INDIGENOUS LEGAL RIGHTS TO FRESHWATER: AUSTRALIA IN THE INTERNATIONAL CONTEXT

M. Durette

CAEPR WORKING PAPER No. 42/2008

ANU COLLEGE OF ARTS & SOCIAL SCIENCES

SERIES NOTE

The Centre for Aboriginal Economic Policy Research (CAEPR) was established at The Australian National University (ANU) in April 1990. From 1990 to 2003 the Centre's main research partner was the Aboriginal and Torres Strait Islander Commission. Since 1 January 1999, CAEPR has operated as a University Centre and is currently funded from a variety of sources including the ANU, Australian Research Council, industry partners, and the Department of Families, Housing, Community Services and Indigenous Affairs.

CAEPR's principal objective is to undertake high-quality, independent research that will assist in furthering the social and economic development and empowerment of Aboriginal and Torres Strait Islander people throughout Australia. Its aim is to be a world-class centre undertaking research on Indigenous economic development issues that combines academic excellence with policy relevance and realism.

CAEPR is currently Australia's major dedicated research centre focusing on Indigenous economic and social policy from a national perspective. The Centre's publications, which include the CAEPR Working Paper series established in 1999, aim to report on Indigenous circumstance, inform public debate, examine government policy, and influence policy formulation.

Working Papers are often work-in-progress reports and are produced for rapid distribution to enable widespread discussion and comment. They are available in electronic format only for free download from CAEPR's website:

<www.anu.edu.au/caepr/>

Enquiries may be directed to:

The Centre for Aboriginal Economic Policy Research
Hanna Neumann Building #21
College of Arts & Social Sciences
The Australian National University
Canberra ACT 0200

Telephone 02–6125 8211
Facsimile 02–6125 9730

Professor Jon Altman
Director, CAEPR
College of Arts and Social Sciences
The Australian National University
May 2008

Cover page images courtesy of the Australian Institute of Aboriginal and Torres Strait Islander Studies and CAEPR staff members.

INDIGENOUS LEGAL RIGHTS TO FRESHWATER: AUSTRALIA IN THE INTERNATIONAL CONTEXT

M. DURETTE

Working Paper No. 42/2008

ISSN 1442-3871

ISBN 0 7315 4941 4

Melanie Durette is currently a consultant for Synexe Consulting. Her interests include environmental law and the engagement of Indigenous people in natural resource management, especially with regards to fisheries and water. Her most recent research projects involve working with Maori in New Zealand to see their cultural values reflected in water allocation policy and facilitating their engagement in freshwater management. In 2006–07 she was an Intern at CAEPR, College of Arts and Social Sciences, ANU, participating in the Young Professionals International Program (Canada) sponsored by the Native Law Centre of Canada, University of Saskatchewan.

FOREWORD

This paper was commissioned by the Indigenous Water Policy Group (IWPG) in Australia, an initiative created and facilitated by the North Australian Indigenous Land and Sea Management Alliance (NAILSMA). One of the objectives of the IWPG is to engage in research relating to Indigenous rights, responsibilities and interests in water resources and this paper forms part of that research. The paper undertakes a comparative overview of the legal position of Indigenous people in relation to freshwater rights in four countries: the United States, Canada, New Zealand, and Australia. It is organised around four themes of particular concern to Indigenous people: ownership of water, water rights, commercial rights, and management rights. The law in each country in relation to these themes is briefly canvassed with the aim of comparing the legal position of Indigenous Australians with their overseas counterparts. This paper reveals that Indigenous people in the United States, Canada, and New Zealand benefit from a comparatively advantageous legal position in relation to their water rights. As such, this research provides a starting point for debate as it offers insight into how Indigenous Australians might realise and protect their legal interests in freshwater.

Jon Altman
Director, CAEPR

Joe Morrison,
Executive Officer, NAILSMA

April 2008

ABBREVIATIONS AND ACRONYMS

ANU	The Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
CHI	Cultural Health Index (New Zealand)
CORA	Chippewa Ottawa Resource Authority
CWA	*Clean Water Ac*t (United States)
IWPG	Indigenous Water Policy Group
NAILSMA	North Australian Indigenous Land and Sea Management Alliance
NPDES	National Pollutant Discharge Elimination System
NTA	*Native Title Act 1993* (Australia)
RMA	*Resource Management Act 1991* (New Zealand)

ACKNOWLEDGMENTS

I wish to thank Lisa Strelein and Michael O'Donnell for their detailed comments on this paper, as well Joe Morrison, Jon Altman and Sue Jackson for their input. Also, thanks to Manuhuia Barcham and Hilary Bek for editing, John Hughes for design and layout, and Melissa Johns for proofing.

CONTENTS

EXECUTIVE SUMMARY

The paper undertakes a comparative overview of the law as it pertains to Indigenous rights in freshwater in four countries: the United States, Canada, New Zealand, and Australia. It is organised around four themes of particular concern to contemporary Indigenous Australians: ownership of water, water rights, commercial rights, and management rights. To date, the law, especially in Australia, has been relatively silent as to the water rights of Indigenous people. It is useful then to undertake a comparison of the legal developments overseas as a means of gaining insight into how Indigenous Australians might protect their legal interests in freshwater.

Generally speaking, the common law has not recognised public ownership of water and vests in Indigenous people a customary title to water. This customary title derives from tradition and custom and is limited in its content. In settler countries such as those examined in this paper the common law has been substantially altered by statutes vesting 'ownership' of water in the government. Therefore, although Indigenous people might have recognised customary title to water, and in some instances fee simple ownership, the government retains ultimate control. The source and content of title to water varies in each jurisdiction. In the United States and Canada, the content of title to water is strong, entitling in some cases the right to development. In New Zealand, the recent settlement process is beginning to provide some redress by returning significant incidents of ownership of water to Maori. Australia by comparison is the country least inclined to expand native title out of its traditional realm. The judiciary thus far in Australia is primarily guided by the policy objective of protecting traditional rights and uses of the land in awarding native title rather than the policies of economic self-sufficiency and promoting sovereignty over natural resources as commonly guides the North American native title decisions. The comprehensive agreements over title and natural resources in Canada and New Zealand stand as a model for Indigenous Australians and represent one option for negotiating water rights that are not available through the legal system.

Water rights, as opposed to water ownership, mainly derive from native title, but may also be located in treaties, constitutional rights and modern settlements. There is a wide variation in the source and content of water rights across these four jurisdictions. In Australia rights have generally been allocated through the legislatures and government policy, while in New Zealand the most recent source of water rights is the modern settlement process. Canada and the United States seem to be influenced by their respective common law and consequently the legal principles that emerge from these two countries are similar. Indigenous people in the United States enjoy considerable water rights in comparison to their counterparts around the world, largely because national policy in the United States has recently favoured determining clearer water rights in order to promote economic self-sufficiency. The Canadian courts are also influenced by this policy, and the strongest source of natural resource rights for Indigenous people is the constitutional affirmation of Indigenous rights which is consistently upheld by the judiciary. On the whole, Indigenous people in North America enjoy a greater range of water rights than those available to Indigenous peoples in New Zealand and Australia.

There is also considerable difference in the levels and sources of protection given to Indigenous water rights in each jurisdiction. In terms of legal protections Canada again stands out, for it has enshrined the rights of Indigenous people to their natural resources in a Constitution. There has also been a recent emergence of a general duty to consult and accommodate in the Canadian common law that provides an additional layer of protection for Indigenous interests in water resources and serves as an important example for the Australian government when dealing with Indigenous interests in the development of freshwater policy. The judiciary acts as a check on the government's actions in Canada and this makes for a much greater certainty in water rights in that country. In both the United States and Canada considerable protection is also found in the common law notion of fiduciary duty which places the obligation on the Crown to act in the best interest of Indigenous people. While there are hints of fiduciary obligations in the court decisions emanating from Australia and New Zealand, the judiciary has not been inclined to utilise it as a real tool for protecting Indigenous interests.

Another important issue that arises is that the rights of Indigenous Australians do not receive the same priority under the law as in the North American jurisdictions. For instance, in the United States Indigenous people living on reservations have priority for certain annual volumes of water over all other users. In Canada, Indigenous resource rights are second only to conservation and the government bears the burden of proving a legitimate legislative objective if the right is infringed. While Australia has numerous statutes dealing with natural resource rights that recognise customary rights, they do not enjoy the same protection or priority as Indigenous rights in North America because there are no grounds for enforcing these statutory provisions.

The emergence of water markets and the use of water pricing in water allocation is one of the newest developments that will significantly impact on Indigenous water rights. Indigenous legal rights within water markets have not been well defined in any of the countries studied in this paper. There is some indication that in the North American jurisdictions, Indigenous people have commercial rights to participate in water markets under the common law. In both the United States and Canada, the judiciary takes a liberal approach to Indigenous rights and has recognised that traditional rights such as fishing may evolve to have a commercial component. Also, in both countries the judiciary holds the government to a fiduciary duty and one aspect of the duty is to facilitate the self-sufficiency of Indigenous people which is in line with conferring on them commercial rights. In New Zealand, it is likely that commercial rights to water would derive from the modern settlement process as it has in the case of fisheries. In contrast to these other countries, water law and policies in Australia to date have focused on the protection of Indigenous customary values rather than advancing the economic position of Indigenous people. Therefore, it is unlikely that Australia will recognise a commercial right to water for Indigenous people in the near future. This combined with the fact that there is minimal legal protection for Indigenous rights, means that it is unlikely that new water policies, especially those relying on market mechanisms, will result in an equitable allocation that reflects the interests and values of Indigenous Australians in water.

Another area of concern for contemporary Indigenous Australians is the right they have to participate in the management of freshwater. In the three other countries considered in this paper, there is a legal basis for the right to participate in management of water. The United States is especially notable as Indigenous people are treated as sovereign and equal to States under federal resource management statutes. As sovereign governments, tribes exercise full authority over its members and lands. The State governments must develop any conservation programs working directly with the tribes as sovereign governments. In Canada, there are strong partnerships on resource management between federal, provincial, and municipal governments and Indigenous governments created under federal legislation. In both these countries Indigenous communities are able to set their own environmental standards, for example on water quality, which are then measured against government standards. In New Zealand, the resource management legislation has been written to have a strong Maori component but it may be that Maori realise the most management rights under the modern settlement process. One of the means of redress through the settlements is the transfer of increased control over natural resources to Maori. In many instances, this may be achieved by vesting ownership of waterways in Maori with most incidents of ownership. In Australia where the common law has not shed any light on the duty to consult, or on general rights of management, it is still unclear whether the right to consultation on natural resource management in Australia has any substantive content.

Australia's national water reform plan could have significant implications for future Indigenous land and sea management. While it refers to Indigenous rights, it is unclear as to how these would be exercised by Indigenous people without any strong legal basis behind the provisions. Australia then by comparison has the least formal legal recognition of the right of Indigenous groups to participate in management of waters.

The paper informs the Indigenous water rights debate by identifying commonalities between the jurisdictions in this paper, but also the differences. In all cases the differences highlight an area where Indigenous Australians rights in freshwater are not as developed as their counterparts overseas. It is to these differences that Indigenous Australians should look for direction.

INTRODUCTION

This paper has been written to inform the work of the Indigenous Water Policy Group (IWPG) which is an initiative created and facilitated by the North Australian Indigenous Land and Sea Management Alliance (NAILSMA).[1] One of the objectives of the IWPG is to engage in research relating to Indigenous rights, responsibilities and interests in water resources and this paper forms part of that research. The paper undertakes a comparative overview of the law as it pertains to Indigenous rights in water in four countries: the United States, Canada, New Zealand, and Australia. As such, it provides an opportunity for Indigenous Australians to consider their legal rights to freshwater in relation to their Indigenous counterparts around the world.

In looking at these issues this paper first provides a brief description of the evolution of water law followed by a short introduction into each of the four key themes around which this paper is organised, these being: ownership of water, water rights, commercial rights, and management rights although there is some overlap in themes. 'Ownership of water' is considered since it represents the strongest interest under the law. Indigenous people are also concerned with water rights such as those of usage, access, flow and quality. These are addressed under the generic heading of 'water rights'. It is around these two themes that the majority of legal discourse has focused to date. Along side these issues, two new key debates are emerging about 'commercial rights in water' and 'rights of management'. To date, the law, especially in Australia, has been relatively silent as to the rights of Indigenous people in relation to these two latter themes. It is useful then to undertake a comparison of the legal developments overseas as a means of gaining insight into how Indigenous Australians might protect their legal interests in freshwater. This comparison is undertaken in the four major sections of this paper and organised around the respective themes: ownership of water, water rights, commercial rights and management rights. The discussion section highlights the key principles and lessons that emerge from this comparison. The international law on freshwater is briefly considered in this section as a means of locating this research in the larger global context. Finally, further research suggestions are given to expand upon this research.

This paper provides a legal perspective on freshwater issues for Indigenous peoples. Accordingly, it does not discuss government policy in any great detail. The conclusions drawn might be somewhat different if a comparative analysis of government policies had been included. As well, it is important to note that the paper is not meant to be exhaustive as the area of law canvassed is both very broad and still quite uncertain in many respects. It should be viewed only as a preliminary scope of the most notable aspects of the law in each country. The paper informs the discourse by identifying commonalities between the jurisdictions, but also the differences. In all cases the differences highlight an area where Indigenous Australians rights in freshwater are not as developed as their counterparts overseas. It is to these differences that Indigenous Australians should look for direction.

BACKGROUND TO FRESHWATER RIGHTS

FRESHWATER & INDIGENOUS PEOPLE

This paper focuses on freshwater rights for Indigenous people. Freshwater is the water that sits on and under the land, including rivers, lakes, waterholes, springs, creeks, and groundwater (ATSIC 2002).[2] Virtually all human uses of water, such as household, agricultural, and industrial, rely on freshwater as a source. The world's supply of freshwater is limited and sources of freshwater are under increasing pressure due to expanding human populations, pollution and climate change. Those countries with abundant supplies of freshwater, such as Canada and New Zealand, often have Indigenous populations who are also reliant on the resource for their livelihood. Insecurity of water rights in these countries leads to conflict over resources and misinformed decisions on efficient water resource use and allocation. Indigenous people often are not aware of their legal rights to freshwater and have lost significant control of freshwater sources.

EVOLUTION OF WATER LAW

For Indigenous peoples, there is often no distinction between the land, rivers and sea. This differs significantly from Western notions of water which separate water from the land and allow it to be measured, taxed, traded, and managed at the level of single species and habitats rather than considering the greater social-ecological system. Emerging international legal instruments acknowledge the human right of Indigenous peoples to their territories, including land and waters (ATSIC 2002). Recently, in international fora, a separate human right to water which entitles every human being to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use has been recognised.[3] Despite this international dialogue, rights to water remain poorly defined as compared to land rights.

Water rights were originally dealt with under common notions of land tenure and riparian ownership, but their source and content under the law is remarkably different today. The common law on water rights in regards to Indigenous people is currently a mixture of legal principles from property law, native title law, constitutional law, and international law. To a large extent, in settler countries, the common law has been substantially replaced by statutory regimes. This is a reflection of governments using legislation to define water rights and assert their right to manage and allocate water. In the countries where Indigenous people inhabited the land and used water long before European settlement, the early statutory regimes on natural resources 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). In most jurisdictions, the statutory regimes now 'legally' vest ownership of water in the Crown. Moreover, water rights are consistently being renegotiated and can now be leased, mortgaged, and traded. Each country has implemented national water policies to cover the range of pressing issues relating to water especially regarding sustainable use. Today's water law is a result of a patchwork of common law rules, statutes and government policies that

were often chosen to suit the interests of government. The result is a tenuous situation for those Indigenous groups that at one time had been sovereign guardians of freshwater.

OWNERSHIP OF WATER

Under the common law, there are many types of legal interests in water with the most desirable being full ownership of water. This paper differentiates between full ownership of property and the complement of rights that often potentially accompanies ownership of property. It is a distinction that must be made in the case of water since the law as it has developed draws this artificial distinction. For example, when one holds land in 'fee simple' they generally hold the associated full spectrum of rights that flow from ownership. However, as will become clear in this paper, 'fee simple' ownership of water in the hands of Indigenous people does not necessarily entail the same set of rights and privileges that accompanies ownership of land. This distinction is made since, at common law, ownership of the water itself is not possible.

Generally speaking the common law has not recognised public ownership of freshwater sources in the sense of full and beneficial ownership. *Halsbury Laws of England* (2004: para. 47) sets out the common law approach to ownership of water:

> Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only a public right in the sense that it is public or common to all who have a right of access to it.

Instead of ownership of the water itself, rights to water at common law are attached to ownership of land. Regarding flowing water, the owner of land abutting onto the water is called a 'riparian owner' and has certain common law rights of access and regress. These rights were limited to uses that did not substantial alter the rights of other users of the same resource—such as those living downstream. The rights of a riparian owner were described in *Young v. Bankier Distillery* (p. 698):

> A riparian proprietor is entitled to have the water of the stream on which the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of this stream in its natural flow, without sensible diminution or increase and without sensible alteration in its character and quality.

In contrast, those waters that were not flowing, such as ground and surface waters could be harvested without limit by land owners on whose land the waters were located. These common law rules were the original means for resolving disputes between water users.

In settler countries such as those examined in this paper, the common law has been substantially altered by statutes enacted by government as they asserted their 'ownership' of the natural resources in the country.

As this paper demonstrates, the law now recognises ownership of the land under the water but not to water itself, yet governments effectively vest ownership of water in themselves. This leads to the question of how much value a recognised right of ownership for Indigenous people in the water bed can have when there is no right of ownership of the water itself.

WATER RIGHTS

The notion of 'water rights' encompasses a wide class of rights under the law. In a recent report by the Productivity Commission (2003) for the Commonwealth of Australia, water rights were defined as 'a legal authority to take water from a water body and to retain the benefits of its use'. Thus, water rights can come in forms such as licences, concessions, permits, access, and allocations. In addition to the right to take water, other rights include access, exclusion, alienation, and management of the resource. The section in this paper entitled 'Indigenous Water Rights' considers all water rights for Indigenous people other than commercial rights and management right—which are separated into their own sections in this paper as two categories of water rights that are especially relevant to Indigenous people and warrant more in-depth consideration.

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. Most often, water rights are negotiated and water systems are developed with little input from Indigenous people. As Getches comments, 'traditional Indian culture surely needed water; yet legal rights to water are tied to fulfilment of national policy goals and not to cultural protection' (2005: 63). The content and scope of Indigenous water rights has been defined within this system that does not reflect the reality of Indigenous groups today.

In all four countries considered in this paper the starting point for Indigenous water rights is that they are customary in nature, usually stemming from customary native title. Despite the same starting point, the content and scope differs considerably among the jurisdictions, as well as the level of protection given to Indigenous water rights. Where Indigenous water rights have not been formally recognised by the legal system, through the common law or through statute, they face the ongoing risk of being obliterated by the interests of private individuals, corporations and governments.

WATER MARKETS & COMMERCIAL RIGHTS

The emergence of water markets and the use of water pricing in water allocation is one of the newest developments that will significantly impact on Indigenous water rights. Some of the concerns in Australia are that water would be used only on the basis of financial interests and values rather than its non-financial benefits, public access to rivers will be subordinate to commercial interests, and that Australian water will be open to overseas commercial interests (Stoeckl et. al. 2006). One of the greatest concerns is that water rights will belong to the highest bidder. Furthermore if water is passed out of the government's hands, how then will Indigenous groups be able to assert their rights in it?

As this paper demonstrates, governments are only beginning to develop water strategies, such as the National Water Initiative in Australia and the Sustainable Water Programme of Action in New Zealand, and in each instance governments are unsure as to how to balance competing rights and interests in a way that accurately reflects Indigenous values in freshwater. For the most part, such water strategies 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. However, since the legal system is yet to deal with the issue, it is unclear how Indigenous interests would fare in these water markets and any Indigenous rights that come about through the water markets are purely a result of government policy and goodwill. Despite the lack of legal discourse, this paper considers Indigenous commercial rights in general and suggests that, especially in countries such as Canada and the United States, a legal basis exists that entitles Indigenous communities to participate in water markets.

MANAGEMENT RIGHTS

For Indigenous people, the right to participate in the preservation of water resources for future generations is extremely important. In settler countries, the control of water and water resources has traditionally vested in governments. Only recently has there been a growing trend towards co-management approaches that incorporates both Western science and Indigenous knowledge (Morrison 2007). In some countries, these co-management structures have a strong legal basis—from recognition of the rights in common law to statutory regimes obliging 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 government.

There is a considerable variety of government policies on co-management, as well as indirect protection of Indigenous interests in cultural and heritage related legislation, but they are beyond the scope of this paper. Rather, the section on 'Management Rights' in this paper looks at those cases and statutes which deal most directly with Indigenous water management rights in each of the four countries and in doing so offers some best case examples where Indigenous groups have taken control of freshwater management through these mechanisms.

INDIGENOUS OWNERSHIP OF WATER

UNITED STATES

In the United States, the federal government holds reservation land and water in trust for Indigenous people. The most notable jurisprudence on water in the United States has not been so much on whether or not Indigenous people have title to water but rather the scope of their water rights—which will be discussed further on in the section on water rights. In the United States, once native title[4] is established the content of it is strong and confers significant water rights.

In the United States the common law and legislation around title to water has developed largely in response to earlier 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. As government policy evolved, there was a point of time in the late nineteenth century when property could be allotted to individuals as fee simple and millions of acres of reserved lands passed into non-Indigenous ownership. These policies have affected the development of the law in regards to Indigenous water rights and have occasionally worked to the benefit of the Indigenous groups as non-Indigenous interests often align with those of the reservation. Lands and waters outside the reservations are subject to ordinary common law principles of native title and the jurisprudence suggests that native title to water off-reservation in the United States is limited to traditional water uses.

Whether or not a tribe has title to water on a reservation will depend on the treaty that created the reservation. For instance, in the case of *Montana v. United States*, 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 right for the tribe. The Court found that the presumption under the common law is that the ownership of waters vests in the Crown unless the treaty clearly indicates an intent to transfer beneficial ownership of waters to the tribe.

Once established the content of native title in the United States is strong. In the Supreme Court case of *Mitchel v. United States* it was held that native title was 'as sacred as the fee simple of the whites' (p. 746) 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. It seems that regardless of whether water rights are based in fee ownership of reservations or customary title at common law, they confer significant powers on the Indigenous people in the United States.

CANADA

The sources of native title in Canada are the common law, treaties, and modern settlements. In Canada the common law around native title to water has developed both within the context of the English common law and, post-1982, in terms of the *Constitution Act* which affirms and protects 'aboriginal' and treaty rights. Both the common law and the Constitution recognise and protect native title though, as will be demonstrated in this section, native title in Canada is distinguished from English property law forms of title. In the end, as most cases are solved through negotiation, the judiciary in Canada has not yet ruled directly on the issue of title to water but has articulated some general concepts that are relevant to the Indigenous water debate. This section will demonstrate how the modern treaties and settlements have been the preferred method for resolving water issues and result in significant transfers of water rights to Indigenous people.

The treaties in Canada often delineate boundaries of ownership in terms of waters. As the country was settled, Indigenous people were originally treated as self-governing people. This meant that the only way that Britain could assert title over Indigenous 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

NISGA'A FINAL AGREEMENT

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.[5] Negotiations began in the 1970s and culminated in 2000 with the *Nisga'a Final Agreement Act* giving legal effect to the agreement. The agreement gave the Nisga'a significant control of water resources through the transfer of nearly 2,000 square kilometres of Crown land to the Nisga'a Nation, the creation of Bear Glacier Provincial Park, and the establishment of a water reservation that entitles the Nation to 300,000 cubic decametres of water annually for domestic, industrial and agricultural purposes. As well, this water reservation is given priority over other water licence holders. The agreement creates another water reservation with a 20 year term to allow for the Nation to explore hydro power opportunities on rivers and streams. The agreement also sets out specific annual volume percentages of each river and stream located within or partially Nisga'a lands. Finally, there are also mechanisms under the agreement for resolving disputes over boundaries. Since the Nisga'a's interest in land amounts to fee simple ownership—the strongest form of ownership under law—they are able to register interests in the land titles system and 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 Final Agreement* is a good example of how Canadian Indigenous people can negotiate significant water rights for themselves, including rights of development.

treaties through which Indigenous Canadians surrendered a significant portion of their rights in both lands and waters. Through these treaties the Crown acquired 'legal' title to land, lakes and rivers with certain rights for Indigenous peoples left in place. As in the case of other settler countries, the views of the Indigenous signatories to these treaties as to what rights they were surrendering differed from the views of the British. In setting aside reserved lands, the earlier treaties did not always specifically deal with the title and right to water (Bartlett 1988). The rights remaining under the treaties are now constitutionally protected and the judiciary consistently interprets any ambiguity in favour of Indigenous claimants in light of the Crown's fiduciary role.

In the areas of Canada not covered by early treaties, modern treaties have been negotiated, the first of these being the James Bay and Northern Quebec Agreement in 1975. These modern treaties often vest ownership (or near full ownership) in land, lakes, rivers, and foreshores in Indigenous groups. Usually though the government retains some power over water resources in these agreements. Among other things, these agreements clearly specify entitlements in terms of rights to a certain annual volume of water and roles in management (for a detailed look at these agreements see the Nisga'a Final Agreement insert above). They also set out the priority of licence holders with Indigenous water reservations having first priority. These newer modern treaties are a preferable means for resolving rights to natural resources since they allow for the negotiation of mutually beneficial outcomes. The process is informed by the common law which obliges the Crown to negotiate in good faith and in the interests of Indigenous people. In the end, the relationship between Canada's government and Indigenous people is strengthened through the formation of long lasting partnerships on the management of resources.

In addition to the treaties and the jurisprudence surrounding them, the common law in Canada also recognises native title to water as an inherent right deriving from the existence of Indigenous people in the country since time immemorial. The Supreme Court of Canada has consistently affirmed the definition of native title in *R. v. Guerin* as 'a legal right derived from the Indians' historic occupation and possession of their tribal lands' (para. 132). This inherent right of native title includes the right to enjoy both the fruits of the land and water equally. As an inherent right, the right to water is an integral part of Indigenous life and 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* would create significant change in the common law of native title in Canada and present an opening for the recognition of significant rights to water for Canada's Indigenous people.

The *Delgamuukw* case was the Supreme Court's most liberal interpretation of native title rights in Canada up to that point. In the case, the Court rejected the argument that native title is restricted to traditional uses of the land, but 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, 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 Court held that it encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be traditional uses. This exclusivity confers priority, over other groups not holding title, to the land and its resources 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 in the *Constitution Act*, whereas the property rights of other landholders are not. *Delgamuukw* is now the leading case on the content of native title in Canada, but the principles articulated by the Supreme Court in the decision are yet to be applied directly to a claim involving title to water. However, as discussed above, the courts have held that native title includes the right to enjoy the fruits of both land and water equally. Therefore, there exists a strong legal argument in favour of exclusive native title rights to water where an Indigenous group could demonstrate use and occupation of lands and the water in a native title claim.

In Canada courts rarely consider claims to water because such water ownership disputes between Indigenous people and government tend to be resolved through negotiation. Water claims have come before the court but most often the litigation is discontinued in favour of a settlement. One of the most well known Canadian cases in this regard is often referred to as the 'Oldman River case'. The court case, known as *Piikani First Nation v. Alberta*, involved a claim to the bed, shores, and waters of a river in 2002 on which there was a substantial dam project. Before the court could rule on the issue, the Indigenous group and 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 finalising disputes to water in Canada, as ownership of water might still vest in the government but Indigenous groups are transferred many incidents of ownership allowing them significant control, and in some cases commercial rights, over the water.

NEW ZEALAND

Under New Zealand law, Maori can hold customary title to water, with ultimate ownership vesting in the government. This section demonstrates how early in New Zealand's history the spirit of the Treaty of Waitangi was soon forgotten and the government went through considerable effort to vest ownership of water resources in itself. Despite the fact that customary notions of title inform the legal discourse in New Zealand and that the government continues to assert its ownership of water, Maori have recently negotiated comprehensive natural resource settlements that transfer a near full complement of property rights in water.

While Maori may have believed that they had maintained their ownership of resources in the 1840 Treaty of Waitangi, the common law soon ruled against them. For example, in the 1912 case of *Tamihana Korokai v. Solicitor-General* the Court affirmed that it would not enforce native title absent statutory direction and at most it would recognise a customary native title. This area of law developed in the twentieth 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 confers different benefits than fee simple ownership of water. It may confer exclusive rights to resources but it is subject to English freehold title rights and may in some cases be extinguished under New Zealand law. The distinction between customary and common law notions of ownership is a complex issue that is not easily understood, yet these uncertainties were relied on by early governments to assert their rights in legislation.

Early statutes imported the idea of Crown ownership of resources. For instance, the 1903 *Water Power Act* vested in the government the 'sole right to use water in lakes, falls, rivers, or streams' (s. 2(1)) for purposes of generating electricity. Similarly in 1967, the *Water and Soil Conservation Act* vested in the Crown the 'sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water' (s. 21). These early statutes have been described by some commentators as 'governmental seizures of water resource ownership rights' (Kahn 1999: 69). Not surprisingly then, even in the settlements in the 1990s the Crown maintained the view that treaty claims should focus on the use, cultural and spiritual values of natural resources rather than ownership (Kahn 1999: 67). The legal system has thus worked consistently throughout New Zealand's colonial history to effectively vest ownership of waters in the Crown.

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 the Te Arawa Lakes Settlements, which recognised local Maori group's traditional, historical, cultural and spiritual association with the lakes of the Rotorua region. The Settlement was made into law in 2006 and transferred ownership and control of 13 lakes (but not the water contained within them) to these local groups. It also included an apology for Treaty of Waitangi breaches and a NZ$10 million dollar financial package. The Settlement also established the Te Arawa Lakes Trust to receive and manage the lake beds on behalf of all members of Te Arawa. While the settlement undoubtedly confers significant responsibility over the lakes to Maori, it is important to realise that the Crown has retained incidents of ownership in the lakes.

Interestingly, as this case demonstrates, 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 water, the animals and plants in it, or structures such as dams on the water. As well, any existing public access or commercial rights will be preserved. Bargh (2007) has commented on the notion of ownership under the Settlement

and notes that it is not specifically the water and air which is vested in the Crown, but the space occupied by these. This effectively enables the Crown to reaffirm their position that water can not be owned per se while simultaneously seeking to benefit from water as though it is owned. On this basis then it seems that the ownership that has been transferred to Maori, even if it comes in the form of fee simple, is a right of management of the waters subject to the existing rights already on them. This raises the question—that occasionally surfaces in the judicial decisions on title—of how meaningful title to the river or lake is if the title does not include the water contained within?

AUSTRALIA

Native title in Australia is customary in nature and it is a right that is tentative against other property interests at common law or under statute. Indeed, early statutes vested primary control of water resources in the government (examples are provided later in this paper). This section demonstrates how the Australian legal system has not evolved beyond a very conservative view of customary law to give effective recognition or protection to Indigenous water rights.

To date the Australian common law as it has developed in relation to water has not conceded anything more than the notion of customary native title rights. In *Mabo v. Queensland (No. 2)* native title was recognised under Australian common law for the first time but the High Court took a narrow approach and based native title in traditional laws and customs. As per this approach, native title in Australia exists as a bundle of rights and interests in relation to land and waters where the rights and interests claimed are based on traditional laws and customs and where the Indigenous people have maintained a connection with the area in question. Building on Mabo, in *Commonwealth v. Yarmirr*, 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. The Court expanded on the content of native title and held that it included rights of access, fishing and hunting, visiting and protecting places with cultural and spiritual importance, and safeguarding traditional knowledge. It was not an exclusive right however in recognition that this would be incompatible with the existence of a public right to fish in that area. As well, later cases have interpreted *Yarmirr* to mean that a grant of fee simple in the inter-tidal zone does not include the waters in that zone and does not confer an exclusive right to control access to the sea overlying that zone.[6] Therefore, to the extent that native title might exist in water in Australia, it will not amount to full ownership and any associated rights will be limited by the customary approach.

In relation to freshwater it seems therefore that the most that can be claimed is not a full property right but rather the right to water in the exercise of native title rights. The Federal Court of Australia in the case of *Mark Anderson on behalf of the Spinifex People v. Western Australia* in 2000 held that such native title rights were exercisable specifically for the purpose of satisfying personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional law of customs. Similarly in the recent 2005 *Gawirrin Gumana v. Northern Territory (No. 2)* case the Court determined that

the native title holders had exclusive rights to control access of inland waters in certain areas, but this did not mean that the rights of native title holders went beyond the right of access and usage and the right did not amount to ownership of the waters. This restricted approach regarding native title to water has also been incorporated into legislation in Australia.

The key statute for defining property rights in water for Indigenous Australians post-Mabo is the *Native Title Act 1993* (NTA). The NTA recognises that native title includes water. Section 223 defines native title as 'group or individual rights and interests of Aboriginal peoples or Torres Strait Islands in relation to land or waters.' As per the NTA, which echoes the common law, these rights and interests must be possessed under traditional laws and customs and the claimant group must demonstrate a connection with the land or water that confers entitlement. These customary interests though clearly sit along side the rights of the Crown under the NTA which vests ultimate ownership of natural resources and the capacity to control and regulate the flow of water, and any existing public access to and enjoyment of waterways, and beds and banks and foreshores of waterways in the Crown.[7]

In addition to the NTA, the States and Territories have their own legislation that affects native title. 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 1992* in the Northern Territory vests in the government 'the property' as well as 'the rights to the use, flow and control of all water' (s. 9). Similarly, in Queensland, the *Water Act 2000* vests in the State 'all rights to the use, flow and control of all water in Queensland' (s.19). Further, s. 24(1) of that Act provides that 'the beds and banks of all watercourses and lakes, forming all or part of the boundary of land are, *and always have been*, the property of the State' (emphasis added). One of the most inclusive statutes recognising Indigenous rights and interests in water is the *Water Management Act 2000* in New South Wales, though even this statute narrowly confines Indigenous water rights to domestic and traditional purposes. These statutes demonstrate that the legislative approach thus far in Australia, in line with the common law to date, has been to narrowly define Indigenous title to water as customary while vesting ultimate property and control in the government.

ANALYSIS

Native title rights to water derive from different sources in each jurisdiction—mainly being the common law (all), treaties (all except Australia), statute (Australia) and modern settlements (most notably Canada and New Zealand). Despite this, some similarities emerge from a comparison of the four countries. First, the history of these four countries in terms of their struggle for control over natural resources paints a similar picture. During settlement of each of the four countries, the early government attempted as much as possible to vest all rights to water in themselves through legislation and treaties. In countries such as Canada and New Zealand especially it is widely accepted that the early treaties did not always reflect the agreement which Indigenous people believed they had reached. Another similarity is that in each of the four countries' legal systems native title derives from customary law and traditions. Though in some instances,

especially in Canada and the United States, the notion of customary title has been applied more liberally and therefore the content of customary title is not necessarily the same in each country. Finally, the common law across all jurisdictions has been relatively silent on the issue of native title to water to date. The result is that Indigenous people in these countries now have tenuous property rights in water under a Western legal system that at best only minimally reflects Indigenous realities and values.

It is interesting that the end result of a successful native title claim including water would lead to very different outcomes between these four countries. In the United States, the content of native title will primarily depend on the interpretation of the treaty which created the reservation but as noted the courts approach the notion of native title quite liberally. The Canadian Supreme Court has also been quite progressive in comparison to other countries in its interpretation of the content of native title. Native title in Canada, as recognised by the Supreme Court, is not limited to traditional purposes and may include an exclusive use and occupancy against all others, which is further reinforced by the Constitution. In New Zealand, while native title as per the judiciary is customary, the recognition of title has resulted in significant transfers of control over the management of water resources to Maori (this will be discussed in a later section). Australia in comparison is the country least inclined to expand native title out of its traditional realm. The judiciary thus far in Australia is primarily guided by the policy objective of protecting traditional rights and uses of the land in awarding native title, rather than the policies of economic self-sufficiency and promoting sovereignty over natural resources as commonly guides the North American native title decisions. In the end, this results in significantly different outcomes in terms of the resource rights that flow on from native title decisions.

Another notable difference is the modern settlements in Canada and New Zealand and their role in transferring some rights at least incidental to ownership of water. Modern settlements are increasingly viewed by Indigenous people and governments alike as a way to negotiate mutually beneficial outcomes in terms of water ownership and control. As final and legally binding settlements are incorporated into statute, they create stronger partnerships as Indigenous people and the government move beyond arguing native title in the often slow moving court system and clearly set out management roles in terms of water. By clearly delineating rights, the settlements lead to greater economic certainty. The positive effect of such settlements is especially pronounced in Canada where large settlements have transferred most incidents of ownership and may be used as financial leverage. In Australia, by contrast, significant energy is still invested in resolving native title disputes when Indigenous people and the government should instead be looking at settlements as a means to reaching mutually beneficial outcomes.

INDIGENOUS WATER RIGHTS

UNITED STATES

Indigenous people in the United States enjoy considerable water rights in comparison to their counterparts around the world, especially those residing on reservations. The well-known '*Winters* doctrine' is the starting point for water rights for Indigenous people residing on reservations. However, there are other significant rights that confer priority on Indigenous people from treaties between Indigenous people and the federal government, the common law and legislation. As this section will demonstrate, the fact that Indigenous communities in the United States are viewed as sovereign is probably the overall key factor for their advantageous position today in relation to water rights.

In the United States, the starting point for any claim for Indigenous water rights is the 1908 court decision of *Winters v. United States*. One of the most well known common law doctrines regarding Indigenous water rights—the reserved rights doctrine—was articulated in the *Winters* case. According to the reserved rights 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. As per this doctrine, 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. This doctrine reflects the government's early reservation policy of promoting self-sufficient Indigenous communities. For instance, in order to 'civilise' an Indigenous group, the reservation may have been divided by government into individual plots for agriculture and under the *Winters* doctrine, the reserve would be entitled to sufficient water for agricultural purposes and to keep the land valuable. The *Winters* doctrine should also entitle Indigenous people on reservation to a certain amount of water reserved to allow them to continue practices such as fishing and hunting as well. In reality, though, for at least 50 years following the *Winters* decision the government continued development of the West with minimal regard to Indigenous water rights, including the building of dams and large irrigation projects (Burton 1991).

Significant change in government policy would come about in 1963 when the Supreme Court revived the *Winters* doctrine in the case of *Arizona v. California*. This case involved the allocation of the flow of the Colorado river as it was divided among three States and the five tribes along the river who used the water for irrigation on their reserves. The Supreme Court, relying on the *Winters* doctrine, ruled that those tribes were entitled to 900,000 acre-feet of water annually, as this was the amount that would be required to irrigate the reservations.[8] The *Winters* doctrine was viewed by the Supreme Court as a mere extension of the prevailing law of prior appropriation since reservations were more senior users than all other users and they were clearly the first historic users of the water. This case then was a clear message that Indigenous water rights attached to reserves were superior to other water rights. As recently as 2005, the *Winters* doctrine was still evolving as the court extended it to apply to groundwater rights as well in the case of *United States and Lummi Indian Nation v. Ecology*. Though in practice it has often been difficult for tribes to exercise their

Winters water rights, theoretically tribal reserved water rights could arise at any time to defeat an already vested water right (Babcock 2006). As well, in practice, 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 (Getches 2005). These cases demonstrate that without means to implement the rights, priority of water rights as per the *Winters* doctrine for Indigenous people are purely theoretical.

In addition to the *Winters* doctrine, the water rights of American Indigenous people are also generally legally superior to non-Indigenous rights under federal treaty obligations. This is largely due to the fact that courts are guided by the principle of law that natural resources and the rights of development were retained by implication by Indigenous people in treaties and agreements which set aside land for reservations (Burton 1991). A related and well established rule of interpretation, in both the United States and Canada, which works in favour of 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,* where the Court found that all rights to develop resources that had not been specifically surrendered by the tribe in the treaty or agreements should be considered as having been retained by them. Thus, treaties can provide another significant source of water rights in the United States.

In the United States further protection of Indigenous water interests comes from the fact that governments are legislatively constrained in terms of water rights. Water rights are viewed as the property of individuals and protected under the different State constitutions. As property of individuals, water rights cannot be removed or modified by a government without the consent of the right holder (Productivity Commission 2003). It is also common to have 'no injury' statutory provisions that protect water users against injury arising from other water users exercising their water rights. In general then governments do not have the power to administratively re-allocate water resources or modify existing water rights. Rather, governments seeking to re-allocate water must do so through the purchase of water rights, harvesting additional water or investing in water savings (Productivity Commission 2003).

An interesting issue worthy of mention that has arisen in the common law of the United States recently is whether water rights as per the *Winters* doctrine extend to rights to a certain quality of water. While the *Winters* doctrine provides a guarantee of a specific quantity of water often allocated on a yearly basis, 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 seems to also protect a right to water quality. In *United States v. Gila Valley Irrigation Dist.* the court declined to rule on water quality but determined that water flows high in salt did not satisfy a 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 thereby leaving only a saline flow for the downstream tribe. In relation to preserving the quality of their water, in recent years tribes have also begun to assert rights to water quality under the federal *Clean Water Act* which has provisions requiring the State to notify tribes as downstream users before issuing discharge permits. The tribe may

provide written recommendations that oblige the State to either accept or explain its rejection, and there is further redress in a veto power for the tribe. On this basis then there is some indication that the water rights of Indigenous people in the United States also extend to a right to quality.

CANADA

In Canada water rights for Indigenous people derive from the common law, the Constitution, and both early and modern treaties. The Canadian common law has recognised that water rights are an integral part of native title which has been recognised as the right to occupy and enjoy the fruits of the lands including the waters on them.[9] Treaties also delineate water rights in Canada, especially the new modern treaties or settlements which are the result of years of negotiations. Not only are such rights acknowledged generally in the common law and in treaties, but they are protected by the Constitution which makes Indigenous water rights legally paramount to ordinary water rights at common law. Finally, as this section will demonstrate there is an additional layer of protection upon Indigenous water rights as the Crown in the role of fiduciary must act honourably and engage meaningfully with Indigenous people before making decisions which could impact on their water rights.

Treaties generally did not provide explicitly for water rights, beyond rights of hunting and fishing, but the understanding of Indigenous peoples on entering the treaties was that they had reserved the water rights (Bartlett 1988). The common law considers each treaty on its own terms when a dispute arises. The jurisprudence favours Indigenous water rights in a general way due to a rule of law in Canada that treaties should be given a fair and liberal construction in favour of the Indigenous group. It is clear in Canada that treaties confer rights to customary usage of water for purposes of hunting and fishing, and the courts have even been willing to extend this to a right to more modern uses such as irrigation (in a similar fashion and no doubt influenced by the jurisprudence in the United States extending customary rights).

Once native title rights to water are established either through successful native title claims or through a treaty claim they enjoy considerable protection under the law. The Constitution in Canada, along with its recognition and affirmation of Indigenous rights, imposes a high burden on the Crown to justify its actions under a two part legal test which considers the government's objective in acting. The right to water can only be interfered with firstly if the government's objective is compelling and substantial and secondly if the objective is consistent with the special fiduciary relationship between the Crown and Indigenous peoples. The fiduciary relationship between the Crown and Indigenous peoples means there is always a duty to consult that goes beyond mere consultation in decisions taken with respect to their lands and that the proposed activity cannot ruin the resource for use of future generations of Indigenous Canadians. The Crown must also demonstrate that fair compensation has been given when native title is infringed. Therefore, not only does the Constitution affirm Indigenous rights, but the two part test further protects resource interests by placing a high burden on the government to act in a fiduciary manner.

Another interesting development in Canadian constitutional law that could provide protection of Indigenous interests in water has been the jurisprudence around environmental rights and the Constitution. In *R. v. Sparrow*, the Supreme Court articulated a liberal approach to constitutional rights that could arguably be extended to environmental protection. The Court stated that Indigenous rights need to be interpreted flexibly so as to allow for evolution over time. In this sense, the Constitution should be construed in a purposive manner which considered the original purpose of the provision of affirming Indigenous rights. Therefore, it seems that if environmental protection is necessary to preserve an already recognised constitutional right, such as fishing rights for Indigenous people, Canadian courts are beginning to suggest that Indigenous people might be able to rely on an argument that water is an environmental right under the Canadian Constitution. This is an argument that is yet to come before the Canadian courts but might be expected in the near future.

Adding to the constitutional jurisprudence, there has also been a recent emergence of a general duty to consult and accommodate in the Canadian common law that provides an additional layer of protection for Indigenous interests in water resources. The duty to consult as articulated by the courts requires the Crown to consult Indigenous stakeholders in good faith with the intention of substantially addressing their concerns.[10] Consultation also entails fully informing Indigenous stakeholders of the proposed activities or measures and their impacts, as well as giving ample opportunity to report to the government on their interests and concerns. This process obliges government to give meaningful consideration to Indigenous interests and at all stages to act in accordance with its fiduciary obligations. Depending on the nature of the interests and title, full consent might be necessary. Accommodation means government and third parties must seriously consider alternative actions and infringe Indigenous rights as minimally as possible, as well as pay compensation where an infringement is unavoidable. These duties apply even in the absence of title being proven. An example of how this can be used to protect resources is found in one case involving the logging of old-growth forest and where native title was still being decided. In that case the Supreme Court stated very clearly that it is not honourable to unilaterally exploit a resource during the process of proving and resolving the Indigenous claim to that resource, thereby depriving the claimants of some or all of the benefit of the resource.[11] In Canada, both the government and industry appear to be acting in accordance with these duties and the country is witnessing the emergence of a new relationship whereby these two sectors work collaboratively with Indigenous groups early on in the process to ensure the most beneficial outcomes for all those with interests in water (Durette 2007).

Canadian jurisprudence also leads to considerable certainty for Indigenous water rights as against conservation measures. Under Canadian law, Indigenous rights are second only to conservation and the government bears the burden of proving a legitimate legislative objective. In the case of R. v. Sundown, the Supreme Court held that if the Crown was to introduce regulation that would impact Indigenous rights, it would not be sufficient for the Crown to simply assert that the regulations are 'necessary' for conservation. Rather strong evidence on this issue would have to be adduced as well as evidence that the legislation does not unduly impair the right. Such an objective will also only be accepted as valid by the courts where

Indigenous people have been meaningfully consulted and where Indigenous people were not able to or were unwilling to implement the conservation measures themselves. In this manner then various resource management Acts across Canada's provinces and territories contain provisions stating that nothing in the Act affects Indigenous and treaty rights and explicitly recognise water rights for traditional heritage, cultural and spiritual purposes.[12] These Acts also refer to an exclusive right to use the waters on Indigenous land and a right to flow 'substantially unaltered' for water flowing through or adjacent to Indigenous land—though it is yet to be determined how this will play out should a case be brought before a court. Water boards are also obliged under the legislation to consult Indigenous groups and cannot issue water licences until they first enter an agreement for compensation with the Indigenous group who will experience loss or damage from the alteration. Therefore, Indigenous resource rights, including water, have priority in most instances in Canada and this is recognised by both the judiciary and legislatures.

NEW ZEALAND

In New Zealand water rights for Maori are based in the common law, legislation, the Treaty of Waitangi, and more recently settlements. To the extent that they have been recognised by the common law and legislation, Maori water rights are treated as customary in nature and stemming from native title. The content and scope of these rights is yet to be decided by the judiciary and would likely vary on a case-by-case basis at common law since the prevailing notion is that Maori title rights fall along a spectrum from full ownership to permissive and revocable rights (Schroder 2004). The recent gains in fisheries for Maori demonstrate how claims to water resources could eventually develop into some significant rights through judicial and legislative action, combined with strong government policy aimed at securing meaningful rights for Maori. At the very least, the fisheries experience in New Zealand has served to bring Maori resource issues to the fore in New Zealand. It demonstrates how claims to water resources could be resolved in a mutually beneficial manner. The starting point for determining Maori resource rights, whether fisheries or water, is the Treaty of Waitangi.

The Treaty of Waitangi is a key document in determining water rights whether at common law or in modern settlements. The Treaty guaranteed Maori control of their lands and natural resources, in return for British sovereignty over New Zealand. In a comparison of Maori and American Indigenous water rights, Kahn (1999) notes that this ceding of sovereignty has been fatal for Maori natural resource rights. Today the Crown is sovereign and any Maori rights can now be removed and augmented by parliamentary will. Subsequent jurisprudence has continually interpreted the natural resource rights reserved under the Treaty as customary rights of usage rather than full ownership. The Crown has based its policy approach on the Treaty of Waitangi and considers that Article One of the Treaty gives it the right to own or regulate natural resources. The Crown believes that its rights under the Treaty override Maori rights provided by it (Schroder 2004). The Crown has taken the position that, based on this interpretation of the Treaty, in times of need if it was in the national interest to abrogate Maori water rights it would not be breaking any duty to Maori (Schroder 2004). With these considerations then Kahn (1999) concludes that when Maori ceded sovereignty in the Treaty they never received the control over natural resources as is necessary for their management of resources or for

self-determination (as has been the result in the United States). Based on their interpretation of the Treaty, the Crown argues that they maintain sovereignty over Maori interests in water.

Modern settlements in New Zealand provide one avenue for negotiation and clarification of water rights, although in keeping with the Crown's interpretation of the Treaty of Waitangi full control of water is never quite transferred to Maori. Negotiated settlements have returned some lands and waters to Maori, as well as provided significant compensation for their historical losses of lands. As discussed earlier, these settlements often transfer title to lake and riverbeds along with many rights associated with ownership. Although the Crown ultimately retains full control of water, and the settlements make clear that the ownership transferred to Maori is not ownership of the water itself, the settlements represent a means for Maori to secure meaningful rights in water that are made into legally binding documents and legislation.

The water rights debate has gained in strength recently in New Zealand with the government announcing its Sustainable Water Programme of Action, which Maori fear amounts to nothing more than a grab for ownership of New Zealand's water (Gifford 2007)[13]. These fears are certainly warranted given the *Foreshore and Seabed Act* controversy in 2004. The *Foreshore and Seabed Act* was enacted as a response to a Court decision saying that if Maori could prove customary use of the foreshore and seabed in some cases this might amount to freehold ownership. The Act overrode the decision by vesting ownership of the foreshore and seabed in the Crown. The options for a Maori legal challenge to the Act and what legal protections might be resorted to are unclear. A starting point would be to question whether such an action fits with the common law notion of fiduciary duty between Maori and the Crown. This duty, as in Canada and the United States, is supposed to protect Maori rights from extinguishment and obliges the government to act in good faith when it comes to Maori interests. As well, there is talk of resorting to international law. The legacy of the foreshore and seabed controversy weighs heavily in the Maori consciousness and there is a now a strong distrust of the government's new water legislation as Maori again might find themselves without legal options to defend their water rights. The new Programme of Action promises to improve Maori engagement and participation in water management but Maori still have concerns as to whether it will protect cultural values in water, provide a role in decision-making about water allocation that reflects the Treaty relationship, and allow for economic access (Gifford 2007).

AUSTRALIA

Recent case law in Australia has begun to consider water rights for Indigenous Australians, but these rights are mainly defined by legislation such as the NTA and other water statutes in the various States. While the common law is generally clear that customary rights of usage will be protected where native title has been established, it is less clear 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 common law that is not sympathetic to protecting Indigenous interests or advancing their overall well-being, means that Indigenous water rights in Australia are ad hoc and tenuous at best.

Significant uncertainty exists in Australian common law over the nature of water rights. Recently, the issue before the courts is whether the common law doctrine of native title will recognise and protect traditional spiritual relationships with water in the face of development pressures. The majority in *Ward v. Western Australia* concluded that the common law does not recognise spiritual relationships with country as an incident of native title. However, in *Yarmirr v Northern Territory*, the Court held that the right to protect cultural knowledge is a right that can be recognised if traditional law requires presence on the country (such as visiting a site to pass on knowledge). The most recent water victory for Indigenous Australians was the case of *Gawirrin Gumana v. Northern Territory of Australia (No. 2)* (or *Blue Mud Bay No. 2*), 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. The reasoning in this case, if upheld in later court challenges, is a potential source of significant rights though it must be cautioned that the case is distinguishable as per the law since the reasoning in it is not based on customary native title but rather the recognised rights stem from ownership rights under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Therefore, the case stands for some important principles that may apply where an Indigenous group has fee simple ownership and while it will not confer full ownership it will confer incidental and exclusive rights. How the Australian courts will next rule on water though remains uncertain.

Legislation in Australia provides some protection for water rights in their customary forms. For example the NTA recognises and provides protection for customary native title rights as does water legislation in both New South Wales and Queensland. The latter two statutes both recognise the right to take or use water without a licence or approval in the exercise of native title rights which include the right to take and use water for domestic, personal and non-commercial communal purposes.[14] Yet despite these protections, these rights can still be 'validly' overridden by the legislatures, and this situation has been further confirmed by the judiciary.

Even if Indigenous Australians are entitled to water rights under the common law and there are statutory mechanisms in place to preserve those rights, these rights face the uncertain prospect of being overridden by the doctrine of extinguishment which has been widely accepted by the courts and subsequently passed into legislation in Australia. For example, the NTA lists different categories of 'future acts' carried about by government that may validly affect native title such as interests granted for agricultural activities and public infrastructure. Arguably, then, the construction of dams would be a work that could validly affect native title rights under the legislation. State legislation imports this doctrine as well. For example, in the case of Ward v. Western Australia where the Court found that even though native title exists in relation to the land and water, any exclusive native title right to control the use and enjoyment of water in the Ord Irrigation District had been extinguished by the *Rights in Water and Irrigation Act 1914* (Western Australia) which vested in the Crown 'the right to the use and flow and to the control of the water in any water-course, and in any lake, lagoon, swamp or marsh, and in any spring, and subterranean source of supply' (s. 4(1)). Where water rights are extinguished, there should be a basis for compensation, yet rights to be compensated are not always clear.[15]

With legislative arrangements differing from State to State, right holders are not always able to seek compensation for a reduction in their water rights. For example, in New South Wales and Queensland, the government is exempt from paying compensation where the reduction in the value of water rights is a result of changes in water allocation plans. In regards to extinguishment by future acts, the NTA allows a range of procedural rights and compensation where native title is affected including in some instances the right to compensation and the same procedural rights as ordinary title holders. As well, these rights do not extend to the situation where a person interferes with native title interests if the activities in question are permitted by a licence, lease, permit or authority nor does it provide compensation for authorised acts which infringe the rights of native title holders.[16] Thus, there seems to be many ways for water rights to be 'validly' overridden and the prospect of compensation is uncertain to unlikely in many instances.

In terms of balancing environmental and Indigenous water allocations, the legislation and policy favours environment over all other water users. A survey of the legislation though suggests that native title rights should at minimum provide a right of consultation where water planning will impact native title interests. For example the South Australia *Natural Resource Management Act 2004* states that water allocation plans must take into account those water users who are dependent on the water source.[17] Most environmental statutes, such as the *Environment Protection and Biodiversity Conservation Act 1999* provide that nothing within them affects the operation of the NTA. The problem is that each statute that contains this type of provision typically follows with a clarification that the protective provision is subject to all of the possible acts under the NTA that could validly extinguish native title rights. Therefore, a variety of actions undertaken via environmental legislation could validly affect native title rights and interests to water. While the breadth of legislation in this regard is too heavy to delve into and it is unclear how the situation would be resolved by the judiciary, it is certain that as water shortages increasingly become the norm in Australia the already limited native title interests in water face even greater restrictions and there are no clear legal means by which Indigenous people can protect those rights.

ANALYSIS

As in the case of native title to water, it is difficult to compare the nature of water rights across these four jurisdictions given the many variations in the law. Each country has its own history of allocating water across users through the common law and the legislatures. Those jurisdictions with scarce water resources will have a different approach over water rights than those jurisdictions where water is bountiful. As well, the sources of rights vary. In Australia rights have generally been allocated through the legislatures and government policy, while in New Zealand the most recent source of water rights is the modern settlement process. Canada and the United States seem to be influenced by their respective common law and consequently the legal principles that emerge from these two countries are similar. However, natural resource rights for Indigenous people in Canada are deeply engrained in the Constitution which creates significant security for Indigenous water interests. In these four countries then the nature of Indigenous water rights varies considerably, but some important patterns emerge. In the end, it appears that the water rights of Indigenous people in the

United States and Canada encompass a wider spectrum of rights and enjoy greater protection under the law as compared to Australia and New Zealand.

One of the interesting features of water rights law that arises on a comparison of these four countries is that, although each country recognises customary rights to water, the end result of this recognition has been different in each jurisdiction. In Australia and New Zealand it appears that the government has historically gone through considerable efforts to vest ownership and ultimate control of water in itself, while retaining customary water rights for Indigenous people. In Australia, as previously discussed, it seems unlikely that these rights would evolve in a commercial sense in the near future. Similarly, in New Zealand, since even though the modern settlements represent considerable opportunity for Maori to regain some rights to water, the most they can expect is rights of usage and management. In Canada and the United States Indigenous water rights are also customary in nature, but in both countries the judiciary has taken a flexible approach to these rights and allowed for an evolution that suggests something beyond mere customary use. This will be discussed further in the 'Commercial Rights' section of this paper. The jurisprudence in Canada and the United States is also heavily influenced by the common law notion of fiduciary duty to which the government is held in relation to Indigenous people, which calls for the evolution of Indigenous rights in recognition of a right to be self-sufficient.

Not only does the nature of water rights differ in each country, but so too there are differences in the levels and sources of protection given to Indigenous water rights. In both Australia and New Zealand legislation affirms Indigenous customary resource rights, yet in practice the government is able to override these rights with minimal accountability. The judiciary in both of these countries still takes a limited approach to natural resource rights and has not extended to any great degree the protections that are available at common law, legislation or in New Zealand the Treaty of Waitangi. One way that the court could protect Indigenous rights in water would be to apply strictly the notion of fiduciary duty that has been consistently applied by the North American courts in resolving both native title and natural resource disputes. While there are hints of fiduciary obligations in the court decisions emanating from Australia and New Zealand, the judiciary has not been inclined to utilise it as a real tool for protecting Indigenous interests. In terms of legal protections, Canada stands out, for it has enshrined in a powerful Constitution the rights of Indigenous people to their natural resources. The judiciary acts as a check on the government's actions in Canada and this makes for a much greater certainty in water rights in that country.

The final theme that emerges is that the experience of the United States, and Canada to a lesser degree, suggests that when the sovereignty of Indigenous people is recognised, greater resource rights follow. The *Winters* doctrine is largely underpinned by the notion of tribal sovereignty and that tribal water rights are crucial to the development of cultural, political, and economic autonomy. However, given the common law heritage of all four countries considered in this paper the opportunity exists for the principles of law that inform the *Winters* doctrine to be applied in Australia, Canada or New Zealand. Therefore, the fact that national policy in the United States has recently favoured determining clearer water rights in order to

promote economic self-sufficiency and self-determination should be seen as a useful example for Australia and New Zealand when they consider Indigenous interests in their freshwater policies (Getches 2005).

INDIGENOUS COMMERCIAL RIGHTS TO WATER

UNITED STATES

The ability of Indigenous people in the United States to transfer or market their water rights is somewhat uncertain as it is unclear whether or not this fits with the influential *Winters* doctrine discussed earlier in this paper. In the United States, reservations are allocated high quantities of water under the *Winters* doctrine 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 were never intended as a purpose in their establishment (Burton 1991). The answer to the debate surrounding the water market depends on the characterisation of the reserved right, specifically whether it is to allow the use and development of reserved lands only or to promote the self-sufficiency of Indigenous people.

There are though, persuasive arguments that tradable water rights for Indigenous people are consistent with the *Winters* doctrine. For instance, if Indigenous people cannot participate in the water market, the value of *Winters* water rights are substantially lessened. This was the approach taken by the Court in the case of *Colville Confederated Tribes v. Walton* which recognised that an owner's right to transfer a portion of the reserved water right was necessary to avoid a diminishment of the treaty right. 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.

Another issue that arises is whether the water rights allocated under the *Winters* doctrine for specific purposes can be put to new purposes. There are mixed judicial decisions on this issue. In *Arizona v. California*, for example, the Supreme Court confirmed that the tribe's future uses of water were not restricted to agricultural purposes which had been the basis for the tribal water right. In contrast, in the *Big Horn* case, the Court did not allow the tribe which had originally been allocated water for irrigation to use a portion of these rights to restore a fishery on grounds that it was not the purpose for which the water had been allocated. These two cases might be distinguishable by application of the 'no injury' rule that is part of State law in the United States. As per this rule, a holder of water rights may alter the type of use so long as no other water users are hurt by the change (Getches 2005). In the *Big Horn* case, in contrast to *Arizona v. California*, there were many other non-Indigenous investments in the river basin that would have been negatively affected. In another case, *Colville Confederated Tribes v. Walton*, the court held 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. Therefore, whether the range of uses to which *Winters* rights can be put includes commercial purposes will be decided on a case by case situation in the United States.

The general common law in the United States hints at a right of development of natural resources that could presumably be extended to allow for Indigenous participation in water markets. For example, in *Johnson v. McIntosh* 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...' (para. 574). Similarly, in *United States v. Shoshone Tribe of Indians,* 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. While these cases do not directly consider the right to trade in water, collectively they provide a foundation to argue for the existence of such a right.

As of 2005, Congress had not yet considered legislation allowing leasing of Indigenous water rights per se (Getches 2005), but as this section has shown there is some indication from the common law that there is a right to engage in trade of natural resources. Most recently water trading rights have been dealt with in negotiations for water rights. Most of these settlement packages provide for trading rights though they place stronger restrictions on a reservation's trading rights in terms of location and scope (Getches 2005).

CANADA

In Canada where water is plentiful, the focus as not been so much on water markets for reasons of allocating water in times of scarcity but rather on bulk water exports, especially to the United States. As the country is home to about 20 per cent of the world's freshwater, there have been many schemes proposed over the years to divert Canada's water to the United States that raise public alarm. Since the North American Free Trade Agreement in 1988, Canadians have been especially aware that the United States is interested in Canada's water and live with the very real threat that the United States may come more aggressively for its water in the near future. Recently, there have been discussions of a North American Future 2025 Project involving the collaboration of Canadian, United States, and Mexican governments—a large component of which involves bulk water exports. Currently Canada enjoys an abundance of water and there is ample supply for all users. However, as quality supplies diminish with environmental changes and pollution, and as the water intensive industries of the United States begin to purchase Canadian water, it is unclear how the rights of Indigenous Canadians will fare in this environment.

The experience thus far in Canada suggests that there may be commercial rights in water for Indigenous people. For example as discussed earlier, the Supreme Court takes a liberal approach to Indigenous rights and has recognised that traditional rights such as fishing may evolve to have a commercial component. One of the reasons for the liberal interpretation is drawn from common law notion of fiduciary duty. Similar to the United States, the Canadian judiciary holds the government to a fiduciary duty in relation to Indigenous people and to act in their best interests. 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. In addition to the progressive approach taken by the judiciary, Indigenous people in Canada have secured commercial water rights through modern treaties. For instance, the *Nisga'a Final Agreement Act* included provisions allocating significant amounts of water some of which could be put towards development of hydro power. Interestingly, at least one Indigenous group in Canada has already joined the global water trade. Iroquois Water Ltd. is an Indigenous owned company in Ontario which markets natural spring water from one of North America's largest aquifers. Iroquois Water claims to be the world's most advanced water bottling facility on Indigenous land.[18] The success of the company is largely due to its sales in United States markets. It seems therefore that in Canada as water trade expands Indigenous people have at least some commercial rights enabling their participation.

NEW ZEALAND

The law as it currently stands in New Zealand limits Maori native title rights to customary usage; whether or not Maori have commercial rights to water remains to be decided. 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*, 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* the Court noted that the right of development of Indigenous rights is indeed becoming recognised in other jurisdictions, but it limited the right in the sense that it must be premised on some sort of historical connection. Therefore, 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 in all contemporary forms of usage. This approach was affirmed in *Te Runanganui o Te Ika Whenua Inc Soc v. Attorney-General*, where the Court rejected claims that native title rights extended to the right to generate electricity, stating that, 'however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power'. These cases taken together do not suggest that Maori would have full control of their water resources for the purposes of competing in a water market, but the experience with fisheries in New Zealand suggests otherwise.

The New Zealand legal system struggles with the dichotomy of customary and commercial rights for Maori. As just discussed, the early case law on fisheries suggested that any commercial rights would be based in 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 it would be difficult to argue a historical connection any more in many aspects of their participation in the fishing industry. According to the 2006 Annual Report of the Maori Fisheries Trust, Maori now have millions of dollars in investments

in the commercial fishing industry with fishing assets continuing to grow. Through careful investments and business management, Maori presently control an estimated 40 per cent of the New Zealand seafood industry, including processing and aquaculture operations. Therefore, the fact that Maori have secured significant commercial interests in fisheries suggests they might also do the same with water. And in this instance, the robust and competitive Maori organisations and communities that have been created through the fisheries experience will be a considerable force.

The water issue is currently on the table in New Zealand with the introduction of New Zealand's recent Sustainable Water Programme of Action (the Programme) which includes as one of its strategies the use of market mechanisms. One of the key strategies of the Programme is to enhance the transfer of water under the *Resource Management Act*. Bargh (2007) in a recent submission to the United Nations expressed scepticism of the consultation process and noted that during the initial meetings Maori expressed concerns over several of the proposed initiatives under the Programme, none the least of which are the market mechanisms. Bargh disputes the New Zealand government's claims that there are no human rights implications in the Programme, noting that the government has clearly failed to give adequate attention to Maori concerns and potential human rights breaches in the marketisation of its water. Bargh also notes that the New Zealand government's commitment to 'free' trade agreements has a significantly negative impact on the ability of Maori to manage water and negotiate water ownership and rights issues. The concerns of Maori then regarding how this Programme will adequately account for their cultural values in water are certainly justified, especially considering a historical tendency on the part of government to act unilaterally to exploit resources without full consideration and accommodation of Maori interests.

AUSTRALIA

Water trading is increasingly being proposed as an efficient means of re-allocating water among rights holders in periods of short supply in Australia yet the rights of Indigenous people in such a market remain uncertain. Altman and Cochrane (2003) argue that to establish an efficient water market 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. Yet, those working within the legal system who have the tools to implement these innovative approaches have not taken the full range of policy considerations into account and gone so far as to extend Indigenous rights beyond notions of customary rights. And these customary rights are often tenuous at best. 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). The New South Wales government is one of the only jurisdictions in Australia to recognise the right for Indigenous people to participate in commercial water markets.

The New South Wales government has established a A$5 million Water Trust for Aboriginal people in New South Wales in recognition that Indigenous people should be encouraged and assisted to enter and participate

in the commercial water market. The Water Trust was established through the *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. Besides the Water Trust, the *Water Management Act 2000* also generally recognises 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 (s.3 (c)). 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.

ANALYSIS

Water markets are a reality in which Indigenous people will have to resolve their rights. All four countries canvassed 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 Canada and the United States where the right to economic development is accepted and indeed progressed by the judiciary. 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 settlements on the scale of the Maori fisheries settlements. Given this, Australia's National Water Initiative and the water market it envisions should be of major concern to Indigenous Australians, as it could very well lessen their already tenuous water rights.

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 is a process that has evolved to provide significant rights for Indigenous people in this regard (Burton 1991). As environmental protection legislation developed, a variety of federal statutes were passed involving 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 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 therefore legislation, common law, and modern agreements on natural resource management have affirmed the role of the third sovereign in effective management of water resources.

Federal statutes provide a number of means through which Indigenous people are able to regulate and manage the quality of waters within their reservations. Under these statutes tribes are able to assume

primacy for programs and are treated as States for the purpose of resource management. An example of this is the *Clean Water Act* (CWA) which operates on the principle known as 'cooperative federalism' that allows 'States' to decide to implement federal programs and gives them the right to set more stringent standards than the federal laws.[19] Thus, for certain water management activities under the CWA tribes may take primary responsibility in the same manner that is afforded to States. Another program available through the CWA allows tribes to regulate pollution if the source is located on the reserve. Known as the National Pollutant Discharge Elimination System (NPDES), this permit program allows a tribe to issue discharge permits and set limitations necessary to meet water quality standards. Where a tribe declines to take action through NPDES, the federal Environmental Protection Agency will issue discharge permits for point sources within the reservation, but the tribe is still able to give input into whether the permits meet the tribal water quality standard. There are also provisions allowing tribes to identify off reservation sources of pollution, such as agricultural and urban runoff, that will impact water quality and develop best management practices to control the pollution. The range of programs available to tribes under the CWA thus offers substantial opportunities in theory to protect the quality of reservation waters (see Box 2).

The common law has also recognised that tribal groups in the United States have significant rights in resource management. For example, one issue that arose in the later twentieth century was whether the States could enforce their environmental management programs on reservations (Burton 1991). In the 1985 case of *Washington v. Environmental Protection Authority*, the Court ruled against the State of Washington which sought to enforce its resource conservation program on the reservation and held instead that the State must develop its program working directly with the tribes as sovereign governments. As sovereign governments, tribes exercise full authority over its members and lands. The common law though is not the most effective means of asserting resource management rights in the United States.

Instead, it seems to be fairly well accepted in the United States that it is more desirable and efficient to solve resource management issues through the early engagement of Indigenous people in the process. Therefore, it is common to see successful Indigenous water management initiatives which are a result of cooperation of the federal, State and tribal governments.[20] For example, the Tohono O'odham were recently given an award by the Environmental Protection Authority (whose enabling legislation regards tribes as sovereign) for creating a water distribution system, including well improvements and increased water storage capacity to a village on tribal land (Hand 2007). A second example of cooperative tribal resource management institutions is the Chippewa Ottawa Resource Authority (CORA) which includes six Michigan tribes with treaty rights in Lakes Huron, Michigan and Superior. CORA not only operates a comprehensive program of fishery management and enhancement, but also deals with water issues such quality and invasive species.[21] It also provides conservation enforcement in treaty waters in cooperation with the Michigan Department of Natural Resources and the Coast Guard, with violators tried in tribal courts. Since it is well accepted that Indigenous people should be dealt with as sovereign states, Indigenous people are able to focus their energies on developing strong bodies such as these for protection and management of their resources.[22]

TRIBAL WATER QUALITY STANDARDS

The Salish and Kootenai tribes currently manage Flathead Lake, the largest freshwater lake in the western United States, and the hundreds of streams draining into it.[23] Management of the lake is undertaken by the Division of Environmental Protection which is located within the larger Natural Resource Department of the tribal government. In 1989, the tribe council received approval for treatment similar to a State under the *Clean Water Act* which allows tribes to take primary responsibility for certain water management activities in the same way that a State would. This enabled them to work closely with the Environmental Protection Authority to develop a comprehensive water program which included the digitalisation of water quality data, the setting and adoption of water quality standards under tribal law which are regularly reviewed and revised, and several specific projects such as education programs and construction and maintenance of infrastructure. In some limited instances, the definition for 'waters of the Tribe' that forms part of the tribal water quality standards may result in water quality standards that are more comprehensive than required under the *Clean Water Act* and the implementing federal regulations.[24] This cooperative approach to resources has an extremely positive outcome: Flathead Lake is now one of the least polluted large lakes in the northern hemisphere.

CANADA

In Canada, the delineation of water management roles mainly comes from legislation. The Constitution sets out the duties of the federal and provincial governments in relation to water but in reality the management of resources is shared by the federal, provincial, and municipal governments and by Indigenous governments. At the national level the Department of Indian and Northern Affairs Canada has a Water Resources Division, that 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 resource into emerging water issues. The federal *First Nations Land Management Act,* which came into force in 1999, also allows First Nations and the Minister of Indian and Northern Affairs to negotiate an agreement giving the First Nation broader powers over land management on their reserve.[25] At the provincial level there are resource management agreements with Indigenous groups and First Nation governments that set out the various roles in water management. A good example of the water rights that might be negotiated through these agreements is found in the *Nisga'a Final Agreement Act* in British Columbia (see insert text above).

The *First Nations Land Management Act* as a federal statute transferring significant power to First Nations over their resources warrants further consideration. It allows a First Nation to develop a 'Land Code' based in part on the basic land law of the Indigenous group which is then measured against provincial standards. Among the powers under the Land Code are the rights to collect and use revenue, expropriate interests, and create laws regarding conservation, protection and management of water interests. Before a First Nation

enacts a law with environmental purposes under a Land Code it must negotiate an agreement with federal Ministers from the Indian and Northern Affairs Department and the Environment Department. The resulting Environmental Management Agreement will ensure that standards set are equal to or greater than those under provincial law. The legislation is a good example of how power for management of resources might be transferred to Indigenous people and how all levels of government can work cooperatively to manage water resources.

NEW ZEALAND

Maori rights to participate in management of water are recognised through both legislation and the recent treaty settlements. 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* (RMA) has been the most significant legislation in New Zealand on management of natural resources. The impetus for the RMA was a government review of coastal management law in which it was decided that Maori should be given an active role in resource management in light of their spiritual and cultural values (Nettheim, Meyers & Craig 2002). The new legislation then would have a strong Maori dimension. The relationship Maori have with the environment is referred to in Part 2 of the RMA, particularly sections 5 to 8—requiring agencies 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 also provisions allowing for iwi (confederation of clans/tribe) to introduce management plans to councils stating how they want to be dealt with under the RMA. The argument has been raised that the impact of the provisions are limited and do not confer effective authority to Maori (Jones 2003). It might also be argued that the RMA, as it currently reads, renders Maori participation in environmental management dependent on the commitment of local authorities to follow the spirit of the legislation. Despite any shortcomings, in the least Maori expect that they will be included in environmental management processes relating to water. One of the main issues for them is the incorporation of cultural values into water management (see the boxed insert opposite on the Cultural Health Index).

In addition to the RMA, Maori are now in the advantageous position of negotiating water management rights through the treaty settlement process. One of the aims of the settlements is to provide appropriate redress—an element of which is recognising Maori's 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 Maori increased control over their resources (Office of Treaty Settlements 2004). Management of waters may be transferred to Maori in the settlement process via the vesting of waterway in Maori, formal agreements known as Deeds of Recognition, or Statutory Acknowledgements. The vesting of ownership, as discussed earlier, effectively confers primarily a right of management of the lakes and rivers that are

MAORI CULTURAL HEALTH INDEX

The Cultural Health Index (CHI) was developed by Maori as a means of helping them participate meaningfully in water management. It is a tool through which Maori can work practically with resource managers to incorporate Maori values into water management. The two main goals of the CHI are for Maori to take an active role in managing freshwater resources and to provide an opportunity for resource management agencies to discuss and incorporate Maori perspectives and values into management decisions.[26] On a practical level, the CHI is a tool for assessing the cultural and biological health of a waterway. The CHI has three components which are assessed separately by the *iwi* (confederation of clans/tribe) in charge of the waterway. The three components—site status, *mahinga kai* values (values as a food-gathering site), and stream health—together provide a comprehensive assessment of the health of the waterway. Site status is a statement of whether or not the site is of traditional significance. The second component allows the *mahinga kai* values to be evaluated and expressed. This involves a species assessment, a comparison of the difference between the site today and in the past, an assessment of access and likelihood of usage. The cultural health stream is made up an assessment of eight separate health indicators including for instance looking at water quality, riparian health, and flow variability. Guidelines set out how to assign a numerical score to each component. Not only is it a practical tool, but it builds Maori capacity from within and enables Maori participation in water management in a meaningful and robust way.

The preliminary research for the program was done by Maori through the Ministry for the Environment's Environmental Performance Indicators Programme. It is designed to be a tool that can sit alongside Western measures of environmental health and be of significant use in co-management initiatives in New Zealand (Tipa & Teirney 2002). Though there are still many difficulties in realising these aspirations, the CHI theoretically facilitates the work of statutory authorities in their fulfilment of obligations to Maori under the *Resource Management Act* since the CHI will promote increased understanding of Maori values in freshwater.

included in the settlements. In certain cases, the settlements allow for the Minister of Conservation to vest land to Maori under the *Reserves Act 1977* who then become responsible for its management under that legislation. An option to ownership, which could be useful 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 provide that Maori must be consulted on certain matters as well as in some instances roles in resource management. The final redress option is 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 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 States as per the federal division of powers in the Commonwealth Constitution although the federal government retains responsibility for environmental matters of national significance. In Australia, rights of management will follow from the 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* also has provisions allowing for Indigenous knowledge to inform land management. In 2000, an Indigenous Advisory Committee was established under the Act to advise the Minister for the Environment and Water Resources on Indigenous issues. However, because the Australian common law has not shed any light on the duty to consult, or on general rights of management, it is still unclear whether the right to consultation on natural resource management in Australia has any substantive content.

The National Water Initiative is Australia's national water reform plan that could have significant implications for future Indigenous land and sea management. While it refers to Indigenous rights, it is unclear as to how these would be exercised by Indigenous people without any strong legal basis behind the provisions. The plan deals with a wide range of pressing water issues. One of the objectives is improved environmental management which refers to integrated water management, knowledge and capacity building, and community partnerships. The Initiative sets out in detail in paragraphs 52 to 54 how Indigenous access is to be achieved. Section 52 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. As well, water planning processes will take into account customary native title. However, the fact that it is left up to each of the jurisdictions as to how these objectives are to be achieved, or even if Indigenous groups will be included through the use of the terminology 'wherever possible' and 'wherever they can be developed', makes it difficult for Indigenous Australians to assert water rights through these non-committal provisions.

ANALYSIS

Australia has the least formal legal recognition of the right to participate in management of waters in comparison with these other countries. The United States is especially notable in this comparison as Indigenous people are treated as sovereign and equal to States under federal resource management statutes. In Canada, there are strong partnerships on resource management between federal, provincial, and municipal governments and Indigenous governments created under federal legislation. Both these countries operate in the spirit of a cooperative federalism model which leads to extremely robust management structures with meaningful roles for Indigenous people. In New Zealand the *Resource Management Act* provides significant recognition of Maori right to participate in water management, with an associated range of

Table 1. Indigenous freshwater rights: Four country comparison

	United States	Canada	New Zealand	Australia
Form of Title	customary title fee simple	customary title	customary title fee simple via settlements	customary title
Source of Water Rights	common law Treaties[1]	common law Constitution treaties[2]	Treaty of Waitangi *Resource* *Management Act*	common law *Native Title Act*
Legal Protections	high	high	moderate	minimal
Priority vs. Other Users	Yes	Yes	No	No
Commercial Rights	Limited	Limited	Possible	No[4]
Management Rights	*Clean Water Act*[3]	*First Nations Land Management Act*	*Resource Management Act* settlements	Statutory

1. Volume/possible quality rights.
2. Environmental/ flow rights.
3. Treated as equal to States.
4. Economic interests in New South Wales.

options such as Deeds of Recognition and Statutory Acknowledgements that offer considerable certainty and are legally enforceable. In these three countries Indigenous people have a meaningful role to play in water management and if government omits to include them and act without consultation, there is recourse through the judiciary. The Australian government, on the other hand, has recently announced a water reform strategy that should create concern for Indigenous Australians as it recognises Indigenous interests in resource management in the most non-committal manner possible.

DISCUSSION

Indigenous water law is a relatively new area and there has been minimal legal discourse on the subject to date. However, this paper has attempted to draw out some common themes which are emerging in the international debate over Indigenous water rights by comparing four countries that have relatively similar settler histories and laws regarding Indigenous people. Legal areas of concern to Indigenous people in these four countries are identified and summarised in Table 1. The following analysis and discussion will be built around these six topics: title to water, water rights generally, legal protections, priority against other users,

commercial rights, and management rights. This analysis focuses on comparing Australia's current legal position on Indigenous water rights with the other three countries included in this study.

TITLE TO WATER

While native title rights to water derive from different sources in each jurisdiction, in some instances, especially in Canada and the United States, the notion of customary title has been applied more liberally by the courts and therefore the content of customary title is not necessarily the same in each country. The content of customary title depends on the policies by which the courts are guided. By emphasising that native title is linked to traditional laws and custom, the Australian High Court's objective appears to be the protection of traditional rights and uses of the land rather than promoting the self-sufficiency of Indigenous communities. In contrast, North American courts are guided by the recognition of the right to economic self determination which allows for increased control over water including the freedom of choosing the use to which the water will be put and in some instances a right of development of the resource. In the United States, native title to water often includes a right to make laws about the water sources and sometimes a right to try an offender in tribal courts. The Australian courts, in remarked contrast and in spite of international developments, continue to narrowly interpret native title rights.

One of the reasons that Indigenous native title rights in Australia have not kept up with changes in the common law in other settler-states may be the tendency for judicial subservience to Parliament and the wishes of executive government in the Australian judiciary (Blackshield 2007). According to Blackshield there is a 'repeated tendency to focus on sustained interpretation of the relevant statute, as a strategy for producing an answer to the immediate question … in a way that avoids any need to consider the deeper issues …' (2007: 23). Using the *Yorta Yorta* case as an example, he notes a tendency for the judiciary to engage in a process 'shot through with fallacies, of reinterpreting the definitions in the *Native Title Act 1993* … in such a way as to drastically narrow the possibilities for successful native title claims, while excluding any possibility of continued development of the common law notion of native title' (2007: 23). In Canada, court decisions on native title and natural resources are based in large part on policy issues. In the United States the important role that the judiciary plays in protecting Indigenous rights is recognised by Burton who describes the federal judiciary as the institution 'least susceptible to shifting political currents and most sensitive to honouring of governmental obligations … [it] has emerged over the course of this century as the primary definer and defender of the Indian water right' (1991: 34).

WATER RIGHTS

Water rights must be legally enforceable if they are to be of value, yet it is unclear what legal basis Indigenous Australians have for realising their water rights. There is no legal precedent for the enforcement of Indigenous water rights, nor are there any statutory options for doing so. For example, the *Water Management Act 2000*

in New South Wales recognises Aboriginal interests and even provides for a Water Trust, but there are no legally enforceable provisions in the legislation. More recently in Australia the National Water Initiative has recognised Indigenous interests in water but it has clarified these rights with wording such as 'wherever possible' and 'wherever they can be developed.' Thus, under the National Water Initiative, Indigenous interests in water are dependent on the will of the state to recognise their rights. This is a similar problem for Maori in New Zealand who, with the legacy of the foreshore and seabed controversy, know all too well that the government might overrule any rights granted by common law by legislative means. In the United States and Canada, by comparison, Indigenous people have recourse through the common law through notions of fiduciary duty and duties to consult and accommodate which will be discussed in the following section. As well, they enjoy considerable constitutional and statutory entitlements. The Australian situation stands in remarkable contrast. Behrendt and Thompson (2004) note that initiatives attempting to provide for Indigenous water interests in Australia, such as those under the *Water Management Act 2000*, are largely unenforceable and without additional measures are unlikely to result in significant change for Australia's Indigenous people. Similarly, the National Water Initiative is unlikely to result in any significant changes in Indigenous access to water, other than those changes that erode these rights further, if Indigenous people do not have legal recourse when their rights are not recognised.

Indigenous Australians might look to negotiate their water rights in settlements, such as those reached in Canada and New Zealand over natural resources and mentioned earlier in this paper, as one means of realising their interests in water. Getches (2005) identifies some of the commonalities of recent water settlements: federal investment in water facilities ensuring delivery to all users, State and local government cost sharing of the expenses of the settlement, and creation of a tribal trust fund that can be put to either water development or general economic development. The negotiation would then be enshrined in legislation and become a means of legal recourse for Indigenous Australians. Ideally these settlements would be reinforced and strengthened by the judiciary imposing a strong legal duty on governments to negotiate in good faith and in the interests of the Indigenous group. In Australia, governments are starting to manifest a willingness to engage in negotiations on native title (McFarlane 2004). Altman and Cochrane (2003) point to Indigenous Land Use Agreements as one means for reaching agreements on the use and management of freshwater, though Behrendt and Thompson (2004) note that Indigenous Land Use Agreements have not been widely used by States and where they are used they do not generally adequately address the full range of Indigenous interests. Thus, while Australia has a long history of agreements on natural resources, they tend not to be as comprehensive as the agreements emerging in North America.

Overseas experience indicates that negotiated native title settlements represent a real step forward towards self government and economic independence for indigenous groups and greater social cohesion of society as a whole (Nettheim, Meyers & Craig 2002). The Canadian model as discussed in this paper not only sets up robust co-management structures, but also provides for economic strategies and self-government. In the United States the most recent policy has been to negotiate water rights settlements in recognition of the lengthy and costly process entailed by the court system. Rather than one-side negotiations, the goal is to

seek ways to provide for Indigenous water rights without jeopardising non-Indigenous water users (Getches 2005) and outcomes that maximise the economic benefits to all users. Therefore, though the tribe may not get the full quantity of water claimed, they will get significant money from the federal government allowing them to build facilities and put their water rights to use (Getches 2005). It is also important to consider that the negotiation process itself results in considerable outcomes in building robust partnerships and overall social cohesion. One of the process outcomes in Canada is the emergence of the idea of a 'new relationship' between Indigenous people and government based on mutual respect for one another's laws and responsibilities in terms of natural resource management. This provides significant space for Indigenous values to be incorporated into resource management. In this regard then the agreement process in Australia would be strengthened from a greater awareness of the content and process of the overseas agreements on natural resources, especially the Canadian model. The social and environmental impact of these forms of agreements also warrants further research.

One new area of law that could lead to major change for the global Indigenous movement for water is the notion of an 'environmental' right. The content and form that this right may take is uncertain. It is also unclear as to the preconditions that will need to be met before the right is triggered. In Canada the Supreme Court has alluded to the idea that the right to water is an environmental right under the Canadian Constitution for Indigenous people. In the United States, there has been some indication by the courts that water rights of Indigenous people in the United States extend to a right to quality as well as a right to quantity. The international developments on Indigenous rights, the right to safe drinking water, and the right to be free from environmental degradation could also provide leverage for Indigenous people asserting their water rights. In the past, governments have been able to use water as a tool for promoting the growth of communities with little concern over water entitlements (Connell 2007). Now, however, with increasing competition among water users, it is important that governments are legally obliged to account for an environmental flow, which would at the same time align with Indigenous interests in managing water resources. This environmental flow may take priority over allocation to all other water users. The developments in this area of law should be considered in more depth to identify how they may apply in the Australian context as a means of protecting Indigenous water rights. It would also be useful to explore how cultural flows relate to environmental flows, as well as other flows such as recreational and agricultural, as this is an emerging area of concern and uncertainty in international water policy.

LEGAL PROTECTIONS

In Australia the government is left unchecked to recognise Indigenous interests in the most limited manner, thereby ensuring the government's legitimacy but maintaining its own interests. In sharp contrast to the other countries in this paper, the protection of Indigenous interests in Australia is left to what Behrendt and Thompson (2004: 71) refer to as the 'whim of Parliament', meaning that rights can be provided or removed as the government so chooses. Moreover, they argue that post-Mabo the legislative trend in Australia has been to merely mention in whatever legislative act that is coming into existence that it does not affect native title

interests as a form of self-legitimisation. This, they argue, does not amount to governments accommodating Indigenous interests adequately. Native title law is an area of law that has considerable potential to protect Indigenous interests in water, but this body of law has been wholly inadequate in Australia. Specifically, the common law has not developed in two key ways that the North American have, these being: the notion of fiduciary duty and the emerging duty to consult and accommodate.

The notion of fiduciary duty was articulated by the Supreme Court of Canada in *R. v. Sparrow*: 'The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship' (p. 1108). In Canada the fiduciary duty arises in light of constitutional recognition and affirmation of existing Indigenous and treaty rights as well as the vulnerability of the rights of Indigenous peoples in relation to the Crown. Accordingly, the right to water in Canada can only be interfered with if the government's objective is compelling, substantial and consistent with the special fiduciary relationship between the Crown and Indigenous peoples. The fiduciary relationship also imposes a duty of meaningful consultation in respect to decisions that could impact Indigenous interests. The burden of proof is on the Crown to prove that any infringement of native title is justifiable under law, part of which involves demonstrating that there was no other means to achieving the end, as well as proving that fair compensation has been given when native title is infringed. This idea of fiduciary duty has been consistently applied by the Canadian judiciary to protect Indigenous rights from the government's interference. It is a particularly powerful remedy as it does not depend on the existence of native title for it to be triggered.

In the Australian case it is still an unresolved issue as to whether or not a fiduciary relationship exists between the Crown and Indigenous people. Legal writers have considered the possibility of such a fiduciary duty, which arguably may arise out of the nature of native title itself or by some voluntary undertaking or assumption of responsibility by the Crown (Sweeney 1995). However, this discussion has mainly been in the abstract as there has been no evidence of a promise by the Crown to Indigenous peoples in the past or in the future. The Australian judiciary has also not taken up the notion either. Such a duty could, however, be imposed on the basis that Indigenous Australians have historically had their territories and rights reduced by settlement, dislocation and development. In *Mabo (No. 2)* the only majority judge to consider fiduciary duty was Toohey J., who recognised that the particular vulnerability of Indigenous Australians to the exercise of power by the Crown to adversely affect their interests and extinguish native title gave rise to a fiduciary relationship. Such a duty, if taken up in a meaningful way by the courts, has a capacity to fundamentally reshape Crown-Indigenous relationships to an even greater degree than the *Mabo (No. 2)* decision on native title (Sweeney 1995).

The common law duty to consult and accommodate which is emerging in Canada also has considerable potential to impact outcomes in decisions over water rights in Australia. As discussed earlier in this paper, the Canadian Supreme Court has articulated a strong common law duty to consult and accommodate Indigenous groups with respect to any proposed activities or measures that could impact title or natural resource rights. This duty has considerable weight for the rights of Indigenous Canadians. In comparison,

the rights of Indigenous Australians to be consulted on natural resource policy and decisions are left to the mainly to the whim of the States. For instance, in the latest water policy—the National Water Initiative—the most Indigenous people can hope for is to be consulted and given access 'wherever possible.' The fact that it is left up to each of the jurisdictions to decide how the Indigenous objectives of the Initiative are to be achieved is problematic. The National Water Commission in the United States has noted the bias that arises when States are left to adjudicate water rights (Burton 1991). Not only should similar duties be imposed on States, but they should exist independently of native title. It has been suggested that the extent of extinguishment and the limits that have been built into the legal doctrine of native title should not be the only benchmark for the engagement of Indigenous people (Morgan, Strelein, & Weir 2004). It might be better then to ground the duty to engage in the principle of honour of the Crown rather than native title. Further research examining the content of this right in Canada and the resulting leverage it provides for Indigenous Canadians in terms of their natural resource rights would be useful. Australia requires legitimate processes of consultation supported by the judiciary in terms of indigenous rights to natural resources such as water and could learn from the Canadian model.

PRIORITY AGAINST OTHER USERS

Another important issue that arises is that the rights of Indigenous Australians do not receive the same priority under the law as in the North American jurisdictions. For instance, it has been shown in this paper that the reserved rights doctrine in the United States confers priority for Indigenous users of water over all other users. This right is strengthened by the setting out of a specific annual allocation of water to which the Indigenous group is entitled. In Canada, Indigenous resource rights are second only to conservation and the government bears the burden of proving a legitimate legislative objective and this requires strong evidence that the right is not unduly impaired. It is not be sufficient for the Crown to simply assert that the regulations are 'necessary' for conservation. The Crown must also demonstrate that there has been meaningful consultation and that Indigenous people were not able to or were unwilling to implement the conservation measures themselves. While Australia has numerous statutes dealing with natural resource rights that recognise customary rights, they do not enjoy the same priority because there are no grounds for enforcing these statutory provisions. The judiciary has not yet held the government accountable for these provisions and until such a time occurs one could argue that such legislation is merely a way for States to legitimise actions in their own self interest.

COMMERCIAL RIGHTS

Indigenous people must assert their legal rights to water as a means of ensuring that the market mechanisms, which are increasingly being employed as a key aspect of water reform, achieve greater equity in allocation among users of water. Indigenous legal rights within water markets have not been well defined in any of the countries studied in this paper. There is some indication that in the North American jurisdictions,

Indigenous people have commercial rights to participate in water markets under the common law. Supporters of commercial water rights in the United States point out the disparity in the government's support of Indigenous and non-Indigenous water users and that government can address both this specific disparity and also the earlier wrongs done to tribes since first contact with settlers by providing them economic opportunity such as facilitating the sale or export of water (Lui 1995).

As well, Indigenous people in each country in this paper, excepting Australia, are well positioned to negotiate significant water rights through natural resource agreements. New Zealand is a prime example of how these new settlements are addressing both historical wrongs and addressing the disparity referred to above through the returning of control over natural resources. It is not unlikely then that Maori will be able to negotiate commercial rights in water in the future. Even if Australia refuses to recognise a commercial right to water, Altman (2004) cautions that Indigenous customary rights must be included from the outset of any water market or there will be a risk of both further alienation of Indigenous people and higher transaction costs in the event that Indigenous people choose to challenge the legal validity of any water trading system that was implemented.

MANAGEMENT RIGHTS

The successful co-management structures emerging in countries such as the United States, Canada and New Zealand are evidence of how the political recognition and empowerment of a country's Indigenous people is critical to achieving more focused and effective water management (UN-Water 2006). According to Kahn (1999) one of the greatest advantages for American Indigenous people is that they are treated as separate political communities in terms of natural resource management, which creates a favourable legal context for claims to and management of water resources. In the same way, in New Zealand, the notion of *tino rangatiratanga*, being Maori conceptualisations of absolute authority or self-determination, is increasingly gaining legal recognition in both the common law and statutes dealing with natural resources. Recognising that Indigenous people should play a key and meaningful role in resource management will also impact on the social cohesion of a country. A prime example is found in Canada where Indigenous people and governments are able to look beyond the legal wrangling in the court system to interact under a 'New Relationship' which involves a shared vision of a new 'government-to-government' relationship based on respect, recognition and accommodation, including recognition of each other's respective laws and responsibilities.[27]

Australia is only just beginning to recognise the value of including Indigenous people in resource management, some examples being the Working on Country and the Indigenous Protected Area programs (Morrison 2007). Without diminishing the importance of these programs to resource management in Australia, it is important to note that they do not operate on the scale of some of the initiatives in other countries where Indigenous people are recognised as sovereign over their own territories. Rather in Australia, the programs are often place or species specific and their existence depends entirely on the political will of the government. Behrendt and Thompson (2004) point to what they call a 'significant deficiency' (p. 83) of the public administration in Australia to engage Indigenous people on their interests in water. The challenge for Indigenous Australians

then is to gain *legal* recognition of their rights to participation in natural resource management in the same manner as their overseas counterparts. This would enable them to participate from the outset of policy making and provide a legal foundation for challenging government decisions regarding control of and access to water that do not account for Indigenous interests.

INTERNATIONAL FRESHWATER RIGHTS

There is a growing international movement calling for the recognition of Indigenous rights to freshwater that warrants further consideration. Recently, there have been a few key international developments that represent significant advances in the recognition of an Indigenous right to water. For example, in the case of *Bernard Ominayak and the Lubicon Lake Band v. Canada*, the tribal group successfully challenged the provincial government under international law on its grant of oil, gas, and timber resources and the construction of a pulp mill on their traditional territory. The resulting environmental degradation had a devastating effect on the environment including certain bodies of water, and consequently on the health and traditional culture of the group as well. The challenge was brought under The International Covenant on Civil and Political Rights, and the Covenant's Human Rights Committee held that interference with Indigenous traditional land uses by environmental degradation is not permitted. In 2007, there have also been some very strong statements issuing from the Convention on the Elimination of all Forms of Racial Discrimination Committee having to do with the right of Indigenous people to be free from the negative environmental effects caused by transnational corporations and their development of natural resources. It is beyond the scope of this paper to provide an accurate picture of various international standards and jurisprudence on Indigenous peoples' right to water, and the related notion of a right to a clean and healthy environment. More research is needed to better understand these international developments, including the availability of effective mechanisms for the realisation of these rights and the remedies that are available under international law.

AVENUES FOR FURTHER RESEARCH

This paper situates Indigenous Australians in the international context in terms of their legal rights to water under the common law and through statutory regimes. It is important to build on this work and undertake further legal analysis on the following issues:

- the content and process of the Canadian agreements on natural resources, including the effect of the duty of government to negotiate in good faith on these agreements;
- examining the content of the right to consult and accommodate in Canada and the resulting leverage it provides for Indigenous Canadians in terms of their natural resource rights;
- a survey of international examples where Indigenous customary rights have precedence over other rights, specifically conservation measures;

- an in-depth look of the options within Australia, but also overseas, for rights and remedies when their natural resource rights are infringed, especially whether or not there is a right to injunctions and compensation;
- international developments in water law, including possible mechanisms under international law for enforcing Indigenous rights and the remedies under international law and the emerging rhetoric around the idea of an environmental human right;
- the international approach to environmental flows and where Indigenous cultural flows fit in relation to them; and
- the existence of legal grounds for participation in water markets both within domestic and international law for commercial purposes and the available legal protections for customary rights to water within water markets.

CONCLUSION

Freshwater rights are a key area of concern for Indigenous Australians. This paper has demonstrated how Indigenous rights to water have been inadequately recognised by the Australian legal system, in comparison to other settler countries. The comparatively advantageous position enjoyed by Indigenous people in the United States, Canada, and New Zealand contains many important legal precedents which could be used to argue for greater acknowledgement of Indigenous water rights in Australia. Water law is a relatively new area, especially in terms of Indigenous commercial rights to water and rights of management. It is hoped that an increased awareness of the legal developments overseas will strengthen the voice of Indigenous Australians in freshwater policy making.

The North American experience suggests that when certain conditions are met, Indigenous people will have the requisite legal foundation for asserting their right to water in the face of new water policies, these conditions being: meaningful consultation and participation in the development of policies; a priority of Indigenous use of water for domestic, social and cultural purposes over all other users; a legal basis for holding government accountable for its actions; and a right to the economic development of resources. This paper has shown that Australia falls short in meeting any of these conditions largely due to a failure on the part of the judiciary to act in the best interests of Indigenous people. In North America the judiciary acts in acknowledgement that claims to native title and natural resource rights are 'woven with history, legend, politics and moral obligations'.[28] In the United States, the judiciary has been described as the 'primary definer and defender' of Indigenous water rights (Burton 1991: 34). In Australia, the judiciary has not been motivated by similar obligations and instead appears to act according to political forces.

As the world is witnessing increasing periods of freshwater scarcity, water becomes power for those who hold rights in it. In Australia, the legal system currently vests that power firmly with the government.

NOTES

1. For more on the IWPG see the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) website, available at <**http://www.nailsma.org.au/downloads/FS1_IWPGRoleObjectivesFinalApr07.pdf**>.
2. The terms 'freshwater' and 'water' are used interchangeably in this paper for ease of reference. 'Water' is often used in legal discourse to mean inland or freshwater.
3. See for example, *General Comment* 15 (January 2003), The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20.
4. The doctrine of 'native title' is known by various names in each of the four jurisdictions in this paper. Since it is known as native title in Australia, this paper utilises that term for all jurisdictions for consistency. In Canada it is usually referred to as 'aboriginal title' whereas in New Zealand it might be 'aboriginal title' or 'Maori customary title.' In the United States, the term is generally 'Indian title.'
5. For further detail on the Nisga'a Treaty and Final Agreement, see Indian and Northern Affairs Canada 2004, *Nisga'a Final Agreement Act* Issue Papers, available at <**http://www.ainc-inac.gc.ca/pr/agr/nsga/pdf/isspap_e.pdf**>. The full Nisga'a Treaty is available at the website of Indian and Northern Affairs Canada <**http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html**>.
6. See for example *Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT*).
7. s. 212, NTA 1993
8. The recent approach of the judiciary is to base their calculations on the reservation's practicably irrigable acreage where the reserve was created for agricultural purposes (Getches, 2005).
9. See for example *Calder v. Attorney General of British Columbia*.
10. This duty was articulated by the Supreme Court in *Delgamuukw v. British Columbia*, and subsequently in cases such as *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.
11. *Haida Nation v. British Columbia (Minister of Forests)*.
12. See for example the *Mackenzie Valley Resource Management Act, 1998*, c. 25, s. 3(1).
13. Available at <**http://www.mfe.govt.nz/issues/water/prog-action/index.html**>.
14. See s. 55 of the **New South Wales Water Management Act 2000**.
15. Though it should be noted that the Ord case did eventually result in a significant compensation package in 2006 for the Miriuwung Gajerrong people known as the Ord Final Agreement.
16. s. 44H, NTA 1993.
17. s. 76., *Natural Resource Management Act 2004.*
18. For more on this see the Foreign Affairs and International Trade Canada website, available at <**http://www.dfait-maeci.gc.ca/aboriginalplanet/business/buiroquois-en.asp**>.
19. See s. 1377, which authorises the Indian tribe to be treated as a state under certain sections of the CWA.
20. However some tribes lack the financial capability or do not have a sufficiently large land base to realistically participate in these programs.
21. See CORA's website for more information, available at <**http://www.1836cora.org/**>.

22. This is not always the case, however, as 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 in that it has been confined to that of 'commentator' (Hand, 2007).

23. For further information see the United States Environmental Protection Agency website, available at <**http://www.epa.gov/waterscience/tribes/files/flathead.pdf**>.

24. The water quality standards of the Salish and Kootenai tribes are available at <**http://www.epa.gov/waterscience/standards/wqslibrary/tribes/salish_kootenai_8_wqs.pdf**>.

25. In this section the terms 'Indigenous' and 'First Nations' are used interchangeably since the latter is a common way of referring to Indigenous Canadians in the resource management statutes and government documents.

26. For more on CHI see the website of the Ministry of Environment, available at <**http://www.mfe.govt.nz/publications/water/cultural-health-index-for-streams-and-waterways-feb06/html/page2.html**>.

27. Many government websites now have 'new relationship' statements, see generally <**http://www.newrelationshiptrust.ca/home**> for more information.

28. *Kruger et al. v. The Queen*, at para. 109.

REFERENCES

Aboriginal and Torres Strait Islander Commission (ATSIC) 2002. *Onshore: Water Rights Discussion Booklet*, Lingiari Foundation, Broome.

Altman, J.C. 2004. 'Indigenous interests and water property rights', *Dialogue*, 23 (3): 29–34.

——and Cochrane, M. 2003. "Indigenous interests in water: A comment of the 'Water Property Rights-Report to COAG from the Water CEOs Group' Discussion Paper", CAEPR Topical Issue, CAEPR, ANU, Canberra, available at <**http://www.anu.edu.au/caepr/Publications/topical/AltmanCochranewaterrights11.pdf**>.

Babcock, H. 2006. 'Reserved indian water rights in riparian jurisdictions: Water, water, everywhere, perhaps some drops for us', *Cornell Law Review*, 91: 1203.

Behrendt, J. and Thompson, P. 2004. 'The recognition and protection of Aboriginal interests in NSW rivers', *Journal of Indigenous Policy*, 3: 37–140.

Bargh, M. 2007. 'Submission on water issues in Aotearoa New Zealand', Submission to Office of the High Commissioner for Human Rights, United Nations Office, Geneva.

Bartlett, R. 1988. *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, Canadian Institute of Resource Law, Calgary.

Blackshield, A.R. 2007. Untitled paper, Presented at conference Beyond Environmental Law: Intersections Between Legal Disciplines and the Environment, February University of Sydney, Sydney.

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

Connell, D. 2007. 'Wrestling with smoke: Coming to grips with the National Water Initiative', *ANU Reporter*, Autumn.

Durette, M. 2007. 'Indigenous property rights in commercial fisheries: Canada, New Zealand and Australia compared', *CAEPR Working Paper No. 37*, CAEPR, ANU, available at <**http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP37.pdf**>.

Getches, D. 2005. 'Defending indigenous water rights with the laws of a dominant culture: The case of the United States', in D. Roth, R. Boelens and M. Zwarteveen (eds), *Liquid Relations: Contested Water Rights and Legal Complexity*, Rutgers University Press, New Jersey.

Gifford, A. 2007. 'Water ownership grab alleged', *Waatea News*, 23 March.

Halsburys Laws of England, 2004 Reissue, Volume 49 (2), Butterworths, London.

Hand, J. 2007. 'Protecting the world's largest body of fresh water: The often overlooked role of indian tribes' co-management of the Great Lakes', Unpublished paper, University of Detroit Mercy, available at <**http://works.bepress.com/jacqueline_hand/1**>.

Kahn, B. 1999. 'The legal framework surrounding Maori claims to water resources in New Zealand: In contrast to the American Indian experience', *Stanford Journal of International Law*, 35: 49.

Jackson, S. and Morrison, J. 2007. 'Indigenous perspectives in water management, reforms and implementation', in K. Hussey and S. Dovers (eds), *Managing Water for Australia: The Social and Institutional Challenges*, CSIRO Publishing, Canberra.

Jones, C. 2003. '*Tino rangatiratanga* 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, Toronto, Canada.

Kempton, K. 2005. "Bridge over troubled waters: Canadian law on aboriginal and treaty 'water' rights, and the Great Lakes Annex", unpublished paper, Olthuis Kleer Townshend, Toronto, available at <**http://www.thewaterhole.ca/publications**>.

Lui, S. 1995. 'American Indian reserved water rights: The federal obligation to protect tribal water resources and tribal autonomy', *Environmental Law*, 25: 425.

McFarlane, B. 2004. 'The National Water Initiative and acknowledging indigenous interests in planning', unpublished National Native Title Tribunal paper delivered to the National Water Conference, November, Sydney.

Morgan, M., Strelein, L. and Weir, J. 2004. 'Indigenous water rights within the Murray Darling Basin', *Indigenous Law Bulletin*, 5 (29): 17.

Morrison, J. 2007. 'Caring for country', in J. Altman and M. Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia*, Arena Publications, Melbourne.

Nettheim, G., Meyers, G. and Craig, D. 2002. *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Canberra.

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

Productivity Commission 2003. *Water Rights Arrangements in Australia and Overseas*, Commission Research Paper, Productivity Commission, Melbourne.

Royster, J. 1994. 'A primer on Indian water rights: More questions than answers', *Tulsa Law Journal*, 30: 61.

Schroder, M. 2004. 'On the crest of a wave: Indigenous title and claims to the water resource', *New Zealand Journal of Environmental Law*, 8: 1–54.

Stoeckl, N., Stanley, O., Jackson, S., Straton, A. and Brown, V. 2006. 'An assessment of the social and economic values of Australia's tropical rivers', Scoping report prepared for Land and Water Australia's Tropical Rivers Program by CSIRO and James Cook University, Townsville.

Sweeney, D. 1995. 'Broken promises: Crown's fiduciary duty to Aboriginal peoples', *Aboriginal Law Bulletin*, 3 (75): 4.

Tipa G. and Teirney L. 2002. 'Mauri and Mahinga kai indicators project: Final report—developing the Cultural Health Index', Ministry for the Environment, Wellington.

UN-Water 2006. *Water: A Shared Responsibility*, United Nations World Water Development Report 2, available at <**http://www.unesco.org/water/wwap**>.

LIST OF CASES

UNITED STATES

Arizona v. California (1963), 207 U.S. 564.

Colville Confederated Tribes v. Walton (1981), 647 F.2d 42.

Johnson v. McIntosh (1823), 21 US (8 Wheaton) 543.

Mitchel v. United States (1835), 34 US (9 Peters) 711.

Montana v. U.S. (1981), 450 U.S. 544.

Re General Adjudication of All Rights to Use Water in the Big Horn River System (1992), 835 P. 2d. 273, Wyo.

United States v. Gila Valley Irrigation Dist. (1992), 804 F. Supp. 1 (D. Ariz)

United States & Lummi Indian Nation v. Ecology (2005), 375 F.Supp.2d 1070.

United States v. Shoshone Tribe of Indian (1938), 304 US 111.

United States v. Winans (1905), 198 U.S. 371.

Washington v. Environmental Protection Agency (1985), 752 F. 2d 1465 (9th Circuit).

Winters v. United States (1908), 373 U.S. 546.

CANADA

Calder v. Attorney General of British Columbia, [1973] SCR 313.

Delgamuukw v. British Columbia, [1997] 3 SCR 1010.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511.

Kruger et al. v. The Queen, [1978] 1 SCR 104.

Piikani First Nation v. Alberta (settled out of court 2002)

R. v. Guerin, [1985] 1 CNLR 120 (SCC).

R. v. Sparrow, [1990] 1 SCR 1075.

R. v. Sundown, [1999] 1 SCR 393.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director, [2004], 3 SCR 550.

NEW ZEALAND

Ministry of Agriculture and Fisheries v. Love, [1988] DCR 370.

Ngai Tahu Maori Trust Board v. Director-General of Conservation, [1995] 3 NZLR 553 (Court of Appeal).

*Tamihana Korokai v. Solicitor-Genera*l, [1912] 32 NZLR 321.

Te Runanganui o Te Ika Whenua Inc Soc v. Attorney-General, [1994] 2 NZLR 20.

AUSTRALIA

Arnhemland Aboriginal Land Trust v. Director of Fisheries (NT) (2000), 170 ALR 1.

Commonwealth v. Yarmirr, [1998] 771 FCA.

Gawirrin Gumana v. Northern Territory of Australia (No. 2), [2005] FCA 1425 (or Blue Mud Bay No. 2).

Mabo v. Queensland (No. 2) (1992), 175 CLR 1 at 58.

Mark Anderson on behalf of the Spinifex People v. Western Australia, [2000] FCA 1717.

Members of the Yorta Yorta Aboriginal Community v. Victoria (2002), 214 CLR 422.

Nangkiriny on behalf of the Karajarri People v. Western Australia, [2002] FCA 660.

Yanner v. Eaton (1999), 166 ALR 258.

Ward v. Western Australia (2000), 170 ALR 159.

INTERNATIONAL

Bernard Ominayak & Lubicon Lake Band v. Canada. Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

Young v. Bankier Distillery (1893), AC 691.