



# A comparative approach to Indigenous legal rights to freshwater in the United States, Canada, New Zealand and Australia

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Working Paper 2010/01

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## ABSTRACT

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This article provides a snapshot of the current status of legal rights to water for Indigenous people in four countries: United States, Canada, New Zealand and Australia. 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 conceptualization 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. Through a comparison of Indigenous legal rights to water vis-à-vis other countries, the article identifies pathways forward for the governments of these countries if they are to account for the full spectrum of interests in water.

*Note:* This article has been revised and published as A comparative approach to Indigenous legal rights to freshwater: Key lessons for Australia from the United States, Canada and New Zealand, (2010) 27 *Environmental and Planning Law Journal* 296.

## 1. INTRODUCTION

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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" (UNESCO-IHP, 2008, p. 3). This argument is largely accepted in the new integrated water resources management approaches that are emerging internationally that recognize 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 Indigenous<sup>1</sup> populations, as well as other interests, in the water resources of these countries. However, the connections that Indigenous people have to water remain largely overlooked within water management systems globally (Durette et al., 2009; National Water Commission, 2009).

One of the reasons that Indigenous water interests have not been accounted for is that Indigenous rights to water remain largely unarticulated by legal systems worldwide. This article provides a snapshot of the current status of legal rights<sup>2</sup> to water for Indigenous people within the legal systems of four countries: United States, Canada, New Zealand and Australia. The law in relation to three main areas<sup>3</sup> is considered: native title rights<sup>4</sup>, commercial rights, and management rights. Since Indigenous water rights is an emerging area of law, this paper often 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 conceptualization 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 comparing Indigenous legal rights to water across these four countries, this article identifies gaps in how the legal systems in these four countries account for the range of interests that Indigenous people have in water - from customary through to commercial. A comparison of Indigenous legal rights to water vis-à-vis other countries identifies pathways forward for the governments of these countries if they are to account for the full spectrum of water interests within integrated water management policies and approaches.

This paper 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. The final section provides a table summarizing the information set out in the preceding sections, and discusses pathways forward if governments are to account for Indigenous interests in water.

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<sup>1</sup> This article recognizes the distinct cultural identity of the peoples discussed in this paper. 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 (Office of the High Commissioner for Human Rights, 1997). 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, 1997).

<sup>2</sup> 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 (ATSIC, 2002).

<sup>3</sup> 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.

<sup>4</sup> The doctrine of "native title" is known by various names in each of the four jurisdictions in this paper. For consistency, this paper uses 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.

## 2. WATER RIGHTS GENERALLY

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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 (Kahn, 1999). 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 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 (Productivity Commission, 2003). The right to take and use water comes in various forms including licenses, concessions, permits, access, and allocations. Additional rights include access, exclusion, alienation, and management of the resource. Indigenous people who are land owners will have access to these rights as any other land owner. 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. As well, 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 (2005), 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” (p. 63).

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 (Durette et al., 2009). 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 finalized 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 (Morrison, 2007). 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 paper, whether or not Indigenous people are involved in water management is still largely a matter of discretion on the part of governments.

### 3. NATIVE TITLE & OTHER SOURCES OF WATER RIGHTS

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#### 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* (1981), 450 U.S. 544 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 favor 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* (1835), 34 US (9 Peters) 711 [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* (1908), 373 U.S. 546, 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. Hence, the establishment of a reservation results in an implied reserved right to take a sufficient amount of water to fulfill 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” (Getches, 2005).

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 (Burton, 1991). A change in government policy would come in 1963 when the Supreme Court revived the Winters doctrine in *Arizona v. California* (1963), 207 U.S. 564. 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* (2005), 375 F.Supp.2d 1070.

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 Indigenous people in the treaties and agreements that set aside land for reservations (Burton, 1991). 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 favor of the tribe. This rule was articulated in the early case of *United States v. Winans* (1905), 198 U.S. 371, 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 (1994) has suggested that if the purpose of a reservation requires a certain quality of water, for example to support fishing, then the Winters doctrine should also protect a right to water quality. In *United States v. Gila Valley Irrigation Dist* (1992), 804 F. Supp. 1 (D. Ariz), 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*<sup>5</sup> 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 (Notzke, 1994). 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 (Notzke, 1994). 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 recognized 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"<sup>6</sup> that includes the right to enjoy both the fruits of the land and water equally. These inherent rights are recognized 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 recognized 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 recognized 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

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<sup>5</sup> 86 Stat. 816 (1972).

<sup>6</sup> See *R. v. Guerin* [1985] 1 CNLR 120 (SCC) [at para. 132].

exclusivity confers even greater protection against government intrusion than other landholders because Indigenous property rights are enshrined in the *Constitution Act, 1867* 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 is 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 that Britain could assert title over lands and waters was if they were first surrendered to the Crown through treaties or agreements (Kempton, 2005). 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 settler 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 favor 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 (Bartlett, 1989).

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 (Notzke, 1994). 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*<sup>7</sup> to make by-laws and thereby may require the government to apply to the First Nation community for authorization of any major projects on the water course (Notzke, 1994).

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*,<sup>8</sup> 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 which 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 finalizing 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 resources 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 the Canadian Federal government.<sup>9</sup> The *Nisga'a Final*

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<sup>7</sup> R.S., 1985, c. I-5.

<sup>8</sup> This case settled out of court in 2002.

<sup>9</sup> For further detail see <[http://www.aincinac.gc.ca/pr/agr/nsga/pdf/isspap\\_e.pdf](http://www.aincinac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf)>. The full Nisga'a Treaty is available at <[http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html)>.

*Agreement Act*<sup>10</sup> transfers to the Nisga'a Nation significant control of water resources including nearly 2,000 square kilometers 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 license 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. Overall, 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, Māori can hold customary title to water, with ultimate ownership vesting in the government. The Treaty of Waitangi, signed in 1840, guaranteed Māori 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 (Kahn, 1999). 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" (Kahn, 1999, p. 69). Since the legal system to date has not been sympathetic to Māori interests, the resolution of claims through the modern settlement process is one of the most promising avenues through which Māori 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 Māori 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 recognize customary native title. This area of law developed in the twentieth century largely around claims to fisheries with the judiciary consistently limiting Māori rights to customary ownership and rights of use and access rather than full ownership. Customary title stems from Māori 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 (Kahn, 1999).

The uncertainty of Māori rights in water was demonstrated in "the foreshore and seabed case"<sup>11</sup> where the Court originally found that it might be possible in some instances for Māori 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 Māori from realizing the benefits of the decision. The fact that the government might assert control over natural resources, despite the rights and interests that Māori might have in those resources, leaves Māori in an uncertain position as regards their water rights.

Despite a protracted history of uncertain customary title for Māori, the recent settlement process in New Zealand is beginning to provide some redress by returning ownership of water to Māori. In the late 1980s, the government and Māori 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 Māori. One of the most well known agreements in this regard is Te Arawa Lakes Settlement, which recognized the local Māori group's traditional, historical, cultural and spiritual association with the lakes of the Rotorua region. The *Te Arawa Lakes Settlement Act 2006*<sup>12</sup> transferred ownership and control of 13 lakes (but not the water

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<sup>10</sup> SBC 1999, c. 2.

<sup>11</sup> *Ngati Apa v. Attorney-General*, [2003] NZCA 117.

<sup>12</sup> Public Act 2006 No. 43.

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 Māori 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 Māori does not include ownership of the water, the animals and plants in it, or structures such as dams. As well, any existing public access or commercial rights are preserved as against what is transferred to Māori. According to Bargh (2007), the Crown asserts that they do not own the water per se, but rather the space occupied by it. 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, Māori 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 well-being, 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 recognized 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] 771 FCA, the first decision relating to native title over water, the High Court recognized 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 characterized 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.<sup>13</sup> 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*<sup>14</sup> 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.<sup>15</sup> Altogether native title cases and legislation have limited native title to water in such

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<sup>13</sup> See for example *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.

<sup>14</sup> (Cwth).

<sup>15</sup> 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 license, are also able to extinguish or suspend native title rights under the Act.

a way that Indigenous groups relying on this area of law to access water will face considerable difficulty (Tan, 2009). The recent National Water Initiative, the Australian government's policy on water management and planning, contains provisions that could potentially strengthen native title rights to water, though the effect of this has not yet been realized in Australia.<sup>16</sup>

In addition to native title, Indigenous rights to water may come from state land rights legislation that gives Indigenous land holders 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<sup>17</sup> where the Federal Court recognized 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*.<sup>18</sup> 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 on the ability to take water from Indigenous lands (Tan, 2009).

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, in Queensland, the *Water Act 2000* vests in the state "all rights to the use, flow and control of all water in Queensland".<sup>19</sup> 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 recognizing Indigenous water rights is the *Water Management Act 2000* in New South Wales. 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 license or administrative approval. The legislation also allows for Indigenous cultural and commercial licenses. Tan (2009) cautions 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

### Key similarities and differences

This section demonstrates that in all four countries native title is the starting point for determining the content of legal rights to water for Indigenous people and that these rights are mainly customary in nature.

Another similarity across the four countries is that governments have historically taken steps so that they effectively retain control of water. Therefore, the Indigenous groups in all these countries are similarly limited in their water rights.

However, some key variations have resulted in significantly different outcomes for Indigenous people in these countries. One of the main differences is the willingness of the courts to give "customary" a liberal or narrow interpretation. In the United States and Canada, a liberal approach taken by the courts has meant that the content of water rights is greater in scope than in New Zealand and Australia.

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. Comparatively, 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

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<sup>16</sup> See ss. 52 to 54.

<sup>17</sup> Also known as Blue Mud Bay No. 2.

<sup>18</sup> (Northern Territory).

<sup>19</sup> S. 19.

practice, this should result in greater certainty for Indigenous water rights in that country. 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.

## 4. COMMERCIAL WATER RIGHTS

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### 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 (Burton, 1991). The answer to the debate surrounding the water market therefore depends on the characterization 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 (2006) 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. This was the approach taken in *Colville Confederated Tribes v. Walton* (1981), 647 F.2d 42 where the Court recognized 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 (Getches 2005), 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* (1823), 21 US (8 Wheaton) 543 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* (1938), 304 US 111, the Court held that native title confers a right of occupancy with its entire beneficial incidents even if this included the 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 (Getches, 2005).

### 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 recognized 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.<sup>20</sup> 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.

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<sup>20</sup> See for example *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686.

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 (Kauth, 2009). 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 (Kauth, 2009). Given that many First Nations are increasingly taking advantage of economic opportunities, some groups will be well situated to capitalize on opportunities that arise from water markets.

## New Zealand

The law as it currently stands in New Zealand limits Māori native title rights to customary usage but there is growing interest among Māori as to their rights in water, both customary and commercial in nature. In a recent survey of Māori perspectives on water allocation in New Zealand, there was a call for both customary and commercial interests be accounted for in water allocation processes and planning (Durette et al., 2009).

The common law has recognized that Māori 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 Māori man for selling undersized fish on grounds that there was clear evidence, from the time of Captain Cook, that Māori 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 recognized 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 Māori 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 Māori customary title and treaty rights may be construed, it cannot be thought that they were ever conceived as including the right to generate electricity by harnessing water power. Therefore, the common law currently recognizes 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 Māori 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 Māori 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, Māori presently control a significant portion of the New Zealand seafood industry, including processing and aquaculture operations.<sup>21</sup> The fact that Māori 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 Māori organizations and communities that will be well positioned to negotiate water rights. Many of these organizations and communities are already working to advance water interests alongside managing and developing their fisheries.

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<sup>21</sup> It is estimated that Māori control up to 50 percent of the aquaculture industry (Te Puni Kōkiri, 2007).

## Australia

Water trading is increasingly being proposed as an efficient means of re-allocating 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 (2003) 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. However, as discussed earlier in this paper, Indigenous water rights as recognized 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 ever be translated into a tradable commercial commodity for a water market system (Altman, 2004). 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 (Morgan, Strelein, & Weir, 2004). This right is especially relevant where there is historical evidence of early trade practices (Morgan, Strelein, & Weir, 2004). It follows, therefore, that Indigenous people should be encouraged and assisted to enter and participate in the commercial water market. However, the New South Wales government is one of the only jurisdictions in Australia to recognize the right for Indigenous people to participate in commercial water markets. A Water Trust was established through the State's *Water Management Act 2000* and offers financial assistance for specific programs and to help secure funding. The Water Trust purports to provide economic benefits to Indigenous people by increasing their participation in the water market and encouraging innovative methods of water use. This legislation also generally recognizes the economic potential of Indigenous groups with one of its objects being to benefit Indigenous people in relation to their spiritual, social, customary and economic use of land and water.<sup>22</sup> It should be noted though that the funds available are small in comparison to other Indigenous water initiatives globally and the Trust has not yet led to any significant outcomes for Indigenous people in New South Wales.

## Key similarities and differences

Water markets are increasingly becoming a reality within which Indigenous people have to resolve their water rights. All four countries considered in this paper 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. In Canada, New Zealand and Australia the courts apply a historical connection test in deciding on commercial rights. However, the recognition of the Supreme Court in Canada that these rights may have modern expression is a significant difference from the approach in the other two countries. In New Zealand, although the judiciary has historically taken a conservative position in relation to Māori rights of development, the recent experience of Māori 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. Given this, Australia's water reform and the water market it envisions may be of concern to Indigenous Australians.

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<sup>22</sup> S.3 (c).

## 5. INDIGENOUS WATER MANAGEMENT

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### 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 (Burton, 1991). 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 federal government sets minimum standards, which are then implemented by the states (Burton, 1991). 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*<sup>23</sup> (CWA) allows “states”, including tribal groups to implement federal programs and gives them the right to set more stringent standards than the federal laws.<sup>24</sup> Through the CWA, 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* (1985), 752 F. 2d 1465 (9th Circuit), 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 (Hand, 2007).<sup>25</sup> 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.<sup>26</sup> It additionally provides conservation enforcement powers in treaty waters in cooperation with government, and violators are tried in tribal courts.<sup>27</sup>

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<sup>23</sup> See footnote 5.

<sup>24</sup> See s. 1377, which authorizes the Indian tribe to be treated as a state under certain sections of the CWA.

<sup>25</sup> Some tribal groups lack the financial capability or do not have a sufficiently large land base to participate in these programs.

<sup>26</sup> See CORA's website for more information, available at <<http://www.1836cora.org/>>.

<sup>27</sup> While ideal, in reality this type of cooperation does not always happen. An example is seen 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, 2007).

## 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.

At the national level, the Department of Indian and Northern Affairs Canada (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*<sup>28</sup> 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 (Notzke, 1994). The Agreement created the Nunavut Water Board that has responsibilities and powers over the use, management and regulation of inland water in Nunavut (Notzke, 1994). 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 (Notzke, 1994, p. 30).

## New Zealand

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

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<sup>28</sup> S.C. 1999, c. 24.

The *Resource Management Act*<sup>29</sup> (RMA) is New Zealand's principle legislation on the management of natural resources. The RMA 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 Māori interests in environmental management (Chanwai & Richardson, 1999). The relationship Māori have with the environment is referred to in Part 2 of the RMA, which require all persons exercising powers and functions under the RMA to recognize and provide for the culture and traditions of Māori 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 also provisions allowing for Māori to introduce management plans to local government stating how they want to be dealt with under the RMA and obliging these authorities to take the plans into account in their own planning and processes.<sup>30</sup>

In addition to the RMA, Māori 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 recognizing Māori spiritual, cultural and historical associations with the natural environment (Office of Treaty Settlements, 2004). One of the means to achieve this goal is to transfer to Māori increased control over their resources (Office of Treaty Settlements, 2004). Management of waters may be transferred to Māori in the settlement process via the vesting of ownership of the waterway in Māori, 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 Māori under the *Reserves Act*<sup>31</sup> and the group receiving the land will then become responsible for its management under that legislation. Another alternative, where the Māori 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 Māori must be consulted and in some instances 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 Māori group. This acknowledgement then strengthens provisions in the RMA 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, for example, through the representation by an Indigenous person on water advisory committees. The *Environmental Protection and Biodiversity Conservation Act 1999*<sup>32</sup> 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.

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<sup>29</sup> 1991 No. 69.

<sup>30</sup> Jones (2003) argues that the impact of these provisions is limited and that they do not confer effective authority to Māori. It might also be argued that the RMA, as it currently reads, renders Māori 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 Māori interests in water (Durette et al., 2009).

<sup>31</sup> 1977 No. 66.

<sup>32</sup> (Cwlth).

The National Water Initiative (NWI) is Australia's national water reform plan that could have significant implications for future Indigenous water management rights. One of the objectives of the NWI is improved environmental management characterized 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.<sup>33</sup> As well, the NWI additionally states that water planning processes will take into account customary native title. However, with the use of terminology "wherever possible" and "wherever they can 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.

### **Key similarities and differences**

North America, especially the United States, provides some good examples of Indigenous 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 considerable 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, the role of Indigenous people has been only minimally acknowledged in legislation and considerable work remains on the part of states to incorporate Indigenous perspectives into water management processes.

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<sup>33</sup> Ss. 52-54.

## 6. ACCOUNTING FOR INDIGENOUS INTERESTS IN WATER

In the countries discussed in this paper, the position of Indigenous people in relation to their water has developed from a similar history, and as a result, Indigenous people in these four countries are in similar positions vis-à-vis water today. In each country, Indigenous access to water, both for customary and commercial purposes, is dependent on a patchwork of common law rules, statutes and government policies that were chosen 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 paper is useful in identifying pathways forward if governments are to account for Indigenous interests in water.

A summary of the current legal position of Indigenous people in relation to water in each of the four countries is set out in the table below.

	United States	Canada	New Zealand	Australia
<b>Native title rights</b>	<ul style="list-style-type: none"> <li>liberal interpretation, equivalent to fee simple</li> <li>strong content due to self-sufficiency policies</li> <li>priority against other users</li> <li>may extend to a right to quality</li> </ul>	<ul style="list-style-type: none"> <li>liberal interpretation</li> <li>priority against other users</li> <li>Constitutional protection</li> </ul>	<ul style="list-style-type: none"> <li>interpreted as customary rights</li> <li>customary title is subject to English freehold title rights</li> </ul>	<ul style="list-style-type: none"> <li>conservative interpretation, customary rights only</li> <li>can be extinguished against other rights under <i>Native Title Act</i></li> </ul>
<b>Commercial rights</b>	<ul style="list-style-type: none"> <li>depends on characterization under Winters doctrine</li> <li>liberal approach extends a right to use resources at own discretion; policies of self-sufficiency</li> <li>found in settlements</li> </ul>	<ul style="list-style-type: none"> <li>liberal approach recognizing that rights may have a modern commercial expression</li> <li>found in modern treaties and agreements</li> </ul>	<ul style="list-style-type: none"> <li>must be based on a historical connection</li> <li>experience with fisheries suggests commercial rights may be negotiated</li> </ul>	<ul style="list-style-type: none"> <li>conservative interpretation, customary rights only</li> <li>one jurisdiction provides right to participate in water market</li> </ul>
<b>Management rights</b>	<ul style="list-style-type: none"> <li>cooperative federalism treats tribal groups as states for resource management</li> <li>courts have protected management rights</li> <li>preference to engage Indigenous people early to avoid court cases</li> </ul>	<ul style="list-style-type: none"> <li>federal legislation allows for some powers to be transferred</li> <li>often negotiated through modern settlements</li> </ul>	<ul style="list-style-type: none"> <li>legislation recognizes interests in management</li> <li>statutory recognition of Māori management plans</li> <li>groups have negotiated rights through treaty settlements</li> </ul>	<ul style="list-style-type: none"> <li>some recognition in natural resource legislation</li> <li>water reform could impact management rights</li> </ul>

When considering the legal position of Indigenous people in relation to water, the starting point is native title and how the courts have interpreted its content. As discussed in this paper, 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.<sup>34</sup> 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 New Zealand and 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 recognized, greater resource rights follow. This means that the ability of Indigenous groups in these countries to exercise their rights in water is considerably stronger than Indigenous groups in countries where sovereignty is not given as much recognition. In contrast, in New Zealand, Māori are often invited to “sit at the table” as stakeholders. Gregory and Trousdale (2009) 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 special status so that consultations take place “government to government” This argument is further supported by a recent study of Māori perspectives of water policy in New Zealand in which there was a strong call from the groups interviewed for a recognition of Māori as equal partners in relation to decision making for water (Durette et al., 2009). In providing recommendations to the government, Durette et al. (2009) note that until Māori are treated as equal partners, the water management system in New Zealand will remain fundamentally flawed from the perspective of Māori. Thus, there is a need for clarity around both the content of native title rights and the roles of Indigenous people in relation to water management – especially in New Zealand and Australia.

In the absence of judicial direction, there is an opportunity for governments to address these gaps in legal rights to water for Indigenous people as government policies are renegotiated to address today’s water challenges. In both New Zealand and Australia there are national Indigenous groups that play an advisory role to water policy makers and in New Zealand there have been recent national consultations with Māori in an attempt to clarify both Māori interests in water and the role for the different levels of governments (Ministry for the Environment, 2005; Durette et al., 2009). Therefore, the structures and processes for such a dialogue are already in place. However, the outcomes depend on a willingness on the part of governments to address the interests and gaps identified by these groups.

It should also be noted 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 (Babcock, 2006). Getches (2005) 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. Thus, without means to implement the rights, priority of water rights, as per the Winters doctrine, for 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 for capacity building of groups to exercise their water rights.

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<sup>34</sup> Though the status of legal rights to water under the Constitution are yet to be tested.

In relation to commercial rights, the situation of Indigenous people, especially in New Zealand and Australia, is even less certain. National water policies in these countries raise market mechanisms as a potential means for managing water, yet problematically these same 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 (Jackson & Morrison, 2007). Altman and Cochrane (2003) 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. They point out that to ignore such interests would run the risk of generating high future transactions 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 recognizing commercial water rights for Indigenous people is quantifying the amount of water that would satisfy these rights. However, it is clear that despite any challenges, governments must address the full spectrum of interests that Indigenous people have in water – including commercial interests.

It may be that, given the high transaction costs of litigation and uncertainty of resolving claims for mutually favorable outcomes, negotiated settlements and agreements are more likely to satisfy the range of interests that Indigenous people have in water (Tan, 2009; Durette, 2008). 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 paper 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 Māori 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.

## 7. CONCLUSION

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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 recognizing 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 recognize 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 realization of Indigenous interests in water. For example, in Australia, the 2009 Biennial Assessment of the National Water Initiative, Australia's blue print for water reform, found that Indigenous social, spiritual and customary objectives are rarely clearly specified in water plans in Australia (National Water Commission, 2009). Similarly, a recent survey of Māori involvement in water management in New Zealand found widespread dissatisfaction amongst Māori as to how the current water management systems in New Zealand provide for their values and interests (Durette et al., 2009). As demonstrated in this paper, 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.

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