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A Hell of a Complex: The Miscarriages of the Federal Hydropower Licensing Regime

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A HELL OF A COMPLEX: THE MISCARRIAGES OF THE FEDERAL HYDROPOWER LICENSING REGIME

Derek “Red Arrow” Frank

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A HELL OF A COMPLEX: THE MISCARRIAGES OF THE FEDERAL HYDROPOWER LICENSING REGIME

*Derek “Red Arrow” Frank**

ABSTRACT

What you are about to read is an illustration of systemic racism. Systemic racism is the current effects of statutes and policies developed through a singular and racially-charged narrative. The current hydropower relicensing regime fails to acknowledge the overarching Treaty-reserved rights of American Indian tribes while statutorily granting state and federal authorities the power to prescribe mandatory conditions on hydropower projects. This fact remains constant whether the hydropower project is within or outside a tribe’s reservation or aboriginal territory. Specifically, the Hells Canyon Complex, which rests along the Snake River, has had and continues to have enormous impacts on fisheries including blocking all fish migrations. The Hells Canyon Complex is currently under consideration for a new fifty-year operating license. This Complex resides inside the exclusive aboriginal territory of the Nez Perce Tribe and the geographical region that harbors the Tribe’s usual and accustomed fisheries.

The Nez Perce Tribe devotes significant resources to protecting the existence of Salmonids. Accordingly, the Tribe continues to fight for fish passage in the Hells Canyon Complex. There is no question the Tribe will continue to pursue the actions necessary to protect and rebuild its Treaty-reserved fisheries. The Tribe’s Treaty-reserved fishing rights, which are the supreme law of the land under the United States Constitution, must be fully acknowledged and embraced. This strive for self-determination is the result of the paternalistic dialogue of American history, a narrative I hope allows you to recognize why systemic repair must take place.

* Derek “Red Arrow” Frank is an enrolled member of the Nez Perce Tribe; *Doug Nash Tribal Scholar*, Seattle University School of Law, Class of 2018. A special thanks goes out to Dave Cummings and Amanda Rogerson for their suggestions and edits, as well as Catherine O’Neill, Eric Eberhard, and Bree Black Horse. All views and opinions reflect solely the author’s.

A Meeting Between Creator and the Animals

One day the Creator called all the animals together to notify them of the great change that many of them would not survive. The arrival of the human beings.

The Creator explained that in order to pass with the great change, they must qualify themselves to be useful to the human beings because the humans were going to be naked and would have a hard time living.

One by one, the different species came forward. When it was Salmon and Steelhead's turn, they said, "we can help the human beings with our flesh." The great Salmon said, "when we come up the river we will die, so the human beings will have to catch us before that happens." "Yes," spoke the Steelhead, "we will come up only certain times of the year to be caught. I want to come in the winter time with something special. That will be the glue from my skin. This glue can be used to make bows and spears. I'll be in the water all winter long." Hearing this pleased the Creator, thus, the Creator qualified both the Salmon and Steelhead. Next was Sockeye Salmon, who said, "I don't want to be big like the other salmon and I want to be red because I will eat different foods." Next was Trout, who said, "I am going to look like a steelhead but I am not going to the ocean. I'll stay here all year around in the water." Finally, Eel said, "I want to be long, and be able to put my mouth on the rocks. I will come up the river every year, and they can use my flesh for food." The Creator, being very pleased, qualified all the fish.¹

¹ This story is an oral legend passed down to the Nez Perce Tribe's youth. Each version is a little different. However, each version illustrates the gifts humanity received from the Creator; this version was passed to the author. *See also* DAN LANDEN & ALLEN PINKMAN, SALMON & HIS PEOPLE; FISH & FISHING IN NEZ PERCE CULTURE 4-8 (1999).

I. INTRODUCTION: THE NEZ PERCE TRIBE

In the beginning, the Nez Perce Tribe (Nez Perce or Tribe) used and occupied 70,000,000 acres of present-day Washington, Oregon, Montana, and Idaho, in an area surrounding the Snake, Salmon, and the Clearwater rivers.² The Tribe's aboriginal territory stretches across mountain ranges, forested highlands, canyons with countless threads of streams and rivers, barren hills, and hot sage plains.³ This rugged, hilly, plateau country helped mold the Tribe into the most virile of people; a people that originally practiced no agriculture, but were consumed with the preoccupation of harvesting roots, wild game, and most importantly, fish.⁴

As intelligent hunters and artful fishermen, the Tribe's people aligned their existence with the seasons of their food supplies. Specific times of the year were measured by the salmon life cycles, signaling the Tribe to gather at traditional fisheries along the Clearwater, Columbia, and Snake river systems.⁵ Notably, after the floods of melting snow-packs in the spring, the "rivers filled with salmon from the Pacific [Ocean]" fighting their way up the Snake River toward the Clearwater River to spawn.⁶ Before each season the Nez Perce waited for a sign of the salmon's arrival, calling the June period when the fish appeared *hillal*, "the time of the first run of the salmon."⁷ Of all the fish in their homeland's tributaries, none was more used and respected by the Nez Perce than the Chinook Salmon.⁸

Since time immemorial, the lives of the Nez Perce people and the salmon have been reciprocal.⁹ Salmon are not considered a "food resource" per se; rather, the relationship between the salmon and the Nez Perce people is a reciprocal one in which each are equally important to the other's survival.¹⁰ Consequently, the Nez

² Herbert J. Spinden, *The Nez Percé Indians*, in MEMOIRS OF THE AM. ANTHROPOLOGICAL ASS'N, v.2 pt.3., 172 (Am. Anthropological Ass'n, 1908).

³ *Id.*

⁴ ALVIN M. JOSEPHY, JR., *THE NEZ PERCE INDIANS & THE OPENING OF THE NW.: COMPLETE & UNABRIDGED*, 16–17 (1997).

⁵ DAN LANDEN & ALLEN PINKMAN, *SALMON & HIS PEOPLE; FISH & FISHING IN NEZ PERCE CULTURE 1* (1999).

⁶ *Id.* at 17.

⁷ JOSEPHY, *supra* note 4, at 17.

⁸ LANDEN, *supra* note 5, at 1.

⁹ LANDEN, *supra* note 5, at 65 (Celilo Falls evidences human use approximately 12,000 years ago).

¹⁰ LANDEN, *supra* note 5, at 65.

Perce people are careful to respect and honor the fish migration. Like many Columbia Basin tribes, the Nez Perce view the salmon migration as a spiritual and voluntary act; therefore, instead of expecting salmon migrations, the Tribe honors the salmon's appearance with celebration and appreciation for its pilgrimage.¹¹ To pass on this mentality and tradition, the Tribe shares parables of the salmon with its youth, teaching their younger generations that the "salmon [are] beings who dwell[] in a great house under the sea;"¹² living there in human form, feasting and dancing all year long.¹³ However, when the salmon people trek upriver to spawn, they assume the form of fish to sacrifice themselves to the many tribes that depend on their nutrition. The story explains that upon making their journey to spawn or to become food, the spirit of each fish returns to the water, resuming its original form as salmon people with no discomfort and ready to repeat the trip next season.¹⁴

The Tribe and its activities are guided by love and respect for the gifts of the Creator, and the earth's Creation guides the Tribe's activities. The Tribe emphasizes the need to avoid acts of greed or selfishness so that natural resources, such as the salmon, are not depleted.¹⁵ These traditional guidelines are aboriginal law, and have been learned and passed down over millennia through the Tribe's myths, legends, songs, prayers, dances, rituals, and ceremonies.¹⁶ Because the earth and its natural resources have always provided for the Tribe's well-being with physical and spiritual sustenance, the Tribe upholds an obligation to protect and preserve the earth and its resources forever.¹⁷ It is understood that future generations will enjoy the land and its resources only if the decisions and actions made by present-day people, both Indian and non-Indian, are mindful of sustainability and stewardship.¹⁸ This mentality guided the Nez Perce Tribe during treaty negotiations with the United States government. By signing the treaty, the Tribe

¹¹ LANDEN, *supra* note 5, at 68.

¹² LANDEN, *supra* note 5, at 68.

¹³ LANDEN, *supra* note 5, at 68.

¹⁴ LANDEN, *supra* note 5, at 68.

¹⁵ *Nez Perce Tribal Salmon Culture*, NEZ PERCE TRIBE: DEPT. OF FISHERIES RES. MGMT., <http://www.nptfisheries.org/Resources/SalmonCulture.aspx> [https://perma.cc/CH96-TGGZ] (last visited Dec. 1, 2017).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

understood they reserved their aboriginal laws and practices indefinitely for their people and the future generations to come.

However, infrastructural development in the twentieth century failed to consider or respect Treaty-reserved rights. Notably, hydropower development ignored Treaty-reserved resources, disregarded tribal interests, desecrated salmon migrations, and slighted the tribal perspectives of resource protection with a paternalistic hydropower licensing regime. Hydropower development came in the form of federal projects, such as dams, that make up the Federal Columbia River Power System and in the form of private projects licensed by the federal government. Hydropower development, both federal projects and federally-licensed projects, in the Columbia and Snake River basins have had and continue to have a devastating impact on the salmon runs and on the Nez Perce.

In order to understand the shortcomings of the federal hydropower licensing regime for private hydropower projects, this paper must discuss: (1) treaty creation, reserved rights, and the importance of treaty interpretation; (2) treaty negotiations between the Nez Perce Tribe and the United States; (3) the Nez Perce Tribe and its place in American development; (4) the consequences of the Hells Canyon Complex; (5) the current statutory system for hydropower relicensing under the Federal Power Act and the Clean Water Act, and the how the statutory system fails to recognize Nez Perce sovereignty and Treaty-reserved resources; and (6) explain why current statutory regimes neglect historically oppressed communities, and how these regimes must be amended to resolve historical oppression through statutory repair.

II. RESERVED RIGHTS AND TREATY INTERPRETATION

Federal Indian law began with the formation of treaties.¹⁹ In negotiating treaties with the United States, Indian Tribes ceded vast amounts of land, granting rights from their aboriginal territory to the United States while reserving all aboriginal rights not granted.²⁰ Treaties are “bargained-for exchanges and political documents binding both tribal signatory and the United States government.”²¹

¹⁹ FELIX S. COHEN, HANDBOOK OF FED. INDIAN LAW § 1.03 at 26 (2005 ed.); KRISTEN A. CARPENTER ET AL., CASES & MATERIALS ON FED. INDIAN LAW (7th ed. 2017).

²⁰ COHEN, *supra* note 19, at 418.

²¹ *Id.*

Treaties constitute the “supreme law of the land,”²² and are constitutionally protected.²³ They retain a significant “legal force that . . . [is] not easily ignored.”²⁴ Although a treaty between the United States and an Indian tribe is an agreement between two sovereign nations, the negotiations that gave rise to these contracts were not equal.²⁵ Accordingly, courts must employ specific rules when interpreting language set forth in Indian treaties.

Treaty-making served two goals: for the United States, it was to take Indian lands to develop and expand non-Indian settlements; for the Indian tribes, it was to secure a means of supporting themselves.²⁶ Treaty negotiations were experienced differently for each party, “sometimes consummated by methods amounting to bribery, or signed by representatives of only small parts of signatory tribes.”²⁷ Significantly, most Indians could not read, write, or understand the English language; therefore, the terms of each treaty must be interpreted differently while considering all circumstances involved with each negotiation.

Courts must construe ambiguities in treaties between the United States and Indian tribes in favor of the Indians. This principle stems from the third case of the *Marshall Trilogy*, where Chief Justice John Marshall wrote “[t]he language used in treaties with the Indians should never be construed to their prejudice.”²⁸ When a court interprets a treaty, the goal is to determine the parties’ intent from the treaty’s text, context, and the history of the negotiations that took place. The courts must interpret the treaty as the Indians understood it at the time of its creation, as justice and reason demand, and where history shows the United States used its power through the English words of “learned lawyers.”²⁹ The court must counterbalance past “inequalit[ies] by [] superior justice which looks only to the substance of the right, without regard to technical

²² *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam).

²³ U.S. CONST. art. VI, cl. 2.

²⁴ COHEN, *supra* note 19, at 26.

²⁵ *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) (“*Washington I*”).

²⁶ *Id.*

²⁷ Cohen, *supra* note 19, at 26.

²⁸ *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

²⁹ *Washington I*, 384 F. Supp. 312 at 331 (citing *Worcester v. State of Ga.*, 31 U.S. 515, 8 L. Ed. 483 (1832)).

rules.”³⁰ Therefore, treaties must always be interpreted in the sense in which the “unlettered people” understood them.³¹

For example, the Nez Perce Tribe and many Pacific Northwest tribes negotiated treaties with Governor Isaac I. Stevens (Gov. Stevens), collectively known as the “Stevens Treaties.” Negotiations for the Stevens Treaties were translated from English to the Chinook jargon; an Indian trading language containing only 300 words.³² The treaties were written in English, a foreign language that the tribes could not read or write. Furthermore, the Stevens Treaty negotiations were conducted by professional diplomats, assisted by interpreters employed by the United States, and recorded by negotiators employed by the United States. The only knowledge tribes had of the terms in which the treaties were framed were the few words communicated to the Indians by the interpreters employed by the United States.³³ The obvious inequity and linguistic differences during treaty negotiations highlight why all circumstances must be acknowledged during treaty interpretation.

To properly interpret the Nez Perce Treaty, it is necessary to understand the circumstances beyond the text of the written document. Let us consider the circumstances surrounding the treaty between the United States and the Nez Perce Tribe during the negotiations of 1855.

III. EARLY AMERICAN DEVELOPMENT, THE NEZ PERCE TRIBE, AND THE TREATY OF 1855

*“Not for ourselves . . . but for those that come.”³⁴
- Walla Walla Treaty Council, June 5th, 1855.*

Manifest Destiny consumed the American people with a god-like purpose of colonizing the West for non-Indian settlement.³⁵

³⁰ United States v. Winans, 198 U.S. 371, 380 (1905).

³¹ *Id.*

³² Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 667 (1979).

³³ Jones v. Meehan, 175 U.S. 1, 11 (1899).

³⁴ Stevens Treaty Official Proceedings, *infra* note 51 at June 5, 1855.

³⁵ *The Religious Origins of Manifest Destiny*, NAT’L HUMANITIES CTR., <http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/mandestiny.htm> [https://perma.cc/2T2H-5EKF] (last visited Dec. 1, 2017) (“‘Manifest Destiny’ was also clearly a racial doctrine of white supremacy that granted no native American or nonwhite claims to any permanent possession of the lands on the North American continent and justified white American expropriation of Indian lands . . . It also was firmly anchored in a long standing and deep sense of a

This historical event is regularly taught through this non-Indian narrative, but the massive migratory invasion from the colonial pilgrimage raided already occupied territories.³⁶ Consequently, conflict between indigenous peoples and the colonizer was inevitable.

A. *Early American Development*

For a brief period, the California gold rush attracted many settlers to the west; however, America's westward surge continued to leach into the Northwest. These appealing lands continued to fill with pioneer families, but the fact that these lands belonged to tribes remained unimportant to the settlers.³⁷ As pioneers continued to flood the Oregon territory, the settlers felt the Oregon government could not competently look after their needs and problems; therefore, the United States granted the emigrants a new territorial organization: the Washington territory.³⁸

On March 2, 1853, the Federal government established the Washington territory by separating the Oregon territory.³⁹ The tribes holding aboriginal title to the lands within the Washington and Oregon territories played no role in providing considerations or shaping decisions that involved their country; including the dividing line between Washington and Oregon, which cuts across the homeland of the Nez Perce.⁴⁰ As the invading emigrant population increased in both territories, the legal right to tribal land became a principal issue; therefore, the United States sought a leader to clear the path for complete colonization.

The United States named Isaac I. Stevens the governor of the Washington territory.⁴¹ Focused on the dissemination of the settling population, coupled with the goal of attaining congressional

special and unique American Destiny, the belief that in the words of historian Conrad Cherry, 'America is a nation called to a special destiny by God.' The notion that there was some providential purpose to the European discovery and eventual conquest of the land masses 'discovered' by Christopher Columbus[.]").

³⁶ *Id.*

³⁷ JOSEPHY, *supra* note 4, at 286.

³⁸ JOSEPHY, *supra* note 4, at 286.

³⁹ Junius Rochester, *Founding of Wash. Territory & Wash. State*, HISTORY LINK, Feb. 26, 2004, <http://www.historylink.org/File/5661> [<https://perma.cc/59FC-7NEM>].

⁴⁰ JOSEPHY, *supra* note 4, at 286.

⁴¹ JOSEPHY, *supra* note 4, at 292.

approval for a transcontinental railroad, Gov. Stevens knew he needed to locate and clear a route for the pioneer traffic.⁴² Understanding this meant trouble for the tribes, Gov. Stevens believed he would “save” and “protect” the tribes by placing them on reservations comprised of unwanted lands.⁴³ This protection meant “extinguishing [tribal] rights to their lands and getting [tribes] out of the paths of the whites.”⁴⁴

The western United States’ territories were held in title for the tribes and could only be opened for settlement upon congressional approval. Consequently, Gov. Stevens visited Washington D.C. to inform Congress that the Pacific Northwest was ready for colonization.⁴⁵ After hearing about the conflicts between the tribes and non-Indians in the Pacific Northwest, accompanied by the impending American Civil War, Congress sought the most economically efficient approach to acquiring tribal lands.⁴⁶ Negotiating treaties with the tribes rather than conquest, saved money and the lives of citizens while furthering the interests of coast-to-coast colonization.⁴⁷ Understanding negotiations would be with a “strong proud people[], intent on preserving their right[s],”⁴⁸ Gov. Stevens intended to seek an agreement by “purchas[ing] []some of the Indians’ lands but reserving the remainder as permanently guaranteed homes for the Indians.”⁴⁹ It is these government-to-government treaty negotiations of the past that define federal Indian law today.

B. *The Treaty of 1855*

On May 24, 1855, a treaty council was called and set in the Walla Walla Valley for the tribes east of the Cascade Mountain range.⁵⁰ The Nez Perce Tribe entered the council grounds with “2,500 warriors mounted on fine horses . . . riding at a gallop, two

⁴² JOSEPHY, *supra* note 4, at 293.

⁴³ JOSEPHY, *supra* note 4, at 310.

⁴⁴ JOSEPHY, *supra* note 4, at 310.

⁴⁵ JOSEPHY, *supra* note 4, at 310.

⁴⁶ *Washington I*, 384 F. Supp. at 330.

⁴⁷ *Id.*

⁴⁸ JOSEPHY, *supra* note 4, at 315.

⁴⁹ JOSEPHY, *supra* note 4, at 309.

⁵⁰ JOSEPHY, *supra* note 4, at 315.

abreast, naked to the breech-clout, their faces covered with white, red, and yellow in fanciful designs.”⁵¹

Protecting its land and resources for future use was imperative for the Nez Perce Tribe, who emphasized its decision was “not for [them]selves . . . but for those that come[.]”⁵² The Tribe stressed the need to preserve access to their usual and accustomed hunting grounds and fisheries, explaining that these territories were necessary for their survival.⁵³ The Tribe voiced its concern about the earth and its priceless quality, and about how strange it was to sell something that was meant to be connected to all.⁵⁴ Although confused and hurt, the tribes attending the council understood treaty negotiations were a process for potential peace while preserving their culture and way of life; therefore, the tribes knew a sale or agreement must be made.

Gov. Stevens listened to each tribes’ needs and worries, then highlighted the important qualities that each proposed reservation offered. For example, the Nez Perce people lived in their territory for the abundance of roots, berries, wild game, and of course the salmon runs.⁵⁵ Gov. Stevens emphasized these qualities, claiming that “[t]here are plenty of salmon . . . there are roots and berries . . . [t]here is also game.”⁵⁶ Gov. Stevens even promised the Nez Perce people that their territory would not be harmed by the “bad white men.”⁵⁷

Gov. Stevens attempted to charm the Nez Perce by emphasizing the reservation’s waterways. Pointing to his map, Gov. Stevens clarified that the reservation would include the Snake River, the Clearwater River, the Salmon River, the Grande Ronde River, and the Palouse River.⁵⁸ Moreover, Gov. Stevens stressed the

⁵¹ JOSEPHY, *supra* note 4, at 316.

⁵² *Certified Copy of the Original Minutes of the Official Proceedings at the Council in Walla Walla Valley, Which Culminated in the Stevens Treaty of 1855*, U.S. DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS (June 11, 1855), <https://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm> [<https://perma.cc/8B6S-XHDF>] [hereinafter, Stevens Treaty Official Proceedings].

⁵³ *Id.*

⁵⁴ *Id.* at Treaty Min. June 5, 1855 (Stachas, a tribal member, explained “[i]f your mothers were here in this country who gave you birth, and suckled you, and while you were sucking some person came and took away your mother . . . and sold your mother, how would you feel then? This is our mother this country, as if we drew our living from her. My friends, all of this you have taken.”).

⁵⁵ *Id.* at Treaty Min. May 31.

⁵⁶ *Id.* at Treaty Min. June 4.

⁵⁷ *Id.* at Treaty Min. May 30.

⁵⁸ *Id.* at Treaty Min. June 5.

Tribe's right to the fisheries, claiming the Nez Perce would retain its right to "the best fisheries on the Snake River."⁵⁹

When his charm failed to accelerate negotiations, Gov. Stevens chose coercion. Gov. Stevens allowed his partner, General Joel Palmer, to remind the tribes that if they did not agree to the offered borders, the tribes risked the depletion of key resources.⁶⁰ Gov. Stevens described tribes who refused to sign treaties as "foolish" and unwise, and emphasized that the tribes who chose to fight against the United States resulted in natives being murdered because the "white men . . . had better arms and [knew] how to make them."⁶¹ Gov. Stevens stressed the need for the tribes to understand that his intention was the "protection" of the tribes and to make a "safe" space away from the "bad white men."⁶² Gov. Stevens explained that during previous treaty negotiations, rebellious tribes were warned that resources would diminish and the settlers would continue to come, but the rebellious tribes still refused to sign their treaties.⁶³ Consequently, Gov. Stevens explained that the white "people continued coming; every year vessels came until . . . people got as numerous as the leaves on the trees,"⁶⁴ and a few years later "the white man killed off the game as well as the Indians . . . leaving the Indians with no food in his lodges, [and] the women and children [] hungry."⁶⁵

Hearing this, Chief Looking Glass, a Chief and Nez Perce war leader,⁶⁶ expressed enormous concerns to Gov. Stevens, making Gov. Stevens promise him there would be fish for his people. Replying, Gov. Stevens confirmed that "Looking Glass knows . . . he can catch fish at any of the fishing stations . . ."⁶⁷ Believing Gov. Stevens, and left with only the choice of complete eradication by a

⁵⁹ *Id.*

⁶⁰ *Id.* at Treaty Min. May 31.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Mark Arthur, *Nez Perce Indian Chiefs and Leaders*, IDAHO INDIAN TRIBES PROJECT https://www.idahogenealogy.com/indian/nez_perce_chiefs_leaders.htm [https://perma.cc/EMA6-ADWG] (last visited Dec 1, 2017) (the United States Government named Chief Lawyer the official Chief of the Nez Perce Tribe; however, many tribal members recognized Chief Looking Glass as their Chief. To ease this conflict, the author named Chief Looking Glass as a War Leader and a Chief, which he was).

⁶⁷ *Id.* at Treaty Min. June 9th.

faithfully violent American migration,⁶⁸ the Nez Perce Tribe reluctantly agreed to sign their treaty.⁶⁹

The Tribe ceded tracts of land to the United States in exchange for, among other guarantees, a *reserved* and *secured* right to “fish at all usual and accustomed places in common with citizens of the Territory and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands.”⁷⁰ Significantly, the land reserved was for the sole use and occupancy of the Tribe.⁷¹ However, in 1860, gold was discovered within the external boundaries of the Tribe’s reservation, followed by an onslaught of non-Indian trespassers.⁷² Rather than honoring the language of the treaty, which claimed the reservation was for the exclusive use of the Tribe and that no white man would be permitted to reside on the reservation without permission of the Tribe,⁷³ the United States government sought to “negotiate” another treaty with the Nez Perce Tribe.⁷⁴ Accordingly, the Federal government shrunk the Nez Perce reservation by 90%, leaving only 750,000 acres.⁷⁵ Although the Nez Perce Tribe ceded a vast amount of land, the Tribe retained absolute fishing rights on all streams and rivers within the boundaries of the original 13.4 million acre reservation and at all of their “usual and accustomed places” including parts of the Snake and Columbia Rivers.⁷⁶

⁶⁸ Author’s Interpretation.

⁶⁹ *Id.* at Treaty Min. June 11th.

⁷⁰ Treaty with the Nez Percés, 12 Stat. 957 (1855) Significantly, the established reservation became reserved land for only the Tribe; for its sole use and occupancy.

⁷¹ *Id.* at Article II.

⁷² *Nez Perce: The Treaty Period*, NAT’L PARK SERVICE, Feb. 28, 2015, <https://www.nps.gov/nepe/learn/historyculture/the-treaty-era.htm> [<https://perma.cc/28DD-D76U>]; Ojibwa, *Gold & the Nez Perce*, NATIVE AM. NETROOTS, Apr. 19, 2011, <http://nativeamericannetroots.net/diary/929> [<https://perma.cc/PP9F-YYQS>] (An estimated \$7–10 million in gold was taken from Nez Perce lands by non-Indian miners. It was estimated that there were about 15,000 miners on Nez Perce land in open defiance of their treaty. Some of the miners even called upon the American government to move the Nez Perce to some other location.).

⁷³ Treaty with the Nez Percés, 12 Stat. 957 (1855).

⁷⁴ *Nez Perce: The Treaty Period*, NAT’L PARK SERVICE, Feb. 28, 2015, <https://www.nps.gov/nepe/learn/historyculture/the-treaty-era.htm> [<https://perma.cc/28DD-D76U>].

⁷⁵ *Id.*

⁷⁶ *Protecting & Conserving Our Way of Life*, NEZ PERCE TRIBE DEPT. OF FISHERIES RES. MGMT., <http://www.nptfisheries.org> [<https://perma.cc/M6FG-PZN4>] (last visited Dec. 1, 2017).

C. *Interpreting the 1855 Treaty*

If we are to use the treaty interpretation principles correctly, we must look to the surrounding circumstances of the treaty to comprehend how the Indians understood the agreement. Here, it is clear the Nez Perce Tribe emphasized the need for sustainable fishing, claiming their negotiations were not for themselves, but for future generations. Chief Looking Glass asked Gov. Stevens to promise him that there would be fishing available for the Tribe. In response, Gov. Stevens promised that, “[t]here is plenty of Salmon . . . This is a large Reservation. The best fisheries on the Snake River are on it.”⁷⁷

Nevertheless, while the Tribe understood it reserved the right to fish at its usual and accustomed places along the Snake River, and understood fish were promised to reach these usual and accustomed places for the future generations, the Hells Canyon Complex was built within the Tribe’s original 1855 Reservation. The Hells Canyon Complex destroyed an enormous amount of productive fish spawning and rearing habitat, and prevented fish migrations from reaching these usual and accustomed places.

IV. THE HELLS CANYON COMPLEX

*There is plenty of Salmon . . . This is a large Reservation. The best fisheries on the Snake River are on it . . .*⁷⁸

- Gov. Isaac Stevens, Walla Walla Treaty Council, June 5th, 1855.

The Hells Canyon Complex (HCC) is a three-dam hydroelectric project owned and operated by the Idaho Power Company (IPC). This section will introduce the HCC, its influence on the environment and anadromous fish migrations, as well as the HCC’s current attempt at another fifty-year operating license.

A. *The Hells Canyon Complex*

After the Great Depression, the American government believed massive development and industrial “progress” was

⁷⁷ Stevens Treaty Official Proceedings, *supra* note 52, at Treaty Min. June 5.

⁷⁸ Stevens Treaty Official Proceedings, *supra* note 52, at Treaty Min. June 5.

necessary for economic stimulation.⁷⁹ Employing this theory, President Franklin D. Roosevelt initiated his New Deal platform hoping to place “Americans back to work” and promote economic recovery.⁸⁰ The Pacific Northwest used this opportunity to strengthen its own economy by building federal projects such as the Bonneville and Grand Coulee Dams.⁸¹ In all, approximately 160 hydroelectric projects were built in the Pacific Northwest, which all lowered the quality of the aquatic environment, devastated fish populations, and tarnished stream flows.⁸²

Currently, the HCC is the largest privately-owned hydroelectric power project in the United States.⁸³ The HCC and its reservoirs impound a thirty-eight mile section of the Snake River along the Oregon and Idaho border.⁸⁴ Comprised of a three-tiered hydropower system, the HCC holds “a combined generating capacity of 1,167 megawatts (MW): the Hells Canyon Dam (391.5 MW), the Oxbow Dam (190 MW), and the Brownlee Dam (585.4 MW).”⁸⁵ The Federal Energy Regulatory Commission (FERC) issued a fifty-year license for the project in 1955.⁸⁶ The fifty-year license did not require fish passage for the Hells Canyon Dam, leaving the dam operational while blocking fish migrations for more than fifty years. The license expired on July 31, 2005, and since then the entire HCC project operates under annual licenses issued by FERC.⁸⁷

⁷⁹ *The Great Depression & the New Deal*, NAT'L ARCHIVES, Aug. 15, 2016, <https://www.archives.gov/seattle/exhibit/picturing-the-century/great-depression.html> [<https://perma.cc/FMD3-QBE4>].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Found. for Water & Energy Education, *Overview of Hydropower in the NW.*, RENEWABLE ENERGY RES. IN THE NW., <http://fwee.org/education/the-nature-of-water-power/overview-of-hydropower-in-the-northwest> [<https://perma.cc/Y67Y-JCA8>] (last visited Dec. 1, 2017).

⁸³ *Idaho State Profile & Energy Estimates; Renewable Energy*, INDEP. STATISTICS & ANALYSIS: U.S. ENERGY INFO. ADMIN., Nov. 16, 2017, <https://www.eia.gov/state/analysis.php?sid=ID> [<https://perma.cc/NE4R-CA33>].

⁸⁴ 158 FERC ¶ 61048 (Jan. 19, 2017) (located in Washington and Adams Counties (Idaho), and Wallowa and Baker Counties (Oregon)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

B. *HCC's Impact on the Environment and Anadromous
Fish Populations*

Before the HCC, the anadromous salmonid populations migrated past or would spawn in the Hells Canyon area.⁸⁸ For example, Snake River Steelhead entered the Columbia River in late spring and summer, reached the HCC area from September through November or from the following February through April, and spawned in the tributaries of the Snake River from March to May.⁸⁹ Also, Spring Chinook entered the Columbia River between March and May, arrived at the Hells Canyon area in late spring, and spawned in a few Snake River tributaries in August and early September.⁹⁰ Fall Chinook, a native of the Snake River area upstream of the HCC, arrived in the HCC area from September to November, and spawned in the main Snake River between the HCC and Swan Falls Dam.⁹¹ Notably, all fish mentioned spawned in the Snake River tributaries.

The 1950's era of infrastructure development fast-tracked all construction, giving little consideration to fish passage. Considerations for fish migrations and habitat loss involved state and federal conservation agencies, as well as the IPC, but left all tribes with an interest in the fish migrations out of the discussions considering the HCC construction and the future of the Snake River fish populations.⁹² Without a tribal perspective weighing heavily on the adverse impacts of hydroelectric project development, some consultants considered removing the fish altogether through a process called "translocation."⁹³ For example, IPC's consultant, T. Murray, went as far as to propose a complete "translocation," asking to transfer "eyed eggs and fingerlings [to be] planted on an extensive and widespread scale in the headwater streams of the Salmon, Clearwater, Grande Ronde, and Imnaha Rivers."⁹⁴ The primary objective was to remove fish populations from the Snake River

⁸⁸ Idaho Power Company, History of the Hells Canyon Complex, Technical Report Appendix E 3.1–2: Feasibility of Reintroduction of Anadromous Fish above or within the Hells Canyon Complex, Chapter 2 at 4 (Dec. 2001).

⁸⁹ *Id.* (many of these tributaries are upstream of the HCC).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 8–13.

⁹³ *Id.*

⁹⁴ *Id.* at 10.

because the HCC lacked any means of fish passage for juvenile and adult salmon migrations.

The effects of the HCC on anadromous fish within the Snake River area was devastating. The Brownlee Dam reservoir created an extremely hostile environment for juvenile fall Chinook, essentially eradicating the populations upstream.⁹⁵ The HCC also eliminated wild runs of Spring Chinook and Steelhead populations in existence prior to construction.⁹⁶ The number of Fall Chinook declined from about 18,000 in 1958 to less than ten by 1971.⁹⁷ The number remains low today.

Despite the disparate impact the HCC has on the environment and migratory fish, IPC continues to fight against the construction of a fish passage system in the HCC.⁹⁸ For example, Oregon law mandates that “fish passage is required in all waters of [Oregon] in which migratory fish are currently or have historically been present,”⁹⁹ this would include the Snake River. In contrast, the state of Idaho opposes fish passage and reintroduction.¹⁰⁰ On November 23, 2016, IPC filed a petition for a declaratory order asking FERC to solve this conflict between the states’ positions—among other things—regarding fish passage, and to conclude, under the Supremacy Clause of the United States Constitution, that Part I of the FPA preempts Oregon’s fish passage requirements with respect to the HCC; consequently, allowing FERC to override the Oregon law requiring fish passage.¹⁰¹ However, FERC dismissed IPC’s Petition for Preemption, stating FERC lacks authority to review state determinations of fish passage and reintroduction, and that state prescriptions and regulations regarding fish passage are governing.¹⁰² Although states possess authority over hydropower

⁹⁵ *Id.* at 20.

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 3.

⁹⁹ Or. Rev. Stat. § 509.585 (2016).

¹⁰⁰ 158 FERC ¶ 61048 (Jan. 19, 2017).

¹⁰¹ *Id.* at ¶ 1.

¹⁰² *Id.* at 13, 31 (“In any event, if Oregon ultimately seeks to require fish passage and reintroduction as a condition of either its water rights decision or its water quality certification, the Commission would have no authority to review these state determinations. Under section 27 of the FPA, the Commission has no authority to adjudicate issues related to state water rights. Similarly, the Commission has no authority to review or reject conditions of a state’s water quality certification. Nor would we have any authority to resolve conflicts between the states’ certifications, if they exist, or conflicts between the states’

licensing, the Treaty-reserved rights and contemporary interests of the tribes remain unbinding.

Why do tribal interests remain unbinding? The answer is that under the current statutory hydropower relicensing regime, FERC is not statutorily required to obtain consent from a tribe in order to license a hydropower project even if the project continues to desecrate resources the tribe reserved for its people during treaty negotiations.

V. CURRENT STATUTORY REGIME AND ITS FAILINGS

*The statutory framework of the FPA itself does not identify a role for Indian tribes to make decisions about or impose prescriptions on hydropower projects, even those that continue to jeopardize the Treaty-reserved resources necessary for economic and cultural stability.*¹⁰³

The Federal Power Act (FPA) and the Clean Water Act (CWA) address hydropower relicensing. This section illustrates: how the hydropower licensing regime operates under the FPA; the FPA's provisions that provide a limited role for the tribes with respect to hydroelectric projects *within* tribal reservations; the state's delegated power under the CWA; the opportunities a tribe holds under the CWA if the hydroelectric project is *upstream* from its reservation; and, the issues tribes face in relation to *downstream* hydropower projects *outside* tribal reservations but *within* the tribes' usual and accustomed fishing places and hunting areas.

A. Current Hydropower Licensing Regime

Many large hydroelectric projects within the Northwest are licensed through the FPA. Part I of the FPA vests FERC with the responsibility to determine whether, and under what conditions, to issue licenses for the construction, maintenance, operation, or continued operation of non-federal hydropower facilities.¹⁰⁴ Because environmental degradation is apparent, considering environmental impacts is fundamental to issuing a new license. As part of FERC's licensing process, various state and federal agencies

certification conditions and any mandatory fishway prescriptions or other mandatory conditions.").

¹⁰³ See *infra* Part IV, Section A (author's words).

¹⁰⁴ 16 U.S.C. § 797(e).

are responsible for providing conditions, prescriptions, and recommendations to protect natural and trust resources, including fish, wildlife, and federal reservations.¹⁰⁵ The federal and state agencies involved in this process are National Marine Fisheries Service, United States Fish and Wildlife Service, National Parks Service, the Environmental Protection Agency, state fish and wildlife agencies, state water resource agencies, and the state agency with CWA authority.¹⁰⁶ If a hydroelectric project is *within* an Indian tribe's reservation, the tribe must either rely on the Secretary of Interior (Secretary) imposing conditions or hope for the best during a non-binding consultation between FERC and the impacted tribe. Specifically, the statutory framework of the FPA itself does not identify a role for Indian tribes to make decisions about or impose prescriptions on hydropower projects, even those that continue to jeopardize the Treaty-reserved resources necessary for economic and cultural stability.

For example, certain sections of the FPA require FERC to either obey or consider the prescriptions from federal resource agencies and other interested parties. Section 4(e) of the FPA requires FERC to give "equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."¹⁰⁷ Additionally, Section 4(e) provides that licenses issued under this section "*shall* be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."¹⁰⁸ In relation to tribes, the Secretary *may* prescribe a condition that protects a tribe's interest only if the hydroelectric project falls *within* the reservation and the Secretary, not the tribe, believes the prescription will protect the reservation.

The United States Supreme Court examined Section 4(e) when FERC rejected a condition imposed by the Secretary under the FPA. In *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, a 1924 license

¹⁰⁵ *Id.* (all reservations, including national parks and Indian reservations).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (emphasis added).

expired, which left FERC to consider issuing a new license under the FPA.¹⁰⁹ During this process, a dispute between FERC, the Secretary, and several Indian tribes arose regarding what conditions a hydropower applicant must meet to obtain a hydropower license.¹¹⁰ Because the hydroelectric project fell *within* an Indian reservation, it was under the jurisdiction of the Secretary. Consistent with Section 4(e), the Secretary required FERC to deny the new permit until the City of Escondido could show that the project would not interfere with the Indian tribes' use of a specified quantity of water.¹¹¹ FERC denied the Secretary's condition, ruling that Section 4(e) of the "FPA did not require FERC to accept without modification conditions which the Secretary deemed necessary for the adequate protection and utilization of the reservations."¹¹²

The United States Supreme Court determined that Section 4(e) requires that FERC adhere to the conditions the Secretary prescribes, but only if the hydroelectric project falls *within* the reservation.¹¹³ The Court reminded FERC that Section 4(e) clearly states FERC "*shall* be subject to such conditions as the Secretary . . . deem[s] necessary for the adequate protection and utilization of such reservation."¹¹⁴ The Court explained that Congress chose this language in an effort to require FERC to include all the Secretary's conditions even if FERC disagrees; therefore, Congress could not have intended to relieve the Secretary of his or her responsibility to protect public lands and reservations.¹¹⁵ The Court limited this power, noting that nothing in Section 4(e) requires FERC to follow the Secretary's conditions to protect *any* reservation, "other than the one *within* which project works are located."¹¹⁶

The United States Supreme Court's decision in *Escondido* resonates two principles: (1) if the Secretary decides that a hydropower project encumbers a tribe's resources, the Secretary can impose mandatory conditions so that these negative effects may be avoided; and (2) the Secretary's power to protect tribal reservations is limited to the extent that a project falls *within* a tribe's reservation.

¹⁰⁹ *Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765, 767 (1984).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 770.

¹¹³ *Id.* at 797.

¹¹⁴ *Id.* at 772.

¹¹⁵ *Id.* at 771.

¹¹⁶ *Id.* at 781 (emphasis added).

What this means is that if a hydropower project negatively affects an Indian tribe's reservation or its resources, and the hydropower project is *within* a tribe's sovereign territory, then the tribe must rely on the Secretary to protect the tribe's interests. Nothing in Section 4(e) grants the tribe authority to speak for itself or on behalf of its citizens. Furthermore, if a hydropower project rests *outside* a tribe's reservation boundary, yet obstructs or desecrates a tribe's access to its water and fish resources, the FPA does not provide the Secretary or the tribe with statutory authority to demand mandatory conditions on the hydropower project to protect the tribe's citizens or economy.

In relation to the Nez Perce Tribe, the HCC lies outside the current boundaries of the Nez Perce Tribe's reservation. Although the HCC clearly desecrates and causes fatal conditions for Treaty-reserved fish populations, the FPA does not provide the Tribe with binding statutory authority to demand mandatory fish passage within the HCC from FERC as part of the relicensing process under the FPA. The only statutory opportunity the FPA offers the Tribe to speak for itself and its resources is the tribal consultation process outlined in Section 10(a) of the FPA.

Section 10(a) of the FPA requires FERC to be satisfied that the project to be licensed is best adapted to a plan improving or developing the waterway.¹¹⁷ During the Section 10(a) process, FERC *considers* comprehensive plans prepared by federal and state entities, and the recommendations (including fish and wildlife recommendations) of tribes possibly affected by the project;¹¹⁸ this is carried out through the tribal consultation process.¹¹⁹ It is noted that the tribal consultation process aims to address tribal concerns through tribal engagement, strives to develop working relationships with tribes, and endeavors to increase direct communication with tribal representatives.¹²⁰ Nonetheless, after consultation, FERC generally combines the concerns raised by tribes, then *considers* the interests whenever FERC's actions or decisions may adversely affect a tribe.¹²¹ Because FERC is only required to *consider* a tribe's recommendations under the FPA, FERC may wholly disregard a tribe's recommendations.

¹¹⁷ 16 U.S.C. § 803(a).

¹¹⁸ *Id.*

¹¹⁹ 16 U.S.C. § 803(a)(3).

¹²⁰ *Id.*

¹²¹ *Id.*

B. *The Clean Water Act*

The CWA prohibits the discharge of pollutants into navigable waters unless the discharge is sanctioned by permit or statute.¹²² The CWA grants states federally-supervised authority to draft water quality standards for waters within its own boundaries, to certify compliance with those standards, and to issue and enforce discharge permits.¹²³ Significantly, Congress amended the CWA in 1987 to permit the Environmental Protection Agency to treat Indian tribes in the same manner as states under Section 518.¹²⁴

In relation to hydropower relicensing, Section 401 of the CWA requires that a federal license or permit applicant, such as a FERC license applicant, obtain certification from the appropriate state pollution control agency verifying that compliance with the CWA is “reasonably certain to occur” following issuance of the license or permit.¹²⁵ If the state or the state’s pollution control agency refuses to grant a certification due to non-compliance with its water quality standards, the CWA directs FERC to deny a license to the hydropower project until it can prove that its activities will comply with state regulations.¹²⁶ Relative to the HCC, FERC is currently waiting for CWA certifications from Oregon and Idaho.

The CWA offers powerful authority to tribes by allowing tribes to be treated as states, and create water quality standards for waters within their reservations. For an Indian tribe seeking to receive treatment as a state (TAS) status under the CWA, the tribe must: (1) be federally recognized; (2) have a government carrying out governmental duties and powers; (3) exercise functions pertaining to the management and protection of water resources held by the tribe, by the United States in trust for the tribe, or otherwise within the reservation; and (4) be capable of carrying out the functions of the CWA.¹²⁷ Once the Environmental Protection Agency has granted an Indian tribe TAS status, the tribe may establish water quality standards for bodies of water *within* its reservation, and require permits for any action that may create a

¹²² 33 U.S.C. § 1311(a).

¹²³ *Id.* at §§ 1313, 1341–42.

¹²⁴ *Id.* at § 1377(e).

¹²⁵ 33 U.S.C. § 1341.

¹²⁶ *Id.* at (a)(1).

¹²⁷ *Id.* at §§ 1377(e) (1–3).

discharge into those waters.¹²⁸ Although a tribe could potentially use these standards to limit discharges from hydropower projects upstream of its reservation, this off-reservation power under the CWA is limited to just that, water quality *upstream*.

TAS status for water quality standards is a remarkably powerful tool for tribes, but is of little help to a tribe seeking mandatory prescriptions on a hydropower project *downstream*. Both the CWA and the FPA fail to recognize a tribes' authority to defend its *downstream* Treaty-reserved resources, leaving *upstream* tribes with the unbinding option under the statutory framework to simply *consult* FERC about resource degradation.

VI. SYSTEMIC RACISM AND ITS SOLUTION

*Whether the United States redresses the continuing harms of American injustice to people within its borders, will speak loudly about its actual commitment to democratic principles and human rights.*¹²⁹

- Eric K. Yamamoto

The FPA and CWA ensure state and federal needs are met through its mandatory consent provisions, which require that FERC obtain the consent of involved state and federal authorities before it can relicense a hydropower project. In contrast, this statutory hydropower relicensing regime fails to recognize tribal autonomy and Treaty-reserved resources. This blatant disregard for tribal authority is imbedded in the FPA's statutory scheme, as the FPA grants no leverage for a tribe to protect necessary resources it reserved during treaty negotiations. Typically, one might suggest a mere congressional amendment to the FPA, suggesting a diplomatic revamp of the consultation process. Under these circumstances, however, a mere amendment would not be enough to bring the hydroelectric relicensing regime into compliance with treaties and the federal trust responsibility; or most importantly, it would not be enough to make effective change for the benefit of Indian tribes and endangered resources.

Systemic change mandates more than an amendment to the FPA; it requires an understanding as to why changes are necessary

¹²⁸ *Id.* at § 1377(e).

¹²⁹ Eric K. Yamamoto, *Am. Reparations Theory & Practice at a Crossroads*, 44 CAL. W. L. REV. 1, 85 (2007).

and how to make them to be abiding and effective. Achieving such an understanding necessitates close interrogation of a broader political issue: why and how do certain statutory regimes historically and contemporaneously neglect disenfranchised communities? Unearthing this answer is essential to ensure that future statutes or amendments—not limited only to the FPA—do not develop with the same oppressive continuity.

This section explores the origins of the FPA and the historical context that gave rise to the current relicensing regime. This history illustrates the singular perspective of the FPA, and why Treaty-reserved resources were neglected during the construction of hydropower projects in the twentieth century. The inherent inequity of the hydropower regime serves as a foundation for a discussion into *why* change is necessary and *why* statutes that overlooked society's needs must be reconstructed to remedy the current legacy of systemic oppression. To remedy the current inequities of the current hydropower regime, the Tribe's Treaty-reserved fishing rights must be acknowledged as the supreme law of the land as the United States Constitution provides. The FPA must *require* FERC to be subject to the conditions an affected tribe deems necessary for the adequate protection and utilization of such reservation and its Treaty-reserved resources—just as FERC must now meet the conditions imposed by affected state and federal participants. Without the addition of this tribal consent provision, the FPA will continue to facilitate the longstanding ideal of a paternalistic statutory environment.

A. The Creation of the Federal Power Act and its Dark Legacy

Congress enacted the Federal Water Power Act (FWPA) on June 10, 1920;¹³⁰ this Act would later become the FPA. Congress intended the FWPA to effectively coordinate the development of hydroelectric projects.¹³¹ Because Congress enacted the Statute in the 1920's, many potentially affected and disenfranchised groups, including Indian tribes, lacked any meaningful congressional

¹³⁰ *Digest of Fed. Res. Laws of Interest to the U.S. Fish & Wildlife Service; Fed. Power Act*, THE CTR. FOR REGULATORY EFFECTIVENESS, <http://www.thecre.com/fedlaw/legal12q/fedpowr.htm> [<https://perma.cc/9T6U-P76M>] (last visited Dec. 1, 2017).

¹³¹ *Id.*

representation during the drafting of the FWPA and other infrastructural statutes.

The systemic reality, the social environment, and the mentality of congressional representatives in the 1920's highlight why tribal and other minority interests were not represented during statutory development.¹³² For example, the Allotment and Assimilation eras were in full-force during the creation of the FWPA. The Allotment Act, also known as the Dawes Act, effectively ruined reservation development and transferred reservation land-rights to non-Indians.¹³³ Coming to fruition in the early 20th century, the Allotment Act resulted in a “decline [of] the total amount of Indian-held land from 138 million acres in 1887 to 48 million [by] 1934.”¹³⁴ This *congressionally* approved appropriation of Indian land highlights the lack of positive congressional perspectives toward Indian territorial rights during FWPA construction.

Furthermore, during this era, federally run boarding schools for Indian children carried a primary “purpose to assimilate Indian

¹³² V. Chapman Smith, *Am. Anti-Slavery & Civil Rights Timeline*, U.S. HISTORY, <http://www.ushistory.org/more/timeline.htm> [<https://perma.cc/U5T6-KPW7>] (last visited Dec. 1, 2017) (In the summer of 1919, also known as the Red Summer, twenty-six documented race-riots occurred, where minority communities across the country were attacked; hundreds of minorities were killed and even more were injured; widespread property damage occurred in minority neighborhoods; and lynching was a legitimate means of intimidating minorities).

¹³³ WILLIAM C. CANBY, *AM. INDIAN LAW IN A NUTSHELL* 22 (6th ed. 2015) (Due to increasing dissatisfaction with reservation policy, the resentment of white settlement being excluded from reservations, and a *white-savior* approach to helping the Indians, Congress parceled out reservation land and opened it up for white settlement. With singular intentions, Congress “believed that if individual Indians were given plots of land to cultivate, they would prosper and become assimilated into the mainstream of American culture as middle-class farmers. The tribes, which were viewed as obstacles to the cultural and economic development of the Indians, would quickly wither away. Such a prospect was not, of course, offensive in the least to those non-Indians anxious to break up the tribal land mass”).

¹³⁴ *Id.* at 23–24 (Much of the land was lost by sale to non-Indians. The power for individual Indians to sell their allotted land “provided many opportunities for non-Indians to negotiate purchases of allotted land on terms quite disadvantageous to the Indians. [The Indians] were frequently left with neither their land nor with any benefits that might have resulted from its disposition.” Moreover, the Allotment Act subjected allotted land to “state intestacy laws that resulted in highly fractionated ownership that effectively rendered the land unusable.” Because of this fractionation, large scale ranges and farming are still impracticable, leaving economic development extremely difficult.).

people into the melting pot of America.”¹³⁵ This federal policy called for the forced removal of Indian children from their families and placed them in supervised detention where the children were abused psychologically, sexually, and physically.¹³⁶ Furthermore, Indian cultures and languages were actively repressed through “severe punishment”¹³⁷ with children’s mouths scrubbed with lye and chlorine solutions for speaking their own language.¹³⁸ With the belief that English was “the language of the greatest, most powerful and enterprising nationalities under the sun,”¹³⁹ the schools sought to “civilize” and “Christianize” the youth.¹⁴⁰ Because Congress did not fund the boarding schools properly, many children were crammed together and neglected, causing disease to spread; consequently, many children never returned home and those that did could not communicate with their families because they had forgotten their tribal language.¹⁴¹

With political agendas resonating a singular, racially-charged narrative of development and control, the creation of the FWPA was nothing but harsh toward Indian rights and resources; from this history, it is clear why Indian resource protection was not drafted into the original hydropower statute.

¹³⁵ Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Nw.*, UNIV. LIBRARIES: UNIV. OF WASH., <https://content.lib.washington.edu/aipnw/marr.html> [<https://perma.cc/2G8J-5AQX>] (last visited Dec. 1, 2017).

¹³⁶ *Cultural Genocide—Boarding Schools*, VOICES OF THE FIRST NATION PEOPLES, <http://firstpeoplesvoices.com/boarding.htm> [<https://perma.cc/A4JE-83SJ>] (last visited Dec. 1, 2017).

¹³⁷ Marr, *supra* note 135.

¹³⁸ VOICES OF THE FIRST NATION PEOPLES, *supra* note 136.

¹³⁹ Marr, *supra* note 135.

¹⁴⁰ Andrea Smith, *The Legacy of Native Am. Schools*, AMNESTY INTL. MAGAZINE (Oct. 9, 2015), <https://laratracehantz.wordpress.com/2015/10/09/soul-wound-the-legacy-of-native-american-schools> [<https://perma.cc/862Q-WF9F>] (“The system, which began with President Ulysses Grant’s 1869 ‘Peace Policy,’ continued well into the 20th century. Church officials, missionaries, and local authorities took children as young as five from their parents and shipped them off to Christian boarding schools; they forced others to enroll in Christian day schools on reservations. Those sent to boarding school were separated from their families for most of the year, sometimes without a single family visit. Parents caught trying to hide their children lost food rations. Virtually imprisoned in the schools, children experienced a devastating litany of abuses, from forced assimilation and grueling labor to widespread sexual and physical abuse.”).

¹⁴¹ Stephan Magagnini, *Long-Suffering Urban Indians Find Roots in Ancient Rituals*, INTERNET ARCHIVE, https://web.archive.org/web/20050829051045/http://sacbee.com/static/archive/news/projects/native/day2_main.html [<https://perma.cc/HBL6-CWJN>] (last visited Dec. 1, 2017).

The HCC received its operating license in 1955, during the Termination Era. In 1953, Congress formally adopted a policy of “termination,” with an express aim to “as rapidly as possible, [] make the Indians within the territorial limits of the United States subject to the same laws . . . [as] other citizens . . . and to end their status as wards of the United States.”¹⁴² Although the tribes negotiated treaties with the American government, Congress disregarded tribal rights and effectively stripped tribal homelands apart by converting tribal homelands into private ownership and selling parcels off—merely because Congress chose to.¹⁴³ During this era, Congress continued to actively oppose tribal development and sovereignty through hostile actions opposed to tribal interests.¹⁴⁴

Given this history, it is easy to understand why tribes were neither involved in the development of the FWPA nor in the licensing of the HCC. The colonial government was set to disregard any other cultures besides its own, especially Treaty-reserved and culturally-significant salmon resources. The statutory consequences of this era remain in effect today. Although the Nez Perce Tribe devotes over \$20 million annually toward the reintroduction and sustainability of fish resources in the Columbia Basin, the FPA fails the Tribe in that it does not statutorily ensure that the project is operated consistent with the United States’ treaty with the Nez Perce Tribe in which the Tribe reserved, and the United States secured, the right to take fish at all usual and accustomed places.

B. *The Nez Perce Tribe’s Role in Relicensing*

The HCC lies within the Nez Perce Tribe’s historic 1855 reservation boundaries and is entirely within the Tribe’s aboriginal sole use and occupancy territory, as defined by the Indian Claims Commission.¹⁴⁵ Accordingly, the Tribe continues to stay active in FERC’s HCC relicensing proceedings in order to ensure the

¹⁴² CANBY, *supra* note 133, at 27.

¹⁴³ CANBY, *supra* note 133, at 27.

¹⁴⁴ CANBY, *supra* note 133, at 27.

¹⁴⁵ Lewis & Clark Rediscovery Project, *Nez Perce: Territory of the Nimlipuu*, UNIV. OF IDAHO, <http://www.webpages.uidaho.edu/L3/ShowOneObjectSiteID34ObjectID162.html> [https://perma.cc/9LWU-7AW2] (last visited Dec. 1, 2017).

adequate protection of its natural and cultural resources.¹⁴⁶ The Tribe continues to highlight water quality issues in the Snake River downstream of the HCC, including: the production of methylmercury within the HCC and its contamination of fish species downstream of the HCC, elevated water temperatures, and dissolved oxygen and total dissolved gas levels.¹⁴⁷ The Tribe also continues to raise concerns about seasonal flow pattern changes in the Snake River, as a result of dam management, and to advocate for sufficient fish passage and reintroduction above the HCC “to mitigate for the historic fish runs that the Tribe has depended on since time immemorial and which the HCC has destroyed or severely diminished.”¹⁴⁸

The Nez Perce Tribe has committed significant resources to advocating for a HCC license that would truly meet the Tribe’s goals and the goals of the FPA in providing equal consideration to power production and fish and wildlife protection. The Tribe has actively participated in numerous regional meetings with various other tribes, federal agencies, states, and conservation organizations to discuss the HCC relicensing. These various parties to the HCC relicensing process, which include the National Marine Fisheries Service, United States Fish and Wildlife Service, FERC, Idaho, Oregon, and other nearby Indian tribes, have long agreed that the impacts of the HCC require real solutions.¹⁴⁹ These regional stakeholders—with the Nez Perce Tribe standing chief among them—have discussed at length fish passage as a potential solution to the devastating effects the HCC has had and continues to have on local fish populations by making fish passage a component of any new HCC license.¹⁵⁰

In December of 2003, the Nez Perce Tribe submitted comments requesting project operation reforms requiring fish passage, habitat improvements, water quality improvements, wildlife protection, and cultural resource protection.¹⁵¹ In January of

¹⁴⁶ See Nez Perce Tribe’s Comments on Hells Canyon Complex (FERC Project Number 1971) Draft Section 401 Water Quality Certification, (Feb. 28, 2017).

¹⁴⁷ *Id.*

¹⁴⁸ Motion to Dismiss & Protest of the Nez Perce Tribe at 2, (Dec. 30, 2016) (Project No. P-1971-079).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Hells Canyon Joint Meeting*, IDAHO POWER COMPANY (June 25, 2003), https://www.idahopower.com/pdfs/Relicensing/hellscanyon/hellspdfs/concurrentfilings/Joint_Meeting_2nd_Stage.pdf [<https://perma.cc/N6PD-WSV6>].

2006, the Nez Perce Tribe submitted 10(a) comments and recommendations requesting that flow patterns be changed, asking for water management and quality to reflect the needs of salmonids, and recommending other changes to protect cultural resources, hunting, gathering, pasturing, fishing, and artificial fish production and reintroduction.¹⁵² However, FERC declined all recommendations with the exception of reduced ramping rates to protect juvenile salmon.¹⁵³ In 2007, the Nez Perce Tribe sought to directly engage IPC regarding HCC relicensing and has done so at least three separate times throughout the relicensing process.¹⁵⁴

Additionally, in April of 2012, the Nez Perce Tribe met with the Columbia River Inter-Tribal Fish Commission, of which it is a member, and IPC staff to discuss the state of the Snake River's fall Chinook Salmon population.¹⁵⁵ At this meeting, the Nez Perce Tribe emphasized issues including fish run reconstruction, adult run timing, thermal conditions, pre-spawn survival, gamete viability, spawn timing, habitat availability, entrapment, and climate change.¹⁵⁶ Further, in November of 2013, Nez Perce Tribal representatives participated in a two-day HCC field trip through their aboriginal territory with IPC staff.¹⁵⁷ In September of 2014, the Nez Perce Tribe met with IPC to explore technical issues regarding fish passage, downstream water quality, upstream water quality, and habitat.¹⁵⁸ At this meeting, the participants discussed IPC's potential "watershed scale restoration approach" to address the thermal impacts of the HCC as part of a potential new license.¹⁵⁹

VII. CONCLUSION

Treaties are not a mere piece of paper that can be overlooked. Treaties are protected under the Constitution, and are deemed as the supreme law of the land.¹⁶⁰ The Nez Perce Tribe negotiated a treaty

¹⁵² Letter from Ryan Sudbury, Nez Perce Tribe Attorney, to Magalie Salas, Fed. Energy Regulatory Comm'n Sec'y (Jan. 26, 2006).

¹⁵³ *Id.*

¹⁵⁴ Motion to Dismiss & Protest of the Nez Perce Tribe at 2, (Dec. 30, 2016) (Project No. P-1971-079).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ U.S. CONST. art. VI, cl. 2.

with the United States that confirmed there would be salmon at all its usual and accustomed places, including the best fisheries on the Snake River; however, the Hells Canyon Complex (HCC) has completely decimated migratory fish populations and has caused environmental degradation to the point that fish swimming in the HCC's reservoirs become tainted with oxidants like methyl-mercury.¹⁶¹ Because it is mandatory that the treaty is interpreted with the goal to determine how the Indians understood the treaty at the time of its creation and under all the circumstances involved during the treaty negotiations, it is simple to conclude that the Tribe believed it was reserving the salmon resource for future generations.¹⁶² Moreover, it is a rule that during treaty interpretation, a court must counterbalance past "inequalit[ies] by [] superior justice which looks only to the substance of the right, without regard to technical rules."¹⁶³

So, how do we address the impacts that the Hells Canyon Complex has had and continues to have on salmon, salmon habitat, and water quality? First, the Tribe will continue to pursue the improvements that are necessary at the Hells Canyon Complex to address the Tribe's fisheries, natural resources, and cultural resource issues consistent with the United States' 1855 Treaty with the Nez Perce. Second, any dam operator would be operating at their peril to assume that FPA's lack of conditioning authority for tribes does not mean that a dam operator can ignore the United States' 1855 Treaty with the Nez Perce and its implications.

For example, in *U.S. v. Washington*, the "Boldt Decision" found that the right to fish at a tribe's usual and accustomed fishing places was a larger right possessed by the Indians, and this right to fish was "not much less necessary to the existence of the Indians than the atmosphere they breathed."¹⁶⁴ Moreover, the Boldt Decision recognized that the treaty was not a grant of rights from the United States, but a reservation of those not granted, and that it "was in the competency of the Nation to secure to the Indians such

¹⁶¹ See Stevens Treaty Official Proceedings, *supra* note 52, at June 5, 1855; see Idaho Power Company, *supra* note 88.

¹⁶² *Supra* Section I.

¹⁶³ *United States v. Washington*, 384 F. Supp. 312, 331 (W.D. Wash. 1974) ("*Washington I*").

¹⁶⁴ *Id.*

a remnant of the great rights they possessed as ‘taking fish at all usual and accustomed places.’”¹⁶⁵

The Ninth Circuit acknowledged these principles in the recent *Culverts* decision. In *Culverts*, the United States and tribes with reserved fishing rights obtained a ruling from the federal District Court that Washington had, and continues to, violate their treaties by building and maintaining barrier culverts.¹⁶⁶ Barrier culverts prevent mature salmon from returning to spawn and prevent smolts from moving downstream.¹⁶⁷ The Ninth Circuit affirmed, noting that “Gov. Stevens had assured the Tribes that they would have an adequate supply of salmon forever,” and it was this promise that moved the tribes to sign their treaties.¹⁶⁸ The Ninth Circuit explained that the Indians could not understand that their treaties held some “qualification that would allow a government to diminish or destroy the fish runs,” and it is this understanding that binds the government to the treaty.¹⁶⁹ The Ninth Circuit held that because barrier culverts block fish and reduce the fish available for Treaty harvest, the state’s actions violated the treaties.¹⁷⁰ Therefore, the Ninth Circuit affirmed the District Court’s injunction, ordering the state to “design and build fish passage at each barrier culvert . . . in order to pass all species of salmon at all life stages at all flows where the fish would naturally seek passage.”¹⁷¹

The *Culverts* decision stands as a testament to the United States’ acknowledgment of the significance of Treaty-reserved fishing rights. Regardless of whether Treaty rights are acknowledged through litigation as in the *Culverts* case—or through an understanding that the United States’ 1855 Treaty is the supreme law of the land with which the FPA must be harmonized—that acknowledgement will be best achieved by: recognizing the historical roots of societal grievances; taking responsibility for healing by seeking to progress society in a multifaceted way, honoring all cultures and perspectives; reconstructing societal and infrastructural institutions that systematically oppress certain communities; and, repairing the historical damage by executing a

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016).

¹⁶⁷ *Id.* at 845.

¹⁶⁸ *Id.* at 848.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 851.

¹⁷¹ *Id.* at 857.

new societal platform with the understanding that history has been unfair to many of those misrepresented during the formative years of modern America.¹⁷²

Here, the United States must continue to acknowledge the significance of the fisheries that the Nez Perce Tribe reserved in its Treaty with the United States and the solemn promises the United States made in that Treaty. It is important for the United States' agencies and citizens to: recognize the historical inequity of improper tribal representation during the formation of the FPA; take responsibility for this inequity; seek a solution by working with tribal representatives to redress the impacts of a hydropower system that has historically oppressed tribal interests for nearly a century; and, repair past damage by ensuring that the promises negotiated with tribes during treaty negotiations are kept.

I argue that for proper repair, the Federal Power Act (FPA) must evolve into a statute honoring tribal autonomy by seeking full consent from a tribe with a Treaty-reserved interest in a hydropower project. Therefore, before a hydropower project is approved, the FPA must *require* the Federal Energy Regulatory Commission to be subject to such conditions as affected tribes deem necessary for the adequate protection and utilization of tribal reservations and tribal Treaty-reserved resources. Without this, the FPA continues to press the longstanding ideal of a paternalistic statutory environment, making it near impossible for a tribe to protect its citizen's interests.

¹⁷² Yamamoto, *supra* note 129, at 48.

Our nation was born in genocide when it embraced the doctrine that the original American, the Indian, was an inferior race. Even before there were large numbers of Negroes on our shores, the scar of racial hatred had already disfigured colonial society. From the sixteenth century forward, blood flowed in battles of racial supremacy. We are perhaps the only nation which tried as a matter of national policy to wipe out its indigenous population. Moreover, we elevated that tragic experience into a noble crusade. Indeed, even today we have not permitted ourselves to reject or to feel remorse for this shameful episode. Our literature, our films, our drama, our folklore [and our laws] all exalt it.¹⁷³

- Dr. Martin Luther King, Jr., *The Other America*

¹⁷³ Native American Cultural Center, *The Other America*, YALE COLLEGE <https://nacc.yalecollege.yale.edu/reflection-today-our-nation-was-born-genocide-when-it-embraced-doctrin> [<https://perma.cc/E7HK-HYEC>] (last visited Dec 1, 2017).