Water Law: Lessons from Colonial and Indigenous Stewardship

Professors Deborah Curran and Val Napoleon
Indigenous Law Research Unit and Environmental Law
Centre University of Victoria (Faculty of Law)

Project Description

We are undertaking a research project that will explore how Indigenous communities and licenced water users in the agriculture and utility sectors steward water in the context of Indigenous and colonial water law. Focusing on three watersheds of the province where water use is at issue – the Similkameen, Cowichan, and Nemiah – we will investigate how communities use water in times of plenty and times of drought whether or not they hold the "right" to use water under licence from the provincial government. The intent is to show Indigenous and non-Indigenous community watershed stewardship and practices so as to further build collaborative watershed management relationships and processes in the context of the opportunity created by the new *Water Sustainability Act* (*WSA*). Our interest is sparked by the new *WSA* that keeps in place much of the existing structure of water rights that do not change as stream flow fluctuates. Also, the *WSA* does not acknowledge Aboriginal rights to water, and it fails to consider Indigenous law born of Indigenous societies fulfilling their legal obligations to steward streams and aquifers.

It is clear from existing research that water users do not adhere strictly to their licenced water rights. Rather, in times of shortage or changing economic conditions they trade water, use less water than to which they are entitled, and work with their neighbours to optimize the water balance in their particular watershed. Their motivations are ecological, economic and social: To maintain viable communities water use must change as conditions fluctuate. The gaps between actual water use licenced under colonial law, Indigenous water stewardship, and the letter of the *WSA* raise many important questions about the interaction between watershed (land and water) stewardship and colonial law that have broad applicability to ongoing water issues in the province and elsewhere.

Our objectives are twofold:
(1) To explore the boundaries of Indigenous laws and non-Indigenous licensee behaviour to inform how the new WSA can adapt to local sustainability approaches; and
(2) To articulate and mobilize Indigenous water laws in collaborative watershed-based initiatives.

We therefore ask:
(a) Irrespective of colonial law, how do farmers, water utilities and Indigenous communities steward and manage water, and does this correlate with the categories of the new *WSA*?
(b) How might the *WSA* assist in the stewardship of water in a way that reflects existing local practices, Indigenous law, social relations, economic arrangements and ecological conditions?
(c) Within each Indigenous legal order, what are/have been the legal institutions needed to operationalize Indigenous water law today?
(d) In the partner Indigenous communities, what are the water laws and governing structures that support or undermine the legal order, and how might these be examined or addressed?

What We Will Do

We will interview up to twenty agriculture and utility sector water rights holders in the three regions of the province to uncover how they understand and use their water rights, how they adjust to changes in stream flow in the context of water law, and how they steward water in a watershed context. At the same time, we will work with three Indigenous communities to map their Indigenous water law and draw parallels between Indigenous water stewardship and licenced water user behaviour in the context of specific watersheds.

The Results

Our findings of how water users actually divert and use water in the context of the *Water Sustainability Act* will help us to:

1. Contribute to the mapping of Indigenous law and Indigenous approaches to the stewardship of natural resources;
2. Demonstrate watershed-based approaches to water stewardship and management that are based on socio-ecological and economic needs in a community and occurs outside of colonial legal boundaries. This information will assist local governments, landowners, First Nations, farmers and other stakeholders to collaboratively formulate water management solutions, for example through water sustainability planning or collaborative water conservation initiatives; and
3. Provide input to the provincial government about how the new *Water Sustainability Act* can assist water users to steward water in the context of changing hydrology.

The specific outcomes are to:
i. *Produce* a body of water law and legal processes from each Indigenous legal order and from the informal non-Indigenous normative order in each watershed;
ii. *Collaborate* with the partner communities to restate local water customs and law that will remain with them for further use, application, critical evaluation and refinement, and that will inform collaborative initiatives towards watershed-based stewardship and planning that are beginning to address the reconciliation of Indigenous and colonial legal systems;
iii. *Reveal* local non-Indigenous water stewardship and management customs that can inform the implementation of the new *WSA* and structure of colonial water law, particularly for the creation of water sustainability plans.

Other Collaborators

Partners and collaborators include the Centre for Indigenous Environmental Resources (Merrell-Ann Phare), First Nations Fisheries Council (Deana Machin), Cowichan Tribes (Larry George), Lower Similkameen Indian Band (Tracy Lawlor), Tsilhqot'in Nation (Crystal Verhaeghe), Water Sustainability Branch of the BC Ministry of Environment (Director Lynn Kriwoken), Okanagan Basin Water Board (Anna Warwick Sears), Water Sustainability Project of the Polis Project (Oliver Brandes, UVic), Cowichan Watershed Board (Rob Hutchins) and researchers Michele-Lee Moore (UVic Geography), Steve Conrad (SFU Resource and Environmental Management), Nigel Bankes (University of Calgary Law) and John Janmaat (UBC Okanagan).