

**SEEKING A SHARED UNDERSTANDING OF THE
HUMAN RIGHT TO WATER: COLLABORATIVE USE
AGREEMENTS IN THE UMATILLA AND WALLA
WALLA BASINS OF THE PACIFIC NORTHWEST**

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When stakeholders work collaboratively to make decisions about

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In 1977, the United Nations hosted the first global water conference in Mar del Plata, Argentina, with the report arising from the conference proclaiming that all people have “the right of access to drinking water.”²³ In 1981, the UN General Assembly ratified the Convention on the Elimination of All Forms of Discrimination Against Women, requiring states to ensure that women have the right to “enjoy adequate living conditions, particularly in relation to . . . water supply.”²⁴ The 1989 Convention on the Rights of the Child established the expectation for countries to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking-water.”²⁵

objective of ensuring adequate supplies of water of good quality for all populations.²⁸ Four years later, The Habitat Agenda of 1996 emphasized the promotion of “efficient and rational use of water to meet basic needs.”²⁹ The next year in 1997, the General Assembly directed special attention to providing “sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.”³⁰ In the same year, the General Assembly adopted the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (“1997 Convention”) outlining the guidelines for agreements made between watercourse states when allocating use of shared waters.³¹ Incorporated into the 1997 Convention were human rights principles of equity and sovereignty,³² the “obligation not to cause significant harm” to other watercourse users,³³ a “general obligation to cooperate”—on the basis of sovereign equality, territorial integrity, mutual benefit and good faith³⁴—and an agreement to resolve conflicts over uses with special regard to “the requirements of vital

28. United Nations Conf. On Env't And Dev., Rio de Janeiro, Braz., June 3-14, 1992, *Report Of The United Nations Conf. On Env't And Dev.*, ¶ 3.8(p), U.N. Doc. A/CONF.151/26/Rev.1, U.N. Sales No. E.93.I.8 (1992, *reaffirmed* 2002) (“Governments . . . should establish measures that will directly or indirectly: (p) [p]rovide the poor with access to fresh water and sanitation . . .”) [hereinafter AGENDA 21].

29. HABITAT AGENDA GOALS & PRINCIPLES, COMMITMENTS & THE GLOBAL PLAN OF ACTION § 43(j), http://www.unhabitat.org/downloads/docs/1176_6455_The_Habitat_Agenda.pdf. (“Promoting the efficient and rational use of natural resources - including water - to meet basic needs . . .”).

30. *See* Convention on the Law of the Non-Navigational of Uses of International Watercourses: Rep. of the 6th Comm. Convening as the Working Group of the Whole, April 11, 1997, U.N.G.A., 51st Sess., Agenda Item 144, U.N. Doc. A/51/869 (1997) [hereinafter, “1997 UN Water Convention”].

31. *See* G.A. res. 51/229, U.N. Doc. A/RES/51/4229 (1997). The 1997 Convention is not yet in force. However, because the International Court of Justice referred to them in the *Gabcikovo* case, some scholars have argued that the principles are in fact incorporated into common law. *See e.g.*, STEVEN MCCAFFREY *THE LAW OF INTERNATIONAL WATERCOURSES NON-NAVIGATIONAL USES*, 189 – 197 (Oxford Univ. Press 2001). We support Professor McCaffrey’s analysis and argue that the human rights principles of equity, sovereignty, obligation not to do harm, cooperation, and the respect for vital human needs, are integral to the successful implementation and maintenance of all water agreements, domestic and international. Two foundational principles in human rights law are the principles of equity and sovereignty. The human rights principle of equity relates to the right of equal access to opportunities and resources for all people. The principle of sovereignty relates to the right to exercise independent authority over a territory, resource, or person.

32. *See* G.A. Res. 51/229, art. 5, U.N. Doc. A/RES/51/4229 (July 8, 1997).

33. *See id.* at art. 7

34. *See id.* at art. 8

Thus, when the General Assembly voted to declare the human right to water and adopted the Sanitation and Clean Drinking Water Resolution on July 27, 2010 by a vote of 122-0, it was only the most recent of numerous statements calling for recognition of a human right to water.⁴⁸ Such calls for action will continue to mount as the international community and domestic lawmakers grow increasingly aware of the devastating impacts of climate change on existing water regimes and developable water resources, and the increasing divide between the global “haves” and “have-nots,” exacerbates already serious questions of equity and fundamental human rights.

B. Implications of Recognizing a Human Right to Water

Besides these hortatory declarations by the UN General Assembly, what does it really mean to recognize a human right to water? At the individual level, the institutional recognition of a human right to water underscores the tremendous importance of water to individual survival, basic health, and quality of life.⁴⁹

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C. Applying the International Concept to Indian Water Rights

As discussed above, the human right to water as a component of international law exists principally as emerging customary international law, creating expectations for states parties to protect and promote certain rights within domestic boundaries. The current international discussion of a human right to water turns the attention inward, creating expectations for state parties to protect and promote certain rights within their domestic boundaries.⁵⁴ The recent calls for recognizing a domestic right to water have primarily focused on the developing world, where nearly 900 million people lack access to safe drinking water, more than 2.6 billion lack basic sanitation, and waterborne diseases kill millions of people every year—including 1.5 million children under age five.⁵⁵ Even in the United States, some places and populations are still at a disadvantage in terms of drinking water and sanitation, Indian reservations being a striking example. The Indian Health Service (IHS) estimates that “[s]afe and adequate water supply and/or waste disposal facilities are lacking in approximately 15% of American Indian and Alaska Native homes, compared to 1% of homes of the U.S. general population.”⁵⁶ The IHS also reports a backlog of 3,300 sanitation facility construction projects

ground, as well as policy-level success in bringing together stakeholders with a collective commitment to flow from flexibility.

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for these populations, at an estimated cost of \$2.9 billion.⁵⁷ And even

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valuable or adequate? . . . The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the

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their reserved rights through adjudication, many such rights remain as unsatisfied claims. In many cases, the Indians' "paper rights" have not yet been officially decreed and quantified, much less reduced to "wet water."⁷¹ In recent decades, as further described in the next section, many Indian Tribes have negotiated settlements of their water rights claims or other collaborative water use agreements in order to move closer to actual development and use of water.⁷² Learning from those

the reservation.); *see generally* WATER LAW IN A NUTSHELL, *supra* note 6, at 308–44.

71. The United States Department of Justice acknowledges "establishing tribal water rights often is a crucial step in building the capacity of tribes to develop economically and to build vibrant homelands . . . The Indian Resources Section, working with tribes, has settled or achieved entry of a final decree of such claims in a number of major water rights adjudications. These settlements recognize and protect the water rights and often provide much-needed resources for tribes to develop and use those rights." *Other Major Water Rights Settlements*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/enrd/4531.htm>. (Last visited April 28, 2011).

72. Since 1978, nineteen Indian water rights settlements have passed congressional review and been enacted. As of this writing, three more are currently pending review in the Senate. *See, e.g.*, Claims Resolution Act of 2010, H.R. 4783, Pub.L. 111-291, 124 Stat. 3064 (2010) (includes Congressional approval of four tribal water rights settlements with the Crow, White Mountain Apache, Aamodt, and Taos Tribes); Ak-Chin Indian Water Rights Settlement

the abstract, but many western tribes have had difficulty turning this abstract value into tangible gain through litigation. Under the McCarran Amendment, most litigation of tribal water rights occurs in state courts within the context of state general stream adjudications.⁷⁵ One example of the difficulties of obtaining meaningful judicial decrees from the state general stream adjudication process can be found in the *Adair* cases of the Klamath Basin in southwestern Oregon. In *Adair II*, the court held that the Klamath Tribe was entitled to “the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864. . . . unless, of course, no lesser level will supply them with a moderate living.”⁷⁶ Several years later, in *Adair III*, the court confirmed that the Klamath Tribes’ reserved water rights included water necessary to support the Tribes’ gathering rights, as well as their hunting, fishing, and trapping rights, and that the priority date for those rights was time immemorial.⁷⁷ Despite the favorable judicial outcomes for tribal water rights, the Klamath Tribes have yet to convert the decreed paper rights into actual wet water through the adjudication process.

Another example of the constraints of using adjudication to effectively realize Indian reserved rights is the Big Horn River Adjudication in Wyoming.⁷⁸ The Eastern Shoshone and Northern Arapaho Indians live on Wyoming’s Wind River Reservation, established by treaty in 1868. In 1977, the state began a general stream adjudication of the rights in the Big Horn Basin, including the rights for the Wind River Reservation.⁷⁹ Over several years, the state sought to determine the Indian water rights, and in 1982, a special

75. The McCarran Amendment, 43 U.S.C. 666 (66 Stat. 560; adopted July 10, 1952) waives the sovereign immunity of the United States where there is a suit designed to establish the rights to a river or other source of water, or the administration of such rights, and the United States appears to own or be in the process of acquiring rights to any such water. The effect is to permit State courts to adjudicate Federal water rights claims under State law. *See*

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sustainability” and “flexibility” as two elements of successful water settlements. When Indian water rights are involved, a successful agreement must go beyond the strict historical conception of reserved rights to recognize the broad cultural importance of water to Indian Tribes. This means appreciating both traditional cultural connections with water *and* providing water that can be used for community support and economic development in the 21st century and into the future. In addition, there should be a shared understanding of a human right to water. This recognition must go beyond just acknowledging a quantifiable legal water right to encompass the crucial significance of water to tribal culture, tradition, identity, territorial integrity, self-determination, and sovereignty.

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IV. LESSONS FROM THE PACIFIC NORTHWEST: OVERLAPPING
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between principles of these agreements with the Convention's principles of equitable and reasonable utilization and participation in decision-making matters;⁹⁹ the obligation not to cause significant harm;¹⁰⁰ and the acknowledgement of a priority for vital human uses of water.¹⁰¹ From Comment 15, we note a correlation between the recommendations in these agreements with Comment 15 recommendations to supply sufficient and continuous water for personal and domestic uses;¹⁰² assurances for providing safe water;¹⁰³ and, to protect indigenous peoples' access to water resources on their ancestral lands.¹⁰⁴

From the Declaration of the Rights of Indigenous Peoples, we note a correlation between the acknowledgments in these agreements and the Declaration acknowledgments of the rights of indigenous people to participate in decision-making in matters which would affect their rights;¹⁰⁵ to own, use, develop and control the lands, territories and resources that they have traditionally owned, occupied or used;¹⁰⁶ and to determine and develop priorities and strategies for the development or use of their lands, territories and resources.¹⁰⁷ From the Draft Articles on the Law of Transboundary Aquifers, we correlate the emphasis on regional agreements, regular exchange of

99. See 1997 UN WATER CONVENTION, *supra* note 32, at art. 5.

100. *Id.* at art. 7.

101. See *id.* at art. 10.

102. GENERAL COMMENT 15, *supra* note 40, at ¶ 12(a) (the international community acknowledges the need for sufficient and continuous availability of clean water for domestic and personal uses). As discussed above, this value is reflected in the 1855 Treaty agreements of the Walla Walla, Umatilla, Cayuse and Nez Perce, establishing the reservations and reserving the off-reservation right to "fish and hunt and all usual and accustomed places." The need for sufficient availability of water is also reflected in the 1908 U.S. Supreme Court decision in *Winters v. United States*, 207 U.S. 564 (1908), entitling tribes to as much water as they need to fulfill the purposes of their reservations. While the *Winters* decision has been interpreted to establish the reserved rights doctrine, we also note Justice McKenna's more specific comments describing the federal government's claim on behalf of the tribes acknowledging "it is essential and necessary that all of the waters of the river flow down the channel uninterrupted and undiminished in quantity and un-deteriorated in quality." *Id.* at 564.

103. GENERAL COMMENT 15, *supra* note 40, at ¶ 12(b).

104. *Id.* at ¶ 16(d). Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous people to design, deliver and control their access to water. Under the Convention, States parties have the obligation to accord sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation.

105. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 17, at art. 18.

106. *Id.* at art. 26.

107. *Id.* at art. 32.

data and information, protection and preservation of the ecosystem, monitoring and management.¹⁰⁸ And from the Human Right to Water and Sanitation Resolution, we note a correlation with the Resolution that governments should provide financial resources, capacity-building and technology transfer.¹⁰⁹ These correlations are important to consider because they illustrate a unique parallel between the local efforts of basin stakeholders in a relatively small corner of the world in Oregon and Washington, and the international efforts of the world's national governments to reach agreement on the collaborative use of limited water resources. More specifically, the correlations illustrate an alignment of purpose where stakeholders come together over water, they can often reach creative, collaborative, durable solutions that embody fundamental human rights principles.

A. The Confederated Tribes of the Umatilla Indian Reservation: Water Sovereignty and First Foods

Prior to Euro-American settlement, the Umatilla, Cayuse, and Walla Walla Indians occupied a vast territory of about 6.4 million acres of land in what is now northeastern Oregon and southeastern Washington. As conflicts with incoming white settlers mounted during the 1800s, the pressure on these Tribes increased to forfeit their land, just as it did across the West. In the case of the Umatilla Indian Reservation, such settler-tribal conflict was particularly intense where the Oregon Trail descended out of the Blue Mountains to the Umatilla River, depositing settlers into the middle of the Umatilla Indian territory.¹¹⁰ In 1855, the three Tribes entered into a treaty with the United States whereby they relinquished most of their ancestral lands in exchange for a reservation along the upper Umatilla River and reserved rights for continued hunting, fishing and gathering at their traditional and accustomed places beyond the reservation boundary.¹¹¹

108. See DALTA, *supra* note 49, at arts. 8, 9, 12, 13, 14.

109. Water and Sanitation Resolution, *supra* note 47, at ¶ 2.

110. E-mail from Daniel Hester, General Counsel, Confederated Tribes of the Umatilla Indian Reservation, to author (January 25, 2011) (on file with author) (calling this area of conflict "ground zero" for the Umatilla Reservation).

111. Emotionally charged water rights negotiations continue today, but now they are carried out in conference rooms and congressional hallways. For a rich historical perspective on the treaty negotiations, see generally JOSEPH DUPRIS, *THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER* 25-40 (2006) (Recounting treaty negotiations at the Walla Walla Council in June 1855):

During the next several decades, the settlers developed irrigated agriculture in the Umatilla Basin downstream from the Reservation, with the aid of federally funded dams and reclamation projects. The same story played out on the other side of the Columbia River in the Tribes' ceded lands along the Walla Walla River, in what is now Washington State. While non-Indian agriculture thrived, the fisheries and the Tribes' livelihood were decimated. Dams built on the Umatilla and Walla Walla blocked fish passage, and irrigation diversions dried up the rivers, depriving the fish of migration and spawning habitat.¹¹²

The tragedy of the loss of the rivers was not just about fish, however. The Confederated Tribes of the Umatilla Reservation view water as a fundamental component of their relationship to their land, and thus to their sovereignty. This view is reflected in the Tribes' 2010 Comprehensive Plan:

The Walla Walla Treaty Council in June of 1855 was one of the most flamboyant, best attended (with more than 5,000 Indians from a variety of tribes, mostly Nez Perce, Yakama, Walla Walla, Cayuse, Palouse, and Umatilla), and best recorded treaty councils in US history . . . At Walla Walla the Indians displayed a suite of diplomatic skills – strategic silences, bluffs, obfuscation, delay, threats, and eloquence – to stem the advantages that favored US negotiators, I.I. Stevens and his counterpart from Oregon, General Joel Palmer . . . Obstacles to successful communication were formidable. Audiences exceeded 1,000. Speeches were in the open air, with interruptions and long pauses. After each sentence, the interpreter spoke to two Indians who shouted forth the message to others who might comprehend it – one in the Nez Perce, the other in the Walla Walla language . . .

Objections were fierce and forceful. Walla Walla Chief Peopeo Moxmox, 'Yellow Bird' to his people and 'Yellow Serpent' to the wary whites, tore into the Stevens-Palmer arguments. He spoke of deception ('You have spoken in a roundabout way. Speak straight.'). reputation ('I know the value of your speech from having experienced the same in California, having seen treaties there.'). religion ('Why should you fear to speak on Sunday?'), pomposity ('Now how are we here as a post?'). A few days later he would protest being addressed 'as if I were a feather.' He spoke of environmental ethics ('Goods and Earth are not equal; goods are for using on the earth. I do not know where they have given lands for goods'). Events were not going Stevens' and Palmer's way . . .

The Tribes will always exercise our national sovereignty and preserve our traditional cultural ways in harmonious existence with our homeland . . . We will live in balance with the land and use our natural resources only when traditional and cultural teachings dictate use . . . Water is the giver of life, food, and the spirit.¹¹³

Water is woven into the fabric of Tribal spirituality, and it is also a pillar of tribal economy: “Economic assets of the tribes include: Clean, cold, fast flowing water for healthy salmon, lamprey, mussels and other water life.”¹¹⁴ The inherent cultural significance of water to the Tribes is further demonstrated by the doctrine of “First Foods.” The Tribes express their relationship to natural resources with the First Foods hierarchy, comprising water, salmon, deer, roots (cous), and berries. The First Foods framework is considered part of the “Creator’s Law” and is a pillar of the Tribes’ cultural and spiritual beliefs, establishing the relationships betwe[(aitual)-5()TJ-0.006-E Fral a.0007 0.1356 Tw -9.58 0 (

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information exchange, and cultural and educational outreach activities, the Tribes have begun to coordinate with other basin stakeholders such as state and federal agencies, watershed councils, irrigators, and other Basin tribes to support the First Foods. These activities are intended to build relationships, trust, and a shared understanding of water and the First Foods approach. In effect, these efforts strengthen the critical foundation of a shared understanding of the human right to water, thus creating the conditions for successful collaborative use agreements.

B. Through First Foods, Moving Toward a Shared Understanding

A critical step toward reaching collaborative use agreements over water involves a shared personal experience among stakeholders that creates a transformation in the parties' relationships. Such an experience may be anything, from a shared field trip along a

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embodies nearly all of the abovementioned principles of international human rights law in the 1997 Convention, General Comment 15, Law

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*people to go beyond what regulation can deliver. It refutes the either-or notion of fish vs. farms, and instead supports the idea that water can be managed so that people, rivers, farms and fish can all continue to share this valuable resource long into the future.*¹⁴³

*After a near century of no spring Chinook or salmon fishing in the Walla Walla River, the Confederated Tribes of the Umatilla Indian Reservation last Sunday opened a fishing opportunity for tribal members on the South Fork Walla Walla River.*¹⁴⁴

Not far from the Umatilla River, and running back and forth across the Oregon-Washington state line flows the Walla Walla River. The Walla Walla runs through much of the Umatilla Tribes' traditional lands and territories. Like the Umatilla River, the Walla Walla River flows into the Columbia, and it is home to endangered species of anadromous fish runs. Also like the Umatilla, the Walla Walla River is over-appropriated and heavily taxed by competing needs from agriculture, ranching, fisheries, and environmental concerns. For these reasons, the tribes and their basin partners have recently begun to explore opportunities to increase stream flow in the Walla Walla, which would restore critical habitat for salmon, improve flow for irrigation, and reduce tensions in the region.¹⁴⁵ Already, tribal fish restoration efforts have shown significant success, not just for the fish returning to the river but also for the high level of tribal, agency and local stakeholder cooperation.¹⁴⁶ Together with the U.S. Army Corps of Engineers, Bonneville Power Administration, State of Washington, State of Oregon, and local entities, the Confederated Tribes of the Umatilla aim to replicate the successes of the Umatilla Basin Project. Unlike the Umatilla Basin Project however, the question of settling Indian instream flow rights lies at the center of the Walla Walla process as a potential mechanism for protecting exchange water as it flows across state lines from Oregon into Washington.

143. WASH. DEP'T OF ECOLOGY, PUB. 08-11-061, Proposal For A Pilot Local Water Management Program In The Walla Walla Basin 4 (2008).

144. Harold Shepherd, *Years-Long Umatilla Tribes Fish Restoration Efforts Lead To Tribal Fishery On Walla Walla River*, CENTER FOR WATER ADVOCACY (2010), <http://www.centerforwateradvocacy.org/news/view/148278/?topic=22775>.

145. *Id.*

146. *Id.* ("Due to the success of the Walla Walla salmon restoration program to date, the high level of tribal, agency and local stakeholder cooperation and the fact that two remaining critical projects are yet to be completed . . . the 1,200 fish return in 2010 is only a fraction of what can be accomplished in the Walla Walla basin.").

The proposed Walla Walla Basin Project (WWBP) is a project to pump water from the Columbia River back to the headgates of the three irrigation districts in the Walla Walla Basin for a bucket-for-bucket exchange so as to restore instream flows and salmon runs in the Walla Walla River. Because the river runs across state lines, the process necessarily involves bi-state collaboration, which brings some complexities that were not present in the Umatilla Basin Project process. One important complexity is the estimated high project cost of \$500 million, a ten-fold increase from the cost of the Umatilla Basin Project. The stakeholders in the Basin, including the Confederated Tribes of the Umatilla Indian Reservation, are working with the US Army Corps of Engineers in an effort to reduce the cost of the project.¹⁴⁷

Another important complexity now is the question of Indian water rights. Where the Umatilla Basin Project is fully implementable in Oregon, and Umatilla River water can be protected instream for the length of the project, the anticipated Walla Walla Exchange Project would follow the river into Washington, where water rights in the Walla Walla River have been quantified differently, and the water may not be protected instream.¹⁴⁸ One option for protecting this water is to settle the Umatilla Tribes' water rights in federal court.¹⁴⁹ However, for all the reasons discussed previously, litigation is not necessarily an effective strategy for fully resolving water rights disputes and obtaining wet water. Furthermore, in recent years, judicial determination of Indian water rights in federal court has been a wild card, as the courts, including the Supreme Court, have been inconsistent in their rulings on the rights of Indian

With good reason, the Umatilla Tribes would rather pursue a negotiated solution. As discussed above, a negotiated solution reached through local efforts and exhibiting broad support also has a better prospect of receiving federal funding than a litigated result because it represents a consensus-based agreement which is unlikely to be challenged as the agreement progresses through Congress. Other existing and potential legal options and approaches for achieving bi-state flow protection in the Walla Walla River include entering an interstate compact,¹⁵⁰ congressional apportionment,¹⁵¹ voluntary agreements not to divert,¹⁵² quantification of tribal reserved water rights in state adjudication,¹⁵³ and purchasing water rights.¹⁵⁴ Some combination of all of the above may in fact be necessary to fully realize the entire project. But in the meantime, interested parties are engaged in local efforts in the Walla Walla Basin to build consensus, begin putting projects on the ground, and work toward federal funding and support.

In 2008, the Walla Walla Watershed Management Partnership, a regional community-based group in the Walla Walla Basin, comprised of representatives from conservation and irrigation districts, Tribes, municipalities and counties, state agencies, and

150. The U.S. Supreme Court has often encouraged states to determine their shares of interstate waters by a compact rather than through litigation. However, negotiating a compact is a time-consuming and complicated process, and would likely be very controversial. *See e.g.*, *Hinderlider v. La Plata Co.*, 304 U.S. 92 (1938).

151. Congress can pass legislation apportioning interstate waters under the Commerce Clause of the U.S. Constitution. *See Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979). However, this is very rarely done. There appear to be only two instances of clearly established congressional water apportionment. *See Boulder Canyon Project Act*, Pub. L. No. 642, 45 Stat. 1057 (1928); *Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Title II)*, Pub. L. No. 101-618, 104 Stat. 3289 (1990).

152. Such agreements would essentially be contracts where water right holders would agree to stop diverting water, in exchange for consideration, in order for the water to stay in the Walla Walla River.

153. The Oregon portion of the Walla Walla River was adjudicated in 1912 and the Washington portion of the Walla Walla River was adjudicated in 1928. Neither of these states were parties to the other state's adjudication. Federal and Tribal reserved water rights were not adjudicated in either of these state proceedings. The United States, as trustee to a tribe, can sue a state in federal court to adjudicate treaty-reserved water rights on behalf of that tribe. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

154. *WWWMP*, *supra* note 55. Purchasing both senior and junior water rights would leave more water in the River, although not necessarily any more than by purchasing senior water rights alone. A water acquisition strategy of this nature will only succeed if there is agency support and adequate resources to regulate water users to the satisfaction of these trust in-stream flow water rights under the priority system. This will require an active effort by a water master and the willingness to take enforcement action when necessary.

community groups, submitted a radical proposal to the Washington Department of Ecology for managing the Walla Walla Basin. The message to the State was, in effect, “we can do it ourselves.” As a result, the Washington State Department of Ecology made an unprecedented offer. Ecology would support flexible, local management of water in the Basin, provided that: (a) stream flows and water quality are enhanced and maintained to support fish, and (b) conflicts that might arise around flexible water use are handled within the Basin.¹⁵⁵ Then, on May 5, 2010, the Washington Department of Ecology’s Columbia River Policy Advisory Group endorsed the agency’s proposal to obligate \$40 million toward the non-federal construction costs of the Walla Walla Stream Flow Restoration Project.¹⁵⁶ American Rivers, Washington Environmental Council, and Trout Unlimited provided letters of endorsement for the Project and for the \$40 million award for funding.¹⁵⁷ All four Washington and Oregon senators sent letters to the Senate Environment and Public Works Committee requesting that the Walla Walla Stream Flow Restoration Project be authorized for construction.¹⁵⁸ In addition, both members of Congress representing the Walla Walla Basin requested authorization for the Walla Walla Basin Project in letters to the House Transportation and Infrastructure Committee, which has jurisdiction over the Water Resources Development Act.¹⁵⁹

The Walla Walla Basin Water Management Initiative and Partnership is an example of a successful implementation of the principles of the Declaration of the Rights of Indigenous Peoples and the Law of Transboundary Aquifers. Since its beginning, the Walla Walla Basin Water Management Initiative has provided local water users with flexibility in exercising their existing water rights in exchange for augmenting and protecting stream flows and water quality within the Basin.¹⁶⁰ The Water Management Initiative

155. *Id.* T m 5 (f o u r) J T J - 0 . 000i o n i 0h e l 5 6 *Id.*

includes a locally governed water management system that would provide a degree of local autonomy and responsibility for water management, giving those with the most at stake greater influence over their own destiny, while at the same time protecting other transboundary rights.

Most importantly, the Initiative and the Report that grew out of it reflects the Walla Walla Basin community's ability to work together, their passion for self-governance, and the confidence in their ability to deliver flows for fish through cooperative and voluntary approaches. This passion is reflected in The Walla Walla River Watershed Vision, titled the "Land of Many Waters:"

The Walla Walla Watershed is a healthy river system capable of equitably sustaining its cultures and communities, including Tribal First Foods, agriculture, recreation, industry, and the amenities that enrich the lives of all residents. This vision requires a river system that is dynamic, with interacting ecological processes that maintain healthy stream and riparian habitats in which native species thrive. This vision involves and is fostered by community members who display a high regard of mutual respect, reflect both public and private interest, and willingly accept responsibility for their actions.¹⁶¹

The early phases of the Walla Walla negotiations thus reflect many of the international principles relating to a human right to water: principles of equity, participation, territorial integrity, and protection of vital human needs;¹⁶² the principles of access for farming and securing the livelihoods of indigenous people;¹⁶³ the rights of indigenous peoples to maintain and strengthen their spiritual relationship with their traditionally owned or occupied lands,

08-06-002, Wash. Dep't of Ecology (June 2008).

161. *Walla Walla Watershed Management Partnership Proposal for a Pilot Local Water Management in the Walla Walla Basin*, 2010, Executive Summary. (On file with the author). Previously available at <http://www.wallawallawatershed.org>. See also Comments of Michael J. Clinton, at Western States Water Council and the Native American Rights Fund on Sept. 1-3, 1992, in Albuquerque, NM ("Take an important lesson from Colorado-Ute. You must go back home and heal the animosity, bigotry, and racism that exist in your local communities. Those feelings exist not just between Indians and non-Indians. They are between neighboring communities, neighboring water users, neighboring tribes, the environmental communities, and other local interest groups. That is where settlements have to come together.").

162. 1997 UN WATER CONVENTION, *supra* note 32.

163. GENERAL COMMENT 15, *supra* note 40.

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note a strong correlation between the structure, terms, and principles of the Umatilla Basin Project and Walla Walla Watershed Management Partnership Initiative with several articles and principles embodied in the Law on Transboundary Aquifers and Declaration on the Rights of Indigenous Peoples, as well as the 1997 Convention, General Comment 15, and the Drinking Water and Sanitation Declaration.

We suggest that parties working toward collaborative water agreements honor the concept of water sovereignty. The two most significant limiting factors on economic development are capital and water,¹⁶⁸ and negotiators must look for commonalities and seek solutions that provide all parties with some measure of both of those elements. We encourage practitioners to be mindful of sovereignty principles, place-based identity, and the effectiveness of local alliances, in order to design durable agreements.