

Water Act Modernization Initiative

**Submission to:
The Ministry of Environment, Water Stewardship Division
Government of British Columbia**

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INTRODUCTION: WATER IS THE LIFEBLOOD OF THE LAND

Common to all traditions of Indigenous Peoples is that water is celebrated as Sacred, and that the deep connections between all things living here, and in the spirit world, are reconfirmed. Water is the lifeblood of the land and the Indigenous Peoples whose cultures flow from the land. Indigenous Peoples recognize that to dam the waters is to dam the connection to our future generations. To fail to protect our lands and waters is a contravention of our traditional laws, and our Aboriginal Title and Rights.¹

As Indigenous Peoples, our cultures are closely linked to water, and negative impacts on water are cycled back to our cultures and societies. Our relationships with our lands, territories and waters are fundamental to the physical, cultural and spiritual survival of our Peoples. We have responsibilities to protect the availability and purity of the waters that our Peoples, and all life, depend upon. We echo the important words of the Simpcw Nation's Water Declaration, "We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life."²

Indigenous laws about water are thousands of years old. Historically in British Columbia, our relationship with Waters and Lands has either been ignored or readily dismissed. The current *Water Act*, devoid of any mention of Indigenous Peoples' Rights over water, is evident of this on-going disregard. The current *Water Act* was developed in 1909, in a context of colonialism, imperialism and exploitation of natural resources for profit, based on the exclusion and oppression of Indigenous Peoples. Indigenous lifeways dependent upon the waters, such as the salmon fisheries, were ignored.

As an incidence of our Aboriginal Title to our territories, Indigenous Peoples have jurisdiction over the waters in our territories. This submission to the Ministry of Environment on the *Water Act* Modernization (WAM) initiative is written in response to the *Water Act Modernization* discussion paper ("the Discussion Paper")³ We begin by explaining the fact that Aboriginal Title includes water and land; provide a critique of the current *Water Act* in relation to Aboriginal Title, Rights, and Treaty Rights, and directly respond to the Discussion Paper.

The Union of B.C. Indian Chiefs (UBCIC) would like to state that this submission does not constitute consultation; the engagement contemplated in the Discussion Paper has an impossibly short timeframe for meaningful input and submission standards.

¹ EAGLE, "Lifeblood of the Land. Aboriginal Peoples' Water Rights in British Columbia" ed. Ardith Walkem et al., June 2004 at p.1-2.

² Simpcw Nation, "Simpcw Water Declaration," may be accessed online at: www.ubcic.bc.ca/files/SIMPCW_WaterDeclaration.doc.

³ British Columbia's Water Act Modernization Discussion Paper may be accessed online at: <http://www.livingwatersmart.ca/water-act/discussion-paper.html>

Nor could UBCIC engage in consultation on behalf of separate Nations. UBCIC is a political organization and does not hold Title; Title rests with separate Nations. The Government of British Columbia is legally obligated to work with each Indigenous Nation who holds title separately.

Furthermore, UBCIC is deeply concerned that the submission process outlined in the Discussion Paper is highly problematic; it was designed without Indigenous involvement and treats Indigenous people as “stakeholders” in the water policy process. There is no recognition of Indigenous jurisdiction or constitutionally-enshrined and judicially-recognized Aboriginal Title and Rights. By UBCIC Resolution 2010-10, the UBCIC Chiefs Council strongly demands that the prior, superior and unextinguished water rights of Indigenous Nations of British Columbia must be addressed and given priority before the Province proceeds with legislative and policy change such as described in the WAM discussion paper.

The province asserts jurisdiction to permit and regulate all uses of water, but this jurisdiction does not extend to Indian reserve lands, or to areas of the province where Aboriginal Title and Rights have not been addressed. Where Aboriginal Title and Rights have not been addressed, the Government of British Columbia does not have the title or jurisdiction to assert ownership, control or jurisdiction over water.

Thus far, Indigenous Nations’ experience with the Government of British Columbia’s resource management schemes, shows that once third party interests are granted or expanded, those economic interests tend to be protected at the great expense of the Title and Rights of Indigenous Peoples and the environmental values that many British Columbians share. Aboriginal Title throws provincial claims to ownership over land and water resources into question.⁴ Section 109 of the *Constitution Act, 1867*, grants provinces “proprietary rights” over lands and resources within their boundaries, subject to any other interests (s. 109). Aboriginal Title is another interest, and any interest that the province has in the lands and waters is subject to Aboriginal Title.

ABORIGINAL TITLE INCLUDES WATER AND LAND

Water is sacred; water is life. The rivers and streams are like the arteries and veins of Mother Earth, they provide life for all of the people, plants and animals. For many Indigenous Peoples, water is a sacred gift from the Creator and Indigenous Peoples are entrusted with the responsibility to care for the waters and headwaters, springs and origins of water. Water is not only a human right: all plants and animals, all of nature has the right to water⁵.

⁴ Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, Calgary: Canadian Institute of Resources Law, University of Calgary, 1988.

⁵ Indigenous Environmental Network, “*Our Sacred Waters: Rights and Responsibilities*,” Unpublished paper submitted to the Council of Canadians for the Blue Communities Project Manual. Prepared by D. Sanderson, T. Goldtooth, C. Thomas - Mueller, 2010.

In 2004 EAGLE (Environmental Guardianship through Law and Education) released an extensive collection of materials on Aboriginal Peoples' Water Rights in British Columbia. In this collection they explain that "From an Aboriginal Perspective, our Aboriginal (Original) Title to the Lands, Water and Resources, together with the jurisdiction to manage and guard the water resource flows from the fact that the Creator placed our Nations upon our traditional territories, along with the traditional laws and responsibilities to care for and protect those lands."⁶

NEW RELATIONSHIP PROMISES

In 2005, the joint executives of the Union of B.C. Indian Chiefs, First Nations Summit, and B.C. Assembly of First Nations (then called "First Nations Leadership Council" or FNLC), signed the historic *Leadership Accord* to work together. The FNLC entered into a "New Relationship" with the province of B.C. The New Relationship Vision outlined a common vision of systemic changes, and committed to joint implementation of a new policy that would acknowledge Aboriginal Title and Rights:

We are all here to stay. We agree to a new government-to-government relationship based on respect, recognition, and accommodation of Aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.

We agree to establish processes and institutions for shared decision-making about the land and resources for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to Aboriginal title "in its full form," including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations' historical and sacred relationship with their territories.

The historical Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians. We agree to work together in this new relationship to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability.⁷

The New Relationship clearly commits the provincial government to acknowledge and respect Aboriginal Title and Rights and jurisdiction, and move forward in the spirit of reconciliation. However, the province has yet to actualize this vision.

⁶ EAGLE, "Lifeblood of the Land. Aboriginal Peoples' Water Rights in British Columbia" ed. Ardith Walkem et al., June 2004 at p.6-1.

⁷ The New Relationship Vision may be accessed online at:
http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

The *Water Act* Modernization process continues British Columbia's history of denying Aboriginal Title and asserting provincial rights to ownership and jurisdiction over water. Implementing the New Relationship Vision in revising the *Water Act* would necessitate a completely different approach, addressing Indigenous Nations' jurisdiction at every level and including the provincial government working with each First Nation in BC.

The current WAM process pays "lip service" to Aboriginal Title and Rights without actually addressing Indigenous jurisdiction. The WAM Technical Background Report acknowledges that Indigenous Nations across B.C. "have diverse and significant interests in water governance," and as per the New Relationship, the province is committed to "respect, recognition and accommodation of Aboriginal title and rights."⁸ However, the Technical Background Report concludes that "there are opportunities to reinforce **some** of these unique cultural interests and to promote the use of traditional knowledge in water stewardship and decision making" (emphasis added). The province cannot choose *which* interests are addressed. Additionally, while we agree that traditional knowledge in water stewardship and decision making must be incorporated in water planning, Indigenous governance and management of water resources have to be addressed too. The Technical Background Report goes on to state that the current *Water Act* "establishes that all water resources are owned by the Crown" without any question of this, or mention of Indigenous jurisdiction. Ultimately, through continuing to ignore Aboriginal Title, the WAM process designed by the provincial government completely contradicts the positive New Relationship commitments. We call on the provincial government to revisit the New Relationship and realize the Vision prior to any attempts to update water legislation.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

By Resolution no. 2010-03, the UBCIC Chiefs Council re-affirmed that Indigenous People's water rights must be respected by Canada and B.C. to the standards set out by the UN *Declaration on the Rights of Indigenous Peoples*. The Declaration states:

Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources;
2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources,

⁸ British Columbia's Water Act Modernization Technical Background Report may be accessed online at: http://www.livingwatersmart.ca/water-act/docs/wam_tbr.pdf.

particularly in connection with the development, utilization or exploitation of mineral, water or other resources;

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The Declaration is an international legal instrument that protects the fundamental human rights of Indigenous Peoples' way of life: our language, cultural practices, and our sacred relationships to the natural world. We share the view of the Indigenous Environmental Network who states that "the Declaration should be fully recognized in any discussion regarding the governance of water- applying to all levels of jurisdiction including provincial, regional and municipal governments."⁹ The WAM process does not currently reflect Indigenous Rights as set out in the Declaration, by neither respecting nor addressing Indigenous Peoples' relationship to water, nor addressing the right of Indigenous Peoples' Self-Determination in developing priorities and strategies for our water. The WAM process has been unilaterally imposed with provincially-determined goals.

INHERENT PROBLEMS WITH THE CURRENT WATER ACT

The current *Water Act* disregards Aboriginal Title, Rights, and Treaty Rights, and is not aimed at conservation. The *Water Act* is an instrument of institutionalized government control over water and has resulted in exploitation of water for the benefit of business and at the expense of Indigenous Peoples' inherent Rights as well as at the expense of water health and purity. There are inherent problems in the fact that the province is regulating an area of Aboriginal Title and Rights concern. The Province does not have the ownership and jurisdiction over water where Aboriginal Title exists, and the proposed *Water Act* amendments continue with the province's history of denial which is damaging both to Indigenous Peoples and cultures, and also to the waters and all life that depends upon the water.

The existing *Water Act* represents a "hard path" approach to water management which is premised on limitless economic development in a "limitless" natural environment. However, Canadians and British Columbians are increasingly aware that the resources within our natural environment are not limitless, and that we can no longer prioritize human consumption over the interests and rights of the environment and Mother Earth. The utility of water is not represented by a singular value of exploitation for profit. Indigenous Nations in B.C. have recognized other values attributable to water which go beyond economy. The holistic approach that we take in our Indigenous understanding of water means that cultural, spiritual, and ecological values are expressed through traditional knowledge systems and legal orders.

Key features of the Province's current *Water Act* include:

- BC asserts ownership and jurisdiction of all freshwater in BC, including surface and groundwater;

⁹ Indigenous Environmental Network, 2010.

- BC has controlled access to surface water through water licenses issued on a “first come, first served” basis. Historically, BC refused to record water allocations made to reserve lands, and in many cases, reserve lands have a lower priority than settler interests;
- BC has not taken environmental or ecological concerns into account in issuing water licenses, and has “over-subscribed” creeks issuing licenses for more water than is actually contained within creeks; and
- Provincial water management and use policy has been based solely on “use” and exploitation of water, with no consideration given to Indigenous Peoples or the long term impacts on the ecosystem of a failure to protect water.

THE WATER ACT MODERNIZATION INITIATIVE

The B.C. Ministry of Environment issued the *Water Act* Modernization Discussion Paper in fall, 2009, and intends to amend the *Water Act* in 2011. To date, B.C. has scheduled three sessions specifically for Indigenous Peoples, and numerous public sessions throughout the province. However, this is the only attempt that B.C. has made at “consultation,” falling far short of legal requirements. In essence, constitutionally protected Title and Rights as described above are falsely addressed (if at all) as though they are “stakeholder interests” equivalent to those of industry, local governments or interest groups. The changes being contemplated will have far reaching implications for Indigenous Peoples.

Despite New Relationship promises of “respect, recognition and accommodation of Aboriginal title and rights,” the WAM initiative as set out in the Discussion Paper and presented in “Living Water Smart: British Columbia’s Water Plan”¹⁰ fails to recognize Aboriginal Title and instead assumes provincial jurisdiction over all water in B.C. (including over all groundwater).

We strongly urge the provincial government to work in the spirit of the UN *Declaration on the Rights of Indigenous Peoples* reflected through the acknowledgement of Aboriginal jurisdiction over water, and a commitment to working toward preserving Indigenous Nations’ legal, governance and conservation practices associated with water.

WATER ACT MODERNIZATION PAPER- RESPONSE TO PRINCIPLES

We are disappointed that the proposed principals outlined in the Discussion Paper completely fail to address Aboriginal Title and Rights, and operate under the continued assumption of provincial jurisdiction asserted in the current and outdated *Water Act*. We do not believe the province of B.C. has the jurisdiction to make unilateral definitions or decisions regarding water usage. For example, the province does not have the power to define sustainable limits for determining water resource usage, or decisions that water resource legislation, policy and decision making processes get integrated across all

¹⁰ Living Water Smart: British Columbia’s Water Plan may be accessed online at: <http://www.livingwatersmart.ca/book/>.

levels of government. UBCIC strongly disagrees that the province has jurisdiction to limit Indigenous Peoples' access to water for conservation purposes. This problematizes principal 5, which states that "rules and standards for water management are clearly defined, providing a predictable investment climate across the province." We disagree that the province has authority to clearly define such rules and standards.

The proposed principal of "flexibility provided to adapt to extreme conditions or unexpected events on a provincial, regional or issue specific level" might allow large projects with harmful social and environmental consequences to "bend the rules" more easily. So too, the principal that "incentives are created for water conservation that considers the needs of users and investors" could potentially be implemented to the detriment of Aboriginal Title and Rights, as well as the detriment of the health and future of water. Water conservation must also consider the needs of the animals and plants that live on traditional territories.

Although the Discussion Paper suggests that Indigenous Nations' social and cultural practices associated with water must be incorporated into policy, we question who is determining what these practices are, as there are 203 communities in the province of B.C. with diverse social and cultural practices. A blanket policy allowing the provincial government to determine Indigenous Nations' water interests is dangerous to the protection of sovereignty, and may further harm water conservation efforts. Again, the province should work with each one of the 203 First Nations in B.C. in the proper context of addressing Indigenous jurisdiction.

The proposed provincial principals fail to respect the diversity and strength of Indigenous knowledges. For example, Indigenous traditional knowledge must be incorporated into any definition of science that informs changes to the *Water Act*. The principles would have been stronger had the province involved Indigenous Peoples in preliminary work.

PROPOSAL TO PROTECT STREAM HEALTH AND AQUATIC ENVIRONMENTS

"Polluted water must be reclaimed- this is an act of self-preservation. Our survival and the survival of all species, depends on restoring naturally functioning ecosystems."¹¹ All Indigenous Nations must be involved in any discussions around increasing protection of stream health and aquatic environments- sovereign Indigenous Nations will decide what level of shared decision making they wish to be involved in, if any. The province must not impose or determine any such role for Indigenous Nations. For example, a provincially imposed blanket role for Indigenous Nations as "shared decision makers" with municipal governments infringes on our Self-Determination. Additionally, any considerations of protection and conservation standards, plans and guidelines must include Indigenous Peoples' traditional knowledge of stream health and aquatic environments.

¹¹ EAGLE, "*Lifeblood of the Land. Aboriginal Peoples' Water Rights in British Columbia*" ed. Ardith Walkem et al., June 2004 at p.2-15.

We do not support any *Water Act* provisions that would continue commodification of water resources. Natural resources are unique, and cannot be easily replaced. Government direction must not permit the continuation of policies detrimental to our water security, such as the current provincial permission of the Department of Fisheries and Oceans' (DFO) "no net loss" policy. Under this policy, the DFO is able to replace "unavoidable habitat losses" with habitat replacement. Clearly this policy enables destruction of Indigenous Nations' waters, and provides the DFO with an inordinate amount of power over our water.¹² In a provincial example, the *British Columbia Environmental Assessment Act* (BCEAA) provides a legislated process for determining the environmental impacts of a project before it begins; however, the decision of permitting a project to proceed is discretionary. Potentially harmful projects may be permitted to proceed even if there are red flags that a project should be assessed under another act as well. This discretionary policy increases commodification of water to the detriment of stream health and aquatic environments. Projects with substantial economic benefits are more likely to be approved than if there were stricter BCEAA guidelines, and such projects infringe on Aboriginal rights as well as water health.¹³ No projects have been refused under the BCEAA to date.

The health of our water is clearly at stake right - the WAM process must address our Aboriginal Title and Rights over water and stop making top-down conservation plans.

PROPOSAL TO IMPROVE WATER GOVERNANCE ARRANGEMENTS

With overlapping interests and jurisdictions, water governance is complex and must include a clear and meaningful role for Indigenous Nations, based on our Aboriginal Title to water. As recognized by UBCIC Resolution 2001-05, water is critical to survival of Indigenous Peoples and cultures, and our cultures flow from the land. Further, UBCIC Resolution 2009-30 states that "water rights are essential to support hunting, trapping, fishing, the production of food, the economic development of the land, and as part of the spiritual and cultural existence of First Nations peoples."

¹² For example, the Takla, Tsay Kay Dene and Kwadacha publicly objected to the destruction of Amazay Lake, given the significance of the lake and surrounding lands. Northgate Minerals proposed using Amazay Lake as a tailings dump for their proposed Kemess North project. Through immense public pressure, both the Government of BC and the Government of Canada rejected the proposal due to the irreparable impacts to Indigenous Nations.

¹³ For example, Taseko's Prosperity Mine received approval from the BCEA Office, despite the harms it proposes to Indigenous Peoples' territory, and to the environment. Taseko plans to drain Teztan Biny (Fish Lake) and make it a tailings pond for the Mine, although the lake is part of the Tsilhqot'in Government's unceded and sacred territory. Taseko has proposed replacing the Tsilhqot'in fishery in Teztan Biny with another restocked lake, in disregard of Indigenous relationship to natural resources, and in disregard for the health of the environment and people nearby. The Tsilhqot'in Government is currently fighting to protect their territory and the health of their land and water resources. According to their website, Taseko projects that the project has a pre-tax net present value of C\$1.6 billion, and is "one of the largest undeveloped gold-copper reserves in Canada"- a prime example of commodification of our water (<http://www.tasekominer.com/tko/Prosperity.asp>).

We disagree with changing water governance structures which could award greater levels of control to local levels of governments through a regional watershed approach- in effect this would mean the province delegating power over water resources that are actually under Aboriginal jurisdiction. Water governance, as outlined in the Discussion Paper could include local governments, and also “First Nations, industry and non-government organizations” in planning and decision making. There is no consideration of the constitutional nature of Aboriginal Title or Rights, and instead Indigenous Peoples’ rights are addressed as a “stakeholder” interest. The non-government organizations could be potential investors with no concern for the longevity and health of the water source- this is unacceptable and flies in the face of provincial conservation strategies.

We strongly object to any type of water governance that would further disregard Aboriginal Title and Rights. The “centralized approach” permits the provincial government to continue in its role as the main decision making institution. Historically and currently, legislation allowing the provincial government to play this role does not take into consideration the needs of Indigenous Nations, or of water conservation and integrity. For example, there are problems when water scarcity becomes an issue in periodic drought years, and the province then prioritizes municipal, agricultural, mining, and recreational needs to maintain economic benefits to outsider majority stakeholders that may not be local groups.

The “shared approach” still includes Government continuing to set strategic direction and policy instead of Indigenous Nations. According to the Discussion Paper, the province would delegate to a First Nation or partner institution “depending on their capacity or willingness to undertake responsibilities.” Who determines capacity? Aboriginal Peoples must be involved at *every level* of decision making in any changes to water governance.

Like the earlier two approaches, the “delegated approach” maintains the fundamental flaw of assuming that the province has jurisdiction over water and has the authority to delegate management of the water. Flowing from the earlier discussion on Aboriginal Title and Rights over water, provincial title can only be determined after Aboriginal Title has been determined, and the province does not have the power to be involved in determining Aboriginal Title. Aboriginal Title is between the federal government and respective Nations and must be determined on a government-to-government basis.

We agree that water governance arrangements must be changed; the current *Water Act* was created to the exclusion of our inherent jurisdiction over water. Because the province cannot determine Aboriginal Title, it would be prudent for the province to re-consider the current approach to changing water governance as outlined in the Discussion Paper. The provincially described approach is based on the false premise of complete provincial jurisdiction and will require revision in the future.

PROPOSAL TO INTRODUCE MORE FLEXIBILITY AND EFFICIENCY IN THE WATER ALLOCATION SYSTEM

The current water allocation system was designed in a time when Aboriginal Rights were not recognized, and further, were being actively denied and entrenched upon by the provincial and federal

governments. Additionally, the system was designed when the provincial population was much smaller, and there was no consideration by governments of finite natural resources. In this regard, the existing water allocation system does not match the current social or political environment; however, any changes to increase flexibility and efficiency that are determined by the province contain the inherent problem of assuming provincial jurisdiction.

The Discussion Paper proposes introducing measures to make water use more “efficient” with potential inclusion of economic instruments, such as water rentals or pricing, for water management, or penalties and bonuses based on use. Indigenous Nations continue to assert and have not ceded their Aboriginal Title to the water in their respective territories, for which the Discussion Paper contemplates that they may be forced to rent or pay for access. The introduction of a commodification process to water management, even if for the stated aim of conservation, will have a serious detrimental impact on Indigenous communities. Conservation measures cannot be made to the exclusion of our Aboriginal Title and Rights; rather, effective conservation opportunities exist through working in the context of Title and Rights.

Provincial proposals to increase conservation measures on existing allocations are problematized by the false assumption of provincial jurisdiction. The Discussion Paper outlines efforts to cancel (for non-use) existing water licenses, or other efforts to encourage conservation. This could include an attempt by the government to regulate water use on reserve lands.¹⁴ The precise nature of changes is not clearly laid out- would the province use conservation arguments in attempt to restrict or deny Indigenous Peoples’ access to water?¹⁵

PROPOSAL TO REGULATE GROUNDWATER EXTRACTION AND USE

Groundwater is an invaluable resource in our province, and will increasingly be relied upon as the demands on freshwater grow, for example through climate change and increase of heat. Groundwater is an integral part of our ecosystem, and plays an important role in the hydrologic cycle impacting both surface and ocean waters.¹⁶ Approximately 97% of all freshwater on the earth (not including glaciers and icecaps) is groundwater.¹⁷ As most groundwater eventually flows into surface waters, contamination of groundwater due to lack of regulations is a serious concern and area for policy change that must occur in the context of Aboriginal Title and Rights to water.

¹⁴ In recent years, the province undertook an extensive inventory of water licenses attached to Federal Reserve lands. In a few instances, the Province attempted to cancel water licenses that were not in use (and did so in one instance). However, we believe it is doubtful that such actions would be upheld in court as it has the impact of restricting the use that Indigenous Peoples can make of Federal Reserve lands.

¹⁵ E.g. in the same way that access to certain species for hunting or fishing is restricted for conservation, without regard to the damage that other government legislation and policies cause to these species.

¹⁶ EAGLE, “*Lifeblood of the Land. Aboriginal Peoples’ Water Rights in British Columbia*” ed. Ardith Walkem et al., June 2004 at p.16-1.

¹⁷ Stephen McCaffrey, *The Law of International Watercourses: Non-navigational Uses*, New York: Oxford University Press, 2001 at 27.

UBCIC opposes the provincial assertion in the Discussion Paper that in the new *Water Act*, the province will be the body to regulate and control access to groundwater, with no mention of Aboriginal Title or Rights. In the past, provincial regulation of access to surface water (falsely premised on assumed provincial jurisdiction) has clearly been problematic for Indigenous communities in exercising their inherent jurisdiction and having water access and health that meets their needs.

Currently, groundwater extraction and use in B.C. is not regulated. B.C. is the only province without licensing or regulations for groundwater use, although the Living Water Smart strategy has made a commitment to regulate groundwater use in priority areas and large groundwater withdrawals by 2012.¹⁸ There is no standard government instrument to address conflicts among water users and deal with reductions in groundwater quality or quality concerns. Crucially, there is no protection of groundwater from pollution, contaminants or depletion. In addition to depletion, contamination of groundwater from resource or land-use activities is a serious concern.¹⁹ The main sources of groundwater contamination include:

- Pesticides, herbicides and fertilizers from agricultural operations;
- Fecal matter from agricultural operations;
- Spills during transportation of fuels, chemicals, etc;
- Leaching from poorly sited septic systems;
- Leachate from garbage dumps and other waste disposal sites;
- Acid mine drainage;
- Spillage from gasoline and fuel tanks; and
- Chemical spills from mills and other industrial operations.²⁰

Following from the Discussion Paper, access to groundwater might follow the same “first come first serve” approach that is taken to surface water under the current *Water Act*. We are extremely concerned that the provincial government may choose to exercise its authority by providing third parties access to our water in this way. UBCIC President Grand Chief Stewart Phillip recently said “As Indigenous Peoples, we are increasingly alarmed when third party interests are granted access to the resources of our territories, especially fresh water; government and the courts protect those corporate

¹⁸ Watershed Watch Salmon Society, et al., “Fish Out of Water: Tools to Protect British Columbia’s Groundwater and Wild Salmon”, April 2009 may be accessed online at <http://watershed-watch.org/publications/files/FishOutOfWater-web.pdf>.

¹⁹ Christensen, R. “Review of British Columbia’s Groundwater Regulatory Regime: Current Practices and Options”, 2007 may be accessed online at http://www.watershed-watch.org/publications/files/Groundwater_Regulation_Review_SLDF.pdf.

²⁰ EAGLE, “*Lifeblood of the Land. Aboriginal Peoples’ Water Rights in British Columbia*” ed. Ardith Walkem et al., June 2004 at p.16-5.

interests at the expense of our Aboriginal Title and Rights and of the environmental values that many British Columbians hold dear.²¹

In areas of the United States, and around the world, there has been significant depletion of groundwater supplies, which is sometimes called “water mining.” This has led to large areas being without any water and the increased need to import or pipe in water from great distances. In addition to impacting overall Indigenous and British Columbian water security, many Indigenous communities rely on groundwater (through wells, etc.) and efforts to regulate ground water stand to impact Indigenous communities.

We protest the notion that the *Water Act* could be “modernized” by providing the province with authority over groundwater- provincial title cannot be determined until Aboriginal Title has been settled. Given the immense importance of groundwater to the survival of our planet, conservation and preservation measures are important policy shifts- however; awarding authority to the province does not imply or guarantee conservation or preservation, and continues to ignore Aboriginal Title and Rights.

CONCLUSIONS

As Indigenous Peoples, we are intimately connected to water and we must protect this sacred resource for the generations to come. We have exercised our inherent Title and Rights over water since time immemorial and continue to do so. In the province of B.C., there are the Douglas Treaties on Vancouver Island and Treaty 8 in the Peace River region, with the majority of the province still unceded Aboriginal Territory. The courts have recognized Aboriginal Title continues to exist unless a Nation cedes this to the federal government. Our Aboriginal Title, Rights, and Treaty Rights are protected under S. 35 of the *Constitution Act, 1982*, and landmark cases continue to define how these Rights can be exercised. International instruments, importantly the United Nations *Declaration on the Rights of Indigenous Peoples*, uphold Indigenous Rights over water and recognize the special relationship that we have with water. The New Relationship Vision document sets out commitments from the province to move forward in a spirit of reconciliation that recognizes Aboriginal Rights, and recognizes that these inherent rights flow from Indigenous Nations’ historical and sacred relationship with their territories.

The existing *Water Act* is out of date and does not reflect the current social, political, spiritual, legal and economic context. The *Water Act* ignores Aboriginal Title, Rights, and Treaty Rights, and falsely assumes provincial jurisdiction over the majority of water in B.C. Although federal and provincial division of powers are not clearly defined in regards to water, under the *Water Act*, the province asserts the majority of control over water in British Columbia, despite the fact that Indigenous Nations have Aboriginal Title and Rights of the land and waters in their respective territories.

²¹ Grand Chief Stewart Phillip, “UBCIC Fully Supports Halalt Protective Blockade,” media release, 10 March 2010, available at http://ubcic.bc.ca/News_Releases/UBCICNews03101001.htm.

The current WAM process and Discussion Paper contain the colonial assumption of continued provincial jurisdiction over waters in B.C. The Union of B.C. Indian Chiefs strongly objects to a top-down, provincially-determined plan for “modernizing” the *Water Act*, and we urge the Government of British Columbia to take immediate steps to rectify this process by directly contacting each First Nation in B.C. to seek feedback and direction. The province must address Indigenous jurisdiction over water resources in B.C.; the current WAM modernization process cannot continue to ignore Aboriginal Title and Rights and environmental values for greater benefit of third party interests. We encourage the province to address the legal implications of our Aboriginal Title and Rights over water, and the legal implications of continuing to move forward in amending the water legislation without taking recommended steps.

On July 8th, 2001, Indigenous Peoples from around the world gathered on Musqueam Territory and ratified an International Indigenous Declaration on Water which reflects Indigenous Peoples laws and traditions. It begins:

*As Indigenous Peoples, we raise our voices in solidarity to speak for the protection of the water. The Creator placed us on this earth, each in our own sacred and traditional lands, to care for all of creation. We have always governed ourselves as Peoples to ensure the protection and purity of water. We stand united to follow and implement our knowledge, laws and self-determination to preserve water, to preserve life. Our message is clear: Protect Water Now!*²²

²² Endorsed by the international community and Indigenous Peoples assembled at the International Conference on water for People and Nature. Available in EAGLE, “*Lifeblood of the Land. Aboriginal Peoples’ Water Rights in British Columbia*” ed. Ardith Walkem et al., June 2004 at p.1-2 to 1-5.