

Global Issues in Water Policy 17

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# Water Policy and Governance in Canada

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## Water Policy and Governance in Canada

This book provides an insightful and critical assessment of the state of Canadian water governance and policy. It adopts a multidisciplinary variety of perspectives and considers local, basin, provincial and national scales. Canada's leading authorities from the social sciences, life and natural sciences address pressing water issues in a non-technical language, making them accessible to a wide audience.

Even though Canada is seen as a water-rich country, with 7% of the world's reliable flow of freshwater and many of the world's largest rivers, the country nevertheless faces a number of significant water-related challenges, stemming in part from supply-demand imbalances but also a range of water quality issues. Against the backdrop of a water policy landscape that has changed significantly in recent years, this book therefore seeks to examine water-related issues that are not only important for the future of Canadian water management but also provide insights into transboundary management, non-market valuation of water, decentralized governance methods, the growing importance of the role of First Nations peoples, and other topics in water management that are vital to many jurisdictions globally. The book also presents forward-looking approaches such as resilience theory and geomatics to shed light on emerging water issues.

Researchers, students and those directly involved in the management of Canadian waters will find this book a valuable source of insight. In addition, this book will appeal to policy analysts, people concerned about Canadian water resources specifically as well as global water issues.

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## Chapter 8

# Transcending Borders Through Postcolonial Water Governance? Indigenous Water Governance Across the Canada-US Border

Emma S. Norman and Karen Bakker

**Abstract** This chapter explores the evolution of transboundary water governance along the Canada-US border. We examine two key examples in two eras of water management across the Canada-US border, separated by more than a century. First, we examine the Boundary Waters Treaty (a bi-national agreement between the federal governments of Canada and the United States), as an emblematic example of the dominant concerns that underpinned (colonial settler) water governance at the turn of the twentieth century, creating the framework in which nation-state governance mechanisms were dominant. Second, we examine the development of Indigenous-led transboundary governing bodies, focusing on the Yukon River Intertribal Watershed Council. We argue that the YRITWC is emblematic of a new era of transboundary water governance: participatory, and (in an increasing number of cases) Indigenous led – which implies new principles for water governance, involving an expanded network of actors beyond the nation-state.

### 8.1 Introduction

This chapter examines two eras of water management across the Canada-US border, separated by more than a century. First, we examine the Boundary Waters Treaty (BWT, a bi-national agreement between the federal governments of Canada and the United States), as an emblematic example of the dominant concerns that underpinned water governance at the turn of the twentieth century. Second, we examine

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the development of Indigenous-led transboundary governing bodies, focusing on the Yukon River Intertribal Watershed Council (YRITWC). We argue that the YRITWC is emblematic of a new era of transboundary water governance: participatory, and (in an increasing number of cases) Indigenous-led – which implies new principles (such as postcolonial governance) and an expanded network of actors beyond the nation-state.

The chapter thus builds on earlier discussions in this volume related to international and transboundary water. As a complement to these other contributions, we offer a constructivist perspective. Simply put, a constructivist perspective holds that water is governed through the social construction and application of political jurisdictions and associated regulatory frameworks – which are influenced by underlying worldviews. This, in turn, highlights a well-recognized and foundational challenge: the mismatch between multiple scales of jurisdiction (which arise from the social construction of (geo)political boundaries) and water's biophysical characteristics – a flow resource that transgresses these boundaries at multiple scales. This mismatch is underwritten by power dynamics, in which some worldviews have more perceived legitimacy than others. In our view, the study of changing patterns of water governance must thus be attentive not only to the content of regulations, but also to the underlying worldviews and power dynamics in which they are embedded. Moreover, these power dynamics evolve over time, as illustrated (in this chapter) by the resurgence of Indigenous participation in transboundary water governance across the Canada-US border.

Our chapter begins with a summary of the historical context of the foundational transboundary treaties and frameworks, which provides important context for our examination of their strengths and limitations. In particular, we emphasize what was *excluded* from the original treaties and frameworks – particularly Indigenous rights and representation (as well as other issues, such as ecological integrity). A historically situated analysis of the legal framework for transboundary governance (which was established more than a century ago) is important for understanding the subsequent evolution of transboundary water governance (Table 8.1). This also underpins our analysis, later in the chapter, of the constraints and context in which new patterns of postcolonial governance are emerging.

## 8.2 The Boundary Waters Treaty, the International Joint Commission, and Binational Cooperation

### 8.2.1 *The Boundary Waters Treaty: The Tug of War between Sovereign Reach and Duty to Cooperate*

On 11 January 1910, in Washington D.C., the United States Secretary of State, Elihu Root, and the United Kingdom's (His Majesty's) ambassador to the United States, James Bryce, signed the BWT – more formally known as "Treaty between



**Table 8.1** Eras of Canada–US transboundary water governance, 1900–2015

Era	Period	Role	Example
Binational	1900–1910	Establish legal framework for management of transboundary Canada-US waters	Boundary Waters Treaty
Cooperative development	1945–1965	Projects of mutual benefit; Federal government encourages hydroelectric development	Columbia River Treaty; St. Lawrence Seaway and hydropower development; Niagara Treaty comprehensive management
Comprehensive management	1965–1985	Issue-based comprehensive river basin planning and more 'environmentally conscious' framework; Water expertise built up at federal-level	Great Lakes Water Quality Agreement
Sustainable development	1985–2005	Linking of economy and environment; Issues more integrative, anticipatory and preventive	Great Lakes Annex
Participatory/post-colonial	2000–current	Indigenous – led transboundary governance mechanisms organized by culturally connected communities; Opening of space for Indigenous leadership roles in existing or new mechanism	IJC International Watersheds Initiative; Coast Salish Gathering/Yukon River Inter-tribal Watershed Council

Adapted from Norman and Bakker (2014)

the United States and Great Britain relating to Boundary Waters, and Questions arising between the United States and Canada". The BWT represented the culmination of years of diplomatic negotiations aimed to secure mutually-agreed upon terms related to the shared waters that span the 7000 km Canada-US border. Initially, this push led to the creation of the International Waterways Commission (IWC), which was established by the Rivers and Harbors Act of 1902. Although the IWC's focus was regional, mainly concerned with the Great-Lakes-St Lawrence system, it provided a platform for the development of a commission that would address water issues across the entire Canada-US Border.

The negotiation of the Boundary Waters Treaty was heavily influenced by the political climate of the time. A central component of the BWT was the creation of the International Joint Commission (IJC), the central governing body established to mediate conflict between the two federal governments. Given the extraordinary length of the international border, this mediation was considered to be desirable (indeed, inevitable) and long-term. As US Secretary of State, Elihu Root, stated prior to signing the treaty (quoted in Munton 1981):

I do not anticipate that the time will ever come when this Commission will not be needed. I think that as the two countries along this tremendous boundary become more and more thickly settled the need for it will increase.

Despite the relatively widespread agreement on the need for a formal cooperation arrangement, the settlement of the treaty was delayed as government representatives debated a critical point in the negotiation: the relative strength of the IJC. A key issue for the negotiators was the question of whether to assign the commission:

real arbitral power or merely to assign a more limited mandate to recommend courses of action, which the governments could accept or reject as they saw fit (Carroll 1981, p 44).

Two competing philosophies played out at the turn of the century during the Treaty's negotiation. On the Canadian side, growing political power in the US made the Canadian negotiators advocate for the strongest, most binding Treaty possible; this was represented in the Gibbons-Clinton draft. In this version, the IJC had binding authority over the final decision and the creation of a supranational court to adjudicate boundary water disputes. Root articulated this preference in a letter to British ambassador James Bryce in 1908:

The difficulty of the United States in assenting to an agreement that all questions within the broad field described by the Gibbons-Clinton draft shall be referred for final determination to such a commission as is proposed, is in the main that such questions necessarily involve, not merely questions of fact and of law suitable for the determination of a commission or arbitral tribunal, but many questions of policy, of mutual concession and of the give and take which is in so great a number of cases the efficient means of reaching possible settlement of difficult controversies. Such questions of policy, of concession, of discretion make it impossible for the Government of the United States to commit to any commission under our system of government. (Carroll 1981)

On the US side, the negotiators leaned towards an agreement with less authoritative power. The preference was for mechanisms that would make "recommendations" rather than have any real arbitral and binding power. Growing concern regarding Mexican unrest and protests was at the forefront of American thinking during the time of negotiation. Concern over this unrest led to the Harmon Doctrine – named after US Attorney General Judson Harmon, who noted that:

the fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own Territory.

This underlying philosophy ultimately provided the guiding context for BWT.

The BWT achieved two crucial goals. It established a core of legal principles to govern the management of internationally shared waters between Canada and the United States, and it established an institutional framework to supervise the implementation of the principles. The historical context of this negotiation is important context in the contemporary discussion of 'sovereign reach', and the balance between nation-state and non-nation-state actors in water governance. At the time of the signing of the BWT, the tension focused on where the power of adjudication lay – in the commission, or in the country itself. The fact that the power balance was seen as an 'either-or' rather than a 'both-and' is an important point to consider for

contemporary transboundary water governance mechanisms. Thus, for both Canada and the US, the politics of the southern neighbor (in Canada – the US – and in the US – Mexico) influenced the binational treaty between Canada and the US.

One hundred years later, tensions have shifted, and much has changed in terms of the make-up of the actors involved in the governance and the expectations for public involvement. Although the balance between sovereign rights has continued to evolve, Secretary Root's prediction held true: along the Canada–US border, the need remains for federal governments to address issues of shared concern, communicate intentions, and mediate potential as well as actual conflicts. However, some key factors have changed. First, a greater range of types and numbers of actors have become involved in these discussions. At the time of the Treaty signing, the governance structure was envisaged as nation-to-nation. Although the six commissioners (three from each country) are asked to act in their professional capacity, rather than representing 'national interests', the structure of the IJC remains distinctly binational. However, a number of other sub-national actors have become increasingly important actors in transboundary water governance processes (such as the Great Lakes Fisheries Council); in some cases, the IJC is thus playing a reduced role (Norman and Bakker 2009). Second, the trend towards rescaling has caused the IJC – which remained largely federally oriented until the past decade – to rethink its approach and role beyond the nation-state.

### 8.2.2 *The IJC's Transition from Binational to Participatory*

The IJC's International Watershed Initiative (IWI) is an example of how the IJC has evolved to include more inclusive governance models – but still within a binational framework. Generally, the IJC proposed the following roles for the Boards:

- Coordinate with existing institutions and agencies within the watershed;
- Report on the state of the watershed to the IJC;
- Serve as liaison between the community and the IJC; develop monitoring indicators; run water-related studies (as directed by the IJC);
- Facilitate the prevention of disputes; foster the development of an "informed transboundary community" regarding watershed management;
- Field comments and complaints regarding the watershed; interface between different jurisdictional and ecological systems (i.e., freshwater, terrestrial and marine) (IJC 1997, 30).

Following IJC protocol, in order for the Watershed Boards to become initially established, political support from both countries and subnational stakeholders is necessary. In 2005, the Commission identified three existing boards to apply the IWI concept: The St. Croix River (New Brunswick, Maine), The Red River (Minnesota, North Dakota and Manitoba), and Rainy River (Minnesota and Ontario). In 2007, the Commission added a fourth pilot international board: The Souris River (Saskatchewan, Manitoba, and North Dakota). In 2007, the International St. Croix

River Watershed Board became the first 'official' International Watersheds Board and, in 2013, the International Rainy Lake of the Woods Watershed Board became the second official board. The International Red River and the International Souris River Board remain pilot IWI boards.

Although Boards have long been part of the IJC's governing process, the IWI marks a departure from the previous IJC governance model. The watershed role moves away from the legal and engineering framework – which dominated the Commission during its first 50 years – to embrace a broader governance approach. During the earlier years of the IJC, the governance structure had a narrower scope and, subsequently, operated with much less infrastructure. Watershed Board is an attempt to broaden the participation within the constructs of the binational approach – and to take a *proactive* rather than *reactive* approach to water governance. In addition, the Board approach provides the opportunity to diversify its membership, open up space for multiple worldviews, and respond to and plan for contemporary water issues. Whether the Boards will fulfill this is yet to be seen; however, the structure is in place for ongoing flexibility.

The evolving approach adopted by the IJC discussed above is one example of a more general trend, in which new issues and concerns have come to occupy a central place in discussions of water governance, including: groundwater, water quality, aquatic species (e.g., salmon), and Indigenous (American Indian or First Nations) communities. As explored below, this exclusion has continuing impacts on water governance frameworks; shifts in governance models increasingly include First Nations communities and actors – and in fact – as discussed in the following sections, legal precedents both in the US and in Canada have the extraordinary opportunity to reshape governance frameworks where Indigenous rights are central to, rather than excluded from, water politics.

### 8.3 Indigenous-Led Transboundary Water Governance: Legal and Historical Context

For most of the twentieth century, Indigenous communities were systematically excluded from water governance on both sides of the Canada-US border. The BWT did not include or reference relationships to Indigenous or First Nations communities. This was particularly problematic for communities whose traditional territories were and are bifurcated by the international border (Norman 2015).

In recent years, as explored below, there has been a resurgence of Indigenous involvement in water governance processes on both sides of the border (Battiste 2000; Norman 2015; Phare 2009; Thom 2010; Von der Porten and de Loë 2013a, b). Although a full discussion of the many reasons for this resurgence is beyond the scope of this chapter, three issues merit discussion: definition and extent of rights, legitimacy of Indigenous law, and Indigenous rights in International Law. The first issue is the definition and extent of Indigenous water rights, particularly given that



although state recognition of Indigenous water rights varies widely, international jurisprudence links water rights to land rights, which may include the right to determine development for lands, territories, and resources, including water (Boelens 2003, 2014; Boelens and Doornbos 2001; Getches 2005; Goodman 2000; Phare 2009; Perreault 2005, 2008; Roth et al. 2005; Thorson et al. 2006; United Nations Declaration on the Rights of Indigenous Peoples, Article 32). The response to this issue hinges, in part, on a second key issue: the degree of recognition of the legitimacy of Indigenous law, which emphasizes the importance of the distinction between inherent rights (based on historic, reciprocal and often spiritual as well as material relationships between Indigenous Peoples and water) as opposed to established ("Aboriginal law") rights (negotiated or defined in and through courts and/or Treaties) (Borrows 2002, 2010). As inherent Indigenous rights continue to grow in importance (Beccar et al. 2002; Boelens 2008, 2009; Boelens et al. 2010; Borrows 1997a, b), they will continue to be subject to critique regarding their comprehensiveness and co-optation (Cornthassel 2008; Coulthard 2007, 2014; Mascarenhas 2007). Nonetheless, we believe that this will be an important trend in the next few decades, and that the distinction between Indigenous law and Aboriginal law will become increasingly central to water governance in traditional territories of Indigenous peoples along the Canada-US border. This is also consistent with the third issue often invoked in this debate: recognition of Indigenous Rights in international law, as exemplified by Article 6 and Article 36b of the UN Declaration on the Rights of Indigenous Peoples (United Nations 2007).

Underlying debates about Indigenous water rights is a key issue that must be addressed: another important issue: the articulation between Indigenous and Western worldviews of water. Asserting a dichotomy between Indigenous and Western approaches runs the risk of essentialization, and threatens to obscure diversity within these traditions. With these caveats in mind, scholars have observed that whereas Western views often frame water as a resource available for human exploitation (Bakker and Cook 2011; although see Strang 2004, 2009 re: the diversity of Western sociocultural relations to water), Indigenous views may frame water as an animate (living) entity which is imbued with socio-cultural and spiritual meaning, is inter-related with all aspects of the environment, is the subject of values, use practices and rituals transmitted across generations, and is thus constitutive of Indigenous law, knowledge, and identity (Barbera-Hernandez 2010; Basdeo and Bharadwaj 2013; Battiste and Henderson 2000; Berkes 2008; Blackstock 2001; Boelens et al. 2010; Craft 2014; McGregor 2012; Perreault 2005, 2008; Phare 2011; Richard 1999; Rizvi et al. 2013; Singh 2006; Toussaint et al. 2005; UBCIC 1991; Wilson 2014). In other words, our worldviews of water influence our approaches to governance (e.g., Craft 2014; Sandford and Phare 2011; Wong 2011; Wong and Christian 2013). The incorporation of Indigenous law (and hence worldviews) into water governance processes – and the concomitant evolution of these processes – thus raises a set of important conceptual issues that are relevant to a broad range of disciplines (Fresque-Baxter 2015). As explored below, these issues are reflected – albeit in varying degrees and with distinct emphases – in the evolving approach to Indigenous water governance in Canada and the United States.

### 8.3.1 *Indigenous Water Governance in Canada*

Water is absent in the Supreme Court of Canada's definition of Aboriginal title, and Aboriginal rights to water have never been explicitly established or disproven through a Supreme Court ruling in Canada (Phare 2009). This situation contrasts to the United States, where the Winters doctrine and subsequent Cappaert decision (Cappaert v. United States 1976; Winters v. United States 1908) state that surface and ground water rights are implied by the federal establishment of American Indian reservations, and (further) set standards to which the US government must adhere in ensuring sufficient water for reservations, thereby recognizing the centrality of water-land interactions to American Indian communities (Shurts 2000). In Canada, comparatively, Indigenous water rights and participation in water governance have, with few exceptions, been treated implicitly within land-focused legal claims; as a result, historical inequalities have often constrained Indigenous communities' access to water and exercise of Aboriginal rights (Phare 2009; Simms 2015; von der Porten 2012; von der Porten and de Loë 2013a, b). As an example, Bill S-8 – the Safe Drinking Water for First Nations Act – has been criticized for its treatment of Aboriginal rights and title, particularly a clause that permits Aboriginal and treaty rights to be overridden to ensure drinking water safety (AFN 2012; Simeone and Troniak 2012).

Another example is the case of First in Time, First in Right (FITFIR) water rights regime in British Columbia and Alberta. Although First Nations are undeniably "First in Time," they are usually not the first rights-holders (BCAFN 2010; Simms 2015). This situation has led to litigation (Tsuu T'ina Nation v. Alberta 2010; Piikani Nation v. Alberta 2002) in which the legal argument has been made that Aboriginal rights and title extend to water. There are several bases to this argument. First, Aboriginal water rights are inherently necessary to fulfill the purpose and intent for which reserves were created (Bartlett 1998; Matsui 2009; Phare 2009; Walkem 2007). Second, insofar as water and land are integrally interconnected, Aboriginal title gives Indigenous peoples the right to lands submerged by waters, and entitles them to make use of waters (Passelac-Ross and Buss 2011). Third, Indigenous peoples have inherent water rights that stem from their historical, ongoing claim to and relationships with their traditional territories, including the customs, practices, and traditions of a given community (BCAFN 2010; Norman 2015; Walkem 2007). As noted by the British Columbia Assembly of First Nations:

For our Nations, ownership of water, or title to water, is considered an aspect of Aboriginal title. We maintain that our Nations have Aboriginal title to water, and therefore the right to use it, and to govern its use (BCAFN 2010, p 445).

Recent jurisprudence is noteworthy in this regard; there have been several recent key court cases that specifically address First Nations' water access and rights (Halalt First Nation v. British Columbia 2011). For example, the BC Supreme Court's recent *Halalt First Nation vs. BC Environment* found that the Halalt had a

proprietary interest in the groundwater beneath their reserve, although the Court's decision also emphasized the fact that the proceeding was not conclusive.

### 8.3.2 *Indigenous Water Rights in the US*

In the United States, federally recognized Indigenous communities have a sovereign status, which provides them with the right to negotiate with the federal government as equals. In essence, there are hundreds of 'nations' within the United States. The nation-to-nation relationship is a complex legal relationship (Deloria and Lytle 1998). Although in the US, tribes have many treaty rights (including rights for self-governance), in practice, the relationship is fraught with power-dynamics that consistently privilege federal and state governments over the tribes themselves. These asymmetrical power dynamics have led tribes to need to reassert treaty rights over-and-over again.

One example of the jurisdictional complexity—and the wrought power dynamics included—is the example of the challenges Indigenous communities are facing in energy extraction. The Ojibwa communities who reside along the coastline of North America's Lake Superior (and whose traditional territory spans into Canada and the United States) face a number of water-related issues that compromise their rights to clean water. One of the biggest threats currently facing Ojibwa communities (similar to many Indigenous communities throughout the world) is mining activity, compromising both surface and groundwater sources. In one case, in Keweenaw Bay Indian Community of northern Michigan, mining permits being issued through the state (avoiding the US Environmental Protection Agency as a loop-hole for conducting federally-run Environmental Impact Assessments) are posing significant and long-term threats to the community's water sources.

In particular, the Eagle Mine in the Upper Peninsula of Michigan has become a point of controversy, as the mine location has disturbed a spiritually and culturally significant place. Although the American Indian Religious Freedom Act was passed in 1978, Indigenous communities still struggle to protect sacred places in the face of resource extraction. As Jessica Koski of the Keweenaw Bay Indian Community states:

it is a shame that the United States of America, proudly founded on values of religious freedom, has trouble guaranteeing this right to all of its nation's first people.

Furthermore, a press release put out by the Keweenaw Bay Indian Community in 2014, stated:

The Anishinaabeg band has opposed the Eagle Mine development, located on Treaty of 1842 ceded homeland, since it was first permitted by the Michigan Department of Environmental Quality in 2006. Unsettled concerns involve the mining regulatory process, improper permitting and inadequate assessment of impacts to the area environment, cultural resources and water quality, including groundwater contamination and the potential for perpetual acid mine drainage upstream from Lake Superior.



However, the 'loopholes' of gaining permits through a state (rather than US entity) has allowed a fast-track for the company to move forward with the extraction. The mining companies have surveyed parcels throughout northern Michigan, Wisconsin, and Ontario (throughout Ojibwa and Anishinaabe territory) and have plans to continue to mine throughout this region. The mining techniques that are proposed pose the risk of compromising water quality for generations to come. Could attempting to join The United Nations' Convention on the Protection and Use of Transboundary Watercourses and International Lakes (The Convention) as the "Ojibwa Nation" help to keep the mining companies in check? The Keweenaw Bay Indian Community has already sent letters to the United Nations General Assembly citing the United Nations Declaration of the Rights of Indigenous Peoples (Koski 2014).

#### **8.4 Emerging Trends in Indigenous-Led Transboundary Water Governance Across the Canada-US Border**

In conjunction with the shifting legal landscape described above, Indigenous peoples are increasingly reclaiming transboundary water governance processes along the Canada-US border. A growing number of Indigenous-led mechanisms have emerged along the Canada-US borderland, which continues to contribute to the growing rescaling and the new era of governance discussed in the previous section. Specifically, Indigenous transboundary water governance mechanisms have become established in the Great Lakes basin (Ontario and Minnesota, Wisconsin, Michigan, New York), the Yukon River basin (Yukon Territory and Alaska) and the Salish Sea basin (British Columbia and Washington). In this new era, not only are Indigenous communities working collaboratively to address environmental issues facing their communities, but they are also working on strengthening traditional lifeways and promoting self-governance.

In essence, Indigenous-led initiatives are serving as mechanisms to both decolonize governance and provide means for self-determination. Arguably, the socio-cultural and political impacts of colonial occupation are exacerbated at the borderland, where Indigenous homelands were bifurcated by the demarcation of the international border and the subsequent creation of Native reserves – reservations, in the United States (Norman 2014). The emergence of an Indigenous-led era in North American transboundary water governance has international relevance, because it gives question to the context of sovereignty and cooperation. For example, the recent move to designate membership of First Nations, Metis, and Tribal members in the Rainy Lake board is precedent-setting for the IJC. Although there has been an increasing move to include representation of Indigenous actors on other IJC boards, this practice has not been consistently applied. The explicit inclusion of Indigenous actors in transboundary water governance activities – which had previously been reserved for federal actors – points to the shift that is occurring.

The rescaling of water governance to account for greater inclusion of Indigenous Peoples in its process occurs in at least two fundamentally different ways. First, through the restructuring of diplomatic relations from nation-to-nation to multinational – and, the subsequent renegotiations of Treaty terms. Second, when the restructuring occurs through a greater emphasis on Indigenous-led governance mechanisms.

The first approach, which requires a shift from bi-national to multi-national understandings of Canadian-US water politics is critical, but will be structurally difficult and require long-term changes either when Treaties come to terms (through Treaty renegotiations) or during the establishment of entirely new treaties. Given, the “Treaty era” of water governance has largely been usurped by more “informal mechanism” (see Table 8.1 and Norman and Bakker 2009) such as MOUs, MOAs and other informal agreements, the Treaty approach would likely occur as Treaty’s come through a renegotiation process – such as the Columbia River Treaty renegotiation process.

However, the ability to renegotiate the terms of all Treaties signed as it relates to Canada-US water is likely an unrealistic goal, given the expense and lack of political movement from the federal governments to implement such a sweeping change, let alone engage in Treaty negotiations at a rate more common in the “Treaty era” of early last century. More likely, treaties that are up for renegotiation – such as the Columbia River Treaty – can be “modernized” – to reflect current political sensibilities and priorities. The Columbia River Treaty is an example, where, through negotiations, greater inclusion of First Nations is leading to a fundamental rethinking of the treaty terms (Cohen and Norman forthcoming; Bakker et al. 2014).

The second approach (which is the focus of the following section of the chapter), in which Indigenous governance mechanisms are established by and for indigenous governments, is less structurally and temporally fraught. In this case, the restructuring occurs through inter-tribal processes and other governments (federal, state, provincial and city, etc.) are invited as partners or *guests*, to the process. This is the case with the Coast Salish Gatherings (Norman 2013) as well as with the Yukon River Inter-tribal Watershed Council (Wilson 2014).

#### 8.4.1 *The Yukon River Inter-Tribal Watershed Council*

The Yukon River Inter-Tribal Watershed Council (YRITWC) is a leading example in North America of an Indigenous grassroots organization whose purview spans multiple borders (Canada, US provincial, state, and Indigenous nations) and whose governance processes are explicitly multi-national (see Fig. 8.1).

The YRITWC represents a collective initiative of 70 First Nations and tribes that reside within the massive watershed. The aim of the Council is to improve the health and wellbeing of the watershed and the people who live within it. Simply put, the Council’s vision is “to be able to drink water directly from the Yukon River” (YRITWC 2013). The mission lays out its mandate:

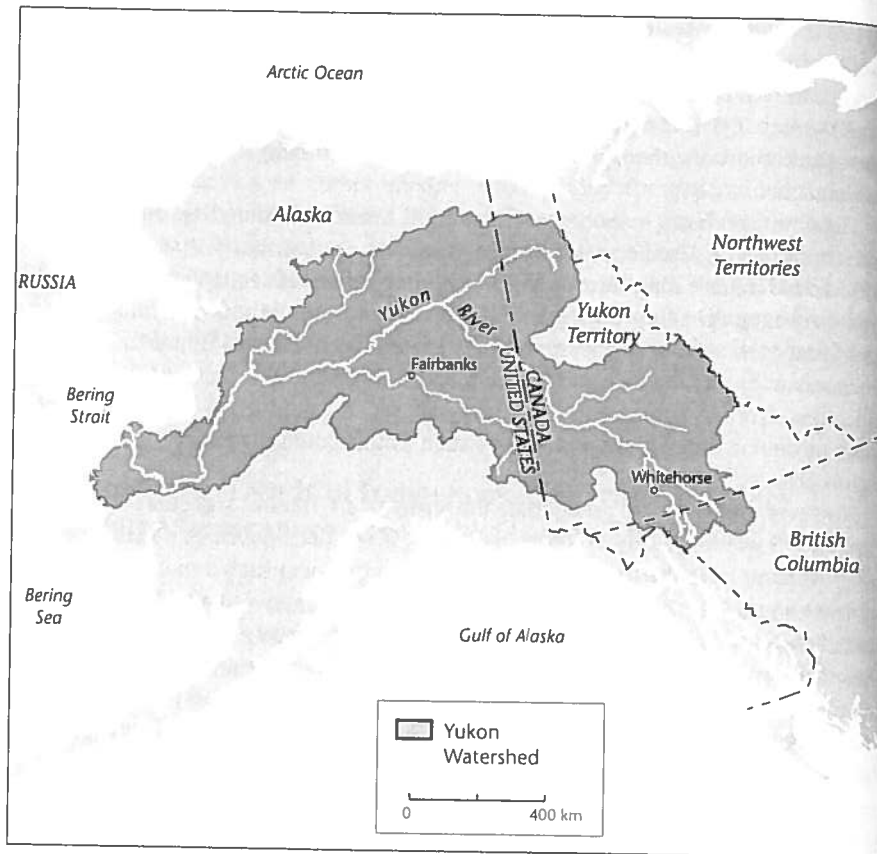


Fig. 8.1 The Yukon watershed

We, the Indigenous Tribes/First Nations from the headwaters to the mouth of the Yukon River, having been placed here by our Creator, do hereby agree to initiate and continue the clean up and preservation of the Yukon River for the protection of our own and future generations of our Tribes/First Nations and for the continuation of our traditional Native way of life.

Foundational to the Council's governance model is a place-based, basin wide approach that accounts for traditional governance mechanisms. The YRITWC's governance structure represents a commitment to inter-basin cooperation; consensus based decision-making, and integrated resource governance, which is consistent with Indigenous governance mechanisms throughout the region (YRITWC 2013). In addition, as former Director Jon Waterhouse, notes, the YRITWC:

understands the need to move forward with the modern technological advances available to them, but are also committed to cultural preservation and grounding in tradition (Waterhouse 2007).



This is particularly important for preparing the youth to serve as the next generation of leaders, of stewards of the Yukon – multigenerational education is a priority for the YRITWC.

Governing the Yukon River is no small feat. The size of the watershed requires a dedicated effort by staff, volunteers, and partner agencies to continue to work towards their goals. With offices in Anchorage, Fairbanks, and Whitehorse, the organization plays a leading role in advocating for the River (both regionally and internationally) and communicating between its upstream and downstream member tribes.

To carry out its mission, the YRITWC relies on a staff of 14 individuals, and an Executive Committee that is selected through a process of consensus at the biennial Summits. Consistent with collective governance models, members of the Executive Committee represent the geographic area of those governments, rather than the First Nation or Tribes themselves, including: Yukon Flats, Tanana River, Innoko Confluence, Middle Yukon, Innoko Confluence, Dahka Tlingit, Vuntut Gwich'in/Tr'ondek Hwech'in, Northern Tutchone, Kaska, and Southern Tutchone. The representatives provide steering for the staff and volunteers to meet its mission – they are also instrumental in communicating the work of the Council back to its constituents.

A central part of the YRITWC's governance structure is to host biennial summits that represent the signatory Tribes and First Nation governments. The Summit is a place to reinvigorate its members and allies and to (re)align them to goals and missions of the YRITWC. The Summit also provides an opportunity to exchange information about activities, voice concerns, celebrate successes, realign priorities, and strengthen allies. The Summit provides the intellectual and administrative space to reflect on the YRITWC program activities (as executed through the five departments), it also provides the staff and director an opportunity to prioritize project foci and assures the continual realignment of activities to the mission of the Council.

Through these reflective, consensus-based governance mechanisms, five priorities of YRITC have been identified through inter-departmental cooperation: sustainable lands, solid waste, science, energy, and drinking water. In the area of sustainable lands, the YRITWC developed a brownfield information system database, which can be targeted for cleanup and redevelopment. The projects include identifying contaminant sites, organizing a corrective action plan, including cleanup planning and reuse of lands. In this process, they document and map a range of contaminants including, asbestos, lead, mercury, PCBs, sewage petroleum, (among others).

The Backhaul Program was established to address the solid waste issues in the Yukon River Watershed – and arose out of the prioritization in the governance process. Between 2004 and 2008 alone, the Backhaul program removed 10 million pounds of solid waste material out of the Watershed.

Water Quality assessment is also a fundamental component of the goals of the YRITWC. Water Quality monitoring occurs consistently throughout the entire River Basin (and is collected through an educational program).

Not only are the accomplishments that directly related to water quality important to consider – the governance process itself is an important component to consider.

Reclaiming traditional governance structures is a key component to Indigenous-led governance. Like the Coast Salish Gathering, equally important as the goals of increasing water quality are revitalizing traditional governance mechanisms and fostering Indigenous self-determination.

In addition, the development of the Yukon River basin-wide Water Management Plan is largely viewed as one of the most significant tangible accomplishments of the YRITWC. The plan incorporates years of discussions and dialogues between member tribes and First Nations and highlights the need for ongoing comprehensive and basin-wide planning.

#### **8.4.2 *Connection to Place***

Lastly, (re)connecting to place is also seen as an important contribution of the YRITWC and a central mission of The Summit. For example, the YRITWC Summit location changes sites every year – the participants experience the River from different vantage points and explore the diverse ecological habitats along the River. In addition, the changing locations provide an opportunity for the host communities to highlight their culture (for example through food preparation that is unique to the region, storytelling, or dance). Another way the YRITWC connects people to the River is through the annual Healing Journey, where people physically connect on the waterway on multi-day canoe trips. This embodiment of the River – getting to know the place in which you work – is starkly different from other approaches, where management is largely disconnected from the place. For example, offices in Washington D.C. and Ottawa, where the locus of power for international water management are far removed from the physical places that are on their “file”. Officials in charge of managing transnational fresh water governance rarely have the chance to physically visit the locales for which they have oversight responsibility. Interviews and field work with managers across Canada and the US found that this lack of physical connection to waterways proved to be a significant barrier to its management (Norman and Bakker 2009, 2015). This is in stark contrast to Indigenous governance – where knowing the place – in body, mind, and spirit – is integral to the practice of water governance. In fact, it would seem unfathomable that one could make decisions about a place without knowing the place intimately – and have the historic knowledge passed down through generations that would guide the relationship with the river.

### **8.5 Conclusion**

Water governance is a reflection of dominant values and worldviews. This is an important observation. This chapter has sought to provide some empirical depth to this observation, through using two examples to illustrate the evolution of

transboundary water governance frameworks along the Canada-US border. We believe that the contemporary, participatory-era governance described above provides an opportunity to rethink transboundary water governance. Indeed, we believe that it signals a coming era of post-colonial, Indigenous-led transboundary water governance.

We offer this historical analysis in order to provide context for contemporary opportunities to renegotiate and reimagine these transboundary governance Treaties, policies and governing frameworks; specifically, we claim that it is important to remember the original historical context in which these agreements emerged in order to more effectively negotiate their future. In short, we argue it is essential to look backward (in time) in order to move forward with the goal of enhancing social and environmental equity in transboundary water governance across the Canada-US border and beyond. These arguments are, we feel, relevant to more general debates about water governance, and in particular the need for “social learning” to support adaptive management. Within this broader context, scholars have called for the evaluation of frameworks under which water laws, policies, and regulations were developed and are operationalized (Hirsch 2001; Jonas and Gibbs 2003; Kramsch and Mamadouh 2003; Kramsch 2002; Maddock 2004; Paehlke 2001; Parson 2001; Verchick 2003; Wismer and Mitchell 2005). This reevaluation provides opportunities to strengthen mechanisms and approaches and also remedy previous omissions.

Moreover we claim that hallmarks of this era will include active attempts to decolonize the borderland by creating indigenous-led mechanisms that rely on traditional (and non-nation-state) networks and protocols. In cases along the Canada-US borderlands, this is already occurring. Indigenous-led transboundary water governance is being enacted, with very significant impacts on nation-state-centric governance mechanisms. For example, in the Pacific Coast region, Coast Salish Gatherings and intertribal Canoe Journeys are raising public awareness of water-related issues – particularly ocean acidification, declining marine habitat and resources such as salmon, and impacts of water pollution. In the Great Lakes, the Grandmother Water Walkers and the Great Lakes Indian Fish and Wildlife Commission are working on issues related to declining water quality and fish contamination due to extraterritorial pollutants, such as PCBs and mercury. And in the Yukon Basin, the Yukon River Inter-Tribal Watershed Council is working towards protecting one of North America’s last ‘wild rivers’ and to continue to maintain the priorities of the Indigenous peoples who rely on the river for subsistence. In all three cases, the preservation of these waterways is also explicitly linked to cultural preservation, economic vitality, self-determination and self-governance (Norman 2015).

Thus, in rethinking environmental governance – and transboundary water governance more specifically – we suggest that there is a need to support communities and activities that have historically been absent from formal binational treaties. Indigenous peoples had little presence in the original treaty-making process in North America related to transboundary waters. Court cases and treaties between tribes and governments have had increased presence in water governance. The North American example provides an opportunity to learn from retrofitting treaties



or, as in the Columbia River renegotiation, 'modernizing' the treaty. Thus, for countries and regions that are currently creating or updating their transboundary water governance mechanisms, a key consideration is to look at the cultural politics associated with the act of creation of the border. The design of the mechanism should reflect historical 'upstream' and 'downstream' relationships and provide avenues for regional mechanisms to take leading roles in long-term governance (Cohen et al. 2014).

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