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Principles of International Law That Support Claims of Indian Tribes to Water Resources

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ABSTRACT

A growing body of international legal principles recognizes the right of indigenous people to water resources as a key component of their rights to self-determination, land, and economic self-sufficiency. These legal norms impose obligations on states both to recognize this right and to take affirmative steps to allow indigenous people to realize it. While the United States has not formally acceded to many of the applicable international instruments, the primary principles are embodied in instruments it has joined, and, in addition, some of these principles may constitute customary international law that applies regardless of accession.

Part I of this Article examines this body of legal principles as they relate to indigenous people's access to water resources and also examines the international institutions which have been set up to interpret and implement these principles. Part II discusses the bipartisan federal policy over the last five decades in the United States to promote and protect the self-determination of Indian Tribes and the specific actions the United States has taken over that time period concerning Indian water rights. Finally, Part III discusses how international legal principles and mechanisms might be used to support a more comprehensive approach by the United States to address the unmet water needs of Tribes, rather than the current approach that focuses primarily on the adjudication and settlement of individual Tribes' legal claims to water.

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INTRODUCTION

Indian Tribes throughout the western United States face perennial water shortages and insufficient access to clean water to develop their reservations into sustainable homelands. This Article examines the extent to which evolving principles of international law concerning the rights of indigenous peoples to land and other resources may be used to support: (1) the claim of an Indian Tribe in the United States to sufficient water to satisfy its needs, whether from sources within or outside its reservation, and (2) a corresponding obligation on the United States to supply that water to the Tribe.

The authors represented the Hopi Tribe for a number of years in litigation seeking to quantify the Tribe's rights to water as reserved under federal law.[1] In the course of work on this litigation, we became painfully aware that there is an acute imbalance between the available supply of water on the Navajo and Hopi Reservations and the water needs of the Navajo Nation and the Hopi Tribe. We learned, for example, that there are no perennial surface streams on the Hopi Reservation and few perennial streams on the western part of the Navajo Reservation, which were included in this litigation. We also learned that a principal groundwater source on both reservations is dropping steadily, drying up surface stream flows and springs as well as endangering wells.

The Hopi have occupied the lands that comprise their Reservation continuously for centuries, beginning long before European explorers first came to the American Southwest. But despite having been the first to live in this region, as we learned through our work, per capita water use on Hopi lands is roughly one-quarter of the per capita usage in non-Indian communities in rural Arizona and in rural areas of other western states. Water use on the Navajo Reservation similarly falls far below the water usage levels in other non-Indian communities.

Indeed, as we worked on this litigation, we learned that at least a quarter of the homes in the Hopi and Navajo Reservations lack full kitchens and bathrooms

1. The Sonosky firm's representation of the Hopi Tribe ceased in August 2011. As of the time of publication, the litigation is still pending. The views in this Article are solely those of the authors and do not necessarily reflect the views of the Hopi Tribe or any other past or present Tribal client of our law firm.

with running water (in contrast to 1 percent of homes nationally).[2] The extreme imbalance between water available to the Hopi and Navajo when contrasted with the water supplies available to most non-Indian rural communities in Arizona is, unfortunately, not atypical. The U.S. Commission on Civil Rights reported in 2003 that 50 percent of all on-reservation housing units throughout Indian Country lacked complete plumbing facilities—kitchens and bathrooms with running water.[3] Economists who worked with the two Tribes in this litigation advised them that it is virtually impossible for Tribes in these circumstances to achieve acceptable levels of economic development and self-sufficiency when so many Tribal members must drive miles from their homes to haul water from community wells (that sometimes do not even meet federal and state safe drinking water standards) and must regularly drive dozens of miles to non-Indian communities outside their reservation to perform necessities like washing their clothes.

More than a century ago, the U.S. Supreme Court held in the landmark Indian water rights case of *Winters v. United States* that when reservations were established for Indian Tribes, water was reserved for the Indians to make those reservations productive, irrespective of whether the Indians had actually used water from streams or other water sources on or near the reservation.[4] As the Supreme Court held in *Winters*, these Indian-reserved rights are protected by federal law and differ markedly from the rights of non-Indian settlers that arise under state law.

The state legal systems of most western states—where the great majority of Indian reservation lands are located—generally follow the doctrine of "prior appropriation" in recognizing water rights.[5] Under the prior appropriation system, a person acquires a right to use water by actually diverting the water and putting it to a beneficial use.[6] This water use is assigned a priority date—which is the date the diversion commences. In times of short water supply, an earlier appropriator is entitled to a full diversion before any subsequent user gets any water.[7]

2. *See* JONATHAN B. TAYLOR & JOSEPH P. KALT, HARVARD PROJECT ON AM. INDIAN ECON. DEV., AMERICAN INDIANS ON RESERVATIONS: A DATABOOK OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES 36–39 (2005).
3. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 15 (6th ed. 2011).
4. Winters v. United States, 207 U.S. 564 (1908).
5. DAVID H. GETCHES ET AL., WATER LAW IN A NUTSHELL 74 (5th ed. 2015); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.01 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].
6. GETCHES ET AL., *supra* note 5, at 74–75, 90–93.
7. *Id.* at 377–78.

The *Winters* case involved a dispute between non-Indian irrigators in Montana and the United States on behalf of a downstream Indian Tribe.[8] After the reservation was established, non-Indians began appropriating water from streams on neighboring lands the Tribe had ceded.[9] When, some years later, the Tribe attempted to irrigate reservation lands, there was insufficient water remaining in the streams, and the United States, as trustee, brought a suit on behalf of the Tribe to enjoin the non-Indian diversions.[10] Although under the state law of prior appropriation the non-Indians would have prevailed because of their earlier actual uses, the Supreme Court in *Winters* enjoined the non-Indian appropriators, reasoning that when the reservation was established, the Tribe had implicitly reserved a prior right protected under federal law to the water it needed for its reservation.[11]

Given the legal framework established in the *Winters* case, one might have expected Indian reservations to receive plentiful amounts of water in the decades immediately after *Winters* was decided. Instead, however, as the National Water Commission found in 1973, the opposite occurred:

> During most of this 50-year period [following the decision in *Winters v. United States*], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian Tribes might have had in the waters used for the projects. . . . In the history of the United States Government's treatment of Indian Tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[12]

Matters began to change for the better by the 1970s, however, after the Supreme Court held in 1963 in a case called *Arizona v. California* that five Indian Tribes with reservations on the mainstem of the lower Colorado River had the

8. 207 U.S. at 565.
9. *Id.* at 565–67.
10. *Id.* at 568–69.
11. *Id.* at 565, 575–77.
12. NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE 474–75 (1973).

right to use sufficient water "to irrigate all the practicably irrigable acreage on the[ir] reservations."[13] The Supreme Court, after extensive oral argument and briefing on the issues in the case stated:

> [The Supreme Court's appointed Master for this case] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. . . . How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.[14]

The Court awarded the five Tribes whose rights were involved in the *Arizona* case a total of 905,496 acre-feet per year[15] for use on 135,636 practically irrigable acres,[16] even though in the early 1960s these Tribes were actually irrigating much less land. The quantification of 905,406 acre-feet a year for these five Tribes allocated over 12 percent of the entire total dependable water supply of the Lower Colorado River to them.[17]

After *Arizona v. California*, many western states adopted the policy of seeking definite quantifications of Indian-reserved water rights within their boundaries, seeking to avoid the threat that they believed unexercised Indian claims

13. 373 U.S. 546(1963).
14. *Id.* at 600.
15. One acre-foot is equal to 325,900 gallons—enough water to cover an acre with one foot of water. This amount of water is generally enough to supply all the municipal and drinking water needs of a family of four or five persons living in a city or suburb. ARIZ. DEP'T OF WATER RES., SECURING ARIZONA'S WATER FUTURE, http://www.azwater.gov/AzDWR/PublicInformationOfficer/documents/supplydemand.pdf [https://perma.cc/34MF-25JV] ("An acre-foot is enough water to serve the needs of a family of five for one year."); *Arizona's Water: Uses and Sources*, ARIZ. EXPERIENCE, http://arizonaexperience.org/people/arizonas-water-uses-and-sources [https://perma.cc/EF3A-9MXE] (stating that "[a]pproximately one acre-foot serves the needs of a family of five for one year"); *What's an Acre-Foot?*, WATER EDUC. FOUND., http://www.watereducation.org/general-information/whats-acre-foot [https://perma.cc/2ZHH-S2NU] ("An average California household uses between one-half and one acre-foot of water per year for indoor and outdoor use.").
16. *See* Arizona v. California, 376 U.S. 340, 344–45 (1964).
17. *See* Special Master's Report on the Motion of the California Defendants to Join as Parties the States of New Mexico, Utah, Colorado, and Wyoming at 21, 48–51, Arizona v. California, 373 U.S. 546 (1963), https://dspace.library.colostate.edu/webclient/DeliveryManager/digitool_items/cub01_storage/2013/07/26/file_1/211565 (determining that a total of 7,500,000 acre-feet a year were allocated between the three states in the Lower Colorado River); *see also* Lawrence J. MacDonnell, Arizona v. California *Revisited*, 52 NAT. RESOURCES J. 363, 386–90 (2012).

posed to existing and future non-Indian uses.[18] Relying on a federal statute passed in 1952 known as the McCarran Amendment,[19] states sought to have this federal law question adjudicated in their state court systems.[20] The McCarran Amendment authorized state courts to determine water rights of the United States in "general stream adjudications"—proceedings to adjudicate all water rights in a particular river system—and waived the sovereign immunity of the United States to allow it to be joined in such suits.[21] Although state courts generally lack jurisdiction over cases where the United States or an Indian Tribe is a defendant, in 1971 the Supreme Court construed the McCarran Amendment as extending to reserved water rights owned by the United States.[22] Some years later, the Court held that federal courts should ordinarily defer to state proceedings to determine Indian and other water rights, so long as the state court proceedings adjudicated all rights in an entire stream system.[23] The litigation in which the authors represented the Hopi Tribe was one such general stream adjudication in state court to determine the water rights of all water users—Indian and non-Indian—in the Little Colorado River system in Arizona. The case involves the water rights of the Navajo Nation, the Hopi Tribe, non-Indian cities, industries, and thousands of farmers and ranchers in northern Arizona. This kind of litigation has been filed in most states in the more arid western half of the continental United States, and suits are now pending in state courts that will determine the federally reserved water rights of several dozen Indian Tribes.

Many of these McCarran Amendment cases have been settled in the past several decades.[24] Congress has enacted statutes ratifying twenty-nine agreements between Tribes, states, and non-Indian water users—including individuals, corporations, and municipalities—to settle water rights adjudications.[25] The typical pattern of these settlements is to quantify the Indian water rights and provide federally funded infrastructure delivering water to reservations for irrigation and for domestic, municipal, commercial, and industrial uses in return for Tribes agreeing that non-Indian water uses that are legally junior

18. *See* Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 550–59 (1983) (discussing suits filed in state courts to adjudicate Indian water rights in Colorado, Montana, and Arizona).
19. 43 U.S.C. § 666 (2012).
20. *See generally San Carlos Apache Tribe*, 463 U.S. 545.
21. *See* COHEN'S HANDBOOK, *supra* note 5, § 19.04.
22. United States v. Dist. Court for Eagle Cty., 401 U.S. 520, 525–26 (1971).
23. *San Carlos Apache Tribe*, 463 U.S. at 567; *see also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
24. *See* COHEN'S HANDBOOK, *supra* note 5, § 19.05.
25. *Id.* § 19.05 n.48; *see also* Reid Peyton Chambers & John E. Echohawk, *Implementing the* Winters *Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447 (1991–92).

to the Tribes' water rights—because they commenced after the reservation was established—will also be protected.[26]

These settlements have proceeded on a piecemeal basis, however, with only a few settlements being considered by each Congress—in total, less than thirty settlements have been ratified over the past forty years.[27] Even after Congress approves a particular settlement, the implementation process has usually been slow and depended on uncertain sources of congressional appropriations, which are generally spread out over many years.[28] Many Tribes, like the Navajo and Hopi, have been unable to reach settlements, in large part because of the high cost of importing water to these isolated reservations from distant water sources. Many of the reservations where settlements have not been reached are located in desert or mountainous regions that lack plentiful indigenous supplies of surface water and groundwater.[29] Unless water can be brought to these reservations, which usually entails great cost, most of the Indian people living on these reservations are likely doomed to continued poverty, since adequate water supplies are a necessary condition of economic growth and development. Given the failure of the United States to comprehensively address the water needs of all Indian reservations over the past four decades, we explore whether international legal principles might assist in addressing this continuing and distressing problem. This Article sets forth our preliminary conclusions.

I. INTERNATIONAL LAW PRINCIPLES AND INSTRUMENTS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLES TO RESOURCES

Both at the global level and in the Americas, there are now several institutions and legal instruments that can potentially be used to provide support for an Indian Tribe's claim of a right under principles of international law to importation of a water supply to address its needs. Indeed, some scholars have concluded that those legal instruments establish a "right to water,"[30] as we discuss below. In any event, as discussed below, several instruments in international law have increasingly proclaimed that indigenous peoples have a right, as part of their right of self-determination, to resources, land, development, and health. It is

26. COHEN'S HANDBOOK, *supra* note 5, § 19.05.
27. *Id.*
28. *Id.*
29. *See In re* the General Adjudication of All Rights to Use Water in the Gila River System & Source (*Gila V*), 35 P.3d 68, 78 (Ariz. 2001).
30. *See generally* SALMAN M. A. SALMAN & SIOBHÁN MCINERNEY-LANKFORD, THE WORLD BANK, THE HUMAN RIGHT TO WATER (2004).

important to keep in mind, however, that these standards and instruments are still developing and evolving. Many of the principles enumerated by various international bodies and legal instruments appear to not yet be legally binding on the United States.[31] Even the instruments to which the United States has not acceded, or which do not create binding legal obligations that could be enforceable in a court of law, however, may provide international law principles that a Tribe could invoke to publicly advocate for support from the United States or to shame the government into action.

A. The United Nations Charter and "Self-Determination"

The Charter of the United Nations (U.N. Charter) and the Universal Declaration of Human Rights (UDHR),[32] both signed in the wake of World War II in 1945 and 1948, respectively, are the foundational bedrock of the modern international human rights regime. The broad principles laid out in these two documents are the basis from which some of the more specific rights discussed *infra*—for example, indigenous peoples' rights, rights to water resources, or rights to development—are drawn.

Most important for present purposes is the right of self-determination, which is the underlying principle of most civil, political, social, cultural, and economic rights. Self-determination is enshrined in the first Article of the U.N. Charter, which states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[33] The U.N. Charter's Articles 55 and 56 link self-determination to standards of living, economic development, and health, providing that—based on "respect for the principle of equal rights and self-determination of peoples"—the U.N. should promote "conditions of economic and social progress and development."[34]

31. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102, 115(1)(b) (AM. LAW INST. 1987). The question whether a particular principle has become part of customary international law and is thus generally binding requires an intensive inquiry into all sources of international law, including the general practice of nations. We do not attempt in this Article to analyze whether any of the principles discussed have achieved the status of binding customary international law.

32. *See* discussion *infra* Part I.A., I.B.

33. U.N. Charter art. 1, ¶ 2.

34. *Id.* at art. 55, ¶ a. In the subsequent Article, member states commit to take measures to create such conditions. *Id.* at art. 56; *see also* Erica-Irene A. Daes (Special Rapporteur on the Promotion and Protection of Human Rights), *Prevention of Discrimination and Protection of Indigenous Peoples*, annex 2, ¶ 5, U.N. Doc. E/CN.4/Sub.2/2004/30/Add.1 (July 12, 2004). In the practice of international law, the opinions of qualified scholars are an important source of evidence of international law norms and are used extensively as a tool of interpretation by

As early as 1958, the U.N. General Assembly recognized that permanent sovereignty over natural wealth and resources is a basic constituent of the right to self-determination. Since that time, both "[t]he Inter-American Commission on Human Rights and the [United Nations] Human Rights Committee . . . acknowledged the importance of lands and resources to the survival of indigenous cultures and, by implication, to indigenous self-determination."[35] This follows from the principle that "[i]n no case may a people be deprived of its own means of subsistence."[36] Numerous subsequent U.N. resolutions—at least eighty as of the last comprehensive review[37]—also support sovereignty over natural resources and rights to resources for development. Of particular importance is a United Nations General Assembly resolution from 1999 on the right to development.[38] This resolution affirmed that the already-recognized right to development includes a right to water, stating that "[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community."[39]

The Special Rapporteur to the Human Rights Committee has echoed this view, determining in 2004 that the right of self-determination logically implies a right to sovereignty over resources and a right to development.[40] The Special Rapporteur studied the legal relationship between indigenous peoples, natural resources, and development by looking at international legal instruments such as the U.N. Charter and subsequent legal instruments discussed in detail below, decisions and opinions by various U.N. and other international institutions, state practice, and other pertinent sources.[41] In the case of indigenous peoples, the Special Rapporteur recognized in her final report the possibility of group or community interests in resources,[42] finding that the right to sovereignty over natural resources exists, even if it is not enumerated explicitly in international instruments.[43] She concluded that an international norm exists, and summed up that norm in the following way: "Indigenous peoples have a right to development

international law tribunals. *See, e.g.*, Statute of the International Court of Justice, art. 38(1)(d); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102 rep. n.1, 103(2)(c), 103 rep. n.1 (AM. LAW INST. 1987).

35. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 141 (2d ed. 2004).
36. International Covenant on Civil and Political Rights art. 1, ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
37. Daes, *supra* note 34.
38. G.A. Res. 54/175, The Right to Development (Feb. 15, 2000).
39. *Id.* at art. 12(a).
40. Daes, *supra* note 34.
41. *See generally* Daes, *supra* note 34.
42. *Id.* at 13.
43. *Id.* at 17.

and actively to participate in the realization of this right; sovereignty over natural resources is an essential prerequisite for this . . . ."[44]

In sum, significant authority allows an Indian Tribe to predicate a claim to sufficient water resources for development on the principles of self-determination enumerated in the U.N. Charter.

B. United Nations Universal Declaration of Human Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (Declaration or UDHR).[45] The Declaration established civil and political rights—which generally restrain governments from actions that interfere with individual rights and liberties, such as the freedom of expression protected by Article 19[46]—and economic, social, and cultural rights. For example, Article 25 maintains a right for all persons "to a standard of living adequate for the health and well-being of himself and of his family."[47]

In 1966, the United Nations General Assembly adopted two covenants implementing these two rather distinct aims of the Declaration: (1) the International Covenant on Civil and Political Rights (ICCPR), and (2) the International Covenant on Economic, Social and Cultural Rights (ICESCR). These are discussed in more detail below. The General Assembly also adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965). All three of these instruments establish human rights principles applicable to indigenous peoples, as we discuss in the following sections.

The United States has been a party to the ICCPR since 1992, and we discuss the ICCPR in Part I.C. While the United States is not a party to either CERD or ICESCR, or to other similar instruments adopted by the Organization of American States (OAS) discussed in Part I.F, taken together these instruments do develop and represent evolving principles of international law that may be binding on the United States at least as a normative matter, and perhaps in some respects even a legal matter, as we also discuss below in Parts I.D and I.E.

44. *Id.* at 11.
45. *See generally* Universal Declaration of Human Rights, Dec. 10, 1948, http://www.un.org/en/universal-declaration-human-rights/ [hereinafter UDHR].
46. UDHR at art. 19
47. UDHR at art. 25.

C. International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a particularly important source of enumerated rights for supporting an Indian Tribe's quest for sufficient water resources, because the United States has ratified the ICCPR, which means its provisions are binding law in the United States. In particular, the ICCPR articulates rights to self-determination and cultural preservation, both of which have been interpreted to support indigenous peoples in the protection and development of their traditional lands and resources. The ICCPR, much like the U.N. Charter, enshrines the right of self-determination in Article 1.[48] The U.N. Human Rights Committee—the body created by the ICCPR to implement its provisions—has power both to receive country reports and to adjudicate disputes or claims that a state party has violated this right.[49] In response to one regular report submitted to the Committee by Canada, the Committee interpreted the ICCPR right of self-determination to protect indigenous peoples in their enjoyment of rights over traditional lands and resources.[50] Such enjoyment could implicitly include an indigenous group's access to sufficient water.

Furthermore, Article 27 of the ICCPR includes the right of ethnic, religious, or linguistic minorities to enjoy their own culture.[51] The Human Rights Committee has interpreted this right as protecting the use of indigenous lands, territories, and resources—which are inextricably linked to preservation of culture[52]—as well as guaranteeing a right to the economic and social resources or activities upon which a Tribal group relies.[53]

There is support under the ICCPR for the proposition that states not only have an obligation to respect the right of self-determination—and all that such a

48. ICCPR at art. 1.
49. ICCPR at arts. 29, 40–42.
50. *See* Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee on Its Sixty-Fifth Session, ¶ 8, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7, 1999) (reaffirming aboriginal rights to dispose of natural wealth and resources).
51. ICCPR at art. 27.
52. *See* Human Rights Comm., General Comment No. 23(50)(art. 27), ¶ 3.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994).
53. Rep. of the Human Rights Comm., annex IX(A), U.N. Doc. A/45/40 (Oct. 4, 1990). The Lubicon Lake Band of Cree Indians petitioned the Committee because Canada was going to allow oil, gas, and timber exploration in the Band's native country. The Human Rights Committee found that this constituted an admissible claim of violations of Article 27 as an infringement on the "right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." *Id.* ¶ 32.2. The Committee allowed Canada to propose an appropriate remedy in accordance with the ICCPR. *See id.* ¶ 33. The subsequent negotiations on this and other land issues between Canada and the Lubicon Band are still ongoing.

right implies for development and sovereignty over resources and land—but must also take positive steps to ensure that the right is realized in practice.[54] The U.N. Human Rights Committee in General Comment No. 23 stated that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially [sic] in the case of indigenous peoples. . . . The enjoyment of those rights may require positive legal measures of protection . . . ."[55] S. James Anaya, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, has similarly concluded that "the duty of states to secure enjoyment of human rights . . . . is implicit, if not express, in human rights treaties and is similarly implicit in discernible customary human rights law."[56]

Therefore, because the ICCPR provides international legal authority binding upon the United States, Indian Tribes could rely on the ICCPR to demand that the United States take affirmative measures to assist them in finding sufficient water for development needs.

D. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR addresses the aspects of the Universal Declaration of Human Rights that pertain to governmental obligations to meet people's basic needs, broadly including rights to an adequate education, healthcare, food, clothing, and housing.[57] The Committee on Economic, Social and Cultural Rights (Committee), unlike the Human Rights Committee established under the ICCPR, lacks adjudicative authority to enforce the provisions of the ICESCR. This is because economic, social, and cultural rights are in some respects seen as aspirational goals or objectives toward which the member states should make progress, as opposed to a legal imperative. Rather than adjudicating disputes, the Committee under the ICESCR issues general comments interpreting the Covenant's provisions.[58]

Nations that are parties to the ICESCR must make periodic reports to the Committee on the measures they have adopted and the progress made "in

54. This is according both to international law scholars and to the U.N. itself. *See* ICCPR, *supra* note 36, at art. 1.

55. Human Rights Comm., *supra* note 52, at ¶ 7.

56. ANAYA, *supra* note 35, at 185 (citing THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 139, 155 (1989)).

57. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights arts. 7, 10–13, Jan. 3, 1976, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx [hereinafter ICESCR].

58. *See, e.g.*, ICESCR arts. 16–22; United Nations Econ. & Soc. Council, Resolution 1985/17 (May 28, 1985) [hereinafter ECOSOC].

achieving the observance of the rights recognized" in the ICESCR.[59] The Committee's general comments are connected to this reporting system, both in assisting the parties to the ICESCR in fulfilling the reporting obligations and in interpreting the rights in the ICESCR that are the subject of the reports. The United States is not a signatory party to the ICESCR; its provisions therefore are not formally binding on the United States. They may be normatively (or conceivably legally) binding, however, to the extent they have become embedded in generally applicable international law.[60]

The ICESCR requires that the rights it enunciates "will be exercised without discrimination of any kind of race, color, sex, language, religion, political or any other opinion, national or social origin, property, birth or other status."[61] This broad nondiscrimination requirement may be helpful in supporting a Tribe's access to a water supply equal to that available to other Americans, particularly since, as discussed in the next paragraph, the Committee General Comment No. 15 elaborates on the "right to water" as an implicit right under the ICESCR.

Most importantly for our purposes, the Committee on Economic, Social and Cultural Rights in 2002 interpreted Article 11 of the ICESCR to imply a human right to water.[62] This General Comment No. 15 interpreting Article 11 was concerned mainly with adequate and safe drinking water. The Committee determined that the "human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[63] The Comment called upon the parties to the ICESCR to "adopt effective measures to realize, without discrimination, the right to water, as set out in this general comment."[64] The Committee also connected the right to water with the rights to life, liberty, and human dignity contained in the Universal Declaration of Human Rights, determining that "[t]he right to water clearly falls within

59. G.A. Res. 2200 (XXI), annex, International Covenant on Economic, Social and Cultural Rights pt. IV, art. 16, ¶ 1 (Dec. 16, 1966).
60. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102, 115(1)(b) (AM. LAW INST. 1987).
61. *See* ICESCR art. 2, ¶ 2.
62. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, General Cmt. No. 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Cmt. No. 15]. The Committee found that the right to water is implied from Article 11 of the Covenant which affirms a "right to an adequate standard of living 'including adequate food, clothing and housing.'" *Id.* ¶ 3. The Committee concluded that "[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since [water] is one of the most fundamental conditions for survival." *Id.* The Committee also concluded that a right to water is "inextricably related to the highest attainable standard of health." *Id.*
63. *Id.* ¶ 2.
64. *Id.* ¶ 1.

the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."[65] Analytically, therefore, the concept the Committee elaborates is that without a right to water, these rights in the core international human rights instruments—such as the UDHR and ICCPR—are impossible to attain.

The scope of the "right to water" requires both that parties to the ICESCR refrain from action interfering with access to water and that parties undertake positive actions, including the commitment of resources. Paragraph 10 of the General Comment so states:

> The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference . . . . By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[66]

The Comment states that "priority in the allocation of water must be given to the right to water for personal and domestic uses."[67] It provides that "water, and adequate water facilities and services, must be within safe physical reach for all sections of the population" and "accessible to all, including the most vulnerable or marginalized sections of the population."[68] The Comment also provides that water must be accessible on a nondiscriminatory basis and "the allocation of water resources, and investments in water, [must] facilitate access to water for all members of society."[69] It explains that states "should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right [to water], including . . . indigenous peoples."[70]

Even more specifically, Paragraphs 25 through 29 of General Comment No. 15 obligate states to take positive measures to fulfill the realization of the right to water, including recognizing the right to affordable water for all persons within national, political, and legal systems.[71] Paragraph 37 sets forth specific obligations in this regard, including: (a) ensuring access to the minimum amount of water that is safe and sufficient; (b) ensuring the right of access to water and water facilities on a nondiscriminatory basis; (c) ensuring physical access to water facilities or services that provide sufficient, safe and regular

65. *Id.* ¶ 3.
66. *Id.* ¶ 10.
67. *Id.* ¶ 6.
68. *Id.* ¶ 12.
69. *Id.* ¶ 14.
70. *Id.* ¶ 16.
71. *See* General Cmt. No. 15, *supra* note 62, at ¶¶ 25–29.

water; (d) ensuring equitable distribution of all available water facilities and services; and (e) adopting relatively low-cost targeted water programs to protect vulnerable and marginalized groups.

These standards under the ICESCR, taken together, support the rights that an Indian Tribe in search of water would seek to protect and actualize. As noted, however, the United States is not a signatory to the ICESCR.

E. International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Like the ICESCR, the CERD has not yet been ratified by the United States, and thus is not binding international law. As in the case of other conventions, however, some principles encompassed by the CERD may have already attained the status of binding customary international law.[72] Under the CERD, states pledge to end racial discrimination and guarantee equality before the law without regard to race, color, or national or ethnic origin in civil rights and in economic, social, and cultural rights.[73]

The Committee on the Elimination of Racial Discrimination (CERD Committee)—created by the CERD agreement—accepts and examines petitions based on violations by signatory states and makes specific and general recommendations based on those petitions. The CERD Committee has made statements similar to the U.N. Human Rights Committee under the ICCPR, recognizing that states have affirmative obligations toward indigenous peoples to provide for the enjoyment of resources for development. For example, the CERD Committee has found that states should "[p]rovide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics" and that states need to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."[74] This serves as further authority for the concept that a state could be liable under international law not only for directly violating indigenous rights to resources and development, but also for not taking adequate positive measures to protect these rights. As noted, however, the

72. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b (AM. LAW INST. 1987). As noted, we do not analyze in this paper whether certain relevant norms have achieved the status of legally binding customary international law.

73. *See* G.A. Res. 2106 (XX), at 47 (Dec. 21, 1965).

74. U.N. Comm. on Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, ¶¶ 4(c), 5, U.N. Doc. A/52/18, annex V (Aug. 18, 1997).

United States is not a party to the Convention, and therefore is not formally bound by the Committee's decrees.

F. Inter-American Instruments

In the Americas, the American Declaration on the Rights and Duties of Man (American Declaration) (1948) is the cornerstone of international human rights and has been signed by nearly every country in the Western Hemisphere. The American Declaration has been supplemented by the American Convention of Human Rights (ACHR) (1978) and the Inter-American Democratic Charter (IADC) (2001). The ACHR includes a supplemental protocol protecting social and economic rights, which essentially mirrors the terms of the ICESCR described in detail above.[75] While the United States has acceded neither to the ACHR nor to its supplemental protocol, both the American Declaration and the IADC have been accepted by and are binding on the entire Organization of American States (OAS) membership, including the United States.[76] The American Declaration, like the U.N. Charter, encompasses mostly broad language, while the IADC and ACHR include more specific provisions.

The Preamble of the American Declaration maintains a duty to preserve, practice, and foster culture "by every means" available.[77] As discussed above, cultural preservation implies the resources necessary to preserve and develop a culture or community such as an Indian Tribe. In addition, Article XI of the American Declaration states that "[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public community resources."[78] As in the ICESCR, the right to "health" and "food" in the American Declaration obviously implies a right to sufficient water, at least as much as is necessary for public health and sanitary purposes.[79]

The IADC—which was finalized and accepted on September 11, 2001 by the full OAS membership—ties "economic, social, and cultural rights" to development of both the economy and democracy,[80] but creates no specific obligations

75. *See, e.g.*, ECOSOC Resolution 1985/17 at sec. (f); UN Docs.E/2011/22-E/C.12/2010/3, ¶¶ 19–59.
76. *See generally* Inter-American Democratic Charter Resolution (Sept. 11, 2001) [hereinafter IADC]; American Declaration on the Rights and Duties of Man (1948) [hereinafter American Declaration].
77. *See Preamble to* American Declaration.
78. American Declaration, at art. XI.
79. *See* discussion *supra* at notes 15–17.
80. Org. of Am. States, Inter-American Democratic Charter, art. 13, Sept. 11, 2001, 40 I.L.M. 1289.

on member states.[81] Again, however, as discussed above, "cultural" and "economic" rights strongly imply a right to water.

G. International Instruments on Indigenous Rights Specifically

There are two other international instruments currently in force that expressly deal with indigenous rights. The older instrument is the International Labour Organization (ILO) Convention No. 169, originally created in 1957 (as the Indigenous and Tribal Peoples Convention No. 107) and revised in 1989.[82] The original 1957 Convention reflected contemporary policies aiming toward assimilation of indigenous peoples, while the recent revision draws upon more thoughtful ideals of continuing diversity, self-determination, and safeguards against dissolution or discrimination.[83] While the United States is not a party to this Convention, the Convention's terms may reflect a growing body of customary international law principles that become generally binding.[84] The ILO Convention also states a basic right to self-determination, including in social, economic, and cultural development.[85] In addition, the Convention maintains that governments are responsible for the following: ensuring equal benefits under law; "social, economic, and cultural rights"; and "eliminat[ing] socio-economic gaps" in ways that are compatible with indigenous ways of life.[86] Article 15 of the Convention states that governments should specifically safeguard the right to resources.[87]

The second, and newer, international instrument relating specifically to indigenous rights is the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted in 2007.[88] UNDRIP was first drafted in 1993, after ten years of debate in a U.N. working group.[89] UNDRIP is not binding on any nation—rather, as a declaration by the General Assembly, it is a "formal and

81. *See generally* IADC, *supra* note 76.
82. *See* International Labour Organization Convention No. 169, Indigenous and Tribal Peoples Convention (1989) [hereinafter ILO Convention].
83. *See* ANAYA, *supra* note 35, at 58.
84. *See* SALMAN & MCINERNEY-LANKFORD, *supra* note 30.
85. *See* ILO Convention, art. 7, June 27, 1989, http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_124013.pdf [https://perma.cc/P25K-GNXY].
86. *Id.* at art. 2.
87. *Id.* at art. 15.
88. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).
89. *See Declaration on the Rights of Indigenous Peoples*, UN HUM. RTS. OFF. COMMISSIONER, http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx [https://perma.cc/E9H8-NKUL].

solemn" instrument that enunciates "principles of great and lasting importance."[90] It does not contain by its terms any cause of action or create a body charged with its application or interpretation.[91] But several factors may indicate its status as a part of the developing customary international law. For instance, UNDRIP was developed over the course of more than a decade and was initially endorsed by the vast majority of the U.N. General Assembly.[92] The four nations that voted against UNDRIP in the General Assembly, including the United States, have since endorsed it.[93]

As *Harvard Law Review* very recently concluded, UNDRIP represents the culmination of a process over the last several decades that "could not be more revolutionary with respect to human rights protections for indigenous peoples."[94] UNDRIP explicitly sets out the rights of self-determination for indigenous peoples and ties self-determination to the protection, promotion, and development of society, culture, and economy for indigenous groups. It enshrines the right of self-determination in Article 3, stating: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[95] Similarly, Article 12 protects the right to "manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies."[96] Articles 21, 23, and 31 state a right of indigenous peoples to develop politically, economically, and socially, including setting their own priorities for development.[97] Article 26 expands on this idea:

> (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

90. Comm'n on Human Rights, Rep. to the Economic & Social Council on the Eighteenth Session of the Commission, ¶ 105, U.N. Doc. E/3616/E/CN.4/832 (Apr. 26, 1962).
91. *See* Joyner-El v. Giammarella, No. 09 Civ. 3731(NRB), 2010 WL 1685957, at *3 n.4 (S.D.N.Y. Apr. 15, 2010).
92. *See* Siegfried Wiessner, *Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT'L L. & FOREIGN AFF. 239, 252 (2010).
93. *Id.* at 252–53. In the case of the United States in particular, one factor in the change in position was likely the change in presidential administrations. *See UN Declaration on the Rights of Indigenous Peoples Review*, U.S. DEP'T ST., http://www.state.gov/s/tribalconsultation/declaration/ [https://perma.cc/336V-334Y].
94. *The Double Life of International Law: Indigenous Peoples and Extractive Industries*, 129 HARV. L. REV 1755, 1755–58 (2016); *see also id.* at 1757–60.
95. U.N. Declaration on the Rights of Indigenous Peoples, art. 3 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [hereinafter UNDRIP].
96. UNDRIP, art. 12.
97. UNDRIP, arts. 21, 23, 31.

> (2) Indigenous peoples have the right to own, use, develop, and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[98]

Articles 29 and 32 also impose positive duties on states toward these ends. Article 29(1) provides that states shall "establish and implement assistance programmes" to conserve and protect indigenous peoples' lands for the protection of their environment and productive capacity, while Article 32 requires indigenous peoples' "free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[99] As explained in Subsections C through F, these protections imply a right to sufficient water for development in accordance with the preferences of the indigenous group—including a positive duty on the government to ensure provision of that water.

Implementation of UNDRIP continues to evolve. The U.N. Human Rights Council has requested the U.N. Expert Mechanism on the Rights of Indigenous Peoples to survey U.N. members and indigenous peoples on the best practices to implement UNDRIP and obtain its goals.[100] As the Expert Mechanism continues to compile recommendations and report them to the Human Rights Council, the consensus on what UNDRIP means and how its provisions can be implemented to protect indigenous rights will likely continue to develop. Tribes could influence the course of this development by submitting their views on implementation strategies directly to the Expert Mechanism.[101]

There is also currently another major draft convention on the rights of indigenous peoples—the Proposed American Declaration on the Rights of

98. UNDRIP, art. 26.
99. UNDRIP, arts. 29, 32.
100. *See* Human Rights Council Res. 21/24, U.N. Doc. A/HRC/RES/21/24, ¶ 7 (Oct. 11, 2012). As discussed in Part III.A, *infra*, the Expert Mechanism is a body of experts tasked with providing advice to the U.N. Human Rights Council on indigenous peoples.
101. Questionnaire on the Declaration on the Rights of Indigenous Peoples, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/QuestionnaireDeclaration.aspx [https://perma.cc/64MN-UAAC].

Indigenous Peoples (Proposed Declaration).[102] The Proposed Declaration was approved by the Inter-American Commission in 1997 and is under consideration by other OAS bodies.[103] As a draft, the Proposed Declaration is not itself binding on any nation. Like UNDRIP, however, it arguably reflects a growing body of customary international law to a certain degree, rather than simply setting forth brand new international norms.[104] There are several provisions in this draft document that deal specifically with self-determination and the right to water, resources, and development. Any controversy among nations on particular draft provisions, however, would be strong evidence that those provisions do not yet reflect accepted customary international law.

The Proposed Declaration includes provisions protecting indigenous groups' rights to development and cultural preservation through sovereignty over resources. The proposed Preamble reaffirms the right of indigenous peoples to develop according to their own traditions and interests and recognizes that indigenous groups traditionally hold resources (including water) in collective ownership. Proposed Article XIII(3) states that "[i]ndigenous peoples have the right to conserve, restore, make use of, and protect their environment, and to the sustainable management of their lands, territories, and resources,"[105] while Proposed Article XV(1) provides that these rights may be realized with autonomous administration.[106] Proposed Article XVIII(2) states a right to recognition of property rights and ownership rights to historically occupied lands and territories, as well as to traditional uses of that land—which would presumably include water and all other resources. The culmination of these rights is stated in Proposed Article XV, which provides autonomy in development, including participation in health, housing, and other social and economic programs.[107] Again, as discussed above, this language would provide a strong basis for a Tribe's claim to sufficient water—either on-reservation or off-reservation—for development in accordance with their own wishes.[108] It remains unclear, however, if any of these principles would be binding on the United States without explicit approval of the Proposed Declaration by member states upon its completion and circulation.

102. Proposed American Declaration on the Rights of Indigenous Peoples (Feb. 26, 1997) [hereinafter Proposed Declaration].
103. *Id.*
104. *See* SALMAN & MCINERNEY-LANKFORD, *supra* note 30.
105. Proposed Declaration, art. XIII(3).
106. *Id.* at art. XV(1).
107. *Id.* at art. XV.
108. *See* discussion, *supra* Parts I.C–I.F.

H. Other International Institutions Recognizing Indigenous Rights

Many international institutions have increasingly recognized indigenous peoples' rights to resources in their operational policies. For example, the World Bank Operational Policy 4.10—Indigenous Peoples (July 2005) institutionalizes a standard that all development projects financed by the Bank that affect indigenous peoples should be undertaken only after a borrower nation seeks broad community support from the affected indigenous groups through "free, prior and informed consultation."[109] At the regional level, the Inter-American Development Bank (IADB) has established similar measures by developing a Strategic Framework for Indigenous Development[110] and an Operational Policy for Indigenous Peoples.[111]

I. Summary of Rights Protected by International Instruments

To summarize, numerous international and domestic bodies have interpreted the overarching right to self-determination as establishing Indian Tribes' right to water, resources, and development. As one of the bases of the U.N. Charter, the right of self-determination is a principle of customary international law, probably even a *jus cogens* (non-derogable) right.[112] Subsequent international instruments, such as the ICCPR, have reaffirmed this right time and again.[113] The right of self-determination is not meant to imply a right to statehood per se, but rather that peoples are able to "freely pursue their economic, social, and cultural development"[114] within a broader nation state. Professor Anaya, for example, clarifies that redresses for "historical violations of self-determination do not necessarily entail a reversion to the status quo ante but, rather, are to be developed in accordance with the present-day aspirations of the aggrieved groups."[115]

109. Jorge E. Uquillas et al., *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006–2008)*, at vii (Aug. 2011) (unpublished manuscript) (on file with the World Bank).
110. *RS-T1073: Consultation Process—Strategic Framework for Indigenous Development*, INTER-AM. DEV. BANK, http://www.iadb.org/en/projects/project-description-title,1303.html?id=rs-t1073 [https://perma.cc/2VTL-WA6E].
111. *RS-T1183: Strategy and Operational Policy for Indigenous Peoples*, INTER-AM. DEV. BANK, http://www.iadb.org/en/projects/project-description-title,1303.html?id=rs-t1183 [https://perma.cc/9LSD-9JYV].
112. ANAYA, *supra* note 35, at 97.
113. *See supra* Parts I.C–F.
114. ICCPR, *supra* note 36, at art. 1, ¶ 1.
115. ANAYA, *supra* note 35, at 107.

Therefore, these international instruments may help Indian Tribes to assert their claim to a right to water.

II. THE INCREASING RECOGNITION BY THE UNITED STATES OF RIGHTS OF INDIGENOUS PEOPLE TO SELF-DETERMINATION

The trend toward recognition of indigenous rights noted above includes the right to both land and to resources, as well as to development of each.[116] In the course of the aforementioned U.N. Special Rapporteur to the Human Rights Committee's study, the Rapporteur found that the trend in both international law and domestic law of nations around the world is to recognize indigenous rights to permanent sovereignty over resources as well as land—as logically necessary elements of well-recognized rights to cultural preservation and self-determination.[117] The extent to which this trend is universal may of course be debated, which is why many of the principles (except to the extent they are included in instruments signed by the United States) may not be legally binding to protect an American Indian Tribe.

But as a normative matter, the United States should be increasingly reluctant to deny these generally recognized rights because every administration over the last five decades has affirmed indigenous peoples' right to self-determination and access to resources. In March of 1968, President Johnson issued the first ever Presidential Message to Congress on Indian Affairs, "propos[ing] a new goal for our Indian programs: A goal that . . . stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."[118] President Nixon issued a similar Message to Congress on Indian Affairs on July 8, 1970.[119] These two Presidential Messages—one by a Democratic president, the other by a Republican—represented a very dramatic departure from and rejection of virtually all prior Indian policies of the U.S. government, and have lasted to this day to guide the federal Indian policy of all future administrations of both parties.

The Indian policy that immediately preceded these Presidential Messages—embraced by the Truman and Eisenhower administrations and congressional majorities during the 1950s—had been to terminate Tribes' treaty and other special rights and the United States' federal trust responsibility to protect and

116. *See, e.g.*, *supra* Parts I.G–I.
117. *See generally* Daes, *supra* note 34.
118. Lyndon B. Johnson, *Special Message to the Congress on the Problems of the American Indian: "The Forgotten American"*, 1 PUB. PAPERS 335, 336 (1968).
119. *See generally* Richard Nixon, *Special Message to the Congress on Indian Affairs,* 1 PUB. PAPERS 564 (1970).

enforce these rights, seeking instead to forcibly assimilate Indians into the American melting pot.[120] Both the Johnson and Nixon Presidential Messages forcefully renounced that termination policy, which Congress had imposed on seventy Tribes in the 1950s and 1960s.[121]

President Nixon's Message also expressly reaffirmed the federal trust responsibility as a permanent legal obligation of the United States to Tribes, which the United States could not discontinue unilaterally. The Message promised "that the . . . Government would continue to carry out its treaty and trusteeship obligations" so long as a Tribe wished it to do so.[122] This was the first time that an administration had ever adopted a policy acknowledging that the federal-Tribal relationship could be a permanent one and that Tribes could have a perpetual existence as governmental entities.

In addition, both Presidential Messages rejected the practice of prior decades during which the Bureau of Indian Affairs had administered virtually all aspects of life on Indian reservations.[123] The Nixon Message observed that "the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials" and denounced that practice as fostering "excessive dependence on the Federal government."[124] It proposed instead that Tribes should control and govern affairs on reservations free of federal dominance, and sent legislation to Congress to accomplish that objective, which Congress enacted and has expanded in succeeding decades.[125]

Promoting Tribal self-determination has been the policy of every subsequent administration and has been embodied in major Indian statutes enacted by Congress.[126] For example, U.S. policy placed in effect by President Bill

120. COHEN'S HANDBOOK, *supra* note 5, at 84–93.

121. *Id.* at 90. For a description of federal Indian policies prior to the Truman Administration, see Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 737–40 (2014).

122. Nixon, *supra* note 119, at 567. In rejecting the legacy of both the termination policy and overreaching federal paternalism, the Nixon Message proclaimed that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." *Id.* at 565.

123. *See, e.g.*, *id.* at 565–68 ("[T]he Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials . . . .").

124. *Id.* at 566.

125. The Nixon Message proposed legislation requiring the Board of Indian Affairs and the Indian Health Service to contract most Indian programs to Tribes, which Congress enacted in the Indian Self-Determination and Education Assistance Act of 1975. 25 U.S.C. § 450 (2016). For a brief description of subsequent legislation on this subject, see Chambers, *supra* note 121.

126. *See, e.g.*, Memorandum From President Obama to the Heads of Executive Departments and Agencies on Tribal Consultation (Nov. 5, 2009), http://whitehouse.gov/the-press-office/memorandum-Tribal-consultation-signed-president [https://perma.cc/LAU5-Z669] [hereinafter Memorandum From President Obama]; Proclamation No. 7500, 3 C.F.R. § 305

Clinton officially accepted the following norms of self-determination for indigenous peoples:

> Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples, in exercising their right of internal self-determination have the internal right of autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.[127]

The federal government's respect and support for Indian self-determination is also reaffirmed in President Barack Obama's presidential memorandum on Tribal consultation.[128] The memorandum charges administrative agencies with "engaging in regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications . . . ."[129] Along with prior presidential policy statements, this memorandum institutionalizes federal recognition of and respect for Tribal self-governance and management of resources in areas that have Tribal implications, like access to water in dry parts of the country.

These Presidential policy statements pledging federal support for tribal self-determination, together with the relevant international principles enumerated above that have considered tribal self-determination as entailing a right to the reasonable use and control of water and other resources needed for economic development, provide support for tribes' right to receive sufficient water to develop and preserve their societies, economies, and cultures. But to date the United States has augmented tribal water supplies on reservations only on a piecemeal

(2001) (President George W. Bush); Exec. Order No. 13,175, 3 C.F.R. § 304 (2000) (President Clinton); *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments*, 1 PUB. PAPERS 662 (1991) (President George H. W. Bush); *Statement on Indian Policy*, 1 PUB. PAPERS 96 (1983) (President Reagan).

127. ANAYA, *supra* note 35, at 111–12 (quoting attachment to Memorandum From Robert A. Bratke, Exec. Sec'y, Nat'l Sec. Council, to Kristie Kenny, Exec. Sec'y, Dep't of State, Julie Falkner, Dir. of Exec. Secretariat, Dep't of the Interior, Frances Townsend, Counsel for Intelligence Policy, Dep't of Justice, Chris Klein, Staff Asst. to the Representative of the U.S. to the United Nations (Jan. 18, 2001)). Former President Bill Clinton adopted this policy during the final days of his administration.

128. *See generally* Memorandum From President Obama, *supra* note 126.

129. *Id.*

basis, reservation by reservation, and almost always as part of a congressionally ratified settlement of a particular tribe's claims in litigation for federally reserved water rights.[130]

We believe that a better, more comprehensive approach would include establishing federal funding for allocation or acquisition of water rights and construction of water delivery infrastructure where reasonably needed to create more economically self-sufficient tribal societies on reservations. Such funding should be provided regardless of the strength of a particular tribe's position in ongoing adjudication of its water rights—and even separate and apart from settlement of water rights adjudications—since federal policy should further Tribal economic self-sufficiency, not simply resolution of litigation. We accordingly suggest that international legal principles support a need-based approach that would address insufficient water supplies as a federal policy matter independent from litigation. Current conditions on Indian reservations in the United States, where large numbers of Indians lack sanitary and sufficient drinking water, could better be rectified as a matter of national policy that is consonant with these evolving international legal principles, and not solely or even principally in the context of settling legal disputes through water rights adjudications.

III. POSSIBLE AVENUES OF RECOURSE

This Part examines the possible avenues of recourse for an Indian Tribe available through the global and regional institutions and instruments discussed in Part I. If an Indian Tribe wishes to draw public attention and outcry to its water situation by presenting its claims for redress to an international forum, which is probably the most effective available means of compelling the United States to action, we conclude that the most useful of these fora would probably be the U.N. Expert Mechanism on the Rights of Indigenous Peoples and the Inter-American Commission on Human Rights. As we discuss below, both of these institutions have a petition procedure that would allow an Indian Tribe to shed international public light on its situation.

A. U.N. Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism is probably the most useful U.N. body if an Indian Tribe wishes to pursue international action against the United States. The U.N. Human Rights Council (HRC) created the Expert Mechanism to aid the Council

130. *See* text accompanying notes 26–29.

in the implementation of its mandate by providing subject matter expertise on the rights of indigenous peoples.[131] It is made up of five experts appointed by the HRC.[132] The Expert Mechanism holds annual sessions at which it accepts written and oral reports from indigenous peoples' representatives, non-governmental organizations (NGOs), academics, human rights organizations, and beneficiaries of the U.N. Voluntary Fund for Indigenous Populations.[133] Unlike many U.N. and other international bodies, the Expert Mechanism can accredit a wide range of groups to submit materials at its annual sessions.[134] Similarly, lack of special U.N. "consultative status" is not a bar.[135] While the Expert Mechanism may not have the resources to investigate specific allegations or send out fact finders, this does not necessarily lessen its value as a means of shaming the target state.[136]

Furthermore, like its predecessor—the U.N. Working Group on Indigenous Populations—the Expert Mechanism publishes reports on its sessions and findings.[137] Commentators reacted positively to the Working Group as a forum for public scrutiny:

> [T]he large volume of written and oral reports by indigenous representatives from around the world, along with the review and summary publication of these reports by the working group, provides for an important measure of scrutiny over state conduct in relation to indigenous peoples in many parts of the world.[138]

Participation in the Expert Mechanism's sessions could effect a similar outcome. With strategic media targeting and press releases, it would be possible to turn participation in the Expert Mechanism's annual session into a public display of the embarrassing status of water issues on a particular Indian reservation. Moreover, the incorporation of an Indian Tribe's concerns into one of the Expert Mechanism's thematic or other reports to the HRC could, in tandem with an amplifying media strategy, put even more pressure on the United States to address the Tribe's concerns.

Despite this potential, at least one commentator has decried the Expert Mechanism, along with the other U.N. bodies focused on indigenous rights, for

131. Rep. of the Human Rights Council on Its Sixth Session, at 74–76, U.N. Doc. A/HRC/6/22 (Apr. 14, 2008).
132. *Id.* at 75.
133. *See Accreditation for the Sessions of the Expert Mechanism on the Rights of Indigenous Peoples*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Accreditation.aspx [https://perma.cc/2TH3-5YA6].
134. *Id.*
135. *Id.*
136. *See, e.g.*, UN DOC A/HRC/30/52 (most recent Expert Mechanism report).
137. *See id.* (citing most recent Expert Mechanism report).
138. ANAYA, *supra* note 35, at 221.

dealing primarily with the complaints and rights of individuals, or individual groups of indigenous people, rather than dealing with indigenous nations as sovereign entities.[139] This tendency could present challenges or ideological problems for an Indian Tribe, but it could also present some benefits, depending on the media and legal strategy that a Tribe wishes to undertake to have its concerns publicized. For example, the Expert Mechanism's propensity for focusing on the rights of individuals might support a strategy focused on concerns in a particular area of the country, or pan-Tribal concerns, rather than focusing on a particular Indian Tribe as a nation.

B. OAS Inter-American Commission on Human Rights

In the Americas, the regional body dealing with indigenous rights and human rights is the Inter-American Commission on Human Rights (IACHR), part of the OAS.[140] The IACHR's seven members are elected by the OAS General Assembly and are expected to act independently from their respective home country governments.[141] The IACHR carries out two main functions. First, upon invitation by a member state, the IACHR may examine the condition of human rights in that state and report on its findings.[142] Second, the IACHR examines individual petitions regarding alleged violations of human rights and makes recommendations on measures to remedy such violations.[143] If the member state has also accepted the jurisdiction of the Inter-American Court of Human Rights (which the United States has not), then the IACHR may submit the case to that court for a legally binding decision.[144] An Indian Tribe might be able to shine public light on its lack of water by bringing a claim before the IACHR. While the United States is not a party to the American Convention on Human Rights, in the past the IACHR has handed down public reports and recommendations to the United States for violating indigenous rights under the American

139. *See, e.g.*, Charmaine White Face, *Individual Rights Only for Indigenous Peoples at the UN*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 3, 2012), http://indiancountrytodaymedianetwork.com/opinion/individual-rights-only-for-indigenous-peoples-at-the-un-101150 [https://perma.cc/HM5J-ES33].

140. There is also an Inter-American Court of Human Rights, but the United States is not a party to that institution as a non-signatory to the American Declaration of Human Rights.

141. INTER-AM. COMM'N ON HUMAN RIGHTS, *Introduction* to BASIC DOCUMENTS IN THE INTER-AMERICAN SYSTEM 8–9, http://www.oas.org/en/iachr/mandate/Basics/introduction-basic-documents.pdf [https://perma.cc/E5RC-XLGU]. For all of the basic documents, see Inter-Am. Comm'n on Human Rights, *Basic Documents in the Inter-American System*, ORG. AM. STS. http://www.oas.org/en/iachr/mandate/basic_documents.asp [https://perma.cc/W4TM-2HMN].

142. INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 141.

143. *Id.*

144. *See, e.g.*, ANAYA, *supra* note 35, at 260.

Declaration on the Rights and Duties of Man (American Declaration).[145] These proceedings do not have the same cloak of confidentiality as the complaint procedure at the HRC discussed in Part III.C. The IACHR publishes each complaint when it is received, and again when the complaint is determined to be admissible or inadmissible.[146] Therefore, the claim would be made publicly available from the beginning and could thus be incorporated into a strategy aimed at garnering public awareness and support for a Tribe's increased water access.

Furthermore, these claims could provide a viable option for Tribes because the admissibility requirements for a petition to the IACHR are not unreasonably burdensome.[147] Anyone can petition—a friendly NGO, the Tribe's attorneys, or a Tribal member or representative.[148] A claim by a Tribe at the IACHR

145. *See, e.g.*, the Western Shoshone land claim in Nevada discussed *infra* notes 154–155.

146. *Rules of Procedure of the Inter-American Commission on Human Rights*, ORG. AM. STS., http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp [https://perma.cc/J565-QW7Z] [hereinafter *Rules of Procedure*].

147. *See* INTER-AM. COMM'N ON HUMAN RIGHTS, PETITION AND CASE SYSTEM: INFORMATIONAL BROCHURE (2010). Any person, group, or NGO may petition the Commission—even on behalf of a third party—against a Member State like the United States who is not a party to the Inter-American Court. The petition must allege violations of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, or other inter-American human rights treaties. *Id.* In addition, the petition is only admissible if a Member State is responsible for a violation of human rights, although a Member State can be responsible if the State failed to act to prevent the violation or failed to follow up on a violation by sanctioning the responsible parties. *Id.* Another requirement for admissibility of a petition is exhaustion of domestic remedies. If domestic remedies have not been exhausted, the petitioner must show either: (1) inadequate due process, (2) effective access to remedies has been denied, or (3) an undue delay in the decision. *Rules of Procedure*, *supra* note 171, at art. 31. If domestic remedies have been exhausted, the petition must be filed within six months of the final decision. INTER-AM. COMM'N ON HUMAN RIGHTS, *supra*.
The process for an admissible petition is also relatively straightforward, and follows these seven main steps:
(1) *Discovery*: The Commission requests information from the Government.
(2) *Comments*: Each party comments on the other party's subsequent responses.
(3) *Investigation/Hearing*: The Commission may investigate, visit the affected area, request more information, and/or hold a hearing.
(4) *Settlement Negotiation*: The Commission usually first offers assistance in negotiating a settlement.
(5) *Confidential Report*: The Commission issues a report. The initial report is not made public, only given to the Member State, with a window of time for correcting or resolving the issue.
(6) *Published Report*: If the State takes no action on the confidential report, then a second (public) report is published.
(7) *Submission to Court:* For American Convention signatories, the case may be submitted to the Inter-American Court of Human Rights within three months. *See Rules of Procedure*, *supra* note 171.

148. *See* American Convention at art. 44; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS R. PROC., art. 28 [hereinafter IACHR R. PROC.].

would probably be ruled admissible. Even if it were not, however, the IACHR would still publish its findings on the claim, bringing to public scrutiny the issues at bar. Essentially, for a complaint to be admissible, the petitioner needs to show that: (1) there is a violation of the American Declaration, (2) an OAS Member State to blame, and (3) domestic remedies were exhausted (or an explanation as to why domestic remedies were not first exhausted).[149] The United States (either through the federal government or a state government) has an affirmative duty under the American Declaration to protect the rights of the Tribe, including the right to self-determination in the way of resource and development rights.[150] Therefore, if the United States failed to meet this duty, it would qualify as an OAS member state to blame—for failure to act to uphold the promises of the American Declaration.[151] In addition, even if there had been no complete exhaustion of domestic remedies in a case for water rights, Tribes could have a solid argument for undue delay, as some water cases take decades to resolve. For example, in a petition on behalf of the Maya Indigenous Communities of the Toledo District (1998), the IACHR accepted plaintiff's argument that three and a half years was an undue delay.[152] Because, in our experience, Tribal water claims invariably take over three and a half years to resolve, Tribal arguments for undue delay could be successful before the IACHR.

It is important to keep in mind, however, that there is no guarantee that the United States will remedy Tribal water problems even if a petition to the IACHR is successful. The end result of a successful petition to the IACHR will be a recommendation to the U.S. government, which will initially be confidential.[153] If the United States does not act to remedy the problem within the window of time provided by the IACHR, however, the IACHR will report its conclusions publicly.[154] This does not mean that the United States would actually act upon the recommendations of the IACHR. In the case of the Dann sisters, for example, the United States has still not acted to remedy the problem despite having been admonished by the IACHR to do so.[155] If the goal is to bring public pressure and

149. *See,* American convention at art. 46(1); IACHR R. PROC., arts. 27–34.
150. *See, e.g.*, ANAYA, *supra* note 35, at 259–60.
151. *See, e.g.*, ANAYA, *supra* note 35, at 259.
152. Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. Comm'n H.R. Report No. 78/00, OEA/Ser./L/V/II.111, doc. 20 rev. ¶¶ 41, 54 (2000).
153. *Rules of Procedure*, *supra* note 146, art. 44.
154. *See, e.g.*, Mary & Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R. Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 (2002).
155. The remedies recommended in *Dann* included (1) "adopting the legislative or other measures necessary to ensure respect for the Danns' right to property . . . in connection with their claims to property rights in the Western Shoshone ancestral lands," and (2) "ensur[ing] that the property

bad publicity to bear against the United States, however, an IACHR petition could be a successful route, in part because the petitions are made publicly available, as described above. Combining a claim to the IACHR with a well-planned media and political strategy could be an effective way of shaming the United States into action.

C. United Nations Human Rights Council

Since 2006, the main umbrella body overseeing human rights at the United Nations level has been the Human Rights Council (HRC),[156] which includes several relevant subsidiary bodies, such as the Expert Mechanism discussed in Part III.A. The HRC is made up of forty-seven member states elected by the U.N. General Assembly.[157] In addition to periodically reviewing the human rights situations in all member states, the HRC entertains complaints submitted by individuals, groups, or NGOs that claim to be victims of human rights violations—or that have direct, reliable knowledge of such violations—through a confidential Complaint Procedure.[158]

While an Indian Tribe could submit a complaint—called a "communication"—through the HRC's Complaint Procedure, the effect of this Complaint Procedure might be minimal given its confidential nature, especially if the purpose is to publicly shame the federal or a state government in the United States. In our view, public shaming is likely the most effective means for a Tribe to compel the United States to action. For the communication to result in success for the Tribe, the matter would have to be made public by the HRC, which is not guaranteed under the HRC's procedures. In fact, there are several substantial steps in bringing a communication to "investigation"—and confidentiality permeates the Complaint Procedure process.[159]

In addition to confidentiality, the Complaint Procedure process has other requirements that can present obstacles to potential complainants. For example, communications must relate to situations that "appear to reveal a consistent

rights of indigenous persons are determined in accordance with the rights established in the American Declaration." *Id.* ¶ 173.

156. The Human Rights Council is a permanent organ of the United Nations, created by resolution of the General Assembly. *See* G.A. Res. 60/251 (Mar. 15, 2006). It is not to be confused with the Human Rights Committee discussed earlier, which was created by and implements the ICCPR only.

157. U.N. Human Rights Council, *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, www.ohchr.org/EN/HRBodies/HRC/pages/aboutCouncil.aspx [https://perma.cc/MK2Y-4NRJ].

158. Human Rights Council Res. 5/1, U.N. Doc. A/62/53, at 48–73 (June 18, 2007).

159. *See, e.g.*, *id.* at 100–05.

pattern of gross and reliably attested violations of human rights."[160] In addition, "[d]omestic remedies [must be] exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged."[161] Upon receipt of the communication, HRC's permanent Working Group on Communications screens it and then obtains the views of the affected state on the issue.[162] If the Communications group determines that the allegations have merit, it provides a file with its recommendations on the communication to the HRC's Working Group on Situations.[163] The Situations group investigates and reports on the violations of rights and freedoms to the full HRC, and provides a recommendation of what course of action the HRC should take.[164] This procedure is entirely confidential unless the Situations group recommends that a situation be considered in a public hearing, "in particular in the case of manifest and unequivocal lack of cooperation" by the state against whom the allegations have been made.[165] Upon consideration of the Situations group's report, the HRC can decide to: discontinue consideration; keep the situation under review; appoint an independent monitor; take up public consideration of the issue; or recommend to the Office of the High Commissioner on Human Rights that the Commissioner provide cooperation, assistance, or services to the offending state to remedy the situation.[166]

Because this procedure is complex, for a communication on lack of water access to bring positive results for a Tribe, a number of pieces would have to fall into place. First, the communication would have to characterize the lack of water access as a gross and continuing violation of international human rights.[167] Second, the HRC's Working Group on Communications would have to accept the communication and investigate the situation, conferring confidentially with the United States.[168] Third, the Working Group on Situations would have to receive the file, investigate the claims, and make a recommendation to the full HRC.[169] Finally, the HRC would need to make a final determination.[170] That final determination might be to discontinue confidential consideration and begin public consideration of the issue, but it might also be to continue confidential

160. *Id.* at 58.
161. *Id.*
162. *See id.*
163. *See, e.g.*, *id.* at arts. 88–89, 96–99.
164. *See id.* at 58–60.
165. *Id.* at 59.
166. *Id.* at 60.
167. *See, e.g.*, *id.* at art. 85.
168. *See, e.g.*, *id.* at arts. 87–88.
169. *Id.* at art. 96–99.
170. *Id.* at art. 109.

monitoring.[171] Because the Working Groups are only required to meet twice a year, this could take several years and, ultimately, there is no assurance of any action or response.[172]

That said, there have been successful communications made against the United States in the past under the communications procedure that preceded the HRC's Complaint Procedure—insofar as the communication resulted in bringing public attention to a failure of the United States. For example, the United States was arguably shamed in 1980 as a result of a communication to the Commission on Human Rights submitted by the Indian Law Resource Center that became public.[173] A similarly positive outcome is possible in the current system. Even so, because of the length of time associated with Complaint Procedures and the confidentiality involved from the outset, the smaller Expert Mechanism of the U.N. (described in Part III.A) is probably the forum better suited for a water situation to be brought to international public light.

CONCLUSION

There is a growing body of international legal principles that recognize the right of indigenous people to water as a key component of self-determination, and create obligations for states to both recognize the right and take affirmative steps to realize the right. While the United States has not acceded formally to many of the applicable international agreements, some of the principles in these agreements may nonetheless constitute customary international law that is binding on all nations. An increasing number of states have recognized the right of indigenous peoples to self-determination and to sufficient land and other resources to attain economic self-sufficiency. Indeed, this has been the bipartisan policy of every administration in the United States since the Messages to Congress on Indian Affairs by Presidents Johnson and Nixon nearly five decades ago. In the event the United States does not respond to efforts by Tribes to invoke these principles embedded in both national policy and evolving international law, international institutions provide, at a minimum, opportunities for public attention, public scrutiny, and international pressure to be brought to bear on the United States to comprehensively address the lack of sufficient water resources on

171. *Id.*

172. *Id.*

173. Violations of the Human Rights of American Indian Peoples by the United States of America, petition dated March 11, 1980, from the *Indian Law Resource Center to the United Nations Commission on Human Rights*, *reprinted in* NAT'L LAWYERS GUILD COMM. ON NATIVE AM. STRUGGLES, RETHINKING INDIAN LAW 141 (1982). The petition was made on behalf of the Seminoles, Houdenousaunee, Hopi, Western Shoshone, and Lakota Nations.

reservations. Indeed, we think the evolving body of international legal principles only bolsters our position that the United States should increase water supplies on Indian reservations on a comprehensive basis. This approach would be a considerable improvement over the present policy of focusing almost exclusively upon the legal claims of particular Tribes as asserted against non-Indian water users in specific litigation.