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Agreement in Principle on a Revised Columbia River Treaty

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Last week the governments of Canada and the United States announced that they had reached an agreement in principle (AiP) on a set of amendments to “modernize” the Columbia River Treaty (CRT). It has taken the parties over six years to reach this point. I have provided some background on the CRT and the launch of the renegotiation in previous ABlawg posts [here](#) and [here](#). The parties have yet to provide the full text of the AiP but the Government of British Columbia has posted a [backgrounder](#) that summarizes the terms of the AiP as well as a useful [Q & A page](#). Here is the text of the summary:

Canadian flexibility: The treaty requires Canada and the United States to annually coordinate 15.5 million acre-feet (MAF) of reservoir storage space behind Canadian treaty dams to optimize hydropower generation in both countries.

- Canada can unilaterally decide to reduce the co-ordinated storage to a minimum of 11.5 MAF in each year through 2039, and 10.5 MAF from 2039-2044 for their own domestic purposes.
- Domestic flexibility will be used to address impacts resulting from the treaty to ecosystems, Indigenous cultural values and socio-economic interests.
- For every MAF co-ordinated storage is reduced, the Canadian Entitlement that the United States is required to deliver to Canada will be reduced by 6.5%.

Canadian Entitlement: The Canadian Entitlement (CE) is Canada’s share of the downstream power benefits provided under the treaty. The CE for the current (2023- 2024) operating year is 1,141 megawatts (MW) in hydropower generation capacity and 454 average MW (aMW) of energy. The anticipated schedule that reduces the CE at the beginning of the 2024-2025 operating year (beginning Aug. 1, 2024), starts from 660 MW capacity and 305 aMW of energy, stabilizing in 2033-2034 at 550 MW of capacity and 225 aMW of energy, and ending in 2044.

- The reduction of the CE takes into account the decrease expected when the treaty was originally entered into.

Preplanned flood control: Following the modernized treaty’s entry into force, Canada will provide the United States with 3.6 MAF of preplanned flood-risk management (FRM), a reduction from the current 8.95 MAF. The U.S. and Canada are working to identify

arrangements under the existing treaty to implement the preplanned FRM for the upcoming flood season (spring of 2025).

Compensation to Canada for flood-risk management and other benefits: Annual payments will be made to Canada:

- 1) Preplanned FRM payments are anticipated to be \$37.6 million (USD) [annually] and indexed to inflation, using the consumer price index (CPI), through 2044. This compensation will be owed the first year Canada provides the preplanned FRM.
- 2) The United States also recognizes that it receives additional benefits from in the operation of the Canadian reservoirs and will provide an additional \$16.6 (USD) million to Canada annually once the modernized treaty enters into force, indexed to inflation using the CPI, through 2044.

Transmission: The Bonneville Power Administration (BPA) and Powerex (BC Hydro’s energy marketing and trading arm) will enter into an agreement to allow Powerex to assume, in a manner consistent with BPA’s transmission tariff that applies to other BPA contract-holders, and pay for existing transmission capacity of 1,120 MW currently held by BPA to deliver the Canadian Entitlement. This long-term arrangement will contribute to British Columbia’s system reliability and energy security.

New transmission: BPA and Powerex will conduct a study on expansion of new transmission and, based on that study, BPA will determine whether to proceed to necessary domestic processes to implement the expansion. If realized, this would further expand British Columbia’s transmission capacity to optimize market opportunities to benefit its energy system.

Indigenous and Tribal advisory body: The United States and Canada will form an Indigenous-led advisory body that will provide recommendations on how treaty and other hydrosystem operations can better support ecosystem needs and Indigenous and Tribal cultural values. This body will integrate a “One River” approach to ecological health along the Columbia River and adopt an adaptive-management framework.

Flows for salmon: Canada will provide 1 MAF of water flows in all years and an additional 0.5 MAF in dry years to support salmon survival and migration, contributing to maintaining and enhancing downstream salmon populations, including Okanagan salmon.

Salmon reintroduction: The United States and Canada acknowledge that the Tribes and Indigenous Nations on each side of the border are conducting salmon reintroduction studies and will co-ordinate on these studies. The goal is to maximize synergies from efforts on both sides of the border and to facilitate information sharing.

Kootenay/Kootenai working group: A multiparty transboundary working group will be formed to work towards addressing common interests in the Kootenay/Kootenai river system such as ecosystems and aquatic objectives, recreation and flood-risk mitigation on both sides of the border.

The AiP is an important achievement but there is still a long way to go to finalize these arrangements. The parties will need to agree on treaty text to give effect to the amendments recorded in the AiP, and then these amendments will need to be ratified by both parties. Barb Cosens and I explored the ratification processes in both Canada and the United States for an amended CRT in *The Future of the Columbia River Treaty (2012)*. This will likely take months if not longer. Until then, and as this summary acknowledges, the relationship between the parties will continue to be governed by the terms of the existing treaty.

Commentary

Given that all we have at this stage is a summary of the AiP rather than actual text it is not appropriate to offer detailed commentary but here are preliminary reactions.

The Timing of the AiP and the Flood Control Provisions

While there is no set termination date in the CRT, the negotiating parties still faced an important and pressing deadline in the form of the sixtieth anniversary of the treaty in September of this year. This anniversary is important since the assured flood control provisions of the CRT change automatically going forward and in a manner that is less favourable to the US and in a way that creates uncertainty for both parties. The AiP text responds to this by offering the US a continuation of assured flood control but for a reduced amount of storage space (3.6 MAF rather than the current 8.95 MAF) and in return for an annual FRM payment of nearly \$40 million (US). This represents a significant change from the terms of the existing treaty which provided for a one-time payment for the more extensive assured flood control operation for the first sixty years. It is unclear from the summary that has been provided whether the US can call upon Canada to provide further flood control measures (as it can now) and, if so, how those services will be valued and paid for.

It is unlikely that these new arrangements will be formally in place for the next flood control season (which requires operations to start in the first quarter of the calendar year) and thus the above summary recognizes that the parties will need “to identify arrangements under the existing treaty to implement the preplanned FRM for the upcoming flood season (spring of 2025).” This suggests the need for some interim arrangements, but at least the parties now have guidance as to the scope and modalities of those arrangements. It is also likely that the operating entities (BC Hydro, the Bonneville Power Administration and the Army Corps of Engineers) will need to modify the terms of the current [flood control operating plan](#) (FCOP). For more detailed analysis of the flood control provisions of the existing treaty see Bankes, “The Flood Control Regime of the Columbia River Treaty: Before and After 2024” (2012) 2 Wash J Envtl L & Pol’y 1-74 (available [here](#)); and for discussion of interim arrangements when the CRT was first being implemented see Bankes and Cosens (2012) *supra*, especially Part 7.

A Reduction in the Downstream Power Benefits

The original treaty recognized that the Canadian treaty dams (Mica, Keenleyside and Duncan) provided downstream power benefits (assured capacity and incremental energy) at mainstem dams in the US. Under the current rules Canada (British Columbia) is entitled to 50% of these benefits.

The cost of these benefits is borne by the owners of these downstream dams who have long lobbied for a reduction of these sharing rules. The AiP (as summarized by BC) anticipates that these benefits will be reduced effective August 2024 (i.e., next month!) although it is far from clear how this can be effected *before* the treaty amendments are ratified. The downstream power benefits may be further reduced if Canada takes advantage of the option that the AiP provides of reducing the amount of storage behind Canadian dams that is committed to treaty power operations (see provisions on Canadian flexibility described above).

Additional Annual Payment to Canada

The current treaty only recognizes power and flood control values and hence offers no compensation to Canada for other benefits that treaty operations may confer (e.g., navigation and agriculture benefits). The AiP as summarized by BC commits the US to an additional annual payment of \$16.6 million (US) but only (unlike the reduced power benefits) once the amendments enter into force.

Non-Treaty Storage and Libby

One important result of the new power and flood control provisions is that a larger share of the storage behind Canadian treaty dams may become non-treaty storage. In the past, BC Hydro and BPA have entered into non-treaty storage agreements ([NTSAs](#)) as to the operation of this storage and how to share the benefits associated with this storage. These agreements are commercial agreements rather than treaty arrangements although they must not derogate from the terms of the treaty. The current [NTSA](#) expires in September 2024 and therefore this too will need to be renegotiated or interim measures put in place (likely some combination of the two). It follows that in the future the NTSAs will become more important rather than less important as the amount of non-treaty storage grows.

There is at least one other agreement that also expires in September 2024. This is the so-called [Libby Coordination Agreement](#) which was adopted by the parties in 2000 to resolve a dispute over the US entity's operation of the Libby dam. The Agreement is summarized and reviewed in Bankes and Cosens (2012), *supra* at 82-84. It is not clear if this is an issue that will be addressed by the proposed Kootenay/Kootenai working group.

Governance, Ecosystem Values and Indigenous Participation

The existing treaty is institutionally weak. Ongoing operations are largely delegated to the entities – BPA, the Army Corps and BC Hydro. The treaty oversight body, the Permanent Engineering Board (PEB), is largely concerned with technical matters of treaty implementation and has no concern with broader values. And as a flood control and power treaty, the CRT is also silent on ecosystem function. Finally, the original treaty was negotiated without Indigenous participation and makes no reference to Indigenous interests or rights.

It is hard to get a complete picture of how these issues have been dealt with in the AiP on the basis of the above summary prepared by the province. The only institutional innovation that is mentioned is the creation of Indigenous-led advisory body, but it is not clear how that body will

interact with the entities, federal and provincial/state governments, or the PEB. As for ecosystem values, there is no sense that these values will be fully integrated into the treaty. They do not merit a separate heading in BC's summary and instead are treated only to passing reference in the sections dealing with Canadian flexibility, the new Indigenous-led advisory body, and the proposed working group to deal with Kootenay/Kootenai basin issues. Ecosystem values also inform the provision on minimum flows for salmon (hitherto a matter dealt with by the entities through supplementary agreements rather than in the treaty itself) and the ongoing commitment to study salmon-reintroduction. As for the Kootenay/Kootenai working group, it remains to be seen how this group will relate to the recently launched and ongoing [Reference to the International Joint Commission](#) on pollution issues in the Elk-Kootenai/y Watershed.

The Tribes and Nations were directly involved on both sides in the negotiations that led to this AiP. BC's summary references Indigenous interests in the sections dealing with Canadian flexibility, Indigenous-led salmon reintroduction efforts, and of course the creation of the new Indigenous-led advisory body. Thus far, First Nations in Canada have expressed support for the AiP while cautioning that much still needs to be accomplished to achieve true reconciliation. See comments from the Ktunaxa Nation Council [here](#), the Syilx Okanagan Nation [here](#) and the Shuswap Nation (Secwepemc) Tribal Council [here](#).

Further Commentary

The parties are apparently committed to releasing the text of the AiP in the coming weeks or months. When that happens, it will be interesting to evaluate the documents against the published objectives of the parties. For a discussion of those objectives and references see Nigel Bankes and Barb Cosens, *Protocols for Adaptive Water Governance: The Future of the Columbia River Treaty* (2014), esp chapter 2.

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