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## The Virtual Reservation: Land Distribution, Natural Resource Access, and Equity on the Yurok Forest

### ABSTRACT

*The abuse of Native American populations and the injustices of federal Indian policy have been well documented. Using the concept of distributive justice to frame the analysis, this article addresses five major Indian land-policy initiatives promulgated to “help” post-conquest indigenous populations, some of the equity arguments used to rationalize them, and their effects on land ownership and terrestrial resources in the Yurok Indian Reservation of northern California. This article then examines the treatment of Yurok land tenure and natural resources over the last 150 years as an indicator of how equitable these policies turned out to be. Maps of land claims and ownership are a graphic representation of the impacts of Indian land-policy initiatives. The cumulative result is an ecological legacy of land fragmentation and loss of indigenous ecosystems that will continue to constrain access to economically and culturally significant resources now and in the future, creating an unprecedented terrain for tribal and ecological restoration. Lastly, this article argues that natural resources decision-making should consider the rights of the few as well as the good of the many and incorporate ecological sustainability as part of a multidimensional framework for assessing equity that includes tribal rights on ancestral lands and the goal of distributive justice.*

### I. INTRODUCTION

Yurok indigenous territory covers more than 400,000 acres in northwestern California and is centered on the Klamath River where it meets the Pacific Ocean. The official boundaries of the Yurok Indian Reservation include approximately 56,000 acres that run in a narrow strip one mile on either side of the Klamath River from its mouth to 40 miles inland. A closer look reveals that, even within the reservation, the land still under some semblance of tribal control now totals less than 5,600

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acres<sup>1</sup> in scattered parcels. The majority of the Yurok Indian Reservation and territory is now in corporate, federal, or state ownership. The forest itself has also changed, transformed from a land of tall redwood groves, scattered oaks, woodlands, and carefully preserved prairies to a network of redwood, Douglas fir plantations, and dense regrowth.

In the United States, the social, cultural, and economic inequities of federal Indian policy for land distribution and management, along with the deep connections between Native American culture and natural resources, have been well documented.<sup>2</sup> Nearly two-thirds of U.S. Indian reservation land was alienated as a result of nineteenth- and twentieth-century policy.<sup>3</sup> For the Yurok, a series of post-conquest policies, promulgated to “help” indigenous populations, resulted in the dispossession not only of land but of ecosystems. How do contemporary arguments about equity pertain to the policy initiatives that dispossessed the Yurok of their natural resources? Using the conceptual framework of distributive justice<sup>4</sup> as a lens, can we learn from this history as we strive to create more equitable institutions for land and natural resource management?

Analysis of federal land title records reveals five major periods in federal land distribution policy that have shaped the Yurok forest:<sup>5</sup> (1) the designation of reservations along the Klamath; (2) the allotting of the reservation and the forced-fee patent period; (3) the Indian New Deal; (4) the termination and relocation era; and (5) the self-determination period.

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1. Calculation of acreage on the Yurok Indian Reservation is confused by inaccurate land surveys and records. The acreages presented in this document are developed from Bureau of Land Management (BLM) land title records, and are the best available. Nevertheless, the acreages presented in this document should be considered approximate. See Lynn Huntsinger & Sarah McCaffrey, *A Forest for the Trees: Forest Management and the Yurok Environment, 1850 to 1994*, 19 AM. INDIAN CULT. RES. J. 155 (1995).

2. See, e.g., RICHARD WHITE, *THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS* (1983); IRREDEEMABLE AMERICAN: *THE INDIANS' ESTATE AND LAND CLAIMS* (Imre Sutton ed., 1985); F. LEE BROWN & HELEN M. INGRAM, *WATER AND POVERTY IN THE SOUTHWEST* (1987); MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* (1999).

3. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 22 (4th ed. 2004).

4. Gary C. Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS (Kathryn M. Mutz, Gary C. Bryner & Douglas S. Kenney eds., 2002).

5. For the purposes of this paper we are setting aside the Hoopa-Yurok Settlement Act of 1988, Pub. L. No. 100-580, 102 Stat. 2924, which separated the Yurok Reservation from the Hoopa Reservation and stipulated how timber receipts from the Hoopa Reservation should be divided. The Act largely resulted from the series of lawsuits collectively referred to as the “Jesse Short Case.” Prior to this, the Klamath River and Hoopa Valley Reservations were treated as one. Aspects of this complex case are still being litigated. In this paper we focus only on the Yurok territory and reservation.

Each of these major policy initiatives was rationalized to some degree, implicitly or overtly, by context-driven arguments about equity, or fairness. This article explores the way in which equity framed the land and resource policies that were applied to the Yurok forest over the last 150 years.

The fairness of various policies can be judged by either the process used to create them (procedural justice) or their outcomes (distributive justice).<sup>6</sup> This discussion focuses on distributive justice.<sup>7</sup> Determinations of fairness further depend on an underlying vision of what is best for people and the landscapes they inhabit, a frame of reference that helps define policy problems and solutions. Taking as a premise that Yurok occupation of land and access to ecosystems was not only a goal of reservation establishment, but also optimal for maintaining traditional spiritual and material culture, what happened to Yurok lands and ecosystems through this period can be shown to measure the long-term distributional equity of Indian land policy initiatives.

In the history of American initiatives for Yurok lands, two competing concepts of equity emerge as Indian policy swings back and forth between assimilation and “measured separatism.”<sup>8</sup> During periods when assimilation is ascendant, utilitarian concepts of equity are dominant. Periods of reform—namely the Indian New Deal and the era of self-determination—are characterized by a stronger emphasis on rights-based formulations of equity. Yurok forest history amply demonstrates a shortcoming of the utilitarian approach, wherein a minority group disproportionately bears the burdens of a policy designed to produce the greatest good for the greatest number.<sup>9</sup> Historically, Yurok land and resources have been better protected by a rights-based approach to equity, including emphasis on representation and protection of the disadvantaged or less powerful.<sup>10</sup> The balance between these two frameworks for achieving equity deserves overt consideration in deliberations about natural resources, allocation, and management.

Maps of land claims and ownership along the Klamath reveal the impacts of Indian land policy initiatives over time. While land ownership can serve as a useful indicator or proxy for the equitability of out-

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6. Bryner, *supra* note 4.

7. *Id.* at 40 (stating that utilitarianism is “one of the most prominent forms of distributive justice . . . [and] calls for a distribution of benefits, opportunities, and burdens that generates the greatest welfare for the greatest number”).

8. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 14 (1987).

9. Bryner, *supra* note 4.

10. *Id.* at 42 (suggesting that, in forms of equity “there may be some factors that justify different treatment,” so that “equality can mean that those who are similarly situated are treated the same, and those who are different are treated differently”).

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comes, environmental impacts are also a crucial component of evaluating equity. In the Yurok forest, the cumulative result of historic natural resource management and land distribution policy has been the irreversible fragmentation and change of ecosystems. From a distributive-justice perspective, these impacts change access to and distribution of natural resources now and in the future. When assessing the equity of natural resource and land distribution policy, ecological outcomes must be considered along with consequences for land tenure.

The equity conference, which is the subject of this publication's issue, provides the focus for the history presented here: an examination of the role of equity in the federal policies that have shaped land tenure and ecosystems on the Yurok forest. This article begins with a review of indigenous Yurok land tenure and management regimes. Subsequent sections analyze the five major periods in federal land distribution policy as they apply to Yurok land, examining the equity-based arguments used to justify these policies, as well as the equitability of outcomes, using land ownership and environmental impacts as indicators. A section on ecosystem change follows, with the article returning to the topic of equity in general before offering its conclusions.

## II. INDIGENOUS TENURE AND MANAGEMENT

Until California statehood, Yurok indigenous territory was well over 400,000 acres, including about 40 miles of the Pacific coast and 42 miles of the Klamath River watershed to the confluence of the Klamath and Trinity rivers.<sup>11</sup> Before contact with non-Indians, an estimated 2,600 people, living in 54 villages, called this land home.<sup>12</sup> The Yurok indigenous economy was based on access to a wide variety of resources dispersed geographically throughout the Klamath watershed, as well as temporally with the seasons and in response to management.

The traditional Yurok diet includes acorns, grass seed, clover, wild sunflower, and a variety of fruits, bulbs, and nuts, complemented with protein-rich game and fish. Homes were constructed of redwood planks, bows made of yew, and baskets woven of hazel, alder, willow, maidenhair fern, and beargrass. To acquire these and a host of other materials from the Klamath River watershed, the Yurok employed two main strategies: (1) a system of usufructuary rights to gathering, hunting, and fishing sites that assured access to resources at near and distant loca-

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11. T.T. Waterman, *Yurok Geography*, 16 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOGRAPHY 177, 183 (1920).

12. Axel Lindgren, *Introduction to THE FOUR AGES OF TSURAI: A DOCUMENTARY HISTORY OF THE VILLAGE ON TRINIDAD BAY* i (Robert F. Heizer & John E. Mills eds., Univ. of California Press 1991) (1952).

tions during the appropriate times of year; and (2) the active management of the watershed to enhance the diversity of plants and animals across time and space.<sup>13</sup>

Usufructuary rights were held by individuals, families, or villages, and might be divided temporally according to the date of use, height of the river, or goods harvested. For example, rights for a fishing site would be determined based in part on whether eels or salmon were being taken (Figure 1, below).<sup>14</sup> A single household might hold rights to sites that extended along 40 miles of river.<sup>15</sup> Lucy Thompson, a Yurok woman writing in 1916, captured the diversity of areas managed by rights of access, which included sites for “gathering grass seeds, such as Indian wheat . . . the oak timber for gathering acorns, the sugarpine for gathering pine nuts, the hazel flats for gathering hazelnuts and the fishing places for catching salmon.”<sup>16</sup> Such rights could be shared, traded, and inherited<sup>17</sup> and gave holders a stake in the protection of these areas. As Thompson writes, “[t]he oak timber they were very careful to preserve, as they gathered the acorns from it late in the fall, October and November. The oak tree furnished them with the staff of life. . . .”<sup>18</sup> Yurok gatherers still recognize such rights. The Tribe’s spiritual life is also linked to sites used for ceremonies, spiritual training, and gathering of ceremonial or medicinal materials. The major Yurok ceremonial dances, including the White Deerskin and Jump Dances, traditionally take place in specific locations<sup>19</sup> and require materials from particular spots.<sup>20</sup>

Fire was used on a landscape scale to preserve or increase the spatial and temporal extent of the grassland, oak woodland, and shrub com-

13. Huntsinger & McCaffrey, *supra* note 1. The Yurok people have a living culture and the use of past tense is not meant to imply otherwise. However, the indigenous landscape and broad application of indigenous management practices are currently a thing of the past, so the past tense is used when discussing them.

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14. Waterman, *supra* note 11, at 218–23. Figure 1 was adapted from Waterman, *supra* note 11, at 225.

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15. *Id.* at 225.

16. LUCY THOMPSON, *TO THE AMERICAN INDIAN: REMINISCENCES OF A YUROK WOMAN* 26 (Heydey Books 1991) (1916).

17. Walter R. Goldschmidt, *Ethics and the Structure of Society*, 53 *ANTHROPOLOGICAL RECORDS* 506 (1951); W.T. ROBERTS et al., *INDIAN LAND AND FOREST RESOURCES: AN ISSUE OF TRUST, A FOREST HISTORY OF THE HOOPA VALLEY INDIAN RESERVATION OF NORTHWESTERN CALIFORNIA* 64–65 (1983); Arnold R. Pilling, *Yurok*, in 8 *HANDBOOK OF NORTH AMERICAN INDIANS* 148 (R.F. Heizer ed., 1978).

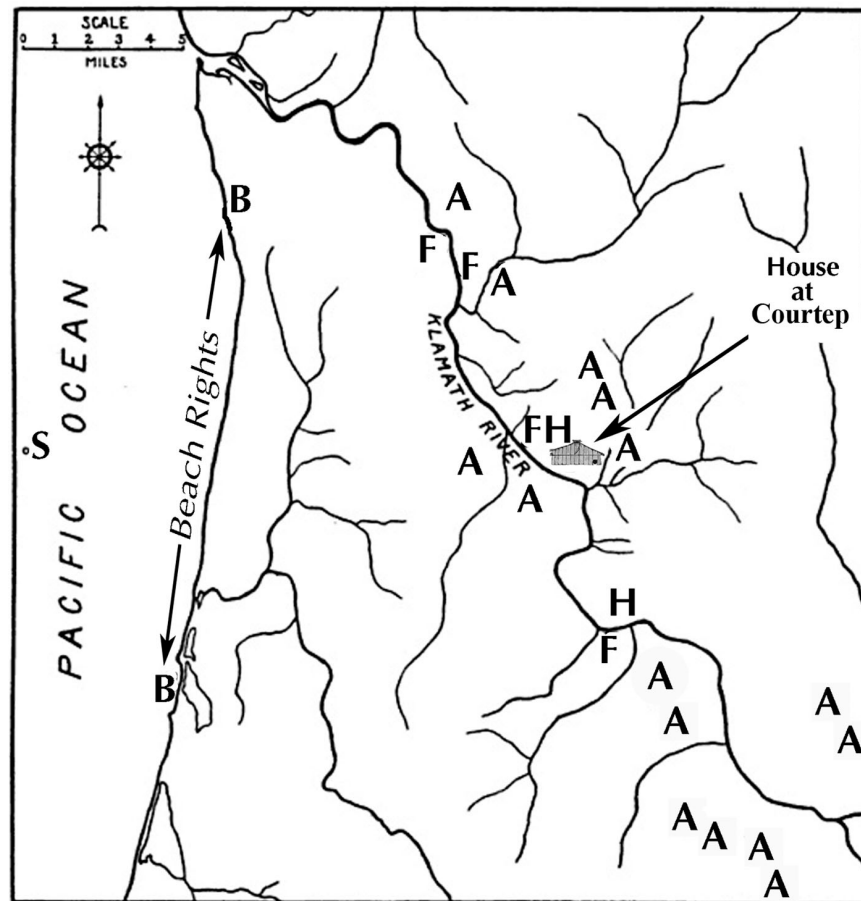
18. THOMPSON, *supra* note 16, at 32.

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19. *Id.* at 135–57.

20. KATHY HEFFNER, *CONTEMPORARY-HISTORIC YUROK ETHNOGRAPHIC DATA FOR THE PROPOSED SIMPSON TIMBER COMPANY LAND EXCHANGE WITH SIX RIVERS NATIONAL FOREST IN KLAMATH, CA* 22–24 (1986).

munities, which provided diverse and abundant food, as well as material resources. Fire was also used for tree management, clearing underbrush,



A – Acorn grounds                      F – Fishing place                      S – Sea lion hunting  
B – Boundary of beach rights      H – Snaring place

**Figure 1:** The areas claimed in usufruct, individually or as part of family, village, or regional groups, by one relatively wealthy Yurok family living at Courtep, as described to T.T. Waterman circa 1909. Such rights could be sold, traded, and inherited. Beach rights meant rights to fish and to collect portions of beached whales.

and hunting and trapping game,<sup>21</sup> stimulating the type of vegetation growth that was useful for carving and weaving, increasing the harvest of acorns, hazelnuts, and other fruits, and protecting villages and houses from larger fires by clearing surrounding areas. Traveling the reservation in 1912, a forest surveyor commented that the “entire reservation was over-run by fire.”<sup>22</sup> An exploration party passing through the area early in the twentieth century described small prairies as lifesaving oases providing game and plant foods that were absent in the other parts of the forest. Contemporaries observed that “[m]ost of these patches if left to themselves would doubtless soon have produced forests, but the Indians were accustomed to burn them annually so as to gather various seeds. . . . These prairies were of incalculable value to the Indians. . . .”<sup>23</sup>

The Yurok also used fire to limit the extent of Douglas fir forest. As described by Thompson: “The Douglas fir timber they say has always encroached on the open prairies and crowded out the other timber; therefore they have continuously burned it and have done all they could to keep it from covering all the open lands.”<sup>24</sup> Under indigenous management, shrub lands, oak woodlands, and prairies were encouraged,<sup>25</sup> while Douglas fir, a vigorous, seed-spreading tree that shades out oaks, grass, and shrubs, was suppressed. At the same time, in a north-south belt circumscribed by climatic conditions, tall redwoods, relatively impervious to fire, remained in mature groves along the river flats and in the canyons and are held sacred by the Yurok.

### III. RESERVATION PERIOD

Due to the relative isolation of the region, Yurok contact with non-Indians was minimal until after the 1849 gold rush. When miners and settlers arrived in the region in the 1850s, reservations were proposed for

21. Conversations between the author, Lynn Huntsinger, reservation residents, and members of the interim tribal council, summer 1993; *see generally*, Pliny Earl Goddard, *Life and Culture of the Hupa*, 1 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOGRAPHY 3 (1903); H.E. Driver, *Northwest California*, 1:6 ANTHROPOLOGICAL RECORDS 297 (1939).

22. ROBERTS et al., *supra* note 17, at 139.

23. L.L. Loud, *Ethnogeography and Archaeology of the Wiyot Territory*, 14 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN AMERICAN ARCHAEOLOGY AND ETHNOLOGY 230 (1918).

24. THOMPSON, *supra* note 16, at 33.

25. ROBERTS et al., *supra* note 17, at 79; *see also* Loud, *supra* note 23; TOM KETER, ENVIRONMENTAL HISTORY AND CULTURAL ECOLOGY OF THE NORTH FORK OF THE EEL RIVER BASIN, CALIFORNIA, USDA FOREST SERVICE PSW R5-EM-TP-005 35–36 (1995); UNITED STATES SOIL CONSERVATION SERVICE, RECONNAISSANCE SURVEY OF THE HOOPA VALLEY INDIAN RESERVATION (1938); Lois J. Reed and Neil Sugihara, *Northern Oak Woodland—Ecosystem in Jeopardy or Is It Already Too Late?* PROCEEDINGS OF THE SYMPOSIUM ON MULTIPLE-USE MANAGEMENT OF CALIFORNIA’S HARDWOOD RESOURCES 59 (1987).

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the Indians. A common view was that reservations would prevent violence and serve to protect both Indians and non-Indians from harm. Treaties did afford Indian tribes special status and rights consistent with their unique position in the American legal system as “domestic dependent nations.”<sup>26</sup>

The idea that a minority group should have special rights and status represents a rights-based formulation of equity within the distributive justice framework.<sup>27</sup> The recurring tension in federal Indian policy between separatism and assimilation is evident during the reservation period, as Indians were isolated from non-Indians but were also concentrated on smaller tracts of land to better meet the goal of directed culture change.<sup>28</sup> These policies are considered part of a paternalistic approach in federal policy,<sup>29</sup> the goal of which is to help the Indians “mature” into a full membership in society. The creation of reservations freed up what had previously been Indian land, serving the national interest in developing the West and placating land-hungry settlers.<sup>30</sup> These arguments belong to a utilitarian concept of equity, wherein the greatest good for the greatest number outweighs the tragic consequences for the few.

The underlying support for this conception of equity was represented by common nineteenth-century perspectives on what was good for the land and for American Indians. Utilitarianism is consistent with an ideology of economic efficiency. Many Euro-Americans believed that land and resources should belong to those who could maximize economic returns. Utilitarianism supports this claim, because a failure to realize a tract of land’s potential for generating wealth was also a failure to improve the general welfare, an unfair result for society as a whole.<sup>31</sup>

A related theory of cultural development posited a linear progression from savagery to civilization through stages that were closely tied to modes of subsistence. According to this view, the landscape and human society evolved together with “the shape of the landscape . . . a visible confirmation of the state of human society.”<sup>32</sup> This formula denigrated

26. *Cherokee Nation v. Georgia*, 30 U.S. 5 Pet. 1 at 17 (1831).

27. Bryner, *supra* note 4, at 42–43.

28. WILKINSON, *supra* note 8, at 13; DAVID RICH LEWIS, *NEITHER WOLF NOR DOG: AMERICAN INDIANS, ENVIRONMENT, & AGRARIAN CHANGE* 15 (1994); SPENCE, *supra* note 2, at 15.

29. FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984).

30. See, e.g., RICHARD WHITE, *A NEW HISTORY OF THE AMERICAN WEST: “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”* 89–92 (1991).

31. Bryner, *supra* note 4, at 40.

32. WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 5–6 (1983). Many early American leaders, including Thomas Jefferson, situated American Indians within what David Rich Lewis terms the “stage theory of progressive evolution.” In the later half of the nineteenth century, Lewis Henry Morgan is best

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Indian uses of the environment and used those of Euro-Americans as the standard against which all others were judged. By linking land use and culture in a hierarchical model—with Euro-Americans at the top and Indians at the bottom—non-Indians were able to justify dispossessing Indians. This rationale also provided an impetus for policies aimed at assimilating American Indians because its adherents believed that Indians must either progress through the stages towards assimilation or face extinction.<sup>33</sup> Throughout the history of federal Indian land policy, assimilation and utilitarianism have been linked; both eschew special considerations or protections for minority populations in favor of maximizing the welfare of the majority.

In 1851, Special Indian Agent Redick McKee of the federal Indian Office signed a series of treaties with tribes in northern California. He determined that the lower portion of the Klamath would make a good reservation, as the area had not been settled by whites to any large degree and still contained Yurok villages with an intact subsistence base. The treaty that McKee negotiated with representatives from a number of villages stated as its purpose:

To promote the settlement and improvement of said tribes or band, it is hereby stipulated and agreed, on the part of the United States, that the following tract or district of land shall be appropriated and set apart as an Indian reservation, and the use and possession thereof forever guaranteed to said tribes, [and] their successors. . . .<sup>34</sup>

California State Assembly members protested that this and similar treaties would unfairly hamper the new state's economic development and persuaded the U.S. Senate not to ratify them. State Assembly members claimed that Indian owners were not deserving of their valuable lands, arguing that treaties took "extensive tracts of the most desirable mineral and agricultural Lands in California" from "energetic and zealous miner[s]" for the use of "ignorant barbarians."<sup>35</sup>

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known for developing the theory of "unilinear cultural evolution" and applying it to American Indians. LEWIS, *supra* note 28, at 8–10.

33. LEWIS, *supra* note 28, at 9–12.

34. TREATY MADE AND CONCLUDED AT CAMP KLAMATH, AT THE JUNCTION OF KLAMATH AND TRINITY RIVERS, STATE OF CALIFORNIA, BETWEEN REDICK MCKEE, INDIAN AGENT, ON THE PART OF THE UNITED STATES, AND THE CHIEFS, CAPTAINS AND HEAD MEN OF THE POH-IK OR LOWER KLAMATH, ETC., TRIBES OF INDIANS, art. 4 Oct. 6, 1851.

35. *Report of the California Assembly Committee to Inquire into the Treaties Made by the United States Indian Commissioners with the Indians of California*, in TREATY MAKING AND TREATY REJECTION BY THE FEDERAL GOVERNMENT IN CALIFORNIA, 1850–1852, at 45–49 (George E. Anderson, W.H. Ellison, and Robert F. Heizer eds., 1978).

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Because congressional failure to ratify McKee's treaties left northwestern California without an Indian reservation, President Franklin Pierce formally established The Klamath River Reservation by executive order in 1855. The reservation, which had been selected from "tracts of land adapted as to soil, climate, water privileges, and timber to the comfortable and permanent accommodation of the Indians,"<sup>36</sup> extended upriver from the ocean for one mile on either side of the Klamath River until reaching the 25,000-acre limit established by an unfriendly Congress.

Two subsequent executive orders influenced the initial reservation. In 1864, the Hoopa<sup>37</sup> Valley Reservation (Hoopa Square) was also established by executive order as a multi-tribe reservation for the Indians in the Hoopa Valley and surrounding areas. Then in 1891, because of concerns about the welfare of the Native Americans living between the original Klamath River Reservation and the Hoopa Square, a third executive order extended the Hoopa Valley Reservation for one mile on each side of the Klamath River to the Pacific Ocean, incorporating a "Connecting Strip" between the Hoopa Square and the Klamath River Reservation. The reservation lands in Yurok ancestral territory, the Klamath River Reservation and the Hoopa Square, were managed as the Hoopa Valley Extension until they were divided into the Hoopa Valley and Yurok reservations in 1988.<sup>38</sup>

In 1885 the local Indian Agent stated:

No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man. The issue of their removal seems to disappear.<sup>39</sup>

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36. George W. Manypenny, Commissioner, U.S. Department of the Interior, Office of Indian Affairs, letter recommending the establishment of the Klamath Reserve (Nov. 10, 1855), in 1 INDIAN AFFAIRS: LAWS AND TREATIES 816 (Charles J. Kappler ed., 1904). The reservation was approved by President Pierce on November 16, 1855, on the basis of this report. The Office of Indian Affairs became the Bureau of Indian Affairs (BIA) in 1947.

37. By convention, "Hupa" is used to describe the people, and "Hoopa" the place name.

38. The reservation as divided by the Hoopa Yurok Settlement Act of 1988, Pub. L. No. 100-580, 102 Stat. 2924 (1988). This article focuses only on activities on what is now the Yurok Reservation and not on the Hoopa Valley Reservation.

39. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 266 (1885), cited in Mattz v. Arnett, 412 U.S. 481 (1973), available at <http://supreme.justia.com/us/412/481/case.html#F25> (last visited Aug. 26, 2010).

While the Yurok had some good fortune, in that the reservation contained part of their indigenous territory, they lost access to most of their ancestral gathering and hunting grounds with the establishment of the reservations. The Klamath River Reservation and Connecting Strip totaled roughly 56,000 acres in 1891, comprising less than 15 percent of Yurok indigenous territory.

#### IV. ALLOTMENT ERA

In 1892, Congress enacted legislation to allot the Klamath River Indian Reservation under the provisions of the General Allotment Act of 1887, also referred to as the Dawes Act.<sup>40</sup> The General Allotment Act sought to subdivide and “privatize” reservation land held in federal trust. The Act’s supporters argued that dividing reservation land into private parcels and eventually removing all federal trust protection would help assimilate Indians into white society.<sup>41</sup> The Act, as amended, authorized the allotment of reservation lands into 80-acre parcels for each Yurok with the goal of turning them into yeoman farmers, despite the unsuitability of most of the reservation to farming.<sup>42</sup> Under the Act, allotted land was to remain in trust for 25 years, during which time the land would be inalienable and its Indian owner would presumably become an established farmer. After 25 years, allottees would receive a fee patent to the allotment, making it private property independent of tribal or government supervision and be granted American citizenship. The expectation was that civilization would follow private property and the plow.

At least in part, support for the General Allotment Act was garnered in Congress based on utilitarian views of what was equitable. The most comparable system of land allocation for non-Indians, the 1862 Homestead Act, granted 160 acres from the public domain to settlers who could farm and build a house.<sup>43</sup> To some, giving Indians and non-Indians the same opportunity was fair, which is yet another example of a rationale for allotment hewed to contemporary ideas about progress, i.e., the belief that land and resources should be developed—and that failure to use resources would be a waste and neglect a duty to society. By the

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40. General Allotment Act of 1887, 24 Stat. 388 (1887); Amendment to the General Allotment Act, 26 Stat. 794 (1891).

41. PRUCHA, *supra* note 29.

42. Alan G. McQuillan, *American Indian Timber Management Policy: Its Evolution in the Context of U.S. Forest History*, in *TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT* 73–102 (Richmond L. Clow and Imre Sutton eds., 2001).

43. Homestead Act, 12 Stat. 392 (1862).

turn of the twentieth century, this utilitarian view of equity<sup>44</sup> had become pervasive in reservation natural-resource management as well as land allocation. The idea that Indian peoples should have access to and control over resources to live as they saw fit, as the earlier treaties implied, was pushed aside in favor of assimilation, utilitarian equity, and the judgment that the “highest and best use” was the same for all people and for all land.

Local history provides an example of how utilitarian arguments could be used by those interested in marketing or otherwise using Native American lands to inflame the citizenry by suggesting that Native Americans were being unfairly favored by government policy. Soon after the Yurok Reservation was established, local citizens began pressuring the government to release reservation lands for non-Indian use. A contemporary property developer writes:

In this Klamath Reservation, locked up by the Government, and rendered useless by the idiotic measures of the Indian Department, are thousands of acres of as fine timber land as the sun ever shone upon. An immense resource in minerals lies useless and idle because of the unjust and absurd policy of the Federal Government. A territory twenty miles long and two miles wide is kept sacred to the use of 82 Digger Indians. When the Reservation was first formed in 1855, it was a necessity arising from the danger to be apprehended from three or four thousand Indians who were running over the county, threatening the whites and making themselves generally obnoxious. This necessity has long since passed away. The Indians on the Reservation have decreased from over 2,000 to less than 100; and as most of their warriors and braves sleep in the embrace of death, there no longer remains any reason to fear them. The Indian Department, entirely ignorant of the true state of affairs, or else careless and indifferent to the matter, have turned a deaf ear to every appeal made to them on behalf of the whites . . .<sup>45</sup>

The author went on to compare the land reserved for the Indians to that of non-Indian settlers, who were only able to claim 160 acres under the Homestead Act: “There are about 25 able-bodied Indian males on the reservation. A moment’s calculation, taking into consideration that the reservation is twenty miles long and two miles wide, will prove that

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44. Bryner, *supra* note 4.

45. A.J. BLEDSOE, HISTORY OF DEL NORTE COUNTY: WITH A BUSINESS DIRECTORY AND TRAVELER’S GUIDE 148 (1881).

each of these Indians is allowed eight or ten times as much as a white man.”<sup>46</sup>

Finally, another argument put forth to support the allotment of the reservation was that the Yurok needed it to secure their land claims. The Lower Klamath was plagued by trespass for timber, mining, and grazing, so much so that a fort was established and white settlers were forcibly expelled on more than one occasion. Floods also ravaged the reservation in 1861 and 1862, leading some to believe that the reservation was extinguished; Congress threatened repeatedly to open the Lower Klamath to sale.<sup>47</sup> The Department of the Interior opposed the dissolution of the reservation but dropped its opposition when a stipulation was added that lands would be allotted before the remainder was sold. In an 1892 letter to the local Indian agent instructing how to conduct the allotments, the Commissioner of Indian Affairs stated that the agent was to inform the Indians that it “was with great difficulty that this office was able to obtain for them the privilege of taking allotments,” and “if they fail to avail themselves of the privilege at this time they may never have another opportunity to secure their land.”<sup>48</sup>

#### A. Allotting the Reservation

In 1892, Congress authorized the allotment of the Klamath River Reservation with the provision that surplus lands would be restored to the public domain for settlement and sale rather than held in tribal trust or purchased from the Tribe as called for in the General Allotment Act. The text of the authorizing legislation, which begins: “Be it enacted . . . [t]hat all of the lands embraced in what was the Klamath River Reservation . . . are hereby subject to settlement, entry, and purchase . . . ,” leaves little doubt that opening the land to settlement was the main purpose of the Act.<sup>49</sup> Preferring customary uses of the forest to farming, a Yurok family might attempt to strategically select allot-

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46. *Id.* at 149.

47. *Short v. United States*, 486 F.2d 561, 562, 202 Ct.Cl. 870 (1973). The Executive Order (extending the Hoopa Valley Reservation to include the Klamath River Reservation in 1864) originated in the administration’s desire to give reservation status to the Connecting Strip and the Klamath River Reservation, the latter then recently held by the courts to be an abandoned Indian reservation *Id.* at 884. From 1879 on, repeated efforts were made in Congress to open the lands of the Klamath River Reservation, as an abandoned reservation, to public entry and sale. *Id.* at 909.

48. Letter from R.V. Belt, Acting Commissioner of Indian Affairs, U.S. Department of the Interior, Washington, D.C. (Sept. 23, 1892). National Archives, Washington, D.C.

49. 27 Stat. 52 (1892) An Act to Provide for the Disposition and Sale of Lands Known as the Klamath River Indian Reservation, 27 Stat. 52 (1892).

ments to protect family gathering, fishing, and spiritual sites.<sup>50</sup> Meanwhile, lands classified as unsuitable for farming or housing—which was most of the reservation in this steep, timbered watershed—were sold to timber companies, as the Yurok did not have the capital or infrastructure to engage in what was considered a legitimate use: red-wood logging.

At the time of allotment, the Yurok of the Lower Klamath were economically self-sufficient.<sup>51</sup> The fact that a small plot of land could not support traditional subsistence practices was ignored in favor of the goal of creating yeoman farmers. As a result of the implementation of the Allotment Act, 161 trust allotments comprising approximately 9,800 acres were allotted on the Lower Klamath, an average of 61 acres per allottee. The remaining 15,321 acres were opened to sale.

Surveying difficulties delayed allotment of the Connecting Strip until 1899. No special instructions were given for this part of the Klamath River Reservation and unallotted lands were left in trust. The fact that the Douglas fir timber—now common on the Connecting Strip—was unmarketable at the time, no doubt played a part in this outcome. Much of the surrounding forest remained in the public domain until 1905, when it became part of the newly formed National Forests. Some 19,493 acres of the Connecting Strip were allotted to 485 Yurok, an average of 40 acres per person, leaving 3,677 acres in tribal trust (Figure 2, below).

Overall, an immediate result of allotment was the alienation of approximately 30 percent of reserved land. Furthermore, as allotment boundaries were difficult to locate or defend, early Bureau of Indian Affairs (BIA) records reveal a history of conflict. In 1925, a concerned local citizen wrote to the Indian Agency in Hoopa stating that a man was selling timber from a fee-patented allotment on the basis of a mining claim, and when the Indian allottee, Daisy Jacobs, complained, the miner beat her severely.<sup>52</sup> The miner was trying to evict Jacobs and her family from the garden they had on the allotment. According to the letter writer,

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50. Gary Morris, *A Land Divided: Yurok Land Allotment*, 6 NEWS FROM NATIVE CALIFORNIA (SPECIAL SUPPLEMENT) (1992).

51. *Short*, 486 F.2d 561, 562, 202 Ct.Cl. 870 (1973). The written opinion of Assistant Attorney General George H. Shields, assigned to the U.S. Department of the Interior, dated January 20, 1891, states: "Congress has made annual appropriations for support of the Indians on the Round Valley reservation, but none for those on the Klamath, and for the all sufficient reason that the latter are self-supporting and have never cost the government a dollar in this respect" *Id.* at 921.

52. Letter from Ivy M. High to C.W. Rastall, of Hoopa, CA, Hoopa Valley School (July 12, 1925), National Archives, Washington, D.C.



**Figure 2:** The Wautek area on the Connecting Strip, 1920, before most allotments were fee-patented. Yurok were often given small village plots and more distant larger “farming” plots, although few were suitable for cultivation. Each individual was entitled to an allotment, so families would try to claim lands they traditionally used under the usufruct system. Note the location of Courtep village. (Map copyright © 1922. Belcher Abstract and Title, Eureka, CA. Sheet 21, Atlas of Humboldt County, CA, Humboldt State University Special Collections, available at <http://library.humboldt.edu/humco/holdings/belcher.htm> (last visited Nov. 21, 2009)).

“they are in deep trouble and their lack of education and understanding of the laws make it hard for them to know what to do.” Rights of way also became a serious issue as the patchwork of ownerships in the watershed meant that access for fishing, mining, hunting, or timber harvest required crossing ownership boundaries between Indian and non-Indian lands.

### B. End of the Trust Period

Land loss from allotment continued when the stipulated trust period came to a close. In 1919, 25 years after allotment in 1893, 29 percent of the Klamath River Reservation trust parcels were fee-patented. More tellingly, 17 percent of the 1899 allotments on the Connecting Strip were also fee patented in 1919, five years before their trust period expired. Allotments could be removed from trust early because the General Allotment Act had been amended substantially by the 1906 Burke Act.<sup>53</sup>

The Burke Act was intended to benefit Indians who were capable of managing their land by allowing their trust allotments to be fee patented early. Additionally, in an effort to protect Indians who had not yet adapted to society, the Act stated that an Indian should not receive a fee patent unless determined to be “competent.” Such good intentions, arguably a minor retreat from the utilitarianism of the General Allotment Act, were subverted when the Burke Act was used to fee patent Indian allotments without the consent and sometimes without the knowledge of allottees. The period from 1913 to 1920 was a frenzy of such fee patenting nationwide. The two underlying arguments made for this acceleration reflect utilitarian notions of equity: (1) the need to ensure that land and resources be fully utilized; and (2) the need to solve the “Indian problem” by freeing Indians from wardship status and assimilating them into American society.<sup>54</sup>

Starting in 1915, Competency Commissions were established to determine whether or not allottees were competent to be granted fee patents immediately. The rationale was that some competent allottees were not applying for a fee patents and were thereby escaping the full respon-

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53. Burke Act of 1906, 34 Stat. 182 (1906), also known as the Forced Fee Patenting Act, was designed to correct certain defects in the General Allotment Act of 1887, clarifying that Indians were to be granted citizenship at the end of the trust period rather than the beginning. The Burke Act gave the Secretary of the Interior the power to issue a patent in fee simple to people classified “competent and capable.” These “competent” allottees would have their land taken out of trust status. In some cases the allottee was not informed that they were deemed competent, and did not know the land was being taxed. Eventually the land was sold without the owners consent to pay past taxes. This process was known as the “forced fee patent process.”

54. PRUCHA, *supra* note 29.



sibilities of citizenship—a situation that was considered “unfair” to society. In the fall of 1918, a Competency Commission visited the reservation and drew up a list of “competent” Yurok allottees. Those with a sufficient percentage of white blood or with an education could automatically be declared competent and issued a fee patent.<sup>55</sup> Other factors such as comportment, economic condition, illness, alcoholism, age, farming ability, and—according to the agency superintendent—the condition and configuration of allotment timber<sup>56</sup> might also be considered in determining competency.

While a great many allotments on the Klamath River were fee patented, the Burke Act allowed nearly 60 percent of Yurok allotments to remain in trust beyond the original 25-year period stipulated by the General Allotment Act. This decision acknowledged that some Indians still merited special treatment, despite the costs to the majority, an example of distributional justice that recognizes the need to moderate utilitarian equity by interventions to protect individual rights and the disadvantaged.<sup>57</sup>

Although policymakers began to back off fee patenting in the 1920s, as evidence grew of the resulting impoverishment of Indian peoples across the nation, allotments along the Klamath River continued to be taken out of trust. In 1925, when the trust period expired for most of the Connecting Strip allotments, the reservation superintendent was instructed to draw up another list of competent individuals. As a result, an additional 21 percent of allotments on the Connecting Strip and another 7 percent of those on the Klamath River Reservation were taken out of trust. In total, more than 10,000 acres of reservation land passed out of tribal ownership because of fee patenting.<sup>58</sup>

According to BIA land title records, at the time of fee patenting, property titles went to individuals—either the allottee, the heirs of the

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55. From 1917 to 1919, those of less than half Indian blood were automatically competent and issued a fee patent; from 1919 to 1923, those of one half or more white blood were automatically competent.

56. Letter from Jesse B. Mortsolf, superintendent, Hoopa Valley Agency, to the Commissioner of Indian Affairs, Washington, D.C. (Oct. 27, 1918). National Archives, Washington, D.C.

57. John Rawls argued that the concept of individual rights is so important in America that they cannot be outweighed by majority will. His theory of justice calls for interventions to remedy environmental or other injustices that place at a disadvantage those who are already less well-off than others. Priority must be given to the status of the least well-off, as long as this can be done without violating basic personal and civil liberties (Bryner, *supra* note 4, at 43).

58. Allotment Schedule, Hoopa Reservation, Land Records Department, BLM California State Office, Sacramento, CA (data analyzed by lead author, Lynn Huntsinger).

allottee, or other Indians or non-Indians.<sup>59</sup> Consistent with the nationwide pattern, most fee patented allotments were quickly sold. In line with the predominant utilitarian view of equity that pushed assimilation and productivity, BIA officials encouraged competent allottees to sell their land if it could not be farmed successfully or if the allottee was unable to farm due to illness or age. Agents actively tried to find buyers for allotments and allegations of land fraud appear in contemporary BIA correspondence. Once fee patented, an allotment became subject to local and state property taxes. This forced the sale of many allotments because of the difficulty of earning a living from reservation land due to the fact that farming was not a viable business venture, fisheries were declining, and income from timber harvest was sporadic or unavailable for most allottees. Many Indian allottees simply had little familiarity with a cash-based economy or the means to get cash.

In addition to the outright dispossession of Yurok lands, in the beginning of the twentieth century, public agencies began an aggressive campaign to suppress rural and indigenous burning.<sup>60</sup> A Yurok could be put in jail for burning to hunt, clear, or stimulate the growth of good basket materials. Those who attempted to farm found keeping the land open increasingly difficult due to the Douglas fir—given the nickname by some of “white man’s fir”—which began to invade formerly open lands.<sup>61</sup> In addition, game populations that depended on open areas declined.<sup>62</sup> During this period, utilitarian notions of equity were inscribed on the land, as the ideas, goals, and management practices of Indians were subsumed by those of the larger society, whose norms of what a forest should look like and be used for came to dominate forest management decisions. The BIA drew heavily on advice from the U.S. Forest Service. In fact, from 1908 to 1909, forested reservations were put under the management of the U.S. Forest Service, whose founder, Gifford Pinchot, is famous for stating that “conservation means the greatest good to the greatest number for the longest time” and that the “outgrowth of conservation, the inevitable result, is national efficiency.”<sup>63</sup>

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59. *Id.*

60. See generally STEPHEN J. PYNE, *FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE* (1982) (describing the history of fire and public agencies).

61. Huntsinger and McCaffrey, *supra* note 1.

62. *Id.* at 175.

63. GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 48, 50 (1910).

## V. INDIAN NEW DEAL

Allotment attrition ended in 1934 with the enactment of the Indian Reorganization Act (IRA).<sup>64</sup> The IRA, the major legislative accomplishment of the Indian New Deal, extended the trust period indefinitely for remaining allotments and reserved lands.<sup>65</sup> Indian Commissioner John Collier's program to reform federal Indian policy acknowledged the disastrous consequences of allotment. Collier believed the idea that "all Americans should conform to a single, uniform cultural standard" was flawed,<sup>66</sup> and he "fought to realize a dream in which Indian tribal societies were rebuilt, Indian lands rehabilitated and enlarged, Indian governments reconstituted or created anew, and Indian culture not only preserved but actively promoted."<sup>67</sup> Collier's ideas reflected a conception of equity based on individual rights and the belief that some groups needed to be treated differently<sup>68</sup>—that the government should not affirm or mandate just one way of life for all its citizens.

During the Indian New Deal, Indian employees were actively recruited to work at the BIA. Jobs were created on reservations through Indian New Deal programs to conserve forests and soil on Indian lands, and tribes were encouraged to formally organize for self-government.<sup>69</sup> The achievements of the Indian New Deal did not fully live up to the rhetoric of its proponents, in terms of equity; however, this period of federal Indian policy advocated for the basic rights of Indian peoples, such as the right to exist and the right to self-government. This policy period stood in sharp contrast to the previous period, when these rights were subordinated to the needs and interests of the non-Indian majority. Furthermore, the BIA attempted to protect the land and natural resources needed to realize those rights.

Though the Indian New Deal recognized that Indians should be treated differently, this idea did not extend to Indian forests. Heavily influenced by the scientific forestry championed by the Forest Service, forest managers sought to turn the heterogeneous forests, produced by Yurok management, into more homogenous, scientifically managed forests for the production of timber.<sup>70</sup> It was assumed that creating jobs and

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64. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. 461 et seq.)

65. LAWRENCE C. KELLY, *The Indian Reorganization Act: The Dream and the Reality*, 44 PACIFIC HISTORICAL REVIEW 291, 293 (1975); CANBY JR., *supra* note 3, at 24.

66. KELLY, *supra* note 65 at 291.

67. *Id.* at 294.

68. Bryner, *supra* note 4, at 43.

69. KELLY, *supra* note 65, at 299.

70. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. 461 et seq.).

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income from timber would benefit the tribes, while also meeting national demand for wood products. This model of conservation did not allow for different ideas of what a forest should be like or how it should be used, nor did it consider who should be involved in decision-making. Instead, the landscape complexity—created and maintained by diverse Yurok practices—was to be addressed technologically, with modern sustained-yield forest management conducted by experts. Focusing forest management on a single resource reduced the spatial and temporal complexity of the Yurok forest, limiting or altogether eliminating Yurok access to and control over economic, cultural, and spiritual resources.

## VI. TERMINATION AND RELOCATION ERA

The final period of widespread land loss and fragmentation from 1953 to 1968 was driven by post-war social attitudes and a high demand for timber. The post-war period was characterized by a renewed emphasis on a single national culture and economic efficiency, as well as a suspicion of communistic social or economic arrangements, such as those of reservations. In 1953, House Concurrent Resolution 108 called for the withdrawal of federal supervision over Indians,<sup>71</sup> initiating the termination and relocation era. The purpose of the policy was “as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards.”<sup>72</sup> The pendulum of Indian policy swung back hard toward assimilation, bolstered by a utilitarian vision of equity. This policy staked its claim to equity on the idea that improving the self-sufficiency of American Indians would lead to a situation where all citizens were treated equally. However, it also rested on the normative assumption that Indian tribes should not exist and that the promises made by the federal government to Indian tribes need not be honored.

Once again, utilitarian notions of equity also served the purposes of profiteers. The development of plywood for World War II airplanes and advances in technology made Connecting Strip Douglas fir timber valuable. A collusion of scientific forestry and bureaucracy created a perfect storm of land loss on the Klamath. When allottees wanted to sell their timber, complex legal requirements meant that it could take several years because the BIA had to handle the sale as trustee.<sup>73</sup> In addition, BIA

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71. ALAN S. NEWELL ET AL., *A FOREST IN TRUST: THREE QUARTERS OF A CENTURY OF INDIAN FORESTRY, 1910–1986* (1986).

72. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

73. The BIA trust responsibility included holding an open sale to the highest bid, the notification and consent of a majority of trust title-holders, and division of proceeds in

foresters sought to manage the timber for sustained yield, as called for by the IRA—harvesting and improving entire properties and blocks of properties—which could delay sales from individual allotments for years. The BIA was required to seek the best price for the timber by allowing all parties to competitively bid, which was seen as the fairest way to conduct timber harvests.<sup>74</sup> Yet, the Yurok often wanted to sell only some of their timber, have relatives and friends do the harvesting, or harvest some timber themselves.<sup>75</sup> Sometimes the need for cash was urgent. Fee patenting and selling the land was one way to speed up the harvest, and this option was promoted by Indian agents.<sup>76</sup>

Given the political climate, the BIA apparently did little to discourage allottees along the Klamath River from selling their lands. Yurok informants stated that the BIA colluded with timber interests, often by taking advantage of illiteracy. Indeed allottees signed many land sales with an “X.” One Yurok allottee, writing to the BIA in 1955, stated that she knew the BIA would not approve any timber sales without the sale of the land with it.<sup>77</sup> It is possible that Indian agents believed they were acting in the best interest of their charges by offering Indian allottees the chance to get the cash to start a new life off of the reservation. In the end, the Yurok were left with less than 5,000 acres of scattered parcels (Figure 3, below).

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accordance with interest in the property. Payments were made directly to the agency superintendent, who distributed them in accordance with regulations. This required that the allottee sign over a power of attorney to the agency representative. An administrative fee was deducted. General Forest Regulations, U.S. Department of the Interior, Office of Indian Affairs, Washington, D.C. (Apr. 23, 1936); Letter from T.M. Holt, Area Forester, to Luana Brantner (Apr. 8, 1955) (copy on file with lead author, Lynn Huntsinger).

74. The Act of June 25, 1910, provided for the maintenance and management of tribal forests, placing the responsibility for over-seeing trust property timber harvest and forest management squarely on the BIA. Regulations resulting from the bill and subsequent modifications in 1918 and 1920 established standardized rules and procedures for the use and sale of timber, including marking and scaling and administration of agency sawmills. The regulations detailed the advertising, awarding, and approval of timber sales contracts by the BIA and protection from fire and trespass. Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. 406, 407. *See also* General Forest Regulations, U.S. Department of the Interior, Office of Indian Affairs, Washington, D.C. (Apr. 23, 1936).

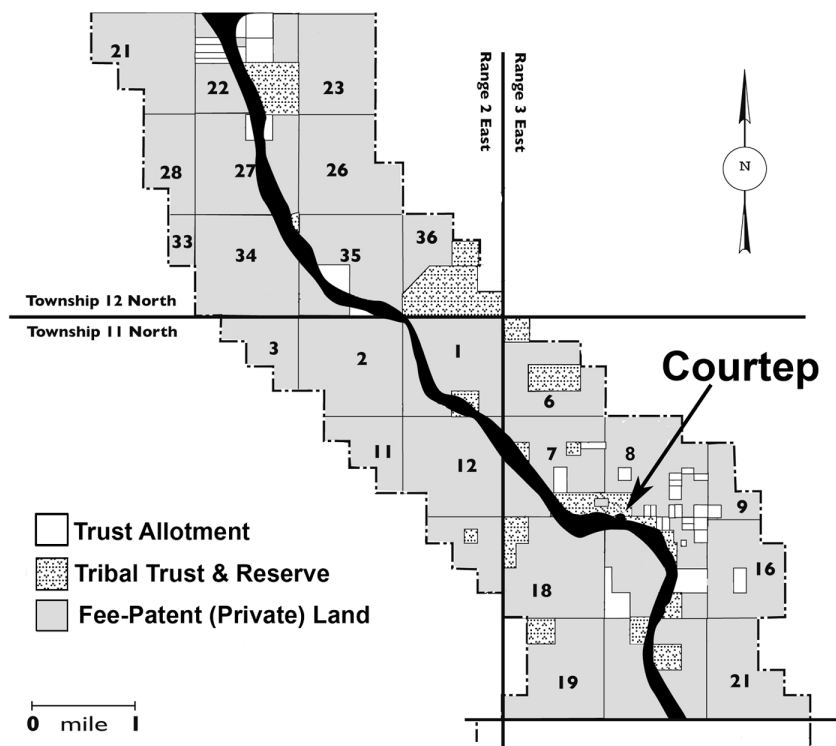
75. Letter from L. Brantner to Leonard M. Hill, Director, Department of Indian Affairs, Sacramento, CA (Feb. 1, 1955). BIA files, BIA Forestry Office, Klamath, CA (copy on file with lead author, Lynn Huntsinger).

76. NEWELL ET AL., *supra* note 71. Letter from Acting Deputy Fred H. Massey to L. Brantner (Jan. 3, 1958) (copy on file with lead author, Lynn Huntsinger).

77. Letters from L. Brantner to Leonard M. Hill, area director, Department of Indian Affairs, Sacramento, CA (Feb. 1 and Mar. 23, 1955). BIA files, BIA Forestry Office, Klamath, CA (copy on file with lead author, Lynn Huntsinger).

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**Figure 3:** Courtep in 1994. The remnants of small village allotments and larger farm allotments can be seen. The large tribal trust areas are former villages or areas where surveyor error kept the land from being allocated or sold.



During this period, 59 percent of the Connecting Strip's timber allotments were fee patented.<sup>78</sup> At least 60 percent of the lands taken out of trust in this period were fee patented to logging interests, with 40 percent going to large corporations and another 20 percent to local loggers. Altogether, the period saw more than 40 percent of the remaining Yurok land taken out of trust. BIA records also reveal widespread timber theft from Indian allotments during this period, sometimes attributed to "surveyor error" because of the difficulty of locating and measuring small allotments in the rough topography of the area, or justified as necessary for "rights of way" to other properties.

78. Allotment Schedule, Hoopa Reservation, Land Records Department, BLM California State Office, Sacramento, CA (data analyzed by lead author, Lynn Huntsinger).

## VII. SELF-DETERMINATION ERA

In the late 1960s, the termination policy was shelved, and the Yurok land base was stabilized. A nationwide shift towards the recognition of minority cultures and Indian rights reduced pressure on Indians to assimilate and produced efforts to protect and empower the disadvantaged. The civil rights movement helped shift Native American expectations as well as the views that the larger society held of Native Americans. In this political environment, policy-makers advocated for allowing American Indians the autonomy and authority to manage their own affairs.

Around the same time, the environmental movement gained traction, a change reflected in national legislation such as the Clean Water Act and the National Environmental Policy Act (NEPA). As a new set of environmental values emerged on the national stage, it became less clear what the “highest and best” use of land should be. Numerous federal statutes and their implementing regulations (e.g., NEPA, Endangered Species Act, Native American Graves Protection and Repatriation Act, National Historic Preservation Act, and American Indian Religious Freedom Act) laid the basis for recognizing tribal sovereignty through a consultation process.

On the Yurok Reservation, more flexible BIA harvest regulations and eventually tribal control of forestry made it easier for allottees to cut timber in accordance with their needs. In 1975, the Indian Self-Determination and Education Act<sup>79</sup> enabled tribes to assume responsibility for services previously provided by the BIA and other government agencies. This Act, along with subsequent amendments in 1988,<sup>80</sup> gave tribes the opportunity to manage their own natural resources.

## VIII. ECOSYSTEM CHANGE

On the Yurok Reservation, social injustice and environmental degradation mutually reinforced each other. There are two forms of seemingly irreversible environmental degradation that have resulted from the implementation of policies for the reservation. The first is change in the forest ecosystem, resulting from the implementation of timber-oriented, scientific management,<sup>81</sup> and fire suppression. These changes to the for-

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79. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a (1975).

80. Indian Self-Determination Act Amendments of 1988, Pub. L. No. 100-472 (1988).

81. NANCY LANGSTON, *FOREST DREAMS, FOREST NIGHTMARES: THE PARADOX OF OLD GROWTH IN THE INLAND WEST* (1995) (describing the impact of such management on the Blue Mountains of Oregon in detail, including the thickening of timber and other environmental impacts).

est made Yurok life more difficult and helped spur the loss of Yurok land. The second is land fragmentation, a form of degradation in and of itself and one that will continue to challenge Yurok natural resource management and cultural practice in the foreseeable future.

### A. Timber Management

In the twentieth century, Yurok land management practices were supplanted with “science-based” professional forestry.<sup>82</sup> The BIA followed the lead of the U.S. Forest Service in implementing programs based on European forestry practices. A central norm of professional forestry is that timber production is the best use of a forest,<sup>83</sup> and, as a corollary, the best way to benefit the Yurok was to develop a timber-based economy. Environmental shifts, resulting from fire suppression and maximizing conifer tree growth, helped push Yurok families to sell their lands. Yet the emphasis of BIA forestry throughout the twentieth century continued to be on managing forests for timber production.

With the removal of fire as a management tool, the land was reclaimed by trees. Long-term vegetation studies along the North Coast have shown an increase in Douglas fir that can be attributed to changes in fire frequency.<sup>84</sup> On land surveyed in a neighboring watershed, there has been a seven-fold increase in Douglas fir forest in the last 120 years, with a corresponding reduction in oak woodlands.<sup>85</sup> Landscape-level changes resulting from fire suppression have also had a significant effect on wildlife populations.

### B. Fragmentation

The Yurok have been left with a highly fragmented landscape, one in which a few parcels of trust land are scattered throughout a matrix of privately held land. Such fragmentation translates into physical disruptions like fences, roads, clearings, houses, and pipelines that interrupt horizontal structure and fragment contiguous areas into smaller patches.<sup>86</sup> Fragmentation of plant communities may enhance susceptibility to windthrow, pest epidemics, and invasion by non-native species.<sup>87</sup>

82. McQuillan, *supra* note 42.

83. Louise Fortmann and Sally Fairfax, *American Forestry Professionalism in the Third World: Some Preliminary Observations*, *ECONOMIC AND POLITICAL WEEKLY*, Aug. 12 1989.

84. KETER, *supra* note 25; Reed and Sugihara, *supra* note 25.

85. KETER, *supra* note 25.

86. N. Thompson Hobbs et al., *Fragmentation of Rangelands: Implications for Humans, Animals, and Landscapes*, 18 *GLOBAL ENVIRONMENTAL CHANGE* 776 (2008).

87. Jerry F. Franklin & Richard T.T. Forman, *Creating Landscape Patterns by Forest Cutting: Ecological Consequences and Principles*, 1 *LANDSCAPE ECOLOGY* 5 (1987).

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In addition, management objectives and practices vary across property lines, and the cumulative impacts of multiple and diverse landowner decisions are difficult to assess, predict, or influence. Ideally, watersheds are managed as a whole so that local actions can be planned and integrated up to the ecosystem level. In this way, fire and water, which cross property lines with impunity, can be managed at appropriate scales and the cumulative impacts of smaller-scale management activities on the watershed can be assessed and managed.

Fragmentation of ownership fed confusion over boundaries, which played into demands to open up the reservation. Ongoing debates from 1892 to 1988 about the very existence of the Klamath River Reservation have generally been resolved in favor of timber and land interests. As late as 1962, the BIA acting area director argued that since the Klamath River Reservation no longer existed, efforts to create an authoritative tribal body for management of the area were unjustified.<sup>88</sup> Historically, situations where ownership and claims have been unclear or overlapping have created archetypical conditions for poor land use and management.

Ownership and management fragmentation have also affected tribal efforts to revitalize cultural and spiritual practices. The Yurok have reestablished sacred dances. The White Deerskin Dance, prohibited in the 1960s but restored in the 1990s, is believed to keep the world in harmony through a complex series of dances performed over several days. Specific locations in the watershed are needed for the ceremonial dances—the group travels and camps as the ceremonies are performed. In order to perform the dance properly, permission from a number of private and public owners is required.

## IX. EQUITY

The history of the Yurok Indians supports the theory that policy for Native Americans, and perhaps for natural resources in general, should consider a vision of equity that makes room for different distributions of resources and management authority to different groups, according to their merit, conditions, and/or needs.<sup>89</sup> Natural resource decision-making today is heavily weighted by its utilitarian roots,

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88. Letter from M.G. Ripke, acting area director, to the commissioner, Bureau of Indian Affairs, Washington, D.C., (Oct. 5, 1962). Real Property Management, Hoopa. BIA Land Title Records Office, Sacramento, CA.

89. Bryner, *supra* note 4.

shaped by the Pinchovian vision of serving “the greatest good of the greatest number.”<sup>90</sup>

As seen through the history of the Yurok forest, land distribution and management policies have ignored the ecological knowledge of indigenous people, destroyed indigenous ecosystems, and failed to help native peoples keep the access they need to culturally and economically important natural resources. Instead, such policies have served the greater good of the ethnic, cultural, and financial majority as well as led to spectacular failures in forest management.<sup>91</sup> Ideas about what is fair have been used to rationalize policies that have benefited timber and mining interests and land speculators. Utilitarian notions of equity have been used to support assimilation policy, paternalism, and one-size-fits-all forest management.

The tendency of Native Americans to decline to take part in the more general “public participation” processes that are so in vogue for public land management today is much lamented. According to a utilitarian logic, tribes should participate along with everyone else in NEPA<sup>92</sup> and other participatory processes for land management, thus gaining an equal voice in decisions over land management. However, the reluctance of some native people to participate in these fora reflects the grossly inequitable outcomes that tribes have experienced historically, as a result of the application of utilitarian concepts of equity to the distribution and management of natural resources and land.

President Clinton’s Executive Order 13,175<sup>93</sup> diverged from a simple utilitarian formulation by requiring federal agencies, including the Forest Service and other land management agencies, to consult with tribes directly when developing any regulation, policy, or plans that may affect them. The Order states that “[a]gencies shall be guided by the principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”<sup>94</sup> Tribal consultation grants no special power or au-

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90. Letter from James Wilson, secretary, Department of Agriculture, to Gifford Pinchot, chief forester, Bureau of Forestry (Feb. 1, 1905), *available at* [http://www.foresthistory.org/ASPNET/policy/Agency\\_Organization/Wilson\\_letter.pdf](http://www.foresthistory.org/ASPNET/policy/Agency_Organization/Wilson_letter.pdf).

91. LANGSTON, *supra* note 81.

92. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1969). The Act requires federal agencies to follow specified procedures for allowing public review and comment on management plans.

93. Consultation and Coordination with Indian Tribal Government, Executive Order 13,175 (Nov. 6, 2000).

94. *Id.*

thority to tribes and does not guarantee substantive participation.<sup>95</sup> However, Native American informants have stated that, though this can be frustrating, it is better than no consultation. If the aspiration is to produce more equitable outcomes, tribal rights and tribal history need to be fully considered in natural resources policy and decision-making.

An “ecological sustainability” equity framework attempts to link environmental sustainability and social equity, adding another dimension to the understanding of what it means to be equitable in the context of natural resources decision-making.<sup>96</sup> The argument that social justice and ecological sustainability are related is amply illustrated by the Yurok history: “The ecological crisis is in large part a matter of treating nature’s diversity as dispensable, a process that has gone hand in hand with the view that a large portion of the human species is dispensable as well.”<sup>97</sup>

## X. CONCLUSION

Drawing on ecological sustainability as a measure of equity means that “[t]he distribution of wealth and material resources is a concern . . . both in terms of intergenerational equity, including the wealth and wealth-generating opportunities preserved for future generations, and in terms of the distribution within the current generation.”<sup>98</sup> In the Klamath watershed, all future natural resource management will be hindered and complicated by the fragmented ownerships. Similarly, all possible future states and productivity of the forest have been shaped by the conditions created by the imposition of externally mandated forest-management objectives and practices.

An ethic of ecological sustainability seems often to be presented as a unifying mandate and a universal good. In other words, the idea of ecological sustainability does not resolve multiple interpretations of which natural resources are most valuable or what types of relationships between people and their environment are most desirable. Without a mechanism for acknowledging and accommodating different social and cultural values, sustainability, like other natural resource management paradigms, could be used to justify the imposition of policies on the Yurok, or other historically marginalized groups, that are antithetical to their needs and interests.

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95. Mary Ann King, *Co-Management or Contracting?: Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007).

96. Bryner, *supra* note 4.

97. Rajni Kothari, *Environment, Technology, and Ethics*, in REFLECTING ON NATURE: READINGS IN ENVIRONMENTAL PHILOSOPHY 237 (Lori Gruen & Dale Jamieson eds., 1994).

98. Bryner, *supra* note 4, at 52.

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Since the mid-1990s, the Yurok Tribe has run its own forestry program, although the timber harvest plans they prepare must be done in accordance with federal rules and approved by the BIA and other agencies. Today, the Yurok Tribe uses Douglas fir harvest as an income source, but some land is dedicated to production of basketry materials, and redwoods are left uncut. Yurok forestry now includes burning for beargrass production, clearing brush around the homes of elders, reducing fuels, creating fuel breaks, making posts and poles for traditional structures, watershed restoration, and selling timber. Spiritual leaders play a significant, if somewhat informal, role in forest management in terms of the BIA-mandated institutional structure.<sup>99</sup>

Restoration and recovery are key concepts on the Yurok forest today. The Yurok Constitution includes the following goals as part of exercising “the inherent sovereignty of the Yurok Tribe[.]” (1) “reclaim the tribal land base within the Yurok Reservation and enlarge the Reservation boundaries to the maximum extent possible within the ancestral lands of our tribe and/or within any compensatory land area;” and (2) “restore, enhance, and manage the tribal fishery, tribal water rights, tribal forests, and all other natural resources.”<sup>100</sup> One of the leaders of the tribal forestry effort commented to the authors that the history made him very sad, and to cope with it, he had to focus on the future.

With the land and forest ecosystems it currently owns, the Yurok Tribe has made great strides toward restoring important cultural and ecological processes that were disrupted by the last 150 years of federal Indian policy; however, significant challenges remain. Considering Yurok history, it is clear that notions of what is equitable vary and have changed over time. Therefore, a single prescription for achieving more equitable processes and outcomes is not realistic. Instead, policy and management decisions should be guided by a sustainability-based concept of equity that links environmental sustainability with social justice, and a rights-based formulation of equity, both of which will provide legal authority for the Yurok to manage their forests and have a substantive role in the management of their ancestral lands. Tribal rights, when acknowledged, have been a powerful tool for giving tribes a seat at the decision-making table and negotiating for more favorable policy outcomes. Strong legal rights also provide some bulwark against shifting

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99. Personal communication from R. Raymond. In order to successfully take charge of their natural resources tribes must develop an “official” forestry department that to some extent resembles those of federal agencies. However, they have often augmented and adapted these institutional structures to accommodate more traditional decision making and communication modes.

100. Yurok Tribe Natural Resources, *From the Yurok Tribe Constitution*, <http://yuroktribenaturalresources.com> (last visited Sept. 1, 2010).

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political and economic winds. In the future, crafting equitable policies and institutions will require knowledge of Yurok history and the ecological legacy of federal policies, attention to sustainability, and a prominent place for Yurok concerns, values, and voices, which should be backed by legal authority and a constant goal of procedural and distributive justice.

