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# Chapter 4

# Indigenous water and Mother Earth

*Margot A. Hurlbert*

*Canada Research Chair, Climate Change, Energy and Sustainability Policy, Johnson Shoyama Graduate School of Public Policy, University of Regina, Saskatchewan, Canada*

## ABSTRACT

This chapter reviews Indigenous water law in Canada and the United States, highlighting the protection of Indigenous rights and their priority in law, even though the historical practice has often excluded or denied them. Through treaties, court cases, and advancing laws respecting Mother Earth, the worldviews and values of Indigenous relations and Buen Vivir inform and mediate water management solutions and competing claims, overexploitation, and water conflict. New legal developments including the rights of nature, protecting them in constitutions, and recognizing river rights in laws in Central and South America, the United States and New Zealand move law, practice and water governance closer to a fairer and more socially just sharing of water resources between Indigenous communities and competing water claims including irrigated agriculture. Addressing water challenges of the 21st century will require innovative solutions and approaches to water management. Including and giving full voice to Indigenous people and their water laws and practices is a necessity both in law and water management practice.

**Keywords:** Indigenous groundwater rights, Indigenous rights, Indigenous water rights, *Sui Generis*, United Nation Declaration of the Rights of Indigenous Peoples

## 4.1 INTRODUCTION

Water has diverse sacred meanings for Indigenous peoples. Water is the artery of Mother Earth (Paul, 2020). A few examples from the language of North American Indigenous people illustrate this idea. In Cree, 'Nipiy' is the word for water joining 'n'niya' or 'I' or 'I am', together with 'iy' or 'pimatisiwin' or 'life'. In this way Niipiy is equivalent to 'I am Life' (Littlechild, 2014). For the Tlingit, water is characterized by respect and relations of responsibility between people, and water is seen as 'more-than-a-human person' (Wilson & Inkster, 2018). Indigenous water meanings are just the beginning. The diverse Indigenous thought, practices and governance (patterns of decision making) approaches destabilize modernism and expose colonial structures (including colonial water law constructs) and there are benefits of recognizing multiple values in enhancing water management and governance and ensuring just and socially accepted water allocation decisions through decolonization. Acknowledging Indigenous water meanings and rejecting settler views of water that subsume Indigenous water laws

within settler-colonial society allows for pluralism. In this process, water can be decolonized and the ontological violence authorized by Eurocentric epistemologies in scholarship and everyday life can be exposed (Wilson & Inkster, 2018).

Agriculture and Indigenous water rights have an interesting history. Colonizing practices did not negate pre-existing Indigenous water rights. However, the state of Indigenous drinking water across the world reflects the legacy of colonialism and the widespread and intensive development of dryland agriculture by settlers. More recently, Indigenous laws and practices are increasingly being acknowledged in modern treaties. Their exercise and practice are now advancing in Canada and the United States, and elsewhere through, for instance, the rights of Mother Earth, rivers, and water. A space exists for the emergence of Indigenous water law, rooted in treaty protection, Indigenous sovereignty, and the United Nations Declaration of the Rights of Indigenous Peoples. This emergent space requires nurturing and the seeds lie in Indigenous traditions and practices, and ultimately Indigenous sovereignty.

This chapter will focus on Indigenous water law in Canada and the United States in Sections 4.2 and 4.3, but expand the discussion globally with considerations of Mother Earth in Section 4.4 and the Rights of nature in Section 4.5 concluding with the United Nations Declaration of the Rights of Indigenous Peoples in Section 4.6.

As a white settler, I write this chapter acknowledging its inherent weakness in recounting Indigenous water law within the confines of colonial structures, rules and practices that have confined it. I will provide an overview of Indigenous water rights (as determined by courts and written by governments) and I will also try to reference and recognize Indigenous water scholarship that is not constricted and confined by the former. However, a comprehensive review is beyond the scope of this chapter.

## 4.2 ENSURING THE PLACE OF INDIGENOUS WATER RIGHTS: PARALLELISM AND PLURALISM

Defining Indigenous law, or Indigenous water law, is a subject of debate. For some scholars, Indigenous law includes customary, common, statutory, and government law that specifically and only affects Indigenous people and the relationship between Indigenous people (University of Melbourne, 2021). For others, Indigenous law is characterized by legal pluralism which recognizes more than one legal system in the same social field (Merry, 1988), an Indigenous legal system and a Canadian, civil or common law, municipal, provincial or federal law system (Borrows, 2010). For Borrows *et al.* (2019) a vision of Indigenous law that is braided is preferred:

> *The braiding of Indigenous law with international and national law is thus a unique undertaking that helps us to reconceive the very idea of law. As suggested, Indigenous Peoples' law questions the claims of both international and national laws to universality and supremacy. Law can be multidirectional in sources and applications. It might be created by clans, flow from experiences with glaciers or rivers, or be sourced in custom and grassroots practices, as well as being created by legislatures, courts and executive authorities.*

For many Indigenous scholars, Indigenous laws move beyond pluralism to parallel expressions of self-determination overlapping with claims often incommensurable to those of the Canadian State (Day, 2001). In the words of James Sakej Youngblood Henderson (2002):

> *The task of Indigenous peoples is to encourage diversity as the prime assumption of legal systems, and to resist any false universality, despite the consequences of existing legal theory.*

In Canada, Indigenous law could be defined as 'a source of law apart from the common and civil legal traditions in Canada' (White, 2021) or Indigenous people's own legal systems. White's (2021) view of Indigenous law as parallel and separate is preferred by the author and recognized in Section 4.2.1. However, due to space, time, and the positionality of the author, this chapter mostly recounts

the Indigenous law braided into the fabric of law through scholarship, court decision, and statute. But first, inherent Indigenous water law will be outlined followed by the law of *Sui Generis* that allows for the uniqueness of Indigenous rights and also builds a bridge back to Settler legal systems.

### 4.2.1 Inherent Indigenous water law

For Indigenous peoples, Indigenous rights, including Indigenous water rights, arise based on Indigenous peoples' existence as sovereign nations residing and governing throughout their territories and are 'inherent' rights (Phare, 2009). These laws are both given and limited by the Creator and include laws of stewardship and reciprocity with nature that Indigenous people cannot alter or narrow, and cannot be altered or narrowed by other humans, governments or their laws. These inherent Indigenous water rights are separate and apart from Indigenous water rights claimed through treaty or constitutional rights. While a discussion of these rights is beyond the scope of this chapter, these water rights are as unique and diverse as Indigenous people and their communities, and not restricted to those recognized by colonial governments and legal systems (Gullason, 2018).

### 4.2.2 *Sui Generis* Indigenous rights

Indigenous rights are *Sui Generis*, having a unique meaning reflecting the uniqueness and diversity of Indigenous people and their laws. They exist in a unique class by themselves (Battiste & Barman, 1995). In law generally, *Sui Generis* is a legal classification existing as a singularity or independent of other categorizations. In North American law, it reflects aspects of community, both human and ecological, interconnected human and Earth relations, and teachings of 'Honoring Earth'. Indigenous rights are separate and different from human rights. Unlike human 'rights', they are not advanced from a place of victimhood or disadvantage that requires redress through creation of a right, but they represent long-enduring rights that arose from the prior occupation of land by Indigenous peoples and the prior social organization and distinctive cultures of Indigenous peoples on that land (McNeil, 2013).

Indigenous rights are recognized as far back as the Royal Proclamation of 1763, wherein King George III received lands surrendered by France in the Treaty of Paris and specifically reserved lands to the Indigenous people as their traditional hunting grounds in the British colonies. This Proclamation established a nation-to-nation relationship between Indigenous people and the English monarch (McNeil, 2013). While human rights claimants are often regarded as 'victims', less powerful, downtrodden, and in need of protection (Ball, 2013), Indigenous rights holders are not.

Several features of Indigenous rights are unique and provide enhanced protection beyond notions of human rights. The unique Crown-First Nations relationship is described as *Sui Generis* because it is derived from both Indigenous and English legal regimes. It is neither exclusively public nor private, but flows from a unique creation of legally enforceable duties of the Crown (R. v. Sioui, 1990). The relation is between those of sovereign states and states with their own citizens (Delgamuukw v. British Columbia, 1997). Indigenous title is a *Sui Generis* right arising from prior occupation of Canada by Indigenous people. Chief Justice Lamer in Delgamuukw stated if occupation was also pursuant to Indigenous law, there would be a second source of Indigenous title arising from the relationship between common law and pre-existing systems of Indigenous law. He stated in his judgement, that this title can't be sold, conveyed to private persons or corporations or held by individual Indigenous persons. It is held by all members of the nation and decisions are made communally. Indigenous land cannot be used in a manner irreconcilable with the nature of the attachment to the land forming the basis of the group's claim of Indigenous title. Indigenous land rights are tied to a unique common interest, fiercely different from private property and its assumed individuality of decision making. It is this legal protection that allows for the Indigenous tradition of honoring Mother Earth.

Human rights are often regarded by Indigenous scholars as assimilative and contrary to the diverse Indigenous people and their rights (Howard-Hassmann, 2014). This is because human rights arise as a construct of Euro-centric structures. Their very conception, their structures of recognition and protection, occur within institutions and cultural practices of European origin. Universal human

rights are regarded as 'totalizing' rights, erasing Indigenous cultural differences, and thus may imply assimilation. Far different from Indigenous collectivities, human rights, including water rights, assimilate rights into liberal, individualist society destroying the collectivity and instead promoting the interests of capital, private property, and individuality (Ball, 2013). This construction of rights is in juxtaposition to the *Sui Generis* nature of Indigenous rights and the Indigenous view of honoring Mother Earth.

The flexibility and evolving nature of *Sui Generis* Indigenous rights act as an interdisciplinary and intercultural legal bridge. As an example, in interpreting Indigenous rights to fish for food, the court in the Supreme Court of Canada's Van der Peet case recognized the contemporary Indigenous legal understanding of the right to fish for food, as well as social and ceremonial purposes connected to cultural and physical survival exercised in a contemporary manner. The decision to recognize these rights protects an allocation of water to preserve their practice. The very act of defining Indigenous rights requires a 'form of inter-societal law that evolved from long-standing practices linking the various communities' (Borrows, 1997). Borrows (1997) state:

> *Therefore, a true sui generis conception of Indigenous rights will respect the existence within Canada of two vastly different legal cultures, European and Indigenous, and will incorporate both legal perspectives. A sui generis approach will place 'equal weight' on each perspective and thus achieve a true reconciliation between the cultures.*

## 4.3 INDIGENOUS WATER LAW IN CANADA AND THE UNITED STATES

After outlining the inherent Indigenous water rights (4.3.1), this section describes Indigenous water rights on reserve (4.3.2), Indigenous water rights by treaty (4.3.3), and Indigenous groundwater rights (4.3.4).

### 4.3.1 Indigenous water rights

Aboriginal water rights have been established in many court cases. In Canada, the Van der Peet case found the right to use the land and adjacent waters for traditional sustenance purposes to be a fundamental right. Even though there was no counterpart in the English law, Canadian courts have recognized Indigenous rights. In law, existing Indigenous laws and customs and their corresponding interests in the land and waters required for their practice must be regarded as continuing, in the absence of extinguishment. Phare (2009) argues that Indigenous water rights exist if First Nations used water for domestic purposes, used the river for food supply, recreational activities, waterways for travel, trade or meetings, conducted ceremonies in the water, and had practices dictated by the significance of water for their culture. Indigenous fishing and harvesting rights protect rights reasonably incidental to the activities, including preserving water quality and quantity, habitat protection, and watershed management for protection of hunting and trapping grounds, harvesting and gathering grounds, and transportation on waterways. Also protected are uses of water reasonably incidental to fulfilling purposes of treaty or the economic stability of Indigenous people including water for manufacturing, irrigation, or the production and sale of electricity (Phare, 2009). Indigenous rights to water stem from the use and occupation of land since time immemorial (Laidlaw & Passelac-Ross, 2010). As with other Indigenous rights, these rights are not frozen in time, but are interpreted flexibly in order to permit their evolution over time and their meaningful exercise (Mitchell, 2001).

In South America, there are similar struggles for the recognition of Indigenous water rights. Water legislation was introduced for general purposes (in the 1970s in Ecuador, Peru, Chile, Bolivia) and resulted in ancient irrigation systems co-existing with more recent community or state water management initiatives. Protests and struggles for recognition have only been partially successful in preserving Indigenous pre-existing rights (de Vos *et al.*, 2006).

### 4.3.2 Indigenous water rights on reserve

In the United States, Indigenous people have an implied reservation of the water associated with their lands. These rights pre-date all other water claims; they take precedence being first in time, and therefore first in right (Winters v. United States). Treaties only confirm these rights and are not a source of these rights. The Winters case has been applied in Canada by the Privy Council in the case of Burrard Power as well as in policy documents that recognized the rights of Indians to 'Take for domestic, agricultural purposes all such water as may be necessary, both now and in the future' (Williams, 1920).

One illustrative example is the Secwepemc people on the Kamloops and Neskonlith reserves who developed irrigated agriculture successfully while competing with nearby settlers for control of water and supporting their traditional livelihoods (Matsui, 2005). Although the Reserve Commission and previous water officials specifically recognized the 'rights of the Indians as the oldest owners and occupiers of the soil to all the water which they require or may require for irrigation and other purposes,' provincial and federal government jurisdictional conflicts prevented the timely recording of these rights on the province's water registry. As the province's water registry worked on the basis of a first in time, first in right system, the late registration disadvantaged the Secwepemc people's water claim. The British Columbia Court of Appeal refused to recognize this claim in 1921; to this day, the Secwepemc people continue to assert their claim to the ownership of the creek and its water as an inherent Indigenous water claim (see 4.3.1) (Matsui, 2005).

### 4.3.3 Indigenous water rights and treaties

Canadian treaties did not specifically extinguish Indigenous water rights. Inherent Indigenous rights find their source in the Creator's laws and responsibilities and cannot be narrowed by other humans or governments (including their laws) and cannot be shed by Indigenous people; recognition by colonial legal systems and governments does not negate or restrict inherent Indigenous rights (Phare, 2009). When the Federal government transferred jurisdiction over water and natural resources to the Prairie provinces in the 1930s, no acknowledgment of or engagement with Indigenous people was made. As a result, some scholars argue that the transfer did not include Indigenous water rights (Phare, 2009) and that Indigenous people might be able to restrict public access to waters (Bartlett, 1986, in respect of Treaty #3). This may include restrictions on non-Indigenous fishing and hunting of waterfowl, public access to headwaters, limits on or removal of manufacturing and industrial uses, mining, hydroelectricity and building of dams. In British Columbia, Indigenous water rights were specifically recognized in the Indian Water Claims Act of 1921, which recognized that water went with land when reserves were created.

Indigenous rights were further recognized in law by the Supreme Court of Canada in 1972, and received constitutional protection through the Constitution Act of 1982. Nevertheless, some modern treaties acknowledge provincial water law as binding on Indigenous First Nation signatories. For example, the Maa-Nulth First Nation Final Agreement provides that the storage, diversion, extraction or use of water and groundwater will be in accordance with provincial and federal law (INAC, 2021). Furthermore, Indigenous water rights and fishery claims in Canada are not always successful. The issue of whether water is included in an Indian reserve is determined based on the reserve's specific provisions and facts surrounding its creation (Saanchton Marina). For example, a detailed review of historical facts and the parties' intention was undertaken in *R.* v. *Lewis* where it was determined the Squamish River was not part of an adjacent reserve, nor did the Bands receive an exclusive fishery. Many other court decisions concern only Indigenous land or fishing rights, and do not necessarily consider water and inherent Indigenous rights holistically (Matsui, 2005).

### 4.3.4 Indigenous groundwater rights

Indigenous people have succeeded in claiming rights to groundwater. In the United States, the Winters doctrine (the presumption that when Congress served land for an Indian reservation, the

water sufficient to fulfill the purpose of the reservation was also reserved) has been extended both in relation to the quantity of water required on reserve and to groundwater. Even so, often the question of water quantity has not been definitively determined. However, in Arizona vs. California, a standard known as 'practicably irrigable acreage' was adopted measuring a reservation's water requirement in terms of the maximum reasonable land area within the reservation. The Winters doctrine has also been applied to groundwater in the U.S. Court of Appeals for the Ninth Circuit decision of Caliente v. Coachella Valley Water District *et al*. The court ruled that the fact the Tribe had not historically used groundwater was irrelevant and did not affect the seniority of the Tribe's groundwater rights which preempted water rights granted by the state.

In Halalt First Nation v. British Columbia (Environment), the British Columbia Supreme Court held that the Halalt had not been adequately consulted when several wells were approved. The Halalt had 'an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfil the objects for which the reserve lands were set aside' and that the Province could not purport to expropriate the groundwater. Although the Court of Appeal set the decision aside based on a finding that there had been adequate consultation, this groundwater finding arguably remains binding law (Gullason, 2018). Gullason (2018) argues that British Columbia's recent Groundwater legislation continues the status quo of ignoring Indigenous water rights and continues to allocate groundwater licenses which will infringe both inherent Indigenous water rights and constitutionally protected Indigenous and treaty rights.

A similar situation exists in Alberta where Indigenous people claim water on reserves, for which interests had not been registered in the provincial water laws starting in 1894. Again, by failure to provincially document the rights, there is a risk of not considering them in allocation decisions. Indigenous reserves and their lands have always been under federal Canadian jurisdiction and argue the province has no jurisdiction over their lands and water (Statt, 2003).

## 4.4 MOTHER EARTH, RELATIONS, AND BUEN VIVIR

The primordial relation of Indigenous people is with Mother Earth. The Assembly of First Nations expression of Indigenous laws and practices considers the Earth and our relations to it and describes it as 'Honoring Earth' (AFN, 2020):

> *From the realms of the human world, the sky dwellers, the water beings, forest creatures and all other forms of life, the beautiful Mother Earth gives birth to, nurtures and sustains all life. Mother Earth provides us with our food and clean water sources. She bestows us with materials for our homes, clothes and tools. She provides all life with raw materials for our industry, ingenuity and progress. She is the basis of who we are as 'real human beings' that include our languages, our cultures, our knowledge and wisdom to know how to conduct ourselves in a good way. If we listen from the place of connection to the Spirit That Lives in All Things, Mother Earth teaches what we need to know to take care of her and all her children. All are provided by our mother, the Earth.*

Sustainable strategies held by Indigenous communities are part of this worldview that identifies problems and determines pro-social solutions to collective action problems (for an example of this in respect to Indigenous communities, hunter gathering lifestyles, sharing (reciprocated and non-reciprocated) and food security, see Ziker *et al*., 2016). It is not that Indigenous people have all the solutions for environmental problems of the 21st century, it is that their Indigenous knowledge allows them to envision the common resource of our world, the 'Mother Earth' and provide teachings and learning on how to share the Mother Earth sustainably. Indigenous knowledge offers what, in the words of Elinor Ostrom, are behavioral approaches to collective action problems that entail understanding 'the effects of structural variables on the likelihood of organizing for successful modes of collective action' (Ostrom, 2010). Indigenous legal traditions are not trite or easy, but complex, based on legal traditions that include intentional and deliberative collective processes to change law

over time, transform implicit law into explicit law, and create legal precedent and a formal memory archive (Napoleon, 2009).

In Maori philosophy, *hau* is one of the basic concepts: 'the wind of life that activates human and non-human networks alike animated by reciprocal exchanges' (Salmond, 2017). Reciprocal exchanges are not material exchanges of commodities but are empirically construed entirely on observation. The intermingling starts with the Maori greeting by touching noses, includes intermingling of breath, could include familial trees, but more often starts with recitation of names of main mountains or rivers in their home territory, binding people together (ibid.). Reciprocal gifting obligates the recipient to participate in the reciprocal infrastructure that the gift itself sets up, which does not just include human relations but structures the world and is underpinned by a debt that can never be repaid; it is that of giving life. In the Maori tradition, belonging to particular lands is not about who one is, but about what one does (Salmond, 2017).

Indigenous people do not have all the answers. As John Borrows notes, trying to understand all our environmental troubles through Indigenous knowledge can potentially compound our confusion as what was successful in one time and place may not be translated appropriately to other settings. 'Self-interest and cultural blindness to the potential dangers of one's own group's practices can be found everywhere; and a healthy degree of scepticism should also accompany any groups claim to a better path of environmental preservation' (Borrows, 1997). But Indigenous contributions are not just evidence of better practices; to be fully appreciated, institutional change is needed. In 1997, John Borrows pointed out that for transformational change, there must be change in people and ideas, the ground upon which decisions are made, and the integral application of Indigenous legal knowledge in decision making.

In Latin America, traditional Indigenous worldviews have merged with critiques of capitalism and the modernist world order to create the idea of *Buen Vivir*. This idea represents a civilizatory transformative proposal to build a new world that addresses colonial and capitalist structures (Gudynas, 2011). *Buen Vivir* represents a collective construction that prioritizes ecological and community co-existence required to meet the demands of society and not those of capital (Acosta, 2018). While the idea of *Buen Vivir* has been incorporated into many Latin American legal systems, it has had ambiguous and contradictory results. Many such initiatives were undermined by expanded exportation of natural resources, hydroelectric power development, oil pipelines and an exclusion of Indigenous people (Sieder & Barrera Vivero, 2017). However, Latin American scholars continue to breathe new life into the idea, imagining economies of degrowth where traditional Andean knowledge based on reciprocal help and collective work can flourish (Acosta, 2018). From this tradition, and Indigenous traditions, the rights of nature have evolved.

The implications are firstly that recognizing these philosophies and traditions is essential for pluralistic water management; by embracing these values and traditions, decisions of allocation and sharing in the context of conflicting claims can be mediated and resolved by all parties focusing holistically on Mother Earth, relations, and *Buen Vivir*. The exact nature of future water management decisions cannot be predicted, but collective discussion and action, taking into account the local context of resources and practices, can allow for appropriate and socially just sharing.

## 4.5 RIGHTS OF NATURE

Important developments of the rights of nature in law have, in some instances, successfully addressed the overexploitation of water resources and moved law, practice and water governance closer to a fairer and more socially just sharing of water resources between Indigenous communities and competing water claims including irrigated agriculture.

### 4.5.1 Constitutional protection for Mother Earth

In 2008, Ecuador became the first country to recognize the legal rights of nature in its constitution. Article 71 of the Constitution of Ecuador recognizes the right of nature to exist. Bolivia followed suit

in 2010, recognizing the Rights of Mother Earth and her constituent life systems, including human communities (Rühs & Jones, 2016; Law 071 of the Plurinational Bolivian State). Rights include those of life, diversity of life (for the variety of beings that comprise Mother Earth), water, clean air, restoration and to live free from contamination (with regard to toxic and radioactive waste). Based on these precedents, the Paris Accord established the International Rights of Nature Tribunal (UN, 2016).

The Ecuador constitution was successfully applied in the Wheeler case (2011), granting an injunction to protect a river and finding the provincial government liable for damages resulting from a project widening a highway and depositing debris in the nearby Rio Vilcabamba. The debris had narrowed the river, increased its speed and caused erosion and flooding. Article 71 was specifically cited and the generational injuries to Nature were outlined, including their magnitude and repercussions to current and future generations. The court decision quotes Alberto Acosta, President of the National Constituent Assembly and his statement that human beings must not bring about the extinction of other species or destroy the functioning of natural ecosystems.

The inclusion of Mother Earth and the environment into law has also expanded law's environmental methodology (Ebbesson, 2003). Prior to colonization, in New Zealand the Māori people communally owned and managed all of the land and water according to traditional laws and customs governing resource sharing and use. Because of British riparian laws precluding ownership of water, Indigenous claims focused on land underneath water. However, Māori water relationships have been accounted for as part of the planning processes in Resource Management Acts with environmental and cultural value protection that must be taken into account in decision making. In New Zealand, the *Environment Act of* 1986 establishes an Environment Commissioner, tasked with maintaining and improving the quality of the environment through review of the government. The commissioner is tasked with the maintenance and restoration of ecosystems of importance, especially those supporting habitats of rare, threatened, or endangered species of flora or fauna. This is an important movement from utilitarian and imperial legal modes towards an appreciation of the rights of everything that constitutes the earth, decolonization and pluralism (Charpleix, 2018).

### 4.5.2 River rights

Recognition of rivers as legal entities with rights is increasingly being recognized through a mixture of court decisions and statutory enactment. The High Court in the State of Uttarakhand, India determined in the Salim case (2017) that the Ganges and Yamuna rivers were juristic persons that therefore required extraordinary measures in order to protect their health and wellbeing as communities from mountains to the sea. Some of the reasoning of the court included the religiously significant aspect of the rivers and the important spiritual and physical functions these rivers represented for Hindus. As a juristic person, the rivers hold rights and obligations and having representative standing, the rivers act through an intermediary, an interstate agency of appointed representatives.

New Zealand became the first country to grant a specific river legal rights in 2017, passing the Te Awa Tupua (Whanganui River Claims Settlement) Act. Māori water conceptualizations have been affected by creation of legal status including the example of the Te Awa Tupua or the Whanganui River that flows from the foothills of Mt Tongariro through the remote wild King Country and Whanganui region out to the ocean at the city of Whanganui. The Environmental Tribunal found the river – defined as a water resource or a single and indivisible entity comprised of water, banks and bed – to be a single, indivisible and living whole incorporating all its physical and metaphysical elements. This finding rendered the parties in a stalemate in water management and ultimately the dispute settled in 2017 with the river being recognized as a legal person, Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Te Awa Tupua Act).

Toledo, Ohio is one of several U.S. communities to pass laws recognizing the rights of nature. Its Lake Erie Bill of Rights protects the lake's shores. Concern has been raised from farmers and river communities about the law adversely affecting their livelihoods and possible liability for their actions (Westermann, 2019). Bangladesh has also granted its rivers status as living entities to protect them

from further pollution. A government-appointed National River Conservation Commission has been established which can charge people harming the river in the same fashion as if they harmed our mother (Turag River Case 2016).

In the Atrato River case in Colombia (2017), a grassroots movement, *acción de tutela*, sought an injunction to halt illegal mining and logging activities dumping harmful chemicals into the river. The court allowed the action based on its interpretation of biocultural rights in the Colombian constitution that represent a unity between nature and humans that respects the role of Indigenous relationships with non-human natural entities that foster biodiversity. International legal instruments incorporated into Colombian law, including the Convention on Biological Diversity, the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) were also cited. The court specifically determined that nature is a subject of rights.

Glaciers, or headwaters of rivers, have also received protection in the Miglani case (2017). The High Court of Uttarakhand, India recognized the right of glaciers not to be polluted and the right to exist and persist as their own vital ecologic system, their own legal entity as a juristic, moral person. The High Court issued an order recognizing the right to clean water. Kauffman and Martin (2016) conducted a comprehensive review of Rights of Nature Cases and interviewed lawyers and judges involved. Their conclusions are that these cases are increasingly successful partly due to the issue's politicization and civil society's efforts to advance these cases. As a result, laws such as Ecuador's, that might be perceived as 'weak' by some, do matter. These cases enhance the protection of rivers and water but are not without problems. Interjurisdictional issues still exist with interprovincial and international boundaries that give rise to enforcement issues; protection also raises issues of liability and ultimately responsibility. Court cases are expensive, take considerable time, and sometimes their results are orders that are largely ineffectual at being enforced. Often the most difficult issue is changing the worldview of the non-Indigenous population (Westermann, 2019). Court cases structure guardianship differently, some drawing from New Zealand's model; court designated guardians may or may not rise to their appointment. Operationalizing river protection may be subject to further legislation and court orders (Kauffman & Martin, 2019).

## 4.6 UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES

Addressing water challenges of the 21st century will require innovative solutions and approaches to water management. Including and giving full voice to Indigenous water laws and practices is a necessity both in law and water management practice. This chapter has reviewed Indigenous water law in Canada and the United States as well as considering Mother Earth, worldviews and values of Indigenous relations, and Buen Vivir that can inform and mediate water management solutions and competing claims, overexploitation, and water conflict. New legal developments including the rights of nature, protecting these rights in constitutions, and recognizing river rights in laws in Central and South America, the United States and New Zealand also moves law, practice and water governance closer to a fairer and more socially just sharing of water resources between Indigenous communities and competing water claims including irrigated agriculture.

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) advances international Indigenous law and rights. UNDRIP recognizes Indigenous sovereignty and, at the same time, augments the legal status of Mother Earth and Water, the lifeblood of the Earth (AFN, 2021). Duties of 'consultation' are raised to requirements of 'consent', introducing the Right to Free, Prior and Informed Consent (FPIC) for Indigenous Peoples. Article 32.1 provides that FPIC is to be obtained prior to the approval of any project affecting Indigenous lands or territories in connection with the development, utilization or exploitation of mineral, water or other resources (Boutillier, 2017). UNDRIP moves beyond the conception of the State granting and distributing rights to people in a Rawlsian distributivist conception of justice (with the state as arbitrator of conflict and protector of individual rights) and embraces recognition justice (Rawls, 1971). Recognition is key in engaging

with the 'other' when two groups have fundamentally different ontological positions, aims and goals. Recognition in accordance with Indigenous law does not aim to overcome each other's position, but to achieve recognition of and respect for difference, leading to more meaningful engagement and justice (Maciel, 2014), applying the *Sui Generis* principles of Indigenous sovereignty. In the words of the Canadian Assembly of First Nations (AFN, 2021):

> *The Creator placed us on this earth, each on our own sacred lands, to care for the earth, environment and humankind. We stand united to follow and implement our knowledge, laws and self-determination to preserve and protect life's most sacred gift – water.*

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