

Washington Journal of Environmental Law & Policy

Volume 2 | Issue 1

6-1-2012

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Recommended Citation

A. P. Firuz, Notes and Comments, *Looking Forward: The Columbia River Treaty*, 2 WASH. J. ENVTL. L. & POL'Y 170 (2012).

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LOOKING FORWARD: THE COLUMBIA RIVER TREATY

*A. Paul Firuz**

Abstract: Since 1964, the Columbia River Treaty has shaped the joint use of the Columbia River by the United States and Canada. The Treaty will be impervious to change until 2024, but either party may give notice of an intent to alter it as soon as 2014. Since the Treaty's ratification, changes in United States domestic law have reflected a shift in attitude toward the environment and the Columbia River. These changes have impacted the Columbia River's governance on the United States side of the border and though domestic law has evolved in response to environmental concerns, the Treaty has remained static. This comment posits that the Treaty as it currently stands is out of synch with the legal framework surrounding the River, and that the Treaty should be updated to more accurately reflect the cultural values and legal imperatives that have developed in the United States over the last fifty years. The comment offers several adjustments that might be made to the Treaty to bring it into accord with current governing principles in the United States.

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I. INTRODUCTION

The Columbia River (Columbia or the River) is the fourth

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largest river in North America,¹ and produces more hydroelectric power than any other river on the continent.² The Columbia carries roughly ten times as much water as the Colorado River, and about two and a half times as much as the Nile.³ Rising in Canada, the River cuts across the border into the United States through Washington State and reaches Idaho, Montana and Oregon, joining with numerous tributaries before flowing into the Pacific Ocean.

Over time, people living in the Columbia Basin have harnessed the River's waters to meet myriad human demands.⁴ Hydropower generation figures prominently among these demands: over half of the Northwest's electric power is generated through hydropower,⁵ the majority of which comes from the Columbia and its tributaries.⁶ The consequences of hydropower generation and its appropriate role on the River are still hotly disputed, and have produced a large body of litigation surrounding the use and administration of the Columbia.

Endeavors to capitalize on the natural wealth the River provides have produced a complex governance structure. In an attempt to more efficiently harness and utilize the Columbia's waters, Canada and the United States drafted the Columbia River Treaty (Treaty) in 1964.⁷ The Treaty was the result of a

1. Behind the Mississippi, Mackenzie and St. Lawrence, as measured in annual discharge (180 million acre-feet). GUS NORWOOD, COLUMBIA RIVER POWER FOR THE PEOPLE: A HISTORY OF POLICIES OF THE BONNEVILLE POWER ADMINISTRATION 6 (1981); Nat'l Wildlife Fed. v. Nat'l Marine Fish. Serv., 422 F. 3d 782, 788 (9th Cir. 2005).

2. U.S. ARMY CORPS OF ENGRS & BONNEVILLE POWER ADMIN., HISTORY AND 2014/2024 REVIEW 2 (2009), available at http://www.bpa.gov/corporate/pubs/Columbia_River_Treaty_Review_-_Feb_2009.pdf [hereinafter History and Review].

3. John Volkman, *The Law of the Columbia River*, in COMPETING FOR THE MIGHTY COLUMBIA RIVER – PAST, PRESENT AND FUTURE: THE ROLE OF INTERSTATE ALLOCATION, 1 Tab 1-2 (1998).

4. *Id.* at 12 (beyond power generation, other uses of the River include irrigation, navigation and recreation).

5. NW. POWER AND CONSERVATION COUNCIL, *Power Generation in the Northwest*, <http://www.nwcouncil.org/maps/power/print.pdf> (last visited Feb. 4, 2012) (hydropower accounts for about sixty-four percent of the Pacific Northwest's power capacity, most of which is generated on the Columbia and its tributaries).

6. *Id.*

7. Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, U.S.-Can., Jan. 17, 1961, 15 U.S.T. 1555, 542 U.N.T.S. 244, available at <http://www.ccrh.org/comm/river/docs/cotreaty.htm> [hereinafter Columbia River Treaty]. The Treaty was signed by the United States in 1961, but was not ratified in British Columbia until 1964.

decades-long project to evaluate the use of the River,⁸ and the two countries enacted it to increase the abilities of both nations to control flooding on the River and to facilitate more efficient generation of hydropower.⁹

By its terms, the Treaty is not amenable to change until sixty years after the date of ratification, with a requisite ten-year notice period to come before any proposed change.¹⁰ The soonest that either party could give notice of an intent to alter the Treaty is 2014. As the period for the potential to propose changes to the Treaty approaches, the River's administrators, as well as scholars and environmentalists, are discussing what, if any, changes ought to be made.¹¹ This comment examines the social and legal developments that have occurred in the United States since 1964, and argues that these changes should be reflected in the Treaty.

This comment begins with a look at the Treaty's history. Part II examines the Treaty's stated goals, as well as some of the substantive provisions that aimed to achieve those goals. Additionally, Part II posits that because the Treaty effectuated damming and alteration of the Columbia's natural flow, the Treaty dams (and perhaps, the Treaty itself) ought not to be excepted from the scrutiny which other dams on the Columbia have been subject. Part III explores the impact that the development of environmental law in the United States has played in the administration of the River on the American side in the time since the Treaty's enactment. This part argues that the shift in law on the River is illustrative of an underlying shift in the priorities, goals and values surrounding the usage of the River and its waters, and that this shift should be reflected in the Treaty if and when it is revisited. Part IV looks at the ways in which the Treaty might be altered in order to reflect the changed circumstances discussed in Part II. Rather than do away with the Treaty entirely, or significantly alter its

8. History and Review, *supra* note 2, at 2.

9. Columbia River Treaty, *supra* note 7, at pmb1.

10. *Id.* at art. XIX, ¶ 2.

11. History and Review, *supra* note 2, at 8; Matthew McKinney, et al., *Managing Transboundary Natural Resources: An Assessment of the Need to Revise and Update the Columbia River Treaty*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 307, 318 (2010) [hereinafter *Managing Transboundary Natural Resources*]; Becky Kramer, *Revisions to River Treaty Floated*, THE SPOKESMAN-REVIEW, Mar. 29, 2009, <http://www.spokesman.com/stories/2009/mar/29/revisions-to-river-treaty-floated>.

substantive provisions, this comment suggests that a more nuanced approach is possible that retains the positive value the Treaty has created while pushing the document to more accurately reflect the parties' intentions for the Columbia.

As the Treaty is not the sole—or even, perhaps, the primary—impediment to ecosystem health on the River, it should be analyzed for what it is: a piece of the legal framework governing the River. Because it has been impervious to change over the last half-century, it is possibly the only piece in the complex legal system that has not been susceptible to other interests on the Columbia. Accepting the Treaty as at least a partial success, in that it achieved its stated goals, this comment proposes that the ways in which the Treaty framed those goals is a static remnant of a bygone era. In the United States today, the body of environmental law that has accumulated since the drafting of the Treaty is substantial. Applying this body of environmental law to the Columbia River Basin would almost certainly make it impossible to contemplate the goals of hydropower generation and flood control to the exclusion of any consideration of environmental goals. Consequentially, the Treaty should be changed to more accurately reflect current attitudes, goals and priorities on the River.

II. LAYING THE GROUNDWORK: THE TREATY'S ACTION ON THE RIVER

The Columbia River Treaty did not introduce hydropower to the region, nor were its dams the first on the Columbia; many non-treaty dams produce hydropower along the River.¹² Thus, the alteration of the natural flow of the Columbia River, and the impacts of that alteration on the health of the river basin's ecosystem, preceded the ratification of the Treaty.¹³

12. For a complete list of hydropower projects in both Canada and the United States, see THE COLUMBIA BASIN TRUST, *A Guide to Major Hydropower Projects of the Columbia River Basin*, available at http://cbt.org/uploads/pdf/CBT_Hydropower_Dams.pdf.

13. Notably, both the Bonneville and Grand Coulee dams were operating in the United States before construction began on any of the Treaty dams. History and Review, *supra* note 2, at 2–3. “The creation of Bonneville and Grand Coulee Dams caused the river to be put to work for man and it has served man well. ... Today's problems arise because men, in their pell mell rush to achieve economic prosperity for the region, either overlooked or ignored the fact that they were changing the ecology of

Nevertheless, the Treaty stands as an important component of the governance structure of the River. The Treaty is also unique in that it has not been susceptible to the changes in environmental laws that have affected other aspects of the River's administration.

A. *The Treaty's Dual Animating Goals*

In 1948, after a major flood wiped out Vanport, Oregon (then the state's second largest city), the United States commissioned a study exploring its ability to control the Columbia's flow to prevent future floods of that scale.¹⁴ The study culminated in a plan to work together with Canada to harness the Columbia River.¹⁵ In the United States, there were already a number of federally-operated dams on the River, but the plan that the two countries envisioned created a vast quantity of storage, allowing for flood control that the preexisting dams were not capable of providing.¹⁶

The countries recognized that the significantly higher volume of storage required to control the River's flooding would also provide for an efficient means of hydropower generation. Thus, the Columbia River Treaty aimed both to tame the River's capacity to flood, and also to capitalize on the control of its flow to produce power. In essence, the Treaty is a highly technical document that cements an agreement to pursue the dual goals of flood control and power generation, which were its animating forces.¹⁷

The Treaty's ambitions are clear and unequivocal, and it does not contemplate anything beyond its specific objectives. Its preamble identifies its purpose as procuring flood control, power generation and economic benefit for the peoples of the United States and Canada.¹⁸ In furtherance of those goals, the Treaty established obligations and benefits for each country. In

the river." ORAL BULLARD, CRISIS ON THE COLUMBIA 15 (1968). At the writing of this book, the Treaty dams were still under construction; the author noted that there had already been substantial environmental impact as a result of hydropower generation on the River.

14. History and Review, *supra* note 2, at 3.

15. *Id.*

16. *Id.*

17. *Id.*

18. Columbia River Treaty, *supra* note 7, at pmb1.

keeping with its stated purpose, the Treaty focuses exclusively on flood control, hydropower generation and pecuniary remunerations for developments furthering those ends. The Treaty does not mention the ways in which the achievement of those goals might impact other aspects of life on the River or environmental concerns.

B. *Achieving the Treaty's Goals*

The methodology used to achieve the Treaty's goals was one of joint development wherein each country shared in the benefits produced by the terms of the agreement.¹⁹ In accordance with the downstream benefit theory, Canada (the upstream riparian) shares in the benefits that its storage provides to the United States (the downstream riparian).²⁰

Specifically, Canada agreed to provide 15,500,000 acre-feet of storage in the Columbia River Basin, in order to "improv[e] the flow of the Columbia River."²¹ This was accomplished when Canada built the three dams outlined in the Treaty.²² The storage provided by these dams is located on the Canadian side of the border.²³ The Treaty also gave the United States the option to build a dam on its side of the Kootenai River.²⁴ The United States took this opportunity and constructed a dam in Libby, Montana. Libby Dam's reservoir extends forty-two miles into Canada, and both countries share storage of its waters.²⁵ The storage capacity of these four dams together is more than twice the capacity available prior to the completion of the Treaty dams.²⁶ The volume of storage the Treaty provided has allowed the two nations to successfully control flooding on the Columbia for over half a century.²⁷ It also has allowed for a

19. LUDWICK A. TECLAFF, *THE RIVER BASIN IN HISTORY AND LAW* 167 (1967).

20. *Id.*

21. Columbia River Treaty, *supra* note 7, at art. II, ¶ 1.

22. *Id.* at art. II, ¶ 2(a)(b)(c), art. II, ¶ 3.

23. *Id.* at art. II.

24. *Id.*, at art. XII, ¶ 1.

25. History and Review, *supra* note 2, at 5. In Canada, the first three dams, Duncan, Keenleyside and Mica, were built in 1968, 1969 and 1973 respectively; Libby dam was completed in the United States in 1973. See also U.S. ARMY CORPS OF ENG'RS., *Libby – Tour the Dam, Introduction*, http://www.nws.usace.army.mil/PublicMenu/Menu.cfm?sitename=libby&pagename=Tour_the_Dam#LibbyDam (last visited Feb. 4, 2012).

26. History and Review, *supra* note 2, at 5.

27. *Id.* at 3–4.

regulation of flow that ensured the capacity to generate energy would be more dependable, enabling both countries to effectively harness more of the River's power.²⁸

Because power generation on the River would not have been possible in the United States without the construction of Canadian storage facilities, Canada received half of the power generated under the Treaty,²⁹ which it initially sold back to the United States for one lump sum.³⁰ The United States also paid Canada for flood control the Treaty dams provided,³¹ with the understanding that this flood control would continue on a pay-as-you-go basis even if the Treaty should be renounced.³²

To a great extent, the Columbia River Treaty has been a resounding technical success, and an example of a well-negotiated international treaty governing the productive use of transboundary fresh water.³³ The Treaty's achievements have not been without detrimental effect, however. The regulation of the Columbia's flow to generate hydropower and control flooding is widely acknowledged as having had—and continuing to have—a significant impact on the life on the River.³⁴

III. SUBSEQUENT CHANGE IN U.S. LAW

Cultural conceptions about human relationships to the environment have changed in the United States since the Columbia River Treaty was ratified, and the country's law has

28. *Id.*

29. Columbia River Treaty, *supra* note 7, at art. V, ¶ 1.

30. History and Review, *supra* note 2, at 6.

31. See Columbia River Treaty, *supra* note 7, at art. VI.

32. *Id.* at art. IV, ¶ 3.

33. See Barbara Cosens, *Transboundary River Governance in the Face of Uncertainty: Resilience Theory and the Columbia River Treaty*, 30 J. LAND RESOURCES & ENVTL. L. 229, 243 ("The resulting solution has been held throughout the world as the pinnacle of international cooperation on freshwater sources."); see also History and Review, *supra* note 2, at 8; *Managing Transboundary Natural Resources*, *supra* note 11, at 310–12 ("The CRT is considered by some experts to be one of the most sophisticated transboundary natural resource treaties in the world. . . . Nearly all of the interviewees said that the CRT is working well for its intended purposes, hydroelectric power production and flood control.")

34. Bill Lang, *Columbia River*, CENTER FOR COLUMBIA RIVER HISTORY, <http://www.ccrh.org/river/history.htm#engineering> (last visited Feb. 4, 2010) ("Dams on the Columbia have contributed significantly to steep declines in historically strong anadromous fish runs.")

adapted to reflect those changes.³⁵ Since the drafting of the Treaty, legal developments have both illustrated and propelled the country's evolving relationship with the Columbia River. This section will examine some of the ways in which the legal landscape now differs from that of the era in which the Treaty was created.

The Columbia is not, however, governed by a single legal scheme that one can point to as evidence of a shift in values and policies. A variety of sources, including statutes, regulations, judicial decisions interpreting and applying those statutes and rules, and the Columbia River Treaty itself compose the legal landscape. Many laws with great impact on the Columbia have arisen since the Treaty's ratification. Judicial interpretation of these laws and their application to the Columbia have resulted in a significant shift in the way that the United States approaches the use and management of the River.

From among the complex web of governing authorities operating on the Columbia, this section will pay specific attention to the changes brought about by the Endangered Species Act³⁶ and the Northwest Power Act.³⁷ These two laws in particular illustrate the shift in collective understanding of the benefits a river can provide since the Treaty went into effect. Under current legal circumstances, the benefits of hydropower generation and flood control cannot be pursued in the United States without at least considering the environmental impact these endeavors might produce. This current legal framework and the modern approach to managing the Columbia should be considered if and when the Treaty is revisited.

A. *Piecing Together a "Law of the River" on the Columbia*

It is perhaps the sheer complexity of the River's governance

35. See generally *Managing Transboundary Natural Resources*, *supra* note 11, at 314 (recognizing the shift in U.S. environmental law). Although this comment is primarily concerned with the change in law and attitude in the United States since the Treaty's promulgation, a similar shift seems to have taken place on the Canadian side of the border as well. See, e.g., THE COLUMBIA BASIN TRUST, ENVIRONMENTAL STRATEGIC PLAN (2009), available at http://www.cbt.org/uploads/pdf/environmental_strategicplanjanuary2009.pdf.

36. 16 U.S.C. §§ 1531–1544 (2006).

37. *Id.* §§ 839–839h.

and administration that makes it difficult to conceptualize its administration (or the law governing it) as a cohesive whole. Though intertwining laws make discerning a singular “Law of the River” on the Columbia a difficult endeavor, this section will show that the law surrounding the River has clearly changed significantly since the drafting of the Treaty. This section looks at the Endangered Species Act and the Northwest Power Act, both of which the United States enacted after the Columbia River Treaty had gone into effect, and analyzes their impact on the legal framework surrounding the River.

The Ninth Circuit observed in 1997 that there is “no single ‘Law of the River’ on the Columbia,”³⁸ but it did outline a scaffolding of interconnected sources that comprise the legal world in which the United States manages the River.³⁹ Others have viewed this scaffolding as constituting a legal framework, while still acknowledging the piecemeal nature of that law. As John M. Volkman noted:

“The Law of the River” is often used to describe the law of the Colorado River. . . . The situation is different on the Columbia. Rather than starting with a Law of the River that shaped development, Columbia River development created its own law of the river as it went along. This gave the law of the Columbia River a complex, utilitarian shape that served river users quite well, at least through the 1960s. Since then, the law of the Columbia has been pushed in new directions by concerns over the environmental impacts of water development and use.⁴⁰

The development-friendly legal framework that existed before the advent of environmental laws in the United States largely still exists,⁴¹ and federal environmental laws have been “layered into the law of the river since 1970.”⁴² The

38. *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F. 3d 1520, 1524 (9th Cir. 1997).

39. *Id.* at 1524–25 (“Rather, as we consider BPA’s decision to enter into these two agreements we must navigate a maze of overlapping treaties, laws, and regulations, which together attempt to balance the varied interests on the river.”). In this opinion especially, the Court pieces together a patchwork of statutory authority, trying to make sense of the interwoven obligations faced by agencies acting on the Columbia.

40. Volkman, *supra* note 3, at TAB 1.

41. *Id.* at 12.

42. *Id.*

Endangered Species Act and the Northwest Power Act are illustrations of ways in which the “Law of the River” has shifted since the ratification of the Treaty.⁴³

The Endangered Species Act and the Northwest Power Act are not the only laws that have touched the governance of the Columbia in a significant way in the past sixty years. Taken together, though, they represent both the federal government’s incidental reach into protection of the Columbia Basin, as well as its explicit intention to protect and preserve the Columbia’s environmental integrity. Together, they have changed the shape of law on the river and have altered its governance such that drafters of the Columbia River Treaty might not recognize it today.

These laws and the accretion of judicial decisions interpreting them certainly have added to the “Law of the River” on the Columbia. This “Law of the River” is surely not capable of predicting with total clarity the outcome of a particular case or controversy, but seeing this string of decisions as a cogent, although perhaps still-developing, whole might be useful. The alternative argument—that what has happened on the Columbia is scattershot, random, unreasoned decision-making, seems less plausible. Instead, perhaps we can view this new outgrowth of law surrounding the river as describing the decades-long struggle of the United States Congress and courts to delineate what we can and cannot sacrifice in using the Columbia’s water. In this story, a coherent, persistent set of policy choices emerges, and we see a rather clear expression of the legal requirements for how the

43. In addition to federal mandates to protect environmental interests, however, it should be noted that Tribal rights to the River and its resources are a strong thread in the “Law of the River” governing the Columbia. Tribal rights on the Columbia are not addressed in depth in this comment, mostly because recognition of the legal rights of the Tribes long predates the signing of the Treaty. *See, e.g.*, *United States v. Winans*, 198 U.S. 371 (1905). This newer environmental statutory framework and its interpretation is the focus of this comment. Tribes, indeed, have frequently employed this scaffolding of newer environmental laws in order to enforce and protect their pre-existing rights, thus helping to solidify the “Law of the River”. *See, e.g.*, *Confederated Tribes of The Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003) (petitioners argued that the BPA failed to meet its legal obligation to “treat fish and wildlife equitably with power” under the NPA); *Confederated Tribes & Bands of Yakima Indian Nation v. Fed. Energy Regulatory Comm’n*, 746 F.2d 466, 468 (9th Cir. 1984) (Yakima Nation joined the National Marine Fisheries Service in claiming that the Federal Energy Regulatory Commission failed to comply with the NPA, NEPA, the Federal Power Act and the Fish and Wildlife Coordination Act).

River is to be used.

What we might call the “Law of the River” on the Columbia today may not constitute a static whole, but it is undoubtedly different than what may have been described as the “Law of the River” on the Columbia in the 1950s or 60s. Viewing the amalgam of environmental statutes and their judicial interpretations as unique and separate from the prior “Law of the River” is useful in a discourse about the *change* in the law, and in trying to locate the current status of the legal framework that supports and reviews action on the river.

i. *The Endangered Species Act*

The Endangered Species Act (ESA) of 1973 unequivocally shifted the legal framework on the United States side of the Columbia by stating that species of “fish, wildlife and plants are . . . of value to the Nation and its people.”⁴⁴ As we have seen, the language of the Treaty, which preceded this declaration, did not in any way recognize the value of fish, wildlife and plants in the Columbia basin. The Treaty focused exclusively on hydropower and flood control, framing its goals in a way that suggested those were the only benefits the River could provide.⁴⁵

Congress intended the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,”⁴⁶ and declared that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act].”⁴⁷

The ESA is a broad-reaching statute that binds all federal agencies, and its application to the agencies that administer the Columbia has produced a significant amount of litigation and controversy. Perhaps the most useful lens through which to view the sharp contentions that have helped to chisel out the changes in the law on the Columbia is the conflict surrounding Pacific Northwest Salmon. Salmon are not the only protected species that suffer adverse consequences as a result of hydropower generation and other “non-natural” uses

44. 16 U.S.C. § 1531(a)(3) (2006).

45. Columbia River Treaty, *supra* note 7.

46. 16 U.S.C. § 1531(b).

47. *Id.* § 1531(c)(1).

of the Columbia,⁴⁸ but their plight has garnered wide attention and has been discussed for several decades on the national stage.

1991 saw the first listing of Columbia Basin salmon as endangered,⁴⁹ and that listing was followed shortly by many others.⁵⁰ Listing a species as Threatened or Endangered through the ESA triggers both procedural and substantive measures that require agencies whose actions may impact a listed species to “ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species.”⁵¹ Under the ESA, then, it is incumbent upon *every agency* whose actions may impact a listed species on the Columbia to take those species into consideration. Such was certainly not the case during the era in which the Treaty was drafted.

Following the declaration of the first Threatened and Endangered Columbia River salmon, the ESA has been perhaps the most oft-wielded tool in attempts to protect northwest salmon, and its presence and importance in salmon litigation on the Columbia has been widely recognized.⁵² In 1994, the Ninth Circuit noted that “it was not until the threat of action under the ESA that the depletion of anadromous fish

48. Interestingly, in the most recent Ninth Circuit case covering the protection of species on the Columbia, the controversy stemmed from the negative impact on another listed fish species, the bull trout, from “a hatchery project intended to mitigate a dam’s impact [on salmon].” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 516 (9th Cir. 2010).

49. Endangered and Threatened Species; Endangered Status for Snake River Sockeye Salmon. 56 Fed. Reg. 58,619 (Nov. 20, 1991) (codified at 50 C.F.R. pt. 222) (Endangered Status for Snake River Sockeye); Endangered and Threatened Species; Lower Columbia River Coho 56 Fed. Reg. 29,553 (June 27, 1991) (Threatened Status for Columbia River Coho).

50. The following year, Snake River Spring/Summer and Fall Chinook were listed as Threatened. *See* 57 Fed. Reg. 14,653 (April 22, 1992) (codified at 50 C.F.R. pt. 227). Today thirteen species of Columbia River salmon are listed as threatened or endangered. Endangered Salmon and Fisheries Predation Prevention Act, H. R. 3069, 112th Cong. § 2(1), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3069rh/pdf/BILLS-112hr3069rh.pdf>; ENVIRONMENTAL PROTECTION AGENCY, COLUMBIA RIVER BASIN: STATE OF THE RIVER REPORT FOR TOXICS 12 (Jan. 2009), *available at* [http://yosemite.epa.gov/r10/ecocomm.nsf/columbia/sorr/\\$file/sorr-columbia-09-indicators.pdf](http://yosemite.epa.gov/r10/ecocomm.nsf/columbia/sorr/$file/sorr-columbia-09-indicators.pdf).

51. U.S. Env’tl. Protection Agency, *Summary of the Endangered Species Act* (Aug. 11, 2011), <http://www.epa.gov/lawsregs/laws/esa.html>.

in the Columbia River Basin was considered to be more than merely an issue that would resolve itself over time.”⁵³ Further, in 2005, the Court observed:

As part of the modern cycle of life in the Columbia River System, each year brings litigation to the federal courts of the Northwest over the operation of the Federal Columbia River Power System . . . and, in particular, the effects of system operation on the anadromous salmon and steelhead protected by the Endangered Species Act.⁵⁴

The Court went on to state that “[i]n the last several decades, the management of the Columbia River System has been strongly influenced by the Endangered Species Act. . . .”⁵⁵ The presence of the ESA is not entirely determinative of the health and survival of the fish and wildlife that rely upon the River, and every case brought under the ESA does not result in a victory for the cause of environmental protection.⁵⁶ The fact that continuous ESA litigation on the Columbia persists, however, and the recognition that its strictures are binding on agencies that act on the River, certainly evidences a changed set of rules and priorities.

The specific requirements that the ESA has imposed, and the judicial decisions interpreting whether or not its requirements have been properly adhered to, have been widely discussed elsewhere.⁵⁷ The purpose of this paper is not to enter into the debate about whether agencies with administrative responsibilities on the River are administering in accordance with the ESA. Rather, this comment points to the *fact* of the administrative agencies’ required compliance with federal environmental law as an indication that the law currently governing the River is fundamentally different than it once

53. *Nw. Resource Info. Center v. Nw. Power Planning*, 35 F.3d 1371, 1377 (9th Cir. 1994).

54. *Nat’l Wildlife Fed’n. v. Nat’l Marine Fish. Serv.*, 422 F.3d 782, 788 (9th Cir. 2005).

55. *Id.* at 789.

56. See, e.g., Michael C. Blumm & Hallison T. Putnam, *Imposing Judicial Restraints on the “Art of Deception”: the Courts cast a Skeptical Eye on Columbia Basin Salmon Restoration Efforts*, 38 ENVTL. L. 47 (2008); Michael C. Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 ENVTL. L. 103, 112 (1982).

57. See, e.g., *id.*

was, and that this difference has been in large part affected by this statute.

ii. *The Northwest Power Act*

Unlike the broad scope of the ESA, the Northwest Power Act (NPA) specifically targets the interaction between power generation and the survival of fish and wildlife on the Columbia River.⁵⁸ The NPA's state purpose is:

[T]o protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.⁵⁹

The NPA's enactment fortifies the argument that a change has taken place in the United States' conceptualization of its priorities, and that now, the pursuit of goals like power generation must be tethered to their environmental consequences. The growing broad concerns of environmentalism were applied to the Columbia in cases litigated based on the ESA, but the NPA illustrates Congress' intentional focus on the specific balance of priorities on the Columbia River, and it articulates a mandate for how this balance is to be achieved.⁶⁰ The Ninth Circuit recognized that "[t]he NPA marked an important shift in federal policy," and that it "created a new obligation on the region and various Federal agencies to protect, mitigate, and enhance fish and wildlife."⁶¹

As a result, organizations and individuals have filed numerous claims under the NPA to protect fish and wildlife on

58. 16 U.S.C. § 839(6).

59. *Id.*

60. *Nw. Resource Info. Center v. Nw. Power Planning*, 35 F.3d 1371, 1377 (9th Cir. 1994).

61. *Id.* at 1377–78.

the Columbia.⁶² In 1997, the Ninth Circuit heard a case in which petitioners alleged that the Bonneville Power Administration (BPA) violated the NPA by failing to give equitable consideration to fish and wildlife in its water storage and flow management policies.⁶³ The case centered on a dispute over the use of excess stored water from dams in Canada that was not contemplated by the Treaty. Petitioners alleged that agreements BPA entered into with its Canadian counterparts regarding the use and allocation of the excess water failed to provide equitable treatment for fish and wildlife, thereby violating the BPA's duty under the NPA.⁶⁴ Petitioners suggested that "if BPA enters into a contract benefitting power, it must contract an equal benefit for fish."⁶⁵ The Court found against the petitioners, but not because it failed to recognize BPA's duties under the NPA.⁶⁶ At the time of the suit, BPA had not yet allocated the majority of its non-Treaty storage capacity, and the court observed that "BPA may well decide that its responsibilities to provide equitable treatment require it to use a reasonable portion of this water for the benefit of fish."⁶⁷ The Court stated that "it may be that BPA would violate its . . . obligations by using a disproportionate amount of its non-Treaty storage capacity for power purposes."⁶⁸

Not long after the NPA's enactment, the Ninth Circuit considered a case in which the petitioner alleged (among other things) a violation of the NPA based upon failure to consider fishery issues prior to issuing a hydropower license.⁶⁹ Although

62. *E.g.*, *Confederated Tribes and Bands v. Fed. Energy Reg. Comm'n*, 746 F.2d 466 (9th Cir. 1984) (petitioners argued that FERC violated the Pacific Northwest Power Planning and Conservation Act, the Federal Power Act, the Fish and Wildlife Coordination Act and the National Environmental Policy Act by failing to consider fishery issues in hydropower relicensing; court held in favor of petitioners on Federal Power Act grounds, but noted that one purpose of the Northwest Power Act is equity between fish and wildlife and power production interests).

63. *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997).

64. *Id.* at 1524.

65. *Id.* at 1530.

66. *Id.* at 533.

67. *Id.*

68. *Id.*

69. *Confederated Tribes and Bands v. Fed. Energy Reg. Comm'n*, 746 F.2d 466 (9th Cir. 1984).

that case was decided on Federal Power Act grounds, the Court affirmed that “[o]ne purpose of the [NPA] is to place fish and wildlife concerns on an equal footing with power production.”⁷⁰

Based on plain language as well as judicial interpretation, the NPA fundamentally changed the legal landscape surrounding the Columbia. It not only articulated a new set of priorities for the administration of the River, but it mandated that those priorities actually be considered in management decisions.

B. *The Treaty’s Place in the Law of the River*

Thus, regardless of whether or how we prefer to conceptualize a “Law of the River” on the Columbia, federal law will no longer permit the cleaving of environmental concerns on the River from endeavors to harness its potential to generate hydropower. The application of the ESA to listed species on the Columbia, the NPA, which directs specific attention to the preservation of environmental health of the Columbia, and the judicial interpretations of those statutes (among others) have fundamentally shifted the legal terrain that governs the Columbia River in the United States. If we choose not to name the legal framework that has developed on the Columbia, the facts still hold firm: in this country, the generation of hydropower on the Columbia is legally intertwined with the welfare of the River’s ecology and the protection of species that depend upon it.

The Columbia River Treaty is of course itself a part of the “Law of the River.” Indeed, when the Ninth Circuit enumerated the laws governing the River, the Treaty was first on its list:

Prominent among the laws on the river are the United States–Canada Columbia River Treaty, the Northwest Power Act, and the National Environmental Policy Act (NEPA). Subsequent to the submission of this case for decision, the Endangered Species Act (ESA) began playing a significant role.⁷¹

It is worth noting that the other laws the Court mentions here are all environmental laws that were passed subsequent

70. *Id.* at 473.

71. *Nw. Envtl. Def. Ctr.*, 117 F.3d at 1525.

to the Treaty's ratification.

In and of itself, the Treaty has not necessarily been an impediment to the environmental health of the River. In the United States, development for the purposes of hydropower generation, navigation and irrigation (among other things) using the Columbia's waters pre-dates the signing of the Treaty with Canada regulating its cross-border flow.⁷² Changing or repealing the Treaty would not in and of itself necessarily improve the fate of Columbia River salmon, nor of any other species hydropower generation on the river affects.

Still, by framing the dual goals of hydropower and flood control as existing independently from any other concerns on the River, the Treaty as it is fails to acknowledge the legal realities as they currently stand in the United States. Further, although the NPA shifted the nature of the conversation by specifically pointing to the interaction between hydropower generation and the protection of the Columbia's ecosystem, "it did not provide a state or local say in whether power production should be optimized over all other ecosystem services from the River. That decision remains static in the choice of hydropower and flood control as the primary international goals."⁷³

IV. LOOKING FORWARD: A TREATY IN KEEPING WITH CURRENT LAW AND VALUES

The Treaty is widely seen as having been successful in achieving its dual goals of providing flood control and an efficient means of hydropower generation on the Columbia, even by parties who recognize its negative environmental impact.⁷⁴ For this reason, although there has been widespread

72. For example, Bonneville, Grand Coulee and The Dalles were all producing hydroelectric power before 1960. See U.S. Army Corps of Eng'rs, *Bonneville Lock and Dam* (Feb. 06, 2012), <http://www.nwp.usace.army.mil/locations/bonneville.asp>; Bureau of Reclamation, Pacific Northwest Region, *Grand Coulee Dam* (Jan. 27, 2012), <http://www.usbr.gov/pn/grandcoulee/>; U.S. Army Corps of Eng'rs, *Portland District History (1871-1996)* (Feb. 06, 2012), <http://www.nwp.usace.army.mil/admin/history2.asp>.

73. Cosens, *supra* note 33, at 258-59.

74. Nearly all of the interviewees said that the CRT is working well for its intended purposes, hydroelectric power production and flood control. Many people also agreed that the technical operations of the CRT have been very successful... Although nearly all respondents said the CRT is working well for its original purposes, many interviewees cited various problems with the CRT ... includ[ing] adverse impacts of fish and wildlife...

acknowledgment of the Treaty's failure to address environmental concerns, there has been little argument for a major alteration of its substantive provisions.⁷⁵ As of yet, no clear singular and cogent plan for adjusting the Treaty has emerged which accommodates current attitudes while still preserving the "successes" it has engendered.⁷⁶

The Treaty's success as a technical document may mean that it will be allowed to continue in its current form with no changes at all. Its silence on the health of the river basin's ecosystem, however, has not gone unnoticed.⁷⁷ Scholars, environmentalists and the River's administrators are all exploring the possibility of amending the Treaty to include coverage of environmental issues. In light of the above discussion of the change in the law undergirding the governance of the River, and of our societal understanding of the wider values to be gained and protected on the Columbia, it seems fitting that the Treaty would lay out—or at least recognize—obligations and benefits that reach more broadly than hydropower and flood control.⁷⁸

Subsection A below explores the arguments against amending the Treaty. Subsection B suggests a change to the Treaty's preamble to recognize the current exigencies facing the administration of the River beyond flood control and hydropower generation. Subsection C looks at the possibility of achieving the representation of environmental concerns without changing the language of the Treaty at all, but by

Managing Transboundary Natural Resources, *supra* note 11, at 312–13.

75. While most of the interviewees agree that the CRT needs to be revised and updated, many of them also explained that they hope the CRT could be revised and updated short of renegotiating the entire Treaty. These respondents seem to embrace a principle of 'keep the foundation in terms of what is working, and build on that foundation to revise and update the CRT.'

Id. at 319.

76. *See id.* at 319 (outlining several options but recognizing that there is no consensus on the United States' goals should be moving forward); *see also* History and Review, *supra* note 2, at 8.

77. *Managing Transboundary Natural Resources*, *supra* note 11, at 313–14.

78. *Id.* at 315 ("... most interviewees agree that the Columbia River must be managed to meet a broader and more complex set of values beyond the original focus on hydropower and flood control."). The authors also suggest an option for working within the framework of the current Treaty, where "the President could modify the composition of the 'U.S. Entity' – perhaps including the U.S Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, Environmental Protection Agency, and even tribal representatives as legally recognized sovereign nations within the United States." *Id.* at 322.

instead changing the composition of the United States administering body to include additional representation. While the arguments of subsections B and C might each be implemented separately, this comment concludes that they are in fact complementary. If the preamble of the Treaty were changed to recognize ecosystem health as a goal to pursue and as something of value to each party, the United States' addition of a representative of environmental concerns would make sense.

A. *Maintaining a Static Columbia River Treaty*

At least two arguments might be made against amendment. First, the fact that environmental law in the United States has grown organically around the Treaty as it currently stands might be said to evidence the fact that an international treaty is not the best means by which to achieve domestic goals. The goals of protection and conservation are already being pursued and achieved in the United States, and perhaps that is enough. Indeed, United States environmental law has developed around the Treaty in its static form over the last half-century. This, it might be argued, is an indication that a technical document allocating water resources need have no concern for the employ of those resources after allocation.

The second argument has more to do with the nature of the relationship between Canada and the United States, and the type of relationship that the Treaty has established. It remains unclear what exactly the United States' goals might be as we enter the 2014 period of potential renegotiation or amendment, but there is no indication that Canada has an interest in taking substantial steps to facilitate the United States' achievement of its own environmental goals. A core change in the Treaty to adjust flows, for example, would presumably need to be accompanied by some sort of provision to compensate Canada for any consequent loss of benefits.

At the very least, a strong argument might be made that for policy reasons, a simple acknowledgment of the linkage between hydropower generation and flood control on the one hand, and the ecological health of the River on the other, would be a useful addition to the Treaty.

B. *A Small but Meaningful Change: Updating the Perambulatory Language*

Because the Treaty has largely been viewed as having succeeded in its stated ambitions, the likelihood of significant alteration to its substantive provisions is questionable at best.⁷⁹ If the parties determine that the technical aspects of the Treaty must remain static, at the very least, the language of the preamble might be changed to reflect the current values of both countries. While updated perambulatory language would perhaps not affect wide change in the daily administration of the Treaty's provisions, it would reflect with more accuracy the goals and values of both countries in relation to the Columbia River. Further, as an international accord governing the use of a transboundary river, the Treaty holds a unique position among the rest of the law on the Columbia. With alteration, both parties may reaffirm their belief that power generation and flood control can no longer realistically be divorced from ecosystem health. A revised preamble could commit to the coexistence and mutual pursuit of all three of these goals.

A perambulatory recognition of environmental concerns is not uncommon in other international treaties governing the use of transboundary rivers. The Amazon Cooperation Treaty, for example, which came into effect in 1980 and was signed by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, recognizes environmental concerns as among the suite of issues facing transboundary governance of their shared river.⁸⁰ The Amazon Cooperation Treaty covers hydropower generation, but also specifies that each party will develop its territory "in such a way that these joint actions produce equitable and mutually beneficial results and achieve also the preservation of the environment, and the conservation and rational utilization of the natural resources of those

79. *Transboundary River Governance*, *supra* note 33, at 261, 265 (entertaining the idea of doing away with the Treaty entirely, the author concludes that reform of the administrative state would be the best way to manage the Columbia River Basin and similar multi-jurisdictional watersheds). Without weighing the potential merits of a new form of governance for transboundary rivers, it seems sufficient to say that such an outcome is unlikely to come about prior to 2014.

80. Brasilia Treaty for Amazonian Cooperation ("Amazon Cooperation Treaty"), art. I, July 3, 1978, 1202 U.N.T.S. 19194, 17 I.L.M. 1045, available at <http://www.otca.info/portal/tratado-coop-amazonica.php?p=otca>.

territories.”⁸¹

Drafting new accords acknowledging environmental interests and establishing separate bodies to address environmental issues on transboundary rivers are not uncommon practices.⁸² The Convention on the Protection of the Rhine opens with the statement that the signers—Germany, France, Luxembourg, Netherlands, Switzerland and the European Community—desire “to work towards the sustainable development of the Rhine ecosystem . . . taking into consideration the natural wealth of the river. . . .”⁸³

Although the preamble to a treaty does not necessarily have binding force, it should not therefore be dismissed as insignificant.⁸⁴ The Vienna Convention on the Law of Treaties specifically notes that a treaty’s preamble shall be used as a component for the interpretation of the treaty’s context.⁸⁵ A change to the Columbia River Treaty’s preamble would allow the Treaty to more accurately reflect its parties’ goals, and would bring it into alignment with current values.

C. *Change Without Alteration*

Alternatively, the authors of *Managing Transboundary Resources* suggest an approach that would not alter the Treaty whatsoever, but that would perhaps produce the desired outcome of greater consideration of environmental concerns in the administration of the Treaty’s provisions. The Treaty calls for two implementing entities, one to represent each country.⁸⁶ The President of the United States creates the United States Entity; currently the Administrator of the BPA and the Northwestern Division Engineer of the U.S. Army Corps

81. *Id.*

82. *See, e.g.*, Convention on Cooperation for the Protection and Sustainable Use of the Danube River, 1997 O.J. L342, 40.

83. Convention for the Protection of the Rhine Against Chemical Pollution, Dec. 3, 1976, 1124 U.N.T.S. 425, pmbl., available at <http://www.iksr.org/index.php?id=33&L=3>.

84. Michael Bowman, “Normalizing” the International Convention for the Regulation of Whaling, 29 MICH. J. INT’L L. 293, 320 (2008) (“In particular, the fact that a preamble is often described as lacking binding force should not be allowed to misrepresent its true significance.”).

85. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. XXXI ¶ 2.

86. Columbia River Treaty, *supra* note 7, at art. XIV.

compose the Entity.⁸⁷ The authors note that the Executive Order directing the implementation of the Treaty might be amended to achieve the goal of environmental interests being represented and pursued without changing the language of the Treaty at all.⁸⁸ Such a change would allow the United States to incorporate a wider range of views by adding additional representatives who could advocate for a broader spectrum of priorities and more accurately represent the breadth of the country's current goals and values.⁸⁹

While this action alone would be a step toward ensuring that environmental interests are present in the dialogue surrounding the River's administration, it would still leave the language of the Treaty entirely unchanged. Consequently, the United States would still be bound by a document that does not recognize the existence of environmental concerns in the governance of the Columbia River, nor any potential benefits that might be derived from the River outside of hydropower generation and flood control.

V. CONCLUSION

The Columbia River Treaty, by all accounts, has been successful in achieving its intended goal of securing both flood control and hydropower generation, to the benefit of both Canada and the United States. Although the Treaty's technical successes may mean that there is little need to change its substantive provisions, developments in the law make its foundational premise—that hydropower and flood control may be sought and achieved from a river without thought to the environmental consequences of such an endeavor—somewhat of a vestigial anachronism. Environmental law in the United States has changed the nature of the River's use and governance despite the Treaty's silences and implied biases. The Treaty's failure to reflect accurately the present goals, values, and priorities of the parties, however, is not inconsequential.

The Treaty has precedence over domestic law, and the

87. Exec. Order No. 11,177, 29 Fed. Reg. 13,097 (Sept. 19, 1964), *available at* <http://www.archives.gov/federal-register/codification/executive-order/11177.html>; History and Review, *supra* note 2, at 4.

88. *Managing Transboundary Natural Resources*, *supra* note 11, at 323.

89. *Id.*

firmness of its pursuit of the benefits of hydropower and flood control with no expression of interest in the cost to the environment, or recognition of other benefits that might be derived from the River, undermine the values and beliefs about the Columbia River that have come to the fore since the Treaty's original ratification. For these reasons, the Treaty should be changed. Even a moderately small change, such as inclusion in its preamble of language reflecting concern for the ecosystemic health of the River, or mentioning the derivation of other benefits in addition to hydropower and flood control, would leave us with a Treaty that more accurately represents our current values. Such a change could be bolstered by the addition of a new representative to the United States Entity, who could add environmental concerns to the priorities addressed in the Treaty's administration.