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Regionalization and Democratization Through International Law: Intertwined Jurisdictions, Scales and Politics in the Columbia River Treaty

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I

INTRODUCTION

The 1964 Columbia River Treaty (CRT)[1] provided for

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[1] Treaty between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, U.S.-Can., Jan. 17, 1961, 15 U.S.T. 1555 [hereinafter Columbia River Treaty]. The CRT, along with the Protocol of January 22, 1964, and other documents are printed in a collected set of documents, The Columbia River Treaty Protocol and Related Documents (Departments of External Affairs and Northern Affairs and

four large storage dams to be built in the upper Columbia Basin to control a significant fraction of the Columbia's flow. Three of these four dams were built in the Canadian portion of the basin and are operated to provide flood control and to optimize hydropower production downstream. See Figure 1. On the surface, the CRT seems to illustrate the principle that international agreements trump the power and leverage of smaller-scale governments and interests, and are thus unaccountable and anti-democratic. Ongoing management of the three Canadian treaty dams and the river flows they control is fairly rigid, narrow in its priorities, inaccessible to anyone other than two government agencies on the U.S. side of the border and one on the Canadian side, and causes significant social and environmental dislocation. And yet the CRT arguably had an empowering impact on subnational regions as well as a kind of transnational region–and this regional empowerment also corresponded to a significant democratization of resource management. The empowerment occurred because the treaty would not have been approved without several associated legal agreements which brought several regional jurisdictions and actors on both sides of the border into active participation in Columbia River management decisions, and gave them considerable control over the distribution of the Columbia River's most profitable benefit, its hydropower.

National Resources, Canada, 1964) [hereinafter CRT Documents]. The Columbia Basin Trust, *infra* Part III.D.2 and note 53, provides most of these documents as a downloadable file, *available at* http://www.cbt.org/about/columbiarivertreaty.rtf.

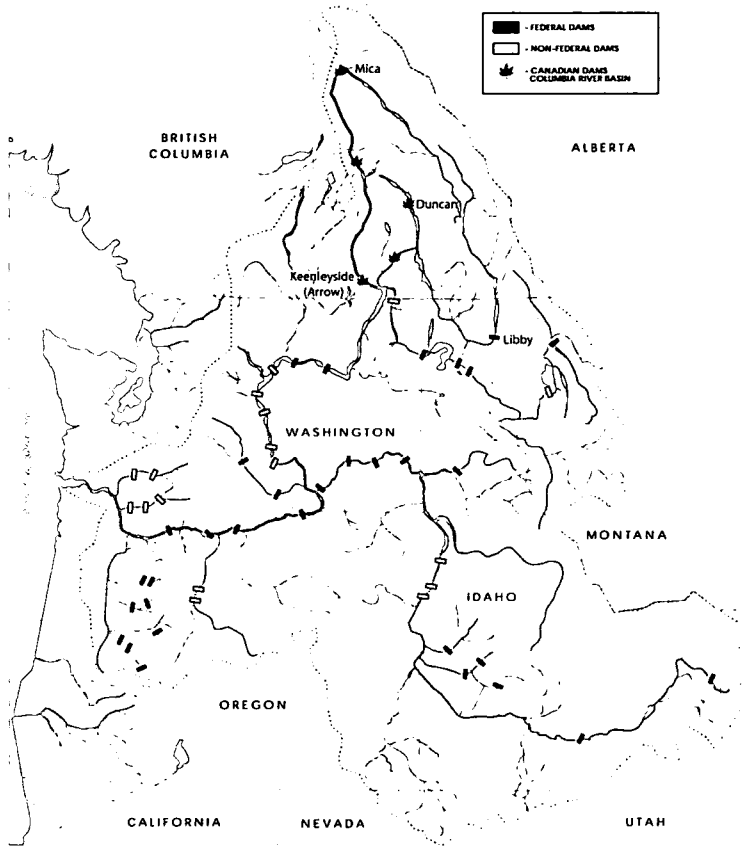

Figure 1. The Columbia Basin and its major dams. The four Columbia River Treaty dams are Mica, Duncan, Keenleyside or Arrow (all in British Columbia, Canada) and Libby (in Montana, United States). Mica, Duncan and Keenleyside provide storage required by the CRT, and their primary purposes are power generation and flood control downstream in the United States. The United States was given the option under the treaty to build Libby Dam, and took that option. While Libby is located within the United States largely to benefit United States interests, it was included in the international treaty because its reservoir backs up into Canadian territory. *Map Source:* Adapted from *The Inside Story*, *infra* note 23, at 10-11.

There is a significant caveat though: while the CRT helped to expand participation in Columbia River management and to distribute river benefits more widely, and these results were rooted in regional-scale management of the river basin, only a limited set of regional jurisdictions, actors and interests profited. Many others were excluded entirely. Further, the international nature of the CRT imposed a permanence that would not have been present in a single-nation law. Forty-four years later, many people, places and interests that were initially excluded from the CRT and its associated agreements have become central actors and concerns on each side of the border. Most prominent among these are Native American and First Nation peoples, native fisheries, and the communities and ecosystems in the Canadian portion of the basin that have been negatively affected by the treaty dams. In both Canada and the United States, these people, places and interests have become central participants or considerations in Columbia River management. Nonetheless, they have no direct influence over treaty-controlled river flows. Their lack of influence ultimately limits the ability of overall Columbia River management to meet important goals. Viewed from a long historical perspective, then, the CRT initially helped to democratize participation in Columbia River management, but impedes that goal today.

This history seems to have two major contradictions. First, there was a concurrent rise of both international-scale autocracy and regional-scale empowerment and democratization. Second, regional-scale empowerment brought democratization in the past, but presently obstructs democratization. How can we make sense of these inconsistencies?

I suggest that these *seem* like contradictions because they challenge several standard notions about the relationship among law, jurisdictional level, geographic scale, and democratization, which turn out to be

problematic. If we can break out of these standard notions, we can better make sense of the past, present and future of the Columbia River Treaty. First, we must extricate ourselves from simple hierarchical notions of international, national and subnational levels and scales of authority and decision-making, for a hierarchical view cannot make sense of the concurrent rise of both international-scale autocracy and regional-scale empowerment and democratization. Second, we cannot make the common assumption that jurisdictional level is congruent to geographical scale. Though it is more complicated even than this, a crucial insight here is that the CRT is inter-national in jurisdiction (that is, it is an agreement between two nations) but mainly regional in its geography. Third, we need to abandon the wishful notion that resource governance (or governance of other issues) will necessarily be more socially inclusive and balanced if it is devolved or re-scaled to smaller local or regional geographic scales, and will be more attuned to environmental processes and needs if it is re-territorialized along the boundaries of natural systems. These results *may* follow from devolution of governance – but that depends on other factors besides geographic scale and jurisdictional level. Finally, we have to step back from static, ahistorical and apolitical views of both law and geography. We must recognize that the process of *constructing* new geographical organizations of governance can be a politically open moment in which new actors and interests can break in, but that once such new geographical organizations and systems of governance are settled and *codified* by law, they can impede further political opening.

In this essay, I use the history of the CRT and its associated agreements as a vehicle to rethink the interrelationships among law, jurisdiction, geographic scale and democratization. I draw from recent work in the discipline of Geography on the "politics of scale." Geographers have argued that geographic scales and

jurisdictional levels are not natural, pre-ordained, nested "containers," each entirely encompassed by the next larger scale, but rather are constructed, dynamic, contested and mutually constituted.[2] I suggest this more dynamic, relational and political conception of scale and jurisdictional level can help to make sense of the seeming contradictions of the CRT case.

The CRT case provides a revealing window into the relationships among international law, jurisdictional level, geographic scale and democratization. To begin, the development of the CRT entailed negotiations and agreements among actors representing a wide range of different geographic scales and legal jurisdictions, so this single example provides abundant illustrations of the ways jurisdiction, scale and democratization can interact. In addition, because the CRT is forty-four years old and a treaty, its lessons are particularly profound. Recently, scholars have begun to recognize the ways geographic scales and legal jurisdictions can become interrelated and reconstituted. Scholars have tended to see these interrelationships and reconstitutions as recent phenomena however, brought about by varied processes sometimes identified as "postmodern," or associated with late-twentieth-century and twenty-first-century globalization. These recent phenomena are cast as if they were starkly different from what happened in the early- and mid-twentieth-century "modern" era, when, supposedly, nation-states met other nation-states as unitary actors, with little room for other scales or jurisdictions to challenge the hegemony of the national state. Of all the forms of international law, the one that has often been seen as the most traditional, most formal and most state-centric,

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[2] *See, e.g.*, Peter J. Taylor, *Beyond Containers: Internationality, Interstateness, Interterritoriality*, 19 PROGRESS IN HUM. GEOGRAPHY 1 (1995).

perhaps, has been the treaty. Yet in the middle of the twentieth-century "modern" era, an international treaty concerning the Columbia River was constituted by complex multi-scalar and multi-jurisdictional politics; and it also reconstituted and empowered smaller scales, with considerable democratization as a result. Far more than recent cases, the history of the CRT proves that the complex and multidirectional relationships we have begun to see among law, jurisdiction, geography and democracy are not new; these complexities are fundamental. Finally, the longevity of the CRT is also helpful because it allows us to see the long-term effects on geographical and jurisdictional reconfigurations of new international laws or legal regimes.

The paper proceeds in four Parts. In Part II I draw on current geography and other literature to consider how we can begin to rethink the relationship among international law, subnational and transnational regions, jurisdictions and geographical areas, and democratization of resource management. Part III examines the multi-layered political contests that shaped the CRT and its associated agreements, and the results in terms of empowerment of regional-scale management and democratization of resource management. In Part IV, I distill the lessons from the CRT example for how to think about the relationship among international law, regional-scale resource management, political openness and democratization. A short epilogue, Part V, touches on the possible future of the treaty and Columbia River management.

II
DIS-ORDERING NOTIONS OF JURISDICTION, SCALE, AND DEMOCRACY

Standard conceptions of international law, jurisdictional level, geographic scale and democratization are built on

several problematic assumptions. Two of these assumptions are tightly linked: first, jurisdictional levels are seen as ordered within a fairly clear hierarchy; and second, jurisdictional level is understood to be spatially congruent to geographic scale. Together, then, standard conceptions see a nested series of jurisdictional levels, each tied to a discrete legal territory, each one higher and larger, more powerful and more spatially encompassing than the next. In the United States for example, State law is seen to apply to individual State territories, and to trump local laws that apply only to local areas, while federal law is seen to apply throughout the entire United States territory, and to trump State laws. The relationship between international and national jurisdiction is more complex – some would argue that international authority is dependent on, and therefore lies below, that of sovereign nation-states, despite international law's greater spatial scale. Others would argue that it can at times create standards, opportunities or strictures to which nation-states must, or at least often do, bend.[3] It seems that whichever stance one takes on the relationship between international and national law, though, a hierarchical view of jurisdiction and geographic scale carries with it the suggestion that international law must reduce the power of regional and local jurisdictions, and de-prioritize the interests that are located within these jurisdictions' territories.[4]

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[3] *See, e.g.*, Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 *passim* (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)), discussing various ways the power of international law may be conceived, and how it relates to the power of national law.

[4] In the first view of the international-national relationship, international law lies below national law. Nations come together to form an international agreement because it furthers national interests, and it is national law that upholds international agreements. However, as many in both law and geography literatures have argued (not to

A further assumption about jurisdictional level, geographic scale and democratization is that governance organized within smaller-scale areas or carried out by lower-level jurisdictions is superior in terms of democratic potential. To simplify, the sense is that by organizing governance in smaller-scale areas people can gain a sense of autonomy and self-fulfillment, build collective empowerment and community, and recognize interdependencies and connections with each other and their environment. All these abilities, supposedly rooted in the familiarity of place and proximity, are thought to lead

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mention political science),"national" interests are not uniform. *See, e.g., id.* (especially Part II.B, at 1295-1302). National state policy in the international arena generally reflects national-scale majorities or politically and economically powerful interests. Thus, international agreements, like the "national" interests that shape them, may override minority interests or minority regions within nations. In the Mekong River accord, for example, a multi-national agreement privileged national governments' push for industrial development over the interests of minority people and regions, who stood to lose (in the upper basin) their homes and farmland to reservoirs, or (in the lower basin) their fisheries to evened-out annual water regimes. Coleen A. Fox, Flexible Sovereignty and the Politics of Hydro-Development in the Mekong River Basin (Aug. 2000) (unpublished Ph.D. dissertation, University of Oregon) (on file with Knight Library, University of Oregon). *See also* Coleen A. Fox & Chris Sneddon, *Transboundary River Basin Agreements in the Mekong and Zambezi Basins: Enhancing Environmental Security or Securitizing the Environment?*, 7 INT. ENVIRON. AGREEMENTS 237 (2007).

In the second view, international law can trump even national law. This criticism has frequently been leveled, for example, at the WTO's effect on national environmental law. *See, e.g.*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, THE WORLD TRADE ORGANIZATION AND ENVIRONMENT: TECHNICAL STATEMENT BY UNITED STATES ENVIRONMENTAL ORGANIZATIONS (1999), http://www.ciel.org/Tae/USNGOletterUSGonWTO.html.

Osofsky, 9 OR. REV. INT'L L. 233 (2007), also suggests that although the hierarchy of national and international law and authority may be called into question, both are normally seen as above subnational law and authority.

to more sustainable economic growth at the same time they spread and nurture wide social and environmental inclusion. Often this idea is an almost philosophical sentiment. But, it has also translated into a wide range of policies and governmental reorganization efforts around the world, which devolve authority, economic initiative and resource management to smaller-scale areas.[5]

Although these standard notions may make sense in some contexts, a review of recent literature on political and economic geography shows they are often problematic, and suggests steps toward a reformulation.

One challenge to these notions comes from commentators arguing that the internationalization of law and legal regimes can reduce the power of the national state, and in doing so, open up room for subnational jurisdictions and geographic areas to grow in power, influence and autonomy. In particular, literature on the European Union has been full of commentary about the reemergence of regions. A European-wide economic and political system has freed subnational and even trans-national regions from national assimilation policies that often tried to suppress regional differences. In addition, the EU also provides funds for developing subnational and transnational regions. European regions have begun to

[5] For a sampling of the wide literature on this topic, some of it celebratory, some more critical, see Ben Bradshaw, *Questioning the Credibility and Capacity of Community-Based Resource Management*, 47 THE CANADIAN GEOGRAPHER 137 (2003); DANIEL KEMMIS, COMMUNITY AND THE POLITICS OF PLACE (1990); DOUGLAS S. KENNEY ET AL., THE NEW WATERSHED SOURCE BOOK: A DIRECTORY AND REVIEW OF WATERSHED INITIATIVES IN THE WESTERN UNITED STATES (2000), *available at* http://www.colorado.edu/law/centers/nrlc/publications/watershed.htm (last visited Oct. 15, 2007); Andrés Rodríguez-Pose & Nicholas Gill, *The Global Trend Towards Devolution and Its Implications*, 21 ENV'T & PLAN. C: GOV'T & POL'Y 333 (2003); KIRKPATRICK SALE, DWELLERS IN THE LAND: THE BIOREGIONAL VISION (2d ed. 2000).

promote and advertise their own unique cultures, histories or landscapes, and in some cases have emerged as thriving economic and cultural centers.[6] Also, in Europe and elsewhere, especially around the Pacific Rim, lowered national trade barriers are often credited for the emergence of thriving economic city-regions, often held up as models and nodes of the new economy.[7]

Thus, international law and legal regimes in wide-ranging parts of the world are understood to help dismantle the hegemony of the nation-state, and in doing so, to allow for the concurrent rise of subnational and transnational regional power.

A further challenge to the standard assumptions about jurisdictional level comes from a recognition that this process of regional empowerment is not simply about the breakdown of national-level power. In response to proclamations of the end of the nation-state,[8] others have scoffed, arguing instead that it is often the national state itself which is responsible for processes of so-called globalization as well as regionalization and localization–

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[6] *See, e.g.*, MICHAEL KEATING, THE NEW REGIONALISM IN WESTERN EUROPE: TERRITORIAL RESTRUCTURING AND POLITICAL CHANGE (1998); Alexander B. Murphy, *Rethinking the Concept of European Identity*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE 55–73 (Guntram H. Herb & David H. Kaplan eds., 1999); Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, *in* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 81–120 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

[7] *See, e.g.*, S.O. Park, *Rethinking the Pacific Rim*, 88 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 425 (1997); MICHAEL STORPER, THE REGIONAL WORLD: TERRITORIAL DEVELOPMENT IN A GLOBAL ECONOMY (1997); Chun Yang, *An Emerging Cross-Boundary Metropolis in China-Hong Kong and Shenzhen under 'Two Systems'*, 27 INT'L DEV. PLAN. REV. 194 (2005).

[8] *See, e.g.*, KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995).

institutionalizing new regulatory systems, for example, which allow the increasing transfer of money, goods and information across large distances, or allow or empower regions or local areas to harness new opportunities.[9] What we begin to see then is that international, national and regional jurisdiction and authority can all become entwined. We must abandon not only the hierarchical view of jurisdictional level, but also the zero-sum view of power that comes with it. Multiple jurisdictional levels are often both mutually constitutive and mutually supportive.

When these multi-jurisdictional systems of regulation and governance are considered in spatial terms, it becomes clear that the same kind of complex intertwining and mutual constitution can be seen among different geographic scales as well as among different jurisdictional levels. Different areas become defined and organized as "local," "regional," "national," or "international" in various ways through a complex and often contested interplay of politics at multiple geographic scales and jurisdictional levels.[10]

All of these points have been synthesized in the geography literature in the last decade or so. Geographers argue that all levels of governmental organization and all

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[9] *See, e.g.*, NEIL BRENNER, NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD (2004); Jim Glassman, *State Power Beyond the 'Territorial Trap': The Internationalization of the State*, 18 POL, GEOGRAPHY 669 (1999); Becky Mansfield, *Beyond Rescaling: Reintegrating the 'National' as a Dimension of Scalar Relations*, 29 PROGRESS IN HUM. GEOGRAPHY 458 (2005); Erik Swyngedouw, *Neither Global nor Local: "Globalization" and the Politics of Scale*, *in* SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL 137–166 (Kevin R. Cox ed., 1997).

[10] *See, e.g.*, Neil Brenner, *World City Theory, Globalization, and the Comparative-Historical Method: Reflections on Janet Abu-Lughod's Interpretation of Contemporary Urban Restructuring*, 37 URB. AFF. REV. 124, 132–36 (2001); Becky Mansfield, *Thinking through Scale: The Role of State Governance in Globalizing North Pacific Fisheries*, 33 ENV'T & PLAN. A 1807 *passim* (2001).

geographic scales are socially constructed through complex and contested interplays of politics. They overlap and are mutually constituted, and are constituted as well by other axes of social power.[11]

But if all scales and jurisdictions are entwined and interconnected, dynamic and contested–if everything is related to everything else–how can we begin to think about the relation among international law, jurisdictional level, geographic scale and democratic potential in any kind of logical fashion? Is the notion of devolution of authority to smaller scales and lower jurisdictions simply meaningless?

I suggest it is not meaningless; rather, the specific character and effect of devolution of authority and governance on wider participation, broader sharing of benefits, or environmental sustainability is indeterminate based on level and scale alone. As geographers Brown and Purcell argue, "There's nothing inherent about scale": just because some resource management program is "local" or some economic initiative "regional," it does not mean that it is necessarily more socially or environmentally beneficial.[12]

More than simply scale and level, what matters is the particular political conflicts, compromises and relationships that construct specific scales and levels of governance. Devolution of authority can be real, even in the face of all this multi-jurisdictional and multi-scalar interweaving. But exactly who and what a smaller-scale area or lower-level

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[11] *See, e.g.*, David Delaney & Helga Leitner, *The Political Construction of Scale*, 16 POL. GEOGRAPHY 93 *passim* (1997); Neil Smith, *Homeless/Global: Scaling Places*, *in* MAPPING THE FUTURES: LOCAL CULTURES GLOBAL CHANGE 87–119 (Jon Bird et al. eds., 1993); Swyngedouw, *supra* note 9.

[12] Christopher J. Brown & Mark Purcell, *There's Nothing Inherent About Scale: Political Ecology, the Local Trap, and the Politics of Development in the Brazilian Amazon*, 36 GEOFORUM 607 *passim* (2005).

jurisdiction of governance includes and excludes depends on the particular politics and institutions that are embedded within its construction. If national jurisdictions and national-scale interests have traditionally dominated policy making, then empowering other jurisdictions and scales may help destabilize entrenched dominant interests – and therefore empower marginalized groups. Berman argues that international law frequently empowers particular social groups within a nation-state relative to others.[13] Equally, international law can empower particular regions or areas within a nation-state, and particular people or interests within those regions. The key is that when international law empowers groups, areas and interests that were formerly marginalized, it can democratize participation in governance considerably.

But *any* level of law has a quality distinct from other kinds of political and social institutions which makes its influence potentially problematic in the long run. This quality is that law can *codify* geographies and levels of democratic participation, or the interests included within a jurisdiction's or geographic scale's purview. Geographers have been passionate about their insights into the constructed, dynamic and relational qualities of scale and jurisdiction, because, they say, seeing scales and jurisdictions this way can open up possibilities for political challenge and change.[14] The key risk of any legalized geography of governance is that it may diminish subsequent political openness and potential for change. International law may pose an especially high risk, for

[13] Berman, *supra* note 3, at 1295–1302.

[14] *See, e.g.*, Ash Amin, *Regions Unbound: Towards a New Politics of Place*, 86 GEOGRAFISKA ANNALER, SERIES B: HUM. GEOGRAPHY 33 (2004); Kevin Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, or: Looking for Local Politics*, 17 POL. GEOGRAPHY 1 (1998); Delaney & Leitner, *supra* note 11; DOREEN MASSEY, FOR SPACE (2005); Smith, *supra* note 11.

undoing international agreements can be as difficult as forming them in the first place. In other words, when constituted in part by international law, regional systems of governance may be especially immutable, and particularly resistant to further democratization.

In examining how international law may influence democratic empowerment through devolution of authority to smaller-scale areas and lower-level jurisdictions, there are two key questions to ask. The first concerns legal and geographical *construction.* What priorities, participants and political relationships are embedded in a particular geography or jurisdiction of governance? The second is about *codification.* What kinds of policy changes become fixed, limiting further political openness?

III
REGIONAL EMPOWERMENT & CODIFICATION VIA THE 1964 COLUMBIA RIVER TREATY & ASSOCIATED AGREEMENTS

A. An Introduction to the CRT[15]

[15] The most thorough treaty sources I have found are:

- Historical: JOHN V. KRUTILLA, THE COLUMBIA RIVER TREATY: THE ECONOMICS OF AN INTERNATIONAL RIVER BASIN DEVELOPMENT (Johns Hopkins Press, 1967); NEIL A. SWAINSON, CONFLICT OVER THE COLUMBIA: THE CANADIAN BACKGROUND TO AN HISTORIC TREATY (McGill-Queen's Univ. Press 1979). The latter is an amazingly detailed accounting of ten full years of multi-party negotiations, with a focus on the Canadian side.
- Recent overview: NIGEL BANKES, THE COLUMBIA BASIN AND THE COLUMBIA RIVER TREATY: CANADIAN PERSPECTIVES IN THE 1990S (Northwest Water Law & Policy Project 1996). See also the Columbia Basin Trust website, *infra* note 53, and the Annual Reports of the Columbia River Treaty from the United States and Canadian Treaty Entities.

Under the Columbia River Treaty (CRT), four large dams were built in the upper Columbia River basin to store spring-summer runoff. Three – Duncan, Keenleyside or Arrow, and Mica – were built in the Canadian portion of the Columbia Basin; and one, Libby, was built upriver on the Kootenai[16] River in Montana. Under the treaty, the three Canadian dams are used to provide flood control and to optimize downstream hydropower generation. Libby operations are controlled for the most part by the United States.[17]

The treaty dams store spring-summer runoff to control floods, and release water according to flood control needs and power demand, mainly during the fall and winter months when people in the cool Pacific Northwest use heat. The dams fundamentally change the flow of the river from an annual cycle that naturally peaked in the spring-summer and could diminish in the fall to one-tenth or less of the peak, to one that is much more even year-round, and peaks

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• Considerations for the future: JOHN SHURTS, RETHINKING THE COLUMBIA RIVER TREATY (2005) (unpublished manuscript) (adapted from a paper presented at the International Law Conference: Transboundary Freshwater Ecosystem Restoration: The Role of Law, Process and Lawyers (University of the Pacific-McGeorge School of Law, Sacramento, Calif., Feb. 18-19, 2005). Shurts aims to publish this manuscript at a future date. (As this is an unpublished manuscript there are no stable page numbers. Section headings are given for references to this source.)

[16] Spelled Kootenai in the United States, but Kootenay in Canada.

[17] BANKES, *supra* note 15, at 14–15, 83–92. Bankes notes, however, that Libby operations are to "be consistent" with any order made "from time to time" by the International Joint Commission with respect to the levels of Kootenay Lake; and that Libby operations have been a source of contention in recent-years as Canadians have claimed that U.S. operations of the dam have interfered with operations of downstream Canadian dams. *See id.*

when power demand is highest, in the winter.[18] See Figure 2.

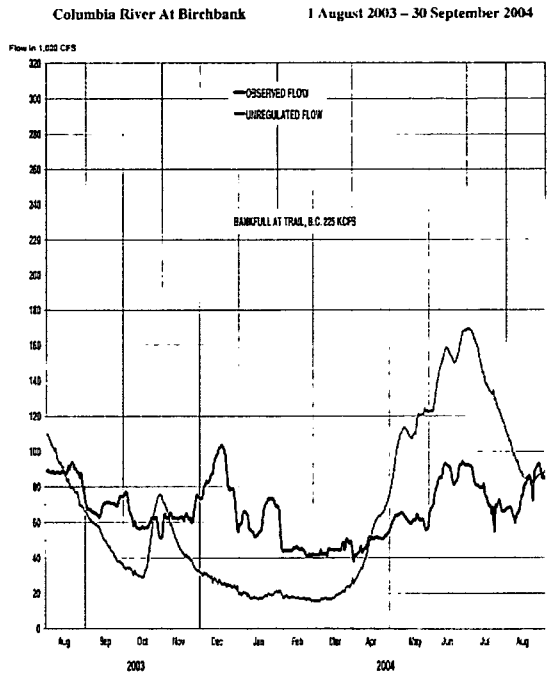

Figure 2. Natural and regulated annual flow cycle. The naturally flowing ("unregulated") Columbia River has a high spring-summer peak and winter low. The treaty dams alter this seasonality considerably, making "observed" spring-summer flows much lower, and winter flows much higher. Water is released in winter from CRT dams in order to turn generators in the US, to power home heating needs. Birchbank, B.C. is about ten miles downstream from Keenleyside Dam, the lowest of the three Canadian treaty dams. *Source:* Annual Report of the Columbia River Treaty, 1 October 2003 through 30 September 2004, *supra* note 15, at 69.

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[18] COMM. ON PROT. & MGMT. OF PAC. NORTHWEST ANADROMOUS SALMONIDS, UPSTREAM: SALMON & SOCIETY IN THE PACIFIC NORTHWEST at 226–28 (National Academy of Sciences 1996) [hereinafter UPSTREAM].

Treaty operations are coordinated between two national "Entities." The Canadian Entity is B.C. Hydro, a provincial corporation that generates and sells most of British Columbia's power;[19] the U.S. Entity is made up of the heads of one federal agency, the Bonneville Power Administration (BPA), and the regional division of another, the U.S. Army Corps of Engineers.[20] Ongoing management of the treaty dams and their water flows is coordinated by a small, tight group of people in these three agencies. Their decisions are not subject to any kind of public review, and their priorities are tightly guided by the forty-four-year-old treaty.[21]

B. Regionalization and Democratization Through an International Treaty

The Columbia River Treaty was not enacted until a series of other agreements were concluded. The Agreement Summary Table (pages 374-75) summarizes the agreements. Together, the CRT and its several associated agreements reinforced and empowered two specific existing regions on both sides of the border, and also built a kind of inclusive cross-border region. On the U.S. side, the region was a Pacific Northwest consisting specifically of Washington, Oregon, Idaho, and western Montana, extending out into small corners of Wyoming, Utah and Nevada. On the Canadian side, the region was British Columbia.

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[19] The Canadian Entity was officially designated by a Canadian Order-in-Council, P.C. 1964–1967 (Sept. 4, 1964).

[20] More specifically, the U.S. Entity is the Administrator of the Bonneville Power Administration and the Division Engineer of the North Pacific Division, Army Corps of Engineers. Exec. Order No. 11177, 20 Fed. Reg. 13,097 (Sept. 16, 1964).

[21] *See* SHURTS, *supra* note 15, at Part IV. *See also* BANKES, *supra* note 15, at 51, 65–69, 75, 81–82.

C. Treaty Construction: The Multi-layered Politics of Regionalization and Democratization

How and why did the Columbia River Treaty come to catalyze such strong, clear empowerment and reinforcement of regional actors, interests and jurisdictions on either side of the border? And how did this help to bring about a kind of democratization – the broadening of participation in Columbia River management and the wider distribution of benefits of river development?

The short answer is that the process of treaty negotiations and construction opened politics in ways that allowed these changes. At a time when the federal U.S. and Canadian governments coveted an international treaty, smaller players and relative outsiders who could prevent the treaty's ratification and implementation had the leverage to win considerable concessions from the two federal governments. Because these smaller players and outsiders previously had limited influence over Columbia River management, their gains amounted to a widening of participation and distribution of benefits.

Within this over-all dynamic, though, "regionalization" and "democratization" were quite different on the two sides of the border, and there were four distinct conflicts that together resolved into the CRT and its associated agreements. Quite specific regional actors, jurisdictions and interests gained greater roles in river management and claimed greater shares of the river's benefits from each conflict; and these differences derived from the distinct jurisdictional and geographical relationships, political and policy contexts, that shaped them.

To get at the roles of different geographical and political forces within the broad pattern of regionalization and democratization, I provide a brief analysis of the four key conflicts that together resolved into the CRT and its associated agreements. See the Agreement Summary Table

(pages 374-75) for a summary of the effects of each agreement on regionalization and democratization. In Part IV I will draw on this summary to develop a generalized analysis of the relationship among four factors in particular: international jurisdiction, regionalization of resource management, political openness, and democratization.

1. Canada Gains Against the United States (Agreement #1 – CRT)

In the over-all negotiations between the United States and Canada, Canada won a favorable treaty by bargaining hard at a time when the United States was the more interested party.[22] Downstream U.S. dams and cities needed upstream storage. But Eisenhower power policy, when superimposed on existing New Deal law, inadvertently precluded the building of storage in the U.S. portion of the

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[22] Thanks to Canada's hard bargaining, Krutilla calculates that the treaty as it was finally put together in 1964 had become economically disadvantageous to the U.S., compared to domestic storage options. But these domestic storage options were not available when the treaty was negotiated during the Eisenhower administration, or initially signed in January 1961, three days before Eisenhower left office. *See infra* note 24. KRUTILLA, *supra* note 15, at 169–204. Nor should the treaty be understood as motivated strictly by economic goals. In a 1970 Masters thesis, William Calkins suggests that part of the purpose for both sides in moving forward after the 1961 treaty signing was simply to further good relations with a critically important neighbor with whom relations for other reasons had become strained. William Clifford Calkins, Some Political and Legal Aspects of the Columbia River Treaty and Related Documents between the United States and Canada 83–98 (1970) (unpublished Masters thesis, University of Oregon) (on file with Knight Library, University of Oregon). Swainson argues that the treaty cannot be seen simply as a product of logical rational analysis. Its details came out of multi-party political bargaining, and the process of bargaining itself shaped the results. SWAINSON, *supra* note 15, at 337–69.

Columbia Basin.[23] Canadian treaty negotiators, well prepared with excellent analyses and sharp negotiators,[24] won fifty percent of the power and flood control benefits that would be produced downstream in the U.S.[25] Although Canada's success did not constitute devolution of governance, it did represent something similar: a jurisdiction with a smaller economy, normally the junior political partner, gained considerable authority and benefits from the jurisdiction that had previously dominated river management. Participation in Columbia River management expanded and internationalized: Canada joined the United States in coordinated basin-wide management.

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[23] Eisenhower policy denied authorization for new federal projects. On the other hand, New Deal law created a disincentive for *non*federal entities to build storage dams, by preventing owners of nonfederal storage dams from obtaining compensation for storage benefits that accrued to downstream federal dams. Since the Columbia River system had several federal dams on the lower river by the 1950s, this meant nonfederal entities could not easily recover the expense of building storage dams. Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power and Conservation Act*, 58 WASH. L. Rev. 175, 209–14 (1983); KRUTILLA, *supra* note 15, at 11–12, 195–98.

[24] Even though Canadians positioned themselves such that development on the Columbia was unnecessary, once negotiations were set in motion, the CRT was a far bigger political issue in Canada than it was in the United States. Krutilla and Swainson both note that given the issue's prominence and the Canadians' acute awareness of the United States' greater governmental resources, the Canadian analysts and negotiators "figured with a very sharp pencil" KRUTILLA, *supra* note 15, at 201; *see also* SWAINSON, *supra* note 15, at 346 (quoting Krutilla). Swainson elaborates on the Canadian policymakers' closer attention to detail and the Canadians' more extensive analyses. *Id.* at 299–300, 325–31.

[25] *See* KRUTILLA, *supra* note 15, at 65–66 (detailing the principles from the International Joint Commission on which this division in benefits was based), 119–150 (detailing the complex considerations and negotiations over how these principles should be applied and analyzed). SWAINSON, *supra* note 15 *passim* (detailing the ongoing negotiations about how these basic agreements would be carried out).

Canada would now also enjoy a large portion of Columbia River power benefits.[26] See the Agreement Summary Table (page 374).

2. *United States: Regional Non-federal Joins Regional Federal (Agreement #2)*

U.S. federal government initiative came not from the national federal[27] government but from the *regional federal* Bonneville Power Administration (BPA), a New Deal agency, which transmits and sells Columbia River power, and from the regional offices of the U.S. Army Corps of Engineers, which owns and operates most of the federal Columbia River dams. While distinctly regional in identity and focus, federal Columbia River management had prioritized power production at federal dams and flood control, and had often aggravated the many Pacific Northwest non-federal utilities and industrial power customers that relied on Columbia River flows and Columbia River power. The latter groups now had two sources of leverage over the treaty that they did not have over regular ongoing federal river management: they could block treaty ratification through their influence over the Pacific Northwest Congressional delegation; and they could block treaty implementation, for they controlled several dams on the mid-Columbia River whose operations had to be coordinated with the Canadian treaty dams to produce the power benefits promised to Canada. Eager for a treaty,

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[26] SWAINSON, *supra* note 15 *passim*. *See also* Volkman, J. M., *A River in Common: The Columbia River, the Salmon Ecosystem, and Water Policy*, report to the Western Water Policy Review Advisory Commission 47–49 (Portland, Or., 1997); Michael C. Blumm and F. Lorraine Bodi, Commentary, *in* JOSEPH CONE & SANDY RIDLINGTON, THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 125–27 (Or. State Univ. Press 1996).

[27] To mark a critical distinction on the U.S. side, I use "federal" for jurisdictional level, "national" for geographic scale.

federal Columbia River managers had to appease this group of disaffected utilities and industries. The result was the Pacific Northwest Coordination Agreement (PNCA) in which non-federal utilities and industrial power customers became participants in yearly U.S. river planning. See the Agreement Summary Table (page 374). These utilities and power customers brought in many local jurisdictions and varying goals, including irrigation, recreation, navigation and flows for fish ladders.[28] The PNCA also expanded the geography of the Columbia River "system": the Columbia's flows came to be managed not only as a part of an integrated hydrologic system, but of a power system that extended far outside the river's hydrologic basin, to the entire U.S. Pacific Northwest.[29]

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[28] This section on the PNCA was developed from Bonneville Power Admin., U.S. Army Corps of Eng'rs and U.S. Bureau of Reclamation, *The Columbia River System: The Inside Story* (2d ed. 2001) 16–17, 22–23, 48, 60–62, 64–66, *available at* http://www.bpa.gov/corporate/Power_of_Learning/docs/columbia_river_inside_story.pdf [hereinafter *The Inside Story*]; Lawrence A. Dean & Merrill S. Schultz, *Pacific Northwest Coordination Agreement: Background and Issues*, Northwest Power Planning Council (1989); Pat Logie, *Power System Coordination: A Guide to the Pacific Northwest Coordination Agreement* (U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, and Bonneville Power Admin. 1993, for the Columbia River System Operation Review), *available at* http://137.161.202.92/PB/oper_planning/Guide_2_the_PNCA.pdf. In addition, I am indebted to conversations with Mike Hansen and Rich Nassief, Northwest Power Pool.

The current PNCA is *1997 Pacific Northwest Coordination Agreement: Agreement for Coordination of Operations among Power Systems of the Pacific Northwest*, 62 Fed. Reg. 43,548 (1997), *available at* http://www.nwd-wc.usace.army.mil/PB/oper_planning/pnca.html.

The first PNCA was signed in 1961. A long-term PNCA was signed with the ratification of the CRT, to run from 1964 to 2003. *See* Logie, *supra* note 23 and *The Inside Story*, at 16–17, 22–23, 48, 60–62, 64–66.

[29] The PNCA's geographic extent corresponded to CRT Annex B, which designated Washington, Oregon, Idaho and western Montana as

3. *British Columbia Prevails Over Canada (Agreements #3 and 4)*

The most contentious struggle in the CRT negotiations did not directly involve the United States at all. It faced off the Canadian federal government and the province of British Columbia (B.C.).[30] Under Canadian federalism, B.C. had the responsibility to license and carry out development projects on the Columbia River, for within Canada the Columbia is a single-province British Columbia river. The federal government, however, was needed to secure a treaty and had authority over the river at the international border. The federal government used this authority in 1955 to block independent provincial Columbia River development.[31] Faced with this federal veto power, B.C.'s premier of the 1950s and 1960s, W.A.C. Bennett, aggressively pursued multiple power development options and was able to negotiate with the federal government from the strong position of not needing Columbia River development. After years of standoff, the Canadian federal government – and the U.S. federal government, as well – acquiesced to virtually all of British Columbia's main demands: its preferred dam sites, a large share of the downstream benefits (both in Agreement #1), full control of treaty implementation, the right to export the downstream power benefits (both in Agreement #3), and a single purchaser for the downstream power benefits (Agreement #4).[32] See the Agreement Summary Table (pages 374-75). Besides clearly devolving management to the province, B.C.'s successes also helped build an

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the Pacific Northwest area. CRT Documents, *supra* note 1, at 79. *See also infra* endnote iii.

[30] Swainson provides a thoroughly detailed and fascinating account of this long and complex conflict. SWAINSON, *supra* note 15 *passim*.

[31] *International River Improvements Act.* R.S.C., ch. I-20 (1955). *See* SWAINSON, *supra* note 15, at 61–64.

[32] SWAINSON, *supra* note 15 *passim*.

international Pacific Northwest; B.C. Hydro came to work closely with the Bonneville Power Administration, the U.S. Army Corps of Engineers and a host of American utilities, in integrated international management of the Columbia River and a regional power system.[33] To some extent, B.C.'s gains helped to spread river participation and benefits more widely: the province gained influence it had not had before, and the Bennett government lowered power costs and improved power distribution to remote parts of the province.[34]

4. *United States: Inter-regional Connection Impels Regional Protectionism (Agreements #4, 5 and 6)*

The final set of agreements came as responses to the British Columbia demand that a single purchaser buy thirty years' worth of Canada's share of the downstream power benefits, known as the Canadian Entitlement. First came two sets of financial agreements, one strengthening Pacific Northwest integration, another one threatening disintegration. First, B.C. Hydro sold thirty-years' worth of the Canadian Entitlement to the Canadian Storage Power Exchange (CSPE), a consortium of the mid-Columbia Public Utility Districts and their customers, backed financially by the BPA (Agreement #4).[35] Next, the CSPE

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[33] *See generally* BANKES, *supra* note 15. *See also,* BONNEVILLE POWER ADMIN., COLUMBIA RIVER TREATY (*Backgrounder* 1989); *The Inside Story*, *supra* note 28; Blumm & Bodi, *supra* note 26; Keith W. Muckleston, *International Management of the Columbia* (unpublished paper presented at the seminar: Conflicts over the Columbia River (Corvallis, Or. 1980).

[34] *See* BC HYDRO PIONEERS, GASLIGHTS TO GIGAWATTS: A HUMAN HISTORY OF BC HYDRO AND ITS PREDECESSORS 153–95 (Hugh Wilson & Andrew Wilson eds., 1998) [hereinafter GASLIGHTS TO GIGAWATTS].

[35] This involved multiple steps. First, Canada and the United States signed a Terms of Sale Agreement to authorize B.C. Hydro to sell the Canadian Entitlement to a U.S. purchaser on Jan. 22, 1964. CRT

found a market for this power among several California utilities.[36] While a sale to California could make the CRT possible, it was also a major threat. It would require a high-voltage transmission intertie to California, and Pacific Northwesterners – in particular, large industrial BPA customers – worried that Californians might cut into their access to the nation's cheapest power (Agreement #5).[37] See the Agreement Summary Table (page 375).

The political negotiations focused on how to regulate a transmission intertie to California. This time, democratization reinforced, expanded and codified regionalization, rather than the other way around. The same array of federal and nonfederal regional power producers, managers and customers who had resolved their decades-long spat in creating the PNCA now came together in a joint lobbying effort, and won the Pacific Northwest

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Documents, *supra* note 1, at 117 (Attachment Relating to Terms of Sale). Next, the Public Utility District owners of the mid-Columbia dams, together with their many utility customers, formed the Canadian Storage Power Exchange (CSPE), a non-profit corporation in Washington State on May 11, 1964. GUS NORWOOD, COLUMBIA RIVER POWER FOR THE PEOPLE: A HISTORY OF THE POLICIES OF THE BONNEVILLE POWER ADMINISTRATION 235 (Bonneville Power Admin 1980) [hereinafter COLUMBIA RIVER POWER FOR THE PEOPLE]; SWAINSON, *supra* note 15, at 273. The CSPE sold bonds to finance the purchase of the Canadian Entitlement. BPA backed the bonds. B.C. Hydro and CSPE signed the Canadian Entitlement Purchase Agreement on Aug. 13, 1964 and CSPE delivered payment to Canada on Sept. 16, the day the treaty was ratified, and then Canada turned the money over to B.C. Hydro. COLUMBIA RIVER POWER FOR THE PEOPLE, *id.* at 235–36; SWAINSON, *supra* note 15, at 280–81; Joshua Binus, *How the West Was One...Electrical Grid*, paper presented at the Western History Association 47th Annual Conference: Crossroads of the West (Oklahoma City, Okla., Oct. 4 2007) [hereinafter Binus 2007]; Calkins, *supra* note 22, at 61–64.

[36] *See* COLUMBIA RIVER POWER FOR THE PEOPLE, *supra* note 35, at 235–36; KAI N. LEE ET AL., ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST 56–57 (1980); Calkins, *supra* note 22, at 61–64.

[37] *See* LEE ET AL., *supra* note 36, at 56–57.

Consumer Power Preference Act. This codified BPA's service region as Washington, Oregon, Idaho and western Montana, extending into the Columbia Basin portions of Wyoming, Utah and Nevada. Customers outside this territory would get BPA power only after regional customers had bought what they wanted.[38] The Pacific Northwest had been since the New Deal united in a vision and practice of shared Columbia River development;[39] now, finally, it was codified as a region with privileged rights to Columbia River power (Agreement #6). See the Agreement Summary Table (page 375).

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[38] BPA's service region was actually codified to extend up to 75 miles beyond the borders of the hydrological basin. Pacific Northwest Consumer Power Preference Act, 16 U.S.C. § 837, at 1(b) (1964) [hereinafter Preference Act]. The literature on the details of the negotiations that built this act is sparse. The best source remains Douglas Norwood, Administrative Challenge and Response: The Role of the Bonneville Power Administration in the West Coast Intertie Decision 55–90 (1966) (unpublished Bachelors thesis, Reed College) (on file with Special Collections and University Archives, University of Oregon). *See also* COLUMBIA RIVER POWER FOR THE PEOPLE, *supra* note 35, at 237–244; James Francis Hanks, The Columbia River Treaty 71–77 (1970) (unpublished M.A. thesis, University of Oregon); LEE ET AL., *supra* note 36, at 56–57; SWAINSON, *supra* note 15 *passim*; Binus 2007, *supra* note 35 *passim*.

[39] Eve Vogel, *Regional Power and the Power of the Region: Resisting Dam Breaching in the Pacific Northwest, in* CONTENTIOUS GEOGRAPHIES: ENVIRONMENT, MEANING, SCALE 165–186 (Michael Goodman, Max Boykoff & Kyle Evered, eds., 2008). The New Deal conception of the Pacific Northwest region was laid out in NAT'L RESOURCES COMM., REGIONAL PLANNING, PART I–PACIFIC NORTHWEST (1936). *See* Eve Vogel, The Columbia River's Region: Politics, Place and Environment in the Pacific Northwest, 1933–Present 74–97 (2007) (unpublished Ph.D. thesis, University of Oregon).

D. Treaty Codification: Political Exclusions and Legal Inflexibility

Ironically, the same dynamic, contested, multi-scalar and multi-jurisdictional politics that opened up the CRT and its associated agreements also built in exclusions and limited flexibility. There were two aspects of the political contests that did this, and two corresponding results. First, the actors, jurisdictions and interests that had the leverage to fight their way in became participants in river management; management was not broadened further. Management goals were similarly limited; they reflected the goals of these politically successful participants. Second, because the contests were so hard-fought and drawn out, they were resolved by very detailed prescriptions that each party could feel confident would be carried out. The result was that the limited range of participants and goals was locked in for decades.

1. Exclusions: Limits to Regionalization and Democratization

The limitations of regionalization and democratization under the CRT and its associated agreements can be divided into three categories: limited regional empowerment, limited participation, and limited interests served.

Limited regional empowerment. Regional empowerment and regional-scale management did not necessarily mean the empowerment of regional jurisdictions – and if it did, that still did not mean the empowerment of those jurisdictions' publics. In Canada, a regional jurisdiction, the province, was empowered, but not all parts or players in the province; rather, only the provincial government's leaders and a new provincial power corporation, B.C.

Hydro.[40] On the U.S. side, regional management remained fundamentally federal; the federal BPA remained at the core of regional collaboration, regional functional interconnection, even regional definition. State governments, the closest thing to regional jurisdictions, gained no authority whatsoever.[41] Quite a few local jurisdictions in the United States gained authority and benefits through their utilities' participation in the PNCA, but these gains related only to these jurisdictions' roles as power producers and dam managers.

Limited participation. Participation in Columbia River management under the CRT was limited to these governmental units and actors – with one major exception. Private utilities and industries had gained authority and benefits on the U.S. side; this was a core aspect of management democratization in the United States. In stark contrast, the most important private utility in B.C. was annihilated in the process of treaty negotiations and bargaining, in order to create B.C. Hydro.[42] No other non-governmental actors or entities participated on either side of the border.

Limited interests served. On both sides of the border, the main interests served were power and flood control. Electric power customers in particular – residences, farms and industries alike – of the entire international Pacific

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[40] SWAINSON, *supra* note 15, at 295–303 (emphasizing that there was considerable political conflict *within* British Columbia, and that a small group of policy-makers and agency analysts developed the treaty).

[41] The four main Pacific Northwest states would finally gain direct influence over Columbia River management with the passage of the Northwest Power Act in 1980. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C.A. § 839 (1980) [hereinafter Northwest Power Act].

[42] See Part III.C.2 on increased participation by private utilities and industrial customers on the U.S. side; *infra* endnote v on the nationalization of B.C. Electric.

Northwest were to benefit from cheap, abundant and reliable electricity. The goals were to improve people's standard of living and to spread opportunities for economic and industrial growth.[43]

But the ecosystems and wild fish in the upper Columbia Basin, and dynamic hydrology of the middle and lower basin which was important for downstream river ecosystems, were ignored or willingly sacrificed by the participants who built the CRT and its associated agreements.[44] So were the people and communities that relied on these natural systems. In the Canadian portion of the Columbia Basin, the four treaty dam reservoirs flooded much of the area's already-scarce wetlands and farmlands, and displaced some 2300 people. Reservoir areas fluctuated seasonally between being huge lakes and huge mudflats; the mudflats became sources of dust storms. Dams, reservoirs and the loss of wetlands negatively impacted waterfowl, migratory elk and caribou and resident fish. These ecological losses impacted area residents, sportfishers and hunters and aboriginal people.[45]

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[43] *See* COLUMBIA RIVER POWER FOR THE PEOPLE, *supra* note 35, 227–51; GASLIGHTS TO GIGAWATTS, *supra* note 34, 171–73.

[44] Salmon fisheries were not unimportant to the developers of the CRT. Rather, the upper Columbia Basin, blocked to salmon since the construction of the Grand Coulee Dam, was seen by parties on both sides of the border as an area where dams could bring great benefits *without* harming valuable fish runs – as opposed to alternative hydropower development proposed on the Fraser and Snake Rivers. KRUTILLA, *supra* note 15, at 26–27. *See also* SWAINSON, *supra* note 15, at 331–32.

[45] BANKES, *supra* note 15, at 208–09; Videotape: Columbia Treaty History (Mike Halleran, WestLand Television for Columbia Basin Trust 1998); DONALD WATERFIELD, CONTINENTAL WATERBOY: THE COLUMBIA RIVER CONTROVERSY (1970); JAMES WOOD WILSON, PEOPLE IN THE WAY: THE HUMAN ASPECTS OF THE COLUMBIA RIVER PROJECT (1973). In addition, I am indebted to conversations with Garry Merkel and Josh Smienk, Columbia Basin Trust, and Bill Green, Canadian Columbia River Inter-tribal Fisheries Commission.

Downstream in the United States, treaty storage dams slowed the migration of juvenile salmon downstream, making them vulnerable to a host of hazards. The river became much less dynamic, no longer maintaining the river ecosystem. For example, in the un-dammed Hanford Reach in the mid-Columbia, the most productive salmon area left in the river's mainstem, vegetation began to encroach on salmon spawning areas because floods no longer scoured them out.[46] These ecological impacts contributed to the steady decline of Columbia River salmon, a decline which has impacted fishers from inland tribal fisherman to commercial fisherman along the Oregon, Washington, British Columbia and Alaska coasts.[47]

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[46] INDEP. SCIENTIFIC GROUP, RETURN TO THE RIVER 2000: RESTORATION OF SALMONID FISHES IN THE COLUMBIA RIVER ECOSYSTEM 139, 146–47 (Northwest Power Planning Council 2000) (1996), *available at* http://www.nwcouncil.org/library/return/2000-12.htm.

[47] Many Columbia River salmon travel north to Alaskan coastal waters during the ocean portion of their lifespan. Fisherman in British Columbia and Alaska have suffered from the declines in Columbia River salmon for three reasons: 1) fewer over-all fish to catch; 2) greater restrictions on their catch, to protect endangered Columbia River runs; and 3) an increasing catch of British Columbia-born fish by Alaska fisherman who no longer catch as many fish from the lower 48 United States. All of this has been part of the ongoing conflict over the Pacific Salmon Treaty. *See generally* UPSTREAM, *supra* note 18; MICHAEL PERRY SHEPARD, A.W. ARGUE, THE 1985 PACIFIC SALMON TREATY: SHARING CONSERVATION BURDENS AND BENEFITS (UBC Press 2005). Nonetheless, Bankes concludes there are no linkages between negotiations over the Pacific Salmon Treaty and negotiations over the CRT. He says this is in large part because the Pacific Salmon Treaty already incorporates so many linkages, and linking in CRT negotiations would only complicate and even obfuscate already complex fishery negotiations. BANKES, *supra* note 15, at 104–09. It is also because, since the Grand Coulee Dam decades ago blocked salmon from reaching most of the Canadian portion of the Columbia Basin (a few still reach Canadian territory in the Okanagan River), most

2. *Codification: Closure to Further Democratization*

All these limitations were locked in place with the codification of the treaty, its minimum sixty-year term, and its imperviousness to national or subnational law or citizen input. Treaty management still follows the stipulations set down in the early 1960s. In recent years management of the treaty dams has been adjusted somewhat in order to provide water for fish and other non-power needs (see figure 3),[48] but this is secondary to the two fundamental treaty purposes of flood control and optimum power production, and these kinds of adjustments can be made only if both Treaty Entities agree.[49] Achieving agreement between the entities is difficult. B.C. Hydro has no incentive, for example, to allow the BPA and Army Corps to alter the management of the river in a way that reduces power proceeds to help fish in American waters, unless it receives benefits in return.[50]

Two other agreements, though, have allowed some further management democratization around the periphery

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Columbia River salmon are managed by within-US parties; indeed PST language has helped to ensure that the U.S. has freedom of action in relation to Columbia River stocks. *See id.* at 107–08.

[48] John Hyde, Kelvin Ketchum & Bolyvong Tanovan, Breaking Down the Barriers: Toward Ecosystem-Based Management in the Columbia River Basin and Beyond: Ecosystem Management and the Columbia River Treaty (Apr. 28, 2002) (suggesting that such modifications have allowed "ecosystem management" under the CRT).

[49] BANKES, *supra* note 15, at 66–75; Shurts, *supra* note 15, at Part VII.

[50] A 1981 article by law professor Michael Blumm suggested that CRT Article VIII(4) could allow the United States to spill water for salmon, and reduce the power benefits paid to Canada accordingly. Michael C. Blumm, *Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resource for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 244–45 (1981). Bankes argues compellingly against this claim. BANKES, *supra* note 15, at 59–62.

of the treaty itself. The PNCA, as a United States-only agreement, has been subject to growing legal mandates to help Columbia River salmon and to incorporate the input of states, Native American tribes and the general public in river management decision making.[51] The result of these legal changes on the PNCA has been that Columbia River

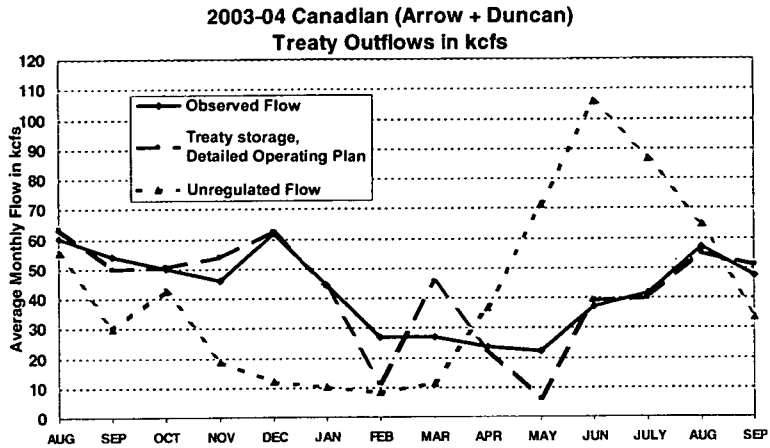

Figure 3. In recent years treaty operations have sometimes been adjusted from the Detailed Operating Plans to allow more favorable flows for fish and wildlife. These adjustments are reflected in the solid "observed flow" line. Thus, for example, in 2003-4 outflows were kept "as steady as possible" in February and March to help B.C. whitefish, and flows were held steady in April and May to help salmon redds (nests) remain watered. It is worth noting that the over-all shape of the observed flow curve became with these adjustments a bit more like the natural river flow ("unregulated"). *Chart Source:* Adapted from *Annual Report of the Columbia River Treaty*, 1 October 2003 through 30 September 2004 (note 15) at 46. Information from same, at 46-47, and John Hyde et al. (note 59).

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[51] The key legal changes on the US side have been the courts' upholding of Native American tribes' treaty-reserved rights to fish salmon, passage of the 1980 Northwest Power Act, *supra* note 41, and the listings of multiple Columbia Basin salmon species under the Endangered Species Act beginning in 1991. *See, e.g.*, MICHAEL C. BLUMM, SACRIFICING THE SALMON 78–86, 129–40, 173–217 (BookWorld Publ'ns 2002); Blumm & Bodi, *supra* note 26, at 185–96, 255–64, 308–23 (providing good overview introductions).

storage release and spills for fish have become part of the non-power goals and constraints which have to be taken into account before regional system-wide power generation can be planned out. By the 1990s these restrictions added up to a major constraint on the PNCA's ability to optimize power production – but also reflected a positive ability of this multi-party U.S. agreement to incorporate and meet a growing array of needs and interests.[52]

More recently, the termination of the thirty-year sale of the Canadian Entitlement also widened participation and spread benefits to previously excluded people and interests. In the early 1990s, as B.C. Hydro began negotiating a new contract for the sale of the Canadian Entitlement, the people of the Canadian portion of the Columbia Basin, who had gained significant political power in 30 years, were able to win for the first time direct control over a significant share of B.C.'s treaty benefits. In 1995, the province committed to providing a significant portion of the downstream benefits from the treaty dams' second thirty years to a new organization, the Columbia Basin Trust, to be used for economic investments and ongoing economic, social and environmental programs within the Canadian Columbia Basin. The Columbia Basin Trust has a strong commitment to wide participation in decision making, and has become a leader in discussions about the future of the CRT and the upper Columbia Basin.[53]

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[52] *See generally* Logie, *supra* note 28. A discussion with Mike Hansen of the Northwest Power Pool also informed this statement on the PNCA in recent times.

[53] *See* BANKES, *supra* note 15, at 96–101; *see also* Columbia Basin Trust, http://www.cbt.org, and in particular COLUMBIA BASIN TRUST (B.C.), COLUMBIA BASIN MANAGEMENT PLAN (Columbia Basin Trust 1997), *available at* http://www.cbt.org/Files/ ManagementPlanOriginal1997.pdf; COLUMBIA BASIN TRUST, COLUMBIA BASIN TRUST BRIEFING BOOK (Columbia Basin Trust 2001); Halleran, *supra* note 45. In addition, I am indebted to

IV

LESSONS: THE IMBRICATIONS OF INTERNATIONAL LAW, REGIONAL-SCALE RESOURCE MANAGEMENT AND DEMOCRATIZATION

What broader lessons can be taken from the foregoing case study about the relationship among the three interacting factors of international law, regional-scale resource management, and resource management democratization? To tease out the lessons from this complex history, I consider the three factors first in pairs, then put all three together.

Before embarking on this focused analysis, two fundamental understandings must be recognized from the CRT history. They correspond closely to insights provided by the geography literature reviewed in Part II. First, different jurisdictions and geographic scales were mutually entwined and mutually constitutive, and they shaped and were shaped by varying interests and kinds of political power. Second, political openness was a key requisite for significant changes in geographies and jurisdictions of resource management, or widening of management participants and beneficiaries. The latter insight can help make systematic sense of the sometimes-overwhelming details of the politics that constructed the Columbia River. The former is a reminder that uncovering combinations and interactions of different scales and jurisdictions is as important as isolating the effects of different ones.

A. International Jurisdiction & Democratization

The international nature of the treaty contributed to but did not determine democratization of river management.

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conversations with Garry Merkel and Josh Smienk, Columbia Basin Trust.

The treaty's international jurisdiction did not trump federal or national control, nor was it somehow inherently more inclusive. What mattered was how it interacted with the two federal governments and their challengers during the long years of political construction of the treaty. The critical mechanisms whereby negotiations over an *international* law in particular effected democratization, were: first, international opportunity placed the two federal governments in a dependent position, wanting something they could not achieve by themselves; and second, a promised international agreement provided forms of political leverage to non-federal actors that would not have been available otherwise. The reason this was democratizing – that is, the reason it widened participation and the distribution of benefits – was that U.S. federal agencies had dominated Columbia River policy beforehand, and both federal governments were in many ways more powerful than those who gained against them. It must be noted that were this not the case – that is, if the parties that gained had already had controlling influence over Columbia River management – then their gains against the federal government would not have constituted management democratization.[54] In other words, inter-

[54] Of course, U.S. utilities and industries *were* already politically and economically powerful, and it was precisely this power that allowed them to gain more influence over Columbia River management through this long negotiation process. I have called their gains democratization in this paper because they were not direct participants in river management before the treaty, and because federal government law and policies in the 1930s and 1940s – particularly the public preference clause in the Bonneville Project Act and its implementation by the BPA – had in fact given them low priority access to federal Columbia River power. Bonneville Project Act, 16 U.S.C.A. § 832 (2000 & West Supp. 2007).

How the empowerment of private versus federal power producers should be judged in terms of democracy is, of course, a long and never-ending debate. During the 1920s and 1930s, public-versus-private power fights in the U.S. led many people to believe that federal river

national law was democratizing because of the specific ways it interacted with federal law and both regional and national politics, destabilizing existing political hierarchies, and allowing new actors, jurisdictions and interests to break in to become participants in management and recipients of river benefits.

While the international jurisdiction of the CRT helped democratize river management during the period of treaty construction, it had the opposite effect once the treaty and its associated agreements were codified. Unless avenues for challenge are written in – and they were not, in the CRT – international law is not accessible to ongoing political challenge or legislative evolution. Other agreements besides the treaty have proved more flexible and open, such as the PNCA because it is a single-nation agreement which could be influenced by new legal mandates, and the sale of the Canadian Entitlement because it had a more limited term.

While the international jurisdiction of the treaty has played a key role in limiting democratization since the treaty was codified, the entwining of multiple jurisdictions and scales has again been important, this time reinforcing the treaty's immobility. One-sided abrogation is not an

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development and federally distributed power were more democratic than private power. However, by the 1950s, private utilities and industries had convinced much of the public that *federal* power was hegemonic and anti-democratic, in much the same way private power had been seen in the 1930s. *See* KARL BOYD BROOKS, PUBLIC POWER, PRIVATE DAMS: THE HELLS CANYON HIGH DAM CONTROVERSY (Univ. of Wash. Press 2006) for a great Pacific Northwest case study of this shift and a resulting fight in the 1950s. Part of the irony here – and complexity of jurisdictional and geographical relationships – is that in the development of the PNCA, a *regional* group of *county-based* Public Utility Districts allied with a *regional group of private* utilities, thanks in part to the public-private "partnership" policy of the *national federal* Eisenhower administration, to challenge the dominance of the *regional federal* BPA.

option because of federal law and national and regional politics in both countries – on the U.S. side, for example, federal treaties are the supreme law of the land, and one-sided abrogation would require huge compensation to Canada, a partner whom the United States values enough to feel obligated to pay. Further, those who benefit from the large volumes of Columbia River power made possible by the CRT are government agencies and industries with considerable political power within their respective regional and national jurisdictions and alliances. Against this constellation of the politically powerful, those who critique treaty operations cannot leverage the kind of national political agreement that would be required to call for abrogation. Nor is early termination, which would require two-party agreement, possible. This would require wide agreement within regional and national politics on both sides of the border, an impossible achievement for treaty critics.

B. International Jurisdiction & Regional-scale Management

In a sense, the same process that helped to democratize Columbia River management during the treaty negotiations also helped to regionalize the smaller actors, jurisdictions and interests empowered in this political dynamic – that is, to make them more regionally organized and identified. In this way, the CRT case seems to echo one of the arguments made about EU regionalization: that regions were empowered and strengthened as international law broke down the hegemony of national state power.

But in fact the international jurisdiction of the treaty was *not* a major contributor to the empowerment and reinforcement of regions, at least not directly. Indirectly, of course, it was essential, for it made the whole prospect of building storage in the Canadian portion of the basin

possible. But it was the huge benefits promised by this storage, combined with existing legal, administrative, political, hydrological and infrastructural geographies on each side of the border that led to the empowerment and reinforcement of regions.

There were three factors that had direct influence on the empowerment and reinforcement of regional jurisdictions and scales in the course of the CRT negotiations. The most significant, ultimately, because it set the baseline political and administrative geography, was national law and administration on the two sides of the border. Both B.C. and the U.S. Pacific Northwest were preexisting regions whose residents and administrators either (on the B.C. side) had specific regional rights and privileges in relation to the Columbia River under national law, or (on the U.S. Pacific Northwest side) were used to acting as if they did. On both sides, regional leaders would have claimed control of any development on the Columbia River, whether international or domestic.[55]

The second factor, which strengthened regional river management, was the incredible bounty in power proceeds that was to accrue from the four large storage dams in the upper Columbia Basin. The actors, jurisdictions and interests which jumped in to claim a place in managing the Columbia River wanted to make sure that they would get to keep control of the vast new benefits. Because they were mostly regionally organized, this meant sharing the benefits within their regions.

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[55] B.C. had claimed control of Columbia River development in welcoming a private developer's Columbia River development scheme in 1954. It was in response to this private development scheme that the Canadian federal government exerted its veto authority with the 1955 International River Improvements Act. SWAINSON, *supra* note 15, at 57–64. See discussion *supra* Part III.C.3 and n.31.

The third influence was the physical geography of the Pacific Northwest's rivers combined with the existing infrastructural geography of power transmission grids, the latter built along the lines of BPA's New Deal-era conception of its region.[56] The variability of streamflow across the Pacific Northwest, combined with the existing regional transmission grid, made region-wide power coordination and integration desirable.

Thus, regional empowerment was not a rising of the region above other jurisdictions and scales but the entwining of multiple jurisdictions and scales in a way which reinforced, more fully integrated, and codified existing regional management of the Columbia River and Columbia River power.

While the international jurisdiction of the treaty did not bring about regionalization of Columbia River management, regionalization under the CRT and its associated agreements did help further internationalization. Regionally organized interests were more willing to embrace power distribution, coordination and financial agreements across international lines, than were the federal governments. This was especially true on the Canadian side. Many in the Canadian federal government feared a loss of Canadian rights and interests against the huge economic power of the United States, which was seen in nationalistic terms as both competitive with Canada and potentially exploitative of Canada.[57] British Columbia's Bennett administration, in contrast, felt far more threatened by the ambitions of the federal Canadian government than it did by the United States.[58] Leaders in B.C. hoped to

[56] See *supra* note 39.

[57] SWAINSON, *supra* note 15, at 23–24, 31–32, 63.

[58] Again and again British Columbia's Bennett government advanced power sales to the United States as a strategic a way to free itself from control by, or criticism from, the Canadian federal government. See SWAINSON, *supra* note 15, at 65, 191–93. Karl Froschauer in WHITE

benefit from commonalities that crossed the international border. Development, interconnection and coordination could bring to B.C. the kind of benefits the U.S. Pacific Northwest had been harnessing from the Columbia River for over two decades.[59]

C. Regional-scale Management & Democratization

There is a popular notion that regional-scale governance is inherently more inclusive and attuned to wide social and environmental needs than national-scale governance. In the case of regional Columbia River management under the CRT and its associated agreements, however, empowerment and codification of regions improved participation and benefits-sharing only slightly.

On the U.S. side, democratization of resource management furthered regionalization, rather than the other way around. It was only when a host of nonfederal utilities and industries forced their way into participation in river management using their leverage over the CRT, that full

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GOLD: HYDROELECTRIC POWER IN CANADA (1999), argues that British Columbia was not alone in preferring association with the United States to control by federal Canada. He argues that Canadian provinces have repeatedly chosen to interconnect electric transmission grids with the US rather than with a national or regional Canadian transmission system. In this sense Canadian "regionalization" – if the sovereign power of provinces under the federal system can be called "regionalization" – has often furthered internationalization. The Canadian federal government has sometimes pursued greater national interconnection, and at other times has supported provinces' "continental" approach. Both Swainson and Froschauer agree that the 1963 federal election was a major turning point in the federal government's approach to provincial hydropower development. After the liberals took power in 1963, the government took a new approach to negotiations with British Columbia, now supporting provincial hydropower development for export to the United States. SWAINSON, *supra* note 15, at 251–84; FROSHCHAUER *passim.*

[59] SWAINSON, *supra* note 15, at 23–24, 40.

regional coordination in river and power flows developed in the form of the PNCA. After this regional coordination was set up, the regional federal agencies and offices joined with these nonfederal utilities and industries to form a regionally unified political bloc; this was what won regional codification and privilege through the Pacific Northwest Preference Act.[60]

On the Canadian side, regional-scale management helped democratize resource management compared to what might have occurred with federal management, but only to a very limited extent – mainly in helping to distribute the promised benefits of the CRT and in limiting its social costs. Participation in Canadian Columbia River decision-making was never wide. The analyses and negotiations over the treaty were run by a small coterie of office-holders and provincial agency analysts. The B.C. government was nonetheless an elected government with representatives from throughout the province, and was more attuned to finer resolutions of needs and interests in the province than was the Canadian federal government. Compared to the federal government's goal of maximum

[60] I argue elsewhere that the regional-scale management of the Columbia River and Columbia River power that was put in place with the creation of the BPA in the New Deal helped to open up the possibility of the kind of democratization brought about during the CRT negotiations, and later, in the formation of the 1980 Northwest Power Act, *supra* note 41. The BPA has a broad public mission, which includes the wide distribution of inexpensive power, and it has long invoked images of natural and bountiful Columbia River flows and salmon as part of its self-promotions. These facts, combined with its identity as an agency meant to serve a limited territory (even before that territory was codified), have made the BPA more responsive to calls from influential government leaders within the Pacific Northwest who make calls for wider distribution of power or improved environmental standards. *See generally* Vogel 2007 and Vogel 2008, *supra* note 39. As the CRT history shows, the BPA has been particularly responsive when regional critics have strong political leverage.

economic development for the province as a whole, the B.C. government consistently prioritized spreading economic opportunity to remote parts of the province, protecting the Fraser River fisheries even if it forced hydropower development into other river basins where it would be more costly, and protecting East Kootenay farmland and communities.[61]

D. General Lessons

What lessons can we take, then, about how to think more generally about the relationship among international law, regional-scale natural resource management and resource management democratization?

In common conceptions about scales and jurisdictions of natural resource governance, smaller-scale management is often seen as inherently more democratic. International agreements, in contrast, while necessary for transboundary resources, are seen as inherently threatening to democracy. International law is understood to be put forward by national governments often themselves out of touch with sub-national regions' needs. Further, international law trumps regional-level and perhaps even national-level authority, impeding input and participation from actors and interests attuned to smaller-scale interests.[62]

While this makes a good, logical argument, the CRT case shows it to be riddled with problematic assumptions. As a result its conclusions profoundly misrepresent the interrelationships among international law, regional-scale management and management democratization.

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[61] SWAINSON, *supra* note 15, at 70, 84 (commenting on British Columbia's determination to protect Fraser River fisheries); *id.* at 142, 148, 305–06 (commenting on British Columbia's resistance to flooding valley farmland in the East Kootenay).

[62] See discussion *supra* Part II and n.3–4.

First, this train of logic rests on the assumption that jurisdictional authority is hierarchical, with each higher level trumping the authority of lower level.[63] Where international law and sub-national law overlap in the substance of their authority, it seems clear that international trumps subnational. But in the CRT case, in fact, an international treaty was actually built largely by regional actors and interests; the treaty in turn further empowered regional authority in the management of the Columbia River. The seeming inversion of jurisdictional power occurred not only between regional and international but between regional and national as well. Regionally organized interests and, in Canada, a regional jurisdiction were able to trump federal interests and authority on both sides of the border. This shows that the relative power of different jurisdictions does not depend simply on their level in a straightforward hierarchy.

Only in one way did international jurisdiction trump others: by codifying the existing management system in a way lower level jurisdictional law could not. Even here, though, the system it codified grew out of *regional* interests and politics. International law froze time; it did not overpower a smaller space.

Not only does the CRT case reveal inversions in the jurisdictional hierarchy, it undermines the notion that different jurisdictional levels are distinct sources of authority. Provincial authority, federal authority and regional interests from a variety of government jurisdictions and non-governmental sources, helped to constitute international authority under the CRT.

[63] There are perhaps two exceptions: first, that the hierarchy of international law versus national law is ambiguous. International law may trump national-scale authority or it may only extend it into new arenas, and be circumscribed by national authority. *See* discussion Part II. Second, that certain powers may be reserved to lower levels, as they are in federal government systems.

International authority helped to reinforce regionally organized management and benefits-sharing. And in the United States, federal agencies were central actors who joined into a new more consolidated *regional* river and power management system.

The regional federal management of the Columbia River in the United States belies a second problematic assumption: that jurisdictional level is congruent to geographic scale. The CRT case shows this assumption to be drastically flawed. The BPA and the Federal Columbia River Power System are both regional in geographic scale and federal in jurisdiction. The treaty also encompasses a territory quite different from its jurisdiction: management under the CRT is regional in scale, both in terms of its actions and the geographical affiliations of its decision-makers and managers, but international in jurisdiction.

The third problematic assumption is that smaller jurisdictions and geographic scales are inherently more democratic. The CRT and its associated agreements resulted in both regional empowerment and democratization of management, but regionalization and democratization were not cause and effect; if anything, it was more the reverse. It was the mobilization and political successes of relatively marginalized regional interests on the U.S. side, and the B.C. government on the Canadian side, which constituted the democratization of river management under the CRT and its associated agreements, and which then won more fully regionalized management of the Columbia River and a more regionally shared distribution of its power. Once the agreements were in place, the new system of more fully regionalized management was not particularly open to further democratization. The limitations to democratization under treaty management today reflect the limited representation within *regional* institutions and politics at the time the treaty was negotiated.

The final problematic assumption is that both geography and law are timeless and apolitical. The CRT case shows at every step that the authority of different jurisdictions, the content of legal agreements and the geographical organization of management authority and benefits-sharing were politically contested; the treaty and its associated agreements were products of these political contests.

Having torn apart the standard assumptions, though, how do we rebuild a conception of the relationship among international jurisdiction, regional-scale management and resource management democratization?

The effects of international law on the authority of other jurisdictions, on interests organized at sub-national geographic scales, and on the breadth of participation in resource management and distribution of resource benefits, must be understood as contingent on the specific way international law interacts with political dynamics among these other factors. The CRT case reveals one set of circumstances in which international law can lead to both regionalization and (limited) democratization. If, during the development or *construction* phase of an international agreement, national or federal governments need political agreement or cooperation from other parties, and if national or federal jurisdictions or national-scale interests have traditionally dominated policy making, then an international law may help destabilize that entrenched national or federal power and bring new participants into governance. In that case, international law may further democratization. If some of those who gain against national or federal governments and interests are sub-national jurisdictions or regionally organized blocs, then an international law can empower regions as well.

But the CRT case also reveals one set of circumstances in which international law may impede democratization,

even when it helps to reinforce regional-scale authority. If an international law *codifies* regional-scale management, and with it, the particular participants or interests included within that region's purview, it can diminish subsequent political openness and potential for change. International law may make regional systems of governance especially immutable, as international agreements are not necessarily subject to systems of challenge inscribed within the law of national and subnational jurisdictions.

More generally, then, the CRT case confirms geographers' arguments about the complex, entwined and fundamentally political relationships among legal jurisdiction, geographic scale and democratic change. The CRT case shows that even in the "traditional" era, under a customary form of international law like a treaty, different levels of governmental organization and geographic scales were mutually constructed through complex and contested interplays of politics. A more geographically and politically informed understanding of the relationships among jurisdiction, geographic scale and democratization is needed to make sense of other cases as well.

V
EPILOGUE

The CRT itself may be terminated by one party as early as 2024, provided that party gives notice by 2014. It is likely that treaty re-negotiations, like the original treaty negotiations, will be a time of political contest, in which interests which now have limited influence over and gain limited benefit from Columbia River management are able to win a much greater say and share. A strong role will probably be played this time by those in the Canadian portion of the Columbia Basin, led by the very active

Columbia Basin Trust.[64] It will be again at a time when the structure of authority is open to transformation that politics will be most opened. The creative challenge this time–and the political pressure–will be somehow to institutionalize a system that can be democratic on an ongoing basis.[65]

[64] Indeed, British Columbia recently invited the Columbia Basin Trust to join in any disscussions on future CRT talks and possible changes. Josh Smienk, former Chair of the Columbia Basin Trust Board, email communication, Mar. 4, 2008.

[65] Shurts, *supra* note 15 at Parts IV, VI and VIII (providing a thorough discussion of issues that will probably arise with possible treaty negotiation, and the positions that different players may take). On the Columbia Basin Trust, see *supra* note 64.

Agreement Summary Table: A summary of the agreements associated with the CRT, and their effect on regionalization and democratization of Columbia River management.

Agreement(s)	**Effect on regionalization: geography and jurisdiction of river management**	**Effect on democratization: participation in Columbia River management and distribution of river benefits**
1) CRT[i]	Internationalized Columbia River management; required basin-wide coordination of river flows.	Canada became co-manager of Columbia River, and gained benefits even from U.S. portion of river.
2) PNCA[ii]	Achieved U.S. Pacific Northwest region-wide coordination of electric power production and distribution – including Columbia River flows for hydropower.[iii]	Diverse U.S. utilities, industries, jurisdictions and objectives brought into river management decision making and sharing of river benefits.
3) Canada-B.C. Agreement[iv]	Canadian federal government gave British Columbia full control of treaty implementation, power sale options. Columbia River development became part of a province-wide endeavor as B.C. could now develop both Peace and Columbia Rivers and used them to provide inexpensive power widely across province.[v]	British Columbia became a co-manager of the Columbia River; Columbia River power benefits spread widely across province to help residents, farms and industry alike.

4) Terms of Sale Agreement,[vi] Sale of Canadian Entitlement to CSPE[vii]	Increased integration of B.C. – U.S. Pacific Northwest electric power market system; further strengthened role of collaboration and benefits-sharing among U.S. Pacific Northwest power producers.	B.C. gained control of proceeds from Canadian Entitlement. Non-federal U.S. utilities gained a major role – supported by the federal BPA – as inter-national and inter-regional power sales brokers, even limited treaty participants.[viii]
5) Pacific Intertie authorization; Sale of Canadian Entitlement from CSPE to California and Southwest utilities[ix]	Interconnected U.S. Pacific Northwest to California and Southwest with high-voltage transmission interties and a large-volume power sale.	California and U.S. Southwest gained influence over the distribution of Columbia River power, and gained large volumes of that power.[x]
6) Pacific Northwest Consumer Power Preference Act[xi]	U.S. Pacific Northwest was codified with legally defined territory and preferential access to Columbia River power.	Preference in receiving BPA's Columbia River power restricted to U.S. Pacific Northwest.

[i] Columbia River Treaty, *supra* note 1.

[ii] *See supra* note 28.

[iii] The Columbia River Treaty, *supra* note 1, itself required U.S. Pacific Northwest-wide power system coordination, at least in calculations: "In computing the increase in dependable hydroelectric capacity and the increase in average annual electric energy, the procedure . . . shall encompass the loads of the Pacific Northwest Area. The Pacific Northwest Area for the purposes of these determinations shall be Oregon, Washington, Idaho, and Montana west of the continental divide . . ." CRT Documents, *supra* note 1, at 79. It was the PNCA, however, that made this coordination happen.

[iv] Can.-B.C. Agreement, July 8, 1963. There was also a second supplementary Can.-B.C. Agreement signed on Jan. 13, 1964. Both

agreements are in CRT Documents, *supra* note 1, at 100, 107 (respectively). The Canadian federal government had announced its reversal of the ban on long-term large-scale power exports on Sept. 27, 1962. SWAINSON, *supra* note 15, at 232.

[v] An important step to making the province-wide approach possible was the joining of three major utilities in the province into B.C. Hydro. This happened between 1961-62, by first nationalizing both B.C. Electric and the Peace River Power Corporation into a single provincial power corporation, SWAINSON, *supra* note 15, at 196-204, 402 n.34 (citing Power Development Act, S.B.C., ch. 4 (1961), and then absorbing B.C. Power into this provincial corporation to create B.C. Hydro, *id.* at 226, 406 n.28 (citing B.C. Hydro and Power Authority Act, S.B.C., ch.8 (1962). For an account of this merger as experienced by the staffs of the two major companies, see GASLIGHTS TO GIGAWATTS, *supra* note 34, at 143-56.

Because of the sale of the Canadian Entitlement (*see* Part III.C.4), the power made possible in the U.S. by the treaty dams was not used by B.C. during the first thirty years of the dams' operation, nor were downstream power proceeds available for anything other than building the treaty dams themselves. B.C. Hydro, however, built generation facilities to take advantage of Libby and the Canadian treaty dams. Bankes provides a detailed account of hydropower development in the Canadian portion of the Columbia Basin, including the Kootenay and Clark Fork-Pend d'Oreille (Pend Oreille in the United States) drainages, as of the mid-1990s. BANKES, *supra* note 15, at 3-21.

[vi] Attachment Relating to Terms of Sale, Jan. 22, 1964. CRT Documents, *supra* note 1, at 117.

[vii] Canadian Entitlement Purchase Agreement, Can.-U.S., Aug. 13, 1964, *available at* http://www.internationalwaterlaw.org/regionaldocs/columbia_river_notel.html. The Canadian Storage Power Exchange had been established as a nonprofit corporation on May 11, 1964 in Washington State. Calkins, *supra* note 22, at 62; COLUMBIA RIVER POWER FOR THE PEOPLE, *supra* note 35.

[viii] CSPE representatives sat in on the final treaty negotiations. The CSPE was also empowered to use the dispute machinery set up in Article XVI of the treaty, in a Canadian Note of September 16, and American acceptance of that note. Calkins, *supra* note 28, at 62-64 and SWAINSON, *supra* note 15, at 280-81, 414-15 n.65-67.

[ix] Funds were appropriated for the intertie in December 1963 and August 1964 in the 1963 and 1964 Public Works Appropriation bills, but in both cases construction was made contingent on the passage of

regional preference legislation. Joshua Binus, Department of History, Portland State University, email communication, Jan. 11, 2008. The intertie was actually authorized within the regional preference law itself. *See* Preference Act, *supra* note 38. For histories of the intertie and regional preference see COLUMBIA RIVER POWER FOR THE PEOPLE, *supra* note 35, at 237-46; Binus 2007, *supra* note 35; Norwood, *supra* note 38.

[x] To obtain access to this power, though, California and Southwest utilities had to accept lower-class status in the preference hierarchy for BPA's Columbia River power. *See* Preference Act, *supra* note 38; Binus, *supra* note 73.

[xi] Preference Act, *supra* note 38.