

# WATER RUSH:

Why B.C.'s Water Sustainability Act fails to protect water



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## Introduction

In British Columbia, new legislation is urgently needed to address dwindling water sources and current threats to water. B.C. experienced record levels of drought last summer. Fracking, mining and bottled water industries are draining water at unsustainable rates and are competing with communities for access to local resources. Provincial legislation is needed before water sources are drained dry in the province.

In May 2014, the B.C. government introduced the province's new *Water Sustainability Act*, which is set to come into force early this year. But does the legislation do enough to protect water for communities? Does the act go far enough to ensure the province learns from California's ongoing drought?

This report explores how the new *Water Sustainability Act* (WSA) delivers some gains and positive steps forward, but falls short of what is needed to truly protect water in B.C.

As with surface water, groundwater will be regulated under the act using the "first in time, first in right" system, which gives priority to older licences regardless of the use or purpose for the water. While water pricing is being debated, some hard questions must be asked about whether communities should allow fracking, mining or bottled water companies like Nestlé to take or pollute what is left of communities' water sources.

Rather than giving companies priority based on when they first used water in a region and permits for an indefinite length of time, the new act should be based on principles of water as a human right, commons and public trust.

Under trade agreements like NAFTA, the Canada-EU Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, companies can challenge water regulations or decisions put in place to protect lakes, rivers or groundwater. The WSA is not immune from these challenges. Governments must exclude water and water services in trade agreements and end investment protections so that communities can develop regulations and policies that responsibly manage water sources.

It should also be noted that most of B.C. is on unceded Indigenous territory. In 2014, the Supreme Court of Canada confirmed that the Tsilhqot'in people have Aboriginal title and authority to land outside a reserve and affirmed that governments and individuals should obtain the consent of Indigenous peoples when proposing to use land. According to the UN Declaration of the Rights of Indigenous Peoples, free, prior and informed consent should be obtained from Indigenous communities for all decisions affecting land and water.

The B.C. government must make further changes to the WSA that incorporate water as a human right and public trust – principles that participants in the public consultation process called to be included in the act. Communities must continue to take action to hold the B.C. government accountable and ensure that these principles are incorporated into the new legislation.

The act promotes business as usual at the peril of Indigenous peoples and residents of British Columbia, threatening water security in the region.

*Green River, British Columbia* by Vince O'Sullivan via Flickr, CC by-nc 2.0



*Water Rush: Why B.C.'s Water Sustainability Act fails to protect water*

## Improvements in the new Water Sustainability Act

For the past five years, the B.C. government has been working to update the 105-year-old Water Act. The new WSA received Royal Assent in May 2014 and will come into force early this year. Some improvements were made in the new act, including the regulation of groundwater, inclusion of environmental flows to ensure there is enough water in lakes and rivers to keep aquatic ecosystems healthy, and a framework for regional Water Sustainability Plans.

B.C. is the only province that does not regulate groundwater. For years, many environmental and community groups, water experts and residents lobbied to have groundwater regulated. Under the new WSA, the province will regulate groundwater for the first time.

In February 2015, the government released the financial rates for bulk water withdrawals, which range from \$0.02 to \$2.25 depending on the industry. There was a public outcry that bottled water companies would only pay \$2.25 for every million litres they pump. Nestlé, for example, draws 265 million litres from the Kawkawa aquifer in Hope every year. More than 225,000 people signed a petition by online activist organization SumOfUs asking the government to increase the water rates for bulk withdrawals. The government agreed to review the rates in July 2015. However, it backtracked in November stating that it would use the previously announced structure and bottled water companies will in fact pay \$2.25 per million litres of water withdrawn.

The B.C. government will be required to consider the environmental flow needs of a waterway when deciding on a water permit application. West Coast Environmental Law (WCEL) has noted that “consider” is not a strong threshold, but pointed out two facets that strengthen this weakness: the government would have to “actually determine what the environmental flows should be” and the “cabinet can designate some streams as ‘sensitive streams’ and introduce additional, and more stringent, rules related to environmental flows.”<sup>1</sup>

While these facets can be used to protect waterways, they rely on the political will of the government to be stringent in how it manages water. The majority of people in British Columbia who submitted comments during the consultation process called for binding standards – not the guidelines that were included – because the guidelines are “too flexible or otherwise not enforceable,” according to the British Columbia’s Water Act Modernization Report on Engagement. Therefore, a consideration of environmental flow still falls short of what people in British Columbia asked for.<sup>2</sup>

As noted by WCEL, the government would have the power to make orders that protect “critical environmental flows” during times of water scarcity and to ensure the flows needed to protect fish populations.

Another strength of the act is set out in Part 3, Division 4. This section includes a detailed framework for the development of regional Water Sustainability Plans to be initiated by the Minister of Environment and used to address local water issues, governance and planning.

The scope of the water sustainability plans appears to be broad and organizations like WCEL are hopeful that the plans “could be a very useful tool for a community seeking to improve water management.”<sup>3</sup>

While the regulation of groundwater, consideration of environmental flows and development of Water Sustainability Plans are a step forward, there is much more to be done in order to protect communities from a full blown water crisis.

It should be noted that while the government created a consultation process – which has been criticized as inadequate by Indigenous communities – it left out some key demands put forward by Indigenous communities and people in British Columbia. These gaps will be explored in the remainder of this report.

## The beginning of a water crisis

As wildfires raged, drought spread across B.C. and in the traditional territories of Indigenous communities last summer. Most of southern B.C. was categorized under “Drought Level 4,” the highest level of drought. In these regions, commercial water use and residential outdoor tap use was restricted. Fishing was banned in many of the rivers in southern B.C. and farmers were asked to restrict water-takings from rivers and their tributaries throughout the summer. The province issued orders for water users to restrict withdrawals. For example, restrictions on water-takings from Coldwater River for irrigation were applied to 50 water licences.

There are 17,000 glaciers in the province and research by the University of Northern British Columbia shows they are all melting. Melting glaciers in both B.C. and Alberta will have an impact on Indigenous communities and western and Prairie provinces where the glaciers provide water.

Despite this, B.C. is promoting some of the most water intensive and polluting industries. Last year, fracking companies used more than 8 billion litres of water in the northeastern corner of the province, the location of what’s known as the “world’s largest frack.” The province has seen a huge boom in fracking projects in the north that put rivers, lakes and groundwater at risk.

Potential spills by tar sands pipelines like Northern Gateway and the Kinder Morgan Trans Mountain pipeline expansion pose a threat to the hundreds of lakes and rivers along their routes. In November 2015, Prime Minister Justin Trudeau indicated his government will follow through on its election promise of placing a moratorium on tankers that would ship the pipelines’ contents along the northern coast of B.C. Despite this, proponents of the

Northern Gateway pipeline have vowed to move forward with the project.

Mining uses and contaminates massive amounts of water. The Mount Polley mine spill, the worst environmental disaster in the province’s history, shows the danger that mining projects can pose to drinking water sources. On August 4, 2014, a massive breach at a tailings dam at Imperial Metals’ Mount Polley gold and copper mine unleashed roughly 25 million cubic metres of toxic tailings water and sludge (enough to fill nearly 9,800 Olympic-sized swimming pools) into Polley Lake, down Hazeltine Creek, and into Quesnel Lake and the Quesnel River. These waterways directly connect to the Fraser River Watershed. The Quesnel Lake watershed is a major source of drinking water and is home to one-quarter of the province’s sockeye salmon.

As of January 2015, there were 579 drinking water advisories in B.C., the highest number out of all the provinces and territories in Canada. The length of the advisories varied, with some dating as far back as the 1990s. The reasons for the advisories include: “source water contamination, inadequate disinfection/treatment, unacceptable microbiological quality, water quality failing to meet Canadian Drinking Water Standards, and unacceptable turbidity.” Nazko First Nation, a community in the northern interior of B.C., has been under a water advisory for nearly 20 years. High levels of arsenic and manganese means that even if community members boil their water, they still cannot drink it.

These threats show clearly that water in B.C. is at risk. More needs to be done to ensure the WSA truly protects communities’ water sources.

## Why water pricing isn't enough

In February 2015, the B.C. government released new water rates, ranging from \$0.02 to \$2.25 per million litres for different industries.<sup>4</sup> The rates, which take effect early this year when the new *Water Sustainability Act* comes into force, are the lowest of any of the provinces in Canada.

There has been an overwhelming amount of public backlash against the low rates, particularly with Nestlé only being required to pay \$2.25 per million litres – a total of roughly \$600 per year for the 265 million litres of water the company draws from a well in Hope and in Sto:lo Nation for bottled water.

SumOfUs and the WaterWealth Project delivered a petition signed by more than 225,000 people calling for increased water rates. While the B.C. government agreed to review the rates after the petition was delivered, it has since reneged on that commitment.

Increased water rates are expected to fund the implementation of the water act. However, hinging water rates on being able to effectively implement water legislation raises questions about how to conserve water. Namely, would the fear of losing revenue needed for the implementation of the act result in the the province being reluctant to decrease the number of high volume licences? Would water conservation efforts be impacted by this need for revenue?

The B.C. government should explore other means of generating revenue to implement water legislation that do not rely on the unsustainable use of water, particularly by polluting or abusing industries. One way would be to use existing revenue to fund the operational costs of the act. Another way would be to increase corporate tax rates. In B.C., corporations that generate revenue more than

\$500,000 (known as the higher or general rate), pay 11 per cent in corporate income taxes, while businesses that generate less than \$500,000 pay 2.5 per cent (what is known as the lower or small business rate). The 11 per cent that corporations pay in B.C. is the lowest corporate income tax amongst all the provinces and territories. Nova Scotia's rate of 16 per cent is the highest. Alberta used to have the lowest tax rate, but a recent bill introduced by the Alberta government means corporate tax rates increased from 10 to 12 per cent in October 2015.

A 2012 Environics poll commissioned by the Canadian Centre for Policy Alternatives in B.C. (CCPA-B.C.) found that 67 per cent of respondents thought major corporations are asked to pay less tax than they should, and 44 per cent say much less than they should.<sup>5</sup>

The 2013 report, *Progressive Tax Options for B.C. Reform: Ideas for Raising New Revenues and Enhancing Fairness* by CCPA-B.C., explores a number of tax reforms that promote fairness, equity and generate revenue. The report points out that, "If B.C. collected today the same amount in tax revenues as a share of the economy (GDP) as we did in 2000, we would have \$3.5 billion more in public funds this year alone."

*The Province* newspaper reported that a Ministry of Environment spokesman said the new water fees and rentals are expected to cover the cost of administering the new WSA. They will bring in an estimated \$8 million per year.

A small increase in corporate taxes would ensure that water legislation could be adequately implemented without having to give away needed water sources.

## “First in time, first in right”: Remnants of the Gold Rush

The B.C. government plans to base the new groundwater regulation system on the same system it uses to regulate surface water. It is an antiquated system known as “first in time, first in right” (FITFIR). The FITFIR system gives priority to those who used water in a region first. During times of water scarcity, it cuts access off to newer users.

Rangi Jeerakathil from MacPherson Leslie & Tyerman LLP has noted that water rights law in Canada come from three sources: riparian law, “prior appropriation doctrine” (also referred to as “first in time, first in right”) and legislation. Most of western and northern Canada base water allocation on prior appropriation or “first in time, first in right.”

In B.C., as with most of western North America, the FITFIR system originated during the gold rushes as a way to guarantee miners access to water in the arid areas of the west.

There are an estimated 20,000 wells in B.C. that industrial users draw groundwater from. Under the proposed regulations, the province will allow a three-year application window for existing groundwater users to establish their priority access when they provide evidence of their date of first use. The government will also waive the application fee for companies or industrial water users that apply for a water licence during the first year the WSA is in force. The B.C. government’s policy paper, *Licensing Groundwater Use Under British Columbia’s Water Sustainability Act*, outlines how well-owners establish priority dates, or dates of first use by using records related to the construction of wells, Environmental Assessment certificates, well maintenance records, photographs, or other corroborating information.<sup>6</sup>

After three years, all new groundwater licences issued will be prioritized based on the date the applicants receive their licence. This model dictates that the users who first establish groundwater use would have priority over other licensed users for

the same aquifer, regardless of what the water is being used for.

On the WSA website, the B.C. government notes: “During times of water scarcity, licences with the earlier priority dates are entitled to take their full allocation of water over the junior licences.” It is unclear which water users will get water permits first when the WSA comes into force this year. The WSA could end up prioritizing permits held by fracking, mining or bottled water companies like Nestlé over municipalities, small farmers or other community water uses because of FITFIR if the former show they drew water in a region first.

The act also does not prioritize Indigenous water use even though Indigenous communities are undisputedly “first in time” users. Instead, the province asserts Crown ownership over water and denies Indigenous communities the ability to govern and steward watersheds and water resources according to their values and traditions. The Union of British Columbia Indian Chiefs (UBCIC) has said, “Historically, B.C. refused to record water allocations made to reserve lands, and in many cases, reserve lands have a lower priority than settler interests.”<sup>7</sup>

What’s more, some water users may establish priority dates from the date of first use regardless of whether they were the owner of the well at the time of first use. The paper *Licensing Groundwater Use Under British Columbia’s Water Sustainability Act* states, “The proposed new Water Sustainability Regulation would allow existing well-owners who apply for a licence within the three-year transition period to seek a priority date based on their historic date of first use and their ongoing use of groundwater for a non-domestic purpose.” For example, Nestlé owns four wells in Hope (with well tag numbers 101355, 95371, 95372 and 109529). The oldest well – 101355 – was built in 1987 and was previously owned by Aberfoyle Springs. Nestlé took the well over in 2000, but could claim the date of first use of 1987.



Though the new act guarantees 250 litres of water per household for “essential household use,” according to the World Health Organization, 50 to 100 litres of water should be allocated per person per day to meet their most basic needs as well as a few health concerns. Based on this, 250 litres per household may not be enough to meet the needs of five people, especially if someone is ill.

The FITFIR system fails to consider growing water scarcity, the obligation to up hold Indigenous

rights and title, and water protection and conservation. A water system that recognizes water as a human right, part of the commons and a public trust and prioritizes Indigenous’ water rights would better reflect the demands of British Columbians and Indigenous peoples as well as growing water scarcity.

*Lake O'Hara | Yukness Mountain by Steffen Sauder via Flickr, CC by-nc-sa 2.0*



## Recognition of Indigenous title and water rights long overdue

Today, most of B.C. is on unceded Indigenous territory. In 2014, the Supreme Court of Canada unanimously recognized Aboriginal title to 1,700 square kilometres of land to the Tsilhqot'in Nation, giving them the right to decide how their lands are used.

The UBCIC has emphasized the intimate link between land and water. In a submission to the B.C. government about the WSA, UBCIC wrote, "As an incidence of our Aboriginal Title to our territories, Indigenous Peoples have jurisdiction over the waters in our territories. Aboriginal Title Rights and Treaty Rights carry significant legal implications, and are priority interests. Aboriginal Title to waters could include waters such as lakes, streams, rivers, hot springs, or ice fields located within an Indigenous Nations' territory. Equally, ocean waters and ocean bed may be part of a Nation's Aboriginal title. Many Aboriginal and Treaty rights rely upon healthy and sufficient flows of water to sustain them, such as fishing, hunting, or other gathering rights, and spiritual practices. Indeed, it is nearly impossible to imagine an Aboriginal or Treaty right that does not depend upon water."<sup>8</sup> Yet in section 5 of the WSA, the province asserts Crown ownership of water. The UBCIC has pointed out how the process of modernizing the water act continues to deny Indigenous title and continues "asserting provincial rights to ownership and jurisdiction over water."<sup>9</sup> Throughout the public engagement process, Indigenous organizations and communities made submissions denouncing the lack of meaningful consultation, emphasizing

the need to recognize Indigenous title and water rights, reiterating the need to engage on a nation-to-nation basis, and expressing grave concerns about allocating priority based on FITFIR rather than on priority to First Nations' water rights.

The UBCIC stated: "The Province does not have the ownership and jurisdiction over water where Aboriginal Title exists, and the proposed Water Act amendments continue with the province's history of denial, which is damaging both to Indigenous Peoples and cultures, and also to the waters and all life that depends upon the water."<sup>10</sup>

In a joint letter, the British Columbia Assembly of First Nations, First Nations Summit and UBCIC reminded the B.C. government of the commitments made in 2005 to build a new relationship. The government promised to:

- "Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing; and
- Identify institutional, legislative and policy changes to implement this vision and these action items."<sup>11</sup>

Recognition of Indigenous title is missing entirely from the new WSA. Further changes to the act must include this important step in order to address colonialism and colonization.

## Water governance and the risk of trade challenges

Investor-State Dispute Settlement (ISDS) clauses are a controversial feature of trade agreements that give companies the right to sue governments over regulations, standards or decisions that affect company profits – even if they are done in the public interest. Companies have used these clauses to challenge water policies or government regulations that protect water sources or public health.

The following examples show how water licensing rules and provincial water management decision-making can be challenged under trade agreements.

French water giant Suez sued Argentina when the country cancelled a contract with a private consortium to provide water. Argentina entered into a 30-year contract with a consortium led by Suez-Lyonnais des Eaux to operate water and sanitation services in Buenos Aires. After tariff increases, cancellation or delay of original investments, and “mounting confrontations, the government cancelled the concession contract and created the public company, AySA, to immediately take responsibility for the provision of water and sanitation services.”<sup>12</sup> The World Bank’s International Center for Settlement of Investment Disputes ordered Argentina to pay the water corporation \$405 million.<sup>13</sup>

In 2011, the Harper government paid AbitibiBowater (now Resolute Forest Products) \$130 million to settle a NAFTA investor-state challenge in which the pulp and paper company alleged its investor protections had been violated when the Newfoundland and Labrador government expropriated its valuable “rights” to timber and water. Abitibi-Bowater had permission to draw water and use timber for the purposes of manufacturing. In 2008, when the company announced it was closing its last remaining mill in the province, those “rights,” which were only ever on loan from the Crown, would have expired. By compensating Abitibi-Bowater, the Canadian government essentially

sided with the company by confirming that the water and timber rights are private property.

Trade lawyer and Council of Canadians board member Steven Shrybman told a standing committee on international trade, “The record-setting \$130-million NAFTA settlement with AbitibiBowater has effectively privatized Canada’s water by allowing foreign investors to assert a proprietary claim to water permits and even water in its natural state.”

In her book *Blue Future: Protecting Water for People and the Planet Forever*, Council of Canadians National Chairperson Maude Barlow warns, “This has set a dangerous precedent whereby corporations from one country operating in another can now claim ownership of local water supplies, thus providing one more way in which the world’s water is becoming commodified and privatized.”

Water licensing rules and local water management can – and have – been challenged under trade agreements. The WSA is not immune from these challenges.

Andrew Gage, a lawyer from West Coast Environmental Law, wrote that “there is room to increase water rates dramatically without running afoul of NAFTA or other trade agreements.” He says it is important to get the correct price for water at the outset and adds that, “Arguably it is only once the water pricing structure is legally enshrined that future changes might amount to an ‘expropriation’ worthy of compensation [under trade deal rules.]”

Under trade agreements like NAFTA, the Canada-EU Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, companies can challenge water regulations or decisions put in place to protect lakes, rivers or groundwater. Governments must exclude water and water services in trade agreements and end investment protections so that communities can develop regulations and policies that responsibly manage water sources.

## Water is a human right, public trust and part of the commons

In July 2010, 122 countries of the United Nations General Assembly voted to recognize the human right to water and sanitation. This internationally binding resolution must now be recognized at every level of government. In September 2015, UN member states reaffirmed their commitment to upholding this fundamental human right by including it in the Sustainable Development Goals. The recognition of water as a human right gives communities lacking access to clean drinking water a legal tool to exercise this right. It also provides legal recourse if a water source is damaged by industrial activities.

More than five years later, the Canadian government has yet to implement this right. Provinces have not upheld the human right to water in provincial water legislation or in the allocation of water.

In the report *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*, Maude Barlow outlines the three obligations the recognition of a human right to water imposes on governments: the obligations to respect, protect and fulfill.<sup>14</sup> The Obligation to Respect requires that a government refrain from actions or policies that interfere with the enjoyment of the human right. For water, Barlow says, "no one should be denied essential water services because of an inability to pay." The second is the Obligation to Protect, which requires a government to prevent third parties from interfering with the enjoyment of the human right. For example, a government is required to protect a community from pollution and inequitable water extraction by corporations or governments. The third obligation, the Obligation to Fulfill, requires a government to adopt additional measures to ensure the right is realized, such as investing in water infrastructure.

The report *British Columbia's Water Act Modernization: Report on Engagement* outlines eight principles for the proposed Water Act moderniza-

tion, including sustainable limits on water use, science-based decision making, integration of water legislation policy, decision making across all levels of government, and responsibility to be efficient and protect stream health. One principle that is missing – as identified in public submissions and by workshop participants – is that water is a human right, not a commodity, and that it must be held in public trust.<sup>15</sup>

Maude Barlow explains that water is a commons to be shared, protected, carefully managed and enjoyed by all who live around it. In *Our Great Lakes Commons: A People's Plan to Protect the Great Lakes Forever*, Barlow describes "the commons" as: "The notion of the Commons is a very old one. A commons narrative asserts that no one owns water. Rather it is a common heritage that belongs to the Earth, other species and future generations as well as our own. (...)The commons approach is based on the belief that just by being members of the human family, we all have rights to certain common heritages, be they the atmosphere and oceans, freshwater and genetic diversity, or culture, language and wisdom."<sup>16</sup>

Surface and groundwater should be declared a public trust, which will require the government to protect water for a community's reasonable use. Under a public trust doctrine, private water use would be subservient to the public interest. Water could not be appropriated or subordinated for private gain. Barlow says the public trust doctrine underpins in law the universal notion of the commons that certain natural resources – particularly air, water and the oceans – are central to our very existence and considered essential to people, who cannot be denied access. She continues, "The trust resources must, therefore, be protected for the common good and not appropriated for private gain. Under the public trust, governments, as trustee, are obliged to protect these trust resources and exercise their fiduciary responsibility to sustain them for the long-term use of the entire

population, not just the privileged few who could buy inequitable access.”<sup>17</sup>

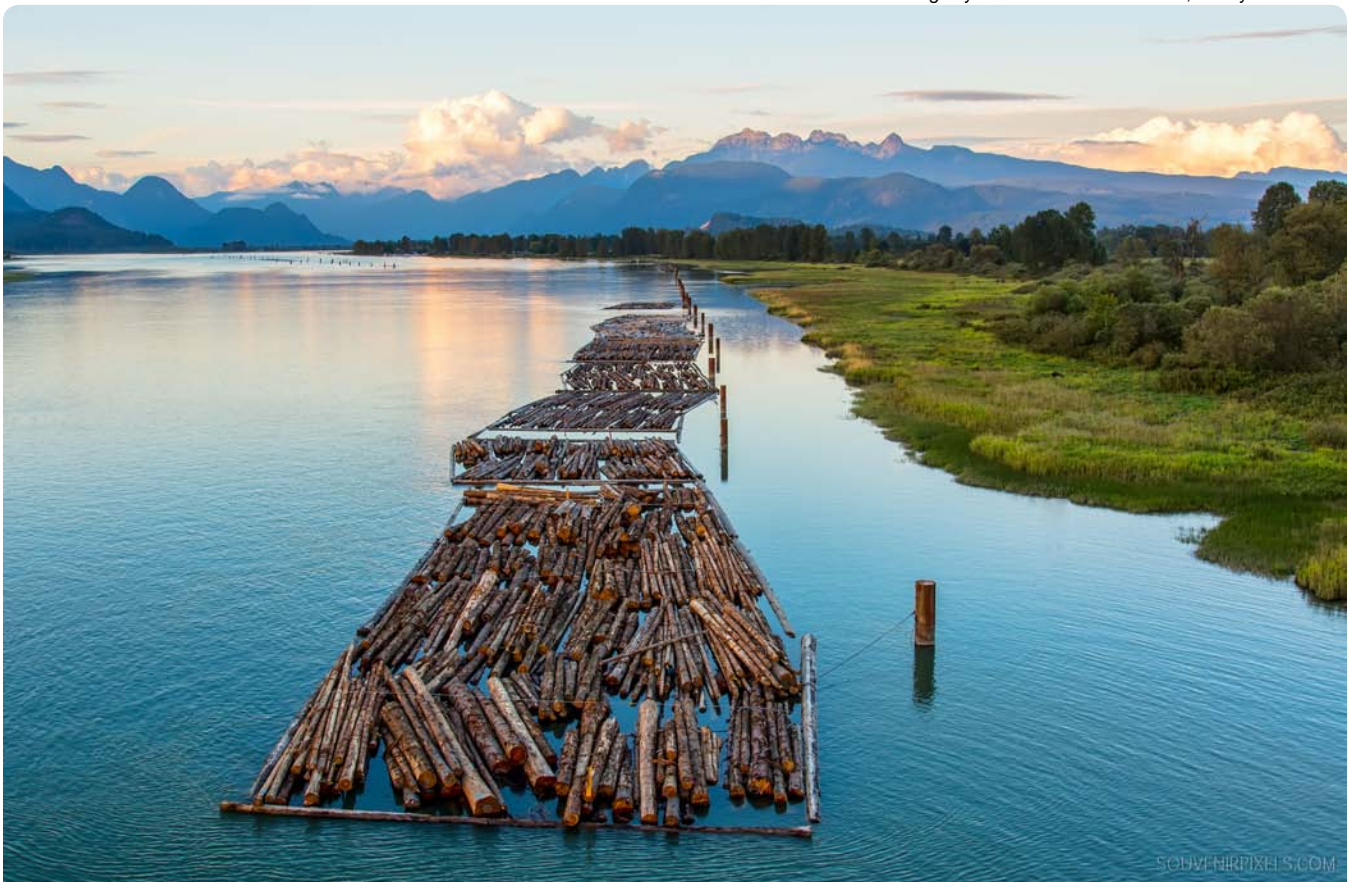
Incorporating water as a human right and public trust into the act would require a shift from an ownership-based approach to water to one based on stewardship. Ownership allows the possibility of sale while stewardship asks governments to be trustees, assuring the preservation of the resource for future generations.

Yet the principles of water as a human right and public trust fail to appear in the WSA. If the modernization of the water act and its implementation

is to be a truly democratic process, recognition of Indigenous water rights as well as recognizing water as a human right, commons and public trust must be included in Part 2 (Licensing, Diversion and Use of Water) of the new WSA. And Section 5, Vesting Water in Government, asserting Crown ownership of water, must be removed in order to respect Indigenous title and water rights.

These principles reflect what communities, residents and other participants called for in the development of the WSA. They must be included if communities are to truly protect water sources.

*Pitt River Logs by James Wheeler via Flickr, CC by-nc-sa 2.0*



## Prioritizing water use: Who should be permitted to use water?

With growing water scarcity, hard decisions must be made about how water use is prioritized – who can draw water and who should be denied water-takings.

According to the *Report on Engagement*, participants in the public consultation process called for water for human consumption and ecosystems to be prioritized over business interests. Participants also urged the provincial government to create a “priority-of-use framework” that puts human consumption, food security and ecosystems first.<sup>18</sup>

With increasing drought in the region, which industries should be allowed to withdraw water? Do communities want bottled water companies like Nestlé, fracking companies, or other polluting industries withdrawing water when sources are running dry?

The District of Hope experienced Level 4 drought conditions (extremely dry) this past summer (2015). *The Province* reported that Nestlé’s well draws from an aquifer that approximately 6,000 nearby residents in Hope rely on.<sup>19</sup> Nestlé draws from the Kawkawa aquifer, which connects to Kawkawa Creek (also known as Sucker Creek). In turn, this creek connects to the Coquihalla and Fraser Rivers, both of which were suffering from low water levels last summer. The CBC reported that salmon fishing in the Lower Mainland portion of the Fraser River was stopped because of low river levels and warming temperatures.<sup>20</sup>

The UBCIC cautions about the dangers of allowing repeated groundwater withdrawals in their document *Response to British Columbia’s Legislative Proposal for a Water Sustainability Act*. They warn, “In areas of the United States, and around the world, there has been significant depletion of groundwater supplies, which is sometimes called “water mining.” The extensive use of underground aquifers has led to depletion and the disappearance of underground water sources in many areas. Depletion of groundwater impacts surface water flows, and many areas are facing droughts and extreme water shortages. This has led to large areas being without any water and the increased need to import or pipe in water from great distances.”<sup>21</sup> Despite the costs, we do not have to – and should not – consent to water being bottled and exported out of a region, nor should we consent to water being used for polluting industries like fracking or tar sands development projects.

A list outlining the prioritization of water use is imperative to protect remaining water sources. Many submissions on the modernization of the water act supported establishing a hierarchy of use, giving priority to human consumption, food production and security, ecosystems and ecological protections.<sup>22</sup> The submissions emphasized that the hierarchy of use created should not only apply during times of drought, but should also be applied to prevent water scarcity when possible.

*Stop Fracking Chevron* by Caelie Frampton via Flickr, CC by-nc-sa 2.0



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## ***Fracking with Water***

The *BC Oil and Gas Commission Water Use for Oil and Gas Activity 2014 Annual Report* noted that, “A total of 8,258,192 m<sup>3</sup> of water was used by 33 companies for hydraulic fracturing of 643 wells.”<sup>23</sup> In other words, 8,258,192,000 litres – the same amount of water people in Metro Vancouver use over the course of a month – was used for fracking in B.C. in 2014.

Fort Nelson First Nation Chief Liz Logan has spoken about the expansion of oil and gas activity in northeastern B.C., which is Treaty 8 Territory. She has highlighted how fracking uses massive amounts of water, noting the toxic nature of fracking fluids, fracking’s link to earthquakes, ground and surface water contamination, high cancer rates, and its impacts on the animals that Indigenous peoples rely on for food.<sup>24</sup>

The Saulteau First Nations also expressed concerns about fracking’s impacts on water sources. In a letter regarding the WSA, they wrote: “Treaty 8 Traditional Territory is unlike any other area of B.C. when it comes to the magnitude of groundwater contamination. The recent boom here in oil and gas activity has led to direct contamination of groundwater through hydraulic fracturing, oil spills and leaky wells. Between 2000 and 2005, 35 per cent of groundwater observation wells showed declining water levels. In addition, the cumulative impacts from other industries, such as forestry, can drastically alter the hydrological regime within a watershed and reduce groundwater recharge.”<sup>25</sup>

Section 10 of the WSA allows for repeat approvals of short-term water use, or when the withdrawal period is less than 24 months. West Coast Environmental Law believes this was “done to facilitate hydraulic fracturing (fracking).”<sup>26</sup>

The B.C. government is further facilitating hydraulic fracturing by allowing fracking companies to withdraw deep saline groundwater at no charge.<sup>27</sup> It is unclear how withdrawing large amounts of deep saline groundwater will impact the hydrological cycle, geology or surrounding ecosystem.

The UBCIC warned, “The WSA proposes to exempt deep saline groundwater from regulation that would allow this water to be used for industrial purposes, such as oil and gas activities, which would alleviate pressure on freshwater supplies. The assumption is that deep saline aquifers have minimal connection to, and should therefore be treated as separate from, drinkable and more shallow freshwater aquifers. (...) Little information is known of the mid- and long-term impacts on water and the hydrologic cycle from activities such as hydraulic fracturing (fracking) on the overall hydrologic cycle and this could be a very dangerous decision. [It would be] impossible to reverse the impacts [of this decision] once it has occurred.”<sup>28</sup>

And fracking will continue to expand. There are 20 Liquefied Natural Gas (LNG) terminals planned for the Pacific Coast. Building LNG terminals will expand fracking operations, exacerbating B.C.’s current climate footprint, and use billions of litres of water in the fracking process.

## Engaging communities in water decisions

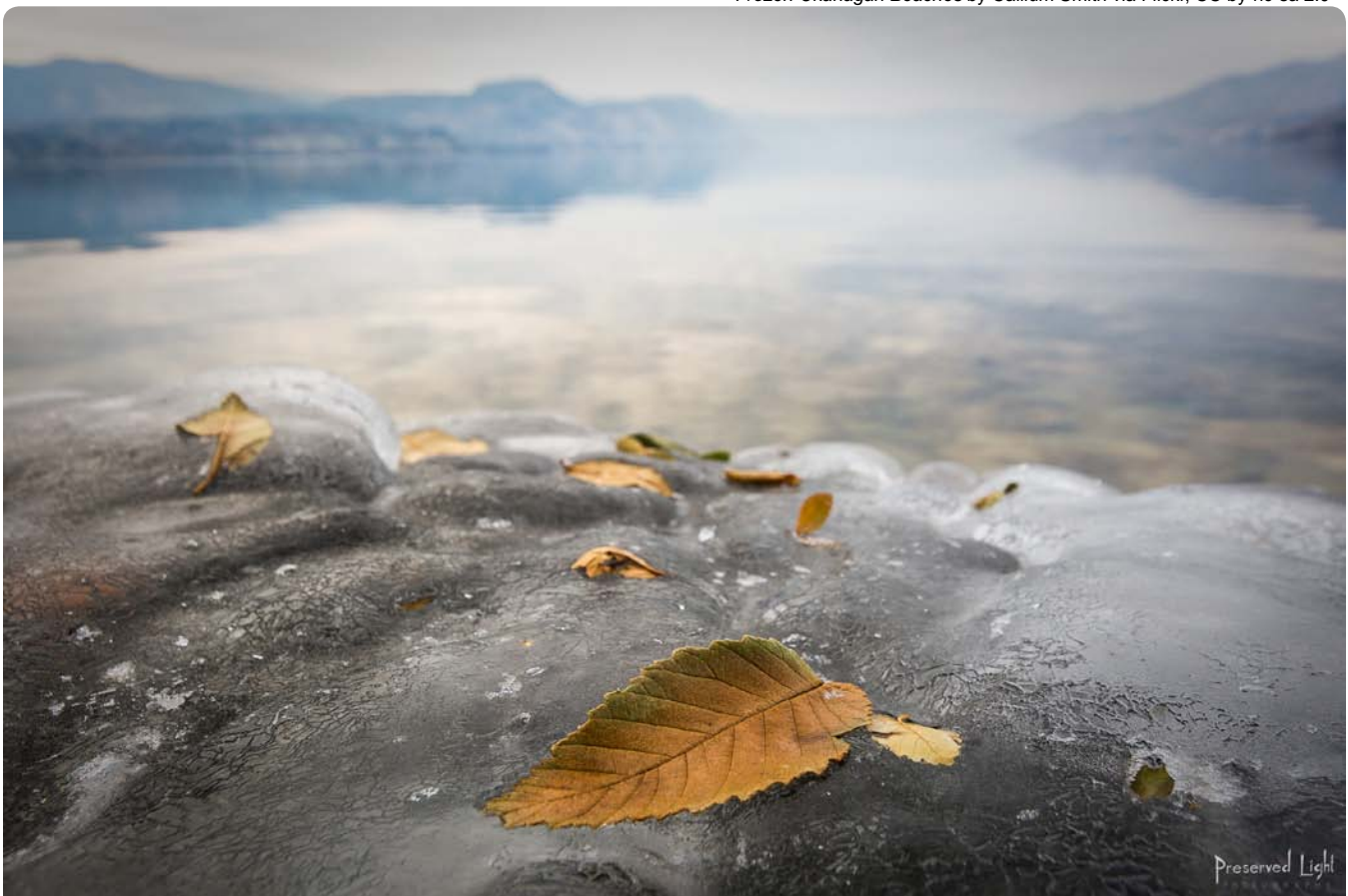
*The Water Sustainability Act* creates a process for communities to develop regional water plans called Water Sustainability Plans. While the terms of reference for the Water Sustainability Plans must include a public and stakeholder consultation process, there is no community consultation process for permit applications for water-takings.

The B.C. Water Act must ensure that free, prior and informed consent is obtained from Indigenous communities, as required by the UN Declaration of the Rights of Indigenous Peoples. The act must also outline an approval process for water withdrawals that includes community consultation, incorporates community input into the final decision, and respects a community's right to say "no" to projects that abuse or pollute water. Strict pollution controls, strong conservation regulations

and stringent monitoring must be established. A process to revoke permits where industries are polluting or abusing water must be created.

In Ontario, a public comment period is triggered for every application for a Permit to Take Water. The Environmental Registry in Ontario posts information on proposed new laws, regulations, policies and programs, as well as air and water permits.<sup>29</sup> Ontarians can submit comments on permit applications or proposed changes. B.C. also needs a public comment process for all water-takings to encourage water literacy and to better engage people. In order to encourage water stewardship, people must be properly informed and consent to water-takings not only in their watershed, but across the province.

*Frozen Okanagan Beaches* by Caillum Smith via Flickr, CC by-nc-sa 2.0





## Conclusion

With increasing drought, people in British Columbia cannot afford to accept a water act that will not stringently protect water sources from fracking, bottled water withdrawals, mining and other harmful industries.

The WSA has considerable gaps and is missing key principles that were called for by Indigenous peoples and people in British Columbia. Therefore, it is an undemocratic piece of legislation.

Because of the FITFIR system, the indefinite length of permits, the failure to incorporate Indigenous title and water rights, and the lack of a community consultation process for water-takings, the WSA in its current form is still inadequate. The WSA does not adequately protect water sources or ensure they will be available for current and future generations.

If these gaps are not filled, Indigenous communities and British Columbians could be facing serious drought repercussions – like the ones California is experiencing – sooner than we think.

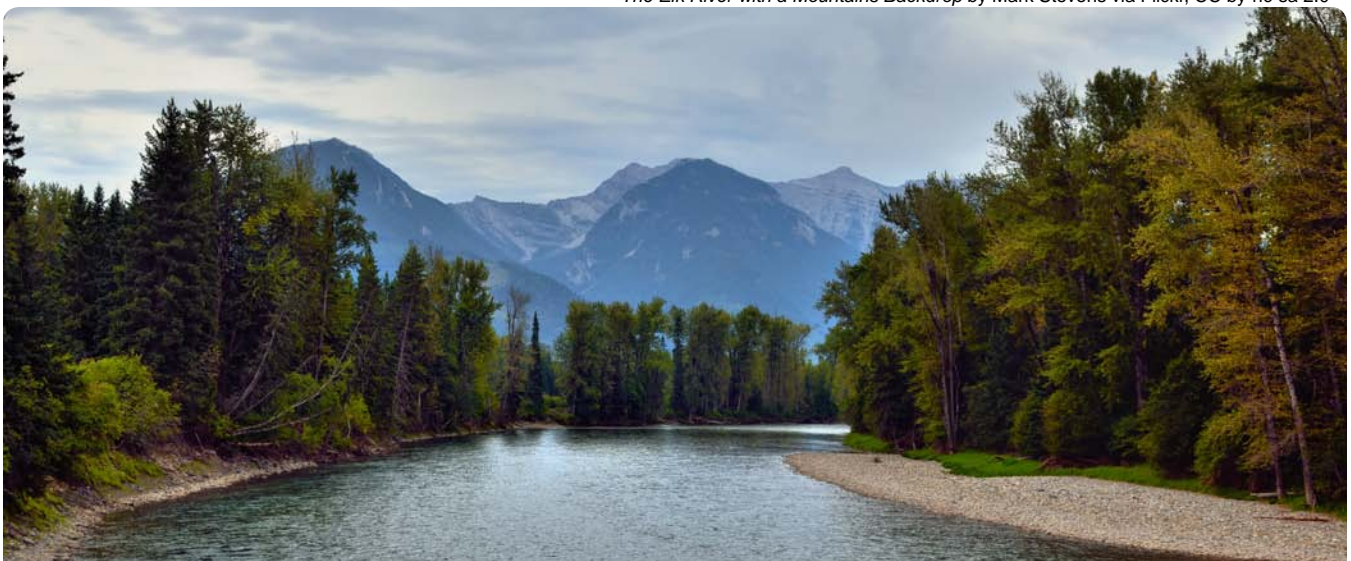
Governments have a responsibility to ensure water is available to meet community needs. Difficult decisions, such as cutting off industries that are polluting and abusing water, must be made.

The Council of Canadians opposes the WSA in its current form. B.C must get rid of the outdated FITFIR system and limit water permits to one to five years. The act must be changed to recognize and incorporate Indigenous title and water rights and embed the principles of water as a human right, commons and public trust.

Regardless of what the B.C. government does, communities must continue to fight to ensure that water is protected for future generations. Fracking, LNG and tar sands projects must be stopped and governments need to transition away from fossil fuels. A consensus is growing around the world that the transition to a 100 per cent clean energy economy by 2050 is not only necessary to solve the climate crisis, it is 100 per cent possible.

As Maude Barlow has said, the time has come to develop a new water ethic – one where we put water at the centre of all policy. British Columbia has the opportunity to become a leader in water stewardship and water justice. Communities must also rise to the occasion and become the real stewards of water.

*The Elk River with a Mountains Backdrop by Mark Stevens via Flickr, CC by-nc-sa 2.0*



*Water Rush: Why B.C.'s Water Sustainability Act fails to protect water*

## Endnotes

1. Gage, Andrew. "The Strengths and Weaknesses of the New Water Sustainability Act." *West Coast Environmental Law*, 14 Mar. 2014. Web. 17 Aug. 2015. <<http://wcel.org/resources/environmental-law-alert/strengths-and-weaknesses-new-water-sustainability-act>>.
2. *British Columbia's Water Act Modernization: Report on Engagement*. BC Ministry of Environment, Sep. 2010. Web. 17 Aug. 2015. <[http://www.livingwatersmart.ca/water-act/docs/wam\\_report-on-engagement.pdf](http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf)>.
3. Gage, Andrew. "The Strengths and Weaknesses of the New Water Sustainability Act." *West Coast Environmental Law*, 14 Mar. 2014. Web. 17 Aug. 2015. <<http://wcel.org/resources/environmental-law-alert/strengths-and-weaknesses-new-water-sustainability-act>>.
4. "Detailed Fees and Rentals Schedule to be Implemented in 2016." BC Ministry of Environment, Feb. 2015. Web. 17 Aug. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2015/02/F-R-fees-Table-Feb-4-Final.pdf>>.
5. "Majority of British Columbians support higher income taxes at \$100k: Poll." Canadian Centre for Policy Alternatives, 28 Nov. 2012. Web. 17 Aug. 2015. <<https://www.policyalternatives.ca/newsroom/news-releases/majority-british-columbians-support-higher-income-taxes-100k-poll-0>>.
6. "Licensing Groundwater Use Under British Columbia's Water Sustainability Act." BC Ministry of Environment, Jul. 2015. Web. 21 Jul. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2015/07/LicensingGroundwaterUse-Web-Copy.pdf>>.
7. "UBCIC Submission to BC Water Act Modernization Initiative." Union of British Columbia Indian Chiefs, 30 Apr. 2010. Web. 17 Jul. 2015. <[http://ubcic.bc.ca/files/PDF/UBCIC\\_WAMSubmission\\_043010.pdf](http://ubcic.bc.ca/files/PDF/UBCIC_WAMSubmission_043010.pdf)>.
8. "Response to British Columbia's Legislative Proposal for a Water Sustainability Act." Union of British Columbia Indian Chiefs, Dec. 2013. Web. 17 Jul. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2013/12/Union-of-British-Columbia-Indian-Chiefs.pdf>>.
9. Ibid.
10. "UBCIC Submission to BC Water Act Modernization Initiative." Union of British Columbia Indian Chiefs, 30 Apr. 2010. Web. 17 Jul. 2015. <[http://ubcic.bc.ca/files/PDF/UBCIC\\_WAMSubmission\\_043010.pdf](http://ubcic.bc.ca/files/PDF/UBCIC_WAMSubmission_043010.pdf)>.
11. "Letter dated March 9, 2011." First Nations Leadership Council. Web. 17 Jul. 2015. <<http://engage.gov.bc.ca/water-sustainabilityact/files/2013/10/Union-of-BC-Indian-Chiefs1.pdf>>.
12. *Here to Stay: Water Remunicipalisation as a Global Trend*. Transnational Institute, Nov. 2014. Web. 17 Aug. 2015. <<https://www.tni.org/files/download/heretostay-en.pdf>>.
13. Patterson, Brent. "Argentina ordered to pay Suez millions after cancellation of water contract." Council of Canadians, 11 Apr. 2015. Web. 17 Jul. 2015. <<http://canadians.org/blog/argentina-ordered-pay-suez-millions-after-cancellation-water-contract>>.
14. Barlow, Maude. *Our Right to Water: A People's Guide to Implementing the United Nations' Recognition of the Right to Water and Sanitation*. Council of Canadians, Mar. 2012. Web. 17 Jul. 2015. <<http://canadians.org/sites/default/files/publications/RTW-intl-web.pdf>>.
15. *British Columbia's Water Act Modernization: Report on Engagement*. BC Ministry of Environment, Sep. 2010. Web. 17 Aug. 2015. <[http://www.livingwatersmart.ca/water-act/docs/wam\\_report-on-engagement.pdf](http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf)>.
16. Barlow, Maude. *Our Great Lakes Commons: A People's Plan to Protect the Great Lakes Forever*. Council of Canadians, Mar. 2011. Web. 17 July 2015. <<http://canadians.org/sites/default/files/publications/GreatLakes%20Commons%20report%20-%20final-Mar2011.pdf>>.
17. Ibid.
18. *British Columbia's Water Act Modernization: Report on Engagement*. BC Ministry of Environment, Sep. 2010. Web. 17 Aug. 2015. <[http://www.livingwatersmart.ca/water-act/docs/wam\\_report-on-engagement.pdf](http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf)>.
19. Fumano, Dan. "Nestlé tapping B.C. water for free; Company takes 265 million litres annually." *The Province*, 14 Aug. 2013. Web. 20 Jul. 2015. <<http://www.theprovince.com/2013+Nestl%C3%A9+tapping+water+free+Company+takes+million+litres+annually/10175100/story.html>>.

20. Hua, John. "Salmon fishing shut down on the Fraser River in the Lower Mainland." Global News, 16 Aug. 2015. Web. 8 Sep. 2015. <<http://globalnews.ca/news/2168780/salmon-fishing-shut-down-on-the-fraser-river-in-the-lower-mainland/>>.
21. "Response to British Columbia's Legislative Proposal for a Water Sustainability Act." Union of British Columbia Indian Chiefs, Dec. 2013. Web. 17 Jul. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2013/12/Union-of-British-Columbia-Indian-Chiefs.pdf>>.
22. *British Columbia's Water Act Modernization: Report on Engagement*. BC Ministry of Environment, Sep. 2010. Web. 17 Aug. 2015. <[http://www.livingwatersmart.ca/water-act/docs/wam\\_report-on-engagement.pdf](http://www.livingwatersmart.ca/water-act/docs/wam_report-on-engagement.pdf)>.
23. *Water Use for Oil and Gas Activity: 2014 Annual Report*. BC Oil & Gas Commission, Jul. 2015. Web. 17 Aug. 2015. <<https://www.bcogc.ca/node/12676/download>>.
24. Moriarty, Eoghan. "Tribal Chief Liz Logan Speaks at LNG Pipedreams Conference (1 of 7)." Online video clip. YouTube, 28 May 2014. Web. 20 Jan. 2016. <[https://www.youtube.com/watch?v=VNdGc\\_U3qzE](https://www.youtube.com/watch?v=VNdGc_U3qzE)>.
25. "RE: Proposal for Modernization to the Water Act (Water Sustainability Act) & Community Watershed Designation for Moberly River Watershed." Saulteau First Nations, 14 Nov. 2013. Web. 17 Aug. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2013/11/Saulteau-First-Nations.pdf>>.
26. Gage, Andrew. "The Strengths and Weaknesses of the New Water Sustainability Act." West Coast Environmental Law, 14 Mar. 2014. Web. 17 Aug. 2015. <<http://wcel.org/resources/environmental-law-alert/strengths-and-weaknesses-new-water-sustainability-act>>.
27. "Detailed Fees and Rentals Schedule to be Implemented in 2016." BC Ministry of Environment, Feb. 2015. Web. 17 Aug. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2015/02/F-R-fees-Table-Feb-4-Final.pdf>>.
28. "Response to British Columbia's Legislative Proposal for a Water Sustainability Act." Union of British Columbia Indian Chiefs, Dec. 2013. Web. 17 Jul. 2015. <<http://engage.gov.bc.ca/watersustainabilityact/files/2013/12/Union-of-British-Columbia-Indian-Chiefs.pdf>>.
29. "Ontario Environmental Registry." Government of Ontario. Web. 17 Jul. 2015. <<http://www.ebr.gov.on.ca/ERS-WEB-External/>>.

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