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Greening the Columbia River Treaty: Alternative Approaches

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Preface

Initially, Wildsight asked the Environmental Law Clinic to conduct legal research into the possibility of “greening” the Columbia River Treaty. When the treaty was first signed 50 years ago, environmental concerns were not taken into consideration. Upon damming the Columbia River many valley bottoms were flooded and many very productive, thriving ecosystems were lost. In addition the salmon were entirely wiped out along with the way of life for many First Nations in the region. Wildsight is seeking to advocate for the creation and negotiation of arrangements between Canada and the United States which will take into account the environment and the concerns of all interested parties.

In the end, because of challenges involved in comprehensively transforming the Treaty itself, we decided to focus on potential alternative ways of accomplishing Wildsight’s goals. Therefore, this report explores potential institutional structures for transboundary governance of the Columbia River Basin -- with an emphasis on arrangements outside of the formal Columbia River Treaty process.

Introduction

After 50 years, the Columbia River Treaty is up for renegotiation. With governments at the negotiating table and various groups calling for change, this is an appropriate time to reconsider governance in the Columbia River Basin. Among other things, individuals and organizations are calling for:

- the inclusion of ecosystem-based function as a third primary objective of the Treaty;
- Indigenous participation in decision making as sovereigns; and
- meaningful public participation.

However, working within the official Columbia River Treaty modernization process is not the only way to achieve these outcomes. Indeed, to achieve these goals in the Columbia River Basin it may be more practical to establish an alternative, formal, transboundary governance structure - - or an informal “Track II” forum. Either way, the new transboundary institution must engage the key players in the Basin and must emphasize collaboration amongst these interests.

This paper will explore options for transboundary initiatives in greater detail. First, it will present key background information to the Columbia River Treaty, relevant transboundary governance principles, and existing work in this field. Next, it will explore the institutional structure of a

Columbia River Basin transboundary governance body. Finally, it will touch upon the potential for informal Track II diplomatic initiatives in the Columbia River Basin.

Background to the Columbia River Treaty

The Columbia River runs from the headwaters in Columbia Lake, British Columbia to the Pacific Coast of Oregon and is the largest river in the Pacific Northwest. The Columbia River Basin covers approximately 671,000km² of the province of British Columbia and seven states (Washington, Oregon, Montana, Idaho, Nevada, Wyoming, and Utah)¹ and encompasses the traditional territories of fifteen tribes and eighteen First Nations.² The volume of water and the potential for power production in the Columbia River is tremendous. Water flow varies significantly depending on the season; the high season flow can be as much as 40 times higher than low season flow.³ British Columbia contributes approximately 30 percent of the river flow and has the best water storage sites while the best hydro-electric sites exist on the American side of the border. These asymmetric conditions prompted the governments of Canada and the United States to begin discussing ways to maximize the economic potential of the Columbia River.

Born out of these discussions, the Columbia River Treaty is an international agreement between Canada and the United States ratified in 1964.⁴ It was negotiated during a time of large hydro-development of the Columbia River in the U.S. to “develop and operate upstream storage in the Canadian province of British Columbia in order to provide a regulated flow on the Columbia and Kootenay rivers.”⁵ The Treaty serves two primary purposes: to coordinate flood control and to share the benefits of hydroelectric energy production. The Treaty is administered by the “Entities”, who make decisions about “the operation of various dams and reservoirs for power production and for local and system-wide flood risk management.”⁶ The Canadian Entity is BC Hydro, a Crown Corporation controlled by the Province of British Columbia. The American Entity consists of two federal agents: the Bonneville Power Administration (BPA) and the U.S. Army Corps of Engineers (USACE). The Entities develop the Assured Operating Plan that sets out the details of flood control and power generation five years in advance. A bilateral Permanent Engineer Board, created under Article 15 of the Treaty, is “responsible for reviewing actions and plans of the Entities for consistency with and alerting the governments of departures

¹ See Appendix A for a map of the area.

² See Appendix B for a map of the area and a list of the tribes and First Nations.

³ Hearn G, *The Columbia River Treaty: A Synopsis of Structure, Content, and Operations*, September 2008, at 5.

⁴ For more detail on the Columbia River Treaty, including the historical context, negotiation process, and specific terms, see: International Waters Governance, “In Depth Case Study of the Columbia River Basin”, online: <http://www.internationalwatersgovernance.com/uploads/1/3/5/2/13524076/columbia-river-case-study.pdf> [In Depth Case Study]

⁵ In Depth Case Study, at 9.

⁶ Sacred Responsibility, at 32.

from [Columbia River Treaty] obligations.”⁷ The Treaty has been in operation, largely unchanged, since 1964.

The Columbia River Treaty has been seen by many across the globe as a successful transboundary water agreement. It has succeeded in achieving its two primary objectives - flood management and hydropower benefits – by integrating and coordinating water management across the Canada/U.S. border. British Columbia receives from \$100-\$300 million a year from the United States for hydro power revenue known as the Canadian Entitlement. In return, the United States is provided with almost carbon-free, renewable energy to millions of people, “safe navigation for river traffic worth billions of dollars, and... irrigation for an agriculture sector worth \$5 billion in Washington State alone.”⁸ However, these successes have not been without significant social and environmental costs, including but not limited to: negative impacts to wildlife and the loss of important wetlands; negative impact to fish, including salmon⁹; flooding of productive valley floor¹⁰; displacement of people; and increased marginalisation of Indigenous peoples and local communities.¹¹

The Future of Governance in the Columbia River Basin

This is a particularly dynamic time for the Columbia River Treaty that provides an opportunity to re-think governance in the Columbia River Basin. September 2014 was the first possible date when either Canada or the United States could have issued a termination notice for the Columbia River Treaty. Termination will take effect ten years after the date that this notice is given. The possibility of terminating the Treaty has prompted both Canada and the United States to undertake its own Columbia River Treaty review process and encouraged groups with an interest in the Basin to reflect on its governance.

Throughout this Treaty review process, there has been significant pressure from individuals and organizations calling for rectification of the Treaty’s shortcomings. In particular, groups are calling for:

⁷ Sacred Responsibility, at 22.

⁸ Sandford RW, Harford D, and J O’Riordan. *The Columbia River Treaty: A Primer*. 2014. at 2-3. [The Columbia River Treaty: A Primer]

⁹ “The Columbia was one of the most, perhaps the most, productive salmon bearing rivers on the west coast. Currently, there is no significant natural production, and an elaborate system of transporting fish around some of the major facilities is used to maintain the natural fish that are left.” In *Depth Case Study* at 17.

¹⁰ The inundation created by the Hugh Keeleyside, Duncan, Mica and Libby dams flooded an estimate 40,000 ha of Lake systems, 8500 ha of rivers, 12,000 ha of wetlands and 20,000 ha of floodplains. *Draft Report of Dam Footprint Impact Summary*, Golder Associates and Kutenai Nature Investigations, (December 2009).

¹¹ “There was relatively little input from local communities and Indigenous groups that were to be affected by the development of the dams. Many of these communities have felt marginalized and there continues to be a strong call for greater participation in the management of the river by local communities.” In *Depth Case Study* at 16-17.

- the inclusion of ecosystem-based function as a third objective of the Columbia River Treaty;
- the involvement of tribes and First Nations as sovereigns in the ongoing negotiation, decision-making, and administration of the Treaty;
- more opportunities for public participation; and
- adaptive management to continuously revise and update the operation of the dams and reservoirs.¹²

For example, the Columbia Basin Tribes Coalition believes that ecosystem-based function should be added as a third primary purpose to the Columbia River Treaty and fully integrated with flood-risk management and hydropower into the operations and recognized benefits of the Columbia River Treaty.¹³ The Coalition notes that the Columbia River Treaty is antiquated and “unable to address the needs and rights of the peoples of the Columbia Basin.”¹⁴ The Coalition calls for the modernization of the Treaty by incorporating ecosystem-based function as well as adaptive management in a way that ensures respect for tribal rights.¹⁵ The Coalition, along with many other groups, sees the Treaty review process as an opportunity to address the concerns and limitations by modernizing the fifty-year old Columbia River Treaty.

Amidst this criticism, the government of British Columbia and the Entities in the United States have both issued recommendation papers that outline specific positions on the renegotiation of the Columbia River Treaty.¹⁶ There are both areas of agreements -- and notable differences -- between the Columbia River Treaty recommendations from Canada and the United States. Both parties recognize the importance of climate change and the need to include it in the future of the Columbia River Treaty.¹⁷ Both mention ecosystem values as an important consideration in the planning and implementation of the Treaty¹⁸ and both agree on the need for adaptive

¹² Sacred Responsibility, at 66.

¹³ Columbia Basin Tribes Coalition: The Columbia River Treaty 2014/2024 Review, Ecosystem-based Function, at 1.

¹⁴ Columbia Basin Tribes Coalition: The Columbia River Treaty 2014/2024 Review, Ecosystem-based Function, at 1.

¹⁵ Columbia Basin Tribes Coalition: The Columbia River Treaty 2014/2024 Review, Ecosystem-based Function, at 1.

¹⁶ Sacred Responsibility, at 24. The British Columbia Columbia River Treaty Review, 2014 can be found online: <http://crt2014-2024review.gov>. The U.S. Entity Regional Recommendation for the Future of the Columbia River Treaty after 2024, (U.S. Entity, 2013) can be found online: <http://www.crt2014-2024review.gov/Files/Regional%20Recommendation%20Final,%2013%20DEC%202013.pdf>.

¹⁷ Canada: “Adaptation to climate change should be incorporated in Treaty planning and implementation.”

United States: “The region anticipates impacts from climate change to all of the elements described in this document. The strategy for adapting the Treaty to future changes in climate should be resilient, adaptable, flexible, and timely as conditions warrant.”

¹⁸ Canada: “Ecosystem values are currently, and will continue to be, an important consideration in the planning and implementation of the Treaty...The Province will explore ecosystem based improvements recognizing that there are a number of available mechanisms inside and outside the Treaty.”

United States: “The health of the Columbia River ecosystem should be a shared benefit and cost of the United States and Canada...In order to achieve the goal of modernizing the Treaty to further ensure a more comprehensive ecosystem-based function approach throughout the Columbia River Basin watershed, the region recommends the following>”

management in the Columbia River Treaty's future.¹⁹ Meanwhile, there are disagreements about the value of the Canadian Entitlement -- with Canada calling for all downstream U.S. benefits (such as flood management, hydropower, ecosystems, water supply, recreation, navigation, and any other relevant benefits) to be accounted for and included in the Canadian Entitlement. Not surprisingly, the United States does not want to expand the list of benefits to be included in its Entitlement payment. Another disagreement is that the United States would like to see salmon re-introduction included as an issue in Treaty negotiations, while the position of British Columbia is that salmon re-introduction is not a Treaty issue.

Neither of these recommendation papers specifically references a willingness to involve tribes and First Nations as sovereigns in the decision-making and administration of the Treaty -- and neither suggests there will be more opportunities for public participation, through individuals or stakeholder organizations.

Nested Governance in the Columbia River Basin

It is important to note from the outset that the Columbia River Treaty does not provide holistic watershed governance of the Columbia River Basin. Governance of the water and natural resources in the Columbia River Basin is complex;²⁰ it involves federal, state, provincial and municipal governments, local watershed organizations, and tribes and First Nations.²¹ Governance and decision-making occurs at multiple geographic scales and involves varying degrees of formal authority. At present, governance of the Columbia River Basin lacks coordination. This fragmented governance makes it difficult to adequately respond to pressing issues affecting the entire Columbia River Basin, including climate change, a decreasing water supply, and ecosystem degradation.

Nested governance "where decision-making is distributed among a hierarchy of institutions" is increasingly recognized as a way to address issues in watershed governance.²² Nested governance is "a mechanism to provide social benefits through decentralized and community-based natural resource management, while addressing causes and consequences of social and ecological issues crossing spatial and jurisdictional scales."²³ A report by the POLIS Project on Ecological Governance states:

¹⁹ Canada: "Treaty provisions post-2024 should be fixed for a sufficient duration to provide planning and operational certainty while allowing for adaptive mechanisms to address significant changes to key components and interests."

United States: "The minimum duration of the Treaty post-2024 should be long enough to allow each country to rely on the Treaty's planned operations and benefits for purposes of managing their long-range budgets, resource plans, and investments, but adaptable enough to allow responses to new information and changing conditions."

²⁰ Sacred Responsibility, at 19.

²¹ Sacred Responsibility, at 6.

²² Wyborn, C. and RP. Bixler. 2013. Collaboration and nested environmental governance: Scale dependency, scale framing, and cross-scale interactions in collaborative conservation. *Journal of Environmental Management*, 123(5): 58-67. [Wyborn and Bixler]

²³ Wyborn and Bixler, 2013.

a nested, multi-scalar approach will be necessary to address the more complex challenges associated with achieving positive, long-term ecological, social, and economic outcomes. For example, setting ecological objectives, including minimum standards and flow needs; ensuring enforcement; maintaining responsibility for developing and overseeing a general resource rights and entitlements regime (including for water); and facilitating regular, science-based assessments and transparent reporting of freshwater ecosystem health will all still directly involve both the federal and provincial government.²⁴

The theory behind nested governance is linked to the principle of subsidiarity in international law - decision-making power should be held by those most directly affected by an issue.²⁵ For a transboundary governance body, this means that only those issues that require international cooperation and input should be within the scope of the governance body.²⁶ The Great Lakes Compact and Agreement are examples of this by “coordinating data collection, exchange of information, and cooperation on those issues that require joint efforts across the border, such as experimental re-introduction of salmon to Canada and flow, while leaving local restoration initiatives to domestic implementation.”²⁷ In British Columbia, community and watershed-based groups are already “involved in decisions that affect their local watersheds, including drinking water source protection, ensuring environmental flows, urban and local resource development, and balancing water use between various stakeholders and rights holders.”²⁸ Nested governance is now recognized as an important component of any transboundary governance structure.

In the Columbia River Basin, some version of nested governance already exists. Local restoration initiatives are implemented by domestic organizations while flood management and hydropower generations are dealt with at an international level. However, this allocation of governance duties has occurred in a haphazard way and has resulted in a fragmented network of governance. What is required is a holistic approach to governance; an approach that contemplates the level at which decisions should be made and coordinates amongst different levels of governing bodies. This approach requires a unified transboundary governance body with the power to make important decisions that impact the entire Columbia River Basin. For those issues that operate at a transnational level and thus require international cooperation, there are real benefits in establishing shared decision-making at a basin-wide level.

²⁴ Brandes OM, O’Riordan T, O’Riordan J, and L Brandes. A Blueprint for Watershed Governance in British Columbia. POLIS Project on Ecological Governance [B.C. Watershed Governance], at 15, online: <http://poliswaterproject.org/sites/default/files/POLIS-Blueprint-web.pdf>. [B.C. Watershed Governance]

²⁵ Or as explained in the Sacred Responsibility report at FN 125: “In its most basic formulation, the principle of subsidiarity holds that social problems should be dealt with at the most immediate (or local) level consistent with their solution.”

²⁶ University of Idaho and Oregon State University. Combined Report on Scenario Development for the Columbia River Treaty Review, at 68.

²⁷ Bankes N and B Cosens. 2014. Protocols for Adaptive Water Governance: The Future of the Columbia River Treaty, at 75-76. [Bankes and Cosens, 2014]

²⁸ BC Watershed Governance at viii

Track II Diplomacy

Track II diplomacy, a term first used in 1981, has become increasingly recognized as a method of resolving conflict and developing creative ways to solve problems. Track II diplomacy was created to distinguish official diplomatic activities (Track I diplomacy) from unofficial interactions. Joseph Montville, the founder of the term, states that “[i]ts underlying assumption is that actual or potential conflict can be resolved or eased by appealing to common human capabilities to respond to good will and reasonableness.”²⁹ Track II diplomacy refers to “non-governmental, informal, and unofficial contacts and activities between private citizens or groups of individuals, sometimes called ‘non-state actors.’”³⁰

As explained in the Universities Consortium report:

Track II diplomacy contrasts with Track I diplomacy, which can be defined as official, governmental diplomacy that occurs inside official government channels. Track II diplomacy is not a substitute for Track I diplomacy. Rather, Track II diplomacy assists official actors to manage and resolve conflicts by developing options and exploring possible solutions derived from inclusive, informed, and deliberative dialogue – which is not constrained by the expectations and requirements of formal negotiation via Track I diplomacy.³¹

Purpose of this Paper

Given the dissatisfaction with the existing Columbia River Treaty and the opportunity presented by the ongoing Columbia River Treaty renegotiation process, individuals and organizations are exploring the possibility of making changes both within and outside the structure of the Columbia River Treaty. Within the Columbia River Treaty structure, one possibility is to “create an advisory committee on ecosystem function to provide ongoing input and advice to the Permanent Engineering Board.”³² This option would see ecosystem function incorporated in the Columbia River Treaty but would not address other criticisms including the lack of Indigenous participation in the Treaty. Another option is to expand the membership of the negotiating teams for the Columbia River Treaty to include representation from tribes and First Nations.³³ This option would not address other concerns including lack of public participation, adaptive management, and ecosystem function.

This paper will focus on ways of approaching governance of the Columbia River Basin in a more holistic way. One option is to create a formal transboundary governance structure responsible for

²⁹ Montville and Davidson, “Foreign Policy According to Freud”, *Foreign Policy*, 1982.

³⁰ Diamond, Louise, and John McDonald, *Multi-Track Diplomacy: A Systems Guide and Analysis*, Occasional Paper No. 3, Grinnell, Ia.: Iowa Peace Institute, June 1991.

³¹ *Sacred Responsibility*, at 62.

³² *Sacred Responsibility*, at 58.

³³ *Sacred Responsibility*, at 58.

implementing the Columbia River Treaty with Indigenous co-governance, shared-decision making powers, and a broader range of objectives including ecosystem-based function. An institutional structure for this Columbia River Basin transboundary governance body is proposed in the analysis section below. Another option is to explore Track II diplomatic initiatives within the Basin by creating “an independent, ongoing transboundary ‘forum’ to inform, invigorate, and supplement the more formal governing arrangements within the Columbia Basin, and to promote a ‘whole basin’ approach to governance.”³⁴ This forum could look similar to a transboundary governance body but would not have any formal decision-making power. Instead, it would be used to foster relationship and inform decisions made within the Columbia River Treaty process.

Analysis

This section of the paper will explore potential institutional structures for basin-wide transboundary governance of the Columbia River Basin. As noted by Hearn *et al.*, with transboundary waters “[t]here are no blueprints for institutional design. A framework must be tailored to the transboundary waters situation’s characteristics and reflect its environmental, hydrological, political, economic, social and cultural circumstances.”³⁵ An institutional structure for a Columbia River Basin governance body will inevitably be unique; there is no single model for transboundary watershed governance that can be copied and applied to the Columbia River Basin. That said, transboundary watershed governance is not a new concept; important lessons can be learned from existing transboundary water governance organizations and then used to inform the governance structure of the Columbia River Basin.

In *A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin Through the Prism of Tribes and First Nations*, the Universities Consortium on Columbia River Governance (Universities Consortium) developed ten criteria, referred to as ‘key elements of transboundary water governance’, used to evaluate nineteen existing transboundary water governance arrangements. The ten key elements of transboundary water governance selected in the report are:³⁶

1. *Geography* (What is covered within the framework?)
2. *Legal Basis* (i.e., is it based on a Treaty, Memorandum of Understanding etc.)
3. *Purpose & Function* (Why was the initiative created and what does it seek to accomplish?)
4. *Implementation Arrangement* (What is the organizational structure to implement the transboundary arrangement?)

³⁴ Sacred Responsibility, at 62.

³⁵ Hearn 2014; United Nations-Water. 2008. Transboundary Waters: Sharing Benefits, Sharing Responsibilities. UN Thematic Paper at 1.

³⁶ Sacred Responsibility, at 160.

5. *Members* (What nations, states, or groups are part of the implementation arrangement? Are there “observer” participants?)
6. *Role of Indigenous People* (What is the unique role of indigenous people in implementation and ongoing governance? Is it an “advisory” role or “shared” decision-making authority or something else?)
7. *Stakeholder Participation* (Is there a mechanism to inform and educate, and to mobilize and engage stakeholders?)
8. *Dispute Resolution* (Is there an explicit method for preventing and dealing with disputes among members?)
9. *Joint Fact Finding* (Is there a mechanism for the participants to share, exchange, and harmonize data?)
10. *Adaptive Management* (Is there a mechanism or protocol to facilitate ongoing monitoring, learning, evaluation, and adaptive management?)

This section of the paper draws on these key elements to explore potential institutional structures of a Columbia River Basin governance body in greater depth. This analysis will examine lessons learned from the nineteen transboundary water governance structures³⁷ identified in the Universities Consortium report, and include a few additional examples. The case studies³⁸ are explored to identify best practices in transboundary watershed governance, to learn from past mistakes, and to apply these lessons to the governance of the Columbia River Basin. This section is based loosely on the key elements of transboundary governance identified in the Universities Consortium report:

Why? Purpose and Function; Scope of Issues

³⁷ Nineteen case studies were selected in the Universities Consortium report according to the following criteria:

- ❖ “Is it “transboundary”? That is, does the case study include water and/or natural resource governance arrangements that cross international, national, and sub-national boundaries?
- ❖ Does it involve indigenous people³⁷ in a meaningful way, either through:
 - Providing input and advice during the negotiation and development of the international governance arrangement? or
 - Participating in making decisions and playing an active role in implementation, management, and ongoing governance?
- ❖ Do indigenous and/or local people play a leadership role?
- ❖ Does it promote a comprehensive, holistic, ecosystem-based approach to land and water management?
- ❖ Can the models and lessons be adapted and/or integrated within the legal and institutional framework of the Columbia River Basin?”

Sacred Responsibility, at 59.

³⁸ As noted in FN 119 of A Sacred Responsibility: “Case studies may have various limitations and constraints including, but not limited to, (1) differing objectives and/or criteria for measuring “success”; (2) different physical, social, political, economic, environmental and cultural circumstances; (3) strong cross cultural communication issues; and (4) what appears to work at one scale may well not work at a different scale.”

Who? Voting Members; Sub-Groups; Stakeholders and Public Participation

How? Adaptive Management

Why? The Purpose and Function of a Columbia River Basin Transboundary Governance Body

Clarifying the purpose and function of a governance body is both the most important and the most challenging task. A clear institutional mandate will serve as a strong foundation for the initiative and for subsequent effective action. This requires a clear vision of why the initiative was created and what the initiative seeks to accomplish.³⁹ The UN-Water Report of Transboundary Waters notes, “[a] clear mandate that outlines cooperation among the different national and transboundary organizations that participate in the institution is usually an important prerequisite for the formation of strong governing bodies.”⁴⁰ It is equally important to appropriately scope the range of substantive issues within the mandate of the governing body and to clearly delineate what is outside the mandate.

Lessons from Case Studies: The Objectives

Transboundary watershed governance bodies are designed to achieve a wide range of objectives. As noted in the Universities Consortium report, “[t]he objectives of most of the case studies seem to focus primarily on:

- Exchanging information and sharing data (e.g. International Commission for the Protection of Lake Constance)
- Coordinating actions (e.g. the Mackenzie River Basin Board, Lake Victoria Basin Commission, and/or International Commission for the Protection of the Danube River)
- Fostering joint initiatives (e.g. Nile Basin Initiative, Organization of the Amazon Cooperation Treaty)
- Advising formal decision-making bodies (e.g. Missouri River Recovery Implementation Committee).⁴¹

Each transboundary governance structure has a unique combination of broad objectives or functions. For example, the Great Lakes Compact and Agreement “provide[s] a model for coordinating data collection, exchange of information, and cooperation on those issues that require joint efforts across the border, such as experimental re-introduction of salmon to Canada and flow.”⁴² This Agreement deals with exchanging information and sharing data as well as coordinating actions but does not advise formal decision-making bodies. In addition, the Lake

³⁹ Sacred Responsibility, at 160.

⁴⁰ Hearn 2014; United Nations-Water. 2008. Transboundary Waters: Sharing Benefits, Sharing Responsibilities. UN Thematic Paper at 1.

⁴¹ Sacred Responsibility, at 60

⁴² Banks and Cosens, 2014 at 75-76.

Tanganyika Authority provides a great example of how data and information provisions can be built into the institutional structure.⁴³ As noted in the Universities Consortium report, “[v]ery few case studies seem to be defined by shared governance among sovereign entities (i.e., sharing power and decision-making authority among nations, states, and indigenous people).”⁴⁴ Often the objectives of case studies are limited to information sharing and coordination of initiatives and actions. The Pacific Salmon Commission and the Great Lakes Water Quality Agreement are rare examples of shared-decision making.⁴⁵

Columbia River Basin: The Objectives

General lessons can be learned from the case studies presented above. However, the Columbia River Basin is situated in a distinct historical, geographical, and political context; no existing transboundary governance body deals with the unique set of issues applicable to the Basin. To effectively govern the Columbia River Basin, a basin-wide governance body could serve several functions including: 1) information sharing, 2) coordinating initiatives and actions, and 3) shared decision-making.

Information Sharing

A Columbia River Basin governance body has the opportunity to serve as a forum for information sharing within the Basin. In the Columbia River Basin, organizations and government agencies on both sides of the border are already collecting and analyzing significant amounts of data.⁴⁶ This information - ranging from climate change models to economic cost-benefit analyses - should directly affect how decisions are made within the Columbia River Basin.⁴⁷ An effective governing body requires “access to credible and reliable data and

⁴³ “Under the Convention on the Sustainable Management of Lake Tanganyika, Article 20 addresses information exchange between the Contracting States, directing them to exchange data and information concerning sustainable management of the Lake Basin and the implementation of the Convention. Contracting States are also directed to employ “best efforts” to provide data or information that is requested, but not readily available. The Convention additionally obligates the Contracting States to report periodically to the Lake Tanganyika Authority on certain measures relevant to the environmental management of the Lake Basin and the implementation of the Convention. Article 21 specifies that the Convention shall not affect the established rights or obligations of Contracting States to protect personal information, intellectual property, and confidential information. It also directs the Contracting States to respect the confidentiality of confidential information they receive.” Hearn at 104.

⁴⁴ “[T]he most instructive examples seem to be the *Pacific Salmon Commission* and the *Great Lakes Water Quality Agreement*.” Sacred Responsibility, at 60.

⁴⁵ Sacred Responsibility, at 158.

⁴⁶ One example is the Columbia Basin Watershed Network which has a water quality database, including stream temperature, water chemistry, and macro and habitat data. For more information, see Columbia Basin Watershed Network, online: <http://cbwn.ca/dev/water-quality-database/>

⁴⁷ Data and information sharing also serve as a “precondition for data integration, joint modeling and common monitoring protocols.” Hearn 2014 at 104. For more information on the importance of information sharing and exchange in transboundary waters, see: Paisley, Richard K. and Taylor W. Henshaw. If You Can’t Measure it You Can’t Manage it: Transboundary Waters, Good Governance and Data & Information Sharing & Exchange. 203 *Int’l & Comp. L. Rev.* [Vol. 24:1] 2014.

information regarding the state of the resource and, among other things, how it is affected by resource use and development, land use practices and climate change.”⁴⁸ A governing body should begin by coordinating and synthesizing the existing data to understand where the collective knowledge base is complete and where more research needs to be done. This first step ensures that research is not being duplicated, thus allowing for research efforts to be more focused and streamlined. Traditional knowledge from tribes and First Nations should be respected and included in this information exchange.⁴⁹ The Lake Tanganyika Authority provides a detailed example of how data and information provisions can be built into the institutional structure.⁵⁰ Within the broader Columbia River Basin governance structure, the function of information sharing can be delegated to a sub-committee devoted to gathering and coordinating information exchange. Sub-groups, including Technical Committees, Advisory Committees, and Working Groups, are discussed in more detail below.

Coordinating Initiatives and Actions

A Columbia River Basin governance body also has the opportunity to coordinate initiatives and actions within local communities. There is no shortage of initiatives in the Columbia River Basin. Government agencies, tribes and First Nations, community organizations, and business groups have been engaged with issues concerning the Columbia River for years. These groups continue to proactively establish a wide range of initiatives within the Columbia River Basin. For example, in 2012-2013 the Columbia Basin Trust⁵¹ disbursed over \$18-million to projects in the Canadian-side of the Basin, including community development, water and environment projects, economic development and social and youth programs.⁵² Wildsight, an environmental non-profit

⁴⁸ Hearn 2014; Gerlak, A., Lautze J, Giordano M. Water resources data and information exchange in transboundary water treaties. 2011. *Int. Environ. Agreem.* 11(2): 179-199.

⁴⁹ Colonial governing structures often ignore traditional knowledge by focusing exclusively on western science. By discounting traditional knowledge, governing bodies perpetuate discriminatory, value-laden judgments of what is considered valid knowledge. Traditional knowledge, or “TEK” as it is often referred to, describes aboriginal, indigenous, or other forms of traditional knowledge regarding sustainability of local resources. It refers to a cumulative body of knowledge, belief, and practice handed down through generations through traditional songs, stories and beliefs.” *Sacred Responsibility*, at footnote 113.

⁵⁰ “Under the Convention on the Sustainable Management of Lake Tanganyika, Article 20 addresses information exchange between the Contracting States, directing them to exchange data and information concerning sustainable management of the Lake Basin and the implementation of the Convention. Contracting States are also directed to employ “best efforts” to provide data or information that is requested, but not readily available. The Convention additionally obligates the Contracting States to report periodically to the Lake Tanganyika Authority on certain measures relevant to the environmental management of the Lake Basin and the implementation of the Convention. Article 21 specifies that the Convention shall not affect the established rights or obligations of Contracting States to protect personal information, intellectual property, and confidential information. It also directs the Contracting States to respect the confidentiality of confidential information they receive.” Hearn 2014 at 104.

⁵¹ The Columbia Basin Trust was created in 1995 to negotiate compensation from the province to local community members who suffered losses from the changing environment associated with the Columbia River Treaty. The Columbia Basin Trust receives a portion of the benefits generated by the Treaty and manages ongoing payments to the region. For more see *Columbia River Treaty: A Primer* at 22.

⁵² *Columbia River Treaty: A Primer* at 22.

organization based in the Columbia and Rocky Mountains of Canada, has recognized the importance of having healthy Columbia headwaters and runs various programs aimed at protecting these headwaters.⁵³ The number of groups working to restore the Columbia River salmon fishery alone is impressive.⁵⁴ The establishment of a governing body to oversee the entire Columbia River Basin presents an opportunity to coordinate these efforts. Without coordination, there is a real possibility that efforts are being duplicated and opportunities for synergy are being missed. Within the Columbia River Basin governing structure, a sub-committee could be devoted to coordinating actions and initiatives.

Shared Decision-Making

Shared decision-making is a more contentious function of a Columbia River Basin transboundary watershed governance body. In the current Columbia River Treaty process, the Entities have decision-making power over two objectives in their mandate: flood management and hydropower generation. The Entities make decisions about “the operation of various dams and reservoirs for power production and for local and system-wide flood risk management.”⁵⁵ Shifting decision-making powers over flood management and hydropower generation in the Columbia River Basin from the Entities to a broader governance body may be met with resistance and will likely require careful negotiation. Simply put, “[t]he willingness of the federal entities in both countries to agree to such a broad in scope situation in which they would effectively lose management control over portions of the basin to a commission would need to be addressed.”⁵⁶

However, it is important to remember that the Entities are not the only players involved in governing the Columbia River Basin. Governance of the water and natural resources in the Columbia River Basin is complex;⁵⁷ it involves federal, state, provincial and municipal governments, local watershed organizations, and tribes and First Nations.⁵⁸ An important task is to “clarify the full range of governance arrangements operating at different spatial scales within the basin, from local to statewide to regional to transboundary. To improve the governance of water and related resources it is essential to understand (a) who is doing what? (b) where are there opportunities to share, leverage, and work together? and (c) where are there gaps that might need to be filled?”⁵⁹ When thinking about decision-making power within the Basin, it is important to adopt the nested governance approach discussed above. If shared decision-making

⁵³ Wildsight is one of many ENGOs working within the Columbia River Basin. For more information, see the Stakeholders section below. Wildsight, “About Us”, online: <http://www.wildsight.ca/about>

⁵⁴ For example, ENGOs including Save Our Wild Salmon, Wildsight, and Watershed Watch Salmon Society. For a paper detailing the reintroduction of salmon into the Upper Columbia Basin, see: Columbia Basin Tribes and First Nations, Fish Passage and Reintroduction into the U.S. and Canadian Upper Columbia: An Interim Joint Paper of the U.S. Columbia Basin Tribes and Canadian First Nations, (2014).

⁵⁵ Sacred Responsibility, at 32.

⁵⁶ University of Idaho and Oregon State University. Combined Report on Scenario Development for the Columbia River Treaty Review, at 68.

⁵⁷ Sacred Responsibility, at 19.

⁵⁸ Sacred Responsibility, at 6.

⁵⁹ Sacred Responsibility, at 62.

cannot be agreed upon, the objectives of information sharing and coordinating initiatives can be achieved through Track II diplomatic initiatives discussed in greater detail below.

Lessons from Case Studies: Scope of Issues

In addition to the broader objectives discussed above, there are a wide range of substantive issues that may form the subject matter of transboundary governance bodies. As noted in the Universities Consortium report, the “purpose and function of the case studies ranges from very narrow interests (e.g., the Pacific Salmon Commission’s focus on conserving and allocating salmon) to extremely broad mandates (e.g., the Lake Tanganyika Authority’s focus on protecting biodiversity and promoting sustainable development).”⁶⁰ The scope of issues included within the mandate of a transboundary governance body will depend on its political, social, and geographic context. The Pacific Salmon Treaty has a narrow mandate because it arose to address conflicts over one specific resource. At the other end of the spectrum, the Nile Basin Initiative is designed to “achieve sustainable socio-economic development through equitable utilization of, and benefit from, the common Nile Basin water resources.”⁶¹ This broad mandate was necessary to address the complex geopolitical situation within the Nile Basin. Again, a nested governance approach can be applied to understand what issues should be within the mandate of a transboundary governance body.

Columbia River Basin: Scope of Issues

It is necessary to decide on the scope of substantive issues within the mandate of a Columbia River Basin governance body. The governance body should be designed to address a comprehensive set of issues while remaining focused on the issues that require transnational coordination; selecting an appropriate scope of issues requires a balance between comprehensiveness and efficiency. The Columbia River Basin involves a unique set of substantive issues, including but not limited to:

- Hydropower;
- Flood management;
- Ecosystem-based function;
- Restoration of salmon;
- Climate change;
- Irrigation and agriculture;

⁶⁰ Sacred Responsibility, at 60.

⁶¹ Sacred Responsibility, at 180. Nile Basin Initiative, online:
http://www.nilebasin.org/index.php?option=com_content&task=view&id=13&Itemid=42

- Navigation;
- Recreation and tourism;
- Water quality; and
- Water supply.

The current scope of the Columbia River Treaty is limited to two main issues: hydropower benefits and flood management. Tribes and First Nations, along with community organizations, have been calling for ecosystem function to be included as a third issue dealt with by a Columbia River Basin governance body. The Columbia River Treaty Review recommendations in both Canada and the United States identify ecosystem-based function as a key component for the future of the Columbia River Treaty.⁶² At the very least, a Columbia River Basin governing body should be designed to effectively address ecosystem function. Climate change is another issue that both Canada and the United States agree should be incorporated into governance of the Columbia River.⁶³

However, a comprehensive Columbia River Basin body would need to address all of the issues listed above -- because it is difficult to meaningfully address one issue without considering the rest. These topics could be separated into sub-committees designed to focus on one issue, such as an expert panel on climate change.

Who? Membership and Involvement in Transboundary Governance

Determining membership is an important consideration of any governance body. Transnational governance bodies often involve three levels of participation: 1) a high-level decision-making body; 2) a mid-level group for technical and scientific analysis; and 3) a secretariat for implementation.⁶⁴

There are already a wide range of organizations involved in governing the Columbia River Basin. A Columbia River Basin governing body should reflect the existing participation by

⁶² Recommendation from Canada: "Ecosystem values are currently, and will continue to be, an important consideration in the planning and implementation of the Treaty...The Province will explore ecosystem based improvements recognizing that there are a number of available mechanisms inside and outside the Treaty." Recommendation from the United States: "The health of the Columbia River ecosystem should be a shared benefit and cost of the United States and Canada...In order to achieve the goal of modernizing the Treaty to further ensure a more comprehensive ecosystem-based function approach throughout the Columbia River Basin watershed, the region recommends the following"

⁶³ Recommendation from Canada: "Adaptation to climate change should be incorporated in Treaty planning and implementation."

Recommendation from the United States: "The region anticipates impacts from climate change to all of the elements described in this document. The strategy for adapting the Treaty to future changes in climate should be resilient, adaptable, flexible, and timely as conditions warrant."

⁶⁴ Hearn 2014 at 109.

“includ[ing] representatives working at different spatial scales beginning with (a) the nearly 100 or more local watershed stewardship groups (b) states and provinces; (c) regional organizations, such as the Columbia Basin Trust and the Northwest Power and Conservation Council; (d) tribes and First Nations; (e) Treaty Entities; and (f) existing transboundary governance arrangements.”⁶⁵ This is a long list of potential members to organize. A model that limits decision-making power to a small core group while allowing for broad participation through sub-groups and committees could be a potential option for the Columbia River Basin.

Decision-Making: Membership

Lessons from Case Studies: Voting Membership

The examples of transboundary governance agreements highlight the need to differentiate between those with decision-making power and other ‘stakeholders’ invited to participate but without formal decision-making power. Hearn *et al.* explain that “[a]n effective institutional design should have clear provisions that include rules for the membership of the decision-making body, the levels of decision-making and the voting rules.”⁶⁶

A core decision-making body (sometimes referred to as a Board or a Committee) is part of a larger group of non-voting members that serve other important functions. Non-voting members can also be organized into sub-groups such as Technical Committees, Advisory Councils, and Working Groups, which are discussed in further detail below. Regardless of the finalized voting structure, it is important to ensure that each member has a clear role and that these roles are neatly delineated.

In most of the formal arrangements included as case studies in the Universities Consortium report, only national government officials were involved in decision-making.⁶⁷ Indigenous governments were involved in a decision-making capacity in a select few transboundary governance agreements. One example is the Pacific Salmon Commission, a result of the Pacific Salmon Treaty, signed between Canada and the United States. The Pacific Salmon Commission consists of four commissioners from each country. In the United States, one commissioner is appointed from the federal government, one is from a list nominated by the Governor of Alaska, one from a list nominated by the Governors of Oregon and Washington, and one from a list nominated by treaty Indian tribes of Washington, Oregon, and Idaho. Canada traditionally had

⁶⁵ Sacred Responsibility, at 63.

⁶⁶ Hearn 2014 at 104; Draper S. Administration and institutional provisions of water sharing agreements. 2007. *Journal of Water Resource Planning and Management*. 133: 446-455.

⁶⁷ Sacred Responsibility.

one First Nations commissioner until 2013 when the First Nations appointment was not renewed.⁶⁸

Columbia River Basin: Voting Members

A review of existing transboundary governance arrangement reveals that a variety of possible voting structures exist. The membership structure of a Columbia River Basin group should be designed to fit the unique needs of the Basin. On the Canadian side, eighteen bands affiliated with various First Nations (including Ktunaxa, Okanagan, Sinixt, and Secwepemc) retain rights in the Columbia River Basin within the province of British Columbia.⁶⁹ In the United States, the Basin includes the lands of fifteen tribal nations and portions of the states of Oregon, Washington, Idaho, Montana, Utah, Wyoming and Nevada. In the Columbia River Basin, voting membership should include representatives for the interests of tribes and First Nations, states and provinces, and federal governments.

A structure similar to that of the Pacific Salmon Commission with an equal number of commissioners from Canada and the United States might be well-suited to the Columbia River Basin. As mentioned above, the Pacific Salmon Commission includes four commissioners from each country. On the United States' side, one of four commissioners represents the interests of the treaty Indian tribes of Washington, Oregon, and Idaho. Until 2013 Canada had a First Nations commissioner. Thus, Indigenous participation in decision-making within the Pacific Salmon Commission has been far more substantial than in many other transnational governance bodies.

In the Pacific Salmon Commission, each country has only one vote. This model is attractive because it encourages collaboration amongst the commissioners and allows for each country to present a united front. However, it could be problematic because commissioners representing a country may not share the same interests. It is entirely conceivable that Canadian commissioners representing indigenous interests, provincial interests, and federal interests might not reach consensus on an issue. Another possible model is to give a vote to each member (instead of each country). This model allows representatives from the same country to vote differently; this would allow for collaboration between parties across the border, including between indigenous governments in Canada and the United States. A potential drawback of this model is that it would be more difficult to reach a consensus with more voting members. Another example is the Flathead Reservation Water Management Board which has five voting members: two selected by the Governor, two appointed by the Tribal Council, and one selected by the other four

⁶⁸ James Keller. First Nations appointments to Pacific Salmon Commission not renewed. 14 January 2013, online: <http://www.theglobeandmail.com/news/british-columbia/first-nations-appointments-to-pacific-salmon-commission-not-renewed/article7340302/>

⁶⁹ Sacred Responsibility, at 16.

members.⁷⁰ Based on this model, another alternative for the Columbia River Basin is for each country to have one indigenous vote and one colonial government vote. Regardless of the model selected, clear and transparent protocols for electing representatives must be established.

Decision-Making: Voting Procedures

Lessons from Case Studies: Voting Procedures

In addition to determining who gets to vote, it is important to consider how decisions are made. There is no single voting procedure used in all case studies. Decision-making bodies usually require unanimity, consensus, or majority voting. For example, in the Pacific Salmon Commission, each country gets one vote.⁷¹ This requires federal, state, and Tribal governments to collaborate, compromise and reach consensus on each decision. In the International Commission for the Protection of the Danube River, each country has one vote and decisions are made based on a 4/5 majority.⁷² Another model is to use different voting requirements depending on the type of decision being made. For example, in the International Commission for the Protection of Lake Constance, substantive decisions require unanimity while procedural decisions only require a majority.⁷³

Columbia River Basin: Voting Procedures

Voting procedures set out what level of consensus is required for decisions to be finalized. The Pacific Salmon Commission model – with only one vote per side – requires unanimity. This gives each party a veto which may be the only option for politically charged decisions.⁷⁴ However, with more voting members consensus becomes more difficult to achieve; this could stall progress and leave important issues at a stand-still. Another possibility is to require different levels of consensus depending on the nature of the decision being made. Decisions that are not politically sensitive (i.e., technical in nature or dealing with changes in internal processes) could be made via majority votes while substantive, politically charged questions could require consensus.⁷⁵

⁷⁰ “Proposed Unitary Administration and Management Ordinance” (“Ordinance”), January 2015, at page 6, 1-1-101. Authority. online: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2015-appendix_4_proposed_umo.pdf/view.

⁷¹ Sacred Responsibility, at 56.

⁷² Sacred Responsibility, at 176.

⁷³ Sacred Responsibility, at 175.

⁷⁴ Draper S. Administration and institutional provisions of water sharing agreements. 2007. *Journal of Water Resource Planning and Management*. 133: 446-455.

⁷⁵ In the International Commission for the Protection of Lake Constance issues concerning administration and procedures are decided with a simple majority while decisions of the Commission are taken with all parties present and unanimously. Sacred Responsibility, at 175.

Dispute Resolution

Another important consideration is how to deal with disputes that will inevitably arise within the decision-making core group. Disputes could include “differences in interpretation of the agreement’s provisions or noncompliance with the agreement itself. Disputes may also arise because of changing conditions that alter the effectiveness of the agreements for one or more of the parties.”⁷⁶ Dispute resolution processes “fulfil a number of key objectives including: (1) reinforcing proactive problem solving and dispute prevention; (2) delivering a remedy based on the facts; (3) resolving disputes and utilizing the human and financial resources of basin states as efficiently as possible; and (4) reducing the risks associated with cooperative management and investment and expanding the potential for mutual gain.”⁷⁷ The most common mechanisms to settle disputes are “direction negotiations, non-binding mediation, or binding arbitration or adjudication by an international institution.”⁷⁸ Hearn *et al.* set out the dispute resolution process of the current Columbia River Treaty in detail:

Article XVI provides that a dispute may be referred by either the United States or Canada to the International Joint Commission. If the IJC does not render a decision within three months of the referral or within another period agreed to by the United States and Canada, either country may submit the dispute to arbitration. The CRT mandates that arbitration must be by a tribunal composed of a member appointed by Canada, a member appointed by the United States and a member appointed jointly by the United States and Canada who shall be Chairman... Decisions of the IJC or of an arbitration tribunal (by a majority of members) are binding and definitive on the parties. The United States and Canada may agree, by an exchange of notes, to use alternative procedures for settling differences arising under the CRT.⁷⁹

Another practical way of resolving disputes is to have an internal dispute settlement body designed for this specific purpose. In the Pacific Salmon Commission, disputes are submitted to the Chairman of the Commission who then refers disputes to the Technical Dispute Settlement Board.⁸⁰ The decisions of settlement bodies can be either binding or non-binding depending on the nature of the dispute. Regardless of the specific form, it is imperative that a dispute resolution process is in place to deal with conflicts that will inevitably arise within a Columbia River Basin governance body.

⁷⁶ Hearn 2014, at 105.

⁷⁷ Hearn 2014.

⁷⁸ Berardo R, A Gerlak. Conflict and cooperation along international rivers: crafting a model of institutional effectiveness. 2012. *Global Environmental Politics*. 12(1): 101-120.

⁷⁹ Hearn 2014, at 105-106. “If within six weeks of the delivery of a notice of arbitration, either country has failed to appoint its member to the arbitral tribunal, or they are unable to agree upon the member who is to be Chairman, either country may request that the President of the IJC appoint the member(s).”

⁸⁰ Sacred Responsibility, at 164.

Sub-Groups

Lessons from Case Studies: Sub-Groups

In addition to the core, decision-making body, an effective transboundary governance structure will also include sub-groups tasked with fulfilling specific functions relevant to the mandate of the larger governance body. These sub-groups form the mid-level of a governance structure. It must be clear how these sub-groups fit within the broader structure of a governing body and, in particular, what function they serve in relation to the decision-making body. It is important to maintain clear separation between sub-groups and the decision-making body. As Bankes and Cosens note in their paper on adaptive water governance:

The separation of the decision making body from the scientific advisory body in the [Great Lake Water Quality Agreements] GLWQAs allows adjustment as social and ecological conditions changed without placing that discretion on technical agencies that lack a representative link to the public. Decision making discretion in the hands of technical entities tends to reduce legitimacy and accountability unless carefully constrained and embedded in a process that allows public involvement.⁸¹

Sub-groups could be designed to gather information for the decision-making body or to make specific recommendations to the decision-making body. These sub-groups can be categorized in different ways, including but not limited to:

- Regional panels;
- Technical Committees;
- Expert Panels;
- Advisory Councils; and
- Working Groups.

Regional panels are created to represent the interests of a specific geographic area.

Transboundary water governance bodies generally govern areas that contain numerous distinct geographic regions, often separated into watersheds. Regional panels are a helpful way of ensuring that the governing body provides comprehensive governing of the area, while adopting a nested governance structure informed by the principle of subsidiarity. Regional panels can be thought of as distinct governing bodies; they can have decision-making power over issues that are best addressed at a local watershed level and reporting duties to the core decision-making body. An example of reporting duties is the Pacific Salmon Commission, which has four regional panels (Northern, Transboundary, Fraser River, and Southern) responsible for providing advice to the Commission on the management of salmon fisheries in their respective regions.⁸² In

⁸¹ Bankes and Cosens 2014, at 53.

⁸² NOAA, Treaty Between the Government of the United States of American and the Government of Canada Concerning Pacific Salmon, online: http://www.nmfs.noaa.gov/ia/intlagree/docs/PSC_IA_Book.pdf

addition to representing regional interests to the core decision-making body, regional panels could also have decision-making capabilities over local issues.

Technical Committees can provide specific technical know-how to the decision-making body. For example, the bilateral technical committees (Technical Committees, Standing Committees, and Restoration and Enhance Fund Committees) inform the Pacific Salmon Commission about particular areas of interest.⁸³ The Columbia River Treaty Entities have already “created a number of bilateral committees to assist them in fulfilling their obligations under the Treaty: an Engineering Committee, an Operating Committee and a Hydrometeorological Committee. These committees provide the basis for ongoing weekly and even daily co-operation and problem-solving.”⁸⁴

Under the Great Lakes Water Quality Agreement, the Great Lakes Science Advisory Board was created to provide advice on research and scientific matters referred to it by the Commission or the Great Lakes Water Quality Board. More specifically, the Science Advisory Board provides advice, analysis, review, or support for: scientific reports related to water quality issues in the Great Lakes Basin Ecosystem; science-based materials prepared by the Commission; identification of specific programs for which binational or international cooperation is desirable and promote communication, cooperation, collaboration, and coordination between these scientists, managers and organizations; efforts to identify the support of binational experts; and compilation and synthesis of research activities and findings pertinent to the GLWQA.⁸⁵ The Science Advisory Board consists of a Research Coordination Committee and the Science Priority Committee. It includes an equal number of Canadians and Americans and is co-chaired by one Canadian member and one American member. The Science Advisory Board has coordinated and released important reports that have helped address water quality issues in the Great Lakes region, including reducing the levels of algae and toxic chemicals in the lakes.

Columbia River Basin: Sub-Groups

A Columbia River Basin Transboundary governance structure can capitalize on the organizations, agencies, and community groups that already exist within the region. Regional panels would be particularly useful in establishing a nested governance structure explained above. Given the numerous, distinct regions within the Columbia River Basin, regional panels that understand the issues of each local watershed may be the best way to represent the wide range of interests in the Basin. These regional panels could serve an information-gathering function by collating local interests and presenting them to the decision-making body. It would also be useful to create expert panels tasked with investigating distinct subject areas, including but not limited to:

⁸³ Committees, Pacific Salmon Commission, online: http://www.psc.org/about_org_committees.htm.

⁸⁴ Banks and Cosens 2014, at 22.

⁸⁵ Great Lakes Science Advisory Board, “Authorities”, online: http://ijc.org/en/_sab/Authorities

- Climate change;
- Salmon restoration;
- Navigation;
- Recreation and tourism;
- Hydrological monitoring (water quantity and quality);

The Great Lakes Science Advisory Board is an attractive model that has achieved tangible results in reducing pollution in the Great Lakes region. This model could be adopted in the Columbia River context to capitalize on the existing technical expertise within the region. Another possibility is to establish a working group responsible for public engagement within the Basin.⁸⁶

Stakeholder and Public Participation

Lessons from Case Studies: Stakeholder and Public Participation

Successful governance of an area as broad and complex as the Columbia River Basin will require meaningful engagement with the public. The United Nations report on Transboundary Waters highlights that public participation is:

fundamental to maximize agreement, enhance transparency and decision-making, create ownership and facilitate the acceptance and enforcement of decisions and policies. It is also a mechanism for gaining a better or common understanding between the various stakeholders on the nature of a given problem and the desirability of specific outcomes. Stakeholder participation strengthens integration, thereby contributing to conflict prevention, and risk reduction.⁸⁷

Another practical reason for encouraging public participation is that the people with their eyes and ears on the river have valuable insights into how the river should be managed. Since the Columbia River Treaty was ratified, there has been “pervasive change in the legal governing process [stemming] from the now global demand for greater public access to information and public participation in governmental decision making.”⁸⁸ Despite its increasing importance in civil society, public participation in transboundary governance structures (through stakeholders and/or individual citizens) is rare and, where it exists, limited in scope. As noted in the Universities Consortium report, “out of 119 river basin organizations, only 44 have any public

⁸⁶ University of Idaho and Oregon State University. Combined Report on Scenario Development for the Columbia River Treaty Review, at 30.

⁸⁷ United Nations-Water. 2008. Transboundary Waters: Sharing Benefits, Sharing Responsibilities. UN Thematic Paper at 1.

⁸⁸ University of Idaho and Oregon State University. Combined Report on Scenario Development for the Columbia River Treaty Review, at 8-9.

participation mechanisms defined at all.”⁸⁹ Where it does exist, “public participation...is most often understood as information sharing only.”⁹⁰

Columbia River Basin: Stakeholder and Public Participation

Development of a new governance body provides an opportunity to improve the relatively weak participation of the public in the Columbia River Basin governance. Participation of the public can be achieved by involving existing organizations as well as engaging individual citizens. It is important to involve members of the public in discussions that will be directly affecting them. Regional panels, discussed above, can be particularly effective at achieving this goal. Public participation can range from information sharing (i.e. informing members of the public through e-mails, website updates, publications etc.) to including members of the public as representatives in sub-groups. Another possibility is to allow residents of the Columbia River Basin the ability to apply for a formal investigation into an issue within the mandate of the Columbia River Basin governing structure. Other examples for increasing participation of the public can be found in *Guide to Public Participation under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes*.⁹¹

Another effective way of involving the public in governance of the Columbia River Basin is to include existing organizations as stakeholders.⁹² Often these organizations have the most expertise in specific topic areas as a result of being engaged with these issues for decades. The involvement of community-based watershed stewardship groups seems particularly important. As noted in the Universities Consortium report, “over 50 multi-stakeholder, community-based watershed groups provide a local forum to solve water and related natural resource issues within particular watersheds in the basin.”⁹³

Examples of existing Canadian organizations that could be included as stakeholders include, but are not limited to:

- The Columbia Basin Watershed Network, which “strives to ensure that local water groups have the resources and knowledge they need to address their watershed priorities and concerns.”⁹⁴
- The Canadian Columbia River Forum “provides an information-sharing forum in which the participants can collaborate on initiatives and processes that affect the Canadian

⁸⁹ Sacred Responsibility, at 61.

⁹⁰ Sacred Responsibility, at 61.

⁹¹ *Guide to Public Participation under the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (United Nations Economic Commission for Europe, 2013)

⁹² It is important to recognize that tribes and First Nations are sovereign entities with distinct rights; they should not be referred to as “stakeholders” or “public participants”.

⁹³ Sacred Responsibility, at 29.

⁹⁴ Columbia Basin Watershed Network, About Us, online: <http://cbwn.ca/dev/about-us/>

portion of the Columbia River Basin. The Canadian Columbia River Forum represents seventeen Canadian federal, provincial, regional and First Nation agencies committed to collaborating on water-management initiatives in the transboundary-reach of the Canadian Columbia River Basin. This networking and information sharing forum brings together decision-makers to collaborate on existing and emerging water management issues that influence the Columbia Basin in Canada.”⁹⁵

- The Columbia Basin Regional Advisory Committee “[m]embers include local government elected officials, First Nations, BC Hydro, MEM, and community citizens. The purpose of the Committee is to 1) act as “sounding board” on Columbia River Treaty reports and other information, providing feedback, opinions and suggestions for improvement; 2) provide feedback to key CRT review questions, in particular regarding Basin interests (e.g. environment, socio-economic, domestic; and 3) help inform recommendations to government on the future of the CRT.”⁹⁶

Adaptive Management

Adaptive management⁹⁷ is a broad term used to describe a “structured, iterative process of robust decision making in the face of uncertainty with an aim to reducing uncertainty over time via system monitoring.”⁹⁸ Adaptive management is necessary to respond to changing times. In a recent report, *Protocols for Adaptive Water Governance: The Future of the Columbia River Treaty*, Bankes and Cosens investigate adaptive water governance in great detail. Bankes and Cosens explain that adaptive management involves “models for authority to monitor for change, alter implementation in response to change, and revisit goals from time to time.”⁹⁹ It involves “build[ing] flexibility and resilience into the governance structure, thus enhancing the ability to adapt and effectively address current and future challenges.”¹⁰⁰ Adaptive management requires finding a balance between flexibility and stability. As Bankes and Cosens note, “[r]ecognizing that the introduction of flexibility creates a tension with one of the primary goals of a transboundary agreement which is to create certainty and stability in relations, a stable

⁹⁵ Sacred Responsibility, at 29

⁹⁶ Sacred Responsibility, at 29.

⁹⁷ From Sacred Responsibility at footnote 123: “Adaptive management (AM), also known as adaptive resource management (ARM) or active adaptive management (AAM), is a structured, iterative process of robust decision making in the face of uncertainty, with an aim to reducing uncertainty over time via system monitoring. In this way, decision making simultaneously meets one or more resource management objectives and, either passively or actively, accrues information needed to improve future management. Adaptive management is a tool that should be used not only to change a system, but also to learn about the system. Because adaptive management is based on a learning process, it usually improves long-run management outcomes. The challenge in using the adaptive management approach lies in finding the correct balance between gaining knowledge to improve management in the future and achieving the best short-term outcome based on current knowledge.”

⁹⁸ Hearn 2014, at 109.

⁹⁹ Bankes and Cosens 2014, at 20.

¹⁰⁰ Brandis, O. and D. Curran. 2009. Setting a New Course in British Columbia – Water Governance Reform Options and Opportunities. Prepared for the British Columbia Ministry of the Environment, Water Stewardship Division by the POLIS Project on Ecological Governance.

organizational structure that is itself capable of evolving is essential to creating a safe and legitimate space for flexibility.”¹⁰¹ In the context of transboundary water governance, adaptive management can take on many forms.

Lessons from Case Studies: Adaptive Management

Adaptive management was incorporated to varying degrees in the transboundary water governance case studies profiled in the Universities Consortium report. Many of the case studies did not allow for any adaptive management. Other transboundary water arrangements, including the Pacific Salmon Treaty (PST), have incorporated adaptive management in meaningful ways. Banks and Cosens explain that:

[the] entire structure of the PST emphasizes the need for flexibility and adaptation in relation to the Pacific salmon fishery. This is apparent in the very architecture of the treaty (annexes which can be amended from time to time) but also in the annual cycle that pervades all of the arrangements including the technical chapters of the important Annex IV. It is indeed an inherent part of a fishery with an annual escapement and regular spawning and return cycles that catch limits and the like must also be revisited on an annual and in-season basis as more information becomes available on returns and actual catch levels.¹⁰²

The Pacific Salmon Treaty has been adapted to respond to changing political and environmental contexts several times. The most significant change was the addition of an entire new chapter to include the Yukon region into the Treaty. Another example is the Great Lakes Water Quality Agreements with a “requirement of monitoring and provision for addition of new annexes without revisiting the entire agreement, and provision for amending the agreement.”¹⁰³ Exchange of diplomatic notes was the method used to amend existing agreements for the Great Lakes and the Rio Grande and Colorado rivers to accommodate adaptation to climate change.¹⁰⁴ The Treaty between the United States and Mexico outlining water-use of the Colorado and Tijuana Rivers and the Rio Grande is a great example of adaptive management.¹⁰⁵

¹⁰¹ Banks and Cosens 2014, at 19.

¹⁰² Banks and Cosens 2014, at 60.

¹⁰³ Banks and Cosens 2014, at 54.

¹⁰⁴ Columbia River Treaty: A Primer, at 130-31.

¹⁰⁵ “The Agreement is extremely flexible in that the overarching accord can be modified and updated by allowing for significant decisions to be made by the International Boundary and Water Commission through the creation of Minutes, which have legal standing... Significant decisions can thus reflect current and contemporary values while fundamentally maintaining the spirit and intent of the original accord...The ability of the [International Boundary and Water Commission] to adapt, amend, and extend the institutional arrangement between Mexico and the United States is a powerful tool to develop a resilient form of cooperation... For example, Minutes have been utilized to adjust water allocations, as well as address salinity issues that have arisen since the signing of the Treaty in 1944. Recently, they have been utilized to adjust the set delivery schedules of water allocated for Mexico due to infrastructure damage associated with an earthquake in April 2010.” Hearn 2014 at 107. See also: Hearn G, RP Paisley. Lawyers write treaties, engineers build dikes, gods of weather ignore both: making transboundary waters

In *The Columbia River Treaty: A Primer*, Sandford, Harford, and O’Riordan note that “[t]he jurisdictions that have most successfully incorporated meaningful climate change provisions into international agreements are those that have overarching joint governance over the entire basin and where legal flexibility is built into their amending procedures.”¹⁰⁶

Columbia River Basin: Adaptive Management

The Columbia River Treaty is a great example to highlight the importance of adaptive management in transboundary water governance structures. Since the signing of the Treaty in 1964, the political, social, and environmental context within the Columbia River Basin has changed considerably. Sandford *et al.* describe some of these changes including:

a new awareness of the rights of indigenous peoples; of the mounting global pressure on fresh water availability; of the implications of that pressure for ecosystem health, food security and the need for renewable energy sources; and of the changing values of all of these things in the context of threats posed by climate change.¹⁰⁷

These significant changes demonstrate the importance of having a governance structure that is able to respond to shifting circumstances. Bankes and Cosens note that “some of the assumptions on which the [Columbia River Treaty] was predicated, including those involving energy sources...as well as public values concerning the environment did not play out in the manner anticipated.”¹⁰⁸ In addition, uncertainty will likely increase in the future as “climate change reduces the ability of managers to rely on the historic water record in planning for system management.”¹⁰⁹

Adaptive management is not explicitly referenced in the existing Columbia River Treaty regime; however, in practice, the Treaty allows for some adaptive management through mechanisms available to the Entities. The Entities “have been quite adept at problem-solving over the years both to meet their own needs but also to meet needs imposed upon them by others including, for example, requirements for fish flows by regulators on both sides of the boundary.”¹¹⁰ This adaptive management is still mostly limited to the objectives of flood management and hydropower generation.

It is imperative for any Columbia River Basin governance structure to be able to adapt to changing circumstances.¹¹¹ Both review processes in Canada and the United States “recognized

agreements relevant, flexible, and resilient in a time of global climate change. 2013. Gold. Gate Univ. Environ. Law J. 6(2): 259-294.

¹⁰⁶ Columbia River Treaty: A Primer, at 130

¹⁰⁷ Columbia River Treaty: A Primer, at 25.

¹⁰⁸ Bankes and Cosens 2014, at 2.

¹⁰⁹ Bankes and Cosens 2014, at 2.

¹¹⁰ Bankes and Cosens 2014, at 32.

¹¹¹ “Effective governance should include a periodic review of the basin context and of the institutional arrangement developed. This is important because the physical nature and resources of the basin or marine body

the difficulty of predicting the future and acknowledged the uncertainty in water supply, demand, and timing of flow that may come with climate change; both recognized that this might warrant a degree of flexibility in the next generation of Columbia River management.”¹¹² Meaningful adaptive management will require mechanisms for monitoring, built-in flexibility to address any detected changes, and an ability to revisit the mandate from time-to-time. Bankes and Cosens advise that “[t]he focus must be on assuring both parties have the ability to raise the prospect of change, both parties have equal bargaining power in addressing that change, and both parties have influence over the outcome.”¹¹³

Another Alternative: Track II Diplomacy

Track II diplomacy, a term first used in 1981, has become increasingly recognized as a method of resolving conflict and developing creative ways to solve problems. Track II diplomacy was created to distinguish official diplomatic activities (Track I diplomacy) from unofficial interactions. Joseph Montville, the founder of the term, states that “[i]ts underlying assumption is that actual or potential conflict can be resolved or eased by appealing to common human capabilities to respond to good will and reasonableness.”¹¹⁴ Track II diplomacy refers to “non-governmental, informal, and unofficial contacts and activities between private citizens or groups of individuals, sometimes called ‘non-state actors.’”¹¹⁵

As explained in the Universities Consortium report:

Track II diplomacy contrasts with Track I diplomacy, which can be defined as official, governmental diplomacy that occurs inside official government channels. Track II diplomacy is not a substitute for Track I diplomacy. Rather, Track II diplomacy assists official actors to manage and resolve conflicts by developing options and exploring possible solutions derived from inclusive, informed, and deliberative dialogue – which is not constrained by the expectations and requirements of formal negotiation via Track I diplomacy.¹¹⁶

Track II diplomatic initiatives typically include workshops sponsored by neutral, non-governmental organizations. These workshops bring together influential academic, NGO, and religious leaders often alongside government officials working in a personal capacity. One of the main ground-rules for Track II diplomacy is to ensure that participants are not negotiating, but

may change and because the socio-economic values and drivers in the transboundary waters situation often change over longer periods of time.” Hearn GS., Henshaw TW, and RK Paisley. Getting what you need: Designing institutional architecture for effective governance of international waters. 2014. Environmental Development 11: 98-111.

¹¹² Bankes and Cosens 2014, at iv.

¹¹³ Bankes and Cosens 2014, at 21.

¹¹⁴ Montville and Davidson, “Foreign Policy According to Freud”, Foreign Policy, 1982.

¹¹⁵ Diamond, Louise, and John McDonald, *Multi-Track Diplomacy: A Systems Guide and Analysis*, Occasional Paper No. 3, Grinnell, Ia.: Iowa Peace Institute, June 1991.

¹¹⁶ Sacred Responsibility, at 62.

instead, are exploring new ideas. In this way, Track II dialogues work to assist Track I diplomatic initiatives, but not replace them. Another key feature of Track II diplomatic initiatives is that individuals are not held to what they express during conversations. Dialogues are nonbinding, discussions are off-the-record, and individual comments are not published.¹¹⁷ This ensures individuals are free to express views and ideas that may not be in-line with the interests they officially represent.

Track II diplomacy can serve a variety of goals. One of the most important functions is to aid in relationship and trust-building through ‘confidence building measures’ (CBMs). Track II dialogue aims to open channels of communication between individuals that might have pre-existing barriers to honest discussion. This is achieved by providing a forum where ideas and views can be expressed without any political commitment and by facilitating open conversations. Track II initiatives can build better relationships by breaking down negative stereotypes and changing deep-rooted attitudes. All this relationship and trust building will often translate into important substantive results. For example, some key agreements in the South China Seas initiative were later adopted as official Codes of Conduct between participant nations. Track II diplomacy allows space to generate creative ideas that might not be raised in the official context. As Montville describes, one goal of track II diplomacy is to create a space “that makes it safe for political leaders to take risks for peace.”¹¹⁸

Track II Diplomacy in the Columbia River Basin

In the Columbia River Basin, most of the attention on both sides of the border has been on official Track I diplomatic efforts to renegotiate the Columbia River Treaty. All eyes have been on the official Treaty modernization process and the recommendations released by the Province of British Columbia and the Entities in the United States. Individuals and organizations have been urging both sides to include ecosystem-based function, adaptive management, climate change, and the reintroduction of fish in the modernization of the Treaty. Groups have been calling on the governments to share decision-making power with tribes and First Nations by establishing co-governance arrangements and to enhance public participation opportunities. Most of these efforts have focused on the official Treaty renegotiation.

The Universities Consortium on Columbia River Governance is a welcome exception to this trend. Established in 2008, the Universities Consortium is a collaboration among representatives of University of British Columbia, University of Idaho, University of Montana, Oregon State University, and Washington State University. One of the main focuses of the Consortium thus far

¹¹⁷ Track II dialogues typically operate under Chatham House rules: “When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.” Chatham House, Royal Institute of International Affairs, online: <http://www.chathamhouse.org/about/chatham-house-rule>

¹¹⁸ Montville J.V. Track Two Diplomacy: The Work of Healing History. *The Whitehead Journal of Diplomacy and International Relations*, Summer/Fall 2006, at 17.

has been on developing a research program to guide policy decisions concerning the Columbia River Treaty. The Consortium also has broader goals that echo those of previous Track II diplomatic initiatives, including “to offer a nonpartisan platform to facilitate an informed, inclusive dialogue among key decision-makers and other interested people and organizations.”¹¹⁹

In some ways, the Universities Consortium can be seen as the beginnings of a Track II diplomatic process. The Consortium organizes annual symposia that are unofficial and governed by the Chatham House Rule.¹²⁰ In these symposia, “every person is participating on their own behalf and does not represent any organization or institution in any official capacity.”¹²¹ This is a key component of any Track II initiative. The main purposes of these symposia also parallel those common in Track II initiatives. The symposia are designed to create a safe space for information exchange, mutual learning, and relationship building. Beyond relationship building, the symposia aim to “explore complex Treaty and international river governance issues, and help shape the future of the Columbia River Basin” and not to “stake out positions or to negotiate solutions per se.”¹²² Again, these goals match up quite closely with the main goals of Track II initiatives discussed above.

Important lessons can be learned from existing Track II diplomacy efforts and applied in the Columbia River Basin context. In *Track II Diplomacy and the GW MDFZ*, Peter Jones postulates how Track II diplomacy could be used in creating a Weapons of Mass Destruction Free Zone (WMDFZ) by:

developing a cadre of regional experts who are conversant with the technical and political dimensions of these complex questions; and providing a low-risk, non-committal platform for the experts and the countries of the region to educate each other as to their views, and begin to develop common understandings of the concepts involved... the region needs to develop a sense of Track Two as a partner in the incubation and development of new ideas... a network of regional institutions needs to be created which is capable of carrying on such an effort. These institutions need to be at arms length from government, to provide the required non-official character and ability to “think outside of the box” of official positions.¹²³

¹¹⁹ Universities Consortium on Columbia River Governance, “About Us”, online: <http://www.columbiarivergovernance.org/About-Us.html>

¹²⁰ For agendas, handouts, powerpoint presentations and meeting summaries from these symposia, see: <http://www.columbiarivergovernance.org/Annual-Symposia.html>

¹²¹ Universities Consortium on Columbia River Governance, “Annual Symposia”, online: <http://www.columbiarivergovernance.org/Annual-Symposia.html>

¹²² Universities Consortium on Columbia River Governance, “Annual Symposia”, online: <http://www.columbiarivergovernance.org/Annual-Symposia.html>

¹²³ Jones, P. *Track II Diplomacy and the GW MDFZ*, online: <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=56149>

Similar lessons can be applied in the Columbia River Basin. Regional experts with knowledge of the technical complexities and political angles could be brought together, alongside government officials, in a non-committal forum to develop common understandings of the issues present in the Columbia River Basin. It is important that this institution be arms-length from the government to allow for more candid discussion and more risk taking.

In *A Sacred Responsibility*, the Universities Consortium acknowledges the need for “an independent, ongoing transboundary ‘forum’ to inform, invigorate, and supplement the more formal governing arrangements within the Columbia Basin, and to promote a ‘whole basin’ approach to governance.”¹²⁴ The report notes that tribes and First Nations “seem to be increasingly interested in helping catalyze, convene, coordinate, and/or lead an inclusive, robust, meaningful, and effective transboundary forum.”¹²⁵ This forum would address “the lack of an ongoing, inclusive forum for transboundary dialogue, learning, coordination, and problem-solving.”¹²⁶

In many ways, the Universities Consortium already has the qualities of a fledgling Track II diplomatic initiative. It is designed to facilitate an informed, inclusive dialogue among key decision-makers and other interested individuals and organizations. As it stands, with on-going annual symposia and a well-established research program, the Consortium could be seen as a light form of Track II diplomacy. This foundation offers an exciting opportunity to explore the potential of this initiative and raises important questions about Track II diplomacy in the Columbia River Basin. These include, but are certainly not limited to:

- Membership – Who should be part of a Track II diplomatic initiative? Who should be excluded?
- Scope of Issues – What topics should this body address?
- Purpose/Structure – How formalized should this body be? What kind of structure allows for efficient operations?
- Substantive Results – What results could be expected from this type of initiative? How can Track II initiatives influence formal decision-making?
- Funding – How will this body be funded? How can funding remain neutral to remove any allegations of bias? How can funding remain consistent?

In an attempt to answer some, but not all, of these questions, this section will introduce two existing Track II initiatives as case studies and will draw important lessons from them. These case studies were chosen because they are sufficiently different that distinct lessons can be drawn from them. In addition, these case studies both focus on resource sharing in aquatic environments. In contrast, other well-known Track II diplomatic initiatives have been more

¹²⁴ *Sacred Responsibility*, at 62.

¹²⁵ *Sacred Responsibility*, at 62.

¹²⁶ *Sacred Responsibility*, at 62.

focused on resolving violent conflicts and peace-building include the conflicts in Kashmir, Northern Ireland, the Balkans, and Israel-Palestine.¹²⁷

South China Sea

Conflicting ownership claims of the islands and resources within the South China Sea have placed the region at the centre of tense, at times violent, disputes.¹²⁸ A Track II diplomacy workshop process was created in 1990 in an attempt to dissolve conflict and promote understanding in the region. The Association of Southeast Asian Nations (ASEAN) had been working to prevent conflict in the region for thirty years prior to the establishment of these workshops and was influential in enabling the workshop process. Hasjim Djalal and Ian Townsend-Gault, key organizers of this track II project, explain the approach:

regardless of the territorial disputes, we should try to find an area or areas in which everyone could agree to co-operate, no matter how small the area or areas might be or how slow or insignificant progress might seem to come. We also aimed to develop confidence-building measures or processes so that the various claimants would become comfortable with one another and would thus be able to address their territorial or jurisdictional disputes within a cordial and constructive atmosphere.¹²⁹

This Track II diplomacy initiative was developed to generate new ideas and approaches and eventually channel them into track-one negotiations. The initiative began mostly as a relationship building exercise but has “increasingly focused on more substantive issues and has spawned several working groups to address specific topics in a wide variety of fields.”¹³⁰ The workshops involved experts from a wide range of backgrounds presenting information to the participants from each nation. The Canadian government, through the Canadian International Development Agency (CIDA), provided core funding for the project. Despite significant successes, the funding was discontinued after approximately ten years; within ten years of funding being stopped, tensions that were not present during the time of the dialogues were renewed.¹³¹

¹²⁷ For more information on the details of Track II in these disputes, see: Montville J.V. Track Two Diplomacy: The Work of Healing History. *The Whitehead Journal of Diplomacy and International Relations*, Summer/Fall 2006.

¹²⁸ For details on the source and extent of this conflict, see Djalal, H., and I. Townsend-Gault, “Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention,” in Crocker, C.A., F.O. Hampson, and P. Aall, (eds.), *Herding Cats: Multiparty Mediation in a Complex World* (Washington: United States Institute of Peace press, 2003).

¹²⁹ Djalal, H., and I. Townsend-Gault, “Managing Potential Conflicts in the South China Sea: Informal Diplomacy for Conflict Prevention,” in Crocker, C.A., F.O. Hampson, and P. Aall, (eds.), *Herding Cats: Multiparty Mediation in a Complex World* (Washington: United States Institute of Peace press, 2003); at 116. [Djalal and Townsend-Gault]

¹³⁰ Djalal and Townsend-Gault, at 107.

¹³¹ Personal correspondence with Glen Hearn on June 12, 2015.

South Asia Water Initiative

An example of a more structured Track II diplomacy effort is the South Asia Water Initiative (SAWI). Established in 2009 as collaboration between the World Bank, United Kingdom, Australia and Norway, the SAWI is focused on increasing “regional cooperation in the management of the major Himalayan river systems in South Asia to deliver sustainable, fair and inclusive development and climate resilience.”¹³² The SAWI focuses on four regions – Brahmaputra Basin, Ganges Basin, Indus Basin, and the Sundarbans Landscape – and works to support regional cooperation amongst the South Asian countries, including Afghanistan, Bangladesh, Bhutan, China, India, Nepal, and Pakistan. The SAWI sets out program strategies, analyzes progress, and collates reports on each region. Little has been written in the way of analysis of the SAWI efforts because it is an ongoing process. What is apparent is that the SAWI is highly structured and has specific goals that are closely monitored. Compared to other Track II diplomacy efforts, the SAWI is a more top-down, structured approach.

Potential criteria for Track II Diplomacy

Membership - Who should be part of a Track II diplomatic initiative?

The interests in the Columbia River Basin are numerous and varied and it can become a challenging task to determine membership in a Track II diplomatic initiative. The South China Seas initiative involved senior level government officials from ten countries, all of whom attended the workshops in their personal capacity – not as a delegate or a representative. These officials were joined by academics who presented on key topics and facilitators who organized the workshops. The SAWI includes both “senior officials and senior technical staff in relevant government agencies at both national, and where relevant, state level.”¹³³ Key partners of the SAWI include development partners; research institute, international NGOs, and academia; and internal World Bank teams.¹³⁴

The Steering Committee from the most recent Universities Consortium symposium included:

- academics from Canadian and American universities;
- participants from tribes and First Nations;
- participants from the Northwest Power and Conservation Council; and
- a participant from the Columbia Basin Trust.

¹³² SAWI, About, online: <https://www.southasiawaterinitiative.org/SAWIComs>

¹³³ SAWI, Communications and Stakeholder Engagement, online: <https://www.southasiawaterinitiative.org/SAWIComs>

¹³⁴ SAWI, online: <https://www.southasiawaterinitiative.org/SAWIComs>

Government officials from the Province of British Columbia, the U.S. federal government, and the U.S. Army Corps of Engineers also gave presentations on their perspectives.¹³⁵ Future Track II diplomacy efforts in the Columbia River Basin could benefit from involving senior level government officials in a more consistent manner. Government officials from relevant agencies in the Province of British Columbia and the U.S. states and federal government could be invited to participate. It would also be important to include participants from the Treaty Entities as they could bring ideas up to the treaty implementation level. To ensure candour and unrestrained debate, it should be clear that these participants are acting in their own personal capacities and not as delegates or official representatives. As mentioned above, Track II diplomatic initiatives often involve influential academic, NGO, and political leaders and other citizens such as activists, journalists, members of think tanks who can interact more freely than high-ranking officials.¹³⁶ It could be beneficial to include other influential leaders and representatives from local watershed stewardship groups in the Universities Consortium.

Purpose: What are the main aims of this initiative?

Track II diplomacy initiatives are designed to achieve a range of goals from relationship building to tangible results, such as agreements. In the South China Seas initiative, one aspirational goal was to “transform the habit of confrontation into the habit of cooperation” by helping participants from different states work together.¹³⁷ To achieve this outcome, the workshops focused on the promotion of confidence-building measures (CBMs) and a confidence-building process (CBP).¹³⁸ The initiative focused on encouraging discussion and dialogue among all parties “with the aim of finding the basis for a solution acceptable to all concerned.”¹³⁹ These purposes involve both process-based and outcome-oriented goals. The stated goals of the SAWI are to increase “regional cooperation in the management of the major Himalayan river systems in South Asia to deliver sustainable, fair and inclusive development and climate resilience.”¹⁴⁰ This includes a process-based goal (to increase regional cooperation) and an outcome-oriented goal (to deliver sustainable, fair and inclusive development and climate resilience). In practice, the goals of SAWI seem less focused on process and relationship building and more focused on specific outcomes. The Annual Reports outline the advancement of specific outcomes in each region as a way to measure progress for the benefit of funders. The 2014 Annual Report notes, “[f]ollowing a positive independent performance review in 2012, the parties to the trust fund agreed to continue support for the program for a further five years, with increased investment, and with the specific objective to increase regional cooperation in the management of the major

¹³⁵ Kathy Eichenberger (British Columbia), Ken Warren (U.S. federal government), and Matt Rea (U.S. Army Corps of Engineers).

¹³⁶ Terms for Conflict Management and Peacebuilding, United States Institute of Peace, online: <http://glossary.usip.org/resource/tracks-diplomacy>

¹³⁷ Djalal and Townsend-Gault, at 116.

¹³⁸ Djalal and Townsend-Gault, at 122.

¹³⁹ Djalal and Townsend-Gault, at 124.

¹⁴⁰ SAWI, About, online: <https://www.southasiawaterinitiative.org/SAWIComs>

Himalayan river systems in South Asia.”¹⁴¹ This suggests that a more structured, top-down approach to progress is employed in the SAWI than was in the South China Seas initiative. This could put undue pressures on the parties involved to achieve specific outcomes, instead of focusing on relationship building and open communication.

Track II initiatives in the Columbia River Basin can be focused on relationship and trust building as well as specific substantive goals. As mentioned in the Universities Consortium mandate, the symposia are designed to create a safe space for open communication, mutual learning, and relationship building. As a substantive goal, the symposia aim to “explore complex Treaty and international river governance issues, and help shape the future of the Columbia River Basin.”¹⁴² Track II diplomatic initiatives in the Columbia River Basin could adopt a similar approach to confidence-building measures as was used in the South China Seas initiative. Relationship building and open communication are worthwhile objectives in the Columbia River context where relationships have been damaged through past misunderstandings.

Scope of Issues: What topics should this initiative address?

In addition to having a wide range of core purposes, Track II diplomatic initiatives can address a variety of substantive issues. There is some debate about whether Track II discussion topics should be structured or limited at all. Djalal and Townsend-Gault discuss this debate as it relates to the South China Seas initiative:

If our process is truly informal, can we really place any limit on what can be discussed at the workshops? In theory, the answer is probably no. However, ours is a consensual process and we try to steer the debate into areas where all participants feel free to exchange views. At the same time, we have no desire to enforce overly strict limits, because to do so would undermine the value of the workshops as a venue where senior officials can discuss politically sensitive matters without fear of compromising the official positions of their governments. We have noted that issues regarded as taboo one year can appear on the agenda with the support of all participants one or two years later.¹⁴³

While it is often best to be fluid and open to new topics, some structure for the scope of topics is needed to guide discussions to the most relevant issues. In the South China Seas initiative, the original topics of discussion were: territorial and sovereignty issues; political and security issues; marine scientific research and environmental protection; safety of navigation; resources management; and institutional mechanisms for cooperation.¹⁴⁴ These topics have shifted over

¹⁴¹ World Bank, South Asia Water Initiative: Annual Report from the World Bank to Trust Fund Donors, July 2014, Foreword, online:

<https://www.southasiawaterinitiative.org/sites/sawi/files/SAWI%20Progress%20Report%20FY14.pdf>

¹⁴² Universities Consortium on Columbia River Governance, “Annual Symposia”, online:

<http://www.columbiarivergovernance.org/Annual-Symposia.html>

¹⁴³ Djalal and Townsend-Gault, at 123.

¹⁴⁴ Djalal and Townsend-Gault, at 116.

time but they give a sense of the types of topics that could be included in Track II dialogues in the Columbia River Basin. Of particular relevance to the Columbia River are: resources management, institutional mechanisms for cooperation, scientific research and environmental protection, and political issues. More specifically, scientific research could focus on the specific substantive subjects mentioned above.¹⁴⁵

In the South China Seas initiative, “discussions on various topics became so detailed that [the organizers] decided to create specific technical working groups and experts groups to devise cooperative projects.”¹⁴⁶ The facilitators created several sub-groups including on: Marine Scientific Research; Resources Assessment; Marine Environmental Protection; Legal Matters; and Safety of Navigation, Shipping, and Communications. The creation of these sub-groups helped to focus the efforts of this larger initiative into high-priority areas. The Columbia River initiative could benefit from a similar structure with sub-groups focused on specific topic areas.

Results: What results could be expected from this type of initiative? How can Track II initiatives influence formal decision-making?

As mentioned above, Track II initiatives can be particularly useful in building relationships, opening communication, and deconstructing entrenched stereotypes. These are the process-based purposes that Track II diplomacy is specifically designed to achieve. Many analysts are more interested in the success of Track II diplomacy in achieving tangible outcomes and results, such as agreements and declarations on conflict resolution. Unfortunately, these results are difficult to assess because Track II dialogues occur off-the-record and behind closed doors. Accounts of successful results invariably come from anecdotes. A full 40-50% of the issues advanced in Track II diplomatic initiatives occur during dinners and coffee breaks.¹⁴⁷ As such, it is challenging to attribute specific diplomatic successes to any one Track II initiative and there are likely many more successful agreements that stem from Track II dialogues not accounted for.

Despite this difficulty, tangible outcomes have been attributed to Track II diplomatic initiatives. For example, in the South China Seas initiative, four agreed upon project proposals were approved between 1990 and 1998.¹⁴⁸ More importantly, Djalal and Townsend-Gault explain that “almost all countries in the South China Sea have indicated a willingness to participate in the implementation of the agreed-upon programs, providing either expertise, facilities, or even financial resources.”¹⁴⁹ A willingness to participate in implementation is a significant step for countries engaged in this kind of diplomacy. Another anecdotal example is that a Code of Conduct for fisheries that was discussed by academics and decision-makers during a South

¹⁴⁵ Hydropower; Flood management; Ecosystem-based function; Restoration of salmon; Climate change; Irrigation and agriculture; Navigation; Recreation and tourism; Water quality; and Water supply.

¹⁴⁶ Djalal and Townsend-Gault, at 118-119.

¹⁴⁷ Personal correspondence with Glen Hearn on June 12, 2015.

¹⁴⁸ Djalal and Townsend-Gault, at 120.

¹⁴⁹ Djalal and Townsend-Gault, at 120.

China Seas workshop was adopted one year later as a MOU Code of Conduct for fisheries between the Philippines and China.¹⁵⁰

In the SAWI, tangible outcomes are measured against results frameworks and agreed targets; these outcomes are systematically catalogued in Annual Reports to the funders. The 2014 Annual Report notes that progress for the most recent term “is considered satisfactory.”¹⁵¹ The results indicators include: 1) number of dialogue meetings facilitated by SAWI; 2) number of participatory processes that support transboundary knowledge generation and stakeholder input to government decision making; 3) number of professionals trained in aspects of water management, water policy or water diplomacy; 4) number of key water management organizations with technical capacity strengthened by SAWI activities; 5) number of ‘knowledge products’ produced and shared with decision makers; 6) number of feasibility studies or intervention designs informed by SAWI activities.¹⁵² The Report notes that “anticipated meetings of the Indus Forum took place, however, the planned dialogue event for the Sundarbans had to be delayed awaiting government approval.”¹⁵³ Seven reports were finalized and published and ‘knowledge products’ were released. This systematic way of assessing results is atypical of Track II diplomatic initiatives and highlights the structured nature of the World Bank-led SAWI process.

Track II initiatives can influence formal decision-making and result in successful outcomes through a variety of mechanisms. An important predictor of success is to ensure Track II dialogues are somehow connected to Track I diplomacy. One mechanism is referred to as “Track 1.5 diplomacy”, where official and non-official actors work together to resolve conflicts in the same institution.¹⁵⁴ In Track 1.5, officials with considerable power are involved in the Track II process. This requires careful consideration to ensure participants will remain candid and open in the presence of official actors. Regardless of the form, Track II participants should have some contact with government policymakers “so that ideas discussed in the unofficial setting have the prospect both to reflect and to filter into the thinking of official policy circles... Official participants attending in an unofficial capacity can directly transfer information they have acquired through track two activities to appropriate governmental channels.”¹⁵⁵ One example of a Track II initiative informing Track I diplomacy is a statement from the South China Seas

¹⁵⁰ Personal correspondence with Glen Hearn on June 12, 2015.

¹⁵¹ World Bank, South Asia Water Initiative: Annual Report from the World Bank to Trust Fund Donors, July 2014, at 7, online: <https://www.southasiawaterinitiative.org/sites/sawi/files/SAWI%20Progress%20Report%20FY14.pdf>

¹⁵² See Table 1 in World Bank, South Asia Water Initiative: Annual Report from the World Bank to Trust Fund Donors, July 2014, at 8, online:

<https://www.southasiawaterinitiative.org/sites/sawi/files/SAWI%20Progress%20Report%20FY14.pdf>

¹⁵³ World Bank, South Asia Water Initiative: Annual Report from the World Bank to Trust Fund Donors, July 2014, at 7, online: <https://www.southasiawaterinitiative.org/sites/sawi/files/SAWI%20Progress%20Report%20FY14.pdf>

¹⁵⁴ Terms for Conflict. <http://www.columbiarivergovernance.org/Annual-Symposia.html>

¹⁵⁵ Kaye, D. Rethinking Track Two Diplomacy: The Middle East and South Asia, Netherlands Institute of International Relations, June 2005, at 7.

workshops being adopted as the ASEAN Declaration on the South China Sea in Manila.¹⁵⁶ Alternatively, sharing ‘knowledge products’ with government decision makers is considered a specific goal in the SAWI. The SAWI also explicitly encourages involving government decision makers in participatory processes discussing transboundary issues. This is a more structured way of ensuring government officials are informed of the conversations occurring in a Track II diplomatic initiative.

In the Columbia River Basin, a Track II process could adopt lessons from the South China Seas and the SAWI case studies. It will be important to develop some mechanism for influencing Track I decision-makers. One possibility is to include influential officials in the Track II process so they are directly involved in these discussions, as occurred in the South China Seas workshops. This Track 1.5 approach is beneficial in that officials will receive the same expert information as other Track II participants and will be intimately connected to these conversations. One concern is that conversations may not be as open or candid with official decision-makers in the room. If official actors participate in a Columbia River Basin Track II initiative, it will be imperative that they do so in their personal capacity – not as delegates or government representatives. Another option is to design Track II initiatives to involve academics, NGOs, and other key thinkers with explicit mechanisms to inform official decision-makers. This approach is used by the SAWI and is even built into their annual reporting structure. The Universities Consortium in the Columbia River Basin already includes participants from tribes and First Nations, academia, and regional organizations, such as the Northwest Power and Conservation Council and the Columbia Basin Trust. The next step could be to include official decision-makers from federal, state, and provincial governments in the annual meetings. As long as officials are participating in their personal capacity, this should not interfere with open communication and may serve to build trust and strengthen relationships among key regional leaders.

One final consideration is how to ensure key ideas and agreements are implemented. In the South China Seas initiative, Djalal and Townsend-Gault note that “participating authorities seem to be reluctant to act on the basis of a workshop recommendation until they see concrete evidence of a commitment on the part of other regional authorities and a funding agency to implement that recommendation... a recommendation resulting from the workshop process may have greater force if it can be shown that it is possible to devise projects for cooperation and bring them at least to the brink of implementation by securing funding, identifying implementing agencies, and so forth.”¹⁵⁷ The Columbia River Basin initiative should ensure that efforts are made to encourage implementation of agreements. This could be done by securing funding, developing a step-by-step implementation plan, and identifying the specific agencies involved in implementation.

¹⁵⁶ Djalal and Townsend-Gault, at 123.

¹⁵⁷ Djalal and Townsend-Gault, at 128.

Funding: How will this body be funded? How can funding remain neutral to remove any allegations of bias? How can funding remain consistent?

Securing long-term, unbiased funding is crucial to the success of any Track II diplomatic initiative. It is important that funding is secured with some certainty so that participants can invest their time and energy in the initiative without worrying that their efforts will go to waste. Relationship and trust building require both time and a secure and safe environment. The South China Seas, for example, was funded for 10 years by CIDA. This certainty allowed participants to devote themselves to the initiative and invest energy into relationships. When the CIDA funding ended, workshops were wrapped up and tensions in the area were renewed. This highlights the importance of maintaining long-term connections and ongoing dialogues amongst key participants. The SAWI was renewed in 2012 for another five years, based on a ‘positive independent performance review’. Linking funding to specific tangible outcomes, as seems to be the case in the SAWI, could be problematic because it shifts the emphasis away from relationship-building towards results-based goals. That said, Track II initiatives can be difficult to fund when there is no guarantee that specific outcomes will be achieved. Funding pitches should emphasize the importance of open communication, trust and relationship building, and generating good-will when attempting to resolve conflicts and come up with creative solutions to problems.

Along with securing long-term funding, it is equally important that the funding comes from an un-biased source. Funding should not exclusively come from a group with a specific interest in the outcome of the discussions. In the South China Seas initiative, Canada was the primary donor. This worked well because Canada had no stake in the outcome of the workshops. The SAWI is a multi-donor trust fund managed by the World Bank and supported by the governments of the United Kingdom, Australia and Norway. In the Columbia River Basin, the Track II initiative could be funded by an independent funding agency with no vested interest. Alternatively, each participant could contribute an equal portion to a seed fund. If this contribution was not enough, it could be topped up by an independent funder. In the South China Seas initiative, CIDA contributed core funding to the workshops but this did not cover the majority of costs associated with sending participants to the workshops. Participant countries managed to get the money together to send people to the workshops; this indicates a willingness on the part of each nation to contribute financially to the workshops. A similar funding mechanism could work in the Columbia River Basin context with a core funder and individual participants picking up accessory costs. Regardless of the mechanism, it is imperative that the funding be secured for the long-term and come from an un-biased funding source.

Conclusion on Track II Diplomacy

Track II diplomatic initiatives could be a viable alternative to an idealized transnational governance structure discussed above. There is a very real possibility that governments in both Canada and the United States will be unwilling to part with, or share, decision-making power

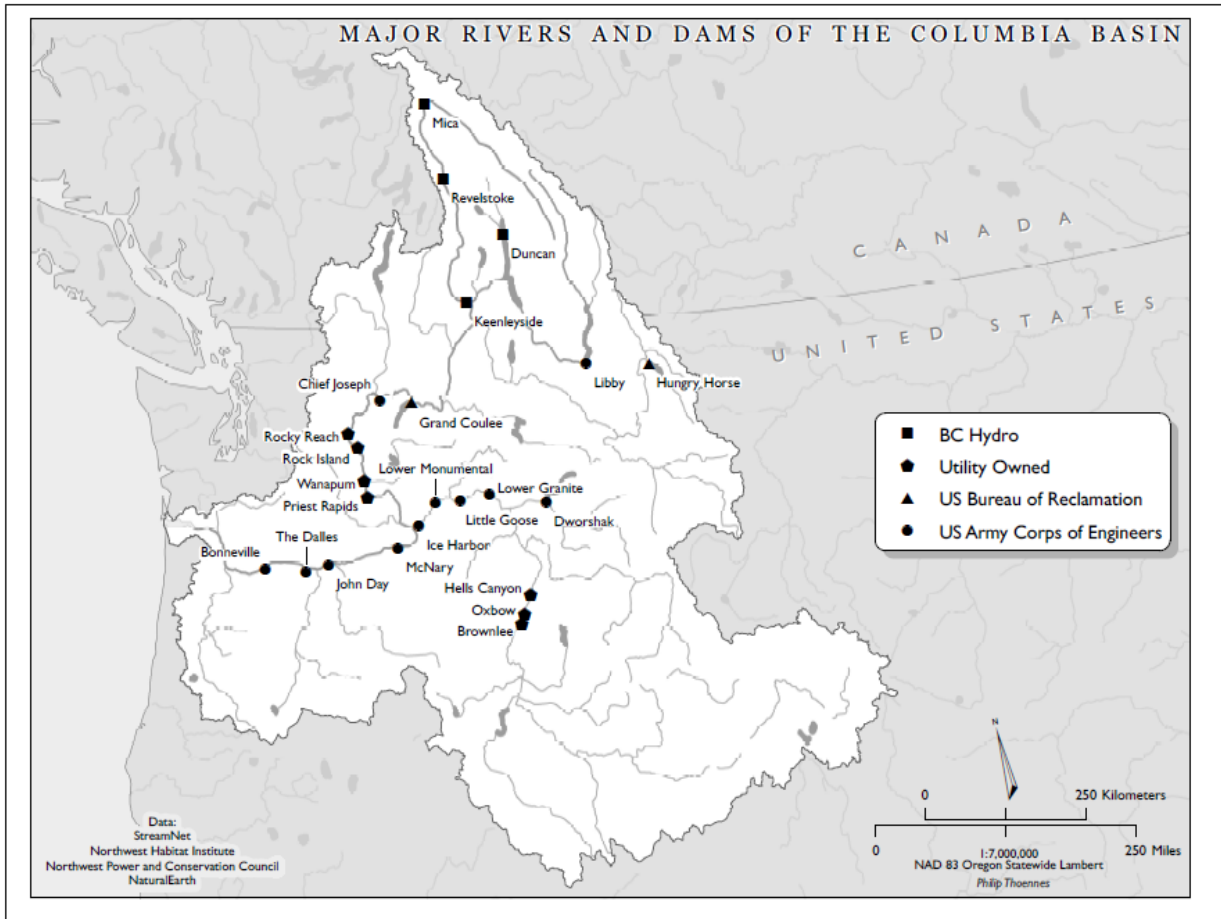
over the implementation of the Columbia River Treaty. Reflecting on the South China Seas initiative, Djalal and Townsend-Gault note that the “workshop process could not have been initiated, much less developed, had there been any attempt to establish it as an official activity taking place on an intergovernmental basis.”¹⁵⁸

Instead of putting all their eggs in the ‘shared decision-making’ basket, individuals and organizations representing other interests in the Columbia River Basin may instead be best off focusing their attention on establishing an influential Track II diplomatic process. Indeed, tribes and First Nations “seem to be increasingly interested in helping catalyze, convene, coordinate, and/or lead an inclusive, robust, meaningful, and effective transboundary forum.”¹⁵⁹ The Universities Consortium has the beginnings of a Track II diplomatic process with annual symposia bringing together academics, tribes and First Nations representatives, regional organizations, and occasionally some government officials. To move this process along, key issues must be explored, including: membership, main purposes, scope of issues, results/outcomes, and funding. The Columbia River Basin has the benefit of learning from other Track II initiatives to make their effort most effective and efficient.

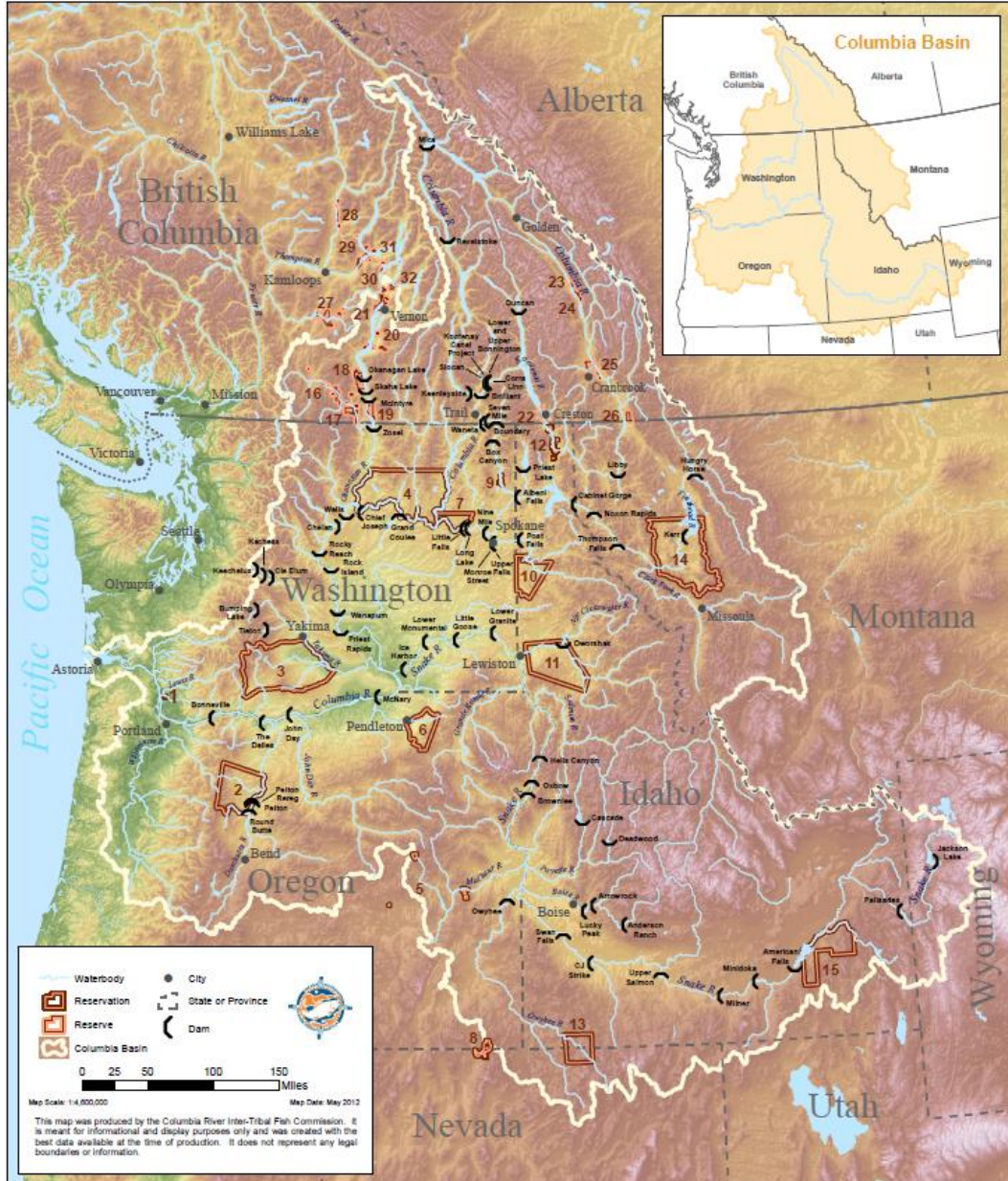
¹⁵⁸ Djalal and Townsend-Gault, at 117.

¹⁵⁹ Sacred Responsibility, at 62.

Appendix A.



Appendix B.



Columbia River Treaty

Tribal Nations in the United States *

- 1 - Cowitz Indian Tribe
- 2 - Confederated Tribes of the Warm Springs Reservation of Oregon
- 3 - Confederated Tribes and Bands of the Yakama Nation
- 4 - Confederated Tribes of the Colville Reservation
- 5 - Burns Paiute Tribe
- 6 - Confederated Tribes of the Umatilla Indian Reservation
- 7 - Spokane Tribe of Indians
- 8 - Fort McDermitt Paiute Shoshone Tribes
- 9 - Kalispel Tribe of Indians
- 10 - Coeur d'Alene Tribe
- 11 - Nez Perce Tribe
- 12 - Kootenai Tribe of Idaho
- 13 - Shoshone Paiute Tribe of the Duck Valley Indian Reservation
- 14 - Confederated Salish and Kootenai Tribes of the Flathead Nation
- 15 - Shoshone-Bannock Tribes of the Fort Hall Reservation

First Nations in Canada

Inside the Columbia Basin

- 16 - Upper Similkameen Indian Band (Okanagan Nation)
- 17 - Lower Similkameen Indian Band (Okanagan Nation)
- 18 - Penticton Indian Band (Okanagan Nation)
- 19 - Osoyoos Indian Band (Okanagan Nation)
- 20 - Westbank First Nation (Okanagan Nation)
- 21 - Suknapiix/Okanagan Indian Band (Okanagan Nation)
- 22 - Lower Kootenay Indian Band (Ktunaxa Nation)
- 23 - Shuswap Band (Secwepemc Nation)
- 24 - ?a'kisqnuq First Nation (Ktunaxa Nation)
- 25 - ?aq'am (Ktunaxa Nation)
- 26 - Tobacco Plains Indian Band (Ktunaxa Nation)

Outside the Columbia Basin with Asserted Interests

- 27 - Upper Nicola Indian Band (Okanagan Nation)
- 28 - Simpcw First Nation (Secwepemc Nation)
- 29 - Adams Lake Indian Band (Secwepemc Nation)
- 30 - Neskonlith Indian Band (Secwepemc Nation)
- 31 - Little Shuswap Indian Band (Secwepemc Nation)
- 32 - Splatsin First Nation (Secwepemc Nation)

* Management authorities and responsibilities affected by the Columbia River Treaty