

APPENDIX E: LEGAL APPENDIX

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The purpose of this appendix is to provide a fuller discussion of the facts and legal issues involved in this Post-Authorization Change (PAC)¹ report. This PAC concerns the integration of the Celilo Village into the Columbia River Treaty Fishing Access Sites (CRTFAS) program, authorized under the CRTFAS Act (Title IV of Pub. L. 100-581, Nov. 1, 1988, 102 Stat. 2944, as amended.)

¹ The Post-Authorization Change (PAC) process, set forth at Appendix G, Section III, of ER 1105-2-100 (22 Apr 2000 edition), Planning Guidance Notebook, is the Corps' process for proposed changes to authorized civil works projects. The lowest level for approving a PAC change is the Division Engineer.

1. THE PARTIES TO THE PROJECT

1.1 The Other Federal Parties

The Bureau of Indian Affairs (BIA) of the Department of Interior (DOI), and the Indian Health Service of the Department of Health and Human Services, are parties to the proposed project by virtue of their Native American programs².

1.2 The Tribal Parties

Four federally-recognized, treaty tribes are parties to this project. The four tribes are the Confederated Bands and Tribes of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Confederated Tribes of the Warm Springs

² The Corps of Engineers (COE) is the oldest manager of the Nation's waterways, with the original civil works projects being created by Congress in response to defense needs of the East Coast ports during the War of 1812. Congress expanded the Corps's civil works authority as the Nation expanded, first into the Mississippi River Valley, and then finally in 1850 to the Presidio of San Francisco for the new West Coast states and territories. Portland District COE was created shortly after Oregon's admission as a state in 1859, in order to provide for Oregon's coastal ports and for navigation on the Columbia River. In the Rivers and Harbors Act of August 18, 1894, 28 Stat. 362, Congress enacted 33 USC 1, which provides in part:

"It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department."

In carrying out this function, the Corps has always partnered with other federal and state agencies. Among the applicable statutes for the Corps' reservoir management planning are 33 USC 2297 (operation and maintenance on recreation lands), 33 USC 2319 (reservoir management), and 33 USC 2320 (protection of recreational and commercial uses). It is on the basis of these and other Corps statutes that the Corps asserts primary jurisdiction (as the term is used in administrative law) with regard to its operations and management of the navigable waters of the Columbia River. As the Supreme Court has stated:

"The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433." United States v. Western Pacific RR Co., 352 US 59, 1 L Ed. 2d 126, 77 S Ct 161 (1956).

The importance of primary jurisdiction is that it lets the Portland District COE, in consultation with other federal and state partners, make certain administrative decisions concerning its delegated missions on the Columbia River with some assurance that the federal courts will consider and follow such decisions as made by the agency charged with administrative primary jurisdiction. The CRTFAS program puts the Portland District in such a position, as Congress entrusted the program to the Corps primarily, instead of the BIA where it might have been assigned under other circumstances. The CRTFAS program is an outgrowth of the District's involvement with the treaty fishing tribes for over 125 years. The District's involvement with the treaty fishing tribes of the Mid-Columbia River is detailed below, and has developed as the tribes' treaty rights have developed.

Reservation of Oregon³, and the Nez Perce Tribe. The current political grouping of the tribes and bands involved in this project is the result of 1855 treaties, in which Territorial Governor Stevens of Washington negotiated the cessation of tribal lands in Eastern Oregon and Washington and Western Idaho in exchange for four designated reservations⁴ and a series of off-reservation fishing, hunting, and food-gathering rights⁵.

³ H.Doc. 531, 81st Congress, 2nd Session, Vol. VII, Appendix Q, Legal, March 20, 1950, page 2949, states that:

“The Confederated Tribes of Warm Springs by treaty in 1865 [Treaty of Nov. 15, 1865, 2 Kapler 908] relinquished ‘the right to take fish, erect houses, hunt game, gather roots and berries, and pasture animals upon lands without the reservation.’ Hence, these Indians have no fishing rights upon the Columbia River, though many of them still fish there. The Indians, parties to the this treaty, allege that it was obtained by fraud and misrepresentation, and as such is void and of no effect. However, since the treaty has been ratified by Congress (March 2, 1867) and has never been repealed or modified by that body, it would appear to be still in full force and effect. The treaty has never been held by the courts, specifically, to have been invalid, nor has its validity been questioned by them.”

Subsequent legislation discussed herein has annulled the negative impacts of the 1865 treaty on the Warm Springs as far as Columbia river treaty fishing rights. The 1947 1948 Interior Department Appropriations Act specifically included the Warm Springs as a named tribal beneficiary at Celilo. The Corps appropriations acts from 1953 to 1957 included them as a named tribal beneficiary. The Nov. 1, 1988 PL 100-581 CRTFAS Act also listed them, as well as the Nez Perce, as specific tribal beneficiaries. Moreover, the case law on 1855 treaty fishing rights involving the Columbia River has also recognized Warm Springs tribal rights.

⁴ The Yakama Indian Nation [spelled “Yakima” for many years until 1994 when the original treaty “Yakama” spelling was restored by tribal resolution] is comprised of 14 tribes and bands including the Palouse, Piquouse, Yakama, Wenat-chapam, Klinquit, Oche Chotes, Kow was say ee, Sk’in-pah, Kah-miltpah, Klickitat, Wish ham, See ap Cat, Li ay was, and Shyiks. Their tribal headquarters is at Toppenish, Washington, near Yakima, Washington and the Yakima River.

The Warm Springs is comprised of members of the Warm Springs (Tenino Band of Walla Walla Indians), Wasco, and Paiute Tribes, as well as descendents of Western Oregon tribes like the Calapooia who intermarried with members of the three tribes, and an assortment of members of other tribes (the 1950 Indian census reported 45 Puyallup-Pitt river, 2 Cowlitz, 1 Upper chinook, 13 Yakama-Klickitat, and 4 Klickitat Indians living on the reservation with the Warm Springs, Wasco, and Paiute Indians.) The tribal headquarters is near Madras, Oregon, on the banks of the Deschutes River.

The Umatilla Reservation includes three tribes, the Cayuse, the Umatilla, and the Walla Walla tribes, as well as members of other tribes including the Paiute. Extensive intermarriage of Umatilla Indians with the members of the Nez Perce Tribe is also reported. The tribal headquarters is outside Pendleton, Oregon, near the Umatilla River.

The Nez Perce Tribe negotiated its own separate reservation under the 1855 treaties. Its tribal headquarters is at Lapwai, Idaho.

⁵ Celilo Village is on the Oregon shore adjacent to the historic and currently inundated Celilo Falls. As discussed in the text, all 4 listed tribes have off-reservation treaty fishing rights at the site, although the site is technically ceded lands of the Warm Springs tribe.

The following Supreme Court quotations stated fundamental principles of Indian law applicable herein: Oneida Indian Nation v. County of Oneida, 414 US 661, 39 L Ed 2d 73, 94 S Ct 772 (1974), at 39 L Ed 2d 79, stated:

"It very early became accepted doctrine in this court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nations and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act."

County of Oneida v. Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985), amplified the language in the earlier decision above, at 84 L Ed 2d 178-179:

All four tribes share similar languages and cultures, and their members have extensively intermarried over the nearly 150 years since the 1855 treaties were signed.

The tribal involvement in this project stems from ancient, off-reservation fishing sites along the banks of the Columbia River⁶, which were recognized and preserved in the

"By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. . . . The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign."

"With the adoption of the Constitution, Indian relations became the exclusive province of federal law. . . . From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. . . . This principle has been reaffirmed consistently."

⁶ In 1889, Indian Agent Gordon surveyed the Indian fishing sites along the banks of the Columbia River in connection with the Winans litigation cited below. His report listed the following data regarding treaty fishing sites on the Columbia River banks:

CASCADE RAPIDS [flooded by Bonneville Dam]

Skamania County, Wash.: 6 miles of scattered sites, Sec. 11-21, T2N R7E (River Miles (RM) 145-149)

CELILO FISHERY [lower sites flooded by Bonneville Dam; upper sites flooded by The Dalles Dam]

a. Tum-water, Wash. (Spearfish) ; Lot 2, Sec.25, T2N R13E to Lot 3, Sec.19, T2N, R14E (RM 193-194) 594 acres

b. Island, mid-river (E of Avery); SE part Sec. 14, T2N R14E (RM 198)

c. Skin or Skein, Wash. (Celilo); Lot 2, Sec.13, T2N, R14E to Lot 2, Sec.18, T2N, R15E (RM 199-200) Island and Skin: 633 acres total

d. Tame Musqua, Wash. (E of Miller Is.) Lot 1, Sec. 13 to Lot 1, Sec. 12, T2N R15E (RM 206) 5.5 acres

e. Dalles, Oregon (Tenino) Lot 3, Sec. 36, T2N R13E to Lot 2, Sec. 20, T2N R14E (RM 192-194) 125.5 acres

f. Celilo, Oregon (Celilo Park) Sec. 19 -20, T2N R15E (RM 200-201) 94.4 acres

g. Wat-tince, Wash. (John Day Dam) Lot 3, Sec. 29 to Lot 1, Sec. 13, T3N, R17E (RM 215-219) 160 acres

h. Tom's, Wash. (Rock Cr.) Lot 4 to Lot 3, Sec.32, T3N R19E (RM 228-229) 207.5 acres

i. John Day River, Ore. NE 1/4 of Sec. 13, T2N R18E (RM 10 on John Day River)

3. ABANDONED SITES:

THOSE FLOODED BY JOHN DAY DAM:

a. Jackson, Wash. (E of Bates) Lot 3 to Lot 1, Sec.34, T3N R19E (RM 231) 3.36 acres

b. Tah-wash, Wash. (E of Blalock Lagoon; 2 mi. W of Sundale) Lots 1&2, Sec. 30, T3N R20E (RM 234)

Both of these sites were rated inferior third class by Gordon.

SITE FLOODED BY MC NARY DAM (Walla Walla District)

Wallula, Wash. Sec. 18, 17, 8, T6N R31E 56.8 acres

4. SITES EAST AND NORTH OF CORPS MID-COLUMBIA RIVER DAM RESERVOIRS:

a. Palouse & Snake River 163 acres

b. Priest Rapids 110.3 acres

1855 treaties, as interpreted seven times by the United States Supreme Court.⁷ Seufert Bros. V. United States, 294 US 194, 197 (1918), stated:

“The district court found, on what was sufficient evidence, that the Indians living on each side of the river, ever since the treaty had been negotiated, had been accustomed to cross to the other side to fish; that the members of the tribes associated freely and intermarried; and that neither claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in common.”

“The record also shows with sufficient certainty. . . that the members of the tribes designated in the treaty as Yakima Indians, and also the Indians from the south side of the river, were accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and they continued to do so . . . and also that Indians from both sides of the river built houses on the south bank in which to dry and cure their fish during the fishing season.”

Following the last of these decisions in 1979, the States of Oregon and Washington, along with the US Fish and Wildlife Service of the DOI , the National Marine Fisheries Service of the Department of Commerce, and the US Department of Justice negotiated a compromise solution to treaty fishing rights on the Lower and Mid-Columbia River, which was divided into 6 zones⁸. The compromise created and designated a Zone VI commercial fishery exclusively for the treaty fishing Indians between the Corps’

PORTLAND DISTRICT AND INDIAN CLAIMS COMMISSION COMPENSATION FOR DAMAGES TO THESE FISHERIES FLOODED BY PORTLAND DISTRICT DAMS includes:

Cascade Rapids: (1) 1945 in-lieu sites authorization; (2) 1946 Indian Claims Commission Act for pre-August 1946 damages; (3) CRTFAS program

Celilo Falls: (1) 1946 Indian Claims Commission Act for pre-August 1946 damages; (2) Special compensation in 1954-1958 civil works appropriations acts; (3) CRTFAS program

Abandoned Sites flooded by John Day Dam: (1) 1946 Indian Claims Commission Act for pre-August 1946 damages; (2) CRTFAS program

⁷ United States v. Winans, 198 US 371 (1905), Seufert Bros. v. United States, 294 US 194 (1918), Tulee v. State of Washington, 315 US 681 (1942), Puyallup Tribe v. Washington Dept. of Game (Puyallup I), 391 US 392 (1968), Washington Dept. of Game v. Puyallup Tribe (Puyallup II), 414 US 44 (1973), Puyallup Tribe v. Washington Dept. of Game (Puyallup III), 433 US 165 (1977), and Washington v. Washington State Commercial Passenger Fishing Vessel Assn. (Fishing Vessel Assn.), 443 US 658 (1979). Winans established that the 1855 treaty rights superseded subsequent real estate rights, including real estate rights gained by the States of Oregon and Washington upon admission to the United States under the “Equal Footing” doctrine. Seufert reaffirmed the treaty rights and held that the Yakama tribal members had fishing rights on the Oregon shore, outside the ceded lands of the Yakama Indian Nation. After these two decisions, the off-reservation treaty right was characterized as an “Indian servitude” on riparian lands along the Columbia River that had been historic “usual and customary” fishing sites.

⁸ United States v. Oregon has been the on-going lawsuit under which the fisheries of the Columbia River in the stretch between Bonneville and McNary Dam have been regulated for the tribes' benefit. Some of the many, ongoing United States v. Oregon decisions include the following: 302 F. Supp. 899 (D Ore. 1969), aff'd. 529 F.2d 570 (9th Cir. 1976); further proceedings: 657 F.2d 1009 (9th Cir. 1981); 718 F.2d 299 (9th Cir. 1983); 699 F. Supp. 1456 (D Ore. 1988); 913 F.2d 576 (9th Cir. 1990); and related case: Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

Bonneville Dam at River Mile 146 and the McNary Dam at River Mile 192. It includes also the reservoirs behind The Dalles Dam at River Mile 192 and the John Day Dam at River Mile 215.⁹

1.3 US Army Engineer District, Portland

1.3.1 Before Bonneville Dam's Operation

The Columbia River has always been a navigable waterway.¹⁰ Archeologists have dated human use through artifacts as far back as 9000 B.C. The Lewis and Clark Expedition, that left St. Louis, Mo., in 1803 traversed the region at issue in 1805-1806. It passed downstream during October and November 1805 when the tribal fishing season was at its height (escorted from the Clearwater River in Idaho down the Snake and Columbia Rivers to the vicinity of Cascade Locks by Nez Perce elders). It returned upstream in the early Spring of 1806.

Numerous rapids and slack water areas made navigation of the Columbia River difficult and dangerous. The Portland District undertook a series of navigation improvements prior to the construction of the Bonneville Dam, 1933-1938 (the first of the 4 dams on the Mid-Columbia River to be constructed.) These improvements focused on two locations – (1)The Cascade Rapids which were permanently flooded and made safe for navigation by the 1938 operation of the Bonneville Dam¹¹, and (2) rapids and falls known as Celilo

⁹ The boundary between the Portland and Walla Walla Districts is the I-82 freeway bridge, about 1 mile downstream (west) of the McNary Dam. All but this last mile of Zone 6 is thus within Portland District project boundaries.

¹⁰ Congress recognized this fact in the Oregon Admission Act, Act of Feb. 14, 1859, Sec. 2: "Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." [reprinted in appendices to Oregon Revised Statutes, Vol. 15, 1999 edition].

¹¹ The Civil Appropriations Act of June 23, 1874 in Sec. 2 authorized the survey of the Cascade Rapids and the rocks and rapids around The Dalles for canals and locks. In the following acts, the construction of Cascade Locks through the Cascade Rapids was authorized and funded for construction:

Rivers and Harbors Approp. Act	August 14, 1876	\$90,000
Rivers and Harbors Approp. Act	June 18, 1878	\$150,000
Rivers and Harbors Approp. Act	March 3, 1879	\$100,000
Rivers and Harbors Approp. Act	June 14, 1880	\$100,000
Civil Appropriations Act	March 3, 1881	\$100,000
Rivers and Harbors Approp. Act	August 2, 1882	\$265,000
Rivers and Harbors Approp. Act	July 5, 1884	\$150,000
Rivers and Harbors Approp. Act	August 5, 1886	\$187,500
Rivers and Harbors Approp. Act	August 11, 1888	\$300,000
Rivers and Harbors Approp. Act	September 9, 1890	\$435,000
Rivers and Harbors Approp. Act	July 13, 1892	\$326,250

The construction and operation of Bonneville Dam in 1938 flooded out Cascade Locks and the rapids around the Locks.

Falls, about 10 miles upstream of the present The Dalles Dam¹². The Dalles Dam was placed in operation in 1958, followed by the John Day Dam in 1968.

1.3.2 Bonneville Dam

The construction of Bonneville Dam in 1933 started out as a Depression-era public works project in fulfillment of a campaign promise by President Roosevelt. Congressional authorization followed the start of the construction work. When Bonneville Dam was completed and put into operation in 1938, it was apparent that the dam's rising reservoir was flooding out numerous tribal treaty fishing sites along the river banks. BIA conducted its own investigations¹³.

¹² During the latter part of the 19th Century, multiple surveys to advance the navigability of the Columbia River through the Celilo Falls area were authorized:

- (1) Civil Appropriations Act of June 23, 1874;
- (2) Rivers and Harbors Appropriation Act of March 3, 1879;
- (3) Rivers and Harbors Appropriation Act of August 11, 1888;
- (4) Rivers and Harbors Appropriation Act of July 13, 1892; and
- (5) Rivers and Harbors Emergency Appropriation Act. of June 6, 1900.

Before authorizing the Dalles-Celilo Canal, Congress in the Rivers and Harbors Appropriation Act of August 18, 1894, authorized a boat railway from The Dalles to Celilo Falls, in accordance with Senate Document 7, 53rd Congress, 1st Session. Due to a variety of problems, the boat railway was never completed. Not even all of the real estate for the project could be acquired due to conflicts with other users.

Congress authorized construction of the Dalles-Celilo Canal in accordance with House Document 228, 56th Congress, 2nd Session, in the June 13, 1902 Rivers and Harbors Appropriation Act. The Canal was finally finished in 1915. The construction and operation of The Dalles Dam in 1958 flooded out Celilo Falls and the Dalles-Celilo Canal. The current navigation channel makes no use of the old flooded-out canal.

¹³ In July 1937, RL Simmons of BIA made an inspection trip by boat between Celilo Falls and Bonneville Dam. Simmons' party identified, photographed, and documented usual and customary fishing sites.

Simmons submitted a Nov. 23, 1937 letter report to the Commissioner of Indian Affairs. This letter report included extracts of old historical documents on the extent of the tribal fishery. The following are key quotes from these documents.

(a) "The United States Exploring Expedition 1838-1842", Wilkes, p. 380: "At the Cascades, during the fishing season, there are about three hundred Indians, only about one-tenth of whom are residents: They occupy three lodges; but there was formerly a large town there. Great quantities of fish are taken by them; and the manner of doing this resembles that at the Willamette Falls. They also construct Canals, on a line parallel with the shore, with rocks and stones, for about fifty feet in length, through which fish pass in order to avoid the strong current, and are here taken in great numbers."

(b) "The Cascades", Wilkes, p. 386:

"The number of Indians within The Dalles Mission is reckoned at about two thousand; in but few of these, however, has any symptom of reform shown itself. They frequent the three great salmon fisheries of the Columbia, The Dalles, Cascades, and Chutes and a few were found at a salmon fishery about twenty five miles up the Chutes [Deschutes] River."

"The season for fishing salmon, which is the chief article of food in this country, lasts during five months, from May to September."

(c) Message from the President to the Two Houses of Congress, 33rd Congress, printed in 1854, pages 460-461, estimates of Indian Population:

"Estimates by

Governor Stevens	7,356
Lewis & Clark, 1806-1807	42,200
Wilkes 1841	2,650-7,600
Ware & Vavasour, in Hudson's Bay Territories 1849	4,500
Dr. Dart 1851	7,103

(d) Report of the Commissioner of Fisheries, 75th Congress, 1st Session, Senate Document 87, page 18:

"The original Indian inhabitants of the Columbia Basin represented a considerable population, which some authorities estimate at about 50,000 individuals. . . . Indian fisheries are reported along the main Columbia from Kettle Falls to the mouth, as well as on many of the tributaries. Among the famous Indian fishing grounds were Kettle Falls, the falls of the Spokane River, the San Poil, Celilo Falls, Cascade Rapids, and the falls of the Willamette."

"Natives in the vicinity of Cascade Rapids, The Dalles, and Celilo Falls made pemmican of the salmon . . . and used this product in trading with tribes in regions remote from the fishing areas."

"By 1861 commercial fishing on the Columbia River [by white settlers] had become an important industry."

(e) Charles H. Carey, "A General History of Oregon Prior to 1861", page 188:

"At the dangerous portage around the swift water near Celilo was a native Village on the north side, called Wishram, where from time immemorial the Indians have been accustomed to assemble in the salmon fishing season; . . . In the fishing season they numbered, perhaps 3,000, comprising not only Klickitats, who lived here permanently, but numerous representatives from different tribes throughout the country."

On August 26, 1942, the Interior Department attorney Edward Swindell transmitted his letter report, which included affidavits from Columbia River tribal members about their fishery history. At p. 148, Swindell stated the importance of the Celilo Falls (Wyamn) site and the adjacent Washington shore known as Spearfish, Wishram, and Nixluidix. Swindell also cited the major cases supporting the tribes' fishing rights: United States v. Seufert Bros., 233 Fed. 579, aff'd 249 US 194 (1919), and United States v. Brookfield Fisheries, 24 F. Supp. 712. Swindell also noted the number of tribal users of Celilo had greatly increased due to the loss of other tribal fishing sites. At p. 148A, he quoted others' estimates:

"It has been estimated that as many as 1500 Indians are assembled in the area during the height of the season, most of whom reside at Celilo Falls."

Swindell also included among the affidavits the affidavit of Chief Tommy Thompson, an hereditary chief of the Wyam or River People. Key testimony of Chief Tommy Thompson includes the following:

"Affiant deposes that up until the time the Celilo Ship Canal was constructed, the old Indian Village and camping ground was located up near where the present upstream or intake end of the canal comes out of the river, and that the Indians did not move to their present location until after they were forced to move by reason of construction of the canal; that when he was a small boy his parents as well as the other older people told him that Wyam was and always had been a permanent Village and that Indians lived there all the year around; That he was told that prior to the time he was born, there were a large number of Indians living at Wyam, probably as many as 600 or 700 individuals; that of this number about 200 were adults;"

"Affiant further deposes that the fishing platform locations on the banks of the river and on the rocks and islands in the river by the falls, have been used by the local people from as long back as the Indians can remember; that these stations have been handed down from the older to the younger Indians of the same family from generation to generation;"

1.3.3 The Original In-Lieu sites

On July 12, 1939, Major Thoron D. Weaver, Portland District Engineer, wrote Superintendent MA Johnson of the Yakima Indian Agency at Toppenish, Washington, providing a formal response to tribal claims for fishing sites flooded out by Bonneville Dam. The Corps proposal offered the following replacement sites to the tribes:

- (1) Tenino Site: a parcel of land between the river and the Celilo Canal, in the vicinity of the Five-Mile Lock on the canal on the Oregon side, on land owned partly by the Federal Government and partly by Seufert Bros.;
- (2) Big Eddy Site: a state owned site in Klickitat County, Wash., comprising Sec. 36;
- (3) Big White Salmon Site at Underwood, Wash.: a parcel of land on the west bank of the Big White Salmon River, near the Columbia river, to be acquired by related condemnation proceedings against Northwest Electric Company;
- (4) Wind River Site: 20 acres approximately between the Bonneville-Coulee transmission line and the river on the Washington side to be acquired; and
- (5) Herman Creek Site: a parcel of land including 5 acres of privately cleared land and part of an Oregon State hatchery¹⁴.

The letter sought the tribes' formal approval of the sites by tribal council resolutions, prior to submitting the report to higher headquarters .

World War II intervened. In 1945 Congress, by the Rivers and Harbors Act, Public Law 14 of March 2, 1945, authorized appropriations to purchase in lieu sites as follows:

"Columbia River at Bonneville, Oregon: The Secretary of War is hereby authorized, under such terms and conditions as he may deem advisable, to acquire lands and provide facilities in the

"Affiant further deposes that when he was a boy he recalls the Indians lived in houses made of tullees . . . and that the same material was used for their drying sheds; that in some of the large houses as many as five or six families would live and in other instances there would be only one family to a house;"

¹⁴ House Document 531, 81st Congress, 2nd Session, Appendix Q, Legal, Oct. 1, 1948, p. 2951, repeated this list of sites and added Little White Salmon, Wash. to the list. The Flood Control Act of May 17, 1950 authorized House Document 531. Subsequent events changed the actual in-lieu sites provided. Lone Pine (downstream of The Dalles Dam) was substituted for Tenino. Cascade Locks was substituted for Herman Creek due to Oregon State fish hatchery on Herman Creek next to the proposed fishing site. Big Eddy was abandoned due to flooding problems. Big White Salmon (Underwood, Wash.), Little White Salmon (Cook, Wash.), and Wind River (Carson, Wash.) were built as planned. The tributary rivers adjacent to these sites are restricted from further development by various limitations in the Columbia Gorge National Scenic Area Act. 16 USC 544 ff., especially 544k(b) and 544o. House Document 531 also on the same list and page identified Celilo Falls, Ore. and Wash.; Klickitat River, Wash.; Spearfish, Wash.; and White Bluffs, Wash. as "usual and accustomed fishing places" that development of proposed dams (including The Dalles and John Day Dams) would impact. The Klickitat River site is now within the Columbia Gorge National Scenic Area, 16 USC 544 ff., and the Klickitat River is partially within Yakama Reservation borders, putting it under 16 USC 544k(b) restrictions. White Bluffs is at Priest Rapids Dam, a PUD dam. Celilo Falls and Spearfish were inundated by The Dalles Dam, discussed *infra*. Four Yakima River fishing sites at Horn, Prosser, Wapate, and Sunnyside Diversion Dams were also listed as fishing sites to be impacted by development by others.

States of Oregon and Washington to replace Indian fishing grounds submerged or destroyed as a result of the construction of Bonneville Dam: *Provided*, That not to exceed \$50,000 may be expended for this purpose from funds heretofore or hereafter appropriated for maintenance and improvement of existing river and harbor works: *Provided further*, That such lands and facilities shall be transferred to the Secretary of the Interior for the use and benefit of the Indians, and shall be subject to the same conditions, safeguards, and protections as the treaty fishing grounds submerged or destroyed;”

For a variety of reasons, progress on acquiring, constructing, and transferring the in lieu sites was slow. Eventually, by 1963, five in lieu sites were acquired, constructed, and transferred to BIA.¹⁵

1.3.4 The Indian Claims Commission Act

On August 13, 1946, the Indian Claims Commission Act (ICCA), 25 USC 70 ff., c. 959, Sec. 1, 60 Stat. 1049, became law¹⁶. The ICCA provided a forum and relief mechanism

¹⁵ BIA’s Les McConnell prepared a summary of the history of the in lieu sites process. Key facts from this summary include the following:

In 1950 the Corps instituted litigation to remove a logging company that had obstructed the Big White Salmon site. The Corps suggested BIA take the site, the balance of the money, and complete the program. BIA refused.

In 1951 the State of Oregon continued its opposition to the Herman Creek site adjacent to the state fish hatchery. The Corps also exhausted the appropriations for the in lieu sites, and told the tribes that more appropriations were needed. At a meeting with the intertribal Celilo Fish Committee, resolutions were adopted including the following last paragraph:

"Be it resolved that the Fish Committee feels that the War Department should replace the living quarters and drying shacks, sheds that were destroyed by the Bonneville Pool in addition to other facilities agreed upon."

In 1957 the original 2 in-lieu sites came under DOI regulation. In March 1959, the Fish Committee met and divided up maintenance responsibility: (1) The Yakama were given responsibility for Big White Salmon in lieu site, and (2) Lone Pine was assigned to the Warm Springs and Umatilla jointly. In September 1959, the Corps was about to refer the matter back to Congress when agreement was reached on Little White Salmon and Wind River sites.

Throughout 1957-1960, the sites deteriorated. In September 1960 the Area office of BIA did a survey of the sites, and distributed its report and photos to the tribes and affected federal agencies. A Nov. 22, 1960 conference resulted in the tribes accusing the Corps of not doing its job. The Corps sent a financial summary to the tribes dated April 19, 1961, which showed a balance of \$75,327.62 in the in lieu site appropriation. Discussions followed through June 12, 1962, when finally the Yakima joined the other tribes in agreeing to the Government acquiring the Lower Cascade Lock site. The Corps proceeded to condemn 1.6 acres at Cascade Locks.

The final Cascade Locks site was acquired in 1963 and constructed in 1963, with work completed in December 1963. There was a balance of \$40,873 left in the in lieu appropriation. It was agreed between BIA and the Corps to use the balance of the money to improve existing sites.

In 1964-1966, health conditions deteriorated at most of the sites. Finally in 1966, the tribes agreed that the balance of the \$40,873 could be used for site improvements in lieu of acquiring additional sites. The summary of the site acquisition program in 1966 was as follows:

Big White Salmon, Wash.	4.19 acres	(1942 acquisition)
Little White Salmon, Wash.	3.14 acres	(1959 acquisition)
Lone Pine, Oregon	9.0 acres	(1956 acquisition)
Wind River, Wash.	23.6 acres	(1959 acquisition)
Cascade Locks, Oregon	1.6 acres	(1963 acquisition)

¹⁶ Since the statute is now omitted from the USCA, the key jurisdictional section is recorded here:

for all tribal claims that arose on or before its effective date, August 13, 1946. It also codified the Indian trust responsibility of the United States with regard to claims arising under its jurisdiction. The four treaty fishing tribes all succeeded in getting relief for pre-August, 1946, treaty-fishing injuries under the act¹⁷.

1.3.5 The Dalles Dam

Corps planning for The Dalles Dam originated in the 1930's, but it was the 1948 Vanport Flood that precipitated speedy authorization¹⁸. The result was that the authorization document, House Document 531, 81st Congress, 2d Session, March 20, 1950, an 8-volume encyclopedia of information, was transmitted to Congress within a year and authorized by the Flood Control Act of May 17, 1950. As had occurred with Bonneville Dam, the speedy authorization left most of the negotiations over compensation for adverse impacts to tribal treaty fishing rights until after the Congressional authorization. However, Congress had authorized a number of tribal compensation measures in House Document 531, including the following:

Paragraph 652 provides in part:

"Sec. 2 The Commission shall here and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

- (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
- (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or equity, or any other ground cognizable by a court of equity;
- (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
- (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

[The rest of the section dealt with what was allowable as a deduction to the United States and what wasn't.]

Section 24 of the act gave the Court of Claims jurisdiction to hear any claims that arose after the date (August 13, 1946) of the act. The Indian Claims Commission had its tenure extended several times by Congress till its final dissolution around 1978 - and the transfer of all pending cases to the Court of Claims.

¹⁷ Records of ICCA relief to the tribes can be obtained from the National Archives in Washington, DC, and the Oregon Historical Society in Portland, Oregon.

¹⁸ On Sunday, Memorial Day, May 30, 1948, Oregon's second largest city, Vanport, Oregon, was destroyed by flooding, about 5 hours after the local federal officials, including the Portland District Engineer, assured the residents that they were safe. The political embarrassment to President Truman's reelection campaign, coming between the May Oregon primary and the June California primary, caused the President to direct the Secretary of War to fix the flooding problem on the Columbia River immediately. The Secretary of War directed the Corps to complete its flood control plan and deliver it to Congress as fast as possible.

“The most important Indian fishing sites remaining on Columbia River are at or in the immediate vicinity of Celilo Falls. There are now approximately 5,000 Indians who claim fishing rights and fish at the sites, first, for subsistence purposes, and secondly, for commercial purposes – that is, selling fish wholesale to canneries and retailing fresh fish to local purchasers.

Construction of a dam at The Dalles site would cause inundation of Indian lands, partial inundation and disruption of Indian villages at Celilo, Oreg., and Spearfish, Wash., and inundation of the ancient and accustomed fishing sites at and near Celilo Falls. Certain lands are owned in fee by individual Indians, but the patents are held in trust by the tribes and the Bureau of Indian Affairs, Department of Interior. Other lands occupied by the Indians are in the public domain, but the Bureau of Indian Affairs and other agencies recognize Indian squatter rights on these lands.” [at p. 276-277]

Paragraph 673 provides :

“ 673. Special considerations. – As a solution to the Indian fishery problem and restitution for the disruption of the Indian fishing grounds, The Dalles Dam project will include the following provision and items:

Inundated lands and properties which cannot be replaced will be purchased.

(b) An allowance will be made for construction of a new Indian Village satisfactory to the Indians and the Bureau of Indian Affairs.

(c) Provision of suitable natural or artificial alternative fishing sites below the dam.

(d) Further restitution and dispensation as deemed fitting and proper by the Congress.” (at p. 281)

The primary focus of compensation was on Celilo Falls, which was to be inundated, and the neighboring Indian villages and residences. In 1952, Portland District prepared a Supplemental Report for the Chief of Engineers and Congress on the matter¹⁹. In 1953,

¹⁹ 13 "Special Report on Indian Fishery Problem, The Dalles Dam, Columbia River, Oregon -Washington", dated March 10, 1952. The report supplements considerably the data in House Document 531 ("the 308 report"). The report includes useful facts for current discussions on Celilo Village:

At p. 4, the report notes that approximately 5000 Indians were entitled to fish at Celilo.

At p. 65, 25 allotments are identified, as well as 168 acre public domain tract associated with Yakama Tribe (Tract B-225). At page 66, the report states that 21 parcels of Indian lands totaling 1428.11 acres are within the project.

At p.71, the report notes that the New Village at Celilo was completed and occupied in December, 1949. The "New Village" included 10 family dwelling units, 5 bathhouses, 60 slabs for erecting tents on, and 4 dormitory-type buildings intended as drying sheds but used as housing.

At p. 72, the "Original Celilo Village", which was inundated by The Dalles Dam in 1958, comprised 22 homes and shacks. Twenty-four families resided year-round, despite the lack of water or sewer facilities. Some of the old Village was on private land and much on federal land, transferred from the Army (War) Dept. to the Indian Service (BIA) by Public Law 713, 70th Congress (S.4036). (Act of Feb. 9, 1929 above). On the "1929 transfer Property", 11 year-round homes and 34 other shacks and drying sheds were constructed and in use when this 1952 report was prepared. (p. 72, report).

At p. 73, it was noted that railroad relocation construction would evict 14 families and remove some 60 buildings in 1955, whereas most of the rest of the Native American dwellings and buildings would not be affected by the dam construction until the pool was raised (1958).

administrative review by the Corps determined that then-existing law provided no compensation for lost fishing rights of individual Native Americans but only for the tribes' lost rights.

Negotiations with the tribes over compensation for Celilo Falls dragged out for several years, with the need for special language to be included in several years' appropriations laws²⁰. In addition, the need to relocate some Indian families immediately out of the way

At p. 73, it was noted that Spearfish had about 50 buildings that would be destroyed and less than ten families who were permanent residents.

The report also discusses then efforts at assimilation (1952 was in midst of tribe derecognition efforts) and also tribal claims pending before Indian Claims Commission (pre-Aug. 13, 1946 claims).

²⁰ Congress followed upon House Document 531 by authorizing appropriations for tribal compensation.

(a) The Civil Functions Appropriations Act of 1954, July 27, 1953, authorized the expenditure of Construction General funds as follows:

"Provided further, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the government incident to the construction, operation, or maintenance of the Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

(b) The Civil Functions Appropriations Act of 1955, June 30, 1954, authorized the expenditure of Construction General funds as follows:

"Provided further, that not to exceed \$750,000 of the funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the government incident to the construction, operation, or maintenance of the Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

(c) The Act of June 8, 1955, Public Law 62, amended the dollar amount of the March 2, 1945 authorization for in lieu sites from \$50,000 to \$185,000.

(d) The Public Works Appropriation Act of 1956, July 15, 1955, authorized the expenditure of Construction General funds as follows:

"Provided, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the government incident to the construction, operation, or maintenance of the Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

"Provided further, That not to exceed \$210,000 of funds appropriated herein may be transferred to the Secretary of the Interior for the relocation of those permanent resident Indian families in The Dalles project

of construction also generated special language in the Public Works Appropriations Act of 1955.

When negotiations were finally completed, a rate of \$3,751.94 per Indian claimant was agreed upon for the loss of commercial fishing rights, with \$15,007,760 being paid to the Yakama Tribe (based upon 4000 tribal fisher-persons) and a total of \$26,888,395 to all four tribes²¹.

who were domiciled within the project area on May 17, 1950, and to acquire such lands as may be necessary therefor on the condition that the Secretary of the Interior transfer to the control of the Secretary of the Army for use in connection with The Dalles Dam project, Oregon, an irregular shaped parcel of land containing in the aggregate approximately five and five-tenths acres located in lot 1 of section 17 and in lots 1 and 2 of section 20, township 2 north, range 15 east, Willamette meridian, Oregon, being a portion of the land previously transferred to the Secretary of the Interior by the Secretary of the Army pursuant to the Act approved February 9, 1929 (45 Stat. 1158). Title to the lands acquired by the Secretary of the Interior for the above stated purpose shall be taken in the name of the United States in trust for the individual Indian for whose benefit it is acquired; any such trust may be terminated by the Secretary of the Interior by conveyance of a fee simple title to the Indian or his heirs or devisees, without application therefor, when in the judgment of the Secretary of the Interior the Indian or his heirs or devisees are capable of managing their own affairs. In carrying out such relocations, the Secretary of the Interior may enter into a contract or contracts with any State or political subdivision thereof."

(d) The Public Works Appropriation Act of 1957, July 2, 1956, authorized the expenditure of Construction General finds as follows:

"Provided, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the government incident to the construction, operation, or maintenance of the Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

(e) The Public Works Appropriation Act of 1958, August 26, 1957, authorized the expenditure of Construction General funds as follows:

"Provided, That funds appropriated herein may at the discretion and under the direction of the Chief of Engineers be used in payment to the accounts of the Confederated Tribes of the Yakima Reservation; the Confederated Tribes of the Warm Springs Reservation; the Confederated Tribes of the Umatilla Reservation; or other recognized Indian tribes, and those individual Indians not enrolled in any recognized tribe, but who through domicile at or in the immediate vicinity of the reservoir and through custom and usage are found to have an equitable interest in the fishery, all of whose fishing rights and interests will be impaired by the government incident to the construction, operation, or maintenance of the Dalles Dam, Columbia River, Washington and Oregon, and must be subordinated thereto by agreement or litigation."

(f) The Public Works Appropriation Act, 1959, Sep. 2, 1958, Public Law 85-863, 72 Stat. 1572, contained the identical appropriation act language stated above in the 1958 Public Works Appropriation Act. This was the final year of this appropriations rider.

²¹ NEZ PERCE TRIBAL RIGHTS IN THE MID-COLUMBIA TREATY FISHERY AND CELILO FALLS When the Lewis and Clark Expedition traversed down the Snake and Columbia Rivers in October – November 1805, during the fall fishing season, two Nez Perce chiefs (" Twisted Hair" and

Tetoharsky) accompanied them as friendly escorts, introducing them to successive tribes and bands as the Expedition moved down river from the mouth of the Clearwater River on the Snake River to below Celilo Falls, where the chiefs took their leave, saying that “their nation extended no further down the river than those [Celilo] falls.” [Journals of Lewis and Clark, editor Bernard de Voto, Houghton Mifflin Co., Boston, 1953, pages 242-267.] The 1889 Gordon report states concerning the Celilo Fisheries and tribal rights there:

“The lands embracing these fisheries are now owned by F. A. Seufert and T. H. Tafe . . . The Indians of the Warm Springs reservation and the non-reservation Indians originally belonging to said reservation, were formerly accustomed to take fish at these fisheries, but are now practically excluded from doing so by the whites and upon the same grounds upon which they were excluded from ‘The Dalles fisheries’.”

Gordon’s data indicates that there was an extensive period of history, after the 1855 treaties were signed, in which the treaty fishing rights were obstructed by white men. The Seufert of Gordon’s report is the same Seufert that was the party to the 1918 Supreme Court decision, upholding the treaty fishing rights and barring their interference by white men. The simple mathematics of the timing of Gordon’s report and the subsequent litigation is that from around as early as 1855 until sometime around 1920 all of the tribes’ treaty fishing rights at Celilo Falls and vicinity on the Oregon side of the Columbia River were obstructed by white men. Finally, when the Portland District did its own investigation of the matter in the 1947-1956 period, it was generally agreed that the Nez Perce had returned to the Celilo Falls fishing site, like the other tribes’ members. At a meeting on December 5, 2001 at the regional BIA offices in Portland, Jay Minthorn, a Umatilla Council member and CRTFAS task force member, stated that he remembered knowing and seeing the Nez Perce camping sites at Celilo Falls before the District flooded the falls in 1957-1958 with The Dalles Dam. In connection with the proposed CRTFAS project at Celilo Village, none of the leadership of the other three tribes has taken exception to the fact that the Nez Perce Tribe has members with traditional fishing rights at the site.

The issue has been extensively debated within the government over the years. In 1933, in United States v. Brookfield Fisheries, 24 F. Supp. 712 (D. Ore., issued in 1933, published in 1938), Judge Fee made the single statement that “The testimony is not convincing that the Nez Perce ever fished there.” But the judge also made other statements that undermined the objectivity and credibility of the opinion, characterizing the Indian witnesses as “members of a moribund and conquered race, mindful of ancient wrongs, and tempted to secure by guile from the overmastering force of the white man a portion of their ancient heritage.”

BIA in its current published regulations, 25 CFR 248.2, states “The in-lieu fishing sites are for the benefit of the Yakima [Yakama], Umatilla, and Warm Springs Indian Tribes, and such other Columbia River Indians, if any, who had treaty fishing rights at locations inundated or destroyed by Bonneville Dam, to be used in accordance with treaty rights. The use of the sites is restricted to such Indians; however, this shall not preclude the use of camping areas on the sites by the families of such Indians.” The Nez Perce have access to fish all of the Zone 6 treaty fishery (the Bonneville, The Dalles, and John Day Dams’ reservoirs).

For Celilo Falls area and up river from there, the final agency and Congressional decisions recognized Nez Perce rights. In 1947 when Congress identified the beneficiary tribes at Celilo Village, no mention of the Nez Perce Tribe was made. In 1953 the Senate Appropriations Committee heard testimony on the subject from the tribes and the then Portland District Engineer, Col. Lipscomb, whose testimony stated that the matter was still under agency review at that time. So Congress in the appropriations language used to authorize tribal compensation for fishing rights at Celilo Falls in fiscal years 1954-1959, identified the three other tribes by name and added “other recognized Indian tribes” to include the Nez Perce if the agency so recommended. [These appropriation acts are provided in another footnote.] The Nez Perce Tribe submitted its final legal defense of its rights in a Memorandum of June 1, 1955, stating among other things that the 1933 Brookfield decision was the result of federal agency action in preventing the Nez Perce evidence ever being presented in court. Although there are documents in the agency file supporting both possible conclusions, the final agency decision was the July 19, 1956 agreement with the Nez Perce Tribe to pay them \$2,800,000 – on the same per capita basis as the other three treaty-fishing tribes – for the loss of their commercial fishing rights at Celilo Falls as a result of the falls inundation by The Dalles Dam. This agreement was approved by the Chief of Engineers for the Corps and by the Commissioner of Indian Affairs W. Barton Greenwood and by Secretary of Interior Fred A. Seaton for DOI. Congress subsequently authorized and appropriated funds to pay the settlement. The result is that, although the 1947 act did not

2. THE CRTFAS PROGRAM

The CRTFAS program includes a number of remedial features authorized by statute. The history and purpose of Title IV (the CRTFAS Act²²) is stated in Senate Report (SR) 100-577, Sep. 30, 1988, as follows:

create any residential rights for the Nez Perce Tribe at Celilo Falls, the 1956 compensation agreement did recognize their treaty fishing rights there. Furthermore, absent Congressional or judicial action changing the situation, this agency determination is considered the final decision on the matter for the Corps. It is further noted that not only has the CRTFAS Act specifically included the Nez Perce Tribe, but so has the United States v. Oregon treaty fishing rights litigation on the Columbia River. See the District Court of Oregon decision at 302 F. Supp. 899 (1969) in which the Nez Perce Tribe is an intervening party. The CRTFAS BIA regulations, 25 CFR 247.3, specifically include the Nez Perce Tribe also.

At the crux of the dispute, it would appear that those who would argue against Nez Perce rights fail to appreciate that the tribes' concept of real property ownership is collective ownership, often called Indian title. Under this concept, one only looks to whether significant numbers of a tribe used a site, without trying to determine individual rights under English common law. The treaty fishing rights are also unique in that it has always been taken for granted that they are shared, intertribal, collective rights. Exclusive use by one tribe is not a condition of having a valid treaty right. Nor are ceded lands a treaty requirement for fishing rights. From the outset, it was recognized that the fishing rights were separate from other Native American rights. While the historical record shows that the other three tribes' members, residing closer to Celilo Falls, also used the falls in greater numbers, the concept of shared, collective ownership among the four tribes allows for recognition of Nez Perce fishing rights even though fewer members of the Nez Perce Tribe actually use the Celilo Falls fishing area. From a cultural standpoint, it is noted that the four tribes share a similar Indian language family and culture, which reinforces the long centuries of intermarriage and shared use of Mid-Columbia region resources.

²² The text of the CRTFAS Act, as amended (with amendments in *italics*) is as follows:

“Sec. 401(a) All federal lands within the area described on maps numbered HR2677 sheets 1 through 12, dated September 21, 1988, and on file in the offices of the Secretary of the Interior, the Secretary of the Army, and the Columbia River Gorge Commission shall, on and after the date of enactment of this Act, be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities for members of the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes and Bands of the Yakima Indian Nation.

Sec. 512 of WRDA 1996, PL 104-304, Oct. 12, 1996, 110 Stat. 3762 replaced 401(a) as follows:

“ *Sec. 401 (a) EXISTING FEDERAL LANDS –*

- (1) IN GENERAL -- All Federal lands that are included within the 20 recommended treaty fishing access sites set forth in the publication of the Corps of Engineers entitled ‘Columbia River Treaty Fishing Access Sites Post Authorization Change Report, dated April 1995’; and*
- (2) BOUNDARY ADJUSTMENTS – The Secretary of the Army, in consultation with affected tribes, may make such minor boundary adjustments to the lands referred to in paragraph (1) as the Secretary determines are necessary to carry out this title.”*

(b) Notwithstanding any other provision of law, the Secretary of the Army shall

- (1) identify and acquire additional lands adjacent to the Bonneville Pool from willing sellers until such time that at least six sites have been acquired adjacent to the Bonneville Pool for the purpose of providing access and ancillary fishing facilities for the members of the Indian tribes referred to subsection (a); and

“Title IV of H.R. 2677 was added by the Committee in markup. Offered by Senator Evans, it provides for the administrative transfer of Federal lands at certain sites along the Columbia River to the Department of the Interior for the use of Indian treaty fishermen to attain an equitable satisfaction of the United States’ commitment to provide lands for Indian treaty fishing in lieu of those inundated by flooding caused by the construction of the Bonneville Dam.

* * * * *

In the 1930’s the United States constructed the Bonneville Dam on the Columbia River which caused the inundation of approximately 40 of the Indians’ traditional fishing sites and severely restricted access to much of the river. In 1939 a settlement agreement between the treaty Indians and the United States provided that the United States would

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- (2) improve the lands referred to in subsections (a) and paragraph (1) of subsection (b) and maintain such lands until such time as the lands are transferred to the Department of the Interior for the purpose of maintaining the sites. Such improvements shall include, but not be limited to, camping and park facilities to the same standards as those provided in the National Park system; all weather access roads and boat ramps; docks; sanitation; fish cleaning, curing, and ancillary fishing facilities; electrical and sewage facilities; and landscaping; and
 - (3) make improvements at existing sites, including but not limited to dredging at the site at Wind River, Washington, and constructing a boat ramp on or near the site at Cascade locks, Oregon.
- (c) The Secretary of the Army shall treat the costs of implementation of paragraphs (2) and (3) of subsection (b) as project costs of the Army Corps of Engineers Columbia River projects, and such costs shall be allocated in accordance with existing principles of allocating Columbia River project costs. Funds heretofore and hereafter appropriated to the Secretary of the Army for maintenance and development of Columbia River projects may be used to defray the costs of accomplishing the purposes of this Act.
- (d) There is hereby authorized to be appropriated a sum not to exceed \$2,000,000 to implement the purposes of subsection (b)(1).

WRDA 2000, PL 106-541, Dec. 11, 2000, amended the dollar amount in 401(d) to \$4,000,000.

- (e) The Secretary of the Interior shall be vested with the right of first refusal, after consultation with the Indian entities in subsection (a), to accept any lands adjacent to the Columbia River within the Bonneville, Dalles, and John Day Pools now owned or subsequently acquired by any federal agency and declared to be excess lands or otherwise offered for sale or lease by such federal agency, and upon such acceptance, such federal agency shall transfer such lands to the Secretary for the purpose of Indian treaty fishing: Provided however, that total acreage of sites provided under this section adjacent to Bonneville Pool of the Columbia River not exceed three hundred sixty acres.
- (f) Nothing in this Act shall be construed as repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or Executive order pertaining to any Indian tribe, band, or community.”

Sec. 15, PL 104-109, Feb. 12, 1996, 102 Stat. 2944-2945, added subsection 401(g) to PL100-581:

“ (g) *The Secretary of the Army is authorized to transfer funds to the Department of the Interior to be used for purposes of the continued operation and maintenance of sites improved or developed under this section.*”

provide more than 400 acres of lands at six described sites along the Columbia in lieu of those sites inundated. To date, the United States has provided five sites totaling approximately 40 acres. These sites are currently referred to as 'in-lieu' sites. Subsequently, more dams were built on the Columbia, including Dalles, John Day, and McNary, causing the inundation of more fishing sites.

* * * * *

In 1973, as a result of litigation initiated by treaty tribes after the United States proposed a project to alter the water levels of the pools behind the dams, a settlement Order was entered by the U.S. District Court of Oregon. The judgment and order noted that the Secretary of the Army and the Secretary of the Interior agreed to propose legislation providing for the acquisition and improvement of additional sites. The agreement of the two Departments to propose this legislation was the key to attaining the tribes' consent in the court order and project. Legislation was forwarded to the Congress in 1974, but no action was taken by the Congress at that time, and no legislation has been forwarded since that time.

Presently, all five existing in-lieu sites are within the Bonneville Pool, the demography of which forces access to these sites and those upriver in the John Day, Dalles, and McNary Pools through private lands and public parks, increasing tensions between the Indians and the general public and taxing public park facilities which are not equipped for Indian fishing treaty activities. Highways, railroads, and fences further hinder access. Also, a phenomenal recent influx of windsurfing or boardsailing in the Columbia Gorge has increased overcrowding and tensions. Finally, facilities at the existing in-lieu sites are in dire need of repair.

Title IV of H. R. 2677 provides a vehicle for the United States to satisfy its commitment to the Indian tribes which exercise fishing rights on the Columbia River and whose traditional fishing places were inundated by flooding caused from the construction of the Bonneville Dam. The provision designates certain sites and authorizes the acquisition of additional sites from willing sellers to allow more and better access to the river for Indian and non-Indian fishermen and to ease overcrowding of access sites by fishermen and recreationists along the Columbia River." (SR 100-577, 100th Cong., 2nd Ses., p. 21-22)

The section by section analysis of SR 100-577 states with regard to Sections 401(e) and (f) as follows:

"Section 401(e) grants the Secretary of the Interior the right of first refusal to accept any lands that any Federal agency of the United States makes available, provided that the total acreage of lands provided as in-lieu sites under subsections (a), (b), and (e) not exceed 360 acres, so that the total acres of in-lieu sites in the Bonneville Pool, including existing sites [40 acres] not exceed 400 acres.

The Committee understands that the Corps of Engineers is currently undergoing a master planning process and that as a result of that process, some of the lands the Corps now owns may be determined to be no longer needed for project purposes. Other Federal agencies often take similar planning exercises. If, after consultation with the named tribes, the Secretary of the Interior determines that any lands that would be declared excess would be suitable for fishing sites, he should take the necessary steps to inform the agency and the lands should be designated as new in-lieu sites and immediately managed by that agency as fishing sites for the named tribes, improved by the Department of the Army, and transferred to and maintained by the Department of the Interior.

Section 401(f) provides that nothing in this Section shall affect any claims the named tribes

or any other tribes may have concerning the Dalles, John Day, McNary Dams or any other projects on the Columbia River except the Bonneville as provided for in subsection (e). This subsection also provides that this Section does not affect the legal status of the existing in-lieu sites and further assumes that the legal status of the newly provided in-lieu sites will be entirely consistent with those of existing sites.”

2.1 Status Of CRTFAS Program

The Section 401(a) List Sites. Senator Evans’ staff organized a tour of the Columbia Gorge to look at potential sites, and prepared a list of about 30 sites²³. This list was then reviewed and amended by BIA and the 4 treaty tribes. It was then used by Senator Evans as Section 401(a) list. Because of the haste in creating the statutory list, SR 100-577 provided that:

“The maps to which the Act refers have been prepared by the Army Corps of Engineers, at the request of the Committee, in conjunction with the named Indian tribes. It is the intent of the Committee that the lands be managed by the Federal agency currently holding them for the purpose of access to fishing sites, and that improvements to the sites be made, from the time of the passage of this legislation. In the event that privately owned lands appear to be represented as sites on the numbered maps, only Federally owned lands are subject to this subsection.”

None of the original listed sites were able to be developed as originally described. With the concurrence of the tribes and BIA, the District submitted a PAC report in April, 1995 that yielded the statutory authority in Sec. 512 of WRDA 1996 to amend the original listed sites²⁴. Once this authority was received, construction of the original amended list of sites began, and is nearing completion.

²³ SR 100-577 included in the body of the report a letter from BG Patrick Kelly, then Corps Director of Civil Works, to Senator Evans, concerning additional fishing sites. BG Kelly identified the need for legislative authority to provide 3 types of sites: (1) transfer of existing Corps project lands on a list of proposed sites developed through joint field trips in the Columbia Gorge; (2) acquisition of new non-federal lands; and (3) acquisition of additional lands (federal and non-federal) to complete the proposed sites on the new site list. BG Kelly’s letter also advised the Senate that the Corps needed more time to prepare a recommended list of Corps sites for fishing access use. But, Senator Evans, the sponsor of the measure, was in his final year as a Senator, and could not wait for the Corps to complete a study.

²⁴ The details of the Section 512 changes in the original 23-site list are as follows.

a. SCOPE CHANGES:

Four sites were abandoned – two because the Federal Government didn’t own them; and two because they were unbuildable. Boardman was politically unbuildable because it took the existing municipal water supply for Boardman. Cliffs was unbuildable because no boat facilities were possible as its name suggests.

b. LOCATION CHANGES:

With exception of the two sites not owned by the Federal Government and two sites where the geography permitted no construction or improvements, changes were proposed for all remaining 19 sites. The changes included adding land and swapping sites. Multiple problems required the changes. Acreage calculation errors left inadequate space to develop some sites. Many sites had conflicts with other facilities. Other sites lacked any suitable areas for docks and boat ramps. Many sites had access problems or lacked practical access at all. And other sites included private lands that had to be deleted.

An entirely new site, taken from undeveloped lands at Maryhill State Park (owned by Corps; leased by State), was substituted for Cliffs. And the Boardman site was replaced with expansion of the Faler site.

c. ACREAGE CHANGES:

Large changes were approved here:

Improvements to existing in lieu sites. The improvements to the existing five in-lieu sites, directed by Sec. 401(b)(3), were among the first project features completed.

Acquisition and construction of new sites. The district is still in the process of acquiring and constructing additional new sites under the authority of Sec. 401(b)(1) and (d). Some have been acquired and completed. Others are still in the real estate acquisition process.

Transfer and improvement of other acquired lands under Sec. 401(e) This authority is also still being used. Walla Walla District has proposed the transfer of some of its Washington shore riparian lands to the CRTFAS program in settlement of litigation with the Yakama Indian Nation. Portland District is also proposing to transfer surplus lands formerly used for the Bonneville Area Office. And the Celilo Village site at issue has also been proposed for Sec. 401(e) treatment by BIA.

Implementation of Sec. 401(f) The Sec. 401(f) savings clause has protected tribal and individual Native American rights from other sources. In-lieu sites' Native American

SITE	ORIGINAL	REVISED
Celilo	11.1 acres	7.6 acres
Preacher's Eddy	3.6	5.0
Roosevelt	3.3	5.0
Boardman	4.6	none
Faler Road	8.4	6.9
Avery	1.8	3.1
Cliffs	8.6	none
Maryhill	none	9.9
North Shore	7.5	5.5
LePage	2.8	1.9
Goodnoe	2.7	5.0
Pasture Point	12.0	53.4
Rock Creek	5.7	5.0
Sundale	6.5	1.9
Moonay	10.3	0.9
3-Mile Canyon	5.7	33.2
Pine Creek	4.6	6.9
Alder Creek	5.7	2.6
Crow Butte	28.1	21.7
TOTALS	133.0 acres	178.9 acres

There is no published legislative history on the Sec. 512 amendment. There is no mention of the contents of Section 512 in the November 9, 1995 Senate Report 104-170 on the Senate WRDA 1995 bill (S. 640).

Only the final conference report (House Report 104-843 of September 25, 1996) notes at page 164:

“Sec. 512 Columbia River Treaty Fishing Access

Senate Sec. 343, no comparable House section – House recedes.”

The oral legislative history is discussed elsewhere.

residents, for example, have had their residential rights under the Sohappy v. Hodel, 911 F.2d 1312 (9th Cir. 1990) respected in work done at those sites²⁵.

3. THE PROPOSED CELILO VILLAGE PROJECT

Following years of success at other sites, in 1999 the four tribes proposed to the Corps CRTFAS project team that the Celilo Village site be added to the CRTFAS program in order to accomplish badly needed improvements at the site. The tribes specifically requested that a 1999 draft plan drawn up by the CTUIR be implemented. The Corps CRTFAS project team undertook an examination of the matter. Among the matters considered in the investigation are the following:

(1) The Celilo Village site in issue was acquired pursuant to the Interior Department 1948 Appropriations Act of July 25, 1947 authorization²⁶.

“[S]uch sum as may be necessary to purchase in the name of the United States in trust thirty-four and one-half acres of land at Celilo Falls, Oregon, for the use of the Yakima Indian Tribes, the Umatilla Indian Tribes, the Confederated Tribes of the Warm Springs Reservation, and other Columbia River Indians affiliated with the aforementioned tribes and entitled to enjoy fishing rights at their old and accustomed fishing sites at or in the vicinity of Celilo Falls on the Columbia River.”

²⁵ Sohappy held that the treaty right to maintain structures at usual and accustomed fishing areas applies at the Cook’s in-lieu site purchased pursuant to the Rivers and Harbors Act of March 2, 1945., 58 Stat. 22. Until the Dalles Dam flooded them out, over 1000 Native Americans resided permanently at the Celilo Falls site alone under the 1855 treaties. The June 13, 1950 Congressional Report #30, Compilation of Material relating to Indians of the United States, went so far as to characterize the Celilo Falls tribal residential area as “Celilo Reservation, Oregon” under the Yakima Indians listing on page 550. Following the flooding of the Celilo fishery by the Dalles Dam’s operational start in 1958, the number of tribal fishers at Celilo dwindled. At the present time only about 14 households reside at Celilo Village.

²⁶ The earliest statutory recognition and authorization for tribal residency at Celilo Village was in 1929. Congress in 1929 returned the use of the 1894 portage railway lands in the “old” Celilo Village (Celilo Park CRFTAS site) by the Act of Feb. 9, 1929, Public Law 713, in which Congress authorized the Secretary of War (Army):

“to transfer to the control of the Secretary of the Interior, for the use and benefit of certain Indians now using and occupying the land as a fishing camp site, two irregular shaped parcels of land containing in the aggregate approximately seven and four-tenths acres”

In the Public Works Appropriations Act, July 15, 1955, these lands were taken back for The Dalles Dam in exchange for other relocation benefits:

“*Provided further*, That not to exceed \$210,000 of funds appropriated herein may be transferred to the Secretary of the Interior for the relocation of those permanent resident Indian families in The Dalles project who were domiciled within the project area on May 17, 1950, and to acquire such lands as may be necessary therefor on the condition that the Secretary of the Interior transfer to the control of the Secretary of the Army for use in connection with The Dalles Dam project, Oregon, an irregular shaped parcel of land containing in the aggregate approximately five and five-tenths acres located in lot 1 of section 17 and in lots 1 and 2 of section 20, township 2 north, range 15 east. Willamette meridian, Oregon, being a portion of the land previously transferred to the Secretary of the Interior by the Secretary of the Army pursuant to the Act approved February 9, 1929 (45 Stat. 1158). Title to the lands acquired by the Secretary of the Interior for the above stated purpose shall be taken in the name of the United States in trust for the individual Indian for whose benefit it is acquired;”

Although not explicit, the authorization was for residential use by permanent residents, unlike the 1945 in-lieu sites. BIA worked with the Corps to provide permanent housing at the site. (See discussion below.)

(2) Designation of the Celilo Village site as a CRTFAS site will formally add the Nez Perce Tribe to the list of trust beneficiaries at the Celilo Village site, as the Nez Perce is a specifically listed tribal beneficiary of the CRTFAS Act. This is not a significant change, as this change only recognizes their temporary fish camp rights at the site. No permanent residential rights for the Nez Perce Tribe or any other current non-permanent-resident at Celilo Village are being created by the proposed project. The Portland District Engineer, after having the rights of the Nez Perce reviewed in connection with compensation studies for the impacts of The Dalles Dam in the late 1940's and early 1950's, recommended inclusion of the Nez Perce tribe in Celilo Falls treaty fishing compensation. Congress agreed and appropriated money for the Corps' financial settlements with all four treaty tribes under the 1955 Public Works Appropriation Act and other appropriation acts for The Dalles Dam. Thus there is nothing new for the Corps in recognizing Nez Perce treaty fishing rights at Celilo Village. The Corps and Congress in the July 19, 1956 Celilo Falls Nez Perce compensation agreement recognized the Nez Perce Tribe as being effectively included in the 1948 Act as

“other Columbia River Indians affiliated with the aforementioned tribes and entitled to enjoy fishing rights . . . in the vicinity of Celilo Falls.”

Nez Perce Tribe members have similarly been recognized in other Corps treaty fishing activities as having equal rights with the other three listed tribes at The Dalles Dam. The official recognition of the Nez Perce Tribe's treaty fishing rights in the CRTFAS Act was just a confirmation by Congress of the status quo of many centuries.

Historically treaty fishing rights were always considered separate and apart from ceded lands issues. Seufert Bros., supra, specifically affirmed that Yakama tribal treaty fishing rights existed on the Oregon shore on ceded lands of the Warm Springs and Umatilla tribes.

(3) In 1947, the Corps provided the original Celilo Village housing from war-surplus stockpiles in the Pacific Theater. This housing had sat through rainy tropical weather too long and was badly warped and rusted. As a result, the houses leaked badly.

In 1955 better quality housing was provided, but it was grossly inadequate for the numbers of Native American families living at Celilo Village. The 1952 Supplemental Report prepared by the district showed that 1000 Native Americans permanently resided in the pre-flooding Celilo area and another 4000 spent up to six months a year around the Celilo area fishing. Yet only about 5 homes were provided on the Celilo Village site, with about 40 other Native Americans relocated off site. For the rest, other than compensation for lost commercial fishing rights and pittances for their existing structures, no relocation benefits or payments were ever made. The Eisenhower Administration Indian policy was one of assimilation – abolishing Indian reservations and derecognizing

Oregon Indian tribes. The Administration was not interested in keeping any permanent settlements of 1000 Indians in and around Celilo Falls.

(4) While this minimal effort met the existing standard relocation legal requirements (this was before the 1970 Relocation Assistance Act), it did not realistically deal with the problem. The situation today, as for the last thousands of years, is that many of the tribal members who exercise treaty fishing rights depend upon the fish for their subsistence and do not have other sources of employment or income. As a result they live at Celilo Village in grossly substandard housing and medically unsafe conditions.

(5) The 1950 replacement Indian Village authorization under the Flood Control Act of 1950 and House Document 531 was never carried out, and no replacement Village ever provided.

(6) With regard to the authority of the tribal councils to speak for all of the affected Indians, it is noted that federal case law supports the authority of the officially recognized tribal governments to represent and bind not just their members but also affiliated members of unrecognized tribes and bands, Joseph's Band of the Nez Perce v. United States, 95 Ct. Cl. 11 (1941) and in Pottawatomie Nation of Indians v. United States, 205 Ct. Cl. 765, 507 F2d 582 (1974). Although some of the Celilo Village Native American residents claim to be unaffiliated members of an unrecognized band known as the "River People", the fact is that treaty tribes have consistently been the official representatives of their interests for many decades in dealings with others.

The results of this investigation are that the tribes, BIA, and Corps personnel both in Portland District and in Northwestern Division seek to proceed with using the CRTFAS program to improve the Celilo Village situation generally along the lines proposed in the CTUIR proposal and endorsed by all four tribes and BIA. The legal issue that has been raised is under what authority to proceed. Several different alternatives have been proposed for consideration and recommendation.

3.1 The Existing Legal Situation

The existing situation is legally complex. The Village land is already in federal trust status, pursuant to the 1948 Interior Appropriations Act. The housing at the site is in three different types of status. The original 1947 homes were government-owned structures in which particular Native American families were permitted to dwell under written BIA permits. Due to the deterioration and/or destruction of these original homes, a number of Native Americans have brought on to the site their own personal trailers or modular homes. Another five homes were provided under the Public Works Appropriation Act of 1955 that conferred individual trust rights to specific homes²⁷.

²⁷ "That not to exceed \$210,000 of funds appropriated herein maybe transferred to the Secretary of the Interior for the relocation of those permanent resident Indian families in The Dalles project who were domiciled within the project area on May 17, 1950, and to acquire such lands as may be necessary therefor on the condition that the Secretary of the Interior transfer to the control of the Secretary of the Army for use in connection with The Dalles Dam project, Oregon, an irregular shaped parcel of land containing in the aggregate approximately five and five-tenths acres located in lot 1 of section 17 and in lots 1 and 2 of section 20, township 2 north, range 15 east. Willamette meridian, Oregon, being a portion of the land

BIA investigation of the current situation discloses that all of the original trust beneficiaries have died or abandoned their individual trust homes, and that the only present claimants are heirs, none of whom has more than a 50% interest in a particular home. Of these partial heirs, only one is currently residing at the site.

3.2 Consideration Of Alternative CRTFAS Act Authorities

Key to recognizing authority to carry out the proposed Celilo Village project is recognition of agency authority to broadly interpret the CRTFAS Act to accomplish its intended purposes. In discovering the boundaries of agency discretion to interpret an agency's statutes, one looks to the appellate case law from the Supreme Court and the 9th Circuit Court of Appeals, in whose jurisdiction Portland District is situated. In United States v. Shaughnessy, 347 US 260, 98 L ed 681, 74 S Ct 499 (1954), the Court defined "discretion" in terms of delegated power to mean "that the recipient must exercise his authority according to his own understanding and conscience." (at 98 L ed 686). In United States v. Alpers, 338 US 680, 94 L ed 457 (1950), the Court was reviewing the interpretation of an obscenity statute – a criminal statute normally construed extremely strictly. Yet, the Court, in dealing with a statute that clearly listed only printed and motion-picture film obscene matter, construed it to include phonograph records as well. In going beyond the class of items listed (the ejusdem generis rule), the Court stated that it did so because of the general intent of Congress to proscribe mailing of all obscene matter. The Court stated that the rule "may not be used to defeat the obvious purpose of the legislation." (94 L ed 461). In Johansen v. United States, 343 US 427, 96 L ed 1051, 72 S Ct 849 (1952), the Court was interpreting how to apply the Federal Employees Compensation Act of 1916 (FECA) to the Public Vessels Act of 1925 (PVA). Clearly the PVA covered private commercial seamen. The question was whether it covered government-employee seamen. The general language of the PVA was broad enough to cover government employees under FECA who were seamen. What the Court did next was to analyze the overall federal scheme for compensation, and determine that Congress had intended to cover federal employees exclusively under FECA. Thus the language of PVA, even though literally including federal employee claims, was construed as barring federal employee claims. The Court's rationale was stated as "Under these circumstances, it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole.' Feres v. United States, 340 US 135, 139, 95 L ed 152, 157, 71 S Ct 153." (at 96 L ed 1056) Feres, of course, is the Supreme Court decision that excluded military servicemen from the protection of the Federal Tort Claims Act. Cox v. Roth, 348 US 207, 99 L ed 260, 75 S

previously transferred to the Secretary of the Interior by the Secretary of the Army pursuant to the Act approved February 9, 1929 (45 Stat. 1158). Title to the lands acquired by the Secretary of the Interior for the above stated purpose shall be taken in the name of the United States in trust for the individual Indian for whose benefit it is acquired; any such trust may be terminated by the Secretary of the Interior by conveyance of a fee simple title to the Indian or his heirs or devisees, without application therefor, when in the judgment of the Secretary of the Interior the Indian or his heirs or devisees are capable of managing their own affairs."

BIA has advised the Corps that no lands under this statute were conveyed in fee to any individual Indians.

Ct 242 (1955), was a decision in which the Court construed how to apply the referenced Federal Employers' Liability Act (FELA) to seamen under the Jones Act, in which Congress had incorporated FELA generally. In this case, the Court found that the Jones Act had an implied survivor's provision, even though FELA had none, because FELA did not have the same needs as the Jones Act. The spoken rationale was that "welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes." (at 99 L ed 263).

What characterizes all three Supreme Court decisions is the Court's interpreting statutes other than according to their literal "plain meaning" interpretation, in order to effectuate the intent of Congress. In one decision, exclusion of federal employees was made because of the Court's holdings making FECA the exclusive remedy for federal employees. In the other two cases, subject matter was added to statutes in order to provide whole remedies, including one case dealing with a criminal statute where the rule is normally strict construction. The 9th Circuit has done the same thing, much more recently, for the same reason. In re Century Cleaning Services Inc., 195 F. 3d 1053 (9th Cir. 1999), involved the issue of paying attorney fees. Congress in amending the bankruptcy statutes, omitted language providing for the payment of attorney fees for legal services to the debtor in bankruptcy. After scrutinizing the legislative history, the 9th Circuit concluded the omission was inadvertent (at 1059-1060) and then proceeded to write the missing language back into the statute. The dissent argued the plain language rule as well as a contrary decision from another circuit court. However, among bankruptcy professionals, the 9th Circuit decision is deemed the correct solution, because debtors in bankruptcy need attorneys, and attorneys need to be paid for the system to work.

The same principles are applicable to the instant situation. The factual premise is much stronger here. In the other cases, the courts had to work hard to demonstrate Congressional inadvertent mistakes. In the case of the CRTFAS Act, Congress itself recognized its large quantity of unintended errors when it provided both relief for some of them in the original legislative history and then in WRDA 1996. In the latter, Congress amended the entire list of designated sites to be constructed as recommended by the District. Congress also granted the District requested authority to make further changes without resorting to Congress. The fundamental principles learned from the cases above are that Congressional intent controls, and remedial statutes are to be construed broadly to accomplish their intent.

The CRTFAS Act is such a broad remedial statute, enacted in 1988 after almost 50 years of agency inaction in carrying out treaty fishing compensation for the flooding impacts of a series of District reservoirs on the Mid-Columbia River. Thirty years had passed since The Dalles Dam flooded out the most significant site, Celilo Falls.

In the instant case, we also know why Congress put out a poor legislative product. The Corps was not ready to give the Congress a good list of prospective sites, because the Corps had not produced such a list over the long decades since the original 1939 promise. The Corps had not even remembered past Village replacement authorizations until very

recent research into old Corps, BIA, and tribal files. And while the agency failed to act, the courts were moving forward. The treaty fishing decisions involved in the Boldt litigation and the finale Supreme Court Fishing Passenger Vessel decision took giant steps forward, converting the treaty fishing rights' language about fishing "in common with the other citizens of the territory" to include a guaranteed 50% of the designated treaty fisheries – language never even hinted at in the treaties.

The proposed interpretations are rational extensions of poorly crafted legislative language to accomplish the purposes and intent of Congress, at the specific request of the statutory beneficiaries, the four treaty tribes. None of the requested extensions of the CRTFAS Act exceed or even come close to the statutory extensions and interpretations taken by the courts in the decisions cited above. The agencies charged with carrying out the Congressional will need to be flexible in doing so.

3.2.1 The Section 401 (b)(3) Existing Site Alternative:

Section 401(b)(3) of the CRTFAS Act directs improvements at "existing sites". Examination of the legislative history indicates that the "existing sites" discussed by and with Congress were the original five in lieu sites, two of which are specifically mentioned in Section 401(b)(3). Nothing in the limited written legislative history indicates that Celilo Village was mentioned specifically²⁸.

²⁸ The final legislation simply used the term "existing sites" as follows at Sec. 401(b)(3):
"make improvements at existing sites, including but not limited to dredging at the site at Wind River, Washington, and constructing a boat ramp on or near the site at Cascade Locks, Oregon."

The only detailed legislative history is Senate Report 100-577, Sep. 30, 1988. It's relevant portions are as follows:

Title page: under "Purpose": "Title IV [the CRTFAS part of the statute] provides for increased access to usual and accustomed fishing sites for Columbia River treaty fishing tribes."

Page 21, under "Background":

"Title IV of HR 2677 was added by the Committee in markup. Offered by Senator Evans, it provides for the administrative transfer of Federal lands at certain sites along the Columbia River to the Department of the Interior for the use of Indian treaty fishermen to attain equitable satisfaction of the United States' commitment to provide lands for Indian treaty fishing in lieu of those inundated by flooding caused by the construction of the Bonneville Dam."

"To date, the United States has provided five sites totaling approximately 40 acres. These sites are currently referred to as 'in lieu' sites. Subsequently, more dams were built on the Columbia, including Dalles, John Day, and McNary, causing the inundation of more fishing areas."

Page 22 cont'd: "Presently, all five existing in-lieu sites are within the Bonneville Pool, the demography of which forces access to these sites and those upriver in the John Day, Dalles, and McNary Pool through private lands and public parks, increasing tensions between the Indians and the general public and taxing public park facilities which are not equipped for Indian treaty fishing activities."

Factually, the Celilo Village site is substantially identical to the five in lieu sites except for its separate 1947 authorization (the in lieu sites were authorized by the 1945 Rivers and Harbors Act). Otherwise, all 6 sites are traditional treaty fishing sites, used by the same four tribes, under the same 1855 treaties, for the same off-reservation fishing rights, protected by the same seven Supreme Court decisions, in the same regulated tribal fisheries.

Other facts support inclusion. The original in-lieu site legislation also contemplated a sixth in-lieu site. The proposed “Tenino” in-lieu site is the same general Celilo Falls area. The 1929 statute (Footnote 25 in opinion) specifically referred to Celilo as a “fishing camp site”. The 1947 statute further described the site as at “Celilo Falls” for Indians with “old and accustomed fishing sites at or in the vicinity of Celilo Falls on the

Highways, railroads, and fences further hinder access. Also, a phenomenal recent influx of windsurfing or boardsailing in the Columbia Gorge has increased overcrowding and tensions. Finally, facilities at the existing in-lieu sites are in dire need of repair.

Title IV of HR 2677 provides a vehicle for the United States to satisfy its commitment to the Indian tribes The provision designates certain sites and authorizes the acquisition of additional sites from willing sellers”

The Senate report also included a letter from Senator Hatfield, which stated at p. 23 in part:

“At the very least, because all of the sites are currently used as fishing sites by the treaty fishermen, the transfer should constitute no significant change in land use or environmental impact.”

The Section by Section Analysis at p. 31 offered only the following short statement:

“Paragraph (3) of subsection (b) requires the Secretary of the Army to make certain improvements at two named sites.”

At p. 43, in a statement included in the record by Morgan Rees of the Office of the Assistant Secretary of the Army for Civil Works, the following statements are made:

“The agreement called for the Government to acquire more than 400 acres of land at six described sites to serve as ‘in-lieu’ fishing sites. The Corps was to make certain improvements thereon, and thereafter turn the sites over to the Department of Interior, Bureau of Indian Affairs, to be administered for the permanent use and enjoyment of the Indian tribes. . . . the Act [1945 Rivers and Harbors Act] did not specify the number, location, or size of the sites to be acquired.

. . . In all, five tracts, totaling 40 acres, were purchased for the use and benefit of the Indians. . . . In acquiring 5 sites, and expending the total amount of funds appropriated by Congress, the Corps is not permitted by law to acquire any additional in-lieu sites. However, as will be discussed later, there are administrative options which could be used to establish in-lieu fish sites on Federal land.”

The statement concluded with comments that the Corps was preparing a report on the matter and lacked authority to acquire additional sites. Such is the extent of the legislative history related to Section 401(b)(3).

Columbia River.” In the tribal responses that were part of the Technical Appendices to the April 1995 PAC on boundary adjustments, the tribes further linked Celilo Falls fishery with the entirety of the CRTFAS program. The conclusion is that Celilo Village is factually an “existing site” but was not specifically identified to Congress as such. However, it is clear from the legislative process that, had Congress been requested to include the site, it would have been explicitly included. Sen. Evans and his senator colleagues were trying to give the tribes what they asked for. The proof of this is how the site list authorized was provided (tribal tour site list), the inclusion specifically of in-lieu sites, the authority to purchase new sites, and the authority to transfer any other surplus federal lands in riparian areas.

Given the prior legislative history of the Celilo Village site, including this site as an “existing site” to be improved under Sec. 401(b)(3) is a direct and logical solution to the problem of Celilo Village, consistent with the Congressional intent to improve similar, related treaty fishing in-lieu sites. Using this authority, the District improves the site without any adjustment to its current trust status except as required under the Snyder Act by the BIA regional director to improve the privately-owned residential housing at the site. No change in statutory language is required – only a broader interpretation of the existing language “existing sites”. The Supreme Court cases and the 9th Circuit case on statutory interpretation above went far beyond this minor broadening of the interpretation of statutory language. The proposed action is also consistent with the practical interpretations of tribal rights encouraged by Judge Nichols of the Federal Circuit in his majority opinion in United States v. Goshute Tribe, 206 Ct. Cl. 401, 412, 512 F.2d 1398 (1975):

“We cannot demand a theoretically perfect award. These ancient wrongs must be settled within our lifetimes.”

and in his concurring opinion in Gila River Pima-Maricopa Indian Community v. United States, 204 Ct. Cl. 137, 152, 494 F.2d 1386 (1974):

“We must approach our tasks of judicial review with our minds wary of legalisms and tolerant of the compromises legalisms must make if these ancient wrongs are to be settled in any of our lifetimes.”

3.2.2 The Section 401(e) Alternative:

Section 401(e) of the CRTFAS Act permits the Secretary of Interior and her delegate, the Regional Director of BIA, to designate otherwise available federal riparian lands within the reservoirs of the Bonneville, The Dalles, and John Day dams as CRTFAS sites, and to request the Corps to make appropriate improvements to such designated sites. The statute leaves the discretion to make the designation entirely with the Secretary of Interior and her delegates. For the Corps, this greatly simplifies the legal matter as the Corps simply responds to the decision of the Interior Department. This is the method that the BIA regional director is leaning toward at this time, although his attorneys have not agreed to it yet. All that the Corps has to do is to carry out a mutually-agreed upon improvement plan for the designated site.

The basis for this alternative is again a broad interpretation of the statutory language. The statute addresses itself to “any lands”. The broad interpretation is in reading “excess lands or otherwise offered for sale or lease” to mean “available for CRTFAS use”. This is clearly the Congressional intent, and once used as such, would allow the addition of CRTFAS status to the Celilo Village site to provide the Celilo Village site the same benefits given to other treaty fishing sites and clearly intended for all treaty fishing sites. There is not a shred of legislative history or other Congressional intent to support leaving the Celilo Village site out of the same improvements given to every other treaty fishing site in every category of fishing treaty site – existing, newly designated, newly acquired, or newly transferred.

3.2.3 The Section 401(a)(2) Boundary Adjustment Alternative:

Section 401(a)(2) of the CRTFAS Act, as amended by Section 512 of WRDA 1996, authorizes the Secretary of the Army to make “minor boundary adjustments” in the amended list of specifically-designated CRTFAS sites. The term “minor” was adopted during markup of the WRDA 1996 Act, as the result of oral discussions among representatives of the Senate committee, the tribes, and Corps personnel. The Corps project manager George Miller was a party to these discussions and has stated that the intent of the word “minor” was to avoid any significant political impacts by taking any more public parks or other similarly politically sensitive sites into the CRTFAS program. Congress did not object to adding fairly large tracts of land to existing sites, as long as the lands were not being used for something else of significance. In light of this legislative history, and in light of the fact that the Celilo Village is adjacent to the Celilo CRTFAS site and both were a single historical, pre-dam, Indian treaty-fishing Village, it is believed that Section 401(a)(2) authorizes the Secretary of the Army to expand the boundaries of the present Celilo CRTFAS site to include the Celilo Village upon the unanimous request of BIA and the four beneficiary tribes. The controlling factor under this authority is that BIA and the four treaty tribes unanimously support such an action. Under CRTFAS, Congress designated BIA and the four treaty tribes as “the customer” whose wishes were to largely guide the program. An expansive reading of Sec. 401(a)(2) is also necessary to achieve the CRTFAS program goal of providing the full 400 acres of replacement treaty fishing sites²⁹. All of these factors support the conclusion that such a boundary adjustment would be consistent with the Congressional intent.

When compared to the Supreme Court and 9th Circuit interpretation cases cited above, this alternative is also a minor matter. It involves no change of legislative language and a broad interpretation of the term “minor” consistent with the oral legislative history of this statute. Under the primary jurisdiction administrative law doctrine, agencies clearly have the legal authority to make statutory interpretations of this type to effectuate Congressional intent. The breadth of interpretation required is minuscule compared to the cases cited above, where words and phrases were written out of or into statutes by the courts.

²⁹ Sec. 401(e) references 360 acres, because the original 5 in-lieu sites provided the first 40 acres.

Moreover, whatever alternative is selected is supported by the 1950 Flood Control Act authorizing and encouraging the District to construct a replacement Celilo and Spearfish Village.

3.3 The Snyder Act Role

A key legal issue under Sec. 401(e) is the authority of the BIA Regional Director as the delegate of the Secretary of the Interior to adjust the trust status of the Celilo Village in order to exercise Section 401(e) discretion. The Snyder Act, 25 USC 465³⁰, supplies such authority:

“The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * * * *

Title to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.”

The broad authority in the Snyder Act to adjust the legal status of land to provide land for Indians was part of the overall scheme of the 1934 Indian Reorganization Act to undo the segmentation and loss of Indian lands due to decades of allotments and other alienations and partial alienations of Indian lands. Because of the huge variety of title interests and defects affecting Indian lands, broad authority is required in the Snyder Act to convert

³⁰The Snyder Act, 25 USC 465, c. 576, Sec. 5, 48 Stat. 985, was originally enacted on June 18, 1934, and amended on Nov. 1, 1988, P.L. 100-581, Title II, Sec. 214, 102 Stat. 2941. Title IV of PL 100-581 is the CRTFAS program at issue, so there is statutory linkage between the Snyder Act and CRTFAS Act.

Senate Report 100-577, 100th Congress, 2nd Session, in the section analysis part, states the purpose of the 1988 Snyder Act amendment as follows:

“Section 214 makes technical amendments to the 1934 Indian Reorganization Act to apply certain provisions of Section 5 of the Act to purchases of land for the Yakima Indian Nation under the Act of July 28, 1955 (69 Stat. 392; 25 USC 608 et seq.).”

Section 214 was also related to Section 213 of PL 100-581 which authorized the Secretary of the Interior to transfer land acquired under the 1964 Yakima Land Act into trust status.

Although the various titles and parts of PL 100-581 covered a variety of unrelated Native American legal matters, it is significant that Congress was aware of and supporting a wide range of remedial measures. Several of the measures benefited some or all of the beneficiary tribes of the Title IV CRTFAS Act. Congress was most certainly aware of the Snyder Act when it authorized Sec. 401(e) of the CRTFAS Act.

A challenge to the constitutionality of the Snyder Act, on account of a perceived lack of judicial review of the discretion of the Secretary of the Interior, was rejected by the Supreme Court in No. 95-1956. Department of the Interior, et al., Petitioners v. South Dakota, et al., 519 US 919, 136 L Ed 2d 205, 1996 LEXIS 6117, 117 S Ct 286 (October 15, 1996) in an order, with a dissent by Justices Scalia, O’Connor, and Thomas. The basis for vacating a lower court opinion of unconstitutionality was an agreement by the Attorney General that aggrieved parties could use a new 30-day pending period in the Quiet Title Act regulatory process for an appeal period.

and/or adjust various parcels and interests in Indian land back into standard Indian trust lands. Both the Snyder Act and the CRTFAS Act have a common goal – the provision of trust lands for the benefit of Native American people. From a common legislative history and for a common purpose, it is necessary and appropriate that the two acts be used in concert to benefit Native American people.³¹

3.4 The Types of Improvements

The CRTFAS Act stated at Sec. 401(b)(2) that improvements should

“include, but not be limited to, camping and park facilities to the same standards as those provided in the National Park system; all weather access roads and boat ramps; docks; sanitation; fish cleaning, curing, and ancillary fishing facilities; and landscaping.”

SR 100-577 also discussed the types of improvements to be made to the CRTFAS sites. The testimony of Morgan Rees, on behalf of the Assistant Secretary of the Army for Civil Works, was included in the Senate report at p. 42-45. At p. 44 his testimony included the statement regarding site improvements:

“[T]he agencies were recommending to OMB legislation for the acquisition of additional in-lieu fishing sites in the lower Columbia River and for construction of improvement on the existing sites. Such facilities would include access roads, boat ramps, sanitary fish cleaning, curing, and other ancillary facilities with electrical service and landscaping.”

In the section by section part of SR 100-577, the Committee wrote:

“Paragraph (2) of subsection (b) requires the Secretary of the Army to improve as defined the lands under subsection (a) [new sites list] and lands acquired under Paragraph (1) of subsection (b) [new lands purchased from willing sellers] at least to the level provided the existing in-lieu sites and to the standards of improvements provided in the National Park System for modern camping facilities. “ (At p. 31)

The Committee report at p. 31 also directed that lands acquired under Subsection 401(e) [new lands provided by any federal agency] should be “improved by the Department of the Army, and transferred to and maintained by the Department of the Interior” as in the case of other lands provided or acquired under the CRTFAS program.

3.4.1 Housing Improvements

Celilo Village is unique when it comes to housing requirements. None of the other in lieu or CRTFAS sites has any authorization for government-furnished housing. Celilo

³¹ The current regulations under the Snyder Act, 25 CFR Part 151, cover only lands not already in trust status and the process for converting them to trust status. The situation in the present case whereby, under the Snyder and CRTFAS Acts, land already in trust status pursuant to earlier statutes has its trust status modified by a subsequent statute, is not within the purview of the regulations. However, the proposed adjustment of trust status is still within the statutory authorizations, although no regulations cover the process. Both statutes give the Secretary of Interior broad discretion to make trust land decisions for the benefit of Native Americans. As will be discussed below, the proposed action is not only supported by all of the beneficiaries acting through their official tribal representatives, but is entirely consistent with the applicable laws and treaties.

Village, in contrast, has multiple such authorizations (1948 Interior Appropriations Act; 1950 Flood Control Act; 1955 Public Works Appropriation Act). In addition, Sec. 401(f) saves and protects the tribal rights under these prior statutes.

The proposed solution, to match CRTFAS improvements with statutory residence rights, is to replace the various existing houses and trailers with modular homes of a character consistent with the National Park Service standards stated in Sec. 401(b)(2). This solution complies with GAO direction its Principles of Federal Appropriations, 2nd Edition, Vol. I, p. 2-48, that the preferred solution to interpreting potentially conflicting statutes is to reconcile them in a reasonable manner. Modular homes of the type used in National Parks meets the Sec. 401(b)(2) requirements, while also meeting prior statutes and case law recognizing tribal residential rights at Celilo Village. This solution also fulfills tribal trust responsibilities and gives the CRTFAS Act the liberal, remedial interpretation called for by the Supreme Court cases above.

3.5 Operations and Maintenance

Sections 401(b)(2) and 401(e) direct that sites with completed construction be transferred to BIA for operation and maintenance. Section 401(g) (added in 1996) authorizes the transfer of Corps funding to BIA for use in paying for operations and maintenance. The legislative history also repeats this direction. With regard to Section 401(b)(2), the legislative history stated:

“This section also provides that the Federal agency currently owning the lands may negotiate an agreement concerning operation and maintenance costs with the Department of the Interior to transfer the sites, after improvements have been made, to the Department of Interior for maintenance and Management purposes.” (SR 100-577 at p. 31)

With regard to Section 401(e), after the Corps has improved such sites, the sites are to be “transferred to and maintained by the Department of the Interior.” In light of these statutes and legislative history, there is no question that the Corps makes the CRTFAS improvements and BIA operates and maintains them.

3.6 The Federal Trust Responsibility

The case law under the Snyder Act and under the 1855 treaty is fully supportive of the proposed Celilo Village project, as is Indian law in general. The body of statutory and case law that constitutes “Indian law” requires a broad interpretation of Indian laws and treaties. This rule has been stated in virtually all significant Supreme Court and lower court opinions on tribal and Native American rights. The Supreme Court has repeatedly, but not without limitation, cited the canon of construction that “legal ambiguities are resolved to the benefit of the Indians.” DeCoteau v. District County Court, 420 US 425, 447, 43 L Ed 2d 300, 315, 95 S Ct 1082 (1975); Andrus v. Glover Construction Co., 446 US 608, 619, 64 L Ed 2d 548, 558, 100 S Ct 1905 (1980). This principle of interpretation has been followed in the Supreme Court and 9th Circuit cases interpreting the 1855 treaties, whose tribal fishing rights are the ultimate issue and the reason for the CRTFAS program. In United States v. Winans, 198 US 371 (1905) and Seufert Bros. V. United States, 294 US 194 (1918), the Supreme Court crafted an equitable real estate servitude to give force to the tribal treaty fishing rights. In doing so, the Supreme Court

created something that was not stated in the treaties. In Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 US 658, 687, 61 L ed 2d 823, 99 S Ct 3055 (1979), the Supreme Court approved a lower court's conversion of a right to fish in common with other citizens of the territory into a 50% share of the fishery. Again the courts fashioned a remedy not stated in the treaty. These are clearly cases of very liberal construction of treaty language in order to enforce a Native American treaty right. This 1979 case was also the seventh time the Supreme Court interpreted this treaty fishing language. Congress was aware of this treaty fish litigation history when it enacted CRTFAS.

The related, recent treaty shellfish adjudication case, United States v. Washington, 157 F 3d 630 (9th Cir. 1998), interpreting the same 1855 treaty fishing language, repeated the same rule:

“Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights.” “Any ambiguities in construction must be resolved in favor of the Indians.”

In this case, the courts again fashioned a broad remedy not found in the treaty in order to carry out the purpose of the treaty. Broad construction of the 1855 fishing treaty rights at Celilo Falls and Celilo Village, under the CRTFAS program, is consistent with the unique case law on treaty fishing rights under these 1855 treaties.

The principle of interpretation flows from the federal trust responsibility. Loudner v. USA, 108 F3d 896 (8th Cir. 1997), summarized the trust responsibility as follows:

“There is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust. *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); see also *United States v. Mitchell*, 463 US 206, 225, 77 L Ed 2d 580, 103 S Ct 2961 (1983). This obligation derives from a ‘a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme] Court’ under which the Government ‘has charged itself with moral obligations of the highest responsibility and trust’ in carrying out its treaty obligations with the Indian tribes. *Seminole Nation v. United States*, 316 US 286, 296-297, 86 L Ed 1480, 62 S Ct 1049 (1942) (footnote omitted). This ‘trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation.’ *Little Earth of United Tribes, Inc. v. HUD*, 675 F. Supp. 497, 535 (D Minn. 1987), amended, 691 F. Supp. 1215 (D Minn. 1988), aff’d 878 F. 2d 236 (8th Cir. 1989), cert. Denied, 494 US 1078, 110 S Ct 1805, 108 L Ed 2d 936 (1990).”

The Supreme Court has on numerous occasions repeated this principle of federal trust responsibility. In United States v. Mitchell, 463 US 206, 77 L Ed 2d 580, 103 S Ct 2961 (1983), the Supreme Court cited multiple cases going all the way back to 1831, including the tax sovereignty case, White Mountain Apache Tribe. V. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980).

Related to the federal trust responsibility is a line of cases requiring fair and honorable dealings with the tribes. Closely akin to the federal trust standard, this statutory fair and honorable dealing standard was enacted as part of the August 13, 1946 Indian Claims Commission Act (ICCA), 25 USC 70 ff. , c. 959, 60 Stat. 1049. Ote and Missouriia Tribe of Indians v. United States, 131 Ct. Cl. 593 (1955), was the first case to explain the

ICCA's new remedies and standards at length. Two cases illustrate the scope of the "fair and honorable dealings" standard created by the ICCA. Gila River Pima-Maricop Indian Community v. United States, 231 Ct. Cl. 193, 684 F. 2d 852 (1982) held that the United States was obligated to provide the tribe an adequate water supply and had failed to do so for an extensive period of history. Northern Paiute Nation v. United States, 225 Ct. Cl. 275, 634 F.2d 594 (1980), held that the United States was liable to the tribe for taking back reservation lands granted under an executive order reservation. The substance of both cases is that the United States had failed to act like a proper trustee in dealing with the Native Americans.

The standard is still followed today. The Supreme Court in State of Arizona v. State of California, 530 US 392, 147 L Ed 2d 374, 120 S Ct 2304 (2000), favorably cited earlier Claims Court decisions following the fair and honorable dealing standard, and directed relief to provide water for the tribes consistent with the standard. In Cherokee Nation of Oklahoma v. United States, 937 F. 2d 1539 (10th Cir. 1991), the court stated that Congress had copied the standard into more recent remedial legislation, PL 97-835, 96 Stat. 1944-45 (1982), to remedy tribal harms on the Arkansas River due to Corps civil works lock and dam construction. Cherokee is nearly identical to the Celilo Village situation in terms of the legal standard. In both cases, the tribes allege that Corps civil works dam projects have damaged (and taken by flooding) their traditional lands and homes. In both cases trust principles create liability for the Corps and justify a broad reading of the remedial legislation. In Cherokee, the tribe lost – not on the legal standard – but on its failure to prove that the Corps had a special relationship with the tribe. In the instant case, the 1950 and 1955 Corps authorizations to fix Celilo Village establish the necessary special relationship.

In Confederated Tribes of the Colville Reservation v. USA, 964 F.2d 1102 (Fed. Cir. 1992), the court analyzed the case law under the fair and honorable dealing standard and listed 4 elements to a "fair and honorable dealings" claim, citing Aleut Community v. United States, 202 Ct. Cl. 182, 480 F. 2d 831 (Ct. Cl. 1973). Celilo Village meets all 4 requirements for relief under CRTFAS. The first requirement is that the Government undertook an obligation. This requirement is met by many circumstances, including the 1929, 1947, 1950, and 1955 statutes that form the legal heritage of the Celilo Village site. The second requirement is that there be a special relationship. Again the long dealings between the Government, including specifically the BIA and the Corps of Engineers, and the tribes and "River People" at issue satisfy this requirement easily. The third requirement is that the obligation be to the tribal members and tribes seeking relief. This requirement is also met. The fourth requirement is that the United States failed to carry out its obligations and that the beneficiary Tribes and tribal members suffered damages as a result. The listing of failures on the part of the United States includes (a) the provision of the original damaged war surplus housing in 1947; (b) the failure to carry out the 1950 authorization for replacement Village for Celilo and Spearfish; (c) the provision in 1955 of replacement housing for only 14 families out of 900 permanent residents; and (d) the failure to fix the Village problems after 1955. The damages to the tribes and River People include the fact that they live in substandard, government-furnished housing, with

serious health and public safety issues connected with their water supply and sewer systems. .

Although the “fair and honorable dealings” claim standard was only specifically included as part of the Indian Claims Commission Act (ICCA) of 1946, it was applicable to all tribal claims arising on or before August 13, 1946, the date of the ICCA. It has been copied into subsequent legislation as well (see Cherokee, supra.)

The most recent case involving the BIA and the Corps with regard to the in-lieu sites, Sohappy v. Hodel, 911 F.2d 1312, 1320 (9th Cir. 1990) followed a similar broad treaty interpretation when interpreting tribal residential rights under the treaties at the in-lieu sites. In connection with some of the original in-lieu sites, the Government argued that there was no right of permanent, individual Native American residence at the sites. The 9th Circuit, looking at the long history of the original fishing sites and at the purpose and uses of the in-lieu sites, ruled otherwise. The court traced a centuries-long tradition of individual permanent residence along the river, and held that the 1855 treaties preserved such fishing uses and customs.

Similarly, the Snyder Act, 25 USC 465, has been broadly interpreted by the courts, in line with Interior Department legal positions that the statute’s goal is to provide Native Americans with land. Its grant of discretion to the Secretary of Interior and BIA is broad. In drawing parallels to the Snyder Act, it must be noted that the CRTFAS statute and the Snyder Act have a similar focus and purpose: the acquisition and transfer of land to Indians for their benefit. In both statutes, BIA has the ultimate say in whether a site will be acquired and transferred (the Corps’ amendments to the CRTFAS statutory list of sites were approved by Congress because the amendments had tribal and Interior consent and agreement.) The very recent case of Sac and Fox Nation of Missouri v. Norton, 240 F.2d 1250 (10th Cir. 2001), affirmed the very broad authority of the BIA under this statute to acquire and accept almost any interest in land for the benefit of Indians.

3.7 The Recommended Alternative and Conclusion

Based upon the foregoing, it is believed that there is adequate legal authority to carry out the proposed Celilo Village project improvements under any of three CRTFAS authorities: (1) the Sec. 401(a)(2) boundary adjustment authority; (2) the Sec. 401 (b)(3) “existing site” authority; or (3) by the BIA regional director invoking the Sec. 401(e) DOI authority to designate other available federal lands to the project. However, because the Department of Interior Regional Solicitor and the Regional Director of the BIA desire specific legislative authority for the Celilo Village Project, the recommended alternative is to seek the simplest acceptable legislative solution, namely, specifically adding “Celilo Village” as a named site for improvement under Sec. 401(b)(3) as follows:

“(3) make improvements at existing sites, including but not limited to *rehabilitating Celilo Village as proposed by the 2002 Post-Authorization Change Report*, to dredging at the site at Wind River, Washington, and constructing a boat ramp on or near the site in Cascade Locks, Oregon.”

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