
A comparative approach to Indigenous legal rights to freshwater: Key lessons for Australia from the United States, Canada and New Zealand

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This article compares Indigenous legal rights to water across four countries: the United States, Canada, New Zealand and Australia. Through this comparison, it identifies gaps in how the legal system in Australia accounts for the range of interests that Indigenous people have in water – from customary through to commercial. The law in relation to three main areas is considered: native title rights, commercial rights, and management rights. This article discusses how, in each of these countries, Indigenous water rights that relate to native title have been limited to rights that are customary in nature. The article further looks at how this narrow conceptualisation restricts the content and scope of Indigenous water rights, and effectively limits not only the ability of Indigenous people to develop resources for economic purposes but also to manage water in such a way that exercises traditional responsibilities and provides for future generations. A comparison of Indigenous legal rights to water in Australia vis-à-vis other countries nations identifies how the Australian government can better account for the full spectrum of water interests held by Indigenous people across the country.

INTRODUCTION

It has been suggested that sustainable solutions to the world's water problems will only be reached if decisions made are based on "a deep understanding of how culture affects, and is affected by, the myriad interactions between people and water".¹ This argument is largely accepted in the new integrated water resources management approaches, which are emerging internationally, that recognise the need to better account for the full spectrum of interests in water. In settled countries, such as Australia, New Zealand, Canada and the United States, this means that governments must address the range of values and interests held by Indigenous² populations, as well as other interests, in the water resources of these countries. However, the connections that Indigenous people have to water remain significantly overlooked within water management systems globally.³

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¹ Division of Water Sciences, *Water and Cultural Diversity: Towards Sustainability of Water Resources and Cultures* (UNESCO-IHP, 2008).

² This article recognises the distinct cultural identity of the peoples discussed. However, it adopts the term "Indigenous people" in reference to their shared collective identity at an international level. Indigenous people refers to those who inhabited a country at a time when people from other cultures or ethnic origins arrived and these new arrivals later became dominant through conquest, occupation, settlement and other means; these Indigenous peoples have retained their social, cultural, economic and political characteristics that are distinct from other segments of the population within their respective countries: Office of the High Commissioner for Human Rights, *The Rights of Indigenous Peoples* (Fact Sheet No 9 (Rev 1), United Nations, 1997), <http://www.ohchr.org/documents/publications/factsheet9rev.1en.pdf> viewed 16 June 2010.

³ Durette M, Nesus C, Nesus G and Barcham M, *Maori Perspectives on Water Allocation* (Ministry for the Environment, NZ Government, 2009), <http://www.qualityplanning.org.nz/pubs/Maori-Perspectives-on-Water-Allocation.pdf> viewed 16 June 2010; National Water Commission, *Australian Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (Australian Government, 2009).

One of the reasons Indigenous water interests have not been accounted for is that Indigenous rights to water remain generally unarticulated by legal systems worldwide. Instead, in countries such as Australia and New Zealand, Indigenous water interests are being advanced at the national level through the work of key groups and various government initiatives. However, the current position of Indigenous people vis-à-vis their water resources remains largely a result of how the legal system has interpreted and articulated Indigenous natural resource rights.

In order to better understand the present position of Indigenous people in Australia, this article reviews the current status of legal rights⁴ to water for Indigenous people in Australia in comparison with three other countries: the United States, Canada and New Zealand. The law in relation to three main areas⁵ is considered: native title rights,⁶ commercial rights, and management rights. Since Indigenous water rights is an emerging area of law, this article in many instances makes suggestions for how the law may develop based on other related areas of law, such as natural resource management and constitutional law. As will be demonstrated in the sections that follow, in each of the four countries Indigenous water rights that accompany native title have been limited to rights that are customary in nature. This narrow conceptualisation restricts the content and scope of Indigenous water rights, and effectively limits the ability of Indigenous people to develop resources for economic purposes but also to manage water in such a way that exercises traditional responsibilities and provides for future generations.

In the 2008 Native Title Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner it was noted that Australian law and policy does not adequately recognise Indigenous rights in water. In comparing Indigenous legal rights to water across these four countries, this article identifies gaps in how the legal system in Australia accounts for the range of interests that Indigenous people have in water – from customary through to commercial. A comparison of Indigenous legal rights to water in Australia vis-à-vis other countries identifies how the Australian government can better account for the full spectrum of water interests held by Indigenous people across the country.

This article first provides a brief and general outline of Indigenous water rights in relation to the three main areas of law. The following three sections discuss in greater depth how the law in relation to Indigenous water rights has developed in each of the three areas: native title rights, commercial rights, and management rights. Each of these three sections provides a short summary of the Australian situation as compared to the three other countries. The final section expands on the key lessons for Australia in relation to Indigenous water rights and discusses pathways forward for the Australian government in accounting for Indigenous interests in water.

WATER RIGHTS GENERALLY

In settled countries, the early statutes on natural resources that followed with European settlement were heavily influenced by a concerted effort on the part of governments to lay legal claim to the resources that were once freely governed by Indigenous people.⁷ As a result, in most jurisdictions, the statutory regimes now explicitly or effectively vest ownership of water in the Crown. Indigenous interests in water now compete against other “water rights” as construed by the legal systems in these

⁴ Water, as considered in this article, refers to the freshwater that sits on and under the land, including rivers, lakes, waterholes, springs, creeks, and groundwater: Aboriginal and Torres Strait Islander Commission (ATSIC), *Onshore: Water Rights Discussion Booklet* (Lingiari Foundation, 2002).

⁵ This distinction between the three areas is arbitrary and inexact since both commercial and management rights are often linked to holding title over the land. However, this article makes this distinction for ease of discussion that is based around three areas of particular concern to Indigenous people worldwide, these being the content of native title and rights that flow from it, commercial interests in natural resources, and the state of the environment and ability to exercise traditional responsibility for natural resources.

⁶ The doctrine of “native title” is known by various names in each of the four jurisdictions in this article. For consistency, this article utilises the term “native title”, which is most commonly used in Australia, for all jurisdictions. In the United States, “Indian title” is commonly used, in Canada, the term “Aboriginal title” is commonly used, and in New Zealand both “Maori customary title” and “Aboriginal title” are commonly used.

⁷ Kahn B, “The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience” (1999) 35 *Stanford Journal of International Law* 49.

countries. The notion of water rights generally encompasses a wide class of rights under the law. Water rights can be defined as the legal authority to take water from a water body and to retain the benefits of its use.⁸ The right to take and use water comes in various forms including licences, concessions, permits, access, and allocations. Additional rights include access, exclusion, alienation, and management of the resource. Indigenous people who are landowners will have access to these rights as any other landowner. However, where native title has been established, Indigenous people will have additional water rights.

There are a suit of rights in water that are uniquely tied to native title, and the content and scope of these rights varies in each of the four countries. These rights may include rights of usage, access and exclusion; in some countries, there will be a priority for these rights as against other users in a system. The content and scope of Indigenous water rights that flow from native title is again limited by systems set up by governments and do not usually reflect Indigenous relationships to water. For example, as noted by Getches, in the United States the entire water rights doctrine is based not on Indigenous values but on federal purposes and policies: “traditional Indian culture surely needed water; yet legal rights to water are tied to fulfillment of national policy goals and not to cultural protection”.⁹

Indigenous people who hold native title will also have certain rights of development for their land and water. Given the increasing usage of market mechanisms in water management globally, it is essential that Indigenous commercial rights in water are clarified. The position of Indigenous interests in these markets is yet to be considered by the courts in any of these four countries, and presently it remains uncertain as to whether Indigenous people have commercial rights in water that would enable them to participate in these markets. For Indigenous people, market mechanisms raise concerns around water ownership, as most Indigenous people would dispute the ability of governments to own and deal with water within these markets. There are also major concerns as to the inequities associated with market mechanisms, both in relation to inequities between Indigenous groups in the same country but at different stages of development and with different access to resources, and between Indigenous people and industry.¹⁰ For those groups currently going through settlement processes, the fact that water could pass out of the government’s hands through these market mechanism before settlements are finalised means that these groups face the prospect of not being able to claim water in their settlements. Market mechanisms also conflict with Indigenous ways of managing water, and raise concerns around the trading of water from one system to others and the impact on the ability of Indigenous people to manage freshwater locally.

For Indigenous people, the right to participate in the preservation of water resources for future generations is also extremely important. In settled countries, the control of water and water resources has traditionally vested in governments. Only recently has there been a growing trend towards management approaches that incorporate both western science and Indigenous knowledge.¹¹ In some countries, these management structures have a strong legal basis in statutory regimes that oblige governments to engage Indigenous people on natural resource management. However, as will be demonstrated in this article, whether or not Indigenous people are involved in water management is still largely a matter of discretion on the part of governments.

⁸ Productivity Commission, *Water Rights Arrangements in Australia and Overseas, Commission Research Paper* (Australian Government, 2003).

⁹ Getches D, “Defending Indigenous Water Rights with the Laws of a Dominant Culture: The Case of the United States” in Roth D, Boelens R and Zwartveen M (eds), *Liquid Relations: Contested Water Rights and Legal Complexity* (Rutgers University Press, 2005) p 63.

¹⁰ Durette et al, n 3.

¹¹ Morrison J, “Caring for Country” in Altman J and Hinkson M (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007).

NATIVE TITLE AND OTHER SOURCES OF WATER RIGHTS

United States

Jurisprudence on water in the United States has not focused so much on whether or not Indigenous people have title to water but rather the scope of their water rights. The law around Indigenous water rights has developed largely in response to early government policies promoting settlement and self-sufficiency of Indigenous people on reservations. Around the 1850s, the government began setting aside large tracts of land known as reservations for the exclusive use and occupation of Indigenous people. Both reservation lands and water are held in trust for Indigenous people.

In the United States, native title confers significant water rights; however, these rights are dependent on the treaty that created the reservation. For instance, in the case of *Montana v United States* 450 US 544 (1981), a tribe claimed ownership of the riverbed as a means of asserting the right to enforce its fishing regulations against non-Indigenous people living on reserve lands. The court ruled in favour of the federal government, which claimed title to the land as a fiduciary for the tribe, and held that the presumption under the common law is that the ownership of water vests in the Crown unless the treaty clearly indicates an intent to transfer beneficial ownership of waters to the tribe. Once native title is established, it is a property interest that nearly amounts to the fee simple ownership of land under the common law. In the Supreme Court case of *Mitchel v United States* 34 US (9 Peters) 711 (1835) at [746], it was held that native title was “as sacred as the fee simple of the whites”. Furthermore, the court noted that the rights to exclusive enjoyment in their own way and for their own purposes were to be respected until they gave them up.

The “Winters doctrine”, or the reserved rights doctrine, set out in the 1908 case of *Winters v United States* 373 US 546 (1908), is often the starting point for the judiciary when considering the content of water rights. This well-known legal precedent relates back to the early government policies of land settlement and the creation of self-sufficient reservations. According to this doctrine, when reservations were established in the early history of the United States, certain rights were reserved for Indigenous Americans with the purpose of allowing them to become self-sufficient communities. Therefore, the establishment of a reservation results in an implied reserved right to take a sufficient amount of water to fulfil the purpose of reserving the land for the Indigenous group. For instance, if, in establishing the reservation, the government had divided the land into individual plots for agriculture, under the Winters doctrine the reservation would be entitled to sufficient water for agricultural purposes but also to promote the economic value and development of the reservation more generally. Where the reserve was created for agricultural purposes, the approach of the judiciary has been to base their calculations on the reservation’s “practicably irrigable acreage”.¹²

The Winters doctrine has since been expanded by the courts to confer priority of Indigenous water rights against other users. For at least 50 years following the *Winters* decision, the government continued development of the western States with minimal regard to Indigenous water rights, including the building of dams and large irrigation projects.¹³ A change in government policy would come in 1963 when the Supreme Court revived the Winters doctrine in *Arizona v California* 207 US 564 (1963). This case involved the allocation of the flow of the Colorado River, as it was divided among three States and the five tribes who used the water for irrigation. The Supreme Court, relying on the Winters doctrine, sent a clear message that Indigenous water rights attached to reserves were superior to other water rights and ruled that the tribes were entitled to 900,000 acre-feet of water annually based on the volume of water that would be required to irrigate the reservations. As recently as 2005, the Winters doctrine was still evolving as the court extended it to apply to groundwater rights in the case of *United States and Lummi Indian Nation v Ecology* 375 F Supp 2d 1070 (2005).

Federal treaties provide an additional source of water rights. The courts liberally interpret treaties to find that natural resources, including the rights of development in them, were impliedly retained by

¹² Getches, n 9.

¹³ Burton L, *American Indian Water Rights and the Limits of Law* (University Press, 1991).

Indigenous people in the treaties and agreements that set aside land for reservations.¹⁴ A related and well-established rule of interpretation, in both the United States and Canada, which benefits Indigenous tribes making claims to natural resources, is that any ambiguity in the treaty must be interpreted in favour of the tribe. This rule was articulated in the early case of *United States v Winans* 198 US 371 (1905), where the court found that all rights to develop resources that had not been explicitly surrendered by the tribe in the treaty or agreements should be considered as having been retained by them.

While the Winters doctrine provides a guarantee of a specific quantity of water, there are mixed opinions as to whether these rights extend to protection of water quality. Royster has suggested that if the purpose of a reservation requires a certain quality of water, eg to support fishing, then the Winters doctrine should also protect a right to water quality.¹⁵ In *United States v Gila Valley Irrigation Dist* 804 F Supp 1 (D Ariz) (1992), the court declined to rule on water quality but determined that water flows high in salt did not satisfy a downstream tribe's right to natural flow of the river and the tribe was able to prevent the upstream non-Indigenous users of the water from diverting the flow of the river for irrigation. In recent years, tribes have also begun to assert rights to water quality under the provisions in the federal *Clean Water Act 1972* (US) (86 Stat 816) that require States to notify tribes as downstream users before issuing discharge permits. The tribe may provide written recommendations obliging the State to either accept or explain its rejection, and there is further redress in a veto power for the tribe. While the law in this area is still developing, there is some indication that the water rights of Indigenous people in the United States also extend to a right to quality.

Canada

First Nation water rights in Canada derive from three main sources: native title, the treaties which established reservations, and riparian rights from occupation of lands adjoining a body of water. Rights flowing from these three sources enjoy priority under the law as against other potential water users. However, ownership of water is not legally possible in Canada and, at most, native title rights imply rights of occupation and use.¹⁶ In addition to these three sources of water rights, modern treaty settlements in Canada provide an opportunity for the negotiation of water rights for communities that may address any limitations imposed by the common law.

Native title is recognised as an inherent right deriving from the existence of Indigenous people in Canada since time immemorial. The Supreme Court has defined native title as "a legal right derived from the Indians' historic occupation and possession of their tribal lands"¹⁷ that includes the right to enjoy both the fruits of the land and water equally. These inherent rights are recognised as an integral part of Indigenous life that must be protected. While the decisions of Canadian courts pre-1997 tended to limit the concept of native title to customary title, the leading case of *Delgamuukw v British Columbia* [1997] 3 SCR 1010 would create significant change in Canadian native title law.

The *Delgamuukw* case was the Supreme Court's most liberal interpretation of native title rights in Canada up to that point. The Supreme Court rejected the argument that native title was restricted to traditional uses of the land, and recognised it as an interest of land in a class of its own. Therefore, native title does not equate with fee simple ownership, nor can it be discussed with reference to traditional property law concepts. Rather, it was recognised that native title is unique in that it derives from prior occupation and pre-existing systems of law, whereas other land titles derive from Crown grants. On the content of native title, the Supreme Court held that it encompasses the right to exclusive use and occupation of the land for a variety of purposes, which need not be traditional uses. This exclusivity confers priority over other groups not holding title and a right to determine the use they will make of the land. The court specified that the exclusivity confers even greater protection against government intrusion than other landholders because Indigenous property rights are enshrined

¹⁴ Burton, n 13.

¹⁵ Royster J, "A Primer on Indian Water Rights: More Questions than Answers" (1994) 30 *Tulsa Law Journal* 61.

¹⁶ Notzke C, *Aboriginal Peoples and Natural Resources in Canada* (Captus University, 1994).

¹⁷ See *R v Guerin* [1985] 1 CNLR 120 (SCC) at [132].

in the *Constitution Act 1867* (Canada), whereas the property rights of other landholders are not. While *Delgamuukw* is yet to be applied to a claim involving water, a strong argument could be made for exclusive native title rights to water because native title includes the right to enjoy the fruits of both land and water equally.

Another main source of water rights in Canada are the treaties that were entered into on the settlement of the country. As the country was settled, First Nations were treated as self-governing, which meant that the only way Britain could assert title over lands and waters was if they were first surrendered to the Crown through treaties or agreements.¹⁸ As demand for land increased, the Crown pressed for treaties in which First Nations surrendered a significant portion of their rights in both lands and waters. Through these treaties the Crown acquired title to land, lakes and rivers with certain rights for First Nations left in place. As in the case of other settled countries, the views of the First Nation signatories to these treaties as to what rights they were surrendering differed from the views of the British. Treaty rights are now constitutionally protected in Canada, which means that their rights have priority against other non-constitutional rights and the judiciary must interpret any ambiguity in favour of Indigenous claimants in light of the Crown's fiduciary role. In the interpretation of the treaties, the Canadian judiciary is also influenced by the *Winters case* from the United States, which, if applied in Canada, means that even if treaties do not expressly refer to water rights it is reasonable to infer that they were intended to guarantee tribal groups at least sufficient water for the development of their reserved lands.¹⁹

Given that many First Nation reservations were created on the banks and shores of specified bodies of water, riparian rights can further endow First Nation communities with significant powers.²⁰ Riparian rights constrain upstream users, including commercial and industrial uses, from disturbing the flow or quality for users downstream. In some provinces, First Nation reservations own the water bed as riparian owners, and are empowered under the *Indian Act* RS 1985, c I-5 to make bylaws and thereby may require the government to apply to the First Nation community for authorisation of any major projects on the water course.²¹

While some water disputes may begin in the courts, First Nation communities have been able to negotiate significant water rights in settlements and modern treaties. One of the most well-known cases in this regard is the "Oldman River case". The court case, known as *Piikani First Nation v Alberta*,²² involved a river on which there was a substantial dam project and over which there had been many previous conflicts in relation to water ownership. Before the court could rule on the issue, the First Nation and both federal and provincial governments negotiated a settlement that included C\$64 million, the right to reasonable quantities of water to meet present and future needs, and the right to participate in the project through decisions and employment opportunities. These settlements are useful in finalising disputes to water in Canada, as ownership of water might still vest in the government but First Nations are transferred many incidents of ownership allowing them significant control, and in some cases commercial rights, over the water.

Finally, the modern treaty process in Canada also provides opportunities for First Nations to negotiate water rights. In most of Canada, treaties were signed when Europeans settled in the country; however, in many areas of British Columbia treaties were not signed and modern treaties are an important part of strengthening First Nation communities in that province. These treaties provide increased certainty for lands and resource access as well as a more secure climate for investment and economic development. The Nisga'a Treaty was the first modern treaty concluded in British Columbia. It is an agreement between the Nisga'a Nation, the government of British Columbia, and

¹⁸ Kempton K, *Bridge Over Troubled Waters: Canadian Law on Aboriginal and Treaty "Water" Rights, and the Great Lakes Annex* (unpublished paper, Olthuis Kleer Townshend, 2005), <http://www.chiefs-of-ontario.org/PageContent/Default.aspx?SectionHeadlineID=126> viewed 16 June 2010

¹⁹ Bartlett R, "Hydroelectric Power and Indian Water Rights on the Prairies" (1989) 14(2) *Prairie Forum* 177.

²⁰ Notzke, n 16.

²¹ Notzke, n 16.

²² This case settled out of court in 2002.

the Canadian federal government.²³ The *Nisga'a Final Agreement Act* SBC 1999, c 2 transfers to the Nisga'a Nation significant control of water resources including nearly 2,000 km² of Crown land, the creation of a Provincial Park, and the establishment of a water reservation with an annual entitlement to 300,000 cubic decameters of water that has priority over other water licence holders. The agreement also has provisions allowing for the Nisga'a Nation to explore hydropower opportunities on rivers and streams. Moreover, since the Nisga'a's interest in land amounts to fee simple ownership, they are able to use their land as security for financing development. On the whole, while the provincial government retains the full ownership of water on Nisga'a lands, the Nisga'a Treaty provides a good example of how First Nations can negotiate water rights for themselves, including rights of development.

New Zealand

Under New Zealand law, Maori can hold customary title to water, with ultimate ownership vesting in the government. The Treaty of Waitangi, signed in 1840, guaranteed Maori full, exclusive, and undisturbed possession or "te tino rangatiratanga" (chieftainship) of their lands, estates, forests, fisheries, and other properties, and their "taonga" (treasures). However, the spirit of the Treaty of Waitangi was soon forgotten after signing and the government went through considerable effort to vest ownership of water resources in itself.²⁴ Through early statutes the Crown asserted ownership of resources in New Zealand in what some commentators describe as "governmental seizures of water resource ownership rights".²⁵ Since the legal system to date has not been sympathetic to Maori interests, the resolution of claims through the modern settlement process is one of the most promising avenues through which Maori can assert their legal rights to water.

Throughout New Zealand's history the government, through the legal system, has worked to effectively vest ownership of waters in the Crown. While Maori may have believed that they had maintained ownership of resources in the Treaty of Waitangi, the common law soon ruled against them. In the 1912 case of *Tamihana Korokai v Solicitor-General* [1912] 32 NZLR 321, the court ruled that it would not enforce native title absent statutory direction and, at most, it would recognise customary native title. This area of law developed in the 20th century largely around claims to fisheries with the judiciary consistently limiting Maori rights to customary ownership and rights of use and access rather than full ownership. Customary title stems from Maori traditions and the benefits it confers are limited in comparison with other types of ownership. Customary title is subject to English freehold title rights and may in some cases be extinguished under New Zealand law. Not surprisingly then, even in the modern settlement process that started in the 1990s, the Crown maintains the view that treaty claims should focus on the use, cultural and spiritual values of natural resources rather than ownership.²⁶

The uncertainty of Maori rights in water was demonstrated in "the foreshore and seabed case"²⁷ where the court originally found that it might be possible in some instances for Maori customary title to be converted into freehold title. Fearing the ramifications of the ruling, the government legislated for government ownership of the foreshore and seabed thereby effectively preventing Maori from realising the benefits of the decision. The fact that the government might assert control over natural resources despite the rights and interests that Maori might have in those resources, leaves Maori in an uncertain position as regards their water rights.

Despite a protracted history of uncertain customary title for Maori, the recent settlement process in New Zealand is beginning to provide some redress by returning ownership of water to Maori. In the late 1980s, the government and Maori entered into a negotiation process with the goal of resolving claims outside the court system. Under these settlements, legal title to the beds of lakes and rivers may sometimes be vested in Maori. One of the most well-known agreements in this regard is Te Arawa

²³ For further detail, see: <http://www.nisgaalisims.ca/treaty-nisgaa-final-agreement> viewed 22 June 2010.

²⁴ Kahn, n 7.

²⁵ Kahn, n 7 at 69.

²⁶ Kahn, n 7.

²⁷ *Ngati Apa v Attorney-General* [2003] NZCA 117.

Lakes Settlement, which recognised the local Maori group's traditional, historical, cultural and spiritual association with the lakes of the Rotorua region. The *Te Arawa Lakes Settlement Act 2006* (NZ) transferred ownership and control of 13 lakes (but not the water contained within them) to the group and included a NZ\$10 million dollar package. The settlement also established Te Arawa Lakes Trust to manage the lakebeds on behalf of the group. This settlement demonstrates how Maori might regain significant control over water – despite the limitations contained within the common law.

However, the scope of these settlements is limited by the fact that the Crown has retained incidents of ownership in the lakes and rivers. In the settlement process, the Crown has asserted that it cannot transfer ownership of lakes and rivers as a whole in these settlements since ownership of water is not legally possible. Therefore, ownership of the lakes and rivers as it is transferred to Maori does not include ownership of the water, the animals and plants in it, or structures such as dams. Further, any existing public access or commercial rights are preserved as against what is transferred to Maori. According to Bargh, the Crown asserts that they do not own the water per se, but rather the space occupied by it.²⁸ This effectively enables the Crown to reaffirm their position that water cannot be owned, while simultaneously seeking to benefit from water as though it is owned. This means that even through the settlements, Maori still do not enjoy the full incidents of ownership.

Australia

In Australia, Indigenous rights to water are mainly defined in native title law. Where native title has been established, it is generally well accepted that customary rights of usage will be protected. The interpretation of these rights by the courts to date has been relatively conservative in that they have not been extended beyond customary rights. Moreover, it is unclear as to what extent these rights will be protected against other users. The governing statutory regime that provides for instances where Indigenous rights can be extinguished, combined with a judiciary that to date has not been sympathetic to protecting Indigenous interests or advancing their overall wellbeing, means that Indigenous water rights in Australia have been ad hoc and tenuous to date.

The starting point for Indigenous water rights in Australia is native title law. In Australia, native title was recognised for the first time in the case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58, where the High Court took a narrow approach and held that native title exists as a bundle of rights and interests and must be based on traditional laws and customs and an unbroken connection with the area in question. Building on *Mabo*, in *Commonwealth v Yarmirr* [1998] FCA 771, the first decision relating to native title over water, the High Court recognised that native title could exist over marine areas where traditional laws and customs demonstrated a connection to the land or water. Native title rights to water are generally characterised as non-exclusive rights to take, use and enjoy the water in accordance with traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs.²⁹ These include the right to hunt and fish for personal, domestic and non-commercial purposes. Significant uncertainty remains in Australian common law over the nature and extent of these water rights.

The *Native Title Act 1993* (Cth) is the key statute that sets out native title rights and their priority against other property owners. The Act reflects the common law and requires that these rights and interests are possessed under the traditional laws and customs and that the claimant group must demonstrate a connection with the land or water that confers entitlement. The Act itself creates many limits on native title and validates certain acts of the Crown as having extinguished native title.³⁰

²⁸ Bargh M, *Submission on Water Issues in Aotearoa New Zealand* (submission to Office of the High Commissioner for Human Rights, United Nations, 2007).

²⁹ See, eg *Mark Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717 where native title rights were found to be exercisable for the specific purpose of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional law of customs.

³⁰ For example, as per s 23A(2) certain previous Acts will have completely extinguished native title where they were exclusive Acts of possession (involving the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction or establishment of public works). Some future Acts, such as the grant of a mining lease or exploration licence, are also able to extinguish or suspend native title rights under the Act.

Altogether, native title cases and legislation have limited native title to water in such a way that Indigenous groups relying on this area of law to access water will face considerable difficulty.³¹

In addition to native title, Indigenous rights to water may come from State land rights legislation that gives Indigenous landholders inalienable communal title to land. The most recent water victory for Indigenous Australians under land rights legislation was the case of *Gawirrin Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425,³² where the Federal Court recognised an exclusive right to the inter-tidal zone, including a right to exclude those seeking to exercise a public right to fish or to navigate, under the *Aboriginal Land Rights Act 1976* (NT). It has been suggested that, in light of this decision, the exclusive right of Indigenous landowners under this legislation to allow entry of persons into their land may have important implications for the ability to take water from Indigenous lands.³³

The States and Territories also have their own legislation that affects Indigenous rights to water. These statutes often vest a right to take, use, manage or control water resources – commonly known as a “right of primary access” – in the Crown. For example, the *Water Act 2000* (Qld), s 19, vests in the State “all rights to the use, flow and control of all water in Queensland”. Further, s 24(1) provides that “the beds and banks of all watercourses and lakes...are, and *always have been*, the property of the State” (emphasis added). One of the most inclusive statutes recognising Indigenous water rights is the *Water Management Act 2000* (NSW). Though this statute narrowly confines Indigenous water rights to domestic and traditional purposes, it entitles native title holders to take and use water in the exercise of native title rights without the requirement of a licence or administrative approval. The legislation also allows for Indigenous cultural and commercial licences. Tan has cautioned that while conceptually native title rights have been given protection in this water legislation, in reality there is no water allocated for Indigenous interests in most water plans in New South Wales.³⁴

Key lessons for Australia

In each of these countries, native title law is the starting point for determining the content of legal rights to water for Indigenous people. For the most part, the law has been relatively silent on the issue of native title to water to date. In all four countries, the courts have interpreted native title rights generally as being mainly customary in nature, although as discussed below some courts have given a more liberal interpretation to customary rights. Another similarity across the four countries is that governments have historically taken steps so that they effectively retain control of water, vesting ownership in themselves through legislation. Therefore, the Indigenous groups in all these countries are similarly limited in their water rights in many ways.

However, there are some key variations that have resulted in significantly different outcomes for Indigenous people in these countries and particularly in Australia. One of the main differences is the willingness of the courts to give “customary” rights a liberal interpretation. In the United States and Canada, a liberal approach taken by the courts has meant that the content of water rights is likely to be greater in scope than in Australia and New Zealand. For example, in the United States native title rights in water have a legal status not unlike fee simple ownership of land under the common law and confer actual volumes of water that will have priority against other users.

Another important difference is whether or not, and to what degree, Indigenous rights in water are protected by the legal system. The water rights of Indigenous people in the United States and Canada enjoy greater protection under the law as compared to Australia and New Zealand. This is especially relevant in Canada where the rights of Indigenous people to their natural resources are protected under constitutional law. In practice, this should result in greater certainty for Indigenous water rights in that

³¹ Tan P, *A Review of the Legal Basis for Indigenous Access to Water* (an unpublished report prepared for the National Water Commission by the National Indigenous Water Planning Forum, 2009).

³² Also known as *Blue Mud Bay No 2*.

³³ Tan, n 31.

³⁴ Tan, n 31.

country than in Australia where native title legislation provides for certain situations where rights to water might be extinguished and overridden by other interests.

Finally, Canada and New Zealand stand out as an example for how modern settlements can provide a means for resolving longstanding claims to resources and increased certainty for groups to advance economically. One of the main reasons the various Indigenous groups in these countries have been able to negotiate significant resource rights is that they have historic treaties that recognise their rights to resources. However, this is not always the case, as on Canada's west coast where historically there were not any treaties and significant rights have been negotiated in the recent modern settlements. In both of these countries, Indigenous people appear to have a stronger bargaining position than Indigenous people in Australia, which has created the space for them to negotiate such settlements. These options should be explored for Australia as a means for advancing Indigenous interests in water.

COMMERCIAL WATER RIGHTS

United States

It is uncertain whether the transfer or marketing of Indigenous water rights fits with the influential Winters doctrine discussed in the previous section. As per the Winters doctrine, reservations are allocated quantities of water and in many instances do not want to, or cannot, use their total entitlement. Yet holders of water rights are constrained by an apparent contradiction that arises with the Winters doctrine when the transfer of water off-reservation is allowed. Since the Winters doctrine bases water entitlements on the purpose for which the reserve was created, opponents of Indigenous participation in a water market argue that commercially selling water was not mentioned in any treaties or agreements that created the reservation and therefore commercial sale of water was never intended as a purpose in their establishment.³⁵ The answer to the debate surrounding the water market therefore depends on the characterisation of the reserved right, specifically whether it serves to allow the use and development of reserved lands only or to promote the self-sufficiency of Indigenous people.

Babcock argues that participation in a water market furthers the overall economic position of Indigenous people, which is consistent with the setting aside of reservations to encourage self-sufficiency of Indigenous people.³⁶ This was the approach taken in *Colville Confederated Tribes v Walton* 647 F 2d 42 (1981), where the court recognised that an owner's right to transfer a reserved water right was necessary to avoid a diminishment of the treaty right and that the tribe could choose how to use the allotted water so long as the use was consistent with the general purpose of the reservation. No clear rules have been articulated around the uses to which *Winters* rights can be put, and whether or not these rights extend to commercial purposes will be decided on a case-by-case basis in the United States.

Other sources of commercial rights are the common law on natural resources and settlements. Although, as of 2005, Congress had not yet considered legislation allowing leasing of Indigenous water rights per se,³⁷ there is some indication from the common law that there is a right to engage in trade of natural resources. For example, in *Johnson v McIntosh* 21 US (8 Wheaton) 543 (1823), the court declared that Indigenous peoples "were admitted to be rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion". Similarly, in *United States v Shoshone Tribe of Indians* 304 US 111 (1938), the court held that native title confers a right of occupancy with its entire beneficial incidents even if this included the

³⁵ Burton, n 13.

³⁶ Babcock H, "Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water, Everywhere, Perhaps Some Drops for Us" (2006) 91 *Cornell Law Review* 1203.

³⁷ Getches, n 9.

commercial exploitation of minerals. Most recently, settlements provide water trading rights; however, there are strong restrictions placed on the rights in terms of location and scope.³⁸

Canada

The experience thus far in Canada suggests that there may be Indigenous commercial rights in water. The Supreme Court takes a liberal approach to Indigenous rights, and has long recognised that Indigenous rights are not frozen in their pre-contact form and that ancestral rights may find modern expression, such as having a commercial component.³⁹ This liberal approach is influenced by the common law notion of fiduciary duty that obliges the government to act in the best interests of Indigenous people. One of the aspects of the fiduciary duty is to facilitate the self-sufficiency of Indigenous people and one of the means of doing so is to assist Indigenous groups to become competitive in the market. This, therefore, suggests that First Nations would have a right to participate in water markets.

In addition to the liberal approach taken by the judiciary, Indigenous people in Canada have secured commercial water rights through modern treaties and agreements. For instance, the *Nisga'a Final Agreement Act* included provisions allocating significant amounts of water, some of which could be put towards development of hydropower. There is also an interest in economic benefits agreements where First Nations share a portion of government royalties for any project.⁴⁰ This is especially relevant to First Nations in the province of British Columbia where the government administers a consultation process for regulatory approvals that requires both government and industry to consult and accommodate First Nations and their interests.⁴¹ Given that many First Nations are increasingly taking advantage of economic opportunities, some groups will be well situated to capitalise on opportunities that arise from water markets.

New Zealand

The law as it currently stands in New Zealand limits Maori native title rights to customary usage but there is growing interest among Maori as to their rights in water, both customary and commercial in nature. In a recent survey of Maori perspectives on water allocation in New Zealand, there was a call for both customary and commercial interests to be accounted for in water allocation processes and planning.⁴²

The common law has recognised that Maori could have a commercial interest in resources where the right claimed was an integral practice, custom or tradition prior to European contact. For example, in *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370, the court dismissed charges against a Maori man for selling undersized fish on grounds that there was clear evidence, from the time of Captain Cook, that Maori traded fish amongst themselves and also traded them with early Europeans in exchange for western goods. This was enough of a historical connection to constitute a customary commercial fishing right. In the later case of *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, the Court of Appeal noted that the right of development of Indigenous rights is indeed becoming recognised in other jurisdictions, but ruled that the right should be limited in that it must be premised on some sort of historical connection. Therefore, in this case, although there may be a right of development for purposes such as tourism on the basis that Maori had acted as guides in the past, there may not be a right for development of water resources for all contemporary forms of usage. This approach was taken in *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, where the court rejected claims that native title rights extended to the right to generate electricity, instead holding that however liberally Maori customary title and treaty rights may be construed, it cannot be thought that they were ever conceived as including the

³⁸ Getches, n 9.

³⁹ See, eg *R v Sappier; R v Gray* [2006] 2 SCR 686.

⁴⁰ Kauth G, "Facing Off with First Nations" (2009) *Canadian Lawyer* 46.

⁴¹ Kauth, n 40.

⁴² Durette et al, n 3.

right to generate electricity by harnessing water power. Therefore, the common law currently recognises a limited right to develop resources for commercial purposes but there must be a clear connection to historic practices.

The recent experience with fisheries settlements in New Zealand suggests that Maori might overcome some of the limitations imposed by the common law through the negotiation of commercial rights in the modern settlement process. As discussed above, early case law suggests that commercial rights under the common law would have to be based on historical practice. Yet, when the current position of Maori in New Zealand fisheries is considered, it is arguable that their fishing rights have evolved to such an extent that any historical connection to earlier fishing practices would be broken. Through careful investments and business management, Maori presently control a significant portion of the New Zealand seafood industry, including processing and aquaculture operations.⁴³ The fact that Maori have secured substantial commercial interests in fisheries suggests they might also do the same with water. Furthermore, the governance structures and skills that have been created through the fisheries settlements mean that there are now competitive Maori organisations and communities that will be well positioned to negotiate water rights. Many of these organisations and communities are already working to advance water interests alongside managing and developing their fisheries.

Australia

Water trading is increasingly being proposed as an efficient means of reallocating water among right-holders in periods of short supply in Australia, yet the rights of Indigenous people in such a market remain uncertain. The government's most recent policy – the National Water Initiative (NWI) – identifies market mechanisms as one of the key means of water management for the country and one of NWI's objectives is the progressive removal of barriers to trade in water. Altman and Cochrane argue that to establish an efficient water market in Australia requires not only the recognition of customary rights in water, but also some consideration of innovative approaches that might accord such rights commercial (or quasi-commercial) status.⁴⁴ However, as discussed above, Indigenous water rights as recognised by the Australian legal system are purely customary in nature and are often tenuous at best as against other interests. Moreover, if native title rights as defined by the legal system are communal in nature, it remains to be seen how these could be translated into a tradable commercial commodity for a water market system.⁴⁵ Therefore, the implementation of market mechanisms creates increased uncertainty for Indigenous access to water.

Previous common law decisions have established that Indigenous people in Australia have a right to pursue their economic life and develop economically.⁴⁶ This right is especially relevant where there is historical evidence of early trade practices.⁴⁷ It follows, therefore, that Indigenous people should be encouraged and assisted to enter and participate in the commercial water market. The *Water Management Act* in New South Wales provides for the grant of specific purpose licences to be accessed by Aboriginal people or communities for either cultural or commercial purposes.⁴⁸ Despite this recognition of Indigenous interests, doubt has been expressed as to the beneficial effects of the

⁴³ It is estimated that Maori control up to 50% of the aquaculture industry: Te Puni Kokiri, *Maori me te ahanaketanga ahumoana – Maori and Aquaculture Development* (Te Puni Kokiri, 2007).

⁴⁴ Altman J and Cochrane M, *Indigenous Interests in Water: A Comment of the "Water Property Rights-Report to COAG from the Water CEOs Group" Discussion Paper* (CAEPR Topical Issue, 2003), <http://www.anu.edu.au/caepr/Publications/topical/AltmanCochranewaterrights11.pdf> viewed 16 June 2010.

⁴⁵ Altman J, "Indigenous Interests and Water Property Rights" (2004) 23 *Dialogue* 29.

⁴⁶ Morgan M, Strelein L and Weir J, *Indigenous Rights to Water in the Murray Darling Basin: In Support of the Indigenous Final Report to the Living Murray Initiative* (AIATSIS Research Discussion Paper No 14, 2004).

⁴⁷ Morgan et al, n 46.

⁴⁸ Jackson S, *Background Paper on Indigenous Participation in Water Planning and Access to Water* (a report prepared for the National Water Commission by the CSIRO, 2009).

legislative framework.⁴⁹ Moreover, a Water Trust was established through the State government to provide financial assistance for participation in water markets and water-related businesses.⁵⁰ However, the Trust has not led to any significant outcomes for Indigenous people in New South Wales.⁵¹ Similarly, under the *Cape York Peninsula Heritage Act 2007* (Qld) in Queensland, a wild river declaration or water resource plan in the Cape York Peninsula Region must provide for a reserve of water for the purpose of helping Indigenous communities in the area achieve their economic and social aspirations. In the government's second biennial assessment of national water policy, it was reported that reserves as per this legislation had been made in three wild river areas.⁵²

Key lessons for Australia

Water markets are increasingly becoming a reality within which Indigenous people have to resolve their water rights. All four countries considered in this article are entering periods of water management reform and looking to water markets as a key strategy of these reforms. In all jurisdictions the ability of Indigenous people to transfer their water rights is uncertain, though slightly less so for countries such as the United States and Canada where the right to economic development is accepted and progressed by the judiciary. Amongst the countries in which the courts apply a historical connection test when deciding on commercial rights, the recognition of the Supreme Court in Canada⁵³ that these rights may have modern expression is a significant difference from the approach taken in New Zealand and Australia. This liberal approach that recognises that Indigenous rights are not frozen in their pre-contact form and may find a modern expression, such as having a commercial component, is influenced by the common law notion of fiduciary duty that obliges the government to act in the best interests of Indigenous people that is also upheld by the Supreme Court of Canada. The courts in New Zealand and Australia have not similarly upheld this notion of the government in the role of a fiduciary.

In New Zealand, although the judiciary has historically taken a conservative position in relation to Maori rights of development, the recent experience of Maori vis-à-vis fisheries indicates that they may well secure for themselves significant water rights in a market through negotiations. Indigenous Australians, by comparison, do not have either the legal backing of the courts or precedent natural resource settlements on the same scale as these other countries. As discussed above, a few States have begun to recognise a right for Indigenous Australians to access economic development opportunities and have reflected this in water legislation and water plans. However, in the second biennial assessment of national water policy, the current approach of States to Indigenous interests in water was criticised as not enabling Indigenous people to benefit from economic development opportunities.⁵⁴

INDIGENOUS WATER MANAGEMENT

United States

The two-tier system for management and protection of water in the United States across the federal and State governments has evolved to provide significant rights for Indigenous people in relation to water management.⁵⁵ As environmental protection legislation developed in the United States, a variety of federal statutes were passed that advanced the notion of "cooperative federalism", under which the

⁴⁹ Jackson, n 48; Behrendt J and Thompson P, "The Recognition and Protection of Aboriginal Interests in New South Wales Rivers" (2004) 3 *Journal of Indigenous Policy* 37.

⁵⁰ Jackson, n 48.

⁵¹ Jackson, n 48.

⁵² National Water Commission, n 3.

⁵³ See, eg *R v Sappier; R v Gray* [2006] 2 SCR 686.

⁵⁴ National Water Commission, n 3.

⁵⁵ Burton, n 13.

federal government sets minimum standards that are then implemented by the States.⁵⁶ There is, however, within this system, recognition of a third sovereign – the Indigenous people in the United States – whose governments also have inherent rights and duties to protect and manage natural resources. In the United States legislation, common law, and modern agreements on natural resource management have affirmed the role of the third sovereign in effective management of water resources.

In the spirit of cooperative federalism, some federal statutes treat tribal groups as States for the purpose of resource management and provide a number of means through which Indigenous people are able to regulate and manage the quality of waters within their reservations. For example, the *Clean Water Act* allows “States”, including tribal groups, to implement federal programs and gives them the right to set more stringent standards than the federal laws.⁵⁷ Through the *Clean Water Act*, tribal groups are also able to regulate pollution if the source is located on the reserve and to issue permits and set limitations necessary to meet water quality standards. Where a tribal group opts not to issue permits, it may instead give input into federally-issued permits and whether these meet tribal water quality standards. There are also provisions allowing tribal groups to identify off reservation sources of pollution, such as agricultural and urban runoff, that will impact water quality and to develop best management practices to control the pollution. Thus, there is a range of programs available to tribes to participate in the management of water.

The common law also has a history of upholding the rights for tribal groups in relation to resource management. For example, in the 1985 case of *Washington v Environmental Protection Authority* 752 F 2d 1465 (9th Circuit) (1985), the court ruled against the State of Washington, which sought to enforce its environmental management programs on a reservation, and held instead that the State government must develop its program working directly with tribal groups as sovereign governments.

There is a preference to engage Indigenous people early in the water management process to avoid having to settle disputes in the courts and therefore water management initiatives that are a result of cooperation of the federal, State and tribal governments are common.⁵⁸ An example of cooperative resource management is the sharing of responsibilities between the Chippewa Ottawa Resource Authority (CORA), which represents six Michigan tribes with treaty rights in three of the Great Lakes, and the Michigan government. CORA not only operates a comprehensive program of fisheries management and enhancement, but also deals with water issues.⁵⁹ It additionally provides conservation enforcement powers in treaty waters in cooperation with government, and violators are tried in tribal courts.⁶⁰

Canada

The Constitution of Canada sets out the respective duties of the federal and provincial governments in relation to water but in reality the federal, provincial, municipal and First Nation governments share responsibility for management of water. The Department of Indian and Northern Affairs (INAC) is a federal government department that is tasked with meeting the government of Canada’s obligations and commitments to First Nations and has some responsibilities for water management. However, First Nation communities may also take on water management responsibilities under federal legislation that allows for the transfer of some powers to First Nations. Further, water management rights and responsibilities might be negotiated through the modern settlement process.

⁵⁶ Burton, n 13.

⁵⁷ See *Clean Water Act* (US), s 1377, which authorises the Indian tribe to be treated as a State under certain sections of the Act.

⁵⁸ Some tribal groups lack the financial capability or do not have a sufficiently large land base to participate in these programs.

⁵⁹ See CORA’s website for more information: <http://www.1836cora.org>.

⁶⁰ Hand J, *Protecting the World’s Largest Dody of Fresh Water: The Often Overlooked Role of Indian Tribes’ Co-management of the Great Lakes* (unpublished paper, University of Detroit Mercy, 2007), http://www.works.bepress.com/jacqueline_hand/1 viewed 16 June 2010. While ideal, in reality this type of cooperation does not always happen. For example, in recent negotiations over the management of the Great Lakes straddling United States and Canadian territory. While both countries’ governments have been involved, it has been suggested that Indigenous people’s role has been minimal to date in that it has been confined to that of “commentator”: Hand, n 60.

At the national level, INAC plays a key role in the management and development of resources in First Nation communities. In relation to water, INAC develops guidelines and codes of practice for water resource management and monitoring, acts in an advisory role to resource management boards and stakeholder groups, and undertakes applied research into emerging water issues. It plays a lead role in management of water in Canada's north where it has provincial-type responsibilities for managing waters in the Northwest Territories and Nunavut. In these two territories, INAC is responsible for the development, implementation and interpretation of all legislation and policy relating to its responsibilities for water management. INAC often works in partnership with First Nation communities, and through various programs supports the capacity development of communities to manage and develop resources.

Some First Nation communities will have the capacity to negotiate powers relating to water management on their reservations. The *First Nations Land Management Act* SC 1999, c 24 is a federal statute that allows a First Nation community and the Minister of Indian and Northern Affairs to negotiate an agreement that will give the First Nation community broader powers over land management on their reservation. The powers of the First Nation community may include the rights to collect and use revenue, to expropriate interests, and to create laws regarding conservation, protection and management of water interests. The First Nation community will be entitled to develop a Land Code based, in part, on the basic land law of that group. The legislation is an example of how power for management of resources might be transferred to First Nation communities and how the various levels of government in Canada can work cooperatively to manage water resources.

Finally, further water management rights and responsibilities are often negotiated through the modern settlement process. For example, the *Nunavut Land Claims Agreement* is the largest land claim settlement in Canadian history and includes a clear role for Indigenous people in the management of resources.⁶¹ The agreement created the Nunavut Water Board that has responsibilities and powers over the use, management and regulation of inland water in Nunavut.⁶² The Nunavut Agreement has been described as an "innovative approach to joint aboriginal-government administration of water resources" that may serve as a model for other similar settlements.⁶³

New Zealand

Maori rights to participate in management of water are recognised in both legislation and the recent treaty settlement process in New Zealand. While the statutory regime remains important for Maori interests, the treaty settlement process in particular provides opportunities for Maori to influence management of water resources.

The *Resource Management Act 1991* (NZ) (RM Act) is New Zealand's principle legislation on the management of natural resources. The RM Act was the result of major legislative reform in the early 1980s that sought to bring management of land, water, soil and air under one statute. One of the objectives of this reform was to give greater recognition to Maori interests in environmental management.⁶⁴ The relationship Maori have with the environment is referred to in Pt 2 of the RM Act, which requires all persons exercising powers and functions under the RM Act to recognise and provide for the culture and traditions of Maori relating to ancestral lands, water, sites, waahi tapu (sacred places) and other taonga (treasures). They must also have particular regard to kaitiakitanga (guardianship/stewardship) and take into account the principles of the Treaty of Waitangi. There are

⁶¹ Notzke, n 16.

⁶² Notzke, n 16.

⁶³ Notzke, n 16, p 30.

⁶⁴ Chanwai K and Richardson B, "Iwi Management Plans and the Resource Management Act" (1999) 3(1) *Butterworths Resource Management Bulletin* 3.

also provisions allowing for Maori to introduce management plans to local government stating how they want to be dealt with under the RM Act and obliging these authorities to take the plans into account in their own planning and processes.⁶⁵

In addition to the RM Act, Maori have negotiated water management rights through the treaty settlement process. One of the aims of these settlements is to provide appropriate redress – an element of which involves recognising Maori’s spiritual, cultural and historical associations with the natural environment.⁶⁶ One of the means to achieve this goal is to transfer to Maori increased control over their resources.⁶⁷ Management of waters may be transferred to Maori in the settlement process via the vesting of ownership of the waterway in Maori, formal agreements known as Deeds of Recognition, or Statutory Acknowledgements. The vesting of ownership confers primarily a right of management in lakes and rivers, rather than the full incidents of ownership. In certain cases, the settlements allow for the Minister of Conservation to vest land to Maori under the *Reserves Act 1977* (NZ) and the group receiving the land will then become responsible for its management under that legislation. Another alternative, where the Maori claimant cannot bear the burden of the costs of full management, is to enter a Deed of Recognition with the Crown. These Deeds specify the matters for which Maori must be consulted and in some instances also set out roles in resource management. The final redress option is through a Statutory Acknowledgement, which is an acknowledgement in statute of the traditional and spiritual significance of a certain site or features of a site to a Maori group. This acknowledgement then strengthens provisions in the RM Act by obliging decision-makers to proceed in light of this recognition.

Australia

In Australia, legislative power over water and the environment rests with the State and Territory governments as per the division of powers in the Commonwealth Constitution. Although the federal government retains ultimate responsibility, the States and Territories have responsibility for water planning and management. Some rights of management for Indigenous people will follow upon recognition of native title, but the legal system has been relatively silent as to the content of these rights. Natural resource statutes in some cases incorporate provisions requiring consultation on water issues, eg through Indigenous representation on water advisory committees. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) also has provisions allowing for Indigenous knowledge to inform land management and an Indigenous Advisory Committee was established in 2000 under this statute to advise the Minister for the Environment and Water Resources on Indigenous issues.

The NWI, Australia’s national water reform plan, could improve the outlook for future participation of Indigenous people in water management. One of the objectives of the NWI is improved environmental management characterised by integrated water management, knowledge and capacity building, and community partnerships. The NWI states that Indigenous people will be included in water planning processes wherever possible and that the water plans themselves will incorporate Indigenous, social, spiritual and customary objectives wherever they can be developed.⁶⁸ As well, the NWI additionally states that water planning processes will take into account customary native title. However, through the use of the terminology “wherever possible” and “wherever they can

⁶⁵ Jones C, *Tino Rangatiranga and Sustainable Development: Principles for Developing a Just and Effective Resource Management Regime in Aotearoa/New Zealand* (unpublished master’s thesis, Graduate Programme in Interdisciplinary Studies, York University, 2003). Jones argues that the impact of these provisions is limited and that they do not confer effective authority to Maori. It might also be argued that the RM Act, as it currently reads, renders Maori participation in environmental management dependent on the commitment of local authorities to follow the spirit of the legislation. Further, a recent study found that even though the commitment might exist, most local authorities would prefer clear guidance from the national government as to the expectations on local authorities regarding the implementation of these provisions and how they are to account for Maori interests in water: Durette et al, n 3.

⁶⁶ Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (NZ Government, 2004).

⁶⁷ Office of Treaty Settlements, n 66.

⁶⁸ National Water Initiative, ss 52-54.

be developed”, the NWI leaves the implementation of these processes up to the discretion of the States and Territories with minimal guidance as to how they should be implemented. The limited effectiveness of these provisions has been revealed in a recent review of the implementation of the NWI to date that found, with the exception of New South Wales, no jurisdictions have an explicit requirement for Indigenous participation in planning.

Key lessons for Australia

North America, especially the United States, provides some examples of effective involvement of Indigenous people in water management. These management initiatives are often undertaken in partnership with governments, but the key difference in the United States is that Indigenous governments are treated as equal to States for water management purposes. This conveys substantial power to Indigenous groups in regulating and monitoring water on their reservations. Other examples are found in Canada and more recently New Zealand through modern settlements and agreements, which are increasingly becoming a preferred way to negotiate contemporary water management arrangements. In Australia, considerable work remains on the part of States to incorporate Indigenous perspectives into water management processes. While there is increasing interest among Indigenous people in the management of their resources, most jurisdictions do not yet explicitly include Indigenous water requirements in water plans, and most jurisdictions are not yet engaging Indigenous people effectively in water planning processes.⁶⁹

ACCOUNTING FOR INDIGENOUS INTERESTS IN WATER

The history of Indigenous people in Australia vis-à-vis their water resources is similar to that of Indigenous people in the United States, Canada and New Zealand. Indigenous access to water, both for customary and commercial purposes, in all four countries is dependent on a patchwork of common law rules, statutes and government policies that tend to suit the interests of government and that do not reflect the relationship that Indigenous people have to water. These countries are only beginning to address Indigenous rights to water and the comparison in this article is useful in identifying pathways forward if governments are to account for Indigenous interests in water.

When considering the legal position of Indigenous Australians in relation to water as compared to other groups overseas, one of the key differences is the varying treatment of native title rights by the courts. As discussed above, the courts in North America have thus far displayed more willingness to take a liberal approach to native title rights – which has positive effects on water rights for Indigenous people. First Nations in Canada have a further legal advantage over Indigenous groups in other countries because native title rights are constitutionally protected.⁷⁰ The courts in North America have also held governments to certain fiduciary obligations, which impose a duty to act in the best interests of Indigenous people, in resolving both native title and natural resource disputes. In some cases, fiduciary duty has been extended to include a duty to promote self-sufficiency of Indigenous communities. In contrast, courts in Australia have been much more conservative in their interpretation of native title and their application of the principle of fiduciary duty to protect native title and other Indigenous interests.

Indigenous water rights are further strengthened when there is recognition of sovereignty and a willingness to work with Indigenous groups as equal partners. The experience in the United States, and Canada to a lesser degree, suggests that when the sovereignty of Indigenous people is recognised, greater resource rights follow. In New Zealand and Australia, the approach is to invite Indigenous people to “sit at the table” as stakeholders rather than to recognise an inherent right to self-government. Gregory and Trousdale note that such an approach is often viewed as an insult by Indigenous people who argue that their link to the land and resources entitles them to a status such that

⁶⁹ National Water Commission, n 3.

⁷⁰ Though the status of legal rights to water under the Constitution are yet to be tested.

consultations take place “government to government”.⁷¹ This argument is further supported by a recent study of Maori perspectives of water policy in New Zealand in which there was a strong call from the groups interviewed for a recognition of Maori as equal partners in relation to decision-making for water.⁷² In providing recommendations to the government, Durette et al note that until Maori are treated as equal partners, the water management system in New Zealand will remain fundamentally flawed from the perspective of Maori. Similarly in Australia, there is a tendency to rely on Indigenous representatives who are present on natural resource committees, which means that often the full spectrum of interests is not reflected in water management outcomes.⁷³ Comparatively, the issue of sovereignty in Australia has received little attention than in these other countries⁷⁴ and Indigenous people remain “stakeholders” for all purposes relating to water management in Australia.

The need for clarity around Indigenous water rights is increasingly pressing as governments worldwide continue to look to market mechanisms as one of the tools for resolving the competing interest in water resources. Market approaches are problematic because governments have not yet resolved how to balance competing rights and interests in a way that accurately reflects not only the relationship that Indigenous people have with water, but also the entire spectrum of values that are dependent on water. Where these policies address Indigenous interests, they have focused on the protection of Indigenous customary values rather than using the emerging water markets to advance the economic position of Indigenous people.⁷⁵ Altman and Cochrane argue that to establish an efficient water market requires both the recognition of customary rights in water, as well as consideration of innovative approaches that give such rights commercial (or quasi-commercial) status.⁷⁶ They point out that to ignore such interests would run the risk of generating high future transaction costs owing to the legal debate and action that may follow should Indigenous people assert their rights to water. One of the main challenges to recognising commercial water rights for Indigenous people is quantifying the amount of water that would satisfy these rights. Indigenous values tend to be expressed a way that is descriptive and subject to the opinions and experiences of the person or people speaking about them.⁷⁷ While qualitative descriptions provide a rich account of the relationships of people with the waterways that are important to them, they do not readily lend themselves to being expressed in a numerical form that can then be accounted for by water planners.⁷⁸ However, it is clear that despite any challenges, for water markets to be effective governments must make investments into finding mechanisms through which the full spectrum of interests that Indigenous people have in water can be identified and realised.

It should also be cautioned that water rights are of minimal value without the means to implement them. For example, although tribal reserved water rights in the United States could theoretically arise at any time to defeat another water right, in practice groups often experience difficulties owing to lack of capability to exercise those rights.⁷⁹ Getches points out that in the western United States, which has the highest population of Indigenous people, non-Indigenous users – especially in the past – had more capital to put their water rights to use as compared to the poverty that prevailed on the reservations.⁸⁰ Thus, without means to implement the rights, priority of water rights as per the Winters doctrine for

⁷¹ Gregory R and Trousdale W, “Compensating Aboriginal Cultural Losses: An Alternative Approach to Assessing Environmental Damages” (2009) 90 *Journal of Environmental Management* 2469.

⁷² Durette et al, n 3.

⁷³ National Water Commission, n 3.

⁷⁴ Reynolds H, “Reviving Indigenous Sovereignty” (2006) 6 *Macquarie Law Journal* 5.

⁷⁵ Jackson S and Morrison J, “Indigenous Perspectives in Water Management, Reforms and Implementation” in Hussey K and Dovers S (eds), *Managing Water for Australia: The Social and Institutional Challenges* (CSIRO Publishing, 2007).

⁷⁶ Altman and Cochran, n 44.

⁷⁷ Durette M, *An Integrative Model for Cultural Flows: Using Values in Fisheries to Determine Water Allocations* (Synexe Working Paper No 2010/01, 2010).

⁷⁸ Durette, n 77.

⁷⁹ Babcock, n 36.

⁸⁰ Getches, n 9.

Indigenous people often remain purely theoretical. Therefore, in countries such as New Zealand and Australia, which are currently considering how to provide for Indigenous access to water, a primary consideration for governments should be the provision of support in various forms for the establishment of robust governance arrangements that will enable groups to exercise their water rights.

It may be that, given the high transaction costs of litigation and uncertainty of resolving claims for mutually-favourable outcomes, negotiated settlements and agreements are more likely to satisfy the range of interests that Indigenous people have in water.⁸¹ Not only will groups be able in some cases to negotiate commercial rights, but they may also take on significant roles in water management through these settlements and agreements. An innovative example discussed in this article is the *Nunavut Land Claims Agreement* that provides a strong role for Indigenous management of water resources in Canada. In New Zealand, this process is underway for the management of New Zealand's longest river – the Waikato River – located on the North Island. In that case, the claim of the tribal group spanned over 21 years, and in settling both Maori and government agreed to put aside ownership issues to focus on co-management of the river. While the proposed governance structures that resulted from the claim were under review mid-2009, the case sets a precedent that will be looked at by other groups in settling their own claims to water resources. There is a trend towards joint management of water between Indigenous governments/communities and government agencies in these four countries, and modern settlements and agreements provide a means for clarifying these arrangements.

In the absence of legal mechanisms to address Indigenous interests in water, there is an opportunity for governments to address these gaps in legal rights to water for Indigenous people through the new water policies that are emerging globally. In Australia, the National Water Initiative is the government's blueprint for water reform and there is recognition in the document of the need to account for Indigenous interests.⁸² The NWI contains provisions that could potentially strengthen native title rights in water and lead to greater inclusion of Indigenous objectives in water planning. Australia's national water policy is accompanied by a growing dialogue throughout the country around water access and entitlements for native title holders that is taking place at the community level. Moreover, policies and practices for both access to water resources and for engagement are being developed by Indigenous organisations in Australia, such as Murray Lower Darling Indigenous Nations and the North Australian Indigenous Land and Sea Management Alliance Indigenous Water Policy Group. At the time of writing, the National Water Commission was supporting the creation of a national Indigenous advisory body that would address issues such as native title interests and water access as well as develop positions on issues such as access to the consumptive pool, including commercial interests, and a definition and policy for cultural water. Thus, while the legal system may lag behind these other countries, there is a growing movement from the Indigenous community that indicates that Australia may be one of the first countries to develop policies and approaches that address Indigenous water interests.

CONCLUSION

Western management systems operate as if the water is separate from the land and the people, and allow water to be measured, taxed and traded. In contrast, for Indigenous peoples, there is often no distinction between the land, rivers and sea and management practices are more holistic in nature recognising the interconnectedness of the entire ecosystem. There is a move in each of these four countries towards more integrated and holistic water management approaches that recognise the benefits of having Indigenous people play a key role in resource management. Increasingly, this role is acknowledged through natural resource management legislation and new water policy.

However, a gap remains between laws and policies and actual realisation of Indigenous interests in water. For example, in Australia, the 2009 Biennial Assessment of the National Water Initiative

⁸¹ Tan, n 31; Durette M, *Indigenous Legal Rights to Freshwater: Australia in the International Context* (CAEPR Working Paper No 42/2008, 2008).

⁸² See National Water Initiative, ss 52-54.

found that Indigenous social, spiritual and customary objectives are rarely clearly specified in water plans in Australia.⁸³ Similarly, a recent survey of Maori involvement in water management in New Zealand found widespread dissatisfaction amongst Maori as to how the current water management systems in New Zealand provide for their values and interests.⁸⁴ As demonstrated in this article, Indigenous legal rights to freshwater have not been fully and finally articulated within the legal systems of these four countries. This creates considerable uncertainty amongst Indigenous people as to whether their legitimate expectations for water will be protected. Water law in relation to Indigenous water rights will continue to develop in the years to come. In the meantime, there is a role for governments to consider the current gaps in legal systems, some of which are highlighted in this article, and take steps to address the range of interests that Indigenous people have in water.

⁸³ National Water Commission, n 3.

⁸⁴ Durette et al, n 3.