

ABORIGINAL PEOPLES AND THE FUTURE OF WATER MANAGEMENT IN ALBERTA



Thursday, June 10 and Friday, June 11, 2010
Grant MacEwan University, Edmonton, Alberta

Convened by the
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University of Calgary

CONFERENCE HANDBOOK

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WATER STEWARDSHIP AND ABORIGINAL AND TREATY RIGHTS

“As a sacred trust we have been given responsibility from the Creator to ensure the integrity of all waters in our lands in all its many forms — from the aquifers deep underground, to the rich marshlands, rivers and lakes that connect and sustain our communities, to the glaciers on the high mountains, to the rains and snow that restore and replenish our Mother Earth in an unending cycle of renewal”.

–The Keepers of the Water Declaration, Liidlii Kue, Denendeh (September 2006)

Aboriginal rights to water

For Aboriginal peoples, water rights flow from their use and occupation of their traditional lands from time immemorial. Waters were not separable from the land and Aboriginal peoples have long asserted the use of water as part of their rights to live on their lands.

Aboriginal rights, including title, are recognized in Canadian law. Justice McLachlin of the Supreme Court has described the Aboriginal interests as “interests in the land and waters”.

However, provincial governments assert that they own the water and that they are entitled to authorize the use of water by issuing licences or permits. The Alberta government says that Aboriginal rights to water have been extinguished and that it has exclusive powers over water in the province. If Aboriginal rights to waters have existed from time immemorial, how can the government claim to have extinguished these inherent rights?

According to Canadian law, Aboriginal rights can only be extinguished by treaty, surrender or legislation that states a “clear and plain intention” to do so. Thus there are three questions that must be asked:

- Did Aboriginal peoples in Alberta agree to give up their water rights when they signed treaties with the Crown?
- Did the Crown extinguish Aboriginal water rights by legislation in 1894?
- Were Aboriginal rights to water extinguished by the 1930 *Natural Resources Transfer Agreement (NRTA)*?

If the answers to these questions are negative, then Aboriginal water rights still exist.

The promise of the Alberta Treaties

The text of the Alberta Numbered Treaties (Treaties No. 6, 7, and 8) contains a provision stating that Aboriginal peoples are giving up their rights to lands (the “land surrender clause”). The understanding of Aboriginal peoples is that land was not given up, they only agreed to share it. The treaties do not expressly mention waters, except for a clause in Treaty 7 that reserves to the Crown certain rights to the rivers of the reserves set aside for the First Nations. This was understandable as water was not viewed as separate from the land promised to First Nations.

The promise of the treaties was to build sustainable communities and to ensure that First Nations continue to gain a livelihood from the land. The British Crown and the First Nations wanted the

First Nations to remain economically self-sufficient, by practicing agriculture and stock raising, and/or by pursuing traditional activities such as hunting, trapping, fishing and gathering. The written text of the treaties specifically protected the rights to hunt, trap and fish (rights to a livelihood) and provided for the creation of reserve lands and the provision of agricultural tools and cattle. The oral promises made on behalf of the Crown at the time of treaty-making confirmed these intentions. Without water, the treaty rights granted could not have been exercised.

The Crown asserts ownership of water and control over water with the *North-west Irrigation Act (NWIA) in 1894 and 1895*

The federal government passed the *NWIA* in 1894 to ensure access to irrigation and encourage settlement. The British Crown asserted the exclusive right to use surface waters and federal ownership of all waters (1895 amendment) in the Prairie Provinces. The *NWIA* did not mention, and did not expressly revoke, Aboriginal water rights. There was no “clear and plain intention” to extinguish existing Aboriginal or treaty rights. In fact, the declaration by the Crown of an exclusive property interest in water was made subject to prior rights inconsistent with that declaration. The Act was passed while treaty negotiations were ongoing in what is now Alberta. Treaties 6 and 7 had already been signed in 1876 and 1877, and Treaty 8 would be signed in 1899. It is unrealistic to believe that the government wanted to extinguish Aboriginal water rights by legislation at the same time as treaty negotiations were ongoing. Remember that government representatives negotiating the treaties promised Aboriginal peoples that they could continue to use waterways for transportation, fishing, and everyday use and were also promoting their settlement on reserve lands to practice agriculture.

The Crown transfers lands and resources to the Prairie Provinces under the *Natural Resources Transfer Agreements (NRTAs) in 1930*

The province of Alberta was established in 1905 but the province did not have authority over lands and resources within its borders. In 1930, Canada and the Prairie Provinces agreed that certain lands and resources would be transferred to the provinces under the *NRTAs*. The list of resources transferred did not specifically include waters. It is only in 1938 that the *NRTA* was amended to “clarify” that surface water was included in the transfer. The amendment stated that the transfer of water was subject to the interests or rights in waters that existed in 1930. This means that Aboriginal or treaty rights to water that had not been extinguished by the *NWIA* in 1894 were excluded from the transfer. In addition, the *NRTA* did not extinguish the Indian interest in reserve lands and confirmed that new Indian reserves that would be created to fulfil the Crown’s obligations to the Indians would be administered by Canada. The province did not acquire any rights in water and waterbeds on reserve lands and did not gain control over these waters.

What can we conclude about the water rights reserved by the treaties?

- At a minimum, First Nations have rights to hunt, fish, trap and gather, understood as rights to live off the lands and its waters (livelihood rights).
- These rights exist both on reserve lands and on traditional lands not “taken up” by government.

- Water is essential to the exercise of these treaty rights: in addition to hunting, trapping, fishing and gathering, the treaty rights also include the right to travel and navigate on waterways, the right to use water for domestic uses, and the right to use water for spiritual, ceremonial and cultural purposes.
- On reserve lands, Aboriginal people claim additional rights to water, based on the argument that reserves were created to encourage agriculture and cattle raising and to provide an alternative livelihood to those who chose to settle on reserve lands.

Note:

- these water rights have not been recognized or denied by a Court in Canada;
- the Alberta government recognizes the treaty rights to hunt, fish and trap, but defines these rights very narrowly, i.e. “for food” only;
- the Alberta government asserts its ownership of all waters in the province, including groundwater since 1962;
- the Alberta government states that the “land surrender clause” in the treaties has extinguished Aboriginal water rights on traditional lands;
- the Alberta government states that it was given ownership of waters and river beds in the province and jurisdiction over water rights by the NRTA.

Additional Sources:

David K. Laidlaw and Monique Passelac-Ross, “Water Rights and Water Stewardship: What About Aboriginal Peoples?” (2010) 107 Resources: The Newsletter of the Canadian Institute of Resources Law, online: <<http://dspace.ucalgary.ca/bitstream/1880/47784/1/Resources107.pdf>>

Monique Passelac-Ross & Christina M. Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still “Exist”? How Extensive are They?*, Occasional Paper #29 (Calgary: Canadian Institute of Resources Law, 2010), online: <<http://dspace.ucalgary.ca/bitstream/1880/47813/1/DefiningOP29w.pdf>>

Merrell-Ann S. Phare, *Denying the Source – The Crisis of First Nations Water Rights* (Victoria: RMB, 2009)

THE PROVINCIAL PICTURE

Evolution of the Provincial Water Act

The journey towards the modern day *Water Act* began with the *North-west Irrigation Act (NWIA)* passed by the federal government in 1894. This Act stated that the Crown owns all water and the right to divert, use and generally, disturb it. The Crown would then allocate to others the right to divert, use or disturb water through legislation. This system continues today. Because the provincial government asserts that it owns all waters in the province, nobody can legally divert, use or disturb water without an authorization issued under the *Water Act*.

Water is allocated under a priority system based on the seniority of the licence (i.e., older licenses had higher priority). For example, during water shortage periods, an irrigation farmer with a senior licence will be able to divert water before a farmer with a recently issued licence. The system is sometimes referred to as a “first in time first in right” or “FITFIR”, and is active only when there is an insufficient supply of water to meet the needs of all licence holders. The Alberta government is responsible for enforcing FITFIR, which, to this day, continues to be the system of water allocation under the *Water Act*.

Timeline and key dates

- Water regulation started with *the North-west Irrigation Act* of 1894.
- Province took ownership and control of surface water resources under the *Natural Resources Transfer Agreement (NRTA)* of 1930.
- In 1931 the *Water Resources Act (WRA)* was passed, and remained law from 1931 to 1999. The *Water Resources Act* was replaced due to the fact that it was in many ways outdated. Commonly cited problems with the WRA include that it contained many uncertainties, especially regarding riparian rights, and it was inflexible, as water rights would attach to a particular parcel of land.
- In 1999 the *Water Act* came into effect, and remains the governing legislation for water in Alberta.
- In 2003, the government released *Water for Life: Alberta’s Strategy for Sustainability*. The Strategy was renewed in 2008.

The Water Act

What is the *Water Act*?

The *Water Act* is the governing legislation in the Province of Alberta regarding water. It is primarily concerned with the allocation of water licences, the transfer of water licenses, water management planning, regulatory procedures, approvals and exemptions, and enforcement mechanisms.

What are some of the key provisions?

Definitions — Subsection 1(m) defines “diversion of water” as “the impoundment, storage, consumption, taking or removal of water for any purpose, except the taking or removal for the

sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment, and any other thing defined as a diversion in the regulations for the purposes of [the] Act”. Subsection 1(1)(b) defines “activity” as encompassing almost any undertaking that can disturb water.

Statutory authorizations — Under section 36 of the *Act*, no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized or exempted under the Act or its regulations. For example, there is a household use exemption, but something like general land drainage would not be exempt and would require an approval under section 36.

Household use exemption (riparian right) — Section 21 states that “Subject to ... any exemptions specified in the regulations, a person who owns or occupies land that adjoins a river, stream, lake, natural watercourse or other natural water body ... has the right to commence and continue the diversion of the water that adjoins that land for household purposes”. The same rules apply to groundwater.

Statutory alteration of other riparian rights — Subsection 21(3) — Nothing in this Act is to be construed so as to repeal, remove or reduce any rights held at common law by a riparian owner or occupant of land or by a person who owns or occupies land under which groundwater exists, other than the right to the continued flow or diversion of water.

Current Review of the Water Allocation and Management System

The province of Alberta wants to reform its water legislation to meet the challenges of a growing population and economy and a changing climate. In 2009, the government received advice from three groups of experts established under various government initiatives. Concerned citizens have also developed their own recommendations and asked for an “overhaul to Alberta’s water rights system, to ensure that water is secured for people and the environment”. The government has announced that it will hold public consultations on the proposed review of its water allocation and management system in the summer of 2010. It has stated that it will seek input from First Nations on water use and watershed planning initiatives through a separate yet parallel process.

Watershed Planning Under the Water Act

Alberta’s *Water for Life Strategy* envisions that there will be a water management plan for each watershed in the province, and currently ten watersheds have organizations formally recognized as Watershed Planning and Advisory Councils to lead in watershed assessment and planning. This is in line with section 9 of the *Water Act*, which specifically authorizes the Minister to require a water management plan be developed for a region. To date only one management plan has been completed and approved: the South Saskatchewan River Basin (SSRB) Water Management Plan. This plan is supposed to inform decisions regarding water allocation and transfers in the region.

Key features of the SSRB Water Management Plan

- Using section 53 of the *Water Act*, it closed the basin to new licenses enabling water transfers.

- Also using section 53 of the *Water Act*, it established a crown reservation for all unallocated water in the basin.
- It lists matters and factors for mandatory consideration by the Director in processing applications for licences and transfers.
- It recommends the use of Water conservation objectives and holdbacks to help protect river flow requirements.

DID YOU KNOW?

Although surface water came under legislation in 1894, groundwater did not come under legislation until 1962, when it was brought under the *Water Resources Act*. Once this happened, the same rules that applied to surface water then applied to groundwater.

Additional Sources:

Water For Life Alberta, online: <<http://www.waterforlife.alberta.ca>>

Government of Alberta South Saskatchewan River Basin Page, and the SSRB Water Management Plan, online: <<http://environment.alberta.ca/01233.html>>

Alberta Water Portal guide to Legislation and Regulation in Alberta, including links to the *Alberta Water Act* and other provincial legislation, online: <http://www.albertawater.com/index.php?option=com_content&view=article&id=54&Itemid=60>

Water Matters and Ecojustice, Share the Water: Building a Secure Water Future for Alberta, online: <<http://www.water-matters.org>>

THE FEDERAL PICTURE

The Constitutional Context

Canada's *Constitution Act, 1867* allocates legislative powers to the federal and provincial levels of government. The Constitution gives each respective level of government exclusive jurisdiction to pass laws with respect to specific matters listed under the Act. However the Constitution does not state explicitly which level of government has control over "water". As a result, both the provinces and the federal government have a role to play in regulating water.

The list of powers given to the federal government under the Constitution gives the government jurisdiction over various aspects of the environment (including water) and public health. They allow for potentially significant federal participation in water management and protection. These heads of power include:

- Peace, order and good government (section 91),
- Trade and commerce (subsection 91(2)),
- Navigation and shipping (subsection 91(10)),
- Sea coast and inland fisheries (subsection 91(12)),
- Criminal law (subsection 91(27)),
- Federal works and undertakings (subsections 92(29) and 92(10)),
- Canals, harbours, rivers and lake improvements (section 108).
- Power to uphold treaties of the Empire (section 132).

The constitutional division of powers means, in effect, that the federal and provincial governments share jurisdiction over water, environmental protection and public health.

Some key water-related statutes administered by the federal government

- **Canada Water Act** — authorizes agreements with the provinces for the designation of water quality management areas, and for the delineation of flood plains and hazardous shorelines to control flooding and erosion; administered by Environment Canada.
- **Navigable Waters Protection Act** — prohibits dumping of wastes that may interfere with navigation and prohibits construction of works in navigable waters without approval; administered by Transport Canada.
- **Canadian Environmental Assessment Act** — provides an opportunity to identify, assess and mitigate the effects of projects that could have significant impacts on groundwater or surface water.
- **Canadian Environmental Protection Act, 1999** — establishes a regime for identifying, assessing and controlling toxic substances; imposes reporting requirements on anyone releasing a toxic substance; creates a national inventory of toxic releases; requires the development of Pollution Prevention Plans; controls nutrient discharges and marine pollution; administered by Environment Canada.
- **Fisheries Act** — protects fish by prohibiting habitat disturbances and the deposit of "deleterious substances" in water frequented by fish; ensures construction of fish-ways

around any obstruction in a waterway; administered by Fisheries and Oceans and Environment Canada.

- **International Boundary Waters Treaty Act** — implements the 1909 Boundary Waters Treaty between the United States and Great Britain (on behalf of Canada) establishing principles and guidelines for the management of boundary and transboundary waters in order to prevent or resolve disputes over water quality and water quantity; administered by Foreign Affairs and International Trade.
- **International Rivers Improvement Act** — along with the International Boundary Waters Treaty Act, this Act regulates the use/alteration/works affecting waters flowing over Canada-U.S. borders; administered by Environment Canada.
- **Canada Shipping Act** — controls pollution from ships by imposing penalties for discharging pollutants without a permit or failing to report a spill; administered by Transport Canada.
- **Arctic Waters Pollution Prevention Act** — controls pollution from ships in Arctic waters by prohibiting any deposit of waste in prescribed Arctic water zones or where it may enter prescribed Arctic water zones without authorization; requires anyone who deposits waste or who is in danger of depositing waste to report it; administered by Indian Affairs and Northern Development.
- **Dominion Water Power Act** — requires authorization from the Minister to use public lands for hydroelectric projects; administered by Parks Canada.
- **Northwest Territories Waters Act and Yukon Waters Act** — authorizes the federal government to take responsibility for inland waters and to delegate water management responsibilities to territorial governments; prohibits depositing waste in these waters without being authorized by a licence or regulations; administered by Indian Affairs and Northern Development.

What are some of the most important federal laws governing water?

Some of the most important federal laws for federal involvement in water management are the *Canada Water Act*, the *Fisheries Act*, the *Canadian Environmental Protection Act*, and the *Navigable Waters Protection Act*.

What does the *Canada Water Act* do?

Enacted in 1970, the *Canada Water Act*, administered by Environment Canada, has several provisions that govern water quality in general. The Act:

- Authorizes various federal-provincial arrangements such as joint subcommittees, programs or agreements with respect to water resource management (Part I);
- Has the potential to regulate discharges of waste into “prescribed water quality management areas” and establishes federal water quality management programs for inter-jurisdictional waters (Part II). However this section has not been invoked since the Act was passed in 1970;
- Establishes advisory committees to assist in the implementation of the Act (section 28); and
- Requires the Minister of the Environment to report annually to Parliament on operations under the Act (section 38).

What does the *Fisheries Act* do?

The *Fisheries Act* was first enacted in 1868 and is administered by the Department of Fisheries and Oceans. Its primary goal is to protect fish and their habitat. The Act contains some strong provisions relating to water pollution, and therefore provides some protection for surface water. The Act:

- Prohibits the harmful alteration, disruption or destruction of fish habitat (subsection 35(1));
- Prohibits the deposit of “deleterious substances” into or near waters frequented by fish (subsection 36(3));
- Enables the passage of regulations in relation to the deposit of waste, pollutants or deleterious substances (subsections 36(4), (5) and (43)); and
- Imposes civil liability for loss or expenses caused by the unlawful deposit of deleterious substances (section 42).

Persons convicted for contravening “fish habitat” and “deleterious substance” provisions face substantial penalties under the Act, such as \$1 million fines, jail terms, profit-stripping, licence suspensions and restoration orders (subsections 40(2), 79.1 and 79.2).

What does the *Canadian Environmental Protection Act* do?

The *Canadian Environmental Protection Act, 1999* is the centrepiece of the federal government’s pollution control regime. It is principally administered by Environment Canada, although Health Canada has certain responsibilities in relation to the assessment and regulation of toxic substances.

The underlying principles are to ensure pollution prevention, achieve sustainable development, protect biological diversity, exercise caution in cases of scientific uncertainty, adopt an ecosystem approach to environmental management, and virtually eliminate persistent and bioaccumulative toxic substances.

The Act contains numerous provisions which address water pollution and environmental enforcement, and, as a result, provides some degree of protection for surface waters. For example, the Act:

- Creates a public right to formally apply for an investigation of suspected contraventions of the Canadian Environmental Protection Act (sections 17 to 21);
- Creates a public right to bring a civil “environmental protection action” in respect of contraventions of the Act (sections 22 to 38);
- Creates a civil cause of action for loss or damage resulting from contraventions of the Act (sections 39 and 40);
- Establishes a regime for identifying, assessing and regulating toxic substances (Part 5);
- Regulates ocean dumping and protects the marine environment from land-based sources of pollution through non-regulatory means (sections 120 to 137);
- Controls Canadian sources of international water pollution through regulations, interim orders or pollution prevention planning (sections 175 to 184);

- Controls transboundary movement of hazardous waste, hazardous recyclable material and prescribed non-hazardous waste for final disposal (sections 185 to 192).

A number of water-related regulations have been passed under the *Canadian Environmental Protection Act* with respect to ocean dumping, phosphorus concentrations, pulp and paper effluent, chlorinated dioxins and furans, and pulp and paper mill defoamer and wood chips.

Persons convicted of contravening the Act face substantial penalties — up to \$1 million in fines, jail terms, profit-stripping restoration and restitution orders (sections 272 to 294). In certain circumstances, a person charged with an offence may avoid prosecution by agreeing to undertake prescribed “environmental protection alternative measures” (sections 295 to 297).

What does the *Navigable Waters Protection Act* do?

A public right of navigation exists in Canada. This right is not written anywhere; it is a common law right. If the waters are navigable, then the public has the right to navigate and this right can only be restricted by an Act of Parliament. Written in 1882, the *Navigable Waters Protection Act* (NWPA) is one such Act. Its purpose is to ensure a balance between the public right of navigation and the need to build works, such as bridges, dams or docks for example, in navigable waters. The NWPA prohibits the construction of works in navigable waters, unless the work, its site and plans have been approved by the Minister of Transport on agreed to terms and conditions. In addition, the Act contains measures regarding the removal of wreck or other obstacles to navigation and forbids to throw or deposit any material in navigable waters.

DID YOU KNOW?

The 2010 Federal Budget, known as Bill C-9 the *Jobs and Economic Growth Act*, includes provisions will severely reduce the strength of the *Canadian Environmental Assessment Act*, one of the most important pieces of federal environmental protection legislation.

Additional Sources:

Federal Legislation Relating to Water, online: <<http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1>>

Resource Library for the Environment and the Law Water FAQ, online: <<http://www.ecolawinfo.org/WaterFAQ-Intro.aspx>>

Watered Down: Overcoming Federal Inaction on the Impact of Oil Sands Development to Water Resources, released by Water Matters, online: <<http://www.water-matters.org/pub/watered-down>>

J. Owen Saunders & Michael M. Wenig, “Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation” in Karen Bakker, ed., *Eau Canada, The Future of Canada's Water* (Vancouver: University of British Columbia Press, 2006)

SAFE DRINKING WATER IN FIRST NATIONS COMMUNITIES

The Legislative Situation

Although the federal laws regarding water management and protection outlined earlier in this handbook are relevant, there is no law presently in force that specifically regulates drinking water quality or safety for First Nation communities. In practice, a duty is imposed on each individual First Nation to assure a certain level of water quality as terms of individual funding arrangements with specific First Nations. Indian and Northern Affairs Canada (INAC) has a *Protocol for Safe Drinking Water in First Nations Communities* which sets “standards” for the design, construction, operation, maintenance and monitoring of drinking water systems. However, the *Protocol* is not legally enforceable.

Although water use and water withdrawals are generally regulated in Alberta by the *Alberta Water Act*, the Alberta Government does not generally require either First Nations or Métis Settlements to obtain a provincial water license prior to withdrawing surface water.

The Regulatory Reality

“In our view, until a regulatory regime comparable with that in the provinces is in place, INAC and Health Canada cannot ensure that First Nations people living on reserves have continuing access to safe drinking water”

–2005 Report of the Commissioner of the Environment and Sustainable Development

The regulation of drinking water sources and supply for aboriginal communities is far more complex than it is for other Canadian communities. Determining which law applies, or if there is any law at all, depends on many factors including: location of the source water, location of the aboriginal water users, location of the water treatment and distribution system, and ownership of the treatment and distribution system.

As an example, different laws and policies apply to each of the three First Nation land designations. Depending on whether the water is found on numbered treaty reserve land, land within numbered treaty areas, or treaty land entitlement areas, completely different rules may apply. The rules may be different again for Métis water supplies, and they could change depending on whether or not the Métis are residing within designated Settlements or not.

Federal Policy and Practice

In practice, three federal departments are presently involved with drinking water protection for First Nations communities: Indian and Northern Affairs Canada (INAC), Health Canada, and Public Works Canada.

Indian and Northern Affairs Canada

INAC plays the main role with respect to the provision of safe drinking water on Reserves, and it does so in the following ways:

- Contribution Agreements — In lieu of federal regulatory action, INAC has chosen to impose “standards”, directives and procedures for the construction and operation of drinking water facilities for First Nations as conditions to receive federal financial support.
- Training- INAC continues to impose “mandatory” training for operators as a term of contribution agreements, not by law. Consequently where no contribution agreement exists, no requirement for training exists.
- Protocol — In March 2006, INAC issued the *Protocol for Safe Drinking Water in First Nation Communities*, based on a combination of Canadian laws and regulatory “best practices”. The *Protocol* requires compliance with its terms for any water system that produces drinking water destined for human consumption, that is funded in whole or in part by INAC. There are however no provisions which make the *Protocol* legally enforceable.
- Compliance — Compliance enforcement is difficult for INAC, as the standards imposed under the contribution agreements are not imposed by law. Instead they are much more like the terms of a contract, and the only response to a failure to adhere to the Guidelines or the Protocol is to hold back funds. As a result, for those First Nations that are not party to any contribution agreement, drinking water standards are essentially unsupervised by the government.

Health Canada

Health Canada plays a strictly advisory role in the management of safe drinking water on reserves. For example, they may recommend a boil water advisory to a First Nation, who in turn is considered by the department to have authority to lift or issue notices or advisories. They may also test and sample drinking water quality and provide funds to First Nations to monitor water supplies and to test drinking water quality themselves. However, Health Canada has no comprehensive plan in regards to safe drinking with specific target dates to meet the needs and concerns of aboriginal people living on reserves.

The Department of Public Works and Government Services Canada (Public Works)

The Department of Public Works is the agency that signs the contribution agreements with First Nations for financial support to construct and operate water treatment infrastructure or related operator training.

Alberta Policies and Practices

The government of Alberta holds the view that Aboriginal water use is subject to provincial laws, and regulates water use and diversion under the *Alberta Water Act*. However, despite its view on Aboriginal *use* of water, the Alberta Government has a different stance about the *drinking water* of Aboriginal peoples. Alberta considers that First Nations are exempt from provincial drinking water laws. Drinking water for aboriginal communities on reserve is governed only by federal guidelines and protocols.

It is unclear how well governed water sources are on reserves in the province. First Nations’ drinking water sources are approximately half ground water and half surface water. Private wells and well drillers are responsible for most well access on reserves, and it is not certain whether or

not well drillers operating on reserve lands are bound by the same laws and protocols as well drillers operating off reserve lands.

What factors should be covered by laws governing drinking water?

The Expert Panel *Report on Safe Drinking Water for First Nations* recommended that a new law include these elements:

- Clarified roles and responsibilities of government and First Nations
- Coverage of drinking water treatment and distribution, and sewage collection and treatment
- Non-piped water delivery systems
- Wells for individual service
- Water withdrawal and use
- Operate certification
- Monitoring

“As long as there are no binding laws in place, there is no legal incentive for the federal government to pursue this policy [of comparable level of health] and uphold its responsibility to maintain adequate drinking water standards on reserves.”

–Randy Christensen *Water proof 2: Canada’s Drinking Water Report Card*

Source:

Linda F. Duncan & Marie Ann Bowden, *A Legal Guide to Aboriginal Drinking Water: A Prairie Province Perspective* (Tomorrow Foundation, The Alberta Law Foundation, The Walter & Duncan Gordon Foundation).

TRANSBOUNDARY ISSUES

1996 Northern River Basins Study

Begun in 1991 and completed in 1996, the Northern River Basins Study (NRBS) was a major \$12 M initiative established by the governments of Canada, Alberta, and the Northwest Territories to assess the cumulative impacts of development on the health of the Peace, Athabasca and Slave River Basins.

In addition to providing a comprehensive scientific overview of the water basin and its ecological makeup, the study contained a number of recommendations regarding key areas such as quality of fish and water, ecosystem health, flow regulation, basin management, and pollution prevention.

In 1997, Canada, Alberta and the Northwest Territories released a response to the NRBS concurring with the recommendations. In their response the governments committed to ongoing improvement of control of water pollution in the northern river basins, to maintaining the integrity of ecosystems, and to facilitating the participation of all stakeholders in their protection

Mackenzie River Basin Transboundary Waters Master Agreement

The Mackenzie River Basin Transboundary Waters Master Agreement (MRBA or Agreement) is the major interjurisdictional instrument affecting the management of northern waters. The Agreement establishes the Mackenzie River Basins Board. It was signed in July 1997 by the Governments of Canada, British Columbia, Alberta, Saskatchewan, the Northwest Territories and the Yukon.

The Agreement contains four main elements:

- principles for cooperative management of the aquatic ecosystem,
- an administration component to facilitate the Board's business and identify its duties,
- provision for neighboring jurisdictions to negotiate bilateral, water management agreements, and
- a dispute resolution mechanism.

It should be noted that the Agreement's approach to dispute resolution does not contain any provisions for binding dispute settlement, whether before a court or in the context of an ad hoc arbitral proceeding. In other words, while the Agreement does provide for staged dispute resolution, including the possibility of studies and investigations, factual reports, recommendation of terms of settlement, and ultimately a possible reference to Ministers, it does not contain any power to order and make binding any settlement.

In signing the Agreement, the Parties committed to the following five principles:

- maintaining the ecological integrity of the aquatic ecosystem,
- managing the use of the water resources in a sustainable manner,

- the right of each Party to manage the use of water resources provided such use does not unreasonably harm the ecological integrity in another jurisdiction;
- providing for early and effective consultation, notification and information, and
- resolving issues cooperatively.

The agreement also makes provision for neighbouring jurisdictions to negotiate bilateral water management agreements to address water issues at jurisdictional boundaries on transboundary streams and to provide parameters on the quality, quantity and flow of water.

Results of the MRBA

Mackenzie River Basin Board

One of the results of the Agreement was the establishment of the Mackenzie River Basin Board (MRBB) to implement the agreement. The Board became fully operational in December 1998 and has thirteen members. Three members represent the federal departments of Environment, Indian Affairs and Northern Development, and Health. Each of the provinces and territories has two members, one government representative and one representative of Aboriginal organizations.

Among other things, the MRBB compiles monitoring results every five years to detect and evaluate trends or impacts on northern waterways.

The Board is not a regulatory or licensing board, and has no legal or policy basis to regulate resource use in any of the jurisdictions. However, the Board may influence regulatory decisions made in the various jurisdictions in a number of ways:

- By providing factual material, such as the State of the Aquatic Ecosystem Reports, to inform development decision makers.
- By participating in and influencing pre or post regulatory processes, such as planning, regional or cumulative environmental impact assessment processes, or ministerial reviews of sensitive decisions.
- By appearing as a “friend of the tribunal” in federal, provincial and territorial public hearings to advocate for the principles endorsed in the Master Agreement.

According to the Agreement the Board's key responsibilities are to:

- Provide a forum for communication, coordination, information exchange, notification and consultation among all six jurisdictions and the public.
- Consider the needs and concerns of Aboriginal people through the provision of culturally appropriate communication, and incorporation of their traditional knowledge and values.
- Recommend uniform objectives or guidelines for the quality and quantity of the water resources.
- Encourage consistent monitoring programs.
- Monitor the progress of implementing the bilateral water management agreements between neighbouring jurisdictions.

- Reviewing the Master Agreement at least once every three years and proposing amendments to the Parties.
- Carry out studies and investigations, as required

Bilateral Agreements Under the MRBA

The Yukon-Northwest Territories Transboundary Water Management Agreement

To date there has only been one bilateral agreement concluded under the MRBA: The Yukon-Northwest Territories Transboundary Water Management Agreement of 2002. Given the limited water resources to which it applies, the agreement is unlikely to have a significant practical effect. However, it is important because it could provide a template for other bilateral agreements with other upstream jurisdictions.

The objectives of the agreement involve references to:

- the ecological integrity of aquatic ecosystems;
- the safety of drinking water and of aquatic species for consumption;
- the prevention, control and minimization of toxic substances;
- the prohibition of extra-basin removals that could affect ecological integrity;
- the provision of opportunities for public participation by those whose water resources may be affected by development activities;
- the fostering of scientific research and use of traditional knowledge with respect to water issues;
- the identification, with appropriate corrective action, of implications of development for the aquatic ecosystem;
- and the provision of public information and the promotion of the consultation process.

There are some criticisms that the substantive measures outlined in the agreement to achieve these objectives are not sufficient. Few substantive provisions are phrased in such a way so as to make them mandatory, and the majority of the language used in the agreement allows compliance to be voluntary, or at the least there are few measures outlined for a concrete dispute resolution process.

Alberta-NWT Memorandum of Understanding on Bilateral Water Management Agreement Negotiations

Although the Yukon-NWT agreement is to date the only bilateral agreement which has been concluded under the MRBA, in 2007 the governments of Alberta and the NWT concluded a Memorandum of Understanding (MOU) on a bilateral water management agreement. While the MOU does not set out in detail what a final bilateral agreement will contain and does not count as a binding agreement, it will undoubtedly be useful in setting and understanding some parameter for future negotiations. Negotiations between Alberta and the NWT are expected to begin in 2010.

Peace River Dams Timeline

1963 – Preliminary site preparation construction began

1964 – Construction on the W.A.C. Bennett Dam itself began

September 22, 1968 – Premier W.A.C. Bennett switched on the dam for power generation

September 28, 1968 – Power from the dam was generated for the first time

1976 – Site C location was selected as a potential third dam on the Peace River.

1980 – Peace Canyon Dam is completed

1982 – B.C. Hydro submitted Site C project to the British Columbia Utilities Commission for review and stakeholder consultation, but no need for a new dam was apparent.

1989 – The potential need for a contingency supply of electricity was identified and Site C was revisited as one of the possible solutions.

1991 – Work on the project was suspended.

2004 – BC Hydro awarded members of Alberta's Athabasca Chipewyan First Nation \$4 Million as compensation for construction of the W.A.C. Bennett Dam in the 1960's

2007 – With demand for electricity continuing to increase, the B.C Liberal government began to consider Site C and project entered Stage 1 review of the feasibility of the project.

2009 – Stage 2 public consultation phase completed, showing province was divided about the benefits of the project.

April 2010 – Premier Gordon Campbell announced government decision that Site C will proceed to Stage 3 environmental and regulatory review.

2020 – Projected in-service date for Site C Dam



Overview of the Dams

W.A.C. Bennett Dam

Background

The W.A.C. Bennett Dam is a large hydroelectric earthfill dam on the Peace River in northern British Columbia, Canada. Construction of the dam took approximately five years, from 1963-1968. The total final cost of the construction was approximately \$700 million, and another \$200 million for the 574 miles of transmission lines put in place to accommodate the dam's power generation. On September 28th, 1968, power from the project was generated for the first time.

Quick Facts

Full name: "W.A.C. Bennett Dam", named after Premier Bennett
Length: 2 kilometres
Width: 800 metres
Height: 183 metres
Capacity: 2,730,000 kilowatts
Spillway:
Length: 850 metres
Width: 30 metres
Capacity: 9,205 cubic metres per second
It is also the largest dam on the Peace River

The construction of the dam impacted people living both upstream and downstream. First Nations communities and other residents of the upstream valley were relocated, and in all over 1,700 square kilometres of resource rich land was flooded. The resulting reservoir, the Williston Reservoir, once filled, became the largest man made lake on the planet.

Impacts

Critics of the dam say that many aboriginal groups saw their hunting grounds, homes, and traditional lands flooded with little warning after the construction of the dam. This resulted in several court cases being launched, which are only now being resolved.

In 2004, BC Hydro awarded members of Alberta's Athabasca Chipewyan First Nation \$4 million as compensation for the construction of the W.A.C. Bennett Dam. More recently, in January of 2010 the B.C. liberal government and the Peace River area Tsay Keh Dene First Nation reached a compensation agreement more than four decades after their homes, burial grounds and hunting territories were flooded to create the Bennett Dam. The agreement involves the B.C. government, BC Hydro and the Tsay Keh Dene, and it will give the band a one-time payment of \$20.9 million, and annual payments of \$2 million for as long as power is produced from the dam.

The Kwadacha First Nation has a similar agreement with BC Hydro and the B.C. government for damage suffered during the construction of the dam. They will receive a one-time payment of \$15 million and annual payments of \$1.6 million after settling with BC Hydro and the province over damages from the creation and operation of the WAC Bennett Dam and Williston Reservoir.

Peace Canyon Dam

The Peace canyon dam is a significantly smaller dam than the W.A.C. Bennett Dam, and was built downstream to reuse the same reservoir water and thus increase generating efficiency. The dam was completed in 1980.

Site C Dam

Background

The Site C dam is a proposal by the British Columbia Hydro and Power Authority (BC Hydro) for a large-scale earth fill hydroelectric dam on the Peace River in north-eastern British Columbia, downstream from the Peace Canyon dam.

Although discussions surrounding the possibility of the construction of a third dam on the Peace River have been ongoing since 1958, it is only recently in 2007, when it entered a Stage 1 feasibility review that the Site C dam has become a potential reality.

Controversy

The Site C dam is being presented as a necessary development by BC Hydro and the BC government, as it will provide clean energy required for sustaining growth in British Columbia. However the proposal has been protested by many groups, including the Treaty 8 First Nations. Chief Roland Willson of the West Moberly First Nations has stated that his band is contemplating court action because his people weren't given an opportunity to present their arguments during the project definition and consultation stage. Members of the Treaty 8 First Nations boycotted the official announcement ceremony at the Bennett Dam in April 2010

The dam would create an 83-kilometer-long reservoir, and it would flood roughly 5,400 hectares of land, much of which is valuable for agricultural and wildlife purposes.

Additional Sources:

Northern River Basin Study Government of Alberta homepage: <<http://www3.gov.ab.ca/env/water/nrbs/index.html>>

Mackenzie River Basin Board homepage: <<http://www.mrb.ca/>>

BC Hydro Site C homepage, online: <http://www.bchydro.com/planning_regulatory/site_c.html>

Blog following developments on the Site C dam, online: <<http://www.site-c-dam.com/>>

British Columbia Treaty 8 First Nation homepage: <<http://www.treaty8.bc.ca/>>

Treaty 8 First Nation' Report on Stage 2 Consultation, online: <http://www.bchydro.com/etc/medialib/internet/documents/planning_regulatory/site_c/2010Q2/treaty_8_first_nations.Par.0001.File.Treaty_8_First_Nations_Report_on_Stage_2_Consultation.pdf>

NORTHERN VOICES, NORTHERN WATERS: THE NORTHWEST TERRITORIES WATER STEWARDSHIP STRATEGY

“Water and the land is like blood in the body. If you pollute or cut off water, the land will die. Water is fundamental to all life and we must work together to protect it”.

–Chief Charlie Football Gameti, NWT

Overview

“Northern Voices, Northern Water: The Northwest Territories Water Stewardship Strategy” is a policy document which was released jointly by the NWT Department of Environment and Natural Resources and Indian and Northern Affairs Canada on May 20th, 2010.

The Strategy acknowledges the importance of water to the NWT, in particular its importance to Aboriginal people, which make up approximately half of the total population of the NWT.

The Vision of the Strategy is that the waters of the NWT will remain clean, abundant and productive for all time.

The Guiding Principles of the Strategy are outlined as prioritizing respect, sustainability, responsibility, knowledge, and accountability.

The six Goals of the Strategy are to ensure that:

- the waters that flow into, within or through the NWT are not substantially altered in quality, quantity and rates of flow;
- residents have access to safe, clean and plentiful drinking water at all times;
- aquatic ecosystems are healthy and diverse;
- residents can rely on their water to sustain their communities and economies;
- residents are involved in and knowledgeable about water stewardship; and finally,
- all those making water stewardship decisions work together to communicate and share information.

Ultimately the overall purpose of the Strategy is to safeguard the water of the NWT for future generations to enjoy.

Timeline of events leading up to the Strategy

- **Fall 2006** – Keepers of the Water I
- **March 2007** – Members of the 15th Legislative Assembly pass a declaration that there is a basic human right to water
- **2007** – the GNWT announces it will undertake an initiative to develop a NWT water resources management strategy.
- **September 2007** – Keepers of the Water II.
- **June 2008** – Northern Voices, Northern Waters: Towards a Water Resources Management Strategy for the Northwest Territories, a discussion paper on developing a water resource strategy, is released by the GNWT and INAC.
- **Summer 2008 to Fall 2008** – Presentations on the discussion paper are made at Aboriginal assemblies and water conferences, notably Keepers of the Water III (August) and the Dene National Environment and Water Summit (November).
- **November 2008** – A steering committee made up of representatives from Aboriginal, territorial and the federal government is formed to guide the development of a draft strategy.
- **November 2009** – the draft NWT Water Stewardship Strategy is tabled in the Legislative Assembly.
- **May 2010** – The final version of the NWT Water Stewardship Strategy is released and tabled in the NWT Legislative Assembly.
- **Fall 2010** – The projected date of completion for the action plan based on the NWT Water Stewardship Strategy.

Approaches outlined in the Strategy to meet its goals

The Strategy outlines four inter-related approaches to progress towards its goals. These are stewardship, an ecosystem-based approach within watersheds, understanding and accounting for the value of water and watersheds, and translating information into informed decision making.

Stewardship

Stewardship recognizes that people are part of the environment, and that as water users or water managers we have a duty to ensure our actions safeguard the environment. Some Aboriginal groups consider water to be a steward of people. Vigilance and effective stewardship can help to ensure clean, abundant and productive waters in the NWT and for downstream neighbours.

Stewardship requires the cooperation and coordinated effort of individuals, governments, boards, organizations, communities, industry and others to be successful. The long-term sustainability and health of water is a shared responsibility.

Ecosystem-based Approach within Watersheds

The Strategy is guided by a holistic approach known as an ecosystem-based approach within watersheds. This approach is founded on the understanding that it is important to sustain a diverse and healthy ecosystem for the benefit of people, plants and animals within a watershed.

Applying this approach requires practicing water stewardship at various scales — from local to river basin-wide collaborations. An ecosystem-based approach within watersheds requires that those who make decisions which may affect water understand and consider structure, function, and processes within the ecosystems, as well as all values within the watersheds. It is important to understand both how human actions affect ecosystems, and how ecosystems affect humans.

An ecosystem-based approach places social and economic considerations in the context of ecosystem health and diversity, emphasizing the following key elements:

- People are a part of ecosystems.
- Ecological, social and economic goals are inter-related in water and land use decisions.
- Watersheds are the basic unit of consideration. Other ecological and migratory paths and political boundaries are layered over the watershed boundary.
- Natural processes and social systems are considered in all their complexity to ensure decisions can be adapted based on new information and do not lead to irreversible consequences.
- Interested parties have the opportunity to be involved and collaborate to define problems and find acceptable solutions that anticipate ecosystem change.
- Understandings of ecosystem structure, function and processes along with responses to environmental disturbances are incorporated in decisions.
- The health and diversity of ecosystems and human uses are sustained.

Water and Watershed Values

Water holds significant value for the natural environment and people. Water and watershed features, which include wetlands and forest cover, provide services such as keeping water clean and storing water. These services are valuable to nature and humans. Such services are often overlooked in water and land-use decisions.

Water and land-use decisions are challenging in that many diverse and sometimes conflicting interests must be taken into account. Whenever a decision relating to water and land use is made, trade-offs and compromises occur. Improving the understanding of natural values, prioritizing values and uses, and assigning respective weightings to water and watershed values can help us make more informed decisions regarding water and land use. Water valuation is a tool that can be used to identify and understand the spiritual, cultural, social and economic values within a watershed. Sustainability accounting is a tool that can be used to track how the values of interest change over time.

Values related to human uses include fisheries, energy production, transportation and fur harvesting, to name a few. Natural values include wildlife habitat, areas that naturally replenish groundwater, wetland water filtering services and the stability that forests provide to river banks.

Spiritual and cultural values may be invaluable or irreplaceable. If we use a monetary value to make decisions on water and land use, we need to ensure that values are compared adequately. For example, the value of fishing may be different on a local level than regionally or nationally. Locally, the fish resource may be very valuable to those people who would need to replace a food source if it were lost. Regionally, the money saved through the use of hydroelectric power as compared to money spent on diesel fuel may be considered when making decisions, even if use of hydroelectric power could have an impact on local fisheries. Cultural or spiritual values in a specific area may vastly outweigh any possible commercial value and may indeed be irreplaceable; these two types of values cannot be compared directly.

Water valuation aims to measure water resources using monetary units or dollar value. Many jurisdictions throughout the world are exploring this method to see if it can help in water and land-use decisions. Work with this tool is in its early stages and not yet ready to be fully implemented in the NWT. Water valuation cannot be implemented until community and regional dialogue takes place to identify and define water and watershed values. As well, there is a need to develop and improve methods of assigning values that would allow some comparison and determine how these methods could be applied to improve decisions. Collectively, we must come to some consensus on the various values we attribute to water, watershed features and water uses. Dialogue at the community level is necessary to assign priorities to the various water

Watershed values include spiritual water features, significant aquatic furbearers, waterfowl or fish habitat, navigational channels, river crossings, ice road routes, particularly biodiverse areas, community public water supply sources, significant wetlands that may purify or slowly collect and release waters to a specific area, and recreationally significant areas.

Water valuation means understanding and accounting for the value of water and watersheds.

Sustainability accounting is tracking the value of water and watersheds for consideration in decision making.

uses and associated values. Achieving consensus would lead to broad support for decisions that are better informed, transparent and accountable.

Information to Understanding

Water partners in the NWT have been collecting water-related information for quite some time through multiple studies and monitoring programs. Monitoring activities need to continue. We must ensure that existing and new information (traditional, local or western scientific) leads to increased understanding and continuously informs water stewardship decisions. By doing so, there will be a better understanding of aquatic ecosystems and how humans impact them through their actions. Early detection of change points to gaps in knowledge and areas that require further study. These studies can determine why observed changes occur and what can be done about them. There is also value in using decision support tools to ensure human actions are being assessed in consistent ways and that predictive models help to forecast what changes might occur. Both of these approaches increase understanding and help to make appropriate decisions; however both rely on the input of substantial and accurate information. Using information to increase understanding with the objective of making informed decisions is part of an adaptive management approach.

Components of the Strategy

The Strategy outlines four broad aspects which it refers to as its “Keys to Success”. These four Keys are represented in the image of the drum, pictured below. The Strategy presents that by incorporating and including all these elements, effective and responsible water management can occur.



Source:

For additional resources regarding the NWT Water Stewardship Strategy, please visit the Strategy homepage on the Northwest Territories Department of Environment and Natural Resources: <http://www.enr.gov.nt.ca/_live/pages/wpPages/water_resources_management_strategy.aspx>

Work Together

Build a cooperative environment that supports water managers and water partners in sharing information, building capacity and working together.

Know and Plan

Build and implement multi-disciplinary aquatic monitoring and research programs that consider traditional, local and western scientific knowledge. Use this information to assist in the planning of water-related stewardship activities.

Use Responsibly

Ensure decision makers have tools available that work well together and are easy to use in a consistent manner.

Check Our Progress

Ensure we make progress towards the Strategy's vision of clean, abundant and productive waters.

APPENDIX 1: Court Cases Asserting Water Rights of First Nations in Alberta

Current cases

- *Stoney Nakoda Nations: Assertion of Substantive Water Rights*

In the Alberta Court of Queen's Bench ("ACQB") the Stoney Nakoda Nations are challenging Alberta's assertion of ownership and jurisdiction under the NRTA (Action No. 0601-1454). The Stoney Nakoda Nations claim ownership of lands and waters, including waterbeds, on reserves. This is a broad and extensive challenge as to the validity of Alberta's position. This litigation is at an early stage. Statements of Defence have yet to be filed.

Another action (ACQB Action No. 0301-19586) claims aboriginal title, aboriginal rights and treaty rights in water in lands off reserve.

In an action in the Federal Court (T-340-99), the signatories to Treaty 7 claim that the federal government holds lands and resources (including water rights) in trust for the plaintiffs and has a fiduciary obligation to protect the plaintiffs' rights.

- *Tsuu T'ina Nation and Samson Cree Nation: Inadequate Consultation*

The Tsuu T'ina Nation and Samson Cree Nation (ACQB 0701-02170 and 0701-02169) challenged the Water Management Plan for the South Saskatchewan River. They argued that the Plan had been developed and adopted without proper and adequate consultation with them, and did not adequately accommodate their existing rights to use and enjoy reserve lands, hunting and fishing rights, and asserted Treaty water rights.

The trial decision was not successful. On appeal, the Court of Appeal found that the government had a duty to consult the First Nations on the development of the water management plan (something that the provincial government denied), but that the duty had been fulfilled (*Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137).

- *Beaver Lake Cree Nation: Cumulative Effects of Development*

The Beaver Lake Cree Nation has launched a different litigation (ACQB 0803-06718) against the provincial and federal governments. They argue that the cumulative impacts of multiple project approvals within their traditional territory unjustifiably infringe their treaty rights to hunt, fish, trap for subsistence and for cultural, social and spiritual needs. They also argue that governments have breached their fiduciary duty, They have failed to ensure that they could meaningfully exercise their treaty rights.

This litigation is at an early stage. Statements of Defence have yet to be filed.

Past Cases

- *Peigan Indian Band v. Alberta: Assertion of Substantive Water Rights*

The Peigan Indian Band launched a litigation against the province in 1986 (Action No. 8601-06578), as a result of the proposed construction of the Oldman River dam and reservoir upstream from their reserve. They claimed rights (including ownership) to the water flowing in and to the Oldman River and to the riverbed of the Oldman River within their reserve.

The Peigans also launched actions against the federal government in the Federal Court (Actions No. T-535-88 and T-1486-88).

The actions against the provincial and federal governments were discontinued in 2002 following a Settlement Agreement signed between the Piikani Nation, Canada and Alberta.

- *Siksika Nation Elders Committee and Siksika Nation v. Director, Southern Region, Regional Services, Alberta Environment: Assertion of Water Rights on Reserve*

The Siksika Nation appealed a permit issued by Alberta Environment authorizing the Town of Strathmore to build a pipeline to discharge treated wastewater from its treatment plant into the Bow River, just upstream from the Siksika Water Treatment Plant (Appeal Nos. 05-053 & 05-054). The Siksika claimed that the discharge would affect the river's ecosystem, the First Nation's supply of potable water as well as its recreational and traditional use of the river.

In a Report and Recommendations issued on April 18, 2007, the Alberta Environmental Appeals Board (EAB) recommended substantial amendment to the original permit and asked the Town of Strathmore to minimize its release of treated wastewater into the Bow River and to examine alternatives to deal with this wastewater. In May 2009, the Town and the Siksika agreed that within three years, the Town will construct a channel that will move the effluent to the mainstem of the river, further away from the reserve, and that it will build a new wastewater treatment plant for Strathmore.

Additional Sources:

Canadian Institute of Resources Law, *Summary of Calgary Workshop on Aboriginal Rights to Water*, 6 November 2009 [unpublished]

Nigel Banks, "Water management planning and the duty to consult and accommodate. A comment on *Tsuu T'ina First Nation v. Alberta* [2008] ABQB 547", University of Calgary Faculty of Law Blog on Developments in Alberta Law (8 October 2008), online: <<http://ablawg.ca/>>

Nigel Banks, "Water management planning and the Crown's duty to consult and accommodate: the Court of Appeal rejects First Nations; application for judicial review of the South Saskatchewan Water Management Plan", University of Calgary Faculty of Law Blog on Developments in Alberta Law (7 May 2010), online: <<http://ablawg.ca/>>

APPENDIX 2:
Selected List of Federal Policies and Reports in Relation to Water Resources

Federal Policy Statement on Inland Waters, 1978

Inquiry on Federal Water Policy, 1985 (Environment Canada)

Policy for the Management of Fish Habitat, 1986 (DFO)

Federal Water Policy, 1987

Northern River Basin Study, Report to the Ministers, 1966

Canada Alberta Northwest Territories Response to the Northern Rivers Basins Study Report to the Ministers, 1997

The Mackenzie River Basin Transboundary Waters Master Agreement, 1997, establishing the Mackenzie River Basin Board

Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act*, 2001 (DFO)

Threats to Water Availability in Canada, 2004 (Environment Canada)

Federal Water Framework, approved by a committee of deputy ministers (CESD 2005), but not publicly released

Senate of Canada, *Water in the West: Under Pressure*, 2005, Fourth Interim Report of the Standing Senate Committee on Energy, the Environment and Natural Resources

Environment Canada, *Northern Rivers Ecosystem Initiative* (undated)

Interim Water Management Framework for the Lower Athabasca River (DFO, AENV), February 2007

House of Commons Standing Committee on Natural Resources, *The Oil Sands: Towards Sustainable Development*, Chair: Lee Richardson, March 2007

Government Response to the Fourth Report of the Standing Committee on Natural Resources on *Oil Sands: Towards Sustainable Development*, August 2007

Report of the Commissioner of the Environment and Sustainable Development, Chapter 1, *Protecting Fish Habitat*, Spring 2009

Water Management Framework: Instream Flow Needs and Water Management System for the Lower Athabasca River, June 2009 (Alberta Environment, Fisheries and Oceans Canada)

Report of The Expert Panel on Groundwater appointed by the Council of Canadian Academies, *The Sustainable Management of Groundwater in Canada*, commissioned by Natural Resources Canada, July 2009. Report in Focus (May 2009) presents a summary of the findings

House of Commons Standing Committee on Environment and Sustainable Development, March, May and June 2009 hearings on Oil Sands and Canada's Water Resources. Report not yet published

Appendix 3: The Duty to Consult and Accommodate: Alberta's Response

The Canadian Constitution was changed in 1982 to add a new section, section 35, that recognizes and protects the rights of Aboriginal peoples. These rights now have constitutional status, they cannot be extinguished by government actions or decisions.

The courts in Canada, in particular the Supreme Court of Canada, have said that Aboriginal peoples' rights are not absolute. They cannot be extinguished, but they can be infringed (adversely affected) by government. However, this can only happen under very strict conditions (*Sparrow*, 1990). One of these conditions is that governments must consult Aboriginal peoples and accommodate their rights before infringing these rights ("duty to consult and accommodate").

The duty to consult and accommodate is triggered when government makes decisions or takes actions that may adversely affect the rights of Aboriginal peoples.

The purpose of the consultation process with Aboriginal peoples is to achieve a true *reconciliation* between government and Aboriginal peoples. The duty is to *protect* the rights, not to justify their infringement. It is a substantive duty, not only a procedural one.

The main components of a consultation process as outlined in Canadian law are:

- government, not industry, has the obligation, although government can delegate some aspects of the consultation process to industry;
- consultation must occur early in order to be meaningful: consultation often occurs on proposed projects and operational plans that have already been developed. The law on consultation requires that consultation take place on the development of laws and policies, on strategic decisions (e.g. when mineral rights, leases, licences are issued), on the development of strategic plans (e.g. land use or watershed plans), when the choice of accommodation measures is much larger;
- the level of consultation depends on the type of right infringed, and on how serious the adverse impact may be on the right;
- government must substantially address the concerns of the Aboriginal peoples.

There is a duty to accommodate the rights of the Aboriginal peoples: accommodation is how government addresses the concerns of Aboriginal peoples:

- the law in Canada does not require the consent of Aboriginal peoples;
- consent is most likely required on Aboriginal title lands;
- on lands where Aboriginal peoples have aboriginal or treaty rights, the government must strike a balance of interests, keeping in mind that the guiding principle is the preservation of the Aboriginal interest;
- if government can show that the larger interest requires that Aboriginal rights must be infringed, it must justify its actions. The test to demonstrate to the courts that infringement of Aboriginal rights is justified is very strict: government must cause as little damage as possible, give priority to Aboriginal interests, compensate for adverse effects, etc.

The law on consultation and accommodation has been implemented at the provincial level, not by legislation but by policies and guidelines. In Alberta, the government developed a consultation policy with First Nations peoples on land management and resource development in 2005. Alberta is the Canadian province where the largest oil and gas deposits and where oil sands deposits are found. Energy developments have been ongoing since the 1960s.

One of the weaknesses of the provincial consultation process is that it is not legally binding, and that the laws that apply to resource development (mining, forestry laws) have not yet been changed to incorporate the new consultation process in their provisions.

The deficiencies in the Alberta consultation process include:

- the process is focused on projects, not on strategic decisions;
- there is no consultation at the time of issuing mineral or surface rights;
- the government relies on project proponents (private sector) to conduct consultations, and sees its role as a “manager” of the process, when in fact its obligation is to protect Aboriginal rights;
- the government is more preoccupied with justifying its infringement of Aboriginal rights than with actively protecting these rights and finding accommodation measures;
- the concept of accommodation is not well understood by government;
- one of the greatest difficulties with Alberta’s consultation policy is that Aboriginal peoples and the government disagree on the nature and the scope of Aboriginal and treaty rights, the extent of traditional territories, and the government’s obligations with respect to Aboriginal peoples. Because it does not acknowledge the full extent of its obligations with respect to Aboriginal peoples, the Alberta government is unable to design a process of consultation and accommodation that adequately protects their rights.

Development of Alberta’s Consultation Policy

Strengthening Relationships: The Government of Alberta’s Aboriginal Policy Framework
(September 2000)

Alberta’s First Nations Consultation Policy on Land Management and Resource Development
(May 2005)

Consultation Guidelines:

- a. A Framework for Consultation Guidelines (May 2006)
- b. Departmental First Nations Consultation Guidelines (August 2006, updated November 2007)

By Resolution 14-09-06/#003R, the Assembly of Treaty Chiefs rejects the Consultation Policy and the Consultation Guidelines (September 2006)

Review of the Consultation Policy and Guidelines starts in 2009 with an anticipated completion date of 2010

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