Water policy reform and Indigenous governance

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Abstract

Concerns related to the governance of water that have emerged at the global scale have created pressure for, and an increase in, water policy reform in many countries. Simultaneously, Indigenous governance movements related to self-determination are undergoing an immense period of growth and change worldwide; the 2007 United Nations Declaration on the Rights of Indigenous Peoples has been a milestone of this growth. These movements are significant because of Indigenous peoples’ asserted rights to lands, waters, and natural resources. In this paper, we explore the extent to which water policy reform efforts recognize concepts of Indigenous governance and self-determination. The extent to which these concepts are recognized is critical because water policy reform often occurs in the asserted traditional territories of Indigenous peoples. Using an empirical case study of water policy reform in British Columbia (BC), Canada, we demonstrate why in Indigenous traditional homelands, water policy reform efforts should have regard for the main tenets of Indigenous governance. The findings indicate that, problematic assumptions exist regarding the role of First Nations. These assumptions have the potential to undermine the prospects for water policy reform. Revisiting these assumptions may be the basis for more effective, enduring policy changes. Implications for water reform processes around the world are discussed.

Keywords: British Columbia; Canada; Collaboration; Indigenous governance; Indigenous self-determination; Public participation; Water governance; Water policy; Water policy reform

1. Introduction

Water policy reform is underway at local, regional, national, and international scales around the world. Drivers for reform typically include water quantity and quality problems; a growing economic interest in water resources; current and anticipated effects of climate change on water; concerns about ecological water flows; and uncertainty over rights to and ownership of surface and groundwater (Connick & Innes, 2003; Wheida & Verhoeven, 2007; Ioris, 2009; Gutierrez, 2010; Wilder, 2010). Concurrently, there is a global-scale Indigenous movement that is gaining momentum, particularly regarding

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self-determination and the reassertion of Indigenous rights to lands, waters, and natural resources. Tensions can arise in cases where water policy reform is occurring on lands that overlap with the (re)asserted traditional homelands or territories of Indigenous peoples. For example, in Tanzania, changes to institutions for water access failed because the concerns of Indigenous water rights-holders were not addressed satisfactorily (Potkanski & Adams, 1998; Brennan, 2001).

The challenges of undertaking water policy reform in jurisdictions overlapping with Indigenous traditional homelands are clearly evident in Canada. Water reforms are underway in several Canadian provinces and territories (Bakker & Cooke, 2011). Simultaneously, Indigenous rights and titles to lands and water remain politically contentious and unresolved (Borrows, 2005; Phare, 2005).

The drivers of water policy reform in Canada mirror those in other jurisdictions. Canada has substantial freshwater resources compared to many other countries. Nonetheless, critics of Canadian water policy point to problems relating to the depletion, diversion, and contamination of water across the country and the need for leadership from governments (Shrubsole & Draper, 2006; de Loë, 2009). Alongside growing recognition of water problems in Canada that demand policy reform, there is a new awareness among Indigenous peoples in Canada regarding their rights and title to the water, traditional territories, and lands they occupied prior to European contact. This is manifested in numerous ways, including, but not limited to, cases that come before the court system, land claims, modern Aboriginal treaties, political demonstration, and Indigenous peoples simply making decisions about the lands within their traditional territories (Borrows, 2005; Spak, 2005; Dalton, 2006).

The Indigenous governance literature captures some of the themes and issues that are voiced by Indigenous peoples around the world. This literature is a field of scholarly discourse centered on the fact that many self-determining Indigenous nations pre-dated and persisted through colonial settlement and ongoing oppression (Battiste, 2000; Mucina, 2004). An important focus in contemporary Indigenous governance literature is on the need for Indigenous peoples to assert their right to self-determination in a variety of global contexts (Smith, 1999; Little Bear, 2000; Deloria & Wildcat, 2001; Osorio, 2001; Mucina, 2008). While authors in this literature do not speak for all Indigenous peoples, they certainly reflect the kinds of concerns that Indigenous peoples have expressed in countless settings, not least of which are the forums that preceded the creation of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (United Nations Economic and Social Council (UN/ECOSOC), 2005; United Nations General Assembly, 2007). Water policy reform literature, on the other hand, is concerned with various aspects of policy reform including the role of change agents (Wilder, 2010); the politics of water policy reform (Gutierrez, 2010); the advantages and shortcomings of various approaches to water policy reform (Gerlak, 2008; Ingram, 2008; Ioris, 2009); and the concepts that underpin policy changes (Huitema et al., 2009). Attention to the kinds of issues and concerns that are expressed in the Indigenous governance literature is largely absent in this literature. Given growing global recognition of the rights of Indigenous peoples, we suggest that this is an important gap to bridge.

The purpose of this paper is to explore the challenge of integrating the perspectives of Indigenous peoples in water policy reform processes. The first section reviews relevant Indigenous governance and water policy reform scholarship, and discusses how they intersect. The next section presents an empirical case study: water policy reform in British Columbia (BC), Canada. This case is important because in the Province of BC very few treaties have been signed between the Crown and First Nations, making the question of self-determination particularly relevant to how provincial government
water policy is made or reformed. In BC alone, there are 199 distinct First Nations. Aboriginal\(^1\) individuals make up just under 5% of the total population of BC (BC MARR, 2012; BC MMS, 2012) and have an unemployment rate that is approximately 14% higher than non-Aboriginal British Columbians (BC MMS, 2004a). Over a third of off-reserve Aboriginal households in BC are considered low income compared to one-fifth of non-Aboriginal households (BC MMS, 2004b). These demographic disadvantages, combined with the legacy of colonialism, have created significant capacity issues for First Nations in BC. A lack of resources and the small size of the Indigenous population in BC hinder efforts to reassert self-determination and Indigenous nationhood. Nonetheless, these efforts are ongoing – and thus reconciling Indigenous concerns in water policy reform in BC is an important challenge.

2. Water policy reform and Indigenous self-determination

2.1. Indigenous governance

Indigenous governance concerns are expressed in a diverse field of scholarship that addresses topics such as colonialism, self-determination, Indigenous knowledge, indigeneity, race, and marginalization as they relate to Indigenous peoples around the world. A central focus of the Indigenous governance literature is on concepts of Indigenous self-determination and nationhood (see Ransom & Ettinger, 2001; Ladner, 2004; Alfred, 2005; Shadian, 2007; Coulthard, 2008). This focus is driven by real-world struggles related to the contested legal and political status of Indigenous peoples (Ladner, 2004; Borrows, 2005) and the historical and ongoing oppression of Indigenous peoples in countries where colonization has occurred (Smith, 1999; Corntassel, 2003; Mucina, 2008). The Indigenous Peoples’ Kyoto Water Declaration (United Nations Educational, Scientific and Cultural Organization, 2003: 2) defines Indigenous self-determination as follows: ‘Self-determination for Indigenous Peoples includes the right to control our institutions, territories, resources, social orders, and cultures without external domination or interference.’ The definition of who may be considered Indigenous varies among countries, continents and contexts. After distilling a variety of organizational and academic definitions, Corntassel (2003) offers the following definition of Indigenous:

‘(1) Peoples who believe they are ancestrally related and identify themselves, based on oral and/or written histories, as descendants of the original inhabitants of their ancestral homelands; (2) Peoples who may, but not necessarily, have their own informal and/or formal political, economic, and social institutions, which tend to be community-based and reflect their distinct ceremonial cycles, kinship networks, and continuously evolving cultural traditions; (3) Peoples who speak (or once spoke) an indigenous language, often different from the dominant society’s language – even where the indigenous language is not ‘spoken’, distinct dialects and/or uniquely indigenous expressions may persist as a form of indigenous identity; (4) Peoples who distinguish themselves from the dominant society and/or other cultural groups while maintaining a close relationship with their ancestral homelands/sacred sites, which may be threatened by ongoing military, economic, or political encroachment

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\(^1\) The term Aboriginal in Canada includes individuals who are First Nations, Métis, or Inuit.
The reassertion of Indigenous rights, responsibilities and identities tied to Indigenous traditional territories or homelands is occurring around the world, and is an essential aspect of moving toward decolonization (Smith, 1999; LaDuke, 2005). Indigenous reassertion of self-determination, identity, ways of knowing, and rights to traditional homelands is occurring in many countries around the world. Examples include Australia, where Indigenous people have asserted rights to self-determination, land, and sacred sites (Smith, 2004); Zimbabwe, where Ubuntu philosophies have enabled Indigenous peoples to maintain their identity (Mucina, 2008); New Zealand, where Maori have asserted sovereignty and self-determination (Coombes, 2007); and Finland, where the Sami Indigenous peoples have created a Sami Parliament and coordinated their efforts to assert Indigenous rights in Finland, Sweden, Russia, and Norway (Henricksen, 2001; United Nations General Assembly, 2007; Feodoroff & Lawrence, 2009).

Indigenous governance scholarship rooted in empirical research within Canada and the United States argues that many Indigenous peoples existed, continue to exist, and have inherent rights within the unceded, self-determining nations that pre-existed European settlement (Deloria & Wildcat, 2001; Corntassel, 2003; McGregor, 2004; Turner, 2006). The term nation refers to Indigenous peoples who are politically sovereign (Christie, 2007), whereas nationhood is based on ‘cultural practices, sacred histories, citizenship requirements, judicial systems, and governmental bodies’ (Corntassel & Witmer, 2008: 4). Conceptually, Indigenous self-determination concerns the reassertion of governance by Indigenous people of their pre-contact homelands and rights, and the reinvigoration of Indigenous ways of governing, language, knowledge, culture, and spirituality (Smith, 1999; Battiste, 2000; Deloria & Wildcat, 2001; Corntassel, 2003; McGregor, 2004; Alfred, 2005; Borrows, 2005; Turner, 2006; Coulthard, 2008). While there are a wide variety of political positions, legal statutes, rights, and values of Indigenous people in Canada and the United States, Indigenous governance literature tends not to assume that Indigenous people have been assimilated into the colonial state. Instead, North American Indigenous governance literature often takes the position that Indigenous people have not ceded their traditional territories or homelands (see Borrows, 2005; Simpson, 2008; Alfred, 2009). This position is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UNGA, 2007) which affirms Indigenous peoples’ right to their lands, resources, and territories.

Stemming from this set of assumptions regarding traditional territories and self-determination, Indigenous people are viewed by some Canadian Indigenous governance scholars as holding sui generis rights (Turner, 2006), or rights that flow from legitimate, politically sovereign nations that pre-existed European contact (Alfred, 2005; Borrows, 2005; Turner, 2006; Phare, 2009). These rights differ from minority rights, which are derived from ethnic, religious, cultural, sexual, or class distinctions. In the context of water policy reform, the sui generis distinction is important since it positions Indigenous peoples as nations or governments, rather than as minorities, interest groups, or stakeholders. We suggest that the emerging reality, represented in part by the UNDRIP, is that Indigenous peoples cannot and should not be treated simply as one among many interest groups in water policy reform processes.

2.2. Water policy reform

Policy reform is defined here as a process in which changes are made to policies, laws, regulations, or other institutions to address a goal such as environmental protection (adapted from OECD, 2006). Academic
interest in water policy reform reflects an increase in real-world water policy reform – or perceived need for reform – in many countries around the world. Numerous factors are stimulating this concern. In some countries, growing demands for fresh water for agricultural, urban, and environmental purposes, combined with population growth and drought-induced low water flows, have triggered water policy reforms (Weinberg, 1997; Wheida & Verhoeven, 2007; Prasad, 2008; Wilder, 2010). Globally, there have also been economic and budgetary drivers of water policy change that stem in part from the need for water in both industrial development and water for ecological purposes; in some cases this has led to economic incentives for conservation and the introduction of water markets in countries such as China, Mexico, Spain, and Australia (Dinar, 1998; Tisdell & Ward, 2003; Heaney et al., 2007; Nickum, 2010). Other reasons for water policy reform are linked to ideological agendas (Gutierrez, 2010); a growing awareness and attitudinal changes of citizens on the perception and use of water resources (Pigram, 1999; Ioris, 2009; Neuman, 2010); political or governance reforms (Nicol & Mtisi, 2003); and attempts to adjust policies to correspond with a watershed scale for management (Huitema et al., 2009).

Water policy reform has occurred or is occurring in many countries around the world. On the continent of Africa, countries such as South Africa, Malawi, Tanzania, and Zimbabwe have undertaken significant water reforms (Nicol & Mtisi, 2003; Marra, 2008; Lein & Tagseth, 2009; Nhapi, 2009). In South America, the decentralization of water management, the privatization of water rights, and institutional changes have each played a part in water policy reform in countries such as Brazil, Argentina, Peru, Colombia, Chile, and Bolivia (Olivera, 2004; Berger et al., 2007; Ioris, 2009; Gutierrez, 2010; Wilder, 2010). In Asia, countries such as Vietnam, China, and Israel have undergone water policy change (Fforde, 2010; Fischhendler & Heikkila, 2010; Mollinga, 2010; Nickum, 2010), as have countries in Europe (Calatrava & Garrido, 2005), where the Water Framework Directive provided the guidelines for significant reforms (Watson & Howe, 2006; Ioris, 2009). Australia has undertaken national-scale water policy reform through the National Water Initiative and has used mechanisms such as pricing and markets to address issues of water property rights and over-allocation of water (Pigram, 1999; Tisdell & Ward, 2003; Bjornlund, 2006; Heaney et al., 2007; Crase et al., 2009; Department of Sustainability, Environment, Water, Population and Communities, 2010). In North America, reforms to water policies at regional and national scales have occurred or are underway in Mexico, the USA, and Canada (Weinberg, 1997; Gerlak, 2008; Kallis et al., 2009; Neuman, 2010; Wilder, 2010). In the Western USA, for example, water policy is reformed in the context of Indigenous water rights settlements negotiated among state governments, the federal government, and Indigenous claimants (Bark et al., 2012). In the context of some regions of the USA, these settlements have had an impact on water policy and have led to water management innovations (Bark & Jacobs, 2009).

Techniques and processes commonly used for water policy reform are diverse and include public participation (Huitema et al., 2009; Ioris, 2009; Wilder, 2010); stakeholder participation methods (Gerlak, 2008; Huitema & Metjerkink, 2009); collaborative processes (Connick, 2003; Kallis et al., 2009); and top-down water policy restructuring by the state (Pigram, 1999; Cooke & Kothari, 2001). For example, in New Zealand, the government has used redress-type legal mechanisms and co-management arrangements in the context of Indigenous water claims to address water policy needs (Ruru, 2013).

2.3. Intersection of water policy reform and Indigenous governance

Assumptions regarding Indigenous people as stakeholders, minority groups or interest groups, rather than as Indigenous nations or as sui generis rights-holders, can be found in the literature pertaining to water policy
reform. These assumptions can be observed within discussions of public participatory approaches to water policy reform, as well as in other discussions of policy reform pertaining to water jurisdiction, ownership, or rights. Public participation, defined as a ‘multi-way set of interactions among citizens and other players who together produce outcomes’ (Innes & Booher, 2004: 419), is an approach that stems from the normative value placed on the democratic goals of public deliberation (Innes & Booher, 2004) and on increasing complexity in issues being addressed in the public sphere (Lenihan, 2012). The process of participation by water users and citizens in water-related decision-making, including water reform, is widespread globally (Gleick, 2000; Conca, 2006; Ioris, 2009; Wilder, 2010). Where these techniques for reform are generalized to public participation that includes Indigenous peoples, problematic assumptions arise.

Problematic assumptions regarding Indigenous people that are made by policy-makers and water policy scholars are visible in public participation approaches to water policy reform. Broadly speaking, public participatory approaches are founded on the idea that citizens assemble themselves into organized interest groups to influence the way government formulates policy (Day, 1997). This idea is inconsistent with concepts found in Indigenous governance literature, which argues that Indigenous people are not just ‘citizens’ or ‘interest groups’ but rather are Indigenous nations and (in jurisdictions where this legal concept is relevant) sui generis rights-holders. This perspective is diametrically opposed to the one adopted by governments that view Indigenous peoples as ordinary citizens.

Water policy scholarship often accepts the public participation perspective endorsed by governments. For example, in the context of the USA, Kallis et al. (2009: 639) lump Indigenous peoples alongside other ‘weaker actors’ including ‘low-income groups, small farmers … people of color, and more radical environmental interests’. These authors are endeavoring to identify those who were marginalized in participatory processes – which is a laudable goal. However, in taking this approach, Indigenous peoples are not recognized as the original stewards and/or right holders of the watersheds and lands where the policy applies. A similar viewpoint runs through much of the water policy literature in general. For example, in examining water markets and water management reform in Australia, Tisdell & Ward (2003) discuss water rights and farmers’ water entitlements beginning at the historical time of European settlement, but do not discuss pre-contact Indigenous rights, self-determination, or entitlements to water, concerns that are well represented in international literature (Mercer, 1993; Gibson, 1999; Nichols, 2002). Jackson et al. (2012) discuss Indigenous peoples as holding a stake in land and water resources which contrasts with them being discussed as the inherent rights-holders to unrelinquished waters and lands.

Recognizing Indigenous peoples as nations and/or sui generis rights-holders, as opposed to stakeholders or other synonymous terms, is conceptually and practically important for water policy reform. In a ‘stakeholder’ role, Indigenous peoples risk being misrepresented as not having nation status or decision-making authority over waters, lands, and natural resources (Alfred, 2005; Phare, 2005; Boelens et al., 2010). This characterization of Indigenous peoples and their relationship to water is understandable given that from a legal perspective, states tend to assume ownership of water resources, and manage them accordingly (Mollinga, 2010). With some exceptions, e.g., Boelens et al. (2012), water policy literature tends to follow this assumption. This is a concern because of the legitimate persistence of Indigenous nations and continued rights to lands and waters despite colonization – a position reflected in documents such as the UNDRIP and the Kyoto Water Declaration (United Nations Educational, Scientific and Cultural Organization, 2003: 2), which states:

‘We Indigenous Peoples have the right to self-determination. By virtue of that right we have the right to freely exercise full authority and control of our natural resources including water. We also refer to our
right of permanent sovereignty over our natural resources, including water … Self-determination includes the practice of our cultural and spiritual relationships with water, and the exercise of authority to govern, use, manage, regulate, recover, conserve, enhance and renew our water sources, without interference.’

Water policy reform processes that fail to acknowledge this tension are problematic.

3. Case study in British Columbia – Provincial Water Act reform

3.1. Research context

The intersection of state-driven water policy reform and Indigenous self-determination in BC, Canada provides an empirical example that demonstrates the importance of addressing this conceptual gap. BC is Canada’s western-most province. Very few treaties have been signed between the Crown and First Nations in BC, and the majority of the province is covered by unceded, traditional territories of First Nations peoples (Figure 1). These Indigenous nations pre-existed colonial contact and are located within the jurisdiction claimed by the Crown. There were and are a diversity of perspectives, institutions, cultures, languages, and governance – including water rights and responsibilities – within and among pre- and post-colonial Indigenous communities in Canada.

Since 2008, the Water Stewardship Division (WSD) of the BC Ministry of Environment has been working to reform the BC Water Act (RSBC, 1996), the primary water legislation in the province. The WSD’s responsibilities include water licensing; surface water-related data collection and forecasting; and groundwater monitoring and collection. The WSD’s stated mandate includes supplying safe and reliable community water and using science to inform decision-making (British Columbia Ministry of Environment, Water Stewardship Division, 2008). As a division of the Provincial Ministry of Environment, the WSD does not enact water legislation nor sign treaties with First Nations. Nonetheless, its staff played a key role in leading the water reform process.

The Province’s interest in reforming the Water Act was driven by multiple factors including, but not limited to, climate change; the need for greater certainty on the part of natural resource industries (which are an essential part of BC’s economy); insufficient ecological flows in many rivers and streams; and a host of water quantity and quality issues (British Columbia Ministry of Environment, 2008, 2010c, d; British Columbia Ministry of Environment, Water Stewardship Division, 2008). In leading the effort to ‘modernize’ or reform the BC Water Act, the WSD used a public participation process. Its Living Water Smart program (British Columbia Ministry of Environment, 2010b) gathered public feedback on the ideas surrounding the reform of the Water Act through processes such as an online blog where the public could comment on ideas put forth by the WSD and other respondents. The Division also held public meetings in several locations throughout the province to obtain feedback and ideas on the proposed water policy reform. The public meetings were town-hall like meetings held in 12 towns or cities in BC; 3 of these meetings were specifically held for First Nations.

2 In Commonwealth realms ‘the Crown’ refers to ‘the state’ at national, provincial, and sometimes other scales of government.
3 The term First Nations is used to describe Indigenous peoples in Canada who self-identify as First Nations. This term is not inclusive of Inuit, Metis, or other Indigenous peoples.
4 The traditional territories of Indigenous peoples is the term used to describe the territories, lands, or homelands that were, and may continue to be, occupied by Indigenous peoples.
Fig. 1. First Nations traditional territories in British Columbia, Canada (Map sources: TNG, 2011; Province of British Columbia, 2012; Sinixt Nation Society, 2012).
3.2. Methods

Empirical research focused on the water policy reform in BC, the public participation approach used to modernize the Act, and the views of Indigenous and non-Indigenous peoples regarding this process. Data used in this paper were collected as part of a larger study that examined governance for water in BC, Canada (von der Porten & de Loë, 2013, in review). Data were collected from three sources: interviews with key informants; personal observations by the first author during public meetings, workshops and other functions where people involved in water policy reform interacted; and a range of academic and non-academic documents. Questions used to frame data collection emerged from the literature reviewed. They focused on assumptions regarding the role of Indigenous peoples, processes used, and outcomes:

- What are the underlying assumptions held by the Province and by First Nations regarding the role of First Nations in the Water Act reform process in BC? What did these assumptions demonstrate regarding positions and assumptions held by the state and First Nations?
- What public participation processes were utilized by the Province in reforming the Water Act? And how do they relate to First Nations?
- Were the processes of water policy reform viewed as satisfactory by First Nations and by the Province? How did these views relate to assumptions regarding the role of First Nations peoples?

In total, 49 people were interviewed using a semi-structured format as a part of the larger project; of those, 24 interviews were applicable to this research on Indigenous governance and water policy reform. These 24 people included seven non-Indigenous provincial bureaucrats involved in the water reform process, and six non-Indigenous people representing non-government organizations. Twelve of the 24 people interviewed identified as Indigenous or First Nations; of these 12, three were academics, while the others were in leadership positions within First Nations governments, nations, or governments. The goal of the interviews was to speak with individuals who were in influential positions within their organizations. Potential interview participants were identified from personnel profiles of organization employees, and from recommendations made by other interviewees. Often, key individuals were identified by several different respondents as important, which in turn reinforced additions and modifications to the list of interview candidates. In this way, snowball sampling was used as the method for reaching the target population (Atkinson & Flint, 2004). Interviews were digitally audio-recorded, transcribed verbatim, and member checked through returning the transcripts to the interview subjects for verification. The document analysis phase of data collection focused on 183 documents, including meeting minutes from the various organizations, Province of BC publications, and published reports. Personal observations were documented throughout the interviews and at two public meetings related to water policy reform and Indigenous peoples.

QSR NVivo 8 software was used to organize, code, and analyze the interviews, documents, and personal observations, and to facilitate triangulation among data sources (Alexander et al., 2008). Categories within these sources were created initially using first-pass, open coding (Richards, 2005), where codes were used to identify key phrases, common ideas, and emergent ideas within the interviews, documents, and personal observations (Creswell, 2007). First-pass codes on interview data and personal observations were created simultaneous to their transcription, and where possible, before the next interview or set of interviews. Next, axial second-pass coding was applied to the data
to identify emergent themes (Seale, 2004; Gladstone et al., 2006) relevant to the questions underlying the research.

4. Results

Findings are organized around major themes that emerged from the data, including underlying assumptions, the nature of the public participation process, and perceptions regarding actual and anticipated outcomes of the reform process. In discussing these issues, interview subjects frequently offered ideas and suggestions for how the concerns could be addressed. This section concludes with a synthesis of these suggestions.

4.1. Foundational assumptions

Analysis of the data revealed several underlying assumptions held by the Province and by First Nations regarding the role of First Nations in the Water Act reform process in BC. All 12 of the First Nations/Indigenous interview respondents discussed First Nations as having jurisdictional, decision-making, and/or legal rights to water in their traditional territories, and all 12 took the position that Indigenous traditional territories in BC have remained unceded since colonial contact. In contrast to this, of the seven provincial bureaucrats interviewed, six considered First Nations as one of many groups or citizens that ought to be included in a public participatory water policy reform process; one person oscillated between the ‘stakeholder’ and ‘nation’ views of Indigenous peoples. As demonstrated below, documents analyzed for the study reflected the same pattern.

Disagreement regarding the question of whether or not First Nations are ‘stakeholders’ emerged as a key theme in the analysis. First Nations unequivocally did not view themselves as citizen groups, interest groups, minorities, or stakeholders, but rather as nations, governments, and/or the rightful decision-makers over their traditional territories and associated waters. The discrepancy in assumptions is demonstrated in a letter written to the WSD by Ken Cossey, Lands Manager for the Tsawout First Nation regarding Water Act reform (Tsawout First Nation, 2010: 1):

‘While I can support the modernization of the [A]ct, … the format of the First Nation sessions has started with the wrong assumption; this assumption suggests that the province has assumed it alone controls and owns the resource.’

This perspective on jurisdiction, which was voiced by nine of the First Nations people interviewed for this study, was articulated clearly by a First Nations interviewee who was a leader within a political advocacy organization:

‘We have rights which were never extinguished, to the water, to use the water, to protect the water, to use it with our traditional ecological knowledge. It’s part of what we feel is our title to the land and the resources. And in no way is it that we’re just another interested party.’

Five First Nations interviewees emphasized that the original Water Act, enacted in 1909, was based on assumptions about Indigenous peoples held by the colonial government at the time of settlement, and
still prevalent today. These assumptions stemmed from the presumed Crown ownership of lands and waters. Ownership of water in BC was assumed by the Crown under the Act, and rights to use water were then assigned by the provincial government under licenses (Government of British Columbia, 1946). Nonetheless, First Nations individuals interviewed during this study tended to view their nation as continuing to hold the rights and responsibilities to the water within their traditional territories. One First Nations interviewee pointed out that the current process of reform and modification to the same Act that was written in 1909 fails to address the larger outstanding issue between the Crown and First Nations regarding rights to, ownership of, and jurisdiction over water and lands.

Disagreement regarding the assumptions made by both First Nations and the Province is apparent in a letter to the WSD by the Union of BC Indian Chiefs (UBCIC) that refers to a Provincial discussion paper (British Columbia Ministry of Environment, 2010a) on Water Act reform (Union of BC Indian Chiefs, 2010: 7):

‘The proposed principals [sic] outlined in the Discussion Paper completely fail to address Aboriginal Title and Rights, and operate under the continued assumption of provincial jurisdiction asserted in the current and outdated Water Act. We do not believe the province of B.C. has the jurisdiction to make unilateral definitions or decisions regarding water usage.’

In contrast to the assumptions and positions asserted by First Nations, the provincial perspectives tended to assume that First Nations are one of many groups, sectors, stakeholders, or interests who ought to have a say in Water Act reform. The rationale for First Nations inclusion was articulated clearly by a non-Indigenous provincial bureaucrat:

‘We can’t solve problems like watershed management by ourselves and if we don’t partner with citizens to do that, and by citizens I mean everyone, First Nations, NGOs, the average person watering their lawn, developers, … if you don’t get everyone to the same table to start sharing both resources and responsibilities … there won’t be a planet left.’

This quotation demonstrates a laudable commitment to a shared approach to water governance and recognition of the fact that numerous people in BC have an interest. However, it is based on a public participation model that assumes that First Nations are simply stakeholders, like developers and ordinary citizens who water their lawns. Similar assumptions were contained in publications by the Province written about the Water Act reform process. For instance, the Province’s Technical Background Report states that ‘Advice and participation from First Nations and other stakeholders in the watershed could be sought during the water allocation planning process’ (British Columbia Ministry of Environment, 2010c: 32). Reflecting a degree of awareness about the issue, other reports by the Province assert that First Nations are not simply stakeholders (British Columbia Ministry of Environment, 2011). As noted below, the tension between these two contradictory positions runs throughout the entire water reform process.

4.2. Nature of the public participation approach

Analysis of the public participation processes utilized by the Province in reforming the Water Act demonstrated unresolved positions and assumptions by the state and First Nations regarding First
Nations rights, title, and roles. The public participation tools used by the WSD included an online *Living Water Smart* blog launched in December 2009 that invited all British Columbians, including First Nations, to comment on the proposed water policy reforms. Additionally, the WSD released a *Discussion Paper* outlining proposed options and ideas related to the water policy reform and written to create a platform for feedback. The WSD delivered 12 regional workshops during March and April 2010 throughout the Province of BC; three of these workshops were for First Nations specifically.

The public participation approach to water policy reform used by the WSD was similar to processes used elsewhere in Canada, and internationally. If not for the specific issue of its compatibility with First Nations perspectives, it would likely be evaluated as an effective strategy based on current public participation practices. Nonetheless, it was used in a setting where First Nations people have clearly articulated and documented reassertions to their unrelinquished traditional territories – and thus the research revealed unresolved tensions. These related to underlying assumptions, and to the particular tools and processes that were used to gather feedback on the proposed policy reform, particularly the blog and the workshops. First Nations believed that the processes used were not an appropriate way to have nation-to-nation discussions on the topic of water. This critique is captured well in the observation of a First Nations interview respondent:

‘If you look at what the Ministry of Environment has done with the modernization of the Water Act, [First Nations] have been highly critical of process because it is largely blog process, online. That is not how the Federal and Provincial governments communicate with each other, [i.e.] through a blog process. They engage at senior levels in discussions or agreements.’

Similar disapproval about the processes used for water policy reform in BC were outlined in interviews with First Nations and in documents written by First Nations. Many First Nations viewed the blog and workshops as appropriate for water users and interest groups, but as inappropriate for government-to-government or nation-to-nation engagement with First Nations who have Aboriginal title and rights protected under the Canadian Constitution (Schedule B to the *Canada Act* 1982 (UK), 1982: c. 11). This view is articulated in a public letter to the Minister of Environment from the First Nations Leadership Council (BC) that comments on First Nations engagement in the *Water Act* reform (First Nations Leadership Council, 2011: 1):

‘There has been no distinct process with First Nations outside the online public Blog process; and it is highly questionable whether the previous three workshops, with a combined total of approximately 60 First Nations individuals in attendance, truly resulted in a forum representative of the 203 First Nations communities around the province. It is our understanding from First Nations that these were not representative workshops and, therefore, did not constitute meaningful engagement with First Nation Governments.’

Four First Nations leaders interviewed specifically noted what they considered the inappropriate nature of the First Nations workshops based on the fact that different Indigenous nations were invited to the same public workshops. First Nations interviewees pointed out that these different nations have differing opinions about the topics being discussed; have their own processes and protocols for meeting with other First Nations that are different than those initiated by the Province; and have decision-making
protocols that cannot necessarily be represented by an individual First Nations community member who independently chooses to attend the workshop.

The Province’s choice of public consultation techniques for water policy reform seems to have been closely linked to the assumptions and positions it took regarding the roles of First Nations in water-related decision-making. The following quotation from a senior Provincial official demonstrates this connection:

‘When it comes to First Nations communities, or First Nations government, the ‘must-do’ is the legal requirement. So what [is the Province] required to do before we change the Water Act? Our assessment is legally, not much at all, frankly. Legally the province can go ahead and define what it wants in the Water Act, and do it. Are we collaborating with [First Nations] to change the legislation? No … we are seeking input. We will talk to First Nations to the extent it makes sense.’

This perspective was common among interviewees from the WSD, who emphasized that the public participation approach was being used to actively engage all water stakeholders in the water policy reform process.

4.3. Satisfaction with reform processes

The results indicated that the difference in views, approaches, and assumptions held by the Province and by First Nations prevented the realization of a process of water policy reform that was satisfactory to First Nations and the Province. While the Province focused on reforming the Water Act for reasons including concerns such as economic certainty and protection or enhancement of ecological flows, First Nations focused on the reassertion of their rights and title to lands and water. Not surprisingly, therefore, the results demonstrated dissatisfaction and a difference of opinion regarding actual and anticipated outcomes by the Province and First Nations.

Consistently, all respondents from the provincial government indicated that they would have liked to have had more First Nations participation in the water policy reform processes, as well as better means of incorporating Indigenous knowledge and oral traditions related to water into water policy. At the same time, findings indicated disappointment over the Water Act reform among First Nations. This perspective was particularly evident in the First Nations written submissions to the Province. The following quotations are from these letters. The first quotation demonstrates a continued willingness for First Nations to work with the Province, while the second points to an impasse on water policy reform:

‘The ONA and its member bands had proposed an initial process framework for WAM consulting; the Province rejected it. This is not acceptable as we expect a resolution to reconciling our mutual interests with regard to water. We are willing to continue to work with the Province on water governance issues’ (Okanagan Nation Alliance, 2010: 1).

‘Cowichan Tribes is currently in litigation with the Province over a water issue. We took this step because the Province was not listening to us (by way of many letters and phone calls) … Cowichan Tribes is confronted with water issues now - the pressure on the resource is heavy - and we simply cannot wait for a stalled treaty process to accommodate our need to protect our sacred resource’ (Cowichan Tribes, 2010: 2).
Delayed water policy reform, legal action related to water policy, and perceived infringements of water rights and title all create time and resources costs for both the Province and First Nations. One key informant working in a First Nations advocacy organization indicated that there would continue to be very ‘strong pushback’ from First Nations on the issue of Water Act reform processes so long as the rights to water remains unresolved in the eyes of First Nations. Another First Nations respondent likened the ongoing process of having to advocate for First Nations rights to being ‘like banging your head against the wall’.

These water policy reform processes were also unsatisfactory to some non-Indigenous proponents of water policy reform. One respondent from the provincial government noted the following: ‘some of the challenges [working with First Nations], is certainly around having the patience and time, and working to extend schedules so that we can fully engage, because First Nations are very interested in a different time frame’. Another non-Indigenous participant at a public conference on water in BC posed a question to First Nations people in the room that demonstrated the frustration on the issue: ‘I just don’t get why First Nations don’t give a little more. I get that you people are sticking to defending your rights, but when it comes to discussions on water, why is it such a hard line?’ Statements such as this indicated that in some cases a shared understanding did not exist regarding the appropriate approach to water policy reform in BC.

4.4. Solutions that emerged during the research

Interviewees in this study offered solutions to tension that existed between the assumptions of First Nations and the Crown. Two solutions were highlighted by nine First Nations and seven non-Indigenous respondents: (1) education for public service employees as a solution to the difference in assumptions; and (2) a continuation of the steps already being made by provincial civil servants toward being more culturally aware about First Nations. A third solution emphasized by these same 16 respondents involved going beyond simply building cultural awareness. For example, one First Nations respondent emphasized the critical importance of the Crown acknowledging First Nations title and rights:

‘[The Province needs to] accept the title and rights of First Nations, find a way to move on and stop denying it, and start creating positions and policies which really signify moving forward together [with First Nations]. That’s what needs to take place, not denying [First Nations title and rights] on one hand, and then coming back to the table later after a Court decision mandates [the Province] to. And then saying ‘well the court says we need to talk to you [First Nations] about this now, because we lost [the court case]. We tried to deny your title and rights and your existence in the court, but we accept it now. We didn’t really mean it.’”

This quotation points to the need for recognizing and reconciling assumptions, and rectifying the differences through genuine positions and policies by the Province that clarify the position of First Nations as nations with unceded rights and title.

Reconciling these diametrically-opposed perspectives clearly will be a challenge. As part of the research process, questions were posed to interview subjects regarding how this could be accomplished. Three main solutions emerged in response: (1) the Crown working to level the playing field in terms of resources so that First Nations can have an equal platform to negotiate water policy reform; (2) the Crown approaching First Nations as a nation or government; and (3) First Nations clearly asserting and articulating their rights and declarations about water.
Several respondents pointed to a lack of resources in First Nations governments that make it difficult for them to negotiate with the state on water governance related issues at a nation-to-nation level. Six First Nations respondents emphasized the need to create a level playing field between the state and First Nations. Respondents indicated that the issue was not simply one of creating more time for First Nations to offer their opinions. Instead, as one First Nation interviewee noted, it would be necessary for First Nations and the Province to write the legislation together.

‘I think the province really made a huge mistake with this new [Water] Act. They engaged First Nations very little and I think that is a big mistake. The Province is following the old status quo, ‘we [the state] are doing our thing, and then we are going to consult First Nations’, as opposed to … If I spend ten months writing this piece of paper, and then I said, ‘I have 10 minutes, can you edit?’ That is different than us writing this together. And that is what the Province did with the Act.’

An equal playing field between the Province and First Nations would play a role in the second aforementioned solution that water reform processes be done on a nation-to-nation or government-to-government basis. The following First Nations respondent contrasts how the participatory process has proceeded versus how it should proceed:

‘[The Province wrote a] letter to the [First Nations] Chiefs, saying ‘we want to engage with you on this.’ I might not have seen all the correspondence from the Ministry [of Environment], but what I did see were always pointing First Nations to the blog. [The Province] was saying ‘you are on notice, here is our process. Use it or don’t’. They should start by saying, ‘hi government, we are government’.’

The results indicated that First Nations too have an important role in creating a nation-to-nation relationship with the state. Three First Nations respondents pointed to the importance of the existing Indigenous declarations on lands or waters to give a clear position on where each First Nation stands on matters related to water, and governance more broadly, and that more First Nations should articulate Indigenous nation declarations and/or water declarations. According to one First Nation leader, the function of the articulation of the declarations in creating a nation-to-nation relationship with Indigenous peoples and the state is to both bolster the position of Indigenous self-determination in the view of the state, and to provide a unity of vision within the First Nation. The following quotation demonstrates how the uses of First Nations declarations extend beyond the provincial and national scales:

‘You can look internationally at the UN Declaration [on the Rights of Indigenous Peoples], and some of things that [Indigenous] communities are doing like putting forward their own statements or declarations about their rights and title, sovereignty about their nations, and their relationship with the land and the water and all of those resources. So it’s not that our positions are undefined, it’s very clear what they are.’

The many factors related to the approach to water policy reform processes for both the state and for First Nations stood out as a challenge in the BC context.
5. Discussion

Three primary themes emerged from the analysis: (1) water policy reform in BC has been carried out by the Province with assumptions that are different from those of First Nations; (2) differences in assumptions between First Nations and the Province were evident regarding the appropriateness of the public participation process initiated by the Province for the purpose of water policy reform; and (3) differences in views and assumptions held by the Province and by First Nations prevented the realization of a process of reform that was satisfactory to either First Nations or the Province. The extent to which the gaps between these perspectives can be closed is uncertain, although the research did reveal a desire on the part of some people interviewed, along with suggestions for how that could be accomplished.

The research findings indicate that assumptions being made by the provincial government in its approach to water policy reform are leading to measurable dissatisfaction with the reform process on the part of both First Nations and provincial officials. Rather than viewing First Nations as holding sui generis rights and as nations with the right to make decisions over their traditional territories, the Province tended to approach First Nations as one of many stakeholders or interest groups – an approach that is consistent with that taken by the Canadian state (Turner, 2006). This approach was most clearly demonstrated by the processes used by the Province to reform the Water Act, namely its use of an online blog and public meetings; these were considered by many First Nations respondents as appropriate for engaging citizens, stakeholders and interest groups, but not nations.

Experiences in British Columbia water reform echo those in other jurisdictions. For example, in Australia the Commonwealth government focused on water policy reform and aimed to publicly engage stakeholders in water policy change processes (Morphy, 2008). Consideration of Indigenous perspectives and recognition of cultural values were explicit goals (DSEWPC, 2010). Success in these efforts has been limited. In most cases, Australia’s state-level governments are ‘not yet engaging Indigenous people effectively in water planning’ (NWC, 2011) and have ‘failed to incorporate effective strategies for achieving Indigenous social, spiritual and customary objectives in water plans’ (NWC, 2011: 46). The problem with the Australian colonial state view of Indigenous peoples as ‘citizens’ and colonization as a fait accompli (Morphy, 2008) is that Indigenous peoples in Australia have asserted rights to self-determination (Smith, 2004), established prior ownership of Australian land through high court decisions (Tedmanson, 2008), and have regained a ‘measure of control of their homelands through land claims and through the development of organisations concerned with the environmental and economic management of their ‘country’’ (Smith, 2008).

A notable example of a possible way forward in the realm of water policy reform is the creation of the Northwest Territories (NWT) Northern Voices, Northern Waters: Water Stewardship Strategy in Canada. This water strategy was achieved through collaboration among Aboriginal governments and the territorial and federal governments (GNWT, 2010). Aboriginal governments were ‘invited to participate’ in the process by the territorial government (GNWT, 2010), and Indigenous peoples were referred to as groups, cultures, and communities, as well as governments and nations by the minister responsible presiding over the creation of the territorial water strategy (Miltenberger, 2009). The process is noteworthy for having been developed in ‘full collaboration with the indigenous governments who will be affected by it and upon whom responsibility for its implementation will ultimately fall’ (Sandford & Phare, 2011: 81–82).
Solutions to the disparity between the position and views of First Nations and the BC Provincial Government revealed through this research included: (1) educating non-Indigenous peoples involved in water policy reform about First Nations history and views on nationhood status; (2) selecting/developing processes that demonstrate respect for First Nations as nations rather than as stakeholders; (3) the state working to level the playing field in terms of resources so that First Nations can adequately negotiate water policy reform; and (4) First Nations articulating their positions on water and nationhood via declarations. The third and fourth points are particularly relevant in light of the demographic and capacity issues noted in the introduction; for Indigenous self-determination to be realized in a way that is satisfactory to Indigenous peoples, systemic disadvantages must be addressed.

The shortcomings related to the view of Indigenous peoples in the literature pertaining to water policy reform, and in practice as demonstrated in the BC empirical context, together create an opportunity for a conceptual integration between water policy reform and Indigenous governance. There exists a potential for water policy reform processes to integrate the ideas surrounding the dual-claim to water rights in countries with Indigenous traditional territories, and to examine the merits and drawbacks of shared decision-making models. Water policy reform practices could integrate Indigenous governance concepts by contextualizing Indigenous peoples as the rightful decision-makers in traditional homelands and by examining the implications of this upon state-driven water policy reform. Additionally, discussion of public participatory approaches to water policy reform could examine how to resolve power and resource disparities between Indigenous nations and larger nation states such as Australia or Canada in water policy reform. Affirmed by the empirical evidence in the context of BC, Canada presented here, there is evidence of opportunities for water policy reform to build a stronger foundation by integrating the central tenets of Indigenous governance scholarship related to self-determination.

6. Conclusion

The purpose of this paper was to explore the challenge of integrating the perspectives of Indigenous peoples in water policy reform processes. This was accomplished through focusing on three specific concerns: (1) identifying gaps related to assumptions regarding Indigenous peoples between the Indigenous governance and water policy reform processes; (2) examining those assumptions within the empirical context of water policy reform in BC, Canada; and (3) identifying ideas related to shifting the thinking regarding Indigenous peoples in future water policy reform processes. The water policy reform literature, and the empirical case study example from the context of BC, Canada, together demonstrate the need for a conceptual shift in thinking about Indigenous peoples in water reform processes. Water policy reform practitioners could better address concerns related to Indigenous water rights; contested ownership of lands and water; and public participatory approaches to reform in the context of Indigenous peoples; and simultaneously, address problems arising from outdated water policies. Policy reform occurs in many contexts besides water, e.g., forestry and mineral extraction, and thus the findings may be relevant to other policy reform contexts involving First Nations.

The reframing of assumptions related to water policy reform and Indigenous governance addresses challenges at two scales: (1) as a process problem related to the involvement of Indigenous peoples as nations rather than as stakeholders in state-led policy reform; and (2) as a larger societal problem related to decolonization and the relationship between the state and Indigenous peoples. This empirical research indicated that the process problem can stem from assumptions associated with public
participatory approaches to water policy reform; thus the findings from this research may be transferrable elsewhere in Canada, and internationally where similar approaches are used. The larger societal problem relates to broad and ongoing issues related to colonization globally. As demonstrated in the empirical example in this research, where First Nations in BC have asserted their traditional territories as unceded nations, problems of jurisdictional authority and the legacy of colonialism continue to confound the resolution of this problem. The question remains then, can the process problem scale be meaningfully addressed without reconciliation or resolution of the larger societal problem scale? As Bloomfield et al. (2001: 505) point out, ‘there is a huge difference between inclusionary processes that are tacked on to unchanged systems of decision making, and those that contribute to a comprehensive renewal of democracy’. This paper argues that there are some constructive measures in the realm of water policy reform that involves the scholarly and practical synthesis and reconsideration of concepts and ideas regarding the view of Indigenous peoples. This synthesis and reconsideration could together play an initial step toward a fundamental shift in attitudes, assumptions, and ultimately actions at the larger societal problem scale. This research illuminates a future research opportunity for developing a roadmap that outlines concrete ways forward for addressing gaps related to the role of Indigenous peoples water policy reform processes.

References


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