Daniel H. Israel Colo #3878
1315 Bear Mountain Drive, Suite A
Boulder, Colo 80305
ph.303-246-9027
fax-303-736-8201

Attorney for plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Klamath Tribes of Oregon, Miller Anderson, Joseph Hobbs, Catherine Weiser-Gonzalez Robert Anderson, Joseph Kirk, Orin Kirk, Leonard Norris Jr., Philip Tupper, Robert Bojorcas, and Klamath Claims Committee	)	
Plaintiffs-Appellants	)	
vs.	)	
	)	Case No. 05-36010
PacificCorp, a corporation	)	
Defendant-Appellee`	)	

REPLY BRIEF OF THE KLAMATH INDIANS

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THE KLAMATHS REQUEST ORAL ARGUMENT TO ALLOW THEM TO CLARIFY FOR THE BENEFIT OF THE COURT ANY CONFUSION CREATED BY THE CONFLICTING REPRESENTATIONS SET FORTH IN THE PARTIES' BRIEFS

1. Summary of Argument

In the 1970's this Court upheld the preservation of Klamath Treaty fishing rights in the upper headwaters of the Klamath River in Kimball v. Callahan , 493 F.2d 564 (9th Cir. 1974(I) and Kimball v. Callahan (II), 590 F.2d 768 (9th Cir. 1979)on the basis of Congress' plan to always protect the unique on Reservation fishing rights secured in the Treaty of 1864. Then in the 1980's this Court acted in United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) to assure again that the on Reservation Klamath Treaty of 1864 fishing rights in the headwaters of the Klamath River rights were always protected, by securing under federal law the required quantities of stream flow to assure passage and preservation of the fishery. Adair found that in the Treaty of Oct 14, 1864;

the Government and the Tribe intended to reserve a quantity of water flowing through the Reservation ....for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands. 723 F.2d at 1410.

This appeal requires the Court to determine whether Adair's articulated intent embraces as well a cause of action for damages when those "reserved water flows" are dammed and the anadromous fishery relying on those flows is destroyed. To accomplish the next step–finding an intent to provide a remedy in the form of damages for destruction of the required passage, federal law requires an inquiry into how "Congress would have addressed the issue had the ....action been included in an express provision in the statute." Gerber v. Lago Vista Independent School District, 524 US 274,285(1998).

Moreover, this inquiry is to be made taking into account the state of federal law at the time of the 1864 Treaty.[1] The Supreme Court found in the time period shortly after the 1864 Treaty the requisite intent in the Act of April 14, 1910

[1]Franklin v. Gwinnett County Public Schools, 503 US 60,70-72(1992), noting that the denial of a remedy for injury to a party protected by federal statute is the exception rather than the rule. Indeed, in Texas & Pacific R. Co. v. Rigsby, 241 US 33,40(1916), the Court summarized the state of the law in place at the time of the 1864 Treaty, noting "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied....(emphasis supplied)

requiring that all railroad cars be equipped with ladders with "secure" handholds for the benefit ot railroad employees. Texas & Pacific Ry. v. Rigsby, at 37 . In upholding the right of an employee who was injured because of failed handhold, the Court stated; "Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor....."Id. The Treaty of 1864 used the same language quoted in Rigsby, namely that the Klamaths on Reservation fishing in the headwaters of the one drainage which reached their Reservation was to be "secured" for their exclusive benefit. [2]

As we show in this Reply Brief, PC does not and cannot dispute the above summary of the applicable implied cause of action of law. To the contrary, PC spends virtually none of its Answer Brief addressing this showing by the Klamaths. Rather,,as we next show, PC adopts a strategy of putting on the table matters which are irrelevant to the inquiry which must be made by the Court.

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[2] PC notes that the treaty at issue in Skokomish Tribe v. United States, 410 F.3d 506(9 Cir. 2005) also utilized the word "secure" . But, as we show in this Reply Brief, the dam at issue in that proceeding inundated one of that Tribe's many off Reservation usual and accustomed fishing locations and reduced to some degree fishing opportunity on the Skokomish River which is the southern boundary of their Reservation. The pledge to "secure" on Reservation fishing for the Skokomish Indians therefore was not implicated in the primary injury at issue in that case–namely inundation of one of hundreds of usual and accustomed fishing location s.

2. What PacifiCorp has right

* We agree with PacifiCorp (PC) that its predecessor, Copco, constructed a dam in the bed of the Klamath River just south of the Oregon-California border commencing in 1911 and that the dam blocked the passage of salmon and steelhead from upstream to and downstream passage from the Klamath Reservation in the headwaters of the Klamath River.

* We agree with PC–as their map attached in their ADDENDUM, PADD102 confirms that the Klamath River and its upper spawning tributaries are the only source of salmon and steelhead for the Klamath Indians who were restricted to on Reservation fishing under the the Treaty of October 14, 1895

* We agree with PC that the dam at issue in this Court's recent ruling in Skokomsh Tribe v. United States, 410 F.3d 506(9th Cir. 2005) blocked one of a large number of drainages where that Tribe reserved access to and an opportunity to fish at its "usual and accustomed" fishing locations

* We agree with PC that Copco, its predecessor, did not secure any governmental license addressing the protection of salmon in the Klamath River until 1957 when for the first time, a Federal Power Act license issued for a dam up stream of Copco No. 1(the dam which blocked the Klamaths' salmon and steelhead) which

license addressed passage issues.[3]

* We agree with PC acknowledgment that the historic record as compiled by Lane &Lane associates for the United States in 1981 estimated inter alia that for the twenty years prior to the construction of Copco no.1, 1000 tribal members consumed each year 40,000 pounds of fresh salmon and 80,000 pounds of dried salmon. .[4]

* We agree with Pc that the Treaty of Oct 14, 1864 does not expressly provide for a cause of action for damages. Nor does it provide , as do other statutes where a private cause of action has not been found , alternative enforcement of the rights secured by the congressional act. [5]

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[3]As explained in Lane & Lane Associates, "The Copco Dams and the Fisheries of the Klamath Tribe"(relied upon by PC), the Federal Power Commission asserted its jurisdiction against PC 44 years after Copco No.1 blocked the Adair protected minimum flows in the Klamath River, because of the Commission's concerns about the dams' impact on downstream anadromous fisheries, noting that the Klamath River "contributes a major share of California's sport and commercial salmonoid fisheries. p. 115. Of course the Federal Power Commission could not make that statement about the Oregon salmonoid fisheries, because as both parties to this appeal agree, that fishery was destroyed when Copco No. 1 was constructed in and about 1913.

[4]Lane & Lane at p. 96

[5] For example, in a case relied upon by PC, Transamerica Mortgage Advisors v. Lewis, 444US 11, 18-24(1979), the Court declined to find an implied cause of action for damages, relying to a great extent on the presence of express statutory language giving private parties a right of recision and the SEC a variety of enforcement options. Similarly in In Re Washington Pub. Power Supply Sys. Sec. Lit,823 F.2d 1349(9th cir.1349 1987), this Court found no implied cause of action under sec. 17 a the Securities Act of 1933, in large part because of the

* We agree with PC that there does not exist a reported case where a Tribe secured damages for interference with its Treaty protected fishery and agree as well with PC that there does not exist a reported case where a court has declined to find an implied cause of action for damages , where the only passage available for Treaty protected anadromous fish on Reservation only, has been knowingly destroyed.

* We agree with PC that Copco's construction of the Link Dam which tore out a portion of the natural reef of the Upper Klamath Lake so as to permit portions of the inactive pool of that natural lake to be accessed for power and irrigation is not involved in this appeal.

3. What PacifiCorp has Wrong.

a. PC mixes liability and damages throughout its Response Brief

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availability of other remedies expressly provided in the Act. In so ruling the Court distinguished " congressional purposes [which] are likely to be undermined absent private enforcement [in which case] private remedies may be implied in favor of the particular class intended to be protected by the statute." quoting from Piper v. Chris-Craft Industries, 430 US 1, 25(1977). 823 F2d at 1355, n. 11. Because the 1864 Treaty does not contain express remedial enforcement provisions, the Klamath Indians and the United States have two alternative common law methods of enforcement vis a vis third parties. Either enjoining a dam prior to construction or obtaining damages once construction has destroyed the Treaty protected salmon fishery. Moreover, nothing in this Court's analysis of how to enforce the right to access and fair share rights placed in the Stevens Treaties in Skokomish Tribe operates to eliminate a cause of action for damages in the setting , as here, of a single source drainage providing salmon to Indians whose Treaty fishing is restricted to their Reservation.

PC's represents to this court that the Klamaths in every respect are pursuing a claim that has been repeatedly litigated before and found lacking. Their tactic is to misrepresent the connection between settled law and the present claim. The Response Brief is riddled with such misrepresentations. For example, on page 3, PC cites this court's reference to a "wilderness servitude" in Adair, at1414 as proof that the Klamath claim is misplaced. But PC does not understand that the "wilderness servitude" discussion in Adair focused properly on the concept that the measurement of minimum stream flow to be quantified under Adair would only be that amount of water necessary to support Klamath retained fishing as currently exercised. In other words, Adair ruled that since the quantity of Treaty fishing had diminished over the years, only the present level of fishing and required water flows could be secured.

The Klamaths agree. To the extent that current Treaty fishing is reduced from that level which existed prior to the 1913 construction of Copco No. 1 for reasons other than the construction of the dam and other actions of PC, such a reduction will be reflected in the measurement of damages. But, reduced Treaty fishing has no relevance to the issue of liability involved in this appeal. So when the Klamaths tell this court that the Treaty of 1864 preserves salmon and steelhead fishing, which

under federal law is restricted only to the 1864 boundaries —as it was at the time of the treaty–they are not attempting to rewrite Adair. To the contrary , they are emphasizing that because salmon and steelhead were the most sought after and relied upon fishing at the time of the Treaty, the Treaty on its face necessarily contemplated the preservation of the then existing passage in the Klamath River. Otherwise, as the United States Supreme Court stated over 100 years ago, the Treaty would have established an "impotent outcome" United States v. Winans, 198 US 371,374 (1905).[6]

In like fashion, the PC Response (p.24) misrepresents that the Klamaths assert that their Treaty rights to anadromous fish were "more important" than were the off reservation anadromous fishing rights at issue in Skokomish Tribe and that unlike the Skokomish fishing rights, the Klamath rights were to last "forever" without "any" change from 1864 conditions. To the contrary, the Klamaths simply pointed

[6] Close on the heals of misapplying Adair, PC (pp 4-5) misapplies the effect of the 1954 Klamath Termination Act addressed by this court in Kimball v. Callahan, 590 F.2d 768, 770(9th Cir. 1979). Obviously the termination of the Tribe from 1961 until 1986(when Congress restored the Tribe with full federal status)and more importantly the sale of most of the Tribe's beautiful Reservation had an impact on the quantity of reserved Treaty fishing . Yes, all Treaty fishing was reduced because of the disbursement of Tribal members and because Indian fishing was shared with non-Indians on the National Forest which took the place of the Reservation. But again this history goes the measurement of damages if the Klamaths are successful in securing a cause of action. This history has nothing to do with whether such a cause of actions exists.

out the obvious: In contrast to nearly all other Northwest Tribes, they have no off Reservation fishing rights .[7] They do not have a large variety of drainages and fishing locations to choose from. To the contrary they have only one passage to allow their on Reservation "exclusive" Treaty fishing to survive. Accordingly, the United States and the Klamaths and their non Indian neighbors all understood that passage along the Klamath River must be preserved as a foundation of the Treaty.[8]

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[7] As pointed out in a case relied upon by PC (Response, p22) this Court has previously found that the Skokomish off Reservation Treaty fishing–like virtually all Northwest off Reservation Treaty fishing--- involved multiple locations and multiple drainages " the [Skokomish Indians] located villages for easy access to fishing stations. They took salmon and steelhead in salt-water areas by trolling, spearing and netting and in freshwater areas by singe dam and double dam weirs and similar types of traps. The usual and accustomed fishing places of the Skokomish Indians during and after Treaty times included all waterways draining into Hood Canal and along Hood Canal itself.(emphasis supplied). United States v. Washington, 384 F. Supp. 312, 377 (W. D. Wash. 1974) aff'd 520 F.2d 676(9th Cir. 1975).

[8] Maintaining passage through the only passage river secured in the Treaty of 1864 was known throughout the basin. As PC concedes, its predecessor, Copco in August of 1916 assured the Bureau of Indian Affairs; "We note that complaints have reached your office through the Klamath Indian Reservation that the run of salmon in the Klamath River has been interfered with by a dam which our company has under construction upon the Klamath River. ....Ample provision has been made in the plans for the dam for a fish ladder which will permit unobstructed passage of fish up the Klamath River...Lane, a p. 150. Then two years later the Assistant Commissioner of Indian Affairs wrote the State of Oregon reconfirming the need "to permit salmon to reach the upper waters of the river." The Assistant Commissioner also emphasized "The Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of their food and it is highly , desirable that proper provision be

In like fashion PC attempts to convince the Court that cases with fundamentally different Treaties and fundamentally different facts somehow foreclose the Klamaths from setting forth Treaty language and surrounding circumstances to show that full protection of Adair river flows and fish passage should embrace a damage remedy for passage interference. PC cites Montana v. United States, 450 US 544, 561(1981) which held that when the Crow Tribe put in place a plan to open to homesteading a large part of their Reservation, the Tribe relinquished the right to regulate as a government, non Tribal members on the fee lands acquired by the homesteaders. Then PC offers Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791(D. Ida. 1994). But that case addressed the right of a Tribe , like the Skokomish Tribe, with off Reservation in common with Stevens Treaties, which had lost several of his many usual and accustomed places and hence its access to fish salmon when Hells Canyon dams were built in the 1960's in the Upper Snake River. Unlike this case, Idaho Power involved dams built under the Federal Power Act where the United States and the Tribes participated in the licensing of the dams and agreed as mitigation to enhanced salmon fishing in the Salmon drainage, 847 F. Supp at 794 and the off Reservation usual and accustomed places inundated were a

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made by the power company for the passage of salmon over its dam." Lane at p.151(emphasis supplied).

few of hundreds of fishing locations of the Nez Perce in the Clearwater, Salmon , Snake and Columbia drainages.

b. PC mistates the facts and law in its attempt to hide behind the Court's ruling in Skokomish Tribe

PC announces that "in all respects" the 1855 Skokomish Treaty and the 1864 Treaty are the "same." Response, p. 19. PC is wrong. Attached as pp 1 and 2 in the Addendum to this Reply are two maps–one showing the Klamath Reservation located on the headwaters of the only drainage providing anadromous fish for its restricted "on reservation " Treaty fishing right.

The second shows the Cushman Dam and the downstream Skokomish Reservation. Cushman Dam blocked one of the upstream spawning areas of the salmon which passed upstream and downstream past the Skokomish Reservation ---- which is located near the mouth of the drainage. The South Fork of the Skokomish River and the large downstream main fork and Hood Canal continued to produce and provide passage to salmon and other anadromous fish. Cushman Dam inundated one of that Tribe's many off Reservation "usual and accustomed" fishing locations. In addition it reduced, but surely did not come close to destroying, the otherwise unaffected salmon passage up and downstream on the Skokomish River mainstem, located on the boundary of the Reservation and thus eligible for fishing as part of the

Tribe's reserved and exclusive right to fish on the Reservation.

PC attempts to rewrite this Court's one hundred years of on reservation and off reservation jurisprudence. It claims that there is "functionally no difference" between a dam blocking one of a large number of off Reservation usual and accustomed places and one blocking the only available anadromous fish passage that was secured by the 1864 Treaty(Response, p. 24). [9] Then , PC appears to take the position while those Tribes with a multitude of off Reservation locations to select are reserved under ample court precedent a right of access and a right to take an equal share of available fish (Response, p. 23), the Klamaths, sitting at the critical spawning grounds of California's most fertile anadromous drainage are reserved no rights. In other words, instead of acknowledging that the Klamaths under their

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[9]PC's attempt to mix apples and oranges comes too late in the day. This Court and the Supreme Court know well the ubiquitous scope of off Reservation fishing opportunities secured throughout the Northwest. Governor Stevens is quoted when selling a treaty to Northwest Tribes during the same January , 1885 that he finalized a treaty with the Skokomish Tribe that traditional roaming and fishing traditions would be honored; "We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries."Washington v. Fishing Vessel Assn, 443 US 658,666(1978). (emphasis supplied). It is precisely because that range and scope of the usual and accustomed fishing places was so widespread and ill defined that this court in Skokomish properly concluded that the 1855 Treaty and its surrounding circumstances could not as a matter of law identify a specifc subject of protection for which damages were an appropriate remedy.

unique treaty were granted special protections as to fish passage on their one and only passage drainage as a quid pro quod for relinquishing multiple off reservation fishing locations, PC plays hard ball and takes the position that the Reservation bound Klamaths have no ability to protect their Treaty rights.

Likewise, throughout its Response Brief, PC informs the court that no cause of action for damages can arise against it , for PC and its predecessor has always acted pursuant to government authorization. We have already established–and PC can not rebut–that no federal license was issued for any of its many dams on the Klamath River under 1957 and that the license were pushed by the Federal Power Commission because of concerns about damage to the downstream salmon fishery. As to State permission, California does not have the authority nor did it purport to exercise any authority to license a dam on an interstate stream. [10] To the contrary , as noted above, after the dam was completed in the absence of any government oversight, California did pursue efforts at developing a fish hatchery, primarily of

[10] In Williamette Iron Bridge v. Hatch, 125 US 2, 10(1887), the Court in discussing the absence of any federal common law addressing the construction of dams, confirmed that in the absence of a federal statute, the states are limited to regulating dams to non- interstate streams; "But it is well settled that the legislatures of such States do have the same power to authorize the erection of bridges, dams, etc, in and upon the navigable waters wholly within their limits..."

course to protect its downstream interests. [11]

c. PC's effort to distract the court from a serious analysis of implied cause of action jurisprudence should be rejected.

While acknowledging that the implied cause of action case law requires an analysis of whether there is any indication of intent, explicit or implicit, on the part of the United States to create or deny a remedy of damages for certain specific injury [12], PC declines to engage in that all important analysis. Indeed, PC fails to even acknowledge that Kimball v. Callahan and Adair are law of the case as to the United States intent to preserve both water and fish resources as required to preserve the Treaty of 1864 secured on Reservation fishing. Moreover, PC fails to identify any document or legal theory to show that the United States never intended to enforce that essential fishing right–through judicial remedies–equitable relief to enjoin construction or damages if an injunction is no longer in the public interest.

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[11]The record is clear. PC's predecessor, COPCO, knowingly constructed the dams , made representations that salmon would not be affected, abandoned fish ladders as impractical, and then participated in a rather primitive effort with the State of California to put in place a hatchery whose principal purpose was to strength a downstream fishery. Lane, at p. 115

[12]Cannon v. University of Chicago, 441 US 677,688(1978) and other cases cited by the Klamath Indians in their Opening Brief, pp 12-15.

Instead, PC discusses two groups of cases which, upon scrutiny, have no bearing to this case.

(i) Cases where the United States directly breached a treaty secured right are not relevant to this dispute

Typical of this category of cases is Nevada v. United States, 463 US 110 (1983) where the United States secured upstream water rights in the Truckee River for a large federal Bureau of Reclamation project while at the same time, it secured a quantity of water rights for the Pyramid Tribe's Pyramid Lake, located at the bottom of the River. In refusing to permit the Tribe to re-open the adjudication, the Court suggested a breach of trust damage claim against the United States might prove to be the better strategy.[13] Similar United States initiated takings of Treaty secured assets resulted over the years in the enactment of specific jurisdictional statutes permitting Tribes to sue the United States for damages; the enactment of the Indian Claims Commission tribunal to permit claims for monies arising out of historic failures of

[13] In citing United States v. Creek Nation, 295 US 103(1935) as somehow showing a federal common law tradition favoring compensation against the United States rather than its land patentees, PC fails to inform the Court that the "taking" of Treaty protected assets of the Creek Nation was not caused by the knowing and intentional actions of a large private utility, as here. To the contrary , the "taking" occurred because of surveying errors of the United States. Hence, the Court found it appropriate to permit the action for damages to go forward under a statute where the United States had waived its sovereign immunity for damages arising out its breach of Treaty obligations.

the United States to secure adequate compensation when it opened Reservation lands to non Indian entry, 28 USC 70a ; and the enactment of 28 USC 1505 where permits Tribes today to initial damages claims against the United States—if brought within a strict six year statute of limitations–for violating its trust duty or relevant statutory duties. Each of the cases cited in the PC Response, pp 28-30 fit within this category.[14]

(ii) Recent Upstate New York Equitable Relief Cases have no precedential value to the claims presented to this court

PC cites a number of New York state cases where the Oneidas have brought equitable claims affecting thousands of private landowners . City of Sherrill v. Oneida Indian Nation of New York, 125 S. Ct, 1478(2005); County of Oneida v. Oneida Indian Nation, 470 US 226 (1985)(Oneida II);Oneida Indian Nation v.

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[14] At last the Klamaths have something to praise PC–namely their inclusion in footnote 12, Response pp 27-28 of two Ninth Circuit cases, where they candidly acknowledge two decisions of the court where damages were upheld against third parties. PC properly notes that damages were granted for trespass where—as here the interference with Tribal assets occurred knowingly and without the authorization of the United States. See eg United States v. S. Pac. Trans. Co, 543 F.2d 676,677-679(9th Cir. 1976) and United States v. Pend Oreille Pub. Util District No. 1, 28 F.3d 1544, 1546-49(9th Cir. 1994). We suggest to the court that these two cases, other cases such as Mescalero Apache Tribe v. Burgett Floral Co., 503 F.2d 336(10th Cir. 1974) and Pueblo of Isleta v. Universal Constructors, 570 F.2d 300(10th Cir. 1978) and the fundamentally different right secured in the Klamath Treaty versus the Skokomish Treaty provide ample authority to find an implied cause of action for damages here, without disturbing the correct determination in Skokomish Tribe.

County of Oneida, 199 FRD 61(N.D.NY 2000); City of Sherrill upheld the Supreme Court's remedy of damages for historic dispossession of the Oneida lands, but struck down the Tribe's request for equitable relief;

> In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II 125 S. Ct. at 1494.

While it is true that these cases involve longstanding disputes between Indian Tribes and third party local entities and private citizens, it is a large reach indeed to claim–as does PC–that they foreclose the Klamath claim for damages caused by one utility at one specific site. [15]

(iii) PC's lengthy treatise on Federal Power Act barriers to the Klamaths' federal common law damages claim cannot mask the fact that PC deliberately avoided for 44 years ----after it knowingly destroyed the 1864 Treaty fishing right and for 37 years after enactment of the 1920 Federal Power Act —any limitations to its operation and construction of multiple dams in the Upper Klamath River

Securing from this court an implied cause for appropriate trespass damages does not , of course, require the Klamaths to show that PC violated any federal or state statute other than its intentional act of destroying the Treaty secured

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[15]Similarly, with respect to those Tribes, such as the Umatilla Tribe involved in Confederated Tribes of the Umatilla Reservation v. Alexander, 440 F. Supp. 553(D. Ore. 1977) , that Tribe was able to assert that damages were inadequate and therefore they secured an injunction against the future construction of a dam on Catherine Creek –required to protect an important usual and accustomed fishing location.

anadromous fish passage. Having elected to "blow off" the Klamaths Treaty rights in 1913 and 1918 and to stay far away from the Federal Power Act for 44 years, PC cannot today hide behind that very Federal Power Act comprehensive regulatory scheme as a defense to a trespass claim.

As we next show, all of the Federal Power Act case law relied upon by PC deals with litigants whose claims could have been addressed in the context of a federally authorized Federal Power Act license. Accordingly common law remedies were not permitted. None of these cases address a trespass which occurred 44 years before the trespasser submitted to federal regulatory scheme. PC cannot have it both ways. It assumed the risk that this claim would never be brought. Now that the claim is in its face, it can not retroactively hide behind a Federal Power Act which it ignored for decades after the Treaty protected fishery was destroyed.

For example, PC cites California Save Our Streams Council v. Ueuter, 887 F.2d 908(9th Cir. 1989) for the proposition that this Court has already ruled once a dam becomes subject to Federal Power Act licensing, a damages claim which addressees trespass 44 years before the utility was forced to have its dams licensed, can not as a matter of law be pursued. Answer Brief, p. 41. But Ueuter stands for no such proposition. To the contrary, it ruled that parties who participated in and were unhappy with Federal Power Act license conditions could not by pass the

statutory requirement of appeal to the court of appeals and could not sue the Forest Service for not being more aggressive in pursuing certain 4e conditions. Then PC cites United States v. Pend Oreille Public Utility dist No. 1, 28 F.3d 1544(9th Cir. 1994) where a licensed utility flooded Indian lands beyond the scope permitted in the license. This court upheld an award of damages notwithstanding the exclusive authority of the Federal Power Commission to establish the rules for the power project. Indeed, this Court put utilities on notice that even in the context of Federal Power Act licensing damage to Indian assets would not be ignored;

> Requiring the utility to reimburse the Tribe for the most profitable use of its land will encourage future applicants for licenses to fully disclose the effect of their projects on Indian reservation lands and current licensees to seek approval to use such lands from the Secretary and the Commission. 28 F.3d at 1551[16]

In like fashion, PC's reliance on DiLaura v. Power Auth. of State of NY, 982 F.2d 73(2d Cir. 1992) is misplaced. DiLaura simply confirms that 16 USC 803©)

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[16] It is interesting to note that this Court in Pend Oreille did not make any reference to the private or local government character of the utility when imposing damages, suggesting that PC's repeated but irrelevant efforts(asserted without any supporting authority) to distinguish damage liability between private and public utility defendants is not a part of any written decision of this court. And in this Court's dissent in Skokomish Tribe, the reference to local government liability was on the table because the dam builder there was a local government entity–not because there exists a fundamental distinction to federal third party tort claims between private utilities and public utilities.

of the Federal Power Act(confirming that when a license is issued injured parties may bring state law damage claims against a licencee) does not itself create an implied cause of action as a matter of federal law. The Klamaths , of course, do not rely on the Federal Power Act as a foundation for their federal damage claims. By the time the Federal Power Act was enacted in 1920, the salmon and steelhead fishery on their Reservation at the headwaters of the Klamath River had been destroyed. And, there is no provision in the Federal Power Act which permits the imposition of a condition on a licensee to restore an extinguished fishery. Rather, only sec 18 mandates to require passage of existing anadromous fish populations-not restoration of a long extinguished fishery and 10a conditions which can be utilized to impose broad mitigation conditions on licenses------not damages for pre-Federal Power Act trespass[17].

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[17] Similarly, PC's other Federal Power Act citations are , upon examination, not relevant, to the question of whether Federal Power Act licensing which began 44 years after the Klamath fishery was destroyed operates a matter of law to defeat an otherwise valid cause of action for damages.. Thus in Skokomish Indian Tribe v. FERC, 121 F.3d 1303(9th Cir. 1997), this court denied that Tribe an application to develop a competing hyropower facility vis a vis the utility who they subsequently sued in Skokomish Tribe, finding that the Tribe's proposed project would use the same water that Tacoma proposes to continue using for power generation....(emphasis in the Court's findings). 121 F3d at 1305. In Covelo Indian Communtiy v. FERC, 895 F.2d 581(9th Cir. 1990) this Court declined to permit a 12 year late motion to intervene in a relicensing proceeding, noting that the Tribe's principal concern–fishing and water rights in the Eel River–are enhanced by FERC license conditions imposed in the Tribe's absence to increase

d. PC mistates the law as it relates to the applicable statute of limitations which is available to the Klamaths in the event this Court distinguishes this damage claim from Skokomish Tribe

The statute of limitations question turns on whether the unrestricted federal common law limitations period for trespass has been eliminated by the Congress' 1954 enactment of the Klamath Termination Act, 25 USC 564 et seq. And if so, has that favorable federal common law rule been retroactively restored by the 1986 enactment of the Klamath Restoration Act, 25 USC 566 et. seq.

We agree with PC on one minor point on the first of these two issues. We were wrong in our Opening Brief when we stated that South Carolina v. Catawba Indian Tribe, 476 US 498 (1986) did not involve a Tribe with a treaty. The Catawbas do not have a treaty with the United States, but they did enter into a treaty with the Crown which provided them , at the very least, with a cause of action for damages to their lands and resources at the time of their termination in the 1950's. But as we next show , the Supreme Court in Catwaba Tribe fully understood that its application of state statute of limitations to a damage claim seeking –as in the case of the many Oneida cases in New York, equitable relief and damages for

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flows in the river and to revisit the license in the event the Tribe were to independently establish minimum stream flow water rights in State proceedings. 895 F.2d at 586. Again these cases simply do not provide the Court with any guidance as to how it should treat the legitimate and unique federal common law damage claims raised by the Klamath Indians.

dispossession of their lands–is a far different animal than applying state statute of limitations to a trespass claim which involved the destruction of treaty protected fishing in settings where Congress has twice enacted legislation for the express purpose of preserving all Treaty fishing and hunting rights and privileges. See 18 USC 1162 and 25 USC 654m, attached in the Addendum.

PC failed to fully set forth the Court's analysis in Catawba. The Court carefully reviewed the scope of what it named an "explicit redefinition" of the federal relationship between the United States and the Tribe. 476 US at 507. In so doing ,it distinguished that application of state statue of limitations before it with Congress' partial termination involved in Kimball v. Callahan , 493 F.2d 564 (9th Cir. 1974)Kimball v. Callahan (II), 590 F.2d 768 (9th Cir. 1979) and Menominee Tribe v. United States, 391 US 404 (1968). Referencing its then 18 year old decision in Menominee Tribe ; the Court in Catawba Tribe stated;

> As the Court of Appeals noted, in Menominee Tribe v. United States...., the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights The Court emphasized that the Termination Act must be read in pari materia with an Act passed in the same Congress that preserved hunting and fishing rights [Public Law 280, 18 USC 1162] Id. At 411.[Public Law 280] In this case, of course there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a backhanded"abrogation of treaty rights, id, at 412; no comparable abrogation is at issue here.

476 US at 509, n.20[18]

Then PC gets it wrong when it refers the Court to 564 m(a) and (b) of the 1954 Termination Act. The first section protected treaty hunting and fishing from abrogation and the second section protected tribal water rights from abrogation , with the proviso that Oregon law of abandonment of water rights would commence to apply 15 years after termination. That language can only mean that Congress put a time limit on the no abrogation rule when it came to water rights. It put no such time limit on the preservation of Treaty fishing rights.[19] Moreover, contrary to what PC says, the notification to the Klamaths that they would be subject to Oregon water abandonment is not, as suggested by PC, the application of a "statute of repose." Answer Brief, p. 51. [20]

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[18] Public Law 280 (Appendix, p.) does not apply in South Carolina but does apply in Oregon as well as in Wisconsin where the Menominee Reservation is located.

[19] Also PC offers congressional testimony in 1954 from a Bureau of Indian Affairs employee to the effect that treaty rights were going to become an ill defined, dispersed and unimportant legacy of the Klamaths with no future United States protection. Answer Brief, p.51. Of course he was wrong. In United States v. Adair, the United States initiated a widespread and aggressive treaty enforcement action–designed as this Court held in 1983–to preserve those treaty rights forever.

[20] A "statute of repose acts to define temporally the right initiate suit against a defendant after a legislatively determined time period. Unlike a statue of limitations, a statue of repose is not a limitation of plaintiff's remedy, but rather defines the right involved in terms of the right to bring suit." P. Stoltsz Family Partnership v. Daum, 355 F.3d 92,102(2nd Cir. 2004). Loss of a water right by

Finally, PC mistates the law of retroactivity when it comes to the role of the 1986 Klamath Restoration Act. The Klamaths assert that this 2004 action, like the trespass action for damages initiated by the Oneida Tribe, whose continuing vitality was confirmed in the Supreme Court's 2005 decision in Sherrill, supra, may proceed free of Oregon statute of limitations –even if Oregon statutes of limitations were in place from 1961(the effective date of termination) to 1986 when the Klamath Restoration Act was enacted.

First, PC is confused when it argues that the restoration of rights only went to the underlying Treaty right, and not to the unrestricted favorable federal common law statute of limitations. The treaty "right" had already been preserved in the 1954 Termination Act so the Restoration Act need not restore such a right. Moreover, the Restoration act embraced rights and privileges—a separate federal statutory protection . That separate federal commitment was inserted by Congress to assure, as Congress promised in the Restoration Act , that upon its enactment, all federal rights of the Klamaths existing on the day before termination were reinstated.

---

abandonment involves an intent to abandon and nonuse for a defined period of time. It has nothing to do with a right to bring suit.

Chenault v. US Postal Service, 37 F.3d 535,538(9th Cir. 1994) declined to retroactively permit a former Postal Service employee from pursuing anew a discrimination claim after he had failed to bring an action against the United States within 30 days of an adverse administrative decision, claiming that a new statute gave federal employees 90 days rather than 30 days to file a complaint. This Court declined to give retroactive effect to the employee finding that to do so would "alter the substantive" rights of the Postal Service and "increase its financial liability." 37 F.3d at 539. The substantive liability of the Post Office was significantly increased by Congress' enactment of sweeping changes in the Civil Rights Act of 1991–wholly apart from a narrow provision which extended to 90 days the time in which to file a complaint. Landgraf v. US Film Production, 511 US 244(1994). So, if the 90 rule were applied retroactively and the employee were successful, the Post Office would be potentially subject to a variety of damage penalties not in existence before the law was changed.

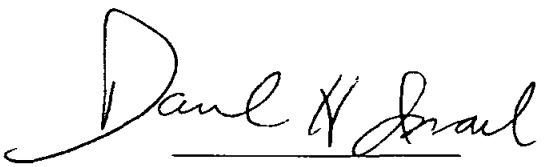
Here, in contrast to the 30 days in Chenault, we have no prior unequivocal period of limitations . Most importantly the 1986 Restoration statute, unlike the 1991 federal statute involved in Chenault, did not dramatically change the scope and measure of liability for third party trespassers. Indeed , it did not address substantive liability issues at all. Unlike Chenault, PC is, except for the passage of

time since the date an Oregon statute of limitation might apply , is not subject under a retroactive restoration of the pre-termination federal common law, to any new statutory liability.

If this Court rules in favor of the Klamaths as to an implied cause of action for damages and rules against the Klamaths on the statute of limitation effect of the 1954 Termination Act, a ruling in favor of the Klamaths on the retroactive effect of the 1986 Klamath Restoration Act will not conflict with Chenault. While such a ruling will surely increase the financial liability of PC, it will not have altered its "substantive rights."

March 30, 2006

Respectfully submitted



Daniel H. Israel
Attorney for plaintiffs-appellants

Certificate of Compliance. This brief contains 6,999 words in total

I certify that on the 30th day of March, 2006, the above Reply Brief was placed in the United States mail, postage prepaid and sent to: Joseph Fagan, Heller Ehrman LLP, 1717 Rhode Island Avenue, NW, Washington DC 20036-3001.

ADDENDUM

page

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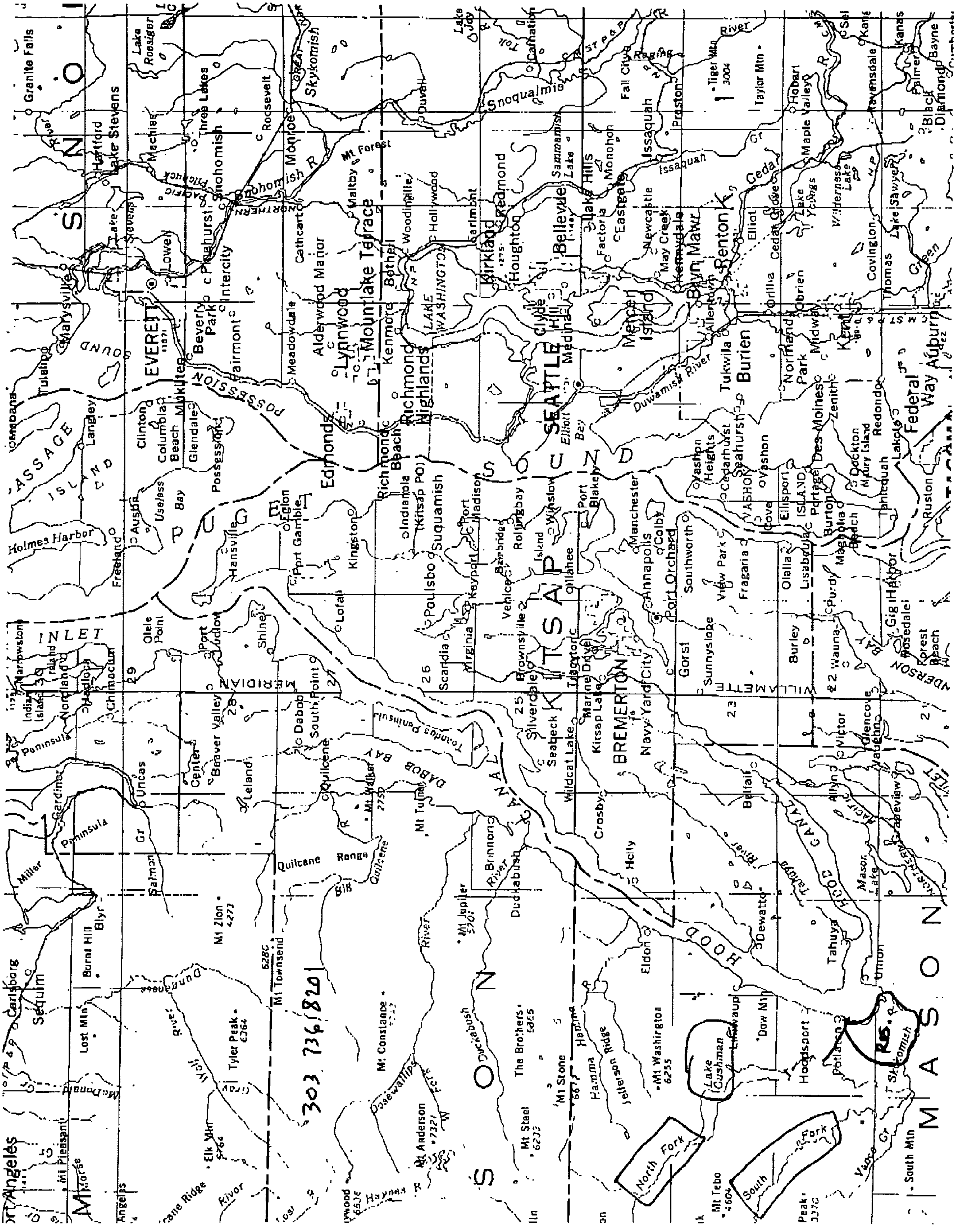
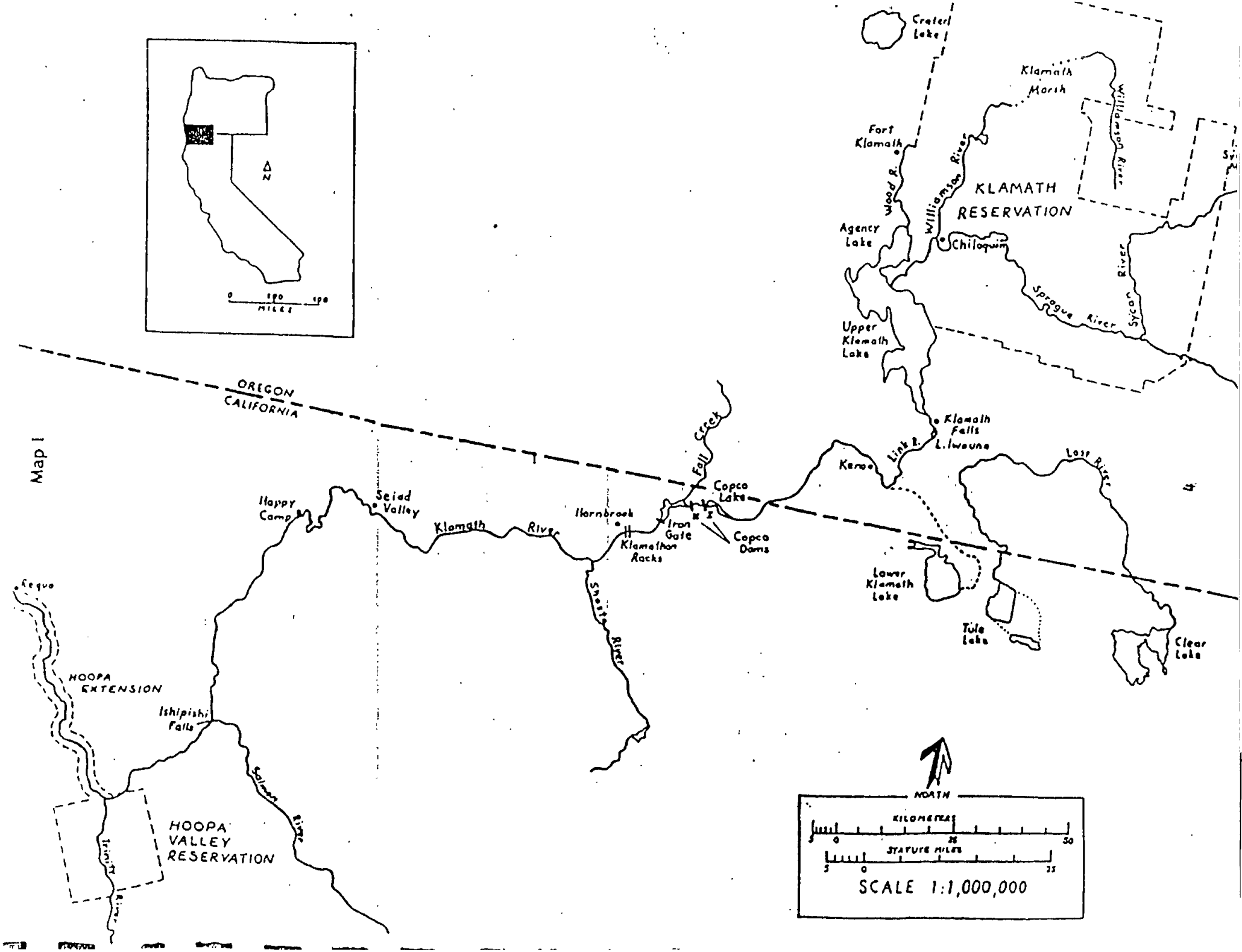



Map I
Crater Lake
Klamath Marsh
Williamson River
Fort Klamath
Wood R.
Williamson River
KLAMATH RESERVATION
Agency Lake
Chiloquin
Sprague River
Sycan River
Upper Klamath Lake
OREGON
CALIFORNIA
Fall Creek
Klamath Falls
L. Iwuna
Keno
Link R.
Lost River
Copco Lake
Happy Camp
Seiad Valley
Hornbrook
Klamath River
Iron Gate
Klamathon Rocks
Copco Dams
Lower Klamath Lake
Tule Lake
Clear Lake
Requa
HOOPA EXTENSION
Ishipishi Falls
Shasta River
Salmon River
Trinity River
HOOPA VALLEY RESERVATION
NORTH
KILOMETERS
0
25
50
STATUTE MILES
0
25
SCALE 1:1,000,000

lishments selling liquor. United States v Mission Golf Course, Inc. (1982, DC SD) 548 F Supp 1177, affd without op (1983, CA8 SD) 716 F2d 907, cert den (1984) 464 US 1041, 79 L Ed 2d 169, 104 S Ct 704.

4. Power granted states

State can require federally licensed Indian trader, who operates general store on Indian reservation, to obtain state liquor license in order to sell liquor for off-premises consumption, since (1) there is no tradition of tribal sovereign immunity or inherent self-government in favor of liquor regulation by Indians, and (2) it is clear from face of 18 USCS § 1161 and its legislative history both that Congress intended to removal federal prohibition on sale and use of liquor imposed on Indians and that Congress intended state laws would apply of their own force to govern tribal liquor transactions as long as tribe itself approved these transactions by enacting ordinance. Rice v Rehner (1983) 463 US 713, 77 L Ed 2d 961, 103 S Ct 3291, reh den (1983) 464 US 874, 78 L Ed 2d 185, 104 S Ct 209.

Oklahoma may require Potawatomi Indian Tribe to obtain state license to sell 3.2 percent beer, within authority jointly conferred to Potawatomi Indian Tribe and State under 18 USCS § 1161 by Congress, in light of Tribe's lack of sovereign immunity in regulation of liquor, and State's substantial interest in regulating sale of 3.2 percent beer. Citizen Band Potawatomi Indian Tribe v Oklahoma Tax Com. (1992, CA10 Utah) 975 F2d 1459.

State does not have authority to prosecute Indian persons for criminal violations of state liquor laws that occur within Indian country, where declaratory relief action by Indian community was dismissed without prejudice as barred by Eleventh Amendment, because while 18 USCS § 1161 authorizes state regulation over Indian liquor transactions, U.S. retains criminal jurisdiction to enforce violations of state liquor laws pursuant to 18 USCS §§ 1154 and 1156. Ft. Belknap Indian Community of Ft. Belknap Indian Reservation v Montana (1992, DC Mont) 793 F Supp 949.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or

taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(Added Aug. 15, 1953, ch 505, § 2, 67 Stat. 588; Aug. 24, 1954, ch 910, § 1, 68 Stat. 795; Aug. 8, 1958, P. L. 85-615, § 1, 72 Stat. 545; Nov. 15, 1970, P.L. 91-523, §§ 1, 2, 84 Stat. 1358.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1954. Act Aug. 24, 1954, deleted ", except the Menominee Reservation" in the Wisconsin line in the table.

1958. Act Aug. 8, 1958, in subsec. (a), added "or Territory" and "or Territories" wherever appearing, and added the Alaska line in the table.

1970. Act Nov. 25, 1970, substituted the Alaska line in the table for one which read:

"Alaska. . . All Indian country within the Territory"; and, in subsec. (c), inserted "as areas over which the several States have exclusive jurisdiction".

Other provisions:

Admission of Alaska as State. Admission of Alaska into the Union was accomplished Jan. 3, 1959, upon issuance of Proc. No. 3269, Jan. 3, 1959 24 Fed. Reg. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Act July 7, 1958, P. L. 85-508, 72 Stat. 339, set out as notes preceding 48 USCS § 21.

Amendments to State constitutions to remove impediments to assumption of jurisdiction. Act Aug. 15, 1953, § 6, provides: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act [For full classification; consult USCS Tables volumes]: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.".

Consent of United States to assumption of jurisdiction by other States. Act Aug. 15, 1953, § 7, provides: "The consent of the United States is hereby given to any other State not having jurisdiction with respect to

proclamation provided for in section 18 of this Act [25 USCS § 564q], the deferment of the assessment and collection of construction costs provided for in the first proviso of the Act of July 1, 1932 (47 Stat. 564; 25 U.S.C. 386a) [25 USCS § 386a], shall terminate with respect to any lands within irrigation projects on the Klamath Reservation. The Secretary shall cause the first lien against such lands created by the Act of March 7, 1928 (45 Stat. 200, 210), to be filed of record in the appropriate county office.

(c) **Appropriation authorization.** There is hereby authorized to be appropriated out of any funds in the Treasury not otherwise appropriated the sum of $89,212 for payment to the Klamath Tribe with interest at 4 per centum annually as reimbursement for tribal funds used for irrigation construction operation and maintenance benefiting nontribal lands on the Klamath Reservation, such interest being computed from the dates of disbursement of such funds from the United States Treasury.

(d) **Adjustment of reimbursable irrigation costs.** The Secretary is authorized to adjust, eliminate, or cancel all or any part of reimbursable irrigation operation and maintenance costs and reimbursable irrigation construction costs chargeable against Indian owned lands that are subject to the provisions of this Act [25 USCS §§ 564 et seq.], and all or any part of assessments heretofore or hereafter imposed on account of such costs, when he determines that the collection thereof would be inequitable or would result in undue hardship on the Indian owner of the land, or that the administrative costs of collection would probably equal or exceed the amount collected.

(e) **Applicable irrigation laws.** Nothing contained in any other section of this Act [25 USCS §§ 564 et seq.] shall affect in any way the laws applicable to irrigation projects on the Klamath Reservation.

(Aug. 13, 1954, ch 732, § 13, 68 Stat. 721.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "first lien against lands created by the Act of March 7, 1928", referred to in subsec. (b), was a reference to the lien against lands created pursuant to Act March 7, 1928, ch 137, 45 Stat. 202, an appropriation act, which appeared as 25 USCS § 387, prior to its omission from the Code, since it was not reenacted in any subsequent appropriation acts. For full classification of this Act, consult USCS Tables volumes.

§ 564m. Water and fishing rights

(a) **Water rights; laws applicable to abandonment.** Nothing in this Act [25 USCS §§ 564 et seq.] shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act [25 USCS § 564q].

(b) **Fishing rights or privileges.** Nothing in this Act [25 USCS §§ 564 et seq.]

shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

(Aug. 13, 1954, ch 732, § 14, 68 Stat. 722.)

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Relationship with other laws and treaties

1. Generally

Termination of Klamath Reservation does not abrogate Indians' water rights, and Indians are still entitled to use as much water on Reservation lands as they need to protect their hunting and fishing rights. United States v Adair (1979, DC Or) 478 F Supp 336, 9 ELR 20733, mod on other grounds (1983, CA9 Or) 723 F2d 1394, cert den (1984) 467 US 1252, 82 L Ed 2d 841, 104 S Ct 3536.

2. Relationship with other laws and treaties

Right of Klamath Indian Tribe to hunt and fish, free of state regulation, on lands within Indian reservation created by 1864 Treaty (16 Statute 707) does not survive as to portion of reservation ceded by tribe to United States under 1901 Cession Agreement (34 Statute 325). Oregon Dep't of Fish & Wildlife v Klamath Indian Tribe (1985) 473 US 753, 87 L Ed 2d 542, 105 S Ct 3420.

Klamath Indian who possessed fishing rights on reservation under federal treaty, at time of enactment of Klamath Termination Act, retains such rights on former Indian land sold to pay for shares in tribal property, even though Indian has withdrawn from tribe. Kimball v Callahan (1974, CA9 Or) 493 F2d 564, cert den (1974) 419 US 1019, 42 L Ed 2d 292, 95 S Ct 491.

§ 564n. Protection of minors, persons non compos mentis and other members needing assistance; guardians; other adequate means; trusts; annuities; assistance factors; contests

Prior to the transfer of title to, or the removal of restrictions from, property in accordance with the provisions of this Act [25 USCS §§ 564 et seq.], the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts of competent jurisdiction, or by such other means as he may deem adequate, without application from the member, including but not limited to the creation of a trust of such member's property with a trustee selected by the Secretary, or the purchase by the Secretary of an annuity for such member: *Provided, however,* That no member shall be declared to be in need of assistance in conducting his affairs unless the Secretary determines that such member does not have sufficient ability, knowledge, experience, and judgment to enable him to manage his business affairs, including the administration, use, investment, and disposition of any property turned over to such member and the income and proceeds therefrom, with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing such property or the benefits thereof: *Provided further,* That any member determined by the Secretary to be in need of assistance in conducting his affairs may, within one hundred and twenty days after receipt of written notice of such secretarial determination, contest the secretarial determination in any naturalization court for the area in which said member resides by filing therein a petition having that purpose; the burden shall thereupon devolve upon the Secretary to show cause why such member should not conduct his own affairs, and the decision of such court

Bureau of Indian Affairs, Portland, Oregon, within two years following the date of approval of this Act. From and after that date, all claims and the right to file claims for any distribution from the judgment in docket numbered 100 shall be forever barred.
(Oct. 1, 1965, P. L. 89-224, § 3, 79 Stat. 897.)

CROSS REFERENCES

This section is referred to in 25 USCS §§ 565c, 565d.

§ 565c. Disposition of funds remaining after distribution

Funds remaining in the United States Treasury to the credit of said Klamath Tribe, or any of its constituent parts or groups, after the distribution of funds resulting from Indian Claims Commission docket numbered 100 as provided by sections 2 and 3 of this Act [25 USCS §§ 565a and 565b], together with any other funds which may be deposited in the United States Treasury, including without limitation funds accruing from other judgments against the United States [(]after payment of expenses, including attorney fees, payments for rights-of-way, trespass damages, or other revenues, together with any interest accrued thereon, shall, after deduction of the estimated cost of distribution, be distributed from time to time as determined by the Secretary to the members of the Klamath Tribe or to the members of any of its constituent parts or groups in the same manner as provided in sections 2 and 3 of this Act [25 USCS §§ 565a and 565b].
(Oct. 1, 1965, P. L. 89-224, § 4, 79 Stat. 897.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
The "Indian Claims Commission", referred to in this section, was terminated Sept. 30, 1978, pursuant to former 25 USCS § 70v.

Explanatory notes:
Brackets were inserted around the opening parenthesis to indicate the probable intent of Congress to omit such opening parenthesis since no corresponding closing parenthesis was enacted.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 565d, 565e.

§ 565d. Disposition of funds insufficient to justify further distribution

After all claims of the Klamath Tribe or any of its constituent parts or groups against the United States have been finally determined, appropriated, and distributed, as provided in sections 2, 3, and 4 of this Act [25 USCS §§ 565a, 565b, and 565c]; and after all litigation expenses (including attorney fees) and costs of distributions have been paid, any funds remaining in the United States Treasury to the credit of the Klamath Tribe or any of its constituent parts or groups which, in the discretion of the Secretary of the

Interior are insufficient to justify a further distribution, shall be deposited in the miscellaneous receipts of the Treasury of the United States.
(Oct. 1, 1965, P. L. 89-224, § 5, 79 Stat. 898.)

§ 565e. Costs

The costs of distribution may be paid out of the deductions authorized by sections 2 and 4 of this Act [25 USCS §§ 565a and 565c]. Any unused portion of such amounts shall remain in the United States Treasury to the credit of the Klamath Tribe.
(Oct. 1, 1965, P. L. 89-224, § 6, 79 Stat. 898.)

§ 565f. Taxes

None of the funds distributed pursuant to this Act [25 USCS §§ 565 et seq.] shall be subject to Federal or State income tax.
(Oct.1, 1965, P. L. 89-224, § 7, 79 Stat. 898.)

§ 565g. Rules and regulations

The Secretary is authorized to prescribe rules and regulations to carry out the provisions of this Act [25 USCS §§ 565 et seq.].
(Oct. 1, 1965, P. L. 89-224, § 8, 79 Stat. 898.)

KLAMATH TRIBE: RESTORATION OF FEDERAL SUPERVISION

§ 566. Restoration of Federal recognition, rights, and privileges

(a) **Federal recognition.** Notwithstanding any provision of law, Federal recognition is hereby extended to the tribe and to members of the tribe. Except as otherwise provided in this Act [25 USCS §§ 566 et seq.], all laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians which are not inconsistent with any specific provision of this Act [25 USCS §§ 566 et seq.] shall be applicable to the tribe and its members.

(b) **Restoration of rights and privileges.** All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes", approved August 13, 1954 (25 U.S.C. 564 et seq.), are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act [25 USCS §§ 566 et seq.], shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act [enacted Aug. 27, 1986].

AFFIDAVITS Page 57

THE COPCO DAMS AND THE FISHERIES OF THE KLAMATH TRIBE

Prepared by
Lane & Lane Associates

For

The Bureau of Indian Affairs
U.S. Department of the Interior
Portland, Oregon

December 1981

salmon between 40 and 50 pounds in weight. This amount would provide for our family which usually numbered between 12 and 14 persons until the next fishing season the following fall. . . . ."

"The average adult Indian would consume three and four salmon, weighing approximately 40 pounds each year. . . ."

Each Indian would, on the average, consume 200 pounds of salmon annually. Assuming there were 1500 Indians on the reservation, which is a conservative estimate, the annual average consumption of salmon would approximate 300,000 pounds.

When you consider the facts that the Indians liked salmon, that they did very little if any farming, had no money and small per capita payments in supplies mainly, and were dependent almost entirely on salmon for their main source of food supply, this estimate is most conservative.

However, using the same, Bertha Lotches would cut the annual consumption of salmon down to 150,000 pounds of salmon, making no deductions for consumption by children:

"Each adult Indian in the Beatty locality would, on the average, consume about 100 pounds of salmon annually. A child living there would consume on the average about 25 lbs. of salmon annually."

There was always more than sufficient salmon to supply the needs of all Indians in the reservation.

Quoting from Bertha Lotches statement:

"I can truthfully state that there would be ample salmon taken out of the river to provide sufficient salmon for each Indian family on the reservation each year. There was always a surplus of salmon available to be caught."

Clayton Kirk reduces the annual consumption to 120,000 pounds.

"In trying to arrive at the quantity of fish caught annually on an average from 1890 to 1909 you might compute it in this way: There are 1,000 Indians, we will say, on the average, including the total population of those Indians that ate fish, with on the average of two fish a day, weighing about 20 pounds. If they ate two fish during the time of the two salmon runs, they would consume 40,000 pounds annually. That is the nearest we can come to computing this. Those fish were salmon. In addition each Indian dried at least 4 salmon each year weighing on the average 20 lbs. for winter consumption which would last until the next salmon run. I would say all of the Indians each year would dry 80,000 pounds annually. We would dry some and had some fresh fish. I estimate that 1/6 of the sustenance of all of the Indians residing on the Klamath River between the years 1890

Evidence adduced at the hearing by the California Department of Fish and Game was to the effect that the Klamath Basin contributes a major share of California's sport and commercial salmonoid fisheries. King (Chinook) salmon, silver salmon and steelhead trout are the principal species. All three species were taken commercially in (some parts of) the river until 1934 when legislation prohibited the activity. It appears that below the Copco plant there are sizeable numbers of rainbow trout. However, the method of operating this and upstream plants has caused the river level downstream to fluctuate severely. Under normal operations there are changes in elevation of the river level of two feet or more one-half mile below the Copco plant when flows therefrom range between 3,200 cubic feet per second to less than 200 cubic feet per second. The evidence shows that fluctuating water levels such as this have a decidedly detrimental effect on fish and aquatic life.

In 1958 the Department studied the effect of fluctuations under a proposal by Copco to limit them to nine inches per hour with a minimum flow of 500 cubic feet per second. The proposed schedule was rejected by the Department "because it did not solve the stranding problem and also because the fluctuations under the proposed schedule still appeared too hazardous to anglers fishing the river below the Copco plant."

. . .

A reinforced concrete arch dam in the SW¼ section 9, T. 47 N., R. 5 W., Mt. Diablo meridian, constructed initially to elevation 2,225 feet (U.S.G.S. datum) with valve controlled discharge and creating a reservoir for regulation of the river below the dam, and associated fish-trapping facilities described in the drawing designated as Exhibit 62-A in the record of the hearing on the application. Ultimately, the development would be completed by increasing the height of the dam and incorporating therein a gated spillway section to create a reservoir with normal water surface at elevation 2,328 feet (U.S.G.S. datum) and extending upstream about 7 miles to Applicant's existing Copco No. 2 development.

. . .

Article 40. Except for conditions beyond the control of the Licensee, the initial stage of Iron Gate Development shall be so operated that the rate of fluctuation of flows in the river below the dam shall not exceed 250 cubic feet per second of water per hour and that the change in river stage or elevation shall not exceed three (3) inches per hour as measured at a gage located not more than one-half (½) mile downstream from the dam, whichever produces the least amount of fluctuation; and Licensee shall release over, around or through said Iron Gate Development a minimum flow of not less than 710 cubic feet per second of water into the natural channel of Klamath River, for the protection and preservation of fish and wildlife;

Article 41. After completion of the ultimate stage of Iron Gate Development and except for conditions beyond the control of the

MITIGATION EFFORTS

Fish Passage

The Klamathon racks were constructed in an attempt to mitigate the damaging effects of the dam. They reflected the practices of fishery management at the time. Fish were trapped the eggs stripped, fertilized and hatched in a hatchery on Fall Creek. Whether or not this did any good at all in maintaining fish runs in the Klamath River below COPCO I (and the two later dams, COPCO II and Iron Gate), the Klamathon racks had no bearing on Klamath Tribal fishing rights. The treaty protected fisheries were above the dam rather than below it. Had fingerlings been transferred above the dam and been able to get back down through and over the dam, they still would not have been able to get back to the Basin as mature fish. The practise of physically carrying fish in containers of some sort past dams had not yet been developed. The only means of getting mature fish up the river past the dam and into the Basin would have been by means of a fish ladder.

In August, 1916, McKee of COPCO assured the Commissioner of Indian Affairs that a fish ladder would be built or was being built:

> "We note that complaints have reached your office through the Klamath Indian Reservation that the run of salmon in the Klamath River has been interfered with by a dam which our company has under construction upon the Klamath River.
>
> "In reply we beg to say that we expect that the said dam will be completed by the end of the present year, 1916. Ample provision has been made in the plans for the dam for a fish ladder which will permit unobstructed passage of fish up the Klamath River. In the meantime, and during the period of construction, the waters of the river are being carried in part through a tunnel around the dam and in flumes through the base of the dam. There is no difficulty about fish making their way upstream under present conditions.
>
> "When the tunnel and flumes through the dam which now permit the run of fish to pass are closed up, the fish ladder will be in operation.

"We are sending copies of this correspondence to our engineer in charge of the work at the dam, requesting him to reexamine the situation and if it appears that anything further can be done to facilitate the passage of fish upstream during the construction of the dam, to do whatever is necessary to bring this about at once. Yours very truly, (signed) J. McKee, Vice President, California-Oregon Power Company." (McKee to Merritt 23 August 1916 in Simmons n.d.:22)

In August, 1918, the Assistant Commissioner of Indian Affairs was still making inquiries regarding the fishway:

This will refer further to the Copco dam being constructed on the Klamath River by the California-Oregon Power Company and the desirability of having installed in connection therewith a fishway to permit salmon to reach the upper waters of the river.

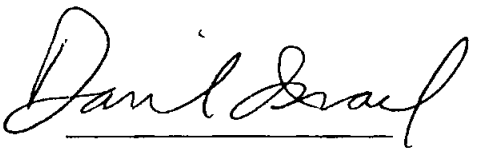
The California-Oregon Power Company has previously expressed a willingness to cooperate in the matter of providing a proper type of fishway over the dam and the Office understands that your Commission delegated Mr. W. H. Hincks, former Irrigation Engineer of the Indian Service, to represent it in a conference with engineers of the power company and a representative of the California Fish Commission relative to the matter. This conference of engineers it is understood has not been held and the Office learns that the power company has concluded or is about to conclude arrangements with your Commission whereby the company shall be released from building the proposed fishway in consideration of the Company's undertaking to place a given number of salmon spawn above the dam. Whether this is in the nature of a tentative arrangement only we are not advised.

As the Office understands it this arrangement would not meet the situation, inasmuch as it appears that salmon are spawned and live in fresh water for their first year and go to sea when they remain in the salt water for three years more, returning at the end of the fourth year of their lives to their home waters for spawning, after which they die. It is also learned that salmon placed above the dam never mature, salmon weighing more than one pound, and that few reach a weight of four pounds.

The Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of their food and it is highly, desirable that proper provision be made by the power company for the passage of salmon over its dam.

This Office will be pleased to be advised concerning the nature of the reported arrangements made by your Commission with the power company in this matter. (Meritt to Oregon State Fish and Game 14 August 1918)

By December of that year, Meritt was aware that no fishway was going to be built.



Daniel H. Israel