



## **Indigenous Peoples Water Rights: Challenges and Opportunities in an Era of Increased North American Integration**

**Ardith Walkem\***

### **Introduction**

Indigenous Peoples are in a unique position when talking with Canadians about fears of a merging North American identity. Many of the fears now expressed by Canadians about the potential outcome of a merged relationship with the United States – assimilation, loss of political and cultural institutions, as well as loss of control over waters, lands and resources – are the precise impacts that Indigenous Peoples have experienced, and continue to experience, as a result of Canadian colonization of our territories and Peoples.

The purpose of this paper is to cast forward and imagine how Indigenous Peoples rights to and in water (or relationship to and with water) may be impacted as the relationship between Canada and the United States becomes increasingly politically and economically intertwined over the next fifteen years, and the choices that both Canadians and Indigenous Peoples will face as a result.

At the same time that Canada and the United States are moving towards greater integration, Indigenous Peoples in North, South and Central America are strengthening their ties, and are experiencing enhanced growth of their population numbers. The impacts of these developments on water management issues, and the choices they present to Indigenous Peoples, will be equally profound.

### **Background: Learning from the Natural Course and Flow of Water**

Water does not respect boundaries. It follows a natural course and flow, dictated by the curves and flat stretches of land, by the shaping of coasts. Water denies simple sovereign assertions, recognizes no human laws, only the natural cycles and rhythms of its own force. A fundamental choice that Canadians will face is whether to respect this natural rhythm or continue with a management style that fundamentally disrespects the nature of water and so endangers its ability to sustain life into the future.

Water calls forth all other life and is required to sustain all other life. Knowledge of this simple truth forms the foundation of Indigenous laws and responsibility to care take water. Our decisions are measured against their possibility to impact upon present and future generations of other Peoples and life who depend upon water. The survival of

---

\* Ardith Walkem, Barrister and Solicitor: [ardith\\_walkem@telus.net](mailto:ardith_walkem@telus.net)

Indigenous Peoples as unique and distinct members of the world community requires recognition of our relationship with and reliance upon the waters of our territories.

Non-Indigenous Peoples believe that scientific knowledge empowers them to control water and allow for uses of water that are fundamentally foreign to its natural course and flow. Science in the absence of knowledge of the sacred nature of water has given rise to a belief that it is possible to determine how far water can be polluted, diverted or consumed without draining its ability to sustain life. Yet it is clear human activities have adversely affected the health and quality of water.

Indigenous Peoples who remain tied to the waters and lands and whose livelihoods depend upon water and watersheds, are increasingly impacted by water scarcity, failing water quality, and overuse and contamination of marine resources. The impacts of water degradation and scarcity have been felt first by Indigenous Peoples who live closest to, and rely heavily upon water. However, these impacts will spread and be felt more directly by the broader Canadian and American public over the next fifteen years.

Canada and the United States were built without regard for Indigenous Peoples reliance upon water for our livelihood and food security. Indigenous Peoples' own knowledge and laws for the protection and preservation of water have been entirely disregarded. Waters have been dammed, over fished, polluted, watersheds logged – all without Indigenous consent or involvement. Every Indigenous Nation is impacted by the destruction of watersheds and watercourses through decisions to build ski resorts, site fish farms and garbage dumps, and other large scale industrial and residential developments. Indigenous Peoples have been largely unable to prevent these developments, as non-Indigenous legal structures have acted to secure state ownership, sovereignty, and relatively unfettered authority to make decisions which impact upon the waters and Indigenous Peoples.

*Canadians will be faced with an opportunity to either acknowledge and learn from the impacts and costs of Canada's dispossession and denial of Indigenous Peoples water rights; Or, by their inaction, to sanction a continuation of water use and management policies which have damaged both Indigenous Peoples and the environment we now collectively share.*

## **Differing Recognitions**

Canada and the United States have followed markedly different paths in recognizing Indigenous Peoples water rights, reflecting political differences between the two states over their relationship with Indigenous Peoples. The United States has long recognized Indigenous Peoples as “domestic dependent nations” with limited sovereignty. Reservations recognized as under the jurisdiction of the tribes are substantially larger than those in Canada, and have been found to include reserved water rights sufficient to meet the needs of the people under the *Winters Doctrine*.<sup>1</sup> This recognition, while often

---

<sup>1</sup> Taken from the case *Winters v. United States*, 207 U.S. 564 (1908).

problematic, has nonetheless protected Indigenous Peoples water rights to a greater extent than that experienced in Canada.<sup>2</sup>

Canada, in contrast, has largely denied that any Indigenous water rights exist, as it tends to deny Indigenous Peoples existence independent of the Canadian state. Where Canada has entered historic treaties, land and water allotments promised have yet to be honoured. In non-treaty areas (such as most of B.C., and parts of Quebec, Ontario and the Maritimes), reserve lands are very limited and carry small water allotments which are subject to provincial authority. Canada's policy is to require that Indigenous Peoples either (1) negotiate and enter a succession treaty in exchange for limited water and land rights, which will remain subject to federal and provincial laws; or, (2) prove the existence of Aboriginal (Original) Title, or Aboriginal Rights in water (e.g., to fish, protection of watersheds, or actual use of water) in a costly and time consuming court process. Even proof of Aboriginal Title or Aboriginal Rights to water will subject Indigenous Peoples to a reconciliation of these rights with the interests of broader society. Thus, there is no secure protection of Indigenous Peoples water rights in Canada.

In discussions between Canada and the United States, Indigenous water rights are not considered independently, but rather are treated as though they are completely assimilated into the state interests. Canadian or American ownership of the waters and legal authority to make agreements or policy convergences is not questioned. In the Canadian context, this reflects an assumption that assimilation is a done deal, that Indigenous Peoples have no independent rights but exist as merely a constituent part of the larger Canadian state and that Canadian governments have unilateral authority to enter agreements regarding water.

Canadian governments in international trade agreements or large scale North American policy convergences are pledging rights to the access and use of water, in both domestic and international arenas, where they do not have a right. Indigenous Peoples' pre-existing and continued Original title to waters and lands has never been addressed. Canada is in no position to make agreements pledging interests in water resources to which it has imperfect claims.

### **Water as a Shared Canadian/American (not Indigenous) Resource**

As pressure to harmonize economic and politic systems continues, waters will be increasingly viewed as a shared resource: One North American people, one set of conjoined interests, one body of shared resources. Defining shared resources in this fashion could fundamentally disrespect the natural flow of water, endanger whole ecosystems, and further minimize Indigenous Peoples relationship with water.

---

<sup>2</sup> In the United States many tribes are currently negotiating to convert these legal rights into "wet rights", to practically acknowledge their existence in the face of State allotments of water which did not respect the existence of these reserved water rights. In some areas, particularly where water is scarce, some cities purchase water allocations from the American tribes: Jon Hare, *Indian Water Rights: An Analysis of Current and Pending Indian Water Rights Settlements*. Washington, DC: Confederated Tribes of the Chehalis Reservation and Office of Trust Responsibilities, B.I.A., 1997.

Canadian and American governments, individually and jointly, are establishing commercial rights to water. In Canada, for example, British Columbia has recently recognized a “right to farm” in our waters. The United States has legislation pending before Congress which would create off-shore economic rights in the deep sea which would allow for the siting of monolithic fish farms, each containing hundreds of thousands of fish, as well as other enterprises far enough from the shoreline to escape public radar or scrutiny.

Proposals reflecting the idea of water as a shared North American resource have included plans for large scale diversion or export of water from Canada to the United States, in order to offer life support to cities and industries built where there is not sufficient water to sustain an urban population.<sup>3</sup> While these plans have been unsuccessful, the idea of large scale water diversion will likely be reinvigorated with greater force as water shortages increase.

The denial of Indigenous Peoples right to water is a form of economic racism which discounts the costs to Indigenous Peoples of water commercialization, pollution and diversion, and instead positively attributes the loss of a traditional lifestyle as a benefit of civilization. Similarly, proposals to divert water count only limited human needs, and do not tally the costs to all life in any watershed which depends upon the continuation of the natural course and flow of water.

### **Choices for Indigenous Peoples**

The Indigenous response to the increased pressure and opportunities posed by escalating Canadian-American integration, and increased demands to use and commodify water will not be unified.

#### 1. Cultural and Ecological Fatalism

One flashpoint will be whether or not environmental and cultural fatalism will dictate water use and protection decisions. Environmental fatalism is based on a belief that natural and ecosystem based production is not efficient, and so must be replaced with reliance on new technologies which further transform the natural world into artificial sites of managed production. The very fact that indiscriminate over use has damaged water and its ability to sustain life will be used as a justification for further industrial uses of water (e.g., destruction of Indigenous fisheries is used as a justification for industrial salmon farming in ocean waters).

The pollution of waters and destruction of watersheds will cause Indigenous Peoples reliance on traditional foods to decrease as they become inedible or unavailable. The need for money to replace traditional economies and food sources will pressure

---

<sup>3</sup> For example, the North American Power and Water Alliance (NAWAPA) proposed to dam and transport water from the Laird, Peace and Yukon rivers into the United States: Maude Barlow, *Blue Gold: The Global Water Crisis and the Commodification of the World's Water Supply*. IFG Committee on the Globalization of Water.

Indigenous Peoples to agree to development plans which severely impact upon water, and further undermine the ability of Indigenous Peoples to sustain traditional lifestyles.

*Indigenous Peoples will be forced to choose whether to accept cultural and ecological fatalism and further assimilate and integrate into the dominant culture, or to move forward in the belief that the continued existence of Indigenous Peoples, living on our own territories, according to our own laws and traditions, is possible.*

Some Indigenous Peoples, driven by the belief that the situation is set and inevitable, will seek to work within Canada, America, or a new merged North American sovereignty, and accede to plans which harm or degrade water in the hopes of being able to make minor adjustments to development plans or to gain economic benefits. Other Indigenous Peoples will continue to fight to protect water and its life giving force. Currently, Indigenous youth are reawakening traditions, reasserting a presence upon the waters and lands, and demanding recognition of their Aboriginal Title and Rights, including rights to the protection of natural ecosystems and a right to benefit economically from their territories. In areas such as Skwelkwel'welt (Sun Peaks), Indigenous Peoples have been arrested and criminalized for asserting their water and land rights. As the numbers of Indigenous youth continue to grow and as water becomes increasingly scarce, the potential for conflict both within Indigenous communities and between Indigenous communities and broader society will grow.

## 2. Integration with other Indigenous Peoples

Over the next fifteen years, Indigenous Peoples will face opportunities to build coalitions with, and learn from the freedom fighting tactics of, other North, Central and South American Indigenous Peoples. These opportunities will be facilitated by increased access to information technologies, and the strengthening of international Indigenous organizations and forums.

In an integrated North American context one flashpoint will be the increased demands of Indigenous Peoples for a greater role for Indigenous knowledges in water and land use decisions – not only to sustain the people but to sustain all life. Currently, in Canada, the Haida are seeking legal recognition of their own laws and jurisdiction to manage and preserve the viability of the lands and waters of Haida Gwaii. Part of the Haida argument is that Canada and British Columbia have made and will continue to make resource use decisions (e.g., logging, or allowing off-shore oil and gas exploration in the future) without regard to the impacts on the overall ecosystem and water, or the Haida's ability to sustain their culture in future.

Demand for recognition of Indigenous laws and jurisdiction to act to protect water is not a Canadian phenomenon, but part of a larger international trend of Indigenous Peoples who are reasserting their jurisdiction and presence upon the waters and lands. For example, in Cochabamba, Bolivia Indigenous Peoples recently united to reserve a

government decision to privatize all waters.<sup>4</sup> This trend will continue to grow over the next fifteen years, and beyond.

*Canada will be forced to choose what sort of citizen it wants to be in the world community in the face of growing demand for recognition of Indigenous rights, including to water. Canada could choose to continue to actively suppress recognition of Indigenous Peoples as Peoples and Nations, or could choose to accept the reality of our existence and move forward.*

### 3. Growing Indigenous Populations

As water flows, Indigenous Peoples are flowing back onto the lands. After contact, Indigenous numbers plummeted due to the introduction of foreign diseases, as well as outright extermination policies. Lower populations have limited Indigenous Peoples ability to act to meaningfully protect or preserve water. The population of Indigenous Peoples in Canada and the United States is growing. In America, this growth is largely represented by Indigenous Peoples from Mexico, many of whom have historic tribal affiliations with the Indigenous Nations of the Southern United States. In Canada, population estimates suggest that over the next decades, Indigenous Peoples will form a significant majority of the population in several Canadian provinces, and perhaps upwards of 50% in the provinces of Saskatchewan and Manitoba.<sup>5</sup>

*As Indigenous populations grow, and begin to form a majority in certain states or provinces, Indigenous Peoples' ability to influence domestic and international decisions regarding water use and preservation will increase. Rising Indigenous population levels will provide a more powerful Indigenous political voice and greater ability to influence both domestic and international water use decisions. Indigenous Peoples will have to choose whether (and how) to exercise this increasing power to protect water.*

### **Water for a New Day – Suggested Action for Canadians**

Indigenous Peoples relationship with water demands far more than a simple recognition of a right to use or drink water, and must include respect for our responsibility to make decisions for the preservation of water and its ability to sustain life. The degree to which Canadian, American, or a new merged North American sovereignty is able to acknowledge this fact will determine whether or not Indigenous Peoples can continue to live upon our territories and maintain our cultures, and whether water will be preserved for future generations.

*Canadians will have to choose whether to allow the continuation of this situation, or to demand redress and correction of the way in which their own government*

---

<sup>4</sup> Interior Alliance of B.C. and The Council of Canadians, “Nothing Sacred: The Growing Threat to Water and Indigenous Peoples.” (Vancouver: 2001)

<sup>5</sup> See: Royal Commission on Aboriginal Peoples (RCAP) Final Report. *Perspectives and Realities*. Vol. 4. Ottawa: Minister of Supply and Services (Canada), 199, Chapter 4.

*deals with Indigenous Peoples. The issue is not merely one of fundamental human rights, but also one of ecological preservation for all life.*

The choice to continue to ignore or undermine Indigenous Peoples' rights to both access and preserve water offers only the certainty of destruction of water and the life which depends upon it. Alternatively, creation of a political and legal plurality which includes Indigenous Peoples' own knowledges and laws for the protection and preservation of our territories and ecosystems offers hope: Water for a new day.