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Indigenous Freshwater Rights in Settler Countries

Introduction

A comparison of water rights law in settler countries reveals that although the notion of an Indigenous customary right to freshwater is widely accepted, the content and outcomes from this recognition vary considerably. In these countries, the content of Indigenous customary rights is largely a result of governments creating and manipulating the law to suit their own interests. For example, historically both the Australian and New Zealand governments have gone through considerable efforts to vest ownership and ultimate control of water in itself, while retaining only customary water rights for Indigenous people. In Australia, especially, these rights are extremely limited and unlikely to evolve in a commercial sense in the near future. In New Zealand, the rights are mainly restricted to those 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 Knowledge Note provides a brief snapshot of Indigenous legal rights to freshwater in these four settler countries and demonstrates that not only does the content of the rights vary in each jurisdiction but so too the level of protection afforded to these 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 reserved rights doctrine is most often the starting point for resolving Indigenous water allocation issues and affords Indigenous Americans substantial water rights. According to this doctrine when reservations were established in the early history of the United States certain rights were reserved for Indigenous Americans with the purpose of allowing those residing on reservations to become self-sufficient communities. As per this doctrine, the establishment of a reservation creates an implied reserved right to take the necessary amount of water to fulfil the purpose of reserving the land for the Indigenous group. Therefore, Indigenous groups claiming these reserved rights are entitled to a priority over other interests in water and this priority might even in some instances extend to a right to a certain quality of water. Additional protection of water rights is based in federal treaty obligations which render Indigenous rights to water legally superior to non-Indigenous rights. Finally, the fact that Indigenous Americans are viewed as having sovereign rights over their natural resources is probably the overall key factor for their advantageous position today in relation to water rights.

Thus, the customary rights of Indigenous people in the United States are generally superior under the law to non-Indigenous interests and, although the judicial decisions are mixed on the issue, there are persuasive arguments for legal recognition of commercial rights to water. North American courts have shown willingness in some instances to locate Indigenous commercial rights to natural resources in the common law notion of fiduciary duty. As per this view, the government, as a fiduciary, has a strong and enduring obligation to ensure that Indigenous people are position to recognise a right to self-sufficiency and one way of doing so is to allow for the evolution of customary rights to include commercial purposes. On this basis, the argument can be made that Indigenous Americans must be able to participate in water markets otherwise the value of their water rights are substantially lessened. Most modern settlement packages provide for trading rights though they place restrictions on the reserve's trading rights in terms of location and scope (Getches, 2005). These settlements are the preferred means for resolving natural resource allocations and management issues

in the United States and have led to considerable water rights for Indigenous Americans.

Canada

In Canada substantial water rights for Indigenous people derive from the common law, both early and modern treaties, and the Constitution. The Canadian common law has recognised that water rights are an integral part of native title which includes the right to occupy and enjoy the fruits of the lands including the waters on them. Treaties also delineate water rights in Canada, especially the new modern treaties or settlements. Historical treaties are liberally interpreted such that they have been extended to more commercial uses of natural resources, but most useful are the modern treaties which result in significant natural resource development rights for Indigenous people. The Constitution further advances and protects Indigenous water rights deriving from both common law and treaties, since as per the Constitution Indigenous natural resource rights in their customary form are legally paramount to other interests in water. This superior interest is second only to conservation measures.

One of the main reasons that Indigenous people in Canada enjoy considerable natural resource rights is that the judiciary acts as a check on government actions. For example, although Indigenous interests are sometimes subjugated in relation to conservation measures, the Crown would bear the burden of proof in a court of law if the measures were challenged. In such a case, the Crown would be held to a strict legal burden of proving that there was a legitimate legislative objective behind the measures and that Indigenous rights had been infringed as minimally as possible. Additional protection for Indigenous water rights is found in the strong fiduciary obligation which the judiciary imposes on the Crown. In regards to water rights, the Crown is obliged to act honourably and engage meaningfully with Indigenous people before making decisions which could impact on their water rights. Most recently, and in light of this fiduciary obligation, the Supreme Court has set out stringent guidelines for consultation and accommodation of Indigenous natural resource interests that apply to both government and industry. Finally, Canada sets an interesting precedent internationally in that there has been suggestion in recent court cases that not only do Indigenous people have customary and commercial rights, but they may also be entitled to environmental rights through constitutional law. These environmental rights, if recognised, could arguably extend to a right to a certain quality of water should Indigenous customary needs be compromised by development.

New Zealand

Although in New Zealand the starting point for Indigenous water rights is the common law and the Treaty of Waitangi, more recently settlements have been the most effective means of restoring significant resource rights to Maori. Maori water rights to the extent that they have been recognised by the common law and legislation 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 gain in fisheries for Maori through the settlement process suggests that they should look to these settlements as a means of securing meaningful rights to water and that increased certainty and cooperation is likely best achieved through modern settlements. In some instances these settlements have transferred title to lake and riverbeds along with many rights associated with ownership and led to robust co-management initiatives returning control of water to Maori.

Settlements are ultimately the preferable vehicle for advancing Maori water rights given the historically conservative approach of both the government and the judiciary to Indigenous natural resource rights. In New Zealand the government has gone through considerable effort to vest all natural resource rights in itself while retaining, at most, customary rights for Maori. The Treaty of Waitangi has only been minimally effective and the spirit of the document was quickly forgotten in the development of New Zealand's natural resources. Even in the modern settlements, this remains an issue in that the Crown is clear that ultimate ownership of water vests in itself. Unfortunately, the judiciary is similarly conservative and struggles with the dichotomy of customary and commercial rights for Maori. The legal system has not created the same priority of Indigenous interests and protections that exists in both the United States and Canada.

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 *Native Title Act* and other water statutes in the various states. For the most part, the common law recognises customary water rights where native title has been recognised. The *Native Title Act* and water legislation in both New South Wales and Queensland provides protection for these customary rights in that they allow

for the exercise of these rights without conformity to the regulatory regime, for example by exempting Indigenous Australians from licensing requirements in the exercise of customary rights. One of the greatest challenges, though, to Indigenous natural resource rights in Australia is the very legislation that purports to protect them. As per the *Native Title Act*, and confirmed by the judiciary, even where 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. Therefore, 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. 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.

In Australia, as in New Zealand, the government has historically put considerable effort into vesting ownership and control of water in itself, and has been successful in this regard. Despite the tremendous knowledge that Indigenous people could potentially bring to the management of water, there remains in Australia a significant deficiency on the part of the public administration to engage Indigenous people on the management of water. 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. The National Water Initiative clearly intends to overcomes some of these difficulties and indicates that Indigenous people should be included in water planning and management, yet the status of Indigenous people remains uncertain as it is left up to each of the jurisdictions as to how the objectives are to be achieved, or even if Indigenous groups will be included.

Conclusion

Freshwater rights are a key area of concern for Indigenous people worldwide yet water law is a relatively new area, especially in terms of Indigenous commercial rights to water and rights of management. In many settler countries, including Australia and New Zealand, Indigenous rights to water have been inadequately recognised by the legal system. The comparatively advantageous position enjoyed by Indigenous people in the United States and Canada, for example in regards to priority of interests and the fiduciary obligations of government, contains many important legal precedents which could be used to argue for greater acknowledgement of Indigenous water rights in these other countries.

As the world is witnessing increasing periods of freshwater scarcity, water becomes an increasingly powerful resource and tool for those who hold rights in it. An awareness of international legal developments may provide a useful lens through which governments and indigenous groups can decide how they can engage meaningfully over the water issue.

References

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Contact

Synexe Consulting Limited

E: synexe@synexe.com

W: www.synexe.com