March 1999

Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants

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CAN COWBOYS BECOME INDIANS? Protecting Western Communities as Endangered Cultural Remnants

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> "[The governor] likes the idea of having a . . . cowboy working for him. Said it was the one minority group he hadn't hired enough of in his administration."[1]

This article examines and evaluates the claims being asserted by communities stressed by rapid growth that they are entitled to some form of protection as an endangered remnant culture. It places these changes in the context of the current western population boom and accompanying shifts in land use and water allocation. The pace of landscape change and the reallocation of water to urban and environmental uses causes considerable, but unquantified, social and economic disruption. There are some legal mechanisms in place to respond to these shifts in resource use, but they do not adequately address the non-Constitutional claims that these communities represent endangered cultures that should be preserved. Community cultural claims receive little recognition and have been largely ignored in the on-going efforts to balance population growth and environmental conservation. This article speculates about the basis of these cultural claims. It finds them more legitimate than many have assumed, suggests that they must be

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1. MICHAEL MCGARRITY, SERPENT GATE 82 (1998).

factored into the ongoing efforts to deal with third-party effects of land and water reallocation, and speculates about the utility of the Indian group land and water rights as a model to protect these communities.

I. INTRODUCTION: THE CHANGING WEST—WINNERS AND LOSERS

A. The New Western Boom Cycle

The West is in the midst of another historic boom cycle and the landscape and cultural changes that it is producing are viewed by many as the final, fatal assault on the region's unique culture and environment.[2] Many rural communities consider themselves at risk from unwanted growth and the attendant social and landscape change that growth brings, especially because this boom cycle is significantly different from past cycles. The current cycle is not driven by the traditional federal infrastructure or energy production investment in the region. Rather, it is driven by the market and is much less dependent on commodity production and mining. Thus, it is more difficult for all levels of government to direct and to control the growth. Governmental responses currently are decentralized because the federal government does not have coherent population growth and distribution policies, and the responses are more contested by competing interest groups throughout the region.[3] Rural communities face special risks because this growth is not driven by the Jeffersonian ideology of stable, rural agricultural communities that prevailed, if only in theory,[4] during the heyday of the Reclamation Era.[5] Thus, the case for subsidies to buffer communities does not command the political support that it once did.

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2. *See* PAUL F. STARRS, LET THE COWBOY RIDE: CATTLE RANCHING IN THE AMERICAN WEST 195-216 (1998).

3. For a perceptive essay on the many contestants for sovereignty in the West, see Daniel Kemmis, *A Democracy to Match its Landscape*, *in* RECLAIMING THE NATIVE HOME OF HOPE: COMMUNITY, ECOLOGY AND THE AMERICAN WEST 2, 4-7 (Robert B. Keiter ed., 1998).

4. *See* Donald J. Pisani, *Federal Water Policy and the Rural West*, *in* THE RURAL WEST SINCE WORLD WAR II 119, 141-42 (R. Douglas Hurt ed., 1998) (observing that large farmers were well entrenched in the West before the golden years of reclamation project development after World War II and that the family farm only became dominant in Oregon and Utah).

5. The Reclamation Era formally began when the federal government enacted the Reclamation Act of 1902, and lasted to the mid-1970s, when the political constituency for subsidized western growth through multiple-purpose water projects evaporated. *See generally* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER (1986) (telling the story of the era); DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902, 273-325 (1992) (describing the political and economic pressures that led to the Reclamation Act of 1902).

The Reclamation Era is over because the government has lost its taste for construction of new subsidized irrigation projects.[6] Irrigated agriculture remains a valuable component of the West's economy, especially in the Central Valley of California, the Snake River Plain of Idaho and the Yakima Valley of Washington state. However, even in these regions and other areas of the West, irrigated agriculture is likely to stabilize at a lower level of acreage than it presently enjoys.[7] This trend is further supported by appropriative rights because they allow water right transfers to new, usually higher valued, uses with reasonable transaction costs. Even the 1996 Federal Farm Bill now forces farmers to adapt their production patterns to the market, instead of federal crop subsidies.[8] The tensions caused by these changes are exacerbated by the continuing ideological transition of public land agencies from commodity production promotion to more environmentally sensitive land management.[9] In short, the rural West is less and less protected by federal subsidies because the "new" West is no longer perceived as a federal raw commodity colony.

Today, the West is a rapidly growing region with a diversified, increasingly service economy fully integrated into global markets. Moreover, the New West is growing for the very reasons people were originally deterred from settling in the region—its harsh climate and rugged, often bleak, non-European landscape.[10] This growth boom is not driven by the traditional commodities of lumber, livestock, mining and irrigated agriculture. While these commodities remain important sources of the region's wealth, the region's economy is increasingly based on services, manufacturing and new amenity-based commodities. The West's new "commodities" include its climate, mountain and desert wilderness areas,

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6. This is one of the central messages of the recent controversial report issued by the Western Water Policy Review Advisory Commission. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY (1998) [hereinafter WATER IN THE WEST].

7. "It is likely that irrigated acreage will decline overall, but the value of irrigated production will remain about the same because of shifts to higher-value crops." NATIONAL RESEARCH COUNCIL, A NEW ERA FOR IRRIGATION 6 (1996).

8. The Agricultural Market Transition Act of the Federal Agricultural Improvement and Reform Act of 1996, 5 U.S.C. §§ 7201-7344 (1996), decouples income support payments and farm prices and substitutes a seven year cycle of declining production flexibility contract payments. The net result is that farmers now have much greater discretion to make acreage and crop planting decisions and, of course, bear more of the financial risks inherent in production agriculture.

9. *See* Robert B. Keiter, *In Search of a Western Ethic: Lessons From Public Land and Natural Resources Policy*, *in* RECLAIMING THE NATIVE HOME OF HOPE, *supra* note 3, at 23, 23-31.

10. This is the nub of the West's current problems. As Lawrence J. MacDonnell observed: "Many of the qualities that make the West attractive are vulnerable to the changes that accompany development." Lawrence J. MacDonnell, *Thinking About Environmentally Sustainable Development in the American West*, 18 J. OF LAND, RESOURCES, & ENVTL. L. 123, 126 (1998).

scenery, free-flowing rivers and open space. These new commodities combine with public and private infrastructure to support what millions perceive as a high quality of life. Thus, in traditional commodity production, as opposed to transportation infrastructure, subsidies are not necessary to induce this growth. The beneficiaries of this market-driven boom are therefore much more broadly distributed geographically than those of previous booms.[11] For this reason, most of the recent growth has occurred in the interior West (between the Sierra Nevada mountains and the Great Plains of eastern Colorado and New Mexico),[12] although California and Texas have, and will continue to have, the greatest population increases due to both births and immigration.

This growth boom creates substantial geographic inequities, although the benefits are more broadly distributed compared to past booms. New residents of the interior West have dispersed throughout much of the region in a series of "urban archipelagos"—areas of high population density surrounded by large rural areas with sparse and declining populations.[13] In contrast to the older, and somewhat more confined "urban oases" such as Denver, Salt Lake City, Phoenix and Albuquerque,[14] each of the new western archipelagos is characterized by a number of central cities typical of a metropolitan area surrounded by a ring of (often quite extensive) suburbs.[15] "Exurban" development or rural gentrification is occurring around these population centers in areas that were once considered "remote" from the influence of urban centers. Exurban development, once a major metropolitan area phenomenon, is encouraged by the continued outward migration and dispersal of jobs. Commuters can now live in country settings beyond ordinary driving distances from urban centers. The more educated

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11. For a more extended treatment of this argument see A. Dan Tarlock and Sarah B. Van de Wetering, *Growth Management and Western Water Law: From Urban Oases to Archipelagos*, 5 HASTINGS WEST-NORTHWEST J. OF ENVTL. L & POL'Y 163 (1998/1999).

12. *See* ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 96 (William E. Riebsame ed., 1997).

13. One of the most complete and penetrating pictures of the New West has been sketched by the demographer, Pamela Case. Her work forms the basis of the Western Water Policy Review Advisory Commission's assessment of future water demand in the region. *See* WATER IN THE WEST, *supra* note 6, at 3-1 to 3-65. However, the northern Great Plains is an exception to this boom cycle.

14. In spite of the image projected by tobacco and automobile advertising, the coastal and interior West has long been characterized by the highest percentage of urban as opposed rural population in the country, but it tended to be concentrated in oasis cities that had marshalled sufficient water supplies to sustain themselves. *See* GERALD D. NASH, THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR 38 (1985); GERALD D. NASH, THE AMERICAN WEST IN THE TWENTIETH CENTURY 90-93, 213-39 (1977).

15. *See* WATER IN THE WEST, *supra* note 6, at 2-15.

and technologically literate urban escapees can telecommute or run home-based businesses rather than practice the hard and ultimately unromantic subsistence farming of previous back to the land movements.

B. Winners and Losers

All economic upheavals produce individual, as well as regional, winners and losers, and this is especially true in the new urban and exurban West. Many individual rural land and water right owners are monetary winners because they have sold their land and water rights at a nice profit. But those who want to maintain traditional ranching and agricultural economies, and the communities dependent on these activities, consider themselves at risk. Their environment changes as large tracts of ranch and farm land are divided and sold to new residents involved in the information economy, and water rights are reallocated to urban and environmental uses.[16] Both rapidly growing urban areas and smaller communities in the watersheds of origin now face rapid landscape and social transformation. The measurable and intangible costs of rapid, widely dispersed growth of larger and smaller areas are substantial, including increased urban and decreased agricultural water use.[17]

The shift to the new market-driven West is painful for many individuals and communities because established ways of living and working are disrupted. Market-driven allocation makes it difficult for many rural residents to retain control of their land base and associated water resources. Private land and state-created water rights are commodities subject to market reallocation.[18] The "commodification" of these common resources can be traced to the original New England settlers[19] and was vigorously carried to the West. Ironically, the rhetoric of conquest of the West led to exaggerated claims of individual property rights in these resources in the West,[20]

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16. These trends are well-documented. *See* WILLIAM E. RIEBSAME ET AL., WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, WESTERN LAND USE TRENDS AND POLICY: IMPLICATIONS FOR WATER RESOURCES 63-64 (Sept. 1997) (report to the Commission).

17. "Since up to half or more of city water use in the drier Western cities goes to landscaping . . . , it can be assumed that a sprawling city uses more water per capita than a dense/compact city." *Id.* at 56.

18. *See* George A. Gould, *Water Rights Transfers and Third Party Effects*, 23 LAND & WATER L. REV. 1 (1988).

19. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 74 (1983).

20. In his fascinating history of property rights on the Overland Trail, John Phillip Reid writes, "The most striking aspect of attitudes toward property on the overland trail was not the respect shown to property rights by the average emigrants. It was rather, the absolute nature in

especially in public land licenses,[21] which now make rapid shifts in land and water use possible without regard to broader community impacts. Many westerners, however, never had to experience the disruptive impacts of private property rights and amoral markets. Until recently, many communities were insulated from the amorality and rapidity of market allocation because property rights allocations, especially in land and water, remained stable over a long period of time.[22] Furthermore, many formal and informal resource sharing arrangements existed so that the benefits of commodification often were locally controlled.[23] The net result is that many Western conflicts over resource uses center on tensions within local communities. In these conflicts, a majority of residents who define their identity in terms of traditional commodity production battle those who believe transition to a modern economy and the "development" of non-commodity resources, such as the natural landscape, will help sustain the community economically in the future.[24]

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which those rights were regarded." JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 289 (1980).

21. Charles Wilkinson has written an important history of resource use in the West from this perspective. *See* CHARLES F. WILKINSON, THE LORDS OF YESTERDAY (1996); *see also* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN (1992).

22. *See, e.g.*, Pleasant Valley Canal Co. v. Borror, 72 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998) (discussing water rights allocation regime that had remained relatively stable from late 1850s to 1990s).

23. In the wake of Garret Hardin's classic essay, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), the assumption has been that small communities cannot manage sustainably shared resources because the absence of exclusive property rights will lead to overuse and resource degradation. However, scholars such as Elinor Ostrum and Robert Ellickson have shown that the "tragedy of the commons" does not always occur, especially in small-scale commons, because the users cooperate to manage the resource efficiently for the benefit of the user community. *See* Elinor Ostrum, *The Rudiments of a Theory of the Origins, Survival, and Performance of Common Property Institutions*, *in* MAKING THE COMMONS WORK: THEORY, PRACTICE AND POLICY 293, 300-03 (Daniel W. Bromley ed., 1992); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672-76 (1986).

24. *See* THOMAS MICHAEL POWER, LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE 2-5 (1996). These new community cultural claims draw inspiration from the recent revival of bioregionalism. *See infra* text accompanying notes 109 to 113. Bioregionalism has sparked a reevaluation of environmental determinism. A philosophy once rejected in the 1920s, environmental determinism posits that a resource base controls social organization and culture. *See* Risa Palm, *Geography and Environmental Law*, *in* GEOGRAPHY, ENVIRONMENT, AND AMERICAN LAW 15, 16-17 (Gary L. Thompson et al. eds., 1997). The *New York Times* reported a micro cultural conflict in a tiny community in the Malheur High-Desert of eastern Oregon near the Malheur Wildlife Refuge and Hart Mountain Antelope Refuge. *See* Sam Howe Verhovek, *Old and New West Clash in Oregon*, N.Y. TIMES, Nov. 20, 1998, at A2. There, a woman has turned the general store into a bed and breakfast and tourist shop which stocks microbrews and caters to fly fisherman and "eco-tourists" to the disdain of local ranchers and a retired BLM official who runs an RV park. *See id.* "Ranching is still an important activity in the area, although most people agree that the industry is on a long slow decline, in part because of

C. The Inadequacy of Growth Management and Water Rights Transfer Strategies to Respond to Cultural Losses

Concern about growth in the West and the consequences for traditional economies and lifestyles is not new.[25] There is a history of attempts to control the pace and scale of the reallocation of land and water resources. Various local governments and states have experimented with growth management since the 1970s to curb the direct and indirect costs of urban sprawl and to protect the agricultural and rural landscape.[26] However, until relatively recently,[27] the idea of growth control was rejected as heresy because it was contrary to the region's manifest destiny, the natural order of United States development,[28] and the enjoyment of God-given property

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successful lawsuits by conservationists who have sought to remove cattle from public wildlife lands." *Id.* The postmistress noted that the new tourists "have less appreciation of the way of life here." *Id.* *See generally* PETER DECKER, OLD FENCES, NEW NEIGHBORS (1998).

25. *See* RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 568-72 (1992) (providing a history of efforts to control the rapid growth that began in the late 1960s).

26. Growth control emerged as a major state and local political issue in many states due to a combination of rapid post-World War II suburban growth and the rising environmental movement which linked open space protection and the costs of sprawl to larger environmental goals. For one of the best surveys of the early initiatives, see JOHN M. DEGROVE, LAND GROWTH & POLITICS (1984).

27. Growth control has flourished on the Pacific Coast since the 1970s. *See, e.g.*, MADELYN GLICKFELD & NED LEVINE, THE LINCOLN INSTITUTE OF LAND POLICY, REGIONAL GROWTH . . . LOCAL REACTION: THE ENACTMENT AND EFFECTS OF LOCAL GROWTH CONTROL AND MANAGEMENT MEASURES IN CALIFORNIA 5-6 (1992) (discussing growth control in California area). Legislation in Oregon and Washington created statewide planning processes that require local governments to delineate urban growth boundaries and to channel development with targeted areas. *See* OR. REV. STAT. § 197-010 (1997); WASH. REV. CODE ANN. § 36.70A.020 (West 1994); *see also* Edward J. Sullivan, *Oregon Blazes a Trail*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 50 (Peter A. Buchsbaum & Larry J. Smith eds., 1993); Larry J. Smith, *Planning for Growth, Washington Style*, *in* STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 137-55 (Peter A. Buchsbaum & Larry J. Smith eds., 1993). *Snohomish County v. Anderson*, 868 P.2d 116 (Wash. 1994), gave a boost to growth management by holding that once a Washington state county adopts a growth management plan consistent with the Growth Management Act, the plan is not subject to a referendum. Subjecting a carefully developed plan to a referenda would undermine the goals of the Act.

28. The traditional case for growth control reflects the European preference for compact, orderly development that results in a clear urban-rural demarcation. *See* TIMOTHY BEATLEY & KRISTY MANNING, THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY 50-52 (1997). One of the most powerful arguments for this policy is that compact growth costs much less than widely dispersed, leap-frog growth. *See* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 555-58 (1994). The root problem of growth control is that compact landscapes are alien to the American experience. The settlement patterns of Central Europe produced clustered villages surrounded by individual fields and common pastures. Urban centers developed around the old Roman centers and the Koeingsburgen (royal cities). Cities were

rights. However, the growing concern over the fiscal and social costs of the current boom has put the issue on political agendas throughout the western region.[29]

The management of growth to avoid quantifiable external costs is a major challenge, but many of the costs of growth are intangible and are not considered within traditional land use and water administration regulation. More importantly, the objectives of most growth management strategies are to slow the pace of growth to lessen the strain on public service providers or to contain it within existing built-up areas.[30] The preservation of small, stabile communities, and the values they represent, through the use of existing change management institutions is therefore even more difficult. The long and short of it is that the social consequences of market-driven change

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walled religious and commercial centers with well-defined limits which grew slowly until the eighteenth century. The rise of the nation-state after the Peace of Westphalia gave rise to the modern theory of city planning and the model of the orderly city remains the dominant vision in Europe and among American planners. Many buildings were destroyed in the Thirty Years War and theories of the ideal town emerged. E. A. Gutkind proposed one theory for the development of urban planning: "City planning became an instrument of state policy . . . . Since the state was omnipotent, it had not only the right but the duty to be an active agent in city planning." E. A. GUTKIND, URBAN DEVELOPMENT IN CENTRAL EUROPE 197 (1964). The critical goals were (1) defense, (2) display or pageantry and (3) aesthetic perspective. *See id.* This led to "the layout of homogeneous squares surrounded on all sides by uniformly designed buildings, to wide uninterrupted streets, to the extension of towns in accordance with definite plans under the supervision of the state or by private contractors who were commissioned by the state authorities." *Id.*

In contrast, the United States was settled as a series of rapidly moving frontiers with very low population densities: this has meant that only the cities on the Atlantic coast grew organically or were planned in the European tradition. The history of pre-20th century city planning is a history of platting. *See* JOHN W. REPS, TOWN PLANNING IN FRONTIER AMERICA 422-29 (1965). Cities were laid out to encourage real estate speculation and each city was to be a metropolis. In Europe, plans extended existing settlements. On the United States frontier, plans were intended to attack urban growth. *See id.* The history of city planning is filled with beautifully platted new "paper" towns that failed to live up to the inflated claims of their sponsors. Thus, cities grew rapidly and chaotically in the 19th century. The dominant pattern in the United States from the Allegheny mountains to the Pacific Ocean is the grid or gridiron and low density occupation of land. We carved up the public lands in square sections and by the beginning of the 19th century the endless pattern of right-angle streets became the model of urban development. The low density tradition has been carried out as people move farther and farther out from the city center in what a leading historian has called "the crabgrass frontier." KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 239 (1985).

29. *See* Gayla Smutny, *Legislative Support for Growth Management in the Rocky Mountains: An Exploration of Attitudes in Idaho*, 64 J. OF AM. PLAN. ASS'N 311-13 (1998) (exploring the complex reasons for this interest in conservative areas).

30. This argument is well-developed in Gabor Zovanyi, GROWTH MANAGEMENT FOR A SUSTAINABLE FUTURE: ECOLOGICAL SUSTAINABILITY AS THE NEW GROWTH MANAGEMENT FOCUS FOR THE 21ST CENTURY 36-37 (1998).

is considered *damnum absque injuria*.[31] The effect of both land use and water transfer regulation is to mitigate the demonstrable external costs of market allocations, not to substitute centralized planning for market allocation. For example, many communities view the risk of losing their water supplies as one of their greatest fears because they would lose the power to control their destiny. However, this concern is inconsistently reflected in the law.[32] Water rights have long been transferable, provided there is no injury to vested junior rights.[33] However, until relatively recently, transfers were the exception because the balance between agricultural and urban uses was relatively stable. This is no longer the case.

Many western communities are squeezed by two new water demands that are, in part, stimulated by dynamic land markets, which constantly convert low to higher density land uses. Environmentalists want more water reallocated to instream maintenance and aquatic ecosystem restoration. Cities want more water to continue growth. In recent years, water marketing has emerged as a major element of a reallocation strategy to meet these two demands. In many western river basins, urban suppliers and environmental organizations are pursuing a not wholly consistent two-pronged strategy[34] to resolve the conflicts that arise over the transition from the old commodity production West to the new latte-drinking, 4x4 driving, ever more ethnically diverse West.[35]

The first prong of the reallocation strategy seeks to solve conflicts through collaborative, consensus-based processes that create new basin or

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31. "A loss or injury which does not give rise to an action for damages against the person causing it." BLACK'S LAW DICTIONARY 393 (6th ed. 1990). "[T]here *is* a widespread sense that community is important . . . yet there is no principle or doctrine to which to turn in those cases where, for whatever reasons, the people affected are unable to generate the political support necessary to induce an act of grace." Joseph L. Sax, *Do Communities Have Rights? The National Parks Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 500 (1984).

32. *See generally* NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT (1992) [hereinafter WATER TRANSFERS IN THE WEST] (examining the efforts to reflect community values in the fragmented and incomplete legal institutions that control the transfer process).

33. *See* Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 632 (Colo. 1954).

34. For a good summary of this strategy by two of its leading architects see Thomas J. Graff & David Yardas, *Reforming Western Water Policy: Markets and Regulation*, 12 NAT. RESOURCES & ENV'T 165 (1998).

35. The West has always been ethnically diverse and one of the central projects of the new western history has been to repopulate the landscape with formerly marginalized groups. *See* PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 348-49 (1987).

watershed-wide physical solutions and institutions to administer them.[36] In effect, these solutions often seek to restore the basin's biological and cultural diversity by defining a non-consumptive baseline against which existing and future consumptive uses will be measured and by reassigning blocks of unallocated or under-used water to new, often environmental, uses.[37] These solutions may also require the reallocation of water dedicated to existing uses because they mainly rely on markets, rather than administrative allocation, to implement these basin-wide solutions. The second prong seeks to use federal environmental baselines[38] to reallocate or threaten to reallocate water, often to induce other stakeholders to seek alternatives to the gridlock that currently characterizes many western water conflicts.[39] This strategy is attractive because market allocation is presumptively both fair and efficient. Markets compensate existing users for the loss of valuable water rights and move a resource to higher valued uses.

These strategies respond reasonably well to the demands of urban areas and the environmental community, but they are not well adapted to mitigating impacts on rural areas. These rural areas must give up commodity control for money, and the financial incentives make it easier to

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36. *See generally* David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997). Professor Jody Freeman calls this movement "collaborative government" to contrast it with the theory of government as an interest group mediator, because a strong but not preemptive government role is crucial to the success of the process. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 5 (1997). Collaborative governance also illustrates the shift away from post-New Deal theory that government by experts needed to be augmented by democratic lay participation. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1988). The environmental and consumer movement of the 1960s and early 1970s triggered a great number of experiments in enhanced democratic participation, but the focus is shifting to more limited (but better quality) participation by stakeholder representatives. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation in Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 241-46 (1997).

37. *See* A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement*, 25 ECOLOGY L.Q. 101 (forthcoming 1999). For a brief introduction to the scientific problems of western ecosystem restoration see Duncan T. Patten, *Restoration as the Order of the 21st Century: An Ecologist's Perspective*, 18 J. OF LAND, RESOURCES, & ENVTL. L. 31, 35-36 (1998).

38. The Endangered Species Act ("ESA") creates regulatory water rights that may require an appropriator to forego using a state-created water right during times when flows are needed for the protection of a listed species. *See* United States v. Glenn-Coulsa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992). The Department of Interior's power to define habitat destruction as a taking was upheld in *Sweet Home*. Sweet Home Chapter of Communities v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994). The ESA recently was upheld against a post-*Lopez* Commerce Clause challenge. *See* National Home Builders v. Babbitt, 130 F.3d 1041, 1054 (D.C. Cir. 1997) (explaining that other federal courts have found "the extinction of animals substantially affects interstate commerce" and thus biodiversity maintenance is a legitimate exercise of the Commerce Clause).

39. *See* Tarlock, *supra* note 37.

induce individual users to sell their water rights and put pressure on irrigation districts to enter water markets. Both prongs of the reallocation strategy focus primarily on mitigating the adverse environmental consequences of past and projected water uses. But, the strategy does not adequately address mitigation of cultural changes caused by reallocation.[40] Water marketing is not designed to mitigate cultural change: it is an engine of perpetual change and is difficult to control because it uses the prior appropriative rights long confirmed by state procedures. Thus, irrigators and small rural communities often oppose water marketing because it represents the loss of control over their destiny.[41] Water rights have long been subject to state regulation, but state water administration is not suited to assess the diverse impacts of water markets. There is a growing recognition that the traditional third-party impact of water transfers needs to be expanded, but no consensus exists about how this should be done or the weight that should be given to these interests.[42]

Water law has protected junior right-holders who may be injured by a transfer of an appropriate right, but the protection of individual water rights has been the historic limit of state review of transfers.[43] Because of the narrow compass of protected interests, a push for a new category of potential transfer injuries, third-party impacts, has recently been identified.[44] Third-party impacts include lost community revenues,[45] environmental impacts such as diminished stream flows,[46] and more generally, the loss of traditional cultures. Water law provides almost no direct protection for these interests, but they can be raised indirectly through public interest challenges; law suits alleging that a transfer is inconsistent with the public trust, the public interest

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40. Recently there has been an interesting attempt to force reallocation strategies to consider cultural changes. *See* Churchill County v. Babbitt, 150 F.3d 1072 (9th Cir. 1998), *amended*, 158 F.3d 491 (9th Cir. 1998) (an at-risk community has standing to challenge an agency's environmental impact statement ("EIS") for ecosystem restoration as inadequate because programmatic EIS are required to cover at-risk community impacts).

41. *See* WATER TRANSFERS IN THE WEST, *supra* note 32, at 115-16.

42. *See id.* at 111-18 (providing a comprehensive analysis of the pros and cons of water transfers as a reallocation strategy and the existing third party protection mechanisms).

43. *See id.*

44. *See, e.g.*, Bonham v. Morgan, 788 P.2d 497 (Utah 1989) (flooding of lands of non-water right holder). *See also* Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681, 713-17 (1987).

45. *See* Joseph L. Sax, *Understanding Transfers: The California Water Torture*, *in* CALIFORNIA WATER TRANSFERS: GAINERS AND LOSERS IN TWO NORTHERN COUNTIES 47, 47-50 (Raymond H. Coppock & Marcia Kreith eds., 1992).

46. *See, e.g.*, Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732 (Wash. 1997).

or an environmental mandate.[47] However, the primary beneficiaries of these procedures are fish, not at-risk communities, because mitigation of external costs not protected by prior appropriation has been associated with environmental protection. The characterization of water as a commodity continues to dominate water policy. Apart from environmental protection, the effort in recent years has been to reduce the transaction costs of transfers.[48] This thinking is the basis for the frequent argument that the protection of community interests creates high transaction costs which impede water markets.[49]

The story is the same for the conversion of land use from rural to more intensive uses. Unlike water law, there never was a "community" interest component of land rights which required transfers to protect vested third parties' interests from interference with the enjoyment of existing uses.[50] Growth management law gives little weight to the losers from growth, and we have never developed a national farmland protection strategy. The principal beneficiaries of growth management are landowners and urban residents in areas zoned for more intensive growth and farmers protected by urban growth boundaries. This protection is not consistent. Rural areas outside the urban boundary are often swamped by the growth forced outward by the lack of coordination among political jurisdictions. A drive around Boulder, Colorado or Portland, Oregon will confirm the sprawl that "green" land use policies visit on non-green jurisdictions.

II. WE'RE ETHNIC, TOO: TAKING "WHITE" CULTURE SERIOUSLY

This article takes a different approach to the problem of those communities at risk from social and economic change. It focuses on the dissenters from water markets, primarily at-risk communities, by examining the problem from two aspects that are missing from the usual discussion of how to incorporate these impacts into existing water and land reallocation mechanisms. It first tries to step back from the immediate concern with rapid growth and water transfers and the many band-aid attempts to stem change. I examine the deeper question of whether at-risk communities have, as they increasingly assert, a legitimate claim to be protected from the

47. *See infra* text accompanying notes 149-59.

48. *See* Lawrence J. MacDonnell, *Transferring Water Uses in the West*, 43 OKLA. L. REV. 119, 128-29 (1990).

49. *See* Barton H. Thompson, Jr., *Water Markets and the Problems of Shifting Paradigms*, *in* WATER MARKETING: THE NEXT GENERATION 124 (Terry L. Anderson & Peter J. Hill eds., 1997).

50. The basic limitations on the exercise of common law rights are the common law of nuisance and the right of subjacent and lateral support.

market because it threatens a unique culture. Initially, it is easy to dismiss the cultural claims of these communities because we recognize cultural rights almost exclusively to protect defined religious groups or aboriginal minorities with non-western value systems from oppression by the dominant culture;[51] not to protect one segment of the dominant culture from another. At-risk communities are neither organized religions nor aboriginal minorities. Thus, neither the First Amendment nor the right to equal protection of the laws applies to these "victim" claims.[52] However, recent developments in post-modern legal and cultural theory make these claims more plausible than one might initially suspect because they posit that culture is a contingent construct.[53] This article speculates about the case for special cultural rights for at-risk communities and the form that they might take.

Irrigators and ranchers would not put their concerns in this fashion, but the traditional water rights holders who wish to preserve the status quo against the continued transition of the West to a less commodity production-based economy[54] are, ironically, exploring ways to claim the perceived benefits of Native American Tribes. They argue for resource inalienability and the recognition of group cultural practices as legitimate components of property rights. In the great American tradition of evaluating minority claims to moral (and Constitutional) entitlements, former members of the dominant culture have increasingly adopted the rhetoric of minority cultures, most notably Native American culture, to claim exemptions from the uniform application of modern laws which support rapid landscape and social change. White Americans are the fastest growing "ethnic group" and support their new "marginalized" status with whiteness cultural studies in universities. The irony is increased because as members of the dominant culture explore the possibility of protection from the operation of market-driven resource allocations, many Native American Tribes, or factions

51. *See* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119-27 (1997) (stating that the purpose of constitutional protection of racial and religious minorities from discrimination is to protect cultural identity).

52. *But see* Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in Aid of Community*, 77 TEX. L. REV. (forthcoming 1999) (arguing extensively that the Constitution allows more autonomy than we have assumed for groups who resist assimilation, such as ex-Mormons who practice polygamy). The extension of this logic to at-risk communities remains a stretch.

53. For a recent example of identity as construct see KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998).

54. In his trenchant reinterpretation of Western history, Richard White observes, "[t]he twentieth century has not been kind to the rural West." WHITE *supra* note 25, at 432.

within a Tribe, are seeking to interpret their rights to allow full participation in water markets and non-agricultural Tribal development schemes.[55]

The second part of the article looks at the claims for more local control over water and land allocation from a more conventional, institutional perspective. Foremost, can the discussion of the proponent's cultural claims inform the administration of the scattered and unintegrated laws and private ordering options that exist to vindicate these claims? My conclusion is that these claims, along with the environmental agenda of ecosystem management, are in fact eroding the states' traditional monopoly on water allocation. Simultaneously, the states' power to allocate land through state land use legislation that delegates regulatory authority to local government is eroding as non-governmental organizations ("NGOs") and local landowners turn to land trusts to define community landscapes. First, this article places the reasons for greater local interest in controlling the use of water in the broader context of changing resource priorities. The dominant culture has long been hostile to federal controls, especially environmental controls. But, local involvement is also driven by pressures to preserve biodiversity at the local level, the revived interest in growth management as the West continues to urbanize, and a related desire to prevent or mitigate the adverse impacts of water marketing, including the sale of water rights for use outside the community. Second, it examines the available legal means for local communities to influence or control the allocation of water, which sustains their communities. It suggests that these efforts can be integrated into efforts to correct a fundamental flaw in American land use controls. Land use law fundamentally seeks to ratify the market or to restrain it marginally rather than to impede its operation, and thus it provides an inadequate basis to sustain communities unless it is supplemented with private resource pooling.

My argument is that there is a basis to recognize the cultural claims of local at-risk communities, but that the claims will remain grounded in state and federal environmental, water allocation and land use laws, and private resource pooling schemes rather than the Constitution. At-risk communities cannot opt out of the nation, although one could envision a legislative structure that allows at-risk communities to elect to organize themselves as Indian tribes and become subject to the jurisdiction of the Bureau of Indian Affairs. Even if one could devise acceptable voting procedures to allow communities to opt for this status, it is likely that few, if any, communities could carry their claims of victimization this far. However, the Native American model does suggest some elements of a protection strategy, such as group property rights, that at-risk communities might consider to sustain

55. WATER IN THE WEST, *supra* note 6, at 3-45 to 3-47.

themselves in the face of relentless growth. In fact, quasi-group rights are emerging in an ad hoc vision of the various landscape and riverine preservation efforts underway in the West. The long dormant community tradition of shared resource use is emerging in new forms and opportunities exist for at-risk communities to integrate cultural preservation into this process.

III. WHO CAN BE A VICTIM?

At-risk communities' claims to special status rest on their status as victims. The harm is the loss of a long-established culture or, as it is more conventionally put, "lifestyle." The irony of this assertion is great since it is a case of an oppressor becoming the oppressed by virtue of the very institutions that these communities have historically venerated, firm individual property rights. The fundamental contradiction in the at-risk community argument is that they seek exclusive property rights and subsidized public resource entitlements which will exempt them from the operation of the inevitable markets which these property rights create. In addition, the communities are not victims of state-sponsored or sanctioned oppression, but of that most democratic and decentralized of institutions, the market. For these reasons at-risk communities face formidable conceptual and technical hurdles in the recognition of intangible or community values in water and land. However, none of the problems are as insurmountable as they might seem because they draw on a long tradition of shared resource use in the West.

A. Just What Is Culture and an At-risk Community?

The first hurdle that at-risk communities face is whether the assertion of cultural claims is legitimate. These claims are based either on claims of cultural heritage or community values. Both are equally problematic. The concept of culture is a multi-faceted one, and has many legal ramifications. But, cultural heritage claims raise two narrower legal questions: what physical objects should the law seek to preserve, and what set of distinctive group behaviors and values should the law exempt from uniform laws that threaten to destroy the cohesive behavior patterns that are central to the group's identity?[56] Cultural heritage is a Western legal construction.

56. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997). Balkin develops this argument at length in the course of his argument that the Constitution should be

Basically, it refers either to the physical remnants of past eras that are deemed worthy of preservation for historical, aesthetic or archaeological reasons,[57] or the special protection of aboriginal peoples from conquest and subjugation by the majority society.[58] Thus, the law is concerned with the narrow question of when culture should be protected from government actions that endanger it or market driven change that puts it at-risk.[59] Cultural groups entitled to protection are conventionally defined as collections of people who have developed unique behaviors and distinctive, non-Western, that is non-rational,[60] world views, and the rights accorded them are usually group rights. Ethnic groups are defined by socially perceived differences based on racial background, religion or language. At-risk community claims draw on both categories. First, they argue that remnant natural and pastoral landscapes are worth preserving to sustain farming and ranching cultures. Second, they argue that local control over landscape and resource use is essential to preserve distinctive behavioral patterns associated with the exploitation of land and water resources.[61]

The assertion of a group right for an at-risk community draws on the recent revival of interest in communitarianism as an alternative to market-driven individualism, but the claims of at-risk communities are problematic

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concerned with protecting "status groups whose identity pervasively affects their interactions with others." *Id.* at 2372.

57. The usual rationale for the preservation of architectural monuments is nostalgia for a mythic, perfect past, but Professor Joseph Sax credits Abbé Grégoire of France with the articulation of the progressive idea that architectural monuments are the common heritage of humankind. In the face of arguments that ancient monuments should be destroyed, he argued that they should be preserved as examples of human genius, and thus, they were fitting models for the new French Republic. *See* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1156 (1990); *see also* John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

58. As my colleague Sarah Harding has observed after surveying the evolution of the term 'cultural heritage,' "we increasingly view cultural heritage as an issue of cultural, ethnic, or in some cases, minority rights, and as one of the keys to cultural preservation and self-determination." Sarah Harding, *Value, Obligation, and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 301 (1999.

59. The term "at-risk" is my own, but it reflects the growing convergence of human rights, cultural and environmental claims raised by groups that are threatened by government actions that give little weight to traditional patterns of social organization. *See* Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms*, 11 GEO. INT'L ENVTL. L. REV. 1 (1998).

60. As Thomas Mann put it, "Our western heritage is reason-reason, analysis, action and progress." THOMAS MANN, THE MAGIC MOUNTAIN 377 (H. T. Lowe-Porter trans., 1924).

61. This is the same claim that aboriginal groups make to defend themselves against activities that adversely impact the use of a specific land base. *See* Bernard Omniayak, Chief of The Lubicon Lake Band v. Canada, Communication No. 167/1984, Annual Report of the Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. 2, at 1, U.N. Doc. A/45/40, Annex IX(A) (1990), *reprinted in* 11 HUMAN RTS. L.J. 305 (1990) (claiming that Canadian government's sale of oil and gas concessions deprived tribe of their means of subsistence).

from this perspective. They run against the theory that the Constitution creates an abstract political community subject to uniform laws except for limited pre-settlement or alien groups.[62] Impaired communities, like Indian Tribes, implicitly define community as a group of people rooted into a specific, small geographic landscape. This is the principal pre-Enlightenment concept of community, but is one which has been largely swept away by modern civil society and the mobility of modern life.[63] The community is not a place but a political abstraction. Communitarianism is a much-disputed term,[64] but the core meaning in modern political discourse is that the community is an abstraction for the "common good."[65] Modern theory builds on Rousseau and asserts that there is a need to subjugate the individual to the community and often to more stringent regulation than the general citizenry, a meaning that does not immediately resonate with the claims of at-risk communities for greater autonomy.[66]

The major hurdle faced by the cultural claims of at-risk communities is the lack of cohesive identity among its members. The hallmarks of cultural-based claims are (1) the existence of an identifiable, usually small, group, (2) with distinctive and consistent behaviors and outlooks that (3) differ from groups around them and (4) are essential to their self-identity.[67] In short, cultural claims are based on distinctiveness and the existence of another culture;[68] either other groups or the "mainstream"/dominant culture. At first

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62. *See* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996).

63. *See* Robert N. Bellah, *Community Properly Understood: A Defense of 'Democratic Communitarianism,'* 6 THE RESPONSIVE COMMUNITY 49 (1995/96).

64. *See* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 692-95 (1992).

65. *Id.* at 690.

66. Mark Rosen provides a more plausible basis for at-risk community claims. He argues that liberal political theory and principles of federalism call for much greater tolerance of "perfectionist" communities than the law has traditionally tolerated. *See* Mark Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1126 (1998). However, in his scheme an at-risk community is not necessarily a perfectionist one. A community must be well-ordered and one "which likely could not co-exist peacefully with those outside their community." *Id.* at 1095. This may be a difficult criterion for some at-risk communities to meet.

67. These characteristics are borrowed from the efforts to determine which groups can legitimately claim a national identity. The fit is not a perfect one. For example, in a perceptive essay Joseph Raz argues that national groups are usually not small, not necessarily geographically concentrated and membership is a matter of the individual and others' determination that a person belongs to a group. *See* Joseph Raz, *National Self-Determination*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 125 (1994). The issue of entry into a cultural group is discussed *infra* at notes 91 to 96.

68. For example, research in cultural or ethnic tourism investigates how groups such as Native Americans and Anglos perceive each other. *See* Maria T. Allison, *Access and Boundary*

blush, there is nothing distinctive or cohesive about at-risk communities. To borrow from the law of public nuisances, they exhibit differences of degree not in kind with the dominant culture. They share the same diversity of religions as the dominant culture, speak the national language (with the exception of hispanic communities in the Southwest) and engage in other conventional dominant practices. In short, they are not a marginal group. In fact, at-risk communities lack the cohesion and coherent belief system conventionally associated with inherent or self-selected at-risk groups. A preference for pick-up trucks over sport-utility vehicles is not a sufficient basis for the recognition of a legally significant culture.

Cultural values are generally associated with the marginal ethnic groups for two distinct but related reasons. First, late nineteenth century social thinkers such as Durkheim and Weber assumed that modern, urban society would eventually erase group distinctiveness and differences. The push for assimilation into a dominant culture focused society's concern on remnant, usually non-European, groups who resisted integration and assimilation. Modern law is highly Weberian and thus can tolerate only limited exceptions.[69] Second, cultural and ethnic groups are a product of classical anthropology, which is a by-product of eighteenth and nineteenth century imperialism. Classic anthropology looks "for pristine replicas of the pre-capitalist, post industrialist past in the sinks and margins of the capitalist, industrial world."[70]

The net result of the western experience with cultural minorities has been the practice of toleration toward these groups. At-risk communities face a serious problem asserting a toleration-based claim. Toleration is one of the most powerful moral ideas in the western tradition,[71] but it is a product of the dominant culture and continues to be defined by it. Toleration has taken the form of either exemption from uniform laws or allowing (or requiring) groups to isolate themselves from the dominant culture. At-risk communities' claims initially fall well within this framework. Basically, they

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Maintenance: Serving Culturally Diverse Populations, *in* CULTURE, CONFLICT, AND COMMUNICATION IN THE WILDLAND-URBAN INTERFACE 99, 103 (Alan W. Ewert, et al. eds., 1993).

69. See Jacob T. Levy, *Classifying Cultural Rights*, *in* NOMOS XXXIX, ETHNICITY AND GROUP RIGHTS 22, 24-34 (Ian Shapiro & Will Kymlicka eds., 1997).

70. ERIC W. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY 18 (1982).

71. *See generally* Thomas Grey, *Civil Rights Versus Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81 (Spring 1991) (arguing that the First Amendment justifies toleration of racist speech); Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, *in* SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 17 (1994) (surveying theories in favor of regulating hate speech).

assert two related group rights to remain distinct from the larger society: (1) the power to exempt themselves from laws, generally environmental, that threaten the maintenance of the status quo and (2) some greater degree of self-governance[72] within existing political structures to resist market forces. Nonetheless, the cultural claims of citizens within at-risk communities are outside the western tradition of toleration.

The merits of toleration are widely recognized throughout the world, but are generally granted only to minority cultures by the dominant culture. "The ultimate beneficiaries of the process of toleration are seen to be minorities."[73] Members of the dominant culture are not thought to require any special protection beyond that provided by constitutional political processes and the rule of law.[74] In fact, the opposite is often the case. At-risk communities have a powerful array of legal weapons, including the Fifth Amendment, to challenge the laws to which they object[75] and their objections to federal and state regulation have enjoyed widespread political support.[76]

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72. *See* Levy, *supra* note 69, at 24-34.

73. Adeno Addis, *On Human Diversity and the Limits of Toleration*, *in* NOMOS XXXIX, *supra* note 69, at 112, 119.

74. At-risk communities are in the opposite situation from groups protected from majority oppression. *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620, 1628 (1996) (holding state referendum repealing local ordinances that prohibited discrimination on grounds of sexual orientation unconstitutional because they targeted a "politically unpopular group") (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

75. *Bennett v. Spear*, 520 U.S. 154 (1997), is a classic example of this power. In *Bennett*, Justice Scalia rewrote the legislative history of the Endangered Species Act. The issue was whether an irrigation district had standing to challenge a jeopardy opinion. To bring the group within the zone of interests, Justice Scalia recast the primary purpose of the citizen suit provision of the Act: "[A]nother objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Justice Scalia's construction of the Act is criticized in William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763 (1997).

76. For example, Congress has considered many bills to expand the right of property owners to challenge environmental regulation as taking, although no legislation has been enacted. In addition, in administering habitat conservation plans under the Endangered Species Act, the Department of Interior has adopted a "no surprises policy" which puts the burden on the government not the landowner to pay for any additional conservation measures required in the future. *See* Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L.Q. 707 (1997). Similarly, Professor Holly Doremus has characterized federal efforts to buffer property owners from the adverse impacts of the restoration of endangered species as the endorsement of the "New West" over the "Old West", but criticizes federal efforts to minimize the economic and social disruption of these efforts as inconsistent with the goal of the long-term recovery of these species in the wild. *See* Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 36-38 (1999).

Thus, they have no basis in either domestic or international law to opt out of control by the national government.[77]

B. Second Order Barriers to Cultural Heritage Protection: Are Local Landscapes Cultural Heritage?

At-risk communities are on stronger ground to assert property-based cultural heritage claims, but again the argument is a stretch. In the United States, we have defined our cultural heritage as our rugged landscape.[78] Landscape preservation claims are, however, difficult for two primary reasons, although these difficulties are eroding. First, such claims are primarily aesthetic, placed at the margin of the law's recognition of aesthetic interests.[79] The common law gave almost no recognition to aesthetic interests because they were not manly. The view that emotion or sensitivity was outside the common law, precluded the recognition that longstanding emotional connections to the landscape could be protected.[80] Landscapes were canvases to be improved upon by human intervention.[81] However, these historic attitudes are eroding, due in part to the environmental movement which has deepened society's appreciation of the "natural." Positive law gives limited recognition to cultural heritage. For example, we have national and state registers of historic places, and physical preservation is possible through the creation of historic districts.[82] This evolving

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77. The status of the right to self-determination is not settled in international law and modern practice seeks to substitute the protection of well-defined, historic minorities from majority suppression of their cultural identity. *See* David Wippman, *Introduction: Ethnic Claims and International Law*, *in* INTERNATIONAL LAW AND ETHNIC CONFLICT 1, 7-16 (David Wippman ed., 1998).

78. *See* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 9 (1980).

79. The common law did not recognize interference with aesthetic sensibilities as an actionable nuisance, but police power may be used for "solely aesthetic" regulation. Aesthetic regulation remains primarily concerned with prevention of aesthetic blight rather than the promotion of beauty and form. We remain concerned about the arbitrary nature of aesthetic regulation. *See* John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 436 (1982).

80. The modern environmental movement seeks to institutionalize this connection through new concepts such as natural resources damages. My colleague, Katherine Baker, has explored the relationship between emotional landscape connection and legal protection in *Consorting with Forests: Rethinking Our Relationship to Natural Resources and How We Should Value Their Loss*, 22 ECOLOGY L.Q. 677 (1995).

81. For a fascinating discussion of the didactic functions of 16th and 17th century palace gardens, see SIMON SCHAMA, LANDSCAPE AND MEMORY 268-81 (1995).

82. *See* The National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6. The law of historic districts is set out in 2 RATHKOPF'S, THE LAW OF ZONING AND PLANNING, ch. 15 (1998).

definition of culture would support local efforts to preserve a community architectural heritage, but there still has been little effort to extend the concept of historical preservation to large areas devoid of a mass of buildings representing a unique architectural style, non-dominant culture or national historical association.[83] There is, however, precedent supporting the integration of architectural and landscape preservation on a community scale; landscape preservation is moving beyond the idea of amassing scattered open space areas to the idea that larger ecosystems should be sustained to support historic human and system functions. For example, in Vermont, legal protection has been extended to the state's landscape which represents a unique, and increasingly valuable, blend of natural and human features.[84]

The second barrier to the recognition of culturally-based property rules is the enlightenment legacy that the rational organization of society requires the simplified, uniform administration of laws. Thus, local variations in practice cannot be tolerated.[85] As applied to landscape, it means that we generally accept the landscape produced by uniform rules. Recent scholars have shown that the drive for uniformity has substituted artificial for natural landscapes and has detached the meaning of community from its original geographical basis. Local cultural practices based on specific environments are ignored when simplified, artificial landscapes are constructed to manage resources.[86] Since the Enlightenment, we have been conditioned to appreciate the value of altered and managed riverine landscapes.[87] Environmental histories, such as William Cronon's now classic *Changes in the Land*,[88] details how the imposition of the common law of real property on Native American occupation and use practices displaced ecosystem practices to create a landscape of individually owned and physically distinct tracts of land. To change this tradition, new western scholars such as Charles Wilkinson have long advocated place-based solutions to resource use

83. *See* Joseph L. Sax, *The Trampas File*, 84 MICH. L. REV. 1389 (1986) (reprinting responses to a proposal that an ongoing community be designated a national park).

84. *See* Norman Williams, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 WASH. U. J. URB. & CONTEMP. L. 3 (1990) (tracing the evolution of the idea of landscape protection).

85. *See* Harding, *supra* note 58, at 333-36 (discussing the debate within liberal theories of culture over whether distinctiveness is worth preserving).

86. For a brilliant exposition of the link between modernity and local knowledge and practice see James C. Scott, *State Simplifications: Nature, Space, and People*, *in* POLITICAL ORDER 42 (Ian Shapiro & Russel Hardin eds., 1996). *See also* SCHAMA, *supra* note 81, at 14.

87. *See* I.G. SIMMONS, ENVIRONMENTAL HISTORY: NEW PERSPECTIVES ON THE PAST 29-41 (1993) (a brief survey of the principle forces of the counter-environmental transformation).

88. CRONON, *supra* note 19.

conflicts to bridge the commodity production-environmental protection gap.[89] Imitating the Chinese practice of policy by aphorism, the Western state governors have adopted a series of "Enlibra" (stewardship and balance) principles; the first is "national standards, neighborhood solutions."[90]

C. The Problem of Entry

At-risk communities essentially assert that they can "construct" themselves as a culture. In short, they seek entry into a protected class. Very little attention has been given to the question of whether non-religious groups can do this and receive legal protection. Cultural minorities are traditionally conceived of as ethnic groups where neither entry nor exit is possible,[91] except that intermarriage may provide both entry and exit over the course of several generations.[92] Membership is involuntary and is basically conferred at birth and reinforced by the majority community's recognition of "immutable differences."[93]

As our notion of human rights has become more refined, the issue of exit from communities that limit individual freedom has become a major issue.[94] The issue of entry seldom arises since relatively few people seek to become minorities. Members of at-risk communities cannot therefore simply constitute themselves as an at-risk culture. The historic basis for identifying distinct minority groups has been blood. Indians have been ethnologically defined as "a community of people bound together by blood ties, who are socially, politically, and religiously organized . . . and who speak a common language."[95] Protection is justified because exit from a blood group is impossible and because society will continue to judge a group member by his or her appearance, not his or her merit. Thus, the risk of discrimination, subjugation or tyranny remains constant. Although the law naturally focuses on the difficulty of exit, the converse proposition is also true—that blood makes entry impossible. This idea would seem to deny members of the

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89. *See* Charles F. Wilkinson, *A View Toward the Future: Lessons from the Tahoe and Truckee*, *in* NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 216, 225-30 (Lawrence J. MacDonnell and Sarah F. Bates eds., 1993); Thomas J. Lyon, *An Ethic of Place*, *in* RECLAIMING THE NATIVE HOME OF HOPE, *supra* note 3, at 15.

90. 1282 *Western States Water*, (Western States Water Council), December 11, 1998.

91. *See* Wippman, *supra* note 77, at 4-5.

92. *See* Balkin, *supra* note 56, at 2322-24.

93. Raz, *supra* note 67, at 130-32.

94. *See* Rosen, *supra* note 66, at 1097-1106.

95. FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 69 (1996).

dominant culture the power to claim a special status or exemption from general laws.

Despite this legacy, entry is not a *per se* barrier. Modern cultural theory and group practice provide a basis for at-risk communities to claim legitimately that the traditional anthropological obsession with blood belies the fluidity of modern cultural groupings. Modern Indian criteria and tribal practice for tribal membership illustrate that the notion of tribal membership exclusively defined by blood, like most constructs, is a problematic basis for a legal classification and that entry as well as exit from a Tribe is possible. Indian Tribes have often been artificial constructs and are becoming more so today. The blood quantum required for membership varies from fifty percent to none. Voluntary entry in some tribes is possible.

> Since abolishing its blood quantum requirement in 1975, northern Michigan's Sault Ste. Marie Band of Chippewas has ballooned from 1,300 to 21,000 members and has earned a reputation, perhaps undeserved, for allegedly selling tribal membership and the valuable fishing rights that accompany it to fishermen who have little or no Indian blood.[96]

Just as Indian Tribes are reviving and inventing their identity, so can members of the dominant culture recast themselves as a tribe. And, post-modern legal theory along with critical race theory provide a justification for communities to overcome the formidable barriers to this self-construction.

D. Post-Modernism and Community Self-Definition

Post-modern scholarship in areas such as critical race theory and the newer academic fad of whiteness cultural studies provide the conceptual basis for communities to self-select as being at-risk or endangered by the "outside" culture and thus worthy of special legal protection. Just as Kenneth Starr used the post-modern notion of narrative as a substitute for the bare assembly of possibly relevant facts in his brief against President Clinton, the critical legal studies movement has undermined many of the traditional objections to community self-definition. Critical race theory, a branch of the critical legal studies movement, posits that race is not inherent but a social construct. "The most important insight to be drawn from the developing race-consciousness scholarship is that there is no essential

96. *Id.* at 73.

concept of race . . . ."[97] This argument usually is used to undermine the legitimacy of racial discrimination or to justify exit from a racial group. For example, the critical race scholar, Cheryl Harris, has persuasively argued that Justice Clarence Thomas has reconstructed his racial identity as a cultural one to justify his refusal to vote for recognized minority rights. Thus, self-identification as a minority can be the basis for a cultural construct once the idea of inherent minority status is deconstructed.[98] The distinctive feature of cultural as opposed to ethnic identity is that both entry and exit are possible. Culture is like modern religion. It is a matter of personal choice.

The broader lesson of post-modern scholarship is that all notions of culture are constructed. Thus, theoretical possibility allows new cultural minorities to form through self-construction just as traditional minorities can seek to "deconstruct" their inherited identities. The fluidity of modern identity boundaries makes it possible for a group to move from one to the other. Since distinctiveness is generally not a positive attribute in most societies, exit rather than entry from distinctive cultures has been the norm. However, there is no reason that this idea cannot be deconstructed, allowing entry, as well as exit, to be conceptualized as a voluntary act. For example, while culture is generally defined as the protection of distinct, usually non-European groups, our system does not confine protection to Native Americans or other "racial" minorities. The best example of the preservation of a European group is protection that the Supreme Court has given to perfectionist communities such as the Old Order Amish. *Wisconsin v. Yoder*[99] held the Amish have a First Amendment right to keep their children out of local public schools, in part, because respect for religious differences reflects the western society's long journey to religious tolerance.[100] Similarly, my colleague Fred Bosselman has suggested that the endangered species model of biodiversity conservation can be extended to counter-assimilationist communities such as the Amish.[101] He would probably limit this protection to communities that have a coherent set of religious beliefs that are incompatible with assimilation into the majority, secular culture. However, no inherent limitations on the analogy between endangered species and human cultures exist. Ecologists increasingly have

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97. GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 183 (1995).

98. *See* Cheryl Harris, Remarks at Faculty Workshop, Chicago-Kent College of Law (April, 1997).

99. 406 U.S. 205 (1972).

100. *See id.* at 234.

101. *See, e.g.*, Fred P. Bosselman, *Extinction and the Law: Protection of Religiously-Motivated Behavior*, 68 CHI. KENT L. REV. 15 (1992).

deconstructed the traditional Linaerian classifications of species and suggested that the Endangered Species Act be based on more localized definitions of species such as evolutionary significant population units.[102] Thus, it is equally possible to recognize new group candidates for cultural diversity protection.

Post-modern cultural claims are making their way into the law through their subconscious use in at-risk community protection strategies. Catron County, New Mexico is the most notable example of efforts to self-declare a new, previously unrecognized or under-appreciated culture.[103] Catron County is a ranching county in southwestern New Mexico with a population of 3,000 people spread over 7,000 square miles. The federal government owns a large percentage of the county, and the county feels particularly victimized by the shift in federal land management policy from commodity production to environmentally sustainable management. After the Sagebrush rebellion of the 1970s and early 1980s failed to produce the desired wholesale divestiture of federal public lands, the county hit upon an indirect approach to avoid the Supremacy Clause. It adopted an Interim Land Use Policy Plan Concerning the Use of Public Lands and Public Resources and the Protection of Private Property which declared "[a] state of emergency prevails that calls for devotion and sacrifice" and asserted control over all federal lands within the county. The plan justified this unconstitutional assertion of local control over federal public lands on the unique "custom and culture" of the area. The county in effect reconstructed itself as a remnant of an ancient civilization[104] to claim exemption from the preemptive effect of public land law. Its claims also match the political vision of the deep ecology movement. Ecological stewardship requires "a decentralized Jeffersonian polity of relatively small, initiate, locally autonomous, and self-governing communities rooted in the land . . . and affiliated at the federal level only for a few clearly defined political purposes."[105] Environmentalists

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102. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1087-1112 (1997).

103. *See* JACQUELINE VAUGHN SWITZER, GREEN BACKLASH: THE HISTORY AND POLITICS OF ENVIRONMENTAL OPPOSITION IN THE U.S. 233-35 (1997).

104. The constitutional basis of this claim is that Congress lacks the power to retain—and therefore to manage—federal lands for environmental and other purposes. This reading of the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, is without merit. *See* Kleppe v. New Mexico, 426 U.S. 529, 536-37 (1976); Nevada State Bd. of Agric. v. United States, 512 F. Supp. 166, *aff'd*, 699 F.2d 486 (9th Cir. 1983). *See also* John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 *passim* (1981). The claim, however, continues to fuel federal supremacy claims. *See* Scott Reed, *The County Supremacy Movement: A Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 545-48 (1993-1994).

105. WILLIAM OPHULS & A. STEPHEN BOYAN, JR., ECOLOGY AND THE POLITICS OF SCARCITY REVISITED: THE UNRAVELING OF THE AMERICAN DREAM 302-03 (1992).

would, of course, characterize the local culture as the opposite of ecologically sustainable development, but Catron County is a fascinating example of a recently marginalized group trying to claim the benefits that liberal society has accorded to institutionally marginalized groups.

Similar cultural claims have obtained some recent scattered judicial and mainstream recognition. Catron County's claims were implicitly recognized by the Tenth Circuit Court of Appeals, which held that the designation of critical habitat under the Endangered Species Act required the preparation of an environmental impact statement because NEPA encompasses broader interests compared to the decision to designate a critical habitat for the purposes of conserving an endangered species.[106] There are other scattered examples of the legitimacy of these claims. Culture claims received some support in a 1996 National Academy of Sciences/National Research Council report on the future of irrigation.[107] The report expressly rejected the theory that irrigation is a solely regulated industry that needs greater market discipline, unlike the electric generation and transmission industry which is being restructured to promote more competition. The utopian settlement vision of irrigation was invoked to argue that irrigation was a distinctive, although declining, culture. The report does not endorse the full claim that irrigation is entitled to continued generous subsidies for cultural preservation reasons, but it does observe that "[i]rrigation will continue to be a part of cultural heritage in many areas and a vital economic sector in some," although "it will no longer be the centerpiece of long-term water planning."[108]

Theories of bioregionalism,[109] natural area management and biodiversity protection, influenced by conservation biology and non-equilibrium ecology,

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106. *See* Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996); *but see* Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996). *See generally* Note, *Catron County v. Board of Commissioners, N.M. v. United States Fish & Wildlife Service: Is Functional Equivalence the Solution to the Emerging Critical Habitat Problem?*, 38 NAT. RESOURCES J. 327 (1998).

107. *See* NATIONAL RESEARCH COUNCIL, A NEW ERA FOR IRRIGATION 20-41 (1996).

108. *Id.* at 40.

109. The conceptual underpinnings for place-based solutions are the emerging international norm of sustainable development, see Opinion and the Separate Opinion of Vice-President Weeramantry in Case Concerning The Gabcikovo-Nagymarros Project (Hungary v. Slovakia), International Court of Justice, Case No. 92, September 25, 1997, and the marriage of the old idea of river basin planning with the new theory of bioregional landscape management. One of the central lessons of current efforts to construct habitat conservation plans to protect endangered species is that we need to manage resources on larger geographic, more ecologically rational scales. Land use scale is emerging as a central focus of future biodiversity protection. *See, e.g.*, John Turner & Jason Rylander, *Land Use: The Forgotten Agenda*, *in* THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 60, 66 (Marian R. Chertow & Daniel C. Esty eds., 1997); Eric Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 654-55

provide another, somewhat surprising basis for the recognition of at-risk community cultural claims. The thrust of natural area and biodiversity protection has traditionally been to isolate "natural" landscapes from humans, but this concept is being expanded for three primary reasons. First, nature no longer categorically excludes human use because there are so few pristine areas uninfluenced by anthropocentric change. Second, in the developing world, efforts to isolate people from biodiversity reserves are usually self-defeating, so it is better to integrate human use into biodiversity conservation management.[110] Third, biodiversity conservation requires a holistic approach to existing landscapes which makes it possible to look at the relationship among all types of landscapes. A biodiversity perspective collapses both traditional political boundaries and ownership classifications because species and ecosystems do not respect these artificial boundaries. Thus, scientists and resource managers are grudgingly coming to recognize that humans are part of the landscape and influence evolutionary processes. This fact creates another basis to allow human landscape use to be factored into biodiversity protection strategies.[111] "[C]ultural transitions" are still generally seen as negative factors,[112] but there is a strong case to redefine landscape preservation to include the built and living landscape.[113] The scientific and value judgment issues are quite complex. For example, they raise the question of whether people should be managed as "exhibits," but the core idea that evolved landscapes are worthy of conservation is a

(1996). Biodiversity is not a self-defining scientific concept that can be easily translated into simple standards; rather, it is a kaleidoscopic human construct that must be applied to specific landscapes. *See* DAVID TAKAS, THE IDEA OF BIODIVERSITY: PHILOSOPHIES OF PARADISE 99 (1996). The new emphasis on landscape recognizes that large areas such as regional landscapes and watersheds must be seen, not only as physical maps to be "read," but as modified natural systems to be protected and actively managed. *See, e.g.*, LANDSCAPE IN AMERICA (George F. Thompson ed., 1995). This requires a delineation of the landscape and the construction of baselines against which resource use patterns can be measured. The goal is not necessarily to preserve a natural system, but to manage the process of change in actual landscapes to strike a balance between the maintenance of natural system functions and human use of the system.

110. *See* A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L. L.J. 37, 57-61 (1996).

111. *See* REED F. NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY 67-98 (1994).

112. *Id.* at 89.

113. The relationship between community preservation and ecosystem management is a complex subject to which comparatively little thought has been given. A notable exception is the work of Professor Joseph L. Sax. *See, e.g.*, *The Trampas File*, 84 MICH. L. REV. 1389 (1986). For a perceptive assessment and criticism of the narrow perspective of ecosystem management, see Sally K. Fairfax, *The Essential Legacy of Sustaining Civilization: Professor Sax on the National Parks*, 25 ECOLOGY L.Q. 385 (1998). For a view that humanless landscapes best promote biodiversity, see Oliver Houck, *Are Humans Part of Ecosystems?*, 28 ENVTL. L. 1 (1998).

powerful one.[114] However, the evolving link between cultural and biodiversity conservation suggests that at-risk community claims gain more legitimacy the more that they are integrated into biodiversity and landscape conservation strategies.[115]

IV. GROUP CULTURAL RIGHTS: AN EXAMPLE OF REVERSE LOCKEAN PROPERTY

A. Reverse Lockean Property Theory

At-risk groups are usually given group property rights because these rights preceded enlightened European settlement and culture. At-risk community efforts to maintain their distinct cultures are undermined by individual property rights that disrupt traditional patterns of resource use and social organization. The issue then becomes, are there alternatives to individual property rights?

The alternatives require a recognition that multiple Lockean property regimes, including group regimes, can exist. Modern property theory owes a great debt to John Locke. Although he set out to provide a biblical justification for representative government, he laid the foundations for both the modern secular state and for the institution of private property.[116] Private property existed prior to Locke, but Locke's labor theory provided the crucial justification for state recognition and protection of individual claims. God had given the earth to Adam and Eve and progeny in common, and much land was open to common use by customary privilege holders. Locke's labor theory put all property into the Roman law "negative community." In Roman law, things that were not capable of ownership until

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114. *See* discussion *infra* at notes 190-93.

115. The legal basis of this claim is the Supreme Court's decision in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593-94 (1987), which holds that federal land management legislation preempts state land use control and planning legislation but not state environmental management legislation. Current state and local resistance to federal control is often voiced through the "wise use" movement which seeks to enshrine multiple (read "commodity") production rather than preservation as the dominant federal land management paradigm. *See also* Note, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1993-1994) (arguing that local land use plans that vindicate local culture and custom interests are valid under *Granite Rock*).

116. The dual contributions of Locke are developed in THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1998) and Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution*, *in* CONFRONTING THE CONSTITUTION 9 (Alan Bloom ed., 1990).

they were captured (such as wild animals) were classified as part of the negative community.[117] Locke made the negative community the norm and vast areas of the world were open to appropriation by individual initiative. The settlement of the American West is a history of individual Lockean grabs subsequently legitimated by a weak state. The dominant view was that "nature existed largely as a collection of commodities,"[118] a view that remains dominant despite the efforts of the environmental community to articulate a counter-view.[119]

Locke helped impose English property concepts on the American landscape and to marginalize common property claims. Commons or group property became the exception for limited resources, such as navigable waters, that are more efficiently exploited by unlimited access. The pre-settlement West had many common property regimes but they were too fragile to survive Lockean property. As Richard White observed:

> "The greatest losers in the capitalist transformation of the West were those who tried to maintain existing communal economies . . . . Many Indian economies quickly buckled under this assault . . . all Spanish and Mexican land grants in California were valid, [but] . . . by the time the commissioners and courts validated the grants, squatters, money lenders, and the very attorneys whom the rancheros had hired had drained the rancheros of their resources."[120]

The communal tradition also existed in the early Anglo settlement of the West, but it did not endure. Brigham Young revived Joseph Smith's law of consecration and stewardship when the Mormons arrived in Utah. However, the some 150 communal communities started by Brigham Young could not survive the arrival of the Union Pacific and the discovery of valuable minerals around Salt Lake City. An economy of small, self-sufficient farms sustained itself well into this century, but, as White reminds us, this self-reliance "was . . . no longer a mark of Utah's independence; but instead it was a sign of the territory's poverty and the unusual religious discipline of its citizens."[121] The communal tradition did survive in mutual irrigation

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117. *See* PETER DRAKOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 42-47 (1996).

118. WHITE, *supra* note 25, at 212.

119. The chief project of environmental ethics, starting with Aldo Leopold's 1949 classic, A SAND COUNTY ALMANAC, has been to articulate a non-exploitive relationship between humans and nature. *See, e.g.*, Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, 1994 U. ILL. L. REV. 819.

120. WHITE, *supra* note 25, at 237-38.

121. *Id.* at 242.

companies and irrigation districts,[122] but these institutions became trustees and managers for individual rights.[123]

B. *Indian and Appropriative Rights Compared and Contrasted*

Cultural claims are usually associated with group rather than individual rights.[124] Group rights were once scorned as vestiges of primitive societies, but through the world there has been a revival of interest in group resource management. Aboriginals have been cast as pro-environmentalists because they practice ecologically sustainable resource use,[125] although the historical record is quite mixed.[126] The work of political scientists and economists, such as Elinor Ostrum, has challenged Garret Hardin's classic thesis that common property regimes inevitably lead to over-use and degradation or destruction.[127] Well-defined, individual rights are not always necessary to the effective management of commons. Stabile groups with a common interest can voluntarily adopt practices that result in the sustainable management of commons by lowering the costs of information dissemination and the transaction costs of formulating, monitoring and enforcing rules that sustain the commons.[128] Federal Indian reserved rights are an example of group commons management or anti-commons rights.[129] In the West, Native American tribes may claim group water rights. Non-indians have traditionally claimed semi-exclusive individual water rights under either prior appropriation or dual appropriative-riparian systems. Indian water rights are

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122. For example, mutual water company articles generally provide for pro rata sharing within shareholder classes. *See* GEORGE A. GOULD & DOUGLAS L. GRANT, CASES AND MATERIALS ON WATER LAW 391 (5th ed. 1995).

123. *See, e.g.*, Jacobucci v. District Court, 541 P.2d 667 (Colo. 1975).

124. This is well articulated in the High Court of Australia's decision recognizing, for the first time, the existence of aboriginal titles in the Commonwealth. *See* Mabo v. Queensland (1992) 175 C.L.R. 1, 51-52; *see also* G.P.L. McGinley, *Natural Resource Companies and Aboriginal Title to Land: The Australian Experience—Mabo and Its Aftermath*, 28 INT'L LAW. 695 (1994).

125. *See* TIMOTHY FRIDJOF FLANNERY, THE FUTURE EATERS: AN ECOLOGICAL HISTORY OF THE AUSTRALIAN LANDS AND PEOPLE 290 (1994) (explaining that aboriginal resource management is superior to European sustained yield conservation).

126. *See, e.g.*, NEIL BARR & JOHN CARY, GREENING A BROWN LAND: THE AUSTRALIAN SEARCH FOR SUSTAINABLE LAND USE 7-9 (1992) (suggesting that only technology restrained Aboriginal peoples from making more substantial alterations in the continent's landscape).

127. *See supra* note 23.

128. *See* LOCAL COMMONS AND GLOBAL INTERDEPENDENCE: HETEROGENEITY AND COOPERATION IN TWO DOMAINS (Robert O. Keohane & Elinor Ostrom eds., 1995).

129. *See* Michael A. Heller, *The Tragedy of the Anti-Commons: Property in Transition From Marx to Markets*, 111 HARV. L. REV. 622, 624 (1998) (study of the difficulties of privatizing the former Soviet Union defines anti-commons as resources subject to multiple rights of exclusion or use vetoes).

therefore a possible model for communities. Their rights are based on the need to sustain a specific land-base, the reservation, and their alienation is more difficult than the transfer of appropriative rights. These possible benefits, of course, come at the expense of the abandonment of Lockean individual, exclusive property rights that have historically sustained the dominant culture of the region and thus the property rights often provide for less than full enjoyment of the resource.

Indian tribes may claim federal reserved water rights to support the purposes for which a reservation was created. *Winters v. United States*[130] held that Tribes hold inchoate rights which date from the creation of the reservation or perhaps earlier.[131] Reserved rights or *Winters* rights have elements of both appropriative and riparian rights. They have a priority date which is either the date of the creation of the reservation or time immemorial. But, unlike appropriative rights, they do not depend upon the application of water to beneficial use. These rights may also be claimed, as needed, long after the creation of a reservation.[132] Nevertheless, the source of these rights continues to be an unsettled issue. They are either rights held by the tribes by virtue of their continuous occupation of the soil or they are federal entitlements transferred to the tribes by the federal government. *Winters* based their existence both on the treaty power and property powers.[133] The first rationale suggests that the tribes reserved what they owned when they were forced to surrender large parts of their lands in return for the tenuous protection of a reservation. The second suggests that the federal government, as ultimate owner of all public lands, transferred its riparian rights to the tribes as reparations for the injustices of the nineteenth century. Both theories invariably lead to limitations on the exercise of these rights that do not exist with respect to state-created private water rights.

In contrast to federal Indian reserved water rights, appropriative rights are temporal rights to a fixed quantity of water. Prior appropriation has long

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130. 207 U.S. 564 (1908).

131. *See id.* at 577.

132. Another species of Indian water rights exist—Indian allotments with attached water rights. These rights have a different mix of exclusive and group characteristics. Allotment water rights are the share of the tribal reserved right allotted to a tribal member. The priority date is the date of the tribal reserved right and the allotted rights are measured by *Winters* standards. *See* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983). Although the issue is not free from controversy, the cases hold that Indian allotted water rights may be sold and severed from the land. *See, e.g.*, Occidental Life Ins. Co. v. May, 77 P.2d 733, 778 (Wash. 1938). The non-Indian transferee acquires a right to irrigate the lands allotted to the tribal member plus any additional acreage that the non-Indian allottee places under irrigation with reasonable diligence. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 50-51 (9th Cir. 1981).

133. *See Winters*, 207 U.S. at 575-78.

been hailed as a shining example of the ability of courts and legislatures to adapt the common law to the arid climate and geography of the region by creating a property regime that created the necessary individual incentives for regional development.[134] The frontier tradition of heroic settlement by entrepreneurial individuals has long assumed that prior appropriation represented the apex of legal progress.[135] In the context of Western individualism, group rights for Indian tribes were thus historically viewed as a minor aberration to tolerate, because it was the law of the land, but cabined to the maximum extent possible. However, group rights, including limitations on use, have always co-existed with prior appropriation. Much water is controlled by mutual irrigation companies and irrigation districts, and these districts have effectively tied water to land either by legislation which prohibits transfers[136] or by raising the transaction costs of such transfers.[137]

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134. The late Frank J. Trelease "pumped the organ" of prior appropriation with great insight and energy. *See, e.g.*, Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1 (1965); Frank J. Trelease, *Interstate Use of Water- 'Sporhase v. El Paso, Pike & Vermejo'*, 22 LAND & WATER L. REV. 315 (1987).

135. However, modern irrigation practices have their roots in Mormon and other utopian communal efforts. *See, e.g.*, ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 9-17 (1983).

136. The trend is to loosen transfer restrictions, but legislation often strikes a balance between the status quo and the encouragement of water markets. The 1992 Central Valley Project Improvement Act is a classic example of this balance. *See* Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706 (1992). The Act limits the transfer of water from the CVP to address the problems of the loss of political power that will accompany transfers. *See id.* § 3404. Transfers in excess of 20% of a contracting agency's long-term space entitlement are subject to agency approval. *See id.* § 3405(1). The amount of transferable water cannot exceed the average annual quantity delivered during the last three years of normal water delivery before 1992. All transfers of water out of the CVP service area are subject to a right of first refusal by the agencies within the CVP service area. *See id.* § 3405(1)(F). In addition to prohibiting transfers which undermine the financial integrity of the CVP, a transfer may be prohibited if it adversely affects the Secretary's ability to meet fish and wildlife obligations under the Act. *See id.* § 3405(1)(H). For an excellent general discussion of existing transfer barriers and the methods that districts and water buyers have used to overcome them, see Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 671 (1993).

137. The on-going efforts to transfer water from the Imperial irrigation district in California to the Los Angeles-San Diego basins illustrate that the law provides many opportunities for agricultural areas to vindicate cultural claims to the status quo by raising the transaction costs of transfers. The idea of ownership simply does not fit with who can control large blocks of water from federal reclamation projects. *See* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 367-69 (1997). Under California law, an irrigation district holds water rights in trust for the landowners who are the beneficial owners. *See* CAL. WATER CODE § 22437; Merchants Nat'l Bank v. Escondito Irrigation Dist., 77 P. 937, 939 (Cal. 1904). The trust must be exercised by the District for the benefit of the individual landowners so unilateral transfers are not possible. The District's title was described as follows:

Legal transfer limitations are the exception, but they have always co-existed with the principle that water rights are alienable property rights.[138] Prior appropriation's greatest strength is that it allows water to be severed from the watershed of origin. As long as water is not wasted, it may be used for almost any purpose where it is needed. Prior appropriation has thus allowed larger metropolitan areas to move water away from areas of origin to the detriment of headwaters communities which had no voice in its allocation. The underlying assumption behind this result, seldom articulated in the cases or commentary,[139] was that water law was an exclusive state function. Justification of this principle has been based on state constitutions that withdraw power from local governments to regulate civil relationships, the constitutional or judicial rule that local government power is limited to the territorial boundaries of the political subdivision, or from the express or implied preemption of local laws by legislation of statewide application. Thus, the enactment of a statewide water code administered by a state official would seem good evidence of express intent to preempt local regulation in both home and non-home rule states. While states control water law, legislatures have been somewhat responsive to local concerns. For example, rural community fears that they will be "dewatered" have been

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> Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. . . . The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all landowners in the District . . . the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district.

United States v. Imperial Irrigation Dist., 559 F.2d 509, 529 (9th Cir. 1977).

The United States Supreme Court reversed the Ninth Circuit on the issue of whether the district was exempt from the acreage limitation of the Reclamation Act of 1902 and questioned but did not reject the Ninth Circuit's characterization of the ownership of water rights. *See* Bryant v. Yellen, 447 U.S. 352, 373-74 (1980).

138. *See* Gould, *supra* note 18.

139. In their path-breaking local government book, Frank I. Michelman and Terrance Sandalow observe: "Whether from want of interest or because of a general understanding that private law is beyond the scope of the power conferred, local governments have rarely attempted" to enact laws that directly regulate traditional Roman law based civil relationships. FRANK I. MICHELMAN & TERRENCE SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS: CASES, COMMENTS, QUESTIONS 314 (1970). The best discussion of the understanding is Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964). The issue has become more complicated as municipalities have more aggressively used their home rule powers to regulate civil relationships such as the law of landlord/tenant.

addressed by legislative enactment of special statutes to protect "areas of origin."[140] Thus, communities have been able to secure guarantees of future supplies or revenue off-sets for lost water,[141] but area of origin protection does prevent the movement of water away from rural areas.

C. The Problem of Incorporating Cultural Values Into Water Rights

Cultural water-related claims ultimately assert that water has intrinsic or extra-market values and invoke the weak community-value tradition in water law. In his book, Green Political Theory,[142] Robert E. Goodin identifies three distinct theories of value or "the Good."[143] The dominant theory is the neo-classical economic theory of value, which equates value with consumer satisfaction. This, of course, supports the dominant view that water is a commodity which should be allocated through the market. Historically, the antithesis of consumer theories of value has been the Marxian labor theory of value. There, value is largely derived from the human inputs that go into producing something. Environmentalism challenges both these theories because it does not fight over how to value a commodity but whether human use and satisfaction are the correct sources of value. As Goodin explains, environmental or "green" theories of value are based on the inherent naturalness of things: "what it is that makes natural resources valuable is their very naturalness."[144] The community tradition in water law predates "green" theories of resource value and essentially posits that the goal of water use should be to sustain a community over time. Community sustainability is not entirely consistent with the concept of "green" values, but nevertheless can be incorporated into the "green" paradigm. Both principles stress the importance of preserving low intensity systems over time.

The incorporation of group cultural values in water allocation into water law can be analogized to the doctrine of custom in the common law. Although the common law evolved from custom, the end product is a set of uniform rules applicable across political jurisdictions, not local areas.

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140. A. Dan Tarlock et al., WATER RESOURCE MANAGEMENT 354-58 (4th ed. 1993).

141. The Arizona Groundwater Management Act requires that all new developments have a 100 year guaranteed supply. *See* ARIZ. REV. STAT. § 45-576 (1994). The enactment of the statute set off a round of water ranch speculation. In 1991, headwaters areas persuaded the state legislature to impose a transportation fee on inter-basin transfers for the benefit of areas of origin. *See generally* ARIZ. REV. STAT. § 45-556 (1994).

142. ROBERT E. GOODIN, GREEN POLITICAL THEORY 19-41 (1992).

143. *See id.*

144. *Id.* at 26.

Custom has survived as a remnant of common law doctrine and can be the source of rules that differ from general common law principles. Likewise, the rationale for the incorporation of cultural values into water law is to justify exceptions to the general rules. Prior appropriation had its origins in the customs of the mining camps of California, but the law has now become highly rationalized. However, the older tradition of community sharing through more ad hoc customary practices has never been completely obliterated in the West and the doctrine of custom is undergoing a small revival.[145]

Water law provides little direct protection for the customary claims not previously assimilated and rationalized into the modern structure of prior appropriation. Likewise, the common law protects individuals against the loss of bodily integrity, human dignity, and economic loss, but not cultural identity.[146] Traditional proponents of alternative values in water have been a distinct minority voice which has often been silenced as soon as it is heard.[147] However, there has been limited judicial support for cultural protection. The most spectacular example of this occurred in Northern New Mexico where

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145. Oregon has recognized customary rights of beach access. *See* Oregon v. Hay, 462 P.2d 671 (Or. 1969). Hawaii has recognized customary access rights for Native Hawaiians. *See* Hawaii Pub. Access Shoreline v. Hawaii County Planning Comm'n, 903 P.2d 1246, 1250 (Haw. 1995). The Oregon result has been attacked as an unconstitutional judicial taking. *See generally* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) (asserting that the courts' return to Blackstonian era customary easements for public beach access could have a curative effect on the just compensation guarantee of the takings clause).

146. For an illustration of the non-recognition of cultural claims at common law, see Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997). This case is one of the many actions that grew out of the 1989 Exxon Valdez oil spill. Plaintiffs sought economic damages for both lost fishing opportunities and for the intangible foregone benefits of the cultural practice of subsistence hunting. *See id.* at 1197. The common law allows private individuals who suffer special damages to bring public nuisance actions. *See* John E. Bryson & Angus Macbeth, *Public Nuisance, The Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 250-51 (1972). The RESTATEMENT (SECOND) OF TORTS § 821(C) (1979) has a liberal standing rule for injunctive relief and abatement actions. A representative of the general public, "as a citizen in a citizen's action, or as a member of a class in a class action" has standing. *Id.* But, § 821(C)(1) limits damage actions to those who suffer "harm of a different kind from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference." *Id.* at § 821(C)(1). Applying this section, the court recognized that Native Americans injured by the Exxon Valdez spill had a right to sue for economic damages from lost fishing opportunities, but refused to allow them to sue to recover "cultural damage—damage to the Class members' 'subsistence way of life'" because the damages were not special. *Exxon*, 104 F.3d at 1198. All Alaska residents have a right to subsistence hunting and fishing, and thus, "'the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and physiological benefits in pristine natural surroundings' is shared by all Alaskans." *Id.*

147. *See id.* at 1196-98.

the acequia culture[148] attempted to insulate itself from the market through the doctrine that no transfer may occur if it will cause unmitigated injury to junior water holders. There, a state trial judge held that a proposed change of use from livestock and early season flood irrigation to a ski resort was invalid even though there was no proof of any injury to vested rights. The trial judge found that the change was contrary to the public interest because:

> [t]he northern New Mexico region possesses significant history, tradition and culture of recognized value, not measurable in dollars and cents; the relationship between the people and their land and water is central to the maintenance of that culture and traditions and the imposition of a resort-oriented economy in the Ensenada area would erode and likely destroy a distinct local culture that is several hundred years old."[149]

The case was reversed on appeal because, at the time, the New Mexico transfer statute did not allow public interest considerations in transfers, and the New Mexico Supreme Court refused to hear an appeal.[150] However, the precedent is not as dead as one might think because New Mexico law now allows the public interest to be considered in transfers.[151]

The *Sleeper* case is not the last word on the incorporation of these interests in water law. As Roscoe Pound taught, law is largely a process to adjust competing interest claims and thus is inherently evolutionary.[152] Cultural interests, once the domain of ethnic minorities, are increasingly being asserted both through litigation and the political process.[153] Traditional

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148. Acequias are communal ditches managed by associations, a tradition inherited from the Spanish settlement of the area. *See generally* JOSE A. RIVERA, ACEQUIA CULTURE: WATER, LAND, AND COMMUNITY IN THE SOUTHWEST (1998).

149. Ensenada Land & Water Ass'n v. Sleeper, No. RA-84-53(C) (D. N.M. 1985), *reprinted in* CHARLES J. MEYERS ET AL., WATER RESOURCE MANAGEMENT 434-35 (3d ed. 1988).

150. *See* Sleeper v. Ensenada Land & Water Ass'n, 760 P.2d 787, 790-92 (N.M. Ct. App. 1988), *cert. quashed*, 759 P.2d 200 (N.M. 1988); Shannon A. Parden, Note, *The Milagro Beanfield War Revisited in Ensenada Land & Water Association v. Sleeper: Public Welfare Defies Transfer of Water Rights,* 29 NAT. RESOURCES J. 861 (1989). *Sleeper* has led some to suggest that communities be given a veto over major water rights transfers. *See* Charles T. DuMars & Michele Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Right Allocation,* 31 ARIZ. L. REV. 817, 835-38 (1989).

151. Despite the appellate opinion, the story has a happy ending for the plaintiffs because the Albuquerque ski resort developers went bankrupt. As of 1993, the water was still flowing into the ditches and not into the ski resort.

152. *See, e.g.*, ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922). Pound himself was ambivalent about this insight. The tensions in Pound's thinking are explored in N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997).

153. *See* F. LEE BROWN & HELEN M. INGRAM, WATER AND POVERTY IN THE SOUTHWEST (1987).

water right holders, especially agricultural users, have increasingly adopted the rights-based rhetoric of the Native American rights movement. Water users once adequately protected by the law and politics of water allocation must now often argue that higher, intangible values such as rural community stability should prevail over monetary values to preserve the status quo. It is not possible to predict how these concerns will be reflected in water law and water allocation institutions, but they will be reflected.

New Mexico has also moved to recognize the unique character of acequias. Acequias have been much celebrated in recent years[154] but under New Mexico law they have been treated no differently from other irrigation organizations. Individual landowners along the ditch "own" the water right, not the association.[155] This rule has been widely criticized by proponents of traditional acequia culture because it subjects all landowners to general stream adjudications which undermine the communal nature of the ditch by confirming individual, transferable water rights.[156] In 1998, the Supreme Court of New Mexico recognized the unique nature of these associations and departed from its long tradition of imposing uniform state laws on them.[157] The court held that neither New Mexico irrigation district law nor the constitutional guarantee of equal protection requires that acequia organizations allocate voting rights in proportion to land ownership.[158] As long as the voting class is comprised of water right owners, a ditch may choose between proportional voting, or one person, one vote systems.[159]

This small but significant case is an example of the increasing willingness of courts to find that local resource management initiatives are not preempted by state law. Biodiversity protection is partly responsible for this trend. Professor Daniel Rodriguez has written, "[w]here the issue is ecosystem management, the case for field preemption is not strong . . . . That ecosystem issues raise matters of statewide concern need not mean these same issues are not simultaneously matters of local concern."[160] Western water cases are starting to re-evaluate the traditional preference for exclusive state control. For example, California has long refused to enact statewide ground water extraction regulation. The state's conscious refusal to regulate

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154. *See generally* STANLEY CRAWFORD, MAYORDOMO (1987) (covering an acequia in New Mexico for one year); RIVERA, *supra* note 148.

155. *See* Snow v. Abalos, 140 P. 1044, 1048-49 (N.M. 1914).

156. *See* WATER TRANSFERS IN THE WEST, *supra* note 32, at 174.

157. *See* Wilson v. Denver, 961 P.2d 153, 160 (N.M. 1998).

158. *See id.* at 162.

159. *See id.* at 166.

160. Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745, 767 (1997).

has opened the door to counties that want to control the export of ground water. Potential exporters challenged these ordinances as outside the scope of local authority, but a California intermediate court of appeals refused to find field preemption.[161] The court upheld the power of counties to prohibit the export of groundwater because the state had not effectively occupied the field of ground water regulation.[162] A Colorado court reached a similar conclusion construing the ambiguous delegation of land use authority to local governments.[163] Colorado has long sanctioned the export of water from the western to the eastern slope of the Rocky Mountains, but it has begun to grant western slope counties more say in the diversions as these counties have gained population and developed major tourist economies. Legislation allows counties to designate activities, such as transbasin diversion, a matter of state interest, and to develop permitting procedures for these activities.[164] A western slope county did so and denied a permit for a transbasin diversion because the diversion structure would impair a wetland.[165] The water right holder argued that state water law preempted the local regulation, but the state court of appeals held that an entitlement to divert water "should not be understood to carry with it absolute rights to build any diversion project."[166]

These cases do not provide a rationale for local exemption from national or state mandates and they show that public interest review, when it is practiced, is still almost exclusively confined to the protection of environmental values and perhaps historical minorities. The broader impacts of financially viable projects, including cultural change, which do not cause immediate adverse environmental impacts remain difficult to review under the public interest standard. A recent Nevada Supreme Court decision illustrates the limits of public interest review.[167] The State Engineer of Nevada approved an inter-basin groundwater transfer to augment the water supply for the greater Reno area over the objections of the Pyramid Lake Indian Tribe.[168] The Tribe argued that the court should follow Idaho law and find that the State Engineer did not adequately evaluate alternative sources of water.[169] Specifically, the Tribe, the federal government, the local water

161. *See* Baldwin v. County of Tehema, 36 Cal. Rptr. 2d 886, 891-92 (Cal. Ct. App. 1994).

162. *See id.* at 176-81.

163. *See* Colorado Springs v. Board of County Comm'rs, 895 P.2d 1105, 1116 (Colo. Ct. App. 1994).

164. *See* COLO. REV. STAT. ANN. § 24-65.1-501 (West 1998).

165. *See Colorado Springs*, 895 P.2d at 1110.

166. *Id.* at 1116.

167. *See* Pyramid Lake Paiute Tribe of Indians v. Washoe County, 918 P.2d 697, 700-02 (Nev. 1996).

168. *See id.* at 698.

169. *See id.* at 700.

utility and the state were in the process of negotiating a new operating agreement for the Truckee River, Reno's principal source of supply.[170] However, the court held that "we can find no indication that Nevada's legislature intended that the State Engineer determine public policy in Nevada by incorporating another state's statutes and vesting the state with authority to reevaluate the political and economic decisions made by local government."[171] Two justices dissented because the State Engineer failed to reply to statutes and cases from other states in defining the public interest and did not make sufficient findings, especially with regard to environmental impacts, to support his "bald" finding that the transfer was in the public interest.[172] In addition, they argued that the failure to consider alternatives "is not consistent with the exercise of his functions as the trustee of the water resources in Nevada . . . ."[173]

D. The Downside of Culture Rights: Humans as Museum Exhibits

There is a great debate about the nature and scope of Indian water rights which goes to the heart of the issue of their use as a model for at-risk community cultural claims. Are Indian water rights cultural rights or proprietary rights given tribes as partial reparations for the sins of the nineteenth century? The ability of tribes to define the scope of the right, and thus chart its future destiny, and the uses to which it may be put turns on the answer to this question. The reparations theory would allow Indian tribes full use of the resource. The conventional answer is that Indian water rights are property rights, but rights that are subject to cultural limitations on the exercise of these rights. Originally, in *Winters v. United States*,[174] rights were recognized primarily to complete the process of destroying Indian culture by assimilating the survivors of the removal era into civilized Christian society.[175] The rights were defined in the terms of the dominant culture and were intended to encourage Indian participation in White society. Today, Tribes also claim water rights to cope with the challenge of solving "twentieth century problems with the tools of our shared civilization."[176]

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170. *See id.* at 698. The operating agreement negotiations are mandated by the 1990 Truckee-Carson Settlement Act. *See* E. Leif Reid, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145, 170 (1995).

171. *Pyramid Lake Paiute Tribe*, 918 P.2d at 700.

172. *See id.* at 704-06 (Springer, J., dissenting).

173. *Id.* at 709 (Springer, J., dissenting).

174. 207 U.S. 564 (1908).

175. *See id.*

176. BORDEWICH, *supra* note 95, at 343.

Thus, tribes both claim the right to market water and to support traditional lifestyles like fishing which has led tribes to make instream and fisheries claims.

The tension between the romantic and dynamic definitions of culture manifests itself in the long-running debate about the transferability and scope of use of these rights. Tribes assert the ability to use their water in the same manner as their non-Indian neighbors, but many westerners have asserted that Indian water rights are geographically and use limited.[177] To many Indians and non-Indians, tribal water marketing is necessary to allow them to obtain some benefit from the *Winters* doctrine. However, many westerners feel *Winters* rights are strictly limited to their original purpose. Thus, they are limited within the boundaries of the reservation and to agricultural use in order to limit the amount that can actually be claimed and to avoid disruption to non-Indians.

The argument that Indian water rights are culturally limited comes from two sources. First, the argument is that if these rights are aboriginal rights, as they have been described by the Supreme Court,[178] then by definition they are limited to aboriginal practices. As the Supreme Court of Canada put it: "Aboriginal rights cannot . . . be defined on the basis of the philosophical precepts of the liberal enlightenment. . . . They arise from the fact that aboriginal people are aboriginal."[179] This "anthropological" argument has support in precedents from Canada, New Zealand and the United States. The Supreme Court of Canada has held that an Indian could be prosecuted for selling fish without a license because aboriginal rights were limited to customs that were "a central and significant part of the society's distinctive culture."[180] The Court found that customary fishing practices allowed ceremonial use and family/kin exchanges, but did not extend to the exchange of fish for money.[181] Justice L'Heureux-Dubé defined aboriginal title as a "sui generis proprietary interest which gives native people the right to occupy and use the land at their own discretion."[182] A similar result was reached in New Zealand.[183]

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177. For a good summary of the issues see RICKY SHEPHERD TORREY, WESTERN STATES WATER COUNCIL, TRIBAL WATER MARKETING (1996).

178. *See* United States v. Santa Fe Pacific R.R., 314 U.S. 339, 346-47 (1941) (holding that the United States may sue to claim that aboriginal title claims based on time immemorial usage had not been extinguished by various actions creating a reservation).

179. Van der Peet v. The Queen [1996] S.C.R. 507, 534.

180. *Id.* at 553.

181. *See id.* at 568-69.

182. *Id.* at 578 (L'Heureux-Dubé, J., dissenting).

183. *See* Ngai Tahu Maori Trust Bd. v. Director-General of Conservation [1995] 3 N.Z.L.R. 553.

The second argument derives from the specific historical context in which *Winters* was decided. *Winters* was decided at the height of the assimilation era in federal Indian policy[184] and articulated a highly paternalistic rationale for the right. Indians need water rights to irrigate their reservations so that they can transform themselves from a nomadic to pastoral people and ultimately become Christian farmers on an equal footing with the non-Indian settlements around their remnant reservations. Thus, western states have long read *Winters* as creating only on-reservation rights for agricultural use.[185] Under this reading, Winters rights may not be transferred to non-Indians for off-reservation use. This limited reading of the case is contested by tribes and proponents of Indian sovereignty and development. Their counter-argument, of course, is that tribes should be free to define the future of the reservation and the tribe under their sovereign powers.

Tribes probably must obtain congressional consent to transfer their water rights. The power to lease to non-Indians, although contested, is much clearer,[186] but the issue has increasingly been resolved in Congress rather than the courts. Tribal water rights settlements recognize the right of specific tribes to lease their water rights subject to conditions, but there is no uniform resolution of the issue. For example, the Ute Water Rights Settlement allows off-reservation transfers, but the *Winters* rights must be converted to state rights.[187] The San Carlos Apache Water Rights Settlement reallocates a large block of the Central Arizona Project water to the Tribe and authorizes the lease of this water to cities and counties in the greater Phoenix area.[188] In contrast, the Fort Hall settlement restricts the Tribe to use within the reservation except for water stored in two reservoirs.[189] The broader point is that group property rights carry more potential limits than individual ones, so one must be very cautious about the use of this model outside of the tribal context.

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184. *See generally* BRIAN W. DIPPIE, THE VANISHING AMERICAN (1982) (providing an excellent history of the ideas that produced this misguided policy).

185. This argument has been used to deny tribal instream rights. *See In re* General Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 90-92 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989).

186. *But see id.* at 83-84.

187. *See* Pub. L. No. 102-575, § 503(d), 106 Stat. 4600, 4652-53 (1992).

188. *See* Pub. L. No. 102-575, § 3706(b), 106 Stat. 4600, 4745-46 (1992).

189. *See* Pub. L. No. 101-618, 104 Stat. 3289 (1990); *see also* ELIZABETH CHECCHIO & BONNIE G. COLBY, UNIVERSITY OF ARIZONA WATER RESOURCES CENTER, INDIAN WATER RIGHTS: NEGOTIATING THE FUTURE 61-62 (1993).

V. A WAY HOME

At-risk communities are not constitutionally protected cultural minorities and are unlikely to separate themselves sufficiently from the dominant culture to merit protection as perfectionist or other new and distinctive counter-assimilationist groups. The best option available for at-risk communities is to preserve their historic cultural identity and resource base by using private sharing arrangements to participate in efforts to re-envision the Western landscape. This will require the creation of new environmentally sustainable property regimes that have elements of common property regimes but stop short of true group rights. Indian water rights are not a perfect model for at-risk communities, but they suggest an essential principle that must be the foundation of any recognition of the cultural claims of at-risk communities. The price for cultural preservation is the acceptance of some restrictions on the place of use and the transferability of resources. The major virtue of Indian water rights is that they are a place-based property rights regime. They are limited in purpose and are difficult to alienate.

Two new and related developments are occurring in the West. One is abstract and the other is concrete and each helps define the other. On the abstract level, the Western landscape is being re-envisioned. In the past this has been done to exploit the landscape; however we are now trying to learn from past mistakes to strike a more harmonious balance between human use and natural function.[190] The effort is primarily driven by environmental efforts to restore degraded landscapes to some level between pre-human intervention and the present or to manage large, relatively undegraded landscapes as ecosystems. At-risk communities often bitterly oppose these efforts because they are inconsistent with continued commodity production. However, at base, both the claims of at-risk communities and the drive toward bioregional or ecosystem management seeks to maintain current baselines against rapid and uncontrolled change. On the concrete level, many communities are coming to realize that the continued enjoyment of land and water property rights without regard to the impacts of this exercise on the large landscape is self-defeating. In the process of trying to develop long sustainability strategies that make economic and environmental sense,[191]

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190. One of the major themes of modern environmental history is that human settlers have always imagined the landscape in the process of manipulating it. *See, e.g.*, ELLIOTT WEST, THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, AND THE RUSH TO COLORADO xx (1998).

191. For example, the Sonoran Institute's gateway partnership program for rapidly changing small, western towns helps these communities develop effective strategies to preserve local economies while promoting sustainable tourism and development. *See* Luther Propst et al., *Meeting*

many communities are creating hybrid or quasi-common regimes in which individual entitlements are retained but control is more widely shared than in the past.

The communal resource sharing tradition based on the separation of the right to unlimited exploitation from the ownership of the resource is being reinvented in the new West. Land is being "recommunitized," and there is no reason that water rights owners could not pool their water rights to achieve the same result. Modern land use law "has more to do . . . with . . . 'communal aesthetics' than it has to do with harm prevention,"[192] and this insight informs both public regulation and private ordering. The market can promote the preservation of a communal landscape and the culture that grew from it through the use of servitudes. Servitudes would permit the control and use of land to be shared by two or more parties and sever the right to develop from the right to use the property. Land trusts and other land conservation transfers are an example of the new communitization of property. Many areas of the west have turned to land conservation trusts to preserve the traditional landscape. There are many options available to a landowner who decides to donate or sell land for the purpose of maintaining the status quo.[193] Individual owners transfer the development rights, in the form of a conservation easement or fee simple title to a trust. In the first case, the owners and their successors in interest continue to use the land as restricted; in the second case, the land can be managed by the trust, resold subject to restrictions or sold to raise cash for other land acquisitions. More generally, these land trusts reflect a desire to integrate public and private land use into biodiversity conservation. Transferable development rights (TDRs) can also be used to balance development and preservation of the status quo.[194]

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the Challenge of Change in Western Communities, 18 J. LAND, RESOURCES, & ENVTL. L. 63, 69-70 (1998).

192. Georgette C. Poindexter, *Light, Air or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 447 (1998).

193. *See* Itzchak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options*, 23 ENVTL. L. 185, 188-201 (1993).

194. TDRs separate the right to develop from ownership of a specific tract and allow the development increment of ownership to be transferred for use on another parcel. In return for a restriction on environmentally sensitive lands, for example, the development increment may be used on other land in the area. State TDR schemes are in existence, but doubts about the constitutionality of the concept remain. The Supreme Court appeared to hold that TDRs were a constitutionally adequate just compensation substitute in the 1970s. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); Fred H. French Investing Co. v. City of New York, 350 N.E.2d 381, 387-88 (N.Y. 1976), *cert. denied*, 429 U.S. 990 (1976). However, at least three members of the current Court seem to have rejected this reasoning. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 749-50 (1997) (Scalia, J., concurring).

Water trusts could be created to achieve the same purposes. Water entitlements could be pooled in an entity. In return each right holder would receive a perpetual entitlement to receive a fixed supply. The rights could either be held by a trust or in common among the rights holders.[195] Existing users would be able to enjoy their entitlements—subject to the usual risks—but would be able to take the water rights out of the market. TDR schemes have not been applied to consumptive water rights because the full development potential of the right has already been applied to beneficial use; however, they could be used to shield unappropriated water from use outside the watershed or to protect the waste assimilative capacity of streams and aquifers.[196]

VI. CONCLUSION

The basic argument of this article is that at-risk communities have a legitimate basis to be protected from markets that threaten to destroy a unique culture. Although these communities are not conventional religious groups or aboriginals subject to a high risk of oppression by the dominant culture, recent developments in post-modern legal and cultural theory makes these claims more plausible than one might initially suspect because they posit that culture is a contingent and evolving construct. Few communities would neither self-identify with the surrounding conventional minority cultures—Native American and Hispanic—which they once oppressed, nor assume the non-exclusive group rights which these minorities "enjoy." However, at-risk communities are both rhetorically and practically exploring ways to claim the perceived benefit of Native American Tribes—resource inalienability and the recognition of group cultural practices as a legitimate component of property rights. The initial effort often ranges from the comic to the ineffective, but as the convergence between the "preservation" efforts of at-risk communities and the efforts of environmentalists to define and maintain an ecological baseline in the non-urban West becomes clear, the cultural claims of at-risk communities will take on a greater legitimacy. These communities must be factored into efforts to re-envision the western landscape and the legal institutions that will develop to manage and sustain this vision.

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195. A private pooling arrangement would have to include a covenant not to partition. The arrangement is similar to concurrent estate property held in a homeowner's association, and non-partition covenants have been upheld as reasonable restraints on alienation.

196. *See* Ann Louise Strong, *Transfer of Development Rights to Protect Water Resources*, LAND USE L. & ZONING DIG., Sept., 1998, at 3.