



COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
729 NE Oregon, Suite 200, Portland, Oregon 97232 503 238 0667

The Honorable Fidelia Andy
Chairwoman, Columbia River Inter-Tribal Fish Commission

***H.R. 5680: A Bill to Amend Certain Laws Pertaining to Native Americans,
and for Other Purposes***
House Natural Resources Committee
April 9, 2008

Chairman Rahall, on behalf of the Columbia River Inter-Tribal Fish Commission, thank you for inviting me to testify on H.R. 5680. I also want to thank Congressman Grijalva for sponsoring this legislation which includes a much needed technical amendment under Section 9 for the Columbia River Treaty Fishing Access Sites.

I am Fidelia Andy, Chairwoman of the Columbia River Inter-Tribal Fish Commission and an elected leader of the Confederated Tribes and Bands of the Yakama Nation. I am a descendent of the signers of the 1855 treaty between the Yakamas and the United States Government. I fished the Columbia River and I clearly understand the impact that the construction of the dams has caused to the tribal way of life.

The Columbia River Inter-Tribal Fish Commission (CRITFC) was formed in 1977 by resolutions from the four Columbia River treaty tribes: Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes and Bands of the Yakama Nation, and Nez Perce Tribe. CRITFC's mission is to ensure a unified voice in the overall management of the fishery resource and to assist in protecting reserved treaty rights through the exercise of the inherent sovereign powers of the tribes. CRITFC provides coordination and technical assistance to the tribes in regional, national and international efforts to ensure that outstanding treaty fishing rights issues are resolved in a way that guarantees the continuation and restoration of our tribal fisheries into perpetuity.

To understand the significance of our technical amendment for the Columbia River Treaty Fishing Access Sites, we need to take into account our history that stretches beyond 10,000 years ago to time immemorial. And we need to review the history over the last two generations that included more promises yet repeated delays and setbacks resulting from federal inaction.

The combined ancestral homelands of our four tribes cover roughly one-third of the entire Columbia River Basin in Washington, Oregon and Idaho. Salmon has always been a unifying figure providing both physical and cultural sustenance. Collectively, we gathered at places like Celilo Falls to share in the harvest, forging alliances that exist today. The importance of fish, especially salmon, to our tribes cannot be overstated. In 1855 when our four sovereign tribes and the United States collaborated and negotiated treaties, our tribal leaders explicitly reserved—and the U.S. agreed to assure—our right to fish in perpetuity within our ancestral homelands as well

as “at all usual and accustomed places”. We kept our word by ceding about 40 million acres of our homelands to the U.S. and the U.S. pledged to honor our ancestral rights.

In 1905 in the famous case of *U.S. v. Winans*, the U.S. Supreme Court stated that fishing was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” This statement, from the highest court in the land over a century ago, symbolizes salmon as an integral part of our cultural, economic and spiritual well-being.

Before the arrival of non-Indian settlers a tribal fishery thrived on the Columbia River. By the late 1880's, non-Indian encroachment blocked access to many of our usual and accustomed fishing grounds. In the late 1880s, Special Indian Agent George Gordon investigated the Columbia River tribal fisheries and found that Indian fishers were being excluded from many of their traditional fishing grounds. Agent Gordon submitted his findings and recommended that the U.S. secure approximately 2,300 acres along the river for use by tribal fishers. Although the government never acted on his recommendations, the U.S. did file several lawsuits seeking to protect the tribes' right to take fish at usual and accustomed fishing grounds (e.g., *U.S. v. Taylor*, *U.S. v. Winans*, *U.S. v. Seufert Brothers*, and *U.S. v. Brookfield Fisheries*). These lawsuits firmly established as a matter of law the tribes' treaty-protected right of access to usual and accustomed fishing grounds.

During the 1930's, the Army Corps of Engineers (COE), responding to congressionally mandated studies, proposed that a series of dams be built along the Columbia River. The Bonneville Dam was the first to be built inundating approximately 37 tribal fishing sites. In 1939, a settlement agreement between the tribes and the U.S. was made to furnish sites in lieu of those lost. The agreement provided for the War Department to acquire approximately four hundred acres of lands at six sites along the Columbia River and install ancillary fishing facilities to be used by the treaty tribes. The agreement was approved by the Secretary of War in 1940 and by Congress in 1945 (Public Law 79-14). However, it took the COE nearly twenty years to acquire five sites, totaling only slightly over 40 acres. These sites are commonly referred to as "in lieu" sites.

As more dams were built more tribal fishing grounds disappeared. In 1973, in a settlement order entered by the U.S. District Court for Oregon in *CTUIR v. Calloway*, the Secretary of the Army and the Secretary of the Interior agreed to propose legislation to provide acquisition and improvement of additional sites and the upgrading of all sites to National Park Service standards. Legislation was forwarded to Congress in 1974, but no action was taken.

During the late 1970's and 1980's tensions continued to grow. Increased fish runs in mid-1980 increased the use and pressure on the existing in lieu sites resulting in the need for improvements and additional fishing access sites. Conflicts also grew with increased non-Indian use of the treaty sites for recreational activities along the Columbia River. From 1982 – 1986, legislation to establish a Columbia Gorge National Scenic Area was considered by Congress. During consideration of this legislation, the tribes once again brought attention to the fact that the federal government still owed significant acreage for fishing sites per the 1939 agreement. Although Congress did not address the in lieu site issue in the passage of the Gorge Act, they indicated they would consider providing additional fishing access sites in the future.

In 1987 and 1988, at the request of the Senate Select Committee on Indian Affairs, the tribes identified a number of locations that could be suitable for additional sites. During hearings in 1988, representatives from the COE testified that they required new legislation before they could

provide additional sites. Congress responded with P.L. 100-581 (Title IV, Columbia River Treaty Fishing Access Sites) in November 1988. This legislation authorized new sites and facilities and required an interagency transfer of the properties from the COE to the Interior Department "for the purpose of maintaining the sites." This included sites behind Bonneville, The Dalles and John Day Dams on the Columbia River in Oregon and Washington. As sites were completed they were transferred to the Bureau of Indian Affairs (BIA) within the Interior Department. The Act also authorized the rehabilitation of the original "in lieu sites" constructed under the P.L. 79-14. To date 29 sites have been completed and one site is undergoing planning leaving one, possibly two sites remaining.

Subsequent amendments have been enacted to modify the legislation. These amendments provide the COE with flexibility on technical boundary adjustments, increases of authorization for appropriations, authorizing the transfer of funding for operations and maintenance to the BIA, and authorization to make improvements at Celilo Village.

In 1995, the COE and BIA agreed to a Memorandum of Understanding (MOU) to effectuate the transfer of facilities and lands and to provide operations and maintenance (O&M) funding. The COE agreed to provide a lump sum of monies for each set of sites and then transfer those monies to the BIA for O&M when the sites were completed. The amount of O&M needed was calculated under a capitalized cost basis relying on a 7.75% discount rate with the assumption that the BIA would invest the funds in an interest bearing account to create a steady O&M funding stream for 50 years (to 2045). In the MOU the BIA also agreed to provide at least \$250,000 per year for the first eight years beginning in 1996.

Unfortunately, the BIA never contributed their share and they lacked authority to invest the O&M funds provided by the COE. Instead, BIA spent about \$2 million of the principal from 1996 to 2003 to cover O&M thereby reducing the term of the fund to less than 50 years. The tribes repeatedly indicated their desire to get the COE-provided funds into an interest bearing account.

In a July 1999 letter from the COE District Engineer to the Chairman of Confederated Tribes of the Umatilla Indian Reservation, the COE even committed to increasing their contribution under the 1995 MOU with the BIA by \$1.2 million if BIA satisfied three conditions. Those conditions were: "First, the funds need to be invested in an interest bearing account. Second, the BIA needs to continue to provide their contributions under the agreement. Third, there needs to be strong technical justification for the increase." Unfortunately, this was another lost opportunity since BIA never met any of these conditions which were quite simply the BIA's commitments in the first place. The additional money from the COE has never been provided.

Later, it was determined that the best way to accomplish investment of the funds was for the tribes to take over the funds. In 2003, under a Self-Determination Act agreement, BIA transferred the O&M balance (approximately \$5.5 million) to CRITFC so the funds could begin earning interest. CRITFC also assumed O&M responsibilities for the sites on January 1, 2004.

However, under 25 USC § 450e-3 of the Self-Determination Act, investments are restricted to low earning federally-backed instruments that typically yield 2 to 6%. With the BIA's lack of contribution per the MOU and the fact they spent principal instead of investing the funds, these investment restrictions add to the inadequacy of O&M funding needs. Under these restrictions

with the current fund balance we estimate that the O&M account will be depleted before 2025 leaving no funding over the final 20 years.

While the investment of principal is restricted, the subsequent interest earnings are not. Over the 30 months ending December 2007, the restricted principal account yielded a 4.51% return compared to CRITFC's investment of the unrestricted interest account which earned 13.16%. CRITFC works closely with a reputable fund manager on prudent investment standards for both the principal and interest accounts. CRITFC also meets at least quarterly with the fund manager and presentations are provided by the manager to the CRITFC Commission. In accordance with the Self-Determination Act agreement, CRITFC prepared and submitted to BIA, an investment policy for both the restricted account and the unrestricted interest account.

Starting in early 2007 CRITFC met with the Interior Department to find a solution to the investments restrictions. Interior staff was unable to find a solution to the restrictions imposed under the Self-Determination Act. Therefore, without objection by the Interior staff at the time, CRITFC began working with the House and Senate on a technical amendment to PL 100-581 to provide an exemption to the restriction specifically for the in lieu and treaty fishing access sites on the Columbia River.

The four-year average for O&M is approximately \$449,900 per year for the 29 existing sites. If the investment restrictions are left in place, an additional \$4.6 million of principal is needed to revive O&M to cover the 50 year time frame. However, if we are able to lift the restrictions to afford returns closer to a historical market rate of 8%, we estimate that we would need an additional \$2.3 million in FY2009. This amount would also satisfy BIA's commitment in the MOU. If funding is delayed until FY2010 we estimate \$2.5 million will be needed.

We support Section 9 of H.R. 5680. This technical amendment is narrow and applies only to the Columbia River Treaty Fishing Access Sites. The amendment would have a significant impact by extending the current O&M fund by another 8-9 years and help us begin to overcome past disruptions with the O&M funds by enabling CRITFC to apply prudent investment standards to achieve higher yields than is now permitted. To complement this effort we will continue to seek funding to fulfill the BIA's commitment under the 1995 MOU with the COE.

On January 16, 2008, the Columbia River Gorge Commission wrote a letter supporting our efforts to secure an amendment to P.L. 100-581 to provide us "greater investment flexibility" for these sites. The Gorge Commission was established in 1987 to develop and implement policies and programs that protect and enhance the scenic, natural, cultural and recreational resources of the Gorge. The Gorge Commission noted that these fishing sites are part of the Columbia River Gorge's "vital cultural, historical and legal infrastructure." The Gorge Commission further supports funding through the U.S. House and Senate to satisfy BIA's funding commitment. The Gorge Commission has 13 members: three appointed by each of the governors of Oregon and Washington, one appointed by each of the six Gorge counties, and a non-voting representative from the U.S. Forest Service.

CRITFC is prudent in spending funds for routine O&M of the sites in an attempt to stretch the funding out as long as possible, but this carries a long term consequence. First, being frugal does not allow maintenance of the sites to conform to the required National Park Service standards. Secondly, keeping maintenance costs low means the sites and facilities will deteriorate faster requiring O&M funds to be redirected towards major capital expenditures.

CRITFC has met our responsibilities. Our federal partner and trustee struggled in meeting theirs. The dilemma of the operation and maintenance funding for the Columbia River Treaty Fishing Access Sites are not the result of the tribal effort. The current fate of the long term O&M funding is the result of federal inaction and therefore we would hope that our federal trustee would understand the need for this amendment and offer their unqualified support. In addition, we would hope that they would support the appropriation of funds necessary to meet the commitment they made in the 1995 MOU with the Army Corps of Engineers.

It is our hope that this Committee will act favorably on the technical amendment as written in H.R. 5680 to lift the investment restrictions for the Columbia River Treaty Fishing Access Sites. This would protect the federal government's investment in the in lieu and treaty fishing sites and also continue to satisfy the long overdue commitments made by the U.S. to our tribes over 75 years ago when the dams were built and over 150 years ago when our treaties were signed.

Again, thank you for this opportunity to express our support for this legislation.

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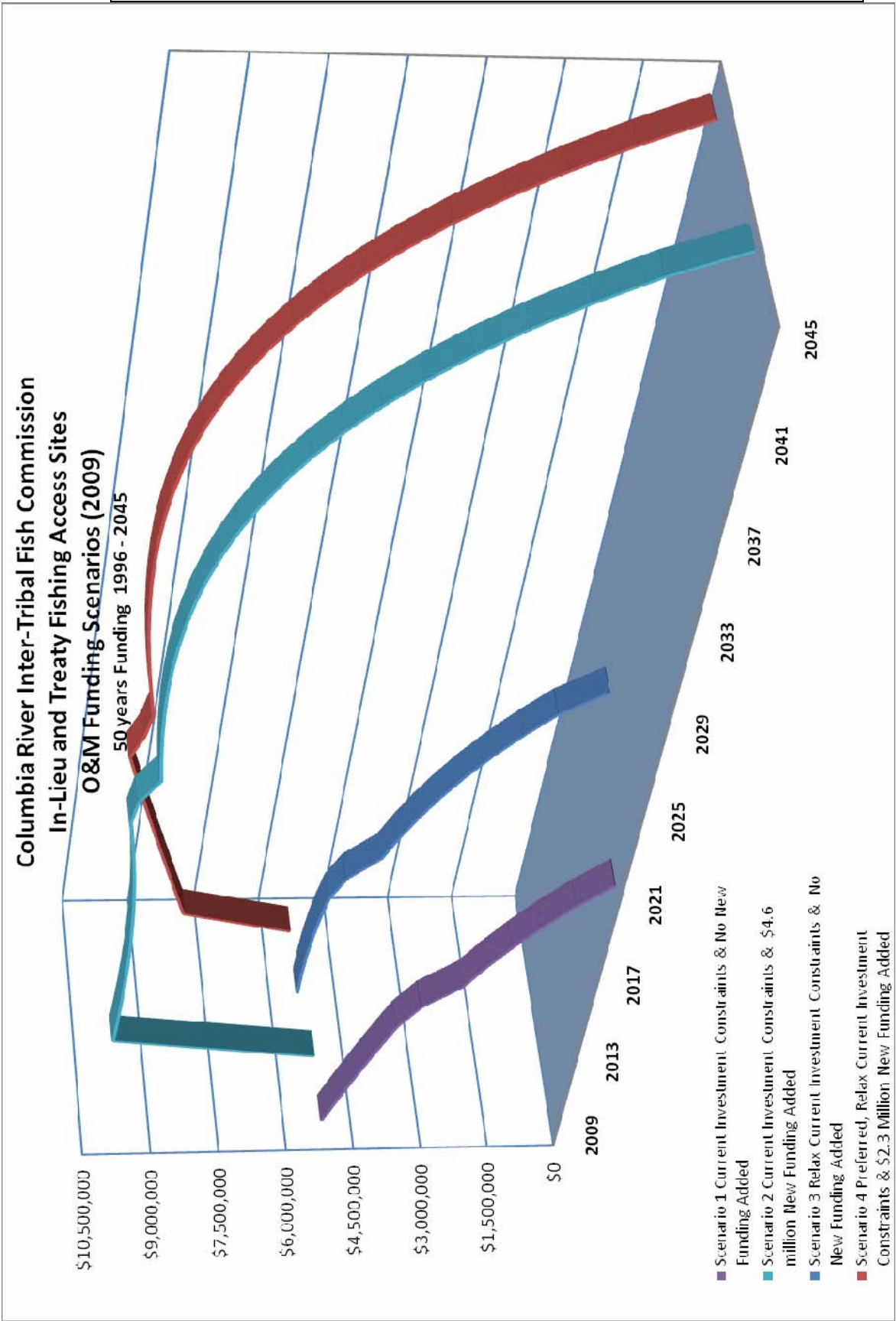
Columbia River Inter-Tribal Fish Commission

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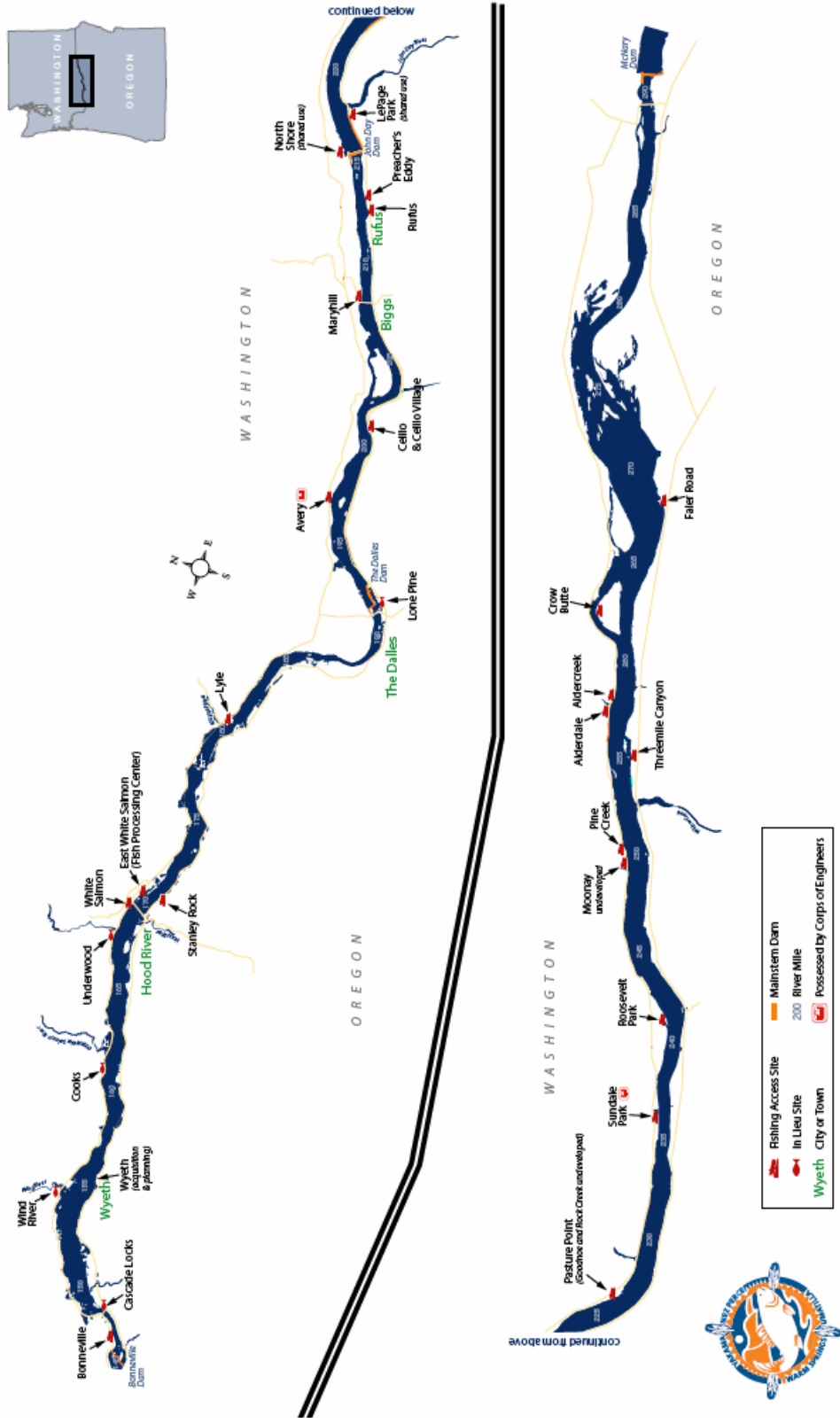
www.critfc.org

ATTACHMENT 1: OPTIONS TO REVIVE O&M FUNDS



ATTACHMENT 2: MAP OF FISHING SITES

Columbia River Treaty Fishing Access Sites



ATTACHMENT 3: COLUMBIA RIVER GORGE COMMISSION LETTER OF SUPPORT



PO Box 730 • #1 Town & Country Square • White Salmon, Washington 98672 • 509-493-3323 • fax 509-493-2229
www.gorgecommission.org

January 16, 2008

Ms. Fidelia Andy, Chair
Columbia River Inter-Tribal Fish Commission
729 N.E. Oregon, Suite 200
Portland, Oregon 97232

Dear Ms. Andy:

First, let me say that the renewed communication and collaboration between the Columbia Gorge Commission and the governments of the Columbia River Inter-Tribal Fish Commission's (CRITFC) member tribes is welcomed by our Commissioners. We're deeply appreciative of CRITFC's presentation to us in September and subsequent participation in the Gorge Commission's Vital Signs Indicators Project.

As you know, the National Scenic Act provides that nothing within it shall affect the treaty rights of Indian tribes, including hunting and fishing rights, which in this context include the rights of the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Warm Springs, and the Nez Perce Tribe. The Act also states that the mission of the Commission is to protect and enhance resources in the Scenic Area. The 29 completed sites and two remaining sites are part of the Columbia River Gorge's vital cultural, historical and legal infrastructure.

The Gorge Commission is concerned about the risk to future funding for Columbia River in lieu and treaty fishing access site operation and maintenance (O&M). We understand that these sites were authorized by PL79-14 and 100-581 to provide lands and facilities to support treaty fishing activities for the CRITFC member tribes and that the sites were promised by the U.S. Government in 1939 after the first of four federal dams flooded traditional fishing sites on the lower Columbia River.

We understand that the U.S. Army Corps of Engineers (COE) and Bureau of Indian Affairs (BIA) signed a Memorandum of Understanding in 1995 to, among various provisions, create an interest bearing account to cover future O&M costs for the sites. This account was intended to provide O&M funding for 50 years (to year 2045), but its term is now threatened. The fund was transferred to CRITFC in July 2003, under an Indian Self-Determination Act agreement to enable the funds to begin earning interest. However, due to the eroded capital and restrictions upon investment, the current fund balance will be depleted before 2025, leaving no O&M funding over the final 20 years.

The Gorge Commission supports the efforts of the Columbia River treaty tribes to secure amendment to PL 100-581 that would provide CRITFC greater investment flexibility than currently contained in 25 USC § 450e-3 specifically for the in lieu and treaty fishing access sites. In addition, we support new appropriations through the United States House and Senate to satisfy BIA's funding commitment.

We look forward to continuing our work with CRITFC's member tribes and the Commission. If you have any questions, please contact myself or Jill Arens, Executive Director, Columbia River Gorge Commission.

Warm regards,

Jeff Condit
Jeff Condit
Chair

**ATTACHMENT 4: JULY 1999 CORRESPONDENCE BETWEEN COE AND
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION**

JUL 13 1999

Planning, Programs and Project
Management Division

Mr. Antone Minthorn
Chairman, Board of Trustees
Confederated Tribes of the Umatilla Indian Reservation
PO Box 638
Pendleton, Oregon 97801

Dear Mr. Minthorn:

In response to Tribal Government initiatives, in 1988 Congress authorized the Secretary of the Army to acquire, improve, and transfer lands and facilities along the Columbia River for the use and benefit of the four Pacific Northwest Indian tribes. The authorization was intended to provide "equitable satisfaction" of the United States government's commitment to mitigate for the impacts of the Bonneville Lock and Dam project on the reserved treaty fishing access rights of the four tribes.

Between 1988 and 1995, the U.S. Army Corps of Engineers, Portland District, in consultation with Tribal Governments and the Bureau of Indian Affairs, developed plans to implement the authorization. In 1995 Congress appropriated funds to begin project construction. However, before construction could proceed, it became necessary to clarify operations and maintenance responsibilities for the new access sites.

In April 1995, a Memorandum of Understanding (MOU) for Operations and Maintenance was signed by the Assistant Secretary of the Army for Civil Works, ASA (CW), and Assistant Secretary of Interior for Indian Affairs. Under the MOU, the Corps of Engineers agreed to incrementally transfer a capitalized amount estimated at \$6.3 million concurrent with transfer of completed facilities. The Department of Interior agreed to accept management responsibility for those sites and to commit additional resources in the amount of \$2 million over eight years for operations and maintenance, training, law enforcement, and other maintenance needs.

In June 1996, construction of the project began. In 1996, Congress authorized the boundary adjustments proposed in the plan. In separate legislation in the same year, Congress authorized the transfer of funds from Army to Interior in accordance with the MOU. By the end of Fiscal Year 1999, the Corps of Engineers will have improved and transferred 15 sites and expended over \$20 million on the project. By the end of Fiscal Year 2000, one additional site will be complete and designs will be prepared for the next construction contract. Funds for completion of the project are currently included in our agency's five-year program. We will proceed with the project through completion subject to continued appropriations by Congress.

In November 1997, after acceptance of the first installment of operations and maintenance funds, the Department of Interior concluded that they lacked authority to invest the funds as envisioned in the MOU. This left shortfalls in the operations and maintenance accounts because interest on the investment made up a significant part of the total operating revenue. The Assistant Secretary of Interior for Indian Affairs recognized this shortfall and recommended that the Tribal Governments enter into a P.L. 93-638 contract and invest the funds as envisioned in the agreement.

At the April 1999 mid-point review conference, our agency committed to increase our contribution under the MOU from \$ 6.3 million to \$7.5 million assuming that three conditions are met. First, the funds need to be invested in an interest bearing account. Second, the BIA needs to continue to provide their contributions under the agreement. Third, there needs to be strong technical justification for the increase. With that commitment, there was consensus from the Task Force to move ahead with development of a Self Determination Act agreement under which the Tribal Governments would assume responsibility for investment and management of the operations and maintenance fund.

As we mark the mid-point of this project, I would like to thank the Tribal Governments, Task Force members, and the Bureau of Indian Affairs for their continued commitment to progress. I congratulate you on your accomplishments to date and wish you well in the challenges that lie ahead. It has been a pleasure working with you during my command.

Sincerely,
/Signed/

Robert T. Slusar
Colonel, Corps of Engineers
District Engineer

Copy Furnished:

Alphonse Halfmoon, Umatilla Indian Reservation
Randal Minthorn, TERO, Umatilla Indian Reservation
Jay Minthorn, Umatilla Indian Reservation

**ATTACHMENT 5: TITLE PAGE 1995 MOU BETWEEN THE ARMY
CORPS OF ENGINEERS AND BUREAU OF INDIAN AFFAIRS**

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
THE DEPARTMENT OF INTERIOR
FOR THE
TRANSFER, OPERATION, MAINTENANCE, REPAIR, AND REHABILITATION OF
THE COLUMBIA RIVER TREATY FISHING ACCESS SITES**

THIS MEMORANDUM OF UNDERSTANDING (MOU) is entered into this 23rd day of June, 1995, by and between the U.S. DEPARTMENT OF THE ARMY, acting by and through the Acting Assistant Secretary of the Army (Civil Works), and the U.S. DEPARTMENT OF THE INTERIOR, acting by and through the Assistant Secretary of the Interior (Indian Affairs);

WITNESSETH, THAT:

WHEREAS, Public Law 100-581, Title IV, Columbia River Treaty Fishing Access Sites (102 Stat. 2944 (1988)) (the Fishing Sites Act) requires that certain designated Federal lands "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 Yakama Indian Nation (the Tribes); and,

WHEREAS the Fishing Sites Act requires the Secretary of the Army to acquire and improve additional lands to accommodate "at least six sites . . . adjacent to the Bonneville Pool" and provides that the Army shall maintain the lands until they "are transferred to the Department of the Interior for the purpose of maintaining the sites"; and,

WHEREAS, the Department of the Army and the Department of the Interior (the parties) have agreed to seek legislation authorizing the Secretary of the Army to transfer funds to the Secretary of the Interior for Interior's use in operating and maintaining the sites after transfer; and,

WHEREAS, the parties recognize the Federal trust responsibility to Native Americans; and,

**ATTACHMENT 6: EXCERPT OF ARTICLE II OF 1995
MOU BETWEEN COE AND BIA**

ARTICLE II - Obligations of the Parties

a. The DA, acting by and through the COE, subject to and using funds appropriated by the Congress of the United States, shall expeditiously proceed with construction of the Project, applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies and in accordance with any other agreements related thereto between the DA, DOI and/or the Tribes.

b. When the District Engineer determines that a functional portion of the Project is complete according to approved Army and DOI plans, the Army shall turn the completed portion over to the DOI, in accordance with the procedure set forth in Article III. DOI shall

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accept the completed functional portion of the Project in accordance with Article III and after transfer, shall be solely responsible for operating, maintaining, repairing, and rehabilitating the Project or functional portion of the Project in accordance with Article IV hereof.

c. The DOI shall be responsible for the costs of O&M training, law enforcement, and for other maintenance needs of the fishing access sites. It is anticipated that the monetary value of the DOI contribution will exceed \$250,000 annually for the next eight years, beginning in Fiscal Year 1996.