

Committee on Resources

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Statement

TESTIMONY OF SUSAN MASTEN, CHAIRPERSON YUROK TRIBE

Before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans on H.R. 2875, A Bill to Amend the Klamath Basin Fishery Resources Restoration Act May 4, 2000

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear before you today to express the Yurok Tribe's opposition to H.R.2875. The bill would amend the Klamath Basin Fishery Resources Restoration Act by granting federal recognition to the fishery of the Karuk Tribe on the Klamath River, which cuts through the heart of the Yurok Reservation, and by giving the Karuk Tribe membership on the Klamath Fishery Management Council. The Yurok Tribe opposes the bill because it will diminish the Yurok fishery, it sets a bad precedent, it would subject the United States to enormous liability for taking the Yurok Tribe's fishing rights, and it would circumvent the administrative review process now underway at the Department of the Interior.

The Yurok Tribe's Federal Reserved Fishing Right

The Yurok Tribe's concerns are best understood in the context of the Tribe's historic and cultural ties to the Klamath River in northern California. Since time immemorial, the Tribe has depended on the Klamath River and its anadromous fishery for its food supply, commercial trading activities and cultural needs. The boundaries of the Yurok Reservation today reflect the Tribe's dependence on the Klamath River. The Reservation extends a mile on each side of the Klamath River from the Pacific Ocean to the confluence of the Klamath and Trinity River. The Reservation, which was 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.

As the Department of the Interior stated in 1904, "[t]here is little question that the prevailing motive for setting apart the reservation was to secure to the Indians the fishing privileges of the Klamath River."⁽¹⁾ This fact has been recognized repeatedly since the Reservation was established -- by the Department of the Interior, the United States Supreme Court,⁽²⁾ the lower federal courts,⁽³⁾ and the California courts.⁽⁴⁾ As Justice Blackmun stated in Mattz v. Arnett, the original Klamath River Reservation "abounded in salmon and other fish" and was in all ways "ideally selected for the Yuroks."⁽⁵⁾ In 1891, the original Yurok Reservation was joined to the Hoopa Valley Reservation by a 24-mile connecting strip, which further underscored the purpose of the United States in protecting and preserving the aboriginal right of the Tribe

and its members to fish the Klamath River for their subsistence, ceremonial and commercial needs.

The joint reservation was known as the Hoopa Valley Reservation until 1988, when Congress enacted the Hoopa-Yurok Settlement Act ("HYSA"). 25 U.S.C. §§ 1300i et seq. The HYSA partitioned the Hoopa Valley Reservation, granting the length of the Reservation along the Klamath River from Weitchpec to the Pacific Ocean (the "Extension") to the Yurok Tribe, and the so-called "Square" to the Hoopa Tribe. Under the Act, the Yurok Tribe was deprived of its interest in approximately 90,000 acres of the Square. Congress indicated that one of the purposes of the Act was to "establish and confirm the property interests of the Yurok Tribe in the Extension, including [the Tribe's] interest in the fishery. . . ." [\(6\)](#)

The right of the Yurok Tribe to take fish on the Klamath River, which is derived principally from the purpose for which the Reservation was created, is protected and guaranteed by federal law. The Ninth Circuit Court of Appeals has ruled 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 (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, 663 F.2d 906, 909 (9th Cir. 1981). Moreover, the courts have ruled that the Tribe is entitled to a sufficient quantity and quality of water in the Klamath River to support the exercise of the fishing right. See Klamath Water Users Protective Association v. Patterson, 191 F.3d 1115 (9th Cir. 1999), opinion amended on denial of petition for rehearing en banc, 203 F.3d 1175 (2000) (Klamath Basin tribes have water rights to support fishing and hunting rights). There is ample legal authority to support the rule that the Yurok Tribe's water rights are senior to other water users in the Klamath Basin. See United States v. Adair, 723 F.2d 1394 (9th Cir. 1983); Klamath Water Users Protection Association v. Patterson, *supra*, (noting that the 9th Circuit has held that water rights for the Klamath Basin Tribes carry a priority date of time immemorial). The federal government's trust obligations to the Yurok Tribe require federal agencies to protect the Tribe's rights and resources. Id. (holding that the Bureau of Reclamation must divert water in the Klamath Irrigation Project in Oregon to satisfy the Tribe's water rights, which take precedence over any alleged rights of the Irrigators). No such rights have been recognized for the Karuk Tribe.

The Yurok Tribe is a prudent and responsible manager of the Klamath River and Trinity River fishery. The Tribe's Department of Fisheries, the largest department of the Tribe, commits millions of dollars each year to fish management, habitat restoration, law enforcement, and fishery monitoring. The Tribe's biologists are recognized as experts in their fields, and the Tribe has developed the best information and science regarding the salmon fishery on the Klamath.

H.R. 2875 would disrupt the orderly development of this consistent body of law and create an anomalous means by which tribes in the Klamath Basin can establish federally-protected fishing rights. It is settled law the federal status of Indian fishing rights must derive from treaty, executive order, unextinguished aboriginal use and occupancy or reservation land. It is doubtful that the Karuk Tribe could satisfy these requirements. Creation of such rights for the Karuk Tribe by act of Congress, without independent legal basis or support, is unprecedented in federal Indian law.

Specifically, the Yurok Tribe opposes H.R. 2875 for the following reasons:

1. The bill is an unprecedented exercise of congressional power.

It is undisputed that the Karuk Tribe does not have a federally-recognized or protected fishing right on the Klamath River. This conclusion was confirmed by the Associate Solicitor for Indian Affairs in a 1994

memorandum. The Associate Solicitor concluded that there was "no evidence that the Karuk's fishery is conducted pursuant to federally reserved Indian fishing rights." Memorandum from Michael J. Anderson to Bill Shake, Fish and Wildlife Service, March 7, 1994. The Associate Solicitor's review found no treaties, federal statutes or executive orders that would form the basis for a claim that the Karuk Tribe's fishery is based on federally-reserved rights, nor was any evidence found of an "historic reservation or trust lands set aside for fishery purposes." As a result, the Associate Solicitor directed that the Karuk catch should not be counted against the share of the fishery reserved for the Yurok and Hoopa Valley Tribes.

Following this opinion, the Karuk Tribe acquired trust land adjacent to a fish site at Ishi Pishi Falls on the Klamath River. The acquisition of land in this manner does not change the conclusion that there is no legal basis for recognizing, either legislatively or otherwise, a federal reserved fishing right for the Karuk Tribe. The Karuk Tribe has no reservation, treaty or executive order that could support an inference that fishing rights were reserved to the Tribe. Nor are we aware of any credible argument that the Karuk Tribe has fishing rights derived from unextinguished aboriginal title to or use of land.

In light of this legal context, it would be unprecedented for Congress to grant federal fishing rights to the Karuk Tribe. To the best of our knowledge, Congress has not acted to create such rights without legal support, and to do so here would set a precedent that has far-reaching implications for Indian law and policy. It would be highly unusual for Congress to create legislatively fishing rights that are not tied to a treaty, executive order or reservation. In its novelty, H.R. 2875 invites a flood of requests by other tribes asking for recognition or creation of rights not grounded in fundamental principles of Indian law.

2. The bill may unfairly diminish the Yurok Tribe's fishery.

The courts have not had occasion to quantify the Yurok Tribe's fishing and water rights, but the Department of the Interior has set minimal standards for satisfying such rights. The absence of judicial quantification does not render such rights legally unenforceable. The Solicitor of the Department of the Interior has ruled that in the absence of an allocation agreement, the Yurok Tribe's reserved fishing right entitles tribal members to take fish for subsistence, ceremonial and commercial uses in whatever amount is necessary to sustain a moderate standard of living, or 50% of the annual harvest of Klamath-Trinity Basin salmon, whichever is less. Fishing Rights of the Yurok and Hoopa Valley Tribes, Memorandum No. M-36979, from the Solicitor to the Secretary, October 4, 1993. Since 1993, the Klamath River fishery has been managed by federal agencies in accordance with this Opinion.

Because the populations of salmon are declining, the standard for determining the tribal catch on the Klamath River has been 50% of the allowable harvest. The tribal catch is presently fully allocated solely between the Yurok Tribe and the Hoopa Valley Tribe, the only tribes in the lower Klamath Basin with federally-recognized fishing rights. The Bureau of Indian Affairs has determined that of the 50% tribal share, the Yurok Tribe is entitled to take 80% and the Hoopa Valley Tribe is entitled to take 20%.

The Yurok Tribe is concerned that as a practical matter, H.R. 2875 may reduce the fish available to the Tribe for food, cultural, ceremonial and commercial purposes. The bill provides that the Karuk Tribe's annual catch "shall be part of the tribe's in-river tribal allocation," but it does not specify what percentage allocation to which the Tribe would be entitled. Section 9. By federalizing the Karuk fishery, the bill would require the Karuk catch anywhere on the Klamath River to be counted in the tribal share of the allowable catch. Because the tribal allowable catch is now fully allocated between the Yurok Tribe and the Hoopa Valley Tribe, and the Yurok Tribe is entitled to the greatest share, counting the Karuk catch in the tribal share will almost certainly cause a reduction in the number of fish the Yurok Tribe is allowed to take. We

are aware of no legal or policy reason that would justify congressional recognition of an Indian fishing right with such deleterious effects when the legal basis of such right is questionable.

We are also concerned that the bill does not limit or define the geographic scope of the federal fishing right accorded the Karuk Tribe, nor does the bill define the means by which fish can be taken. The Klamath River runs through the Yurok Reservation for over 45 miles. The River also traverses the Redwood National Park, national forest lands and other federal areas. The failure to limit the geographic scope creates nearly insoluble jurisdictional problems, which the bill does not acknowledge, much less address. For example, if the scope is not restricted, the bill would create the anomalous circumstance of an Indian tribe exercising a federally-recognized fishing right within the reservation of a neighboring tribe in the absence of an agreement regarding allocation, law enforcement and related issues. Even if the scope were limited to the former aboriginal territory of the Karuk Tribe, such problems would persist. The bill thus raises vexatious questions of tribal jurisdiction and inter-tribal relations.

The absence of a geographic limit on the exercise of a federal Karuk fishing right arguably would give the Karuk Tribe, which has no treaty or executive order lands, greater rights than the Yurok Tribe, which has had a federal reserved fishing right since at least 1855. Since time immemorial, the Yurok Tribe has fished and hunted throughout its aboriginal territory in northern California, including portions of the Pacific Ocean. The establishment of the executive order reservation, while grounding the Tribe's fishing right in federal law, has meant that as a practical matter the exercise of the right has been confined to the Klamath River within the exterior boundaries of the Reservation. The bill imposes no such practical or legal limit on the Karuk Tribe's exercise of this newly-created right. This disparity in treatment is wholly unjustified.

3. The bill would subject the United States to liability for taking the fishing rights of the Yurok Tribe.

The Yurok Tribe's fishing rights are property rights protected by the Fifth Amendment to the Constitution against unfair and uncompensated takings by the United States. The Hoopa-Yurok Settlement Act of 1988 recognized that the Yurok Tribe has a vested property interest in its Reservation and the fishery in the Klamath River within the Reservation. 25 U.S.C. § 1300i-1(c)(confirming that the "trust lands and assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.") 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" S.Rep. No. 564, 100 Cong., 2d sess., 2-9 (1988). There can be no doubt, therefore, that the Yurok Tribe's right to fish in the river running through the heart of its aboriginal territory is property in the fifth amendment sense.

Although Congress' power in Indian affairs is broad, the exercise of such powers is subject to constitutional limitations, including the 5th Amendment's prohibition against uncompensated takings of Indian property. This rule has special force when the taking concerns property vested by prior congressional action. Hodel v. Irving, 481 U.S. 704 (1987) (Indian Land Consolidation Act's taking of small estates of Indian land vested under statute violates the 5th Amendment). The taking of fishing and hunting rights is subject to the 5th Amendment. See Menominee Tribe, 391 U.S. 404 (1968). The passage of legislation which diminishes the number of fish that the Yurok Tribe may take under its federal reserved fishing right, as confirmed by the Hoopa-Yurok Settlement Act, plainly is a taking of such right. Thus, enactment of H.R. 2875 would give rise to a claim for compensation by the Yurok Tribe against the United States. The scope of the liability is potentially very large, inasmuch as the Yurok Tribe would suffer a loss of fish each year that the Karuk allocation diminishes the Yurok tribal share.

4. The bill would interfere with the legal review now underway at the Department of the Interior

As noted above, in 1994, the Associate Solicitor of the Department of the Interior concluded that the Karuk tribal fishery is not conducted pursuant to federally-reserved fishing rights. On April 16, 1999, the Director of the BIA Office of Trust Responsibilities requested the Associate Solicitor to review the 1994 opinion in light of the fact that the Karuk Tribe had acquired trust lands along the Klamath River. The Associate Solicitor is presently conducting the requested review. The Department's legal review may clarify the status of the Karuk fishery. H.R. 2875 would circumvent that administrative review process, and usurp the responsibility of the Department of the Interior to determine the nature and scope of the Department's obligations to Indian tribes that use the resources of the Klamath River.

5. Summary and Conclusions.

H.R. 2875 is an improvident exercise of congressional power that would grant federal legal protection to tribal fishing that is not grounded in treaty, executive order or administrative action. The Yurok Tribe opposes enactment of the bill because it is likely to diminish the Yurok Tribe's fishery, it sets a bad precedent, it would subject the United States to enormous claims of liability for taking Yurok fishing rights, and it would circumvent the administrative review process now underway at the Department of the Interior.

Thank you for this opportunity to present the views of the Yurok Tribe.

1. ¹ Crichton v. Shelton, 33 I.D. 205, 217 (1904).

2. ² Mattz v. Arnett, 412 U.S. 481, 487 (1973); Donnelly v. United States, 228 U.S. 243, 259 (1913).

3. ³ 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); United States v. Wilson, 611 F.Supp. 813, 817-818 (N.D.Cal. 1985), rev'd on other grounds sub nom. United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986).

4. ⁴ Mattz v. Superior Court, 46 Cal.3d 355, 362-364, 758 P.2d, 606, 610-612 (1988); Arnett v. 5 Gill Nets, 48 Cal.App.3d 454, 461, 121 Cal.Rptr. 906 (1975), cert. denied, 425 U.S. 907 (1976).

5. ⁵ 412 U.S. at 487, citing, 1858 Report of the Commissioner of Indian Affairs 266.

6. ⁶ S.Rep. No. 564, 100th Cong., 2nd Sess., 2-9; H.Rep. No. 938, Pt. 1, 100th Cong., 2nd Sess., 8-15 (1988).

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