



# Prairie Water Policy Symposium

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## Presentation

- Indigenous water rights
- Constraints to Indigenous watershed management
- Water policy gaps
- Other initiatives



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## Presentation

- Premise
  - Aboriginal people in Manitoba have water rights
  - Effective management of water bodies requires a substantive Aboriginal involvement in decision-making processes
    - Strategic level
      - Policy decisions
      - Program creation and delivery
      - Strategy development
    - Project level
      - Licensing and other project decisions



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## Indigenous Water Rights

- No case litigated in Canada confirming or denying existence of Indigenous water rights
  - Some underway
    - Seabed title (Walpole Island)
  - Have been settlements
  - Have been numerous cases in U.S. confirming “Indian water rights”



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## Indigenous Water Rights

- *Winter's Doctrine*
  - Implied “hold-back” of water rights by First Nation when reservations were created
  - First Nation water rights first in line
- *Adair*
  - Water reserved for current and future generations, treaty rights to hunt and fish include implied reservation of water rights
- *Arizona*
  - Reserved enough water for current and future needs, including enough water to irrigate all irrigable land



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## 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
    - Legal tests regarding extinguishment not met



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## 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



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## Indigenous Water Rights

What do Aboriginal peoples say?

- Piikani First Nation vs. Alberta 2002
  - Only true water rights case in Canada
  - Based upon Treaty 7 hold-back of water rights
  - Relied upon *Winters Doctrine*
    - Purposes of reserve required extensive water access
  - Settled 2002 with Canada and Alberta



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## Indigenous Water Rights

### Piikani First Nation vs. Alberta 2002

- Settled water claims and redress for diversion of water in Oldman River
  - \$64.3 million trust, \$800,000 annual payment
  - \$3,000 per capita distribution
  - Settlement of nine specific claims against Canada (\$32.17 million re: non-fulfillment of Treaty 7)
  - Participation in Oldman River Dam Hydro project
  - Assured water supply: residential, community, agricultural, and 37,000 acre feet for commercial
  - Discontinuance of Piikani water rights litigation



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## Indigenous Water Rights

- Manitoba Perspective
  - *“Except as otherwise provided in this Act, all property in, and all rights to the use, diversion or control of, all water in the province, insofar as the legislative jurisdiction of the Legislature extends thereto, are vested in the Crown in right of Manitoba”* Water Rights Act
    - Abolishes common law water rights only
    - No “clear intention” re aboriginal or treaty rights
      - No government can unilaterally infringe any right (through any means including legislation) without following proper steps
      - Numerous cases from *Sparrow* to *Haida* and *Taku*



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## 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



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## Indigenous Water Rights

- Ontario
  - **Treaty 3 “Headland-to-Headland” Dispute**
    - 1894 Agreement Canada and Ontario
    - Reserve lands include land covered by water, including headland lands and waters even if only partially in the reserve
    - Remains unresolved



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## Indigenous Water Rights

### Headland-to-Headland Government Report, 1970

- **Restriction of:**
  - Public access to the waters and through water routes;
  - Non-Aboriginal fishing and hunting of water-fowl;
  - Public use of islands within the headwaters;
  - Creation of hydro-electric power (or the creation of indigenous-controlled hydro-power);
- **Restriction or elimination of manufacturing and industrial uses of water;**
- **Restriction or impacts to fisheries;**
- **Mining activities, which could create water pollution;**
- **Building of dams, which could create fluctuating water levels;**
- **Loss of provincial revenue from the sale of islands;**
- **Privately-owned land would be within reserve boundaries.**



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## 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.



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## 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



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## 1. Indigenous Water Rights

- 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



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## Consult and Accommodate?

*...the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title.*

- Haida Nation v. British Columbia (Minister of Forests)  
2004



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## Consult and Accommodate?

- All policy, plan, licensing and approval decisions by both the federal and provincial governments, regardless of the authority level of the decision-maker
  - It is the impact of the decision that matters, not the status of the decision-maker within government



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## 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
  - Etc.



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## 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



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## Indigenous Watershed Management Constraints

- Differences in long-term vision
- Indigenous governance constraints



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## Long-Term Vision

- Need common standard of environmental care and stewardship of water
  - Definition of “impact”
  - Common definition of “significance” of impact (vs. threshold)
  - Common definition of “scientific certainty”, and statement of level of uncertainty of predictions
  - Definition of “meaningful”
    - ie. public participation vs. consultation and accommodation



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## Long-Term Vision

- Adopt common standard of environmental care and stewardship (cont'd)
  - Agreement that upstream user bears reverse onus burden of proof
  - Assessment of value of possible impacts
  - Adoption of Precautionary Principle
  - Adoption of Reciprocity Principle
  - Agreement to conduct follow-up (public review of decisions) within 3 years of policy or planning decisions



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## Indigenous Governance Constraints

- Aboriginal legislative provisions for water management or legal recognition of rights  
and/or...
- Aboriginal actions based upon inherent governance rights
  - If provisions or actions exist (through land claims agreements, treaties, *Indian Act*) they are not linked to outside water management regimes
  - Harmonisation and reciprocity very difficult to achieve



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## Indigenous Governance Constraints

- 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



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## Indigenous Governance Constraints

- Indigenous communities need information management structures / networks
  - At local, regional watershed and basin levels
  - Need way to link watershed level information to local information
- Aboriginal communities and Fed/Prov need to “de-bottleneck” their communications and enhance their communication capacities
  - Similar and high capacities for data transmission
  - Common graphics software packages
  - Competent GIS systems
  - Abilities to archive large quantities of archival information in a searchable way
  - Automated file searching, or data source searching
- Establish joint communications and information-sharing protocols, and permanent bi-lateral structures to accomplish protocol goals
  - Aboriginal-focussed information registry
  - Strategy groups coordination



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## Indigenous Governance Constraints

- Limited mechanisms for watershed level community mobilisation and participation
  - Most current Aboriginal governance not organised 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



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## Policy Needs <sup>(1)</sup>

1. Aboriginal / treaty rights
  - Indigenous rights-based water rights acknowledged and their water needs first in line
    - Rights not extinguished
  - Métis rights
  - Commitment to cooperation and accommodation process to resolve water-related conflicts
    - Policy to negotiate and cooperate as well as required accommodation
      - City of Winnipeg: “no consultation required”
      - Churchill River Diversion and Lake Winnipeg Regulation licensing



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## Policy Needs (2)

### 2. Common long-term vision of watershed

- Developed and evolving through committed participatory planning
  - COSDI recommendations
- What is the goal?
  - Yukon Inter-tribal Watershed Counsel: “drink the water from the river” vs. pollution sink

### 3. Sustainability policy

- Precaution-based approach to achieving true sustainability of watershed
- Abundance-based (vs. “sustainable yield”, “assimilation capacity”, etc.)
  - all uses dictated by level of abundance currently available



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## Policy Needs (3)

### 4. Provincial energy policy

- Watershed, reservoir, both?
- What is the use limit?
- “Indigenous rights friendly” policy?

### 5. Provincial / federal jurisdictional cooperation policy

- Cooperation and rule-based
- Commitment to Indigenous issues
  - Garrison Diversion (NAWS), Devils Lake



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## Policy Needs (4)

### 6. Commitment to a stable, transparent water licensing regime

- Effective management is not possible without it
- Full public awareness of licensing plans
  - CEC recommendations
  - CRD, Lake Winnipeg Regulation, future hydroelectric initiatives



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## Other Institutional Voids

- No institutions have authority to negotiate with Indigenous people re: treaty-related water management concerns
  - IJC
  - CEC
  - Provincial water management structures
    - Lake Winnipeg Stewardship Board Recomm. 1.4
    - Manitoba *Water Protection Act*
- Dealing with fundamental Aboriginal concerns has not been integrated into their mandates
  - Even at management level
  - Or for purpose of rationalising adjoining systems



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## 4. Where it's working: Examples

- The Turning Point - BC
- The Yukon River Inter-Tribal Watershed Council - Yukon
- Aboriginal Mapping Network - BC
- Wahnapiatae First Nation GIS Watershed Mapping - Ontario
- Peel Watershed Planning Commission - Yukon



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## 4. Where it's working: Examples

- Formal agreements to cooperate
  - Planning and all development activities at watershed level
- Indigenous institutional structures created
  - Commissions, councils, networks
  - Cross border, multi-jurisdictional
- Information, education, and research are priorities
  - The Yukon River Inter-Tribal Watershed Council - Yukon
  - Wahnapiatae First Nation GIS Watershed Mapping - Ontario
  - Aboriginal Mapping Network - supported by Ecotrust
  - The Turning Point - David Suzuki Foundation



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## Thank You

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