

Administrator and CEO, Bonneville Power Administration

and

Division Engineer, Northwestern Division, U.S. Army Corps of Engineers

acting as

The U.S. Entity for the Columbia River Treaty

RECORD OF DECISION

LIBBY COORDINATION AGREEMENT

15 FEBRUARY 2000

United States Entity for the Columbia River Treaty
U.S. Department of Energy, Bonneville Power Administration
U.S. Army Corps of Engineers, North Western Division

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Summary

Based on the factors outlined in this Record of Decision (ROD), the United States (U.S.) Entity has decided to sign a Libby Coordination Agreement (LCA) with the Canadian Entity to resolve an existing difference between the Entities regarding Libby coordination and operations for nonpower requirements (NPRs). The LCA recognizes the continued operation of Libby for species listed under the Endangered Species Act (ESA), and provides for two separate annual operations that help to minimize any adverse impact of the sturgeon operation on the operation of Canada's Kootenay River projects. The first operation is provisional draft of Canada's Arrow Reservoir and exchanges of power between the Bonneville Power Administration (BPA) and British Columbia Hydro and Power Authority (BC Hydro). The second is an optional storage exchange between the Libby project and Canadian storage. The LCA can be terminated for any reason by either Entity with 30 days' written notice.

Background

Congress first authorized Libby Dam on the Kootenay River in 1948, contingent upon approval by Canada of allowing approximately 42 miles of the reservoir on Canadian territory. Support for the project was offered by Senator Neuberger of Oregon during the period 1955-1958, and the 1959 report of the International Columbia River Engineering Board (first begun in 1944) also called for construction of Libby. An International Joint Commission report at the end of 1959, based on a special study request by Canada and the U.S. at the beginning of the year, led to a set of principles negotiated by the national governments to yield the Columbia River Treaty (Treaty) between Canada and the U.S. in January 1961.

The Treaty, which became effective through an exchange of diplomatic notes on September 16, 1964, required the construction and operation of 15.5 million acre-feet (MAF) of storage at three large Canadian reservoirs (Duncan, Arrow, and Mica) for power and flood control benefits in Canada and the U.S. The Treaty requires the U.S. to deliver to Canada one half of the downstream power benefits (known as the Canadian Entitlement).

Under Article XII (Kootenai River Development) of the Treaty, the U.S. was given the option to construct a dam on the Kootenai River near Libby, Montana, to provide storage to meet flood control and other purposes in the U.S. The U.S. exercised that option and construction was completed on Libby Dam in 1973. The reservoir impounds five MAF, and its five 121-megawatt (MW) generators were installed between 1975 and 1984. British Columbia acquired the 42 miles of land for the Libby Dam reservoir in Canada.

All benefits that occur in either country from the construction and operation of the Libby storage accrue to the country in which the benefits occur.

Treaty Provisions Relating To Entity Responsibilities

The Treaty required designation of Entities to carry out the provisions of the Treaty, including the preparation of operating plans for Canadian storage that would optimize the power and flood control benefits. The U.S. Entity, appointed by Presidential Executive Order 11177, dated September 16, 1964, is the Administrator and Chief Executive Officer of BPA and the Division Engineer of the Northwestern Division (formerly the North Pacific Division) of the U.S. Army Corps of Engineers (Corps). BC Hydro is the Canadian Entity, designated by the Canadian government.

Treaty provisions relating to the responsibilities of the Entities are addressed in Article XIV (Arrangements for Implementation) and Annex A (Principles of Operation). The Entities' duties include, but are not limited to, preparation of hydroelectric operating plans, determination of downstream power benefits, and preparation and implementation of detailed operating plans (DOPs). Annex A charges the Entities with agreeing annually on assured operating plans (AOPs) and the resulting downstream power benefits for the sixth succeeding year of operation.

Overview of Entity Differences on Libby Coordination

In the fall of 1994, the U.S. Fish and Wildlife Service (USFWS) recommended in a Biological Opinion (BO) that the Corps operate the Libby project in a fashion that the USFWS had determined would meet the ESA requirements for recovery of declining endangered Kootenai River white sturgeon (*Acipenser transmontanus* [sturgeon]) stocks. The Corps agreed to this Libby operation in a ROD issued March 10, 1995. In the previous year, the USFWS had coordinated with the Corps in a test of alternate release regimes from Libby to assist in sturgeon spawning recovery. The 1994-1995 DOP, prepared in August 1994, did not reference the test because the Canadian and U.S. Entities could not agree to inclusion of the test in the DOP.

Changes to the operation of Libby for sturgeon and salmon flows have the general effect of decreasing flows in the fall and winter and increasing flows in the spring and summer. This change can cause decreased generation at downstream Canadian projects during the fall and winter, and increased spill and some increased generation during the spring and summer. Canada requested in 1995 that the U.S. cease what it characterized as unilateral operation of Libby Dam for sturgeon flows and compensate the Canadians for alleged power losses at their downstream Kootenay River projects during the 1994-95 operating year. Based on their interpretation of Paragraph 5 of the Protocol of the Treaty, the Canadian Entity claimed that the Treaty gave Canada a right to downstream power and flood control benefits in Canada that are a result of an operation of Libby *only* for power and flood control benefits in the U.S.

To avoid an impasse, the 1995-1996 DOP, prepared in August 1995, included two sets of rule curves: those proposed by the U.S. Entity that met NPRs for sturgeon, and rule curves from the previous AOP studies that did not reflect sturgeon requirements. The 1995-1996 DOP Entity Agreement included language rejecting any specific operation as setting a precedent for future years' operations. Subsequent DOPs have essentially been similar, containing both sets of operating data, with and without sturgeon requirements.

The Canadian Entity has continued to mitigate some of the adverse power impacts by changing the operation of their Duncan and Kootenay Lake reservoirs. Nevertheless, the Canadian Entity's calculation of alleged power losses during the 1994-95 operating year of 164 gigawatthours [18.7 average MW (aMW)] was valued at \$4.2 million. No specific claims were made for the 1995-96 through 1998-99 operating years. Recent Canadian studies estimate total alleged losses at about \$12 million for 1994 through 1999. After several years of discussions and a detailed legal review, the U.S. government rejected Canadian claims for compensation.

AOPs are to be prepared six years in advance. In 1995, the U.S. Entity insisted that sturgeon flow requirements be included in the hydroregulation studies for the 2000-01 AOP, and the Canadian Entity insisted on AOP studies without the sturgeon flows. Consequently, the Entities have not agreed to the 2000-01 and subsequent AOPs. Until now, failure to agree has not been a serious problem since AOPs had been agreed to through the 1999-2000 operating year.

Negotiated Resolution

In the spring of 1998, it became clear to both Entities that failure to resolve the Canadian Libby claim could ultimately lead to a default of their Treaty responsibilities by August 1, 2000, when the 2000-01 AOP and the concurrent determination of downstream power benefits (DDPBs) would be needed to define the operation of Canadian Treaty storage and the amount of Canadian Entitlement power to be delivered. Failure to agree to an AOP could mean failure to operate approximately one-half of the storage for power and flood control on the Columbia River and failure to deliver the Canadian Entitlement for a given year.

The U.S. and Canadian Entities coordinated with their respective national foreign departments (U.S. Department of State and Canadian Department of Foreign Affairs and International Trade) to open discussions on ways to resolve the impasse on AOPs and DDPBs. The Entities directed the Columbia River Treaty Operating Committee, their technical committee, to explore solutions to the problem. The Operating Committee negotiated an agreement (the LCA) which would allow the Canadian Entity to compensate itself for the power losses they experienced by Libby operations for listed U.S. species, at little or no cost to U.S. parties.

The key elements of the negotiated LCA include the following:

- Use of historic (not updated) NPRs for Libby is required in future AOP studies that determine the default operation of Canadian storage and the Canadian Entitlement.
- The LCA will resolve the past and future claims by the Canadian Entity on the operation of Libby as long as both Entities continue to perform under the agreement.
- The LCA creates a Libby Operating Plan (LOP) that recognizes that the Corps will continue to operate Libby consistent with U.S. NPRs and fisheries objectives. The LOP coordinates the operation of Libby in accordance with Treaty Articles XII, XIV, and Protocol V. The Corps will update the LOP with all expected operating requirements.
- The Canadian Entity may compensate itself for power losses caused by Libby's operation for NPRs, through the use of storage draft at Arrow Reservoir and the exchange with BPA of the resulting changes to downstream federal hydropower generation. Specific provisions include:
 1. During July 1 through March 31 of each operating year, the Canadian Entity may twice provisionally draft and return water from Arrow Reservoir.
 2. BPA will exchange with BC Hydro the resulting changes in downstream U.S. federal generation.
 3. The maximum amount of draft is 125 thousand second-foot days (ksfd) at rates up to four thousand cubic feet per second (kcfs) per day.
 4. All provisional draft must be returned by March 31.
 5. The U.S. Entity may restrict provisional draft during certain times due to U.S. power or nonpower impacts.
- The Entities will share equally the estimated two aMW-difference in Canadian Entitlement associated with Libby NPRs.
- The U.S. Entity is granted the option for five mid-week changes to Arrow outflows during the term of each DOP.
- The LCA provides an option that the Entities may exercise an annual Libby/Canadian storage exchange.
- The LCA becomes effective upon signature, and continues until September 15, 2024, which is the first day the Treaty can be terminated, although either party can terminate the Agreement with 30 days' notice. Upon termination, no precedent is set for either government's position with respect to Libby Treaty rights and obligations.

Benefits Of the Negotiated Resolution

The benefits of the negotiated resolution include:

- The LCA resolves the on-going AOP dispute in time to implement operations planning for the 2000-01 operating year, and satisfies the Treaty requirement to complete AOPs.
- The LCA recognizes the U.S. obligations with respect to Libby operations for U.S. NPR objectives, and does not affect the U.S. ability to operate Libby for listed and future ESA species (including sturgeon, salmon, and bull trout), or any other objective.
- The LCA does not address Canada's claim, which was: (1) cessation of the unilateral operation of Libby for sturgeon and other new NPRs and (2) 100 percent compensation for Canadian alleged past power losses caused by Libby NPRs. Instead, this agreement enables Canada to compensate for alleged Kootenay project power losses caused by updated Libby NPRs through the use of provisional draft of their Arrow project at a small cost to the U.S.
- The fundamental confrontation between Treaty issues over Libby operations and obligations under ESA is avoided and it does not compromise either government's legal positions with respect to Treaty requirements.
- The LCA may supplement the water available in late summer for mainstem Columbia River fish migration. The Canadian Entity may elect (as it is expected) to provisionally draft up to four kfs during July through September, a time period when prices are high. However, timing of drafts and returns are at the Canadian Entity's option.
- If periods of provisional draft return coincide with heavy Columbia mainstem runoff (although not required by the LCA), total dissolved gas may be reduced (especially in the January-March period) and serve as a fishery benefit.
- Enabling the Libby/Arrow storage exchange, at either Entity's option, will result in a firm plan for recreation, power, or other benefits.
- BPA gains a guaranteed one aMW as a result of the negotiation, which is approximately one-half of the difference in the DDPBs with and without sturgeon in the AOP studies.
- Power benefits are provided for BPA from use of five annual mid-week changes to weekly Canadian flow agreements, and there are significant power benefits to the Mid-Columbia project owners that are a side effect of Canadian provisional draft and similar in kind to the Canadian power benefits.
- The Agreement results in much less cost to the U.S. when compared to potential costs from arbitration to resolve the Libby dispute, estimated at: (1) \$2 million to

\$4 million if resolved in the U.S.'s favor, and, (2) an additional \$14 million to \$16 million for past losses and about \$2 million to \$3 million annually for future losses, if Canada were to prevail in the arbitration.

Costs Of the Negotiated Resolution

The costs of the negotiated resolution include:

- There are minor lost opportunity costs to share benefits of the 125 ksf/d provisional draft at Arrow, reduced opportunity for alternative arrangements for BPA use of Arrow provisional draft, potential (rare) reductions to capacity sales or shaping capability, competition in U.S. power market demand, and one to two hours per week work for operations planning and scheduling staff.
- Generator use to generate power for delivery to Canada is expected to be negligible, since only the timing of generation is affected. The total annual cost to implement the agreement is expected to be less than about \$200,000.

Environmental Compliance

The U.S. Entity has assessed the potential environmental impacts associated with the LCA and determined that National Environmental Policy Act (NEPA) compliance is satisfied by the Columbia River System Operation Review Environmental Impact Statement (SOR EIS) (DOE/EIS-0170, November 1995) and subsequent RODs. This operation for Libby sturgeon is within the scope of the SOR EIS, which was prepared jointly by the Corps, the U.S. Bureau of Reclamation, and BPA. Furthermore, the operation is consistent with the System Operating Strategy adopted by the agencies in their RODs. BPA's Columbia River System Operation Review on Selecting an Operating Strategy for the Federal Columbia River Power System (FCRPS) ROD was issued February 21, 1997; the Corps' Columbia River System Operation Review, Selection of a System Operation Strategy ROD was issued February 20, 1997.

The System Operating Strategy RODs reaffirmed the RODs issued in March of 1995 by the operating agencies. Those March 1995 RODs implemented the "Biological Opinion. Reinitiation of Consultation on 1994-1998 Operation of the Federal Columbia River Power System and Juvenile Transportation Program in 1995 and Future Years" (1995 BO), issued by the National Marine Fisheries Service (NMFS) on March 2, 1995, and the USFWS on March 1, 1995. The selected System Operating Strategy includes specific operating requirements that stem from the "reasonable and prudent alternative" in the 1995 BO. Thus, the LCA is consistent with the 1995 BO. The LCA is also consistent with the May 14, 1998, "Supplemental Biological Opinion. Operation for the Federal Columbia River Power System Including the Smolt Monitoring Program and the Juvenile Fish Transportation Program: A Supplement to the Biological Opinion Signed on March 2, 1995, for the Same Projects" (1998 Supplemental BO) and the Corps' Record of Consultation and ROD, dated June 24, 1998.

The U.S. Entity has determined that the proposed agreement with Canada regarding Libby operations would not adversely affect listed species or critical habitat in ways not

already covered in existing biological opinions on the FCRPS. At briefings held in July 1999 with NMFS and in August 1999 with USFWS, agency representatives indicated they concurred with this view. Drafts of the LCA were shared with both agencies in September 1999. In response to an October 13, 1999, request by the U.S. Entity, written concurrence was provided by NMFS and USFWS on November 8 and 18, 1999, respectively.

Determination

Based on the forgoing, and including the Treaty rights and obligations of the U.S. Entity to:

- adopt and have in place an AOP and DDPB for the operating year 2000-01 and subsequent years,
- resolve the planning issue to avoid default of the Treaty requirement to operate Canadian storage and deliver the Canadian Entitlement, and
- agree on DOPs that may produce results more advantageous;

and considering:

- the U.S. government's desire to resolve the dispute with little cost or adverse impact to the U.S., and no precedent or adverse impact on legal interpretations of Treaty rights and obligations, and
- the Treaty Permanent Engineering Board's review and favorable report to the governments on the LCA;

and upon the relative benefits in:

- avoidance of future planning issues related to Libby operations,
- resolution of past claims by the Canadian Entity,
- resolution at little or no cost to the U.S.,
- potential fisheries benefits in the mainstem Columbia River through increased flows and lowered dissolved gas levels,
- delivery by Canada of 1 aMW to the U.S.,
- increased flexibility through mid-week changes to Treaty flow agreements,
- avoidance of substantially reduced salmon flows in the Columbia River, and
- preservation of U.S. rights to operate Libby as it sees fit;

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and costs to the United States of:

- changing the generation of energy to different times of the year,
- lost opportunity for maximum fall provisional draft of Canadian storage,
- increased competition for the U.S. power market demand,
- small increase in scheduling workload, and
- increased inter-agency coordination;

and consistent with NEPA and other environmental compliance mandates by being:

- within the scope of the SOR EIS and System Operating Strategy RODs,
- coordinated with the resource agencies responsible for the listed species of fish in the Columbia River system, and
- consistent with the 1995 BO and the 1998 Supplemental BO;

the U.S. Entity has decided to enter into the Libby Coordination Agreement, to become effective upon execution by both the Canadian and U.S. Entities.

Dated this 15th day of February, 2000.

By J. A. Johansen
Judith A. Johansen, Chairman

By Carl A. Strock
Carl A. Strock, Member
Brigadier General, US Army Corps of Engineers