

16 Indigenous Customary Governance

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Jabiru, wetland
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CONTENTS

1.	KEY POINTS	2
2.	NEW DIRECTIONS FROM INDIGENOUS COMMUNITY INITIATIVES	3
2.1	Taking responsibility for Canada’s Skeena Watershed	4
2.2	Indigenous water rights in the USA	8
3.	SUMMARY.....	13
4.	REFERENCES.....	15

1. KEY POINTS

1. Land and water resource planning and decision-making is based on a set of closely related and often unstated beliefs and assumptions relating to social organisation, political authority and property rights. These beliefs and assumptions differ widely over time and amongst cultures and, if not recognised and resolved, lead to ongoing and damaging contests over resource use and management. Indigenous groups in northern Australia are increasingly combining to form community management groups that attempt to reconcile cultural differences in Indigenous and non-Indigenous land management. Their engagement with government management regimes provides a structure and process through which Indigenous people can respond to state forms of management whilst maintaining the legitimacy of their own systems. This positively impacts on Indigenous well-being, not only through its cultural impacts but because it affects the way that Indigenous communities conduct economic enterprises. It is therefore critical that government land and water management processes seeks to accommodate Indigenous perspectives of resource management and use.
2. Experience in the United States has shown that the explicit creation of Indigenous rights to access for one resource (e.g. hunting and fishing) also carries implied legal rights to other resources (e.g. the water that sustains the animals that hunted and fished). As a consequence, the intended legal separation of land, water and landscape elements that depend on them (e.g. animals) is unsuccessful, and management rights become merged in law to reflect their relationship in the landscape. Unless the likelihood of this legal ‘merging’ is understood and accounted for *a priori*, it leads to escalating resource management disputes. These often revolve around the difficulty of quantifying an implied Indigenous water right (that may or may not be extracted) and its priority over other claims for access water. The United States has yet to find a consistent (amongst states) or agreed (amongst states, federal government and Indigenous people) approach to dealing with this problem – which is germane to northern Australia, where land and water rights are currently legally separate.
3. Experience in Canada has shown that the need to support consensus-building processes is not restricted to decision-making efforts between Indigenous peoples and governments. Agreements are being established to negotiate water resource decision-making between Indigenous groups and to enable Indigenous communities to collectively inform broader watershed resource decision-making. Governments seeking to allocate management rights for land or water to particular groups will often need to support processes that facilitate Indigenous and broader collaborative decision-making. This is particularly required in northern Australia, where many different Indigenous and non-Indigenous groups commonly co-exist in one catchment.

4. Experience in the United States has shown that difficulties in the widespread and uniform application of Indigenous water rights often relate to:
 - a. The combined symbolic, cultural and economic value of water, which makes it difficult to conceive of it as a commodity rather than a fundamental value, thereby eluding simple quantification
 - b. The fact that water rights disputes often involve three layers of government, each of which is less interested in water than in establishing the relative limits of authority in relation to each other
 - c. Difficulties in establishing the interests of many thousands of individual water stakeholders using representational negotiating processes
 - d. The fact that tribes simultaneously assert rights as both proprietary owners of a valuable resource and as governments exercising jurisdictional authority over the management of the resource. The tensions generated by this dual role often require state agencies to develop new forms of negotiation and agreement.
 - e. The allocation of a scarce resource to Indigenous people frequently involves re-allocation away from existing non-Indigenous uses.Each of these difficulties is likely to resonate with experience in northern Australia, which suggests that they elude simple solution.

2. NEW DIRECTIONS FROM INDIGENOUS COMMUNITY INITIATIVES

From her examination of an Indigenous community's initiative 'in taking primary responsibility for the land and waters' in the Mitchell river catchment of Queensland, Nonie Sharp has shown how distinctive Indigenous relationships to their country, and to one another, affect their management decision-making processes, activities and agendas (22). She explains how respect for Indigenous law and responsibility for the land has become a pre-condition for cross-cultural co-operation around fishery management issues in Queensland's gulf area. Drawing from this experience, she has argued that Indigenous and non-Indigenous groups can both make a unique contribution to conserving land-seascapes, provided Indigenous people's rights and contributions to the management of their homelands are acknowledged. It is from within these frameworks, Sharp argues, that pluralistic co-management partnerships can be achieved:

From the standpoint of indigenous peoples living on their own lands, taking primary responsibility gives them the chance to observe their own customs. Following the affirmation that their relationship to land and to one another has its own distinctive principle, they put primary responsibility before co-management. Their mode of responsibility, including a particular way of ownership, is not necessarily incompatible with a non-indigenous mode of use, access or even tenure. But being primary, it precedes any co-management and forms a framework for the way such management proceeds (22 p.95)

To direct her analysis to alternative and more appropriate forms of development in Australia and Canada, Elspeth Young turns to current Indigenous aspirations and initiatives already in place. There she finds that people have opportunities 'not just to take part in development but to change its character to accord more closely with their desires for the future (34). The effects of past land and resource decisions and geographical changes have required Indigenous people to respond in a number of different ways. For example, in her work in the Northern Territory, Young has shown how forms of Aboriginal customary behaviour, and people's relationships to the land and to each other, affect the way Aboriginal communities conduct economic enterprises (34). As Young has argued,

such initiatives, and the Indigenous principles of decision-making that they embrace, provide useful starting points for a deeper act of recognition of Indigenous rights and autonomy.

Many Indigenous groups in northern Australia and elsewhere are now combining to form community management organisations to respond to government management regimes and resource allocation programs and to ensure that native law and concepts of responsibility provide the basis for contemporary dialogue. Feit (9) has shown that community-based management systems provide both a structure and a process through which Indigenous people can respond to state forms of management, whilst maintaining the legitimacy of their own systems. This has enabled them to harness existing government management structures to help meet their goals. As Jackson and Robinson in Chapter 30 highlight, there have been various strategies employed by Indigenous people to ensure their governance systems are appropriately recognised and integrated into natural resource planning and decision-making processes.

Below are some strategies and experiences from Northern Canada and USA that have enabled Indigenous people to make considerable progress in establishing rights and agreements that support Indigenous governance systems in environmental planning and management arrangements and processes. Various strategies have been employed by Indigenous people overseas in an effort to participate in environmental planning and decision-making. Some communities have worked within the legal claim process while others have harnessed existing government management structures to help meet their goals.

2.1 Taking responsibility for Canada's Skeena Watershed

The world is a complex partnership in which all species have important roles to play; the partnership functions smoothly and to the benefit of all as long as all the partners perform their roles properly (19).

In 1981 the Gitksan-Wet'suwet'en tribal council presented a proposal to the Pearse Pacific Fisheries Commission. It called for co-management dialogue and outcomes to be 'based on the principle that the hereditary House Chiefs must have the final authority and responsibility for resource management within their territories'. While recognising that their community management system would need to be coordinated with other Indigenous and non-Indigenous authorities, the Gitksan and Wet'suwet'en remained emphatic that any dialogue should be based on 'negotiations among equals' (19). Neil Sterrit of the Gitksan Tribal Council recalled the incentive behind the initiative:

... we felt it was time to reassess what was going on here ... unchecked forestry practices were destroying important areas ... everywhere As well as overfishing ... this put intense pressure on fish resources which saw significant reduction in fish stocks ... and other environments and species here [in the north] ... No-one was held accountable We did and still insist that our people are involved with management decisions, based on respect and application of our traditional laws ... to ensure resources are being used sustainably and properly - it's part of our right and responsibility for self government - and necessary for our survival (quoted in 26).

Systems of management, economic dependency and cooperative partnerships were indeed all seen to be part of the First Nation community's vision for self-government. As members of the Gitksan and Wet'suwet'en First Nations emphasised:

The assumptions are that Gitksan and Wet'suwet'en fisheries management will be based on:

1. Ownership and jurisdiction of the Houses through their House Chiefs, run according to Gitksan and Wet'suwet'en law and hereditary social structures.
2. Sound biological principles and data.

3. Sound economic principles and data.
4. The stated willingness of the Chiefs to work with non-Gitksan and Wet'suwet'en fishermen both within and outside their territories (see 24).

Under this form of governance, areas and resources within each First Nation territory are divided into a number of smaller areas and sites, each belonging to a smaller corporate group or House whose members belong to one of the four clans. House territories and resources, including fishing sites, are owned, regulated and controlled by a Chief on behalf of the members of the House. Through interlocking sets of kin, trading and ceremonial relationships, each House member also has range of complementary rights and responsibilities to other House territories and resources. On the Skeena River, for example, each Chief has authority over a variety of fishing territories and sites, including the right to determine fishing access to House, clan or non-members, and to start and end the fishing season.

Various researchers have also examined how the distinct and complementary roles of male and female members of more than one House cooperate in fish-harvesting, processing and distribution (ie 18). This requires certain protocols to be followed: numerous sacred histories warn of the consequences of improper behaviour, such as waste or over harvesting. Salmon enjoys particular ceremonial status, and has long provided a vital resource for exchange, sale and trade (19; 25). Since cannery operations and commercial fisheries developed in the region, many Indigenous residents have long been involved in the industry.

As with other First Nation communities in the North-west, the cumulative knowledge of the laws established by mythological ancestors (some of whom are fish) is an essential element in the establishment and confirmation of ownership rights and management responsibility. Clan ties link House Chiefs to common ancestors and heritage, and these are articulated in names, crests, songs or collections of sacred histories, and find expression in the web of principles regulating resource use and allocation within the wider First Nation territory. The first migration of salmon, for example, was traditionally celebrated and distributed through an annual potlatch ceremony of gratitude and respect. Many still welcome the arrival of salmon into their House territories with ceremony and song.

Group feasts ('potlatches') still provide important fora where sacred oral histories are delivered to acknowledge distinctive and shared connections with the land, to confirm important linkages between Indigenous people and their ancestors, validate or transfer territorial rights, and decide on territorial access while resources are distributed and acknowledged. Songs and images encapsulating historical events, the oral accounts which detail them, and the feasting system which validates this history, combine to form a powerful historical-geographical record of the region's Indigenous people and homelands. It was these aspects of legal governance that provided the basis upon which hereditary Chiefs sued Canada for claiming and invading jurisdiction over their House territories. Gitksan Chief Delgam Uuwkw explained why:

For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From each encounter comes power. The land, and plants, the animals and the people all have spirit and they all must be shown respect. That is the basis of our law When a Chief directs the House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the feast hall. In this way, the law, the Chief, the territory and the Feast become one. The unity of the

Chief's authority and the House's ownership of its territory are witnessed and thus affirmed by the other Chiefs at the feast (quoted in 18, p. 22).

Delgam Uukw went on to explain how other relationships, including the court case itself, were embedded in this history, and he challenged European law to consider a new framework of co-existence:

Our histories show that whenever new people came to this land they had to follow its laws if they wished to stay The purpose of this case then is to find a process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue (18).

Several steps were taken to achieve their goal of attaining co-management partnerships that recognised and reflected the principles of self-governance outlined in the Gitksan-Wet'suwet'en fisheries management proposal. Firstly, the Gitksan and Wet'suwet'en established a fishery agency (SWFA) to provide a mechanism through which their fisheries management proposal could be negotiated and developed. Various government schemes that had been introduced to enhance stream habitats, and to prepare Indigenous people for the management of the fishery resource, were utilised to train local Gitksan and Wet'suwet'en people. Trainees were also taken to local hereditary Chiefs to learn about 'the law' behind traditional fish management and conservation practices. This included certain protocols which needed to be followed to ensure that respect for the fish was maintained, and that fish were neither wasted nor over-harvested (25).

Secondly, a major fisheries management study was undertaken. This included an appraisal of the health and status of the fisheries in the region. In opposition to DFO's approach to mixed-stock fisheries, the SWFA proposed more discriminatory, stock-by-stock fishing techniques, to ensure the sustainability of weaker stock types. As the SWFA argued, all fish have spiritual and resource value and so no fish species could be considered expendable (24). The study also identified three key issues that divided non-Indigenous and Gitksan and Wet'suwet'en laws and approaches. Government efforts were found to be directed at optimising the coastal harvest to the detriment of inland fishers and the resource base. DFO failed to acknowledge the authority of Indigenous resource owners and decision-makers. The regulation over First Nation people's rights to sell and trade fish also failed to recognise the economic aspects of Gitksan and Wet'suwet'en native rights (24).

The study also considered mechanisms by which the principles and practices of the Gitksan and Wet'suwet'en resource management system could be re-inserted into the modern context. As the Chiefs argued, this would enable rights and relationships between Gitksan and Wet'suwet'en and the fishery resource to be honoured and maintained under the collective authority of their own regime of governance. Interaction and interdependence of human and natural resources had to be balanced cooperatively through 'traditional law' and 'native values', Chiefs argued, to ensure the use and decision-making on fish harvesting, allocation and distribution were appropriately coordinated (25). As Gitksan hereditary Chief Don Ryan asserted:

[The strategy] intends to return full management responsibility to the hereditary Chiefs of the Gitksan and Wet'suwet'en. By asserting the property right of the Gitksan and Wet'suwet'en people to the fish, the [strategy] directly addresses the common property problem When a cohesive group with common goals has recognized property rights to a resource, then harvest can be planned so as to maximise the benefits derived from the resource, and the inefficiencies due to individual attempts to increase individual shares of the harvest can be avoided (28)

Eventually, alliances between the Gitksan, Wet'suwet'en, Tsimshian and Nat'oot'en First Nation communities were made, to create a community management arrangement asserting First Nation authority for the entire Skeena catchment, based on the principles offered by the SWFA proposal. Bob Hill from the Tsimshian Tribal Council explained the underlying incentive:

We [First Nations of the Skeena] sat down together to form a framework upon which our distinct and shared native title rights for the fish could co-operatively manage the fisheries within the entire Skeena River catchment. Not only did this strengthen our position to negotiate how native title rights could work with other fishery interests and management agencies in the area. ... It also made sense in our goals to sustain the fishery resource (quoted in 24).

Those involved in the community initiative were aware that the achievement of this goal would not be easy. Meetings between Hereditary Chiefs were held to negotiate how their authority might be coordinated within and between First Nation communities; how First Nation people could increase their role to ensure that the protection, management and harvest of the fishery resource 'reflected their native title rights and management responsibilities; and how this framework could provide the basis for cooperation with governments and other fishing interests.

The Skeena Fisheries Commission

Under a Memorandum of Understanding signed in February 1990, the Tsimshian, Gitksan and Wet'suwet'en tribal council and Nat'oot'en First Nation committed to four principles of 'balanced respect'. Firstly, each recognised the native title right to fish for social, ceremonial and economic purposes; secondly, each acknowledged that it continued to depend on the fisheries resource as a mainstay of economic, social and cultural well-being; thirdly, it was agreed that the right to fish superseded all non-Indigenous fishing interests and would only be limited by the need for proper conservation of threatened fish stocks; and that, as rightful 'Guardians', each was obliged to protect, conserve and harvest the fishery resource 'according to traditional law (25).

Each Chief argued that, although 'the practice of Indigenous resource management had been seriously disrupted and supplanted by legislation and regulation, a strong sense of traditional social and spiritual values remained'. All agreed that the community agreement would provide a valuable mechanism to revitalise these laws, and provide an integrated resource management approach which would incorporate human and natural resources together (see archival files reviewed in 24). Thus, while each House Chief's responsibility to autonomously harvest and manage all fisheries on the respective House territories is still recognised and exercised, this information and the consequences of House Chief's resource-use and management decisions can now be checked and negotiated with other House and First Nation users. To achieve the vision expressed in the Memorandum of Understanding, a Skeena Fisheries Commission was established to plan, coordinate and establish a Skeena Fisheries Program to promote cooperation between community and co-management dialogue and to work towards a goal of self-governance and economic self-sufficiency (21, 25).

As the hereditary Chiefs emphasise, the Skeena Fisheries Commission not only provides an important avenue to assert and apply Native law and management on the Skeena River, it also prevents what they consider to be unchecked destruction and mismanagement of their homeland territories. As an alternative, the Skeena Fisheries Commission offers an organisation which recognises that equal partnerships can ensure that distinctive management approaches are respected and coordinated; among communities of each First Nation; between First Nations on the Skeena and neighbouring First Nations; and between First Nations, Canada, Provincial governments and industry.

2.2 Indigenous water rights in the USA

The USA has resource allocation systems that recognise the interests of Indigenous people in water use and development. Much legal attention has been given to the scope and priority of Indigenous water rights where the content of customary title to water has been found to be strong. Tribal water rights come from two sources: treaty rights and aboriginal rights. Prior to the 1870s treaties were negotiated between the US government and Native American tribes. Treaties often created a right in the Indian tribe to utilize a resource, a right which may conflict with other non-indigenous resource users (8), particularly as a variety of forces sought to separate land and water rights (11). As explained by Eisenstadt (8), the treaty might be explicit in granting such a right, such as the right to hunt and fish on off-reservation land. An implied reservation of water to sustain treaty hunting and fishing rights was affirmed in the USA in 1983 when Fletcher J. observed that the Indian entitlement consists of 'the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies'. Tribes that have historically relied on water for fishing 'developed an aboriginal right to an amount of water necessary to preserve their fishing economy'.

In other cases, the treaty is silent, but a seminal case pronounced the judicial doctrine that has since created a right in a resource. In the case of *Winters v. United States*, where the courts addressed a dispute between Indigenous and non-Indian water uses and determined the priority of the rights, or precedence, asserted by each group. The famous *Winters* case of 1908 affirmed the Gros Ventre and Assiniboine Indian's development right to use the water of the Milk River to the extent necessary to irrigate the reserve. The Court did not however conclude that the tribes, or for that matter the United States, owned the water that 'provided the benefit of the bargain which validated the treaty' (5, 7). Regardless of this point of law, the contract creating the reservation is not affected by the ambiguity over property in water (see 32).

Under the American system of prior appropriation operating in the western states, an early priority date will require other rights holders to take water subject to the Indian water rights. Montana's water users, irrigating land upstream of the Indian Reservation of Fort Belknap, argued that their diversion of waters was prior in time to the Indians' use (8). Under Montana law, the non-Indian users had a valid claim to dam the river and continue to divert water. The treaties which created the reservation were silent on the question of water rights, but by the turn of the twentieth century, the water supply problem on the reservation had become acute. In *Winters*, the Court concluded that Indians had an implied right to take water. This conclusion was reached through examination of congressional intent in providing water for reservations:

Because one of the chief purposes of settling the Indians on reservations was to 'civilize' them through agrarian living, the Court found that the federal government must have reserved water for the Indians for that use (8, p. 211).

As Davidson (5, 5) has argued, the effect of *Winters* case is that a 'dual system of water rights' has emerged – one for Indigenous reservations, the other for private uses on lands governed by state law. Tribal reserved rights attach to water sources that are within or adjacent to Indian reservations (27). Royster (27) adds that in some cases reserved rights may extend to water sources that are not physically located in Indian country. Groundwater was incorporated into the reservation doctrine in 1976 in *Cappaert v United States*. For some reservations, particularly in the arid west, groundwater is the primary or sole source of water supply (27). Indian tribes can assert rights to groundwater by means other than the federally-reserved water rights promulgated by the *Winters* doctrine, including state law groundwater rights available to tribal land owners, and water settlement acts that address tribal rights to groundwater as well as surface water (27). State-law rights may be claimed in addition

to reserved groundwater rights under *Winters* or as the sole basis for a legal entitlement in states such as Wyoming which do not recognise *Winters* rights to groundwater (27).

Recent decisions have considered the use of water for other than agriculture and the non-consumptive nature of an Indian water right to support hunting and fishing. The circumstances of Indian life and the American approach to water law and Indian law are different to that of Australia and this will likely limit the relevance of the broad commercial scope given to Indian water rights. It is also worth noting that no case has involved the application of Indian reserved rights in a riparian jurisdiction (as opposed to those jurisdictions where the prior appropriation doctrine prevails) (5). Nonetheless, the rights to hunt and fish would appear to be very significant for Australia's Indigenous peoples who have placed such importance on these practices as an essential incident of custom and tradition.

Although court decisions created a doctrine of implied water right, the key question raised by the *Winters* doctrine is how to quantify the Indian water allocation, an established but unused right. For 60 years following *Winters* 'almost nothing was done to provide water to Indian users' and as of 1968 it was estimated that only about 1% of all potential agricultural land on western reservations had been irrigated (11). This question was addressed in the second major Supreme Court case on the issue, *Arizona v. California* in 1963.

In that case, the courts set out a system of apportionment that gave effect to the previously recognised water rights to certain tribes on the main stem of the lower Colorado River (9). The standard of treaty allocation, advanced in *Arizona v. California*, provided Indian tribes with rights equal to 'practical irrigable acreage' (PIA), defined as sufficient water to irrigate each acre of reservation land irrigable, regardless of whether such land was under cultivation. The PIA standard affirmed in *Arizona* has proved to be very valuable (8). It has provided Indians with a generous amount of water in a water scarce region of the west. The PIA remains the sole method of determining water allocation despite legal challenge and modifications limiting the benefits of the doctrine for Indians (ibid). Eisenstadt describes the benefits of the PIA standard from the Indian perspective:

The PIA standard depends on the size of the land, not the number of people. The resource is held by the tribe for the tribe's use, not held in gross by individuals. As the original signatories of the treaty no doubt viewed the water as a collective tribal resource, the PIA standard is consistent with such an outlook... the PIA does not set an economic level that the Indians cannot exceed. Should the PIA standard provide the tribe with a surplus of water beyond their own subsistence needs, nothing prevents the tribe from engaging in commercial agriculture to provide income and jobs for their members (8, p. 213).

The PIA standard has been used widely in estimating the potential extent of claims, it is one that Folk-Williams (9) argues, may have limited relevance to many reservations. The limiting factor is likely to be the primary use for which the reservation of land was made. Several reservations were created to protect hunting and fishing and not agriculture.

There appear to be numerous standards for quantifying the scope of Indian claims to water and little uniformity 'regarding either methods of quantification or consistency of studies made from state to state' (9, p. 64). A 1984 study prepared by the Western States Water Council attempted to determine the scope of water claims, indicating that the potential claims of tribes in 15 states 'accounted for a significant fraction, sometimes more than the total available, of the unused water resources in each state' (9.p. 64).

Quantification of *Winters* rights has been helpful in determining the relative priorities in time of users, however, it has not resolved every water conflict, as explained by Clayton:

...quantification will not resolve conflicts over priorities of uses between non members and members (of tribes). Further, many tribes have not quantified their Winters rights. Tribal governments have the authority to regulate the use of water by Indians on tribal lands pursuant to validly enacted water codes. Their ability to regulate the conduct of non-Indians on fee lands within the reservation, however, is another matter (9.p 542).

New institutions have been established in states such as Montana, where the Montana Reserved Water Rights Commission was formed solely for the purpose of negotiating and settling Indian water claims (5). Not all Indian tribes, however, have welcomed quantification of their implied rights (5). Tribes in the upper reaches of the Missouri, for example, that hold title to a considerable amount of land are said to be wary of state efforts to reduce their rights to a specific quantity (ibid) and regard quantification to be premature. In this case, where water is not scarce and the resource is the abundant flow in the main channel, tribal interests might be considered more akin to riparian rights where landowners seek and enjoy their water benefits on the basis of geographic location:

... tribes are compelled to argue that since it is the abundant flow that is generating economic benefits, tribes must, like any other property owner, be allowed to determine how the flow is to be used, and to enjoy directly the economic benefits generated by that use...on the Missouri the tribes have an acknowledged but unadjudicated Winters right to the waters. However, it is the flow that is of economic value, just as it is the diversion that is of economic value on the Colorado (5, p.19).

In the Missouri basin at least 6 reservations were flooded by dams built by the Bureau of Reclamation and the Army Corps of Engineers to resource irrigation development by non-Indians (11).

A decade or more of intense judicial water rights activity followed the standard setting case of Arizona. In 1984, it was estimated that at least 4,000 native water rights cases had been brought before Federal courts since 1908, the majority filed after 1970 (11).

In summary, these judicial decisions established a number of key points (5, 8, 11):

1. reserved water is intended to satisfy both the future and present needs of the reservation
2. the decision requires the quantity of the reserved water to be measured by the amount of lands within the reservation susceptible of irrigation (the Court rejected a per capital allocation)
3. the Indian water rights were carved out of the then existing non-Indian claims under state law
4. a federal reserve right, once established, is superior to all appropriations which follow the creation of the federal reserve
5. *Winters* articulated sovereign ownership of water in contrast to state doctrines that determine individual ownership of water (thus Winters rights should not be compared solely to individual user rights, 'but also to state sovereign ownership of water')
6. Native nations have in some cases been able to influence water use developments that may have negatively impacted their customary use
7. Native nations have been able to sell or lease some portion of their water rights to other users without waiving their broader reserved rights.

Indian tribes are increasingly turning to negotiated agreements or settlements to advance their water rights and, according to Royster, settlements likely represent the future of Indian water law (27). Royster argues that litigation has proved costly and time consuming, 'often leaving tribes with

an award of paper rights but no actual water' (27,p.500). State courts are also perceived to be unsympathetic to federal Indian rights¹. Clayton summarises the advantages:

Tribes and states are able to resolve complex and extremely sensitive issues relating to jurisdiction over water users, availability of groundwater to satisfy tribes' water entitlements, delivery of reserved water from federal projects after it has been quantified, shortage sharing, off-reservation marketing of water, and new or altered uses that directly affect other users under different jurisdictional regimes. In sum, every issue that can be litigated can also be settled (1992: 540-541).

In a study of tribal rights to groundwater, Royster (27) calculates that of the twenty or so settlement acts since 1978, more than half contain provisions relating to groundwater rights. A north - south distinction based on water availability can be observed with southern State settlements addressing groundwater as a primary water source and northern State settlements tending to focus on surface water. The chief characteristics are outlined by Royster:

There is little uniformity or consistency in the groundwater provisions of water rights settlements. Several settlement acts specify a quantity of groundwater for tribal use, or set an upper limit on tribal pumping of groundwater. Other settlements provide generally that tribes have rights to the use of groundwater beneath their lands, or in one instance to the groundwater 'springs and fountains' on federal lands ceded by the tribe. In some settlements, tribal rights to use groundwater are incorporated into the rights to surface water... Only a few of the settlement acts address tribal institutional management of groundwater resources. One act provides for a tribal groundwater management plan; another requires a tribal water code that would apply to both groundwater and surface water, and establishes a groundwater monitoring program (27, p. 502)

Notwithstanding the strong interest and progress made in negotiating settlements, there are a number of problems that limit the widespread application (9, p. 63-64):

1. water is vested with great symbolic and cultural as well as economic importance: representing the basis of life, for example. The special quality of water makes it difficult, Folk-Williams argues, for community leaders to bargain about 'what is seen not as a commodity but almost as a fundamental value' .
2. water rights disputes regularly involve at least three levels of government (state, federal and Indian) and take place in a 'context of dispute over the relative limits of the authority of each level in relation to the others'.
3. the interests of tens of thousands of individual water holders may be at stake, generating significant problems of representation in a negotiation process
4. tribes, and in some instances governments, assert rights in two roles simultaneously: 'they are at once proprietary owners of valuable property rights and governments asserting jurisdictional authority over the administration and management of water source'. The tension between these roles gives rise to a separate set of problems that may require different forms of agreement.
5. scarcity of supply requires that settlements are likely to require re-allocation of water from existing non-Indian to Indian uses.

Relatively few tribes regulate groundwater use and allocation, therefore, tribal groundwater institutions are generally still in the developmental stages (27). There is some experience in enactment and enforcement of tribal water codes on reservations. A tribal water code is enforceable

against members on trust lands and allotment land held in trust, but doubt remains about whether it is enforceable against non-tribal member users on fee lands.

Possibly the largest settlement in the south-west was finalised with the Arizona Water Settlements Act negotiated to provide certainty and finality to many critical issues facing Arizona with its major water infrastructure and supply project, the Central Arizona Project. A number of Indian groups were involved, including the Gila River Indian community. Under the Agreement, the tribes will receive a total water package of around 635,500 acre-feet, some of it from the Central Arizona Project. Smith and Colby (30) describe one aspect of the agreement:

Under the innovative reclaimed water exchange agreement, the cities (Mesa and Chandler) will exchange treated effluent for part of the tribe's Central Arizona Project water, on a 5 to 4 ratio. The cities benefit by securing the rights to potable water for their citizens, and the tribe benefits by getting treated effluent to use for agricultural purposes (30, p. 212).

Tribes can also lease some of their water to residents of the city of Phoenix. Other provisions of the settlement include \$200 million of funding for the tribe to rehabilitate and construct water-delivery facilities, defray operation and maintenance costs associated with delivery, implement a water quality monitoring program, and rehabilitate subsidence damage caused by groundwater pumping. Changes to Arizona law will limit excessive pumping in the southern areas adjacent to the reservation.

Expansion of urban settlements through population growth and increased per capita use of water, e.g. for recreation, have seen the value of senior water rights in strategic areas grow (20). According to Smith and Colby (20, p. 213), 'multiple demands for water generate increased interest in leasing tribal water'. Constraints have been placed on developers wanting to subdivide, requiring them to demonstrate security of supply for the next one hundred years. The tribes' senior water rights are attractive to those seeking additional water to support such growth and development, and to 'drought proof' urban centres:

However, surface water-supplies are fully appropriated, and Arizona limits groundwater pumping in active management areas. The costs, both in monetary terms and in environmental terms, of developing new water supplies are high, and leasing water is often the most economical means to obtain additional supplies (30, p. 213)

Leasing has been controversial according to Smith and Colby (30). Some consider it inappropriate to treat water as a commodity for sale, others are concerned that it may lead to loss of their water rights, as non-Indian communities become dependent on tribal water. Some non-Indian water users do not want to pay for water they have accessed freely, even though tribes have legal claims to it. State governments have tended to oppose interstate tribal water leasing because it has the potential to disrupt carefully balanced interstate apportionments. The benefit for tribes is that they have an ongoing flow of water lease revenue.

3. SUMMARY

Land management is based on a set of closely related and often unstated beliefs and assumptions relating to social organisation, political authority and property rights. These beliefs and assumptions differ widely over time and amongst cultures and, if not recognised and resolved, lead to ongoing and damaging contests over resource use and management.

Northern Australia has an enduring history where environmental (including water) planning styles and decisions have served to enable colonial management and property rights and meanings to gain prominence over those of Indigenous peoples. This process and agenda has often represented Northern Australia as a colonial frontier that has described and separated Indigenous people as primitive and rendered Indigenous territories and governance systems as invisible.

The persistent activism from Indigenous groups employing local, national and international legal and political avenues has also seen native title finally recognised in the legal and political arenas of both Australia and overseas. The process in Australia's water resource and planning domain is still in its early phases, but various domestic and international frameworks are now available established to help inform ways in which Indigenous people can reclaim environments and resources, and exercise some management power over them.

The Indigenous claim for country and its governance is consistent in its message. It is a claim for the recognition of the discrete and shared responsibilities of a collective group and entails a system of governance to guide the behaviour of Indigenous people and their relationships to ecosystems. Experience in the United States has shown that the explicit creation of Indigenous rights to access for one resource (e.g. hunting and fishing) also carries implied legal rights to other resources (e.g. the water that sustains the animals that hunted and fished). As a consequence, the intended legal separation of land, water and landscape elements that depend on them (e.g. animals) is unsuccessful, and management rights become merged in law to reflect their relationship in the landscape. Unless the likelihood of this legal 'merging' is understood and accounted for a priori, it leads to escalating resource management disputes. These often revolve around the difficulty of quantifying an implied Indigenous water right (that may or may not be extracted) and its priority over other claims for access water.

The United States has yet to find a consistent (amongst states) or agreed (amongst states, federal government and Indigenous people) approach to dealing with this problem – which is germane to northern Australia, where land and water rights are currently legally separate. Experience in Canada has shown that efforts to allocate decision-making responsibilities and management rights for land or water to particular groups will often need to enact processes that facilitate management partnerships between different Indigenous groups. This is particularly likely to be required in northern Australia, where many different language groups commonly co-exist in one catchment. Experience in the United States has shown that difficulties in the widespread and uniform application of Indigenous water rights often relate to:

- a. The combined symbolic, cultural and economic value of water, which makes it difficult to conceive of it as a commodity rather than a fundamental value, thereby eluding simple quantification
- b. The fact that water rights disputes often involve three layers of government, each of which is less interested in water than in establishing the relative limits of authority in relation to each other
- c. Difficulties in establishing the interests of many thousands of individual water stakeholders using representational negotiating processes

- d. The fact that tribes simultaneously assert rights as both proprietary owners of a valuable resource and as governments exercising jurisdictional authority over the management of the resource. The tensions generated by this dual role often require state agencies to develop new forms of negotiation and agreement.
- e. The allocation of a scarce resource to Indigenous people frequently involves re-allocation away from existing non-Indigenous uses.

Each of these difficulties is likely to resonate with experience in northern Australia, which suggests that they elude a simple solution.

Indigenous groups have also established community management organisations to respond to government management regimes and resource allocation programs and to ensure that native law and responsibility enter into the co-management process. In each case, Indigenous people insist that watershed or water resource co-management interactions and outcomes must offer pluralistic partnerships which draws upon and reinforce Indigenous people's distinct and extant relationships with their territories. The example of Skeena co-management agreements established in the watersheds of North-west British Columbia highlights how Indigenous people have maintained reciprocal and cooperative co-management relationships within, and between groups. Like many Indigenous groups in Northern Australia, these Indigenous communities continue to extend their own management principles to direct relations with non-Indigenous groups in an effort to establish equitable and ongoing co-management processes which are sensitive to their rights and relationships to their country, and enable them to direct and control the content and implications of resource use and management agreements.

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