



**Yukon
Water Board**

*Office des eaux
du Yukon*

AN OVERVIEW OF THE COMPENSATION PROCESS UNDER THE *WATERS ACT* AND THE UMBRELLA FINAL AGREEMENT

Yukon Water Board

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INTRODUCTION

This document provides an overview of some of the major issues which must be addressed by the Yukon Water Board (“YWB”) when it is called upon to make an award of compensation under either the *Waters Act* (“the Act”) or Chapter 14 of the Umbrella Final Agreement (“UFA”). The YWB is the agency responsible for ruling on compensation claims and awarding compensation under both the Act and Chapter 14 of the UFA.

The Board has prepared three other documents: “A Guide to Claiming Compensation under the Waters Act”; “A Guide to Claiming Compensation Under Chapter 14 of the Umbrella Final Agreement” and “Compensation Claim Information Form”. These documents contain greater detail about these compensation systems and about the legal issues which the Board will have to address when making a compensation award.

This overview is intended to provide some basic information about the Board’s responsibilities and some of the policy and legal issues involved. Readers who want more detail are encouraged to refer to the more comprehensive documents mentioned above. They are available from the Yukon Water Board’s office **or on the Water Board’s website at www.yukonwaterboard.ca**.

A. Compensation under the *Waters Act*

1. The Act and the Role of the Yukon Water Board

The *Act* is the current legislation under which water is managed in Yukon. This statute is based on an approach to water management in which the property in and the exclusive right to the use and flow of all water is vested in Her Majesty the Queen. Under this system, the Crown then allocates water rights by way of licences, or under the *Waters Regulation* to authorized users who do not require licences. Some activities such as domestic, instream and emergency use are exempted from the requirement for a licence. Otherwise, all significant use of water requires a licence. The agency responsible for issuing water licences is the YWB.

The YWB’s responsibilities and authorities are set out in the Act but, since 1995, they have been supplemented by authorities assigned by the Umbrella Final Agreement (we say more about that in Part B below). The objects of the YWB are specified in the Act and include the responsibility to provide for the “conservation, development and utilization of waters in a manner that will provide for the optimum benefit” of Yukoners and all Canadians.

Access to water is vital for both the environment and for development. Economic development cannot take place without water. Long term security of water rights is essential to any water user. To provide this security, the Act protects water users who were granted rights first. This protection is achieved by way of a system which ensures that prior water rights holders are not adversely affected by the water use of subsequent users. The system also requires the payment of compensation if it appears that any new licensed use may affect the rights and interests of a user who was there before the licence application was made. It is not necessary to prove fault or negligence in order to secure compensation, only that the new licensed use will cause the loss or damages claimed.

The Board is the decision maker on compensation claims made in the context of the water licensing process. Since the YWB is only a licensing authority, it cannot, however, deal with compensation claims arising from the actions of authorized users.

Under the legislation certain classes of water users can apply for compensation if they believe that a new water licence is going to adversely affect them. In such a case, a compensation claim can be made to the YWB which must decide on the compensation before it issues the licence. Although these compensation provisions have been present in the legislation since 1992, there have so far been few claims for compensation made to the Board.

The Act deals with compensation claimants on the basis of two categories. In the first, based on paragraph 12(4)(a) of the Act, are existing licensees and persons who have applied for but have not yet been granted a licence. The second category, based on section 12(4)(b) of the Act, includes licensees to whom 12(4)(a) doesn't apply, domestic, instream and authorized users, owners and occupiers of property and the holders of outfitters licences, registered trapline holders and the holders of other similar rights (the "12(4)(b) users"). We discuss each of these categories separately below.

2. Compensation Claims under Paragraph 12(4)(a) of the Act

An existing licensee or an applicant for a licence with precedence may apply for compensation under paragraph 12(4)(a) of the Act if their water use will suffer a significant adverse effect as a result of a new licence. The decision as to what is significant rests with the YWB. The YWB, of course, make its determinations on the basis of the evidence brought forward in the water licensing proceeding. The responsibility for providing this evidence to the YWB rests with the Applicant for the new licence.

The Applicant can either show that the proposed new licence activities will not have a significant adverse effect on existing licensees or applicants or else it can show that it has negotiated a compensation agreement with these parties. If it does so, the licence can be issued. If there is a significant adverse effect and no agreement has been reached, the YWB cannot issue the new licence.

The new licence must, of course, be the cause of the damages that are claimed and the YWB may be called upon to make such a determination. If the damages are too remote or unrelated to the Applicant's proposed water use, the Board could decide that the Applicant was not responsible for the damages and issue the licence.

3. Compensation Claims under Paragraph 12(4)(b) of the Act

The 12(4)(b) users must meet a different legal test in order to qualify for compensation. They must be "adversely" affected by the proposed new water use. There are several other requirements which must be met for a 12(4)(b) user to make a compensation claim. They must have been a user at the time the licence application was made and they must have responded to the notice of the Application published by the YWB within the time specified by the YWB. It is particularly important for 12(4)(b) users to meet this deadline specified in the notice in order to give the Applicant and the YWB notification of their compensation claim. A failure to do so may disqualify their compensation claim.

Licence Applicants again have a choice in how they deal with compensation claimants who have paragraph 12(4)(b) rights. The Applicant could convince the YWB that the proposed licence will not adversely affect the 12(4)(b) claimants or else that they have negotiated a compensation agreement with the adversely affected users. In either of these instances, the YWB will not have to order compensation and can issue the licence. If, however, no compensation agreement is reached and the YWB decides that an adverse effect will occur, then it must order that compensation be paid before the licence can be issued.

Subsection 12(5) of the Act lists the types of damages for which compensation can be paid to 12(4)(b) users.

4. YWB Policy and the Compensation Process

Paragraph 12(4)(a) clearly requires the negotiation of a compensation agreement in a case where a significant adverse effect is likely as a result of a licence application. Paragraph 12(4)(b) leaves room for such negotiations. The YWB will ask the parties to a compensation claim in all instances about their efforts to achieve a negotiated settlement. The claimant for compensation may also be required to show the YWB that they have mitigated their losses that any compensation paid will not be covering damages which could have been avoided and that compensation for the damages is not being paid by other sources.

If the parties to a compensation claim negotiate compensation, they can provide for awards in any form, cash, in kind etc. and on any payment schedule they wish, lump sum, periodic etc. If the YWB must make a compensation order, the Board will determine the parties positions but will make whatever compensation payment arrangements it considers appropriate.

B. Compensation under the Umbrella Final Agreement

2. The Umbrella Final Agreement and the Role of the Yukon Water Board

Chapter 14 of the Umbrella Final Agreement deals with Water Management and section 14.2.0 of the UFA establishes the YWB as the “Board” for purposes of that chapter. Chapter 14 grants unique water rights but only to Yukon First Nations (“YFNs”) and Yukon Indian Persons who are party to a First Nation Final Agreement. These rights are in addition to not in substitution for any rights which YFNs and Yukon Indian Persons might secure under the Act.

The UFA water rights system requires that compensation be paid if the water rights granted YFNs and Yukon Indian Persons are adversely affected by other water uses. The agency responsible for making compensation awards under the UFA is the YWB. The UFA does not contemplate compensation agreements such as those referred to in subsection 12(4) of the Act. It appears that the YWB will be responsible for making all compensation awards under the UFA.

The water rights granted to YFNs and to Yukon Indian Persons by the UFA are found in subsections 14.8.1 and 14.9.1 respectively. UFA water and compensation rights are in addition to any statutory rights which may be held by YFN or Yukon Indian Persons. A YFN could, for example, be an owner or occupier of land along a watercourse and hold chapter 14 rights as well and thus, in appropriate circumstances, could claim compensation under both paragraph 12(4)(b) of the Act and under chapter 14 of the UFA. Fault or negligence is not required for compensation to be payable under the UFA but the water use which affects YFN or Yukon Indian Persons’ rights must be the cause of the loss or damage.

The UFA also provides opportunities for YFNs and for Yukon Indian Persons to make application to the YWB to determine whether they are eligible for compensation under the UFA. Such an application could be made outside the context of a licensing hearing.

UFA rights when enshrined by way of a First Nation Final Agreement are land claim rights protected by section 35 of the *Constitution Act, 1982*.

3. Yukon First Nation Water Rights and Compensation

Subsection 14.8.1 of the UFA gives YFNs the right to have water which is on or flowing through or adjacent to their Settlement Lands remain substantially unaltered as to the quality, quantity and rate of flow including seasonal flow. Under subsection 14.8.5 of the UFA, if the YWB grants a water licence which “interferes” with a YFNs 14.8.1 rights, it shall order the licensee to pay compensation. No application or claim for compensation is even necessary in these circumstances.

If an authorized user of water substantially alters the quality, quantity or flow, including the seasonal rate of flow of water which is in on or adjacent to Settlement Land, the YFN may apply to the YWB for compensation. This right to go to the YWB for compensation when an authorized user affects YFN water rights is not available to licensees affected by authorized uses under the Act.

Only interference with section 14.8.1 rights is necessary for compensation to be required. This would not likely require a significant effect on quality, quantity or rate of flow. In the case of a compensation claim against an authorized user, however, there must be a substantial alteration of quality, quantity or rate of flow before compensation will be required.

The compensation provisions in the UFA require that there be provable loss or damage before compensation can be ordered and specify that the amount and terms of compensation shall be determined by the YWB.

The UFA is not clear on the question of who must prove that a proposed water licence will interfere with subsection 14.8.1 rights. One option is to treat YFNs no more harshly in the course of protecting their UFA rights than they would be under the Act and thus to make the licence applicant responsible for this evidence. The Board will consider placing the onus to prove that a new proposed use will not interfere with UFA rights on a new licence applicant.

The YWB has a great deal of flexibility in structuring compensation awards under the UFA and may order periodic, lump sum compensation or both. The Board may also award costs in a UFA compensation proceeding.

4. Compensation for Yukon Indian Persons Under the UFA

When a licensee substantially alters the quality, quantity or rate of flow including seasonal rate of flow in violation of a licence or contrary to law, in a manner that causes loss or damage from an interference with a Traditional Use by a Yukon Indian Person in their Traditional Territory, then compensation will be required.

Traditional Uses include the use of water for trapping and non-commercial harvesting, including transportation related to trapping, traditional heritage and spiritual purposes.

Based on the requirements from subsection 14.9.2 of the UFA, outlined above, it appears that compensation claims from Yukon Indian Persons may be infrequent.

5. YWB Policy on Compensation Under the UFA

Although UFA rights are unique, it is possible in the same case that claims may be advanced for compensation under the UFA and the Act. In such a case, compensation will be paid on the basis of the categories of loss or damage listed in the UFA and the Act. Compensation will however be limited to total provable loss or damage under these two laws. No duplication will be allowed. The YWB will also expect claimants to mitigate their losses and no compensation will be considered under the UFA for avoidable damage or loss.

CONCLUSION

This document is intended to give an overview of these compensation processes. Anyone who wants more detail should secure copies of the guides referred to in the Introduction above.