Hydroelectric Power and Indian Water Rights on the Prairies

Richard H. Bartlett

ABSTRACT. Hydroelectric projects have had a negative impact on aboriginal communities in western Canada. These projects have reduced the ability of various aboriginal groups to sustain themselves via traditional pursuits such as hunting, trapping and fishing. While they have occasionally produced some jobs for aboriginal people, these have tended to be low status, low pay, temporary jobs. But the provincial governments and utility companies have proved unwilling to consider the impact on aboriginal peoples when planning these projects and equally unwilling to pay compensation once these projects are onstream and the aboriginal economies have been demonstrably unsettled. This article traces the impact of several major dams on aboriginal peoples and outlines the legal arguments as to why such disregard for aboriginal rights cannot continue with impunity. The 1988-89 settlement at Cumberland House may provide a useful model as to both procedure and substance as to how this disregard of aboriginal rights may be addressed.

SOMMAIRE. Les projets hydro-électriques ont eu un impact négatif sur les communautés autochtones de l'Ouest canadien. Ils ont réduit la capacité de divers groupes autochtones à se nourrir des produits de la chasse, de la trappe et de la pêche comme c'est leur coutume. Bien que ces projets aient parfois créé quelques emplois pour les autochtones il s'agit en général d'emplois temporaires, mal rémunérés et inférieurs. Mais les gouvernements provinciaux et les services publics se montrent peu disposés à tenir compte de l'influence de ces projets sur les peuples autochtones lorsqu'ils les planifient. Ils sont tout aussi peu disposés à offrir une compensation lorsque ces projets sont en place et que les économies autochtones s'en trouvent affectées. Cet article traite de l'impact de la construction de plusieurs grands barrages sur les peuples aborigènes et examine brièvement les arguments juridiques qui font qu'on ne peut continuer impunément à passer outre aux droits des Autochtones. Le réglement de Cumberland House de 1988-89 pourrait être un modèle utile quant à la procédure et au fond pour savoir comment rendre aux Autochtones leurs droits longtemps ignorés.

Introduction

The principal theme of any study of resources and aboriginal peoples in the prairie provinces must be the historic determination of the provincial governments to deny resources to the Indian people. It has long been recognized that local legislatures are antipathetic to the interests of Indian people. In 1837 the British House of Commons Select Committee on Aborigines (British Settlements) declared that

> the protection of the Aborigines . . . is not a trust which could conveniently be confined to the local Legislatures. In proportion as those bodies are qualified for the right discharge of their proper functions, they will be unfit for the performance of this office, for a local Legislature, if properly constituted, should partake largely in the interests, and represent the feelings of the settled opinions of the great mass of the people for whom they act. But the settlers in almost every Colony, having either disputes to adjust with the native Tribes, or claims to urge against them, the Representative body is virtually a party, and, therefore, ought not to be the judge in such controversies . . .[1]

A later report declared that the "Indian and European races" were influenced by "antagonistic interests."[2]

The interests of settlers on the Prairies have inevitably run counter to those of Indians. Settlers have favoured the exploitation of the resources and lands; Indians have sought to avoid the alienation of lands left or reserved to them. The desires of the local interests have been manifested in: (1) opposition to the establishment of reserves and, in the event of the creation of reserves, attempts

to exclude resource-rich lands from the areas selected. The most recent example is the reluctance of the prairie provinces to fulfill the constitutionally entrenched obligation to meet outstanding treaty land entitlement; (2) attempts to encroach upon, reduce and alienate reserve lands which have been set apart for the Indians. The history of inducing surrenders of reserve lands was driven by the desire of settlers for more land; and (3) attempts to manage, control and secure the maximum benefits for local interests from the development of reserve lands. The federal-provincial agreements regarding reserve lands provide particular examples. The provinces insisted upon one-half of all mineral royalties from reserves set apart after 1930, and application of provincial standards and rules in the mineral exploration and staking of reserve lands.

The focus of this article is hydroelectric power. There have been many disputes between Indians and settlers concerning water resources, but unlike other resources which have been dealt with by federal-provincial agreements, there has been little resolution. The unique aspect of water resources is their commonality and interjurisdictional nature. A river flowing through Alberta, Saskatchewan and Manitoba provides a common resource to all the provinces, and to both Indians and non-Indians on its path. Non-Indian users have been able to exploit the resource with little regard for Indian rights or interests. The resolution of Indian claims to water rights has been largely ignored. This article examines the legal significance of Indian water rights and the regard accorded those rights in hydroelectric development, particularly in Saskatchewan, and attempts to suggest some approaches to resolve the current disputes.

Water has always been of great significance to the Indian people of the Prairies, less because of the cultivation of cereals as practiced in eastern Canada than because of the traditional practices of hunting, trapping and fishing, which continue to be important sources of food and income today. A 1975 report on the impact of a hydroelectric dam on the Churchill River in Saskatchewan declared that trapping and fishing were the major industries employing local labour in the northern part of the province,[3] employing approximately half the local labour force, and providing half of the income or income in kind, in 1972.

Hydroelectric development has substantially altered traditional water flows. It has changed the water quality, quantity and flow of rivers and lakes in Canada. It has affected, to the injury of the aboriginal peoples, wildlife habitat, fishing, transportation and water supplies, and has flooded reserve lands. Hydroelectric development projects in Saskatchewan are the subject of particular examination in this article, but projects in other parts of the Prairies, including the Churchill River Diversion in Manitoba and the Brazeau and Bighead Dams in Alberta, have had a severe impact on traditional patterns of sustenance.

The value of hydroelectric development to the non-Indian society in economic terms is not questioned, but the losses from such development are

currently borne by the Indian people. The dams have undermined the basis of the traditional Indian economy. The Churchill River Study Report concluded that "losses would be imposed on those who earn part of their income by fishing and trapping in the North. Most of the gains would be realized in the southern part of the Province."[4] The report is one of the few that have given substantial consideration to the impact of water control projects upon aboriginal peoples before construction was undertaken. Following its release the government of Saskatchewan abandoned plans to build on the Churchill River. Instead another dam was built on the Saskatchewan River at Nipawin, but without consideration of the impact upon Indian people downstream.

Description of the impact of non-Indian water projects upon Indians indicates the significance of the assertion of Indian water rights to non-Indian interests. The affirmation of Indian water rights would demand an accommodation of Indian interests which has rarely been provided to date.

Indian Water Rights

Indian water rights on the Prairies are derived from the treaties under which reserve lands were set apart, and from the riparian character of the lands. The object of the provision of Indian reserves by treaty was generally to enable the Indians to become a settled and "civilized" people in the European manner, who nonetheless maintained traditional uses of the land and water. Alexander Morris, lieutenant governor of Manitoba and the North-West Territories, was a treaty commissioner in the negotiation of Treaties 3, 4, 5 and 6 on the Prairies. He subsequently commented on the reasons for setting aside reserves:

> The allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which cannot be sold or alienated without their consent, and then only for their benefit; the extent of lands thus set apart bring generally one section for each family of five. I regard this system as of great value. It at once secures to the Indian tribes tracts of land, which cannot be interfered with, by the rush of immigration, and affords the means of inducing them to establish homes and learn the arts of agriculture.[5]

The setting apart of reserves was not intended, however, to deprive the Indians of their traditional means of sustenance, and the treaties assured the Indians of their continued right to hunt, trap and fish.

The language of the treaties did not expressly refer to the surrender of water or water rights by the Indians. Nor did it specifically refer to water or water rights attaching to the reserve lands, although Treaties 1, 2, 5 and 7 provided for lands to be set aside on the banks of rivers and shores of lakes.

Indian organizations have maintained that the treaties were not understood by the Indians as entailing a surrender of the water and that Indians have paramount water rights. The Indian understanding is not shared by the provincial

governments on the Prairies, and it is accordingly necessary to establish the principles which govern the interpretation of treaties. Conventionally a court seeks the intention of the parties to an agreement by ascertaining the "plain meaning" of the words used in the agreement. The Supreme Court of Canada has recently indicated that such an approach is not necessarily appropriate with respect to treaties, statutes and other instruments relating to Indians. In the landmark case of *Nowegijick v. The Queen*, Judge Dickson for a unanimous court declared that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians . . ."[6]

Dickson quoted the decision of the United States Supreme Court in *Jones v. Meehan* that "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians."[7]

Such principle of interpretation was affirmed unanimously by the Supreme Court of Canada in *R. v. Simon.*[8] Thus, the Supreme Court of Canada has twice affirmed the need for a "liberal construction in favour of the Indians," and the dictum of *Jones v. Meehan* that regard should be accorded the sense in which treaty language "would naturally be understood by the Indians." This is a significant departure from conventional principles of interpretation and is founded upon the historical relationship between the Crown and the Indians.

Such an approach was followed in the only reported Canadian case concerning the treaty right to water. In *Saanichton Marina Ltd. v. Claxton* the treaty right to use water to maintain a traditional fishery was upheld.[9] The Tsawout Indian Band on Vancouver Island sought to prevent the construction of a marina in a bay which band members had traditionally fished. In 1852 the band had signed a treaty which stated it did "consent to surrender" the Saanich Peninsula upon "condition" *inter alia* that "we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly." Judge Meredith decided that "the words must mean that the Indians will have resort to traditional fishing grounds." He rejected a suggestion that the Indians could merely "have the right to fish in common with everyone else," observing that "in any event, if two interpretations are possible the document will be construed against the maker, in this of all cases." Meredith held that the "right of the Band is to assert that the whole of the Bay continue to be used as a fishery" and since "the marina would reduce the size of the fishery," resulting in irreparable injury, an injunction should issue. The court expressly rejected the argument that the right of fishery was reduced to the extent that areas of the sea bed were occupied by the marina. The decision in *Saanichton Marina* is likely to be the first of many in Canada upholding an Indian right to water for the purpose of hunting, trapping and fishing.

The paucity of Canadian cases suggests the value of the consideration of decisions from the United States. Indian water law in the United States is founded upon the principles of interpretation of treaties and statutes which have been recently approved and adopted by the Supreme Court of Canada in *Nowegijick* and *Simon*. In the landmark case of *Winters v. United States* the United States Supreme Court declared:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule certainly will be applied to determine between two inferences, one of which could support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were about to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government . . .[10]

The adoption in Canada of the rules of interpretation of treaties and statutes applied in the United States suggests the significant precedential value of Indian water law there. In *Winters v. United States* the Supreme Court concluded that water rights to irrigate the Fort Belknap Reservation on the Milk River in Montana were reserved by an agreement or treaty with the Indians in 1888, thereby enabling the Indians "to become a pastoral and civilized people."

The case involved a suit brought by the United States to restrain Henry Winters and others from constructing or maintaining dams or reservoirs on the Milk River in Montana, or in any manner preventing the water of the river or its tributaries from reaching the Fort Belknap Indian Reservation. The case turned on the interpretation of the agreement of May 1888, resulting in the creation of Fort Belknap Reservation. In language which is most appropriate to the consideration of the treaties in Canada, the court observed:

> In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and "civilized communities could not be established thereon." And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the land and waters—command of all their beneficial use, whether kept for hunting, and "grazing, roving herds of stock," or turned to agriculture and

> the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?[11]

The Supreme Court had no difficulty in concluding that the water rights on the Milk River were reserved to ensure the ability of the Indians "to become a pastoral and civilized people" through irrigation. The court observed "that the government did reserve them we have decided . . . This was done May 1, 1888." Subsequent decisions have repeatedly affirmed the decision in *Winters*, most notably in the 1963 decision of the Supreme Court in *Arizona v. California*.[12]

The decisions in the United States have also upheld a treaty right to water to sustain hunting and fishing rights. *United States v. Adair* considered an 1864 treaty whereby the Klamath Indians surrendered their traditional lands in return for a reservation in Oregon, including the Klamath Marsh.[13] The marsh is subject to seasonal flooding and is an important feeding and retiring area for waterfowl and supports a variety of other indigenous wildlife. The treaty expressly declared the exclusive right of the Klamath to hunt, fish and gather on the reservation, and made provision to encourage them to engage in agriculture. The state of Oregon argued that the prime intent of the 1864 treaty was to convert the Indians to an agricultural way of life. The court concluded that both the encouragement of agriculture and the guarantee of "continuity of the Indians hunting and gathering lifestyle" were objectives which qualified "as primary purposes of the 1864 treaty and accompanying reservation of land." The court emphasized the "historical importance of hunting and fishing" and the language of the treaty, and accordingly determined that

> at the time the Klamath Reservation was established, the Government and the tribe intended to reserve a quantity of water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands.[14]

The court concluded that the Klamath tribe was entitled to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members."[15]

The nonconsumptive nature of an Indian water right to support hunting and fishing was recognized by the court in *Adair*. Judge Fletcher observed:

> diversion of water is not required to support the fish and game that the Klamath Tribe take in exercise of their treaty rights. Thus the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. See 1 R. Clark, Waters and Water Law s. 55.2, at 578-81 (1967). The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies. See *Cappaert* (characterizing right in

> similar manner). In this respect, the water right reserved for the Tribe to hunt and fish has no corollary in the common law of prior appropriations.

An Indian water right to such character has great significance to the development of hydroelectric generation. The Supreme Court of the United States refused *certiorari*.[16]

The treaties promised lands for farming and other development, and the maintenance of hunting, trapping and fishing. It could be suggested that ordinary principles of interpretation require that such water rights be implied in the undertakings given by the Crown. Without water rights the promises made by the Crown cannot be fulfilled. Reference to principles requiring a "fair, large and liberal construction" and regard for the Indian understanding of the treaties and agreements demands such a conclusion. American jurisprudence has articulated such results in the United States where similar conditions prevailed. The Supreme Court of the United States has recognized the common fundamental object of governments in the United States and Canada, and has stressed the conclusion that the government intended "to deal fairly with the Indians by reserving for them the waters." It is suggested that Canadian jurisprudence demands a similar result in Canada. As the Department of Indian Affairs opined in 1920:

> The avowed purpose of the Crown when making treaties with Indians, as shown by the policy of this treatment of them extending over many years, was and is to encourage Indians in habits of industry and to induce them to engage in pastoral pursuits and in the cultivation of the soil in order that they may not only become self-supporting but that they may eventually take up the habits and busy themselves with the enterprise of civilized people.
>
> I am satisfied that the Courts in construing the treaties between the Crown and the Indians under which reserves were set apart would follow the view taken by the American Courts that there must be implied in such treaties an implied undertaking by the Crown to conserve for the use of the Indians the right to take for domestic, agricultural purposes all such water as may be necessary, both now and in the future development of the reserve from the waters which either traverse or are the boundaries of reserves.[17]

Water rights derived from treaty are in addition to riparian rights—those rights to water which were recognized by the common law as a natural incident to the right to the soil itself.[18] They are "natural rights" derived from possession of land adjacent to water. They do not depend upon any express or presumed grant. The riparian land owner "has the right to have [the water] come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction."[19] Riparian rights entail the right to the natural flow of the water—that it should run as it has been accustomed to run. Treaty water rights are substantially broader than those derived from Indian ownership of riparian

land. But riparian rights do pose a formidable constraint upon upstream uses. Hydroelectric generation which depletes the water supply, alters the flow or affects water quality will breach the rights of Indian riparian landowners. Riparian rights suffice to protect the traditional and domestic uses of water by Indian people.

Abrogation of Indian Water Rights: Were the Treaties Broken?

This article has pointed out the basis and significance of Indian water rights. The discussion has not, however, considered the regulation or indeed abrogation of those rights by legislation. It is obviously crucial to the significance of Indian water rights in the context of hydroelectric generation on the Prairies to consider the impact of legislation. The provinces commonly assert that Indian water rights were abrogated by legislation. The legislation upon which they rely is the North-West Irrigation Act 1894 and its successors.[20]

The North-West Irrigation Act deemed all property and rights of use in any river or body of water to be vested in the Crown except to the extent that an inconsistent private right of use was established. Any person holding water rights "for domestic, irrigation or other purposes" was required to obtain a licence; failing the obtaining of a license, the water rights were forfeited to Her Majesty. After the passing of the act, acquisition by riparian title or Crown grant or "otherwise" of rights to appropriate water was barred except in pursuance of an "agreement or undertaking" existing at the time of the passing of the act or in accordance with the provisions of the act. The effect of the statute was to abrogate the common law notion that water was not the subject of ownership and the common law concept of riparian rights to water appropriation.

Was the act intended to apply to Indian water rights on the Prairies? Unlike eastern Canada, where the provinces were not empowered to abrogate Indian water rights, the federal government was so empowered.

The question is one of the intention of Parliament. The recent Supreme Court of Canada declarations suggest the need for a "clear and plain indication" to be found to abrogate Indian property rights; for specific rather than general words; and for the resolution of ambiguities in favour of the Indians. The North-West Irrigation Act does not specifically refer to Indian reserves or water rights and it does not suggest any "clear and plain indication" to abrogate these rights and break the treaty promises. The debates in Parliament made no reference whatever to Indian reserves or water rights.

While no Canadian decisions have considered the relationship between Indian water rights and the North-West Irrigation Act, the Supreme Court of the United States has done so with legislation similar to the Irrigation Act, concluding that the legislation is not applicable. The Desert Lands Act was passed in 1877.[21] It purported to apply to

> all lands . . . which will not, without irrigation, produce some agricultural crop in the States of California, Oregon and Nevada and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota.

The act provided for a grant of these lands upon their reclamation by irrigation. It declared that the "right to the use of water shall depend upon *bona fide* prior appropriation" and that the "surplus water upon public lands" above such appropriation shall remain free for appropriation by the public "subject to existing rights." The Supreme Court has considered and explained the object of the act.[22] The comments of the court suggest the similarity to circumstances on the Canadian Prairies. The court considered that Congress determined that the common law of riparian rights was inappropriate:

> In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation.[23]

However, in *Winters*, the Desert Lands Act was held *inapplicable* to Indian reservations. In *Winters* it was argued that the waters of the Milk River were subject to the Desert Lands Act and that the act precluded any rights of the Indians to waters except in accordance with the act. The United States Court of Appeal specifically considered the question of the application of the Desert Lands Act and whether or not the non-Indian appropriators had gained water rights by virtue of the application of the act. The court denied the acquisition of such rights.

The *Winters* decision was followed in *United States v. Walker River Irrigation District*.[24] The court there commented that

> the settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below.[25]

The American courts have reached a similar conclusion with respect to the Reclamation Act 1902 which provided that state laws should govern the appropriation and use of water made available by reclamation works.[26] Deference to state laws did not include the abrogation of Indian water rights. The American courts have determined, through the rules of construction applicable to Indian rights, that the general nature and language of the Desert

Lands Act and the Reclamation Act afford an insufficient indication of intent to abrogate Indian water rights.

The conclusion of the American courts appears most relevant to the determination of the application of the Irrigation Act to Indian water rights on the Canadian Prairies. They suggest the inapplicability of the act on account of the general nature and language of the act and the total absence of reference to, or consideration of, Indian water rights in the act. One aspect of the reasoning of the Supreme Court of the United States in *Winters* is particularly compelling. In *Winters* it was argued that the Act of Admission of the state of Montana in 1889, "upon an equal footing with the other States," had abrogated Indian water rights. Counsel argued that by such Act of Admission all water rights in the state become subject to state law. The court declared:

> That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.[27]

The court refused to conclude that the government should be considered to have agreed to Indian water rights and then one year later to have unilaterally and without consent or notice to the Indians abrogated them. The North-West Irrigation Act was enacted in 1894; the numbered treaties on the Prairies which were subject to the act were entered into between 1871 and 1906. It would be, in the words of the Supreme Court of the United States, "extreme to believe," and entail a highly disenchanted view of federal policy to conclude that the federal government, in the midst of treaty negotiations, engaged in so substantial a violation of treaty promises.

The provisions of the Irrigation Act remained substantially unchanged until they ceased to apply upon the enactment of the Natural Resources Transfer Agreements in 1930. The agreements transferred the interest of the Crown in land and resources to the administration of the prairie provinces. The agreements declared that

> the interest of the Crown in the waters . . under the Northwest [*sic*] Irrigation Act, 1898 . . . shall . . . belong to the province, subject to any trusts existing in respect thereof and to any interest other than that of the Crown.[28]

The interest of the Crown transferred to the administration of the provinces is subject to whatever rights survived the enactment of the Irrigation Act. Provincial legislation is *ultra vires* to the extent that it would seek to expropriate, confiscate or regulate Indian water rights.

Hydroelectric Development and Indian Water Rights in Saskatchewan

The foregoing has established the legal significance of Indian water rights, but what of the regard accorded those rights? The author has chosen to focus on Saskatchewan because of some familiarity with the problems attending the recognition of those rights in this province. In general it may be said that Saskatchewan has historically disregarded and denied any Indian claims arising from hydroelectric development in a manner that justifies the mid-nineteenth-century view that the "Indian and European races" were influenced by "antagonistic interests."

There are four principal hydroelectric dams in Saskatchewan—Island Falls on the Churchill River, Coteau Creek on the South Saskatchewan River, and Nipawin and Squaw Rapids on the Saskatchewan River. The Island Falls Dam was constructed by the Churchill River Power Company, pursuant to an interim license issued under the Dominion Water Power Act in November 1928. A final license was issued by the province for a term of fifty years from 1 April 1931. It was built to supply power to the Hudson Bay Mining and Smelting operation at Flin Flon, Manitoba. The license authorized the flooding of provincial lands. The license required payment of rental for the provincial lands flooded or used and for the use of water. In 1943 a further license was issued and agreement was entered into between the province and the Churchill River Power Company to construct a storage dam upstream from the Island Falls Dam at the Whitesands Rapids. The license authorized the company to raise the level of Reindeer Lake "to a limit of ten feet over and above basic datum." The company was required to pay rent for the provincial lands flooded or used. The term of the license was the same as that of the Island Falls Dam. The dams have since been sold to the Saskatchewan Power Corporation (SPC).

The Churchill River Study described the impact of the construction of the Island Falls Dam on the adjacent Métis community at Sandy Bay.[29] Upon the construction of the dam the Cree-speaking Indians and Métis of Sandy Bay abandoned traditional pursuits and went to work for the Churchill River Power Company. The socioeconomic report of the study comments:

> After thirty years of employment, no Cree had been advanced higher than a sub-foreman of an all-native work crew or carpenter's or plumber's helper. Natives were forced to use separate toilet and coffee break facilities on the job and a separate commissary and lunch room on the periphery of the community. Any relations between whites and Cree after work hours were frowned upon except for occasional baseball games.[30]

No attempts were made to provide training and the "highest positions of responsibility open to Cree were two positions of sub-foremen on all native work-crews."

The report observes:

> The proximity to the hydro-electric station has not bestowed any material advantages on the community—it took 28 years to get electricity introduced, 35 years to establish a local municipal government body, 40 years to obtain minimally adequate housing and streets, and (if things progress satisfactorily) 45 years to obtain indoor plumbing, running water and adequate telephone communication to the outside. All of these (with the exception of local government) have been available at Island Falls since the 1930s. The dam at Island Falls provided no long-term benefits for the community other than a monetary income which resulted in only a minimal standard of living.[31]

In the winter of 1967-68 the Island Falls power station was automated and the white population transferred to Flin Flon. The company offered jobs in Flin Flon to the displaced Natives, but most of the men returned to Sandy Bay. With automation "the entire economic base of Sandy Bay disappeared."

The report observed that the residents of Sandy Bay held the dam responsible for the decline in beaver, muskrat and sturgeon populations, and that there are "now few such animals in the immediate vicinity of Sandy Bay, especially below Island Falls." Furthermore, changes in water levels "have definite effects on the extent to which the bush is used" for hunting, trapping and fishing. While employment was provided at the dam, "propagation of the skills necessary for fishing and trapping was neglected. When the dam was automated and employment declined, it was impossible to revert to these traditional pursuits."[32]

Upstream from the Whitesands Dam are the members of the Peter Ballantyne Band at Southend Reindeer Lake. Six hundred acres of the shoreline of their reserve lands were flooded by the operation of the dam. It damaged the wildlife habitat, adversely affected hunting, trapping and fishing by band members, and rendered travel more difficult. The province and the power companies have never offered compensation for the damage inflicted upon the Indian and Métis people by the operation of the dam.

The Squaw Rapids Dam was completed on the Saskatchewan River upstream from Cumberland House in 1962. The Gardiner and Qu'Appelle Dams on the South Saskatchewan River at Diefenbaker Lake were completed between 1958 and 1967. Power generation commenced at Coteau Creek in 1968. The Nipawin Dam was completed on the Saskatchewan River in 1986. The dams are operated as "peaking units" to provide hydroelectric power at periods of peak demand rather than "run of the river" units. The Cumberland House Indian Band and Métis community at the Saskatchewan Delta complain of the substantial injuries inflicted by the operation of the dams. The impact described by the band includes reductions in summer water flows, increases in winter flows, sudden unannounced changes in water levels, mercury pollution, loss of flood peaks, and a general lowering of water levels. The consequences of such changes include the drowing of muskrat and beaver lodges, trapping of moose on "false

islands,'' freezing of water in the lake which kills fish, greatly reduced wildlife and fish habitat, difficulty and damages in boat travel, loss of equipment, loss of income from hunting, trapping, fishing and guiding, and loss of an unpolluted water supply. The dams on the rivers have severely disturbed its natural flow and damaged the traditional means of sustenance of the Indians. The Saskatchewan Delta at Cumberland House is regarded as one of the most significant wildlife habitat areas in North America. The band and the community have long sought a settlement with respect to the impact of the dams.

The treatment of the band and the community by the province and its agent, the SPC, typify the disregard of Indian water rights. No assessment of the environmental impact in the Cumberland House area was conducted for any of the dams, including the Nipawin Dam in 1986. At a 1962 meeting of the Squaw Rapids Hydro-electric Liaison Committee the minutes record:

> The Chairman noted the possibility of loss of beaver and muskrat population downstream from the Powerhouse due to sudden fluctuations in the flow rate. SPC . . . will co-ordinate Generator testing in 1963 as fully as possible in order to minimize damage.[33]

The SPC responded immediately to indicate that it could not

> be expected to limit operations at Squaw Rapids site to protect beaver and muskrats . . . any restriction . . . in the interest of wildlife will, no doubt, result in economic losses to the hydro project that will greatly exceed the value of any fur-bearing animals.[34]

At no point did the SPC ever consult with or meet the members of the Cumberland House Indian Band.

Lake Diefenbaker and the Gardiner Dam resulted from the Report of the Royal Commission on the South Saskatchewan River Project in 1952. The report considered most aspects of the project other than the impact upon Indian people downstream. Legal memoranda prepared by Connolly and Goldenberg gave no consideration whatever to Indians or Indian lands.

The Trappers and Fishermen's Associations, which had both Métis and status Indian members, had begun to raise objections and seek solutions to the impact of the dams, particularly the Squaw Rapids Dam, shortly after their construction. In response the province initiated studies as to how the damage might be mitigated, including the Saskatchewan River Delta Study of 1969, the Committee on Saskatchewan River Delta Problems of 1972, and the Cumberland Lake Water Level Control Study of 1977. All recognized the impact of the dams and offered suggestions as to its mitigation. In 1980 the province proposed the construction of a weir (at a cost of $3 million) which would marginally have raised the level of Cumberland Lake but would have done little to mitigate other

impacts. Construction was delayed pending an environmental impact assessment and in the interim (1982) the government was defeated at the polls.

In December 1983 the Cumberland House Local Community Authority (LCA), on behalf of the residents of the largely Métis community, and the Trappers and Fishermen's Associations filed a statement of claim against the government of Saskatchewan and the SPC seeking damages. An injunction application against the construction of the Nipawin Dam, then underway, was denied in 1984. The lawsuit was initially funded by the LCA. In 1984 a contingency fee arrangement was reached with the LCA's lawyer.

The band did not participate in the LCA's lawsuit, and in 1984 approached counsel for the Federation of Saskatchewan Indian Nations (FSIN), Delta Opekokew, for advice on how best to pursue the band's claims. In October 1984, at the invitation of the FSIN, the writer was retained by the band. Limited and always delayed funding for that purpose was provided by the Department of Indian Affairs through the Environmental Impact Program. The funding was not at rates that would meet the costs or fees of lawyers in private practice.

Representations were made by the band and the LCA to the SPC to enter into negotiations to settle the matter but little progress was made. Representatives of both the band and the LCA kept up media pressure. In December 1985 the band filed a complaint with the Water Corporation seeking a public hearing into the operation of the dams. Two weeks later, faced with the LCA's statement of claim, the band's complaint, and continuing media pressure, the government offered to put the matter into mediation.

A mediation agreement, modelled on the Grassy Narrows mercury pollution mediation agreements, was eventually reached in June 1986. It provided funding for legal representation and support for band and LCA leaders. It required full disclosure of documents.

The mediation was successful in enabling the issues to be fully canvassed and presented by the band and the LCA. The SPC remained intransigent, however, and there was no progress in negotiations. In August 1987 the LCA built a temporary weir in an effort to raise the level of Cumberland Lake. It was ineffective but did attract national television coverage. In October 1987 the province offered to build a bridge to the community by way of a final settlement but the offer was rejected. The band now prepared for legal action and assembled a team at the College of Law, University of Saskatchewan, to bring the matter to trial. The band, and the LCA in particular, sought to maintain political and media pressure on the province.

In April 1988 Sid Dutchak QC, a former provincial minister responsible for the Indian and Native Affairs Secretariat, was appointed as conciliator by the province. His appointment was significant due to his ability to influence the decisions and commitment of the province and the SPC to settle the matter. All

summer meetings and hearings were held in Cumberland House in an attempt to candidly address the issues and secure a solution. On 30 September 1988 a settlement was reached, which was finally executed on 30 March 1989. The settlement consists of three agreements: (1) a settlement agreement, signed on 21 December 1988 with the SPC, under which the SPC pays $1 million to the Cumberland House Development Corporation for social and economic development, $1 million towards the construction of a recreation centre by the SPC, the maintenance of the policy of SPC in providing compensation for lost equipment of trappers and fishermen, and the minimization of damage to wildlife downstream of the Squaw Rapids Dam, insofar as it is consistent with the efficient operation of the dams; (2) an escrow agreement, signed on 21 December 1988, whereby the settlement agreement would be null and void if a development agreement was not signed by 30 June 1989; and (3) a development agreement, signed on 30 March 1989 between the band, the LCA, the province and the development corporation (SPC is not a party to this agreement). Under the development agreement the province, *inter alia*, agrees to pay or transfer to the development corporation $13 million over ten years, a government farm including equipment and livestock worth at least $2 million, and fifty thousand acres of land. The development corporation is jointly owned and controlled by the band and the LCA.

Conclusion

Only after the passage of nearly thirty years have the province or the SPC started to provide compensation for the damage inflicted by hydroelectric dams on Indian people in Saskatchewan. This is not because of the lack of legal rights which could compel such a result. Indeed a principal point of this article is the significance of the legal rights of Indian bands to control and limit hydroelectric development. Rather it is the disparity in the abilities of Indian bands to assert their legal rights compared to that ability of the utility companies to resist. It is suggested that the federal government should provide funding for litigation in such cases where negotiation has failed, and a strong *prima facie* case can be shown. Experience in the United States suggests that settlements are furthered by a determined litigation strategy.[35] The political expediency of such settlements where injury is inflicted by a larger community on a smaller accords with such an approach. There would, moreover, be no incentive to a utility company to obstruct and delay in the hope that the plaintiff Indian band would fail through lack of resources to maintain its claim.

Given the necessary legal resources to further the claims of bands injured by the dams there seems little doubt that settlements could usually be obtained. Neither side benefits from lengthy legal proceedings which drain monies away from a possible settlement. Nor does litigation usually provide a solution which maximizes the benefits to all parties. Settlements could be facilitated by a

mediator or conciliator, preferably a person who could deal directly with the board of the utility company and the appropriate minister. An agreed settlement is also, of course, likely to commit the band or community to coping with and adjusting to hydroelectric development, a process which the the attitude of the province and the utility company might otherwise impede. Thus the Cumberland House Development Corporation, a joint venture of the band and the Métis community, has now been charged and entrusted with funds to bring about social and economic development in the region. It would appear to be a step in the right direction, although there will no doubt be significant problems. The effect of the denial of resources and power to the communities for so long, of which the impact of hydroelectric development is just one part, cannot be overcome overnight. But it offers at least a basis and hope for improvement in social and economic conditions in the region.

NOTES

1. British Parliamentary Papers, 1839, p. 3.
2. Report of the Special Commissioners to Investigate Indian Affairs in Canada, Journals of Legislative Assembly of Canada, 1858, Appendix no. 21.
3. "Churchill River Study, Final Report," no. 25, Socio-Economic (Saskatchewan) Ed J. Mitchell, 1975, Department of Economics and Political Science, University of Saskatchewan, Chapters 6 and 7. Also, D. Knoll, "The Key Lake Project: Impact of Uranium Development on Traditional Native Harvesting Rights" [1980] 2 C.N.L.R., pp. 1, 9-10.
4. Ibid., p. 22.
5. A. Morris, *Treaties of Canada With the Indians* (1880; reprint, Toronto: Coles Publishing Co., 1971), 287-88.
6. [1983] 2 C.N.L.R., pp. 89, 94 (S.Ct.Can.).
7. 175 U.S., p. 1 (1899).
8. (1985) 62 N.R., pp. 366, 377. See also *R. v. White and Bob* (1965) 52 W.W.R., p. 193 (B.C.C.A.) affirmed (1966) 52 D.L.R. (2d), p. 481 (S.Ct.Can.) *R. v. Taylor and Williams* [1981] 3 C.N.L.R., p. 114 (Ont. C.A.).
9. (1987) 18 B.C.L.R. (2d), p. 217, [1987] 4 C.N.L.R., p. 48 (B.C.S.Ct.).
10. 207 U.S., pp. 564, 576-77 (1908). See also *United States v. Kibner* 27 F. 2d, pp. 909, 911 (1928-Idaho Dist. Ct.), *Colville Tribes v. Walton* 647 F 2d, pp. 42, 47, (1981-U.S.C.A.-9th circuit), and generally *Arizona v. California* 373 U.S., pp. 546, 597-98 (1963).
11. Ibid., pp. 575-76.
12. 373 U.S., p. 546 (1963).
13. 723 F 2d, p. 1394 (U.S.C.A.-9th-1983).
14. Ibid., p. 1409.
15. Ibid., p. 1414.
16. 104 S.Ct., p. 3526.
17. National Archives of Canada, 10 Vol. 3660 File 9755-4, A.S. Williams to Scott, 27 July 1920.
18. *Chasemane v. Richards* (1859) 7 H.L. Case, p. 349, 11 E.R., p. 140.
19. Ibid., p. 382.
20. S.C. 1894 c. 30 as amended by S.C. 1895 c.33.

21. 19 U.S. Stat c.107, 43 U.S.C.A. s. 321.
22. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S., p. 142 (1935).
23. Ibid., pp. 157-58.
24. 104 F 2d, p. 334 (9th Circ-1939).
25. Ibid., p. 339.
26. 32 U.S. Stat c.338 s.7.
27. *Winters v. United States*, 207 U.S., p. 564 (1908) at p. 577, 52 L.Ed. 340 at pp. 346-47.
28. An Act to Ratify an Agreement Between the Governments of Canada and Saskatchewan, S.S. 1929-30, c.87, as am. by An Act to Ratify an Agreement Between the Governments of Canada and Saskatchewan, S.S. 1938, c.14; The Manitoba Natural Resources Act, S.M. 1930, c.30, as am. by An Act to Ratify an Agreement Between the Governments of Canada and Manitoba, S.M. 1937-38, c.27; An Act Respecting the Transfer of the Natural Resources of Alberta, S.A. 1930, c.21, as am. by An Act to Ratify an Agreement Between the Governments of Canada and Alberta, S.A. 1938, c.14, s.4.
29. "Churchill River Study," supra n. 3. Chapter 10 and Appendix G.
30. Ibid., 386.
31. Ibid., 444.
32. Ibid., 257, 261.
33. Saskatchewan Archives Board (hereafter SAB) R78-129, quoted in J. Waldram, *As Long as the Rivers Run: Hydroelectric Development and Native Communities in Western Canada* (Winnipeg: University of Manitoba Press, 1988), 63.
34. SAB 00(94), quoted in J. Waldram, *As Long as the Rivers Run*, 63.
35. J.A. Folk-Williams, "The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights" *Natural Resources Journal* 28, no. 63 (1988).