

**A GUIDE TO CLAIMING WATER
COMPENSATION UNDER
CHAPTER 14 OF THE UMBRELLA
FINAL AGREEMENT**

Yukon Territory Water Board

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INTRODUCTION

This Guide was prepared to assist Yukon First Nations, Yukon Indian People, water licence Applicants, other water users or interest holders and the public to understand the compensation provisions of the Umbrella Final Agreement (UFA). It is not a substitute for a careful reading of the UFA, the *Yukon Waters Act* (the Act) and regulations. Yukon First Nations (YFNs) or Yukon Indian People intending to make a compensation claim should consider securing legal assistance.

Chapter 14 of the UFA establishes a compensation system which compliments the statutory compensation provisions of the *Yukon Waters Act*, and consistent with the principle of prior allocation, protects YFNs and Yukon Indian People who may suffer adverse effects, loss or damage from new use of water licensed under the Act or from other water uses.

The most important water rights granted by the UFA are found in subsections 14.5.4 and 14.8.1. This includes the exclusive right to use water which is on or flowing through Settlement Land and the right to have water which is on or flowing through Settlement Land remain substantially unaffected as to quality, quantity or rate of flow, including seasonal rate of flow. These UFA rights are subject to the laws of general application and in this context, that means the *Yukon Waters Act*. The UFA adopts the Yukon Territory Water Board as the Board responsible for the implementation of Chapter 14.

Yukon First Nations can claim or must be paid compensation in the circumstances described in subsections 14.8.5, 14.8.6, 14.7.8 and 14.11.1.5 of the UFA. Yukon Indian Persons must be paid compensation in the circumstances described in subsection 14.9.2 of the UFA.

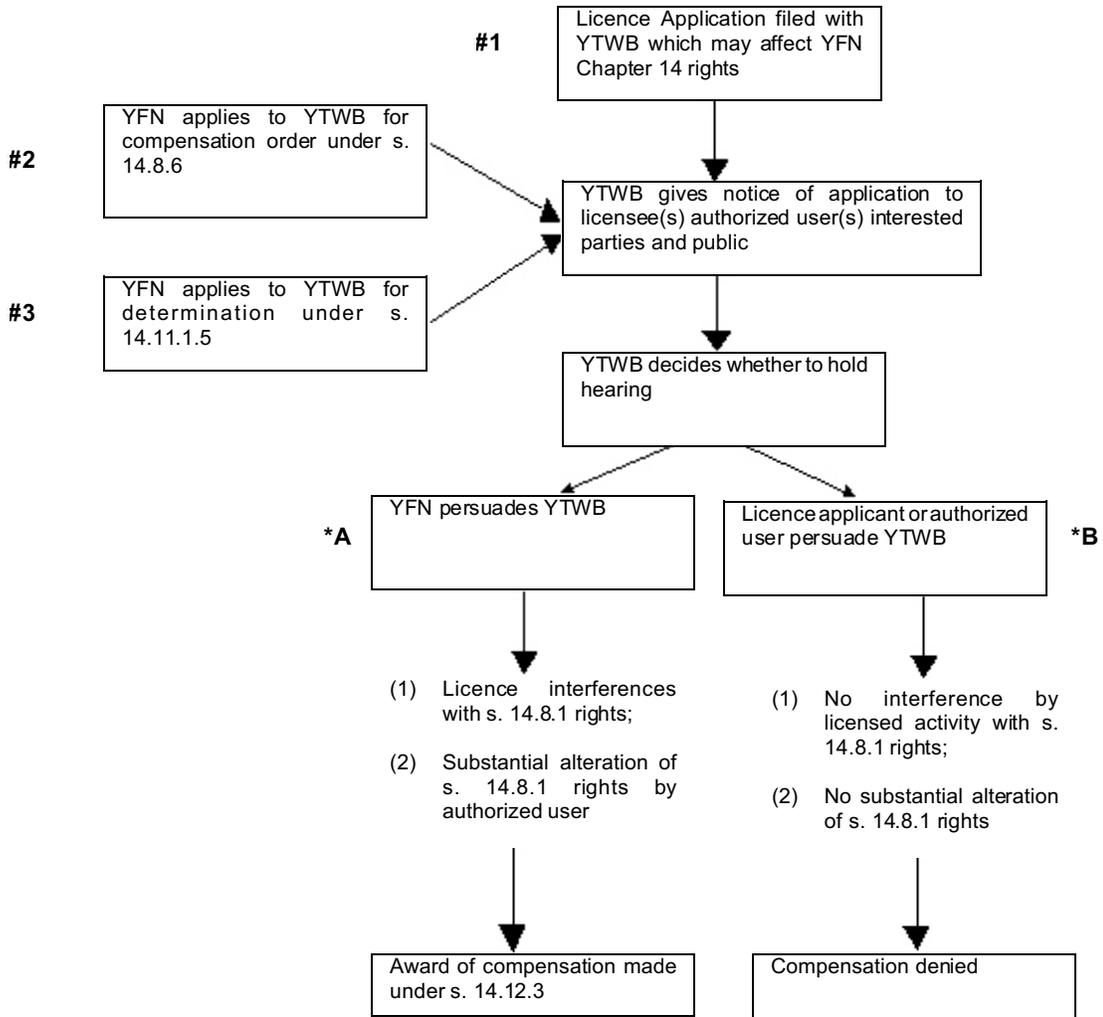
The Guide is intended to provide an overview of some of the important issues and questions which should be considered during the preparation of a claim for compensation under the UFA. It provides an outline of the approach which will be applied by the Water Board to such claims. The UFA compensation system is illustrated schematically on a flow chart and the overview is provided by way of a series of questions and answers with attached explanations. This Guide is not intended to be a complete “How To” manual for the preparation of a compensation claim.

Figure 1

Yukon First Nation Compensation under Chapter 14, UFA

A. Yukon First Nation Compensation

There are three ways for YFN Chapter 14 Compensation to be raised with the Water Board. See UFA Guide page 8.



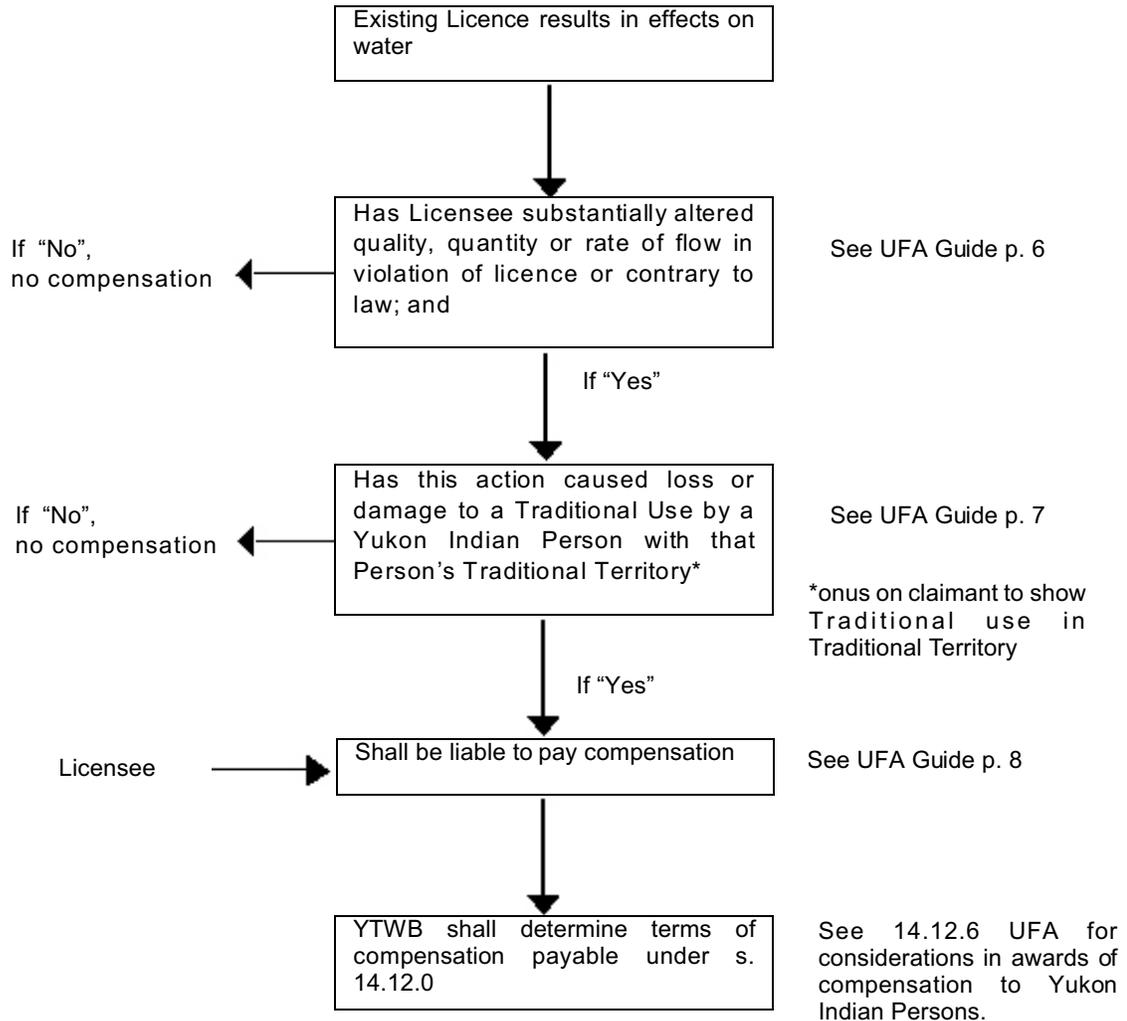
*These lines both lead to a Water Board decision on compensation. Line A represents a situation where the onus of proof lies on the YFN. Line B puts the onus on the applicant or the authorized user. The UFA does not allocate the onus.

***Note: The question of onus of proof is as yet unresolved in this process.**

Figure 2

Yukon Indian Person Compensation under Chapter 14, UFA

B. Yukon Indian Persons Compensation



A Guide to Compensation Claims under the Yukon Water Licensing Process

Compensation Claims under the UFA Regime

1. Who can claim compensation under the UFA?

UFA, subsection 14.12.1 makes provision for compensation of the following classes of claimants:

- ▶ Yukon First Nations which have settled Final Agreements; and
- ▶ Yukon Indian Persons from First Nations with Final Agreements.

Comment 1:

- The UFA compensation regime extends and complements the *Waters Act* regime. In certain circumstances a YFN or a Yukon Indian Person could claim compensation under both systems.
- Chapter 14 of the UFA includes compensation provisions. Subsection 14.12 outlines the process for determining the amount and terms of compensation.

Comment 2: Only Yukon First Nations with Final Agreements can take advantage of subsection 14.12 compensation.

Comment 3: The onus should be on a claimant to prove their status as a Yukon Indian Person.

Compensation Claims under the UFA Regime

2. In what circumstances may UFA compensation claimants advance a claim?

Yukon First Nations

- ▶ No application is necessary under subsection 14.8.5 – however, if the YTWB grants a licence that interferes with YFN water rights outlined in subsection 14.8.1 the Board *shall* order compensation paid.
- ▶ Under UFA subsection 14.8.6, a YFN may apply to the YTWB for a compensation order when any unlicensed person uses water in a manner not contrary to law and substantially affects subsection 14.8.1 rights.
- ▶ Under UFA subsection 14.7.8, and no sooner than three years after the effective date of a YFN Final Agreement, persons holding licences under UFA 14.7.3 are liable to pay compensation to the YFN if the use of water substantially affects subsection 14.8.1 rights.
- ▶ Under UFA paragraph 14.11.1.5, a YFN may apply to the YTWB for a determination of whether compensation is payable.

Yukon Indian Persons

- ▶ Subsection 14.11.5 authorizes Yukon Indian Persons to apply to the YTWB to determine if they are entitled to compensation under subsection 14.9.2.
- ▶ Subsection 14.9.2 is the only UFA provision which authorizes a Yukon Indian Person to be directly compensated by the YTWB.

Compensation Claims under the UFA Regime

3. What other requirements must be met before compensation may be awarded?

Yukon First Nations

- ▶ Under subsection 14.8.5, a licensed use must *interfere* with subsection 14.8.1 rights.
- ▶ Under subsection 14.8.6, the unlicensed but lawful use must *substantially alter* the quality, quantity or rate of flow including seasonal flow of water on YFN settlement lands in violation of subsection 14.8.1 rights.
- ▶ Under subsection 14.7.8 the licensed use must *affect* the YFN's subsection 14.8.1 rights – the nature of the effect required is not clear.

(emphasis added)

Yukon Indian Persons

- ▶ Under subsection 14.9.2 UFA, the licensee must:
 - *substantially alter* the quality, quantity or rate of flow including seasonal flow of water;
 - alteration must be in violation of a licence or contrary to law;
 - alteration must cause loss or damage resulting from interference with a Traditional Use by a Yukon Indian Person; and
 - Traditional Use must have been within Yukon Indian Person's Traditional Territory.

(emphasis added)

Comment: Subsection 14.8.1 guarantees the right to have water which is on or flowing through or adjacent to Settlement Land remain unaltered as to quantity, quality and rate of flow, including seasonal flow.

Comment: The test for subsection 14.8.5 is mere interference, that for subsection 14.8.6 is substantial alteration of the subsection 14.8.1 rights.

Comment: The test for subsection 14.9.2 is substantial alteration of quality, quantity or rate of flow, including seasonal flow which interferes with a Traditional Use.

Compensation Claims under the UFA Regime

4. How is liability for compensation established?

Yukon First Nations

To require the payment of compensation:

- UFA subsection 14.8.5 only requires interference with YFN water rights described in subsection 14.8.1.
- Subsection 14.8.6 require substantial alteration of the quality, quantity or rate of flow of water.
- Under subsection 14.7.8 test not clear.

Yukon Indian People

To require the payment of compensation:

- UFA subsection 14.9.2 requires a substantial alteration of the quantity, quality or rate of flow of water; and
- Violation of licence terms or law causes losses or damage.

Comment: YTWB has no enforcement jurisdiction under *Waters Act* and may not have authority to determine that a water use is a violation of a licence or contrary to law. If it does not, compensation would only be granted after the water user has been convicted by a Court.

Comment 1: UFA subsection 14.12.1 requires “provable” loss or damage for any compensation claim to be made.

Comment 2:

- Fault or negligence are not required under the UFA in order for liability to be established. Causation would need to be proven.
- “Provable” means susceptible of being proven. It does not require that the loss or damage already have occurred and it does not have any implication with respect to onus or burden of proof.

Compensation Claims under the UFA Regime

5. Who bears the onus to prove liability and damages?

Yukon First Nations

Yukon Indian Persons

Comment: The UFA is silent on these questions.

Comment 1:

- The requirement for compensation under subsections 14.8.5 and 14.7.8 would result from a YTWB licensing decision.
- The options for allocating the onus to prove liability and damages in the licensing context would appear to be:
 - (1) to adopt the same approach as is applicable under subsection 14(4) of the *Waters Act* and place the onus on the licence Applicant to show that their use will not violate the tests outlined in sheet 1.4 above; or
 - (2) to place the burden of proving a violation of UFA water rights on the YFN.

Comment:

- If a licensee is found to have violated licence conditions or the law the YTWB may wish to place the onus on the licensee to prove that their actions did not cause loss or damage to the Traditional Uses of the Yukon Indian Person.
- If this approach is adopted the claimant should only have to bring the basic facts forward (meet the evidentiary burden) showing that loss or damage might have resulted from the licensee's actions.
- Further analysis of the procedural and legal aspects of this issue is recommended.

Comment 2:

- In the case of a subsection 14.8.6 compensation claim *or* an application under paragraph 14.11.1.5 different factors apply.
- Further analysis of the procedural and legal aspects of this issue is recommended.