

Supreme Court of the United States.
 KLAMATH TRIBES OF OREGON; Joseph Hobbs;
 Robert Anderson; Joseph Kirk; Orin Kirk; Leonard
 Norris Jr.; Phillip Tupper; Robert Bojorcas;
 Klamath Claims Committee: Catherine Weiser-
 Gonzalez; Miller Anderson, Petitioners,
 v.
 PACIFICORP, Respondent.
 No. 07-1492.
 May 28, 2008.

On Petition For A Writ Of Certiorari To The United
 States Court Of Appeals For The Ninth Circuit

Petition For A Writ Of Certiorari
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 Petitioners.

QUESTION PRESENTED

The Court on multiple occasions has ordered equitable relief, based upon an implied right of action, to preserve the exercise of Northwest Indian treaty fishing at hundreds of off reservation “usual and accustomed stations.” Should a right of action at law for damages against a private dam builder be recognized as the preferred remedy for the one Northwest treaty which (a) forbids treaty Indians from leaving their reservation to protect their exclusively on reservation fishing right from downstream interference and (b) granted control over the only means of salmon passage to non Indian pioneers?

*II LIST OF PARTIES

Plaintiffs-Appellants are the Klamath Tribes of Oregon, a federally recognized **Indian tribe**, the Klamath Claims Commission, a federally sanctioned tribal entity and Tribal members Joseph Hobbs; Robert Anderson; Joseph Kirk; Orin Kirk; Leonard Norris Jr.; Phillip Tupper; Robert Bojorcas; Catherine Weiser-Gonzalez; and Miller Anderson.

Defendant-Respondent is PacifiCorp, an Oregon corporation doing business in Oregon and California and other states.

*III RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Klamath Tribes *et al.* is a federally recognized **Indian tribe**, has no parent and there are no publicly held companies that hold any stock of the petitioners.

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***1 PETITION**

The Klamath Tribe, the Klamath Claims Commission and individual tribal members respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Oregon is reproduced in Appendix C. The unreported opinion of the United States Court of Appeals for the Ninth Circuit is reported at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTORY AND TREATY PROVISIONS

1954 Klamath Termination Act, 25 USC 564 *et seq.*

1986 Klamath Restoration Act, 25 USC 566 *et seq.*
The Treaty of October 14, 1864, 16 stat. 707.

***2 STATEMENT OF THE CASE**

A. Introduction

Consistent with the Supreme Court Rule 10(c), the Klamath Tribes *et al.* demonstrate that their petition should be granted, for the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Moreover, its ruling does not constitute the misapplication of a properly stated rule of law.

The Ninth Circuit's one sentence ruling ignores the Court's well documented analysis for determining when a right of action for damages may be implied where "rights creating" federal directives are violated by "deliberate indifference," resulting in "less favorable treatment." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005). Here, the federal enactment is the Treaty of October 14, 1864, 16 Stat. 707, ratified July 2, 1866. By its express terms, non Indian pioneers were to occupy the southern 90% of the Klamaths' historic domain. The Indians were to vacate their historic roaming and fishing and remain within the northern 10% of their territory. In exchange, the Klamaths' undisputed reliance on salmon fishing was "preserved." The Indians and pioneers each understood that the promise that Klamath fishing would be "preserved" required continuing passage of salmon in the Klamath drainage.

This Petition asks the Court to confirm an implied right of action for damages as it relates to the *3 successor of the entity which knowingly and deliberately elected to block salmon passage and generate electricity for the growing pioneers. That private entity knew that its profits would far exceed the damages incurred by the Klamaths. Beginning in 1916, the company constructed the first of several dams on the Klamath River - the sole passage way for Klamath treaty salmon. No consent of the Klamaths or of the United States was secured. To the contrary, the dam builder represented it would keep salmon coming and/or "assume liability" to keep the Klamath Indians whole.

The 1864 treaty "bargain" is spelled out unambiguously in Art. 1 of the 1864 treaty. The Indians were required to cede to the United States and non Indian

pioneers millions of acres of down river terrain and move north to the headwaters of the Klamath River and remain there with the express commitment that "the exclusive right to fish in the rivers arising within the reservation would **be secured.**" In exchange, non Indians were to permit passage of salmon in the Klamath River. In the absence of such a commitment the federal rights granted the Indians would disappear and the 1864 agreement would in the words of the Court result in an "impotent outcome." *United States v. Winans*, 198 US 371, 380 (1905). This federal treaty right has been noted by the Court, when subsequently it acknowledged that salmon fishing was then essential to the ability of the Klamath Indians to sustain themselves on their *4 reduced reservation. *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984).

Equitable relief enjoining the construction of a barrier to salmon passage downstream was not realistic. By the express terms of the 1864 treaty, the Klamaths could not, under threat of federal law, leave their reservation. Arguably any attempt to seek equitable relief would have been resisted on the basis that unlawfully leaving the reservation to police salmon passage downstream would constitute a violation of the equitable maxim that "he who comes into equity must come with clean hands." *Precision Co. v. Automotive Co.*, 324 US 806, 814 (1944). The Indians' only practical form of relief could be the calculation of damages at law - measured once they saw their reservation salmon runs disappear. No ruling of this Court supports the one sentence conclusion of the Ninth Circuit, below; which operates to permit only pre-dam construction injunctive relief as the sole remedy to protect explicitly guaranteed on reservation fishing rights.

As the Klamaths next show, the Court's multiple holdings that once a federal law contains "rights creating language" and there exists no parallel enforcement scheme to protect such rights, damages are the appropriate remedy in the face of evidence of "deliberate indifference", unless they prove inadequate, *Franklin v. Gwinnett County Public*

Schools, 503 US 60, 76 (1992).

***5 B. The Present Litigation**

In May of 2004, the petitioners filed an action seeking significant historic damages against PacifiCorp as the successor in interest of Copco, the builder in the period 1913-1917 of Copco No. 1 - a dam placed in the bed of the Klamath River just south of the California-Oregon line. The dam is located within the Klamath River drainage which was ceded to the United States and pioneers in 1864. It is undisputed that construction of the dam eliminated the once significant and economically important salmon fishery secured by the Treaty of 1864. As anadromous fish, salmon breed in the upstream reaches of the Klamath River - an area expressly reserved for the sole and exclusive use of the Klamath Indians in their 1864 Treaty. With the construction of Copco No. 1, salmon could no longer pass upstream to the Klamath Reservation and downstream to the Pacific Ocean.

The Klamath Indians further claim that no federal and state statute of limitations prevents the prosecution of their damage action. Finally, the petitioners claim that post treaty developments in the Upper Klamath River, including large irrigation depletions and the changing land ownership, through acts of Congress, may affect the quantity of damages but do not eliminate a cause of action for damages. See first amended complaint. KER, pp. 37-38; PCER, pp. 4-12.^[FN1]

FN1. References to PCER are to the Pacific Corps' Excerpts of Record before the Ninth Circuit and KER are to the Klamaths' Excerpts of Record before the Ninth Circuit. In addition each party submitted Addendum to their respective briefs, cited here as PC ADD and K ADD.

***6** On April 14, 2005, Magistrate Cooney of the United States District Court for the District of Oregon entered recommendations finding that the 1954 Klamath Termination Act, 25 USC 564 *et seq.* had

made applicable Oregon statutes of limitations to the Klamaths' claims and dismissed the amended complaint on the basis that it was time barred. Upon review, United States District Court Judge Ann Aiken, *sua sponte*, ruled on July 14, 2005 that the Ninth Circuit intervening *en banc* decision in *Skokomish Tribe v. United States*, 410 F. 3d 506 (9th Cir.) (en banc) (2005) foreclosed the Klamaths' cause of action. Appendix C.

Skokomish Tribe held that while an equitable claim may be pursued to preserve off reservation treaty fishing, there existed on the face of the 1855 treaty before it no basis for implying damages which might arise from the inundation of one of many off reservation usual and accustomed fishing stations reserved by the Indians for treaty fishing. A timely notice of appeal was filed on October 11, 2005 after the District Court denied a motion filed by the Klamaths under Rule 59(e) to set aside the July order. Appendix B. On February 28, 2008, the Court of Appeals for the Ninth Circuit held in one sentence that its prior holding in *Skokomish Tribe* foreclosed the claim of the Klamaths. Appendix A.

***7 REASONS FOR GRANTING THE PETITION**

A. The Court's past recognition of equitable rights of action against third parties to preserve the federal right to fish in off reservation "usual and accustomed grounds and stations in common with all citizens of the United States" sets the stage for this on Reservation treaty damage action against third parties.

The Ninth Circuit read the Court's past equitable relief decisions - protecting Northwest treaty rights which assured Indians that they could continue to roam and fish at all of their usual and accustomed stations - as foreclosing damages in the setting of a different federal treaty which barred off reservation roaming and fishing and required the Klamaths to fish exclusively on reservation. In our view, the prior Treaty protection cases of this Court are not a bar here.^[FN2] Rather they establish the presence of an implied right of action to protect Treaty fish-

ing rights. Given the unique nature of the Klamaths' Treaty, the Court's long acknowledged right of action to enforce off reservation fishing rights should be recognized here as embracing an award of damages.

FN2. See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658 (1979); *Puyallup Tribe v. Department of Game of Washington*, 391 US 392 (1968); *United States v. Winans*, 198 US 371 (1905); *Seufert Bros. Co. v. United States*, 249 US 194 (1918).

*8 The Court's past cases uniformly uphold equitable remedies associated with such off Reservation treaties - focusing primarily on the obligations of the states to regulate non Indian fishing so as to fully preserve the Indians' fishing opportunity and early on confirming a land servitude on private lands to allow subsequent generations of Indians to retain physical land access to the retained fishing stations.

In *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 666, n.9, the Court acknowledged that the ancient right of roaming would be preserved and quoted from Governor Stevens who developed the treaty bargain for Northwest Indians, on behalf of the United States: "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." In the District Court litigation leading up to *Fishing Vessel*, the court reiterated the broad and ubiquitous range of reserved "usual and accustomed fishing stations" for a large number of tribes including: the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets. Customary use patterns varied according to the types of water areas, with freshwater

fisheries being controlled by the *9 residents while the deeper saltwater areas were open to anyone who traveled thereon. Their fishing techniques included trolling, stream weirs, spearing and tidal traps. These Indians continued to fish these areas following their relocation on the Squaxin Island Reservation and to rely in part on fishing for subsistence and monetary income. Salmon fishing and the fishing areas used by their predecessor bands continue to be important to members of the Squaxin Tribe.

United States v. Washington, 384 F. Supp. 312, 378 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975).

These court findings flow of course from the plain language of the identical Stevens off reservation Northwest treaties. For example the 1855 Treaty, permitting the Skokomish Indians to continue to roam and fish as they had since time immemorial, expressly protected this right to roam, Art. IV; made it explicit that the small reservation to which they were directed were not permanent, Art. VII, and required the treaty Indians to travel to a central off reservation location where the United States would provide educational, medical and other treaty promised services. Art. XI. PC ADD, pp. 3-5. Each of these provisions confirm that while Indian title to large portions of water and land were ceded, the Northwest Indians retained significant access and control rights throughout their extensive aboriginal domain.

These now familiar to the Court treaty provisions set forth duties and rights which as noted above are fundamentally different from the duties and rights *10 established in the Klamaths' treaty of 1864. Because the federal rights established at Klamath are different, the character of the implied right to protect the treaty fishing is different. The protection of undefined roaming rights surely does not support damages - for with multiple fishing locations it would be impossible to determine the numbers of Indians who are derived of fishing or indeed the number of fish that might be reliably calculated as being lost to treaty beneficiaries. **No such inad-**

equacy of damage calculations is present where there exists ,only one drainage and where there exists only one geographic location where Treaty fishing can be exercised.

The decision in *Skokomish Tribe* properly acknowledged that under the Court's precedent, in the setting of hundreds of off reservation "usual and accustomed fishing stations", only equitable relief was contemplated to protect the treaty fishing rights secured for the Tribes and their members. The Ninth Circuit found no implied right to a damage remedy as against third parties:

The Supreme Court has held that the Treaty of Point No Point and similar treaties are "self-enforcing" and thus do not require implementing legislation to form the basis of a lawsuit To make this determination, the Court looked at language common to the treaties, which stated that the treaties "shall be obligatory on the contracting parties as soon as [they are] ratified by the President and the Senate of the United States." *Id.* However, the City [of Tacoma] and TPU *11 [Tacoma Public Utilities] are not contracting parties to the Treaty. *Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party.* Cf. *Alexander v. Sandoval*, 532 US 275 (2001) ... ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") *Skokomish Tribe*, at 513 (emphasis supplied).

The Klamath Indians agree with these findings of the Ninth Circuit. The Ninth Circuit conclusion is required by the very bargain established in the Northwest treaties - that Indians reserved to this day the right to roam and fish throughout their aboriginal domain. Unlike the Klamaths' federal rights, no one river was required for the Skokomish Indians to secure salmon passage. No one fish passage corridor was to remain open in exchange for the Indians surrendering their aboriginal domain and permitting the white pioneers to settle free of

attack. To the contrary, as noted above, the typical Northwest Indians were free to roam as they had since time immemorial. "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." Art. IV, 12 Stat. 933, 934 KER, p. 2.

*12 The Klamaths next show that in the setting of the 1864 on reservation treaty fishing rights established for the Klamath Indians, there does exist in the language and the structure of the treaty "rights creating language" which supports a claim for damages against a non-contracting party.^[FN3] At Klamath, white pioneers, who benefited greatly from the Klamath Indians' renunciation of their aboriginal domain, were necessarily bound to protect salmon passage on the one river which supplied the all important salmon upon which the Klamath treaty was based.

FN3. As the Court has noted in its implied right of action cases, rights creating language which is the foundation for an implied right of action is to be distinguished from a congressional plan where Congress merely prohibits certain activity, finding the latter "states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further." *California v. Sierra Club*, 451 US 287, 289 (1980). The Klamath treaty contains a rights creating agreement. No proscription against salmon passage interference was specifically established.

B. The 1864 Klamath Treaty is structured to support a claim for damages - not claims for equitable relief.

PacifiCorp and the lower courts acknowledge that the geographically specific federal fishing right es-

tablished in the 1864 Klamath treaty established “rights creating language” for which equitable protection exists. That is, no party informs the Court that the Klamath Indians bargained for and received a *13 federal treaty right with no implied enforcement. Rather, it is claimed that the Klamaths, having bargained in 1864 for a fundamentally different federal right than the multiple 1855 off reservation fishing treaties, are forever limited to only equitable relief, regardless of the specific federal rights created.^[FN4]

FN4. This conclusion is at odds with the Court’s longstanding treatment of implied rights and damages: “... it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provide an adequate remedy, and if not whether equitable relief would be appropriate Moreover, in this case the equitable remedies are clearly inadequate prospective relief accords her no remedy at all”. *Franklin v. Gwinnett County Public Schools*, 503 US at 76.

On its face, the Treaty, operating with the force of federal law, separated forever the Indians from their former roaming grounds which were located south on the Klamath River into California, restricted them to upstream on Reservation treaty fishing only, and limited their practical ability to protect their treaty rights utilizing equitable remedies. The Treaty on its face and as expressly understood by all parties, provided the following bargain. In exchange for immediately moving on a permanent basis to a confined Reservation, the Klamaths were “secured” exclusive fishing in that small portion of their original domain identified in the 1864 treaty. Essential to “securing” for the Indians their traditional salmon fishing, the United States and newly arriving *14 pioneers assumed the obligation of protecting salmon passage in the only drainage passing into the Reservation - the Klamath River.

The tribes of Indians aforesaid cede to the United States[and its pioneers] *all their right, title, and claim to all the country claimed by them*, the same being determined by following boundaries, to wit ... thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of...

That the following described ‘tract, *within the country ceded by this treaty*, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians[and] held and regarded as an Indian reservation,...

And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, *they will remove to said reservation and remain thereon,; and the exclusive right of taking fish in the streams and lakes, included in said reservation*, and of gathering edible roots, seeds and berries within its limits, *is hereby secured* to the Indians aforesaid. Art. I, 16 Star. 708; KER, p. 32 (emphasis supplied).

*15 The Indians, the United States and the pioneers all knew the southern boundary of the ceded lands - the *ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose* - embraced large portions of the Klamath River south of the smaller reservation located on the northern portion of the lands described in the treaty as “the country claimed by them.” While this geographic bargain may not have been fully understood by pioneers located all the way to the mouth of the Klamath River in California, it was surely understood by then present and future pioneers in southern Oregon and northern California where Copco No. 1 was constructed **within the area ceded**.

The federal plan to have the Klamath Indians - unlike other Northwest Indians - give up their abori-

ginal roaming and fishing practices on condition that they retain anadromous and non anadromous fishing at the headwaters of the Klamath River followed directly from the unusually hostile pretreaty conflicts between Indians and settlers.

[t]he advantage of a state of peace over a state of harassing war would be of vast advantage to the pioneers who are endeavoring to develop that country, and will advance the interest of both the settlers and the government many times the amount of the appropriation. Superintendent of Indian Affairs, *16 March 5, 1864. Klamaths' Opening Brief, Addendum, p. 6.

If a law could be enacted requiring the Indians to remain upon the reservation and providing for their punishment (by withholding annuities or otherwise) if they absent themselves without the consent of the agent and making it an offence for a white person to entice an Indian to leave, or to conceal or harbor him., its effect would be most salutary.... Superintendent of Indian Affairs, Sept. 26, 1864. *Id.* at p. 8.

Once understood, the rights and responsibilities imposed on the Klamaths and the pioneers preserved treaty fishing in exchange for removing to a reservation at the headwaters of the Klamath drainage. The “advantage” secured by pioneer’s of ridding their lands of hostile Klamaths was balanced by the “advantage” provided the Klamaths to have their Klamath River anadromous fishing corridor preserved. The Court in *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984) cited to a stipulation in that litigation which confirmed that 1864 Treaty fishing had been “crucial to their survival during the years 1864, 1900 and 1906.” In addition the record before the Court here - relied upon by both parties - shows a pre-treaty white explorer writing on May 6, 1846 upon arriving at Klamath Lake; “This is a great fishing station for the Indians Up this river the salmon crowd in great numbers to the lake, which is more than four thousand feet above the sea.” Then post treaty, the *17 Klamath Falls Republican in 1901 reported: “Enormous droves of fish can be seen in the rivers and creeks

throughout the county. Mulletts, rainbow trout and salmon - splendid fish giants of their size and apparently anxious to be caught. This phenomenon will last a month, and until their egg-laying camp meeting is over with.” Klamaths Opening Brief, Addendum, p. 3A and p. 18.

Moreover, the Ninth Circuit over thirty years ago confirmed that in the Klamaths' Treaty “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.” *United States v. Adair*, 723 F. 2d 1394, 1410 (9th Cir. 1983), *cert. denied*, 467 US 1252 (1984). The undisputed historic record before the Court therefore confirms that the heart of the 1864 Treaty was the commitment by the United States on its behalf and on behalf of its citizens that the Klamaths would retain the right to fish for salmon on their reduced Reservation.

Neither the Court of Appeals nor the District Court felt free to explore the rights and responsibilities placed in the 1864 Treaty, given the *en banc* decision in *Skokomish Tribe*. Because this Court is not restrained by the Ninth Circuit analysis and has had a longer and more in depth history in dealing with the legal issues raised in the Klamaths' damages action, the Klamaths request this Court to consider their claims on the merits.

*18 C. The Klamaths' ongoing right to have third parties preserve their ceded area's only salmon passage corridor - secured by the boundaries set forth in the treaty, the common knowledge of anadromous fish passage and the on reservation fishing limitation imposed by the treaty - was explicitly acknowledged twice by iPacifiCorp's dam building predecessor.

PacifiCorp agrees that the 18,64 Treaty secures a different treaty fishing right than those reserved by all other major Northwest treaties. But they informed the lower courts that the Klamaths may protect their acknowledged federal right through in-

junctive, relief against non treaty signatories and damages only against the United States, when Congress so consents.

PacifiCorp is falsely riding the injunctive relief precedent which arose solely out of off reservation fishing disputes involving state regulation or land access to the omniscient fishing locations. Their effort to contend that the past recognition of equitable remedies operates to foreclose damages at law flies in the face of the Court's most recent implied right of action analysis which confirm a right to damages when a protected class is found to have been subjected to "less favorable treatment" through "deliberate indifference." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005).

Second, PacifiCorp's claim that only equitable relief is available is, of course, 180 degrees different *19 what its predecessor told the Indians twice, once in 1916 and then again in 1917. Thus in 1916, PacifiCorp's predecessor told the United States as it was constructing Copco No. I in the bed of the Klamath River, that the dam being constructed would preserve the passage of salmon to the upstream Klamath Reservation;

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 August 1918, the Assistant Commissioner of Indian Affairs sought assurances that the Klamaths' treaty rights to salmon would in fact be honored.

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 Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of *20 their food and it is highly desirable that proper provision be made by the power company for the passage of salmon over its dam.*

The office feels that the shutting off of the salmon run in the Klamath River was a result of the construction of the dam in question, is an imposition on the Indians who depended upon it in the past and would like to have your cooperation in the matter of requiring the company to build a proper fish-way as originally contemplated. (emphasis supplied)

PC ADD. pp. 116-117.

Then a year later in 1917, when the very same power company Copco constructed with the United States Bureau of Reclamation, the Link Dam - 60 miles further north - at the foot of the Upper Klamath Lake - the United States required Copco and Copco agreed as an express condition to initiating construction, to pay damages to the Klamath Indians if their second dam inflicted harm on "property or rights", which on its face includes federal 'treaty protections.

*The company assumes any and all liability for damage to the property or rights of any person or corporation or the property or rights of the State of Oregon or of the Indians due to the operations of said dam by said Company or to the regulation and control of the levels of said lake by said Company and hereby undertakes to hold the United States harmless from any and all liability for *21 damage due to such regulation and control. Par. 7 (emphasis supplied)*

KER, p. 38. The entire 1917 agreement was lodged with the Ninth Circuit. The agreement remains in force.^[FN5]

FN5. Copco's second written commitment to make the Klamath Indians' treaty fishing whole confirms the widely understood bargain placed in the 1864 treaty that pioneers as well as the United States were to protect

the Klamaths' exclusively on reservation fishing rights. The commitment further shows that the protection recognized post dam damages and not merely pre-dam injunctive relief. Finally, because the United States required the payment of damages, the requirement sets forth an understanding that the treaty had indeed included the rights creating language which the Court requires to find an implied right of action for damages in the face of deliberate and/or consciously indifferent violations. While no claim for loss of salmon is claimed for the construction of this second dam - for the year earlier construction of Copco No. 1 had already blocked treaty protected fish passage - Copco's second representation to the Klamaths is nevertheless further indication of the presence of an implied right of action for damages.

These two commitments by Copco reflect the understanding of the non Indians who benefited by the removal of the Klamaths to their head waters reservation that Klamath on reservation treaty rights - required ongoing fish passage. Notwithstanding Copco's multiple acknowledgements of its obligation to protect salmon passage, Copco remained "consciously indifferent" to its destruction of the treaty fishing rights "secured" by the treaty of 1864. Given the central role which salmon played at treaty, it is inconceivable that the Indians would have agreed to *22 stay on their diminished reservation in the absence of assurances of continued fish passage. Accordingly, the rights establishing provisions in the Treaty and the structure of the federal bargain with the Klamaths give rise to a claim for damages. As this Court has directed, such a conclusion follows from an examination of what Congress would had inserted, had a remedy "been included in an express provision in the statute." *Gerber v. Lago Vista Independent School District*, 524 US 274, 285 (1998).

D. Neither the passage of time nor the changed cir-

cumstances of the Klamath Reservation operate to sidetrack the Klamaths' request for Court review.

If the Court were to determine that the Klamaths' right of remedy request deserves judicial review, a second issue requires resolution. Is such a right of action for damages barred by either the application of State statute of limitations or laches? PacifiCorp relies upon *South Carolina v. Catawba Indian Tribe*, 476 US 498 (1986) for the proposition that when a Tribe - like the Klamath Tribe - is terminated, 25 USC 564 *et seq.*, state statute limitations are triggered to bar this claim. But of course, the Court in *Catawba Indian Tribe*, 476 US at 509, n. 20 (1986) expressly distinguished its finding in that case from the preservation of hunting and fishing rights secured by treaty associated with another terminated tribe, the Menominee Tribe. *Menominee Tribe v. United States*, 391 US 404 (1968). *23 And subsequently in cases not challenged by PacifiCorp, the Ninth Circuit applied the treaty analysis and a separate Congressional protection for treaty rights applicable to the Wisconsin Menominee and the Oregon Klamaths, but not the South Carolina Catawbas, 18 USC 1162, to carve out from termination Klamath Treaty fishing and hunting rights. *Kimball v. Callahan*, 493 F. 2d 564 (9th Cir. 1974), *cert. denied*, 419 US 1019 (1974) and *Kimball v. Callahan H*, 590 F. 2d 768 (9th Cir. 1979), *cert. denied*, 444 US 826 (1979). Accordingly, there exists considerable doubt that the Court would apply state statute of limitations to a federal common law claim focusing on the injury to expressly protected treaty fishing rights.

Apart from the *Catawba Tribe* and *Menominee Tribe* analysis, is the application of the Court's retroactivity precedent as it relates to the possible application of state statutes of limitations to the Klamaths' damage claim. *Landgraf v. USI Film Products*, 511 US 244, 265 (1994) directs the analysis to the 1986 Klamath Restoration Act, 25 USC 566 *et seq.* where Congress provided that any provision of the 1954 Klamath Termination Act, 25 USC 564 *et seq.* "shall be inapplicable to the Tribe

and the members of the Tribe after the date of the enactment of this Act.” 25 USC 566(B). Accordingly if the Klamath Termination Act were to be read - as urged by PacifiCorp - as identical to the Catawba Termination Act with the result that state statutes of limitations would apply to eliminate the Klamath's damage claims here, *24 Congress directive in 566(B), enacted in 1986 would change that outcome.

Under *Landgraf*, the directive in the 1986 restoration act that any provision in the termination act “shall be inapplicable” to the Tribe and its members after the 1986 enactment date constitutes what the Court described as language of Congress “which expressly preserves the statute's proper reach.” 511 US at 280.^[FN6] Under this analysis then, the Klamaths' 2004 damage action would be free of the bar of state statutes of limitations. The Klamaths' common law nuisance claim would be pursued under federal common law principles which impose no statute of limitations. *County of Oneida v. Oneida Indian Nation*, 470 US 226, 240 (1985).

FN6. This analysis was adopted by the Federal District Court below. Appendix C. App. 16-17.

In like fashion, the Court's recent reliance on laches in *City of Sherrill v. Oneida Indian Nation of NY*, 544 US 197, 217-219 (2005) is not applicable here. Noting that the laches defense is “not a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced - an inequity founded upon some change in the condition or relations of the property or the parties”, the Court would not permit a belated assertion of a “right to present and future sovereign control over territory..., finding that longstanding observances and settled expectations are prime considerations.” 511 *25 US at 218. Here, in contrast, no change in the relations of property or the parties can seriously be alleged or proven. Copco and now PacifiCorp continues to block salmon passage and continues to make millions of dollars through hydropower generation. Accordingly while the passage of time does

increase the amount of the Klamaths' damages, those damages are modest indeed when compared to the profits enjoyed by PacifiCorp generating hydropower each year since 1917.

Finally, the decision to review this appeal should not be influenced by the multiple so-called defenses which PacifiCorp has offered below. Thus licensing of Copco No. 1 under the Federal Power Act, 16 USC 791a *et seq.* in the 1950's plays no role in this damage claim which is premised on a 1917 destruction of the Klamaths' salmon fishery. Similarly, the fact that congressional termination in the 1950's reduced the concentration of Klamath fishermen and that transfer of much of the Klamaths' 1864 reduced reservation to the United States Forest Service resulted in Klamath treaty fishing being undertaken side by side with non Indian fishing regulated by the State of Oregon both relate, if at all, to the damage calculation. Such change in circumstances do not and can not eliminate an otherwise identified implied right of action.

*26 CONCLUSION

The petition for a writ of certiorari should be granted.

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