

September 13, 2024

New “Public Document” on the Agreement in Principle to Modernize the Columbia River Treaty

By: Nigel Bankes

Document commented on: “[Negotiations to Modernize the Columbia River Treaty, Agreement-in-Principle Content, Public Document](#)”, dated August 30, 2024, release announced September 5, 2024.

In the first part of July, the governments of Canada and the United States announced that they had reached an agreement in principle (AiP) on the modernization of the Columbia River Treaty (CRT). At about the same time, the province of British Columbia released a [backgrounder](#) summarizing the AiP. I provided an ABlawg commentary on that backgrounder [here](#) and I have previously posted on modernization of the CRT [here](#) and [here](#).

My understanding at that time was that British Columbia was committed to releasing the actual text of the AiP in due course (see the province’s Q & A, item # 3, [here](#)). We have yet to see the text of the AiP. In place of that, the province has chosen to release the rather curiously titled “[Negotiations to Modernize the Columbia River Treaty, Agreement-in-Principle Content, Public Document](#)” (public document or PD). This is *not* the AiP. Instead, it is a more detailed version of the backgrounder with some additional content. While the document is clearly directed at a British Columbia audience I understand from Kathy Eichenberger, Executive Director, Columbia River Treaty Branch of BC’s Ministry of Energy, Mines and Low Carbon Innovation, that the content of the document “was vetted and agreed to by the US and Canada.” The US State Department has also released summaries of the AiP [here](#) and [here](#), but this provincial public document is significantly more detailed, especially under the heading “ecosystem considerations”. Canada’s negotiating team (including First Nations representatives) has also posted a video [here](#). This video does an excellent job of communicating both the context of the negotiations and the outcomes.

This post examines the ways in which this public document expands upon BC’s July backgrounder but also identifies what seem to be some outstanding questions.

What New Light Does the Public Document Shed?

This section is organized around the headings used in the public document: (1) flood risk management, (2) Canadian flexibility, power coordination and transmission, (3) compensation, (4) power benefit sharing, (5) ecosystem considerations, and (6) time periods.

Flood Risk Management (FRM)

The public document gives us a clearer picture of how the pre-planned FRM (or assured flood control) will operate when the amendments enter into force. It will be recalled that the current assured flood control operation of 8.95 million acre feet (MAF) of space in Arrow, Mica, and Duncan (2.58 MAF Mica, 1.27 MAF Duncan, and 5.1 MAF Arrow) terminates automatically this month (September 2024). Instead of this assured operation the current treaty rules would allow the US to call for the operation of Canadian storage once the US has made effective use of its flood control capacity. This called-upon operation offers the US far less certainty than the current assured operation and there is much disagreement as to how such an operation would work in practice, including the trigger for a called-upon operation.

Given this uncertainty the parties have apparently agreed to extend to the US a more limited assured operation – 3.6 MAF rather than 8.95 MAF. The additional information that we have from the public document includes the following:

- All the storage will be made available at Arrow. This makes sense to both parties since Arrow/Keenleyside provides the most effective flood control for the United States as well as downstream communities in British Columbia including Castlegar and Trail (PD at 2).
- The parties will give effect to the assured operation through the terms of a revised Flood Control Operating Plan (FCOP). For the current version of the FCOP see [here](#). The FCOP will be developed by the US Army Corps of Engineers as it has in the past but BC/BCHydro will likely give the draft close scrutiny (PD at 2).
- The FCOP will include plans for coordinated refill on a *proportional* basis. It is not entirely clear what this means but it is presumably intended to ensure that the FCOP does not allow the US to preferentially refill Grand Coulee while delaying refill of Arrow (PD at 2).
- In addition to the assured operation the US will still have access to additional Canadian storage on a called-upon basis (see discussion of called-upon above). It is far from clear what this means, and the public document effectively admits that more negotiations will be required to resolve the knotty issues associated with a called-upon operation:

Canada and the United States have mutually determined to develop a process to enhance the understanding of each other's positions regarding Called-Upon flood control. (PD at 2)

- There will apparently also be some provision for the US to cooperate as to the manner in which it operates the Libby dam – so as to afford consideration of downstream flood control in Canada, including Kootenay Lake levels. BC has long been concerned about Libby operations and the current treaty provisions are very thin – see CRT Article XII and especially XII(5). But it is far from clear from the language of the public document whether the proposed cooperative mechanism will be included in treaty text or some more informal set of understandings. Furthermore, any discussion of Kootenay Lake levels will necessarily need to take account of the existing levels order for Kootenay Lake established by the International Joint Commission under the Boundary Waters Treaty (see CRT, Article XII(6)).
- It appears that all of these arrangements will have a twenty-year life, 2024 – 2044.

Canadian Flexibility, Power Coordination and Transmission

The Canadian negotiating team has made much (and rightly so) of the increased flexibility that the AiP, once implemented, will give British Columbia as to the way it operates treaty dams. This flexibility is achieved by reducing the amount of storage in Canadian treaty dams that is dedicated to treaty operations – whether flood control operations or power operations. How that flexibility will be used is a domestic matter for Canada and British Columbia and need not be (and should not be) reflected in treaty text.

The public document provides some additional information on how the flexibility will be achieved.

- The document informs that the principal treaty mechanism to implement the flexibility will be the recognition of “specified operations” (SO) which may be undertaken for “domestic priorities, such as environmental, Indigenous cultural values and socioeconomic purposes.” (PD at 3)
- It appears that an SO will be accommodated by a variation in the existing assured operating plan (AOP) process (PD at 3). (For the existing AOP process see in particular CRT Article XIV and Annex A.)
- The AOP process will continue with some modifications to accommodate SOs and an updated record of flows for the Basin.

The parties will also address transmission options which, if implemented, will give BCHydro enhanced access to Pacific Northwest markets for both the import and export of energy. This will deliver mutual efficiency and security benefits to both Canada and the US (PD at 4).

Compensation

The AiP contemplates that Canada/BC will receive two compensation streams in addition to any power benefits (see below on power benefits). The first stream is a payment of USD 37.6 million per year (indexed) for the reduced assured flood risk management operation described above. The second stream is an annual payment of USD 16.6 million (also indexed) “in recognition for the additional benefits the U.S. receives through coordinated operations.” (PD at 4)

Perhaps the only new information in the PD on this issue is the following statement:

While these benefits have not been enumerated in negotiations, Canada notes that the U.S. has described in public forums benefits the CRT brings to navigation, irrigation, fisheries and recreation. (PD at 4-5)

As with other provisions, these arrangements will cover the next twenty years.

Power Benefit Sharing

The AiP contemplates that the Canadian entitlement (share of the incremental downstream power benefits conferred by treaty operations) will be reduced (and further reduced by SO flexibility

operations). The public document spells this out in tabular form but there is no new information here (PD at 5).

Ecosystem Considerations

There is considerable new information in the public document under this heading and the following sub-headings and sub-sub-headings: Kootenay/Kootenai Transboundary Coordination, Joint Ecosystem and Indigenous and Tribal Cultural Values Body (JEB) (including JEB Membership, Creating the JEB, JEB Work and Recommendations, Adaptive Management, Anadromous Fish Flow Augmentation and Salmon Reintroduction).

Under the heading “*Kootenay/Kootenai Transboundary Coordination*”, the public document expands upon the plan to create a joint working group as follows:

The intent is to create a collaborative group, the Kootenay/Kootenai Transboundary Collaborative Workgroup (KTCW), to facilitate transboundary efforts around each country’s interests to provide a forum for sharing, exchanging, and collaborating on scientific and Indigenous knowledge and other information to inform planning and management processes in the Kootenay/Kootenai Basin. (PD at 6)

The KTCW geographic remit would include the Kootenay/Kootenai River system in both countries. Further detail is as follows:

A binational sub-committee is expected to develop a recommended governance plan, and short- and medium-term workplans. These workplans can inform a broad range of management and planning processes in the sub-basin.

Canada and the United States, subject to the availability of funding, intend for the KTCW to begin its work on a provisional basis in the period between concluding the text of a Modernized Treaty and its entry into force, if all participants of the KTCW are amenable. (PD at 6)

As I indicated in my earlier [post](#), “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 public document does not address this point. It does however note that there will need to be some interaction between this group and the previously discussed cooperation with respect to the implications of Libby operations for Canadian flood risk concerns downstream of Libby. The public document addresses that relationship as follows:

Such cooperation is intended to consider any recommendations of the [KCTW} once established, to incorporate Canadian flood risk concerns downstream of Libby Dam. (PD at 2)

The public document notes that the proposed Joint Ecosystem and Indigenous and Tribal Cultural Values Body (JEB) will be “a new body under the CRT”. The purpose of the JEB is said to be:

... to enhance ecosystem health and integrate Indigenous and Tribal cultural values in decision-making by making formal recommendations in line with its terms of reference and workplan and applying a One River approach in its work. (PD at 6)

The public document and BC's previous backgrounder are not completely clear as to the composition of the JEB. The backgrounder refers to the JEB as an Indigenous-led advisory body, while the public contains the following statements:

Canada and the United States intend the JEB to be made up of representatives of Indigenous Nations and Columbia Basin Tribes.

There would be equal representation from Indigenous Nations and the Tribes and between Canada and the United States (for Canada that includes representation from the Province of British Columbia) in the JEB. The JEB would be co-chaired by Indigenous Nations and Tribes. *The United States and Canada, including representation from the Province of British Columbia, are expected to participate in all aspects of the JEB's work except making decisions on recommendations.* (PD at 6-7) (emphasis added)

While the first quoted paragraph suggests that the JEB's membership will be limited to the Indigenous Nations and Tribes, perhaps the better reading of the two paragraphs together is that there will also be a participation role for non-Indigenous governments.

Canada and the United States contemplate the creation of a preparatory committee to establish a governance structure, terms of reference, and an initial work plan for the JEB. It is anticipated that this will be accomplished prior to the entry into force of the modernized treaty.

The public document provides important guidance as to the intended status of the JEB and its recommendations and its relationship with other treaty players:

The JEB is expected to make its recommendations by consensus of its Indigenous Nations and Tribal representatives. The JEB's recommendations would be provided to the Parties (the Governments of Canada and the United States), the Entities, and agencies of the Province of British Columbia and other entities, as appropriate, with the intention of informing their decision-making.

Recommendations by the JEB, which will be made available to the public, will pertain to the mainstem Columbia River. In preparing those recommendations, the JEB may consider the relationship of the tributaries to the mainstem Columbia River, consistent with the One River approach. When Parties and Entities receive recommendations from the JEB, they will either implement the recommendations or explain in writing why they will not implement the recommendations in whole or in part. (PD at 7)

The text does not specifically refer to any possible relationship between the JEB and the existing Permanent Engineering Board (PEB).

Among other things, the JEB will have the responsibility for developing an adaptive management (AM) program (for an early reference to AM in the Columbia Basin see Kai Lee, *Compass and Gyroscope: Integrating Science and Politics for the Environment* (Washington, DC: Island Press, 1993)). The public document indicates that the AM program will include:

- objectives, study topics, a review of existing data and gap analysis, and data collection methods, including establishing environmental baseline data;
- a long-term monitoring regime; and
- identification of performance measures, and the changes to them that would trigger a recommendation by the JEB for a review of operations (including storage and flows) in both countries. (PD at 8)

The ecosystem section of the public document also provides further details with respect to Canada's commitment to provide augmented spring and summer flows for migrating fish through to 2044. The commitment is described as a "reasonable efforts" commitment to store 1 MAF for fish flows in Canadian reservoirs by mid-April each year and to release that amount "annually within the May 1 – August 7 salmon and steelhead migration period, *through a long-term enabling agreement.*" (PD at 8) (emphasis added). The italicized text makes it clear that further negotiations will be required to operationalize this commitment. It is not clear whether the enabling agreement will be part of the treaty text or a stand-alone arrangement. In forecast low flow years (any year in which the forecast of water conditions for the April – August period at The Dalles, Oregon, is below the 20th percentile) Canada will make a reasonable efforts commitment to store and release an additional 0.5 MAF. The PD describes the JEB's involvement in this process as follows:

The United States and Canada intend to report annually to the JEB anadromous fish flow augmentation operations for each previous operating year and how the volumes were used to meet specific objectives for different populations of anadromous salmon and steelhead.

The JEB may review fish flow augmentation operations in conjunction with other operations at dams in the U.S. and Canada and make recommendations for changes to the objectives to maximize benefits for anadromous species in both countries while improving, to the extent possible, other fish populations; and to mitigate the impacts of climate change on fish.

The JEB is expected to review anadromous fish flow augmentation operations and effectiveness and make recommendations, if any, to improve the effectiveness of aiding in overall salmon and steelhead survival. (PD at 8-9)

The final topic under this heading of Ecosystem Considerations is Salmon Reintroduction. BC's early backgrounder was short and to the point on this issue noting as follows:

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. (Backgrounder at 2)

The public document provides considerably more detail.

Both countries, consistent with existing authorities, are independently supporting phased reintroduction feasibility studies outlined in the July 2015 Joint Paper of Columbia Basin Tribes and First Nations on Reintroduction and Fish Passage into the United States' and Canadian Upper Columbia Basin.

Current studies led by the Upper Columbia United Tribes in the United States include salmon behaviour and survival studies, coupled with design and testing of interim passage facilities.

While both countries are proceeding with their respective studies, transboundary coordination and cooperation to share information, data, study approaches and results are essential for success. Both countries would commit to respecting and addressing the needs of reintroduction within the modernized Treaty regime as described below, taking into account the One River approach.

Reintroduction of salmon into the blocked areas of the Columbia Basin will require careful consideration of many factors, including available habitat, operational considerations (such as flow volume and timing), and passage/transport through dams and reservoirs upstream of, and including, Chief Joseph and Grand Coulee dams. (PD at 9)

The public document also addresses the role of the JEB in salmon reintroduction noting that “Canada and the United States intend to work with the JEB to ensure collaboration on reintroduction studies and efforts, to include data sharing and potential joint studies.” (PD at 9) Furthermore, both parties anticipate that the JEB will:

... provide recommendations on long-term reintroduction programs. At least every five years following the entry into force of a Modernized Treaty, the JEB should review the results of reintroduction studies and activities completed to date and make recommendations regarding reintroduction actions that would support further progress on reintroduction. (PD at 9)

It is clear that all of these references to the work of the JEB will feed into the terms of reference to be developed by the JEB Preparatory Committee referenced above.

Time Periods

The public document addresses two points under this heading.

First, the document aims to clarify what is an operating year for treaty purposes and stipulates that an operating year runs from August 1 to July 31. That is useful to know, but how does that relate to the termination of the assured flood control operation later this month (September 2024, see CRT, Article IV)? Is the document suggesting that since the 60th anniversary occurs after the operating year has started that the assured operation is somehow grandparented? That is hardly an

obvious interpretation, but if that is not the point, what is the purpose of emphasising treaty usage in relation to operating years? Perhaps it relates to the duration of the 20-year commitments?

The second point covers the relationship between the treaty modernization provisions and the existing treaty. On this point the text of the public document is also confusing. I have anticipated that the result of the modernization process would be an amended treaty which would effectively push out for twenty years the issue of treaty “termination”. But the public document muddies this expectation (at least for me). Here is what the document says:

The Modernized Treaty will remain in force, subject to termination. Termination of the Modernized Treaty may be by agreement of the Parties (the Governments of Canada and the U.S.) at any time, *or can be unilaterally initiated by either Party with 10 years’ written notice to the other Party. However, as indicated earlier in this document, some provisions, such as pre- planned FRM and power coordination/power benefit sharing expire in Operating Year 2044.* The Parties may agree, in writing, to amend or extend the Modernized Treaty. Negotiations to amend the Modernized Treaty may commence at any time mutually agreed by the Parties. (PD at 9-10) (emphasis added)

It is far from clear to me how you can have treaty termination on ten years notice but continuation of its most central provisions (power and flood control) for twenty years. The current treaty is already complex on this point (some provisions, especially called upon flood control, are effectively immune from termination, see CRT Article XIX). This statement of the position under a modernized treaty suggests even more complexity – or at the very least it cries out for further clarification.

What Are Some of the Outstanding Questions?

I have already referenced some of the outstanding questions in the previous section. These questions include the following:

- The details of how a called upon operation will work in conjunction with the more assured operation and the question of the trigger for the US to make a call.
- The details of a revised FCOP.
- The form of the proposed mechanism for managing Kootenay Lake flood risk.
- The details and the form of the long-term enabling agreements for augmented fish flows.
- The relationship between the proposed amendments and the existing treaty termination provisions.

But there are also other questions. One question is simply that of how the treaty modernization will be effected in drafting terms? The public document is less than helpful on this point insofar as it states that since some of the common understandings “include elements not present in the existing Treaty, Canada and the United States will work together *to reflect these new elements in the preamble of the Modernized Treaty.* Updated elements to include are ecosystem health, Indigenous and Tribal cultural values, and adaptive management.” (PD at 1) (emphasis added)

Really? Is this document suggesting that all that will be required in drafting terms is some tinkering with the terms of the Preamble? This seems untenable given the magnitude of the changes the AiP contemplates to the most fundamental provisions in the CRT.

Another question on which the public document is completely silent relates to the continued role and composition of the PEB (see CRT Article XV). Presumably the PEB will continue, but will its role and membership change? How will the PEB relate to the JEB and *vice versa*?

The document is also silent as to the question of the possible renewal of existing entity agreements dealing with non-treaty storage (NTS) – a matter I commented on in my previous post. While the response to this may well be that the document does not mention NTS issues since, by definition, these issues fall outside the treaty, there will be many on both sides of the border who will have an interest in understanding how the entities propose to manage the NTS available in British Columbia’s reservoirs.

A further question of course is just when will we see the actual AiP? The BC Government’s [Q & A on the AiP](#) still indicates that “[w]e are confirming arrangements for public release of the AIP with our Canadian and U.S. partners. We look forward to sharing the AIP during our engagement with Basin communities.” If this is still the case it seems strange to provide this more detailed summary of the AiP without the AiP itself. It’s certainly a useful document but would it not be better if we were able to examine the text itself and form our own opinions as to how the AiP measures up against the negotiating objectives of each party?

Map of the basin showing the main dams including the Canadian treaty dams (Keenleyside, Mica and Duncan), as well as the CRT authorized Libby dam in the US



Source: <https://engage.gov.bc.ca/app/uploads/sites/6/2019/07/updated-Map-of-Columbia-Basin-USACE-high-res.jpg>

This post may be cited as: Nigel Bankes, “New “Public Document” on the Agreement in Principle to Modernize the Columbia River Treaty” (12 Sept 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/09/Blog_NB_CRT_AiP.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)