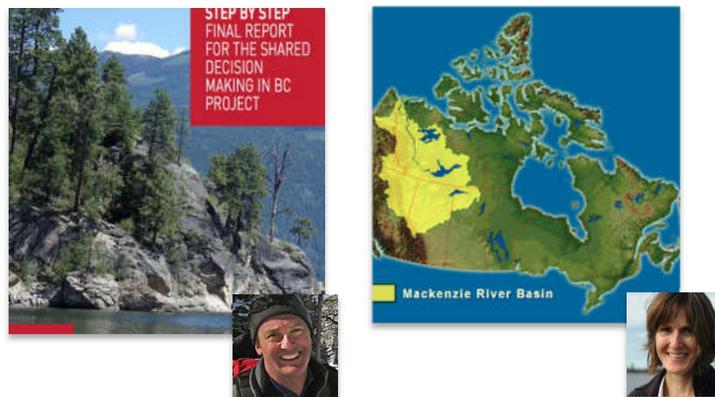


B.C. WATER FUNDERS MEETING

- Lunch 'n Learn Webinar Series -

Shared Decision-Making in Watershed Governance: Lessons Learned from Gov't to Gov't Agreements



November 26, 2015

12:00 – 1:00pm PST

Weblink: <https://vimeo.com/147359630>

Password: bcwater

INTRODUCTION

British Columbia's new *Water Sustainability Act* opens the door for delegated or shared responsibilities with local communities and the recognition of creative watershed governance agreements. In addition, there is a growing appetite to identify how to build capacity towards Aboriginal co-governance of watersheds in British Columbia, which has been identified by POLIS as a "winning condition" of watershed governance. This webinar will consider lessons learned from several shared decision-making agreements in BC as well as the recently signed NWT-Alberta Mackenzie Bilateral Water Management Agreement, with the goal of identifying opportunities to build capacity towards government to government agreements which govern shared watersheds. In particular, the presenters will consider the interests and perspectives of First Nations in shared decision making agreements and consider how funders might invest in opportunities which build capacity for First Nations participation in shared watershed governance agreements.

PRESENTATIONS



MERRELL-ANN PHARE

Chief Negotiator, NWT Negotiation Team, NWT-Alberta Mackenzie River Bilateral Water Management Agreement

WATER AGREEMENT MAKING IN THE MACKENZIE RIVER BASIN

PowerPoint presentation attached.

- Speaking about lessons learned from recent negotiations on two agreements for the Mackenzie between NWT and BC and Alberta.
- Agreement covers the borders and is about the transboundary waters
- Took about 4 years of negotiating but about 5-8 years of preparations. Preparatory phase was instrumental and involved significant involvement of indigenous governments.

Genesis of Water Agreement

- Where did the Water Agreement come from?
 - In 2014, Government of Northwest Territories (GNWT) assumed control over land and water as part of the process of devolution. In preparation to be ready, realized had to get their house in order by developing policy agreement on what they saw for their future, which was represented by the NWT Water Strategy, developed by GNWT, federal government and Aboriginal governments. This formed the foundation for their thinking on what they wanted to accomplish with water and where this fit in their long-term approach for their territory.
 - The GNWT takes a collaborative approach on pretty much everything, including co-drafting legislation with Aboriginal governments, forest agreements, and forming parks.
- Mackenzie River Master Agreement – created in 1997 by five jurisdictions. Had broad level principles but couldn't get to the details so they were left to bilateral agreements. The Master Agreement recognized traditional knowledge and established Mackenzie River Basin Board with each jurisdiction appointing an aboriginal representative for their region (therefore, six aboriginal representatives on the Board).
- Took a long time to get bilateral agreements done. When GNWT approached the negotiations had two key goals:
 - 1) Not just about water (quality and quantity) but also about all elements of the aquatic ecosystem – the bugs, fish, wetlands, groundwater, deposition from air. Fundamental principle was that ecosystem needs should come first – maintaining ecological integrity of aquatic ecosystem seen throughout the final agreement.
 - 2) Engaging Aboriginal governments in a meaningful way – collaboration is both process and content. Involved in the lead-up to the negotiations through the water strategy. And then kept going back through each step of the process to ask what do they want to see in the agreement. Now one seat on the Bilateral Committee and traditional knowledge throughout the agreement. Governments have committed to going out and getting input prior to meetings of the committee

- **Governance** – comes down to who make decisions
- **Co-management** – can be about working together on tasks and discharging responsibilities but in its worst form just doing what they are told to do by an authority.
- **Co-governance (Cooperative or Collaborative Governance)** – Collaborative governance means committing to working together on all aspects of governance. Doesn't mean that everybody is involved equally in every decision but working on whole piece together. Doing the broad scoping together and then may have different roles in implementation.

- Some questions raised about why Aboriginal governments would not be co-signers of the Agreement. GNWT was supportive of this approach but other jurisdictions did not agree with this. So GNWT developed an MOU with all the Aboriginal governments outlining what they would do together to implement the bilateral agreement.

The Bilateral Management Committee

- The Bilateral Management Committee (BMC) is a critical committee and only governance structure created through the bilateral agreements. Charged with implementing the agreement. Each government brings an Aboriginal representative to the committee.
 - **BMC is cooperative.** Governments consider that the agreement is a binding agreement but it is not binding or contractual. The governments agree to joint decision-making on the transboundary elements and that jurisdictional decision-making will meet the terms of the Agreement.
 - **BMC is nested.** Decisions happen within multiple levels. Have to have indigenous governments involved in all of the nested layers in order for governance to be meaningful. If not involved in all levels will have someone else making decisions for Aboriginal governments.
 - **MRB Master Agreement** covers the basin. It is a basin-wide agreement and jurisdictions commit to cooperating.
 - **Bilateral agreements and BMC** governs the boundary crossing points
 - Then have jurisdictions laws and policies. For example, in the NWT, under Devolution Agreement, which was signed by Aboriginal governments, and have an **Intergovernmental Council** (comprised all Aboriginal governments and GNWT), which together crafts all of the directions of the NWT
 - Under NWT Water Strategy have **Aboriginal Steering Committee** that provides information from technical and community level into the GNWT. GNWT then uses that information to make decisions. Technical people on the Aboriginal Steering Committee communicate with political level with Intergovernmental Council.

So big question is how will these different levels communicate with one another ie. how will MRBB and BMC communicate with the different levels ie. Intergovernmental Council and Aboriginal Steering Committee?

Lessons Learned

1. Pushing of NWT interests aided Aboriginal Governments in other jurisdictions because if good enough for GNWT and Aboriginal governments in NWT, hopefully good enough for other Aboriginal governments.
2. Typically, downstream jurisdictions are at a disadvantage because receiving other jurisdictions issues but in this case there was an advantageous role of downstream government because able to “lift all boats” by advocating for the things we cared about.
3. Couldn’t make other jurisdictions do things the way we do it but because of interest-based approach to negotiations, the interests of the GNWT and Aboriginal partners had to be considered
4. Water terms in land claims were also helpful as had to be taken into account
5. One of the challenges of collaboration is that when started, people assume will be involved in everything but not practical so have to have difficult conversations about our capacities to spend the time needed and figure out what really interested in and what we can share. It’s a practical conversation about who is going to do what.
6. Environmental governance is complicated and not all parties involved have equal capacity, skills to do it all. Governance is quite political so have to be connected into the political structure.
7. Collaboration vs consultation – in GNWT consultation required by law is a safety net that will always be there but implies a one-way communication. GNWT takes position that it can do much better than that and see if we can work together as governments to make something really interesting happen.

Most important thing:

- An agreement is not an event; it is a **process** and a long-term commitment to work together. If seen as an event then won’t be implemented. It takes a lot of learning and building trust.
- These agreements are a **step to reconciliation** because they are about restoring relationships, not about getting words on a piece of paper, therefore the relationship has to continue if you want to pursue reconciliation.
- Agreement now **joint responsibility** of everyone in the north and have to figure out how to implement this and figure out how to fund it.



JULIAN GRIGGS

Principal, Dovetail Consulting Group; Project Director, Shared Decision Making in British Columbia Project (Simon Fraser University's Centre for Dialogue)

SHARED DECISION MAKING IN BRITISH COLUMBIA

PowerPoint presentation attached.

Background

- Independent research project funded by Gordon and Betty Moore Foundation as one of a series of 'governance learning projects'.
- Project results are based out of Simon Fraser University, which provided a neutral platform for this research
- Agreements largely operating under the radar screen and still are to a large extent. Wanted to begin asking some questions about their effectiveness and how might evolve. Also hoping to assist those involved in these agreements to help support making the best of them.
- Two streams of activity:
 - Face-to-face dialogues - wanted to provide a platform for shared learning among First Nations and also between First Nations and the Province. This was not a political vehicle under Leadership Council for example. Not about negotiation. Place for shared learning and reflection and bring senior management level to the table rather than political leaders or just the technicians
 - Research of literature and rounds of interviews informed by conceptual frameworks.

What is a Shared Decision Making Agreement?

- Agreements within existing legal and political framework. Framework by which the parties (individual or group of First Nations) agree to work with Provincial Crown in the absence of resolved jurisdiction and authority.
- First Nation or group of First Nations working with the Provincial Government (Crown). Two species of these:
 - Strategic engagement agreement (SEA)
 - Reconciliation protocols – these add an economic piece and often generated at a political level.
- One significant outlier agreement in Haida Gwaii, which for various reasons is really one of a kind and not dealt with in this presentation.
- These are government-to-government agreements. No explicit involvement of third parties unlike Treaty processes although can make provision for it.
- See map of agreements in presentation (slide 9). This is already out of date as things are moving pretty fast. Several agreements since March and announcement about new reconciliation agreement in Treaty 8 territory in recent days.

Drivers for These Types of Agreements

- Province is insisting on operating through the framework of the Taku and Haida rulings (2004). Pressures post Tsilhqot'in decision but so far not yet shifted the bar. Still, these decisions pushed Province to the table.
- One of key developments that nudged the emergence of these agreements was the New Relationship Vision. It referred explicitly to shared decision-making to distinguish from other terms (but already become muddled and no longer clear).
- Operational drivers – mostly related to the huge inefficiencies of the referrals process not working and the burden this has created for Crown and First Nations.

Purpose and Scope of SDM Agreements

BC Perspective:

- With these drivers in mind, the Province came to the table in 2007/2008/2009 with a series of goals in mind. Have only produced one written document to date (factsheet) on what these agreements are intended to achieve. Included:
 - Advance reconciliation
 - Improve social and economic circumstances in First Nations communities
 - Increase consultation effectiveness
- The flavour of Province's engagement has shifted substantially in the early part of this decade much more to economic certainty and underlying drivers around reconciliation are not as prominent in the dialogue.

First Nations Perspective:

- First Nations bring different perspectives and objectives to the table. Complex arena for many First Nations to deal with. For many of them, they would argue that this is one of a series of opportunities to move the bar and take a step in the right direction. Pleased to do some learning with the Province but not seen as a panacea.

One of the problems of the varying expectations and the multiple drivers and history, there are quite different conceptions of what they are intended to be (see slides). Minimally, expectation that engagement is about considering decisions on a day-to-day basis, and occasionally dealing with a longer-term resource management issue. Others would argue that more substantially it is a stepping-stone to reconciliation. Failed attempt to come up with Reconciliation Act in 2008 but some of the thinking has flowed into the thinking around SDM Agreements but still confusion about purpose and scope of these agreements.

Implementation

Looked at a number of different implementation aspects. Really, three clusters of outputs.

1) G2G Forums

Centrepiece of the new institutional arrangement. A government-to-government forum provides oversight for implementation, and a single point of engagement to nurture a new respectful type of relationship. Creates a focus for ongoing discussions (in contrast to dealing with multiple different agencies). Practical challenges – building relationships, leadership at the table maintaining institutional memory. Crown and First Nations also have to pull their agencies along. Forums have a central role in being a steward in these agreements going forward.

2) Joint Initiatives

Overseen by G2G Forum. A series of joint initiatives/working committees are another set of outputs that might relate to things like wildlife management or cumulative effects management. What's interesting is that they create potential pathway for innovative government-to-government work because somewhat under the radar and nested under these agreements, which gives them support and some resources. Allows First Nations the space to push the envelope and explore new approaches.

3) Government-to-Government engagement process

Replaces a referrals process and establishes an agreement where parties agree on a process and set of expectations when individual applications considered by both governments and becomes nuts and bolts of how agreements are carried out. Contrasts to referral process as governments consider the merits of the proposal in parallel. Not a joint decision model or single screening but have agreed on depth and timelines of technical review, exchange of information and issue resolution. Intent is that two parties make a recommendation and that they minimize the possibility that they would come to a different recommendation. Province will issue their authorization. First Nations do not have a parallel authorization but can send communication to proponents.

Challenges

- Shift in relationships is tricky as some individuals may have been in conflict over many years
- Bringing other agencies and staff into these arrangements
- The more advanced projects that require review under EA Act are excluded from these arrangements. This is frustrating to First Nations.
- Province has limited accommodations toolbox and concerns about fettering statutory decision maker.

Success of SDM Agreements

- Have demonstrated substantial shift in relationships, in some cases, potentially transformative.
- Much more clarity about how two governments work together.
- Contribution to capacity although this is modest at best and significant gap with regard to economic development in the interests of First Nations communities.
- Real room to build from this platform moving forward

Limitations & Areas for Improvement

- Some strategic issues come to the table but don't get resolved
- Alignment of provincial agencies still an issue
- Capacity building is a significant gap
- Ambiguity about long term funding – Crown providing minimal amount and uncertainty whether they can maintain long-term support.
- Limited monitoring and evaluation
- Longer-term commitment to reconciliation is still an open question
- Unclear what the socio-economic benefits are for First Nations
- Uncertain trajectory in light of Williams/Tsilhqot'in decision

Question & Answer Period

Question #1: What is the biggest challenge in bringing First Nations to fully participate in shared decision-making tables?

Julian: Number of First Nations are keen to establish such agreements but challenge is convincing Province that this is the tool that can deal with the issues bringing forward. Some concern about engaging in a lot of these as there is a lot of work involved so a challenge on both sides. Capacity for First Nations is a critical issue and a lot of work involved. Province's funding is inadequate over the long term. First Nations need funding and to build the capacity to participate in a meaningful way over time.

Merrell-Ann: Biggest barrier is whether Crown truly believes that shared decision-making is actually the goal and what it means. Get to a certain point and then shared decision-making is no longer the focus. A lot of expectation clarification needs to happen in order for the table to be effective.

Julian: Haida Gwaii management council is one example where there is a joint decision-making body with delegated powers and story has not been told around the effectiveness of that nor experience of trying to build it. But not clear what it would take for Aboriginal governments to develop the capacities required to deliver on all aspects of decision-making. In areas where title been proven, what does it take to build capacity to establish new set of arrangements (administrative and management capabilities). Lot's of lessons North of 60 need to be looking at.

Merrell-Ann: Non-indigenous governments do not all overlap each other's work. Will take a long time but need to get to a point where trust each other enough where First Nations and non-indigenous governments can work together and don't necessarily need to be involved in everything if have a long history of trust. In the North, they have land claims in many areas and even where they don't, they act the same way – respect jurisdictions, share decision-making.

Question #2: How do we overcome the barriers preventing First Nations engaging in shared decision-making?

Merrell-Ann: Show other jurisdictions that it can be done. As the Tsilhqot'in decision came out, we noticed a change in approach from BC government to engage First Nations as part of the Mackenzie negotiations, but BC was looking for a tool for engaging Aboriginal governments in the Agreement so adopted approach from GNWT and used the MOU approach that GNWT had used to create a government to government agreement. Sometimes just need to break down problems that seem intractable and take steps forward and not wait for courts.

Julian: Strategic Engagement Agreements and Reconciliation protocols are creatures of Taku/Haida cases, within existing consultation/reconciliation framework. Despite good language up front when look deeper clear still within that legal framework and this is a fairly big constraint. Many people had great hopes that Tsilhqot'in would mean government would take a different, more ambitious approach. However, Crown lawyers say nothing has changed unless on Title land. Nonetheless, if looking for areas in the Province where want to try different approaches and new arrangements, would think best approach would be to build on the goodwill created through these types of agreements. However, not much sign of movement yet from the Crown.

Question #3: Could SDM agreements support regional level watershed governance, such as through joint initiatives that are also inclusive of other parties?

Julian: Yes, it's possible – not yet robust examples of where that is occurring. Under joint initiatives established by G2G agreements, no reason couldn't focus on watershed planning and establish mechanisms by which other interests could be brought to the table, such as the Ktunaxa in Kootenays. There is an example in the Northwest where brought a group of miners together to establish best practices. Not precluded and in fact agreements create a logical home for such arrangements with a direct reporting platform to two governments. Worth exploring as one of several potential pathways towards watershed co-governance.

Question #4: What advice would you have for funders and what opportunities are there for building capacity to support shared decision-making?

Julian: Two things: 1) Often tendency to underestimate messy, long-term implementation phase that requires sustained support and interest. Less exciting than getting to an agreement and almost need emotional resilience to work through this; and 2) Appetite and need for monitoring, evaluation and shared learning about effectiveness of Agreements.

Merrell-Ann: Practical example – now have this signed agreement with Aboriginal governments intimately involved. To sit on the binational committee and figure out how to implement will take people, time and expertise. All of the partners saying they have day jobs so we need more people, more training and more money to pay for that. How do each of these Aboriginal gov'ts get more bodies, more time and more skills to participate?