misdirected agricultural activity; there will be some short term dislocation but in terms of overall agriculture in this country, the majority of farmers and ranchers get nothing out of the pork. By changing the different patterns, I don't see food security being a variance with how we use water. It's not just the water, it's the energy used that causes some very real economic constraints. We can do better for farmers, ranchers, nutritional needs.

Jody Calica, Warm Springs Tribe

The Warm Springs Tribe is one of a few tribes that have a peacefully negotiated treaty. The differing tribes each have unique relationships with the United States and none are one-size fits all. The Warm Springs Tribe has a binding contract with the United States. We have unique language that reserves the rights of United States Citizens and not the rights of state citizens. Warm Springs owns 99% of its land base.

Warm Springs have been taught by their elders to always operate as good neighbors, indeed this is one of the tribe's hallmarks. Some principles that guide the Warm Springs Tribe include: water as the gift of all life, fish and plants. In addition, we shall never use more of our precious resources so that they may continue forever.

Scenic rivers compacts started with the basic premise that the creator gave us those special places. We recognize that many different users use those places, and we did not want one user to dominate and affect the use of others. As we worked through this process, we recognized the conflicts of the different stakeholders. We took a similar approach to this water conference, we had no set agenda, just easels and note pads. Everyone came in with their own interests, so we wanted them to express those interests by leading a topic and being responsible for finding a resolution to the

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

We manage our resources by the good neighbor approach and using this approach engaged the environmental defense fund and other stake holders from this viewpoint. In working in areas where you have many different agencies it is best remember human rights as a starting point. Human rights are very similar to spirituality. It helps you recognize and respect yourself and your relationship with others. It creates the ability to respect both living and non-living creations. So when struggling with the meaning of human rights lets start by talking about the quality of life.

CONCLUSION

The conference summary in Part I captures most of the substantive discussions and deliberations during the conference. Beyond those conclusions, a few other points are worth noting.

First and foremost, collective wisdom is greater than the sum of individual wisdoms. The conference participants appreciated the participatory conference design, which engaged them in actively and collaboratively discerning the most important questions and beginning to answer those questions.

Second, the conference brought together a broad array of perspectives and disciplines, which fostered candid and animated discussions among people who seldom talk to one another. This dialogue is critical if the western United States is going to meet the water stress and other challenges that lie ahead for our region.

Third, the conference was just the beginning of the regional dialogue about the human right to water in the West. The dialogue will continue in other fora. Already other regional and national conferences are beginning to include or focus on the topic. These include large events such as the 2012 ABA Water Law Conference and smaller events such as the June 2011 Oregon State Bar Sustainable Futures Conference. Conference participants were eager to have Willamette to reconvene the conference in the future or to create an institute to focus additional attention on the subject.

Finally, though the conference papers provided a strong and enduring intellectual foundation for discussions about the human right to water, the conference discussions were not simply academic. By the final plenary session, many conference

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