
NATURAL RESOURCES JOURNAL

Volume 26
Issue 2 *U.S. - Canada Transboundary Resource Issues*

Spring 1986

The Skagit-High Ross Controversy: Negotiation and Settlement

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SETTING AND BACKGROUND

The Skagit River is a short but powerful stream which rises in the mountains of southwestern British Columbia, cuts through the northern Cascades in a spectacular and once-remote mountain gorge, and empties into Puget Sound approximately sixty miles north of Seattle. The beautiful mountain scenery of the heavily glaciated north Cascades was formally recognized in the United States by the creation of the North Cascades National Park and the Ross Lake National Recreation Area in 1968, and earlier in British Columbia by creation of the E.C. Manning Provincial Park. The Ross Lake Recreation Area covers the narrow valley of the upper Skagit River in Washington and portions of several tributary valleys. It was created as a political and, to environmentalists who wanted national park status for the entire area, controversial, compromise which accommodated the city of Seattle's Skagit River Project and the then-planned North Cascades Highway. It separates the national park into two units, provides the major highway access to the park, and is the foreground of most of the scenic vistas enjoyed by automobile travellers. It was also the setting of Seattle's controversial proposal to raise the height of its Ross Dam. The settlement of that controversy is the subject of this article.

Seattle City Light (SCL), a municipally owned utility, began construction of its three dam (Gorge, Diablo, and Ross) hydroelectric project on the Upper Skagit River in 1927. The first two dams plus the existing Ross Dam have been completed, but the ultimate plan called for raising Ross Dam by an additional 122.5 feet and the existing dam was constructed so as to accommodate the added height. The existing dam inundates some land in British Columbia; the addition would have increased the reservoir area in British Columbia nearly ten-fold.[1]

The addition was approved in 1942 by the International Joint Commission (IJC), the agency created by the Boundary Waters Treaty of 1909

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1. Ross & Marts, *The High Ross Dam Project: Environmental Decisions and Changing Environmental Attitudes*, 19 CAN. GEOG. 221 (1975). *See also* P. PITZER, BUILDING THE SKAGIT: A CENTURY OF UPPER SKAGIT VALLEY HISTORY 1870-1980 (2d printing, 1978).

to have jurisdiction over boundary water issues between Canada and the United States. However, the IJC's approval was contingent on Seattle's reaching an agreement with British Columbia concerning compensation for the land to be inundated. A tentative agreement reached in 1952 was not ratified in British Columbia, but an agreement was reached and signed in 1967. Seattle City Light then proceeded with its plans to construct the fourth and final stage of Ross Dam (which came to be known as High Ross Dam), confident that it had the requisite international approval and contract, and that the additional power was needed.[2]

The proposal by Seattle City Light to raise Ross Dam, long-planned and presumably all arranged, ran into an unexpected storm of controversy with environmental and eventually international dimensions that was quieted only after the IJC took some extraordinary measures. These measures led to a negotiated settlement comprising a very interesting package of trade-offs and long-term commitments that was consummated by a treaty between Canada and the United States. Settlement was not reached, however, before the issue had become a *cause celebre*[3] in British Columbia, where it symbolized the public's frustration both with the perceived insensitivity of their and Seattle's governments to environmental values and with Yankee exploitation of their backyard. The controversy contributed to a change of government in British Columbia and nearly reached the United States Supreme Court.[4] Although their legal position was strong, Seattle City Light's managers were not positioned to cope with the political and international turbulence triggered by what seemed to them to be merely a logical and orderly next step in a long-range plan of developing the hydropower resource of the Skagit River.[5]

The Skagit case demonstrates nicely that resource development planning with long time horizons requires that planners allow for and be prepared to deal with changing social values, as well as with other contingencies.[6] These factors are especially important in this case because

2. Seattle City Council, Briefing Papers, Ross Chronology (May 1983). *See also* Perry, *The Skagit Valley Controversy: a Case History of Environmental Politics* in R. KRUEGER & B. MITCHELL, MANAGING CANADA'S RENEWABLE RESOURCES (1977).

3. Term applied by Thomas Perry, British Columbian and former Coordinator of the Run Out Skagit Spoilers committee (ROSS).

4. Swinomish Tribal Community v. FERC, 627 F.2d 499 (D.C. Cir. 1980).

5. A general historical overview is available in J. CARROLL, ENVIRONMENTAL DIPLOMACY 95 (1983); Perry, *supra* note 2; Ross & Marts, *supra* note 1; T. Simmons, The Damnation of a Dam: The High Ross Dam Controversy (1974) (unpublished Master's thesis, Dept. of Geography, Simon Fraser University); and U.S. Federal Power Commission, City of Seattle, Project No. 553, Initial Decision Amending License for Skagit River Ross Development (Feb. 4, 1976). *See also* Lane, *Ross Dam Fight, U.S. Conservationists Join with Canadians*, Seattle Times, Oct. 11, 1970 at A16, col. 1.

6. Ross & Marts, *supra* note 1.

the development crosses an international boundary and affects the political tranquility of the neighboring country.

Public utilities, such as Seattle City Light, are particularly vulnerable to changing social values because they tend to engage in large and long-term programs, and because they are more exposed and accountable to pluralistic political processes than are private utilities. A private utility that became embroiled in such a controversy would be more sensitive to the costs of delay because of higher interest rates on borrowed capital, and would have been likely to cut its losses quickly and seek an alternative. A federal agency, such as the U.S. Army Corps of Engineers, perhaps would have been more influenced by concerns for national and international comity, concerns which transcend the usual framework of municipal decisionmaking. Seattle City Light, on the other hand, with its limited spatial focus and political horizons, exhibited a tenacity verging on obduracy, protecting not only its sunk investment and the integrity of its planning, but also its commitments to the Pacific Northwest Power Pool, and the sacrificed opportunity costs represented by its not having sought an equivalent alternative in view of its plan for raising Ross Dam. Thus it held out against environmentalists on both sides of the international border, and insisted that British Columbia honor the agreement reached in 1967 or "make Seattle whole" in exchange for Seattle's foregoing construction of High Ross.[7]

The essential elements involved in the case were as follows:

1. A modest additional step in a sixty year program of planning and development of the river's hydropower resource that involved inundating additional lands in Canada.[8]
2. An agreement between Seattle and British Columbia (1967)[9] sanctioned by an order (1942) of the IJC;[10]
3. An unforeseen change in environmental values which was rein-

7. International Joint Commission, in the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River approximately 130 feet at the International Boundary between the United States and Canada, Statement in Reply of the Province of British Columbia to Statements in Response to the Request in the Application Made by the Province of British Columbia, (Feb. 6, 1981) [hereinafter cited as B.C. Statement in Reply]. (*Chronology* at 7, and Appendix, British Columbia-Seattle Negotiations, Pertinent Correspondence at 21) [hereinafter cited as Pertinent Correspondence].

8. Ross & Marts, *supra* note 1.

9. Agreement between British Columbia and the City of Seattle (Jan. 10, 1967) [hereinafter cited as 1967 Agreement]. The full text of this Agreement appears in Before the Federal Power Commission, Application for Amendment of License, Skagit River-Ross Development, Project No. 553-Washington, By the City of Seattle, Washington, Exhibit F (Oct. 1970).

10. International Joint Commission, Order of Approval in the Matter of the City of Seattle for Authority to Raise the Water Level of the Skagit River approximately 130 feet at the International Boundary between the United States and Canada (Jan. 27, 1942) [hereinafter cited as 1942 Order].

forced by other Canadian frustrations in dealing with the United States and also by British Columbians' frustrations in dealing with their own provincial government, leading to the case becoming a national issue in Canada but only a localized issue in the United States;[11] and

4. A negotiated solution signed in 1984 only after the controversy had festered for some fourteen years.[12] This solution was made possible largely by another unanticipated change in the planning environment: recognition of surplus generating capacity in British Columbia.[13]

Thus, the case is an excellent example of the importance of anticipating shifting social values. It also raises the question of how well the architects of this agreement have anticipated future shifts in the social and economic values of natural resources.

Short History of the Controversy

As noted, the High Ross Dam proposal was an integral part of Seattle's staged development of the Skagit River, built to serve as the upstream storage reservoir to maximize electrical output of the three-dam system. It also provides some flood control for the lower Skagit Valley. The initial stages were constructed so as to accommodate the fourth step relatively inexpensively. The third stage extended the reservoir into Canada, inundating approximately 500 acres in British Columbia at full pool. This area was never cleared and groomed properly, in the expectation that it would be inundated when the fourth stage was completed. The Skagit Project is a major component of Seattle's electrical supply system, but Seattle does own other generating resources, including Boundary Dam in northeastern Washington on the Pend Oreille River, which played a role in the final agreement, discussed later.[14]

11. Perry, *Hey, this land is your land, too*, 93 MACLEAN'S 6 (Dec. 8, 1980); CARROLL, *supra* note 5, at 95; and Gray, *A Wilderness Preserved*, 96 MACLEAN'S 32 (Apr. 11, 1983).

12. British Columbia-Seattle Agreement, Annex at 5 in Treaty with Canada Relating to the Skagit River and Ross Lake in the State of Washington, and the Seven Mile Reservoir on the Pend d'Oreille River in the Province of British Columbia, Apr. 2, 1984, United States-Canada, Senate Treaty Doc. 98-26 [hereinafter cited as Treaty]. The Agreement was signed March 30, 1984, and includes five appendices [hereinafter cited as Agreement].

13. The rapid reversal from forecasting deficits to acknowledging surplus of electric power is an amazing chapter in the history of Pacific Northwest electricity planning, and is generously documented. *See, e.g.*, DEPT. OF ENERGY, BONNEVILLE POWER ADMINISTRATION, POWER OUTLOOK, MAY 1980 THROUGH 1990-91 (1980) compared with DEPT. OF ENERGY, BONNEVILLE POWER ADMINISTRATION, BONNEVILLE POWER ADMINISTRATION 1982 PROGRAM AND FINANCIAL SUMMARY (March 1983). *See also Hydro Claims on Surplus Power Hit*, Vancouver Sun, Nov. 26, 1981, at A19, col. 1, and *Alice in Hydroland*, Vancouver Sun, Nov. 26, 1981, at A4, col. 1 (editorial). For later discussions of the power surplus situation in British Columbia, *see* Fox, *Dam Cost is Crippling*, Vancouver Sun, Apr. 11, 1983, at A5, col. 1, and Connelly, *Conservation Works so Well B.C. Has Extra Electricity and Erases Big Dam Plans*, Seattle Post-Intelligencer, Sept. 26, 1983, at B9, col. 1.

14. Perry, *supra* note 2. *See also* PITZER, *supra* note 1; Agreement, *supra* note 12.

Seattle's development had converted the spectacular and remote gorge into a readily accessible "stairway" of three dams and reservoirs, and SCL's "Skagit Tours" became a popular tourist attraction. Thousands of tourists had seen the "waffle face" of the existing dam, so designed to ensure proper bonding of the concrete that would be needed for the fourth stage.

Seattle's plan for the fourth and final stage called for increasing the height of the 540-foot dam by 122.5 feet, to an elevation of 1,725 feet above sea level. This would extend the reservoir an additional seven miles into Canada and inundate an additional 4,720 acres of Canadian land when the reservoir was full.[15] The enlargement would increase substantially the peaking power capacity of the Skagit Project and reduce Seattle's dependence on Bonneville Power Administration's relatively expensive peaking power. The increase in energy provided by the enlargement would have been much more modest. This differential in the output of the project increased SCL's difficulty in explaining the project to opponents, many of whom were not familiar with power managers' distinctions between "capacity" and "energy," and the relative value of each. At the time of the initial planning, little consideration was given to environmental values, except those associated with fish and wildlife.[16]

In 1942 the IJC approved the fourth High Ross stage subject to a compensation agreement with British Columbia. As noted, that agreement was reached with the Social Credit government of Premier W.A.C. Bennett in 1967.[17] The agreement covered a 99-year period, with Seattle to make annual payments of $34,566 either in cash or in equivalent power valued at 3.75 mills per kilowatt hour, plus taxes on the reservoir land. Throughout the long period of stalemate that followed 1967, Seattle paid the annual rental and taxes. But after Bennett's Social Credit government was replaced in 1972, British Columbia repudiated the agreement and ceased accepting Seattle's payments.[18]

Prior to the late 1960s, residents of both Washington and British Columbia had voiced little if any oposition to the dams. Indeed, the twenty-two mile long Ross Lake, accessible by rough road at the Canadian end and by boat at the Ross Dam end, became popular for boating and fishing. There were, however, objections to the unsightly "stump farm" and mudflats exposed at the Canadian end whenever the reservoir was drawn down, which was its typical autumn and winter condition, and also to

15. Gordon & Berry. Report to International Joint Commission re: Ross Dam 10 (Apr. 2, 1982).

16. *See. e.g.*. Before the Federal Power Commission, Application for Amendment of License. Skagit River-Ross Development. Project No. 553-Washington. By the City of Seattle. Washington. October 1970. The Environmental Statement submitted February 1971 as part of this Application was only 25 pages in length. *See also*. Pertinent Correspondence. *supra* note 7.

17. 1967 Agreement. *supra* note 9.

18. Perry. *supra* note 2. at 249.

the loss of stream fishing at the north end of the reservoir. Early in 1970, the British Columbia government announced plans for a new 3,700-acre provincial park and 32,900-acre recreation area in the Skagit Valley to take advantage of the proposed enlargement of the reservoir.[19]

By 1969, however, the environmental movement had gained strength. Opposition to High Ross began to crystallize on both sides of the border, spearheaded by the Sierra Club, the North Cascades Conservation Council (N3C), and a new group in Canada known as ROSS (Run Out Skagit Spoilers), a coalition of established British Columbian environmental organizations which coalesced around the High Ross issue. Concerns of U.S. environmentalists focused largely on inundation of tributary valleys which provided scenic hiking access to the North Cascades, particularly Big Beaver Valley. Canadians objected especially to the loss of additional free-flowing Skagit River and the streamfishing it provided, and the low annual rental tendered by Seattle to British Columbia.[20] By October 1970, when Seattle applied to the Federal Power Commission (FPC), later Federal Energy Regulatory Commission (FERC), for a High Ross license, the debate had developed into a confrontation. Opposition was expressed in both the British Columbia Legislature and the Canadian Parliament, and, as noted, the Social Credit government was overturned in 1972.[21] British Columbia in 1974 requested the IJC to reconsider the 1942 decision.[22] Meanwhile, the Washington State Ecology Commission and the Washington Department of Ecology expressed opposition to the project, but were unable to halt it, and the requisite state water permit was granted by the Department of Ecology.[23] With two new members the Seattle City Council, which had approved submission of the application to the FPC in 1970, recognized the growing opposition by reopening hearings but reaffirmed its approval.[24]

During the latter half of the 1970s, Seattle and British Columbia sought to reach a negotiated settlement that would involve a trade of power from one or more specific power sites in British Columbia (e.g., installation of another generating unit at Mica Dam on the upper Columbia River) in exchange for Seattle's agreeing to forego construction of High Ross.

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19. Ross & Marts, *supra* note 1, at 223.

20. Perry, *supra* note 2, at 240. *See also* T. PERRY, A CITIZEN'S GUIDE TO THE SKAGIT VALLEY (1981).

21. Perry, *supra* note 20.

22. Province of British Columbia, Request in the Application, in the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River Approximately 130 Feet at the International Boundary Between the United States and Canada (June 25, 1974) [hereinafter cited as 1974 Request].

23. Seattle Times, March 18, 1971, at B7, col. 3. *See also* Lane, *State 'no's' camouflaged High Ross 'yes'*, Seattle Times, Mar. 13, 1974, at B2, col. 3.

24. Ross & Marts, *supra* note 1, at 224.

These negotiations broke down over technical issues involving the kinds of power that might be traded (peaking, firm, secondary) for the High Ross capability, and the relative value of the power, given differences between the two countries in exchange rates, construction costs, and financing costs. Seattle perceived British Columbia's promise to provide power to be much less secure than having High Ross Dam on U.S. soil. It appears also that both sides had strong expectations of "winning" in other arenas and were not prepared to make substantial concessions. The negotiations were completely broken off in August 1980. Whatever the reasons, it appears that both parties shared the belief that all the ground had been covered and an acceptable negotiated settlement was simply not feasible. These negotiation efforts, however, did help define the issues.[25]

Meanwhile, Seattle's position was strengthened when, in 1977, the Federal Power Commission approved the construction of High Ross, and the IJC dismissed, though without prejudice, British Columbia's 1974 request to annul the 1942 Order. Opponents challenged the FPC license on environmental grounds, including the effects that operation of High Ross would have on the fishery resources downstream.[26] The U.S. Court of Appeals rejected this appeal in July 1980, with one judge dissenting, and the rejection was not appealed to the U.S. Supreme Court.[27] In August 1980, British Columbia again appealed to the IJC to set the 1942 Order aside.[28] Opposition by the environmental community and Canadians in general continued unabated, and Seattle was perceived as uncaring and intransigent.

The Dilemma

As things stood in late 1980s, the case appeared to be in a stalemate.

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25. B.C. Statement in Reply, *supra* note 7.

26. There are important salmon and steelhead spawning grounds downstream from Gorge Dam. Manipulation of streamflow incident to power operations creates problems of cold water, stranding, dewatering of eggs, and silting of spawning beds. SCL asserted throughout that High Ross would not worsen the existing situation, but opponents were skeptical. Although planned as a system, there is an hydraulic imbalance between Ross and the two downstream dams. At full operation, Ross passes approximately twice the water that can be used by Diablo and Gorge power plants and there is inadequate storage capacity in their pools to store the excess water. Thus, full operation of the Ross powerhouse for any sustained period leads to "spills" (water not used for generating electricity) at Diablo and Gorge. This situation led opponents to suspect that construction of High Ross would lead Seattle to construct a dam at the Copper Creek site, downsteam from Gorge, as a reregulating project. A Copper Creek Dam would have eliminated approximately eleven additional miles of river, now used for spawning. In April 1981, Seattle subsequently withdrew from further consideration the construction of Copper Creek Dam, so this aspect of the downstream problem is moot. *See* SEATTLE CITY LIGHT, COPPER CREEK UPDATE (No. 10, July 1981) (public information newsletter).

27. Swinomish Tribal Community, *supra* note 4.

28. Province of British Columbia Request in the Application, In the Matter of the Application of the City of Seattle to Raise the Water Level of the Skagit River Approximately 130 Feet at the International Boundary Between the United States and Canada (Aug. 14, 1980).

Both sides believed their positions would prevail. Seattle felt its legal position was unassailable. The 1942 Order and the 1967 agreement had been upheld by the IJC, the Federal Power Commission had granted the license, the opponents' appeal to the courts had failed, and Seattle had invested substantial sums in engineering and planning studies and, perhaps prematurely, in building the existing dam to accommodate the additional stage. On the other hand, British Columbia knew that Seattle's proceeding with construction would be a "hostile" act against both a friendly neighbor and the environmental community.

The political reality for British Columbia was two-faceted. It was unacceptable to its constituents to allow the dam to be raised, yet it was also unacceptable to repudiate the 1967 agreement unilaterally without adequate restitution to Seattle. British Columbia had hopes that its second appeal to the IJC would prevail. Failing that, there was always the chance that intervention by one or both federal governments might extricate the province from its uncomfortable position.

It was unacceptable to the IJC to rescind the 1942 decision arbitrarily. The Commission wished to ensure that any resolution would be both equitable and durable. It also was concerned with the precedents it might establish in reopening a longstanding and legally intact order and caving in to the persistent stonewalling by one party.[29] At the same time, environmentalists in both Washington State and British Columbia remained adamant in their opposition to the project, and politicians on both sides of the border were aware of the inherent political costs—for those in Seattle, the costs of proceeding with the project, and for those in British Columbia, the costs of honoring the 1967 agreement.[30]

The dilemma seemed intractable; it appeared that only a "win-lose" solution could be reached whether the IJC responded to British Columbia's second appeal favorably or unfavorably. The long period of confrontation, review, licensing, reexamination, political maneuvering, and negotiation had not produced a mutually agreeable "win-win" solution; indeed, a win-win solution seemed impossible. However, things were about to change, beginning in 1981 with five new appointments to the IJC following two Canadian resignations and replacement of the entire U.S. Section by the new administration of President Reagan.[31]

The new political environment in Washington, D.C., and the presence

29. Personal interview, J.K.K. with David LaRoche, Secretary of the U.S. Section, IJC, April 15, 1984.

30. *Id. Also*, personal interviews, J.K.K. with B. Marr, Deputy Minister of the Environment and British Columbia representative on the Joint Consultative Group, *infra* note 49 (Sept. 1, 1983), and Bob Royer, former Deputy Mayor of Seattle and representative on the Joint Consultative Group (May 25, 1983 and Apr. 5, 1984).

31. Seattle Times, Mar. 11, 1981 at D1, col. 1; Vancouver Sun, Mar. 17, 1982 at B7, col. 1.

of the new U.S. commissioners with high level political access, may have contributed to the Commission's willingness to take new initiatives. Certainly the infusion of new personalities, individuals unburdened by the dispute's long and frustrating history, helped produce a fresh approach to the dilemma.[32] In any case, the new Commission was about to lay the groundwork for breaking out of the dilemma.

BREAKOUT FROM IMPASSE

In addressing British Columbia's 1980 Request, the IJC took an imaginative departure from the rather narrow, legalistic assessment of the merits of the request and its background. Instead, the Commission adopted a much broader view, emphasizing the general dispute resolution intent of the 1909 Boundary Waters Treaty.[33] Also, recognizing that there were various actors with disparate but valid interests in the outcome, the Commission broadened the participation and adopted the concept that only a mutually satisfactory solution would be acceptable. The IJC's agenda, then, changed from adjudicating an awkward controversy to designing a strategy to achieve a mutually acceptable solution. Moreover, the IJC's initiatives raised the Ross Dam case from what, in the larger view, was a modest project with localized impacts to a textbook example of international conflict resolution.[34]

An important first step was the appointment of a team of special advisors, Douglas J. Gordon and George T. Berry, with impeccable credentials for expertise and impartiality, to work with the advisors to the Commission.[35] These special advisors arbitrated the data base and the complex technical issues pertaining to costs and output of High Ross and of the most likely British Columbia alternatives for providing equivalent power to Seattle. The difficulties of estimating and gaining agreement on these points should not be underestimated. The output of a complex hydropower project such as Ross Dam and the two related downstream plants depends on many factors, including the amount and timing of precipitation and runoff; the operation of the powerplant in the Skagit River system and in Seattle's total generating system; and the shape of Seattle's electricity load curve and the possibility of selling surplus output to other utilities. Related with these factors are the kinds of output that

32. LaRoche interview, *supra* note 29, and Royer interview, May 25, 1983, *supra* note 30. *See also* Vancouver Sun, *supra* note 31.

33. Treaty Relating to Boundary Waters and Questions Arising between the United States and Canada, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548, opening paragraph.

34. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); R. FISHER & W. URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

35. Mr. Gordon and Mr. Berry were recently retired chief executive officers of Ontario Hydro and The Power Authority of the State of New York, respectively.

are physically producible: capacity to meet short-term or sustained peak demands, average firm energy, and marketable secondary energy. All of these factors must be considered over time, that is, over the life of the project. Such issues had contributed to breakdown of the earlier, bilateral negotiations. The progress toward agreement on the complex technical issues facilitated by the Gordon/Berry Report was a notable achievement.[36]

Another important step taken by the IJC was to bring the contending parties back into negotiating mode. This required shaking the confidence of both parties in achieving an ultimate victory at the expense of the other. In December 1981 the IJC paid a visit to British Columbia to convey the message that it "should not make the mistake of simply assuming that [the Commission] would go through the regular drill in processing the province's request and they would certainly make a grave error in assuming the Commission would rule positively on that request." The IJC then delivered a similar message in Seattle, to the effect that "any idea that they could under present circumstances willy-nilly construct the dam, regardless of what they thought their authority to be, was a pipe dream, that they had better ground themselves in reality and realize that it wasn't going to be quite that easy. And, they had no way to guarantee that [the Commission] would dismiss British Columbia's request."[37]

Both Seattle and British Columbia were told that they should start anew looking for a way to come to some kind of agreement. The response of the contending parties was unenthusiastic. The long and unsuccessful period of bilateral negotiations (1974 to 1980) had left both parties frustrated and mistrustful.[38]

Then, a few weeks later, the Commission convened the parties in the IJC's Washington, D.C. office and made it clear "that the two could no longer sit idly waiting for something to happen," and that they were expected to reach an agreement.[39] In short, the responsibility was put squarely on Seattle and British Columbia; the IJC showed no intention of extricating them from the dilemma. The IJC also gave the parties a preview of the Supplementary Order, to be issued shortly, and told them that the IJC found British Columbia's request "without merit" but was not dismissing it, and that one year would be allowed for reaching a

36. Gordon & Berry, *supra* note 15, at 6.

37. LaRoche interview, *supra* note 29.

38. *Id.*; interviews with Marr and Royer, *supra* note 30. *See also* Pertinent Correspondence, *supra* note 7.

39. LaRoche interview, *supra* note 29.

settlement. Both parties were made to feel at risk, facing the possibility that either one could lose outright.[40]

In February 1982 the Commission requested a report from the special advisors to cover "determination of agreed figures and formulas to assess the benefits which Seattle will forego" by not building High Ross, and "determination of a preferred mechanism for implementing alternative means" to provide Seattle with equivalent benefits.[41] This report, dated April 12, 1982, verified the benefits and costs of High Ross to Seattle, eliminated certain alternatives from consideration because of costs or poor match with High Ross, and identified promising alternatives, namely raising Seven Mile Dam and adding a fifth generator at Mica Dam.[42] These alternatives had been considered in the earlier negotiations between Seattle and British Columbia, but the Gordon/Berry Report lent them added credibility. The report established the technical and economic feasibility of the "paper dam" concept, and arbitrated the data base, providing a set of economic and technical assumptions and conclusions which had earlier been in dispute.[43] Interestingly, a similar "paper dam" concept—a contract agreement—whereby Seattle would pay British Columbia the costs of building and operating High Ross, and British Columbia would provide power equivalent to High Ross in exchange, had been proposed in the earlier negotiations.[44]

Having set the stage for renewal of negotiations and armed with the analyses provided by the expert advisors, the IJC issued the Supplementary Order on April 28, 1982.[45] In the Order the Commission addressed both policy and procedure. It declined to grant British Columbia the relief sought in the 1980 Request, saying that the arguments presented "do not constitute sufficient grounds to persuade [the Commission] to exercise its jurisdiction."[46] The Commission referred to its responsibility to prevent disputes, ordered Seattle to maintain Ross Dam at its existing height for one year, and stated that the Canadian Skagit Valley should not be flooded

40. The details of the events preceding issuance of the Supplementary Order are from interviews with LaRoche, *id.*, Marr and Royer, *supra* note 30, and also a short conversation with Geoffrey Thornburn, Secretary of the Canadian Section, IJC (Aug. 4, 1983).

41. Gordon & Berry, *supra* note 15, at 3.

42. *Id.* at 30.

43. *Id.* at 3.

44. Pertinent Correspondence, *supra* note 7.

45. International Joint Commission, In the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River approximately 130 Feet at the International Boundary between the United States and Canada, Supplementary Order, Ottawa, Ontario (Apr. 28, 1982), *reprinted in* CARROLL, *supra* note 5, as Appendix 6 at 370 [hereinafter cited as 1982 Supp. Order].

46. *Id.* at 371.

beyond the current level provided that Seattle receives "appropriate compensation in the form of money, energy, or any other means . . .for the loss of a valuable and reliable source of power."[47] The order pointed out that the IJC was not obligated to make a final resolution, but would retain jurisdiction. It indicated that the Commission reserved the right to "make such further Order or Orders . . . as may be necessary."[48]

The procedural step was to announce that the Commission would appoint a Special Board composed of two members of the Commission and two non-governmental experts, and would invite the two federal governments, the Province of British Columbia and the City of Seattle, each to nominate a representative to be a member of the Board. The Board was to coordinate, facilitate, and review on a continuing basis the negotiation and implementation of a mutually acceptable agreement. A forcing provision was that the Special Board was to provide status reports to the Commission every four months regarding progress.[49]

The composition of the Board was important. It was recognized from the outset that a treaty would be necessary as well as other implementing measures, including an agreement between British Columbia and Canada, that were beyond the authority of either the province or the city. The participation of the federal representatives was important to ensure the necessary cooperation of the variety of entities that would be involved in the implementing measures and guarantees at the federal level. It is significant that this was the first time the federal governments were represented at the High Ross negotiating table, giving the parties assurance that the federal governments were committed to reaching and implementing a solution. The federal and Commission representatives on the Board also implied a "policing" presence.

In summary, the IJC had deferred the final decision, returned the parties to the negotiating table with a firm deadline in the presence of and with the support of federal authority, and exerted pressure to ensure a good faith negotiation. Through the Gordon/Berry Report, the IJC provided an authoritative informational basis for resolving the many technical difficulties in calculating the costs and benefits of High Ross and of an equivalent alternative. In the same stroke, the IJC discomfited the parties with the awareness that they could lose the entire game if an agreement had not been reached during the grace period.

The package proved to be a bold and effective set of initiatives; however, belief that the process had a chance of succeeding required an act

47. *Id.*

48. *Id.* at 372.

49. *Id.*: later renamed Joint Consultative Group to emphasize that it was an advisory rather than a decisionmaking entity.

of faith by the IJC and by the participants. The process nearly broke down on several occasions during the one-year negotiation period. Repeatedly the IJC reminded the parties that they had to make some sacrifices, that there was "only one way out," and that both were responsible for the higher interests of both countries.[50]

There is no public record of the negotiation proceedings. The available record is only partial and is based on recollections and anecdotal accounts of participants. After several meetings of the Joint Consultative Group, and as a result of commitment, hard work, faith, and possibly also luck, Seattle Mayor Charles Royer and British Columbia Premier William Bennett jointly released a "framework agreement" in April 1983.[51] This was followed by drafting of an agreement between Canada and British Columbia[52] and of a treaty between Canada and the United States. After some further refinement of details, the final Agreement was completed on March 30, 1984, ending a corrosive controversy that had persisted for more than a decade.[53]

THE AGREEMENT AND THE TREATY

The Agreement between British Columbia and Seattle is a complex document with many intricacies covering a variety of contingencies. The following discussion is a substantial simplification. The four essential components are: 1) an energy contract (the "paper dam," as it came to be known); 2) a termination option; 3) an environmental endowment fund; and 4) the implementing treaty. The key element of the Agreement, of course, was the energy contract.[54]

The Paper Dam

The basis of the British Columbia-Seattle Agreement is the principle that Seattle would forego building High Ross if the parties could find a way, at no additional cost to Seattle, to substitute similar resources for those Seattle was entitled to by the 1942 Order and the 1967 contract. After the IJC issued the 1982 Supplementary Order, British Columbia and Seattle set out together to build the dam not of concrete, but of paper. In the resulting contract, Seattle agreed to pay British Columbia the estimated cost of constructing, financing, and operating High Ross.[55] In

50. LaRoche interview, *supra* note 29.

51. Province of British Columbia Ministry of Environment and City of Seattle Office of the Mayor Joint News Release, Skagit Details Released, (Apr. 14, 1983).

52. Canada-British Columbia Agreement (unsigned copy dated Dec. 8, 1983, in author's file).

53. Agreement, *supra* note 12.

54. Overlying the Agreement, *supra* note 12, is the Treaty, *supra* note 12. The two are highly interrelated; comments made in discussing one may also pertain to the other.

55. Agreement, *supra* note 12, § 5 at 7.

return. British Columbia agreed to supply Seattle with the estimated equivalent electrical output of High Ross.[56]

The term of the agreement is eighty years, from 1986 to 2066.[57] This is based on the remainder of Seattle's 99-year entitlement to the High Ross reservoir under the terms of the 1967 compensation contract. The agreement also reflects the fact that most of the delay since 1967 occurred in the United States as a result of licensing procedures, environmental studies, and legal challenges. In addition, it acknowledges the assumption that if Seattle began High Ross construction in early 1983, power generation would be expected to begin in January 1986. This, then, is the date of first power delivery to Seattle under the Agreement.[58]

The contract required Seattle to pay British Columbia $21,848,000 (U.S.) annually for 35 years.[59] This payment schedule is the same that Seattle would have followed had it borrowed the money necessary to finance High Ross construction. It was assumed that Seattle would have issued bonds covering the $208 million capital cost at an interest rate of 10.127 percent, the rate Seattle actually paid on an entirely separate bond issue in December 1982.[60] Seattle will also pay British Columbia an annual operation and maintenance charge throughout the 80-year contract period. This payment will be $100,000 (U.S.) in the first year, and thereafter will be adjusted annually according to changes in the U.S. Consumer Price Index.[61]

In return, British Columbia will provide 37.3 average megawatts of firm energy on a seasonal schedule similar to that which High Ross would have produced, and must cover the transmission costs to deliver the power to Seattle because Seattle could have transmitted the High Ross output over its existing transmission lines.[62] In addition, British Columbia will provide peaking capacity as follows: 150 megawatts from April through October, and 532 megawatts less actual production of existing Ross Dam from November through March.[63]

If British Columbia defaults on this obligation, Seattle may gain access to other British Columbia power, for example, a portion of British Columbia's power entitlement under the Columbia River Treaty. This is

56. *Id.* § 4 at 7. It is beyond the scope of this article to analyze the technical bases for the power and cost calculations. The authors accept the figures established in the Agreement which, in turn, are based on the Gordon & Berry Report with some modifications.

57. *Id.* § 2 at 6.

58. *Id.* § 4 at 7. *See also* Seattle City Council, Briefing Papers, *supra* note 2.

59. Agreement, *supra* note 12.

60. Seattle City Council, Briefing Paper, *supra* note 2, at Tab. 3.

61. Agreement, *supra* note 12, § 5 at 7.

62. Personal interview, J.K.K. with Ray Nelson, Power Manager, Seattle City Light, Feb. 28, 1985.

63. Agreement, *supra* note 12, § 4 at 7.

British Columbia power generated at United States dams using releases from storage reservoirs built in Canada under terms of the Columbia River Treaty.[64]

British Columbia also is permitted to raise the reservoir level behind its Seven Mile Dam on the Pend Oreille River an additional 15 feet, which will allow B.C. Hydro to produce a significant portion (about half the average annual energy though a lesser amount of the capacity) of the power it must deliver to Seattle.[65] Raising the Seven Mile Reservoir will result in less than 200 acres of additional flooding; approximately three-quarters of this will occur in British Columbia. At normal full pool, a maximum of fifty acres will be flooded in Washington State, fortuitously on property owned by Seattle downstream from Seattle City Light's Boundary Dam.[66] British Columbia will compensate SCL for losses in power generation at Boundary Dam resulting from tailwater encroachment caused by the higher Seven Mile Reservoir.[67] Seattle agreed to cede its land holdings in the Canadian Skagit Valley back to the province.[68] This was land which had been purchased in 1929 from private owners.

Further, both parties agreed to create an Environmental Endowment Fund to repair and enhance the environment surrounding the existing Ross Reservoir and improve public access to the area. If feasible, Manning Provincial Park in British Columbia may be linked with the North Cascades National Park on the United States side of the border by a trail system. The fund is to reach $5 million (U.S.) in four years, with Seattle contributing eighty percent. Over a ten year period, the majority of the expenditures are to be made in British Columbia. In part, these differentials reflect the damage to the environment caused by the existing Ross Reservoir. Both Seattle and British Columbia will supplement the fund with a surcharge on the energy each receives from the Agreement. This surcharge is not to exceed twenty cents per megawatt hour. An Environmental Endowment Commission comprising four representatives appointed by the Premier of British Columbia and four by the Mayor of Seattle will administer the fund and develop plans and programs for the area.[69]

The Agreement spells out procedures for resolving disputes which might arise in operating the "paper dam," a consulting board for low

64. Treaty with Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, United States and Canada (Jan. 17, 1961) (eff. 1964), Art. IV and V, 15 U.S.T. 1555, Pt. 2, T.I.A.S. No. 5638; and Agreement, *supra* note 12, § 9-D-(i) at 10.

65. Agreement, *supra* note 12, § 7 at 8; Gordon & Berry, *supra* note 15, at 36.

66. Seattle City Council, Briefing Papers, The Proposed High Ross Settlement: Seattle and British Columbia Perspectives 4 (1983).

67. Agreement, *supra* note 12.

68. *Id.* at § 12 at 11.

69. *Id.* at § 11 at 11 & App. D at 38. Author J.K.K. is an alternate member of the Commission.

level disputes, and an arbitration tribunal for more serious matters.[70] The Agreement requires the two parties to meet at least once every ten years to review possibly mutually beneficial changes in the Agreement.[71]

Seattle and British Columbia agreed to have the IJC dispose of the 1942 Order.[72] In doing so, the parties consented to abolishment of Seattle's original claim to High Ross, while replacing it with a completely new set of rights and conditions under the Agreement and Treaty.

The Termination Option

After 1991, either party may terminate the paper dam according to the procedure laid out in the Agreement. Either party may unilaterally initiate a termination by giving a formal notice of its intent. This notice triggers a one-year review period during which the notifying party may unilaterally withdraw its notice. If it is not withdrawn, a five-year notice period commences and can be withdrawn only by consent of both parties. Once the full five-year notice period elapses, the energy contract is terminated. The two parties may mutually agree to an earlier termination.[73]

If Seattle terminates the paper dam, it simply ceases its obligation to make capital, operation, and maintenance payments to British Columbia and forfeits all interest in the energy deliveries and any future claim to High Ross.[74] If British Columbia terminates the paper dam, matters are much more complicated. In this case, Seattle receives the unconditional right to immediately construct High Ross Dam and raise Ross Reservoir the additional 122.5 feet. Seattle retains this right for the duration of the Agreement, until 2066. If Seattle chooses to raise Ross Dam, British Columbia would have to pay Seattle the lesser of the project construction costs or a sum sufficient to acquire equivalent electrical power less the value of Seattle's remaining scheduled capital payments. If British Columbia commits a material breach of the contract, it may lose its right to the higher Seven Mile Reservoir.[75]

If Seattle declines to build High Ross immediately, then British Columbia must still reimburse the city in the same manner. This least-cost provision anticipates the possibility of less expensive resources becoming available at some future time, for instance in the event that a new and lower cost generating technology is developed.[76]

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70. *Id.* at § 10 at 10.
71. *Id.* at § 8 at 8.
72. *Id.* at § 2 at 6.
73. *Id.* at § 9 at 8.
74. *Id.*
75. *Id.* at § 9 at 10.
76. *Id.* at § 9 at 9.

The Treaty

The Treaty is the Agreement's implementing instrument.[77] Had it not been ratified, the British Columbia-Seattle Agreement would have been called off. The Treaty establishes one of the most important features of the arrangement, the federal guarantees. The Treaty directs the federal governments to "endeavor to ensure" that the parties fulfill their obligations under the Agreement, and should either party fail, the respective federal government is responsible for meeting all of that party's obligations.[78]

The federal securities are of great importance to the parties, particularly to Seattle, as British Columbia's word was considered suspect because the 1967 contract had not been honored. The Treaty defines the authorizations and conditions for operation of Ross and Seven Mile Reservoirs at the international boundary. It makes explicit Seattle's claim to High Ross if British Columbia terminates the paper dam.[79] In a sense, the Treaty is the enforcing mechanism in that it guarantees the various sanctions.

The Treaty establishes the authorizations for operating the reservoirs on the Skagit and Pend Oreille Rivers, requiring no further action by the IJC.[80] It sanctions all the commitments made under the agreement, and establishes the superordinate authority to enforce those commitments.[81]

It creates an immunity for Seattle's conditional claim (in the event of a British Columbian termination) to High Ross from any potential rulings, orders, or legislation by any government entity in the United States or Canada which would interfere with that right.[82] It requires Canada to modify its electrical export policies to permit British Columbia's long-term export contract.[83] This form of federal involvement, absent in the previous negotiation attempt, is a crucial factor in explaining the success of the 1982-83 negotiation effort.

The basic framework of the Treaty was formulated under the direction of the Joint Consultative Group, simultaneous with development of the Agreement, during the 1982-83 negotiation process. Subsequently, other implementing arrangements had to be made between the parties and their respective federal governments which validated the "federal securities"

77. Treaty, *supra* note 12.
78. *Id.* Art. IV at 3.
79. *See id.* Art. II and III at 2.
80. *See id.* Art. II at 2.
81. *See supra* note 78.
82. Treaty, *supra* note 12, Art II at 2.
83. *Id.*

mechanisms. In the United States, this process proved to be far from automatic.[84]

The IJC had to coordinate with U.S. federal agencies which had not previously been involved in drafting the Agreement and Treaty. These agencies stood to gain very little from the conflict resolution, but their concurrence was essential. They were the Bonneville Power Administration (BPA); its parent, the Department of Energy; the Treasury Department; and the Office of Management and Budget.

BPA found itself in an awkward position because it wished to avoid the appearance of sanctioning the importation of low cost power from British Columbia while it was also struggling to adjust to the unanticipated power surplus in the Pacific Northwest. Understandably, BPA showed little or no interest in supporting the proposed Treaty and since BPA is an agency of the U.S. Department of Energy, whose support was required as a practical matter, ratification by the United States was, for a time, in doubt.

Another issue posed by the Treaty concerned the establishment of the federal guarantee mechanism. Seattle insisted on a Canadian federal guarantee of British Columbia's obligations, leading Canada to seek a reciprocal guarantee by the United States. This required that the U.S. Treasury Department participate as guarantor of Seattle's financial obligations, a difficulty because Reagan administration policies sought to restrict federal involvement in state and municipal affairs.

In both instances United States IJC Commissioner L. Keith Bulen personally interceded at the top levels of government to enlist U.S. agency cooperation in the final stages of Treaty creation. His success underscores the importance of personal and political influence in securing the support of peripheral actors who had not had the opportunity to "buy into" the negotiated settlement, and who might actually incur some sacrifices from it.

ANALYSIS

Several factors contributed to the success of the 1982-83 negotiations: the conflict-resolution approach taken by the IJC, changes in both the political and economic environments, the skill of the participants, and certain elements designed into the Agreement. These elements provide equity, flexibility, and security to the two parties. Ironically, the third party, the environment, is less well provided for.

Equity

Equity stems from the Agreement's fundamental principle of making

84. This and the following four paragraphs are based largely on the LaRoche interview, *supra* note 29, and subsequent telephone communication of Sept. 18, 1985.

Seattle whole at the same cost as High Ross and without building High Ross. The Agreement respected Seattle's property right in High Ross by virtue of the 1942 Order and 1967 contract, and on the other hand preserved the Canadian Skagit Valley from further inundation. This principle not only laid the basis for a feasible solution, but it was also a politically appealing concept, perceived as providing "honor and equity for all concerned."[85] British Columbia escaped from the onerous 1967 contract, Seattle could not reasonably expect anything more than a High Ross equivalent, and the IJC was freed from the prospect of having to make a unilateral decision which could not avoid being unpopular with one party or the other. The principle served as a standard of fairness in apportioning costs and benefits and aided in resolving the many complex technical and economic issues that had to be addressed in framing the Agreement.

Equity to the environment is more ambiguous, and involves two aspects. One aspect is that the Agreement does not *guarantee* that Ross Reservoir will not be raised and the Canadian Skagit Valley further inundated. Indeed, the Agreement guarantees Seattle that option if British Columbia terminates the Agreement before it has run its full 80-year term.[86] However, the equity here is that the destiny of the Canadian Skagit is entirely under the control of British Columbia, which is reassuring to enviromentalists, who perceived the province as having become defender of the Skagit.

The other and negative aspect of the environmental question is that the environmental damage that might have been caused to the Canadian Skagit Valley has been relocated and spread ("regionalized") over the entire B.C. Hydro system, and perhaps with impacts on the Columbia River with which the B.C. Hydro system is hydraulically integrated. The impacts at any part of the system will probably be very modest, perhaps even imperceptible, although Seven Mile may be an exception. After all, the total amount of electricity involved, and therefore the amount of manipulation of streamflows required, is very modest. But it should be recognized that some of B.C. Hydro's proposed projects now in the planning stage are environmentally controversial, and adding the commitment to Seattle to B.C. Hydro's future generation requirements could possibly lead to added environmental and political stress.[87] The current

85. *Skagit Victory for Everyone*, Vancouver Province, Apr. 15, 1983, at B2, col. 1.

86. Agreement, *supra* note 12, § 9 at 8.

87. British Columbia Utility Commission rate hearings, Jan. 1986, reported in 192 CLEARING UP 13 (Jan. 17, 1986) (weekly newsletter for western utilities published by Newsdata Service, Box 9157, Queen Anne Station, Seattle WA 98109). B.C. Hydro officials, questioned about new resources for meeting domestic load in addition to the Site C project on the Peace River, which is currently proposed for export of power to the United States, referred to the possibility of a 200 MW powerhouse at Keenleyside Dam on the Columbia River and also to a dam and powerhouse at the Murphy Creek site on the Columbia River approximately two miles upstream from Trail, B.C.

surplus of electricity both in British Columbia and the U.S. Pacific Northwest has produced a truce with the environmentalists but not an armistice.

Flexibility and Security

The termination option in the Agreement allows future decisionmakers a degree of flexibility, although their choices are restricted to a few discrete options as a compromise with security. Flexibility is especially important, given the lesson of the sharp changes in social values that underlay the Ross Dam controversy, and the inability to predict long-term energy requirements and future technological change.

At the other end of the spectrum, the Agreement emphasizes the security and protection of one party's interests if the other terminates unilaterally. The termination sections of the Agreement appear to provide that either party would be no worse off, and perhaps better off, should the other party choose to terminate the Agreement. Again, as noted above, the Canadian Skagit could be flooded if British Columbia terminates; the security provided the Skagit Valley is more conditional than that provided the two parties to the Agreement.[88]

Despite the flexibility and security built into the Agreement by the termination option, an 80-year energy contract involving substantial commitments is inherently risky, and is particularly sensitive to changes in energy economics. The two parties' exposure to risk changes over time, and in opposite directions. The Agreement moderates this risk exposure very even-handedly, but can not eliminate the risk. British Columbia is exposed to the risk that energy will escalate in value more than anticipated, facing the province with the choice of providing valuable electricity to Seattle that could bring greater returns in other markets, or terminating the contract. But there are disincentives to the termination option. Foremost, British Columbia would take the risk that Seattle would build High Ross. Also, the province would have to pay Seattle the cost of constructing High Ross should it terminate, and in effect would have provided free power to Seattle from 1986 to the year of termination. Moreover, the returns to British Columbia from investing Seattle's capital payments help insure the province against increases in the cost of meeting the commitment to Seattle. Finally, British Columbia's access to the very low cost increment of power resulting from raising Seven Mile Reservoir can be suspended if the province is in serious default of its obligations to Seattle.

Seattle's exposure to unanticipated changes in the future value of power runs in the opposite direction: lower-than-expected future value means that Seattle would have paid too high a price and could have obtained

88. Agreement, *supra* note 12, § 9 at 8; Treaty, *supra* note 12, Art II and III at 2.

equivalent power elsewhere at lower cost. Seattle could meet this issue by terminating and ceasing to make payment. However, the economic disincentive to early termination by Seattle is that after the thirty-five years of annual capital payments, the cost of the contract power drops to an almost trivial figure. Seattle maximizes its total net benefits only if the contract runs full-term, despite the fact that it could minimize capital outlay by early termination. The estimated "crossover year," the first full year in which High Ross "paper dam" power becomes less expensive to Seattle than purchasing equivalent power from the Bonneville Power Administration, is forecast to be about 1997. Over the life of the contract, the High Ross power is forecast to save Seattle City Light ratepayers 21.1 mills per kilowatt hour delivered (1983 data) compared to purchasing from Bonneville Power Administration.[89] Thus Seattle's economic incentive to terminate declines over time.

Summing up this discussion of economic risk, Seattle gets expensive power in the early years but is making a long-term investment in anticipation of future net benefits, exactly as would be the case had it proceeded with construction of High Ross. On the other hand, British Columbia can meet its commitment relatively painlessly in the early years because of its current surplus of generating capacity and the low cost of the Seven Mile increment, but must shoulder the greater gamble on the future. Acceptance of future risk is a burden the province has assumed for absolving itself from the 1967 contract and saving the Canadian Skagit Valley.

It should be noted, however, that the province's future risk is modest because the commitment to Seattle represents less than one percent of B.C. Hydro's total generating capacity. To Seattle, conversely, it represents an increment of about three percent in firm baseload energy and fifteen percent in highly valued peaking capacity.[90] In short, the economic incentives for termination versus adhering to the contract are nicely balanced on both sides of the border, regardless of unforeseen changes in the value of energy.

Beyond the balancing of economic incentives and disincentives are the arbitration procedures and the federal guarantees. The arbitration procedures provide a means to adjudicate grievances and award compensation for damages. The federal guarantees provide the essential "default insurance" which was absent in earlier settlement proposals. The Treaty, the highest form of a contract between sovereign states, guarantees per-

89. Seattle City Light, Memorandum to Ray Nelson from Al Yamagiwa, First-Year Cost Impacts of the High Ross Contract (Mar. 5, 1985) (1983 data).

90. Seattle City Council, Briefing Papers, *supra* note 2. These figures are 1983 estimates and vary with each utility's load and resource mix.

formance or compensation, and makes explicit at the national level the rights and conditions for operation of the energy contract, the Seven Mile and Ross reservoirs, and all variations of the termination option and the rights of the non-terminating party.

Durability and the Skagit Environment

The durability of the Agreement, of course, controls the fate of the Canadian Skagit Valley, concern for which triggered the controversy and ultimately the settlement. As noted, termination of the Agreement by British Columbia would expose the valley to inundation by High Ross, and the Agreement and Treaty leave no legal basis for objection should Seattle elect to exercise its option to construct. In a real sense, the valley environment is a pawn in the hands of power managers. Fortunately for the environmental interest, B.C. Hydro is an agency of the Province of British Columbia, and thus subject to the political process. At present, it is hard to imagine that the province would ever voluntarily trade the Skagit Valley for power or money, after having fought a long and fierce "holy war" for its preservation. Moreover, the changing economics of outdoor recreation with increasing population pressure and increasing scarcity value provide a measure of built-in protection. Presumably, too, the Environmental Endowment Fund will contribute to the valley becoming more than an outdoor recreation area, but rather a very special place, a symbol of international cooperation with the special values people attach to such symbols. Certainly the Agreement itself is already a monument to the international community of environmentalists who vowed fifteen years earlier to surrender no more of the Skagit to incremental development.

Will the Agreement run its full term and thus preserve the remaining Canadian Skagit Valley? The question can not be answered with certainty, of course, and the shifting values that led to breakdown of the 1942 and 1967 decisions encourage caution in hazarding prediction. Nonetheless, the equitable balancing of incentives and disincentives, of options and penalties, and the pervasive element of fairness suggest the Agreement is not only a durable, but also an exemplary instrument.

Finally, it can be argued that the political benefits which accrue invest the Agreement with enhanced durability. Seattle can claim it won a High Ross equivalent and that its concession of the dam was a praiseworthy contribution to preservation of the Skagit environment, thus scoring points with Seattle citizens, environmentalists, and the U.S. State Department.

British Columbia's prize is control of its Skagit Valley, an important political objective not only to environmentalists but also to the British Columbian citizenry as a symbol of the progress that had been achieved

in making its provincial government more sensitive to its political sentiments regarding natural resource management. The victory appeased the public's anger and frustration that its provincial government had so lightly handed over resources for convenient exploitation by its southern neighbor and bolstered Canadian nationalistic pride as well.

A more subtle, but perhaps more important, benefit to British Columbia is the opportunity to reestablish its credibility by fulfilling, through the Agreement, the longstanding obligation of the 1967 contract. This, of course, will require British Columbia's successful performance over the period of the Agreement, but it would seem foolhardy for the provincial government to turn its back on these political benefits and terminate the Agreement.

A MODEL FOR THE FUTURE

The High Ross Agreement was such an unexpectedly successful conclusion to a longstanding and seemingly intractable controversy that the observer inevitably looks for general applicability. Some of the procedures and strategies discussed above are transferable to other situations, but there were fortuitous changes in the environment surrounding the controversy that could neither be predicted nor produced on command. They were, simply, serendipitous.

First and foremost of the serendipitous factors was the growing awareness, beginning about 1981, that electricity surplus had replaced shortage in both British Columbia and the U.S. Pacific Northwest as the fundamental condition of the power planning environment.[91] Although a negotiated settlement might have been reached regardless, it seemed obvious during the 1982-83 negotiating period that British Columbia could supply power to Seattle in exchange for High Ross at little or no opportunity cost for at least an initial period of several years. By the time the British Columbia-Seattle Agreement was signed in 1984, the period of surplus power was being measured in decades, not years. This was reinforced by another factor: High Ross was to be essentially a *peaking* power project and the alternatives available to Seattle for acquiring peaking power were more expensive despite the general energy surplus in the Pacific Northwest. Thus it had become feasible for British Columbia to provide the equivalent of High Ross power, at least in the short run, and for Seattle to compensate British Columbia by an amount of money eqivalent to High Ross costs. The only alternative market available for British Columbia's surplus was in the southwestern United States, and this is constrained by limitations on B.C. Hydro's access to the Pacific Coast Intertie.

91. *See supra* note 13.

A settlement might well have been reached, but no amount of planning foresight or willingness to negotiate could have created the condition of complementarity which had arisen.

Another favorable factor that would not be generally applicable was the availability of Canadian power that was generated at U.S. powerplants as a result of upstream storage in Canada provided under the terms of the Columbia River Treaty (1961).[92] The share of the Treaty power to which British Columbia is entitled was sold to U.S. entities for a thirty year period dating from completion of each of the three upstream reservoirs, and these contracts begin to expire in the late 1990s. The physical availability of this power within the boundaries of the United States as backup security for the High Ross Agreement served to reassure Seattle of recourse in case of default by British Columbia.

Another favorable, and very site-specific, factor was the existence of B.C. Hydro's Seven Mile Dam on the Pend Oreille River immediately downstream from Seattle's Boundary Dam. Seattle was able to use its assent to raising Seven Mile as a bargaining chip. At the same time, the Canadian negotiators could reassure their constituents by pointing to the availability of increased, and low cost, power output at Seven Mile that was made possible by Seattle's agreeing to the inundation of its lands. Both the amounts of incremental power and land to be inundated are modest, but the point could be made that a concession had been won from Seattle. Had Boundary Dam and the lands below been controlled by some other entity, the concession would have been less meaningful and might not have been possible. Also, as noted, the possible loss of Seven Mile power provides an incentive for British Columbia to avoid default.

Somewhat more speculative than the preceding factors were the changes in the rules of environmental and utility decisionmaking that occurred during the 1970s in the United States, and Seattle and SCL were not insulated from these changes. The National Environmental Policy Act (NEPA) with its environmental impact statement and public participation requirements was passed in 1969.[93] In addition, open meeting and administrative procedure laws led to changes in administrative behavior—as it had generally affected public resource decisionmaking in the United States—that moved decisionmaking into the public arena and broadened the agenda of debate and the range of alternatives considered. Utility managers had to defend proposals before increasingly sophisticated and skeptical publics. In the electrical utility field the ethic of "utility re-

92. *See supra* note 64.

93. National Environmental Policy Act of 1969, Pub. L. 91-190 §§ 204 & 205, 83 Stat. 852 (codified at 42 U.S.C. § 4321 *et seq.*, (1976)).

sponsibility" which meant to provide capacity to meet all load growth, coupled with an unshakable faith in the price inelasticity of power demand, had dominated decisions for decades. In the 1970s this was challenged by the rising ethic of conservation and environmental protection. In the Pacific Northwest, the Pacific Northwest Electric Power Planning and Conservation Act of 1980 [94] was a very different piece of legislation from the earlier versions that had been designed and sponsored by utility leaders of the region. The difference reflected a fundamental shift in values, a lessening of the prestige of utility technocrats, and an ascendancy of the politician's skills in seeking accommodation among competing interests.[95]

In Seattle the shift in values had led in 1976 to a decision of the City Council to override the recommendation of SCL to acquire a ten percent interest in the Washington Public Power Supply System (WPPSS) nuclear plants 4 and 5. The Council's decision was based in part on a citizen-sponsored study, *Energy 1990*, which advocated conservation of electricity as an alternative to acquiring new generating capacity.[96] The subsequent problems of WPPSS demonstrated that electricity demand was indeed responsive to price. The termination of plants 4 and 5, which created the largest municipal bond default in U.S. financial history, validated the Council's decision against participating in the two projects and strengthened the hand of the public and the political decisionmaking apparatus in dealing with utility technocrats. It was the first time in modern history that a major recommendation of SCL had been rejected by the City Council. The reciprocal was that meeting future load growth became a shared concern of SCL, the Council, and, to some extent, the involved public. Although the WPPSS 4 and 5 decision did not directly involve High Ross, it conveyed the message that political leaders could make decisions on grounds other than engineering and economics. Neither Seattle nor British Columbia officially abandoned their positions until the negotiated settlement was reached, but there appeared to be a subtle shift from a focus on the legal issues to the possibility of a negotiated solution.[97]

Although the climate for a successful settlement had improved because of unanticipated and uncontrollable factors not directly connected to the High Ross case, there are lessons from it that have more general appli-

94. Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697 (codified at 16 U.S.C. 839 *et seq.* (1980)).

95. U.S. Dept. of Energy, Legislative History of the Pacific Northwest Electric Power Planning and Conservation Act, prepared by BPA Library, Portland OR, 1981. *See also* H. Rep. 96-976, Pt. II (Interior) and H. Rep. 96-976, Pt. I (Commerce). *See also* K. LEE & D. KLEMKA, with M. MARTS, ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST ch. V (1980).

96. Sugai, *The WNP 4 & 5 Participation Decision: Seattle and Tacoma—a Tale of Two Cities*, 1 NORTHWEST ENVT'L J. 45 (1984).

97. Gibson, *The Evolution of the High Ross Dam Settlement*, 2 NORTHWEST ENVT'L J. 1 (1985).

cability for the participants, planners, and environmental activists. One important lesson is to expect unexpected change. There should not be open-ended, unlimited term agreements. Course correction can be provided by building in requirements for periodic re-examination, sunset clauses, and re-opening provisions. Such conditions are not compatible with large capital investments, such as Ross Dam, but adjustments to them may be less costly than lengthy controversy. Seattle, relying on the 1942 order, incurred substantial costs in building Ross Dam to accommodate the fourth step. Had the Order provided for periodic re-examination or been for a certain period, Seattle would have planned and constructed differently, or at least anticipated the possibility of sunk costs.

The 1967 compensation agreement was anachronistic from the outset. Not only had the environmental movement become a force by then, but the earlier negotiation of the Columbia River Treaty made it clear that equitable apportionment of benefits and costs was the preferred underlying principle for shared international ventures.[98] Despite the Treaty experience, the 1967 agreement was based on the value of the land to be inundated rather than a sharing of the benefits, and with no provision for periodic re-evaluation even of the value of the land. True, British Columbia had the option to take the rental payments in power rather than cash but the basis of the power option was land rent rather than equitable sharing of benefits. Sharing the output of High Ross could have been based on some proportioning of the storage and head provided on the Canadian side of the border. Somewhere the principle of equitable apportionment that led to the 1961 Columbia River Treaty was lost in negotiating the 1967 Agreement between British Columbia and Seattle. The IJC should retain jurisdiction over all international agreements subsidiary to its basic orders, such as the 1967 agreement, in order to keep such derivative agreements consonant with changes in international comity.

But no modification in international decisionmaking procedures would have prevented the environmental storm that arose in the late 1960s. Seattle City Light managers, confident in the correctness of their High Ross position, appeared to have underestimated the strength of the environmentalists' position from the outset, and sought to meet environmental criticisms with a "father knows best" response. The environmentalists were not interested in compromise, nor in arguments about peaking versus other kinds of electricity or reduced reservoir drawdown, which SCL advanced in vain. The position of the environmentalists was clear and straightforward: no High Ross dam. Moderates who viewed High Ross

98. Johnson, *The Canada-United States Controversy Over the Columbia River*, 41 WASH. L. REV. 676, 758 (1966).

as less environmentally damaging than possible alternatives were quickly driven from the field.[99] During the long debate, the environmentalists had come to mistrust Seattle City Light.[100]

Thus, SCL's protestations that the vertical drawdowns of the High Ross reservoir would be substantially less than existing drawdowns (55 feet vs. 122 feet), and that the reservoir shorelands would be groomed carefully for aesthetic enhancement, fell on deaf ears. Communication between environmentalists and SCL approached zero. With Seattle-based and Vancouver-based environmentalists linked, the project and the credibility of the utility were in deeper trouble than proponents, guided by engineering and economic logic, recognized.[101] There were some possible compromises that SCL could have offered, such as iron-clad guarantees to reduce the vertical drawdown, to hold the reservoir full during the summer recreation season, and to groom the shorelands and the seasonally exposed mudflats and stump "farms." SCL might also have agreed to forego construction of the proposed Copper Creek Dam downstream from Gorge Dam, a project that would have been destructive of salmon-spawning habitat, bald eagles dependent on the spawned-out salmon, and the remaining white-water recreation on the Skagit River. But SCL was unable to convince environmentalists of its good intentions with respect to the first two points, and apparently unwilling to bargain away the Copper Creek option. The creation of an Environmental Affairs Division within SCL's bureaucratic structure was both too little and too late.

The case is a good example of a bureaucracy's failure to communicate on the basis of mutual respect and confidence with an underestimated constituency. The final chapter of the effect of environmental opposition to High Ross has not been written, but there is no question that the delay clearly helped to move the final decision from the era of development to the era of environmental protection. The lesson for bureaucracy is clear: environmentalists and other publics must be brought sincerely and openly into the planning process early, not for cooption, but for conscientious consideration of alternative views and possibilities. In hindsight, it is unfortunate that the formula of citizen participation in Seattle's WPPSS 4 and 5 decision was not also applied in the High Ross case. A municipal utility is a branch of government, and government must remain accessible and open to all responsible citizen input.

99. Personal experience of author MM, former member of the Board of the North Cascades Conservation Council (N3C).

100. *See, e.g.*, Beck, *The Incredible Ross Dam Story*, WILD CASCADES 5 (Aug.–Sept. 1970) (bulletin of the North Cascades Conservation Council). Most issues of this bulletin during the early and mid-1970s carried articles and editorials critical of the High Ross project and SCL, conveying the feelings of environmentalists in no uncertain terms.

101. Lane, *supra* note 5.

There are also lessons for the environmentalists. In the Skagit case, they were able to take advantage of political events such as passage of the U.S. National Environmental Policy Act and the Skagit issue's attainment of unusual significance, which repeatedly forestalled a High Ross decision and allowed environmentalists to buy time. Fate may not be so generous in every case. But for the changing environment of negotiation and its different personalities, a settlement satisfactory to the environmentalists might not have been reached. The Ross Dam decision should probably be considered more a victory for skillful political negotiation than for confrontational environmental politics, although confrontation did force both delay and review. In the end, foregoing High Ross Dam was the outcome sought by environmentalists, and the Environmental Endowment Fund and the promise it holds for enhancing the existing reservoir environment is clearly a victory, and no small one.

CONCLUSION

Construction of Ross Dam commenced in 1938 and conformed to the values of that time. Likewise, the settlement reached in 1983 conformed to the values of the new environmental ethic that arose in the 1960s. Least-cost electricity—and whatever economic development it might have fostered—was no longer the highest good. The early planners could not have foreseen the change in social values wrought by the environmental movement or that environmental values would take a place alongside conventional priorities.

The Skagit controversy was a political conflict. Although many legal issues were raised and thoroughly examined, it was not a legal conflict. It was an environmental conflict only in the sense that High Ross Reservoir was inconsistent with environmentalists' preferences. This in itself would have been insufficient cause to devise an elaborate agreement and treaty, and the scale of the High Ross impacts pales in importance compared to such transboundary environmental problems as acid rain or Great Lakes water quality.

At the heart of the political conflict lay matters of principle. Seattle expected, with justification, that one way or another, British Columbia should live up to its 1967 commitment. The province expected Seattle to be sensitive to its legitimate political dilemma and grant special consideration. Over time, the international dimension greatly compounded these issues, and without the successful intervention by the IJC, the elected officials in British Columbia and Seattle were unable to transcend the narrow purview of their own interests.

The IJC might have imposed arbitration. Instead, it required the two participants to hammer out a settlement, making their own painful trade-

offs and maximizing their gains wherever possible. Instead of an imposed settlement, which might have caused more friction, British Columbia and Seattle are now able to live with their own Agreement, and with an understanding of the many limiting technical, economic, and political constraints embedded in it. In fact, the two parties may have maximized their separate interests; if so, the Agreement has achieved *Pareto optimality—neither one could be made better off without making the other worse off.*[102]

The High Ross solution is an example of conflict resolution at its best. The fact that certain fortuitous changes had occurred in the external environment does not detract from the skill, commitment, and efforts of the negotiators, nor from the IJC for its perceptivity in recognizing the possibilities offered by the changed environment and the willingness to risk an unconventional approach.

The Agreement was the right solution at the right time. All three sides of the controversy won: British Columbia, Seattle, and the environmental community. And a corrosive factor in the relationship between Canada and the United States has been removed.

102. Testing this possibility is beyond the scope of this article, but the authors suggest that such a test would be a useful research project.