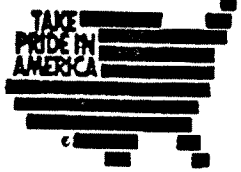




United States Department of the Interior



OFFICE OF THE SOLICITOR
Washington, D.C. 20240

October 4, 1993

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M-36979

Memorandum

To: Secretary

PIRTLE, MORISSET
SCHLOSSER & AYER

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

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

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

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 between 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 Reservations⁵

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 reservations 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 fishermen, 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 existence of the area included within the original Klamath Reservation were subsequently 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.

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 established 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 rights 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

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.

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

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

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

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

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, 1 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

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 reserved 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

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

of the Klamath river"); cf. Fishing Vessel Ass'n, 443 U.S. at 665 n.7, 666 n.8 (dependence of Stevens 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 was 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 members 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 P.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 state 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 other 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 resource. 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 those 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. The inquiry must also include recognition of the Indians' "need to maintain themselves under changed 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, the United States was well aware of the importance of the 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 the Indians to maintain their livelihood and be self-sufficient on the reservation.³³ The United States

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

