United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

October 4, 1993

M-36979

Memorandum

To: Secretary

From: Solicitor

Subject: Fishing Rights of the Yurok and Hoopa Valley Tribes

You have asked for an opinion concerning the rights of the Yurok and Hoopa Valley Indian Tribes to an allocation or quantified share of the Klamath River Basin anadromous fishery resources. The request arises from the need of this Department for definitive legal guidance in setting yearly tribal harvest allocations. The Department of Commerce, although it does not have authority to regulate in-river Indian fisheries, has also requested a legal determination from this Department on the Tribes' rights because of the impact on decisions that the Commerce Department must make concerning ocean fisheries that harvest Klamath basin fishery resources.[1]

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[1] By memorandum dated September 16, 1991, the Assistant Secretary - Indian Affairs, originally requested this opinion. On March 10, 1993, in a letter to the Secretary of Commerce, you stated the position that in the absence of a formal legal determination, the most reasonable and prudent course for the United States, as trustee for the Tribes, would be to set aside at least a 50 percent share of the harvestable surplus of Klamath River stocks for the Indian in-river fishery. As a temporary resolution of differences between your recommendation and concerns expressed by the Department of Commerce, which has jurisdiction over ocean fisheries, this Department set the in-river tribal harvest ceiling in 1993 at 18,500, and both Departments agreed that additional conservation measures for 1993 were appropriate. The Secretary of Commerce directed a 1993 ocean fishing season that conformed to the in-river tribal harvest constraint, and provided a natural spawner escapement floor of 38,000 for 1993. See "Commerce and Interior Departments Set Chinook Salmon Management Measures," April 29, 1993 (U.S. Department of Commerce Press Release NOAA 93-R117); Ocean Salmon Fisheries Off the Coasts of Washington, Oregon, and California, 58 Fed. Reg. 26922 (May 6, 1993) (emergency interim rule); Ocean Salmon Fisheries Off the Coasts of Washington, Oregon, and California, 58 Fed. Reg. 31664 (June 4, 1993) (amendment to emergency interim rule).

During the past twenty-two years, numerous court decisions have confirmed that when the United States set aside in the nineteenth century what are today the Yurok and Hoopa Valley Indian Reservations along the Klamath and Trinity Rivers, it reserved for the Indians federally protected fishing rights to the fishery resource in the rivers running through the reservations.[2] This Department, through legal opinions and policy statements, also has acknowledged the fishing rights of the Yurok and Hoopa Valley Indians, and the Department's corresponding obligations.[3] None

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[2] See, e.g., United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986); Pacific Coast Federation of Fishermen's Ass'n v. Secretary of Commerce, 494 F. Supp. 626, 632 (N.D. Cal. 1980); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606 (1988); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, cert. denied, 469 U.S. 1062 (1984); Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906 (1975), cert. denied, 425 U.S. 907 (1976); Donahue v. California Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1971).

[3] The Solicitor's office, through the Associate Solicitor, Division of Indian Affairs, has issued a variety of legal opinions since 1976 concerning the nature, extent, and scope of federal reserved Indian fishing rights in the Klamath River basin. See, e.g., Memorandum from Acting Associate Solicitor, Indian Affairs, to Director, Office of Trust Responsibilities (November 4, 1976) (regulation of on-reservation Indian fishing on the Klamath River); Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary, Indian Affairs (May 4, 1978) (rights of the Klamath and Hoopa Reservation Indians to fish for commercial purposes); Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary - Indian Affairs (March 14, 1979) (Indian legal considerations with respect to Trinity River diversions at Lewiston Dam).

In addition, as a matter of policy this Department has acknowledged the existence of Indian fishing rights on the Klamath and Trinity Rivers and the Department's corresponding obligations. See, e.g., Letter from Assistant Secretary - Indian Affairs to Secretary of Commerce, May 19, 1992; Letter from Secretary of the Interior to Acting Chairperson, Yurok Transition Team, August 23, 1991; Letter from Assistant Secretary - Indian Affairs to Secretary of Commerce, July 25, 1991; Letter from Secretary of the Interior to Secretary of Commerce, May 1, 1991; Trinity River Flows Decision (May 8, 1991) (Decision of the Secretary of the Interior) (adopting recommendation for 1992 through 1996 flow releases, based in part on Department's trust responsibility to the Hoopa Valley and Yurok Tribes); Secretarial Issue Document on Trinity River Fishery Mitigation (approved by Secretary, January 14, 1981) (flow releases of water in the Trinity River); Memorandum from Assistant Secretary for Fish and

of the court decisions, however, have decided whether the Tribes' fishing rights entitle them to a specific allocation or quantified share of the Klamath and Trinity River fishery resources.

I conclude that the fishing rights reserved for the Tribes include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living. I also conclude that the Tribes' entitlement is limited to fifty percent of the harvest in any given year unless varied by agreement of the parties.

I have reached my conclusions by examining the history of the reservations, the Indians' dependence on the Klamath and Trinity River fisheries, the United States' awareness of that dependence, and the federal intent to create the reservations in order to protect the Indians' ability to maintain a way of life, which included reliance on the fisheries. I have conducted this examination in the context of the now-substantial body of case law examining the history of the present-day Hoopa Valley and Yurok reservations and confirming the reservation Indians' fishing rights,[4] and the variety of cases involving other tribes' reserved fishing rights.

I. BACKGROUND

A. The Fishery Resource

The Klamath River originates in Oregon and flows southwesterly into California to its juncture with the Trinity River. The lower 40-50 miles of the Klamath River lie within the Yurok Reservation. From the point of confluence, the Klamath River flows northwesterly to discharge into the Pacific Ocean. The lower 12 miles of the Trinity River flow through the Hoopa Valley

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Wildlife and Parks to Assistant Secretary for Land and Water Resources, October 24, 1979.

The Department of Commerce also has recognized that the tribes of the Klamath River basin have federal reserved fishing rights. Letter from Director, National Marine Fisheries Service, Department of Commerce, to Assistant Secretary - Indian Affairs, Department of the Interior, October 16, 1992.

[4] In addition to the cases cited in footnote 2, see Crichton v. Shelton, 33 I.D. 205 (1904) (history of Klamath River and Hoopa Valley Reservations); Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, S. Rep. No. 564, 100th Cong., 2d Sess. 2-9 (1988) (same); and Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, H. Rep. No. 938, pt. 1, 100th Cong., 2d Sess. 8-15 (1988) (same).

Reservation, before discharging into the Klamath River near the boundary betwsen the Hoopa and Yurok Reservations.

The Klamath and Trinity Rivers provide habitat for runs of salmon and other anadromous fish. Anadromous fish hatch in fresh water, migrate to the ocean, and complete their life cycles by returning to their freshwater places of origin to spawn. Because of the regular habits of the fish, it is possible to some extent to forecast stock abundance and to control harvesting throughout their range in order to maintain appropriate spawner escapement numbers for conservation and regeneration. However, different species have different life cycles, and different stocks intermix in the ocean before sorting themselves out and returning to the rivers of their origin. See generally Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662-64 (1979) (discussion of anadromous fish). As such, it is more difficult to regulate the numbers of particular stocks harvested in mixed-stock ocean fisheries, than to regulate stock-specific harvests by ocean terminal or in-river fisheries.

B. The Reservations[5]

1. Klamath River Reservation

The reservations which today constitute the Hoopa Valley and Yurok Reservations originally were created by executive orders issued pursuant to statutes authorizing the President to create Indian reservations in California. The Act of March 3, 1853, authorized the President "to make . . . reservations . . . in the State of California . . . for Indian purposes." 10 Stat. 226, 238. On November 10, 1855, the Commissioner of Indian Affairs submitted a report to the Secretary of the Interior, recommending a reservation that would encompass "a strip of territory one mile in width on each side of the (Klamath) river, for a distance of 20 miles." I Kappler, Indian Affairs: Laws and Treaties 816 (1904) ("Kappler"). The Commissioner's report noted that the proposed reservation had been selected pursuant to the Secretary's instructions "to select these resservations from such 'tracts of land adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians.'" Id. The report also noted in particular the representations of the federal Indian officials in California

[5] Attached as Appendix A is a copy of a map of the former Hoopa Valley Reservation appended to the Supreme Court's decision in Mattz v. Arnett, 412 U.S. 481 (1973). The map pre-dates the more recent partition of the reservation but generally speaking, the Hoopa Valley Reservation today includes what the map refers to as the "Original Hoopa Valley Reservation," and the Yurok Reservation today encompasses the "Old Klamath River Reservation" and the "Connecting Strip" shown on the map.

"that the selection at the mouth of the Klamath River is a judicious and proper one." Id. On November 12, 1855, the Secretary of the Interior recommended the proposed reservation to the President, and four days later President Pierce signed the proclamation establishing the Klamath Reservation. Id. at 817.[6] The lands were mostly occupied by Yurok Indians, and the reservation encompassed what is today the lower portion of the Yurok Reservation.

2. Original Hoopa Valley Reservation

The original Hoopa Valley Reservation is a 12-mile square extending six miles on each side of the Trinity River. The Superintendent of Indian Affairs for California located and proclaimed it in 1864, pursuant to legislation enacted that same year. The legislation authorized the President to set apart up to four tracts of land in California "for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended." Act of April 8, 1864, § 2, 13 Stat. 39, 40 ("1864 Act"); see I Kappler at 815; see also Donnelly v. United States, 228 U.S. 243, 255-57 (1913); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610 (1988). The reservation was mostly inhabited by Hoopa Indians. Although Congress itself thereafter recognized the existence of the Hoopa Valley Reservation as early as 1868, Donnelly, 228 U.S. at 257, it was not until 1876 that President Grant issued an executive order formally setting aside the reservation "for Indian purposes, as one of the Indian reservations authorized . . . by Act of Congress approved April 8, 1864." I Kappler at 815.

3. Extended Hoopa Valley Reservation

Between 1864 and 1891, the legal status of the Klamath River Reservation as an Indian reservation came into doubt. Although the Klamath Reservation had been created pursuant to the 1853 statute, the subsequent 1864 Act limited to four the number of reservations in California, and contemplated the disposal of reservations not retained under authority of the 1864 Act. See 1864 Act, § 3, 13 Stat. at 40. By 1891, the Round Valley, Mission, Hoopa Valley, and Tule River reservations had been set apart pursuant to the 1864 Act. Mattz v. Arnett, 412 U.S. at 493-94. Still, the Department of the Interior continued to recognize that the Klamath Reservation was critical for protecting the Indians who lived there and for protecting their access to the fishery, and continued to regard it as a

[6] See also Mattz v. Arnett, 412 U.S 481, 487 (1973); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610 (1988).

reservation throughout the period from 1864 to 1891. As the Court noted in Mattz v. Arnett, the reservation "continued, certainly, in de facto existence," during that time. Id. at 490.

Finally, in 1891, in order to eliminate doubt, to expand the existing reservation, and to better protect the Indians living there from encroachment by non-Indian fiehermen, President Harrison issued an executive order under the authority of the 1864 Act. The order extended the Hoopa Reservation along the Klamath River from the mouth of the Trinity River to the ocean, thereby encompassing and including the Hoopa Valley Reservation, the original Klamath River Reservation, and the connecting strip in between. Thereafter, the original Klamath Reservation and connecting strip have been referred to jointly as the "Extension" or the "Addition," because they were added to the Hoopa Valley Reservation in the 1891 Executive Order. See I Kappler at 815 (Executive Order, October 16, 1891); Mattz v. Arnett, 412 U.S. at 493-4; Donnelly, 228 U.S. at 255-259. The validity of the 1891 addition and the continuing exietence of the area included within the original Klamath Reservation were eubsequently upheld by the Supreme Court in the Donnelly and Mattz v. Arnett decisions.[7]

4. Partition into the Yurok and Hoopa Valley Reservations

In 1988, Congress enacted the Hoopa-Yurok Settlement Act, which partitioned the extended Hoopa Valley Reservation into the present Hoopa Valley Reservation, consisting of the original 12-mile square bisected by the Trinity River and established under the 1864 Act, and the Yurok Reservation, consisting of the area along the Klamath River included in the 1891 Extension (excluding Resighini Rancheria).[8] Hoopa-Yurok Settlement Act of 1988, Pub.

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[7] In Donnelly v. United States, 228 U.S. 243, modified and rehearing denied, 228 U.S. 708 (1913), the Court affirmed the federal conviction of the defendant for murdering an Indian within the boundaries of the 1891 Extension. The Court concluded that the Extension had been lawfully estabiiehed and constituted Indian country. In Mattz v. Arnett, 412 U.S. 481 (1973), the Court rejected California's argument that the Act of June 17, 1892, 27 Stat. 52, opening the original Klamath Reservation to non-Indian settlement, had diminished the boundaries of the extended reservation. The Court struck down a state forfeiture proceeding against gill nets confiscated from a Yurok Indian, holding that the act opening the reservation to settlement did not alter the boundaries of the extended Hoopa Valley Reservation.

[8] For the history and background of the 1988 Settlement Act, see S. Rep. No. 564 and H. Rep. No. 938, pt. 1, supra note 4. You asked for an opinion addressing the righte of the Hoopa and

L. No. 100-580, 102 Stat. 2924, 25 U.S.C.A. § 1300i-1300i-11 (Supp. 1993).

The congressional partition "recognized and established" each area as a distinct reservation, and declared that "[t]he unallotted trust land and assets" of each reservation would thereafter be held in trust by the United States for the benefit of the Hoopa Valley and Yurok Tribes, respectively. 25 U.S.C.A. § 1300i-1(b)&(c). Both the House and Senate committee reports accompanying the legislation make specific mention of the Yurok Tribe's interest in the fishery. See S. Rep. No. 564, supra note 4, at 2, 14; H. Rep. No. 938, pt. 1, supra note 4, at 20.[9]

Although there are now two distinct reservations for the Yurok and Hoopa Valley Tribes, the events most relevant to your inquiry occurred prior to the 1988 partition. For purposes of this opinion, the various reservation areas will be referred to as the original Klamath River Reservation, the Hoopa Valley Reservation (original 12-mile square), and the extended Hoopa Valley Reservation (the post-1891 reservation, consisting of the Hoopa Square, the original Klamath River Reservation, and the connecting strip).

Yurok Tribes. We do not address the fishing rights of the Coast Indian Community of the Resighini Rancheria or other tribes in the Klamath River basin in California.

[9] Both House and Senate committee reports refer to the substantial economic value of the Yurok Reservation fishery. The Senate Committee Report on the Settlement Act states:

> Tribal revenue derived from the "Addition" [now the Yurok Reservation] recently has totalled only about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the "Addition" is also in excess of $1,000,000 a year. The Committee also notes that because of the cooperative efforts of the Hoopa Valley Tribe and other management agencies to improve the Klamath River system, and because the Fisheries Harvest Allocation Agreement apportioning an increased share of the allowable harvest to the Indian fishery, the tribal revenue potential from the "Addition" is substantial.

S. Rep. No. 564, supra note 4, at 14-15; see H. Rep. No. 938, pt. 1, supra note 4, at 20. See also Central Valley Improvement Act, Pub. L. No. 102-575, Title XXXIV, § 3406(b)(23), 106 Stat. 4706, 4720 (1992) (reference to federal trust responsibility to protect the fishery resources of the Hoopa Valley Tribe).

C. Historic Dependence of the Yurok and Hoopa Indians on the Salmon Fishery

Since prehistoric times, the fishery resources of the Klamath and Trinity Rivers have been a mainstay of the life and culture of the Indians residing there.[10] See Mattz v. Arnett, 412 U.S. 481, 487 (1973); Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981). One estimate is that prior to settlement along the coast by non-Indians, the Indians in the Klamath River drainage "consumed in excess of 2 million pounds . . . of salmon annually from runs estimated to have exceeded 500,000 fish." U.S. Department of the Interior, Environmental Impact Statement - Indian Fishing Regulations 2 (Hoopa Valley Reservation, California) (April 1985).

The Indians' heavy dependence on the salmon fishery for their livelihood has been well-documented.[11] "The salmon fishery permitted the [Klamath-Trinity basin] tribes to develop a quality of life which is considered high among native populations." AITS

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[10] The Indians' reliance on fishing continues. As the court noted in United States v. Wilson:

> To modern Indians of the [pre-1988] 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.

611 F. Supp. 813, 818 n.5 (N.D. Cal. 1985) (citing National Park Service, Environmental Assessment: Management Options for the Redwood Creek Corridor, Redwood National Park (1975)), rev'd and remanded on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986).

[11] See, e.g., Anthropological Study of the Hupa, Yurok, and Karok Indian Tribes of Northwestern California: Final Report 10, 22, 67-68, 101, 107 (American Indian Technical Services, Inc. January 1982) (Prepared for the U.S. Department of the Interior) ("AITS (1982)"); Edwin C. Bearss, History Resource Study - Hoopa-Yurok Fisheries Suit - Hoopa Valley Reservation 60 (U.S. Department of the Interior 1981); see also Ethnohistorical Data on the Klamath-Trinity Tribes of Northwestern California With Particular Emphasis on the Yurok (Klamath) Indians of the Lower Klamath Area (American Indian Technical Services, Inc. June 1984) (prepared for the U.S. Department of the Interior) ("AITS (1984)").

(1982) at 10. The salmon resource was the primary dietary staple of the tribes, and was the center of their subsistence economy. As the court noted in Blake v. Arnett, 663 F.2d at 909, the fishery was "not much less necessary to the existence of the [Yurok] Indians than the atmosphere they breathed") (quoting United States v. Winans, 198 U.S. 371, 381 (1905)).

During the pre-contact period, the salmon fishery also held significant commercial and economic value in Yurok and Hoopa culture and economy. Both tribes appear to have held firm concepts of property rights associated with the fishery. Fishing rights were considered personal property and part of an individual's wealth. Rights to fishing sites could be owned privately, fractionally, or communally, and could be inherited, sold, or transferred to pay debts.[12] Ownership of fishing sites gave owners the right to do what they wished with the fish taken, including sale or trade.[13] Access to the fishery was the subject of trade and barter, and use of fishing sites not one's own might be paid for by providing a portion of the catch. Virginia Egan-McKenna, Persistence with Change: The Significance of Fishing to the Indians of the Hoopa Valley Reservation in Northwestern California 74-75 (Unpublished M.A. Thesis, University of Colorado 1983). Ownership of fishing rights associated with particular sites also may have given the owner control over downstream activities. Id. at 69.

According to one source:

> A key factor in [trading of fishing rights between tribes] appears to have been the number of salmon runs a tribe received each year. For example, the Chilula received only one run a year and they often either traded with the Hupa for fish or bartered for temporary fishing rights (Curtis 1924:4). The Chimariko "sometimes paid the Hupa for the privilege of fishing at the falls near Cedar Flats" (Nelson 1978: 25-26).

AITS (1982), supra note 11, at 73; see Egan-McKenna at 76.

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[12] AITS (1982) at 23, 49, 57, 72-73, 99, 105; Testimony of Dr. Arnold Pilling, Transcript of Proceedings at 55, California v. Eberhardt, No. 76-051-C (Cal. Super. Ct., County of Del Norte) (May 18, 1977).

[13] Declaration of Arnold R. Pilling at 3, People v. McCovey, No. A012716 (Cal. Ct. App., 1st App. Dist., Div. 3) (Dec. 10, 1982) (Exhibit 25 to State's Brief).

Although experts have disagreed on the extent that harvested salmon was used in trade,[14] the above example and other evidence indicate that such trading did occur. In years when salmon were plentiful throughout the Klamath-Trinity river system, there was little or no need to trade salmon to support the Indians' standard of living.[15] Salmon were dried and stored, however, and were used in trading partnerships in years when other Indians in the basin did not have access to salmon because of river blockage or low flows. Pilling Testimony, supra note 12, Transcript at 56, 102-03 ("[I]f you have lots of stored salmon [when the Klamath was blocked], why, you're in a position to make very good bargains with your trading partners."), 106-09. Gourmet items such as salmon cheeks were "great trade items." Id. at 58-59. The trading partnerships were part of a complex economic, social, and ceremonial system within the tribal society. Id. at 109-115; see also George Gibbs, Journal of the Expedition of Colonel Redick McKee, United States Indian Agent, Through North-Western California, Performed in the Summer and Fall of 1851, in Henry R. Schoolcraft, Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States 146 (1853) ("Some understanding, however, seems to exist as to opening

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[14] The ethnographic and archeological documentation appears somewhat limited on the issue of trade, although it has been asserted that the sale and trade of harvested salmon was not extensive among the tribes of the Klamath-Trinity basins. See AITS (1982) at 117, 173. In declarations introduced by the State of California in 1982 in People v. McCovey, Drs. William Wallace and Arnold Pilling criticized the AITS (1982) study. See Declaration of William J. Wallace, People v. McCovey, No. A012716 (Cal. Ct. App., 1st App. Dist., Div. 3) (Dec. 10, 1982) (Exhibit 24 to State's Brief); Declaration of Arnold Pilling, supra note 13; see also William J. Wallace, Detailed Account of Yurok Aboriginal Fishing Practices 17-18, attached as Exhibit 2 to Declaration of William J. Wallace, supra. In 1977, in California v. Eberhardt, Dr. Pilling had testified as a defense witness, and Dr. Wallace testified as a witness for the prosecution. In their declarations in 1982, both Wallace and Pilling criticized the AITS (1982) study's conclusion concerning the extent to which trade or sale of salmon played a role in aboriginal Yurok and Hoopa culture. Although a subsequent AITS study responded to that criticism, AITS (1984), at 45-46, determining the extent of the Tribes' legal rights does not require resolving that dispute, which focuses on a specific form of use rather than the degree of dependence as a source of livelihood and culture.

[15] See Pilling Testimony, supra note 12, Transcript at 106; Testimony of William J. Wallace, Transcript of Proceedings at 276, California v. Eberhardt, No. 76-051-C (Cal. Super. Ct., County of Del Norte) (May 19, 1977).

portions of [fish dams] at times, to allow the passage of fish for the supply of those above.").

In California v. Eberhardt,[16] the trial court relied on the testimony of Drs. Pilling and Wallace to recognize that "[i]t is probably true that there was some degree of mutual exchange between and among Yuroks themselves and with other tribes in which fish was one of the items of exchange." The court also stated that "the anthropological testimony is not persuasive that the nature of the aboriginal custom of the Yurok Indians in 'commercial fishing' as that term might have been considered in aboriginal times, is anything like the concept of commercial fishing in present times." Id. As discussed below,[17] the legal quantification of the reserved right depends not so much on the degree to which historic uses of salmon parallel modern uses, but on the degree of dependence on the salmon fishery.

Following non-Indian settlement in the area, the Indians of the Klamath-Trinity basin adapted to the new trading and economic opportunities presented. When non-Indians entered the area, there is some evidence that the Indians sold salmon to them. Pilling Testimony, supra note 12, Transcript at 61-62; Wallace Testimony, supra note 15, Transcript at 279. As the commercial fishing industry developed in the late 19th century, the Indians played an important role in supplying fish to and working at local canneries. See AITS (1982), supra note 11, at 119-21.

When the canneries developed, according to Dr. Pilling, the basic ownership right of access to the fishery seemed to be viewed by the cannery owners "as in Indian hands, and this was something that had to be negotiated. You had to meet specific contractual relationships, especially with the Spott family, to participate as canners on the lower Klamath, because it was essentially Indian territory. This is my understanding of the mercantilism." Pilling Testimony, supra note 12, Transcript at 69-70. The salmon cheeks were recognized as a luxury cut, which "[t]he cannery didn't get . . . unless the Indians waived [their] right" to keep the salmon heads. Id. at 58.

In 1876, the first commercial fishery was established on the Klamath by Martin V. Jones and George Richardson. Bearss, supra note 11, at 159-60. In 1879, in order to protect the Indian fishery from outside interference, the U.S. military sent a force to the Klamath Reservation with orders "[t]o suppress all fishing by whites and require all citizens residing on the Reservation to leave without delay." Id. at 146. The military construed this

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[16] Ruling on Motion to Dismiss for Lack of Jurisdiction, at 2, No. 76-051-C (July 18, 1977).

[17] See infra, at 18 to 22.

as extending to the expulsion of non-Indian fisheries from the river, even if they did not land on the shore, because under no circumstances were the Yuroks to be "deprived of the Salmon as it is their main subsistence." Id. at 148-49. After the expulsion of the Jones and Richardson commercial fishery from the Klamath reservation, a small military outpost was maintained at Requa "to protect the Yuroks in the enjoyment of their only industry--salmon fishing." Id. at 151. Jones then erected a cannery nearby. "The Indians would catch and deliver the salmon for so much a head. . . . As the cannery was off the reservation and the Indians were benefitted by its presence, the military took no action to interfere with its operation." Id. at 160-61.

In 1883, R.D. Hume sought to lease the Klamath fisheries from the United States. Because it considered the fishery to be within the Klamath Reservation and subject to federal protection of the Indians' access to their fishery, the Department of the Interior declined Mr. Hume's request.[18] The Indians apparently opposed R.D. Hume's efforts to establish a cannery operation because Hume's activities interfered with Yurok fishing and Hume wasn't interested in purchasing fish from the Indians but instead brought his own men to fish. AITS (1984), supra note 11, at 46.

By contrast, in 1886, John Bomhoff contracted with a number of Yuroks to supply his cannery with salmon. "By this agreement the Yuroks were not to fish for any other person nor give any other white the right to fish in the Klamath." Bearss at 163 (emphasis added); see AITS (1982), supra note 11, at 131. Bomhoff apparently also employed some Indians for wages. Bearss at 164. The Indian Bureau sanctioned Bomhoff's arrangement to purchase fish from the Indians. Id. at 186.

Eventually additional canneries were established in the area, and at the turn of the century, most of the commercial fishermen were Indians, some fishing at night and taking employment in the canneries during the day. See Bearss at 348; AITS (1982) at 121 & 131.

II. EXISTENCE AND CHARACTER OF YUROK AND HOOPA FEDERAL RESERVED INDIAN FISHING RIGHTS

The power of the United States to create or reserve fishing rights for Indian tribes is derived from its plenary power over

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[18] Appendix B to this opinion recounts the conflict that developed between the Government and Hume. After a court upheld Hume's resistance to expulsion, the United States expanded the Hoopa Valley Reservation to ensure that the original Klamath Reservation would have Indian reservation status. See Appendix B at 7-18.

Indian affairs, grounded in the Indian Commerce Clause, and from the Interstate Commerce Clause.[19]

In Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 617 (1988), the Supreme Court of California squarely rejected the State's assertion that the Federal Government lacked the authority to reserve Indian fishing rights in the Klamath River fishery when it created the reservation. Notwithstanding the substantial body of case law recognizing the extended Hoopa Valley Reservation Indians' federally reserved fishing rights,[20] the State contended otherwise, arguing specifically that the Indians had no federally reserved right to fish commercially. The Supreme Court of California rejected the State's contention based on federal and state court precedent and upon its own substantive legal review of the merits of the State's argument. As the Court noted, the State's theory in essence sought a repudiation of the well-established federal reserved rights doctrine recognized by the Supreme Court in Arizona v. California, 373 U.S. 546 (1963). Mattz v. Superior Court, 758 P.2d at 617; see id. at 616 (right to take fish from the Klamath River was reserved for the Indians when the reservation was created).[21]

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[19] See Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985) ("Constitution vests the Federal Government with exclusive authority over relations with Indian tribes); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer v. Connecticut, 161 U.S. 519 (1896)); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281-82 (1977) (Congress' power under the Commerce Clause to regulate taking of fish in state waters where there is some effect on interstate commerce); Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Or. 1969) ("Statehood does not deprive the Federal Government of the power to enter into treaties affecting fish and game within a state, especially migratory species.") (citing Missouri v. Holland, 252 U.S. 416 (1920)); see also Arizona v. California, 373 U.S. 546, 596-601 (1963) (post-statehood executive order reservations included federally reserved water rights); Toomer v. Witsell, 334 U.S. 385, 399-402 (1948).

[20] See note 2, supra.

[21] A few years earlier, the State had made a similar argument in another case. See Respondent's Supplemental Memorandum of Points and Authorities and Brief on Appeal, at 29-30, People v. McCovey, Crim. 23387 (Cal.) (Nov. 28, 1983). The State contended that the federal power to appropriate or reserve proprietary interests, including Indian fishing rights, was limited to the pre-statehood period. That argument was implicitly rejected in the California Supreme Court's decision in that case. People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 697,

In 1940, one of my predecessors issued an opinion concerning the right of the Indians of the extended Hoopa Valley Indian Reservation to fish in the Klamath River within the boundaries of the reservation. See Right of Hoopa Valley Indians to Fish in Klamath River Without California State Interference, I Op. Sol. (Indian Affs.) 945 (March 13, 1940). It assumed without much consideration that the Indians' rights depended on a determination of whether the United States owned the bed of the Klamath River, suggesting that if the State of California owned the bed, the Indians' fishing rights were subject to plenary state regulation. That opinion rested on the same mistaken premise unsuccessfully asserted by the State in People v. McCovey and Mattz v. Superior Court.[22] In light of subsequent federal and state court decisions confirming the Indians' federal reserved fishing rights,[23] that opinion must be overruled. Both the Commerce Clause and the Indian Commerce Clause provide constitutional authority for the United States to reserve fishing rights for Indians in migratory fishery resources, regardless of state ownership of a riverbed passing through the reservation. Therefore, this opinion does not address questions of navigability and title to the Klamath River.[24]

In short, it is now well-established that the Yurok and Hoopa Valley Indians have federal reserved fishing rights,[25] created in

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205 Cal. Rptr. 643 ("rights were granted by Congress when it authorized the President to create the reservation for Indian purposes"), cert. denied, 469 U.S. 1062 (1984).

[22] In Mattz v. Superior Court, the State specifically cited the 1940 opinion to support its argument. See 758 P.2d at 616 & n.8.

[23] See note 2, supra.

[24] The 1940 opinion did not determine whether the Klamath River was in fact navigable at statehood.

[25] A federally rsserved fishing right is not one of ownership in particular fish, but a right to an opportunity to obtain possession of a portion of the resource, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource. See United States v. Washington, 520 F.2d 676, 687 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see also Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct., 573 F.2d 1123, 1129 n.6 (9th Cir. 1978), vacated and remanded, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (vacating judgments of Ninth Circuit and state supreme court and remanding for further proceedings not inconsistent with the U.S. Supreme Court's opinion).

the nineteenth century when the lands they occupied were set aside as Indian reservations. Numerous court decisions have recognized that the United States intended to reserve for the Indians the rights and resources necessary for them to maintain their livelihood.[26] As the Ninth Circuit has stated, the right includes "fishing for ceremonial, subsistence, and commercial purposes." United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986).[27]

Appendix B to this opinion recounts and summarizes the history of the Klamath River and Hoopa Valley Reservations, reviewing in particular the Annual Reports of the Commissioner of Indian Affairs. As described there, at the time the reservations were created, the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others.[28] As

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[26] See cases cited supra, note 2; see also Menominee Tribe v. United States, 391 U.S. 404, 406 (1968); United States v. Adair, 723 F.2d 1394, 1408-10 (9th Cir. 1983) (reservation of water rights to accompany reserved rights to hunt, fish, and gather).

[27] See also Memorandum from Associate Solicitor, Division of Indian Affairs, to Assistant Secretary, Indian Affairs (May 4, 1978) (Indian fishing on Klamath and Trinity Rivers); United States v. Wilson, 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), rev'd on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986) (same); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 690 (same), cert. denied, 469 U.S. 1062 (1984); and see Arnett v. 5 Gill Nets, 48 Cal. App. 3d 454, 458, 121 Cal. Rptr. 906, 909 (1975) (Indian commercial fishing early in 20th century), cert. denied, 425 U.S. 907 (1976).

[28] See Mattz v. Arnett, 412 U.S. 481, 487-88 (1973); Donnelly v. United States, 228 U.S. 243, 259, modified on other grounds and rehearing denied, 228 U.S. 708 (1913); United States v. Eberhardt, 789 F.2d at 1360 (9th Cir. 1986) (Hoopa Valley Reservation Indian fishing rights were granted by Congress when it authorized President to create reservations for Indian purposes) (citing McCovey, 36 Cal. 3d at 534, 685 P.2d at 697; Wilson, 611 F. Supp. at 817-18 & n.5; Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 618 (1988) (river and Indian fishing played a primary role in the 1891 extension of the Hoopa Valley Reservation to include the old Klamath Reservation and connecting strip); 5 Gill Nets, 48 Cal. App. 3d at 459-62, 121 Cal. Rptr. at 909-911 (Klamath); Donahue v. California Justice Court, 15 Cal. App. 3d 557, 562; 93 Cal. Rptr. 310, 313 (1971) (Hoopa Valley Reservation); Crichton v. Shelton, 33 I.D. 205, 217 (1904) ("the prevailing motive for setting apart the [Klamath River] reservation was to secure to the Indians the fishing privileges

against third parties, the Indians' reserved fishing rights were of no less weight because they were created by executive orders pursuant to statutory authority rather than by treaty.[29] Courts have uniformly rejected a "treaty vs. non-treaty" distinction as a basis for treating Hoopa and Yurok fishing rights differently from the treaty-reserved fishing rights of tribes in other areas of the United States.[30]

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of the Klamath river"); cf. Fishing Vessel Ass'n, 443 U.S. at 665 n.7, 666 n.8 (dependence of Stevene Treaty tribes on fishing); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.) (executive order reservation for Indian purposes included purpose of preserving tribal access to fishing grounds and acted to reserve water rights necessary to maintain the fishery), cert. denied, 454 U.S. 1092 (1981); Quechan Tribe v. Rowe, 350 F. Supp. 106, 111 (S.D. Cal. 1972) (executive order reservation for "Indian purposes" necessarily included right to hunt, trap, and fish on the reservation).

[29] The congressional committee reports accompanying the 1988 Hoopa-Yurok Settlement Act concluded that, as against the plenary power of Congress to make further dispositions of the reservation property and resources, no constitutionally protected property rights had vested in any particular tribes or individuals when the reservation areas were established by executive order. S. Rep. No. 564, supra note 4, at 12; H. Rep. No. 938, pt. 1, supra note 4, at 18-19. That conclusion wae based on "peculiar facts and law" relevant to the extended Hoopa Valley Reservation. S. Rep. No. 564, at 14. The same conclusion had been reached in the Court of Claims more than a decade earlier. Short v. United States, 202 Ct. Cl. 870, 486 F.2d 561 (1973), cert. denied, 416 U.S. 961 (1974).

This conclusion does not affect the present analysis. Short and related court decisions, as well as the legislative history of the 1988 Act, confirm that the Hoopa Valley Reservation was created for Indian purposes. See S. Rep. No. 564, at 12; H. Rep. No. 938, pt. 1, at 18. The absence of a compensable vested property interest as against congressional authority to allocate reservation resources among the tribes or tribal membere settled thereon is not inconsistent with the history of the reservation demonstrating that the United States granted rights of use and occupancy to the Indians, including fishing rights, which were protected against third party or state interference while reserved for federal purposes. See Arnett v. 5 Gill Nets, 48 Cal. App. 3d 459, 121 Cal. Rptr. 906 (1975), cert. denied, 425 U.S. 907 (1976); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687 (Cal. 1984).

[30] See Blake v. Arnett, 663 F.2d 906, 909-910 (9th Cir. 1981); Wilson, 611 F. Supp. at 817-18; McCovey, 685 F.2d at 696-97; 5 Gill Nets, 48 Cal. App. 3d at 459-62, 121 Cal. Rptr. at

III. QUANTIFICATION OF THE FISHING RIGHT AND ALLOCATION OF HARVEST

A. Introduction

The legal measure of the Tribes' fishing rights depends primarily on the purpose of the United States in reserving such rights when it created the Klamath River, Hoopa Valley, and extended Hoopa Valley Reservations. See United States v. Walker River Irrigation Dist., 104 F.2d 334, 336 (9th Cir. 1939) (statute or executive order setting aside a reservation may be equally indicative of intent as treaty or agreement; intent is discerned by taking account of the circumstances and needs of the Indians and the purpose for which the lands had been reserved); cf. Arizona v. California, 373 U.S. 546, 596-600 (1963).[31]

910-11. See also Antoine v. Washington, 420 U.S. 194, 200-03 (1975). In response to California's petition for Supreme Court review of Arnett v. 5 Gill Nets, Solicitor General Bork's brief for the United States noted:

> That executive orders played a prominent role in the creation of the Reservation does not change this result [that the United States reserved to the Indians the right to fish on the Reservation without stats interference]. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. . . .
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from othsr reservations.

Memorandum for the United States as Amicus Curiae, at 5, Arnett v. 5 Gill Nets, (U.S. No. 75-527), cert. denied, 425 U.S. 907 (1976).

[31] The legal quantification of non-treaty federally reserved on-reservation Indian fishing rights to a specific share of an anadromous fishery resource appears to be a matter of first impression. It is well-settled, however, that non-treaty federally reserved rights, recognized when an Indian reservation is created, can affect off-reservation use of a natural rssource. See, e.g., Arizona v. California, 373 U.S. at 596-600. In addition, the cases adjudicating the treaty fishing rights of the Northwest tribes have recognized that location-specific Indian reserved rights affect fishing taking place outside thoss locations. See, e.g., U.S. v. Washington, 459 F. Supp. 1020, 1070 (W.D. Wash. 1978); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Ore. 1969). As such, while the precise issue addressed in this opinion may be one of first impression, many of the principles applied are well-established.

The fishing rights now established in the Yurok and Hoopa Valley Tribes were reserved when the reservations were set aside for Indian purposes. See Act of April 8, 1864, § 2, 13 Stat. 39, 40 (reservations to be set aside "for the accommodation of the Indians," with "due regard to their adaptation to the purposes for which they are intended."). Because the rights arose by implication rather than by express language, the purposes of the reservation are discerned by examining the historical record and circumstances surrounding creation of the reservation.[32] Therefore, we must consider the evidence of the dependence of the Indians on the fishery "as a source of food, commerce, and cultural cohesion," Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979), and the Federal Government's awareness of the Indians' reliance on the fishery. Ths inquiry must also include recognition of the Indians' "need to maintain themselves under changsd circumstances." Colville v. Confederated Tribes v. Walton, 647 F.2d 42, 47 & n.10 (9th Cir.), cert. denied, 454 U.S. 1092 (1981). Finally, the United States is presumed to have intended to deal fairly with the Indians. Arizona v. California, 373 U.S. at 600.

B. Quantification

The history of the creation of the Klamath River and Hoopa Valley Reservations, and the extension of the Hoopa Valley Reservation to include the Klamath River Reservation and connecting strip, plainly shows a purpose by the United States to reserve for the Indians what was necessary to preserve and protect their right to obtain a livelihood by fishing on the reservation. As discussed earlier, the Indians were highly dependent upon the fishery resource. As recounted in Appendix B, ths United States was well aware of the importance of ths fishery to the Indians and created the reservations to preserve their access to an adequate supply of fish. The historical record demonstrates the importance of the reservations to achieving the Federal Government's objectives of creating and maintaining peaceful relations between the Indian tribes and non-Indians, protecting the Indians from further encroachment and displacement by non-Indians, and obtaining the resources necessary for ths Indians to maintain their livelihood and be self-sufficient on the reservation.[33] The United States

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[32] Indian hunting and fishing rights generally arise by implication when a reservation is set aside for Indian purposes. See, e.g., Quechan Tribe v. Rowe, 350 F. Supp. 106, 111 (S.D. Cal. 1972). The precise extent of the right, however, is determined by examining the facts and circumstances of each case.

[33] As the court in United States v. Wilson, noted, "[i]n establishing the Hoopa Valley Reservation, Congress reserved those rights necessary for the Indians to maintain on the land ceded to them their way of life, which included hunting and

sought to isolate and protect the Indians from non-Indians who would otherwise appropriate the lands and the fishery resource upon which the Indians were so dependent for their livelihood.

The physical locations of the reservations--one mile on each side of the Klamath, six miles on each side of the Trinity--plainly demonstrate the United States' awareness of the centrality of the rivers and the fisheries to the purposes for which the reservations were created. As the Supreme Court noted in Mattz v. Arnett, 412 U.S. 481 (1973), the Klamath River Reservation was ideal for the Indians because of the river's abundance of salmon and other fish. The United States was well aware of the Indians' dependence on the fishery rssource and of the need to protect the Indians' use of the fishery from non-Indian encroachment. Id. at 487 & n.6; Crichton v. Shelton, 33 I.D. 205, 216-18 (1904).

While the Unitsd States also sought to introduce agriculture to the Indians, see, e.g., Appendix B at 4 & 7, it anticipated that the Indians would continue to rely on the reservation fishery. Thus, the fishery and agriculture may be said to be twin primary purposes for creating the reservation. Cf. Walton, 647 F.2d at 47-48 (reserved water right for agriculture and fishing, based on primary purposes of reservation).[34]

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fishing." 611 F. Supp. 813, 817-18 (N.D. Cal. 1985), rev'd and remanded on other grounds sub nom., United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); see Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981).

[34] In his journal of the 1851 expedition visiting Indian tribes in Northwestern California, George Gibbs recognized the value of protecting the Indian fisheries within a reservation, even while pursuing other assimilationist objectives:

> The Indians of the Klamath and its vicinity afford a field for a new experiment. Their country furnishes food of different kinds and in quantity sufficient to supply their absolute wants. . . . If collected as occasion may offer, and its advantage be shown to them, upon reservations, whsre their fisheries can still be carried on, whsre tillage of the soil shall be gradually introduced, and where the inducements to violence or theft will be diminished or checked they may possibly be made both prosperous and useful to the country.

George Gibbs, Journal of the Expedition of Colonel Redick McKee, United States Indian Agent, Through North-Western California, Performed in the Summer and Fall of 1851, in Henry R. Schoolcraft, Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States 142-43 (1853).

Upon establishment of the original Klamath Reservation in 1855, the Commissioner of Indian Affairs contemplated that the inclusion of the fishery would eliminate any need to provide the Indians with rations of beef, as was common on other Indian reservations. See Appendix B at 1. Between 1855 and 1891, when the Hoopa Valley Reservation was extended to ensure the reservation status of the lower Klamath area, the annual reports of the Commissioner are replete with references to the importance of the fishery for the continued livelihood and welfare of the Indians. See, e.g., id. at 3-4, 8-9.

In short, the fishery here, no less than the water in the arid southwest, was deemed "essential to the life of the Indian people" for whom the reservation was created. Arizona v. California, 373 U.S. 546, 599 (1963). The inclusion within the reservation of the fishery at the mouth of the Klamath within the boundaries of the reservation demonstrates the purpose to prevent non-Indians from establishing commercial fisheries there to supplant the Indian fishery. Thus here, no less than with the Pacific Northwest treaty tribes, the Government "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979).

At the time the reservation was created, ocean trolling was of little commercial consequence and was not of sufficient magnitude to interfere with the in-river fishery. Bearss, supra note 11, at 235. Only with subsequent technological advances did the ocean fishery begin to have a significant impact on salmon runs. As a practical matter then, the reservation boundaries as established were substantially equivalent to protecting the Indian fishery from significant non-Indian encroachment.

The standard for determining the extent of the Pacific Northwest treaty tribes' fishing rights has been stated by the Supreme Court as one which will "assure[] that the Indians' reasonable livelihood needs [will] be met." Fishing Vessel Ass'n, 443 U.S. at 685 (citing Arizona v. California, 373 U.S. at 600; Winters v. United States, 207 U.S. 564 (1908)). The "central principle here must be that Indian . . . rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate living." Fishing Vessel Ass'n, 443 U.S. at 686.

With respect to the reserved fishing right, I can find no meaningful difference between the federal purpose in creating the reservations for the Yurok and Hoopa Valley Indians, and the bilateral intent in the treaties with the Pacific Northwest tribes to guarantee to the tribes "an adequate supply of fish."

United States v. Washington, 506 F. Supp. 187, 197 (W.D. Wash. 1980), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985). Although the circumstances of this case may differ in certain respects from those of the Pacific Northwest treaty tribes,[35] they are not relevant to the outcome. Therefore, I conclude that the Government intended to reserve for the tribes on the Hoopa and Yurok Reservations a fishing right which includes a right to harvest a sufficient share of the resource to sustain a moderate standard of living.

There is, as discussed earlier, some uncertainty over the extent to which salmon was traded or sold "commercially" in aboriginal Hoopa and Yurok culture. But the focus of the inquiry into the Tribes' legal rights is on the degree of dependence on the fishery resource at the time the reservation was created or expanded, rather than on what particular uses were made of the fish, which may or may not approximate patterns of use or trade in non-Indian culture. As the Court in Fishing Vessel Ass'n noted with respect to the tribes in western Washington, it is not possible to compare Indian uses of fish for trade in aboriginal times with the volume of present day commercial use of salmon. 443 U.S. at 665 n.7. The same could be said of comparisons of the uses of salmon in aboriginal times to support a "reasonable livelihood," as compared with modern-day uses to the same end.[36] Present-day tribal needs to support the livelihood of members may be more or less than the volume utilized in aboriginal times. Cf. Fishing Vessel Ass'n, 443 U.S. at 687. In short, the United States Supreme Court has rejected the notion that prehistoric patterns or volumes of use must mirror modern economic uses of salmon in order to find sufficient Indian dependence on the

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[35] For example, while the importance of salmon to the diet and cultural cohesion appears similar, historical evidence more extensively documents the use of harvested salmon for trade by the Pacific Northwest treaty tribes than by the Yurok and Hoopa Tribes. Cf. AITS (1984), supra note 11, at 45 ("trade patterns of the Northwestern California tribes in general have received little attention from anthropologists and historians"). The Yurok and Hoopa Indians' concepts of private ownership of fishing access sites also appear to contrast with the culturs of the Northwest tribes, which viewed fishing rights as more communal. See United States v. Washington, 384 F. Supp. 312, 353 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

[36] Indeed, a "subsistence" right limited to quantities based on aboriginal consumption levels might well equal or exceed modern-day notions of moderate living needs as satisfied by both consumptive and commercial uses.

salmon fishery sufficient to justify application of the moderate living standard.[37]

The Yurok and Hoopa Indians had a "vital and unifying dependence on anadromous fish," compare Fishing Vessel Ass'n, 443 U.S. at 664, which the historical evidence demonstrates was well-known to the United States. As with the Northwest treaty tribes, salmon was the great staple of their diet and livelihood. Although the anthropological evidence does not clearly demonstrate the use of dried fish for trade in the same manner as was shown for the Northwest treaty tribes, it does demonstrate that anadromous fish constituted the primary means for the Indians' livelihood, and that fishing rights and the fishery were an integral part of the diet, economy, and culture of the tribes. Cf. United States v. Washington, 384 F. Supp. 312, 350-58, 406-07 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). There is some evidence of the Indians' readiness to capitalize on the economic value of the fishery by selling or bartering dried fish with non-Indians passing through the area, and certainly the Indians adapted their utilization of the fishery to provide fish to the non-Indian canneries.

In this case, considering the nature of the right, which the courts have already confirmed, and considering the Indians' historic dependence on the fishery and the federal purposes of the reservation, the "reasonable livelihood" needs must satisfy ceremonial, subsistence, and commercial fishing needs. See Fishing Vessel Ass'n, 443 U.S. at 686-88.

C. Allocation of the Harvest

While the moderate standard of living generally has been identified as the benchmark for identifying the quantity of tribal reserved fishing rights, see United States v. Washington, 506 F. Supp. 187, 198 (W.D. Wash. 1980), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985), various Indian fishing rights cases have also limited tribal

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[37] As the amicus brief for the United States in Arnett v. 5 Gill Nets stated,

> Petitioner cites no authority, and we know of none, that would limit an Indian's on-reservation hunting or fishing to subsistence. The purpose of a reservation is not to restrict Indians to a subsistence economy but to encourage them to use the asssts at their disposal for their betterment.

Memorandum for the United States as Amicus Curiae 8, Arnett v. 5 Gill Nets (U.S. No. 75-527) (on petition for certiorari), cert. denied, 425 U.S. 907 (1976).

harvest rights by an allocation ceiling of no more than 50% of the harvestable numbers of fish, thus providing that the tribes share the resource with non-tribal fishers. The 50% allocation has been based on express treaty language in some cases. Even where a specific treaty does not refer to sharing of the resource, at least one court has reached the same result based on the intent of the parties.

In the Pacific Northwest treaties, the tribes reserved off-reservation fishing rights at their usual and accustomed fishing places "in common with" the citizens of the Territory. The courts held that this language justified limiting the tribes' entitlement for allocation purposes to 50% of the harvestable catch. See id., 506 F. Supp. at 195-98. Thus, even though the treaties were designed to guarantee the tribes an adequate supply of fish and even though the starting point for apportionment is assuring that the Indians' reasonable livelihood needs will be met, Fishing Vessel Ass'n, 443 U.S. at 685, the tribes' agreement to share the resource with non-Indian users justified limiting the tribes to a percentage allocation. See United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).[38] That is, the treaties protected and recognized the treaty-derived rights of both the tribes and the non-Indians to a share of the available fish. Fishing Vessel Ass'n, 443 U.S. at 684-85.

In Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976), the court of appeals refused to set aside the district court's 50% allocation formula, adopted to reflect the Columbia River treaty tribes' right to a fair share of the salmon harvest. In United States v. Oregon, the parties agreed to a Columbia River Management Plan that allowed in-river harvesting on a 60% treaty/40% nontreaty basis, an allocation which deviated from the 50%-50% starting point in order to compensate for ocean fishing by non-Indians. 718 F.2d 299, 301-02 & n.2 (9th Cir. 1983).

In United States v. Michigan, the district court contrasted treaty rights explicitly held "in common with" other citizens with the treaties of the Indian tribes in Michigan, which had no

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[38] Limiting the tribal allocation to a 50% share of the harvestable resource in any given year is distinct from determining whether the moderate standard of living component of the right is being satisfied. Given the current depressed condition of the Klamath basin fishery, this opinion need not address how to calculate the quantities of fish needed to support the Tribes' moderate living needs. Until the fishery resource is substantially restored to the point that the evidence establishes that a 50% share is more than is needed to support the Tribes' moderate living needs, the 50% allocation is the appropriate quantification of the Tribes' rights.

such language. See 505 F. Supp. 467, 472-73 (W.D. Mich. 1980), remanded, 623 F.2d 448 (6th Cir. 1980) (to consider preemptive effect of new federal regulations), modified, 653 F.2d 277 (1981), cert. denied, 454 U.S. 1124 (1981). Although not deciding the allocation issue itself, the district court observed:

> [T]he Indians of Michigan presently hold an unabridged, aboriginal, tribal right to fish derived from thousands of years of occupancy and use of the fishery of the waters of Michigan. That aboriginal right arose from the tribes' reliance upon the fishery for its livelihood, that is, from its dependence upon this fishery for food and trade. That right was confirmed in its entirety by the Treaty of Ghent and left whole by the Treaties of 1836 (7 Stat. 459) and 1855 (11 Stat. 621). Thus, today the Michigan tribes retain the right to fish Michigan treaty waters to the full extent necessary to meet the tribal members' needs.
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> This 50% maximum [for the Washington treaty tribee] arises directly from the "in common with" language in the Washington treaties. [Fishing Vessel Ass'n,] 443 U.S. 686. The 50% ceiling ie euggested, if not necessarily dictated by, the word "common" as it appears in the Washington treaties. No such language is present in the Michigan treaties. 443 U.S. at 686 n.27.
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> The general principle in Fishing Vessel is that Indian treaty rights to scarce natural resourcee are defined by what is necessary to assure that the Indiane' reasonable livelihood expectations are met. 443 U.S. at 686. Where, as here, there was no negotiation reeulting in a right held in common and the Indians implicitly reserved their aboriginal right in its entirety, this principle might, over time, mandate that the Indians have access to the entire available resource.

Id., 505 F. Supp. at 472-73.

In the lengthy Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin litigation, the court also addressed Indian treaties with language different from those in the Pacific Northwest. The Treaty of 1837 with the Chippewas provided that the "privilege of hunting, fishing and gathering the wild rice [in the ceded area] is guarantied to the Indians, during the pleasure of the President of the United States." Lac Courte Oreilles Band v. Wisconsin, 653 F. Supp. 1420, 1425 (W.D. Wiec. 1987) ("LCO III"). The Treaty of 1842 provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." Id. at 1425. Both treaties were eilent concerning whether the off-reservation reserved harvesting rights would be exclusive or in

common with other citizens. Lac Courte Oreilles Band v. Wisconsin, 686 F. Supp. 226, 232 (W.D. Wisc. 1988). Because of the absence of treaty language limiting the tribes' right as one "in common with" other users, the court was reluctant to follow the 50% allocation formula adopted in the Pacific Northwest treaty cases, focusing instead on the moderate living standard. Id.

Ultimately, however, when forced to allocate the harvest, the court concluded that "[t]he only reasonable and logical resolution is that the contending parties share the harvest equally." Lac Courte Oreilles Band v. Wisconsin, 740 F. Supp. 1400, 1417-18 (W.D. Wisc. 1990). The court noted that the treaties did not reserve to the Indians an exclusive right of harvesting in the ceded area. The court also found, though, that when the treaties were made, the Indians understood that the presence of non-Indian settlers would not require that the Indians forego the level of hunting, fishing, gathering, and trading necessary to provide them with a moderate living. Id. at 1415 (citing LCO III, 653 F. Supp. at 1426). The court then stated:

> This unexpected scarcity of resources makes it impossible to fulfill the tribes' understanding that they were guaranteed the permanent enjoyment of a moderate standard of living, whatever the harvesting competition from the non-Indians. It also makes it necessary to try to determine how the parties would have agreed to share the resources had they anticipated the need for doing so.

Id. at 1415. Based on the treating parties' understanding that there would be competition for the resource and the fact that the Chippewa Tribe did not retain exclusive harvesting rights in the ceded territory, the court concluded

> that the parties did not intend that plaintiffs' reserved rights would entitle them to the full amount of the harvestable resources in the ceded territory, even if their modest living needs would otherwise require it. The non-Indians gained harvesting rights under those same treaties that must be recognized. The bargain between the parties included competition for the harvest.
>
> How to quantify the bargained-for competition is a difficult question. The only reasonable and logical resolution is that the contending parties share the harvest equally.

Id. at 1416 (emphasis added). While the court emphasized its view that the Chippewa treaties differed in significant respects from those of the Pacific Northwest tribes, it concluded that the

equal division was the "fairest" and "inevitable" result. Id. at 1417-18.

In United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), in the context of addressing the relationship between reserved Indian fishing rights and federal reserved Indian water rights, the Ninth Circuit affirmed the district court's holding that the Klamath Tribe was "entitled to as much water on the Reservation lands as they need to protect their hunting and fishing rights . . . as currently exercised to maintain the livelihood of Tribe members." Id. at 1414. The court explained:

> Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living.

Id. at 1415 (citing Fishing Vessel Ass'n, 443 U.S. at 686) (emphasis added). Thus, the Ninth Circuit suggested, tribal fishing rights are not necessarily accompanied by a 50% allocation ceiling.

The Klamath River and Hoopa Valley reservations and accompanying federal rights were created by executive action pursuant to congressional statutory authorization, rather than through a bilateral, bargained-for agreement, as in the Pacific Northwest and the Great Lakes Tribes' fishing rights cases. Because the operative documents creating the reservation do not expressly reserve fishing rights, neither do they expressly limit the implied rights reserved for the Indians of the reservation. Thus, an argument could be made that the tribal moderate standard of living needs should be satisfied first, before other user groups can be afforded fishing privileges. Cf. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972) (unqualified treaty language contrasted with "in common with" treaty language, denoting a qualified right).

At the time the reservations were created, the United States doubtless contemplated that the reservation resources, and in particular the fishery, would be sufficient for the Indians to continue to be self-supporting, see Appendix B at 8, or in other words, to support a moderate standard of living. Furthermore, although there was competition for the fishery, the United States sought to reduce it by including what was then the location most desired by the early non-Indian fishing industry--the area at the mouth of the river--inside the reservation boundaries. The historical evidence does not indicate that either the United States or the Indians contemplated scarcity of the resource as a whole.

On the other hand, the Tribes' right to fish in this case does not extend beyond the reservation. Moreover, the doctrine of implied reserved fishing rights has not been extended to provide an exclusive on-reservation right to a fishery resource such as anadromous fish that migrates off the reservation. To do so could totally deprive off-reservation users of access until tribal rights are fully satisfied. The historical evidence that I have examined is not sufficient to infer that the United States, in creating the extended Hoopa Valley Reservation, contemplated that in times of scarcity, fishing by other user groups, wherever located, could be completely cut off until the Indians' total ceremonial, subsistence, and commercial needs are satisfied.[39]

While reservation purposes should be construed broadly, after considering the relevant history, I conclude that the United States did not intend to reserve for the Indians a right to the full amount of the harvestable resource, to the complete exclusion of non-Indian fishing off the reservation until the moderate living standard could be satisfied. Instead, the case law indicates that there should be a ceiling on the tribes' right to ensure that the resource is shared. In summary, the tribes are entitled to a sufficient quantity of fish to support a moderate standard of living, or 50% of the Klamath fishery harvest in any given year, whichever is less.[40]

The Tribes' fishing right is a "right to take a share of each run of fish that passes through tribal fishing areas." Fishing Vessel Ass'n, 443 U.S. at 679; Washington State Charterboat Ass'n v. Baldridge, 702 F.2d 820 (9th Cir. 1983), cert. denied, 464 U.S. 1053 (1984); Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 686-87, 689 (W.D. Wash. 1981). Thus, in the present case, it applies to Klamath River basin stocks that, absent interception, would pass through the Tribes' reservations. See U.S. v. Washington, 520 F.2d 676, 688-89 (9th Cir. 1975) (affirming 384 F. Supp. at 344), cert. denied, 423 U.S. 1086 (1976). In calculating the allocation, the numbers of fish harvested or intercepted by each user group is counted against

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[39] This is not to say, however, that in times of severe shortage, certain tribal ceremonial and subsistence needs may not take priority over the privileges of other user groups. This issue was left open by the Supreme Court in Fishing Vessel Ass'n, 443 U.S. at 688.

[40] This rule is not inflexible, and may be varied by agreement of the parties. See Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 690 (W.D. Wash. 1981); United States v. Oregon, 699 F. Supp. 1456, 1463 (D. Ore. 1988), aff'd, 913 F.2d 576, 585 (9th Cir. 1990).

the respective party's share, regardless of where they are taken or for what purposes. Fishing Vessel Ass'n, 443 U.S. at 687-89.

Although the Tribes' rights in this case are geographically limited to the on-reservation fishery, it is well-settled that tribal fishing rights have a geographical component that requires that fishing outside of those areas be managed in such a way to permit tribal access to their share of the fishery at those geographical locations. See Hoh Indian Tribe v. Baldridge, 522 F. Supp. at 687; Sohappy v. Smith, 302 F. Supp. 899, 910-911 (D. Ore. 1969) (state cannot so manage the fishery that little or no harvestable portion of the run reaches the Indian fishing aress).

Indian reserved fishing rights have both a geographical and a "fair share" aspect. Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1511-14 (W.D. Wash. 1988). The right is not only one to harvest a particular share, but also to be able to hsrvest that share on the reservation or at other geographical locations linked to the reserved right. Thus, although the Northwest treaty tribes have fishing rights that attach both to reservations and to "usual and sccustomed" locations, while the Yurok and Hoopa Valley Tribes' rights geographically are linked to their reservations, the underlying principle is the same. In each case, the tribal fishing rights are linked to specific geographic areas, and other fishing must not interfere with the Tribes' right to have the opportunity to catch their share.

IV. FEDERAL FISHERY REGULATION AND ACTIONS AFFECTING INDIAN FISHING RIGHTS

A. Federal Trust Responsibility

The United States is the trustee of Indian reserved rights, including fishing rights.[41] The role of the United States as trustee of Hoopa and Yurok Indian fishing rights has been recognized in various court decisions. See United States v. Eberhardt, 789 F.2d 1354, 1359-62 (9th Cir. 1986); id. at 1363 (Beezer, J., concurring); People v. McCovey, 36 Cal. 3d 517, 685 P.2d 687, 694, 205 Cal. Rptr. 643, cert. denied, 469 U.S. 1062 (1984). As recently ss 1992, Congress explicitly acknowledged a trust responsibility in connection with the Indian fishery in the Trinity River. "[F]or the purposes of fishery restoration, propagation, snd maintenance," and "in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of

[41] See, e.g., Joint Bd. of Control v. United States, 862 F.2d 195, 198 (9th Cir. 1988); United States v. Michigan, 653 F.2d 277, 278-79 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988).

the Act of October 24, 1984, Public Law 98-541," Congress directed an instream release of water to the Trinity River of not less than 340,000 acre-feet per year. Central Valley Improvement Act, Pub. L. No. 102-575, Title XXXIV, § 3406(b)(23), 106 Stat. 4706, 4720 (1992).

The obligation of the United States as trustee of Indian resources and rights extends to all agencies and departments of the Executive Branch. See Pyramid Lake Paiute Tribe v. Department of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990); Covelo Indian Community v. FERC, 895 F.2d 581, 586 (9th Cir. 1990). As such, the Departments of Interior and Commerce, as well as other federal agencies whose actions affect the fishery resource, must ensure that their actions are consistent with the trust obligations of the United States to the Tribes.

Proper allocation of the harvest of Klamath River basin stocks is only part of the effort needed to protect the reserved fishing rights of the Tribes. The Secretary of the Interior has acted in the past to increase flows in the Trinity River, in part to improve the fishery for the benefit of the Indians.[42] This was a recognition that protection of the fishery itself is necessary to make the tribal fishing right meaningful.

In order for both the purpose of the reservations and the objectives of the Magnuson Act[43] to be fulfilled, the fishery resource here must be rebuilt to sustain a viable fishery for all user groups, consistent with sound conservation practices. Cf. Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 691 (W.D. Wash. 1981). The Trinity River Basin Restoration Act of 1984, Pub. L. No. 98-541, 98 Stat. 2721; the Klamath River Basin Fishery Resources Restoration Act of 1986, 16 U.S.C. § 460ss; and section 3406(b)(23) of the Central Valley Improvement Act of 1992, 106 Stat. at 4720; all reflect congressional intent to restore and protect the anadromous fishery in the Klamath and Trinity River basins.

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[42] See 1991 Trinity River Flows Decision, supra note 3; 1981 Secretarial Issue Document, supra note 3; see also Memorandum from the Associate Solicitor, Division of Indian Affairs to the Assistant Secretary - Indian Affairs, March 14, 1979 (quoted in 1981 Secretarial Issue Document).

[43] Magnuson Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331, codified as amended at 16 U.S.C. §§ 1801 - 1882 (1988).

B. Regulation of the Klamath Fishery

The regulation of the Klamath River basin anadromous fishery resource is divided among a number of governments and agencies.[44] Within the three-mile territorial eea off the coast, the states have jurisdiction. Federal jurisdiction over management of the Klamath fishery resource is split between the Interior and Commerce Departments. The Tribes and the Department of the Interior have the authority to manage the in-river on-reservation tribal fishery.[45] See 25 C.F.R. Part 250. In the exclueive economic zone, generally three to two hundred miles offshore, the Department of Commerce has exclusive management and regulatory jurisdiction. See Magnuson Act, 16 U.S.C. §§ 1801 - 1882; Washington Crab Producers Inc. v. Mosbacher, 924 F.2d 1438, 1439 (9th Cir. 1991).

As a general matter, all parties that manage the fishery, or whose actions affect the fishery, have a responeibility to act in accordance with the fishing rights of the Tribes. This may go beyond safeguarding their right to an appropriate ehare of the harvest on their reservations, cf. U.S. v. Washington, 459 F. Supp. 1020, 1070 (W.D. Wash. 1978), to include a viable and adequate fishery from which to fulfill the Tribes' rights, whether those rights are fulfilled by a 50% ehare or by a lesser amount, if a lesser amount will satisfy fully the moderate living standard to which the Tribes are entitled. Cf. United States v. Washington, 506 F. Supp. 187, 197 (W.D. Wash. 1980) ("treaties were designed to guarantee the tribes an adequate eupply of fish"), aff'd in relevant part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S. 994 (1985).

Because of the migratory nature of anadromoue fish, ocean fishing has a direct impact on the available harvest in the Klamath and Trinity Rivers within the Tribes' reservatione. The Magnuson Act provides:

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[44] The complicated jurisdictional scheme for managing anadromous fishery resources was described in Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1442 (9th Cir. 1991). The disjuncture between ocean and in-river fishing regulation authority over the Klamath basin fiehery resource was noted with concern by Judge Beezer in his concurring opinion in United States v. Eberhardt, 789 F.2d 1354, 1363 (9th Cir. 1986) (Beezer, J., concurring).

[45] As a general matter, reasonable, necessary, and nondiscriminatory conservation measures may be imposed by the Federal Government or the states, as appropriate, on the exercise of tribal fishing rights in the absence of adequate tribal regulation. See Antoine v. Washington, 420 U.S. 194, 207 (1975); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986).

> Any fishery management plan which is prepared by any Council, or by the Secretary [of Commerce], with respect to any fishery, shall . . . contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are . . . consistent with . . . any other applicable law.

16 U.S.C. § 1853(a)(1)(C) (1988) (emphasis added).

The Yurok and Hoopa Tribes' fishing rights are "applicable law" within the meaning of the Magnuson Act, because regardless of whether they were created by treaty or pursuant to statutory authority, thsy are rights that arise under federal law.[46] See Pacific Coast Federation v. Secretary of Commerce, 494 F. Supp. 626, 632 (N.D. Cal. 1980) ("It cannot be doubted that the Indians have a right to fish on the reservation. Congress has carefully preserved this right over the years, and the courts have consistently enforced it."); see also Washington State Charterboat Ass'n v. Baldridge, 702 F.2d 820, 823 (9th Cir. 1983) (treaty fishing rights as "applicable law"), cert. denied, 464 U.S. 1053 (1984); Hoh Indian Tribe v. Baldridge, 522 F. Supp. 683, 685 (W.D. Wash. 1981) (same). Furthermore, nowhere in the Magnuson Act has Congrsss stated an intent to interfere with Indian rights in the Klamath River area. Pacific Coast Federation, 494 F. Supp. at 633. Therefore, fishery management plans and ocean fishing regulations must be consistent with those rights. The Act, however, provides no authority to either the Pacific Fishery Management Council, see 16 U.S.C. § 1852(a)(6), or the Secretary of Commerce over in-river Indian fishing or in-river tribal harvest levels. Pacific Coast Federation, 494 F. Supp. at 632. Thus, in managing the ocean fisheries, the Secretary of Commsrce must rely on management by the Department

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[46] The Magnuson Act expressly refers to Indian treaty fishing rights. Specifically, 16 U.S.C. § 1853(a)(2) rsquires that fishery management plans contain a description of "Indian treaty fishing rights, if any." Because the plans themselves are limited to management of the ocean fishery, however, this provision refers to Indian treaty fishing rights existing in ocean fishing areas, and not to in-rivsr tribal fishing rights--treaty or otherwise. See Washington Troller's Ass'n v. Kreps, 466 F. Supp. 309, 313 (W.D. Wash. 1979) (description of in-river fishery not required by Magnuson Act). Section 1853(a)(2)'s failure to refer explicitly to other federally reserved Indian fishing rights does not affect our conclusion that § 1853(a)(1)(C) is the relevant provision requiring that fishery management plans substantively conform to Indian reserved rights. The status, scope, and character of those rights is determined by looking to their source--not to the Magnuson Act.

of the Interior or the Tribes of the in-river fishery. Cf. Washington Crab Producers, 924 F.2d at 1443.

Except for the general Magnuson Act requirement that ocean fishery plans be consistent with any other applicable law, the Act's provisions governing regulation of the ocean fishery do not extend to in-river Indian fisheries. Arguments to the contrary by both ocean fishermen and inland tribes have been rejected. Compare Washington Trollers Ass'n v. Kreps, 466 F. Supp. 309 (W.D. Wash. 1979) (rejecting ocean fishing association's argument that the fishery plan must describe inland fisheries); with Hoopa Valley Tribe v. Baldridge, No. C-82-3145, slip op. at 43-45 (N.D. Cal. June 25, 1984) (rejecting Tribe's argument that alleged discriminatory regulation of in-river tribal fishing violated the Magnuson Act's prohibition against discrimination in allocating the harvest).

V. CONCLUSION

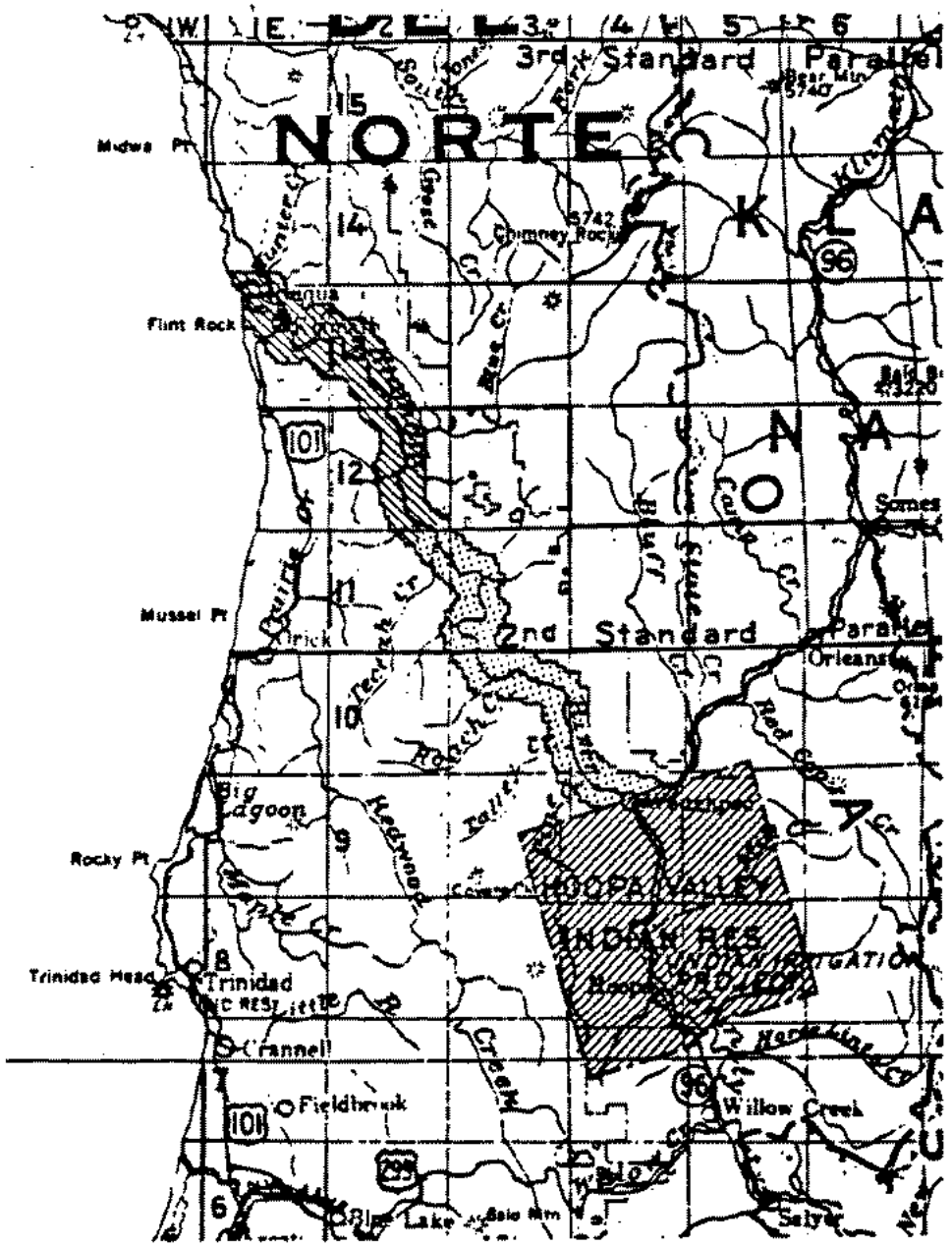
I conclude that when the United States set aside what are today the Hoopa Valley and Yurok Reservations, it reserved for the Indians of the reservations a federally protected right to the fishery resource sufficient to support a moderate standard of living. I also conclude, however, that the entitlement of the Yurok and Hoopa Valley Tribes is limited to the moderate living standard or 50% of the harvest of Klamath-Trinity basin salmon, whichever is less. Given the current depressed condition of the Klamath River basin fishery, and absent any agreement among the parties to the contrary, the Tribes are entitled to 50% of the harvest.

John D. Leshy
Solicitor

APPENDIX TO OPINION OF THE COURT

MAP OF HOOPA VALLEY INDIAN RESERVATION, CALIFORNIA*

Scale: 1 inch = 12 miles



LEGEND:

- Old Klamath River Reservation.
- Connecting Strip.
- Original Hoopa Valley Reservation.

*United States Department of Interior, General Land Office 1944.

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APPENDIX B

Overview of the History of the Klamath River and Hoopa Valley Reservations

The original Klamath River Reservation was established in 1855. The location had been selected pursuant to "directions [from the Secretary of the Interior] to select . . . reservations [in California] from such 'tracts of land adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians, which tracts should be unincumbered by old Spanish grants or claims of recent white settlers.'" I Kappler, Indian Affairs: Laws and Treaties 816 (1904) ("Kappler") (Letter from Commissioner of Indian Affairs to Secretary of the Interior, Nov. 10, 1855). In creating the reservation, President Pierce accepted the Interior Department's recommendation to set aside a strip of territory one mile wide on each side of the Klamath River, for a distance of twenty miles. See id. at 816-17.

In the 1856 Annual Report of the Commissioner of Indian Affairs, the Klamath reservation is described as follows:

> Klamath reservation is located on the river of that name, which discharges its waters into the Pacific ocean twenty miles south of Crescent city.
>
> The Indians at this place number about two thousand. They are proud and somewhat insolent, and not inclined to labor, alleging that as they have always heretofore lived upon the fish of the river, and the roots, berries, and seeds of their native hills, they can continue to do so if left unmolested by the whites, whose encroachments upon what they call their country they are disposed to resist. . . . The land on this river is peculiarly adapted to the growth of vegetables, and it is expected that potatoes and other vegetable food, which can be produced in any abundance, together with the salmon and other fish which abound plentifully in the Klamath river, shall constitute the principal food for these Indians. It is confidently expected in this way to avoid the purchase of beef, which forms so expensive an item at those places where there is no substitute for it. The establishment of the Klamath reserve has undoubtedly prevented the spread of the Indian wars of Oregon down into northern California.

Annual Report of the Commissioner of Indian Affairs ("Annual Report") 238-39 (1856).

The next year, the Government agent at the Klamath Reservation described the importance of the fishery to the Indians on both the Klamath and Trinity Rivers. Because of the harm caused to the fishery on the Trinity, he recommended relocation of those Indians to the Klamath Reservation:

> Salmon has been very abundant this season, and in the different villages upon the reservation there has not been less than seventy-five tons cured for winter use. . . .
>
> We are now engaged in clearing, with Indian labor, one hundred acres of land, which will be ready for crop by the middle of October. . . .
>
> The Indians are located at different points upon the Klamath river, which runs through the reservation, . . . for the convenience of fishing . . . . On this river, above Marippe Falls, the eastern boundary of the reserve, there are probably about fourteen hundred Indians; they subsist upon fish, game, and the natural products of the earth. Some few of them work for the settlers.
>
> In Hoopa valley, on Trinity river, there are about seven hundred Indians; they subsist by hunting, fishing, grass seeds, and acorns. Many of them work for the white settlers in the valley, and are well paid for their labor.
>
> On the Trinity river and its tributaries, above Hoopa, there are about five hundred Indians; their resources for fishing and gaining a livelihood have been destroyed by mining in the vicinity; . . . I would recommend their removal to this agency.

Annual Report 391 (1857) (Letter from Indian Sub-Agent Heintzelman to Sup't of Indian Affairs, July 13, 1857).

In 1858, the California Superintendent reported:

> It is proper to remark, that in almost every locality in California there is a sufficiency of the natural products of the country for the subsistence of Indians residing there, and they could support themselves quite well, were it not for the encroachments of the whites, and the consequent destruction of their food by the settlement of the country.
>
> * * * *

> Klamath reservation is progressing steadily and quite satisfactorily. The crop is good, and with the yield of salmon at the fisheries the Indians are contented and happy.

Annual Report 283, 285 (1858) (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, Sept. 4, 1858).

The Klamath Reservation sub-agent reported on the "abundance of [the Indians'] natural food," and also indicated the unlikelihood of extensive agricultural production on the Klamath reservation:

> One great difficulty this reservation labors under is the small amount of land that can be brought under cultivation. The Klamath river runs through a canon the entire length, and the reservation being located upon each side of it, the only land suitable for cultivation is in the bottoms, ranging in size from one acre to seventy.

Id. at 286 (Letter from Indian Sub-agent Heintzelman to Sup't of Indian Affairs, July 1, 1858).

In 1859, the Klamath Reservation's Indian agent reported about two thousand Indians "on this reservation proper" and about four thousand more "who inhabit the mountain streams, and subsist principally on fish and game, which are very abundant, and seem inexhaustible." Annual Report 437 (1859) (Letter from Indian Agent Buel to Jas. Y. McDuffie, Esq. (undated)).

The agent's report in 1861 continues to reflect the importance of the reservation and its fishery to the Indians:

> [The Klamath] reservation is well located, and the improvements are suitable and of considerable value. There is an abundance of excellent timber for fencing and all other purposes, and at the mouth of the Klamath river there is a salmon fishery of great value to the Indians. The number of Indians here is not far from eighteen hundred.
>
> * * * *
>
> I suggest, as this reservation has never been surveyed, that it should be so laid out as to embrace the island and fishery at the mouth of the Klamath, and extend a mile in width each side of the river, to a point one mile above Wakel, and a half a mile in width each side of the river, from that point to the mouth of the Trinity river.

Annual Report 147 (1861) (Letter from Superintending Agent Geo. M. Hanson to Comm'r of Indian Affairs, July 15, 1861).

In December, 1861, the Klamath agent reported the entire loss of the agricultural developments on the Klamath Reservation by an "unparalleled freshet." Annual Report 313 (1862) (Lstter from Agent Hanson to Comm'r of Indian Affairs, Dec. 31, 1861). As a result of the 1861 flood, the Superintendent and one group of the Indians moved to the Smith River reservation. Most, however, remained on the Klamath Reservation or in an area up the river. Nearly all eventually returned to the Klamath River and vicinity. See Letter from Comm'r of Indian Affairs to Secretary of the Interior, April 4, 1888, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 19-22 (1889); Mattz v. Arnett, 412 U.S. 481, 487 (1973); Short v. United States, 202 Cl. Ct. 870, 887 (1973), cert. denied, 416 U.S. 961 (1974).

By 1862, the Indian Superintendent was recommending the sale of the Klamath Reservation and relocation of the Indians to another suitable reservation. See Annual Report 40-41 (1862). While Government officials now spoke of the Klamath Reservation as "almost worthless," and as "almost entirely abandonsd by the Indians," it sought to relocate the Indians to another reservation which would continue to provide the Indians with a fishery, in addition to agricultural lands. See Annual Report 8-10 (1863). The 1863 Commissioner's report referred to the "abundance of fish" on the Round Valley reservation and noted that the Smith River valley, a recommended site, was isolated from non-Indians and would furnish the "best of fisheries" from the Pacific Ocsan. Id. at 9-10.

As part of an sffort to consolidate and reduce the number of Indian reservations in California, Congress in 1864 passed an act authorizing the President to set apart up to four tracts of land in California for the purposes of Indian reservations. See Act of April 8, 1864, § 2, 13 Stat. 39, 40; Donnelly v. United States, 228 U.S. 243, 257, modified and rehearing denied, 228 U.S. 708 (1913); Mattz v. Superior Court, 46 Cal. 3d 355, 758 P.2d 606, 610, 250 Cal. Rptr. 278 (1988).

In 1864, the Klamath, Redwood, and Trinity Indians were reported to still be at war with the forces of the United States. Annual Report 13 (1864); see Short, 202 Ct. Cl. at 889. Austin Wiley, an attorney, was appointed Superintendent of Indian Affairs for California. In order to restore and establish peaceful relations with the tribes, Superintendent Wiley entered into negotiations and concluded a treaty with the Indians, which provided for locating the Indians in the Hoopa Valley. See Annual Report 12-14 (1864); Short, 202 Ct. Cl. at 891. Although the treaty was never ratified, and there is doubt whether the Indians really

understood the terms of Wiley's treaty, see id. at 895, Wiley proceeded, consistent with the proposed treaty, to locate the Hoopa Valley Reservation. Id. at 891-92. By treating with the Indians and establishing the reservation, Superintendent Wiley "thereby brought to an end the war with the Indians of Humboldt, Klamath and Trinity counties." Id. at 896.

By 1865, the Government's original intention to remove the Klamath River Indians to the Smith River reservation had changed and refocused on use of the Klamath Reservation:

> It was intended to remove the Indians from the Smith River reservation, and place them at the old Klamath reservation, still owned by government, but to place the occupants under the charge of an employee of the Hoopa Valley agency. No definite suggestions were made as to the selection of the other two permanent reservations.

Annual Report 11 (1865).

Superintendent Maltby, who had replaced Superintendent Wiley, reported on the newly located Hoopa Valley reservation, and expressed his expectation that the "Klamath Indians in the vicinity, numbering eighteen hundred, will . . . most of them move to the [Hoopa Valley] reservation." Id. at 113 (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, Sept. 15, 1865). The same year, the Government surgeon living on the Hoopa Valley reservation along the Trinity River reported on the Indians' reliance on the salmon fishery, and the difficulties resulting from harm to the resource caused by local mining:

> They no longer sport on the banks of clear streams literally alive with salmon and other fish, but gaze sadly into the muddy waters, despoiled almost of their finny prey by the impurities from the sluice-boxes of the miners at the head of the stream. In this consists one of the greatest calamities inflicted upon the Indians of recent years. Their salmon fishing is destroyed to a very great extent, and with it one of their chief means of subsistence. Those who saw the Klamath and Trinity rivers in early days say that during the summer months they ran as clear as crystal, and thronged with salmon from the sea; now they are muddy streams and almost deserted by this fish.

Id. at 116-17. The Government surgeon nonetheless noted that the Indians continued to secure "all the fish they can," id. at 117, and remarked at "the large quantity of fish oil they consume as food," id. at 118.

In 1866, Robert J. Stevens was appointed special commissioner to investigate and report on Indian affairs in California. His report dated January 1, 1867, and addressed to the Commissioner of Indian Affairs, is contained in the 1867 Annual Report 117-48. Commissioner Stevens reported on continuing difficulties in maintaining peace between the Indians and non-Indians, and of the need for reservations for the exclusive use and occupancy of the Indians. He discussed the Hoopa Valley reservation in connection with Superintendent Wiley's "treaty," and the establishment of peaceful relations with the Indians. Commissioner Stevens travelled from the Hoopa Valley reservation down the Trinity to the Klamath River, making the following report:

> On the banks of the Klamath the villages were more numerous. . . .
>
> The salmon fisheries of the river have been very much injured by the former mining operations. Only now and then one of their ingenious weirs is seen. . . .
>
> * * * *
>
> The count of Indians on the Klamath, made officially, but little over a year previous to my visit, gave a census of 2,217 below the mouth of the Trinity.
>
> At this point I wish to submit my observations as to the character of the country through which flows the Klamath river. For 10 miles or more on each side to a point about 30 miles above its mouth, following its course, it is unsettled and wild, peopled almost exclusively by Indians, to whose wants and habits it is well adapted, supplying wild food and fish in abundance. Very little of it is tillable land, and whites will never care to settle upon it.
>
> My attention had been particularly directed to this region by Major Bowman while with him at Fort Humboldt. The following is his suggestion:
>
> "Extend the Hoopa reservation on its northern boundary, so as to include not less than six miles along the northern bank of the Klamath to the sea-shore, thence down the sea-shore to the mouth of Redwood creek, thence up Redwood creek to the point nearest to the head of Willow creek, thence down Willow creek to the boundary of the Hoopa reservation."
>
> He adds:
>
> "Very little of this tract is suitable for cultivation, and consequently not desirable for the settlements of white men, but will furnish sufficient tillable land, I think, for the wants of all the Indians that may be placed there, and range for necessary stock. . . ."

"The miners engaged on the river banks within the described limits are but few, and are daily diminishing in numbers."

Id. at 127-29. Commissioner Stevens recommended the withdrawal for Indian use, "not only the tract on the Klamath, . . . but an enlargement thereof." Id. at 145.

In 1868, the Indian agent at the Hoopa Valley Reservation remarked in his report that establishment of the reservation "was right and its location good," and that "it would be almost impossible to remove [the Indians] to any other locality, and then only by a great expense, endangering the peace of this section while it was being done." Annual Report 133 (1868) (Letter from Indian Agent Pratt to Comm'r of Indian Affairs, July 20, 1868).

For a number of years, the reports from the Hoopa Valley Reservation discussed the attempts to begin agriculture livestock raising, and ranged from the optimistic to the pessimistic. Compare Annual Report 16 (1869) (Hoopa Valley reservation "under a fine state of cultivation and highly prosperous"), with Annual Report 78 (1870) (Letter from Sup't of Indian Affairs to Comm'r of Indian Affairs, July 13, 1870) (Hoopa Valley reservation "has but a poor prospect of becoming self-sustaining;" "the soil at Hoopa is so poor that it is incapable of raising produce sufficient to feed 1,000 Indians").

In 1882, the Commissioner's report, while noting that "Indian farming has increased satisfactorily," noted that the salmon fishery still comprised one-third of the subsistence of Indians located on the Hoopa Valley reservation. Annual Report 10 (1882).

In 1883, a commercial fisherman named Hume contacted the Secretary of the Interior and proposed to lease the salmon fisheries of the Klamath River, within the Klamath River Reservation. The Acting Commissioner of Indian Affairs replied:

> [N]o such proposition can be entertained. It would be against usage and at variance with the policy of the Department in the control and management of Indian affairs.
>
> The permanent settlement of the Indians residing upon said reservation, and the disposal of so much of the reservation as may not be needed for that purpose, are matters engaging the attention of the Department at this time. . . .

> The reservation is still in a state of Indian reservation, and must so remain, uninterfered with, until otherwise ordered by competent authority.

Letter from Acting Comm'r of Indian Affairs to D.B.[1] Hume (July 23, 1883), reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 11 (1889).

Two years later, Special Agent Paris Folsom investigated and reported on the "Condition and Needs of Non-Reservation Klamath Indians in California," noting the particular suitability of the Klamath River fisheries for satisfying the needs of the Indians:

> The distance from the line of the Hoopa Valley Reservation, at the juncture of the Klamath and Trinity Rivers, to the Klamath River Reservation, upper line, by way of the river, is some 18 miles, and it is within these limits that the non-reservation Klamath Indians are located.
>
> Nature seems to have done her best here to fashion a perfect paradise for these Indians, and to repel the approach of the white man. She filled the mouth of the Klamath River with a sand-bar and huge rocks, rendering ordinary navigation impossible, . . .
>
> . . . [The Indians] form a very respectable peasantry, supporting themselves without aid from the Government by fishing, hunting, raising a little stock, cultivating patches of soil, and by day's labor at the Arcata lumber-mills. . . .
>
> * * * *
>
> . . . . Fisheries, staging for holding the fishermen and their nets, are dotted along the river. Indians have had general and actual, though unrecorded, possession and occupation of the whole river line here for years and years. Their dwellings are scattered and permanent. They wish to remain here; here they are self-supporting--actually self-sustaining. This is their old home, and home is very dear to them--treasured above everything else. No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to

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[1] This appears to be an error. Hume's initials apparently were "R.D." For historical works about Hume, see A Pygmy Monopolist: The Life and Doings of R.D. Hume Written by Himself and Dedicated to His Neighbors (Gordon B. Dodds, ed.) (Univ. of Wisconsin 1961); Gordon B. Dodds, The Salmon King of Oregon: R.D. Hume and the Pacific Fisheries (Univ. of North Carolina 1959).

them. No territory offers more to these Indians and very little territory offers less to the white man.

* * * *

I have the honor to further recommend that these same provisions be extended to the Indians on the Klamath River Reservation immediately adjoining the land here considered, and that the lower and remaining portion of that reservation be thrown again with the public lands, providing security and protection to the fisheries of the Indians above the mouth of the Klamath River.

Report of Special Agent on Condition and Needs of Non-Reservation Klamath Indians in California (June 25, 1885), reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 7-11 (1889).

In 1886, the Acting Agent for the Hoopa Valley Reservation reported on the "Klamath Reservation:"

My duties, as both agent and commanding officer, require me to exercise a supervision over the reservation on the Klamath. A small outpost is maintained at the mouth of that river to prevent intrusion on the Indian lands, and protect the Indians in their only industry--that of fishing for salmon.

Those Indians are also anxious for a subdivision of their lands, but before this can be done the lines of the reservation must be fixed determinately. . . .

The people, like the Hoopas, are friendly and well disposed, and maintain amicable relations with the white people about them, but should the military power of the Government be removed from this valley, both reservations would soon be overrun, and the Indians dispossessed. The Klamaths live almost exclusively on the salmon, though a few plant a little.

Annual Report 43 (1886) (Letter from Acting Agent Wm. E. Dougherty, Capt. First Infantry, to Comm'r of Indian Affairs, Aug. 15, 1886).

The following year, in 1887, Acting Agent Dougherty reported on a controversy that had arisen with the commercial fisherman Hume at the mouth of the Klamath:

There are believed to be on the Klamath river about 1,200 Indians of that name. The live in villages on the river bank, a few miles apart, from far up it to its mouth, and have always been self-sustaining, relying to a great extent for subsistence upon the salmon. . . .

* * * *

> In May last, R.D. Hume, of Ellenburgh, Oreg., entered the mouth of the Klamath river, with a light-draft steamboat and a gang of fishermen brought from the north, and established a floating cannery on the fishing grounds near the mouth of the river. The Indians along the river are much disturbed at what they deem to be an intrusion that will deprive them to a great extent of their means of subsistence, and I think that unless some remedial measure is applied by the Government necessity will actuate them to seek a remedy in their own way.

Annual Report 9 (1887) (Letter from Acting Agent Wm. E. Dougherty, Captain U.S. Army, to Comm'r of Indian Affairs, July 5, 1887).

Concerned about the intrusion of R.D. Hume's steamer into the Klamath River within the Klamath Reservation, the Interior Department sought to obtain relief for the Indians and protection for their fishery. In June, 1887, the Secretary of the Interior sought an opinion from the Attorney General concerning the Government's power to protect the Indians and their unimpaired access to the fishery within the boundaries of the reservation. The Secretary's inquiry prompted exchanges between the Interior and Justice Departments on the authority of the United States to exclude Hume from the Indian fishery at the mouth of the Klamath River. Much to the consternation of the Interior Department, the Justice Department took a narrow view of the Federal Government's power to protect the Indians.

The Attorney General concluded that "so long as the acts of persons resorting to these waters to take fish fall short of invading the right of Congress to regulate commerce with foreign nations or among the several States, no case for Federal interference can be said to exist." Letter from Attorney General to Secretary of the Interior, June 11, 1887, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 13 (1889). In reaching his conclusion, the Attorney General discussed principles of state ownership of the beds of tide-waters and of fish running in them, noted that the State had declared the Klamath River to be navigable, and found that power over the fisheries had not been granted to the United States and thus remained under the exclusive control of the State.

The Interior Department continued to press its case to establish and protect the rights of the Indians. On June 21, 1887, the Commissioner of Indian Affairs submitted a brief setting forth arguments supporting the Indians' right to the fishery, see S. Exec. Doc. No. 140, supra, at 14-16, which the Secretary

submitted to the Attorney General. Interior's brief contended that the Indians,

> have had exclusive use of the fisheries in the Klamath River, from which they have supported themselves, entirely unaided by the Government, at least since the freshet of 1861.
>
> * * * *
>
> Have not the Indians acquired private rights in their fisheries by prescription?
>
> * * * *
>
> Can the legislature of the State of California by declaring the Klamath River navigable, when in fact it is not navigable, deprive the Indians of the exclusive use of fisheries?
>
> * * * *
>
> The Klamath Reservation having been declared by the President, in pursuance of an act of Congress, for Indian purposes exclusively, can the State of California so far defeat the purposes of said act of Congress as to grant liberty to any and all of her citizens to enter within its boundaries and engage in the business of catching and curing fish, to the injury of the Indians for whom the reservation was created?
>
> * * * *
>
> By seining near the mouth of the river the whites would obstruct the passage of the salmon and cut the Indians off from their accustomed supply.
>
> Section 2149 of the Revised Statutes provides as follows:
>
> "The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person * * * within the limits of the reservation whose presence may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians."
>
> The presence of Hume and his party within the limits of the Klamath River Reservation is manifestly detrimental to the peace and welfare of the Klamath River Indians, in that it is likely to provoke open hostilities between them; and if they are permitted to remain the whitss will deprive the Indians of their means of support. Certainly nothing could be more detrimental to their peace and welfare.
>
> The right to navigate the river is not denied, but anchoring floats with a view to erecting buildings thereon for the accommodation of extensive business operations during an entire season is another thing.

> Captain Dougherty, the acting agent in charge, is an Army officer of large experience amongst the Indians, and good judgment.
>
> He asks that "the highest power be invoked to protect the Indians in the possession of their only (food) resource."
>
> * * * *
>
> A small military force has for a long time been stationed at the mouth of the Klamath to protect the Indians in their fishing privileges.

Id.

Two days after submitting the brief to the Secretary, the Commissioner sent him another letter discussing the similarity of the Klamath case with a court decision issued concerning Pyramid Lake:

> Referring to my letter . . . and accompanying paper relative to the Klamath River Reservation in California, and the attempted dispossession of the resident Indians of their fishing grounds by a gang of white men under one Hume, I have the honor to draw your attention to a case [concerning the Pyramid Lake Reservation.]
>
> [The non-Indian defendants in the case were charged with trespass for fishing on Pyramid Lake, and contended that the taking of fish inside the reservation was not unlawful], upon which the court said:
>
> "If this argument is sound the whole purpose of the law, in setting apart lands for the separate use of the Indians, is defeated . . . . We know that the lake was included in the reservation that it might be a fishing ground for the Indians. . . . It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment those who thus encroach on the reservation and fishing ground violate the order setting apart for the use of the Indians, and consequently do so contrary to law."
>
> It can be said with equal truth . . . that the Klamath River was included in the reservation, "that it might be a fishing ground for the Indians." True, the executive order does not so state in terms, neither does the order setting apart the Pyramid Lake Reservation. But it is manifest from the description of the boundaries of the Klamath Reservation that it was the purpose and intention to exclude white people

from fishing in the river, from its mouth to the upper extremity of the reservation.

Should the whites be permitted to enter the river to fish, but little if anything of it will be left of the reservation and the whole purpose of the law will be defeated.

Letter from Comm'r of Indian Affairs to Secretary of the Interior, June 23, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 16.

On June 23, 1887, the Attorney General asked for a more precise statement of the case and the question for which Interior was soliciting an opinion. The Commissioner of Indian Affairs then wrote the Secretary of Interior stating the case and questions he recommended be sent to the Attorney General:

So far as we can ascertain the Klamath River Indians in California have held and enjoyed exclusive fishery privileges in the Klamath River from time immemorial, and were in full possession of them at the date of the Guadalupe Hidalgo treaty, by which the territory embracing the Klamath River and the State of California was acquired by the United States.

This exclusive possession has never been disturbed, and until recently never challenged.

Letter from Comm'r of Indian Affairs to Secretary of the Interior, July 6, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 17. The Commissioner posited five queetions for the Attorney General:

(1) Did not the Klamath River Indiane acquire by prescription and hold at the date of the Guadalupe Hidalgo treaty, title or property in the fisheries of the Klamath River?

(2) Was not such title or property recognized and guarantied by the provisions of said treaty?

(3) Was not the legislative and executive action which fixed the present reservation on either side of the Klamath River a recognition of the Indians' right and title to the exclusive fishery privileges of Klamath River within the boundariee thereof?

(4) If the Indians have rights under the Guadalupe Hidalgo treaty, or have acquired rights by prescription since the date of that treaty, can the State of California by direct or indirect means divest them of those rights?

(5) If the Indians have the exclusive right to fish in the Klamath River within the boundaries of

> their reservation, can not the Department, through this Bureau and its agents, protect those rights within said boundaries by the enforcement of the laws and regulations made in pursuance thereof for the maintenance of peace and order on Indian reservations?

Id.

The Attorney General replied that he deemed Interior's questions "clearly justiciable" and more properly presented to a court than to him. Letter from Attorney General to Secretary of the Interior, July 11, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 17-18. On October 4, 1887, the Acting Commissioner of Indian Affairs recommended to the Secretary of the Interior that the United States bring suit on behalf of the Indians to judicially determine their rights in the fisheries. Letter from Acting Comm'r of Indian Affairs to Secretary of ths Interior, Oct. 4, 1887, reprinted in S. Exec. Doc. No. 140, supra, at 18. The lawsuit against Hume followed, and the Interior Department's position that the Klamath River Reservation remained an Indian reservation was set forth in a letter from the Commissioner to the Secretary of the Interior, dated April 4, 1888. See S. Exec. Doc. No. 140, supra, at 19-22 (1889).

In 1888, even while the controversy with Hume continued, Acting Agent Dougherty reported that the Indians had negotiated a commercial agreement to supply a non-Indian cannery operation with fish:

> The question of the prescriptive rights of the Lower Klamaths to the fisheries of the Klamath River is still in abeyance, and I do not think that any action has yet been taken on the instructions given by the honorable the Attorney-General, in October last, to institute proceedings in this case.
>
> Meantime the Indians have made a co-operative partnership with Mr. John Bornhoff[2] of Crescent City, who has supplied them with boats, nets, stc., and the plant for a cannery, which is now in operation at the mouth of the Klamath. This enterprise gives occupation to all the Indians at that place, and for some distance up the river,
>
> . . . .
>
> Mr. Hume's party from Oregon is again in the river fishing. The Indians complain as before, of this intrusion, and are awaiting with some anxiety the decision that will

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[2] Bearss, supra note 11 in Opinion, at 163, gives the name as John Bomhoff, which is consistent with Dodds, The Salmon King of Oregon, supra note 1 in Appendix B, at 180.

> determine whether the exclusive right claimed by them will be sustained or not."

Annual Report 10 (1888) (Letter from Acting Agent Wm. E. Dougherty, Captain U.S. Army, to Comm'r of Indian Affaire, Sept. 20, 1888).

The action eventually brought against Hume was proeecution of libel against his goode, for unlicensed trading in Indian country in violation of Revised Statutes § 2133, as amended. 22 Stat. 179 (1882).[3] The court rejected the claim that the area in question was within an Indian reservation. While the court agreed that the area was still a federal reservation not open to public entry, it also concluded that the Government had abandoned it as an "Indian reservation." Therefore, notwithstanding its federal reservation status, the court held that it did not qualify as an Indian reservation or as Indian country for purposes of R.S. § 2133. United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403, 406 (D.C.N.D. Cal. 1888), aff'd, 38 F. 400 (C.C.N.D. Cal. 1889); see Short v. United States, 202 Ct. Cl. 870, 912-16 (1973) (description of controversy and decision), cert. denied, 416 U.S. 961 (1974). The court never addressed or

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[3] Revised Statutes § 2133, as amended, provided:

> Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without [an Indian traders] license, shall forfeit all merchandise offered for sale to the Indians or found in his poesession, and shall moreover be liable to a penalty of five hundred dollars.

Act of July 31, 1882, ch. 360, 22 Stat. 179.

Much to the consternation of the Indian agent, Captain Wm. Dougherty, when the case against Hume came to trial in district court, "[t]he United Statee attorney did not appear . . . and the Government was not represented. Hie honor stated that it was the sixth time the caee had been eet for hearing, and decided to go on with it, and hear the Government's argument later." Letter from Agent Wm. E. Dougherty to Comm'r of Indian Affairs, May 29, 1888, reprinted in S. Exec. Doc. No. 140, 50th Cong., 2d Sess. 23 (1889).

adjudicated the questions raised by the Interior Department to the Attorney General.[4]

After losing in district court, the Secretary of the Interior requested an appeal and reported that in order to protect the Indians, authority was needed at once "to set apart these lands as a reservation and thus remove all doubt." Short, 202 Ct. Cl. at 914. On April 1, 1889, the circuit court affirmed the district court's decision, and concurred in the district court's analysis. 38 F. 400 (C.C.N.D. Cal. 1889).

Soon thereafter, Congress took up the question whether to open the reservation lands to non-Indian settlement. In 1890, the House of Representatives passed a bill rejecting allotments for the Indians on the Klamath River Reservation, and providing for public sale of the reservation lands. See Short, 202 Ct. Cl. at 917-18. Although a similar bill was introduced in the Senate, the Senate took no action on either the House-passed bill or the Senate bill. Id.

The setback in the courts and the activity in Congress prompted the Interior Department immediately to review its authority for establishing Indian reservations in California to determine whether it could better protect the Indians along the Klamath. The Department sought a legal opinion from the Assistant Attorney General. On January 20, 1891, the Assistant Attorney General replied that in his view, under the special circumstances of the case, the Department had retained the Klamath River Reservation under the 1864 four reservations Act and that it was a part of the Hoopa Valley Reservation. Letter from Assistant Attorney-General to Secretary of the Interior, January 20, 1891 (copy on file in Office of the Solicitor, U.S. Department of the Interior). In response to the decision in Forty-Eight Pounds of

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[4] The district court did note the Indians' involvement in commercial fishing:

> At the proper season, [Hume] proceeds with his vessel to the river, and employs the Indians to fish for him, supplying them with seines and other appliances. He pays them 'in trade,' furnishing them with various articles composing the cargo of his vessel.

United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403, 406 (D.C.N.D. Cal. 1888), aff'd, 38 F. 400 (C.C.N.D. Cal. 1889).

Rising Star Tea, the Assistant Attorney-General noted his disagreement with the reasoning,[5] but concluded that

> [t]his difficulty may yet be removed by the President issuing a formal order, out of abundant caution, setting apart the Klamath river reservation, under the act of 1864, as part of the Hoopa Valley reservation, or extending the lines of the latter reservation so as to include, within its boundaries, the land covered by the former reservation, and the intermediate lands, if the title to the last be yet in the United States.

Letter from Assistant Attorney-General, supra, at 28-29.

On January 21, 1891, the Secretary requested the Commissioner to prepare the necessary orders for extension of the Hoopa Valley Reservation, and on October 16, 1891, President Harrison signed the executive order extending the boundaries of the Hoopa Valley Reservation to include the Klamath River Reservation and the Connecting Strip between the two reservations. I Kappler 815; see also Mattz v. Arnett, 412 U.S. 481, 493 (1973), Donnelly v. United States, 228 U.S. 243, 255-59, modified and rehearing denied, 228 U.S. 708 (1913); Short, 202 Ct. Cl. at 920-23.

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[5] The Assistant Attorney-General did agree with the result. Following the reasoning adopted by the Attorney General in his June 11, 1887, letter, the Assistant Attorney General considered the Klamath River as not within the Klamath Reservation, and therefore beyond the authority of the United States to exclude persons fishing on the waters of the Klamath River. Letter from Assistant Attorney-General to the Secretary of the Interior, January 20, 1891, at 24-27.

In Mattz v. Superior Court, the State of California submitted this letter to establish that the Federal Government lacked the authority to reserve Indian fishing rights in the Klamath River or at least lacked the intent to reserve fishing rights for the Indians of the reservation. The Supreme Court of California rejected those arguments. 46 Cal. 3d 355, 758 P.2d 606, 616-18, 250 Cal. Rptr. 278 (1988).