WATER LAW AND INDIGENOUS RIGHTS -WALIR
Towards recognition of indigenous water rights and management rules in national legislation

Summary of the presentations at the public meeting (7 March 2002) on the occasion of the International WALIR Seminar, 4-8 march 2002, Wageningen, The Netherlands.

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INTRODUCTION

In a special session of the Second World Water Forum (The Hague, March 2000), organised to analyse the issue of "Water and Indigenous Peoples", participants reached this alarming conclusion in their final statement: "… having examined the Forum documents, indigenous peoples and their unique systems of values, knowledge and practices have been overlooked in the Global Water Vision process. The session concluded that there is an urgent need to correct the imbalance of mainstream thinking by actively integrating indigenous women and men in subsequent phases, starting with the Framework for Action". While this attention was lacking in the carefully prepared, official March 2000 debate, the situation in 'the field' is still far worse. Even when indigenous rights and water management practices are not simply obstructed by national legislation and intervention policies, attention to the subject is negligible, and governments have paid it mere lip service.

Policies and legislation generally do not take into account the day-to-day realities and specific contexts of peasant and indigenous groups, who most often lose their water access rights and face a reality of extreme marginalisation in which rationales and perspectives for water and livelihood development are neglected. While indigenous management forms must not be romanticised, the Forum rightly concluded that "…there is a recurrent problem for indigenous peoples, who are often constrained to deal with vital issues on terms dictated by others. Many shared their experience of how their people's traditional knowledge is seen as inferior in current political, legal and scientific systems and therefore their arguments are discarded time and again by courts and other institutions. Strong measures should be taken to allow indigenous peoples to participate, more actively sharing their specific experience, knowledge and concerns in the Global Water Vision and Framework for Action". For this reason, a comparative research, exchange and advocacy programme has been set up to contribute to the understanding of indigenous water rights and organisation-strengthening, and to sensitise decision-makers regarding the necessary legal and policy changes.

The "W*ater Law and Indigenous Rights*" (WALIR) programme is a collaborative endeavour co-ordinated by Wageningen University, The Netherlands and the United Nations Economic Commission for Latin America and the Caribbean (UN/ECLAC), and implemented in co-operation with counterpart institutions in Bolivia, Chile, Ecuador, Peru, Mexico, The Netherlands, France and the USA. It sets out to analyse water rights and customary management modes of indigenous peoples and local communities, comparing them with the contents of current national legislation. The aim is to contribute to a process of change that structurally recognises local and indigenous water management rules and rights in national legislation. It also aims to make a concrete contribution to the implementation of better water management policies.

The following presentations reflect some initial concepts and cases that, among various others, will be explored in the next steps of the programme. They were presented during the public debate (7 March 2002), part of the WALIR seminar week (4 – 8 March 2002). WALIR is in its initial phase and does not yet have final conclusions. (The second phase will start in January 2003, funded by the Water Unit

of the Netherlands Ministry of Foreign Affairs). The International Seminar was held to discuss the conceptual and strategic points of departure, and develop action-research plans and network strategies. During the week, apart from action-research proposals, a conceptual document (prepared by Ingo Gentes, ECLAC) and several studies on national legislation and indigenous rights were discussed. These research findings were presented by Paulina Palacios (ECUARUNARI, Ecuador), Armando Guevara and Patricia Urteaga (CONDESAN, Peru), Ingo Gentes (ECLAC, Chile), Rocio Bustamante (CONIAG / Centro AGUA, Bolivia) and David Getches (University of Colorado, USA) who also presented a draft study on international treaties on indigenous rights. Paul Gelles (University of California at Riverside) presented a draft study on indigenous identity and water management in the Andes. Apart from the above contributions, and the more than 100 participants to the public debate, representing a variety of local, national and international institutions, Thierry Ruf (IRD, France), Annelies Zoomers (CEDLA, The Netherlands), Jeroen Vos, Bernita Doornbos and Leontien Cremers (Wageningen University), Rigel Rocha (Centro AGUA, Bolivia), Mourik Bueno de Mesquita (ETC, Peru), Rutgerd Boelens (Wageningen University), Miguel Solanes (ECLAC), Linden Vincent (Wageningen University) and Karin Roelofs (Netherlands Min. of Foreign Affairs) supported the seminar by means of specific contributions and presentations on the WALIR issue. The above legislative studies are not presented in the abstracts below, and final versions can be obtained from the coordinators of the programme.

WALIR co-ordinators
Rutgerd Boelens (Wageningen University)
Miguel Solanes (UN/ECLAC and SAMTAC-GWP)

2. WATER RIGHTS, LIVELIHOODS AND EMPOWERMENT

Linden Vincent
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Welcome ladies and gentlemen to a public debate on water rights and empowerment, especially in the context of indigenous rights. It is my honour to open a session designed to let speakers tell you about the programme's work on water law and indigenous rights, but also a session which gives you a chance to speak.

How do water rights link with empowerment, and how can local people defend their irrigation systems when water comes under increasing pressure, from its scarcity, from inequitable local power relations, and also through globalisation and neo-liberal reforms that may change the local control of resources? I want to start the discussion by emphasising the first vital link, through the livelihoods that water provides.

I use a very particular definition of livelihoods that can show the power of technology and organisation. Livelihoods are the means people use to support themselves, and survive and prosper. They result from the way that people transform their environment and the social relations they build given wider social and political forces. Irrigation systems, and the rights that people have to use the water provided, are critical means for peoples' food security and income and a wide range of domestic and spiritual needs. However the constant care and negotiation needed to maintain and operate systems also builds social relations and social consciousness.

In the past, we have often been too involved in looking to improve irrigation through special programmes of new technology and services. Earlier, our attention to rights had a much more mixed history. Even in the few areas where radical land reforms did happen, the redistribution of water rights, at field, system and basin level was less clear - leaving a struggle for justice that has needed a voice, and recognition.

When people build their livelihoods around water, they create relationships of collaboration and control to manage systems and build their negotiating power. This power must be built not only locally, but also externally towards governments and the private sector.

'Livelihood thinking' about water, rather than about production, creates important shifts in approaches to design, management and representation. It involves sensitive understanding of the environment and technology people can use, but also understanding that water is a contested resource. This then also requires abilities to understand and work with the political processes available to local groups that allows them to question resource assessment and allocation. It means working with farmers. Working for empowerment also means working with a commitment to understand of the how and why of action in these areas

Finally I want to mention 'livelihood justice': how people have human rights to water and the rights to have access to water despite the 'higher values' that other uses may appear to have, and the higher charges that water companies may want to charge. In this situation, rights are not just about use - they link with law that can help people defend their rights to water and the systems that carry the water. This requires yet different kinds of support and struggle, in the work to change laws and the struggle to build equitable institutions when laws are changed or promulgated for economic objectives alone.

Having present these ideas, it is also now my honour to present the book "Water rights and empowerment" by Rutgerd Boelens and Paul Hoogendam, which focuses on these issues in the Andes. This is a very special book, as the researchers and activists writing this book also use the words and voices of the local people themselves. In effect these local people tell their stories of how their power and their struggle is related with their water systems. This book gives recognition and understanding of the history of struggle around water rights, that has often gone on alongside other interventions in this region. It gives the local people their platform to tell us their testimonies. The "Water rights and empowerment" book tries to analyse how livelihoods, technology, rights and empowerment come together, but to show this through the lives of people and real action research experiences, not though blueprints of best practices.

The book we present today also looks at local norms and cultural expressions on water rights in different groups, as well as the cultural politics of resistance and rights building. It looks at how rights link with the design and management of irrigation systems, and how people build negotiating power at watershed level to defend the systems which form their livelihoods and part of their identity. The book presents learning on action for change in working with local groups and processes in participatory design, but also in negotiating water allocations. It above all shows how struggle around water, to build, defend and renegotiate rights to deal with new conditions can lead to empowerment - despite the harshness of the environment and of the political control in the Andes. As the professor of the irrigation and water engineering group here, this book represents our belief that equitable and sustainable technology can come from an understanding of the dynamics of people in the environment they live in, and the relationships and artifacts they work to construct. It is part of the 'livelihood thinking' that engineers and development assistance should have, that brings an understanding of rights to the forefront in questions of sustainability and justice. I am proud to present this unique book to the public on this occasion.

With this presentation, I now hand over to one of the editors of this book, and a core proponent of the livelihood thinking that puts rights and people first. He will start the discussion on the new programme on Water Law and Indigenous Rights, that builds on the work of the people and the researchers presented in the "Water rights and empowerment" book.

3. WATER LAW AND INDIGENOUS RIGHTS: RESEARCH, ACTION AND DEBATE

Rutgerd Boelens
Wageningen University
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> "Colonial specialists do not want to recognize that the culture has changed, and they hasten to support the traditions of native society. It is precisely the colonialists who have become the defenders and advocates of a native lifestyle".
> (Frantz Fanon, 1954 / *Black skin, white masks*)

Before discussing some key themes and challenges of the Water Law and Indigenous Rights (WALIR) programme, it is useful to recall the above observation that Frantz Fanon made half a century ago. It gives a powerful warning to scholars, action-researchers and NGOs, to refrain from naïve participationism or philanthropical imperialism and critically rethink every intent to support so-called 'indigenous' knowledge, culture, rights, livelihoods and natural resource management. It also provides a background for the discussions that the programme intends to stimulate, and shows partly how complex its objectives are: WALIR, in co-ordination and collaboration with other local, national and international organisations, networks and counterpart-initiatives, wants to work as a think-tank in order help understand indigenous and customary water rights and management systems, and analyse how they are legally and materially discriminated against and destructed. Next, it sets out to contribute to and present concepts, methodologies and contextual proposals and to sensitise decision-makers regarding the changes needed for appropriate recognition of indigenous water rights and management rules in national legislation and water policies.

The research and action programme concentrates its activities in the Andean countries (Bolivia, Peru, Chile and Ecuador), but is embedded in a broader framework, and carries out a series of comparative cases in other Latin American countries and particularly in Mexico and the USA. Preparatory studies conducted so far have focused on current legislation and legal attention to, or neglect and discrimination of, indigenous and customary water rights. The project aims to have an effect beyond this Andean focus, by providing an example and tool for similar action research to be pursued in other regions.

Notes on the Andean context

Currently, the context for water rights and management rules is changing rapidly in the Andean countries. Increasing demographic pressure, and the processes of migration, transnationalisation and urbanisation of rural areas, among others, are leading to profound changes in the agrarian structure, local cultures and forms of natural resource management. Newcomers enter the territories of local peasant and indigenous communities, generally claiming a substantive share of existing water rights and often neglecting local rules and agreements.

Further, the Andes is undergoing an era of aggressive neoliberal water reform. In this context, it is common to see that powerful stakeholders manage to influence new regulations and policies or monopolise water access and control rights. National and

international elites or enterprises use both State intervention and new privatisation policies to nullify and appropriate indigenous water rights.

But at the same time there appear to be opportunities for customary and indigenous cultures and rights systems. It can be observed that most Andean countries have accepted international agreements and work towards constitutional recognition of ethnic plurality and multi-culturality. At a general level 'indigenous rights' are associated with or considered to be 'human rights'. However, when it comes to materialising such general agreements in practice or in concrete legislative fields, such as water laws and policies, particular local and indigenous forms of water management (water *control* rights) tend to be denied, forbidden or undermined.

In the last decade, as a reaction, we see a certain shift from a class-based to a class- and ethnicity-based *('indigenous')* struggle for water access and control rights, especially in countries such as Ecuador and Bolivia. In many regions the traditional struggle for more equal land distribution has been accompanied or replaced by collective claims for more equal water distribution, and for the legitimisation of local authorities and normative frameworks for water management.

This comes as no surprise. In these times of growing scarcity and competition regarding access to water resources, water rights become a pivotal issue in the struggle of local indigenous and peasant organisations to defend their livelihoods and secure their future. Water in Andean communities is often an extremely powerful resource. Apart from being a foundation for productive, social and religious practice and local identity, the particular, collective nature of 'water' almost by definition forces people to build strong organisations: in most cases, the resource can be managed only by means of day-to-day collective action. This ´forced´ collective action to manage the resource cannot be romanticised and is not embedded in a presumed 'Andean solidarity'. It is a form of local, 'contractual reciprocity' to sustain and reproduce local water management systems and the households and communities that depend on them. And apart from the local orientation of this collective reciprocal action, it may also create a strong basis for broader political alliances, for example, in order to claim particular water policies and oppose forms of legislation and policies that deny indigenous or customary rights.

Fundamentally, a *water right,* more than just a relationship of access and usage between 'subject' (the user) and 'object' (the water), is a social relationship and an expression of power among humans. It is a relationship of inclusion and exclusion, and involves control over decision-making. Therefore it is crucial to consider the two-sided relationship between water rights and power: power relations determine key properties of the distribution, [delete "the"] contents and [delete "the"] legitimacy of water rights and, in turn, water rights reproduce or restructure power relations. Typically, in Andean communities water rights do not refer to rights of access and withdrawal only, but are considered to be authorized claims to use water and control decision-making about water management. And it is precisely the *authority* of indigenous and peasant organisations that is increasingly being denied, their water *usage rights* that are being cut off, and their control over *decision-making* processes that is increasingly being undermined.

The programme

'Water Law And Indigenous Rights' (WALIR) is a collaborative working programme co-ordinated by Wageningen University and the United Nations Commission for

Latin America and the Caribbean (UN / ECLAC) and is implemented in co-operation with counterpart institutions in Bolivia, Chile, Ecuador, Peru, Mexico, France, The Netherlands and the USA. It is a comparative research programme builds upon academic research, local initiatives and action-researchers in local networks – both indigenous and non-indigenous. It attempts to be a kind of think -tank to critically inform debates on indigenous and customary rights in water legislation and water policy, both to facilitate local action platforms and to influence the circles of law- and policy-makers. Equitable rights distribution and democratic decision-making and therefore, support for empowerment of discriminated and oppressed sectors, are major concerns.

WALIR sets out to analyse water rights and customary management modes of indigenous and peasant communities, comparing these with the contents of current national legislation. The aim is to contribute to a process of change that structurally recognises indigenous and customary water management rules and rights in national legislation. It also aims to make a concrete contribution to the implementation of better water management policies.

Phase 1 of the project started on the 1st December 2000, and ends in 2002. In the initial phase, the co-ordinators have set up an inter-institutional network of institutions, scholars and practitioners of various disciplines and backgrounds, all involved in and committed to the above objectives. Several preparatory, comparative research projects on current legislation and indigenous and customary water rights in the four Andean countries and the USA were formulated and have been conducted. Another study, in the second phase of WALIR, will focus on indigenous rights in international law and treaties. A next study relates to the question of indigenous identity and water rights. In phase 2, a number of literature reviews on current indigenous water management systems will be carried out. These will be complemented by several field case studies and thematic, complementary research efforts (on the relation between "WALIR" and gender, food security, land rights, water policy dialogue methods, among others). Short comparative studies in other countries will further complement and strengthen the project and its thematic networks, and lay the foundation for a broader international framework. Next, a number of exchange, dissemination, capacity-building and advocacy activities will be implemented, in close collaboration with local, national and international platforms and networks.

The programme, therefore, is not just academic but also action-based. While especially the indigenous populations are being confronted with increasing water scarcity and a traditionally strong neglect of their water management rules and rights, the current political climate seems to be changing. However, actual legal changes are still empty of contents, and there is a lack of clear research results and proposals in this area. The programme, as a sort of interinstitutional 'think-tank', aims to help bridge these gaps, facing the challenge to take into account the dynamics of customary and indigenous rules, without falling into the trap of decontextualising and 'freezing' such local normative systems.

Challenges

WALIR itself is based on diversity. It has an interdisciplinary composition with lawyers, anthropologists, water professionals, sociologists and agro-economists. Their social background also differs strongly: from scholars and policy-advisors to action-researchers and legal advisors of indigenous organisations. And obviously, the

countries studied and their respective legal structures differ strongly, as do the national debates on indigenous and customary rights, and the languages and concepts that are used. Therefore the challenges are manifold, and they are both practical and conceptual.

For example, what is, or who is, 'indigenous' ? In the Andean region, so-called 'Indians' were invented and the concept of 'indigenous' was constructed by various racist currents, developmentalist paradigms and romanticised narratives, and by the indigenous peoples themselves. Divergent regimes of representation constructed images or projections of 'indigenous cultures' or 'Andean identity', even long before the year 1492. These projections refer either to the backwardness of the 'Indians', populations who therefore should be assimilated into mainstream culture, or to neo-positive, idealised images of 'real and pure Indians', isolated from cultural interaction and defenders of original positive human values. Indigenous groups have often adopted or contributed to the creation of these stereotypes, sometimes unreflectively, sometimes with clear ideological and political purposes.[1]

Is it possible to speak of specific 'indigenous' or 'Andean' cultures, communities, water management forms or socio-legal systems? On the one hand, indigenous peoples dynamically shop around in other normative systems and discourses, selecting and appropriating those elements, tools, and meanings that can strengthen their positions and legitimise their claims. New, diverse indigenous identities are being constructed and strategically strive to represent the indigenous collectivities in their struggle against subordination and discrimination. On the other hand, Andean communities show specific historical and cultural forms of collective action and resource management, embedded in specific Andean cultures with their particular normative repertoires, symbols and meanings, livelihoods and local economies.

Together, both aspects show the importance of analysing Andean cultures and management forms as dynamic and adaptable to new challenges and contexts. As mentioned by Gelles[2], Andean culture and identity, therefore, is "a plural and hybrid mix of local mores with the political forms and ideological forces of hegemonic states, both indigenous, Iberian and others. Some native institutions are with us today because they were appropriated and used as a means of extracting goods and labour by Spanish colonial authorities and republican states after Independence; others were used to resist colonial and postcolonial regimes" (Gelles 2000).

Nowadays, we find a mixture of diverging positions with respect to the notion of 'indigenous' and its implications in practice, for example, racist constructions of the concept (oriented toward either ´exclusion´ or ´bio-political inclusion´), constructs related to developmentalist integration (´backwardness´), to Maoist-Leninist missions

[1] It was therefore not just the dominant, racist class and social Darwinists, but also many 'indigenist' (and later 'indianist') scholars – e.g. Marxist thinkers and activists, who fought against racial discrimination and racial oppression – who contributed to the great *mestizaje* project, intending to paternalistically ´include the poor indigenous peoples in modern society´. This was done, among other means, by ´modern´ irrigation technology, legislation and capitalisation of Andean communities, or by defining 'indigenous' as synonymous with 'revolutionary', in Western schools of thought. Furthermore, some indigenous and Indian scholars and movements tried to create the 'modern Indian', rooted in ancient indigenous myths and symbols and pan-Andean discourses, in order to foster regional pride and nationalism or legitimise their political and ethnic (often *mestizo*) positions. The ´indigenous´ was –and often still is- essentialised by projecting stereotyped images.

[2] P.H. Gelles, 2000. "Water and Power in Highland Peru: The Cultural Politics of Irrigation and Development". New Brunswick, New Jersey: Rutgers University Press.

(´revolutionary nature´), to indigenous-advocates' or romanticised ways of life (´cosmovisionist´) or based on postmodern analysis (´deconstruction´). It is interesting, therefore, to see in this contemporary context a strategic struggle of indigenous water user groups to re-appropriate not just a) access to *water and infrastructure*, b) *rules and organisational forms* regarding water management, and (c the legitimacy of local *authority* to establish and enforce rules and rights; but also at d) the construction of their own counter- *discourses* on 'Andeanity' and 'Indianity' and the policies to regulate water accordingly.[3] Obviously, this dynamic, strategic-political struggle for counter-identification (self-definition), is not necessarily based on solely ´local´ truths, rules, rights and traditions.

Another main challenge of the programme is related to the notion of 'legal recognition'. In order to confront the processes of discrimination, subordination and exclusion, indigenous and advocacy groups often aim for strategic-political action with clear, collective, unified objectives and answers. However, the struggle for formal and legal recognition poses enormous conceptual problems and challenges with important social and strategic consequences.

In another paper we have discussed the dilemma regarding 'recognition of legal hierarchies' arguing that a distinction must be made between analytical-academic and political-strategic recognition[4]. "In an analytical sense, legal pluralistic thinking does not establish a hierarchy (based on the supposedly higher moral values or degrees of legitimacy, effectiveness or appropriateness of a legal framework) among the multiple existing legal frameworks or repertoires. In political terms, however, it is important to recognise that in most countries the existing, official legal structure is fundamentally hierarchical and consequently, in many fields state law may constitute a source of great social power – a fact that does not deny the political power that local socio-legal repertoires may have. Recognising the existence of this political hierarchy and the emerging properties of state law in particular contexts offers the possibility to devise tools and strategies for social struggle and progressive change. In the discussion about 'recognition' as a way of giving legal pluralism a place in policy-related issues, both the political-strategic and analytical-academic aspects of recognition combine" (Boelens, Roth and Zwarteveen 2002).

Thus, instead of collective and unified claims, many questions arise in the debates and struggles for 'recognition', e.g.:

- Do indigenous peoples and their advocates claim recognition of just 'indigenous rights' (with all the conceptual and political-strategic dilemmas of the

[3] See, for example, our last publication on customary water rights and local struggles in Andean societies, presented during this same WALIR seminar (R. Boelens & P. Hoogendam, eds. (2002) "Water Rights and Empowerment". Assen: Van Gorcum).

[4] "Taking 'recognition' as a point of departure implies that there is a 'recognising party' and a 'party being recognised'. This would put us in the kind of state-biased position in which matters are decided upon according to a state-determined hierarchy of legal systems' validity and capacities of validation. Such a position, needless to say, would invalidate the insights derived from attention to legal complexity. On the other hand, it is important to be aware of the possible opportunities involved in (state) recognition, taking into account and taking seriously the fact that many local groups of resource users, ethnic and other minorities actively aspire and strive for this form of recognition. As we have mentioned before, water users (and especially marginalised actors) are often constrained by state law, but at the same time they can (try to) approach it as a powerful resource for claiming or defending their interests and rights" . R. Boelens, D. Roth and M. Zwarteveen (2002), "Legal complexity and irrigation water control: analysis, recognition and beyond". Paper for the International Congress of Legal Pluralism, 7-10 April 2002, Chiang Mai, Thailand.

'indigenous' concept), or do they also struggle for recognition of the broader repertoires of 'customary', and 'peasant' rights prevailing in the Andes? And what precisely is the difference in concrete empirical cases?

- There are no clear-cut, indigenous socio-legal frameworks, but many dynamic, interacting and overlapping socio-legal repertoires: should indigenous peoples try to present and legalise *delimited frameworks* of own water rights, rules and regulations? Or should they rather claim the recognition of their water control rights and thereby the *autonomy to develop* those rules, without the need to detail and specify these rules, rights and principles within the official legal framework?
- Or would it be a more appropriate and effective strategy to claim and defend legalisation of their water *access rights* – since these are increasingly being taken away from them - and assume that water management and control rights will follow once the material resource basis has been secured?
- Do recognition efforts only focus on the legal recognition of explicit and/or locally formalised indigenous property structures and water rights ('reference rights', often, but not always, written down), or do and should they also consider the complex, dynamic functioning of local laws and rights in day-to-day practice? These 'rights in action' and ´materialised rights´ emerge in actual social relationships and inform actual human behaviour, but are less 'tangible'.
- How to define and delimit the domain of validity of so-called indigenous rights systems, considering the multi-ethnic compositions of most Andean regions and the dynamic properties of local normative frameworks? In terms of exclusive geographical areas, traditional territories, or flexible culture and livelihood domains?
- How to avoid assimilation and subsequent marginalisation of local rights frameworks when these are legally recognised? And how to avoid a situation in which only those 'customary' or 'indigenous' principles that fit into State legislation are recognised by the law, and the complex variety of 'disobedient rules' are silenced after legal recognition?
- Indigenous socio-legal repertoires only make sense in their own, dynamic and particular context, while national laws demand stability and continuity: how to avoid 'freezing' of customary and indigenous rights systems in static and universalistic national legislation in which local principles lose their identity and capacity for renewal, making them useless?
- 'Enabling' and 'flexible' legislation might solve the above problem. However, enabling legislation and flexible rights and rules often lack the power to actually defend local and indigenous rights in conflicts with third parties. How to give room and flexibility to diverse local water rights and management systems, while not weakening their position in conflicts with powerful exogenous interest groups?
- And what does such legal flexibility mean for 'internal' inequalities or abuses of power? If, according to the above dilemmas, autonomy of local rule development and enforcement is claimed for (instead of strategies that aim to legalise concrete, delimited sets of indigenous rights and regulations), how to face the existing gender, class and ethnic injustices which also form part of customary and indigenous socio-legal frameworks and practices?

Another dilemma involves the effectiveness of legal recognition strategies. Considering peasant and indigenous communities' lack of access to State law and administration: is *legal* recognition indeed the most effective strategy, or would it be

better and more effective for them to defend their own laws and rights 'in the field' ? Moreover, it often is not the State law as such that sets the rules of the game in peasant and indigenous communities, but hybrid complexes of various socio-legal systems. Formal rights and rules cannot act by themselves, and it is only the forces and relationships of society that can turn legal instruments into societal practice. Especially social and technical water engineers, lawyers and other legal advocates have often overestimated the actual functionality or instrumentality of formal law and policies in local contexts. On the contrary, their legal anthropological colleagues sometimes tended to underestimate the power of formal law, assuming that all conflicts are settled by means of local normative arrangements, without any influence from official regulations. However, the neoliberal Water Laws (e.g. Chile) or top-down instrumental water policies (e.g. in Ecuador and Peru) have not only neglected customary and indigenous water management forms, they also have had concrete, often devastating consequences for the poorest people in society. It is because of this that indigenous and grassroots organisations have fiercely engaged in the legal battle. Moreover, in this regard it is important to consider here that efforts to gain legal recognition do not *replace* but rather *complement* local struggles 'in-the-field'. On both levels there is political-strategic action to defend water access rights, define water control rights, legitimise local authority and confront powerful discourses.

A major challenge stems from the fact that national legislation by definition claims that law must focus on uniform enforcement, general applicability and equal treatment of all citizens, where local and indigenous rights systems, on the contrary, by definition address particular cases and diversity. How to deal with the conflict and fundamental difference between legal Justice (oriented at 'Right'-ness / Generality) and diverse, local Equity ('Fair'-ness / Particularity)? Various forms of State legislation have recognised this fact when faced with the problem of law losing its legitimacy in practice: official Justice was perceived of as being 'unfair' in many specific cases. Legal rules are general and individual cases are particular, hence the need to appeal from one set of rules to another. Common laws were called upon and in some cases this second set of principles (fairness) have been institutionalised. This was not to replace the set of positivist rightness rules, but to 'complement and adapt it'. In fact, ironically, it appeared that official legislation, Justice, often could survive thanks to the 'fairness' and acceptability of common laws that were incorporated: an institutionalised equity. More often than not 'customary rules and practices' are incorporated into national legislation by means of 'special laws'. However, this leads almost automatically to the ironical situation in which the set of common or customary rules, 'equity', itself becomes a *general*, formalised system and loses its pretensions of 'appropriateness', 'being acceptable' and 'doing justice' in particular cases[5].

National legislation is often an expression of post-colonial positivist equality discourses. Equality refers to the right (and duty) to become equal to, among others, the image of the non-indigenous citizen or water user, to equalise the norms, rights and principles of 'modern' water management, to adopt occidental water use technology and to adapt to exogenous forms of organisation. As a reaction, in many

[5] B. Schaffer and G. Lamb (1981). "Can equity be organised? Equity, development analysis and planning". Brighton: Institute of Development Studies, Sussex University. And regarding the concept of equitable water management, see also: R. Boelens and G. Dávila (eds) (1998) *Searching for equity. Conceptions of justice and equity in peasant irrigation*. Assen: Van Gorcum.

local communities today, peasant and indigenous water users claim both the right to equality *and* the right to be different. On the one hand, there is a demand for greater justice and equality regarding the unequal distribution of water and decision-making power. On the other hand, there are the claims for internal distribution to be based on autonomous decisions, locally established rules and rights, and local organisational forms for water control that reflect the diverse strategies and identities found in peasant and indigenous communities.

4. WATER POLICIES AND REGULATIONS: CONDITIONS TO RECOGNIZE INDIGENOUS WATER RIGHTS.

Miguel Solanes
UN/ECLAC and SAMTAC-GWP

Socially, Andean Water is a community asset, with communities having elaborated systems of rights and duties conditioning their use and enjoyment. At the same time, water management at community level provides cohesion to the communities. Individualistic privatization of water rights, may, by limiting the influence of communities over their membership, contribute to social fragmentation and dissolution.

Because indigenous rights, be they communal or otherwise, have not always been formally acknowledged by governments, they face the risk of being obliterated by grants of formal rights to either individuals or corporations. The risk is particularly high if beneficiaries of formal grants are corporations protected under treaty provisions for the protection of foreign investment. Such treaties are at the top of the legal ladder, and investors infringing upon de facto customary uses will be well off arguing that indigenous people had no rights, and that in any case, lacking a legal provision acknowledging or recognizing such rights and administrative acts for their legalization and/or recording, there was no way in which they could know their existence.

It is therefore essential to pursue an strategy to obtain a recognition of indigenous water rights and management in national legislation and to design and simplify operational procedures for their actual determination and recording at field level. This should be done in clear and non-ambiguous terms, since ambiguity on the one hand results in ignorance and therefore on hesitation, and on the other creates uncertainty and therefore vague and encroachable boundaries. In this respect Latin América lags far behind other countries (i.e. USA, Canadá, New Zealand, Papua New Guinea, Fig) in the protection of the water entitlements of its indigenous population.

In this respect the following minimal legislative contents are needed:

. Water laws should recognize customary water utilization, including the role of water as part of a stable and lively environment and environmental water services. Obviously this recognition includes uses requiring diversions, inflow utilization, and the broader environmental role of water as part of a stable and sustainable habitat.

. Management-wise the strategy is closely associated to integrated basin management and the regulatory tools needed to ensure preventing the destruction of water sources and production by bad land and forestry management.

. Should national projects affect indigenous customary rights prompt and adequate compensation should paid, taking into account no only the removal of an asset, but also the affectation of a life style and the cancellation of environmental services.

. Indigenous communities and individuals should be able to request the recording and recognition of indigenous uses at any time. Paper rights affecting indigenous uses should be nullified. If conflicting rights are not void indigenous users should be paid

compensation. Beneficiaries of water rights affecting indigenous uses should be joint and severally liable for the payment of compensations, together with the government and the head of the water authority. The indigenous right to request recording of indigenous uses is not to be subjected to caducity or forfeiture.

. The right to request recording and recognition of indigenous uses should be exercised by any member of a community, or its head, on behalf of the community. Individual claims could only be made by the beneficiary of a claim, or the head of his/her community, on her/his behalf and benefit.

. Where indigenous groups and communities have their location water authorities should survey, recognize, and record, ex-oficio, diversion or inflow uses and rights. Infringing this duty the head of the water authority violates the duties of a public officer, making the head of the water authority liable to criminal charges and civil liability.

. Proceedings to implement indigenous water policies, survey and record indigenous rights and uses should ensure that interested communities and individuals are heard and have timely and opportune participation. They should also be able to submit evidence sustaining their claims, uses and rights. When in doubt decisions should favor indigenous parties (in dubio pro indigena).

5. INDIGENOUS RIGHTS AND INTERESTS IN WATER UNDER UNITED STATES LAW

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Introduction

The foundational principles in Indian law in the United States were announced by the Supreme Court in the early days of the nation. The Court's decisions define a fiduciary relationship in which the national government is charged with protecting the rights of tribes in their lands. The same Supreme Court decisions give the Congress broad powers to implement this obligation but also to extinguish rights when lawmakers determine that it is in the interest of the country to do so. This great federal power in the area of Indian affairs has been invoked frequently to limit states' efforts to encroach on the property rights and self-governing authority of tribes within their territory.

In modern times the federal policy toward Indian tribes has favored self-determination and economic self-sufficiency, but this has not always been the case. In the late nineteenth century, for instance, national policy sought to assimilate Indians into the mainstream of society by ending their communal pursuits, breaking up tribal land holdings, and promoting individual farm cultivation. Whether the national goal has been to promote individual or collective self-sufficiency on the lands reserved for tribes and their members, access to sufficient amounts of water to make the lands useful has always been essential.

Water is necessary for agriculture in arid environments and to maintain the habitat needed to sustain fish life. And for tribes, the integrity of land, water, and the natural world is often at the heart of traditional cultures and spiritual life. Tribes of the Great Plains were placed on reservations and told to give up their far-ranging hunts. In the desert Southwest, some tribes had established irrigation cultures using the sparse and seasonal streams. In the Northwest and Great Lakes regions reservations were created that limited the homelands and the historic fishing pursuits of native peoples.

In each case, encroaching populations of non-Indians and the resulting competition for water and water-dependent resources threatened the ability of Indians to survive on their reservations. Nonetheless, national policies in the era of homesteading and westward expansion encouraged this settlement. The resulting establishment of non-Indian communities and creation of property rights in land and water have conflicted and competed with the Indians' capacity to use natural resources.

In the early days of the twentieth century the United States Supreme Court announced a remarkable doctrine of water rights that favored Indian tribes in their attempts to secure sufficient water to make their reservations useful. The "reserved rights doctrine" guaranteed tribes the right to use water to fulfill the purposes for which their reservations were established. The right could be exercised anytime in the future, even if non-Indians had used the water first and had been granted rights under state law.

The history of the tribes' exercise of their ostensibly bold and potent reserved water rights for Indian reservations has been problematical. The tribes have lacked capital to put their water rights to use and now they compete with non-Indians who have built their economies using the water to which the Indians are rightfully entitled. Tribes have remained in a state of poverty and reservations are largely undeveloped. Some tribes near population centers have sought economic development by legalizing gambling. Their independent sovereignty makes them immune from state laws prohibiting gambling. But in most places long-term, economic well-being and cultural survival on their reservations depend on asserting and using their water rights for agricultural or industrial development.

Increasingly, tribes have pressed for a vindication of their theoretically great but actually underutilized water rights. The non-Indians know that the inchoate rights of the tribes pose a threat to their economic security. Because investments and property values are undermined by uncertainty, non-Indians and the western states that tend to support non-Indian interests have also urged that Indian water rights should be legally determined. Judicial processes now underway in most states are lengthy and expensive. In recent years several tribes' water rights have been resolved in negotiated settlements and implemented through federal legislation. This remains the preferred method of quantifying tribal water rights primarily because it infuses federal funding into solutions that enable tribes to use their water rights and it protects established non-Indian uses.

A Brief History of Indian Water Rights

There are hundreds of Indian reservations in the western United States. In the nineteenth century, tribes who once hunted, fished, and gathered over large expanses of land were confined to reservations in order to reduce conflict with white settlers. In successive treaties and agreements the tribes agreed, often reluctantly or under pressure, to move onto smaller reservations. Typically the government sought to convert the Indians into farmers. Because the West is an arid region where agriculture is difficult without irrigation, most reservations required a supply of water if the Indians were to sustain life.

Other reservations were located along rivers to ensure that Indians could continue fishing to sustain their livelihoods and culture. Again, water was necessary to fulfill the purposes of the reservation. As a general matter, it is correct to say that all reservations were intended to be permanent homelands for the tribes, where they could survive and be self-sufficient. Invariably, the reservations required water.

The fundamental legal principle giving rise to Indian water rights is stated simply: The establishment of a reservation results in an implied reservation of a right to take water sufficient to fulfill the purpose of reserving the land for the Indians. In the words of the United States Supreme Court:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians to change those habits and to come pastoral and civilized people. If they should become such the original tract was too extensive, by a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. . . . The Indians had command of the lands and the waters –

> command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which make it valuable or adequate? (*Winters v. United States*, 207 U.S. 564, 576 (1908)).

The Supreme Court announced the doctrine of "reserved water rights" in *Winters.* The case arose on the Fort Belknap Indian Reservation in Montana where the Indians had been placed after a series of treaties that had limited them to a small fraction of their former territory. The Court recognized the government's intention of "civilizing" the Indians by making individual farmers of them and breaking up the communally held tribal lands. The government plan involved dividing up the reservation lands into individual land holdings, allotting the land to heads of Indian families to be cultivated, and then opening the rest of the land on and off the reservation for non-Indian homesteaders. Without sufficient irrigation water for the reservation, this civilizing scheme would fail. If the individual allotment policy fell, lands desired by settlers – the so-called "surplus lands" on reservations and former reservations – would not be available for white settlement.

It would have been grossly unfair to the Indians to confine them to reservations without the means to eke out a living. Moreover, the plan for obtaining and distributing former Indian land to non-Indians would have failed if the tribes could not survive on their reservations. Thus, the reserved rights doctrine of *Winters* became the cardinal rule of Indian water rights. It was later applied to federal reservations of land for parks, forests, military bases, and other public uses (*Arizona v. California,* 373 U.S. 546 (1963)). As with Indian lands the quantity of water reserved depended on the purposes for which the reservation was established.

Over the years, the reserved rights doctrine has promised more than it has delivered. The government has rarely applied it in litigation to assert rights as against non-Indian water users. The Indians themselves, until about thirty years ago, often lacked their own attorneys to represent them in protecting their water rights. They were sometimes represented by government attorneys in water litigation where the government had a conflict of interest. Meanwhile, non-Indians built dams and diverted water from streams and initiated uses that depended on that water.

Non-Indian water development was often planned and paid for by the federal government, which is ironic considering the well-established legal principle in American Indian law that the government is charged with responsibility to act for the benefit of Indian tribes. The National Water Commission found in its 1973 report that:

> Following *Winters*, . . . 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 the 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 on of the sorrier chapters (National Water Commission 1973, 474-475).

Many decades after the Supreme Court first articulated the reserved water rights doctrine, Indian water rights finally gained considerable attention when the Court issued its opinion in *Arizona v. California* (373 U.S. 546 (1963)). The case involved an allocation of the Colorado River's flow among three of the states that touch the river. The United States, which was involved in the case because the river also crosses extensive Indian and federal lands, claimed reserved rights for five tribes along the river. The Supreme Court awarded those tribes 900,000 acre-feet of water per year – a huge quantity of water – which it determined by calculating how much water would be required to irrigate all of the practicably irrigable acreage on the reservations. This sent a strong message to water users all over the West that Indian claims could be made to formidable amounts of water. The reserved rights doctrine had been idle, but it was far from dead.

As explained earlier, prior appropriation was the historical method for allocating water in the American West. Although this doctrine has been altered in various ways and embellished with rules that satisfy important public purposes, most of the West's water long ago was allocated to the earliest users of water. The most valuable rights are the oldest because in times of shortage the holders of those rights can insist on delivery of the full quantity of water to which they are entitled. Accordingly, when senior users assert their rights, the most junior users often must curtail their water uses. The Supreme Court created reserved water rights to fit into the priority system, with a tribe's priority date established by the date its reservation was established. Because most reservations were established more than one hundred years ago, the accompanying water rights are usually quite senior.

This ability to fix a precise priority date for a tribe's water right makes it possible to determine which uses potentially must be cut back in order to allow water to flow to the reservation. That is, the tribe's position in the system of priorities is easy to determine. But the scope of the right – and thus its impacts on other water users -- remains uncertain until the quantity of water to which the tribe is entitled is determined. This is not an issue when non-Indians' water rights are established in the prior appropriation system because the quantity of their rights is determined based on the amount of water actually used in the past. The fact that reserved rights can exist without a history of actual use, then, can deprive neighboring water users of certainty. This lack of certainty can frustrate non-Indian neighbors when they seek to make investments or borrow money based on assumptions about how much water is generally available to them.

One solution to this uncertainty is to quantify Indian reserved rights. This can be done judicially by asking a court to decide how much water is necessary to fulfill the purposes of a reservation. Where the purpose of setting up the reservation was to allow the Indians to pursue agriculture, the courts follow the formulation in *Arizona v. California* (373 U.S. 546 (1963)) based on the reservation's practicably irrigable acreage (PIA). In arid areas the amount of water needed to produce crops can be enormous; in adopting the PIA formula, the Supreme Court opened the way for tribes to claim huge quantities of water. The Court expressly rejected the idea that tribes should just get merely a "fair share" of the water in a river or that rights should be determined based on reservation populations. The court said that rights were not to

meet present needs, but to meet future needs and therefore should be set according to the reservation's full capacity to use water.

A court seeking to determine how much land is irrigable and how much water is required for irrigation must examine evidence of soil type, structure, and depth, topography, salinity content, possible crops, and climate. As this information usually is based on expert studies in hydrology, soil science, engineering, and economics, trials can be long and expensive. Given the importance of scarce water, the process can also be contentious.

Tribal Rights are Determined by State Courts

The United States has two separate court systems, state and federal. The individual court systems of the fifty states have local courts with general jurisdiction and appellate court systems. These state courts usually handle water rights matters arising within a particular state. The United States generally is not subject to the jurisdiction of state courts, and the principle of sovereign immunity provides that the United States cannot be sued without its consent. Thus, ordinarily state courts would not be able to adjudicate federal reserved water rights. Similarly, Indian tribes are also considered sovereign governments with sovereign immunity from suit without their consent or the consent of the U.S. Congress.

Federal courts, with district courts sitting in every state and a separate system of appeals, have more limited jurisdiction than state courts. The primary task of federal courts is adjudicating "federal questions," including interpretation and application of federal laws. This can include determining how much water a tribe would be entitled to use for a reservation established under a treaty or agreement with the United States. The U.S. Congress decided in the 1950s, however, that when a state court takes jurisdiction over the adjudication of all water rights in a river, the United States will waive its sovereign immunity to suit and the state court can determine all federal water rights. It passed a law authorizing state courts to adjudicate Indian reserved rights, called the McCarran Amendment of 1952 (43 U.S.C.A. sec. 666).

Congress recognized in the McCarran Amendment the importance to non-Indians of knowing clearly the extent of water rights of others with whom they compete for water in times of shortage under the prior appropriation doctrine. The law applies to all water rights of which the United States is the "owner." Although the United States only holds title to Indian water rights in trust for the tribes, the Supreme Court has held that Congress intended to extend state jurisdiction over those rights whenever the rights to an entire river were being adjudicated (*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976)). This caused great concern for tribes because they feared that state courts were likely to be less equitable to them than federal courts. There is a history of tension between tribes and states. The Supreme Court long ago described the situation of Indians relative to states: "They owe no allegiance to the states, and receive from them no protection. Because of local ill feeling the people of the States where they are found are often their deadliest enemies" (*United States v. Kagama*, 118 U.S. 375, 384 (1886)).

After the Supreme Court made it clear that Indian water rights were subject to determination in state courts, many states initiated "general stream adjudications" -- legal proceedings involving sometimes tens of thousands of water rights claimants in an entire river basin. These cost and complexity of these proceedings have proved burdensome to everyone. Some of these adjudications have continued for over twenty

years and have not neared completion. Today, there are over sixty Indian water rights cases pending in state courts.

Although Indians believed that state courts would not provide fair trials for their water rights claims, the results have been mixed. In most cases the tribes have been able to prevail on the United States as their trustee to furnish lawyers and expert witnesses. Alliances of government and tribal lawyers have presented cases competently to the courts. In some cases, the state courts have awarded tribes impressively high quantities of water. Yet the overall record is not reassuring to critics who say that relegating tribal rights to the mercies of state courts is bound to be unfair to Indians.

In the adjudication of the Big Horn River, for example, the Wyoming Supreme Court affirmed the right the tribes of the Wind River Reservation to some 400,000 acre-feet of water, most of the water in the river (*In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, affirmed, *Wyoming v. United States*, 492 U.S. 406 (1989)). Undeniably, the amount of water, based on a lower court's determination of the amount of irrigable acreage on the reservation, is enormous. Yet the state supreme court rejected the tribes' claims for water to be used for mineral development, fisheries, wildlife, and aesthetics. It also rejected the tribes' attempt to extend their reserved water rights to groundwater. Many scholars and at least some other courts differ with each of these holdings. Whether or not the state court erred in defining the scope of the tribes' reserved water rights, it awarded them enough water to overshadow the impacts of those parts of the decision. The state challenged the decision in the United States Supreme Court but the state court decision was upheld, although barely; the Justices on the Supreme Court were divided by a vote of four to four.

The *Big Horn* case is the only state court adjudication of Indian water rights that has proceeded through final judgment and appeal to the Supreme Court. But other state courts have handed down rulings in general stream adjudications, some favorable and some unfavorable to Indian tribes. In Arizona, the state supreme court has held that the treatment of groundwater under state law as a resource that is allocated and managed under a regime entirely separate from surface water could not affect any rights the tribes had to groundwater under the reserved rights doctrine because those rights were a matter of federal law (*San Carlos Apache Tribe v. County of Maricopa*, 972 P.2d 179 (Ariz. 1999)). In Idaho, however, the state courts have rejected tribal claims to exemption from the state adjudication process under the McCarran Amendment (*In re Snake River Basin Water System*, 764 P.2d 78 (Idaho 1988)).

Negotiated Settlement of Indian Water Rights Claims is an Alternative to Litigation

The results in state court adjudications of Indian water rights vary, but all are terribly costly and take years to conclude. The combination of unpredictability and the burdens of litigation have induced all parties to consider seriously negotiation as an alternative to litigation. Since the 1980s there have been about 18 negotiated settlements of Indian water rights. Settlement negotiations usually are commenced after a tribe or the United States becomes involved in litigation with a state and non-Indian water users. Sometimes this is part of a general stream adjudication started by a state under the McCarran Amendment. It also can follow litigation in federal courts

brought by the tribe or the United States. In a few cases settlement negotiations have begun without litigation.

Negotiations typically allow for all interested parties to participate. Sometimes they require court decisions to decide basic legal questions like the tribe's priority date. Negotiations are most useful when there are factual disagreements based on technical data. Rather than dwell on these contests, the parties seek to craft a solution that will satisfy at least some of their respective needs. Instead of an all-or-nothing court decision with a clear-cut victory for one side, they seek ways to provide recognition for tribal water rights without jeopardizing existing water uses. Although the tribes may not receive the full quantities of water originally or potentially claimed, they often get money – mostly from the federal government – to enable them to build facilities to put their quantified water rights to use.

The "lubrication" of federal funding has been a key element in most Indian water rights settlements. It has allowed for tribes to secure not only paper water rights, but also "wet water" delivered through irrigation systems and pipelines for domestic supplies. At the same time, non-Indians have gained assurance that they can continue using water under water rights that are junior to tribal water rights. Sometimes federal or state funding is also assured for projects that benefit non-Indian water users. Because funding is usually part of a settlement package, an agreement reached by the various parties in negotiation usually must be approved and monies appropriated by Congress. Thus, settlements are almost always accompanied by federal, and sometimes accompanying state legislation. Although each Indian water rights settlement is unique, several examples illustrate how they work.

Congress has approved two water settlements in Arizona. In 1978, the Ak-Chin Indian Community agreed with the Secretary of the Interior to forgo a substantial amount of water claims against non-Indian users in exchange for 85,000 acre-feet of irrigation water provided by a federal well-field water project (Public Law No. 95-328, 42 Stat. 409 (1978); Public Law No. 98-530, 98 Stat. 2698 (1984); Public Law No. 102-497, 106 Stat. 3528 (1992)). Using the well water on the Ak-Chin reservation, however, would deplete the groundwater under the Papago Indian reservation. In order to avoid this problem, the Department of Interior renegotiated a water contract with an irrigation district, which received its water from the Colorado River to deliver its surplus water to the tribe. In 1982, the San Xavier Band of the Tohono O'Odham Nation first settled its groundwater claims without involving the federal government in the settlement process. The tribe could not proceed without the federal government participation and financial support in the final water settlement. The bill was ultimately approved (Public Law No. 97-293, 96 Stat. 1274 (1982)). These water settlements exemplify successful water negotiations, which provide the tribes with promises for delivered water and a consideration of their reserved water rights.

Each settlement is different because the legal, geographic, and economic situations of tribes vary and so do the political factors. The ability of tribe and its neighbors in one state to achieve a settlement will differ with the relative power of the members of Congress that represent that state. The receptiveness of Congress to settlements will also vary depending on the economic health of the federal government at the time a settlement package is presented. Notwithstanding the inevitable differences among them, a review of the Indian water rights settlements to date that are summarized in Figure 1 shows several characteristics that are common to many of them.

- **Federal investment in water or water facilities.** By providing funds to build dams and delivery works, the settlement can ensure delivery of water to both Indians and non-Indians.
- **Non-federal cost-sharing.** A typical condition of providing federal funds is that state or local governments bear a portion of the cost of the settlement.
- **Creation of tribal trust fund.** Cash funds are usually appropriated for the use of the tribes. Sometimes the money is to be used for water development and sometimes it is available generally for economic development.
- **Limited off-reservation water marketing.** For various reason, tribes that are entitled to water rights cannot or do not want to use all of their water on their reservations. Allowing them to lease water for use by non-Indians off the reservation can provide cash income that can help build the tribe's economic self-sufficiency while allowing non-Indians to use water they need. Under the legal systems governing water in the West, water rights can be transferred with few restrictions beyond protection of other water rights holders. Denying tribes the same right seems inequitable. Most settlement packages allow the tribes to market their water but nearly all restrict these transfers more than the transfer of non-Indian water rights are restricted.
- **Deference to state law.** Often the settlements require that Indian water use be subject to state water law, at least when the water is used off the reservation. Where two or more states enter into a compact allocating the use of a river that is the source of water used to satisfy tribal water rights claims, the Indian water rights settlement agreement and accompanying legislation usually provide that the compact will govern water use.
- **Concern for efficiency, conservation, and the environment.** Less pervasive among the settlements but included in many of them is a provision for improving the efficiency of water use and advancing environmental values.
- **Benefits for Non-Indians.** Perhaps the most important characteristic of Indian water settlements in terms of giving them political viability is that they provide benefits for non-Indians. At a minimum, they receive certainty that their established water uses can continue. If the United States agrees to build water facilities they may get access to water that will allow new uses. In some cases, non-Indians have been able to obtain federal funding for projects that otherwise would have been politically impossible. They have succeeded in the context of Indian water rights settlements, however, by "wrapping their projects in an Indian blanket."

Current Issues

1. Finality of Determinations of Rights

One of the goals of non-Indians in seeking quantification of Indian rights is to provide the certainty they need in order to make investments and borrow money to build water projects and to develop their lands. This was surely a motive for enactment of the McCarran Amendment. Tribes also can benefit from knowing the extent of their rights as they try to attract investments in water facilities and otherwise to realize value from the important asset of water rights. Yet the tribes that have had their water rights adjudicated have learned that they must suffer the consequences if they have inadequate legal representation in the litigation of their claims. Even if mistakes are

made, they cannot later return to court and ask for their water rights to be adjusted because that would disrupt non-Indian expectations. The likelihood that the outcome of a quantification will be immutable raises a serious concern for any tribe embarking on a quantification of its water rights.

In two cases where tribes had their rights fixed in the past and wanted to reopen cases to expand their rights, the Supreme Court has refused to allow any change in tribal rights. In *Arizona v. California* (373 U.S. 546 (1963)) five tribes along the Colorado River had been represented in court by the U.S. Department of Justice. Attorneys for the U.S. failed to claim all of the tribes' practicably irrigable acreage. Thus, the tribes' water rights were limited to the quantity needed for the irrigable lands claimed by the government. The tribes later hired their own lawyers and experts and reopened the case. They proved that additional lands were irrigable and asked the Supreme Court to award a greater quantity of water. But the Supreme Court in 1983, twenty years after the original decision, held that the quantification could not be changed except where there was actually an error in boundaries that a court had corrected (*Arizona v. California*, 460 U.S. 605 (1983)). The Supreme Court said there is a "strong interest in finality" in western water law and therefore it would be unfair to the non-Indians who had relied on the earlier decision if the tribes were allowed to increase their claims.

In another case, the Pyramid Lake Paiute Tribe also had depended on the United States to protect its interests in court. Early in the twentieth century the U.S. Bureau of Reclamation built a federal irrigation project to benefit non-Indian farmers. The tribe historically depended on fishing, and its reservation consisted almost entirely of a large lake. The federal water project diverted nearly all of the water from the single stream that supplied water to the lake. The U.S. went to state court to secure the necessary water right before building the project. Purporting to represent both the tribe and the irrigation project, the federal government claimed only water rights sufficient to irrigate the Indian lands in the narrow ring of land around the lake, and claimed no water to maintain the Indians' fishery. Without water to sustain the fishery and the lake level, the lake shrunk and the fish started to die off.

Years later the tribe, through its own attorneys, proved that the U.S. had failed to claim sufficient water rights due to its conflict of interest and got a lower court to order the government to take action consistent with its trust responsibility and stop diverting all the water to the reclamation project. The U.S. also was forced to reopen the old case that had given the tribe inadequate water rights. But, on appeal, the U.S. Supreme Court refused to let the case be reopened, citing the interest of the non-Indians in having certainty in their water rights (*Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972), supplemented by 360 F.Supp. 669 (D.D.C. 1973), reversed, 499 F.2d 1095 (D.C.Cir. 1974), certiorari denied, 420 U.S. 962 (1975)).

The outcomes in these two cases make it imperative for tribes whose reserved water rights are being determined to participate fully and aggressively in asserting the full extent of those rights. This is difficult for tribes with limited financial resources. In recent times the United States has provided funding for some tribes for lawyers and experts, however, even when it has represented the tribes as a trustee.

The daunting specter of a final and unalterable judgment may provide an argument against seeking an adjudication of reserved water rights. In most cases, however, tribes have no choice about whether to adjudicate their rights because the United States can be sued any time a state initiates a general stream adjudication and must claim all federal and Indian water rights. Although the tribe, as a sovereign

government, remains immune from being sued, the rulings of the Supreme Court teach that if the tribe abstains from the litigation it does so at its peril.

2. Water Marketing

One of the most controversial questions concerning Indian water rights is whether tribes can sell or lease their water to non-Indians outside their reservations. In many cases, the government decided that Indians should become farmers, and moved them to reservations for that purpose. Some tribes do not have a cultural tradition that is based on agriculture, however, or are unable to produce a livelihood because they were put on reservations that are too small or that have poor lands for farming. This has led some tribes to consider allowing others to use their water off the reservation. As we have explained earlier, most of the negotiated settlements of Indian water rights provide for some off-reservation use of tribal water rights, although it is typically restricted in location and scope.

Non-Indians control the best agricultural lands on many reservations. The allotment policy opened up the reservations to non-Indian settlement; today, non-Indians cultivate 69% of all farmland and have 78% of the irrigated acreage on reservation lands throughout the nation. Moreover, in the last one hundred years, the allotments issued to individual Indians have descended through inheritance to an unwieldy number of heirs. The only way to put these lands to use is to lease them, usually to non-Indian farmers. A share of the tribe's reserved water rights attaches to allotted lands and the right to use water can go with a lease to non-Indians (*Skeem v. United States*, 273 Fed. 93 (9th Cir. 1921); 25 U.S.C. sec. 415).

There is considerable debate about whether tribes should have the legal right to allow their water rights to be used outside their reservations, however. Opponents of Indian water marketing argue that the nature of the reserved right is to make reservation lands useful and this purpose is not fulfilled when water is used elsewhere. Proponents say that the ultimate purpose of the reservations was to provide a homeland where Indians could be self-sufficient. This goal may be best achieved if tribes can enter the marketplace and realize the economic value of tribal resources.

Off-reservation Indian water marketing could provide a way to continue and expand non-Indian uses. Simply paying Indians for the right to use their water could buy the certainty that is now lacking for non-Indian users. Nevertheless, non-Indians who have depended on using undeveloped Indian water without charge do not want to be forced to start paying for it. They have raised policy and legal arguments against marketability.

The most substantial legal question about Indian water marketing is whether a tribe has the legal right to convey what is essentially a property right. One of the oldest rules of Indian law is that tribes cannot transfer land or rights in land to non-Indians without the participation or approval of the United States government (*Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); Non-Intercourse Act, 25 U.S.C.A. sec. 177). Any legal doubt on this point can be resolved by obtaining congressional consent. This consent was granted in several negotiated Indian water settlements that allowed water marketing. Action by Congress also moots the issue of whether there is a fundamental conflict between the Supreme Court's original rationale for reserved water rights and a tribe's use of them outside the reservation. In any event the legal restraint on alienation of Indian property is intended to protect Indian rights from encroachment by non-Indians or the states. This suggests that the primary concern in whether Indian water should be marketable is whether the tribes

have been dealt with fairly. Presumably, congressional approval should depend on a finding that it is in the best interests of the tribe.

Some observers have proposed that Congress should authorize tribes to lease their water rights subject to the approval of the Secretary of the Interior just as tribes can now lease tribal lands with secretarial approval. One of the arguments offered in favor of Indian water leasing is that non-Indians may freely transfer their water and water rights so long as the rights of others are not harmed. Therefore, it is inequitable to deny tribes the same attributes for its water rights. As yet, Congress has not seriously considered legislation for Indian water leasing.

3. Tribal water codes and administration

As sovereigns over their members and territory, Indian tribes can legislate and regulate water rights. Their ability to do so has been frustrated, however, by political impediments to the federal government's approval of tribal water codes and by some recent decisions of the Supreme Court that limit the reach of tribal regulatory authority over non-Indians on reservations.

It is clear that a state has no jurisdiction to regulate Indian use of Indian water rights. This is part of a 150-year legal tradition of maintaining tribal jurisdiction over Indians and their property on reservations, free from state control. The harder question is under what circumstances non-Indians on an Indian reservation can be controlled by tribes and when they are subject to state jurisdiction. Generally, if non-Indians are on Indian land, they like Indians can be subjected to tribal jurisdiction. The Supreme Court's decisions in this area have created doubts about whether tribes can regulate non-Indians, especially if they are on non-Indian owned land.

One case says that a tribe may have jurisdiction over a non-Indian on its reservation, even on the non-Indian's fee land, if the non-Indian's conduct would threaten or have a "direct effect on the political integrity, the economic security, or the health and welfare of the tribe" (450 U.S. 544, 566 (1981)). The use of waterways on a reservation presumably would affect some or all of these interests. But in a case dealing specifically with the applicability of a tribal water code, *United States v. Anderson* (736 F.2d 1358 (9th Cir. 1984)), the court held that the tribe lacked the requisite interest to regulate. This was because the stream in question originated outside the reservation, ran only a short way along the reservation boundary, then turned away and joined the Spokane River outside the reservation.

In *Holly v. Confederated Tribes & Bands of the Yakima Indian Nation* (655 F. Supp. 557 (E.D. Wash. 1985), affirmed subnom, *Holly v. Totus*, 812 F.2d 714 (9th Cir. 1987), certiorari denied, 484 U.S. 823 (1987)) the same court upheld the application of a tribal water code to non-Indians using water on their land within the reservation where the stream was entirely on the reservation. The court added, however, that the tribe could not control "excess" water used by non-Indians – presumably water not subject to reserved water rights.

It would appear that tribes with comprehensive, well-developed codes and regulations governing waters on their reservation would be better able to demonstrate the need to regulate non-Indian water to further tribal interests. For instance, the U.S. Supreme Court upheld the exclusive authority of the Mescalero Apache Tribe to regulate game and fish on its reservation, including hunting and fishing by non-Indians (*New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983)). This case did not deal with regulation on non-Indian land, but the court did emphasize the importance to the tribe of having unified regulation of a resource like wildlife.

Similarly, the political integrity of tribal government control of resources would depend on unified control of water resources.

Tribes attempting to enact legislation to regulate water resources on their reservations do not have support from the U.S. Department of the Interior. Perhaps half of the tribal constitutions have provisions that require certain tribal legislation to be approved by the Secretary of the Interior before it will be effective. For twenty-six years the department has maintained a moratorium on approval of any tribal water codes that would extend to non-Indian water use. On two occasions the department has circulated draft regulations governing the approval of such codes, but they were met with a firestorm of opposition from western senators and congressmen. The federal government has departed from the moratorium in only a few cases to approve tribal codes as part of negotiated water settlements approved by Congress.

The last administration voiced sympathy for the tribal effort to regulate water resources, but did not change the policy. Secretary Bruce Babbitt said that if a tribe wanted to enact a water code and confronted a requirement for secretarial approval, as is the case in many tribal constitutions, all the tribe had to do was to amend its constitution to remove the requirement for secretarial approval of ordinances, and he would approve the amendment removing the approval requirement so the tribe could adopt a water code without the need for federal approval. Although not all tribes have a secretarial approval requirement for tribal codes, and those that do may have a means to remove the impediment, the apparent policy of the Department of the Interior disfavoring tribal codes could portend difficulties if code enforcement is challenged by a non-Indian and a court is called upon to examine the tribe's authority to enact the provision.

Notwithstanding the uncertain area of tribal water code enforcement over non-Indians within a reservation, many tribes have sophisticated codes. Some have well-trained professionals on the staffs of water resources departments that do water resources planning and enforce water rights among those who share in the use of water on the reservation.

4. Use of Rights for New Purposes

Reserved water rights can be quantified for any purpose for which the federal government established an Indian reservation. As described earlier, the most commonly expressed purpose for creating reservations was to enable the Indians to pursue agriculture, but reserved rights can arise from other purposes. For example, in historically important fishing and hunting areas reservations were located to provide access to rivers and lakes to enable the continuation of these traditional lifestyles.

In *United States v. Adair* (753 D.2d 1394 (9th Cir. 1983), certiorari denied *Oregon v. United States*, 467 U.S. 1252 (1984)), the court found that a treaty provision guaranteeing the Klamath Tribe the exclusive right to hunt, fish, and gather on its reservation showed the primary purpose for creating the reservation. Other parts of the treaty mentioned agriculture; the court found that encouraging the Indians to take up farming was a second essential purpose of the reservation. Although state law did not allow water rights for fishing and hunting, the court held that the Indians had such a right which could be enforced to prevent non-Indians from depleting streams below levels that were required to maintain streamflows for fish and game.

A more difficult question arises when a tribe wants to use water for purposes other than those for which its reserved water rights were quantified. For instance, if rights were quantified for agricultural uses, can a tribe use the water for industrial

purposes, or for a fishery, or even to water a golf course? When the Supreme Court approved the report of a Special Master and decided the reserved water rights of tribes on the Colorado River, the Master's report said that tribes' use of water was not limited to the uses that were the basis of quantification. In *Arizona v. California* (439 U.S. 419 (1979)) in 1979 the Court approved this report.

In the *Big Horn* adjudication, the court quantified the tribes' reserved rights based on irrigable acreage (753 P.2d 76, 98 (Wyo. 1988), affirmed, *Wyoming v. United States*, 492 U.S. 406 (1989)). The Wind River Tribes decided to use a portion of these rights to restore streamflows within the reservation and build up the fishery. They recognized an opportunity to recover the natural ecosystem and to reap economic benefits from tourism and recreational uses by attracting anglers. Non-Indian water users on the reservation who would have had to leave water in the stream instead of diverting it for irrigation objected. The state supreme court rejected the tribes' attempt to use water for instream flows, saying that any change in use would have to be in accordance with Wyoming state law, which does not recognize such instream uses as "beneficial" (*In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992)). The United States Supreme Court did not review the decision.

If a tribe changes its water rights to uses that were not the basis for a quantification of reserved rights and this must be approved under state law, the matter will be reviewed under the so-called "no injury" rule. This rule applies to all changes in use under the prior appropriation system. Limiting tribes to one use and prohibiting all changes would be inconsistent with that system of water rights. When prior appropriators change their use they must show that no other water users are hurt by the change. If the no injury rule were applied to Indian reserved water rights it could render them useless. Recall that tribes generally have not been able to raise the capital needed to put water rights to use. On the Wind River Reservation, for instance, the federal government financed an irrigation system that has served mostly non-Indians and the Indians have made little use of the system. Commencing Indian uses on Wind River and in other river basins where hundreds of non-Indian water users have built their investments on the use of water that the tribe, as the senior water rights holder, could have claimed, is bound to cause injury.

There is no doubt that the equities of established non-Indian water users deserve consideration. The non-Indian irrigators are neighbors and they are not responsible for the way the system from which they benefit was developed and for the fact that it has operated to the detriment of the Indians. The government created the system and the non-Indians inherited the situation. So the non-Indians reasonably expected that the present conditions would continue. On the other hand, they have been using Indian water to build their wealth. Under these circumstances, it seems inappropriate to apply the no injury rule mechanically. This would halt tribal progress and extend even longer the already long-delayed tribal benefits from use of reserved water rights.

Walker and Williams propose that tribes like those on the Wind River Reservation exercise their authority to administer and regulate water rights on their reservations and in doing so take control over the "change of use" question (Walker and Williams 1991). They can adopt criteria for "sensible water use policies for all reservation citizens" non-Indian as well as Indian (Walker and Williams 1991, 5:10). Some non-Indians have relied on state permits to use water diverted on the reservation that are over eighty years old. Walker and Williams urge that tribes "balance the complex interests of these non-Indians against . . . [t]he unique historical

circumstances of water development on Indian reservations [that] may well compel compromise" (Walker and Williams 1991, 5:9). They say that one such compromise would be for tribes to adopt a public interest standard for tribal reservation water administration and apply it in a way that considers, along with other equities, the injury to juniors of changing the use of reserved water rights.

Conclusion

The doctrine of Indian reserved water rights is certainly a potent force for tribes. Yet its application has not justified worries that assertion of Indian rights will displace non-Indians' established uses. First, only a handful of tribes – fewer than thirty – have finally determined the extent of their rights. Of those, only a few have put a significant portion of their water rights to use. Consequently, non-Indians have not been affected adversely by Indian water use. As Richard Collins wrote:

> [T]his situation has generated powerful political and financial forces that oppose Indian development, of which there has been very little. There have been extravagant claims of the threat posed by Indian water claims, but actual conflict has been almost entirely a war of words, paper, and lawyers. Indian calls are not shutting anyone's headgates (Collins 1985, 56:482).

The doctrine is strong in theory and the challenge to lawyers and tribal leaders is to give it potency in practice. The fora for doing this are many. The processes for adjudication or negotiation for determining reserved water rights are expensive and arduous. They are also uneven in result, depending as they do on the fortuity of how much political power a particular state's congressional delegation wields and the timing relative to the nation's economic health. Once tribal rights are quantified they will remain unused because of a shortage of capital, restrictions on marketing, and limits on changes of use. The tribes must also be able to exercise comprehensive control over the water when there are non-Indian users within the reservation. Achieving justice and equity for Indians, then, depends not only on have a generous legal foundation but fair and reasonable means to use and regulate water resources.

6. ANDEAN CULTURE, PEASANT COMMUNITIES, AND INDIGENOUS IDENTITY

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Indigenous Peoples and Andean Culture

Irrigation water, one of the most culturally and ritually elaborated resources in Andean society and civilization, is today central to production in thousands of highland agricultural systems. As such, water is a highly contested resource, both in terms of irrigation development and the different meanings assigned this water. In the Andean nations under study, as in many other parts of the world, we find social groups fighting not only over the physical control of irrigation systems, but also over the right to culturally define and organize these systems. My paper argues that a dynamic and processual understanding of "indigenous" identity, "Andean culture" and the indigenous peasant community—one that views enduring patterns of belief and ritual as compatible with the porous, and even transnational, character of many Andean communities—has a role to play in the formation of national identity and its expression through national water laws, policies, and irrigation bureaucracies in the Andean countries.

But what do we mean by "indigenous"? Many approaches—from neoliberal to postmodern to Marxist—effectively deny the existence of indigenous peoples (as Jeanne Kirkpatrick put it, "whoever *they* are"). The United Nations defines "indigenous people" in the following way: "Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their own territories, considered themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal systems" (in Van Cott 1994:23). There are more than 40 million indigenous peoples in Latin America, and they constitute over half of the population in some countries (e.g., Peru, Bolivia, Guatemala) and less than one percent in others (e.g., Brazil).

Approximately half of the indigenous population of Latin America is found in the Andean countries of Peru, Bolivia, and Ecuador. It is no exaggeration to state that indigenous highlanders and their urban relatives constitute "cultural majorities" in the Andean nations (see, e.g., Murra 1982). So how do we define the indigenous cultures of the Andes? The concept of Andean culture, "lo andino," has recently come under attack from different quarters in anthropology and Andean studies (see, e.g., Montoya 1987, Poole 1990, Urbano 1992, Starn 1991). As Abercrombie puts it, "to suggest the existence of a rural/indigenous culture in the Andes, what is often called in the literature, 'the Andean,' is usually to fall victim to non-Indians' essentializing stereotype of 'the Indian'. In other words, the 'Andean' is only rightly studied as a [usually utopian] image projected by various urban groups" (1991:97). Questioning "Andeanism" has been salutary for the field, forcing anthropologists to examine the dynamic movement and plural identities of highlanders (see, e.g., Starn 1991).

Yet, I believe that the critique and subsequent devaluation of all things "Andean" can also play into the dominant cultural discourses of Peru which effectively deny the validity of highland lifeways. As I have explored elsewhere (Gelles 2000), I believe that something called “Andean culture” does exist; indeed, it is best viewed as having been created from a hybrid mix of local mores with the political forms and ideological forces of hegemonic states, both indigenous and Iberian. Some native institutions are with us today, albeit in a thoroughly revised form, because they were appropriated and used as a means of extracting goods and labor by Spanish colonial authorities and those of the Peruvian state after Independence; others were used to resist colonial and postcolonial regimes. These institutions, reproduced and transformed through the everyday practices of millions of people, today vary greatly from one locality to the next. Andean cultural production is dynamic and adaptable, providing orientations and identity for villagers as well as for migrants who transit different national and international frontiers.

The Highland Community

To understand Andean cultural production, and the definition of “lo andino” that I wish to advance here, requires us to understand the highland community, "the principal source for the reproduction of Andean identity" (Ossio 1992b:249). This is not to say that Andean cultural production does not take place in the cities of Peru; it most certainly does. But the relationships, social and spiritual, which have come to define lo andino take place in rural community settings. Let us first review the material base that these relationships rest upon.

Perhaps most importantly, the political economy of extraction in the Andes has been bolstered by an extensive and long standing agricultural infrastructure. Covering countless thousands of mountain slopes, the canals and terraces that precolombian indigenous states and local polities built are truly monumental structures and represent millions of human days of labor. Unlike the pyramids, palaces, and fortresses that precolumbian polities also built, the congealed labor found in terraces and canals has reproduced their investment in this form of "humanized nature." But today, because of Peru's coastally oriented political economy of development and the negative stereotypes of highland peoples and their resources that predominate in Peru, the productive potential of this infrastructure is far from realized.

While this infrastructure constitutes the material basis for thousands of highland communities, we must also understand these rural settlements historically and culturally. The Andean community is clearly the product of Peru's "colonial matrix" (Fuenzalida 1970), which brought together indigenous and European social, cultural, and political forms to constitute a new and unique entity. Many of the thousands of highland communities that dot the Andean landscape, controling vast territories, were established in the late sixteenth century, as locally dispersed populations were resettled by the Spaniards into nucleated settlements (*reducciónes*) for the purposes of tribute assessment, social control, and religious indoctrination. Since that time, successive national governments have see-sawed back and forth between "emancipating," that is, severing, indigenous populations from their communal identities and collective forms of organization, and providing official recognition and legal protection to communities. Today, with the neoliberal reforms that are sweeping the Andean nations and the rest of Latin America, we see the pendulum swinging back to the policies of the early Republican period, with attacks

by different industries, private citizens, and government agencies on indigenous highland communities, their common property regimes, and their cultural identity.

These communities, and the ways in which Andean cultural identity is threatened, denied, or marginalized by current and past regimes, must be also be understood in terms of a cultural orientation that links people, place, and production within particular communities. In the Andes, during precolumbian times, and well through the Spanish colonial period, Andean peoples and polities throughout the Central Andes traced their origins to sacred features of the landscape, such as mountain, lakes, and springs. Today, the prosperity of each family, village, and community is to a large degree seen as depending on frequent "gifts to local mountain deities, the Earthmother, and assorted figures in the Catholic pantheon. This is a key feature of life in the Andes, defining ritual practice and social life, as well as cultural and ethnic identity. Clearly, then, there is a strong material and spiritual basis to Andean lifeways and cultural orientations, one that has a firm foundation in a long standing infrastructure and in well developed understandings that join sacred landscapes to production, community, and cultural identity.

Indigenous Mobilization and Cultural Politics in the Andes

Against the common historical, political, and cultural processes--an indigenous empire that further developed an already extensive infrastructure, the loss of much of this infrastructure and the resettlement of rural populations in *reducciones* during the Spanish colonial period, and the "Andean" type of identity that conceptually links people, place, and production to local deities (both native Andean and Catholic)—we have the separate nation-states or "imagined communities" (Anderson 1983) of Peru, Bolivia, and Ecuador that developed since independence in the early 19th century. In the Andean nations of Ecuador and Bolivia, indigenous peoples from both the Andes and the Amazon have made significant political gains. Indigenous organizations in Peru have only recently begun to have some impact on national politics, and most of these represent the interests of Amazonian "native" communities as opposed to the large concentration of indigenous people found in Andean "peasant" communities.

The reasons for this has in great part to do with the fact that the Velasco regime (1968-1975) largely "peasantized" the highlands of Peru (see, e.g., Mayer 1994), that is, made the class-based term of "campesino" the predominant idiom for discussing rural dwellers; the regime replaced an ethnic designation, *indígena* (as in Comunidades Indígenas) with a socioeconomic one, *campesina* (as in Comunidades Campesinas). This is part of the mixed legacy of the Velasco regime. While it carried out massive land reform, made Quechua a national language, and ruptured Peru's colonial past, the Velasco regime, largely because of its class-based orientations, also sidelined the potential for ethnicity-based mobilization.

The 1980s in Latin America was generally a time of transition from authoritarian to "democratic" rule, where the fall of socialism and the decline of the Latin American left cleared a space among popular organizations for ethnic-based mobilization (Van Cott 1994). This was not the case in Peru, where the change from military to "democratic" rule was accompanied by the rise of the Shining Path revolutionary movement. More than 27,000 people, mostly Andean peasants, died in the war between Peru's brutal military and Shining Path, which took up armed struggle in 1980 and which used the peasantist Chinese model and class-based language to characterize their revolution and the cause of rural dwellers. The language

of peasantism and class-based revolution and social change was once again reinforced.

Yet there are other reasons that go beyond the use of class based terms which explain the almost total lack of indigenous mobilization and the defense of Andean cultural rights, and which explain why Peru is compared to apartheid South Africa in terms of the "differential incorporation" (Smith 1982) of its indigenous Andean majority. The strong cultural and geographic divide between the coast and highlands in Peru is unique among the Andean nations in its intensity, and it is reflected in language, music, dance, dress, food, education, and many other cultural and social arenas. Today, popular and national cultural discourses present the Spanish-speaking, white, West-facing minority as the model of modernity, the embodiment of legitimate national culture, and the key to Peru's future.

Just as the coastal cities are iconic of criollo culture in popular national discourse, highland communities are iconic of indigenous culture. Many of the negative stereotypes directed towards the people of the Andes, who are referred to as "serranos" or indios ("Indians")--that they are backwards and unproductive--are extended to the mountains and their systems of production. In sum, Peru is a nation in which a dominant cultural minority deploys its world view throughout the provinces by means of its educational system, civic ceremonies, language, its water and land policies, and through its vision of development.

Conclusions

The perspective advanced here challenges those who would trivialize indigenous lifeways, and, at the same time, it problematizes Andean culture by examining its production and reproduction in relation to larger political and economic forces. Implicit in most ideologies of national development in the Andean nations addressed by WALIR, and throughout the Americas, is the assumption that indigenous peoples must renounce their cultural orientations and identities to progress. The secular, bureaucratic, monetary, and supposedly more rational and efficient state models of resource management--and which today increasingly work hand in hand with neoliberalism and the privatization of land and water--claim to provide universal benefits, while in fact extending state control and the cultural orientations of national and international power holders.

But things are changing. While indigenous people increasingly transit regional, national, and international frontiers, discovering new worlds, adopting new technologies, and prospering, they do so without necessarily having to sacrifice their cultural orientations. Rather, indigenous peoples in the Andes are demonstrating that their cultural distinctiveness is entirely compatible with "modernity," urban spaces, transnational migration, and social mobility. But unfortunately, indigenous identities, Andean and otherwise, are inextricably linked--by representations in popular media, nationalist doctrine, and scholarship alike--to images of poverty and marginality, the implicit message being that to achieve social mobility, indigenous peoples must renounce their identities. The definitions and images generated by the dominant society allow for little else, viewing their cultures as archaic, static, and part of nature, far removed from the cultural mainstream of the modernizing nation. Until native peoples and their advocates succeed in reshaping and resignifying the constraining terms "Indian" and "indigenous people," this situation will likely remain unchanged.

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7. WATER LAW AND INDIGENOUS RIGHTS IN THE ANDEAN COUNTRIES: CONCEPTUAL ELEMENTS

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Background

The conceptual document on WALIR attempts to define and clarify the legal and cultural grounds for water management and compare positive (statutory) and local indigenous law. Accordingly, it is a document for initial discussion regarding the *Water Law and Indigenous Rights* project. This project has the objective to contribute to understanding indigenous law and the need to recognise and identify their rights, and to sensitise decision-, policy- and law-makers with the aim to achieve concrete recognition of indigenous norms on usage, rights, customs and management of water in the national legislation of each country.

In most Andean countries' laws, public administration and policy regarding water resources ignore or deny the existence or importance of common-law normative frameworks regarding local indigenous rights and uses and water resource management. If local indigenous / rural communities' regulations are taken into account[6], the intention is generally only strategic: some indigenous organisations feel that these public policies are designed to institutionalise them and treat them as static societal bodies, which does not go along with Andean communities' day-to-day realities or customs.

In regard to water resources, it seems evident that, without even minimally clear systems to recognise indigenous uses or rights, any reference to integrated water management systems is seriously weakened. For example, laws, courts and policies for water resource management largely overlook user organisations' fundamental practices and principles in the Andean countries. Rules and procedures are generally imposed 'top-down and from outside'. However, despite the problems they face, local normative frameworks, rights and water management in indigenous and rural communities also confirm the possibility of achieving sustainable, equitable management, sometimes more democratically and better suited to the local historical and agro-ecological context. The wide diversity of agro-ecological zones in the Andean countries, and the great variety of cultures and peoples, offer no justification for a 'one-size-fits-all' legal framework or a water policy seeking standardisation of all water management institutions, based on external criteria and contexts.

Indigenous demands for a flexible legal framework including water uses and customs by indigenous peoples seem to pose structural problems for current national laws, since these laws ignore the negative results when water uses – by indigenous communities, cities or commercial / mining activities – interfere with each other. The lack of some national-scale bodies and norms to respect and protect local and

[6] The term "indigenous / rural community" is used to refer, in this paper, to the households and farmers of indigenous origin, living in certain territories, who identify with a given people or nationality, base their livelihood on socially collective, community-oriented practice of reciprocity and redistribution, and have a system of political, administrative, economic, spiritual and cultural organisation that is collective and community-based.

indigenous rights has meant the destruction of many indigenous communities' uses and rights by mining activities and runaway urban growth.

At the moment, the indigenous and peasant population is facing especially severe and growing shortage of water. Conflicts regarding water resource distribution or pollution are growing, partially caused by denial, discrimination or unsuitable management and regulation mechanisms. However, there seems to be a new opening in present-day politics that could make it possible to amend existing laws. These are possibilities for change that must be taken advantage of in order to direct attention to those normative frameworks that are still in force in indigenous communities, as well as the uses and rights resulting from these norms.

Local indigenous water law and legal water management principles

There is undoubtedly tension between (local) common-law systems and the official laws comprising different notions of public and private domain and various ideas about property and property rights. This tension arises, for example, insofar as there is no clear, explicit recognition of indigenous communities' water rights in Latin America.

We must be aware that (1) strictly speaking, it would be logistically and administratively unmanageable to attempt to codify common law (and governments have no commitment to undertaking such a task in the Andean countries); and (2) local rights (exclusive or priority-related) entail a number of new problems, as outlined above, for local management and on the national water management level. For example, with respect to local rights to underground water or basins, local rights to basins during drought periods, cases of over-utilisation due to increasing demand by farmers, new canals or aqueducts crossing and cutting through traditional routes and divisions, or local rights that work with new integrated management principles and deny or reject local collaboration, etc.

Common-law systems, for water resource management and usage, generally feature: local rights that often go beyond mere rules of expedience or practice, and are sometimes firmly grounded in people's religion or world-view; local rights that sometimes emerge from historical rivalry or jealousy, such as among communities, family groupings and large farm owners; local rights that are dynamic; local rights that are imprecise, for instance in limiting responsibilities and quantifying usage rights, etc. For jurists local and indigenous rights are often difficult to acknowledge, because they are responsive and flexible, which forces attorneys to depend more on assertion than on proof to demonstrate their effective existence.

Water rights acquired under the notion of a common-law system are generally not transferable separately from the adjacent land – water and land comprise a territorial unit. Most local systems recognise community entitlement to land (and consequently to water) rather than individual rights – so the land owns people, rather than the other way round. In general, indigenous and peasant communities practise various legal and management systems, constituting complex mixtures and legal plurality. Moreover, they also resort to outside bodies in order to achieve a consensus or reconciliation.

Water management strategies proclaimed by many indigenous user organisations often focus on trust and co-operation among and with indigenous communities. Such factors as consensus, reconciliation and gradual internal penalties are also fundamental for integrated water management.

Seen in this light, constitutions or water laws that enable individual water use may certainly contain factors favouring indigenous communities. Nevertheless, nation-wide rights individualization undoubtedly weakens or fragments community collective-right strategies if disputes arise. Therefore, a number of grassroots proposals in Andean countries mention that individual rights must be overridden by collective rights. Definitely, the alternative to individual water rights, as proposed by indigenous and peasant organisations in Bolivia, for example, may be to manage and use water as a community property or right.

Can both normative systems co-exist? Should the two systems (positive governmental law and local community law) be jointly codified? The advocates of this idea point to a number of successful examples from other parts of the world[7]. How can they take advantage of each other?

The discussion about recognition of indigenous and local rights gives rise to several questions and core issues for reflection, such as: Should as many elements of customary norms be recovered as possible, specified and thus preserved, from the present or the past? This would seem impossible, in view of the tremendous variety of customs, and the contradiction between details of indigenous customs and national water policy principles. Must ownership, administration and control systems be as flexible as possible in order to reflect customary law? How can local traditional authorities be taken into account, from the outset, into integrated water management structures? Should integrated water management always follow agreements based on community consultation and linkages with local community structures? etc.

Certain proposals would formally codify common law, requiring a formal framework for local participation in structuring the water system, monitoring and legal penalties to ensure both local and public efficiency.

Other proposals suggest to isolate and codify water rights, taking the elements of indigenous common law that are essential to perpetuate the existence of local lifestyles and ensure their continued "collective community ownership" without interference from governmental bureaucracy. All uses or requirements for other projects (e.g. irrigation) serving the community at large must be allocated by public domain. This would enable the entire community to enjoy benefits in the same terms as the family unit does.

Many of such proposals mention that any sort of arrangement requires an inventory of local law relevant to given water use rights. Attorneys who favour the letter of the law will want both local and non-local rights to be defined, with quantifiable, legitimate terms and constraints, administratively. This, however, would entail a number of problems, as we have seen in earlier chapters.

Some assert that local and indigenous rights are perfectly viable within a "modern" legal system, since they respect both outside-world rights and those inside the "local customary unit". They even claim that local customs are open to institutional changes, since these rights have essentially been moulded through lengthy processes of conflicts, and adaptations to different legal and socio-historical

[7] Two well-known examples of co-existing customary rights and modern legal systems in water management crop up throughout the literature: the *huertas* in Spain and the *zanjeras* in the Philippines. Both systems have survived for several centuries in co-existence with the legal norms of national systems. Indeed, both are complicated, detailed rule systems governing participation, control and balance issues peculiarly suited to the locality's specific socio-economic needs. However, it would be virtually impossible to copy either system elsewhere, although they share the intrinsic features of community water-resource law.

settings. A number of proposals mention the importance of maintaining flexibility in the ways that rules and unique organisational forms are formulated and applied, rather than outlining them in detail.

Ultimately, if local law is to be fit into formal water systems, there is the problem that a single local customary legal system could contribute to training a school of attorneys, who would then always want to defend their own "prototype customary law".

Questions about preparing a roster on recognition of indigenous local water rights, uses and customs

It would seem that some of the countries under examination have designed administrative and planning procedures regarding indigenous areas and property rights. However, they commonly fail to clearly define the rights and obligations of all interested sectors (e.g. mining, agriculture, hydropower or logging) or of the government, in relation to indigenous rights. Much less hey have developed the material means or procedures to enforce them. The resulting vague, un-defined situations not only create uncertainty and legal insecurity, but also fail to effectively ensure the collective indigenous interests that are protected.

The concept paper for WALIR stresses the significant difference between the way indigenous people's rights are regulated in Latin America and in the United States, especially in the American Western states. It is essential that, in the US, after historical expropriation processes, current judicial decisions have operationally accorded very high priority to indigenous rights, which are respected and enforced by statutory law. The US system thereby corroborates another traditional element of the law / policy / economics system: clear, precise property rights and authorities who are willing and able to enforce them, even if coercion is required.

Another associated problem in Latin America, alluded to in earlier sections, is that water legislation usually does not recognise non-appropriative customary uses, such as fishing in lakes. Moreover, once customary uses are destroyed, they are no longer even considered in water project assessments, much less indemnified for. Some authors insist that, if previous concessions to third parties cannot be voided, indigenous communities must be indemnified. The amount of compensation should reflect not only the pecuniary amount, but also their relevance to indigenous communities' livelihoods.

In view of these issues, it is urgent to develop recommendations and points for reflection, in coming studies, on the following questions and issues, among others:

1. To what degree should existing water laws incorporate principles of customary indigenous law, as applicable for i) consumptive uses and to preserve use of flowing water; ii) such activities as fishing, navigation, hunting or the use of drinking-holes, springs, plains and wetlands, and iii) activities that require no re-routing of flow.

2. How can consultation be ensured with indigenous peoples, and their representation and decision-making power in public-interest hydraulic projects affecting indigenous territories? How and when should indigenous and peasant communities be compensated for such projects?

3. Is it necessary for a law to prescribe that indigenous peoples may always, at any time, apply for registration and formalisation of their traditional rights; if these same rights have already been granted to third parties, can that grant be voided? Is it feasible to consider that rights be expandable, as the conditions and the number of indigenous population change?

4. How to address the issue of legal representation of indigenous communities or any of their chosen members? Can these actions be accepted as valid under national law, or by an administrative or judicial agency, at their option? This power would have to include, consequently, the power to apply for all precautionary measures required in order to safeguard indigenous rights. Will current public policies be willing to undertake this administrative process?

5. What can be done with areas where most inhabitants are indigenous? Must the authority necessarily govern and register, *ex officio*, uses and rights that are allowed?

6. Indigenous / rural organisations demand that procedures to implement these processes must guarantee, during all legislative procedures, hearings, participation, defence of their rights and constant proof that rights and uses remain in effect. Must some higher body be established to oversee just, equitable distribution of water?

7. If indigenous *in situ* rights and uses are to be recognised in water legislation, does this make it necessary to codify the type, form and amount of the right as a community property right? How to assure effective, beneficial and equitable uses?[8].

[8] See, in this connection, the Principles of Dublin (1992) and the Vision of the South American Technical Advisory Committee (SAMTAC) of the Global Water Partnership (GWP): Water for the 21st Century: Vision to Action. Buenos Aires, 2000.

8. THE "WATER WAR" IN COCHABAMBA: A WAR AGAINST PRIVATISATION

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Background on the problem

- Conflicts over water in Cochabamba began very early in time; actually, some of the first lawsuits in colonial times were about water.

- During the 20th century , trouble began in the 60s because the (public) water company attempted to dig dwells in the Central Valley in order to provide the main city with potable water.

Reasons for the Conflict

- First of all, the public water company was privatised through a procedure that was seriously questioned, and granted under a concession to a newly created consortium called AGUAS del TUNARI.

- Second, in order to legalize this and other contracts, a new Law was approved by Congress which, under the cover of the potable water and sewerage sector, included general regulations about water – in short, an undercover Water Law.

These were commitments made with the World Bank, in order to receive development loans, as shown in the 1999-2000 Country Policy Matrix.

In early 2000, another element emerged because urban water fees were increased, by as much as 100% and even 150%. This situation spread the conflict to the city as well.

Events in January

January 10th / 11th

- *Meeting of "La Coordinadora del Agua" to analyse the Contract with the Concessionaire and Law No. 2029.*
- *Blockades in the city. Civic Movements against the contract.*

January 13th

- *Public protest and Cabildo abierto (Public Assembly)*
- *Negotiations began with La Coordinadora and Civic Committee representatives. Agreements were reached regarding:*
- *Creation of a commission to review water fees*
- *Critical reviewof the Aguas del Tunari contract*
- *Amendment of Law No. 2029 within 45 days*

- *Proposals for a General Water Law on the basis of agreements reached through public hearings .*

Two crucial days in February

February 4th – Protest march and "Cochabamba takeover"

February 5th – Confrontation between police and social organisations

Agreements

In the Agreement for Cochabamba, the Government made several commitments:

- To implement the multipurpose Misicuni project
- To review water fees review and to freeze them in the meanwhile at the 1999 level.
- To negotiate proposals for amendment of Law No. 2029
- To create a Technical Commission in order to analyse the financial, legal and technical aspects of the contract with Aguas del Tunari.
- To set up three Commissions to discuss the problem
  - Tariffs
  - The Contract
  - The Law

By late February, negotiations broke down and the Commissions stopped working.

A Referendum: is water a public good?

March 26th: Referendum on La Coordinadora del Agua y de la Vida

Questions:

1. *Do you accept the water fee increase?*
2. *Should the contract with Aguas del Tunari be canceled ?*
3. *Do you agree that water is private property, as in Law No. 2029?*

*48,276 persons voted: 99% said **no** to the first question, 96% answered **yes** to the second one and 97% said **no** to the third one.*

A war in April

Main occurrences during the water war conflict:

March 31th

- *A Civic strike was announced for April 4.*
- *Peasant organisations began using blockades nationwide.*

April 4th

- *Civic strike in Cochabamba*

April 5th

- *Thousands of people gathered in the main plaza and demanded that Aguas del Tunari leave the city.*

April 6th

- *The main plaza was taken over again.*
- *Negotiation began with the government.*

April 7th

- *A crowd took over the main plaza calling for Aguas del Tunari to leave and amendment of Law No. 2029.*
  The political authority announced contract cancellation and resigned.
  During the night, many representatives of La Coordinadora were imprisoned and their houses were invaded by the police.

April 8th

- *A state of emergency was declared for 90 days in Bolivia.*

- *Confrontations between protesting "Water Warriors" and police were frequent in the city. The violence of the conflict resulted in many injuries and one dath.*

April 9th

- *It was officially announced that Aguas del Tunari would leave the country but the people decided to continue the blockades and mobilisations until Law No. 2029 was finally amended.*
- *The people continued their struggle . They demanded to seedocuments as proof the government* was *not cheating them.*

April 10th

An Agreement between the Bolivian Government and the Coordinadora del Agua was signed, establishing that:

- *The remaining public company, SEMAPA, would be put in charge of the service again, under Municipal supervision and with the participation of social organisations.*
- *The blockades would stop only when Law 2029 was replaced by a new one in Congress and when the government proved that the contract with Aguas del Tunari had been canceled.*

That very night, the first condition was implemented.

April 11th

- *The new Law, No 2066 this time, was proclaimed by the President. The new version amends 36 out of the 72 articles.*

April 20th

- *The state of emergency state was declared to be over.*

And what now?

The achievements

- The water company remains public but also under private regulations (Dutch model)
- A consensus-building process over the Bylaws (Law 2066 and Irrigation) began.

The Challenges

- The water problem is not solved yet. 40% of Cochabamba's population has no access to potable water service.
- There are no short-term solutions for the water problem and the required investments are difficult to obtain.
- The Company demands compensation for the contract termination. The Bolivian government has been cited to an international court (in the Netherlands), because Aguas del Tunari is claiming around 25 million dollars to cover its losses.
- The water rights of peasant organisations are still insecure.

A few points to think about privatisation

- It is important to reconsider the issue of private-sector participation issue, because this is not necessarily limited to private companies' participation, but must include water users' organisations as well (as in the irrigation sector).

- Service privatisation need not be linked with water resource privatisation because utilities and water resources are governed by different rule systems.

- In countries like Bolivia, where the concession system is often used to obtain investments to improve and expand water infrastructure, service provision is only profitable with a fee increase.

- Privatisation is just part of a broader process of mercantilisation, that implies:

- Commercialisation: changes in norms, rules and institutions in order to enable the market (e.g. subsidy elimination, full-cost prices, anti-monopoly regulations, etc.)
- Privatisation: transfer of ownership to private hands .

In most cases, commercialisation is under way, as a prelude to privatisation.
These companies generally do not contribute any capital, but only mobilise loans , sometimes even from the World Bank, which has changed its policy lately and is supporting private companies as well as governments.

The most "developed" countries are not necessarily the most privatised ones. On the contrary, many of them keep public services under public control.

To support privatisation processes, an academic and technical discourse has been promoted. Recognition of water's economic value is one of its main principles, within a context of more integrated water management and use. The mechanisms to achieve this recognition (private rights, water markets) are often in conflict with water management practices and rules.

9. WATER LEGISLATION AND INDIGENOUS WATER MANAGEMENT IN PERU

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The national context, official legislation and common-law frameworks for water management

In Peru, as in many Andean countries, national legislation, public policy and governmental bureaucracy regarding water either deny, ignore or barely acknowledge the validity of local common law and indigenous norms governing water resources. Recognition of local rights and uses, and of customary ways of resolving water-related conflicts is halting, subordinated to the logic of government procedures and the market economy[9].

There has been a dramatic turnaround in Peru over the past decade in regard to the concepts of economics and the State, which have reversed the direction of traditional Latin American nationalism. Liberalisation of the economy, liquidation of public enterprises, and the resulting need to adapt the government's role to these processes all surged forward during the successive administrations of former President Fujimori (1990-2000). In ideological terms, this economic liberalisation has aimed to reinforce the concept of governmental sovereignty over natural resources. Although some resources, such as in mining, have always been under the Republic's eminent domain, replicating the Spanish colonial royalty system, in others, such as water, this national assertiveness has taken much longer. It was only in 1969, for instance, that the reform-oriented military government nationalised control over water resources. In the recent wave of neoliberal reforms, the government reaffirms its monopoly over natural resources on behalf of the Nation and undertakes to distribute them (under concessions, transfers, etc.). The idea is not to directly utilise them through public enterprises, but to offer them to investors, promote domestic and foreign investment, and generate fiscal revenue. Under this arrangement, the neoliberal government proclaims its eminent domain over resources in order to provide legal security for concessionaires who are granted utilisation rights.

The social and economic engineering required to develop this model calls for adequate handling of the law. One of the first legal instruments under this orientation was the 1993 Constitution. First of all, it tightly restricted the Government's business activities[10] and, secondly, it defined natural resources, both renewable and non-renewable, as the Nation's heritage, asserting that the State wields the sovereign power to utilise them. Pursuant to this constitutional mandate, the sectoral law on natural resource utilisation (1997) clarified that the State sovereignty "entails the

[9] See I.2. of the WALIR-PERU Work Plan.
[10] "Only if expressly authorised by law may the State perform, directly or indirectly, any subsidiary entrepreneurial activity, for reasons of high-priority public interest or manifest national expediency" (1993 Political Constitution of Peru, Article 60, second paragraph).

jurisdiction to legislate and perform executive and judicial functions in regard thereto" and the power to grant private parties "the right to sustainably utilise" them[11].

These norms are intended to foster an active policy of concessions to the private sector and keep the Government from getting directly involved in utilising natural resources. Accordingly, the domestic and foreign business sector is called upon to finance and undertake investment and utilisation projects. As an example, the current draft water law also empowers the public administration to grant water concessions as real-property rights[12]. The problem, as we have mentioned, is: what happens with societal groups who have been owners and users of resources by ancestral entitlement? We are referring specifically to indigenous peoples or indigenous and other rural communities. Since this norm is designed for economic players who have access to financing, in practice it tends to displace Andean peoples and communities from any traditional rights that they still had prior to the enactment of the norm. In sum, the norm creates an implicit societal hierarchy based on entrepreneurial capacity and the possibility of earning revenues for the Government.

Under this approach, this sectoral law for natural resource utilisation stipulates, for example, that indigenous communities have preference in access to the resources located within their own lands, providing that the Government has not reserved access to itself or granted a concession to them. Although the 1993 Constitution recognises the right for native and rural community authorities to administer justice according to their local law, the norm fails to recognise the power of local law to define, distribute, or exclude third parties from tapping such resources. Evidently, there is no recognition or effective legislative protection to grant validity to communal or local jurisdiction over the resources they control. Although this does yield the highly-prized “legal security” that investors look for and paves the way for infrastructure development projects, the other side of the coin is local legal and social insecurity (from the standpoint of traditional allocation of access and usage rights).

In the specific case of water, the market has not yet been liberalised, because the law dates back to 1969 and embodies an ideology of public, governmental orientation, which is wielded by numerous sectors of rural society to oppose full privatisation of water resources. However, countless draft laws that have been discussed between 1993 and 2001 are geared to fit water law into the current constitutional framework, arguing that it is time to free water management from bureaucratic red tape and give local management bodies room to exercise their autonomy[13]. What is at stake in the national debate is precisely the degree to which water law will be bent to liberal postulates, the government’s role in resource management (custodian, arbiter, neutral), the acceptable room for local autonomy in sustainable water management, and how to foster equitable, efficient water resource distribution[14].

Research into indigenous water rights

Beyond limited recognition of local autonomy in water use and rights, and aside from the impacts of governmental norms, ethnographic studies have shown that Andean

[11] Law 26821 of 1997, Articles 6 & 19.
[12] Del Castillo 2001.
[13] E.g., user boards, irrigators’ committees; see Del Castillo 2001; Rebosio 2001.
[14] See, e.g., the recent electronic conference on the water law, Del Castillo 2001.

communities define and administer water according to their own way of thinking[15]. Even so, Gelles[16] himself, in his book's epilogue, admits that the governmental irrigation model ("*de canto*") has taken over, although co-determination by economic organisation and market contingencies could well give rise to a resurgence of the dual model (*hanan/urin*) of irrigation[17]. In any event, ethnographers have yet to determine what long-term impacts local management systems will undergo through exposure to liberal public policy.

The current status of research into water rights is encouraging because legislative debate and structural reforms over the past decade have generated a demand for studies that are not only speculative but also proactive and ethnographic. In general, water studies have taken two divergent points of view. One approaches water in terms of the government and its agencies, and the other from the societal groups who use water, especially small farmers and indigenous people. The first group, legal engineering studies explore the best ways to regulate water use by putting the government and the agencies it generates (e.g. user boards) in charge. By contrast, national studies[18] find their counterpart in larger-scale proposals. They take a macro-social, comparative approach, with a scope of observation transcending the national framework[19].

Such observations conclude that legislation must be amended to recognise multiple uses of water and the heterogeneity of societal stakeholders who need water. They also stress the need to safeguard the access and usage rights of societal groups who are at the bottom of the social pyramid. They also suggest avoiding legal transplants, because our countries are so hugely heterogeneous in geographical and social terms. Precisely for that very reason, water administration must be highly autonomous and democratised, enabling users to take part in water resource management and ensuring equity. From the other standpoint, ethnographic studies emphasise communities' approach to social organisation, management and distribution of water[20]. One characteristic that should be stressed is that this research goes beyond the *a priori* dichotomy that used to be drawn between rural communities and the government. A theoretical and methodological effort to understand the power dynamics between these two parties is evident. It only remains to explore legal integration among different governmental institutions and local societal stakeholders. This will be crucial in describing how the semi-autonomous societal mechanisms that are involved will work. To develop the propositional part of WALIR-Peru, it will be necessary to contrast available contributions with actual field experience, emphasising the study of inter-law dynamics.

Challenges in recognising indigenous rights in water legislation

Legislative policy design ought to take into account the political context in which policies are intended to intervene. Therefore, to discuss recognition of indigenous water rights in Peruvian legislation, it is essential to analyse the current political situation, as well as the process of neoliberal economic sedimentation. Legislation on

[15] E.g., Gelles 2000; Boelens & Dávila 1998.
[16] 2000, 162-164.
[17] See I.4 of the WALIR-PERU Work Plan.
[18] Del Castillo 2001; Rebosio 2001.
[19] E.g., Jouravlev 2001; Solanes & Getches 1998.
[20] E.g., Gelles 2000; Boelens & Dávila 1998; Mitchell and Guillet 1994.

indigenous rights, and specifically law governing water, reveals four fundamental problems.

Firstly, norms governing natural resources are out of step with those for water, which reflect more differences than just the tendencies of the times when they were formulated. Further, this lack of synchronisation reveals that these norms are grounded in ideologically opposing public policies (the public-oriented law of 1969 and the neoliberal 1993 Constitution) and are different to reconcile. Nonetheless, they coexist due to the failure to adapt laws to neoliberal legislative policy. This evinces the government's intra-systemic lack of congruence, impedes any discussion of changing or keeping a given legal model, or the proposal of uniform policies.

Secondly, the neoliberal model, proposed as a pattern for the nation's economy in the early 1990s, has been envisioned as a legal matrix under which the specific laws for each sector must be arrayed. This matrix recognises no differences in power, ethnic grouping, status, gender, etc. This implies not only that the State fails to recognise these differences but that, consequently, it should not intervene in any way to regulate or balance these real-world disparities. Grounded in the premise that we are all equal under the Law, a rural community may be *legally* able to compete under '*equal conditions*' with a trans-national company for the concession to some natural resource, with no need for governmental intervention. Moreover, the less that the State gets involved in directing the nation's economy (i.e. the more it becomes non-interventionist), the further it grows from its regulatory role and from the economic activities it used to take part in. Under this arrangement, natural resources that were once regulated are gradually liberalised, falling under the law of supply and demand. That is, domestic and international markets and investments take over, squeezing out any societal institutions that cannot compete.

Thirdly, indigenous rights can be claimed only by those parties who authenticate their differentiated ethnic status, in order to qualify for special laws and judicial mechanisms. International Labour Organisation (ILO) Convention 169 established the fundamental legal guidelines to define who is indigenous. A problem arising in this regard is that terminology for native and rural communities is far from homogenous. On the one hand, laws from the 1970s are still on the books, drafted by the military reform government with the intent to eliminate the racist, discriminatory connotations of "Indian" and "indigenous" by decree, preferring "rural" and "native". These norms overlooked the transcendental changes going on internationally to recover precisely such terms as "indigenous" and "indigenous peoples" in order to recognise their rights. On the other hand, although Peru has ratified Convention 169, it has not yet adapted its internal legislation to the Convention's terminology or concepts. This lag must be corrected as soon as possible to avoid legal confusion and to be able to activate indigenous rights as established in the Convention. These two legal concepts – indigenous peoples and rural communities – differ from those recognised by the Water Law, which are being imposed on Andean communities: the user board and the irrigators' committee. In any event, the law calls for Andean peoples to organise legally as rural communities in order to qualify for any legal entitlement; and to register administratively as user boards or irrigators' committees in order to have any water rights.

Finally, the legislative analysis reveals that, despite the begrudging constitutional recognition of special indigenous jurisdiction and the ratification of ILO Convention 169, Peruvian law has dragged its feet in recognising indigenous rights. In fact, since 1995 (when the Convention went into effect) the contents of rights granted to indigenous peoples have not been developed in laws or regulations. This

keeps these rights from being enforced. Accordingly, indigenous rights to water use have no priority and, whenever there is a clash between the government's rights and those of indigenous peoples, the former override. The priorities set in the Water Law to grant water right concessions ignore ethnic criteria for allocation. Under the ranking established in the Law, indigenous uses and rights must fit into the order set up by the government, without any special consideration at all.

As for usage, the sectoral law for sustainable utilisation of natural resources (1997) recognises ancestral modes of natural resource use by rural communities and local population groups, but makes them subject to eminent domain by the State, which can alter such uses and grant concessions to those resources. It also makes recognition of ancestral natural-resource use conditional upon meeting all environmental protection norms. Finally, under the administration of justice, the Constitution empowers community authorities to perform judicial functions according to local law, within their communal territory. In addition to the spatial boundary, it is also clearly established that such decisions and penalties may not violate the human rights of the persons involved.

Regarding consumptive water uses, the norms recognise no specific indigenous right. In general, they declare that consumption to meet primary needs requires no administrative authorisation. Further, the government will respect communities' uses and customs and, consequently, recognises ancestral modes of natural-resource use. In theory, consumptive uses by indigenous and rural peoples must fit into the ranking set forth in the 1969 General Water Law and Legislative Decree 653 of 1991. Water right allocation for non-consumptive uses must also follow that order of preference. Accordingly, communities are not only applying for concessions to use medicinal and ore-panning water as tourist attractions, but are also increasingly applying for permits to set up fish farming in their bodies of water. Hydroelectric generation through micro-power stations is also increasing non-consumptive uses of water that compete with indigenous usage modes.

What can be done?

Successive attempts to radically overhaul the legal system governing water bears witness eloquently to governmental water policy's crisis and loss of legitimacy. In general, the legislative system does not meet users' needs. Lack of legitimacy is also evident in the gap between official norms and the country's hydrological diversity. Furthermore, there is the refusal to recognise indigenous rights as a viable alternative for water management, at least in high-altitude Andean irrigation. In such a context, full recognition of indigenous rights is not merely a legal issue. It is also a genuine alternative to relieve the government of the obligations it has failed to fulfil, and to decentralise water policy, and reinforce local management of resources.

In fact, recognition of legal pluralism under a neoliberal context ought to lead us to propose the possibility for indigenous peoples – organised into and recognised as rural and native communities – to take part in decision-making about the use and regulation of resources found in their territories. If liberalisation means denial of the State's central role, why not imagine that, under this new arrangement, the State should recognise the autonomy of indigenous peoples to manage their resources as well, taking into account that they represent a societal sector requiring special incentives. To this end, legal engineering must recognise indigenous rights to water use, not only to consolidate democracy and equality, but also to achieve social and economic policies grounded in equity.

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