

Why water tenure matters

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Background

- The **Voluntary Guidelines on the Governance of Land, Forests & Fisheries** (VGGT) were adopted by the Committee on World Food Security of the Food & Agriculture Organization of the United Nations (FAO) on 11 May 2012
- Purpose of the VGGT is to set out principles and internationally accepted standards for responsible practices in order to provide a framework that actors can use when developing their own strategies, policies, legislation and programs
- The voluntary guidelines approach: VGGT + technical guidelines



What is (land) tenure?

- Tenure arrangements determine how people access and use natural resources
- Of many definitions of land tenure FAO's definition is:

The relationship, whether legally or customarily defined between people, as individuals or groups, with respect to land

- Ownership, leases, use rights, mortgages, rights of way, formal/customary law etc.
- NB: land tenure is multi-disciplinary – economics, surveying and land management, law, sociology, gender, political economy...
- Government & donor policies and programs on land tenure
- Water (water tenure) was supposed to be included but in the end, for a range of reasons, was not...
- Water tenure? In the water sector we don't talk about tenure we talk about water rights (And this is one of the reasons why water is not in the VGGT)

Water rights, yes. But which?

Assumed & impossible water rights

Local law/customary water rights

Commonhold water rights

Agency control water rights

Traditional land-based formal water rights

Regulatory short term license based water rights

Contractual water delivery water rights

De minimis small scale use water rights

Concession/foreign investment contract water rights

Long term permit based 'modern water rights'

Traditional use-based formal water rights

Informal water rights

In-stream rights/e-flow requirements

Exempt commercial use water rights

Unrecognized water rights

- These are all examples of relationships relating to water resources, examples of water tenure
- Based on FAO's definition of land tenure we can propose the following definition of water tenure:

The relationship, whether legally or customarily defined between people, as individuals or groups, with respect to water resources

- So a first benefit talking in terms of water tenure is that it recognizes this messy reality
- Better to understand that reality rather than just cite what laws say...

Water tenure and the law

- Law and law-phobia (or lawyer phobia?)
- Water law is very context specific
- There are legal differences between tenure types
- But so what?



- Law is everywhere
- Just about everything is 'defined' or described one way by law or another by the law
- But this does not mean that only lawyers can discuss the differences between, say, motorbikes, cars and trucks....



- And for water tenure the differences are pretty clear

Preliminary typology of water tenure arrangements recognized by formal law

Type	Summary description	Strengths	Weaknesses
Traditional formal water rights	Usually land based: rights to use water resources derive from land tenure rights. In parts of the Western USA and Canada based on prior use.	Arise automatically by operation of law.	May be out-dated in terms of hydrology/technology. Often difficult to quantify and enforce.
'Modern' formal water rights	Permit-based long-term rights (12-30 years or more). Property rights/quasi property rights, valuable and capable of being asserted against the state and third parties.	Sophisticated, legally robust, potential to confer the highest level of tenure security. Rights holders have an interest in asserting them. Possibility of trading.	Depend on monitoring and measurement. May be costly to implement.
Regulatory licences	Short term (e.g. annual) licences to use water based on a command and control approach.	Relatively easy to legislate for and to implement on paper.	Very difficult to enforce. Rights are personal. Holders have very little incentive to comply.
Agency Control	Extensive legal powers are granted to an irrigation/water agency to abstract and use water resources.	Streamlined decision-making enables rapid infrastructure investment.	Risk of elite/political capture. Little room for water users to participate in decision making.
Water supply contracts	Contracts, usually written, for the bulk supply of water for irrigation, industry or other purposes using water infrastructure.	If of sufficiently long duration can create strong rights to water delivery.	Annual contracts provide little water security.
Commonhold water tenure	Rights to water held in common by a distinct community of users such as members of a WUO.	Enable large numbers of users to benefit from common infrastructure	Highly dependent on effective governance within, say, the relevant WUO
Investment contracts	Rights to use water resources are created on the basis of investment contracts. Arbitration awards in the case of foreign investors enforceable under international law through seizure of host state assets	Can be rapidly concluded. In theory confer the highest level of legal security for foreign investors.	Typically confidential. Do not automatically bind other water users and so difficult to enforce except through arbitration.
<i>De minimis</i> rights – small scale	Right to abstract and use small quantities of water without administrative formalities for non commercial uses such as drinking and meeting basic needs, bathing etc.	Arise automatically. No need to obtain a licence or permit.	Rights to water cannot be asserted. No independent security.
Exempt commercial uses	Right to use specified quantities of water in specified areas for specified commercial purposes	Relevant users are exempted from obtaining a permit/licence.	Difficult to actively assert.
Reserves/minimum flow requirements	Specify mandatory amounts of water to be left within water bodies.	Ensure that sufficient water is provided for environmental services and small scale and inland fisheries/non-consumptive livelihood uses	Cannot be asserted by water users. Reliant on water administration action.

Preliminary typology of water tenure arrangements not recognized by formal law

Type	Summary description	Strengths	Weaknesses
Customary water tenure	Rights to abstract/and or use water resources based on customary/local law	May be robust/enforceable at the local level.	Difficult, often impossible, against formal water tenure arrangements.
Religious law	Rights with regard to the use/protection of water/water resources based on religious teachings.	May be long established and widely supported by the relevant faith.	Tend not to address practical issues of allocation and use
Informal water tenure	Simple illegal use of water resources	No administrative burden for users.	No formal security. Possible risks of sanctions under administrative/criminal law.
	Illegal uses that are tolerated by the water administration sometimes for years	Some degree of <i>de facto</i> security.	Can be withdrawn at any time.
Assumed rights and impossible rights	Formal water rights are wrongly assumed to exist due to the 'official' nature of the use..	None	No legal security.
	Lack of legal personality means organisations cannot hold formal water rights	None.	No legal security.
Unrecognized water tenure	A range of economic/livelihood activities that relate to the use of water resources such as inland fisheries, use of wetland resources etc., that are not typically regulated by water law.	May be protected under customary law	Typically invisible to water law/water law administrations and thus no security.

Comparing different types of water tenure....

Security

1. **Recognition under formal law**
2. **Enforceability under formal law in terms of a 'share of water resources'**
3. **Existence of 'fair' enforcement mechanisms**
4. **Relative ease of access to enforcement**
5. **Duration of claim**
6. **How to reconcile claims under different normative bases?**
7. **Who would invest without security?**
8. **How can you have water security without security of tenure?**

Equity

1. Why should certain kinds of water tenure (and therefore uses) benefit from greater security than others?
2. How are decisions made about water tenure arrangements?
3. Who benefits from certain types of tenure arrangement?

Sustainability

1. How do different tenure regimes ensure that sufficient water is left in rivers to meet vital ecosystem needs?
2. How flexible/adaptable are different types of tenure arrangement so as to take account of climate change etc?

Efficiency

1. Inefficiency of investments without security
2. Inefficiency of tenure regimes that preclude re-allocation to higher value uses
3. Possibility of using market forces to re-allocate water resources

Water tenure and water use

- Water tenure is indifferent to water use (or rather the purpose for which water is used)
- Nevertheless different types of water user will tend to depend on specific types of tenure
- Possibility of mapping use types to tenure type in a given context
- This list of use types is by no means definitive (e.g. untreated drinking water from natural sources is not included)

	Drinking water supply (network)	Agriculture	Industry	Hydropower	Environment	Navigation	Inland fisheries/ livelihoods	Recreation/ landscape
Traditional formal water rights	Red	Green	Grey	Red	Green	Red	Red	Grey
Modern formal water rights	Green	Green	Green	Green	Red	Red	Red	Red
Regulatory licensing	Grey	Green	Grey	Grey	Green	Green	Red	Green
Agency hegemony	Green	Green	Green	Green	Red	Red	Red	Red
Water supply contract	Green	Green	Green	Red	Red	Red	Red	Red
Commonhold tenure	Red	Green	Red	Red	Red	Red	Red	Red
Investment contract	Green	Green	Green	Green	Red	Red	Red	Red
<i>De minimis</i> use	Red	Green	Red	Green	Red	Red	Red	Red
Regulated free use	Red	Green	Red	Green	Red	Green	Red	Red
Customary water tenure	Red	Green	Red	Green	Green	Green	Green	Green
Religious law	Red	Red	Red	Green	Green	Red	Red	Green
Informal tenure	Red	Green	Green	Green	Red	Red	Red	Red
Assumed or impossible tenure	Green	Green	Red	Grey	Red	Red	Red	Red
Unrecognised tenure	Red	Red	Red	Red	Red	Red	Green	Green
Reserve/ minimum flow	Red	Red	Red	Red	Green	Green	Red	Green

Scenario 'Tenuristan'

- No system of modern formal water rights
- Largely unimplemented regulatory licensing regime.
- Irrigation infrastructure is operated and maintained by an irrigation agency that relies on its rights of agency control to build irrigation systems and abstract water resources.
- Agency in turn supplies water on the basis of annual contracts to WUOs that exist mainly on paper.
- Agency also supplies water to industry and large farms but in these cases on the basis of long-term contracts.
- No provision for the setting of minimum flow requirements
- Extensive use of long term investment contracts with foreign investors

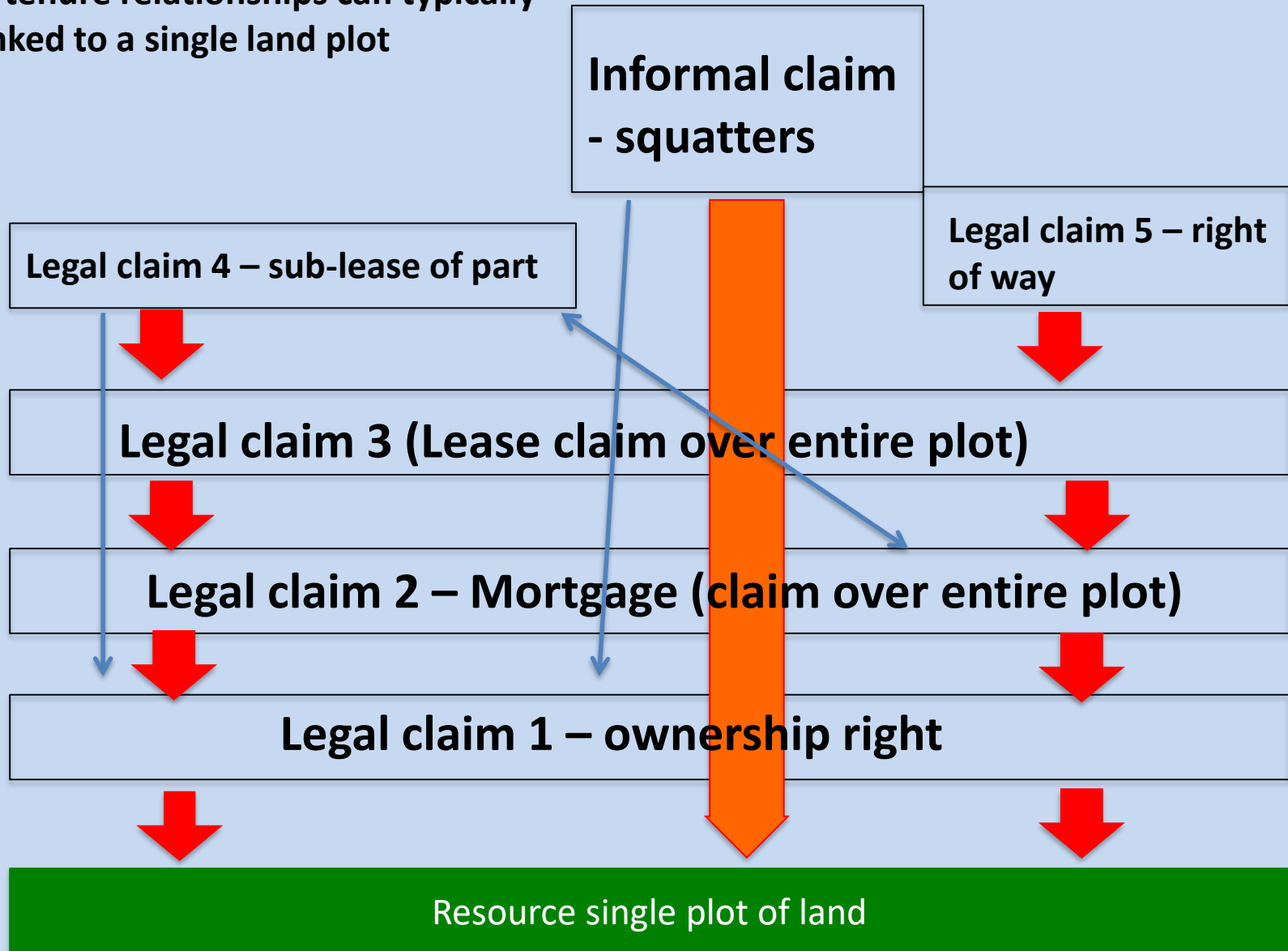
Assessing and comparing security of water tenure

	Water supply (traditional)	Water supply (network)	Agriculture (small/medium scale)	Agriculture (Large scale)	Industry	Hydropower	Environment	Navigation	Inland fisheries/ livelihoods	Recreation/ landscape
Tenure relationships defined by formal law										
Traditional formal water rights			Weak		Weak					
Regulatory licensing			Weak	Weak	Weak			Weak		Weak
Agency control			Weak	Strong	Strong	Strong				
Water supply contract			Weak	Strong	Strong					
Commonhold tenure			Weak							
Investment contract		Strong		Strong	Strong	Strong				
<i>De minimis</i> use	Weak			Weak						
Regulated free use			Weak	Weak						
Tenure relationships not defined by formal law										
Customary water tenure	Weak		Weak	Weak			None	None	None	None
Religious law	Weak			Weak			None			None
Informal tenure			None	Weak	Weak				None	
Assumed or impossible tenure	None	None	None	None						
Unrecognised tenure	None							None	None	None

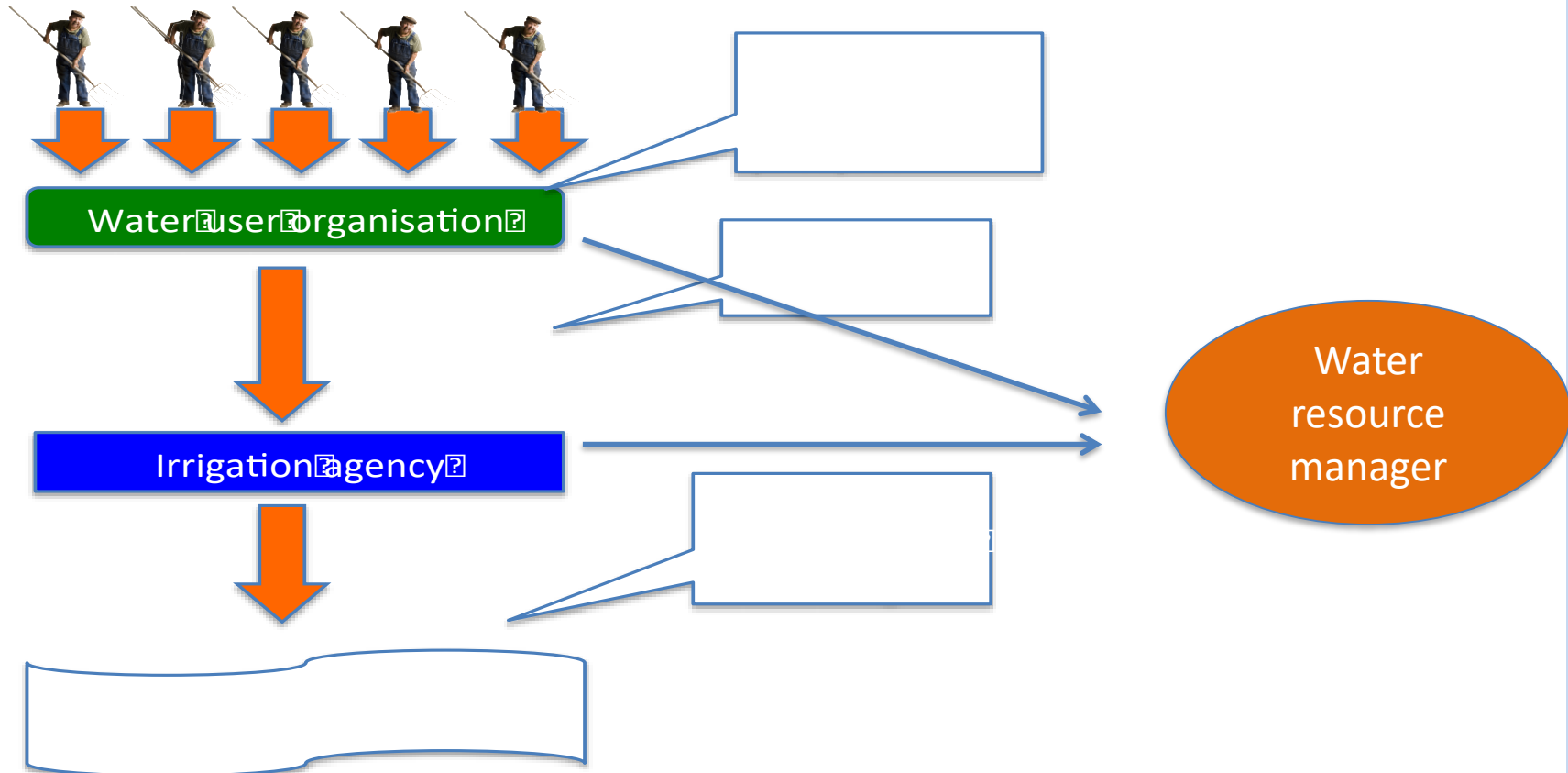
If actors do not have secure water tenure how can we talk about water security?

Exploring the full scope of tenure

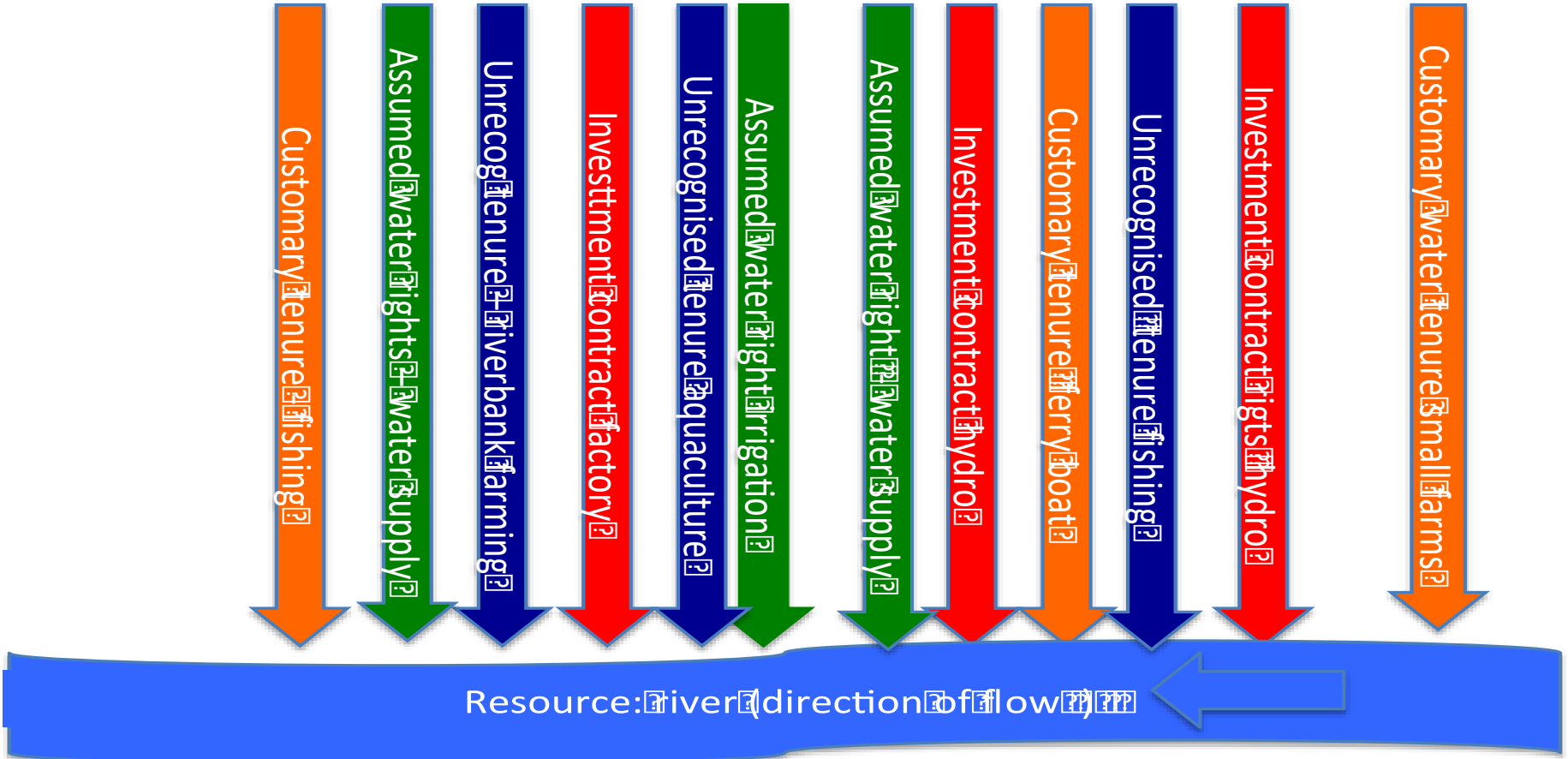
Land tenure relationships can typically be linked to a single land plot



Water tenure relationships relating to specific infrastructure do not look so different



However water tenure relationships relating to water resources (e.g. rivers) are linear ...
More complex and over a greater scale



Water tenure and water governance

- Governance of what?
- Water?
- Water resources?
- Or are we really concerned with the governance of water tenure? How decisions are made and implemented with regard to the allocation of water resources

Peace, bread and water!

The political economy angle

- Discussions on water governance usually lead to broader governance questions in the state concerned
- There is a clear historic link between land tenure and political reform/activity
- Water has tended to play a lesser role
- But in terms of water governance/water reform, water tenure and its political economy implications should not be ignored
- Water tenure informs and explains the power dynamics in the sector
- All reforms result in winners and losers
- Put another way sector reforms that do not take account of existing water tenure arrangements will fail.....

Water... flows uphill to money, sucked uphill to politics...

Benefits of a 'water tenure approach'

- Holistic – shows things as they are
- Non-prescriptive
- A more sensitive & nuanced approach
- Policy coherence
- Multi-disciplinary
- Focus on users

The relationship, whether legally or customarily defined between people, as individuals or groups, with respect to water resources

Conclusions

- Water tenure exists, has always existed and will always exist even if we choose not to recognize it
- For water users it is the only thing that matters
- Sector reforms that fail to take account of water tenure will continue to underperform
- Investment needs water tenure security
- Water users need water tenure security..
- The real question is not 'should we take water tenure seriously' but rather, at a time when business as usual is not an option, 'can we afford not to pay attention to water tenure?'



<http://www.fao.org/3/I5435E>

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