

# ELR

## NEWS & ANALYSIS

## Show Me the Water! It Is Time for Congress to Acknowledge the Human Right to Water Access

by Chad West

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*Editors' Summary: The majority of U.S. citizens do not think twice about water usage when they take a shower, flush their toilets, or wash their cars. Yet 1.95 million people in the United States lack basic access to sufficient water and sanitation. The international community is already taking steps to ensure that water conflicts are limited and resources are protected for the future. In fact, many nations are declaring that water is a human right and that all citizens have the right to access and sanitation. State legislation and court decisions within the United States show a similar movement toward a cleaner environment and better water management. The U.S. Congress, however, has yet to take any stand. This Article argues that the time has come for Congress to advance international and state interests by acknowledging that the right to water, like the right to life or the right to be free, is fundamental to all citizens. The author argues that Congress must take immediate steps to provide sufficient clean and accessible water to Americans whose current water resources do not meet World Health Organization standards. He urges Congress to affirm the Water for the World Resolution and to sign the Senator Paul Simon Water for the Poor Act of 2005, thereby allowing Congress to take the necessary first steps in acknowledging water's importance to international and domestic communities.*

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### I. Introduction

Water, like air, is essential to human survival.<sup>1</sup> The World Health Organization (WHO) describes water as the essence of life.<sup>2</sup> While water accounts for 70% of the earth's surface, more than 97% of earth's water is seawater, and most of the remaining 3% is found in glaciers and aquifers too deep to be accessed.<sup>3</sup> Still, earth's natural water cycle, consisting of evaporation and rainfall, should provide more than enough water to meet the entire world's human need.<sup>4</sup> However, wa-

ter is not always located where it is needed.<sup>5</sup> Because the world's population has tripled and global demand for water has increased sixfold over the last century, water has become increasingly important to both people and governments.<sup>6</sup> The lack of clean drinking water has led to famine, starvation, and even war.<sup>7</sup>

Half the world's population still suffers with water services inferior to those available to the ancient Greeks and Romans. Preventable water-related diseases kill an estimated 10,000 to 20,000 children each day, and the latest

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1. WORLD HEALTH ORGANIZATION (WHO), WORLD HEALTH ORGANIZATION BRIEF: THE RIGHT TO WATER 6 (2003), available at [http://www.who.int/water\\_sanitation\\_health/rightwater/en/](http://www.who.int/water_sanitation_health/rightwater/en/) (last visited Nov. 23, 2005) [hereinafter THE RIGHT TO WATER].

2. *Id.*

3. SANDRA POSTEAL, LAST OASIS: FACING WATER SCARCITY (W.W. Norton & Co. 1997).

4. JEFFREY ROTHFELDER, EVERY DROP FOR SALE (Jeremy P. Tarcher ed., 2001). Even though the earth's population continues to grow and

the earth continues to receive 40,000 cubic kilometers of water each year, the problem is getting the water to where it is needed. *Id.* Specifically, places like Australia and Iraq do not have enough water while places like Canada have more water than they can use. John Peet, *Priceless*, ECONOMIST, July 17, 2003, available at [http://www.economist.com/displaystory.cfm?story\\_id=1906846](http://www.economist.com/displaystory.cfm?story_id=1906846) (last visited Nov. 5, 2005). This unequal dispersion of water has gradually increased the gap between those who have access to water and those who do not. ROTHFELDER, *supra*.

5. ROTHFELDER, *supra* note 4.

6. See JOHN SCANLON ET AL., WATER AS A HUMAN RIGHT? I (International Union for Conservation of Nature and Natural Resources (IUCN), Environmental Policy and Law Paper. No. 51, 2004), available at <http://www.waterandnature.org/pub/EPLP51EN.pdf> (last visited Nov. 23, 2005) [hereinafter WATER AS A HUMAN RIGHT].

7. See *id.*

evidence suggests that [the world is] falling behind in efforts to solve these problems. There were new, massive outbreaks of cholera in the 1990s in Latin America, Africa, and Asia. The number of cases of dengue fever—a mosquito-borne disease—doubled in Latin America between 1997 and 1999.<sup>8</sup>

With dwindling fresh, nonpolluted water resources in many countries, the international community is taking steps to ensure that water conflicts are limited and resources are protected for the future.<sup>9</sup> There is an international trend where nations are declaring that water is a human right and the right to access and sanitation belongs to all citizens.<sup>10</sup> The United Nations (U.N.) identified the year 2003 as the International Year of Freshwater, with aims to halve the proportion of people unable to reach or afford safe drinking water by the year 2015.<sup>11</sup> This goal has been supported by many international and U.S. lobbying groups such as the Sierra Club and the Episcopal Church.<sup>12</sup> State legislation and court decisions within the United States also show a similar movement toward a cleaner environment and better water management.<sup>13</sup>

Although the international and domestic trends call for water to be acknowledged as a human right, the U.S. Congress has yet to take any stand. Due, in part, to Congress' lack of action, 1.95 million Americans lack basic access to sufficient water or sanitation. The time has come for Congress to advance international and state interests by acknowledging that the right to water, like the right to life or the right to be free, is fundamental to all citizens. Further, Congress must take immediate steps to provide sufficient clean and accessible water to Americans whose current water resources do not meet WHO standards. By affirming the Water for the World Resolution, which was submitted to Congress on March 17, 2005, and by passing the Senator Paul Simon Water for the Poor Act of 2005, which was submitted to Congress on October 28, 2005, Congress will acknowledge water's importance to international and domestic communities.<sup>14</sup> Affirmation will also advance the platforms of environmental groups who are calling for greater restrictions on bulk sales of water, more efficient agriculture irrigation techniques, and limitations on water resource privatization.<sup>15</sup> Most importantly, Congress' affirmation will ignite an immediate response from human rights groups who will call for long-term solutions to domestic water ac-

cess and sanitation problems. This Article analyzes recent domestic water problems, calls upon Congress to acknowledge the human right to water access, and predicts what policy changes will be proposed as a result of Congress' affirmation of the resolution.

## II. Domestic Water Access and Sanitation Problems

The majority of U.S. citizens do not think twice about water usage when they take a shower, flush their toilets, or wash their cars. That is because 99.31% of all U.S. households have clean water and indoor plumbing.<sup>16</sup> The WHO and U.N. attention is focused on the millions without water in developing countries.<sup>17</sup> Even domestic-based human rights and environmental activists seem to have concentrated their focuses on the international water problems.<sup>18</sup> According to the Rural Community Assistance Partnership (RCAP), however, the United States has water problems of its own.<sup>19</sup> This section analyzes the underreported water sufficiency and access problems that many poor, rural Americans face daily.

### A. Demographics

The U.S. Census 2000 revealed that 0.69% of the population lacked basic access to water or sanitation.<sup>20</sup> Although the percentage may seem statistically insignificant, it represents 1.95 million people in 670,000 households.<sup>21</sup> The RCAP states that while some might assume that people lacking water and sanitation access are in temporary extreme circumstances or have chosen to live where access is not possible, demographic studies show that extreme poverty is usually the main factor.<sup>22</sup>

Most Americans lacking water access are very poor and are likely to live "in the rural communities bordering Mexico, the mountain hollows of West Virginia and Kentucky, remote New England, the vast reaches of rural Alaska and on tribal reservations in New Mexico and Arizona."<sup>23</sup> Almost 1 in 20 Alaskan natives lack complete, working, indoor plumbing. Additionally, Native Americans in Arizona, Colorado, New Mexico, and Utah also have severe water access and quality problems: "In Apache County, [Arizona,] 35% of households lack complete indoor plumbing. In Navajo County, it is 27%."<sup>24</sup> The Census 2000 data included a comparison of indoor plumbing between urban and rural areas.<sup>25</sup> In the comparison, 1.6 million urban households and 600,000 rural households lacked indoor plumbing.<sup>26</sup> Rural

8. PETER H. GLEICK, *THE WORLD'S WATER 2* (Island Press 2003).

9. See text accompanying *infra* notes 55-83.

10. See *id.* Throughout my research, I found that the meanings of "right to water" and "right to access water" differed depending on the context in which they were used. For the purposes of this Article, I will use the IUCN's definition, which defines "a 'right to water' as the right to access sufficient water, with the term 'access' also including economic accessibility, i.e., 'affordability.'" WATER AS A HUMAN RIGHT, *supra* note 6, at 2.

11. See WATER AS A HUMAN RIGHT, *supra* note 6, at 1.

12. See Public Citizen, *Water Resolution Supporters*, at <http://www.citizen.org/cmep/Water/congress/rez/articles.cfm?ID=12133> (last visited Nov. 10, 2005), for a list of organizations that have joined in an effort to lobby the U.S. Congress for a Constitutional Resolution for Water as a Human Right.

13. See text accompanying *infra* notes 84-108.

14. Water for the World Resolution, H.R. Con. Res. 468, 108th Cong. (2004); H.R. Con. Res. 120, 109th Cong. (2005) [hereinafter Water Resolution]; Senator Paul Simon Water for the Poor Act of 2005, H.R. 1973, 109th Cong. (2005) [hereinafter Simon Act].

15. See text accompanying *infra* notes 163-212.

16. RURAL COMMUNITY ASSISTANCE PARTNERSHIP, *STILL LIVING WITHOUT THE BASICS IN THE 21ST CENTURY* (2005), available at <http://www.rcap.org/slwbob.html> (last visited Nov. 23, 2005) [hereinafter RCAP].

17. See *supra* notes 9.

18. See text accompanying *infra* notes 77-80.

19. RCAP, *supra* note 16.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* This area mainly involves the four intersecting corners of Arizona, Colorado, New Mexico, and Utah, where the Apache, Hopi, and Navajo tribes reside.

25. *Id.*

26. *Id.*

households, however, were more likely to lack any plumbing, indoors or outdoors.<sup>27</sup>

The Mexican-U.S. border region is arguably the worst region regarding water access and sufficiency. The region is 2,000 miles long and stretches from San Ysidro, California, to Brownsville, Texas, extending 72 miles north of the border into the United States.<sup>28</sup> The region, consisting of 48 counties in 4 states, includes some of the poorest counties in the United States. In these counties, approximately 350,000 people live in *colonias*—non-zoned, semi-rural communities—without access to public drinking water or wastewater systems.<sup>29</sup>

The sanitation and water access deficiencies throughout the border region are severe. “Forty-six million liters of raw sewage flow daily into the Tijuana River. Another 76 million are dumped into the New and Rio Grande Rivers.”<sup>30</sup> While treaties exist between Mexico and the United States to govern water use, the treaties do not address pollution management, including sewage and pesticide runoff.<sup>31</sup> Untreated, unmanaged water resources often lead to serious health concerns for citizens who rely on that water for their livelihood.<sup>32</sup>

U.S. farm workers, including child laborers, encounter water access and quality problems similar to those found in the rural households mentioned above. The United Farm Workers Union estimates that there are 800,000 adolescent laborers in the United States.<sup>33</sup> Large populations of these workers live and work in Arizona, California, Florida, Texas, and Washington.<sup>34</sup> The Occupational Safety and Health Administration (OSHA) requires farms to provide, at a minimum, “[d]rinking water, water for hand washing, and toilet facilities” for their workers.<sup>35</sup> According to a study by the Human Rights Watch (HRW), however, most of these minimal requirements are ignored.<sup>36</sup> Through interviews with child laborers, the HRW found that many employers provided little to no water and often sold sodas and beer in place of water.<sup>37</sup> Further, almost no employer provided toilet facilities to their workers.<sup>38</sup> Many of the laborers, who were thirsty and dehydrated, drank pesticide-contaminated water from irrigation runoffs and streams.<sup>39</sup>

### B. Domestic Health Concerns

Regardless of what demographic category a person falls into, the water they use must be safe. By consuming contam-

inated water, people can incur life-threatening infectious diseases.<sup>40</sup> Infectious waterborne diseases include diarrhea, typhoid, cholera, hepatitis, and shigellosis.<sup>41</sup> These diseases “are leading causes of death and illness in the developing world, while outbreaks of waterborne infectious disease caused by agents such as *Cryptosporidium*, *Campylobacter* and *E. coli* O157 continue to occur in industrialized countries worldwide.”<sup>42</sup>

In 1993, a water-related outbreak of cryptosporidiosis in Milwaukee, Wisconsin, caused nearly 400,000 illnesses, more than 4,000 hospitalizations, and more than 50 deaths.<sup>43</sup> This incident brought national attention to the quality of the nation’s drinking water. Consequently, from 1994 to 1999, the U.S. Department of Agriculture spent nearly \$2 billion in more than 1,600 rural communities nationwide.<sup>44</sup>

As evidenced by the U.S. Census 2000 results, however, Congress needs to address water problems again. Focus is most critically needed in the border region because the population is growing so fast in that section of the United States.<sup>45</sup> “During the 1980s, this region experienced a [25%] to [30%] increase in population, compared to a less than [10%] increase for the U.S. population.”<sup>46</sup> The high population growth rate was attributable to high fertility and immigration rates.<sup>47</sup> The border region growth rate has “serious implications for the poverty, environmental pollution, and disease that now plague residents struggling without adequate housing, sewage management, water, and health care.”<sup>48</sup> Communicable diseases are very prevalent in border areas.<sup>49</sup> The region shows high incidences of waterborne diseases like shigellosis and higher-than-normal rates of hepatitis A, tuberculosis, and measles.<sup>50</sup> The health of citizens living in the border regions can only be protected by sufficient, accessible water quantity and quality.

While the presence of indoor plumbing is important for maintaining domestic health, it does not guarantee safe drinking water. From 1999 to 2000, “the U.S. Center for Disease Control reported 39 outbreaks of waterborne diseases in 23 states affecting more than 2,000 individuals.”<sup>51</sup> Additionally, according to the Rural Community Assistance Program, the U.S. Environmental Protection Agency (EPA)

27. *Id.*

28. *Id.*

29. *Id.*

30. See Bureau of Primary Health Care, *U.S.-Mexico Border Health*, at <http://bphc.hrsa.gov/bphc/borderhealth/default.htm> (last visited Nov. 23, 2005) [hereinafter Bureau of Primary Health Care].

31. *Id.*

32. *Id.*

33. Human Rights Watch, *Adolescent Farmworkers in the United States: Endangerment and Exploitation*, at <http://www.hrw.org/reports/2000/frmwkr/frmwkr006-02.htm> (last visited Oct. 18, 2005).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See *id.*; see also RCAP, *supra* note 16.

42. See THE RIGHT TO WATER, *supra* note 1, at 16 (emphasis in original). For a comprehensive list of waterborne diseases, see *id.* at 17.

43. CNN.com, *Rural America Gets Clean Water Dollars* (July 16, 1999), at <http://www.cnn.com/NATURE/9907/16/water.enn/> (last visited Oct. 18, 2005).

44. *Id.*

45. See Bureau of Primary Health Care, *supra* note 30; see also CENSUS 2000, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 27 (2001), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf> (last visited Nov. 5, 2005); and CENSUS 2002, AREAS WITH CONCENTRATED POVERTY: 1999, at 5-6 (2003), available at <http://www.census.gov/prod/2005pubs/censr-16.pdf> (last visited Nov. 5, 2005).

46. See Bureau of Primary Health Care, *supra* note 30.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Centers for Disease Control & Prevention, *Surveillance for Waterborne-Disease Outbreaks—United States, 1999-2000*, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5108a1.htm> (last visited Nov. 23, 2005); see also RCAP, *supra* note 16.

reported “that a full nine percent of U.S. households are drinking water that fails to meet standards for maximum contaminant levels, and as the existing water and sanitation infrastructure ages, the pressure on current systems is likely to increase.”<sup>52</sup>

Most Americans are fortunate enough to be able to wash their clothes and cook their food without having to worry about contracting a waterborne disease like cholera or hepatitis.<sup>53</sup> However, since 9% of U.S. households have substandard drinking water and 1.9 million Americans do not even have basic water access, Congress needs to join the international trend and recognize the human right to water.

### III. Development of the Human Right to Water Internationally

Unlike the U.S. government, the international community has taken bold steps toward recognizing the importance for all citizens to have sufficient access to adequate water. An understanding of the views of other countries and entities helps explain the need for Congress to affirm the resolution. This section analyzes reasons behind the international growth toward the human right to water and discusses the recent trend by the U.N. and other entities toward more liberal water protection laws.

#### A. Increasing International Discussions Regarding the Human Right to Water

In *Water as a Human Right*, the International Union for Conservation of Nature and Natural Resources (IUCN) discusses what benefits the international community will gain by acknowledging a human right to water.<sup>54</sup> The authors are mainly concerned that past academic discussions have only increased the awareness of water issues while failing to ignite any proactive changes.<sup>55</sup> Because discussions have proven ineffective, the IUCN joins other activists calling upon governments to grant the human right to water because “the right to life and to development cannot be realized in the absence of the right to water.”<sup>56</sup> Although the right to life

and the right to development should include the right of water, the IUCN feels the currently existing substantive rights offer too narrow a scope of protection for individuals suffering from water pollution or from the deprivation of clean water.<sup>57</sup> “Under the current regime, such harm to people cannot by itself constitute a cause of action, but needs to be linked to other rights, ‘leaving the courts and commissions on the shaky ground of creatively extending rights.’”<sup>58</sup> Recognizing the human right to water access would not only make government obligations clear but would also make any violations of this right more evident.<sup>59</sup>

Injurious deprivation or pollution of an individual’s water supply, or denial of his/her access to sufficient and safe water would enable him/her to seek redress through the court system of the state concerned. In the event of failure at national level, aggrieved individuals would still have an international avenue of redress through human rights institutions.<sup>60</sup>

Opponents of the IUCN suggest that water is like air and “is so fundamental to preserving a right to life that explicit recognition [is] unnecessary.”<sup>61</sup> However, the IUCN asserts that since water is becoming a scarcer resource, the need for governments to grant it as a human right is more important than ever.<sup>62</sup>

#### B. Trend by International Entities Toward More Defined Water Resource Protection Criteria Through Persuasive and Binding Human Rights Laws

The concept of the human right to water is not new. As early as 1948, the U.N. passed the Universal Declaration of Human Rights, which guaranteed all people a right to a healthy standard of living.<sup>63</sup> In 2000, the U.N. Committee on Economic, Social, and Cultural Rights (UNCESCR) interpreted the right to health as an inclusive right that includes all factors that determine good health, including access to safe drinking water and adequate sanitation.<sup>64</sup>

In 2001, participants at World Water Day further defined the right to water as “a right to access to water of sufficient cleanliness and in sufficient quantities to meet individual needs.”<sup>65</sup> The participants also determined that, at a minimum, the quantity of water must suffice to meet basic human drinking, bathing, cleaning, cooking, and sanitation needs, while quality requirements vary depending on the

52. RCAP, *supra* note 16.

53. *Id.*

54. See WATER AS A HUMAN RIGHT, *supra* note 6, at 13. The IUCN criticizes past efforts to provide adequate water to people by stating that it is “time to consider new and more effective approaches that improve meaningful commitment to implementing sustainable development *on-the-ground*.” *Id.* (emphasis added).

55. See *id.* “The principles of sustainable development are widely accepted, but the practical application of these has not enjoyed much success.” *Id.*

56. See *id.*; see also Amnesty International, *World Water Forum*, at <http://web.amnesty.org/pages/ec-water-eng> (last visited Nov. 29, 2005) (stating that a right to water makes it clear that governments have duties to fulfill that right). Amnesty International also stated that the rights approach promotes people to think of water scarcity as the nonfulfillment of rights, thereby strengthening efforts to address this scarcity. *Id.*; see also Public Citizen, *Water for All, Campaigning to Keep Water as a Public Trust*, at <http://www.citizen.org/cmep/Water/articles.cfm?ID=6249> (last visited Oct. 18, 2005) (stating that the only way people can be guaranteed water is if governments recognize that the “right to water is an inalienable individual and collective right”); see also World Water Day, *Water, Health and Human Rights: Overview of Thematic Articles*, at <http://www.worldwaterday.org/wwday/2001/thematic/hmnrights.html> (last visited Nov. 10, 2005) [hereinafter *Water, Health and Human Rights*] (proposing that providing affordable water is not a charitable act, but a state obligation and the right of each individual).

57. See WATER AS A HUMAN RIGHT, *supra* note 6, at 21. In addition to asserting that water is a substantive right, the authors also discuss water as a procedural right. See *id.* The authors proposed that the following procedural rights to water should be granted: “[T]he right of individuals to information concerning the government’s activities on water-related issues; the right of individuals to participate in decision-making, which concerns water issues; the right of individuals to recourse for environmental harm suffered; [and] the right of individuals to fair and just administrative action.” *Id.* at 31.

58. *Id.* at 21 (quoting J. Eaton, *The Nigerian Tragedy*, 15 B.U. INT’L L.J. 297 (1997)).

59. See *id.*

60. *Id.* (quoting D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 134 (1991)).

61. *Id.* at 20.

62. See *id.*

63. *Id.*

64. *Id.*

65. *Water, Health and Human Rights, supra* note 56.

particular usage, i.e., cleaner water is needed for drinking water than for sanitation water.<sup>66</sup>

In 2002, the UNCESCR further recognized that water was an independent right.<sup>67</sup> “[D]rawing on a range of international treaties and declarations, [it] stated: ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.’”<sup>68</sup> This statement, found in General Comment 15, was not an actual declaration, but instead a comment that drew upon other treaties.<sup>69</sup> The authors of General Comment 15 included provisions asserting that the right to water comprises both “freedoms” and “entitlements.”<sup>70</sup> Freedoms include, among other things, the right to be free from water disconnections through the contamination of water supplies, while entitlements include the right to a system of water supply and management that provides water equality for all people.<sup>71</sup>

In 2003, the WHO expanded on the requirements set forth by the 2001 World Water Day and General Comment 15 by evaluating citizens’ access to adequate water.<sup>72</sup> The WHO used distance, likely volumes of water collected, and needs met to determine if access and quality were sufficient.<sup>73</sup> A person has *optimal access* to water when water is present in multiple taps within the house at an average volume of 100 to 200 liters per capita per day, *immediate access* when water is provided through at least one tap and there is access to

approximately 50 liters per capita per day, *basic access* when water is located within one kilometer or within a 30-minute round trip and there is access to 20 liters per capita per day or less, and *no access* when water is only located more than one kilometer away and volume is below 5 liters per capita per day.<sup>74</sup>

The most recent declaration of the human right to water occurred at the Third World Water Forum, held in Kyoto, Japan, in March 2003, where the ministers and delegation heads used General Comment 15 and other instruments to form their position on water: “Water is a driving force for sustainable development [and is] indispensable for human health and welfare. Prioritizing water issues is an urgent global requirement.”<sup>75</sup>

While the messages sent by the UNCESCR, WHO, and the Third World Water Forum support the human right to water, critics argue that the declarations are ineffective because none is binding.<sup>76</sup> The Third World Water Forum has received the most criticism by activist groups, who claim that it took a step back in water rights for the entire international community by failing to declare the human right to water.<sup>77</sup> Amnesty International was at the forefront, stating that “affirming the human right to water will assist efforts to address issues of water scarcity, climate change, water quality, and the spread of water-borne diseases,” and the declaration’s failure to recognize this right is a step backwards because the U.N. has already affirmed the right to water.<sup>78</sup> The Freshwater Action Network was also unimpressed with the results from the Third World Water Forum, stating that there “was an obvious lack of knowledge and commitment to the right to water in Kyoto [because it] was not included in the Ministerial Declaration or mentioned in many of the stakeholder sessions.”<sup>79</sup>

66. *Id.*

67. See THE RIGHT TO WATER, *supra* note 1, at 8. The UNCESCR recognized this in General Comment 15 at its 29th session held in November 2002. [Righttowater.org.uk](http://www.righttowater.org.uk), *General Comment 15*, at <http://www.righttowater.org.uk/code/No15.asp> (last visited Oct. 18, 2005).

68. See THE RIGHT TO WATER, *supra* note 1, at 8. The brief also states that development should be approached from a rights perspective because it empowers people to be at the center of their development and not simply recipients of aid. *See id.* at 9. Ultimately, “a rights-based approach may deliver more sustainable solutions because decisions are focused on what communities and individuals require, understand and can manage, rather than what external agencies deem is needed.” *Id.* at 10. Additionally, *Water as a Human Right* links the right to water with a list of other fundamental and natural human rights such as the right to life, the right to food, the right to self-determination, the right to adequate standard of living, and the right to health. *Id.* at 19-20.

69. [Righttowater.org.uk](http://www.righttowater.org.uk), *supra* note 67. General Comment 15 is a document generated by the U.N. that includes governmental responsibilities to ensure that water access is available to all citizens. UNCESCR. The right to water (arts. 11 and 12 of the Int’l Covenant on Econ., Soc. & Cultural Rights), U.N. Econ. & Soc. Council, UNCESCR, General Comment No. 15, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002), at [http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf) (last visited Nov. 5, 2005) [hereinafter General Comment 15].

70. [Righttowater.org.uk](http://www.righttowater.org.uk), *supra* note 67.

71. *Id.*

72. GUY HOWARD & JAMIE BARTRAM, DOMESTIC WATER QUANTITY, SERVICE LEVEL, AND HEALTH 3 (WHO 2003), available at [http://www.who.int/water\\_sanitation\\_health/diseases/en/WSH0302.pdf](http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf) (last visited Oct. 19, 2005).

73. *Id.* In evaluating the “needs met” requirement, the WHO notes that

[w]ater must be safe for drinking and other household uses. Drinking-water must be free from microbes and parasites, and chemical, physical and radiological hazards that constitute a threat to a person’s health. It must also be acceptable in terms of [color] and [odor] so that individuals will choose this water rather than polluted alternatives that may look more attractive.

THE RIGHT TO WATER, *supra* note 1, at 15.

74. HOWARD & BARTRAM, *supra* note 72.

75. Third World Water Forum, *Ministerial Declaration* (Mar. 23, 2003), at <http://www.mofa.go.jp/policy/environment/wwf/declaration.html> (last visited Nov. 10, 2005).

76. Right to Water, *General Comment 15*, at [http://www.righttowater.org.uk/code/no15\\_3.asp](http://www.righttowater.org.uk/code/no15_3.asp) (last visited Nov. 15, 2005). “Several states have consistently refused to acknowledge that access to water is a human right, rather than just a basic need.” *Id.* The critics argue that U.N. comments are only drafted in order to clarify state objectives, and therefore, General Comment 15 cannot create new human rights. *Id.* Specifically, it is only an interpretive tool that does not, by itself, constitute legally binding policy. *Id.*

77. See Amnesty International, *Human Right to Water*, at <http://web.amnesty.org/library/index/engIOR100022003?open&of=eng-398> (last visited Oct. 19, 2005); Sierra Club, *Declarations on the Right to Water*, at [http://www.sierraclub.org/cac/water/human\\_right/](http://www.sierraclub.org/cac/water/human_right/) (last visited Nov. 28, 2005).

78. Amnesty International, *supra* note 77. Amnesty International believes that the human rights theory is the best method to handle critical water issues. *See id.*

If the issue of access to water is addressed from a human rights perspective, we necessarily must consider the rights of all individuals to water. Disputes over water must then be resolved in ways that guarantee access, and do not for example, make it conditional on one’s relative wealth, social status, or nationality.

*Id.* Sierra Club was also disenchanted with the World Water Forum’s refusal to declare that access to water is a human right. Sierra Club, *supra* note 77.

79. Water-L News, *Water Forum Declaration Bar of Solutions to Water and Sanitation Crisis* (Mar. 23, 2003), at [http://www.iisd.ca/Water-L/Water-L\\_News\\_1.html#35](http://www.iisd.ca/Water-L/Water-L_News_1.html#35) (last visited Nov. 10, 2005) (quoting the World Water Forum’s living waters program director, Jamie Pittock).

Even with the alleged backwards step by the Third World Water Forum, international doctrine still strongly supports a human right to water. General Comment 15 cites to two legally binding treaties that support the declarations for the human right to water: “The right to water is enshrined in two of the six core human rights treaties: the Convention on the Elimination of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989),” both of which are legally binding upon all signing states.<sup>80</sup> While both treaties were designed to protect against discrimination, they are applicable to water protection. The Convention on the Elimination of All Forms of Discrimination Against Women, Article 14(2), states that

parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality with men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . . (h) [t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply. . . .<sup>81</sup>

The Convention on the Rights of the Child, Article 24(2), similarly holds that parties should take appropriate measures to “combat disease and malnutrition through . . . the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”<sup>82</sup>

Many experts disagree on the legally binding power of the above treaties and General Comment 15. However, most governments throughout the world recognize the responsibility to provide water, or at least a clean environment, to their citizens.

#### IV. Development of State Laws Regarding the Environment

Before a government can enumerate the human right to water, the human right to a healthy environment must exist. Many environmental groups assert that the United States should pass a constitutional amendment granting citizens the right to a “healthy and healthful” environment.<sup>83</sup> While attempted constitutional amendments have failed, some states have successfully incorporated environmental language and rights into their constitutions.<sup>84</sup> State court decisions have also played major roles in influencing environmental policy. This section discusses recent constitutional changes and common-law decisions that are influencing state environmental laws.

##### A. State Constitutions

Many states have environmental language engrained in their constitutions. Specifically, 31 states and Puerto Rico

reference the environment or natural resources in their constitutions. “Alaska, Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, Rhode Island, and Texas all provide environmental rights in their constitutions.”<sup>85</sup> The remaining 23 state constitutions either include public policy statements in favor of environmental protection or at least refer to natural resources and environmental protection.<sup>86</sup>

Many states use bold language in their constitutions to grant environmental rights. For example, Hawaii’s Constitution states that “[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural re-

85. See Neil Popovic, *Pursuing Environmental Justice With International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338 (1996). The article lists the constitutional provisions as follows:

ALASKA CONST. art. VIII, §16 (right not to be divested of use of waters, interests in land); HAW. CONST. art. XI, §9 (right to clean and healthful environment); ILL. CONST. art. XI, §2 (right to healthful environment); MASS. CONST. art. XCVII, §243 (right to clean air and water, freedom from excessive noise, natural, scenic, historic and aesthetic qualities of environment; right to conservation, development and utilization of natural resources); MONT. CONST. art. II, §3 (right to clean and healthful environment); PA. CONST. art. I, §27 (right to clean air, pure water and preservation of natural, scenic, historic, and aesthetic values of environment); R.I. CONST. art. I, §17 (right to use and enjoyment of natural resources “with due regard for the preservation of their values”); TEX. CONST. art. XVI, §59 (right to preservation of natural resources).

*Id.* at 355 n.75.

86. See *id.* at 356-58, where the author lists other state provisions:

ALA. CONST. amend. 543 (protection of unique lands and water areas); CAL. CONST. art. I, §7(a) (protection of the environment); COLO. CONST. art. XVIII, §6 (preservation of forests), art. XXVII (preservation, protection, enhancement, and management of state’s wildlife, park, river, trail, and open-space heritage); FLA. CONST. art. II, §7 (conservation of natural resources and scenic beauty); LA. CONST. art. IX, §1 (protection, conservation, and replenishment of natural resources); MICH. CONST. art. IV, §14 (conservation and development of natural resources); N.M. CONST. art. XX, §21 (protection of state’s “beautiful and healthful environment”); N.Y. CONST. art. XIV, §4 (conservation and protection of natural resources and scenic beauty); N.C. CONST. art. XIV, §59 (conservation and protection of lands and water); S.C. CONST. art. XII, §1 (conservation of natural resources); VA. CONST. art. XI, §1 (conservation, development, and utilization of natural resources, public lands, and historical sites; protection of atmosphere, lands, and water from pollution, impairment, or destruction); P.R. CONST. art. VI, §19 (conservation, development, and use of natural resources); ARK. CONST. amend. XXXV (wildlife conservation); GA. CONST. art. III, §VI, ¶ II(a)(1) (power to restrict land use to protect and preserve natural resources, environment, and “vital areas”); IDAHO CONST. art. XV, §1 (use of waters a public use); MINN. CONST. art. XI, §14 (trust fund for environment and natural resources); MO. CONST. art. III, §37 (water pollution control fund); NEB. CONST. art. III, §20 (inalienability of natural resources on state lands); OHIO CONST. arts. II, §36 (authorization of laws for conservation of natural resources), VIII, §21 (parks, recreation, and natural resources project); OKLA. CONST. art. XXVI, §1 (department of wildlife conservation); OR. CONST. arts. XI-E (forest rehabilitation and reforestation), XI-H, §1 (pollution control); TENN. CONST. art. XI, §13 (authorization of laws to protect game and fish); UTAH CONST. art. XVIII, §1 (forest preservation); WYO. CONST. art. I, §31 (control of water use).

80. General Comment 15, *supra* note 69, at 2 n.5.

81. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13 (1979).

82. Convention on the Rights of the Child, G.A. Res. 44/25, art. 24(2)(c), adopted Nov. 20, 1989, entered into force Sept. 2, 1990, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (last visited Oct. 19, 2005).

83. Water Resolution, *supra* note 14.

84. See text accompanying *infra* notes 86-97.

sources.”<sup>87</sup> Michigan’s Constitution also grants the right to the environment by making the following policy statement: “The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources . . . .”<sup>88</sup> Montana also established environmental rights through its constitution: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment.”<sup>89</sup> In addition, Virginia’s Constitution holds that “it shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”<sup>90</sup> New York’s Constitution provides for private lawsuits to enforce public protection of constitutional, environmental protections: the state policy “shall be to conserve and protect its natural resources. The legislature . . . shall include . . . provision[s] for the abatement of air and water pollution and . . . the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.”<sup>91</sup> Any violation of this provision can result in a suit by the violated party or notice to the representative attorney general.<sup>92</sup>

The Texas Legislature has also taken proactive steps to protect water resources for drinking and for the protection of wildlife. The Edwards Aquifer provides the sole source of drinking water to 1.5 million people in South Central Texas.<sup>93</sup> Additionally, the aquifer “supports an extremely diverse wildlife population in surface springs and underground [waters],” and at least nine endangered species rely on the aquifer’s springflows for survival.<sup>94</sup> Texas law still supports the rule of capture, but “[s]everal serious droughts (1984 and 1996), legal decisions to enforce the Endangered Species Act (between 1990 and 1996), and citizen action that raised public understanding of the importance of the aquifer led the Texas Legislature to gradually impose public control over” this aquifer’s water.<sup>95</sup> “In 1993 the legislature created an Edwards Aquifer Authority to limit water pumping, penalize violators, issue permits, control the transfer of water rights, and institute water quality programs.”<sup>96</sup>

### B. State Courts

Various state courts have also taken proactive approaches toward protecting environmental, and consequently, water resources through the public trust doctrine. In New Jersey, a court held that the Department of Environmental Protection could impose a right to enter a wastewater treatment plant’s

facilities as a condition of an approved permit to construct and operate the facility.<sup>97</sup> Further, “statutes which seek to protect public health and welfare through control of water pollution are entitled to liberal construction so that their beneficial objective may be accomplished.”<sup>98</sup> A Virginia court, in requiring residents to discontinue using a private well and to connect to a city water system, determined that pure water supplies are so “intimately connected with health of community that provisions with regard to it are properly a part of police power.”<sup>99</sup> Therefore, any Virginia statute or regulation that is reasonably calculated to preserve health is valid and within the power of health authorities.<sup>100</sup> A Vermont court determined that a city’s right to protect a pond’s water purity for drinking purposes superseded a riparian landowner’s right to bathe in the pond.<sup>101</sup> Therefore, a “regulation of the State Board of Health prohibiting bathing in a pond from which a city derived its water supply was not unconstitutional as depriving a riparian proprietor of his property without compensation.”<sup>102</sup> These decisions suggest a trend where courts view water as more of a public resource than a private commodity.

Idaho is perhaps the most proactive state regarding the public trust doctrine. In *Shokal v. Dunn*,<sup>103</sup> an Idaho appellate court criticized a lower court for failing to evaluate the local public interest when evaluating a fishing permit. The court defined the public interest as “the affairs of the people in the area directly affected by the proposed use,”<sup>104</sup> and then expanded on this definition by quoting *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*<sup>105</sup>:

The state holds all waters in trust for the benefit of the public, and “does not have the power to abdicate its role as trustee in favor of private parties.” Any grant to use the state’s waters is “subject to the trust and to action by the State necessary to fulfill its trust responsibilities.” Trust interests include property values, “navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality.” Reviewing courts must “take a ‘close look’ at the action [of the legislature or of agencies such as Water Resources] to determine if it complies with the public trust doctrine and will not act merely as a rubber stamp for agency or legislative action.”<sup>106</sup>

*Shokal* also cited a Utah Supreme Court case where the court authorized a state engineer to limit water applicants’ applications whenever the interest of public welfare is at issue.<sup>107</sup> And in California, “in assessing the duty of the state

87. *Id.* at 358 (quoting HAW. CONST. art. XI, §9).

88. MICH. CONST. art. IV, §52.

89. Popovic, *supra* note 85, at 360 (quoting MONT. CONST. art. II, §3). The article also notes that Montana failed to specify what constitutes a violation of the right to a clean and healthful environment and how the government is to handle enforcement. *Id.*

90. VA. CONST. art. XI, §1.

91. N.Y. CONST. art. XIV, §5.

92. *See id.*

93. GLEICK, *supra* note 8, at 74.

94. *Id.*

95. *Id.*

96. *Id.*

97. In re State Dep’t of Env’tl. Protection, Div. of Water Resources, 426 A.2d 534 (N.J. Super. 1981).

98. *Id.* at 541.

99. Weber City Sanitation Comm’n v. Craft, 87 S.E.2d 153, 160 (Va. 1955).

100. *Id.*

101. State v. Morse, 80 A.189 (Vt. 1911).

102. *Id.* at 194.

103. 707 P.2d 441 (Idaho 1985).

104. *Id.* at 448.

105. 671 P.2d 1085 (Idaho 1983).

106. *Shokal*, 707 P.2d at 447 (citing Kootenai Env’tl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088, 1092, 1094-95 (Idaho 1983)).

107. *See id.* at 448 (citing Tanner v. Bacon, 136 P.2d 957, 964 (Utah 1943)); *see also* People v. Shirokow, 26 Cal. 3d 301 (1980) (in the public interest, the state may require applicants to salvage the water required for a project); East Bay Mun. Util. Dist. v. Department of Pub. Works, 1 Cal. 2d 476 (1934) (a water authority should be al-

water board imposed by California's 'public interest' provision, the California Supreme Court declared, 'If the board determines a particular use is not in furtherance of the greatest public benefit, on balance the public interest must prevail.'"<sup>108</sup> These decisions by state courts promoting the public interest in domestic water protection, coupled with the proactive state legislation regarding the environment, suggest a national movement toward the protection of water supplies and access. The next logical step is for Congress to take a stand on the issue and acknowledge the human right to water.

### V. Congress Should Acknowledge the Human Right to Water Access

The United Nations and the WHO have ignited the current trend for many countries to acknowledge the human right to water. Additionally, many of the 50 states within the United States have drafted legislation and settled legal disputes in favor of a right to a healthy environment.<sup>109</sup> There is a statistically small, but dangerous water access and sanitation problem in many parts of the United States.<sup>110</sup> Congress must join the international and domestic trend and acknowledge that all citizens have a right to water in sufficient quantity and quality. With the United States following this trend, many developing and underdeveloped nations could be encouraged to take more proactive measures to protect water quality and quantity for their citizens. More importantly, the current U.S. water sanitation and access problems will be brought to the public's attention.

While Congress has taken no stance on the human right to water, it has not been totally inactive toward water protection.<sup>111</sup> In 1970, President Richard M. Nixon and Congress saw a need to increase the efficiency and oversight capabilities of the government's environmental sector. The National Environmental Policy Act (NEPA)<sup>112</sup> provided an outlet for Congress to declare its environmental goals:

Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations . . .<sup>113</sup>

NEPA notes that one of the social requirements for future generations is a safe and healthful environment.<sup>114</sup> President William J. Clinton used an Executive Order to extend NEPA's protections to low-income populations, requiring EPA to "achieve environmental justice" by identifying and

lowed to impose restrictions and conditions on water applications in the public interest).

108. *Shirokow*, 26 Cal. 3d at 310 (citations omitted); *accord Tanner*, 136 P.2d at 962, asserting that the state has "the duty to control the appropriation of the public waters in a manner that will be for the best interests of the public." (emphasis added).

109. See text accompanying *supra* notes 85-96.

110. See text accompanying *supra* notes 16-53.

111. See, e.g., 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607; 42 U.S.C. §9613(g)(2).

112. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

113. *Id.* §4331(a).

114. *Id.* §4331(c).

addressing adverse human health issues in impoverished and minority populations.<sup>115</sup> This Executive Order also recognizes the importance of protecting children, making "it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children."<sup>116</sup>

Through the Clean Water Act (CWA), Congress recognizes the need for safe, accessible water.<sup>117</sup> The CWA, officially known as the Federal Water Pollution Control Act, was passed in 1972 to offer federal protection to the country's waterways by stopping pollutant discharge and by maintaining water quality to provide a safe environment for fishing and swimming.<sup>118</sup>

The CWA's goal was to completely eliminate "the discharge of pollutants into waters and to have those waters fit enough for fishing or swimming by 1985."<sup>119</sup> Although those goals have not been met, the CWA has reduced significant pollutant discharge, consequently improving the cleanliness of recreational waters.<sup>120</sup> Approximately 75% of the waters tested have reached the goal.<sup>121</sup> While the CWA relates entirely to pollution control and environmental concerns, it shows a federal interest in protecting the environment.

The Safe Drinking Water Act (SDWA) also exhibits Congress' interest in protecting water resources.<sup>122</sup> The SDWA provides guidance to water administrators and state agencies on water contaminant levels, testing procedures, and risk assessment studies for public water systems.<sup>123</sup> If a municipality fails to meet minimum standards for water safety, EPA "may bring a civil action in the appropriate United States district court to require compliance."<sup>124</sup>

Even though Congress has passed legislation to protect water availability and sanitation, the laws are not working to their fullest potential because Congress has an overly relaxed attitude toward their importance.<sup>125</sup> Robert Svadlenka and Peter Mann of the World Hunger Year organization recently interviewed Maude Barlow, author of *Blue Gold, The Fight to Stop Corporate Theft of the World's Water*. Barlow commented that water-rich countries have the attitude "that

115. Exec. Order No. 13045, 62 Fed. Reg. 19885 (Apr. 21, 1997), ADMIN. MAT. 45088.

116. *Id.*

117. See *id.*; see also Gail Bellenger, *What Is the Clean Water Act?* (Pagewise 2002), at [http://pa.essortment.com/cleanwateract\\_rgrl.htm](http://pa.essortment.com/cleanwateract_rgrl.htm) (last visited Nov. 29, 2005).

118. Bellenger, *supra* note 117. "This Act was passed because rivers and lakes were becoming alarmingly polluted and wetlands were drying up. The Act also includes sections devoted to wetlands." *Id.*

119. 33 U.S.C. §§1251-1387.

120. Bellenger, *supra* note 117.

121. *Id.* The U.S. government has made some progress in improving our water quality.

In October 1997, which was the 25th anniversary of the Clean Water Act, President Clinton announced the Clean Water Action Plan which was to continue and even increase the regulations that had already been in place, providing more funding when necessary and setting deadlines for some procedures. The Clean Water Action Plan was given a high priority in the FY1999 budget with an allotment of \$2.5 billion.

*Id.*

122. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.

123. *Id.* §300g.

124. *Id.*

125. MAUDE BARLOW & TONY CLARKE, *BLUE GOLD, THE FIGHT TO STOP CORPORATE THEFT OF THE WORLD'S WATER* (New Press 2002).



there is a never-ending supply of fresh water and that we can use as much as we want, when we want it, without a thought.”<sup>126</sup> Further, most national governments combine this myth of abundance with the misconception that potential problems are curable by technology. Therefore, “even when we manage to convince people that the world’s water supply is running out, most assume that there is a ‘technological fix’ close at hand.”<sup>127</sup> Barlow feels that national governments must drop this lackadaisical attitude to ensure a water-secure future.<sup>128</sup> More importantly, governments must act as the real water keepers and guarantee every person on earth a certain amount of water as a basic human right.

Congress can take a giant step toward eradicating the small, but dangerous, water sanitation and access problems in the United States by affirming the Water for the World Resolution and the Senator Paul Simon Water for the Poor Act of 2005.<sup>129</sup> While both of these bills are intended to assist poor, developing countries, affirmation of either will exhibit Congress’ intent to tackle water access and sanitation problems. And by signing the Water for the World Resolution, Congress will acknowledge the human right to water, which will consequently help tackle water problems at our own doorstep.

The Water for the World Resolution, introduced by U.S. Rep. Jan Schakowsky (D-Ill.) in June 24, 2004, and then re-introduced on March 18, 2005, is a bold document that inadvertently calls for Congress to recognize the human right to water. If Congress signs the resolution, it will:

- (1) affirm water as a public trust, thereby limiting, and possibly denying its use as a private commodity<sup>130</sup>;
- (2) recognize and pass policies to ensure poverty does not prevent citizens from accessing water<sup>131</sup>;
- (3) recognize that agricultural practices need to be changed to protect water resources<sup>132</sup>;
- (4) commit to meeting the Millennium Development Goals pertaining to water access and sanitation<sup>133</sup>;
- (5) affirm that international loans and debt reduction programs should not be conditioned on the implementation of cost recovery policies that *might* result in increased water rates<sup>134</sup> and;
- (6) reaffirm Congress’ original pollution control goals.<sup>135</sup>

While well-intended, the resolution’s ambiguous language does not call for any concrete actions. It is also not binding. However, by signing the resolution, Congress will essentially acknowledge the human right to water access.

126. World Hunger Year, *The Why Interview: Fighting for Water as a Human Right*, at [http://www.worldhungeryear.org/why\\_speaks/ws\\_load.asp?file=31&style=ws\\_table](http://www.worldhungeryear.org/why_speaks/ws_load.asp?file=31&style=ws_table) (last visited Nov. 28, 2005).

127. *Id.*

128. *Id.*

129. Water Resolution, *supra* note 14; Simon Act, *supra* note 14.

130. Water Resolution, *supra* note 14, §2(1).

131. *Id.* §2(2).

132. *Id.* §2(5).

133. *Id.* §2(6).

134. *Id.* §2(8).

135. *Id.* §2(11).

Like the resolution, the Water for the Poor Act of 2005 recognizes the need for increased attention on international water sanitation and access problems.<sup>136</sup> Unlike the resolution, however, the Act does not discuss any mandates for private-sector businesses or financial institutions and does not effectively grant the human right to water access.<sup>137</sup> Also unlike the resolution, the Act is binding and provides for several unambiguous, concrete steps. Specifically, it authorizes “the President to furnish foreign assistance to provide safe water and sanitation to people in developing countries.”<sup>138</sup> It also authorizes the appropriation of fiscal year 2006 funds to carry out this task.<sup>139</sup> The bill mandates that the Secretary of State develop a strategy to use the funds and report back to Congress.<sup>140</sup> The bill drafters estimated that the total cost of implementing the Act would be “\$3 million in 2006 and \$130 million over the 2006-2010 period.”<sup>141</sup>

The Act, while important, is primarily a humanitarian relief bill that does not address long-term privatization, irrigation, or governmental marketing concerns. Therefore, to truly ensure that all citizens have adequate access to water resources now and in the future, Congress should pass the resolution. By acknowledging the human right to water, Congress will set an example to developing and underdeveloped countries. More importantly, Congress will show an interest in providing water access and sanitation for all U.S. citizens. Congress’ affirmation will also open the door for environmental activist groups to advance water-related protection measures. The following sections address Congress’ responsibilities should it acknowledge the human right to water access.

## VI. Possible Responsibilities Congress Could Incur by Affirming the Resolution

If Congress affirms the resolution, Congress will not be legally bound to take any action. An affirmation, however, could empower environmental activists to call for domestic action and water policy change.<sup>142</sup> Further, the IUCN asserts that any granted human right imposes three obligations on states: the “obligation to respect”; the “obligation to fulfill”; and the “obligation to protect.”<sup>143</sup>

### A. Obligation to Respect

The obligation to respect “requires that States refrain from interfering directly or indirectly with the enjoyment of a human right.”<sup>144</sup> States that recognize water access as a human right must refrain from “engaging in any practice . . . that limits equal access to adequate water; arbitrarily interfering with traditional arrangements for water allocation; unlawfully polluting water; [and] limiting access to . . . water ser-

136. Simon Act, *supra* note 14.

137. *Id.* at summary.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. World Hunger Year, *supra* note 126.

143. WATER AS A HUMAN RIGHT, *supra* note 6, at 22. Note that Congress would not “grant” the human right to water access by affirming the resolution; they would only acknowledge that a human right to water access exists. *Id.*

144. *Id.*

vices and infrastructure.”<sup>145</sup> Through legislation such as the Comprehensive Environmental Response, Compensation, and Liability Act, NEPA, the SDWA, and the CWA, Congress already has taken proactive steps to show it respects individual rights to water.<sup>146</sup> Thus, if Congress affirms the resolution, activists will not be able to use the obligation to respect to assert that the federal government should incur additional responsibilities.

### B. *Obligation to Fulfill*

The obligation to fulfill will be tougher for Congress to satisfy.<sup>147</sup> The two congressional responsibilities this obligation requires are Congress’ acknowledgement that water is a human right and Congress’ assurance that all U.S. citizens have access to water.<sup>148</sup> The first responsibility would call for Congress to adopt all measures necessary to realize a human right to water access exists.<sup>149</sup> “If water was [recognized] as a human right, States could meet this obligation by way of legislative implementation, adoption of a national water strategy and plan of action to realize this right while ensuring that water is affordable and available for everyone.”<sup>150</sup> By simply affirming the resolution, Congress would effectively acknowledge that a human right to water exists, and consequently, meet this obligation’s first requirement.

To meet the second responsibility under the obligation to fulfill, Congress would have to ensure that all citizens not only have access to adequate water, but access provided at fair and reasonable rates. Since 1.9 million Americans do not have adequate access to water, Congress should sponsor state programs, or enlist a national program, to ensure that every American has indoor plumbing and sanitized water.<sup>151</sup> Congress already has authority under the Commerce Clause and the Tenth Amendment to impose water restrictions on all citizens.<sup>152</sup> To provide sufficient water access to all citizens, Congress could enlist a program similar to the CWA, which has been described as “a program of cooperative federalism.”<sup>153</sup> The CWA gives states the choice of either letting EPA regulate water quality within their jurisdictions or incorporating federal regulations into state law and regulating water quality themselves.<sup>154</sup> States that choose to regulate would receive funding to ensure their citizens’ needs are met.<sup>155</sup> As with the CWA, Congress should appoint EPA or another overseeing agency to ensure that all citizens have indoor plumbing and basic water services.

Further, Congress will need to ensure that OSHA rules for laborers are enforced. This will ensure that both child

and adult laborers have access to sanitary drinking water and toilet facilities, and will further NEPA’s goal of keeping a heightened environmental watch over children and minorities.

To fully meet their obligation to fulfill, Congress should also review existing water rates that citizens pay. For impoverished citizens, “the basic water requirement for users should be provided for less than cost.”<sup>156</sup> Congress could incur additional responsibilities to research impoverished areas and to determine if citizens in those locations should be subsidized.<sup>157</sup> Critics often incorrectly assert that an enumerated human right to water would legally bind governments to provide free water to all.<sup>158</sup> The UNCESCR, however, emphasized at their November 2002 meeting that governments that grant the human right to water simply put water on par with food, medical care, housing, and social services, all of which are required to be provided at affordable prices that do not compromise other basic needs.<sup>159</sup> Essentially, this means that persons who are denied the right to adequate water are given access to legal remedies and compensation.<sup>160</sup> Therefore, “the recognition of water as a right is not in conflict with water being understood as an economic good.”<sup>161</sup> Consequently, under the obligation to fulfill, activists could hold Congress responsible for ensuring that all citizens continue to have water access and for providing water to impoverished citizens at less than cost.

### C. *Obligation to Protect*

If Congress affirms the resolution, groups such as the IUCN may assert that Congress would incur a third obligation—the obligation to protect individuals’ rights to water resources from third parties.<sup>162</sup> Under this obligation, third parties such as individuals, groups, and corporations must not interfere with citizens’ enjoyment of water, including access to water and the quality and quantity of water. Some issues Congress might be called to address under this obligation include limiting bulk sales of water, regulating the efficient use of water by the agricultural and industrial communities, and limiting the privatization of public water resources.<sup>163</sup>

#### 1. Bulk Sales

Regulations regarding bulk sales of water for economic benefits are some of the most controversial aspects of water pol-

145. *Id.*

146. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405; 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209; 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465; 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

147. See WATER AS A HUMAN RIGHT, *supra* note 6, at 22.

148. See *id.*

149. See *id.*

150. *Id.*

151. RCAP, *supra* note 16.

152. Robin Kundis Craig, *The Clean Water Act Turns 30: Celebrating Its Past, Predicting Its Future*, 33 ENVTL. L. 113, 122 (2003).

153. GLEICK, *supra* note 8, at 79.

154. *Id.*

155. *Id.*

156. *Id.* at 80.

157. See *id.* Subsidies should also be economically and socially sound:

Subsidies are not all equal from an economic point of view. For example, subsidies to low-income users that do not reduce the price of water are more appropriate than those that do because lower water prices encourage inefficient water use. Similarly, mechanisms should be instituted to regularly review and eliminate subsidies that no longer serve an appropriate purpose.

*Id.*

158. Freshwater Action Network, *Right to Water*, at <http://www.freshwateraction.net/resources/thematic/rights.asp> (last visited Oct. 19, 2005).

159. General Comment 15, *supra* note 69.

160. See WATER AS A HUMAN RIGHT, *supra* note 6, at 13.

161. *Id.*

162. *Id.*

163. *Id.*

icy. This idea has been put into practice throughout the last decade. “Prices have been set for water previously provided for free. Commercial trade in bottled water has boomed. Proposals have been floated to transfer large quantities of fresh water across international borders, and even across oceans.”<sup>164</sup> The debate, however, is growing as to how, and even whether, a resource so fundamental as water should be priced and sold. Proponents of water trade

argue that natural resources, such as timber, finished lumber, minerals, fossil fuels, raw fish, and agricultural goods, are exported every day without generating nationalistic anti-export sentiment. Opponents of trade in water argue that water is different in important ways from other . . . natural resources, and that these differences require that water be treated different in some important way from trade . . .<sup>165</sup>

Under the obligation to protect, states are required to: “adopt the necessary and effective legislative and other measures to restrain third parties from . . . *inequitably extracting* from water resources.”<sup>166</sup> Therefore, if Congress signs the resolution, some may argue that Congress’ obligation to protect is subject to Barlow’s contention that water belongs “to the commons and must not be [commoditized] by a small elite and put on the open market for sale to the highest bidder.”<sup>167</sup> In the most extreme form, this could entirely close the door on water marketability—private individuals selling water for profit.<sup>168</sup>

Water has been treated as an economic good for some time.<sup>169</sup> “Private entrepreneurs, investor-owned utilities, or other market tools have long provided water or water services in different parts of the world. What is new is the extent of privatization efforts underway today, and the growing public awareness of, and attention to, problems associated with these efforts.”<sup>170</sup>

In the United States, where water privatization is fairly new, the private water sector generates more than \$80 billion per year in revenue.<sup>171</sup> U.S. bottled water sales have increased from just over 2 billion liters per year in 1980 to almost 18 billion liters per year in 1999, and sales increase at a rate of 10% annually.<sup>172</sup> Many examples of groundwater overdraft—where human extraction exceeds natural replenishment—have occurred.<sup>173</sup>

In the mid-1990s, the Ogallala Aquifer underlying seven states in the central United States was pumped at rates three to four times faster than natural recharge. In the case of exports of water from the Great Lakes of North America, some have argued that only a tiny fraction of the lakes are “renewable” and that the vast bulk of the stored water was laid down in geologic times.<sup>174</sup>

Lawsuits over water disputes resulting from water sales in the United States are common. In *Sipriano v. Great Spring*

*Waters of America, Inc.*,<sup>175</sup> landowners sued for an injunction against Ozarka Natural Spring Water after the company drained large amounts of water from the aquifer and severely depleted the landowners’ wells.<sup>176</sup> The court recognized that the rule of capture, as applied to underground waters, can sometimes be harsh and outmoded, but deferred to the legislature to adjust the law to Texas’ changing needs.<sup>177</sup> Under the IUCN guidelines for a government’s obligation to protect, Ozarka, the third party in *Sipriano*, inequitably extracted the water resources and ultimately interfered with the landowners’ enjoyment of their water rights.<sup>178</sup> Using the IUCN standards, it is arguable that any infringement of a landowner’s water enjoyment is a violation of her human right to water.<sup>179</sup>

The United States has taken some positive measures to limit bulk transfers of water.<sup>180</sup> The most notable protection from bulk water withdrawals by third parties was created by the North American Free Trade Agreement (NAFTA).<sup>181</sup> In 1993, Canada, Mexico, and the United States signed a joint declaration providing explicit protection for water resources and the rights of the originating country under NAFTA:

Unless water, in any form, has entered into commerce and becomes a good or product, it is not covered by the provisions of any trade agreement, including the NAFTA. And nothing in the NAFTA would obligate any NAFTA Party to either exploit its water for commercial use, or to begin exporting water in any form. Water in its natural state, in lakes, rivers, reservoirs, aquifers, water basins and the like is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.<sup>182</sup>

The Pacific Institute for Studies in Development, Environment, and Security believes this statement “is the clearest exposition of the intent of the parties to NAFTA to protect natural waters from uncontrolled bulk withdrawals for international trade.”<sup>183</sup>

The large-scale, bulk exportation of water across borders is unlikely because of the high cost of moving water. However, to fulfill their obligation to protect, Congress would need to “clarify both national and international rules governing bulk exports of water.”<sup>184</sup> Therefore, under the obligation to protect, activists could call for Congress to adopt a

175. 1 S.W.3d 75 (Tex. 1999).

176. *Id.* Sipriano and other landowners sued Ozarka Natural Spring Water for negligently draining their water wells, alleging that in 1996, “Ozarka began pumping about 90,000 gallons of groundwater per day, seven days a week, from land near Sipriano’s. Soon after the pumping began, Sipriano’s wells were severely depleted. Sipriano sought injunctive relief, as well as actual and punitive damages for Ozarka’s alleged nuisance, negligence, gross negligence, and malice.” *Id.* at 75-76.

177. *Id.*

178. *Id.* at 78-79; see *WATER AS A HUMAN RIGHT*, *supra* note 6, at 22.

179. See *WATER AS A HUMAN RIGHT*, *supra* note 6, at 22. It is also apparent that the IUCN standards more strongly support the reasonable use doctrine instead of the rule of capture. See *id.*

180. GLEICK, *supra* note 8, at 51.

181. See *id.* at 51-52.

182. *Id.* at 51.

183. *Id.*

184. *Id.* at 54.

164. GLEICK, *supra* note 8, at 33.

165. *Id.* at 42.

166. *WATER AS A HUMAN RIGHT*, *supra* note 6, at 22.

167. World Hunger Year, *supra* note 126.

168. *Id.*

169. GLEICK, *supra* note 8, at 57.

170. *Id.*

171. ROTHFELDER, *supra* note 4, at 102.

172. *Id.*

173. See *id.* at 49-50.

174. *Id.* at 50.

national policy prohibiting “the mining and export of non-renewable water resources.”<sup>185</sup>

## 2. Agricultural Irrigation Modernization

The obligation to protect also includes modernization of water usage by the agricultural community.<sup>186</sup> According to a recent survey by the *Economist*, agriculture accounts for 90% of water usage in some developing countries.<sup>187</sup> Therefore, governments and lobbyist groups addressing water issues should consider agricultural concerns alongside domestic water concerns.<sup>188</sup> The WHO also recommends that governments balance domestic and agriculture water usage when creating water policy.<sup>189</sup> By using a water-balancing test, the agricultural community usually finds more effective irrigation techniques.<sup>190</sup>

“The potential for water efficiency improvements from techniques such as furrow diking, land leveling, direct seeding, drip irrigation, micro-sprinklers, and water accounting is large.”<sup>191</sup> To protect water resources for the future, Barlow asserts that outdated farming practices must change and societies should pressure their governments to shift from flood to drip irrigation:

Massive leakage of water from inefficient irrigation systems all over the world could be easily and dramatically improved by new and more efficient technologies, as well as by better management and farm practices, including highly efficient sprinklers and drip irrigation. Drip systems that replace flood systems deliver water directly to individual plant roots, eliminating evaporation and cutting down on salt build-up, thereby saving water and energy. Drip irrigation is 95 percent efficient, in that almost all the water goes directly to the plant, while flood irrigation loses up to 80 percent of its water in evaporation or runoff.<sup>192</sup>

Although drip irrigation systems are more effective than flood systems, “only 0.7 percent of irrigated farmland worldwide” uses drip systems.<sup>193</sup> Another method to improve irrigation efficiency is the laser leveling of fields.<sup>194</sup> “This technique causes water to be distributed more uniformly, reducing the water required to ensure that all parts of the field are irrigated adequately.”<sup>195</sup> *The World’s Water* details an Arizona study where “water use declined between 20 and 32 percent as a result of laser leveling, and yields increased from 12 to 22 percent.”<sup>196</sup> “This practice [required] that land be leveled every two to five years at . . . about \$40 per acre for each leveling.”<sup>197</sup>

Even though all U.S. citizens have access to water, activists could propose that the United States should set an

example to developing countries by modernizing irrigation techniques. The drip irrigation system and laser leveling are the most likely long-term solutions to improving water efficiency.

## 3. Privatization of Public Water Resources

Governments that privatize public resources may also be violating their obligation to protect.<sup>198</sup> The privatization of water services occurs when a public water utility contracts all or part of their responsibilities to provide water to private entities.<sup>199</sup> There are several forms of privatization. One form is the “full ownership and operation of water systems to the private sector,” where the private entity owns the previously public water resources and provides full services and billing to a community.<sup>200</sup> More common forms are those “that leave public ownership of water resources unaffected and include transferring some operational responsibilities for water supply or wastewater management from the public to the private sector.”<sup>201</sup>

Although the greatest risks of failed privatization exist where the governments are weak, the United States can incur problems by overprivatizing its water resources.<sup>202</sup> Specifically, the privatization of water management can “lead to the loss of local ownership of water systems, which in turn can lead to neglect of the public interest.”<sup>203</sup> Some privatization contracts explicitly transfer water resource ownership from public to private entities. The Edwards Aquifer Authority, in addition to causing bulk sales concerns, is a prime example of where water resource ownership has been transferred from public to private entities. Texas, by selling perpetual withdrawal rights to aquifers, reduced “the public’s ability to ensure that the aquifer [was] managed as a social good.”<sup>204</sup> Actions in Texas providing for the public’s ownership of underground water have been upheld, however. The Texas Supreme Court, for example, rejected a claim that the creation of the Edwards Aquifer Authority deprived landowners of a vested property right and consequently protected the aquifer waters as public resources.<sup>205</sup> The authority is “an excellent example of the type of changes in property rights and rules that are necessary if water is to be managed effectively as both a social and an economic good.”<sup>206</sup>

To fulfill their obligation to protect, federal, state, and local governments should continue to maintain responsibility for providing water and water services to communities.<sup>207</sup> Since privatization can increase efficiency and reduce costs of service, however, some outsourcing to private entities may be in everyone’s best interests. If local governments do

185. *Id.*

186. World Hunger Year, *supra* note 126.

187. Peet, *supra* note 4.

188. *Id.*

189. *Id.*

190. *Id.*

191. GLEICK, *supra* note 8, at 4.

192. World Hunger Year, *supra* note 126.

193. GLEICK, *supra* note 8, at 4.

194. *Id.* at 20.

195. *Id.*

196. *Id.*

197. *Id.*

198. World Hunger Year, *supra* note 126.

199. GLEICK, *supra* note 8, at 63-68. “The United States has long had a mix of privately owned and publicly regulated water and wastewater utilities, though an estimated 85 percent of residences still receive water from public agencies.” *Id.*

200. *Id.* at 63.

201. *Id.*

202. *Id.* at 68, 74.

203. *Id.* at 74.

204. *Id.* at 75.

205. *Id.*

206. *Id.*

207. See WATER AS A HUMAN RIGHT, *supra* note 6, at 22.

decide to outsource some water responsibilities, to fulfill the obligation to protect, they must: (1) use sound economics in water management; and (2) maintain strong government regulation and oversight.<sup>208</sup>

Governments must use sound economics in water management. Proposed rate increases should be associated with improvements in services, not only with profits. “Experience has shown that water users are often willing to pay for improvements in service when such improvements are designed with their participation and when improvements are actually delivered.”<sup>209</sup> To encourage conservation, governments should also “permit companies to earn a return on efficiency and conservation investments” through their rate structures.<sup>210</sup>

To ensure public interests are protected when water resources and services are privatized, governments must also maintain strong regulation and oversight.<sup>211</sup> The Sierra Club has asserted that

[w]ater, as a public trust and an inalienable human right, must be controlled by the peoples and communities that rely on it for their lives and livelihoods. The management of water services must not only remain in public hands, but must be revitalized and strengthened to make community and worker participation central in order to democratize decision-making processes and ensure transparency and accountability. This participation must be extended to the state, regional, and international level in all decisions pertaining to water resources. Furthermore, all water resource development projects must be based on respect for the rights of affected communities and must provide full and meaningful participation in decision-making.<sup>212</sup>

Permanent public ownership of water resources ensures that the public has leverage to protect the balance between social and economic concerns. Contracts between municipi-

208. See GLEICK, *supra* note 8, at 80.

209. *Id.* Further, “linking the rate increase to improvements in service creates a performance incentive for the water supplier and increases the value of water and water services to users.” *Id.*

210. *Id.* at 81.

211. See *id.*

212. Sierra Club, *supra* note 77.

palities and private water providers should also “lay out the responsibilities of each partner” and “protect the public interest” by ensuring a certain “quality of service and a regulatory regime that is transparent, accessible, and accountable to the public.”<sup>213</sup>

In summary, if Congress affirms the resolution, activists could assert congressional responsibilities to protect water resources from overprivatization. These responsibilities will likely include continuing to manage water as a social good, using sound economics in water management, and maintaining strong government regulation over private entities providing water services to municipalities.

## VII. Conclusion

Congress should affirm the Water for the World Resolution and effectively grant the human right to water. The international community, under U.N. and WHO guidance, has taken bold steps toward recognizing the importance for all citizens to have a human right to water. It is time for Congress to take immediate actions to ensure that all Americans have adequate and accessible water. By adopting the Congressional Resolution on Water as a Human Right, Congress will take its first step toward improving domestic water needs. Congress’ affirmation will also set an example to developing countries by publicly acknowledging that water, like air, is a right that all citizens should have.

Congress’ affirmation of the resolution will not legally bind the United States to pass new laws or water ordinances. It will, however, open the door for organizations like the IUCN, the WHO, and environmental groups to call for Congress to meet certain obligations. If Congress affirms the resolution, it will have to determine how to answer these calls and how to balance the human right to water access with agriculture and private enterprise interests. Although this will be a difficult path for Congress to undertake, Congress must sign the resolution and take immediate steps to alleviate the water access and sanitation problems for the 1.9 million Americans currently without sufficient water.

213. GLEICK, *supra* note 8, at 81.