IN THE UNITED STATES COURT OF FEDERAL CLAIMS

KLAMATH CLAIMS COMMITTEE

Plaintiff,

v.

Case No. 09-CV-75L
Judge Francis M. Allegra

UNITED STATES OF AMERICA

Defendant

RESPONSE OF THE KLAMATH CLAIMS COMMITTEE TO UNITED STATES MOTION TO DISMISS

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CROSS MOTION FOR SUMMARY JUDGEMENT FILED BY THE KLAMATH CLAIMS COMMITTEE UNDER RULE 12(d)

Under the Court's rule as set forth in L R 12 (d) when a motion to dismiss for a failure to state a cause of action is accompanied by materials beyond the pleadings---as here--- the matter before the court must be converted into summary judgment. Accordingly, the Klamath Claims Committee hereby files a cross motion for summary judgment seeking a ruling of the court that it has set forth supporting documentation(including affidavits) and legal argument establishing :

1. That the Committee has standing as a long recognized entity of the Klamath Tribe- assigned the tasks of pursuing legal claims arising out of the termination of the 1864 Treaty Reservation, including the claims set forth herein:

2. That the statute of limitations has not run with respect to the August 2008 taking of Chiloquin Dam:

Proposed Findings of Uncontroverted Facts

a. Following the termination proclamation in 1961, the BIA moved forward to implement the termination act. The Claims Committee was established by the Tribe , approved by the BIA and addresses legal claims arising out of termination. See pp 8-14 of this Response

b. The complaint in this action was filed in February of 2009 , within the six year statute of limitations , so as to permit the court to address the Committee "takings" claims arising out of August 2008 destruction of Chiloquin Dam. Nothing in this claim addresses the 1974 transfer of the Dam from trust status---if at all that transfer may implicate the scope of Tribal property taken when the Dam was removed. See pp 8-9 of the United States Motion to Dismiss and Exh F .

MEMORANDUM OF LAW IN SUPPORT OF THE COMMITTEE'S RESPONSE TO THE UNITED STATES MOTION TO DISMISS

STATEMENT OF FACTS: STANDARD OF REVIEW

The Klamath Claims Committee does not have any serious dispute with the Statement of Facts nor the Standard of Review set forth by the United States.[1] Some of the Statements are conclusionary. The Committee will address in this Response those legal conclusions of the United States which it believes are in error. It is possible some of the Committee's legal contentions will challenge minor portions of the United States Statement of Facts

ARGUMENT

1.Having recognized the Committee and its authority to prosecute claims on behalf of 1954 Tribe and the members on the 1954 termination roll since 1961, it is wrong for the United States to represent to the Court that the Committee does not have standing to assert Klamath Reservation based claims

The Committee next sets out a consistent documentary history showing that the United States has long understood that the Committee represents the 1954 Tribe and its members in court claims matters. Attached as Exh.1 is a November, 2004 letter from the Northwest Regional Director of the BIA confirming that the regional solicitor has reviewed the "requirements of the Klamath Tribe's Litigation Fund account" and approved the payment of funds from the litigation

[1] In urging under Standard of Review, that the plaintiff's complaint must meet the "plausibility standard", Motion at 11, the United States does not make it clear that it is relying on that portion of federal law that involves what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act and is focusing on the type of allegations required to set forth the parallel conduct or conspiracy required under that Act. Bell Atlantic Corp. v. Twombly 550 U.S. 544, 554-557(2007) But nothing in that requirement under the Sherman Act rewrites the elementary requirement of Federal Rule of Civil Procedure 8(a)(2) that only " a short and plain statement of the claim showing that the pleader is entitled to relief," is required in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," Id . Indeed a well pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely" Id .

fund account to "be expended to pay for attorney fees and expenses for the Klamath Claims Committee." Exh 2, is a August 2, 1961 resolution of the Klamath Executive Committee relating to a litigation fund which references a resolution dated August 21, 1952 by the Klamath General General Council which addresses the prosecution of claims.[2]

Exh 3 is a January 18, 1983 Resolution of the Klamath Tribal Executive Committee (Claims) providing in part:

> WHEREAS, the Klamath Tribal Executive Committee (Claims), under authority of resolution dated August 21, 1961, was designated as the post-termination (ie post August 13, 1961) representative body of the Tribe for the purpose of supervision and management of tribal claims against the United States and for all dealings, including entering into contracts and making amendments thereto , with claims attorneys. This power of the Committee was ratified by the Department of the Interior on August 30, 1961. Subsequent to termination, the authority of the Klamath Tribal Executive Committee (claims) to act on behalf of the Tribe has been recognized and affirmed by the Department of the Interior and the Indian Claims Commission, respectively in passing upon settlements and disposition of several trial claims …..
>
> Exh. 4 is a July 28, 1993 resolution of the Klamath Tribe Executive Committee (Not Claims) which provides in part:
>
> WHEREAS, The Klamath Executive committee on claims established prior to the termination of the Tribe with the exclusive responsibility to overcome the many

[2] Confirmation that at termination the Executive Committee was in charge of claims is seen in US Exh. E, p. 30 where the Executive Committee at some time on or before 1958 ---as it has during the past decades, infra, pp. 9-11 requested permission from the BIA for assistance in "pressing Klamath Claims beyond the [termination]proclamation date." Today but not in 1958 there exists a separate claims fund established by contributions from 1954 members and overseen by the BIA which funds litigation claims and so the Claims Committee does not have to seek appropriated funds from the BIA. Nevertheless in order to access the funds in the Litigation Fund account under the supervision of the BIA and the Office of the US Trustee, the Claims Committee must comply with certain federal regulations. See 25 CFR 1200.13. Requiring the Committee to comply with current federal law regarding the distribution of tribal funds is yet further proof that the United States continues to treat the Committee as an integral component of the Tribe. Currently the Committee working with the BIA and the Office of the US Trustee is in the process of obtaining financial support to pursue the very claims set forth in this case.

injustices that took place on the Klamath Reservation since its formation in 1864, and through the disastrous termination era, on behalf of the 2, 133 Tribal members whose names appeared on the final 1954 rolls: and

WHERAS, The restoration of Klamath Tribe in 1985 by the United Congress did not detour from the previous responsibilities and activities for the Executive Committee on Claims; ….

WHEREAS The Bureau of Indian Affairs, Portland Area Office has been administering trust funds estimated at about 2.8 million dollars, the trust funds composed of unclaimed claims funds, litigation funds, interest fund etc; and

WHEREAS, The Klamath Tribal Executive Committee agrees with the Klamath Executive Committee of Claims that a portion of these funds can be returned to the membership leaving only those judgments funds of $533,000 plus interest that was set aside for litigation purposes in 1982, thereby insuring there will be funds available to pursue future Tribal claims.

NOW THEREFORE BE IT RESOLVED, that the BIA work with the Klamath Claims Committee and chairman of the Klamath Tribe to carry out this request….

Ex. 5 is March 6, 1996 Resolution of the Klamath Executive Committee (Not Claims)

providing that:

WHEREAS, the members of the Executive Committee having met with representatives of the United States government in the person of the Portland Area Director of the Bureau of Indian Affairs, Mr. Stan Speaks; and

WHEREAS, the BIA is willing to undertake the organizing and disbursement of the Klamath Litigation Trust funds upon formal designation of the BIA to act as the disbursement office for these funds for the Klamath Tribes

NOW THERFORE BE IT RESOLVED, the Klamath Tribes Executive Committee approves and adopts the attached litigation distribution plan and designates the Bureau of Indian Affairs, Portland Area Office to act as the official disbursement office for the Klamath Tribes Litigation Trust Funds;

Exh. 6 is a May 1, 1996 Resolution of the Klamath Claims Committee which states

WHEREAS, The Klamath General Council adopted by resolution dated August 2, 1961 delegated to the Executive Committee the authority to act in the name of the General Council to pursue claims; and

WHEREAS, Public Law 89-224, Oct. 1, 1965 an Act also known as the Distribution Act recognizes the authority granted to the Executive Committee to pursue claims against the United States in docket number 100.[3]

WHEREAS, The members of the 1954 General Council on August 4, 1994 directed the Claims Committee to redistribute the Litigation Trust Funds with $533,000 to be maintained in a Litigation account; and

WHEREAS, the Claims Committee and the BIA are working in co-operation to redistribute the Litigation Trust Funds excepting the $533,000 by agreeing upon the distribution processes;

Exh. 7 is a June 1, 1996 report from the Claims Committee to the General Council of the Klamath Tribe (the Tribal membership as a whole) which provides inter alia:

The Claims Committee continued to exist and function through the Termination and Restoration eras to pursue Claims established prior to Termination. Both General councils[sic] of the 1954 final roll membership and the present Klamath Tribes General Council has [sic]given the direction for the Klamath Executive Committee and the Claims Committee to work together.

Exh. 18 is a March 13, 2008 Joint Resolution of the Klamath Tribal Council

and the Claims Committee which provided inter alia:

WHEREAS, It is necessary to utilize funds out of the Klamath Claims Committee Litigation Fund established by act of Congress in 1961[sic] to pursue claims….approved by the Claims Committee acting with their authority as established by the General Council.[4]

WHEREAS, The Bureau of Indian Affairs Regional Director Stanley Speaks has suggested that enactment of this resolution will be needed to access the Claims Committee Litigation Fund: and….

[3] Attached as Exh.10 is Public Law 89-224. The Act addresses then ongoing Klamath claims matters against the United States and authorizes the retention by the BIA of funds for the benefit of the Klamath Tribe " or any of its constituent parts or groups" "for the purpose "of paying the usual and accustomed expenses of prosecuting claims against the United States" The act provides additional authority for the BIA to assist, as it has over the decades, in supervising Claims Committee funds withheld from distribution.

[4] Before and after termination, the General Council (made up of the entire Tribal membership) retained ultimate authority over Tribal matters. The General Council directs the elected Tribal Council which handles day to day matters. Section 25 USC 566a of the 1986 Restoration Act recognizes and carries forward the primary authority of the General Council.

> THEREFOR BE IT FURTHER RESOLVED, The Klamath Tribal Council and the Claims Committee agree that bills for reimbursement of expenses by Claims Committee and bills for services and expenses……are to be sent to the Office of the United States Trustee…..for payment directly to the individuals submitting the bills.

The documentary history confirms the Claims Committee is not a private association—as claimed by the United States in this litigation. Rather it is a Committee established by the Tribe and its members in 1961 at the time of termination whose existence and purpose have been approved and assisted by the BIA over the course of 50 years.

2.The documentary history confirms the Claims Committee is not a private association—as claimed by the United States in this litigation. Rather it is a Committee established by the Tribe and its members in 1961 whose existence and purpose has been approved and assisted by the BIA over the course of 50 years to pursue claims relating to communal assets addressed at termination

The United States is simply wrong when it represents to the court, that the Claims Committee is "an association" which represents only individual members of the Klamath Tribe. Indeed the documentary history set forth confirms that it represented the interests of the Tribe as it was terminated officially in 1961 and the Tribal members then on the rolls. It continues to represent those Reservation based claims and those still living members enrolled as of 1954.[5]

The United States cites United Food and Commercial Works Union Local v. Brown Group, 517 US544, 546 (1996) as barring the Claims Committee from having standing to pursue the claims brought to this court. United Fruit does not apply to support the US motion to

[5] When in paragraph 4 of the First Amended Complaint, the Committee stated that non termination enrolled members of the Tribe do not have a direct interest in this litigation, it sought to clarify that such younger members of the Tribe have an interest solely as descendents of the 1954 roll membership and not an interest in their own right.

dismiss for several reasons. First 28 USC 1505 involved here but not in United Fruit establishes a "group" of Indians separate from a " Tribe" as eligible to invoke this court's jurisdiction.

The Indian Tucker Act, as codified at 28 U.S.C. § 1505, provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

Hence, even if the Committee were a group—independent from the terminated Tribe which it is not----under 1505 it would have standing as a "group" of Klamath Indians. Second, unlike the labor union at issue in United Fruit, the Committee was not established by a vote of unaffiliated employees. To the contrary, as established above, the Committee emerged out of termination, out of the need to oversee ongoing claims against the United States as acknowledged in the 1965 Distribution Act, PL 89-244 and whose existence has been confirmed by over 50 years of recognition and assistance by the BIA.

Third, the Committee in fact complies with the three factors set forth in United Fruit to permit an association to seek damages on behalf of its members. Motion at 12 . First , 28 USC 1505, as noted above, expressly permits a "group" of Klamath Indians to seek damages in this court. A group made of all still living 1954 terminated members may invoke 28 USC 1505 in an effort to obtain damages associated with the intangible and tangible property assets identified in this proceeding. Separately individuals of the group could invoke 28 USC 1491, which states in part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any

> Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Hence, the 1954 members whose interests are directly represented by the Committee could if necessary proceed on their own to assert the claims at issue. Second, the protection of Klamath Reservation assets at termination held in trust by the United States for the benefit of the Tribe and its members.—at issue in this litigation—are communal assets whose protection is precisely the purpose for which the Tribe's termination era elected leadership (and the BIA) designated the Committee to pursue. [6]Hence the interests sought to be protected here are at the heart of the Committee's mission—the second requirement of United Fruit And three, neither the claims nor the relief requested in this lawsuit requires the participation of individual tribal members, for the Committee working with the BIA is to distribute any damages secured. United Fruit at 343. Accordingly, United Fruit does not apply to the Committee and in the alternative if it does, the Committee and the nature of the claims it has set forth before the court satisfy United Fruit. As a result, the Committee requests the court to strike the US motion to dismiss insofar as it wrongly attempts to portray the Committee as an improper "representative" litigant.

3.The Reimbursement Pledge of the United States in the 1954 Termination Act and the preservation of Klamath Irrigation Assets each represent interests which are protected under the Fifth Amendment and from a breach of trust

> [6] This Court has previously rejected the efforts of the United States to convert a communal "group" or "tribal" claim into an individual claim. "Defendant cites no legal authority for its novel propositions that a group claim is converted into separate individual claims upon distribution of the communal asset, and that the process of distribution itself creates "individual, vested property rights" held by each recipient of the group asset…. The reason for defendant's failure to cite relevant authority is apparent to the court: there is none." Chippewa Cree Tribe v. US, 73 Fed. Cl. 154, (2006).

The United States is wrong when it represents, Motion at 16 , that somehow the 1986 Klamath Restoration Act, 25 USC 566 "rescinded" any "individual interest earlier created in tribal property through the Termination Act." Apparently the United States theory is that the Restoration Act eliminated whatever vested property right for Fifth Amendment purposes may have existed with respect to these acknowledged Reservation assets. But of course the Restoration Act restored and did not rescind rights that had been "diminished " by the termination act . 25 USC 566(b). **The Committee's claims arise not out of a diminishment of rights caused by termination, but rather a loss of property rights caused by how termination was carried out. Hence the restoration act plays no role here**

The US further suggests that individual Indians have no vested interest in tribal property to permit them to seek relief with respect to such property. Id at 16. The US raises these defenses with respect to the 25 USC 564l (c) reimbursement and the removal of the Chiloquin Dam component of the Klamath Irrigation Project . The US claims, Id, that because Congress can change the "terms of distribution of tribal property without incurring liability to individual Indians that may have had a future interest in the tribal property" the Committee representing tribal members has no claim. First, of course the Committee has already established that it has always asserted and once again in this litigation is asserting **communal** claims arising out of the failure of the BIA to property protect termination assets. [7] Second there is no change here in the distribution of tribal property. Third , unlike N. Cheyenne Tribe v. Hollowbreast, 425 US 649 (1976) –relied upon by the United States--there is no allottee property at issue. Hollowbreast

[7] The United States claim here that the Committee is asserting post restoration individual claims of course runs smack into the long involvement by the BIA to facilitate having the Committee be the entity to assert post termination tribal claims. See pp 8-10 supra.

involved a dispute between a tribe and its allottees over title to minerals. In ruling that the individual allottees did not possess vested mineral rights, the Supreme Court stated:

> The Court has consistently recognized the wide ranging congressional power to alter allotment plans until those plans are executed…. This principle has specifically been applied to uphold congressional imposition on allottees of restraints against alienation of their interests or expansion of the class of beneficiaries under an allotment Act…...Id at 655.

But this litigation does not involve Congress rearranging allottee assets as between different members of the 1954 membership through an act of Congress subsequent to an earlier act—here termination. Rather, as noted above, this case involves the real property interests of the 1954 Klamath Tribe and its members at the time of termination. As noted above , nothing in this litigation depends upon a restoration of rights or indeed a diminishment of rights. Rather the Claims Committee asserts that the United States either took without compensation property rights of the 1954 Tribe and its members protected in the termination act and/ or breached its duty to protect and dispose of such Reservation assets as expressly set forth in the relevant provisions of the 1954 termination act. [8]

a.The 564l (c) intangible property claim

The Committee's First Amended Complaint alleges that in 25 USC 564l (c), Congress authorized the executive branch of the United States to "reimburse" the Tribe that was being

> [8] The acknowledgement of a debt owed by the United States placed in 25 USC 564l sets forth long acknowledged intangible personal property rights. See the treatment of debt and intangible property by the Supreme Court in Pennsylvania v. New York 407 U.S. 206, 210(1972) "The Court was asked to decide which of several States was entitled to escheat intangible property consisting of debts owed by the Sun Oil Co. and left unclaimed by creditors."

terminated and its members $ 89,212 with interest at 4% which the Tribe had previously advanced to the United States for construction and maintenance of components of the Klamath Irrigation Project which at termination were serving non Indian lands. The statute further provided:

Such interest being computed from the dates of disbursement of such funds from the United States Treasury Id.

The United States first claims, Motion at 14 that the reimbursement pledge cited above is no different that the overtime compensation statutory right at issue in Adams v. United States, 391 F.3d 1212,1217 (Fed. Cir. 2004). In Adams, the court distinguished between a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute, noting that entitlements are considered to be government conferred benefits, safeguarded exclusively by procedural due process. In light of this, entitlements are often referred to as "property interests" within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are "property" under the Takings Clause. The court then gave examples of statutory entitlements not protected by the Fifth Amendment:

> In Larionoff, the Supreme Court considered a soldier's entitlement to a reenlistment bonus under the statutory Variable Reenlistment Bonus Program. 431 U.S. at 866, 97 S.Ct. 2150. Similarly, in Zucker, we decided civil servant retirees' entitlement to cost-of-living-adjustments under the Civil Service Retirement Act, while in Kizas, the United States Court of Appeals for the District of Columbia Circuit addressed FBI agents' entitlement to a "special preference" as an element of compensation under Title 5 of the United States Code. Zucker, 758 F.2d at 639-40; Kizas, 707 F.2d at 534-38.
>
> Adams v. U.S. 391 F.3d 1212, 1220 (C.A.Fed.,2004)

As the United States concedes, the entire framework for the 1954 Termination Act was to terminate federal services, to dispose of most Reservation assets and make cash payments

thereafter and to separately address how specific assets such as the Klamath Irrigation Project are to be preserved . Nothing in this undisputed Congressional action possesses the attributes of a federal statutory benefit , where familiar due process rights are at stake. Moreover, the funds identified in 25 USC 564 l (c) are expressly referenced as a "reimbursement" to the Tribe for its prior advances. The Committee requests the court to strike the motion to dismiss on the incorrect basis that the 25 USC 564 l (c) funds are not Fifth Amendment protected property interests.

c. The 564l real property claim

When it comes to the Chiloquin Dam, the United States claims first, that the Committee possesses as an association of individual tribal members no legally protected interest in the Dam (but that defense has been addressed supra, pp 8-11); that the Committee has not demonstrated injury; that the termination act permitted the transfer and demolition of the Dam: that the lack of Klamath water storage claims in and of itself shows no water assets were involved in the dismantling of the Dam; and that because the termination act expressly granted the United States the right to take and sell hundreds of thousands of acres of timber lands, such authorization also included Klamath Irrigation Project assets. Motion at 16-19.

The Committee next responds. The termination act expressly separated its treatment of forest lands from the specific provisions addressing the Klamath Irrigation Project lands. Cf. 25 USC 564 d and e with 25 USC 564 l . Under 25 USC 564 d and then e, Congress specifically addressed the hundreds of thousands of Reservation real property whose fair market value " is established by logging." 564 d. As to those lands, management specialists were brought in to appraise the land. Once appraised, the tribal members were to elect to "withdraw" from the Tribe

and received their individual share in forest proceeds or "remain in the Tribe"and see their collective share transferred to private managers. Then 25 USC 564 e authorized the Secretary of Interior to sell and distribute the forest lands "belonging" to that portion of the Tribe which had elected to withdraw.

When it came to the Klamath Irrigation Project facilities—including Chiloquin Dam---Congress carefully and separately addressed those irrigation assets. This separate treatment is fully consistent with the separate treatment of irrigation assets found in the Treaty of Oct. 14, 1864, 16 Stat. 707. As US Exh. A shows, Article II of the Treaty expressly set aside significant funds to " advance[the Indians]….especially in agriculture. Article III authorized yet additional funds for the "purchase of teams, farming implements, tools, seeds….."Article IV required that a flouring mill and suitable buildings for the use ….of a wagon and plough maker " be set up. And finally Art. V agreed to pay for 15 years for a "superintendant of farming operations, one farmer…….". Further, as US Exh.B , p. 2 shows the Modoc Point component of the Klamath Irrigation Project was first constructed in 1900. Accordingly, the United States and the Klamaths jointly understood that apart from preserving hunting and fishing treaty rights, the development and preservation of irrigation assets was a significant component to permitting the Tribe to achieve self sufficiency.

Then at termination , Congress set forth future operations and maintenance provisions, capital repayment provisions and of course the above mentioned provision recognizing the federal debt to the Tribe and authorizing the reimbursement. Thus 25 USC 564 l (a) provides that 43 USC 499 shall be applicable to the irrigation works on the Klamath Reservation. 43 USC 499 provides

> Whenever any legally organized water-users' association or irrigation district shall so request, the Secretary of the Interior is authorized, in his discretion, to transfer to such water-users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe.

On its face 43 USC 499 deals only with the transfer of operations and maintenance duties. Nothing is said about title. Then 25 USC 564 l (b) provides that the deferment of construction repayment authorized under 25 USC 386a shall terminate. This has the effect of triggering the commencement of construction repayment obligations by tribal members utilizing the Klamath Irrigation Project. 25 USC 564 l (c) sets forth the $ 89, 212 plus 4% interest reimbursement discussed earlier. 25 USC 654l (d) operates to modify the termination of repayment deferment required under (b) by giving the Secretary of Interior the discretion to waive such costs when the hardship of the Indian owner was implicated. Finally, 25 USC 564 l (e) provides that nothing in the termination act shall affect laws applicable to irrigation projects on the Klamath Reservation.[9]

There is nothing in the termination act which authorized the Secretary of Interior to transfer, sell or exchange any asset identified at termination with the Klamath Irrigation Project. Hence the contention of the United States that Irrigation Project lands and assets were embraced within 25 USC 564 d and e which authorized the sale and distribution of sale funds of the hundreds of thousands of timber must be rejected

[9] Subsequently, the reimbursable irrigation charges imposed against the Modoc Point Unit non Indian lands were canceled by the Secretary of Interior , with the Secretary's actions ratified in two separate actions by Congress. The Act of August 24, 1964, PL 88-456 and the Act of August 10, 1972, 86 Stat. 531. But in neither act did Congress authorize the Secretary of Interior to transfer United States **title** in the Modoc Point Unit assets, including Chiloquin Dam.

Next the United States Motion at 8-9 claims that even if the Committee has alleged a Fifth Amendment protected interest in the preservation of the Chiloquin Dam, the Committee has not set forth sufficient allegations of injury, citing Hoopa Valley Tribe v. U.S. 86 Fed.Cl. 430, 436 (Fed.Cl.,2009). But Hoopa Valley Tribe involved a congressional scheme where it was undisputed that all United States commitments had been honored:

> Thus, Plaintiffs cannot show that an "invasion of a legally protected interest" occurred in this matter to establish an "injury in fact." The Hoopa Valley Tribe already received its share of the Fund in 1991; only the Yurok were entitled to monies remaining in the Fund in 2007. In short, Plaintiffs already have received the amount of the Fund to which they are entitled, and could not be injured by distribution of monies to which they have no right.
>
> Further, Plaintiffs, as individual Hoopa Valley Tribe members, had no right to an individual entitlement from the Fund. Congress, in the Act, recognized individual entitlements only for those Indians of the former Joint Reservation who chose not to become a member of either Tribe. 25 U.S.C. § 1300i-5(d). As the Plaintiffs in this case are members of the Hoopa Valley Tribe, *see* Am. Compl. ¶ 3, they are ineligible for a lump sum payment under the Act and could thus only benefit from the monies previously distributed to the Hoopa Valley Tribe. Simply put, the Act provides no mechanism for individual Hoopa Valley Tribe members to receive payment directly from the United States. (emphasis supplied)

The Committee has alleged that the terminated tribe and its members had vested property (for Fifth Amendment purposes) and express statutory (for breach of trust purposes) rights and interests in the Chiloquin Dam----established at termination. The Committee next alleges that those property and statutory rights have been dismantled to the injury of the terminated tribe and its members. First Amended Complaint, paras. 11,15,17,20,25 allege that the Chiloquin Dam has been taken down depriving the terminated tribe and the 1954 membership of a number of vested Reservation based property rights.[10] These allegations set forth both the property interest

[10] Further, Exh. 20 , affidavit of Klamath Tribe Vice Chairman Joe Hobbs confirms that the Chiloquin Dam, Modoc Point canals and fixtures were all Reservation real property trust assets located within the 1954 Reservation.

involved and the injury involved. Accordingly, the Committee has complied with the requirements of this court by alleging on behalf of the 1954 members that a valuable Reservation asset has been taken down without the payment of just compensation.

Hoopa Valley Tribe bears no resemblance to these allegations, for there full compensation had already been paid. Finally, the bundle of property rights associated with the pulling down of the Chiloquin Dam—to be discussed pp infra35-36 ---may well not---- as claimed by the United States---- include modest storage rights in a diversion dam. But that defense goes not to whether a taking has occurred but to the value of the taken assets. Accordingly that portion of the Motion to Dismiss should be denied.

4. The Six Year Statute of Limitations May have run on the $89, 202 plus 4% interest reimbursement obligation if in fact the BIA has made the payment :The Court should direct the parties to engage in discovery to resolve this claim..

Klamath and Modoc Tribes v. U. S. 436 F.2d 1008, 1022 (Ct.Cl. 1971) found a taking occurred with respect to certain units of the Klamath Forest and the Klamath Marsh resulting from the improper implementation of the 1954 termination act relied upon by the Committee in this proceeding.. That proceeding would arguably be res judicata as to the reimbursement claim of 25 USC 564 l (c), if the United States is correct, Motion at 22 , that any breach of duty or taking with respect to the $89, 202 reimbursement occurred at the time termination was finalized in 1961. In other words, if 25 USC 564 l (c) is to be read differently as alleged by the Committee and to require the United States to make a distribution **only** at the time of the 1961 effective date of termination, then both res judicata—not raised by the United States—and the statute of limitations—raised by the United States—would defeat the claim.

On the other hand , if the Committee is correct as it has alleged, that Congress expressly committed the United States to the reimbursement but did not expressly commit the reimbursement to a date certain, no claim would have necessarily accrued at time the Court of Claims litigation, cited above, was pursued in the late 1960's. And if the Committee is correct , the claim accrued when in 2008 the Committee requested confirmation from the BIA that in fact the funds had been paid. See Exh.18 T**he Committee sees Congress' insertion in this subsection that there would be "… dates of disbursement of such funds from the United States Treasury "Id as confirming Congress set forth an unambiguous commitment to reimburse with an uncertain payment date.** Given this statutory plan, the Committee has properly alleged a taking and/or breach of trust within 6 years of the filing of this complaint.[11]

5. The Six Year Statute of Limitations has not run with respect to a taking of the tribal interests at issue in demolition of Chiloquin Dam in August of 2008

The United States contends, Motion, at 22 that any claim the Committee may have relating to the Chiloquin Dam and its removal accrued under 28 USC 2501 six years after the 1973 purported transfer of canals, pumps , equipment and Chiloquin Dam from the status of Reservation trust assets to the Modoc Irrigation District. If the Committee were claiming that transfer constituted a taking or a breach of trust then perhaps the claim is stale.

[11] To be sure the United States has identified , Motion at 6 and in Exh. E at 25 a 1955 Congressional appropriation which appears to address the 564l (c)payment and a 1958 report which in one word states that the payment had been ""completed." The Committee requests the Court to permit it to undertake a reasonable level of discovery to confirm that in fact a payment of the required sum certain with 4% interest was made or to confirm that in fact no payment was made. If a full payment with interest was made, no claim will exist and the statute of limitations will have run.

But this litigation is about the action of the United States in removing the Dam in 2008, aware that the removal implicated tribal interests. **In other words the United States, acting through the BIA and the Congress has over the past six years not acted as if the 1973 transfer severed all Tribal interests in the Dam. As the Committee next shows Congress knowingly appropriated funds to dismantle the Dam aware that important Tribal interests were at stake. The allegations of a 2008 taking have been set forth. Accordingly, the relevance of the failure of the 1973 transfer to transfer full title of the Dam to the Modoc Point Irrigation District goes not to a statute of limitations defense or to whether the components of a taking have been pled, but rather to determining the full scope of the Tribal property rights at stake when the Dam was removed.**

The applicable law is clear when it comes to a taking of Indian property. The United States may be liable to pay just compensation. Thus U.S. v. Klamath and Modoc Tribes 304 U.S. 119, 120-126(1938) found with respect to other treaty secured assets of the Klamath Tribe:

> It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefore to appropriate lands of an Indian tribe to its own use or to hand them over to others…….. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking…..
>
> The taking was to enable the government to discharge its obligation, whether legal or merely moral is immaterial, to make restitution of the allotted lands. The taking was in invitum, specifically authorized by law, a valid exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the government to pay plaintiffs just compensation. Id at 125-125.(emphasis supplied)

We next show that the 1973 transfer of Chiloquin Dam from the Reservation to the Modoc Irrigation District involved ultra vires actions of United States officials and accordingly never affected a transfer of title. As a result , in the absence of a post-transfer judicial declaration of adverse possession in favor of Modoc Point Irrigation District , which never occurred, the Tribal interests as they existed at Termination at the Dam remained in place at the time of the 2008 removal. Then, we show that the acts of the BIA and Congress resulting in the 2008 Dam removal establish the perquisite of a taking in 2008 for which compensation is due.

This public record confirms **that in this setting,** the relevant test of accrual-----that the "obligation to sue accrues once the "permanent nature of the United States action is evident"----occurred at the time of Dam removal. Goodrich v. United States, 434 F.3d 1329, (Fed.Cir. 2006). Until then the United States provided the public and the Klamath Indians mixed and conflicting signals as to its authority to act, its purposes in acting and its obligation , if any, to the Klamath Tribe.

6.The 1973 transfer is ulta vires and did not legally affect title transfer of the Chiloquin Dam from the Tribe to the Modoc Point Irrigation District: Hence at the removal of the Chiloquin Dam the Tribal interests were as they existed at termination

On June 28, 1973 senior officials of the Department of Interior entered into two contracts implicating Chiloquin Dam. One contract –CANCELLATION ORDER—cancelled all past due construction costs relating to that portion of the Modoc Point Unit of the Klamath Irrigation Project (which includes Chiloquin Dam) on the condition that the Modoc Point Irrigation District assume the obligation of maintaining the irrigation system (which includes Chiloquin Dam). The CANCELLATION ORDER also included the phrase "the transfer of the Modoc Point Unit irrigation system from the United States to the District." US Exh. C

On the same day senior offices of the Department of Interior signed a TRANSFER ORDER which cited two provisions of the Klamath Termination Act as "authority" to allow the United States to transfer " all of the right, title, and interest of the United States in the irrigation works, facilities and equipment of the Modoc Point Unit of the Klamath Indian Irrigation Project…to the Modoc Point Irrigation District. US Exh. C The TRANSFER ORDER on its face cited sections 10 and 13 of the Klamath Termination Act as authority for the title transfer.

On pp 18-19, supra, the Committee has already shown that nothing in section 13, 25 USC 564l authorizes a transfer of title. To the contrary the only transfer authority in that provision of the termination act relates to the transfer of operations and maintenance responsibilities frequently utilized for Bureau of Reclamation projects . That authority was made applicable in the event the Modoc District elected at some future point in time to assume operation and maintenance responsibility. [12] In addition to 25 USC 564 l, the TRANSFER ORDER relied upon 25 USC 564 i which is entitled:

564i. Transfer of federally owned property

> The Secretary is authorized, in his discretion, to transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefit.

In 564i, Congress addressed federal property not held in trust as part of the Reservation being terminated. Here Congress provided for the protection and potential distribution of BIA

[12] Congress regularly authorizes transfers of **title** to federal irrigation facilities but does so through separate authorizations. Examples of such recent authorizes include: P L 106-566 (transfer of title to Sugar Pine Dam , Reservoir & all works in California): (PL 106-377 (Sly Park Dam, Reservoir and facilities, California):(PL 106-512 (Palmetto Bend Dam, Reservoir, all facilities, Texas).

owned property **not then owned in trust for the benefit of the Klamath Tribe and its members**. That is confirmed by the first sentence stating that such property could be transferred to the Tribe. Further 564 i states that United States owned property must at termination be used for BIA administrative purposes. These limitations are not diminished because the last sentence gives the BIA the authority to transfer such federal property held for administrative purposes [not tribal property such as Chiloquin Dam]to an outside body for public use---such as the irrigation district which was the recipient of the 1973 transferred works. **Very simply, the BIA lacked here the authority to convey Klamath Irrigation Project real property interests of the terminated Klamath Tribe and its members.**

This reading of the separate sections of the termination act is confirmed by portions of the exhibits of the United States. Thus Exh .E, p 19, a 1958 report on the status of the termination process reports that under 564 i---dealing with federal property— shows that the United States acting through the BIA knew well the difference between the treatment of federal property under 25 USC 564i and Klamath Irrigation Project assets addressed under 25 USC 564l. Thus the report states;

> Area Director (BIA) delegated authority for transfer of Federal personal property. Transfer of real property is retained by Commissioner (BOA) Two government –owned houses on Agency reserve have been transferred to the Tribe with adjustment made in Management Specialists' appraisal.(For removal of reserve status from Agency and other administrative reserves, see discussion at the end of Section 5).

Then section 5 , pp 11-12 describes how 7,662 acres of tribal lands have been set aside by the Secretary of Interior for administrative purposes and will be restored to tribal ownership when administration need ceases to exist. The report notes

> The only government –owned land was purchased for irrigation purposes and can be released under law to the water users when the Irrigation District is organized." Id. Subsequently, the 1958 report provides:
>
> Irrigation buildings have been constructed on a tract of administrative reserve of tribal land at Chiloquin. This is contrary to the usual procedure and poses a problem. Irrigation buildings are, by law, reimbursable and the land, of course, trust. Since the irrigation buildings at Chiloquin will be required by the project, they may be sold for off-site use with proceeds to be deposited to the Irrigation account. p. 12

These statements –made by the BIA as its administered the termination act---clearly identified the type of United States owned property that was eligible for transfer under 25 USC 564i. Of the eligible property, only limited lands associated with the Klamath Irrigation Project were identified as "purchased" by the United States and hence treated as "government owned" land under 25 USC 564i. Such small parcels are in the termination act and in the 1958 BIA report unquestionably distinguished from "trust" property where the beneficial title is in the Klamath Tribe. See, p, infra, 25 USC 564 and 564a where Congress expressly defined Klamath trust real and personal property .[13]

In like fashion the 1973 transfer documents expressly identify that property which the BIA included in the transfer. Importantly no United States owned lands were included. Rather, the United States purported to transfer all of its title and interest in "irrigation works, facilities and equipment of the Modoc Point Unit of the Klamath Irrigation Project…..including but not limited to easements, rights-of –way, canals, laterals, drains, structures of all kinds, equipment,

[13] US Exh. D, p. 12 shows that the BIA knew exactly the difference between the transfer of title—in Exh. D irrigable lands---in its legal discussion of the federal reserved water rights which might subsequently attach to those lands acquired by non tribal members----- from irrigation assets already in place and held as trust property by the United States.

available operation & maintenance collection monies…." Canal lands, lateral lands and the Chiloquin Dam were unquestionably trust property. See eg. the affidavit of Joe Hobbs.Exh. 20

As such they are entitled to the protection of 25 USC 177—which prohibits the transfer of Indian lands unless approved by Congress. In Oneida County, N.Y. v. Oneida Indian Nation of New York State 470 U.S. 226, 240(1985), the Supreme Court reaffirmed that 25 USC 177-enacted in 1790---still protects Indian lands from loss in the absence of **express** congressional consent.

> We recognized in *Oneida I* that the Nonintercourse Acts simply "put in statutory form what was or came to be the accepted rule--that the extinguishment of Indian title required the consent of the United States." 414 U.S., at 678, 94 S.Ct., at 782. Nothing in the statutory formulation of this rule suggests that the Indians' right to pursue common-law remedies was thereby pre-empted. Accordingly, we hold that the Oneidas' right of action under federal common law was not pre-empted by the passage of the Nonintercourse Acts. [14]

Given the scope of the 1974 transfer---it listed the following real property of the Tribe—

10 miles of main canals containing 140 structures

15 miles of laterals containing 282 structures

8 ¼ miles of drain canals

1 diversion dam on Sprague River

1 pumping plant—Williamson River

[14] See also Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975):"That policy [25 USCA 177] has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty….. and the purpose is to prevent the unfair, improvident, or improper disposition of Indian lands…. Since Indian lands have, historically, been of great concern to Congress, see Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully".(case citations omitted).

[specific pumps and other equipment]

--- 25 USC 177 , 25 USC 564i and 564l demonstrate that where Congress has elected not to transfer title –as here---no such title passes by ulta vires acts of the United States or of third parties. In contrast, of course, Congress did honor 25 USC 177 when it came to real property whose primary value was logging. As earlier noted, Congress provided in 25 USC 564e express authority to sell those trust lands to third parties.

The articulated rationale for the 1973 transfer shows the BIA focusing almost exclusively on the non Indian participants at Modoc Point—causing the BIA to ignore its statutory duties to the terminated tribe and its 1954 membership role. As US Exh. B, p 9—CANCELLATION ORDER-- confirms ,the United States officials made the 1973 transfer because given the "defects in the irrigation works"…."it is not in the best interest of the United States to undertake this rehabilitation" and therefore it " was in the best interest of the United States to transfer the care, operation, and maintenance of the project to said District under the 1954 (termination)Act upon the condition that said District assume and undertake the responsibility for such work:" The BIA was in such a hurry to wash its hands as the owner of the Irrigation Project that as the CANCELLATION ORDER shows, it first reduced the repayment obligations of the non Indian irrigators as permitted under 25 USC 389-389e and then went the next step—as discussed supra, pp 26-27 and impermissibly cobbled together 25 USC 564 i and l of the 1954 termination act to rid itself of any future duties through purporting to transfer the assets. The United States own record therefore confirms the transfer of these Treaty of 1864 and termination act protected trust assets was not made for the benefit of the Indians.

Moreover, decades later having convinced the Klamath Indians that they no longer owned Chiloquin Dam and the other real and personal assets of the 1954 Reservation Klamath

Irrigation Project allegedly transferred in 1973, the United States obtained appropriations in excess of $10,000,000 to build a substitute irrigation pump on the Williamson River to supply water to the Modoc Irrigation District lands once the former source of water supply provided by Chiloquin Dam was removed. [15] **In other words having purported to have transferred equitable title to the Dam out of Indian ownership for its own purposes on the express condition that the United States would thereafter be relieved of all future capital and maintenance costs, the United States turned around and financed a new source for irrigation water for non Indians of the Modoc Point Irrigation District**. And then 34 years later, the United States in August of 2008 re-emerged under the authority of 25 USC 13(Congress' general Indian authorization statute) to remove the Chiloquin Dam for the benefit –it claimed of Indian treaty fishing and more broadly to pursue Endangered Species Act policies.

This twisting and turning included—as noted infra, p.35, a public acknowledgement that the BIA had no authority to address Endangered Species Act issues—one of the announced purposes for the Dam removal. So , in other words the BIA represented to Congress that vested Klamath interests were at stake , that the BIA had the authority to take the lead and that the job would get done if appropriations were made available. This history shows a deliberate undertaking by the BIA to force **" some people alone to bear burdens which , in all fairness and justness, should be borne by the public as a whole." See p.35 infra. As a result a 2008 taking of important vested property interests of the Klamaths occurred even in face of BIA**

[15] US Exh F, pp 2 and 8 confirm a new pumping plant will be built and Committee Exh.17, a September 19, 2006 Klamath Falls Herald and News report obtained on line ,confirms that Congress will be paying millions for the new pump.

representations to the public in its Environmental Assessment that the Modoc Point Irrigation District possesses "title" to Chiloquin Dam. US Exh. F ,p 14.

7.Years after the 1973 transfer of the Dam, Congress authorized the BIA to assume control of the financing and implementation of the Dam removal, demonstrating a Congressional understanding that Tribal interests were at stake at Chiloquin Dam

In 2002, Congress enacted PL 107-171(Sec. 10905) which inter alia authorized the Secretary of the Interior in collaboration with the Modoc Point Irrigation District , the Klamath Tribes and the Oregon Department of Fish Wildlife to study the feasibility of providing adequate upstream and downstream passage for fish at Chiloquin Dam. Exh. 9 Congress expressly directed the study to examine the mitigation need for "Klamath tribal non consumptive uses, as a result of the implantation of [each] alternative" Id. The main focus of these non consumptive uses is protection of flows to sustain Klamath Treaty fishing rights.

On July 17, 2004 the United States House of Representatives Committee on Resources held a field hearing in Klamath Falls, Oregon and was informed that the "blockage of a large amount of potential spawning habitat by Chiloquin Dam….must be eliminated or circumvented." Exh. 11 p. 11. In April of 2005 the BIA prepared an Environmental Assessment regarding the removal of Chiloquin Dam. Excerpts Committee Exh. 21 On August 15, 2005, the BIA issued a FONSI finding no significant environmental impact associated with the breaching of the Dam. US Exh. F. Both BIA documents focus on the potential benefits for stream passage for ESA protected suckers that would likely be established through Dam removal. . [16]

[16] In order to sustain its representations to Congress and its reliance on 25 USC 13, the BIA addressed in the EA traditional Klamath Treaty practices and acknowledged that while it hoped that the sucker would benefit long term from the increased fish passage predicted by dam removal, other tribal interests would be adversely impacted. Thus on

On October 17, 2006 the Department of Interior announced a signing ceremony on October 19, 2006 to execute a cooperative agreement between the Department and the Modoc Point Irrigation District to remove the Chiloquin Dam, noting that President Bush in March of 2002 established a Klamath River Basin Federal Working Group to advise the President on issues in the Klamath River Basin which resulted inter alia in a decision by the Department of Interior to remove of the Chiloquin Dam. Exh. 12 On October 20, 2006 the Klamath Falls Herald reported on the signing ceremony and noted that Allen Foreman, the chairman of the Klamath Tribes stated at the ceremony that "not all tribal members support dam removal. The structure built from 1914 to 1918 created fishing and swimming opportunities for generations. A lot of people depended on it for recreation." Exh. 13 Further the affidavit of Joe Hobbs, Vice Chairman of the Klamath Tribes attached here to as Exh.20 shows his representation to the United States at the time of the 2005 FONSI that the overwhelming number of tribal members surveyed did not want Chiloquin Dam taken down .[17] Based on his long experience in treaty fishing Vice Chairman Hobbs states that the great majority of tribal member fisherman do not regard Chiloquin Dam as the cause of the decline in suckers and red-band trout. See Exh. 20, paras. 6-10. Based on his first hand experience Vice Chairman Hobbs has found that since the

> p.35, Committee Exh. 21, the EA states:" The first sucker ceremony shifted to below the dam and commercial harvest of fish began occurring at the dam's central fish ladder." Then under Indian Trust Assets, the EA simply concludes without explanation……" managing fish passage over Chiloquin Dam appears to be one way of conserving and protecting the Klamath Tribes Indian trust assets." Id at 36. Then at 71, the EA acknowledges there will be adverse impacts to Klamath treaty rights:" The Traditional fishing locations just below the dam may be altered. The BIA has worked with the Klamath Tribes…..and others to identify , improve, and provide access to a potential fishing site near the Chiloquin Dam. "
>
> [17] The vice chairman's affidavit references his 2005 report to the Department of Interior. That memorandum has not been found , but presumably would be found if the court were to permit the discovery requested by the Committee.

removal of the Dam, predicted silt movement has destroyed valuable trout habitat just downstream of the Dam with again the predictable result that spawning has been badly impaired.

These supporting facts confirm that from the perspective of many tribal members, particularly tribal fishermen, Chiloquin Dam, the stored water behind it and the flows below it remained an important recreation , swimming, cultural and fishing site for the decades between the 1961 termination proclamation and the August , 2008 Dam removal. See Committee Exh. 17 where the Modoc Point Irrigation District confirmed in 2006 the long standing use of the Dam as a "recreation ' site, describing it as "recreation "hang-out for the community of Chiloquin for four generations." [18]On February 15, 2007 the associate Deputy Secretary of the Department of Interior appeared before the United States Senate Committee on Indian Affairs to address the President's Budget Request for Indian Programs for FY 2008 and informed the Committee:

> The Indian Affairs FY 2008 budget includes a reduction of $ 1.5 million due to the completion of funding for removal of the Chiloquin Dam and associated remediation. Exh. 16. [19]

This preliminary record demonstrates a conscious understanding on the part of the Congress that the BIA was to take the lead in removing the Chiloquin Dam and that the Klamath Tribe had vested interests in the consequences of both the removal of the Dam and the non

[18] The BIA in its EA quoted Vice Chairman Hobbs as confirming that the "majority of the [treaty] fishing in the Chiloquin appears to occur downstream of the Chiloquin Dam." Exh. 21 at 20.

[19] These exhibits set forth materials found on line. The Committee has not been able to secure a broad array of relevant information in support of its claim which could of course be secured through discovery, such as the BIA –Modoc Irrigation District October, 2006 agreement; full Department of Interior documentation to Congress on the dam removal and Full FY 2007 and 2008 appropriations actions (these were continuing resolution appropriation years which makes the task more difficult) .

removal of the Dam. Congress fully understood the its funding was to be utilized by the BIA to carry its traditional functions of protecting Tribal assets and other interests. At the time of the Dam removal the public record suggests that the primary Klamath Tribal interest then in the minds of the BIA was the Tribe's treaty protected fishing rights which the BIA and the public has always known focused most importantly on salmon, trout and lastly------on the sucker which the BIA believed—but of course had no certainty about---might in the future benefit from the removal . Accordingly, the Dam removal necessarily carried with it the prospect of a taking of Klamath treaty fishing and hunting rights separate from title. Indeed the Tribe's major federal court litigation since termination has focused on the compensable nature of treaty fishing rights after termination. Menominee Tribe v. United States, 391 US 404,406,n.4 (1968) ----relied upon by the Ninth Circuit to rule on three Klamath fishing treaty cases in the 1970's and 1980's---Kimball v. Callahan, 493 F.2nd 564 (9th Cir. 1974): Kimball v. Callahan (II), 590 F. 2d 1972 (9th Cir. 1979) and United Sates v. Adair, 723 F2nd 1394 (9th Cir. 1983) ---confirmed that treaty protected fishing and hunting rights are property rights for which Fifth Amendment compensation must be paid.

Importantly, US Ex. F, p 15 expressly references 25 USC 13 as the source of authority for dam removal. 25 USC 13 provides:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support and civilization, including education.
>
> For relief of distress and conservation of health.
>
> For industrial assistance and advancement and general administration of Indian property.

> For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.
>
> For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.
>
> For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.
>
> For the suppression of traffic in intoxicating liquor and deleterious drugs.
>
> For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.
>
> And for general and incidental expenses in connection with the administration of Indian affairs.

Further, the same Exh, F p.19 confirms that BIA does not have the "authority" to determine Endangered Species Issues—the publically stated purpose of the removal. The BIA which went to Congress , received financing and undertook the Dam removal in order to provide pursuant to 25 USC 13 " general support and civilization" for the benefit of the Klamath Tribe.

The public record therefore sets forth a prominent tribal interest in the removal of the Dam—focusing on Tribal treaty protected fishing and other recreation and historic rights and interests--- notwithstanding BIA's expressed statements ----contrary to federal law ---- that the Dam was in modern times "owned" by the Modoc Irrigation District.[20] Accordingly, the United States intentionally removed the Dam for public purposes believing that the Klamath Tribe had some bundle of vested property interest in the Dam. Otherwise, of course the United States could never invoke 25 USC 13 as authority to appropriate and act.

[20]The federal courts have held in that in a takings suit, ownership of the real property at issue is to be determined by the court. Malone v. Bowdoin, 369 US 643,647 (1962)

Given these interests, a taking has occurred and compensation is owed the Klamath Tribe and its 1954 membership. A taking requiring compensation exists because the United States "may not force some people alone to bear burdens which , in all fairness and justness, should be borne by the public as a whole. Armstrong v. Untied States, 364 US 40, 49 (1960). The Committee is not contending that the BIA acted ultra vires in 2008 as it had in 1974—rather that it pursued a variety of public policies which impermissibly "interfered" with the private property rights of the Klamath Tribe, with the result that just compensation must be paid. First English Evangelical Lutheran Church of Glendale v. County of La, 482 US 304, 315 (1987). [21]

The question of the amount of compensation owed the Tribe and the 1954 members

[21] The United States is well aware of the ample US Supreme Court precedent which has confirmed that unlawful conveyances of Indian lands by the United States are void , do not in fact convey title and expose the United States to claims of compensation . "Certainly it would not justify the defendants in treating the lands of these Indians-to which, according to the bill, they have a complete and perfect title-as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership."Lane v. Pueblo of Santa Rosa 249 U.S. 110, 113, (1919): See also: "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty… The power does not extend so far as to enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation; * * * for that would not be an exercise of guardianship, but an act of confiscation…. The right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. U.S. 299 U.S. 476, 497-498 (1937)(emphasis supplied)

involves an analysis of the full bundle of property rights of the Tribe and its 1954 members which existed at the removal of the Dam. As set forth in this Response, the Committee believes there is a compelling argument those bundle of rights includes the title value of the Dam, the replacement value and the value of associated treaty fishing and recreation rights lost by Dam removal. **That is, as shown supra, pp, 26-29, because of the ultra vires nature of the 1973 transfer, no title to Chiloquin Dam effectively passed. Therefore beneficial title to Chiloquin Dam remains in the Klamath Tribe as terminated in 1954.**

Therefore, if the court denies the U S motion to dismiss, the Committee at trial if permitted will establish the full value of the vested property interest of the Klamath Indians in the Chiloquin Dam. Members of Peanut Quota Holders Ass'n, Inc. v. U.S. 421 F.3d 1323, 1334 (C.A.Fed.,2005) recently addressed the parameters of protected property rights –secured under federal law as Klamath Irrigation assets were secured under the 1864 Treaty and 1954 termination act----under the Fifth Amendment:

> A property right accrues when the government has seen fit to take a limited resource and secure it for the benefit of an individual or a predetermined group of individuals. The peanut quota holders possessed an excludable interest, because the peanut quota program isolated their particular interest from competition. For the reasons stated, we conclude that the Members established a property interest cognizable under the Fifth Amendment

Members of Peanut Quota Holders Assn did not prevail however, for the Federal Circuit found that while they enjoyed a protectable property interest , their property represented by the peanut quota was entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the program statute indicated that the benefits could not be altered or extinguished at the government's election. In this regard the peanut quota program statute at issue in Members of Peanut Quota Holders Assn, has the characteristics of the

inchoate allottee mineral rights discussed in Hollowbreast, supra, p. 12. Further, nothing in the Tribe's 1854 Treaty rights, the termination act or indeed the 1986 restoration act possesses the "unilateral" characteristic of the peanut quota program(permitting the property rights to be altered or extinguished) and the US in its motion to dismiss does not contend to the contrary.

8. The United States established in 25 USC 564i and l "specific rights creating or duty imposing statutory prescriptions bearing the hallmarks of a conventional fiduciary relationship.

The Supreme Court has recently re-affirmed that nature of the United States duty which can upon a breach give rise to damages:

> In *Navajo I* we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a "conventional fiduciary relationship," *then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages,"… U.S. v. Navajo Nation 129 S.Ct. 1547, 1551 -1558 (U.S.,2009)(Navajo II)

U.S. v. White Mountain Apache Tribe 537 U.S. 465, 473-474(2003)—issued 6 years prior to Navajo II and finding a compensable breach of trust--- explains, as shown next, how general obligations imposed on the United States differ from the "specific" rights creating duty which gives right to a claim for damages. The Court first analyzed the two 1980's era Mitchell cases and then the facts of the case before it:

> Although in form the United States "h[e]ld the land ... in trust for the sole use and benefit of the Indian," 25 U.S.C. § 348, the statute gave the United States no functional obligations to manage timber; on the contrary, it established that "the Indian allottee, and not a representative of the United States, is responsible for using the land," that "the allottee would occupy the land," and that "the allottee, and not the United States, was to manage the land." *Mitchell I,* 445 U.S., at 542-543, 100 S.Ct. 1349. Thus, we found that Congress did not intend to "impose any duty" on the Government to manage resources, *id.,* at 542, 100 S.Ct. 1349; cf. *Mitchell II, supra,* at 217-218, 103 S.Ct. 2961, and we made sense of the trust language, considered without reference to any statute beyond the Allotment Act, as intended "to prevent alienation of the land" and to guarantee that the Indian

> allottees were "immune from state taxation,"**1133 *Mitchell I, supra,* at 544, 100 S.Ct. 1349.
>
> The subsequent case of *Mitchell II* arose on a claim that did look beyond the Allotment Act, and we found that statutes*474 and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by those statutes and regulations were enforceable by damages. The Department of the Interior possessed "comprehensive control over the harvesting of Indian timber" and "exercise[d] literally daily supervision over [its] harvesting and management," *Mitchell II, supra,* at 209, 222,…, giving it a "pervasive" role in the sale of timber from Indian lands under regulations addressing "virtually every aspect of forest management," *Mitchell II, supra,* at 219, 220, … As the statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians," we held that they "define[d] ... contours of the United States' fiduciary responsibilities" beyond the "bare" or minimal level, and thus could "fairly be interpreted as mandating compensation" through money damages if the Government faltered in its responsibility. Id at 474

Three factors dominate this analysis. Were the Indians put on notice under the statutory scheme that they were to control their own assets. If not, did Congress utilize the words "trust" in its scheme, giving rise to an inference that the United States was on notice of the need to undertake specific actions to protect the trust assets at issue. And in the alternative, if the Indians were not put on notice of their duty to control and the Congress did not utilize express words of trust, were federal officials delegated such comprehensive control over the assets that again federal law will infer damages upon a showing of a material breach of statutory compliance.

The Court in White Mountain Apache Tribe addressed the statutory scheme before it.

> The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach. The statutory language, of course, expressly defines a fiduciary relationship in the provision that Fort Apache be "held by the United States in trust for the White Mountain Apache Tribe." 74 Stat. 8. Unlike the Allotment Act, however, the statute proceeds to invest the United States with discretionary authority to make direct use of portions of the trust corpus. The trust property is "subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose," *ibid.,* and it is undisputed that the Government has to this day availed itself of its

> option. As to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*. While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. "…One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets… *United States v. Mason,* 412 U.S. 391, 398, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973) (standard of responsibility is "such care and skill as a man of ordinary prudence would exercise in dealing with his own property" (quoting 2 A. Scott, Trusts 1408 (3d ed.1967) (internal quotation marks omitted))); Restatement (Second) of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"). Given this duty on the part of the trustee to preserve corpus, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." Id at 475.

White Mountain Apache reject a number of arguments likely to be made by the United States here. First that any property which Congress may have set aside for United States purposes is "not a trust corpus at all." The Court found this reading by the United States to be:

> [a]t odds with a natural reading of the 1960 Act. It provided that "Fort Apache" was subject to the trust; it did not read that the trust consisted of only the property not used by the Secretary. Nor is there any apparent reason to strain to avoid the straightforward reading; it makes sense to treat even the property used by the Government as trust property, since any use the Secretary would make of it would presumably be intended to redound to the benefit of the Tribe in some way." Id at 476(emphasis supplied)

Second the Court rejected the United States claim that its liability must rest on some explicit "provision for money damages." Id. at 477 . And third, the Court rejected the request of the United States that it be subject only to injunctive relief and not retrospective damages. Id at 478.

In this ligation the United States, Motion at 25, says that neither the 1864 Treaty nor the 1954 Termination Act establish the required "specific rights-creating or duty-imposing statutory

or regulatory prescriptions" The US sweeps too broadly across the applicable federal statutes and fails, as required by White Mountain Apache, and Navajo Nation II to examine in detail Congress' plan. As in White Mountain Apache, supra, Congress expressly provided in 25 USC 564 that:

> The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.(emphasis supplied)

Then in 564 (a) Congress again expressly defined tribal property as both real and personal and held in trust:

> Tribal property" means any real or personal property, including water rights, or any interest in real or personal property, that belongs to the tribe and either is held by the United States in trust for the tribe or is subject to a restriction against alienation imposed by the United States.(emphasis supplied)[22]

Then prior to the 1961 proclamation of termination , Congress in 564 (c)provided that the rights of members in tribal property shall become personal property subject to restrictions, still in trust status. In 564(d) tribal property whose value is established by logging was appraised and divided into that portion to be sold to withdrawing members and that portion to be held by a private trustee for remaining members. In 564(e) the first portion of the was sold to raise funds for cash

> [22]While the presence of the word 'trust' in a statute by itself is neither necessary nor sufficient to create a compensable claim, statutory or regulatory language using terms normally associated with trust or fiduciary law will be given great weight in the analysis. United States v. White Mountain Apache Tribe, at 480-481(Ginsburg, J., concurring) (distinguishing between a statute that "expressly and without qualification employs a term of art ('trust') commonly understood to entail certain fiduciary obligations" and a statute that contained no trust language and "lacked the characteristics that typify a genuine trust relationship").

payments to withdrawing members and one portion was conveyed to a private management company for the benefit of remaining members.

25 USC 564 (q) provided that upon the proclamation of termination the "trust " relationship between the United States and the tribe and its members was terminated. Thereafter, except as provided in the termination statute, all federal statutes that normally apply to Indians would no longer apply and the normal state laws would then apply to the tribe and its members. As the Committee next shows, this scheme has many of the characteristics of Congress' scheme at White Mountain Apace Tribe. [23]There and here the United States acknowledged that the personal and real property at issue is held in "trust." There and here the United States had with respect to the 564l(c) reimbursement funds "discretionary authority" over when to make the reimbursement payments. In like manner as the "owner" of the retained Klamath Irrigation Project it retained the rights to insist that O&M payments by water users—addressed in 25 USC 564 l---be adequate over the years to protect and preserve the trust assets. As in White Mountain Apache Tribe , the BIA as the owner of the irrigation assets exercised its full discretionary authority by exercising " daily supervision ... and enjoying " daily occupation" of the trust corpus.

[23] Also, because the termination act was expressly addressing assets of the Klamaths which over the years were an integral part of the United States' 1864 Treaty duties, the recognition of debt and the treatment of Klamath Irrigation Project assets are appropriately treated as creating trust duties. See Quick Bear v. Leupp, 210 U.S. 50, 77, 80 (1908) (distinguishing between Indian funds appropriated under the heading "Fulfilling Treaty Stipulations with and Support of Indian Tribes," which were administered on behalf of the Indians by the government, with funds appropriated under the subcategory "Support of Schools," which constituted a mere gratuitous appropriation of public monies).

Moreover, as in White Mountain Apache, the United States at Klamath allowed the assets to fall into disrepair. [24] Indeed as shown, p. 36 , supra, the disrepair of the facilities is what prompted the United States in 1974 to "dump" the Modoc Point Irrigation Unit. While the disrepair and the subsequent ultra vires transfer arguably constitute a breach of trust, the breach of trust claim alleged by the Committee in this proceeding focuses, as set forth throughout this Response, on the subsequent demolishment of one component of the Modoc Point Irrigation Unit—namely Chiloquin Dam in 2008 **under a public record which unquestionably shows the BIA acting with the knowledge that significant Klamath Indian interests were involved in the decision to remove or not remove the Dam .** [25] The Committee requests the court to find that Congress' protection of express trust assets here as in White Mountain made it abundantly clear that the BIA could not "allow it [the trust assets] into ruin." Id at 465. [26]

[24] The trust assets at White Mountain Apace were a former military post. Under the 1960 act, the United States used up to 30 buildings and appurtenances. The Tribe there alleged that rehabilitation of the buildings would take up to $14 million. Id at 469-470

1. [25] The disrepair of the Irrigation Assets carried forward and became a primary reason why in 2005 the BIA's EA favored Dam removal. Thus Committee Exh. 21 ; noted: "Chiloquin Dam and its associated structures pose a potential health and safety concern to the general public. The dam is old and many of the associated structures f1no longer function. The structures include….an abandoned concrete fish ladder…a heavily deteriated concrete fish ladder near the center of the dam…and a nonfunctioning sluiceway adjacent to the east abutment fish ladder."Id at 36-37. …."Loss of the dam in its current dilapidated condition would be a beneficial aesthetic impact." Id at 85

[26] The two Navajo cases, 537 US 488 (2003) and 129 S.Ct. 1547, 1551 - 1558 (U.S.,2009) in contrast do not turn on any analysis of inferences arising out of the use of "trust language." Rather , they turn on the threshold question of whether federal statutes and regulations impose any concrete substantive obligations, fiduciary or otherwise, on the Government. Those cases answer that question in the negative . As a result the second question of whether the statutory scheme and the conduct of the United States subsequent to termination can "be fairly interpreted to

Finally, to respond to two misleading contentions of the United States, the Committee briefly addresses Wolfchild v. United States, 559 F.3d 1228(Fed. Cir. 2009) and the role of Winters water rights in this litigation. Importantly unlike the lands set aside for the Minnesota Indians discussed in Wolfchild v. United States, 559 F.3d 1228(Fed. Cir. 2009) , there is no suggestion here that the Secretary of Interior treated the Klamath trust assets as " limited to temporary use and occupancy " by the Indians. Id at 1240 Further, the United States, Motion at 27 addresses the wrong lesson from Wolfchild,. Wolfchild does not teach—as alleged by the United States—that appropriation acts per se do not establish money mandating duties. Rather , as noted here, Wolfchild examined both congressional authorizations and appropriations to determine the precise nature of the United States obligations as they related to the Indians in that case. That analysis is precisely the determination set forth here by the Committee.

Moreover, the United States is wrong to suggest, Motion at 28 that the irrigation assets are not trust assets entitled to the protection set forth in this Response because they were not required to be developed by the United States under the Winters reserved rights doctrine. But the Committee has shown the assets were developed as a result of express provisions in the Treaty of 1864 and their continuing value was confirmed by the special treatment which Congress utilized in 25 USC 564l---to preserve them , to adjust the repayment requirements as necessary but **not** to convey title as Congress did for the timber lands.

9. Conclusion

> mandate compensation for harm caused by maladministration of the property " was never reached.

The United States Motion to Dismiss should be denied. The Court should grant the relief requested in the Committee's Cross Motion for Summary Judgment as it relates to the standing of the Claims Committee and the absence of a statute of limitations defense when it comes to the takings claim relating to Chiloquin Dam.

Moreover, the court should permit under L R 56(f)(2)the Committee to pursue discovery as it relates to the potential time or times when the United States paid out its acknowledged reimbursement debt set forth in 25 USC 564l ---such discovery will determine whether a claim in fact exists for which relief can be secured and whether the statute of limitations has run

The court should permit under LR 56 (f)(2) the Committee to pursue discovery as it relates to the full scope of the Klamath Indian interests understood by the United States to be at play when the Chiloquin Dam was removed in August , 2008 and thereafter set this claim for trial.

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