

Chapter 19

Water, Riparian, and Foreshore Rights

This chapter provides some basic background information and lists resources for research projects relating to water, riparian and foreshore rights. The type of research you do on these subjects will be different depending on whether you are investigating reserved water rights and other rights associated with them or **Aboriginal Title** to water. As well, your research project may be straightforward or complicated, depending on whether you want basic provincial water license information or a complete history of water rights since the time of reserve allotment.

Key Terms

Water Rights

Water rights provide the authority to use water contained in a particular body of water, such as a stream, river, groundwater system, lake or ocean. Water rights can be substantial or narrow in scope depending on the particular circumstances of each situation. They can also be precisely documented, such as in certain Reserve Commission **minutes of decision**, or they can be implied, such as reserves allocated for agricultural purposes which arguably implied a right to enough water to grow crops. In BC, water rights are managed according to a **priority of registration system**, which will be explained later in the chapter.

Riparian Rights

Riparian rights are rights to water that occur as a natural result of rights to specific areas of land. They are the rights that belong to those who live on the shore of a river, lake or ocean *because* they live there. They include limited rights to use the water and rights to the water in its natural state, in the ordinary amount and quality of the flow. They include the authority to use the bank of a watercourse (such as a river, lake or stream) as well as the waterbed. Riparian rights usually include access to and from the water, protection of the property from erosion, and rights to certain uses of water, such as drinking and other domestic purposes. Riparian rights are recognized by **common law** (based on long-standing practices and case law) rather than by **statute** (a written Act of Parliament), although in certain situations the common law principle can come into conflict with specific statutes.

Foreshore Rights

Foreshore rights are also concerned with rights to part of the waterbed and can include issues of access (such as to beachfront) and may include rights to harvest beach resources, such as shellfish. Foreshore rights deal with rights to waterbeds between high and low watermarks (tides), in the area called the “intertidal zone.”

Historical Overview

Before BC’s entry into Confederation in 1871, the allotment of Indian reserves often mentioned water provisions. In the 1870s the Joint/Indian Reserve Commission (J/IRC) began allotting and adjusting Indian reserves throughout the province. The Commissioners were not given any specific instructions regarding the allotment of water rights. However, they often allotted water along with reserve land, especially in the Interior where access to water was crucial. The Commissioners often specified the amounts of water that could be used, measured in **miner’s inches** (flows of water through a cut hole per minute). They also specified the source, for example, which creek, river or stream from which the water could be drawn. The British Columbia government rejected the J/IRC’s allotments, and they continually asserted that the Indian Reserve Commissioners did not have the power to allocate water rights on reserves.

In 1884 the BC government passed the *Land Act, 1884*, which made no provision for the allotment of water on Indian reserves. The government amended the Act in 1888 and included a provision for the recording of water rights for Indians in the province.

In 1909 the BC government passed the *Water Act* which created a Board of Investigation to review all existing water rights and order the issue of water licenses. The Department of Indian Affairs appointed agents to represent the Indians at Board meetings.

On June 1, 1912, the Dominion government passed the *Railway Belt Water Act*, transferring part of the administration of waters in the Railway Belt to the province. It was amended the following year, confirming the water allotments made by the Indian Reserve Commissioners in the Railway Belt.

The BC government addressed the issue of Indian water rights with the 1921 *Water Claims Act*. Under the Act the province agreed to consider a number of water rights on reserve as set out in lists submitted to the province in the 1880s by local Indian agents. The province later



Irrigation flume,
Kamloops
(BCA F-08001)

incorporated the lists into a licensing process. This licensing process also considered the status of existing licenses, water availability and water usage when issuing water licenses. The Water Rights Board of Investigation made the final decision regarding reserve water licenses. The water allotments under these licenses were considerably smaller than those granted by the Indian Reserve Commission. Since that time water rights on Indian reserves have continued to be administered by the province.

For a more comprehensive treatment of these events, please see the Union of BC Indian Chiefs' 1991 publication *Indian Water Rights in British Columbia*. It is available at the UBCIC Resource Centre.

Researching Water Rights

History of Water Allotments

The documents and records in this section may provide some useful background about the history of your community's water rights. However, there is limited documentation on Indian water rights until 1921. This is because the provincial government controlled water licensing and it did not acknowledge any Indigenous community's right to water until the 1921 *Water Claims Act*. See Chapter 4: Documents for more information on the documents listed here and Chapter 3: Resource Institutions for relevant contact information.

- In the late 1990s, the province published a series of reports titled *First Nations Water Rights in British Columbia*, in which they identified some 135 bands in BC holding water rights records. If such a report has been completed for your band, this may provide useful information. One note of caution: you must double check the material contained in the reports against other sources, as it has been known to contain errors. The reports are available through the provincial Water Management Branch (Land and Water BC Inc.) These reports are also available at the UBCIC Resource Centre.
- To get a complete history of your band's water rights, you will need to establish the facts around the early history of reserve water allotments. Begin by looking at the materials outlined in Chapter 5: Basic Reserve Research. There you will find a list of documents to review. You will want to devote special attention to the J/IRC Minutes of Decision for your band's reserves. This is where you will find the Commissioners' water allocation, if one was made. You may also want to review correspondence and reports of the J/IRC for additional information regarding a particular allotment.
- It may also be important to review the reserve allotments themselves, particularly if your reserve borders a waterway. Look for any material that discusses the intended reserve boundary: was it the shoreline or the middle of a river or stream? As well, consider the practical circumstances that may have affected water allotments. For instance, if a certain amount of water was allotted, was it easy to access and use? Was the allotment meant for a special purpose? How would not having the rights to water have affected the lives of band members? Is there anything now that is

- preventing your community from accessing these rights?
- Even if the J/IRC did not allot water to your community at the time of the original reserve allotments, the Indian agents may have done so at a later date. The lists produced by Indian agents in the 1880s and 1890s can be found in **RG 10** records at Library and Archives Canada (LAC). RG 10 Finding Aid 10-52 is particularly useful as it indicates a series of files that contain the Indian agent lists.
 - Check the Indian Affairs 1913 reserve schedule as it lists existing water records on BC Indian reserves. Also, check the 1916 Royal Commission (McKenna-McBride) Final Reports to note any changes to water allotments.
 - For a record of the provincial Water Rights Board of Investigation's decisions and orders regarding Indian reserves, contact the Water Management Branch of Land and Water BC Inc. Call ahead to make an appointment to view the documents related to your reserves.
 - You may also review archived land and water records at the BC Archives. Of particular note is the Archives' inventory of Records Relating to Water Rights in British Columbia, located in the BC Archives reference area. This provides an overview of how the province has administered water issues over time and a detailed listing of the many different government record groups within BC Archives dealing with water rights (including GRs 0884, 0972, 1086 and 1443, among others). BC Archives also has a number of water rights plans that would also be useful for this type of research.
 - For information about water rights within the Esquimalt and Nanaimo Railway Land Grant and details about ownership of beds of non-navigable water in the Peace River Block and Railway Belt, see W.A. Taylor, *Crown Land Grants: A History of the Esquimalt and Nanaimo Railway Land Grants, the Railway Belt, the Peace River Block* (Surveyor General Branch, Ministry of Environment, Lands and Parks, 1993 [reprint]). It is available at the UBCIC Resource Centre.

Water Licenses and the Priority of Registration System

The provincial government is responsible for issuing water licenses, which convey certain water rights to license holders. Water licenses are issued for many purposes such as irrigation, waterworks and providing water for livestock. The Water Management Branch of Land and Water BC Inc. also generates license reports. These reports indicate the amount of water each band is authorized to use and the priority date of the water license. For instance, a license with a priority date of January 24, 1969 has a prior right to water over a license with the priority date of June 1972. The next in line has second right and so on. This first right is crucial if there is a water shortage, as the party with the earliest priority date has its access to the available water protected by law. For this reason it is very important for you to note all licenses held by the band along with the priority date and amount of water licensed. Include this information for all other licenses on a particular water source so that you know how your band's priority date and water allocation compares to others.

The Water Management Branch of Land and Water BC Inc. is your best resource if you want to investigate the record of your provincially assigned water licenses. The Water Management Branch has a database that will provide you with information regarding your band's current and expired water licenses. This database can also supply you with file reference numbers for your band's water licenses. You can use these reference numbers to investigate the official correspondence relating to your license. The database can be accessed on the Internet at <http://srmwww.gov.bc.ca/sstu/portal>. Click on the "water rights" link and then "water license query."

You can also review Water Management Branch files relating to licenses allotted in the 1920s. In fact, any Indian band water license with a priority date in the 1880s or 1890s is likely based on a J/IRC allotment, and so is worth checking. The Branch can also supply you with data regarding all other licenses held on water sources of interest to you.

Some Water Management Branch record searches can be done using the Internet; other searches may have to be done by Water Management Branch staff. Note that the Water Management Branch charges a fee for database searches, copies and file access. While you can access water licenses online, you will have to contact the Branch directly for any correspondence in relation to a particular license.

Researching Riparian and Foreshore Rights

Because riparian and foreshore rights exist in common law rather than as rights protected by statute, they may be explicitly limited by legislation. This is the case in British Columbia, where the Province owns nearly all the freshwater and saltwater foreshore. Furthermore, riparian and foreshore rights are the subject of a great deal of legal debate. So, although riparian and foreshore rights are clear under common law they are by no means clear in practice in the province of British Columbia. The BC government does not recognize Indigenous community ownership or right to the foreshore.

From a research perspective, your task should be to identify and document the area of land and the body of water in question. A basic history of the reserve, including a good selection of maps is essential. Some BC Department of Lands GRs at BC Archives have information on foreshore leases. Contact Land and Water BC Inc. for any recent information on foreshore leases.

As well as basic reserve research, traditional use research of foreshore areas could be helpful to press for recognition and protection of foreshore/riparian rights. Please see Chapter 10: Maps and Surveys and Chapter 6: Oral History for further information. You may want to consider consulting legal counsel for an analysis of current case law in this area.

Resources

- Bartlett, Richard H. 1988. *Aboriginal Water Rights in Canada: a Study of Aboriginal Title to Water and Indian Water Rights*. Calgary: Canadian Institute of Resources Law.
- Barton, Barry. 1985. *Water Resources and Native Peoples*. Conference Paper: Canadian Waters: the State of the Resource. Calgary, AB. (Available at the UBCIC Resource Centre).

- British Columbia. Ministry of Lands, Parks & Housing. July 1984, Revised 1995. *Riparian and Public Foreshore Use In the Administration of Aquatic Crown Land*. Occasional Paper No. 5. Victoria: Ministry of Environment, Lands and Parks
- Cail, Robert. E. 1974. *Land, Man and the Law: The Disposal of Crown Land in British Columbia, 1871-1913*. Vancouver: UBC Press.
- Doran, Janis. *History of Water Rights on Indian Reserves in British Columbia (Circa 1850-1930)*. 1982. Ottawa: Department of Indian Affairs and Northern Development.
- Smith, Donald M. 1985. *Water Rights on Indian Reserves in British Columbia*. Ottawa: Department of Indian Affairs and Northern Development.
- Starr, Vina. 1985. *Indian Title to Foreshore on Coastal reserves in British Columbia*. Ottawa: Department of Indian Affairs and Northern Development.
- Tyler, Kenneth J. 1982. *Indian Resources and Water Rights*. Canada Land Survey Record: 4.
- Wuerscher, Rose Boyko. 1982. *Title to the Water Bed: The Legal History of the Ad Medium Filum Aque Rule*. Ottawa: Department of Indian Affairs and Northern Development.
- Union of BC Indian Chiefs. 1991. *Indian Water Rights in BC*. Vancouver: Union of BC Indian Chiefs.

Websites

BC Ministry of Sustainable Resource Management, Land and Registry Portal
<http://srmwww.gov.bc.ca/sstu/portal>