CUSTOMARY WATER LAWS AND PRACTICES: GUYANA

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BACKGROUND

(a) Geography

Guyana is the only English speaking country located in South America. It is bordered on the north by the Atlantic Ocean, by Venezuela in the west and to the south by Brazil. Mount Roraima, where Guyana, Brazil and Venezuela meet, forms a tri-state boundary. Suriname lies to the east. Culturally Guyana has been identified with the Caribbean, has links with the West Indian islands and is a member of Caricom but environmentally it is one of the countries within the Amazon river system.

Guyana covers 215,000 square kilometres (83,000 square miles approx) and is divided geographically into five zones viz., the coastland, the interior plains, the western highlands, the southern uplands, and the southwestern savannahs. The coastland is a low, flat, narrow, alluvial belt, about 15 to 70km long where approximately ninety percent of the population live. The land was reclaimed and drained by Dutch settlers and lies below sea level at high tide. It is protected from saltwater intrusion by sea walls, groynes, dams and canals. The bulk of Guyana's agriculture also takes place on the coastland. The rest of the country is generally regarded as the hinterland where the majority population are Amerindians.

(b) History

Guyana was settled by the Dutch in the 17th century and the original legal system was Roman-Dutch. In 1803 the Dutch surrendered their colonies to the British but the Articles of Capitulation states that the "Laws and Usages of the Colony shall remain in force and respected…" As the English population increased the majority of inhabitants found themselves governed by a system of laws which was alien to them and written in a language they did not understand. As English judges and officials were appointed they began to apply English principles and introduce English law until the legal system was no more than "an incongruous medley of Dutch and English legal principles."[1]

Roman Dutch law remained a fundamental part of the legal system until the early twentieth century when it was replaced by English law. However existing rights were saved and the principles of Roman-Dutch law are still relevant in determining rights over and interests in land and water.

(c) Social/Political

Great Britain granted independence to British Guiana in 1966 and the country became a republic in 1970. It is a constitutional democracy with a National Assembly elected by proportional representation. Ten seats in the National Assembly are reserved for the representatives of the ten regions. Each administrative region has a regional development council who are elected by voters in the region.

A recent census puts the population at 749190[2] made up of people of African, Indian, Portuguese, English and Chinese descent as well as Amerindians. The Amerindian groups in Guyana are the Akawaio, Arecuna, Arawaks (or Lokonas), Carib, Makushi (Macuxi), Paramona, WaiWai and Wapishana. The Amerindian population is estimated to be about 60,000 (8%) of the population.

The seventy-seven Amerindian villages listed in Table1[3] have title to land. A government initiative is in progress to survey and demarcate these titles and over half have been completed. However opposition from one advocacy group has resulted in delays. There are approximately another 40 recognised communities who occupy land without any formal legal title and who have to wait for the first stage of demarcations to be complete before their lands can be surveyed and titles granted. These communities are listed in Table 2[4].

Each Amerindian village elects a village council and a Touchau (captain). Women are represented on the village council but women touchaus are rare. Under the Local Democratic Organs Act 1980 the Amerindian Village Councils have the status of local government authorities.

Amerindian villages are located in the Hinterland, far from the main centres of population and separated from one another by large distances. Each village has a central meeting place, a shop and in some cases an airstrip. Families may have homes near the village and locate their farms miles away

Mabaruma, Port Kaituma, Mahdia, Ituni and Lethem are five small townships (2000 – 5000 people) located in the Hinterland. They are not traditional Amerindian Communities and are therefore not covered in this report.

1. Brief description of the country's water resources

Guyana means "land of many waters." It has four main rivers - the Berbice, Corentyne, Demerara, and Essequibo - and a host of smaller rivers, creeks and streams. The Essequibo River drains over half the country and is a major river by international standards.

Average annual rainfall in Guyana is about 2300mm. It varies from about 1800mm in the savannahs to over 4300mm in parts of the rainforest. In the savannahs there is one rainy season from May to August. The rest of country has two distinct rainy seasons: November to February and May to August. However the actual rainfall in any month can vary significantly

The amount of surface water resources in Guyana compares favourably with the level of consumption but because of the uneven distribution of rainfall over the year Guyana has some problems with droughts (and floods). In the southern part of the country, heavy rainfall during the rainy season from April to August results in widespread flooding. In February and March, however, before the rains start, some creeks can dry up.

Groundwater is the main source of public water supply in the coastal zone. Lying beneath the coastal zone are three significant layers of sand known as the Upper Sands, A sands and B sands. The A and B sands are separated by clay. Under these sands lie the aquifers that supply water for domestic use and some water for industrial use. Along

this part of the country, once a well is dug the water rises above ground level without pumping.

Ground water is also being increasingly used in Amerindian Communities in the hinterland but the extent of groundwater supplies is not known and it is unclear whether this use is sustainable.

2. Customary rights and practices

2.1 Traditional water entitlements

Traditional water entitlements in Guyana means use by Amerindian Communities. It includes use that is recognised as custom in the strict common law sense as well as use that is traditional or historical.

There are two main sources of water for Amerindian Communities:
(i) ground water in those villages which have wells; and
(ii) surface water from rivers, creeks and ponds (small lakes).

Most of the Amerindian communities depend on nearby creeks and rivers or dig shallow wells close to their homes for their water supply. Use is domestic and agricultural. Any industrial type use is sporadic and is limited to small-scale mining. Safe sources of drinking water are preserved by ensuring that only certain springs and creeks are used for drinking and other uses such as washing or bathing are prohibited near those water sources.

Most Communities do not collect and store rain water. Buildings are traditionally constructed with roofs made from leaves which makes them unsuitable for collecting water. Those Communities which collect rain water have to ensure that collection facilities are sealed to prevent the spread of mosquito larvae and the risk of diseases such as malaria. Black plastic tanks which are the preferred option have to be brought in from Georgetown and the cost of purchasing and transporting them is prohibitive for many communities. However some villages have been able to obtain these usually with assistance from the Government of Guyana.

Traditional water entitlement is taken to mean access to sufficient water. Drawing on the definition used in *Water and the Web of Life*[5], "access" includes affordability and "sufficient" includes both quantity and quality. In Guyana, Amerindian Communities have traditionally taken water at will, without restriction and without making any payment.

The Guyana Water Authority (now replaced by Guyana Water Inc.) has assisted some villages to construct limited systems to make water available to communal buildings such as schools, community centres and health centres which are usually located within the centre of the village. Under these systems water is available free of charge.

The Global Water Supply and Sanitation Assessment 2000 Report puts rural water coverage in Guyana at 91%. This figure which includes hinterland use under rural use is incorrect. The draft Hinterland Strategy shows that only 106 out of 148 settlements are covered by some form of improved water supply. These include 52 hand driven pumps, 8 engine driven pumps, 19 windmill driven pumps, 5 solar pumps and 3 electric sub-pumps.

However even this analysis may be optimistic. Since Amerindians live at some distance from one another, an improved water point is unlikely to reach more than a few people and actual coverage from an improved supply may be very low. This means that traditional access to water remains a critical issue.

2.2 Rules of water allocation

There are no formal rules of water allocation within Amerindian Communities. The likely reason is the abundance of water relative to the size of the population. Historically there has been sufficient water for each person or family within the Community to abstract whatever is needed for their use.

Communities have been established close to safe and reliable sources of water such as creeks and smaller rivers. With the exception of a few villages (e.g. Santa Rosa, Aishalton) the villages have relatively low populations (under 1200) with all members of the community knowing one another. The pressure on water resources is reduced by the fact that families tend to live at some distance from one another and to locate their farms away from the village. As a result they may be using different sources of water.

If there is a shortage then use has traditionally been reduced by consensus.

2.3 Dispute settlement mechanisms

Amerindian communities traditionally make decisions collectively and work on the basis of consensus. Individual needs and perspectives are expected to be taken into account by the community as a whole but the individual also has responsibilities to the community.

Where there is a dispute within an Amerindian Community, it is usually settled by a meeting between the disputants. If this is not possible then the Touchau may be asked to be present, to provide advice and to mediate. More serious disputes may be subject to some form of adjudication or mediation by the Village Council or other persons with sufficient influence.

Where there is a dispute between members of one village and another, there are usually meetings between the disputants, who may be accompanied by their elected Touchau or other members of the respective Village Councils. These will also mediate and attempt to reach a consensus.

Where agreement cannot be reached the next step is usually a complaint to the Minister of Amerindian Affairs and a request for her to intervene and advise. The Minister does not have the power to impose a decision on the disputants but her advice would generally be followed.

An alternative mechanism for solving disputes is to bring the matter to the attention of the Regional Democratic Council. However this is a last resort since the RDC is a completely separate institution under the local government system with responsibility for the whole region not just Amerindian Communities and its approach is different to that of the Communities.

NGOs are regarded by Amerindian Communities as separate from them and they have no role in settling disputes.

2.4 Traditional institutions for the administration of rights and for the settlement of disputes

The traditional institutions for administering rights and settling disputes are the Touchau, the Village Council and the Community itself. As the elected captain of the village the Touchau is regarded as having greater influence than individual members of the Council. However he does not have any formal powers to impose a result.

The Village Council does have power to make decisions but will first attempt to broker a settlement between disputants. Village Councils are also supposed to reflect the will of the Community. Village Council meetings are required by law to be held at least every three months and to be open to the public (i.e. the Community) unless theVillage Council otherwise directs.

The Village meeting is also a traditional institution for solving disputes but one which is not formally recognised in the legal system. Discussions relating to rights, including who has what rights and how they should be exercised can also place at community meetings.

In Region 8, the Amerindian Communities have established the Amerindian Touchaus Area Council. This council is made up of all of the elected touchaus in the region, including some touchaus whose villages do not have formal land title. Its meetings are held in the villages and are open to all members of the Community. The Area Council has provided a forum for some mediation and for concerns to be expressed and dealt with at the wider community. The Minister of Amerindian Affairs and members of the Regional Democratic Council have taken part in the Council's meetings as have EU representatives.

A new but relevant development is the system of community development officers (CDOs). The CDOs are Amerindians who have been provided with training in legal and social issues through the Ministry of Amerindian Affairs. They are then employed by the Ministry of Amerindian affairs in their region to provide support and advice to the Communities. The CDOs have no official

powers to settle disputes, but may support and strengthen the traditional institutions.

Amerindian Communities have not traditionally had disputes over water. Within villages there is usually sufficient water for everybody's use. Villages are scattered and tend to have their own water supply from the abundant rivers and creeks so there is little or no scope for disputes between villages. There have been no cases, either formally litigated or brought to village councils over water use.

3. Statutory water rights

(Brief description of nature of rights, and of how created/granted and administered by which government agency)

Water rights in Guyana are generally regarded as the property of the State (as successor to the Crown) which then authorises use. Section 36 of the Constitution provides that the State will protect and make rational use of its water resources, the clear assumption being that all water belongs to the State. The State Lands Act (Cap 62:01) also assumes that the State is the owner of all water. In keeping with this the Hydro-electric Power Act (Cap 56:03) provides that, "Subject to any rights lawfully held, the property in and the sole right to the use of all State water powers are hereby declared to be vested in and shall remain the property of the State."

In 2002, as part of a major reform of the water sector in Guyana the Government brought in new legislation, the Water and Sewerage Act 2002 (the Act), "to provide for the ownership, management, control, protection and conservation of water resources, the provision of safe water…" This Act is the key piece of legislation and must be looked at in some detail to understand how water is now dealt with. All water rights are now governed by this Act which establishes a new regime for water use and management in Guyana.

Under Section 18 of the Act "the ownership of all water resources and the rights to use, abstract, manage and control the flow of water are vested in the State." The Act creates rights in water through a licensing scheme. It also recognises existing rights and attempts to incorporate these into the new regime. Ground water and surface water are dealt with in slightly different ways.

(a) Ground Water

In the case of ground water, any person who is operating a borehole must within three months of the commencement of the Act notify the Hydrometeorological Department (Hydromet) of the location of the borehole. A borehole is defined as "any well, excavation or any artificially constructed or improved underground cavity" for the purpose of collecting or storing water from an aquifer. The operator must inform Hydormet of the use for which water is abstracted, the rate and volume of abstraction and the authority by which such borehole is operated. It is illegal to operate a borehole without a licence or other lawful authority. The

operator is required to apply for a licence or risk a fine of ten thousand to forty thousand Guyana dollars (approximately US$50 to $200).

The application for the licence must be made to Hydromet and there are restrictions on who may hold a licence. An individual applicant must be a citizen of Guyana. Corporate bodies have to be registered cooperative societies, public corporations (i.e. government corporations) or local government organs such as Amerindian councils. A private company controlled by citizens of Guyana can also hold a licence but any other company must first obtain the permission of the Minister.

The licence grants rights to abstract and use water. Those rights are subject to restrictions whose purpose is to ensure that water is used in a sustainable way. The licence holder has a statutory duty, "not to exercise his rights in such a way as to jeopardise or threaten the water supply for existing or potential water users…"[6] The Act imposes on Hydromet a duty to specify in the licence the maximum and minimum quantities of water which may be abstracted on a daily and an annual basis. This provision is particularly important in those areas where unrestricted use may result in future shortages. If there is likely to be insufficient water in the water resource, the Act allows Hydromet to amend the licence in order to accommodate existing or authorised water uses. However other licences for that area must be amended in an equitable manner. Hydromet can also amend the licence to protect the quality of the water resource. Any abstraction which exceeds the levels set in the licence is unlawful. If a licence holder abstracts more than he is entitled to, then Hydromet may suspend or cancel the licence.

(b) Surface water

In the case of surface water the Act merely provides that, "No person shall divert or abstract surface water in an amount which exceeds that prescribed by regulations unless such diversion or abstraction is authorised by a valid licence or by law."[7]

No regulations have yet been promulgated and no licences have been issued for abstraction of surface water.

(c) Administrative Arrangements

The administrative arrangement for water resources and water rights in Guyana are divided among different agencies. This has led to a lack of clarity and potential for institutional conflict and concurrent jurisdiction.

The Minister of Housing and Water is the minister with primary responsibility for water under the Act. He has a duty to develop a national water policy for the use of water resources. However the Minister of Agriculture has the power to make drought orders which may restrict the use of water, including customary use and use under a licence. There is a risk that drought orders could be inconsistent with the national water policy.

The Act also establishes a National Water Council whose role is to advise the Minister on the development of a national water policy which will contain the strategies, objectives, plans, guidelines and procedures to ensure the equitable allocation of water in Guyana.

The Minister of Housing and Water is responsible for appointing a public supplier who has the duty to provide potable water for domestic purposes and a satisfactory supply of water for industrial and commercial purposes. The Act requires there to be a public supplier for every region in Guyana. The current public supplier is Guyana Water Inc., (GWI) a company which wholly owned by the Government of Guyana but managed by a British water company. GWI operates under a licence for twenty-five years and its obligations include providing potable water to Amerindian Communities. Its role with regard to customary rights is examined below.
The Hydromet department is responsible for operating the licensing system for ground water and, when it comes into operation, the system for licensing surface water. Hydromet is responsible for verifying existing lawful uses and bringing those uses within the regulatory framework established by the Act. Hydromet is also responsible for establishing and maintaining systems to monitor water quality and use. Hydromet reports to the Minister of Agriculture not the Minister of Housing and Water.

Under Section 21 of the Amerindian Act, Amerindian Village Councils have the power to make rules for the provision, maintenance and regulation of water supplies and the prohibition of the poisoning of the waters of any river and stream. These regulations bind the Amerindian community but no one else.

4. Legal status of customary water rights and interface with statutory rights

4.1 Recognition of customary water rights (in the Constitution, in the country's water legislation, in the case law if any)

(a) The State's approach

There is no comprehensive regime in Guyana for the identification or recognition (and registration) of customary water rights. The State has usually avoided dealing with the question of Amerindian rights when it brings in new legislation, preferring instead to save existing rights. This approach has been followed for customary rights to fish, hunt, cut timber, navigate and travel on the rivers and, to some extent, for mining activities such as panning for gold and diamonds.

In relation to water the State Lands Act, which assumes that the State is the owner of all water resources, saves Amerindian rights as follows, "Nothing in this Act shall be construed to prejudice, alter or affect any right or privilege legally possessed, exercised or enjoyed by any Amerindian in Guyana." The act

recognises that Amerindians have some rights in relation to the rivers and creeks but does not say what they are. Instead the act gives the Minister the power to "make any regulations to him seeming meet defining the privileges and rights to be enjoyed by Amerindians in relation to the State land and the rivers and creeks of Guyana."

The position is to some extent superseded by the Water and Sewerage Act 2002 which states in Section 18(2) that "all existing rights to own, use, abstract, manage and control the flow of water are hereby saved upon the terms of their grant *or other lawful authority under which they are held*." (Emphasis added). The legislation recognises the virtual impossibility of identifying all existing use. The words "lawful authority" are intended to catch existing uses which are not registered or set out in statute. This would include rights acquired by prescription or rights recognised under Roman-Dutch law and the common law.

Although this saving provision should include rights held by custom, these rights are addressed specifically in Section 94 of the Act which provides that, "Nothing in this Act shall be construed to prejudice, alter or affect any right, privilege, freedom or usage possessed or exercised by law or *by custom* by any person." (Emphasis added).

To qualify as custom Amerindian use of water would have to be ancient, certain, reasonable and continuous. It is unclear to what extent current use would meet these requirements and it would be up to the Amerindian Communities to prove the existence of such custom. However there is, as yet, no case law in Guyana, on the question of Amerindian rights to water.

The Act provides no definition of the rights, privileges, freedoms and usages which it protects. If Amerindians are unable to show that they have a customary right to water, it then becomes necessary to consider whether their traditional use of water may still be protected under Roman Dutch law or the Common Law.

(b) The Roman-Dutch system

Guyana's formal legal system was first developed by Dutch colonists and all ownership and use of resources was governed by Roman-Dutch principles. Under Roman-Dutch law the State was regarded as the owner of all public streams and running water. There appears to be no evidence that the Dutch recognised Amerindian customary use of water.

The Dutch settled mainly on the banks of the major rivers – the Essequibo, the Demerara and the Berbice - relatively close to the coast and on the coast itself. They did not have a policy of removing Amerindians from the land but their very presence meant that Amerindians moved deeper into the hinterland, in effect relinquishing parts of their territory to the Dutch and abandoning their use of water in these areas. The Dutch issued transports (titles) to settlers along the river banks but none of these transports has any provisions which recognise Amerindian customary use. The prevailing view in Guyana is that any customary

rights that Amerindians may have had over these areas no longer exist either because of extinguishment or simple abandonment.

Under Roman-Dutch law a landowner has the right to draw water from underground sources on his land. It is unclear to what extent, if at all, the Dutch recognised Amerindian ownership of land and its related right to abstract ground water.

The orthodox view is that, "the ownership of all land in British Guiana can be traced to the prerogative by virtue of which ownership of land vested in the Crown at cession, or to grants from the Dutch West India Company and later from the Crown in favour of the Colonial Government."[8] There is no recognition of aboriginal systems of tenure and all land in Guyana is treated as having become the property of the State irrespective of whether it was occupied and used by Amerindians. This position is entrenched in a number of statutes. The State Lands Act which was discussed above acknowledges the State as the owner of all land not privately held under transport or registered title. The State is also the owner of all forests under the Forests Act and of all minerals under the Mining Act 1989. This line of legal reasoning does not recognise Amerindians as landowners nor as the holders of any rights to water, whether as an incident of land ownership or otherwise. This is the current legal position until the courts of Guyana pronounce otherwise.

Amerindian land ownership was addressed in 1977 when the Government of Guyana amended the Amerindian Act cap 29:01 to grant title to Amerindian communities. The titles encompassed all the rights, titles and interests which the State had over the lands which lay within the Village boundaries. However no title and no rights to control or manage were transferred in respect of rivers and all lands sixty-six feet landwards from the mean-low water mark. Consequently these titles do not support a claim for recognition of traditional water rights.

This situation may have been altered in 1991 when the Government issued documents of title to Communities in respect of the same tracts of land. Each document of title stated that the transfer was in recognition of the fact that the Amerindian Communities had "from time immemorial been in occupation." It is arguable that these titles recognise traditional Amerindian ownership and therefore all the usual rights of ownership. This argument is supported by the statement in each titled deed that the land is transferred with, "all and singular the appurtenances and privileges thereto belonging."

There was a reservation in favour of the State in respect of minerals but no reservation or limitations in respect of water. Consequently the titles could include rights to use groundwater as recognised under Roman-Dutch law.

This reasoning would not apply to surface water which, as discussed above, is regarded as owned by the State. Roman-Dutch law as applied in Guyana to date does not recognise rights to water against the State and Amerindians would have to show that they had some other basis for their right. This is discussed below in

the context of the developing common law concept of aboriginal title.

(c) The Common Law

The Civil Law Ordinance 1916 (the "Ordinance") abrogated Roman-Dutch law as the law of the colony and replaced it with the English Common Law with effect from 1st January 1917. The key question is whether the common law of Guyana could recognise the Amerindian rights to water in some way. As stated above the orthodox view of land ownership in Guyana is that the State owns all land and all rivers. The development of aboriginal title in other jurisdictions means that this view is now highly questionable. Cases from other jurisdictions may be persuasive but they are not binding on the courts of Guyana. State ownership of Amerindian lands has been challenged in one case in Guyana by a few Amerindian Villages but they appear to have taken little action on it and there has been no hearing as yet. A discussion of the various arguments for and against aboriginal title in Guyana is outside of the scope of this paper but the impact of recognising aboriginal title ought to be considered.

If the courts recognise some form of aboriginal title or pre-existing right there are grounds for arguing that Amerindian customary use of water amounts to a legal right. There would then be two possibilities - either Amerindian ownership of surface water is itself recognised or Amerindian rights operate as a burden on the State's ownership.

It is submitted that on present authorities Amerindian ownership of surface is unlikely to be accepted by a court. The Dutch appear to have extinguished Amerindian rights at least in respect of the major rivers and Section 5 of the Civil Law Ordinance which vests title in the State in relation to rivers gives statutory recognition to this. Nevertheless this point should still be regarded as open to challenge until there is a final decision of the courts.

For customary or traditional water use to operate as a burden on the State's property, it would have to amount to an interest which is recognised within the framework of the common law or analogous to an existing interest.

When English law was introduced into Guyana by the Civil Law Ordinance, Section 3 (3) provided that, "The English Common Law of real property shall not apply to immovable property in the Colony," and the English law of personalty was applied to land and interests in land. The law relating to easements and real servitudes as administered by the court was saved but the impact of the change to personalty is still not fully settled.

In theory traditional use could amount to an easement. But this position is weak since easements would have originated with the introduction of English law into Guyana. They would not have been recognised under the Roman-Dutch system as applied in Guyana. The most likely interest would have to be one recognised by Roman-Dutch law such as a servitude. The Civil Law Ordinance 1916 retains servitudes as a part of the law of Guyana (although the law relating to personal

servitudes was omitted.)

Section 2(3) of the Ordinance provides support for the argument that Amerindian rights could have survived. It provides that "Nothing in this Ordinance contained shall be held to deprive any person of any right of ownership or other rights, title or interest in any property movable or immovable or of any other right acquired before the date of this Ordinance and where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law for which there is no equivalent in the English Common Law or where the English Common Law in the opinion of the Supreme Court of British Guiana is not applicable owing to any special local conditions not provided for by this or any other Ordinance, effect may be given to the Roman-Dutch rule or procedure to such extent as the Supreme Court of British Guiana may deem advisable in the interests of equity if the said Court is so advised."

The question then is whether there exists sufficient scope within Guyana's legal framework for there to be some kind of servitude. For a servitude to exist there must be a dominant and a servient tenement. If Amerindians are recognised as owners of land with aboriginal title their lands could constitute the dominant tenement.

Servitudes are either personal or praedial. Personal servitudes vest in an individual and die with the owner. They are also inalienable. "In the judgment in *Willoughby's* case, Innes, J., goes on to say: 'From the very nature of a personal servitude, the rights which it confers is inseparably attached to the beneficiary. He cannot transmit it to his heirs, nor can he alienate it; when he dies it perishes with him.'"[9] Amerindian rights to water are held communally, not individually, and pass from one generation to the other. It also seems that personal servitudes are no longer legally recognised in Guyana. Any attempt to protect water rights on the basis of a personal servitude would therefore fail.

A praedial servitude vests in the owner because he is the owner of the *praedium*. Amerindian Communities could assert that, as owners of the land, they are entitled to take water from the creeks and rivers belonging to the State. It is unclear to what extent a servitude may exist against the State under the laws of Guyana. However there is scope for the court to find that such a right exists against the State because there is a pre-existing right based on aboriginal occupation and use.

It is a feature of servitudes that the person asserting the servitude has the burden of proving its existence. Amerindian Communities would be unable to show any grant or agreement creating the servitude but this would not necessarily be fatal to a claim for recognition of their rights. They could argue for a grant precario based on sufferance or even by some form of implied licence. Such an arrangement would be revocable at will and would be contrary to the idea of a right. A better approach would be to rely on the doctrine of *Vetustas* which gives rise to a legal presumption that the origin of the servitude was legitimate.

For the doctrine of *Vetustas* to apply the Amerindian Communities would have to show that their use of water "dates back to a period to which the memory of man does not extend…."[10] The acknowledgement in the title deeds of occupation from time immemorial would support this approach.

Amerindian customary water rights are therefore capable of recognition as servitudes. However if a court does in future recognise customary water rights in this way, they will need to be registered.

(d) Constitutional protection

The Constitution of Guyana does not provide anywhere for the recognition of customary rights. These are protected only to the extent that they can be brought within the heading of property.

Article 142 of the Constitution of Guyana provides protection from deprivation of property. It provides that, "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of any written law…." That written law must provide for compensation and a right of appeal to the High Court.

Amerindian ownership of land, including any right to ground water as an incident of that ownership, would therefore be protected against arbitrary State action. Similarly, servitudes in relation to the State would be protected because servitudes are property rights.

The Constitution does make an exception for Amerindian property where the purpose of the taking is the "care, protection and management of any right, title or interest held by any person in or over any lands situate in an Amerindian District, Area or Village for the purpose of effecting the termination of transfer thereof for the benefit of an Amerindian Community." It is unclear what this provision was intended to cover. It cannot be applied in a discriminatory way to deprive Amerindians of their property since that would violate Article 149 which prohibits discrimination.

4.2 Statutory mechanisms to reconcile customary water rights with statutory rights

The Act appears to deal with customary rights as an afterthought in Section 94 (which was discussed above) or in an indirect manner under the general references to existing lawful authority. The Act does not establish any mechanisms specifically for reconciling customary use with the new regime for regulating water use. The approach taken is to provide for verification of existing lawful uses. Customary use would be dealt with as part of that.

(a) Ground water

Section 19 which establishes the licensing system for groundwater makes it illegal to operate a borehole unless such operation is authorised by a valid licence or *other lawful authority*. [emphasis added.] There is no attempt to extinguish customary use of groundwater but neither is there any explicit recognition in this section of customary use.

The Act requires any person who operates a borehole under any lawful authority other than a licence to apply to Hydromet for a licence within 6 months. Under the Interpretation and General Clauses Act Cap2:01 'person' includes, "any body of person corporate or incorporate." Any Community which operates a well would certainly be brought within the meaning of the section and would therefore be under an obligation to apply for a licence. The proper applicant would be the Village Council which is the legally recognised governing body. Wells used by individuals or families would also be caught by this provision. To date no applications have been made. This is almost certainly because Amerindian Communities and their Village Councils are unaware of these provisions.

Hydromet has the power to require a borehole operator to apply for verification. However Hydromet must warn the operator that his entitlement to use water may lapse if he does not make the application in time. To date, Hydromet has not required any Amerindian Community to verify its use of groundwater.

(b) Surface water

The position with respect to surface water is similar to ground water in that abstraction must be authorised by a licence or by law. However for surface water this only applies to abstraction which is above any limits set by regulations. As no limits have yet been set, Amerindian customary rights to surface water are not affected.

Should abstraction levels be set it is very unlikely that they will be so low as to affect customary water use. The abundance of water resources means there is no reason for the State to seek to limit customary use and they have not done so.

(c) Licensing

Under Section 24 it is clear that Amerindian councils (whether village councils, district councils or area councils) are entitled to hold water licences and this may be an attempt to recognise customary use while at the same time bringing it within the regulatory framework. But this approach is problematic. There are mandatory terms, imposed by statute which may lead to conflict with customary rights or which may impose conditions that Amerindian Communities cannot comply with.

For example each licence must state the maximum daily and annual rates of abstraction. If Hydromet sets these abstraction levels too low there will be an adverse effect on community use and a conflict between customary use and the

new licensing regime. Each licence also contains mandatory provisions which require the licence holder to measure and record the daily and annual rates of abstraction, water quality and water level. Communities and their Village Councils would be unable to do this unless training and equipment were provided.

A condition of each licence is that the licence holder must pay an annual administration fee and an annual abstraction fee. Such a condition would conflict with customary rights to use water without payment. In addition, approximately 85% of Amerindians are regarded as "extremely poor"[11] and it is very doubtful whether they would be able to make these payments.

If a licence holder breaches a condition of the licence Hydromet may suspend or cancel the licence. This has serious implications for Amerindian Communities. Once a licence is granted it replaces the lawful authority under which water was previously used and therefore customary access would be extinguished. If Communities lose their licence because they are unable to meet the licence conditions, then in theory they can no longer access water by right. If traditional rights are replaced by a licensing system and a Community accepts a licence, then there is no deprivation of property which would be protected by the Constitution. The loss of customary rights would be regarded as voluntary and the loss of the licence would be regarded as lawful within its terms.

It would be more in keeping with the spirit of the Act and its saving of customary rights for there to be a verification process but no application of the licensing system and its fees to Communities. Section 32 allows a person who used water resources under lawful authority to apply for verification and does not require the grant of a licence. However this section does not sit well with the previous requirement for all use to be licensed. The point must be regarded as open until there is a decision from Hydromet or, if challenged, a judgement from the court.

(d) Drought orders

Section 38 of the Act gives the Minister of Agriculture the power to make drought orders if there is a serious deficiency of water supplies in any area. The Minister's powers are extremely wide. He can make such provision, "as appears to him to be expedient with a view to controlling the amount of water demanded….." He also has the power to authorise Hydromet to prohibit any person from taking water from a source specified in the drought order. There is no requirement of reasonableness and no duty to consult Amerindian Communities and no mention of customary use. The Minister can make different provision for different persons, circumstances and localities. This allows him to take customary water use into account but does not oblige him to do.

The power to make drought orders clearly has the potential to affect and restrict customary use. Any challenge to the order by a Community would have to be brought under Section 94 which protects customary use but a court case is likely

to be expensive and time consuming.

(e) Other relevant provisions

There are other provisions in the Act which give some consideration to Community interests and provide in a very limited way for customary rights to be taken into account. The Minister has a duty to ensure that he discharges his functions in such a manner that communities are protected from severe hydrological events such as floods and droughts. In discharging this duty the Minister would be expected to protect customary use and traditional access to water.

The National Water Policy may also set out strategies, objectives, plans, guidelines and procedures to protect communities from severe hydrological events. The Act imposes on the Minister an obligation to consult Amerindian Village Councils when he is developing the national water policy. This provides an opportunity for the Amerindian Communities to ensure that their customary use is recognised and safeguarded within the policy.

4.3 Statutory and judicial mechanisms to settle disputes between customary water rights and statutory rights

The Act does not establish any mechanisms such as tribunals or inquiries to reconcile customary water rights with statutory provisions. If a decision by Hydromet on verification was to affect customary water rights that decision would be subject to judicial review under normal administrative law principles.

4.4 Relevant practice of the government water resources administration

Although the Act was passed in 2002 the national water policy is still to be developed and there have as yet been no strategies, plans, guidelines etc which might protect or take into account customary rights. Hydromet has not required Amerindian Villages to apply for verification of their water use nor sought to bring such use within the licensing system. There do not appear to be any instances of administrative action which would threaten customary use. On the contrary, there appears to be a culture of non-interference with customary use and, in some cases, enhancement of customary use through the provision of wells and pumps.

Under the terms of its licence, the public supplier, Guyana Water Inc has a duty to ensure that safe water is available to or supplied to 80% of all settlements in the hinterland by November 2007. This has to be done through sustainable, cost effective and locally appropriate means. The licence does not take into account customary use but assumes that a delivery system must be set up. The management contract further states that one of its objectives is for GWI is to develop a strategy for "formalising arrangements with small scale independent producers in order to regularise service to [hinterland] customers."

The way in which GWI fulfils its licence terms will have an impact on the extent to which customary rights to water will be respected in practice. There is a danger that the traditional free and unrestricted access may be replaced by a system that is closer to rural water delivery including some cost recovery or subsidy. A key issue for communities will be the extent to which they maintain control over water and are able to remain independent of external suppliers.

GWI has not yet begun to carry out any programmes in Amerindian Communities and the Hinterland Strategy is still a draft document. It contains a number of important suggestions for increasing accessibility to safe water. These include capacity building and community based management. It also looks at low-cost technologies such as hand pumps, wind pumps, solar powered pumps and shallow wells which can be maintained by Communities and would provide a more effective way for Communities to exercise their customary rights. The strategy also stresses the need to develop close working relationships with Village Councils and the Ministry of Amerindian Affairs.

It is impossible to say what impact the administrative changes will have on customary water use until the Hinterland Strategy is implemented. It does not contain any proposals which are intended to restrict customary rights but unless Amerindian Village Councils and Communities are fully consulted in the design of any projects and take part fully in the implementation, there is a risk that the strategy could marginalise them.

4.5 Judicial and other records of conflict between customary water rights and statutory water rights

All judicial records are kept in the Supreme Court Registry in Georgetown. Records are not computerised and all cases which are filed with the court have to be entered in a large bound volume. In order to check on a case, the counter clerk must retrieve the volume for the year in which the case was filed and physically leaf through it until he finds the relevant entry. This system makes it difficult and time consuming to track cases. In addition cramped conditions make storage and retrieval of files difficult and it is not always possible to find documents and files in the vaults even when they are located in the records.

Significant court decisions are recorded in the Guyana Law Reports but the volumes which deal with cases from 1977 onwards have not yet been printed. Lawyers therefore rely on conversations with one another to find out what decisions might be relevant to their cases. Decisions of the Court of Appeal are binding and constitute part of the law of Guyana, but these decisions are not easily accessible to practitioners. This is a highly unsatisfactory situation and inevitably affects the quality of legal advice that may be given and the development of jurisprudence.

It was not possible to find any records of a conflict between customary water rights and statutory rights in the judicial records. While this is not conclusive it is persuasive since such a conflict would be regarded as very significant and

would receive publicity.

5. Issues

5.1 Identification and analysis of issues

(a) Threats to customary water use

The two most significant threats to customary water use are drought and the pollution of natural water sources.

(i) Drought

Seasonal variations in rainfall can lead to drought during the dry season. Particularly dry years occur approximately every 5 to 7 years at roughly the same frequency as the El Nino effect (and probably linked to it).

There are some suggestions that drought is increasing and that the uncontrolled burning of savannahs which destroys trees and other vegetation is leading to a drier environment. However there is insufficient scientific data on these issues.

In 1998 the Government of Guyana began a programme to construct new wells and improve existing wells by making them deeper in order to protect customary access to water. There is incomplete data on groundwater in the hinterland and as yet it is not clear whether current levels of use are sustainable.

(ii) Pollution

In all areas of Guyana where mining takes place, pollution is a threat to water supplies whether these are surface waters or ground waters. Pollutants include cyanide and mercury. In August 1995 the breach of a tailings pond at the Omai gold mine resulted in a massive spill of tailings containing cyanide into the Omai river and down to the Essequibo, Guyana's largest river. Amerindians in the vicinity complained that their sources of water were polluted and they developed skin diseases. A national emergency was declared, an inquiry was held and there have been attempts at litigation, so far without success.

Mercury is used in small scale mining by individuals, known locally as porknockers, who travel through the interior searching for gold. Their use of mercury is difficult to regulate and monitor and there is still a lack of awareness of the dangers which mercury poses to health.

Water supplies are also affected by missile dredging in which high powered hoses are used to break away river banks. These collapse into the rivers and result in high levels of turbidity. Trees and other vegetation destroyed in the process further clog the rivers. As the gold reserves in the rivers become exhausted miners have been moving into the smaller creeks with the same adverse impacts. Dredges used on land also contribute to the turbidity and pollution of waterways.

There has been a tendency to ignore the involvement of Amerindian Communities in mining but this is a serious issue which has to be addressed. For many Amerindian men, working on a dredge is one of the few opportunities available for employment and they have very little choice but to take part in an activity which may bring in cash in the short term but undermines the Community in the long term. There have also been reports of one Amerindian leader owning and operating a dredge in the upper Mazaruni region.

At the next level up, some villages have sought to increase Community income by allowing mining within the village territory. However the agreements are generally made without legal advice and are to the detriment of the Community.

It is clear that Communities are in an increasingly difficult position in trying to protect their sources of water but needing to obtain income in order to take part in the increasing cash economy.

Complaints have been made to the Guyana Geology and Mines Commission, the Minister responsible for mining and the Environmental Protection Agency, all of whom have carried out some investigations and taken some limited action. The Guyana Geology and Mines Commission had asked some Communities to provide them with information about their villages and water use but this does not appear to have been done. The Prime Minister has visited Amerindian Communities affected by mining and taken some steps to resolve the issue. Members of the Guyana Gold and Diamond Mining Association have also had meetings with Amerindian Communities.

The activities which pollute the waterways and threaten customary use are already illegal. The problem is one of enforcement and Amerindian Communities have so far not used the legal system to stop these activities.

The protection of shallow aquifers around villages is also becoming an issue. There is a potential risk from domestic effluent to nearby wells but there is still insufficient monitoring and insufficient data available on this.

(b) Marginalisation and disempowerment

Amerindian Communities live in relative isolation from the capital. This means decisions have often been taken about their future without adequate consultation and participation. Communities do not have any representatives based in Georgetown and they are not able to fund their elected representatives to attend meetings to speak for them.

Communities are also marginalised by not having adequate access to information. In many villages even daily newspapers have to be brought in by boat or aircraft. Radio contact is available to some extent but inevitably is insufficient for ensuring that Communities have full information on a timely basis.

Community decision making structures are also under threat. Communities have traditionally made decisions on the basis of consensus in which all views are taken into account and discussed. This means lengthy meetings which can be too time consuming for outsiders who want a quick decision. Communities complain that when they are consulted they are not given enough time to absorb information and reach a consensus among themselves.

The approach of some NGOs is also contributing to the sidelining of traditional community institutions and to the creation of divisions within communities. NGOs are not elected by the Communities and are not in any way accountable to them, but they claim to represent them. They have access to funding and a presence in Georgetown which means that it is their voices rather than those of the Communities which are heard. It is also easier for development agencies to talk to Georgetown based groups rather than to visit Communities. When these discussions are used as evidence of consultation with Amerindians this further contributes to the marginalisation of the Amerindian Communities and their collective decision making.

The question of marginalisation is directly relevant to the continuation of customary water rights. Unless Communities have a say in the projects and proposals that affect them the result may be activities which affect their customary access to water.

5.2 An agenda for future action

(a) Further legal research

The law relating to customary water rights in Guyana is unclear and further research into this issue would be an important contribution. In particular it would be useful to look in more depth at how customary rights may be identified and incorporated into legislation. Discussions with lawyers from other jurisdictions, particularly discussions on their jurisprudence would be useful in developing the thinking on customary water rights.

(b) Practical application

In order to protect their customary water rights Communities need to have full access to information and to ensure that they take part fully in decisions that affect them. In relation to Guyana specifically, two important contributions that could be made are a protocol between Amerindian Communities and Guyana Water Inc for consultation and participation in the Hinterland Strategy and a guide for Amerindian Communities on the legal framework within which they exercise their water rights. A wider application would be to compare the different approaches and develop guidelines for the incorporating customary rights in legislation.

TABLE 1: Amerindian Villages with title

Achiwuib	Kamwatta Hill	Santa Aratak
Aishalton	Kanapang	Santa Rosa
Akawini, Pomeroon River	Karaudanawa	Sawariwau
Arau	Kato	Sebai
Assakata	Kokerite	Shea
Awariwaunau	Kopinang	Shulinab/Macusi
Bethany, Essequibo Coast	Koraibo	St. Ignatius (homesteads)
Bunbury Hill	Kurukabaru	St. Cuthberts, Mahaica River
Capoey Lake, Essequibo	Kurutuku	St. Ignatius (Farmlands)
Chenapau	Kwebanna	St. Francis, Mahaicony River
Chinese Landing	Little Kaniballi	Tapakuma (St. Deny's) Essequibo Coast
Chinoweing	Mainstay/Whyaka, Essequibo Manawarin	Taruka
Hobodia	Maruranau	Tobago and Wauna Hill
Hotoquai	Mashabo, Essequibo Coast	Toka
Hururu	Massara	Waikrebi
Itabac	Moco-Moco	Waipa
Jawalla	Monkey Mountain	Wakapau, Pomeroon River
Kabakaburi, Pom. River	Nappi	Waramadong
Kaibarupai	Orealla	Waramuri-Moruca
Kaikan	Paramakatoi	Warapoka
Kairimap/St. Monica's, Pomeroon River	Paruima	Wikki River
Kako/Morowta	Phillipai	Yakarinta
Kamana	Potarinau/Ambrose	Yupukari
Kamarang Keng/Waratta	Red Hill	
	Sand Creek	

Other areas designated as Amerindian districts are: Annai, Karaudanawa, Karasabai, Baramita and Konashen.

Table 2: Amerindian Villages that Lack Title

REGION	VILLAGE
1	Aruau Barabina/Kobarima/Kairie Hills Kariaku, Barama River Mabaruma Hill (Barimbanobo) Wauna/White Creek Other various small and scattered settlements
2	Siriki
7	Agatash Awarapati Batevia Goshen Isseneru, Middle Mazaruni Kaburi/72 Miles, Lower Mazaruni Kambaru, near Imbaimadai - Upper Mazaruni Karrau Creek, Essequibo River Meruwang Mosapai/Kaikan, Upper Mazaruni Saxacalli Serenamu-Pashenamu, Middle Mazaruni Tashareng/Issano, Middle Mazaruni
8	Campbelltown, Mahdia District Tumatumari/Micobie Tusenen Karisparu Maikwak Mahdia/Kangaruma
9	Apoteri Aranaputa Fairview, Essequibo River Katoonarib, South Rupununi Parikwarunau, South Rupununi Rewa, North Rupununi Rupunau, South Rupununi
10	Calcuni Great Falls, Demerara River Hittia, Berbice River Kimbia, Berbice River Mabura Hill Malali, Demerara River Riversview Wiruni, Berbice River

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Local Democratic Organs Act 1980

State Lands Act 62:01

Water and Sewerage Act 2002

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[1] Land law in British Guiana (1966) Fenton Ramsahoye at page 16

[2] Stabroek News 14th May 2004

[3] Source: National Development Strategy

[4] Source: National Development Strategy

[5] Water and the Web of Life: Scanlon, Cassar and Nemes 7th International Conference on Environmental Law 2003

[6] Section 28 Water and Sewerage Act 2002

[7]Section 20 Water and Sewerage Act 2002

[8] Land law in British Guiana (1966) Fenton Ramsahoye at page 25

[9] Hall on Water Rights in South Africa (1974) *C G Hall* at page 163

[10] Hall on Water Rights in South Africa (1974) *C G Hall* at page 41

[11] Poverty Reduction Strategy Paper 2001