



First Nations Perspective and Issues Regarding Water



Traditional Philosophy

- Water critical and connected to life
- Water represents life and creation
- The role of women as water carriers and givers of life is considered sacred
- Traditional ceremonies always include a sacred offering to recognize the power of water in creating life – only the women make this offering
- Water considered highly spiritual



Indigenous Water Rights

Historic treaties and water rights

- No express extinguishment by Crown of any First Nation rights or title to water
 - Review of treaties shows no “clear and plain intention” to extinguish water rights



Indigenous Water Rights

What does text of treaties say?

- Treaty 1, 2
 - Cedes all lands, no water references
- Treaty 4
 - Cedes partial waterways
 - Did First Nations intend water sharing? (no cessation)
- Treaty 5 (and adhesions)
 - Crown navigation
 - First Nations wanted to continue to use land and water to 10 miles off shore

Indigenous Water Rights

Manitoba perspective

- Treaties extinguished First Nation title to water
 - No references, First Nations disagree
 - Not necessarily extinguish other Aboriginal water rights
- *Natural Resources Transfer Agreements, 1930*
 - Transferred land (and water) from Canada to Provinces
 - Subject to any existing trusts or existing interests
 - Treaty obligations and unextinguished rights
- *Constitution Act, 1938*
 - Constitutional amendment clarifying NRTA, 1930
 - Provides water ownership transferred to Provinces



Indigenous Water Rights

Federal position...Federal Water Policy 1987

- In recognition of native people's special interests in water, the federal government will:
 - Negotiate land claims settlements that define use and management powers for waters within claimed areas;
 - Review and clarify with native people their water-related issues and interests with respect to their treaty areas as well as to lands subject to land claims;
 - Improve understanding of native needs and commitments associated with water;
 - Determine, in consultation with native people, how they will participate in resource management programs affecting water resources of interest to them; and
 - Encourage greater native participation in water allocation and management decisions involving in-stream and traditional uses.



Indigenous Water Rights

- Government activities that may have infringed existing Aboriginal water rights includes
 - Licensing and approval of all forms of water-dependent development such as manufacturing, food and animal processing, industrial use, farming, and water bottling
 - Allowing non-Aboriginal water users to deplete or degrade water sources that First Nation requires for its use
 - Allocation and over-allocation of water rights to others



Indigenous Water Rights

Infringements (continued)

- Diversions, dams, water regulation structures, and irrigation structures
 - Allowing impediments to water travel
 - Changing water quality, quantity, flow etc.
 - Approval of schemes that restrict indigenous use or reliance upon the water resource
- Hydro-electric development
 - Approval of activities which permanently and drastically damage water quantity and quality of the utilised water systems

Consult and Accommodate?

- 3 First Nations Supreme Court Challenges that targeted at the Government (Federal or Provincial) “Duty to Consult”
- *Haida, Taku, Mikisew*
- Determined that a policy, plan, licensing and approval decisions by both the federal and provincial governments, must consult First Nations, if there is potential to infringe or impact on Aboriginal or Treaty Rights



Consult and Accommodate?

- **What is “consult and accommodate”?**
 - Good faith negotiations
 - Level playing fields
 - Resolve issues, areas of concern
 - Meeting of minds
 - Agreements on approach, limits, timeframes
 - Ongoing discussions, partnerships
 - Reasonable “accommodation” to the First Nation in lieu of the impact on their Rights



Indigenous Water Rights

- **Limited indigenous positions taken on this to date in Manitoba**
 - Historical water abundance
 - Protection of fishing rights have been the focus
- **This is changing, as water resources are increasingly allocated without consideration / involvement of Aboriginal peoples**
- **Also changing because of the “Duty to Consult” requirement**



Indigenous Governance Constraints

What are some of the constraints First Nations face?

- **There are no Aboriginal legislative provisions for water management**
- **Poor policy development tools at local level**
 - Lack of research, monitoring tools to inform policy
 - No planners or trained policy-makers
 - No links between external and internal policy frameworks
 - Limited ability to adapt to change or requests



Indigenous Governance Constraints

- Indigenous communities need information management structures / networks
- Aboriginal communities and Fed/Prov need to “de-bottleneck” their communications and enhance their communication capacities
- Establish joint communications and information-sharing protocols, and permanent bi-lateral structures to accomplish protocol goals



Indigenous Governance Constraints

- **Limited mechanisms for watershed level community mobilization and participation**
 - Most current Aboriginal governance not organized around watersheds
 - No regional plans, few comprehensive community plans
 - No water-specific institutions or networks (water watchers, water monitors, water networks)
 - No independent, non-political local water organisations
 - Especially need institutions that involve youth
 - Regional and local political bodies in competition for scarce resources
- **Need active support re: development of Aboriginal-other linkages so information exchange and coordination of participation is ensured**

Policy Needs

1. Aboriginal / treaty rights

- Indigenous rights-based water rights acknowledged and their water needs first in line
 - Rights not extinguished
- Commitment to cooperation and accommodation process to resolve water-related conflicts

2. Common long-term vision of watershed

- committed participatory planning

3. Sustainability policy

- Precaution-based approach to achieving true sustainability of watershed

4. Provincial / federal jurisdictional cooperation policy