

Know Your Treaty, Part 4

by Cynthia Stowell

Rights Reserved in Treaty Have Been Challenged

It is a well-established fact that when the Wasco and Walla-Walla bands transferred title to their land to the U.S. Government in 1855 they did not give up their right to hunt, fish, and gather wild foods at the "usual and accustomed stations."

These off-reservation rights have weathered many challenges through the years. Perhaps no other aspect of Indian relations with the non-Indian population has created more tense moments — in the courtrooms and on the rivers of the nation.

But the federal courts have continually upheld off-reservation treaty rights, interpreting broadly the few simple words of the treaty, and building a strong framework of precedents within which disagreements are resolved today.

SURVIVAL OR FORESIGHT

The struggle for depleted resources could not have been anticipated at treaty time when the land offered ample plant and animal life to the sparse inhabitants. The white newcomers brought seed and plows and seemed more interested in measuring and dividing the land than in laying claim to its fish, game and vegetation.

Whether it was survival or foresight, the Indians knew that they must hold on to these resources. Even into the third day of treaty negotiations Sim-tus-tus was still asking that the land itself be retained.

"The Falls where we catch the fish, we would like to reserve it. You have seen our country where we get our Roots this is the country that I spoke about. I wish to keep the section of country beyond the Tygh. . . there we gather our Berries."

But later on, Iso saw the futility of changing General Palmer's mind, saying, "I wished to have a piece of country on the other side of Deschutes at the xouch (a type of root) country." But realizing that Palmer would not make reservations "here and there" Iso said he would be content "to go there every spring to dig xouch if you give me the privilege." A provision was made in Article 1 for the exercise of such privilege.

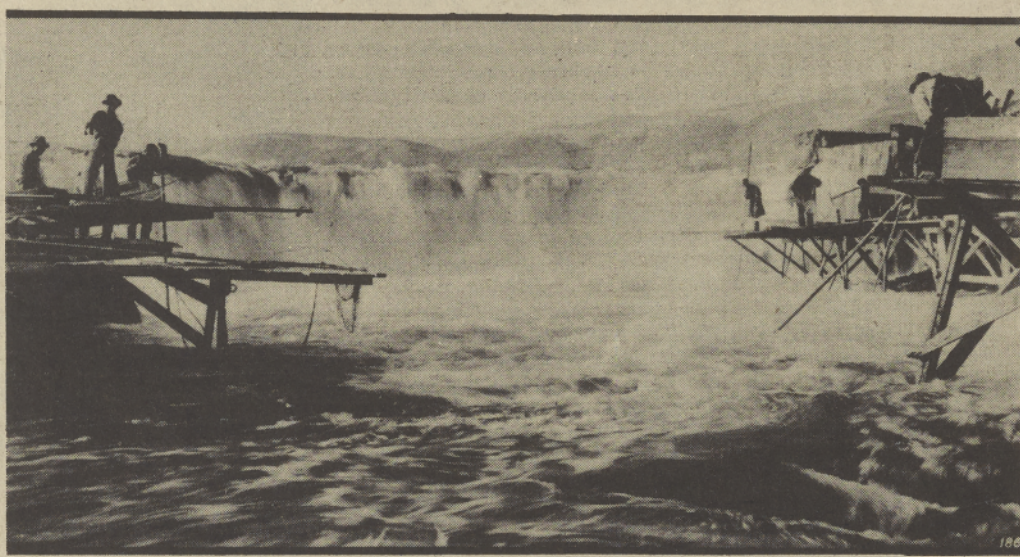
EXCLUSIVE RIGHTS ON THE RESERVATION

In the treaty, the exclusive right of fishing was guaranteed on the reservation and in the bordering streams. Hunting and gathering are rights that flow from ownership and occupancy.

Although nothing was said in the treaty about rights to water, the right to fish has been considered meaningless if a minimum stream flow is not maintained in streams traversing and bordering the reservation.

The first major court decision confirming water rights on and off the reservation was *Winters v. United States* (1904), where rights to the use of water in the Milk River were upheld for members of the Ft. Belknap Reservation in Montana. The *Winters Doctrine* asserted the right of the Indians to "waters which made it (the reserved land) valuable or adequate." These water rights were not given up when Montana was admitted to the Union, the decision stated.

Nearly sixty years later in *Arizona v. California*. The Supreme Court reaffirmed the *Winters Doctrine*, further de-



CELILLO FALLS — A "USUAL AND ACCUSTOMED STATION" NO MORE

fining Indian water rights. The decision, which involved tribes' rights to the Colorado River, stated that such aboriginal rights are not lost by disuse, pertain to the entire stream system, are not quantified or measured, and exist for whatever purposes the reservation was established.

On the local basis, the status of Indian water rights was tested and upheld in *Federal Power Commission v. Oregon* (1954), at the time the Pelton Dam Project was being planned. The state's objection to the licensing of the power project was discounted on the basis of consent given by the Confederated Tribes — whose reserved land and water would be affected by the project.

The question today seems to be how much water is reserved for Indians. Congressman Lloyd Meeds (R-Wash) has introduced his quantification bill which would limit the right to the extent that it was exercised in the five years prior to enactment of the bill, a possible contradiction of the *Arizona v. California* decision.

USUAL AND ACCUSTOMED STATIONS

Since the parcel of land reserved in the treaty was largely unfamiliar to the Wasco and WallaWalla bands, they insisted on access to their traditional fishing, hunting, and gathering places outside the reservation boundaries. These rights were "in common with citizens of the United States," a phrase that has undergone considerable definition and interpretation through the years.

Wasco Chief Nelson Wallulatam describes many accustomed stations along the Willamette River, the Columbia, and the upper Deschutes where his people and other tribes and bands fished for salmon, steelhead, trout, whitefish, sturgeon, eels and even mussels, crawdads and an occasional seal. Not only have many sites been given up but the variety of the Indians' fish diet diminished to the point where only salmon, steelhead and eels have retained their popularity, says Wallulatam.

Although many accustomed stations were given up voluntarily in deference to the increasing non-Indian population and changing palates, there were some heavily-used and well-loved sites that were altered or destroyed by civilization's encroachments.

The inundation of Celilo Falls was much more than the destruction of a fishing site. It has come to symbolize the surrend-

TREATY WITH THE TRIBES OF MIDDLE OREGON, 1855

ARTICLE I (cont'd)

Provided, also, That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians: and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens of the United States, is secured to them. And provided, also, That if any band or bands of Indians, residing in and claiming any portion or portions of the country in this article, shall not accede to the terms of this treaty, then the bands becoming parties hereunto agree to receive such part of the several and other payments herein named as a consideration for the entire country described as aforesaid as shall be in the proportion that their aggregate number may have to the whole number of Indians residing in and claiming the entire country aforesaid, as consideration and payment in full for the tracts in said country claimed by them. And provided, also, That where substantial improvements have been made by any members of the bands being parties to this treaty, who are compelled to abandon them in consequence of said treaty, the same shall be valued, under the direction of the President of the United States, and payment made therefor; or, in lieu of said payment, improvements of equal extent and value at their option shall be made for them on the tracts assigned to each respectively.

ered treaty right and the resultant loss of a way of life. So long and established was the tradition at Celilo that Indian fishermen could not think of a day when the falls would not be there. Now the feeling exists that anything is possible as Indians cling to their remaining sites.

But the Dalles Dam agreement as well as the Bonneville Dam construction could also be considered acknowledgements of treaty rights, despite the outcome. When Bonneville was built Congress authorized the Army Corps of Engineers to replace destroyed fishing sites with "in lieu" sites at Cascade Locks, Lone Pine, Wind River and Cooks (one promised site was never provided).

The Dalles Dam construction was preceded by years of negotiation between the Army Corps of Engineers and the Warm Springs, Yakima and Umatilla tribes. The key to the agreement was the sum of \$27 million offered in exchange for the subordination of fishing rights.

Although most feel that no price could have been attached to these rights, it was at least recognized by the government that the rights belonged to the tribes and merited compensation.

It is generally understood (and upheld in *U.S. v. Oregon*) that the Celilo settlement did not relinquish a general right to take fish at other locations but only those fishing rights exercised in the areas flooded.

Today, the Columbia River about Bonneville Dam continues to be the primary fishing site,

along with the Deschutes River at Sherar's Bridge. Many still make an annual trek to Oregon City to capture eels in the Willamette River.

Berries are still gathered in the Mt. Hood area, although timber and brush are crowding them out, and roots are still dug near Prineville and Shaniko despite private landowners fencing the ladies out on occasion.

1865 TREATY: A FLUKE

Apparently in the years after the treaty was signed, the tribes took full advantage of their off-reservation rights, to the consternation of the government and

local citizens. This prompted the drafting and signing of a new treaty in 1865, a little-discussed fiasco that historians have been hard-pressed to explain, attorneys and judges unable to defend, and tribal members eager to forget.

The 1865 document stated, "It having become evident that the provision of article 1 of the treaty (of 1855) . . . which permits said confederated tribes to fish, hunt, gather berries and roots, pasture stock, and erect houses on lands outside the reservation, and which have been ceded to the United States, is often abused by the Indians to the extent of continuously residing away from the reservation, and is detrimental to the interests of both Indians and whites; therefore it is hereby stipulated and agreed that all the rights enumerated . . . are hereby relinquished by the confederated Indian tribes . . ."

Members of the tribes were ordered to stay on the reservation, and could leave only with a written pass from the superintendent or agent. In exchange for the off-reservation rights, more money was to be poured into agricultural efforts.

The much-maligned treaty has been discredited by court decisions since it was revised, and was finally dashed in *U.S. v. Oregon*.

THE LONGEST FISH STORY

Again and again in the years since the original treaty of 1855 was signed, the rights retained therein have been upheld in federal court cases directly involving the Confederated Tribes or applied from other Indian litigation. Indians' reserved rights have repeatedly been found to be superior to state rights.

Winans v. United States (1904) involved the Yakimas and their traditional use of the Columbia River for fishing. State-licensed fish-wheel operators on land along the Columbia sought to exclude the Indians from the exercise of their fishing rights, but the Supreme Court ruled that "the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed."

The decision also reaffirmed

(Continued on Next Page)

REFERENCES TO DATE FOR "KNOW YOUR TREATY"

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- Part 2 - (Treaties grew from tension between settlers and middle Oregon Indians)**
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