PROGRAM ON WATER GOVERNANCE

Perspectives on the BC Water Sustainability Act: First Nations Respond to Water Governance Reform in British Columbia

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1. INTRODUCTION

> Just as any modernization of the *Water Act* must recognize the need to cope with a larger population and increased demand on water, so must it recognize the rights of First Nations that can no longer be ignored under the New Relationship.[1]

In 2009, one century after the introduction of British Columbia's original Water Act of 1909, the Province of British Columbia began the process of modernizing the act. Following a series of public workshops and the gathering of input through a public blog, the province drafted the new Water Sustainability Act (WSA). The legislation came into effect on February 29, 2016, and six priority regulations have been developed to guide the application of the legislation.[2] Additional regulations will be developed from 2016 onward to support the full implementation of the new act.[3]

The new Water Sustainability Act provides a comprehensive framework for water management in the province of British Columbia. It focuses on changes to seven key policy and regulatory areas in order to:[4]

1. Protect stream health and aquatic environments
2. Consider water in land-use decisions
3. Regulate groundwater use
4. Regulate the use of water during periods of scarcity
5. Improve security, water-use efficiency, and conservation
6. Measure and report on water quality and quantity
7. Enable a range of governance approaches

Many provisions of the new act offer greater opportunities for First Nations participation in water management and governance. In many ways, modernizing the Water Act represents a step forward for First Nations, who view it as a relic of colonialism and a reflection of past attitudes that largely dismissed or ignored Aboriginal rights (Cowichan Tribes, 2013; UBCIC, n.d.). In addition to meeting the growing demands placed on a limited water supply, the Water Sustainability Act represents an opportunity to evolve from earlier practices to reflect new attitudes and legal realities that will guide the province towards a new relationship with Aboriginal peoples.[5] The consultation process was limited in a number of important ways, however. Jollymore et al. (2016) demonstrate that key policy outcomes in the Water Sustainability Act do not align with

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[1] Coldwater Indian Band, 2010.
[2] The six priority regulations include: Water sustainability regulation; Water sustainability fees, rentals, and charges tariff regulation; Groundwater protection regulation; Dam safety regulation; Water district regulation; Violation ticket and fines regulation.
[3] The focus of additional regulations will include: Water objectives; Water sustainability plans; Measuring and reporting; License reviews; Designated areas; Dedicated agricultural water; and Alternative governance approaches.
[4] "A Water Sustainability Act: A Legislative Proposal," 2013. British Columbia Ministry of Environment.
[5] In 2005, the Province of British Columbia and BC First Nations entered into a "New Relationship" with the aim of improving government-to-government relations. The accord sets out new processes and structures for working together on decisions over land and resource use, revenue sharing, and economic development.

the input provided by the majority of submissions, including those from First Nations. Further, by reviewing the multiple stages of submissions, they document the fact that repeated suggestions were offered by First Nations at each stage, indicating that issues raised were not necessarily being addressed. In their submissions, First Nations contended that modernization should entail working directly with First Nations governments on a government-to-government basis to shape legislation with the potential to significantly affect First Nations lives and livelihoods. Nevertheless, although this potential was not fully realized during the public consultation and act modernization process, there are still opportunities to work more fully towards this vision as part of the implementation of the new act.

This report presents the range of perspectives from several First Nations across British Columbia on the proposed, and now enacted, Water Sustainability Act. Unlike other stakeholders, First Nations have constitutionally protected rights that need to be considered separately to ensure that those rights are not infringed upon. Also important, First Nations have distinct relationships to their lands and waters and can offer unique insights and sustainable solutions to water management within the watersheds that overlap with their traditional territories. An improved and respectful working relationship with First Nations can support: (1) the province's goals of improved water and watershed management and governance; and (2) First Nations access to safe and clean water sources in order to sustain their cultures and communities.

1.1 Key Limitations

Before proceeding with the discussion, it is critical to highlight a key limitation related to the modernization process. Most of the submissions by First Nations expressed deep concerns over the process undertaken by the Province of British Columbia to gather feedback as part of the multi-stage public stakeholder consultation. They indicated that this was not an appropriate means of consulting First Nations, particularly because of the act's potential to negatively impact Aboriginal rights and title. Because the province's voluntary process of soliciting feedback may have limited the participation rate of BC First Nations, the perspectives presented in this report represent only a small fraction (i.e., 18 of 203) of BC First Nations;[6] they should not be taken to represent all BC First Nations or all First Nations in general. Nonetheless, valuable insights are found in the submissions that were made available through the process. Our goal is to highlight the major themes and insights that were foregrounded by First Nations as part of this process.

[6] A total of 18 submissions from individual First Nations governments, plus 7 submissions by Tribal Associations out of the 203 individual First Nations that make up British Columbia.

2. BACKGROUND: ABORIGINAL RIGHTS AND TITLE TO WATER

> The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.[7]
>
> – Section 35(1), Constitution Act, 1982

> For our Nations, ownership of water, or title to water, is considered an aspect of Aboriginal title. We maintain that our Nations have Aboriginal title to water, and therefore the right to use it, and to govern its use.
>
> – British Columbia Assembly of First Nations, 2010

A series of legal decisions by the Supreme Court of Canada (SCC) over the past two decades have extended Aboriginal rights and title in Canada in a number of ways.[8] However, the question of whether water is included within Aboriginal title (legal land rights) has not yet been addressed by the Canadian courts (Laidlaw & Passelac-Ross, 2010; Phare 2009). Aboriginal rights to water have never been explicitly established or disproven through a court ruling in Canada, despite the fact that historical inequalities have often constrained Indigenous communities' access to water (Phare 2009; Simms et al 2016; von der Porten & de Loë, 2013a, b).[9]

As a result, Indigenous water rights in Canada, with few exceptions, have been treated implicitly within land-focused legal claims.[10] Recent jurisprudence is noteworthy in this regard, with several key court cases specifically addressing First Nations' water access and rights. For example, the BC Supreme Court's *Halalt First Nation v. BC Environment* found that the Halalt had a proprietary interest in the groundwater beneath their reserve (Laidlaw & Passelac-Ross, 2010).

The water-related implications of the landmark Supreme Court of Canada *Tsilhqot'in* decision (*Tsilhqot'in Nation v. British Columbia*) also merit consideration. The 2014 ruling granted Aboriginal title to lands outside an Indian reserve (Coates & Newman, 2014; Tsilhqot'in National Government, 2014). It conferred land ownership rights over a more significant land area (compared with the size of reserve lands) within the Tsilhqot'in people's traditional territory. Other rights conferred by the ruling include the right to decide how the land will be used; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land

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[7] Section 35(1) of the *Constitution Act, 1982*.
[8] *Calder* (1973); Guerin (1984); *Sparrow* (1990); *Delgamuukw* (1984-97); *Haida/Taku River Tlingit* (2004).
[9] This situation contrasts with that in the United States, where the Winters doctrine and subsequent *Cappaert* decision (*Winters v. United States,* 1908; *Cappaert v. United States,* 1976) state that surface and ground water rights are implied by the federal establishment of American Indian reservations, and (further) set standards to which the US government must adhere in ensuring sufficient water for reservations, thereby recognizing the centrality of water-land interactions to American Indian communities (Shurts 2000).
[10] Aboriginal rights are enshrined in Section 35(1) of the *Constitution Act, 1982,* which protects existing Aboriginal rights from being extinguished without consent of the Aboriginal group with rights and/or interests in a specific land base.

(para. 73). These rights present First Nations with greater opportunity to develop self-governance functions (Miller, 2015).

In its decision, the Supreme Court of Canada further clarified that in using and managing the titled lands, Aboriginal peoples are not "confined to the uses and customs of pre-sovereignty times" (para. 75), and thus can also choose how to use their lands. However, the court noted that Aboriginal title comes with an important restriction on use, which implies an inherent conservation limit on the usage of land and resources. It held that Aboriginal title is

> collective title held not only for the present generation but for all succeeding generations … it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. (para. 74)

This statement builds on a similar restriction originally articulated in the Supreme Court of Canada's *Delgamuukw* ruling (*Delgamuukw v. British Columbia*) (Indigenous and Northern Affairs Canada, 2010). However, in *Tsilhqot'in,* the court has clarified that this restriction not only applies to the First Nations holding Aboriginal title but also restricts the Crown's use of the land. Furthermore, the restriction can affect third parties seeking Crown licenses, approvals, and/or permits for development (West Coast Environmental Law, 2014).

Another key feature of the *Tsilhqot'in* ruling was the greater responsibility placed on government, or others seeking to use the land, to obtain the consent of the Aboriginal titleholders (para. 76). The court recommended that "governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group" (para. 97). This represents a marked change from the previous procedural requirement to consult and accommodate First Nations.

The court also clarified that without obtaining consent, the only way to avoid interfering with Aboriginal rights and to ensure respect from Crown governments was to require that all infringements be justified. On the question of whether legislation would apply equally to Aboriginal title, the court found that provincial laws of general application "should apply unless they are unreasonable, impose a hardship or deny the titleholders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above" (para. 115). The court further predicted that

> [l]aws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. (para. 105)

As of 2016, an Aboriginal right to water has not been tested in Canadian courts, but the

SCC ruling has helped to clarify the respective responsibilities and restrictions applying to both Aboriginal peoples and the Crown in managing lands and resources. Thus, *regulating* resources under provincial laws may qualify as a justifiable infringement on Aboriginal title. However, *allocating* resources to third parties on Aboriginal-title lands without prior and informed consent of the Aboriginal group affected by the allocation may present a more challenging test for the provincial government. In other words, granting rights to "timber, minerals or water on Aboriginal title land to non-Aboriginal groups will be subject to intense scrutiny" (Miller, 2015).

Equally important in the *Tsilhqot'in* ruling is the expectation of cooperation and the implications for supporting First Nations interests in water governance with the Province of British Columbia. In his concluding remarks, the Chief Justice stated the expectation that "Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both" (para. 105).

A full analysis of the implications of legal developments, including the *Tsilhqot'in* decision and the Government of Canada's 2016 endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, is beyond the scope of this report. This evolving legal landscape provides context for our analysis of the limits and potential of the Water Act Modernization (WAM) process. The following section of the report now turns to this analysis.

3. SUMMARY OF FIRST NATIONS SUBMISSIONS

3.1 Overview

In this section, we provide an overview of the submissions received through the Water Act Modernization public engagement process that are available on the public blog portal. Over the three-stage public engagement process, First Nations governments, tribal associations, organizations, and individuals made a total of 46 submissions. Most of these submissions expressed the view that the public engagement process was inadequate, as it did not meet their expectations of how the province would engage in meaningful consultation regarding changes to the Water Act.

Following the 2009 release of the "Living Water Smart Plan," the province entered into its first public consultation period for the Water Act Modernization project. Through information sessions and a public blog, it engaged the public, other stakeholders, and First Nations on proposed changes to the Water Act. It prepared and distributed three discussion papers for stakeholder review and comment:

1. British Columbia's Water Act Modernization: Discussion Paper (released September 2010)
2. British Columbia's Water Act Modernization: Policy Proposal on British Columbia's new Water Sustainability Act (released December 2010)
3. A Water Sustainability Act for BC: Legislative Proposal (released October 2013).

A total of 34 First Nations organizations, governments, and individuals throughout British Columbia, and one from Alberta, made 46 formal submissions on the three discussion papers (see Appendix A for a list of respondents). The majority of responses, 18, were from individual First Nations, 7 from regional tribal associations, 4 from provincial/territorial organizations for BC First Nations, 3 from independent First Nations organizations, and 2 from First Nations individuals.

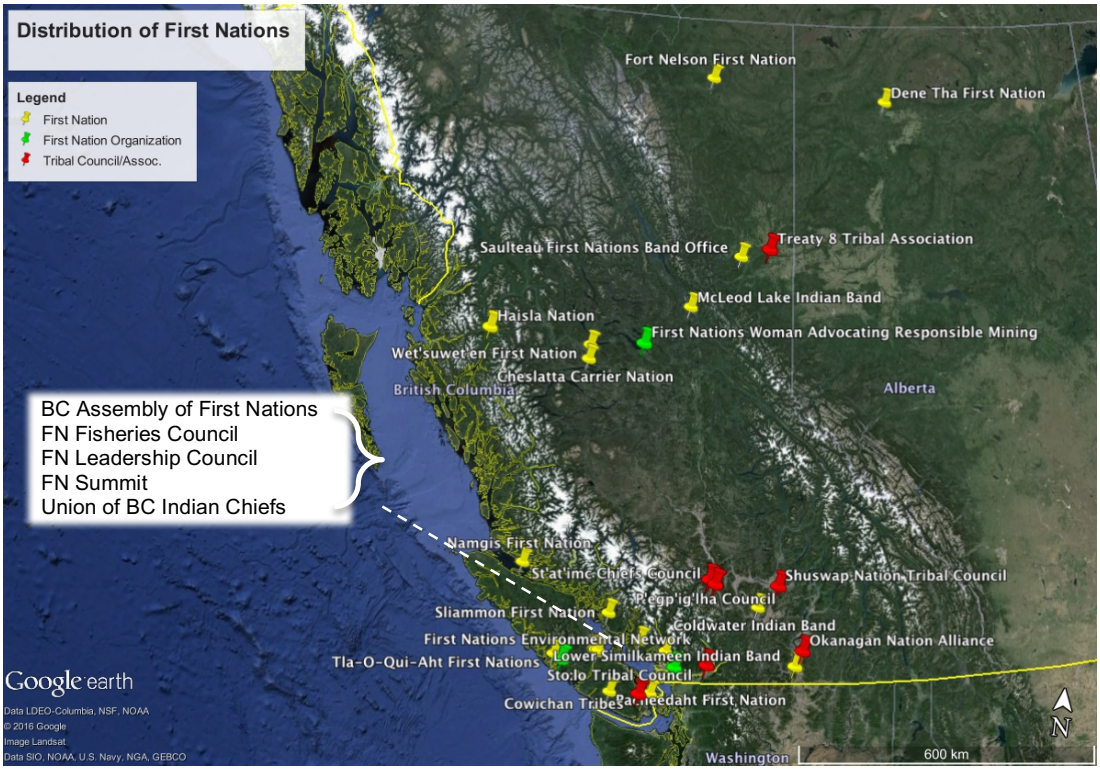
The highest concentration of participation came from First Nations and First Nations organizations located in and around Vancouver Island and the Lower Mainland (see Map 1). Responses varied in length from 1 to 32 pages, and ranged from broad legal and policy analyses to focused, one-issue submissions.

Fourteen of the submissions were made in response to the first discussion paper, 8 in response to the second paper, and the majority (24) in response to the legislative proposal. Only two respondents (Kekinusuqs and the Union of BC Indian Chiefs) submitted a formal response to all three papers. These generally low numbers are indicative of a process not designed and implemented in a way that solicited meaningful First Nations input into the process (cf. Jollymore et al., 2016).

3.2 Statement of Methods

This report is based on a review of the 46 submissions made by First Nations governments, organizations, and individuals during Stages 1, 2, and 3 of the BC Ministry of Environment's public engagement process. Common themes that emerged centred on consultation, jurisdiction, and the relationship between First Nations and the province. Additional themes that were identified related more specifically to the proposed changes to the Water Act. Although many of the comments expressed similar concerns and/or support for changes in the act, some divergent opinions were expressed, largely reflecting how the proposed changes might be interpreted, particularly as they pertained to either the specific First Nation or the broader public. For example, many submissions suggested that the proposed water fees and rentals were too low and would not encourage conservation of water (broad public application), whereas a few (two to three) individual First Nations argued that water fees and rentals should not apply to all the uses proposed (i.e., run-of-river hydropower). In the latter instances, it was clear that some of the proposed changes would have a direct impact on the First Nation with a water-use license.

Besides being based on a review of submissions, this report was supplemented with a review and summary of the Supreme Court of Canada's ruling in *Tsilhqot'in Nation v. British Columbia.* Additional legal summaries were also reviewed to help interpret key statements in the *Tsilhqot'in* decision.



Map 1 – Distribution of First Nations that submitted formal responses.

3.3 Summary of First Nations Water Needs

Although the respondents represented only a fraction of the 203 First Nations communities throughout British Columbia, they listed a range of interests and concerns regarding water use in their traditional territories. This section outlines some of the introductory comments that many respondents made regarding their unique interests and challenges with water use in First Nations communities and traditional territories.

3.3.1 First Nations Relationship to Water

> Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence. This relationship to our Mother Earth requires us to conserve our freshwaters and oceans for the survival of present and future generations. We assert our role as caretakers with rights and responsibilities to defend and ensure the protection, availability and purity of water. We stand united to follow and implement our knowledge and traditional laws and exercise our right of self-determination to preserve water, and to preserve life.[11]

One of the most notable themes observed among the submissions was the relationship to water that many First Nations respondents described as "sacred" or as a trust-like relationship that engendered reciprocity and responsible stewardship.

> As Indigenous Peoples, we are intimately connected to water and we must protect this sacred resource for the generations to come.[12]

> Water is central to our ancestral beliefs, values and customs in which our cultures thrive and exist. Thus "water" is sacred.[13]

> Our rights and responsibilities to protect, care for, and manage the land, air and water within our territory are part of our heritage.[14]

> … we carry the responsibility for maintaining the health of all resources for future generations.[15]

> As First nations people, we reiterate the importance of these issues as it is our responsibility to speak for the protection of water and the life that stems from it, for all our future generations.[16]

Many First Nations respondents indicated that their existence, traditional and contemporary, relied on access to clean water.

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[11] From the Simpcw First Nation (a Shuswap Nation member) Water Declaration (2010), cited in Shuswap Nation Tribal Council, 2013, p. 1.
[12] UBCIC, 2010, p. 14.
[13] Okanagan Nation Alliance, 2010, p. 1.
[14] Fort Nelson First Nation, 2013, p. 1.
[15] P'egp'ig'lha Council, 2013, p. 1.
[16] Shuswap Nation Tribal Council, 2013, p. 1.

> Every aspect of the existence of the Cheslatta Carrier Nation, from a historic perspective to a contemporary aspect, has been and is centered around the issue of water. We are here because of water, we exist because of water.[17]

3.3.2 First Nations Water Use

Most respondents viewed water as being of central significance to First Nations communities, not only for meeting basic needs to sustain their health and well-being but also for carrying out traditional practices and customs, such as providing access for fishing, hunting, trapping, harvesting, and gathering.

> Cowichan people have always fished and harvested from the rivers and the sea in our Traditional Territory, continuing to do so to this day.[18]

Traditionally, water was also a means of transportation, with travel corridors following waterways.

> Historically, the availability of fresh, clean water allowed us to travel freely throughout our territory.[19]

> From a historical perspective the dugout canoe was our primary source of travel … [my great-great-grandmother] would paddle to the travelling site by Port Mann bridge to harvest cedar roots.[20]

However, respondents also outlined additional, contemporary uses for water in their communities, including drinking, irrigation, commercial purposes, and transportation.

> Our main reserve … was set aside as a reserve by Indian Commissioner Sproat in 1878 and it [sic] primary function and purpose as a reserve has always been for grazing and agricultural purposes … Access to water is a necessary element of these reserve lands in order to make them effective for their intended purpose.[21]

Several submissions also expressed the importance of water for creating economic opportunities in their communities.

> First Nations see [run-of-river] hydro projects as a potential opportunity for economic development, it has provided benefits for many Nations already.[22]

3.3.3 Water Issues in First Nations Communities

Most respondents cited access to safe, clean water for a variety of traditional and contemporary uses as a critical issue for community members. Many described a range of water-related concerns affecting their communities, including seasonal flooding, boil-

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[17] Cheslatta Carrier First Nation, 2013, p. 1.
[18] Cowichan Tribes, 2010, p. 3.
[19] Fort Nelson First Nation, 2013, p. 2.
[20] Shellene, 2013, p. 2.
[21] Coldwater Indian Band, 2010, pp. 1-2.
[22] Tseshaht First Nation, 2011, p. 1.

water advisories, freshwater contamination from mining and oil and gas activities, and declining water levels.

> Every year a large portion of our reserves are flooded and our members are forced to leave their homes … [Flooding] further increases contamination of our wells and our rivers.[23]

> The communities of Takla, Tsay Key Dene and Kwadacha … challenged the proposed expansion of a gold and copper mine that would dump 800 million tonnes of tailings and waste rock into the pristine, high elevation, freshwater lake called "Amazay Lake."[24]

> Between 2000 and 2005, 35% of groundwater observation wells showed declining water levels.[25]

Another key water-related issue that many respondents noted was the potential impact on aquatic habitat observed in First Nations traditional territories. Uncertainty over climate change and the need to consider how water will be managed in a changing climate were two concerns raised by several respondents.

> [Water] is becoming more important as climate change and global warming increases issues of drought and water scarcity.[26]

Some respondents were already experiencing relative water scarcity and had concerns regarding the current allocation, or overallocation, of water for development.

> Within the Okanagan basin many of our streams and rivers are over allocated in terms of water licensing. The highly competitive nature of water allocation within our territory is harming our environment and way of life.[27]

Although limited to respondents from northeastern British Columbia (and one respondent from Alberta), serious concerns were raised over water use and contamination of freshwater aquifers attributed to hydraulic fracturing. Shale gas development requires considerable quantities of water, and one respondent detailed the concerns over the approval of approximately 1,700 applications to withdraw 2.6 million cubic metres of water per day from water resources in their traditional territory.[28] These water withdrawals and associated activities were found to be impacting not only water and riparian habitat in this region but also First Nations culture, health, and ability to exercise Aboriginal and treaty rights.

> [Shale gas development] activities result in a host of known environmental effects including changes in the magnitude and timing of peak and low flows, increased

[23] Cowichan Tribes, 2010 p. 3.
[24] First Nations Summit, 2010, p. 10.
[25] Saulteau First Nation, 2013, p. 3.
[26] Kekinusuqs, 2013, p. 1.
[27] Okanagan Nation Alliance, 2013, p. 3.
[28] Fort Nelson First Nation, 2013, p. 2.

> run-off and erosion causing higher sediment concentrations, and harm to or loss of wetlands and riparian habitat.[29]

3.4 Summary of Key Issues Related to the Water Sustainability Act

This section offers a breakdown of key issues raised by First Nations and First Nations organizations in relation to the proposed changes under the Water Sustainability Act. First, we summarize a range of initial comments made by many respondents that largely agree on the need for improved water management and governance. Next, we explore core tensions relating to the process of modernizing the BC Water Act, including: lack of direct consultation with First Nations; jurisdiction over water resources; and lack of recognition of Aboriginal rights and title. Finally, we summarize key concerns expressed in the submissions that relate directly to the changes that were proposed to the Water Sustainability Act.

3.4.1 General Comments on the Water Sustainability Act

Most respondents agreed on the need to improve regulations and to modernize the Water Act. Many of the submissions spoke of shared interests in the province's proposal to keep freshwater systems healthy for future generations. In general, the responses were largely supportive of high-level principles in the proposed legislation that focused specifically on sustainability, protection of water resources, and water conservation.

> First Nations share the BC government's objective of improving water governance and protection, if they are achieved on the basis of recognition of Aboriginal title and rights, and with the full involvement of First Nations.[30]

Many expressed approval of improved water management and governance practices, including but not limited to the adoption of an ecosystem-based approach to watershed management, management of surface and groundwater together as a linked resource, and collaborative development of watershed plans at the watershed level.

> An ecosystem based approach may allow watershed management to be more responsive, adaptive or resilient to changes and fluctuations in the hydrologic cycle due to the natural or seasonal variability and to changing environmental conditions.[31]

In spite of the general agreement to make improvements to the outdated act, all respondents clearly expressed concerns over the largely nonexistent role of First Nations in the development of the new legislation and of policies and regulations to implement it. Almost all the submissions asserted that the province needed to collaborate with First Nations in order to advance the act and recognize Aboriginal rights and title with respect to water.

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[29] Ibid.
[30] First Nations Summit, 2010, p. 8.
[31] First Nations Fisheries Council, 2010, App. B, p. 4.

3.4.2 Concerns with the Consultative Process

> [The Act] must reflect that First Nations in BC have constitutionally protected Aboriginal title and rights under section 35 (1) of the *Constitution Act, 1982,* and the Crown has corresponding obligations to First Nations when it undertakes planning and decision-making with respect to lands and resources.[32]

A review of the submissions reveals that for an overwhelming number, the primary issue for First Nations was that the public consultation process set out by the province did not meet First Nations' expectations of engaging in meaningful consultation over changes to the legislative framework governing water use in British Columbia.

Furthermore, many respondents clearly stated that their submission did not constitute consultation.[33] Many described consultation as a longer period of engagement, in contrast to the relatively short timeframe set by the province for submissions. "Meaningful consultation" was also understood as one that was first set out and agreed to by all parties engaged in the consultation process.

> The broad public process that has taken place thus far is not focused on aboriginal concerns, is not an aboriginal consultation process and does not uphold the honour of the Crown in respect of its duties to consult with [First Nations].[34]

To resolve this issue, many submissions referred the province to the principles outlined in the "New Relationship" vision.[35] The New Relationship Accord committed the BC government and the BC First Nations Leadership Council (FNLC) to an improved relationship honouring three principles:

- Respect, recognition, and accommodation of Aboriginal title and rights
- Respect for each other's laws and responsibilities
- Reconciliation of Aboriginal and Crown titles and jurisdictions. (Province of British Columbia, 2005)

The New Relationship documents – particularly the Transformative Change Accord and the Métis Nation Relationship Accord – set out a framework for working together, specifically on land and resource decisions. Many submissions pointed out that the government of British Columbia was not acting in accordance with its New Relationship commitments (for a critique of the New Relationship, see Woolford, 2011). Some submissions also articulated the legal obligations of all levels of government in Canada

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[32] Submission by First Nations Summit, 2010, p. 1.
[33] See Supreme Court of Canada *Haida Nation* (2004) and *Taku River Tlingit* (2004) decisions.
[34] Ratcliff & Company, LLP, May 4, 2010, submission on behalf of the Coldwater Indian Band.
[35] The New Relationship document was agreed to by the leadership of the First Nations Summit, the Union of British Columbia Indian Chiefs, the British Columbia Assembly of First Nations, and then-Premier Gordon Campbell. This document resulted from discussions with senior provincial government officials on how to establish a new government-to-government relationship based on respect, recognition, and accommodation of Aboriginal rights and title. The document sets out a vision statement, goals of the parties, principles of a new relationship, and some action plans. See http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf.

to engage in consultation with First Nations, and argued that the consultation process did not recognize that Indigenous peoples have constitutionally protected rights that have been "recognized and affirmed" in the Constitution of Canada and thus require an appropriate degree[36] of consultation directly with First Nations governments.[37]

For example, many of the First Nations organizations and governments invited the province to engage directly at the Nation level with First Nations throughout British Columbia to ensure that water needs as well as the interests and values of communities were accurately and adequately considered in the proposed and forthcoming legislative, policy, and regulatory changes. However, the consultation process was structured in such a manner that Indigenous groups were treated as analogous to stakeholders and interest groups, rather than as one of the principals in a Nation-to-Nation relationship.

The process undertaken by the province to solicit feedback from First Nations also created barriers to participation. Most of the submissions by BC First Nations expressed interest in participating in the discussion because of the significance of water and its management on their reserves and in their traditional territories. They indicated, however, that the time period allotted for review of the discussion papers was particularly problematic due to the limited resources and capacity of most First Nations to conduct a thorough review of legislation. Many of the respondents requested that the province provide additional resources to help First Nations perform an in-depth review of the proposed legislation, thus enabling them to participate in the process.

An additional barrier cited by some First Nations involved the technology employed by the province to gather input. Some suggested that soliciting feedback using Internet technologies could exclude some First Nations due to limited Internet access in remote locations. Relying solely on input obtained through an online portal could also exclude community members, such as Elders, who had specialized local knowledge of water resources but lacked access to adequate technologies.

> Many First Nations do not have regular access to the Internet (e.g., due to remoteness) and, so, would not be in a position to access the Living Water Smart Blog in a regular or meaningful way.[38]

3.4.3 Challenging Provincial Jurisdiction over Water

> Where Aboriginal Title and Rights have not been addressed, the Government of

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[36] In its 2008 *Hupacasath* decision (*Hupacasath* First Nation v. The Minister of Foreign Affairs Canada and The Attorney General of Canada, 2015 *FCA* 4, *FCA*), the court distinguished "deep consultation" from lower levels of consultation. The extent of consultation depends on the First Nation's strength of claim and the extent of the potential infringement on Aboriginal rights (see Jones and Marcoux 2015).

[37] From the *Haida* and *Taku River Tlingit* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada determined that the Crown has a duty to consult and, where appropriate, accommodate First Nations when the Crown is contemplating an action or activity that might adversely impact potential or established Aboriginal or Treaty rights. The degree of consultation with First Nations depends on the strength of the case supporting the existence of Aboriginal rights and title and the seriousness of the adverse effect, or potential effects, on the rights and/or title claimed. *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.,* 2000 BCSC 1712, para. 138.

[38] UBCIC, 2011, p. 7.

> British Columbia does not have the title or jurisdiction to assert ownership, control or jurisdiction over water.[39]

A number of respondents rejected the provincial assertion of jurisdiction over water resources, specifically noting that surface and ground water located on and below Indian reserve lands were not under provincial jurisdiction. Several respondents also disputed the province's authority to grant water licenses to third parties giving them priority access to resources that are considered to fall under Aboriginal jurisdiction or that would interfere with Aboriginal rights.

> The province asserts jurisdiction to permit and regulate all uses of water; but this jurisdiction cannot extend to Indian reserve lands, or to all areas of the province where Aboriginal Title and Rights have not been addressed.[40]

> [T]he proposed WSA … continues to assert unilateral jurisdiction to regulate and control access to groundwater including the authority to provide third parties with access to water resources that are under Aboriginal jurisdiction.[41]

Several respondents took issue with the province's proposal to delegate authority without addressing the rights and jurisdiction of First Nations peoples and governments.

> This delegated approach maintains the fundamental flaw of assuming that the Province has sole jurisdiction over water and thus the authority to delegate water resources where there is a reasonable basis for Aboriginal jurisdiction.[42]

Instead of delegated authority, some respondents expressed the need for shared, or collaborative, approaches to govern water resources, due in part to the challenge of managing a resource that crosses political and administrative boundaries.

> Water issues transcend jurisdictional boundaries and are not the responsibility of just one governing body.[43]

Regardless of whether the province will assert a centralized, delegated, or shared approach to water governance, many respondents requested greater clarity regarding how First Nations rights and knowledge will be respected in the new act.

> [A]ny governance system respecting water must include traditional ecological knowledge in water allocation decisions, and prioritize First Nations' water rights in decision-making, whether the preferred approach is centralized, shared or delegated.[44]

For many, the issue of water ownership and jurisdiction represented not only an outstanding issue that needs to be reconciled with existing Aboriginal rights but indeed the central issue for BC First Nations.

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[39] UBCIC, 2010, p. 3.
[40] UBCIC, 2013, p. 4.
[41] BCAFN, 2013, p. 20.
[42] Ibid., p. 23.
[43] Cowichan Tribes, 2013, p. 1.
[44] Dene Tha First Nation, 2013, p. 12.

> [The] most important issue for our Nations is who owns the water and who has the right to determine access to the water for all possible uses.[45]

3.4.4 Lack of Recognition of Aboriginal Rights and Title

> The Proposal fails to address [our] First Nation's constitutionally-protected rights to sufficient quality and quantity of water.[46]

Another core tension raised by most First Nations respondents was the province's lack of explicit recognition of Aboriginal prior and priority rights to water use. For many First Nations, Aboriginal title includes water, as access to safe, clean water is necessary to the continued practice of Aboriginal rights that have already been recognized and protected by law.

> Many Aboriginal and Treaty rights rely upon healthy and sufficient flows of water to sustain them, such as fishing, hunting, or other gathering rights, and spiritual practices. Indeed, it is nearly impossible to imagine an Aboriginal or Treaty right that does not depend upon water.[47]

Because of the inextricable link between access to water and the ability to exercise Aboriginal rights, many respondents maintained that Aboriginal rights and title must include the inherent right of self-determination over water resources. This is particularly important for some First Nations, such as Treaty 8 First Nations, whose constitutionally recognized Aboriginal rights and title need to be explicitly recognized in the new legislation.

> Our strong position was that our Treaty should confirm ownership and protection of groundwater.[48]

3.4.5 Key Issues and Concerns Regarding the Legislative Proposal

This section outlines key concerns relating directly to the proposed provisions of the Water Sustainability Act.

Precedence of rights (FITFIR model)

Based on the submissions that mentioned the "first-in-time, first-in-right" (FITFIR) model proposed by the province, all parties rejected the proposal as an appropriate means of managing water, especially in times of scarcity. This was largely due to its reliance on the date that a water license was originally issued, rather than on prior[49] and priority use[50] for water.

> The introduction of the water licensing system by the Province does not change

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[45] From British Columbia Assembly of First Nations, *Governance Toolkit,* p. 445, cited in BCAFN, 2013, p. 8.
[46] Ditidaht First Nation, 2013, p. 1.
[47] UBCIC, 2013, p. 4.
[48] Sliammon First Nation, 2013, p. 1.
[49] Prior use relates to First Nations "prior, superior, and unextinguished Aboriginal Title and water rights" (UBCIC, n.d., p.4).
[50] Priority use describes the need to consider environmental flow needs for preservation of aquatic habitat.

> the fact that Aboriginal peoples of BC, and indeed across Canada, were the first users of the water, and continue to use water for the exercise of their constitutionally protected Aboriginal and Treaty rights.[51]

One respondent suggested that first rights to water should be determined based on the water uses that are most essential for supporting or giving life. For example, water for drinking would be the first priority, followed by water for growing food for local residents. Others suggested working with First Nations to establish water-use priorities based on rights and needs. For many, this would mean giving first priority to conservation needs or environmental flow needs, followed by Aboriginal water needs. This order of priority would be consistent with the Supreme Court of Canada's decision in *R. v. Sparrow,* which found that subsistence harvesting by Aboriginal peoples should be given priority once conservation requirements for the resource have been met (Library of Parliament, 1996).

> First Nations rights, contemporary or traditional, enjoy a constitutional priority.[52]

As determined by *Sparrow,* conservation needs have been established as the first priority in the context of resource use, followed by Aboriginal rights, meaning that once conservation goals for a given resource have been met, Aboriginal people have priority right to resources for food, social, or ceremonial purposes over other user groups. How this would apply to water resources has not been tested in the courts – yet.

Groundwater regulations

While generally supporting the introduction of groundwater regulations, many respondents again rejected the FITFIR model as it would be applied to groundwater licenses.

> This approach to groundwater regulation continues the Crown's practice of legitimizing historical denial of Aboriginal rights.[53]

Many not only took issue with the province's overlooking of First Nations' prior groundwater use but also raised concerns over the potential for overallocation of groundwater resources through the granting of water licenses to all existing users. As some suggested, this approach could potentially commit the province to an unsustainable level of groundwater usage.

> The Issuance of back-dated licenses to existing users would be extremely problematic, particularly in conjunction with the FITFIR principle. Many groundwater aquifers are already over-allocated … This approach would enhance the rights of large-scale users at the expense of the environment and other users.[54]

> This approach to groundwater regulation is particularly problematic given the fact

[51] UBCIC, 2011, p. 3.
[52] First Nations Fisheries Council, 2010, p. 4.
[53] BCAFN, 2014, p. 2.
[54] Fort Nelson First Nation, 2013, p. 12.

> that the current use of groundwater in BC is not ecologically sustainable.[55]

A few respondents raised concerns specifically over the proposed exemptions for a groundwater license, including exemptions for domestic wells, geothermal and remediation wells, and deep saline groundwater wells. Without the need for a license, it is not clear how the province intends to manage these wells should the aquifer become depleted, thereby increasing the potential for conflict among well users drawing from the same aquifer.

Several respondents offered additional suggestions to enhance the proposed groundwater regulations, including:

- Recognizing First Nations' prior and priority rights to groundwater
- Making water allocations the sole responsibility of one statutory decision maker[56]
- Completing an inventory of groundwater resources that would consider linkages to surface water
- Developing exemptions with First Nations
- Considering traditional knowledge in assessing the cumulative impacts to groundwater.

New or updated governance tools

Many of the submissions referred specifically to the suite of new governance tools proposed in the legislation. However, several First Nations indicated that these tools should be considered only after First Nations' priority water rights were recognized.

Environmental flow needs (EFN) – Initially, several First Nations acknowledged the value of identifying environmental flow needs. However, many expressed concerns over the language of simply "considering" EFN, as they felt that it did not offer enough protection. Some were also concerned that EFN would be considered only in the context of new or amended licenses. Many stated that in doing this, the province would be overlooking existing pressures on water systems.

Many also suggested that the province integrate localized traditional knowledge to define EFN and adopt a precautionary approach in setting critical thresholds to protect the health of the aquatic ecosystem.

Area-based regulations and water sustainability plans – Several First Nations expressed the need to work with the province to develop thresholds to ensure that First Nations could exercise constitutionally protected rights, including fishing and harvesting.

> Any establishment of area-based regulations, which define thresholds of water use, and/or set out potential exemptions from licensing, must be subject to

[55] BCAFN, 2014, p. 2.
[56] Water licenses may be authorized by one of the following agencies: Ministry of Environment; Ministry of Forests, Lands, and Natural Resource Operations; and Oil and Gas Commission.

> consultation with First Nations, to ensure that First Nations' Flow Needs and First Nations' water rights are taken into account.[57]

Many respondents were encouraged by the potential for greater collaboration among government, First Nations, the public, and other stakeholders to develop locally appropriate plans and regulations, as well as by the potential off-ramp to FITFIR that the development of a water sustainability plan could provide. However, as participants in a multi-stakeholder process, several felt that it was important for issues relating to First Nations rights not to be "subsumed into public discourse and subject to debate."[58] The legislation will need to address how decision making is to be shared and how different interests will be weighed.

Water objectives – Again, many First Nations described the need to be engaged in developing water objectives that will be used to influence decision makers. Establishing water objectives would entail not only defining the objectives or targets but also identifying the processes to develop and implement these objectives and to ensure that they are enforced regionally.

Agricultural water reserves – Several First Nations indicated that water reserved for agricultural use would need to first respect First Nations' priority rights to water use.

Beneficial use – Some concerns were raised over how "beneficial use" is defined to benefit private users exclusively, thus excluding unlicensed users and uses such as First Nations and the environment. Several noted the possibility that "beneficial use" could adversely affect First Nations water rights by affecting "availability of sufficient water quality and quantity to exercise Aboriginal and treaty rights."[59]

Temporary water reduction orders – Many suggested that planning for and responding to times of water scarcity will require First Nations engagement and integration of traditional ecological knowledge.

Monitoring and reporting – There was general support for greater and more frequent monitoring of surface and ground water resources to help inform water allocation and adaptive management approaches.

> The WSA should require applicants for all water withdrawal applications (both short and long-term) to collect adequate baseline data including multiple years of hydrological data collected from the point of diversion that captures seasonal variability.[60]

Some further suggested that the modernization process was an opportunity to work with First Nations to enhance understanding of local watersheds. A few respondents indicated an interest in having access to data collected in their traditional territories.

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[57] Dene Tha' First Nation, 2013, p. 8.
[58] Pacheedaht First Nation, 2013, p. 7.
[59] Ibid., p. 8.
[60] Fort Nelson First Nation, 2013, p. 6.

Some had concerns that the proposed threshold of 200,000 L/day for carrying out monitoring and reporting was too high. Only a fraction of users are represented at this volume, and it may not accurately represent the extent of water use in the province.

Unlicensed permitted uses – Concerns were expressed over the lack of information pertaining to the types of uses that would not require a permit. Allowing unlicensed permitted uses could potentially leave the resource vulnerable to exploitation. Many respondents indicated that more information would be needed in order to understand the overall impact on a water system.

> While it may seem that low risk applications may be little impact, if there are enough of them, or the water levels are more sensitive to use, or people take advantage and use the water for other purposes and there is not enough enforcement, stream health could be affected.[61]

Significant concerns were voiced over the exemption from permit requirements of saline water source wells that are typically used in hydraulic fracturing activities. Several First Nations supported the regulation of all industrial water uses.

Duration of permit – Several concerns were raised over the term over the proposed term of water licenses. Some respondents indicated the need for more frequent reviews of water licenses than the term proposed by the province, and suggested that more frequent reviews would allow for a more proactive implementation of adaptive management measures.

> Licenses should have limited, defined terms, so that Environmental Flow Needs and First Nations Flow Needs will be assessed upon renewal on a regular basis. This will allow for adaptive management.[62]

Delegated decision-making – As mentioned earlier, many First Nations have stated that the province is not in a position to delegate authority over all water resources, especially where there is a reasonable basis for Aboriginal jurisdiction. Resolution of overlapping and shared jurisdiction will be needed to ensure the legitimacy of authority delegated by the province. In addition, some respondents called for greater clarity regarding roles, responsibilities, and financial resources that would be made available to carry out delegated duties.

Water fees and rentals – A few respondents suggested that the proposed fees were too low and would not encourage conservation of water. Some felt that First Nations should not be subject to the same water fees as other users, and requested exemptions for community projects. Others reasoned that higher fees should not apply to non-consumptive water licenses.[63] Still others indicated an interest in pursuing revenue sharing, as proposed in the New Relationship Accord.

> [Run-of-river] power projects don't consume water so increasing fees to

[61] Kekinusuqs, 2010, p. 6.
[62] Ditidaht First Nation, 2013, p. 7.
[63] Tseshaht First Nation, 2011, p. 1.

> encourage conservation will place an additional burden upon our's [sic] and other First Nation small hydro projects.[64]

There were also concerns that charging fees for water would contribute to the commodification of water resources and that there might be broader implications under international trade agreements. Many respondents rejected outright what they perceived as the commodification of water resources.

> The utility of water is not represented by a singular value of exploitation for profit.[65]

> The Province's approach to water governance has largely been to manage water as a commodity – a resource to be exploited for economic gain. This contrasts with the near opposite worldview of First Nations who primarily view water and water resources as essential for life and a resource to be valued and protected first and foremost.[66]

Additional concerns

A number of concerns were raised by respondents with respect to a broader range of issues relating to water management.

Cumulative effects – Concerns were expressed over the combined impacts on the environment from the existing 44,000 water licenses, as well as over the potential for "oversubscribing" water flows and the effects on the riparian habitat.

> FNWARM shares the concern with other First Nations that revision to the current legislative framework should include a cumulative impact assessment of multiple groundwater extractions.[67]

> The cumulative impacts of forestry, transmission lines, seismic lines, oil and gas wells and wind tenures, amount to a significant change in the hydrological regime within the Moberly River Watershed.[68]

Sustainable water allocations – Respondents emphasized the desire to ensure that water would be sustainably and equitably allocated for both existing communities and future generations.

> Provided watershed-based water allocation plans are founded on environmental protection, sustainability and protection of aboriginal and Treaty rights … and are developed with meaningful participation with First Nations, we support these plans setting the regulatory framework for decision-makers.[69]

Climate change – Many respondents indicated the need to consider water allocations

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[64] Tla-o-qui-aht First Nation, 2011, p. 1.
[65] UBCIC, 2010, p. 7.
[66] First Nations Summit, 2013, p. 21.
[67] First Nations Women Advocating Responsible Mining, 2010, p. 7.
[68] Saulteau First Nation, 2013, p. 4.
[69] Treaty 8 First Nations, 2010, p. 5.

in a changing climate model and to consider options for monitoring and mitigating climate change effects.

> More frequent reviews will be increasingly important, given the potential of climate change to drastically affect water supply.[70]

Resolution of water conflicts – Some First Nations currently have a dispute with the province over water and have expressed the desire to create a mechanism to resolve water conflicts outside the courts.

> The key to creating a better water governance structure is recognition and implementation of Aboriginal title and rights, negotiating solutions to public policy challenges directly with First Nations on a government-to-government basis, and developing legislation and regulations in collaboration with First Nations. This would result in less conflict and more certainty.[71]

Reliance on industry to self-regulate – Some respondents warned that industry should not be relied upon to set objectives regarding water quality.

> [The Chair] raised concerns as to the reliance of government upon industry to set standards with regards to water quality rather than conducting independent assessments.[72]

Reliance on desktop assessment – Several respondents were concerned that the province's proposal to rely on desktop assessments in the allocation of water permits would not provide sufficient accuracy for current conditions or allow consideration of traditional knowledge.

> This simplified desktop approach will not ensure that traditional knowledge and use information is reviewed and integrated into the needs assessment.[73]

Instead of a simple desktop assessment, a detailed assessment was proposed by many First Nations for larger or more complex projects requiring a water license.

3.5 Summary of First Nations Interests in Water Governance

Many respondents indicated not only an interest in but also a need for First Nations participation in governing water resources in their traditional territories. This section summarizes key themes observed among the responses.

3.5.1 Perspectives in Management and Shared Decision-Making

> At a very minimum, the Province should engage in shared decision-making with respect to these issues.[74]

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[70] Dene Tha' First Nation, 2013, p. 11.
[71] First Nations Summit, 2010, p. 11.
[72] First Nations Women Advocating Responsible Mining, 2010, p. 7.
[73] Dene Tha' First Nation, 2013, p. 7.
[74] BCAFN, 2013, p. 23.

Many First Nations detailed their collective responsibility to care for their lands and waters, often describing it as a stewardship responsibility. Many expressed the need for direct involvement of First Nations in all decisions impacting their lands and resources, particularly in the development of legislation and regulations.

The four provincial/territorial organizations (see Appendix A for a list) further specified support for First Nations involvement both at the local operational level and at a strategic planning and decision-making level. In addition, because of their relationship with their lands and water, a number of respondents noted the need for traditional knowledge to inform various aspects of the water governance tools proposed in the new act, such as environmental flow needs and water objectives.

> The Act must be updated to reflect the unique and cultural interests that First Nations have with water, and to promote the use of traditional knowledge in water stewardship and decision-making.[75]

Beyond the inclusion of traditional knowledge, however, several First Nations indicated that greater consultation with First Nations in general would be necessary in defining specific regulatory and management objectives of the Water Sustainability Act, notably the following (see previous section for detailed concerns):

- Environmental flow needs
- Water objectives
- Area-based regulations and water sustainability plans
- Agricultural water reserves
- Beneficial use requirements
- Duration of licenses and reviews
- Temporary water reduction orders
- Delegated decision making
- Groundwater regulations.

Finally, several respondents noted that water is a shared responsibility and emphasized the need for multilateral engagement with all levels of government, particularly First Nations governments, along with participation from industry and local communities.

> The Province must pursue a strategy with First Nations, and the federal government and industry, that promotes and supports the ability of First Nations to be full participants in watershed protection planning and implementation, and decision-making over land and resource use.[76]

3.5.2 Perspectives on Advancing the New Act

Despite the clear frustration expressed in their submissions, and the lack of meaningful engagement between the province and First Nations, many respondents were deeply interested in pursuing change and offered several key messages to help British

[75] First Nations Summit, 2010, p. 1.
[76] Ibid, p. 1

Columbia better engage First Nations in developing improved water management practices. The following suggestions are in no particular order:

- Recognize First Nations priority use of water related to Aboriginal rights and title.
- Negotiate solutions and consult directly with First Nations on a government-to-government basis.
- Develop legislation and regulations in collaboration with First Nations, including working with First Nations to define priority and beneficial water uses and establishing critical thresholds and environmental flow needs.
- Distribute all water monitoring and reporting to affected First Nations governments.
- Create a more accessible dispute resolution mechanism to resolve water conflicts (rather than the Environmental Appeal Board).
- Complete an inventory of groundwater resources.
- Establish a First Nations technical working group comprising regional representatives and ensuring gender equity.[77]
- Practice shared and delegated water governance with First Nations that includes Aboriginal systems of knowledge.
- Recognize First Nations traditional laws in the management of water resources in their respective territories.
- Establish a reciprocal consultation process with First Nations to promote effective participation in water governance.
- Honour fiduciary responsibilities of the Crown to ensure that First Nations are afforded the opportunity to participate equally in the planning, management, and governance of water resources.
- Work directly with First Nations to ensure that their communities have access to sufficient water resources to meet current and future demands.
- Reject new applications for watercourses that are already oversubscribed, and work with local communities to identify watercourses that are at risk.
- Adhere to the principles outlined in the New Relationship Accord and the United Nations Declaration on the Rights of Indigenous Peoples.

[77] First Nations Women Advocating Responsible Mining, 2010.

4. FROM PARTICIPANT TO PARTNER

4.1 Consultation: A Legal Duty or a Missed Opportunity?

In soliciting feedback on proposed changes to the Water Sustainability Act, the Province of British Columbia initiated a public engagement process and invited members of the public, interest groups, stakeholders, and First Nations to participate. This process was challenging in part because First Nations are neither an "interest group" nor a stakeholder. Rather, they have constitutionally recognized – though undefined – rights that have been acknowledged and affirmed by law.

Aside from a handful of public information workshops, no resources were provided to meaningfully engage First Nations in the review and discussion of the proposed changes to the legislation. This represents not only a dereliction of the Crown's responsibilities but, perhaps much more significant, a missed opportunity to build a stronger relationship with Aboriginal peoples in British Columbia. This is particularly disappointing in light of the fact that several respondents expressed their appreciation for the proactive approach to engage First Nations in the discussion of water-related issues in the first round of input gathering. Many others welcomed the opportunity to work with the province to shape the legislation to reflect the interests and values of First Nations as well as the new legal realities surrounding resource management. One organization called it a "precursor"[78] to the government's engagement with First Nations via the consultation process, while the BC Assembly of First Nations extended a direct offer to help develop a consultation process for engaging meaningfully with First Nations across the province.

Over the course of the consultation period for all three discussion papers, there was a distinct change in the tone of submissions. Initial responses to the first discussion paper often welcomed improvements over the earlier *Water Act,* whereas submissions pertaining to the legislative proposal were distinctly litigious in tone, with several referring to the legal risk of excluding First Nations from meaningful consultation.

By treating First Nations as just another stakeholder, the province has not only perpetuated a relationship "based on conflict rather than mutual respect and cooperation"[79] but also missed an immense opportunity to better understand the water systems it is working to manage, and to take positive steps towards meaningful collaboration and co-governance arrangements.

Because of their relationship with their lands and water, First Nations have considerable knowledge about their water systems. As suggested by many of the respondents, and increasingly recognized by ecosystem scientists and environmental managers as a best

[78] Ibid.
[79] First Nations Summit, 2010, p. 8.

practice,[80] traditional knowledge can help inform the development of appropriate site-specific water objectives, including critical thresholds, environmental flow needs, and sustainable water allocation plans.

Finally, after receiving the submissions in Stage 1, the province drafted a *Report on Engagement,* a summary of all submissions received for the first discussion paper. This report does not distinguish First Nations rights and interests from that of public stakeholders. From reviewing this report, it is not clear how the province chose to incorporate First Nations submissions into its changing legislative framework, if at all. Indeed, a thorough review of the submissions relative to outcomes, conducted by other researchers at the University of British Columbia's Program on Water Governance (Jollymore et al., 2016), demonstrates that the policies advocated in most of the submissions, including those from First Nations, do not align with many of the outcomes in the Water Sustainability Act. This was particularly true for policies related to water licensing, in which status quo approaches were maintained, in accordance with the preferences of industry respondents (even though they were a clear minority in terms of numbers of submissions). The *Report on Engagement* and subsequent discussion papers provided limited information on how such policy decisions were made, or how First Nations' submissions (among others) were drawn upon to inform those decisions.

Without meaningful and direct Nation-to-Nation engagement with BC First Nations, the province risks being confronted with legal challenges associated with water licenses issued in their traditional territories; more fundamentally, this erodes the basic foundation for creating a partnership with Aboriginal peoples that had been set out in the constitutional entrenchment of Aboriginal rights and title. These circumstances can significantly affect how successful the implementation of new policies and regulations under the new act will be.

4.2 The Water Sustainability Act's Potential Impact on First Nations

From the submissions overall, it is clear that the duty to consult was not perceived by First Nations as simply a matter of legal obligation or procedural requirement owed by the Crown. Rather, First Nations respondents clearly expressed the need for meaningful consultation because of the significance of the proposed changes to the outdated *Water Act* and their potential to affect Aboriginal rights and title.

First Nations depend on access to clean, safe water for their lives and livelihoods. Poor water quality, degraded aquatic habitat, or even reduced access to water affect, or have the potential to affect, the ability of Aboriginal peoples to fish, hunt, and harvest country foods and traditional medicines. In other words, they impact constitutionally protected Aboriginal rights and/or title. As articulated by numerous First Nations in their submissions, it is of utmost importance to these communities who decides "what" and "how much" water is used in their traditional territories. This is particularly the case given the structural inequities built into the "first-in-time, first-in-right" (FITFIR) regime.

[80] For more information on best practices, see research by Berkes (1989, 1999); Binder and Hanbridge (1993); Moller et al. (2004); Pinkerton (1989, 1998).

4.3 Recommendations for Advancing the Act with First Nations

The suite of tools identified in BC's new Water Sustainability Act offers new opportunities for First Nations to engage in water management and governance in the province. However, based on First Nations' responses to proposed changes and to the public engagement process, it is evident that core tensions and key barriers persist and need to be addressed in order to facilitate meaningful First Nations participation in water governance. Indeed, this is consistent with research emerging from legal and water scholarship research.[81]

Advancing the new act with First Nations participation will require: (1) investment of time and resources in building the relationship; (2) working with First Nations to redefine roles and responsibilities; and (3) exploring, in partnership with First Nations, practical and appropriate tools and mechanisms to facilitate First Nations engagement and participation.

4.3.1 Rebuilding the Relationship

As explored above, the Province of British Columbia and the BC First Nations entered into a "New Relationship" in 2005, with a vision of improving government-to-government relations. This embodied, in part, the recognition that governments in Canada have constitutional and legal obligations to Indigenous peoples in this country. Although the New Relationship framework can help guide the relationship, it is clear that it alone is insufficient to create the durable working relationships between governments that are necessary for consultation on key issues such as the modernization of the Water Act.

There is no clear or easy way for the province to meet the minimum legal requirements to consult 203 individual First Nations in a meaningful way within existing resource and capacity constraints, yet resource and capacity limitations should no longer preclude First Nations participation in shared governance or management decisions. This is particularly true when these decisions, such as legislative and regulatory changes to the Water Act, have significant potential to impact First Nations lands, resources, rights, title, health, and well-being. Thus, while the spirit and intent of the New Relationship may be considered an important first step, additional measures need to be explored, not only to advance the vision of the New Relationship alongside the government's constitutional and legal obligations but also to ensure that First Nations have a meaningful role in water governance.

Notably, some such measures have recently emerged. A number of First Nations and Tribal Councils have entered into negotiated agreements with the province – Strategic Engagement Agreements (SEA) – that set out a mutually agreed upon framework for consultation and accommodation (Province of British Columbia, n.d.), and Reconciliation Protocols (RP), which represent an incremental step towards reconciling First Nations and Crown title and a framework for joint decision making concerning lands and resources (Kunst'aa Guu, 2009). However, although these types of

[81] See research by Brandes and Curran (2009); Brandes and O'Riordan (2014); Simms et al. (2016); and von der Porten and de Loë (2013a, 2013b).

agreements help create the conditions for collaboration while acknowledging core differences, they do not attempt to resolve underlying issues regarding jurisdiction (Griggs and Dunsby, 2015). Further, these agreements are relatively new and it remains to be seen whether they merit additional investment and broader uptake among First Nations (ibid.).

4.3.2 Defining First Nations Role in Shared Water Governance

First Nations clearly need to have a greater role in deciding how lands and resources are used and who benefits from their use. The unique water needs, interests, and rights of Indigenous peoples described in the submissions suggest that the province's Internet-based submission approach is unsatisfactory and that a different approach is needed (such as in-person consultation or funding for opportunities to engage in a meaningful way) to clearly articulate the role that First Nations want to play in water management and governance in British Columbia.

In addition, greater emphasis has been placed more recently on collaborative approaches with First Nations. Both collaboration and First Nations participation are described as "winning" conditions for fostering successful watershed governance (Brandes and O'Riordan, 2014). However, the cultural and geographic diversity of First Nations in BC – together with their individual relationships with the local, provincial, and federal governments, unique water needs and interests, and locally available capacity and resources – indicate that there cannot be a prescriptive, one-size-fits-all approach. There may be common elements among First Nations interests in water governance, but this needs to be explored on a province-wide scale and in collaboration with First Nations governments and organizations in order to help shape and define specifically what their role should be and what structures and processes are needed to facilitate this collaborative approach.

4.3.3 Identifying Tools to Support First Nations Participation

Identifying the full suite of legal and policy tools available to support First Nations participation in water governance will entail a critical analysis of the new Water Sustainability Act combined with a comprehensive review of First Nations water governance initiatives and relevant legal analysis – all of which is beyond the scope of this report. However, within the submissions, a number of respondents identified specific initiatives and potential tools or mechanisms that could support First Nations participation in water management and governance. These merit further review for future research. They include:

- Development of a province-wide First Nations technical group to advise the province on water-related matters
- Development of a province-wide Elders Council to guide water governance in First Nations traditional territories
- Development of alternative dispute resolution mechanisms to resolve water conflicts

- Completion of a province-wide inventory of First Nations water stewardship initiatives, water rights and interests, and water laws (traditional or contemporary).

Additional initiatives might include applying the suite of new governance tools set out in the Water Sustainability Act, such as developing new approaches for shared and/or delegated water governance with First Nations. Indeed, co-governance with First Nations has been described as a "necessary condition for success" in water governance (Brandes and O'Riordan, 2014, p. 37). Co-governance can help address some of the core tensions by creating the framework for the province and First Nations to define and agree on the process for shared responsibility over water resources (Simms et al., 2016). Of course the development and application of new tools, mechanisms, and initiatives is dependent on the resources available to support it. Identifying sustainable funding streams will be necessary to ensure First Nations participation in water governance both today and in the future (Brandes et al., 2016).

4.3.4 Affirming and Incorporating Indigenous Water Law

Prior to the establishment of settler colonial governments, Canada's Indigenous peoples were sovereign and self-governing, using their laws to manage the people living within or moving through their traditional territories. Rooted in social, spiritual, and political values, these laws reflected the teachings and knowledge of respected individuals and leaders within the community (Borrows, 2002, 2010; Law Commission of Canada, 2007; Simpson, 2004). It is these traditional laws, practices, and protocols, together with Indigenous peoples' relationships with the lands and resources, that form the basis of Indigenous law (which is prior to and exceeds colonial state power). This raises our final, key point: the need to engage with Indigenous legal orders as opposed to Aboriginal law (Borrows, 2002, 2010; Phare, 2009; Wilson, 2014). Indigenous law emphasizes the importance of the distinction between inherent rights (based on historical, reciprocal, and often spiritual as well as material relationships between Indigenous peoples and water) as opposed to established rights (negotiated or defined in and through courts and/or treaties, and often referred to as Aboriginal rights) (Borrows 2002, 2010). Some Indigenous communities in British Columbia have taken the initiative in developing policies for resource governance in their traditional territories. In many instances, these policies embody principles that flow from Indigenous law (e.g., role as stewards of the land; environmental regulations consistent with traditional laws) and imply new, practical regulations (e.g., Aboriginal base flows). Engaging with Indigenous water law in the ongoing process of rule making following passage of the Water Sustainability Act offers, we suggest, a means of fulfilling the government's obligations of meaningful reconciliation – as well as an important avenue for deepening the sustainability of British Columbia's approach to water governance.

4.3.5 Future opportunities

Clearly there is a role for First Nations in water allocation and management decisions. First Nations have not only unique interests with respect to water but also constitutionally protected rights to access water for the pursuit of cultural activities. The

evolution of traditional practices, within the legal context, suggests that an existing or potential right to resource use might also apply to a range of contemporary water uses, including water for drinking, irrigating fields, transportation, and access for fishing, hunting, and trapping, and for harvesting of other plants and animals. And contemporary water use signals the need for greater involvement in management and decision making.

In addition to protected Aboriginal rights and title, the relatively recent ruling from the Supreme Court of Canada provides some insight into the role that Aboriginal peoples have in managing water resources within their traditional territories, and surface and ground water in reserve and titled lands. This decision, *Tsilhqot'in,* significantly improves opportunities for First Nations to advance their Aboriginal rights and title in a manner that reflects their vision, values, and perspectives (Mandell Pinder LLP, 2014). It enables Indigenous laws and protocols to maintain control over their lands and resources, suggesting a new role in managing water resources in traditional territories.

Finally, First Nations intimately know their lands and water resources and can contribute rich and nuanced information on how to manage them in a sustainable manner that respects Indigenous laws and traditions. It is this knowledge, together with constitutionally protected rights, that can transform First Nations from participants to partners in water management and governance. Whether this new partnership implies shared management and decision making within co-governance arrangements is yet to be seen. What is clear is that – backed by the enabling powers of the *Tsilhqot'in* decision and the new provisions in the Water Sustainability Act – First Nations have perhaps never been better positioned to define and shape their role in water management and governance in the province of British Columbia.

APPENDIX: LIST OF SUBMISSIONS

Table 1. First Nations respondents to the public blog between 2010 and 2013.

Respondent	Type	Location	Response to Discussion Papers		
			1	2	3
BC Assembly of First Nations	PTO	Lower Mainland	X		X
Cheslatta Carrier Nation	Nation	Burns Lake			X
Cold Water Indian Band	Nation	Merritt	X		
Cowichan Tribes	Tribal Association	Duncan	X		X
Dene-Tha First Nation	Nation	Alberta			X
Ditidaht First Nation	Nation	Port Alberni			X
First Nations Environmental Network	Organization	Tofino			X
First Nations Fisheries Council	Organization	Lower Mainland	X		X
First Nations Leadership Council	PTO	Lower Mainland		X	X
First Nations Summit	PTO	Lower Mainland	X		X
First Nations Women Advocating Responsible M**ining**	Organization	Northern BC	X		
Fort Nelson First Nation	Nation	Fort Nelson			X
Haisla Nation	Nation	Kitimat	X	X	
Kekinusuqs (Dr. Judith Sayers)	Individual	Vancouver Island	X	X	X
Lower Similkameen Indian Band	Nation	Keremeos			X
McLeod Lake Indian Band	Nation	McLeod Lake			X
Namgis First Nation	Nation	Alert Bay			X
Okanagan Nation Alliance	Tribal Association	Interior BC	X		X
Pacheedaht First Nation	Nation	Port Renfrew			X
P'egp'ig'lha Council	Tribal Association	Lillooet			X
Saulteau First Nation	Nation	Chetwynd			X
Shellene, Paul	Individual	Lower Mainland			X
Shishalh (Sechelt) First Nation	Nation	Sechelt			X

Respondent	Type	Location	Response to Discussion Papers		
Shuswap Nation Tribal Council	Tribal Association	Kamloops			X
Skwxwu7mesh-Uxwumixw (Squamish) First Nation	Nation	Lower Mainland			X
Sliammon First Nation	Nation	Powell River			X
St'at'imc Chiefs Council	Tribal Association	Lillooet		X	
Sto:lo Tribal Council	Tribal Association	Fraser Valley	X		
Tla-o-qui-aht First Nation	Nation	Tofino		X	
Treaty 8 Tribal Association	Tribal Association	Northern BC	X		
Tsawout First Nation	Nation	Saanichton	X	X	
Tseshaht First Nation	Nation	Port Alberni		X	
Union of BC Indian Chiefs	PTO	Lower Mainland	X	X	X
Wetsuweten	Nation		X		
TOTAL			14	8	24

Notes:

1. The information provided in the table is derived from the submissions under the "First Nation" category during Stages 1, 2, and 3 of the public engagement blog hosted by the BC Ministry of Environment, https://engage.gov.bc.ca/watersustainabilityact/what-weve-heard-2/ (last accessed, May 31, 2016).

2. PTO = Provincial Territorial Organization.

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