

ORIGINAL
FILED

JUN 19 1985

WILLIAM L. WHITTAKER
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellant,)
)
vs.)
)
TOM WILSON and SONNY ERICKSON,)
)
Defendants-Appellees.)

No. CR-84-0396 EFL

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellant,)
)
vs.)
)
GIG and JEANETTE EBERHARDT,)
)
Defendants-Appellees.)

No. CR-84-0395 EFL

MEMORANDUM OPINION

Tom Wilson and Jeanette Eberhardt were charged by information with the unlawful sale of anadromous fish caught within the Hoopa Valley Indian Reservation.¹ Both

¹ Anadromous fish are hatched in freshwater, grow to maturity in the ocean, and usually return to their freshwater parent streams to spawn. The important anadromous fish found in the Klamath and Trinity river drainage basin are chinook and coho salmon, steelhead, coastal cutthroat and brown trout, green a white sturgeon, American shad, Pacific lamprey and candlefish Bureau of Indian Affairs, Environmental Impact Statement, Indian Fishing Regulations 9 (1985).

1 defendants were charged under 16 U.S.C. § 3372(a)(1), the Lacey
2 Act, which makes it unlawful for any person to sell any fish
3 taken in violation of any regulation of the United States.
4 Specifically, the defendants were accused of violating 25
5 C.F.R. §§ 258.8(d), (e) prohibiting commercial fishing by
6 Indians on that part of the Klamath River that flows through
7 the Hoopa Valley Reservation.²

8 Both defendants agreed to have their cases heard by a
9 magistrate. Magistrate Steele F. Langford, recognizing that
10 these cases involved common questions of law and fact, agreed
11 to consolidate the proceedings. On September 14, 1984,
12 defendants Wilson and Eberhardt moved to have the informations
13 filed against them dismissed. The defendants argued that the
14 regulations prohibiting commercial fishing on the Hoopa Valley
15 Reservation, which underlie their prosecutions under the Lacey
16 Act, were invalid. Defendants' motions were heard on November
17 9, 1984. On March 5, 1985, Magistrate Langford granted
18 Wilson's and Eberhardt's motions to dismiss. The next day, the
19 Government filed a notice of appeal to this Court.

20 I. Background Facts

21 Both Wilson and Eberhardt are members of the Yurok
22 Indian Tribe. Along with the Hoopa Indians, the Yuroks occupy
23 the Hoopa Valley Reservation in California's Del Norte and

24
25 ² During July 1982, undercover agents of the United States Fis
26 and Wildlife Service met the defendants. The agents allege
27 that on several occasions Wilson and Eberhardt sold them
28 anadromous fish within the boundaries of the Hoopa Valley
Indian Reservation.

1 Humboldt counties. Geographically, the reservation consists of
2 three parcels: (1) the Old Klamath River Reservation, one mile
3 in width on each side of the Klamath River, extending from the
4 river's mouth on the Pacific Ocean up the river for 20 miles;
5 (2) the original Hoopa Valley Reservation, a 12-mile square,
6 centered at the confluence of the Klamath and Trinity rivers;
7 and (3) a 30-mile strip along the Klamath River connecting the
8 Hoopa and Klamath parcels. See Mattz v. Arnett, 412 U.S. 481,
9 493 (1973); Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 458
10 (1975), cert. denied, 425 U.S. 907 (1976).

11 The Department of Interior ("Interior") has promulgated
12 regulations regarding the commercial taking of anadromous fish
13 by Indians on the Hoopa Valley Reservation. People v. McCovey,
14 36 Cal. 3d 517, 529-31 (1984). In 1977, Interior expressly
15 limited commercial fishing by Indians to five fish per day. 42
16 Fed. Reg. 40,904-40,905 (August 12, 1977). In 1978, Interior
17 imposed interim regulations that allowed eligible fishermen to
18 fish commercially on the Klamath River only during limited
19 seasons. 43 Fed. Reg. 30,048 (July 13, 1978). Interior then
20 superceded these rules by another set of regulations in 1979.
21 44 Fed. Reg. 17,144-17,151 (March 20, 1979) (codified in 25
22 C.F.R. 258).³

23 It was in 1979 that Interior prohibited all commercial
24 fishing and sale of anadromous fish caught on the Hoopa Valley

25
26 ³ These regulations were operative at the time appellees
27 committed the offenses. The regulations currently in effect
28 are substantially similar to those promulgated in 1979.
McCovey, 36 Cal. 3d at 529 n.12.

1 Reservation. 25 C.F.R. § 258.8(c), (d). These regulations
2 define commercial fishing as the taking of fish or fish parts
3 with the intent to sell or trade them or profit economically
4 from them. 25 C.F.R. § 258.4(b). The 1979 prohibition has
5 remained in effect for over six years, having been renewed in
6 successive versions of the regulations. McCovey, 36 Cal. 3d at
7 529.

8 The defendants argued before the Magistrate that
9 Interior's prohibition on commercial fishing constituted a
10 "modification or abrogation" of their treaty right to take
11 Klamath River fish. The defendants contended that absent
12 express Congressional authority this right could not be
13 abridged by an executive agency. United States v. Fryberg, 622
14 F.2d 1010, 1013 (9th Cir.), cert. denied, 449 U.S. 1004 (1980).
15 Since the fishing regulations at issue in the Wilson and
16 Eberhardt prosecutions were not expressly authorized by
17 Congress, the defendants concluded, they were invalid.
18 Alternatively, the defendants argued that, even if authorized,
19 Interior's moratorium on Klamath River fishing was
20 impermissible because it discriminated against Indians by
21 placing the greatest burden of resource conservation upon
22 tribal fishermen.

23 In his March 5, 1985 order, Magistrate Langford granted
24 the defendants' motions to dismiss. First, contrary to the
25 position advocated in the amicus brief submitted by the Court
26 of Indian Offenses, the Magistrate ruled that the district
27 court had concurrent jurisdiction to hear and determine the
28

1 defendants' motions. Second, the Magistrate held that Interior
2 was without authority to promulgate regulations that abrogated
3 the tribe's federally reserved right to take fish from the
4 Klamath River. Third, the Magistrate held that even if
5 Interior were authorized to promulgate these fishing
6 regulations, as written they were arbitrary, not necessary to
7 achieve a conservation purpose and impermissibly discriminatory
8 Concluding that the regulations underlying the Lacey Act
9 prosecution were invalid, the Magistrate dismissed the
10 informations against the defendants.

11 The Government appeals this decision. As the
12 Magistrate's conclusions constitute findings of law, they are
13 subject to this Court's de novo review on appeal. U.S. v.
14 Nance, 666 F.2d 353, 356 (9th Cir. 1982). There are,
15 therefore, three distinct issues before this Court: proper
16 jurisdiction, abrogation, and discrimination.

17 II. Jurisdiction

18 Appellee Eberhardt argues on appeal that Congress did
19 not intend the Lacey Act to be used to prosecute Indians in
20 federal court. Instead, she contends, the Court of Indian
21 Offenses of the Hoopa Valley Reservation has the exclusive
22 jurisdiction to try eligible Indians accused of violating
23 Interior's regulations. The Magistrate rejected this
24 jurisdictional argument. He ruled instead that the Lacey Act
25 conferred concurrent jurisdiction on federal and tribal courts
26 to prosecute Indian fishing offenses. The Court agrees.

1 The Lacey Act provides no independent basis for criminal
2 prosecution but rather makes a violation of an underlying law
3 or regulation a trigger to federal liability.⁴ Section
4 3372(a) makes it unlawful for any person:

5 (1) to import, export, transport, sell,
6 receive, acquire, or purchase any fish or
7 wildlife or plant taken or possessed in
8 violation of any law, treaty, or regulation
9 of the United States or in violation of any
10 Indian tribal law;

11 (2) to import, export, transport, sell,
12 receive, acquire, or purchase in interstate
13 or foreign commerce -

14 (A) any fish or wildlife taken, possessed,
15 transported, or sold in violation of any law
16 or regulation of any State or in violation
17 of any foreign law, ...

18 16 U.S.C. § 3372(a).

19 As expressly stated in the Lacey Act, federal courts
20 have jurisdiction over any actions arising under it. 16 U.S.C.
21 § 3375(c). Section 258.14 of the underlying Interior
22 regulations also expressly grants the Court of Indian Offenses
23 jurisdiction to try Indians accused of violating the rules.
24 Thus federal jurisdiction is concurrent, but it is not
25 extinguished by the separate jurisdictional grant afforded by
26 the underlying regulations.
27
28

24 ⁴ The legislative history of the Act indicates that Congress
25 intended the Lacey Act to enhance enforcement of wildlife laws
26 and regulations by "federalizing" the violation of other
27 independent provisions. See H.R. No. 276, 97th Cong., 1st
28 Sess. 13 (1981); S. Rep. No. 123, 97th Cong., 1st Sess. 4
(1981).

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

III. Abrogation of Tribal Rights

The central issue presented on appeal is whether the Government, acting in its role as trustee, improperly deprived Hoopa Valley Reservation Indians of their federally protected tribal right to take fish from the Klamath River. As held by the Ninth Circuit in United States v. Fryberg, 622 F.2d 1010, 1013 (9th Cir.), cert. denied, 449 U.S. 1004 (1980), the Government may not abrogate or modify Indian tribal rights without clear Congressional authorization. The question before this Court, therefore, is two fold: (1) whether the Interior regulations under which the appellees were prosecuted "modify or abrogate" Hoopa Valley Reservation tribal rights, and (2) whether such an "abrogation," if found, was clearly authorized by Congress.

A. Scope of Reserved Rights

In order to assess whether the Klamath River regulations modified or abrogated Hoopa Valley Reservation tribal rights, it is first necessary to determine the scope of these rights and whether the appellees' actions were within those rights. See United States v. Dion, 752 F.2d 1261, 1263 (8th Cir. 1985). It is only when the scope of the rights is known that it can be determined whether or not governmental actions have modified or abrogated them.

The rights of the Yurok Indians to exploit resources on the Hoopa Valley Reservation were reserved by statute, not treaty. Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981). The Hoopa Valley Reservation, as outlined by the Supreme Court

1 in Mattz v. Arnett, 412 U.S. 481 (1973), has had a complex
2 history. By its Act of March 3, 1853, Congress authorized the
3 President to make five military reservations from the public
4 domain in California for Indian purposes. President Pierce,
5 consistent with this authority, specified the Old Klamath River
6 Reservation in his order of November 16, 1855. Mattz, 412 U.S.
7 at 487. In 1876 a 12-mile square, known as the original Hoopa
8 Valley Reservation, was formally set aside by another executive
9 order. In 1891 President Harrison extended the reservation to
10 encompass the Old Klamath River Reservation and added to the
11 reservation a 30-mile strip connecting these two areas. Mattz,
12 412 U.S. at 502.

13 In establishing the Hoopa Valley Reservation, Congress
14 reserved those rights necessary for the Indians to maintain on
15 the land ceded to them their way of life, which included
16 hunting and fishing. Menominee Tribe of Indians v. United

17 //////////////

18 //////////////

19 //////////////

20 //////////////

21 //////////////

22 //////////////

23 //////////////

24 //////////////

25 //////////////

26 //////////////

27 //////////////

28

1 States, 391 U.S. 404, 406 (1968).⁵ It makes little
2 practical difference that Congress granted these rights by
3 statute rather than by treaty. Blake, 663 F.2d at 909; Arnett
4 v. 5 Gill Nets, 48 Cal. App. 3d 454, 459 (1975), cert. denied,
5 425 U.S. 907 (1976). In determining the scope of those rights,
6 therefore, the rules of Indian treaty construction should
7 apply.

8 In construing Indian treaties, the courts have required
9 treaties to be liberally construed to favor Indians,
10 "ambiguous expressions in treaties must be resolved in favor of
11 the Indians, and [the] treaties should be construed as the
12 Indians would have understood them." Dion, 752 F.2d at 1263

13
14 ⁵ Historical accounts of Indian ways and customs clearly
15 establish the dependence of the tribes upon the Klamath River's
16 resources. As described by an agent of the Indian Bureau,
17 writing of the suitability of the Klamath River Indian country
18 to the needs of the Indians:

19 [n]o place can be found so well adapted to these
20 Indians, and to which they themselves are so well
21 adapted, as this very spot. No possessions of the
22 Government can be better spared to them. No
23 territory offers more to these Indians and very
24 little territory offers less to the white man.
25 The issue of their removal seems to disappear.

26 Report of the Commission of Indian Affairs 266 (1885) (as
27 quoted in Mattz v. Arnett, 412 U.S. at 487 n.6).

28 To modern Indians of the Hoopa Valley Reservation, fishing
remains a way of life, not only consistent with traditional
Indian customs, but also as an eminently practical means of
survival in an area which lacks the broad industrial or
commercial base which is required to provide its population,
Indian or otherwise, with predictable full-time employment and
income adequate to provide sufficient quantities and qualities
of the necessities of life. National Park Service,
Environmental Assessment: Management Options for the Redwood
Creek Corridor, Redwood National Park (1975).

1 (quoting United States v. Top Sky, 547 F.2d 486, 488 (9th Cir.
2 1976)).

3 Neither the executive order of 1855 nor that of 1891
4 contain an express reservation of hunting and fishing rights.
5 Blake, 663 F.2d at 909. Nonetheless, the fact that the
6 reservation, when created, was riparian to the Klamath River
7 leads inescapably to the conclusion that the right to take fish
8 from the river was reserved to the tribe and that the Indians
9 understood the reservation to include the right to fish.
10 Blake, 663 F.2d at 911.

11 This right to take fish includes not only the right to
12 catch fish for individual consumption, but also the right to
13 engage in commercial taking. See Dion, 752 F.2d at 1265 n.11.
14 Interior, in both the regulations and at argument on this
15 motion, has explicitly acknowledged the Hoopa Valley
16 Reservation's tribal right to take fish for commercial purpose
17 43 Fed. Reg. 30,048 (July 13, 1978); 44 Fed. Reg. 17,146,
18 (March 20, 1979). "Based upon the history of Indian fishing c
19 the Klamath, as well as on the substantial case law
20 interpreting Federal fishing rights, the Department has
21 concluded that the Indians' reserved fishing right includes th
22 right to use fish for commercial purposes." 43 Fed. Reg.
23 30,048 (July 13, 1978).

24 Nonetheless, the Government contends that it may
25 foreclose this right to fish commercially when it is done for
26 "conservation" purposes. Interior relies on the Puyallup cas
27 authority holding that Indian rights to exploit reservation
28

1 resources are, at their outer limit, subject to the
2 environmental demands of species conservation. As noted by
3 Justice Douglas in Department of Game of Washington v. Puyallup
4 Tribe, 414 U.S. 44, 49 (1973) (Puyallup II), Indian treaty
5 rights do not give Indians a federal right "to pursue the last
6 living steelhead until it enters their nets." Thus, the
7 Yurok's federally reserved rights do not extend to include the
8 right to fish anadromous species on the Klamath River to
9 extinction. Puyallup Tribe, Inc. v. Department of Game of
10 Washington, 433 U.S. 165, 175-76 (1977) (Puyallup III). See
11 also Washington v. Washington State Commercial Passenger
12 Fishing Vessel Association, 443 U.S. 658, 684 (1979).

13 The present situation is clearly distinguishable from
14 this line of Puyallup authority. While Puyallup II holds that
15 Indian rights can be controlled by the need to preserve a
16 species, such an environmental crisis did not exist on the
17 Hoopa Valley Reservation in 1979. Interior has not established
18 or even claimed that anadromous fish in the Klamath River were
19 on the verge of extinction when it promulgated its ban on
20 Indian commercial fishing. As stated in the prologue to
21 Interior's regulations, ocean fishing, which harvested the vast
22 majority of Klamath and Trinity salmon, remained substantially
23 unregulated.⁶ Sports fishing by non-Indians on the

24
25 ⁶ Between 1976-1984, ocean fishers took 67 percent of the
26 available adult Klamath River chinook salmon, Indian fishers
27 took 8 percent and sports fishers caught 2 percent. Bureau of
28 Indian Affairs, Environmental Impact Statement, Indian Fishing
Regulations 29 (1985).

1 Klamath was also allowed during this period. There is, in
2 short, absolutely no evidence before this Court that at the
3 time of the regulations Interior believed that the Hoopa Valley
4 Reservation's fish resources were facing imminent extinction.
5 In 1979, Congress could still have acted expressly to prohibit
6 commercial fishing had it wished to do so. See Dion, 752 F.2d
7 at 1268 n.14.

8 B. Modification or Abrogation

9 - Given that the Indians of the Hoopa Valley Reservation
10 had a reserved right to take Klamath River anadrogenous fish for
11 commercial purposes, it must next be determined whether
12 Interior's regulations suspending all commercial fishing have,
13 in fact, modified or abrogated that right. See Dion, 752 F.2d
14 at 1265.

15 The Magistrate found that a six-year prohibition on the
16 Yurok's tribal right to fish for commercial purposes
17 constituted an "abrogation" of the treaty right. The
18 Government disputes this on appeal, arguing instead that the
19 regulations merely suspend the tribe's right without affecting
20 it.

21 The issue of what action rises to the level of
22 "abrogation" is a difficult one which has never been directly
23 addressed by this circuit. In United States v. Fryberg, 622
24 F.2d 1010, 1014 (9th Cir.), cert. denied, 449 U.S. 1004 (1980)
25 the Ninth Circuit held that the Eagle Protection Act's
26 prohibition on taking of eagles by Indians constituted a
27 "modification or abrogation" of treaty hunting rights.
28

1 Acknowledging that the regulation in question involved only a
2 "relatively insignificant modification of the Indian's hunting
3 rights," the court still required a clear intention on the part
4 of Congress to so affect those rights. Id.

5 The regulations at issue here constitute more than an
6 "insignificant modification" of the Hoopa Valley Reservation
7 Indians' reserved right to fish commercially. Instead, they
8 rise to the level of "substantial infringement" of the type
9 outlined in Washington v. Washington State Commercial Passenger
10 Fishing Vessel Association, 443 U.S. at 690 (Fraser River
11 Treaty between the United States and Canada could not infringe
12 upon Indian rights absent express statutory language). As
13 such, Interior's regulations "modify or abrogate" the Indians'
14 treaty right so as to require express Congressional
15 authorization.

16 C. Congressional Authorization

17 It is undisputed that Congress can modify or abrogate
18 reserved tribal rights. See Lone Wolf v. Hitchcock, 187 U.S.
19 553 (1903). The intention to do so, however, is not to be
20 lightly imputed to Congress. Menominee, 391 U.S. at 413. A
21 decision directed by United States v. Fryberg, 622 F.2d 1010, 1013 (9
22 Cir.), cert. denied, 449 U.S. 1004 (1980), the Court should
23 look to surrounding circumstances and legislative history for
24 evidence of Congress' intent to abrogate.

25 The Government maintains that it was specifically
26 authorized to promulgate the Klamath River regulations based
27 on three statutes: 43 U.S.C. § 1457; 25 U.S.C. §§ 2, 9, 13; and
28

1 the Reorganization Plan No. 3 of 1950. See 44 Fed. Reg. 17,148
2 (March 20, 1979) (authority). Under these statutes, Interior
3 is authorized to supervise and manage Indian affairs. McCovey,
4 36 Cal. 3d at 534 n.21. See also Udall v. Littell, 366 F.2d
5 668 (D.C. Cir. 1966).⁷

6 The Government contends that this general statutory
7 authorization constitutes sufficient evidence of Congress'
8 intent to abrogate the Hoopa Valley Reservation's right to fish
9 commercially. In support of its position, the Government cites
10 several cases where Interior has acted under its general
11 statutory authorization. In Udall v. Littell, 366 F.2d 668
12 (D.C. Cir. 1966), the court held that Interior's cancellation
13 of an attorney's contract with the tribe was a proper exercise
14 of oversight authority. 366 F.2d at 674. In United States v.
15 Consolidated Mines & Smelting Co., 455 F.2d 432, 443 (9th Cir.
16 1971), the court approved Interior's decision to halt the
17 alienation of Colville tribal lands. In Yavapai-Prescott
18 Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), the court
19 approved of Interior's decision to block the tribe's
20 unilateral cancellation of a lease.

21 The Court rejects the Government's argument. The very
22 broad grant of management authority given to Interior under
23 these statutes is wholly inadequate to impute Congressional

24
25 ⁷ [T]he very general language of these statutes makes it quite
26 plain that the authority conferred on the Commissioner of
27 Indian Affairs was intended to be sufficiently comprehensive to
28 enable him ... to manage all Indian affairs, and all matters
arising out of Indian relations. Udall, 366 F.2d at 673.

1 intent to modify the federally protected right to fish
2 commercially held by the Hoopa Valley Reservation Indians.
3 None of the cases cited by the appellant authorizes Interior's
4 interference with reserved tribal rights absent Congressional
5 authorization. The Udall and Consolidated cases each dealt
6 specifically with a tribe's right to contract with private
7 parties. In Udall, the tribe specifically asked the Secretary
8 to investigate and terminate the contract if he discovered any
9 improprieties. 366 F.2d at 671. In Consolidated, Interior had
10 historically exercised its right to withhold public lands from
11 private development. 455 F.2d at 442-44. More importantly,
12 both of these cases involved only the management of tribal
13 affairs by Interior, not the abrogation of federally protected
14 tribal rights. Nor does Yavapai-Prescott support the
15 Government's position. In that case, Congress had passed a
16 specific statute authorizing the Secretary of Interior to
17 approve leases of Indian land. 707 F.2d at 1074. Thus,
18 Congress had explicitly authorized Interior's intervention.

19 It is clear from Fryberg that Congressional intent to
20 abrogate or modify tribal rights must be clear from the face of
21 the statute and the circumstances surrounding its passage.⁸
22 Looking at the express language of the statutes relied upon by
23 Interior to authorize its ban on Klamath River fishing, there

24
25 ⁸ Where, as here, the interference with tribal rights is
26 substantial, the Court should rely more on express language of
27 the statute and less on the surrounding circumstances to
28 establish Congressional determination to modify or abrogate a
right. Fryberg, 622 F.2d at 1014.

1 is absolutely nothing to indicate that Congress authorized the
2 abrogation of the Hoopa Valley Reservation's tribal right to
3 fish commercially. Nor is there any basis for finding such
4 Congressional intention in the legislative history of these
5 acts. The authority now relied in part upon by the Secretary
6 is derived from Statutes of 1832 and 1834, 4 Stat. 564 and 4
7 Stat. 735, 738. At the time Congress granted this authority, a
8 "policy of almost total tribal self-government" prevailed.
9 Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962). It
10 is impossible, therefore, to impute to Congress an intention to
11 authorize Interior to abrogate Indian fishing rights on the
12 Hoopa Valley Reservation almost 150 years later.

13
14 The Court agrees with the Magistrate that the general
15 trust statutes relied upon by the Department of Interior
16 do not constitute explicit Congressional intent necessary to
17 abrogate or modify reserved tribal rights. Thus under Fryberg
18 the Interior regulations prohibiting the commercial fishing of
19 anadromous fish on the Hoopa Valley Reservation are
20 impermissible and invalid.

21 IV. Conclusion

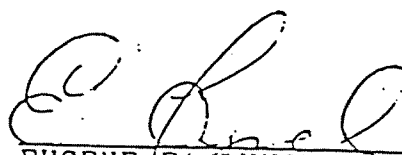
22 The Court, therefore, affirms the Magistrate on the
23 following issues. Jurisdiction is properly within the federal
24 court. The Indians of the Hoopa Valley Reservation have a
25 reserved tribal right to fish for commercial purposes on the
26 Klamath River. The regulations under which the appellees were
27 prosecuted were invalid as an unauthorized modification of
28

1 these treaty rights and, therefore, cannot support a
2 prosecution under the Lacey Act. As the Court finds the
3 regulations unauthorized, it is not necessary to reach the
4 issues of whether the regulations were arbitrary and capricious
5 or discriminatory.

6 The Court affirms the Magistrate's dismissal of the
7 informations against the appellees.

8 IT IS SO ORDERED.

9 DATED: June 19, 1985.

10
11
12
13
14 
15 EUGENE F. LYNCH
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28