



**INDIAN WATER RIGHTS
IN
BRITISH COLUMBIA**

A HANDBOOK

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FORWARD

Water is an essential part of the lives of our First Nations. It is basic for hunting, fishing, trapping, and gathering. It is crucial for agricultural and economic development. It is a foundation of our spiritual and cultural existence within our homelands.

Many people assume that British Columbia has an excess of water. In the past year alone, several business proposals have come forward to export huge quantities of water to drought-stricken areas in the United States. Yet there are regions of British Columbia, particularly in the central interior, where adequate water for domestic and agricultural development is very scarce. Demands on this limited resource are steadily increasing as the population grows, more housing is built and more land is brought into agricultural production.

For our First Nation citizens, the need for adequate water resources is even more critical. Many Indian reserves in British Columbia are located adjacent to major rivers, streams and lakes. These reserves were established so that the Indian people in those areas could pursue their traditional way of life, centered on fishing. However, the influx of European immigrants and agriculture, especially into the interior of the province, had a negative effect on our peoples' way of life. Church and state put pressure on Indians to "settle down" and become good, responsible, productive farmers in the mold of the European settlers.

In the interior of British Columbia, many of the Indian reserves included land that had some agricultural potential. In many instances, Indians were farming or ranching in the area when the reserves were first set up. There is ample evidence to show that many Indians were successfully participating in agricultural activities when their efforts were effectively curtailed by illegal water restrictions imposed by the provincial government.

Since 1978, land use for agriculture has increased from 15% to over 50% of the arable land base on Indian reserves in British Columbia. The population and domestic water requirements of our respective Nations have increased significantly over the past thirteen years as well.

Today, as in years past, Indian water rights mean *survival* for our people and our future generations.

As President of the Union of B.C. Indian Chiefs, I am pleased to be able to share this Indian Water Rights handbook with you. The information it contains has been extracted and edited for publication from various reports prepared by the UBCIC research and legal staff over the past six years. I hope it will be useful to the many band and tribal council researchers working on behalf of our people and to others with an interest in understanding Indian water rights issues in British Columbia.

It is appropriate at this time that I acknowledge the law firm of Mandell, Pinder, Thalassa Research Associates, and Nancy Sandy, UBCIC in-house counsel, for their work for UBCIC member bands on water rights issues over the years.

I also wish to acknowledge the Native Programs Branch of the Legal Services Society of British Columbia, whose support has made the publication of this handbook possible.

Chief Saul Terry
President
UNION OF B.C. INDIAN CHIEFS

April, 1991

INTRODUCTION

The goal of this handbook is to provide historical and legal background information on Indian water rights in British Columbia. The handbook is divided into two main sections.

Part I outlines the history of the Indian water rights issue in British Columbia from the pre-Confederation period up to 1939. Using archival documentation, it describes how colonial, provincial, and federal authorities viewed Indian Water rights and how, over the years, aboriginal and reserve water rights were compromised, restricted and denied by these governments. In writing this section, a conscious effort has been made not to editorialize and let the documents themselves speak directly to the reader.

Part II outlines the general legal arguments available to First Nations who wish to assert their aboriginal and reserved water rights. By its nature, this section draws legal conclusions from the cases and statutes relevant to Indian water rights in British Columbia. It also addresses the controversial legal issues of extinguishment of aboriginal water rights and restriction of reserved water rights by the provincial government.

The handbook concludes with notes on historical sources of documentation on Indian water rights in British Columbia compiled by the UBCIC Specific Claims Research Program. The notes are intended to assist band and tribal council researchers and others in locating key archival record groups and secondary sources related to the Indian water rights issue.

It has been said that *Knowledge is Power*. The Union of B.C. Indian Chiefs hopes that this handbook serves as a tool of *empowerment* for B.C. First Nations in asserting their water rights and carrying forward the struggle of their forefathers for recognition of Aboriginal Title and Rights and a just settlement of the Land Question.

PART I

INDIAN WATER RIGHTS: HISTORICAL OVERVIEW

1. PRE-CONFEDERATION WATER ALLOTMENTS

Prior to British Columbia's entry into Confederation in 1871, the availability of water was a key factor in the allotment of Indian reserves. On January 17, 1866, for example, surveyor J. Turnbull wrote to the Chief Commissioner of Land and Works, Joseph Trutch, describing three Indian Reserves that had been laid out on Okanagan Lake:

The whole of the flat may be considered for agricultural purposes, as it can all be irrigated with very little trouble... *British Columbia, Papers connected with the Indian Land Question, 1850-1875, Victoria: 1875, pp. 35-6.*

On October 30, 1868, Magistrate H.M. Ball wrote to the Chief Commissioner of Lands and Works regarding the survey of small reserves in the vicinity of Lytton:

As the culture of the land in that district is carried on by irrigation, and all the available land eagerly taken up where water can be used for irrigation, I think it would be advisable that in the spring the Indians should have their small plots of land secured to them and surveyed off, together with a certain amount of unappropriated water where required. *Papers Connected, p. 53.*

On September 12, 1870, Magistrate E.H. Sanders wrote to the Surveyor General of the Colony, informing him that he had allotted three reserves between Lillooet and Foster's Bar. In his description of the reserves he specified the amount and source of water allotted for each. *Papers Connected, p. 85*

The reserves cited above were not included in the Province's 1871 schedule of surveyed Indian Reserves in British Columbia. However, the

provision of water was mentioned in connection with other reserve allotments. *Papers Connected, pp. 104-106.*

Responding to a letter from Reverend A. Good regarding the lack of water on Indian Reserve No. 3 at Nicola Lake, Magistrate Peter O'Reilly wrote:

my instructions in laying out these reserves were to deal liberally with the Indians I considered it indispensable that the reserves should be well supplied with wood and water... . *Papers Connected, p. 91.*

This reserve was included in the 1871 Schedule of B.C. Indian Reserves.

The policies and intentions of the Imperial and Colonial governments regarding water rights and Indian Reserves in B.C. were closely examined in March and April, 1909 in a series of memoranda from J.B. Harkin, the Chief Clerk, Department of the Interior, to the Minister of the Interior, Frank Oliver. In his memo of March 15, Harkin defined the issue of Indian water rights for the Minister. He argued that Indians in B.C. had rights to water based on the following grounds:

1. That their aboriginal right was never surrendered.
2. That old records and correspondence show that the desire and intention of the Imperial Government - and of the Colonial Government - was to deal fairly, frankly and generously with the Indians... .
3. That when reserves were set aside the use of water by the Indian was in mind, because in cases where reserves had special advantage in the matter of irrigation, the official reports give this fact as an evidence of the suitability of the reserves.
4. That English Common Law prevailed in British Columbia when most of the reserves were set aside and that it provides wide riparian rights.
5. That there are a number of legal decisions which ... will hear out a special claim for Indians ... on account of conditions and laws prevailing at the time the reservations were made.

Harkin also defined the case against Indian water rights for the Minister and presented the following arguments:

1. The fact that as far back as 1861 the Colony of British Columbia [undertook] to deal with water privileges and yet made no legislative exceptions regarding Indian Reserves.
2. That the Province claims control over water and that the Dominion has not disallowed any of its water legislation... .
3. That the Indian Department and other federal departments have recognized the provincial plan by taking records of water under provincial legislation.
4. That it would be difficult to establish a "beneficial use" claim to antedate any records made prior to a few years ago because the Indians have not been going in for irrigation in the past to anything like the extent that they will have to in the future. *P.A.C. RG10, Vol. 4010, File 259,190.*

2. POST-CONFEDERATION: 1871 - 1887

The Joint Indian Reserve Commission was established by federal - provincial orders-in-council in 1876 to allot reserves in British Columbia. The three Commissioners were not given specific instructions regarding the allotment of water rights on Indian Reserves. However, several Minutes of Decision signed in 1877 by the Joint Reserve Commissioners included water rights allotments. For example, the Minute Decision for the Kamloops Indian Reserves, dated 29 July 1877, contains the following reference to water rights:

The prior right of the Indians, as the oldest owners or occupiers of the soil, to all the water which they require or may require for irrigation and other purposes from St. Paul's Creek and its sources and northern tributary is, so far as the Commissioners have authority in the matter, declared and confirmed to them.

In 1878, when Gilbert Malcolm Sproat became the sole Indian Reserve Commissioner, he included water rights in his Minutes of Decision, specifying the sources and/or amounts of water he was allotting.

On March 18, 1878, a draft of General Instructions to Surveyors of B.C. Indian Reserves (unsigned, but probably by Sproat) directed them to carefully record the depth, crossings, width and velocities of creeks, especially in the Interior,

... as an estimate may be required of the amount of water available for irrigation, and the surveyor should ascertain what quantity of water, if any, has been recorded by settlers... *P.A.C. RG10, Vol. 3633, File 6425-1.*

Reporting on water rights to the Provincial Secretary on April 22, 1878, Commissioner Sproat recommended that the Provincial Government not record water rights for white settlers in areas reserved for Indians until the matter of Indian water rights was settled. Sproat also inquired as to whether Joint Reserve Commission decisions on water allotments were equivalent to a legal record or whether the supply of water for individual bands needed to be recorded with the Province in addition. Sproat did not receive a reply and on November 6, 1878, he reported to the Superintendent-General of Indian Affairs that:

... a difficult question has arisen with the Provincial Government respecting a supply of irrigation water for Indian Reserves, which the old Colonial Government neglected in many cases to provide... I will have to state what quantity [of water] this should be for each reserve, and the water rights will have to be conveyed to the Dominion Government by the Provincial Government together with the land.

With this correspondence, Sproat enclosed a report by surveyor E. Mohun, "Indian Reserve Commission: Report on Irrigation, 1878, Interior Division." Mohun's report outlined technical aspects of irrigation and indicated that the Gold Field Act, 1859 provided the customary measurement of one miners inch of water per acre. *P.A.C. RG10, Vol. 11027, File 9755-1; Vol.3633, File 6425-3.*

In April and May of 1879, correspondence between Commissioner Sproat and the Superintendent-General of Indian Affairs indicates that no action had been taken by the Provincial Government on the Indian water question. On August 29, 1879, Sproat wrote to the Chief Commissioner of Lands and Works:

The water question especially requires the co-operation of the Provincial Government... I shall be glad to know the time when and the manner in which this co-operation shall begin. *P.A.C. RG10, Vol. 3680, File 12,395-1.*

In a memo dated September 25, 1879, the Deputy Superintendent-General of Indian Affairs, C. Vankoughnet, summarized for Sir John A. MacDonald, the Superintendent-General, the conflict with the Province regarding water rights. He reported that Commissioner Sproat had delayed the allotment of Indian Reserves in the Interior of B.C. due to the controversy surrounding the issue. *P.A.C. RG10, Vol. 3680, File 12,395-1.*

The Federal-Provincial dispute over Indian Water Rights next surfaced with the passage of the provincial Land Act, 1884. As with previous provincial legislation, the Land Act, 1884 made no provision for the allotment of water on Indian reserves. However, the Chief Commissioner of Lands and Works stated in a letter to the Dominion's Inspector of Indian Agencies, I.W. Powell, dated December 5, 1884, that:

The Land Act provides for the acquisition of water privileges, and I opine it applies to Indians and white men alike... The Indian Commissioners seem to have had not the slightest authority to confer any rights to water upon the Indians... *P.A.C. RG10, Vol. 11027, File 9755-1.*

On December 9, 1884, Powell replied that the Indians did not have any rights under the Land Act. He noted that the Reserve Commissioners' work in the Interior of B.C. would have been useless if they had not had the power to allot water along with reserve land. Reporting to the Superintendent-General on December 31, Powell stated that:

Prior to the perusal of the [the C.C.L.W.'s] letter, I was quite unaware that there was any question as to the power of the Commissioners to apportion water with the reserve. *P.A.C. RG10, Vol. 11027, File 9755-1.*

Powell also objected to involvement by the office of the Chief Commissioner of Lands and Works in awarding water rights applications to Indians:

I feel persuaded that it was so understood by the local Government existing at the time, and the Commission themselves, otherwise water would not have been apportioned, nor would so grave an error have been committed by the Commission as to lead Indians astray... .

Powell also noted that water allotments made by the current Indian Reserve Commissioner, Peter O'Reilly, had been approved by Chief Commissioner of Lands and Works Smithe.

On January 7, 1886, Macdonald again instructed Powell to apply for water for Indian Reserves through the Chief Commissioner of Lands and Works. Powell was advised that there would be no difficulty if he applied for the amounts specified in the J.R.C.'s Minutes of Decision. As for the water subsequently allotted for Indian reserves by O'Reilly, the Superintendent-General declared that "that there is no question so far as I am aware at issue in regard to them." *P.A.C. RG10, Vol. 11027, File 9755-1.*

On March 23, 1886, Powell applied to the Chief Commissioner of Lands and Works for specific water rights for seven Interior bands. However, on June 22 Vankoughnet was obliged to report the Chief Commissioner of Lands and Works's lack of response to Powell's applications to Superintendent-General Macdonald. Vankoughnet advised Macdonald that:

Very serious complications will inevitably ensue unless the water privileges of the Indians are clearly defined, and this is more imperatively necessary in view of the influx of white settlers into the province... . who will, unless the Indian rights in the water are protected, monopolize all the water, and

the land allotted to the Indians for the purposes of cultivation will thus be rendered absolutely useless to them . . . *P.A.C. RG10, Vol. 11027, File 9755-1.*

In an effort to resolve the dispute, Dominion Order-in- Council 1534 was passed on July 19, 1887. It requested that the B.C. Government appoint one member of their Executive Council "clothed with full power to settle all such outstanding questions," between the Province and the Dominion, including:

The question of the rights of the Indians of the Interior of the Province of British Columbia, to a sufficiency of water from Streams and Lakes, wherewith to irrigate the lands allotted to them as Reserved in order to render the same cultivable. *P.A.C. RG10, Vol. 11027, File 9755-1.*

By Order-in-Council, dated September 28, 1887, the B.C. Provincial Secretary, John Robson, was appointed as the delegate for the Province. Previous to this, the Dominion Government had appointed Thomas White as its representative.

On an undated "Summary . . . relative to the question of irrigation in B.C.," prepared during the White-Robson discussions, a handwritten note indicates that the

Provincial Government will apply for legislation to enable Indian Agents to apply for water for irrigation purposes, as white settlers do, for the use of Indians.

Later correspondence from both the White-Robson Conference and Inspector Powell indicates that this note represented the delegate's official decision on the water rights issue, prompting an amendment to the provincial Land Act in 1888.

3. WATER RIGHTS IN B.C.: 1888 - 1910

Under the terms of the amended Land Act, 1884, which was passed by the B.C. Legislature on April 28, 1888, provision was made for the recording of water rights for Indians in B.C.. The Act granted the Chief Commissioner of Lands and Works the power to authorize the diversion of any unrecorded and unappropriated water for agricultural purposes "... for the benefit of all or any of

the Indians located on an Indian Reserve." The Chief Commissioner of Lands and Works was also given authority to vary or cancel the records as he saw fit.

Inspector Powell reported on the amended legislation in a letter to the Superintendent-General on July 31, 1888:

. . . the present Provincial Land Act, so far as permitting records for water for Indians is concerned, is a great sham, and a positive injustice and hardship to the Indians.

Even after a record is made, there is no security to the Indian... . *P.A.C. RG10, Vol. 11027, File 9755-1.*

However, on August 6, Powell indicated to the Department that Indian Agents had been instructed to take the necessary steps under the Land Act to record water rights for Indians within their agencies. *P.A.C. RG10, Vol. 11027, File 9755-1.*

In his report of July 31, Powell pointed out to the Superintendent-General that, as most of the reserves requiring water were within the Railway Belt, it appeared that water privileges for the majority of these reserves were under the direct authority of the Dominion Government. Powell's understanding was confirmed by the Deputy Minister of the Interior on August 17, 1888 in a letter to the Deputy Superintendent-General of Indian Affairs, wherein he stated that the Department of the Interior had

always contended that the grant of twenty miles of land on either side of the C.P.R. in B.C. conveyed absolutely the land and everything appertaining thereto such as mineral and water privileges. *P.A.C. RG10, Vol. 11027, File 9755-1.*

The question of jurisdiction over water within the Railway Belt became the focus of the water rights dispute between the Provincial and the Dominion Government over the next twenty years.

On September 1, 1888, Powell was informed by the Superintendent-General of the Department of Interior's position regarding Indian water rights in the Railway Belt. He was instructed to immediately record water rights for reserves in the Railway Belt with the New Westminster office of the Department of the Interior. These rights were to be defined by the relevant specifications

contained in Sproat's and O'Reilly's Minutes of Decision. On September 4, 1888, the Department forwarded to Powell a list entitled, "Water Privileges as reserved by the Indian Reserve Joint Commission and Commissioner Sproat and O'Reilly lying within the Canadian Pacific Railway Belt, B.C." A note at the end of this list reads:

This general statement of water privileges as outlined in this document are taken from the Records of the Department. The [writing] on the margins on several pages are taken from an incomplete return of later date from [Mr.] Superintendent Powell. *P.A.C. RG10, Vol. 11027, File 9755-1.*

On January 8, 1889, S. Moffat, Acting Indian Superintendent for B.C. forwarded to the Department in Ottawa a "revised" list of reserves, as recorded by Indian Agent McKay on September 26, 1888. This list showed the quantity and source of water for Railway Belt reserves in the Kamloops and Fraser River Agencies. At the same time, Moffat forwarded a list of water privileges for reserves outside the Railway Belt that McKay had submitted to John Clapperton, J.P., for recording in the Provincial Land Office at Nicola Lake. *P.A.C. RG10, Vol. 11027, File 9755-1.*

In addition to McKay's lists, water records for the Cariboo, Lillooet and Chilcotin Districts (William's Lake Agency) were compiled by Indian Agent Meason in July of 1888 and submitted to B.C. Government agents at Richfield and Clinton pursuant to the Land Act. On March 21, 1889, Moffat reported to the Department in Ottawa that Meason's list for water within the William's Lake Agency had been forwarded for publication in the B.C. Gazette and the Inland Sentinel. *P.A.C. RG10, Vol. 11027, File 9755-1.*

On April 18, 1889, Moffat was informed by the Department that Clause 27 of the Regulations for the disposal of Dominion Lands within the Railway Belt "shall apply to the diversion and use of water from any stream or lake, and the rights of way necessary for the conveyance thereof in respect to the irrigation of agricultural lands." On April 29 Moffat reported back to the Superintendent-General that copies of the Dominion Mining Regulations had been forwarded to

Indian Agents with jurisdiction over Railway Belt reserves. *P.A.C. RG10, Vol. 11027, File 9755-1.*

However, correspondence in January and February, 1890 between the Department of the Interior, DIA Headquarters, and B.C. Indian Superintendent Vowell suggests that the status of water rights for Railway Belt reserves remained uncertain. On March 12 of that year, two lists of Indian water privileges in the Railway belt were compiled by Dominion surveyors E. Skinner and W.S. Jemmett. These schedules defined two categories of reserves: those with specific water rights allotted by the Reserve Commissioners; and those in need of "special arrangements."

In 1891, the Department of the Interior began to consider the allotment of water for those reserves requiring "special consideration."

A Dominion Order-in-Council, dated January 20, 1892 exempted Indian Lands in the Railway Belt from the Dominion Mining Regulations which previously governed the allotment of water within the Railway Belt. The Order-in-Council authorized the Minister of the Interior "to prescribe what privileges he deems it necessary in the public interest to accord for the proper irrigation of Indian lands, upon applications and recommendations made from time to time by the Indian Reserve Commissioners." In accordance with this Order-in-Council, the Department instructed Vowell and O'Reilly on May 5, 1892 to draw up applications for Indian water rights in the Railway Belt as per Moffat's list of 1889, including any revisions recommended by O'Reilly. However, the Provincial Government refused to recognize the authority of the Dominion Government to allot water rights for Indian reserves in the Railway Belt. *P.A.C. RG10, Vol. 11027, File 9755-1.*

In a letter to Superintendent Vowell on October 7, 1896, the Victoria law firm of Drake, Jackson, and Helmcken, local agents for the Minister of Justice, offered their legal opinion that water records made by the Indian Agent in Kamloops under the Dominion regulations were valid as against subsequent records made by agents of the Province. They advised Vowell to request that the Provincial Government instruct its agents to cease granting water records for the Railway Belt and to cancel all records made by them since the transfer of the

Railway Belt to the Dominion. If the Province did not comply with this request, the Dominion Government could apply to the Supreme Court of B.C. for an injunction restraining the holders of provincial records from using waters already recorded in favor of the Indians. *P.A.C. RG10, Vol. 11027, File 9755-1.*

Superintendent Vowell wrote to the Department of Indian Affairs on November 28, 1896, outlining the position being taken by the provincial government. Vowell recommended "that every step which may be necessary and could prove effective should be taken to place the natives in undisputed possession of such water as they need and may be in a position to obtain." According to Vowell, the Provincial Government refused to recognize Indian rights to water in the Railway Belt unless they were recorded in the Provincial Land Office as required by the Land Act. But, even if the Dominion Government were to comply with the Province's position, Vowell pointed out, "it would be of doubtful benefit to the Indians as their rights so obtained would be subject to prior claims of white settlers." *P.A.C. RG10, Vol. 11027, File 9755-1.*

The Deputy Superintendent-General responded to Vowell's letter on January 14, 1897:

I have to request you to ... arrive at a temporary understanding with the Provincial authorities, to the effect that no water records which may affect the prior right of the Indians shall be granted by the Province within the Railway Belt and that the Indians shall have the use of all waters recorded for them in the Dominion Lands offices until the said decision is arrived at. *P.A.C. RG10, Vol. 11027, File 9755-1.*

On February 26, 1897, twenty-six water records were recorded by B.C.'s Deputy Commissioner of Lands and Works for a limited number of Indian reserves in the southern portion of the Kamloops-Okanagan Agency. These records, signed by L. Norris, Assistant Commissioner of Lands and Works, give the source and amount of water "for irrigation and domestic purposes for a period of ninety-nine years." *P.A.C. RG10, Vol. 11027, File 9755-1.*

On July 22, 1897 Superintendent Vowell submitted to the Department in Ottawa lists of all water records for reserves in and outside of the Railway Belt

in the Kamloops-Okanagan and Fraser River Agencies. Additional lists followed on August 26, 1897 for the Kootenay and Williams Lake Agencies. These lists included the twenty-six water records granted by Norris on January 30, and recorded on February 26, 1897. Vowell noted in his accompanying letter that no water records had been made in the Babine, North West Coast, Kwakewlth or West Coast Agencies. *P.A.C. RG10, Vol. 11027, File 9755-1.*

The dispute over water records in the Railway Belt continued to 1905. On May 29 of that year, S. Bray, Chief Surveyor of the Department of Indian Affairs, wrote to the Deputy Superintendent-General on the current status of water rights in the Belt:

The Provincial Government . . . is granting water records, and is not being restrained by the Dominion Government, except in having the matter brought to the attention of the Provincial Government from time to time. *P.A.C. RG10, Vol. 11027, File 9755-2.*

On June 8, 1905 Vowell explained to the Deputy Superintendent-General his 1897 attempt to effect a "temporary understanding" with the Provincial Government on water rights in the Railway belt. Vowell reported that he had written and personally interviewed the Chief Commissioner of Lands and Works, who informed him that special legislation would be enacted by the Province and that the Department's requests would receive consideration. Vowell forwarded a copy of the new Land Act (1902), in which Clause 35 was revised to provide for the recording of water rights for Indian Reserves. *P.A.C. RG10, Vol. 11027, File 9755-2.*

On June 20, 1905, the Deputy Superintendent-General advised Vowell that Provincial authorities had refused to recognize any claims to water rights recorded in Dominion land offices. He thus instructed Vowell to record all Indian water rights in Provincial offices "including those that have adverse claims ... and the fact should be made know that [the DIA] intends to make good its claims to these waters on account of priority of record in the Dominion office." *P.A.C. RG10, Vol. 11027, File 9755-2.*

Finally, on November 1, 1910 the dispute between the Dominion and Provincial Governments over Railway Belt water rights was resolved by the

decision of the Privy Council in the case of Burrard Power Company v. Regina. On November 23, J.D. McLean, Assistant Deputy and Secretary of the DIA, reported to W.E. Ditchburn, Inspector of Indian Agencies in B.C., that the Privy Council's decision meant that "all waters for irrigation recorded in the Dominion Government offices in favor of Indian reserves are therefore valid." *P.A.C. RG10, Vol. 11027, File 9755-2.*

4. WATER RIGHTS/BOARD OF INVESTIGATION, 1909 - 1916

On March 12, 1909, the B.C. Legislature passed the Water Act, 1909, which created a Board of Investigation, "a semi-judicial body with authority to review all existing rights and order the issue of licences in respect to them." *B.C. Governments, Report of the Lands, Surveys, Water Rights Branches, Victoria: 1946, p. 79.*

In 1912 the Board of Investigation established under the Water Act held its first hearings. The Department of Indian Affairs appointed agents to act as Counsel for the Indians at Board meetings.

On June 1, 1912, the Dominion Government passed the Railway Belt Water Act, transferring part of the administration of waters in the Railway Belt to the Province. In placing Railway Belt waters under the Provincial record system, the R.B.W. Act invalidated riparian water claims. In 1913 the R.B.W. Act was amended to fully protect the rights of the Indians. As amended, the R.B.W. Act validated the water allotments made by the Indian Reserve Commissioners within the Railway Belt. However, recording of these water rights remained with the Province and its Board of Investigation, as if they had been granted under the provincial Water Act. *P.A.C. RG10, Vol. 11027, File 9755-2.*

In 1913, the validity of the Indian Reserve Commissioners' water allotments outside the Railway Belt was addressed by the Board of Investigation. On October 25, 1913, A.P. Cochrane, the lawyer representing the Dominion Government, outlined his position to the Secretary of the Department of Indian Affairs.

We must in some way convince the Board that the different Commissioners who set apart the respective reserves had authority to so do and likewise had authority to allot water rights. *P.A.C. RG10, Vol. 11027, File 9755-2.*

In addition to the issue of the Reserve Commissioners' authority to allot water, questions surfaced early on in the Board's proceedings about the specific quantities and dates of priority for the Commissioners' allotments.

In 1914, the B.C. Legislature passed the B.C. Water Act, 1914. The Board of Investigation was retained, with Section VIII of the Act outlining the Board's functions and procedures. The new Act did not substantively alter the rights of Indians to record water. However, the Act did establish June 1, 1916 as a cut-off date for applications for riparian claims to water. It also outlined a system of water administration supervised by District Engineers, whose duties included investigating and monitoring the use of water throughout the Province.

On August 12, 1914, J.A. McKenna writing on behalf of the Royal Commission on Indian Affairs for B.C., endorsed the authorization of provincial District Engineers to investigate the water situation on Indian reserves:

Again and again in our visitations of reserves in the "dry belt" I got the impression that Indians are being deprived of water to which they are entitled... . The only way to protect the Indians in their water rights is through the fullest and most hearty cooperation between the officers and engineers of the Water Rights Branch of the B.C. Land Department and the agents of the D.I.A. *P.A.C. RG10, Vol. 11027, File 9755-2.*

While conducting its hearings, the Royal Commission gathered information regarding water rights on Indian reserves throughout the province. The Assistant Secretary of the Commission, Mr. Gibbons, compiled extracts from the evidence given before the Commissioners relating specifically to water. This report was forwarded to J.F. Armstrong, Chairman of the Board of Investigation. Gibbons also compiled a list of water records based on the 1913 DIA Schedule of Indian Reserves, and instructed Indian Agents throughout the Province to furnish Indian water records for their Agencies missing from the 1913 schedule. Gibbons proposed to Armstrong that the issuing of water

records be suspended by the Province for any lands which the Royal Commission wished to consider for new reserve allotments. *P.A.C. RG10, Vol 11027, File 9755-2. P.A.C. RG10, 11020, File 515.*

The Minister of Lands responded to Gibbons' proposal on December 2, 1914, stating that, although he could not recommend the establishment of interim reserves of water to the B.C. Cabinet, all such requests "would be noted in the [Lands] Department and given consideration in connection with any applications that might be made in other interests for the use of the water in question."

On June 15, 1916, the Royal Commission passed the following resolution concerning the water rights of Indians in B.C..

Be it resolved: That, to the extent to which the allotting Commissioners had authority to allot such water rights, this Commission, insofar as the power may lie in it so to do, CONFIRMS the said allotted Water Rights as set forth in the schedule hereto appended. (Schedule enclosed) *P.A.C. RG10, Vol 11027, File 9755-2. P.A.C. RG10, 11020, File 515.*

5. BOARD OF INVESTIGATION HEARINGS, 1918-1939.

In 1918, the Department of Interior and the Department of Indian Affairs agreed upon a policy for investigating and protecting Indian water rights in British Columbia. Under the direction R.G. Swan, the Dominion Water Power Branch's Chief Engineer for water resources in B.C., the Dominion would thoroughly investigate water records relevant to each reserve and present them to the Provincial Board of Investigation. On March 18, 1919 Inspector Ditchburn wrote to the Department in Ottawa, recommending that Swan's Assistant, Mr. Balls, should record water rights on reserves where Indians were using water for irrigation without a licence. *P.A.C. RG10, Vol. 11027, File 9755-3.*

On April 7, 1919, J.W. Ellis, counsel for the DIA, wrote to the Deputy Superintendent-General, D.C. Scott, on the position to be taken by the Dominion Government at the hearings of the Board of Investigation. Ellis reported that he and Inspector Ditchburn agreed that the Dominion should

claim, on behalf of the Indians, "the first right as to the use of the water." H.W. Grunsky, legal advisor to the Dominion Water Power Branch, in a memo dated April 15, 1919 to the Superintendent of the D.W.P.B., Mr. Challies, concurred with Ellis and Ditchburn's opinion and outlined legal arguments relevant to the Dominion's position. *P.A.C. RG10, Vol. 11027, File 9755-3.*

On April 29, 1919, Ellis detailed for Scott the argument he had presented to the Board of Investigation at a preliminary meeting. The Department's position -- that Indians were entitled to priority in water rights -- was based on the following points:

First: The Dominion Government controls the water on the Indian reserves as a necessary incident of the trusteeship and management of the Indian Reserves given to the Dominion Government under the Terms of Union.

Second: That the Indians are entitled to first consideration as the settled policy of the Province dating from the time it was a Crown colony.

Third: The Indians are entitled to first right of water on the grounds of prescription. *P.A.C. RG10, Vol. 11027, File 9755-3.*

In a further report to Scott on July 31, 1919, Ellis elaborated on these points and stated:

Unless the question of the priority of the Indian ... is insisted upon and pressed very strongly by the Indian Department, the B.C. Water Commissioners will decide in many instances against the Indians ... as their jurisdiction is confined simply to the Water Act and they take the view that the Indians are the same as any other individuals and not above the law. *P.A.C. RG10, Vol. 11027, File 9755-3.*

On October 10, 1919, Challies reported to Deputy Superintendent-General Scott that the Board of Investigation hearings had been discontinued because "the provincial Board was not empowered to adjudicate upon" the Dominion's "sweeping claims" to water rights for the Indians. However, Challies also advised that

the cooperative surveys and investigations which are now being made upon the Indian reserves by engineers of the Dominion and the Province under the direction of Mr. Swan might afford the basis for an equitable settlement by the Board of Indian water rights claims. *P.A.C. RG10, Vol. 3660, File 9755-4.*

Meetings of the Board of Investigation resumed in 1920. On June 15, Ellis reported to Scott that both the Chairman of the Board and the Counsel for the Province, Mr. Lane, took the position that only water records filed pursuant to provincial Water Acts had any basis for consideration. With regard to water records outside the Railway Belt, the Board had decided that:

in so far as any allotments made by the different [Indian Reserve] Commissions held under the authority of the Dominion Government [are concerned], the claim of the Indian cannot be considered unless these allotments were followed up by the filing of records in the proper [provincial] offices and then priority of filing counts. *P.A.C. RG10, Vol. 3660, File 9755-4.*

Ellis also advised Scott that the Board of Investigation had refrained from deciding on water rights inside the Railway Belt.

Following the Board of Investigation's ruling on Indian water rights, the Assistant Deputy Minister of Justice advised Scott on July 30, 1920:

If your Department should be dissatisfied with any disposition of the waters affecting Indian reserves ordered to be made by the Provincial authorities, the ordinary appeal by the Waters Acts is open to your Department ... while the administration of the waters is left in the control of the provincial authorities. *P.A.C. RG10, Vol. 3660, File 9755-4.*

On July 31, 1920, the Board of Investigation ruled on Indian water rights inside the Railway Belt. The Board accepted the list of water rights filed in the Dominion Lands Office at New Westminster on September 26, 1888 as bona fide applications for records of water. This list contained general water allotments made by the various Reserve Commissioners as well as more specific water allotments:

The Board will treat the Indian Reserve Commissioners' Allotments and the items in the list as it does the earlier indefinite Provincial Records granted to white men. That is to say, it will determine the source or sources of supply and the quantity of water which may be used and fix the point or points of diversion. The date of the list will be looked upon as the date the rights became a matter of record and they will be entitled to priority accordingly.

The Board also ruled that water records made by the province before the establishment of the Railway Belt were "not affected by the transfer of the Belt to Dominion jurisdiction." Water records granted by the Province after the establishment of the Railway Belt were "deemed to be valid and effective by virtue of the provisions of section 5 of the RAILWAY BELT WATER ACT." In addition, the Board advised that it had no jurisdiction over prescriptive claims to water by Indians and reserved decision regarding riparian rights to water until a later date. *P.A.C. RG10, Vol. 3660, File 9755-4.*

On June 23, 1921, Inspector Ditchburn advised the Deputy Superintendent-General that the Board of Investigation's decision not to consider any of the Reserve Commissioners' allotments outside the Railway Belt meant that "the Indians would lose many years priority." In a meeting between Ditchburn and the Deputy Attorney General of B.C., W.D. Carter, it was agreed that "the best thing to do was for the Province to place the Indian reserves outside of the Railway Belt in the same position as they are within the Railway Belt." In view of these negotiations, Ditchburn requested Ellis to "ask the Board to reserve Judgement in all cases where the date of allotments by the Indian Reserve Commissioners was prior to 1888... ." On July 28, Balls reported to Swan that Mr. Ellis had "requested the Board to reserve decision on all claims to water rights which are not supported by an actual record under the Water Act." *P.A.C. RG10, Vol. 3660, File 9755-5.*

On August 15, 1921, Ditchburn wrote to Scott on reserved water rights within the Railway Belt. Ditchburn recommended that the Dominion Government amend Section 5(4) of the Railway Belt Water Act, 1913, in order that "the Indians enjoy the full priority of the . . . allotments of water," validated from the date of allotment by the Reserve Commissioner(s). Ditchburn also

advised that he would ask the Provincial Government to pass remedial legislation concerning water allotments outside the Railway Belt.

On October 10, 1921 Ditchburn forwarded to the Minister of Lands, T.D. Patullo, a lengthy memorandum which outlined the history of the Indian water rights question. Ditchburn recommended "the passing of some remedial legislation at the coming session of the Legislature which will have the effect of securing to the Indians the necessary amount of water ... for irrigation and domestic purposes on Indian reserves." On November 25, 1921, Ditchburn advised Scott by telegram that the Provincial Government was on the verge of passing an act dealing with Indian water claims which, "while not granting everything asked for in my memorandum ... will help considerably and will validate applications made in eighteen eighty eight." *P.A.C. RG10, Vol. 3660, File 9755-5.*

On December 1, 1921, Ditchburn forwarded to Scott copies of An Act respecting certain Claims to Water for Use on Indian Reserves, which was then undergoing final reading in the Provincial Legislature. Ditchburn explained that although the legislation did not

give the Indians everything asked for in my memorandum to ... Pattulo in the way of validating water allotments made by the Reserve Commissioners from the dates of allotting the reserves, it affords considerable relief in that direction and places the reserves outside the Railway Belt, in so far as water records are concerned, in a much better position than they have ever been before . . . *P.A.C. RG10, Vol. 3660, File 9755-5.*

Under the terms of the Water Claims Act, the Board of Investigation was given authority to handle applications based on the 1888 lists of Indian water rights outside the Railway Belt, as though they were regular applications dated from 1888. The Norris lists of 1897 were not included in the definition of an "Indian water claim" under the Act. Ditchburn contended that this would not "affect the Indians to any great extent and they are assured of not being disturbed in the amounts of water they have used under the records since 1897." *P.A.C. RG10, Vol. 3660, File 9755-5.*

Under Section 5 of the Act, the Government of British Columbia refused to recognize any claim for Indian water on account of any aboriginal or prescriptive right or by virtue of any allotment or recommendation made by any Indian Reserve Commission or Commissioner.

On May 12, 1922 Superintendent Challies of the D.W.P.B. wrote to J.D. McLean, Acting Deputy Superintendent-General of the DIA, suggesting that under the authority of Section 6(1) of the Railway Belt Water Act, 1913, an Order-in-Council could be passed making the Indian Water Claims Act, 1921 applicable within the Railway Belt. Since the Department felt that the situation regarding Indian water rights outside the Railway Belt was satisfactory due to the passage of the 1921 Act, this action would equalize the status of Indian water rights inside and outside of the Belt. Challies also suggested that Section 5 of the Indian Water Claims Act, 1921 could be omitted entirely from such an Order-in-Council if desired. Our research has not yielded documents showing what action, if any, was taken on Challies' proposals. *P.A.C. RG10, Vol. 3660, File 9755-5.*

After passage of the Indian Water Claims Act on December 3, hearings of the Board of Investigation resumed. The Board now had the authority to deal with Indian water claims outside the Railway Belt and began to issue Conditional Water Licences for Indian Reserves in British Columbia. The Dominion Water Power Branch continued its investigations and surveys of water requirements on Indian Reserves. As reported by Swan to Challies on January 6, 1922, these investigations included:

(1) - Reserves on which irrigation has never been practised but for which water records have been confirmed by the Board of Investigation pending the filing of plans for irrigation.

(2) - New reserves - Water requirements for filing of applications for records.

(3) - Investigations and surveys for construction of storage and other irrigation works for development of irrigable areas now idle. *P.A.C. RG10, Vol. 3660, File 9755-5.*

On December 21, 1923, Ditchburn wrote to Scott recalling a meeting the previous July between himself, Scott and Assistant Engineer Balls of the Dominion Water Power Branch. At the meeting it was pointed out that "a number of claims had been allowed by the Board of Adjudication but investigations in the field went to show that some of the claims were of little or no importance to the Indians." Ditchburn recommended that the Department abandon these claims because erecting the required water works would be expensive. Ditchburn pressed this argument in another letter to the Department on July 14, 1925.

The main object in abandoning these old rights was to wipe off from the books of the Provincial Water Rights Branch all matters that are not considered of any value. A number of these old water rights would involve very large expenditure, on the part of the Department ... in other cases it is advisable to abandon the rights ... in view of the fact that priority of right is of little or no importance ...*P.A.C. RG10, Vol. 3661, Files 9755-6 and 9755-7.*

On November 23, 1925, Ditchburn submitted to the Chairman of the Board of Investigation a list of old Indian reserved water rights to be abandoned. *P.A.C. RG10, Vol. 3611, File 9755-7.*

The Board of Investigation was renamed the Water Board in 1929 and its work continued until 1939.

* * *

PART II

INDIAN WATER RIGHTS: A LEGAL OVERVIEW

Water rights are essential to the lives of First Nations - essential to the production of food, to support hunting, trapping, fishing, for domestic purposes, economic development of the land, and as part of their spiritual and cultural existence. It is therefore somewhat surprising that there has been in Canada so few cases which define with any precision the legal rights in the First Nations to water, either arising out of aboriginal rights, or reserve allocations in British Columbia.

The history of British Columbia gives rise to legal arguments involving water rights not available to First Nations in other parts of the Country. First, unlike most other Provinces, few treaties have been concluded in British Columbia. Therefore, aboriginal rights to water remain to be argued for and claimed, legally and politically. Further, reserves were set up in British Columbia outside of the Treaty process and in many cases water rights were expressly reserved.

This chapter will outline the legal arguments available to First Nations of British Columbia regarding the assertion of water rights.

1. ABORIGINAL TITLE TO WATER

The decided case law supports the view that aboriginal title includes rights to water.

In *Guerin v. The Queen* (1985) 1 C.N.L.R. 120 (C.S.S.) at 132 former Chief Justice Dickson has declared that the Supreme Court of Canada in *Calder v. Attorney General of British Columbia* "recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands." In *Calder*, (1973) S.C.R. 313 Judson, J. (Martland and Ritchie, JJ., concurring), declared:

"Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the

Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means..."

Hall, J. (Spence and Laskin, JJ., concurring), described aboriginal title as "a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams." As Hall, J., indicated, the use of water was an integral part of the "historic occupation and possession" of the territory."

There remains a debate in law whether the water rights recognized as an incident of aboriginal title must by definition be limited to historic or traditional uses. Chief Justice McEachern in the *Delgamuukw* case suggests such a limitation is to be found in all asserted aboriginal rights under Canadian law. This is part of the freezing of rights which the Judge endorsed, despite Supreme Court of Canada decisions to the contrary. Even such limited rights he would have extinguished.

However, the Supreme Court of Canada in the *Guerin* case emphasized that aboriginal title is *sui generis*, a unique interest in land, and the Court in *Guerin* defined aboriginal title as extending beyond the historic use model.

Chief Justice Dickson (Choinard, Beetz, Lamer, JJ., concurring) declared:

"It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, [e.g. *Attorney General of Canada v. Giroux*] and those which characterize it in a personal, usufructuary right [e.g., *Star Chrome Mining*]. Any apparent inconsistency derives from the fact that in describing what constitutes a *unique interest in land* the courts have almost inevitably found themselves applying a somewhat *inappropriate terminology drawn from general property law*. There is a core of truth in the way that each of the two lines of authority has described native title, but an appears of conflict has none[the]less arisen because in neither case is the categorization quite accurate..."

The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."

In the recent decision by the Supreme Court of Canada in the *Sparrow* case, the Supreme Court affirmed that aboriginal title must be interpreted flexibly, to permit the evolution of rights over time.

Similarly, the leading cases involving water rights in the United States suggest that there are no limits upon the right to use water derived from aboriginal title arising from historic use.

U.S. v. Winans, 198 U.S. 371
(1905); *Winters v. U.S.*, 207,
U.S. 564 (1908), 52 L. Ed. 340;
and *Arizona v. California* 373
U.S. 546 (1963), 10 L. Ed. 2d
542

In summary, there is strong authority to suggest that water is an incident of aboriginal title. The authorities are divided whether water rights arising from aboriginal title will be defined with reference to traditional use alone, or may encompass economic opportunities not contemplated by the First Nations at the time of first European contact. There is high authority to support an interpretation of water rights not limited to traditional use.

2. RESERVED WATER RIGHTS

Strong authority exists in both U.S. and Canadian cases to infer water rights as part of a reserve allocation, whether such rights were reserved expressly or not.

The U.S. Courts have established that in cases where reserves have been established, water rights were also implicitly reserved, in order that the objectives for which the land was set apart can be met.

*U.S. v. Walker River Irrigation
District* 104, F. 2d 334 (9th Cir.
1939) at 339-340;

Arizona v. California 373, U.S.
546 (1963), 10 L. Ed. 2d 542

In the case of *Burrard Power Co. v. The King* (1911) A.C. 87 (P.C.), the Privy Council recognized that water rights will be conveyed or appropriated, even in the absence of express reference, where necessary in order to fulfill the objects and intent with which the lands were conveyed or appropriated. The Indian interest in waters adjacent or running through reserves is to be determined by examination of the circumstances and instruments whereby the lands were set apart. In *Star Chrome Mining*, (1921) 1 A.C. 401, (P.C.) at 410 the Privy Council declared that it was concerned to give effect to "the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title." And in *Davey v. Isaac* (1977) 77 D.L.R. (3d) 481 (S.C.C.); (1974) 51 D.L.R. (3d) 170 (G.N.C.A.) at 180-181, Arnup, J.A., for the Ontario Court of Appeal, stressed the need to examine the circumstances and language used in the instrument in order to ascertain the Indian interest.

The principle applicable to reading water rights into reserve establishment (in the absence of express language reserving water rights) is found in the Supreme Court of Canada decision *Nowegijick v. The Queen* (1983) 2 C.N.L.R. 89 (S.C.C.) where Dickson J. for a unanimous Court, declared that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

3. BRITISH COLUMBIA: WATER RIGHTS EXPRESSLY RESERVED

The argument that water rights were reserved in British Columbia as part of the land set aside for Bands is especially strong. In establishing Indian Reserves, the Federal and Provincial Governments clearly indicated their intention that Reserves be set aside to permit the First Nations the ability to carry on their way of life on that land.

Governor Douglas, described his policy in setting up reserves in B.C. before Confederation:

"Douglas described the pattern: The principle followed in all cases, was to leave the extent and selection of the land entirely optional with the Indians who were immediately in the Reserve; the surveying officers have instructions to meet their wishes in every particular and to include in each

reserve the permanent Village sites , the fishing stations, and Burial grounds, cultivated land and all the favourite resorts of the Tribes and in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide against the occurrence of Agrarian disputes with the white settlers." (Cail, R.E., *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913*, Vancouver, British Columbia Press, 1974, Appendix D, Item 4, at 303)

Douglas went on to refer to the needs for water by the Indian cattle ranches.

Following Confederation the Department of Indian Affairs affirmed that water rights were considered by the Federal Government to be associated with Indian reserves, as a necessary resource to carry out the objectives for which the reserves were established:

"The lands being more or less arid the need of water was and is manifest and so it must be considered that it was likewise intended that the Indians should have and enjoy the use of water in available streams whenever their needs might require it." (A.S. Williams to Scott, 27 July 1920, P.A.C.R.G. 10, Vol. 3660, File 9755-9754)

For many Indian reserves, the Schedule of Indian Reserves includes a water allocation specifically noted for the specific Band.

In *Pasco v. Canadian National Railway Co.*, leave to appeal to S.C.C. denied 18 November 1985, [1986] 1 C.N.L.R. 34 (B.C.C.A.), aff'g [1986], an Alliance of Indian Nations including the Oregon Jack Creek Band in British Columbia asserted a proprietary right in a salmon fishery in the Thompson River and sought an interim injunction to restrain the double-tracking of the Canadian National Railway that might damage the fishery and their access to the fishery. The Court stressed the principles of interpretation cited in *Nowegijick* and declared:

"The Band's claim to a proprietary right in the river is strengthened by its fishing rights. In this province Indian

reserves were reduced in size on the grounds that the Indian people did not rely on agriculture, and that so long as their fisheries were preserved their need for land was minimal. That philosophy is reflected in the Indian Affairs Annual Report, 1876, concerning British Columbia:

'There is not, of course, the same necessity to set aside extensive grants of agricultural land for Coastal Indians; but their rights to fishing stations and hunting grounds should not be interfered with, and they should receive every assurance of perfect freedom from future encroachments of every description.'

The Court issued an injunction restraining the railway from interfering with the fishery or access thereto. Although only a decision on an interlocutory matter, the case is an authority requiring that the water rights of an Indian band on a reserve are to be construed with regard to the intent with which the reserve was set apart. The intent of the Crown with respect to the Oregon Jack Creek Reserve contemplated the maintenance of the salmon fishery and access thereto by the Band.

In summary on this point, there is clear support in law that the First Nations of British Columbia, possess water rights incidental to their land reserve allocation whether a specific water allocation especially was reserved for them.

4. RIGHTS ENCOMPASSED IN RESERVED WATER RIGHTS

While none of the issues below have been resolved yet in Canadian Courts, there is support in law that the following general water rights are encompassed within reserved water rights. It may also be argued that aboriginal water rights includes the same general rights, although reserved water rights carry more judicial support at the present time.

A. Instream Rights

There is authority that reserved water rights include the right to protect the quality and quantity of water and flow regime required to protect other resources and habitation valued as reserved interests. In the case of *Saanichton Marina Limited v. Claxton* (1987) 18 B.C.L.R. (2d) 217 the British Columbia

Court of Appeal found the right to water implicit in the treaty right of the Tsawout Indian Band to "carry on their fisheries as formerly." The Court issued an injunction restraining the construction of a marina in waters adjacent to the Reserve which would have interfered with that fishery. It follows from this decision that interference in water levels which protect or support other valuable reserved resources could also be restrained.

B. Riparian Rights

Riparian rights are those rights to water which were recognized by the common law and the civil law as a natural incident to the right to the soil itself. They do not depend upon any express or presumed grant. As Lord Wensleydale declared in *Chesmore v. Richards* (1859) 7 H.L. Cas. 349 at 382, 11 E.R. 140:

"It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour, (nor from the presumed acquiescence of the proprietors above and below)."

In summary, riparian rights permit the Bands to maintain the water flowing through their reserves in its natural state, and in the same quantity and quality of flow. Similarly, the Band has an obligation to maintain the quality and quantity of flow for the benefit of downstream users. Riparian rights also encompass the right to use the water for drinking and other domestic purposes.

In *Pasco v. CNR* (1986) 69 B.C.L.R. 76, MacDonald, J. granted an interlocutory injunction to protect Indian riparian rights to the Fraser River based on their ownership of reserve land along the River.

C. Allocation Rights

The U.S. law has firmly established that the reserved right entitles the Band to a protected allocation of water in keeping with the purposes for which the reserve was established. This doctrine is known as the *Winters Doctrine*, and was enunciated by the Supreme Court of the United States in *Winters v. U.S.* 207 U.S. 654 (1908). It is based on the principle that the setting aside of a reserve for a Indian Band implies a setting aside of waters appurtenant to the reserve to enable the purposes for which the Reserve was set aside (agriculture, ranching, etc.) to be fulfilled. In *Winters*, a reservation of water rights was implied even though the treaty in the case did not refer to water rights.

The Courts continue to debate the proper test to be applied to determine the quantity of water to which the Band is entitled as a protected allocation under the *Winters Doctrine*. The analysis involves a close look at the amount of water which the Band could use, if the Band were to irrigate every acre of the reserve. This test has been called irrigable acres (I.A.). In some cases, an economic factor has been introduced and the test considers not only how much land could be irrigated, but how much land could practically be irrigated in light of market factors. This test is known as practically irrigable acres (P.I.A.). In other cases, the test has been measured against the amount of water which the Band requires to maintain their homeland. Consideration is given to the amount of water required to maintain a way of life on the reserve.

There continues to be debate in the U.S. cases whether a water allocation, once made, could be sold by the Band or whether it must be used or lost. While the proper formula to determine allocation rights will be determined by a Canadian Court in time, there remains a clear argument that Bands have a right to a protected water allocation as part of their reserved rights, and that this allocation may be used by the Bands or sold.

D. Ownership of Waterbed and Foreshore

The location of the boundary of the reserve is central to the whether the Band owns the riverbed or foreshore. It has been pointed out both in the case law and by leading authors that in determining the extent of the reserve interest,

first importance naturally attaches to the document upon which the ownership is predicated. Thus, the first question in determining ownership of riverbeds and other foreshore interests would be whether the boundary of the reserve include these water courses and the beds thereof.

By the common law of England, the bed of non-tidal rivers and streams belongs, in the absence of any evidence to the contrary, by presumption of law, in equal halves to the owner of the riparian land. Thus, if a reserve boundary goes to the bank of a river the Band would own the bed of the river *ad medium filum aqua* - to the center of the stream. If the river cuts through reserve lands, the Band would own the whole river bed. No such presumption applies with respect to tidal water.

British Columbia Courts have recognized the presumption of ownership of the riverbed both of navigable and non-navigable water bodies.

*Reference re British Columbia
Fisheries (1914) A.C. 153 (P.C.)*

According to the common law, the owner of the riverbed owns everything above and below the lands. Thus, ownership of the riverbed or foreshore of a river lake or sea would confer rights of fishing.

In summary, Indian Bands as owners of reserve lands abutting on water courses are entitled to claim the ownership of the bed of adjacent waters in accordance with the presumptions recognized. In British Columbia no Band may assert ownership of the foreshore or bed of tidal waters *on the basis of presumptions alone*.

However, both in respect of tidal and non-tidal waters, the Crown may grant riparian rights, rights to ownership of the water bed and foreshore. The grant may be either express or implied and the question is one of intention. If, for example, it can be shown that the intention of the Crown in setting aside the reserve was to protect the waterbed or foreshore (and implicitly the fishery) for the Band, an argument exists that even in tidal waters, the Band is entitled to ownership of the waterbed and foreshore.

In British Columbia, the argument is especially strong since historical documents make it clear that the Governments in setting aside the reserves understood that traditional hunting, trapping and fishing would entail substantial use and dependence upon the waterbed or foreshore.

Indian ownership of the waterbed gives rise to significant rights and powers. They are as follows:

1. The right as any other land owner to erect wharfs, bridges or dams;
2. The right to enact by-laws under the *Indian Act* to control the construction and maintenance of water courses;
3. The exclusive right to hunt, trap and fish over the land.

*Reference Re British Columbia
Fisheries (1914) A.C. 153 (P.C.
at 167)*

4. The power to enact fishing by-laws under Section 81(1)(o) of the *Fisheries Act*.

Two issues remain to be discussed. Both involve assertions which have been made or which may arise if the Province defends against the Band's assertion of water rights.

5. EXTINGUISHMENT OF WATER RIGHTS

Were aboriginal rights extinguished by the Colony of B.C.?

The Colony of British Columbia introduced measures qualifying the common law rights attaching to water. The question arises in law whether such measures extinguished aboriginal rights to water prior to Confederation.

The early measures taken by the Colony were associated with the development of gold mining. (*Proclamation to make provision for regulating the law of Gold Mines in British Columbia, and for the Administration of Justice therein [hereinafter Gold Fields Act, 1859] August 31, 1859.*) The *Goldfield Act*,

1859, provided that the Governor might issue rules and regulations and decide disputes relating to any ditch or water privileges. The Rules provided that the Gold Commissioner might issue exclusive water privileges, that water privileges should be recorded, and that rent be paid. (*Rules and Regulations for the Working of Gold Mines, April 7, 1859; September 29, 1862*)

In 1865 water privileges were extended by the *Land Ordinance (An Ordinance for regulating the Acquisition of Land in British Columbia [hereinafter Land Ordinance, 1865], S.B.C. 1865, No. 27)* to those persons "lawfully occupying and 'bona fide' cultivating lands". Such person might divert "unoccupied water" upon obtaining a record of the privilege. Priority of right depended on priority of record. The object of the *Land Ordinance* was explained by Gwynne, J., in the Supreme Court of Canada:

"Instead of contemplating an addition to the common law right of riparian proprietors to the natural flow of the waters in a stream flowing through their properties, the design of the statute was to make provision for enabling all persons requiring the use of water for agricultural or other purposes to obtain it from all neighbouring streams or lakes from which it could advantageously be bought, thus qualifying the common law right of riparian proprietors by substituting therefor those statutory rights which the conformation of the country made absolutely necessary..."

The qualification of riparian rights was affirmed in 1870. In that year the *Land Ordinance* was amended. (*Id.*, at 677, 680-81. *An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia [hereinafter Land Ordinance 1870], R.L.B.C. 1871, No. 144, s.30; An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia [hereinafter Land Ordinance, 1877], C.S.B.C. 1877, c. 98, s.48).* The Colony did not intend Indians to be eligible to assert rights under the *Land Ordinances*. This was made explicit in the legislation.

While the issue of pre-Confederation extinguishment of aboriginal rights remains a debatable point, the most that the Crown would argue in favour of pre-Confederation extinguishment of water rights would be that aboriginal title to water in British Columbia was extinguished only to the extent that water privileges were actually issued to non-Indians, which impaired or abrogated the

use of water by some Indians. However, implying the test enunciated by the Supreme Court of Canada by Mr. Justice Hall in *Calder*, and in the *Sparrow* case that extinguishment must be "clear and plain," a strong argument can be made that no extinguishment of aboriginal title existed in the pre-Confederation period as no clear and plain legislative expression can be found to that effect. Once again, the full meaning of this test will have to be decided on the *Delgamuukw* appeal.

6. COULD PROVINCIAL LEGISLATION BAR THE ALLOCATION OF WATER RIGHTS BY THE RESERVE COMMISSIONERS ?

While contrary authority may be found in the decision in *Western Canada Ranching Company v. Department of Indian Affairs* (1921) 60 D.L.R. 360 (B.C.C.A.), the position most supported by present legal authority is that the Reserve Commissioners had the authority to confirm water rights and did so. Further, after Confederation it was beyond the power of the Province to legislate in a manner which abrogated or derogated from aboriginal or reserved water rights.

However the Federal and Provincial Governments were divided in their view as to the right, if any, of the Province to pass legislation affecting Indian water rights after Confederation. As a result, the Federal and Provincial Government made arrangements which amounted to a compromise of their differing positions on Indian water rights.

The exchange of correspondence between the federal and provincial governments in 1884 respecting the power of Reserve Commissioners to appropriate water rights for reserves provoked attempts to resolve the dispute. On 23 March 1886 and on 24 January 1888 the Superintendent of Indian Affairs filed a statement of the water requirements of Indian reserves with the provincial Chief Commissioner of Lands. The 1888 list was published in the *British Columbia Gazette*. The same year the provincial legislation was amended.

An Act to amend the "Land Act, 1884", S.B.C. 1888, c.16, s.1; Water Act, 1914, S.B.C. 1914, c.81, s.46.

In 1914, the following provision was substituted:

Notwithstanding any provision in this Act to the contrary, an Indian Agent may acquire, in trust for all or any Indians located on any Indian reserve, one or more licenses to divert so much of any unrecorded water from any stream as may be reasonably necessary for use or such reserve for "domestic" or "irrigation" purposes.

The Chief Commissioner of Lands, with approval of the Lieutenant Governor in Council, was empowered to authorize the diversion of so much "unrecorded and unappropriated water" adjacent to or passing through a reserve "for the benefit of all or any of the Indians located on any Indian reserve...for agricultural purposes, as may be reasonably necessary for such purposes." Compensation was payable to those persons affected. A record of water privileges could not be issued unless a notice was first published in the *Gazette*. Indian Agent Mackay published a notice of water privileges which had been submitted for record in the *Gazette* on May 2, 1889.

It is worth noting that the amendments allowed only "unrecorded and unappropriated water". This provision subordinated Indian claims to those of settlers who may have obtained water records after the establishment of the reserve. Further, the amendment restricted the use to which the water might be put to "agricultural purposes."

The Department of Indian Affairs sought to rely on the legislation to secure water rights for the reserves. The Department was not very successful. Few water records were issued to Indian bands under the provincial legislation and delays occurred when provincial approval was sought.

In December 1921 the Province enacted the *Indian Water Claims Act*. *Indian Water Claims Act*, S.B.C. 1921 (2d Sess.), c.19, s.2. The Act conferred jurisdiction upon the Board of Investigation to hear and determine every "Indian water claim", which was defined as:

s.2 any statement of the water requirements of any Indian reserve without the Railway Belt set out in a certain letter dated January twenty-fourth, 1888, filed by Indian Superintendent L.W. Powell with the Chief Commissioner of Lands and Works for British Columbia, and any item referring to water privileges for any Indian reserve set out in a notice published by Indian Agent J.W. MacKay in the British Columbia Gazette dated May second, 1889, as a list of water privileges submitted for record but does not include any such statement of water requirements or item referring to water privileges in respect of which a water record or licence has been granted.

The Board was empowered to disallow or confirm, by issuance of a licence, any Indian water claim upon such terms as it considered "just and reasonable", including the source, the point of diversion, the use of the water, the area where it might be used, and the period of the year it might be used. Particularly significant were the terms which might be imposed with respect to priority and amount. The priority could in no case "be earlier than the date on which the Indian water claim was filed or published" and the quantity could in no case exceed the quantity stated in the filed or published claim.

The jurisdiction of the Board denied priority of water allocation as at the date of the setting apart of the reserve, contrary to the urging of the Chief Inspector of Indian Agencies for British Columbia. Further, the jurisdiction of the Board did not allow for future increases in water use arising from development on a reserve. The Chief Inspector explained:

"The legislation passed represents the limit to which the Government of the Province were prepared to go at the present time as there were many obstacles in the way of complying with my requests in full, as this would have involved placing the Indians' claims ahead of the records of a great number of white users and the Minister informed both Mr. Ellis and myself that any Bill carrying such a proposal would meet with strenuous opposition on the floor of the House, and he therefore thought it is better to have a Bill prepared such as the one enacted, which he felt certain could be put through without endangering the Indian claims." (Ditchburn to Scott, 1 December 1921, P.A.C.R.G. 10, Vol. 3660, File 9755-5)

Every licence issued under the Act was expected to be subject to the provisions of the provincial *Water Act* and the continuing jurisdiction of the

Board. Each licence was accordingly subject to amendment and abolition by the provincial Act or the Board.

The Act expressly denied any right to any water allocation by reason of the setting apart of the reserve or by aboriginal title. Section 5 declared:

"No right to divert, store, or use any water without the Railway Belt shall be deemed to be or to have been acquired by or on behalf of any Indians by length of use, or by virtue of any aboriginal or prescriptive right or title, or by virtue of any allotment or recommendation made by any Indian Reserve Commission or Commissioner."

The Chief Inspector of Indian Agencies of British Columbia observed that while "this Act does not give the Indians everything asked for...it affords considerable relief."

The provisions of the Indian Water Claims Act were repealed in 1939 at the time of a wholesale revision of the Water Act (Water Act, 1939, S.B.C. 1939, c.63). The repeal was subject to "saving and preserving any rights and privileges existing at the date of this enactment and which have been acquired under any former Act or Acts". The property in and the right to use water was vested in the Crown in the right of the Province subject to existing rights.

A strong legal argument remains that the entire Act, insofar as it purported to regulate and abrogate Indian water rights, was *ultra vires* the province.

When Federal-provincial agreement was eventually reached with respect to the terms of conveyance of reserve lands by the province to the Dominion in 1929, the agreement (*Scott-Cathcart Agreement, P.C. 1930-208, Canadian Gazette, 3 February 1930, Schedule 4*) provided that the "lands set out in schedule hereto be conveyed" to the Dominion subject, *iter alia*, to the rights of the province described in the following provision:

provided also that it shall be lawful for any person duly authorized in that behalf by us, our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in

the vicinity of the said hereditaments, paying therefore a reasonable compensation.

The Governor in Council approved the agreement and the lands were conveyed on these conditions in 1938. (B.C.O.C. 1036, 29 July 1938) The conveyance does not purport to abrogate water rights on the reserve, however it does empower the province to take and use water from the reserve, subject to the payment of compensation.

The terms of the 1938 conveyance are a compromise which recognizes the rights of the Indians to some water rights and to compensation accordingly, but also recognizes the right of the province to administer such privileges. The compromise does not, however, resolve the question of the priority or the scope of a Band water rights. Further the major issue as to whether the Province ever had or has today any power to interfere with a Band's water rights remains an outstanding and unsettled question. The recent decision of *A.G. B.C. v. Chief Fraser Andrew* (B.C.C.A.) puts in doubt this power.

Finally, a strong argument exists that the Federal Government continues to be in breach of its fiduciary obligations in failing to have defined the scope of a Band's water rights while permitting these rights to be encroached upon by the Provinces, which continues to allocate water interests for the benefit of non-Indian users.

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NOTES ON ARCHIVAL SOURCES

The Public Archives of Canada (P.A.C.) Indian Affairs record group (RG10) includes a number of files on microfilm containing important documentation on the general history of the Indian water rights issue in British Columbia. These files are:

RG10, Vol. 3633, files 6425-1, 3;
RG10, Vol. 4010, file 259,190;
RG10, Vol. 3680, file 12,395-1;
RG10, Vol. 11027, files 9755-1, 2, 3
RG10, Vol. 3660, files 9755-4, 5;
RG10, Vol. 3661, files 9755-6, 7;
RG10, Vol. 3579, file 663;
RG10, Vol. 11020, file 515.

In addition to the above files, there are numerous RG10 files on microfilm containing information about water rights, water works and irrigation projects for specific reserves and Indian Agencies in British Columbia. These files can be identified in the finding aides for the RG10 "Black Series" and subsequent RG10 Central Registry microfilm accessions.

RG10 microfilms can be accessed at the Union of B.C. Indian Chiefs' Resource Centre (73 Water Street, Vancouver, B.C.), at the Provincial Archives of British Columbia in Victoria, B.C., and at the National Library of Canada and the Public Archives of Canada in Ottawa. The Department of Indian Affairs libraries in Ottawa and Vancouver have RG10 microfilm holdings as well.

There are three main record groups at the Provincial Archives in Victoria that contain water rights documentation. These are: GR 1443 (B.C. Water Branch general files), GR 1006 and GR 884 (B.C. Water Rights Branch files containing old water records, licences and related correspondence). Finding aides for these record groups are located in blue folders in the main reading room of the Archives.

In addition to records held at the Provincial Archives, water licences and background correspondence for specific reserves can be obtained from the B.C. Ministry of the Environment, Water Management Branch in Victoria.

Secondary sources

The following is a selected listing of books, papers and articles on Indian water rights in British Columbia, Canada and the United States. Many of these titles can be found at the UBCIC Resource Centre; some are available for purchase at the Chiefs' Mask Bookstore, 73 Water Street, Vancouver, B.C.

Bartlett, Richard H., *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, Canadian Institute of Resources Law, University of Calgary, 1986.

British Columbia, Land Programs Branch, *"Riparian/Littoral Rights and the Administration of Aquatic Crown Land,"* Occasional Paper No. 5, 1984, 20 pp.

Doran, Janis, *"History of Water Rights on Indian Reserves in British Columbia,"* DIAND, B.C. Region, 1982, 13 pp.

Reno, Philip, *Mother Earth, Father Sky, and Economic Development*, Albuquerque: University of New Mexico Press, 1981.

Ross, Jeffrey A., *"Indian Water Rights in the Western United States: An Historical Overview and Discussion of Some Current Issues,"* DIAND, 1985, 39 pp.

Smith, Donald M., *"Water Rights on Indian Reserves in British Columbia,"* DIAND, 1985, 69 pp.

Wuerscher, Rose B., *"Title to the Water Bed: The Legal History of the *Ad Medium Filum Aquae* Rule,"* DIAND, 1982, 70 pp.

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