# BILATERAL UNIVERSITY LEGAL WORKSHOP ON THE COLUMBIA RIVER TREATY
# June 28, 2012

# Workshop Report

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**For the Program on Water Issues,**
**Munk School of Global Affairs at the University of Toronto**
**in collaboration with the University of British Columbia,**
**the University of Idaho and the University of Calgary**

MUNK SCHOOL OF GLOBAL AFFAIRS

UNIVERSITY OF TORONTO

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# Table of Contents

## BACKGROUND

For 48 years, the United States and Canada have cooperatively shared the management of the Columbia River under the Columbia River Treaty (CRT). During this period the Treaty has provided both parties with significant direct benefits from flood control and power generation and the indirect benefits of economic growth in the Pacific Northwest.

As we approach the 50th anniversary of the Treaty coming into force, the parties to the Treaty and many stakeholders on both sides of the border have begun to think about its future. Under international law, the U.S. and Canada may agree to modify or terminate the Treaty at any time. Although the CRT contains no automatic expiration date, either party can unilaterally terminate portions of the Treaty beginning in 2024 by providing notice at least ten years in advance (i.e. by 2014). The Entities – the operating bodies that are charged with implementing the Treaty on behalf of the United States and Canada − have begun their own assessments of alternative futures for the CRT. It is possible that the future may hold something different from the two options allowed for in the CRT − continuation and unilateral termination.

To aid in future discussions on the CRT, the Program on Water Issues at the Munk School of Global Affairs at the University of Toronto (the Munk School) in collaboration with the University of British Columbia, the University of Idaho and the University of Calgary developed a discussion paper, *The Future of the Columbia River Treaty*. The paper, prepared by Nigel Bankes of the University of Calgary and Barbara Cosens of the University of Idaho assesses the degree of flexibility that is available to the parties under international law and the domestic laws of the United States and Canada to negotiate and implement possible future legal arrangements for the Columbia River Basin.

A bilateral legal workshop was held by the Munk School and its partners on June 28, 2012 at the University of British Columbia to present the Discussion Paper, receive feedback on it, and discuss options for negotiating, ratifying and implementing possible future legal arrangements for the Columbia River Basin. The workshop was attended by a broad range of people interested in the legal aspects of the CRT. It included presentations by the authors of the paper, comments from two sets of panelists, discussion and comments from participants and observers, and final observations from Stephen McCaffrey and Gordon MacNabb. The agenda and the list of attendees are included as Appendices.

This Workshop Report was prepared by Joanna Kidd of Kidd Consulting and is intended to convey the major comments, suggestions and questions received at the Workshop. As the Workshop was held under the Chatham House Rule, the comments made by participants are not attributed. Clarifications relating to accuracy and completeness of what was said

were received from two participants on the Draft Report (August 20, 2012) and have been addressed in the final version (October 1, 2012). Apart from minor formatting changes, additions or changes in this version are noted in yellow highlighting. Any errors or omissions are the work of the author.

## Introduction and Setting the Stage

Hans Schreier, Professor of the Faculty of Land and Food Systems at the University of British Columbia welcomed attendees to the workshop on behalf of the University of British Columbia (UBC) and the organizers of the workshop. He advised attendees to think about the future − what the world might be like in 2072. He observed that that was what the original drafters of the Columbia River Treaty had done. He noted that some of the best minds in the legal field were present in the room, and hoped that the discussion paper and the workshop might provide a foundation for future negotiations.

Adèle Hurley, Program Director of the Program on Water Issues at the Munk School of Global Affairs, University of Toronto welcomed participants and observers and acknowledged the program support of the Walter and Duncan Gordon Foundation and the Tides Canada Foundation. She then introduced the Workshop Chair, Jack Blaney, highlighting his experience as a Commissioner of the International Joint Commission (IJC), chair of the Fraser Basin Council and president of Simon Fraser University.

Chair, Jack Blaney welcomed attendees and noted that UBC had been the first university he had attended. He reviewed the purpose of the workshop. He noted that the discussion paper was very interesting and commended the authors for developing a very clear and informative draft report and the organizers of the workshop for providing an opportunity to make it even better through discussion at the workshop. He also noted the outstanding experience and talent present in the room. He then called on Richard Paisley from UBC who paid tribute to Charles Bourne. Richard described Bourne as "one of the icons of international water law" who had been a founding director of the International Law Program at UBC, had been very involved in the development of the Columbia River Treaty and who had passed away on June 26th. A number of participants noted Bourne's influence in the field of international law.

Jack then went on to review the agenda and presented the rules of the meeting which included the use of the Chatham House Rule. He noted that Joanna Kidd would be preparing a workshop report and would be audio recording it to ensure its accuracy. The workshop report will be circulated in draft and attendees will have two weeks to comment on it. Attendees wishing to make additional comments on the workshop should send them to Adèle Hurley by July 6th. He also asked attendees to fill out the comment form included

in the registration package at the end of the workshop. Jack then asked participants and observers to introduce themselves, giving their affiliation and a one-sentence description of their interest in the Columbia River Treaty.

## Presentation of the Paper

Barb Cosens, professor of law at the University of Idaho College of Law and the Waters of the West Program began the presentation by thanking Adèle Hurley for coordinating the development of the discussion paper, *The Future of the Columbia River Treaty*. She also thanked Michael Blumm, Stephen McCaffrey, Don McRae and Tim Newton for peer reviewing the document and Joanna Kidd for editing assistance. She noted that the authors are responsible for the contents of the paper.

### Background

Barb provided the background to the discussion paper, noting that the Columbia River Treaty (CRT) provides for two possible futures – continuation of the Treaty with the expiration in 2024 of the flood control provisions and unilateral termination with some of the flood control provisions continuing. She noted that since the first Universities Consortium on Columbia River Governance in 2009, stakeholders in the Basin have articulated the need to consider other issues in a future agreement, including factors such as changing energy markets, climate change and ecosystem health. Stakeholders expressed concern about going through the process of advice and consent of the US Senate and were interested in knowing what other options were available for US ratification of a future agreement. A second major issue is that residents of the Basin would like to have input into decisions regarding a new Treaty and its implementation. The paper addresses both of these issues. She emphasized, however that the paper does not develop scenarios for the future of international management of the Columbia River. Rather, it seeks to capture the flexibility that is needed to accommodate the range of scenarios under discussion.

### International Law

Nigel Bankes, professor of law at the University of Calgary provided attendees with an overview of the international law context for the CRT. The CRT (and its Protocol) is an international treaty governed by international law which includes the elements of the Vienna Convention on the Law of Treaties (VCLT). The CRT does not prescribe how it is to be amended and under international law, the parties to a bilateral treaty (the "States") are free to amend in any way they see fit. In particular, they need not use the same procedure for an amendment as for the original treaty.

Nigel noted that not all agreements between US and Canada are treaties. In some cases, such as with a Memorandum of Understanding (MoU), there will be no intention to create

legal relations that are governed by international law. In some cases, such as with the Non-Treaty Storage Agreements (NTSAs) used in the Columbia River Basin, the agreement will be a commercial agreement that would be governed by commercial law. In other cases such as the Flathead MoU, the agreement will be between a state (Montana) and a province (BC) with the Ktunaxa and Kootenay peoples involved in some aspects of implementation.

He pointed out that international law has little to say about the negotiation of a treaty, leaving the composition of a State's negotiating team to be governed by domestic law and practice. It is certainly possible for a State to include regional representation and indigenous peoples (Tribes and First Nations) in the negotiation process.

With respect to ratification (or entry into force), Nigel noted that a treaty or treaty amendment enters into force in accordance with its terms. For example, it could enter into force through signature, an Exchange of Notes or ratification. The process of ratification is a domestic matter and the mode of ratification and any preconditions to ratification (e.g., the advice and consent of the US Senate) is governed by domestic law, not international law.

Similarly with implementation, the general rules of international law require that a State must implement a treaty in good faith. However, the manner in which it does so is generally governed by domestic law. Implementation can be defined in the treaty, or it can be left to the States. Importantly, he noted that a State cannot rely on its domestic laws or constitution as a reason for failing to perform the terms of a treaty.

### Treaties in US Domestic Law

Barb gave a presentation on treaties in US domestic law. The US constitution grants the sole authority for negotiating treaties to the Executive Branch and states that the President shall have the power to make treaties by and with the advice and consent of the Senate. The President can delegate this authority and it is common practice to do so. In general, the authority goes to the State Department, but other relevant Federal Agencies have sometimes been given the lead in negotiating, depending on the issue. She noted that it is very common to have Congressional observers or advisors involved in negotiations. There is nothing that requires the US to have either tribal interests or Basin interests at the table but there is also nothing that precludes that on a negotiating team. As an example, the original CRT negotiation team included the Deputy Assistant Secretary of State Ivan White, General Itschner, Chief of the U.S. Army Corps of Engineers, and the Interior Department Under Secretary Bennett, who was Chairman of the US Delegation. In addition there were Congressional observers from the Basin including Senator Mansfield of Montana, Senator Church of Idaho and Senator Morse of Oregon who participated in an advisory capacity

Barb observed that the ratification of treaties in the US is not a simple matter. The Constitution allows ratification by the President following advice and consent of a 2/3 majority of the Senate. However a number of international agreements have been entered into through other mechanisms. Congress may delegate (Congressional-Executive Agreement) authority to the Executive by a simple majority vote of both the House and Senate either before or after ratification by the President. This mechanism is commonly used for trade agreements or agreements that require appropriation of funds. Unilateral (or Sole Executive) Agreements can be used in areas in which the Constitution grants authority to the President, for agreements under an existing treaty, and where there is Congressional acquiescence. A 1984 study showed that 94% of international agreements reached between 1946 and 1972 were ratified without the advice and consent of the Senate. She indicated that scholars believe that this is likely a result of the number of treaties arising from increased globalization.

The State Department has developed criteria to guide decision-making with respect to whether the advice and consent of the Senate is needed for ratifying treaties. The criteria are:

- Risk for the nation;
- Effect on state law;
- Need for enabling legislation;
- Past US practice;
- Preference of Congress;
- Need for formality;
- Duration and timing;
- General international practice.

Of these, Barb suggested that the risk for the nation and the preference of Congress have been perhaps most important in controversies that have arisen concerning Executive action. As noted in the discussion paper, it would be wise to involve Congressional members from the Basin early and often in the discussions. Past US practice is also very important, which is why it is examined in the CRT discussion paper.

With respect to the implementation of treaties, Barb noted that drafters can build flexibility into a treaty, but it is hard to predict the future. The interpretation of treaties is left to the Executive and Congress. The US Courts and the Executive will seek to avoid conflict between an international agreement and a later-enacted domestic law. The Libby Coordination Agreement and other initiatives are actions intended to accommodate the *Endangered Species Act* which was enacted after the CRT.

## Treaties in Canadian Domestic Law

Nigel gave an overview of treaties in Canadian domestic law. He began by noting that the negotiation and conclusion of a treaty is an executive act of the federal government. However a treaty does not change the division of powers and so the federal government must include the provinces in any matters which engage provincial property interests, resource rights and legislative powers. In some cases, the federal government will follow the lead of the provincial government. This is the case with the CRT, not only because of the subject matter, but also because of the BC/Canada agreements of 1963 and 1964. Although First Nations were not involved in the negotiations for the CRT in the 1960s, the situation has changed and today a treaty amendment that may affect aboriginal or treaty rights will trigger a duty to consult and accommodate

In Canada ratification of a treaty is authorized by a federal Order in Council and supported by a memorandum to cabinet. Nigel noted that recent practice requires that a new treaty be tabled in the House of Commons prior to ratification. Presumably this practice should apply to (significant) amendments, but it may not apply to withdrawal from a treaty.

Implementation of a treaty is in accordance with the existing division of powers between the federal and provincial governments depending on the subject matter of the treaty. For the CRT, implementation is largely a provincial responsibility. The mode of implementation for a new Columbia River agreement may be by executive act of the provincial government or it could require new legislation depending on subject matter and the effect on rights and interests of citizens. Nigel pointed out that there is no federal or provincial CRT Implementation Act and the Treaty has been implemented over the last 50 years by executive act. A significant amendment to the CRT may need to be implemented by legislation or may be implemented through executive act, depending on the nature of the amendment.

## US-Canada Treaty Practice

The discussion paper looks at bilateral US-Canada treaties relating to water and also the Migratory Birds Convention (and its 1995 Protocol) and the Pacific Salmon Treaty. Nigel noted that the purpose of this coverage was to see if there was a consistent practice relating to how these treaties or amendments entered into force. The examination shows the US tended to ratify older treaties following the advice and consent of the Senate process. Amendments to treaties were generally entered into by way of Exchanges of Notes and did not trigger the advice and consent of the Senate process. More recent water treaties (and their amendments) entered into force without triggering the advice and consent of the Senate process. Important recent exceptions to this include the Migratory Birds Convention Protocol and the Pacific Salmon Treaty. Modern practice such as the Souris

Agreement has included structuring important obligations as being conditional upon approval of domestic appropriations.

There has been limited involvement of Tribes and First Nations in bilateral US-Canada water agreements but they were significantly involved in the Migratory Birds Convention Protocol and the Pacific Salmon Treaty negotiations.
Barb observed that recent studies of US-Canada treaty practice identify that this bilateral practice is different from the US's treaty relations with other countries in that they tend to be more informal and concluded at lower levels of government.

## Practice under the CRT

Nigel noted that the authors examined practice under the CRT to explore the degree of flexibility allowed under the current Treaty by asking the following questions. How much flexibility have the parties and the Entities had to address new interests and new concerns? What have they been able to do without needing the advice and consent of the Senate?

The conclusions are that the CRT contemplates continuing implementation by the Entities and occasionally requires an Exchange of Notes to confirm new arrangements. Nigel observed that there is only one case in which an Exchange of Notes has required the advice and consent of the Senate. This was when an additional flood control payment was needed because flood control started earlier than predicted. Importantly, supplemental agreements between the Entities have allowed the accommodation of non-treaty values (e.g., fish flows). The Treaty allows these as long as both parties agree they will be better off with the supplemental agreements.

He observed that the practice under the CRT shows that solutions to problems are generally generated in the Basin with the Entities working closely together. Only if necessary are agreements referred to Ottawa or Washington for formal approval by way of an Exchange of Notes (e.g., for the Return of Entitlement) or a Diplomatic Note (e.g., which sanctioned the Libby Coordination Agreement). Further flexibility has been provided by the NTSAs which are not treaties. Especially in a termination scenario, it may be useful to think how flood control can be accomplished through NTSAs for the mutual benefit of the parties and what are the pros and cons of such an approach.

Barb finished off by emphasizing that the authors are specifically looking for feedback on accuracy and completeness of the discussion paper, how it is presented and organized, any additional international agreements that should be examined, the practice under the international agreements examined in the paper, and appropriate audiences for the final version of the paper.

### *Questions of Clarification*

Q: The CRT was tabled in Parliament in 1964. Was it customary to do so at that time?
A: No, it was exceptional at the time.
A: Before 2006 it was a political decision to table and debate an important treaty in Parliament; annually all treaties would be tabled. In 2006, by a Memorandum to Cabinet, the policy was initiated of always tabling treaties in Parliament including the option for the Opposition to debate the treaty if desired. Under rare circumstances this can be avoided.
A: In 1964, the Columbia River Treaty was a highly charged issue and the government of the day could not have avoided tabling it in Parliament. Future amendments may be just as sensitive.

## Discussion

Where possible, the comments and advice received at the workshop have been organized into issue areas that relate to the discussion paper, *The Future of the Columbia River Treaty*.

### General Comments on the Paper

- A number of attendees commented on the excellent job done by the authors of the discussion paper and that it provided a good foundation for discussion.

- The discussion paper is useful in that it examines various avenues through which the CRT can be updated.

- The discussion paper does a good job of focusing on the legal process issues at the international, national, state/provincial and community levels.

- The paper is useful in communicating the bilateral challenges.

- Most of what is in the paper including the analysis is correct.

- The paper is excellent, well-organized, thorough and practical.

- The paper is a public service, will be helpful to many audiences as we move forward and will have a long life.

- The division of material into negotiation, ratification and implementation is not so useful when thinking about the flexibility of the Treaty. It is really one issue: What

can you do to make an agreement that can be implemented without requiring the advice and consent of the Senate?

- The paper underrepresents the interests of the indigenous peoples of the Columbia River Basin.

## Comments Relating to the CRT Background (Chapter 2)

### *Columbia River Basin*

- In Canada, much of the Columbia River Basin coincides with the traditional territory of the Ktunaxa Nation. The Ktunaxa view some of this territory as exclusive and some is shared. There is a great deal of collaborative work that has been done in the shared area in the past and is going on now.

- The Ktunaxa government has jurisdiction in its area, through which the Columbia River runs. This should be reflected in the paper and it should acknowledge the existence of the Ktunaxa and other indigenous peoples in the watershed.

### *History of the CRT*

- Although it is beyond the scope of the paper, it is important to recognize that because of its lack of consideration of the environment, the CRT is strikingly one-dimensional and archaic. This becomes obvious when compared to other international water treaties such as the 1997 UN Convention on International Watercourses and bilateral agreements such as the 1978 Great Lakes Water Quality Agreement which is a good example of an ecosystem-based approach to transboundary water management. The CRT clearly needs updating in the environmental field.

- In contrast to the above statement, the CRT is not archaic. Through the IJC the parties spent 15 years studying the Columbia River to identify which resources would benefit from international cooperation. These were identified as power generation and flooding. This was not to suggest that other values such as fisheries weren't important, but the expert opinion at the time was that they could be optimized through domestic actions. This may not be true today. However, the CRT serves as an excellent model as to how to go about achieving international cooperation on other values.

- Environmental issues were not totally ignored in the original Treaty. They were considered in Canada as part of the selection of projects and sites.

- The CRT recognizes that storage at dams increases the potential for power generation at US mainstem dams and benefit sharing is based on this potential. In recent times the US has used a portion of this potential, not to generate power, but to enhance flows for fisheries. The payments to Canada have been based on the original potential fall. Accordingly the "costs" of providing ecosystem benefits have come exclusively from the US.
- In the US, the negotiation delegation in 1961 was led by the Under Secretary of the Interior, not the US State Department. The Secretary of the Interior presented the Treaty to the Senate and argued the case for it.

- The Canadian negotiation in the 1960s was always led by a Minister of the Crown, supported by the Under Secretary of State for External Affairs and the Secretary of Cabinet. The team was supported by two provincial ministers.

- In Canada, the negotiations around the CRT were done in the context of a highly politicized atmosphere. There was no doubt but that the Treaty had to be tabled in Parliament. If future changes affect the essence of the CRT, history might repeat itself.

- Many people think the 1964 Protocol amended the CRT, but in fact it was an implementation agreement that did not need to go to the Senate for approval.

- The authors could emphasize that the CRT is the paradigm of equitable sharing of downstream benefits in international river basins.

- The paper should expand upon the history of the river and the CRT with respect to First Nations.

## Comments Relating to International Law (Chapter 3)

- Generally in international law, if a treaty does not contain a termination clause, it is hard to terminate. This is even truer when there is a termination clause in the treaty. A termination clause governs. However, there is some question as to whether and to what extent grounds for termination under international law co-exist with a termination clause.

- Continuing flood control benefits could be terminated under the grounds for termination in the Vienna Convention.

- What does it mean in international law when you have a continuing obligation (i.e., after a treaty has ended)? It would be a very different situation if this was not the case. The "fundamental change" test that would allow Canada to unilaterally terminate these obligations is very high burden to overcome. But how high is it? Could the climate change impacts on flows be considered a fundamental change? What about other political, legal and First Nations changes that have taken place since 1964?
- Agree with the conclusions on the constitution of negotiation teams. Countries are free to appoint whatever kind of negotiating team they want. However, having regional and/or tribal involvement in a negotiating team does not convert a bilateral negotiation into a multilateral one. Members of the negotiation team represent their country.

- The paper identifies how much flexibility there is internationally in treaty law.

- There are 263 international shared river basins in the world. Many of them have found ways to deal effectively with ecosystem issues.

- If there were no dams on the Columbia River and Canada had the desire and money to build the dams now, it would raise interesting questions in terms of international law. The US would like water at different times for salmon. Is it Canadian water? Could they dam it and keep it all? What would be the costs and benefits of international cooperation? What are the continuing costs of the 1964 area framework including ecosystem costs? What values would we want to include in a treaty today?
    - The Boundary Waters Treaty allows Canada to "obstruct" upstream water without requiring IJC approval. However article 2 of the Treaty gives downstream rights in the US the same status as rights in Canada and common law states that "water flows should be permitted to flow". Under common law, there is a right to sue if there is interference with water in its watercourse.

- How do we design international treaties that are resilient and flexible enough to be able to address climate change, changing societal values and other issues? What precedents are there – domestically and internationally?

- The paper can benefit from taking a broader perspective on international treaties. The CRT is one of 264 treaties on international rivers. What can we learn from the 3rd and 4th generation treaties such as the Senegal, Nile and Mekong River treaties that try to incorporate ecosystem values?

- An international agreement is an instrument between two parties. A private party cannot sue on the basis of the Treaty, but there could be a challenge relating to implementation (e.g., the Operational Plans, etc.)

***International Treaties vs. Domestic Laws***

- While the paper says that the parties cannot use domestic law to trump a treaty, there are instances where this is so. More elaboration on this would be useful.

- When the CRT was negotiated in the 1960s, the Province believed that aboriginal title had been extinguished in BC. In 1997, the courts ruled that it hadn't been extinguished. There has been a new legal regime since 1982 with the constitutional entrenchment of aboriginal rights and title. In this constitutional regime, no government legislation or action can unjustifiably infringe those protected constitutional rights. We would argue that an international treaty cannot unjustifiably infringe aboriginal constitutional rights (such as fishing, hunting, cultural heritage resources, etc.) The involvement of the First Nations in the Migratory Birds Protocol was for this very reason.

- There is one large disconnect in the CRT between the Canadian and US side. The US is obliged to run operations and calculate downstream benefits, but there is no obligation to operate that way. They can operate the system as they please (e.g., to use power allocation for fisheries benefit). This means there is no conflict between the Treaty and domestic law. Canada, on the other hand is obliged to operate according to the Assured Operating Plan. Canada cannot, for example, vary operations to address fisheries issues except through Detailed Operating Plans and Supplemental Agreements.

***Indigenous Peoples in International Law***

- The paper provides good examples of how First Nations interests have been accommodated in international agreements in the Migratory Birds Convention Protocol and the Pacific Salmon Treaty. These demonstrate how First Nations interests and engagement can be directly built into international agreements.

- There should be more reference in the paper to the UN Declaration on the Rights of Indigenous Peoples. Article 18 refers to indigenous peoples having the right to participate in decision-making in matters that affect their interests. The decisions ahead will affect the interests of First Nations and therefore the obligation is there.

- There is a growing obligation under international law human rights law framework that there is a right of indigenous peoples to be consulted on and participate in decisions about natural resources.

- The First Nations are concerned about the historical infringements of the CRT within the Columbia Basin. In the aftermath of the Rio Tinto decision, the obligation to consult and accommodate is largely forward looking. However, the decision mentions alternative mechanisms for addressing other issues. With respect to this, Article 11.2 of the UN Declaration on the Rights of Indigenous Peoples says that "States will provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs". The treaty negotiations between the BC government and the Ktunaxa nation might be one mechanism to address the impacts of the original CRT. The key interests (which are shared by many others in the Basin) include: the restoration of salmon and salmon fisheries, protection of cultural heritage resources, ecosystem management, Libby Dam operations and a share in the benefits from the CRT.
    - The loss to First Nations under the CRT has been profound – the impact is huge and so is the opportunity in a renegotiated Treaty.

- For the First Nations, there are potential causes of action in the areas of nuisance, unjust enrichment, and traditional environmental remedies.

- It is the obligation of a modern, democratic, industrialized state to consult with indigenous peoples on issues such as the CRT.

## Comments Relating to Treaties in US Domestic Law (Chapter 4)

- There is little in the paper on termination of treaties under US domestic law. Most appears under the heading of ratification. The case of Goldwater against Carter is discussed but this is a treaty termination case. It raises the interesting question as to whether acting unilaterally the President can terminate a treaty, especially in the case of an Article 2 treaty that requires the advice and consent of the Senate. That question is unresolved although there is a view that the President can do this.

- It is noted that "ratification" is an international term, not one that is used domestically.

- There is little in the paper on a third category of executive agreements – those concluded pursuant to treaty. A treaty may expressly or by implication authorize the President to conclude further agreements for the implementation of the treaty. (This may be the case with the 1909 Boundary Waters Treaty).

- The paper identifies how much flexibility there is domestically in treaty law (e.g., 94% of all recent international agreements that the US has entered into now were ratified without the advice and consent of the Senate).

- The paper should note that if the President signs a treaty without the advice and consent of the Senate, it is not subject to judicial review.
    - There is a way to contest an Executive decision but the actions have failed in the courts.
    - Even if an action fails in court, agreements could be tied up for a long time in court.
    - There is a case from 2007 on climate change (**Massachusetts** et al **vs**. **Environmental Protection Agency)** where the majority of the Supreme Court held that US states have special solicitude for standing to contest a federal decision when it involves protecting their sovereign interests.

- There are basically four scenarios relating to ratification:
    - If the 8 NW senators approve of a future agreement and there is no appropriation, then it is clear sailing;
    - If the 8 NW senators approve of a future agreement and the appropriation comes out of BPA, then it is probably OK;
    - If the 8 NW senators approve of a future agreement and a federal appropriation is needed, then you are in trouble; and
    - If there is no consensus among the NW senators and a federal appropriation is needed, you are in worse trouble.

- Related to the above, a key question would be "When would you need a federal appropriation?" Does it relate to the size of the cheque? Can the payment (e.g., for ecosystem benefits) be included in the BPA rate base?
    - There is an elaborate set of federal statutes relating to BPA's money flow. Anything that alters that does need to be considered by Congress because it would be changing the uses of appropriated funds. Congress does not give an agency the authority to "run on its own bottom".
    - Would it be possible in the paper to identify the options that would require additional funding?
    - Very little that is being discussed in the Basin would not involve more money. This is and will be a political process.

- There is a different constitutional and legal framework for indigenous peoples in the US. On the West Coast of the US, there are no constitutional disputes about aboriginal title. The application of the *Endangered Species Act* was precipitated by native American tribes asserting their treaty rights and winning in US Federal Court. This triggered a biological analysis that suggested that there might be an endangered species issue. On the US side, the State Department must always consult with Tribes and involve them. If it does not, they will go before a judge and have the Department brought to the table.
    - As a matter of policy, the State Department accords the same consultation rights to non-treaty tribes as with treaty tribes.

## Comments Relating to Treaties in Canadian Domestic Law (Chapter 5)

- It would be useful if the authors expanded the section on First Nations rights so that US readers can appreciate the quality and magnitude of First Nations interests in Canada.

- An important consideration in the Canadian context is the nature of the consultation obligation with First Nations that modern Canadian law imposes. Some of the statements made in the paper are too general. The nature of the consultation obligation is driven by the nature of the conduct that the provincial and federal governments might be contemplating as the discussions take place. When the conduct is defined, then one can ask "What First Nations interest might that affect?" and this will define the nature of the consultation obligations.

- The current information from the parties is that all options are open for discussion, so it would be problematic to cut out First Nations from engagement at this point because the "nature of the conduct to be contemplated" is not yet defined.

- When we are thinking about the obligation to consult and accommodate First Nations, it is important to focus on accommodation. It is not just about identifying the interests of First Nations but also finding ways to address those interests. The engagement to get to this point has to be meaningful (i.e., to take place at multiple stages in the process).
    - There is no "if" with respect to whether the First Nations have an interest in the Columbia River Treaty. It is First Nations land and we do care for it.

- With respect to the subject matter of the CRT, in most of BC, there are no treaties with the First Nations and aboriginal title is outstanding. The courts have ruled that the federal government has a constitutional responsibility to safeguard aboriginal

rights. Accordingly, there is doubt as to whether the federal government will indeed follow the provincial lead in amending the CRT.

- In general, most of the consultation that the provincial and federal governments have done with the Ktunaxa is inadequate.

- The paper should reference the fact that the doctrine of discovery – that this land was "unoccupied and not being used" – is the basis of sovereignty for both the US and Canadian governments. Canadian sovereignty in the Columbia River valley requires a treaty between the federal government and First Nations, and that treaty does not exist.

- The Mackenzie River negotiating team which is developing a transboundary water agreement with three provinces and three territories is spending more than half its time engaging and consulting with First Nations.

## Comments Relating to Canada-US Bilateral Treaty Practice (Chapter 6)

- The Boundary Waters Treaty (BWT) provides an example of how a treaty can be changed over time. It is a very different instrument now – even the definition of "boundary waters" has changed. There are other examples from international law. The question is: Are the Parties willing to go beyond what the CRT currently permits?

- In many cases, the subject matter of these water treaties is highly technical and beyond the ken of the US State Department. As a consequence, US constitutional practice – the President's delegation to the State Department – and its international treaty practice is an 18th century model that is still adjusting to the circumstances of the 21st century. The technical details of how to prevent flooding are not traditionally the subject of international treaties.

## Comments Relating to Practice under the CRT (Chapter 7)

- Disagree with the concept that NTSAs are examples of commercial agreements between countries. They are agreements between the Entities to deal with the resources that are not dealt with under the CRT.

- Although it may be outside the scope of the paper, it would be useful to know how we could arrange it if we switched to "called upon" flood control.

- Is it possible under the CRT to develop a multi-year protocol that would allow the parties to store water and move it around to allow fish passage?

- What flexibility is there to re-shape the power benefits under the existing Treaty without requiring the advice and consent of the Senate?

- How can we expand the participation of people involved in implementation of the Treaty?

- Regarding the re-adjustments in flood control payments relating to Arrow and Duncan which received the advice and consent of the Senate, House approval was required for appropriation. Only secondarily was Senate approval needed because under the Constitution, a House Bill needs Senate approval. On the US side, we shouldn't confuse actions that require implementing legislation – such as anything requiring appropriation − with actions requiring the advice and consent of the Senate.
    - The big difference is that advice and consent requires a 2/3 majority of the Senate; passage in the House requires only a simple majority.
    - The height of the hurdle is related to the amount of money needed; the greater the amount of money needed, the more interest there will be outside the northwest.

- The reason the "on call" provisions for flood control have not been used in 48 years is the requirement for approval of the House for appropriation of funds to transfer to Canada if increased flood control is needed. There is not enough time to go to the House between the time that high flows are forecast and when they come down the river.
    - In addition, it was suggested that the power operating plans have provided sufficient flood control benefits.

- There is a significant amount of flexibility built into the CRT. It would be useful to mention the principles and procedures agreements that have resolved a lot of issues and resulted in additional benefits. These are technical interpretations of the Treaty. It was recognized from the beginning that this kind of interpretation had to take place and that is why there are no details about how to prepare operating plans (for example) in the Treaty. The Permanent Engineering Board (PEB) was created in order to assess whether the interpretation actions were straying too far from the Treaty objectives. The principles and procedures agreements addressed such issues as the impacts of irrigation on storage and downstream benefits, thermal resources outside the northwest, shifting and shaping of loads, the alteration of Assured Operating Plans for mutual benefit, and the 1996 definition of "critical periods".

- A key question is "How far can the Entities push the envelope through the use of Supplemental Operating Plans?" For example, could we significantly reduce the power benefits?

- The ability of the Entities to work together with mutual respect in a "win/win" approach has been critical to the success of the CRT.

- One of the roles of the legal branches of the US State Department and the Canadian Department of International Affairs and Trade (DFAIT) is to interpret treaties for bodies, such as the IJC, that are created by them. If the two signatories of a treaty come to a common interpretation, then it is fixed.

- It can be argued that the institutions that are created under treaties are interpreting law, and are in fact administering the law with oversight if needed. One could argue that there is lawmaking going on in the interstices.

- With respect to climate change, the climate change models show that in general snow pack will be reduced within the Basin (more in the US than in Canada), average flows will be the same but there will be greater fluctuations, and more precipitation will be in the form of rain. This would probably change the way in which you would operate storage on the river, which is within the authority that the Entities currently have.
    - The CBT has been working with the Power Planning Council and other agencies to examine the outputs from both Canadian and US climate models. This shows that the Canadian part of the Basin will have essentially the same amount of runoff but other parts of the Basin will change considerably. As an example, summer stream flows in the Okanagan will decrease and that would be an issue for fisheries and also for the shifting of hydroelectricity demands to the summer months to deal with higher temperatures. Dams are great adaptation mechanisms in that they can be used to store water as natural storage source (such as glaciers) are depleted.
    - The Columbia River Inter-Tribal Fish Commission has taken information developed by others to examine the impacts of climate change on flows, fisheries, ecosystem function and other issues.

- USACE and BPA have technical expertise in hydro generation and flood management, but are not experts in ecosystem function. The First Nations and Tribes of the Basin have expertise in ecosystem function and can help integrate these issues into river management plans.

***Benefits***

- Currently there are several hundred thousand sockeye salmon returning to the Okanagan Basin as a result of the Okanagan Nation working with public utilities and habitat improvements. The changes to the mid-Columbia flows and operation of those facilities are now benefiting the stock of Okanagan sockeye. The US is receiving downstream benefits and sharing ecosystem benefits upstream.

- There are issues in the US about "who pays" for upstream ecosystem benefits and how that payment is delivered. When you change the benefits in an international agreement, it gets more difficult to implement.

- An important question is when BC will start paying for some of the ecosystem benefits they receive from transboundary fish.

## Comments Relating to Moving Forward

- There is merit in trying to move forward within the framework of the existing Treaty which is very flexible. This would avoid the problems associated with the advice and consent process, might help keep out some political issues, would give the people of the Basin more control.
    - The existing Treaty has substantial flexibility (e.g., to change the operation of Canadian storage to meet other – non-power and flooding – objectives).

- It would be useful if the paper, in addition to looking at the flexibility available, also examined the constraints. How far can we go before we are constrained by the law or the Treaty itself?

- The paper could be "sharpened" as to what we are looking for in terms of moving forward.

- In 2012, it's time to ask the same question they asked in 1960: "What ways do we want to cooperate in the management of the Columbia River?"

- We need to continue bilateral cooperation and discussion. It may be worth using a map that doesn't include the border (i.e., "one river, one people").

- US environmental agencies are interested in how to optimize the Columbia River system to provide not only for salmon and steelhead, but also for white sturgeon, burbot, bull trout and other species. There is a question as to whether the same level of information is available in Canada. A key question moving forward is: "What

does an operation that is better for ecosystem benefits look like in a coordinated system?"

- It is important that the river be managed as a unit. We should take the boundary lines out and address all interests. We should manage the river so that fish can move around it, not so we have fish to harvest in the US. If we define where we need to be and then look at the impediments to getting there, we will be farther ahead.

- Getting money for flood control is generally easier than getting money for other issues. However, there is a lot of frustration in communities in the upper watershed, such as in Kootenay which is flooding right now, that dams are being managed primarily to benefit Portland, which is still building in the floodplain.

- There is a different dynamic now for power generation than there was in the 1960s and this should be factored into discussions.

- There is a paradox between the desire of some for fundamental change (in consultation and scope of the Treaty) and the desire to avoid the processes (such as getting the advice and consent of the Senate) that might be triggered by fundamental changes.

- Perhaps what we perceive as being fundamental changes in the CRT (such as addressing ecological, environmental, indigenous and public participation values) were actually fundamental foundations in the 1960s. We are not asking therefore to fundamentally change the Treaty, but to adapt it to recognize the values that were always there.

- The authors could perhaps shed some light on how far we can go in terms of addressing values other than power and flooding without changing the essence of the Treaty.
    - The essence of the CRT is the operation for power benefits and flood control, the calculation of what those are, and the division of them. If you change the power and flood control portions of the Treaty, you are developing a new treaty.
    - Changing the Migratory Birds Convention posed a similar problem − how to adjust it without losing its status as an Empire Treaty. This was done successfully.

- Regarding the ability of the PEB to expand its scope of work, it is supported by a committee with federal and state/provincial members and its resources are provided

by the federal, state and provincial governments. Expanding the scope of work would require going back to the governments for additional resources. Also, it should be noted that it is an "Engineering Board" that addresses technical issues as opposed to legal or political issues.

  - Culturally, the PEB is an engineering board, but Article XV(2)f in the CRT suggests that the Parties could agree to give the PEB additional responsibilities if they wished. They could also add additional Entities, such as the Ktunaxa or the Columbia Basin Trust.
  - Currently the PEB could be given additional authority in two ways: to conduct an Investigative Report or it can be directed to carry out an action by an Exchange of Notes between the Parties.
  - The Parties can override the PEB and the Entities if they wish.

- The US government has yet to hear from the Canadian government as to the future of the CRT. The Entities are not signatories to the Treaty, nor do they represent the Parties. The US government has taken no action to cede its sovereign obligations and responsibilities to any body.

- If there was a desire to expand the scope of the Treaty, how far could we go before further legislative action is needed (i.e., it could not be accomplished with an Exchange of Notes)? What is "outside" the scope of the Treaty?

- The cart is slightly before the horse with respect to the processes that could be followed in amending the CRT. The two sovereign states have to decide what they want to do. Until this happens the legal advisor's office in the State Department will not undertake hypothetical opinions. It does not see its job as figuring out how to get around the need for gaining the advice and consent of the Senate in some matters. It does not want to prejudice what the "client" wants by unduly intervening with hypothetical legal scenarios.
  - One of the purposes of the discussion paper, this workshop and meetings of the Universities Consortium on Columbia River Governance is to provide advice that may influence the Parties.
  - In democracies there needs to be mechanisms to send messages to decision-makers (elected officials).

- The Ktunaxa Nation is interested in staying involved in any future initiatives relating to the CRT.

- The concerns of the indigenous peoples of the Basin include the protection of ecosystems, the need to be involved in implementation (the decision-making operating structures), and benefits from the construction of dams that flooded First

Nations territories. The First Nations are involved in a process with BC Hydro and are building a more bilateral relationship with the federal government.

- Are the Entities driving the process to update the CRT because the federal governments are disengaged?
    - The Entities have technical expertise in managing the river and calculating the benefits that does not exist in Natural Resources Canada (for example). However, this means that the approach is quite limited in scope. BPA, USACE and BC Hydro have certain statutory responsibilities (e.g., responsibilities to their ratepayers and to manage flooding). They might be pushed to address other values, but they won't start there.
    - The review process could be done differently, but that would depend on the federal governments and states and the province wanting to change the orientation of the CRT. It has happened in the US with the accommodation for the *Endangered Species Act*.

- The Columbia River Inter-Tribal Fish Commission can provide additional information on the process used in the development of the Pacific Salmon Treaty (PST). Instead of being consulted, the Tribes participated in the Treaty review as working members (as sovereigns). The PST provides a good example of how to conduct a participatory process that involves stakeholders and governments that are affected. The process included panels that were comprised of representatives of federal and state governments, tribes and other stakeholders. Voting is left to the federal and state governments, but the panels allow a great deal of stakeholder input to be collected. The panels provide recommendations to the governments on how the fisheries should operate in subsequent years and the ultimate decisions are contained in an Exchange of Notes.

- The Confederated Salish and Kootenai Tribes can provide their Common Views Document that has been endorsed by each of the 15 tribes.

- With respect to scope, the question of how these four dams can be operated is a small part of transboundary water management. There is a rich history of contamination problems in the Basin and for the most part these have been addressed from outside the Basin, either judicially or through the IJC. Examples are the Columbia River downstream of the Trail smelter and the more recent selenium contamination in the Elk River which drains into the Kootenay River, the Libby Dam and Lake Kootenay. This is a transboundary water quality issue that affects fish, amphibians and birds. It would be useful if the paper could explore whether there is flexibility in the CRT to address water quality and other issues that require regional solutions.

- It would be useful if the paper could explore whether there is flexibility in the CRT to address issues of equity and participation. As an example, can the Parties add additional Entities?

- The US State Department has already met with the Tribes in the Basin. The government's goal at this time is to incorporate Basin interests (including the Tribes) in the on-going technical review process. (This is not a full-blown policy review process). On the US side, the Department's position is that the treaty tribes are extremely relevant and appropriate parties to the issue at hand.

- There is a need to get the right set of values at the table if we are going to have institutional arrangements and outcomes that reflect a broader range of values.

- If we look at the core functions of the existing CRT, the Entities that were designated were appropriate at the time, given the scope of the Treaty. They have been asked to do a technical review of their core functions. This doesn't mean that other issues shouldn't be addressed as we move forward. They may or may not be appropriate to address under the CRT.

***Termination***

- The paper would benefit from more discussion of possible termination of the Treaty, especially with regard to US domestic law. What legal hurdles would have to be met? Would an Environmental Impact Assessment (EIA) be required if this happens? Would it be needed after a notice to terminate was issued? Would an EIA be required if there is a move to "called upon" flood control. Would commercial agreements be open to law suits and damages?

- On the US side, subject to the terms of a treaty, there is no constitutional requirement to discuss termination of a treaty with the Senate.

- The US *National Environmental Policy Act* (NEPA) has been held not to apply to international treaty negotiations or actions. However, if the CRT was terminated and the actions of the two US Entities changed significantly to become a "significant federal action", they would have to conduct an environmental policy review prior to changing their operations.

- An EIA might be needed if the Treaty was terminated and the Parties moved to "called upon" flood control, which means that the US would have to make effective use of its storage capacity before calling upon Canada. In such circumstances, the

NEPA analysis might not be system-wide and could be applied on a reservoir by reservoir basis. The determination of that would be applied by a US federal court.

- The Entities have looked at the impacts of one scenario – termination – on fish flows.

- It should be noted that Canada has not raised the issues of capacity, effective use and "called upon" flood control with the US and so they have not been discussed or interpreted by the Parties.

- If Canada wanted to give a notice to terminate the Treaty, it wouldn't trigger an environmental assessment under the *Canadian Environmental Assessment Act* (CEAA) because it is not a "project". It would trigger a requirement for a strategic environmental assessment, but that is a function of federal government policy, not legislation. It would trigger the duty to consult and accommodate First Nations.

- The International Court of Justice has just ruled in the Pulp Mills Case (Argentina v Uruguay, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=au&case=135&k=88&p3=0 that there is an international legal obligation of both governments to prepare a transboundary EIA in the case of activities that may have a significant effect on the environment of the other country.

- There is NEPA jurisprudence in a BC Federal Court of Appeal regarding water projects in North Dakota which would require a NEPA EIA to consider environmental impacts in Canada.

- Canada is a signatory and has ratified the ESPOO Convention on International Impact Assessment. The US is a signatory but hasn't ratified it.

## Miscellaneous Comments

- There are very different attitudes towards litigation in Canada and the US. In Canada, we start with negotiation and compromise. If that fails, we go to court. In the US, litigation is often the very first step in negotiation to get someone's attention. An example in the CRT was the return of the entitlement to Canada.

### Comments on the Workshop

- A number of attendees acknowledged the importance of the workshop as a forum to discuss legal aspects of the Columbia River Treaty and appreciated the opportunity to attend.

## Wrapping Up

Barb Cosens and Nigel Bankes thanked participants and observers for their comments and suggestions. They noted that many of the comments related to the need for the paper to address (or provide more detail on):

- the history of indigenous peoples in the Basin and how that relates to rights;
- the international law and indigenous peoples;
- the legal history of tribes in the US;
- the requirements to consult with indigenous peoples;
- the Entity appointment process and the amount of flexibility within the current structure to designate Entities;
- who is currently engaged in the technical review process;
- possible future scope of the CRT including water quality;
- international law and the watershed approach;
- the degree of flexibility

In his concluding remarks, Stephen McCaffrey noted that there had been a rich discussion and he had learned a lot. He suggested that the workshop was a fantastic opportunity to learn from one another and gave credit to Adèle Hurley and her staff. He suggested that the process of the workshop itself was something to take note of and be thankful for.

With respect to key highlights for him, Stephen suggested that most in the room believe that we should keep the CRT, in the hope that it can be broadened to include other values such as fisheries. Whether the two Parties agree with that is another matter. Two key areas in which people would like to see additional work relate to ecosystems and indigenous peoples. Somehow these values have to be addressed through the CRT and Treaty mechanisms. However, he suggested that a second paper or workshop might be needed to fully explore these issues and to remove the border and look at the Basin as a whole.

Gordon MacNabb began his concluding remarks by likening the CRT to a skeleton on which people are trying to add weight. He asked the question: How much weight can it take and still survive? How much flexibility did we build into the Treaty? He recalled the history behind the CRT, which came about after 14 years of study by the IJC. The IJC was asked to study five aspects and concentrated on just two – power generation and flood

management – in its report to the Parties. This was not to say that the other three issues were not important, but that international coordination was not necessary to address them. The IJC negotiations on issues such as downstream benefits – which were unique at the time – took another year. When the treaty negotiations began, Canada took the IJC principles as the basis of its negotiations. The United States took the IJC principles as a guide. The overall process took twenty years.
Gordon recalled that there were many battles on the Canadian side between the federal and provincial governments and at times these were more difficult than the battles that went on internationally. The great debates were not at the technical level, but were focused on which projects would be built and what valleys would be flooded. The federal government had a team of experts that were located in Portland, Oregon who were able to work with the Province, USACE and BPA. He noted that this is not the position today. Likely a great deal will depend on the technical competence within BC Hydro.

Gordon also recalled that the implementation Protocol was not something that was insisted upon by the BC government, but was a priority of the new Liberal government in Ottawa which had been in opposition (and against the Treaty) when the Conservatives were negotiating it. At a political level, the Protocol contained "improvements" that enabled the Liberals to support the Treaty. These were significant and improved the energy and capacity benefits. Major changes were made to the flood control commitment (the "called upon" concept after 2024).

Regarding flexibility, Gordon indicated that the team tried their best to build in significant flexibility for the Entities to carry out their work. They expected that the energy and capacity benefits would be reduced over time, and inserted a proviso into the Protocol that if they decreased, then Canada would only be obligated to provide as much storage as needed to match the diminished benefit.

Gordon finished by wishing participants good luck as they moved forward. He stressed that as long as the power and flood control obligations are maintained under the Treaty, "you can build in whatever flexibility you want". The Assured Operating Plans for power and flood control and the sharing of the benefits are the essence of the CRT. He cautioned against trying to add too much on top of this. If you can do it, then the Treaty can be left as is. If not, he said, it may be better to look at a new international arrangement, rather than trying to distort the existing Treaty. He finished off by suggesting that the crunch will come in 2024, not so much for power generation, but for flood control. There needs to be an agreement between the Parties to change the requirements for flood control in the Treaty Protocol.

Chair, Jack Blaney wrapped up the workshop by thanking: Hans Schreier, his staff and the University of British Columbia; the authors of the discussion paper − Nigel Bankes and Barbara Cosens; the eight panellists; Adele Hurley at the Munk School of Global Affairs for spearheading the development of the discussion paper and the workshop, and Program Assistant, Jackie Quirk; and the participants and observers for attending and contributing to the discussion.

# BILATERAL UNIVERSITY LEGAL WORKSHOP ON THE COLUMBIA RIVER TREATY

June 28, 2012
Liu Institute for Global Issues
University of British Columbia, Vancouver, B.C.

## AGENDA

**JUNE 27, 2012**
6:00 pm Participants arriving in Vancouver the evening before the workshop and wishing to get together with colleagues are invited to meet for dinner at the University of British Columbia's Westward Ho! Restaurant at the University Golf Club. See page 3 and 4 of the agenda for maps and directions for the dinner and the workshop. PLEASE NOTE CHANGE OF LOCATION FOR THE WORKSHOP TO THE LIU INSTITUTE FOR GLOBAL ISSUES.

## JUNE 28, 2012

### PURPOSE OF THE WORKSHOP:

To present and receive feedback on the workshop paper, "The Future of the Columbia River Treaty" and discuss options for negotiating, ratifying and implementing possible future legal arrangements for the Columbia River Basin

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| 8:30 am | REGISTRATION AND CONTINENTAL BREAKFAST | |
| 9:00 am | Welcome and Introductory Remarks<br>• Background | Host: Hans Schreier, Professor, Faculty of Land & Food Systems, University of British Columbia |
| 9:05 am | Introduction of Workshop Chair | Adèle Hurley, Program Director, Program on Water Issues at the Munk School of Global Affairs, University of Toronto |
| 9:10 am | Setting the Stage<br>• Purpose of the workshop<br>• Agenda review<br>• Chatham House Rule (see page 5)<br>• Introduction of participants and observers | Jack Blaney, President Emeritus, Simon Fraser University |

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| 9:20 am | Presentation by Co-Authors of Workshop Paper,<br>**"The Future of the Columbia River Treaty"** | Nigel Bankes, University of Calgary<br>Barb Cosens, University of Idaho |
| 10:15 am | BREAK | |
| 10:30 am | Panel #1 Discussion of Workshop Paper<br>• Panel with opening remarks on:<br>o Overall purpose, theme and organization of paper<br>o Chapters 1-4, with emphasis on the chapters on international law (Chapter 3) and US domestic law (Chapter 4)<br>• Comment and discussion | Stephen McCaffrey<br>Nancy Morgan<br>Chris Sanderson<br>John Shurts<br>Participants |
| 12:00 pm | LUNCH | |
| 1:00 pm | Panel #2 Discussion of Workshop Paper<br>• Panel with opening remarks on:<br>o Chapters 5-8 , with particular attention on Canada domestic law (Chapter 5), bilateral treaty practice (Chapter 6) and practice under the CRT (Chapter 7)<br>o Conclusion (Chapter 8) and overall approach, theme and conclusions of paper<br>• Comment and discussion | John Hyde<br>Tim Newton<br>Eric Dannenmaier<br>Richard Paisley<br>Participants |
| 2:30 pm | BREAK | |
| 2:45 pm | Open Discussion of Workshop Paper<br>• Comment and discussion | Observers |
| 3:45 pm | Wrapping Up<br>• Concluding remarks on Workshop Paper and Workshop comments<br>• Final comments, acknowledgements and next steps | Stephen McCaffrey<br>Gordon MacNabb<br>Jack Blaney |
| 4:30 pm | WATER, WINE AND CHEESE SOCIAL MIXER<br>Sage Bistro at the Peter Wall Institute | |

## PARTICIPANTS

Nigel Bankes, Professor and Chair of Natural Resources Law, University of Calgary
Bill Barquin, Attorney General, Kootenai Tribe of Idaho
Barb Cosens, Professor, Waters of the West Program, University of Idaho College of Law
Eric Dannenmaier, Professor of Law, Environmental and Natural Resources Program, Indiana University
Steve Doherty, Senior Advisor to the Secretary for the Northwest, U.S. Department of Interior
Craig Gannett, Partner, Davis Wright Tremaine LLP
Jim Heffernan, Policy Analyst, Columbia River Treaty, Columbia River Inter-Tribal Fish Commission
Joe Hovenkotter, Staff Attorney, Confederated Salish and Kootenai Tribes
John Hyde, Retired from Bonneville Power Administration
Christopher Jones, Senior Legal Counsel, Legal Services Branch, BC Ministry of Justice
Gayle Lear, Assistant Division Counsel, Northwestern Division, U.S. Army Corps of Engineers
Gordon MacNabb, Member, Water Advisory Board, Columbia Basin Trust
Les MacLaren, Assistant Deputy Minister, Electricity and Alternative Energy Division, BC Ministry of Energy and Mines
Heather Matthews, Project Manager, Columbia River Treaty Review, BC Hydro
Stephen McCaffrey, Professor, McGeorge School of Law, University of the Pacific
Nancy Morgan, Morgan and Associates, Counsel to the Ktunaxa Nation Council
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Linda Nowlan, Director, Pacific Conservation, World Wildlife Fund Canada
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John Shurts, General Counsel, Northwest Power and Conservation Council
Kenneth Thomas, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

## OBSERVERS

Darcy Blais, Senior Policy Advisor, Electricity Resource Branch, Natural Resources Canada
Alex Etchell, Graduate, University of Victoria Law
Marisa Ferguson, Political/Economic Officer, U.S. Consulate General Vancouver
Christine Golightly, Policy Analyst, Columbia River Inter-Tribal Fish Commission
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Ralph Pentland, Canadian Water Issues Council, Munk School of Global Affairs, University of Toronto
Doug Robinson, Canadian Entity Secretary, BC Hydro
Troy Sebastian, Special Projects Coordinator, Ktunaxa Nation Council
Stephen Smith, Fisheries Consultant
Chris Trumpy, Senior Economist, Columbia River Treaty Review Team, BC Ministry of Energy and Mines

## OTHER

Jack Blaney, (CRT Legal Workshop Chair)
Adèle Hurley, Director, Program on Water Issues, Munk School of Global Affairs, University of Toronto
Joanna Kidd, Kidd Consulting (Notetaker)
Hans Schreier, Professor, Faculty of Land and Food Systems, University of British Columbia (Host)
Jackie Quirk, Program Assistant, Program on Water Issues, Munk School of Global Affairs, University of Toronto