Fresh Thinking on BC's Water Future –

The *Evolution* of BC's Water Law – are we ready for drought?

3 take away points

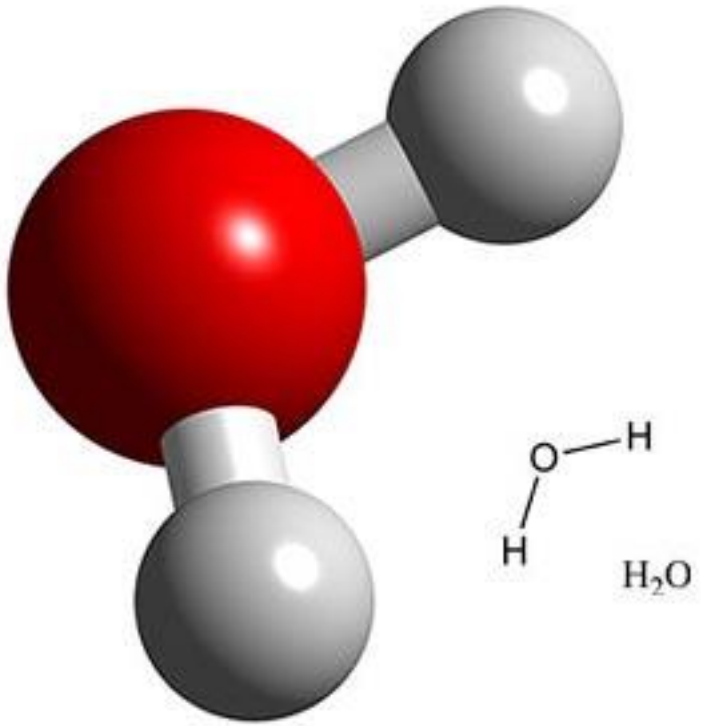
1. ***Water matters*** – socially, ecologically, economically and spiritually
   - *those impacted want a say!*

2. Entering the ***age of adaptation***
   - *resilience and taking uncertainty seriously are our only option – must build social resilience*

3. Water law and governance ***is changing***
   - *more in the next 10 years than it has over the last 100*

Overview

- BC Water Law and Governance Context
  - Key concepts and definitions
  - BC in context: where have we come from?
  - Historical foundations of BC water act …
- Water Law Reform and BC's New *Water Sustainability Act*
  - What's new, what's different?
  - What's still to come …
- Where next?
  - Watershed Governance an emerging priority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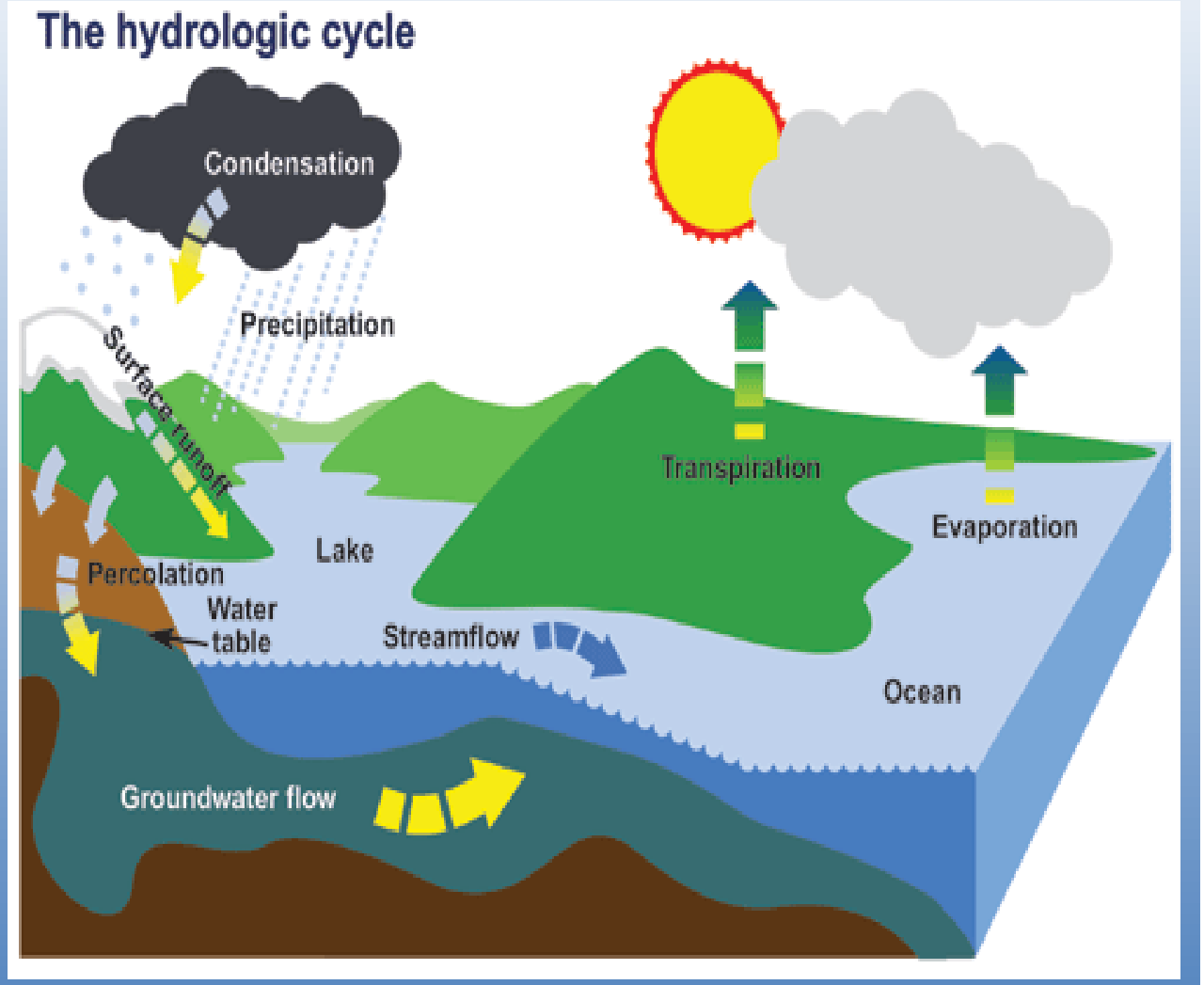
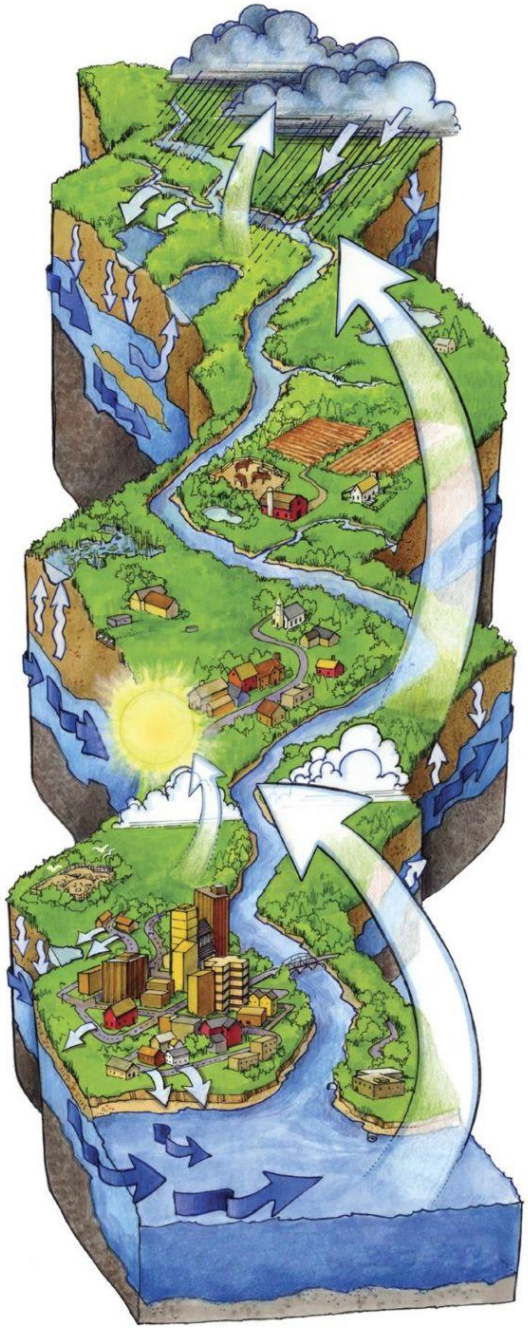
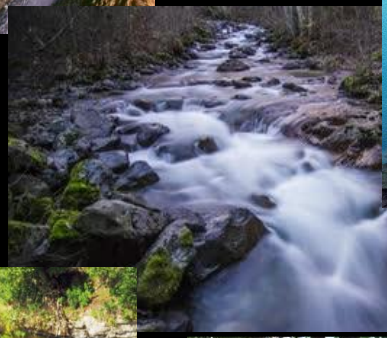
Watershed Tour



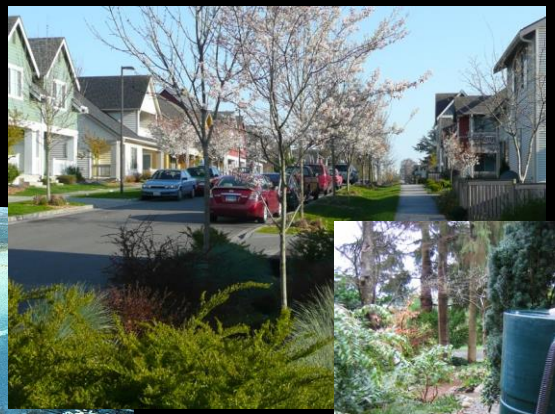


Same Water – Different Rules

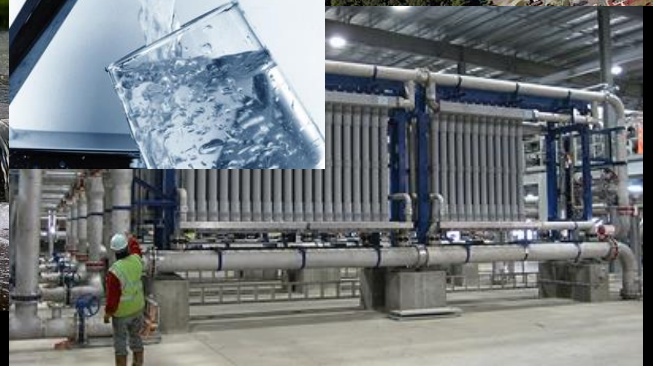










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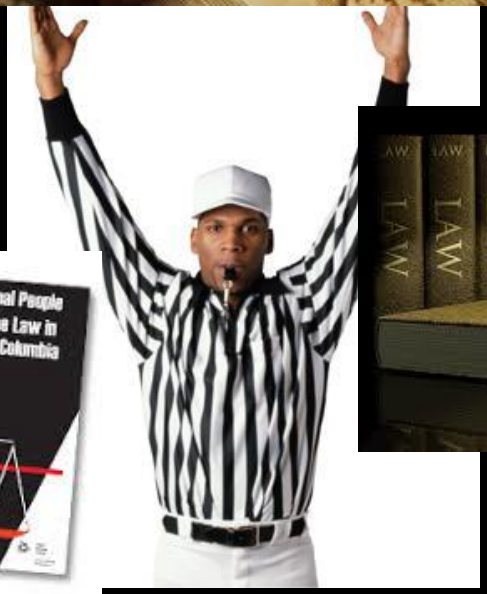
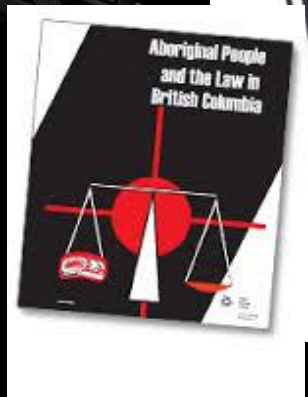
Key concepts and definitions

Law, Policy and Governance

Governance

Policy





Law

Key Distinction

Governance-the process of social decision making and holding those to account

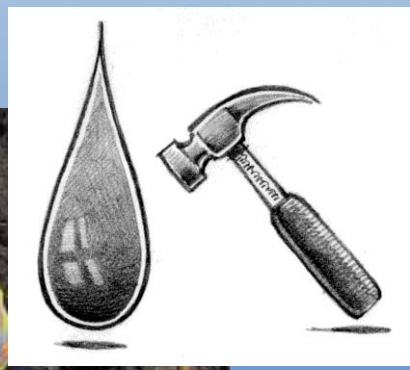
Who–What–How & Accountability

Power

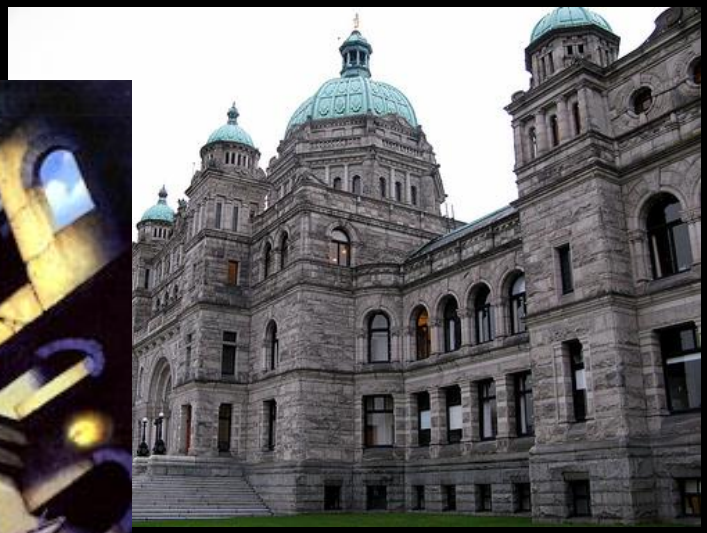
Focus on ends - does the right thing

Management-operational, on-the-ground activity to regulate a resource and conditions of its use

- ***Focus on means*** - does things right



Who Decides?



Complex Water Governance

Evolving Water Governance Across Canada

- History of top-down, state-driven regulatory approaches
- Some experimentation with markets in Alberta
- Recent emphasis on collaborative approaches and partnerships
- International trend towards increased sharing of responsibility and authority
- Quebec, Ontario, Alberta, NWT—move to new modes of shared or collaborative governance and better protection of water resources

Water(shed) governance is complex

Towards Better Governance

- The public intuitively understands that protecting water has something to do with…
  - Expertise / Science
  - Rules / Enforcement
  - Citizens and Local Control

Why governance matters ?

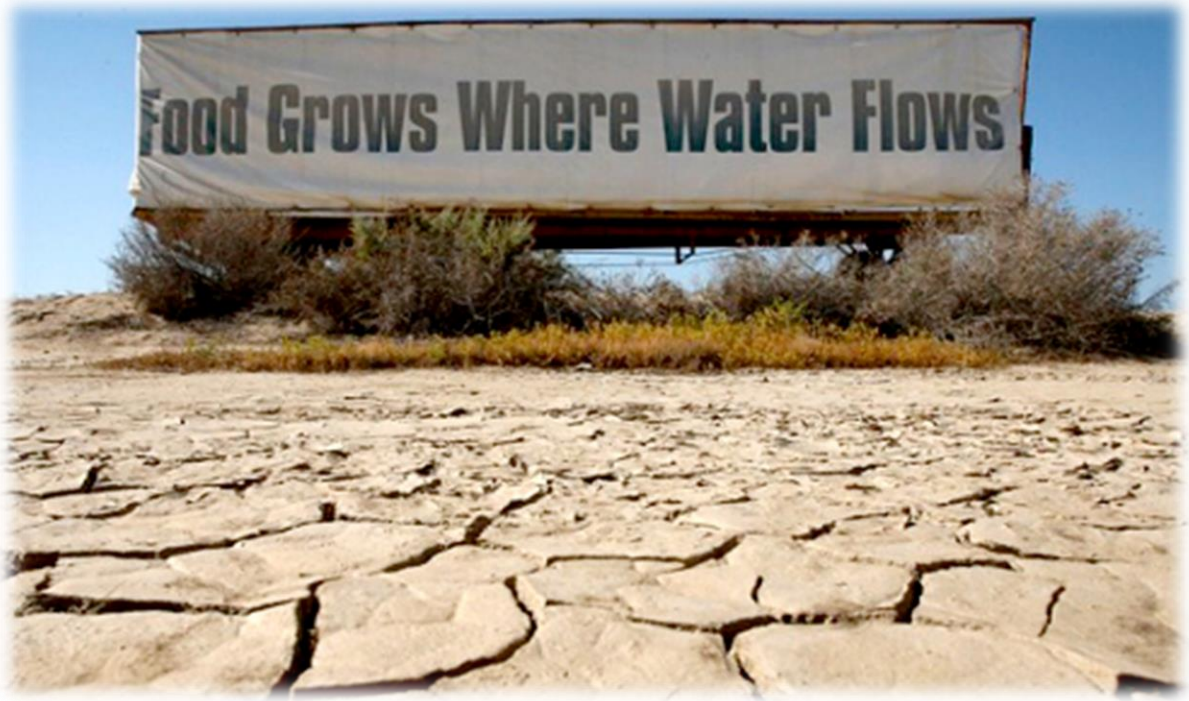
- Builds social resilience to ***adapt to change***
- Enables ***innovation***, new approaches and experimentation
- Leverages expertise and ***additional resources*** for management
- Clarifies roles and responsibilities - ***increases accountability***
- Complex systems needed when ***power*** and decision making is diffuse and fluid
- Reduces conflict and increases public confidence

More than just pushing paper around

Putting BC’s Water in Context

Water Crises are the top Global Risk

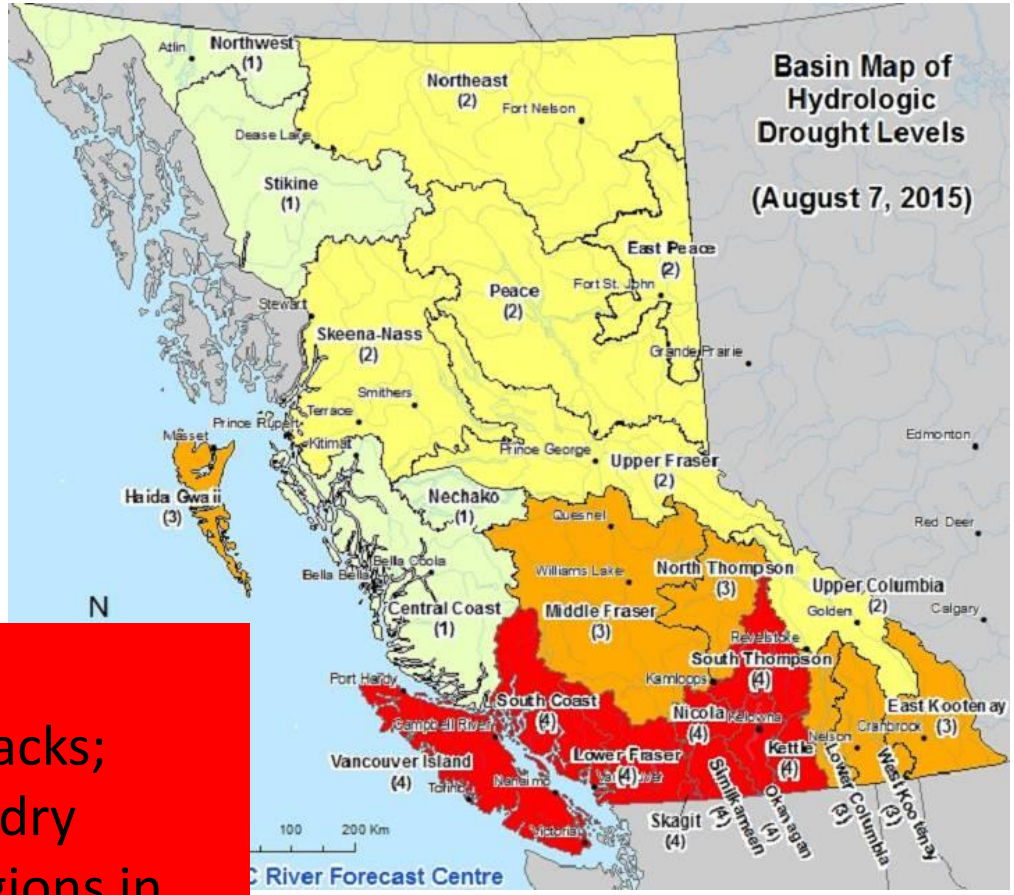
World Economic Forum 2015 Annual Global Risks Report



Source: Wakefield

Our water is under pressure

- Climate change
- Population growth and urbanization
- Growing and competing demands
- Resource extraction
- Overallocation



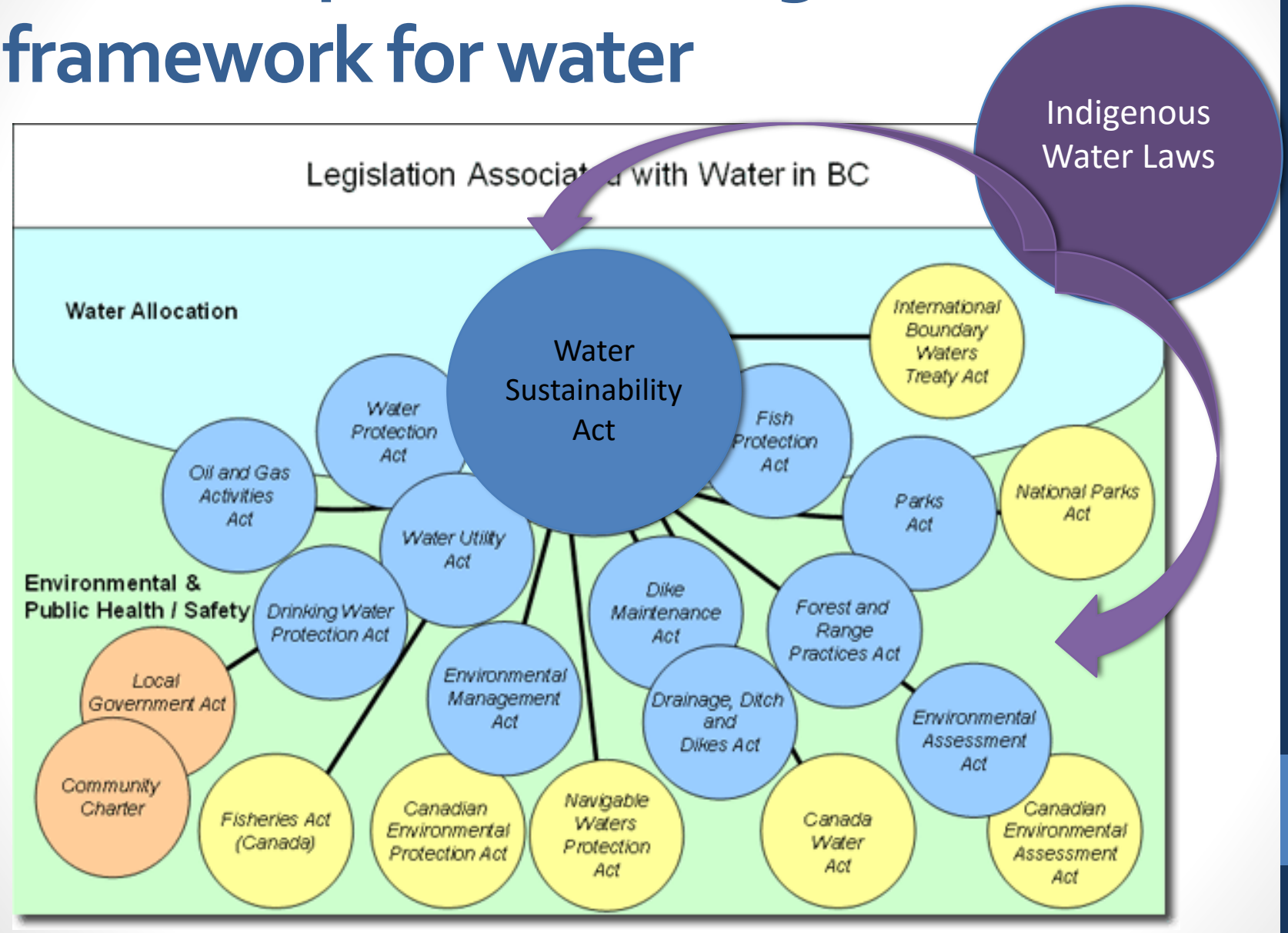
Drought 2015

Historical low snow packs; unprecedented hot & dry conditions; several regions in prolonged stage 4 drought

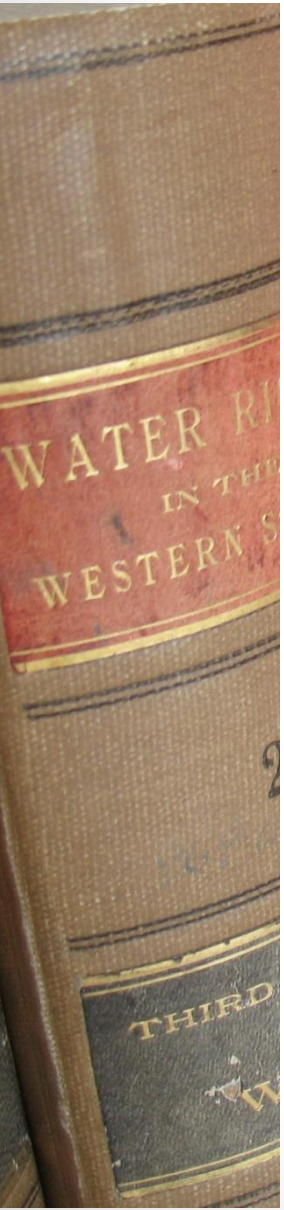
Water as a "Strategic" Asset

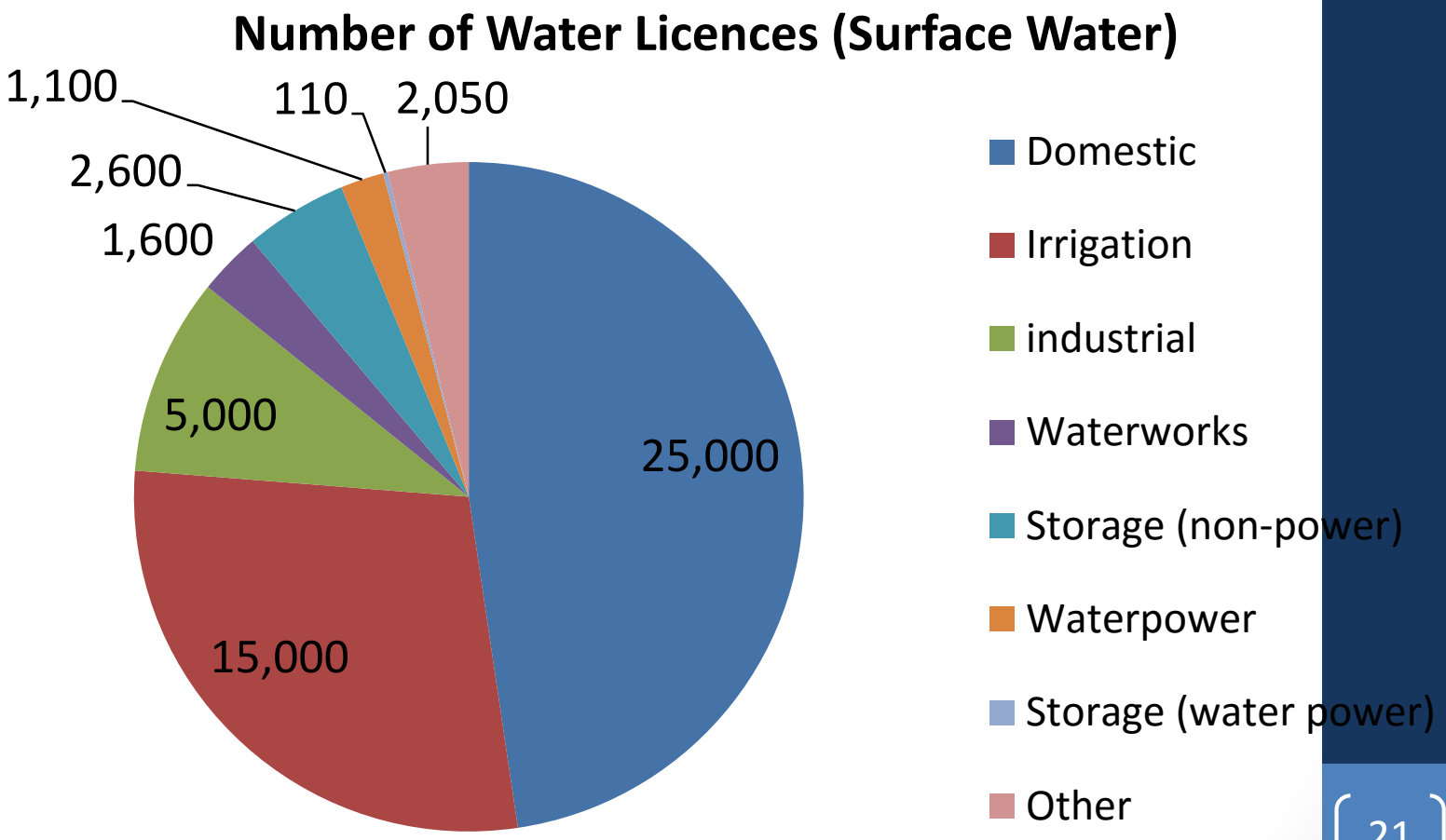
- We are endowed with a rich AND HIGHLY VARIED water resource—but not extra …
- **Ecology:** Water performs a wide range of ecological functions, free of charge
- **Economics:** Water as a commodity and fundamental to community prosperity—licensed for agriculture, industry, and municipal purposes
- **Social:** Water and society—recreation, aesthetics, urban water services, health and quality of life
- **Spiritual:** Water as inspiration beyond physical—object of awe and the sacred

A central piece of the legislative framework for water



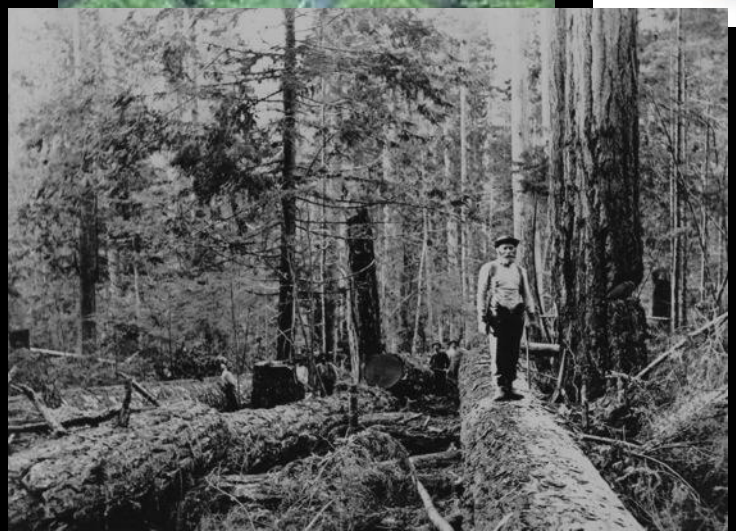
A long history of regulating surface water





Number of licences rounded for presentation

Where BC’s water law came from



B.C. *Water Act* – Early History

1850s

Industrial water use began in British Columbia with the gold rush in 1858. Water use regulation by government began at that time as part of mining and land use legislation.

1909

First *Water Act* comes into force. Modifications occur in the 1930s.

1960

Water Act simplified moving the procedural and administrative aspects into regulations

- shift to a discretionary decision-maker focus
- Comptroller of Water Rights to make all water use decisions, with supporting advice from Regional Engineers
- Shifts to a more regionalized model with SDMs over time
- water quality/"changes in or about a stream" added

Old BC *Water Act*: Colonial Water Law Foundations

* Over 100 years old (1909)
* Primary purpose to facilitate gold mining and agricultural development
* Served its purpose of creating certainty for investment for its time
* Not environment law, resource extraction rules
* Ignores First Nations Rights and Title – asserts ***Crown ownership***

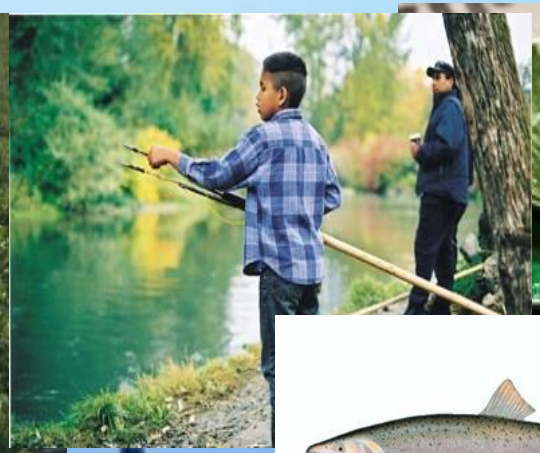
Miners, ground sluicing, Grouse Creek, 1867 or 1868. (British Columbia Archives and Records Service, HP765).

Colonial Water Law Foundations

* Principles of BC *Water Law*
  - **(prior allocation) *FITFIR*: first come, first serve**
  - **economic link to "beneficial use"**
  - **"use it or lose it"**
  - **management and enforcement through administrative action**
    - **Reliant on discretionary Statutory Decision Making**
    - **Silo-ed/fragmented decision**

BC Water Law Reform





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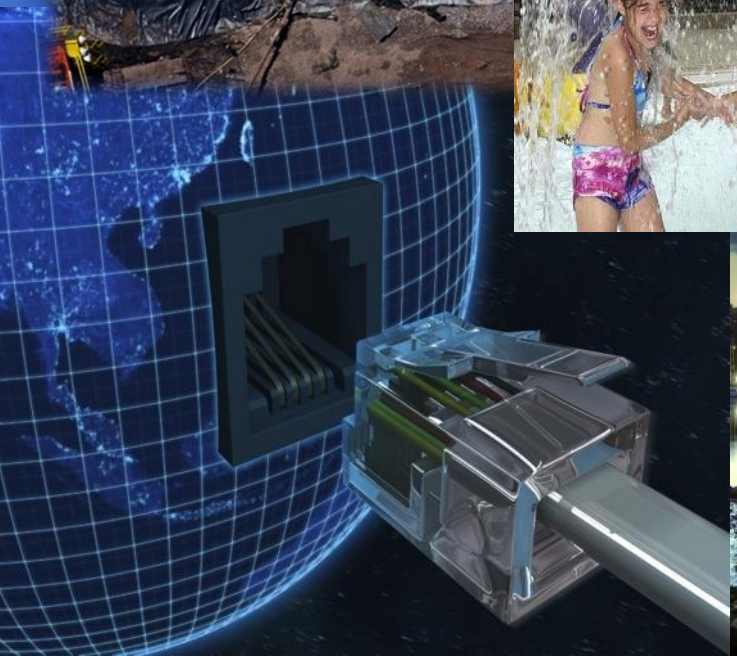
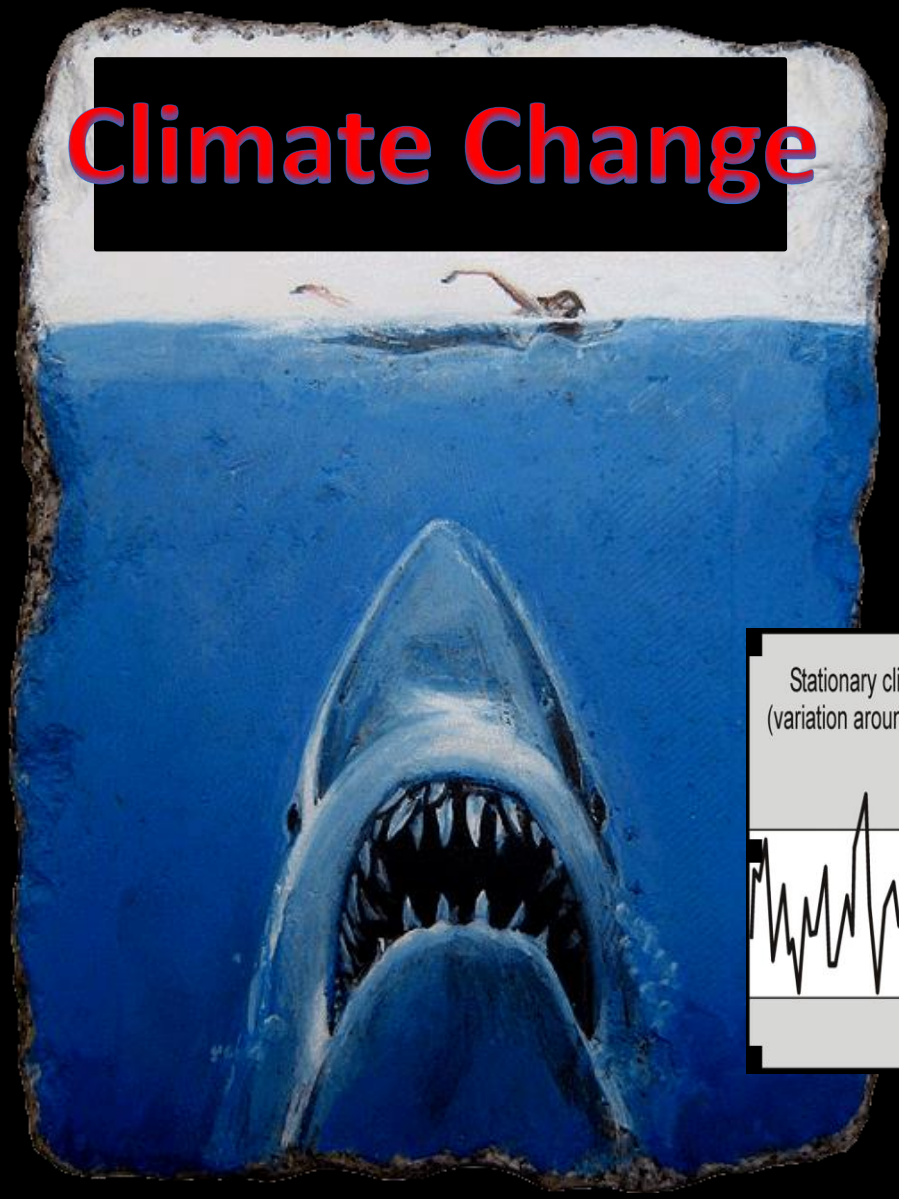
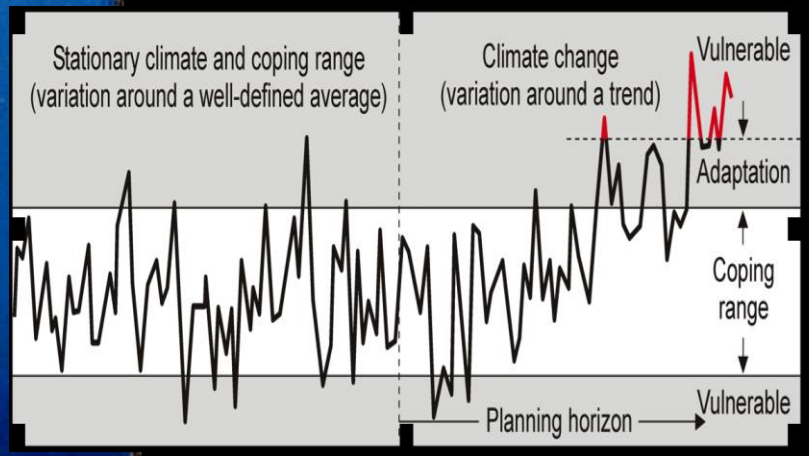



Discussing Water Rights, A Western Pastime

If climate change is the shark...



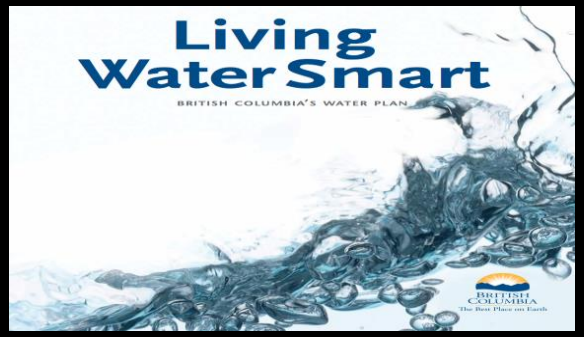


...water will be its teeth!

- Trouble in the Water

- Awakening to a new water reality

- Policy window & political commitments



= BC's new *Water Sustainability Act*

Water Sustainably Act – now in force

- **Replaces the 107-year old *Water Act***

- **Initial regulations:**
  - Water sustainability
  - Groundwater protection
  - Dam safety
  - Violation tickets & fines

- **New fees & rentals**

What will the *Water Sustainability Act* give BC?

WSA: What's changed or new?

- Extends to **groundwater** for the first time
- **FITFIR "off-ramps"**
- Definition of **beneficial use** which includes efficiency requirement
- Legal protection for **environmental flow needs**
- New provisions for planning and delegated governance: foundation for a new **partnership model**

Much still the same?

- Lots of overlap with *Water Act;* primarily deals with water allocation/licensing
- Concerns:
  - Colonial structure remains
    - **FITFIR** remains & is extended to groundwater
    - Asserts **Crown ownership** & continues exclusion of **Indigenous water rights**
  - Relies largely on on discretionary decision-making by statutory decision-makers

… Enabling legislation – much CAN happen but requires government action

"Sacred Water Spirits" – Artist Mark Anthony Jacobson

What's in place now?

Groundwater – regulated for the first time

What? Groundwater withdrawals

What we had: Groundwater withdrawals unregulated & unpriced

What's new:

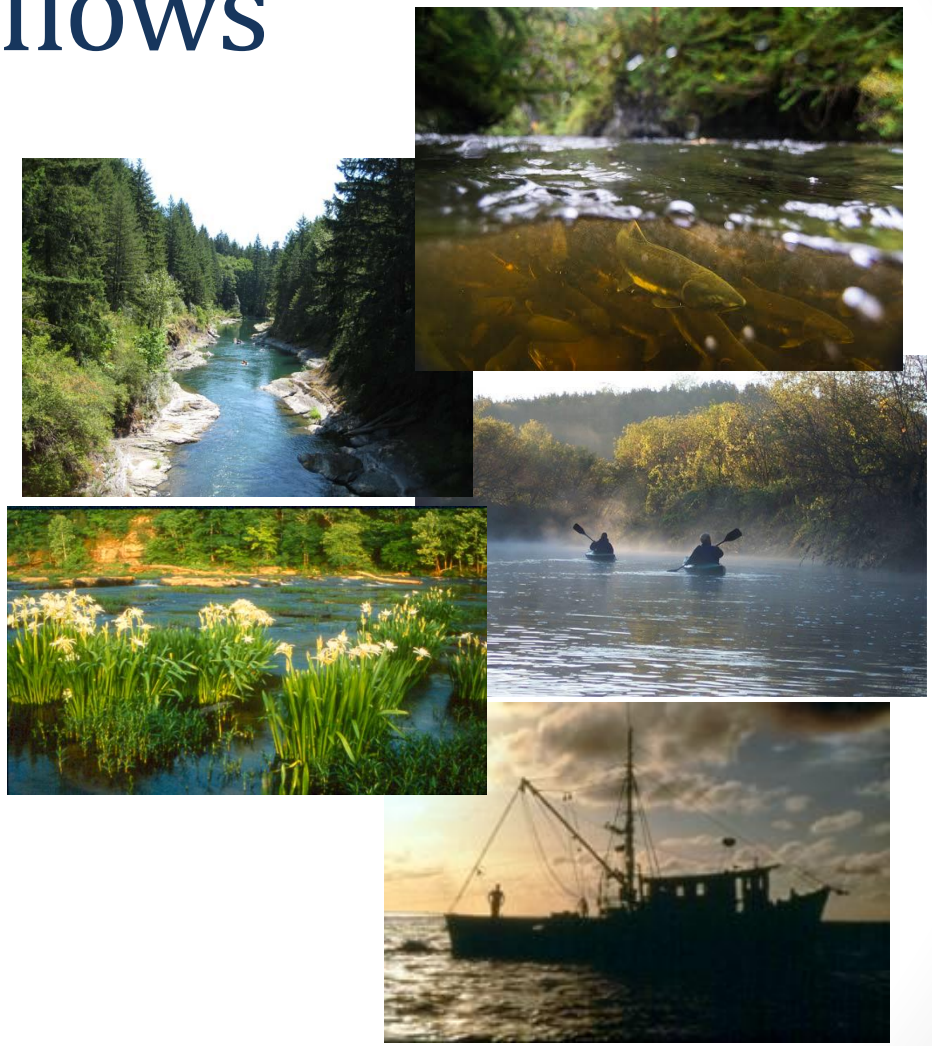
- Non-domestic groundwater users required to hold licence & pay fees/rentals
- Domestic users generally exempt
- 3 year transition period to bring existing users into the allocation system

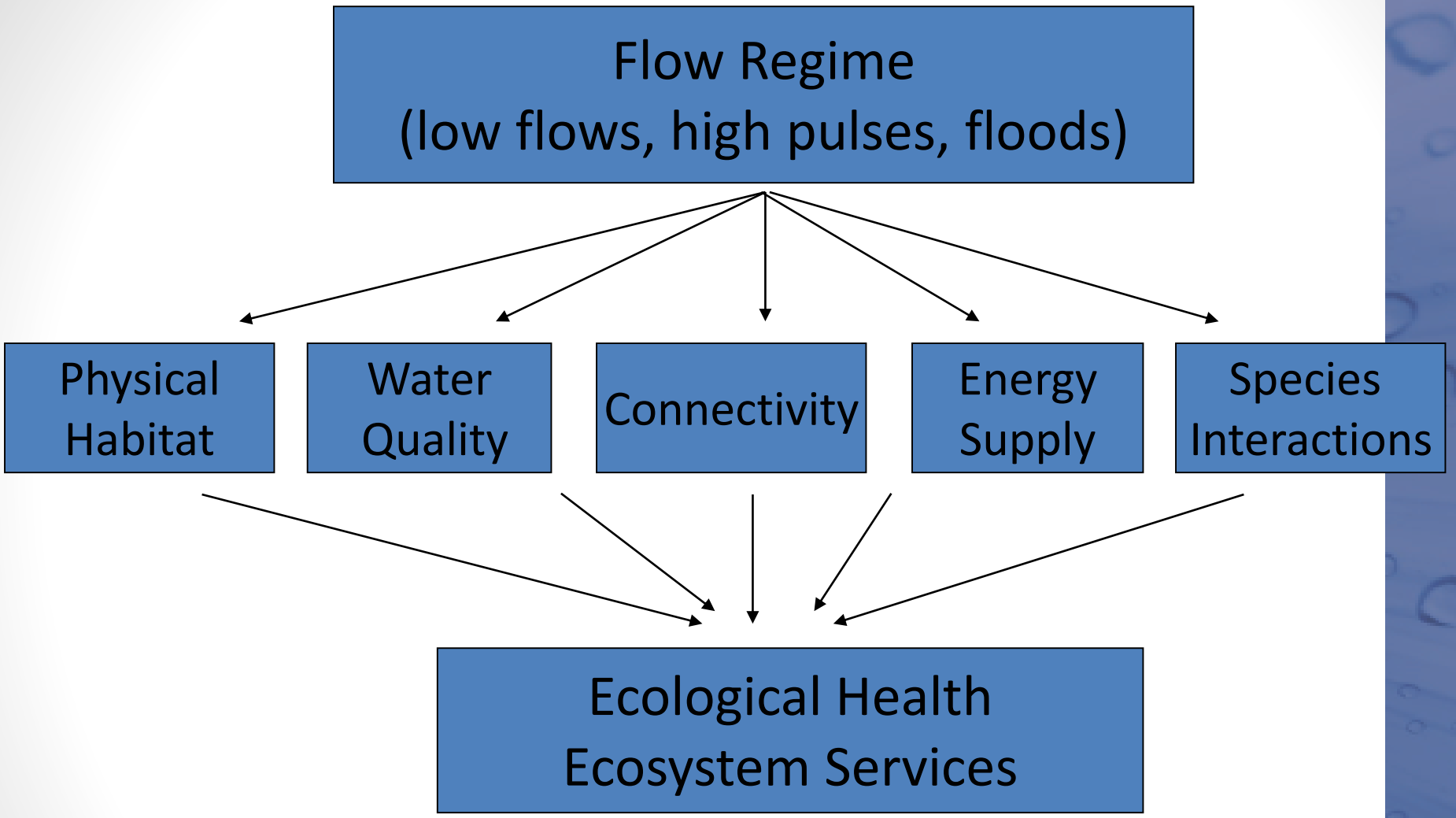
✓ PHASE 1 REGULATION

Some protections for environmental flows

The quantity, timing, and quality of water flows required to sustain freshwater and estuarine ecosystems and the human livelihoods and well-being that depend on these ecosystems.

(from the Brisbane Declaration)





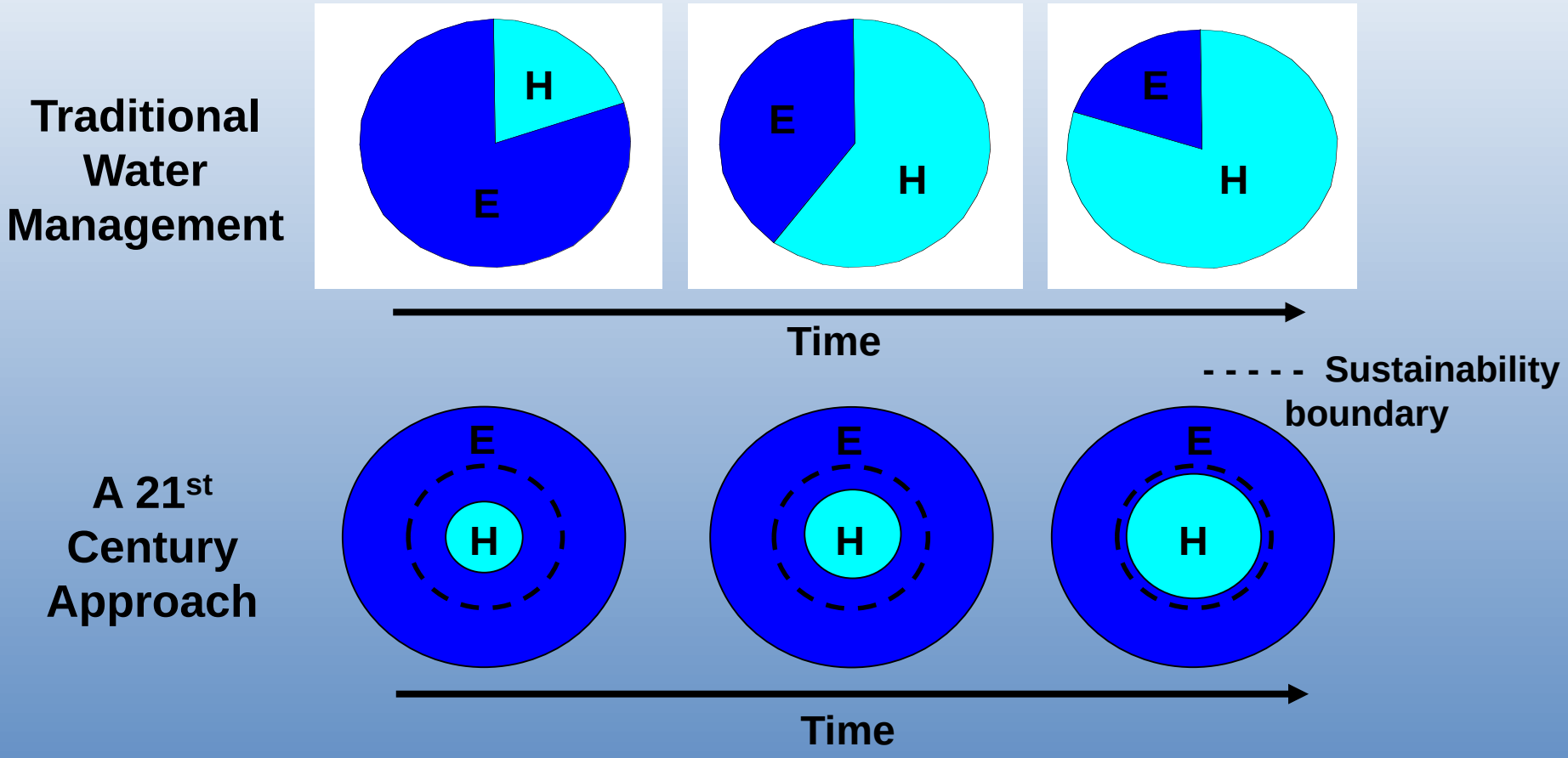
Flow regime is the "master variable"

WSA & Environmental Flows

- **What we had:** Limited protection through regional policies or fish protection mechanisms
- **What's new in phase 1 regulations?**
  - Decision-makers MUST CONSIDER eflows when issuing NEW licenses ***(non-domestic uses)***
  - Critical environmental flow and fish population protection orders

(critical for drought management)

Allocating water in the 21st Century



Adapted from: Postel & Richter, 2003

What’s still to come?

Putting “sustainable” in the WSA

- Five key regulation areas:
  - Environmental flows
  - Groundwater
  - Monitoring & reporting
  - Water Objectives
  - Planning & Governance

Regulations, huh?

- WSA is an enabling act
- Regulations: subordinate legislation, have the force of law, include necessary details

Monitoring and Reporting

- **What?** Tracking water use

- **What we had:** Licence holders not required to monitor and report water use; many gaps in data

- **What's new:**
  - Requirements for some licence applicants and licence holders to provide data (e.g. on sensitive streams)
  - Cabinet can pass regulations on measuring, testing & reporting

✓ PHASE 2 REGULATION

Water Objectives: linking land and water

- *Criteria for water quality and quantity that land and resource use decision-makers can be required to consider when making their individual decisions.*

- E.g.: X turbidity level; Y environmental flow volume; Z water temperature



Water Objectives

What's new:

- Objectives for quality, quantity, aquatic ecosystem needs
- Decision-maker can be *required* to consider
- May over-ride other enactments

What's needed?

- Specific and measurable;
- Required for consideration;
- Ecologically relevant

✓ PHASE 2 REGULATION

Communities can help advocate & establish locally appropriate water objectives; act on Advisory boards to inform development of water objectives.

WSA & Environmental flows ctd.

- **Outstanding concerns**:
  - Limited opportunities to address impacts of *existing* licences on environmental flows
  - Ability to make link to water quality and land-water connections

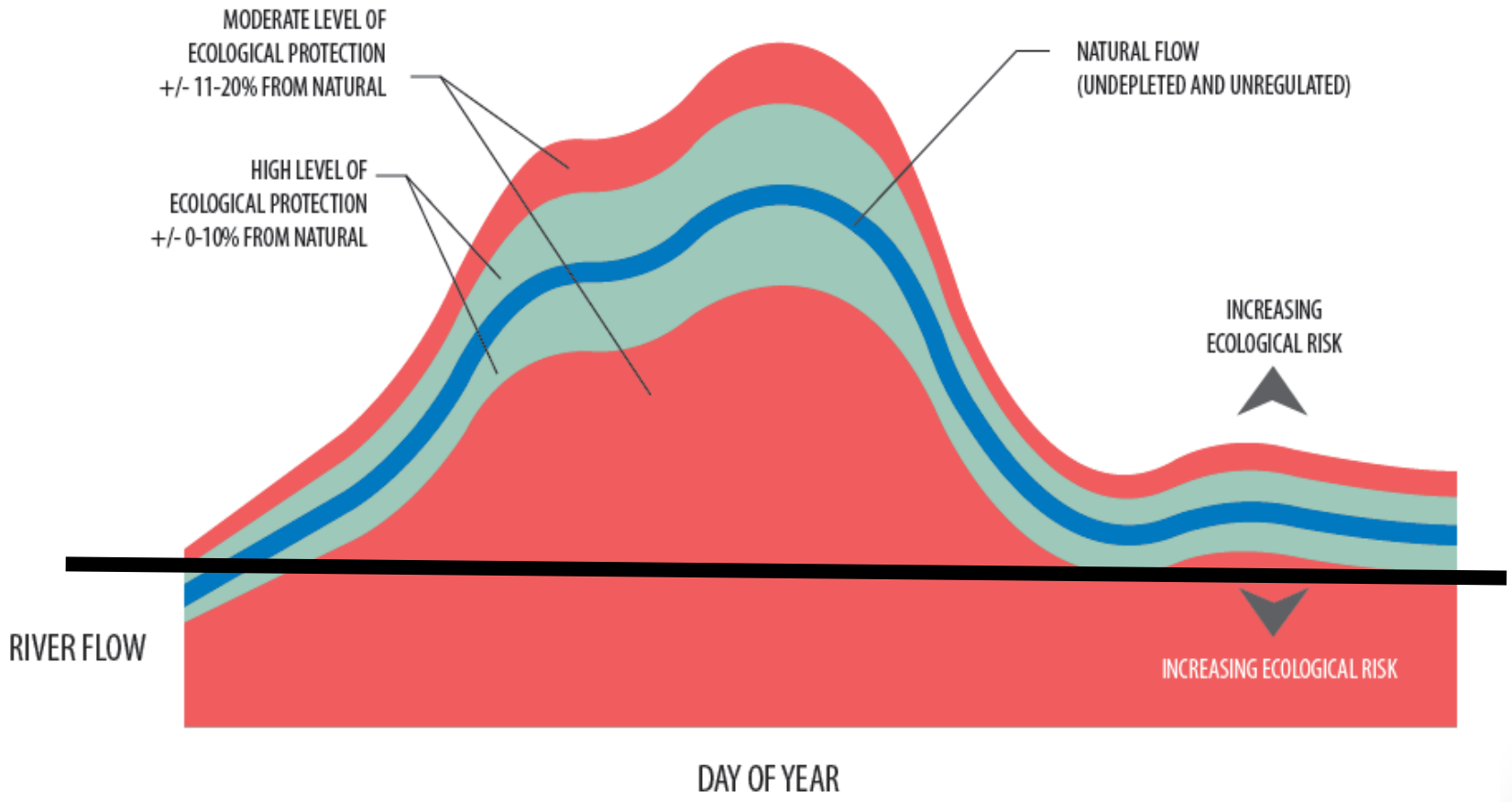
- **What's needed?**
  - Specific eFlow regulation, not just policy
  - Area-based regulations for domestic use licencing in priority & stressed areas
  - Protect more than water quantity

Communities can help establish and signal their expectation that locally appropriate science based <u>CRITICAL</u> and <u>ENVIRONMENTAL</u> flow thresholds will be respected

WSA eflows web of protections

Primary Mechanisms	**Section 15**: Decision-makers "Must Consider" environmental flows for new authorizations **Section 16-17:** Mitigation measures **Sections 66-68:** Temporary orders (critical flow & fish population protection)
Additional Mechanisms	**Section 128:** Sensitive streams **Section 43:** Water Objectives **Section 123:** Area-based regulations
Related Planning & Administrative Processes	**Sections 64-85:** Water Sustainability Plans **Section 1:** Beneficial Use **Sections 23 & 121:** Adaptation & no compensation **Section 127:** C. may make regulations that prescribe methods of determining eflows

Richter's presumptive standard approach for interim protection



Planning and Governance

What?: Watershed planning processes

What we had: Patchwork of water-based plans, few enforceable

What's new: Water Sustainability Plans

- Triggered by conflict
- Can be tailor-made to regional issues
- Can be made binding through regulation

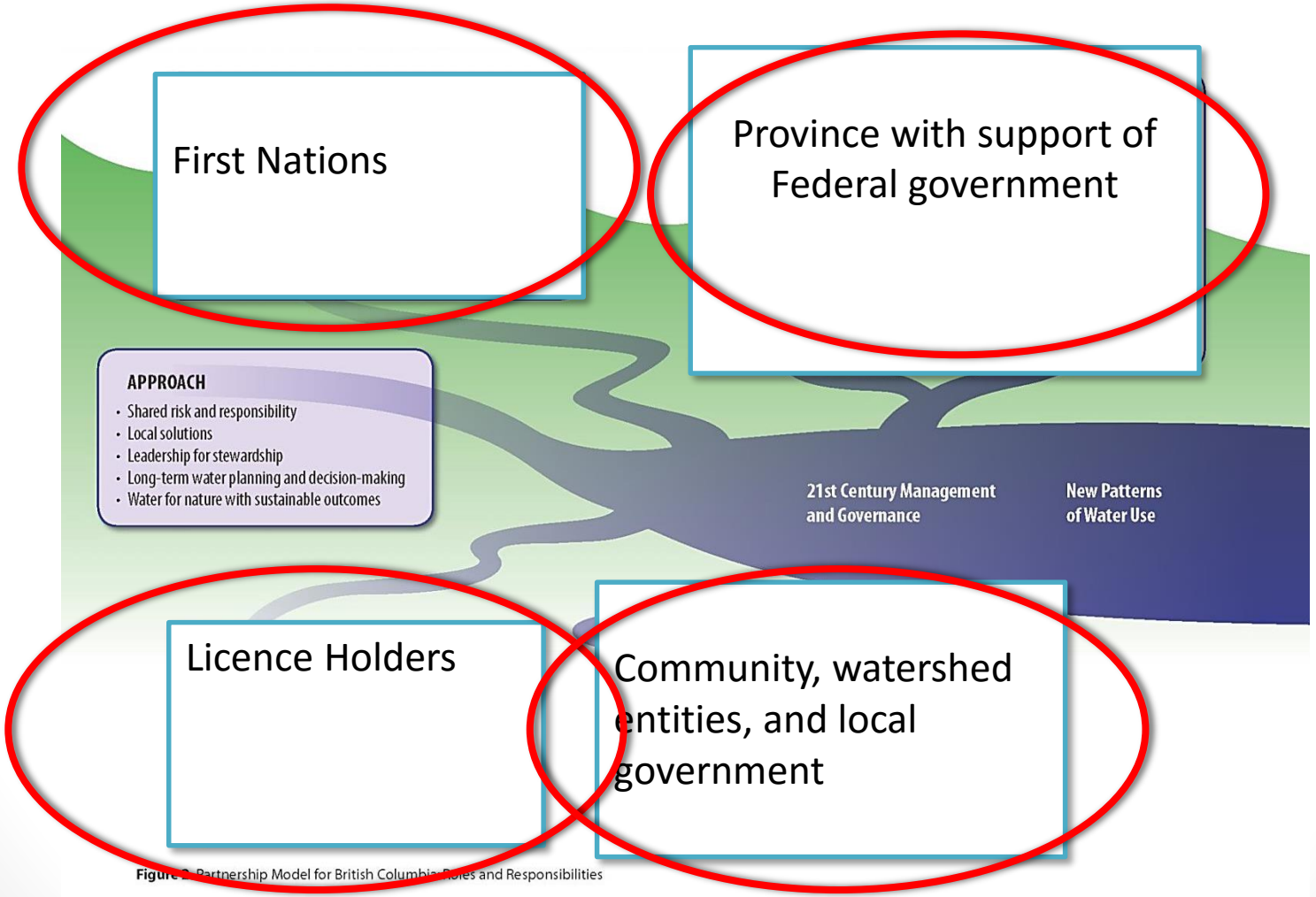
What's needed?

- Develop and implement binding plans in partnership with First Nations
- Commit adequate resources

✓ PHASE 2 REGULATION

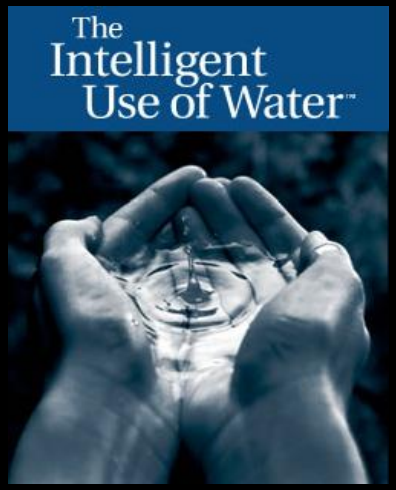
Prerequisites to Success

- New partnership approach for management and governance



Where to next?

3 "Big Ideas" in the Water World



New concept of infrastructure

– conservation the priority … cheaper, faster more sustainable

Watershed Governance

…and better integrated decision making at the watershed scale … Not *IF* but *WHEN*

Rivers with rights!

August 2012: New Zealand court agreement between government and Maori recognized the Whanganui River and its tributaries as a legal entity, with rights to exist and flourish as an "integrated, living whole"

Uncertainty

Risk

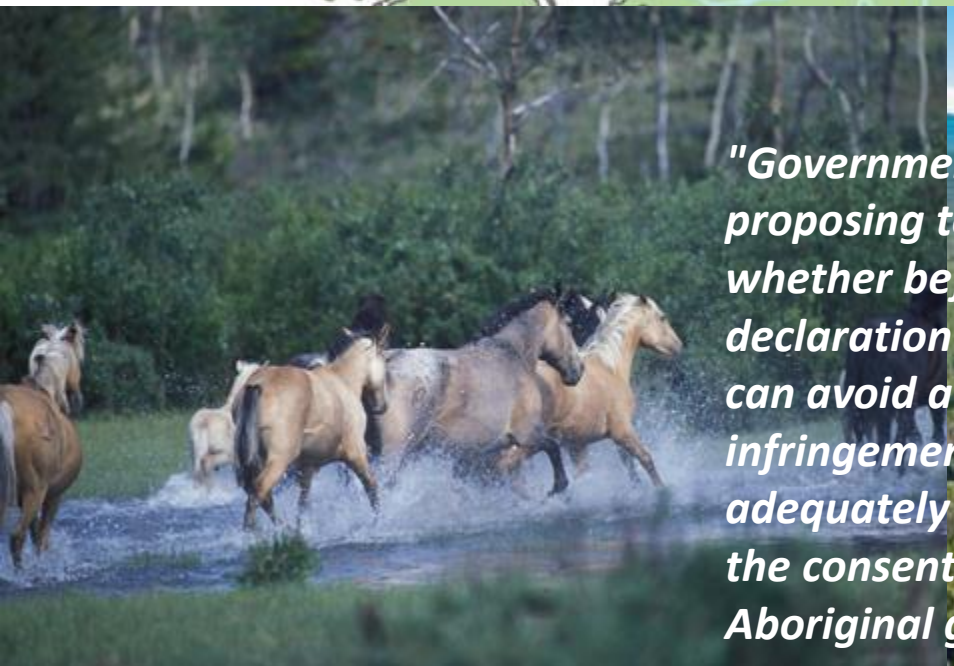
Resilience

Re-Thinking Governance in a Watershed Context

- Government is critical to ***governance,*** BUT governance is broader than government
  - Engage key actors—civil society, First Nations, business and industry, community
- Both formal and informal structures – scale matters
  - Legislative (regulatory) and persuasive (influence) to create a watershed culture
- Achieve long-term sustainability of watershed resources
  - Better integrate natural ecosystem into all aspects of decision-making

Tsilhqot'in

recent SCC decision – affirms that FN explicit role in decision making in traditional territories is **not** optional



"Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."


Move from
managing the
watershed
to
managing people
in the watershed.