

“All of the water that is in our reserves and that is in our
territory is ours”: Colonial and Indigenous water governance in
unceded Indigenous territories in British Columbia

by

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Abstract

With increasing legal recognition of Aboriginal rights and title, growing calls for collaborative water governance arrangements with First Nations, and approval of British Columbia's new *Water Sustainability Act (2014)*, shifts are unfolding in water governance in BC which have some significant implications for First Nations. First Nations across British Columbia have also clearly articulated that water and water governance are priority areas of concern. Within this context, this thesis examines the historic and present roles and experiences of First Nations in colonial water governance in British Columbia, based primarily on a case study conducted with the Lower Similkameen Indian Band.

In Chapter 2, I examine the historical formation of reserves and the colonial water allocation system, exploring how the demarcation of reserve boundaries and water licenses established some fundamental barriers for First Nations in water access and governance that persist today. Chapter 3 provides an overview of concerns about colonial water governance that were identified by Lower Similkameen Indian Band interviewees and others, followed by a critical discussion of how a collaborative watershed planning model could address, or further entrench, existing governance challenges.

This thesis provides a timely and relevant commentary on the contested realities of First Nations' engagement in colonial water governance in the province. Insights suggest that while there is growing recognition that First Nations have a legitimate place at the center of water governance in British Columbia, the collaborative watershed planning approach adopted in the *Water Sustainability Act* falls well short of adopting the necessary steps towards full Indigenous water governance or water co-governance. Existing colonial water governance challenges and failures are not likely to be addressed by a collaborative watershed planning approach. Overall, this thesis suggests that the transition to more effective and just water governance in British Columbia includes observation of Aboriginal rights and title, commitment to relationship and trust building, and capacity development for colonial and First Nations governments.

Preface

Ethics approval for this research was obtained from the UBC Behavioural Research Ethics Board, Certificate Number #H12-03691. This thesis is original, unpublished, independent work by the author. Figure 1 and Figure 2 are used with permission from applicable sources.

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List of Abbreviations

AANDC: Aboriginal Affairs and Northern Development Canada

AFN: Assembly of First Nations

BCAFN: British Columbia Assembly of First Nations

FITFIR: First in Time, First in Right

FNFC: First Nations Fisheries Council

FNLC: First Nations Leadership Council

FNS: First Nations Summit

LSIB: Lower Similkameen Indian Band

MOE: Ministry of Environment

OAG: Office of the Auditor General

ONA: Okanagan Nation Alliance

SRBP: South Saskatchewan River Basin Plan

SVPS: Similkameen Valley Planning Society

WSA: Water Sustainability Act

UBCIC: Union of British Columbia Indian Chiefs

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Chapter 1: Introduction

1.1: Overview & research questions

On a cool March evening in 2014, a group of neighbours on the Lower Similkameen Indian Band Ashnola reserve gathered together in a packed living room to share their thoughts about “the basis of everything”: water. We perched on every available piece of furniture, with several children, some scuffling dogs, and a very vocal pet bird contributing its own insights on the topic. As the conversation moved around the circle, community members shared their stories and voiced their concerns about changes they have already seen to water in their territory, as well as the threats looming large on the horizon. One of those threats was a proposed hydroelectric dam upstream on the Similkameen River. I am sharing two of the many eloquent reflections offered that evening as ‘launch points’ into the focus of this research. As one woman related:

And I think like a grandma, because I am one. And so I think – well I’m never going to be able to take my grandkids out there and show them the right way to go pick berries and listen to the water, have our ceremonies. All of those places are sacred places, and it’s not just our generation, it’s the ones coming and the ones before us. And it makes me angry that First Nations just seem to be erased from the equation all the time. Are we there or do we just get pushed to the margin all the time? It’s like we don’t exist. But we know we do and we have always been here.

Later in the discussion, another woman spoke:

It really impacts us, because the government can’t even do anything about it. And so locally we have a responsibility to take care of the water, we are the only ones. And we had a discussion with one of the provincial government representatives, and he was saying that the public really relies now on First Nations people to impact whatever development happens because nobody else has a voice anymore. We are the only ones, because of our title and rights issues, that can really stand up and have a voice and say yes or say no.

These two quotations capture some core themes explored in this thesis, which queries shifting roles and experiences of First Nations in water governance in British Columbia (BC), historically and at present. In the first speaker's words, we hear profound concerns about what the severing of ties to water might mean for future generations; anger and frustration over historical and ongoing exclusion from meaningful involvement in governance of land and water; and also assertion of rights and resistance: "we know we do [exist] and always have been here." The second speaker presents a different angle to the story, positioning First Nations not at the margins, but at the center. She relates that, as First Nations, they are the "only ones" who have power, responsibility and voice to shape water governance into the future, as Aboriginal rights and title are consolidated and colonial governments increasingly retreat from their roles. The tensions embedded within these narratives can be extended to the broader picture of the interactions between First Nations and current colonial water governance in BC. While there is growing recognition that First Nations have a legitimate place at the center of water governance and management in the province, there are also many barriers in place. At times these limit, and at other times deny, First Nations' rights to water and strategic-level engagement in decision-making. In this thesis, I will unpack some of these dynamics. I write a loose chronologic narrative, with the two substantive chapters guided by the following questions.

- What are some Indigenous ways of governing and accessing water and how did colonial water governance frameworks affect the LSIB and other First Nations in the past and present? [Chapter 2]
- What barriers and strategic sites of engagement do the LSIB and other First Nations encounter within the current colonial water governance framework in BC? In addressing this question, I specifically ask: Based on the existing state of colonial

water governance in BC what are some of the potential implications of collaborative watershed planning models on First Nations' water governance goals"? [Chapter 3]

1.2: Reflections on colonial framings of water governance

When I first signed on with this research project two years ago with the *Program on Water Governance* at UBC, the initial framing of the project suggested exploring water governance in relation to 'drinking water governance,' 'information needs' and 'drinking water quality' on First Nations' reserves in British Columbia. It did not take long for me to realize such an approach would be too narrow and technocratic, and in effect would be contributing to perpetuating colonial framings of water governance, as if "drinking water" and "water quality" could be parsed out as disparate issues and reserve boundaries could adequately delineate the extent of water governance concerns. These assumptions were quickly disrupted as the project evolved, and notably as I participated in various First Nations' water governance workshops in which there was a strong emphasis on the need to consider water from a holistic perspective. This then required an approach to "governance" far more inclusive and meaningful than one that might remain consistent with a narrow definition as "a decision-making process through which water is managed" (see glossary in section 1.6). McGregor's (2012) work on traditional knowledge and water management in Ontario drives this point home:

In the Anishinabe tradition, one of the main features of knowledge, based on thousands of years of living sustainably with Creation, is its holism: the recognition that all aspects of Creation are inter-related. Thus, degradation of water quality directly impacts the people, permeating every aspect of their lives. It threatens their very survival. First Nations maintain unique perspectives on (and relationships with) water and feel these perspectives should form an integral part of water governance (10).

Water is not a single, discrete aspect of the environment; it is part of a greater, interconnected whole. When one considers water, therefore, one must consider all that to

which water is connected and related. Elders felt current government initiatives around water to be limited and short-sighted. When one considers water, one must consider all that water supports and all that supports water. Therefore, a focus on just drinking water is misguided. It is not in keeping with traditional principles of holism and the interdependence of all living things. One must also consider, for example, the plants that water nourishes, the fish that live in water, the medicines that grow in or around water, and the animals that drink water (11).

I do not claim that I have a full understanding of the many meanings of water of importance for Indigenous peoples, nor of Indigenous forms of water governance. However, I am honoured for the teachings I have received that have confronted my own assumptions and led me to broaden the scope of this work, as well as to recognize the colonial origins and implications of what I initially considered as constituting ‘water governance. Governance is an inherently political and contested process: a struggle of different worldviews and interests at the level of decision-making processes. I am mindful of the need to widen the view of what constitutes “governance” to acknowledge and include the many Indigenous understandings and enactments of water governance that go beyond this formal definition (Ladner 2003; Norman 2015; Wilson 2014). Ladner (2003), for instance, describes that “Within the parameters of Indigenist thought, governance is “the way in which a people lives best together”...in other words, it is an expression of how they see themselves fitting in that world as a part of the circle of life, not as superior beings who claim dominion over other species and other humans” (125). Norman (2015) also highlights a more holistic conceptualization of environmental governance: “...addressing environmental issues for Indigenous communities is often a twinned goal of ecosystem protection and counter-hegemonic activities. This occurs through action, education, and performative means--such as canoe journeys, water walks, protests, and teach-ins” (67).

In the concluding chapter of this thesis, I will turn to some visions of what decolonized water governance might look like, mindful that this will require ongoing thought and critical

reflection. I acknowledge that as a non-Indigenous person working within academia, I too am complicit in privileging colonial forms of acquiring and sharing knowledge. This thesis represents an attempt to challenge the validity of colonial water governance frameworks currently perpetuated throughout unceded Indigenous territories in the province of BC.

1.3: Research approach and methods

“Outside researchers who are useful to Aboriginal peoples do not have their own research agendas, or at least are able to put them aside. They are willing to spend time looking inside themselves, uncovering their own biases and privileges, and they are willing to learn from our people, not about Aboriginal peoples but about themselves and their place in the cosmos, they are willing to be transformed, in a sense they are willing to be developed” (Simpson 2001: 144).

1.3.1 Guiding framework

It was with Simpson’s (2001) strong words echoing in my mind that I stepped into this research, assuming the complicated and conflicting role of a non-Indigenous student and researcher from a university working with, and within, Indigenous communities and institutions. The challenges that Simpson poses to non-Indigenous researchers, to learn *from* and not *about* Indigenous peoples, with an emphasis on humility and critical self-reflection on our positions of power and privilege, are ones that I have continued to grapple with as I have moved through this project. My tentativeness around the role and value of non-Indigenous researchers working with Indigenous communities has continued to grow as I have become more familiar with the exploitative and extractive legacy of Western research in Indigenous communities, and aware of the burden that research can place on communities that have been ‘researched to death’ by outsiders (Castellano 2004; Ross et al. 2010; Schnarch 2004; Smith 2012).

Like most Canadians, I was raised learning the benevolent version of this country’s colonial history (Regan 2010). When Indigenous peoples were mentioned at all in school

curriculum, they were portrayed as relics of the past, as exotic cultures frozen in time. I had no idea that the *Sinixt* peoples, in whose unceded, traditional territory I was living, were absent from their lands having been declared ‘extinct’ by the Government of Canada in 1965 (Sinixt Nation Society 2013). It was not until my undergraduate work at McGill that a professor from the James Bay Cree Nation took the preconceived ideas I had and turned them on their heads, guiding us non-Indigenous students to confront Alfred’s (2009) challenge that: “Change will only happen when Settlers are forced into reckoning with who they are, what they have done and what they have inherited” (154). Since then I have been privileged to work and learn in different contexts with Indigenous youth and knowledge holders in several programs, including *Students on Ice*, the *Aboriginal Youth Water Leadership* summer program, and the *Culturally Relevant Urban Wellness Program*. I inevitably made (and continue to make) mistakes and stumble as I go, and my thanks go out to all who have been patient and generous with their feedback. Reckoning with *who I am, what I have done, and what I have inherited* will be a continual process throughout my life; I have much yet to learn.

After combing through some of the critical conversations around Indigenous research and decolonizing methods, I found myself aligning most comfortably with the approach adopted by scholars and practitioners such as Evans et al. (2009) and Kotaska (2013). Their work proposes that non-Indigenous researchers direct their gaze away from exclusively looking inwards on Indigenous communities and community members to provide ‘data,’ given the extractive history of research and concerns of research fatigue. Instead, Evans, Hole and Bert (2009) advocate for “Turning the direction of gaze outwards to elucidate the operation of colonizing structures themselves. This reversal of the object of study is a part of an overt and positioned agenda” (900). Applying this framing to my research, the principal *object of study* is colonial water

governance in BC, where my aim is to expose some of the injustices, complications, and fissures of opportunity for First Nations in this system. In large part, therefore, the interviews and workshops I attended were with natural resource staff, both Indigenous and non-Indigenous, who are involved in some capacity in water management and governance, in order to get a sense of their experiences working within the existing colonial water governance landscape. However, throughout this project, the reversal of gaze as Evans, Hole and Bert (2009) suggest was partial. I also wanted to be attentive to the voices of diverse community members, to hear their stories and concerns about water, and to learn about how water policies ‘trickling down’ from federal and provincial governments unfold on the ground and impact their lives and livelihoods. Through the conversations ‘looking inwards’ with members of the Lower Similkameen Indian Band (LSIB), I learned a tremendous amount about historical and contemporary water situations in the territory (e.g., impacts from industrial projects on water; water licensing and rights), the importance of water, and ideas and visions for the future. These elements guided and are integrated throughout this thesis. Before discussing specific methods in greater detail, I want to acknowledge the traditional teachings and stories about water that were shared with me throughout this project, mindful that this is not my knowledge to pass-on and share. These teachings have helped me to understand and appreciate the central role of water in *Syilx* culture.

1.3.2 Methods & analysis

The overall conceptual framework guiding this research was exploratory and holistic in nature, in order to gain a multi-scalar perspective of the colonial water governance landscape for First Nations in BC. This involved a mixed qualitative methods approach, the core of which was case study work with the LSIB. During the first stage of the project, I conducted a short online

survey shared with First Nations natural resource officers across the province (n=17), querying their concerns and interests in drinking water and water governance. I subsequently conducted follow-up phone interviews with survey respondents who expressed interest (n=5). This survey and first round of interviews provided me with an initial sense of the relevant issues and questions. Early in this research, I also attended, as both a participant and observer, various provincial-level First Nations water workshops, including the First Nations Leadership Council *Right to Water Workshop* (March 2013), and the First Nations Fisheries Council *Water Governance Workshop* (May 2013) and *Water Strategic Planning Workshops* (June 2013). These workshops and a follow-up interview with a Fisheries Council representative provided perspective on the spectrum of concerns about water from First Nations across the province. It was also through these workshops that I connected with natural resource staff from the LSIB, where there was mutual interest in working together on water research, mapping out the governance context and getting a sense of community concerns. The Similkameen is a particularly rich site to observe interactions between First Nations and other governments in the area of water governance, as water is at the forefront of planning in the region: the Regional District of the Okanagan-Similkameen is developing a Similkameen Watershed Plan and the LSIB sits on the steering committee for this plan (the Similkameen Valley Planning Society); the LSIB is working to build its own watershed planning process; and the Okanagan Nation Alliance is coordinating the *Syilx* Water Strategy (*i? k^wuxSyilx i? siwłk^wtət* or “Our *Syilx* Water”) that will “incorporate *Syilx* principles and practices associated with water stewardship” (ONA 2014).

This research project was developed through an iterative process with the LSIB Chief and Council, initially approved through a Band Council Resolution in August 2014, followed by development of a work plan and research agreement (see Appendix 2 for a copy of the research

agreement). The majority of work was done in the community between August 2013 and April 2014, through multiple short visits as schedules on both ends permitted. The thesis draft was submitted to LSIB natural resources and Chief and Council in September 2014 for their review. I worked in close correspondence with staff from the LSIB environment office and with Tessa Terbasket as a Research Assistant, whose input and guidance in this project were invaluable. In addition to the ‘formal’ interviews and meetings detailed below, this work was informed by attendance at the *Watersheds 2014* conference, as well as volunteering with the Centre for Indigenous Environmental Resources’ *Youth Water Leaders* workshop in the Similkameen, and attendance at the LSIB *Syilx Water Visioning* workshop.

With the LSIB, I first conducted open-ended, semi-structured interviews with natural resource staff and others whose work addresses some aspect of water, at both the band and Okanagan Nation level (see interview guide in Appendix 1). I also organized three neighbourhood or family meetings, which was recommended as an appropriate and accessible format for meeting and sharing knowledge in the community. For these meetings, we gathered in a family home over a meal, neighbours and family members joined (with a range of four to eleven attendees), and we discussed concerns and ideas about water in an open talking circle format. To get a sense of perspectives on water and collaborative watershed planning initiatives outside of the LSIB, I also interviewed a local government representative involved in the Similkameen Watershed Plan, a water engineer from Aboriginal Affairs and Northern Development Canada (AANDC), and members of two existing watershed boards in BC. Interviews and family meetings were recorded and transcribed, with follow-up in some instances with interviewees to clarify meanings and return transcripts where desired. These interviews (a total of 18) and talking circles were supplemented by content review of several documents.

Documents reviewed include: the BC First Nations Water Rights Strategy; LSIB and Okanagan Nation Historical Water Rights documents; the *Water Sustainability Act* legislative proposal; submissions and letters from individual First Nations and representative organizations on the *Water Sustainability Act* and Bill S-8; and modern treaty agreements. While it was beyond the scope of this research to undertake an exhaustive, comprehensive review of treaty documents, I looked at how water allocation and jurisdiction have been addressed in the four treaties that have reached Final Agreement and the two self-governance accords. This document review provided details and perspective on the broader set of concerns and interactions between various First Nations and provincial First Nations leadership around water governance in BC.

Transcripts and documents were coded for themes, convergences and tensions through a combined inductive and deductive approach using NVivo 10 from QSR International. While I do not claim to have done a comprehensive comparative inter-community or provincial-level study, the interviews with First Nations external to the LSIB, attendance at provincial water planning workshops, and document review were useful for triangulation and uncovering some shared patterns and diverging experiences between different First Nations. I do my best to avoid generalizations and recognize the tremendous diversity within and between First Nations. I do not suggest that my results can be generalized or are representative of the views of all LSIB members or of different First Nations across the province. This thesis is my narrative, which has been reviewed by the LSIB and corroborated by my committee members and other reviewers; any misinterpretations herein are mine alone. I do not claim to represent the views of the LSIB or any other First Nations who were involved in this work.

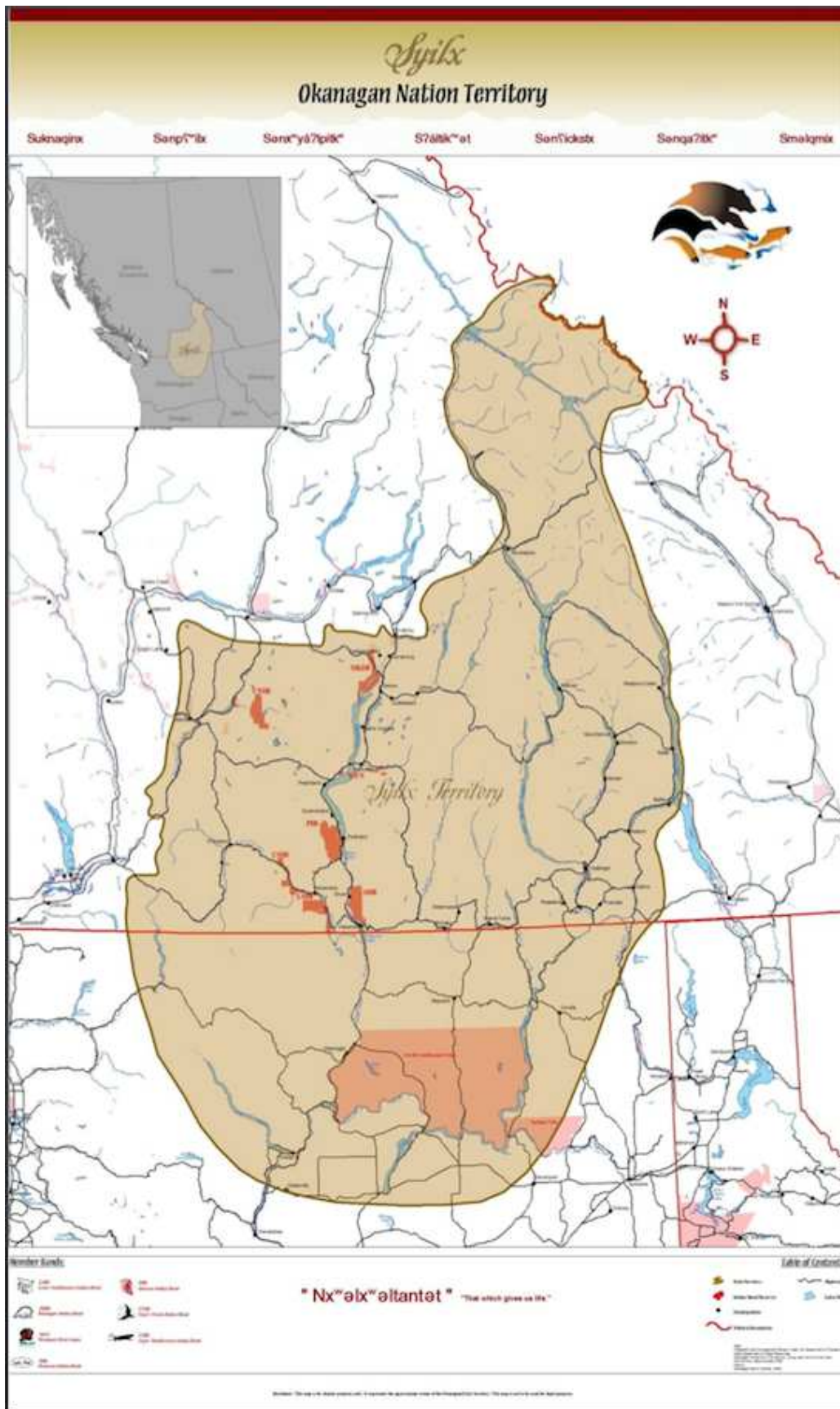


Figure 1: Map of Syilx territory. Reproduced with permission from the Okanagan Nation Alliance

1.3.3 *Syilx peoples & the Similkameen watershed*

“The word Syilx describes a people who continuously are in the process of unwinding the long-term knowledge of a right relationship within the land, and coiling its many strands into one strong thread to lead, unbroken, into the future” (Armstrong 2013: 43).

The Lower Similkameen Indian Band (Smelqmix) is a “small, geographically isolated community in the Similkameen Valley, located in the South Central Interior of BC” (LSIB 2014). The Band has a current membership of 459 members, half of whom reside on reserve. There are a total of 11 LSIB reserves covering 15, 276 hectares of land spread out over 90 kilometers.¹ As the LSIB website describes, the Similkameen, or *Syilx* people, speak the NSyilxcen language, holding “A history with the land that spans thousands of years in what is now Washington State and the Province of BC. The Similkameen People were originally a nomadic people who moved from location to location, mainly due to the ever changing availability of foods and climates” (LSIB 2014). Figure 1 above shows the span of *Syilx* territory. The LSIB is one of seven Canadian member bands of the Okanagan Nation Alliance, of which the Colville Tribes in Washington also forms a part. The international border imposed significant divisions in the *Syilx* territory as communities on each side of the border were designated to different political regimes: “Colonization divided us from one another and from our way of life. We were divided from the resources we relied upon, and our self-sufficient economy collapsed” (ONA 2010). Today, through initiatives such as the *Syilx* Nation Unity Trek throughout Okanagan traditional territory, the *Syilx* are reclaiming connections to, and continuity within, their whole territory. The LSIB is governed by the LSIB Chief and Council, based in the town of Keremeos.

¹ The 11 LSIB reserves are: Lower Similkameen (IR No.2); Narcisse’s Farm (IR No. 4); Blind Creek No. 6 & 6A; Chopaka No. 7&8; Alexis IR No. 9; Ashnola IR No. 10; Keremeos Forks No. 12 & 12A; IR No. 13.

The Similkameen Valley is a “diverse and complex landscape of grasslands, shrub-steppe, dry forest, rugged terrain, wetlands, lakes, rivers, and streams in close proximity to each other” (White 2006: 56). As the landscape is described on the LSIB website: “The land base of the Lower Similkameen Indian Band is a combination of distinctive desert lands, luscious valley lands, mountainous alpine and fertile wetlands. The mountainous region contains various streams, creeks, rivers and lakes...the area is known for its diversity in agriculture through ranching, farming and orchards. Natural resource development in logging, restoration and forest management is also important in this area.” This region has long been under pressure from agricultural expansion and associated population growth; Wagner and White (2009) describe historical landscape change in the Okanagan:

Irrigation agriculture quickly led to much higher population densities and development of roads, railways and light industry. Beginning in the 1950s, an extensive program of flood control measures was implemented involving the straightening of rivers, most notably the Okanagan River, and the consequent loss or degradation of many wetland and riparian habitats... (26).

Today, the Similkameen region faces mounting pressure on water from climate change, population growth, increasing demands for water coupled with growing water scarcities during drought periods, and large-scale industrial development, including the Copper Mountain Mine and the proposed Fortis Hydroelectric dam on the Similkameen River at Princeton. In light of these pressures, particularly the proposed dam, in 2014 the *Outdoor Recreation Council* listed the Similkameen River as one of the most endangered rivers in BC. This thesis explores water governance in the Similkameen within this context of growing concerns around water quality and scarcity.

1.4: Water governance and First Nations in BC: why does it matter?

Why are interactions between Indigenous peoples and water governance, specifically in the context of BC, a productive, timely and relevant topic worth pursuing? I suggest and elaborate upon three key notes of interest that are also starting points for this research. First, First Nations have clearly articulated that water and water governance are priority areas of concern. Second, there is recognition that improving water governance practices and our understandings of water governance is critical to achieving more just and sustainable water resource management. Many water issues, including those pertaining to First Nations in BC, can be attributed to failures of governance. Finally, there are currently shifts unfolding in colonial water governance in BC, with replacement of the now century-old *Water Act* with the new *Water Sustainability Act* (WSA), and a growing impetus to pursue a watershed-based collaborative governance approach, which have significant implications for First Nations. I will briefly explore below the legal and theoretical backdrop against which these shifts are occurring: increasing legal recognition of Aboriginal rights and title in BC and currents of thought in environmental governance scholarship about the criteria for ‘good’ water governance, both pointing towards greater acknowledgement of First Nations’ concerns as a priority in colonial water governance.

1.4.1 Water: “the basis of everything”

First Nations across Canada and BC have clearly identified the significance of water and governance of water in their communities. While being mindful of the diversity of First Nations and wary of making simplistic or essentialist claims, the cultural, spiritual, and socioeconomic values of water to Indigenous peoples have been widely described. McGregor (2009), an Anishnaabe scholar whose work focuses on Indigenous perspectives on water, writes that,

“Water quality is not just an environmental concern; it is a matter of cultural survival... Water is integrally tied to the cultural survival of the people” (36). Descriptions of water as a powerful medicine and sacred resource, as the lifeblood of the land, and as a relative that must be respected and cared for, are echoed by Indigenous communities and organizations, and scholars throughout the literature (Blackstock 2001; LaBoucane-Benson et al. 2012; McGregor 2012, 2013; Sanderson 2008; Walkem 2004; Wilson 2014). The vital, dynamic and sustaining relationships between water, physical and community wellness, and cultural practices were also shared throughout the many conversations I had during this research. In the words of one *Syilx* woman:

In terms of our traditional practice, we hold high value in water. It is essential to everything, so it all ties into that. It is our responsibility to protect it, and it is very key in terms of our cultural practices. You know, we sweat by the water, we pray through the water. It sustains us. So in our own practice it is being very careful about how you use it, and being aware of protecting it.

Not only is water itself critically important to many Indigenous peoples, so too is its governance. Reclaiming access to land and water, and affirmation of the right to govern land and water, have been identified as critical components First Nations’ struggles for self-determination and to rebuild prospering communities (Borrows 1997; FNLC 2011; Kotaska 2013; UBCIC 2010, 2011; Walkem 2004; Wilson 2014). This sentiment is clearly articulated in the British Columbia Assembly of First Nations’ (2010) *Water Governance Toolkit*: “Water is an important subject to be considered in rebuilding First Nations governance” (444), where, “...at the outset, the most important point for our Nations is, who owns the water, and who has the right to determine access to water for all the possible uses” (445). Armstrong and Sam (2013) share their view on the importance of water governance and resistance:

The social life of water related to water governance, for indigenous peoples, represents struggle against colonial exclusions under water law and injustices in water governance as one aspect of the much larger injustice of the forces of globalization and the overarching resistance the world over by indigenous peoples to political annihilation (239).

Strategic planning around water governance is an increasingly prominent part of the portfolios of a range of First Nations' provincial and national political organizations, including the Assembly of First Nations (National First Nations Water Strategy/First Nations National Water Declaration 2012), the First Nations Fisheries Council (Water Strategic Framework 2013) and the First Nations Summit (BC First Nations Water Rights Strategy 2013). While they differ on specifics, the shared core message is clear: water governance arrangements must "recognize those First Nations or their duly created and mandated institutions that have the capacity and capability to develop, administer and enforce their own water laws" (Assembly of First Nations [AFN] 2012).

What is driving this increasing attention being directed towards water and water governance?

When I asked a representative from the First Nations Fisheries Council this question, she offered the following explanation:

I really think it's the rate of development in communities. A lot of communities are faced with referrals that come into their office from developers, whether it is municipal or domestic development, forestry referrals for building roads to get access to some of the forest cut blocks, a lot of mining referrals, and people coming into for resource extraction. So communities are really being bombarded with all of these things coming into their offices. And water is one of those things that really cross-cuts a lot of the issues that communities are dealing with...So I often say that all the stuff we are doing with water, is really trying to knit together the streams, the planning streams from various processes that are going on that may deal with completely different things, but a lot of it has to do with needs around water.

As she suggests, water governance can be viewed as an integrative process, linking a range of issues and different pressures that communities may be facing.

1.4.2 Existing failures of governance

Looking at a snapshot of the state of freshwater on the globe and in Canada in the 21st century, the list of concerns and threats to water quality and availability is seemingly endless (Gleick 2014; Jackson et al. 2001; Sandford 2012; Schindler & Donahue 2006). In response, there is widespread recognition within water governance and policy scholarship that these problems do not stem from poor understanding of water management techniques or characteristics of ‘the resource’ itself, but rather from failures of governance (Bark et al. 2012; Budds & Hinojosa 2012; Pahl-Wostl & Kranz 2010; Tropp 2007). As Brandes and Curran (2009) relate, “Governance alone cannot correct inadequate water management, but poor governance will almost certainly prevent effective management” (iv). Water governance is a notoriously complex and often nebulous issue to approach (Moore 2013). For instance, Baird and Plummer (2013) note that, “Diagnosing the [world water] crisis as a matter of governance highlights the complicated and dynamic social landscape of societal decision-making. Many actors are involved, roles and responsibilities are contested, and multi-scale influences need to be carefully considered” (1). This complexity is clearly illustrated in Figure 2 below from the Ministry of Environment showing the array of disparate legislation pertaining to water in BC.

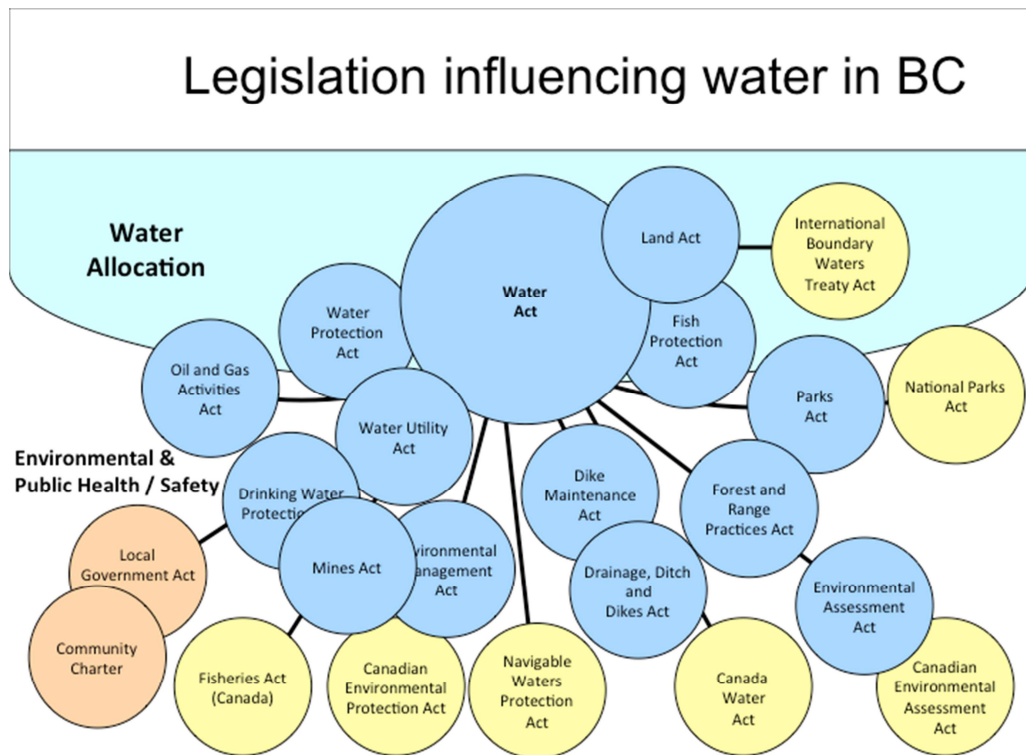


Figure 2: Fragmentation in action: current water legislation influencing water in BC. Absent is the Water Sustainability Act which replaces the Water Act as depicted in the diagram, as well as the Indian Act. Figure reproduced with permission from BC Ministry of Environment (2014).

Turning to the existing governance framework for First Nations and water in BC, several governance failures and injustices are apparent. While jurisdictional, scalar, and territorial fragmentation, lack of inter-governmental coordination, and inadequate monitoring and enforcement characterize colonial water governance generally in Canada (Bakker & Cook 2011; Dunn et al. 2014), these factors are even more pronounced when one considers the colonial water governance laws, institutions and processes that pertain to First Nations. In BC, the province asserts ownership of all ground and surface waters, granting licenses for surface water under the *Water Act* and the *Water Protection Act*. The federal government, through the *Canadian Constitution* and the *Indian Act*, has powers in the realm of fisheries, federal lands, and navigable waters, as well as control over “Indians and lands reserved for Indians.”

Aboriginal Affairs and Northern Development Canada (AANDC) and Health Canada are the federal overseers of drinking water and wastewater service provision on reserve lands.

However, this arrangement was recently modified in BC: as of October 2013, Health Canada's responsibilities for drinking water have been transferred to the new First Nations Health Authority. Responsibilities for water supply are often further delegated from the province to the local government level. First Nations have some jurisdictional powers over drinking water and wastewater on reserves as well as the ability to enact bylaws as stipulated in the *Indian Act*. This colonial water governance arrangement generally remains in place in the modern treaty and self-government agreements that have been signed between some First Nations and the federal and provincial governments in BC. For instance, in the case of the Maa-Nulth, Nisga'a, and Tla'amin Nation treaties, BC grants specific water licenses to the First Nation for domestic, agricultural and industrial uses. Federal and provincial laws over water still apply and all license applications must meet provincial regulatory requirements. As written in the Maa-Nulth agreement 8.1.1: "Storage, diversion, extraction or use of water and Groundwater will be in accordance with Federal Law and Provincial Law." In all cases, ownership of water remains vested with the province and federal governments. For instance, Art.132 of the Nisga'a treaty reads: "This Agreement is not intended to grant the Nisga'a Nation any property in water," while Art. 136 of the Westbank First Nation self-government agreement stipulates that, "To the extent that Westbank First Nation has rights over water as recognized by federal or provincial legislation or by operation of law, Council has jurisdiction to manage and regulate water use."

With recognition of the wide spectrum of encounters and relationships that different First Nations have had within the realm of colonial water governance, from existing literature

and this research, it possible to distil some general features and barriers in the existing system that affect, and are contested by, many First Nations. The fragmented divisions of authority make it difficult to trace lines of accountability for disparate aspects of water management; this has been thoroughly discussed in the case of drinking water (MacIntosh 2008, 2009; Phare 2009; Swain et al. 2006). Further documented are challenges First Nations have in accessing adequate and transparent information about water quality and quantity. Throughout this research, I heard persistent concerns that existing systems of colonial water governance do not respond adequately to local conditions, and that there is a lack of consideration for the diverse cultural and spiritual relationships, laws, and forms of governance for water that different First Nations uphold. Overarching and informing all of these concerns is the fact that it is often a struggle for First Nations to be involved at a strategic level in decision making in government-to-government relationships given the existing political climate and capacity constraints. Chapter 2 will focus on uncovering the historical roots of the fragmentation and procedural injustices within the existing system, while Chapter 3 will consider some of the realities of working through these barriers within the governance system.

1.4.3 Shifting colonial water governance terrain

A third starting point for this research is the change currently underway in colonial water governance in BC which involves and impacts First Nations across the province. My work coincides with the modernization of BC's century-old *Water Act* and the approval of the province's new *Water Sustainability Act* (WSA). Central features which persist from the *Water Act* as well as key amendments made within WSA are summarized briefly following from Curran's (2014) policy analysis:

- The *Water Act* provided for the allocation and management of surface water through licences.
- The provincial Crown continues to assert ownership over water in both the *Water Act* and the WSA.
- The First in Time, First in Right system remains in place both in the *Water Act* and the WSA. However, provisions are made in the WSA for a water reservation for essential household use, and decision makers must consider the environmental flow needs of a stream when evaluating a water licence application for a stream or aquifer.
- The WSA introduces provisions for groundwater licensing and regulation, which formerly did not exist under the *Water Act*.
- The WSA includes provisions for protecting riparian areas, aquatic ecosystems and fish.
- “Aside from treaty First Nations water reservations resulting from negotiating a treaty with the province and asserting aboriginal water rights through litigation, there is no ability in Bill 18 [WSA] to daylight the oldest water rights in the province indigenous water rights –and begin to reconcile them with the colonial water apparatus under the *Water Act* and upcoming *Water Sustainability Act*” (8).
- The WSA will enable new governance approaches, including water sustainability plans in which, “The intent is to have a watershed – or issue - defined process where interested parties, including local governments, the provincial government, water users and First Nations, can come to an agreement about most aspects of water” (6).

With the May 2014 approval of the *Water Sustainability Act*, the potential for modified water governance arrangements in the province has become more tangible, at least on paper. One of the WSA’s seven key policy directions is to enable a range of governance approaches, with strong

emphasis on a watershed-based model with various avenues to address First Nations' interests, including "opportunities for consideration of traditional ecological knowledge; and greater involvement and participation in water management and watershed planning processes" (MOE 2013: 6). The WSA has been a controversial topic for First Nations in the province. The legislative proposal highlights that "The provincial government acknowledges First Nations interests and will continue to meaningfully engage with First Nations through development and implementation of the proposed *Water Sustainability Act*" (MOE 2013: 6). However, the WSA has been widely criticized by First Nations across BC for a host of reasons, including the lack of meaningful consultation with First Nations in a government-to-government relationship during its development and the legislation's lack of modification to the First in Time, First in Right water allocation scheme (FNLC 2011; UBCIC 2010; von der Porten & de Loë 2014). These identified shortcomings in the WSA confront growing recognition that a robust, meaningful, and co-governance role for First Nations is a critical component of any future water governance arrangements in BC. In water governance scholarship and within the freshwater advocacy community in BC, there is increasing recognition of the integral importance of Aboriginal rights and title, with repeated calls for First Nations to have a government-to-government role in water governance (Brandes & Curran 2009; Brandes & O'Riordan 2014; Nowlan & Bakker 2007; Ord 2011; von der Porten & de Loë 2013a, 2013b). For instance, as Brandes and O'Riordan (2014) capture:

First Nations, with their strong historical, cultural, and economic ties to the land, represent not only a formal political force but might also be the critical lever of change and innovation. This is especially true in BC, where unresolved Aboriginal rights and title haunts all aspects of resource decision-making and development in the province. First Nations are an important level of government that must be properly acknowledged and hold an important place in any efforts to improve the governing of watersheds to ensure more ecologically and socially sustainable outcomes (8).

I next situate this call for greater First Nations involvement in water governance at the confluence of two related streams: 1) the increasing legal affirmation of Aboriginal rights and title in BC and 2) the discourse on criteria for ‘good governance’ in environmental and water governance scholarship.

1.4.3.1 Historical exclusion to legal recognition of Aboriginal rights and title

The legal landscape for Indigenous peoples in BC is unique in Canada in that very few historic treaties were signed in the province (with the exception of the Douglas Treaties on Vancouver Island² and a section of north-eastern BC which falls under Treaty 8), and only a small number of treaties have been finalized through the modern treaty process.³ Thus, First Nations in BC have never ceded their lands, waters, or governance powers over lands and waters to colonial governments (Blackburn 2005; Borrows 2000; FNLC 2011; UBCIC 2010, 2011; von der Porten & de Loë 2013a). Despite the legal fact that the majority of BC is unceded Indigenous territory, Indigenous peoples have historically been excluded from territorial and water governance through imposed colonial institutions and processes. Today, however, following decades of legal battles and pivotal court cases, the bottom line has changed, at least on paper: Aboriginal rights and title can no longer be legally ignored and First Nations must have a say in decisions that impact their territories and lives. It is beyond the scope of this thesis to delve into the lengthy legal history or examine in detail the key court cases and their contributions (see, for example: Asch 2002; Kotaska 2013; Morellato 2008). Further, I am informed by, but do not critically evaluate or discuss, debates related to the limitations of a rights-based approach and the

² The 14 Douglas Treaties were purchases of land by the Hudson’s Bay Company between 1850 and 1854 at the request of the British Crown. These cover ~930 km² of land around Victoria, Saanich, Sooke, Nanaimo, and Port Hardy (Madill 1981).

³ Only 4 modern treaties have been finalized through the BC Treaty Process at time of writing.

politics of state recognition (Alfred 2002, 2009; Coulthard 2007; von der Porten 2012). Within this literature, the core critique of state-granted rights and recognition runs that "...when an Indigenous community seeks recognition from a state government or a hegemonic colonial society, the act of doing so creates an inherent power imbalance" (von der Porten 2012: 6). Thus, Wilson (2014) cautions that, "A certain level of scepticism is required when discussing strategies for decolonization through processes that require colonial states to recognize Indigenous water rights and sovereignty, where the recognition of sovereignty is not necessarily in the interest of these states" (7). Here I limit my discussion to the history of the exclusion of First Nations from colonial water governance in BC, the legal changes and the precedents they have set, and the complexities of the legal terrain specific to water.

When European colonizers first arrived in the lands of what is now the province of BC, their claims to territory and sovereignty over the land and water were founded on the Doctrine of Discovery and the notion of *terra nullis*. This racist concept deemed Indigenous people to lack the ability to use land properly; thus, land and resources were seen as unused, empty, and put to waste (Borrows 1997; Harris 2001). Under the rationale of *terra nullis*, settler state sovereignty was claimed on the illegitimate basis of discovery of the land (Culhane 1997). Colonial intrusions also extended to water and water governance. The prior allocation water licensing system, for instance, denied First Nations' rights to water and water access as the original occupants of BC; this is the central discussion taken up in Chapter 2.

From the 1970s through the 1990s, a series of court cases began to shift the discussions and bring Aboriginal rights and title to the forefront. Critical outcomes from these cases include, but are not limited to: confirmation that Aboriginal title to land did exist at the time of the 1763 Royal Proclamation (Calder 1973) and continues to exist (*Delgamuuk'w* 1997);

declaration of Aboriginal title to specific lands (*Tsilhqot'in* 2014); establishment of criteria to determine whether an Aboriginal right exists and how a government may be justified to infringe upon it (e.g. *Sparrow* 1990; *Van der Peet* 1996); and development of requirements for consultation and accommodation (e.g. *Haida* 2004). Aboriginal rights were written into the Canadian Constitution in 1982 through Section 35(1), which recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples of Canada. Further consolidation of these terms is manifested in such agreements as the New Relationship protocol signed between BC and First Nations in 2005; agreements such as Great Bear Rainforest Agreements, which recognize First Nations' nationhood status (Low & Shaw 2011); and various Recognition and Reconciliation Agreements that the province has entered into with different First Nations and Nation groupings, such as the Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol (Kotaska 2013). A few key court cases south of the border also bear mentioning as their significance has impacted the Canadian context. *Winters v. United States* was a pivotal case in 1908 which established the priority of tribal reservation water licenses (Shurts 2000); I discuss the *Winters* doctrine in greater depth in section 2.3.2 of this thesis in which I contrast the precedents set by *Winters* with the First in Time, First in Right water allocation system in British Columbia. Second, the *Boldt* decision of 1974 also marked a turning point in tribal fishing rights and governance in Washington State. Fisher (1993) describes this case:

The *Boldt* decision ended almost a century of illegal obstruction by Washington State of treaty-based Indian access to salmon fishing, a resource central to Coast Salish Indian identity, spiritual life, and livelihood. The federal court affirmed Indian treaty rights to fish in off-reservation locations and allocated half the Washington salmon catch to Indian fishers. The Indian share of the salmon harvest thereby increased about tenfold (77).

There have been several recent key court cases and pieces of legislation that specifically address different dimensions of First Nations' water access and rights in Canada. In the *Halalt First Nation v. British Columbia* case in 2011, the BC Supreme Court ruled that a project proposed by the District of Cowichan to extract groundwater from the Chemainus Aquifer, which lies under the Halalt reserves, could not proceed as there had not been adequate consultation during the six-year environmental assessment process. Further, this case began to address the complex question of Aboriginal rights to groundwater:

The Court also addressed whether the Halalt could have a proprietary interest in the groundwater of the Chemainus Aquifer, noting that the issue of ownership of groundwater was a complex one not yet addressed by the Courts. While emphasizing that the current proceeding did not conclusively determine this question, the Court found that the Halalt had an arguable case that it had a proprietary interest in the water in the Aquifer. Most of the Aquifer was underneath the Halalt's reserve land, and the Halalt had an arguable case that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the objects for which the reserve lands were set aside (Bull Houser 2011).

Bill S-8, the Safe Drinking Water for First Nations Act, a key piece of legislation for reserve drinking water, was passed into law in June 2013. Although Bill S-8 has been lauded by AANDC as, "A vital step towards ensuring First Nations have the same health and safety protections for drinking water as other Canadians," (AANDC 2013), several deficiencies have been identified with this policy approach that will likely inhibit effective implementation. The bill enables the development of federal regulations related to drinking water provision and water quality standards on First Nations reserves. In an attempt to meet the needs of each region, these federal regulations will vary province to province, incorporating by reference existing provincial drinking water and wastewater standards (AANDC 2013). However, some key flaws remain. Developing regulations without an accompanying investment in capacity and resourcing to implement the legislation will not improve access to safe drinking water. Bill S-8 perpetuates the

devolution of control and liability over drinking water management to First Nations governments without a corresponding transfer of resources that builds communities' capacity to assume operation and management responsibilities. Many First Nations, particularly small and remote communities, face financial, technical and human resources capacity deficits for service provision as a consequence of historical and ongoing colonialism (Swain et al. 2006). Second, the federal government failed to fulfill its legal duty to consult with First Nations on Bill S-8. Subsequently the bill has been widely rejected by First Nations as yet another unilaterally imposed policy that did not involve meaningful consultation (AFN 2012; BCAFN 2013; UBCIC 2011). Particularly contentious is Bill S-8's treatment of Aboriginal rights and title. Although the bill includes a non-abrogation clause of existing Aboriginal and treaty rights, it then goes on to note that such rights can be overridden *to the extent necessary to ensure the safety of drinking water on First Nation lands*. This is deemed an unacceptable encroachment on First Nations jurisdiction (AFN 2012). Further, the bill does not outline how First Nations will be involved in making and enforcing the new regulations. Drinking water concerns remain at the forefront; in June 2014, the Tsuu T'ina, Ermineskin, Sucker Creek and Blood First Nations in Alberta filed a lawsuit against the federal government for its "systemic conduct that has created, contributed to and sustained unsafe drinking water on First Nations' reserves." Two further court cases which have challenged the water allocation scheme in Alberta – *Tsuu T'ina Nation v. Alberta* 2010 and *Piikani Nation v. Alberta* 2002 – will also be discussed in greater detail in section 2.5 in relation to concerns about the First in Time, First in Right system, which is the system of water allocation followed in both BC and Alberta.

As the preceding paragraph suggests, legal grey areas around water add an additional layer of complexity. Water is noticeably absent in the Supreme Court's definition of

Aboriginal title, and Aboriginal rights to water have never been explicitly established or disproven through a court ruling in Canada (Laidlaw & Passelac-Ross 2010; Phare 2009). There is a strong legal argument, however, that Aboriginal rights and title *do* extend to water and water governance. The British Columbia Assembly of First Nations' (BCAFN) *Water Governance Toolkit* is explicit on this point: "For our Nations, ownership of water, or title to water, is considered an aspect of Aboriginal title. We maintain that our Nations have Aboriginal title to water, and therefore the right to use it, and to govern its use" (445). This thesis begins with the assumption that Indigenous peoples have inherent water rights that stem from their historical and ongoing relationships to their traditional territories (Phare 2009). As Laidlaw and Passelac-Ross (2010) write: "Insofar as water is considered to be an integral part of land, then Aboriginal title gives Aboriginal peoples the right to the lands submerged by water and entitles them to make use of the waters for a wide variety of purposes...Aboriginal title also imparts the right to make decisions with respect to water, and the right to apply Aboriginal law systems to water uses" (3). Aboriginal rights to water stem from Aboriginal title, and from the rights to uses of water associated with the customs, practices and traditions of a given Aboriginal community (Walkem 2004). It is also argued that Aboriginal water rights are inherently necessary to fulfill the purpose and intent for which reserves were created (Bartlett 1998; Laidlaw & Passelac-Ross 2010; Matsui 2009; Walkem 2004).

At the end of the day, these proceedings have established a legal foundation mandating that "Indigenous nations need to have the authority – and the accountability that goes with it – to shape what happens on their lands and in their communities" (Cornell 2007: 162), with accompanying changes in colonial government obligations to, and relationships with, First Nations. Though there is undeniable progress in terms of increasing legal recognition of

Aboriginal rights and title, I want to end this discussion with a note of caution. It remains highly debated whether the Supreme Court rulings have translated into progress in a meaningful and widespread way, and if they have enhanced or further restricted Indigenous self-determination (Dalton 2006). In the realm of water, though increasing attention is being placed on First Nations' rights and concerns within water governance scholarship, it is certainly discouraging that the *Water Sustainability Act* has fallen short of upholding such principles. Sam (2013) relates his scepticism on this point: "Indigenous water rights in this modern era have yet to be fully recognized by the imperialistic governments of colonizing nations. Granted, there have been Supreme Court rulings that have provided legal space within these jurisdictions yet very little has been gained as a result of these decisions" (139).

1.4.3.2 Collaborative watershed planning with Indigenous peoples

The changing legal requirements described above extend into colonial water governance, constituting what Plummer and Fitzgibbon (2004) describe as a critical "precondition" of co-management. Concomitant with this legal impetus for greater First Nations' involvement in water governance is an emphasis within water governance scholarship on the idea that in order for water governance to be equitable and effective, it should be collaborative, include more participants in the decision-making process, and rescaled to a local watershed level (Brandes & O'Riordan 2014; Cohen 2012; Memon & Kirk 2012; Nowlan & Bakker 2007; von der Porten & de Loë 2013a). This shift away from federal and provincial control towards local and collaborative water planning and governance is occurring in BC (Nowlan & Bakker 2007, 2010), with "... profound implications for how and if Indigenous peoples choose to play a role in state or non-Indigenous water governance processes" (von der Porten & de Loë 2013a: 1). The need

specifically for a greater role for Indigenous peoples in water governance is well-documented (Barnhill 2009; Memon et al. 2010; Memon & Kirk 2012; Phare 2009; Tipa & Welch 2006; von der Porten & de Loë 2013a), as is the requirement for First Nations in BC to be involved not as local stakeholder groups but in government-to-government relationships (von der Porten & de Loë 2013a). As articulated here by Tipa and Welch (2006):

It has been concluded that the knowledge of all groups within society needs to inform resource management practice if sustainability is to be realized, and the need to develop more effective local-level practices is emphasized. More specifically, there has been recognition of the values, beliefs, and practices of indigenous communities and of the importance of the participation of such communities in resource management and conservation... What remains uncertain is exactly how indigenous communities might reengage with the practice of natural resource management and the impediments they might face when seeking to do so (374).

Regardless of the complications, collaborative planning and shared decision making with First Nations continues to be widely promoted as a model to adopt in BC. Chapter 3 of this thesis will examine some of the implications, impediments, and opportunities for First Nations within a collaborative watershed planning approach.

1.5: Thesis overview

To tie the above strands of discussion together and situate this thesis within its context: First Nations across BC have clearly articulated the importance of water and water governance to their communities. Further, is widely recognized within the realm of water governance and advocacy that First Nations need an increased and meaningful role in any future water governance approaches that are negotiated in BC. This shift is taking place in the context of increased legal recognition of Aboriginal rights and title; the province's updated *Water Sustainability Act* with its potential for new governance approaches; and a prominent trend

within water governance scholarship advocating for shared decision making with Indigenous peoples at a watershed scale. While BC is thus poised for potentially significant changes in water governance and there is heightened attention to First Nations' interests, I argue that before this 'meaningful role' for First Nations can be realized, attention must be given to the complex histories of governance and the existing barriers of colonial water governance in the province. By shedding light on some of these dimensions, this research will be relevant to efforts on the part of both First Nations and colonial governments to define and shape governance into the future.

In one family meeting in the Similkameen, a Band member expressed that he wanted to walk the Similkameen River watershed from the headwaters in Manning Park to the river's discharge in the Okanagan River in Washington. In a metaphorical way, it is my aim to follow a similar route with this thesis, traversing the waters historically rather than geographically. In Chapter 2, I will start in the headwaters where the current picks up, looking to the past to briefly consider Indigenous water governance prior to colonization. I next explore how the drawing of reserve boundaries and allocation of water licenses established many of the fundamental barriers for the *Syilx* and other First Nations in water access and governance that we still see today, such as fragmentation, jurisdictional ambiguity, disregard for First Nations' water rights, and exclusion of Indigenous knowledge and governance. In Chapter 3, I move downstream to take a critical look at the present-day situation, exploring some experiences of First Nations working within colonial water governance processes and unpacking some complications with respect to First Nations and collaborative watershed planning arrangements. In Chapter 4, I conclude by offering some suggestions for how water governance could be more just and effective in BC.

1.6: Establishing terminology

With recognition that, “terminology can represent more than just a word...it can represent certain colonial histories and power dynamics” (First Nation Studies Program 2009), this section clarifies at the outset how key terms are employed throughout this thesis.

Colonial & Indigenous water governance: As discussed above, colonial water governance is understood in this thesis following Bakker’s (2003) definition as: “The range of political, organizational and administrative processes through which communities articulate their interests, their input is absorbed, decisions are made and implemented, and decision makers are held accountable in the development and management of water resources and delivery of water services” (3). In more straightforward terms, colonial water governance can be thought of as the structures that frame *who* decides and who is accountable; *what* the parameters of the decisions are; and *how* the decisions are made (Brandes & Curran 2009). Some colonial water governance processes pertain to Indigenous peoples; however, Indigenous input, interests and knowledges are often excluded from colonial governments’ political, organizational, and administrative processes. I understand water governance to be a subset of environmental governance.

Environmental governance has been defined as “the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes” (Lemos & Agrawal 2006: 298). Water governance differs from water management, which encompasses the on-the-ground ways in which water is used and regulated (Nowlan & Bakker 2010). I use *Indigenous water governance* to broadly describe Indigenous conceptualizations and enactments of water governance, again, without suggesting that I hold a full understanding of the

depth and breadth of Indigenous forms of governance. There is not a singular form of Indigenous water governance, but rather these processes will be particular to each nation.

Collaborative watershed planning: A process in which First Nations and various stakeholders are consulted, informed, and engaged in watershed planning and decision-making, but do not have substantive decision-making authority. Often in these processes, First Nations are not able to assume their authority as Nations and colonial power imbalances are perpetuated.

Co-governance: Co-governance is broadly understood following Kotaska's (2013) definition as a governance model in which Indigenous and colonial governments co-create shared forms of jurisdiction over areas or resources that First Nations have agreed to share with non-Indigenous people.

Crown referral process: The process through which the federal and provincial governments consult and accommodate First Nations on land and resource decisions that could impact Aboriginal interests. This fiduciary duty is an obligation owed by the Crown, and cannot be delegated to third parties. However, the project proponent may be involved in the procedural aspects of consultation. Although the content of the duty to consult and accommodate varies with the circumstances, in general, governments must provide affected First Nations with adequate notice and full information about the proposed project or action and its potential impact on their rights (Penny 2009).

Cultural & spiritual flows: Those water flows (quality and quantity of water) which are necessary to fulfill Indigenous water uses, not only for drinking and other household and economic uses, but also for spiritual and ceremonial activities.

En'owkin process: The En'owkin process is a *Syilx* form of decision-making and conflict resolution through dialogue. The En'owkin centre describes this process: “A *Syilx* conceptual metaphor which describes a process of clarification, conflict resolution and group commitment. With a focus on coming to the best solutions possible through respectful dialogue, literally through consensus” (En'owkin Centre 2014).

Indigenous: This work follows the recommended uses of terminology outlined by UBC's Indigenous Foundations resource. *Indigenous peoples* is understood to refer, “...broadly to peoples of long settlement and connection to specific lands who have been adversely impacted by incursion by industrial economies, displacement, and settlement of their territories by others” (First Nations Studies Program 2009). According to the UN Permanent Forum on Indigenous Issues, the term *Indigenous* encompasses the following elements:

- Self-identification as Indigenous
- Historical continuity with pre-colonial and/or pre-settler societies
- Non-dominant groups of society
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples.

First Nation – singular – describes the government of an Indigenous community, a band, a reserve-based community, or a larger tribal grouping. This term came into widespread use in the 1970s and 80s and “highlights the nationhood status of Indigenous groups and their existence prior to the colonizing state” (Kotaska 2013). There are 203 individual First Nation bands in BC; more than 30 Indigenous languages are spoken in the province, and eight of the eleven Indigenous language families in Canada are found in BC (First Nations Studies Program 2009).

First Nations – the plural of the word - describes Indigenous peoples of Canada who are ethnically neither Métis nor Inuit. *Aboriginal* refers to the first inhabitants of Canada, and includes First Nations, Inuit, and Métis peoples. This term became more commonly adopted in the Canadian context after 1982 when it was defined as such in Section 35 of the Canadian Constitution (First Nations Studies Program 2009). In this thesis, I primarily use the terms Indigenous and First Nations, limiting *Aboriginal* to discussions of Aboriginal rights and title.

Colonialism: I understand colonialism as a process described by Frideres (1983) as a practice, policy or system in which a more powerful nation maintains or exerts its authority and control over a less powerful nation or people, generally to access land and resources. This includes geographical incursion, socio-cultural dislocation, the establishment of external political control and economic dispossession, the provision of low-level social services, and the creation of ideological formulations around race which position the colonizers at a higher evolutionary level than the colonized. Further, I follow Kelm’s (1997) argument that: “In some ways it might be argued that First Nations never gave up their power, as Frideres suggests, but rather maintained a power that was less a ‘power over’ and more a ‘power to’ (A power to resist, to create, to control, to survive)” (xix).

Aboriginal Rights: Those rights due to Aboriginal peoples because of their sovereignty prior to the assertion of state sovereignty and their continued use and occupation of certain areas.

Aboriginal rights are inherent rights: “Aboriginal rights have not been granted from external sources but are a result of Aboriginal peoples’ own occupation of their home territories as well as their ongoing social structures and political and legal systems” (First Nations Studies Program 2009). There are various categories of Aboriginal rights, including a right to land (Aboriginal title), rights to self-government and self-determination, language and cultural practices, and rights to access subsistence resources.

Aboriginal title: An Aboriginal right to land. This includes the right to its exclusive use and occupation and to choose to what uses land can be put.

Self-determination: I adopt Dalton’s (2006) definition of self-determination: “Aboriginal self-determination in Canada refers to the right of Aboriginal people to choose how they live their shared lives and structure their communities based on their own norms, laws, and cultures” (14).

Syilx: The Okanagan peoples. The word *Syilx* holds great importance:

“The root word “Yil” refers to the action of taking any kind of many-stranded fiber, like hemp, and rolling it and twisting it together to make one unit, or one rope. It is a process of making many into one. “Yil” is a root word which forms the basis of many of our words for leadership positions, as well. *Syilx* contains a command for every individual to continuously bind and unify with the rest. This command goes beyond only humans and encompasses all stands of life that make up our land. The word *Syilx* contains the image of rolling or unifying into one, as well as the individual command which is indicated by the “x” at the end of the word which indicates that it is a command directed at the individual level. The command is for every individual to be part of that stranded unified

group, and to continue that twisting and unification on a continuous basis. It is an important concept which underlies our consideration of the meanings of aboriginal title and rights” (ONA 2010).

Non-Indigenous & Settler: As per Kotaska (2013), I use the terms *settler* and *colonial* “...in situations where it is modifying a noun, such as ‘settler government’ (the governing body) or ‘settler state’ (the political power), as these governing institutions and powers are, for the most part, a product of settler colonialism” (xv). Following from this, I predominantly use *colonial government(s)* to refer to federal and provincial governments historically and at present. I limit my use of *settler society* or *settler* to the historical discussion in Chapter 2 to refer to the non-Indigenous people who initially settled in BC. I use *non-Indigenous* to describe non-Indigenous peoples in Canada in contemporary times, with recognition that this is a diverse group of people from varying ancestry who have been residents of Canada for different lengths of time.

Chapter 2: First in Time, First in Right?

Dispossessions of Indigenous water access and governance through reserve formation and water allocation in BC

2.1: Introduction

“My dad always taught us that we had full water rights. Now I hear people say that we don’t have water rights. What happened to these old ways?” (Sylx member, January 2014)

In this chapter, I look to the past to explore some of the ways in which Indigenous peoples’ relationships and rights to water access and governance were disrupted through the joint colonial processes of territorial dispossession and water allocation in BC. Chapter 2 thus addresses my first research question: What are some Indigenous ways of governing and accessing water and how did colonial water governance frameworks affect the LSIB and other First Nations in the past and present? The aim is to trace contemporary colonial water governance in BC to its roots, critically examining some of the foundations upon which non-Indigenous assumptions, policies, relationships and attitudes towards water and First Nations are based. Motivation for this inquiry flows from Harris’ (2001) suggestion that, “A new geography of Native-non-Native relations in BC may be built a little more easily and securely if we know more about the arguments, policies and modalities of power that underlay the old” (xxvi). While I had not initially planned to place a central focus on “the old”, throughout the course of this research it became clear that due attention needed to be given to the historical factors that have shaped the course of water access and governance today. Specifically, a prominent thread running throughout the interviews, workshops, family meetings, and various water strategies and submissions reviewed as part of this project, was concern and uncertainty about the impacts of BC’s First in Time, First in Right (or prior allocation) water licensing system on First Nations’

water access, rights, and governance. These concerns about water allocation were particularly visible in the Similkameen, where water scarcity is a real and growing issue, and water licensing is increasingly a topic of contention. Such questions about water allocation and access have a strong historical lineage, tracing back to reserve creation in the late 19th century and the concurrent application of the First in Time, First in Right (FITFIR) water allocation system. It is my aim with this chapter to foreground reserve formation and the associated FITFIR water allocation system as key contributing factors that condition water access and governance concerns currently experienced by the LSIB and other First Nations across the province.

A brief consideration of some forms of Indigenous water governance in BC that pre-date colonization is my point of entry into Part 2 of this chapter. Next, taking an environmental justice perspective, I explore how two related features of the reserve system established fundamental features for First Nations and colonial water governance in the province – issues that still characterize the system today. In Part 3, I look at the antecedents and logic of the reserve system and the FITFIR water licensing scheme. I highlight that the act of bounding water into licensed allotments to be granted to reserves within a prior allocation scheme was an intrusion into Indigenous water governance in BC, wherein colonial governments sanctioned the widespread appropriation of water by settler society. In many cases, these actions isolated First Nations communities from the water sources that had sustained them for centuries; marginalized them in the licensing allotment processes; and failed to recognize the status of these communities as the original inhabitants of the lands of BC. I add an empirical contribution from three First Nations that shows how systems of water allocation in BC have impacted their water access and livelihoods. In Part 4, I provide a theoretical analysis of how the demarcation of reserve boundaries and water's inherent inability to obey those fixed boundaries marked the beginnings

of intense jurisdictional fragmentation and conflict in the colonial water governance framework for First Nations in BC. These complications arose from the intrinsic nature of water as a flow resource which held little regard for the newly established boundaries and jurisdictional divides. Finally, in Part 5, I examine the current state of water allocation in BC, demonstrating some of the concerns and uncertainties documented through work with *Syilx* community members and others about the future impacts of water allocation on their water access and rights. This provides a segue into Chapter 3, which will look at some of the experiences, challenges, and strategic sites of engagement that different First Nations encounter within the current colonial water governance landscape in BC.

This chapter draws primarily on work with the LSIB, supplemented by interviews with natural resource officers from three other First Nations in BC, and document review of historical water rights documents, publications from provincial First Nations organizations, and various *Water Sustainability Act* submissions. As I want to highlight throughout this thesis, I do not claim that this chapter gives a complete account of water access and governance that is representative of the diverse experiences of all LSIB community members, nor of all First Nations in the province. However, I engage with the experiences of the LSIB to shed light on wider trends likely to be of relevance throughout BC.

2.2: Indigenous water governance in BC pre-colonization

“Water governance here in this valley is a Syilx responsibility that has existed for thousands of years” (Sam 2008: 2).

While a detailed discussion of the many forms of Indigenous water governance in BC prior to colonization is beyond the scope of this research, it is valuable to briefly consider some of the water governance systems that were in place before the introduction of colonial forms of

water governance. As two prominent *Syilx* scholars describe, there was a sophisticated and complex “network” of Indigenous water governance systems in place across BC prior to colonization:

Aboriginal water use arises in social customs as a system of water governance historically held in place through a network of localized operational, indigenous political jurisdictions that determined access and limitations in aboriginal water use related to each place (Armstrong & Sam 2013: 250).

River systems in particular were important sites of governance, as they were vital spawning grounds for migrating salmon and provided transportation networks. As Sam (2008) writes:

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 (2).

He relates further the important role of the ‘Salmon Chief’ in traditional *Syilx* water governance:

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 (2).

Indigenous water governance has strong links to fish harvest and ceremony. Armstrong and Sam (2013), for instance, describe that:

Aboriginal use of water includes customary water governance methods such as maintaining fish-ceremonial activities that are foundational to traditional intertribal law observance for harvest access and distribution and fishing locations, fishing stations, and tribal boundaries (250).

Doug Harris in his book *Fish, Law, and Colonialism* also has provided thorough documentation of First Nations’ pre-colonial laws and regulations surrounding fisheries: “Given the importance

of fish to most local groups, the sites for their capture and harvest were prized, and thus closely surrounded with regulation” (19) and further “the historical record is replete with examples of the Native regulation that had managed the resource and that was transforming to meet new opportunities and to contest the imposition of state law” (61). While this certainly is not an exhaustive discussion of Indigenous water governance prior to colonization, it is clear that water *was* actively governed through a diversity of means and systems that determined use and access. Such diverse forms of Indigenous water governance persisted through and remain in tension with the imposition of colonial modes of water governance, a point I will return to in section 2.4 below.

2.3: Reserves, water licensing and impacts on Indigenous water governance and access

2.3.1 Overview of FITFIR water allocation applied to reserves in BC

Colonial appropriation of Indigenous lands and attempts to assimilate and ‘civilize’ Indigenous peoples in Canada were, and remain, deeply violent processes. Forced removal of over one hundred and fifty thousand children into Residential Schools “to kill the Indian in the child”; germ warfare; government policies which banned vital cultural activities such as the potlatch, dismantling Indigenous systems of governance and imposition of the colonial Band Council model are sadly but a few of the atrocious acts committed by colonial governments against Indigenous peoples. The designation of land into Indian reserves in BC was no exception: at its core, this was a strategy to remove Indigenous peoples from the landscape – to “keep them quiet” (Carstens 1991) – in the face of increasing Euro-Canadian settlement pressures in the 1800s. Harris (2004) is explicit on this point: “Native people were in the way, their land was coveted, and settlers took it” (167)., Confining Indigenous peoples onto reserves

was also a key strategy in the federal government's assimilationist project to convert Indigenous peoples into settled 'productive' and 'civilized' agriculturalists (Kelm 1997). Although some 140 reserves had been established prior to 1871 when BC joined confederation, the majority were mapped throughout the late 1800s and early 1900s (Harris 2001). As a consequence of colonization and the reserve system, Indigenous peoples were denied access to much of their territories and confined onto tiny tracts of fragmented land, "surrounded by clusters of permissions and inhibition that affected most Native opportunities and movements" (Harris 2001: iii). The reserve land area ratio demonstrates the scale of dispossession: there are 1500 small reserves in what is today the province of BC, comprising a mere one third of 1% of the provincial land base (Harris 2004). While it is beyond the scope of this chapter to consider the full breadth of impacts that the reserve system had on physical, socioeconomic and cultural wellness, it is clear that it affected almost every aspect of First Nations' lives and livelihoods (Harris 1997, 2001, 2004; Kelm 1997; Miller 2000; Thom 2009). As Armstrong and Sam (2013) describe in *Indigenous Governance and Resistance: A Syilx Perspective*: "Forced removal and displacement from land imposed restrictions on water and other resources that disallowed freedom of movement to vital subsistence procurement sites and inhibited the ability of indigenous peoples to continue ancient customary relationships and responsibilities within their ecosystems" (245). Furthermore, it is critical to acknowledge that Indigenous peoples actively resisted the reserve policy and the appropriation of territories by settler society (Harris 2001). At the time that reserve lands were delineated, so too were water rights, as colonial governments in BC attached water rights to reserve lands under a prior allocation system. Although I narrow my focus specifically on the impacts of reserve water allocation in the remainder of this chapter, colonialism and the reserve system impacted Indigenous water rights, access and governance in

many profound ways. The scale of territorial dispossession was immense and reserves were “surrounded by clusters of permission and inhibitions that affected most Native opportunities and movements” (Harris 2001: xxi). Consequently, Indigenous peoples in BC lost access and governance of the majority of water bodies in their territories, including key fish and other food harvest sites, transportation routes, and ceremonial sites. The water allocation system imposed on reserves was just one aspect of the broader colonial processes which systematically denied Indigenous peoples’ rights to access and govern their territories and waters according to their own laws and practices.

Water allocation systems “provide the rules and procedures for assigning rights and establish the processes used to decide how water should be shared among various users” (Brandes et al. 2008: 6). In BC, water is allocated through a prior allocation (or First in Time, First in Right) licensing scheme, which is under the jurisdiction claimed by the provincial government. Before its adoption in BC, this system had been applied extensively throughout the Western States and Prairie Provinces; indeed, “by the end of the 19th century, the enormous area of Canada that stretched from the Pacific Ocean to Hudson Bay was subject to broadly similar principles of water law” (Percy 2005: 2093). Shurts (2000) has provided a useful summary of the key features of prior appropriation. First, this system generally entails privatization of water by means of individual property rights, and separation of water and rights to water from a direct relation to land. In the case of reserves in BC, however, this operates slightly differently as licenses *are* attached to specific reserve lands: “For the most part, water licenses granted by BC are assigned to the specific reserve as a whole and are held in the name of Canada or an *Indian Act* band to which they were granted” (AFN 2013). Second, as its name suggests, the prior allocation scheme operates on a first-come, first-serve logic:

Water rights in BC may be exercised under a system of priorities according to their respective priority dates. During times of scarcity, water licenses with the earlier priority dates are entitled to take their full water allocation over the junior licenses, regardless of the purpose for which the water is used” (MOE 2013: 17).

Third, water licenses operate under a ‘use it or lose it’ system, and licenses must be put to ‘beneficial’ productive use or they can be revoked (BCAFN 2010). The irony of the title First in Time, First in Right could hardly be more blatant from a First Nations’ perspective. Despite the fact that First Nations undeniably are the *First* Peoples in the land of BC and were clearly first in time for all water in the province, the water rights defined and assigned to reserve lands were not registered as such, let alone water off reserve lands. This is an ongoing influence on reserve water access that continues to be resisted today.

Although there was a great deal of provincial-federal wrangling over the so-called ‘Indian land question’ and the delineation of reserve boundaries, this jurisdictional strife was equally pronounced in the debate over how to allocate water to the parcels of reserve land (BCAFN 2010; Bartlett 1998; Harris 2004; Matsui 2005, 2009; Richard 1999). BC began to grant water licenses to settlers in 1865. Significantly, these licenses were registered *prior to* the establishment of reserves (BCAFN 2010). In 1871, by the terms of Union, Indigenous peoples and their lands became a federal responsibility, while jurisdiction over land and water was transferred to the province (Harris 2001). With this division, a prolonged dispute was initiated between the two governments over whether or not water rights should be assigned to reserve lands; further, both governments were determined to maintain exclusive authority for defining water rights in the province (Bartlett 1998). First Nations were completely barred from applying for water licences in their own name until 1888 (BCAFN 2010). First Nations actively resisted the water licensing at the time of reserve designation and water allocation in the 1800s: “Native people were not quiescent in the face of deteriorating conditions on their reserves...Repeatedly

they [Aboriginal leaders] petitioned the government for assistance in getting adequate water” (Kelm 1997: 48). As reserve water rights were designated, however, First Nations’ well-articulated demands and desires were not considered by colonial governments; rather, as Matsui (2009) writes,

Despite their differing opinions on the question of Native water rights jurisdiction, both provincial and federal officials shared the belief that whatever rights Natives had, they were held at the ‘pleasure of the Crown.’ A number of Native testimonies and petitions, which asserted inherent Aboriginal rights to water, did not sway either federal or provincial officials... (63).

In 1876, a joint federal-provincial Reserve Commission was established with the aim of settling reserve land boundary disputes, and by extension, resolving reserve water allocations. Federal commission officials generally recognized the great importance of assigning water to reserves, on the basis that, “water rights were essential to the fulfillment of the objectives with which the [reserve] lands were set apart...including the encouragement of agriculture and ranching, and the maintenance of traditional forms of sustenance such as hunting, trapping and fishing” (Bartlett 1998: 43). Arguing that water was necessary for irrigated agriculture, which in turn was a critical element in the project of assimilating Indigenous peoples, federal reserve commissioners took measures to register water licenses to accompany reserve lands in BC. The federal government held these licenses on behalf of First Nations (Matsui 2005, 2009; Walkem 2004). Provincial government officials, on the other hand, were reluctant to recognize the federal government’s jurisdiction over reserve water allocation, or to recognize First Nations’ water rights to the detriment of settlers (Bartlett 1998). Provincial authorities maintained that the reserve water rights granted by federal officials were not legitimate grants but merely unauthorized records (Matsui 2009). In 1920, for example, a provincial Board of Investigation ruled that the reserve water records entered by federal Indian Commissioners were legally invalid (Matsui 2009). This

federal-provincial divide over reserve water allocation is evident in the case of the LSIB, for instance, where water rights data indicate that the provincial government still does not formally recognize two reserve water allotments that were granted by federal officials in the 1880s (these licenses are for Blind Creek/Cawston Creek and Nahumcheen Creek, see Table 1 below).

Overall, as a result of the back-and-forth between federal and provincial officials, there was a great deal of ambiguity and inconsistency in how water allocations were being documented and assigned to reserves. From an environmental justice perspective, as per Schlosberg (2007), this was a far cry from upholding any notions of procedural justice, or “fair and equitable institutional processes of a state” (25) with broad and authentic participation of those affected by environmental policy. Chapter 3 of this thesis will continue the discussion of how procedural injustices continue to dominate the current governance context, where it is a struggle for First Nations to be involved at a strategic, government-to-government level in existing colonial water governance processes.

2.3.2 First in time, last in right: outcomes of the dispute

The ultimate outcome of the provincial-federal clash over reserve water licenses, and of the fact that First Nations could not apply for their own licenses, was that reserve water rights were often left far down the priority list within the provincial system and were frequently cancelled or overridden by settler water licenses (Bartlett 1998; Richard 1999). Bartlett (1998) notes that the allotments of water made by the Reserve Commissioners were, “Invariably made subject to the prior recorded rights of white settlers, though it was noted at the time that in many instances water had been recorded by white settlers which was really necessary for the Indians” (48).

| Reserve water sources | Band license priority ranking | Total licenses on water source |
|------------------------------|--|---------------------------------------|
| LSIB | | |
| Ashnola River | 1, 3 | 6 |
| Old Tom Creek | 1 | 1 |
| Jim Creek | 1 | 2 |
| Johns Creek | 1 | 1 |
| Paul Creek | 1 | 1 |
| Blind Creek & Cawston Creek | LSIB allocation from Indian Reserve Commission not formally recognized by province | 1 |
| Keremeos Creek | 22 | 40 |
| Nahumcheen Brook | LSIB allocation from Indian Reserve Commission not formally recognized by province | 2 |
| Similkameen River | 61 | 105 |
| Susap Creek | 2 | 4 |
| Narcisse Creek | 1 | 1 |
| Sintlehahten Creek | 1 | 1 |
| Shoudy Creek | 1 | 1 |
| Snehumtion Creek | 1, 2 | 2 |
| Okanagan Nation | | |
| Bradley Creek | 1 | 1 |
| Deep Creek | 1, 10 | 20 |
| Ellison Lake | 2 | 2 |
| Equesis Creek | 1, 5, 7 | 10 |
| Irish Creek | 3 | 7 |
| Isaac Springs | 1 | 1 |
| Moffat Creek | 3 | 5 |
| Naswhito Creek | 1 | 2 |
| Newport Creek | 1 | 1 |
| Okanagan Lake | N/a | N/a |
| Salmon River | (Holds only 2; priority not described) | 214 |
| Vernon Creek | 18 | 28 |
| Whiteman Creek | N/a | 3 |

Table 1: Water rights of the Lower Similkameen Indian Band and Okanagan Nation. Source: Ministry of Environment (1997a, 1997b)

Table 1 above documents the licensed water sources for the LSIB and Okanagan reserves and their ranking in the provincial system. It is clear that the Bands' water licenses tend to be ranked lower than others within the provincial registry, particularly on heavily licensed sources. On the

Similkameen River, for instance, the Lower Similkameen Band holds a license that is 61st in priority, out of a total of 105 licenses on the river. An incident recorded in the LSIB Historical Water Rights Summary further illustrates the denial of the Band's water rights within the water licensing system. In 1969, the LSIB applied for the right to use 2,000 gallons of water a day from Nahumcheen Brook, but the application was refused on the basis that there was insufficient water to grant this allocation. However, seventeen years later, the province issued a license to a private landowner for 150 acre-feet of water annually and 1,000 gallons a day from Everden Spring and Nahumcheen Brook. Sam (2013a) has further documented how this inconsistency unfolded in the case of the Penticton Indian Band, where, "The Joint Indian Reserve Commission...recognized Indigenous priority rights to water resources within the Penticton Indian Reserve. However, settler water licenses were given priority on all streams that flowed through reserve lands, despite the Commission's recognition of existing water rights" (45). One interviewee I spoke with from the We Wai Kai First Nation on Vancouver Island could not have summarized the discrepancy more aptly: "When it comes to water rights, we are literally the low man on the totem pole." From a distributive environmental justice perspective, "inequity in the distribution of social goods" (Schlosberg 2007) is all too apparent in these scenarios described by *Sylx* members and others.

It is worth a brief exploration here of the contrasting trajectory of tribal reserve water allocations in the USA. The FITFIR allocation system does not inherently negate Indigenous water rights per se, excluding the deeper epistemological issue that defining water as an inanimate 'resource' that can be granted in licenses stands in contradiction to many of the manifested beliefs that Indigenous peoples hold about water (see 1.3.1). Rather, it is the way in which priority of water access was determined in BC that is particularly controversial, where

First Nations were not recognized as the original occupants of the land holding distinct First in Right entitlements to water. Water in the Western States also was allocated on a First in Time, First in Right basis; however, through the *Winters* doctrine, which arose out of a court case with the Fort Belknap Indian Reservation in Montana in 1908, tribal water rights were explicitly designated within the system. According to the *Winters* doctrine, “An Indian reservation may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority for that water dating from the treaty that established the reservation” (BCAFN 2010: 445). In other words, the *Winters* doctrine affirmed that water rights were assigned at the time of reserve creation and that reserved rights were based on historical occupancy, intention, and agreement, not on diversion and use. The doctrine also includes an understanding that reserve water rights were flexible and unquantified, and further, that water rights assigned to reserves were understood to encompass not only existing but also *future* tribal reserve water needs (Shurts 2000). While not without its own critiques, the *Winters* doctrine did signify that “reserved rights established on this basis mostly predated any other rights on the watercourse” (Shurts 2000: 6), setting a very different foundation for tribal water rights and governance than in BC. At least in principle, *Winters* more closely adheres to the notion of First in Time, First in Right in its true sense: the first peoples of the land generally hold the earliest recorded water licenses, which has “real effects on water allocation decisions, including effects at least partially favorable to the long-term interests of western American Indians” (Shurts 2000: 8).

2.3.3 Impacts of FITFIR water allocation on water access and Indigenous livelihoods

Perhaps nowhere was the complex history of reserve water allocation in BC driven home more forcefully in this research than through an interview and follow-up email exchange I had with a staff member from the Kanaka Bar First Nation.⁴ As they related:

Colonial “Indian reserve land” surveyors were supposed to set aside both reserve lands and also allocate water licenses, but here at my community, they said there were no “Indians,” so no reserve and no water licenses were allocated during colonial times. That’s problematic in that Kanaka membership has lived here for thousands of years and there is a written record of observations of “Indian residency” from 1808 to today’s date...

The Province is created in 1871 and authority over “Indians” and “reserve lands” occurs. When the federal surveyor arrived here at Kanaka in 1878, he found a lot of Indians and was pretty upset that miners, missionaries, and settlers had already scooped all the land and water. We eventually got 700 acres of reserve lands and very limited water licenses (not enough to provide the community with adequate drinking and irrigation though). Even worse was that some of our original water licenses were issued not just on intermittent streams but on ephemeral streams which ran for such limited times. At some point, the local Indian Agents actually started cancelling our meager water licenses...

It was this story that provided me with the initial impetus to look more closely at the institutions of water allocation in BC. In the description, we see how the colonizer’s logic of *terra nullis* unfolded in Kanaka Bar: the community was declared non-existent despite thousands of years of living in that territory. “Problematic” seems rather a light term to characterize the implications. Even after colonial officials recognized that the Kanaka Bar community ‘existed’, this interviewee suggests that throughout the course of jurisdictional struggles, colonial governments did not provide the reserve land with sufficient water for drinking, let alone with an adequate

⁴ The Kanaka Bar traditional territory spans the Fraser Canyon region.

quantity to support other activities or economic development. They describe that these licenses were granted for sources of water that were unreliable at best and subject to arbitrary cancellation on the part of the province, reflecting Kelm's (1997) account that, "Not only were reserve allocations spatially limiting to the First Nations, but the alienation of water rights to the province also meant that some reserve communities had difficulty getting adequate and clean water" (46). Related instances in which it was a struggle for First Nations to gain adequate water allotments for irrigation and drinking have been documented in the case of the Kamloops and Neskonlith reserves (Matsui 2005, 2009). The Kanaka Bar case captures the precedent of Indigenous exclusion in colonial water governance in BC, the denial of water rights, and the deliberate attempts by colonial governments to restrict reserve water access.

During a neighbourhood meeting with six *Syilx* members in April 2014, similar stories were shared about some ongoing consequences of water licensing for Band members' water access. One woman described that:

These neighbours of ours had their water. They took it for years. They used it for years. And then a guy bought the property below it and realized that there wasn't any formal licensing on it, so he applied for a license and got it. So now it's his water. And suddenly this guy...I guess he still gives the other people [our neighbours] water, but he could at any time say, "no thank you, there's no more water" or, "it's going to cost you a ton of money."

Another man followed up:

And with all of the water permits. I mean, like I say, the band was *using* them. And they [the province] just went, "Oh that's too bad, we gave them away." It was all springs, there were pipes running to these peoples' houses, they just hadn't gone to the paperwork.

These stories reveal how the water allocation scheme compromised community members' secure access to water; their rights were not consistently recorded and could be cancelled or overridden

seemingly on a whim. Another *Syilx* community member recalled an instance in which settlers resorted to force to gain access to water sources used by *Syilx* inhabitants:

Well at Trout Creek. The little old couple, they had a ranch. They had fruit trees. They lived on the creek. They got thrown in jail. Because other people wanted the rights to the water, so they got thrown in jail. That was way back. Way back when. That's how they got the water.

While similar experiences have been documented for other reserve communities across the province (Bartlett 1998; Matsui 2005), it is also important to highlight the diversity of histories and encounters that different First Nations have had with respect to reserve water allocation. For instance, a staff member from the Akisqnuq First Nation in the East Kootenays related that in her community, reserves and the water allocation system did not severely impact their ability to access customary water sources. In her words:

So traditionally, obviously, the Akisqnuq knew where to settle by the good water. And we are lucky because our reserves are still in our traditional territory by our traditional water sources. Other communities are not so lucky. And I think my sense of it is that we were left in our traditional lands, we weren't moved. Our communities kept their good water. They kept their high ground. So we are very lucky and in a good place.

Further, although the dominant narrative I heard in this research was one in which Indigenous water rights were infringed upon by settlers, water rights disputes were not universal or simple 'Indigenous-versus-settler' scenarios, and there were complexities and variation in how this relationship unfolded (Matsui 2005).

This section has traced the turbulent history of the application of First in Time, First in Right water licensing to reserves in BC, demonstrating why this has been problematic for reserve water access and governance. Manifest in the process of assigning licenses to reserves are many of the same power relationships, asymmetries, and interactions that remain visible in colonial water governance in BC today, the most prevalent being the exclusion of First Nations from

water allocation governance process. As a result of jurisdictional conflicts between the federal and provincial government over reserve water allocations in BC, reserve water licenses were often ranked low in priority within the FITFIR system. Reserve licenses were also frequently overridden or cancelled by water allocations granted to settlers. This stands in contrast to the situation in the USA, where reserve water rights were clearly granted at the time of reserve creation. The FITFIR system and the situation of ambiguity around water rights in BC have, through restricting water access, had lasting impacts in many instances on reserve communities' material realities and livelihoods. Despite encroachments on water rights and access, First Nations in BC actively resisted the water licensing scheme from the outset and continue to voice opposition to the system today, which will be discussed in detail in section 2.5.

2.4: Setting the course for colonial water governance through borders around land and water

Thus far, the discussion has traced some impacts on reserve water access stemming from the FITFIR licensing scheme, and provided an overview of procedural injustices and exclusion of First Nations from the process of designating water allocation to reserve land. Here, I look at precedents established in colonial water governance accompanying the setting of borders around reserve lands and water. With the drawing of reserve boundaries, for the first time water also became a *transboundary* resource for First Nations in BC, crossing through different colonially-delineated jurisdictions, with all of the associated governance complexities this entails: "As an interloper between jurisdictions, water provides a challenge for governance systems that are delineated by fixed political boundaries" (Norman 2015: 1). In this section, I focus on the transboundary governance issues of jurisdictional fragmentation and conflict, and extend the

argument more metaphorically to discuss the “bordering” of water and exclusion of Indigenous knowledge in this process.

As reserve boundaries were delineated, acute jurisdictional fragmentation was introduced into the colonial governance framework for water and First Nations. Though fragmentation is notoriously prevalent throughout different aspects of water governance in Canada (Bakker & Cook 2011; Dunn et al. 2014), the jurisdictional split that occurred with the setting of reserve boundaries exacerbated fragmentation in colonial water governance for reserve communities.⁵ For the first time as it flowed along its course, water crossed borders where there was a collision of jurisdictions, authority and power, and different policies and management systems (Norman & Bakker 2009). On the inside of the reserve boundary, power and authority over water were assigned to the federal government, while on the other side of the border, jurisdiction lay with the provincial government.⁶ Later, First Nations governments also were ‘granted’ some powers over water within reserve boundaries in the realm of drinking water and through *Indian Act* bylaws. As discussed above, the jurisdictional divides introduced by reserve boundaries were a source of friction and power struggle from the outset, with provincial and federal governments vying for control over defining reserve water rights, and First Nations pushed to the margins. Two brief case studies of source water protection and drinking water demonstrate how this jurisdictional divide continues to hinder effective colonial water governance for reserves. While surface and groundwater sources on reserve are impacted by off-reserve land and water use activities such as agriculture and mining (Finn 2010; Swain et al. 2006), the ability for First

⁵ The ‘on the ground’ consequences and challenges of working within this fragmented system will be discussed in detail in Chapter 3.

⁶ Today, local governments (municipalities, regional districts, and improvement districts) also play a role in water and watershed management in BC. Local governments generally manage municipal water supply and wastewater management. However, local governments need authorization from the Province to have jurisdiction over specific aspects of water management (Fraser Basin Council 2014)

Nations to exercise their jurisdiction outside of reserve boundaries has been limited. Federal attempts at sourcewater protection for drinking water on reserve as recently stipulated in Bill S-8, *the Safe Drinking Water for First Nations Act*, apply only to water sources within reserve boundaries (Simeone & Troniak 2012). Approaching source water protection at this limited within-reserve scale does not account for the basic fact that off-reserve activities influence reserve water quality, particularly given the small size of many reserves. Decisions about source water protection and planning for off-reserve activities that impact reserve water quality are often made at the municipal or provincial level without meaningful First Nations involvement (MacIntosh 2008; Phare 2009). In the realm of drinking water, reserve boundaries have created abrupt divides; critics have long cited jurisdictional overlap and ambiguity in the respective roles and responsibilities of AANDC, Health Canada and First Nations in drinking water provision as one of the key reasons why chronic drinking water problems persist on reserves across the country (Boyd 2011; OAG 2005; Phare 2009; Swain et al. 2006). Despite nearly 3 billion dollars invested since 2006 into a series of federal drinking *Water Action* plans (AANDC 2013), the situation has not changed significantly: as of June 30, 2014, 156 First Nations reserves in Canada are under a Drinking Water Advisory, 29 of which are in BC (Health Canada 2014; First Nations Health Authority 2014). Consequences of fragmentation are evident in the case of drinking water quality regulations. Though the province is responsible for establishing drinking water standards and local governments generally manage municipal drinking water supplies and infrastructure, these standards do not apply within reserve borders. Up until 2013, the federal government failed to create binding regulation for on-reserve water quality (AANDC 2013; Phare 2009).

It is also productive to extend the discussion of the border more metaphorically to consider the “bordering” of water into a quantifiable licensed resource, and the types

of knowledge that were being included and excluded in this process. As discussed above, the application of prior allocation water licensing to reserve lands had immediate consequences for many reserve communities' material realities through restricting access to customary water sources. However, the impacts of these colonial forms of allocation and governance on First Nations' lives and relationships with water also percolated under this visible surface into the discursive and epistemological realm of 'ways of knowing' water. As Norman (2012) writes of the colonial history of border making: "This worldview is closely linked to power and privilege asserted by, and for, the newcomers. As part of this process, a matrix of new laws, policies, and landscapes were formed and normalised over time. In this process, traditional indigenous interpretations were often overshadowed" (143). Similarly, describing the process of categorization, Jones (2009) notes that as borders are drawn, "...there is a concomitant destruction of alternative knowledges and ways of life as new power relationships are imposed" (176). As colonial systems of water governance were imposed in BC, including the reserve water licensing system, a matrix of laws and policies was established which re-wrote water into a 'resource' that was quantifiable and owned by the provincial government to be subsequently 'granted to' First Nations in a FITFIR licensing system. These notions collided with some of the manifested beliefs that Indigenous peoples hold about water as a powerful medicine and sacred resource, as the lifeblood of the land, and as a relative that must be respected and cared for (Blackstock 2001; LaBoucane-Benson et al. 2012; McGregor 2012; Sanderson 2008; Walkem 2004). In part through the act of bounding land into reserves and water into licensed allotments, such knowledges, relationships, and responsibilities for water were pushed

to the margins. It was the colonizer's understandings and "hydrosocial relations" with water which ultimately persisted in water governance in BC and elsewhere (Wilson 2014); as Walkem (2004) describes, "We see our waters governed by imposed foreign, colonial, and inhumane laws and practices that disconnect us as Peoples from the ecosystem" (4). However, even as reserve boundaries were drawn, water was parceled into licenses, and jurisdictional barriers were created, First Nations' rights to water, and to govern water according to their laws and practices, have flowed onwards into the present day (Bartlett 1998; BCAFN 2010; Matsui 2009; UBCIC 2011). In the words of a natural resource officer at the We Wai Kai First Nation on Vancouver Island:

With our Nation we have five designated reserve lands and like most coastal communities, they're small in size but they were provided to us so that we could also control those waterways. So our point of view is that, you know, the reserve land and that continuum of that water is still within our territory and our right of governing control. So it's very important to us. And that governance and the use of all in there is, I would definitely say, of very high importance to us.

To summarize this section's core arguments, it is useful to draw upon Norman's (2014) suggestion:

The act of drawing a line bounds territory and ultimately sets a trajectory for a relationship between people and its environment. As water transgresses in and out and through jurisdictions, it becomes integrated into wider social-political contexts that are wrought with power dynamics, historical legacies, and asymmetries. This line, in turn, can be revealed as scale, power, and justice (7).

Throughout the process of setting reserve boundaries and water allocation in the 1800s, we see a trajectory set for colonial water governance in BC with a precedent of inter-jurisdictional conflict, fragmentation, and procedural injustices where Indigenous peoples and knowledges were pushed to the margins of decision-making over their water sources.

2.5: A lasting legacy: the murky waters of reserve water allocation today

Ongoing opposition to water licensing and its associated infringements on Indigenous water rights was common theme running throughout almost every interview and conversation I had during this research. This final section will guide the discussion into the current context to look at the lasting legacy of the prior allocation water licensing system, a particularly relevant focus given that the basic principles of the First in Time First in Right system have now been enshrined within BC's new *Water Sustainability Act*, passed in 2014 (MOE 2013). As the legislative proposal outlines, the decision to uphold FITFIR is justified on the basis that this allocation system is easy to understand and administer, and does not require a re-ranking of users which "could change with time and be highly subjective" (MOE 2013: 116). Although the WSA does not provide substantive changes to the provincial water allocation mechanism, the legislation does include a slight modification to enable decision-makers to make allowances for essential household use regardless of the priority of other licenses. This is seemingly deemed a sufficient amendment to appease those who dispute the FITFIR system: "These modifications...to allow for essential household use should address many of its perceived shortcomings" (MOE 2013: 116). Further, although the WSA includes a provision for decision-makers to consider environmental flow needs⁷ in new water license applications, the adopted definition of environmental flow needs does not include cultural or spiritual flows and only makes vague mention that there will be "continued mechanisms to reserve water for First Nations" (MOE 2013: 6). The licensing measures adopted in the WSA fall short of responding to the many issues and questions that Indigenous communities and organizations have raised about

⁷ Environmental Flow Needs (EFNs) refers to the quantity and timing of flows in a stream that are required to sustain freshwater ecosystems, including fish and other aquatic life (i.e., maintain stream health).

FITFIR, and completely sidestep the topic of Aboriginal rights and title to water. As Jackson (2008) writes of the Australian context, “Indigenous groups participating in environmental water planning processes consistently express a strong desire to ensure adequate environmental flows, yet to date, Australian Environmental Flow Assessments have a poor record of incorporating indigenous values or knowledge, rarely considering indigenous water rights or cultural and heritage issues” (885). Similarly, in her submission regarding the WSA, Kekinusuqus, Judith Sayers, National Chair of Aboriginal Economic Development, outlines why this is also an outstanding issue in BC: “First Nations have been asking that Environmental Flows include water flows that allow for spiritual/cultural use and this is not taken into account in the definition – ensuring water flows and quality of water is integral to continue practicing Aboriginal ways of life-rights.” Above all, the WSA perpetuates a water licensing scheme that fails to recognize Indigenous peoples as the legitimate ‘First in Time’ senior water rights holders. The LSIB’s submission to the WSA is explicit that the adopted amendments will not suffice:

The “First in Time, First in Right” system of water allocation does not consider the inherent rights that the Lower Similkameen Indian Band has in regard to the use and management of waters in the Similkameen Valley and within the Traditional Territory of the Lower Similkameen Indian Band; the Lower Similkameen Indian Band has been using these for cultural and sustenance purposes since time immemorial.

Beyond the *Water Sustainability Act*, prior allocation water licensing has also been upheld in the modern treaty and self-government agreements signed in BC. For instance, the Maa-Nulth, Nisga’a and Tla’amin Nation treaties all include specified water allocations from the province.

As an example, the Maa-Nulth Final Agreement establishes that:

- 8.1.1: “Storage, diversion, extraction or use of water and groundwater will be in accordance with Federal Law and Provincial Law”

- 8.2.1: BC establishes 5 water reservations for domestic, industrial, and agricultural purposes for the Maa-Nulth Nation.
- 8.4.8: These 5 licenses hold priority over all other licenses *except those issued before October 2003*.
- 8.4.1: Maa-Nulth First Nation may apply to BC for additional water licenses and,
- 8.4.9: BC will consult with the Maa-Nulth about all applications for water licenses (from external parties).

In sum, those licenses granted prior to 2003 still trump the Maa-Nulth allocations granted through the treaty; ownership of water remains vested in the province; and all licenses must adhere to existing colonial government regulations and laws.

Since prior allocation remains intact in the *Water Sustainability Act*, it will continue to be a cornerstone feature of future water allocation arrangements in BC. There is the possibility that FITFIR will be increasingly contentious moving forward, particularly for those First Nations that, as a result of the injustices set into motion at the time of reserve creation, do not have priority water licenses. It is important to recall that under the FITFIR system, the earliest recorded license has priority access to water *in times of shortage*. There is no denying the fact that water scarcity is becoming a tangible and pressing reality in several regions of the province. Many water bodies are nearing the point of full or over-allocation; 25% of water sources in BC now have restricted licensing (Brandes & Curran 2008). It is in instances of water scarcity that the FITFIR system will come into force in a substantial way and those license holders lower down the priority list, including First Nations, could face a great deal of uncertainty in water access (Brandes et al. 2008). The Okanagan region in particular is a hotspot for mounting water scarcity problems (Shepherd et al. 2006). As Wagner and White (2009) note, “Scientists and

water managers are predicting significant water shortages in the region within the next few decades as a consequence of rapid growth and global warming...As a result, competition over water resources is intensifying and could well lead to increasing inequities of access to water and to unsustainable use of the available supply” (378). In the South Okanagan, 235 of 300 streams are now fully allocated, and no additional water licenses can be granted (Brandes & Curran 2008). In a submission from the Okanagan Nation Alliance on the WSA, we learn of concerns about how the licensing system is already damaging water sources and impacting the well-being of *Syilx* people: “Within the Okanagan basin many of our streams and rivers are over-allocated in terms of water licensing. The highly competitive nature of water allocation within our territory is harming our environment and way of life.” The 2013 BC First Nations Rights to Water Strategy raises similar concern that water licenses granted in the past will impinge on First Nations’ ability to access water in an increasingly water-scarce future:

First Nations are concerned about longer-term water licenses issued by the provincial water stewardship officials which can lock in rights of access to public water supplies for years...Many First Nations reserve lands have associated water licenses; however, many require additional volumes of water for community and economic development purposes (4).

Common themes and parallels resound throughout the many comments about water licensing shared during interviews and family meetings with *Syilx* members. I heard fears that existing water licenses have already over-allocated and depleted local water supplies; worry that there is not enough water to support the growing pressures from rapid population growth, development and climate change; and apprehension about where this state of over-allocation leaves *Syilx* peoples. During one family meeting, as we gathered over a meal and settled into an evening discussion, a band member voiced with great frustration her thoughts about water licensing and over-allocation on the Similkameen River:

Well, there is a limit to what the river can provide and there are so many people who have licenses for water and that. You know, who is monitoring it? Who is deciding how much water is being used? How many gallons can the water put out here before it is compromised?

Another key issue is conflict with other water users related to water licensing and rights; several community members related concerns about other licenses infringing on *Syilx* water rights. Even when priority water rights are recognized, they are not always clear or enforced. In the words of one man:

We have some very historical water rights but at the same time they [the province] don't advise us if those are being fulfilled or if anything is infringing on them. So again that's for us to police ourselves, I guess. And we've had difficulties with adjacent property owners to the reserve in fighting about water rights.

Both of these quotes also convey another main element, namely, the lack of information and transparency around license allocation and monitoring. Another woman highlighted how confusing the system is to navigate:

Water licensing and water rights kind of underlies everything. But we don't have a full understanding of who holds the licenses, how much water is allocated, how the whole system works. We have a basic understanding, but when it comes to each community and we hear concerns like, "X or Y creek, it flows through here and it dries up in the summer; who has the water licenses? Why don't we have enough water every year?" And "my cows aren't getting enough water; we can't drink the water." So it is hard to answer the questions, basically, because it is so big.

Lastly, an overarching issue that was shared was the question of why the authority and jurisdiction to actually *grant* water licenses lies with the province: why a government official in Victoria can issue water licenses to anyone for a minor application fee, while it is at the local level that community members both know the water sources best, and will be most heavily impacted by the effects of over-allocation. One band member drove this message home: "Who gives the licenses and who authorizes them to give a license? I think that all of the water that is

in our reserves and that is in our territory is ours. There should not be a license on water that is ours...”

The Kanaka Bar First Nation case shows how one Indigenous community is strategically negotiating with the provincial water licensing system in more recent times. Although the Kanaka Bar water license was initially slotted well down the priority list in the provincial system, through strategic action and challenging the senior license holders, the community has triggered shifts in the system and has been able to “free up” water for community use and development into the future. The Kanaka Bar member I interviewed described that “We [the community] became responsive,” confronting the FITFIR licensing system in order to develop a band-run independent hydroelectric power project:

We applied for a water license for hydroelectric purposes in 1990. However, we were now fourth in line. So guess what? We were not first in right, so we were tanked. We were on the outside looking in, but as a result of the application we now had an ‘in’ with the provincial regulators. And at the time they were fully immersed in “well we have the constitutional jurisdiction.” And as a First Nation we were saying, “well no, this is our land and resources!”

So what we did do was trigger for the first time that those few water licenses ahead of us had to develop a process of consultation and accommodation... you will see that recalculations and cancellations are pending as fee simple land owners must now demonstrate “use it or lose it.” So we should be able to free up some future water sources for the community soon.

In Alberta, on two occasions First Nations have turned to the courts and launched legal challenges against the colonial water allocation system. In 1986, the Piikani First Nation launched a lawsuit against the Alberta government over the proposed construction of the Oldman River dam and reservoir upstream from the Piikani reserve. Laidlaw & Passelac-Ross (2010) summarize the case:

The Band claimed that it had rights to appropriate water for its reasonable needs, that the riverbed of the Oldman River formed part of the reserve, and that the construction of the dam and reservoir would change the flow and quality of the Oldman River through the reserve and interfere with the Band's water or riparian rights. However, the issue of the nature and extent of the Piikani's water rights, including their ownership of the riverbed, was never resolved by the courts. All legal challenges against Alberta and Canada were discontinued when the Piikani entered into a settlement agreement with both levels of government in 2002.

In 2010, the Tsuu T'ina and Sampson Cree Nations took the province to court over the South Saskatchewan River Basin Plan (SRBP), one phase of which involved transfer of water under existing licenses. The Tsuu T'ina and Sampson Cree Nations stated that they had not been properly consulted during the SRBP's development. Further, they stated their claim to First in Time rights to water:

- “A declaration that the Plaintiffs have a property interest in all water resources and the beds and foreshore of the water courses and water bodies within an adjacent to the boundaries of the reserve”
- “A declaration that the Plaintiff's Treaty water rights have priority over all statutory grants, permits, and licenses granted under the North-west Irrigation Act, the Water Act, and all predecessor legislation”

The court ruled against both of these claims, stating that the province *had* fulfilled its duty to consult. The court essentially sidestepped the question of priority Aboriginal rights to water, stating that these were not directly linked to the SRPB, but rather that, “If there is presently any adverse impact on the water use of the Applicants, (either directly or as an adjunct to their other rights) it is a result of the priority system as set out in the Water Act and the licenses already granted. These are historical facts and not the result of the decisions under review or the SSRB Plan” (CanLII 2010: 22). In this case, it was ruled that the Tsuu Tin and Sampson Nations had

only “unproven substantive rights” where “the merits of the claims for water rights were far from being established.” Further, the Judge noted that the *Winters* doctrine does not apply in Canada. Following from this court case, the Tsuu T’ina and Samson Cree Nations have commenced actions concerning the nature and extent of their treaty and Aboriginal rights as they pertain to water rights and water management. These actions are still in their early stages and, among other things, include declarations that these Nations possess Treaty and Aboriginal rights to water; a property interest in the water resources, beds and foreshores of water courses and water bodies within and adjacent to their reserve lands; and that the *Water Act* constitutes an unjustified infringement of their Treaty water rights and right to self-government because it vests all water in the Crown (Denstedt & Oleniuk 2010). As. Justice O’Brien summarized in his Judgement:

At the heart of the concern of the appellant First Nations is that other water users will gain priorities to water and thereby deprive the appellants of the control of the management of the waters which they claim to own, and to have priority for their uses. However, if the appellants should succeed in their litigation presently before the courts and they are found to possess Aboriginal rights to water and it is further found that the *Water Act* and all predecessor legislation enacted by the province of Alberta since 1930 constitutes an unjustified infringement of their treaty and aboriginal rights, then the priorities under the existing regime will be an issue and required to be re-addressed. (para 92).

While similar cases challenging the FITFIR system have yet to arise in BC, the precedents set through these court cases in Alberta will have a direct impact on any future legal action taken by First Nations in BC regarding the colonial water allocation system.

Overall, the injustices built into the architecture of the water licensing system remain apparent. For instance, a 2011 submission from the Union of BC Indian Chiefs regarding the WSA relates that during a recent provincial inventory of water licenses attached to reserve lands, the province again attempted to cancel several reserve water licenses that were not in use,

successfully doing so in one instance. This incident is reminiscent of government action at the time of reserve creation and water allocation in the 1800s, when the province frequently attempted to negate water licenses associated with reserves. It again highlights the jurisdictional divides over water allocation that arose on the dividing lines set by reserve boundaries. One non-Indigenous interviewee working in watershed planning in the Okanagan shared with me the ongoing disjoint she sees in the water licensing system:

You have to actually account for the amount of water that the Bands need to do their economic development and their agriculture and all that, and the provincial government doesn't consider First Nation water needs when they are allocating water. So you have this giant gap where there is a dysfunction related to First Nations water use.

2.6: Conclusion

As Kotaska (2013) summarizes, “The roots of injustice lie in history.” This chapter has explored this concept specifically with respect to the drawing of reserve boundaries and the application of the First in Time, First in Right water licensing system to reserves. Examining, following Harris’ (2001) suggestion, the arguments, policies, and modalities of power that underlay the reserve water allocation scheme as discussed above, we see the emergence of some fundamental features in colonial water governance in BC that persist today. In the federal-provincial jostling over how to water to reserve lands, the odds were heavily weighted against First Nations. Reserve water licenses were often ranked far down the priority list in the provincial water licensing scheme and were frequently cancelled in favour of settlers, which has had lasting consequences for reserve water access, as the case of Kanaka Bar clearly illustrated. A core take-home message is that many of the prominent barriers in colonial water governance that we see today, such as fragmentation, jurisdictional ambiguity and overlap, and exclusion of First Nations from governance were evident as lines were drawn around reserve borders and

water was allocated to reserve land. At that moment, water began its future as a transboundary resource for First Nations reserves in BC, with particularly pronounced jurisdictional divides and frictions. First Nations have resisted FITFIR water allocation in BC since its inception, and the system continues to be largely opposed today even as FITFIR remains intact within the province's new *Water Sustainability Act*. *Syilx* members, among many other First Nations and their leadership organizations in BC, have raised various concerns about the system's infringement on Aboriginal rights and title; over-allocation; lack of clarity of information about water licensing and monitoring; conflict with other license holders; and legitimacy of provincial jurisdiction over water licensing decisions.

Although FITFIR is now written into the WSA and the future of water allocation in BC, certain amendments are still possible that could begin to address some of the concerns described in this chapter. First Nations have already stated clearly the terms on which water allocation should proceed in the province in order to be more appropriate and effective. First, First Nations' rights to water – of sufficient quality and quantity for existing and future needs – must be explicitly recognized and protected within the licensing system, whether or not their ranked priority is currently lower than that of other water users. A key component of this is the need for the province to meaningfully engage with First Nations in the governance process for water allocation and in establishing acceptable water licensing standards and thresholds. For instance, the First Nations Summit states in its WSA submission:

Fundamentally, planning for and responding to times of water scarcity must engage First Nations from the outset, on a government-to-government basis. Some First Nations communities experience drought situations regularly. Others may begin to experience scarcity where their water sources are overburdened by user demands. These plans and response mechanisms need to be jointly identified and developed, and a mutual plan for implementation agreed on...

First Nations have a rightful governance role in setting principles that guide decision-making in any water management regime. They have important traditional knowledge that would help to establish relevant and necessary standards and thresholds for effective water management.

Compiling an updated inventory of the volumes of water currently licensed and diverted on water sources shared between First Nations and non-Indigenous water users is also an important step forward. This information should be compiled in a format that is transparent and readily available to community members. As the BCAFN Water Governance Toolkit stresses:

Each of our Nations will need to look at what water rights/licences, if any, are currently recorded for our existing reserve lands and determine whether this volume is sufficient to meet our communities' needs for domestic use and economic activity... All sources of water will need to be considered and an analysis undertaken to identify who the other users are, including those potentially competing with the Nation for access to the same water (449).

Overall, it is critical that the FITFIR licensing system be adapted to respect the concerns that First Nations have raised, as such issues will likely only continue to be amplified as water shortages become a tangible reality in many parts of BC. As Brandes & Curran (2008) state: "The vast majority of Aboriginal Rights and Title claims to water in BC have not been finalized and are not factored into the water licensing regime and ecological needs for instream flows. This could have a significant impact on existing allocations in the future" (4).

Chapter 3: Moving Forward With Collaborative Watershed Planning in British Columbia: Potential Opportunities and Tensions

3.1: Introduction

3.1.1 Chapter overview

In the introductory chapter of this thesis, I outlined the current regulatory framework for water and First Nations in BC, describing the conflicting roles and responsibilities asserted by federal, provincial, and First Nations governments (see 1.3.2). Subsequently, Chapter 2 exposed some of the historical roots of this governance landscape, examining some of the precedents for water access and governance established with reserve creation and application of First in Time, First in Right water licensing. Here in Chapter 3, I bring the discussion to the current day through examining my second broad research question: What barriers and strategic sites of engagement do the LSIB and other First Nations encounter within the current colonial water governance framework in BC? In addressing this question, I specifically ask: Based on the existing state of colonial water governance in BC (Part 2): what are some of the potential implications what are some of the potential implications of collaborative watershed planning models on First Nations' water governance goals (Part 3)? This chapter also provides a critical discussion of the move towards collaborative watershed planning with First Nations, a governance shift anticipated to gain prominence in BC (MOE 2013; Brandes & O'Riordan 2014). In Part 1, I situate my discussion within a review of watershed governance literature and a comparison of collaborative planning and co-governance approaches. Part 2 introduces and examines specific barriers in colonial water governance that were identified throughout this research, providing a sense of the existing governance conditions for some First Nations in BC.

Third, Part 3 delves into a discussion of some implications of collaborative watershed planning for First Nations in BC, considering the extent to which this governance approach addresses the challenges outlined in Part 2, as well as exploring potential strategic opportunities for First Nations in this governance model. This chapter draws primarily on a case study with the LSIB, interviews with natural resource officers from two other First Nations, observation at water planning processes at the First Nations Fisheries Council and First Nations Summit, and document review of the WSA and its submissions (for detailed methods description see section 1.2). Again, I acknowledge that this is not an exhaustive analysis of the diversity of forms, tactics and relationships in which First Nations are engaging in water governance in BC. Each First Nation will pursue different avenues in terms of what is strategic or possible in their own specific context. In the words of one interviewee on this point:

To be engaged in planning is one thing but is really different than if you are developing your own plans as well. So I think that is one of the areas that communities are really figuring out: how they do that, and where is the best place for their time and energy. Sometimes maybe it's strategic for the band to be involved in things happening outside, or maybe it's more about building their own process. You know, you can be involved in this city, or this regional district is doing a plan, or you have a good relationship with this mining company that wants to come in and do work in the area. And of course they all want your time and energy and you really have to figure out where is the best place to do that.

3.1.2 Watersheds and collaborative planning in BC: an overview

3.1.2.1 Watersheds

It is well documented in the literature that across Canada, provincial and territorial governments are shifting away from top-down approaches to water governance and management towards delegated models, often at a watershed scale and with increased involvement of local actors (Brandes & O'Riordan 2014; Cohen & Bakker 2014; Norman & Bakker 2009; Nowlan &

Bakker 2007, 2010). Watersheds are commonly understood to be “areas of land draining into a common body of water, such as a lake, river, or ocean” (Cohen 2012: 2207). In BC, governance at a watershed scale is increasingly being promoted as an appropriate and even beneficial governance model (Brandes & O’Riordan 2014; MOE 2013), which in effect involves “substituting hydrological boundaries for political borders” to designate water governance and management areas (Norman & Bakker 2009: 103). Although there is an existing patchwork of collaborative watershed-based governance entities in BC, such as the Cowichan Watershed Board, the Fraser Basin Council, and the Okanagan Basin Water Board (von der Porten & de Loë 2013a, 2013b), these arrangements have thus far “emerged organically, and are not directed by an overall provincial law or policy” (Nowlan & Bakker 2007: 14). Now, however, watershed-based planning is given increasing policy prominence as an element of BC’s new *Water Sustainability Act* (MOE 2013). As written in the WSA legislative proposal:

Watershed governance would build on water governance to potentially include activities (and sectors) within a watershed and their impacts on watershed function (i.e., both land and water). BC’s current water governance model is primarily centralized within the provincial government with limited powers to distribute roles and responsibilities to others. At the same time, interest in exploring alternative approaches to water and watershed governance is growing in BC (63).

While the merits of watershed-based management and governance went largely uncontested in the literature until recently (Budds & Hinojosa 2012; Cohen 2012; Norman & Bakker 2009), there is now a growing set of critiques of this approach. Central points of debate, including boundary choice and implicit enhanced public participation, are summarized briefly here. On the topic of boundary selection, proponents of a watershed approach argue that watersheds are ‘natural’ boundaries that demarcate the appropriate limits and ecological scales for water management (Barnhill 2009; Brandes & O’Riordan 2014). Critics refute this point with

the argument that watersheds are not ‘natural’ or set in stone, but rather socially constructed (Budds & Hinojosa 2012; Cohen & Harris 2014), where, “choosing *which* watershed boundary to use is often a political act as much as it is a scientific one” (Cohen & Davidson 2011: 2). Cohen and Davidson (2011) argue that watersheds do not always represent the appropriate scale to address and make decisions about different water issues, since “watershed boundaries (or, for that matter, any other boundaries) rarely encompass all of the physical, social, or economic factors impacting upon the area within its borders” (4).

Further, it is often assumed that a watershed-based governance approach will be participatory, collaborative, and involve a form of shared decision-making. The embedded assumption is that through devolving decision-making to the local level, a watershed-based approach will empower local actors, which in turn leads to improved “social resiliency” and better water management outcomes (Barnhill 2009; Brandes & O’Riordan 2014). Again, the notion of watersheds as ideal platforms for shared and equitable decision-making has been challenged; for instance, Cohen (2012) underscores that “there is nothing inherently participatory about a hydrological boundary” (2213). Norman and Bakker (2009) have further argued that “although rescaling of water governance to the local level is indeed occurring, this process is not necessarily empowering for local actors” (100). Overall, Cohen and Davidson (2011) drive home a central critique that a watershed approach is not an immediate ‘fix’ to existing governance and management challenges: “Watersheds may *not* be appropriate in cases where re-scaling is being undertaken to address persistent governance challenges, such as lack of monitoring and enforcement, without concomitant attention to the underlying sources of the problem; such cases, we suggest, perpetuate rather than solve governance failures” (9). In short, watershed governance must address the initial conditions in which it is applied; to set this context, Part 2 below will

provide an overview of some key existing challenges for First Nations in colonial water governance in BC.

In suggesting watersheds as a potential basis for governance moving forward in BC, the *Water Sustainability Act* appears to fall on the spectrum closer to the notion of *watersheds as panacea*. Throughout the legislative proposal, a watershed-based approach is presented as an appropriate response to an array of existing governance deficiencies and ecological issues in the province:

- To improve coordination, monitoring, and flexibility of water management, e.g.:
“Improving water governance to enable better coordination within watershed boundaries, across all levels of government and between those with interests in the watershed” (12).
- As a way to “tailor” plans to local needs and to “respond to the diversity and the unique conditions in different local situations” (29).
- As a means to “Respond to conflict (among users or between users and the environment) and to increasing ecological risk (to water quality, supply or aquatic ecosystem health)” (28).

Although the WSA does not specify the form of governance that could be applied at the watershed-level, the legislative proposal stipulates a “collaborative public process” (60) and “greater involvement and participation for First Nations in water management and watershed planning processes” (6). Thus, there are broad suggestions there will be some form of collaborative watershed planning (e.g. authorities or watershed boards) with First Nations’ representation:

The intent is to have a watershed- or issue- defined process where interested parties, including local governments, the provincial government, water users and First Nations, can come to an agreement about most aspects of water. Plans are not limited to water

allocation but may consider water quality, drought planning, water sharing, changes to existing licences, and anything else set out in the terms of reference (Curran 2014: 6).

3.1.2.2 Collaborative planning versus co-governance

In this section I discuss and contrast collaborative watershed planning and co-governance. I suggest that while these two terms have many different interpretations and expectations attached to them, there is a tendency for the former to be conflated with the latter, which obscures fundamental differences in how these two concepts address Indigenous rights and authority. The main point of disjuncture between collaborative planning and co-governance lies in the degree of power sharing each entails in decision making between Indigenous and colonial governments (Goetze 2006; Tipa and Welch 2006): from a consultative or participatory ‘stakeholder’ role for First Nations in a planning process to joint decision making in government-to-government relationships between First Nations and provincial or federal governments in a co-governance scenario. Goetze (2006) summarizes:

...the reality is that provisions for power-sharing in co-management vary widely, most noticeably with respect to the decision making authority accorded indigenous co-managers. Most co-management arrangements that involve indigenous peoples are designed as measures of "consultation," in as much as they legally designate "advisory" status to the co-management board. This does not involve indigenous participants in the process of decision-making with any substantive or legally binding authority (248).

Co-governance is broadly understood following Kotaska’s (2013) definition as a governance model in which Indigenous and colonial governments co-create shared forms of jurisdiction over areas or resources that First Nations have agreed to share with non-Indigenous people. Tipa & Welch (2006) describe central features of a ‘true’ co-governance model with Indigenous peoples, developed in the New Zealand context. Work by Goetze (2006) and Kotaska (2013) has also set

out some key parameters for “empowered” or “effective” co-governance. Taken together, the work of these scholars proposes that the goal of co-governance includes:

- Formal acknowledgement of First Nations as governments negotiating with the Crown.
- Indigenous participation in the process of decision making with substantive or legally binding authority where Nations achieve the level of authority they desire.
- An emphasis on power sharing and counteracting current power imbalances.
- A privileging of Indigenous worldviews, knowledge, and governance systems, or at least giving them equal weight with non-Indigenous ones (depending on the desires of the nation).
- Both First Nations and colonial governments engage in capacity building.
- “A balance struck between establishing governance structures that ensures a mandated form of interaction and maintains the right of partners to advocate for the needs and interests of those they were appointed to represent” (Tipa & Welch 2006: 388).

While these are some of the features of the ‘ideal’ of co-governance, critics argue that existing co-governance schemes, which predominantly consider lands and wildlife, do little to challenge existing power relations and imbalances between Indigenous and colonial state representatives (Nadasdy 2003a, 2003b; Natcher et al. 2005; Plummer & Armitage 2007; Tipa & Welch 2006). Natcher et al. 2005 argue that, “rather than promoting socio-political equity, co-management has been criticized by some as furthering the hegemonic role of government” (242), where Indigenous participation reduces to a form of tokenism rather than meaningful and equal engagement (Tipa and Welch 2006). Politics around knowledge translation and integration also feature centrally in the co-governance debate. While the promise of co-governance is a heterogeneous pool of knowledge that is more context-specific, particularly through drawing on

traditional ecological knowledge (TEK), the epistemological and practical difficulties of Indigenous knowledge translation have been well documented (van Tol Smit, de Loë & Plummer 2014). The central critique is that in existing co-governance and management schemes, Indigenous knowledge is not treated as a complete knowledge system, but rather distilled from its context into disparate fragments that can easily be incorporated into dominant bureaucratic resource management structures (Cruikshank 2004; Nadasdy 2003; Natcher et al. 2005). In contrast to co-governance, collaborative planning is understood as a process in which First Nations and various stakeholders are consulted, informed, and engaged in watershed planning and decision-making, but do not have substantive decision-making authority. Often in these processes, First Nations are not able to assume their authority as Nations and colonial power imbalances are perpetuated. Overall, although the WSA is vague on the types of governance models that may be adopted moving forward, the legislation suggests more of a collaborative watershed planning process rather than true watershed co-governance with First Nations:

- The WSA legislative proposal does not make explicit the degree of power sharing with First Nations intended in decision-making, stipulating merely that First Nations will have “greater involvement and participation in water management and watershed planning processes” (26).
- The province retains ultimate decision-making authority, and colonial laws and forms of governance continue to be privileged:

Ultimate accountability for environmental protection would remain with the provincial government. It would continue to establish and coordinate laws, rules, agreements and financial arrangements, including setting provincial objectives and outcomes. It would also be responsible for deciding the institutions, systems and roles for any delegated responsibilities (MOE 2013: 84).

- First Nations are not regarded as Nations, but rather lumped in with local governments as authorities to which statutory authorities can be ‘devolved’: “The *Water Sustainability Act* would provide for regulations that would permit the delegation of particular statutory authorities to people and/or agencies outside of the provincial government (e.g., local government, First Nations)” (MOE 2013: 22)

Throughout this chapter, I will document that the collaborative watershed planning approach proposed under the WSA falls short of the goals of full Indigenous governance or a co-governance scheme following some of the criteria described above. Describing her vision for full Indigenous governance, one *Sylix* interviewee explained: “Quite frankly we would rather monitor and manage everything, you know?”

A few scholars have specifically considered different angles on collaborative watershed governance arrangements involving Indigenous peoples in Canada and elsewhere. Most closely related to this research, von der Porten and de Loë (2013a, 2013b) have initiated an important conversation considering the extent to which existing collaborative water governance arrangements and policy reform in BC recognize concepts of Indigenous governance and self-determination. Their main finding is that “in promoting collaboration as a way of addressing water governance problems, proponents typically assume that the basic principles underlying the engagement of “stakeholders” can be applied to Indigenous peoples. This assumption reflects a deeply-held belief that Indigenous peoples *are* stakeholders” (2013a: 4). Rather, First Nations are *Nations* and governments that have authority. In the BC context, research out of the POLIS Project on Ecological Governance strongly advocates co-governance with First Nations as a “winning condition” for watershed governance moving forward in the province (Brandes & O’Riordan 2014). Working on freshwater catchment co-management with Maori communities in

New Zealand, Tipa and Welch (2006) highlight capacity imbalances as key barriers impeding equal and meaningful Indigenous participation in water governance. Similar to von der Porten and de Loë (2013a, 2013b), they document ongoing frictions around power sharing and Indigenous authority: “Maori have deep concerns about any system of co-management in which they are positioned as one among a number of communities or groups because their status and that of their knowledge is inevitably challenged in such arrangements” (287). Further research by Memon and Kirk (2012) examines the extent to which Maori are able to exercise an active role in collaborative freshwater governance, finding that in practice this is still limited: “effective Maori agency in the lake and wider catchment continues to be burdened by the historical forces of institutional inertia” (955). Additional work around watershed-level co-governance and Indigenous concerns in the Australian and USA contexts has found a range “from sustained versus ad hoc integration of Indigenous participation in water planning” (Bark et al. 2012: 175). On the topic of Indigenous authority and knowledge, Barnhill (2009) considers a collaborative watershed planning initiative with the Onondaga Nation, finding that the planning process did not include traditional knowledge or explicitly address Onondaga sovereignty. I add to this body of work that sits at the intersection of the watershed approach and collaborative governance arrangements, providing a critical discussion around the potential opportunities and conflicts of adopting of a collaborative watershed planning approach with First Nations in BC.

3.2: Reviewing the barriers in colonial water governance in BC

3.2.1 Jurisdiction in BC colonial water governance: a “classic enduring battle”

“Every time we want to talk with the provincial government we always get labeled as a stakeholder, as an interested party, versus a higher-level government agency that is trying to make high-level decisions” (Okanagan natural resource officer, April 2014)

The words of this natural resource officer in the Okanagan speak to a core tension underlying many conversations about First Nations and water governance across BC today: the ongoing lack of observation of First Nations' rights and jurisdiction in colonial water governance, and the subsequent struggle for First Nations to be involved at a strategic-level in decision-making around water use and access. While certainly not a 'new' finding in environmental governance more broadly (see, for example: AFN 2012; Dalton 2013; Kotaska 2013; McGregor 2013; Walkem 2004; von der Porten & de Loë 2013a, 2013b), the prominence of this theme throughout interviews conducted in my research stands to reinforce just how pervasive such concerns are. Indigenous groups and representative organizations in BC have made explicit that their rights to water and water governance have never been ceded, and that they must be engaged as Nations in a government-to-government relationship (see, for example: UBCIC 2011/2013; AFN 2010; as well as overview in 1.3.3). The 2013 *BC First Nations Water Rights Strategy* document captures this clearly:

First Nations must be involved in all decisions that impact upon our lands and resources, including water resources, from mega-projects, run-of-river projects, to decisions made by local governments. As confirmed by the Supreme Court of Canada, this involvement must occur not only at the local operational level, but also at the strategic planning and decision-making level. The Honour of the Crown requires that the Crown consult and accommodate First Nations on decisions at each of these levels that have the potential to impact Aboriginal title, rights or treaty rights (7).

Many scholars have also commented on the ongoing denial of the nationhood status of Indigenous peoples in colonial environmental and water governance (McGregor 2013; Sam 2008a, 2013b; von der Porten & de Loë 2013a, 2013b, 2014). For instance, as Goetze (2005) summarizes, "Both the federal and provincial governments are 'using the phraseology of

Aboriginal self-government but denying its substance” (248, citing Penner 1987). The contrast between the terms agreed upon in the 2005 New Relationship Agreement signed between First Nations and the Province of BC and the consultation process for the *Water Sustainability Act* illustrates how this discrepancy has manifested in recent water policy change in the province. The New Relationship stipulated that First Nations and the province must “Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making.” The consultation and approval process for the WSA, however, did not uphold this standard, and First Nations were lumped in with other ‘stakeholders’ in providing online comments on the legislation (von der Porten & de Loë 2014). As Kekinusuqs, Judith Sayers, National Chair of Aboriginal Economic Development, captures in her WSA submission: “Collaboration with First Nations is a pretty weak proposition. Being thrown in a melting pot of everybody is also not respecting First Nations Governments and rights.” Outside of the WSA process, several *Syilx* members and workshop participants related various narratives around the issue that “Recognition of indigenous rights in legal documents does not necessarily result in those rights being enjoyed by people in their day to day lives” (Goetze 2005: 13). For instance, one man commented:

Consultation is only with Chief and Council. And that is the problem historically. Historically in the past, if someone phoned from the province and talked to the band and spoke to someone they would put it down as consultation, despite the fact that they could have talked to anyone, like a receptionist who happened to answer the phone. And so the distrust is on so many levels and so many ways. So it’s not a meaningful consultation they just treat us like a member of the public or another stakeholder. As opposed to government-to-government.

Another *Syilx* member voiced similar frustration:

Then the proponent will go to the ministry and say, “Oh do I have to talk to the Indians?” And basically the Ministry will go “Oh well not really, no. Consultation and

accommodation is the duty of the Crown.” Which we know to be true legally, but the ministry turns around and says, “Oh well we can’t help fund that work that needs to be done to mitigate this.”

In short, though there is now legal recognition of Aboriginal rights and title, and agreements signed that acknowledge the nationhood status of First Nations, the translation into practice in colonial water governance is not being consistently experienced. As such, in the realm of colonial water governance, it can be an ongoing challenge for First Nations to be, as one *Syilx* interviewee stressed, “Not consulted but *engaged*” in decision-making processes.

3.2.2 *Decontextualized policies and fragmented authority*

Beyond the jurisdictional tensions described above, decontextualized policies and fragmented lines of authority and accountability stood out as other key challenges that the LSIB and other First Nations often face in navigating colonial water governance landscape in BC. Chapter 2 discussed the historical basis for fragmentation in the colonial water governance framework for First Nations; here, I consider how it plays out on the ground. Several interviewees and workshop participants raised questions about the mismatch in governance scales for water policy and management, noting that policies administered by federal or provincial governments do not always respond adequately to local conditions and needs. For instance, a *Syilx* member related that the drinking water guidelines and policy changes they must adopt are not based on specific needs in the Similkameen, but rather on regulations developed elsewhere in Canada and subsequently ‘implanted’ locally:

Federally it’s not so much an interaction as a dictation. Because, you know, as far as I know, there is a new Bill⁸ out that will dictate how Bands will manage their water

⁸ A reference to Bill S-8, the Safe Drinking Water for First Nations Act, passed in 2013.

systems. And AANDC, you know, they set the regulations on that, because we are under the federal government and they deal with things across the country. So it is never anything specific to our area or even to the province because they are looking at things nationally. So it always seems to be the case that if there is something that goes wrong back east we end up getting changes over here as a result of that.

Relatedly, an overarching theme I heard throughout this research (consistent with the work of LaBoucane-Benson et al. (2012) and Walkem (2004) among others) is the ongoing exclusion of Indigenous knowledges, methods and experiences in colonial water governance in BC today. As one natural resource officer in the Okanagan summarized, “it is still completely missing that other worldview.” Chapter 2 began a discussion of this theme, and I will return to it again in 3.3.3 below in the context of collaborative watershed planning.

Fragmentation in colonial water governance, and the associated complications and frustrations this creates, was also a prominent theme, particularly with respect to accessing information. Several natural resource staff and *Syilx* community members relayed the message that it is unclear which authorities are responsible for different aspects of water governance and management, and who is accountable for monitoring and sharing water quality and quantity information. As already noted in Chapter 2, water cuts across several jurisdictions: First Nations, federal, provincial and local governments. Within each of these government entities, responsibility for specific aspects of water management is further integrated into many different departments, including forestry, public works, and lands management. An interviewee with the We Wai Kai First Nation described how these divides complicate her work:

Everyone does want to stake their claim [in water] and say, “No, it’s a regional district”, or “No, it’s this municipality” or “No, it’s provincial crown” or “No, it’s federal” or, you know. And then I think in other instances where again there’s cross jurisdictional [matters]...it really does get confusing because those lines of, is it provincial? Is it federal? Whose responsibility? And we go with, well, it’s all ours. So depending on what

it is, you know, we're going to see it that way and then kind of go with the premise that it's all ours. Until someone says anything different we'll, you know, go accordingly.

In a family meeting in the Similkameen, a woman related that it is difficult to locate who is responsible when she has a query about water quality:

I do think one thing we can do for the water, is when we see damage to the water or issues with the water, like I saw that big slime, sludge in the water, and when I see that I don't have one central person to report this to. I need one central person to report to and for that person to document it and keep track of it. Nobody is keeping track of when we see these things. I think that would help us to protect our water. Right now we don't have that one person to go to, or that one agency or department or anything. I don't know if they are recording it, noting it.

3.2.3 Capacity and funding

Across the spectrum of First Nations natural resource practitioners with whom I spoke during this research, capacity⁹ was the recurrent and immediate answer to the question: "What are some barriers and challenges you see to First Nations involvement in water governance and management in BC?" There are a few points and caveats on the topic of capacity that I want to make clear from the outset. First, my interpretation does not suggest that First Nations are inherently 'capacity deficient.' Quite the contrary: First Nations not only possess capacity to govern within their own systems of knowledge and laws, they have and continue to develop capacities to interact with and challenge colonial governance. Emphasis needs to be placed on reversing the gaze of 'capacity development' back to colonial governments, requiring colonial governments to build an understanding of each First Nation's laws, language, protocols for

⁹The United Nations Development Program (UNDP) (1997) defines capacity broadly as the "ability of individuals, institutions and societies to perform functions, solve problems and set and achieve objectives" (cited in Graham & Fortier 2006).

working together, etc., as well as enough staff to effectively engage with each First Nations and make consensus decisions. As Tupa and Welch (2006) comment, there is "...an under-theorization of how capacity building is achieved, itself a reflection of a common belief held by local-level agencies that it is primarily if not only indigenous groups that require such enhancement of capacity" (383). Further, capacity varies tremendously across scales and between individual First Nations and Nation alliances in BC.¹⁰ Thus, this discussion does not claim to be representative of the experiences of all First Nations in BC.

Funding and capacity were at the forefront as First Nations natural resource staff explained the kinds of daily operational constraints they face. These capacity limitations are experienced in very concrete ways in terms of insufficient staffing, funding, and time. For instance, in the case of the LSIB, a staff of two is responsible for managing the entire referrals process. Morellato (2008) has characterized this Crown referral process as "One of the greatest logistical difficulties facing Aboriginal communities today" (72) posing a major burden on many First Nations natural resource departments' time and resources. One staff member expressed that the LSIB is swamped with referrals requests:

In 2012 we had 486 referrals of all different types. This year so far we have over 850. Any referrals for developments of any sort on the land will usually come through this department. It could be something as simple as a water license on privately owned land where they are drawing water from the creek, or it could be the Fortis Similkameen Dam project. It is all over the map: it could be small like a mouse or big like an elephant. When I first walked into this office I saw stacks and stacks and stacks of referrals that didn't fit in a cabinet and were still needing to be looked at, and some of them pre-existed my presence by more than a year.

¹⁰ As Kotaska (2013) describes, the growing prominence of nation groupings and alliances can be in part related to the fact that, "the province is trying to negotiate strategic engagement agreements or reconciliation protocols with groups of nations and reduce the number of relationships in which it is engaged" (366).

The fragmented nature of colonial water governance for First Nations in BC as elucidated above also ties into the discussion of capacity. Water is often just one of a host of responsibilities in a given staff member's portfolio and thus can get pushed to the sidelines. A provincial First Nations fisheries staff person explained that:

Even on the First Nations side, people are well intentioned and they are interested. But in some cases when the person is dealing with your water stuff is a member of council or maybe the Chief, and they are dealing with 10 million other things, it's really hard to have that thoughtful kind of engagement that is really needed for those processes. So even at the community level you need people who have the time to be engaged and to stay engaged.

A staff person from the Akisqnuq First Nation in the East Kootenays shared a similar narrative:

Well I think we just try to deal with priorities and with the other stuff just keep a general awareness, but we have to wear a million hats and that's where leadership comes in. That's the job of Chief and Council, to keep track of bigger issues, but they also get pulled in so many directions, their time is also very tight. We try to divvy up and share the load.

Capacity can also be a barrier to communities' access to externally derived data, and a challenge in developing their own water quality monitoring programs. Several *Syilx* interviewees and workshop participants expressed a desire to build capacity for community based monitoring to develop their own database on water quality and quantity as aspects of water governance moving forward. One woman at a neighbourhood meeting voiced her frustration with the Band's existing lack of information:

The entire Similkameen River system needs to be tested quite often to keep track of how it's doing. I would like to see the results of that to help us protect that water. And I would like to see that started as soon as possible. Because we don't have any data! The government has data, the mining companies have data, the corporations have data, but we don't have any, yet we own the resource. Scientists are muzzled; you can't necessarily trust the information they have.

While there is an in-depth discussion in existing literature on concerns around technical, financial, and monitoring capacity related to drinking water on reserves, (Graham & Fortier 2006; MacIntosh 2008; OAG 2005; Swain et al. 2006; Watt 2008), I consider the topic in section 3.3 below from a procedural justice perspective: how capacity limitations could impact some First Nations' capability to participate meaningfully and fully in collaborative watershed planning. In addition, although I am foregrounding the kinds of constraints that First Nations can face in water management, tied to historical and ongoing colonialism, I also want to point out that in Canada's current political climate, provincial and federal governments also face fairly severe capacity and budgetary restraints, particularly in the realm of environmental governance and management.

3.2.4 Trust

At the confluence of the issues described above – contested jurisdictions, fragmentation, and capacity challenges – lies the outstanding matter of trust. In the words of the LSIB member quoted previously, “the distrust is on so many levels and so many ways,” from mistrust in externally derived water data and information, to a lack of confidence in colonial water governance processes. The provincial government historically has given First Nations little basis to trust that they will be engaged and informed in a government-to-government relationship in colonial water governance, and while the New Relationship was supposed to change this, as mentioned previously, the WSA is an example of how such obligations are not being carried through. Fragmentation and capacity challenges and the associated barriers these can create for First Nations in water governance, such as difficulties accessing information or conducting their own monitoring, further undermine some First Nations' confidence in the existing system and

data. These themes are captured in the following narrative from a *Syilx* man describing his mistrust in the data available from an upstream mining company, and the subsequent need for the LSIB to take water monitoring into its own hands:

And I don't really trust their water sampling reports, because you can type whatever you want in those little spreadsheets, and who is going to utilize it? And there's a reason we don't press these things, because it's only because we've experienced it over and over again. So unless our own people are doing that work and documenting it, I don't personally trust it. They send it [that data] every week but I don't necessarily trust or believe in it.

Writing of co-governance and self-government, Goetze (2005) describes the existing “crisis of confidence” between First Nations and the province of BC where, “negotiating new relationships must contend with a firmly entrenched legacy of suspicion and distrust” (256). This legacy was evident in the interviews, workshops, and document reviews for this research, and I return to the theme of trust in my discussion of jurisdiction and relationships in collaborative watershed planning below.

3.3: Moving forward with collaborative watershed planning in BC

“At the core of co-management is the need to rethink the boundaries (real and constructed) among people, institutions, and environments, and adopt novel governance arrangements to foster sustainability” (Plummer & Armitage 2007: 834).

The above section detailed some central obstacles documented by the LSIB and other First Nations in colonial water governance in BC today, providing a sense of the ‘initial conditions’ upon which a collaborative watershed planning approach would build. In section 3.3, my concern is with dynamics, opportunities, and conflicting elements of collaborative watershed planning approach, integrating a discussion of how this model could address and/or further

entrench the issues discussed previously. Specifically, I consider three themes: watershed border selection and scale, jurisdiction and relationships, and capacity and knowledge integration.

3.3.1 Rethinking boundaries between environments: drawing new borders, responding to context?

Throughout this research, I heard various narratives around the idea that watersheds could correlate as more appropriate water governance areas for First Nations than the existing political borders that demarcate colonial water governance in BC. Across Canada, there are several examples of First Nations adopting watershed boundaries as aspects of, or ‘guiding markers’ for, water planning and governance processes, such as the Assembly of First Nations’ Draft National Watershed Protection Strategy; the Yukon Intertribal Watershed Council, and the Xeni Gwet’ in Chilko Roundtable Watershed Plan. At a very general level, support from First Nations political organizations for watershed-based governance can be read in the ratification by the First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations, of a Collaborative Watershed Governance Accord for BC (Fraser Basin Council 2012). A few interviewees in this research explicitly described that ‘natural’ watershed boundaries align with the boundaries of different First Nations traditional territories in BC. Following from this, it is suggested that watersheds could be units of governance that more closely resemble divisions of Indigenous authorities in the province (though such a parallel cannot be assumed to hold true in all cases, as I discuss below). One interviewee involved in provincial First Nations fisheries and water policy illustrated this concept:

The interesting thing, too, is that when you look at a map of BC with the rough approximation of First Nations in BC, not at the community level but at

the nation level, a lot of the time those coincide with, or line up with, the watershed boundaries. So it is kind of a natural distinction between areas. So potentially if things were done on a watershed or large watershed basis it kind of lines up nicely with the areas that First Nations have authority and jurisdiction in as well.

As she suggests, transitioning governance to watershed areas within which distinct First Nations hold authority is a potential response to the concerns described above about existing policies not responding to local conditions and governance. A *Syilx* community member shared corresponding ideas that considering the entire Similkameen River watershed better encompasses the extent of her concerns about water:

Well all over, in the whole watershed, is a concern. Because we're not the only ones. We have family and relatives downstream. My understanding is that the watershed is the extent of our concerns to the west. It's a large area, right? I would think that if we are ever looking at water governance that is what we are looking at, at a minimum.

Writing in a compilation on *Canadian Perspectives on Integrated Water Resources*

Management, Wilson (2004) presents a similar line of reasoning:

The remarkable correlation between the Treaty boundaries negotiated in past centuries and the drainage basin boundaries recognized today by governments and watershed-based planners are based on the original First Nations' river routes, the water highways that Aboriginal - and later non-aboriginal cultures - used to travel for exploration and trade. Furthermore, watersheds often identified the historic boundaries of the various First Nations. Using the watershed and Treaty boundaries as a means to organize themselves, First Nations would be relying on ancient traditions to facilitate their participation in the 21st Century; an example of traditional knowledge informing modern times (78).

Though I cannot provide a detailed analysis of the overlap between territorial and watershed boundaries or comment on the extent to which different First Nations share this viewpoint, I do want to insert a critical angle on the topic and suggest that the "remarkable correlation" is perhaps not as clear-cut as Wilson (2004) implies. As previously noted, although the watershed

is often conceived of as a natural or intrinsic property, watershed boundary selection is best understood as a social and political decision (Cohen & Bakker 2014; Cohen & Davidson 2011). This presents two scalar issues that may blur a clear overlay between watersheds and First Nations' traditional territories BC. First, there are “infinitely nested watersheds” (Cohen & Davidson 2011: 2) that encompass a vast array of scales and areas, from those that define a small creek, to others as large as the Fraser Basin. Second, there are several scales and axes along which the 203 First Nations in BC are organized for different aspects of governance. Some First Nations continue to work independently as individual bands, while others have grouped into tribal or nation alliances and treaty groups such as the Coastal First Nations or the Coast Salish Aboriginal Council (Kotaska 2013; Low and Shaw 2011; Norman 2012). Thus, the governance scales and territorial boundaries within which First Nations operate and engage are highly variable across the province and do not necessarily correspond to particular watershed areas. Further complicating the matter is the issue of overlapping and competing claims to territories between First Nations in the province (Kotaska 2013). As Phare (2011) describes: “In any given region, there may be multiple claims by different First Nations to the waters. These First Nations may have different, and competing values, ranging from conservation-oriented perspectives to development and full exploitation. Further, each First Nation may have a different strength of claim to water rights in an area, and this would have to be determined” (14). While the general correlation between watershed boundaries and traditional territories has been identified, including by interviewees in this research, given the vast array of watersheds and scales of Indigenous governance in BC, the selection of boundaries is not a clear-cut or apolitical process. In the event that a given watershed border is not appropriate, it could have the same effect on

First Nations as any other boundary or border imposed by colonial governments (Norman 2012, 2015).

In addition to the potential resemblance between watersheds and traditional territory boundaries, a few interviewees also suggested that the place-based and integrated *rationale* of watershed management could be a more appropriate approach for Indigenous water governance in BC. Wilson (2004) again is optimistic on this point, suggesting that such an integrated approach “mirrors” Indigenous worldviews around water governance which, broadly speaking, take a holistic perspective and look beyond human health to include the health of all elements in the environment that also rely on water (Wilson 2014). While I did not hear such explicit suggestion during interviews, workshops, and family meetings that watershed management mirrors ‘traditional’ knowledges and modalities of governance, there was significant dialogue around the need to consider water issues from a more integrated and upstream-to-downstream perspective. Working at the watershed level could thus address some of the issues of fragmentation discussed above and provide a space for First Nations to assume a greater role in sourcewater protection planning beyond reserve boundaries. In the Similkameen, an integrated watershed-based approach was emphasized in relation to worries about water quality and contamination from upstream industry, such as the Copper Mountain Mine and the proposed Fortis Hydroelectric Dam. One *Syilx* interviewee commented on the importance of addressing water quality at a watershed-scale:

Primarily because it all flows down to our homes. I mean this is a map of the watershed. Everything that happens in the valley drains into here, and all of our people live down below at the very bottom of the valley. So anything that occurs anywhere else in there is one way or another going to reach us. It might just be a drop in the bucket at the top but with all the drops in that bucket, by the time it gets to us it's a full bucket. And that's what we have to be concerned about, mostly. I think that by the time we get and have

access to [water], and it's not just us it's all of Keremeos, all of Cawston, all of the towns where people live along the way, we are all going to be affected by it.

In a family meeting on the Ashnola reserve, another member shared similar thoughts about the need to consider the entire Similkameen watershed to address cumulative impacts on water:

And the other thing that we have to think about in terms of long-term water issues is the cumulative impact of every mine that happens, every dam that happens, and every other industrial business that happens upstream from us. We have to look at every issue from a point of view that it is not only impacting for what that specific business is doing, but also what on top on everything else, is impacting it. Because the government tends to look at every mine, everything that they do within a silo and just consider those impacts, but we are not considering the cumulative impact. And what happens as a result of ten or fifteen impacts to our water systems, to all the drainages that come into the Similkameen River.

This section has highlighted different dimensions of a watershed approach that may present opportunities for First Nations in water governance in BC, including potential alignment between territorial and watershed boundaries, and incorporating an integrated perspective on context-specific water quality and quantity issues. In exploring how the watershed concept has been interpreted and employed strategically as elements of Indigenous water governance planning processes in BC, I add an additional layer to Cohen's (2012) critical intervention in the watershed governance debate which highlights the status of watersheds as conceptually malleable *boundary objects*. This is understood as, "A common concept interpreted differently by different groups... cohesive enough to travel among different epistemic communities, and plastic enough to be interpreted and used differently within them" (2207). Thus far, the discussion has failed to consider the ways in which some First Nations as distinct 'epistemic communities' are adopting and interpreting the watershed concept. However, despite the uptake of the watershed approach by several First Nations in the province and across Canada, it should not be taken as a given that watersheds are universally appropriate for all First Nations as units

of governance. Such generalizations are elusive particularly given complexities around watershed border selection and the diverse array of scales and boundaries within which distinct First Nations in BC are organized.

3.3.2 Rethinking boundaries between people and institutions: jurisdiction & relationships in collaborative watershed planning

Writing of co-governance generally, Goetze (2005) describes that this approach "... is not only about improving the management of resources, it is also about negotiating and redefining relationships between people with varying interests in, and varying degrees of authority over, the resource(s)" (248). In this section, I take an exploratory look at how tensions around strengths and scales of authority in water governance (as previewed in sections 1.3.3 and 3.2.1) are already playing out in the relationships between First Nations and provincial and local governments in collaborative watershed planning, emphasizing that these dynamics will require ongoing negotiation in the future. This discussion integrates several segments from interviews with the LSIB and others, as well as document review, to illustrate various perspectives on the jurisdictional elements of collaborative watershed planning. Overall, interviewees reflected a great deal on this topic, with consensus that there are no easy answers as to how to proceed.

Dimensions of scale are again complicated in considering First Nations' jurisdiction and authority in the context of collaborative watershed planning. Cohen and Davidson (2011) note that "The watershed approach represents both a scaling up from municipalities and a scaling down from nations, states and provinces..." (4). Although these shifts are straightforward enough as they pertain to colonial governments, the direction of governance rescaling is less clear-cut in the case of First Nations' authority. As has been made abundantly clear, First

Nations are not stakeholders or local governments, but rather function as a government that negotiates with the Crown. At the same time, distinct First Nations have strong and unique ties to, and governance powers over, specific lands and waters. One interviewee from the Okanagan spoke to the tensions of this jurisdictional ‘scale jumping,’ the simultaneously local and government-to-government nature of First Nations authority:

But First Nations have the jurisdiction and authority at the local level. So that is the other piece of the pie, the difference in the structure in the governance of First Nations and the governments of Canada or BC. The strength of authority is different. That is why it is very difficult for First Nations to be doing things at a BC-wide scale. For instance, my rights as an Okanagan don’t transfer anywhere else in the province and can’t necessarily be applied anywhere else across the province either. In some cases they do very generally. But my rights around water or fisheries are specific to the Okanagan.

Relatedly, the question of who has legitimate final authority in the scenario of co-governed watershed entities is also a point of contention. For instance, the National Chair of Aboriginal Economic Development writes in her submission to the WSA:

First Nations as rights holders should be able to negotiate Shared Decision making models so that their rights are not competing with all users in a watershed or be just one of a committee. Working collectively together is important to bring everyone’s interest to the table, but in the end, it should be First Nations interests as priority in order to protect their rights enshrined in s. 35 of the Constitution Act.

Although Sayers is explicit that at the end of the day, First Nations should have the strongest position in any collaborative watershed planning arrangement, it remains to be seen whether or not such provisions for “First Nations interests as priority” will be adopted under the WSA. A natural resource consultant working in the Similkameen further contemplated how the province’s claims to jurisdiction and ownership of water could compromise the legitimacy of devolved watershed boards from the outset:

It is interesting because it would have to be that the Nation or Band would have a decision-making authority over whatever decisions are being made, whether it's a co-management-type of approach with the other authorities, and it has to be equal, right? So one of the challenges is well, does the province even have the authority to delegate any governance to First Nations? So they can't really *do* that. There is going to have to be some kind of relationship where the province and First Nations say well, "for these decisions we can't delegate but we offer..." I don't know how that will work. That will take some thinking.

While there is extensive commentary on the relationships and frictions between the province and First Nations in colonial water governance (see, for example FNLC 2011; UBCIC 2010; von der Porten & de Loë 2014), less attention has been given to the interactions between First Nations and local governments in BC. Given that both local governments and First Nations will be at the table in a scenario of collaborative watershed planning, and furthermore that local governments across BC are already spearheading watershed-based initiatives¹¹, it is worth exploring some dynamics of this relationship. Wells (2004) notes that relations between First Nations and local governments are still in relatively early stages: "Historically, in Canada, First Nations and local government have had a distant relationship in that they experienced little interaction with each other. When there has been a relationship it has mostly centered on servicing agreements where local government provides municipal services to the neighboring reserve community" (20). Today, however, more extensive relationships and partnerships are emerging between municipalities and First Nations (Abram 2002; Wells 2004). For instance, in 2013, three bands in the Okanagan, the Osoyoos Indian Band, LSIB, and Penticton Indian Band, signed a protocol agreement with the Regional District of the Okanagan-Similkameen, which "provides a framework for formalizing a Government to Government agreement." One man, explaining the protocol agreement, suggested that although the gesture is meaningful, the

¹¹ See, for instance: the Cowichan Valley Regional District Watershed Planning Initiative and the Kettle River Watershed Management Plan by the Regional District of Kootenay Boundary.

government-to-government stipulation is more symbolic than anything since this type of obligation to “give due diligence to First Nations” does not rest with local governments but rather with the Crown. Another natural resource officer in the Okanagan recounted the stumbling blocks involved in collaborative work with the municipalities and regional districts, where differing scales and strengths of authority can hinder progress even when there are strong intentions to work together:

It is good, you know, every band is trying to work with the local municipality the best they can so that they have a better working relationship. And when it comes to issues such as water, that’s so big that it has to be there for everybody in the community, Native and non-Native. So they are trying hard to do that. At a Nation level, every time we look at interacting with regional districts we have to be very cautious because we can’t recognize that level of government. We call it government-to-government, because we are federally mandated, and we have deal with the federal government when it comes to every issue like that. Basically we haven’t signed a treaty, we haven’t done anything, so basically all the lands within the province are First Nations’ lands. So that causes – every time we want to talk with anybody – we have to be very careful with Aboriginal title and rights, and signing over, consultation, and jurisdiction.

The Similkameen provides an interesting case of an existing watershed initiative between local governments and First Nations. The LSIB and the Regional District of the Okanagan-Similkameen have recently started working together on a Similkameen Watershed Plan. This plan is headed by the Similkameen Valley Planning Society (SVPS), of which the LSIB is a member.¹² While the plan is still in its early phases, and I do not claim to know the full extent of dynamics and relationships involved, it is productive to look at the factors shaping negotiations thus far. A LSIB member described that being part of the SVPS watershed initiative is potentially *one step* towards greater proximity to decision-making around water: “So obviously the band was very smart and wise to recognize that sitting and being part of the society is

¹² The Upper Similkameen Indian Band has pulled out of the process for unknown reasons.

strategically very important for saying, “hey, we want to be a decision-maker in this valley.”

This staff member emphasized that establishing terms of collaboration has not been straightforward, that building and maintaining the relationship requires ongoing commitment, and that it can still be a struggle to be involved at a strategic level:

So that sort of has been the last struggle in the last year with the LSIB at the SVPS table, is to help them to understand that we need to be meaningfully well, not consulted, but engaged to do this work in this watershed planning strategy. We worked hard to get a piece of that which we managed to finally do. It was a bit of a struggle, because of understanding of what governance at that table means.

However, despite these challenges, she conveyed a tentative sense of progress in working with local government on this watershed plan:

At the SVPS table so far it seems to be working for us. I mean we are still new in the process but we are and we appear to be working together. So I would say we’ve made some really good ground at that table. I mean they don’t sit there and assume that because you are an Indian you approve for the band. They now understand that that is consultation that has to happen at a different level, but we are there and we are participating in this information.

A non-Indigenous SVPS board member expressed their intention to work closely with the LSIB throughout the process:

Out of the terms of reference we developed a plan through the Regional District, and LSIB parallel to us doing their First Nations perspectives in a similar fashion that will ultimately be integrated into the terms of reference and the final plan. They are doing something that will feed into our plan, and nobody else should do it. First Nations should do what they do, and we do what we do, and we look at it from sort of an umbrella perspective. We have every intention to not go anywhere without First Nations. Period.

As the Similkameen case suggests, at the heart of moving forward with collaborative watershed planning are the basic requirements of time and relationship building to move beyond the “crisis of confidence” (Goetze 2005) and establish trust and capacities for collaboration. For instance,

one non-Indigenous water board member in the Okanagan related that a mutual lack of understanding of both water board functioning and band governance is currently a major barrier to working together. Another interviewee involved in First Nations fisheries and water governance highlighted that putting agendas aside is a critical starting point for moving forward with collaborative watershed planning:

And it's about relationship building and understanding different perspectives and what other peoples' needs and drivers are. And how they communicate. So to me that is always the most important part of the process, if you can spend the time building the relationship without worrying too much about what the objectives are, or without trying to work *to* something. But if you can be flexible on the time, until everybody understands each other, and *then* you work together towards a series of common objectives and goals that you work to.

An additional challenge to long-term relationship building, however, is the short Band Council election cycle imposed by the *Indian Act*, wherein the default is for a new Chief and Council election every two years, although First Nations can now set a different cycle. This has been identified as a major disruption to continuity of leadership and relationship building (Standing Senate Committee on Aboriginal Peoples 2010).

In summary, although Brandes and O'Riordan (2014) are optimistic that, "The Watershed Entity model outlines a potential starting point to reconcile and integrate both Aboriginal title and Crown sovereignty for watershed governance" (27), it is clear that this will not be a 'quick fix.' This section has outlined a host of issues around contested lines of authority and jurisdiction with which collaborative watershed planning will still have to contend. The province's authority to delegate collaborative watershed planning in the first place is questioned; there is skepticism over whether there will be adequate provisions for power-sharing and observation of First Nations' authority; and collaborative work between First Nations and local governments will

require time and commitment to relationship building, trust, and developing acceptable terms of reference. Following Goetze (2005) on co-governance, such arrangements will only be empowering to the extent that they “facilitate the exercise of power historically held by Aboriginal peoples in managing their resources as autonomous nations” (248). Similarly, the legitimacy and acceptability of watershed entities will rest on the extent to which provisions are made for power-sharing and decision-making authority for First Nations (Kotaska 2013; von der Porten & de Loë 2013a, 2013b).

3.3.3 “Always having to fit into someone else’s worldview”: collaborative watershed planning, capacity, and ongoing colonial control

As discussed, capacity limitations in terms of time, staff, and resources are a significant day-to-day challenge for many First Nations in colonial water governance and management. Given the existing constraints, resources need to be provided for First Nations to assume a role at a decision making level. For instance, a staff member from the Akisqnuq First Nation in the East Kootenays related a sense of being stretched too thin to engage with the local watershed organization:

We get clobbered, and I mean I kind of laughed, I was feeling so overwhelmed. And so when Lake Windermere Ambassadors called me, I was just swamped and I have a pretty lean staff. And I brought it up in the staff table thinking that we should, you know, definitely sit in on that. But we are maxed out. It was just another, “Oh my goodness we have to deal with another government group?” So it is overwhelming for us because we deal with a lot.

A LSIB member echoed similar thoughts about the SVPS Similkameen Watershed Plan:

We want to get along with the [Regional District], we share this area together. You [the Regional District] need to stop trying to plan on Crown land what you are going to do without telling us. Because there is a good shift in understanding to realize it is easier to

work with us than to not work with us. So it's just a matter of – they have tax dollars and capacity to fund that position, whereas for us to have a dedicated person who works in that position with them, we would need to find the capacity for it. So there are still some of those traditional barriers to being able to participate fully into the meaningfulness to that agreement.

In their work on watershed co-governance and management in the New Zealand context, Tupaia and Welch (2006) have problematized similar dimensions around capacity as an impediment to Maori participation in basin governance. They highlight that cooperative management, predicated on the ideal of “interaction between equal partners in decision making” is unsatisfying insofar as it “omits to explain how equal status and equal participation are to be realized when one partner has greater access to funding, staffing, expertise, statutory powers, and functions” (382). Tupaia and Welch (2006) further stress that “...the meaning of equality requires careful definition. Where the partners to a collaborative management agreement are a government and indigenous people, there is manifestly not equality in terms of available resources” (388). Such considerations are equally at the forefront in the context of collaborative watershed planning in BC. As Brandes and O’Riordan (2014) summarize: “Financial resources will have to be provided to engage First Nations and build their capacity to participate. Although challenging in today’s economic climate, commitment and sharing of local resource benefits to ensure sufficient capacity to be involved and effectively participate is likely required for co-governance arrangements to work” (37). One interviewee I spoke with suggested some potential options for funding these positions, including equitable sharing of resource revenues, where, for instance, water license holders with licenses in *Syilx* territory would pay licensing fees not to the provincial government but to *Syilx* governments. Kotaska (2013) has also proposed a model of resource revenue sharing which addresses historical injustices:

I would suggest that the goal in revenue sharing is not ‘equal’ distribution between Indigenous and non-Indigenous people, for example on a per capita basis. The goal is also not to protect settlers’ and their governments’ current economic positions. A ‘fair’ sharing means that settlers and their governments have to diminish their economic positions and opportunities—to give things up. Addressing past injustices toward Indigenous peoples—the taking of their lands, resources, and economic opportunities even within the imposed economic system—requires that they be entitled to a greater share now (103).

In sum, capacity issues must be addressed before a scenario of collaborative watershed planning at a watershed scale will represent a step towards more meaningful First Nations participation in colonial water governance (Brandes & O’Riordan 2014; von der Porten & de Loë 2014). This includes shifting the onus on capacity development for collaboration onto colonial government institutions as well, which I will return to below.

While there is recognition that capacity in terms of funding, human resources, and technical knowledge is a prominent concern for collaborative watershed planning with First Nations, Nadasdy (2012) writes that such calls for capacity development in the narrow sense have problematic undercurrents:

This same paternalistic subtext is evident in by now taken-for-granted calls in the Canadian self-government discourse for First Nations to build capacity, a euphemism for Euro-Canadian-style training that will enable them to serve as the bureaucratic functionaries increasingly required by land claim and self-government agreement as if they had not had the “capacity” to govern themselves before the arrival of Euro-Canadians (529).

Although Nadasdy (2012) is writing of the land claims process, his argument translates into a critique of collaborative watershed planning as well. I argue that the consideration of capacity in collaborative watershed planning needs to be broadened to include the realm of knowledge integration and translation: who is being asked to speak whose language, and on whose terms and knowledge systems is collaborative watershed planning proceeding? With increasing

recognition of Aboriginal rights and title; growing prominence given to the notion that interactions between colonial governments and First Nations should be on a government-to-government basis; and a proliferation of natural resource co-governance schemes, “First Nations have had to learn completely new and uncharacteristic ways of speaking and thinking” (Nadasdy 2003a: 2; see also Natcher et al. 2005; Natcher & Davis 2007). Kotaska (2013) has documented that this has generally held true in emerging co-governance arrangements in BC, where “provincial structures and processes dominate” (343). She also adds an important and more nuanced perspective that knowledge integration is not an entirely one-way transfer: “In the BC case, Indigenous and non-Indigenous knowledges, worldviews, systems of governance, and strategies of engagement have continuously informed each other from the beginning of First Nation-Crown relationships” (345). Turning to water specifically, given the heightened prominence of collaborative watershed planning with First Nations as a future governance model, First Nations now face a likely ‘onslaught’ of requests to participate in collaborative watershed planning processes. An interviewee involved in provincial First Nations fisheries and water policy articulated her preoccupation that First Nations will be pushed to work in a governance framework whose foundations and rationales derive from colonial governments and Western science perspectives, leaving little space for Indigenous knowledges and conceptualizations of governance. I am including a full transcript of her words below to let them speak for themselves:

But the thing that I worry about is that if there gets to be more watershed based planning and First Nations are engaged at that level, I always just worry about...it’s wrong to say the *ability* or the *knowledge* that people would need to have coming into a planning process like that or a management process. And again it is sort like the situation where as a First Nations [person], I have to fit into someone else’s worldview and how they think or how they manage and how they plan.

So the thing that I worry about is how successful are these things going to be if people come into these processes with different sets of experience and knowledge that may not be recognized by the other parties in the group? The challenge for First Nations will really be, if I could think ahead to who I could foresee being involved in these things, if they don't have somebody who has a technical understanding of sort of a western science technical management perspective, it will be hard for First Nations to have to engage only at that level. But I think that First Nations bring a wealth of knowledge in the knowledge that they have about the landscape and the territory which might not be that compatible. But that doesn't mean that it is not as valuable. So I think it is the knowledge systems that will be used going forward, will they be respected and recognized within the planning process?

I worry about that. Are we setting people up to fail? Even you know, going to school, you are learning something new, it takes a long time to get up to speed. Depending on what the topic or what the issue is, it might take you a couple years before you become comfortable with the process and with the language and before you feel comfortable to really speak up and participate.

This summary and analysis integrates two main issues that require attention. First, expressly foregrounded is imbalance in the direction of accommodation in watershed co-governance: the concern that First Nations will have to continue to adapt to the terms of water governance processes under the control of colonial governments, versus placing the onus on colonial governments to adapt and more closely follow an Indigenous approach. As such, a power imbalance is embedded within the process from the outset. Relatedly, this interviewee raises the difficult question of whether and how spaces will exist within watershed entities for First Nations' experiences, knowledge, and viewpoints to be privileged or considered on equal grounds as Western knowledges. While there is no definitive statement on how this will unfold in BC, it is helpful to look at other cases of watershed co-governance with Indigenous peoples in other areas of the world. Bark et al. (2012) have described that in watershed co-governance entities in Australia and the USA, Indigenous knowledge continues to be pushed to the margins:

“While water planning now places a greater reliance on decentralized arrangements and processes, these regimes have struggled to reflect that water claims are vested with religious, cultural, and economic significance for Indigenous societies” (169). Similarly, recent research on knowledge integration in five collaborative watershed governance arrangements in Nova Scotia found that:

One type of knowledge that does not seem to have been used in the collaborative processes studied was Indigenous knowledge. The areas within which the five case study organisations functioned overlapped the traditional territories of numerous First Nations. Whereas the small-area MRA [a watershed group] reported having willing local First Nations representation, evidence from both other small-area groups, GDDPC and the HRAA [other watershed groups] did not mention First Nation participation at all (van Tol Smit, de Loë & Plummer 2014: 13).

As several panellists at the *Watersheds 2014* conference emphasized, Indigenous knowledges do not just relate to detailed practical knowledge about certain aspects of water management that can be integrated as ‘sources of data’ into watershed planning processes. Rather, they are complete and contemporary body of knowledge and governance that encompasses science, education, politics, conflict resolution, institutions for decision making, forms of passing knowledge, among other things.

Attention must be directed at *who* is in control and running collaborative watershed planning processes, and *if and how* Indigenous knowledges are being privileged. After power sharing and authority are established, identifying points of intersection between two equivalent knowledge systems will be a key direction in collaborative watershed planning moving forwards. For instance, one natural resource consultant in the Similkameen suggested that the En’owkin process, a *Syilx* approach to decision making, could be enacted within a watershed planning process:

One of the things I am thinking is that a [watershed governance] model we would build with First Nations engagement that includes an Indigenous method, whether that's around decision making or conflict resolution, such as the En'owkin process that could be incorporated into the terms of reference or process that the board informs.

While there are no easy answers as to how to level the playing field around these daunting areas of capacity, knowledge, and accommodation in the context of watershed co-governance, I start from Kotaska's (2013) point that, "Working together also requires each side to (try to) understand the other's worldviews and governance systems and engage with them to a greater or lesser degree, depending on the model of co-governance" (341). To achieve more just and effective collaborative watershed governance, greater onus needs to be placed on colonial governments to engage and build capacity to better understand water governance approaches forwarded by First Nations. For instance, as Tipa and Welch (2006) highlight, "More significant [than resource/revenue disparities] is the need by both government and indigenous peoples to develop their respective capacities for collaboration...where they are in practice much closer to being equals" (388). It is also important for colonial governments and institutions to respond to and learn to work with the many water governance processes and strategies that different First Nations in BC are developing, such as the *Syilx Water Strategy*. This will likely include both strategic engagement to gain state-based recognition of water rights and pursuit of Indigenous alternatives outside of the rights framework (Wilson 2014). For instance, one member involved in *Syilx Water Strategy* outlined a vision of how this process could unfold:

Within this year we are going to be getting feedback about the policy we developed, and at the end of this year we will be able to use it to engage with provincial and federal proponents and regional districts, and say: "this is our viewpoint and this is how we want to manage water." And I think it is just going to start a dialogue between people. So it will help as a starting point. Like "here's our viewpoint, here's your viewpoint, and let's figure out how we are going to deal with it." So that's a really big hope. Because right

now we are not talking about anything. Here's our policy, here's our viewpoint, and how are we going to work together to come to these similar levels, right?

Throughout this research, when the topic of capacity was raised, there was also extensive discussion about the importance of youth and building youth engagement into water management and planning moving forwards. Several programs are now emerging to build youth leadership in water, including the Centre for Indigenous Environmental Resources' *Youth Water Leadership Program*. I will return to this with more detail in the concluding chapter.

3.4: Conclusion

Against the backdrop of growing emphasis on collaborative watershed planning with First Nations in BC, including in the *Water Sustainability Act*, this chapter has addressed the question: Based on the existing state of colonial water governance in BC (Part 2): what are some of the implications of collaborative watershed planning for First Nations (Part 3)? This research has documented that the existing colonial water governance setup for First Nations in BC is flawed in many ways, where key issues shared by *Syilx* members and others relate to jurisdiction, decontextualized policies and fragmented authority, capacity, and trust. With these concerns in mind, collaborative watershed planning approach presents both potential opportunities and ongoing complications. On the strategic side, the watershed concept is being employed by First Nations across BC and Canada in their water planning processes, with suggested linkages being made between watershed borders and traditional territories, as well as support for the holistic rationale of the watershed approach. However, such parallels should not be taken as a given, since there are multiple scales and different boundaries defining watersheds and areas of First Nations' authority and governance in BC. This discussion is a noteworthy contribution to watershed governance theory. Further, complications around jurisdiction and power sharing will

require ongoing negotiation, including concerns about provincial assertion of jurisdiction over unceded Indigenous territories and persistent tensions around First Nations' authority, all of which can constrain effective collaborations between First Nations and local and provincial governments. Third, discussions need to continue around capacity building for both First Nations and colonial governments in collaborative watershed planning approaches, with greater onus placed on colonial governments to adapt to and work with Indigenous processes and governance strategies. Overall, provided First Nations' experiences with colonial water governance, shaped by colonialism and the current political context, this chapter argues that existing colonial governance failures will not be addressed by a collaborative watershed planning model. Where full Indigenous territorial governance or co-governance is the goal, the adopted measures in the WSA fall well short of these models, resembling instead collaborative planning with no disruption to existing power imbalances. A key consideration moving forward with collaborative watershed governance with First Nations is time and commitment to relationship and trust building, and developing acceptable terms of reference with both provincial and local governments. Each of these levels of colonial government holds distinct responsibilities and obligations to First Nations that currently are not consistently being fulfilled, which undermines the effectiveness of any collaborative watershed planning process. Explicit observation of Aboriginal rights and title is needed, as is a commitment to sharing of power and authority, where Indigenous laws and decision-making are at least on equal terms with those of provincial or federal governments. Finally, it is critical to shift the onus to colonial governments to respect and respond to First Nations' water strategies and the diversity of ways in which First Nations are choosing to participate in water governance.

Chapter 4: Conclusion

“We have to start somewhere together” (Okanagan natural resource staff, April 2014)

“When we say “give it back” we’re talking about settlers demonstrating respect for what we share – the land and its resources – and making things right by offering us the dignity and freedom we are due and returning our power and land enough for us to be self-sufficient” (Alfred 2009: 155).

During the time of writing of this thesis, two major events have raised the profile of Indigenous struggles against ongoing colonial injustices in Canada. The first is *Idle No More*, a grassroots Indigenous movement which rapidly gained momentum in Winter 2012-13 and sparked hundreds of protests and actions across the country in a call for resistance to colonialism and to “honour Indigenous sovereignty and to protect the land and water.” Among the eight federal government Bills which sparked the initial stirrings of *Idle No More* was *Bill S-8: the Safe Drinking Water For First Nations Act*. *Idle No More* quickly became one of the largest Indigenous movements in Canada (IdleNoMore 2014), with its powerful messages of Indigenous sovereignty, environmental protection, and a restructuring of the relationship between Indigenous peoples and Canada. This clear rejection of colonial water policies within the *Idle No More* movement demonstrates the fundamental importance of water within Indigenous work toward self-determination and territorial governance. A second significant event in 2014 was the Supreme Court of Canada’s recent landmark decision on the *Tsilhqot’in* case, which formally declared Aboriginal title to a specific area of Tsilhqot’in territory. With this ruling, the Tsilhqot’in Nation has exclusive authority to decide the uses of title land and who benefits from that land. This case further confirmed the requirement for colonial governments to obtain a First Nation’s consent to carry out development projects that impact title lands. Although the

Tsihlot'in case affirmed the problematic provision that colonial governments can infringe on Aboriginal title if the infringement can be justified, the case has been hailed as a major victory in the lengthy succession of legal challenges since the 1970s addressing Aboriginal rights and title. Both *Idle No More* and the *Tsihlot'in* decision directly challenge colonial governments' continuing denial of Indigenous rights to self-determination and territorial governance, and both point to the fundamental need to restructure relationships between Indigenous and colonial governments in Canada.

Within the context of these critical calls for systemic change, this thesis represents my attempt, however small, to contribute to a critical conversation about colonial water governance in unceded Indigenous territories in BC. This thesis provides a commentary on the contested realities of First Nations' interactions with colonial water governance, including the existing barriers to effective and meaningful First Nations engagement in current water governance processes in the province. In the chapters above, based primarily on work with the LSIB community, of the Syilx Nation, I provided a broad overview of past and present interactions between First Nations and colonial water governance in BC, exploring various elements that together feed into this complex and often turbulent topic. With increasing legal recognition of Aboriginal rights and title and growing calls for co-governance arrangements with First Nations, there is heightened attention to the requirement that First Nations must have a central role in water governance. Such requirements, however, were not fulfilled within the development process or the content of BC's new *Water Sustainability Act*, approved earlier this year. I want to reiterate that this research does not capture a complete account of the types of experiences and interactions with colonial water governance within the *Syilx* community or between First Nations across the province. However, common themes do appear throughout, and I hope that the

discussion will be of interest to both First Nations and colonial governments in their respective and combined efforts to shape more just and effective water governance moving forward.

In Chapter 2, motivated by the prominence of concerns I was hearing about water licensing and fragmentation in existing colonial water governance, I explored the historical precedents of colonial water governance in BC pertaining to the establishment of reserves and application of the First in Time, First in Right licensing system. This chapter shed light on the critical role of reserve creation in shaping two elements of the colonial water governance context. First, the application of First in Time, First in Right water allocation system by colonial governments to reserves placed First Nations at a disadvantage in water access, since reserve water licenses were left registered far down the priority list in the provincial system. This has had ongoing consequences for reserve water access and livelihoods, which were resisted historically and continue to be today. Second, the drawing of reserve boundaries exacerbates the issue of jurisdictional divides and fragmentation in colonial reserve water governance, since water now flowed over a dividing line that split First Nations, provincial, and federal authorities. Although I focus on water allocation and the transboundary water governance issues associated with reserves, I also highlighted that colonialism and reserve creation had wide-reaching and profound impacts on many dimensions of Indigenous water access and governance, restricting access to the majority of water sources in Indigenous territories and the governance and ceremonial practices associated with these water bodies. In addition, Chapter 2 contributed a discussion of some existing and future implications of FITFIR water licensing. Despite many submissions from different First Nations voicing their concerns that the FITFIR system is an infringement on Aboriginal rights and title, the province did not heed such concerns and the FITFIR system remains essentially unmodified in the new *Water Sustainability Act*. BC has

continued to avoid addressing the inherent contradiction embedded within the FITFIR system, and First Nations' senior water rights on all water in the province continue to be denied.

Although FITFIR remains a part of colonial water governance in BC for the time being, First Nations' rights to water – of sufficient quality and quantity for existing and future needs – must be explicitly recognized and protected moving forward, including in the licensing system. First Nations must be engaged in the governance of water allocation, and cultural and spiritual uses of water must be factored into future water threshold and flow needs standards. While direct legal challenge to the FITFIR system by a First Nation has yet to materialize in BC, there is ongoing litigation in Alberta wherein First Nations are challenging the prior allocation system. The outcomes of these court cases will undeniably shape if and how legal action is taken in BC to force the province to re-rank water licenses such that the system is truly First in Time, First in Right and Indigenous water rights hold priority.

Chapter 3 moved the discussion more fully to the present day, first presenting an overview of existing concerns about colonial water governance that I heard from *Syilx* members and others, including fragmentation and lack of access to information, capacity, and trust. Underlying all of these concerns is a fundamental contestation over sovereignty over water in BC. The provincial government continues to assert ownership over all water in the province, despite the fact that the majority of Indigenous territories and waters have never been ceded to colonial governments through treaty. This undermines the legitimacy of the WSA and of the province's calls for collaborative watershed planning with First Nations. I subsequently considered how collaborative watershed planning with First Nations, as suggested in the WSA, might respond to and/or further embed some of these challenges. Specifically, I considered narratives around the resemblance between watershed and traditional territory boundaries;

dimensions of jurisdiction and scale that complicate collaborative watershed work between First Nations and provincial and local governments; and capacity and ongoing colonial control.

Overall, I conclude that the collaborative watershed planning suggested by the WSA falls well short of achieving the goal of full Indigenous water governance or watershed co-governance.

There is no challenge to existing power imbalances, colonial governments remain in control of water governance processes, and it is not clear if First Nations will have a substantive role in decision-making. In short, existing governance failures will not likely be addressed by moving water governance to a watershed scale with collaboration with First Nations.

Although this thesis has demonstrated that the collaborative watershed governance approach in the WSA is flawed in critical ways, it is productive to envision what decolonized water governance *could* look like. Again, I do not claim to have a clear ‘answer’ here, but rather present some initial thoughts with an invitation and wish for ongoing reflection. One clear route towards decolonizing water governance would be towards full Indigenous water governance. As Kotaska (2013) describes, Indigenous territorial governance describes a model in which:

Indigenous nations have title to the land and jurisdiction over the land and resources. They are able to decide to what purposes the lands and resources can be put, including whether land, resources, or responsibilities are delegated, leased, or sold to other governments or third parties. Correspondingly, they decide whether and how revenue is collected and used when resources are utilized (96).

In a scenario of full Indigenous water governance, First Nations would invite colonial governments to participate in Indigenous water governance plans and processes, if and as deemed appropriate by the nation in question. This would place the onus on colonial governments to build their capacities in order to learn, adapt and work with these Indigenous water governance plans and processes. Phrased differently, as Kotaska (2013) summarizes, a key criterion of decolonizing territorial governance is: “settler governments supporting the

continuation of local Indigenous laws and governance institutions” (95). These Indigenous water governance approaches could be entirely internally-driven, based on Indigenous laws and governance institutions, or they could draw on some aspects of non-Indigenous knowledge or governance approaches, as desired by the nation. Citing Smith (2005) and Alfred (2009), Snelgrove, Dhamoon & Cornassel (2014) describe the former approach:

Smith (2005) writes, “when we do not presume that [settler colonial states] should or will always continue to exist, we create the space to reflect on what might be more just forms of governance, not only for Native peoples, but for the rest of the world” (17)...In recent years, Indigenous resurgence emerged to signal the importance of a turn away from dominant settler institutions, values, and ethics towards Indigenous institutions, values and ethics of “interdependency, cycles of change, balance, struggle, and rootedness” (19).

While the *Syilx Water Strategy* is still in its developing stages, it represents the effort of one Nation to build an Indigenous water governance strategy, where “the themes expected to emerge from this work will be the Syilx perspective on the importance and value of water, how it should be used and not used, issues with how water is currently used and strategies to conserve, respect and protect water in Syilx territory” (ONA 2014). To return to the interviewee I quoted in Chapter 3, this person envisions that the *Syilx Water Strategy* will also be a starting point to set acceptable terms of engagement with local, provincial and federal governments in water governance moving forward:

We [the *Syilx Nation*] will be able to use it [the *Syilx Water Strategy*] to engage with provincial and federal proponents and regional districts, and say: this is our viewpoint and this is how we want to manage water. Here’s our policy, here’s our viewpoint, and how are we going to work together to come to these similar levels, right?

Building capacity and resourcing will be critical in this scenario of Indigenous water governance. First Nations need to be able to collect resource revenues and finance their own governance, which could occur, for instance, if First Nations collected water licensing fees on all water licenses issued within their territories. The importance of First Nations youth as current and

future leaders in water governance was a consistent desire that I heard expressed throughout this research in discussions of capacity. Developing programs to engage youth, such as the *Youth Water Leaders Program* initiative headed by the Centre for Indigenous Environment Resources, is an exciting option moving forward. This program involved youth from the Atlantic, Pacific, Arctic and Hudson Bay watersheds, with a focus on leadership development and developing real solutions to water issues in the youths' respective communities. The vision for this project speaks to the vital role of youth in building Indigenous water governance:

This workshop will help youth realize their own strengths in leadership qualities, which builds self-confidence, while embracing culture and science. We focus on youth because they are the future makers of change in their communities and we, as knowledge holders, should share our knowledge to empower the youth to realize their leadership potential. The future of the health of the lands and waters in Indigenous communities lies in the hands of their youth as they will be guardians on Turtle Island (CIER 2014).

A second route leads towards decolonized water co-governance. I will return here to the criteria for co-governance summarized in Chapter 3 and elaborate on some ideas about how such criteria could be met in a scenario of water co-governance. The first point is observation of Aboriginal rights and title and formal acknowledgement of First Nations as governments negotiating with the Crown. The First Nations Summit makes this point clear in its submission to the WSA:

The key to creating a better water governance structure is recognition and implementation of Aboriginal title and rights, negotiating solutions to public policy challenges directly with First Nations on a government-to-government basis, and developing legislation and regulations in collaboration with other First Nations.

The Kunst'aa Guu – Kunst'aayah Haida Reconciliation Protocol establishes a possible model for how incremental reconciliation of provincial and Aboriginal title to water could occur. In the reconciliation protocol, both the Haida Nation and the province explicitly acknowledge their

competing claims to Haida Gwaii territory. The Haida Nation asserts: “Haida Gwaii is Haida lands, including the water and resources, subject to the rights, sovereignty, ownership and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions.” Conversely, BC asserts that Haida Gwaii is Crown land subject to the legislative jurisdiction of Canada and the province of BC. With these competing claims made clear, the Protocol states:

Notwithstanding and without prejudice to the aforesaid divergence of viewpoints, the Parties seek a more productive relationship and hereby choose a more respectful approach to coexistence by way of land and natural resource management on Haida Gwaii through shared decision-making.

While there is certainly not one prescriptive approach to reconciling competing claims to title to land and water, it is possible to envision similar protocol agreements that would both explicitly acknowledge competing Indigenous and provincial claims to title to water and establish clear terms for “a more respectful approach to coexistence” through joint decision-making. This leads to a second criterion of co-governance: power sharing and Indigenous participation in the process of decision making with substantive or legally binding authority, where First Nations achieve the level of authority they desire. Key aspects to consider include the final decision-making authority or veto powers First Nations would hold in the co-governance process; the level of authority desired by different Nations will vary and must be negotiated on a case-by-case basis (Goetze 2006).

Third, a key component of any co-governance approach that emerged clearly in this research is the need to take time to develop trust and respectful relationships at multiple levels, from the personal to the institutional, between First Nations and colonial governments. On the topic of relationships and engagement between First Nations and settler governments and organizations around water governance, it is helpful to draw on Ermine’s (2007) notion of the

“Ethical Space of Engagement.” As Ermine writes, “The “ethical space” is formed when two societies, with disparate worldviews, are poised to engage each other” (193), where:

In its finest form, the notion of an agreement to interact must always be preceded by the affirmation of human diversity, created by philosophical and cultural differences. Since there is no God’s eye view to be claimed by any society of people, the idea of the ethical space, produced by contrasting perspectives of the world, entertains the notion of a meeting place, or initial thinking about a neutral zone between entities or cultures (202).

Syilx author and scholar Jeannette Armstrong also presents an inspiring vision for negotiation based on the En’owkin process, a *Syilx* decision-making approach:

The point of the process is not to persuade the community that you are right, as in a debate; rather, the point is to bring you, as an individual, to understand as much as possible the reasons for opposite opinions. Your responsibility is to see the views of others, their concerns and their reasons, which will help you to choose willingly and intelligently the steps that will create a solution — because it is in your own best interest that all needs are addressed in the community. While the process does not mean that everyone agrees—for that is never possible — it does result in everyone being fully informed and agreeing fully on what must take place and what each will concede or contribute.

As both Ermine (2007) and Armstrong (2000) suggest, creating this meeting place around water governance moving forward will be a long-term process that begins from a place of recognition of distinctness and efforts to understand contrasting perspectives.

As discussed in the preceding section, negotiating co-governance requires both First Nations and colonial governments to engage in capacity building. Again, I suggest that the emphasis should be on colonial governments to build their capacities to respond and work within an Indigenous approach, while also transforming the resourcing scheme such that First Nations are collecting resource rents on water licensing and other water-related projects in their territories. Lastly, following from Tupa & Welch (2006), co-governance must include: “A balance

struck between establishing governance structures that ensures a mandated form of interaction and maintains the right of partners to advocate for the needs and interests of those they were appointed to represent” (388). For instance, the Northwest Territories’ *Northern Voices, Northern Waters Water Stewardship Strategy* makes explicit that the strategy does not impact on Aboriginal and treaty rights:

This strategy does not affect or infringe upon existing or asserted Aboriginal rights, treaty rights or land, resource and self-government agreements. In the case of any inconsistency between the Strategy and existing or future treaties or land, resource and self-government agreements, the provisions of the treaties and agreements shall prevail.

While BC’s WSA has failed to uphold principles of co-governance and is problematic on many accounts in its treatment (or lack thereof) of Indigenous water rights and concerns, the *Northern Voices, Northern Waters Water Stewardship Strategy* in the Northwest Territories has set a very different precedent. The strategy was co-created by an Aboriginal steering committee together with federal and territorial governments. Further, the document makes explicit that Indigenous knowledges and forms of governance will be privileged in the plan, another key criterion for decolonizing water co-governance:

Aboriginal people expect to be directly involved in the Strategy, especially the implementation phase. The appropriate use and consideration of all types of knowledge, including traditional, local and western scientific, are an integral part of the Strategy and related initiatives.

Some limitations and challenges of this research bear reiterating. The study was constrained by the short time frame of a Masters program, which at times was in tension with the need to build long-term, meaningful and lasting relationships with the LSIB and others with whom I engaged in this work. I would like to have carried out more extensive work with the LSIB community, involving more neighbourhood and family meetings and use of other

participatory and creative methodologies. Further, I recognize that additional interviews with other First Nations, the provincial government, and organizations working on watershed initiatives, would have provided a more complete and nuanced discussion of the existing challenges and opinions about collaborative watershed planning. An in-depth comparative study of different communities and their respective forms of engagement with water governance would be a beneficial extension of this research.

Overall, there are several dimensions to the evolving relationships between First Nations and water governance in BC that will be productive areas for future research. For instance, an interesting line of inquiry will be to assess the effectiveness and outcomes of collaborative watershed planning processes developed under the *Water Sustainability Act*, beginning with the governance model ‘case studies’ proposed under the legislation. Exploring the perspectives of both Indigenous and non-Indigenous members who are participating in these processes will be an important contribution towards gauging the efficacy of such models. In addition, it will be informative to follow the evolution of, and responses to, the many water strategies and governance approaches that different First Nations across BC are developing, including the *Syilx Water Strategy* currently being finalized by the Okanagan Nation Alliance. Looking outside of the BC context to consider and compare different provincial and/or territorial water strategies and First Nations’ engagement in provincial water policy development would also be a worthy area to explore in greater depth in future research. Finally, a systematic review of the array of the existing capacity building programs for First Nations and colonial governments and institutions in water governance would help to build a picture of the types of approaches that resound with those currently engaging in water governance.

Building more just and effective water governance in BC will require fundamental transitions away from the existing colonial water governance framework. This includes acknowledging that past injustices, such as the FITFIR system, continue to impinge on Indigenous water access and governance today. It also will require a commitment to the principles of Indigenous water governance or co-governance described above. Overall, I suggest that there must be greater emphasis placed on building trusted and accepted governance processes and less focus directed at achieving specific water management outcomes. Any approach will require “cycles of change” (Alfred 2009) and ongoing renewal. I end with the words of a LSIB community member sharing her vision for the future of water governance:

And probably about three or four years ago I had a dream that some grandmothers came, and they said that we need to start putting together our traditional knowledge and the academic knowledge to rebuild the water. Because there are so many people that take the water, and they use it and it gets contaminated from the orchardists and the mines and the forestry people and even the ranches, like the cattle contaminate water. And our job as Indian people is to use our knowledge to help the water to cleanse itself, and they showed a vision of different things that had to be done that we need to take care of. And I was really happy to see that because I felt, well that is a really positive thing that we can still work together and make a difference for the water.

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Appendix 1: Sample Interview Guide

1. Introduction: How long have you been working in your current position? Can you explain your current position to me: what do you do? In what capacity do you engage with water in your work?
2. What are your main concerns regarding water in the area?
3. Can you tell me about the kinds of water-related planning processes that the LSIB/your organization is involved in currently, or was involved in during the past? In what *capacity* is the LSIB/your organization involved in these processes?
4. What are some barriers and challenges you see to LSIB/First Nations involvement in water governance in BC?
5. What are some opportunities you see today for increased LSIB/First Nations involvement in water governance in BC?
6. Have you seen any changes in how First Nations are being involved in water governance in BC?
7. How does LSIB interact with other levels of governments with respect to water management and planning?
8. Can you describe the kinds of powers that the Band currently asserts with respect to water planning/use/management?
9. If there is a development project (such as the Copper Mountain mine, or FORTIS B.C. hydro project) that impacts water for the LSIB, how is band involved in decision-making? What is the process you follow for getting community input?
10. One of the policy directives in the Water Sustainability Act is to “*Enable a Range of Governance Approaches.*”
 - What forms of governance do you think could be effective in the context you work in?
11. *There is increasing emphasis placed on watershed-level governance and planning in B.C.* In your opinion, what are the implications of the shift to watershed-level planning for First Nations?
12. In a collaborative watershed planning scenario for water: What are the conditions required for First Nations to have an “increased” and “meaningful” role?

13. In the long-term, how do you think increased First Nations involvement in water governance could impact the way water resources are managed?

Appendix 2: LSIB Research Agreement

This research agreement establishes the basis of the relationship

between Rosie Simms

(Name of researcher)

of University of British Columbia

(Institution of the principal researcher.)

and the Lower Similkameen Indian Band

OCTOBER 7th, 2013

The researcher and the representatives of Lower Similkameen Indian Band acknowledge the following:

ETHICS:

- i. All research activities and reports or publications arising from research will conform to the research principles outlined in the Tri-Council Policy Statement for Guidelines for Research Involving First Nations people in Canada and will meet the requirements of University of British Columbia's Human Ethics code. These will further conform to the specific requirements of the LSIB.
- ii. The development of this project is based on sincere communication between community members and researchers. All efforts will be made to incorporate and address local concerns at each step of the research, including ongoing consultation with Chief and Council and the natural resource staff. The research will be inclusive of all community members who wish to participate.

CONSENT:

- i. Free, Prior and Informed consent of individual participants is to be obtained in these agreed ways: Participants will be invited to participate in the project through the appropriate process as defined by the LSIB Chief and Council and/or a community research associate. For interviews/talking circles/workshops, we will confirm with community contacts as to whether verbal or written consent is more appropriate. In the case of written consent, a consent form will be signed prior to any interviews/workshops. In the case of verbal consent, we will read the consent information the beginning of each workshop and ask everyone to verbally acknowledge his or her consent before we begin the discussion. The same process will be followed with youth participants.
- ii. Parental consent will be sought for all participants under age 19.

- iii. Participation in this study is entirely voluntary and participants may refuse to participate or withdraw from the study at any time. A copy of the consent form will be left with the respondent where the phone & email address of each researcher can be used at any time, should the respondent wish to contact the researcher(s) for additional information.

CONFIDENTIALITY:

- i. All participants' identities will be strictly confidential unless participants explicitly express a wish to be identified by name. Generic names/code numbers will be used on all official documents and final reports.
- ii. Participants in workshops will be informed that their confidentiality will be guaranteed outside of the workshop, but given in-person interactions during workshop, what they say will not be confidential. As such, participants will be assured that do not have to respond to any questions for which they are uncomfortable. There is no consequence of no-response. After the workshop, all information will be coded/anonymous
- iii. Anonymity and confidentiality of research participants is guaranteed.

DATA ACCESS & STORAGE:

- i. Data from the study will be stored in a secure location. According to UBC Policy #85 on Scholarly Integrity, data must be retained for at least 5 years within a UBC facility. Audio-recorded files will be uploaded to a portable laptop and back-up disk. Original records will be destroyed following the upload. Notes from interviews will be protected and kept under lock when possible. All computerized files, including survey data, will be password protected and encrypted. Audiotapes and interview notes will be labeled with pseudonyms. Transcripts, surveys and other raw data will only be seen by members of the research group and those granted permission to access them at LSIB.
- ii. Upon completion of the study, data and records that are collected in the context of the research study remain the property of the LSIB. Data from the study will be transferred to the LSIB to be stored at the LSIB Band Office in addition to a secure location off-site determined by Chief and Council. This could include completed surveys or questionnaires, transcripts and tapes from interviews, etc. All data will be anonymous and labeled with pseudonyms.
- iii. The analysis and interpretation that arises from the raw data for the purposes of a MA Thesis will remain the property of the researcher(s) as per UBC requirements.

PUBLICATION:

- i. UBC researchers request that project results and methodologies generated by this research may appear in various publications, reports and/or conference proceedings.
 - ii. Members of the LSIB, Natural Resource officers, and other individuals instrumental to the project will be acknowledged in all publications.
 - iii. Any reports or publications arising pertaining to the LSIB from the research shall be submitted to the natural resource staff and Chief and Council for revision prior to distribution to communities or submission for publication. The LSIB may not unreasonably reject publication of a manuscript that adheres to the principles herein.
 - iv. Results of research shall be distributed as widely as possible within the LSIB community. Efforts shall be made to present results in non-technical language where appropriate.
 - v. The LSIB will be provided with two hard copies and one digital copy of all reports/papers derived from the research project.
 - vi. The researcher shall report on an ongoing basis to the LSIB Chief and Council and natural resource staff on the development, planning, implementation and results of the research.
 - vii. The data collected and stored **may not** be made accessible to other researchers and/or used for research purposes other than those agreed upon without informed consent.
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