

**Yurok and the Klamath River:
Yurok Historical Context and Data
for Assessing Current Conditions and the
Effects of the proposed Klamath Restoration Project
on Yurok Tribal Trust Assets and
Yurok Resources of Cultural and Religious Significance**

**Report Prepared for the
Department of the Interior
Bureau of Indian Affairs
For Use in the Secretarial Determination Overview Report
and NEPA/CEQA Analysis
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I. Introduction: Purpose of Report

This report has been prepared under contract with the US Fish and Wildlife Service for the purpose of providing information to the Department of the Interior (DOI), the Secretary of the Interior, the Bureau of Indian Affairs (BIA) and all federal agencies involved in the Secretarial Determination and compliance with the National Environmental Policy Act (NEPA) and California Environmental Policy Act (CEQA) currently underway for the purposes of evaluating the proposed action of removing four Klamath River dams and implementing provisions set forth in the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA). The primary focus of this report is the impact of the current conditions of continued operations of the Klamath Hydroelectric Project on Yurok trust resources and implications regarding the federal government's trust responsibility to the Yurok Tribe.

Much of the contents of this report are historical in nature due to the fact that historic context is required to adequately assess the direct and cumulative impacts of current conditions and current operations of the Klamath Hydroelectric Project on tribal trust resources and the Klamath River ecosystem and its fishery.

The Yurok Tribe, its history, culture, identity, spirituality and economic survival have always relied upon the Klamath River. For Yurok people, the Klamath River is "the Bloodline: the life blood of the people". The dependence and interdependence of the Yurok on the River and its resources cannot be overstated. It has always been and remains the central feature in Yurok life, ceremony and traditions. Reliance on the Klamath River fishery is not simply for economics, but most importantly for subsistence and cultural survival. Prior to the arrival of non-Indians into the region, the Yurok Tribe was considered one of the most prosperous and wealthy tribes in the area. This wealth was a result of an abundant year-round fishery that provided the basis for the entire Klamath River tribal economic system. Fish were traded and sold to neighboring tribes for a range of resources used in daily and ceremonial life. Abundant food provided by the year-round fishery allowed for the development of a highly developed social and economic system that was reinforced through a highly structured ceremonial and cultural cycle that still persists today.

Klamath River fish are irreplaceable to the Yurok Tribe's culture, religion and economy. From time immemorial, Yurok people have depended on the Klamath River. The River is central to Yurok society by providing food, transportation, commercial trade, and numerous other activities essential to Yurok life. Throughout history and today, the identity of the Yurok people has been intricately woven into natural environment including the Klamath Basin watershed. Tribal religious and ceremonial practices focus on the health of the world; the Klamath River and its fisheries are a priority. The Yurok Tribe's obligation to protect the fishery has always been understood by Yurok people. The ancestral territory of the Yurok Tribe included coastal lagoons, marshes, ocean waters, tidal areas, redwood and other ancient forests, prairies and the Klamath River. The Preamble of the Constitution of the Yurok Tribe identifies:

Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, Wo'ge' made things ready for us and the Creator, Ko-won-no-ekc-on Ne ka-nup-ceo, placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty. In times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses and bushes, all of which are used and provide materials for baskets, fabrics, and utensils.

(Yurok Tribe Constitution 1993)

Because of the rivers' importance, one of the Tribe's highest priorities is to protect and preserve the resources of the rivers, and in particular, to restore the anadromous fish runs to levels that can sustain Yurok people. When the original Klamath Reservation was established in 1855, the rivers were filled with abundant stocks of salmon, steelhead, eulachon, lamprey, and green sturgeon. Today, the abundance of fish in the Klamath River and its tributaries are only a small fraction of their historic levels. Many species of fish have gone extinct, many other species, such as fall Chinook, are in serious trouble. Nonetheless, anadromous fish continue to form the core of the Yurok Tribal fishery. The Yurok Tribe is pursuing its fishery restoration goals through a fish management and regulatory program, participation in various forums to reach long term solutions to Basin problems and when necessary, litigation. The Tribe has devoted a large share of scarce funding resources to budgets for fishery management and regulation. The Tribe has enacted a fisheries ordinance to ensure that the fishery is managed responsibly and in a sustainable manner and has a longstanding record of resource protection. The Tribe's fisheries department is well respected and recognized as a knowledgeable and experienced fisheries entity in the Klamath Basin. The Yurok Tribal Council and the Tribal members they represent are well known for taking and supporting responsible actions to protect fisheries resources.

The management of the Klamath River and its ecosystem was radically altered due to historical events that led to the dispossession of lands and resources from Yurok and other Tribal people in the Basin during the settlement and expansionist era of American society, starting in the mid 1800s. Loss of lands and political autonomy resulted in the loss of management authority by Yurok and other Tribes over the River and the resources on which they relied upon since time immemorial. Subsequent management decisions regarding commercial fisheries, the establishment and abolition of canneries, and the construction of a series of dams in the upper basin have had a cumulative impact on tribal society, economy, culture and traditional lifeways. The Yurok Tribe had no say in these

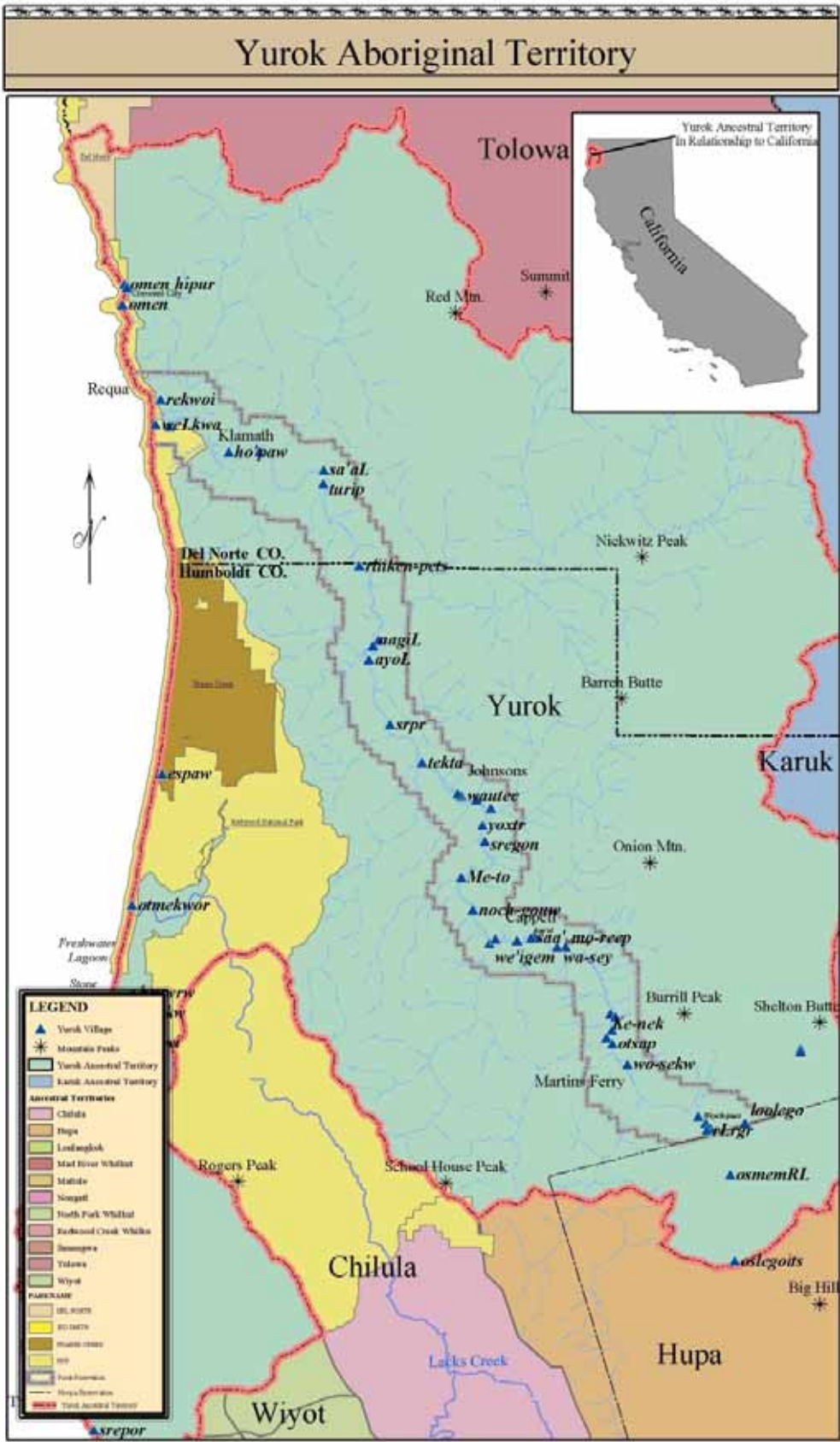
decisions when they occurred, yet have born the disproportionate burden of the ecological and socio-economic impacts of these management decisions over time. During the Reservation Era, the Termination Era and prior to the Self-Determination Era the Tribe has suffered the consequences of these short-sighted management decisions by state and federal managers and agencies with regards to the Klamath River and its resources. These management decisions have resulted in extirpation of numerous runs and species of culturally significant anadromous and riverine species that were relied upon by Yurok and other tribes. Today, Candlefish (once an important subsistence food) no longer exist in the Klamath River. Coho Salmon and Green Sturgeon are on the Endangered Species list. Pacific Lamprey have experienced dramatic decreases and Chinook Salmon have declined to such numbers that only a short commercial fishing season can be practiced for the fall run, and all other runs have diminished to the extent that they are no longer viable for economic harvest.

Impairments to Klamath River water quality as a result of the ecological impacts of the Klamath River dams and their artificial reservoirs have resulted in recurring annual blooms of toxic blue green algae that exceed World Health Organization and state and county public health standards resulting in the posting of closures throughout the basin on an annual basis, always during the peak time for commercial and subsistence fishing and ceremonial practice for Yurok people. All of these adverse impacts not only effect the natural resources on which Yurok people rely, but also the cultural and ceremonial lifeways.

Numerous Yurok Trust Resources exist within the Klamath Basin and many are directly associated with the Klamath River ecosystem. These resources include fish and aquatic species: various species of salmon, pacific lamprey, sturgeon, candlefish, freshwater mussels, steelhead trout, amphibians and others. Additional resources include the water itself, waterfowl, plants and medicines, and numerous Traditional Cultural Properties including fishing places, prayer places, gathering places and cultural activity areas. All of these resources are resources of cultural and religious significance to the Tribe and its members. All of these resources are Trust Resources and must be protected by the federal government as part of its Trust Responsibility to the Tribe and its members.

It is the opinion of the Yurok Tribe that the current conditions (ie: the current operations of the Klamath Hydroelectric Project and its dams) result in adverse and devastating impacts on these irreplaceable Yurok Trust Resources. It is also the opinion of the Yurok Tribe that only the removal of the four Klamath dams currently under review and the implementation of the Klamath Basin Restoration Agreement (KBRA) and Klamath Hydroelectric Settlement Agreement (KHSAs) can restore and redress the longstanding issues and adverse impacts on these Yurok Trust Resources. These issues are, at their core, fundamental issues of Environmental Justice and must be adequately evaluated as such per Executive Order 12898. It is the responsibility of the Department of the Interior, the BIA, and all the federal agencies involved in the Secretarial Determination and the ongoing NEPA and CEQA process to acknowledge and resolve these Environmental Justice issues during this process.

Yurok Aboriginal Territory



Yurok Tribe – Overview of Yurok History

“The Ach (the People) are river people. Have been since time began. If the river dies, we are no more. Without salmon in the river, I don’t believe our culture can survive.”
(Yurok Tribal Member Survey Respondent 2006)

Yurok Overview

The Yurok Tribe Dependence on Klamath River Basin Fish

Klamath River fish are irreplaceable to the Yurok Tribe's culture, religion and economy. From time immemorial, Yurok people have depended on the Klamath River. The River is central to Yurok society by providing food, transportation, commercial trade, and numerous other activities essential to Yurok life. Throughout history and today, the identity of the Yurok people has been intricately woven into natural environment including the Klamath Basin watershed. Tribal religious and ceremonial practices focus on the health of the world; the Klamath River and its fisheries are a priority. The Yurok Tribe’s obligation to protect the fishery has always been understood by Yurok people. The ancestral territory of the Yurok Tribe included coastal lagoons, marshes, ocean waters, tidal areas, redwood and other ancient forests, prairies and the Klamath River.

Yurok people have resided within their ancestral lands, including the Lower Klamath River since time immemorial. Yurok people have always utilized a large and diverse cultural landscape that extended along the northern California coast and inland up the Klamath River and surrounding mountains.

The traditional names for the Yurok people living on the upper region of the Klamath River, lower region of the Klamath River, and the coast within Yurok Ancestral Territory are the Petch-ik-lah, Pohlik-la, and Nr’r’nr people, respectively. However, they have come to be known as the Yurok, which is the Karuk name meaning “downriver.” The ancestral territory of the Yurok people is comprised of a narrow strip along the Pacific Ocean stretching north from the village on the Little River (Me’tsko or Srepor) in Humboldt County to the mouth of Damnation Creek in Del Norte County.

In addition to the Yurok coastal lands, Yurok ancestral territory extends inland along the Klamath River from the mouth of the river at Requa (Re’kwoi) to the confluence of Slate Creek and the Klamath River (Constitution of the Yurok Tribe Art. 1, Sec. 1). Within this ancestral territory there are approximately seventy known villages, which are situated along the banks of the Klamath or along the ocean streams and lagoons (Kroeber 1925:8, Waterman 1920, Pilling 1978). Many of these villages were permanent settlements, particularly the villages where ceremonial dances were held while others were only temporarily inhabited. Each village had its own geographical boundaries, as well as its own leaders who governed various sites and activities within the village. These sites

included fishing and hunting spots, permanent home sites, seasonal sites, gathering areas, training grounds, and spiritual power sites (Lindgren 1991).

Although there were villages all along the river and coast, a village of great importance would have several other villages in close proximity in a concentrated area. An example of this is at the confluence of the Klamath and Trinity Rivers where there were three villages, which in the 1850s had a population of about 200 (Bearss 1969:1). The largest of these three villages was We'itspus, meaning "confluence." This village was of extreme importance because it held a World Renewal Ceremony, also known as the White Deerskin Dance. This is one of several important ceremonial dances in the Yurok religion because its purpose is to renew or maintain the health of the world. The location of the village of We'itspus is on the north bank of the Klamath River and directly across from We'itspus, on the other side of the river was the village of Rlrgr. The third village in this close proximity was located across the Trinity River from Rlrgr and that village was known as Pek-tul.

Similarly in the middle course of the river is the village of Pecwan, located just downstream of Pecwan Creek from where the creek flows into the Klamath River. This is a village of great importance and wealth because Pecwan was a location for another major ceremony, the Jump Dance, which continues to be performed there today. The other villages in close proximity to Pecwan moving downstream on the northern bank are Qo'tep, Woxtek, and Woxhkerro.

The final example of a concentration of villages is at the mouth of the Klamath River. On the northern slope of the hill ascending above the mouth is the largest Yurok settlement of Re'kwoi. In 1852, Re'kwoi had 116 residents and is another location for a Jump Dance (Bearss 1969:2). Just across the river on the southern side is the village of Welkwa. This village is the site of the annual Salmon Ceremony, which is performed to remove the effect of the taboo on the run of spring salmon (Waterman 1920:228). The last village in close proximity to the village of Re'kwoi is Tse'kwel.

There are many other Yurok villages residing along the Klamath River, which provides a means for transportation. Redwood dugout canoes are used on the River to access the villages lining the riverbanks. The river is also a primary source of sustenance, providing salmon, sturgeon, eels, and steelhead. Salmon, or nepū'i, meaning "that which is eaten" is one of the primary food sources for the Yurok, the other being acorns. Salmon is obtained during the annual runs by erecting a fish weir across the river, which provides salmon for people in surrounding villages. One location where fish weirs are erected include near the village of Kepel. The other primary food source for the Yurok is acorns. Acorn gathering grounds are found throughout the hills surrounding the villages. Acorns are processed into a soup-like mush, which is cooked in large baskets with hot stones.

Although the river was the primary means of transportation, an elaborate trail system was also utilized. Trails were to be treated with respect and travelers were to stay within the trail. Heavily utilized trails or trails deemed important had many resting spots where one

may stop and catch their breath. If a traveler stopped somewhere along the trail other than the resting place, they could bring themselves bad luck (Waterman 1920:185).

Redwood canoes were primarily used on the river, however, they were also used in the ocean to gather mussels and hunt sea lions. The Yurok, however, primarily stay away from open water. Other ocean food sources include surf fish and smelt, which are caught from the beach with throw nets. Seaweed, eels, and abalone are also important food sources for Yurok people. The latter is also used for regalia for ceremonial purposes.

The villages on the coast are primarily concentrated around lagoons and ocean streams. A prime example of such a concentration is the many villages that are located around Big Lagoon. Beginning to the north and continuing south along the eastern shore of the lagoon were the villages of Pa'ar, Oslok, Keihkem, Maats, Pinpa, and Opyuweg, which is sometimes referred to as Ok'eto. Opyuweg means, "where they dance" because this is another village where a Jump Dance was held (Waterman 1920:266).

Although all the villages within Yurok Ancestral Territory are culturally and jurisdictionally Yurok, there is a distinction between those Yuroks residing within river villages and those along the coast. Coastal Yuroks living south of the mouth of Redwood Creek (Orek) are commonly referred to as Nr'r'nr, which describes a slight difference in dialect extending from Redwood Creek in the north to Tsurai and Me'tsko in the south. The other villages that comprise the Nr'r'nr area, beginning to the north are Orek, Orau, Tsahpek, Hergwer, Tsotskwi, Pa'ar, Oslok, Keikem, Ma'ats, Opyuweg, Pinpa, and Sumeg. Prehistorically, the largest concentration of occupants were located in the villages along the river, while the total number of houses in the coast villages were approximately one-third the number in river villages (Waterman 1920:184).

Historical documents record that the coastal Yurok had initial contact with Europeans as a result of Spanish expeditions spanning the mid 1500s to the late 1700s (McBeth 1950:2; Bearss 1969). Various Spanish-led expeditions and ships came up to northern California along the coast, followed later by American vessels as early as 1803 and 1805 (McBeth 1950:2; Bearss 1969). By 1828, the Klamath River had been documented and visited by ships from Britain, Spain, Russia and America (McBeth 1950:3; Bearss 1969).

First contact between Europeans and Yurok people on the upper Klamath River was documented to have occurred in 1827 when traders for the Hudson's Bay Company traveled downriver in search of furs and trade (Murray 1943:21-24; Bearss 1969). First contact within the project vicinity occurred in February 1827, when men from Peter Skene Odgen's party encountered Yurok in the Martins Ferry area. While these are the first documented encounters by non-Indians within the upriver areas of Yurok territory, the Hudson's Bay Company party documented the presence of European trade goods being used and sought by Yurok people, indicating prior interaction through trade or travel by Yurok people (Murray 1943:21-24; Bearss 1969; Pilling 1978:140).

In 1828, Jedediah Smith led an American party of beaver trapping men down the Trinity River, to the Klamath and the up the Pacific Coast (Goddard 1904; Bearss 1969). As a

result of the discovery of gold in the Trinity River, gold prospectors inundated the region by 1848. Upriver Yurok settlements were severely impacted by the incursion of gold prospectors in the 1850s, resulting in displacement and relocation away from some Yurok traditional villages along the Klamath River (Bearss 1969; Pilling 1978:140).

In 1851 a “Treaty of Peace and Friendship” was signed between the United States Government and the Klamath River Indians under the direction of U.S. Indian Agent Col. Reddick McKee (See Appendix A). The United States Congress did not ratify this treaty. Non-Indian incursions and resultant conflict continued and an Indian Agency and military fort were established on the River to mediate the conflict. The Agency was located on the south bank of the Klamath River, in the area known as *Waukel* (also spelled *Wo’kel* and Waukell) across the River from the military fort, Fort Terwer. In spite of the creation of these government posts, gold prospectors, miners, farmers, and settlers continued to encroach on Indian lands, often resulting in conflicts and violence. On November 16, 1855, the Klamath River Reserve (also known as the Klamath Indian Reservation) was created by Executive Order (pursuant to the Act of March 3, 1853, 10 Stat 226,238). This Order designated the reservation lands from the mouth of the Klamath River, one mile on each side extending approximately 20 miles upriver to Tectah Creek. The Klamath Reserve was established for several tribes because the treaty of 1851 was not ratified and the military was increasingly called to intervene between miners, settlers and Indians. It was the U.S. intent to move the Tolowa and Yurok onto it, but the Tolowa left soon after they were relocated (Bearss 1969).

The United States’ original recognition of the central importance of rivers and fish to the Indian people of the Klamath-Trinity region is exemplified by the very shape and location of the lands first set aside for their reservations. The Secretary of Interior’s own instructions at the time were, “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.” In 1855, Indian Agent S. Whipple’s, when speaking of the Yurok, noted that “The river is abundantly supplied with Salmon. A fine large fish quite easily taken by the Indians and which is very properly regarded by the Indian as his staff of life.”

In the letter was written to the Commissioner of Indian Affairs by Special Agent Whipple, the first Indian Agent on the Klamath River Reserve. This letter is important because it clearly describes several aspects of Yurok land use and their relationship to the River. In recommending the reservation boundaries extend five miles away from the River, Whipple recognized the Yurok use of the entire watershed associated with the River. He also describes the Lower Klamath as the best salmon fishing grounds in northern California. Whipple describes large alluvial terraces along the floodplain of the River that were used to gather a wide variety of plants, roots, and berries for food and supplies (Whipple 1855).

In that same year, President Pierce established the Klamath River Reservation. The Reservation (not to be confused with the Klamath Reservation in Oregon) was designated as a strip of territory commencing at the Pacific Ocean and extending one mile in width

on each side of the Klamath River for a distance of approximately 20 miles. This reservation lied entirely within the aboriginal territory of the Yurok.

While it was the Federal Government's intent to eventually move all the region's Indians onto the Klamath River Reservation, only the Yurok and some Tolowa did so. Both Fort Terwer and the Indian Agency at Waukel were destroyed in the floods of 1861 and 1862. Flooding along the Klamath River in 1862 led to the closing of the area's Indian Bureau office and the erroneous belief that the Reservation had been "abandoned", though it was still occupied by the Yurok. The Smith River Reservation, occupied primarily by Tolowa, was created in 1862 to supplement the loss of agricultural lands as a result of the floods. In 1865 the Hoopa Valley Indian Reservation was established with the intent of relocating all northwestern California Indians to this reservation (Bearss 1969).

Escalating conflict between Indians and non-Indians over encroachment onto the Klamath Indian Reserve resulted in the gradual displacement of Lower Klamath Indians further upriver during the 1860s and 1870s (Bearss 1969; McBeth 1950:44). In spite of the area being within the boundaries of the Klamath River Reserve, the area was occupied by non-Indians in defiance of the 1855 Executive Order and an 1877 order by the Department of the Interior that explicitly ordered non-Indian settlers off the reservation (McBeth 1950:46; Bearss 1969). Squatters resisted government attempts to remove them from the reservation and even when evicted by United States soldiers under orders in 1879, they quickly returned to the homes and farms they had established on Indian lands (McBeth 1950:53; Bearss 1969).

Soon after, on August 21, 1864, the Federal Government issued a proclamation and instructions from the Interior Department that established the Hoopa Valley Reservation on the Trinity River. The Trinity River flows north through Hoopa Valley to its confluence with the Klamath River. The Reservation is 12 miles square and is bisected by the last 12 miles of the Trinity River (it has often be called the Square or the 12 mile Square). In 1876 President Grant issued an Executive Order formally establishing the boundaries of the Hoopa Valley Reservation and provided that the land contained within those boundaries, "be withdrawn from public sale, and set apart in California by act of Congress approved April 8, 1864."

Efforts soon began to provide a single contiguous homeland for the region's Indian people by connecting the Klamath River Reservation (considered "abandoned" but not formally "extinguished") to the Hoopa Valley Reservation. Paris Folsom, a Special Agent for Interior proposed that the two reservations be connected in his "Report of Special Agent on Conditions and Needs of Non-Reservation Klamath Indians," sent to the Commissioner of Indian Affairs in 1885. In that report Mr. Folsom wrote:

"Nature seems to have done her best here to fashion a perfect paradise for these Indians She filled the mouth of the Klamath river with a sand-bar and huge rocks, rendering ordinary navigation impossible, and pitched the mountains on either side into such steep and amazing confusion that the river has a hard struggle to drive its way through the wonderful gorges ... Tremendous boulders (sic) and

cragged points jut into the river and change its course, forming innumerable eddies and back currents, where salmon seek to rest, to be taken in large numbers by means of Indian nets” (Folsom 1885).

Nonetheless, it was not for another six years, until 1891, that the Klamath River Reservation was extended 20 miles up River to connect with the Hoopa Valley Reservation and made part of that Reservation in “an effort to better protect the region’s Indians.” By that time, as a result of the Dawes act of 1887, much of the Klamath River Reservation and extension lands (the 20 mile strip which connected the two reservations is commonly referred to as the "Connecting Strip" or "Extension") not already claimed as allotments by resident Indians had been opened up to non-Indian settlement. This led to checkerboard ownership of the Yurok portions of both the Extension and former Klamath River Reservation. Through various means, several timber companies had quickly consolidated and heavily logged much of this land.

In 1891, President Harrison issued an order to expand the existing Hoopa Valley Indian Reservation to include lands one mile on either side of the Klamath River from the Pacific Ocean to the Hoopa Valley, thereby including the Klamath Indian Reserve (Bearss 1969). In order to do this, he created the “extension”, extending the Klamath River Reserve upriver until it reached the Hoopa Square. The “extension” was established in relation to the Dawes Act as a ploy to open up much of the land that was not claimed as allotments by resident Indians. Thus began the history of checkerboard ownerships of the Yurok portions of the Klamath Reservation and Extension. The result of Harrison’s order was the essentially the creation of a new reservation by combining two existing ones. The new reservation consisted of the old Klamath River Reserve, the “extension”, and the Hoopa Square and was referred to in its entirety as the Hoopa Valley Indian Reservation. On June 25, 1892, President Harrison signed a bill passed by Congress to open the reservation for non-Indian settlement. The bill declared all surplus lands open to settlers, “reserving to the Indians only such land as they require for village purposes” (McBeth 1950:48; Bearss 1969). The process of assigning Indian allotments within the reservation took two years. After decades of conflict, the Klamath Indian Reservation was legally opened up for non-Indian settlement on May 21, 1894 for homesteading (McBeth 1950:48; Bearss 1969). As a result, many Yurok people were displaced from their traditional villages along the Klamath River. Many Yurok relocated to the Hoopa Valley Indian Reservation and continue to live there today.

In the early 1900s the commercial fishery was overtaken by non-Indians and numerous canneries were established within Yurok territory near or at the mouth of the Klamath River. The resulting over harvest resulted in a complete closure of the Lower Klamath fishery by California Department of Fish and Game in the 1933. During this time, Yurok and other Indians were prohibited from fishing for subsistence or commercial purposes. The recreational fishery was restored for non-Indians in subsequent years, but the practice of subsistence and commercial fishing by Yurok people was prohibited and criminalized. Nonetheless, Yurok continued to fish the river as they always have, but the activity was deemed by state regulators as a criminal act, rather than a subsistence right.

In the 1970s enforcement actions for these unjust policies by the State of California Department of Fish and Game resulted in what is commonly referred to as the “Fish Wars” on the Klamath River. During this time Yurok fishers engaged in acts of civil disobedience, known as “Fish Ins” often resulting in the battery and arrest of those participating in these peaceful acts. After escalating violence and confrontations over Yurok exercising their fishing rights, one Yurok fisherman, Raymond Mattz was arrested and charged by the California Department of Fish and Game. The result was a court battle that went all the way to the US Supreme Court and the now-famous ruling that affirmed Yurok fishing rights: *Mattz vs Arnett*, 412 US 481 decided in 1973 (See Appendix B).

From 1891 through 1988 the Hoopa Valley Reservation was comprised of the Hoopa Valley Square, the Extension and the original Klamath River Reservation. In 1988 Congress, under the Hupa-Yurok Settlement Act, separated the Hoopa Valley Reservation into the present Yurok Reservation (a combination of the original Klamath River Reservation and Extension) and Hoopa Valley Reservation (the Reservation as proclaimed in 1864).

After decades of struggle to regain their traditional homelands, the Yurok Tribe was re-organized and granted its own reservation in 1988. As a result of the 1988 Hoopa-Yurok Settlement Act (PL-100-580), the Yurok Indian Reservation was established, comprised of the old Klamath Reserve of 1855 and the “extension” of 1891. The current reservation is comprised of trust land, tribal allotments, fee land, and privately owned land.

In 1993, the Department of the Interior further clarified Yurok fishing rights in the Solicitor’s Opinion (See Appendix C). In this opinion, the Solicitor concluded that the Yurok Tribe has a reserved right to “harvest quantities of fish on their reservations sufficient to support a moderate standard of living” with an entitlement of 50% of the harvest in any given year. This decision enabled the Yurok Tribe to resume its traditional commercial harvest for economic purposes.

In spite of the restored rights for subsistence and commercial fishing, Yurok people continued to suffer the cultural and economic impacts of a declining fishery. The reasons for the decline are complex and a result of cumulative impacts of numerous management decisions within the Klamath Basin, but the dams and water diversions in the upper Basin have had a direct and adverse effect on the water quality and the health of the fishery throughout the Klamath watershed. In 2002, a drought, low flows and water diversions for agriculture in the upper Basin resulted in dire consequences on the Lower Klamath. Increased water temperatures and low flows resulted in the mass die off of over 30,000 adult returning Fall Chinook salmon within the Yurok Reservation. This tragedy is known as the “Klamath Fish Kill”. The effect was devastating to Yurok people and resulted in the determination by the Yurok Tribe to save the fishery and actively engage in negotiations and efforts to protect their resources, their River and their salmon for not only this generation, but future generations of Yurok People.

“Never in our time have we, the elders of the Yurok Culture Committee, seen such a mass destruction of our salmon resource.” (October 2, 2002)

In 2006, the Yurok Tribe entered into a Cooperative Agreement with the Department of the Interior for the Cooperative Management of the Klamath River with federal agencies. (See Appendix D) The Agreement was the result of a settlement agreement with the Tribe over the 2002 Klamath Fish Kill. It is important to note that the Yurok Tribe refused to take a financial settlement for this loss of an irreplaceable resource, consistent with a Yurok philosophy of refusing to assign a dollar value to a resource that is irreplaceable.

COOPERATIVE AGREEMENT
between
UNITED STATES DEPARTMENT OF THE INTERIOR
and
YUROK TRIBE
for the
COOPERATIVE MANAGEMENT OF TRIBAL AND FEDERAL LANDS
AND RESOURCES IN THE KLAMATH RIVER BASIN OF CALIFORNIA

I. STATEMENT OF JOINT OBJECTIVES:

A. Purpose. This Cooperative Agreement (Agreement) is made and entered into between the United States Department of the Interior (DOI) and the Yurok Tribe (Tribe) to coordinate and cooperatively manage Federal and Tribal lands and resources within the Klamath Basin in California, both within the Yurok Reservation as well as the related basin, upstream river, and Pacific Ocean resources subject to the jurisdiction or authorities of various DOI agencies and bureaus. This Agreement will provide more consistent, economical, effective, and collaborative management of Federal and Tribal lands and natural resources while furthering the Trust relationship that exists between DOI and the Tribe. This Agreement will also greatly expand the resources available to address the shared goals of DOI and the Tribe to improve our collective understanding of the river system and its dynamics, improve the health and vitality of the fishery, and identify and develop programs for natural resource management and service delivery in order to provide long-term benefits to the Tribe, local communities, and the general public and to improve the condition of the basin's natural resources. DOI and the Tribe anticipate that this Agreement will be the foundation for subsequent, continuing, and specific collaborative programs in natural resource management, including but not limited to land and water management, fisheries management, water quality monitoring, land use planning, data gap analysis, interpretation and outreach, and Tribal-interagency management initiatives which will enhance the opportunity to identify and resolve issues critical to the success and survival of a healthy river-based ecosystem in the lower Klamath Basin.

B. Objective. DOI and the Tribe intend to establish an ongoing collaborative government-to-government relationship for management of land, water and other natural resources which will inure to the benefit of DOI, the Tribe, and the communities, as well as the ecosystem and economy of the Klamath River Basin. This Agreement provides a

mechanism to coordinate natural resource management programs, develop joint planning and management initiatives, and coordinate program and budget priorities through the cooperative allocation of resources and the development of long-term resource management and programmatic goals between the signatories. The Agreement will improve DOI and Tribal services to the Tribal and local communities and the general public by improving Klamath River resources management, addressing the health of the fishery, and establishing related programs for restoration and management of natural resources. The Agreement will provide an opportunity for the Tribe to bring to bear its acknowledged scientific expertise, its knowledge of the basin, and the wealth of its culture and traditions to its collaborative relationship with DOI. The Agreement will provide a mechanism by which the Tribe and DOI may further the protection and preservation of Tribal cultural values and practices while collaborating on management of basin natural resources. The Agreement will accomplish these objectives by developing mechanisms for increasing the potential contribution and participation in federal programs by the Tribe while also realizing broader benefits to Klamath Basin communities, the general public, federal agencies and the scientific community.

Under re-organization the Yurok tribe has emerged as the largest tribe in California, with over 5,600 enrolled tribal members, and over 200 tribal government employees. The Yurok Tribe has a growing tribal population and is actively pursuing economic development and resource management both on the reservation and Yurok ancestral lands. The Yurok Tribe has a Natural Resources Department with the largest governmental fisheries program in the state of California. Other programs include the Yurok Tribe Watershed Restoration Program, devoted to restoring fish habitat, the Yurok Tribe Environmental Program, devoted to establishing and monitoring clean air, water, and land, and the Yurok Tribe Culture Department devoted to preserving Yurok culture. These departments assist the Tribal Council in its work to protect and maintain Yurok values as articulated in the Preamble Objectives of the Yurok Constitution (Yurok Tribe 1993). The River continues to be the foundation of Yurok culture, economy, and tradition.

Yurok Timeline – Contact to Present

- **1775** – Spanish explorer Juan Francisco de Bodega arrives in Trinidad Bay at Patrick’s Point in order to lay claim to Spanish territory for the King of Spain.
- **1822** – Peter Skeene Ogden a fur trapper from the Hudson Bay Company arrives in Weitchpec.
- **June 8, 1828** – Jedidiah Smith on his intended exploration of the Sacramento River ended up in the Pacific Northwest. After hitting the south fork of the Trinity River, Smith and his men followed the river through the reported rough terrain to the Pacific Ocean at the mouth of Wilson Creek in Requa.
- **1848** – Josiah Gregg on a botanical expedition to collect specimens entered the Klamath River territory.
- **1849** – The beginning of the Gold Rush; settlers and miners first enter the Klamath River area for its rich natural resources (redwoods, fish etc.). These miners and settlers, in seeking the Klamath’s resources, tried to force the Yuroks out of their ancestral land through practices such as hunting them down, ridicule, rape or enslavement. They would attack villages and in some cases slaughter men, women and even infants. Upon their return, the men would be treated as heroes and would also be paid by the state’s government for their successful work.
- **September 4, 1851** – California became the 31st state.
- **1851** – Klamath River Peace Treaty was made at Camp Klamath at the junction of the Klamath and Trinity Rivers. The treaty was between Indian Agent Redick McKee and the tribes of the Yurok (Poh-lik or Lower Klamath), as well as the Hupa (Hoo-pah) and Karuk (Pen-tsick or Upper Klamath). For the tribes that agreed and acknowledged to keep peace under the U.S. government, they were to have a large Reservation set aside for them; the tribes requested that they be allowed to stay within their traditional territories. The treaty was never fully ratified by Congress due to the political pressure from the non-Indian residents of California and California’s Governor James Douglas and Lieutenant Governor John Bigler. Almost all of the villages along the Klamath had been burned by miners; those villages that did survive were infested by disease outbreaks such as small pox, measles and tuberculosis.
- **November 16, 1855** – President Franklin Pierce, acting pursuant to the Act of March 3, 1853, amended on March 3, 1855, authorizing the creation of the Klamath River Military Reserve. The reservation started at the Pacific Ocean and extended one mile in width on each side of the Klamath River for a distance of approximately 20 miles, positioned about 25 miles north of the Klamath-Trinity confluence, setting aside a total of 25,000 acres.
- **1857** – Fort Terwer was established at Terwer Creek to keep peace between the Indians and the growing number of miners and traders trying to move onto the Klamath River Military Reserve.
- **1861** – The Klamath River Military Reserve was flooded and many of the homes were destroyed included Fort Terwer.
- **1864** – Congress enacted legislation that authorized the President to establish 4 Reservations in California, 13 Stat. 39. The Hoopa Valley Reservation was

- provisionally created and became the supervising agency over the Lower Klamath River Indians. Indian Superintendent Wiley negotiated a “treaty” with Hupa and other tribes to establish a reservation that encompassed the Square. This “treaty” was never submitted to Congress and was never ratified. Nevertheless “The Yuroks were beneficiaries of the 1864 Treaty (never ratified) that called for the creation of the Reservation”.
- **June 23, 1876** – An Executive Order was approved by Ulysses S. Grant, establishing the Hoopa Valley Reservation and its boundaries for sixteen local area tribes and bands in their ancestral territories; including the Lower Klamath River people. The Hoopa Valley Reservation encompassed the Square and was established “in part for the Yuroks”.
 - **Fall 1876** – Martin V. Jones and George Richardson came to the Klamath to engage in the business of catching and salting for the first fishery market on the Klamath River
 - **November 21, 1877** – By order from the Department of Interior... “All the WHITE men living on the KLAMATH RIVER MILITARY RESERVE have been ordered to move off, forthwith.” War Department, General Irwin McDowell ordered Captain Parker to notify the settlers on the reservation to leave immediately. The evicted settlers left their homes, but returned as soon as the soldiers left the lower Klamath and returned to Fort Gaston in Humboldt County.
 - **June 3, 1878** – The Timber and Stone Act allowed settlers to receive a timber lot which was to be used in conjunction with homesteading. It was only to be applied to unoccupied, unimproved, unreserved, surveyed, non-mineral lands unfit for cultivation with the maximum allowable of 160 acres per person. It was widely abused, particularly in dealing with the Redwood forests by various lumber companies in the 1880’s.
 - **March 3, 1883** – 22 Stat. 582 provided that the proceeds of timber sales should go into the treasury for the benefit of the members of the tribe.
 - **1885** – Commercial and sports fisheries started to flourish due to the Klamath-Trinity salmon runs. R.D. Hume’s “floating cannery” entered the mouth of the Klamath and began harvesting the salmon that the Yurok’s relied on for subsistence.
 - **February 8, 1887** – 24 Stat. 388-391 The Dawes or General Allotment Act allowed for the breakup of tribal lands into parcels or allotments. These allotments were to be held by individual allottees that were then granted citizenship upon receiving their allotments. Allotments allowed the Indian land to be held in trust with the U.S. Government for a period of 25 years. Allotment trust land could neither be taxed nor alienated. At the end of the 25 year period, the land was to be delivered to the allottees in fee patent (i.e. become private property) free of any encumbrance.
 - **June 1889** – Nearly all the soldiers on the Lower Klamath had been removed. Squatters were appearing on the Klamath; nearly every foot of land from the mouth inland for twenty miles had been settled on.
 - **1890’s** – Four Klamath allotments were used for a cannery established by A. Bomhoff near the mouth at Requa. In exchange for the land, he agreed to hire only Indian fishermen and workers in the cannery.

- **October 16, 1891** – By Executive Order, President Harrison extended the Hoopa Valley Reservation to include the tract of land one mile in width on each side of the Klamath River from the confluence of the Trinity River to the mouth at the Pacific Ocean. The extension included not only the Klamath River Military Reserve but also the connecting strip between the Klamath River Military Reserve and the Hoopa Valley Reservation, known as the “addition” or “extension”, creating an enlarged single Reservation of approximately 155,000 acres.
- **June 17, 1892** – Pursuant to the Dawes Act, Congress allowed for “surplus” unoccupied land upon the Reservation to be sold to the general public.
- **1892** – Congress enacted allotment legislation affecting only the former Klamath reserve portion of the Reservation. Ambrose H. Hill was appointed to make the individual allotments on the original Klamath River Military Reserve. Each Indian was to be allotted either 80 acres of agricultural land or 160 acres of grazing land. Indians on the Lower Klamath Reservation had to apply for these lands, while those on the “connecting “strip” received their allotments automatically.
- **February 13, 1893** – Ambrose H. Hill submitted a schedule of 161 allotments on the original Klamath River Military Reserve. These allotments varied from 8 to 160 acres, averaging 60 acres and totaling 9,762 acres. Three traditional villages of Requa, Hoppaw and Scaath totaling 70 acres, were set aside as reserves for the Klamath People. The remaining 15,321 acres of the Klamath River Military Reserve were returned to public domain for disposal via homesteading or sale under the Timber and Stone Act. Other lands were threatened for removal under the authority of Congress’ Swamp Act of 1850 which enabled states to reclaim lands that were considered “swamp land” and could be traversed by a flat bottom boat.
- **February 1894** – Charles W. Turpin took over and completed the allotment process. Hill had made 246 allotments on the “connecting strip” while Turpin had made the final 253 allotments upon the “connecting strip”. The allotments ranged from 5 to 160 acres, averaging 40 acres and totaling 19,330 acres.
- **April 1894** – Public notice was published:
TO WHOM IT MAY CONCERN
“The Klamath Indian Reservation opened
May 21, 1894, at 9 a.m. Now prepared
to receive application for homesteads.”
- **June 23, 1898** – Within the “connecting strip” the Hill schedule had been approved for 9,215 acres and the Turpin schedule was approved for 10,115 acres four days later. The total allotted acres for the whole Klamath River Military Reserve was then 29,095 acres, containing approximately 641 separate allotments. About 320 acres on the “connecting strip” were for Village Reserves at Notchko, Mettah, Waseck, Kanick, Mareep, Moreck, Cawtep, Surgone, Wauteck, Pecwan, Cappell and Weitchpec.
- **May 8, 1906** – 43 Stat. 182 - The Burke Act authorized the Secretary “whenever he shall be satisfied that any Indian allottees is competent and capable of managing his or her own affairs” to issue a patent in fee simple to such allottees

and it allowed the trust period to be extended for those Indians found to be “not competent”.

- **1910** – There was an estimated 688 Klamath River Indians, a decrease of about 73% of their original population in 1848 before white contact.
- **June 25, 1910** – 36 Stat., 885 authorized the Secretary of the Interior to sell land of allottees who died before their 25 year expiration of their trust period without the consent of all their heirs, upon showing that one or more of the heirs were deemed “incompetent” to manage their own affairs. 307 parcels were sold in this manner with only 213 cases that had obtained consent from all of the owners. An Indian was seen as competent if they had greater than one-half white blood, had received a year or more of white schooling or if they were able to read or write English and were 21 years of age or older.
- **October 8, 1910** – Bids for allotted Indian lands were advertised and were opened up for sale on September 30th, 1910. They were advertised in the *Blue Lake Advocate*, a local Humboldt County newspaper.
- **March 28, 1914** – H.R. 10848 – A bill was re-introduced to Congress after having first been introduced in 1911, to allow for the disposition of \$25,000 in funds resulting from the sale of “surplus” Indian lands on the Lower Klamath Reservation. The funds from the sale of lands were originally to be used for the “maintenance and education of the Indians now residing on said lands and their children”. H.R. 10848 provided for the \$25,000 to be used to build a road along the Klamath River, connecting a road from Requa to the “extension” portion of the reservation.
- **1917** – The Trinidad Rancheria was established for landless Indians in the Trinidad area including Indians from three local tribes of the Yurok, Wiyot and Tolowa.
- **October 15, 1917** – Commissioner of Indian Affairs announced the “policy of greater liberalism”. This allowed the Secretary of Interior to issue fee patents to allottees, resulting in allotted lands being removed from trust status whether the allottees had requested the removal or not. Subsequently, many allotments taken out of trust were subject to taxation by Humboldt and Del Norte Counties. Shortly thereafter, allottees began losing allotments for non-payment of back taxes, real estate fraud and the need for cash.
- **1918** – Copco 1 Dam was created on the Klamath River. It permanently blocked more than 75 miles of steelhead and salmon habitat in the main stem of the Upper Klamath and its tributaries. In 1925 Copco 2 Dam was constructed a quarter-mile downstream to regulate flows from Copco 1 Dam.
- **July 10, 1918** – The Big Lagoon Rancheria was established by Executive Authority by the Secretary of the Interior.
- **March 7, 1919** – A large number of allotments go out of trust along the Klamath River due to the pressures from white settlers and timber interests. The competency Commissioner had instructed the Superintendents of the various Indian reservations to submit a list of those allottees who were deemed competent along with a description of their allotments, resulting in 6,278 acres or 22% of the allotted lands passing into fee status.

- **1925** – The BIA in Washington DC sent instructions to Superintendent Montsorf to draw up a list of “competent” Indians on the “connecting strip” in anticipation of the expiration of their allotment trust periods. Another large group of allotments were then taken out of trust.
- **1931** – The Forest Service, in creating the “Redwood National Forest”, established a Redwood forest acquisition program targeting reservation lands, including 780 acres of the Klamath River Military Reserve and 2,110 acres of Indian allotments for acquisition.
- **1933** – The State of California bans all forms of tribal traditional burning practices. The California Department of Fish and Game bans all commercial fishing and closes the canneries on the lower Klamath River.
- **1934** – Indian Reorganization Act, the Government extended the trust period for allotments from 25 years to indefinitely, stopped the issuing of Indian allotments and annulled their authority to sell surplus reservation lands, and instead move towards efforts of returning these lands back to the Indian People. The Klamath River Indians were banned from all of their traditional practices of commercial fishing and gill-netting. Yurok fishermen are given jobs building a road from the Klamath Glen to Blue Creek in exchange for gill nets.
- **1950** – With the assistance of the B.I.A., some Hupas organized as the Hoopa Valley Business Council. Prior to this time, from time immemorial, none of the Indian Tribes of the area had been formally organized.
- **1952** – The Secretary of the Interior approved the Hoopa Valley Tribe’s Constitution and by-laws.
- **1953** – Public Law 280 enacted by Congress imposed State of California jurisdiction over criminal and civil cases committed by or against Indians in Indian Country. This failed to recognize tribal sovereignty and tribal self-determination. House Concurrent Resolution 108 encouraged the termination of Indian Reservations and the idea of relocating Indians off their reservations. Many Indians were encouraged to sell their allotted lands through questionable and forced fee patents, resulting in at least 60% of the lands being taken out of trust and sold to logging companies, primarily to support the plywood industry that was booming after WWII.
- **1955** – The Trinity River Act allowed the construction of the Trinity River Dam along the Trinity River that flows into the Klamath; to be completed by 1963. The B.I.A. approved timber sales for communally held timber in the Square and as the request of the Hoopa Valley Business Council; the B.I.A. began disbursing per capita payments to individual Hoopa Valley tribal members.
- **1958** – Solicitor’s opinion provided that it is legal to distribute revenues from the unallotted trust timberlands of the Square in per capita payments to Hoopa Tribal members (later determined to be erroneous in Short).
- **May 19, 1958** – The Indian Land Restoration Act allowed the return of previously disposed of land restored back to tribal trust, most of which were exceptionally steep or frequently flooded, thus unsuitable for habitation. The 20 acres of Village Reserve at Requa was returned to public domain and allotted to four individual Indians.

- **1960** – Logging upon the North Coast had consumed nearly 90% of the original Redwood forest.
- **1962** – 173-foot high Iron Gate Dam was constructed in order to regulate the flows of the Copco Dams and to run 20 mega-watt's for Pacific Power's power plant. With the construction of Iron Gate Dam another 7 miles of salmon and steelhead spawning habitat disappeared.
- **1963** - A legal suit was filed against the United States on behalf of 16 named Yurok's. Later 3,222 additional claimants and descendants were added in a 1967 modification. The suit asserted that the Yurok Indians should share equally in the proceeds derived from the selling of timber resources on the area comprising the original Hoopa Valley Reservation. Jesse Short, et al v. United States.
- **1964** – The worst flood in recorded history occurred on the Klamath River wiping out the town of Klamath and many low-lying houses. The Lewiston dam is built on the Trinity River.
- **1968** – Redwood National Park was created by Congress and later expanded in 1978. The National Parks Service took over the possession of three individual allotments that were along the south end of the Lower Klamath. In all, 1,300 acres of Yurok Tribal land were included in the new Parks boundaries.
- **1973** – Jessie Short Et. Al. v. The United States, Court of Claims held that the Yurok Reservation was not a separate entity but actually an extension of the Hoopa Valley Reservation and was therefore entitled to equal rights to income from timber sales on unallotted trust land.
- **1973** – Mattz v. Arnett, was decided; it upheld the “Indian Country” status of the Reservation. The case involved the State of California trying to assert jurisdiction to regulate Indian fishers on the Klamath River; The Court determined that California had no such jurisdiction.
- **1974** – The U.S. Supreme Court declined to review Short v. United States. The Short court embarked on the task of determining which of the 3,800 plaintiffs were bona fide Indians of the Reservation and therefore entitled to damages. The U.S. and the Hoopa Valley Tribe vigorously contested the status of many of the plaintiffs and litigation continued for two decades. Eventually, in 1994 plaintiffs were certified and received Treasury checks for damages for the period of 1955 to 1974.
- **1974** – The Secretary of the Interior established the 70% escrow account for timber revenues. “Upon the denial of certiorari to the court's decision...The Secretary of the Interior ceased to distribute revenues exclusively to members of the Hoopa Valley Tribe. On the theory that all of the 3,800 plaintiff's could eventually be entitled to 70 percent of annual timber revenues in escrow pending a final decision on the number of plaintiffs in Short qualifying as Indians of the Reservation entitled to per capita distributions of timber revenues.” Hoopa Valley Tribe v. United States.
- **1976** – Arnett v. 5 Gill Nets held that the state of California lacked jurisdiction to regulate the Indian fishing on a reservation and that the Yurok Indians had a reserved right to commercial fishing dating back to their aboriginal times and are protected by the governments trust responsibility.

- **1979** – The Hoopa Valley Tribe’s suit for damages against the United States for breach of trust and otherwise for failing to protect the Hoopa Valley Reservation was decided adversely to the Tribe.
- **1974-1987** – The Hoopa Valley Tribe unsuccessfully urged Congress to over-turn Short.
- **April 1988** – Puzz v. United States affirmed the previous decision for the Hoopa Valley to receive consent from the Yurok’s in the distribution of the escrowed timber sale proceeds. The Yurok’s continued to refuse to form a separate tribal roll from that of the Hoopa Valley Tribe as well as participate in any “joint-management” schemes that would allow them to govern themselves. That the Department of the Interior would no longer recognize the Hoopa Valley Tribe as the exclusive government of the Hoopa Valley Reservation.
- **October 31, 1988** – 102 Stat. 2924 The Hoopa-Yurok Settlement Act (P.L. 100-580) divided the land into two separate Reservations: the “square” became the Hoopa Valley Reservation and the “extension” (including the original Klamath River Military Reserve) became the Yurok Reservation; excluding the Resighini Rancheria. This bill reversed the previous court decisions of the Short and Puzz cases and directed the Yurok Tribe to form a tribal council to handle their reservation responsibilities; they also had to establish a tribal roll as well as criteria for sharing the proceeds of the decision. Persons eligible by the criteria of the Short cases who elected not to pursue Yurok Tribal membership were entitled to a buyout payment of \$15,000. The Short escrow accounts, plus some small Yurok escrow accounts, are transformed into a Hoopa-Yurok Settlement Fund; and a ten million dollar federal contribution to the Settlement fund was authorized (and appropriated). The Yurok Tribe, subject to adopting a waiver of claims, was given several small land tracts, the authority to organize, and an authorization of not less than 5 million dollars for land purchases. The Settlement Fund was to be allocated to the Hoopa Tribe and the Yurok Tribe based on their relative enrolled population at time of distribution. Both Tribes were to provide waives of claims against any takings of land or assets affected by the Act. This act specifically vest to the Yurok Tribe the fishery. The Yurok allocation of fish is 80% of the total Tribal allocation.
- **1990** – Water division due to the upriver dams has led to a 90% decline in the Klamath and Trinity Rivers fisheries.
- **1991** – The tribe becomes organized under the adoption of the Constitution of the Yurok Tribe and establishes their first Yurok Tribal Council.
- **1991** – In Heller, Ehrman v. Lujan, the Short claims attorneys sued the Secretary of Interior for attorney’s fees of up to 25% of the Settlement Fund. They asserted that 70% escrow account was derived from their litigation efforts and that the Settlement Fund was in fact the escrow account. Yuroks, Jesse Short, Susan Masten, and Valerie Reed intervened as co-defendants with the consent of the United States to protect the Settlement Fund. The Yurok and United States defendants were successful when the federal court of appeals determined that the plaintiffs could not sue the United States for money damages in federal district court.

- **1991** – The Department of the Interior allocated the Hoopa-Yurok Settlement Fund based on Hoopa and Yurok tribal enrollments. From the \$85,979,348.37 Fund balance, the Hoopa Tribe's share is determined to be 39.5% or \$34,006,551.87. This amount has been provided to the Hoopa Valley Tribe. The balance of the Fund, after withdrawals for payments for buy-outs, and enrollments are made, was placed in a Yurok Tribe Trust Fund. The balance after the Hoopa withdrawals and the individual buy-out and enrollment (payment) withdrawals in 1991-93 in the Yurok Trust Account was \$37,819,971.79. Each individual Yurok who received as enrollment check had to waive his/her rights to sue the United States for money damages for an unconstitutional taking under the Settlement Act
- **1993** – Twenty acres of the former Weitchpec Bar Mining Claim near Weitchpec was returned to tribal trust due to a surveying problem near Cappell and the end of the Reservation line at Weitchpec.
- **1993** – The Yurok Tribe formally organized and adopted a Constitution under its inherent powers of self-governance. The Department of the Interior recognized the Constitution and the Yurok Tribal Council as the governing body of the Yurok Tribe.
- **1994** – The Yurok Tribe assumed responsibility over the management of their fisheries from the Bureau of Indian Affairs and the U.S. Fish and Wildlife Service.
- **1996** – Parravano v. Masten affirmed the right of the Yurok and Hoopa Valley Tribes to 50% of the harvestable surplus of Klamath River Chinook.
- **1997**- Coho salmon are listed under the Endangered Species Act.
- **2002** – Klamath Fish Kill. Over 30,000 returning adult fall Chinook salmon die in the Lower Klamath River, within the Yurok Reservation as a result of diseases caused by low flows and increased water temperatures. The Yurok Culture Committee statement on the mass die off: The Yurok Tribe files suit against the United States as a result.
- **2006** – The Yurok Tribe, in a settlement agreement over the 2002 Klamath Fish Kill enters into a co-management agreement with the Department of the Interior. The Congress set aside funding for disaster relief due to the low populations of Klamath River fall Chinook for this year.
- **Today** - The Yurok Tribe is currently the largest tribe in California with over 5,600 members. The Yurok currently have approximately 3,400 acres of unallotted trust land, 350 acres of village reserves and 1,900 acres of trust allotments left on the reservation. This represents less than 10% of the original reservation land set-aside for the Yurok people. Billions of dollars in timber, water, fish and minerals have been removed from the lands within the Yurok Reservation with little or no support returned to the original inhabitants of the land. (petition was filed to list Chinook salmon in the Klamath River noting low populations of natural spring and fall Chinook in the Klamath)

III. Yurok Traditional Knowledge and the Klamath River

PREAMBLE OF THE CONSTITUTION OF THE YUROK TRIBE

Approved by the Interim Council on November 24, 1993

Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, Wo'ge' made things ready for us and the Creator, Ko-won-no-ekc-on Ne ka-nup-ceo, placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty. In times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses and bushes, all of which are used and provide materials for baskets, fabrics, and utensils.

For millennia our religion and sovereignty have been pervasive throughout all of our traditional villages. Our intricate way of life requires the use of the sweathouse, extensive spiritual training, and sacrifice. Until recently there was little crime, because Yurok law is firm and requires full compensation to the family whenever there is an injury or insult. If there is not agreement as to the settlement, a mediator would resolve the dispute. Our Indian doctors, Keg-ae, have cared for our people and treated them when they became ill. In times of difficulty village headmen gather together to resolve problems affecting the Yurok Tribe.

Our people have always carried on extensive trade and social relations throughout our territory and beyond. Our commerce includes a monetary system based on the use of dentalium shells, Terk-n-term, and other items as currency. The Klamath River was and remains our highway, and we from time beginning utilized the river and the ocean in dugout canoes, Alth-wayoch, carved from the redwood by Yurok craftsmen, masterpieces of efficiency and ingenuity and have always been sold or traded to others outside the tribe. Our people come together from many villages to perform ceremonial construction of our fish dams, Lohg-en. Our traditional ceremonies -- the Deerskin Dance, Doctor Dance, Jump Dance, Brush Dance, Kick Dance, Flower Dance and others -- have always drawn hundreds, and sometimes thousands, of Yuroks and members of neighboring tribes together for renewal, healing, and prayer. We also have always traveled to the North

and East to the high mountains on our traditional trails to worship the Creator at our sacred sites, -- Doctor Rock, Chimney Rock, *Thklamah* (the stepping stones for ascent into the sky world), and many others.

This whole land, this Yurok country, stayed in balance, kept that way by our good stewardship, hard work, wise laws, and constant prayers to the Creator.

Our social and ecological balance, thousands and thousands of years old, was shattered by the invasion of the non-Indians. We lost three-fourths or more of our people through unprovoked massacres by vigilantes and the intrusion of fatal European diseases. The introduction of alcohol weakened our social structure, as did the forced removal of our children to government boarding schools, where many were beaten, punished for speaking their language, and denied the right to practice their cultural heritage. After goldminers swarmed over our land we agreed to sign a “Treaty of Peace and Friendship” with representatives of the President of the United States in 1851, but the United States Senate failed to ratify the treaty. Then in 1855, the United States ordered us to be confined on the Klamath River Reserve, created by Executive Order (pursuant to the Act of March 3, 1853, 10 Stat. 226, 238) within our own territory.

In 1864 a small part of our Ancestral land became a part of the Hoopa Valley Indian Reservation which was set apart for Yuroks and other Indians in Northern California. This became known as the 12-mile “Square.” In 1891, a further small part of our Ancestral land was added when “The Extension” to the Hoopa Valley Indian Reservation was set aside by executive order authorized by the 1864 statute, which created the Hoopa Valley Indian Reservation. This statutory reservation extension extended from the mouth of the Klamath River, including the old Klamath River Reserve, about 50 miles inland and encompassed the river and its bed, along with one mile of land on both sides of the river.

But even this small remnant of our ancestral land was not to last for long. In the 1890’s, individual Indians received allotments from tribal land located in the Klamath River Reserve portion of the Hoopa Valley Reservation and almost all of the remainder of the Reserve was declared “surplus” and opened for homesteading by non-Indians. The forests were logged excessively and the wildlife was depleted. Even the great salmon runs went into deep decline due to over-fishing and habitat destruction. In the mid 1930’s the State of California attempted illegally to terminate traditional fishing by Yurok people, the river’s original --and only -- stewards from Bluff Creek to the Pacific Ocean. Our fishing rights were judicially reaffirmed in the 1970’s and the 1980’s after many legal and physical battles.

Throughout the first 140 years of our tribe’s dealings with the United States, we never adopted a written form of government. We had not needed a

formal structure and were reluctant to change. The United States had decimated the Yurok population, land base, and natural resources and our people were deeply distrustful of the federal government. Yet we, the Yurok people, know that this is the time to exercise our inherent tribal sovereignty and formally organize under this Constitution. We do this to provide for the administration and governance of the modern Yurok Tribe that has emerged, strong and proud, from the tragedies and wrongs of the years since the arrival of the non-Indians into our land. Our sacred and vibrant traditions have survived and are now growing stronger and richer each year.

The Yurok Tribe is the largest Indian tribe in California, and, while much land has been lost, the spirit of the Creator and our inherent tribal sovereignty still thrives in the hearts and minds of our people as well as in the strong currents, deep canyons, thick forests, and high mountains of our ancestral lands.

Therefore, in order to exercise the inherent sovereignty of the Yurok Tribe, we adopt this Constitution in order to:

- 1) Preserve forever the survival of our tribe and protect it from forces which may threaten its existence;**
- 2) Uphold and protect our tribal sovereignty which has existed from time immemorial and which remains undiminished;**
- 3) Reclaim the tribal land base within the Yurok Reservation and enlarge the Reservation boundaries to the maximum extent possible within the ancestral lands of our tribe and/or within any compensatory land area;**
- 4) Preserve and promote our culture, language, and religious beliefs and practices, and pass them on to our children, our grandchildren, and to their children and grandchildren, on and on, forever;**
- 5) Provide for the health, education, economy, and social well being of our members and future members;**
- 6) Restore, enhance, and manage the tribal fishery, tribal water rights, tribal forests, and all other natural resources; and**
- 7) Insure peace, harmony, and protection of individual human rights among our members and among others who may come within the jurisdiction of our tribal government.**

(Yurok Tribe Constitution 1993)

Yurok Culture and the Klamath River

From time immemorial Yurok people have lived along the Klamath River from the mouth of the river up to the Karuk boundary. Nearly every aspect of Yurok life, language, ceremonies, society, and economy, was, and continues to be, bound by the river. The River, being so basic that it has no specific Yurok word designation, is euphemistically referred to in its lower stretch as the “Yurok highway”. At the mouth of the River, Yurok also refer to the Klamath River as *HeL kik a wroi* or “watercourse coming from way back in the mountains.” It is not surprising that Yurok culture reflects a strong connection to the riverine environment. In contemporary times the Klamath River is referred to as “the main vein” or “blood line” of Yurok People, emphasizing the vital importance of the River to Yurok health and survival.

With the steep terrain and temperate rainforest climate of the Klamath-Trinity basin, the sun’s rising and setting are not an accurate means of tracking time and direction. Thus, the Yurok have always based time and direction on the Klamath’s flows. As one Yurok elder said, “without this river we would not know who we are, where we’re from or where we’re going” (Gates 1996). Under natural conditions, the rates and sounds of the River’s flow tell the Yurok both the season and time of day. The skill of the Yurok fisherman has always been measured by his ability to navigate the Klamath River in the dark. Navigation is not done by the stars or landmarks, but by correlating the location and swiftness of the current and back eddy of the River with the sounds that are unique to each bend, slick and riffle. Every feature of water’s movement and characteristics are named by the Yurok. Even when the Yurok are away from the River, they remain acutely aware of their location in relation to it, always measuring direction by the River’s flow. For example, it is not uncommon to refer to the burners on a kitchen stove as up or down-river burners depending on their position in relation to the River’s flow.

The Yurok’s connection to rivers (particularly the Klamath), and their flows, go far beyond time and direction. Through a long history of observation and inter-generational education they have developed an extensive knowledge of rivers, an ability to astutely interpret what changes in the river’s flows and ecosystem mean for the Yurok people. For example, it is known that the Spring run of salmon will come soon after the budding of the thimble berry that grows along the Klamath River. It is known that willow-root basket materials are best gathered in a straight narrow section of the River where a flood’s raging waters have scoured the roots. The Yurok people have developed numerous ceremonies that officiate this human connection and communication with all these river processes.

A Yurok elder recalls in the 1920's going down the Klamath River in a traditional Yurok dugout canoe powered by an outboard motor and guided by his father. As they approached within five miles of the coast they noticed that the River was backed up and stagnant because the sand buildup prevented it from flowing out to the ocean. Prayers and offerings were made on the sandbar. A day later, a spirit guardian represented as a large rock granted the request, and the River broke through the sand bar, allowing fish to once again enter.

The majority of the Yurok cultural sites on the Klamath and Trinity Rivers are traditional fishing spots owned by Yurok families. Fishing spots are locations where there are deep holes, significant back eddies and ideal spots to set a net or erect a platform out over the river. Fishing spots can be given, inherited, loaned, leased, hawked and bought and sold and were central to the Yurok economy. Over time, as the rivers' flows have changed, so have the locations of these cultural sites. With nearby mining activity and dam-impeded river flushing, many of these sites have been filled with sediment and are no longer viable for fishing.

The Yurok Tribe, and Yurok people prior to the formal organization of the Tribe, fought hard to preserve the ability of Yurok Tribal members fish. The Tribe's dependence upon fish is recognized throughout its history and by the United States when the Yurok and prior reservations were created. The Yurok's dependence upon fish is well established applicable law and reflected by the fact that approximately 90% of Klamath River fish is harvested by the Yurok Tribe. The Yurok Tribe's allocation of Klamath River fish is 80% of the total Klamath River tribal allocation.

Yurok Oral History and the Klamath River

There are Yurok stories that reinforce the Yurok belief that the river was created in a distinct way in order to provide Yurok people with the best of worlds. For example, Wohpekumeu said "let the river run downstream" and that is how the river came to flow the direction it does. In the story No'ots, a young man went out on the river and took his paddle and rode about on the river. That is why it is crooked at Olege'l.

It is clear from Yurok oral history that the River is such an integral part of the Yurok way of life that without it the traditions of the Yurok people would be perceived in a radically different perspective. Practically every function of the Yurok way of life is associated to the river: The origination of fish, proper methods for taking fish, how the river is to flow, death passage ceremonies, locations for fish dams and ceremonies all reflect the bond between the river and the Yurok people. It is essential that the river be maintained at a level that provides relevance to the young Yurok mind that hears these stories.

The anthropologist Alfred Kroeber traveled throughout the Yurok's territory in the early 1900's interviewing Yurok people and documenting the tribe's way of life. Of the 169 stories which Mr. Kroeber presents in his book Yurok Myths (Kroeber 1978), 77 make direct reference to the river.

Among those stories, there are tales of the construction of the fish dams, locations and origins of ceremonies held along the river, bad places in the river, where the first salmon was created, what one must do with salmon caught at certain locations, how the river came to flow the way it does, and death passage on the river. Much of Yurok knowledge and belief about the river and its resources are held in their stories.

When the creator, *Wohpekumeu*, first came to the Klamath and Trinity Rivers, he saw that there was no food for the people. There were only two women who had salmon. *Wohpekumeu* took the salmon from the women and let them go into the River. *Wohpekumeu* said the people would never catch the Great Salmon. When the Great Salmon comes up, he will swim in the middle of the river so he isn't caught with the nets. The Immortals (*Woge*) only wanted salmon to go up on one side of the river to make sure they knew where they could get salmon. But they never caught anything so they made it so the salmon would come up both sides. A man from the village of *Welkwau* wanted to learn how to fish at the mouth of the River so he went to *Kowetsek* (the home of the salmon) and asked the headman to show him how to harpoon fish. The headman agreed to show the man from *Welkwau*. When '*Nepwo*' (the Great Fish) came through the mouth of the river, the headman acted as if he was going to spear it. He would make thrusting motions with his spear but not actually spearing it, at the same time, he was praying for more salmon to come up the river. More salmon came up the river. The headman speared some salmon and the man from *Welkwau* saw that he handled the fish in a particular way. The headman explained that if salmon was caught at the mouth, a man was not to use a wooden club to kill it; he was to use a stone to hit it in the head. But upstream from the mouth everyone else would use wooden clubs. If a salmon is caught at the mouth it must be buried with only its tail sticking out. People who use a spear to catch fish at the mouth must practice certain medicine before catching salmon. The lamprey eel was also made at *Kowetsek* and there are certain rules one must follow when catching them at the Mouth. This story, as recorded by Kroeber (1978), tells of how the reverence for fish and creator provided the Yurok not only with abundance of salmon, a place for salmon and people to inhabit (the River), that explains the proper etiquette and moral responsibilities of salmon and people.

Among the oral traditions are accounts how the River came to flow the way it does, of Yurok ocean travel to the home of salmon, construction of the fish dams, locations and origins of ceremonies held along the River, where the first salmon was created, what is supposed to be done with salmon when caught at certain locations, and in the proper method for transporting a corpse up the River. There are Yurok stories that reinforce the Yurok belief that the River was created in a distinct way in order to provide Yurok people with the best of worlds. For example, *Wohpekumeu* said, "let the river run downstream" and that is how the River came to flow the direction it does. In the story *No'ots*, a young man went out on the River and took his paddle and rode about on the River. That is why it is crooked at *Olege'l*.

When the world was made ready for Yurok to inhabit, immortals (*woge*) who occupied the land and River came together for discussion. There was indecision as to whether the Yurok people should be taught the knowledge of immortality. It was decided that instead the people should know mortality. Those *woge* who felt sorry for Yurok decided to transform into rocks along the River that would help Yurok with the suffering of death. The last journey of the deceased involves a boat trip up-river with ritual stops at various rocks at the River's edge.

The anthropologist Alfred Kroeber traveled throughout the Yurok territory in the early 1900's interviewing various Yurok people and documenting a Yurok way of life. In *Yurok Myths* (Kroeber, 1978), it is obvious that the River was as important to the people from that era as it is to Yurok people now. Out of the 169 stories in *Yurok Myths*, there are 77 that make direct reference to the River. Yurok words that name places, plants, animals, and things associated with the River are detailed throughout Yurok stories.

When *Wesona-me'getoL* (the one up-above) created the world, the homes of the supernatural and the people were segregated. The ocean *Pish kaL* separated the two homes. The region on the other side is further divided into *tsi'k-tsik-oL* the home of money, culture hero *Wopekamaw's* home, *Pulekuk*, home of gambling, and the home of *Koowetsik*, the dwelling place of Salmon. Salmon and humans were created to interact with one another and accordingly the River was created to provide a zone of interaction. There are Yurok stories that reinforce the Yurok belief that the River was created in a distinct way in order to provide Yurok people with the best of worlds. For example, *Wopekamaw* said, "let the River run downstream" and that is how the River came to flow the direction it does (Kroeber 1978).

The story *The Salmon and Koowetsik* depicts the location of where the first salmon originated (Kroeber 1978). When *Wohpekamaw* first came to the Klamath River, he saw that there was no food for the people. There were only two women who had salmon. *Wohpekamaw* took the salmon from the women and let them go. *Wohpekamaw* said the people would never catch the Great Salmon (*Nepwo*). When *Nepwo* comes up, he will swim in the middle of the River so he isn't caught with the nets. The Immortals (*woge*) only wanted salmon to go up on one side of the River to make sure they knew where they could get salmon. But they never caught anything so they made it so the salmon would come up both sides. A man from the village of *Welkwau* (south side of the mouth of the Klamath River) wanted to learn how to fish at the mouth of the River so he went to *Koowetsik* and asked the headman to show him how to harpoon fish. The headman agreed to show the man from *Welkwau*. When *Nepwo* came through the mouth of the River, the headman acted as if he was going to spear it. He would make thrusting motions with his spear but not actually spearing it, at the same time, he was praying for more salmon to come up the River.

These ritual actions demonstrated to *Nepwo* that Yurok were sincere in the proper treatment of salmon and *Nepwo* informed the other salmon that it was good to come into the Klamath River. More salmon came up the River. The lamprey eel was also made at *Koowetsik* and there are certain rules one must follow when catching them. This Yurok story is the explanation for the origin of the first fish ceremony.

In the story *Cappel fish dam or Tsurau man*, a young man from *Tsurai* (a Yurok village near the present day coastal town of Trinidad) longed to be around people (Kroeber 1978). He made a place where he could get woodpecker crests and money '*OL we-tsik*'. In order to get those things he would need to wash his hands in certain springs. While he was sitting near the springs, a stick spoke to him and informed the man to build a sweathouse. After the man built the sweathouse, he came back and the stick had turned

into a man whose name was *Tohstek*. *Tohstek* told the man to follow certain rules and he would become rich and would be able to do anything else he desired. The man slept in the sweathouse and began to dream. He dreamed of the Deerskin, Jumping, and Brush ceremonies and he thought that these are the types of things he wants to see. He went to get wood and when he came back to the sweathouse there were ten wooden trunks. Inside the trunks, were all of the things he would need to hold the ceremonies he dreamed about. He traveled up the Klamath River stopping along the way to hold the ceremonies. His final destination was *Cappell*. When he arrived, the people were in the process of building the fish dam but they did not have the proper medicine to finish the dam. *Tsurau* man conducted a ceremony there and the people were able to finish the dam. The headman from *Cappell* gave *Tsurau* man his best boat (*yoch*) so he could return home. Every autumn when the Fish Dam was built, *Tsurau* man traveled up the Klamath River to help the people conduct the ceremony.

Fish dams *?umyo?* were built to make sure there was enough fish for everybody. The *Cappell* Dam was of utmost importance because it signified the beginning of the dance cycle. Many stories center around the fish dam and the importance of proper ceremony and medicine in its construction and the taking of fish. One such tale, *The Salmon and Kowetsek*, tells about the time that the Creator, *Wohpekumeu*, first came to the Klamath and Trinity Rivers, and saw there was no food for the people. There were only two women who had salmon. *Wohpekumeu* took the salmon from the women and let them go into the river. He said the people would never catch the Great Salmon. When the Great Salmon comes up the river, he will swim in the middle so he isn't caught with nets. The immortals (*Woge*) only wanted salmon to go up on one side of the river to make sure they knew where they could catch them. But they never caught anything so they made it so the salmon would come up both sides. A man from the village of *Welkwau* wanted to learn how to fish at the mouth of the river so he went to *Kowetsek* (the home of the salmon) and asked the headman to show him how to harpoon fish. The headman agreed to show the man from *Welkwau*. When *Nepwo* (The Great Fish) came through the mouth of the river, the headman acted as if he was going to spear it. He made thrusting motions with his spear without actually spearing it. At the same time, he prayed for more salmon to come up the river and more salmon came up the river. The headman speared some salmon and the man from *Welkwau* saw that he handled the fish in a particular way. The headman explained that if salmon was caught at the mouth, a man was not to use a wooden club to kill it, he was to use a stone to hit it in the head. But upstream from the mouth everyone else would use wooden clubs. If a salmon is caught at the mouth it must be buried with only its tail sticking out. People who use a spear to catch fish at the mouth must practice certain medicine before catching salmon.

Another Yurok story depicts a place on the river named *Akierger* where the immortals who used to fish there established a rule that any fish caught in that spot must have its eyes taken out and thrown away. In yet another story, a young man from *Tsurau* longed to be around people. He made a place where he could get woodpecker crests and money, *Ol we-tsik*. In order to get those things he would need to wash his hands in certain springs. While he was sitting near the springs, a stick spoke to him and informed the man to build a sweat house. After the man built the sweat-house, he came back and the stick

turned into a man whose name was *Tohstek*. *Tohstek* told the man to follow certain rules and he would become rich and would be able to do anything else he desired. The man slept in the sweat-house and began to dream. He dreamt of the deerskin, Jumping, and Brush dances and he thought that these are the types of things he wants to see. He went to get wood and when he came back to the sweat-house there were ten wooden trunks. Inside the trunks were all of the things he would need to hold the ceremonies that he had dreamt about. He traveled up the Klamath River stopping along the way to hold the ceremonies. His final destination was Cappell. When he arrived, the people from Cappell were in the process of building the fish dam but they did not have the proper medicine to finish the dam. The headman from Cappell gave *Tsurau* man his best boat (or *yoch*) so he could return home. It is said that *Tsurau* man travels every year to help the people dance.

In the story of the *Lo'olego* Ceremony, a young man from *Lo'olego* sought to build a fish dam, but when asked, the *Weitspus* people would not help. They thought he wanted to have a ceremony but lacked the regalia to do so. There was a rock with a hole in it located on the river. The young man went into the hole and didn't come out for a year. When the young man returned, the *Weitspus* people came to help him build the fish dam. When the dam was built, the *Weitspus* people went downstream to perform the White Deerskin Ceremony. The *Lo'olego* people had their own deerskin ceremony at *Lo'olego*. This story helps to show that personal sacrifice is respected and is rewarded.

In another story, *Kerenit* (Chicken Hawk) built his house on top of a large boulder by the river at *Knetkenolo*, which translates as "arrowhead-where fish-weir." He built a fish dam near the boulder and made a water fall so high that the salmon couldn't jump over. There are holes in the rock that held the posts that can still be seen today.

Several stories with translated titles such as, "Origin of Death" and "Death and Purification," indicate the location of eighteen rocks along the Klamath River which are central to the death purification ceremony of the *Woge*. Specifically, when the Yurok transport a corpse along the River they must speak to the *Woge* spirits that live in these rocks.

There are Yurok stories that reinforce their belief that the River was created in a distinct way to provide for the Yurok people. *Wohpekumeu* said "let the river run downstream" and that is how the River came to flow in the direction it does. In the Yurok story *No'ots*, a young man went out on the River and took his paddle and rode about the River near *Olege'l*. This is why it is believed the river is crooked at *Olege'l*.

It is evident from Yurok oral history that rivers are such an integral part of their way of life that without them, their traditions and culture would have little meaning. The stories from which young Yurok learn of their people depend on healthy and vibrant river ecosystems for much of their context. These selected oral traditions and corresponding ritual practices, of which there are many more, tell of the Yurok reverence for fish and creator and if adhered to, provide the Yurok with abundance of salmon, and a place for salmon and people to inhabit.

How Fish Came to be in the River (as told by Florence Shaughnessy, Yurok and documented by Perry 1988):

In the beginning, there was an Indian goddess. They sent her with the first Indians to be settled here. They told her to stock the world with whatever she thought our people were going to need. So they got all kinds of animals- deer, elk, bear, and all the others. Then she took her people down to the beach, and she talked to the god there.

“I have brought the children here because that is going to be their home. This is where they shall live.”

“Now” she said, “ I will need help, because along the shore here there is food.”

And he said, “Yes, there is food, but there shall be proper help at the proper time. The food that is in the ocean is so delicate that it cannot be exposed for hours like the food that goes on land. They are different. You shall have a helper.”

And she said, “Who will my helper be?”

“The moon, The moon shall control the tides.”

And so it was settled who should control the tides. They put the fish down at the mouth, the sturgeon and every known fish.

And she said, “The sturgeon shall go far, far up the River until he is trapped, but he shall be a strong swimmer. And the salmon, there shall be four kinds of salmon coming in over the year. There shall be different species that survive the winter rains. And steelhead. And there shall be smaller fish that are seasonal, like the candlefish and surfish. And the lamprey eels, they are for variety of the diet.”

Then the sea foods were promised. So we got seaweed, seaboots, crabs, mussels, China slippers, clams of all sizes and others.

And so it was that all the fish were named and sent as far as they could go up the river to feel the people all along the way. And the people were to follow and have their own fishing rocks. They were to look for a place with an eddy and claim that rock. Then they would build homes nearby because their food rock would be there, and then they can take care of their families.
(Perry 1988:15)

The Yurok people are named and live in relation to the rivers and the sustenance that those quality flows provide. Residency, natural and cultural resource sites, ceremonial practices, oral history, transportation route, economic and sociological dependence, indeed the Yurok identity, are all intricately woven into the ecosystems of the Trinity and Klamath Rivers. Of 72 village sites in Yurok ancestral lands, the Yurok continue to live upon many of the 44 village sites that line the Klamath and Lower Trinity Rivers. These are places where Yurok have been born, lived, fished, gathered, prayed and have been buried.

Each generation was taught the appropriate respect for each other and everything in the Yurok World. Respect for the River was of particular importance because Yurok and the River are intertwined with sustaining the balance of life. The River is the main stem of Yurok life ways. Nearly every aspect of Yurok life was and continues to be bound to the River and surrounding landscapes that are defined by the actions of these waters. Yurok people and the River provide important roles in Yurok ceremonies, in defining proper methods for treating the deceased, religiously sanctified methods for taking fish at certain locations, gathering the necessary plant products for the manufacture of Yurok material culture and in maintaining the central transportation route.

A Yurok elder said, “without this river we would not know who we are, where we’re from or where we’re going.” Other Native Americans track directionality based on cardinal directions. In a steep riverine environment with a temperate rainforest climate, the suns’ rising and setting points are not accurate ways of tracking time and direction. Instead, the flow of the river is most essential for telling time and direction. River flow rates under natural conditions indicate both seasonality and time of day. The capability to estimate time of day and year is enhanced in the estuary where the river is subject to tidal fluctuations. A good Yurok boatman is rated by his ability to navigate the River in the dark. The boatman does this by correlating the location and swiftness of the current and the back eddy of the river in relation to the sound of the river that is uniquely created in each bend, slick and riffle of the riverine environment. Every type of unique feature of the water’s movement and characteristics are named. Even when away from the water directionality is measured by the river flow, requiring people to always know where they are in relation to the river. For example it is not uncommon to refer to burners on one side of a kitchen stove as up or down-river burners.

Not only are the Rivers’ fluctuations known by characteristics of water content but is also known by what the water flows additionally provide Yurok people. For example it is known that the spring run of salmon will come soon after the budding of the thimbleberry that grows along the Rivers’ courses. It is known that after a good flooding willow-root basket materials are best gathered in a straight narrow section of the river where a flood’s raging waters have scoured the roots. After a flood event, specific gravel bars are searched for new deposits of granite boulders used for porch rocks in Yurok traditional homes. It is known that in a drought year, flooding occurs in the lower portions of the River because of sandbar buildup at the mouth of the River. And for all of these natural occurrences Yuroks know of appropriate ceremonies that officiate the human communication with these river processes.

Various ethnographic sources show a wide diversity and abundance of cultural sites located along the River. For example in 1909 the anthropologist Thomas Waterman documented 82 various cultural places, 41 rocks of cultural significance, 97 fishing spots, and 44 villages all located in the river channel, river flood-plane or just above the high water mark. The 82 places are places significant to Yurok history (both historic and legendary), ceremony, gathering, and hunting. In addition to these 264 sites, the Yurok Tribe Heritage Preservation Office has documented approximately 100 additional sites

that were either missed by Waterman or have been established since his early century visit to the territories of the Yurok people.

Yurok Traditional Law and the River

Yurok political organization is and has always been very organized. Traditional political organization and the accompanying judicial system was established by Creator's Law, is institutionalized in the Yurok ceremonial system, and the determination of fault and compensation occurs in very exacting ways. Yurok Traditional Law operates on principles of payment rather than punitive penalty for damages or wrong-doing. This traditional system of jurisprudence is interrelated with the harvesting of fish through both individual fishing places as well as the annual community construction of the fish dam. As these traditional forms of communal fishing, traditional use of the river and traditional forms of jurisprudence were disrupted by non-Indian intervention so also did Yuroks become involved in the Indian wars of the 1860s and the Yurok fish wars of the 1970s. Likewise, the traditional and stabilized living patterns were disrupted and Yuroks began to shift from permanent dwelling lifestyles (with bi-annual migrations) to multiple and migratory dwelling lifestyle. These new lifestyles also led to a change of traditional life ways but core Yurok values, particularly in relation to the River and Yurok Traditional Law persist:

The Creator placed Yurok people and fish together for reasons of balance and longevity. The Yurok have a responsibility for assuring the fish get up the River. These reasons are codified as Indian Law, first instructions from the Creator to the Yurok People. When the Law is not followed, the balance is not maintained and the fish do not return, the River dries up and the Yurok people dwindle away.

(Yurok Culture Committee 2003)

Traditional Yurok Fishing Law is as follows:

- 1. Know your family relations. Know where you are related along the river. Know the River and its locations, particularly the village name that your family is from.**
- 2. Not every Yurok family had/has a fishing place right.**
- 3. Every Yurok has a fishing place right through permission.**
- 4. Permission is gained by asking and being granted the right, with terms and conditions.**
- 5. Permission given once is not permission given forever.**

6. **One standard condition is to offer some fish caught at the place where permission was granted.**
7. **Some fishing places are “open” and anyone can fish there. They are open on a first-come, first-serve basis. If someone is fishing in an open place then the latercomer informs the first party that they want to fish, and then they politely wait a day unless they have already caught enough fish, then they should make ready to leave. It is polite for the first party to provide some fish to those waiting.**
8. **No fighting on the River, particularly no fighting over fishing places. The River is a place to show respect.**
9. **Do not waste fish; do not take more than what is needed. It is not what the River will do for you, it is what you will do for the River.**
10. **Drift netting can occur anywhere as long as it doesn’t disturb anyone else’s fishing place or net set.**

(Yurok Culture Committee 2003)

Yurok Language and the Klamath River

The Yurok language reflects the intimate connection and relationship between Yurok People and the Klamath River. Yurok words that name places, plants, animals and other things they associate with the river are detailed throughout their stories. The importance of river resources to their people are captured in Yurok names. As discussed previously, rivers are the mainstream of the Yurok people. Nearly every aspect of Yurok life, their ceremonies, society and economy, was and continues to be bound by the river. Therefore, it is not coincidental that the Yurok language and oral history reflect a strong connection to the riverine environment. Yurok knowledge and tradition is handed down and preserved from generation to generation in stories. Stories and the Yurok language are an important part of the education received by younger generations.

There are numerous words for all aspects of the River’s characteristics, rate of flow, back flows, eddies, boils, riffles and slicks, and color. Locations and directions are linguistically identified in relation to the river. For example, *poh* refers to ‘down river’ and *pech* refers to ‘up river’. This is why the original Yurok word denoting the Yurok people is ‘*Poh lik lah*’ or “down river people.” Even places away from the river, such as the high country, are referenced as “way back from” the River or “*heL kau*.” It has been reported that an elderly Yurok woman referred to her stove burners and knobs as the up-river and down river burners, effectively aligning the cook, stove, and house in relation to the directional flow of the river (Hinton 1994).

Waterman (1920) documents only three cardinal directions in Yurok Geography: ‘up river’, ‘down river’, and ‘away from river’. This use of language in Yurok concepts of

geography underscores the central role the Klamath River has played in Yurok culture, history and cosmology. It also supports the Yurok view of the River as the central bloodline for Yurok People.

Language analysis can show the long-term values and emphasis of a people. For example while there is no specific name word for the Klamath River, the word for 'river' is *la yoh*, and translates as "to run" in reference to liquids. Another word for river, *?ume?wo* is in reference to the fish dams that are placed across the river. The English word 'salmon', denoting several types of anadromous fish does not readily translate into the Yurok word '*ne po y*', "that which is eaten." '*Ne po y*' denotes more than 'fish', but also includes connotations of Yurok reverence for a creature that provides sustenance to a people and way of life. Thus, *ne po y* reflects the Yurok reverence for a creature of the river and an explicit recognition that it sustains their people and way of life. Yurok places are sometimes named after the way the river moves in a particular stretch.

Place Names Associated with River

Yurok people have place names for numerous features and locations on the River and within their landscape. Yurok places are sometimes named after the way the river moves in a particular stretch. For example the town of '*Rekwoi*' denotes the mouth of the river; the town of '*AyoL*' denotes a wide curve in the River and the town of '*Olegel*' denotes a particularly twisty stretch of the River.

Many of these place-names were documented in T.T. Waterman's geographical research (Waterman 1920). Fishing places had names, rock out crops had names, villages, trails, and gathering areas all had Yurok names. Place names were often descriptive, others were references to creation stories, or stories about events that had occurred there. The number of place names given to locations on and around the river and surrounding landscape speak to the intimate relationship between Yurok and their environment, as well as their long-term presence within it.

Various ethnographic sources show a wide diversity and abundance of cultural sites located along the rivers. For example in 1909 the anthropologist Thomas Waterman documented eighty-two various cultural places, forty-one rocks of cultural significance, ninety-seven fishing spots, and forty-four villages all located in the river channel, river flood-plane or just above the high water mark. The eighty-two places locate places significant to Yurok history (both historic and legendary), ceremony, gathering and hunting. In addition to these two hundred and sixty-four sites, the Yurok Tribe Heritage Preservation Office has documented approximately one hundred additional sites that were either missed by Waterman or have been established since his early century visit to the territories of the Yurok people.

Many of these place names reflect geographic placement in relation to the River. For example the Yurok center of the world is named *Kenek*. A place immediately down-river from the town of *Kenek* is named *Kenek-pul*; '*pul*' translates as 'down-river'. A place up

the hill from *Kenek-pul* is named *Kenek-pul hi-won*; '*hi-won*' translates as 'little way up hill'. Another town, named *Ayolth*, denotes a sweeping bend in the River. The village is named after that type bend. The Yurok Village of *Rekwoi*, located at the mouth of the Klamath River, translates as "Mouth of the river." Other examples abound. The word 'Yurok' is a Karuk word for 'down river'. The Yurok people call them selves *Poh-lik Lah*; translated as 'down-river people'. Whether the Karuk or Yurok words are used, it is very clear that a people are named and identify with the river and its particular place in the world.

Yurok Traditional Fishing Technology and Use

The technological expertise of Yurok people presents a direct link to how and why tools were made. Specific types of implements or devices were made to fit a particular environment and type of fishing. For example, specific types of nets were made for river fishing and other types were made for ocean fishing. Tools or devices were not made simply to take river or ocean resources, but some were created specifically to signify the time of sacred ceremonies. The fixed weir is one such example. The most important Yurok fish weir (dam) is known as the Cappell Fish Dam, which signified the time to hold the Deerskin and Jump ceremonies, which in turn insured the abundance of health and resources for all the people. As described in *Fishing Among the Indians of Northwestern California* (Kroeber & Barrett, 12:1960):

The weir was an elaborate structure built in ten named sections by ten groups of men, all working under the actual, as well as the ceremonial, direction of one formulist. Each section was built with an enclosure provided with a gate, which could be closed when the fish entered. The fish were then easily removed with dip nets.... All told, the full ceremonial cycle connected with the Kepel dam covered some fifty to sixty days. It was the most elaborate undertaking of any kind among the tribes of this Northwestern California region.

While the Fish Dam allowed for community fishing activities, Yurok fishing technology also allows for individual fishing activities. Landing, lifting, flat, and cylindrical nets are used to take a variety of fish. Trap baskets are used to catch eels. Mesh size was determined by the size of fish taken. Some nets were equipped with trigger mechanisms that trapped incoming fish. River & ocean going boats, nets hooks, lines, rope, sinkers, bait, harpoons, clubs fishing baskets and carrying baskets are just some of the technological adaptations employed by the Yurok to assist in the taking of fish.

One of the most important technological advancements of Yurok culture is the construction of river and ocean goings canoes. Canoes, or *yoch*, were carved from selected redwood trees. The ocean going Yurok canoe was from 30 to 40 feet in length, six to eight feet in width and three feet deep. It could haul up to five tons of cargo (usually seal carcasses) and was customarily paddled by five to 20 paddlers and an oarsman who steered the boat from the back. The oarsman was also the headman or,

poyweson, who had the financial and persuasive background to coordinate ocean-going expeditions. There are historic accounts of expeditions traveling 180 miles along the coast (Powers 1871, Gould 1968). Canoes were also used for gathering, fishing, and hunting and general travel along the River. River canoes average from 16 to 20 feet in length and are three to four feet in width. Canoes were customarily paddled and/or pushed with a long pole.

In proto-historic times canoes were also rigged with sails. The double ender canoe was introduced for travel on the estuary near the mouth of the River. Double ender canoes introduced by Yurok carvers in the early 20th century are easier to make and could be adapted to the outboard motor. As redwood logs and access to suitable logs for making a traditional Yurok canoe decreased, the Yurok utilized non-traditional boats to continue their use of and travel on the River. As the motorboat was introduced to the Klamath River, motors were also adapted to fit onto traditional canoes. More recently, modern aluminum boats have been designed specifically for use on the Klamath River, these are often referred to as “Klamath River Sleds” because their design allows them to travel well in various River depths and currents. Today the best boatmen of the Lower Klamath River, utilizing various watercraft, are predominately Yurok.

Specialized methods for harvesting fish and eel from the River were utilized to maximize the success of fishing at different localities on the river. Specific attributes of the river, riffles, shallows, eddies, falls, deep pools, and creeks each had unique attributes for which the Yurok developed specialized equipment or fishing methods to ensure a successful harvest:

Riffles: harpoons and gaffs were used along with specialized traps.

Shallows: fish weirs were often built in these areas, with impounding pens for spearing, dip netting, gaffing and trapping. Kepel fish dam was in one of these areas on the Klamath.

Eddies: platform fishing with triggered lifting nets were used in these areas.

Falls or cascades: plunge nets, traps, harpoons, and gaffs were used to harvest fish that were trapped below these natural river features.

Deep pools: diving, bow and arrow, snaring, poisoning and sturgeon riding were used in these still and deep areas of the river.

Creeks, streams and tributaries: short fish weirs, basket traps, and hook and line fishing techniques were common in these areas.

Lamprey were harvested by use of lifting nets, dip nets, and basketry eel traps, gaffs and hand catching in certain areas. (Kroeber and Barrett 1960:8)

Fishing techniques were highly specialized to take advantage of specific characteristics of river morphology, as well as species behavior in their annual migration up the Klamath River. The importance of these river resources for Yurok people, and other Klamath River tribes is evident in the complex fishing methods, schedules, rituals and the use of specialized equipment and technique for each species. (Kroeber and Barrett 1960:8)

Traditional Fishing and Gathering

The river is lined with numerous fishing and gathering sites. A detailed discussion of Yurok Fishing Places is provided in Chapter V. The river is also lined with numerous gathering areas associated with plants adapted to flow levels of the river. Various plants are used as food and material to make ceremonial regalia, baskets, cloths, houses, boats, nets, and other everyday household utensils. For example it is well known that a specific type of willow root is best gathered in long narrow stretches of the river where the rivers scouring effect exposes the material sought. There are also places along the river where weavers traditionally meet to avoid the hot summer sun and weave together.

A wide variety of plants, for food, materials, and medicines were gathered along the riparian zone of the Klamath. Numerous species of berries grew along the banks of the River. Plants and roots used for basketry were collected along the River and along tributaries. Plants used for medicines and ceremonies grew along the riparian zone and were gathered for specific purposes by medicine women and ceremonialists (Curtis 1924). Resource areas used for gathering plants for food and materials were often owned by families or individuals. Driftwood along the river, root-gathering areas, seed gathering areas, tobacco plots were resources that were owned by families and individuals (Pilling 1978:147).

The Lower Klamath River, and most of Yurok ancestral territory occupies a discrete botanical niche, commonly referred to as the Oregon Biotic Province. In addition to containing unique species which do not occur anywhere else in North America (for example, California coastal redwoods), the groups that occupy this unique botanical niche share a common culture, and traditional subsistence pattern that is not shared with their neighbors who reside outside of this biotic region. Culturally significant plants for foods, medicines and arts are shared by the distinct Indian tribes that occupy this region and are part of the common culture that is defined by the Klamath River (Mead 1971:48-49). Yurok share a common forest type with their Karuk and Hupa neighbors, primarily mixed evergreen forest and coniferous forest even if the range and percentage of this type varies between groups (Mead 1971:97).

According to Mead, Yurok used over 13 species of plants in basketry, both in the construction and design of a basket. Four plants were used as dyes for basket materials (Mead 1971:64). Mead further identifies six different stems, and kinds of roots, and one type of leaf used in Yurok basketry (Mead 1971:66). Many of these roots and stems were gathered within the floodplain of the River, along the shore or from the exposed banks. Based upon the common use of plants for medicines, food and materials, Mead

concluded that the common culture areas for the region included a grouping of Yurok, Hupa and Karuk even though each group represented a different language family (Mead 1971:71).

Willow was used for many purposes and was often collected along the river. It's roots and shoots were used for basketry. It's leaves were used as medicine in myth times (Curtis 1924:174). Willow was used as a primary basketry material, particularly up river. It can be used interchangeably with hazel for the foundation of the basket. High quality willow shoots were generated every year within the floodplain of the river due to the fact that peak flows would remove the previous year's growth and stimulate new shoots in the spring, which are the most desirable for basketry (O'Neale 1995:16)

Spruce roots were primarily gathered near the mouth of the River and along the coast. They were traded upriver for basketry material for bear grass, black fern, and hazel (O'Neale 1995:17). The primary body material for a basket is spruce root (*Picea sitchensis*). This was gathered by digging out the root and cutting it in lengths of two to three feet. They are then split, while still soft, into broad, flat bands, and then split again to the desired size. These are woven over a frame of hazel (*Corylus*) sticks to form the basket (Merriam 1967:170). Spruce roots are often gathered on exposed riverbanks.

Traditional Trade and Exchange

Trade between upriver and downriver Yurok and between River Yurok and Coastal Yurok was a common practice that enabled the exchange of desired food items between localities. Shellfish, seaweed and surf fish from the coast were traded for salmon, sturgeon, and lamprey from the river. Salmon caught and dried near the mouth of the River were sought by upriver Yurok because of the better flavor provided by the extra fat, which the fish lose as they migrate upstream. These patterns of trade and exchange existed prior to European contact, and persist in present day Yurok society (Perry 1988:13).

One of the primary indicators of trade and exchange both on the River, and up the coast, was the importance of shell money, or dentalia in Yurok society. Yurok men would often have a special tattoo on their forearm for the sole purpose of measuring lengths of dentalium. These shells are indicative of wide trade and exchange because they originated offshore of Vancouver Island. The use of dentalia as currency on the Klamath River beyond Yurok territory indicates the trade networks along the river were quite extensive (Davis 1963:7).

Other common trade goods exchanged between Yurok and their upriver neighbors, the Karuk and the Shasta included obsidian, coastal shells such as Olivella, clam, mussel and abalone, tobacco seeds, juniper beads, white deerskins, woodpecker scalps, sugar pin nuts, elk antler, baskets, redwood canoes, acorns, salt, and seaweed (Davis 1963:49-50).

IV. Yurok Resources of Cultural and Religious Significance

“The River is the lifeline of the Indian people. We depend on the fish, depend on eels, sturgeon. In his lifetime, as an Indian person, going to school, come out to our freedom. River is medicine to him. He can feel lousy as hell and go out on the River and come back feeling good. Gives strength, knowing this is mine; this is where I live, where I’m born. This is where my roots are.”

(Yurok Elder Walt McCovey Jr. 2003)

All the natural resources associated with the Klamath River have cultural significance to Yurok People. The fish, aquatic life, water and numerous riparian plant and riverine species are relied upon for a range of uses: subsistence, economic, ceremonial, medicinal and recreational. All are aspects of Yurok culture and lifeways. Most of these traditional practices are still practiced today, even if by a fewer number of Yurok than in pre-Contact times. Previous sections of this report have already documented many of the traditions and uses of the River and its resources and the importance of these uses and traditional practices for cultural identity, transmission and survival. As stated in the quote above, and by numerous Yurok: the River is the “Blood line” of the Yurok People. For this reason all the resources it provides remain resources of cultural and religious significance to the Yurok Tribe.

That the River remains integral to Yurok Culture and life ways is reflected in many aspects of contemporary Yurok life. Traditional ceremonies, that either never stopped or were restored in recent decades, are the Brush Dance, Jump Dance, White Deerskin Dance, and Boat Dance Ceremonies. All four ceremonies must be conducted in close proximity to the River and the cultural and ceremonial significance of these Ceremonies are linked directly to the River and include practices within the Ceremony that require direct exposure to the River, including bathing and drinking of River water. The First Salmon ceremony and the Cappell Fish Dam are currently not practiced but there is interest within the ceremonial community in restoring all Yurok Ceremonies. The Yurok ritual of taking the deceased up river to the death purification rocks is still practiced for those Yurok buried in the traditional fashion.

Yurok culture has recently had a resurgence of the traditional stick games, a ceremonial sport that combines aspects of wrestling and lacrosse. The playing fields are constructed on sandy beaches along the river during the summer months and often in conjunction with the Brush dance ceremony. Aspects of all Yurok ceremonies require interaction and even immersion in the River and require high water quality to be practiced with integrity and also the health and wellbeing of ceremonial practitioners.

Traditional gathering continues, primarily by contemporary basket weavers and medicine people and despite the increasingly difficult task of finding adequate plant population of good quality. Increased restrictions on accessing private and federal properties, increased timber production, and increased use of herbicides and pesticides have all limited the

traditional gatherers' access to suitable and desired species and have impeded efforts to revitalize traditional weaving. Willows, alders, ferns and other cultural plants used for basketry and medicines were traditionally harvested along the river bar where the materials were considered to be of highest quality for use. Decreased flows have impaired and adversely impacted many traditional gathering areas due to low flows, less scouring, and build up of gravel and cobbles along the Lower Klamath. Traditional users still access these areas for these plants and materials, but the availability of suitable materials has declined since the dams were constructed.

Yurok Ceremonial Uses of the Klamath River

This previous chapter of this report has already documented some of the rich Yurok ceremonial and cultural traditions associated with the Klamath River. All Yurok ceremonies involve the River and require high water quality as part of ceremonial activities.

As previously reported in Chapter V, Yurok oral history identifies a time before the world is as it is. In this time, the *wo'gey* lived in Yurok lands. There was a constant struggle to keep the world balanced upon the water. "Knowing that this would be so, before they left the *wo'gey* instructed certain people in what to do to put the world back in balance when the weight of human violations grew too great for it" (Buckley 2002:214). These instructions are the world renewal ceremonies that are held between villages on ceremonial grounds of Yurok, Karuk and Hupa alike. It is a common culture and a common ceremonial cycle that connect the people along the River in the past, present and future (Buckley 2002). Traditional Yurok Ceremonies included the First Salmon Ceremony, The Cappell Fish Dam Ceremony, the Brush Dance Ceremony, the White Deerskin and Boat Dance Ceremonies, and the Jump Dance Ceremony. Of these Ceremonies the Brush Dance Ceremony, the White Deerskin and Boat Dance Ceremonies, and the Jump Dance Ceremony are still practiced today. There is growing interest within the tribal community to restore all traditional Yurok ceremonies as part of cultural revival and cultural restoration efforts undertaken to heal the spiritual, social and psychological trauma experienced during the past 160 years.

Many of the items made and used in Yurok Ceremonies come from the River environment. Baskets made of plant materials collected at the water's edge are used to hold food and ceremonial medicine. Acorns, cooked in the baskets, are converted to a nourishing mush that is rendered by placing several hot rocks (cooking rocks), gathered off of specific river bars, into the acorn flour and water that is placed into the baskets. Regalia that adorn the ceremonialists is constructed out of various plant and animal products that the riverine environment provides. Ceremonial bathing in the River and its tributary creeks is a requirement for some of the participants. Ceremonialists also prepare themselves by listening to the River's sounds. While many guests today arrive by car, many more arrive by traditional transportation: boats.

In the early Spring, the first salmon to enter the Klamath River was speared and ritually eaten by medicine men. This event traditionally signified the beginning of the fishing season for the Yurok. The ritual also marked the scheduling of the construction of the fish dam at Cappell located thirty-three miles from the river's mouth on the Pacific. The fish dam was constructed in conjunction with ceremony and sanctified the taking, distribution and consumption of salmon. Salmon are ritually managed to assure that the Yurok people are all provided for, that up-river people are assured a percentage of the fishery and that enough fish are allowed to re-populate the species. While there still remains a general reverence for salmon, without proper ceremony a strong belief prevails that the salmon will not return in sufficient numbers. All other ceremonies were scheduled after the fish dam construction ceremony took place. The Yurok have many ceremonies in common with the Hupa such as the Jump ceremony and the White Deerskin ceremony. An integrated part of the White Deerskin Ceremony is the Boat Dance Ceremony. The River is central to all these ceremonies.

The Brush Dance held in many of the traditional village sites along the Klamath River, requires the proper scenic river qualities and the availability of river resources. As a brush dance unfolds over a four day period it attests to the wealth that the riverine environment provides. Baskets made of plant materials collected at the water's edge are used to hold food and ceremonial medicine. Acorns, cooked in the baskets, are converted into a nourishing mush that is rendered by placing special hot rocks gathered off of specific river bars into the acorn flour and water placed in the baskets. Regalia that adorns the dancers are constructed out of the various plant and animal products that the riverine environment provides. Ceremonial bathing in the River and its tributary creeks is a requirement for some Dance participants. Ceremonialists also prepare themselves by listening to the River's sounds. While many guests today arrive by car, many more arrive by the traditional transportation method: boats.

Just as children coming into the Yurok world are introduced in various ways to the rivers and the culture that surrounds their people's riverine way of life, so do the elderly depart from this world via the river and its features. Rocks located in the Klamath and Trinity Rivers and at their edges are seen as spirit people who guide Yurok knowledge concerning proper burial procedures. The deceased's last worldly journey is a boat ride up-river. At each of eighteen rocks from the mouth up to Slate Creek and up the Trinity, various burial rites and proscriptions are observed to assure the best departure for the deceased as well as those that remain in this world. There are several rocks in the mid-section of the rivers that contain rare petroglyphs giving instructions from the Creator to the Yurok people. One such instruction is a warning that when the rivers stop flowing it will mark the end of the Yurok world. Accordingly, some elders have prophesied that the manipulation of flows by damming represents the beginning of the end for the Yurok.

The White Deerskin Ceremony is held to thank the Earth and Creator for continued sustenance. An important component of Yurok Ceremonial life is the Boat Dance. In this ceremony, several boats filled with ceremonialists in full regalia traveled down river,

making a ceremonial crossing. The ceremonialists thank the River for continuing to flow and providing the pulse of life that sustains the Yurok world. The Boat Dance requires adequate flows of water in the River at particular times of the year. This is still true today. Therefore, diverting the water chokes the life out of the Klamath River environment. Currently the Tribes have to call the Bureau of Reclamation (BOR) and request an increase in water flows in order to have the Boat Dance during the White Deerskin Ceremony.

Klamath River Water

The Klamath River has always been the central feature of Yurok identity, cultural, spiritual and economic life. Integral to that relationship is water quality. Traditional Yurok ceremonial activities require high water quality due to ritual practices requiring immersion and even ingestion of Klamath River water. A healthy river is required for a healthy Tribe, as articulated by multiple respondents in the Yurok Tribe's 2006 Healthy River, Healthy People Traditional Foods Survey (Yurok Tribe Environmental Program 2006). Water quality issues on the Klamath River, including toxic algal blooms, have severely impacted many Yurok activities on and around the River, with many respondents indicating they stayed away from the River the summers of 2005-2010 out of concerns over public health warnings on recurring annual toxic algal blooms within the watershed. Water from the River is central to many traditional Yurok activities and ceremonies. Gathering of basketry plants and medicine plants is done along the shores, requiring one to wade in the river while following the shoreline. Similarly fishing, accessing fishing places, gillnetting, and dipnetting expose fishers to splashing water and frequent immersion. Eeling is done from the shoreline near areas of high, splashing water and rapid currents. In all cases the possibility and frequency of exposure to River water is extremely high. As a result, Native American people who utilize the River for harvesting or gathering resources have a higher risk of exposure to any toxins in the water than many other users of the same watershed. Tribal members remain very concerned about the toxic algae and other persistent toxins that may be entering the watershed from upstream sources. Degrading water quality not only has a disproportionate adverse impact on downstream tribes and tribal trust resources, but also on cultural activities. The River plays a central role in Yurok ceremonial life and as such water quality and quantity have a direct and significant impact on Yurok ceremonial and religious practices.

V. Yurok Fishing Sites and Fishing Rights

“Most Indian people had fishing spots. They have a right to fish, sometimes it’s handed down through relations. You can give a fishing place to someone else....Tradition gives people the right to do things. They can say this is what we’ve done for years and years. Tracing back generations and generations, this is what makes us strong culturally. Hold onto the old ways. Stick with family fishing holes”

(Yurok Elder Glenn Moore Sr. 2003)

Fishing Places

Fishing places have always been considered real property in Yurok culture. The primary form of fishing was using a dip net in a deep hole or eddy that would form naturally behind a large rock or boulder in the River. A scaffold or platform would be built to access the fishing hole, and are called in Yurok, “*kworl*”. Fishing places were considered to be owned by individuals or families. They could be sold, traded, or passed on to others. Agreements for fishing places were not made in writing, but were all verbal. The person giving would let it be known that the person could fish there. The owner of a fishing place could grant permission to others, families and others, to fish there. People were allowed to use the fishing hole of someone else as long as they offered it to you. The value of the fishing hole would be based upon its productivity, how many fish could be caught there in terms of Indian money (dentalia). The value of the fishing place would fluctuate depending on its condition as it would be impacted by annual river flows that could cause gravel or silt to alter its productivity (Waterman 1920:219). Several individuals might own a fishing place, which they used in rotation for one or more days according to their share of ownership in the site. Establishing a new fishing place, or fishing below an existing hole was not allowed. Ownership of existing fishing places was an economic matter, allowing for sale, trade or inheritance. This strict management of fishing places guaranteed the value and the viability of existing fishing places owned by individuals, groups, or families (Bearss 1969:3).

A fishing place can be a place where there is good river access, a deep hole, or good back eddy allows for fish to rest on the way up-river. Fishing places are designated fishing areas on the river, a pool, a rock, and eddy. Often times large projecting river rocks both provide such a place for fish and a place where Yurok fishermen can build scaffolds that allow for the establishment of fish netting areas. Fishing places are a form of real property in Yurok culture. Fishing places can be owned; by individuals, families, or a group of individuals. Fishing places are borrowed, leased, inherited and bought and sold. If shared, each owner has a right to fish there. Some ownership rights at fishing places depend on species of fish caught, salmon, eels, or sturgeon. Others depend on the water level, with individuals owning the right to fish at that place if the River is below or above a certain level. Ownership of a fishing place is not necessarily linked to ownership of

adjacent property, as individuals who live away from the River can have ownership in a fishing place. Some fishing places are abandoned during times when the productivity of a particular place was poor (Waterman 1920:219). Yurok people still recognize this traditional form of resource management and use on the River. Families and individuals continue to use and own rights to fishing places on the River. An entire traditional etiquette and jurisprudence has been developed to regulate the orderly taking of fish.

Fishing places could be shared between individuals who negotiated turns and shared equipment. A very good fishing place might be owned by five to ten men, who would rotate days and times of day to fish. Others fishing places were owned by one person for salmon, and another person for eel or sturgeon. Another fishing place might be owned to a certain water level, with one owning the right to fish when the water was above or below a certain level. Some fishing places might be abandoned due to siltation or some other factor that made it undesirable. If left abandoned so long that the owner was forgotten it could be claimed by a new owner. The Yurok word for that kind of fishing place is “*weq sisiik*”. It was generally accepted in Yurok culture that all fishing places along the river were owned by individuals, families or groups of individuals who had the primary right fish there (Waterman 1920:220).

Waterman (1920) documented a total of 94 Yurok fishing places on the Klamath River. Each of these sites had a name and an identified owner or owners. The distribution of these sites on Waterman’s maps indicate a gap in his own field data as he notes only one fishing site existing down river of *Turip*, near the mouth at *Rekwoi*. Contemporary ethnographic information, as well as oral history indicates that there are numerous Yurok fishing sites between *Rekwoi* and *Turip* that were not included in Waterman’s inventory. Instead his field data appears to have been collected for areas upriver from *Turip* with the majority recorded between Cappell Creek and *Weistpus* at the mouth of the Trinity River.

While fishing places were owned, those who did not have a fishing place could work for the owner in exchange for some of the fish caught there. In this way it was possible for all Yurok to participate in the annual fishing season, and receive a share of the harvest, even if they did not possess a fishing place of their own (Roberts 1932:287).

The best fishing places on the River were privately owned by single individuals, or a group of individuals who rotated fishing at a specific location. Fishing places were recognized as personal property and could be sold, given away or passed on by inheritance. Fishing rights on the River extended beyond the Yurok who lived in river villages. For instance, Yurok who lived in coastal villages away from the River were still recognized as having ownership of fishing sites on the river. (Kroeber and Barrett 1960:3)

Fish Camps

Fish camps on the Klamath River are necessary in order for Indian fishers to take advantage of their fishing rights at the mouth of the River during the commercial fishing season. Many Yurok travel from upriver villages to participate in the annual commercial fishing season. Fish camps are temporary campsites where families stay during this time. Fish camps are places for people to gather, socialize, share stories, and prepare for the next day's catch (Perry 1988:14).

When Indian commercial fishing resumed on the Klamath in 1987, Indian fishing could only occur between 7:00 pm to 7:00 am. This meant nets had to be checked, and fishers had to stay up all night in order to pull in nets and clean and prepare their catch. Once 7:00 am came around, Indian fishers had to remove their nets to allow for recreational fishing. When the night's work was complete, Indian fishers would sleep during the day and then prepare for the next night's work (Perry 1988:14-15).

Yurok fish camps on the Klamath continue to be both a social and economic enterprise. Fish camps are temporary camps that are used annually for the purpose of commercial and subsistence fishing on the river. They are strong indicators of a river-based economy. During the salmon runs on the river, these places are utilized by individuals and families. Yurok fish camps are primarily located near the most productive fishing locations, such as Dad's Fish Camp on the south bank, near the mouth of the River (Bearss 1969:14).

Historic Commercial Fishery

The first non-Indian commercial fishery for Klamath and Trinity chinook was established in 1876 on the lower Klamath River. The first cannery was started at Requa in the late 1880's. While non-Indian settlement and commercial fishing in the region began to erode the Yurok's ability to live in their traditional ways, they adapted as best as they could to the new economic opportunities that were created (Bearss 1969). The canneries themselves were not owned by the tribes; however, all of the fish reaching the canneries was being supplied by Indians since they were the only ones permitted access to the in-river fishery.

The peak of salmon canning on the Klamath took place in 1912 - 1915. In 1912 it is estimated that 141,000 salmon were canned. Local Indians were not only employed to harvest the fish but also performed most of the work at the canneries. With little regulation or coordination of in-River and particularly, ocean fishing activities, the Klamath and Trinity River stocks were fished to the limit during the first several decades of the 20th century. In 1933, the State of California, opting to halt the precipitous decline of both rivers' fisheries as a result of fishing, mining, logging, and farming, banned the use of gill-nets on the lower 20 miles of the Klamath (even for subsistence fishing), closed the canneries and prohibited the sale of river-caught salmon. This had severe implications for the tribes, as they were increasingly dependent on the economic opportunities provided by their fishery resources. The tribes resisted the Fish & Game

restrictions, the issue coming to a head in the 1960s and 70s when on several occasions Hupa and Yurok tribal members were cited for violations of the Code and armed confrontations narrowly averted (USFWS et al 2000).

Indian Reserved Rights

By first creating reservations “for Indian Purposes,” the United States sought to provide the Hoopa Valley and Yurok tribes with the opportunity to remain mostly self-sufficient, exercise their rights as sovereigns and maintain their traditional ways-of-life.¹ Implicit in this objective was an expectation that the federal government would protect the tribes and the resources they retained (a protection that extended beyond reservation borders). The prerogative of tribes to continue to utilize resources as did their ancestors has long been recognized as an application of their inherent sovereign powers and aboriginal rights, not a privilege bestowed upon them by the Federal Government; an Indian treaty is “not a grant of rights to the Indians, but a grant of rights from them.”² Therefore, any right not explicitly terminated by treaty or federal statute is considered reserved for a tribe. This basic principle of Indian law is called the “reserved rights” doctrine and has important implications in any action, such as the proposed Trinity River Restoration, which may affect tribal access to resources (USFWS et al 2000).

Yurok Fishing Rights

The fishing rights of the Yurok Tribe are well-established as a matter of federal law. The Yurok Reservation, created pursuant to an 1855 act of Congress, was established within the Yurok Tribe's aboriginal homeland primarily to provide a territory in which the Tribe's fishing-based culture and way of life could thrive and continue to exist. This fact has been recognized repeatedly since the Reservation was established -- by the Departments of the Interior and Commerce, the United States Supreme Court, the lower federal courts, and the California courts. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 487 (1973); *Donnelly v. United States*, 228 U.S. 243, 259 (1913); *Parravano v. Masten*, 70 F.3d 539, 545-46 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996); *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981). As Justice Blackmun observed in *Mattz v. Arnett*, the original Klamath River Reservation, the precursor to the current Yurok Reservation, “abounded in salmon and other fish” and was in all ways “ideally suited for the Yuroks.” 412 U.S. at 487.

The Yurok Tribe’s right to take fish on the Klamath River is protected and guaranteed by federal law. The Ninth Circuit Court of Appeals confirmed that the executive orders that created the Yurok Reservation vested the Yurok Tribe with “federally reserved fishing rights.” *Parravano v. Masten*, 70 F.3d 539, 541 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016

¹ Pevar, Stephan L., The Rights of Indians and Tribes, Second Edition, 1992. Chapter 2.

² U.S. v. Winans, 198 U.S. 371 (1905).

(1996). The same court has aptly observed that the salmon fishery of the Yurok Tribe is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett, supra*, at 909. The Solicitor of the Department of the Interior has determined that the Yurok Tribe is 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. Memorandum from Solicitor to Secretary of the Interior, No. M-36979, October 4, 1993. The right includes fishing for subsistence, commercial and cultural purposes. As the court in *Parravano* noted, the purpose of the Yurok Reservation was to enable the Yurok people to continue their fishing way of life. The River and its fish are undeniably the cultural heart of the Yurok people.

In 1969, the State of California's jurisdiction over Indian fishing was challenged in court by Raymond Mattz a Yurok fisherman who had his gill nets taken from him by State officials when he tried to fish on the lower Klamath. Mr. Mattz asserted that as an enrolled member of the Yurok Tribe, State law does not apply since he was fishing in "Indian Country". While he lost his case in two lower courts, the Supreme Court reversed the decision in *Mattz v. Arnett*, 412 US 481 in 1973 (See Appendix B).

Nonetheless, it was not until 1977, that the Department of Interior reaffirmed the right of Indians of the reservations to sell fish and reopened the lower Klamath to Indian gill-net subsistence and commercial fishing. Interior's action was based in large part on the First District Court's decision in *Arnett v. 5 Gill Nets* that effectively overturned state regulation of on-Reservation Indian fishing. Shortly thereafter, in August of 1978, Interior placed a "Conservation Moratorium" on the Indian commercial fishery (in an effort to satisfy spawner escapement goals in the Klamath River drainage during anticipated low run years).

In 1977 and early 1978 more than 140 Indian fishermen sold salmon harvested from the Klamath River (includes Trinity River stock). Following implementation of the Moratorium a relatively small number of Indian's continued to sell fish, claiming the Moratorium infringed upon their fishing rights and unfairly and inequitably allocated the Rivers' fishery resources between ocean-based and Indian fisheries. This led to several armed confrontations (USFWS et al 2000).

During the nine years that Indian in-river commercial fishing was restricted for "conservation" purposes, 1978 through 1986, both in-river and off-shore non-Indian fishermen landed an average of 140,130 Klamath origin chinook per year for commercial and recreational purposes, while the Indians harvested an average of 20,660 chinook annually (Pierce, 1990).

Once the Moratorium was lifted in 1987, the tribes increased their fishing in accordance with stock abundance projections made in that year and the following two years, 1988 and 1989. More recently, tribal subsistence fishing has been severely limited, and commercial operations mostly non-existent, due to low numbers of fish. This has had a significant impact on the economic situation of the tribes. In 1993, the Department of the Interior concluded that the Pacific Fishery Management Council's ocean harvest

regulations had not met fishery conservation requirements and thus adversely impacted the tribes' in-river fisheries. During that same year, Interior's Solicitor's office reaffirmed the fishing rights of the tribes and fixed their share of the harvestable Klamath-Trinity basin salmon fishery at an amount, sufficient to support a moderate standard of living or 50% (Solicitor 1993) (See Appendix C).

Ocean commercial fisherman subsequently sued the Secretaries of Commerce and Interior claiming that the Solicitor's decision had forced them to reduce their harvest, and thus, that their harvest rights under the Magnuson Fishery Management and Conservation Act had been violated. This suit was settled in 1995, when the U.S. 9th Circuit Court of Appeals ruled in Commerce's favor, finding that under the Magnuson Act the government can implement regulations which affect coastal fishing if the objective is to meet the purposes of other applicable law, such as its trustee obligation to protect tribal fishing rights.

Salmon, steelhead, sturgeon and lamprey that spawn and migrate up the Klamath river, pass through the Yurok Reservation and are harvested in tribal fisheries. The fishing traditions of these tribes stem from practices that far predate the arrival of non-Indians. Accordingly, when the U.S. established what are today the Hoopa Valley and Yurok Indian Reservations on the Trinity and lower Klamath Rivers, it reserved for the benefit of the Indian tribes of those reservations a right to the fish resources in the rivers running through them (Whipple, Cannery, 1933). The U.S. has long recognized the right of the tribes of the Klamath-Trinity basin to fish. To protect those rights, the Federal Government has a responsibility to ensure that sufficient fish are produced and available to meet certain of its trust obligations to the respective tribes (USFWS et al 2000).

Today, the reserved fishing right includes the right to harvest quantities of fish that the Indians require to maintain a moderate standard of living. It is a vested property right held in trust by the United States for the benefit of the Indians that has been acknowledged and confirmed by the executive, legislative and judiciary branches of the Federal Government in a number of authorities including: 1) Opinion of the Solicitor of the Department of the Interior (Opinion M-36979 (October 4, 1993, see Appendix); 2) The Central Valley Project Improvement Act, Public Law 102-575 3406 (b) (23); and 3) *Parravano v. Babbitt and Brown*, 837 F. Supp. 1034 (N.D. Calif. 1993); 861 F. Supp. 914 (N.D. Calif. 1994); affirmed 70 F.3d 539 (9th Cir. 1995); cert. Denied 1996 WL 79843 116 S.Ct 2546 (June 24, 1996). It cannot be supplanted by state or Federal regulation.

The above referenced 1993 Solicitor's opinion: 1) reaffirm the historic and legal basis of the reserved fishing rights of the tribes of the Klamath-Trinity region, 2) acknowledge the Federal Government's cognizance of the importance of fish to these Indians at the time it first established reservations on their behalf, 3) fixes the tribes' salmonid fishing rights at 50% of the harvestable surplus of salmonid stocks, 4) recognizes that under the current depleted condition of the fishery, a 50% allocation does not adequately meet the tribes' needs, and 5) argues that it is the degree of the Hoopa Valley and Yurok dependence on fisheries at the time their reservation's were first created or expanded, and not the tribes'

specific uses of the fish, that is relevant in determining their present day fishing rights (USFWS et al 2000).

The Yurok Tribe, and Yurok people prior to the formal organization of the Tribe, fought hard to preserve the ability of Yurok Tribal members fish. The Tribe's dependence upon fish is recognized throughout its history and by the United States when the Yurok and prior reservations were created. The Yurok's dependence upon fish is well established applicable law and reflected by the fact that approximately 90% of Klamath River fish is harvested by the Yurok Tribe. The Yurok Tribe's allocation of Klamath River fish is 80% of the total Klamath River tribal allocation.

Reserved Water Rights

In addition to fish, the tribes have reserved rights to water. The concept of reserved rights in general, and Indian reserved water rights specifically, originated just after the start of the 20th century with *Winters v. United States*, 207 U.S. 564 (1908). The ruling in this case, commonly referred to as the *Winters* Doctrine, states that when the Federal Government established a reservation, it implicitly reserved a quantity of water necessary to fulfill the purposes of said reservation (that the government would not create a reservation, and Indians accept a permanent area for their home that would be useless without sufficient water). Generally, all original documents related to the establishment of reservations -- treaty, executive order or statute -- indicate, at a minimum, that the purpose of the reservation is to provide a "permanent home" for the tribe(s) in question. Some reservations were established with the general objective that the Indians become civilized. In cases where reservations have been created with specific language stating or implying reserved fishing, gathering or other rights, *Winters* has been interpreted to mean that adequate water supplies for these purposes have been reserved (even in addition to more general uses -- see *U.S. v. Adair*, 723 F.2d 1410 [9th Cir. 1983]).

The Department of Interior Solicitor's office and the Courts have continuously reaffirmed these rights with respect to Bureau of Reclamation activities, stating that, "Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriations as well as Reclamation's trust responsibility to protect tribal trust resources" (Solicitor's Opinion, July 25, 1995,). Furthermore, the Solicitor notes that the Secretary of Interior, "through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian water rights" (Solicitor's Memorandum Jan 9, 1997) (USFWS et al 2000)

The Salmon Resource

Salmon far exceeds other resources in its importance to the diet and cultures of the Hoopa Valley, Yurok and other tribes who have historically lived in the Klamath-Trinity basin (Swezey & Heizer, 1977; Warburton & Endert, 1966). The Supreme Court in *U.S. v. Winans*, 198 U.S. 371, 381 (1905) recognized the primary importance of salmon to these

tribes when they concluded that access to the fisheries was “not much less necessary to the existence of the Indians than the atmosphere they breathed” (Kroeber, 1960). The abundance of salmon has always been an important measure of tribal well-being -- where feasting is not simply an exercise in eating, but has deep rooted connections to the vitality of the Earth and a traditional connotation of community health (Gunther, 1926). The timing and cycle of many tribal societal, religious and economic activities were made to closely coincide with the seasonal and geographic variations in fish runs, particularly the arrival of the first salmon (USFWS et al 2000).

Despite variations in the size of the semi-annual runs, in times past, the tribes could typically procure enough salmon for their people. The abundance of fish once supported by the region’s rivers is well documented, with stories that recount the challenge of fording the Trinity, and even Klamath River, because the salmon runs were so thick. It is estimated that prior to non-Indian settlement along California’s North Coast, the region’s Indians consumed over 2 million pounds of salmon annually from runs which are believed to have exceeded ½ a million fish (EIS Indian Fishing Regulations, 1985). Fishing by the Hupa and Yurok had one of the highest yield-to-effort ratios (i.e. was the most efficient) of any subsistence undertaking in all of North America (Swezey & Heizer, 1977). This was due not only to the abundance of fish, but the various fishing techniques developed by both tribes (USFWS et al 2000).

The continual bounty of salmon (as well as steelhead, sturgeon, lamprey and other fish species) available to the region’s tribes prior to European settlement, has not been attributed to sparse human population or poor fishing technology, but management. These cultures have always recognized the potential humans have for damaging ecosystems. They also strongly believe that man can be sustained by nature if properly stewarded and revered by him; that nature’s health is ultimately expressed through the resources it provides. Consequently, the tribes developed remarkably sophisticated and environmentally sensitive fishery management practices and shared a strong spirit of cooperation in their use of the region’s fishery resources. In this manner, they minimized their impact on the fishery, and in some cases, enhanced its productivity. For example, salmon runs historically were protected by a very strict series of laws and traditional mores prohibiting over fishing and ensuring that only the amount needed by tribal communities was taken. Laws also served to guarantee that upstream people received a fair share of the salmon, and most importantly, that weir gates (e.g., fish dams) were kept opened for extended periods during harvest time to insure that adequate numbers of salmon could reach their spawning grounds. Other management activities included the clearing of smaller tributaries to facilitate fish migration. Furthermore, the tribes heeded tales that warn against eating too much and wasting food lest it run out and a belief system that states the salmon will be withheld if abused or mistreated (Lewis 1994). Such proscriptions continue to be voiced today by tribal elders (USFWS et al 2000).

During the pre-Euro-American contact period, fisheries were an essential part of the economy of the region’s tribes. The sharing, trading, and consumption of fish was so important that fishing places were acquired as property. Fish were also used for commercial purposes, and were traded in substantial volume. Northwest California

Indians have been catching salmon for trade with other tribes since time immemorial.³ Trade enabled them to acquire food, raw materials, and manufactured goods. The trade, which involved both necessities and luxuries of native life, existed because of the variation in available local resources. Food preservation methods were developed which allowed fish to be stored throughout the year and transported over great distances. It was tribal custom to take fish for food and commerce efficiently and without damaging the continued existence of the species. Today still, salmon continues to represent an important economic resource for the Klamath River tribes (USFWS et al 2000).

Yurok Cultural Resources

The inseparable relationship of the Yurok people with the environment and resources provided by the rivers of the Klamath-Trinity basin cannot be overemphasized. The Klamath River is a vital natural resource which is the foundation of Yurok social and cultural way of life. At its most basic level, the River has always been a source for food and other necessities of daily life. The River also provides basket materials, fish net materials, and a means of transportation. Even rocks from the river are used by Yurok people to practice their cultural ways. The Yurok River is traveled during religious ceremonies and in recreational activities, it is integral to the Yurok language and its oral tradition and truly represents the binding force of their community. Yurok use of the River developed over a long period of time as evidenced by the complexity of their religious ceremonies and practices. In aboriginal times, religious practices were integrated with fisheries management.

The Yurok have many traditional dances and ceremonies which they have long practiced along the banks of the Klamath and Trinity Rivers. The Yurok's ceremonial way-of-life has greatly suffered with the deterioration of the region's rivers. The Yurok have always depended on the Klamath and Trinity Rivers and the sustenance that their flows provide, they name themselves after the rivers and much of their universe is defined in terms of their physical relation to rivers. Residency, natural and cultural resource sites, ceremonial practices, oral history, transportation routes, economic and sociological resources, indeed the Yurok identity, are all intricately woven into the ecosystems of the Klamath and Trinity Rivers. Yurok continue to live upon some of the forty-four village sites that line the Klamath and lower Trinity Rivers. These are places where Yurok have lived, fished, gathered, prayed and have been buried for countless centuries (USFWS et al 2000).

³ U.S. v. McCovey reaffirmed Yurok Fisherman's rights to sell fish off the reservation.

VI. Yurok Beneficial Uses of the Klamath River and Tributaries

“The River is part of life. No river, no life. God put it there for us, the people, to use. If people don’t use it right, it’s gone. It was a place for everyone. The River is there to supply food to the people who need it. We wouldn’t be here without the River. I don’t know how they figure they are going to get the water back [in the river system]. Who has the water? It is natural to have high water in the winter. I can’t see anything bad about it. It is an act of nature”.

(Yurok Elder Billy Wilson, 2003)

“The River is our life. Our life revolved around the River. For our own subsistence, our own person, later for business, kept our families for year round. We depended on the River for survival. Without the River, you don’t have the fish. The River needs to be taken care of”.

(Yurok Elder Fawn Morris, 2003)

“The Klamath River has provided the River Yurok people with food salmon, eels, candle fish, sturgeon and also transportation, eels, roots for basket materials and also willow sticks for basket materials.”

(Yurok Tribal Member Survey Respondent 2006)

“I grew up and lived in and around the Yurok Reservation (ceremonial – social – cultural) for the first 31 years of my life. I have hunted with my family for deer and other wildlife, all of my life. I have gathered everything: acorns, berries, teas, plants/medicine mushrooms, all the resources I have used throughout my life time, Basked materials – ferns, willow, Redwood and spruce roots, bear grass, hazel stick, mosses, chitum bark. Salmon is our family’s life blood – it provides (food) nourishment all year round. We fresh canned, smoked and canned smoked fish, even the heads and tails, heart and other inner parts are eaten. The backbone is dried and used for soup in the winter. Fish guts used to fertilize (food) gardens. The Redwood trees that grow on my family allotments depend on the Klamath River for water. The Klamath River is the heart and veins of our watershed – the web of life on which the tribe depends and for what we our, Yurok! Down River People! It is what our circle is: What we live, we eat, and sing songs about.”

(Yurok Tribal Member Survey Respondent 2006)

The California North Coast Regional Water Quality Control Board has established both Native American Cultural and Subsistence Beneficial Uses for the Klamath River and its tributaries. In 2006, Klamath River tribes participated in an Environmental Justice Pilot Project with the State Water Resources Control Board that served to help provide data on these Beneficial Uses in terms of types of uses and also times of the year during which these Beneficial Uses occur. In 2006 a proposal prepared by the Tribes (Karuk, Yurok, Hoopa) stated:

The Klamath Basin Tribes working with the State Water Resources Control Board propose an Environment Justice Pilot Project for the Klamath River Watershed. This project seeks to restore Klamath River water resource health for the protection, restoration, and enforcement of Native American Cultural and Traditional Subsistence Beneficial Uses.

The need for such a pilot project is clear. Water quality- based Environmental Justice issues of special concern are:

- (1) that the tributaries, lakes, wetlands and the main stem of the Klamath River continue to benefit the Klamath River Basin tribes through traditional economic, subsistence, commercial, and ceremonial uses;
- (2) that Native American Cultural and Traditional Subsistence Beneficial Uses, including ceremonial and religious uses of the river, subsistence fishing and other continued traditional cultural uses can and must be restored and protected.
- (3) that tribal cultural, social, and physical health can be improved through State Water Board programs designed to restore water quality within the Klamath River Basin.

In order to address the significant water quality issues, the Klamath Basin Tribes have determined that the primary goal of this EJ Pilot Project is to uphold all regulatory parameters for Native American Cultural and Traditional Subsistence Beneficial Uses per the SWRCB North Coast Region Basin Plan:

The basis for the discussion of beneficial water uses, which follows, is Section 13050(f) of California's Porter-Cologne Water Quality Control Act, which states:

"Beneficial uses" of the waters of the state that may be protected against water quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves. An essential part of a water quality control plan is an assessment of the beneficial uses, which are to be designated and protected....

Protection will be afforded to the present and potential beneficial uses of waters of the North Coast Region as designated....The beneficial uses of any specifically identified water body generally apply to all its tributaries....

Water quality standards are adopted to protect public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act (as defined in Sections 101(a)(2), and 303(c) of the Act). Water quality standards consist of 1) designated beneficial uses; 2) the water quality objectives to protect those designated uses; 3) implementation of the Federal and State policies for antidegradation; and 4) general policies for application and implementation....

Established and adopted Beneficial Uses for the SWRCB North Coast Region that are of particular importance to Klamath Basin Tribes include but are not limited to:

Native American Culture (CUL) Uses of water that support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.

Subsistence Fishing (FISH) Uses of water that support subsistence fishing.

The SWRCB EJ Pilot Project for Klamath Basin Tribes should be devoted to assisting each Tribe in asserting regulatory enforcement of tribally-determined water quality criteria for these Beneficial Uses as they relate to SWRCB policies and actions for the Klamath River Basin.

It is important to recognize that each tribe has its own unique history, culture, and status relative to federal recognition, retained rights, and sovereignty. Participation in this project does not represent a waiver of sovereignty or any rights for any tribe, nor does it establish any additional rights for any tribe.

In a final 2006 Scope of Work prepared by the California State Water Quality Control Board as part of the pilot project the tribes stated:

The State and Regional Water Boards are engaged in a number of activities to prevent further degradation to the Klamath River and its tributaries and to restore the health, habitat and beneficial uses of the river.

The Klamath River and its tributaries are listed as impaired on the Federal Clean Water Act (CWA) Section 303(d) list. The Regional Water Board has adopted

Total Maximum Daily Loads (TMDLs) including Action Plans to restore the water quality and beneficial uses of Scott, Shasta, and Salmon River watersheds, and is in the process of developing TMDLs for the main stem Klamath River.

A TMDL is a framework for assessing the condition of a watershed, evaluating the factors that contribute to water quality problems in the watershed, and for developing a plan to restore healthy water quality conditions. There are five general objectives of a TMDL:

1. To assess the condition of a waterbody, and determine/confirm cause(s) / source(s) of stress.
2. To quantify the sources of the pollutant or stressor.
3. To determine how much of a particular pollutant or stressor a waterbody can handle and still meet desired conditions.
4. To identify whether and how much the different sources need to be reduced in order to support desired conditions.
5. To develop a plan which, when implemented, will restore waterbody health.

The Klamath River is listed as impaired due to low dissolved oxygen, high water temperature and nutrient concentrations. The Water Quality Control Plan for the North Coast Region (Basin Plan) designates the following beneficial uses to one or more hydrologic areas or sub-areas of the Klamath River:

- Municipal Water Supply (MUN)
- Water Contact Recreation (REC-1)
- Non-Contact Water Recreation (REC-2)
- Cold Freshwater Habitat (COLD)
- Spawning, Reproduction or Early Development (SPWN)
- Migration of Aquatic Organisms (MIGR)
- Rare, Threatened or Endangered Species (RARE)
- Commercial and Sport Fishing (COMM)
- Native American Cultural (CUL)
- Subsistence Fishing (FISH)
- Wildlife Habitat (WILD)
- Marine Habitat (MAR)
- Navigation (NAV)
- Shellfish Harvesting (SHELL)
- Aquaculture (AQUA)
- Agricultural Supply (AGR)
- Industrial Supply (IND)
- Industrial Process Supply (PRO)
- Groundwater Recharge (GWR)
- Freshwater Replenishment (FRSH)
- Hydropower Generation (POW)

In addition to beneficial uses related to the cold water fishery (COLD, SPAWN, MIGR) and drinking water (MUN); the Native American Cultural (CUL) use and the Subsistence Fishing (FISH) use are extremely important to the Klamath Basin Tribes (Tribes). The Regional Water Board added the CUL and FISH beneficial uses during a Basin Plan update in June 2003. This was done to specifically acknowledge reliance by the Tribes on fish to provide most of the protein in their diet and the extreme importance of high-quality water to their culture, spirituality and their economy.

The North Coast Basin Plan defines the Native American Cultural (CUL) and Subsistence Fishing (FISH) uses as follows.

Native American Culture (CUL) Uses of water that support the cultural and/or traditional rights of indigenous people such as subsistence fishing and shellfish gathering, basket weaving and jewelry material collection, navigation to traditional ceremonial locations, and ceremonial uses.

Subsistence Fishing (FISH) Uses of water that support subsistence fishing.

At the time the CUL use was added to the Basin Plan, the Regional Water Board staff did not have adequate information with which to support the designation of the use for all of the waterbodies in the region as existing or potential. Thus, staff did the best they could with the designations using the information submitted by approximately five tribes in the Region. For this reason the CUL designations are not complete in the beneficial use table found within the Basin Plan. There are many other waterbodies where the CUL use very likely exists or existed historically (potential). The Regional Water Board plans to update these beneficial use designations at their earliest opportunity.

In addition, Regional Water Board staff had originally proposed to add subsistence fishing to the Commercial and Sport Fishing use definition. However, at the adoption hearing for the Beneficial Use Amendment, the State Water Board stated that they preferred not to change the statewide definition of this use, but instead agreed to add a separate beneficial use entitled “Subsistence Fishing” (FISH). Because this use was adopted separately, the Regional Water Board was unable to designate this use to any specific waterbody at the time of adoption. This use is known to exist or existed historically (potential) in many waterbodies, including the Klamath River, and will be designated during the next update of the Beneficial Use Chapter of the Basin Plan.

Existing uses are those uses, which were attained in a waterbody on or after November 28, 1975. Existing uses cannot be removed or modified unless a use requiring more stringent criteria is added. However, a use requiring more stringent criteria can always be added because doing so reflects the goal of further

improvement of water quality. Biological data, human use statistics, and/or professional experience is used to document the existing uses.

Waterbodies may have potential beneficial uses established for any of the following reasons: 1) the use existed prior to November 28, 1975, but is not currently being attained; 2) plans already exist to put the water to that use; 3) conditions make such future use likely; 4) the water has been identified as a potential source of drinking water based on the quality and quantity available (see *Sources of Drinking Water Policy*, in Appendix 7); 5) existing water quality does not support these uses, but remedial measures may lead to attainment in the future or 6) there is insufficient information to support the use as existing, however, the potential for the use exists and upon future review, the potential designation may be re-designated as existing.

The CUL use is designated as an existing as well as a potential beneficial use in the Basin Plan and as such, must be protected and if impaired, must be restored. As stated above, existing uses cannot be removed using a use attainability analysis (UAA).

It is imperative that the beneficial use designations in the Basin Plan be updated to reflect existing and potential CUL and FISH beneficial uses so that water quality necessary to protect these uses can be restored and maintained as required by the federal Clean Water Act and the state Porter Cologne Water Quality Control Act.

Under the project described above, the Yurok Tribe Environmental Program (Sloan and McConnell 2007) collected data on Yurok Beneficial Uses of the Klamath River and its tributaries. This work continued in 2008 under a California Environmental Justice Grant (Sloan and McConnell 2009) and documented that Yurok traditional uses of the Klamath River and its tributaries is extensive and continual, spanning through most months of the year. The following tables present information both on types of uses and times of year during which these uses occur within the Yurok community.

YUOK TRIBE CULTURAL USES OF THE KLAMATH RIVER & TRIBUTARIES

Codes used in table: 1 = Main stem Klamath only, 2 = Tributaries only, 3 = Main stem AND Tributaries

USES:

	January	February	March	April	May	June	July	August	September	October	November	December
CEREMONIAL												
Plants	3	3	3	3	3	3	3	3	3	3	3	NO
Fish	3	3	3	1	1	1	1	1	1	1	1	NO
Fishing	3	3	3	3	3	3	3	3	3	3	3	NO
Water-drinking, steaming, cooking	2	2	2	2	2	2	2	2	2	2	2	2
Rocks	3	3	3	3	3	3	3	3	3	3	3	NO
Bathing						3	3	3	3	3	3	
Boating	3	3	3	3	3	3	3	3	3	3	3	3
Wildlife	3	3	3	3	3	3	3	3	3	3	3	3
River & Trail Access	3	3	3	3	3	3	3	3	3	3	3	3
Training	3	3	3	3	3	3	3	3	3	3	3	3
Swimming						3	3	3	3	3		NO
Prayer/Meditation	3	3	3	3	3	3	3	3	3	3	3	NO

YUOK TRIBE CULTURAL USES OF THE KLAMATH RIVER & TRIBUTARIES

Codes used in table: 1 = Main stem Klamath only, 2 = Tributaries only, 3 = Main stem AND Tributaries

USES:

ACTIVITIES	January	February	March	April	May	June	July	August	September	October	November	December
Plants	3	3	3	3	3	3	3	3	3	3	3	NO
Water-drinking, steaming, cooking	2	2	2	2	2	2	2	2	2	2	2	2
Rocks	3	3	3	3	3	3	3	3	3	3	3	NO
Bathing	3	3	3	3	3	3	3	3	3	3	3	3
Boating	1	1	1	1	1	1	1	1	1	1	1	1
River & Trail Access	3	3	3	3	3	3	3	3	3	3	3	3
Training	3	3	3	3	3	3	3	3	3	3	3	3
Swimming						3	3	3	3	3		
Washing	3	3	3	3	3	3	3	3	3	3	3	3
Meditation	3	3	3	3	3	3	3	3	3	3	3	3
Wood Gathering	3	3	3	3	3	3	3	3	3	3	3	3

YUOK TRIBE CULTURAL USES OF THE KLAMATH RIVER & TRIBUTARIES

Codes used in table: 1 = Main stem Klamath only, 2 = Tributaries only, 3 = Main stem AND Tributaries

USES:

BASKETRY	January	February	March	April	May	June	July	August	September	October	November	December
Roots	3	3	3	3	3	3	3	3	3	3	3	NO
Sticks	3	3	3	3	3	3	3	3	3	3	3	NO
River & Trail Access	3	3	3	3	3	3	3	3	3	3	3	NO
Plants				3	3	3	3	3	3	3		NO

JEWELRY	January	February	March	April	May	June	July	August	September	October	November	December
			3	3	3	3	3	3	3	3	3	

YUOK TRIBE CULTURAL USES OF THE KLAMATH RIVER & TRIBUTARIES

Codes used in table: 1 = Main stem Klamath only, 2 = Tributaries only, 3 = Main stem AND Tributaries

USES:

SUBSISTENCE	January	February	March	April	May	June	July	August	September	October	November	December
Plants				3	3	3						NO
Fishing	3	1	1	1	1	1	1	1	1	1	1	NO
Eeling	1	1	1	1	1							NO
Shellfish						1	1	1				NO
Water-drinking, steaming, cooking	2	2	2	2	2	2	2	2	2	2	2	2
Wildlife	3	3	3	3	3	3	3	3	3	3	3	NO
River & Trail Access	3	3	3	3	3	3	3	3	3	3	3	3
Food Preparation	2	2	2	2	2	2	2	2	2	2	2	2

Yurok Tribe Cultural Uses of the Klamath River & Tributaries

CEREMONIAL	Pathways of Exposure
Plants	Gathering, walking in streams & river side, cooking, cleaning, soaking, exposure to water when dispensing of medicinal plants, water often taken to ceremonies and used with plants for medicine
Fish	Catching is the same as subsistence, fish for ceremonial use is fresh, contact with fish during preparation
Fishing	Same as subsistence, contact with water nearly constant
Water-drinking, steaming, cooking	Water often taken to the site of ceremony and used in various ways including cleansing, cooking, preparation, drinking, landscaping (packing sand down),
Rocks	Steaming, sweating, cooking, gathering on river and creek banks, exposure to water while walking to pick up rocks.
Bathing	Bathing before, during and after ceremonies and sweats, exposure to water while immersed.
Boating	Getting in and out of boat, splashing, paddling, accidentally falling in, boat capsizing
Wildlife	Walking during hunting for wildlife, cleaning, wildlife drank the water, otter, sea lion, ducks
River & Trail Access	Splashing while walking near and in waterways, trail often cross tributaries or run along side waterways.
Training	Swimming, diving, bathing after training
Swimming	Immersion in waterways, splashing, possibly swallowing water during swimming
Prayer/Meditation	Sitting on riverbank, feet in water
Fish dam	Full body immersion during construction, use of dam after construction, and deconstruction

Yurok Tribe Cultural Uses of the Klamath River & Tributaries

ACTIVITIES	Pathways of Exposure
Plants	Gathering in and near waterways, walking to gather plants, cleaning, cooking, steaming, rinsing, wading in waterways to gather plants,
Water-drinking, steaming, cooking	Drinking water from tributaries, using water to cook and clean, steaming, used to rinse food and eating utensils, water used in camps for multiple purposes
Rocks	Rocks gathered from banks of waterways, often time coming in contact with the water while gathering, either by splashing or wading. The rocks gathered have been in contact with the water, as well as rinsed in the water. Rocks are then used to cook and prepare either medicine or food.
Bathing	Daily bathing in river or tributaries, either by immersion, rinsing or splashing. Direct contact with skin and body
Boating	Getting in and out of boat, splashing while moving and paddling, putting in and taking boat out of water. As a result of being on the water there is constant contact with the water. Bailing of water from boat.
River & Trail Access	The trails often cross paths with waterways or are around, run along side. Contact by wading, splashing. Also when traveling the trails the waterway is used for cooling down and drinking
Training	Swimming, immersion in water, bathing, and diving.
Swimming	Full body immersion, splashing, wading, playing near and in the waterways
Washing	Washing of baskets, utensils, food, rocks, and plants. Washing hands, face, feet, and other body parts. Water used through out the day to wash various things, constant contact with water.
Meditation	Same as ceremonial
Wood Gathering	Gathering wood from the banks of the river, splashing. Traveling to gather wood, having to go through or wade in the shallows of the water to get to the wood. Also possibility that wood has been exposed to the water at some point. Winter gathering involvesthe use of a boat to gather wood that is floating downstream
Tanning hides	Placing of hides in creek

Yurok Tribe Cultural Uses of the Klamath River & Tributaries

BASKETRY	Pathways of Exposure
Roots	Having to dig near the water for roots. Wading in water to get the roots. Constant exposure of water on hands to gather. Also the cleaning and preparing the roots for use. Soaking the roots for flexibility
Sticks	Gathering near tributaries and river could possibly put one in contact with the water. Cleaning and soaking of the sticks to make them usable.
River & Trail Access	Wading to get to the resource. Crossing tributaries and river while gathering basket materials.
Plants	Gathering plants near waterways, having to travel to the plant location puts one in contact with waterways. Also the preparation and cleaning of plants uses water from river and tributaries. The soaking of plant material for flexibility uses water from the river and tributaries.
Weaving	Women would often gather in groups near a tributary. The placing of a wet stick or root in the mouth while weaving.

JEWELRY	Pathways of Exposure
Shells	Gathering from the streams and river. Wading to gather resource. Also preparation of use of the shells requires them to be cleaned in the waterways. Dipping of shell (abalone) in water while grinding

Yurok Tribe Cultural Uses of the Klamath River & Tributaries

SUBSISTENCE	Pathways of Exposure
Plants	The gathering plants in and near streams and rivers, cleaning and rinsing. Preparation, cooking, soaking, steaming...
Fishing	Getting in and out of the boat, Setting and pulling the net. Hands and arms continuously in the water while checking the net and removing fish. Cleaning the fish with water, using the water for slush tanks for storage, wading in the water, splashing from fish, boat moving and dropping the anchor. Trigger net for salmon and sturgeon
Eeling	Setting and checking eel baskets in the water ways. Hooking eels by wading and exposing feet, legs, hands and arms to the water. `Scraping` eels from rocks at Coon Creek and Smokers Falls. Trigger net and dip net. Cleaning eels and preparing them.
Shellfish	Immersion in the water to gather, cleaning and preparation of freshwater clams.
Water-drinking, steaming, cooking	Drinking water directly from tributaries, using water to cook and clean food and items used for food preparation. Water used for multi purposes in the kitchen with preparing all foods.
Wildlife	Wildlife caught in and near waterways. Water used to clean and prepare wildlife for consumption. Geese, ducks, mudhens
River & Trail Access	The trails used to gather and prepare subsistence food are in direct or indirect contact with the waterways.
Food Preparation	Water is used directly and indirectly with food preparation. Used for gathering, cooking, steaming, boiling, cleaning, and multiple uses in all food preparation.

VII. Environmental Justice

“I was born and raised on the River. My life is woven with the river and its fish and people. If the River is sick, so am I. So are we all, because it is our spirit and strength. Even though I live in town, I still live and choose to live close enough so I can go to the River whenever I choose. I participate in ceremonies on the River. If it were possible, I would live on the River, to see it and hear it and smell it every day and every night. I will not be completely healthy again until I can look out my front door at night and see the salmon moving up the River as they did when I was a child. It is not the simple fact of eating healthy food from the River that is important... It is the knowing in my mind, heart and spirit that the River itself is whole and healthy. We are merely a reflection of the river, and will never be healthy again until it is.”

(Yurok Tribal Member Survey Respondent 2006)

“Over the years, the river got smaller and smaller. The color has gradually gotten darker. At first, (60’s, 70’s, 80’s) the Klamath only looked unhealthy at the end of summer. Now the River always looks too dark in color and low. At the end of summer now, the Klamath looks dark, low, slow, dirty, slimy and too unhealthy to get into or eat anything coming from it. We used to be able to tell which salmon were not from the mouth, because they would sometimes have a muddy taste. Now I don’t eat any salmon that aren’t from the mouth for fear of eating toxins and diseased fish.”

(Yurok Tribal Member Survey Respondent 2006)

“If something is not done to improve the river water temp – there will be no fish. As a people we are still dancing, without the fish there will be no ceremonies. Without the ceremonies we will be NO MORE. Something is going to have to be done about the damns on the Klamath and Trinity Rivers. Especially the Klamath River. Fish will not travel in hot water – the old holes where fish could find cool water, have filled in giving the fish no place to go – but belly up. I heard Calvin Rube speak before the Senate Committee 45 years ago. He said that we (younger generation) would see fish kills, because of the water temp., which would also cause algae to grow – making river unhealthy.”

(Yurok Tribal Member Survey Respondent 2006)

“I am trying to teach my children how to fish on the River and have been very disappointed with the numbers of fish available. I do believe that a lot of traditional foods are being lost and becoming unavailable. Beach fishing is almost impossible to gather surf fish, clams and others. Gathering herbs for teas is becoming a lost art. There is very little if any big game available for food which could provide a lot for the people. Salmon is really the only thing we have left and it is hurting.”

(Yurok Tribal Member Survey Respondent 2006)

“The Klamath River is considered a big pool of pesticides flowing to the ocean to do more damage. There will be NO chance that my children will swim in this pool of pesticide run off. I cannot see seven generations ahead on this River. I have had three family members die from cancer. They lived at Notchko. I pray for the River to come back and show my children the way of life. As it did for me.”

(Yurok Tribal Member Survey Respondent 2006)

No single minority population in the US experiences higher rates of unemployment, poverty, diabetes, heart disease, cancer, or high-school drop out rates than Native Americans, and those statistics are starkly higher for on-reservation communities. EO 12898 was signed with the intent of finally recognizing, considering, and where possible mitigating the disproportionate adverse impacts on low-income and minority populations in federal actions. Presidential Executive Order 12898 issued a directive to all federal agencies on Environmental Justice:

“each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”

The Yurok People remain intrinsically tied to the Klamath River and the resources it provides the community through the fishery. For the Yurok Tribe, the river is the foundation of tribal culture, spirituality, transportation, subsistence, as well as the traditional and contemporary economy. In pre-Contact times, the Yurok villages along the Klamath managed and utilized the fishery, as their primary source of sustenance and the fishery was the basis of the Klamath River economy. During the cannery period, tribal people continued making their livings of the fish that the river provided. Even with significant declines in anadromous fish populations in recent decades, the fishery remains a primary source of the tribal economy and subsistence of the tribe.

Environmental justice issues for the Yurok Tribe with regards to the Klamath River include: loss of traditional subsistence, lack of benefit from hydro-electric power generated by Klamath River dams, increased health risks as a result of degraded water quality and increase of toxic algae blooms, and the lack of funding to actively participate in the Pacificorp and dam re-licensing efforts or in the Secretarial Determination and NEPA/CEQA process currently underway.

The Yurok Tribe has been a long-time advocate for the protection of the Klamath River and the health of the fishery. The Yurok Tribe has been actively engaged in tribal and inter-tribal efforts to protect and restore the fishery for many decades. Since its re-organization in 1988, the Yurok Tribe has developed several departments to help promote the Tribe's goals on the management of both natural and cultural resources. The Yurok Tribe has established and active programs in Forestry, Fisheries, Watershed Restoration, and the Yurok Tribe Environmental Program (YTEP). YTEP is an ongoing and current recipient of EPA funding for several programs in several media. All of these departments have demonstrated numerous successes in obtaining and managing grant funded programs, achieving grant objectives and deliverables, and utilizing grant funding to further enhance technical capacity within the Tribe.

Klamath River Tribes and California EJ Pilot Project

In a 2006 proposal to the State Water Quality Control Board for an Environmental Justice Pilot Project, the six federally recognized Klamath Basin Tribes stated:

The Klamath River is a valuable ecological resource to the states of California and Oregon. The Klamath River and the resources it provides serve as a common cultural, spiritual, and social link between all Klamath Basin Tribes.

In pre-Contact times, the tribes on the Klamath managed and utilized the fishery as a primary source of sustenance and the fishery was the basis of the Klamath River economy. Even the location of tribal communities was determined by the significance of salmon and the fishery to these tribes. The federal government considered the significance of the subsistence fishery in determining the location of reservations and rancherias.

During the cannery period, tribal people continued to make their living from the fish that the River provided. Even with significant declines in salmon populations returning to the Klamath since the construction of the Klamath Project dams, the fishery remains a primary part of the tribal economy and source of sustenance for the tribes that still have access to fish.

It is significant to note that some Klamath Basin Tribes have lost their entire tribal salmon fishery. The primary reason for the loss is the construction of dams that completely block fish access to the upper Klamath, once a prime salmonid spawning area.

The dams also degrade Klamath River water quality resulting in a major impact to the health of the watershed. The cumulative impacts of the dams has caused a significant decrease in the number of salmon that return each year. California Klamath Basin Tribes have experienced a dramatic decline in their subsistence and commercial fisheries as a result of degraded water quality, including increased water temperature, algae and bacteria growth, high pH, and deadly dissolved oxygen levels.

In order to better manage the Klamath River and the resources that it provides, this proposal will rely on Government Code § 65040.12, which describes “Environmental Justice”.

Environmental justice is defined by California statute as,

“The fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” (Gov. Code. §65040.12).

Given the mandates of this Section, it is critical that any environmental justice project for the Klamath River address the significance of salmon and other river resources to the traditional life ways and contemporary cultures of Klamath Basin Tribes. This should be accomplished through the identification and development of criteria to protect, restore, and enforce Native American Cultural and Subsistence Fishing Beneficial Uses for the Klamath Basin Tribes.

The tribal governments located in the Klamath Basin take the position that the issues of water quality and the impacts of dams on the traditional diet, traditional subsistence, and the continuation of tribal culture (spiritual, ceremonial, and resource uses) of the Klamath River and its tributaries must be a priority for this project if the mandates of Section 65040.12 are to be heeded and established Beneficial Uses are to be protected, restored, and enforced. A meaningful environmental justice project must address the cumulative impacts of degraded water quality not only on Native American Cultural and Subsistence Fishing Beneficial Uses, but also on the physical health of tribal people due to the decline of salmon and steelhead, and the loss of these fish in their daily diet.

The tribal governments and their people are united in their commitment and determination to protect what remains of the fishery and restore to historic levels river health, biodiversity, and the fishery (salmon, steelhead, sturgeon, lamprey, and suckers).

Given the language of Gov. Code § 65040.12 it is important that the Klamath Basin Tribes, through their respective tribal governments, take a lead role in developing the research design, methods, and implementation strategies for any pilot project proposal for environmental justice being proposed by the SWRCB for the Klamath River watershed.

The Klamath Basin Tribes agree that the Klamath River is an excellent choice for an environmental justice pilot project by Cal/EPA and the SWRCB. In order for this project to adequately identify and design both a methodology and implementation strategy for meeting the stated goals of the Cal/EPA environmental justice policy, then it must enable tribes to take the lead in the process, particularly in identifying needs, goals, methods, and implementation of any such project.

The Klamath Basin Tribes have historically been at a disadvantage while participating in the process surrounding the re-licensing of the Klamath Hydroelectric Project. Internal

capacity, lack of funding, limitation in staff numbers, and travel expenses are all factors that inhibit fair participation by the tribes. In contrast, federal, state, and local agencies have staff and funding for their representatives to participate in these processes. Industry and special interest groups also have more resources and expertise at their disposal during this process.

Furthermore, while other interest groups have benefited greatly from the development of the Klamath River, the tribes have not realized an economic benefit, nor have they realized a benefit from the energy generated by the hydro-electric operations, or agriculture. In fact, the negative impacts of these developments have proven to be detrimental to tribal interests.

It is important to note the social, cultural, economic and health issues that impact these tribal communities as a direct result of the loss and/or decline of their traditional fisheries, degraded water quality, and the disruption of a naturally functioning watershed and ecosystem by the construction of the Klamath dams.

It is important to recognize that the Klamath Basin Tribes have all paid the highest socio-economic, cultural, and related health costs resulting from land and water management decisions that have led to adverse cumulative impacts on water quality and watershed health.

Klamath Basin Tribes have suffered the highest impacts as demonstrated in the loss or decline of their fisheries, their traditional diet, and their ability to conduct ceremonies and practice traditional culture and spirituality in harmony with nature and the historic Klamath Basin ecosystem.

There is an intrinsic relationship between the overall ecological health of the Klamath River and the physical, cultural, and economic health of the Klamath Basin Tribal communities. The fundamental goal of this project must be the overall restoration of Tribal-specific Beneficial Uses of Klamath River Basin and related fisheries and cultural resources.

California State Water Resources Control Board

The proposal from the Tribes resulted in a final scope of work for the EJ project prepared by the State Water Resources Control Board:

Scope of Work for Klamath River Watershed

Environmental Justice Pilot Project

August 16, 2006

The Klamath River is a valuable ecological resource to the states of California and Oregon. For the tribes of the Klamath, the river is the foundation of tribal culture, spirituality, subsistence, and traditional and contemporary economy. The Klamath River

Basin also provides important spawning habitat for Chinook Salmon and other fish species.

The Klamath River is in a state of decline, in which impaired flows, disease, toxic algal blooms and diminished habitat have led to loss of the anadromous fishery and significant impact to the lives, economy, health and traditions of the Klamath River tribes.

These impacts to the Klamath River have also had a significant affect on salmon fishing and have led Governor Schwarzenegger, on June 6, 2006, to declare a state of emergency for Chinook Salmon in the Klamath River Basin. The disaster declaration states, in part:

WHEREAS Klamath River Basin Chinook Salmon have been significantly impacted by poor ocean conditions, drought, water management, water quality, water flows, disease, and the elimination of access to historical spawning habitat; and

WHEREAS restoration of habitat and improved water quality and flows are critical to restoring an environment suitable to the long-term sustainability of the Klamath River Basin Chinook Salmon and other anadromous fish species; and

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, find that conditions of disaster or of extreme peril to the safety of persons and property exist within the California counties of Monterey, Santa Cruz, San Mateo, San Francisco, Marin, Sonoma, Mendocino, Humboldt, Del Norte, and Siskiyou due to the poor ocean conditions, drought, water management, water quality, water flows, disease, and the elimination of access to historical spawning habitat and resulting from the significant restrictions that have been imposed on the State's salmon fisheries. Because the magnitude of this disaster will likely exceed the capabilities of the services, personnel, and facilities of these counties, I find these counties to be in a state of emergency, and under the authority of the California Emergency Services Act, I hereby proclaim that a State of Emergency exists in these counties.

The decline of the salmonid fishery in the Klamath River has altered the diet of each of the tribes along the river and its tributaries. For example, traditional consumption of fish by the Karuk tribe was historically estimated at 450 pounds per person per year, while in 2003 the Karuk people consumed less than 5 pounds of salmon per person, and in 2004 less than ½ pound per person was consumed.

The Klamath River Basin is home to the largest population of Native Tribes in California. Tribal groups depend on the Tribal Trust species of the Klamath River for subsistence fishing purposes. The Trust species include, but are not limited to: Coho Salmon, Chinook Salmon, Steelhead Trout, Pacific and non-anadramous Lamprey Eel, Sturgeon, and Eulachon. Sufficient numbers of Trust species must be maintained to sustain the primary dietary needs of the Klamath Basin Tribes. The federal allocation of salmon fishery to the Klamath Basin Tribes is 50% of the total available harvest. (50 CFR 661).

Sufficient habitat and suitable water quality is necessary to provide numbers of Tribal Trust species adequate to support the dietary needs of the Klamath River Basin tribal members.

The decrease in abundance and availability of traditional foods, including the Tribal Trust species, is responsible for many diet related illnesses among Native Americans including diabetes, obesity, heart disease, tuberculosis, hypertension, kidney troubles and strokes. These conditions result from the lack of nutrient content specific to traditional foods such as salmon, as well as from the decrease in exercise associated with fishing and gathering food. The estimated diabetes rate for the Karuk Tribe is 21%, nearly four times the U.S. average and the estimated rate of heart disease for the Karuk Tribe is 39.6%, three times the U.S. average.

The destruction of the Klamath River fishery has led to both poverty and hunger. Prior to contact with Europeans and the destruction of the fisheries, the Karuk, Hoopa and Yurok tribes were the wealthiest people in what is now known as California. Today they are amongst the poorest. This dramatic reversal is directly linked to the destruction of the fisheries resource base.

The devastation of the resource base, especially the fisheries, is also directly linked to the disproportionate unemployment and low socio-economic status of Karuk people today. Before the impacts of dams, mining and over fishing the Karuk people subsisted off salmon year round for tens of thousands of years. Now poverty and hunger rates for the Karuk Tribe are amongst the highest in the State and Nation. The poverty rate of the Karuk Tribe is between 80 and 85%. The poverty rate is even higher for tribal members living in Siskiyou County (Norgaard 2005 Exec Summary).

The degradation of these uses threatens the very existence of these tribes. Restoration and protection of these uses is essential to preserve the health and culture of the Tribes.

Pierce, 2002 (p.7-2) states:

Salmon are food, culture, and religion to the Klamath River tribes. Religion, lore, law, and technology all evolved from the Indians relationship with the Salmon and other fish of the Klamath River Basin. The Supreme Court has recognized the importance of salmon to the Northwest Tribes such as those in the Klamath River Basin, concluding that access to the fisheries was not much less necessary to the existence of the Indians than the air they breathe.

Dr. Thomas King and Klamath Riverscape

In 2004, anthropologist Thomas King conducted a study of the Klamath Riverscape in a report entitled *First Salmon*. This study evaluated the Klamath River as a Traditional Cultural Property and Cultural Riverscape for its potential eligibility for inclusion on the National Register of

Historic Places for the Klamath River Inter-Tribal Fish and Water Commission. In this report, Dr. King also evaluates the proposed re-licensing of the Klamath Hydro-Electric Project under a range of federal environmental laws. In his evaluation of Environmental Justice Executive Order 12898 he concludes:

Executive Order 12898 on “environmental justice” calls upon Federal agencies to do what they can to prevent disproportionate adverse environmental impacts on low income and minority populations. The tribes – both those that are federally recognized and those that are not – constitute such populations.

Guidance from the Council on Environmental Quality, Environmental Protection Agency, and Department of Justice indicates that agencies are to comply with Executive Order 12898 by identifying low income and minority communities that might be affected by their actions, by involving such communities in their environmental review work, and by working with such communities to identify and, if possible, avoid or mitigate disproportionate adverse effect on aspects of the environment that affect or are important to low income and minority people. In the case of the Klamath Riverscape, all the tribes (both federally recognized and non-recognized) are minority communities, and probably low-income as well.

It is evident from the preceding discussion that the dams contribute to a pattern of cumulative effects on the cultural values and interests of the tribes – aspects of the environment that are of great importance to them. This would be the case even if the Klamath Riverscape were found ineligible for the National Register, because whatever the significance of the riverscape in the eyes of the National Register, to the tribes it is utterly central to their cultural identity.

This being the case, it is equally evident that the effects of the dams, together with the other contributors to the Klamath’s plight, fall disproportionately on the tribes. While others live within the riverscape, travel through it, fish in it and hunt in it, only the tribes have an intimate cultural connection to the riverscape going back to time immemorial. Only to the tribes is the riverscape the core of their cultural identity. Maintaining and reinforcing this association is particularly important today, as the tribes work to reestablish their traditional belief systems and ways of life.

Yurok Comments on FERC EIS

In 2006 the Yurok Tribe provided extensive data and comments on the Draft EIS prepared by the Federal Energy Regulatory Commission (FERC) on the Klamath Hydro-Electric Project Relicensing Application filed by Pacificorp. Portions of these formal comments filed by the Yurok Tribe related to Environmental Justice issues and the inadequacy of the socio-economic analysis in the DEIS. Excerpts from these comments are provided in the remaining pages of this Chapter.

Socioeconomic Resources

A legitimate socioeconomic impact assessment of the Klamath Hydroelectric Project and current conditions must determine how the proposed *federal action* affects the lives of current and future residents of the impacted area. PacifiCorp selected a 5-mile and 50-mile corridor as the study areas identifies for analysis under the National Environmental Policy Act (NEPA), which effectively diluted the representation of Tribes that live on the Klamath River and its tributaries and distorted the impact the Klamath Hydroelectric Project has on those Tribes. A socioeconomic impact assessment must evaluate the impacts of the proposed *federal action* on low-income and minority populations. The analysis of impacts on low-income and minority populations must address both specific/direct and cumulative effects of the project on the populations' demographics, employment, income levels, aesthetic environments and community-specific social, health, and economic conditions. The FERC EIS failed to adequately assess or consider any of those criteria, particularly for their impacts on the Yurok Tribe, Yurok Indian Reservation, or other Native American tribes within the basin and watershed.

The National Environmental Policy Act mandates that the Lead Agency follow a valid, established, and legitimate scientific assessment and process for insuring NEPA compliance and considering the impacts and cumulative effects of the proposed federal action and any alternatives. Section 4332 of NEPA states:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The NEPA process is intended to promote excellent decision-making by federal agencies. It is intended to be interdisciplinary in scope. It requires compliance with all applicable federal and state laws. The Lead Agency cannot make any determination concerning compliance with federal and state laws if the necessary data have not been collected, and the necessary studies have not been conducted. The FERC EIS was fatally flawed because it did not contain the data necessary to identify and assess compliance with state and federal laws based on the Klamath Hydroelectric Project's effects on Native American tribes, reservation communities, and tribal trust resources.

The federal government, specifically those federal agencies involved in the preparation of the Secretarial Determination Overview Report and the associated NEPA analysis being conducted for the current proposed action, must fulfill its responsibilities under NEPA and to federally recognized Indian Tribes, especially to the Yurok Tribe; a tribe that has been undergoing active social, cultural, economic, and political restoration as a result of the Tribe's reorganization following the Hoopa-Yurok Settlement Act of 1988.

In 2006, out of concern over the lack of a legitimate socioeconomic analysis of the dams' impacts on Native American communities, the Yurok Tribe conducted a preliminary socioeconomic survey. The Tribe performed this survey as a preliminary way of identifying some of the potential socioeconomic impacts of the Project on the Yurok people. Because the Tribe recognizes the significance of these issues and understands the need for the Department of the Interior to have sufficient reliable information necessary to make a balanced and informed analyses under NEPA and for the Secretarial Determination Overview Report, the Tribe is providing key data and findings from this 2006 study in this report. Some of the key findings of this study, The Yurok Tribe's *Healthy River, Healthy People Traditional Foods Survey* are presented in the following comments. As these data and analyses will show, the FERC's socioeconomic data and analyses as presented in the Final EIS were biased and misrepresented or ignored socioeconomic impacts of the Klamath Hydroelectric Project on the Yurok Tribe, and Native American communities in general. This analysis was also submitted to the FERC in formal comments submitted by the Yurok Tribe on the Draft EIS to the formal FERC record in a separate filing. This 2006 study and the following data and findings have direct bearing on the Secretarial Determination Overview Report and the NEPA analysis currently underway. It is being submitted to the Bureau of Indian Affairs (BIA) due to its relevance and bearing on issues of tribal trust responsibilities of the federal government and its agencies.

Executive Order 12898 on Environmental Justice requires all federal agencies to consider the impacts of their actions on low-income and minority populations. Native American communities and Tribes are by all definitions low-income and minority populations. Federal and state laws, statutes, and government policies on Environmental Justice (EJ) that must be considered in the current NEPA and CEQA analysis and the Secretarial Determination Overview Report also include:

Federal Environmental Justice:

- Constitution of the United States;
- Title VI of the Civil Rights Act of 1964 (42 USC sec. 2000 et seq.) -Non discrimination in programs with Federal Funds;
- 40 CFR 7.35 (No disparate impacts from programs with Federal funds); and
- Executive Order 12898 (Established Federal EJ program).

State Environmental Justice:

- California State Constitution;
- Government Code section 65040.12 (Definition of EJ and designation of OPR as coordinating agency for EJ);
- Government Code section 65040.2 (requiring OPR to develop EJ guidance for General Plan); and
- Public Resources Code § 71110 et seq. (Established CA EJ program).

California Public Resources Code § 71110 et seq:

71110. The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following:

- (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
- (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.
- (c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.
- (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
- (e) Coordinate its efforts and share information with the United States Environmental Protection Agency.
- (f) Identify differential patterns of consumption of natural resources among people of - different socioeconomic classifications for programs within the agency.

The socioeconomic analysis in the FERC EIS failed to present any evidence of tribal consultation in the NEPA process by the FERC on Project impacts on the Yurok Tribe. The relationship between the United States and Indian tribes is defined by treaties, statutes, and

judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum, departments and agencies of the Executive Branch have been directed to consult with federally recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes, in a manner that recognizes the status of the tribes as sovereign governments. Some applicable statutes on the federal responsibility regarding government-to-government consultation with Tribes include:

- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (issued November 6, 2000);
- Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (issued May 14, 1998);
- Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments (issued April 29, 1994), reprinted at 59 Fed. Reg. 22,951; and
- Executive Order 12875, Enhancing the Intergovernmental Partnership (issued October 26, 1993).

In order for the Lead Agency, the BIA, or the Secretary of the Interior to make an accurate and valid determination of the current conditions on tribal trust resources, it must engage in meaningful consultation with Tribes, particularly on the design and implementation of research used to identify and assess Project impacts on tribal communities, tribal governments, tribal economies, and reservation communities. As the final FERC EIS illustrates, this consultation has yet to occur. Further, the socioeconomic analysis in the EIS makes it evident that PacifiCorp failed to make a valid or defensible effort to assess Project impacts on the Yurok Tribe, the YIR, and the Yurok People who have born the disproportionate costs of the Klamath Hydroelectric Project in the loss of many tribal trust resources, tribal trust species, cultural, traditional and ceremonial resources, traditional subsistence resources, and other significant tribal trust resources on which the Yurok Tribe relies for its survival, restoration, and recovery from more than one hundred years of cultural genocide, racism, oppression, and injustice that continues to affect the Tribe through the present-day.

Restoration of the Klamath River, its species and its fishery is an appropriate first step to begin to mitigate the decades of trauma and injustice inflicted upon Klamath River tribes, and the Yurok Tribe in particular. In fact, the Klamath Watershed is one of the few areas where that which was taken from the Yurok people can be restored. Klamath River and Basin Tribes have historically paid, and continue to pay the highest, and most adverse social, cultural, and economic costs for the Project. The failure of the FERC EIS to address these disproportionate impacts on tribal communities invalidates some of the conclusions in the FEIS. Therefore, the BIA cannot simply rely upon the FERC EIS findings specific to Environmental Justice and Tribal Trust issues.

Affected Environment

Yurok ancestral territory lies entirely within Humboldt and Del Norte Counties. The aboriginal territory used by the Yurok Tribe extended into adjacent counties. Today, the Yurok Indian Reservation (YIR) encompasses one mile on either side of the Klamath River from the Mouth at the Pacific Ocean upstream 45 miles, extending though both Del Norte and Humboldt counties. As demonstrated in the previous Yurok Tribe submissions (Sloan 2003, Gates 2003, King 2004) to the FERC, the center of Yurok culture and life has always been, and continues to be, the Klamath River. The Klamath River is the common thread that unites and connects all Klamath River Basin Tribes, in spite of distinct histories, cultures, languages, and governments.

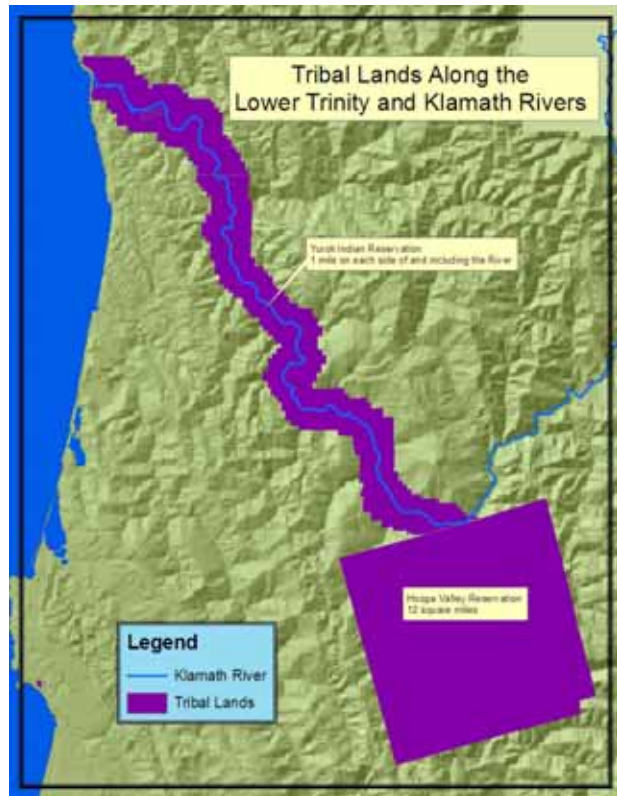
The Yurok relationship to the Klamath River has been well-documented for the purposes of evaluating current conditions and potentially effected tribal trust resources (Sloan 2003). Abundant data exist within peer reviewed and published literature that document the Yurok reliance on the Klamath River and its abundant resources for their cultural, spiritual, economic, and political survival and for their prosperity and well-being. Information on this data (archival, historical, primary, and ethnographic documents as well as academic studies and peer-reviewed literature) have already been provided to PacifiCorp and the FERC, yet none of this information was utilized in the Final EIS. The FERC EIS failed to adequately acknowledge the previous submissions to the FERC that address the socioeconomic and cultural impacts on the Yurok Tribe resulting from the operations of the Klamath Hydroelectric Project, particularly the impacts on those tribal members who live within Yurok ancestral territory. Furthermore, the EIS mischaracterized the demographic and economic realities of Native American communities within the Klamath River Basin and watershed, the impact of the loss of the Tribe's subsistence and commercial fishery on the tribal and reservation communities and economies, and the significance of the Klamath River and the health of the Klamath River ecosystem to the past, present, and future of Yurok People.

The BIA and the Secretary of the Interior need to address the fact that the current conditions of the Klamath Hydroelectric Project have had a disproportionate and adverse impact on those Native American communities that have always relied, and continue today to rely upon the Klamath River. Executive Order 12898 on Environmental Justice directs all federal agencies to consider the impacts of their actions on low-income and minority populations. Furthermore, California Environmental Justice law requires that California agencies consider the impacts on differential rates of consumption for low-income and minority communities. The FERC EIS failed to accurately portray or assess the impacts and cumulative effects of the Project on Native American tribes, low-income and minority communities that rely upon the Klamath River and its resources for their subsistence, culture, spiritual traditions and practices, and local economies. These tribal communities experience significantly higher rates of food insecurity, poverty, and unemployment than non-Indian communities within the counties included in the study area (Fig.1-5). The FERC must consider the impacts of the Project, and any application for continued operations, on the Yurok Tribe, especially the impacts on Tribal Members

residing on the Reservation and within the two counties (Humboldt and Del Norte, CA) that contain the Yurok Ancestral Territory.

PacifiCorp did not provide adequate data or analysis for the FERC to make an accurate assessment on the determination of the affected environment. It is the position of the Yurok Tribe that PacifiCorp and the FERC did not adequately fund or conduct the necessary socioeconomic impact assessments, environmental justice analyses, cultural resources studies, or cumulative effects analyses and as a result, the information provided to the FERC by PacifiCorp was both flawed and misleading and resulted in inadequate analysis in the Final FERC EIS. It is the responsibility of the Department of the Interior, specifically the Secretary of the Interior to consider these omissions and following data in the final assessment that will lead to the Secretarial Determination for the current proposed action to remove the dams and implement the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSA).

The BIA is evaluating the effects of current conditions and the proposed Action (to remove the dams and implement the KBRA and KHSA) on tribal trust resources and the federal government's trust responsibility the effected federally recognized Indian Tribes. The Yurok Tribe has maintained and continues to maintain that impacts of the Klamath hydroelectric Project dams extend downstream of the dams to the Klamath River mouth



the Pacific Ocean and beyond. For the Yurok Tribe, the affected environment is the Tribe's ancestral territory as well as those areas within the external boundaries of the YIR. The federal government has a trust responsibility for reservation and non-reservation trust lands; all of which are lands held in trust for the Tribe by the US Department of Interior. The FERC EIS and PacifiCorp failed to recognize the unique status of the Yurok Tribe, whose reservation occupies both sides of the Lower Klamath River (part of PacifiCorp's 'downstream subregion'), a region that suffers the cumulative adverse effects of everything that occurs upstream in the watershed. The FERC EIS failed to assess these impacts, or even acknowledge the overwhelmingly disproportionate adverse effects upon Yurok Tribe and its members. The FERC EIS not only failed to do this, but relied entirely on information provided by PacifiCorp that appears to be presented in an attempt to deliberately mask the socioeconomic realities of the YIR and

the Yurok Tribe and to avoid addressing the Project impacts on the Tribes within the region. The economic conditions on the Reservations in the downstream subregion are significantly worse compared to those in the downstream counties; likewise, Tribes suffer significantly greater poverty and food insecurity than the surrounding non-Indian communities in the downstream subregion. Thus, economically disadvantaged Native American communities have borne the disproportionate socioeconomic costs of the Project resulting in the decline of the fishery and the decline or loss of numerous traditional cultural species resulting from altered riparian conditions caused by the Klamath Hydroelectric Project dams and current conditions.

Demographic Characteristics

The FERC EIS failed to consider the historical, cultural and economic geography of *tribal lands* within the Klamath Watershed. By using five- and fifty-mile corridors, the analysis offered by PacifiCorp diluted the representation of Tribes. Further by using county, city and census-designated-place data to describe the economic context of the project, the FERC EIS grossly underestimated the levels of unemployment, poverty and food insecurity in Indian Country—conditions that increased abundance of salmon and other fish species would *directly* ameliorate through increased subsistence and commercial harvests. The FERC EIS did not include data that included the socioeconomic and cultural impacts of the Klamath Hydroelectric Project on Tribes and Tribal Lands within the PacifiCorp-designated downstream five-mile corridor, nor was any economic, social or cultural justification given for using a five-mile corridor in their socioeconomic analysis. Given that both downstream and upstream Reservations are immediately adjacent to the Klamath River and its tributaries, it difficult to understand why an analysis of the socioeconomic impacts of the Klamath Hydroelectric Project on the Tribes, Reservations and Trust Lands was missing from the FERC EIS, even though it was provided to the FERC in formal comments on the Draft EIS in 2006.

The earliest historic accounts of non-Indian encounters with the *Poh-lik-lah*, the Down-River-People, the name the Yurok People used for themselves, document in great detail the elaborate cultural, spiritual, subsistence, and economic importance of the Klamath River and its abundant species of salmon, steelhead, pacific lamprey, eulachon, and sturgeon to the Tribe. As previously summarized in the Sloan (2003) Ethnographic Inventory, the Klamath River has always been the center of Yurok life and culture. This traditional life and culture continues today, in spite of the economic, social and cultural dislocation that the Tribe has experienced over the past 150 years. Yurok People continue to live, pray, practice, fish, and rely upon the Klamath River. The Yurok culture or Tribal Members' desire to continue a traditional way of life persist, but the loss of economic viability as a result of dramatically declining fish populations threatens the ability of the Yurok Tribe to continue practicing their traditions.

The FERC EIS failed to adequately address the socioeconomic impacts of the loss of the commercial fishery on the Yurok Tribe, but also fails to adequately assess the socioeconomic impacts resulting from the decline of a viable subsistence fishery. The Yurok Tribe is submitting this data to illustrate the importance of the subsistence fishery

to the Yurok Tribe, particularly for those living on the YIR and within Humboldt and Del Norte Counties. Loss of an abundant and reliable subsistence harvest compounds the extremely high levels of food insecurity experienced within these Yurok communities (Fig. 10).

Employment data and analysis used in the Secretarial Determination Overview Report and associated NEPA and CEQA analysis currently underway must clearly identify the data specific to the Yurok Tribe, the YIR, and other Native American communities within the Klamath River Basin. Tribe-specific data should then be compared against the county and state employment data. Because county-specific data for Tribes is not available in the US 2000 Census⁴, these county-specific data will need to be collected before any appropriate analysis can be performed. Using available Tribal, BIA Labor Force, and Census data, the Yurok Tribe Environmental Program performed a preliminary analysis of the economic conditions of Tribes and reservations in the downstream subregion to illustrate the disparity between tribal communities and non-Indian sectors within the 5-mile corridor. Although the Yurok Tribe experiences adverse and disproportionate impacts from the current operations, data and analysis fail to address the impacts of the Project on downstream tribal communities who rely on a healthy fishery for their subsistence, cultural, spiritual, and economic survival and prosperity. The FERC EIS used county, city and census-designated-place data while ignoring the cognate 2000 census data available for reservations and non-reservation trust lands. There is no excuse for excluding sources of data on affected Tribes, such as the data from the 2000 US Census, from this analysis or any analysis currently underway for determining the effects of current conditions on the Yurok Tribe or Yurok trust resources. The Secretary and the BIA must consider the data submitted in the following sections in its analyses and reports. The current analysis must accurately capture and evaluate the very real and cumulative adverse impacts of the Klamath Hydroelectric project on Yurok Trust resources and the Yurok people.

Population, Race and Ethnicity

The 2000 Census data on demography, race and ethnicity for the ‘downstream’ Reservations (Yurok Indian Reservation or YIR and Hoopa Valley Indian Reservation or HVIR) paint a very different portrait than the one offered by the FERC in the final EIS for the downstream subregion. Not surprisingly, 75% of the population living within these lands is designated by the 2000 U.S. Census as “American Indian alone or in combination with one or more other races”⁵. Population growth rates for the region are also distinct; based on data from the 1990 and 2000 US Census, the population of the two reservations grew by an average 46%—a significantly higher growth rate than those cited for the downstream subregion within the EIS^{5,6}.

⁴ US Census Bureau, 2006 Letter, Question Reference #061117-000054, copy available upon request

⁵ U.S. Census Bureau, Census 2000 American Indian and Alaska Native Summary Profile of Selected General Demographic Characteristics 2000
http://factfinder.census.gov/servlet/QTTable?_bm=y&-reg=DEC_2000_SFAIAN_DP1:20A|69A;&-qr_name=DEC_2000_SFAIAN_DP1&-ds_name=DEC_2000_SFAIAN&-geo_id=01000US&-lang=en&-format=&-CONTEXT=qt

⁶ U.S. Census Bureau, Census 1990 Census Summary Tape File 1 (STF 1) – 100 percent data;

http://factfinder.census.gov/servlet/DatasetMainPageServlet?_lang=en&-ts=182194946578&-ds_name=DEC_1990_STF1_&-program=

Economic Sectors

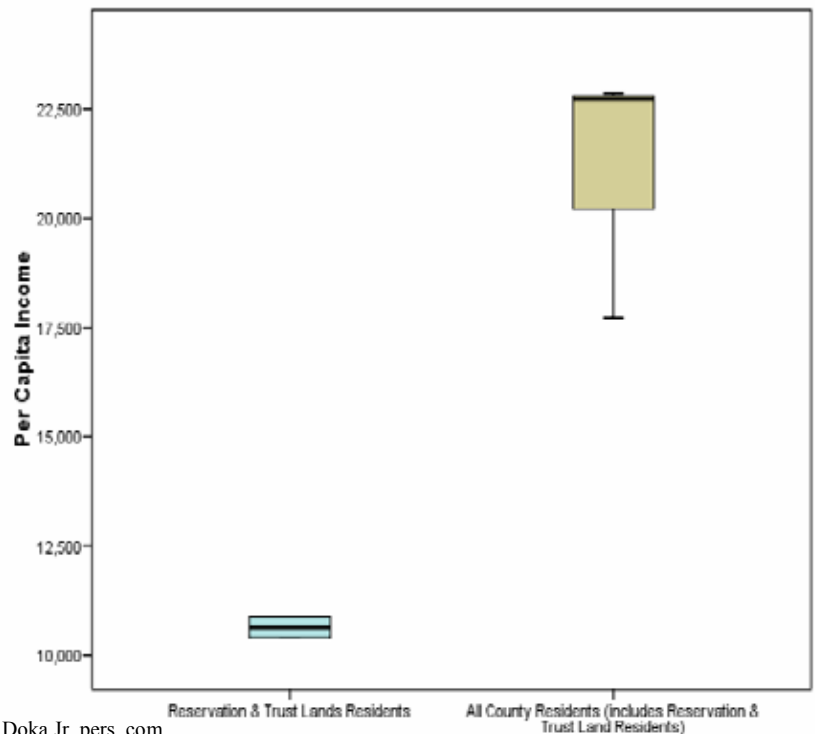
The FERC EIS failed to accurately portray the political and economic realities of tribal governments and Indian reservations. Tribal and reservation economies are unique and specific to each tribe, often operating as closed or semi-closed economic entities independent of state or county economic trends. PacifiCorp and the FERC failed to evaluate the socioeconomic impact of the Project on tribal and reservation communities within the 5- and 50-mile corridors even though there are six (i.e. Klamath Tribes, Quartz Valley Indian Tribe, Karuk Tribe, Hoopa Tribe, Yurok Tribe and Resighini Rancheria) federally recognized Indian Tribes with recognized tribal governments and within these corridors. Socioeconomic impacts of the Project on the Yurok Tribe and other federally recognized Indian Tribes must be evaluated using accurate demographic, economic, social, cultural and epidemiological data for both the YIR and the Tribe as a whole.

The following preliminary analysis was submitted as evidence that the data provided to the FERC by PacifiCorp was incomplete and misleading and resulted in a flawed analysis in the FEIS.

Employment and Income

The Tribes that live on the Klamath River have suffered and continue to suffer major losses of cultural, subsistence and commercial resources. Despite the net job growth cited by the DEIS the unemployment rate of Tribes in the downstream subregion is extremely high and significantly greater than that experienced by the counties in the downstream subregion ($G=66.77$, $p<0.001$).

Employment data for 2001 from the BIA⁷ indicate that the unemployment rate is 75% for Yurok and 40% for Hoopa Tribal Members. Comparable data for the downstream three counties in 2001 are much lower; Humboldt and Del Norte and Curry County Oregon having 6%, 8.1% and 6.9% unemployment respectively.⁸ Likewise, there is significant disparity in the median per capita income between the downstream Reservations and the counties in the downstream subregion (Fig. 3).⁹



7 Unemployment figures for Tribes (not reservation) BIA 2001 F. Doka Jr. pers. com.

8 2001 Unemployment figures for counties Bureau of Labor Statistics <http://www.bls.gov/lau/#tables>

In contrast to the figures reported in the FERC EIS, between 1990 and 2000 people living on the YIR experienced a *net increase* of 59% in employment in the agriculture, forestry, fishing, hunting and mining sector, while the HVIR saw a net decrease of 7% in the same sector comparing data in the 1990 and 2000 US Census. In 2000 this sector employed 10.7% and 6.7% of Yurok and Hoopa Reservation residents respectively. Contrary to the statement in the DEIS that “employment related to recreation and tourism is not separately reported in the census” (p. 3-474), data on employment in the “arts, entertainment, recreation, accommodation and food services” sector are reported for both Reservations in the 2000 US Census. For the YIR this sector provided 18.1% of all employment in 2000, whereas for the HVIR the proportion was lower, at 3.8%.¹⁰

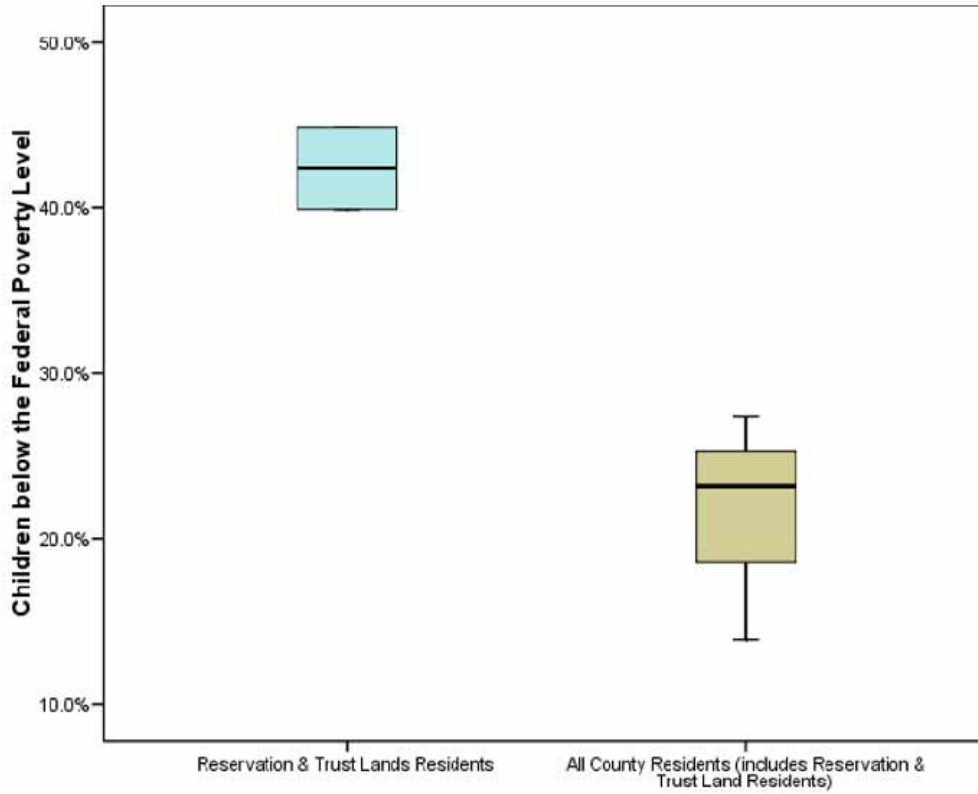
Declining fish stocks have affected all aspects of Yurok life. All the species on which Yurok People depend upon are in decline; largely because of effects the Klamath River Hydro-electric Project has had upon the fishery resource. As noted in Table 3-55 of the DEIS, the Yurok Tribe has had only minimal levels of fall Chinook commercial harvest during four of the past fifteen years. During the remaining 11 years the Yurok Tribal Council determined that the projected abundance of Klamath fall Chinook was insufficient to support a commercial fishery. For the past 15 years, the Yurok Tribe has also forgone commercial harvest of species other than fall-run Chinook (with the exception of minimal numbers of spring Chinook that were harvested during the beginning of the fall Chinook fishery). The Yurok Tribal Council has chosen not to have any commercial fisheries for other species such as spring-run Chinook salmon, Coho salmon, steelhead, lamprey, eulachon and sturgeon because of their concern regarding the status of these other species.

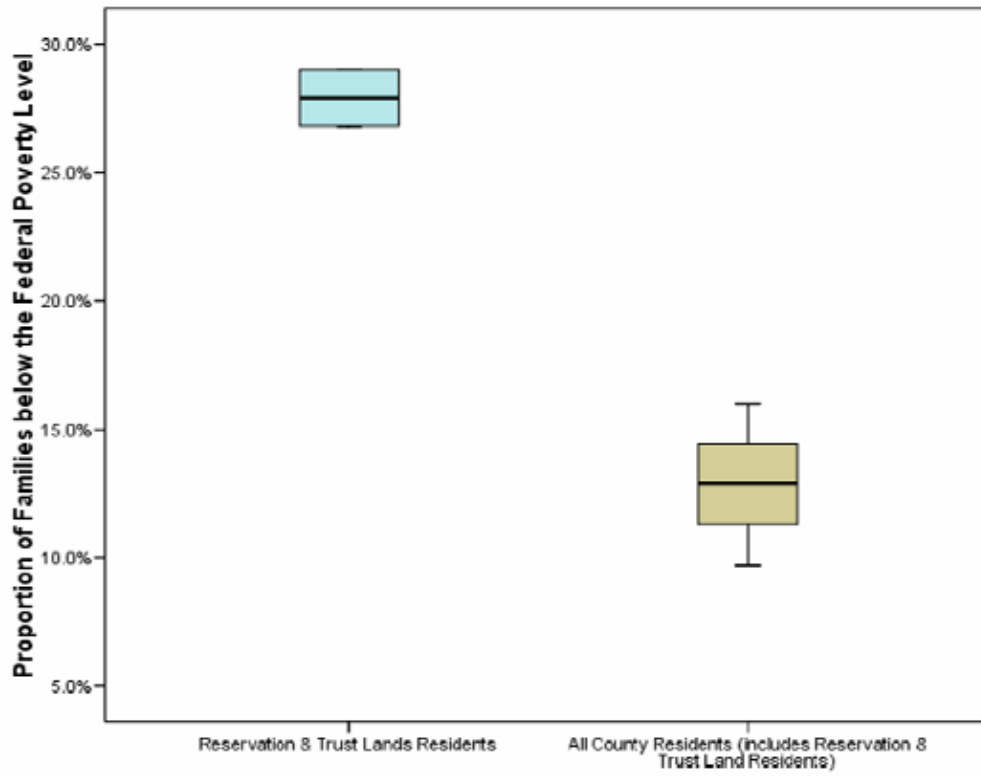
Poverty, inadequate access to traditional foods and resources, high unemployment rates and lack of food security are critical problems for the Yurok Tribe. The 2000 US Census indicates that 27% of families and 33% of individuals living on the Yurok Indian Reservation (YIR) fell below the federal poverty level in 1999¹⁰. For the Tribe as a whole, irrespective of residence location, the 2000 census data suggest that 20% of families, 25% percent of individuals and 26% of children fell below the federal poverty level¹⁰. For families with children the situation is worse: 26% of families with children under the age of eighteen and 32% of families with children under the age of five were below the federal poverty level in 1999 and 38% of Yurok families with a female head of household and no husband present fell below the federal poverty level in that year¹⁰. Figures four through six, compare the proportion of children, families and individuals living on the downstream Reservations with children, families and individuals living in the surrounding counties the downstream subregion living below the federal poverty level in 1999; in all cases, significantly greater proportion of children, families

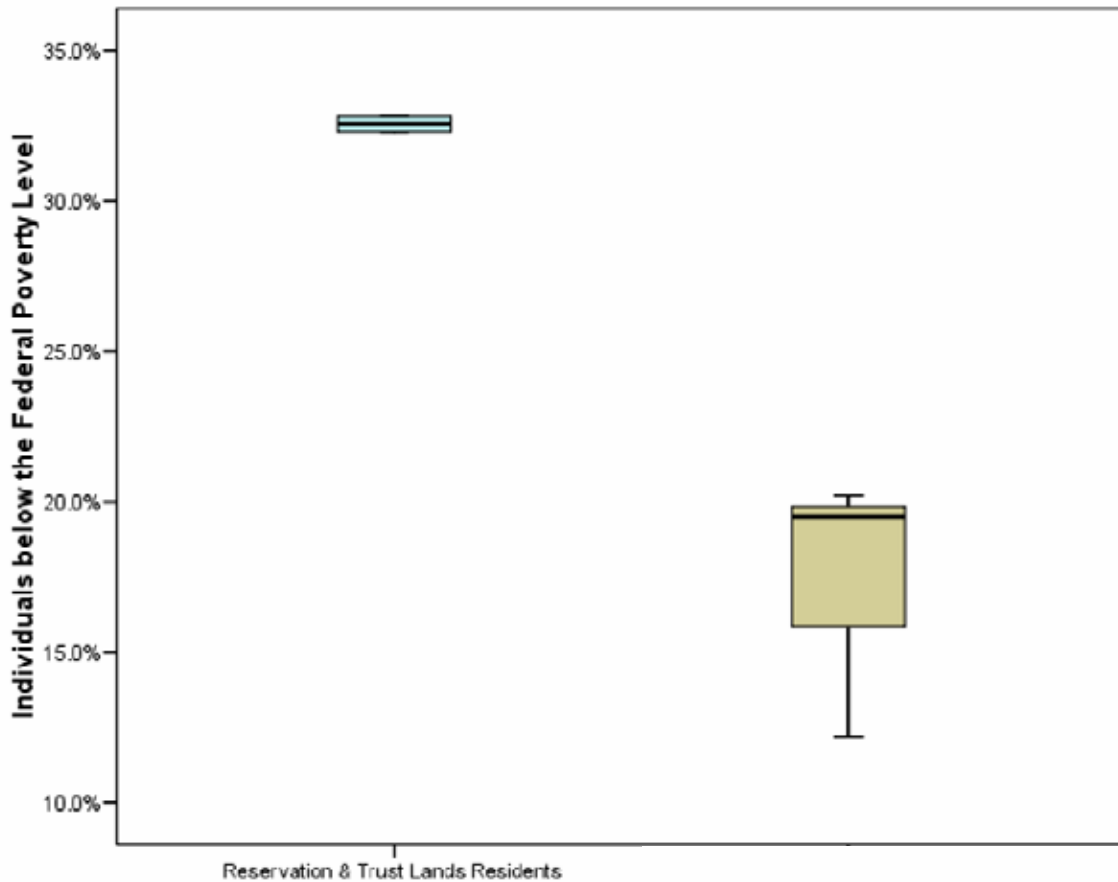
9 U.S. Census Bureau Census 2000 DP-3: Profile of Selected Economic Characteristics: 2000 Data Set: Census 2000 Summary File 3 (SF 3) - Sample Data, Geographic Areas: Humboldt & Del Norte County, California, Curry County, Oregon.

10 U.S. Census Bureau, Census 2000 American Indian and Alaska Native Summary Profile of Selected General Economic Characteristics 2000 http://factfinder.census.gov/servlet/QTTable?_bm=y&-reg=DEC_2000_SFAIAN_DP3:20A|69A;&-qr_name=DEC_2000_SFAIAN_DP3&-ds_name=DEC_2000_SFAIAN&-geo_id=01000US&-lang=en&-format=&-CONTEXT=qt

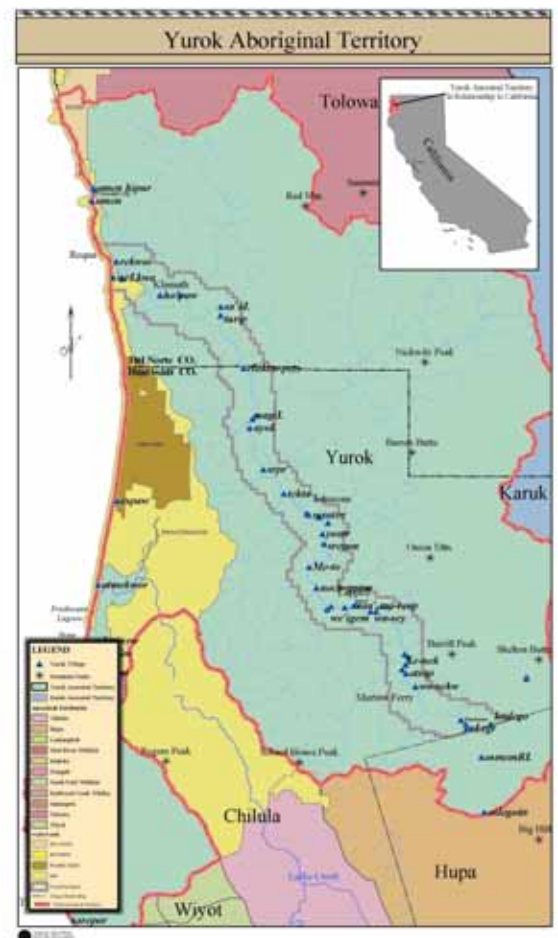
and individuals living on the downstream Reservations fall below the federal poverty limit than do the children families and individuals living in the downstream counties (chi-square, $p < 0.001$, in all cases).^{9,10}







In 2006 the Yurok Tribe circulated a survey to determine the impact of the deteriorating health of the Klamath River on the health and wellbeing of Tribal Members. The *Healthy River, Healthy People, Traditional Foods Survey* collected data on access to traditional resources, economic status, medical conditions and the influence of water quality on Tribal Members health and wellbeing. The survey was only sent to adults (i.e. individuals 18 years of age or older) and response rate was >12%. 56% of respondents lived within the Ancestral Territory (Fig. 7) and 44% lived elsewhere. There were no significant differences in age or sex between the respondents living in the Ancestral Territory and those living elsewhere



(F=0.99, p=0.32, G=0.44, p=0.51, respectively). Regardless of where they live, the majority of respondents consider the Ancestral Territory in general, and the Klamath River in particular, home. It has been less than two hundred years since the Yurok Tribe was displaced from the Ancestral Territory and the Yurok continue to rely on the Klamath River and its abundant resources for their cultural, spiritual, economic, and political survival and for their prosperity and wellbeing and so the Klamath River is home.

I was born and raised on the River. My life is woven with the river and its fish and people. If the River is sick, so am I. So are we all, because it is our spirit and strength. It is not the simple fact of eating healthy food from the River that is important... It is the knowing in my mind, heart and spirit that the River itself is whole and healthy. We are merely a reflection of the river, and will never be healthy again until it is.

(Yurok Tribal Member Survey Respondent 2006)

Preliminary analyses of household income data from the *Healthy River, Healthy People, Traditional Foods Survey* are broadly congruent with census data for the Reservation and the Tribe. Data from both the Tribe's Survey and the 2000 US Census indicate that Yurok Tribal members living in Humboldt & Del Norte Counties suffer significantly greater poverty and unemployment compared to the populations of the three counties taken as a whole. A greater proportion of Yurok Tribal Members living within the Ancestral Territory earn less than \$10,000 per annum compared to the three counties in the downstream subregion taken as a whole (G=10.25, p<0.01) (Fig. 8). Significant economic disparities also exist between Tribal Members who remain within the Ancestral Territory and those who reside outside of the Ancestral Territory (G=23.69, p<0.005) (Fig. 9). The data presented here support the common assertion by Tribal Members that they are forced by economic circumstances to move away from home.

Even though I live in town, I still live and choose to live close enough so I can go to the River whenever I choose. I participate in ceremonies on the River. If it were possible, I would live on the River, to see it and hear it and smell it every day and every night. I will not be completely healthy again until I can look out my front door at night and see the salmon moving up the River as they did when I was a child.

(Yurok Tribal Member Survey Respondent 2006)

Figure 8. Comparison of individuals earning less than \$10,000PA in the counties in the downriver subregion with Yurok Tribal Members living in the Ancestral Territory within those two counties who earn less than \$10,000 PA.

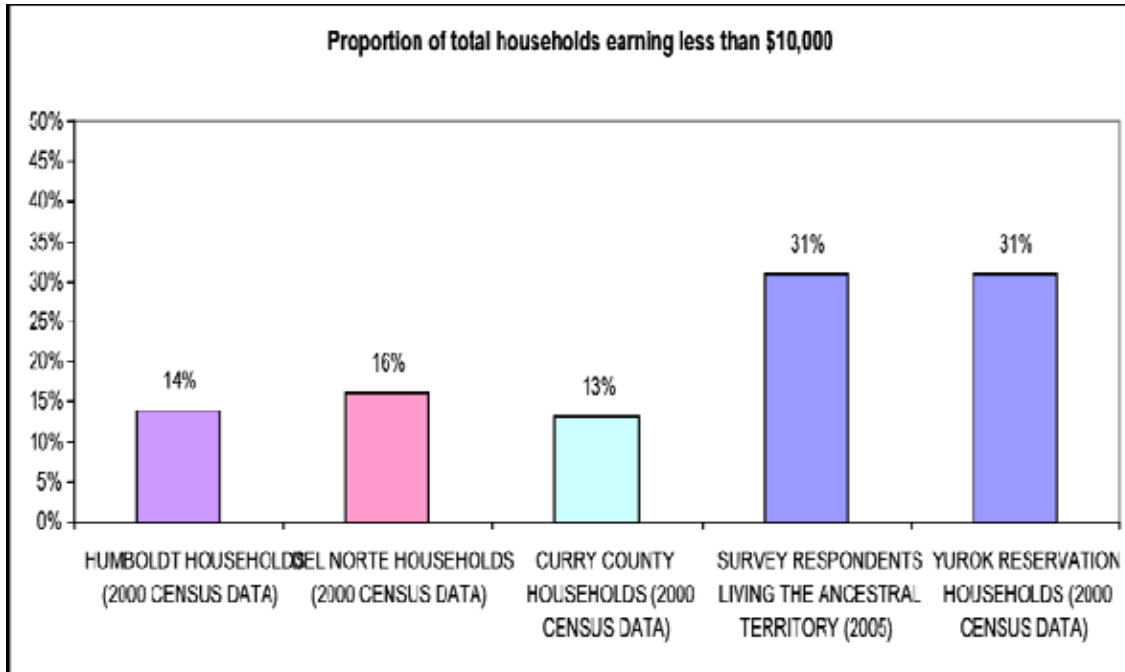
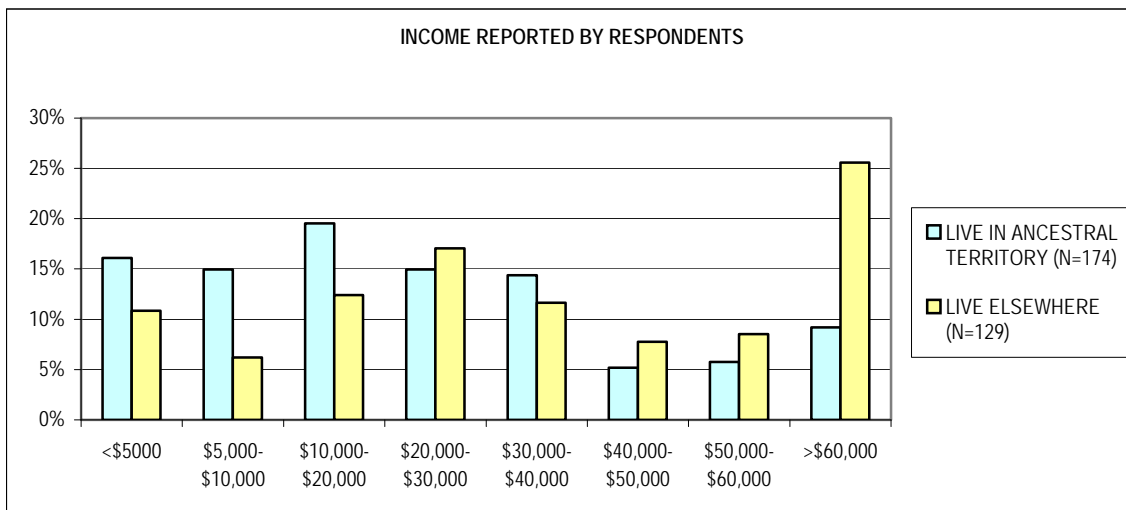


Figure 9. Comparison of income reported by survey respondents living within and outside of the Yurok Ancestral Territory



Similarly, food security continues to pose a significant problem for Tribal members. As defined by Harrison *et al.* in their 2002 UCLA Health Policy Research Brief, families and households in California are food insecure if their income is <200% of the federal poverty level¹¹. According to the 2000 US Census, the average size of a Yurok family or household is three persons.¹² If we assume that the ‘average’ Yurok family or household in 2006 also consisted of three people, the federal poverty level for that family/household in 2006 is \$16,600¹³ and 200% of the poverty level for an ‘average’ Yurok family/household is \$33,200. By the definition of food insecurity used by Harrison *et al.* (2002) 57% of Yurok families/households lack basic food security.

Respondents living within the Ancestral Territory are even more at risk: 80% lack basic food security. The 2000 Census reports that 68% of individuals living on the YIR were below 200% of the Federal Poverty Level in 1999, the survey data suggest that poverty, and with it, food insecurity has increased within the Ancestral Territory during the six years since the census was performed.

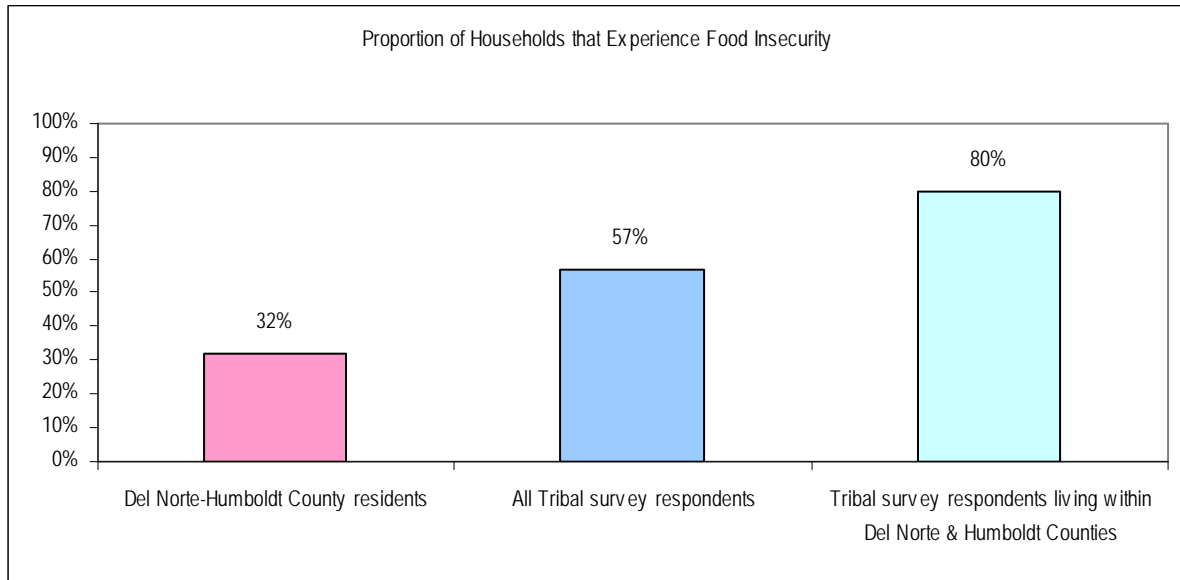
How do Tribal Members compare with the general population living within the Ancestral Territory? The UCLA study analyzed Del Norte and Humboldt Counties, together and found that, as of 2002, 32% of residents were food insecure (Fig. 10). The prevalence of hunger and food insecurity among Yurok Tribal Members residing within the Yurok Ancestral Territory in 2006 is almost three times that reported for the general population of Humboldt and Del Norte Counties in 2002.

11 Harrison, G.G. C.A. Disogra, G. Manalo-Leclair, J. Aguayo, W. Yen. 2002. Over 2.2 Million Low-Income California Adults Are Food Insecure; 658,000 Suffer Hunger. Policy Brief, UCLA Center for Health Policy Research, November 2002. Available online at <http://www.healthpolicy.ucla.edu/pubs/files/FoodInsecurity.pdf>

12 U.S. Census Bureau, Census 2000 American Indian and Alaska Native Summary Profile of Selected General Demographic Characteristics 2000 http://factfinder.census.gov/servlet/QTTable?_bm=y&-reg=DEC_2000_SFAIAN_DP1:20A|69A;&-qr_name=DEC_2000_SFAIAN_DP1&-ds_name=DEC_2000_SFAIAN&-geo_id=01000US&-_lang=en&-format=&-CONTEXT=qt

13 Federal Register, Vol. 71, No. 15, January 24, 2006, pp. 3848-3849

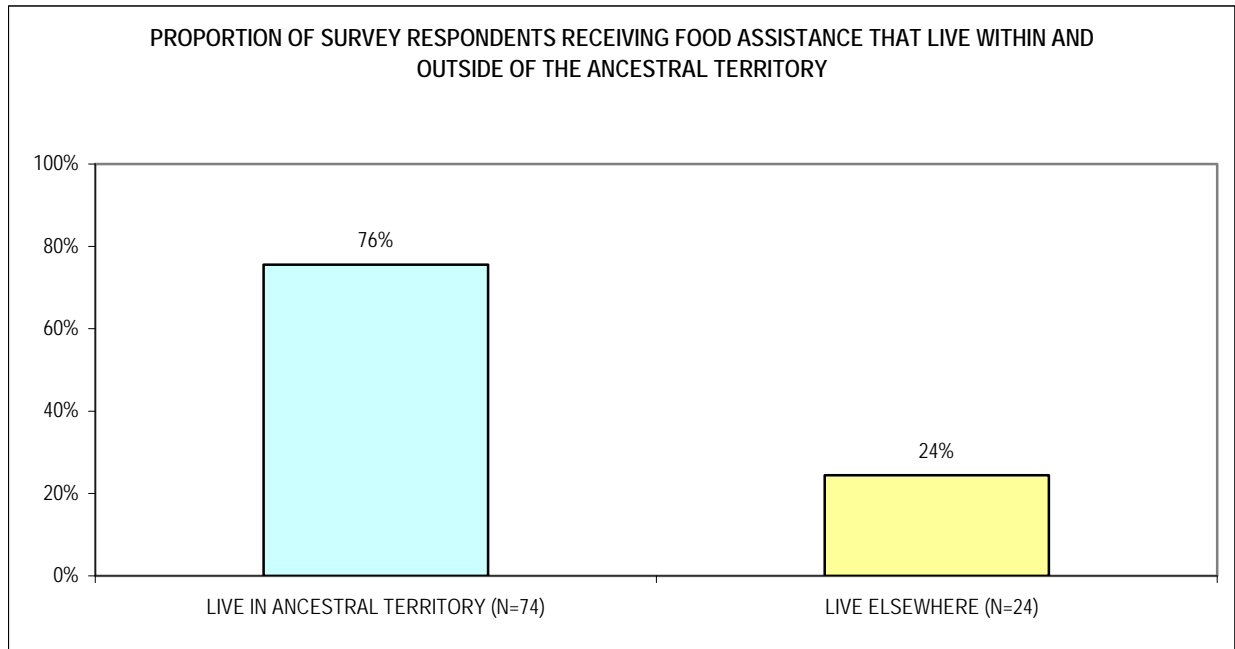
Figure 10. Proportion of households that experience food insecurity, data for Del Norte & Humboldt County residents from Harrison *et al.* 2002¹¹.



These estimates of food insecurity correlate well with the results of the survey regarding food assistance programs. Survey results indicate that 31% of the 305 respondents who answered the survey questions regarding food security receive some form of food assistance on a regular basis (compared to 57% classified as food insecure above), with the majority of aide going to respondents living within the Ancestral Territory ($G=21.12$, $p<0.001$) (Fig. 11).

This document uses respondents' reports of participation in the federal food assistance programs (Food Stamps, WIC and Commodity Supplemental Foods Program) as a surrogate variable for low income status since eligibility is directly linked to income (130%-185% of the federal poverty level). Because all individuals who are eligible for food assistance do not apply, the numbers used here undoubtedly underestimate the number of low income households within our pool of respondents. Harrison *et al.* (2002) report that, of income eligible persons in California who report hunger, less than 20% of adults participate in the Food Stamp Program and only 66% of hungry, eligible, pregnant women participate in WIC.¹¹

Figure 11. Comparison of food assistance between respondents living within and outside the Ancestral Territory.



Historically, Yurok People were able to harvest fish from the Klamath River all year-round. People harvested fall Chinook and Coho salmon during the late summer/fall; steelhead, lamprey and candle fish during the winter and spring Chinook, sturgeon and lamprey during the spring and summer. The decline in these and other river species means that the Yurok People can no longer sustain themselves from the river on a year-round basis. In any community where 80% of the people lack basic food security this loss is ruinous. For the Yurok People who are recovering from more than one hundred years of cultural genocide the loss is catastrophic. Any assessment of the impact of the current conditions on the Yurok Tribe, the federal government’s trust responsibility and any impacts of current conditions on tribal trust resources must consider these facts.

Dependence on food assistance and lack of traditional foods have been implicated in the development of a range of medical conditions.¹⁴¹⁵ Preliminary results from the Healthy River, Healthy People, Traditional Foods Survey suggest that similar patterns may exist within the Yurok Tribe. For example, the prevalence of diabetes among survey respondents 65 years and older is significantly greater among those who receive food assistance than those who do not ($G=5.64$, $p<.0.05$) (Fig. 12). In contrast, the prevalence of obesity, hypertension and heart disease and other related disorders show no significant differences between those who receive food assistance and those who do not.

14 Dillinger, Teresa L. et al. 1999. Feast or famine? Supplemental food programs and their impacts on two American Indian communities in California. *Intl. J. Food Sci and Nutr.* 50:173-187.

15 Norgaard K. 2005. The Effects of altered diet on the health of the Karuk People. A Report prepared for the Karuk Tribe of California

The prevalence of diabetes among American Indians and Alaska Natives is 2.3 times greater than that of non-Hispanic Whites and as of 2002, diabetes prevalence for American Indian and Alaska Natives as a whole was 15.3%¹⁶. Yurok Tribal Members report comparable levels of diabetes by and large, although they do report higher levels of diabetes among younger (25-30 year olds) and older (65 and older) age classes compared to the diabetes levels reported for American Indian and Alaska Natives as a whole (Fig. 13)¹⁶. Further research is needed to determine if these differences are significant and to determine the underlying factors associated with these high-than-average rates of diabetes among Yurok Tribal Members. Comments concerning the prevalence and incidence of diabetes within the FERC EIS indicate a lack of familiarity with the medical literature: Native American populations experience a disproportionately higher prevalence of diabetes than the overall US population. Contrary to statements within the FERC EIS, the increased prevalence and incidence of diabetes among the Native American population is statistically and epidemiologically distinct from that in the general US population (Fig. 14).¹⁷ These preliminary findings suggest that further investigation into the health affects associated with loss of traditional foods and other river-based resources is warranted.

16 Acton, K.J et al. 2003. Diabetes prevalence among American Indians and Alaska Natives and the overall population---United States, 1994-2002. Morbidity and Mortality Weekly Report, August 1, 2003, 52(30): 702-04.

17 Diabetes prevalence among American Indians and Alaska Natives and the overall population--United States, 1994-2002. MMWR. Morbidity and Mortality Weekly Report - 2003 - Aug 1;52(30):702-4. NB According to the Editor, this report probably underestimates prevalence of Diabetes among AN/AN population;

Figure 12. Dependence on food assistance and prevalence of diabetes among respondents 65 years and older

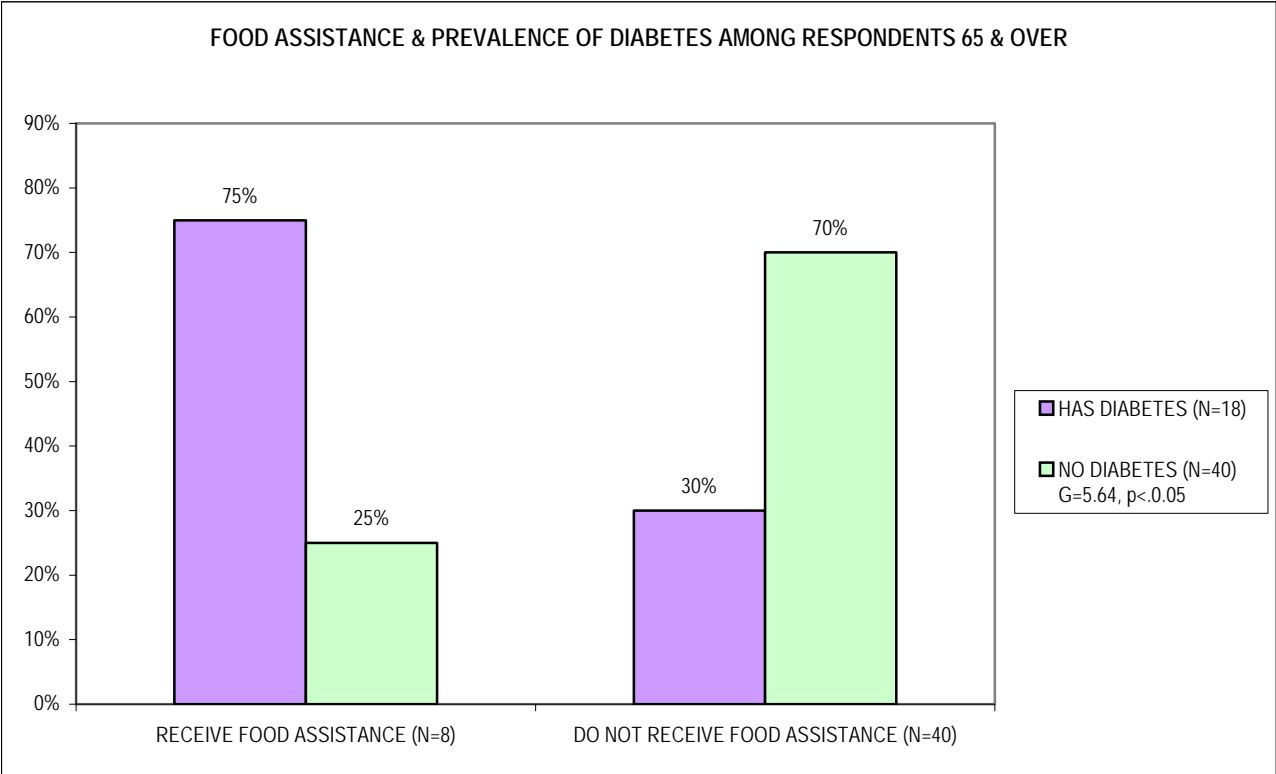


Figure 13. Prevalence of Diabetes among three populations compared within age groups. Data for AI/AN and US Population from Morbidity & Mortality Weekly Report, all differences significant (95%CI).

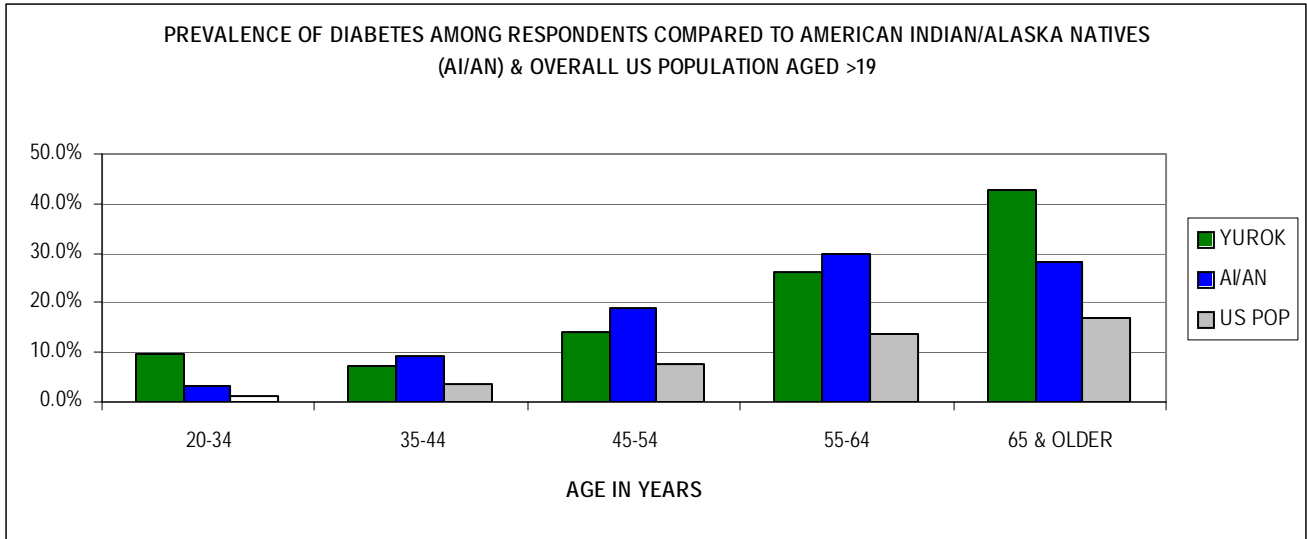
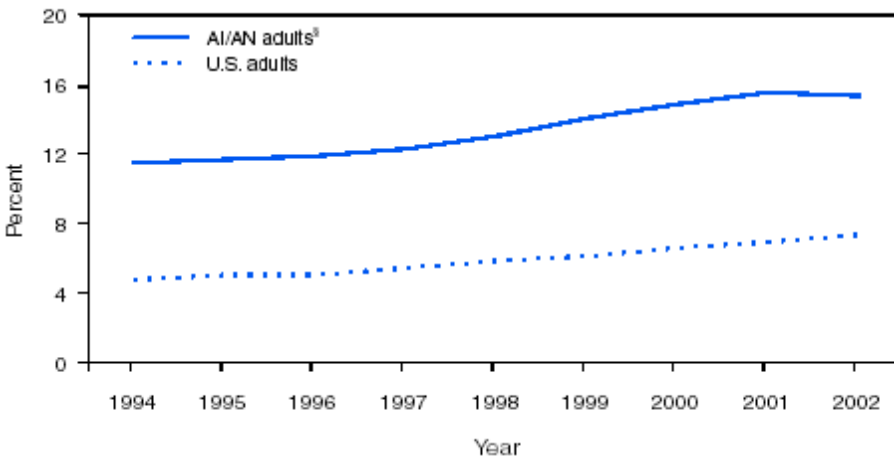


Figure 14. Prevalence of Diabetes among AI/AN and US Population taken from Morbidity & Mortality Weekly Report¹⁷

FIGURE. Age-adjusted prevalence* of diagnosed diabetes among American Indian/Alaska Native (AI/AN) and U.S. adults aged ≥ 20 years, by year — United States, 1994–2002[†]



* Based on the 2000 U.S. population.

[†] Based on Indian Health Service ambulatory patient-care data and the Behavioral Risk Factor Surveillance System.

[§] Although the rate of increase in diabetes prevalence among AI/ANs slowed during 2001–2002, additional data are needed to assess recent trends.

Commercial and Subsistence Fisheries

Although subsistence and commercial fishing rights have been restored for the Yurok Tribe in recent decades, fish populations in the Klamath River have declined precipitously over this same period due to the operations of the dams, water diversions for agriculture, and other management decisions made by federal agencies within the Klamath Basin. Many of these adverse effects on tribal trust resources, specifically the fishery, are largely a result of effects the Klamath River Hydro-electric Project, or current conditions. The Yurok Tribe has had only minimal levels of fall Chinook commercial harvest during four of the past fifteen years. During the remaining 11 years the Yurok Tribal Council determined that the projected abundance of Klamath fall Chinook was insufficient to support a commercial fishery. For the past 15 years, the Yurok Tribe has also forgone commercial harvest of species other than fall-run Chinook (with the exception of minimal numbers of spring Chinook that were harvested during the beginning of the fall Chinook fishery). The Yurok Tribal Council has chosen not to have any commercial fisheries for other species such as spring-run Chinook salmon, Coho salmon, steelhead, lamprey, eulachon and sturgeon because of their concern regarding the status of these other species. Reduced abundance of these species has also affected subsistence harvest patterns.

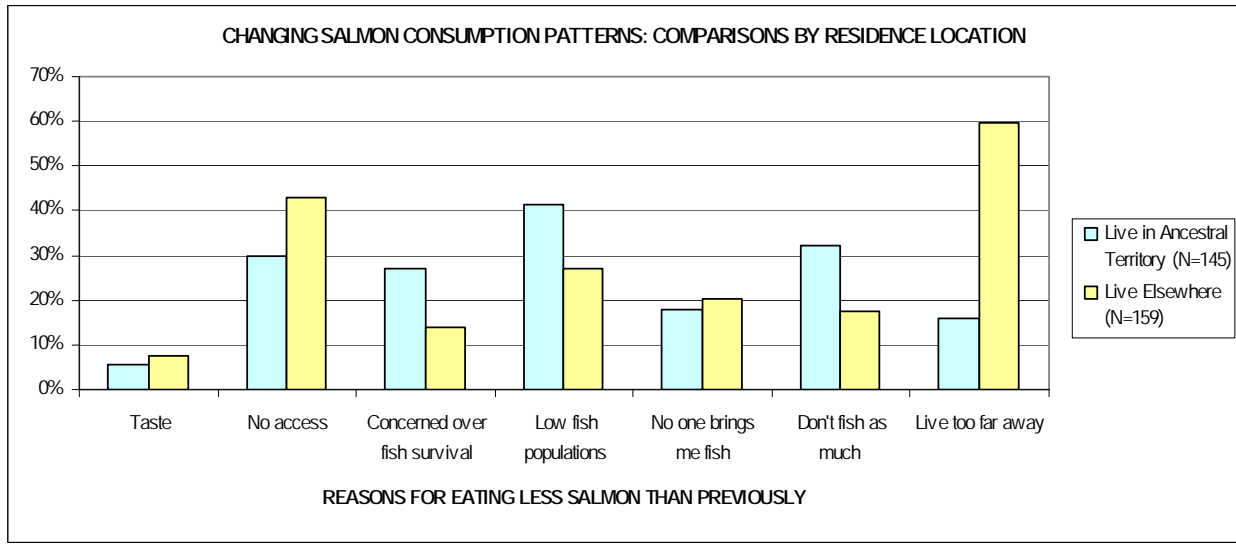
As a kid there were abundant salmon because you could see the salmon thick in the river from the bridges. You had to row your boat out to rocks that you can walk out to now.....In my lifetime I have watched the salmon, sturgeon, and eels become depleted. Salmon, eels, and sturgeon were our main food. We ate one of the three daily. We only ate meat on payday. The rest of the week we ate fish. Now we get fish only occasionally. This year we have not had any fish. My children may not have any salmon in the future.

(Yurok Tribal Member Survey Respondent 2006)

Because long-term data on fish numbers in the Klamath River do not exist for the periods prior to the construction of the first dams, respondents were asked about lifetime consumption patterns as way to document changes in the availability of particular species to Tribal Members over time. When comparing respondents' diets growing up as a function of age, reported consumption of Coho, Lamprey and Candlefish declined significantly ($G=18.34$, $p<0.01$, 19.00 , $p<0.01$, $G=37.9$, $p<0.001$ respectively). A similar trend exists for Spring Chinook, Steelhead, Fall Chinook, and Sturgeon.

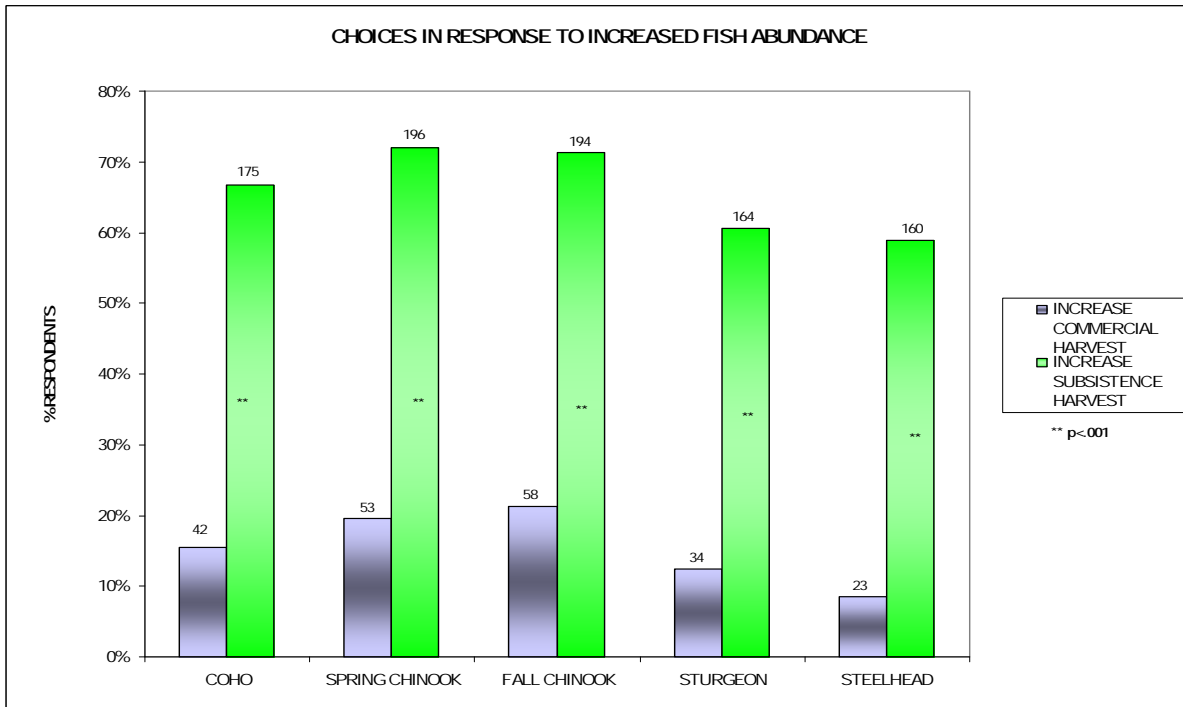
To determine whether decreased consumption was a reflection of changing tastes, respondents were asked to identify the reasons they consumed less salmon. For respondents residing within the Ancestral Territory the most influential factor was reduced fish populations, whereas those living outside the Ancestral Territory cited lack of access and distance from the Klamath River as the major factors responsible for reduced salmon consumption by other Tribal Members (Fig 15).

Figure 15. Changing consumption patterns



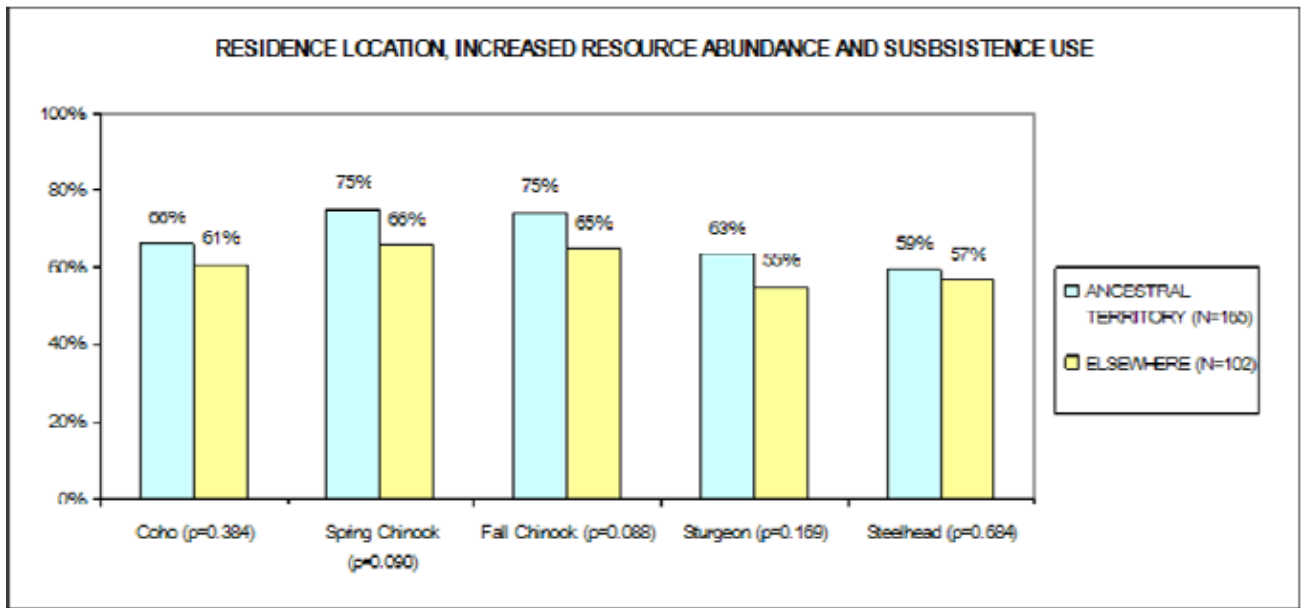
Respondents were asked whether they would increase subsistence and/or commercial harvest if fish were more abundant. In all cases, the majority of respondents indicated that they would increase subsistence fishing if the fish resource were more abundant. A significantly smaller number of individuals indicated that they would be interested in commercial harvests given increased resource availability (Fig. 16).

Figure 16. Choices in responses to increased fish abundance comparing subsistence and commercial interests of all respondents.

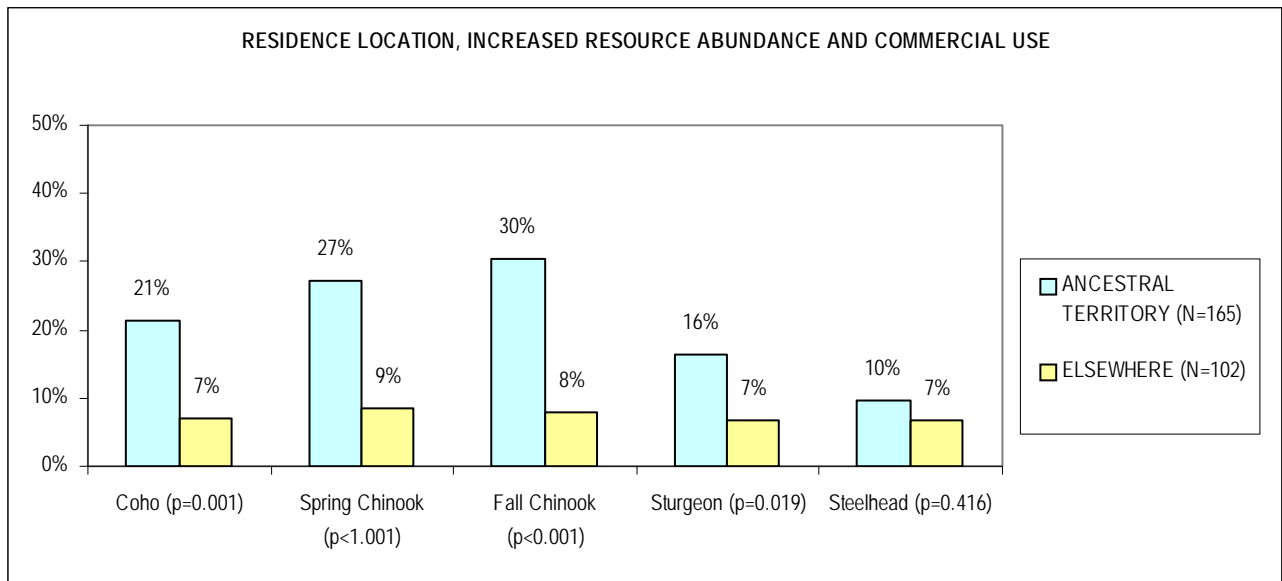


Interest in increased subsistence activity transcends geography: the majority of respondents living within and outside the Ancestral Territory indicated that they would increase subsistence activities in response to increased fish abundance (Fig. 17).

Figure 17 Comparison of responses to increased resource abundance among respondents living with the Ancestral Territory and those living elsewhere, showing the proportion of respondents who would increase subsistence harvest in response to increased resource abundance.



In contrast, interest in commercial use of most fish stocks is greater among those living within the Ancestral Territory (Fig. 18).



Fish are not commodities and their importance cannot be quantified using the usual economic measures; however the loss of these traditional resources, the closures and reduced harvests of the Tribal Commercial Fishery have had an economic impact on Tribal Members. As might be expected, the survey data suggest that the hardships associated the Commercial Fishery closures have had a greater impact on respondents living within the Ancestral Territory than those living elsewhere and in some cases these losses have disproportionately affected those respondents who receive food assistances (Table 1)

Table 1. Losses associated with Tribal Commercial Fishery closures

LOSSES ASSOCIATED WITH CLOSURE OF TRIBAL FISHERY	PROPORTION OF RESPONDENTS REPORTING LOSSES	PROPORTION OF RESPONDENTS ON FOOD ASSISTANCE REPORTING LOSSES	TOTAL RESPONDING
Loss of income	22% (61)	33%* (30)	280
Increased food expenses	28% (78)	39%* (38)	280
Reduction in social & cultural activities	24% (66)	32%* (29)	280
Loss of goods & services received through barter & trade	18% (49)	28%* (25)	280
Increased financial stress	18% (51)	30%* (27)	280
Reduced income from secondary business	8% (21)	13%* (12)	280
Applied for public assistance due to closure	8% (22)	21%*(19)	280

*Significantly greater proportion of respondents on food assistance affected, Chi-square test, p<0.05

Tribal Members who choose to remain within the Ancestral Territory experience higher levels of poverty and food insecurity than Tribal Members who live elsewhere. In spite of these conditions, Tribal Members choose to live in the Ancestral Territories because their culture and identity are inextricably bound to these lands and resources, and specifically the Klamath River. Economically forced relocation is perceived as another of the inequalities visited on the Tribe as a result of denied access to traditional resources, particularly the resources of the river.

I no longer live or work along the Klamath River. I had to leave due to financial reasons. I can no longer fish or gather, my children are not learning the culture like they should. They are not experiencing all that the Klamath River has to offer.

(Tribal Member Survey Respondent 2006)

Traditional Activities

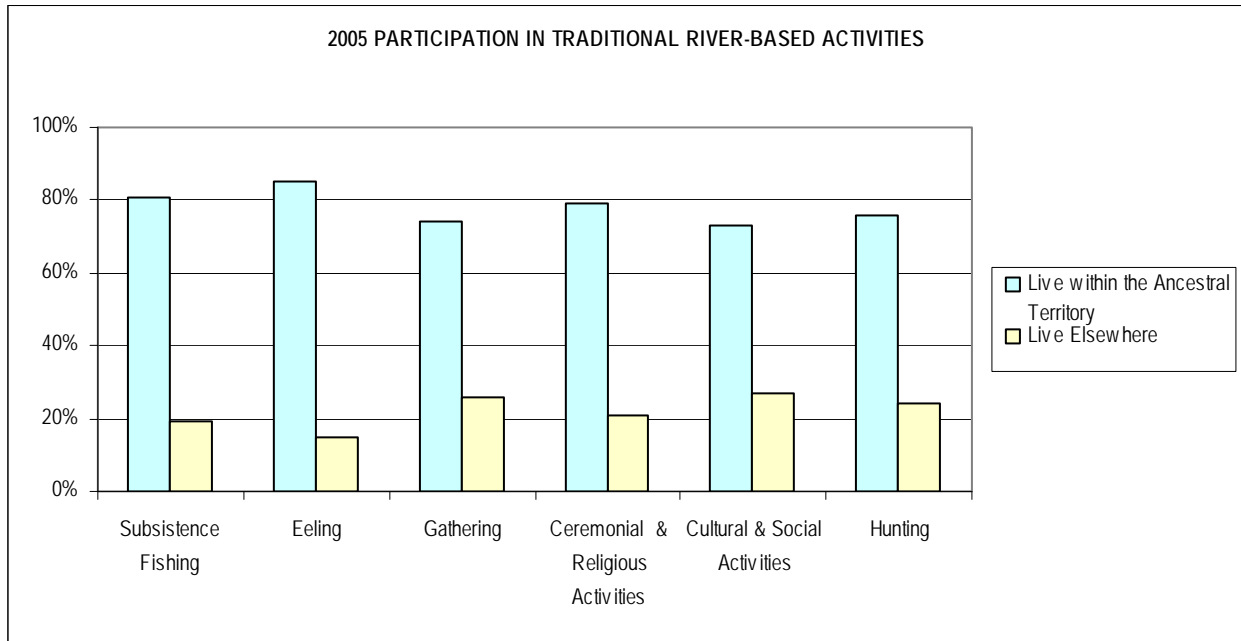
Fish plays a variety of roles in Yurok households. According to respondents, 86% use fish as food, 72% share fish with friends and family, for 34% fish fills ceremonial and religious roles and in 45% of households fish is part of cultural and social activities. In contrast, 21% of households report using fish in barter or trade and only 16% of households sell fish. This underscores the important *meanings* of fish for the Tribe. The Klamath River Hydroelectric Project has altered the river in ways that are destructive for all parts of Yurok life:

“[T]he dams contribute to a pattern of cumulative effects on the cultural values and interests of the tribes – aspects of the environment that are of great importance to them... to the tribes [the Klamath River] is utterly central to their cultural identity. This being the case, it is equally evident that the effects of the dams, together with the other contributors to the Klamath’s plight, fall disproportionately on the tribes. While others live within the riverscape, travel through it, fish in it and hunt in it, only the tribes have an intimate cultural connection to the riverscape going back to time immemorial. Only to the tribes is the riverscape the core of their cultural identity. Maintaining and reinforcing this association is particularly important today, as the tribes work to reestablish their traditional belief systems and ways of life.”¹⁸

Preliminary analyses of survey data indicate that a greater proportion of individuals who participate in traditional activities as children are more likely to continue those activities as adults. A similar pattern exists when those who live within the Ancestral Territory are compared to those who live elsewhere. In 2006, respondents who lived within the Ancestral Territory participated in traditional activities in significantly greater numbers than Tribal Members who lived elsewhere Territory (Fig. 20).

¹⁸ King, T.F. 2004. First Salmon. Prepared for Klamath River Intertribal Fish and Water Commission

Figure 20. Respondents involved in traditional activities in 2006 compared by residence location. In all cases Chi-square, $p < 0.05$.



In spite of more than one hundred years of concerted attempts to destroy the Yurok Tribe's cultural and spiritual integrity, the language and the culture survived. For the Yurok Tribe, the health of the Klamath River, its fish runs and other traditional resources are essential for cultural survival.

Denied access to the river and the salmon is tantamount to denied access to essential cultural and spiritual resources. In these circumstances, poor water quality and unhealthy conditions constitute denied access. Respondents have indicated that poor water quality has had a detrimental affect on many aspects of their lives not just during the 2005 cyanobacterial bloom but various times during the past five years (Tables 2 and 3).

Table 2. Proportion of respondents who changes their use of the Klamath River in response to concerns over water quality during 2000-2004

ACTIVITY	PROPORTION REPORTING CHANGED USE	NUMBER REPORTING CHANGED USE	TOTAL RESPONDING
Fishing	52.9%	148	280
Eeling	33.2%	89	268
Hunting	19.5%	52	267
Gathering	21.2%	55	259
Ceremonial & Religious Activities	16.6%	43	258
Cultural & Social Activities	20.8%	54	260
Recreational	46.0%	126	274
Transportation	20.9%	53	254
Bathing & Drinking	49.8%	134	269

Table 3. Proportion of respondents who changes their use of the Klamath River in 2005 in response to the Microcystin Public Health Notice for the Klamath River

ACTIVITY	PROPORTION REPORTING CHANGED USE	NUMBER REPORTING CHANGED USE	TOTAL RESPONDING
Fishing	46.1%	113	245
Hunting	24.7%	59	239
Gathering	26.8%	64	239
Ceremonial & Religious Activities	22.5%	53	236
Recreational	45.8%	110	240
Transportation	22.6%	53	235
Bathing & Drinking	44.1%	104	236

When people are denied access to the River, they are cut off from these essential activities. Poor water quality has changed peoples' use of the River and interfered with many aspects of Tribal Members' lives.

“Over the years, the river got smaller and smaller. The color has gradually gotten darker. At first, (60’s, 70’s, 80’s) the Klamath only looked unhealthy at the end of summer. Now the River always looks too dark in color and low. At the end of summer now, the Klamath looks dark, low, slow, dirty, slimy and too unhealthy to get into or eat anything coming from it. We used to be able to tell which salmon were not from the mouth, because they would sometimes have a muddy taste. Now I don’t eat any salmon... for fear of eating toxins and diseased fish.”

(Tribal Member Survey Respondent 2006)

This analysis, while preliminary, clearly demonstrates the inadequate and flawed data and analyses submitted by PacifiCorp to the FERC for the DEIS. The Yurok Tribe has managed to provide a more comprehensive and accurate analysis than PacifiCorp provided or the FERC itself offered, but this is hardly sufficient to remedy the deep structural and substantive defects in the FERC analysis. A more thorough, representative evaluation of the cultural, social and economic analysis of the affects of the Project on Tribes within the region must be undertaken before any determination can be made by the FERC.

Environmental Effects

Data compiled by the Yurok Tribe and submitted in formal comments to the FERC DEIS in 2006 indicate that the Project's immediate and long-term, cumulative impacts on the socioeconomic conditions of the Yurok Tribe are actually severe and disproportionate. The impacts of the current conditions are particularly onerous on Native American Tribes in the Klamath basin and watershed, Tribes who are dependent upon the River and its fishery for not only subsistence but also their cultural, spiritual, economic way of life. Again, impacts on the Yurok Tribe, the YIR, and tribal trust resources must be accurately and meaningfully considered and evaluated in the Secretarial Determination Overview Report in addition to the NEPA and CEQA analysis currently underway.

The FERC EIS was completely inadequate in its consideration of Project effects on low-income and minority populations. Executive Order 12898 mandates that all federal agencies must consider the impacts of their actions on low-income and minority populations. California also has an Environmental Justice law that mandates all state agencies not only to consider impacts of actions on low-income and minority populations, but also examine disproportionate effects on differential rates of consumption of resources. The FERC EIS provides inadequate analysis of the impacts of the loss of a traditional diet on Klamath River tribes. Comments within the FERC EIS indicate a lack of familiarity with the evidence indicating that Native American populations experience disproportionately higher prevalence of diabetes than the overall US population. Contrary to statements within the FERC EIS, this increased prevalence is statistically and epidemiologically distinct from that in the general US population.¹⁹

The fact remains that the impacts of the current conditions on the Yurok Tribe, a low-income and minority population and a federally recognized Indian Tribe, are extensive. It is important to note that the FERC EIS failed to acknowledge or assess the health benefits of a traditional diet or the impact of food insecurity and

¹⁹ [Diabetes prevalence among American Indians and Alaska Natives and the overall population--United States, 1994-2002](#). MMWR. Morbidity and Mortality Weekly Report - 2003 - Aug 1;52(30):702-4. NB This report probably underestimates prevalence of dDiabetes among AN/AN population; also see figure below

poverty on the health of Native Americans in the affected areas. A preliminary analysis of poverty, food insecurity and tribal health data are being submitted as supporting documentation on this issue in the following comments. Peer reviewed and published medical studies support both the health benefits of a traditional Yurok diet, and the disproportionate rates of diabetes in Native American communities.^{11,14,15,16,17,19}

The FERC EIS failed to address Environmental Justice (EJ) issues resulting from Project impacts on the Yurok Tribe, particularly in the area of disproportionate impacts on the health to Tribal and reservation communities, and the health of individual tribal members. The Klamath Hydroelectric project, current conditions and its continued operations, as well as the biased and discriminating treatment of Native Americans by PacifiCorp and the FERC in the previous NEPA process, as demonstrated in the flawed, insufficient and indefensible assessment of Project impacts in the FERC EIS are examples of what can only be defined as environmental racism and examples of blatant environmental injustice. The Yurok Tribe has provided ample testimony and evidence to PacifiCorp and the FERC that the Klamath Hydroelectric Project has had and continued to have significant, adverse, and disproportionate impacts on the Yurok Tribe and other tribal communities, which are low-income and minority populations. Unlike other stakeholders within the Basin, the Yurok Tribe receives no economic benefit as a result of the Project, yet the Project has resulted in the near-destruction of the River, its anadromous and resident species, numerous culturally significant resources, ie: tribal trust resources and as a result, the complete Yurok tribal fishery. The Klamath Hydroelectric Project and current conditions have had, and continue to have significant disproportionate adverse impacts on the Yurok Tribe because of its position in the watershed and its continued reliance on both subsistence and commercial fisheries. The basic and fundamental tenets of federal and state EJ laws suggest that the Department of the Interior and all federal agencies involved in the current analysis must consider the very real effects of these disproportionate impacts on a range of tribal trust resources.

The Department of the Interior and all federal agencies involved in the current Secretarial Determination and NEPA/CEQA analysis must consider the impacts of all aspects of the Klamath Hydroelectric Project and current conditions on low-income and minority communities, particularly on individual Klamath River Basin Tribes including the Yurok Tribe. The FERC EIS only provided a superficial assessment of the data submitted by the Karuk Tribe.¹⁵ The Klamath Hydroelectric Project has had significant adverse effects on all aspects of Yurok cultural and traditional life and on numerous tribal trust resources. These impacts have been documented and submitted to the FERC, in written and verbal testimony by hundreds of Yurok tribal members, yet they are not included or reflected in the FERC EIS or the assessment of the impacts of current conditions on low-income and minority populations.

Cumulative Effects

In general this section of the DEIS fails to follow the Council for Environmental Quality's (CEQ) (1997) guidance on conducting cumulative effects analysis under NEPA. The Department of the Interior and all federal agencies involved in the current Secretarial Determination and NEPA/CEQA process should follow the CEQ guidance for identifying, evaluating, and assessing the cumulative effects of the current conditions on all types of environmental resources. Cumulative Effects analyses should be conducted for all natural and cultural resources within the study area for all alternatives under evaluation..

If the Klamath Hydroelectric Project is relicensed and current conditions continue without dam removal and implementation of the KBRA and KHSA, populations of traditionally and culturally and economically significant food sources species will continue to decline, possibly to extinction. Water quality would continue to deteriorate, toxic algal blooms would continue and possibly increase, culturally significant tribal trust resources and species would continue to suffer significant declines, diseases, and Project-related impacts that in turn would have a continuing significant adverse effect on the Yurok Tribe and YIR residents. The adverse socioeconomic impacts on the Yurok Tribe would continue and compound if current conditions continue. Only the removal of the four dams, and a fully restored River and fishery can uphold the federal government's tribal trust responsibility to the Yurok Tribe and protect these irreplaceable tribal trust resources.

The Department of the Interior and the BIA have a responsibility to ensure the protection of tribal trust resources because it acts as the primary branch of the US federal government responsible for tribal trust matters. The FERC EIS failed to acknowledge or adequately assess the impacts of the Project on tribal trust resources of the Yurok Tribe for which the federal government has a fiduciary responsibility. The status quo, or current conditions, would result in the eventual extirpation of all culturally significant tribal trust resources within the Klamath River watershed upon which Yurok culture has evolved, been sustained, and continues into the present day. If the current conditions continue they will result in severe socioeconomic and cultural costs, and continued losses, to the Yurok Tribe. These impacts must be assessed by the Department of the Interior and all federal agencies involved in this current analysis and these assessments must accurately evaluate the federal trust responsibility to the Yurok Tribe and its members. The Secretarial Determination process provides for the first ever comprehensive assessment of these tribal trust issues and the environmental, economic, social and cultural impacts of the Klamath Hydroelectric Project, current conditions, and the proposed action of dam removal and implementation of the KBRA and KHSA. The further future decline of the fishery and the health of the Klamath River watershed, and its dependent tribal communities, is not an "unavoidable adverse effect". Rather, the adverse effects are only unavoidable if the federal government, its departments and agencies, fail in their trust responsibilities and the current conditions are allowed to continue, the dams are not

removed and the KBRA and KHSA are not implemented. The Department of the Interior, specifically the BIA and the Secretary of the Interior should not follow the FERC's mistake of ignoring the best possible science, the law, the needs of effected Tribes and the status quo (ie: current conditions) are maintained at the cost of a healthy river, restored watershed, sustainable economies, and tribal communities.

The Klamath Hydroelectric Project has literally destroyed, or nearly destroyed, the entire Klamath Basin ecosystem and all the abundant resources that the Tribe has relied upon for countless generations. And that near-destruction has happened within one generation or lifetime. Downstream tribal communities have received no benefit from the Klamath Hydroelectric Project, but have paid an overwhelming and disproportionate cost for the profit and benefit of PacifiCorp and a handful of upstream users. The Yurok Tribe has not even received the benefit of electricity generated from the Project, yet the Project has severely impacted the reservation economy, which relied upon the River primarily for food, and less as a commercial and recreational fishery. The lack of ability to make a living wage on the YIR has led to a Yurok diaspora, or displacement into surrounding areas or further in search of economic stability, yet Yurok who leave often return or wish to return to live on the reservation, if only they could make a living. These are profound Environmental Justice issues that have yet to be adequately addressed but must be addressed meaningfully in the Secretarial Determination and the ongoing NEPA and CEQA analysis for removing the four dams and implementing the KBRA and KHSA. Only the full removal of all four dams and the restoration of the Klamath River ecosystems and its once abundant fishery can begin to redress and resolve these Environmental Justice issues. It is imperative that the Department of the Interior, the Secretary, the BIA and all federal agencies involved in the current analysis acknowledge these long-standing Environmental Justice issues and address them in their final analysis and determinations on the proposed action and any alternatives and the Secretarial Determination Overview Report currently underway.

VIII. Tribal Trust and Potentially Impacted Trust Assets

“The River is the lifeline of the tribe. It needs to be clean and full so the salmon can come back and nourish the people. The salmon is like the miner’s “canary” – if it is sick or dying it is a sign that our people are sick and dying too. If it is abundant and thriving – so are the people. It is the responsibility of the tribe and other government agencies to ensure this life line is healthy and abundant for the future generation.”

(Yurok Tribal Member Survey Respondent 2006)

“There seem to be only memories of long and not so long ago when the fish were so plentiful to our kitchen tables or just catching, cleaning, hanging 20 fish in one day. Now it seems like you can go fishing all day or just to catch the tides and you come back home with 1 or 2 fish and moss and mud and plenty of sticks in your net. Not too many of us who traditionally live on eating sticks. None of the boys bring eels to you anymore cause they caught so many they don’t know what to do with them. When your drifting at the mouth, you have to fight the sealions for one fish and sometimes he even takes the belly. The sealions chase you for a fish if you clean it too close to the waters edge. When I was a little girl my uncles used to bring the fish to Gram’s house and we would spend all day hanging that fish and she would can it up and even share a jar or 2 for a gift every once in a while, now we can barely feed Gram and our own mouths and spirits.

Maybe we need to feed our elders and children – let them acquire a taste for that good real “CANDY” as Gram used to call it. When good fish used to run plentiful, Gram would make baked fish, fried fish, salmon patties, dried fish, canned fish, kippered fish. Cooked on sticks and even fish soup. Now we have to go buy a fish at the local market or eat burgers, pizza, Mexican food, hamburger helper, or any of the other processed foods full of all that stuff our elders wouldn’t have dreamed of eating 20 to 30 years ago – Our elders don’t even know what some of that stuff is.

When we have ceremonies and cultural gatherings we should not only be thankful for what we put in our mouth and cherish every bite, but pray for that fish to come back again and make us strong and keep our elders healthy and make our children healthy too with its strong vibrations. – We should ask that our fish and berries be made plentiful again. Let our youth and little Indian babies experience the love we have for the fish too and learn to harvest it the way Gram used to and feed us dried fish in the winter with her hot baked “Injun” Bread and jam. We are and always will be the fish people. May we be the ones the fish come back to.”

(Yurok Tribal Member Survey Respondent 2006)

“As a kid there were abundant salmon because you could see the salmon thick in the river from the bridges. You had to row your boat out to rocks that you can walk out to now. Before I went to Vietnam in 1967 the River was high; when I came back after the Dam was built the water had dropped. In my lifetime I have watched the salmon, sturgeon, and eels become depleted. Salmon, eels, and sturgeon were our main food. We ate one of the three daily. We only ate meat on payday. The rest of the week we ate fish. Now we get fish only occasionally. This year we have not had any fish. My children may not have any salmon in the future.”

(Yurok Tribal Member Survey Respondent 2006)

“My Yurok elders have always talked about the loss our natural resources and how this impacts our life way. The Tribe itself, the employees need to understand and advocate for both (ceremony and natural resources). When we do our Jump Dance we are praying for these things to return to abundance state. The Yurok people cannot survive without fish, acorns, language, and ceremonies.”

(Yurok Tribal Member Survey Respondent 2006)

The Yurok have always inhabited California’s northwestern coastline from Little River to Damnation Creek. Yurok Ancestral Territory also extends along the Klamath River from the mouth of the river up past the Klamath – Trinity confluence to Slate Creek. Yurok Territory continues six miles up the Trinity River. The Yurok language (and the neighboring Wiyot language) is affiliated with the Algonquin linguistic stock. Algonquin languages are primarily spoken by Tribes residing in the Great Lakes and New England areas. While the Yurok language is spoken fluently by several dozen Yurok people, a Tribal language program is in place to increase the fluency of its tribal members. Traditional subsistence animal species include salmon, ocean fish, sturgeon, sea lion, whale, elk, deer and duck. Acorns, berries, bulbs and grass seed are staple plant foods.

Yurok life is defined by extended families affiliated with villages and represented by head spokespersons. Ceremonial wealth and rights to subsistence resource areas determine familial standing within Yurok social structure. Yurok are recognized for their skills making redwood canoes, weaving fine baskets, highly stylized art forms, hunting, and specifically riverine salmon fishing. The ancient traditions are continued through contemporary times.

The traditional homeland of the Yurok Tribe extends from the Pacific Ocean along the lower Klamath River and into the Trinity River Basin. While Yurok culture and tradition centers on the Klamath River, their people have always lived along the lower Trinity and depended on its fish, water and other resources. The traditional and present territories of the Karuk and Klamath (Oregon) Tribes are located along the upper Klamath River, above the River’s confluence with the Trinity. Both these tribes also depend on the

resources of the Trinity River, primarily as it influences the Klamath River ecosystem (USFWS et al 2000).

Natural resources hold significant cultural, ceremonial, spiritual and other non-economic values for all the Indian tribes of the Klamath region (the term cultural refers to the cultural anthropology of the tribes not their archaeologically significant artifacts and monuments which are addressed elsewhere in this document). Thus, standard economic methods of accounting and valuation cannot adequately measure the consequences of any action that may affect these tribes' trust assets. In fact, in previous EIS analysis processes, representatives of the Klamath River tribal governments have voiced concern over the utility and validity of attempts to quantify and express the benefits of natural resources, such as salmon, to their people in economic or dollar terms. Accordingly, the trust analysis does not focus simply on economics; instead, it evaluates the anticipated impacts of the Restoration in terms that are more meaningful and of primary importance to the potentially affected tribes. Specifically, the trust section endeavors to characterize the fundamental role of the region's rivers and river health in tribal history. It is in this context that the Restoration alternatives are evaluated in terms of their anticipated impact on the health of the Klamath River (USFWS et al 2000).

Healthy alluvial river ecosystems are ultimately the resource of greatest importance to the region's tribes. Continued tribal access to many trust resources such as fish, wildlife, water and plants depends on the condition of the rivers which transect their lands. Riverine health itself is a function of many fluvial and geomorphic attributes, including rates of sediment loading, flow variability, channel migration and riparian plant life-cycles, among others. Therefore, it is necessary to evaluate the influence the proposed project may have on these physical attributes of the Klamath River to understand the potential tribal trust impacts.

Trust Responsibility

From their earliest contact with the Indians of North America, the European powers and the United States have dealt with Indians on a government to government, or tribal basis. In principle, all treaties, statutes, and executive orders implementing Federal Indian policy are premised upon this political relationship.

From 1787 to 1871, the United States entered into hundreds of treaties with Indian nations in which Indian tribes gave up land in exchange for reservations, safety, and the well being of their people. The Supreme Court has held that treaties create a trust relationship between the Federal Government and Indian tribes. This relationship is "marked by peculiar and cardinal distinctions which exist nowhere else" and "resembles that of a ward to his guardian". The U. S. has a "duty of protection" toward the Indians. [See: *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); *U.S. v. Kagama*, 118 U.S. 375, 384 (1886); *Seminole Nation v. U.S.*, 316 U.S. 286 (1942)]. In *U.S. v. Mitchell* [463 U.S. 206, 225 (1983)], the Supreme Court reaffirmed the principle of "the undisputed existence of a general trust relationship

between the United States and the Indian people.” The Federal Government’s obligation to honor the trust relationship and to fulfill its treaty commitments is the trust responsibility. The Federal Government has extended the trust responsibility through federal statutes, agreements, and executive orders. These documents can create trust obligations in the same way that a treaty does. [See *Antoine v. Washington*, 420 U.S. 194 (1975) and *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983)]. The trust responsibility imposes an independent obligation upon the Federal Government to remain loyal to Indians and to advance their interests, including their interest in self-government. [See: *Manchester Band of Pomo Indians v. U.S.*, 363 F. Supp. 1238 (N.D. Cal. 1973)]. The American Indian Policy Review Commission’s, *Final Report* stated “The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-governance, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society” (USFWS et al 2000).

Indian Natural and Cultural Resources

The Trust Doctrine requires, in part, that Indian tribes have continued access to natural resources if they are to preserve their cultural and traditional ways of life. Therefore, in order to fully characterize the potential impacts of any action that may affect a tribe’s trust resources, it is necessary to examine the role of those resources in tribal cultures and societies.

Like all peoples, Native Americans depend on natural resources for the necessities of life, food, housing, and clothing. However, tribes have not traditionally regarded those resources simply as commodities to be bought, sold, or indiscriminately exploited. “The landscape itself...is seen as sacred and quivering with life. It is inscribed with meaning regarding the origins and unity of all life, rather than seen as mere property to be partitioned legally into commercial real-estate holdings” (USFWS et al 2000).

When non-Indians first began settling in North America, what they perceived as a wild and uninhabited land, had in many places been managed and utilized by Indian people. Over the millennia, many Native American peoples observed and learned to recognize, rely upon, and even emulate natural processes as part of their ceremonial and religious ways-of-life. In this manner, they enhanced the richness and productivity of the land and other resources on which they depended, and developed an intimate connection to the order and cycles of the natural world (Salter, 1996). The spiritual and practical environmental knowledge they amassed over time was passed orally from one generation to the next through story and language, and includes many what are today considered highly refined and enlightened techniques for eco-system management (USFWS et al 2000).

The significance of the Native American reliance on and veneration for nature is evident in all facets of their cultures, traditions, religions, and resource management. Consequently, increasing resource scarcity over the last century and a half has had a profound effect on Indian tribes. Tribal cultures across North America, such as those of the Klamath-Trinity region, are no longer in a position to fully embrace their traditional ways of life (USFWS et al 2000). This is not to suggest that Indian culture has disappeared. Rather, that the declining availability of resources critical to Native American traditional and spiritual practices has rendered some of those resources even more precious as a means of sustaining their cultures and made additional losses of their resource base increasingly difficult to accept (USFWS et al 2000).

Any tribal trust impact analysis must focus on the potential affect on the health of the Klamath River, as the River's overall health is a primary factor determining not only the availability of fish, but many trust assets including water, wildlife, and vegetation. Thus, increased numbers of chinook salmon and Pacific lamprey, just as other trust assets, represents an expected beneficial by-product of riverine health. The potential tribal trust impacts were not evaluated on a trust asset by trust asset basis because such an analysis would not only require a level of effort well beyond the scope of the EIS but it is unlikely to produce scientifically valid results or results readily interperable with respect to the overall implications for the region's tribes and the U.S.'s trust responsibility to those tribes (USFWS et al 2000)..

In the case of tribal trust resources however, a focus on present and future conditions may fail to adequately represent the true nature of the potential impacts on the region's tribes and its implications for the U.S.'s trust responsibility to those tribes. As the Tribal Trust -- *Existing Conditions* must evaluate the cultures, traditions, religions, languages and perspectives of the Indian tribes of the Klamath-Trinity region that are rooted to the area's once healthy rivers and the associated abundance of salmon, elk, vegetation, and other natural resources. Thus, while the tribes' access to natural resources and their socio-economic and cultural situations under existing and projected environmental conditions are relevant to the analysis of tribal trust impacts, it is far more meaningful to consider the impacts in the context of the tribes' traditional reliance upon rivers as well as the once pristine condition of those rivers relative to their currently degraded state.

Tribal Trust Resources

In his 2004 analysis, anthropologist Thomas King concluded:

Another law that is pertinent to tribal use of the Klamath Riverscape is the American Indian Religious Freedom Act (AIRFA), which articulates a policy of respect for and protection of tribal rights to the practice of traditional religion. Although AIRFA provides little direction about how agencies are to carry out this policy, it has generally been interpreted to require consultation with tribes when planning actions that might affect religious practice, and actions to avoid impact to such practice where feasible.

The tribes obviously use the Klamath River, its water, its fish, and other elements of the Klamath Riverscape for religious purposes. It is not at all too much to say that the river is central to the tribes' religious practice. The Klamath Hydroelectric Project and other projects in the Klamath Basin have changed the river, and continue to change it, in ways that are deleterious to tribal religious practice. They do this by altering the quality of the river's water, which is traditionally used for purification rituals. They do this by altering the habits and habitats of the fish that play central roles in religious belief. They do this by causing the erosion of locations where key spiritual activities must take place. They do this by fundamentally altering the character of the river as an environment in which people can touch the immortal.

Under AIRFA, FERC and other Federal agencies are obligated to consult with the tribes and try to make decisions about actions affecting the river in such a way as to avoid doing further injury to religious practice. The logic of AIRFA would also suggest that FERC should seriously consider doing what it can to undo damage done in the past, in order to help the tribes regain the ability to practice their religion in traditional ways.

Effects on Indian Sacred Sites

Executive Order 13007 directs Federal agencies to try to avoid physical impact to "Indian sacred sites" on Federal and Indian land, and to avoid blocking tribal access to such sites. Sites like *Paniminik*, owned by the Karuk Tribe and recognized as a place of great spiritual importance, qualify as such sites; there may be sites meeting the executive order's definition on other tribal land or on land managed by the Forest Service, Bureau of Land Management, or Bureau of Reclamation. A site need not be eligible for the National Register to be a "sacred site" in terms of the executive order. FERC²⁰ and other agencies need to consider this possibility in making decisions about the Klamath Hydroelectric Project and other actions along the river.

Trust Responsibility for the Riverscape

Beyond the requirements of any specific law or executive order, the federal government has a broad trust responsibility toward federally recognized Indian tribes, derived from the Constitution, a great many treaties, laws and policies extending back to the earliest days of the nation, and a massive corpus of case law. The trust responsibility has most recently been articulated in a government-wide manner in Executive Order 13175.

²⁰ The applicability of executive orders to independent agencies like FERC is uncertain, but FERC's *Tribal Policy Statement* promulgated July 23, 2003 includes Executive Order 13175 among its authorities, suggesting that FERC views itself as obligated to be responsive to such orders.

Partly in response to this executive order, FERC has acknowledged in official polity that—

--as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes²¹.

FERC goes on to pledge itself to working with tribes on a government-to-government basis to address the effects of proposed projects on tribal rights and resources. Thus FERC has committed itself to exercising the Federal government's trust responsibilities toward tribes

Depending on its context, the term “trust responsibility” with respect to Indian tribes and the United States government is usually taken to connote either the relatively narrow responsibility to protect tribal interests in “trust assets” to which a tribe has rights by treaty, statute, or outright ownership (timber, minerals, fish)²², or the more general responsibility to be sensitive to and represent tribal interests vis-à-vis other parties.

Taking the narrow definition first, it is well established that the Yurok and Hupa Tribes have federally recognized rights to fish in the Klamath River and its tributaries²³. The Karuk have not been held to possess such rights, apparently because the tribe lacks a treaty explicitly reserving them. However, one of the central tenets of Indian law is that tribes retain all rights not explicitly ceded²⁴, so arguably the Karuk have retained rights to the Klamath's fish as well.

Apparently using a broader definition, the Trinity River EIS identifies not only anadromous fish but “non-anadromous fish, water, wildlife, and vegetation” as “trust-protected assets”²⁵.

FERC must understand itself to have a trust responsibility toward at least tribal rights to anadromous fish in the Klamath Riverscape, and arguably toward a broad array of the riverscape's other contributing elements.

²¹ FERC *Tribal Policy Statement*: 18 CFR 2.1c(b)

²² 25 CFR 900.6

²³ Trinity River EIS:3-208; The primary Hupa rights are to fish in the Trinity, one of the Klamath's main tributaries.

²⁴ The “Reserved Rights Doctrine,” see *U.S. v. Winans*, 198 U.S. 371 (1905).

²⁵ Trinity River EIS: 3-205

Yurok on Federal Government's Trust Responsibility

In 2009, the Yurok Tribe drafted core principles on the Tribe's position on Klamath River and Yurok Trust Resources in a White Paper presented to the US Fish and Wildlife Service.

The Yurok Tribe has developed this white paper to provide a description of the Tribe's interest in Klamath River Basin fish, water and related issues. The Klamath River Basin includes the Trinity, Scott, Shasta, Salmon, Williamson, Wood and Sprague Rivers including all connected tributaries.

The following principles must be applied when the United States is involved in any issue that affects Klamath River Basin fish, water or other resource issues:

- 1) That the United States fully and properly protect and restore all trust resources of the Yurok Tribe. This principle includes the need to manage Klamath River Basin resources such that the Yurok Tribe can fully participate in the subsistence, commercial and ceremonial harvest of all species and races of anadromous and other fish;
- 2) That the United States abide by and honor the commitments made in the Cooperative Agreement between United States Department of the Interior and Yurok Tribe for the Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin of California;
- 3) That any activities which affect fish and/or water resources within the Klamath River Basin affect the Yurok Tribe Reservation and the Yurok Tribe whether such activities occur in California or not;
- 4) That the United States, including the Department of the Interior, must provide the Yurok Tribe with any proposal, initiative or other concept that affects the interests and resources of the Yurok Tribe;
- 5) That the United States, including the Department of Interior, pursuant to the cooperative management agreement mentioned above, principles of the government-to-government relationship, and in proper recognition of the dependence of the Yurok Tribe upon Klamath River Basin fish, water and other resources, will not take any action affecting Yurok interests without the full, timely, and meaningful participation of the Yurok Tribe in all decision and other processes;
- 6) That the United States and the Department of the Interior recognize that the Yurok Tribe harvests the vast majority of Klamath River Basin fish as demonstrated by the Tribe's past harvest;
- 7) That the United States recognize and respect the Yurok Tribe fishery interests as specifically recognized by the 1993 Opinion of the Solicitor, the 1988 Hoopa Yurok Settlement Act and its legislative history and other appropriate sources.

What follows is a description of the Yurok Tribe's dependence upon the Klamath River and its fisheries, including attached rights.

The Yurok Tribe's message is that there is a continuing and substantial impact to the Yurok Tribe's fisheries and other resources. That impact has dire social and economic consequences on the lives of Tribal members, their families and Tribal communities. Any process regarding the management of Klamath River Basin fish, water or other resources must include the Yurok Tribe. The United States, including the Department of Interior, must properly share all information in its possession as it such relates. Any decisions regarding tribal resources must be based upon the Tribe's unique circumstances and strengthen Tribal culture and related priorities.

The Yurok Tribe Dependence on Klamath River Basin Fish

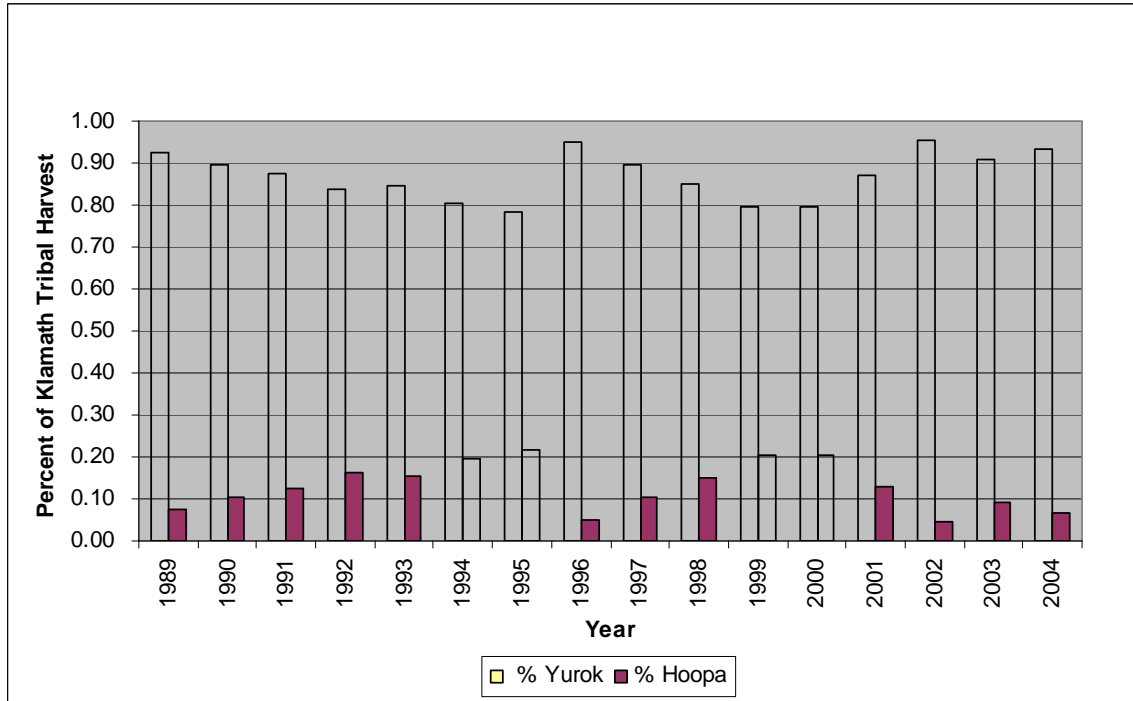
Klamath River fish are irreplaceable to the Yurok Tribe's culture, religion and economy. From time immemorial, Yurok people have depended on the Klamath River and all of its streams and tributaries. The River is central to Yurok society by providing food, transportation, commercial trade, and numerous other activities essential to Yurok life. Throughout history and today, the identity of the Yurok people has been intricately woven into natural environment including the Klamath Basin watershed. Tribal religious and ceremonial practices focus on the health of the world; the Klamath River and its fisheries are a priority. The Yurok Tribe's obligation to protect the fishery has always been understood by Yurok people. The ancestral territory of the Yurok Tribe included coastal lagoons, marshes, ocean waters, tidal areas, redwood and other ancient forests, prairies and the Klamath River.

Because of the rivers' importance, one of the Tribe's highest priorities is to protect and preserve the resources of the rivers, and in particular, to restore the anadromous fish runs to levels that can sustain Yurok people. When the original Klamath Reservation was established in 1855, the rivers were filled with abundant stocks of salmon, steelhead, eulachon, lamprey, and green sturgeon. Today, the abundance of fish in the Klamath River and its tributaries are only a small fraction of their historic levels. Many species of fish have gone extinct, many other species, such as fall Chinook, are in serious trouble. Nonetheless, anadromous fish continue to form the core of the Yurok Tribal fishery. The Yurok Tribe is pursuing its fishery restoration goals through a fish management and regulatory program, participation in various forums to reach long term solutions to Basin problems and when necessary, litigation. The Tribe has devoted a large share of scarce funding resources to budgets for fishery management and regulation. The Tribe has enacted a fisheries ordinance to ensure that the fishery is managed responsibly and in a sustainable manner and has a longstanding record of resource protection. The Tribe's fisheries department is well respected and recognized as a knowledgeable and experienced fisheries entity in the Klamath Basin. The Yurok Tribal Council and the Tribal members they represent are well known for taking and supporting responsible actions to protect fisheries resources.

The Yurok Tribe dependence upon Klamath River fish is supported by Tribal harvest information. Since the passage of the Hoopa Yurok Settlement Act in 1988, the Yurok

Tribe harvest of Klamath River fall Chinook represents approximately 87% of the 50% Tribal allocation (see Figure 1.). In terms of the overall allocation of Klamath River fall Chinook, comprised of Tribal and non-Tribal fishing groups, the allocation of fall Chinook for the Yurok Tribe is the largest single allocation of any group, Tribal or non-Tribal, harvesting Klamath River fall Chinook. The Tribe's allocation is 80% of the Tribal allocation or 40% of the total allocation of harvestable surplus of Klamath fish.

Figure 1. Percent of Klamath Tribal allocation harvested by the Yurok and Hoopa Valley Tribes, 1989 – 2004.



The Tribe's dependence on Klamath River fish and the expectation that the Tribe would have significant economic opportunities from the fishery was identified by Congress during passage of the 1988 Hoopa Yurok Settlement Act. Unfortunately, the lack of Klamath River fish has prevented the Yurok Tribe from realizing the benefits of the Klamath fishery as intended by Congress. The legislative history confirms that Congress intended to vest in the Tribe property rights to the fishery on the Klamath River. The Committee noted that the Act "will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its interest in the fishery. Senate Report No. 564, 100 Cong., 2d sess. (1988).

IX. Conclusions and Recommendations

For the Yurok it is difficult to discuss the traditional and contemporary culture in two distinct life ways. Instead Tribal presence throughout the Klamath River Basin is a continuum running from time immemorial into the future generations yet to come. While this continuum can be marked by periods of change (creator, *woge*, culture heroes, oral tradition of prehistory, oral tradition of proto history, oral and written 20th century history, and 21st century contemporary occurrences.) the basic relationship remains the same: for Yurok People, social and physical health, culture and economy continue to rely on the Klamath River and its fishery. Further, the Yurok fishery depends on a healthy river ecosystem that includes as a necessary requirement adequate flows of high quality water to sustain the abundant trust resources that Yurok depend on to maintain their way of life.

The relationship between indigenous people, fish, and rivers with water is fundamentally a cultural relationship. The cultural relationship encompasses all other ways of defining the relationship and thus includes relationships of economics, politics, ecology and environment, and religion. In addition archeological or historical perspective for understanding cultures, while yielding important information, are limited in scope by the requirements of objectivity, evidence and a chronological ordering that may be radically different than that of the cultures to be understood. The River is of such great importance that there is no particular unique word that names the river. Instead, the River is named as 'river'. Yurok words for 'river' are '*la yoh*', '*ra yoy*', and are translated 'to run' or to 'run past' in reference to a liquid.

Yurok interaction and emulation of the environment is a spiritual - ceremonial activity. More than environmental management, for Yurok interaction and emulation are a religious right. This is important for linking Native American environmental practices to additional laws, regulations, policy orders, and policy that acknowledge Native American religious rights (American Indian Religious Freedom Act 1978, Executive Order 12898, Executive Order 13007).

Oral traditions, the spoken word that links people, cultural practices and place are critical to understanding the environment from the perspective of the Yurok and other Klamath River Tribes. The Klamath River as a cultural environment important to indigenous people is more than a collection of individual historic properties or sites. Instead it is the whole of the River considered as a single entity that best frames the meanings and relationships between Indigenous people, fish and water. It is clear from Yurok oral history that the River is such an integral part of the Yurok way of life that without it the traditions of the Yurok people would be perceived in a radically different perspective. Practically every function of the Yurok way of life is associated to the River: The origination of fish, proper methods for taking fish, how the River is to flow, death passage ceremonies, locations for fish dams and ceremonies all reflect the bond between the River and the Yurok people. It is essential that the River be maintained at a level that provides relevance to the young Yurok mind that hears these stories.

The condition of the Klamath River, its health and quality, is of grave concern to Yurok people. Healthy habitat, adequate and high quality water flows, sustainable and abundant fish populations are of critical importance to Yurok culture. This concern is due to dependence on the River for all aspects of Yurok life, the directives handed to the People by the Creator as Indian Law, and a responsibility for good stewardship of the River and the resources it provides. The role and significance of the River in Yurok life and ceremony, from birth to death, cannot be overstated. The River is the bond that unifies Yurok culture. It is also the bond that unites Yurok with their upriver neighbors in a common life way that has persisted through time.

In a 2004 report evaluating the eligibility of the Klamath Riverscape for inclusion on the National Register of Historic Places, anthropologist Thomas King reported:

Effects of the Project downstream from Iron Gate Dam are less straightforward than those within the Project area itself. Such effects must be understood as parts of a complex of cumulative effects – contributions to the overall transformation of the river from its natural condition to the way it is at present. This complex of effects is the result of a variety of forces. Besides the PacifiCorp Project, contributors include the dams managed by the Bureau of Reclamation (BOR), farming practices, particularly in the Klamath Basin upstream from the Project, logging, mining, sewage disposal, and other modern human activities along the river, and offshore commercial and recreational fishing that depletes salmon and steelhead runs in the river. To these contemporary impacts must be added the past impacts of hydraulic mining, which tore down riverbanks, altered streamflow, and filled in fishing holes. It is beyond the scope of this report to detail all the effects of all these sources, but it may be helpful to characterize them in general and then to consider what contribution the PacifiCorp Project may itself have to the overall pattern of effects.

The culturally significant character of the riverscape is fundamentally controlled by the character of the river, which in turn is controlled by the quantity and quality of water flowing down it and the manner in which flows are regulated, whether by natural or human agent. Insufficient water, or water that has been polluted, obviously affects direct human consumption and other uses, but it also has a variety of damaging effects on the riverscape's cultural values. Effects discussed in the ethnographic reports and elsewhere, and by tribal consultants, include:

- Impediments to Tribal River access, particularly just downstream from Iron Gate Dam.
- Blocking the passage of anadromous fish up the river – resulting from the simple presence of the dams²⁶.

²⁶ See KRITFWC 2003. Karuk and Yurok consultants disparage the extent to which hatcheries can make up for this blockage, reporting that hatchery fish are very different from wild fish – softer, spongier. Shasta

- Other impacts on fish – ranging from catastrophic effects like the massive 2002 fish kill to a general decline in the populations of both anadromous and resident fish, and including the complete or near elimination of particular fish runs²⁷, resulting from such factors as:
 - Release of insufficient water down the river, or releases at the wrong times, or in the wrong amounts, to meet the biological needs of all fish species, at all life stages.
 - Release of water that has been warmed (or cooled) by being held in reservoirs, creating an unnatural and detrimental temperature regime for fish.
 - Release of water that is polluted by agricultural runoff from above the reservoirs, full of chemical foam and algae, making it unhealthy not only for fish but also for people to drink or bathe in.
 - Deposition of sediment in cold-water holes where fish congregate.
 - Creation of a flow regime in which periodic flushing flows (“freshets”) are replaced by a flat flow punctuated by flood events²⁸, failing to clear away sand and gravel bars at the mouths of tributaries and thus sealing off spawning ground and fish refugia.
- Through the same alterations in flow regime, causing erosion of culturally important areas along the river, such as the World Renewal site *Katamin*.
- Through flow alterations, temperature changes, and pollution, causing damage to the health of plants required for basketry and other cultural purposes.

Such effects have obvious implications for the relationships of the tribes to the river, the fish, special places along the river, and other elements that contribute to the significance of the riverscape. If the salmon do not run, the First Salmon Ceremony becomes meaningless. If the priest’s sweatlodge washes away, the priest cannot use it during the World Renewal Ceremony. If the river is too polluted to bathe in, important purification rituals cannot be performed. If people cannot get enough salmon, or steelhead, or lampreys, their connection with the riverscape is diminished.

consultants did not make this distinction but reported similar differences between wild and farmed salmon, and all consultants commented on the problem of competition between hatchery-raised fish and wild fish, arguing that the wild population is endangered by the release of hatchery fish.

²⁷ For summary statistics from Federal government sources, see Karuk ethnographic report:77-8

²⁸ See, for instance, Karuk ethnographic report:57-8

Further, interviews with Yurok tribal elders have made it clear that for Yurok, there is a direct cause and effect between the dams and the conditions on the River and impairments to the fishery and Yurok way of life:

I think Iron Gate has a lot to do with the Klamath River because what it's doing is during these slack years when there is less water, that algae builds up in the bottom of swimming ponds, well that's the same thing that's happening up there now and we're getting this fertilizer and stuff from them farms building up on the floor of these little reservoirs. It is building up thick and then we get a little high water and they hold the water back. They hold the water back because they're trying to keep their water level in the reservoirs which cuts it short from going into the ocean. Then it just builds up and finally we get our weather and they say, 'Okay, we hit our level,' and they turn it loose. Then they open the gates and all we get is that slush and cow shit and debris from them reservoirs and it's pouring into our water and there is that white foamy stuff on the top of the water and this algae that is so thick you can't even walk in it and it's no good for the fish. It's no good for the wildlife. It's no good for nothing. And anymore even if we do have a high water it doesn't flush it. It goes down the little channels where the water is supposed to be and all this algae is on the sides and it floats up and goes down to where the fish are and never goes away. There it is. That has a lot of effect on our river.

The River used to have high winter flows. People would move around in the winter. The River would rise 40-50 feet every year in peak flows. Walt recalls high water and flood events in 1955, 1964, and 1974. High water events removed silt and sediments and large woody debris from the river. Now the flows are not high enough to float out the big logs over the riffles or clear out the gravel and sediments that pile up at the mouths of the creeks. The construction of dams on the Klamath and the Trinity Rivers had a big impact on the River and its annual flow. Walt stated that a significant decline in fish population was evident after the construction of the dams.

(Walt McCovey Jr., 2003)

In his 2004 analysis, Thomas King concludes the following:

The Klamath Riverscape is the physical cultural environment of the tribes, and that its health is intimately related to the health of their less tangible cultural institutions. The Klamath Riverscape, the river itself, and its fish would be key cultural resources for the tribes even if they were not eligible for the National Register. To the extent the dams contribute to the pattern of cumulative impacts on the riverscape, they have an adverse effect on the integrity of these resources, which must be considered in project review under NEPA.

It remains the position of the Yurok Tribe that the only resolution of these long standing violations of Yurok sovereignty, the depletion and degradation of Yurok Trust Resources and the actual fulfillment of the federal government's Trust Responsibility to the Yurok

Tribe and its members requires the full removal of the 4 Klamath River dams and the implementation of the KBRA and KHSA all leading to the restoration of the Klamath River its ecosystem and its fishery. This report has been prepared for the purposes of providing citations, references, data and evidence that will assist the Department of the Interior, the Secretary of the Interior and all federal agencies engaged in the Secretarial Determination Process and the ongoing NEPA/CEQA process in making a sound and informed decision on these important matters of vital interest to the Yurok Tribe.

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XII. Attachments

- A. 1851 Treaty with the Poh-lik-lah**
- B. 1973 USC 412 US 481 Mattz v. Arnett**
- C. 1993 DOI Solicitors Opinion: Fishing Rights of the Yurok and Hoopa Valley Tribes**
- D. 2006 DOI Cooperative Agreement: Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin in California**

A. 1851 Treaty with the Poh-lik-lah

Klamath River Reserve.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, November 10, 1855.

SIR: Referring to your communication of the 8th of August last to the Acting Commissioner of Indian Affairs, advising him of the approval by the President of the United States of the recommendation of the Department that it was expedient to expend the money appropriated on the 3rd of March last for removing the Indians in California to two additional military reservations, I have the honor now to make the following report:

On the 15th of August last the Acting Commissioner inclosed a copy of your letter of the 8th of that month to the superintendent of Indian affairs in California, with directions 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, which tracts should be unincumbered by old Spanish grants or claims of recent white settlers," limiting the dimensions of the reserves to within 25,000 acres each, and to report to this office a description of their geographical position in relation to streams, mountain ranges, and county lines, etc., and indicating the same upon a map. A copy of that letter is herewith, marked A. By the last mail from California, I have received from Superintendent Thomas I. Henley a report upon this subject, dated the 4th ultimo (a copy of which is herewith, marked B), by which it appears he recommends as one of the reservations aforesaid "a strip of territory one mile in width on each side of the (Klamath) river, for a distance of 20 miles." The superintendent remarks upon the character of the country selected, and incloses an extract from a report (also herewith, marked C) to him of the 19th of June last, by Mr. S. G. Whipple, which contains in some detail a description of the country selected, habits and usages of the Indians, etc., but no map is furnished.

It will be observed from this report of the superintendent that he has deemed it important to continue the employ of an agent and to prepare for raising a crop in order to assure the Indians of the good faith of the Government and to preserve the peace of the country. Considering the great distance of this reserve from the seat of Government and the length of time it necessarily requires to communicate with an agency at the Klamath, it is desirable that some definite action be taken, if practicable, before the sailing of the next steamer, to leave New York on the 20th instant.

I, therefore, beg leave to ask your attention to the subject, and if you shall be of the opinion from the representations made by the superintendent in California and Mr. Whipple that the selection at the mouth of the Klamath River is a judicious and proper one, that it be laid before the President of the United States for his approval, but with the provision, however, that upon a survey of the tract selected that a sufficient quantity be cut off from the upper end of the proposed reserve to bring it within the limitation of 25,000 acres, authorized by the act of 3d March last.

I also inclose herewith a copy of another letter from Superintendent Henley, of 4th ultimo (marked D), in which he states, in relation to the other reserve, that it is intended to locate it "between the headwaters of Russian River and Cape Mendocino." In reference to both of these proposed reserves, and as connected with the means to be used to maintain peaceable relations with the Indians, the superintendent is of opinion that it is of great importance to provide for crops, and that to do so an agent in each instance is necessary. As this last-named selection has not been defined by any specific boundaries, and no sufficient description is given as to soil, climate, and suitability for Indian purposes, to enable the Department to determine the matter under-

standingly, of course nothing definite can now be done. But it may not be improper to consider the subject in connection with the general intent as to the particular locality in which it is proposed to make the location.

The reserve proposed on the Klamath River and Pacific coast does not appear from the map of the State of California to be very far removed from Cape Mendocino, or a point between that and Russian River; and as provision is made only for two reserves in the State other than those already in operation, the question arises whether it should not be situated farther in the interior, or perhaps eastern part of the State, than the point referred to. The Noome Lacke Reserve is situated in one of the Sacramento valleys, at about the latitude of 40 degrees north and 122 degrees of longitude west, about the center of that portion of the State north of the port of San Francisco. As, therefore, the proposed Klamath Reserve, being northwest from the Noome Lacke Reservation, would appear to be adapted to the convenient use of the Indians in that direction, the question is suggested whether the other reserve should not be located farther east and north, say on the tributaries of either Pitt or Feather Rivers. As in the case of the proposed reserve of the Klamath, I am desirous of obtaining your opinion and that of the President of the United States, with such decision as may be arrived at under the circumstances, in season to communicate the same by the next California mail, for the government of the action of superintendent Henley.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

HON. R. McCLELLAND,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 12, 1855.

SIR: I have the honor to submit herewith the report from the Commissioner of Indian Affairs of the 10th instant, and its accompanying papers, having relation to two of the reservations in California for Indian purposes, authorized by the act of 3d March last.

The precise limits of but one of the reservations, viz, a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River, are given, no sufficient data being furnished to justify any definite action on the other.

I recommend your approval of the proposed Klamath Reservation, with the provision, however, that upon a survey of the tract a sufficient quantity be cut off from the upper end thereof to bring it within the limit of 25,000 acres authorized by law.

Respectfully, your obedient servant,

R. McCLELLAND,
Secretary.

The PRESIDENT.

Let the reservation be made, as proposed.

FRANKLIN PIERCE.

NOVEMBER 16, 1855.

Mendocino Reserve.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, April 16, 1856.

SIR: Referring to the report I had the honor to submit for your consideration on the 10th of November last, relative to the establishment

B. 1973 USC 412 US 481 Mattz v. Arnett

MATTZ v. ARNETT, 412 U.S. 481 (1973)

412 U.S. 481

Case Number: 71-1182

Decided: 01/01/1900

United States Supreme Court

Cite as: 1973 US, 412 U.S. 481, ____

U.S. Supreme Court

MATTZ v. ARNETT, 412 U.S. 481 (1973)

412 U.S. 481

**MATTZ v. ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME
CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT**

No. 71-1182.

Argued March 27-28, 1973

Decided June 11, 1973

Petitioner, a Yurok, or Klamath River, Indian, intervened in a forfeiture proceeding, seeking the return of five gill nets confiscated by a California game warden. He alleged that the nets were seized in Indian country, within the meaning of 18 U.S.C. 1151, and that the state statutes prohibiting their use did not apply to him. The state trial court found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," and concluded that the area was not Indian country. The State Court of Appeal affirmed, holding that since the area had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. Indian country is defined by 1151 as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The Klamath River Reservation was established by Executive Order in 1855 and included the area in question. In 1891, by Executive Order, the Klamath River Reservation was made part of the Hoopa Valley Reservation. The Act of June 17, 1892, provided that "all of the lands embraced in what was Klamath River Reservation" reserved under the 1855 Executive Order, are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights . . . Provided, That any Indian now located upon said reservation may, at any time within one year . . . apply to the Secretary of the Interior for an allotment of land And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract . . . upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians." The Act further provided that proceeds from the sale of the lands "shall constitute a fund . . . for the maintenance and education of the Indians now residing on said lands and their children." Held: The Klamath River Reservation was not [412 U.S. 481, 482] terminated by the Act of June 17, 1892, and the land within the reservation boundaries is still Indian country, within the meaning of 18 U.S.C. 1151. Pp. 494-506.

(a) The allotment provisions of the 1892 Act, rather than indicating an intention to terminate the reservation, are completely consistent with continued reservation status. *Seymour v. Superintendent*, 368 U.S. 351. Pp. 496-497.

(b) The reference in the Act to the Klamath River Reservation in the past tense did not manifest a congressional purpose to terminate the reservation, but was merely a convenient way of identifying the land, which had just recently been included in the Hoopa Valley Reservation. Pp. 498-499.

(c) The Act's legislative history does not support the view that the reservation was terminated, but by contrast with the final enactment, it compels the conclusion that efforts to terminate by denying allotments to the Indians failed completely. Pp. 499-504.

(d) A congressional determination to terminate a reservation must be expressed on the face of the statute or be clear from the

surrounding circumstances and legislative history, neither of which obtained here. Pp. 504-505.

(e) The conclusion that the 1892 Act did not terminate the Reservation is reinforced by repeated recognition thereafter by the Department of the Interior and by the Congress. Congress has recognized the reservation's continued existence by extending, in 1942, the period of trust allotments, and in 1958, by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation. P. 505.

20 Cal. App. 3d 729, 97 Cal. Rptr. 894, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Lee J. Sclar argued the cause and filed briefs for petitioner.

Roderick Walston, Deputy Attorney General of California, argued the cause for respondent. With him on the briefs were Evelle J. Younger, Attorney General, and Carl Boronkay, Assistant Attorney General.

Harry R. Sachse argued the cause for the United States as amicus curiae urging reversal. With him on the brief [412 U.S. 481, 483] were Solicitor General Griswold, Assistant Attorney General Frizzell, Carl Strass, and Glen R. Goodsell.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Our decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress or whether it remains "Indian country," within the meaning of 18 U.S.C. 1151. ¹When established, the reservation was described as "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River" [412 U.S. 481, 484] for a distance of approximately 20 miles, encompassing an area not exceeding 25,000 acres. This description is taken from President Franklin Pierce's Executive Order issued November 16, 1855, pursuant to the authority granted by the Act of March 3, 1853, 10 Stat. 226, 238, and the Act of March 3, 1855, 10 Stat. 686, 699. ²

Petitioner Raymond Mattz is a Yurok, or Klamath River, Indian who, since the age of nine, regularly fished, as his grandfather did before him, with dip, gill, and trigger nets, at a location called Brooks Riffle on the Klamath River. On September 24, 1969, a California game warden confiscated five gill nets owned by Mattz. The nets were stored near Brooks Riffle, approximately 200 feet from the river, and within 20 miles of the river's mouth.

The respondent Director of the Department of Fish and game instituted a forfeiture proceeding in state court. Mattz intervened and asked for the return of his nets. He alleged, among other things, that he was an enrolled member of the Yurok Tribe, that the nets were seized within Indian country, and that the state statutes prohibiting the use of gill nets, Cal. Fish & Game Code 8664, 8686, and 8630, therefore were inapplicable to him. The state trial court, relying on *Elser v. Gill Net Number One*, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966), found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," ³and concluded that the area where the [412 U.S. 481, 485] nets were seized was not Indian country. The court thereby disposed of petitioner's primary defense to the forfeiture. It did not reach other issues bearing upon the application of the California statutes to Indian country and the existence of Indian fishing rights there.

On appeal, the State Court of Appeal affirmed, holding that, inasmuch as the area in question had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. 20 Cal. App. 3d 729, 97 Cal. Rptr. 894 (1971). The Supreme Court of California, one judge dissenting, denied a petition for hearing. See 20 Cal. App. 3d, at 735, 97 Cal. Rptr., at 898. We granted certiorari, 409 U.S. 1124 (1973), because the judgments of the state courts appeared to be in conflict with applicable decisions of this Court.

We now reverse. The reversal, of course, does not dispose of the underlying forfeiture issue. On remand, the questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status will be addressed. We intimate no opinion on those issues.

I

While the current reservation status of the Klamath River Reservation turns primarily upon the effect of an 1892 Act of Congress which opened the reservation land for settlement, the meaning and effect of that Act cannot be determined without some reference to the Yurok Tribe and the history of the reservation between 1855 and 1892.

The Yurok Indians apparently resided in the area of the lower Klamath River for a substantial period before 1855 when the Klamath River Reservation was established. Little is known of their prior history. There are sources, however, that provide us with relatively [412 U.S. 481, 486] detailed information about the tribe, its culture, living conditions, and customs for the period following 1855. ⁴ That the tribe had inhabited the lower Klamath River well before 1855 is suggested by the name. Yurok means "down the river." The

names of the neighboring tribes, the Karok and the Modok, mean, respectively, "up the river" and "head of the river," and these appellations, as would be expected, coincide with the respective homelands. Powers 19; Kroeber 15. ⁵ [412 U.S. 481, 487]

By the Act of March 3, 1853, 10 Stat. 238, the President was "authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." The Act of March 3, 1855, 10 Stat. 699, appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore . . . Provided, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for." President Pierce then issued his order of November 16, 1855, specifying the Klamath River Reservation and stating, "Let the reservation be made, as proposed." Kappler 817.

The site was ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was "peculiarly adapted to the growth of vegetables," 1856 Report 238; and the river, which ran through a canyon its entire length, abounded in salmon and other fish. *Ibid.*; 1858 Report 286. ⁶

In 1861 nearly all the arable lands on the Klamath River Reservation were destroyed by a freshet, and, upon recommendation of the local Indian agent, some of the Indians were removed to the Smith River Reservation, established for that purpose in 1862. Only a small number of Yuroks moved to the new reservation, however, and nearly all those who did move returned within a few [412 U.S. 481, 488] years to the Klamath River. *Crichton v. Shelton*, 33 I. D. 205, 208 (1904); Kappler 830; 1864 Report 122. The Smith River Reservation was then discontinued. Act of July 27, 1868, 15 Stat. 198, 221.

The total Yurok population on the Klamath River Reservation in the 1860's cannot be stated with precision. In 1852, based in part on a rough census made by a trader, it was estimated at 2,500. Kroeber 16-17. ⁷ [412 U.S. 481, 489] The effect of the 1861 flood cannot be firmly established; but it is clear that the tribe remained on the Klamath thereafter. ⁸ For later years, Kroeber estimated that the population in 1895 was 900, and, in 1910, 668. Kroeber 19. From this it would appear that the flood at least did not cause a dissolution of the tribe; on the contrary, the Yuroks continued to reside in the area through the turn of the century and beyond.

The Act of April 8, 1864, 13 Stat. 39, designated California as one Indian superintendency. It also recited that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations." It further provided that "the several Indian reservations in California which shall not be retained . . . under . . . this act, shall . . . be surveyed into lots or parcels . . . and . . . be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry." *Id.*, at 40.

At the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River. It appears, also, that the President did not take immediate [412 U.S. 481, 490] action, upon the passage of the Act, to recognize reservations in California. It was not until 1868 that any formal recognition occurred, and then it was the Congress, rather than the President, that acted. In that year Congress discontinued the Smith River Reservation, 15 Stat. 221, and restored the Mendocino to the public lands. *Id.*, at 223. No similar action was taken with respect to the Klamath River Reservation. *Crichton v. Shelton*, 33 I. D., at 209. Congress made appropriations for the Round Valley Reservation, 15 Stat. 221, and for it and the Hoopa Valley Reservation in 1869, 16 Stat. 37, although neither of these, apparently, had been established theretofore by formal Executive Order. ⁹

The Klamath River Reservation, although not reestablished by Executive Order or specific congressional action, continued, certainly, in de facto existence. Yuroks remained on reservation land, and the Department of Indian Affairs regarded the Klamath River Reservation as "in a state of reservation" throughout the period from 1864 to 1891. ¹⁰ No steps were taken to sell the reservation, or parts thereof, under the 1864 Act. Indeed, in 1879, all trespassers there were removed by the military. In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation. ¹¹ In February 1889, the Senate, by [412 U.S. 481, 491] resolution, directed the Secretary of the Interior "to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian reservation . . . in pursuance of the provisions of the act approved April 8, 1864." 20 Cong. Rec. 1818. In response, the Commissioner of Indian Affairs, by letter dated February 18, 1889, to the Secretary disclosed that no proceedings to this effect had been undertaken. ¹² An Assistant Attorney General for the Department of the Interior expressed a similar view in an opinion dated January 20, 1891. ¹³ [412 U.S. 481, 492]

In 1888, in a forfeiture suit, the United States District Court for the Northern District of California concluded that the area within the Klamath River Reservation was not Indian country, within the meaning of Rev. Stat. 2133, prescribing the penalty for unlicensed trading in Indian country. The court concluded that the land composing the reservation was not retained or recognized as reservation land pursuant to the 1864 Act and that, therefore, it no longer constituted an Indian reservation. *United States v. Forty-eight Pounds of Rising Star Tea*, 35 F. 403 (ND Cal. 1888). This holding was expressly affirmed on appeal to a circuit judge. 38 F. 400 (CCND Cal. 1889). The Assistant Attorney General, in the opinion referred to above, conceded the probable correctness of the judgment but was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. He felt that the court's comments as to the abandoned status of the reservation "were dicta and not essential to the decision of the case before the court."

Thus, as of 1891, it may be fair to say that the exact legal status of the Klamath River Reservation was obscure and uncertain. The petitioner in his brief here, [412 U.S. 481, 493] p. 14, states that the reservation "ceased to exist in 1876, at the latest."

Any question concerning the reservation's continuing legal existence, however, appears to have been effectively laid to rest by an Executive Order dated October 16, 1891, issued by President Benjamin Harrison.¹⁴ By the specific terms of that order, the Hoopa Valley Reservation, which, as we already have noted, was located in 1864 and formally set apart in 1876, and which was situated about 50 miles upstream from the Klamath River's mouth, was extended so as to include all land, one mile in width on each side of the river, from "the present limits" of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended.

The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. These were the Round Valley, referred to above, the Mission,¹⁵ the Hoopa [412 U.S. 481, 494] Valley, and the Tule River. Kappler 830-831. Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act to expand an existing, recognized reservation. He enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts.¹⁶ The President's continuing authority so to enlarge reservations and, specifically, the legality of the 1891 Executive Order, was affirmed by this Court in *Donnelly v. United States*, 228 U.S. 243, 255-259 (1913), reh. denied, 228 U.S. 708, and is not challenged here.

II

This general background as to the origin and development of the Klamath River Reservation is not contested by either party. The reservation's existence, pursuant to the Executive Order of 1891, is conceded. The present controversy relates to its termination subsequent to 1891, and turns primarily upon the effect of the Act of June 17, 1892, 27 Stat. 52, entitled "An act to provide for the [412 U.S. 481, 495] disposition and sale of lands known as the Klamath River Indian Reservation." This Act provided:

"That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: Provided, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. . . . Provided further, That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children."

The respondent Director argues that this statute effected the termination of the Klamath River Reservation. The petitioner urges the contrary. It is our task, in light of the language and purpose of the Act, as well as of the historical background, outlined above, to determine the proper meaning of the Act and, consequently, the current status of the reservation. [412 U.S. 481, 496]

The respondent relies upon what he feels is significant language in the Act and upon references in the legislative history. He contends, "The fact that the lands were to be opened up for settlement and sale by homesteaders strongly militates against a continuation of such reservation status." Brief for Respondent 3.

We conclude, however, that this is a misreading of the effect of the allotment provisions in the 1892 Act. The meaning of those terms is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.¹⁷ Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958).¹⁸ [412 U.S. 481, 497] Under the 1887 Act, however, the President was not required to open reservation land for allotment; he merely had the discretion to do so.

In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment.¹⁹ The 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier Act, do not,

alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. See *Seymour v. Superintendent*, 368 U.S. 351, 357-358 (1962). Rather, allotment under the 1892 Act is completely consistent with continued reservation status. This Court unanimously observed, in an analogous setting in *Seymour*, *id.*, at 356, "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." See *United States v. Celestine*, 215 U.S. 278 (1909); *United States v. Nice*, 241 U.S. 591 (1916). See also *Wilbur v. United States*, 281 U.S. 206 (1930); *Donnelly v. United States*, 228 U.S. 243 (1913).

III

The respondent further urges, however, that his view of the effect of the 1892 Act is supported by the Act's reference [412 U.S. 481, 498] to "what was [the] Klamath River Reservation." According to the respondent, this reference, and other references in the legislative history, compel the conclusion that Congress intended to terminate the reservation in 1892.

The 1892 Act, to be sure, does refer to the Klamath River Reservation in the past tense. But this is not to be read as a clear indication of congressional purpose to terminate. Just a few weeks before the bill (H. R. 38, 52d Cong., 1st Sess.), which eventually became the Act, was reported out of committee on February 5, 1892, H. R. Rep. No. 161, 52d Cong., 1st Sess., the President had formally extended the Hoopa Valley Reservation to include the Klamath River Reservation. And only that portion of the extension which had been the Klamath River Reservation was the subject of the 1892 Act. The reference to the Klamath River Reservation in the past tense seems, then, merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act.²⁰ We do not believe [412 U.S. 481, 499] the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo.

The respondent also points to numerous statements in the legislative history that, in his view, indicate that the reservation was to be terminated. We need not refer in detail to the cited passages in H. R. Rep. No. 161, *supra*, or to the debates on the bill, 23 Cong. Rec. 1598-1599, 3918-3919 (1892), for there is no challenge here to the view that the House was generally hostile to continued reservation status of the land in question. In our estimation, however, this very fact, in proper perspective, supports the petitioner and undermines the respondent's position.

As early as 1879, there were efforts in Congress to abolish the Klamath River Reservation. From that date to 1892 strong sentiment existed to this effect. But it does not appear that termination ever commanded majority support. The advocates of termination argued that the reservation, as of 1879, long had been abandoned; that the land was useless as a reservation; and that many white settlers had moved on to the land and their property should be protected. See H. R. Rep. No. 1354, 46th Cong., 2d Sess., 5 (1880). That whites had settled there is clear, but the view that no Indians remained after the flood of 1861 appears to have been a gross misconception on the part of those who sought termination.²¹ [412 U.S. 481, 500]

The first bill providing for public entry and sale of the Klamath River Reservation was introduced in the Senate on May 28, 1879. S. Res. 34, 46th Cong., 1st Sess.; 9 Cong. Rec. 1651. The resolution referred to the reservation's having been "abandoned" in 1855 "and the tribe removed to another reservation established for its use." No action was taken on the bill, and another, of the same purport, was introduced on January 12, 1880, in the House. H. R. 3454, 46th Cong., 2d Sess.; 10 Cong. Rec. 286. This bill provided that the reservation "be, and the same is hereby, abolished," and authorized and directed the Secretary of the Interior to survey the lands and have them made subject to homestead and preemption entry and sale "the same as other public lands." It is clear from the report on this second bill, H. R. Rep. No. 1354, *supra*, at 1-5, that the establishment of the reservation in 1855 was viewed as a mistake and an injustice. According to the Report, the reservation had been abandoned after the 1861 freshet, and the Indians had moved to the Smith River and, later, the Hoopa Valley Reservations. White settlers had moved in and wished to exploit the lumber and soil of the area which, some said, "has no equal in California as a fruit and wine growing country." *Id.*, at 5. Inasmuch as the reservation blocked access to the river, the resources of the area could not be developed. Although unmentioned in that Report, the Office of Indian Affairs opposed the bill. See H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1 (1882). The bill as reported was recommitted and no further action was taken. 10 Cong. Rec. 3126 (1880).

An identical bill was introduced in the following Congress. H. R. 60, 47th Cong., 1st Sess.; 13 Cong. Rec. 90 (1881). The Commissioner of Indian Affairs opposed the bill as introduced, but stated that he would not oppose it if provision for prior allotments to the Indians was made. H. R. Rep. No. 1148, *supra*, at 2. The [412 U.S. 481, 501] Commissioner's proposed amendment was approved by the Committee, 13 Cong. Rec. 3414 (1882), but no action on the bill was taken by the full House.

In 1883 and 1884 three more bills were introduced. It is of interest to note that each acceded to the request of the Commissioner that provision be made for prior allotments to resident Indians. H. R. 112, 48th Cong., 1st Sess.; 15 Cong. Rec. 62 (1883); S. 813, 48th Cong., 1st Sess.; 15 Cong. Rec. 166 (1883); H. R. 7505, 48th Cong., 1st Sess.; 15 Cong. Rec. 5923 (1884). Each bill would have "abolished" the reservation and would have made the land subject to homestead and pre-emption entry. None of the bills was enacted, although passage must have been generally regarded as likely, for the Indian Bureau in 1883 began the work of allotment and survey, perhaps in anticipation of passage.

In 1885 two bills were introduced in the House. Each was substantially identical to those introduced in 1883 and 1884. H. R. 158 and H. R. 165, 49th Cong., 1st Sess.; 17 Cong. Rec. 370 (1885). No action was taken on either bill.

No further bills, apparently, were introduced until 1889. During the intervening period, however, the General Allotment Act of 1887, 24 Stat. 388, was passed and thereafter amended, 26 Stat. 794. The Rising Star Tea case, 35 F. 403, was also decided.

In 1889 a bill providing for the allotment of the Klamath River Reservation was introduced. The allotments, however, were to be made in a manner inconsistent with the General Allotment Act. H. R. 12104, 50th Cong., 2d Sess.; 20 Cong. Rec. 756 (1889). And after affirmance of the Rising Star Tea case by the circuit court, 38 F. 400 (1889), identical bills were introduced in the House and the Senate providing, without mention of allotment, that "all of the lands embraced in what was Klamath River Reservation . . . are hereby declared [412 U.S. 481, 502] to be subject to settlement, entry, and purchase" under the land laws. H. R. 113, 51st Cong., 1st Sess.; 21 Cong. Rec. 229 (1889); S. 2297, 51st Cong., 1st Sess.; 21 Cong. Rec. 855 (1890). The Indian Office opposed the bills, recommending that they be amended to provide for allotments to the Indians under the General Allotment Act, that surplus lands be restored to the public domain, and that the proceeds be held in trust for the Klamath River Indians. See *Short v. United States*, No. 102-63, pp. 44-45 (Report of Commissioner, Court of Claims, 1972). H. R. 113 was reported out of committee with certain amendments, including one to the effect that proceeds arising from the sale of lands were to be used for the "removal, maintenance, and education" of the resident Indians, the Hoopa Valley Reservation being considered the place of removal. Allotments to the Indians on the Klamath Reservation, however, were emphatically rejected. H. R. Rep. No. 1176, 51st Cong., 1st Sess., 2 (1890). The bill was so amended and passed the House. 21 Cong. Rec. 10701-10702 (1890). It died in the Senate.

In light of the passage of this last bill in the House and the presence of the Rising Star Tea opinions, the Indian Department moved to have the Klamath River Reservation land protected for the Indians residing there. The details of this effort, including the opinion of the Assistant Attorney General, referred to above, are outlined in the Commissioner's report in *Short v. United States*, supra, at 45-50. These efforts culminated in President Harrison's Executive Order of October 1891 expanding the Hoopa Valley Reservation to include the Klamath River Reservation.

It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced. H. R. 38, 52d Cong., 1st Sess.; 23 Cong. [412 U.S. 481, 503] Rec. 125 (1892). The bill provided for the settlement, entry, and purchase of the reservation land and specified that the proceeds should be used for the "removal, maintenance, and education" of the resident Indians. No allotments were provided for, as the Indians were "semicivilized, disinclined to labor, and have no conception of land values or desire to cultivate the soil." H. R. Rep. No. 161, 52d Cong., 1st Sess., 1 (1892). The House Committee on Indian Affairs amended the bill by changing the word "and" to "or" in the proviso relating to the use of proceeds. Id., at 2.

The bill passed the House without change. 23 Cong. Rec. 1598-1599 (1892). It was struck out in the Senate, however, and another version was substituted deleting reference to the removal of the Indians and providing that before public sale the land should be allotted to the Indians under the General Allotment Act of 1887, as amended. Id., at 3918-3919. This substitute measure had the support of the Interior Department. Id., at 3918. The Senate called for a conference with the House, id., at 3919, and the conference adopted the Senate version with amendments. Sen. Misc. Doc. No. 153, 52d Cong., 1st Sess. (1892). The bill was then passed and became the 1892 Act.

IV

Several conclusions may be drawn from this account. First, the respondent's reliance on the House Report and on comments made on the floor of the House is not well placed. Although the primary impetus for termination of the Klamath River Reservation had been with the House since 1871, this effort consistently had failed to accomplish the very objectives the respondent now seeks to achieve. Likewise, the House in 1892 failed to accomplish these objectives, for the Senate version, supported by the Interior Department, was substituted for that of [412 U.S. 481, 504] the House. The Senate version, ultimately enacted, provided for allotments to the Indians and for the proceeds of sales to be held in trust for the "maintenance and education," not the removal, of the Indians. The legislative history relied upon by the respondent does not support the view that the reservation was terminated; rather, by contrast with the bill as finally enacted, it compels the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely.

A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. 1151, defining Indian country "notwithstanding the issuance of any patent" therein. More significantly, throughout the period from 1871-1892 numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation. ²²The Court stated in *United States v. Celestine*, 215 U.S., at 285, that "when Congress has [412 U.S. 481, 505] once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour v. Superintendent*, 368 U.S. 351 (1962);

Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress. In 1904 the Department, in *Crichton v. Shelton*, 33 I. D. 205, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation,²⁴ and it continues to do so today. And Congress has recognized the reservation's continued existence by extending the period of trust allotments for this very reservation by the 1942 Act, described above, 25 U.S.C. 348a, and by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act, *supra*.²⁵ [412 U.S. 481, 506]

We conclude that the Klamath River Reservation was not terminated by the Act of June 17, 1892, and that the land within the boundaries of the reservation is still Indian country, within the meaning of 18 U.S.C. 1151.

The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings.

It is so ordered.

Footnotes

[^{Footnote 1}] Title 18 U.S.C. 1151 defines the term "Indian country" to include, *inter alia*, "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . ." Title 18 U.S.C. 1162 (a) provides that, with respect to Indian country within California, that State "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . ., and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . ." Section 1162 (b) provides, however, "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." Finally, the California Fish & Game Code 12300 (Supp. 1973), reads: "Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States [18 U.S.C. 1162]."

[^{Footnote 2}] The Executive Order is reproduced in 1 C. Kappler, *Indian Affairs - Laws and Treaties* 817 (1904) (hereinafter *Kappler*). At the end of this opinion, as the Appendix, is a map of the Klamath River Reservation. The area described in the text is indicated as the "Old Klamath River Reservation."

[^{Footnote 3}] See *Pet. for Cert.*, App. B 4-5.

[^{Footnote 4}] A. Kroeber, *Handbook of the Indians of California*, cc. 1-4, published as *Bulletin 78, Bureau of American Ethnology* 1-97 (1925) (hereinafter *Kroeber*); S. Powers, *Tribes of California*, cc. 4 and 5, published as 3 *Contributions to North American Ethnology* 44-64 (1877) (hereinafter *Powers*). Various Annual Reports of the Commissioner of Indian Affairs provide further information; see, for example, the 1856 Report of the Commissioner of Indian Affairs 249-250 (hereinafter *Report*).

[^{Footnote 5}] Kroeber, in the preface to his work, suggests that the factual material contained in Powers' manuscript is subject to some criticism. Kroeber's reference to Powers deserves reproduction in full here: "I should not close without expressing my sincere appreciation of my one predecessor in this field, the late Stephen Powers, well known for his classic 'Tribes of California,' one of the most remarkable reports ever printed by any government. Powers was a journalist by profession and it is true that his ethnology is often of the crudest. Probably the majority of his statements are inaccurate, many are misleading, and a very fair proportion are without any foundation or positively erroneous. He possessed, however, an astoundingly quick and vivid sympathy, a power of observation as keen as it was untrained, and an invariably spirited gift of portrayal that rises at times into the realm of the sheerly fascinating. Anthropologically his great service lies in the fact that with all the looseness of his data and method he was able to a greater degree than anyone before or after him to seize and fix the salient qualities of the mentality of the people he described. The ethnologist may therefore by turns writhe and smile as he fingers Powers's pages, but for the broad outlines of the culture of the California Indian, for its values with all their high lights and shadows, he can still do no better than consult the book. With [412 U.S. 481, 487] all its flimsy texture and slovenly edges, it will always remain the best introduction to the subject." Kroeber *ix*.

[^{Footnote 6}] Of this area one agent stated, "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 them. No territory offers more to these Indians and very little territory offers less to the white man. The issue of their removal seems to disappear." 1885 Report 266.

[Footnote 7] It is interesting to note that Powers believed the Yurok population at one time far exceeded 2,500 and perhaps numbered over 5,000. This was, as Powers stated, "before the whites had come among them, bringing their corruptions and their maladies . . ." Powers 59. The renowned Major John Wesley Powell, who was then in charge of the United States Geographical and Geological Survey of the Rocky Mountain Region, Department of the Interior, placed little faith in Powers' figures and requested that he modify his estimates. Powers expressed his displeasure at this in a letter to Major Powell stating, in characteristic fashion, "I have the greatest respect for your views and beliefs, and, with your rich fund of personal experience and observation; if you desire to cut out the paragraph and insert one under your own signature, in brackets, or something of that kind, I will submit without a murmur, if you will add this remark, as quoted from myself, to wit: 'I desire simply to ask the reader to remember that Major Powell has been accustomed to the vast sterile wastes of the interior of the continent, and has not visited the rich forests and teeming rivers of California.' But I should greatly prefer that you would simply disavow the estimates, and throw the whole responsibility upon me. "This permission I give you; but I have waded too many rivers and climbed too many mountains to abate one jot of my opinions or beliefs for any carpet-knight who yields a compiling-pen in the office of the - or - . If any critic, sitting in his comfortable parlor in New York, and reading about the sparse aboriginal populations of the cold forests of the Atlantic States, can overthrow any of my conclusions with a dash of his pen, what is the use of the book at all? As Luther said, at the Diet of Worms, 'Here I stand; I cannot do otherwise.' "I beg you, my dear major, not to consider anything above [412 U.S. 481, 489] written as in the slightest degree disrespectful to yourself; such is the farthest remove from my thoughts." Powers 2-3. Powers' estimates were not altered, and the above-quoted letter was placed sympathetically by Major Powell in the introductory section of Powers' published study.

[Footnote 8] 1864 Report 122; Opinion dated Jan. 20, 1891, of the Assistant Attorney General for the Department of the Interior, quoted in *Crichton v. Shelton*, 33 I. D. 205, 210 (1904); Kroeber 19. Another source estimates that in 1871 the Indian population along the Klamath was 2,500. Report of D. H. Lowry, Indian Agent, Sept. 1, 1871, noted in *Short v. United States*, No. 102-63, p. 35 (Report of Commissioner, Court of Claims, 1972).

[Footnote 9] The Hoopa Valley Reservation was located August 21, 1864, but formally set apart for Indian purposes, as authorized by the 1864 Act, by President Grant only by Executive Order dated June 23, 1876. Kappler 815. See Appendix map. The area is that described as the "Original Hoopa Valley Reservation."

[Footnote 10] Letter dated Apr. 4, 1888, from the Commissioner of Indian Affairs to the Secretary of the Interior, quoted in *Crichton v. Shelton*, 33 I. D., at 211.

[Footnote 11] The allotments, however, were postponed "on account of the discovery of gross errors in the public surveys." *Ibid.*; 1885 Report XLVIII.

[Footnote 12] "In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2)." Quoted in *Crichton v. Shelton*, 33 I. D., at 212.

[Footnote 13] "Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system . . . It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so? . . . "In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and [412 U.S. 481, 492] it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable." Quoted in *Crichton v. Shelton*, 33 I. D., at 212-213.

[Footnote 14] "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 8., 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; Provided, however, That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws

of the United States are hereby excluded from the reservation as hereby extended." Kappler 815.

[Footnote 15] Kappler 819-824. It is noteworthy that the boundaries of the Mission Reservation were altered repeatedly between 1870 and 1875, [412 U.S. 481, 494] and even thereafter. These actions were taken under the President's continuing authority to set apart and add to or diminish the four reservations authorized under the 1864 Act. *Donnelly v. United States*, 228 U.S. 243 and 708 (1913). In its final form, the Mission Reservation consisted of no less than 19 different and noncontiguous tracts. Kappler 819-824; *Crichton v. Shelton*, 33 I. D., at 209-210.

[Footnote 16] See Appendix map. The strip of land between the Hoopa Valley Reservation and the Klamath River Reservation is referred to there as the "Connecting Strip." Under the 1891 Executive Order the Hoopa Valley Reservation was extended to encompass all three areas indicated on the map. The connecting strip and the old Klamath River Reservation frequently are referred to as the Hoopa Valley Extension.

[Footnote 17] The trust period on allotments to Indians on the Klamath River Reservation expired in 1919, but was later extended by Congress by the Act of Dec. 24, 1942, 56 Stat. 1081, 25 U.S.C. 348a. See S. Rep. No. 1714, 77th Cong., 2d Sess. (1942). And in 1958 Congress restored to tribal ownership vacant and undisposed-of ceded lands on various reservations, including 159.57 acres on the Klamath River Reservation. Pub. L. 85-420, 72 Stat. 121.

[Footnote 18] For an extended treatment of allotment policy, see D. Otis, *History of the Allotment Policy*, in *Readjustment of Indian Affairs*, Hearings on H. R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428-440 (1934). The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. 461 et seq.

[Footnote 19] See, for example, the Act of Mar. 2, 1889, 25 Stat. 888 (Sioux Reservations), and *United States v. Nice*, 241 U.S. 591 (1916); the Act of Mar. 22, 1906, 34 Stat. 80 (Colville Reservation), and *Seymour v. Superintendent*, 368 U.S. 351 (1962); the Act of May 29, 1908, 35 Stat. 460 (Cheyenne River and Standing Rock Reservations), and *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA8 1973), affg 344 F. Supp. 777 (SD 1972).

[Footnote 20] The respondent argues, however, that Congress, perhaps unacquainted with the Executive Order of October 1891, intended this language to convey the view expressed in the House Report, H. R. Rep. No. 161. *supra*, 23 Cong. Rec. 1598-1599 (1892), that the Klamath River Reservation had long been abandoned and, in fact and in law, had already been terminated. It is clear from the text, *infra*, that there were efforts in certain quarters of the House to terminate the reservation and open it for white settlement. See *Short v. United States*, *supra*, n. 8, at 34-52. While the respondent's interpretation of the phrase is plausible, it is no less plausible to conclude, in light of the repeated and unsuccessful efforts by the House to terminate the reservation, that the Senate proponents of the legislation were not inclined to make their cause (of requiring allotments) less attractive to the House by amending the bill to refer to the "former Klamath River Reservation, now part of the Hoopa Valley Reservation" rather than "what was [the] Klamath River Reservation."

[Footnote 21] The Department of the Interior took issue with the Committee's population estimates. H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1-3 (1882). In a letter transmitted to the Committee on Indian Affairs in 1881, an infantry lieutenant, acting as Indian Agent, suggested that the Committee's population estimates were "gleaned principally from civilians, who are, I believe, somewhat inclined to lessen the number, thinking doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers." *Id.*, at 2.

[Footnote 22] Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain"), and *Seymour v. Superintendent*, 368 U.S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished").

[Footnote 23] In *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (1973), the United States Court of Appeals for the Eighth Circuit reached a similar conclusion in a case presenting issues not unlike those before us. The court concluded, *id.*, at 689, that "a holding favoring federal jurisdiction is required unless Congress has expressly or by clear implication diminished the boundaries of the reservation opened to settlement" (emphasis in original).

[Footnote 24] Hearings before a Subcommittee of the Senate Committee on Indian Affairs, *Survey of Conditions of the Indians in the United States*, pt. 29, California, 72d Cong., 1st Sess., 15532 (1934).

[Footnote 25] Although subsequent legislation usually is not entitled to much weight in construing earlier statutes, *United States v.*

Southwestern Cable Co., 392 U.S. 157, 170 (1968), it is not always without significance. See Seymour v. Superintendent, 368 U.S.,
at 356 -357. [412 U.S. 481, 507]

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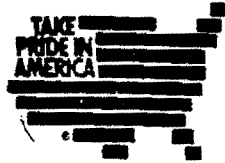
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C. 1993 DOI Solicitors Opinion: Fishing Rights of the Yurok and Hoopa Valley Tribes



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

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, 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.

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.

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 Regua "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 no., 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 rehearings 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 reserved³¹); cf. Arizona v. California, 373 U.S. 546, 596-600 (1963).

910-11. See also Antoine v. Washinston, 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

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 resource 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 United 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

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, where their fisheries can still be carried on, where 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

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 culture 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.

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

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 assets 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

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.

* * * *

This 50% maximum [for the Washington treaty tribes] arises directly from the "in common with" language in the Washington treaties. [Fishing Vessel Ass'n,] 443 U.S. 686. The 50% ceiling is suggested, 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.

The general principle in Fishing Vessel is that Indian treaty rights to scarce natural resources are defined by what is necessary to assure that the Indians' reasonable livelihood expectations are met. 443 U.S. at 686. Where, as here, there was no negotiation resulting 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. Wisc. 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 silent 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

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 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 Department; 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 Act⁴³ 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. Baldrige, 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.

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 sea 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 exclusive 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 responsibility to act in accordance with the fishing rights of the Tribes. This may go beyond safeguarding their right to an appropriate share 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% share 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 supply 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 anadromous fish, ocean fishing has a direct impact on the available harvest in the Klamath and Trinity Rivers within the Tribes' reservations. The Magnuson Act provides:

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 fishery 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, they 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. Baldrige, 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. Baldrige, 522 F. Supp. 683, 685 (W.D. Wash. 1981) (same). Furthermore: nowhere in the Magnuson Act has Congress 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 Commerce must rely on management by the Department

⁴⁶ The Magnuson Act expressly refers to Indian treaty fishing rights. Specifically, 16 U.S.C. § 1853(a)(2) requires 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-river 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. Baldrige, 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

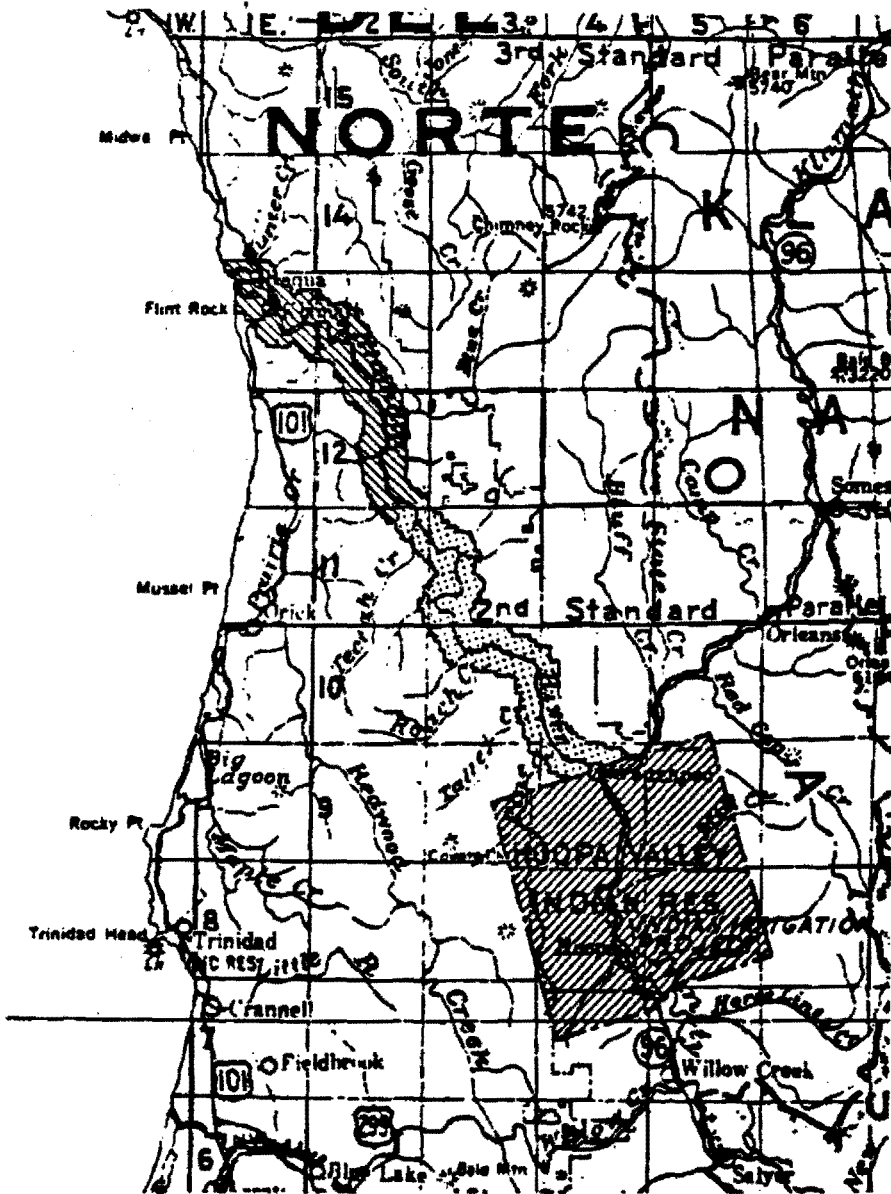
I conclude that when the United States set aside what are today the Hoopa Valley and Yurok Reservations, it reserved for the Indians of the reservations a federally protected right to the fishery resource sufficient to support a moderate standard of living. I also conclude, however, that the entitlement 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 Hoop Valley Reservation.

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

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) (Letter 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 abandoned 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 Ocean. Id. at 9-10.

As part of an effort 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 rehearsing 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

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. They 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 whites 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 questions for the Attorney General:

(1) Did not the Klamath River Indians 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 boundaries 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 the 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 Bornhoff² of Crescent City, who has supplied them with boats, nets, etc., 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

² Bearss, supra note 11 in Opinion, at 163, gives the name as John Bomhoff, which is consistent with Dodds, The Salmon King of Orean, 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 Affairs, Sept. 20, 1888).

The action eventually brought against Hume was prosecution of libel against his goods, 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

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 possession, 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 States attorney did not appear . . . and the Government was not represented. His honor stated that it was the sixth time the case had been set 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

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 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.

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).

D. 2006 DOI Cooperative Agreement: Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin in California

COOPERATIVE AGREEMENT
between
UNITED STATES DEPARTMENT OF THE INTERIOR
and
YUROK TRIBE
for the
COOPERATIVE MANAGEMENT OF TRIBAL AND FEDERAL LANDS
AND RESOURCES IN THE KLAMATH RIVER BASIN OF CALIFORNIA

I. STATEMENT OF JOINT OBJECTIVES:

A. Purpose. This Cooperative Agreement (Agreement) is made and entered into between the United States Department of the Interior (DOI) and the Yurok Tribe (Tribe) to coordinate and cooperatively manage Federal and Tribal lands and resources within the Klamath Basin in California, both within the Yurok Reservation as well as the related basin, upstream river, and Pacific Ocean resources subject to the jurisdiction or authorities of various DOI agencies and bureaus. This Agreement will provide more consistent, economical, effective, and collaborative management of Federal and Tribal lands and natural resources while furthering the Trust relationship that exists between DOI and the Tribe. This Agreement will also greatly expand the resources available to address the shared goals of DOI and the Tribe to improve our collective understanding of the river system and its dynamics, improve the health and vitality of the fishery, and identify and develop programs for natural resource management and service delivery in order to provide long-term benefits to the Tribe, local communities, and the general public and to improve the condition of the basin's natural resources. DOI and the Tribe anticipate that this Agreement will be the foundation for subsequent, continuing, and specific collaborative programs in natural resource management, including but not limited to land and water management, fisheries management, water quality monitoring, land use planning, data gap analysis, interpretation and outreach, and Tribal-interagency management initiatives which will enhance the opportunity to identify and resolve issues critical to the success and survival of a healthy river-based ecosystem in the lower Klamath Basin.

B. Objective. DOI and the Tribe intend to establish an ongoing collaborative government-to-government relationship for management of land, water and other natural resources which will inure to the benefit of DOI, the Tribe, and the communities, as well as the ecosystem and economy of the Klamath River Basin. This Agreement provides a

mechanism to coordinate natural resource management programs, develop joint planning and management initiatives, and coordinate program and budget priorities through the cooperative allocation of resources and the development of long-term resource management and programmatic goals between the signatories. The Agreement will improve DOI and Tribal services to the Tribal and local communities and the general public by improving Klamath River resources management, addressing the health of the fishery, and establishing related programs for restoration and management of natural resources. The Agreement will provide an opportunity for the Tribe to bring to bear its acknowledged scientific expertise, its knowledge of the basin, and the wealth of its culture and traditions to its collaborative relationship with DOI. The Agreement will provide a mechanism by which the Tribe and DOI may further the protection and preservation of Tribal cultural values and practices while collaborating on management of basin natural resources. The Agreement will accomplish these objectives by developing mechanisms for increasing the potential contribution and participation in federal programs by the Tribe while also realizing broader benefits to Klamath Basin communities, the general public, federal agencies and the scientific community.

C. Authority. The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(b); Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; National Park Service Organic Act, 16 U.S.C. 1 *et seq.*; and Klamath River Basin Fisheries Resource Restoration Act, 16 U.S.C. § 460ss *et seq.*, among others, provide that the Secretary of the Interior may undertake programs of resource management through Cooperative Agreements.

D. Benefits. Cooperative undertakings within the scope of this agreement will result in increased public management effectiveness, enhancement of natural resource program coordination, opportunity for joint public outreach, and a greater level of consistency and effectiveness in public and Tribal land use planning. This cooperative relationship provides DOI with access to resources and services not otherwise available, as well as the benefit of continued contributions by and involvement of Tribal officials, planners, resource specialists and the general Tribal membership in public land management. This broader partnership to further the federal-Tribal relationship is critical to providing a higher level of public service and to involving the Tribal government and the public in the development and coordination of resource management programs and cooperative land-use planning and management opportunities.

II. DEFINITIONS:

A. DOI: Means United States Department of the Interior, including its agencies, offices, and bureaus.

B. TRIBE: Means the Tribal Government, the Executive Offices, and/or authorized staff and agents of the Yurok Tribe.

C. AGREEMENT: Means this Cooperative Agreement.

III. SCOPE:

A. DOI agrees to:

Coordinate and consult with the Tribe, as frequently as required by DOI agencies and at least annually, through the Assistant Secretary, Policy Management and Budget or his/her designee and/or appropriate regional and other officials to identify opportunities for the development of land and resource management programs and coordination of resource program priorities and initiatives.

Identify opportunities for development of cooperative initiatives for coordinated management of land and water resources, beneficial data collection, fisheries or other natural resource management programs, land management initiatives, public outreach and such other programs which may offer opportunities for more efficient resource management.

Seek specific opportunities to involve the Tribe in DOI land and resource management activities in a more active role in furtherance of the federal-Tribal relationship and the partnership established under this Agreement.

Coordinate, organize, and assure appropriate government professional and management involvement in programs within the scope of this Agreement.

B. The TRIBE agrees to:

Coordinate and consult with the DOI, as often as necessary and at least annually, to identify Tribal land management priorities, resources and opportunities for joint Tribal-DOI program development.

Coordinate, organize, and assure appropriate Tribal governmental, Tribal member, professional, and executive involvement in programs within the scope of this Agreement.

Seek to identify opportunities for governmental partnerships and cooperative programs, including the identification of Tribal resources available for such initiatives.

Identify and provide appropriate staff and other resources for planning and implementation of initiatives developed pursuant to this Agreement.

C. DOI and the TRIBE agree to:

Establish an on-going joint management group to cooperate in identifying opportunities for collaborative projects pursuant to this Agreement, including program development, budget preparation, planning, and all other aspects necessary to make effective the purposes and objectives of this Agreement.

Conduct and collaborate on specific programs to further the goals and objectives of this Agreement and improve resource conditions, and in doing so: identify and achieve managerial efficiencies; identify and cooperatively address data gaps on fisheries, land, water and other natural resources and systems; involve where appropriate other parties to achieve critical resource management; and accomplish Tribal and agency program priorities and address comprehensive program issues.

Meet as necessary and at least annually to identify specific resource management, planning, scientific, economic, and other appropriate joint management opportunities.

Enter into separate agreements ("Task Orders") with respect to specific resource management projects, identifying the project goals, contributions of both parties, tasks to be performed, completion dates, and related matters as appropriate to the project; comply with the terms of the Task Orders developed in accordance with this Agreement; enter into initial task orders simultaneous with the signing of this Agreement; and identify, prepare, and carry out future task orders as the parties and circumstances determine.

Cooperatively seek additional partnerships, and where appropriate funds, and authorities to achieve shared Tribal and DOI management goals and work to identify additional resources, agencies, and authorities that can facilitate the goals of the parties set forth in this Agreement.

IV. TERM OF THE AGREEMENT:

This Agreement shall become effective on the date of signature (a) by the Secretary of the Interior or his authorized representative and (b) by the Tribal Chairman or his designee. This Agreement shall remain in effect until canceled or modified as provided in Section VI.

V. FINANCIAL SUPPORT:

This document does not authorize the transfer of funds or anything of intrinsic monetary value, nor does it confer upon any of the signatories the authority to commit the federal government or the Tribe to the expenditure of funds. Nothing in this Agreement shall be construed to commit a federal official to expend funds not appropriated by Congress. To the extent that the

expenditure or advance of money or the performance of any obligation of the United States under this Agreement is to be funded by appropriation of funds by Congress, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by Congress that are available for this purpose and the apportionment of such funds by the Office of Management and Budget. No breach of this Agreement shall result and no liability shall accrue to the United States in the event that funds are not appropriated or apportioned.

It is anticipated by the signatories that, at a future date, the transfer of funds, dedication of equipment, delegation or assignment of personnel, and other tangible commitment of fiscal, labor and non-labor resources will be necessary to implement the intent of this Agreement. Such commitments and transfers shall be specifically developed and described through individual task orders or other appropriate instruments implementing this Agreement, and transfers shall be accomplished by separate procurement, financial assistance, or other appropriate instruments, which will be approved and issued by appropriate officials of the Tribe and DOI and be subject to the standard terms and conditions for such instruments.

VI. MODIFICATION AND TERMINATION:

This Agreement may be modified, amended, or supplemented by mutual consent of the parties. Either party may propose modification by notifying the other in writing. Termination may be requested by either party through notification of the other signatory. The notified party shall respond within 30 days. The parties agree to seek a mutually acceptable schedule to negotiate any modifications in the Agreement. In the event that this Agreement is terminated by either or both of the parties, the parties shall have a continuing obligation to comply with the terms of task orders or other instruments covering existing or ongoing specific collaborative projects.

VII. GENERAL PROVISIONS:

Nothing in this Agreement shall modify or abrogate the statutory or other authorities of either party signatory to this Agreement.

Each of the signatories warrants that he or she is authorized to enter into this Agreement on behalf of the party for whom the signatory has executed the Agreement.

VIII. COUNTERPARTS:

This Agreement may be executed in counterpart originals and each copy will have the same force and effect as if signed by all parties.

IN WITNESS WHEREOF, the parties have executed this Agreement:

APPROVALS:

U.S. DEPARTMENT OF THE INTERIOR

By: _____
Assistant Secretary-Policy, Management and Budget Date

YUROK TRIBE

By: Howard McConnell 6-16-06
Tribal Chairman Date

IN WITNESS WHEREOF, the parties have executed this Agreement:

APPROVALS:

U.S. DEPARTMENT OF THE INTERIOR

By: R. Thomas Kleiman 6/12/06
Assistant Secretary-Policy, Management and Budget Date

YUROK TRIBE

By: _____
Tribal Chairman Date