

Title: Exchange of notes constituting an agreement between Canada and the United States of America regarding sale of Canada's entitlement to downstream benefits under the treaty relating to co-operative development of the water resources of the Columbia River Basin

Parties: Canada, United States

Basin: Columbia

Date: 1/22/1964

EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT ¹ BETWEEN CANADA AND THE UNITED STATES OF AMERICA REGARDING SALE OF CANADA'S ENTITLEMENT TO DOWNSTREAM BENEFITS UNDER THE TREATY RELATING TO CO-OPERATIVE DEVELOPMENT OF THE WATER RESOURCES OF THE COLUMBIA RIVER BASIN, SIGNED AT WASHINGTON, ON 17 JANUARY 1961. ² WASHINGTON, 22 JANUARY 1964

I

*The Secretary of State of the United States of America
to the Secretary of State for External Affairs of Canada*

DEPARTMENT OF STATE

Sir,

Washington, January 22, 1964

I have the honor to refer to the discussions which have been held between representatives of the Government of Canada and of the Government of the United States of America regarding a sale of Canada's entitlement to downstream power benefits under the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin, signed on January 17, 1961. ²

On the basis of these discussions my Government understands that the Two Governments recognize that it would be in the public interest of both Countries if Canada's entitlement to downstream power benefits could be disposed of, as contemplated by Article VIII of the Treaty, in accordance with general conditions and limits similar to those set out in detail in the attachment hereto, and further, that before such a disposition can be concluded and confirmed by the two Governments, additional steps must be taken in each country. Therefore, in furtherance of this aim, it is understood the two Governments are agreed that :

- (a) the Government of the United States will use its best efforts to arrange for disposition of Canada's entitlement to downstream power benefits within the United States of America in accordance with the general conditions and limits set forth in the attachment, and
- (b) the Government of Canada will use its best efforts to accomplish all those things which are considered necessary and preliminary to ratification of the Treaty as quickly as possible, including any arrangements for implementation and acceptance of the general conditions and limits set forth in the attachment.

I should like to propose that if agreeable to your Government this note together with the attachment and your reply shall constitute an agreement by our Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

Dean Rusk

Secretary of State
The Honorable Paul Martin, P. C., Q. C.
Secretary of State for External Affairs
Ottawa

ATTACHMENT RELATING TO TERMS OF SALE

A. The disposition shall consist of the downstream power benefits to which Canada is entitled under the Treaty, other than Canada's entitlement to downstream power benefits resulting from the construction or operation of a project described in Article IX of the Treaty, and shall be by way of a contract of sale authorized in accordance with Article VIII of the Treaty between the British Columbia Hydro and Power Authority and a single Purchaser containing provisions mutually satisfactory to the parties to the contract but shall be subject to and be operative in accordance with the following general conditions and limits :

1 (a) The storages described in Article II of the Treaty shall be fully operative for power purposes in accordance with the following schedule :

Storage described in Article II (2) (c) - approximately 1,400,000 acre-feet on April 1, 1968,
Storage described in Article II (2) (b) -approximately 7,100,000 acre-feet on April 1, 1969,
Storage described in Article II (2) (a) -approximately 7,000,000 acre-feet on April 1, 1973.

(b) The period of sale of the entitlement allocated to each of the storages shall terminate and expire thirty years from the date on which that storage is required to be fully operative for power purposes in accordance with the schedule in subparagraph (a) of this paragraph.

(c) In the event any storage is not fully operative in accordance with the schedule in subparagraph (a) of this paragraph or if, during the period of sale, the storage is not operated as required by the hydroelectric operating plans agreed upon in accordance with the Treaty, as modified by any detailed operating plan agreed upon in accordance with Article XIV (2) (k) of the Treaty, and the Canadian entitlement is thereby reduced, the British Columbia Hydro and Power Authority shall pay the Purchaser an amount equal to the cost it would have to incur to replace that part of the reduction in the Canadian entitlement which the vendees of the Purchaser could have used other than costs that could have been avoided had every reasonable effort to mitigate losses been made by the Purchaser, the United States entity and the owners of non-federal dams on the Columbia River in the United States of America. Alternatively, the British Columbia Hydro and Power Authority may, at its option, supply power to the Purchaser in an amount which assures that the Purchaser receives the capacity and energy which would have constituted that part of the reduction in the Canadian entitlement that the vendees of the Purchaser could have used if there had been no default, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss of power would otherwise have occurred. If the assurance described in paragraph B. 5 of this attachment is given to the Purchaser, the United States entity may succeed to all the rights of the Purchaser and its vendees to receive the entire Canadian entitlement, or that part that could be used by the vendees, and to be compensated by British Columbia Hydro and Power Authority in the event of non-receipt thereof. The United States entity agrees that before it purchases more costly power from any third party for the purpose of supplying the necessary

amount of the Canadian entitlement to the Purchaser, it will first cause to be delivered to the Purchaser, or for its account, any available surplus capacity or energy from the United States Federal Columbia River System and compensation to the United States entity because of such deliveries shall be computed by applying the then applicable rate schedules of the Bonneville Power Administration to the deliveries. In the event of disagreement, determination of compensation in money or power due under this paragraph shall be resolved by arbitration and shall be confined to the actual loss incurred in accordance with the principles in this paragraph.

(d) For the purpose of allocating downstream power benefits among the Treaty storages from April 1, 1998 to April 1, 2003, the percentage of downstream power benefits allocated to each Treaty storage shall be the percentage of the total of the Treaty storages provided by that storage.

2. For the Period of the sale the British Columbia Hydro and Power Authority shall operate and maintain the Treaty storages in accordance with the provisions of the Treaty.

3. (a) The purchase price of the entitlement shall be \$254,400,000, in United States funds as of October 1, 1964, subject to adjustment, in the event of an earlier payment of all or part thereof, to the then present worth, at a discount rate of 4 1/2 percent per annum.

(b) The purchase price shall be paid to Canada contemporaneously with the exchange of ratifications of the Treaty and shall be applied towards the cost of constructing the Treaty projects through a transfer of the purchase price by Canada to the Government of British Columbia, pursuant to arrangements deemed satisfactory to Canada, to be entered into between Canada and the Government of British Columbia.

4. If, during the period of the sale, there is any reduction in Canada's entitlement to downstream power benefits which results from action taken by the Canadian entity pursuant to paragraph 7 of Annex A of the Treaty, the British Columbia Hydro and Power Authority shall, by supplying power to the Purchaser, or otherwise as may be agreed, offset that reduction in a manner so that the Purchaser will be compensated therefor.

5. The Purchaser shall have and may exercise the rights of the British Columbia Hydro and Power Authority relating to the negotiation and conclusion with the United States entity, of proposals relating to the exchanges authorized by Article VIII (2) of the Treaty with respect to any portion of Canada's entitlement to downstream power benefits sold to the Purchaser.

B. The Notes to be exchanged pursuant to Article VIII (1) of the Treaty contain, inter alia, provisions incorporating the following requirements:

1. As soon as practicable after start of construction of each Treaty project the Canadian and United States entities shall agree upon a program for filling the storage provided by the project. The filling program shall have the objective of having the storages described in Article II (2) (c) and Article II (2) (b) of the Treaty full by September 1 following the date when the storages become fully operative and the storage provided by the dam mentioned in Article II (2) (a) of the Treaty full to 15 million acre-feet by September 1, 1975. This objective shall be reflected in the hydroelectric operating plans and shall take into account generating requirements at-site and downstream in Canada and the United States of America to meet loads.

2. In the event the United States of America becomes entitled to compensation in respect of a breach of the obligation under Article IV (6) of the Treaty to commence full operation of a storage, compensation payable to the United States of America under Article XVIII (5) (a) of the Treaty shall be made in an

amount equal to 2.70 mills per kilowatt-hour, and 46 cents per kilowatt of dependable capacity for each month or fraction thereof, in United States funds, for and in XXXX (pg308) of the power which would have been forfeited under Article XVIII (5) (a) of the Treaty if Canada's entitlement to downstream power benefits had not been sold in the United States of America. Alternatively, Canada may, at its option, supply capacity and energy to the United States entity in an amount equal to that which would have been forfeited, together with appropriate adjustments to reflect transmission costs in the United States of America, delivery to be made when the loss would otherwise have occurred.

3. A diminution of Canada's entitlement to downstream power benefits sold in the United States of America which is directly attributable to a failure to comply with paragraph A. 1 (a) or paragraph A. 2 of this attachment, in the absence of compensation therefor by the British Columbia Hydro and Power Authority, constitutes a breach of the Treaty by Canada and Article XVIII (5) of the treaty and the exculpatory provisions in Article XVIII of the Treaty do not apply to such breach. Compensation or replacement of power as specified in paragraph A. 1 (c) of the attachment shall be made by Canada and shall be accepted by the United States of America as complete satisfaction of Canada's liability under this paragraph.

4. For any year in which Canada's entitlement to downstream power benefits is sold in the United States of America, the United States entity may decide the amount of the downstream power benefits for purposes connected with the disposition thereof in the United States of America. This authorization, however shall not affect the rights or relieve the obligations of the Canadian and United States entities relating to joint activities under the provisions of Article XIV and Annexes A and B of the Treaty; nor shall it apply to determination of compensation provided in paragraph A. 1 (c) and paragraph B. 2 of this attachment.

5. If necessary to accomplish the sale of Canada's entitlement to downstream power benefits in accordance with this attachment, the United States entity shall assure unconditionally the delivery to or for the account of the Purchaser, by appropriate exchange contracts, of an amount of power agreed between the United States entity and the Purchaser to be the equivalent of the entitlement during the period of the sale.

C. Canada shall designate the British Columbia Hydro and Power Authority as the Canadian entity for the purposes of Article XIV (1) of the Treaty.

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*The Secretary of State for External Affairs of Canada
to the Secretary of State of the United States of America*

THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

January 22, 1961

Sir,

I have the honour to refer to your Note dated January 22, 1964, together with the attachment thereto regarding the Treaty between Canada and the United States of America relating to cooperative development of the water resources of the Columbia River Basin signed at Washington on January 17, 1961.

I wish to advise you that the Government of Canada agrees that your Note with the attachment thereto, together with this reply, shall constitute an agreement between our two Governments relating to the Treaty.

Accept, Sir, the renewed assurances of my highest consideration.

Paul Martin
Secretary of State for External Affairs

The Honourable Dean Rusk

Secretary of State of the United States of America
Washington

¹ Came into force on 22 January 1964 by the exchange of the said notes.

² See p. 246 of this volume.