

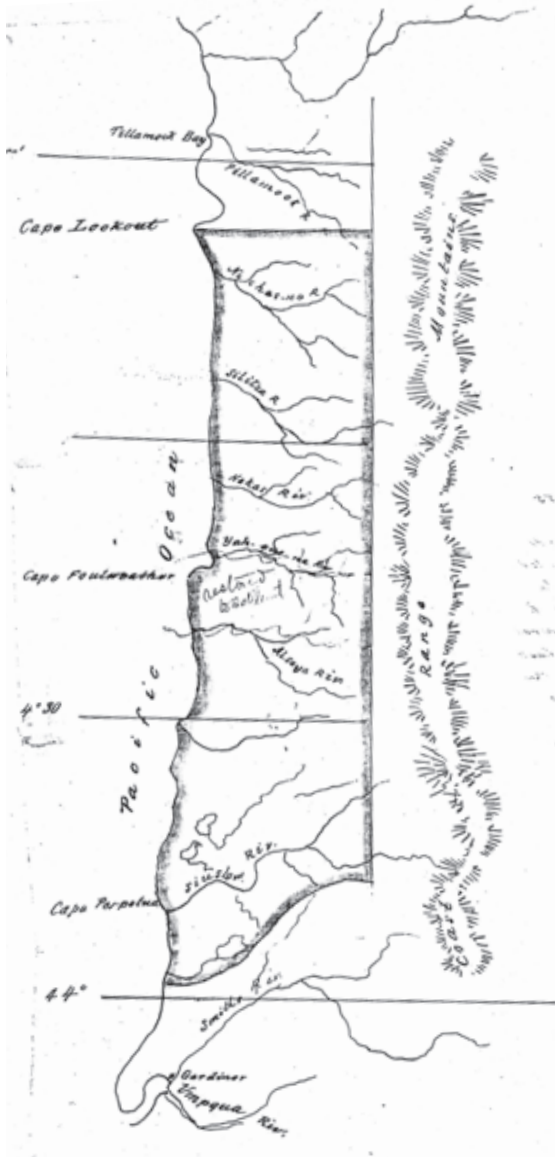
offered some hope. With the signing of the treaty by Palmer and tribal representatives and the presumed approval by the Senate, the tribes seemed to be assured of a large, magnificent, and permanently secured homeland. But the saga of Indian land rights on the Coast had only begun to be written.



Despite all the effort by Palmer and Indian leaders—and despite the congressional and administrative determination not to repeat the destabilizing mistakes of the past in failing to ratify Oregon treaties—Congress never ratified the 1855 Coast Treaty. This was not due to objections to Palmer’s plan for locating the coastal tribes on a permanent reservation or even to concerns about the size of the reservation. Instead, confusion wrought by rudimentary long-distance communications, the outbreak of the Rogue River War, and legal uncertainties over presidential power led, not to a ratified treaty, but to an executive order by President Franklin Pierce establishing a reservation nearly identical to the original April 17 reserve Palmer had proposed. When the Interior department received the Coast Treaty just a few days after the president signed the executive order, the Senate was in recess. Soon thereafter, the department submitted several treaties when Congress resumed business, but the Coast Treaty sat in the Interior department for fifteen months before it was sent to the Senate. Commissioner Manypenny reported that the treaty had been “overlooked.” The muddled process left in its wake a tangle of problems that would plague western Oregon Indians for generations.

Returning to his office in the Willamette Valley town of Dayton after negotiating the Coast Treaty, Joel Palmer, who had no way of knowing that time would be of the essence, waited nearly a month before sending the treaty and his report back to Washington on October 3, 1855. The treaty package literally went by slow boat, first by steamship to San Francisco and then by a three-to-four-week ocean journey from San Francisco to New York via the Panama railroad route, which had opened in 1855. Presuming that the trip from New York to the nation’s capital was accomplished in just a few days, mail from or to Oregon took between five weeks and three months.

Earlier in the year, in reporting on his declaration of the Coast Reservation on April 17, Palmer had asked for ratification of this set-aside land; he had been given basic instructions and accorded broad authority, but he had acted unilaterally and understandably wanted confirmation of this sweeping administrative action. In addition to the slow pace of the mail, two additional



Joel Palmer's original map of the Coast Reservation, developed in April 1855 in connection with his closing the area to homesteading by non-Indians and taking the initial step toward establishing it as a reservation for the exclusive use of the Coast, Willamette, Umpqua, and other tribes. President Pierce's executive order of November 9, 1855, establishing the Coast Reservation, was based on Palmer's request, which included this map.

months had been taken up by a malfunction: Palmer's letters had arrived, but he had sent the map in a "tin case," which had been delayed in transit. In the meantime, the Interior department advised Palmer to notify land officers to assume that the designation of Indian land was valid and that no settlements by whites should be authorized.

By September, the map of Palmer's April set-aside had arrived and the commissioner of the General Land Office recommended to the secretary of the Interior the creation of "a large reservation of land, for the Coast, Umpqua, and Willamette Tribes." The GLO commissioner, who had no way of knowing that out in Oregon Palmer had just obtained the last signatures on the Coast Treaty, further recommended that a presidential order be obtained.

Secretary McClelland then requested a full report from Commissioner Manypenny, who responded at some length on October 29. He reviewed

Oregon Indian policy and Palmer's request that his August 17 set-aside "be made a permanent Indian reserve." Manypenny then advised that "this course does not conflict with the uniform policy of the Government, and is in keeping with that pursued in the case of the treaties in Oregon already ratified." The commissioner emphasized that action on Palmer's request could not have been taken earlier "in the absence of the map." With the map now in Washington, however, and because "very great embarrassment must result to the service because this subject has not been determined," Manypenny agreed that the permanent reservation recommended by Palmer should be established, subject to later adjustments by treaty or legislation:

As therefore, the policy of concentrating the Indians upon one or more reservations, is that already adopted in the State of California, by Act of Congress, and I know no reason why the recommendation made by the Supt. is not the best in view of all the surrounding circumstances that can be devised, I respectfully recommend that the tract of land designated on the accompanying map from the General Land Office as that "proposed for Coast & Umpqua & Willamette Indians," be reserved from sale or settlement, and set aside for Indian purposes—subject however to such curtailment in dimensions as treaties here after to be made and ratified and a better knowledge of the requirements of the Indians may admit under the direction of Congress. It is only by some such action that the salutary provisions for treating with the Indians of Oregon for a cession of their lands to the United States, and their consequent concentration at any point can be carried into effect, without the delay of further legislation, if not war and bloodshed.

Having received Commissioner Manypenny's report, Secretary McClelland made his recommendation to the president on November 8:

Before submitting the matter to you I desired to have a more full report of the subject from the Indian Office, and the letter of the head of that Bureau, of the 29th ultimo . . . having been received and considered, I see no objection to the conditional reservation asked for, "subject to future curtailment, if found proper," or entire release thereof, should Congress not sanction the object rendering this withdrawal of the land from white settlement at this time advisable.

A plat marked A, and indicating the boundaries of the reservation,

accompanies the papers, and has prepared thereon the necessary order for your signature, should you think fit to sanction the recommendation.

The matter went to President Pierce's desk the following day. Because of the slow course of the mail, the officials in Washington still did not know that two months before, Joel Palmer and tribal leaders had executed the Coast Treaty, which called for a reservation very similar to the one referenced in the executive order. The treaty would arrive in Washington just five days after the secretary presented the executive order to the president, but by then the president had already signed the executive order:

November 9, 1855

The reservation of the land within denoted by blue-shaded lines is hereby made for the purposes indicated in letter of the Commissioner of the General Land Office of the 10th September last and letter of the Secretary of the Interior of the 8th November, 1855.

Frank'n Pierce

The executive order can be viewed in three different ways. First, and most likely, it can be understood as fulfilling the president's duties in the Oregon Indian treaties to provide "permanent" reservations if tribes are moved from their temporary reserves. Second, President Pierce's order could be viewed as a separate, stand-alone action, providing the kind of rights that attach to those executive orders not related to treaties. Third, the order might be read as creating a lesser kind of executive order reservation—one that is "conditional."

These distinctions have considerable legal consequences. Treaty land is fully owned by the tribe. It is not subject to unilateral action by a president; only Congress can remove land from the reservation. If treaty land is taken (Congress does have the power to abrogate Indian treaties), the tribe is entitled to full compensation under the Fifth Amendment to the Constitution.

Stand-alone executive orders, unrelated to treaties, are different. While Congress in the twentieth century granted important protections to executive order reservations, the courts had long upheld presidential rights to adjust reservation boundaries. As late as 1942, the U.S. Supreme Court ruled that executive order tribal land is "subject to termination at the will of either the executive or Congress." Unlike treaty land, if Congress does take executive order land, then it is not subject to compensation under the Fifth Amend-

ment. Finally, if the Coast Reservation were “conditional”—that is, temporary—then any tribal rights would be minimal, especially in the days before Congress took steps to give additional protections to executive order reservations.

The difference between reservations being altered by Congress or by a president acting alone would prove to be of great moment at Siletz. A decade after President Pierce created the Coast Reservation, President Andrew Johnson unilaterally—and probably illegally—signed an executive order divesting the tribe of 200,000 acres, about one-fifth of the reservation.

President Pierce based his order in part on Secretary McClelland’s brief and seriously flawed one-paragraph letter, which purported to accept Commissioner Manypenny’s recommendation for a “conditional” reservation. The commissioner, however, never used the term “conditional” and did not intend such a result. In addition, McClelland misquoted Manypenny’s letter, which nowhere described the proposed reservation as being “subject to curtailment, if found proper.” While Manypenny employed the term “proper” three times, he always tied it to whether the reservation should be established in the first place. McClelland’s combining of the two passages can be read as applying “if proper” in a different sense, to the curtailing—that is, termination—of the reservation. And, although he never made the claim, perhaps McClelland’s letter suggests that it is the president, not Congress, who decides when it is “proper” to remove land from the Coast Reservation.

Secretary McClelland’s letter to President Pierce was terse in the extreme and may have been written hastily. He almost certainly failed to think through the effect of the Oregon treaties, which did not allow the president the option of creating a “conditional” reservation. To some extent, that was understandable. The use of presidential executive orders to create Indian reservations was brand new at the time, having been used only three times, all earlier in 1855, to establish reservations in Michigan and Minnesota. None of them involved prior, ratified treaties.

But, whatever one may make of McClelland’s communication, there is no reason to believe that President Pierce was attempting to infringe on Congress’s authority over Indian treaties. The executive order never used the term “conditional” or asserted a presidential prerogative to abridge this reservation, which traces to promises in the Oregon treaties. Even treaty reservations can be altered or terminated, although it must be done by Congress, not by the president. That is why, in recommending a permanent reservation, Commissioner Manypenny was careful to qualify it in order to acknowledge congress-