43D CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 439.

H. A. WEBSTER, V. B. McCOLLUM, AND A. COLBY.

APRIL 17, 1874.—Committed to a Committee of the Whole House and ordered to be printed.

Mr. B. W. HARRIS, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany H. R. 2999.]

The Committee on Indian Affairs, to whom was referred Executive Document No. 119, being the letter of the Secretary of the Interior transmitting an estimate for an appropriation to pay for certain improvements by settlers on lands set apart for the Makah tribe of Indians in the Territory of Washington, having considered the same, make the following report:

On the 31st January, 1855, the United States made a treaty with the Makah tribe of Indians, acquiring title to their lands in the northwestern portion of Washington Territory, lying on the Straits of Fuca and the Pacific Ocean, including all the islands lying off the same on the straits and the Pacific coast. The treaty was ratified March 8, 1859, and proclaimed by the President on the 18th of April following. (See 12th Stat. at L., p. 939.)

By the second article of the treaty there was reserved a tract of 12,000 acres, lying on the straits and coast, embracing Cape Flattery, which was set apart to be surveyed and marked out for the exclusive use and habitation of the Indians. The consideration to the tribe for the relinquishment of their lands was the sum of $30,000, to be paid in installments, and "to be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may determine at his discretion upon what beneficial objects to expend the same."

By the sixth article of the treaty it was further provided "that to enable the said Indians to remove and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of $3,000, to be laid out and expended under the direction of the President, and in such manner as he shall approve."

The treaty further provided that slavery should be abolished; that the use of ardent spirits should be excluded; and that no trade should be carried on with Vancouver's Island or elsewhere out of the dominions of the United States on the part of said Indians. The United States agreed to establish an agricultural and industrial school, to be free to the children of said tribe; to provide a smithy and carpenter's shop, furnishing them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years. The right of fishing, whaling, and sealing was secured to the Indians.

After the removal of the tribe to the reservation, it was found that, within all the boundaries as provided by the treaty, there was no land suitable for cultivation, or for the erection of agency or school buildings. The reservation was a mountainous coast, covered with a thick forest of hemlock, and not susceptible of cultivation. Its natural advantages were fishing, whaling, and sealing only. Neah Bay, in the Straits of Fuca, adjoining the reservation on the east, was a most excellent harbor, adjacent to land which might be used for farming-purposes. Such being the case, it became necessary, in the opinion of the Interior Department, to occupy land outside of the limits of the reserve, on both the straits and the coast, for the erection of buildings, the establishment of a school, and for farming-purposes. The President therefore issued the following order:

EXECUTIVE MANSION, *October* 21, 1873.

In lieu of the addition made by Executive order dated October 26, 1872, and amended by Executive order of January 2, 1873, to the reservation provided for by the second article of the treaty concluded January 31, 1855, with the Makah tribe of Indians of Washington Territory, (Stat. at Large, vol. 12, p. 939,) which orders are hereby revoked, it is hereby ordered that there be withdrawn from sale and set apart, as such addition for the use of the said Makah and other tribes of Indians, the tract of country in said Territory bounded as follows, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore of said bay, in a northeasterly direction, four miles; thence in a direct line south six miles; thence in a direct line west to the Pacific shore; thence northwardly along the shore of the Pacific to the mouth of another small brook running into the bay on the south side of Cape Flattery, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook; and thence following the same down to the place of beginning.

U. S. GRANT.

This proceeding withdrew from survey and sale 4,000 acres of public land, a portion of which had been cultivated and improved by pre-emption claimants, and attached the same to the Neah Bay reservation for public uses, in order to carry out the terms of the treaty on the part of the United States.

Improvements of considerable value having been made on said additional tract prior to its being attached to the reservation, it was deemed important for the Government to obtain a relinquishment of all pre-emption claims growing out of prior settlements and improvements. The Interior Department, therefore, directed an appraisement of the same to be made under the supervision of the agent at Neah Bay, on the 25th April, 1873, and which was made by three persons, the first by the agent, the second by the claimants, and the third by the two first chosen. The appraisement thus made by J. F. Devore, J. B. Montgomery, and George D. Hill was returned to the Indian Office as follows:

In favor of H. A. Webster on account of his improvements, consisting of one dwelling-house and store, one cottage-house, one hennery, one woodshed and water-closet, one carpenter-shop, one Indian dwelling and store-room, one warehouse, (No. 1, back,) one warehouse, (No. 2, front,) one Indian dwelling, one boat-house, barn and pig-sty, railroad and cars	$20,100 00
In favor of V. B. McCollum for a frame dwelling-house and a small inclosure under cultivation	1,000 00
And in favor of A. Colby for improvements consisting of a frame dwelling-house and inclosure under cultivation	1,300 00
Making an aggregate of	22,400 00
Add to this the costs of appraisement	1,208 34
Total estimate submitted by Secretary of the Interior	23,608 34

The Commissioner of Indian Affairs, in his letter to the Secretary of the Interior transmitting this estimate, says:

> It having been determined by the Department to adhere to this appraisement, I have, in accordance with the suggestions made in your letter of the 27th instant upon the subject, caused an estimate to be prepared for an appropriation required to pay for the said improvements, as valued by Messrs. Devore, Montgomery, and Hill, and to meet the cost of the appraisements made thereof, which is respectfully presented herewith, with the recommendation that it be submitted for the favorable consideration and action of Congress.

The questions here brought before the committee are:

I. Was the order of the President withdrawing from sale and setting apart the additional tract legal and authoritative, and was it necessary and expedient?

II. Is the estimated value of the improvements taken possession of a valid claim against the Government?

The right of the President to reserve a portion of the public domain for public uses, without express authority of Congress, was considered by the Supreme Court in the case of Grisar *vs.* McDowell, (6 Wallace, p. 363.) The court said:

> It only remains to notice the objection taken to the authority of the President to make the reservations in question. The objection is twofold: first, that the lands did not constitute any part of the public domain; * * * and, secondly, if they did constitute a part, they could only be relieved from sale and set apart for public purposes under the direct sanction of Congress. * * * From an early history of the Government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress. In the pre-emption act of May 29, 1830, it is provided that the right to pre-emption contemplated by the act shall not extend to any land which is reserved from sale by act of Congress or by *order of the President*, or which may have been appropriated for any purpose whatever. Again, in the pre-emption act of September 4, 1841, "lands included in any reservation by any treaty, law, or *proclamation of the President* of the United States, or reserved for salines or for other purposes," are exempted from entry under the act. So by the act of March 3, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that State shall be subject to pre-emption and offered at public sale with certain specific exceptions, and, among others, of lands appropriated under the authority of this act, or *reserved by competent authority*. The provisions in the acts of 1830 and 1841 show very clearly that by "competent authority" is meant the authority of the President and officers acting under his direction.

Long practice, therefore, and the express recognition of the power by the Supreme Court, seem to make it clear that the President may rightfully reserve lands, as in this instance, for public uses. And he may modify, by reducing or enlarging it, a reservation previously made. Numerous authorities are to be found sanctioning this view, and holding the further doctrine that the order of the Secretary of War, or of the Secretary of the Interior, being officers of the President, is sufficient authority to withdraw from sale and set apart public lands for public uses. (See Little *vs.* Barume, 2 Cranch, p. 170; Parker *vs.* The United States, 1 Peters, p. 293; Wilcox *vs.* Connell's Lessee, 3 Peters, p. 498; The United States *vs.* Elanor, 16 Peters, p. 291; Williams *vs.* The United States, 1 Howard, p. 290.)

It was deemed important to enlarge the reservation to comply with the terms of the treaty. These terms the Government was under obligations to fulfill, and the Indian-Office was desirous of carrying out the policy of withdrawing the Indians from savage habits and teaching them those of civilized life. Such progress has already been made as

to justify the expediency of this effort. Additional land has been cultivated, increased crops have been grown, schools have been established and missionary labors to some extent have met with success.

The committee are, therefore, of the opinion that the President's order, enlarging the reservation was properly issued, and that it ought to receive the sanction of Congress by an act confirming and establishing it.

The second inquiry is one of more difficulty and of more importance. The estimate embraced in Executive Document No. 119, on which this report is based, presents the claims of pre-emptors for indemnity, rather than the indebtedness of a department of the Government, and will be considered as such.

They are claims for separate improvements and not dependent on each other. The claimants had no hand in making themselves the creditors of the Government.

It is admitted that the Indian title was extinguished; that *bona-fide* settlements were made upon unsurveyed public lands.

It is urged by the claimants that the fourth article of the treaty providing "that the right of taking fish and of whaling or sealing at usual or accustomed grounds and stations is further secured to said Indians *in common with all the 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*, That they shall not take shell-fish from any beds *staked or cultivated by citizens*," was a public declaration and guaranty in favor of pre-emptors. It is claimed that there was a vested pre-emption right of possession under the third section of the act of July 17, 1854, (see 10 Stat. at L., p. 305,) which declares "that the pre-emption privilege granted by the act of September 4, 1841, shall be, and the same is hereby, extended to the lands in Oregon and Washington Territories, whether surveyed or unsurveyed, not rightfully claimed, entered, or reserved, under the provisions of this act, or the acts of which it is amendatory, nor excluded by the terms of the said act of 1841, with the exception of the unsurveyed lands above mentioned." And the right of the claimants is further maintained under the first section of the act of June 2, 1862, (see 12 Stat. at L., p. 413,) enacting "that all the lands belonging to the United States to which the Indian title has been or shall be, extinguished shall be subject to the operations of the pre-emption act of September 4, 1841, and under the conditions, restrictions, and stipulations therein mentioned."

It is not disputed that these settlements were within the provisions of these acts, and that the claimants were entitled to all the benefits lawfully accruing under them. The claimants insist, therefore, that their rights could not be disturbed by executive officers of the Government; that the fourth article of the Constitution of the United States (section 3) declares that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" and that "*no appropriation of the public lands can be made for any purpose but by the authority of Congress.*" (United States *vs.* Fitzgerald, 15 Peters, p. 407.) This argument has been sufficiently answered in the fact that the acts of Congress of September 4, 1841, July 17, 1854, and June 2, 1862, provide for reservations, and the conduct of the executive officers in this instance was by the delegated power and authority of Congress.

The claimants further quote the language of Justice McLean in the case of Lytle *vs.* The State of Arkansas, decided at the January term,

1850, of the Supreme Court of the United States, (9 Howard, p. 333.) The court said :

> It is a well-established principle that when an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglet of a public officer, the law will protect him. * * * The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantial right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer who is found in advance of our settlements encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.

The committee acknowledge the force and justness of these sentiments. They were sanctioned by the whole current of previous authorities in the federal courts. The magnanimous national spirit of that day would not accept of a construction less liberal, and such was held to be the law in 1850 when the eminent judge pronounced the decision, though it is to be said that three members of the court gave dissenting opinions in the case.

But later adjudications, by the light of modern experience and from the necessities or cupidity of the Government, have modified the rule then maintained in favor of pre-emptors. Their claim, instead of being a *vested* right, is believed to be *inceptive* merely, and, though superior to that of adverse claimants without pre-emption settlements, is wholly subordinate to that of the Government. It is a right of preference over other purchasers, but confers no title until surveyed, entered, and purchased, and, until all of these preliminary conditions are satisfied, does not *devest* the Government of its right to claim the land again for public uses.

However hard this rule may seem to be, applied to these claimants, it was the law which governed the Indian-Office in their case. They had acquired only pre-emption rights in the land, and were dispossessed of their settlements, to accommodate the public policy. The Supreme Court of the United States had made this possible. At the December term, 1869, in the case of Frisbie *vs.* Whitney, (9 Wallace, p. 187,) the law of pre-emption was considered at length, and the new rule adopted.

The court decided "that settlement on the public lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money."

With this opinion there was such general dissatisfaction, and such extensive protest was made against it, that, at the December term 1872, the question was brought again before the Supreme Court, and was re-argued and re-affirmed, in the Yosemite Valley case, (15 Wallace, p. 77,) and may now be considered as closed to all further controversy.

The court decided that "the United States by the pre-emption laws do not enter into any contract with the settler, or incur any obligation that the land occupied by him shall ever be put up for sale. They simply declarethat in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the

lands before they are offered for sale, or to appropriate them to any public use."

The case of Frisbie *vs.* Whitney was affirmed in terms, and that of Lytle *vs.* The State of Arkansas was explained away and its doctrines extinguished.

There remains to be considered the question of indemnity to the claimants. While it is shown that their titles have become worthless, their improvements had become valuable. That of Webster, the principal claimant, was commenced in 1857, before the pre-emption laws had fallen to their present construction. The labor of more than ten years had been expended on this settlement, under the protection of the broader principles of Judge McLean's decision. He resisted the action of the Government with what moral force he could bring, until the final judgment was rendered in the Yosemite Valley case. Further resistance was useless. He submitted, finally, to the requirements of the Government, under assurances that compensation would be made for his improvements. However worthless these assurances were, they had the effect of getting an early possession of the claimant's improvements. That his was a most desirable location adjoining the reservation, on the best harbor of the Straits of Fuca, and enjoying extraordinary advantages of fishing and sealing, are not sufficient arguments against the equity of his claim; for he enjoyed those privileges, under the treaty, "in common with all the citizens of the United States." He had but accepted the invitation of the pre-emption laws in making use of them. That he was enabled by these means to improve his settlement to the value and amount of his present claim is not doubtful. There is evidence of this fact, independent of the claim.

The United States Indian agent for the Makah tribe, in his report of September 1, 1871, says:

> Nature supplies them abundantly with nearly all the necessaries of life. They are the most happy and independent people I have ever seen. They catch plenty of the finest fish, which they dry in great abundance for winter use. They take several kinds of shell-fish, which they eat with great relish. They catch a great many dog-fish, from which they make oil, and seal, from which they obtain both fur and oil, which they barter to the white traders for clothing, flour, and such other articles as they may need" (Ex. Doc. 1, part 5, 2d sess. 42d Cong., p. 694.)

The superintendent for Washington Territory, in his report of the same date on the same subject, says:

> These Indians are a bold hardy race, getting their subsistence principally from the ocean, and caring but little about tilling the soil; and it is with the utmost difficulty they can be persuaded to work for the small wages of $1 or $2 per day, when they not frequently make as high as $40 by taking the fur-seal. (Ibid., p. 692.)

There is further evidence showing that this claimant's improvement was valued at an annual rental of $3,000 in gold, which had been offered for it, and which he would have received had not the Government dispossessed him of the title. It is clear, therefore, that the inducements to enter upon these settlements were considerable, and the means of gain and profit were sufficient to accumulate a valuable property.

It is not believed that any serious objection could be made to the enterprise of the claimants. Their habitation and example were advantages rather than obstructions to the civilization of the Indians. To regard them as trespassers on the public lands seems manifestly unjust. The Indian-Office did not so regard them, but recognized their claims to the full value of their improvements.

On the 1st of August, 1873, the Commissioner of Indian Affairs issued authority to the board of appraisers to go upon the premises, take tes-

timony, and make appraisement of the actual value of the improvements made by the personal labor and private means of the claimants. The value of land was excluded. This appraisement was made under oath, and embraced such buildings and erections as the Government took possession of and used, and none other. This amount is recommended to be paid, and the committee do not find any ground upon which that recommendation ought to be considered adversely.

They therefore report the following bill and recommend its passage:

A BILL to enlarge the reservation of the Makah Indians of Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the tract of land heretofore set apart and reserved for the exclusive use of the Makah tribe of Indians of Washington Territory by the second article of the treaty between the United States and said tribe thirty-first January eighteen hundred and fifty-five, and ratified by the Senate of the United States eighth March, eighteen hundred and fifty-nine, there is hereby withdrawn from sale and set apart for like uses the country in said Territory bounded as follows: Commencing on the beach at the mouth of a small brook running into Neah Bay, next to the site of the old Spanish fort; thence along the shore of said bay, in a northeasterly direction, four miles; thence, in a direct line south, six miles; thence, in a direct line west, to the Pacific shore; thence northwardly, along the shore of the Pacific, to the mouth of another small brook running into the bay on the south side of Cape Flattery, a little above the Waatch village; thence following said brook to its source; thence, in a straight line, to the source of the first-mentioned brook; and thence following the same down to the place of beginning. And the order of the President of the United States, dated twenty-first October, eighteen hundred and seventy-three, withdrawing the same from sale, and making it part and parcel of the said reservation, is hereby ratified and confirmed.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to cause to be paid to H. A. Webster, V. B. McCollum, and A. Colby the value of their improvements on said land used by the United States, according to the appraisement made by the authority of the Commissioner of Indian Affairs, dated April twenty-fifth, eighteen hundred and seventy-three; and for that purpose there is hereby appropriated the sum of twenty-three thousand six hundred and eight dollars and thirty-four cents, or so much thereof as shall be necessary, out of any money in the Treasury not otherwise appropriated.

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