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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Klamath Tribes of Oregon, Miller Anderson, Joseph Hobbs,
Catherine Weiser-Gonzalez
Robert Anderson, Joseph Kirk, Orin Kirk,)
Leonard Norris Jr., Philip Tupper, Robert)
Bojorcas, and Klamath Claims Committee)

Plaintiffs-Appellants)

vs.)

PacificCorp, a corporation)

Defendant-Appellee)

Case No. 05-36010

OPENING BRIEF OF THE KLAMATH INDIANS

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I. Jurisdiction Statement

Jurisdiction before the district court relies upon 28 USC 1331 and 1362.

Jurisdiction before this Court rests upon 28 USC 1291 from a final order of the district court dated September 20, 2005 dismissing all claims of the plaintiffs. A notice of appeal was filed in a timely fashion on October 11, 2005 by all plaintiffs, in accordance with FRAP 4(a)(4)(A).

2. Statement of the Issues; Reviewability and Standard of Review

Does the Treaty of Oct 14, 1864,16 Stat 707 establish an implied cause of action for damages against an intentional blockage of anadromous fish in the only River leading to the Klamath Reservation , under circumstances where the Klamath

Indians were restricted to exclusive on Reservation fishing? Raised in first amended complaint. Dismissed by the district court when it granted summary judgment to PacifiCorp on July 14, 2005, Excerpts of Record, pp 2-15, and the applicable standard of review is de novo review. Pacific Coast Federation v. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005)

If the Klamath Indians do have an implied cause of action for damages, are they free to pursue their damage claim under federal common law , free of state statutes of limitations. Raised in answer to first amended complaint. In its granting of summary judgment on July 14, 2005, the district court held that the statute of limitations issue was moot. Excerpt of Record, pp 2-15. The applicable standard of review is de novo review. Pacific Coast Federation v. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005).

3. Statement of the Case

On May 11, 2004, the Klamath Tribe, the Klamath Tribe Claims Committee and individual Tribal members filed an action in the United States District Court for District of Oregon seeking historic trespass damage claims against PacifiCorp, whose predecessor built a number of dams in the bed of the Klamath River, resulting in a destruction of the Klamath Reservation Treaty anadromous fishing

rights located upstream of the dams. After moving the case from Portland to Medford, on September 3, 2005 an amended complaint was filed and on October 5, 2005 a timely answer to the amended complaint was filed by PacifiCorp. The parties thereafter established a schedule for pre-trial matters and commenced discovery.

On February 10, 2005 , PacifiCorp filed a Motion for Summary Judgment, contending the complaint was barred by applicable State of Oregon statutes of limitations. After a hearing before Magistrate John Cooney , Medford, Oregon, the magistrate issued on April 14, 2005 Findings and Recommendations against the Klamath Indians on the statute of limitations issue to District Judge Ann Aiken of Eugene, Oregon. Excerpts of Record, pp 16-29. On May 2, 2005, the Klamath Indians filed objections to the Findings and Recommendations. On May 7, 2005, the Klamath Indians filed a Motion for Partial Summary judgment raising separate issues of the applicability of state statute of limitations—not embraced in the issues presented to the Magistrate----- and this Motion was held in abeyance by the Magistrate on May 12, 2005.

On July 14, 2005, District Judge Ann Aiken entered an order declining to adopt the Findings and Recommendations of the Magistrate relating to the applicability of State of Oregon statutes of limitations, but dismissed the case on summary

judgment, sua sponte, for a failure to state a cause of action under this Court's then recent decision in Skokomish Tribe v. United States, 410 F.3d 506(2005)(en banc) Excerpts of Record. pp 2-15. On July 22, 2005, the Klamath Indians filed a Rule 59(e) Motion, seeking to set aside the July 14, 2005 judgment on the basis that the parties had not briefed nor argued the applicability of Skokomish Tribe (but rather briefed and argued statute of limitations issues only) and that the Klamath Treaty was distinguishable from the off Reservation "in common with" treaty at issue in Skokomish Tribe. PacifiCorp responded. On September 20, 2005, Judge Aiken denied the Rule 59(e) motion. Excerpts of Record, pp 16-18. On October, 11, 2005, the Klamath plaintiffs filed a notice of appeal. Excerpts of Record , p1

4. Statement of the Facts

In October of 1864, the United States and the Klamath Indians entered into a treaty, subsequently ratified , which placed the Klamath Indians on a large Reservation at the headwaters of the Klamath River. In order to reduce federal expenses associated with maintaining the Indians in their reduced homeland(it was reported by the United States at the time that the Indians ceded over 20,000 square miles of lands and waterways embracing one seventh of Oregon and including California lands), the Klamaths were given exclusive rights to possess their Reservation. Moreover the United States explicitly "secured" the Indians the right

to “exclusive “ fishing on the Reservation, including fishing for salmon.

The United States plan with the Klamaths was not only motivated by a desire to save money by assuring the Indians ample means of sustaining themselves. In addition, the United States wanted to completely sever contacts between the Indians and the fast growing White population of northern California and southern Oregon, to avoid Indian raids and Anglo liquor, and to incorporate civil institutions for the benefit of both the Indians and non Indians. This plan was fundamentally different from the multiple Steven Treaties in the Pacific Northwest, one of which was at issue in Skokomsh Tribe where the Indians were granted small Reservations and permitted to roam and fish in their historic range “in common with “ the White settlers.

Beginning in the period 1913-1917, Copco, the predecessor of PacifiCorp constructed a large dam(Copco No. 1) in the bed of the Klamath River just south of the Oregon border and then fifty miles further north pulled out portions of the natural reef in the Upper Klamath Lake and built a second shorter dam, the Link Dam. This dam was designed, in cooperation with the United States, to extract additional water supplies from the large Upper Klamath Lake, both for the benefit of downstream hydro power and fast developing irrigation.

The destructive and predictable effect of these actions on the passage of

anadromous fish and the Treaty rights of the Klamath Indians is confirmed by then contemporary commitments by Copco in the case of Copco No. 1 to assure the continued passage of salmon for the benefit of the Klamath Indians. It was further confirmed by a written agreement between Copco and the United States holding Copco responsible for any damage caused by the construction and operation of the second dam, Link Dam. The combination of these two dams and several others built by Copco and subsequent large scale irrigation depletions which have taken place over many years has significantly impaired what the National Academy of Science in a detailed report in October, 2004 declared to once be an unique ecosystem.

The combined effect of these actions had devastating effects on the Klamath Tribe and its members. These effects led in part to Congress' 1961 termination of the federal relationship with the Tribe. A change in federal policy initiated by President Richard Nixon resulted years later in the full restoration of the Klamath Tribe in 1986. During the past three decades this court has addressed at least three Treaty fishing cases involving the Klamath Indians and in every case took steps to assure that their Treaty fishing rights were fully protected from interference from third parties. This case completes that cycle, by seeking damages from PacifiCorp, as successor to Copco, for intentionally and deliberately depriving the Klamath

Indians of their treaty guaranteed right to fish anadromous fish.

5. Summary of Argument

The key to determining whether an implied cause of action exists in a federal statute(or treaty) which is silent on the subject is to make an examination of how the “ Congress would have addressed the issue had theaction been included in an express provision in the statute.” Gerber v. Lago Vista Independent School District, 524 U.S. 274,285(1998). This Court in Skokomish Tribe v. United States, 410 F.3d 506(2005)(en banc) correctly ruled that a treaty fishing right which guaranteed the Indians land access to their usual and accustomed off Reservation fishing locations did not create an implied cause of action for damages against a non landowner who had built a dam in the bed of a river relied upon for anadromous fish passage.

The Klamath Treaty preserved no off Reservation fishing locations and no right of land access. It did, however, guarantee the Indians that they could continue to fish anadromous fish at the headwaters of the Klamath River. The treaty is clear that the blocking of fish passage by the construction of a dam in the bed of the Klamath River would undermine the basic assumption of the United States plan. The understanding of the United States parallels that of the Klamaths, for a trespass claim for damages against the Copco—the predecessor of

PacifiCorp—was prepared by the United States but not filed several decades ago. Moreover, third parties such as Copco knew that their dam violated the express terms of the treaty. Their own public documents confirm that common understanding as does United States v. Winans, 198 US 371(1908) and Seufert Brothers v. United States, 249 US 194(1918 —two cases where the Supreme Court put third parties on notice that they were subject to legal process for their private actions destroying reserved treaty fishing in the Northwest. In those cases such private parties were enjoined by the courts from any action depriving Indians land access to their usual and accustomed fishing locations.

Damages at law were inevitably inadequate in those cases, for it was impossible to foresee what quantity of anadromous fish were the denied the Indians by reason of interference to their land access. These rulings permit in the setting of the Klamath treaty, liability for damages by private parties, such as PacifiCorp, which knowingly constructed major dams in the bed of the only anadromous fish corridor to the Klamath Reservation. The Klamath Indians are prepared to show the amount of Treaty protected salmon lost by their members each year and the economic loss associated annually with that obstruction.

If the Court finds an implied cause of action for damages in the setting of the Klamth River, Klamath Reservation and Klamath treaty, the Klamath Indians

should be able to pursue their damages free of State of Oregon statutes of limitations.

ARGUMENT

1. The District Court decision is in error because it never made the implied cause of action analysis required by longstanding Supreme Court precedent.

The District Court ruled, sua sponte, that based on this Court's decision in Skokomish Tribe, the Klamath Indians did not have a federal cause of action for damages for the knowing interruption by PacifiCorp's predecessor, Copco, of salmon passage to the Klamath Reservation. The District Court ruled that because no express provision in the 1864 Treaty gives the Indians a cause of action for damages against third parties destroying the passage of anadromous fish to the 1864 Reservation, no cause of action exists.

As shown below, this is contrary to the law of the land. It is contrary to this court's analysis in Skokomish Tribe v. United States, 410 F.3d 506(2005). It is also inconsistent with Supreme Court analyses in a number of implied cause of action acts. See e.g. Cannon v. University of Chicago, 441 US 677(1978); Franklin v. Gwinnett County Public Schools, 503 US 60 (1992), Gerber v. Lago Vista Independent School District, 524 US 274(1998); and other well known federal implied cause of action cases.

An implied cause of action for damages against PacifCorp can be found as a matter of law if it is adequately demonstrated that Congress in the Treaty of Oct. 14, 1964 (i) intended to protect anadromous fish passage and (ii) that a claim for trespass damages against a knowing passage blocker appropriately implements that Treaty protection.

A. The Four elements of the analysis that must be made to find an implied cause of action for damages

Cannon v. University of Chicago, supra explored in detail how the federal courts are to determine whether a given federal statute gives rise to an implied cause of action.

First, is the plaintiff one of the class for whose especial benefit the statute was enacted. 441 US at 688, n.9

Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Id

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? Id

Fourth, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. Id

B. The Treaty of October 14, 1864 between the United States and the Klamath Indians unquestionably protected fish passage for the benefit of the Klamath Indians

At the very time in 1913-1917 when Copco(PacifiCorp's predecessor in interest) was constructing its first dam in the bed of the Klamath River, knowingly blocking salmon passage to the Klamath Reservation at the River's headwaters, the Supreme Court issued its first implied cause of action case, Texas & Pacific R. Co. v. Rigsby, 241 US 33, 40 (1916) and confirmed that such a claim was a well acknowledged component of the common law;

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., tit. Action upon Statute (F) in these words; So, in every case where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law. 241 US at 39-40

The Supreme Court in its implied cause of action jurisprudence has focused on the "state of the law" at the time of the enactment of the federal statute at issue. Gwinnett County Public Schools, 503 US at 71. Neither the text of the 1864 Treaty nor the perspective of the United States before and after the Treaty demonstrate any

indication to limit the availability of trespass damages as against a third party which knowingly and intentionally took actions to undermine a basic foundation of the Treaty.

The Klamaths next explain why the Treaty fishing rights provided the Klamaths give rise to a damage claim against PacifiCorp . We do so first by comparing the specific Klamath Reservation benefits secured in the Oct. 14, 1864 Treaty with the very different benefits negotiated in multiple Stevens Treaties common throughout the Northwest, one of which was examined by this Court in Skokomish Tribe.¹ Important distinctions exist between the Klamath's 1864 Treaty and the treaty examined in Skokomish Tribe. In that case, the Treaty of Jan. 26, 1855, 12 stat. 933 reserved a small 3840 acre reservation for the Indians. Addendum, pp 1-2. The United States, the Indians and the newly arriving settlers fully understood that the Treaty at the same time expressly preserved extensive off-Reservation occupancy , hunting, roaming, and fishing rights throughout a huge portion of the Washington Territory. Addendum, pp 1-2.² The Treaty limited the off

¹As this Court expressly noted in Skokomish Tribe, 410 F.3d at 512, n.5, differences in Treaty language and setting might well give rise to a judicial finding of an implied right of action for damages.

²Skokomish involved one of a large number of "Stevens" treaties named after Governor Isaac Stevens, the first Governor of the Washington Territory. In Washington v. Fishing Vessel Assn., 443 US 658,666 (1978) the Court noted, at

Reservation fishing rights, however, by requiring the Indians to fish “in common” with the white citizens. Moreover, on the Reservation, white citizens could with permission reside and share in the Reservation’s resources. Art. II.

The Treaty language preserving off Reservation roaming and fishing rights operated to create an open ended number and range of federally protected fishing sites located throughout the large and bountiful drainages in the Pacific Northwest. Because of the number and range of traditional fishing locations, the 1855 Treaty included no language expressly protecting fish passage in specific drainages. Rather, the Treaty created a federal servitude to assure the Indians land access to their catalogue of fishing places. United States v. Winans, 198 US 371,382 (1905).³

n.9 that Governor Stevens informed the Indians at one of the signings, for example, the Treaty of Point Elliott on Monday , January 22, 1885 that “We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries.”

3

In Winans, the Supreme Court held that the Treaty language preserving off Reservation rights “ of taking fish at all usual and accustomed places...contemplated future ownership of the lands , “in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees and the States and its grantees.” 198 at 382-383.(emphasis supplied) The underlined portion of this ruling confirms that third parties are indeed subject to liability for actions which breach a fishing treaty right. The question therefore is what is the nature of the protected treaty right and what is the scope of the liability of those who deliberately interfere with

In contrast, the Treaty of Oct. 14, 1864, reserved for the Klamath Indians a larger and exclusive Reservation and Treaty fishing rights were expressly confined to the Reservation, located at the headwaters of the Klamath River. Whereas the Skokomish Indians were permitted to roam and fish far beyond their homeland, the United States and the Klamaths agreed to a different plan. At Klamath, the Indians gave up much of their traditional hunting, gathering, and fishing locations and agreed to "bind themselves" to the Reservation. Art. I, Excerpts of Record, pp 30-32 ⁴ Indeed, the Klamaths relinquished a huge domain(over 20,000 square miles) as described on the face of the Treaty, including lands in the State of California located over 50 miles from the southern boundary of their retained headwaters in Oregon. Excerpts of Record, p. 33-34. In exchange the United States gave the

its exercise. The Klamath treaty protected fish passage, not land access. Because all salmon were stopped with the construction of the dam, the Klamaths are in a position to offer expert testimony as to the number and economic value of the salmon that would have otherwise been consumed and bartered by them.

⁴Because the judgment below was entered in response to a Rule 59(e) motion by the Klamath Indians to a district court decision which raised sua sponte this Court's decision in Skokomish Tribe, some of the historical record relating to the 1864 Treaty are not included in the Excerpts of Record, but rather in this Brief's Addendum. These matters, comprised of longstanding official United States records were provided PacifiCorp in discovery, but were not formally submitted to the lower court in the short in length and in time papers submitted pursuant to Rule 59(e). Other matters in the historic record which were presented to the Court in the context of the statute of limitations issues are included in the Excerpts of Record.

Indians veto power over the right of any white citizen to enter the Reservation. The United States also pledged to “secure” for the Indians the “exclusive right” of taking fish in the streams and lakes located within that Reservation. Id.⁵ Moreover, the express terms of the Reservation territory set aside for the Klamaths in the 1864 Treaty cut through, on the southern boundary, the Klamath River drainage (the only major drainage on the Reservation). Id.

These specific provisions show a Treaty commitment by the United States to protect fish passage in the Klamath drainage to allow the Indians to sustain themselves on their now fixed homeland. Other provisions of the Treaty guaranteed Reservation peace and order. They expressly forbid white citizens to enter the

⁵ Cannon v. University of Chicago, 441 US at 690, n.13, listed a comparable federal guarantee to a selected group (like the Klamath treaty pledge that their exclusive on Reservation rights would be forever “secured”) in the Railway Labor Act which read “Representatives...shall be designated by the respective parties...without interference, influence, or coercion exercised by either party...” Id. The Cannon Court observed that such language established the basis for the Court to “never refuse to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. Id. In like fashion, the Supreme Court confirmed in Alexander v. Sandoval, supra, that a Congressional commitment comparable to the commitment to protect the Klamaths in their time honored right to exclusive fishing, stating “no person...shall...be subject to discrimination” provides a private remedy for damages, whereas a second portion of the same statute which provides that “the Federal department or agency...is authorized and directed to effectuate the provisions of (the rights creating) provision” did not result in a private remedy for a violation of the subsequent executive department regulations.

Reservation and confirmed that the Indians would remain the exclusive users of Reservation fish and game.⁶ Accordingly, the pledge of the United States to secure these long relied upon and necessary subsistence and trading traditions without question embraced that downstream Klamath River passage necessary to permit fish to reach the Reservation. Otherwise, as noted in United States v. Winans, supra, the Treaty negotiations would result in an “impotent” outcome. 198 US 379, (1904).

The explicit pledge of the United States to “secure” forever the availability of native fish in the highest reaches of the Klamath River, including of course the all critical anadromous fish, has no parallel in the very different Treaty approach examined in Skokomish. The off Reservation in common with Treaty fishing rights examined in Skokomish created an ongoing federal cause of action as necessary to require physical access to usual and accustomed fishing locations in many drainages. In contrast, the Klamath Treaty created an ongoing federal cause of action as necessary to require fish passage solely in the Klamath Basin. Skokomish Tribe sought damages for passage interference relying on a Treaty which only

⁶This specific protection to preserve Klamath fishing as it was the day before the 1864 Treaty is, of course, fundamentally different from the “in common with” treaties where, as this Court noted in Skokomish Tribe, 410 F.3d at 514, the Indians did not secure a continuing right to fish in the usual and accustomed manner.

required land access. In contrast the Klamaths seek damages for passage interference relying on a Treaty which requires continuing fish passage.⁷

C. At the time of the Oct. 14, 1864 Treaty, the common law presumed that a federal law specifically protecting an activity would give rise to a judicial remedy by those who were injured in contravention of the law

As noted above, Texas & Pacific R. Co. v. Rigsby, 241 US 33, 40 (1916) addressed the remedies which a party had who was injured by the failure of his employer to conform to Railway safety requirements. The Court confirmed that the common law permitted the injured party to recover damages. The traditional availability of damages was revisited in Franklin v. Gwinnett County Public Schools, 503 US 60, 70-72 (1992), where the Court stated that the general rule, “therefore , is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.” The Court went on to explain in the

⁷A reading of all of the Supreme Court cases arising out of the multiple off Reservation fishing “at usual and accustomed places” shows that none before Skokomish made the jump from assuring the Indians continuing land access to their many fishing locations to asserting rights in the beds of the many rivers where they roamed. Indeed, United States v. Winans, *supra* and Seufert Bros. Co. V. United States, 249 US 194 (1918), the two earliest of such cases each reviewed the issuance of injunctions—the first one by land owners who alleged Indian trespassing on private lands and the second an injunction by the United States to prevent private land owners from blocking Indian access to fishing locations. As noted above, in neither case were damages ascertainable as they are in this proceeding.

context of the 1972 enactment of Title IX of the Civil Rights Act the proper analysis;

Rather, in determining Congress' intent to limit application of the traditional presumption in favor of all appropriate relief, we evaluate the state of the law when the Legislature passed Title IX....In the years before and after Congress enacted this statute, the Court "followed a common-law tradition and regarded the denial of a remedy as the exception rather than the rule....As we outlined in Part II, this has been the prevailing presumption in our federal courts since at least the early 19th century. Id

The appropriate analysis was not made by the district court. Because the implied cause of action was not briefed fully by the parties , but was raised sua sponte by the court, neither party set forth their full version of the required analysis. This Opening Brief sets forth what the Klamath Indian believe to be the basis for permitting them to proceed to prove in further district court proceedings the tortious acts of PacifiCorp and the resulting damages to the Klamath Indians.

D. The Oct. 1864 Treaty was understood by all as protecting the unique and valuable fishery, including anadromous fishery, which existed at the headwaters of the Klamath River reserved for the exclusive use of the Klamath Indians. Moreover, the Oct. 1864 Treaty was designed to civilize and indeed did civilize the by separating them from whites , so that resort to civil remedies for resolving conflicts,—rather than Indian raids— became institutionalized in the Upper Klamath Basin.

As stated on page 10 ,the key to determining whether an implied cause of

action exists in a federal statute(or treaty) which is silent on the subject is to make an examination of how the “ Congress would have addressed the issue had theaction been included in an express provision in the statute.” Gerber v. Lago Vista Independent School District, 524 U.S. 274,285(1998). Lacking a modern legislative history, we rely on the numerous official reports of the Oregon Superintendent of Indian Affairs to help show that the normal common law rule in effect in 1864 preserves for the Indians an implied cause of action for damages

1. In 1852 it was reported that “The spring salmon enter but few of the rivers on the coast, and only those either of considerable size or coming from snow mountains. Both the spring and winter kinds run up the Klamath and Sacramento rivers in vast numbers” p. 51 1981 Report of the United States, prepared by Lane & Lane Associates entitled “THE COPCO DAMS AND THE FISHERIES OF THE KLAMATH TRIBE. Addendum, pp. 3-3A

2. Six years earlier in 1846, it was reported that the Klamath Lake....is a great fishing station for the Indians, and we met here the first we had seen since leaving the lower valley.Up this river the salmon crowd in great numbers to the lake, which is more than four thousand feet above the sea. Id. .

3.The Oregon Superintendent of Indian Affairs wrote on September 13, 1861 of the importance of establishing a federal Indian agency in the Klamath or Goose Lake Country, noting;

The country is thickly inhabited by Indians...It is impossible to judge of[sic] the number of Indians in this region. I judge, from what I have seen and the Indian accounts, that a thousand or fifteen hundred of the Lake Indians could be collected in one place, and a good many from the surrounding

country belonging to other tribes. These lakes abound in the finest of fish, the surrounding marshes and low lands in wild rice, and the adjoining valleys in roots and wild game; so that their means of subsistence are abundant. ⁸ Addendum p. 4

4. On March 2, 1864, the Office of Indian Affairs for the Northern District of California reported on a meeting with bands of Klamath Lake and Modoc Indians and out of that meeting a preliminary set of agreements were reported, including the following commitment by the Indians to address difficulties with the white man using civil means, not war;

You Indians of the Modoc and Klamath Lake country, are subject to the inspection, protection and restraint of the officers of Fort Klamath. Do you agree to submit yourselves and your difficulties to them for adjustment and settlement, and, in case of any trouble with white men, to go and state your difficulties to the officers at that fort. Addendum, p.5

5. The Oregon Superintendent of Indian Affairs, JW Huntington, on August 1, 1864 in anticipation of the treaty negotiations with the Klamath Bands pledged that in this Treaty the United States would limit its financial commitments and require the Indians to rely on their own skills for survival;

⁸ This Court twenty three years ago recognized the central component of preserving in the Treaty of October 14, 1864 anadromous fishing when it ruled; "In view of the historical importance of hunting and fishing and the language of Article 1 of the 1864 Treaty, we find that one of the "very purposes" of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle. This was at the forefront of the Tribe's concerns in negotiating the treaty and was recognized as important by the United States as well." United States v. Adair, 723 F.2d 1394,1409 (1983).

A strict regard for economy both in expenditure of the treaty fund and the stipulations in favor of the Indians will be observed.....If then, the remaining ten thousand dollars of the appropriation can be used through the Indian department to bring them into peaceful subjection, economy alone imperatively demands that it be applied for that purpose and the advantage of a state of peace over a state of harassing war would be of vast advantage to the pioneers who are endeavoring to develop that country, and will advanced the interest of both the settlers and the government many times the amount of the appropriation. Addendum, pp.6,6A

6. The Oregon Superintendent of Indian Affairs wrote in September of 1864 leading up to the October Treaty meetings of the need to “restrain the Indians to their reservations”, stating

If a law could be enacted requiring the Indians to remain upon the reservations and providing for their punishment (by withholding annuities or otherwise)if they absent themselves without the consent of the agent, and making it an offence for an white person to entice an Indian to leave, or to conceal or harbor him after he has left without permission, its effect would be most salutary.. Addendum, pp.7,8

7. The Superintendent in this same September, 26, 1864 document set forth his hope that the Indian bands would be amenable to cease their roaming and raiding of outside groups.

I found those bands willing to come under the control of the government, cease their predatory habits, and remove to a reservation. I anticipate little difficulty in making a favorable treaty with them, and I also hope the some of the bands further east may be induced to come in at the same council. Addendum, p. 9

7A. The Superintendent on December 10, 1864 reported after the treaty negotiations;

The reservation....gives them access to the Middle lake and the Klamath or Williamson river, connecting the two, for fishing purposes....Their separation from whites would be as nearly complete as possible . The reservation is not likely to be traversed by any important line of travel..... Addendum, pp. 10-11

8. On August 6, 1866, the Oregon Superintendent , out of the Ashland Mills Office reported on a December 1865 visit to the Klamath bands, following up the October 1864 Treaty and reported;

On December 15, 1865 I started for Forth Klamath to attend to the issuing of subsistence to the Snake Indians and to examine into the condition of the other tribes, and on arriving there I issued to Pauline such an amount of shorts and flour as I deemed would supply him and his people until spring. At that time I found the Klamath and Yahooskins generally quite well enough provided with dried fish, to subsist them during the remainder of the winter.... Addendum, p. 12

9.The annual report of the Superintendent in June of 1867 confirms that ongoing reliance by the United States and the Klamath Indians of fish running the upper reaches of the Klamath Basin;

About the 15th of March, fish commenced running in Lost river, in greater numbers than before for many years, and the Indians flocked thither, leaving the old and decrepit and most needy behind, to whom I

used most the remaining flour..... They [the Klamaths] look upon the whites as superior beings and their greatest ambition is to emulate , and I think would, under good rules and regulations, do away with their savage habits and customs to a great extent and adopt those of civilized people. Addendum, p. 13

10. Even though the United States was providing only marginal funds to the Klamath Indians , everyone in the Upper Klamath Basin knew the reliance by the Indians on the abundant game and fish. Thus On August 20, 1867, the Oregon Superintend wrote;

The lakes, and the small streams putting into them, abound in fish of the finest quality,These articles, manly the fish and wo-kus, formed the chief articles of food for the Indians until the advent of the whites. They have begun, under the direction of Sub-Agent Lindsay Applegate, the cultivation of the soil, and preparation are now making to enlarge the operations under the treaty of 1864, ratified in 1866. If the crops are as successful as Sub-Agent Applegate thinks they will be, we will be able to report net year a handsome amount of agricultural products. I must say, however, that some very limited experiments, made by the military officers at Fort Klamath, which I had opportunity to examine, do not warrant quite so sanguine a view of the future production as that gentleman has taken. Addendum, pp.14,15

11 In 1869 the Commissioner of Indian Affairs confirmed the central role of fishing for the Klamaths:

The Klamath sub-agency established under the operations of the treaty of October 14, 1864bordering on the Klamath lakes contains about 1,200,000 acres of lands....The lakes, however, afford an abundance of fish of the finest quality, and a very nutritious water-plant called wo-

kus. These were the chief sources from which the Indians drew their subsistence until brought in contact with the whites from whom they have since learned to depend somewhat upon cultivating the soil for support. Addendum, p. 16.

Subsequent reports of the Superintendent of Indian Affairs confirmed that a cold climate made agriculture pursuits unreliable, while the rich fishing resources not only sustained the Klamaths but also were become a growing attraction of white visitors. Of course it was understood by all that the Klamaths, by virtue of their treaty, were empowered to regulate such fishing. Thus by August 30, 1898, the Superintendent of Oregon Agencies wrote;

The season having been unusually gray and frosty, it has been a very unfavorable one for farming operations. Although a large acreage was sown, the Indians will realize a very light crops.....The Klamath Reservation possess many attractions for the fisherman, having in Spring Creek and some other pure cold tributaries of the Klamath lakes some of the finest trout streams in the world. Tourists have often been permitted to camp for some weeks at a time on these streams for recreation and pleasure of angling, but this they have not been permitted to do without the consent of the Indians and agent, and, so far as I am informed, no such persons during the past year have abused the privileges extended to them by imposing upon Indians in any way. Such persons are given to understand that the exclusive right to take fish on the reservation was guaranteed to the Indians by the treaty of October 14, 1864, and that no one not belonging to the reservation can indulge this privilege except through sufferance of the tribes.⁹ (Emphasis supplied)

⁹ Knowing that only the Klamath River provided the necessary fish passage to the Klamath Indian Reservation makes the Klamath Treaty protections as they relate to salmon and steelhead fully foreseeable to third parties. As the Supreme Court noted in Washington v. Fishing Vessel Assn., 443 US 658, 663(1978), "The regular habits of these (anadromous fish) make their 'runs' predictable..."

Addendum, p.17

13. On March 21, 1901, the KLAMATH REPUBLICAN newspaper reported:

“enormous droves” of fish can be seen in the rivers and creeks generally throughout the county. Mulletts, rainbow trout and salmon—splendid fish, giants in their size and apparently anxious to be caught This phenomenon will last a month, and until their egg-laying camp meeting is over with. Addendum, p. 18

14. On October 14, 1901, the Klamath Agency superintendent restated that all fishing was subject to regulation by the Klamath Indians ;

The scenic beauties of the reservation, with its immense springs of as pure water as there is in the world, its beautiful groves of cottonwood and aspens, its luxuriant natural meadows, and its thousand square miles of pine forests , with game and trout in abundance, has always made it a favorite resort of the tourist, the hunter , and the angler.During the last year not a single dispute has arisen between the Indians and the great number of white people who have visited the reservation. The white people have respected the rights of the allottees and have yielded with a good grace to the rather strict adherence of the regulations which we have exacted as to hunting and fishing. (emphasis supplied)
Addendum, p. 19

15. The Klamath School Superintendent reported in September 25, 1903 of the need of Congress to address promptly an acknowledged erroneous survey in the 1864 Treaty Reservation. This report submitted just 10 years before Copco (PacifiCorp's predecessor in interest started construction on Copco No.1

blocking salmon passage in the Upper Klamath Basin)observed;

The several tribes who were parties to the treaty of October 14, 1868....agreed to remain within the tract which was set apart for their permanent residence and to be known as the Klamath Reservation, a tract embracing less than one-tenth of the magnificent domain which they gave up to the Government by the said treaties...As a measure of simple justice to a people, who, on account of their consistent loyalty and the readiness with which they gave up to white settlement a princely domain which has already added much to the wealth of two States, as well as for their prompt acceptance of our civilization, they are deserving at least of the fulfillment on the part of our great Government of its solemn promises to them. Addendum, p.20

16.As incorporated in the complaint in this action in 1916

and then again in 1917 Copco publically assumed responsibility for injury to Klamath treaty fishing. ¹⁰ In 1916, Copco (J. McKee, Vice Pres.) made the following commitment to the United States;

We note that complaints have reached your office through the Klamath Indian Reservation that the run of salmon in the Klamath River has been

¹⁰ Not only fishing tourists, but also the United States understood the exclusive nature of the Klamath treaty fishing rights agreed to in 1864 included the right of either treaty party to take appropriate legal actions to protect the fishery. Thus, in 1918 the Assistant Commissioner of Indian Affairs raised strong objection to rumors that Copco would be “released from building the proposed fishway”(which the company promised the Klamath Indians would be included in Copco no. 1.....noting..... “The Indians of the Klamath Reservation have, from time immemorial depended upon the supply of fish for a large percentage of their food and it is highly, desirable that proper provision be made by the power company for the passage of salmon over its dam.” United States Lane & Lane Report, p. 151. Addendum, p. 21 .

interfered with by a dam which our Company has under construction upon the Klamath River. In reply we beg to say that the said dam will be completed by the end of the present year, 1916. Ample provision has been made in the plans for the dam for a fish ladder which will permit unobstructed passage of fish up the Klamath River. ¹¹ Excerpts of Record, p.35-37

17. Then, a year later when signing an agreement with the United States to remove part of the natural reef from Upper Klamath Lake and construct Link Dam—upstream of the Copco dam described above-- to regulate River flows to maximize hydropower production and agriculture depletions, Copco agreed

¹¹ While the non Indian communities in Skokomish Tribe did not have notice of an ongoing obligation to maintain fish passage in the multitude of drainages relied upon by the numerous Columbia River tribes subject to the many Stevens treaties, non Indians subject to those ubiquitous treaties had already been found by the Supreme Court to have been put on notice as to the established usual and accustomed fishing grounds, which notice formed the basis of the federal servitude imposed on land access to the fishing locations. In Seufert Bros. v. US, 249 US 194, 199 (1918), the Court confirmed that third parties “had notice of these Indian customary rights by the reservation of them in the treaty” Further, in Washington v. Fishing Vessel Assn, 443 US 658, 676-678 (1978), the Supreme Court entered additional rulings which strengthen the Klamath Indian demonstration here that had the parties to the 1864 Treaty inserted specific enforcement provisions to protect fish passage, they would have included all common law options, including damages. Thus Fishing Vessel emphasized both that each party fully intended to “protect that (anadromous fish) source of food and commerce” knowing it was “crucial in obtaining the Indians’ assent” and that third parties were on notice of the full extent of the Indians’ reserved right because of “the relative predictability of the (timing and size) of the harvest” unique to “anadromous fish” which assured both parties of the presence of “the large quantities of fish that will almost certainly be available at a given place at a given time.”

to hold the United States harmless and assume all liability to the Klamath Indians arising out of the operation of the Link dam or the resulting lake levels. Excerpts of Record, p. 37

18. As a result of these commitments and the resulting destruction of the treaty fishing harvest, the United States prepared but did not file in 1941 a complaint for damages. The complaint set out the history of efforts by the United States and Copco to preserve salmon passage and included a large number of Klamath Indian declarations going back to the 19th century confirming the regular and expansive fishing of salmon by Tribal members. Excerpts of Record, pp. 38-41.

Implying a federal cause of action which includes trespass damages not only furthers the specific protections placed in the October 14, 1864 Treaty and the historic record. It also conforms with requirements 2 and 3 set forth in Cannon, supra. Encouraging the Klamaths or the United States to invoke common law damage claims to protect threats to fish passage carries forward the United States policy—explicitly stated at Klamath—that the Indians and the growing number of white settlers resolve their differences using existing dispute resolution institutions rather than battle. Finally, permitting a federal cause of action to protect treaty guaranteed rights does not interfere with areas of policy or law traditionally left to

the States. Under the Constitution and throughout the history of the United States, beginning with the 1790 enactment of the Nonintercourse Act, 25 USC 190, management of Indian affairs has been an exclusive federal function. Indeed, several decades ago, Congress enacted 28 USC 1362 to confirm that Tribes could invoke federal court jurisdiction to protect Treaty assets, whether or not the United States chose to act on their behalf.

Skokomish Tribe involved no such affirmative pledges by a utility and no such demands made by the United States on behalf of the Indians. Skokomish Tribe did not involve a single drainage to which the Indians' "exclusive" treaty rights were forever "secured" In our view, the Oct 14, 1864 Treaty specifically protects the present and future right of Klamath Indians to continuously secure native fish from the Klamath drainage. As such the 1864 Treaty, unlike the 1855 Treaty considered in Skokomish, constitutes a "rights-creating" cause of action for damages, for the Treaty unquestionably "confers rights on a particular class of persons." Alexander v. Sandoval, 532 US 275, 288-89(2001).¹²

¹² The claim which the Klamath Indians seek to pursue is in the nature of a private nuisance. The Supreme Court addressed a similar claim involving not a dam in the bed of a river and third party interference, but rather overflights undertaken by the United States over an owner of land. "For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of

2. If the Court upholds the right of the Klamath Indians to bring civil damage claims against PacifiCorp for its predecessor's intentional interference with the passage of anadromous fish upstream to the Treaty protected fishing locations, the Court should find that State statute of limitations are not applicable to restrict the claim.

A. This Court should hold that the Klamath Termination Act of 1954, 25 USC 564 et seq. did not submit the Klamaths' present claim to State statutes of limitations

PacifiCorp contends that in 1961 when the Secretary of the Interior implemented the Klamath Termination Act, 25 USC 564 et seq., 26 Fed. Reg. 7362 (1961), State of Oregon statutes of limitations law became applicable to defeat the historic trespass claims. ¹³ PacifiCorp relies upon the holding in South Carolina v. Catawba Indian Tribe, 476 US 498 (1986) which applied state statute of limitations to

the value of property taken....And that value may reflect the use to which the land could readily be converted, as well as the existing use...If by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose;; their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.” United States v. Causby, 328 US 256,261(1945)

¹³ The Supreme Court observed in County of Oneida v. Oneida Indian Nation, 470 US 226,239, n.12(1984) “[I]t would appear that Congress contemplated that a tribe’s access to federal court to litigate a matter arising ‘under the Constitution, laws, or treaties’ would be at least in some respects as broad as that of the United States suing as the tribe’s trustee.” Important to this case, County of Oneida specifically held that when tribes prosecute claims for trespass damages and/or to recover federally protected Indian lands, they are not normally bound by state statute of limitations. Hence, the potential application of state of Oregon statute of limitations for trespass actions would fundamentally change the federal rules applicable to the Klamath Indians.

a federal common law ejectment claim for repossession of Reservation land—brought by a Tribe which like the Klamath Tribe had its federal relationship with the United States terminated.

The Klamath Indians disagree-- believing that both the United States Supreme Court and this Court have long established that the Klamath Indians are entitled to obtain a declaration of the scope of their treaty rights and protection from third party interference—free of State law--- when treaty fishing and hunting rights have been impaired. Under federal law (but not Oregon law) it does not matter that the construction of the barrier to the passage of Klamath Treaty salmon occurred in 1916, because no statute of limitations exists. County of Oneida v. Oneida Indian Nation, 470 US 226,244-245(1984)

The ruling in Catawba Tribe does not address treaty rights of Indians, for that terminated Tribe had no treaty with the United States and unlike the Klamath Termination Act, the Catawba Termination Act included no express proviso stating “nothing in this Act shall abrogate the fishing treaty rights of the Tribe and its members” 25 USC 564m (Klamath Termination Act). The Klamaths rely upon Menominee Tribe v. United States, 391 US 404(1968) where the Supreme Court rejected the argument that the termination scheme operated to apply state hunting laws to Indian hunting following termination:

It is therefore argued with force that the Termination Act of 1954 which became fully effective in 1961 submitted the hunting and fishing rights of the Indians to state regulation and control. We reach, however, the opposite conclusion.

391 US at 410

The Court explained that because that portion of the many termination acts which make state law applicable subsequent to termination to the terminated tribes and their members and stated that federal statutes no longer applied, did not include the Treaty of Wolf Creek, 10 stat. 1064 between the Menominees and the United States, the treaty rights to hunt and fish survived termination. 391 US at 412 The Court also relied upon, 391 US at 411, Public Law 280, 18 USC 1162 enacted contemporaneously with the Menominee and the Klamath termination acts in 1953 and 1954. That act triggered a partial transfer of civil and criminal authority over Reservation affairs to certain States, including Wisconsin and Oregon. In so doing, Congress provided;

Nothing in this sectionshall deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity afforded under Federal treaty agreement, or statute with respect to hunting, trapping or fishing or the control licensing or regulation thereof.

This Court has followed the Menominee analysis in two cases directly dealing with the survival Klamath Treaty hunting and fishing rights, free of state regulation, subsequent to termination. See . Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974)

and Kimball v. Callahan (II), 590 F.2d 768 (9th Cir. 1979). Then, in United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), this Court confirmed that State of Oregon beneficial use water right laws could not operate to deprive the Klamath treaty protected fish from their required instream water flows. This Court concluded that the Treaty right to water in the streams and lakes arose out of federal common law and would not be restricted by the application of Oregon law.;

The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state prior appropriation law is not controlling as federal law provides an unequivocal source of such rights.

723 F.2d at 1411, n.19¹⁴

PacifiCorp would have this Court abandon all of this precedent and apply one component of State law to Klamath treaty fishing rights, even after this Court has rejected the application of Oregon hunting, fishing, and water law.

¹⁴Adair shows once again how the full bundle of rights associated with preserved treaty rights operate. Even though termination ended federal supervision and benefits for the Klamath Tribe and its members, the United States in Adair affirmatively took the lead to establish federal common law instream flow rights in the Upper Klamath Basin . It did so in part to protect federal wildlife assets once a part of the Klamath Indian Reservation and in part as a Treaty of Oct. 14, 1864 signatory to improve the required habitat for Treaty fish to maintain harvestable levels.

PacifiCorp relies on South Carolina v. Catawba Indian Tribe, 476 US 498 (1986), which did not directly involve the protection of retained treaty fishing and hunting rights. In the absence of a treaty claim expressly preserved from termination, the Supreme Court in Catawba applied South Carolina statute of limitation law to defeat that terminated tribe's ejectment claim. But, the Court expressly rejected the use of State laws to reduce or, as here, to eliminate federal claims based on Treaty rights.

As the Court of Appeals noted, in Menominee Tribe v. United States, 391 US 404 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read in pari materia with an Act passed in the same Congress that preserved hunting and fishing rights. [Public Law 280, 18 USC 1162] Id., at 411. [Public Law 280] In this case, of course, there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a "backhanded" abrogation of treaty rights, id, at 412; no comparable abrogation is at issue here.

476 US at 509, n.20

To conclude, the Klamath Indians urge the Court to rule that they may pursue federal common law trespass claims against PacifiCorp free of State of Oregon statute of limitations.

B. The 1986 Klamath Restoration Act expressly preserves the right of the Klamath Indians to pursue federal common law trespass claims free of state statute of limitations

The district court never reached the competing contentions summarized above

in Section A. Rather, the district court held that enactment of Congress in 1986 of the Klamath Restoration Act, 25 USC 566 et.seq. put the Tribe in the same position it was prior to termination—able to pursue federal common law trespass claims free of Oregon statutes of limitations. Excerpts of Record, p. 11 Congress clearly has the power to extend or repeal a statute of limitations and thereby “revive” a previously time barred claim. See Osmundsen v. Todd Pacific Shipyard, 755 F.2d 730, 733 (9th Cir. 1985). The defendant obtains no vested right in immunity from suit as a result of the running of a statute of limitations. Rather, as explained by the United States Supreme Court, statutes of limitation are a matter of “legislative grace”:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitraryThey represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a ‘fundamental’ right or what used to be called a ‘natural’ right of the individual. [The defendant] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. V. Donaldson, 325 U.S. 304, 314 (1945) (citations omitted).

Statutes of limitation generally only affect the availability of a remedy; they do not extinguish the underlying right. See Osmundsen, 755 F.2d at 733. As a result of a change in congressional policy, Congress may restore the plaintiff’s remedy and

divest the defendant of the statutory bar. Chase Securities Corp., 325 U.S. at 316.

The Klamath Restoration Act was part of a federal policy repudiating the failed policies of Termination. See, David H. Getches, Charles F. Wilkinson, & Robert A. Williams, Jr., Federal Indian Law, (3rd ed. 1993) at 251-254. The Restoration Act explicitly restored to the tribes “[a]ll rights and privileges . . . under any Federal treaty, Executive order, agreement or statute, or any other Federal authority, which may have been diminished or lost under the [Klamath Termination Act]” Thus, even if the assimilation policy underlying the Termination Act of 1954 supported application of state statutes of limitation to the Tribes’ claims during the termination era, which the Klamath Indians dispute in the context of their treaty fishing rights exempted from termination, the Restoration Act of 1986 reflects Congress’ subsequent repudiation of that policy.

A state statute of limitations is only applied to a federal common-law action by an Indian tribe where federal policy suggests that Congress intended the analogous state statute of limitation to apply. Occidental Life Insurance Co. of California v. Equal Employment Opportunity Commission, 432 U.S. 355, 367 (1977). However, “[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.” *Id.*

3. Conclusion

For all of the reasons set forth above, the Klamath Indians request that this Court reverse the judgment of the district court and remand the proceedings to allow evidence of causation and damages to be submitted.

January 27, 2006

Respectfully submitted



Daniel H. Israel

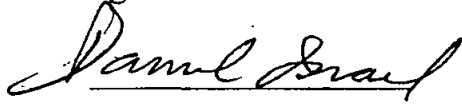
Attorney for plaintiffs-appellants

Certificate of Compliance. This brief contains 10,481 words in total

I certify that on the 27th day of January, 2006, the above Opening Brief and

¹⁵The national policy that must guide the court's determination of whether to borrow the state statutes of limitation in the present case is the current national policy expressed in the Restoration Act, not the repudiated policy of termination. As expressed by the Ninth Circuit, courts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975).

the Excerpts of Record were placed in the United States mail, postage prepaid and sent to: Joseph Fagan, Heller Ehrman LLP, 1717 Rhode Island Avenue, NW, Washington DC 20036-3001.

A handwritten signature in cursive script, appearing to read "Daniel H. Israel". The signature is written in black ink and is positioned above the printed name.

Daniel H. Israel

ADDENDUM

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SHOOLK-KAN-NAM, Lummi sub-chiefs.	his x mark.	[L. S.]
CH-LOK-SOTS, Lummi sub-chiefs.	his x mark.	[L. S.]

Executed in the presence of us—

M. T. SIMMONS, Indian Agent.
 C. H. MASON, Secretary of Washington Territory.
 HENRY F. SUAW, Interpreter.
 CHAS. M. HITCHCOCK.
 H. A. GOLDSBOROUGH.
 GEORGE GIBBS.
 JOHN H. SCRANSTON.
 HENRY D. COCK.
 S. S. FORD, Jr.
 OMBERTON CUSHMAN.
 ELIAS BARRES.
 R. S. BAILEY.
 S. M. COLLINGS.
 LAFAVETTE BALCH.
 E. S. FOWLER.
 J. H. HALL.
 RONT DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
 SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved (two-thirds of the senators present concurring) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwamish, Squamish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"AUGEST:
 ASBURY DICKINS, Secretary."

Now, therefore, be it known that J. JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty:
 In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in [seal] the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.
 JAMES BUCHANAN.
 By the President:
 LEWIS CASS, Secretary of State.

Treaty between the United States of America and the Skallams Indians. Concluded at Point No Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 22, 1859.

JAMES BUCHANAN,
 PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: January 26, 1854.

WHEREAS a Treaty was made and concluded at Huala Skus, or Point No Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates of the different villages of the Skallams Indians, viz.: the Kahlai, Squah-quahit, Tel-queen, Ste-tellum, Tsolkw, Yennis, El-lawn, Pishet, Hunnig, Klat-la-wash, and Oke-no, and also of the Sko-komish, Toon-loosh and Chom-a-kum tribes occupying certain lands on the straits of Foca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention, made and concluded at Huala Skus, or Point No Point, Squamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the Skallams, viz.: Kahlai, Squah-quahit, Tel-queen, Ste-tellum, Tsolkw, Yennis, El-lawn, Pishet, Hunnig, Klat-la-wash, and Oke-no, and also of the Sko-komish, Toon-loosh and Chom-a-kum tribes, occupying certain lands on the straits of Foca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Foca, thence southeasterly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeasterly and southerly along said summit to the head of the west branch of the Satop River, down that branch to the main fork; thence easterly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeasterly to the portage known as Wilkes' portage; thence northeasterly, and following the line of lands heretofore ceded to the United States by the Dwamish, Squamish, and other tribes and bands of Indians to Squamish Head; thence northerly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands; to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the

Cession of lands to the United States.
 Boundaries.

Vol. 1, p. 1132.

ante Treaties, p. 1.

Reservation.

amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Tribes to settle on reservation.

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Privileges to the Indians.

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.*

Payments by the United States.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year, after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

An appropriation for removal, &c.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aboriginal reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed to other reservations.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms, and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

Vol. x. p. 1044.

Lands may be surveyed and assigned, &c.

Annuities not to be taken for debts of individuals.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year heretofore written.

ISAAC I. STEVENS, Governor and Superintendent. [L. S.]

CHITS-A-MAH-AN, the Duke of York, his x mark. [L. S.]

Chief of the Sklallams. [L. S.]

DAH-WHL-LUK, Chief of the Sko-ko-mush. his x mark. [L. S.]

KUL-KAH-I-HAN, or General Piercy, his x mark. [L. S.]

Chief of the Omenahum. [L. S.]

HOOL-HOLE-TAN, or Jim, Sko-ko-mish sub-chief. his x mark. [L. S.]

SAI-A-KADE, or Frank, Sko-ko-mish sub-chief. his x mark. [L. S.]

LOO-GWEI-OOS, or George, Sko-ko-mish sub-chief. his x mark. [L. S.]

Annuities may be withheld from those drinking ardent spirits.

United States to establish school.

Mechanics' shop.

To employ a physician.

Tribes to free slaves and not to acquire others. Not to trade out of the United States.

When treaty to take effect.

Signatures, January 26, 1855.

Not to trade out of the United States.

When treaty to take effect.

Signatures, January 26, 1855.

Not to trade out of the United States.

When treaty to take effect.

Signatures, January 26, 1855.

Not to trade out of the United States.

When treaty to take effect.

Signatures, January 26, 1855.

THE COPCO DAMS AND THE FISHERIES OF THE KLAMATH TRIBE

Prepared by
Lane & Lane Associates

For

The Bureau of Indian Affairs
U.S. Department of the Interior
Portland, Oregon

December 1981

In addition to fish, crawfish and fresh water mussels were eaten:

Crawfish are taken from the streams. These are simply boiled and are soft enough to eat in this fashion. To judge by the quantities of fresh-water clamshells at the old house sites, clams are also an article of diet. (Spier 1930:154-155)

Anadromous Fish

Non-anadromous fish were important in the Klamath Basin but so also were anadromous fish. Table C indicates those known to have been available in the Klamath Basin. The Klamath River and its headwaters was one of the major anadromous fish sources between the Columbia and the Sacramento Rivers. It supported considerable populations of both spring and fall chinook and steelhead. The presence of salmon in the waters of the Klamath Basin is noted from records of the mid-nineteenth century. On May 6th, 1846 Fremont, the second known White visitor to the Klamath noted:

In the forenoon of the sixth we reached the Tlamath Lake at its outlet, which is by a fine, broad stream, not fordable. This is a great fishing station for the Indians, and we met here the first we had seen since leaving the lower valley. They have fixed habitations around the shores of the lake, particularly at the outlet and inlet, and along the inlet up to the swamp meadow, where I met the Tlamaths in the winter of '43-'44, and where we narrowly escaped disaster.

Our arrival took them by surprise, and though they received us with apparent friendship, there was no warmth in it, but a shyness which came naturally from their habit of hostility.

At the outlet here were some of their permanent huts. From the lake to the sea I judged the river to be about two hundred miles long; it breaks its way south of the huge bulk of Shastl Peak between the points of the Cascade and Nevada ranges to the sea. Up this river the salmon crowd in great numbers to the lake, which is more than four thousand feet above the sea. It was a bright spring morning, and the lake and its surrounding scenery looked charming. (Fremont 1887:483)

In 1852 Gibbs wrote of the Klamath salmon:

No. 63.

ASHLAND MILLS,

Jackson County, Oregon, September 13, 1861.

SIR: Your communication of September 3d I received yesterday, and in accordance with your wishes I will give you all the information I can on this important subject.

I am fully satisfied, as I have before stated, of the importance of the establishment of an agency in the Klamath or Goose Lake country. An establishment there would not only protect the settlements of Southern Oregon and Northern California, but would have a good effect in protecting the travel on the different roads leading through that country. It would protect the emigrants passing by the three different travelled roads to the Pacific, owing to its central position to different roads. The country extending east from the Klamath to the head of the Humboldt, and from the northern boundary of California to the Blue mountains on the north, contains many fine valleys which are bound to become valuable for stock raising and agricultural pursuits. The appearance of the country generally is favorable for gold and silver, and I think the country much favored by being sheltered by the Blue mountains on the north.

This country is thickly inhabited by Indians; the greater portion, from the Klamath east, is inhabited by the Snake tribe, who are very numerous, inhabiting both sides of the Blue mountains, and have, from time to time, committed outrages on emigrants passing through their country. Being so remotely situated, they have escaped the punishment they so justly merited. From some point in the Klamath country they could be kept in subjection. Since the settlement of the Pitt River and Honey Lake country a great many Indians have been driven north, in the direction of the Blue mountains. From the statements of the Modocks, there are a great many Indians east of their country.

All these Indians could be collected on the same reserve with the Modocks and Klamath Lake Indians.

These Lake Indians object to being removed from their country, but say they would be willing to sell a portion and still remain on a portion.

It is impossible to judge of the number of Indians in this region. I judge, from what I have seen and the Indian accounts, that a thousand or fifteen hundred of the Lake Indians could be collected in one place, and a good many from the surrounding country belonging to other tribes. These lakes abound in the finest of fish, the surrounding marshes and low lands in wild rice, and the adjoining valleys in roots and wild game; so that their means of subsistence are abundant.

A portion of the Indians east of these lakes I think will require considerable dragoon service before they can be managed; but I believe their country will admit of the best and cheapest military road from the South Pass in the Rocky mountains to the Pacific, from Camp Stuart, in Rogue River valley, by passing between the two Klamath lakes, thence by the head of Lost river, thence by the north end of Goose lake, and intersecting the emigrant road near the head of the Humboldt at the City of Rocks. A portion of this route I have never been over, but from the best information I can get on the subject I believe it practicable. It would avoid the Blue and Cascade mountains on the north, and the alkali regions of the Humboldt on the south.

I have but little time to reflect on this subject, wishing to forward my report in due time, so you will please excuse the shortness of my communication.

I remain, very respectfully, your obedient servant,

LINDSY APPLGATE,

Special Indian Agent for Southern Oregon.

W. H. RECTOR, Esq.,

Superintendent Indian Affairs, Portland, Oregon.

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farms on the first day of April. I found the Coose and Umpqua farms to consist of about 250 acres enclosed; 57 acres of that under cultivation, known as the Yawhick farm, situated on south end of the Yawhick prairie.

The Alsea farm consists of about three acres broke and fenced on the north end of Yawhick prairie. When I took charge of this place I found 13½ acres of oats and timothy, and also 4½ acres of wheat, had been sown on Yawhick farm before I took charge of it. After the first of April I planted Indian gardens, two acres for Umpqua tribe, also two acres for Coose Indian tribe, all in cabbage, carrots, rutabagas, &c. I planted 24 acres of potatoes on Yawhick farm; they were put in the ground between April 15 and May 5. I also put in 10½ acres of turnips on this farm.

The Indians have about five acres in private gardens, not included in the farm. They dug up this ground and made their gardens themselves, without asking or getting any assistance from the whites.

The Alsea farm, three acres, I ploughed the ground; the Alsea Indians planted it all in potatoes, turnips, and cabbage. The Indians at this agency do all their own work, such as planting, hoeing, and digging potatoes, but they are very lazy and slow to work.

The oats, timothy, and potatoes look very well, and promise a good yield. The wheat, turnips, carrots, cabbage, rutabagas, &c., do not look so well, owing to so much dry weather at this place. We have had no rain of any consequence during the months of May and June, yet I think they will yield a tolerable fair crop.

Since the first of last April I broke 24 acres of fresh ground; that, with what had been broken before I took charge here, would make 84 acres on Coose, Umpqua, and Alsea farms.

THOMAS CLARKE.

Superintendent of Farms at Alsea Agency.

GEO. W. COLLINS, Esq.,

United States Indian Agent, Alsea Agency.

No. 28.

OFFICE OF INDIAN AFFAIRS,

Northern District of California, Yreka, March 2, 1864.

SIR: I have the honor to report that on the 14th ultimo the Klamath Lake Indians, with their chief Salakes; the Modocs, with their chief Sconges; the Shastas, with Josh and Jack, their chiefs; the Scott Valley Indians, with their chief John, and the Hamburg Indians, with their chief Jim, met me in council near Yreka, for the purpose of arranging their difficulties among themselves, and arranging terms with the whites.

Upon my entering upon the discharge of the duties of my office these Klamath Lake and Modoc Indians were making preparation for war, and exhibiting hostile intentions, which I then arranged by a temporary agreement, as stated in a former report.

Since then, owing to some of their warriors having been killed by the Shasta and Hamburg Indians within the lines of the white settlements, in retaliation for the supposed protection rendered the Shastas, the Klamath Lake and Modoc Indians, commenced depredations by stealing the cattle of the frontier settlements, robbing travellers passing through their country, and uttering threats of murder and war on the opening of the spring. In view of these demonstrations and threats, Colonel Drew arrested and caused to be executed an Indian commonly known as George, and killed an Indian commonly known as "Scocum".

3d. When you come into white settlements or camps, you shall not get drunk or steal either small things or great. You shall not rob Chinamen of their gold, or rob their sluice boxes. You shall remain out of town, and in your camps, nights. And you shall not sell to white men or others Indian children, either of your own tribe or of other tribes, and you shall not sell, except to Indians, any squaws, unless the person buying will go before the white man's judge and marry the squaw sold him.

4th. The great white Chief desires that all people, Indians as well as white men, should live in peace and have no more war, and particularly that the Modoc Indians should not go into the country of the Pitt Rivers to fight or steal squaws or children to sell them. Do you agree to let them alone if they do not trouble you?

5th. You, Indians of the Modoc and Klamath Lake country, are subject to the inspection, protection, and restraint of the officers of Fort Klamath. Do you agree to submit yourselves and your difficulties to them for adjustment and settlement, and, in case of any trouble with white men, to go and state your difficulties to the officers at that fort?

6th. Indians, except in the unsettled country, or when hunting, shall not pack (carry) guns or bows and arrows; shall not bring them into the white settlement, except to get them repaired; and when you come into the settlements you shall leave your guns in camp.

7th. On the part of the white Chief, we agree to give you a right to come to our settlements, and we will protect you at all proper times. When coming to the settlements you should get a paper pass from the officers at the fort.

This was agreed to in council before the undersigned witnesses.

E. W. POTTER,

Justice of the Peace.

D. KEAM, Sheriff.

E. S. STEELE,

Sup'g Agent Indian Affairs, Northern District, California.

H. K. WHITE.

T. S. BALL,

Interpreter for the Modocs.

No. 29.

OFFICE SUPERINTENDENT INDIAN AFFAIRS,

Salem, Oregon, March 5, 1864.

SIR: I have to acknowledge the receipt of your letter of 30th December last, in reply to my letter of 21st November, concerning apprehended trespass upon the Coast reservation, and approving my action in the premises. Your letter also calls my attention to the second section of the act of June 12, 1858, and directs that if attempts to settle upon the reserved lands are persisted in, the superintendent will "communicate the fact to this office, when the necessary steps will be taken to furnish such force as may be necessary to summarily eject all trespassers from said reservation."

I have now to inform you that the attempts to settle upon the lands alluded to have been thus far but few in number, and limited to a small locality upon the Aquina bay, and at last advices from there the agent expected to be able to remove those remaining without the employment of military force. The difficulties of travel in the winter season will probably deter persons from making any similar attempts until the spring months, but after that time I anticipate a repetition of the offence.

I consider it my duty to use every effort in my power to preserve that and the other reservation for the benefit of the Indians, and will not fail to vigorously

also covering copies of letters from late Superintending Agent Steele, relating to the councils held by him, with a few of these Indians last year.

I have also received a letter from Superintendent Wiley, of California, stating that he has been advised by your office of his appointment as my associate in the matter, and that he cannot at present meet me in consequence of other engagements. He further says that he has so advised you, and hopes that other arrangements will be made.

It is my intention, as soon as the necessary funds are placed at my disposal, to proceed to Klamath lake immediately, by way of Jacksonville, for the purpose of holding a preliminary council with such of the Indians in the vicinity of the lake as can be collected at short notice, and I shall then fix a time and place for concluding the treaty, at which all the Indians within reasonable distance can be gathered. I have written to Superintendent Wiley to this effect, and shall duly advise him of the time and place determined on. If, however, he shall fail to attend, I shall deem it my duty, in view of the lateness of the season and the importance of the proposed treaty, to proceed, in conjunction with one of the agents of this superintendency, (whom your letter authorizes me to appoint,) to make a treaty without his aid. I shall regret the necessity of dispensing with his services, but I trust that, under the circumstances, my proposed course will have your approval. If it does not, this letter will reach you in time for a telegraphic despatch to be sent to this office, suspending operations.

In conducting these negotiations your instructions will be carefully considered and observed, and due weight will be given to the suggestions of late Superintending Agent Steele contained in the copies furnished. A strict regard to economy, both in expenditure of the treaty fund and the stipulations in favor of the Indians, will be observed. The sum which I am notified will be at my disposal is not large, especially when the unfortunate depreciation of the currency is considered, but the expenditures will be confined to it, in any event, and if they can possibly be contracted within smaller limits, the whole will not be expended.

But it is not possible, by any means, to include *all* the Indians referred to in the act of Congress, in *one* treaty. They are scattered over too vast a region to admit of their being all collected at one place, without military force and an expense far beyond that contemplated by Congress. The bands near the Klamath lakes are friendly with the whites, and have been for some time. Their desire to treat for the sale of their lands has been known for some time; but the bands north and east of those lakes have for two or three years past been making vigorous war upon whites, and upon the friendly Indians at Warm Springs. Their depredations have been so numerous and so disastrous, that three military expeditions have been sent against them during the past summer. Two of these entered their country from the north, and were commanded by Captains Drake and Curry. The third started from Fort Klamath, and was commanded by Lieutenant Colonel Drew.

I have unofficial information, which I deem reliable, that many of them are willing to come to terms, and submit to the control of the department. In the present state of affairs the government is expending, through the military department, several times the amount appropriated for treaties with them, every month.

If, then, the remaining ten thousand dollars of the appropriation can be used through the Indian department to bring them into peaceful subjection, economy alone imperatively demands that it be applied for that purpose, and the advantage of a state of peace over a state of harassing war would be of vast advantage to the pioneers who are endeavoring to develop that country, and will advance the interests of both the settlers and the government many times the amount of the appropriation.

There are many other things of interest connected with the Indian service of which I would like to speak, but I have already written enough to weary your patience.

I am, sir, very respectfully, your obedient servant,
A. R. ELDER,
United States Indian Agent, W. T.

Hon. A. P. USHER,
Secretary of the Interior, Washington, D. C.

OREGON SUPERINTENDENCY.

No. 6.

OFFICE OF THE SUPERINTENDENT OF INDIAN AFFAIRS,
Salem, Oregon, September 26, 1864.

SIR: In submitting the usual annual report upon the condition of this superintendency, it gives me much gratification to be able to state that all of the Indians who have ever been brought under the control of the department have remained friendly, have made material advances in agriculture and other civilized arts, and are now in such condition as will render further progress easy and rapid.

The reports of the several agents and subordinates which are herewith transmitted give detailed statements of affairs at their respective reservations. My remarks will be confined to matters of general application and the suggestion of a few measures, the adoption of which will, in my judgment, advance their interests without detriment to the whites or material increase of expense to the government.

PARTITION AND ASSIGNMENT OF LANDS.

The tribes located upon the Coast, Grande Ronde, Warm Springs, and Umatilla reservations have shown conclusively their capacity to learn the art of agriculture, and to support themselves by its practice. With the few exceptions of orphan children, decrepit old men and women, and those enfeebled by disease or dissolute habits, they have all, during the years 1863 and 1864, raised ample supplies of food for their needs, while many of them have had a considerable surplus, which has been sold when the location made the Indians accessible to the purchaser. The statistical returns of farming for 1863 from the several agencies, which were transmitted to your office in December last, show the amount of different crops raised, and will, I hope, be printed with this report. It needs no extended argument to show that Indians who are capable of producing these large amounts of valuable crops will be benefited by an allotment of land to each head of family, sufficient to enable that family to support itself, and, aside from the advantage to the Indian, of giving him a home which he has the assurance will not be taken from him, and which he has every encouragement to improve and cultivate; as a measure of economy to the government it is also desirable.

The annuities paid to the tribes with whom treaties have been made are diminishing, and will soon cease altogether by the terms of the several treaties. The government should endeavor to so instruct its wards that it will not, when that period arrives, be under the necessity of again appropriating money for their support, or permitting them to be turned loose upon the white settlements. I do not think it expedient to convey the allotments to the Indians in fee, so as to give the latter full control and power to sell. If this were done, a large part of them would soon be landless again, either through their own improvidence or

the knavery of dishonest speculators. The land should be held in trust by the government, and perpetual possession and all other rights incident to ownership should be guaranteed, except the right to alienate. These rights should also descend to the heirs of the original recipient upon his decease. I recommend that the superintendent, in conjunction with the agent in charge, be authorized to allot a tract of land, not exceeding eighty acres, to each family at Alsea, Siletz, Grande Ronde, Warm Springs, and Umatilla agencies, and that an appropriation of five hundred dollars for each of the agencies named be made to pay the expense of surveying and marking the tracts.

RESTRAINING INDIANS TO THEIR RESERVATIONS.

A large part of the labors of the agents, and their incidental expenses in this superintendency, are caused by the constant efforts of a part of the Indians to leave their reservations and live about the white settlements. If this is permitted, the Indians become an intolerable nuisance to the whites, and the effect upon themselves is most pernicious. They are always drunken and debauched, their women become prostitute, and all soon become infected with loathsome diseases. There are found in every community a few white persons who are vile enough to associate with them and desire their presence. These persons naturally acquire the good will of the Indians and have much influence over them. By enticing them to leave the reservation, notifying them of the approach of the agent, and assisting them to conceal themselves from him, they often defeat the object of the government of keeping the white and red races apart. Another class of citizens, who are respectable, and do not furnish them whiskey or debauch their women, thoughtlessly encourage their presence to secure their services upon their farms or at other labor. But once away from the reservations, and beyond the control of the agent, they unavoidably come in contact with immoral influences, and the effect is the same as if the motive was bad.

If a law could be enacted requiring the Indians to remain upon the reservations, and providing for their punishment (by withholding annuities or otherwise) if they absent themselves without the consent of the agent, and making it an offence for any white person to entice an Indian to leave, or to conceal or harbor him after he has left without permission, its effect would be most salutary, and result in a large saving of expense to the government. I therefore recommend the passage of a law embodying these provisions.

COAST TRIBES.

In my last annual report I set forth the reasons why a treaty should be made with these tribes, or the one made by General Palmer in 1855 should be ratified.

These reasons still exist with increased force. About half the Indians in the superintendency, who are under the control of the government, are located upon this reservation. Their number is about three thousand. Except the small tribe of Shasta Scoton, none of them are entitled to annuities, nor are appropriations made for their benefit. They were induced to remove to the reservation by late Superintendent Joel Palmer in 1855, and a treaty for the purchase of their lands concluded. The Senate failed to ratify the treaty, and they have consequently never received anything under it. But their part of the stipulations have all been complied with. They gave up their lands, and they have since been occupied by whites. Common justice requires that some provision be made for them. They have no means of procuring clothing, are not in reach of any market where agricultural products can be sold, and they are consequently discontented, and eager to leave the reservation whenever they can elude the vigilance of the agent. I still think, as I expressed it in my report for 1863,

tions, a permit to take oysters, by paying a stipulated sum for the benefit of the Indians, has been given. It is due to the people of the counties named to say that they have uniformly respected the authority of the agent, and have refrained from violation of the law. But some persons from California have been less regardful of their duty. One Captain Hillyer has been for more than a year and a half engaged in repeated and pertinacious attempts to evade and defy the authority of the department, by engaging in trade, erecting houses, taking oysters, tampering with Indians, &c., &c. The conduct of himself and the men in his employ became so outrageous that Agent Simpson, after repeatedly ordering him to leave, was compelled to call upon the military for assistance. Lieutenant Herzer arrested him and ejected him from the reservation; but upon application of Hillyer's friends at San Francisco to General Wright, Lieutenant Herzer was ordered to release him, and to "not interfere with persons engaged in legitimate traffic" again. Upon learning the real facts, General Wright immediately countermanded his hasty order; but, in the mean time, Hillyer had filled his vessel with oysters and sailed for San Francisco. Hillyer commenced proceedings in equity, in the court of the 2d judicial district of Oregon, to enjoin Agent Simpson, the military officer, and myself, from interfering with him any further. The hearing of the case was deferred to the next November term of the court. Within a few days Hillyer has returned, bringing with him a party of fifteen armed men, who defy the authority of the agent, and express a determination to reside upon the reservation. Measures will be taken to promptly expel them at all hazards.

The Coast reservation is a very large tract, containing about two thousand square miles, a large part of which is so rough and inaccessible that it will never be of any value to either whites or Indians. A few small valleys at wide intervals afford fertile land, and are amply sufficient to supply the wants of a much larger number of Indians than are now located upon the reservation. The navigation of the bay, and the right to sufficient land along it for navigation and transportation purposes, may be conceded to whites without detriment to the interests of either the government or of the Indians. If the treaty which I have recommended is authorized, as I trust it will be, a provision can be incorporated into it which will give to the whites sufficient privileges, and at the same time be so guarded as to protect the rights of the Indians.

THE UNTAMED TRIBES OF SOUTH EASTERN OREGON.

The vast region, comprising about one-half of Oregon, situated east of the Cascade mountains, and south of the territory purchased of the tribes near the Columbia river, is occupied by roving bands known by the different names of Snake, Shoshonees, Bannack, Klamath, Modocs, &c. Their intercourse with whites has always been of a hostile character, and their depredations upon life and property in the last ten years have been enormous. My last annual report gave a detailed account of them.

The last Congress made an appropriation of twenty thousand dollars for the purpose of making a treaty with these tribes. One half of this amount has been placed to my credit, and under the instructions contained in your letter of 22d June last, having communicated with Superintendent Austin E. Wiley, of California, I went to Fort Klamath, held a conference with the chiefs and such of the headmen as could be collected upon short notice, and made the preliminary arrangements for holding a council with the Klamath and Modoc tribes on the 8th of October next. I found those bands willing to come under the control of the government, cease their predatory habits, and remove to a reservation. I anticipate little difficulty in making a favorable treaty with them, and I also hope that some of the bands further east may be induced to come in at the same council. From such information as I have been able to gather from the Indian

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OREGON SUPERINTENDENCY.

OFFICE SUPERINTENDENT INDIAN AFFAIRS,
Saginaw, Michigan, December 10, 1864.

Salem, Oregon, December 1, 1901.

Sam: I have the honor to report to you, in compliance with your instructions, that, in compliance with your instructions of June 22, last, I visited the tribes mentioned in August last, and held a preliminary conference with them upon the subject of the proposed treaty. An account of that conference was submitted to your office with my last annual report for 1864, and it is not necessary now to refer to it. Superintendent A. E. Wylie, of California, who was authorized to act in conjunction with myself as commissioner to conduct the negotiations, was appointed Agent for the purpose, and I therefore (as instructed by you) appointed Agent for the purpose, and I therefore (as instructed by you) appointed Agent for the purpose, and I therefore (as instructed by you) appointed Agent for the purpose.

In the latter part of September I again went by the way of the Dalles and Warm Spring agency. Agent William Logan accompanying, to Fort Klamath arriving there on the 9th of October, and found a large number of Indians assembled, which number was soon increased to 1,071, all told.

OREGON SUPERINTENDENCY

The wishes and instructions of the Government were very carefully and fully explained to the Indians, and they exhibited a complete willingness to become subjected to the United States, and cease deprivations upon the citizens thereof, in accordance with the treaty. To the stipulations of that instrument I invite your careful attention. Its provisions are, in some respects, similar to those of other treaties heretofore negotiated with tribes in this State, but they differ from them in calling for the expenditure of smaller amounts of money, and in subjecting the Indians to a somewhat stricter control of the Government.

The country ceded by the treaty of 15th October is of vast extent, as you can see by reference to the map, say 15,000 to 20,000 square miles, and presents great diversity of topography, soil, and climate. Parts of it are barren mountains and sage plains, of no agricultural value, but probably possessing great mineral wealth. Other portions are valuable for grazing purposes, producing a large amount of nutritious grass, but containing little or no land fit for cultivation. The valleys of the Klamath lakes, Rebut lake, Goose lake, Lost river, and seven others, have much fertile soil. Some portions are well supplied with excellent timber, while in other parts there is very little. The climate of the whole region is dry, differing widely in that respect from the coast counties of Oregon, and while some parts of it enjoy a mild, equable temperature in winter, the cold in other parts is severe. Its convenient situation with reference to the mines of Idaho, eastern Oregon, and Washoe, will always assure to settlers who may locate therein a favorable market for their products.

The reservation designated by the treaty for the use of the Indians includes, besides much country almost a desert, the Upper Klamath lake or marsh, which affords great supplies of edible roots and seeds for the Indians, and much fine grazing land; and it gives them access to the Middle lake, and the Klamath or Williamson river, connecting the two, for fishing purposes. It also takes in enough arable land of good quality near the mouth of Williamson river to support all the Indians which are ever likely to be placed upon it. The more extensive valleys upon the Middle and Lower lakes are not embraced within its limits. In determining the bounds of the reservation, I sought primarily to secure a tract of country which had local advantages for supporting a colony of Indians by industrial pursuits. I think this tract will satisfy this, in my judgment, the greatest demand. A second object, and one scarcely less important, was to so locate the tribes their separation from whites would be as nearly complete as possible. Its reservation is not likely to be traversed by any important line of travel, and but a small portion of it will be covered by routes for settlement.

I consider it, in every respect, well adapted to the purpose for which it was designed. I recommend that the treaty be sent to the Senate for ratification.

I respectfully recommend that we embrace the largest area of Indians ever included in one treaty in Oregon, that it covers the expenditure of country ever purchased at one treaty, and that it involves the expenditure of a smaller amount of money than any other important treaty. Upon its ratification there can be no objection to its confirmation by the government. Upon its ratification the necessity for an additional agent will be immediate and apparent, and no delay should be made in appointing one. At the council the Indians unanimously concurred in the desire that Lindsay Applegate has been and no delay should be made in appointing one. Mr. Applegate was familiarly known to the Indians, is well known to the Indians, is familiar with their country habits, and character, and his appointment would, in my opinion, be a discreet one.

The ratification of the treaty certain appropriations will be necessary, and an estimate of what is necessary.

Upon the ratification of the treaty.^{*} An estimate of what it would cost to carry into effect its provisions. In regard to the expense according to my judgment, is here with transmitted. At this time, that only one-half of negotiating this treaty, I will only remark, at this disposal to be expended, of negotiating (\$10,000) was placed at my hand, leaving the appropriation portion of this sum remains on hand, fourth quarter 1864. Not and that a considerable portion of this sum remains on hand, fourth quarter 1864. Not details to be transmitted with my accounts for fourth quarter 1864. Not details to be transmitted with my legal-tender notes, worth only forty-five cents on the dollar, the total disbursements are less than any previous years.

* The time of holding the council,

This will have the effect to quiet them and convince them of the good faith of the Government.

After the conclusion of the treaty, while the Indians were engaged in agriculture, I remained at Warm Springs, Agent Logan and myself, living in accordance with the provisions of the treaty. One day, while I was engaged in the examination of the party, came suddenly upon two Indians, who immediately endeavored to escape to the bush. They were stopped, however, and upon examination we found them to be Snakes, of Pauline's band. I immediately caused the party to encamp, and sent out scouts in search of the camp of the main body. They were found late in the day upon Mill-lick creek, about fifteen miles east of where that stream empties into the Des Chutes. Three men, three women, and two children were captured and brought into camp. They were assured that they should not be harmed, and I was congratulating myself that I had at last the long-desired opportunity of communicating with the hostile Snakes, when the five men suddenly made an attempt to seize our guns which were standing around some trees in camp. We were compelled to commence firing upon them at once, and three of them were killed, the other two escaping, badly wounded. One of these I have since learned died that night, while the other escaped to Pauline's camp and recovered. One of the women proved to be the wife of Pauline, the celebrated war chief of the Snakes, who has been the leader in the war which has been waged upon whites for so many years in that region. I brought her with the other women and children to Fort Vancouver, and turned them over to Brigadier-General Alford for safekeeping. I rely much upon them in bringing Pau-

Pauline himself has since come in to Fort Klamath, in response to my invitation and assurance that he should be permitted to depart unharmed. Captain Kelly, in charge of that post, delivered to him my message, and received one from him to me, to the effect that he was tired of war and ready

No. 15.

ASHLAND MILLS, OREGON,
August 6, 1866.

Sir: I respectfully submit the following, my first annual report as United States Indian sub-agent:

I entered upon the discharge of my duties in the Klamath and Rogue River region about the 25th of September, 1865, under instructions requiring me to exercise supervision over the Klamath and Modoc tribes, the several tribes of Snakes, and all stragglers lurking around the mountains of southern Oregon.

On the 15th October ensuing I set out for the lake country, in company with the interpreter of the sub-agency, appointed agreeable to your instructions on the 12th of that month, to attempt to conclude a treaty of peace with Howlock, principal chief of a tribe of Snake Indians not treated with, who was then said to be in the vicinity of Sprague River valley, and anxious to enter into a treaty of amity with the United States.

Having sent out a deputation of Yahooskin Snakes, together with Pauline, chief of Noll-pah-po Snakes to see Howlock, they returned reporting that Howlock declared himself for a continuation of the war, and attempted to persuade Pauline to join with him. The prospects of concluding a treaty with Howlock were hence blasted, and after remaining some time on the reservation, examining into the state of feeling among the different tribes and inquiring into their condition, I returned to Ashland.

Pauline appeared at that time desirous to carry out, on his part, the provisions of the treaty made with his tribe on August 12, 1865, and as a proof of his sincerity, offered to accompany, with his warriors, the military, if an invasion of Howlock's country should be made from Fort Klamath. Pauline, however, brought but few of his people on to the reservation.

On December 18, I started for Fort Klamath to attend to the issuing of subsistence to the Snake Indians and to examine into the condition of the other tribes, and on arriving there I issued to Pauline such an amount of shorts and flour as I deemed would supply him and his people until spring. At that time I found the Klamath and Yahooskins generally quite well enough provided with dried fish, &c., to subsist them during the remainder of the winter, but to quiet their loud clamorings for flour, I made some moderate issues to the chiefs and, through them, to some of their subjects who seemed rather woody. I became convinced at this time of a growing disaffection among the Indians, on account of the tardiness of the government in fulfilling treaty stipulations, and I gave it as my opinion, in a communication addressed to your office, that something should be done by the government, as soon as possible, to inspire the Indians with proper confidence in it.

In order to give the Indians some tangible evidence of the government's intention to fulfil its promises, as well as to ascertain the variety of garden vegetables and cereals that could be produced on the Klamath reservation, as far as possible, considering the limited amount of funds provided for colonization purposes, in obedience to your instructions, I commenced making arrangements towards the close of April last to proceed to the reservation and put in a crop there, calculating that early in May it would be possible to cross the Cascade mountains with a wagon.

Having made necessary purchases and having employed a person to assist in driving the team and also in ploughing and planting, I left Ashland on May 1, and followed the old emigrant road without difficulty, except from fallen timber, as far as the emigrant crossing on the Klamath river, where I changed my course from almost due east and pursued as far as Sink river, in a northeasterly direction, a route sometimes followed by wagons on their way to the gold region of the Columbia. At Sink river I changed my course a little west of north through the mountains bordering Upper Klamath lake on the east, and after travelling through a pass in the mountains never before traversed by wagons, but decidedly practicable, on May 12 I arrived at the head of navigation on the lake, about eight miles south of Fort Klamath, four miles north of Williamson river, and twenty-five from Ashland, and at the point I decided to commence operations.

From this place, which is called Ko-was-ta by the Indians, level, fertile plains extend off towards Fort Klamath, bordered on the east by splendid groves of timber and crossed by beautiful streams of water, clear as crystal. This location for an agency, in my estimation, could scarcely be excelled. Fine timber, stone and wild meadow lands abound; the climate is far milder than that of Fort Klamath, but a few miles above, and it is near enough to that port and to the Indian village on Williamson river for any required purpose. Three miles above on Ko-was-ta or Crooked river there is as fine a mill site as I have ever seen, and from the rivulet just mentioned all the tillable land below could be easily irrigated if it should require it.

Ploughing was commenced soon after arriving at Ko-was-ta, and by the 31st of May sixteen acres were put in, seven in wheat, oats, bearded and bald barley, seven in corn and beans, and two in turnips, carrots, peas, potatoes, artichokes and onions. By the assistance of the Indians, there was also built a good substantial log house, and the Indians on-

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was to obtain permission to remain 40 or 50 miles from the agency, in Sprague River valley, where they could communicate with hostile parties of their people, and also to secure promise of winter supplies. They professed friendship, said their hearts were good, and they only asked winter subsistence and permission to remain in Sprague River valley. I told them I would require them to come down to Council Grove, near the agency, where they could be cared for and protected. This they agreed to do, and again assuring me that they talked with a "straight tongue," the council closed; and on the night succeeding they left the reservation, taking with them some horses and guns belonging to the Yahooskins and Klamaths, and a train sent out by Captain Sprague to convey their property to Council Grove returned, and a hostile force was sent out instead.

The Klamaths had for some time been expecting a raid into their country by the Snakes, and now became more fearful than ever. Some Snake spies were actually seen on the confines of the reservation, some horses were stolen from the Modocs, and I became convinced that danger was imminent. Early in October I commenced the fortification of the agency buildings, which were completed. I made a requisition on Captain Sprague for four men to garrison the fort thus constructed. The men were readily furnished, in accordance with my request, and some arms were also provided for friendly Indians to use in case of extremity; and the Indians, convinced of a determination to continue operations at the agency, were much encouraged. Up to the falling of snow, in December, the plow continued running, and twenty acres of wheat were sown. In December some sickness prevailed, and a few Klamaths died.

With the heavy fall of snow towards the close of this month the mountains east were blocked, and the Indians ceased to apprehend any danger from the Snakes. About this time some excitement was occasioned by Chief Mashen-kasket, of the Yahooskins, attempting to depose High Chief La Lakes; but the revolution was stayed and harmony again secured. Early in January the lake became frozen, and remained so until the 1st of April, during which time the Indians suffered much for the want of suitable and a sufficient number of blankets, and towards the close of February and until the middle of March there was an actual want of provisions that occasioned much suffering. Issues of shorts from the small supply on hand were made from time to time; but this was not adequate to the demand. About the 15th of March fish commenced running in Lost river, in greater numbers than before for many years, and the Indians flocked thither, leaving the old and decrepit and most needy behind, to whom I issued most of the remaining flour. Early in April operations were commenced on the farm. Five acres of the fall wheat having been preyed upon in the fall by birds and squirrels, proved to be very scattering, and was ploughed up and turnips and carrots substituted. The oxen came out of the winter in excellent condition, the hay having proved to be a splendid article, and were kept busy until the 1st of June, at which time planting ceased, with forty acres planted, as follows: Wheat, 17 acres; pearl barley, 10 acres; turnips, carrots, beets, potatoes, parsnips, cabbage, lettuce, &c., 13 acres.

The crops now look well. Everything planted is up beautifully, and I confidently expect a fine harvest. The crops have a decided advantage over those of last year, having been put in nearly a month earlier, and hence of course will mature before the frosts of autumn are severe enough to bite or rust.

The Modocs are in their own country, bordering Clear lake, and, like the Klamaths, Yahooskins, and Snakes, are engaged in collecting roots, which abound throughout the country. The Indians, being fearful lest the Snakes make a raid into their country for purpose of pillage and plunder, are scattered over the reservation in large parties, each strong enough to make quite a resistance in case of attack.

The southern portion of the Klamath country, on the old reservation, is

reach the white settlements. The Snakes killed several Indians, took some prisoners, and drove off a large amount of cattle and horses. These raids have been repeated every year, although never so extensive as the one described above, and the agency is in constant dread of them. Military protection has sometimes been afforded, and at other times been withheld.

If the operations against the Snakes are successful the chief obstacle in the way of this agency will be removed.

The buildings at this agency are commodious, substantially built, and in good repair. No expenditure is needed upon them beyond what can be done by the regular employes. The mills are of good quality, and ample for the demands upon them. A day school is kept at the agency, of which the teacher, Mr. Gillette, gives full report. I shall refer to it before closing this report.

KLAMATH AGENCY.

This agency is located on the reservation of the same name, and includes the whole of the upper and borders on the lower Klamath lakes. It is a high region, subject to frosts in summer, intense cold and sometimes deep snows in winter. Parts of the land included (which, in the aggregate, is 1,200,000 acres) are utterly barren, entirely incapable of producing anything of value, while other parts have rich soil, and produce well such crops as the cold and dry climate will allow. Timber of good quality is abundant. The lakes, and the small streams putting into them, abound in fish of the finest quality, while the swamps about their borders produce a number of varieties of edible roots. The lakes also produce abundantly an aquatic plant called wo-kus, belonging to the natural order *nymphaeacea*, the pericarp of which is about the size of a pint-cup, and filled with seed, which are very nutritious.

These articles, mainly, the fish and wo-kus, formed the chief articles of food for the Indians until the advent of the whites. They have begun, under the direction of Sub-Agent Lindsay Applegate, the cultivation of the soil, and preparations are now making to enlarge the operations under the treaty of 1864, ratified in 1866. If the crops are as successful as Sub-Agent Applegate thinks they will be, we will be able to report next year a handsome amount of agricultural products. I must say, however, that some very limited experiments, made by the military officers at Fort Klamath, which I had opportunity to examine, do not warrant quite so sanguine a view of the future production as that gentleman has taken. But there is no doubt of an ample supply for the use of the tribes located there.

The tribes located at Klamath reservation are the Klamath, Madoc, and Yahooskin Snakes. They number about 2,500 souls. They are peaceable, and not disposed to be vicious, very desirous of engaging in agriculture, &c., and under good management will become prosperous. A few who have lived near the mining towns in California and southern Oregon, or near the military post at Fort Klamath, are debauched and diseased, perhaps past redemption, but of a majority of them I can repeat the remark I made once before, that "they are as good raw material out of which to make civilized Indians as any on the continent." I might, with propriety, add that they will acquire the vices of white society quite as readily as any other.

INDIANS NOT LOCATED AT AGENCIES.

There are two classes of Indians not located at agencies, to wit:

First. The Indians scattered along the Columbia river, those on the upper branches of the north Umpqua, a small band on the Clatsop Plains, and the Nestuccas, Salmon River, and Tillamooks, numbering in all not far from 1,200 souls. They are in immediate vicinity of white settlements, in fact intermingled

Dalles to the reservation be improved, as in its present state it is impossible to travel over it with safety. He also asks that additional buildings be erected for the employes.

Grand Ronde agency, situated on the western edge of the Willamette Valley, adjoins the Coast reservation, and is the oldest agency in the superintendency, embracing a tract of 3,388 acres. The Indians in charge, numbering about eleven hundred, are composed of the fragments of numerous tribes, and are those who came earliest into intercourse with the whites. They have made greater progress than any other of the tribes in the superintendency, and their condition is one full of promise. They are very anxious to have the lands which are being cultivated by them surveyed, and allotments made to the heads of families. This, of course, no doubt, be gratifying, and stimulate them to greater diligence in making improvements in homes which they can then have the satisfaction of contemplating as their permanent possession. Two schools are provided by treaty stipulations for this agency, the Umpqua day-school, and another conducted on the manual labor principle. Only one is now in operation, for want of means to carry on both successfully at the same time. The agency houses and mills are in bad condition, no money having been expended upon them since they were built; they should be repaired or new ones erected. There are about three hundred Indians living along the coast from the mouth of the Columbia River to that of the Siletz, utterly demoralized, who should be brought upon the reservation. Altogether, the agency and its results demonstrate the practicability of the red man being reclaimed from his savage state.

Siletz agency is located upon the Coast reservation, a tract of land selected in 1855, for Indian use and occupation, by Joel Palmer, superintendent of Indian affairs, and confirmed by an executive order in 1856 in extent one hundred miles north and south by twenty miles in width, and was intended for a home for all the tribes along the coast from the Columbia River to the State line of California. The Indians in charge, being remnants of fourteen bands or tribes, number about twenty-three hundred, and have no ratified treaty with the government, that of 1855 never having been definitely acted upon, although attention has been called to the necessity thereof, or of some other arrangement for securing these Indians in the permanent occupation of their present homes. A good work is being effected among them; they have abandoned Indian habits and customs, and are eager to adopt the usages of the whites, asking that they may be supplied with agricultural implements, horses, and other requisites to help them in their endeavors to become civilized. Their manual labor school, owing to the limited means afforded for its support, has been changed to that of a day school, which has had but indifferent success.

Alsea sub-agency is also located upon the Coast reservation referred to above, about eight miles below the mouth of the Alsea River. The tribes in charge, who are all parties to the unratified treaty of 1855, are the Coosaws, Umpquas, Alseas, and Sinselaws, numbering about five hundred souls, and are in the main in a prosperous condition, being industrious in fishing and cultivating gardens. They are without educational advantages for their children, no provisions having yet been made for giving them a school. The fewness of the Indians does not seem to justify the keeping up of this agency, and it is suggested that they should be concentrated with those of the Siletz, where they could have the benefit of a school, medical treatment, and instruction in the useful arts. This would bring the Coast reservation Indians more compactly together, and allow

Klamath sub-agency, established under the operations of the treaty of October 16, 1864, with the Klamath and Modoc tribes of Southern Oregon, and embracing lands bordering on the Klamath lakes, contains about 1,200,000 acres of land, mostly barren, a comparatively small portion of the tract being fertile, and producing only such things as the cold and dry climate will allow. The lakes, however, afford an abundance of fish of the finest quality, and a very nutritious water-plant called *W-ko-kus*. These were the chief sources from which the Indians drew their subsistence until brought in contact with the whites, from whom they have since learned to depend somewhat upon cultivating the soil (for example). The tribes in charge are the Klamath, Modoc, Wollpahpe, and Yahooskin Snake. All of the first-named tribe are upon the reservation, and a part only of the others, numbering in all about fifteen hundred. The main body of the Modocs remain off, and cannot be got on without military assistance. Some of the Indians work as farm hands, and show a disposition to adopt the manners and laws of the whites. This should be made a full agency, as at present it is perhaps of more importance than any other in the superintendency, on account of its recent establishment, and in view of the fact that it includes the care and management of a large number of Indians of the wildest character. With the exception of a part of the Modocs these tribes are peaceable. The agent indulges in the expectation that through the influence and example of Wollpahpe Snakes the remaining bands of Smokes in the southeast part of Oregon may be led to settle upon a reservation.

Besides the tribes here mentioned as being provided with reservations, there are others within the bounds of this superintendency, scattered along the Columbia and other rivers, in the immediate vicinity of white settlements, who have no such provision made for them, not parties to any treaty, and represented to be as thoroughly degraded as they can well be. They are estimated to number about twelve hundred. Measures should, it is suggested, be taken to place them upon a reservation. In addition to these are others, regarded as hostile, of the Snake or Shoshone nation, who have a wide range, extending from Nevada and Utah to Oregon, Idaho, and Montana, where they are known by different names. They are charged with having committed many murders and depredations of late years, and seem to be beyond the reach and control of the Indian Department.

CALIFORNIA.

Under the act of Congress passed in 1864, it was provided that not more than four reservations should be set apart for the Indians of this State, (formerly there were more,) and two superintendents. There were accordingly established those known as the Round Valley, Hoopa Valley, Smith River, and Tule, the last two-named being in extent about thirteen hundred acres, and leased from settlers. Smith River has, since the date of the last annual report, been abandoned, and the Indians removed to Hoopa Valley. The Indians in this superintendency are reported as generally quiet, and those on reservations obedient and willing to labor for their support and improvement. They are not in treaty relation with the United States. Negotiations were entered into with many of the tribes in 1851, by commissioners authorized for the purpose, but the treaties then effected were never confirmed, the Senate rejecting them on the ground that the United States, acquiring possession of the territory from Mexico, succeeded to its rights in the soil, and,

yet completed, is a very creditable structure, 110 feet long, 26 feet wide, and fills a long-felt want. The old log commissary still stands, a memorial of early days, but it has been condemned and will soon disappear. If the several residences occupied by the carpenter, sawyer, farmer, etc., constructed some thirty years ago and repaired a little from time to time, could have plain but convenient cottages substituted for them, the change would add greatly to the comfort of the employees and to the neatness and sanitary condition of the agency. Having a splendid water power contiguous to the school at Klamath, I think we should have, if practicable, an electric plant, which would afford us a safe and convenient system of lighting both school and agency buildings at an inconsiderable expense.

The season having been unusually dry and frosty, it has been a very unfavorable one for farming operations. Although a large acreage was sown, the Indians will realize a very light crop. As the harvest has not yet been gathered, I am not yet able to state, even approximately, what it will be. In this connection, I would state that the fine fertile lands lying between Williamson River and Modoc Point, embracing an area of about 20,000 acres, could probably be irrigated at an expense of less than \$5,000 and would provide the Indians with one of the richest areas for either grain or grass in southeastern Oregon. Lying as it does near the shore of Klamath Lake and somewhat distant from the Cascade chain, it is less frosty than other portions of the reservation and is a favorable locality for either cereals or vegetables.

The lowering of Klamath Lake by blasting out a portion of a rock ledge at the head of the Klamath River (locally called Link River), which is the outlet of the lake, is worth considering. It is thought that an expenditure of less than \$5,000 would lower the lake 2 feet without interfering with navigation, thus reclaiming vast areas of meadow land on the reservation, especially about the mouth of Williamson River. Doubtless this improvement would increase the acreage of meadow land of the agency farm sufficiently to enable us to make more than 1,000 tons of hay annually.

The court of Indian offenses holds its sessions alternately at this agency and at Yainax Boarding School or subagency. The judges are quite intelligent men, are careful in their investigations of cases, reasonably equitable in their decisions, and relieve the agent of the trial of many charges, a large percentage of which are of rather a trivial character. I think the scheme is a very good one and one that may be largely educational if properly managed.

The regulations with respect to roads have not been fully observed, and, notwithstanding that our usually level country possesses many naturally fine routes of travel, there are some roads much needing intelligent and judicious work. This matter we promise to take up at as early a date as practicable and organize our force for active work. During the current year we hope to make a respectable showing in the improvement of our roads.

The Klamath Reservation possesses many attractions for the fisherman, having in Spring Creek and some other pure cold tributaries of the Klamath lakes some of the finest trout streams in the world. Tourists have often been permitted to camp for some weeks at a time on these streams for recreation and the pleasure of angling, but this they have not been permitted to do without the consent of the Indians and agent, and, so far as I am informed, no such persons during the past year have abused the privileges extended to them by imposing upon Indians in any way. Such persons are given to understand that the exclusive right to take fish on the reservation was guaranteed to the Indians by the treaty of October 14, 1864, and that no one not belonging to the reservation can indulge this privilege except through the sufferance of the tribes. No angling is permitted except with a hook, baited with insects, real or artificial, and no nets, spoons, or explosives are allowed to be used by fishermen. It is true, however, that fish are less abundant than formerly in our trout streams and that an important resource of the country is not what it once was, either as a source of food or pleasure. The establishment of a fish hatchery on Spring Creek or some other eligible stream in the Klamath region would be worth considering by the proper authorities.

At this date haying is still in progress at the agency and at many other points on the reservation. At Yainax we have put up 115 tons for the school stock, an ample amount for that place. Here we expect to put up 200 tons, although delayed by swampy ground. On Sprague River, in the vicinity of Yainax, the hay crop is very light, on account of the dry season, and it is doubtful if the Indians get hay enough to feed their stock this winter, unless it should prove a very mild one.

Respectfully,

O. C. APPLGATE,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

thousand inches of water each, are the marvel of all newcomers, and afford, in many localities, excellent water power and convenient means of irrigation. The clear, cold streams still abound in trout of several varieties, although the great fame of Spring Creek, Williamson River, and other streams have attracted many anglers from afar whose skill has perceptibly reduced the number of fish which these beautiful streams afford.

The millions of waterfowl which in early days swarmed about our lakes and marsh lands are no longer seen in great numbers, and the prairie chickens and sage hens, which abounded in the uplands, are almost extinct. This change is perhaps partly due to the fact that the Indian is himself a fine marksman and possesses improved arms, but more to the merciless greed of the white hunter, who, in localities adjacent to the reservation, made for many years unceasing war upon the feathered tribe.

We no longer permit shooting by tourists and travelers on the reservation, and allow no fishing for commercial purposes and only temperately for use and sport by visitors. The fish afforded by these streams is a valuable resource to the Indians, and as the reservation furnishes some rare localities for the purpose the Government would confer a great favor upon our people, not only upon the Indians who reside upon the reservation, but to the numerous white settlers of southern Oregon and northern California upon the Klamath River, by establishing fish hatcheries upon the sources of that great stream upon this reservation. Spring Creek, which rises at once from the earth with a volume of thousands of inches of clear, cold water, would probably afford an ideal locality for a fish hatchery, and I earnestly hope the matter of establishing a hatchery there will have your attention.

Irrigation.—A matter of great interest here has not had much attention this summer. Under the authority granted for a preliminary irrigation survey last year, about five months' time was spent by Engineer Eugene B. Henry, with two assistants, in this work. The first ditch surveyed was to convey the water of Crooked Creek from its source, within about 5 miles of the agency, across the allotments of a number of Indians, to the school and agency farms. About 3 miles of this ditch was opened without delay by the Indians interested and with such assistance as we were able to furnish from the agency, and the result has been almost phenomenal in the increased productiveness of the Indian allotments through which it proceeds. This initial work in irrigation has proven an important object lesson to the Indians, and will assist us greatly in our opening up of more expensive and elaborate canals upon the reservation.

The conflicting interests of the various allottees has caused no little contention, even among the few concerned in this rather unimportant initial enterprise. This suggests the importance of an organization of interested parties upon a plan of mutual cooperation which shall not disregard the rights of any individual, and which shall combine all in labor for the common benefit. The work of extending the irrigation surveys was not continued this year, although the system is far from complete. I suppose it is the plan of the Department to proceed with the work of construction as soon as practicable, postponing the work of making additional surveys until ditches already surveyed shall be completed.

Among the irrigation enterprises which have not yet been initiated is the one which contemplates diverting from its old channel the Yamsay River, the principal affluent of the Klamath marsh. The water of this stream could be carried in ditches around the bases of the hills bordering the dry prairies adjacent to the marsh, thus making productive many thousands of acres of fertile uplands, while the withholding of the water from the lowlands would reclaim vast areas of the swamp land, now too wet for use, and convert it into profitable meadow.

Under date of February 16, 1900, I submitted Mr. E. B. Henry's report of his preliminary irrigation survey, with estimates of means required to commence opening the three principal ditches surveyed by him, upon the assumption that as there is much difficult work to be done in opening these principal ditches, viz, the Syacan River, Williamson River, and Modoc Point ditches, the Indians could not be depended upon to do more than half the work of construction without compensation. I am of the opinion, however, that those who are interested in each locality can be so combined and led that they would do half the work of construction, even upon the most extensive canals. Mr. Henry's report was submitted under date of December 14, 1899, with a letter of my own somewhat in detail, and estimates of the expense of commencing construction work were submitted to your office February 16, 1900. I quote as follows from my letter of that date:

The plans heretofore submitted will show the location of the important canals. I am hoping that the Indians will prove so appreciative of the importance of this work that they will voluntarily do half the construction work on the larger canals and practically all the work on the less important ones. Mr. Henry's estimates have been made with this idea in view. Assuming that

The Klamath Republican of March 21, 1901 reports:
"Those who like to see fish, immense congregation
of them, all alive and running, and most of them
weighing from 2 to 6 pounds apiece ought to be
here now. Five minutes walk from Main street
brings one to the shores of the Klamath rapids,
where every little nook, bay and tributary creek
is so crowded with mullets that their backs stick
out of the water. Ordinary fishing with hooks and

~~spears or even nets is too slow to think of. With
a pitchfork or with naked hands a backload may be
thrown out in five minutes.~~ These enormous droves
of fish can now be seen not alone here, but in the
rivers and creeks generally throughout the county.
Mulletts, rainbow trout and salmon -- splendid fish,
giants of their size and apparently anxious to be
caught. This phenomenon will last a month, and
until their egg-laying camp meeting is over with.

After that, the herd of fish will be distributed
over a wider space and will be in plenty the year
through. By the way fortunes could be made here
in catching fish and sending them in refrigerator
cars to markets at San Francisco and Portland.
As soon as refrigerator cars can get here, the
fish business will be one of the big things of
the county." (As Told to Me ... by John Yaden,
February 3, 1948," KCHS, Klamath Echoes Vol 1,
#2, 1965, p. 21)

curdling war whoop, they are merely given to enliven the occasion, and are valuable, I think, in suggesting to the young the wonderful advancement made in a few years, under reservation training, from active savagery to a position well advanced toward practical civilization.

In nothing else I think is their progress more significantly shown than in their faithful and serious observation of Decoration Day. Then nearly all the work of the reservation is suspended for a few days in advance of the day, all cemeteries are carefully renovated, the fences are repaired, headstones are adjusted and painted, and everything is put in order as well as their limited means will permit, and the day itself is devoted to appropriate religious exercises and to the decoration of the graves. On these occasions I have been pleased to observe that the graves of men like Chief David Hill, who was always a leader in civilization and a noted ally of the whites during both the Paiute and Modoc Indian wars, have been carefully decorated and marked by placing the nation's flag over them.

The interest that has been taken in instilling into the minds of these people the lessons of American history has been of very great value. The Klamaths, the dominant tribe in this region and originally a warlike people who had, for centuries, to defend their favored valleys from the Paiute nomads who outnumbered them several times to one and who occupied a vast and semiarid region, were never, as a tribe, hostile to the whites. They were our allies in the wars with both the Paiutes and Modocs, and are now absorbing our civilization as readily as they joined with us against their hereditary foes. In this connection, I wish to say that the death of our gentle and noble President, the friend of all humanity, has had a profound influence upon the more advanced Indian people, who seem to have as fully appreciated the great loss to the nation as have many of their more favored white brethren.

The Klamath Reservation.—So much has heretofore been written about the topography and character of the Klamath Reservation that there is little need of again referring to it. Briefly, its diversified area aggregates about 1,865 square miles and its average elevation is about 4,500 feet. The climate is dry and healthful. The average rainfall is about 20 inches. The contiguity of the great Cascade Range, the higher elevations of which are covered for half the year with several feet of snow, adds to the coolness of the atmosphere, and summer frosts are frequent.

However, the volcanic soil of the uplands, as well as the alluvial lands bordering on the lakes and streams, is fertile and produces almost phenomenal pasturage for stock, making the entire reservation an ideal one for stock-raising purposes. Many localities are sufficiently free from frost to admit of the growing of vegetables and the cereals. Domestic grasses, such as timothy, redtop, and clover, can be grown with great success wherever there is sufficient natural moisture or the lands have been improved by irrigation. Some extensive sandy districts, as the Modoc Point country, for the improvement of which a ditch is now being constructed, and the tract of some 30,000 acres of the Sprague River Valley, contiguous to the Yainax subagency, which it is proposed to irrigate from the Siacan River, will doubtless grow in perfection the great forage plant lucerne, or alfalfa, thus making profitable an area which now only yields in perfection the useless artemisia, or sagebrush, and affords generally a rather scant pasturage.

The scenic beauties of the reservation, with its immense springs of as pure water as there is in the world, its beautiful groves of cottonwood and aspens, its luxuriant natural meadows, and its thousand square miles of pine forests, with game and trout in abundance, has always made it a favorite resort of the tourist, the hunter, and the angler. Crater Lake, that great natural wonder, 2,000 feet deep, 6 miles in diameter, and filling half full a chasm 4,000 feet deep in the bosom of an ancient volcano, is only a few miles from the reservation and attracts many tourists from all parts of the world, many of whom linger for a time along the pleasant streams and grassy lake shores of the reservation.

During the last year not a single dispute has arisen between the Indians and the great number of white people who have visited the reservation. The white people have respected the rights of the allottees and have yielded with a good grace to the rather strict adherence to the regulations which we have exacted as to hunting and fishing.

Population.—The annual census just completed does not differ materially from that made last year. The figures are as follows:

Males	533
Females	622
	— 1,155
Males above 18 years of age	293
Females over 14 years of age	495

Fourth of July money by peddling their vegetables, besides treating the entire school to radishes and young onions. The girls had equal success with their flower gardens.

Official visits.—Superintendent Reel and Supervisor Chalcraft visited the school during the vacation months, and the latter returned in the winter while school was in session. Both of these visits were enjoyed by us. We were especially gratified by the comments on the homelike atmosphere of the school.

Employees.—The employees of this school without exception have performed good and faithful work during the last year, and have contributed their full share toward the successful administration of its affairs.

Conclusion.—I wish to express to the honorable Commissioner of Indian Affairs and to all officers of the Department my sincere thanks for their kind assistance and support in all matters pertaining to the management of affairs at this school.

I have the honor to be, very respectfully,

Dr. ANDREW KERSHAW,

Superintendent and Special Disbursing Agent.

THE COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SCHOOL SUPERINTENDENT IN CHARGE OF KLAMATH AGENCY.

KLAMATH AGENCY, OREG., *September 25, 1903.*

SIR: I submit herewith my fifth annual report as United States Indian agent at this agency, for the year ending June 30, 1903. At that date the agency régime terminated after a period of thirty-eight years, my father, the well-known pioneer, Lindsay Applegate, having been the first agent, commencing his period of service in June, 1865. I began service as his interpreter and clerk October 12 of the same year, before the ratification of the Klamath treaty of 1864 and before there were any white settlers east of the Cascade Mountains in Oregon. Fort Klamath and several other military posts in southeastern Oregon were the only points occupied by people of our race.

The several tribes who were parties to the treaty of October 14, 1864, Klamaths, Modocs, Paiutes (Snakes), and the subsequent Snake treaty of August 12, 1865, relinquished by those agreements an area lying in southeastern Oregon and northern California aggregating about 20,000 square miles and agreed to remain within the tract which was set apart for their permanent residence and to be known as the Klamath Reservation, a tract embracing less than one-tenth of the magnificent domain which they gave up to the Government by the said treaties.

Of this reservation they lost by the erroneous Mercer survey of 1871, 621,824.28 acres, for which they look to Congress for indemnification in the sum of \$537,007.20. Their contention is so well known that it is not necessary to refer to the matter in detail. The Commissioner of Indian Affairs succinctly states the truth in the following language:

There can be no doubt as to the title of the Indians to their reservation, including the lands excluded by the erroneous survey. If any doubt ever existed on this point it was removed by the decision of the district court of the United States (87 Fed. Rep., 533) in which the status of the reservation is very fully and accurately stated.

In my report of November 24, 1900, I said: "These Indians have patiently waited for more than thirty years for recognition of their rights to the land given them by treaty stipulation, and a settlement with them should no longer be deferred." This statement I repeat with added emphasis. It is earnestly hoped that this agreement will be ratified at the coming session of Congress, that these Indians be no longer compelled to await the pleasure of the Government in fulfilling its solemn treaty stipulations.

All Secretaries of the Interior, of all parties, and all Commissioners of Indian Affairs since this matter was first brought to their attention, have not failed to realize the equity of the Indian contention and have strongly urged Congressional action. April 16, 1902, the Senate of the United States passed a bill authorizing an appropriation to carry out the McLaughlin agreement to compensate the Indians, but in the rush of business in the House of Representatives at that session the measure, though on the calendar, was not reached.

From a report made by the Committee of Indian Affairs in the House of Representatives on February 21, 1903, upon this subject, I quote this language:

The Indians of the Klamath Reservation in Oregon receive no rations or annuities from the Government of the United States; they have no funds to their credit in the Treasury of the United States; they are self-supporting, earning their living by stock raising, laboring, etc.; they have taken allot-

THE COPCO DAMS AND THE FISHERIES OF THE KLAMATH TRIBE

Prepared by
Lane & Lane Associates

For

The Bureau of Indian Affairs
U.S. Department of the Interior
Portland, Oregon

December 1981

"We are sending copies of this correspondence to our engineer in charge of the work at the dam, requesting him to reexamine the situation and if it appears that anything further can be done to facilitate the passage of fish upstream during the construction of the dam, to do whatever is necessary to bring this about at once. Yours very truly, (signed) J. McKee, Vice President, California-Oregon Power Company." (McKee to Merritt 23 August 1916 in Simmons n.d.:22)

In August, 1918, the Assistant Commissioner of Indian Affairs was still making inquiries regarding the fishway:

This will refer further to the Copco dam being constructed on the Klamath River by the California-Oregon Power Company and the desirability of having installed in connection therewith a fishway to permit salmon to reach the upper waters of the river.

The California-Oregon Power Company has previously expressed a willingness to cooperate in the matter of providing a proper type of fishway over the dam and the Office understands that your Commission delegated Mr. W. H. Hincks, former Irrigation Engineer of the Indian Service, to represent it in a conference with engineers of the power company and a representative of the California Fish Commission relative to the matter. This conference of engineers it is understood has not been held and the Office learns that the power company has concluded or is about to conclude arrangements with your Commission whereby the company shall be released from building the proposed fishway in consideration of the Company's undertaking to place a given number of salmon spawn above the dam. Whether this is in the nature of a tentative arrangement only we are not advised.

As the Office understands it this arrangement would not meet the situation, inasmuch as it appears that salmon are spawned and live in fresh water for their first year and go to sea when they remain in the salt water for three years more, returning at the end of the fourth year of their lives to their home waters for spawning, after which they die. It is also learned that salmon placed above the dam never mature, salmon weighing more than one pound, and that few reach a weight of four pounds.

The Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of their food and it is highly desirable that proper provision be made by the power company for the passage of salmon over its dam.

This Office will be pleased to be advised concerning the nature of the reported arrangements made by your Commission with the power company in this matter. (Merritt to Oregon State Fish and Game 14 August 1918)

By December of that year, Merritt was aware that no fishway was going to be built.