



Customary Water Law



Summary

Customary water law refers to a collection of water allocation rules and traditional practices used by indigenous communities. Incorporating indigenous perspectives into customary laws can enhance the development of adaptive and context-specific management approaches that are socially and culturally appropriate, leading to more effective and sustainable water resource governance. This Tool introduces the concept of customary water law, discusses the benefits of integrating customary knowledge and practices into statutory law, introduces the guiding principles to integrate traditional knowledge into statutory regulation, details the use of cumulative effect assessment as methodology for understanding traditional water use and values, and gives practical insights on integrating customary practices in statutory law.

Introducing customary water law

Customary water law refers to broad collection of water allocation rules and traditional practices used by indigenous communities (FAO, 2008). It is based on practice, generally recorded orally rather than in written codes (Mann and Blunden, 2010). Indigenous rights arising from traditional law include the right “to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources” (Art.25, UN Declaration on the Rights of Indigenous People, 2007) and “to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use” (Art.26.2, UN Declaration on the Rights of Indigenous People, 2007).

The recognition of indigenous peoples' rights to fishing and hunting practices, referring to their traditional and customary entitlements to engage in fishing and hunting activities, has significant implications for water resource management. Indigenous communities have long-standing relationships with water ecosystems and rely on fishing and hunting as integral parts of their cultural, subsistence, and economic practices ([Berkes, 2017](#)). These rights, rooted in customary law and traditional knowledge, provide valuable insights into sustainable resource use and conservation ([Biggs et al, 2021](#)).

Benefits of integrating customary knowledge and practices into statutory law

By honouring and integrating indigenous rights, including fishing and hunting rights, into water resource management policies, governments and regulatory bodies can ensure the preservation of ecological integrity, maintain biodiversity, and support the well-being of indigenous communities ([Borrini-Feyerabend, 2015](#)). Additionally, incorporating indigenous perspectives and customary laws can enhance the development of adaptive and context-specific management approaches that are socially and culturally appropriate, leading to more effective and sustainable water resource governance ([Armitage et al., 2019](#); [McGregor, 2011](#)).

Recognising indigenous fishing and hunting rights, therefore, becomes crucial in achieving equitable and inclusive water resource management practices that balance conservation goals with the needs and aspirations of indigenous communities. The following are the benefits of integrating customary knowledge and practices into statutory law:

- **Incorporating customary law into water legislation and management systems offers significant benefits and potential in the realm of water resources:** This approach recognises and respects indigenous communities, leveraging their transmitted knowledge systems to inform decision-making processes ([Craig & Gachenga, 2010](#)). It enables culturally sensitive management, integrating indigenous perspectives and traditional practices alongside existing regulations.
- **Integrating indigenous knowledge through participatory approaches offers a valuable opportunity to bridge the gap between practitioner, indigenous, and local knowledge with scientific knowledge:** This inclusive process helps address information gaps, enhance stakeholder agency, and empower all involved parties ([Biggs et al, 2021](#)).
- **Customary law guides sustainable practices, regulating fishing, water extraction, and accounting for seasonal and cultural variations:** It establishes more comprehensive benchmarks for environmental and cultural flows, reflecting the needs and values of local communities ([Tool C5.04](#)). This collaborative approach fosters mutual respect, sustainability, and the preservation of water ecosystems and the communities dependent on them.

Guiding principles to integrate indigenous knowledge and practices

There are guiding principles that have been developed and can be used to help governments meet indigenous water requirements and integrate traditional knowledge into policy and legal development processes. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is one of those frameworks ([Tan and Jackson, 2013](#)). Domestic laws that integrate the following principles from the UNDRIP set a strong basis for recognising indigenous rights in relation to water management:

- Consult and cooperate in good faith with Indigenous peoples' own representative institutions, to obtain their free, prior and informed consent before implementing legislative or administrative measures that may affect them (Art 19);
- Acknowledge the right of Indigenous peoples to maintain and strengthen their spiritual relationship with their traditionally owned territories and waters (Art 25);
- Recognise and protect Indigenous rights to own, develop and control lands, territories and resources traditionally owned, occupied or used (Art 26);
- Consult and cooperate in good faith to obtain free and informed consent prior to the approval of any project affecting their lands or territories particularly in connection with the development, utilisation or exploitation of mineral, water or other resources (Art 32); and
- Take appropriate measures, including legislation, to achieve the ends of the Declaration (Art 38).

The Bluff Principles which were derived from rounds of dialogue between Hopi and other tribal leaders in Moab and Bluff, Utah in 2016 provide an example of how to integrate indigenous knowledge, perceptions, and practices into statutory law. These principles are ([Water and Tribes Initiative, 2020](#)):

1. Clean water for all peoples.
2. Honoring sacred sites and the religious beliefs of all peoples.
3. A holistic approach to water management that focuses on the ecosystem.
4. Educating the public on the value of water: water is life.
5. Using science to improve our understanding of water quality and quantity.
6. A focus on collaborative, inclusive policymaking.
7. A water regime free of racism and prejudice.
8. An ethic that emphasizes concern and caring for everyone, downstream and upstream.
9. A goal of stewardship; leave the Earth and its water systems better than we found them.

10. Equity and fairness should be basic features in all water allocation decisions.
11. Understand that traditional wisdom, especially from the Elders, is critical.
12. A sense of urgency; we must act now before the problems become overwhelming.
13. We must think of the welfare of future generations, not just for our own time.
14. Value water as a precious life-giving resource; we should not take it for granted.
15. Water is a gift provided by the Creator and should be sacred, shared, and loved.
16. Water policymaking should embody more spirituality and kindness, and less confrontation.

Cumulative effect assessments methodologies

In addition to ratifying the UNDRIP, countries may incorporate in law the need to perform cumulative effects assessments (CEA) for any projects and actions that may affect the environment and the way of life of indigenous communities. Cumulative effects assessment is the process of systematically analysing and evaluating cumulative environmental change (Smit & Spaling, 1995). CEA may be used for various purposes. It is typically considered an information-generating activity using research design and scientific analysis approaches (Bedford & Preston, 1988; Smit & Spaling, 1995). It can also be seen as a strategy for using planning concepts and methods to find the preferred order of a collection of resource allocation alternatives. This methodology brings together cumulative impacts evaluation with regional or comprehensive planning (Hubbard, 1990; Smit & Spaling, 1995). In addition to the analytical functions of information gathering, analysis, and interpretation, CEA includes value framing, multi-goal orientation, and participatory decision-making.

Therefore, CEA established a proxy to assess how indigenous people have lost the capacity to utilise and engage in certain activities related to an environmental resource. CEA constitutes a robust and comprehensive review of whether indigenous rights have been honoured and provides the groundwork for identifying areas where reform is necessary to realise those rights. Examples of cumulative effects that the CEAs may address include (Government of Canada, 2012):

- **Fish & Fish Habitat:** Destruction of habitat of the same fish population from multiple physical activities.
- **Aquatic Species:** Destruction of the shoreline as a consequence of repeated physical actions resulting in the elimination of several patches of a marine plant.
- **Socio-Economic Conditions:** Environmental consequences from several physical activities resulting in the decrease of a bivalve population upon which an Indigenous community relies on for revenue.
- **Physical and Cultural Heritage:** Damage caused by repeated physical actions to locations involved with the production of legends, ceremonial events, personal vision quests, etc.

- **Current Use of Lands and Resources:** Effects on the use of traditional fishing grounds as a consequence of diverse physical activities that reduce fish population.
- **Archaeology:** Disturbance of an archaeologically important site resulting from several physical building activity.

There are five steps required to conduct a cumulative effect assessment (Government of Canada, 2012). They are:

1. **Scoping:** The first stage is defining the scope of the evaluation. This begins with the identification of environmental elements that may be impacted by the proposed project or reform and are thus included in the CEA. These ecological traits are known as "valued components" (VC). The process of finding the valued components is a collaborative one, since the worth of ecosystem components is contingent on the value that people assign to them and the function they play in the ecosystem. After identifying the valued components, the geographical and temporal bounds must be determined to establish the CEA's constraints. The association between the project's intended physical activities and the valued components is then established.
2. **Analysis:** In the second stage, the influence of the physical activities on the valued components is assessed based on the spatial and temporal constraints established in the first step.
3. **Mitigation:** In Step 3, the viable countermeasures to these effects are determined. Mitigation methods include those that remove or decrease the intervention's effects and, if necessary, pay for any losses suffered.
4. **Significance:** In Step 4, the importance of undesirable cumulative environmental consequences is assessed in consideration of the mitigating actions maintained in Step 3
5. **Follow-up:** In Step 5, a follow-up plan is designed to determine the degree to which the anticipated consequences materialise and the efficacy of the proposed mitigation measures.

Practical insights on integrating customary practices in statutory law

Several countries have started to acknowledge indigenous concepts of land ownership and common property within their official legal and policy frameworks related to water management. Here are some practical experiences from countries that aim to recognise customary rights as part of their regulatory setup for water ([FAO, 2008](#)):

- Argentina: The Argentinian indigenous people have traditionally maintained a communal way of living and regarded resources located on their traditional ancestral land and water in general as sacred. When the traditional land has been taken in some parts, ancestral practices of water use were abandoned as a big part of lost cultural identity. The current constitutional regime upholds indigenous land rights by recognising legal personality of indigenous communities ([Art.17, Sec.75, Constitution of the Argentine Nation, 1994](#)). These communities are entitled to all property on their land and have a right to participate in management of their natural resources. There is no specific recognition for customary water rights in the national or provincial laws, but governmental bodies are required to account for third party interests when issuing water use permits, which could protect earlier right holders. One of the important cases on contradictions between customary and statutory rights took place during the construction of Yacyreta hydroelectric dam in 1997 ([Kornfeld, 2015](#)), where the panel found that the government failed to engage indigenous communities in decision-making process on their ancestral lands. Another landmark case took place in 2020, when the Inter-American Court of Human Rights found Argentina in violation of indigenous communities' rights to communal land and consultation, condemning Argentina for disregarding its treaty commitments (Lhaka Honhat Association Argentina case, Judgment, [IACHR, 2020](#)).
- Canada: Most of applicable legislation focuses on land rather than water rights, combining the concepts of ownership and utilisation in court judgments and local regulations. The materials from Royal Commission on Aboriginal People (RCAP) suggest that the customary water rights included "unquestioned right of access" to communal resources for each community member, excluding a possibility of viewing water as a commodity ([RCAP, 1996](#)). Current legislative framework recognised aboriginal rights which cover "an activity which must be an element of a practice or custom integral to the ... aboriginal group claiming the right" ([v. Van der Peet, 1996, 509](#)). Indigenous groups were signatories to historic land treaties with the UK, which had specific provisions on water. Thus, aboriginal title indisputably includes water use rights within the land boundary. These rights have evolved from customary laws to constitutional recognition mainly through numerous legal precedents (e.g. James Bay project ([Marsh, 2015](#)), Saanichon Marina ([Saanichton Marina Ltd. v. Claxton case, 1989](#)) and Piikani ([Phare, 2009](#)) cases).
- Ecuador: customary rules considered water as a sacred communal resource, while most indigenous communities believed that water resources should be shared in a participatory manner. This included the right to participate in associations, which had membership fees for water users. Members also participate in "mingas", a communal labour event for infrastructure maintenance and a way to acquire and review the water rights, ensuring compliance with social commitments on member's side. The legal system nowadays recognises water as a national good for public use

([Constitution of Ecuador, 2008](#); [Wingfield et al. 2021](#)), where individuals need a special authorisation for its use, and even land rights do not confer ownership of surface or groundwater. Indigenous rights are compiled into statutes to clarify the rights and obligations of a particular group, however, conflicts over water uses appear quite often due to lack of common register for water licenses. The contradictions may be settled only if they arise among indigenous rights of the groups, but not if the indigenous rights conflict with statutory provisions. For example, Chevron-Texaco case ([Donzinger, 2010](#)) appears to be one of great examples of struggles to protect indigenous rights within a national legal system against global corporations.

Connected Resources

[Customary water rights and contemporary water legislation](#)

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