



**Water
Sustainability
Project**

POLIS Project on Ecological Governance



**University
of Victoria**
Law



**Environmental
Law Centre**

UNIVERSITY OF VICTORIA

When the Water Dries Up: Lessons from the Failure of Water Entitlements in Canada, the U.S. and Australia Workshop Proceedings Report

When the Water Dries Up: Lessons from the Failure of Water Entitlements in Canada, the U.S. and Australia took place in Vancouver, BC on June 11-12, 2012. The Environmental Law Centre and the POLIS Project on Ecological Governance hosted the workshop at the Morris J. Wosk Centre for Dialogue.¹ The intent of the workshop was to explore legal and policy responses from jurisdictions around the world to water shortages. The following proceedings report contains a brief summary of each speaker's presentation, including the clarifying questions that followed. The final portion of the proceedings report outlines the key themes and discussions that emerged during the workshop. The Appendix contains the agenda for the workshop.

Day 1: June 11th 2012

Keynote

Lessons from the Klamath Basin: 100 Years of Arguing about Water

Glen Spain, Northwest Regional Director, Pacific Coast Federation of Fishermen's Associations & Institute of Fisheries Resources

Summary

Glen's presentation focused on his experiences representing the Pacific Coast Federation of Fishermen's Associations (PCFFA) in negotiating the Klamath Basin Settlement Agreements (the Agreements), designed to end the decades of conflict over water use and extraction along the Klamath River in Oregon and California. The Agreements span multiple geographic jurisdictions, including two different states, federal lands, and the territories of four First Nations who continue to inhabit their traditional lands. The range of interests represented is also diverse, ranging from commercial fishing to subsistence salmon fishing communities, as well as agricultural irrigation and wetlands habitat restoration and conservation.

A main factor in the conflict is the existence of four dams (circa 1906-1964), which completely block the passage of most Chinook runs to the upper Klamath Basin. Current fish runs are at only

¹ Thanks to graduate students Sarah Malan, Adam Nott, Christine Twerdoclib, Sue von der Porten, and Michelle Zakrison for contributing notes taken during the workshop sessions and to Jennifer Smith for compiling them. Special thanks to Jesse Baltutis for stellar organization and coordination throughout the workshop.

10 percent to 20 percent of historical densities with some species having become extinct. The dams were issued 50-year licenses in 1956, which are now expiring. The current regulatory environment makes it illegal to build dams that do not allow for fish passage and existing dams must meet this requirement to qualify for relicensing. Furthermore, tribal treaty rights to fish, which were not considered at the time of dam construction, also require the passage of fish. The operation of the dams, in their original state, deprive the lower portion of the river of gravel for spawning and created nutrient pooling, which cause a proliferation of algae blooms and fish disease. The dams cause particular problems for subsistence salmon fishing communities. And despite the presence of the dams, there is no electricity on most of the reserve lands. So, there are considerable problems associated with the dams that are perceived as bringing electricity to the basin. It is important to note that these dams do not provide water storage for irrigation.

In 2002, after a decade of litigation, years of serious water shortages and ineffective balancing of stakeholder interests, there was a realization that the flows in the Klamath River were not sufficient for any interest. A range of diverse groups and coalitions, many of which ultimately became settlement parties, engaged in 10 years of negotiation to reach the Agreements. The Agreements detail a 50-year plan to fund and facilitate removal of four dams, which is expected to double salmon populations. Indian treaty fishing rights are respected in the Agreements, and there is cooperation and investment in reestablishing fish habitat and watershed health (some wildlife refuges currently have no water allocation). As well, the Agreements contain strategies that enable irrigators to trade lower allocations, accompanied by assistance to help them become more water efficient, for higher stability, reliability and certainty. Water management will be based on actual in-stream flows on a weekly/biweekly basis. The Agreements are currently awaiting congressional approval.

However, despite the conclusion of the Agreements, not everyone is on side with them. One First Nation and three counties remain opposed. In spite of lingering opposition, it is anticipated that ratepayers will pay less for water and most of the conflicts in the upper basin will be resolved. The Klamath situation is both an exemplar and a cautionary tale, reminding us of the complexity of water issues and water governance challenges.

Clarifying Questions

1. *Are the Agreements tied up in congress because they are controversial or because everything is tied up in congress right now?*

Both. It is gridlock because its an election year and congress is divided because Republicans control the house. And one of the downfalls of the agreement is that they are complicated. There are locational concerns, property values for lake/reservoir front property will decline (a concern for property owners) leading to tax revenues also declining (a concern for local government).

2. *Are the dams used to regulate water flow?*

No, the water released by the dams was for direction into turbines. There is one smaller dam that does this task and it will remain in place with fish ladders, etc.

3. *What are the legal implications for license holders who are negatively impacted but are not in agreement with the agreement?*

There is no ownership of water in the sense of a property right, there is only a right to use it. Typical rights holder won't be affected by the voluntary settlement but dispute resolution

would be by adjudication. There is no subordination obligation in the agreement. All federal water licenses are subject to environmental law

4. *What species run up and what is the elevation of upper basin?*
4000 ft and 300 miles to upper basin . Chinook above (Spring) and below (Fall), Coho (Fall) – tributary fish are returning at one percent to two percent of historic population. Chinook now dominate.
5. *What is the compensation scheme for property devaluation?*
There is a proposed claims settlement process for reductions in property values (NOTE: the “lake” is currently poisoned, which is also reducing values). The settlement process would set the values on a take it or leave it basis with a right to appeal if not acceptable. Note also that the original term was a 50 year license, which constitutes “acceptable notice” for any court.
6. *What are relicensing costs compared to removal?*
The cost would be \$460 million for relicensing and upgrades that would meet current regulatory requirements plus costs to clean up the water. The Agreements cap Pacific Corp.’s (dam owners) expense at \$200 million, which will come from ratepayers. Projected operation post-relicensing is expected to be a \$20 million loss per year, this power could be replaced by 15-20 wind turbines. Pacific Corp. has the ability to replace that power very easily.
7. *Where did the \$200 million figure come from?*
We knew it could be less than the \$450 million projection, at which point there was a requirement to re-consult. In 2020 there will be \$200 million waiting (collected from ratepayers) and the State of California will pick up the rest of the tab.
8. *Tribal fisheries rights are prioritized, would First Nations agriculture rights also have the same priority?*
No, because the treaty protected /tribal rights are based on historical practice, so they are mostly fish and wildlife rights. There are four different sources of rights related to the individual tribal treaties and each is in a different place legally in terms of enforcement and desires.

Discussion Panel

Jim Mattison, Water Policy Consultant and former Comptroller of Water Rights, Province of British Columbia

Michele-Lee Moore, Associate Professor, Department of Geography, University of Victoria

Frank Brown, Director, Land and Marine Stewardship, Coastal First Nations

Summary

Jim Mattison began the discussion by thanking Glen and reflecting on the process of water use planning for BC Hydro relicensing in BC. He recalled to being 9 or 10 years into the 5-year project wondering if it would ever end. This reflection indicates the enormous effort involved in making even minor changes in the operation of hydroelectric. It was a massive effort to bring people together, with more than \$30 million in costs for consultation. Jim also noted the extent to which it often takes a crisis to pull people together to work towards solutions.

Michelle-Lee Moore took up the discussion focusing on the complexity of water governance challenges. In particular, she noted two specific points of complexity. The first was the complexity of water issues themselves, which can include such things as: uncertainty; elements of surprise; fish kills without clear indicators; and different actor groups. The second point of complexity was around how we get to solutions whether we use litigation, planning process, town halls, or other processes. She noted that in the simpler two-sided or two-party scenarios it might be possible for competition, in which the best argument or proposal wins, to result in solutions. However, in more complex, multi-party scenarios competition does not work. This type of complexity requires different solutions and also different processes to get to solutions. Michelle-Lee also noted the important role of economics at the compensation and implementation stages, but queried the other motivators at the crisis stage. In particular, she noted a practice of forwarding economic arguments by those who oppose change but the absence of economic arguments by those who support change. Michelle-Lee's final comment was a query as to whether we can create a system of water entitlements without creating a sense of entitlement?

Frank Brown reflected on the similarity of the Klamath dispute with BC's War in the Woods, a conflict over resource extraction in the Great Bear Rainforest that brought together diverse groups. Ultimately, the conflict was resolved through the signing of a reconciliation protocol agreement that recognized the duality of title. Frank also reflected on the common experience of aboriginal people in Canada and the United States with respect to a discriminatory underpinning of entitlements. Regarding BC's *Water Act* modernization, Frank noted that the *Water Act* is included in the Coastal First National Reconciliation Protocol Agreement and that decision making for lands and resources cannot take place without a consideration of the water that runs over the land. The challenge for Coastal First Nations is how to reconcile their rights with the responsibilities of the BC government. The Coastal First Nations, as the original stewards of the land, will not allow decimation of traditional lands, give control over resources to corporate interests or support the privatization of fresh water. However, the Coastal First Nations have a capable team and are prepared to negotiate with the BC government.

Day 2: June 12th 2012

Session 1A

The Australian Experience

Henning Bjornlund, Canada Research Chair in Water Policy & Management, University of Lethbridge & Associate Research Professor University of South Australia

Summary

Henning's presentation focused on the recent Australian experience with transformation of the national water governance regime. Much like the Klamath situation, conflict and stress over water allocation operated as important drivers in the process. In Australia, like western Canada, the use of riparian rights as a basis for water allocation failed. The state of Victoria gave ownership of water to the Crown, which led to licensing and placed government in control. The licensing system that arose was not a priority system; rather, licenses were proportional. In the 1970's, this situation shifted to one of volumetric licenses. However, a situation arose in which people were not using the licenses they were issued and more were issued without taking any others away. This

overallocation led to significant water reforms and basin closures. In the 1980's there were no new water licenses issued but many new ventures (especially winery projects) arose; therefore trading and selling of licenses became common. In the early 1990's there arose significant pressure for policy reforms, including the need to secure specified rights that are separate from land and the recognition that the environment has a legitimate right to water.

A 10-year review of 1994 reforms produced three key themes:

1. There was considerable uncertainty about long-term access to water;
2. Water market arrangements needed further development to reach their full potential; and
3. There was still considerable concern about the pace of securing adequate water for the environment and introducing adaptive management to ensure river health.

In 2004, an intergovernmental agreement on a National Water Initiative was signed based on the following principles:

- The need introduce a new intergovernmental initiative;
- All states should be similar;
- Allocations should be based on a percentage for consumptive use (good (sustainable) in principle);
- Environmental needs must be determined; and
- Determinations must be made based on how much water is in the water body, subtract environmental needs to determine the consumptive use and then allocate proportions amongst users.

However, when the plan came out it only included the environment. In 2010, the main strategy for dealing with over-allocation was still based on buyback of unused licenses.

Australia is still in need of a variety of tools so that different problems can be solved in different ways. A useful approach would be to separate water rights into four distinct rights instead of keeping them bundled as one. The four components/rights are:

1. Access entitlement (tradable);
2. Water allocation account (can buy water in the market);
3. Water use right (required to actually use what is in your account; prove efficient use); and
4. Capacity entitlement (the right to get purchased/traded water delivered to your site).

This disaggregation of water rights would allow for markets to operate more fluidly and could link the trade of water rights to environmental assessment by requiring environmental assessment approval for trading of rights to occur. Australia's recent experiences with water governance are a classic example of how bad it can be if you wait until things get really, really bad.

Clarifying Questions

1. *How much do people pay for water rights that they are now selling? How did they get the rights to sell it? It looks expensive.*

The problem is what is the alternative? Does the government make the best decisions? We need a mechanism for the water to move to where it is most beneficial, this is key to surviving drought in Australia. Those who bought water did so to minimize losses not maximize profits.

2. *Did the Mabo decision (a court case relating to aboriginal water rights) affect the four rights stages?*

There are no treaties (government refuses to enter into them). Land claims exist but there is no ownership – indigenous communities lease for traditional purposes. Some tribes have water rights that they can use like any other entitlement and can sell them, which some do. The situation for aboriginal peoples in Australia is far worse than in North America.

3. *With markets you get market failures, how do you avoid monopolies? Water speculation is driving smaller farmers out of business and concentrating ownership to a small number. The most economically efficient use is not the most socially efficient use.*

We need to define social needs and protect them (because most economically beneficial does not necessarily equal the greatest social benefit). That existence of monopolies is a regulatory weakness. The idea of water barons is problematic. This can be avoided through a rule that you can only own ten percent of water in a basin. There are a lot of farmers today that do not own the land. Why can't farmers lease land and lease water so they do not have to go into debt? Social and environmental interests are taken care of within the economic system. If you can use that much water every year, why shouldn't we allow the market to distribute the water that is still available? There are court cases in the US about whether water should be owned. Even if a monopoly owns water, there is only so much they can do with it.

Session 1B

The Alberta Experience

Nigel Bankes, Professor and Chair of Natural Resources, Faculty of Law, University of Calgary

Summary

Nigel's presentation detailed Alberta's approach to water allocation, beginning with an overview of the water allocation situation. The rivers in Southern Alberta have been over-allocated, with licensed users in southern Irrigation Districts holding the most and the largest appropriations that date to very early in time. Most individual farmers do not own water licenses, but have entitlements to irrigation within an Irrigation District. A crucial moment in the water governance regime was the decision to close the South Saskatchewan Basin to new allocations, meaning that it is not possible to get a license for new appropriations; thus creating a condition of scarcity. The Milk River Basin has also long been closed.

In Alberta, the status of senior (in time) water rights from a legal perspective is that they are extraordinarily well protected. They have been grand-parented by new legislation and in the event of conflict the existing right prevails. These senior rights authorize volume and rates of diversions and some, but not all, included minimum flow requirements. Despite the protection afforded to senior allocations, the director does have discretion to alter allocations in order to protect the environment. However, compensation is required.

Alberta has a process for transferring water rights, either in whole or in part, including for a change in use or in the point of diversion. Under new legislation water management plans also authorize water transfers. Transfers can occur if the subject license is in good standing, which means in use. Transfers may be permanent or for defined temporary durations, and for all or part of the license allocation. The approval of transfers occurs according to a prior approval process where transfers are assessed on a case-by-case basis. The approval of a transfer requires consideration of compliance within a "no harm" context. This means that there are no *significant adverse* effects to

environment. A ten percent hold back for instream flow needs is permitted. Transfer decisions are subject to appeal to the Environmental Appeal Board.

In addition to transfers of licenses, “assignments”, arrangements that facilitate sharing of existing allocations, are also permitted. For instance, assignment of irrigation acreages is common. Irrigation Districts also act as water brokers and decide how allocations in the district might best be divided amongst users. They also transfer rights.

The existence of water transfer procedures in Alberta creates a sort of cap-and-trade system with respect to water licensing, particularly in the basins that are closed to new licenses. The result is that underused licenses have value and become a transferrable form of wealth creating incentives for those not using their whole license to either sell or intensify use, rather than conserve. The resultant system has high transaction costs, it is difficult to match sellers and buyers, and Irrigation Districts have significant market power.

From an environmental perspective, market solutions to water allocation can be problematic because water is not a commodity. Further, any market system should be based on legally enforceable science based objectives, which are currently not in place. The Alberta legislation has limited scope for protection of ecological values, requiring that irrigation plans provide strategies for protecting the environment and meeting water conservation objectives. However, despite the appearance of science-based definitions, the practical reality is a discretionary balancing of economic and environmental values. Furthermore, there is no ability to incorporate consideration of these values into existing licenses, only new ones.

Other concerns also exist. For instance, despite some favorable case law, First Nations water rights are not protected by the current legislation. As well, transparency with respect to transfers and appeals is a concern as the Environmental Appeal Board has been resistant to public interventions in hearings. Furthermore, transfer decisions are not publicly posted but they can be accessed via Freedom of Information requests.

Clarifying Questions

1. *What do you think about the robustness of the current system and how is it going to break down under stress? Where will it fall apart or how will it hold together? Who will be affected?*

I think its best is to set scientific amounts early on before allocation/sale. A scheme for making sure that happens is problematic. I think it will affect aquatic ecosystem health. The biggest risks are that we did not set water conservation objectives on a science basis early enough so the more the market works it will intensify use and leave less water instream. Instruments to ensure instream flow needs are regulated are not in place and that is problematic. Could see fish die-offs and other environmental effects. Waiting for that crisis, perhaps.

2. *Can you say more about the compensation provisions in the Alberta Water Act?*

They say that it is up to the director to make the compensation order and there is a right of appeal to the land compensation board. These provisions have never been triggered but there have been private settlements made which are completely confidential. It is hard to know how they were calculated. What we have put in place is a compensation regime. It is part of the property rights debate going on in the province. You also see it in SARA (the federal *Species at Risk Act*) with the compensation of critical habitat for species at risk. There is a high entitlement to compensation but how it works out in practice has yet to be seen.

3. *What about environmental holdbacks and transfers, what are the criteria? Do you see Alberta buying back rights like Australia?*

Most of the time it is being used. The test in the legislation is that if the director thinks it should be used they make that decision. Where it is not being used is where it is having an effect on aquatic health.

Session 2A

The British Columbia Experience

Jim Mattison, Water policy consultant and former Comptroller of Water Rights, Province of B.C.

Summary

Jim's presentation provided a chronology of BC's approach to water allocation beginning with the Gold Rush in the mid 1800's. Everything began in 1849 due to the need for large amounts of water for gold prospecting; this is also the year that the United States began its water rights regime. In 1858 Governor James Douglas took over the mainland and named British Columbia. In the same year, gold was discovered in the Fraser River. The ensuing Gold Rush led to a situation where there were more Americans in BC than British subjects in the province. Negotiations over the placement of the BC border were also taking place during this time. In 1859 the *Gold Fields Act* was introduced to regulate mining in BC. This legislation established the first water use regulations in BC, some provisions of which remain intact today. Water was claimed like gold, by staking a claim. This practice, in which circuit judges handed out licenses, went on for decades during the gold rush. However, there was no organized system through which licenses were recorded.

In 1862/3 a border agreement was reached which set the border at the 49th parallel. In 1864 the Charlottetown Conference was held, followed closely by Confederation in 1867. In the late 1800's Canadian Federal Reserve Commissioners established reserves and made water allocations to First Nations people. The province decided that it would not honor the water allocations granted to First Nations by the federal commissioners. Despite this failure to honor the allocations, the oldest and largest allocations of water in BC are held by First Nations communities.

In 1893 the *Water Privileges Act* moved the water parts of the *Gold Fields Act* into this new legislation. A commission recorded all of the permits issued. In 1909 BC's first *Water Act* was enacted, providing licenses for mining and logging to cut railway ties, build homes, etc. This was followed by a period in the 1950-60's characterized by hydroelectric development, for which permitting became very important. Then in the 1960-70's the environmental movement began to make waves. This movement has influenced the infusion of environmental considerations into water regulations over the past 30 years. Little consideration for the environment has been imported into the *Water Act* itself, but considerations have been infused into water-related acts such as the federal *Fisheries Act*. A result of this is that every water allocation decision made since the 70's has had to consider fish. As well, the B.C. *Environmental Assessment Act* of the late 1970's requires water considerations in major projects. Despite these changes, the number of licenses has doubled since the 1970's.

Since 2004 we have seen minor amendments to the *Water Act* that have major implications. For instance, a term in all hydropower licenses (since 2003/4) is that they now have 40-year expiry

dates, at which time renewal depends upon satisfying any new conditions set out. This provision avoids the need for government to pay hydro projects to behave properly.

The water allocation that we have is based on *first in time first in right* prioritization of water usage. The allocations are either tied to land or to a specific use. The allocations must be used or they are lost. Allocations are transferrable, on an applications basis, which is appealable. The purpose of a license may also be changed on application; these decisions are also appealable.

Looking forward, there are a number of big issues and considerations on the horizon for water management. One is the need to find the right ways to build the right relationships with First Nations communities, an issue taken up more fully by the next speaker. A second consideration is population growth; a low population projection for 2036 is 6.9 million people in BC, representing a 70% increase over 25 years. Half of this increase is expected in the lower mainland region, with the remainder expected in the Okanagan, Kootenay and northern regions. There is no projection for water use in conjunction with these population projections.

A third major issue is climate change for which we need a new model. British Columbia may have more water due to climate change but this water is likely to arrive as winter rain rather than snow. This means a loss of snowpack as a storage mechanism, winter flows will be higher and runoff will change. In contrast, summer flows will be lower because run off from snow packs will decline. Taken together these changes in flows indicate a need for more water storage and more summer flows for salmon. Higher summer water temperatures may create problems in aquatic health such as algae blooms and fish kills. However, salmon are now being found in some of the Arctic Rivers indicating that mobile species can adapt to climate change if they have sufficient time.

In order to address the big issues on the horizon, we need to look at our current legislation to decide which parts of it are working. These parts need to be preserved while other less useful provisions can be discarded. The water allocation system that we need to move towards must include First Nations communities; it must be adaptive in order to deal with the increased intensity of floods and droughts that can be anticipated with climate change; and it must promote conservation and sharing. It is important that the non-economic values we place in water are protected. For instance, the fact that 25 percent of the endangered species in Canada live in the Okanagan Valley needs to be reconciled with the choices we are making for human uses like golf courses.

Proposals for modernization of water governance in BC includes requests for:

- Groundwater regulation, because when in-stream flow licenses are halted folks take ground water instead;
- Suspension of *first in time first in right* prioritization (there is some opposition from those with senior rights);
- Greater planning ability with community involvement;
- Strengthening aquatic ecosystems; and
- Water conservation objectives.

However, nothing is expected to change before the next provincial election.

Clarifying Questions

1. *There has been a weakening of environmental assessment processes at the federal and provincial levels. What are the impacts of this?*

The following impacts and further changes can be pointed to:

- Feds are likely to make legislative changes before BC
- More ability to share responsibility
- Feds are weakening but BC is not likely doing this

These changes should not change water law amendments. There is an opportunity to streamline. The use of the section 35 HADD (in the federal Fisheries Act) is essentially useless anyways because it has not been enforced in the last decade or so anyways.

2. *Was Summerland based on section 35?*

Yes. So section 35 is often used as a threat, but rarely enforced in practice. But its usefulness is still there.

3. *The conflict over water has been apparent in other areas. If you reflect on your role as comptroller in avoiding conflict or resolving conflict prior to the panic button, do we need new institutions and processes?*

Yes, new processes are needed. New institutions? Maybe, this might follow processes. In 2002 there was intense conflict between BC Hydro and the comptroller's office. 24 facilities were reviewed and plans put in place to try to find better outcomes in terms of operations (not footprints):

- To protect fish;
- To better First Nations outcomes;
- To promote other recreational and social values; and
- To include physical works changes, monitoring and inventory

The changes were effective in many areas:

- For fish habitat and values;
- For archeological explorations by First Nations
- 23/24 plans were given consensus support
- At a cost of \$30 million and 10 years to design and implement the plans, including First Nations consultations

BC Hydro cooperated due the threat of fisheries prosecutions hanging over their heads in 1990's.

4. *What about population growth and closing basins to further water allocation? Closing has been an informal note on water files in the past, so how does reallocation occur then in a closed basin?*

We are just getting there now, we have not reached the crisis yet. We might look to higher value crops, maybe forgo second and third hay cuts because its not efficient. It requires transfers and reallocation. Markets have been pretty much rejected by the people. What's left? An ability to transfer, this is bureaucratic but it is done all of the time. Planning processes – compensation for use elsewhere. Need to reduce bureaucracy but we need a regulator regardless of what we do, markets or otherwise. Delegation to regional authorities to make transfer decisions seems reasonable.

Session 2B

The British Columbia First Nations Experience

Judith Sayers, Adjunct Professor, Faculty of Law & entrepreneur-in-residence Peter B. Gustavson School of Business, University of Victoria

Summary

Judith's presentation detailed the critical importance of water to indigenous people: as providing essential habitat for traditional food sources and livelihoods; as integral to travel; and as a central element to spiritual and cultural practices and ceremonies. Water has long been a contested issue between First Nations communities and settlers in terms of both the quantity and quality of water available to aboriginal communities. For example, on-reserve residents do not benefit from a level of drinking water protection comparable to those who live off reserve. The massive numbers of boil water advisories and community evacuations faced by on-reserve communities illustrates this. A result of this is a disproportionate vulnerability to waterborne disease and associated health effects.

In BC, the most overarching objection First Nations have with respect to water is the Crown's unilateral claim of ownership. This is problematic in the political context of BC, where questions of land, title and ownership have not been resolved. First Nations assert jurisdiction/ownership over land and waters that have not been ceded by treaty or otherwise extinguished. Unresolved conflicts and questions around aboriginal title continue to create uncertainty over a multitude of major issues including water rights. Indigenous people across assert their right to, and in, water. To date, Canadian courts have not specifically dealt with Aboriginal water rights. Despite this, many First Nations take the position that water cannot be separated from the land and so it is necessarily part of Aboriginal title, which confers rights to the land (and water) itself. While several explicit claims to water as intrinsic to title have been made, courts have declined to deal with the issue. However, the Supreme Court of Canada has made several references to water while discussing the nature of Aboriginal title, suggesting that water may be included.

According to the Canadian Constitution, Aboriginal rights (including title) persist unless there is express extinguishment via surrender, treaty or express legislation that states a "clear and plain intention" to do so. Extinguishment has not occurred in BC; therefore, rights persist today. This situation creates uncertainty in re-thinking the licensing scheme in BC. For instance, in the BC Hydro planning process the Hupacasath opposed the process, which asked First Nations to prioritize rights over one another, such as rights to hunt, to fish, and to water flow. The Hupacasath declined to choose or prioritize in this way because it is inconsistent with their understanding of rights as interrelated and equally important.

In the absence of a clearly recognized right to water, there are several recognized Aboriginal Rights that flow from the right to water, such as the right to fish. As well, many BC First Nations are involved in water-based economic activities, such as independent power or run of river projects. Currently, 150 First Nations are involved in such projects. This is an important market for First Nations to access because it is ecologically sustainable, involving a non-consumptive cycling of water, and it is a relatively easy market to access. There is some concern over the current political uncertainty surrounding the future of Run of River projects.

Modern Treaty processes also have First Nations water implications because the modern treaties guarantee a water allocation. However, the allocations contained in modern treaties are subject to all *first in time first in right* licenses in existence prior to the treaty, resulting in a situation where the treaty terms change nothing. In a situation of scarcity, modern treaty allocations are at the bottom of the junior licensees. This is a major problem. Given the prior existence of First Nations in BC, even modern treaty rights should take priority over Water Act licenses. This issue has been a major sticking point in some treaty negotiations, as many First Nations are not prepared to accept this term.

The New Relationship and Shared Decision Making commitment between the province and First Nations Leadership Council were made to guide a relationship of reconciliation, based on recognition that there are co-existing Crown and First Nations titles and jurisdictions. However, for First Nations, shared decision-making means a government-to-government relationship. This is distinct from the Crown, which uses shared decision making as a means to engage First Nations in discussion, but insists on retaining final and sole decision making authority. Despite these differing perspectives, there are some collaborative decision making models currently existing in BC, such as in Clayoquot Sound and under the Coastal Reconciliation Protocol. However, shared decision making models can become problematic in times of scarcity particularly when parties have a distinct ways of approaching problems, utilizing different knowledge, different laws, customs, technologies. It is critically important to take these differences seriously.

Clarifying Questions

1. *How can we build better/more effective relationships? This has been difficult, particularly with a two year First Nations leadership term.*
Some First Nations have had continuity in leadership, but many have not. First Nations can choose step outside of the *Indian Act*. There is opt-in legislation (First Nations Elections Act) currently proposed that will extend terms to 4 years. Note that many First Nations have community-designed or custom election codes while others run election based on self-government constitutions.
2. *In the event the Court makes a decision affirming Aboriginal Right to water, what else would need to make this right actually realizable?*
Negotiation between First Nations and the province are needed that flesh out the complexity and substance of the right.
3. *How do you understand the nature (depth) of this right?*
A multi-pronged definition that captures all of the different roles: drinking, habitat, economic development, etc.
4. *Grape growers in the Okanagan find it difficult to incorporate FN participants. How can we improve this relationship?*
It is important for planning processes to incorporate real modes of shared decision-making. See for example, the Cowichan Valley as a potential best practice. This is all about building relationships and trust.
5. *How can we make equal sharing of resources explicit in our legal system?*
Notions of equality are relatively easy in situations of abundance, but when faced with scarcity, the distribution question becomes very difficult. Decisions about priority have to be made.

Discussion Panel

Glen Spain, Pacific Coast Federation of Fishermen's Associations

**Oliver M. Brandes, Director, Water Sustainability Project, Centre for Global Studies
University of Victoria**

Anna Warwick Sears, Executive Director, Okanagan Basin Water Board

Merrell-Ann Phare, Director, Centre for Indigenous Environmental Resources

Merrell-Ann began the discussion by pointing out some of the challenges we face in BC with respect to water governance. The largest indicator of our current failures relates to the government's underlying entitlement to allocate water. The core of this entitlement to allocate water is poorly defined and not well scoped. The obvious evidence of this problem/failure is our current situation of over allocation. To remedy this failure, we need some language around the duties and boundaries within which government must operate in administering allocations. A second issue is that of (un)certainty and our, perhaps unrealistic, expectation that a new system will be able to provide certainty. A third concern is the way in which discussions with First Nations are being approached; it makes no sense to ask rights holders to enter into a discussion when they have been forewarned that their rights will not be considered valid. A new approach is needed, perhaps one in which First Nations lead the process instead of being invitees.

Anna Warwick Sears then took up the discussion focusing on the issue of responding to crisis in the context of water allocations. She queried first what would constitute a crisis, and second whether we would recognize a crisis as such if one arose. Regardless of the nature of a crisis, there is a need to move forward in situations of uncertainty by focusing on the processes and decisions that allow adaptive, deliberative and strategic long-term planning, monitoring and scientific assessment. Community building within and across communities is essential in our responses to uncertainty. As well, the province is and will continue to be the regulator with respect to water allocations; there is a need for support to the government in this role to build and maintain its regulatory capacity. Key areas where support can be provided to the government regulator are with respect to resourcing and knowledge.

Glen Spain returned the discussion to the Klamath Basin and lessons learned there, noting that a key to their success was seeking common ground despite differences and competition between the participants. The desire to have more fish to fight over rather than less fish to fight over became a unifying goal. Another key in the Klamath Basin was the fundamental recognition that the Klamath Tribes are sovereign peoples. In responding to crisis situations that require longer terms to implement and execute solutions, it is important that institutions be interest-dependent and based on enduring communities so that 50-100 year projects can survive election cycles. A further key to resolving complex disagreements over resources is a shift in focus to social cohesion and sustainability rather than economic benefit.

Oliver Brandes concluded the panel's discussion with the recognition that complex problems require complex solutions. There is much that we, in British Columbia, can learn from our counterparts around the world both in terms of good principles and things to avoid. As well, Oliver noted that when we conceptualize litigation as our safety net, it is important to remember it is a net with big holes in it. We are all better off trying to resolve problems by employing balance and resilience

Overall Themes And Discussions

Over the course of the two days of presentations and dialogue a number of themes emerged and were discussed at length. This section briefly summarizes the key points from those valuable conversations.

Collaboration

Collaboration is of vital importance but knowing how to do it well and actually doing it well can often be challenging:

- It is both important and difficult to appropriately respect, acknowledge and work with different kinds of knowledge
- The explicit acknowledgement of different types of knowledge (scientific and traditional/community) are required
- A diversity of interests/voices must be at any table
- The end game must be at top of mind. Need to think about what we're trying to do at the end of the day
- Different groups may have different goals
- Explore all of the options not just the ones that lead to the desired outcome
- Various types of knowledge can make all of these options more visible
- It is important to realize that people do not necessarily know how or want to work together' they want to win
- Part of getting folks to work together is demonstrating that there is a problem
- The other part is demonstrating that they cannot win at the expense of all others either in the courts or politically because one stakeholder or use of water does not make a sustainable economy or community
- It is only once all the "fight" avenues are closed that people become willing to cooperate – only when there is more to lose by not cooperating than by cooperating
- Embrace the one water concept --- we need local strategies to cooperate with one another
- Licenses are not an excuse to avoid compromise

Complexity

Water governance challenges are complex:

- Complexity is apparent in water governance challenges
- More complex problems require different types of solutions-based processes
- Complexity of water issues is linked to uncertainty and lack of predictability
- There is a complexity of thinking about getting to solutions – litigation, planning processes etc. are more simple in two-sided disputes in which one side or interest can win
- The *Water Act* modernization process is intimidating
- Incrementalism is not an option for us right now
- Scale is extremely important to pay attention to when thinking about and generating solutions
- Entitlements are not enough to get us to creative solutions - we need to think beyond entitlements

Crisis and Uncertainty

We are dealing with a lot of uncertainty in water governance:

- We need to create processes to work towards certainty and deal with uncertainty

- Water security is an issue
- If we did not have an entitlement system how would we actually move ahead? What is the process from moving from pure entitlements to collaborative water governance?
- Its important to know what happens in a community when there is not enough water for all of the entitlements
- Some refuse to acknowledge crisis until all reasonable (and unreasonable) solutions are exhausted
- Everyone is not at the same starting point, some basins are already in crisis. There are regional and local level differences
- We need to acknowledge that the crisis state is not the same for everyone. The trigger or threshold is different for everyone according to our differential perceptions of how we are impacted
- Its hard to convince the public of water shortage when they see water everywhere
- Some water districts are denying water shortages
- We perceive water shortage as a high consequence/low probability scenario
- Do we need an economic price signal that tells us there is a crisis?
- We often forgo the opportunity to pay for ecological choices
- Crisis is really about initiating and instigating political will so does crisis have to be the instigator? There are a variety of ways to generate political will

Water Markets

There is a lot of concern over the role of water markets:

- Regarding water trading and markets, water can be divided into ecological and consumptive pools
- On a global scale, where the consumptive pool is available to highest bidder this will exacerbate the food security crisis because corporate ownership for industrial purposes will dominate
- We should look at the consumptive pool and further divide it for agriculture, personal and industrial needs with accompanying priorities
- Water management and drought planning has to happen. Lets focus on consideration of different use pools
- The role of markets has been conflated. Markets are useful but they only work if the governance is right. They can be governed to produce the right results
- Markets as a basis of exchange is different that markets as a basis of capital accumulation
- Community based markets and situated markets are useful
- Markets without reciprocity that are based solely on extraction are dangerous

Ecology Versus Economy

We need to find ways to shift the focus from economy to ecology:

- Looking at ecological values before economics is not what is happening in the meetings and negotiations
- It's all about "interests" and economic considerations
- The ecological values statement professed is idealistic but what underpins the processes are the interests of the actors
- The biological reality is that our economic survival relies on ecological health
- Humans are a part of the ecosystem
- Human needs fall within the ecological pool not the consumptive pool

- If we start by assuming that humans are a part of the ecosystem and we need a healthy ecosystem then over allocation might be impossible
- We have to overcome our history and assumptions about the way the world works
- We have an economic system that treats the environment as an add-on. This will flip, we must focus on ecological systems
- Nature is not a commodity
- Land and water are connected, we need to consider the interface
- We need to consider actual in-stream flows
- Neither nature nor capital are limitless resources = both are operating at unsustainable levels in our current reality

Setting the Goalposts

It is important to make some decisions about what we are trying to achieve:

- Water is not just tied to land; water is tied to everything
- We do not have enough water for agriculture into the future to ensure food security in the province
- The conversation has to be about creating systems and processes to deal with scarcity
- How can we attempt to fix the entitlements problem before we decide other bigger issues such as do we want 100% food security? 50%? What are our actual goals?
- We need to decide some of these bigger issues to know what we are working towards in terms of water entitlements and allocation decisions
- We need projections in terms of time and impacts to make the probable scenarios more real – is there a way to translate this for people as an opportunity for discussion?
 - The Okanagan watershed has a modeling process in place with real life data. However, the province is not paying for it and there are 1700 watersheds and only a few have been done so far

Re-Envisioning Allocation

It is important to consider how and where allocation decisions will be made:

- The new *Water Act* is not about the licenses; its about the management
- Entitlements need to be re-envisioned rather than dissolved or thrown out so that we avoid the tendency to dig in our heels around the fear of losing entitlements
- Reordering, revising and revisiting entitlements
- Entitlement to a share rather than an amount of water through proportional rather than absolute entitlements is an option. This is sensible given that most agriculture users do not know how much they are using anyways. Absolutes are not in operation now
- Requirements for infrastructure and conservation strategies can help to increase efficiencies
- There is not a one size fits all solution for BC given the diversity in watersheds that exist
- Does actual decision-making need to be relocated?
- Start with basic principles such as principled governance and sustainable institutions
- Net worth localism is an apparent theme – territorial, physical and ecosystem health
- Nested hierarchies – functional governance models with specific accountability [not the old top down model]
- Principle of subsidiarity – do it locally if you can do it locally, only move up to the next scale if needed (watershed planning)
- Include local monitoring and local representation



AGENDA

When the Water Dries Up: Lessons from the Failure of Water Entitlements in Canada, the U.S. and Australia

Workshop on Water Entitlements, June 11 (6:45 p.m.–9 p.m.) & June 12 (9 a.m.–5 p.m.) 2012

Wosk Center for Dialogue 580 West Hastings Street, Vancouver

Monday June 11 Evening

6:45 Welcome & Overview of Event (Deborah Curran, Hakai Professor in Environmental Law & Sustainability, Faculty of Law & Oliver Brandes, Director, Water Sustainability Project, University of Victoria)

7:00 Lessons from the Klamath Basin: 100 Years of Arguing About Water
Glen Spain, Northwest Regional Director, Pacific Coast Federation of Fishermen's Associations & Institute of Fisheries Resources

8:15 Discussion Panel (Moderator Deborah Curran)

Jim Mattison – Water Policy Consultant and former Comptroller of Water Rights, Province of B.C.

Frank Brown – Director, Land and Marine Stewardship, Coastal First Nations

Michele-Lee Moore – Associate Professor, Department of Geography, University of Victoria

9:00 Reception (no host)

Tuesday June 12

9:00 Welcome and setting the stage (Deborah Curran)

9:20 The Australian Experience

Henning Bjornlund – Canada Research Chair in Water Policy & Management,
University of Lethbridge & Associate Research Professor University of South
Australia

10:00 The Alberta Experience

Nigel Bankes, Professor and Chair of Natural Resources, Faculty of Law, University
of Calgary

10:40 Break

11:00 The British Columbia Experience

Jim Mattison, Water policy consultant and former Comptroller of Water Rights,
Province of B.C.

11:40 The British Columbia Experience (First Nations)

Judith Sayers, Adjunct Professor, Faculty of Law & entrepreneur-in-residence Peter
B. Gustavson School of Business, University of Victoria

12:30 Lunch (in house)

1:30 Discussion Panel (Moderator Deborah Curran)

Glen Spain – Pacific Coast Federation of Fishermen’s Associations

Oliver Brandes – Director, Water Sustainability Project, Centre for Global Studies
University of Victoria

Anna Warwick Sears – Executive Director, Okanagan Basin Water Board

Merrell-Ann Phare – Director, Centre for Indigenous Environmental Resources

3:00 Break

3:30 Roundtable Discussion: Views from participants

Graduate student facilitation

5:00 Wrap up – Closing Observations

Michael M’Gonigle, Eco-Research Chair in Environmental Law and Policy, University
of Victoria

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