BEFORE THE STATE OF WASHINGTON
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

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| In the Matter of the Petition of<br><br>QUINAULT INDIAN NATION<br><br>For a Declaratory Order Re: Fish Passage Obstruction at SKOOKUMCHUCK DAM. | ) | DOCKET NO. _____<br><br><br>PETITION FOR DECLARATORY ORDER |

1. Name and Address of Petitioning Party:

   Quinault Indian Nation
   Quinault Business Committee
   P.O. Box 189
   Taholah, WA 98587
   (360) 276-8211 | Phone

2. Statutes, Rules, Orders, or Other Legal Requirements at Issue:

   RCW 77.57.030(1) and (2) (fish passage obstruction)
   RCW 77.57.040 (obstruction modification and removal)
   RCW 7.48.140(3) (public nuisance)

## INTRODUCTION

Quinault Indian Nation ("Quinault") petitions for a declaratory order that the Washington Department of Fish and Wildlife ("WDFW" or "Department") exercise its authority to:

(1) declare the Skookumchuck Dam (the "Dam") on the Skookumchuck River, located at river mile 21.6, a fish passage impediment in violation of RCW 77.57.030;

(2) to order the Dam immediately removed upon closure of the Centralia Coal Plant, but no later than the end of 2025; and



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(3) to declare, in accordance with RCW 77.57.030(2), that if the Dam's owners TransAlta Corp. do not remove the Dam within 30 days of the WDFW declaration and Order, that WDFW will use its authority to remove the Dam.

FACTUAL BACKGROUND

1. TransAlta Corp. ("TransAlta") owns and operates the Skookumchuck Dam through its subsidiary Skookumchuck Dam LLC. The Dam was built in 1970, located on the Skookumchuck River at River Mile (RM) 21.6.[1] Historically, the Dam stored and provided water for two coal-fired steam generation turbines at the Centralia Steam Generation Plant (the "Steam Plant") on the Skookumchuck River at RM 7.2.[2]

2. The Steam Plant operates under a Federal Energy Regulatory Commission ("FERC") permit.[3] TransAlta has retired one turbine at the Steam Plant and must retire the second in 2025.[4]

3. The Dam itself does not require a FERC permit and has an Order Granting Exemption from FERC licensing (exemption P-004441) because of its low power output (1 MW), transferred to TransAlta in 2004.[5] The exemption order requires some minimum flows and some fish- and wildlife-related actions.[6] It does not include fish passage.

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[1] Ecology, *Skookumchuck Dam Initial Data Compilation and Analysis*, Publication 22-13-002 (September 2021), available at: https://apps.ecology.wa.gov/publications/SummaryPages/2213002.html ("Ecology Study") (enclosed).
[2] *Id.* at 2, 6-8, 13-17.
[3] *Id.* at 8.
[4] *Id.* at 6-7, 16-17.
[5] *Id.* at 8, 17.
[6] Ecology Study at 8, 17. The order requires some environmental conditions: water temperature management, minimum flows, reservoir levels, ramping rates, water quality, revegetation after construction, erosion control, avian protection on the transmission lines, herbicide restrictions, tailrace improvements, and annual reporting. *Id.* at 17.


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4. Historically, the Skookumchuck River upstream of the Dam site had up to 21 miles of salmonid spawning habitat with a minimum (and likely more than) of 4.3 miles of Chinook spawning habitat, and 8 miles of coho spawning habitat.[7] While few spring chinook were observed in the Chehalis river in surveys of habitat conditions and salmon usage upstream of the Dam site in the 1960s, the low numbers were a result of past and on-going effects of watershed alterations due to logging and other land uses, together with extreme over-fishing. (Finn, 1973, and Phinney and Bucknell, 1975). *See also*, Center for Biological Diversity and Pacific Rivers, Petition to List the Washington Coast ESU of Spring-Run Chinook Salmon (Oncorhynchus tshawytscha) under the Endangered Species Act, filed July, 2023, copy enclosed with this Petition.

5. From the natural falls, the Skookumchuck River continues for another 10 miles upstream where it is estimated that 1,800 coho, 500 spring Chinook, 371 fall Chinook, and 2,100 chum salmon would have spawned *upstream* of the Dam.[8] There is no estimate for the potential number of steelhead produced upstream of the Dam, but the Washington Department of Game (WDG) estimated the potential spawners to be 700 fish (WDG 1970, as cited in Hiss, et al. 1982).[9]

[7] Ecology Study at 8 (citing 1996 Weyerhaeuser study); the upper watershed also has cutthroat and rainbow trout, *id.*
[8] *Id.* at 20.
[9] Ecology Study at 8 (citing 1996 Weyerhaeuser study); the upper watershed also has cutthroat and rainbow trout, *id.*



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6. The Skookumchuck Dam is a complete fish passage barrier to upstream migration.[10] WDFW's current observations of fish populations in Skookumchuck river end at the Dam.[11]

7. Under 1974 and 1979 agreements that were combined into the 1998 Centralia Steam Electric Generating Project Fish and Wildlife Agreement,[12] there are fish handling/collection facilities at the Dam, and Coho and steelhead production via the Skookumchuck Hatchery built near the base of the Dam.[13] There is no fish passage at the Dam.

8. WDFW has captured and transported hatchery-produced steelhead upstream of the Dam.[14] Hatchery-produced smolts for Coho and steelhead are released below the Dam, as well as at two other locations in the upper Chehalis Basin.[15] Coho have been eliminated above of the Dam.

9. Fall and spring Chinook are not raised in the hatchery. [16] Chinook have also been eliminated above the Dam.

10. When the Dam was built in the early 1970s, a fish sluice (a slot in the dam spillway structure) provided downstream passage of smolts that would be produced from spawners released upstream of the Dam. Smolts could also go over the spillway when reservoir levels are sufficiently high (Anchor QEA draft, 2022). The effectiveness of these structures for

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[10] Office of Chehalis Basin, Washington Department of Ecology, Chehalis Basin Strategy, *The Skookumchuck Dam Study*, https://chehalisbasinstrategy.com/skookumchuck-dam-study/ ("Skookumchuck Dam Website"), available at: https://chehalisbasinstrategy.com/skookumchuck-dam-study/.
[11] WDFW, SalmonScape, http://apps.wdfw.wa.gov/salmonscape/ (last accessed Jan. 19, 2023).
[12] Ecology Study at 17.
[13] *Id.*
[14] *Id.* at 18, 30.
[15] *Id.* at 18, 30.
[16] *Id.*



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passing smolts had not been evaluated until recently – and that evaluation was not based on fish health and success.

11. According to Anchor QEA (draft, 2022), the current downstream passage facilities "create[] several hazardous flow and debris conditions for fish passage." These hazardous conditions include "excessive velocities and turbulence, insufficient flow depths, abrupt changes in flow direction, a lack of smooth flow transitions, and a likelihood that collisions will occur between fish and structural components of the spillway and chute."

12. Anchor QEA also concluded that "[t]he existing fish sluice and chute return to the river were evaluated to not be a desirable downstream fish passage facility."

13. Prior to the construction of the Dam fall and spring Chinook could co-exist without adverse impacts. Individuals of the fall and spring Chinook run-types can interbreed, producing hybrids (heterozygotes), which have an intermediate river entry and spawning timing between the two pure run-types. Interbreeding of the two run-types is a major threat to spring Chinook in Washington coastal rivers, including in the Chehalis Basin (Thompson et al. 2019a and b; Waples et al. 2022). Over time, where interbreeding of the two run types is significant, the spring-run type will lose out and be replaced by fall Chinook as a result of spring Chinook generally being less productive (e.g., smaller body size with fewer eggs) (Thompson et al. 2019a).

14. For these two different Chinook run types to co-exist in a river, it is essential that spatial separation occurs during spawning. (Waples et al. 2022; QIN letter to Doyle, 2023). In some rivers, or sections of rivers, separation is provided for by waterfalls or steep cascades (Waples et al. 2022). Spring Chinook can ascend the steep stream reaches in the springtime during spring runoff. But, in late summer or early fall, when stream flows have dropped to their



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lowest levels, fall Chinook are unable to pass upstream to those same areas (as was apparently the case in the upper Skookumchuck River upstream of the reservoir reach). In other rivers, or sections of rivers, where waterfalls and steep cascades don't exist, spawning separation can occur due to low flows and temperature conditions in mid to late summer, which impede migration of early fall Chinook upstream of areas where those conditions exist.

15. Mapping of the upper Skookumchuck River indicates that historical conditions upstream of the Dam site spatially segregated spring and fall Chinook spawning, enabling the two run types to co-exist without significant adverse effects from interbreeding. The mechanisms for providing spawning separation of the two Chinook run-types were operative in the Chehalis Basin and within the Skookumchuck subbasin (Ferguson, J., and L. Lestelle 2022).

16. In some rivers, or sections of rivers, separation is provided by waterfalls or steep cascades (Waples et al. 2022). Spring Chinook are able to ascend the steep stream reaches in the springtime during spring runoff. But, in late summer or early fall, when streamflows have dropped to their lowest levels, fall Chinook are unable to pass upstream to those same areas (as was apparently the case in the upper Skookumchuck River upstream of the reservoir reach). In other rivers, or sections of rivers, where waterfalls and steep cascades don't exist, spawning separation can occur due to low flows and temperature conditions in mid to late summer, which impede migration of early fall Chinook upstream of areas where those conditions exist. This is the situation that is believed to have existed historically in parts of the Chehalis Basin, enabling the two run types to co-exist without significant adverse effects from interbreeding (Ferguson, J., and L. Lestelle 2022). Both mechanisms for providing spawning separation of the run-types were operative historically in the Chehalis Basin and within the Skookumchuck subbasin.



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17. The Dam and its operations obliterated the natural state of these spawning separation mechanisms in the Skookumchuck River, contributing to the decline of spring Chinook in both the Skookumchuck subbasin and in the Chehalis Basin as a whole. Historically, most spring Chinook spawned in the part of the river under the Dam's reservoir. The Dam has drowned that habitat and blocked access to the habitat above the Dam.

18. Additionally, construction of the Dam without upstream fish passage forced all Chinook (spring and fall) to spawn downstream of the Dam. Prior to the Dam's construction, most spring Chinook spawned upstream of the Dam site while the majority of fall Chinook spawned downstream of the Dam site. The Dam's construction created an unnatural scenario where fall Chinook spawned atop spring Chinook nests, disturbing the deposited eggs, a phenomenon referred to as superimposition. Over time, this led to hybridization between the two run-types. Finn (1973) identified that preventing this superimposition required halting fall Chinook from intruding on spring Chinook spawning grounds.

19. Two reports by the U.S. Fish and Wildlife Service (USFWS), Hiss et al. (1982 and 1985), described how WDFW and the Dam owner at that time tried to prevent superimposition by using a temporary weir to keep spring and fall Chinook from spawning in the same area. A statement in Hiss et al. (1982) is particularly insightful:

> To keep fall chinook from digging up spring chinook redds, a weir was built several miles below the dam and only spring chinook were allowed upstream. After five years the weir was removed because it was assumed that the two runs had established separate spawning grounds (R. Palmer, PP&L, personal communication).

The assumption regarding separate spawning grounds was inaccurate. Hiss et al. (1985), in a follow-up report, described how superimposition by fall Chinook on spring Chinook redds was extensive, but particularly in a 2 ½ mile reach below the Dam. The authors recommended that



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the segregating weir be reconsidered to remedy the situation. Neither WDFW nor the Dam owner took any action to mitigate the effects following the report of the USFWS.

Operation of the Dam has also resulted in significantly increased flows over the entire course of the lower Skookumchuck River (both upstream and downstream of the water diversion structure at RM 7.2), contributing to significant hybridization of the Chinook run types. The changes to the flow quantities from pre-dam conditions has created a very unnatural flow regime during summer and early fall in the lower Skookumchuck River below the dam—a situation that has generally existed since the Dam operations began, except in the past two years as part of an experimental project to attempt to restore flows downstream of the diversion to pre-dam flow levels (Ferguson, J., and L. Lestelle 2022).

20. Increasing flows to levels greater than the natural flow level downstream of the diversion has also resulted in flows in the mainstem Chehalis River downstream of the Skookumchuck being increased substantially. There, flows could be as low as 120 cfs or less prior to dam construction. The result was that flows downstream of the Chehalis-Skookumchuck confluence were typically increased by at least 30%, sometimes much more than that, in late summer and early fall (QIN letter to Doyle, 2023).

21. Altering the flow regime likely triggered an earlier migration of some fall Chinook into the upper Chehalis River, including into the Skookumchuck River further narrowing the separation between spring and fall Chinook and increasing the probability of hybridization. The upstream migration of adult wild fall Chinook into Washington coastal rivers typically begins near the end of August or in early September with the first rainfall events of the season (SIT and WDFW 2010; Lestelle et al. 2019). Upstream migration by large-bodied adult salmon over shallow riffles prior to increased flows imposes physical stress thereby discouraging



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early migration of fall Chinook to elevated flows resulting from flow regulation in the Skookumchuck River triggered an earlier migration of some fall Chinook through the lower Chehalis River and into the Skookumchuck River.

22. Moreover, an advanced arrival timing of some fall Chinook to the mouth of the Skookumchuck River likely also resulted in an advanced arrival to the Newaukum River, as well as to the upper Chehalis River. Migration to all of these areas would likely have been affected by the unnaturally elevated flows downstream of the Skookumchuck River that followed dam construction.

23. Based on genetic sampling of emergent fry in the Skookumchuck River, it is clear that significant hybridization of the run types is occurring in that river (Gilbertson et al. 2021; Gilbertson 2022). The fry sampling also shows that hybridization is occurring in the Newaukum and upper Chehalis rivers. Interbreeding is likely occurring between run types in all these areas because of unnaturally elevated flows in the Skookumchuck River during late summer and early fall. Again, the hybridization harms spring Chinook.

24. As explained above, the Dam has caused harm, and continues to cause harm, to Chinook salmon in the Skookumchuck River, as well as to the species in the overall Chehalis Basin. While the level of harm has been greatest on spring Chinook, coho and steelhead are also adversely affected. In 2023, the National Marine Fisheries Service ("NMFS") issued a "warranted" finding on a petition to list spring Chinook on the Washington Coast, including the Chehalis Basin, as threatened under the Endangered Species Act ("ESA").[17] Under the ESA, NMFS is required to make a final listing determination by July of 2024. Hybridization of spring

[17] National Marine Fisheries Service 90-Day Finding on a Petition to List Spring Chinook Salmon on the Washington Coast, 2023, copy enclosed with this Petition; 88 Fed. Reg. 85,178 (Dec. 7, 2023).



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and fall Chinook was identified as an important factor in the ESA listing petition for spring Chinook, and it will very likely be an important factor when NMFS considers the listing petition under the ESA.

REQUIREMENTS FOR A PETITION FOR A DECLARATORY ORDER:
RCW 34.05.240(1); WAC 463-34-070.

25. Pursuant to state law, any petition for a declaratory order by an agency must show that an uncertainty necessitating resolution exists; that there is an actual controversy arising from the uncertainty and the requested declaratory order will not merely be an advisory opinion; that the identified uncertainty adversely affects the petitioner; and that the harm from the uncertainty outweighs the adverse effect, if any, on others or on the public from the requested order. RCW 34.05.240(1)(a)-(d).

A. Uncertainty Necessitating Resolution.

26. There is uncertainty regarding the Dam's continued existence. TransAlta is ceasing operation meaning that the Dam is no longer needed for the purposes for which it was built.

27. While the Dam has been subject to "mitigation" requirements for adverse effects to fish and wildlife, the mitigation is wholly inadequate for the passage barriers and destruction of spawning habitat caused by the Dam. Moreover, the purpose of and need for the 1998 hatchery agreement has ended.

28. Further, the Dam's removal can no longer be considered impractical. RCW 77.57.050.

29. Despite the fact that the Dam is no longer needed for the purposes for which it was built, and despite the fact that the Dam was built in violation of Washington requirements to provide adequate fish passage (and it has never been exempt from that requirement because the



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Hatchery Agreement never addressed Chinook), and despite the great harm the Dam has plainly caused and is causing to salmonids, TransAlta and other parties are moving forward with actions to keep the Dam in place contrary to RCW 77.57.030(1), through transfers of water rights that appear to depend upon flows that would come from maintaining the illegal Dam.

30. WDFW must resolve this uncertainty concerning the Dam's violation of state statutes and fish passage and its impact on salmonids before additional actions are taken to maintain the Dam in violation of the law.

B. Actual Controversy.

31. RCW 77.57.030(1) requires an owner/agent/person in charge of a potential or existing barrier to fish passage to "provide[] durable and efficient fishway" and "maintain[] effective condition and continuously suppl[y] it with sufficient water to freely pass fish." WDFW must approve such fish passage. RCW 77.57.030(1).

32. RCW 77.57.030(2) allows WDFW to construct a fishway or remove the Dam and recover its costs from the owner if it fails to take action within 30 days' notice. [18]

33. Failure to comply with RCW 77.57.030 is a gross misdemeanor under RCW 77.15.320(2) and RCW 9A.20.021(2) for each day of violation, subject to a maximum of 364 days imprisonment, a $5,000 fine, or both.

34. Quinault asserts that the Dam is a complete barrier to anadromous fish passage (as well as causing the destruction of important spawning habitat that has been drowned under the

[18] RCW 77.57.040 allows WDFW to remove the dam at its own expense, but appears to prohibit cost recovery from the owner, but this provision does not explicitly repeal the prior provision. This creates some ambiguity about whether WDFW may recover costs; *State Dept. of Fisheries v. Pub. Utility Dist. No. 1 of Chelan County*. 91 Wash.2d 378, 588 P.2d 1146 (1979) (holding Fisheries Department could not recover costs for upgrading dam because RCW 77.57.040 superseded 77.57.030, *but see*, dissent at 384-86, noting that legislative history circumscribes RCW 77.57.040 to specific context of federal grant program for fish guards).



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reservoir) in violation of state law; that the Dam is no longer exempt from the requirements because the hatchery agreement has ended and removal is not impractical because from 2025 forward the purpose for which the Dam was built will cease to exist. Washington state statutes require immediate removal of the Skookumchuck Dam.[19]

C. Uncertainty Adversely Affects Petitioner.

35. The Quinault Indian Nation is a signatory to the Treaty of Olympia (1856) in which it reserved a right to take fish at its "usual and accustomed fishing grounds and stations" and the privilege of gathering, among other rights, in exchange for ceding lands it historically roamed freely. Treaty rights are not granted to tribes, but rather are "grants of rights from them—a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 380-81 (1905). Treaty rights are akin to easements running with the lands or places they burden and include a right of access to those places. *See id.* at 381. As such, treaty rights are property rights within the meaning of the Fifth Amendment and cannot be "taken" without compensation. *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968)).

36. Treaties impose on the government the "highest responsibility" and create a special fiduciary duty and trust responsibility upon all agencies of the United States and states to protect treaty rights, including fishing rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). These rights cannot be abrogated except by explicit Congressional authorization. Federal courts have consistently required the federal agencies and states to keep the treaty promises upon which the Tribes relied when they ceded huge tracts of land by way of the

[19] Quinault also adopts and incorporates the statements in the ESA listing petition for spring Chinook regarding barriers and adverse impacts on spring Chinook. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fisheries.noaa.gov/s3/2023-07/WA-Spring-Chinook-Petition-7-17-23-508Compliant.pdf; enclosed.



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Treaties. See, e.g., *Winans*, 198 U.S. 371; *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *United States v. Oregon*, 718 F.2d 299, 304 (9th Cir. 1983); *Muckleshoot*, 698 F. Supp. 1504; *Nw Sea Farms v. U.S. Army Corps of Eng'rs,* 931 F. Supp. 1515 (W.D. Wash. 1996); *United States v. Washington*, 2007 WL 2437166 (W.D. Wash.).

37. In a landmark court case known as the "Boldt decision," a federal court confirmed that Indian tribes have a right to half of the harvestable fish in state waters and established the tribes as co-managers of the fisheries resource with the State of Washington. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Specific to the Quinault Indian Nation, the Boldt decision affirmed the Quinault usual and accustomed fishing areas to include the Chehalis River and its watershed. *Id.* at 374.

38. The Chehalis and its tributaries, including the Skookumchuck River, provide the freshwater habitat that supports natural production for spring and fall Chinook, chum, and coho salmon, and steelhead of critical importance to the Quinault Nation's Treaty-protected fisheries.

39. The Quinault Indian Nation has an obvious interest in protecting the fish and habitat that the Quinault rely on in the Chehalis Basin and the Skookumchuck River to exercise federally-guaranteed treaty fishing rights. Additionally, the Quinault Nation's treaty fishing right includes a right of access to its traditional fishing areas and any impact to that right is an unconstitutional taking of a property right.

40. The Quinault Indian Nation's Division of Natural Resources manages all aspects of its many fisheries, both on and off the reservation. Quinault fishers catch salmon and steelhead among many other species, from the Chehalis River and its watershed.



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41. The Dam injures the Quinault in several ways. First, the Dam has drowned important, likely critical, spawning habitat for salmonids, particularly spring Chinook, under its reservoir since its construction, adversely affecting 50 years of generations of salmon. Second, the Dam is a complete barrier to fish passage completely cutting off access to a large percentage of spawning habitat in the Skookumchuck River for salmonids and completely cutting off critical and historic spawning habitat for spring Chinook. Third, the Dam barrier has forced spring and fall Chinook into the same and/or significantly overlapping spawning habitats below the Dam and has artificially increased flows leading to less separation between spring and fall migrations, causing and contributing to the declines in spring Chinook either outright or through hybridization of these distinct populations. These adverse impacts to salmonids, especially spring Chinook, have harmed and continue to harm Quinault's subsistence, commercial, recreational, aesthetic, spiritual, cultural, and other interests.

42. Now, creation of a water bank from the waters retained behind the reservoir and proposals to issue new water rights, supposedly "mitigated" from the water in the bank, will adversely affect the Quinault because it will perpetuate the significant harms from the Dam into the future. This occurs through the creation of a set of expectations and junior water rights reliant on the existence of the Dam, which in turn will adversely affect the instream flows in the Skookumchuck River, and potentially parts of the Chehalis River, necessary for salmon. The minimum instream flow right is a water right that is senior to the newly created rights and the water bank right, because it is appropriate to consider the instream flow minimums as a minimum proxy for the first in time rights of the Quinault for the protection of fish dating to time immemorial.



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D. The Obligation to Remove the Dam or Provide Modern Fish Passage Outweighs Adverse Effects, if Any, From the Requested Order.

43. In this case, the adverse effect on Quinault and Washington's salmonids of this old and illegal Dam "outweighs any adverse effects on others or on the general public that may likely arise from the order requested." RCW 34.05.240. First, TransAlta is ceasing operations in 2025. The Dam was built to serve TransAlta's steam generation plant needs. Those needs will cease entirely (and are already much reduced) in 2025. There will be minimal financial impact (inability to see all the water in the bank) to TransAlta from Dam removal, and certainly no harm from the provision of adequate and modern fish passage. Second there will be no harm to the public from Dam removal of the provision of modern and effective fish passage. Rather, the public will benefit from a determination to remove this old, harmful Dam to aid in the restoration of native salmonids in the Skookumchuck River and help prevent the extirpation of spring Chinook. The public will further benefit from the restoration of natural flows in the Skookumchuck River particularly as the negative effects of climate change on Washington streams will only increase in the coming years.

44. To the extent that any entity or person argues reliance on the continued existence of the Dam, that reliance is again far outweighed by the harm caused by a Dam that plainly violates Washington law on its face and has done so for decades. Further, reliance on an illegal Dam must give way in the face of senior water rights of the Quinault to ensure adequate and natural instream flows for salmon. Quinault has the first in time right, since time immemorial and while the quantity has not been adjudicated, instream flows in the Skookumchuck have been set for the protection of salmonids and as such those instream flows can and should be considered a proxy first in time right for the Quinault until the first in time right is fully



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quantified. Any reliance argument must give way and would be outweighed by the benefits of Dam removal.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE STATUTE, THE SKOOKUMCHUCK DAM VIOLATES WASHINGTON LAW.

45. The State of Washington has made clear that barriers to fish passage are prohibited, [cite] and has conferred on WDFW the authority to ensure that passage is maintained and/or restored. RCW 77.57.030.

A. The Skookumchuck Dam is a Complete Fish Barrier.

46. As set forth above, the Skookumchuck Dam has no fish passage facility such as a ladder. Salmonids are unable to pass the Skookumchuck Dam.

47. Further, as set forth above, the reservoir behind the Dam has completely covered and destroyed important salmonid spawning habitat upstream of the Dam.

48. The Dam has harmed spring Chinook salmon in particular by creating a complete barrier to their migration to upstream habitat and by forcing spawning below the Dam leading to competition and/or hybridization with fall Chinook.

49. In all these ways, the Skookumchuck Dam has harmed salmonids, especially spring Chinook, and is likely a significant contributing factor in the decline and precarious status of spring Chinook in the Chehalis River basin.

B. Removal of the Dam is Not Impractical.

50. The Dam is no longer needed for the purpose for which it was built and has been used for decades. The TransAlta coal-fired power plant has decreased operations within the last three years, decreasing the need for water from the reservoir behind the Dam. The coal plant will wholly cease operations in 2025 and the reservoir will no longer be needed at all.



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51. Removal of the Dam is technically possible as well, as has been demonstrated by countless dam removals from small to very large (e.g. on the Elwha, Rogue, and Klamath Rivers) leading to restoration and recovery of species in all these rivers. The engineering necessary for dam removal is known and readily available throughout the Pacific Northwest.

C. The Hatchery Agreement Was Inadequate to Mitigate Harms Caused by the Dam and Has Expired Leaving the Dam no Exemption From Passage Requirements.

52. As set forth in detail above, spring Chinook have declined precipitously in the Skookumchuck and Chehalis Rivers. The Dam is a significant cause of that decline both by blocking access to, and destroying, habitat and by forcing competition and hybridization with fall chinook. The hatchery has done nothing to address this situation.

53. Given that the hatchery never raised Chinook or addressed the harm to Chinook, Quinault asserts that the Dam was never entitled to the hatchery exemption. Further, coho are now raised and released only wholly below the Dam. It is also unlikely WFDW's transport program will produce a substantial steelhead population in the Skookumchuck River upstream of the Dam for two reasons. First, since the adult steelhead transported upstream of the Dam are all hatchery-origin fish, their reproductive success when spawning in nature is significantly reduced. Ford et al. (2016) reported at least an 80% reduction in reproductive success for hatchery-origin steelhead spawning in nature. Second, as described above, the effectiveness of the current downstream passage structures for smolts at the Dam is severely impeded. Additionally, the hatchery has not, and cannot, address the destruction of prime spawning habitat under the reservoir, nor the harm from hybridization of spring and fall Chinook, a harm identified *before* the Dam was built. Finally, the Hatchery Agreement has expired, meaning that the Dam no longer has even an argument for exemption from the fish passage requirements (if it ever had a



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valid exemption, given that Chinook were never part of the hatchery and the hatchery could not address lost habitat and hybridization harms).

54. The Skookumchuck Dam plainly violates Washington's fish passage laws and has no exemption from those laws.

## II. THE SKOOKUMCHUCK DAM ALSO CONSTITUTES A PUBLIC NUISANCE UNDER WASHINGTON LAW.

55. An actionable nuisance is defined as "obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property," and is actionable for "damages and other and further relief." RCW 7.48.010.

56. A public nuisance is "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal," and includes "obstruct[ing] or imped[ing], without legal authority, the passage of any river, harbor, or collection of water." RCW 7.48.130, 7.48.140(3).

57. It is a public nuisance to fail to provide fish passage, without an exemption, after 30 days' notice from WDFW to correct any violation. RCW 77.57.030.

58. A private person may bring a civil action for a public nuisance if it is "specially injurious to himself or herself." RCW 7.48.210. "A public nuisance may be abated by any public body or officer authorized thereto by law," RCW 7.48.220, or self-help by "any person" by removing or destroying the nuisance without committing a breach of the peace or unnecessary injury, RCW 7.48.230.

59. The three elements of nuisance are: (1) The defendant acted unlawfully or failed to perform a duty; (2) The unlawful act or failure to perform a duty injured others; and (3) The defendant's unlawful act or failure to perform a duty was the proximate cause of plaintiff's injury. RCW 7.48.120.



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60. Violation of a statute is a per se public nuisance that satisfies a complainant's burden of proving the first two elements of nuisance and only needs to show proximate cause to their injury. *Tiegs v. Watts*, 135 Wash. 2d 1, 18-19, 954 P.2d 877 (1998); *see also*, *Gill v. LDI*, 19 F. Supp. 2d 1188, 1198-1200 (W.D. Wa. 1998) (finding nuisance per se for NPDES violation applying *Tiegs*). *See also* RCW 7.48.120.

61. The Skookumchuck Dam is a public nuisance. It violates Washington statute in being illegally built and maintained without adequate fish passage or a compensating hatchery. Even if the hatchery was considered adequate, the agreement has ended, meaning that an exemption for the illegal Dam no longer exists. It obstructs the Skookumchuck River for salmonids and results in the destruction of important habitat. It has contributed significantly to the decline of spring Chinook. The illegal Dam and the immeasurable harm it has caused to salmonids also harms the public and especially the Quinault and their treaty rights. The Dam is the proximate cause of that harm to the Quinault and the people of the State of Washington generally.

## CONCLUSION

For the reasons discussed above, petitioner Quinault Indian Nation asks the Washington Department of Fish and Wildlife to issue a declaratory order that the Skookumchuck Dam is a fish passage impediment in violation of RCW 77.57.030, ordering its immediate removal, and to declare, in accordance with RCW 77.57.030(2), that if the Dam's owners TransAlta Corp. do not remove the Dam within 30 days of the WDFW declaration and Order, that WDFW declare the Dam a public nuisance and that WDFW will use its authority to remove the Dam should TransAlta fail to immediately do so.



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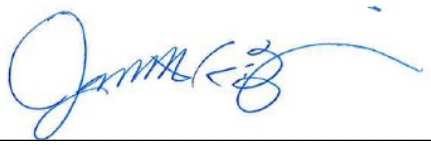
Respectfully submitted this 13th day of June, 2024.



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