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ENVIRONMENT: GARRISON DAM, COLUMBIA RIVER, THE IJC, NGOS

Nigel Bankes[†]
Canadian Speaker

Thanks for that introduction, Brad, and thanks for the invitation to be here to speak today.

I want to commence my remarks by relating a conversation I had with the Immigration Officer yesterday at Calgary International Airport, who seemed to be unusually interested in why I was heading down to the U.S.

I told him I was going to speak on the Columbia River Treaty. He expressed tremendous surprise there was, in fact, a Treaty relating to the Columbia River. Then the real kicker question was “what does it allow *you* (i.e. Canada) to do to us (i.e. the United States)?” I thought that was an interesting encapsulation, particularly if you are familiar with some of the terms of the Columbia River Treaty and its co-operative and coordinated approach to the development of the waters of the Basin.

I want to start with some preliminary observations that will help set the scene for considering the idea of multiple actors within the Basin I will then talk about the Columbia River Treaty itself.¹ I will focus on what the issues have been since 1964. My argument is, while we may know the terms of the Treaty, we must analyze what has happened since it entered into force. What have been some of the issues that the parties have had to address?

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¹ See Nigel Bankes, *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s*, NORTHWEST WATER LAW AND POLICY PROJECT RESEARCH PUBLICATION PO95-4 (1996).

SOME PRELIMINARY OBSERVATIONS

First, while the Columbia River Treaty was and is very much a state-to-state agreement governed by rules of public international law, it was also clear when it was negotiated there would have been no Columbia River Treaty without the active support of the government of the Province of British Columbia

Second, while in the context of the times the public review and ratification process (involving hearings conducted by the Water Comptroller in British Columbia and parliamentary committee hearings in Ottawa) was actually quite extensive there was little opportunity for participation by non-state actors. Indeed the public was seen as "people in the way" as the title of a book² by Professor Wilson puts it in a text that looks at those who were to be displaced as a result of the construction of the dams associated with the Treaty.

Third, while the focus of the Treaty in 1964, was very much power and flood control,³ times have changed and different values have assumed increased importance within the Basin. These values include fish values and values associated with recreation and aesthetic concerns. While the debate on the original values of power and flood control was dominated by an exclusive club that was knowledgeable about these issues including the Bonneville Power Administration, British Columbia Hydro as well as private utilities, a plurality of different actors has emerged as the scope of the debate has broadened. These new values are championed by a range of actors including fisheries managers in both the United States and Canada, Environmental Non-governmental Organizations (ENGOS), regional authorities, and some newly constituted regional authorities like the Columbia Basin Trust in Canada and the longer standing Northwest Power and Conservation Council in the United States, as well as the tribes, and First Nations. These actors have used a variety of strategies and opportunities to articulate their concerns and bring them to the table. Often those strategies have involved the use of domestic law, the Fisheries Act in Canada,⁴ and even more dramatically, the Endangered Species Act in the United States,⁵ but the strategies also include international institutions such as the CEC, as we heard earlier.

I disagree with Professor Schaffer to some extent (insofar as he suggests that petitions are launched by persons within the state against whom the peti-

² JAMES WOOD WILSON, *PEOPLE IN THE WAY: THE HUMAN ASPECTS OF THE COLUMBIA RIVER PROJECT* (University of Toronto Press 1973).

³ See *Columbia River Basin: Cooperative Development of Water Resources*, Sept. 16, 1964, U.S.-Can., 15 U.S.T. 1555 (hereinafter *Columbia River Treaty*).

⁴ Fisheries Act, ch. LX, 1868 S.C. (31 Vict.) 177 (Can.) (hereinafter 1868 Act). See also Fisheries Act, R.S. ch. F-14 (1985) (Can.) (hereinafter 1985 Act).

⁵ Endangered Species Act, 16 U.S.C. §§ 1531 et seq.

tion is launched) because one of the factual records that we have seen so far was a factual record about Canada's alleged non-enforcement of Section 35-1 of the Fisheries Act.⁶ That petition was presented by both U.S. and Canadian NGOs.⁷

Fourth, while we have seen a range of new actors take the stage, one set of actors has remained dominant in the basin. This set of actors comprises the so-called "entities". These entities are the operating entities designated by the two national governments under the terms of Article XIV(1) of the Columbia River Treaty, B.C. Hydro, the Bonneville Power Administration and the Army Corps of Engineers.⁸

Fifth, my own assessment, and I think the assessment of most commentators, is that the basic story of the Columbia River Treaty is a success both in terms of its negotiation and its implementation. It is a success story precisely because those who have been engaged in treaty negotiation and implementation have been asking somewhat different questions than those put to me by the United States Immigration Officer yesterday. Their focus has always been to try to identify the cooperative win-win solutions.

Here is a map of the basin. Note that while only 15 percent of the basin is within Canada, 30 percent of the flows originate in Canada. The main stem of the Columbia rises in Columbia Lake. As we move downstream, the map identifies the key mainstem dams including Mica, Revelstoke and Keenleyside South of the border is the massive Grand Coulee Dam constructed in the 1940s as well as string of dams below that site.

⁶ Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 169 (2002).

⁷ *Id.*

⁸ Columbia River Treaty, Jan. 17, 1961, art. 14(1), United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638.

Figure 1. Columbia River Basin

Source: U.S. Army Corp of Engineers, Northwest Division, Fish Management Office, available at: <http://www.nwd.usace.army.mil/ps/colrvbsn.htm>.

One of the most notable consequences of Grand Coulee is that that dam cut off the escapement of salmon to the entire upper Columbia Basin.⁹ Prior to the dam, salmon used this entire basin all the way up to Windermere and Columbia Lakes at the source of the Columbia. As a result, the only salmon in the Canadian portion of the basin are in the Okanagan system where there is a small population of sockeye.

The other main tributary with which we are concerned is the Kootenay. The Kootenay rises in the Canadian Rockies, heads south to Libby Dam, before heading north back up to Canada and into Kootenay Lake, before joining the main stem of the Columbia 29 miles north of the boundary. Below Kootenay Lake, there are a number of important Canadian dams including Corra Linn and Brilliant.

⁹ Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 472 (1998).

WHAT ABOUT THE TREATY? WHAT DID THE TREATY HAVE TO SAY?

Canada's commitments under the Treaty were to build three Treaty dams, the Mica Dam, the Duncan Dam, and the Arrow Dam, (now known as Keenleyside Dam) and to operate them in accordance with an assured operating plan and a set of detailed operating plans. These plans were designed to provide flood control benefits and power benefits in both the United States and Canada by providing storage that could be used to store flood waters and firm-up existing and future generating capacity at downstream dams.

Canada also committed to provide flooding rights for Libby since Libby, you will note from the map, backs up water into Canada (Lake Koocanusa)¹⁰ Canada's other commitment was not to divert the Kootenay into the Columbia, at least for a period of some years.¹¹ You should note that Libby provides significant storage which can also be used for flood control and to firm up capacity at downstream dams including the Canadian dams downstream of Kootenay Lake some of which installed additional capacity following the Columbia Treaty to take advantage of Libby. Those were the Canadian commitments.

WHAT ABOUT THE CANADIAN ENTITLEMENTS UNDER THE COLUMBIA RIVER TREATY?

The Canadian entitlements under the Treaty were 50 percent of the incremental energy and capacity benefits from U.S. main stem dams.¹² The idea here is that Canadian storage in the upper Columbia firmed up capacity at existing U.S. dams and that Canada, in return for providing storage, should receive a share of these downstream power benefits. Those downstream benefits, Canada (British Columbia) then immediately turned around and sold into the United States on a presale basis for a 30-year period thereby allowing British Columbia to raise the capital to simultaneously develop both the Columbia and Peace systems.¹³ In addition, Canada obtained upfront flood control payments for the flood control benefits conferred on downstream U.S. Canada, as we have seen, was also able to capture downstream benefits from Libby on the Kootenay dams downstream of Kootenay Lake.

There were also some non-treaty benefits, which became possible to Canada. Canada built Mica, a Treaty dam, in such a way as to provide not just

¹⁰ Columbia River Treaty, Jan. 17, 1961, art. 12, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638.

¹¹ *Id.* at art. 13.

¹² *Id.* at art. 4.

¹³ Daniel W. Meek, *Pacific Northwest Conservation for California: The Mutual Benefits of Long-Term Cooperation*, 13 ENVTL. L. 841, 894 (1983).

the Treaty guaranteed storage, but also additional storage. Canada\British Columbia also installed generation at Mica and built and installed generation at Revelstoke, downstream of Mica.

WHAT WERE THE OBLIGATIONS OF THE UNITED STATES?

Moving to the U.S. side of the equation, we see the correlatives of the Canadian rights and obligations. Thus, the U.S. is obliged to provide downstream benefits and flood control payments,¹⁴ and it is obliged to consult over the operation of Libby.¹⁵

The entitlements of the U.S. are, of course, to have significant effective control, over the operation of Canadian Treaty dams in accordance with the terms of assured operating plans as varied only by agreed detailed operating plans. The U.S. was also allowed, but not obliged, to construct Libby. In addition, Canada provided the flowage space for Libby.

Other actors in the United States who were involved in the Treaty framework included those U.S. utilities on the main stem of the Columbia, who were to be beneficiaries of the storage provided upstream. They were also the parties who assumed responsibility for buying Canada's share of the downstream benefits for the first 30 years.

WHAT ABOUT THE INSTITUTIONS OF THE TREATY?

I think the key institutions that the Treaty recognizes and creates are the operating entities, British Columbia Hydro, Bonneville Power Administration, and the Army Corps of Engineers.¹⁶ The Treaty delegates these entities significant authority. These authorities include the opportunity to develop win-win solutions by operating treaty and non-treaty facilities in ways that will provide additional benefits to both countries.

As this is an integrated hydro system, and an interconnected electrical system, the cooperation is a day-by-day, week-by-week affair facilitated through an operating committee. Oversight of the entities is provided not by the International Joint Commission, but by a body known as the Permanent Engineering Board.¹⁷ Sometimes there is a lot in a name and this is certainly true of the Permanent Engineering Board, which sees its primary task as being to ensure that the objectives of the Treaty are being met.¹⁸ What are

¹⁴ Columbia River Treaty, Jan. 17, 1961, art. 12(1), United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638.

¹⁵ *Id.* at art. 12(5).

¹⁶ *Id.* at annex.

¹⁷ *Id.* at art. 15.

¹⁸ *Id.*, at art. 15, cl. 2(d).

those objectives? The answer is the delivery of power and flood control values.¹⁹

FOUR SIGNIFICANT ISSUES

What have been some of the most significant issues that the parties and perhaps more specifically the entities have faced since 1964? I shall refer briefly to four issues: (1) filling Mica, (2) fisheries issues, (3) the return of the downstream entitlement, and (4) the operation of Libby for sturgeon flows. I am going to spend most of the time talking about that fourth issue, the operation of Libby for sturgeon flows.

One of the first issues that arose was how to fill Mica. This was an issue because Mica, in addition to holding significant Treaty storage of seven million acre feet (hereafter “MAF”),²⁰ also has some non-treaty storage of about five MAF.²¹ Well, if Canada was going to fill that non-treaty storage, was it not going to have a detrimental effect down in the United States? If so, how should that be resolved? Furthermore, what would be the rules on the re-fill of that non-treaty storage and the apportionment of benefits arising from the use of that non-treaty storage?

In the end, the issue was resolved not by an amendment to the Treaty, but by an agreement between the entities themselves, leading to something called the non-treaty storage agreements.²² There are various iterations of those agreements (hereafter, “NTSAs”) still in force today.

I emphasize this point for two reasons. First, it shows the entities engaged in problem solving. While they may do so under the general supervision of the Departments of State and Foreign Affairs in practice they have a lot of latitude in finding practical on-the-ground solutions that make operational sense. Second, the existence of the NTSAs has provided significant operational flexibility, which might not have been available in the Treaty, to operate storage for different purposes other than power and flood control.

That takes me to the second issue. Fisheries issues started to emerge as significant issues, particularly on the downstream portion of the Columbia during the 1970s and 1980s. The other major tributary of the Columbia is of course the Snake. While Grand Coulee had wiped out upper Columbia escapement, the U.S. became increasingly interested in finding flows of water

¹⁹ *Id.*, at pmb1.

²⁰ *Id.*, at art. II, cl. 2(a).

²¹ Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydro-power, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 709 (1991).

²² *Id.*

to support passage of Snake salmon down to the ocean by securing minimum flows of water from facilities in the Upper Columbia

One of the questions was, "Could the United States require Canada to operate Treaty storage for the purposes of providing those fish flows?" No, answered the Permanent Engineering Board. However, while the Treaty might not impose such an obligation the entities have been able to work out annual arrangements to provide for fish flows in both Canada, below Keenleyside (for resident fish), and in the United States. They were able to do so in part because of the availability of non-treaty storage in Mica

Third, there was the question of the so-called return of the downstream entitlement. You will recall that when the treaty was first implemented the government of British Columbia elected to pre-sell its downstream entitlement to US utilities.²³ The terms of the sale involved thirty-year terms for the share of the entitlement attributable to each of the three treaty dams and commencing with the in-service date of each dam. Those sales arrangements therefore expired over a five-year period between 1998 and 2003. The Treaty of course did not expire (and will not expire until 2024 at the earliest)²⁴ and so the return of the entitlement gave rise to a series of questions. For example, if British Columbia were to take delivery of the power where should it be delivered? Article V of the treaty contemplated delivery at Oliver but given the pre-sale this had never happened and capacity at Oliver was inadequate. Or, should the Canadian entity be allowed to take delivery in the United States and re-sell into the US market and if so how should the parties deal with place of delivery and transmission access.²⁵ Ultimately, and after an initial proposed deal collapsed, the parties were able to finalize an agreement. Once again, it is important to emphasize that the entities took the lead in working out the agreement although the two federal governments did have to endorse the result since the treaty contemplated that delivery arrangements should be approved by an exchange of notes.

Finally, I want to discuss the operation of Libby for sturgeon flows. It is a nice example of the tension between a Treaty negotiated in a particular era and informed by a particular set of values and a newer and emerging set of values.²⁶ So what is the issue?

With the completion of Libby in 1975, the Kootenay River was regulated for power and flood control purposes. This had unforeseen consequences for

²³ JC Day, Kristan Boudreau, Nancy C Hackett, *Emerging institutions for bilateral management of the Columbia River Basin*, AM. REV. OF CAN. STUD. (June 1997).

²⁴ Columbia River Treaty, Jan. 17, 1961, art. 19, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638.

²⁵ *Id.* at art. 15

²⁶ For another example see the decision of the International Court of Justice in Case Concerning the Gabcikovo and Nagymoros Project (Hungary Slovakia), [1997] ICJ Rep. esp at para. 140.

a population of sturgeon that was resident in the river between Libby and Kootenay Lake.²⁷ Essentially, and after a number of years, biologists discovered that there was no recruitment of young sturgeon to that population once the natural flow of the river had been changed. To cut a long story short, the Kootenay sturgeon was listed under the Endangered Species Act²⁸ and the Army Corps of Engineers, the operator of the dam became charged with the obligation to operate Libby not for power and flood control purposes exclusively, but to provide fish flows, flows for sturgeon, and, to a lesser extent, for salmon.²⁹

In the opinion of B.C. Hydro, this new operation of Libby caused power losses at those Canadian dams located downstream of Kootenay Lake.³⁰ B.C. Hydro suggested that was a breach of the Treaty.³¹ The dispute escalated. It came very close to being submitted to the International Joint Commission for arbitration under Article XVI of the Columbia River Treaty. Ultimately, however, the entities preferred to negotiate another win-win solution.

The basis of the agreement was that B.C. Hydro obtained additional flexibility in the operation of Keenleyside,³² and the Army Corps of Engineers got to operate Libby in accordance with the Endangered Species Act.³³ Thus, once again we have an entity driven solution endorsed by governments.

There are some real advantages with allowing the entities to develop the solutions to identified problems. In particular, the entities have the knowledge base and the operational capacity to imagine what might be possible and where it might be possible to identify mutually advantageous solutions that effectively make the pie bigger. By contrast, the federal governments and especially the Departments of State and Foreign Affairs lack the working knowledge of the operation of the hydro system and the interconnected transmission system. However, there is also a potential downside from a public policy perspective and it is this: “can we trust the entities?” Who are these entities? They are power corporations. They are interested in and

²⁷ Dwane Wilkin, *Sturgeon's Sex Drive Disrupted by Hydro-Electric Dams*, *Researchers Say*, KNIGHT-RIDDER TRIB. BUS. NEWS, April 16, 2001.

²⁸ *First fish released in unique sturgeon stocking program*, M2 PRESSWIRE, Oct. 18, 2002.

²⁹ *Groups to Sue Army Corps Over Endangered Sturgeon*, ENVIRONMENTAL NEWS SERVICE, May 8, 2002.

³⁰ Fish operations cause the dam to be operated more along the lines of the natural hydrograph. Consequently the operation mimics the spring freshet causing downstream dams to spill water while later in the season there is less storage available to firm up capacity at those downstream dams.

³¹ Specifically the obligation to consult under Article 12(5) and a more general obligation to coordinate the operation of Libby.

³² Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., 4, T.I.A.S. No. 11,091 (entered into force Mar. 18, 1985).

³³ *Id.*

committed to the values of the Treaty, power and flood control. They are not the natural guardians of the Columbia ecosystem in general or fish values in particular. But can they be coerced into protecting those other values? And this next question, leads us to think about other actors who may be in a position to coerce the entities.

WHO ARE THESE OTHER ACTORS?

In addition to the Department of State and the Department of Foreign Affairs, and the provincial government in British Columbia other key actors include the fisheries managers in the two jurisdictions. For example, the Department of Fisheries and Oceans in Canada has been taking an increasingly active interest in ensuring adequate fish flows below Keenleyside. In the United States the Kootenay sturgeon listing is simply one example of how listing of both resident and anadromous species under ESA has a significant impact upon the operation of hydro facilities. In fact, some would ask, "Who really runs the river? Is it the Endangered Species Act, or are Bonneville and the Army Corps of Engineers?"

Regional actors, I think, have also become increasingly significant within the Basin. In Canada, perhaps the most important development was the creation in 1995 of the Columbia Basin Trust. The impetus for the Columbia Basin Trust was the government of B.C.'s belated recognition that the residents of the region might have just been people in the way in 1964, but it was time, with the impending return of the downstream benefits, to recognize that the region has suffered serious impacts and that it was important to return some of the treaty benefits to the region and to provide a vehicle for reinvestment in the region.³⁴ In the United States, the key regional institutional development was the creation of the Northwest Power and Conservation Council in 1980. One of the responsibilities of the NWPPC was to establish a program to protect and enhance the fisheries resources of the Columbia River and to mitigate damage already done to anadromous fish. Funding for the program comes from Bonneville's rate revenue.

Other actors include, of course, non-governmental environmental organizations and tribal organizations. For example, one ENGO, the Sustainable Fisheries Foundation³⁵ has been instrumental in convening a series of conferences designed to focus on the Columbia Basin as a whole rather than particular national or regional jurisdictions within the Basin.³⁶ Other ENGOs have been instrumental in triggering the listing process for endangered fish species under ESA while Canadian ENGOs have in some cases pressured the

³⁴ See <http://www.cbt.org/about/main.asp?fl=2&pg=history> (last visited Sept. 30, 2004).

³⁵ See <http://www.sff.bc.ca> (last visited Sept. 30, 2004).

³⁶ See <http://www.sff.bc.ca/Events.html> (last visited Sept. 30, 2004).

Department of Fisheries and Oceans to be more vigorous in using the federal Fisheries Act to require BC Hydro to operate its hydro facilities in ways that do not endanger fish and fish habitat. Finally, ENGOs on both sides of the border have used the CEC process to pressure Canada to do a better job of enforcing the Fisheries Act against BC Hydro.³⁷ And while this submission related to a number of BC Hydro's facilities one of the key facilities listed in the petition as being an example of Canada's non-enforcement of the Fisheries Act was the Keenleyside dam which the petitioners alleged was being operated in such a way as to affect fisheries habitat under Section 35-1, and that Canada was not enforcing the Act in relation to that facility.³⁸

CONCLUSIONS

Power and flood control values drove the negotiation of the CRT. Those values remain dominant, but other values have been accommodated over the course of the implementation of the Treaty. These other values have been accommodated through the terms of the non-treaty storage agreements, through annual operating plans agreed upon by the entities and through other agreements such as annual fish flow agreements and the agreement that resolved the Libby dispute. The pressure to accommodate these values has come from other actors relying principally on domestic laws rather than international laws.

There are challenges that remain. Either party may terminate the Treaty beginning in 2024 upon ten years prior notice. Interested parties such as the Columbia Basin Trust are already starting to talk about what the options will be in 2024. Another challenge is the continuing need to develop a basin consciousness that crosses the 49th parallel. While the treaty itself envisaged the coordinated development of the Basin other laws and institutions tend to focus our attention on different jurisdictional parts of the Basin. A visual demonstration of this is the frontispiece of a briefing book prepared by the Northwest Power and Conservation Council. While the NWPPC claims to take an ecosystem approach to the Columbia basin the map on that front page cuts the Basin off at the 49th parallel, and ignores the upper Canadian basin.³⁹

³⁷ See Registry of Submissions of Enforcement Matters, SEM-97-01, and Response from Canada (July 21, 1997) available at: <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=46> (last visited Sept. 30, 2004).

³⁸ *Id.*

³⁹ See <http://www.nwppc.org/library/2003/2003-2.pdf> (last visited Sept. 30, 2004).

