

COLUMBIA RIVER TREATY & WOTUS RULES UPDATES

Henry's Fork Watershed Council

Jerry R. Rigby

Rigby, Andrus & Rigby Law, PLLC

COLUMBIA RIVER TREATY

Finalized in 1964, the Columbia River Treaty (“CRT”) governs Columbia River flows for flood control and power generation.

- a. 8,950,000 acre feet: Guaranteed flood control space in Canada.
- b. 2024: Flood control changes from “guaranteed” to “called upon.”
- c. “Called Upon”: Canada will mitigate floods that “could not be adequately controlled by all the related [U.S.] storage facilities” existing in 2024.
- d. Canadian Position: “Called upon” obligates the United States to use all available storage before looking to Canada for help. This includes reservoirs not historically used or authorized for Columbia River Basin flood control.
- e. Agreement with Wash. & Ore. that “revised treaty” should include Ecosystem elements which were not included in 1964 Treaty.

THE IDAHO STAKEHOLDERS' POSITION

- Hydropower
- Flood Control
- Ecosystem Function

HYDROPOWER

The Canadian Entitlement should be rebalanced to reflect actual value of coordinated operations.

- a. US is currently paying substantially higher Entitlement Payments than Market Price.

FLOOD CONTROL

- CRT flood control provisions should be renegotiated prior to 2024 to provide for coordinated flood control operations consistent with the guaranteed flood control operations that have been in effect since the CRT was initially executed.
- Should be no additional flood control obligations placed on Idaho's storage projects, water facilities or water users. The term "Idaho's storage projects" includes the private and federal storage projects in Idaho or on rivers forming the Idaho border.

FLOOD CONTROL (Cont.)

- “Effective use” of the US storage system should not place any additional flood control obligations on Idaho’s storage projects or water facilities and should not alter or affect Statebased water rights, State Laws or Congressional Authorizations, including the Snake River Water Rights Agreement (i.e. the Nez Perce Settlement Agreement) of 2004, in any manner.

ECOSYSTEM FUNCTION

- 1. The US Entity should reconsider and eliminate Ecosystem Function as an additional purpose of the CRT.
- A. Habitat and other ecosystem functions are already addressed under current US and State-specific laws and regulations – including, but not limited to, the Endangered Species Act and the Clean Water Act.
- B. These laws and regulations impose conditions and limitations on the use and development of Idaho's water resources and are sufficient to protect the ecosystem functions of the Columbia River Basin.

ECOSYSTEM FUNCTION (Cont.)

- 2. Any Ecosystem Function that may be included in a renegotiated CRT should not affect Idaho storage projects, water facilities or water users and must not alter any state-based water rights, State Law or Congressional Authorizations.
- A. This includes, but is not limited to the 2004 Snake River Water Rights Agreement (i.e. the Nez Perce Agreement), which was ratified by Congress. See Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, 3431 (div. J, title X of Consolidated Appropriations Act of 2005). The agreement includes several components – including a flow augmentation component that provides for the annual release of up to 487,000 acre feet of water in the Snake River Basin. The obligations and protections of Nez Perce Agreement should not be altered as a result of any renegotiation of the CRT.

NEGOTIATION PROCESS & TERMINATION

- Modernizing the CRT should be accomplished through an amendment, minutes or other similar process and should be limited to addressing.
- (1) the Canadian entitlement and
- (2) post-2024 flood control operations
- Possible Termination of Treaty by either Party.
 - If, at any time the US Entity determines that substantive negotiations are not making progress toward a renegotiated CRT, a Notice of Termination should be submitted.

Potential Impacts of Altered Flood Control Ops.

- From 1999 BOR Report analyzing removal of 1,000,000 AF./year.
 - Loss of annual production ranging from \$90 million to over \$240 million
 - Loss of annual income ranging from \$46 million to over \$80 million
 - Loss of annual hydropower generation exceeding \$2 million
 - Loss of annual recreational value ranging from \$4 million to over \$13 million
- Reduced reliability of water supplies may impact future projects, including recharge operations
- Impacts to barging resulting from reduced summer/early fall flows in the lower Snake
- Altered habitat for spawning downstream of Hells Canyon Complex
- Reduced recreational days during the summer months, which cost local recreation-based economies millions of dollars in lost revenue.

ADDITIONAL POTENTIAL IMPACTS

- Reduced allocation for irrigation, hydropower, recreation, fish and wildlife flows and other uses
- Reduced reliability of flow augmentation under the 2004 Snake River Water Rights Agreement
- Lost hydropower generation opportunities when augmented flows to increase flood control space exceed generation capacity
- Altered access for boating recreation, State Parks, wildlife refuge/conservation areas, etc.
- Altered tailwater fisheries and downstream river rafting opportunities (commercial & public)
- Increased reservoir water temperatures, resulting from drafting below minimum pool elevations, encouraging greater aquatic growth, which may negatively impact fish productivity in the reservoir and downstream and may cause reservoirs to draft below minimum pool requirements implemented to protect ESA/Threatened species as outlined in existing BiOps
- Increased reservoir turbidity due to increased sedimentation from unstable shorelines, additional landslides, and exposing possible mine waste
- Reduced reliability of flow augmentation or ability to provide minimum flows assumed during the development of the BiOp.
- Several others ---

WOTUS – UPDATE

(Waters of the United States)

- Late 1980s, Rapanos filled 22 acres of what was claimed to be a wetland that he owned with sand, in preparation for the construction of a mall, without filing for a permit with EPA under the CWA.
- Rapanos claimed that his land was up to 20 miles from any navigable waterways as required by the CWA.
- Found guilty as term "navigable waterway" has been broadly interpreted by Corp & EPA to include areas connected to or linked to waters via tributaries or other similar means.
- Appealed to Supreme Ct. 4 justices affirmed. 4 justices voted to vacate & strike down the Corps interpretation of the CWA, & to remand under a new "continuous surface water connection" standard. Kennedy also voted to vacate and remand but under the different, "significant nexus," standard.

Actions and Rulings Following *Rapanos*

- Citing the confusion created by *Rapanos*, on June 29, 2015, the Corps and EPA promulgated a new 75-page regulation attempting to clarify the scope of WOTUS. (The WOTUS Rule)
- Many states and agricultural groups saw the WOTUS Rule as an unlawful attempt to expand federal jurisdiction over water that had previously been only under state jurisdiction (e.g., prairie potholes).

Preliminary Injunctions (August 2015)

- ND along with Idaho and 11 other states that filed in the US District Court for ND were granted a preliminary injunction, but the Court refused to extend it nationwide.
- The remaining challenging states (31) and industry groups sought and were granted a nationwide stay from the 6th Circuit on October 9, 2015. As a result, the Agencies resumed nationwide use of the prior rules defining the term “waters of the United States.”

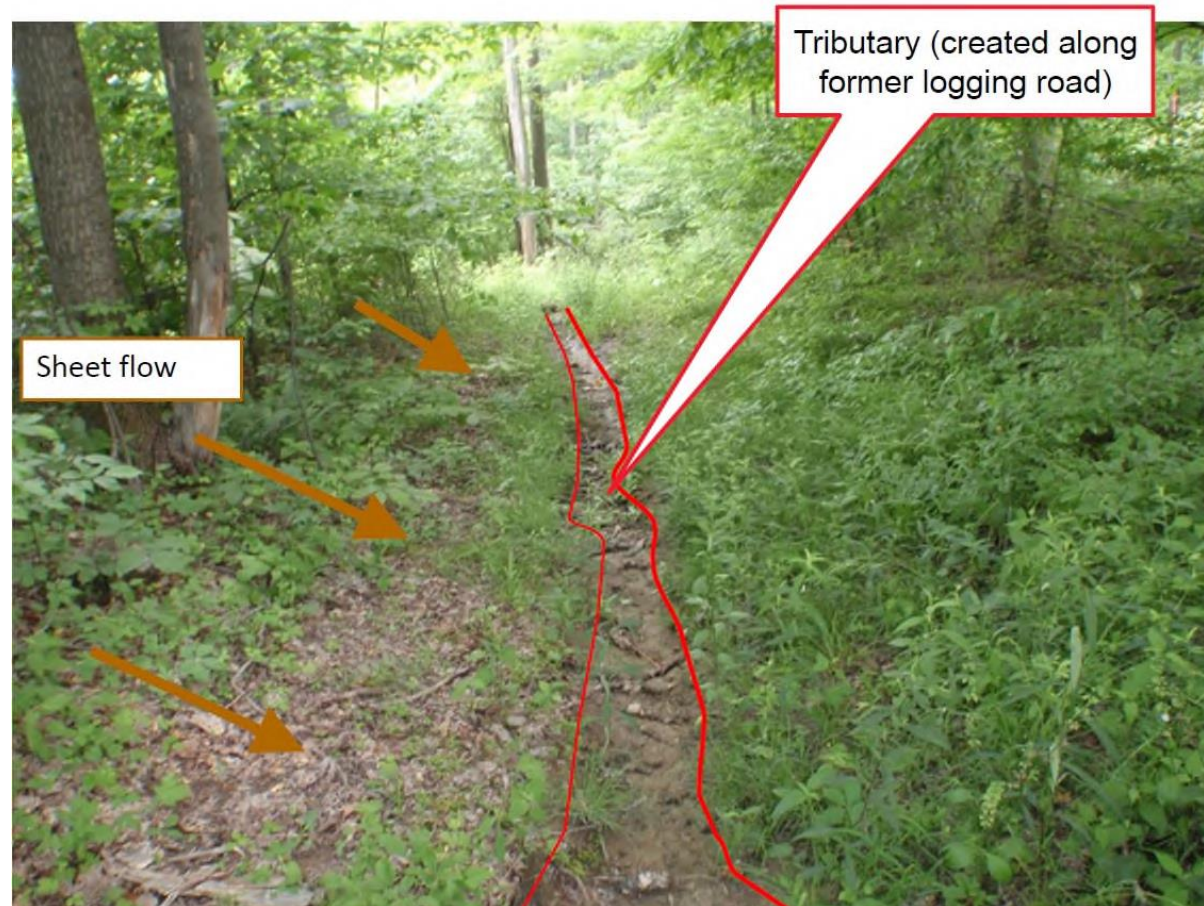
WOTUS Rule did three things:

- (1) Listed waters covered under the Clean Water Act,
- (2) Listed specific exclusions,
- (3) Defined terminology.

This feature was deemed to be a “water of the United States” in 2014 after the Corps concluded that it exhibits an ordinary high water mark.



Because the red lines likely constitute an “ordinary high water mark” with a bed and banks between them, likely to be a “navigable water” under the Rule’s definition of a tributary



Jurisdictional Issues (Fall 2015 - January 2018)

- The 6th Circuit first addressed the jurisdictional issue:
 - All the district court cases were eventually stayed or dismissed due to the 6th Circuit case.
 - On February 22, 2016, the 6th Circuit issued a ruling that it – not district courts – was the proper court to hear the challenge to the rule. It was a 1-1-1 decision. The 6th Circuit jurisdictional ruling was appealed to the Supreme Court. Order held in abeyance.
- On January 22, 2018, the Supreme Court reversed the 6th Circuit's jurisdictional ruling, holding that the challenges are subject to review in the district court and instructing the 6th Circuit to dismiss the case for lack of subject matter jurisdiction.
- On February 28, 2018, the 6th Circuit issued an order dismissing the case. The nationwide stay was vacated.

Merits Litigation at District Courts (January 2018 – ongoing)

- Attention then shifted back to the district courts for decision on the merits. The ND case was the furthest along.
- On January 26, ND and 6 other states filed a motion to lift the stay entered May 24, 2016, and set a briefing schedule for a merits decision.
- On March 23, magistrate judge grants ND's motion to lift stay and denies Agencies' motion for further stay. Agencies appeal to Judge Hovland, which he denied on May 1.
- On August 22, 2018, the Court held a status conference where the parties discussed plaintiffs' request for a hearing. Waiting to hear back from the Court on the hearing request.
- Movement also began in other cases, including states seeking preliminary injunctions in GA and TX coalitions.
 - Texas coalition argued for a preliminary injunction on February 22. On September 12, 2018, the Texas Court enjoined the WOTUS Rule in Texas, Louisiana, and Mississippi.
 - Georgia coalition (11 states) received preliminary injunction on June 8, 2018. Georgia court held that the States were likely to succeed on the merits on several of the same legal points ND made in its June 1 brief. On September 26, 2018, the American Farm Bureau filed a motion asking the court to expand the injunction nationwide.

Regulatory Efforts

- On February 28, 2017, the President issued an Executive Order directing EPA and the Department of the Army to review and rescind or revise the WOTUS Rule.
- On January 31, 2018, the Agencies published final rule adding an applicability date of February 6, 2020 to the WOTUS Rule. The Agencies' stated intent is to maintain the legal status quo of pre-2015 implementation, while continuing to review the WOTUS Rule.
 - The Delay Rule was subject to immediate challenge. At least three lawsuits have been filed. Two environmental groups in US District Court for SC and in the SDNY. 10 states and DC are challenging in the SDNY.
- Agencies are conducting a two-step rulemaking process to implement the February 28, 2017 Executive Order.
 - Step One: Establish the legal status quo by recodifying the previous rule (1986 definition of waters of the US). The Agencies issued a notice of proposed rulemaking on July 27, 2017. The comment period ended September 27, 2017. The Agencies issued a Supplemental Notice on June 29, 2018, which clarified that the Agencies are proposing to permanently repeal the WOTUS Rule in its entirety and provided an opportunity to comment on additional considerations that support the Agencies' proposed repeal. The comment period on the Supplemental Notice closed on August 13, 2018. The Agencies are reviewing comments and reportedly do not plan to issue a final rule until March 2019. "Proposed Recodification Rule."
 - Step Two: Propose a new definition to replace the WOTUS Rule, taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality. The Agencies held stakeholder meetings in the fall of 2017. On June 15, 2018, the Agencies sent a proposed rule to the White House Office of Information and Regulatory Affairs. The Agencies are reportedly issuing a proposed rule this month with a final rule by September 2019.
 - EPA has indicated they do not plan to finalize the "Proposed Recodification Rule" until they are ready to publish the new proposed rule.

Tump's Direction to EPA

- “The president directed EPA to issue a new Clean Water jurisdiction rule,” “And he encouraged EPA to issue a rule that would be as narrow about federal jurisdiction as [Justice Scalia's concurring opinion in the Rapanos case](#).” In that 2006 opinion, Scalia wrote
- *The phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams, oceans, rivers, [and] lakes,” Webster’s New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.*

Latest Court Actions

- On August 16, 2018, the South Carolina court granted a motion for summary judgment against the “Suspensions Rule” and enjoined the rule nationwide and reinstated the WOTUS Rule in the 26 states (not Idaho) where the WOTUS Rule had not been preliminary enjoined. The SC court agreed with environmental groups that the Agencies failed to follow notice and comment requirements required under the APA. Parties are appealing.
- An EPA spokeswoman said in a statement: "EPA and the Army Corps will review the order as the agencies work to determine next steps."