COLUMBIA RIVER TREATY
POWER GROUP

The Columbia River Treaty: Termination of the Power Coordination Provisions

Termination of the Columbia River Treaty power coordination provisions was anticipated and expected by U.S. and Canadian Treaty drafters in the 1960's. Prompt issuance of notice of intent to terminate the power coordination provisions of the Treaty fulfills historical acknowledgement of the need to address changed circumstances.

The Columbia River Treaty (Treaty) provided for the cooperative development of the water resources of the Columbia River Basin. Despite the Treaty's successes, it contains a number of shortcomings and assumptions that create distortions which greatly affect value to the United States beyond its minimum 60 year term.

Termination of the power coordination provisions was raised throughout the multi-year review of the Treaty led by the U.S. Entity. Importantly, the 2013 Regional Recommendation concludes that if the "United States and Canada are unable to achieve agreement on key aspects of a modernized Treaty by 2015, other options to create a modernized post-2024 Treaty should be evaluated."

Sufficient evidence exists to warrant the immediate issuance by the United States of a notice of intent to terminate the power coordination provisions of the Treaty. Issuance of a notice of intent to terminate is not a negative outcome or a verdict on the Treaty's historical merits. The notice provides an opportunity to incorporate important lessons learned and improvements into potential post-2024 arrangements.

Article XIX of the Columbia River Treaty sets out the commercial and power coordination provisions that are eligible for termination. Other Treaty provisions, including flood control, continue indefinitely and cannot be terminated.

Article XIX clearly states that the aspects of the Treaty which can be viewed as more commercial and are associated with joint optimal power coordination and its associated benefit splitting are allowed to be terminated via unilateral action. The historical record confirms that those involved in negotiating the Treaty recognized the high degree of unavoidable uncertainty that accompanies long range planning. Therefore, both countries carefully crafted exit provisions into the Treaty so that no party would be trapped, beyond the minimum 60 year term, into a bargain that no longer was mutually advantageous.

Importantly, mere provision of notice of intent does not then necessarily equate to a termination declaration nor does it preclude the party providing notice of intent from rescinding the notice or continuing on under the Treaty "as-is" for as long as it sees fit, provided it does not issue a final termination declaration.

Prompt issuance of a notice of intent to terminate the power coordination provisions is a necessary step to modernize the Treaty. The notice of intent to terminate starts a 10 year period before actual termination might occur.

A notice does not equate to termination nor does it preclude the United States from deciding to continue with the Treaty "as-is". The 10 year notice is an opportunity to bring both sides to the table with "focused minds" and the imperative of a "ticking clock". Without a notice of intent to terminate the Treaty, it is unlikely that progress will be made, inevitably leading to substantial and inequitable costs for Northwest electric ratepayers beyond 2024.

The U.S. and Canada purposely included termination of the power coordination provisions to address changed circumstances in the Northwest after the initial 60 year Treaty period.

Over the course of the fifty years since the Treaty was ratified, the future has unfolded in ways that are tremendously different from the range of expectations the Treaty crafters had or might have imagined. Careful examination of the historical record, especially the primary source material available, shows that termination of the power coordination provisions upon reaching the 60 year minimum Treaty period was likely. There is scant evidence that anyone expected the Treaty to continue "as-is" beyond its initial 60 year life.[1]

U.S. commitments to compensate Canada, above and beyond the three Treaty dams, in lieu of building storage in the United States will be complete in 2024 as envisioned by both countries. A notice of intent to terminate the power coordination provisions will drive negotiations to modernize the Treaty and to determine future Treaty benefits to be equitably shared.

Treaty historian John Hyde in his paper, "Four Little-Known Points about the Columbia River Treaty," captures the essence of the issue. Hyde writes, "Essentially, the agreement was that Canada would construct and coordinate the operation of Canadian storage for approximately 50-years for downstream power and flood control benefits; the U.S. would sufficiently compensate Canada during that period for the cost of the dams and a little more; and afterwards the U.S. would realize minor but still important benefits for capital costs as it would have if instead it had constructed its own projects." Hyde goes on to say, ". . . those involved in developing the Treaty were focused to a large extent on determining benefits and costs for each nation that would assure Treaty project costs and associated infrastructure would be more than repaid over the expected 60-year life of the Treaty. Finally, Hyde concludes, "Canada accepted the payment procedures and estimated results as full compensation for all post-2024 U.S. benefits, based on the assumption that the Treaty would be terminated in 2024 and renegotiated for circumstances at that time."

While both countries benefitted over the life of the Treaty, Canada's benefits particularly in recent years far exceed benefits expected by Treaty negotiators. Hugh Keenleyside, former Chair of B.C. Hydro and recognized Canadian Treaty expert, recalled in 1964, "Over the years, my work has made it necessary for me to give a good deal of study to Canadian economic history. I am satisfied that this Columbia agreement is the most profitable single, international, commercial transaction in the history of our country."

The U.S. for multiple reasons agreed to a compensation scheme that provided great benefits to Canada. Ivan White, the Deputy Assistant Secretary of State, captured part of the reason behind these concessions when he testified to Congress in 1964, ". . . we were anxious that this agreement would operate to progressively reduce power costs in British

[1] Treaty historian John Hyde in a paper titled, "Four Little-Known Points about the Columbia River Treaty," notes the list is extensive of those making statements in testimony and other written documents about expected termination. Hyde documents that these statements anticipating termination of the Treaty can be found in the U.S. and Canadian Senate records, Parliament External Affairs Committee minutes, the 1964 Canadian Presentation and Related Documents, technical reports and presentations, and speeches by many of those involved in the negotiations. This includes Secretary of State for External Affairs Paul Martin Sr., lead Canadian Treaty negotiator and Federal Minister of Justice Davie Fulton, B.C. Premier W.A.C. Bennett, B.C. Hydro and Canadian Entity Chair Dr. Hugh Keenleyside, Acting U.S. Secretary of State Douglas Dillon, Secretary of Interior Stewart Udall, Under Secretary of Interior Elmer Bennett (Chair of U.S. Delegation to 1960-61 negotiations), Senators Frank Church and Clarence Dill, Chief of the Army Corps of Engineers General Emerson Itschner (Member of U.S. Delegation), BPA Administrator Charles Luce, and Deputy Administrator Charles Kinney who also served as the Chair of the International Work Group. Justice Minister Davie Fulton, testifying before the External Affairs Committee in 1964, referred several times to expected Treaty termination in 2024, and when asked what he thought would happen in 2024, said he expected the Treaty would be renegotiated for the circumstances at that time. The 1964 Canadian "Presentation" which served as the principal explanatory vehicle supporting Treaty ratification from the Canadian Treaty technical experts to the Canadian Parliament and to its citizenry has as its primary focus the benefits to Canada over a 60 year period without exception and explicitly references the termination of the Treaty multiple times.

Columbia; firstly and obviously because if there was going to be an agreement it had to operate in that direction for the Canadians; secondly we regard Canada as a partner in the free world, and its growth, its economic growth, as being important to the United States."

There is precedence and a historical record of terminated agreements between the U.S. and Canada. The two countries have terminated agreements that no longer served a mutually advantageous purpose. The Columbia River Treaty should not be any different. If, going forward, it no longer provides sufficient benefit to one or both sides, a notice of intent to terminate the power coordination provisions must be utilized to force modernization and renegotiation.

The record clearly shows that even without a future wildly different from what may have been envisioned, there were clear reasons why the United States would seek to modify the Treaty and absent modification, to terminate the Article XIX power coordination provisions of the Treaty. In order to secure the cooperative development of the Columbia River, the United States consciously agreed to aspects of Treaty implementation that provided very favorable outcomes to Canada. This is particularly true regarding the calculation of the Downstream Power Benefits and resultant Canadian Entitlement payment. These choices were entered into knowingly and willingly and were necessary to secure the entire agreement. But the highly favorable concessions provided to Canada and the fact that the United States would now be enjoying the benefits of fully paid off capital on its own domestic sources of generation had it pursued alternatives, have long created the expectation that Treaty modification, and likely termination, at 60 years was the most rational outcome.

Conclusion: The U.S. should provide Canada with immediate notice of intent to terminate the power coordination provisions of the Columbia River Treaty.

In the final analysis, the United States should provide Canada with immediate notice of intent to terminate the power coordination provisions of the Columbia River Treaty to rectify current inequities. Provision of this notice can be expected to achieve the purpose it was designed for – providing sufficient time to address inequities and strongly focusing the parties' efforts. Notice of intent does not force termination; rather it triggers an important process. If negotiations cannot achieve an equitable outcome, a unilateral exercise by the United States of its termination rights under the Treaty may be required. Such an action should be viewed as a fair and rational response to current inequities that reflect significantly different conditions than existed when the Treaty was created. Absent a notice of intent to terminate the Treaty it is unlikely that meaningful progress will be made on Treaty modernization. Absent modernization, Northwest electric ratepayers will continue to overpay Canada for a service that is no longer valuable or desirable.