



“ALL OF THE WATER THAT IS IN OUR RESERVES AND THAT IS IN OUR TERRITORIES IS OURS”:

COLONIAL AND INDIGENOUS WATER GOVERNANCE IN UNCEDED INDIGENOUS TERRITORIES IN BRITISH COLUMBIA

LEILA HARRIS AND ROSIE SIMMS, UNIVERSITY OF BRITISH COLUMBIA

Research conducted 2012-2016



WEPGN
Water Economics, Policy
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INTRODUCTION

This research explored some of the shifting roles and experiences of First Nations in water governance in British Columbia (BC). There are three key reasons why the interactions between First Nations and water governance in the British Columbia context are important to consider:

1. First Nations have clearly articulated that water and water governance are central to cultural, spiritual, and socioeconomic wellness in their communities. Descriptions of water as a powerful medicine and sacred resource, as the lifeblood of the land, and as a relative that must be respected and cared for, are echoed by Indigenous communities and organizations, and scholars. Not only is water itself critically important, so too is its governance; this is clearly articulated by the BC Assembly of First Nations in the quote highlighted above.

2. There are currently significant shifts happening in water governance in BC, with replacement of the over century-old *Water Act* with the new *Water Sustainability Act (WSA)*, and a growing emphasis on pursuing collaborative watershed governance, which have significant implications for First Nations. With the May 2014 approval of the *Water Sustainability Act*, the potential for modified water governance arrangements in the province has become more tangible, at least on paper. One of the WSA's seven key policy directions is to enable a range of governance approaches, with emphasis on a collaborative watershed-based approach to planning and potential for delegated governance. The WSA has been a controversial topic for First Nations in the province. The Act has been widely criticized by First Nations across BC for a host of reasons, including the Province's insufficient consultation with First Nations in a government-to-government relationship during the WSA's development, and the legislation's continued reliance on a First in Time, First in Right water allocation scheme (see *Results Part 1* below).

3. In the context of increased legal recognition of Aboriginal rights and title, it now is widely recognized that First Nations need to have an increased and meaningful role in territorial and water governance moving forward.

Despite the legal fact that the majority of BC is unceded Indigenous territory, First Nations have historically been excluded from colonial governments' decision-making and management frameworks for fresh water. Today, however, through a series of legal decisions, most recently the 2014 *Tsilhqot'in* case, the Supreme Court has clearly established that Aboriginal rights and title can no longer be legally ignored and that First Nations must be involved in planning and decision-making in their territories in a meaningful way that respects their rights. As the legal landscape of rights and title continues to evolve, so too do the requirements and impetus for colonial governments to engage meaningfully with First Nations in land and water governance and management.

“Water is an important subject to be considered in rebuilding First Nations governance” (444), where, “...at the outset, the most important point for our Nations is, who owns the water, and who has the right to determine access to water for all the possible uses.”

(BC Assembly of First Nations 2010)



LEGAL DECISIONS ON ABORIGINAL RIGHTS AND TITLE

From the 1970s through the 1990s, a series of court cases began to shift the discussions and bring Aboriginal rights and title to the forefront. Critical outcomes from these cases include, but are not limited to: confirmation that Aboriginal title to land existed at the time of the 1763 Royal Proclamation (*Calder* 1973) and continues to exist (*Delgamuuk’w* 1997); declaration of Aboriginal title to specific lands (*Tsilhqot’in* 2014); establishment of criteria

to determine whether an Aboriginal right exists and how a government may be justified to infringe upon it (e.g. *Sparrow* 1990; *Van der Peet* 1996); and development of requirements for consultation and accommodation (e.g. *Haida* 2004). Aboriginal rights were written into the Canadian Constitution in 1982 through Section 35(1), which recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples of Canada (Morellato 2008).

RESEARCH QUESTIONS

In light of these points and shifts underway, it is critical to give attention to the complex histories and interactions of Indigenous and colonial water governance in BC, and to better understand the existing barriers and opportunities in water governance for First Nations. The two main questions this research explored were:

1. How have colonial water governance frameworks (including the water allocation scheme and distributions of decision-making authority) impacted the Lower Similkameen Indian Band (LSIB) and other First Nations in British Columbia?
2. Based on the existing state of water governance in BC, what are some of the potential implications for First Nations of a shift towards collaborative watershed governance?

WHAT IS COLONIAL WATER GOVERNANCE?

The term *colonial water governance* refers to systems of water governance implemented by colonial governments in Canada, understood here as: “The range of political, organizational and administrative processes through which communities articulate their interests, their input

is absorbed, decisions are made and implemented, and decision makers are held accountable in the development and management of water resources and delivery of water services” (Bakker 2003: 3).

RESEARCH APPROACH AND METHODS

This research project involved a case-study with the Lower Similkameen Indian Band (LSIB) of the Syilx Nation, supported by additional document review and interviews to gain a broader provincial perspective. We first conducted interviews with natural resource staff and others whose work addresses some aspect of water, querying the types of barriers and opportunities they encounter working within colonial water governance systems. This project also involved three neighbourhood or family meetings, in which we gathered in a family home over a meal, neighbours and family members joined, and we discussed concerns about water and ideas about how to improve water governance in an open talking circle format. To get a sense of perspectives outside of the LSIB, we interviewed natural resource staff from four other First Nations in BC, and members of two existing watershed boards in BC. This research was also supported by attendance at several First Nations-led water workshops, as well as document review (e.g. First Nations’ submissions to the *Water Act* modernization process). We recognize the tremendous diversity within and between First Nations and do not suggest that results are representative of the views of all LSIB members or of different First Nations across BC.



The Similkameen River valley by Keremeos (photo by Bryant DeRoy)

Water in the Western United States was also allocated on a First in Time, First in Right basis; however, through the *Winters* doctrine, which arose out of a court case with the Fort Belknap Indian Reservation in Montana in 1908, tribal water rights were explicitly designated within the system. The *Winters* doctrine affirmed that tribal water rights were assigned at the time of reserve creation, and that reserve water rights were flexible, unquantified, and encompassed *future* tribal reserve water needs.¹

“The “First in Time, First in Right” system of water allocation does not consider the inherent rights that Lower Similkameen Indian Band have in regard to the use and management of waters in the Similkameen Valley and within the Traditional Territory of the Lower Similkameen Indian Band; the Lower Similkameen Indian Band has been using these for cultural and sustenance purposes since time immemorial.” ~LSIB Submission re. *Water Act* modernization

RESULTS

(1) CONCERNS ABOUT WATER LICENSING

A major theme in interviews was concern and uncertainty about the impacts of BC’s water licensing system on First Nations’ water access, rights, and governance. Water is allocated in British Columbia through a First in Time, First in Right licensing scheme. This is basically a first-come, first-serve system: “Water rights in B.C. may be exercised under a system of priorities according to their respective priority dates. During times of scarcity, water licenses with the earlier priority dates are entitled to take their full water allocation over the junior licenses, regardless of the purpose for which the water is used” (MOE 2013: 17). However, despite the fact that First Nations were undeniably the earliest users of water in the province, the water rights that the provincial and federal authorities accorded reserve lands were often not registered as holding the earliest priority date. On the Similkameen River, for instance, the Lower Similkameen Band holds a license that is 61st in priority, out of a total of 105 licenses on the river.

- **Overallocation:** “Well, there is a limit to what the river can provide and there are so many people who have licences for water...Who is deciding how much water is being used? How many gallons can the water put out here before it is compromised?” (Interviewee April 2014)
- **Competing with other water users:** “We have some very historical water rights but at the same time they [the Province] don’t advise us if those are being fulfilled or if anything is infringing on them. So again that’s for us to police ourselves, I guess. And we’ve had difficulties with adjacent property owners to the reserve in fighting about water rights.” (Interviewee April 2014)
- **Lack of information and transparency:** “Water licensing and water rights kind of underlies everything. But we don’t have a full understanding of who holds the licenses, how much water is allocated, how the whole system works...” (Interviewee May 2014)

The basic principles of the First in Time, First in Right (FITFIR) system are maintained in the new Water Sustainability Act, passed in 2014. This falls short of responding to the many issues and questions that Indigenous communities and organizations have raised about water licensing (such as via submissions to the Water Act modernization process), and does not address the topic of Aboriginal rights and title to water. Above all, the WSA fails to explicitly recognize Indigenous peoples as the First in Time’ senior water rights holders.

It is important to recall that under the FITFIR system, the earliest recorded license has priority access to water in times of shortage. Water scarcity is becoming a pressing reality in many regions of the province, particularly in the Okanagan. It is in instances of water scarcity that the FITFIR system will come into force and those license holders lower down the priority list, including some First Nations, could face uncertainty in water access. The box above summarizes some key concerns interviewees related about water licensing:

(2) BARRIERS AND CHALLENGES IN COLONIAL WATER GOVERNANCE

From interviews and document review conducted in this research, we highlight three barriers in the colonial water governance framework:

There are fundamental contestations over jurisdiction and tensions with the Province. A core tension within the existing colonial water governance framework in BC is the ongoing lack of observation of First Nations' rights and jurisdiction, the Province's assertion of exclusive Crown ownership over water, and the struggle for First Nations to be, as one interviewee stressed, "not consulted but *engaged*" in decision-making related to water. Despite legal recognition of Aboriginal rights and title, and agreements signed between First Nations and the Province that acknowledge the need for government-to-government relationships and shared decision-making processes, the translation into practice in colonial water governance is not being consistently experienced. Many First Nations have voiced their concerns that the consultation and approval process for the WSA failed to uphold this obligation and that First Nations were lumped in with other 'stakeholders' in providing comments on the legislation.

The colonial governance framework for water is fragmented and excludes Indigenous laws and knowledges. Decontextualized policies and fragmented lines of accountability stood out as other key water governance challenges. Several interviewees noted that water policies administered by colonial governments do not always respond adequately to local conditions and needs. Further, interviewees highlighted that within colonial water governance systems, there is a lack of consideration for the diverse cultural and spiritual relationships, laws, and forms of governance for water that different First Nations practice and uphold. As one natural resource officer in the Okanagan summarized, "it [current water governance] is still completely missing that other [Indigenous] worldview."

Capacity and funding are persistent barriers for First Nations. Interviewees highlighted funding and capacity challenges as key constraints First Nations natural resource staff face in water governance, which are experienced in very concrete ways in terms of insufficient staffing, funding, and time. Water is often just one of a host of responsibilities in a given staff member's portfolio, and as one interviewee explained: "we all wear so many hats and get pulled in so many directions."

At the confluence of the issues described above – contested jurisdictions, fragmentation, and capacity challenges – lies the outstanding matter of lack of trust. In the words of one interviewee, "the distrust is on so many levels and so many ways." First Nations have been given little basis to trust that they will be engaged respectfully in water governance.

(3) OPPORTUNITIES AND TENSIONS OF COLLABORATIVE WATERSHED GOVERNANCE

Although the WSA does not specify the form of governance that could be applied at the watershed-level, the legislative proposal stipulates a "collaborative public process" (60) and "greater involvement and participation for First Nations in water management and watershed planning processes" (6). Thus, there are broad suggestions there will be some forms of collaborative watershed governance entities (e.g. authorities or watershed boards) with First Nations' representation. The following four themes capture some key barriers and opportunities of a shift towards collaborative watershed governance:

Watershed boundaries might delineate more appropriate governance areas. Some interviewees described that a shift towards watershed boundaries might better align with the boundaries of different First Nations' traditional territories in British Columbia. Others suggested that watersheds might be better scales to work at to consider cumulative impacts on water.

Jurisdiction is an outstanding concern. There are doubts about whether there will be adequate provisions for power-sharing and recognition of First Nations' rights and authority in collaborative watershed planning initiatives: "*First Nations as rights holders should be able to negotiate shared decision making models so that their rights are not competing with all users in a watershed or be just one of a committee. Working collectively together is important to bring everyone's interest to the table, but in the end, it should be First Nations interests as priority in order to protect their rights enshrined in s. 35 of the Constitution Act.*" (National Aboriginal Economic Development Chair, 2013)

Working with local government on watershed planning is not straightforward. Tensions between the differing scales and strengths of authority between First Nations and local governments can complicate collaboration: "...every band is trying

to work with the local municipality the best they can so that they have a better working relationship...At a Nation level, every time we look at interacting with regional districts we have to be very cautious because we can't recognize that level of government [As previously described, First Nations are not stakeholders or local governments, but rather function as governments that negotiate with the Crown].” (Interviewee April 2014)

Capacity barriers can limit engagement. Given the existing capacity constraints and lack of resources in many First Nations communities, linked to historical and ongoing colonialism, engaging in watershed planning and governance may be infeasible for some communities: *“So it's just a matter of, they have tax dollars and capacity to fund that position whereas for us to have a dedicated person who works in that position with them, we would need to find the capacity for it, so there are still some of those traditional barriers to being able to participate fully into the meaningfulness to that agreement.” (Interviewee November 2013)*



The key to creating a better water governance structure is recognition and implementation of Aboriginal title and rights, negotiating solutions to public policy challenges directly with First Nations on a government-to-government basis, and developing legislation and regulations in collaboration with other First Nations.

(First Nations Summit, submission re. Water Act modernization)

IMPLICATIONS AND CONSIDERATIONS FOR DECISION-MAKERS

Building more just and effective water governance in BC will require fundamental transitions away from the existing colonial water governance framework. The following are some key implications and considerations for decision-makers:

- Although FITFIR is now written into the WSA, certain provisions could begin to address some of the concerns First Nations have raised. Many First Nations have stated clearly the terms on which water allocation should proceed. First Nations' rights to water – of sufficient quality and quantity for existing and future needs – must be explicitly recognized and protected within the licensing system. Further, the Province must meaningfully engage with First Nations in establishing acceptable water licensing standards and thresholds.
- At the heart of moving forward with collaborative water governance are the basic requirements of time and relationship building to move beyond the “crisis of confidence”² and establish trust and capacities for collaboration. This must happen at multiple levels, from the personal to the institutional.
- First Nations and colonial governments must co-create forms of sharing authority and decision-making related to water, in which there is agreement about *which* decisions can and should be shared, and which should remain distinct. Each First Nation will pursue different avenues in terms of what is strategic or possible in their own specific context.
- It is important to develop ways and protocols for working together in the interim, notwithstanding fundamental disagreements about jurisdiction and authority. The Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol establishes a possible model: in the reconciliation protocol, both the Haida Nation and the Province explicitly acknowledge their competing claims to jurisdiction for Haida Gwaii territory. With these competing claims made clear, the Protocol states:
Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making.
- It is critical to consider not only the resources that First Nations require to address existing capacity constraints, but also the capacities that colonial governments and institutions need to build to work respectfully with First Nations in water governance, as well as to respond to the water governance processes and strategies that different First Nations in BC are developing. This could include, for instance, requiring colonial governments to build an understanding of different First Nation's laws and protocols for working together.



The Water Economics, Policy and Governance Network’s (WEPGN) overarching goal is to build knowledge and facilitate exchange between social science researchers and partners, thereby increasing the application of research to decision making and enhancing water’s sustainable contribution to Canada’s economy and society while protecting ecosystems. WEPGN was established with a SSHRC Partnership Grant. WEPGN’s objectives are to:

- Create a vibrant and multidisciplinary network of Partnerships amongst researchers, government agencies and community groups;
- Provide Insight by mobilizing knowledge from social science perspectives to improve our understanding of water’s role in Canadian society and economy;
- Strengthen Connections by facilitating a multidirectional flow of knowledge amongst researchers and partners to promote more efficient and sustainable water management;
- Provide high quality Training experiences for students and practitioners with interests in water policy decision-making and management.

This project by Harris contributes to each of the above objectives, and is a notable example of a project that provides insights by mobilizing knowledge from social science perspective to improve our understanding of water’s role in Canadian society and economy.



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REFERENCES

¹ SHURTS, J. (2000). Indian reserved water rights: The Winters doctrine in its social and legal context, 1880s-1930s (Vol. 8.). Norman: University of Oklahoma Press.

² GOETZE, T. (2005). Empowered Co-management: Towards Power-Sharing and Indigenous Rights in Clayoquot Sound, BC. *Anthropologica*, 47(2): 247-265. doi:<http://www.jstor.org/stable/25606239>

BAKKER, K. (2003). Good Governance in Restructuring Water Supply: A Handbook. Federation of Canadian Municipalities.

BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS (BCAFN) (2010). Section 3.31: Water. In BCAFN Governance Toolkit: A Guide to Nation Building

FIRST NATIONS LEADERSHIP COUNCIL (FNLC) (2011). Open Letter: First Nations Leadership Council Concerns on Water Act Modernization.

KOTASKA, J. (2013). Reconciliation ‘at the end of the day’: Decolonizing Territorial Governance in British Columbia after Delgamuukw. (PhD Dissertation), Resource Management and Environmental Studies, University of British Columbia

MATSUI, K. (2009). Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada. Montreal, QC: McGill-Queen’s University Press.

MINISTRY OF ENVIRONMENT. (2013). A Water Sustainability Act for BC: Legislative Proposal.