



IUCN – The World Conservation Union

Water Law Series – Issue 8

Trading In Water: Defining Property Rights

Who ‘owns’ water?

This question often arises, especially when one sees a sharp increase in the demand for water, an increasing value being placed on water, and a greater demand for attention to be paid to water quality and river health.

Different systems have evolved over time either through custom or law, or a mix of the two, to tackle this question. The issue of who ‘owns’ water needs to be addressed within the context of the particular circumstances of each country and the system that has evolved to meet these circumstances. The importance of Indigenous perspectives is addressed under Issue 11.

What does ‘ownership’ of water mean?

‘Ownership’ can be a difficult legal concept. Rights conferred by ownership of any particular thing can vary significantly in nature and degree. There is a difference between the right to *access and take* water and the ownership of water. Water, while forming part of the natural resource, cannot be said to be ‘owned’ by anyone, it is a public commodity with the State often acting as the custodian of the resource. Once water has been legally captured from its natural resource and taken under a persons control, that person *could* be said the ‘own’ that particular water.

What approaches have been taken allocating water rights?

Water rights can traditionally be seen to have been based upon a variation or combination of three systems, namely riparian rights, prior (appropriate) rights and public allocation of rights. There are also a variety of ways in which rights have been defined, such as a by volume or as a share of the resource, and rights have also been defined as being for consumptive or non consumptive use.

A case study: riparian rights

The common law did not confer ‘ownership’ of water resources on riparian owners. Instead it defined rights and duties with respect to water resources such as the right to control the flow, to take water and the obligation not to foul or obstruct watercourses such that they could not be used by downstream users.

Riparian rights allowed a landholder unlimited use of groundwater and of water flowing over the land. All riparian rights were dependent upon the ownership and occupation of land. As riparian rights conferred rights on landowners they could not be transferred as they were consequent upon ownership or occupancy.

A codified approach

Common law systems are increasingly either modifying or abolishing the common law riparian rights position and replacing them with statutorily defined rights and duties. This is necessary if land title and water title are to be separated, which is an essential prerequisite to trading water rights.

Issues to address in codifying rights to water in any system when seeking to separate water and property rights, as a prerequisite to establishing a system for trading water *include*:

- Ensuring a clear specification of relevant entitlements ie volume, reliability, transferability;
- Acknowledging the environment as a legitimate user of water (see Issue 7);
- Providing for open and transparent public involvement; and
- Addressing equity issues.

Why trade water?

Trading water is seen as an effective market based means of having water shift to its highest and best use. Secure water rights, which underpin a trading regime, are seen as providing greater resource security and as providing an opportunity for attracting investment.

Are there examples of where separation and trade has happened?

Yes. Chile has long experience with separating land and water title and in trading water rights, and more recent examples include Mexico and Peru. In Australia each State has responded to the Council of Australian Governments 'National Competition Policy: Water Related Reforms' by separating land and water title. Most States now allow intrastate trade and interstate has also been trailed in the Murray Darling Basin. One State has provided for trade of water within its own borders for the past 35 years.

Where do I go for further assistance?

The IUCN Environmental Law Programme: see below for contact details.

IUCN Environmental Law Centre for the IUCN Environmental Law Programme

Contact the IUCN Environmental Law Centre at: waterlaw@elc.iucn.org

Visit the IUCN Environmental Law Programme Website at: www.iucn.org/themes/law