



May 5th, 2005

International Joint Commission
Canadian Section
234 Laurier Avenue W., 22nd Floor
Ottawa, ON K1P 6K6

Attention: Murray Clamen, Secretary

Thank you for your letter dated February 28, 2005. The International Joint Commission (the IJC) has asked CCRIFC to address the following two questions:

1. Is CCRIFC alleging that damage to First Nations' fisheries was caused by raising the natural levels of the Columbia River at or above the international boundary, or by the construction, maintenance or operation of the Grand Coulee Dam (the "Dam"), or by some other factor(s)?
2. If CCRIFC is not alleging that all the damage was caused by raising the natural levels of the Columbia River at and above the international boundary, how does IJC have jurisdiction to grant the relief being requested?

1. Is CCRIFC alleging that damage to First Nations' fisheries was caused by raising the natural levels of the Columbia River at or above the international boundary, or by the construction, maintenance or operation of the Grand Coulee Dam, or by some other factor(s)?

The damage to the First Nations' fisheries was caused by the construction of the Dam. In particular, construction of the Dam cut the salmon off from the Columbia River upstream of the

Canadian Columbia River Inter-Tribal Fisheries Commission

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Dam. The Dam was constructed and continues to operate, without any fish ladders or other provision to allow adult salmon to pass upstream.

It is well known that the most severe impact of the Dam has been on anadromous fish that once spawned upstream of the dam.¹ This damage was foreseeable. Prior to construction of the Dam, salmon were central to the economic, cultural, and spiritual life of Canadian First Nations and were integral to their diet. Construction of the Dam has resulted in severe dietary, health, spiritual and economic consequences.² The Dam blocks all anadromous fish runs to the Ktunaxa, Shuswap and Lakes-Sinixt territories. The livelihood and culture of the First Nations represented by CCRIFC were permanently and significantly altered.³

No consideration was given to the cultural and economic significance of salmon to Canadian First Nations. Canadian First Nations were unaware of the proposal to construct and operate the Dam, and no mitigation or compensation has ever been received by, or offered to, Canadian First Nations.⁴ When the Dam was being approved and planned, Canada did not express concern over the potential loss of salmon and steelhead in the upper Columbia River, and did not advocate for fishways, because there was no non-Aboriginal commercial fishery on the Columbia River in Canada.⁵

2. If CCRIFC is not alleging that all the damage was caused by raising the natural levels of the Columbia River at and above the international boundary, how does IJC have jurisdiction to grant the relief being requested?

It is our position that while the raising of the natural levels of the Columbia River at and above the international boundary triggered the IJC's jurisdiction over the project, the scope of the IJC's jurisdiction once triggered is not limited to addressing the direct effects of raised water levels. Rather, it is our position that the IJC has jurisdiction over the manner in which the water levels were raised. Article VIII of the 1909 Treaty Between the United States and Great Britain

¹ World Commission on Dams, *Final Report regarding the Grand Coulee Dam and the Columbia Basin Project USA*, 2000 (the Report). p. ix.

² *Ibid.*, pp. 82-83.

³ *Ibid.*, p. 103.

⁴ *Ibid.*, p. xiii.

⁵ *Ibid.*, pp. x, 82.

Relating to Boundary Waters, and Questions Arising between the United States and Canada (the "Treaty"), and Conditions 1 and 2 of the 1941 Order, give the IJC jurisdiction to grant relief for damage to Canadian First Nations' fisheries caused by construction and operation of the Dam.

a) Article VIII of the Boundary Waters Treaty

The IJC approved the construction and operation of the Dam under Article IV of the Treaty. The IJC's jurisdiction was triggered because the Grand Coulee dam and reservoir would have the effect of raising natural water levels on the Canadian side of the boundary.

Article VIII sets out the rules and principles that govern the Commission in exercising its jurisdiction over applications under Article IV. Article VIII gives the IJC broad discretion to require the protection of interests in Canada injured by construction the Dam:

The Commission in its discretion may make its approval *in any case* conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases **may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of all interests on the other side of the line which may be injured thereby.**

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, **the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.** (emphasis added)

The IJC's jurisdiction to grant the relief requested by CCRIFC can be found in the first paragraph of Article VIII, which gives the IJC broad discretion (i.e., 'in any case') to require that suitable and adequate provision be made for the protection and indemnity against injury of **all interests** on the other side of the line which may be injured. The term "interests" in Article VIII is broad, and in our submission encompasses all interests deserving protection, including First Nations' interests in the fisheries of the Columbia River. The IJC's jurisdiction is not limited to direct effects of the raising of water levels (e.g., flooding). Moreover, it appears from the

construction of the second paragraph of Article VIII that the concluding 'injured thereby' refers to '...the construction or maintenance on the other side...'

The IJC's broad jurisdiction is evidenced in its 9 December 1982 Order of Approval in the Matter of the Application of the State of Washington for Approval to Construct a Control Structure Near the Outlet of Osoyoos Lake (the "Osoyoos Order"). As in the case of the Dam, the IJC's jurisdiction over the Osoyoos Control Structure was triggered by Article IV, because the effect of constructing the works would raise the natural level of waters on the other side of the boundary.

The Commission imposed conditions in the Osoyoos Order to ensure suitable and adequate provision would be made for the protection and indemnity of all interests in Canada that may be affected by construction of the works. One of those conditions requires the works to include fish passage facilities.

Therefore, it is respectfully submitted that the IJC has jurisdiction pursuant to the Treaty to attach conditions to approvals of projects in order to protect any interests that may be injured by the approved project. We therefore submit that the Commission's jurisdiction of the Grand Coulee Dam under the Treaty included jurisdiction to require protection and indemnification of the interests of First Nations in Canada in the anadromous fishery of the Columbia River, which interests would undoubtedly be affected by construction and operation of the Dam.

b) Conditions 1 and 2 of the 1941 Order

The first condition of the 1941 Order is as follows:

That the applicant make suitable and adequate provision, to the satisfaction of the Commission, for the protection and indemnification of **all interests** in British Columbia by reason of **damage resulting from the construction and operation of the Grand Coulee Dam and reservoir.**

Like Article VIII of the Treaty, the first condition is broad, requiring protection and indemnification of **all interests** damaged by the **construction and operation** of the Dam and reservoir. This condition is not limited to damage resulting directly from raising the natural levels of the Columbia River, such as flooding. It is therefore submitted that this condition required protection and indemnification of the interests of First Nations in the fisheries on the Columbia River in British Columbia. Such protection and indemnification has never occurred.

The second condition of the 1941 Order is as follows:

That the Commission expressly reserves and safeguards its right under the aforesaid Treaty further to exercise jurisdiction over such effects on the natural levels or stages of the Columbia River at and above the international boundary as might actually result from the operation of the said Grand Coulee dam and reservoir; **and to issue such further order or orders in the premises as the Commission may deem to be appropriate and justified for the protection and indemnification of the Province of British Columbia or of any private or municipal corporation or citizen thereof that might be found by the Commission actually to have sustained damage on account of the raising of the natural levels of the Columbia River at and above the international boundary;** Provided, that any such further order or orders shall be issued only after the Commission shall have received and considered formal applications filed by aggrieved parties in accordance with the Rules of Procedure.

A narrow, technical reading of this second condition may suggest that the IJC's continuing jurisdiction over the Dam is limited to damage sustained directly by the raising of the levels of the Columbia River. However, the raising of the natural levels was effected by the construction and operation of the Dam, which in turn has caused the damage complained of.

It is submitted that the IJC intended to retain the jurisdiction granted by Article VII of the Treaty, and to retain jurisdiction over the subject matter addressed in Condition 1, to the extent necessary to ensure adequate protection and indemnification of all interests that may be harmed by construction and operation of the Dam.

It is submitted that the Second Order should be read in a similar manner to the following portion of the Osoyoos Order:

And it is further ordered that the Commission retains jurisdiction **over the subject matter of this application** and after giving such notice and opportunity to all interested

parties to make representations as the Commission deems appropriate may make further order or orders relating thereto as may be necessary in judgment of the Commission.

This jurisdiction retained in the Osoyoos Order is broad enough to encompass effects caused by the construction and operation of the works and not just by the resulting raising of the natural levels of the River.

We hope that this letter answers the questions raised in your letter of February 28, 2005. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to be 'Fred Fortier', written over a horizontal line.

Fred Fortier
Chairperson

- cc. Mr. Paul Sprout, RDG Pacific Region, Fisheries and Oceans Canada
Mr. Barry Rosenberger, Regional Director – BC Interior, Fisheries and Oceans
Canada