From: Randy Christensen [rchristensen@ecojustice.ca]
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Please see the attached submission which is accompanied by two enclosures.

Randy Christensen
Staff Lawyer
Ecojustice Canada
214-131 Water Street Vancouver BC V6B 4M3
Telephone: (604) 685-5618 Ext. 234
Fax: (604) 685-7813
rchristensen@ecojustice.ca <mailto:rchristensen@ecojustice.ca>

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The Public Trust and a Modern BC *Water Act*

By Oliver M. Brandes and Randy Christensen

...the public trust doctrine is based on a timeless and primal relationship to the land...this beneficial interest in the land was not artificially imposed or granted by a legislative body. It is a sui generis *relationship arising from biological imperative independent of statutory law and inherent in the common law...*

Stewart Elgie, *Introduction and History of Public Rights* (2009, unpublished)

Key Points

- Public Trust Doctrine helps protect ecological values, ensure water for future needs, engage the public, and protect public uses and interests.
- The principles embedded in the Public Trust Doctrine are being used in many places around the world to form the cornerstone of effective, efficient and modern sustainable water management regimes.
- Many of the foundational aspects of the doctrine—as applied to freshwater management—already exist in British Columbia's legal framework.
- Proactively adopting the public trust as part of the *Water Act* modernization process allows the BC Government to implement the doctrine in a comprehensive and efficient way that is best suited to decision making processes and existing *Living Water Smart* priorities.

About the Series:

The POLIS Water Sustainability Project *Future of Water Law & Governance* series explores concepts of water law and governance, to test their potential application and relevance to emerging challenges and opportunities for legal and institutional reform.

The series offers leading research and applied advice in the search for solutions toward sustainable water management and governance in Canada.

In this Issue:

About this Brief

This briefing note outlines how the concept of the Public Trust Doctrine (PTD) can be applied in British Columbia with specific recommendations and advice in reference to current efforts to modernize the framework for water law in British Columbia. The analysis emphasizes that many of the key attributes of the public trust are already in place in the province, and stresses that the public trust does not constitute a significant departure from existing policies and practice.

The PTD is of invaluable assistance in protecting ecological values, ensuring water for future needs, engaging the public and protecting public interests. In short, the Public Trust Doctrine is perfectly suited to deliver the vision of *Living Water Smart* and should be formally considered as a cornerstone in the current efforts to modernize the BC *Water Act*.

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The Public Trust Doctrine

"The oldest expression of water and environmental law"

The concept of a "public trust" or an "environmental fiduciary duty" is based on public rights to certain natural resources which have a particularly public character that the state protects for the benefit of the commons. Certain interests were simply not alienable by the Crown for exclusive private possession or purposes. In a broad sense the common ownership of crucial resources is a nearly universal notion, and in Canada an increased interest in the application of this concept is emerging.

The concept can be traced to Roman law, where the Institutes of Justinian set out that: "by the law of nature these things are common to mankind—the air, running water, the sea..." The public trust was a key component of the Magna Carta, a fundamental part of the English Common Law system on which the legal system of English Canada is based. Public rights based on Roman Law were also adopted in the French Civil Code.

In its more modern form it has become firmly established as a common law basis for environmental protection. The Public Trust Doctrine has evolved through both judicial decision and formal legislative action, to protect water quality and quantity, ensure adequate water for the environment, and to assist in managing water resources in the public interest. It is not a set of hard and fast rules but rather a unifying framework that helps ensure that non-consumptive uses of water are protected and that water is managed for the broader social benefit.

The Untapped Potential of the Public Trust Doctrine

For centuries, people have enjoyed public access to resources such as the ocean, certain bodies of fresh water and tidal water, certain lands (e.g., parks and highways) shorelines, or other public property of a special charter. Centuries-long recognition of these rights is not mere historical happenstance and goes beyond just public access. The Public Trust Doctrine recognizes and reflects the fundamental need to safeguard public rights and interests by ensuring long-term protection of limited and vulnerable resources necessary for our survival and well-being.

At its core the Public Trust Doctrine is a "background principle" of property law[1] that serves to strike an appropriate accommodation between the public interest and private development rights through requiring "continuous state supervision"[2] of trust resources (i.e., resources to which the

[1] Michael Blumm, "The Public Trust Doctrine and Private Property: The Accommodation Principle," *Pace Environmental Law Review 27* (Forthcoming 2010); p. 4 (of stand alone print).
[2] In *National Audubon Society et al., Petitioners, v. The Superior Court of Alpine County*, 33 Cal.3d 419 (1983), the California Supreme Court stated: "In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust."

public has rights of use or access that by their nature are of collective interest, such as water). The earliest uses of the doctrine protected fundamental access rights such as navigation, fishing and foreshore access.

Another way to view the public trust is as recognition that private rights to use water were not granted in a completely unencumbered fashion. Rights to use water are obtained through an appropriation (or licensing) system administered by government and with implicit restrictions to not unduly and irreparably harm the resource and associated values. This is consistent with the dual role of government to encourage private economic activities and its duty to protect trust resources. Thus, the PTD is a safeguard that prevents monopolizing of trust resources and promotes decision making that is accountable to the public.

The PTD is also a resource management approach capable of evolving in response to changing circumstances. The PTD is receiving increasing attention as a tool to protect underlying resources from stressors and challenges such as population growth, a changing climate, and increasing development and resource use. In the context of fresh water, this approach has the potential to address concerns about proper watershed function, drinking water supply, and recreational, environmental, and aesthetic needs—all of which depend upon preserving sufficient quantities of good quality water and keeping it in the ecosystem.

How it Works and What it Can Do

The public trust is distinct from private trust law and thus does not rely on traditional criteria or principles needed to validate a private trust relationship[3]—legal scholars instead suggest that it has emerged as a *sui generis* (unique) response. It is more helpful to think of the PTD as fiduciary duty, which means that government officials entrusted with managing the underlying resource (e.g., water) owe a duty to preserve the resource and act in good faith in management decisions. In recent years Canadian courts have expanded the law of fiduciaries, which only further facilitates acceptance of the use of this argument or approach.[4]

The PTD is generally enforced in a number of ways:[5]

1. As a ***public easement guaranteeing access to trust resources***. This has been the most visible aspect of the public trust over centuries—guaranteeing access to shorelines, navigable water and fishing.
2. As a ***rule of statutory construction to interpret legislation***, guiding the discretion of legislative bodies and administrative agencies. For example, in Idaho the state supreme court has stated that "the public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."[6] The most famous example is the *Mono Lake case* where the courts limited legally authorized water diversions by the City of Los Angeles due to concern about the potential implications to the ecological integrity of the lake.[7]

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[3] J.C. Maguire "Fashioning an Equitable Vision for Public Resources Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) *Journal of Environmental Law and Practice 7.*
[4] R. Pentland, *The Public Trust Doctrine – Potential in Canadian Water and Environmental Management* (Victoria, BC University of Victoria's POLIS Project on Ecological Governance, 2009).
[5] Numbers 1-3 from B. von Tigerstrom "The Public Trust Doctrine in Canada: Potential and Problems" (1998) *7 Journal of Environmental Law and Practice 7*, pp. 379-401 and S. Kidd "Keeping Public Resources in Public Hands: Advancing the Public Trust in Canada" (2006) *Journal of Environmental Law and Practice 16*, p. 187, and #4 from J. Olson (Personal Communication April 10, 2010).
[6] Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1095 (Id. 1983).
[7] *Mono Lake National Audubon Society v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983).

3. To invoke ***procedural remedies to ensure detailed consideration of public trust values*** in administrative decisions. This application of the doctrine builds public confidence and engagement, and may in the long run reduce (or even avoid) conflict by providing clear guidance and directions to decision makers and communities. For example, Vermont has issued public guidance describing the general types of "encroachment" projects that are permissible under the doctrine (e.g., water intakes and docks). The document describes the factors considered when determine whether a project is consistent with public trust values.[8]
4. To ***safeguard water and associated ecological resources from sale or impairment by government*** or through interferences by others that would shift control to private interests for primarily private purposes.[9]

Canadian Experiences with the Public Trust Concept

The public trust concept is increasingly a component of "modern" water and environmental legislation. The Yukon and Northwest Territories (NWT) have explicitly incorporated trust principles into some of their environmental legislation. The *Environment Act of the Yukon*, passed in 1991, recognizes that the government is a "trustee of the public trust to protect the natural environment from actual or likely impairment."

The NWT law is similar. Although not specifically related to water, the law has been interpreted as imposing a heightened "duty of care" for those who obtain licences to hunt wildlife.[10]

The NWT judgment has been described as a "watershed" because "the concept of a 'public trust' in wildlife has now been clearly enshrined in the wildlife law of the Northwest Territories" and as a result courts will "adopt the higher standard for reasonable care... and will demand a high standard of performance of those involved in the commercial exploitation of wildlife in the Northwest Territories."[11] The Public Trust Doctrine could affect those exercising water withdrawals or proposed diversions or exports in a similar way.

British Columbia has had positive experiences with this kind of trust framework. The *Islands Trust Act* identifies lands vulnerable to development pressure and provides that land use planning and decision making must be done in a manner that "preserves and protects" the resource.[12] The *Islands Trust Act* has been credited with significantly raising the level of protection on the Gulf Islands.[13]

In 2009, the National Assembly of Quebec passed by unanimous consent "An Act to affirm the collective nature of water resources and provide for increased water resource protection."[14] It

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[8] "Explanation of Public Trust Review of Encroachment Permit Applications," Vermont Agency of Natural Resources Department of Environmental Conservation, (July 1995), found online at: http://www.anr.state.vt.us/dec//waterq/lakes/docs/lp_sep-trustreview.pdf

[9] See for example, *Ill Central Railroad (US 1892), Attorney General ex. Rel. Scott v. Park District*, 36 NE 2d 773 (1977).

[10] In *R. v. Ram Head Outfitters Ltd.,* [1995] NWTJ. No. 29 at paras 33-35, the court stated: "What is reasonable in any particular case will depend on the circumstances and will be influenced by a variety of factors.... The *Wildlife Act* regulates both the harvesting and the conservation of wildlife, a precious, if renewable resource. Accordingly, the gravity of the potential harm must be measured against the observation of Vertes J.... In effect, the legislature has passed on some of the responsibility for its public trust to the outfitter; in return the latter receives what amounts to a business monopoly in the affected area.... [W]ith the special privilege comes the special responsibility."

[11] J. Donihee, "Wildlife Outfitting Rules Tested in the Territorial Court" (1995) *Journal of Environmental Law and Practice 6*, pp. 67-78.

[12] *Islands Trust Act* [RSBC 1996] Chapter 239, s. 33.

[13] The BC Court of Appeal in *MacMillan Bloedel v. Galiano Island Trust Committee*, [1995] BCJ No. 1763, confirmed that the language in this legislation demands a higher level of environmental protection for the Islands.

[14] Bill 27, 39th Legislature, First Session. Assented to June 12, 2009.

declares: "…both surface water and groundwater, in their natural state, are resources that are part of the common heritage of the Québec nation."[15] The Act goes further and provides that "[e]very person has a duty, under the conditions defined by law, to prevent or at least limit the damage the person may cause to water resources."[16] The Act also provides the Government of Quebec the ability to sue individuals for damaging water resources.[17]

No court in Canada has explicitly recognized or adopted the Public Trust Doctrine with respect to freshwater resources. However, the basic attributes of the doctrine are found throughout Canadian law. Public rights to the environment that have been affirmed by Canadian courts include:[18]

- the use of public rivers[19] and oceans,[20] including rights of fishing and navigation;
- the use of lands dedicated for public use,[21] including public highways,[22] and "parks, and public squares and commons";[23]
- the maintenance of key environmental features,[24] likely including clean air and water, healthy fish stocks and wildlife,[25] and publicly owned forests.[26]

Judicial recognition of the Public Trust Doctrine is clearly increasing. The best recent example is in the *Canfor* decision (concerning British Columbia's attempt to hold a forestry company liable for environmental damage resulting from a negligently started fire). Supreme Court Justice Binnie raised the Public Trust Doctrine in *obiter* (which means it is not necessarily binding to future decisions but does invite further consideration of the issue). He affirmed "the notion that there are public rights in the environment that reside in the Crown and has deep roots in the common law." He noted "important and novel" issues that may arise from those rights, including "the Crown's potential liability for inactivity in the face of threats to the environment, [and] the existence or non-existence of enforceable fiduciary duties owed to the public." He also made specific reference to an American case where the Crown had both the "right and the fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust."[27]

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[15] Ibid, s. 1.
[16] Ibid, s. 5.
[17] Ibid, s. 8.
[18] For a comprehensive discussion of this issue, see: Andrew Gage "Public Rights and the Lost Rule Principle of Statutory Interpretation" (2005) *Journal of Environmental Law and Practice 15*, p. 107.
[19] *Attorney General v. Harrison* (1866), 12 Gr. 466 (Court of Chancery of Upper Canada), at p. 473 adopting the language of an earlier riparian rights case, *Attorney General v. Birmingham*, unreported, as a valid statement of the public rights associated with public rivers.
[20] *R. v. "Sun Diamond"* [1984] 1 F.C. 3 (T.D.).
[21] *Wright v. Long Branch (Village)* [1959] S.C.R. 418 at 423, 18 D.L.R. (2d) 1, accepting that property may dedicated for a range of public uses.
[22] *Schraeder v. Gratton* [1945] 4 D.L.R. 351 (Ont. H. Ct. of Justice); see also *McCann v. Dugas* (1979), 27 N.B.R. (2d) 361 (Q.B.).
[23] *Wright v. Long Branch (Village)* [1959] S.C.R. 418 at 423, 18 D.L.R. (2d) 1, at p. 423.
[24] *British Columbia. v. Canadian Forest Products Ltd.,* 2004 SCC 38, [2004] 2 S.C.R. 74. at paras. 74-76.
[25] In relation to wildlife, see S. O'Keeffe. "Using Public Nuisance Law to Protect Wildlife", (Fall 98) *Buffalo Environmental Law Journal 6*(1), p. 85. Also *Cadman v. Saskatchewan (Dept. of Parks & Renewable Resources)* (1988) 51 D.L.R. (4th).
[26] *British Columbia. v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74.concerned liability for a forest fire that destroyed public forests. Consequently, the court's discussion of public rights strongly suggests that the public holds a right to the sustainable management of public forests.
[27] *British Columbia. v. Canadian Forest Products Ltd.,* 2004 SCC 38, [2004] 2 S.C.R. 74.

International Recognition and Application

The Public Trust Doctrine in its modern form remerged in the United States in the 1970s and has become a firmly established common law basis for environmental protection.[28] The PTD has also been formally adopted in India, South Africa and to some extent in Australia, South America and parts of Europe (either as common law, or existing public rights have been affirmed in some way by statute or constitutional amendments). See Appendix A for a more detailed discussion of each.

In the United States, the Public Trust Doctrine has been used to preserve the right of the public to use water (and other resources), as well as to challenge the action or inaction of various levels of government with respect to the protection of the public interest in certain lands and resources. Although the concept is applied in a various ways across different states, Hawaii stands out as one of the more progressive applications of the concept.

Hawaii Case Study

The State of Hawaii has pioneered a groundbreaking and unique path to using the modern Public Trust Doctrine to protect water resources. The State's common law doctrine is buttressed by an explicit constitutional provision and a fairly comprehensive state water code. In addition to native Hawaiian customs, the State also has a robust set of public trust provisions.

In 2000 in the Waiahole case, the Hawaii Supreme Court gave new force to the role of the Public Trust Doctrine in water resources protection.[29] A grassroots coalition of Native Hawaiians, farmers, and community members petitioned the state water commission to return water to its natural flow from a decommissioned irrigation system. In its ruling, the Court recognized a separate water resources trust that includes all waters of the state. The Court in Waiahole defined traditional trust uses, extended the public trust to ground and artisanal waters, and noted a continuing supervisory duty of the State to protect the water resource. Importantly, the Court noted that parties—private or state—that undertake activities impacting public trust resources must justify those activities in light of public trust purposes.

The Public Trust as a Tool to Achieve *Living Water Smart* in British Columbia

The public trust has always been a fundamental part of the common law tradition and even some long standing legislation like the Canadian *National Parks Act* where the public trust elements exist in the context of a trust vis-a-vis our parks. This explains why so many aspects of the public trust are already recognized in Canadian law. The most foundational aspect of adopting the public trust doctrine for freshwater management has already been undertaken: the vesting of the right to all water in the Crown.[30] This clearly establishes government's role in relationship to the management of water resources. British Columbia has also had positive experience in using "trust-like" management arrangements created by statute (e.g., the Gulf Islands Trust and the Columbia Basin Trust).

As outlined in the "Key Developments" table (pages 7 and 8) a growing movement in Canadian courts toward recognition of the public trust is apparent. Increasingly, legislatures across the country—and, as the previous section demonstrated, around the world—are employing it as tool to assist with sustainable resource management.

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[28] J.L. Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," *Mich. L. Rev. 68*, p. 471 (1970).
[29] 94 Hawaii 97, 9 P.3d 409 (2000).
[30] Section 2, *Water Act*, [RSBC 1996] Chap. 483.

Key Developments in Canadian Public Trust Doctrine					
Principle	**Year**	**Statute or case**	**Where**	**Right/issue**	**Synopsis or key language/concept used**
Recognition of the right of the public to use rivers	1886 1882	*Attorney General v. Harrison* (1866), 12 Gr. 466 *Court of Chancery of Upper Canada* *R. v Robertson* (1882) 6 S.C.R. 53.	ON NB	Water Fisheries	At p. 473 adopting the language of an earlier riparian rights case, *Attorney General v. Birmingham*, unreported, as a valid statement of the public rights associated with public rivers. At para 126 the Crown is a trustee for public rights to use of a stream, including fishing and navigation.
Recognition of public rights of fishing	1895 and 1913	Re Provincial Fisheries (1895), 26 S.C.R. 444; Reference re BC Fisheries (1913), 5 W.W.R. 878 (JCPC)	All provs BC	Fisheries	"…I am of opinion that the right of fishing is public, and that such public right of fishing is not restricted to waters within the ebb and flow of the tide." (para 13).
Protection of navigation (infringement only after public consultation)	1882	*Navigable Waters Protection Act*, s. 5.	Feds	Navigation	No work shall be built or placed in, on, over, under, through or across any navigable water without the Minister's prior approval of the work, its site and the plans for it. Issuance of an approval generally triggers the need for an assessment under the *Canadian Environmental Protection Act.*
Right of use of all water vested in the Crown "Ownership" of water by the Crown	1892 1925	*Water Privileges Act*, 1892, S.B.C. 1892, C.47, s.2 *Water Act Amendment Act*, 1925, S.B.C., c.61, s.3.	BC	Fresh water	Current version: The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.
Recognition of the right of public use of the ocean	1984	R. v. "Sun Diamond", [1984] 1 F.C. 3 (T.D.)	BC	Oceans	The federal Crown's right to sue a ship owner for damages to public rights to use the ocean was upheld.
Recognition of public rights of navigation	1992	*Friends of the Oldman River Society v. Canada* (Minister of Transport), [1992] 1 S.C.R. 3 Supreme Court of Canada	AB	Fresh water	The Supreme Court held that the Governor in Council was competent to make an order on the method of assessment in environmental matters. The federal Parliament had the requisite authority to so act in relation to the project in question under one of its heads of power as set out in the Constitution: it could invoke the incidental doctrine or even, if need be, its residuary power. In this instance, by virtue of its jurisdiction over navigable waters in Article 91 of the *Constitution Act* (1867), the federal government could proceed to assess the dam being built on the Oldman River.
Inclusion of groundwater in government ownership of water	en 1979 s.1.1 en 2001, in force 2004	*Water Act*, s. 1.1 (2)	BC	Fresh water	The Lieutenant Governor in Council may, by regulation, fix a day on and from which some or all of Parts 2 and 3 of this Act apply to groundwater in British Columbia or in an area of British Columbia the Lieutenant Governor in Council designates in the regulation.
Recognition of the need to protect the public trust	en 1988, in force 1990	*Environmental Rights Act*, Section 6	NWT	Individual rights to protect the environment	The Act recognizes the need "to protect the integrity, biological diversity, and productivity of the ecosystems in the Northwest Territories" and the right to protect the environment and the public trust.

Key Developments in Canadian Public Trust Doctrine (continued from previous page)					
Principle	**Year**	**Statute or case**	**Where**	**Right/issue**	**Synopsis or key language/concept used**
Resources are common heritage and government is the trustee of the public trust	en 1991, in force 1992	*Yukon Environment Act*, preamble, s. 6 - 7	YT	Individual rights to protect the environment	Recognizing that the resources of the Yukon are the common heritage of the people of the Yukon including generations yet to come. Recognizing that the Government of the Yukon is the trustee of the public trust and is therefore responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment.
Recognized public rights in the environment that may found claim for compensation due to damage by private actors	2004	*BC v. Canadian Forest Products* [2004] SCC 38 Supreme Court of Canada	BC	Forests	The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law.… Indeed, the notion of "public rights" existed in Roman law…. By the law of nature these things are common to mankind—the air, running, water, the sea…(paras 74-75).

Proactively adopting public trust allows the BC Government, as part of its water law reform process, to implement the doctrine in a comprehensive and efficient way that is best suited to decision-making processes and existing priorities rather than having it imposed by a court in a piecemeal or ad hoc fashion. The BC Government already provides for public participation in environmental decision making. Recognizing the public trust does not constitute a significant shift in regulatory policy, but would merely fit with current trends around protection of natural capital and engaging community and citizens. Furthermore, a clear and proactive declaration of public trust arguably enhances, on public property or trust grounds, protection of water or the environment from the unpredictable assertion of claims under NAFTA or challenges to regulations under international trade laws.

The Public Trust Doctrine and a Modern *Water Act*

The BC Government's stated goals of *Water Act* modernization are:

- Protect stream health and aquatic environments.
- Improve water governance arrangements.
- Introduce more flexibility and efficiency in the water allocation system.
- Regulate groundwater use in priority areas and for large withdrawals.

The Public Trust Doctrine has real potential to assist the government in achieving each of these stated goals.

- The PTD, as demonstrated by international experience, is one of the strongest tools available to protect stream health, the aquatic environment and ensure the consideration of ecosystem integrity.
- The PTD improves water governance arrangements by bringing an ecosystem perspective to the governance process and by providing means for members of the public and local residents to become involved in the decision-making process.
- A fundamental strength of the PTD is its flexibility and adaptability, because its objective is to protect the priorities of the public interest over time. As circumstances change, the ongoing

supervisory nature of the doctrine allows government officials to revisit previously made decisions if there have been unforeseen impacts.

- Adopting the PTD would help justify decisions of the Ministry of Environment aimed at protecting the environment and natural resources. Ministry decisions to protect crucial resources like water are routinely challenged in front of the Environmental Appeal Board, resulting in increased expense (to all parties) and overall lost administrative efficiency. Many scholars hold the view that adopting the Public Trust Doctrine gives government another legal basis—a context and framework—for regulation and action.[31]
- The Public Trust Doctrine provides an avenue for protecting groundwater, including taking into account future water needs by limiting the overdrafting of aquifers.

***How to Enshrine the Public Trust into a Modern* Water Act**

1. ***Clear Statement of Public or State Ownership and State Duties***. Legislation must have a clear statement of public or government ownership of water resources and a corresponding statement of the affirmative and ongoing duties and obligations to protect and manage those resources for the benefit of present and future generations.
2. ***Superiority of Public Rights over Individual Use Rights***. Legislation must have a clear statement that an individual water right is strictly a right of use, rather than ownership, that is subordinate to and conditioned on a superior public right.
3. ***Inclusion of Groundwater***. Any Public Trust Doctrine provision must include surface water and groundwater to ensure complete protection of water resources and to accurately reflect the hydrologic cycle.
4. ***Translation of Dynamism***. If the common law is incorporated into a constitutional or statutory provision, both should retain their dynamic nature such that the doctrine remains accommodating as public uses and values evolve.
5. ***Criteria for and Prioritization of Public Uses***. A list of public trust uses or, less specifically, criteria for identifying a public use should accompany any public trust provision.
6. ***Public Participation***. The provision should permit public participation in determining the use and management of a water resource.
7. ***Sufficient Information and Planning***. The provision should require any proposed alteration or use of public trust resource be determined to not violate the public trust interests and uses.
8. ***Primarily Private Purpose***. The provision should require that no authorization, licence, or permit to transfer, use, alter the water, land, or other natural resource that is subject to the public trust unless it is determined that there is a significant or substantial and primary public purpose or social benefit or purpose.
9. ***Resources for Implementation***. Legislation should include the financial, personnel, and institutional resources for implementation, without which even the strongest legal foundation will falter.

Source: Adapted from Alexandra Klass & Ling-Yee Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Center for Progressive Reform, September 2009) with #7 and #8 provided by J. Olson. Personal Communication April 14, 2010.

[31] See R. J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," *IOWA L. REV. 71*, pp. 655-56.

Proposed Amendments to the BC *Water Act*

Honouring the public trust in water allocations in British Columbia could be accomplished with a few minor amendments.

1. Statement of Ownership of BC's Resources

A simple step to enabling this concept is amending the current Section 2 of the *Water Act* from:

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

to:

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government in trust for the public, and any private rights established under licences or approvals under this or a former Act are subject to be managed in the interest of present and future generations.

2. Superiority of Public Use Rights

The current BC *Water Act* (Section 5), already limits the rights acquired under a water licence, *inter alia,* to "divert and use" water and does not grant any rights of ownership over the water. Thus, a crucial aspect of protecting the public trust is already in place. The *Water Act* should be amended to further include a clear preamble statement, for example:

- "Water serves a multitude of public and private purposes, both instream and extractive. This Act provides protections for public uses of water and grants rights to use water for private purposes that may only be exercised in a manner that does not significantly harm public purposes."

The current *Water Act* and related *Fish Protection Act* already provide that in certain circumstances, private rights to use water may be limited through "Water Management Plans" and "sensitive streams" protection. While these provisions evidence that public interest may have priority to private rights, they have been underused. Accordingly the *Water Act* framework should be amended to require the establishment of environmental flows and those flows should have priority over private licences, regardless of dates of issuance.

3. Inclusion of Groundwater

Section 1.1 of the current *Water Act* allows for a regulation to be issued making the Act applicable to groundwater. While the full extent of a groundwater regulation is beyond the scope of this paper, to honour the public trust, any groundwater regulation should:

- recognize the hydrologic connection between groundwater and surface water;
- license all groundwater extractions, subject to some very limited exceptions (e.g., limited household use); and,
- ensure that groundwater extraction be controlled to protect public interests and future needs as appropriate.

4. Prioritization of Public Trust Uses

The *Water Act* addresses the precedence of water licences—with the current prior appropriations system, water licences take precedence from the date they are issued.[32] Where licences have the

[32] Section 15, *Water Act*.

same date (an infrequent occurrence) precedence is determined according to an ordering of uses. Under this scheme, domestic use has priority but "conservation" ranks 10th out of 12 uses. The *Water Act* should be amended to specify that public uses have a higher priority than private, commercial uses, and the primary system for water stressed situations should be based on this priority system (with a proportional sharing of a flexible and consumptive pool).

Oliver M. Brandes is Associate Director and Water Sustainability Project Leader at the University of Victoria's POLIS Project on Ecological Governance. Randy Christensen is a staff lawyer and water law specialist at Ecojustice.

APPENDIX A – Detailed International Experiences

In the **United States** the PTD has become a cornerstone of environmental law and practice. The application of the concept varies greatly around the country and has unique characteristics in each state where it has been recognized. Some of the most interesting developments and evolution are in the context of western water law. A few cases have also held the federal government to public trust duties.[33] At the state level a broad spectrum of approaches is employed.

Some states have taken a narrow view of resources protected by the trust,[34] limiting it to navigable waters—the traditional focus of English common law. Other states have taken a more expansive view,[35] recognizing the interconnection between navigable waters and the sources that feed those river systems.[36] In some states the trust has been expanded to include: all water usable for recreational purposes, the dry sand area of beaches for public recreation purposes, parklands, wildlife and wildlife habitat connected to navigable waters, drinking water resources, and inland wetlands.[37] Some state legislatures have also extended the PTD to explicitly protect groundwater.[38]

India's highest court first declared the doctrine part of Indian common law in 1996.[39] While the court borrowed significantly from the American doctrine, in subsequent cases it also linked the doctrine to constitutional rights, as well as Indian customs as set out in ancient texts.[40]

In **South Africa**, the PTD arises from constitutionally protected environmental rights,[41] and legislation declaring water[42] and environmental resources to be held "in trust" for the benefit of the people. Drafters of the legislation drew substantially from the PTD, and included duties owed by private and public parties to protect trust resources.[43]

In **Australia**, public rights to tidal waters prevent granting of exclusive fishing rights. A number of Australian cases have also held that licence holders under pollution control legislation have "public trust" duties. A breach of the terms of the pollution licence constitutes a "breach of public trust," raising standards of care and penalties.[44]

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[33] See *Sierra Club v. Dept. of Interior*, 398 F. Supp. 284, 293 (N.D. Cal. 1975) (holding that a federal officer violated "trustee duties" by failing to safeguard Redwood National Park from destructive timber operations. The decision does not mention the "Public Trust Doctrine."). See also J. Olson, "Toward A Public Lands Ethic", 56 J Urban L 739 (1979); and, J. Olson, "The Public Trust Doctrine," *Detroit Col. L. Rev. 161* (1976).

[34] A. Klass & L.Y. Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Center for Progressive Reform, September 2009) (examples of narrower application include Kentucky, Alabama, Colorado, Delaware, Georgia, Kansas, Ohio, Oklahoma).

[35] A. Klass & L.Y. Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Center for Progressive Reform, September 2009) (examples of more expansive applications Arkansas, Massachusetts, Michigan, Minnesota, New York, Utah, Iowa, California, Wisconsin, Montana, New Jersey, Hawaii, Vermont, and Louisiana).

[36] *Mono Lake National Audubon Society v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983) [Mono Lake].

[37] A. Klass & L.Y. Huang, *Restoring the Trust: Water Resources and the Public Trust Doctrine, A Manual for Advocates* (Center for Progressive Reform, September 2009), p. 708.

[38] E.g., New Hampshire, N.H. Rev. Stat. § 481:1 (2009) (declaring broad protection for water "whether located above or below ground" in the interest of present and future generations).

[39] *M.C. Mehta vs. Kamal Nath and others* [1996] INSC 1608 (13 December 1996) (WordLii).

[40] *Fomento Resorts & Hotels & ANR. v. Minguel Martins & ORS* [2009] INSC 100 (20 January 2009) (WorldLii).

[41] Constitution of the Republic of South Africa 1996, No. 108 of 1996, s. 24.

[42] *National Water Act*, No. 36 of 1998 (South Africa).

[43] Department of Water Affairs and Forestry, "South Africa White Paper on a National Water Policy" (1997), online: http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf. p. 184 [White Paper].

[44] *Environment Protection Authority v. Port Kembla Copper Pty Ltd* [2001] NSWLEC 174, 115 LGERA 391; *Environment Protection Authority v Ableway Waste Management Pty Ltd* [2005] NSWLEC 469; *Environment Protection Authority v Hochtief AG* [2006] NSWLEC 200; *Environment Protection Authority v Buchanan* [2009] NSWLEC 31, 165 LGERA 383.

As demonstrated by these examples the concept of the public trust has an extensive range of applications. Experts even suggest that further permutations and potential for extending this concept still exist. For example, Jim Olsen, a leading practitioner of water law and public trust in the United States suggests, "just because public trust rights of public access have been limited to certain navigable waters or waters that affect navigable public trust waters for purposes of balancing public and private rights or use, it does not mean the state cannot protect the residual or reserved public interests or rights in commons like water not granted as part of the evolution of private property rights." In his view, "[t]he state retains a right to protect the commons and public interests in it for present and future generations as part of the public trust duty; indeed has a duty not to violate this broader trust by lack of planning or public purpose or strong social benefit associated with its management of water."[45]

[45] J. Olson, personal communications April 14, 2010. See also, for example, *Hudson County v McCarter*, 209 US 349; *United Plainsmen v. North Dakota* (ND 1976); *Paepke v. Public Bldg Commn.,* (Ill App 1971); Michigan Oil v NRC, 249 NW2d 135 (1976).

STATEMENT OF EXPECTATIONS
on Reform of the BC Water Act
from BC Nongovernmental Organizations

December, 2009

As recognized by government in *Living Water Smart*, the failure to fundamentally reform BC water laws jeopardizes the environment and the well being of British Columbians. This document answers the call of the Premier of British Columbia for citizens to become part of the solution for securing our water future. It outlines key minimum steps critical to protecting this precious resource. This statement of expectations was developed through study and consultation, and the undersigned groups urge the BC government to take swift and decisive action on the issues described below.

BC's Water At Risk

The following issues are self-evident:

- Without an adequate supply of clean, safe water, human health, the BC economy, and the environment are threatened.

- Water in all its forms is owned as a public resource. Private rights to use water are limited, temporary, and must therefore be subject to conditions that protect the public interest.

- Many of BC's water bodies experience water shortages during certain seasons/years.

- Addressing the unprecedented challenges brought about by changing climate necessitates a fundamental re-thinking of how we store and deliver water, generate power, protect ecosystems and ecosystem resilience, ensure food security, and provide people with access to adequate, clean water.

- In BC, many land use practices such as forestry, mining, agriculture, oil and gas extraction and increasing urbanization can affect water quality and quantity, both inside the province and outside our borders. The scale and intensity of many practices and industries continues to grow, as does the demand for water. For example, the recent development of river-based independent power projects (which require water licenses issued under the BC Water Act) currently proceeds in an inadequate regulatory environment to protect watershed health and function.

- BC's water governance regime evolved at a time when there was little recognition of the need to legally allocate water for environmental needs, guarantee an equitable distribution of water, provide credible public oversight and accountability, or to resolve issues of water scarcity and conflict.

- BC is one of only a few jurisdictions in North America that fails to issue groundwater extraction licenses.

- BC provides limited independent oversight, accountability and opportunity for public input on water licencing decisions, even though it is well recognized that public input increases the quality of environmental decision-making, and water is a resource that supports public and environmental values, in addition to private needs.

- Jurisdictions worldwide are reforming governance and developing allocation systems that recognize rivers, lakes, wetlands and groundwater as priority water users based on the principle of seasonal sharing of an available consumptive pool among all identified water users, and based on

the value of ecosystem services.

- The BC Government has commendably and wisely recognized the need to take action and has made the bold commitment to modernize the law as a core part of the BC Living Water Smart (LWS) strategy, released June 2008.

Transparency and Participation in the Legislative Reform Process

The undersigned urge the government to use a transparent and participatory process to develop the law, including:

- opportunities for public input at all stages of the legislative reform process;
- creation of an advisory committee, composed of people outside government from a variety of interests, to provide strategic advice to the Government of British Columbia;
- a registry for public input regarding any policy option being considered (e.g., "white papers");
- regional public engagement processes to allow public input;
- a plan to ensure the key aspects of any water policy reform are enshrined in a legally binding manner.

Securing our Water Future with a Modern Water Act

A modern BC Water Act must provide comprehensive protection for BC's water resources, maintain or restore natural ecological function, build public confidence in government's role in managing water, and secure safe drinking water for communities.

A modern BC Water Act will set standards for all BC waters, whether surface, ground or diffuse, in all areas of the province, rural and urban. BC's water laws will protect transborder rivers, lakes and aquifers. The legislation must create a structure that allows for the engagement and participation of all levels of government (including First Nations), and members of the public.

A modern BC Water Act will set strong standards for protecting water, and will require collaborative governance to implement the standards at the watershed or basin scale.

The legislation should prioritize all uses of water and provide protection for all users of water. The new law will guard against overuse of water, address threats to water quality, prevent changes to riparian features, and enable adaptation to climate change. A modern Water Act will recognize the crucial "public interest" role for government in managing the resource and affirm that licenses are only temporary rights to use the resource and not permanent or property rights. A new Water Act will codify an allocation principle based on recognizing the environment as a priority and equitable sharing of a consumptive pool among all users. Ultimately, the provincial government must be responsible and accountable for protecting water resources in accordance with the precautionary approach.

In particular, a modern BC Water Act will:

1. Protect stream health and aquatic environments.
2. Improve water governance arrangements.
3. Improve the water allocation system.
4. Regulate groundwater use.

1. Protect stream and aquifer health and aquatic environments.

A new BC Water Act will:

- Protect water for the environment by legislating instream or environmental flows with priority over other licensed uses; and require a "cap" on water withdrawals to protect key physical, biological and chemical processes in the aquatic system (ecosystem services).

- Ensure that projects with the potential for harmful impacts on water are permitted only in areas identified as appropriate through watershed and aquifer planning.

- Require due consideration of the public interest, protection of the environment, conservation, efficiency, and use of best available technology in the issuance of water licences.

- Ensure adaptive capacity and maintain and enhance resilience both in natural and social systems to deal with a changing climate and unexpected events.

- Facilitate reuse and recycling of water to reduce demands on watersheds and aquifers, anticipate the effects of climate change, and provide flexibility to accommodate increased hydrologic variability and other future threats to watershed function or aquatic health.

2. Improve water governance arrangements.

A new BC Water Act will:

- Provide water for the future by requiring legally binding watershed plans, developed at the local level with public consultation in accordance with strong provincial standards, to address threats to water quality and quantity, and ecosystem protection. The Act must require ongoing public engagement in monitoring, implementation and updating of watershed plans.

- Provide for effective public engagement through transparency, oversight and opportunities for participation.

- 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.

- Enable new municipal powers for the purposes of water and watershed protection, including: the ability to manage threats to drinking water sources; the requirement to update bylaws to be consistent with watershed plans; enabling water reuse and recycling; requiring metering, reporting of use and full cost accounting; and, as part of watershed plans, municipalities should be required to develop, implement and publicly report on water conservation plans according to provincial standards, which must include the ability to impose water conservation and efficiency requirements on all users, and to collect and report data on water use by sector.

- Ensure adequate resources are available for all authorities responsible for the development and implementation of watershed planning including funding or funding tools, technical expertise and

training.

3. Improve the water allocation system.

A new BC Water Act will:

- Embed requirements for conservation, efficiency, and quantity monitoring.

- Continue to affirm crown ownership, subject to constitutionally protected aboriginal title and rights, of both ground and surface water and explicitly recognize water licenses as temporary "use" rights and not permanent or property rights.

- Create systems to prevent water scarcity where possible and equitably resolving water conflicts where it is not. Establish a "public interest" test to assist in resolving conflict and guide future allocations in areas of scarcity or drought and prioritize existing water use.

- Develop a progressive allocation systems that recognize rivers, lakes, wetlands and groundwater as "legitimate priority users" and moves beyond a prior allocation ("first in time, first in right" - FITFIR) system and codifies a system based on the principle of equitable sharing of an available consumptive pool among all identified water users.

- Require ongoing monitoring to facilitate increased reporting of water quality and quantity monitoring and trend analysis.

- Promote cost recovery so that all those who impact water quality or quantity, as well as those who benefit from the provision of clean water, contribute to the costs of source protection, to a degree appropriate to their impact or benefit.

- Require metering of all large groundwater and surface water users, both existing and new.

4. Regulate ground water use.

A new BC Water Act will:

- Treat water as one interconnected resource by requiring water management plans to evaluate both groundwater and surface water systems and the linkages between them.

- Require groundwater licensing in all areas of the province. The province should revisit its plan to regulate only in 'priority areas', as referred to in LWS. If any geographical areas are proposed to be exempted from groundwater licensing requirements, the province must justify the exemption through scientifically derived criteria.

- Provide a remedy for those negatively affected by existing groundwater extractions. Due to the existing lack of regulatory controls on groundwater use, there are many areas of the province where residents are negatively affected by groundwater extraction, yet lack a remedy.

Supporting Organizations

1. Alouette River Management Society
2. B.C. Federation of Drift Fishers
3. BC Nature (Federation of BC Naturalists)
4. Burns Bog Conservation Society
5. Burke Mountain Naturalists
6. Canadian Parks and Wilderness Society
7. David Suzuki Foundation
8. Ecojustice
9. Environmental Law Centre, University of Victoria
10. Fraser River Coalition
11. Georgia Strait Alliance
12. North Shore Wetland Partners
13. Pacific Streamkeepers Federation
14. POLIS Water Sustainability Project
15. Raincoast Conservation Foundation
16. Salmon River Enhancement Society
17. Shuswap Environmental Action Society
18. Sierra Club BC
19. Skeena Watershed Conservation Coalition
20. Smart Growth BC
21. Squamish River Watershed Society
22. Steelhead Society of British Columbia
23. T. Buck Suzuki Environmental Foundation
24. The Pembina Institute
25. WA:TER (Wetland Alliance: The Ecological Response)
26. Watershed Watch Salmon Society
27. West Coast Environmental Law Association
28. Wilderness Committee
29. WWF-Canada

ecojustice
formerly Sierra Legal Defence Fund

VANCOUVER OFFICE
131 Water Street, Suite 214, Vancouver BC V6B 4M3
Phone (604) 685-5618
Fax (604) 685-7813
linfo@ecojustice.ca
www.ecojustice.ca

April 27, 2010

Via Email: livingwatersmart@gov.bc.ca
Water Stewardship Division – BC Ministry of the Environment
PO Box 9339 Stn Prov Govt
Victoria BC V8W9M1

RE: Water Act Modernization - Submission of Ecojustice Canada

INTRODUCTION

Ecojustice commends the BC Ministry of Environment for undertaking the much needed step of modernizing the *Water Act* (the "WAM" process). The failure to sustainably manage water resources threatens the environment, health, communities and economic activities.

Ecojustice supports the larger goals of WAM and believe it is essential that these objectives be backed up by a legislative and regulatory regime that guarantees that environmental and other public interest protections are fully implemented and that the public is given a real voice in the decision making process.

This submission is supplemental to two documents Ecojustice has assisted in preparing and that are enclosed with this submission:

1) The "Statement of Expectations on Reform of BC's Water Act by BC Non-Governmental Organizations" in January 2010. This document identifies the key drivers of the need to reform the *Water Act* and the key priorities of the ENGO community for *Water Act* reform as they relate to the four themes identified by the Ministry. And,

2) "The Public Trust and a Modern BC *Water Act*" by Oliver Brandes (POLIS) and Randy Christensen (Ecojustice). This document identifies how an approach to water management known as the "public trust doctrine" is consistent with and would help to achieve the objectives of Living Water Smart.

This submission addresses the most critical questions as presented in the WAM Discussion Paper.

WAM PRINCIPLES

Generally speaking, Ecojustice supports the principles set out in the Discussion Paper. The bulk of this submission concerns how the Principles can be realized.

It is, however, important to address the potential for conflict between Principles 5 and 6 which state.

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

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

Ecojustice recognizes the desirability – from the perspective of licencees – of having a predictable water right. However, given that stream volume is inherently unpredictable, guaranteeing licences a "firm" quantity of water means that the ecosystem needs will be doubly impacted during low flow periods as those needs will receive a declining share of a shrinking resource.

The Principles of WAM should clarify that ecosystem needs hold a higher priority than extractive, consumptive uses. As low flow periods become more severe, ecosystems should be guaranteed a greater percentage of the remaining flow.

Predictability for licence holders should be achieved primarily by limiting licencing on streams to account for seasonal and yearly variability and potential changes to the hydrologic regime due to climate change. In other words, licencing should be stopped at a point where there is still enough unlicenced water to meet environmental needs and provide a buffer against extreme low flow conditions. Predictability may also be achieved by setting clear rules determining the point conservation measures and right suspensions will begin and the order and manner that restrictions of extractions will be imposed. *Licences should not guarantee a firm quantity of water to any licence exercisable regardless of other conditions.*

GOAL #1: PROTECTING STREAM HEALTH AND AQUATIC ENVIRONMENTS

Ecojustice strongly advocates for Environmental Flow Standards. Standards should be adopted rather than Guidelines.

Guidelines represent merely the ability to provide environmental protection, but not a guarantee that environmental protection will be implemented. This would provide little improvement over the current situation. On numerous occasions, the Environmental Appeal Board has upheld the Comptroller's power to deny or condition licences to protect fish and the environment. This ability however has not prevented situations of over-allocation. Creating a more detailed statutory regime – but leaving the protection of aquatic environments as discretionary – represents a failure to squarely address the challenge of protecting aquatic environments.

Another advantage of Standards over Guidelines is that a decision to restrict a water taken pursuant to optional Guidelines is much more vulnerable to a legal challenge. A policy decision to draft Guidelines will almost certainly result in a significant increase in challenges to Ministry decision that will require the Ministry to produce highly technical, scientific evidence supporting its decision.

Ecojustice supports binding Water Allocation Plans. While Ecojustice acknowledges that it will sometimes be necessary to make exceptions to Plans, deviations from approved plans should be done with the approval of the Minister or Lieutenant Governor in Council.

Finally, the *Water Act* should clearly provide for the authority to regulate the dumping of potentially harmful substances into streams should be prohibited.

GOAL #2: IMPROVING WATER GOVERNANCE ARRANGEMENTS

Ecojustice supports the "Delegated Approach" outlined in the Discussion Paper. Ecojustice recommends the comments of the POLIS Water Project, which has done extensive research on this issue.

GOAL #3: MORE FLEXIBILITY AND EFFICIENCY IN THE WATER ALLOCATION SYSTEM

Ecojustice strongly supports the general objectives identified for introducing more flexibility and efficiency in the water allocation system.

Options to Encourage Water Use Efficiency:

The options described in the discussion paper appear to present a false choice. Government determinations of need, efficiency codes and

economic incentives can be structured to work together to promote water use efficiency.

For example, it would be appropriate for government to evaluate the requested quantity sought in a water licence application to determine if it is reasonable given the intended use. That need not prohibit the creation of efficiency standards for an industry that would ensure that a licence holder use water efficiently and adopt water saving technology and practices as practicable. Water rental fees may still be charged to the licencee and could be raised to a level discourage waste. None of these options should be abandoned.

Ecojustice strongly opposes any amendments to the *Water Act* to facilitate water rights transfers without a more thorough examination and public debate about the risks of such markets. Ecojustice has written extensively about the risks of such markets in *Fight to the Last Drop*[1] and *Share the Water.*[2]

Options for the Water Allocation System:

Ecojustice strongly supports prioritizing new licences based upon the nature of the use and not the date of the application. Ecojustice would recommend going further by phasing out the "first in time first in right" (FITFIR) system altogether.

While FITFIR was successful in promoting economic development in the early history of British Columbia, it is not the optimal system given current challenges and priorities. A system designed to promote orderly development when water supply was abundant relative to the demand for water uses may not address the issues of secure water supplies for all users and environmental protection that we face today. Our current system of water allocation operates in an environment where there are diminishing water supplies, increased conflicts, and threatened aquatic ecosystems.

Options to Address Temporary Water Scarcity:

Ecojustice believes that the best option for addressing water scarcity is through a mixed approach of a hierarchy of uses and sharing. For example, in times of moderate water scarcity, it may be reasonable as a first approach

[1] Found at: http://www.ecojustice.ca/publications/reports/fight-to-the-last-drop-a-glimpse-into-alberta2019s-water-future/attachment
[2] Found at: http://www.ecojustice.ca/share-the-water/attachment

to have all users reduce consumption by a set percentage. However, if deeper cuts are needed, it may be necessary to impose restrictions based on a hierarchy of uses.

GOAL #4 – REGULATING GROUNDWATER USE

Groundwater and surface water are one resource and licensing and allocation systems should recognize their interconnectedness.

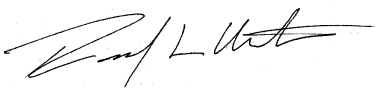
It is concerning that the Discussion Paper only presents options that will exempt some classes of groundwater use. Ecojustice feels that, at a minimum, all groundwater wells should be registered and required to report actual usage. While it may be acceptable to forego formal regulatory approvals for some classes of wells, that should be a decision taken after an analysis of local conditions and an assessment of existing and future water use.

CONCLUSION

As noted at the outset, this Submission responds to the most key questions posed in the Discussion Paper. It is supplementary to the "Statement of Expectation" submitted by BC ENGOs and "The Public Trust and a Modern BC *Water Act*".

We again want to commend the Water Management Branch for taking on this important initiative.

Yours truly,



Randy Christensen

ENC:

1) "Statement of Expectations on Reform of BC's Water Act by BC Non-Governmental Organizations" (January 2010)

2) "The Public Trust and a Modern BC *Water Act*" (April 2010)