

Water Governance and First Nations

Prepared by: Marlowe Sam for the Okanagan Water Stewardship Council Workshop
Rotary Centre for the Arts, 421 Cawston Ave., Kelowna, B.C. 15 May, 2008.

I first would like to thank Nelson Jatel for inviting me to participate in today's discussion. First of all I want to make it clear that I do not represent the views of the Okanagan Nation Alliance or any of the bands under its authority. The primary theme of my MA research is based on the Okanagan water systems.

The first issue that I would like to address has nothing to do with water governance but should be considered in future discussions with indigenous peoples. The use of the words "First Nations" to mean individual village band councils is clearly a way to pretend that the Royal Proclamation is being respected when it really is a tool to get consent of Aboriginal Nations to come under the constitution. In essence, to be part of Canada by consent (Armstrong et al 1994:80).

The Royal Proclamation of King George III was issued in 1763 at the urging of the British Board of Trade. The Royal Proclamation was the legal tool by which the old English colonies and the new Colony of Canada were to make trade relations with Aboriginal Nations in trade territories newly under British Authority. It set out the boundaries and their duties in getting access to the west for settlements and trade (Armstrong et al 1994:27).

Brian Statterly (in Harris 2002:14) contends that the proclamation recognized, "that Indian peoples hold rights to unceded lands in their possession throughout British dominions in North America." The Royal Proclamation had defined most of the interior of North America as "Indian territory," and had established that the prior Native right in it could be acquired only by the Crown through formal treaty, cession, or purchase" (Harris 2002:91). Once it was determined that aboriginal peoples were not going away, it then became necessary to establish an accommodation process, at this time the government began careful case-by-case negotiated compromises (Harris 2002:147). (treaties, court decisions)

The issue of identity is an important factor as the government is attempting to gain legal ownership of our lands and resources through an accommodation process wherein the only way they can accomplish this is by the Syilx giving consent. The lumping of all indigenous peoples into one recognizable body, 'First Nations' is a form of creating a legally accepted term of reference for judicial collectives.

The duty to accommodate—or "seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation"—arises when government consultations with an aboriginal group show a strong likelihood that the asserted aboriginal right does in fact exist, and when the proposed government decision would affect that right in a significant way (Olynyk 2005:5). This strategy might be considered as an accommodation process by the provincial and federal governments as an attempt to deal with conflicting interests over water management in the Okanagan Valley.

Syilx water governance

Water governance here in this valley is a Syilx responsibility that has existed for thousands of years. Trends of water management practices have without a doubt transformed the local environment here in the Okanagan Valley since settlement first began in the nineteenth century. Transformation and the rapid deterioration of our regional ecosystems were resultant from a number of factors, the introduction of cattle; settler population growth; evolution of modern agri-industries; and the policies and laws associated with the colonization process.

The Syilx have the right to live in a harmonious relationship with the natural world, likewise the biological diversity within Syilx territory shares in this natural right. Syilx rights to land and resources do not emanate from the Crown or any form of foreign imposed jurisdiction or authority.

The Syilx perspective on water rights is understood in a vastly differing manner than the European concept of rights, which is tied to exclusionary ownership that lie vested in principles of control and domination. Syilx rights are viewed as an ethical responsibility that allows for the regeneration of all life forms. The Syilx were the caretakers and stewards of our natural world, for all that might share in its abundance.

The traditional territory of the Syilx was ferociously protected and defended as the major water systems were recognized as being central to all life. The survival of the Syilx depended on their ability to control these water systems and they made it abundantly clear to other tribes that it was their right to distribute and share the food resources. The ability to protect and defend these resources ensured the survival of future generations of the Syilx. The allies of the Syilx also benefited as they were allocated equal shares in the salmon resources, yet it was made clear that it was at the sole discretion of the regional Salmon Chief.

The traditional governance of the water and its resources fell into the hands of the ‘Salmon Chief’ and it was his rulings that determined and regulated the harvest and distribution of salmon along with other subsistence resources that flourished in the wetland habitats. He was labored with the responsibility of maintaining this authority and thus assured that the people were treated fairly and that surpluses were then allowed to leave the territory as trade items. It has been almost two hundred years since David Thompson first came into contact with Okanagan peoples at the famous Columbia River fishing site at Kettle Falls. It is here that he witnessed the authority of Knkanaxwa, the Kettle Falls salmon chief.

The first water use legislation in British Columbia was passed in 1859. It was designed to respond to the needs of the day, conferring powers to grant water rights and collect water user fees. But its main thrust was to ensure long-term water supply for farmers, miners and other settlers (Province of B.C. 1993:6).

In 1870 Joseph Trutch, chief commissioner of lands and works, noted that, “No provision had been made for irrigation water (which in British Columbia Natives were

not allowed to record). In many areas, settlers had taken all available water” (Harris 2002:140). It is clear that Syilx water rights have not been abrogated and the 1877 Joint Indian Reserve Commission records acknowledge the existence of these rights prior to the first preemptions in the Okanagan Valley that occurred ten years prior. The Joint Indian Reserve Commission in 1877, “gave the Okanagan first water rights on all streams flowing through these reserves” (Harris 2002:127).

Within Part I, of the 1982 Constitution Act, “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

- a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired (Canadian Charter of Rights and Freedoms 1982).

According the Province of BC (1993:7-8), “Water must not be allocated or used beyond its capacity to be naturally replenished, both in quality and quantity. Water management must recognize and safeguard the rights of water users, including First Nations.”

As I mentioned earlier, our people have lived on this land for thousands of years, and over this time we developed a human/land relationship that became the basis of a sustainable resource management system. This is the traditional governance framework that allowed for a meaningful and respectful co-existing relationship with the land and its resources. The evolution of civilized societies here in the Okanagan is similar to what occurred in other civilizations around the world, this being that human societies established centralized governed settlements in near proximity of the water systems.

In the traditional territory of the Syilx are four transboundary rivers: the Columbia, Okanagan, Kettle and Similkameen. This fact has great significance as the Syilx have rights and responsibilities that extend outside of the Okanagan Valley. According to the written journals of Lewis & Clark, the Wenatchi tribes, a southern sub-group of the Syilx that are related through, custom, marriage, linguistics and trade economies, were witnessed as occupying lands as far south as the confluence of the Klickitat and Columbia Rivers in the years of 1804-05. This would mean that the Interior Salish peoples that were connected through language and culture occupied a 1,000 mile stretch of the Columbia River’s 1,200 mile length.

Despite moving into the twenty-first century and in many ways succumbing to the effects of colonization, we today still have our salmon chief. At this moment he has not assumed the responsibility that goes with the role, we wait patiently for the time when he does so.

In the meantime it is our responsibility to maintain a certain presence upon the land and the water. Salmon ceremonies have been maintained on an annual basis at the flooded Kettle Falls and other fishing sites within the traditional territory of the Syilx. The salmon ceremonies are extremely important because it was our great teacher Snk'lip that first brought salmon into our territory and the salmon ceremonies were to be continually practiced as showing respect to the salmon and thus ensuring that our people would have this food resource forever. It was promised that as long as we continued these ceremonies we would have salmon.

The exploration of Aboriginal Rights in North America will depend on investigating legal decisions that affected indigenous rights around the world. It seems that international law and legal decisions pertaining to land title and resource usage has according to Dawnis Kennedy (2007:79), "influenced the manner in which Canada has benefited, and continues to benefit, from its ability to maintain its communities, laws, and traditions within Indigenous lands, but this benefit has been gained at the expense of Indigenous legal systems, traditions, and communities."

It has almost been two hundred years since first European contact in the Okanagan. There have been many highs and lows as our cultures have often collided during the colonization period. In my opinion, there exists four words that constitute a threat to the continuance of Syilx societies as we have known it to be, they are, "treaties," "consultation," "exclusion," and "accommodation."

The Supreme Court (Canada) said that the duty to consult is based in the honour of the Crown, and does not arise out of any fiduciary duty...It is now clear that government need not make resource management decisions based solely on what is in the best interests of the affected aboriginal groups. Rather, government is entitled to balance other societal interests against aboriginal interests in making those decisions (Olynyk 2005:5). Therefore, "If government consults with an aboriginal group through a reasonable process, and gives appropriate consideration to the aboriginal rights asserted by the aboriginal group and the potential impact of the government's decision on those rights, the Supreme Court has indicated that the courts should not interfere with the resulting decision, even if the aboriginal group does not support it" (Olynyk 2005:6).

It is this legal determination that creates and maintains a division between our societies. The Supreme Court of Canada is indicating that public or settler interests as being senior in rights to aboriginal interests. Political chiefs and councils of the Okanagan Nation are currently engaged in numerous cases wherein the government is hoping to accommodate these senior interests, which will open up vast areas within the Okanagan Valley as well as surrounding watersheds. This board must take into consideration these provisions that guarantee Crown protection and any attempt to include aboriginal peoples in a provincial accommodation process with the intent to divest guarantees held within the 1763 proclamations or any other provincial or federal agreements may be construed as unconstitutional.

In closing I would like to speak as a concerned grandfather. Today, our community in this valley, consists of many diverse cultures from around the world, and the duty and responsibility of protecting this territory has fallen on many shoulders. As we look forward into the future, we must continually remind ourselves that our children are depending on our best collaborative thought and actions.

Notes

Representatives of local Indian Band governments were not invited by any of the valley wide task forces to offer their perspectives or to voice concerns over the valley's water management, referring to the Canada-British Columbia Okanagan Basin Agreement. The comprehensive study that contributed to the final drafting of the Agreement had one short reference to Indians wherein 18,800 acres of reserve lands were considered suitable for agricultural purposes (Hall 1972:8).

Works Cited

- Armstrong, Jeannette, Derickson, Delphine, Maracle, Lee and Greg Young-Ing, Eds. 1994. *We Get Our Living Like Milk From the Land*. Penticton, British Columbia: Theytus Books Ltd.
- Government of Canada. 1982. *Canadian Charter of Rights and Freedoms*. Ottawa, Ontario: Department of Justice Canada.
- Hall, G.D. 1972. *Irrigable Land Within the Okanagan Basin*. Canada-British Columbia Okanagan Basin Agreement, Preliminary Report No. 3. Penticton, BC: Office of the Study Director.
- Kennedy, Dawnis. 2007. *Reconciliation without Respect? Section 35 and Indigenous Legal Orders*. In *Indigenous Legal Traditions*. Law Commission of Canada, Ed. Vancouver & Toronto: UBC Press. 77-113.
- Moore, Dave. 2004. *The Aboriginal Fisheries Experience In Canada*. In *Water and Fishing: Aboriginal Rights In Australia and Canada*. Sydney, Australia: National Library of Australia. 157-164.
- Olynyk, John M. 2005. *The Haida Nation and Taku River Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accomodation*. Paper prepared for April 2005 edition of the magazine, *Canadian Association of the Petroleum Landman*.
- Province of British Columbia. 1993. *Stewardship of the Water: A Vision for New Water Management Policy and Legislation*. Victoria, BC: Ministry of Environment, Lands and Parks.