

**Community Water, Sanitation and Health Project
(COMWASH) Malawi**

Operational Research Report

On

**Water Ownership and Access Rights in Malawi:
Customs, practice and statutory laws**

Submitted to:

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Acronyms

ADC	Area Development Committee
BVC	Beach Village Committees
CBM	Community Based Management
CIDA	Canadian International Development Agency
COMWASH	Community Water Sanitation and Healthy Project
DA	District Assembly
DCT	District Coordinating Team
DRA	Demand Responsive Approach
LGA	Local Government Authority
MNEA	Ministry of Natural Resources and Environmental Affairs
MWD	Ministry of Water Development
NWDP	National Water Development Program
NWRA	National Water Resources Authority
NGO	Non-governmental Organization
UN	United Nations
VDC	Village Development Committee
VHC	Village healthy committee
VNRMC	Village natural resource management committee
WSSS	Water Services Sector Study

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Summary

Community Water sanitation and Health (COMWASH) Project is a CIDA is a government of Malawi CIDA funded projects which is being implemented in Thyolo and Phalombe districts to strengthen national, district and community capacity to implement sustainable water, sanitation and health programs through gender sensitive demand responsive approaches. During the course of implementing this project, key questions regarding the position of communities and districts in terms of the legal rights over the use of local water resources, water facilities and their management have emerged, the decentralisation process and how it affects the present ownership and utilisation of the water facilities arose over the past two years.

This report serve to answer some of these key questions which relating to traditional practices or customs regarding ownership and access to local or nearby water resources in rural areas; government laws governing ownership and use of water resources; effects of decentralisation on ownership, access and allocation of management responsibilities; and the Ministry of Water Development's strategy, guidelines as they relate to the statutory laws and customary practices.

The research carried out in October and November 2003, focused on Phalombe and Thyolo districts which are the impact districts of COMWASH. However, the research team interviewed people from Mulanje, Zomba and Salima. The team also interviewed individuals from both government and NGOs at district regional and national levels.

Findings of the research

The research results reveal that there are various customs and beliefs that relate to access to and control of water resources but they are not documented and their application is dependent on the influence of the elderly people. Most people interviewed mentioned that these traditions and customs are rarely practiced by the current generation even though they are important.

People recognize water as a God given resource and every person has the right of access. The ownership becomes stronger if the people near the water facility are the ones maintaining it. Despite this recognition there are still some people who still think that it is the responsibility of the government to provide and repair the water facilities in the villages.

The water point committees, scheme and branch committees believe that they are the rightful owners of the water facilities such as taps, boreholes as well as the main lines but they are not recognized as such under the Law. Currently, the rural people are not aware of the law requirement in order for them to claim ownership of the facilities.

The research revealed that the LGA do not have adequate human and financial resources to be able to provide the technical and supervisory support to the schemes that have been rehabilitated and constructed in the two districts.

The MWD has developed clear guidelines for supplying water to the rural areas. However, many people are not aware of the change in policy and approach to supplying water in the rural areas. Because of lack of awareness of the changes in the approach to the water supply process in the rural areas, some people have develop some resistance towards community maintenance of the water facilities.

According to section 5 of the Water Resources Act, it stipulates that any person has the right to use public water without a water right for domestic purposes only. The rural people and some NGO as well as government personnel expressed ignorance of this provisions in the Water Resources Act.

The law provides that the scheme or branch or WPC can legally own the water works or facilities if they are constituted under a modicum of legal personality as a cooperative or company or Trust. This means that the communities will have to transform their various committees to legal entities so that they can be legally recognized and have the power to sue and be sued. Discussions have not yet started between the facilitators of the water supply projects (COMWASH, DCT and the LGA) and the rural community in relation to the long-term direction and governance of the water works as stipulated by Law.

Recommendations and concluding remarks

Based on the research findings, the research team makes the following recommendations:

- There is need to evaluate and document as well as promote the good traditional practices that relate to the access and ownership of water resources. If possible, modify some of the useful traditions or customs to suit the current CBM approach in rural water supply.
- There is need to intensify awareness campaigns on the policy changes and the legal framework governing access to and control of water resources.
- The DCT with support from the COMWASH project should assist the WPCs, branch committees to develop by-laws to govern use and management of the water facilities.
- As the scheme committees are transforming into legal entities they should be assisted to choose the legal formation that will be easier and less rigorous in meeting its obligations.
- The government, donors and the NGO community need to deliberately focus on strengthening the capacity of the local government authority in order to facilitate the community based management of water resources.
- Governance of the water schemes would improve if the long-term direction of the scheme committees is clearly defined. To operate as legal entities, the scheme committees need to be assisted to develop their own policies, systems and procedures as well as rules and regulations.

Conclusion

The research has revealed that the demand response approach to rural water supply will strengthen ownership and sustainability of the water projects in the rural area. Community ownership of the water schemes and points will definitely reduce the heavy load on the government since all the repair and maintenance responsibilities of the water schemes will rest in the hands of the rural people. The policy framework is conducive to the community based management of the water resources but the rural communities are not fully aware of the framework. For the communities to fully own the water facilities, they need to form village level institutions that are legally constituted under the laws of Malawi. It will be a biggest challenge for all the village level institutions such WPC, branch committees and scheme committees to be legally constituted. As a starting point, the scheme committee are well placed to transform into legal entities constituted by law.

1. Introduction and Background

1.1 Introduction

Despite one third of Malawi being covered by water, only 47% of the population, which is estimated at 11 million, have access to safe drinking water. With the enormous poverty and high prevalence of HIV and AIDS, the country is faced with enormous challenges that the Government on its own cannot provide solutions. The majority of the rural people continue to rely on unprotected and unsafe water sources such as rivers, open wells, springs and lakes for their water supply. Based on the observations in the filed and literature review (Ministry of Water Development, 1999) less than 47% of the population is accessing safe drinking water currently due to non-functional water facilities and their geographical distribution.

With the advent of democracy, the Government recognises the fact that access to safe drinking water is one of the basic rights of each human being. Therefore, the Government has set water and sanitation as one of the key priorities amongst the social services it is committed to provide to its people. Despite willingness to provide safe drinking water in right quantities and quality to every Malawian, Government is currently facing serious financial difficulties. The belief in the supply driven approach to water supply has proved costly to the Government (Mtisi, *et al.*, 2003). During the past years, the rural water supply and sanitation activities have been implemented on project-by- project basis and government and governed by individual donor needs (MWD, 2003).

During the early 1980s to 1990, the water supply sector received considerable financial support and investments more especially during the UN Water Decade (International Drinking Water Supply and Sanitation). Despite such heavy investments, the water facilities provided were not sustainable because they lacked effective community participation from the water users according to the Water Services Sector Study (WSSS) carried out in 1994 (MWD, 2003). The WSSS noted that lack of community involvement and ownership of the water facilities are critical problems to sustainability.

Emerging out of the lessons from the UN Water Decade of the 1980s and the WSSS was the need for community-oriented management of water resources. Government has revised its Water Development Policy (2003), and is now advocating demand responsive approach to rural water supply using the community-based management of water and water facilities. This policy direction of the government is based on the premise that the users are the best managers of the resources upon which their lives depend.

1.2 Background to the research

With support from the Ministry of Water Development and Canadian International Development Agency (CIDA) COMWASH is piloting a community based management approach of water resources in Thyolo and Phalombe. The purpose of COMWASH Project is to strengthen national, district and community capacity to implement

sustainable water, sanitation and health programs through gender-sensitive and demand-responsive approaches. The project has over the past two years drilled boreholes and constructed as well as rehabilitated a number of gravity-fed water schemes in the two districts. The water users contribute money for the construction and maintenance of the water points. Using this approach the project aim to provide safe drinking water to 350,000-500,000 people in the two pilot districts.

1.3 Terms of reference (TORs)

During the course of implementing this project, key questions have emerged regarding the position of communities and districts in terms of legal rights over the use of local water resources, water facilities and their management. It is also unclear to what extent decentralization, which provides greater authority and autonomy to the district, will affect present ownership and utilization of the water facilities. Through the Project Steering Committee (PSC), COMWASH initiated the operational research to look into the issues surrounding the water ownership and access rights. The research aim to investigate and seek clarification on the following:

- Traditional practices or customs regarding ownership and access to local or nearby water resources in rural areas more especially in Thyolo and Phalombe districts.
- Government laws governing the ownership and use of water resource in rural areas.
- The effect of decentralization on ownership, access rights and allocation of management responsibilities.
- Review Ministry of Water Development's RWSS program strategy and guidelines and identify any areas that may be contradictory or unclear in relation to statutory law or customary practices.

1.4 Methodology of the Research

In order to address the TORs, COMWASH hired Training Support for Partners (TSP), which put together a research team comprising 8 people (Lawyer, Natural Resource Management specialist and six research assistants). The team adopted several techniques of data collection including the following; literature review of relevant water related documents including policies, laws, guidelines; focus group discussions (FGD); individual interviews (II); transect walks as well as key informant interviews. In addition direct observation was utilized in order to gain a deeper understanding of issues being discussed during the interviews with individuals. Interviews were carried out at Ministerial, regional, district and village levels. Interviews were also carried out in irrigations schemes in Salima and Zomba Districts in order to triangulate and compare the information on access to and control of water resources and facilities. A total of 900 people including village head persons, traditional leaders, parliamentarians, government and Non-governmental personnel, businesses people and villagers, were interviewed during the data collection process (appendix 1).

Village interviews were mainly carried out in villages under Traditional Authority Mphuka and Thomasi in Thyolo, Mkhumba, Nazombe and Kaduya in Phalombe as well as Mkanda in Mulanje district.

2.0 Findings of the Research

2.1 Traditional practices and customs regarding ownership and access to water sources

2.1.1 Types of water sources and means of access

Various sources of water exist in the rural areas including boreholes, wells, springs, and swamps, standing taps, rainwater and broken gravity fed scheme pipes. Water is treated as a common good, which is accessed by everyone free of charge unless the source belongs to an individual such as a household well. The amount of money contributed depends on the price of the spare part that needs to be repaired or replaced on the borehole or tap.

2.1.2 Ownership and management of water resources

2.1.2.1 Ownership of water and water facilities

Responding to a question on that owns the water and water facilities, people had varied answers. In Thyolo, Phalombe, Salima and Zomba people said that water is a gift from God and is owned by everyone in the villages. Regardless of the source, the water belongs to everyone in the village. Ownership however, varies on the type of work done on a particular water source or facility and who are the people performing such work. They argued that those people directly drawing water from a particular water source and are responsible for maintenance and repair of that source are considered the owners. They however said that in the past government would drill a borehole without engaging or involving the beneficiaries. In this case, every time the water facility is broken down, villagers were always waiting for the government to come and repair it. The villagers believed that even though the water is for all the people in the village, the facility belonged to the government. People said that the perceptions of people are changing because currently, people are involved in the repairs and maintenance of the water facilities such as borehole and taps. The farmers in the irrigation scheme indicated that they repair the pumps, pipes and buy their own fuel or pay for electricity bills in order to continuously have water for irrigating their crops. They believe that the water facilities are theirs and donated to them by the government. The villagers in Thyolo and Phalombe indicted that they own the water facilities. In both Phalombe and Thyolo, people interviewed indicted that there are some people in the villages who still believe that the government will continue to repair the water facilities and hence the sense of ownership of the facilities is very weak. These are the type of people who are always giving problems when it comes to contributing money for repairing the borehole or taps when it is broken.

2.1.2.2 Management of water sources

People interviewed said that it is difficult to manage open access water sources such as rivers, streams or springs because no one can claim ownership. Without strong leadership in the villages and support from the Government or donors, management of the open access water source is a problem in most cases according to the villagers.

Water points such as open wells, boreholes and taps have user groups that are responsible for their management. The water users indicated that they perform a number of activities in order to ensure that the water sources are protected and continue to provide water. These activities include guarding the water facilities against theft and robbery, repairing, cleaning and clearing surroundings, planting flowers to beautify the surroundings, dredging as well as constructing raised surfaces around the wells.

In both Phalombe and Thyolo, people indicated that at the moment they are not involved in the management of rivers, streams and swamps. In Thyolo, villagers indicated that before the two water schemes Didi and Mvumoni were constructed, people were asked by the COMWASH project to plant trees in the catchment of the two schemes. While in Phalombe, people indicated that water scheme catchment area falls within a protected area, which is managed by the Forestry Department.

2.1.3 By-laws, traditional beliefs and customs

People indicated that they have unwritten by-laws governing the care and management of boreholes, taps and wells. The rules or by-laws are set when the water point has been constructed by local leaders more especially village or family heads supported by water point committee if they do exist. In the case of newly constructed boreholes and taps, the by-laws are set by the water point committees supported by the local leaders. Villagers said that the water point committees and local leaders set the by-laws and are communicated through women to all the other water users around the water points. Some by-laws are based on the people's traditional beliefs and customs, which are passed on from one generation to another. Some of the beliefs and customs are applicable on each and every water point while others are only applicable on boreholes or taps. Women interviewed agreed that they are following the rules and regulations for taps and boreholes though unwritten. Most of the by-laws at the water point are linked to the care, maintenance of the water facility as well as hygiene of the water

Villagers staying near the water point supported by water point committee members (if it does exist) are the key by-law enforcers. However everyone in the community play a key role in monitoring and guarding the water facilities against theft or people with ill intentions. When an individual discovers that a colleague is breaching the by-laws he or she reports to the people nearby or water point committee members who then consults the accused individual.

Women indicated that these by-laws are rarely revised. In case something serious happens that necessitates revision of the unwritten by-laws, the village headman/women and committee summons a village meeting to announce the changes. At borehole and tap

level, people are able to abide by the set rules and regulations and enforcement is not a problem.

Box 1: Some of the notable by-laws for boreholes, taps and wells

The notable common by-laws on wells, boreholes and taps included “No plate or clothes washing or bathing at the water point. No animals are allowed to drink from the tap, borehole, wells or piped water. Children are not allowed to play at the borehole, tap and well. If an individual household member has not paid the monthly contribution for the maintenance, she will be prevented from drawing water. In some cases these by-laws are formulated by the water committee and handed over to the community, while in other cases the water point committees and all community members jointly formulate the by-laws. It was noted that where the community participated in the formulation of the by-laws the majority of the community adhered to them. Whenever some individuals go against the by-laws, the water committee consult such individuals to discuss and advise them on the importance of conforming to the by-laws. In cases where the individual becomes uncooperative, then the committee hands over the case to the village head.

Villagers said that previously, it was possible for the chief and village headmen to set and enforce by-laws on the management of the riverbanks, springs and streams. People were not allowed to cultivate close to the river or springs and cut down trees along the riverbanks. People feel that enforcement of these rules and regulation is difficult because of many freedoms that the new political dispensation has brought. Because the rules and regulation are not written down, enforcement is dependent on the charisma and strength of the local leaders. If the local leader is weak villagers do not fear him or her. The case in point is the encroachment of the once feared Thyolo Mountain Reserve. The Mountain reserve survived for many years because of traditional beliefs that were associated with it.

People said that previously they used to have strong beliefs in the traditions and customs relating to the protection and management of water catchment like Thyolo and Mulanje Mountain Forest Reserves. However, local leaders lamented that these traditional beliefs and customs are currently not being respected and followed. The current generation considers traditional beliefs and indigenous knowledge as absolute and primitive. T.A. Thomasi in Thyolo mentioned that people were not allowed to cut down certain tree species because they were associated with water conservation. To instill a sense of respect on the tree, old people used to say if you cut down that tree species for firewood then your family is going to break apart or parents will die. Because people believed in these beliefs and customs, such tree species were being preserved and water in the stream and rivers continued to flow all year round.

Farmers in the irrigation schemes visited (Kambwiri sere, Ngolowindo and Domasi), said that they have formed Water User Associations which have elaborate by-laws, which are agreed and set by all the farmers in the scheme. These by-laws have been translated into constitutions, which have been used to register their associations as Cooperatives. The key institutions for enforcing these by-laws are the water user associations themselves, which are now legal entities. This is in line with the Irrigation policy where it is promoting formation of legally recognized groups to own and manage the irrigation schemes as a business.

2.2 Decentralization and community based management of water resources

The natural resources management sector has witnessed a number of policy reforms since the Earth Summit, which took place in Brazil in 1992. All the reforms are advocating for decentralized management of natural resources. In simple terms decentralization refers to the transfer of responsibility for planning, management and resource allocation to local level agencies. This transfer helps to overcome many of the problems of centralized service provision. Decentralized natural resource management is aimed to improve efficiency, equity and sustainable resource use, principally by reducing the distance between the decision makers and beneficiaries (Bwalya, 1992 quoted in Mtisi, *et al*, 2003). People interviewed agree with observations by Bwalya that it is indeed true that the community based approach has helped to reduce the problems of repair and maintenance of water facilities. Once a borehole or tap is broken down the water users themselves are responsible for repairing not the government.

With the current decentralization process following the adoption by Government of the National Decentralization Policy in 1998, a shift to a more regularized community-based management of water and water facilities has taken place. It is evident that the Local Government Authorities (LGA) with support from the various donor funded programmes and NGOs have taken this new approach seriously as seen in the COMWASH supported gravity-fed water schemes. To support the decentralization process, the COMWASH project works through a District Coordinating Team (DCT) at the district assembly or local government level that oversees the implementation and overall coordination of the water projects in Thyolo and Phalombe. The DCT comprise heads of government departments from Health, Community Development, Water and District Planning at the LGA level. According to the project implementation strategy, the DCT is the strongest link between the communities and the project (COMWASH) at the same time provide a link between the local governance structures (scheme committee and water point committees) with the Local Government Authority (District Assembly). The DCT oversees the mobilization and training of communities, procuring project supplies and monitoring the progress of the project. With the current arrangement, the DCT feel empowered to coordinate the activities of the COMWASH project.

DCT members indicated that their activities are currently being supported by the project but their concern is the continuity of their activities after the project closes down. The villagers will continue to require technical back-up support either from government or other services providers, which are currently being sourced by the DCT with support from the COMWASH project. It was unclear during the interviews whether the communities apart from contributing money for maintenance and repair of the water schemes will also be able to pay for the advisory services, which they are going to require from time to time.

The local government authority and NGO personnel interviewed said that the formation of scheme, branch and water point committees as local level structures to facilitate and govern the gravity fed schemes is a sure way of ensuring sustainability of the water supply systems. Previous projects failed to achieve better results and were not sustainable

because the governance structures at local level did not exist or if they existed people involved were not trained and empowered to own the water supply system. People expect that with the CBM approach more emphasis will be put on empowering these local level structures to function effectively. As a way of taking ownership of the water scheme, people through their water point committees contribute money for maintenance and repair. A portion of this money goes to the scheme account for the overall management of the scheme. Once fully functional, the scheme committee will be expected to run all the affairs of the scheme. The committee members recognize that most of their current support is coming from COMWASH as part of the capacity building process. After the project has phased out, the committees are expected to run their own affairs relating to the water schemes. The committee members said that they are committed and ready to take on the challenge as owners of the water schemes.

2.2.2 Institutional linkages

2.2.2.1 Ministry of Water Development and National Water Resources Authority

The National Water Policy recognizes the fact that management of water resources requires an integrated approach involving all stakeholders including the Ministry responsible for water affairs, which is vested with the responsibility of the water. The Policy clearly stipulates roles and responsibilities of various institutions in managing water. The ministry has set clear policies and guidelines relating to the development and supply of water to the rural communities in the country.

At the national level, the policy vest the authority of water management in the Ministry for Water Development with the National Water Resources Authority (NWRA) as the key institution for coordinating, controlling and regulating water resources development in the country. As a regulatory authority, the NWRA is responsible for issuing access rights certificate to water users as well as advising on the declaration of controlled catchment areas, prescribing and determining the establishment of water users' associations for rural piped water supply schemes but is not specific on the process of formalizing water users such as scheme committees into legally recognizable institutions.

It was found out that many communities and organizations do not know the existence and functions of the Water Resources Board that was constituted under the Water Resources Act (Cap: 72:03) let alone the NWRA as envisaged under the National Water Policy.

2.2.2.2 District Assemblies

At the district level, the NRWA works very closely with the local government authorities that coordinate, solicit financial support and implement water and sanitation programmes. The LGAs have the district development fund through which various development activities at that level are funded. However, as is the case now, the assemblies have little resources to finance the various programs. The MWD has district offices, which provide the technical support on water issues to the district assemblies and various organizations such as NGOs that are providing water services activities in the districts. More often that

not, the district water offices do not have adequate technical staff that could provide constant back-up professional support to the local communities. The two districts, Phalombe and Thyolo have had a major contribution in terms of gravity fed water scheme rehabilitation. According to Phalombe District Water Office, the rehabilitation of water schemes in these districts would need more back-up technical support to the communities from the district water supply offices and DCT.

2.2.2.3 Scheme and Water Point Committees

In an effort to strengthen the community based management approach, it was noted that a number of village level institutions have been established to manage the water points. The water point committees are intended to ensure transfer of control of water management from the central government and donors to communities. During the focus group discussions it was mentioned that, these WPCs are formed and trained before the water point is fixed in the case of taps while those responsible for a borehole are usually trained after the borehole is drilled and fixed. The WPCs work very closely with the Health Surveillance Assistant and Water Monitoring Assistants who assist in forming and training the committees.

The scheme committee members said that they are preparing themselves to take full responsibility of the water schemes once the project has phased out. They however raised concern that without proper institutional systems and procedures, the scheme committee members will face an uphill task to manage the scheme. The scheme committee members and government officers at the LGA believe that there is need for a lot of training of the scheme committees in order to strengthen the governance of the water scheme. The effective governance of the schemes will depend on how well the village institutions such WPCs, Brach committees and more importantly the scheme committee members have been empowered.

2.3 Laws governing ownership and access to water resources

The principal law governing ownership and use of water resources in rural areas is the Water Resources Act. The Act was passed in 1969 “to make provision for the control, conservation, apportionment and use of the water resources of Malawi.” The Act has six main Parts, which cover the following:

- (a) The ownership of water resources which vests in the President and the interest right for the use of water for domestic purposes by every person, without a permit;
- (b) The database of existing water rights prior to enactment of the Act in 1969;
- (c) Grant of water rights for use, development, conservation, diversions, etc. of water resources from a river, stream, lake or underground; or consents to discharge wastes into public waters to an applicant;

- (d) Revision, variation, determination and diminution of water rights and pollution of public water;
- (e) Miscellaneous powers of the Minister to declare controlled areas for the purpose of natural resources management of the area, or creation of an easement; and
- (f) Schedules for the establishment, composition and operation of the Water Resources Board that is entrusted with assisting the Minister in the implementation of the Act and the general administration and management of water resources in Malawi.

It should also be mentioned that prior to 1995, urban and peri-urban water supply schemes, except for Blantyre and Lilongwe, were run by central government pursuant to the Waterworks Act (cap.72:01) of 1926. The water supply schemes for Blantyre and Lilongwe were run by water boards under the Blantyre Waterworks Act (cap.72 :02) of 1962 and the Lilongwe Waterworks Act (cap.72:04) of 1987 respectively. These three Acts were repealed by the Waterworks Act (No. 17 of 1995). Suffice it to say that there is no correlation between the Water Resources Act, 1969 and the Waterworks Act, 1995.

Under subsection (1) of section 3 of the Water Resources Act, the ownership of all public water is vested in the President. The position of the law regarding public water is critical as under the Water Resources Act, public water is defined to include all water flowing over the surface of the ground or contained in or flowing from any river, spring or stream or natural lake or swamp or in or beneath a water course and all underground water but excluding any stagnant pond or swamp wholly contained within boundaries of any private land. It should be borne in mind therefore that the definition of public water and consequently the implication on its ownership is in sharp conflict with the perception as to ownership of such public water in the communities as demonstrated elsewhere in the paper. Hence, as the Water Resources Act as part of the laws of the land prevails over the customary practices and perceptions, there is already a risk of the observance of the Act more in breach than compliance. The provision creates a public trust for the benefit of the people of Malawi. Under subsection (2) of section 3 of the Water Resources Act, however, the Minister has control of all public water which control is exercisable in accordance with the Act.

Section 4 of the Water Resources Act establishes a Water Resources Board, which has powers, *inter alia*, to grant water rights in terms of section 10 of the Act. Under section 10 of the Act, the Minister has power to grant to any person the right to divert, dam, store, abstract, or use public water from such sources on such quantity for such period, definite or indefinite and for such purpose as may be specified in the water right. The application for a water right shall be made in the prescribed manner, that is, it shall describe, *inter alia*, the applicant, the use, the works, the period of the right and the quantity of the public water needed under the right.

Any person has the right to use public water without a water right for domestic purposes only pursuant to: section 5 of the Act. All other usage of public water has to be sanctioned under a water right. Further, under section 7 of the Water Resources Act, the right to use public water cannot be acquired by prescription, that is, by mere reason of length of use or lapse of time.

Pursuant to sections 19 and 20 of the Water Resources Act respectively, the Board has power to inspect and demolish unlawful works.

The ownership of the works being used to enjoy a water right over public water is vested in the person to whom a water right has been granted. Person may be a natural person or a legal person. Under the scheme of the Water Resources Act therefore a community has possessory rights to use public water for domestic purposes only. A community may enjoy use of public water under a water right for all other purposes if such a community is constituted under a modicum of some legal personality as a partnership under the Partnership Act (cap.46:04) or a company under the Companies Act (cap.46:03) or a trust under the Trustees Incorporation Act (cap.5:03) or a cooperative society under the Cooperative Societies Act (No. 36 of 1998).

Four main points can be made regarding the Water Resources Act *vis-à-vis* the ownership and use of water resources in the rural areas. First, in the light of the National Decentralization Policy adopted by Government in 1998 there is need to revisit the mandate of the Water Resources Board with a view to synchronizing such mandate with the role of local government authorities in the administration and management of water resources. Secondly, if the aspirations of the National Water Policy are to be met in so far as CBM is concerned, a deliberate framework should be put in place in the Act, which enables communities to acquire water rights over public water to ascertain ownership and use of water resources in those communities. There is a need for recognition in the law of the obligations of Malawi as a State party to the UN Convention on Non-Navigation Use of International Watercourses and the SADC Protocol on Shared Watercourse Systems. Lastly, there is need to harmonize the Act with other laws on the management and protection of the environment and natural resources, most notably, the Environment Management Act (No. 23 of 1996), the Forest Act (No. 11 of 1997) and the Fisheries Conservation and Management Act (No. 25 of 1997).

3.0 Emerging issues from the research findings

3.1 Traditional practices or customs regarding ownership and access to water resources

- **Traditional practices and customs**

There are various customs and beliefs that relate to access to and control of water resources but they are not documented. The application of these customs and beliefs are dependent on the influence of the elderly people. Most people interviewed mentioned that these traditions and customs are rarely practiced by the current generation even though

they are important. Some practices are good for the access and control of water resources but the problem is that they are never documented and promoted. People believe that traditional practices and customs are primitive therefore are valueless. It will be essential to evaluate and document these traditional practices as well as promote them. If possible modify them to suit the current situation in terms of access to water resources in the rural areas.

- **Traditional rules and regulations governing access to water resources**

Just as mention above most of these rules and regulations are not documented. Their enforcement is dependent on the influence of the local leaders. According to the people these rules are set by the village elders and communicated to all the people in the village. For example, access to Thyolo mountain reserve was controlled by the traditional rules and regulations that were linked to the ancestral spirits. People believed that anyone accessing the mountain without following the set traditional rules would die or face undefined misfortunes. People do not believe in these spirits anymore and have lost trust in the traditional rules and regulations. The current political dispensation has brought with it many freedoms some of which are not conducive to the development of the country.

- **Ownership and management of water resources**

People recognize water as a God given resource and every person has the right of access. With the advent of the modern water facilities, the users of that facility are now being considered the rightful owners. The ownership becomes stronger if the people near the water facility are the ones maintaining it. There are still some people who think that the government would continue managing the water facilities in the villages and therefore they are not supposed to be involved in their management. Continued awareness raising on the CBM approach in the villages would help improve the understanding amongst people about the water facilities and their role in managing them.

The water point committees, scheme and branch committees believe that they are the rightful owners of the water facilities such as taps, boreholes as well as the main lines but they are not recognized as such under the Law. They have to undergo a certain process to transform into legal entities in order to be legally recognized as rightful owners of the water facilities who can sue and be sued. Currently, the rural people are not aware of the law requirement in order for them to claim ownership of the facilities provided to them by government.

3.2 Decentralization, ownership, access rights and allocation of management responsibilities

- **Limited human and financial resource at the Local Government Authority (LGA) level.**

CBM has brought its own demands on the decentralized structures at the LGA level. In order to effectively manage the water systems, the rural communities will rely on the LGA to provide back-up technical support. The research revealed that the LGA do not have adequate human and financial resources to be able to provide the technical and

supervisory support to the schemes that have been rehabilitated and constructed in the two districts. According to the scheme committee members, they are not sure whether they will be responsible for paying the expenses of the technical support (which may include audit, complicated repair works, major conflict resolution with big organizations like Southern region Water Board) they would receive from the government or any service provider from the money contributions from water users. If this is the expectation of the LGA then mechanisms have to be put in place spelling out who is going to be responsible for what and when.

- **Governance of the water schemes**

The effective performance and sustainability of the CBM approach depends on the strength of the institutions that are charged with the responsibility of managing the gravity fed water schemes. Currently, the various committees more especially the scheme committees do not have the binding rules and guidelines relating to the management of the schemes and WPCs. The continued functioning of the taps depends on how well the committee members are organized and working as teams.

The scheme committee members are responsible for the overall management of the schemes supported by Scheme Managers. The establishment of branch committees is expected to reduce the distances that the scheme committee members would be traveling as they perform their tasks. The scheme committees will need to operate as cohesive units with clear guidelines, policies, systems and procedures that have not been developed currently.

- **Capacity of the various committees (Scheme, Branch and Water point committees)**

Management of the WPC would not be as complex as the managing big schemes like Phalombe and Sombani. Although the local institutions are going to have the technical backing from the LGA or other service providers, the committee members would fail to manage the schemes if they do not receive adequate training on managing their institutions effectively.

3.3 Policies and strategies for rural water supply

- **Level of awareness amongst rural people**

The MWD has developed clear guidelines for supplying water to the rural areas. However, many people are not aware of the change in approach from supply to demand driven. The change in approach requires that people should repair and maintain their own water facilities. Because of lack of awareness of the changes in the approach to the rural water supply strategy, people develop some resistance towards community maintenance of the water facilities. The awareness campaigns organized by COMWASH improved the level of understanding amongst people of the new demand responsive approach (DRA).

3.4 Laws governing ownership and use of water

- **Awareness of the Water Related Laws**

According to the rural people water is a God given resource which belongs to everyone in the community. Rural communities believe that water can be used for any purposes including irrigation (small or large scale) without any need to get a water right from government. Section 5 of the Water stipulates that any person has the right to use public water without a water right for domestic purposes only. Which means that any use other than domestic one has to obtain a water right from the MWD. Over 90% of the 900 people interviewed during the research indicated that they are not aware of this legal requirement. The rural communities indicated that they are also not aware that they can only claim ownership of the water works or facilities if they are legal persons or entities.

- **Legal status of the various water committees**

The law provides that the scheme or branch or WPC can legally own the water works or facilities if they are constituted under a modicum of legal personality as a cooperative or company or Trust. This means that the communities will have to transform their various committees to legal entities so that they can be legally recognized and have the power to sue and be sued. Discussions have not yet started between the facilitators of the water supply projects (COMWASH, DCT and the LGA) and the rural community in relation to the long-term direction and governance of the water works as stipulated by Law. This is another important part of the ownership of the water works, which can take a long time to facilitate.

4.0 Recommendations

- The research has revealed that people have their own traditional practices and beliefs regarding ownership and access to water resources in the rural areas. However, the practices or customs and beliefs including the traditional rules and regulation are not documented. There is need to evaluate and document as well as promote the good traditional practices that relate to the access and ownership of water resources. If possible, some of the useful traditions or customs could be modified to suit the current CBM approach in rural water supply.
- The recognition that the users are the best managers of the water resource has strengthened the sense of ownership of the water facilities by the rural people. However, there are still people in the villages who have not fully understood the community-based management of water resources. Intensifying awareness campaigns on the new approach would help raise level of understanding of the approach and strengthened the chances of sustainability of the water projects in the two districts.
- Currently, the WPCs, branch committees and scheme committees are operating as social grouping with no clearly defined legal personality. These institutions have not binding documents such as constitutions or by-laws to indicate their legal status. The DCT with support from the COMWASH project should initiate a process of assisting these village level institutions to develop their own by-laws or constitutions and register as legal personalities.
- It will be an uphill task to assist all the WPCs, Branch and Scheme Committees to become legal entities. In all fairness, the scheme committees are rightful institutions that need to become legal entities. Therefore the DCT should assist

these institutions to achieve the legal status in order to be legally recognized as rightful owners of the water works. The scheme committees can transform into Trust, Cooperative or Company according to the existing legal frameworks in the country. The scheme committees should be assisted to choose the right legal formation of their own choice that will be easier and less rigorous in meeting its obligations.

- The research shows that decentralization process has pressed a lot demands on the available limited human and financial resources at LGA level. The government offices at the local government level lack financial resources and have very limited qualified human resources. The government, donors and the NGO community need to deliberately focus on strengthening the capacity of the local government authority in order to facilitate the community based management of water resources.
- Empowerment of the water institutions in rural areas will strengthen the performance and sustainability of the water schemes. Continued training of the WPC, branch committees and scheme committees is very essential if the rehabilitated boreholes or gravity fed schemes are going to continue providing water to people after the donor support is phased out.
- Governance of the water schemes would improve if the long-term direction of the scheme committees were clearly defined. To operate as a legal entity, the scheme committees need to be assisted to develop their own policies, systems and procedures as well as rules and regulations. The scheme committees need to be taken through an organization development process.
- The rural population is not fully aware of the various policies and laws governing access to and management of water resources. It is therefore recommended that LGA with support from various projects or donors or NGOs should organize civic education activities in the rural areas on the various laws more especially those related to access and management of water resources.
- There is need to clarify roles and responsibilities between the LGA and the scheme committees and the community at large in relation to the overall management of the water scheme. There is need to clarify the expectations of the communities, scheme committee and the LGA before the scheme committee before they become legal entities to avoid conflicts in future.

5.0 Conclusion

The research has revealed that the demand response approach to rural water supply will strengthen ownership and sustainability of the water projects in the rural area. Community ownership of the water schemes and points will definitely reduce the heavy load on the government since all the repair and maintenance responsibilities of the water schemes will rest in the hands of the rural people. The policy framework is conducive to the community-based management of the water resources but the rural communities are not fully conversant of the framework. For the communities to fully own the water facilities, they need to form village level institutions that are legally constituted under the laws of Malawi. It will be a biggest challenge for all the village level institutions such WPC, branch committees and scheme committees to legally constituted. As a starting

point, the scheme committee is well placed to transform into legal entities constituted by law.

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Appendices

Appendix 1: List of people and individuals interviewed

Name individual or village	Institutions/organization
Mr. M. Mikuwa	Ministry of Water Development
Mr. Muheziwa	Ministry of Water Development
Mr. Matamula	Ministry of Water Development
Prof. Z. Kasomekera	National Water Development Project
Mr. Nkosi	Thyolo District Water Office
Mr. J. Kamangira	IFAD
Mr. L. Malembo	COMPASS
Mr. W. Chadza	WESM
Hon. D. Mwale	Parliamentary Committee on Agriculture, Environment, Natural Resources and Land
Mr Maweru	Controller of Irrigation Services
Chief Chikumbu	Mulanje
Senior Chief Nsabwe	Thyolo
Chief Kwataine	Ntcheu
Chief Mpando	Ntcheu
Mr. Kaphuka	Thyolo District Assembly
Chief Mphuka	Thyolo
Mr. Ebele	Chairman, Didi Gravity- Fed Water Scheme
Mr E. Majai	Secretary, Didi Gravity-Fed Water Scheme
Representatives of Business persons	Didi trading Centre
GVH Liphama	Liphama village-Phalombe
Mr Dankeni	Dungunya village- Phalombe
Njaya village	Phalombe
Mr J.B Makhula	Mpeni village, Phalombe
Mr Mpombwe	Migowi Water Scheme Chairman
Mr Mugwa	Migowi Water Scheme Secretary
Traditional Authority Kaduya	Phalombe
Mr B.B.C Mkandawire	Water Aide
Naveya village	Mulanje
Jeremia village	Thyolo
Thawani village	Thyolo
Mwanapwa village	Thyolo
Mathotho village	Thyolo
Mpenda village	Thyolo
Chisinkha 1	Thyolo
Chisinkha 2	Thyolo
Chitimbe village	Thyolo

Thawani	Thyolo
Liphama village	Thyolo
Mpino 1 and 2	Thyolo
Mbendera village	Thyolo
Witiri village	Thyolo
Headmaster Didi School	Thyolo
Mphera village	Thyolo
Mpenda village	Thyolo
Khokholowa village	Mulanje
Chimenya village	Phalombe
Mulunguzi orphan Care	Phalombe
Ndungunya 1 and 2	Phalombe
Murirya (mzungu village)	Phalombe
Tupwe village	Phalombe
Magololo	Phalombe
Waruma village	Phalombe
Sakwedwa village	Phalombe
Nandolo village	Phalombe
Mkuchuma village	Phalombe
Mwachande village	Phalombe
Ndungunya village	Phalombe
Namasoko village	Phalombe
Domasi Water User Association	Domasi Irrigation Scheme, Zomba
Ngolowindo water User Association	Salima
Kambiri Water user Association	Salima
Assistant Irrigation Officer	Salima District Agricultural Office

Appendix 2: List of traditions and beliefs on water

- Washing of ones hands and feet at the river after burying the dead and before going home is a requirement to avoid the sprit of the dead from troubling the relatives.
- If one urinates or defecates in water, they believe that that person will suffer from bilharzias and dysentery.
- If one sneezes in water he/she has nose bleeding
- Rivers are rain callers
- A menstruating woman should not go to draw water from the otherwise the well will dry off
- If a girl plunged a dirty utensil in a well she will never get married
- God has blessed water and so it can never cause diseases.
- For the traditional beer to cook properly, one has to use the water from the river and not well or boreholes/tap
- Once a house has been burnt accidentally the owners are made to wash their faces with medicine that has been soaked in water from the river to avoid reoccurrence of such incident
- The Zion believers drink water whenever they are sick as their medicine
- Whenever a person commits suicide, the whole village is supposed to wash their faces with river water to avoid another person from doing the same
- Whenever one gives birth to twins, the babies are bathed where two rivers join each other to avoid occurrence
- Whenever one of the twins passes away, the remaining baby is bathed at the same place where the rivers join each other to prevent the remaining one from dying
- Babies that grow teeth first from the upper gum are bathed at the river twice
- Rivers/streams are used for initiation and baptism ceremonies

- Any girl who has just entered into the adolescent stage is not supposed to bath from the bathroom but at the river. The same applies to a woman who has just given birth
- If they throw a rabbit's bone on the well it will never dry off
- For the sustainability of the love in the family, women are advised to throw the concoctions in the river or any water way
- Children who are undergoing initiation ceremony are not supposed to drink water from home that is why they opt to have the ceremonies along the river.
- Once you have a case with the chief just bath in the river to win the case.

Appendix 3: Checklist for the Water Right Operational Research
Water ownership and access rights in Malawi:
Custom, practice and statutory Laws

1. Traditional practices, customs regarding ownership and access to water resources

- Type of water resources in the area
- Sources of water for drinking and other uses
- How do they access the water (buy, beg from local leaders)
- In their opinion who owns the streams and rivers
- Why do they think that way?
- Who and Why are they involved in the management of the water resources if at all they do
- Which water sources are owned by people (spring, open well, borehole, tap, river)? Why?
- Why do they feel that they need to get involved in the management of the water resources?
- Any traditions or customs that govern access to and control of water resources in the villages
- Community Bye Laws governing access to and control of water sources. (how do people develop and enforce these by-laws)
- Beliefs, customs or culture attached to water access and control (wells, rivers, springs, boreholes etc)
- Gender issues and water sources

2. Review of Government Laws Governing the ownership and use of water resources in rural areas.

- Review the Malawi Constitution, Water Development Act; Land related Laws, Local Government Act, Mining Act, Water Board Act, Environmental Management Act, etc. (What do these documents say on ownership and use of water resources by local people)
- Review government policies (which policies have a bearing on ownership and access of water resources)
- Process and procedures for providing water to communities. (what do the policies say on access to control of water and other natural resources).
- Examples of community ownership. What really happened? What is the role of government?
- Do you feel community ownership of the water resources is a possibility?

3. Impact of decentralization on ownership, access rights and allocation of management responsibility

- A quick appraisal of the decentralized assembly structures at district, area and villages level in relation to access to and control of water resources

- How is the decentralization policy implementation process as it relate to water development?
- Capacity of the LGA, WPCs, scheme committees and branch committees.
- The governance structure versus management of the schemes.
- Strength of the institutional linkages at national, regional, district and local level
- Ownership of the water facilities

4. Review of MoWD RWSS program strategy and guidelines and identify areas of contradiction or unclear in relation to the statutory law and customary practices.

- Review strategy, guidelines
- Where does ownership of the water resources lie?
- Compare with customary practices
- Process and procedures for providing water to communities. (Where does one start from)
- Do communities have control or access rights of the water resources.
- Role of various institutions in water resource management (Water resource Board, departments, regional water boards,

Appendix 4: Summaries of Focus Group Discussions in the Villages and Irrigation Schemes

Table 1: Number of participants per district

District	Men	Women	Total
Thyolo	140	192	332
Phalombe	180	217	397
Mulanje	27	41	68
Zomba (Domasi)	23	15	38
Salima (Kambiri and Ngolowindo)	25	18	40
Total	389	483	875

Table 2: Traditional practices, customs regarding ownership and access

Issues	Thyolo	Phalombe	Mulanje	Salima	Zomba
Key sources of water	Rivers, streams, boreholes, wells	Rivers, boreholes, taps, wells	Rivers, boreholes, taps, wells	Boreholes, wells	Rivers, wells, boreholes, streams
Means of access	Free	Free	Free	Free	Free
Ownership of water	God given	God given	God given	God given	God given
Ownership by source	75% boreholes	92% borehole and tap-near to people and clean	90% tap and borehole	¹ –	–
Ownership and management of water facilities	90% Community Contribute money for repairs	90% Community Contribute money for repairs	60% Community contribute money when broken	Farmers (95%) ² . Pay subscription fees, electricity bills	Farmers (95%). Repair channel
Management of water catchment	Forestry Department	Forestry Department	Forestry Department	Local government and communities	Forestry Department, local people
By-laws on open access water	Do not exist	Do not exist	Do not exist	Do not exist	Do not exist
By-laws on boreholes and taps	Verbal by-laws exist for newly constructed points.	Verbally communicated	50% exist on newly constructed points	Written by-laws and constitutions	Written by-laws and constitution
Traditions and beliefs	40% exist, not written,	50% exist, not written, recognized by old women only	65% exist, not written, young people not recognizing	Exist but fading out	Exist but not truly practiced
Willingness to manage water facilities	95% big yes ³	98% big yes	85% big yes	100% ⁴	100%

¹ Irrigation activities are done with water from the rivers and dip wells. The water user associations were however not aware of the need to obtain a water right.

² When a pump breaks down, the farmers are responsible for maintenance. If there a major break down, the source technical support from the government. Few farmers indicated that the government has some influence.

³ The few people that see management of the water facilities as the responsibility of government mentioned poverty as the deterrent factor. They indicated that they may not be able to contribute the amount of money requested for maintenance or monthly contributions due to lack of sources of income.

⁴ Farmers indicated that they depend on the irrigation schemes for their livelihood and they make a lot of money after selling their produce. Therefore, they do not expect someone to come and manage the water and water facilities for them.

Table 3: Individual Perceptions on the impact of Decentralization on ownership, access rights and allocation of management responsibilities.

Number of people interviewed: 25

Institutions: Government Departments, NGOs, Parliamentarians, chiefs, politicians

Issues	Satisfied	Indifferent	Unsatisfied
Policy implementation process	5 ⁵		20
Capacity of DCT			25
Sustainability of DCT activities		10 ⁶	15
Sustainability of the water schemes	18		7
Governance structure of the schemes	23	2	
Institutional linkages	4	1	20
Capacity of scheme, branch and WPC	25 ⁷		
Ownership of the facilities	18 ⁸	2	5

⁵ The government is not progressing well in its decentralization process due to many reasons including lack of finance and capacity.

⁶ Ten people indicated that they are not aware of how the DCTs are going to function after COMWASH

⁷ Even though satisfied, the scheme, branch and water point committees require constant monitoring and technical support.

⁸ Politicians, local leaders and NGO leaders said that water facilities belong to the communities.