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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RESIGHINI RANCHERIA, FRANK DOWD, and GARY DOWD, Plaintiffs, vs. CHARLTON H. BONHAM, individually and in his official capacity as Director of the California Department of Fish and Game, Defendant.	Case No. CV 11 6710 EMC PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; AND PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: June 15, 2012 TIME: 1:30 p.m. CTRM.: 5, 17th Floor

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TO: DEFENDANT, CHARLTON H. BONHAM:

PLEASE TAKE NOTICE that on June 15, 2012, at 1:30 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Edward M. Chen, Judge of the United States District Court for the Northern District of California, Courtroom 5, 17th Floor, located at 450 Golden Gate Avenue, San Francisco, California, plaintiffs, Resighini Rancheria ("Tribe'), Frank Dowd, and Gary Dowd, will move the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

RELIEF SOUGHT BY THE PLAINTIFFS

Plaintiffs seek the following relief from the Court:

1. A declaration that the Director, Charlton H. Bonham ("Director"), and the officers of the California Department of Fish and Game ("Department") acting at his direction and under his control have no jurisdiction to enforce the provisions of the California Fish and Game Code against members of the Tribe within the boundaries of the old Klamath River Reservation/Extension.

2. A declaration that, under Public Law 280, 28 U.S.C. § 1360, and 18 U.S.C. § 1162 ("P.L. 280"), the Director and the officers of the Department, acting at his direction and under his control, lack civil regulatory authority over the Tribe's regulation of fishing by its members on the Klamath River within the old Klamath River Reservation/Extension.

3. A declaration that the Director and the Department, under color of State law, to wit, the provisions of the California Fish and Game Code, have deprived Frank Dowd and Gary Dowd (collectively "Dowds") and the individual members of the Tribe of the right to fish in the Klamath River within the old Klamath River Reservation/Extension free of state regulation and control, a right guaranteed to them by federal law, in violation of 42 U.S.C. § 1983.

4. To preliminarily and permanently enjoin the Director, his officers, agents, and employees from citing members of the Tribe for fishing on the Klamath River within the old Klamath River Reservation/Extension not in accordance with State law.

5. Award the plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

6. Grant the plaintiffs such other and further relief as the Court deems appropriate.

ISSUES TO BE DECIDED

1. Whether the Director and the Department have jurisdiction to enforce the civil regulatory provisions of the State's Fish and Game Code against the Dowds and members of the Tribe in the Indian Country of the old Klamath River Indian Reservation/Extension under P.L. 280.

2. Whether the Director and the Department have civil regulatory authority over the Tribe's regulation of fishing by its members within the Indian Country of the old Klamath River Indian Reservation/Extension under P.L. 280.

3. Whether the Director and the Department have deprived the Dowds and the members of the Tribe of their federally reserved right to fish in the Klamath River at the Tribe's usual and customary fishing places within the old Klamath River Reservation/ Extension, free of State regulation and control, in violation of 42 U.S.C. § 1983 and the 14th Amendment to the United States Constitution.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the declarations of Frank Dowd, Gary Dowd, Kathy Dowd, and Lester J. Marston filed in support of the plaintiffs' Motion for Summary Judgment. Rather than repeat every one of those facts here, the Tribe will incorporate the facts set forth in those declarations as if they were set forth here in full. A summary of the relevant facts contained in the declarations is set forth here for the convenience of the Court.

Pursuant to the authority granted to him by the Acts of March 3, 1853, and March 3, 1855, President Pierce established the Klamath River Reservation ("Klamath River Reservation") on November 16, 1855. Declaration of Kathy Dowd In Support of Plaintiffs' Motion for Summary Judgment ("Kathy Dowd Declaration"), p. 2, ¶ 7. The Klamath River Reservation established by President Pierce encompassed "a strip of territory one mile in width on each side of the [Klamath] river, for a distance of twenty miles." Kathy Dowd Declaration, p. 2, ¶ 7. The lands comprising the Klamath River Reservation were occupied mostly by Yurok Indians and encompassed what is today the Yurok Reservation. *Id.*

In 1864, the Superintendent of Indian Affairs for California located and proclaimed the original Hoopa Valley Reservation, pursuant to the 1864 Four Reservations Act, April 8, 1864, 13 Stat. 39 ("1864 Act"), enacted that same year. Kathy Dowd Declaration, p. 2, ¶ 8. The Hoopa Valley Reservation was mostly inhabited by Hoopa Indians. *Id.*

Between 1864 and 1891, the legal status of the Klamath River Reservation as an Indian reservation came into doubt. The 1864 Act limited the number of reservations in California to four and contemplated the disposal of reservations not retained under authority of the 1864 Act. Kathy Dowd Declaration, p. 3, ¶ 4. By 1891, the Round Valley, Mission, Hoopa Valley, and Tule River Reservations had been set apart pursuant to the 1864 Act. *Id.*

In 1891, in order to eliminate any doubt regarding the status of the Klamath River Reservation, and to expand the existing Klamath River Reservation to better protect the Indians living there from encroachment by non-Indian fisherman, President Harrison issued an Executive Order under the authority of the 1864 Act. Kathy Dowd Declaration, p. 3, ¶ 10. The Order extended the Hoopa Valley Reservation along the Klamath River from the mouth of the Trinity River to the ocean, thereby encompassing and including the Hoopa Valley Reservation, the Klamath River Reservation, and the connecting strip between them ("Extension") into one reservation. *Id.*

By deed dated January 7, 1938 ("Deed"), Gus Resighini deeded to the United States in trust all that real property situated in the County of Del Norte that presently constitutes the Resighini Reservation ("Resighini Reservation"). Kathy Dowd Declaration, p. 3, ¶ 11. The purchase of the land that presently constitutes the Resighini Reservation by the United States in trust was made under the authority of § 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Kathy Dowd Declaration, p. 4, ¶ 12. By Proclamation dated October 21, 1939, the Secretary of the Interior, under the authority of § 7 of the Indian Reorganization Act, 25 U.S.C. § 463, declared the land purchased from Gus Resighini to be an Indian reservation. All of the lands that comprise the Resighini Reservation are located within the exterior boundaries of the Klamath River Reservation and are located at the intersection of Highway 101 and the Klamath River in Del Norte County, California. Kathy Dowd Declaration, p. 4, ¶ 13. The Tribe was

recognized by the Secretary of the Interior as a federally recognized Indian tribe in 1975, thirteen years before the establishment of the Yurok Reservation under the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-1300i-ll (Sub. 1993). Kathy Dowd Declaration p. 5, ¶ 17. The tribal governmental body of the Tribe, the Business Council, has been in continuous operation since 1975. *Id.*

In 1998, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned the extended Hoopa Valley Reservation into the present Hoopa Valley Reservation, consisting of the original twelve-mile square bisected by the Trinity River and established under the 1864 Act, and the Yurok Reservation, consisting of the area along the Klamath River within the Klamath River Reservation, including the 1891 Extension ("old Klamath River Reservation/Extension"), excluding the Resighini Reservation. Kathy Dowd Declaration, p. 4, ¶ 15. Under the Hoopa-Yurok Settlement Act, Congress "recognized and established" each area as a distinct reservation and declared that "[t]he unallotted trust land and assets" of each reservation thereafter be held in trust by the United States for the benefit of the Hoopa Valley and Yurok Tribes, respectively. Kathy Dowd Declaration pp. 4-5, ¶ 16.

From time immemorial to 1938, the Yurok ancestors of current members of the Tribe fished in the Klamath River within the old Klamath River Reservation/Extension. Kathy Dowd Declaration, p. 1, ¶ 2. From 1938 to the present, the members of the Tribe fished in the Klamath River within the old Klamath River Reservation/Extension at traditional fishing sites located outside the boundaries of the Resighini Reservation. Kathy Dowd Declaration, p. 5, ¶ 19.

Gary Dowd and Frank Dowd were cited for California Fish and Game Code violations, specifically, fishing on the Klamath River without a Yurok ID. Declaration of Gary Dowd In Support of Plaintiff's Motion for Summary Judgment ("Gary Dowd Declaration"), p. 1, ¶ 3; Declaration of Frank Dowd In Support of Plaintiff's Motion for Summary Judgment ("Frank Dowd Declaration"), p. 1, ¶ 3. Both citations were issued by Yurok Tribal Police officers deputized by the Del Norte County Sheriff. In each instance, the individual plaintiffs were fishing within the boundaries of the old Klamath River Reservation/Extension. The Del Norte

County District Attorney later dismissed both charges. Declaration of Lester J. Marston In Support of Plaintiff's Motion for Summary Judgment ("Marston Declaration"), pp. 1-2, ¶¶ 2-5.

On August 29, 2011, the general counsel for the Tribe sent a letter ("Letter") to John McCamman, former Director of the California Department of Fish and Game, advising him that the California Department of Fish and Game has no jurisdiction to enforce the California Fish and Game Code against members of the Tribe within the boundaries of the old Klamath River Reservation/Extension. Marston Declaration, p. 2, ¶ 6. The Letter also asked that Mr. McCamman inform the Tribe's general counsel whether State Game Wardens would be enforcing the State's Fish and Game Code against members of the Tribe. Marston Declaration p. 2, ¶ 6-9.

On October 17, 2011 the California Department of Fish and Game sent a letter to the Tribe's legal counsel, Lester J. Marston, advising him that the State does not recognize the Tribe as having any right to fish in the Klamath River off of the Resighini Reservation and that the California Department of Fish and Game may criminally enforce the Fish and Game Code against members of the Resighini Reservation fishing on those portions of the Klamath River located off the Resighini Reservation. Marston Declaration, p. 2, ¶ 7.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is an action brought by the Resighini Rancheria, a federally recognized Indian tribe, and two members of the Tribe, Gary Dowd and Frank Dowd, against Charlton H. Bonham, Director of the California Department of Fish and Game, seeking an order from this Court declaring that: (1) the Director and the California Department of Fish and Game's officers, agents, and employees have no jurisdiction to enforce the California Fish and Game Code against members of the Tribe within the boundaries of the old Klamath River Reservation/Extension, and (2) the Director's and Department's actions have, under color of State law, deprived Frank Dowd and Gary Dowd of their federally reserved right to fish in the old Klamath River Reservation/Extension, in violation of 42 U.S.C. § 1983 and the 14th Amendment to the United States Constitution.

In this brief, the plaintiffs will demonstrate that: (1) the Director and the Department have no jurisdiction to enforce the California Fish and Game Code against the members of the Tribe within the boundaries of the old Klamath River Reservation/Extension; (2) under Public Law 280, the Director and the Department lack civil regulatory authority over the Tribe's regulation of fishing by its members within the old Klamath River Reservation/Extension; and (3) the Director and the Department have, under color of state law, deprived Frank and Gary Dowd and the individual members of the Tribe of their federally reserved right to fish in the Klamath River within the old Klamath River Reservation/Extension free of State regulation and control, in violation of 42 U.S.C. § 1983.

There are no material facts in dispute in this case. The issues presented in this case are all issues of law. The plaintiffs, therefore, are entitled to summary judgment. The plaintiffs file herewith the Kathy Dowd, Gary Dowd, Frank Dowd, and Marston Declarations in support of the Plaintiff's Motion for Summary Judgment.

I.

SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.

The Tribe moves for summary judgment pursuant to Rule 56 of the Federal Rules of

Civil Procedure ("Rule 56 "). Rule 56 provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). See also *Gasplus, L.L.C. v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C 2007). There are no genuine issues of material facts in dispute in this case and, therefore, the plaintiffs are entitled to summary judgment as a matter of law.

II.

THE STATE OF CALIFORNIA IS WITHOUT JURISDICTION TO ENFORCE ITS CIVIL REGULATORY LAWS AGAINST INDIANS WITHIN INDIAN COUNTRY.

The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nations' history. *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, 168 (1973).

Indian tribes retain attributes of sovereignty over both their members and their territory, and tribal sovereignty depends on and is subordinate only to the United States. *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)); see also, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). While these cases indicate that Congress can expressly provide that state laws may be applied to Indians within a reservation, no statutory authority exists granting California jurisdiction over Indians acting within the exterior boundaries of a reservation, except two federal statutes.

In the first statute, Congress granted California limited criminal jurisdiction over offenses committed in Indian Country.[1] 18 U.S.C. § 1162. In the other, Congress granted

[1] Indian country is defined as all lands within the boundaries of an Indian reservation.

California courts limited civil jurisdiction to apply State law to resolve disputes arising within Indian Country. 28 U.S.C. §1360. This grant of civil jurisdiction is limited to private litigation involving Indian residents of reservations in state court proceedings and applies only to laws of general application within the State.

Based on these two federal statutes, commonly referred to as "Public Law 280," California does not have civil regulatory authority over Indians on reservations within the State. *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-390 (1976)[2] (28 U.S.C. § 1360 confers only state jurisdiction in private litigation involving reservation Indians in state courts, but does not provide counties authority to levy taxes on Indian personal property located on land held in trust by the United States); *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987) (neither 28 U.S.C. § 1360 nor 18 U.S.C. § 1162 authorizes California to enforce its civil regulatory laws within Indian Country).

When a state seeks to enforce its laws against an Indian residing within a reservation under the authority of either 18 U.S.C. §1162 or 28 U.S.C. §1360, a court must determine whether the law is a criminal/prohibitory statute of statewide application, and thus fully applicable to Indian residents of a reservation, or civil/regulatory in nature, and thus applicable only as between private state court litigants. *California v. Cabazon,* 480 U.S. at 208; *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffey*, 694 F.2d 1185 (1982), *cert denied*, 461 U.S. 929 (1983). In making this determination, courts apply a criminal/prohibitory and civil/regulatory distinction test. *Cabazon, supra*, at 209, and *Capitan Grande, supra*, at 1188-1190.

If the Court determines that the State law regulates, rather than prohibits, the conduct at issue, then the State is without jurisdiction to enforce the law against the Indian. *Id.*

[2]To the extent that the language of either 18 U.S.C. § 1162 or 28 U.S.C. § 1360 admits of ambiguity, a well established rule of statutory construction in Indian cases requires this Court to resolve the ambiguity in favor of the Indians. *Bryan v. Itasca County, supra; Northern Cheyenne v. Hollowbreast*, 415 U.S. 649, 655 fn.7 (1976); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 583 (1832); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975).

III.

THE STATE'S FISHING LAWS ARE NOT CRIMINAL STATUTES BUT, RATHER, CIVIL REGULATIONS, AND THEREFORE CANNOT BE ENFORCED AGAINST THE DOWDS OR MEMBERS OF THE TRIBE ON THE KLAMATH RIVER RESERVATION/EXTENSION.

The shorthand test for determining whether a law is civil/regulatory or criminal/prohibitory turns on whether the conduct at issue violates California's public policy. *Cabazon, supra*, at 209.

If the intent of a State law is to generally prohibit certain conduct, it falls within 18 U.S.C. § 1162's grant of criminal jurisdiction. But if the state law generally permits certain conduct, subject to regulation, as in this case, the civil grant of jurisdiction under 28 U.S.C. §1360 does not authorize its enforcement on Indian Reservations or within Indian Country. *Cabazon*, *supra*, at 209.

The fact that a civil/regulatory law is enforceable by criminal means does not convert it to a criminal statute for 18 U.S.C. §1162 jurisdictional purposes. Otherwise, the distinction between 18 U.S.C. §1162 jurisdiction and 28 U.S.C. §1360 civil jurisdiction could easily be avoided. *Cabazon, supra*, at 209. See also*, United States v. Marcyes*, 557 F.2d 1362, 1363-1365 (9th Cir. 1977); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert denied*, 449 U.S. 111 (1981). Were this not so, a state could enforce its regulatory system against a tribe or its members by making criminal the failure to comply with state or local regulations. *Marcyes, supra*, at 1365. California State law does not prohibit fishing generally or fishing on the Klamath River in particular. Instead, the State regulates the date, manner, and means by which people within the State can fish. The State's Fish and Game Code provisions regulating fishing within the State are civil/regulatory, not criminal prohibitory. *Cabazon*, *supra*, at 209. As a result, the State lacks jurisdiction to enforce the provisions of the California Fish and Game Code against the Dowds and the members of the Tribe within Indian Country set aside for the Yurok Indians.

IV.

CREATION OF THE OLD KLAMATH RIVER INDIAN RESERVATION AND OF THE EXTENSION RESERVED TO THE YUROK INDIANS, INCLUDING THE YUROK INDIANS OF THE RESIGHINI RESERVATION, THE RIGHT TO FISH WITHIN THE RESERVATION FREE OF STATE REGULATION AND CONTROL.

There is no doubt that when the old Klamath River Reservation was created for Indian purposes, it reserved to the Indians of the old Klamath River Reservation, including the Yurok Indians who are currently members of the Resighini Reservation, a federally reserved right to fish in the Klamath River.

> To begin with, the People's broad claim that Yurok Indians enjoy no federally protected fishing rights in the Klamath River flies directly in the face of *all* of the recent federal and state decisions involving Yurok Indian fishing on the Hoopa Valley Reservation. As we have seen, in 1975, the California Court of Appeal specifically held in *Five Gill Nets, supra*, 48 Cal. App. 3d 454, *cert. denied*, (1976), 425 U.S. 907 [47 L.Ed.2d 757, 96 S.Ct. 1500], that state regulation of such on-reservation Indian fishing was preempted by the Indians' federally protected fishing rights; that holding, of course, is totally incompatible with the People's present contention that the Yurok Indians enjoy no federally protected fishing rights in the Klamath River. Similarly, more recent federal decisions have likewise expressly recognized that "[the] right to take fish from the Klamath River was reserved to the Indians when the Reservation was created." (*United States v. Eberhardt, supra*, 789 F.2d 1354, 1359; see, *Blake v. Arnett, supra*, 663 F.2d 906, 909; *Pacific Coast Fed. v. Secretary of Commerce* (N.D. Cal. 1980) 494 F. Supp. 626, 632-633.) And, of course, our *McCovey* decision also expressly held that the Yurok Indians possess federally reserved fishing rights in the Klamath River which were properly subject to federal regulation. (*McCovey, supra*, 36 Cal.3d at P. 534.).

Mattz v. Superior Court, 46 Cal.3d 355, 371 (1988).

Prior to the creation of the Resighini Reservation, the Yurok Indians, including the Yurok Indians whose descendants are members of the Resighini Reservation, fished on the Klamath River within the old Klamath River Reservation and Extension free of State regulation and control. *Id.* In fact, both before and after the creation of the Resighini Reservation, the Yurok Indians of the Resighini Reservation fished on the Klamath River within the old Klamath River Reservation and Extension at their usual and customary fishing stations pursuant to their federally reserved fishing right. *Id.*

The Resighini Yurok's immunity from State law existed even though the State had been

granted criminal/prohibitory jurisdiction over "Indian country" within California under Public Law 280, because that statute provides that it shall not "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof." 18 U.S.C. § 1162(b). [3]

Moreover, in *Blake v. Arnett*, 663 F.2d 909 (9th Cir. 1981), the Ninth Circuit Court of Appeals expressly held that it did not matter that federally reserved fishing rights were created by statute, as opposed to a treaty, since "both treaties and statutes are the supreme law of the land." *Blake v. Arnett, supra*, 663 F.2d at 909.

Likewise, State law cannot be applied to Indian hunting and fishing rights in "Indian country" by way of the Assimilative Crimes Act, 18 U.S.C. § 13. *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

Finally, California is also preempted from prohibiting the possession or sale of fish from the Klamath River Reservation/Extension by Resighini Yuroks who take the fish on the old Klamath River Reservation/Extension.

> After reviewing the comprehensive nature of the federal regulatory scheme governing Indian fishing on the Hoopa Valley Reservation, we concluded in *McCovey* that, as in *Mescalero*, [there] is little question that the exercise of State criminal jurisdiction in this area will "disturb and disarrange" the federal scheme. [Citation omitted.] Concurrent jurisdiction by the State would supplant the present federal regulatory scheme with an inconsistent dual system.

People v. McCovey, 36 Cal.3d 517, 531 (1984); see, *Mattz v. Superior Court*, 46 Cal.3d 355 (1980), *cert. denied*, 489 U.S. 1078 (1989).

In short, it is now well established that the Yurok Indians of the Resighini Reservation have federally reserved fishing rights within the old Klamath River Reservation/ Extension, which were initially created in the nineteenth century when the lands they occupied were set aside for "Indian purposes." Numerous court decisions have recognized that the United States

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[3] The California Court of Appeal found that the old Klamath River Reservation and the Extension was created by statute, within the meaning of the phrase "immunity afforded under Federal . . . statute," *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454 (1975).

intended to reserve for the Yurok Indians the rights and resources necessary for them to maintain their livelihood. As the Ninth Circuit has stated, the right includes "fishing for ceremonial, subsistence, and commercial purposes." *United States v. Eberhardt*, 789 F.2d 1354, 1355 (9th Cir. 1986).

Thus, P.L. 280 did not grant California any jurisdiction to enforce its fishing laws against Yurok Indians fishing within the Indian Country that comprises the old Klamath River Reservation/Extension.

V.

ABSENT AN ACT OF CONGRESS CONTAINING A CLEAR CONGRESSIONAL INTENT TO TERMINATE THE FISHING RIGHTS OF THE YUROK RESIGHINI WITHIN THE YUROK RESERVATION, THE YUROK RESIGHINI RETAIN THE RIGHT TO FISH OFF THE RESIGHINI RESERVATION AT THEIR USUAL AND CUSTOMARY FISHING STATIONS ON THE KLAMATH RIVER WITHIN THE YUROK RESERVATION.

It is well settled that federally reserved fishing rights cannot be extinguished in the absence of a clear indication of Congressional intent to that effect. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985).

The federal courts generally require that Congress make its intent to abrogate reserved fishing rights clear and unambiguous. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). In many cases, the Supreme Court has stated that Congress must make its intent to abrogate clear through the use of "explicit statutory language." *Washington v. Washington State Commercial Passenger Fishing Vessels Ass'n*, 443 U.S. 658, 690 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1960) ("[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred in a treaty."). In other cases, the Supreme Court has allowed a somewhat less stringent standard, finding it sufficient if Congress' intent is "clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). In any case, however, the Supreme Court has provided that: "The intention to abrogate or modify a treaty is not to be

lightly imputed to the Congress." *United States v. Dion, supra,* 476 U.S. at 739. The "essential factor is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.*, at 739-740.

These standards are consistent with general principles regarding Congressional intent to extinguish Indian property rights. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985). Although the vast majority of cases dealing with extinguishment of Indian fishing rights arose in the context of treaty fishing rights, under the Supremacy Clause of the United States Constitution, there is no difference between a fishing right reserved by treaty and a fishing right reserved by statute. Therefore, the rationale applicable to the extinguishment of Indian fishing rights reserved by treaty applies equally well to Indian fishing rights reserved by statute.

> We do not think that the distinction between a treaty and a statute have great significance. . . . However, first, both treaties and statutes are the supreme law of the land. Const. Art. IV, cl. 2. Second, the real power had lain with the United States alone long before 1871. Some at least of the treaties were the embodiment of orders imposed on Indians by the Executive. On occasion, the United States invented tribes and appointed their chiefs. [Citation omitted.] Third, the change from treaty to statute was at least in part a result of political infighting in Congress. The House was excluded from the treaty making process under Const. Art. II § 2, cl. 2, and it wished to have a clear say in Indian policies. [Citation omitted.] Fourth, as regards Indians, there is no clear cut distinction between treaties and statutes, nor any clear division between what was done by treaty and what was done by statute. Both treaties and statutes were worded in a wide variety of ways, some explicitly granting fee simple interest to tribes, some explicitly granting only Indian title (a right of occupancy at the pleasure of the United States), some saying no more than that land was reserved for Indian occupancy, some expressly reserving or granting rights, some silent on the subject. [Citation omitted.] **For all of these reasons, we believe that whether the source of the right is in a treaty or in a statute is of little contemporary relevance**.

Blake v. Arnett, 663 F.2d 906, 909-910 (9th Cir. 1981) (Emphasis added) .

Through enactment of the 1864 Four Reservations Act, Congress expressly authorized the President to create no more than four reservations within the State of California for "Indian purposes." Kathy Dowd Declaration, p. 2, ¶ 8. Pursuant to that authority, the President created and set aside first, the Klamath River Reservation, and then the Extension, reserving to the Yurok Indians, including the Resighini Yuroks, the right to fish in the Klamath River free of

State regulation and control. Kathy Dowd Declaration, p. 2, ¶ 7.

Once Congress reserved to the Resighini Yurok the right to fish in the Klamath River, on what is now the Yurok Reservation, the Resighini Yurok retain the right to continue to fish in the Klamath River within the old Klamath River Reservation/Extension free of State regulation and control unless, or until, Congress, by enactment of subsequent legislation, extinguishes or terminates the right by clear and explicit language. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Mattz v. Superior Court*, 46 Cal.3d 355 (1980).

VI.

THE HOOPA-YUROK SETTLEMENT ACT DOES NOT CONTAIN EXPRESS AND EXPLICIT LANGUAGE EVIDENCING A CLEAR CONGRESSIONAL INTENT TO EXTINGUISH THE RESIGHINI YUROKS' RIGHT TO FISH ON THOSE PORTIONS OF THE KLAMATH RIVER LYING WITHIN THE YUROK RESERVATION.

In 1988, Congress Enacted the Hoopa-Yurok Settlement Act ("Act"), which partitioned the Hoopa Valley Reservation into the present Hoopa Valley Reservation and the Yurok Reservation. 25 U.S.C. § 1300i-1300i-ll.

As no constitutionally protected right had vested in any tribe or individual to the communal lands and other resources of the 1891 Reservation, the Act provided for a fair and equitable resolution of disputes relating to ownership and management of the 1891 Hoopa Valley Reservation. 25 U.S.C. § 1300i-1-1300i-11. Pursuant to and in accordance with the Act, the 1891 Reservation was partitioned between the Hoopa Valley Tribe and the Yurok Tribe. 25 U.S.C. § 1300i-1. The section of the 1891 Reservation known as "the Square" was established as the Hoopa Valley Reservation, and the sections known as old "Klamath River Reservation" and "the Extension" was established as the Yurok Reservation. 25 U.S.C. § 1300i-1. The Act also created a settlement fund initially comprised of funds derived from economic ventures occurring on the 1891 Hoopa Valley Reservation and supplemented by additional funds appropriated by Congress. Particular benefits of the Act, i.e., the provisions relating to the partitioning of the Reservation, potential expansion of the newly formed Reservations, and participation in the Settlement Fund, were conditioned upon the tribes'

adopting individual tribal resolutions, granting their consent to the partition of the 1891 Reservation and waiving potential claims that they may have against the United States. 25 U.S.C. § 1300i-1.

Under the Act, a Settlement Roll was to be prepared of the "Indians of the Reservation" not already included as enrolled members of the Hoopa Valley Tribe; persons on the Settlement Roll were to choose from among Hoopa tribal membership, Yurok tribal membership, and non-tribal membership options, each of which included a payment of various amounts of compensation; the Yurok Tribe was to receive the remainder of the Settlement Fund after payment of the Hoopa Valley Tribe's proportional share and deduction of sums paid to individuals; and upon the enactment of a resolution waiving claims that the Yurok Tribe might have against the United States arising out of the Act. 25 U.S.C. § 1300i1-1300i3. In addition, the Yurok Tribe was to become eligible for various benefits, including land acquisition authority, appropriations, governmental organization and other federal benefits and programs provided to Indian tribes. 25 U.S.C. § 1300i-1.

The Act established procedures for the organization of the Yurok Tribe, for the development of the Settlement Roll, and for the distribution of the Settlement Fund. 25 U.S.C. § 1300i-3, 1300i-4, 1300i-8. As part of the tribal organizational process, the Act provided for the election of a "interim council" having limited powers, including the adoption of a resolution waiving any claim the Yurok Tribe may have against the United States arising out of the Act and affirming tribal consent to the contribution of Yurok escrow money to the Settlement Fund, and for the use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in the Act. 25 U.S.C. § 1300i-8.

Among the specific benefits of the Act purportedly conferred on the Yurok Tribe was the transfer to the Yurok Tribe, to be held in trust, certain federal lands in the Six Rivers National Forest within the boundaries of the old Klamath River Reservation/Extension; addition of lands to the Yurok Reservation through consensual acquisition; the expenditure of not less then $5 Million Dollars for the purpose of acquiring lands or interest in lands for the Yurok Tribe, and appropriation to the Yurok Tribe of the remainder of the Settlement Fund after

distribution to the Hoopa Valley Tribe and individuals on the Settlement Roll. 25 U.S.C. § 1300i-1300-ii.

Of all of the provisions in the Act, only section (2), subsection (c), paragraph (1), contains any language that one could argue expresses a Congressional intent to extinguish Yurok Resighini fishing rights to fish on the Klamath River within the old Klamath River Reservation/Extension. 25 U.S.C. § 1300i-1(c)(1). That section provides that, effective with the partition as provided in subsection (a), that portion of the Hoopa Valley Reservation known as "the Extension" shall be recognized as the Yurok Reservation and shall be a reservation for the Yurok Tribe. 25 U.S.C. § 1300i-1(c)(1).

But, that section does not contain the express and explicit language necessary to effectuate an extinguishment of the Yurok Resighini fishing rights. There is nothing in the language of the section that is inconsistent with creating a reservation for the Yurok Tribe out of the old Klamath River Reservation and Extension lands and, at the same time, preserving valid pre-existing rights of third parties to use the waters constituting the new Yurok Reservation for fishing by Resighini Yurok.

Congress's intent to preserve pre-existing third party rights in the newly created Yurok Reservation is clear from the language of the statute. First, section (2), subsection (c), paragraph (1), specifically provides that the creation of the new Yurok Reservation excludes "the lands of the Resighini Rancheria." 25 U.S.C. § 1300i-1(c)(1). Congress knew at the time that it was creating the Yurok Reservation that the Resighini Reservation existed and would be located entirely within the boundaries of the Yurok Reservation. By excluding the lands of the Resighini Reservation from the Yurok Reservation, Congress intended that the creation of the Yurok Reservation would not extinguish or terminate the Resighini Reservation or any rights that the Indians of the Resighini Reservation had within the Yurok Reservation prior to the creation of the Yurok Reservation.

Other sections of the Act manifest a clear Congressional intent not to extinguish the rights of third parties to the lands and waters of the newly created Yurok Reservation, when those rights had vested, or been reserved, prior to the creation of the Yurok Reservation. For

example, paragraph (2) of the Act provides that, "**subject to all valid existing rights**," all National Forest lands on the Yurok Reservation and about fourteen acres of the Yurok Experimental Forest shall be transferred to the Yurok Tribe in trust. 25 U.S.C. § 1300i-1(c)(2). (Emphasis added.) Thus, Section 2, Paragraph (2) evidences a clear Congressional intent to convey lands to the Yurok Tribe as part of the Yurok Reservation, but to preserve valid existing rights on the Klamath River, such as Yurok Resighini fishing rights on the Klamath River within the old Klamath River Reservation/Extension.

Probably the clearest expression of Congress's intent that the Act not terminate any pre-existing, valid rights, including the right of the Yurok Resighini to fish in the Klamath River off of the Resighini Reservation, is found in Section 6 of the Act. 25 U.S.C. § 1300i-5(d). That section expressly provides that 25 U.S.C. § 1300i-5 is not a termination provision but, rather, merely offers a lump sum payment to persons on the Settlement Roll who wish to have no future interests or rights in the tribal, communal, or unallotted land, property, resources, or rights in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation of the Hoopa or Yurok Tribes, or in the Settlement Fund. 25 U.S.C. § 1300i-5(d).

Nor does the legislative history of the Settlement Act show clear and reliable evidence that Congress intended to abrogate the right of the Yurok Resighini to fish in the Klamath River outside the boundaries Resighini Reservation. The purposes of the Settlement Act, as explained in the related Senate Report, are to partition the Hoopa Valley Reservation lands between the Hoopa Valley Tribe and the Yurok Tribe, to establish and confirm each tribe's property interests in their respective lands, and to enable the Yurok Tribe to organize and assume governing authority in their portion of the partitioned lands. S. REP. NO. 100-564, at 2 (1988). The House Report on the Act indicates that it was intended to be a reasonable and equitable method of resolving the confusion and uncertainty then existing on the Hoopa Valley Reservation. H.R. REP. 100-938, pt. 1, at 18-19 (1988). Sections of the Senate Report discussing fishing rights on the Klamath River mention only that the Settlement Act will confirm the Yurok's commercial interest in fishery on its portion of the partitioned land. *See,* S.

REP. NO. 100-564, at 2, 14-15 (1988). These sections do not touch on the existence of a federally reserved fishing right possessed by the Resighini Yurok because Congress did not intend for the Settlement Act to divest the Resighini of any rights. 25 U.S.C. § 1300i-1300i-ii.

The only discussion of how the Resighini Reservation or the Tribe will be affected by the Settlement Act is set forth in Section 11 of the Settlement Act, which allows certain Rancherias of Yurok origin to vote to "fully merge their lands, assets and membership," with those of the newly organized Yurok Tribe. S. REP. NO. 100-564, at 29 (1988). As discussed earlier, Section 6(d) of the Act provided a lump sum payment to persons on the Settlement Roll who elected not to join and merge their interests with the Hoopa Valley or Yurok Tribes. The Senate Report does also state explicitly that Section 6(d) of the Settlement Act is not intended as a termination provision. S. REP. NO. 100-564, at 24 (1988).

In 2002, the Secretary of the Interior, as required by Section 14(c)(2) of the Act, prepared and submitted a report ("Section 14 Report") describing the final decision on any claim challenging the partition of the joint reservation and discussing the allocation of assets and benefits conveyed by the United States under the Act. Nowhere in the Section 14 Report does the Secretary indicate that the Act divested all tribes save the Yurok Tribe and the Hoopa Valley Tribe of fishing rights reserved through the establishment of the old Klamath River and Hoopa Valley reservations. Instead, in a discussion of how fairness and equity entitles the Yurok Tribe to an enhanced asset base in relation to that of the Hoopa Valley Tribe, the Secretary enumerates prospective tribal assets that the Yurok Tribe will receive under the Act, including a share of the Settlement Fund, other real property rights and benefits conveyed in Section 2(c) of the Settlement Act, and legislation providing equitable relief that will promote land acquisition, infrastructure improvement, and improved fisheries. Secretary of the Interior, Report to Congress, Hoopa-Yurok, Pursuant to Section 14(c), Public Law 100-580, pp. 12-13 (March 2002) ("Section 14 Report"). The Secretary also indicated that the major purpose of the Act was to establish definitive boundaries for the Yurok and Hoopa Valley reservations. Section 14 Report, p. 1. In 1993, the Solicitor for the Secretary of the Interior issued a memorandum concerning the rights of the Yurok and Hoopa Valley Indian Tribes to a share of Klamath River

fisheries. Memorandum Opinion 36979, p. 1 (October 4, 1993). The memorandum specifically excludes any discussion of fishing rights reserved to the Resighini Tribe and does not deny the existence of said rights. Memorandum Opinion 36979, p. 7, n. 8 (October 4, 1993). Rather, the memorandum and the Section 14 Report show that the Act effected distribution of rights and benefits to the Yurok and Hoopa Valley tribes vis-a-vis each other.

When the Yurok Resighini exercise their off-Resighini Reservation right to fish in the Klamath River, they are not exercising a right conferred by Congress to the Yurok Tribe or its members under the Settlement Act. Rather, they are exercising a right that Congress reserved to them with the creation of the old Klamath River Reservation and Extension. Therefore, there is nothing inconsistent in the creation of a separate Yurok Reservation and the members of the newly created Yurok Tribe to fish on the Reservation free of State regulation and control and the Resighini Yuroks exercising a pre-existing right to fish in the Klamath River within the boundaries of the newly created Yurok Reservation free of State regulation and control.

In short, the Hoopa-Yurok Settlement Act does not contain any clear and express language that would evidence a Congressional intent to extinguish or terminate the Yurok Resighini's rights to fish at their usual and customary fishing stations within what is now the boundaries of the Yurok Reservation in the same manner and to the same extent that they fished off the Resighini Reservation prior to the passage of the Act. The Yurok Resighini, therefore, have the right to continue to fish in the Klamath River off of the Resighini Reservation within the exterior boundaries of the Yurok Reservation at the same locations and in the same manner as they did prior to the creation of the Yurok Reservation under the Act.

VII.

DEFENDANT HAS DIVESTED RESIGHINI MEMBERS OF FEDERALLY RESERVED FISHING RIGHTS IN VIOLATION OF THE 14TH AMENDMENT AND 42 U.S.C. § 1983.

Title 42 of the United States Code Section 1983 provides a remedy for deprivation under color of state law, of "any rights . . . secured by the Constitution and laws of the United States." 42 U.S.C. § 1983 ("Section 1983"). To state a claim under Section 1983, a plaintiff must allege facts that show a deprivation of a right, privilege, or immunity secured by the

Constitution or federal law by a person acting under color of state law. *Lopez v. Dep't of Health Services*, 939 F.2d 881, 883 (9th Cir. 1991), *citing Daniels v. Williams*, 474 U.S. 327 (1986). The plaintiff in a Section 1983 action may seek a declaration that his or her rights have been violated, as well as an order of the court enjoining defendants from engaging in the illegal practices in the future. *See, e.g., Will v. Michigan Department of State Police,* 491 U.S. 58, 71, n.10 (1989); *Johnson v. Railway Express Agency,* 421 U.S. 454, 460 (1975) (declaratory and injunctive relief available for violations of 42 U.S.C. § 1981). The federal right at issue need not derive only from equal rights laws; the phrase "and laws" in the text of Section 1983 refers generally to all federal statutory law. *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980). Another determining factor in the scope of Section 1983 coverage is whether the federal right asserted "is one that protects the individual against government intrusion," *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989). To evaluate whether a federal right has been violated, courts have considered whether the constitutional or statutory provision in question creates obligations binding on a governmental entity rather than simply stating a finding or Congressional preference. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). The right or interest the plaintiff claims must not be so abstract as to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987).

Here, individual plaintiffs, Gary and Frank Dowd, seek relief from deprivation of their federally reserved right to fish at their usual and customary fishing grounds on what is now known as the Yurok Indian Reservation, as well as relief from seizure of property (i.e., fish and fishing gear) without due process. As discussed in Section IV, the Tribe's federally reserved fishing right was derived from federal law, i.e., the Act of March 3, 1853 (10 Stat. 238). As individual members of the Tribe, Gary and Frank Dowd enjoy the rights of users in tribal property derived from the legal property right of the Tribe of which they are members[4].

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[4] In *United States v. Dion*, the U.S. Supreme Court stated that tribal members can enforce treaty fishing rights. 476 U.S. 734, 738 n. 4 (1986). As discussed in Section IV, the distinction between a right reserved by treaty and a right reserved by statute is not significant. *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981).

Kimball v. Callahan, 590 F.2d 768, 773 (9th Cir. 1979). A Tribe's federally reserved fishing rights have legal force in that they preempt state regulation of Indian fishing on Indian lands and are protected against non-federal interests. See, *Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995); *Arnett v. Five Gill Nets,* 48 Cal. App. 3d 454 (1975). This Court can enforce the Dowds' fishing rights through a declaration of the extent and nature of those rights and by enjoining the Director and the Department from citing the Dowds for Fish and Game Code violations, from interfering with the Dowds' federally reserved fishing rights, and from seizing fish taken and fishing nets owned by the Dowds in violation of federal law.

In addition, the Director and the Department acted under color of State law in depriving the Dowds of their federally created fishing right. In an official-capacity action for a governmental entity, the official will be held liable under Section 1983 when the entity itself is a "'moving force'" behind the deprivation. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 690 (1978). That is to say, the entity's "policy or custom" must have played a part in the violation of federal law. *Kentucky. v. Graham*, 473 U.S. 159, 166 (1985). Here, the Director is employed by the State of California, is acting in his official capacity, and is exercising his responsibilities to enforce the California Fish and Game Code pursuant to California law. Through his General Counsel, the Director has stated that the Department does not recognize the Tribe's federally reserved fishing right and that the Department may enforce the Fish and Game Code against tribal members, such as the Dowds, fishing in their historic fishing grounds on the Klamath River. Marston Declaration, pp. 2-3, ¶¶ 7-8. As such, the Director has stated that it is the policy of the Department to interfere with Resighini members' federally reserved right to fish and to seize tribal members' fishing gear and fish caught on the Klamath River under color of the California Fish and Game Code.

The Director has firmly stated his intention to illegally enforce the Fish and Game Code against members of the Tribe. Without the remedy afforded by Section 1983, the Director and officers under his control will continue to divest the Dowds and other members of the Tribe of their right to their subsistence fishery within the boundaries of the old Klamath River Reservation. Such State action cannot be squared with 42 U.S.C. § 1983.

CONCLUSION

The Yurok Indians of the Resighini Reservation have the right to fish at all of their usual and customary fishing places in the Klamath River within the boundaries of what is now the Yurok Reservation in the same manner and to the same extent that they fished in the old Klamath River reservation/Extension prior to the creation of the Yurok Reservation. The right of the Resighini Yurok to fish off the Resighini Reservation has never been extinguished by a subsequent Act of Congress and the Hoopa-Yurok Settlement Act does not manifest a clear Congressional intent to extinguish the Resighini Yuroks' off-Resighini Reservation fishing right. All of the lands and waters within the old Klamath River Reservation is "Indian Country" as defined by 18 U.S.C. § 1151. All of the provisions of the California Fish and Game Code are civil/regulatory in nature. Under P.L. 280, the State has no jurisdiction to regulate the fishing rights of the Resighini Yurok to fishing within the boundaries of the old Klamath River Reservation/Extension, Indian Country set aside for the Yuroks, including the Resighini Yuroks. The State of California has no jurisdiction to enforce the provisions of the California Fish and Game Code against the Resighini Yuroks on the Klamath River within the boundaries of the old Klamath River Reservation/Extension.

For the foregoing reasons, the Tribe's and the Dowds' motion for summary judgment should be granted.

Respectfully submitted,

DATED: March 30, 2012

RAPPORT AND MARSTON

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, my office electronically filed the foregoing document using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the following:

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