

1 4 JAN 1981

Memorandum for Myles E. Flint  
Chief, Indian Resources Section  
Land and Natural Resources Division

Re: Commercial Salmon Fishing Rights of  
Hoopa Valley Reservation Tribes

Your office has solicited our views as to the extent, if any, of the commercial salmon fishing right enjoyed by the Indian tribes residing on the Hoopa Valley Reservation. The Department of the Interior has asked the Department of Justice to file suit against the State of California for damages resulting from California's interference with the putative tribal fishing right. Interior's position, which is endorsed by the Land and Natural Resources Division, is that the tribes have a right to one-half the harvestable run of salmon, and that California is obligated to limit the non-Indian fishery in its ocean waters so as to ensure that an adequate supply of salmon reaches the tribal fishery. The Department of Commerce's National Oceanic and Atmospheric Administration, however, has expressed misgivings about the wisdom of such a suit and has suggested a need for further legal analysis. This agency has responsibility under the Fishery Conservation and Management Act of 1976 for regulating the Pacific salmon fishery beyond the three-mile limit.

We conclude that the statutes and executive orders authorizing and establishing the Hoopa Valley Reservation and its predecessors do confer a tribal right to fish commercially for salmon. The tribes are entitled to one-half of the total harvestable run or tribal needs, whichever is less. We are unable at present to express an opinion as to whether, as a corollary of this right, California is obligated to regulate the non-Indian fishery in state waters to ensure, so far as reasonably possible, that the tribal share of salmon reaches the tribal fishery.

I.

The Hoopa Valley Reservation, in Northern California, is homeland to Indians of the Hoopa and Yurok Tribes ("tribes"). The reservation encompasses sections of the Klamath river and its tributary, the Trinity river. 1/ In aboriginal times and

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1/ Indians of the Yurok Tribe live primarily on the lower Klamath river, while the Hoopas reside along the Trinity river. These tribes are consolidations of a variety of tribal groups which lived in the area before the coming of white men.

well into the present century these rivers were among the richest salmon waters on the entire west coast.

Salmon occupied an exceedingly important place in aboriginal tribal culture, both as the primary source of nourishment. 2/ and as the focus of ritual and ceremony. 3/ Indian towns were located along the rivers and ocean where access to salmon was most convenient. 4/ As early as 1913, the Supreme Court,

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2/ See A. Kroeber, Handbook of Indians of California, quoted in Appendix to Petition for Writ of Certiorari in No. 91-1181, Mattz v. Arnett 37 (U.S. Supreme Court, October Term 1972) (hereafter cited as Kroeber). An early white visitor observed:

"The [Klamath] river is abundantly supplied with salmon, a fine large fish easily taken and which is very properly regarded by the Indian as his staff of life. These are regarded as perhaps the best fishing grounds in Northern California and thousands of Indians have stored away their Tribes' annual supply of dried salmon upon these grounds for centuries to all appearances."

Letter from Special Agent Whipple to Superintendent Henley, June 19, 1855 (collected in National Archives and cited hereafter as Whipple letter).

3/ See E. Erikson, Fishermen along a Salmon River, in Childhood and Society 168 (2d ed. 1963) (hereafter cited as Erikson):

"Only once a year, during the salmon run, are [various ceremonial avoidances] set aside. At that time, following complicated ceremonies, a strong dam is built which obstructs the ascent of the salmon and permits the Yurok to catch a rich winter supply. The dam building is 'the largest mechanical enterprise undertaken by the Yurok, or, for that matter, by any California Indians, and the most communal attempt' (Kroeber). After ten days of collective fishing, orgies of ridicule and of sexual freedom take place along the sides of the river, reminiscent of the ancient pagan spring ceremonies in Europe, and of Sioux license before the Sun Dance."

4/ Kroeber 42.

recognized that "[a]s a matter of history, it plainly appears that the Klamath River Indians established themselves along the river in order to gain a subsistence by fishing." 5/

While the existence of an aboriginal subsistence fishery is well established, it is somewhat less clear whether the Tribes engaged in commercial fishing. Certainly the preconditions for a commercial fishery were present. Salmon could be dried and kept in nourishing form for many months. Although voyages over the rough terrain adjacent to the river were unlikely, the Indians were skilled boatmen and could trade with neighboring river tribes. 6/ Even before the appearance of whites the Yurok were a trading, possession-conscious culture, using a currency of shells obtained from inland tribes, presumably in exchange for valuable goods such as dried salmon. 7/

Recorded references to commercial dealings in salmon are scarce. In 1861 the Commissioner of Indian Affairs noted that "at the mouth of the Klamath river there is a salmon fishery of great value to the Indians." 8/ It is unclear, however, whether the "value" referred to was a commercial value or the value of sustenance. In 1888 a federal court described the activities of a non-Indian on the Klamath river as follows:

"At the proper season, he 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." 9/

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5/ Donnelly v. United States, 228 U.S. 243, 259 (1913).

6/ Whipple Letter.

7/ Erikson 167.

8/ 1861 Report of the Commissioner of Indian Affairs, quoted in 33 I.D. 205, 216.

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

This activity, however, took place well after the introduction of white culture; in addition, it is questionable whether the Indians referred to, who seem to have been merely employees of the white entrepreneur, could be said to have engaged in "commercial" fishing in their own right.

An expert in Yurok culture testified in a 1977 criminal case that Yurok families traditionally engaged in trading partnerships with upriver families. When a river blockage cut off a salmon run, the upriver family would trade goods such as venison for salmon caught by the downriver family. <sup>10/</sup> The same expert cited evidence that a commercial cannery owned by whites but employing Indian labor existed prior to 1876. <sup>11/</sup>

Although the evidence for an aboriginal commercial fishery is less than compelling, we believe there is enough evidence to make the existence of such a fishery more probable than not. Indeed, the Department of Justice has already represented to the Supreme Court that the Yurok Indians "depended largely on fish from the Klamath river for their diet and trade." <sup>12/</sup> We therefore conclude that some type of aboriginal commercial fishery did exist on the Klamath.

The gold rush of 1848-52 brought white settlers and miners into all areas of Indian country in California. In order to avoid Indian war, the Department of the Interior sent agents throughout California in 1851 to treat with the various tribes. One of those agents negotiated a treaty with all the lower Klamath river tribes, including the Hoopas and the Yuroks. In explaining the treaty to the Indians, the agent represented that

"[H]is object was to restore peace among the whites and Indians . . . That if peace was restored, and the Indians preserve inviolate the bargain about to be made, measures would be taken to improve the condition of the Indians; that he should have a home of his own - be taught to build houses to live in - have clothes to wear - and after a while learn to draw their subsistence

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<sup>10/</sup> Testimony of Arnold R. Pilling, 56-57, in People v. Eberhardt, Crim. No. 76-051-C (Del Norte County Court 1977).

<sup>11/</sup> Id. at 70.

<sup>12/</sup> Brief for the United States as amicus curiae in Mattz v. Arnett, No. 71-1182, at 10 (October Term 1972)(emphasis added).

from the soil, and not be dependent upon game and fish for food; that they should have teachers to teach their children the English language, and that many things would be done for their comfort and happiness. 13/

The draft treaty provided that the Indians would cede their lands and move to a reservation on the Trinity and Klamath rivers consisting of a "tract twenty miles in length by twelve miles in width, and containing in all six or seven square miles of farming land." 14/ The United States agreed to protect the Indians from incursions by whites, to supply "facilities for farming, stock-raising, &c." and to provide "farmers, mechanics, and school-teachers to instruct them in the language, arts, and agriculture of the whites." 15/

The Klamath treaty, together with 18 others, failed of passage in the Senate, largely because of opposition by the California delegation. 16/ But while the treaties were pending many Indians had removed from their homelands and proceeded towards the promised reservations. The years 1852 and 1853 found the California Indians in desperate straits, unable to return to homelands which had been occupied by whites and forbidden to move to the reservations promised by the Indian agents. 17/

To remedy this situation, Senator Sebastian introduced a floor amendment to the 1853 Indian appropriations bill authorizing the President to set aside five military reservations from the public domain. 18/ Senator Sebastian explained the purposes of this amendment as follows:

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13/ S. Ex. Doc. No. 4, Special Sess. 161 (1853).

14/ Treaty with the Pohlik or Lower Klamath, etc. of 1851 Art. 4 (unratified).

15/ Id. Art. 5.

16/ See 30 Cong. Globe 1085 (1852) (remarks of Sen. Sebastian).

17/ See 1853 Report of the Superintendent of Indian Affairs in California, S. Ex. Doc. No. 57, 32d Cong., 2d Sess. 2 (1853); 28 Cong. Globe 2175 (1852) (remarks of Sen. Weller).

18/ 30 Cong. Globe 1085 (1853).

"The plan of Indian reservations resorted to by the treaty power will be found unequal to the object; and now it is recommended to collect the tribes together upon small military reservations, which, because they are military, can be removed according to the exigency of the case, and can be placed here or removed there. It will entitle the Indians to protection against the whites, which is more needed than protection against the Indians . . . [W]e must endeavor . . . , therefore, . . . to congregate the Indians upon small military, agricultural reservations, just large enough to maintain life upon, and then respect their rights." 19/

As ultimately agreed to, the Act of March 3, 1853 ("1853 Act") authorized the President to set aside "for Indian purposes" five military reservations of no more than 25,000 acres each. 20/

Pursuant to this statute, as amended, 21/ the Secretary of the Interior instructed the Superintendent of Indian Affairs

19/ Id; see also id. at 1151 (remarks of Rep. Ficklin) ("policy of inducing the Indians to cultivate the soil, and turn their attention to industry").

20/ The Act provides in pertinent part:

"That the President of the United States, if upon examination he shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby 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: Provided, That such reservations shall not contain more than twenty-five thousand acres in each: And provided further, That said reservation shall not be made upon lands inhabited by citizens of California, and the sum of two hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to defray the expense of subsisting the Indians in California and removing them to said reservations for protection . . . ."

10 Stat. 238.

21/ The number of reservations authorized by the 1853 Act was reduced to three by the Act of July 31, 1854, but restored to five by the Act of March 3, 1855. The Klamath reservation was one of the two set aside under the 1855 statute.

to select reservations from such "tracts of land adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians." 22/ Special Agent Whipple recommended in 1855 that a reservation be established on the lower Klamath river. He reported that the area was rich in game, fish, shellfish, and sea animals, and that the prairies along the river banks were "well adapted for agriculture, and will afford ample facilities for the construction of farms to supply an abundance of foods for all the Indians. . . .". In addition, there were no white settlements or vested rights of any kind in the area. Finally, because of the deep attachment of the Tribes for their homes it would be difficult to remove them elsewhere. 23/ Whipple's recommendation was endorsed in large measure by his superiors in the Department of the Interior, with the proposed reservation set forth as a strip extending one mile in width on each side of the Klamath river extending from the Pacific Ocean to a point as far inland as to make up 25,000 acres. 24/ The President established the reservation as proposed. 25/

The Office of Indian Affairs thereupon commenced farming operations on the reservation. In 1856, the Superintendent of Indian Affairs in California reported that

"The Indians at [Klamath reservation] 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 on what they call their country they are disposed to resist. Their prejudices upon these points are fast giving way before the policy of the government, and no serious difficulty will be encountered in initiating the system of labor among them. The land on this river is peculiarly adapted to the growth of vegetables, and it is expected

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22/ 1 C. Kappler, Indian Affairs - Laws and Treaties 816 (1904) (hereafter cited as Kappler).

23/ Whipple letter.

24/ Kappler 817.

25/ Id.

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." 26/

The farm system lasted only until 1861, when a freshet carried away most of the topsoil along the river and caused the government to abandon the reservation. 27/ On the 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 removed to the new reservation, however, and nearly all those who did remove returned within a few years to the Klamath river. 28/ By 1864 the Tribes were at war with the federal government. 29/

In 1864, Congress passed and the President signed a bill reorganizing Indian affairs in California ("1864 Act"). 30/ Section 2 authorized the President to set apart up to four tracts of land

"to be retained by the United States 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."

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26/ 1856 Report of the Commissioner of Indian Affairs, in S. Ex. Doc. No. 5, 34th Cong., 3d Sess. 789-80 (1856). See also 1858 Report of the Commissioner of Indian Affairs, in S. Ex. Doc. No. 1, 35th Cong., 2d Sess. 637 (1858)(reporting that "[t]he crop is good, and with the yield of salmon at the fisheries the Indians are contented and happy.")

27/ 1862 Report of the Commissioner of Indian Affairs, in H. Ex. Doc. No. 1, 37th Cong., 3d Sess. 457-68 (1862).

28/ See Mattz v. Arnett, 412 U.S. 481, 487-88 (1973).

29/ Donnelly v. United States, 228 U.S. 243, 257 (1913); 1864 Report of the Commissioner of Indian Affairs, in H. Ex. Doc. No. 1, 38th Cong., 2d Sess. 271 (1864)(hereafter cited as 1864 Report).

30/ Act of April 8, 1864, 13 Stat. 39.

Section 2 further provided that the new reservations could include existing reservations and could enlarge existing reservations to such an extent as necessary "in order to [their] complete adaption to the purposes for which [they were] intended." Section 3 provided for the survey and public sale of reservations not retained under section 2. The legislative history of the 1864 Act provides virtually no guidance as to the intent of Congress in so reorganizing the reservation system.

In August of 1864 the Superintendent of Indian Affairs in California "located" an Indian reservation in Hoopa Valley, on the Trinity river, above its junction with the Klamath and about 20 miles upstream from the abandoned Klamath reservation. <sup>31/</sup> His choice of Hoopa Valley as a reservation resulted from several considerations. First, it achieved peace with the hostile Indians, most of whom lived in the valley. <sup>32/</sup> Second, removal of these Indians elsewhere was infeasible since they could not be induced to remain at a nearby reservation and since the Office of Indian Affairs had insufficient funds to transport them to a distant spot. <sup>33/</sup> Third, the improvements of white settlers could easily be purchased. <sup>34/</sup> Finally, the location was appropriate for sustaining the Indians:

"The valley is beautifully located, surrounded by high mountains well watered, with land enough in cultivation to feed all the Indians that are there or that may come there. Trinity river affords them fish during the spring and fall season, and the mountains on either side abound with acorns, berries, seed, etc." <sup>35/</sup>

In inducing the hostile tribes to lay down their arms, the Superintendent entered into a purported "treaty," by which the United States agreed to set aside Hoopa Valley "for reservation purposes for the sole use and benefit of the tribes

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<sup>31/</sup> Kappler 815.

<sup>32/</sup> 1864 Report 275-79.

<sup>33/</sup> Id.

<sup>34/</sup> Id.

<sup>35/</sup> Id. at 279.

... which reservation was to include "a sufficient area of the mountains on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, &c." The United States agreed to instruct the Indians in "farming and harvesting" and to protect them from white incursion. <sup>36/</sup> This document, although signed, was never submitted to the Senate for ratification.

The Hoopa Valley reservation was formally established by Executive order in 1876. <sup>37/</sup> This order set out the metes and bounds of the reservation and declared that the lands were

"withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart in California by act of Congress approved April 8, 1864."

By 1876, when the Hoopa Valley reservation was established, the President had exhausted the authority conferred on him by the 1864 Act by creating four reservations. In 1888, a federal court held that the old Klamath reservation had been disestablished, by virtue of section 3 of the 1864 Act, at the latest when the four reservations authorized by that Act were created. United States v. Forty-Eight Pounds of Rising Star Tea, 35 F. 403 (N.D. Ca. 1888), aff'd, 38 F. 400 (1889).

In 1891, President Harrison issued an Executive order extending the boundaries of the Hoopa Valley reservation so as to include all land, one mile in width on each side of the river, from its then-existing limits to the Pacific Ocean. <sup>38/</sup>

<sup>36/</sup> Id. at 280.

<sup>37/</sup> Kappler, supra 815.

<sup>38/</sup> Id. The Executive order provided in full:

"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."

As of 1891, therefore, the Hoopa Valley reservation included the reservation on Trinity river formally established in 1876; the "old" Klamath reservation established by Executive order in 1855; and the connecting strip between the two. 39/ The purpose of the 1891 executive order was to establish the "old" Klamath reservation and the connecting strip as within an Indian reservation authorized by the 1864 Act. Mattz v. Arnett, supra, at 493-94. The Supreme Court affirmed the legality of the 1891 Executive order in Donnelly v. United States, 228 U.S. 243, 255-59 (1913).

## II.

The statutes and Executive orders 40/ authorizing and establishing the reservation "for Indian purposes" 41/ implicitly create a tribal right to fish commercially for salmon. To be sure, nowhere in the 1853 and 1864

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39/ For a map of the Hoopa Valley reservation as constituted under the 1891 executive order, see Appendix to Opinion of the Court in Mattz v. Arnett, 412 U.S. 492 (1973).

40/ Arguably, the only legally relevant documents are the 1864 act and the 1876 and 1891 Executive orders, since the "old" Klamath reservation established under the 1853 Act and the 1855 Executive order was deemed terminated as of 1876. However, in light of the complex history of the reservation recounted in Section I, we believe that the latter provisions and their accompanying histories are useful as guides to interpretation, and even the unratified treaties of 1851 and 1864 are relevant.

41/ The 1853 Act authorized the creation of reservations for "Indian purposes", while the 1864 Act spoke of "the purposes of Indian reservations." The 1876 and 1891 Executive orders created reservations "set apart for Indian purposes." The 1855 executive order merely stated cryptically "[l]et the reservation be made, as proposed," but the file submitted to President Pierce represented that the proposed reservation would be "adapted as to soil, climate, water-privileges, and timber, to the comfortable and permanent accommodation of the Indians." The unratified 1851 treaty guaranteed the "use and possession" of the proposed reservation to the tribes in perpetuity, while the unratified 1876 treaty set aside Hoopa Valley "for reservation purposes for the sole use and benefit of the tribes."

Acts, their legislative histories, or the Executive orders of 1855, 1876, and 1891 is there any explicit reference to tribal fishing rights. 42/ But federal statutes and Executive orders creating Indian reservations are construed generously to the Indians, and may grant a variety of rights by implication. 43/ Language creating a reservation "for Indian purposes" or the like, whether it be in treaties, statutes, or Executive orders, is generally read as implying rights necessary to further a purpose for which the reservation is established. 44/ In determining whether a right is necessary to further a reservation purpose, we must carefully examine the facts attending the creation of the reservation, including the underlying federal policy, the area's geography and ecology, the Indians' aboriginal

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42/ It is also noteworthy that the unratified treaties of 1851 and 1864 contained no explicit reservation of fishing rights. By contrast, treaties negotiated with the Indians of Washington and Oregon Territories in 1854-55 did explicitly reserve a fishing right. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

43/ Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1919)(statute); Winters v. United States, 207 U.S. 576-77 (1908)(statute); Arizona v. California, 373 U.S. 546, 600 (1962) (executive orders).

44/ See Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968)(on-reservation hunting and fishing rights inferred from treaty setting aside "a home, to be held as Indian lands are held"); Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974)(on-reservation hunting and trapping rights inferred from treaty establishing residence "to be held and regarded as an Indian reservation"); United States v. Finch, 548 F.2d 822 (9th Cir.), vacated on other grounds, 433 U.S. 676 (1977) (title to on-reservation riverbed, and exclusive fishing right, inferred from treaty setting apart reservation for the "absolute and undisturbed use and occupation of the Indians"); United States v. Montana, 604 F.2d 1162, 1166 (9th Cir. 1979) (same), cert. granted, U.S. (1980); Winters v. United States, 207 U.S. 564 (1908)(rights to beneficial use of reservation water inferred from statute confirming an agreement setting aside arid reservation "for a permanent home and abiding place"); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)(exclusive on-reservation fishing rights inferred from statute setting apart an island reservation "to be held and used by [the Indians] in common"); Arizona v. California, 373 U.S. 546, 600 (1963)(rights to beneficial water use inferred from creation of arid reservations by executive orders).

(Footnote continued on page 13)

practices, and -- at least in the case of treaty reservations -- the Indians' understanding of the purposes for which the reservation was established. 45/

The federal policy with respect to the California Indians was to segregate them in reservations. Removing the Indians to remote areas opened the rest of the State to mining and settlement by whites and reduced the possibility of Indian depredations or exploitation by whites. Concentrating the Indians in central locations, particularly valleys, increased the Government's ability to control them militarily. Establishing the reservations by Executive order rather than by treaty enabled the Government to move Indians elsewhere if existing reservations proved desirable for other purposes.

44/ Cont'd The forthcoming Supreme Court decision in Montana v. United States, while highly relevant to the present case, will not necessarily be dispositive. The issue as framed by the petition for certiorari involves only the question of ownership of a riverbed -- a question which the Court answered in favor of the Klamath Indians in 1913. Donnelly v. United States, 228 U.S. 243 (1913). The Solicitor General's brief argues further that quite apart from the question of land ownership the Indian tribe possesses an exclusive property right to fish on rivers passing through the reservation. Brief for United States in Montana v. United States, No. 79-1128, at 33-41. A decision in favor of the Tribe on this broader ground would provide strong additional support for the conclusion we reach here regarding fishing rights on the Klamath and Trinity rivers.

45/ See Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968) (purpose of treaty to maintain traditional Indian ways of life which included hunting and fishing; reservation selected because of abundant game there); Winters v. United States, 207 U.S. 564 (1908) (desire of Indians and Federal government for tribes to become "pastoral and civilized people" would be frustrated if reservations were deprived of irrigation water and rendered practically worthless); Alaska Pacific Fisheries v. United States 248 U.S. 78 (1918) (location of reservation on remote island without much arable land but with excellent fishing waters; purpose of Indians to become self-sustaining; congressional purpose to make Indians civilized, industrious, and self-sustaining); Arizona v. California, 373 U.S. 546, 599 (1963) (desert environment made water "essential to life of the Indian people and to the animals they hunted and to the crops they raised"); Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974) (significant role played by hunting and trapping in native life).

An essential corollary of the reservation system was the policy of encouraging Indian agriculture. The Indian farms were to be self-sufficient, thus eliminating costly federal sustenance and reducing the likelihood that Indians would leave the reservations and either resume traditional ways or become thieves. The farming system was also designed to encourage "civilized" values of industry and labor and to wean the Indians from their "primitive" habits of hunting and gathering.

The Klamath and Hoopa valleys were well-suited to furthering these policies. They were thickly settled with Indians and almost devoid of whites. The steep valley walls were ideal for keeping whites out and Indians in. The river bottom areas contained sufficient arable land to feed the Indian population, who were deeply attached to their lands and unwilling to remove elsewhere.

While the government policy was to encourage agriculture, and federal agents promised the Indians that they would "not be dependent on game and fish for food," this policy was not contrary to establishment of an Indian fishery. Federal agents time and again cited the fishery as a strong reason for locating a reservation on the Klamath or Trinity rivers and as a source of contentment to the Indians once the reservation was established. The Office of Indian Affairs was well aware of the fishery's exceedingly important place in native life and did nothing to discourage its continuation.

It is well established that the 1891 Executive order guaranteed a tribal right to fish for subsistence purposes both in the "connecting strip," Donnelly v. United States, 228 U.S. 243 (1913), 46/ and in the "old" Klamath reservation,

46/ Donnelly was a federal prosecution for a murder which had taken place on the riverbed in the connecting strip. The accused claimed that the place of the crime was outside the federal jurisdiction. In concluding that the riverbed was within the lands set apart by the 1891 Executive order, the Court reasoned that

"As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the

river is described as running in a narrow canyon through broken country, the Indians as dwelling in small villages close to its banks."

228 U.S., at 259. In this passage the Court clearly assumed that the 1891 Executive order established a right to fish at least for subsistence purposes.

Arnett v. Five Gill Nets, 48 Cal. App. 3d 459, 121 Cal. Rptr. 906, cert. denied, 425 U.S. 907 (1976). We have no reason to doubt that the same subsistence fishing right exists in the original Hoopa Valley reservation which was formally established by Executive order in 1876.

There are no court decisions recognizing a tribal right to fish commercially for salmon on the reservation. However, the Indians engaged in such activities in aboriginal times and undoubtedly continued to do so without federal interference under the reservation system. An Indian commercial fishery could only have furthered the federal purposes, implicit in the agricultural policy, of promoting economic self-sufficiency and encouraging Indian labor and industry. We therefore conclude that the tribes do have a right to fish commercially for salmon throughout the reservation.

There is no easy measure by which to quantify this right. Certainly the Indians are not entitled to all the salmon. Even in aboriginal times they permitted salmon to escape up the river to spawn or be caught by upriver Indians. In our view, the maximum catch to which the tribes are entitled is one-half of all the Klamath and Trinity river salmon, whether located in the river or in the ocean, reduced by the number needed to maintain the fishery by spawning. This is the maximum figure adopted by the Court in Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), in quantifying a treaty right to take fish "in common with all citizens of [the Washington] Territory." Although the Court's holding in that case clearly rested on specific treaty language, we believe that the same maximum would be adopted by a court in the present case, in view of the inherent arbitrariness of any other maximum figure and the essential similarity in the situations of the tribes in the two cases. We also believe that a court in the present case would follow Fishing Vessel Ass'n by reducing the Indian share if tribal needs may be satisfied by a lesser amount. There is no rational reason to provide the Indians with more salmon than that necessary to give them "a livelihood - that is to say, a moderate living." Id. at 686. While the "tribal needs" standard is inherently difficult to quantify, this difficulty did not deter the Court from adopting it in Fishing Vessel Ass'n and should not prove a stumbling block in the present case. In short, the Tribes' commercial fishing right is to take the lesser of (a) one-half the total harvestable run or (b) the amount necessary for tribal needs.

It seems clear that California may not interfere directly with the tribal fishing right by prohibiting commercial fishing

within the reservation. 47/ The harder question is whether the creation of the reservation implicitly imposed any affirmative duties on the State to regulate the conduct of non-Indians. The Court in Fishing Vessel Ass'n did infer a duty on the part of Washington to regulate its non-Indian fishery. Fishing Vessel Ass'n, however, is only tangentially relevant to the present case. There, the State's duty sprang from a treaty which the United States ratified when Washington was still a territory; when Washington became a State, it voluntarily succeeded to these treaty obligations. In the present case, in contrast, California had been a State at all times relevant to the creation of the reservation. Whatever obligations it has with respect to the tribal fishery flow, not from its voluntary action in accepting the benefits of statehood, but rather from the actions of the federal government in creating the reservation at a time when California was already a State.

The statutes and Executive orders authorizing and establishing the reservation might possibly be read as obligating California to regulate its non-Indian ocean fishery. The reservation was established for the purpose, inter alia, of providing the tribes with a share of the salmon run. This purpose would be frustrated if the Indian fishing right did not have as its corollary an obligation on the part of some governmental entity to limit the non-Indian ocean fishery. Because no individual private fisherman takes a catch large enough in itself to interfere with the tribal share, a lawsuit to enforce the right against private parties would be difficult to manage and all but impossible to win.

On the other hand, we will not read the federal actions creating the reservation so broadly as to render them unconstitutional. The commerce power is limited by principles of federalism and the Tenth Amendment, and does not authorize significant federal intrusions on integral state governmental functions. National League of Cities v. Usery, 426 U.S. 833 (1976). The federal actions in the present case are based on

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47/ The State may, however, regulate commercial fishing in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968).

a commerce power 48/ and clearly do interfere to some degree with integral state functions if read expansively. Even prior to the Usery decision, three courts of appeals seriously questioned the constitutionality of federal actions forcing States to adopt laws or regulations or to take other affirmative regulatory measures. 49/ Hence there are serious constitutional questions insofar as the federal actions creating the reservation are read to impose an affirmative obligation on California to regulate its non-Indian ocean fishery.

The analysis under Usery is, inevitably, heavily factual in nature, turning in each case on the nature and extent of the federal interest and the degree of interference with the state interests and the burden imposed on the State. This is evident from Justice Rehnquist's opinion for the court, which focused on the specific ways in which the challenged federal statute would have increased the costs of state government and displaced state policies. 426 U.S., at 846-52. It is evident as well in the concurring opinion of Justice Blackmun whose vote was necessary to the majority opinion. Justice Blackmun stated:

"[I]t seems to me that [the Court's opinion] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where State facility compliance with imposed federal standards would be essential. . . . With this understanding on my part of the Court's opinion, I join it."

Id. at 856.

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48/ That power might be the Indian Commerce Clause rather than the Interstate Commerce Clause. We think that the Indian Commerce Clause is also subject to limitations under principles of federalism or the Tenth Amendment, although federal power to intrude on state prerogatives might be somewhat greater in the Indian Commerce Clause context. The treaty power is not involved since the reservation was created by Executive order.

49/ Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), vacated sub nom. EPA v. Brown, 431 U.S. 99 (1977); District of Columbia v. Train, 172 U.S. App. D.C. 311, 521 F.2d 971 (1975), vacated sub nom. EPA v. Brown, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated, 431 U.S. 99 (1977).

Because of the highly factual nature of the inquiry under Usery, we are unable to provide a definite answer at this time as to whether, despite these constitutional considerations, the federal actions creating the reservation should be read as imposing an affirmative regulatory obligation on California. On the one hand the federal interest in ensuring that the tribes receive their share of the salmon would be frustrated if no affirmative regulatory obligation were imposed. On the other hand, the degree of interference with state prerogatives and the burden placed on the state turns on the specific facts. We do not know the extent to which state actions adequate to safeguard the tribal fishery would interfere with the legitimate state interest in enhancing the non-Indian fishery. Nor do we have a clear idea as to how expensive a state regulatory program of this nature would be, or whether actions to protect the Indian fishery would significantly alter or displace an existing state program. Without this type of information, it is impossible to assess whether there is a sound basis in law for a claim of damages resulting from California's failure affirmatively to regulate its non-Indian ocean fishery.

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