

**STATEMENT OF
MICHAEL J. ANDERSON
PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
BEFORE THE HOUSE RESOURCES COMMITTEE
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS
ON H.R. 2875
A BILL to AMEND
THE KLAMATH RIVER BASIN FISHERY RESOURCES RESTORATION ACT**

May 4, 2000

Good afternoon, Mr. Chairman and members of the Subcommittee. I am Michael J. Anderson, Principal Deputy Assistant Secretary for Indian Affairs, Department of the Interior (Department). I appreciate the opportunity to provide the Administration's views on H.R. 2875, which seeks to amend the Klamath River Basin Fishery Resources Restoration Act (Klamath Restoration Act) by including provisions regarding the Karuk Tribe of California.

The Administration welcomes this Subcommittee's continued attention to the fishery resource issues faced by those in the Klamath River Basin in Northern California and Southern Oregon. As you know, fish stocks of the Klamath Basin have been severely depleted over the past few decades, leading to the eventual listing of coho salmon as threatened under the Endangered Species Act (ESA); steelhead remain a candidate species for listing status. Other species have likewise declined in numbers precipitously. The depleted status of the Basin's fishery has required the imposition of various fishing restrictions or outright bans, some of which continue today.

This Congress on several occasions has recognized the plight of these resources and the associated negative impacts on those dependent on the fishery resources of the Klamath

Basin for their livelihoods, including area Indian tribes, sport and recreational fishers, ocean commercial fishermen, and numerous North Coast communities. Over the past two decades, Congress has enacted several laws aimed at addressing the problems which caused the collapse of the Klamath Basin fishery and at restoring and protecting the fishery so that those dependent on the fishery may again enjoy a sustainable harvest which provides for the economic, ceremonial, and subsistence needs of the area Indians and other local communities and interested parties.

In that spirit, Congress passed the Klamath River Basin Fishery Resources Restoration Act in 1986. The Klamath Restoration Act called on the Secretary of the Interior (Secretary) to develop and implement a twenty-year program to restore and subsequently maintain anadromous fish populations in the Klamath Basin to optimum levels. The program includes efforts such as improving and restoring fish habitats, rehabilitating problem watersheds, improving hatchery support, improving fish migration, and research to evaluate fish populations and the various efforts undertaken by the program. The Klamath Restoration Act also called for the formation of two administrative bodies: (1) the Klamath River Basin Fisheries Task Force (Task Force), which assists the Secretary in carrying out the program and coordinates with other governmental restoration efforts; and (2) the Klamath Fishery Management Council (Council), which provides advice for the in-river and ocean harvest associated with Klamath Basin stocks consistent with the restoration program and which makes recommendations to federal, state, and tribal fishing agencies regarding allowable harvest of Klamath Basin fishery resources.

As introduced, H.R. 2875 would amend the Klamath Restoration Act by adding three provisions which address the Karuk Tribe's fishing interest. One amendment would provide for a representative of the Karuk Tribe, as appointed by the Tribe's governing body, to sit on the Council. Another provision would amend the "Findings" section by including a new finding that the Karuk Tribe has a federally protected Indian fishery similar to other tribal fisheries on the Klamath River. Finally, H.R. 2875 would include a new section which would provide that the Karuk Tribe's harvest through the tribal fishery on the Klamath River shall be part of the tribe's in-river tribal allocation.

The Administration supports adding a provision to the Klamath Restoration Act to include a separate seat for a Karuk Tribe representative on the Klamath Fishery Management Council. This would be consistent with the Tribe's current membership on the Task Force under the Klamath Restoration Act. Moreover, history shows that all native peoples of the Klamath River Basin relied on the fishery resources that the Basin's rivers provided. We have no reason to doubt that the Karuk Tribe still looks to the Klamath River and its fishery for ceremonial and subsistence purposes. In fact, the need for monitoring and incorporating the Karuk Tribe's fish harvest into the Council's information making harvest allocations decisions in light of the best available scientific information, consistent with the purposes of the Klamath Restoration Act, has been raised numerous times. Having a full representative on the Council from the Karuk Tribe will help ensure the inclusion of this important information.

Similarly, the Administration recommends amending the Klamath Restoration Act to provide for a specific seat on the Council for a representative from the Yurok Tribe. When Congress

passed the Klamath Restoration Act in 1986, prior to the formal organization of the Yurok Tribe under the 1988 Hoopa-Yurok Settlement Act, the Act provided for two Indian representatives on the Council--a representative of the Hoopa Valley Tribe appointed by its governing body, and a representative of "the non-Hoopa Indians residing in the Area" to be appointed by the Secretary. Currently, based on the views provided in this testimony, the Secretary has appointed a member of the Yurok Tribe to the latter position. Based on the subsequent formal organization and the long-recognized federally reserved fishing rights of the Yurok Tribe, the Administration is of the view that it would be more appropriate under the Klamath Restoration Act to designate a specific seat on the Council for the Yurok Tribe, to be appointed by its governing body, and to remove the provision which requires the Secretary to appoint a representative of the "non-Hoopa Indians." We believe that because the Secretarial appointment currently is to represent the "non-Hoopa Indians", any new configuration should assure the continued representation of the non-Hoopa Indians.

As to the other two proposed amendments to the Klamath Restoration Act, the Administration has strong concerns about their purposes, their validity under the law, and their potential to disrupt relations within the Basin. The first proposed amendment would insert a new "Finding" to state that "the Karuk Indian Tribe's fishery on the Klamath River is a federally recognized and federally protected Indian fishery subject to such laws and regulations as are otherwise applicable to Indian tribal fisheries on the Klamath River." Although the Administration agrees that the Karuk Tribe is a federally recognized Indian tribe, the Administration questions the accuracy of the remainder of the proposed finding.

The Department's Office of the Solicitor has issued two legal memoranda regarding federally reserved fishing rights in the Klamath Basin. In 1993, the Solicitor issued an opinion addressing the fishing rights of the Yurok and Hoopa Valley Tribes. The Solicitor's Opinion recognized the historic dependence of the area's Indians upon the fishery resources of the Klamath Basin for subsistence, ceremonial, and economic purposes; the federal establishment of reservations on the Klamath and Trinity Rivers, respectively, because of the Indians' dependence on the fishery resources; and numerous court cases and Departmental legal and policy opinions which acknowledged the federally protected fishing rights of the Indians of what are today the Yurok and Hoopa Valley Reservations. The Solicitor concluded that the 1988 Hoopa-Yurok Settlement Act (1988 Act) vested federally reserved fishing rights in the Yurok and Hoopa Valley Tribes and that the Tribes are entitled to an allocation of the Klamath Basin fishery harvest sufficient to support a moderate standard of living, but no more than 50 percent of the annual harvest allocation. Based on the current conditions, the Solicitor further concluded that the Yurok and Hoopa Valley Tribes are now entitled to 50 percent of the harvest, absent any agreement by the parties to the contrary. The Department of Commerce adopted the Solicitor's Opinion into its decision making authority under the Magnuson Act to set ocean harvest regulations, and subsequent legal challenges to the Commerce Department's rulemaking were upheld by the federal district court and the United States Court of Appeals for the Ninth Circuit, which both relied substantially on the Solicitor's Opinion.

It should be noted that the Solicitor's opinion specifically noted that it did not address the fishing rights of any other tribe in the Klamath Basin. In a subsequent legal opinion in 1994, however, the Associate Solicitor for Indian Affairs concluded that the Karuk Tribe did not

have federally reserved fishing rights. That opinion noted that no treaty, federal statute, or executive order were found that could form the basis of such right; that the Karuk Tribe did not have an historic reservation or trust lands set aside for fishery purposes; and that the Karuk Tribe's catch had historically not been counted against the Tribal share of the Klamath fishery allocation. Because lands along the Klamath River have recently been brought into trust on behalf of the Karuk Tribe, the Solicitor's Office has been asked to revisit the 1994 opinion. The Solicitor's Office has not yet completed its review and analysis. Thus, the Administration opposes a finding that the Karuk Tribe has a federally reserved or protected fishing right as contrary to the historical record and the currently existing legal views of the Department.

The Administration recognizes that Congress has plenary authority over Indian affairs and can, by statute, enact laws that recognize and protect a federally reserved fishing right for the Karuk Tribe. Even if such a finding in legislation established a federally protected fishing right, the Administration also questions the purposes and effect of the proposed new section.

As introduced, the proposed section would read: "The Karuk Tribe's annual catch yielded through the tribal fishery on the Klamath River shall be part of the tribe's in-river tribal allocation." Although the language of this proposed amendment is unclear, it appears that this language is intended to include the Karuk Tribe's catch of Klamath fishery resources within the allocation of the Yurok and Hoopa Valley Tribes. As noted previously, including the Karuk Tribe's catch in the tribal allocation would be contrary to the historical record and existing legal precedent. In addition, the 1988 Act vested the unallotted property interests of what are today the Yurok and Hoopa Valley Reservations—including federally reserved fishing rights—in the Yurok and Hoopa Valley Tribes as trust assets to be held by the United

States on their behalf. If the proposed language were enacted, counting the Karuk Tribe's catch against the Yurok and Hoopa Valley Tribes' fishery allocation could lead to a breach of trust claim against the United States and arguably a takings claim by the Yurok and Hoopa Valley Tribes under the Fifth Amendment to the United States Constitution. It should be noted that the Federal Circuit Court of Appeals recently rendered a decision involving these Tribes and a takings claim related to the 1988 Act, and the time to appeal that decision has not yet expired. Thus, the Administration urges great caution and consideration before taking further steps regarding the allocation of these depressed fishery resources.

In conclusion, the Administration appreciates the Subcommittee's attention to issues facing the fishery resources of the Klamath Basin. The Administration does not dispute the Karuk Tribe's interest in the Klamath Basin fishery. However, while the Administration supports adding Karuk and Yurok Tribe representation to the Council, the Administration cannot support the remaining proposed amendments as introduced at this time. The Administration has strong concerns with H.R. 2875 as written and suggests that, prior to proceeding with any legislation such as H.R. 2875, further government-to-government consultation is necessary between the Department and all affected Klamath Basin Tribes.

This concludes my statement. I would be happy to answer any questions you may have.