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Subject: First Nations Summit
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To Whom It May Concern:

Enclosed is the First Nations Summit submission to the Water Act modernization initiative.

Please do not hesitate to contact me if you have any questions.

Thanks,
Harmony.

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FIRST NATIONS SUMMIT

WATER ACT MODERNIZATION INITIATIVE

Submission to:

THE MINISTRY OF ENVIRONMENT, WATER STEWARDSHIP DIVISION
GOVERNMENT OF BRITISH COLUMBIA

APRIL 30, 2010

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Water Act Modernization Submission
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INTRODUCTION

The First Nations Summit is comprised of a majority of First Nations and Tribal Councils in British Columbia, and represents First Nations in BC involved in treaty negotiations with the governments of Canada and British Columbia (BC). The First Nations Summit provides a forum for First Nations in BC to address issues related to treaty negotiations as well as other issues of common concern, but does not participate in negotiations at individual treaty tables.

In British Columbia, the *Water Act* is one of the province's oldest provincial statutes and is the primary law for provincial management of water resources. Under the Act, the provincial government makes decisions on water licences, as well as water management planning, allocation planning and drought management. The Province has undertaken a Water Act Modernization initiative "to respond to new challenges that exist for managing our waters, including dealing with population growth and climate change." As part of this process, the Province issued a Discussion Paper that describes possible solutions for changing the existing Act.[1]

First Nations agree that the current BC *Water Act* is outdated. It was developed prior to the enshrinement of Aboriginal title and rights in the Canadian Constitution, and in time when issues such as environmental protection needs and climate change were not known. 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. In particular, it 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. 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.[2]

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[1] British Columbia's *Water Act Modernization Discussion Paper* may be accessed online at: http://www.livingwatersmart.ca/water-act/discussion-paper.html.

[2] There is support for this approach by others as well. See, for example, *Backgrounder: Statement of Expectations on Reform of the BC Water Act from BC Nongovernmental Organizations*, which states that a new Water Act will "give effect to Aboriginal title and rights: In recognition and respect of First Nation traditional environmental knowledge, as well as their aboriginal and treaty rights, the province must pursue a strategy with the federal government and First Nations that will support the ability of First Nations to be full participants in watershed protection planning and implementation." http://www.ecojustice.ca/media-centre/media-backgrounder/backgrounder-statement-of-expectations-on-reform-of-the-bc-water-act-from-bc-nongovernmental-organizations.

The purpose of this submission is to provide a general overview of First Nations' rights and interests as they relate to water, and to propose approaches for ensuring that First Nations perspectives are included in the modernization process and resulting *Water Act* regime. This submission is intended to provide general responses to the provincial *Water Act Modernization Discussion Paper* and is not intended to set out an exhaustive overview of First Nations' rights and interests in relation to water. The Province has a legal obligation to engage and consult with First Nations directly in its modernization initiative, including with regard to any consequential amendments to other legislation. As agreed in the *New Relationship* in 2005, BC needs to work jointly with First Nations on new legislation and policy.

Aboriginal title and rights give rise to a right to make decisions about the lands and resources, and to benefit from the use of those lands and resources. As such, First Nations must be involved in all decisions that impact upon their lands and resources, including water resources, from mega-projects, run-of-river projects, to decisions made by local governments. As confirmed by the Supreme Court of Canada, this involvement must occur not only at the local operational level, but also at the strategic planning and decision-making level. Decisions at each of these levels have the potential to impact Aboriginal title, rights or treaty rights.

Water is a sacred resource to First Nations. First Nations have a sacred, cultural relationship with water as their very survival relies on access to clean water for their health and well-being; cultural practices, customs and traditions; sustenance; and, economic opportunities. Aboriginal rights to water are essential to the existence of contemporary First Nations. These rights include the right to use water for drinking, irrigation, commercial purposes, transportation, and access for fishing, hunting, trapping and other harvesting and gathering activities. These rights also include the right to protect water and the aquatic habitat that supports plants, trees and other life forms with whom First Nations share their traditional lands and upon whom they depend.[3] Finally, these rights include jurisdiction over use and access to water and the protection of water and aquatic habitat from both a health and resource management perspective.

This submission includes a general discussion of First Nations interests in water and the legal context that supports First Nations involvement planning, management and decisions making as it relates to water. It also responds in a general way to issues raised in the Province's *Water Act* Modernization Discussion Paper.

THE CANADIAN LEGAL FRAMEWORK

Constitution Act, 1867

The *Constitution Act, 1867* sets out the division of powers between the federal and provincial governments. Water is not listed as a separate matter within the Constitution. For most of Canada's history, there has been no comprehensive plan to protect water. Rather, water (and the environment generally) has been managed through a mix of provincial and federal statutes, "mainly as part of the management scheme for other resources".[4]

Although there are a number of provincial statutes which impacts upon water, there is no overarching legislation designed to protect water. Instead, the province has attempted to address various environmental issues through a number of separate legislative acts. Consequently, there is a conflict

[3] B.C. Aboriginal Fisheries Commission, "*First Nations and Water Use Planning in British Columbia. Legal Analysis*", August 2, 2001 at p.21.

[4] EAGLE, "*Lifeblood of the Land. Aboriginal Peoples' Water Rights in British Columbia*" ed. Ardith Walkem et al., June 2004 at p.3-1, 3-2.

between "industry-specific legislation that grants permission for the use of water, and environmental legislation that attempts to minimize damage caused by resource development".[5]

Constitution Act, 1982

Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal title and rights of Aboriginal peoples. Aboriginal title encompasses the right to exclusive use and occupation of land; the right to choose the uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and, has an inescapable economic component."[6]

An important element of water management and decision-making, which has not historically been fully considered, is the interplay between Aboriginal rights, and treaty rights protected under section 35(1) and the existing provincial and federal legal framework for water management. Since the enactment of section 35(1), the Courts have clarified that the Constitution does not exhaustively distribute powers to only the federal and provincial governments, provided considerable direction on the implications of Aboriginal title and rights on Crown discretion.[7]

Aboriginal and Treaty Rights to Water

There is a solid foundation in law for First Nation involvement in managing water, including: constitutionally protected Aboriginal title and rights, treaty rights and the corresponding Crown duty to consult and accommodate; water rights associated with Indian reserves; and, agreements between First Nations and the federal or provincial governments.[8] Furthermore, international law recognizes the importance of, and supports, Indigenous peoples' relationship to resources such as water.

Aboriginal Title and Rights, and Treaty Rights, to Water – Use, Governance and Economy

The Aboriginal right to water flows from the historic and on-going connection of First Nations to their traditional lands and resources. Aboriginal title and rights include the ability of First Nations to make decisions about their lands and resources, and to benefit from the resources that are used or extracted.[9] Traditional laws, principles and teachings guide the decisions and actions of First Nations.

The courts have clearly articulated that the purpose of s. 35(1) is to reconcile the prior presence of Aboriginal peoples with the assertion of Crown sovereignty. The Supreme Court of Canada has further

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[5] *Ibid*.

[6] *Delgamuukw* v. *The Queen*, [1997] 3 S.C.R. 1010 at para 166.

[7] See *Campbell et al* v. *AG BC/AG Cda & Nisga'a Nation et al* 2000 BCSC 1123, at para 124: "This passage, however, cannot mean that all legislative powers in Canada belong to the Crown (either federal or provincial). Rather, the comment concerns the assertion of sovereignty over the lands of Canada, and the power of the Crown to pass laws regarding those lands. Without doubt the fact of Crown sovereignty in that sense is binding upon this court: R. v. Ignace [1996] B.C.J. No. 2081 (QL) (C.A.). However, the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups do not lead to the conclusion that powers of self-government held by those Aboriginal groups were eliminated. Such a conclusion would be inconsistent with the principles underlying aboriginal rights…first articulated by Chief Justice Marshall and later affirmed by the Supreme Court of Canada in cases like Sioui."

[8] *Supra*, note 4 at p.3-1, 3-2.

[9] *Supra*, note 6.

held that s. 35(1) must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of Aboriginal peoples on the land.[10] Specifically, section 35 recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. The need for reconciliation stems from the legal fact that, under the common law, Aboriginal people "could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests, and streams had since ancestral times provided for them."[11] With the assertion sovereignty arose an obligation to treat aboriginal peoples fairly and honorably, and to protect them from exploitation.[12] The Crown did not complete treaties in much of BC and, so, there remains the outstanding constitutional requirement to reconcile the respective Aboriginal and Crown titles and jurisdiction in the Province. Since the Crown took *de facto* control of Aboriginal title lands in the absence of treaty, the Province's title and jurisdiction over lands and resources remains, by virtue of s.109 of the *Constitution Act, 1867*, encumbered by un-extinguished Aboriginal title.

The Supreme Court of Canada has determined that the honour of the Crown must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Further the Court has instructed that nothing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal peoples with the sovereignty of the Crown. It is widely understood that the honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.[13] In all situations, the Crown's duty requires it to engage substantively and meaningfully with First Nations at an early stage and to demonstrate a good faith intention to fully engage at each successive stage of decision-making as part of its ongoing duty.

The Crown's "honour of the Crown" and fiduciary obligations have implications for the manner in which government develops regulatory schemes to govern resource use. For example, in the *Adams*[14], the Court held that, "In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights..." Furthermore, the court reasoned that:

> "If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties".

This is particularly important in the context of activities which have been, and continue to be, a core and an integral component of Aboriginal peoples' way of life and culture, such as harvesting fish and other aquatic species, as was clear in *Sparrow*.

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[10] *Supra*, note 6 at para 141.
[11] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para 31 and para 272.
[12] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 32.
[13] *Supra*, note 12 at para 18.
[14] *R. v. Adams*, [1996] 3 S.C.R. 101.

Aboriginal title and rights, and treaty rights – and corresponding Crown obligations - provide the legal/constitutional foundation for Aboriginal involvement in planning and decision-making processes related to the management of water.

Indian Reserves

Colonial land ordinances and Indian reserves provide a further valuable platform for First Nations involvement in the management of this important resource. While Indian Reserves fall under the exclusive jurisdiction of the federal government under section 91(24) of the *Constitution Act, 1867*, it is nevertheless important to examine how reserves were created based largely on meeting First Nations' water, and water resources, needs.

The method of Indian reserve allotment can be significant in making a determination of what water rights, if any, attach to the reserve and how the water rights differ from general water rights attached to other lands in the province. The method of reserve allotment varied considerably throughout the province.[15] A reserved right to water could include either "a water allocation that was specifically set aside or an implied reservation of water" necessary for the Aboriginal peoples to make full and beneficial use of reserve lands.[16]

Some reserves were allotted before British Columbia joined Confederation and became a province of Canada in 1871, with more reserves created after, followed by several readjustments after 1871. In addition, between 1850 and 1854, Governor James Douglas entered into treaties with some First Nations on Vancouver Island, the Douglas Treaties.[17] The policy followed in establishing reserves during that period was to reserve those lands identified by the Aboriginal people themselves, including villages, burial sites, fishing stations as well as other preferred areas. In many cases, reserves were created on the shores of rivers, lakes and oceans, largely to allow people to continue with their traditional ways of life.[18]

The following principles have been identified as being key objectives for which reserves were established in British Columbia:

- to facilitate the peaceful settlement of the province by ensuring that the Aboriginal peoples were secured an adequate land base;
- to ensure that Aboriginal peoples could be self-supporting and self-sufficient on their reserve lands; and
- to provide for the peaceful enjoyment of reserve lands by the Aboriginal peoples.[19]

Historically, many reserve lands were set apart with the objectives of encouraging agriculture, ranching and the maintenance of traditional forms of sustenance such as hunting, trapping and fishing. These objectives were recognized by the Court in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 34 (B.C.C.A.).[20]
The inclusion of water in reserve creation was necessary to achieve these objectives. The purposes of reserve creation are important factors in determining what is "included" in the reserve. The Canadian

[15] *Supra*, note 3 at pp.21, 31.
[16] *Supra*, note 4 at p. 6-2.
[17] *Supra*, note 3 at p. 31.
[18] *Supra*, note 4 at pp.7-6, 7-7.
[19] *Ibid*.
[20] Richard Bartlett, "Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights" Canadian Institute of Resources Law, 1988 at p. 43.

legal framework "directs that we read into federal powers those features which are essential to ensure the federal objective can be carried out". In order to protect the federal objective in establishing reserve lands, it is essential to assume the federal ability to provide and protect an adequate water supply to reserve lands. To assume otherwise, would be to defeat the purposes for which reserves were established.[21]

In *R. v. Simon*[22], the Supreme Court of Canada acknowledged that the recognition of Aboriginal rights would be hollow and meaningless if Aboriginal people are prevented from exercising or practicing those rights. It is not sufficient to give protection to the right itself, without also giving protection to the means necessary to practice the right. In the context of reserve lands and water rights, reserving lands which people are unable to use due to lack of water would render the reserve lands practically useless.[23]

A further basis for recognizing water rights attaching to Indian reserves arise from the common law riparian right, which concerns rights in waters running adjacent to or through lands. It is understood that riparian rights include a right to the maintenance of the natural flow, quality and quantity of the water.[24]

Moreover, in British Columbia, there is evidence of at least one reserve being allotted which included the right to use and control of water. The Joint Indian Reserve Commission fixed the boundaries of the Kamloops Reserve and wrote in their report that "the prior right of Indians as the oldest owners and occupiers of the soil to all the water which they require or may require for irrigation and other purposes from Paul's Creek, and its sources, and northern tributaries, is, so far as the Commissioners have authority in the matter, declared and granted to them".[25] To deny water rights to lands would defeat the purpose of setting aside reserve lands for the "use and benefit" of Indians, as provided for in the *British Columbia Terms of Union*.[26]

Finally, as mentioned above, the Courts have clarified that a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[27]

International Law

International standards and laws provide important guidance regarding the protection of the rights of Indigenous peoples. In particular, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which establishes minimum standards for the protection of Indigenous rights, and which the Canadian government is now taking steps to endorse, includes the following:

> Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
>
> Article 32:
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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[21] *Supra*, note 4 at p.7-9.
[22] (1985), S.C.R. 387.
[23] *Supra*, note 4 at p.7-9.
[24] *Supra*, note 4 at p.7-12.
[25] *Supra*, note 3 at p.39.
[26] *Supra*, note 20 at p.44.
[27] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335.

> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

To further demonstrate the importance of water to First Nations' culture and way of life, Indigenous peoples from around the world gathered on Musqueam Territory and ratified an International Indigenous Declaration on Water in 2001. The Declaration on Water reflects Indigenous peoples laws and traditions respecting water use and management. The Declaration on Water is "a powerful and eloquent statement about the importance of water to Indigenous peoples, combined with a call for action for Indigenous peoples to initiative efforts to protect water".[28]

Agreements

Agreements between First Nations and the federal and/or provincial governments also provide for First Nations involvement in decisions that affect their rights to water.

For example, in *Haida Nation*,[29] the Supreme Court of Canada held that treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define the Aboriginal rights guaranteed by s. 35(1).[30] A number of modern-day treaties negotiated between Canada, British Columbia and First Nations have been concluded which contain provisions relating to water and groundwater. These agreements generally require the government to consult with the local First Nation about the issuance of public water licenses, provide water reserves for First Nations and contain provisions regarding the extraction and use of groundwater.[31]

CURRENT REALITY

The lack of safe drinking water is an ongoing problem in many reserve communities. In approximately 20% of the Indigenous communities across Canada, the water supply is contaminated and poses significant health risks to First Nations. This is of tremendous concern to First Nations as community health and well-being is the overriding priority.

In 2005, Canada's Office of the Auditor General charged its Commissioner of Environment & Sustainable Development (CESD) with reviewing the status of First Nations drinking water. The CESD reported that, despite a significant amount of federal funds invested, there remains a significant proportion of drinking water systems in First Nations communities that continue to deliver drinking water whose quality or safety is at risk. Of particular concern is that, as of June 30, 2009, the Canadian government reported that 110 First Nations communities across Canada are under a "drinking water advisory". Of those 110, the federal government indicated that 21 are at high risk.[32]

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[28] *Supra*, note 4 at p.1-2.

[29] *Supra*, note 12.

[30] Note: Treaty 8 contains a provision which guarantees the rights of hunting, trapping and fishing to Aboriginal peoples "for as long as the rivers run".

[31] For more information see the Maa-nulth First Nations Final Agreement which may be accessed online at http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf.

[32] Merrell-Ann Phare, *Deny the Source: the Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at p.7.

Furthermore, Canadian water resources are under growing stress from urban land development, pollution, climate change, intense land use activities such as agriculture, urban development, mining, hydro projects and logging of watersheds from which Indigenous communities draw their domestic water supply.[33] For example, as of August 31, 2009 there are 148 current water licenses for independent power production (IPP) on First Nations territories. There are an additional 592 applications awaiting approval. At present BC Hydro has signed 95 energy purchase agreements (EPAs). Approximately 44 of these EPAs are currently delivering power to BC Hydro. The value of these EPAs exceeds $27.8 billion and uses a land base that is the equivalent to 28 Stanley Parks. Some First Nations have agreements with these IPP companies, but many do not.

Current legislation and policies have created water disputes with some First Nations on Vancouver Island and in the Okanagan. As well, many First Nations have had to challenge the governments and proponents in various review/assessment processes, quasi-judicial processes and in court with regard to development projects that would significantly impair or destroy important water resources. For example, the communities of Takla, Tsay Keh Dene and Kwadacha, supported by First Nations in BC, 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." First Nations are continually forced into lengthy and costly litigation and other processes to advance their Aboriginal title and rights as a means of protecting the environment against unsustainable development and practices. This perpetuates a relationship with the Crown, and proponents, based on conflict, rather than mutual respect and cooperation.

Given these realities, First Nations welcome the following commitments made by the provincial government in the *Living Water Smart British Columbia's Water Plan*. These commitments are a result of the provincial government's overall strategy to respond to modern expectations, as well as to promote stream health and water resource sustainability[34]:

- Government will improve the quality and protection of drinking water sources, particularly in First Nations communities;
- Tools to incorporate traditional ecological knowledge into information and decision-making will be developed by 2015; and
- Government will continue to work toward preserving First Nations' social and cultural practices associated with water.

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

WATER ACT MODERNIZATION DISCUSSION PAPER – RESPONSE TO "PRINCIPLES"

The *Water Act Modernization Discussion Paper* (the Discussion Paper)[35] proposes the following guiding principles, which underpinned the development of the Discussion Paper and which will help guide the policy development process.

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[33] Karen Bakker, ed., *Eau Canada: The future of water governance in Canada*. Vancouver: UBC Press, 2006 at pp.304-306.

[34] Living Water Smart. British Columbia's Water Plan may be accessed online at http://www.livingwatersmart.ca/book/.

[35] *Supra*, note 1.

The following sets out general responses to these principles. It is incumbent upon the Province – and the Province is legally required to - engage First Nations directly for their input and perspectives on these principles and the *Water Act* Modernization initiative overall.

1. BC's water resources are used within sustainable limits.

Comment: Generally, First Nations support for fundamental principles that focus on sustainability, protection of the resource, and conservation. Conservation and sustainability must be primary principles that are taken into consideration by all government decision-makers prior to making any decisions that involve or may have an indirect impact upon water resources. As clarified by the Courts, conservation is the first priority consideration in the context of land and resource planning, with Aboriginal title and rights being the next priority.[36] "Sustainable limits" must be identified with First Nations, who have valuable traditional knowledge that will help inform this dialogue.

2. First Nations social and cultural practices associated with water are respected and accommodated.

Comment: Although it is a positive step to acknowledge that rules and standards for water management must respect and accommodate First Nations "social and cultural practices", the respect and accommodation must also extend to First Nations treaty and governance rights, and decision-making, over water resources in First Nations territories, as well as First Nations "values".

3. Science informs water resource management and decision-making.

Comment: Traditional knowledge, or traditional ecological knowledge, of First Nations communities must be included in "science". The concept of "stewardship" is important to First Nations when speaking of "management and decision-making", as it conveys a holistic approach to managing the lands and resources.

4. Water resource legislation, policy and decision-making processes as well as management tools are integrated across all levels of government.

Comment: First Nations must be engaged in the development/revision of legislation and policy, and management tools, and be a key player in planning and decision-making. The Crown must engage First Nations at the strategic level through to the operational level as decisions can be made at each of these levels that can potentially impact Aboriginal title or rights, or treaty rights. Integration across government must focus on the primary principles of conservation and sustainability and integration should result in only sustainable development and practices proceeding.

5. Rules and standards for water management are clearly defined, providing a predictable investment climate across the province.

Comment: These rules and standards must reflect that there are constitutionally protected Aboriginal title and rights, and treaty rights, in BC which give rise to First Nations governance and decision-making with regard to the lands and resources in their territories. Rules and standards are desirable for all users, not just investors.

6. Flexibility is provided to adapt to extreme conditions or unexpected events on a provincial, regional or issue-specific level.

[36] See: *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

Comment: The principle of flexibility cannot be interpreted in a manner that relaxes rules and standards, thereby easing the process for the development of mega-projects.

7. Incentives are created for water conservation that consider the needs of users and investors.

Comment: Water conservation incentives or requirements should be premised on the overarching principles and need to achieve sustainability, protection of the resource and conservation.

8. Rights to use water come with responsibilities to be efficient and help protect stream health.

Comment: These responsibilities must be clearly understood by users.

WATER ACT MODERNIZATION DISCUSSION PAPER – RESPONSE TO "GOALS"

Goal 1: Protecting Stream Health and Aquatic Environments
Objectives:

- *Environmental flow needs are considered in all water allocation decisions to protect stream health.*
- *Watershed or aquifer-based water allocation plans include environmental flows and the water available for consumptive use.*
- *Habitat and riparian area protection provisions are enhanced*

First Nations share the objective of protecting stream health and aquatic environments. Population growth, changes in water demand, development and climate change all impact stream flow patterns and health. While the availability of drinkable water is not the only indicator of the health of a waterway, it is an important one. Generally, if water is not fit for human consumption, it is likely to pose a significant risk to the ecosystems that depend upon it, especially if the low quality is a result of pollutant discharge from industrial operations or increased turbidity from deforestation-related sediment runoff.[37]

First Nations support protection mechanisms involving the integrated management of "eco-system-based conservation and planning" to protect and maintain fully functioning ecosystems. Such an approach is reflective of traditional Aboriginal legal systems as it incorporates the understanding that what is done to one part of the environment is done to all parts, and encourages the sustainable protection of land use, fresh water and oceans. This approach to land management is more closely aligned with traditional knowledge and is increasingly being reflected in western science,[38] and includes a focus on the critical need to consider the cumulative impacts of development.

In addition, it is important to understand and take into account the inter-related impacts of agriculture and stream health (e.g. drawing of water for ranching and agriculture and its impact on fisheries, and runoff from farmlands and its impact on water quality and health issues).

As stated above, environmental flows are important to, among other things, the fishery. Effective and efficient water governance measures must include consideration of environmental flows in guiding water allocation decisions. By improving stream health protection, there would be improvements to fish habitat. The Discussion Paper suggests that *Water Act* decisions may consider environmental flows to better protect fish needs and to align and coordinate with other provincial, federal and local laws. Specifically,

[37] *Supra*, note 32 at p.14.
[38] *Supra*, note 4 at pp.17-3, 17-4.

considering environmental flows will better coordinate management with initiatives under the federal *Fisheries Act*.

However, First Nations have expressed concern about the Department of Fisheries and Oceans policy of 'no net loss', which may potentially be supported by the modernization of the *Water Act*. This policy is a working principle by which the Department strives to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada's fisheries resources due to habitat loss or damage may be prevented. Given that this policy has been used to support the destruction of lakes that are important to First Nations across the province[39], First Nations do not support the integration into the *Water Act* of any provisions that would reflect a no net loss policy.
First Nations take seriously their historical and on-going stewardship of their lands and resources and recognize that traditional knowledge and sustainable practices are essential links to the protection of water. In developing plans for water management, use or allocation, First Nations traditional knowledge and community use of any stream must be given high consideration and First Nations must be included in the development of such plans.

Goal 2: Improving Water Governance Arrangements
Objectives:

- *Governance roles and accountabilities are clarified in relation to the allocation of water and the protection of stream health. This includes roles for First Nations, industry, local communities and non-government organizations in planning and decision making.*
- *Governance arrangements are flexible and responsive to future needs and values.*
- *Management is coordinated with neighbouring jurisdictions across all levels of government and those with a major interest in the watershed.*

Governance and management of water use is very complex. There are numerous federal and provincial statutes and policies that govern various matters relating to water and it is often unclear who has responsibility for making decisions. Improving water governance arrangements is a much needed and positive step.

To date, water management through legislation, regulations and policies has led to water disputes with a number of First Nations (e.g. the Halalt First Nation on Vancouver Island and the Okanagan First Nation near Vernon, B.C.). 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.[40] This would result in less conflict and more certainty for both First Nations and other parties and would create conditions where First Nations are more likely to welcome sustainable development.

On February 14, 1859, James Douglas issued a proclamation that all the lands, mines and minerals in British Columbia belong to the Crown in fee. In issuing this proclamation, he failed to acknowledge that

[39] For example, the Takla, Tsay Kay Dene, and Kwadacha have been engaged in efforts to protect Amazay Lake from use as a mine tailing pond and waste rock dumpsite. The lake has significant cultural value to local First Nations and is home to five species of fish. Northgate Minerals spent 5 years trying to convince the Crown that this lake had minimal to no meaning to the Sekani people and that the fish were undernourished. Ultimately, a review panel recommended the project should not proceed due to the irreparable impacts to First Nations.
[40] Grand Chief Edward John, "World Water Day" (Address given to the University of Victoria Consensus Conference on Small Water Systems Management for the Promotion of Indigenous Health, March 2010) [unpublished].

First Nations have never ceded these lands. Today, the land question remains unresolved.[41] First Nations must be engaged/involved in any process for water planning and management reflects that Aboriginal title and rights includes the ability to make decisions about the lands and resources and to benefit from the resources that are used or extracted. BC First Nations have diverse interests in water governance, but generally support an approach to water management that results in an appropriate, effective and collaborative governance regime that recognizes First Nations' right to make decisions with respect to their traditional lands and resources.

With respect to the first objective under this goal, it is necessary to distinguish between those entities with governance/stewardship responsibilities (First Nations and other governments) and those of users (industry) and interest groups (non-government organizations). First Nations have constitutionally protected Aboriginal title and rights which give rise to a right to make decisions about the land and resources.

In addition, completely separate and apart from this process, are the legal and constitutional duties related to consultation in respect of Aboriginal title and rights.[42] It is a corollary of s. 35 that the Crown act honourably in defining and recognizing the Aboriginal rights it guarantees, and in reconciling them with other rights and interests. The Crown's duty to consult with Aboriginal peoples and to accommodate their interests is grounded in the honour of the Crown, which is always at stake in its dealings with Aboriginal peoples.[43] To this end, the Supreme Court of Canada has directed that:

> "…The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable."[44]

Generally speaking, First Nations support a shared approach to decision-making that recognizes First Nations rights, including their inherent authority to govern with respect to lands and resources in their traditional territories. This approach to shared decision-making must occur at both the local level and at the broader strategic and policy level. Such an approach requires the province to move away from its assertion that it has full jurisdiction over water resources.[45]

In 2005 the leadership of the First Nations Summit, the Union of BC Indian Chiefs, the BC Assembly of First Nations and the Province endorsed a document entitled "A New Relationship", which was aimed at finding new and innovative ways of advancing reconciliation, and responding to the Court decisions in *Haida* and *Taku*. [46] This document is the result of discussions with senior provincial government officials on how to establish a new government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights. The document sets out a vision statement, goals of the

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[41] *Ibid*.
[42] *Supra*, note 3 at p.15.
[43] *Supra*, note 12.
[44] *Ibid*.
[45] *Supra*, note 33 at pp.220-225.
[46] A backgrounder regarding the New Relationship can be accessed online at: http://www.fns.bc.ca/info/newrelationship.htm. The New Relationship document can be accessed online at: http://www.fns.bc.ca/pdf/New_Relationship.pdf.

parties, principles of a new relationship and action plans. It specifically includes a commitment to "shared decision-making" about the use of land and resources in BC. The document opens with a vision that states:

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

The New Relationship further states:

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

First Nations have repeatedly emphasized the importance of water in their individual treaty negotiations, and in province-wide action plans, including:

- BC First Nations Mountain Pine Beetle Action Plan;
- BC First Nations Energy Action Plan;
- BC First Nations Fisheries Action Plan;
- Transformative Change Accord: First Nations Health Plan;
- Tripartite First Nations Health Plan; and
- BC First Nations Mineral Exploration and Mining Action Plan.

First Nations generally view watersheds as "the proper scale of management".[47] Such an approach should include an integration of water flow and supply, conservation planning, surface and ground water management, waste and storm water management, and urban design. The watershed is the logical context for this holistic integration.[48]

It is understood that water resources vary from watershed to watershed and that a singular approach to water governance is not an effective approach. Minimum best practices for watershed-based resource stewardship, to be incorporated into water legislation, policy and regulations is the engagement of multiple levels of government, First Nations and members of society.[49]

Goal 3: Flexibility and Efficiency in the Water Allocation System
Objectives:

- *The water allocation system emphasizes and encourages efficiencies in both water use and the administration of water as a natural resource.*
- *Water users and decision makers have flexibility to quickly adapt to changing environmental, economic and social conditions.*

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[47] Oliver Brandes et al., "At a Watershed. Ecological Governance and Sustainable Water Management in Canada". The POLARIS Project on Ecological Governance, University of Victoria, 2005 may be accessed online at http://poliswaterproject.org/publication/24.
[48] *Ibid.*
[49] *Supra*, note 33 at p.258.

- *The water allocation system integrates the management of groundwater and surface water resources where required in problem areas.*
- *Water users conserve water during drought or when stream health is threatened.*

The future of First Nations depends on finding sustainable, beneficial, environmentally sound ways to benefit from the resources on and in our lands. There is general agreement that the water allocation system is outdated and must be modernized to a system that encourages a collaborative, holistic approach to water governance and water use efficiency. Any future water allocation system must move away from prioritizing the use of the resource based on prior appropriation, and move towards prioritizing based on rights and needs. Canadian courts have been clear that any allocation of priorities, after the implementation of valid conservation measures, must give priority to Aboriginal rights.[50]

First Nations must be involved in decision-making processes over water allocation. As discussed, Aboriginal title and rights, and treaty rights, include the right to decide how the lands and resources will be used. Water allocation engages strategic level decision-making that considers applications for the use and diversion of water, and is an opportunity to consider issues such as protection of stream health and ensuring water use efficiencies. Courts have confirmed that First Nations must be engaged at the earliest opportunity with regard to these kinds of decisions, as they have the potential to impact on Aboriginal title and rights. A new governance approach that fully involves First Nations would ensure this early input. First Nations must be engaged directly on appropriate tools or instruments for allocating water use rights (e.g. licenses, permitted uses)l a modernized system must also take into consideration how the resource will be used (i.e. using most efficient equipment and processes available).

The First Nation's perspective must inform the Province's work with water users, local governments and various industry groups to improve the efficiency of water use and administration, and the certainty of access for social, economic and environmental needs. BC First Nations bring a unique understanding of the various watershed resources and have a distinct perspective to contribute to water planning processes. Under modernized legislation, accessible dispute resolution mechanisms should be incorporated into the regulations, particularly given that appeals to the Environmental Appeal Board are limited to applicants, affected landowners and licensees whose rights may be affected.
Lastly, if the Water Act Modernization initiative results in the development of a more flexible, efficient system in which changes or modifications may be made to a license once granted, the system must ensure the continued involvement of First Nations and must include provisions aimed at addressing past infringements of Aboriginal title and rights.[51]

Goal 4: Regulating Groundwater Extraction and Use in Priority Areas
Objectives:

- *Groundwater extraction and use is regulated in priority (critical) areas and for all large withdrawals.*

Currently, groundwater is subject to minimal legal control in BC. Surprisingly, BC is "the only province in Canada and one of the few jurisdictions anywhere" that does not regulate the use of groundwater,

[50] *Supra*, note 36.
[51] For example, under an agreement entered into between Alcan and the BC government, the company obtained the right to water on the Nechako River in perpetuity, without the consultation of local First Nations. By agreement with the government, made in 1950, Alcan was guaranteed access to the public water resources it needed to generate the electricity that was, in turn, needed for aluminum smelting. The Carrier Sekani Tribal Council is currently in the Supreme Court of Canada arguing a case against Rio Tinto Alcan, BC Hydro and the BC Utilities Commission over the impacts of the Kenney Dam, built in the 1950s. These impacts and infringements are inter-generational and have not been meaningfully addressed by the Crown.

though a commitment has been made to regulate groundwater use in priority areas and large groundwater withdrawals by 2012 in the Living Water Smart strategy.[52] There is general agreement that groundwater quality and quantity must be protected from depletion and contamination, and support for the objective that groundwater resources must be sustained in perpetuity.

Any regime contemplated to achieve these objectives must involve First Nations. Indeed, the Aboriginal right to harvest, and protect the habitat of, fish and other aquatic species could potentially be a constraint on the Province's ability to authorize the use of groundwater, which is currently unregulated.[53] Groundwater is important to the habitat of fish and other aquatic species as it provides a stable flow of cool and clean water, particularly when stream flows are low.[54] If an authorized water allocation use causes an adverse effect, such as reducing the flow or impairing the quality of groundwater which, in turn, impacts the habitat on which the Aboriginal fishery depends, this could potentially impair an Aboriginal right to harvest.[55]

The importance of effective governance in relation to groundwater regulation is reflected in modern treaties. Recently concluded treaties contain provisions in relation to groundwater and aquifers. For example, the recently concluded Maa-nulth Treaty includes provisions that guide the volume of groundwater under Maa-nulth First Nation that may be extracted and used.[56]

Groundwater is a crucial but under-appreciated and misunderstood resource in Canada and is under considerable stress. As surface and groundwater often form a single connected resource, extracting water from one will affect the other. Groundwater and surface policies must be integrated through some form of conjunctive water management. Currently, groundwater allocation systems fail to protect aquifers and the surface ecosystems that rely on them.[57] Minimal groundwater protection has potentially harmful impacts for fish and fish habitat; consequently, the absence of a comprehensive regulatory approach has significant consequences for fish. Hydrologists have long recognized the interconnection between groundwater and surface water bodies supporting fish habitat and addressing the interconnection is increasingly a standard regulatory feature in many jurisdictions.[58]

A lack of cumulative impact assessment of multiple groundwater extractions is a challenge under the current BC regulatory regime. In-stream flows must be determined and protected on a watershed-by-watershed basis and potentially for each river on a reach-by-reach basis to ensure that no part of a river's flow is significantly affected. Similarly, groundwater balance must be considered on a catchment-by-catchment basis.[59]

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[52] Watershed Watch Salmon Society, et al., "Fish Out of Water: Tools to Protect British Columbia's Groundwater and Wild Salmon", April 2009 may be accessed online at http://watershed-watch.org/publications/files/FishOutofWater-web.pdf.

[53] See: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *Tsawout Indian Band* v. *Saanichton Marina Ltd.* (B.C.C.A.) [1989] B.C.J. No. 563.

[54] *Supra*, note 1.

[55] *Supra*, note 52.

[56] *Supra*, note 31.

[57] *Supra*, note 47.

[58] Christensen, R. "Review of British Columbia's Groundwater Regulatory Regime: Current Practices and Options", 2007 may be accessed online at http://www.watershed-watch.org/publications/files/Groundwater_Regulation_Review_SLDF.pdf.

[59] *Supra*, note 47.

To support First Nations participation in achieving the above noted objectives, resources should be made available to First Nations to develop an accurate understanding of where groundwater and aquifer sources exist and how they flow to better identify potential threats and dangers to groundwater. Furthermore, resources are required to establish a process for testing and monitoring groundwater quality.[60]

CONCLUSIONS

The *Constitution Act, 1867*, which sets out, the division of powers between the federal and provincial governments does not specifically provide for jurisdiction over water as a separate matter, nor does it exhaustively distribute powers among the federal and provincial governments. Generally, water has been managed through a mix of provincial and federal statutes. The current *Water Act* is outdated and requires modernization. A new regime must reflect the interplay between provincial authority and First Nations' rights and authority under section 35(1).

Generally, First Nations support fundamental principles that focus on sustainability, protection of the resource, and conservation. Conservation and sustainability must be primary principles that are taken into consideration by all government decision-makers prior to making any decisions that involve or may have an indirect impact upon water resources.

The Aboriginal right to water flows from the historic and on-going connection of First Nations to their traditional lands and resources. Aboriginal title and rights include the ability of First Nations to make decisions about their lands and resources, and to benefit from the resources that are used or extracted. Until recently, government legislation, regulations and policies have largely ignored the existence of the Aboriginal right, which has led to recent water disputes with a number of First Nations.

Any contemplated legislative changes that impact significantly on Aboriginal rights and title (i.e. changes to the *Water Act*, the *Clean Energy Act*, and the mining free entry system) or that impact significantly on First Nations health or quality of life must be developed in collaboration with First Nations. First Nations are prepared and able to engage in discussion on an equal government-to-government basis. Indeed, the modernization of the provincial *Water Act* is an opportunity for the Province to live up to its commitments in the *New Relationship* and to embark on shared planning, management and decision-making, and benefits sharing, based on mutual recognition.

First Nations can play a leading role in ensuring sustainable development occurs in BC where the protection of stream health is of paramount importance. First Nations have constitutionally protected Aboriginal title and rights, and treaty rights, which set out a clear legal context for First Nations governance in relation to water and water resources. They have continuing Aboriginal legal systems and invaluable traditional knowledge that have enabled them to be effective stewards of the resources since time immemorial, which, applied today, could be the key to addressing modern day issues such as climate change.

[60] *Supra*, note 4 at p.16-8.