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Modernization of the Columbia River Treaty: An Opportunity for Idaho

Barbara Cosens

With the expiration of certain flood control provisions in the Columbia River Treaty between the United States and Canada in 2024, considerable regional and federal resources have been devoted to its review and analysis of the need for modernization. Ninety eight percent of Idaho lies within the basin with much of that on the main tributary to the Columbia—the Snake River. While the Snake River joins the Columbia River downstream of the international border, the physical, legal and economic connectivity of the basin make changes to the Columbia River Treaty of interest to the future of Idaho. The following paragraphs describe the setting of the Columbia River Basin and why it is important to Idaho; the Columbia River Treaty and why it is under review; and concludes with the opportunity the review presents for Idaho, including possibilities for aquifer recharge, storage and improved flood management.

The Columbia River Basin and its importance to Idaho

With its headwaters in the Rocky Mountains of Idaho, Montana and British Columbia, the Columbia River's main stem flows 1,243 miles crossing the U.S.-Canada border before it empties into the Pacific Ocean along the border between Oregon and Washington (figure 1). The Columbia River Basin covers 671,000 square 259,500 square miles, with 85 percent in the United States.¹ The Basin is jurisdictionally complex with 15 Native American Tribes, 15 First Nations, seven states, two countries, one province, and numerous local governments sharing interests in its water resource.²

Salmon and steelhead have a 10 million-year history in the Basin,¹⁵ and were a central feature of Native American and First Nation livelihood, culture, and spiritual life.¹⁶

The small portion of the basin within British Columbia generates high spring runoff and contributes approximately 38 percent of the average annual flow and 50 percent of the peak flow measured at The Dalles, (located between Oregon and Washington downstream of the confluence with the largest tributary – the Snake River),³ and up to half of the critical late summer flow.⁴ It would be misleading to measure the Columbia River Basin by its average annual flow of 200 Million Acre Feet (MAF), because it experiences a seasonal variability of 1:34.⁵ Storage capacity within the basin of 40 percent of the average annual flow allows a degree of control over flow timing, with the result being that the Columbia River produces more hydroelectric power than any other river on the continent.⁶

The largest tributary to the Columbia River is the Snake River⁷ and 85 percent of Idaho lies within the Snake River Basin. Tributaries draining another 13 percent of Idaho join the Columbia River via the Spokane, Pend 'Oreille, and Kootenai Rivers.⁸ The Snake River is more heavily dammed than any other tributary to the Columbia,⁹ with major storage in the upper Snake built primarily for irrigation but with the added benefit of hydropower,¹⁰ flood con-

trol,¹¹ and navigation.¹² Along with groundwater, this storage system provides a degree of certainty to the farmers of Idaho's 3.6 million acres of irrigated lands—lands representing 60 percent of Idaho's \$3 billion agricultural industry.¹³

While tourism in general brings \$3.4 billion to Idaho annually,¹⁴ the exact value of the sport fishing and white water industry is more difficult to tease out and generally reported by those with interests in the industry. Nevertheless, it is clear that much of Idaho's tourism and quality of life is focused on outdoor recreation and much of that recreation from skiing to angling to rafting to hot springs, focuses on water in all its various forms.

Salmon and steelhead have a 10 million-year history in the Basin,¹⁵ and were a central feature of Native American and First Nation livelihood, culture, and spiritual life.¹⁶ Today, 13 populations of Columbia River salmon and steelhead are listed as either threatened or endangered under the Endangered Species Act (ESA).¹⁷ One hundred seventy-eight salmon hatcheries support the fishery,¹⁸ and hatchery fish make up 80-90 percent of the anadromous fish runs.¹⁹ Dams constructed in the U.S. without fish passage, including Grand Coulee, Chief Joseph, Dwor-

shak, and the Hells Canyon Complex, block salmon from 37 percent of their former habitat.²⁰ Coordinated operation of the river across the international border altered the hydrograph to correspond with energy demand.²¹ Fisheries within the basin were engineered through the development of hatcheries.²²

Through judicial recognition of Treaty fishing rights in the 1970's, certain tribal nations are entitled to 50 percent of the harvest that pass or would pass their usual and accustomed fishing grounds.²³ The governance and fisheries science capacity building of Native American Tribes following these rulings is evident in the review of the Columbia River Treaty.

The Columbia River Treaty: What's all this talk of review?

The United States and Canada have operated the main stem of the Columbia River jointly since the Columbia River Treaty entered into force in 1964.²⁴ Under the Treaty, Canada agreed to build three new dams to provide 15.5 MAF of storage.²⁵ The United States agreed to pay Canada \$64.4 million for dedication of 8.45 MAF of that storage to assure flood control for 60 years²⁶ and to share the added benefits from hydropower generation in the United States, resulting from the release of water from three reservoirs (referred to as the "Canadian Entitlement").²⁷

The U.S. Congress authorized construction of the Pacific Northwest-Pacific Southwest Intertie,²⁸ which led to an interconnected North American electric grid. The provincial utility, BC Hydro, entered into 30-year contracts for sale of the Canadian electricity to utilities in the U.S. Southwest. BC Hydro continues to sell that power on the U.S. market following expiration of the

contracts.²⁹ The Treaty also allowed, but did not require, the United States to build a dam on the Kootenai River (spelled Kootenay in Canada) that would back water up into Canada.³⁰ The United States exercised this option when it built Libby Dam.

The U.S. and Canada could, at any time since the Treaty entered into force, mutually agree to modify or terminate the Treaty. It is the expiration of the 60-year period of assured flood control on September 16, 2024, combined with a Treaty provision allowing either country to unilaterally walk away from the

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Treaty beginning on that same date, given 10 years' notice, has triggered broad review.

The U.S. Army Corps of Engineers and the Bonneville Power Administration led the regional review in the United States,³¹ and British Columbia led the review in Canada.³² The U.S. review included the establishment of a sovereign review team, composed of one representative from each of the four main states in the Basin, five representatives of the 15 Native American tribes, and representatives of the 11 federal agencies with interest in the

Basin.³³ The sovereign review team also had comparable representation on a technical advisory body.³⁴ Listening sessions were held throughout the Basin to obtain input from other interest groups and the general public.³⁵

In a remarkable act of intertribal diplomacy, the 15 Native American tribes in the Basin came together to develop a set of "Common Views" on the future of the Columbia River and continued to work in concert throughout the process.³⁶ This sophisticated act of diplomacy influenced the outcome of the review process and was not matched by the states. The British Columbia review process included extensive public engagement and consultation with the First Nations claiming resources in the Basin.³⁷ On December 13, 2013, the U.S. entity transmitted the Regional Recommendation to the U.S. Department of State,³⁸ and on March 13, 2014, British Columbia announced its position on the future of the Treaty.³⁹

The United States Entity Regional Recommendation outlines three primary goals for modernizing the Treaty:

1. Elevate ecosystem function to a third primary purpose of international cooperation, along with hydropower and flood control;
2. Amend the formula for sharing of power benefits to more closely reflect actual operations;⁴⁰ and
3. Continue to cooperate on the development of a flood risk management plan that reflects, among other things, the implications of climate change.

Although the Treaty currently does not address apportionment of water supply or navigation, the recommendation calls for acknowledgement of the importance of each. It also calls for the flexibility to seek mutual benefits in use and development of storage for out of stream

use. The recommendation responds to the call for greater public and sovereign participation by recommending the formation of an advisory body for negotiations and reconsideration of the composition of the U.S. entity for implementation of the modernized treaty. The U.S. Department of State has appointed Brian Doherty to lead negotiations.

The provincial government of British Columbia seeks to “[c]ontinue the Columbia River Treaty and seek improvements within the existing Treaty framework,” and sets forth 14 principles including:

1. Recognition that shared benefits go beyond hydropower production and that British Columbia should be compensated accordingly;
2. Recognition that the impacts of the treaty dams on Canada are ongoing and should be compensated; and;
3. a greater use of U.S. storage for flood control and thus a reduced reliance on Canada. While the Province supports continued efforts to cooperate on ecosystem function, it does not view this as a component that requires change to the Treaty. Canada has yet to appoint a lead for new Columbia River Treaty negotiations.

The Negotiations: An opportunity for Idaho

In 2014 the Idaho Legislature passed a resolution opposing the addition of ecosystem function as a third prong of the Treaty and opposing any additional use of reservoirs in Idaho for flood control.⁴¹ The following paragraphs present reasons why it may be prudent for Idaho to do a full analysis of opportunities for Idaho to benefit from a more distributed approach to flood control and to reconsider this ideological reaction against ecosystem function. While full analysis may reveal that

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the benefits are limited, it may not, and it is certainly worth exploring.

Flood Control: Opportunities for storage and aquifer recharge

The difference in positions represented by the U.S. Regional Recommendation and the BC decision on flood control are related to the degree to which the Treaty reservoirs in Canada are operated to assure a low level of flood risk downstream. The United States seeks continuation of the low level of risk enjoyed since the dams were built; British Columbia would like the United States to rely on its own reservoirs first as is already provided in the CRT for emergency high flow situations. Even under the existing Treaty language, the United States takes the position that U.S. storage refers to only those federal dams authorized for flood control whereas BC takes the position that it refers to any dam in the U.S.

Idaho’s 2014 Resolution is consistent with the U.S. Regional Recommendation’s position in seeking continuation of the current reliance on Treaty dams in Canada to reduce flood risk downstream and in its opposition to use of other dams in the U.S. for flood control. What is at risk for Idaho is whether Reclamation dams in the United States might be targeted for increased contribution to flood control. While it is understandable that both Idaho and the

larger region would oppose this on its face, consider whether this might also present an opportunity to solve other issues. For example, no one has studied this with the following goals in mind:

1. Does this present an opportunity for federal assistance for improvement of aging water storage infrastructure including increasing storage at existing sites; and
2. Does this present an opportunity to develop new storage through dedication of a flood control pool in existing reservoirs that could be used for aquifer recharge and through identification of any opportunities for new off-stream storage?

Potential for a shared burden on salmon recovery

In 2015, the Columbia River basin’s waters experienced temperatures lethal to salmon. As we enter a period of increasing temperature and higher variability, cold water refugia are of heightened importance to the recovery of listed species in the Columbia River Basin. Currently the primary location of cold water refugia is in the Salmon and Clearwater tributaries to the Snake River in Idaho. While Idaho has a history of opposing all things related to the Endangered Species Act, the hope that listings without recovery will simply end is unlikely to come

to pass. The main stem of the Columbia in Canada is the other possible cold water refugia for these species. By opposing discussion of fish passage and ecosystem function in CRT negotiations, Idaho has placed a recovery target on itself.

A wise person once told me, the first rule of negotiations is to show up. While it has always been tempting for Idaho to think of the Snake River as its own, it is both physically and legally part of the Columbia River Basin. In the context of a shared watercourse, diplomacy is an exercise of sovereignty. The leadership shown by the Idaho agricultural and timber communities in bringing the State to the table in the Nez Perce water settlement negotiations with the hope of identifying means to resolve instream flow claims while addressing potential issues under the Endangered Species Act need to once more step up. Failure to do so may mean missed opportunities for the future of Idaho. In short, Idaho – show up!

Endnotes

1. James Barton and Kelvin Ketchum, *Columbia River Treaty: Managing for Uncertainty* in THE COLUMBIA RIVER TREATY REVISITED: TRANSBOUNDARY RIVER GOVERNANCE IN THE FACE OF UNCERTAINTY at 43 (Barbara Cosens ed., 2012);
2. Richard Kyle Paisley and Matthew McKinney, Universities consortium on Columbia River Governance, *A Sacred Responsibility: Governing the Use of Water and Related Resources in the International Columbia Basin Through the Prism of Tribes and First Nations* (2015), available at: http://www.columbiariver-governance.org/A_Shared_Responsibility_2015_FINAL.pdf.
3. Barton and Ketchum *supra* note 1.
4. Alan F. Hamlet, *The Role of Transboundary Agreements in the Columbia River Basin: An Integrated Assessment in the Context of Historic Development, Climate, and Evolving Water Policy*, in CLIMATE AND WATER: TRANSBOUNDARY CHALLENGES IN THE AMERICAS

263, 267 (Henry F. Diaz and Barbara J. Morehouse eds., 2003).

5. U.S. Bureau of Reclamation, U.S. Army Corps of Engineers and Bonneville Power Administration. THE COLUMBIA RIVER SYSTEM INSIDE STORY at 5 (2001) https://www.bpa.gov/power/pg/columbia_river_inside_story.pdf. The year to year variability of unregulated peak flow on the Columbia is 1:34, compared to a mere 1:2 on the Saint Lawrence River or 1:25 on the Mississippi River.

6. The hydroelectric generation in the basin is 38,670 megawatts, amounting to roughly 2/3 of the demand in the Pacific Northwest. Northwest Power and Conservation Council (NWPPCC). 2013. A Guide to Major Hydropower Dams of the Columbia River Basin. URL: <https://www.nwpcouncil.org/energy/powersupply/dam-guide>

7. The Snake River discharges on average 27.5 million acre-feet to the Columbia or 14% of the Columbia's average annual flow. NWPPCC. 2008. Columbia River History Project: Snake River. URL: <https://www.nwpcouncil.org/history/SnakeRiver>

8. The Bear River Basin which drains toward Utah from south eastern Idaho makes up 2% of Idaho's land mass. See Bear River Water Information System URL: <http://www.bearriverinfo.org/html/bear-river-watershed-description>

9. NWPPCC *supra* note 6.

10. US Bureau of Reclamation, Pacific Northwest Region, Snake River Area Office. Dams, Projects, and Powerplants. URL: <https://www.usbr.gov/pn/snakeriver/dams/>

11. US Army Corps of Engineers, Walla Walla District, Dworshak Dam and Reservoir. URL: <http://www.nww.usace.army.mil/Locations/District-Locks-and-Dams/Dworshak-Dam-and-Reservoir/>

12. US Army Corps of Engineers, Walla Walla District, Lower Snake River Dams. URL: <http://www.nww.usace.army.mil/Missions/Lower-Snake-River-Dams/>

13. USDA, 2016 State Agricultural Overview: Idaho. URL: https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=IDAHO

14. Idaho Department of Commerce, Tourism Resources. URL: <http://commerce.idaho.gov/tourism-resources/>

15. Michael C. Healey, *Resilient Salmon, Resilient Fisheries for British Columbia,*

Canada, 14 No. 1 ECOLOGY AND SOCIETY Art. 2 (2009), available at <http://www.ecologyandsociety.org/vol14/iss1/art2/>; see also Paul W. Hirt, *Developing a Plentiful Resource: Transboundary Rivers in the Pacific Northwest*, in WATER, PLACE, AND EQUITY 147, 155 (John M. Whiteley et al. eds., 2008) (noting that pre-European settlement salmon runs were estimated at 12–15 million salmon).

16. Mary L. Pearson, *The River People and the Importance of Salmon*, in THE COLUMBIA RIVER TREATY REVISITED: TRANSBOUNDARY RIVER GOVERNANCE IN THE FACE OF UNCERTAINTY at 77 (Barbara Cosens ed., 2012); *United States v. Washington*, 384 F.Supp. 312, 350 (W.D. Wash., 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975);

17. Current listings of salmon species found in the Columbia Basin: Snake River Sockeye (endangered), Upper Willamette River Chinook (threatened), Lower Columbia River Chinook (threatened), Upper Columbia River spring-run Chinook (endangered), Snake River fall-run Chinook (threatened), Snake River spring/summer-run Chinook (threatened), Lower Columbia River Coho (threatened), Columbia River Chum (threatened). Final Listing Determinations for 16 ESUs of West Coast Salmon, 70 Fed. Reg. 37,160, 37,193 (June 28, 2005). Note that four ESU's of steelhead are also currently listed: 69 Fed. Reg. 33,105 (June 14, 2004) and 71 Fed. Reg. 5,178 (Feb. 1, 2006); see also *Species Lists*, NOAA FISHERIES, WEST COAST REGION, [HTTP://WWW.WESTCOAST.FISHERIES.NOAA.GOV/PROTECTED_SPECIES/SPECIES_LIST/SPECIES_LISTS.HTML](http://WWW.WESTCOAST.FISHERIES.NOAA.GOV/PROTECTED_SPECIES/SPECIES_LIST/SPECIES_LISTS.HTML).

18. Hatchery Scientific Review Group, *COLUMBIA RIVER SYSTEM-WIDE REPORT 9* (2009) http://www.hatcheryreform.us/hrp_downloads/reports/columbia_river/system-wide/1_introduction.pdf.

19. Chris Peery, *The Effects of Dams and Flow Management on Columbia River Ecosystem Processes*, at 138, in Cosens, B. editor. *The Columbia River Treaty Revisited* in THE COLUMBIA RIVER TREATY REVISITED: TRANSBOUNDARY RIVER GOVERNANCE IN THE FACE OF UNCERTAINTY at 43 (Barbara Cosens ed., 2012).

20. John Harrison, *Northwest Power and Conservation Council, Fish Passage at Dams* (2008) [online] URL: <http://www.nwpcouncil.org/history/fishpassage>

21. Barton and Ketchum *supra* note 1.

22. See generally, Perry *supra* note 19;

Goble and Hirt *supra* note 19.

23. United States v. Washington (*Boldt Decision*), 384 F. Supp. 312, 332 (W. D. Wash. 1974), *aff'd* 525 F.2d. 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1975) (affirming treaty fishing rights associated with language found in the 1855 treaties of the tribes now organized as the Columbia River Inter-Tribal Fish Commission); *see also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass., 443 U.S. 658, 685 (1979) (responding to litigation involving implementation of the *Boldt* decision, the Court stated: “[A]n equitable measure of the common right should initially divide the harvestable portion of each run that passes through a ‘usual and accustomed’ place into approximately equal treaty and nontreaty shares, and should then reduce the Treaty share if tribal needs may be satisfied by a lesser amount.”).

24. Treaty Between the United States of America and Canada Relating to Co-operative Development of the Water Resources of The Columbia River Basin, U.S.-Can., Jan. 17, 1961, 15.2 U.S.T 1555 [hereinafter CRT].

25. *Id.* at Article II.

26. *Id.* at Article IV(2).

27. *Id.* at Article V.

28. Pacific Northwest Consumer Power Preference Act, 16 U.S.C. § 837 (2012).

29. John Shurts, *Rethinking the Columbia River Treaty*, in TRANSBOUNDARY RIVER GOVERNANCE IN THE FACE OF UNCERTAINTY: THE COLUMBIA RIVER TREATY at 195 (Barbara Cosens ed., 2012).

30. CRT at Article XII, The Kootenai River is a tributary to the Columbia River that has its headwaters in Canada, flows into the United States, then back into Canada before it joins the Columbia River. Libby Dam is on the U.S. section of the river.

31. U.S. Army Corps of Engineers and Bonneville Power Administration, Columbia River Treaty: 2012/2024 Review, Process, Sovereign Review Team (May 17, 2015), <http://www.crt2014-2024review.gov/Files//SRT%20Roster%20Update%2005172013.pdf>.

32. British Columbia, COLUMBIA RIVER TREATY REVIEW, <http://blog.gov.bc.ca/columbiarivertreaty/>

33. U.S. Army Corps of Engineers and Bonneville Power Administration, Columbia River Treaty: 2012/2024 Review,

Process, Sovereign Review Team (May 17, 2015), <http://www.crt2014-2024review.gov/Files//SRT%20Roster%20Update%2005172013.pdf>.

34. U.S. Army Corps of Engineers and Bonneville Power Administration, Columbia River Treaty: 2012/2024 Review, Process, Sovereign Technical Team, <http://www.crt2014-2024review.gov/Files/STT and STT Work%20Group%20Contact%20List 07222013.pdf>.

35. U.S. Army Corps of Engineers and Bonneville Power Administration, *supra* note 29.

36. Columbia Basin Tribes, *Common Views on the Future of the Columbia River Treaty* (2010), <http://www.usea.org/sites/default/files/event-/Common%20Views%20statement%20NQ.pdf>.

37. COLUMBIA RIVER TREATY REVIEW, FAQs, <http://blog.gov.bc.ca/columbiarivertreaty/faqs/> (last visited Oct. 11, 2015). Although the federal government of Canada remains the final decision maker on international treaties, the provincial government implements and receives the benefits between the United States and the Province. *See generally* Jeremy Mouat *The Columbia Exchange: A Canadian Perspective on the Negotiation of the Columbia River Treaty 1944-1964*, in *The Columbia River Treaty Revisited: Transboundary River Governance in the Face of Uncertainty*, at 22–33 (Barbara Cosens ed., 2012); Shurts 2012, *supra* note 27 192, 192-199, 222-235; Paul Hirt and Adam Sowards, *The Past and Future of the Columbia River*, in *Transboundary River Governance in the Face of Uncertainty: The Columbia River Treaty* at 115, 123-131 (Barbara Cosens ed., 2012).

38. U.S. ENTITY, REGIONAL RECOMMENDATION

Although the federal government of Canada remains the final decision maker on international treaties, the provincial government implements and receives the benefits between the United States and the Province.

FOR THE FUTURE OF THE COLUMBIA RIVER TREATY AFTER 2024 (Dec. 13, 2013), <http://www.crt2014-2024review.gov/Files/Regional%20Recommendation%20Final,%2013%20DEC%202013.pdf>.

39. *Government of British Columbia Decision on the Future of the Columbia River Treaty*, COLUMBIA RIVER TREATY REVIEW (May 13, 2014), http://www.enewsletters.gov.bc.ca/Columbia_River_Treaty_Review_eNewsletter/May_2014/Government_of_British_Columbia_Decision_on_the_Future_of_the_Columbia_River_Treaty_Review/article.

40. Under the CRT, changes to operations in the U.S. to satisfy the ESA that result in reduced hydropower production are not reflected in the calculation of the Canadian Entitlement. Instead, the Entitlement is calculated under the Annual Operating Plan developed by the entities. Shurts *supra* note 27 at 192-248.

41. Idaho House Joint Memorial 10. 2014.

Professor Barbara Cosens of the University of Idaho, College of Law, teaches and does research in water law. Her outreach focuses on western water law and its reform in the face of extended drought and climate change and the Columbia River Treaty. She has been appointed by the Governor of Idaho as Advisor to Pacific North West Economic Region Idaho Council.

