

Selected Topics in Federal Indian Law Final Paper

Karuk Sovereignty in Elk Habitat and Herd Management

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1. Introduction:

Karuk tribal members have managed elk habitat and hunted elk for food, materials, medicine and regalia in their ancestral territory in northern California since time immemorial¹. Karuk traditional laws, oral traditions and ceremonies incorporate specific land management practices for elk, including seasonal application of prescribed fire to support elk habitat and regulation of take for subsistence, ceremonial and commercial use based on seasonal ecological indicators and herd population dynamics². Due to fire suppression, habitat loss, and hunting for meat and hides, all elk were extirpated from the Karuk Tribe's ancestral territory as early as the 1870s³. Beginning in 1985, six Roosevelt Elk from Redwood National Park were re-introduced into Elk Creek in Klamath National Forest. By 1996, 232 Roosevelt elk had been re-introduced into Klamath National Forest and the Marble Mountain wilderness by the US Forest Service and California Dept. of Fish and Wildlife (Cal DFW)¹. Since reintroduced, the elk have thrived. There now exist at least four vibrant elk herds in the Marble Mountains, with a total population size of about 3,000⁴.

A tightly regulated elk hunt was initiated by Cal DFW in 1995. To the 3,000-4,000 eager hunters who apply very year, DFW gives out about 50 Marble Mountain

¹ Karuk Tribe Dept. of Natural Resources, 2011. Eco-Cultural Resource Management Plan p 69-70, 2011; US Department of the Interior 1982. Archaeological study of Hupa, Yurok, Karok Tribes. P 143

² ECRMP p 69-70.

³ Habitat loss and hunting for meat and hides during the gold rush is considered a major factor in the extermination of Roosevelt elk in the Klamath-Siskiyou see e.g. Harper, J. A., J. H. Ham, W. W. Bentley, and C. F. Yocum. 1967. The status and ecology of Roosevelt elk in California. Wildl. Monogr. No. 16. The Wildl. Soc., Bethesda, Maryland. 49 pp; Doney, A. E., P. Klink, and W. Russell. 1916. Early game conditions in Siskiyou County. Calif. Fish and Game 2: 123-125.). Some contested accounts hold that a few herds managed to survive in the Scott and Salmon mountains. See e.g. Harper, J. A., J. H. Ham, W. W. Bentley, and C. F. Yocum. 1967. The status and ecology of Roosevelt elk in California. Wildl. Monogr. No. 16. The Wildl. Soc., Bethesda, Maryland. 49 pp.

⁴ 1500-3000 depending on estimate, USFS 2007. Klamath National Forest Elk Management Strategy.

elk tags through various means such as auctions and lotteries. Though the habitats of at least four of the Marble Mountain herds, the Ukonom, Wooley, Elk and Independence Creek herds, lie within Karuk ancestral territory, the Karuk community has not yet been able to participate in the Cal DFW-sponsored Marble Mountain hunt or herd management processes⁵. As stated in their Eco-Cultural Resource Management Plan (2011, p78): “the Karuk Tribe desires to regain the rightful entitlement to manage and restore elk habitat, populations and harvest these culturally significant wildlife species“. The Karuk Tribal Council and Department of Natural Resources has identified the population viability of elk and the restoration of habitats needed to support them as a “great concern” and a major restoration priority (ECRMP p 69). In addition to the wide-ranging ecological benefits of managing elk’s seasonal habitat needs at different elevation bands across the Western Klamath landscape, elk play important cultural, religious, political, and socio-economic roles in Karuk communities.

Elk populate Karuk stories and ceremonies, are used in regalia and play an important role in dances. Recent studies have linked denied access to traditional foods with high rates of diet-related illness, diabetes and heart diseases among the Karuk community⁶. Managing and harvesting elk for subsistence purposes is seen as an important step towards “decolonizing” the Karuk diet, or expanding access to cultural foods and re-establishing traditional food management and distribution⁷. The Karuk DNR has been part of a Food Security and sovereignty initiative through the USDA-AFRI project titled “Enhancing Tribal Health and Food Security in the Klamath Basin of Oregon and California by building a Sustainable Regional Food System”. Elk are seen as a critical component of local foodsheds and elk meat is seen as an important potential component of healthy Karuk diets⁸. Karuk seasonal

⁵ (also potentially the Horse creek- btwn seiad and beaver crk , maybe Russian wilderness herd?)

⁶ Norgaard, Kari. 2005. The Effects of Altered Diet on the Health of the Karuk People. Karuk Tribe, Happy Camp, Ca.

⁷ see e.g. Klamath River News, Klamath River Keeper News: Decolonizing Diet: How river restoration, environmental justice and traditional nutrition go hand in hand on the Klamath. Pgs 4-5

⁸ USDA-NIFA-AFRI: Food Security Grant #2012-68004-20018. “Enhancing Tribal Health and Food Security in the Klamath Basin of Oregon and California by building a Sustainable Regional Food System”.

food crews are considering strategic elk habitat management initiatives that also accomplish management objectives related to other cultural foods, fibers and resources such as tan-oak acorns, matsutake mushrooms, huckleberry and salmon. Managing resources on a landscape-bioregional scale through seasonally rotating applications of cultural fire according to species' seasonal habitat needs is an important step in moving Klamath resource management away from a paradigm oriented around fire suppression and timber production. Therefore reinstating Karuk elk habitat and herd management has far ranging implications for social and environmental justice in the Klamath: restoring local ecosystems and watersheds, expanding access to cultural foods and fibers, supporting local subsistence economies and community health, revitalizing cultural and ceremonial practices and enhancing self-governance and tribal sovereignty.

This paper attempts a preliminary analysis of the law and regulatory policy that enables and inhibits the Karuk Tribe to manage and harvest elk in their ancestral territory. In the next section, I will provide a brief overview of the case-law related to off-reservation hunting rights. I then describe the Karuk tribe's unique historical and legal relationship with State and Federal government agencies and identify the specific obstacles and opportunities to establishing a Karuk elk management program in Karuk ancestral territory. I explore two specific strategies for expanding Karuk sovereignty over elk habitat and herd management. I outline of the risks and benefits of pursuing elk co-management through habitat for harvest deals, and ceremonial take provisions in the Fish and Wildlife code. My goal is to produce a document that will give the Karuk Tribe's Department of Natural Resources a better sense of their options for strategic approaches to expanding Karuk sovereignty over elk habitat and herd management.

2. Legal and Regulatory overview

This section attempts to lay out some of the legal theories and case law related to off-reservation hunting rights. On reservations, Tribes maintain sovereignty over natural resources and wildlife management apart from state authority or oversight⁹. Off-reservation rights are created primarily by treaty provisions that explicitly cover fishing, hunting, or food-gathering activities outside of reservation boundaries. The Supreme Court has been willing to recognize off-reservation hunting and fishing rights, but typically only when there are explicit treaty provisions providing for or guaranteeing them. In exceptional cases, Courts have been willing to recognize off-reservation fishing and hunting rights without specific treaty language, as long as such activities are not prohibited by law or Statute. According to Clinton et al. (2005): “Indians sometimes have argued for the existence of off-reservation rights based on aboriginal claims or on substantially less-than explicit treaty language. Where made, such claims have generally failed”¹⁰. However, the Supreme Court has repeatedly held that unequivocal congressional intent is required to terminate an aboriginal hunting right¹¹. For the Karuk Tribe and other tribes without reservations or even ratified treaties let alone off-reservation hunting provisions, the status of their off-reservation hunting rights is uncertain. The Karuk and many other California tribes facing similar legal situations need clarity on the status of their sovereignty and rights related to elk habitat and herd management in their aboriginal territories.

⁹ see Sanders, Jason. Wolves, Lone and Pack: Ojibwe Treaty Rights and the Wisconsin Wolf Hunt. Wisconsin Law Review, 2013, p 8; Judith V. Royster & Rory Snow, Arrow Fausett, Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion, 64 WASH. L. REV. 581, 601-05 (1989).

¹⁰ Clinton, Goldberg, Tsosie American Indian Law: Native Nations and the Federal System, Cases and Materials, 4th edition. 2005; See e.g. Minnesota v. Keezer, 292 N.W.2d 714 (Minn. 1980) In State v. Quigley, 52 Wash. 2d 234, 324 P.2d 827 (1958) WA supreme court- once aboriginal rights to land are extinguished and land passes to private ownership, aboriginal rights are also extinguished. State v. Coffee- Idaho supreme court- Kootenai Indians did retain their aboriginal right to hunt on open and unclaimed lands despite congressional extinguishment of the tribe's right to the land. However not on privately owned land p 1238-1239 e.g. US v Dion, 474 US 900 (1985) which held that eagle protection act abrogated Indian treaty-guaranteed hunting rights to take bald and golden eagles in Indian country except as permitted by the act under a permit system for religious uses

¹¹ e.g. Menominee Tribe v. United States, 391 U.S. 404 (1968), Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

The leading case on off-reservation hunting rights appears to be *Winans v. US*¹², a 1905 Supreme Court case dealing with off-reservation fishing rights on the Columbia River in Washington. The Winans brothers owned a fishing company and had erected fences and fishwheels on their property, preventing Yakima Indians from being able to fish in their traditional fishing spots. The US filed suit in federal circuit court to enjoin the Winans from obstructing Yakima members from exercising their fishing rights and related privileges¹³. The treaty between Washington and the Yakima Nation in 1859 guaranteed them the exclusive right of hunting and fishing on their reservation as well as “the right of taking fish at all usual and accustomed places...together with the privilege of hunting, gathering roots and berries”¹⁴. The court sided with the Yakima and held that the treaty “reserved rights to every individual Indian, as though named there in” and “imposed a servitude upon every piece of land as though described therein”¹⁵.

Though the Yakima treaty specifically mentions off-reservation hunting, the Winans decision deals mostly with fishing and doesn’t directly address hunting rights. Still, according to Clinton et al (2005), Winans became “the beginning of the evolution in the construction of the meaning and scope of off-reservation hunting (as well as) fishing rights”¹⁶. In addition to fishing, many treaties also explicitly reserved off-reservation hunting and food-gathering rights. In *Menominee Tribe v US*, 391 U.S. 404 (1968), the court ruled that implied hunting and fishing rights are not terminated unless Congress expresses clear intent to sever them¹⁷. In *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) the 9th Circuit, leaning on *Menominee*, held

¹² *United States v. Winans* 198 U.S. 371 (1905)

¹³ Wilkins, David and Lomawaima, K. Tsianina. *Uneven Ground. American Indian Sovereignty and Federal Law.* P 125- 130

¹⁴ “in right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land...” 1242.

¹⁵ *United States v. Winans*, 198 U.S. 371 (1905)

¹⁶ Clinton, Goldberg, Tsosie *American Indian Law: Native Nations and the Federal System, Cases and Materials*, 4th edition. 2005, p 1244

¹⁷ Wilkens p 133

that Klamath Indians retained rights to hunt and fish in the lands ceded to the federal government under the Klamath Termination Act¹⁸. Most recently, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court upheld the off-reservation fishing and hunting rights of Milles Lac Band of Chippewa Indians based on a 1837 Chippewa treaty that expressly provided for off-reservation hunting rights¹⁹. This decision upholds the principle expressed in *Menominee* that reserved hunting rights can only be abrogated when Congress unequivocally expresses its intent to terminate hunting rights²⁰.

When mentioned in a treaty, it seems pretty clear in Federal law that, as long as they are mentioned in treaties, off-reservation hunting by tribal members is not subject to State regulation²¹. In *Antoine v Washington*, 420 U.S. 194 (1975), the Supreme Court held that Washington conservation laws did not apply to an Indian

¹⁸ However, in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), the Supreme Court ruled that a 1901 agreement clarifying and diminishing the boundaries of the Klamath reservation did not preserve the right to fish and hunt on ceded private lands that had been within the former boundaries of the reservation, even though hunting and fishing were expressly covered in a 1864 treaty. "Held: In light of the terms of the 1901 Agreement and the 1864 Treaty, and certain other events in the Tribe's history, the Tribe's exclusive right to hunt and fish on the lands reserved to the Tribe by the 1864 Treaty did not survive as a special right to be free of state regulation in the ceded lands that were outside the reservation after the 1901 Agreement. Pp. 766-774."

¹⁹ "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States". 1837 Treaty with the Chippewa, 7 Stat. 537. From the decision, pg 2: The Chippewa agreed to sell the land to the United States, but they insisted on preserving their right to hunt, fish, and gather in the ceded territory. See, e.g., *id.*, at 70, 75-76. In response to this request, Governor Dodge stated that he would "make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them." *Id.*, at 78. To these ends, the parties signed a treaty on July 29, 1837. In the first two articles of the 1837 Treaty, the Chippewa ceded land to the United States in return for 20 annual payments of money and goods. The United States also, in the fifth article of the Treaty, guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States." 1837 Treaty with the Chippewa, 7 Stat. 537.

²⁰ See Wilkins et al p 138

²¹ However, off-reservation treaty backed rights are generally subject to Federal regulation Clinton, p. 1238 "As a general rule, Indian conduct outside of Indian reservations is subject to nondiscriminatory state law otherwise applicable to all citizens of the state" see *Mescalero Apache Tribe v Jones*, 411 U.S. 145 (1973) subject to constitutional and federal statutory restraints and protection of wildlife and regulation of hunting and fishing are within the police power of the states. (*Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978)). "Thus the Supreme Court has never held that states lack power to regulate the exercise of off-reservation hunting and fishing rights based on aboriginal title or occupancy". See *Organized Village of Kake v. Egan* 369 U.S. 60 (1962) "cases suggest considerable fed authority to regulate and therefore to partially limit even guaranteed Indian hunting and fishing rights". E.g. *Northern Arapahoe Tribe v. Hodel* 808 F2d 741 (10th Circ 1987) court sustained sec of interior's authority to issue interim game regulations for wind river res after Shoshone tribe and northern Arapahoe didn't agree on a game code. Shoshone requested the sec of interior to act to protect game resources Clinton et al p 1236.

hunting on the north half of the former Colville Indian Reservation. The statute ceding the land provided that “the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged”²². The case turned on the meaning of the phrase “in common with all other persons”. The Washington State Supreme Court interpreted this “as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there and that State conservation regulations would apply”²³. In contrast, the Court held, citing *Winans*, that the treaty must be construed to the prejudice of the Indians. In absence of other congressional legislation explicitly terminating their rights, their off-reservation hunting rights were more than just those held in-common with other State citizens, “else Congress preserved nothing which the Indians would not have had without that legislation”²⁴.

3. Karuk land status and elk management

As shown in the previous section, the Supreme Court typically recognizes off-reservation hunting rights, but only when they are specifically provided for in treaties. The Karuk’s treaty with the Federal Government was never ratified and the legal status of their off-reservation hunting rights is, for that reason, currently undetermined and uncertain.. The eighteen treaties made with California tribes in

²² Art 6. Clinton p 1262 “State disposed of conservation issue by saying “state of Washington has not argued, let alone established, that applying the ban on out-of season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer”

²³ 82 Wash. 2d, at 449-450, 511 P.2d, at 1357-1358

²⁴ *United States v. Winans*, 198 U.S., at 380 ; *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 397 -398 (1968).” From the opinion: “Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to [420 U.S. 194, 206] hunt there. 82 Wash. 2d, at 449-450, 511 P.2d, at 1357-1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed “in common with all other persons,” does not support that interpretation or affect the Supremacy Clause’s preclusion of qualifying state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing. The ratifying legislation must be construed to exempt the Indians’ preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For consistency with the canon that the wording is not to be construed to the prejudice of the Indians makes it impermissible in the absence of explicit congressional expression, to construe the implementing Acts as “an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.” *United States v. Winans*, 198 U.S., at 380 ; *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 397 -398 (1968).

1851-1852 were classified and buried deep in senate files by California senators who refused to let go of the ceded land, then estimated at over a hundred million dollars²⁵. In 1905, when the injunction of secrecy was lifted, the treaties were read aloud in a closed session of the Senate, where action was again deferred.

Unlike the other tribes of the Klamath Basin, such as the Yurok, Hoopa, Quartz Valley and Klamath Tribes who were later granted reservation lands through subsequent treaties and legislative acts, the Karuk Tribe does not have a reservation to this day. In 1978, the Karuk Tribe gained federal recognition after a BIA field officer visited the Klamath and determined that, “based on the findings collected, the continued existence of the Karoks (sic) as a federally recognized tribe of Indians has been substantiated”²⁶. The Assistant Secretary for Indian Affairs then notified the local offices of the Bureau of Indian Affairs on January 15, 1979, that: “In light of this finding, I am directing that the government-to-government relationship, with attendant Bureau services within available resources, be re-established”²⁷. The tribe then drew up a constitution, held elections and established a Tribal Council in 1985²⁸.

The Karuk Tribe’s Aboriginal Territory was mapped by the BIA as part of the federal determination process for tribal recognition. It includes an estimated 1.38 million acres in the Middle stretch of the Klamath River Basin, nearly all of which is located concurrent to lands administered by the USDA Forest Service’s Klamath and Six Rivers National Forests. The Forest Service holds a number of tribal lands, waterbodies, sacred sites and trails, cultural management areas, and ceremonial districts in trust for the Karuk Tribe. In addition, the tribe has numerous MOUs in place to direct management on federal lands in a manner consistent with tribal

²⁵ See Heizer, Robert. 1972. Intro to George Gibbs Journal of Redick McKee’s Expedition through Northwestern California in 1851 UCB Archaeological Research Facility; Arthur J Ray, Central Sites, Peripheral Visions : Cultural and Institutional Crossings in the History of Anthropology ed. Handler, Richard; Publisher: University of Wisconsin Press : 2006

²⁶ See 13 IBIA 76, 78; 1985 WL 69127 (I.B.I.A.)

²⁷ January 15, 1979 Memorandum entitled “Revitalization of the Government-to-Government Relationship Between the Karok (sic) Tribe of California and the Federal Government”

²⁸ Constitution of the Karuk Tribe (formerly known as the “Karuk Tribe of California”) Original Constitution Adopted April 6, 1985; Amendments Adopted by Special Election July 19, 2008; 73 Fed. Reg. 18,535, 18, 544 (April 4, 2008)

values. A few ceremonial sites and dance grounds are registered or nominated as cultural historic properties in the state and national registers of historic places. The Karuk Tribe claims jurisdiction over their nearly 4,000 members and their entire 1.38 million acre aboriginal territory²⁹. Most Tribal housing, fee-trust property and administrative centers are located in the towns of Happy Camp, Orleans, Somes Bar, and Yreka.

Elk are identified as an important cultural and ceremonial resource and ecosystem management indicator in the Karuk Department of Natural Resource's latest Eco-Cultural Resource Management Plan: "of greatest concern in terrestrial environments are the management and population viability of elk and deer and the restoration of habitats needed to support these animals" (p 69). Elk fit into a strategic landscape-scale restoration plan that targets rotational seasonal burns at different elevation bands according to elk's seasonal habitat needs such as forage, cover, parturition and calving. The prescribed burns target other fire and watershed management objectives and consider habitat needs of other culturally and legally significant species such as spotted owl, porcupine, tan-oak, and salmon. Opening up meadows for summer habitat on ridgelines, transitional dispersal corridors and wintering habitat along river bottoms serves multiple social and ecological landscape values:

"Restoration of traditional management practices with the use of fuels reduction, prescribed fire and wildland fire should significantly improve wildlife habitat and correlating population densities... These practices can restore fire adapted, dependent, and resilient habitats of grasslands, oak and pine forests, selected riparian zones, mixed conifer/hardwood forests, and high elevation meadows... Restored habitat and species composition will increase production and population viability which in turn will assist in the maintenance of restored landscapes and help reduce the threat of uncharacteristically intense wildland fires". ECRMP p. 71.

²⁹ Mission and Values Statements: The Karuk Tribe values the interests and wellbeing of the Karuk People. The values associated with this wellbeing are primarily health, justice, economic security, education, housing, self governance, as well as the management and utilization of cultural/natural resources within and adjacent to the Karuk Aboriginal Territory now and forever. The mission of the Karuk Tribe is to promote the general welfare of all Karuk People, to establish equality and justice for our Tribe, to restore and preserve Tribal traditions, customs, language and ancestral rights, and to secure to ourselves and our descendants the power to exercise the inherent rights of self governance. From ECRMP p 2

As mentioned earlier, in addition to the benefits to local ecosystems and watersheds, vibrant elk populations and expanded access to cultural foods and fibers in turn could support local subsistence and community health, help revitalize cultural and ceremonial-religious practices and enhance Karuk self-governance and tribal sovereignty.

Based on initial conversations I've had with wildlife biologists, fire ecologists and agency staff at Karuk DNR, California Department of Fish and Wildlife and Klamath and Six Rivers National Forests, it seems that Cal DWF and USFS are interested in exploring possibilities for a Karuk elk co-management program. USFS is interested in managing for elk as a landscape-ecological indicator in the strategic habitat value and multiple-resource benefits of prescribed fires for elk meadows and forage³⁰. Recently, Klamath and Six Rivers national forests have been engaged in the Fire Learning Network, a Nature Conservancy-facilitated collaborative process along with the Karuk Tribe, local Firesafe and Watershed councils and landowners to plan, prioritize and execute fire and fuels management projects in the Western Klamath mountains. Elk wintering range received a point weighting score in their restoration prioritization process and is seen as an important component of fire-adapted ecosystems and communities in the Western Klamath mountains³¹. In addition, the Karuk DNR is spearheading, along with other Klamath Basin tribes, a USDA food security and sovereignty program titled, "Enhancing Tribal Health and Food Security in the Klamath Basin of Oregon and California by building a Sustainable Regional Food System"³². As mentioned earlier, there is widespread

³⁰ KNF Elk Management Plan 2007, pg. 24: "The Marble Mountain Analysis area has limited forage value in the winter range. The opportunity to increase forage value of the winter range can be realized by reducing conifer basal area and canopy closure in high restoration potential polygons that have black oak or white oak components in the stand"; "The Salmon Analysis area has limited forage value in the winter range on federally managed lands (private lands currently provide most quality winter range). The opportunity to increase forage value and reduce depredation on private property can be realized by reducing conifer basal are and canopy closure in high restoration potential polygons that have black oak or white oak stand components." Pers com 3_2_14; Lake, Frank. 2007. Traditional Ecological Knowledge to Develop and Maintain Fire Regimes in Northwestern California, Klamath-Siskiyou Bioregion: Management and Restoration of Culturally Significant Habitats. PhD Thesis OSU

³¹ See prioritization matrix point scheme 12_2013

³² USDA-NIFA-AFRI: Food Security Grant #2012-68004-20018

tribal community interest in elk as a strategic component of local foodsheds and diets.

While USFS claims jurisdiction over most of the elk habitat in Karuk Ancestral Territory, the California Department of Fish and Wildlife maintains jurisdiction over the Marble Mountain elk herds³³. Members of the California Dept. of Fish and Wildlife have expressed interest in exploring possibilities of co-management of elk habitats and herds³⁴. The latest elk management plan for the Klamath National Forest (2007), co-authored by USFS and DFW, acknowledges the importance of indigenous ecological knowledge and stewardship practices, especially with regards to the use of fire to maintain elk habitat³⁵. However, there is currently no legal or policy framework in place that spells out the authorities, government-government relations or specific processes for co-management of elk in the Marbles. The next steps that KDNR and CDFW take in initiating the conversation around elk co-management are critical, with far-ranging implications not just for the Karuk tribe, but for the self-determination and ecological and cultural revitalization initiatives of tribes across California. In the remainder of this paper, I weigh the risks and benefits of two different strategic approaches to establishing a government-to-government relationship between the Karuk Dept. of Natural Resources and California Dept. of Fish and Game for elk management in Karuk ancestral territory.

4. Strategies

³³ See Fish and Game Code, Sections 200, 202, 203.1 and 240

³⁴ pers com. 4/14

³⁵ From DFW KNF, p 3: "Large herds of Roosevelt elk once roamed across much of Northern California....Their existence is documented by numerous place names and in anthropological accounts of tribes such as the Shasta, Karuk, Hupa, Chilula, Chimariko and Yurok (Bright 1978). These tribes all hunted elk, using various methods such as stalking, driving, and snaring (Toweil and Thomas, 2002)... Landscapes once shaped by Indian burning have changed dramatically over the last 150 years (Huntsinger and McCaffrey 1995). By setting back vegetative succession and reducing overstories, these traditional burning practices created favorable elk habitat conditions (Higgins 1986). By the mid 1800s, traditional burning practices of Northern California Indian tribes had virtually ceased. Many areas once managed for oak woodlands and grasslands now have dense canopies of Douglas-fir and other conifers (de Rijke 2001)."

1. California Fish and Game Code 186:

It would be much easier for Cal DFW to set-up an elk co-management program with Karuk DNR if a law or a treaty provision explicitly covered Karuk off-reservation hunting. California Dept. of Fish and Game Code Section 186 allows for Karuk ceremonial game take, but restricts it to a narrow section of the Klamath river corridor and limits it to “ceremonial purposes in such manner as the commission deems proper”³⁶. The permitting process laid out in the code has never been used, as it implies a diminishment of Karuk sovereignty and self-determination by requiring a permit that is contingent upon verification by Cal DFW of whether or not the take counts as a traditional or ceremonial practice. Another issue with Section 186 is the zoning restriction³⁷, as Elk do not currently use the section of the river specified in the Code due to proximity to roads and lack of habitat, specifically refuge and forage. However, a recent prescribed burn near Katimiin at the confluence of the Salmon and Klamath rivers has opened up elk habitat and forage and, reportedly, elk moved in only three days after the treatment³⁸. One low-risk solution to Code 186 problems would be to work within the current zoning and permitting parameters and ceremonially harvest elk along the Klamath corridor as laid out in the code. However, this still does not fix the curtailment of sovereignty implied in forcing the tribe to get a determination and a permit from CDFW. It is my opinion that Code 186 is currently unworkable as it stands, suggesting that a legislative overhaul may be necessary. Despite its significant flaws, Section 186 is a unique legal resource that, if amended to address the zoning and sovereignty issues, could provide an opportunity for the Karuk Tribe to co-manage elk habitat and herds in their ancestral territory.

³⁶ CDFW CODE Sec 186 (a) such portion of the public domain of the State of California as is contiguous to the portion of the Klamath River between the mouth of the river and Katamin Rancheriaand (e) Indians taking fish and game under this section shall do so in accordance with the rules and regulations of the Fish and Game Commission and under permit issued by the Department of Fish and Game. The commission may adopt rules and regulations and impose conditions on the issuance of such permits which shall limit the taking of fish and game to taking for ceremonial purposes in such manner as the commission deems proper. Sec 186 purportedly has its origins in CA case law related mostly to access to Salmon fisheries.

³⁷ “contiguous to the portion of the Klamath River between the mouth of the river and Katamin Rancheria”

³⁸ DS: pers com 3_14_14

It seems that the most risk-averse way to amend the Code would be to work through the Fish and Game Commission's Tribal Committee³⁹. The Fish and Game Commission is authorized by Article IV, Section 20 of the California Constitution and by Sections 200-221 of the Fish and Game Code to regulate the taking of fish and game. The Commission is composed of five members, appointed by the Governor and confirmed by the Senate. General statutory authorities and duties vested in the Commission include specifying hunting seasons, bag limits, and territorial boundaries of hunting⁴⁰. It seems that most strategic way to introduce an amendment to the Fish and Game code would be to work with members of the Commission's Indian sub-committee to develop a proposal that would be eventually be introduced at a sub-committee meeting and then a full Commission hearing⁴¹.

It will be critical to work with members of the sub-committee before hand to conduct a full stakeholder analysis, risk assessment and environmental impact analysis that identifies all foreseeable issues and parties that could potentially be negatively affected by the proposed amendment. One way to demonstrate widespread support would be for the Department of Natural Resources to draft a

³⁹ COMMITTEES: Currently the Commission has three committees: the Marine Resources Committee (MRC) and Wildlife Resources Committee (WRC), which were created in statute (Sections 105 and 106 of the Fish and Game Code), and the Tribal Committee. Each is chaired or co-chaired by no more than two Commissioners. These assignments are generally made annually by a majority vote of the Commission at the time of election of the President. The goal of these committees is to allow presentations and discussions on regulatory proposals that allow greater time and detail than what is possible at full Commission meetings. The committee meetings are less formal in nature and provide for additional access to the Commission. Additionally, the committees follow the requirements of Bagley-Keene. It is important to note that the committee chairs cannot take action independent of the full Commission. Instead, the chairs make recommendations to the full Commission at regularly scheduled meetings. <http://www.fgc.ca.gov/public/information/>

⁴⁰ General statutory powers and duties vested in the Commission related to the take of birds, mammals, fish, mollusks, crustaceans, amphibians reptiles include the following: 1. Establish, extend, shorten or abolish open and closed seasons; 2. Establish, change or abolish bag, possession and size limits; 3. Establish and change territorial limits for taking any or all species or varieties; and 4. Prescribe the manner and means of taking any species or variety.

⁴¹ Any public request for Commission to take a position on proposed legislation shall first be considered by one of the Commission subcommittees. Upon approval by simple majority of a subcommittee, the subcommittee, Commissioner assigned to the subcommittee, or a Commission staff representative shall bring the request to the Commission for action at a Commission meeting. Under extraordinary circumstances and at the discretion of the Commission President, proposed legislation may be placed on the agenda for consideration of a position or other action by the Commission. Also, by a majority vote the Commission may direct staff to place proposed legislation on the agenda for possible action at a future meeting. A Commissioner, making clear that he or she is not representing the entire Commission in any official capacity, may support or oppose legislation apart from the Commission.(Amended 12/4/92, 11/17/11), Commission Policies, <http://www.fgc.ca.gov/policy/p1com.aspx#staffing>

one-page summary of the need for the proposed amendment and request letters or signatures of support from the Klamath National Forest Supervisor, KNF and Cal DFW wildlife biologists, CalFire Unit Chiefs, USFS fire ecologists, Fish and Game Commissioners, environmental NGOs such as local Watershed and Firesafe councils, the Nature Conservancy, and EPIC and the Yurok and Hoopa tribal councils. Once the Tribe could be certain that a majority of sub-committee members would agree to the proposed amendment and that a Commissioner would sponsor it, the amendment could be introduced in a FGC Indian committee meeting⁴².

If a simple majority of the subcommittee approves the amendment, the Commissioner would then direct Commission staff to bring a request to the Commission for action at a Commission meeting. Once the proposed action is placed on the agenda, the Tribe's representative can work with members of the Commission and their Staff to make sure all of the Commissioners are briefed on the proposed amendment and assured that all affected parties had agreed to it. The stakeholder analysis, risk assessment and environmental impact documentation developed for the Indian subcommittee could be circulated to the full Commission so that their concerns were addressed well before the proposed amendment goes before the full Commission. The proposed amendment might also require a 30-day public comment period to comply with the California Administrative Procedure Act.

If a majority of Fish and Game Commissioners agree to support the amendment, it is my understanding that they would then amend the code and instruct the Department of Fish and Wildlife to prepare the necessary Environmental Impact Report/Statement documentation. The Office of Administrative Law (OAL) would ensure that the amendment to the regulation was clear, necessary, legally valid, and available to the public⁴³. This strategy would be

⁴² Next meeting September 17, 2014, Tribal Committee Department of Consumer Affairs Hearing Room 1747 North Market Blvd. Sacramento, CA

⁴³ CALIFORNIA ADMINISTRATIVE PROCEDURE ACT: The Fish and Game Commission's regulatory process is governed by the California Administrative Procedure Act (APA). APA is a series of acts of the California

risk-averse because it starts building support at the beginning of the regulatory processes, addressing concerns and issues before it even goes to vote in the subcommittee so that, by the time it goes in front of the Commissioners, everything is buttoned up and there is already a consensus among them. Though low-risk, this strategy would be expensive and would likely require a full-time lobbyist for the duration of the sub-committee and Commission hearings and also legal counsel for advice on specific language and zoning implications of the proposed amendment. This strategy might also require research funds for an interdisciplinary team to document the overall ecological, wildlife and watershed benefits of the proposed amendment.

In my initial conversations with Fish and Game Commission representatives, it seems that Code 186 might not actually be the best entry point into the elk co-management conversation. The commission would be more comfortable with a more exploratory conversation about what is meant by elk management, what respective agency responsibilities would come into play in a co-management scenario, and what authorities exist on the books to support such a scenario. In particular, the most sensitive subject and most important issue to address would be the allocation of special tribal hunting opportunities not shared by members of the general public. The commission would like a better sense of exactly what the Tribe wants with regards to elk management, the timing and extent of their take demands, and an overview of the nuts and bolts of how this would play out. The commission would also like to see successful examples of other State-Tribal wildlife partnerships that have worked elsewhere. Before the issue is even brought to the tribal committee, it would be important to have all of the details worked out and buttoned up in a tight proposal ahead of time. An off-line group could draft a working model, then bring it to the Tribal Committee for discussion so that the committee discussion is focused and targeted at further action. UC Berkeley could be a

Legislature, first enacted June 15, 1945. Chapter 3.5 of the APA requires California State agencies to adopt regulations in accordance with its provisions. The APA allows the public to participate in the adoption of State regulations in order to ensure that the regulations are clear, necessary, and legally valid. The APA provides that any interested person may petition a State agency to change regulation. These changes include the adoption of a new regulation or the amendment or repeal of an existing one.

potential venue to facilitate these initial conversations, as it is seen as a relatively neutral institution with natural resources and wildlife expertise and the ability to convene a wide range of stakeholders. The UCB facilitated sessions could aim to produce a white paper that serves as a straw-man proposal to initiate a targeted elk-management conversation in the Fish and Game commission's Tribal Committee meetings.

2. Habitat management and set-asides: acres for allocation.

Another strategy involves developing an MOU between the Tribe, the US Forest Service and Cal DFW that awards the Tribe a hunt allocation in exchange for their elk habitat management and enhancement initiatives. There currently exists a Cal DFW landowner set-aside program whereby private landowners manage their lands for elk in exchange for a draw in the lottery for that year's elk hunt tags. Landowners need at least 640 acres to enter the program, and the landowner signs a contract with CDFW stipulating the kind of restoration work they will do on their property. Then, based on an assessment of habitat enhancement, carrying-capacity, acreage, etc., the landowner gets a certain number of draws in the tag lottery. This could potentially be an avenue for KDNR to get an elk allotment in proportion to its elk habitat enhancement work. The main drawback with this approach is that the Tribe does not want to enter the tag lottery as merely another stakeholder in the draw; they demand to be negotiated with as a sovereign government with place-specific management expertise.

If a similar acres-for-tags formula could be applied to public lands used to figure out an actual allotment each year, rather than a draw proportion, then a habitat-for-hunting rights MOU or government-to-government agreement might be a good entry point into elk co-management. The tribe could then leverage their management expertise and their ability to do cultural burns on public lands in exchange for sovereign authority over elk management and allocation of harvest

opportunities. From CDFWs perspective, the tribe is leading the Nation in wildland fire management, which is outside of their jurisdiction but one of the most critical components of wildlife management. A partnership with an entity like KDNR or the FLN is exactly what is envisioned in their latest State Wildlife Action Plan (2014). However, another drawback of the landowner set-aside program is that it focuses primarily on private lands and most of the elk habitat enhancement projects are slated for federal lands. If the State was interested in providing special access to elk for tribal members on public lands, they could create a “public lands management set-aside” program, where on public lands, whereby they could set aside a share of the allowable harvest to a particular tribe or tribes in exchange for habitat enhancement work. In addition to prescribed fire and habitat restoration, another leverage point in this conversation is the issue of off-season poaching, about which the Department of Fish and Wildlife is currently extremely concerned. Given the Tribe’s sovereign jurisdiction over its members, it could offer to help with harvest monitoring and enforcement in exchange for the ability to allocate harvest opportunities among its members. One component of an elk co-management agreement could involve a joint enforcement agreement between State and Tribal law enforcement agencies allowing them to work hand in hand to prevent poaching.

This strategy would therefore require either a three-way MOU or two separate MOUs between the USFS, Karuk DNR and Cal DFW. It would be less expensive than the legislative amendment, as it would only require counsel on the drafted MOUs rather than a full-time lobbyist. The USFS MOU would have to be signed by Patty Grantham, the Forest Supervisor for Klamath National Forest, and the Tribal Council chairman. I believe the Cal DFW MOU would have to be signed by Department of Fish and Wildlife Director Charlton Bonham and the Council chairman. Each MOU would require a significant amount of negotiation ahead of time. It would be advisable to provide the Forest Supervisor and DFW director with a full stakeholder analysis, risk assessment and environmental impact analysis to anticipate all foreseeable issues and allay parties that might take issue with the Memorandum such as environmental and wildlife groups, hunting outfits and

neighboring tribes. The MOUs might also require a 30-day public notice and comment period. In this strategy, I feel it is important to convey to the Supervisor and Director the wide-ranging public benefits that Karuk elk habitat management could have for wildlife, forest ecosystems and watersheds in the Klamath. Again, it will be important to develop a clear proposal of exactly what the tribe wants, how the allocation of harvest opportunities would be distributed, and which agencies would be responsible for which aspects of the management process. The Fish and Game Commission typically responds well to well-researched, clear and straightforward proposals that put everything on the table at the beginning of the negotiating process. A solid, well thought-out plan that lays out expectations and responsibilities and enumerates the landscape-scale benefits of elk habitat revitalization to ecosystems and watersheds, traditional foods, local economies, community health and tribal sovereignty would be difficult to turn down.

¹ Table 1. From Klamath National Forest Elk Strategy. History of Klamath National Forest cooperative Roosevelt Elk reintroduction program:

Year	# Elk	Source	Release	Cooperators
1985	6	Redwood NP	Elk Creek	USFS, NPS, CDFG, RMEF
1986	6	Redwood NP	Elk Creek	USFS, NPS, CDFG, RMEF
1987	6	Redwood NP	Elk Creek	USFS, NPS, CDFG, RMEF
1988	1	Humboldt Zoo	Elk Creek	USFS, CDFG, RMEF
1989	27	Jewell Mdws. OR	Elk Creek	USFS, ODFW, CDFG, RMEF
1990	27	Jewell Mdws. OR	S. Fk. Salmon	USFS, ODFW, CDFG, RMEF
1991	21	Jewell Mdws. OR	Elk Creek	USFS, ODFW, CDFG, RMEF
1992	30	Jewell Mdws. OR	S. Fk. Salmon	USFS, ODFW, CDFG, RMEF
1994	31	Dean Ck. OR	Steinacher Ck.	USFS, ODFW, CDFG, RMEF
1994	21	Jewell Mdws. OR	Independence Ck.	USFS, ODFW, CDFG, RMEF
1995	27	Jewell Mdws. OR	Independence Ck.	USFS, ODFW, CDFG, RMEF
1996	29	Jewell Mdws. OR	Independence Ck.	USFS, ODFW, CDFG, RMEF
Total	232	*****	*****	*****