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Cover Photograph: Giant Geyser spouts off in Upper Geyser Basin of Yellowstone National Park (Photograph by F.J. Haynes, 1899. Courtesy of the Haynes Foundation Collection, Montana Historical Society)

THE HISTORY OF THE WENATCHI¹ FISHING RESERVATION

E. RICHARD HART

Deputy United States Surveyor Oliver B. Iverson was toiling along the banks of the Wenatchee River in August 1893, surveying a reservation that the United States had guaranteed to the Wenatchi Tribe nearly forty years earlier. The terrain was rough, and his eight-man crew of chainmen, flagmen, ax men, and compass man were alternately struggling through marshes and over-forested, mountainous country with occasional thick undergrowth. As Iverson surveyed the exterior boundaries of the "Wenatshapam Fishery Reserve," as it was called, his men marked out the boundary lines by establishing monuments, scoring trees, and setting posts. Dozens of trees and posts had been marked and set to outline the bounds of the reservation, when on August 17, newly appointed Yakima Indian Agent L.T. Erwin arrived on the scene and ordered Iverson to "discontinue the survey and to destroy monuments set." Iverson reported that he did destroy all of the posts and monuments he had set and the bearing trees he had marked. The following day, on August 18, 1893, Agent Erwin ordered Iverson to survey new boundaries

E. Richard Hart, who provides historical, ethnohistorical, and environmental historical services and expert testimony, is the author or editor of seven books, the most recent of which is the award-winning *Zuni and the Courts: A Struggle for Sovereign Land Rights*.

¹Although better known in the literature by the Sahaptin name *Wenatchi*, the tribe today, as one of the Colville Confederated Tribes, also uses its own Salish name for itself, *P'squosa*. The spelling for *Yakima* has been retained here for historical consistency with cited documents. In recent years, that tribe has revised the spelling of its name to *Yakama*.

located far from where the reservation was intended under the Walla Walla Treaty of 1855.²

* * *

The history presented here describes how the Wenatchi Tribe, though parties to both a ratified treaty and a ratified agreement with the United States, were, nonetheless, denied the considerations promised them by the government. It is a story unique in both the loss of considerations twice guaranteed by the United States at its highest levels, and in the manner in which an unusually good documentary record reveals details of the deceit and fraud that caused the tribe to be deprived of those rights and property.

The story that led to the encounter between Agent Erwin and Deputy Surveyor Iverson began nearly a half-century earlier, at Governor Isaac I. Stevens' Walla Walla treaty council. Representatives of numerous tribes were gathered with Stevens, who wanted the tribes to cede most of their aboriginal territory in return for smaller reservations that would be set aside for their use.

Tecolecun represented the Wenatchi as one of the fourteen Indian signers of the 1855 Yakima Treaty. Under the terms of that treaty the tribes agreed to cede much of their traditional territory in return for hunting, fishing, and gathering rights, as well as reservation lands. Most of the tribes, under the terms of the treaty, agreed to remove to the Yakima Reservation, but article 10 of the treaty established a reservation for the benefit of the Wenatchi Tribe. In his letter submitting the treaty to Washington, Governor Stevens explained that the Wenatchapam Fishery Reserve was intended for the use of the "Pisquouse" (the Wenatchi) and their neighbors, the Methow. However, the Methow did not sign the treaty. The Wenatchapam Fishery Reserve was intended to include twenty-three thousand acres (six miles square) of land at the forks of the Wenatchee and Icicle

²Oliver B. Iverson, U.S. deputy surveyor, "Field Notes of the Survey of Wenatchapam Fishery Reserve" (Office of the U.S. Surveyor General, state of Washington, December 1893); Surveyor Fieldnotes, Oregon State Office Information Access Center, Bureau of Land Management, microfiche, vol. 103, 1-42, in which is pasted Erwin to Iverson, August 18, 1893; Erwin to Iverson, August 18, 1893, copy, BIA, Yakima Indian Agency, press copies of letters sent to the commissioner of Indian affairs, 1882, 1914; box 12, 1891, 1893; National Archives-Pacific NW Region [hereafter NA-PNW].

Rivers, the location of one of the region's most abundant salmon fisheries.³

The Wenatchi Tribe had used this ancient fishery for centuries, relying heavily upon it for their necessary annual supply of fish. During the seasons when the salmon were running at the fishery, thousands of Indians (Wenatchi and invited neighbors) gathered along the banks, built weirs, and dried the harvested fish for use throughout the remainder of the year. In the hills and mountains surrounding the drainage, people hunted for game, dug roots, and gathered berries. Two hundred people lived year-round at the permanent village located at the fishery, but during fishing season as many as three thousand lined the banks of the rivers to harvest the numerous salmon.⁴

The Wenatchi living in their traditional villages in the mid-nineteenth century had every reason to believe that the United States had complied by the terms of the treaty and had set aside a reservation, on the land where they lived, for their perpetual use. In 1855 and 1856, hostilities broke out between the United States and other tribes that had signed the treaty, but the Wenatchi held fast to their agreement and remained peaceful toward the whites. When Colonel George Wright visited them in 1856, the Wenatchi, under their chief, Skamow, again confirmed their peaceful intentions; Wright, in turn, marked the bounds of their reservation and emphasized to

³James Doty and Isaac I. Stevens, "Official Proceedings at the Council held at the Council Ground in the Walla Walla Valley with the Yakima Nation of Indians and which resulted in the conclusion of a Treaty on the 9th day June 1855," Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801–1869, Record Group [hereafter RG] 75, microcopy T-494, roll 5, Ratified Treaties, 1854–1855, National Archives [hereafter NA]; Isaac Ingalls Stevens, *The True Copy of the Record of the Official Proceedings at the Council in the Walla Walla Valley, 1855*, ed. Darrell Scott (Fairfield, Wash., 1985), 69; Charles J. Kappler, "Treaty with the Yakima, 1855" (12 Stat., 951) in *Indian Affairs, Laws and Treaties*, vol. 2 (Washington, D.C., 1904), 698–702.

⁴Verne F. Ray, "Ethnohistorical Notes on the Columbia, Chelan, Entiat, and Wenatchee Tribes," in *Interior Salish and Eastern Washington Indians IV* (New York, 1974), 424–26, described the Wenatchi village at the fishery, and the other uses of the landscape in the area; Francis Marion Streamer, "Life. Celestial and Terrestrial. And Walks and Talks of Francis Marion Streamer," vol. 2 (Tacoma, Wash., 1890), 5–6, 327, and transcriptions from pp. 36, 323, and 364. Streamer provided vivid descriptions of fisheries in the 1880s and 1890s; Streamer, *Miscellaneous Notebooks and Correspondence*, Streamer Collection, original and on microfilm, Washington State Historical Society (Tacoma, Wash.).

them the commitment of the United States to recognize their rights to that reservation.⁵

Two years later the Wenatchi assisted Captain J.J. Archer while he and his troops were engaged in the area. Both U.S. officials and Wenatchi later reported that when Captain Archer, who was then commander of Fort Simcoe, learned that Wenatchi had helped white miners escape from an attack by other Indians, Archer met with the Wenatchi and told them he would see to it that their reservation was expanded to include thirty-nine thousand acres (eight miles square) of their aboriginal territory around the Wenatchapam Fishery.⁶ Records show that the following year, Captain Archer acknowledged their rights to live in their homeland and rewarded the Wenatchi people by distributing goods, seeds, and tools to them, where they lived near the juncture of the Icicle and Wenatchee Rivers.⁷ Unbeknownst to the Wenatchi, however, the United States failed to actually survey and take the necessary action to see that the Wenatchapam Fishery Reservation was reserved from the public domain.

⁵Proceedings of Council between Moses, other Indians, and General Howard, at Priest Rapids, September 7 and 8, 1878. RG 75, Office of Indian Affairs, 1824-80, microcopy M 234, roll 918, NA; U.S. Senate, "Letter from the Secretary of the Interior, Transmitting a copy of an agreement with the Yakima Nation of Indians, and a draft of a bill to ratify same" (March 19, 1894), Executive Document 67, 53d Cong., 2d sess. [hereafter SED 67], esp. 25-26; Streamer, "Life. Celestial and Terrestrial"; Streamer to Major General O.O. Howard, Governor's Island, New York, August 20, 1890, Streamer Letters, Archives of the Washington State Historical Society; John Harmelt and Louis Judge to commissioner of Indian affairs, January 3, 1910, CCF 1907-1939, 5330-1910-300 Yakima, RG 75, NA; Louis Judge, "Wenatchee Indians Ask Justice," *The Washington Historical Quarterly* 16:1 (January 1925): 21-28; Richard D. Scheuerman, ed., *The Wenatchi Indians: Guardians of the Valley* (Fairfield, Wash., 1982), 79-82; Tom Hackenmiller, *Wapato Heritage: The History of the Chelan and Entiat Indians* (Wenatchee, Wash., 1995), 60; George W. Gordon, "Report on the 'Wenatshapam Fishery' and Reservation guaranteed to the Indians of the Yakima Reservation, on the Wenatshapam River (now We-nat-chee) in Washington Territory" (February 6, 1889), RG 75, BIA, Yakima Indian Agency, copies of letters sent to the CIA, 1877-1921, box 300 (entry 91), NA-PNW. According to the Wenatchi, a more correct spelling for Skamow's name would be *Pschamouch*.

⁶SED 67, 24-34; Sister Maria Ilma Raufer, O.P., *Black Robes and Indians on the Last Frontier: Introduction of Catholicism into the Colville Country* (1966; Colville, Wash., 1992), reproducing Chief John Wapato to Frank M. Streamer, August 20, 1890, 76; Judge, "Wenatchee Indians Ask Justice," 20-28; John Harmelt and Louis Judge to commissioner of Indian affairs, May 18, 1899, RG 75, NA; Tonner to secretary of the interior, March 11, 1898, M-1070, Yakima Agency, RG 48, microfilm roll 59, NA.

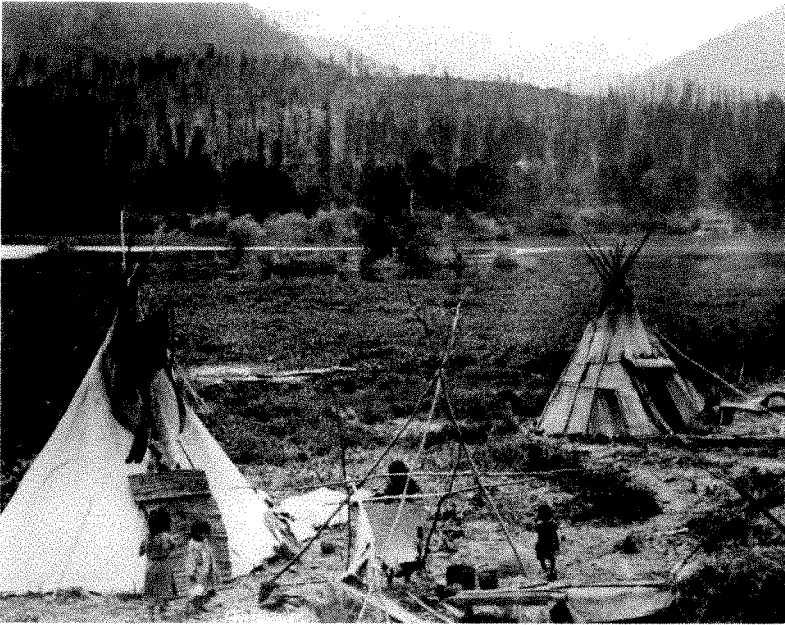
⁷Lansdale to Archer, March 18, 1859, Fort Dalles Papers, Huntington Library, San Marino, California.

During the next two decades, the Wenatchi lived in relative isolation and at peace, insulated from whites by prominent geography. Chief Skamow made early contacts with the United States in the mid-1850s, but by the end of that decade, the responsibility of the chieftainship had passed to Harmelt. Though isolated, Harmelt and the Wenatchi suffered severely from the effects of smallpox and other European diseases, the population dropping by 1860 to about a quarter of what it once had been.⁸

By 1870, the first white traders had settled in Wenatchi country, and Jesuit missionaries were working hard to convert the tribe. When the great earthquake of 1872 rocked their country, many people were prompted to seek spiritual solace from the Catholic priests. In the following year, nearly two hundred Wenatchi were baptized, and by 1874 a mission church was completed at one of the Wenatchi villages.⁹ Although many Wenatchi converted to Catholicism, their traditional lifestyle changed little. They continued to fish at the Wenatchapam Fishery, hunt for deer and other animals, gather berries, and dig roots. Their rich native social traditions were passed down from generation to generation, and today tribal members still continue to engage in these traditional tribal activities.

⁸Stuart A. Chalfant, "Material Relative to Aboriginal Land Use and Occupancy by the Columbia Salish of Central Washington," *Interior Salish and Eastern Washington Indians IV* (New York, 1974), 281–82, citing Teit and Mooney for some of his information, and listing epidemics of 1782–83, 1800, 1825, 1830–32, 1846, 1847, and 1852–53; David H. Chance, "Influences of the Hudson's Bay Company on the Native Cultures of the Colville District," *Northwest Anthropological Research Notes* 7:1, pt. 2 (1973): 27, estimated that the 1783 epidemic may have killed half the population of tribes in the area; James Mooney, "The Aboriginal Population of America North of Mexico," *Smithsonian Miscellaneous Collections* 80:7 (February 6, 1928): 14–16.

⁹D.C. Linsley, "Lake Chelan and Agnes Creek in 1870: A Journey up Lake Chelan by Indian Canoe," *Northwest Discovery* 2:6 (1981): 382–401. Linsley described the trading post that had been established by Jack G. Ingram and a Mr. McBride; A.J. Splawn, *Ka-mi-akin: The Last Hero of the Yakimas* (1917; Caldwell, Idaho, 1958), 328–29, described the earthquake; Patrick J. Graham, ed., *Colville Collection: Book I* (Colville, Wash., 1989), 67, 113. Photographs of the Catholic mission as it looked before and after reconstruction in the 1930s; Raufer, *Black Robes and Indians on the Last Frontier*, 38, 56–57, 78–81, 83–86. Father Grassi's reports of his visits to the Wenatchi in 1873 and 1874 are published in the *Woodstock Letters*; Robert H. Ruby and John A. Brown, *Half-Sun on the Columbia: A Biography of Chief Moses* (Norman, Okla., 1965), 58; Ruby and Brown, *Dreamer-Prophets of the Columbia Plateau: Smohalla and Skolaskin* (Norman, Okla., 1989), 68, 155–56; Scheuerman, *The Wenatchi Indians*, 104–112.



Hunting camp at Lake Wenatchee, with one cloth tepee and one mat tepee. (Courtesy of the Confederated Colville Tribes History office)

Throughout the early 1870s, the Wenatchi remained independent, yet peacefully inclined toward whites, continuing to believe that their fishery and homeland had been protected by treaty with the United States. But U.S. officials seemed now largely unaware that the reservation had been mandated by the 1855 treaty, and by the late 1870s, the Wenatchi began to feel pressures from non-Indians and to wonder whether their homes were as secure as they once had believed.

Even before the Nez Perce War, General O.O. Howard and U.S. officials were laboring to force the Plateau Salish tribes onto reservations—Yakima to the south and Colville to the northeast of the Wenatchi. During the war, Chief Joseph attempted to rally the Salish to join him, but the Salish tribes—Sinkayuse, Chelan, Okanogan, Entiat, and Wenatchi—refused his appeals and reported, while they were gathered on the council grounds at Wenatchee Flats in 1877, that they would remain at peace.¹⁰

¹⁰Splawn, *Ka-mi-akin: The Last Hero of the Yakimas*, 336–38.

After the cessation of Nez Perce hostilities,¹¹ Howard and the United States were even more eager to place the Plateau Salish tribes on reservations, especially the Sinkayuse, under Chief Moses. The Sinkayuse, now commonly known as the Moses Columbia, lived in the plains, valleys, and great coulees to the east of Wenatchi territory. In 1878, with the Nez Perce matter behind him, Howard was intent on seeing a permanent peace arranged with Chief Moses, whom he feared might raise another rebellion, this time among the Salish tribes. Howard called a meeting at Priest Rapids, which Moses and a number of Salish leaders attended, including Chief Harmelt, who had now taken on the first name of William.¹²

Encouraged by U.S. officials, including Howard, Moses assumed the role of spokesman for tribes between Yakima and the Canadian border and between the Colville Reservation and the Cascades. At the council held at Priest Rapids in 1878, he lobbied for a reservation that would have included Wenatchi territory, but a local trader and friend of the Wenatchi spoke up, and Howard learned that the Wenatchi had already been promised a reserve. After the council, Howard recommended to Washington that a large reservation be set aside for Moses and his followers, and also recommended that the president formally set aside "the small tract secured to [the Wenatchi] by Colonel Wright, near the mouth of the Wenatchee," also submitting a map showing the location where he thought the Wenatchi reservation was supposed to be located.¹³

¹¹Alvin M. Josephy, Jr., *The Nez Perce Indians and the Opening of the Northwest* (New Haven, Conn., 1965), provides an excellent account of the Nez Perce War.

¹²Proceedings of Council between Moses, other Indians, and General Howard, at Priest Rapids, September 7 and 8, 1878, letters received, 1878 Washington Superintendency W 2064 (2), Records of the Bureau of Indian Affairs, RG75, NA.

¹³*Report of the Secretary of War; Being Part of the Message and Documents Communicated to the Two Houses of Congress at the Beginning of the Third Session of the Forty-Fifth Congress in Four Volumes*, vol. 1 (Washington, D.C., 1878), 207, 210–13, 234–35; Proceedings of Council between Moses, other Indians, and General Howard; "Map Showing Territory desired by Chief Moses as a Reservation," General Land Office Map, Washington Territory, 1876, RG 75, NA. Copy located as petitioner's exhibit 465a, dockets 224-161, records of Indian Claims Commission, RG 279, NA; James Wilbur, "A Rough Sketch of the Surrounding Country...", circa 1878, RG75, Bureau of Indian Affairs, RG 75, NA. Although Howard misidentified the location of the reservation by a few miles, the Yakima agent was able to locate where the reservation was to be.

After the Wenatchi converted to Catholicism, they had the benefit of advice from priests who better understood the motives of whites and the United States, and who could interpret political shifts and explain new legislation. One such piece of legislation was the Indian Appropriations Act passed by Congress in 1875, which contained a provision that came to be known as the Indian Homestead Act, granting Indians the right to make a homestead entry into 160 acres of the public domain.¹⁴

Jesuit missionary Father Urban Grassi visited with the Wenatchi in 1878 and reported that the tribe "seemed to be under the impression that the Americans wanted them to leave their lands and go to some Reservation, to which they have a great aversion." Father Grassi tried to calm their fears and suggested, undoubtedly referring to the recent passage of the Indian Homestead Act, that "if they would fence up a piece of land, build on it a little house and live peaceably they would never be molested." He said, "This pleased them."¹⁵ The following year, when pressured to move his people to Yakima, Chief William Harmelt echoed Father Grassi's advice, informing a U.S. military officer that he and the Wenatchi preferred to file the necessary papers to stay in their homes, where they were.¹⁶ Unfortunately, homesteads at that time required the deposit of fees, which most of the Wenatchi probably could not afford, and also required surveys, which were expensive and had not yet been done in their area.

During the following year, 1879, General Howard and the United States finally arranged to set aside a reservation for Moses and his followers. At first the crafty Moses had asked for a reservation that encompassed at least a portion of his territory, but he settled for a reservation that would include

¹⁴Charles J. Kappler, "The Indian Homestead Act, 1875," in *Indian Affairs, Laws and Treaties*, vol. 1 (Laws) (Washington, D.C., 1904), 23 (18 Stat., 402; March 3, 1875); Francis Paul Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman, Okla., 1976), 232-34. Prucha noted that relatively few Indians across the country took advantage of the law.

¹⁵U[rb]an G[rassi], S.J., letter, *Woodstock Letters: A Record of Current Events and Historical Notes connected with the Colleges and Missions of the Soc. of Jesus in North and South America*, vol. 7 (Woodstock College, 1878), 178.

¹⁶Green to assistant adjutant general, October 6, 1879, records of the U.S. Army Commands, Department of the Columbia, letters received, entry 715, box 59, #3879, RG 393, NA; Gary B. Palmer, "Ethnohistorical Report on Columbia, Entiat, Chelan, and Wenatchi Peoples of Colville Confederated Tribes," for The Colville Confederated Tribes, June 18, 1991, 3.1-3.5.

Methow territory and much of Chelan and Okanogan territory.¹⁷ Howard held a council at which Wenatchi Chief Harmelt was present. Both Howard and Moses encouraged the Wenatchi to move to the new Columbia Reservation. Harmelt professed his friendship with whites, declaring that they couldn't all be rascals, but steadfastly refused to move with his people from their homeland.¹⁸ Howard's officers reported that Harmelt was adamant in stating that Moses did not represent the Wenatchi and that his people were intent on filing the necessary papers to establish Indian homesteads where they lived.¹⁹ Although by this time the Wenatchi evidently had begun to doubt whether their reservation had ever really been set aside, as yet very few whites were competing for their lands, and they still seemed secure in their homeland.

Throughout the early 1880s, Wenatchi territory remained largely free of non-Indians. Sam Miller had married an Indian woman and was running a trading post at the mouth of the Wenatchee River, maintaining good relations with the Wenatchi Tribe.²⁰ A few other white men had married Wenatchi women and were living among the tribe along the river. But when Francis Marion Streamer, the transient jour-

¹⁷"Memorandum of an Agreement with Chief Moses," April 18, 1879, special case 65, Relating to the Columbia (Moses) Reserve, Intruders, Mines and Mineral Claims, RG 75, Bureau of Indian Affairs, NA (microfilm); Kappler, *Indian Affairs, Laws and Treaties*, 904. Executive Orders of April 19, 1879 and March 6, 1880. The southern boundary was expanded by the 1880 order to the south shore of Lake Chelan when it was clear the Northern Pacific land grant would not conflict with that southern boundary.

¹⁸Secretary of War, *Report of the Secretary of War; Being Part of the Message and Documents Communicated to the Two Houses of Congress at the Beginning of the Second Session of the Forty-Sixth Congress, in Four Volumes*, vol. 2, House of Representatives, Executive Document 1, part 2, 46th Cong., 2d sess. (Washington, D.C., 1880). U.S. Serial Set, no. 1903, war 1879, fiche 2-3, 153; C.E.S. Wood, "An Indian Horserace," *Century Magazine* (January 1887) [as reprinted in *Okanogan County Heritage* 2:1 (December 1963): 3-7]; Ruby and Brown. *Half-Sun on the Columbia*, 163; Scheuerman, *The Wenatchi Indians*, 112-15.

¹⁹Palmer, "Ethnohistorical Report," 3.1-3.5, quoting Green to assistant adjutant general, October 6, 1879, records of U.S. Army commands, part 1, Department of the Columbia, letters received, RG 393, entry 715, box 59, #3879, NA; Cook to adjutant general, Department of the Columbia, Vancouver Barracks, October 12, 1879, transcript from Colville History Office.

²⁰Thomas William Symons, U.S. Army Corps of Engineers, *The Symons Report on the Upper Columbia River & the Great Plain of the Columbia* (Fairfield, Wash., 1967), Senate Document 186, 47th Cong., 1st sess., 43. Symons reported "one settler" at the mouth of the Wenatchee.

nalist and Civil War veteran, visited the valley in 1882, the only other non-Indian he reported seeing was Catholic priest Father Grassi. Streamer described the fishing activities of the Wenatchi and guests from other tribes at the Wenatchapam Fishery. Willow weirs were constructed across the river using five hundred poles and involving dozens of Indian men working on the project, including divers. The women constructed drying racks along the banks and prepared the salmon for winter use. Prayers were said to the trees that were cut, and as the first catch was brought into the camps along the river, the people engaged in their annual First Salmon Feast.²¹

In 1883 and 1884, several events transpired that would weaken the Wenatchis' relative insulation from non-Indians. To the north, white miners and settlers had lobbied Congress to open the Columbia Reservation along the Canadian border. In 1883, Moses again traveled to Washington, D.C., this time with Okanogan leaders Sarsarokin and Tonasket, and agreed to the opening of the Columbia Reservation. The tribal people who actually lived on the Columbia Reservation (Methow, Entiat/Chelan, and Okanogan) were allowed the choice of moving to Colville or staying where they were and taking square-mile allotments. In the same year, a fifteen-mile-wide strip along the top of the reservation was opened to the miners and settlers.²² It would be another three years before the proposed allotments were completed and the entire reservation was opened to non-Indian settlement,²³ but the opening of the fifteen-mile strip and the anticipation of other lands becoming available encouraged non-Indians to move into the region. This wave of non-Indian immigration was further stimulated by the completion of the Northern Pacific Railroad during the same year.

In order for a settler to file a legal homestead on lands in the public domain, he had to obtain a survey of those lands. That was a relatively inexpensive procedure if a cadastral survey of the surrounding township had already been accomplished. But if the desired homestead was on unsurveyed lands, it was necessary for the prospective homesteader to

²¹Streamer, *Miscellaneous Notebooks*, July 1882; Ann Briley, *Lonely Pedestrian: Francis Marion Streamer* (Fairfield, Wash., 1986), 89–92; Streamer, "Life. Celestial and Terrestrial," vol. 2.

²²Kappler, "Agreement with the Columbia and Colville, 1883," in *Indian Affairs, Laws and Treaties*, vol. 2 (Treaties) (Washington, D.C., 1904), 1073–74; Kappler, *Indian Affairs, Laws and Treaties*, vol. 1 (Laws), 904–15.

²³*Ibid.*, 224.

make a "special deposit" to cover the cost of the survey. In 1879, an act of Congress made special deposits negotiable. This amendment to the 1862 Special Deposit Act prompted the formation of a wide-reaching criminal syndicate that sought to take advantage of the system through fraud. By 1883, the "Benson Syndicate" was conducting fraudulent surveys throughout the West, including Washington State. Several fraudulent surveys submitted to the General Land Office by the syndicate in 1883 and 1884 covered portions of Wenatchi territory, including the village and lands of John Harmelt, who had replaced his father as chief of the Wenatchi.²⁴ Although these surveys are demonstrably fraudulent, they had the effect of opening the area to questionable homestead entries.²⁵

While Chief John Harmelt and the Wenatchi clung to the belief that the United States would honor their treaty reservation, they were pragmatic enough to want to file Indian homesteads. Such homesteads had been legal since 1875, but they required fees that were exorbitant to an Indian living in a traditional resource-based economy. The fact that the lands had not been surveyed meant homesteads also required a special deposit and thus were even more expensive, essentially completely out of reach to the Indi-

²⁴James R. Fields, "The Benson Surveys," *Engineering Field Notes*, vol. 22 (September–October 1990), 1–8; C. Albert White, *A History of the Rectangular Survey System* (Washington, D.C., 1991), 157, 159; Harold Hathaway Dunham, *Government Handout: A Study in the Administration of the Public Lands, 1875–1891* (New York, 1941), 76–77; Lowell O. Stewart, *Public Land Surveys: History, Instructions, Methods* (1935; reprint Minneapolis, Minn., 1976), 66; Charles Holcomb, Township No. 23 North, Range No. 19 East, commenced September 14, 1884, completed September 20, 1884, approved by the Surveyor General of Washington, December 17, 1884; plat map, Bureau of Land Management archives; Portland, Ore.; Holcomb, Township N. 24 North, Range No. 19 East, commenced July 24, 1884, completed July 30, 1884, approved by the Surveyor General of Washington, December 17, 1884, plat map, Bureau of Land Management archives, Portland, Ore.

²⁵U.S. Department of Agriculture, Forest Service, Pacific Northwest Region (Craig Holstine, ed.), "An Historical Overview of the Wenatchee National Forest," Eastern Washington University Reports in Archaeology and History 100-80 Archaeological and Historical Services, November 1994, 3.4–3.6; Dave Rea, "Old, Faulty Land Surveys Haunt Chelan County," *Wenatchee World*, October 7, 1980; Chuck Holm, Memorandum to Files, July 20, 1980, WA5 Allotment Files, Realty Office, Colville Confederated Tribes; Fred Berry, Map. Partial Resurvey of T23N, R19E, 1910, Dominic, WA5, Wenatchee Allotment Files, Colville Tribal Realty Office.

ans.²⁶ But with some—albeit fraudulent—surveys completed in Wenatchi territory, Chief Harmelt and the Wenatchi, undoubtedly encouraged and helped by the Catholic priests, tried to take advantage of the opportunity and began to file for homesteads on lands near or including their traditional villages. Eventually, Wenatchi people filed on more than thirty homesteads, at least fourteen of them located in townships fraudulently surveyed by the Benson Syndicate.²⁷ Although in 1884 Congress had amended the Indian Homestead Act to waive all commissions

²⁶Paul W. Gates, *History of Public Land Law Development* (New York, 1979), 394. Gates reported that land office fees of about \$18 were required.

Survey rates per mile were set by statute. In 1893, in the state of Washington, in certain instances surveyors could charge up to \$25 per linear mile (27 Stat., 592).

Lynch to commissioner, October 24, 1892, BIA, Yakima Indian Agency, press copies of letters sent to the commissioner of Indian affairs, 1882, 1914; box 12, 1891-93; NA-PNW. Lynch reported that survey rates were about \$18 per mile, meaning a homestead survey would cost about \$18; anyone attempting to file a homestead on unsurveyed lands prior to 1884 would have had to pay out approximately \$36, an amount virtually impossible for an Indian living in a traditional lifestyle without any wage-based economy.

²⁷Marilyn Watkins, "Homesteads and Allotments of the Wenatchi," Hart West & Associates, July 10, 1998, produced for the Colville Confederated Tribes, esp. 7-13 and 90-92.



Wenatchee Indians apply for Indian homesteads at Waterville, ca. 1884-85. From left: Lucy (sister of Chief John Harmelt), Chief John Harmelt, Kami Sam, Felix, and an unknown man. (Courtesy of North Central Washington Museum, negative #78-214-62)

and fees for Indians filing homesteads, local land agents still required the Wenatchi to pay improper and excessive fees.²⁸

In 1886, after the Columbia Reservation allotments had been assigned, the reservation was opened for non-Indian settlement. Exaggerated reports of mineral wealth spurred some migration, and the newly completed railroad made the region much more accessible. Although the Wenatchi were still anticipating (and fervently hoping) that the reservation promised them would soon be fully delivered, on the national level Congress had served notice, with passage of the General Allotment Act, that it hoped to see existing reservations opened to non-Indian use.²⁹ Through it all, the Wenatchi remained ensconced in their homes along the Wenatchee River. The Catholic mission at Cashmere continued to provide support for them, and Father de Rouge traveled through the area from 1885 until his death in 1916. Primarily as a result of disease, the Wenatchi population had now been reduced to less than two hundred, perhaps only 10 percent of what it had been one hundred years earlier.³⁰

In 1887, Special Agent George W. Gordon reported the first conflict between the Wenatchi and a white settler over lands in the Wenatchee Valley.³¹ The following year, Gordon was directed by the commissioner of Indian affairs to investigate Indian fishing rights in the Northwest.³² While working on the

²⁸Kappler, *Indian Affairs, Laws and Treaties*, vol. 1 (Laws), 23; the "Indian Homestead Act of 1875" (18 Stat., 402; March 3, 1875); *ibid.*, 23; "Indian Appropriations Act, July 4, 1884" (23 Stat., 96); Prucha, *American Indian Policy in Crisis*, 234. These homesteads could be proved up to fee simple titles after twenty-five years.

Streamer to Howard, quoting Wapato John, August 20, 1890, Streamer letters, mss., Archives of the Washington State Historical Society; Gates, *History of Public Land Law Development*, 394.

²⁹Wilcomb E. Washburn, *The American Indian and the United States: A Documentary History—Volume III* (Westport, Conn., 1973), 2188–93, reprinting the General Allotment Act (Statutes at Large, XXIV, 388–91) with attached commentary.

³⁰Raufer, *Black Robes and Indians on the Last Frontier*, 95–97, 101.

³¹George W. Gordon, special agent, to commissioner of Indian affairs, November 5, 1887, RG 75, letters received, 1887, NA. Gordon reported that it was on surveyed lands and thus could be settled by examining the land office records.

³²A.B. Upshaw, acting commissioner, to secretary of interior, June 27, 1888, RG 393, part 1, Department of the Columbia, letters received, entry 715, 1888–1649, NA; William P. Vilas, secretary of interior, to secretary of war, July 13, 1888, RG 393, part 1, Department of the Columbia, letters received, entry 715, 1888–1793, NA.

Yakima Reservation, Gordon became familiar with article 10 of the 1855 treaty, which established the Wenatchapam Fishery Reservation. He then traveled to the Wenatchee Valley to determine exactly where the reservation should be located. When he consulted with whites who lived in the area, they described Colonel Wright's marking off the boundaries of the reservation around 1855. They told him that one of the whites, Richard "Dick" Thompson, who had married a Wenatchi woman and had lived among the tribe since the 1850s, said he was an eyewitness when Wright "staked off" the reservation around the forks where the Icicle River and Peshastin Creek flowed into the Wenatchee River and, further, that he could identify where some of the monuments had been located. Another settler reported that he thought the reservation was to be in the area of Mission Creek where most of the Indians now lived, and Gordon said whites there were becoming nervous at the possibility of a reservation in the vicinity. The information from Thompson, however, indicated the reservation had been correctly located by Wright, who marked out its bounds between Icicle and Peshastin, along the Wenatchee River.³³

Gordon noted that the Wenatchi (he called them the "Yakima Indians of the We-nat-chee river") continued to fish at the Wenatchapam Fishery, "by means of traps or wicker work built in the river." He also noted that both whites and Indians had made homestead entries in the area of Mission Creek. He said there were few whites at the fishery, and they were "squatters, the lands being still unsurveyed." At Icicle forks, he "found the fishing camps, camp equipage, drying scaffolds and canoes of the Indians, who were absent in the mountains hunting." When whites told him the Indians also fished further up the Wenatchee River, he traveled eight or ten

³³Gordon, "Report on the 'Wenatshapam Fishery' and Reservation"; Briley, *Lonely Pedestrian*, 89, 151-52. Thompson was born about 1811 in Virginia and died on Bonaparte Creek on June 3, 1894. Streamer had written a biographical sketch of the man in an attempt to obtain a pension for him.

J.J. Archer to Captain Pleasanton, January 2, 1859, A4, RG 393, part 1, Department of Oregon, entry 3574, letters received, 1858-61, box 1, NA, discussed a "Thomasson," who was married to an Indian woman and in the area in the 1850s, almost certainly Richard Thompson; Archer to Captain Pleasanton, January 1, 1859, Fort Dalles Papers, Huntington Library, is a copy of the same letter in Archer's hand; Albert Bowman Rogers, diary, trans. Emily Rogers Valentine, accession number 642, folder number 392A; mss., Special Collections, University Archives, Allen Library, University of Washington, 73. Rogers met Dick Thompson coming over the Wenatchi trail to the coast in 1887.

miles up the river (to the vicinity of Chiwaukum Creek), and found "Indians fishing with extensive traps and drying houses." He asserted that "this was their main fishing ground on the Wenatchee during the last fishing season," but noted that since he had no interpreter, he was able to gather very little information from the Wenatchi. He said that from four hundred to six hundred Indians gathered in the area to fish each season, a few coming from the west side of the Cascades, some from Yakima, but most from the Wenatchee Valley and Salish camps further north along the Okanogan River.³⁴

Gordon recommended that Wright's correspondence be searched to enable him to reestablish the boundaries of the reservation. If Wright's field notes could not be found, Gordon suggested establishing a commission to determine the correct location for the reservation. Because there were now white settlers near Mission Creek, he said the reservation might better be placed upstream at the forks of the Icicle, where the few white settlers were all squatters, with no rights to the land, or better still, he conjectured, eight or ten miles upriver, where there were no white settlers at all, but where there were also good hunting grounds. Up to that time, he said, the Wenatchi had not been interfered with, where they fished the Wenatchapam Fishery along the Icicle and Wenatchee Rivers.³⁵

Although the Wenatchi continued to utilize the Wenatchapam Fishery without interference, encroachments by whites into the valley were now causing them to doubt the federal government's pledge to guarantee them their lands through a reservation. In 1890, Frank Streamer again visited the fishery at the forks of the Icicle and Wenatchee Rivers, where he talked with Chief Harmelt about "the old Colonel Wright and Sam-ow [Skamow] treaty reservation," watched Wenatchi catch and dry hundreds of salmon at the fishery, and joined them in feasting.

A feast of salmon broiled on sticks by the fire in the clear, scarlet-colored meat, is the great repast for delicacy and deliciousness of flavor—all purely salmon—without salt or seasoning of any kind.³⁶

But the following month, Streamer attended a "Grand Medicine Council" of tribal leaders at the traditional

³⁴Gordon, "Report on the 'Wenatchapam Fishery' and Reservation."

³⁵*Ibid.*

³⁶Streamer, "Life. Celestial and Terrestrial" vol. 2, 5–6, 327.

Wenatchi gathering place, the Wenatchee Flats Council grounds. Five hundred Indians attended, representing tribes from throughout the region, including Moses Columbia, Chelan, Nez Perce, Spokane, Entiat, and Wenatchi. To the north of Wenatchi, a white-imagined "Indian Scare" in the town of Ruby and the forced removal of Chelans from their homes at gunpoint had helped to raise fear among the tribes.³⁷

On August 20, Wapato John, an Entiat leader who could speak English, dictated a letter to Streamer, to be sent to General Howard. He said that the Wenatchi wanted to know what had become of their treaty, which they believed granted them an eight-mile-square reservation where they lived along the Wenatchee River. They complained that they were not supposed to be charged fees for their Indian homesteads, but that the land office had charged them \$22, and that whites were now moving into what they thought were reservation lands. They also mentioned Gordon, and said that he had suggested their reservation should be placed further upstream from where it was supposed to be located, in a place "where a bear could not live." They told Howard they were "very poor, yet they fought for Colonel Wright and Washington City." Now Indian agents were trying to force them to go to the Colville Reservation "and forget where we belong . . . and whether we ever had a good father or mother or whether we [are] only coyotes to be shot at, and corralled [sic] like cay-uses."³⁸

U.S. officials had been fully cognizant of their obligations toward the Wenatchi for more than a decade, since before there was a single white entry into the public lands in Wenatchi territory. General Howard had recommended action in 1879, Gordon in 1889, and now in 1890 Howard again asked

³⁷Streamer to Howard, August 20, 1890, Miscellaneous Notebooks and Correspondence; Streamer to Howard, November 20, 1890, Miscellaneous Notebooks and Correspondence; Streamer to Howard, November 20, 1890, RG 75, special case 177, NA; Henry Setin to post adjutant, Fort Spokane, August 2, 1890, RG 393, part 1, Department of the Columbia, letters received, entry 715, 1890-2232, NA; Cole to commissioner, July 21, 1890, 10334-1891, incl. #8, RG 75, special case 177, Long Jim, Kultus Jim, Wenatchi Bob, NA; no author, *Glimpses of Pioneer Life of Okanogan County* (Okanogan, Wash., 1924), 78.

³⁸Streamer to Howard, Governor's Island, New York City, August 20, 1890, quoting Wapato John, Streamer letters, mss., Archives of the Washington State Historical Society; Raufer, *Black Robes and Indians on the Last Frontier*, 76, reproducing Chief John Wapato to Frank M. Streamer, August 20, 1890; Hackenmiller, *Wapato Heritage*, 126-31; Ruby and Brown, *Half-Sun on the Columbia*, 271-73.

Commissioner of Indian Affairs Morgan to take action. Howard reported on Streamer's letter and, calling Morgan a "real friend of the Indians," asked the commissioner to please take action in behalf of these Northwest Indians.³⁹

The anticipated arrival of the Great Northern Railway in Wenatchi territory finally focused the attention of the delinquent federal government on article 10 of the Yakima Treaty, forty-three years after its ratification by Congress. James J. Hill had begun construction of the railroad in 1886 and, the following year, had sent Albert Bowman Rogers to scout for a route through the Cascade Mountains. Although the Northern Pacific had been completed in 1883, it had left Seattle without a major transcontinental connection. Hill sent Rogers to search for a route through the jagged Cascades to Seattle's port. On July 29, 1887, Rogers encountered a group of Wenatchi fishing at the Wenatchapam Fishery, where Icicle Creek met the Wenatchee River. After he explained his objective, to find a route over the mountains, the Indians suggested he follow a route up Chumstick Canyon to Lake Wenatchee and then on to Cady Pass. Rogers concluded that this route, which paralleled an old Wenatchi trail to the coast, was the best route over the North Cascades.⁴⁰

By late 1889, Hill's chief engineer, John F. Stevens, had been sent to map a rail route over the North Cascades. The letters of Stevens' assistant, engineer C.F.B. Haskell, indicate that they first looked at Rogers' route, up Chumstick Canyon to Lake Wenatchee, a route for which Haskell said they would have to "cut a trail."⁴¹ Stevens agreed with Rogers' earlier

³⁹O.O. Howard to General Morgan, September 3, 1890, RG 75, L-R, CIA, NA.

⁴⁰Michael P. Malone, *James J. Hill: Empire Builder of the Northwest* (Norman, Okla., 1996), 102–112. Hill's rails followed much of the route identified by Governor Stevens nearly four decades earlier.

Derek Hayes, *Historical Atlas of the Pacific Northwest* (Seattle, Wash., 1999), 146–47, reproducing maps of the 1853 Stevens route and the route and grant of the Northern Pacific; Albert Bowman Rogers, *Diary*, trans. Emily Rogers Valentine, accession number 642, folder number 392A, mss., Special Collections, University Archives, Allen Library, University of Washington, pp. 60–64, 80. Rogers also noted Wenatchi berrying above Lake Wenatchee.

JoAnn Roe, *Stevens Pass: The Story of Railroading and Recreation in the North Cascades* (Seattle, Wash., 1995), 53–54; Kurt E. Armbruster, *Orphan Road: The Railroad Comes to Seattle, 1853–1911* (Pullman, Wash., 1999), 27, 163–64; Linsley, "Lake Chelan and Agnes Creek in 1870." Linsley had attempted, but failed, to find a route over the North Cascades for the Northern Pacific in 1870. He did reach the vicinity of White Pass.

⁴¹Daniel C. Haskell, ed., "On Reconnaissance for the Great Northern: Letters of C.F.B. Haskell, 1889–1891," *Bulletin of The New York Public Library* 52: 2 (February 1948): 130.

conclusion that the Wenatchee drainage provided the best opportunity for a route over the mountains, but working with Haskell, in late 1890, he designed a slightly different route, up Tumwater Canyon and over what would be named Stevens Pass in honor of the engineer.⁴² In order to acquire a four-hundred-foot-wide right-of-way through unreserved portions of the public domain, the railroad was required to file a map with the secretary of the interior, showing a survey of the proposed route. The secretary then could approve the route, conveying the right-of-way to the railroad, subject to proof of actual construction.⁴³

Unfortunately for the Wenatchi, the Great Northern route passed directly through the lands that had been ordered reserved for their reservation forty-five years earlier. The railroad was fully aware that the route over Stevens Pass was of crucial importance to its own financial success. In August 1891, the railroad submitted its map of the route from Mission Creek to the Icicle confluence.⁴⁴ Two months later, the route was approved by Secretary of the Interior Noble.⁴⁵ This section of the route was so important to the railroad that it filed this map before it had determined a route from Spokane to the mouth of the Wenatchee River.⁴⁶

⁴²John F. Stevens, *An Engineer's Recollections* (New York, 1936), 27–30; Stevens, "Great Northern Railway," *The Washington Historical Quarterly* 20:2 (April 1929): 111–13.

⁴³"An Act granting to railroads the right of way through the public lands of the United States." *Statutes at Large*, vol. 18, part 3 (Washington, D.C., 1875) (18 Stat., 482). The lands could not have been reserved previously for any other purpose.

⁴⁴Lawrence to commissioner, General Land Office, August 12, 1891, RG 49, Division F, entry 571, box 35, number 102858, NA; "Great Northern Line, Pacific Extension, Station 270 to Station 1167 + 88," map, dated June 22, 1891, filed July 20, 1891, approved by the secretary of the interior, October 1, 1891, RG 49, bundle 227B, 1891/93498, NA (College Park, Md.).

⁴⁵Secretary of Interior Noble to commissioner of General Land Office, October 1, 1891, RG 49, Division F, entry 571, box 35, NA; Register to commissioner of General Land Office, December 15, 1891, RG 49, Division F, entry 571, box 35, NA.

⁴⁶Peter J. Lewty, *Across the Columbia Plain: Railroad Expansion in the Interior Northwest, 1885–1893* (Pullman, Wash., 1995), 158–60. The railroad first proposed a route through Wilbur and Coulee City, but Hill eventually approved a more southerly route, via Odessa; Register to commissioner of General Land Office, December 15, 1891, RG 49, Division F, entry 571, box 35, NA; Haskell, "On Reconnaissance for the Great Northern," 125–40.

Although the railroad had determined its route,⁴⁷ it did not submit a map showing the route from the Icicle confluence up Tumwater Canyon.

Between June and December 1891, Haskell's engineering crew was locating the route through the Wenatchi drainage, and by early 1892, grading for the rails had begun on the west side of the Cascades and between Spokane and the Columbia River.⁴⁸ Now it had become virtually impossible to ignore the situation. Yakima Indian Agent Jay Lynch was aware of the great importance of fishing rights to tribes in the area, and had recently directed the local U.S. marshal to prosecute anyone attempting to interfere with Indians' "exclusive right of taking fish in the streams where running through, or bordering" the Yakima Reservation.⁴⁹ On July 11, 1892, Lynch wrote to the commissioner of Indian affairs, quoting the text from article 10 of the 1855 Yakima Treaty and asking the commissioner if the Wenatchapam Fishery Reserve had ever been "surveyed and definitely located and marked" as it should have been under the provisions of the treaty.⁵⁰ Finally, the commissioner acted, on September 8, directing Lynch

to visit said fishery, reserved and set apart by said treaty for the use of said Indians, and to fix and determine, as best he could, the boundaries of said tract of land by metes and bounds or by natural objects, that it might be surveyed and marked out, under directions of the President, as the treaty stipulated, and to submit an estimate of the probable cost to have such tract of land as he might designate properly marked out and surveyed.⁵¹

⁴⁷J.H. Gault, "Map of the Wenatchee Valley," December 25, 1891. Also certified with statement Helena, Mont., March 5, 1892, HLH. Certified by S.G. Watson to be "a correct tracing of a blue print Map given me by E.H. Bickler Chief Engineer [sic] of the Pacific Extension of the Great Northern Ry." RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA. By December 25, 1891, the railroad had determined its route up Tumwater Canyon and through the Chiwaukum fishery on its way to Stevens Pass, and was fully aware of the location of the Icicle Forks.

⁴⁸Haskell, "On Reconnaissance for the Great Northern," 137-38; Lewty, *Across the Columbia Plain*, 164-65.

⁴⁹Lynch to Simmons, deputy U.S. marshal, April 27, 1892, RG 75, BIA, Yakima Indian Agency, press copies of letters sent, 1886-1913, box 25, 1890-1893; NA-PNW.

⁵⁰Lynch to commissioner, July 11, 1892, "Wenatchapam Fishery Reserve," special case 183, RG 75, NA.

⁵¹Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 926-27.

After receiving his instructions, between September 20 and October 2 Lynch traveled about 150 miles to the Wenatchee River drainage and tried to determine the correct location of the Wenatchapam Fishery Reserve. He described the scenery in the drainage as "some of the wildest and I believe the grandest mountain scenery in the world," and said that he had hopes that "what seemed to be a lost Reservation may be again restored to these Indians."⁵²

Nearly three weeks later he submitted his report, claiming to have traveled up the Wenatchee River to Lake Wenatchee, where he observed two large creeks entering into the river. These, he concluded, represented the "forks" in the treaty, and then he recommended a reservation that took in the head of the Wenatchee River and the next ten miles of the river's length. He noted that there were only three or four white men in that area, who were squatting on unsurveyed lands with the intent of cutting timber. At \$18 per mile, he calculated the cost of surveying the twenty-three-thousand-acre reservation at \$540 and suggested that it be surveyed immediately, since settlers were bound to arrive in the area via the Great Northern Railway, which would soon be completed through the valley.⁵³

A little less than a month later, Commissioner of Indian Affairs Morgan recommended to the secretary of the interior that the president, by executive order, authorize a survey of the reservation, following Lynch's suggestions, but "provided that the lines surveyed and marked out when completed should embrace the whole of the land contemplated to be set apart by the treaty, and approximately near the area named therein." Two days later, President Benjamin Harrison approved the proposed order and, with his signature, made it law.⁵⁴

With his proposed boundaries of the reservation, Lynch intended to include the Chiwaukum fishing grounds described by Gordon in 1889, which were within eleven or twelve miles of the head of the Wenatchee River. Unfortunately, his conclusion that the confluence of Nason Creek and the Chiwawa

⁵²Lynch to CIA, October 4, 1892, BIA, Yakima Indian Agency, press copies of letters sent to the commissioner of Indian affairs, 1882, 1914, box 12, 1891-1893, NA-PNW.

⁵³Lynch to commissioner, Yakima Oct. 24, [189]2 Hon. Commissioner of Indian affairs, Washington, D.C., BIA, Yakima Indian Agency, press copies of letters sent to the commissioner of Indian affairs, 1882, 1914; box 12, 1891-1893, NA-PNW; Lynch to surveyor general of Washington, October 17, 1892, RG 75, BIA, Yakima Indian Agency, press copies of letters sent, 1886-1913, box 25, 1890-1893, NA-PNW, requesting an estimate of surveying costs.

⁵⁴Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 926-28.

River with the Wenatchee formed the "forks" in the river was clearly in error, and was understood to be in error even by those whites in the area who opposed the reservation. J.J. Matthews said that he lived seven miles below the lake and that Lynch only came up the river as far as "the old fishery," where the Chiwaukum flowed into the Wenatchee. There, because of high water, he turned back and produced his proposal using a defective map.⁵⁵ James H. Chase and other whites who had recently moved to the area also pointed out to the commissioner that Lynch's reservation was many miles upstream from where the traditional fishery was located.⁵⁶

The commissioner of the General Land Office moved quickly. In December the office instructed the surveyor general of Washington to let a contract.⁵⁷ President Harrison had been defeated in the national election in November and would soon be replaced by Grover Cleveland. Even though Agent Lynch had incorrectly placed the reservation at least fifteen miles from where it should have been located, probably in order to protect white squatters, he was still worried that the next administration would be even less sympathetic to the Indians. Anxious about the lack of a survey, he wrote to the commissioner on December 20:

I trust this matter can be permanently settled during the present administration, and if there is anything more I can do to assist in the matter for these Indians, please instruct.⁵⁸

But it took the surveyor general of Washington until May 1893 to let a contract with Deputy Surveyor Oliver B. Iverson to survey the "Wenatshapam Fishery Reserve."⁵⁹ The Harrison administration

⁵⁵J.J. Matthews to secretary of the interior, July 6, 1893, as found in SED67, 9–10.

⁵⁶James H. Chase to secretary of the interior, June 30, 1893; Chase to commissioner, August 28, 1893; and petition, as found in SED67, 7–8 and 11–13.

⁵⁷M.M. Rose, assistant commissioner of the General Land Office to surveyor general of Washington, December 5, 1892, RG 49, entry 478, Letters Sent to the Surveyor General of Washington, vol. 76, 57–58, NA; M.M. Rose to surveyor general of Washington, December 5, 1892 (second letter of same date), RG 49, entry 478, Letters Sent to the Surveyor General of Washington, vol. 76, 58, NA.

⁵⁸Lynch to commissioner, December 20, 1892, as found in SED67, 5.

⁵⁹Shaw to Iverson, enclosing contract no. 408, with attached map, May 5, 1893, RG 49, Oregon, series 22, box 48, contracts 33, Thompson file, Seattle Federal Archives and Records Center (Sandpoint), NA.

had not moved fast enough, and in June Agent Lynch was replaced by Agent L.T. Erwin before the survey could be completed.⁶⁰

In the meantime, the survey of the reservation was to be further jeopardized by actions of the Great Northern. As 1892 came to a close, James J. Hill was desperate to complete his rail line over the Cascades. With the Northern Pacific verging on bankruptcy, Hill feared it would lower its rates to compete better against the Great Northern. The nation was teetering on the brink of a national economic depression. Hill, furious at delays, became nearly hysterical when he learned the railroad would not be finished earlier in 1892. He relentlessly pushed thousands of workers to finish the line over the Cascades in the dead of winter, until at last the final spike connecting the rails to the west coast was driven on January 6, 1893.⁶¹

The railroad line had been built, but in the frantic rush to finish, the company had not obtained the necessary right-of-way for the line through the crucial Tumwater Canyon section. It had failed to file a map of this section with the General Land Office, a procedure required in order to obtain its four-hundred-foot-wide right-of-way.⁶²

⁶⁰Lynch to James, December 26, 1893, RG 75, special case 183, NA. In this letter, Lynch explained that he was removed as agent by the president in June 1893.

Prucha, "Thomas Jefferson Morgan, 1889-1893," in *The Commissioners of Indian Affairs, 1824-1977*, ed. Robert M. Kvasnicka and Herman J. Viola (Lincoln, Neb., 1979), 193-209; William T. Hagan, "Daniel M. Browning, 1893-1897," in *ibid.* Grover Cleveland replaced Benjamin Harrison as president in 1893. Cleveland immediately replaced Thomas Jefferson Morgan with Daniel M. Browning as commissioner of Indian affairs.

⁶¹Lewty, *Across the Columbia Plain*, 234; Lindley M. Hull, ed., *A History of Central Washington: Including the Famous Wenatchee, Entiat, Chelan and the Columbia Valleys* (Spokane, Wash., 1929), 343, 383-84. The railroad workers also brought smallpox to the area.

John A. Gellatly, *A History of Wenatchee: "The Apple Capital of the World"* (Wenatchee, Wash., 1960), 19-21, 24-25, 34; Holstine, "An Historical Overview of the Wenatchee National Forest," 3.29; Armbruster, *Orphan Road*, 167-69, 172.

⁶²"An Act granting to railroads the right of way through the public lands of the United States" provided the authority for the right-of-way and requirements for obtaining it.

Register to commissioner, March 19, 1928, right-of-way file no. 016256, Bureau of Land Management, Spokane, Wash.; Township 26 north, range 17 east, tract book, Bureau of Land Management, Spokane, Wash.; Township 26 north, range 17 east, plat book, Bureau of Land Management, Spokane, Wash.; "Great Northern Railway Peshastin to Winton Revision, Amended Definite Location, Chelan Co., Wash.," map submitted March 18, 1928, approved March 2, 1931, right-of-way file no. 016256, Bureau of Land Management, Spokane, Wash. A right-of-way from Peshastin to Winton was not obtained until 1931.

Roe, *Stevens Pass*, 34, 61-62, 92-99. The original route went up Tumwater Canyon. In 1925 an easier rail route was completed up Chumstick Canyon, bypassing Tumwater.

In March 1893, before the contract with Iverson had been let, James H. Chase wrote to Hill informing him of the pending action to survey the Wenatchi Reservation. Chase told Hill that the reservation, as described by Lynch, would encompass eight miles of the railroad's tracks and would block the use of twenty-three thousand acres of good timber. He also asserted that whites already claimed all of the area.

I have thought it probable that this matter was of sufficient interest to the road to interest you and possibly to have you take such steps in the matter as will cause the Govt. to fully investigate it before any thing more is done, and finally to drop it altogether.⁶³

Hill directed his secretary to respond to Chase, saying that "he expects to be in Washington in the latter part of this month, and will then take the matter up with the Department."⁶⁴

It was not until June 1893 that the first passenger service from St. Paul to Seattle was to begin, and, according to engineer Stevens, work on the line over the summit continued until October 1893.⁶⁵ So when Deputy Surveyor Iverson finally arrived to survey the Wenatchapam Fishery Reserve, the railroad's men were still working on the line, even though the Great Northern did not have a valid easement or right-of-way through much of the land that had been designated as a reservation nearly forty years earlier.

After consulting with the surveyor general, who instructed him to run the reservation lines parallel with the river rather than as a rectangle, Iverson and his crew began working on August 10. They completed a preliminary survey of the exterior bounds—bounds that would include ten linear miles of the Wenatchee River where it leaves Lake Wenatchee,

⁶³Chase to Hill, March 31, 1893, Minnesota Historical Society, St. Paul, Minn., Great Northern Railway, subject file 1783, Indian reservation on Wenatchee River, 1893.

⁶⁴Secretary to the president to Chase, April 14, 1893 [copy], Minnesota Historical Society, St. Paul, Minn., Great Northern Railway, subject file 1783, Indian reservation on Wenatchee River, 1893.

⁶⁵Malone, *James J. Hill*, 147–50; Albro Martin, *James J. Hill and the Opening of the Northwest* (St. Paul, Minn., 1976), 396; Lewty, *Across the Columbia Plain*, 164–69; Stevens, *An Engineer's Recollections*, 31; Stevens, "Great Northern Railway," 111–13.

generally southward towards Tumwater Canyon. He had already begun the final survey when Agent Erwin arrived.⁶⁶

Erwin concluded that the reservation "ran across the railroad"⁶⁷ and ordered Iverson to move the reservation boundaries another ten miles up into the mountains:

You will discontinue your present survey of the Wenatshapam Fishery Reserve, and begin at a point westerly by meanders of the shore of the Lake Wenatchee one mile from where the Wenatchee River leaves the same, running thence south one mile, thence east six miles; thence north six miles, thence west six miles, thence south to the place of beginning.⁶⁸

Iverson and his crew went back out and destroyed the monuments that had been created and the trees that had been scored to mark the bounds of the reservation described in his contract. Iverson then surveyed a new line to match the reservation ordered by Erwin, the southern boundary of which was now some twenty-five miles up the Wenatchee River and far away from the actual Wenatshapam Fishery. When he finished, he provided a "General Description" of the newly surveyed reservation. Iverson must have been well aware that the "Wenatshapam Fishery Reserve" was supposed to protect an important Indian fishery. In his description he pointed out that only "a few salmon" made it past Tumwater Falls to go further up the Wenatchee River, and they "are so battered up as to be unfit for food." He said that there were trout to be found in Lake Wenatchee and in the rivers flowing through the reserve as surveyed, but that they did "not appear to be abundant or easily caught."⁶⁹

⁶⁶Iverson, "Field Notes of the Survey of Wenatshapam Fishery Reserve"; Iverson to Watson, August 1, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA; Amos F. Shaw, surveyor general of Washington, to Iverson, August 1, 1893, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA.

⁶⁷L.T. Erwin to W.P. Watson, August 2, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA. Erwin suggested that Iverson had joined him in the decision to change the reservation, but Iverson made it clear in both his field notes and his correspondence that the decision had been made by Erwin.

⁶⁸Erwin to Iverson, August 18, 1893, as found in Iverson, "Field Notes of the Survey of Wenatshapam Fishery Reserve"; and Erwin to Iverson, August 18, 1893, copy, BIA, Yakima Indian Agency, press copies of letters sent to the commissioner of Indian affairs, 1882, 1914, box 12, 1891, 1893, NA-PNW.

⁶⁹Iverson, "Field Notes of the Survey of Wenatshapam Fishery Reserve."

While the reservation was being surveyed in its new location, now high in the mountains, Chief Harmelt and a Wenatchi delegation sought out Erwin and met with him. They protested the location of the reserve and said that it should be further down the river, "below Icicle." Erwin admitted the reservation was being surveyed in the wrong location, but claimed to have nothing to do with its placement. Although he had just moved the reservation from the location identified by Agent Lynch and had ordered the surveyor to destroy the survey markers already set, Erwin told Harmelt and the Wenatchi, "I have no power nor authority to change the location." He told the Indians that former Agent Lynch had located the reservation and there was nothing he could do about the location.⁷⁰

After Chief Harmelt protested to Agent Erwin about the erroneous location of the survey, he sought out a sympathetic white, F.D. Schnebly, in Ellensburg and had him draft a letter to the post commander at Fort Vancouver. Two Wenatchi, probably Harmelt and an associate, then traveled to the post and delivered the letter, in which they claimed the right to a reservation below Icicle, not above. The army first forwarded the letter to the agent at the Colville Reservation, but when he reported that he knew nothing of the claims, it was forwarded to Erwin on the Yakima Reservation. The military authorities at Fort Vancouver later reported that they heard nothing back from the Yakima agent.⁷¹

Even before the survey was completed, whites in the area began to protest against the reservation's very existence.⁷² In response, new Commissioner of Indian Affairs Browning suggested that whites submit a petition to him, which he could then use to facilitate a cession of the reservation.⁷³ At about the same time, Agent Erwin reported to the commissioner that the Wenatchapam Fishery Reserve had been surveyed. But Erwin used the same subterfuge with the commissioner that he had used on Harmelt and the Wenatchi. He told the commissioner

⁷⁰L.T. Erwin to commissioner of Indian affairs, September 1, 1893, and The Council Proceedings, December 18, 1893–January 6, 1894, as found in SED67, 12, and quoted at 25 and 27.

⁷¹F.D. Schnebly, Ellensburg, Wash., to post commander, Fort Vancouver, Wash., September 4, 1894, RG 94, Office of the Adjutant General, document file, 5607 AGO 1894, NA, Washington, D.C.

⁷²For example, see Chase to commissioner of Indian affairs, August 28, 1893, RG 75, special case 183, NA; and SED67, 7–10.

⁷³Browning to Chase, July 18, 1893, as found in SED67, 8–9.

that he had been visited by "quite a number of Wenatshapam Indians," who were "protesting against the location of the fishery at Lake Wenatchee" and said that it should be located "further down the river." In that, Erwin was honest, but he went on to say, "As I had no discretion to change the location, it has caused much dissatisfaction."⁷⁴

The commissioner fixed on this piece of misinformation to recommend to the secretary of the interior that the United States seek a cession of the reserve. Even before the reservation survey was submitted to the General Land Office for approval, the commissioner of Indian affairs asked the interior secretary for authority to seek a cession of the reserve, claiming that the reservation had been located erroneously by former Agent Lynch, and using that mistake as justification for the cession.⁷⁵

On October 2, 1893, the secretary of the interior authorized negotiations to obtain a cession of the reserve, before the survey had even been submitted to the General Land Office, let alone certified as accurately representing the mandated description in article 10 of the 1855 treaty.⁷⁶ The commissioner and the secretary gave the appearance that they were unaware that article 10 of the 1855 treaty provided for a reservation specifically designated for the benefit of the Wenatchi Tribe.⁷⁷ Instead they arranged for a cession council with the Yakima Tribe. But they did recognize that the Wenatchi should participate in the council and should be parties to any agreement. In mid-October 1893, they appointed Yakima Agent L.T. Erwin, together with Special Agent John Lane, to represent the United States at the cession council.⁷⁸

⁷⁴L.T. Erwin to commissioner of Indian affairs, September 1, 1893, as found in SED67, 12; Erwin, "Report of Yakima Agency," August 27, 1894, in Department of the Interior, commissioner of Indian affairs, *Annual Report of the Commissioner of Indian Affairs, 1894* (Washington, D.C., 1895), 325–27. This report provides no further details on the survey.

⁷⁵William P. Watson, U.S. surveyor general of Washington to commissioner of the General Land Office, March 28, 1894, RG 49, entry 180, box 39455, #36147, NA; commissioner of Indian affairs to secretary of the interior, September 19, 1893, as found in SED67, 13–14.

⁷⁶Sims to commissioner, October 2, 1893, as found in SED67, 14–15.

⁷⁷James Doty and Isaac I. Stevens, "Official Proceedings at the Council held at the Council Ground in the Walla Walla Valley with the Yakima Nation of Indians and which resulted in the conclusion of a Treaty on the 9th day June 1855," microcopy T-494, Ratified Treaties, roll 5, 1854–55, NA.

⁷⁸D.M. Browning, commissioner of Indian affairs, and William H. Sims, acting secretary of the interior, to John Lane, special agent, and L.T. Erwin, Indian agent, October 13, 1893, as found in SED67, 15–17.

When former Agent Lynch learned that the survey had placed the reservation in the mountains at Lake Wenatchee, he wrote to complain about the whole affair. He said the survey had resulted in a great injustice, and that the reservation he had described included salmon fishing grounds about ten miles below the lake. He said the Indians were "astonished and bewildered" by the current move to get them to cede the reservation.

I do not think I can give you a clearer idea of the situation than to quote the remarks of an old Indian in making his argument to me in behalf of their old fishery:

"Does our Great Father at Washington think a salmon is an eagle that lives on top of a mountain, or does he think a salmon is a deer that lives in the woods and hills, or does he think a salmon is a mountain goat that lives among the rocks of the snow-covered mountains?"

Lynch said the old Indian told him they wanted their salmon fishery on the river, not on a mountain lake containing little trout. He said that the whites were driving them away from their legitimate fishery reserve, which was given to them a long time ago by Governor Stevens.⁷⁹

Erwin and Lane opened their cession council with the Yakima and the Wenatchi on December 18, 1893. Chief John Harmelt and the Wenatchi had traveled over the mountains in deep snow to reach the council. Erwin began by saying he wanted to hear "especially from those who come from the Wenatchee who live in the neighborhood of this fishery,"⁸⁰ but then, yet again, he was dishonest with them. He admitted that the reservation had not been properly located, and again said former agent Lynch was responsible and that he, Erwin, had not had the authority to change the location of the reservation. He recalled meeting Harmelt and the Wenatchi the previous summer near Lake Wenatchee when Harmelt told him that "no

⁷⁹Jay Lynch to Hon. Darwin R. James, December 26, 1893 and other correspondence, as found in SED67, 25; Lynch, "Report of Yakima Agency," July 28, 1893, in Department of the Interior, commissioner of Indian affairs, *Sixty-Second Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 1893* (Washington, D.C., 1893), 340. Lynch's motives may also be suspect, since before leaving the agency he reported that he believed the Indians would be willing to dispose of the reservation "if the matter were properly presented" to them.

⁸⁰The Council Proceedings, December 18, 1893–January 6, 1894, SED67, 25.

Indian could live there because the snow was too deep." Erwin did not reveal to the Indians that he himself had ordered the reservation boundaries to be moved to the higher mountain location. Then Erwin suggested to the Wenatchi that their only alternative was to sell the improperly located reserve.

Now the question then resolves itself into this: Would it not be wise to sell the fishery not properly located; a piece of land that might get into the courts and if it did get into court you might lose all your rights. To avoid all this, the Government sends Special Agent Lane with a proposition to buy it.⁸¹

With this statement, Erwin made a calculated effort to mislead the Indians, claiming that since the reservation was improperly located, it might be illegal. He indicated that the Wenatchi had only the choice of selling the reservation, not the choice of rejecting the sale and having the reservation moved. In fact, the General Land Office later did reject the survey as invalid,⁸² which indicates how central Erwin's misrepresentation was to the outcome of the negotiations.

Although there is no documentary evidence to demonstrate that Erwin was paid to defraud the Wenatchi, Erwin's own statements and his close association with the Great Northern Railway and local whites suggest that the motivation for his duplicity was not merely to obtain good favor with railroad officials and endear himself to white squatters.

The Yakima seemed unmoved by Erwin's representations. Old Captain Eneas stated that he could recall the words said at the 1855 treaty council, that the reservation was set aside to provide for the Wenatchis' homes and to protect their fishery. He said he could not vote to take away their reservation, concluding, "I am not going over to my friend's house and throw him off his place and tell him I would get rich and fat off his place."⁸³ He told Erwin that it was for the Wenatchi to decide what to do. It was their reservation, and not the Yakimas'. It was time for the government "to treat these Wenatchee Indians right."

⁸¹Ibid., 25.

⁸²S.W. Lamoreux, commissioner, General Land Office, to U.S. surveyor general, July 18, 1894, "Sale of the Wenatshapam Fishery," special case 183, RG 75, NA; assistant commissioner, General Land Office, to commissioner of Indian affairs, July 18, 1894, "Sale of the Wenatshapam Fishery," special case 183, RG 75, NA.

⁸³The Council Proceedings, December 18, 1893–January 6, 1894, SED67, 25.

You talk to these Wenatchee Indians and ask them what they want for that land, but not the Yakimas. That is all I have to say.⁸⁴

After another Yakima leader, Joe Stwire, also told Erwin and Lane that any decision must come from the Wenatchi, Lane asked Chief Harmelt to speak. Harmelt began, "I did not come here to lie to anybody. I have come here with a true, honest heart." Then he gave a detailed account of the reservation and of the tribe's dealings with Colonel Wright and Captain Archer in the 1850s, and of the Wenatchis' efforts in behalf of whites over the years. Harmelt concluded,

Last year a paper came and said "The Wenatshapam Reservation will be renewed." All the Indians were glad. We thought we would find our country now. We are treated poorly by the whites in that country. If we lived in our own reservation, we would be all right, therefore I am here to talk about it.

We don't want to sell this reservation. That is all I have to say.⁸⁵

But Erwin continued to cajol and pressure Chief Harmelt relentlessly, until he responded simply, "We want to have our own, that is all." Eventually, Erwin took a different tack, seeming to relent to Harmelt's demands. Erwin said that now he wanted to fix things so the Wenatchi would be satisfied. Yakima Joe Stwire produced a copy of the map made by Stevens in 1857, which verified that the Wenatchapam Reserve was meant to include the Icicle forks. Erwin then suggested that if the Indians would cede the reservation, as surveyed, the Wenatchi would each receive an allotment of up to 160 acres where they now lived, within what should have been the legitimate boundaries of the reservation, between Icicle and Mission Creek, and that they would retain their fishing rights. Since there were approximately 180 Wenatchi still living in the Wenatchee Valley, this meant the tribe was being promised between 14,400 and 28,800 acres of allotments along the river (80-acre allotments of farmland or 160-acre allotments of grazing land). This prospect seemed to please

⁸⁴Ibid.

⁸⁵Ibid., 26-27.

Chief Harmelt and to somewhat satisfy the Yakima, who persistently had demanded that the Wenatchis' treaty rights be respected. At this point in the proceedings, Harmelt and the other Wenatchi set out for home to discuss the proposal with their people, and with the expectation and promise that Erwin would meet with them "in a short time" to arrange the Wenatchi allotments.⁸⁶

On December 21, 1893, Erwin and Lane adjourned the cession council until early January and wired the commissioner to say they believed they had reached an agreement. Some of the Yakima, believing that the Wenatchis' treaty rights had been guaranteed, were willing now to discuss a price for the Wenatchapam Reserve, and suggested \$1.50 an acre (Lynch suggested it was worth \$10 to \$20 an acre), but the commissioner would not approve that amount. The two agents reconvened the council on January 6, 1894, this time without inviting the Wenatchi to attend. The Yakima again demanded and received assurances that the Wenatchis' treaty rights would be protected. Charley Skummit pointed out, "You said you would allot this land where they lived," then added, "Everybody heard it." Erwin assured them that the Wenatchi would receive a total allotment of at least ten thousand acres and emphasized to the Yakima that the agreement would "not interfere with their [the Wenatchis'] rights at all." Finally the Yakima agreed to cede the Wenatchapam Reserve for a total payment of \$20,000.⁸⁷

Most of the pertinent correspondence relating to the Wenatchapam Fishery Reserve was forwarded to Congress by the Interior Department prior to the ratification of the cession on August 15, 1894.⁸⁸ What was not forwarded to

⁸⁶Ibid., 27-32; Erwin to commissioner, April 29, 1896, enclosing "Census of the Wenatchee Indians made by L.T. Erwin, April 16, 1896," RG 75, L-R, CIA, NA. The Erwin census of 1896 showed there were, indeed, 180 Wenatchi living in the valley.

I.I. Stevens, "White Swan Map," July 12, 1899, map 1689-1/2, tube 345, NA.

⁸⁷Jay Lynch to Hon. Darwin R. James, December 26, 1893, and the Council Proceedings, December 18, 1893-January 6, 1894, SED67, 25, 33-36.

⁸⁸Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 529-31; "An Act Making appropriations for . . . the Indian Department and fulfilling treaty stipulations," *Statutes at Large*, vol. 28 (Washington, D.C., 1895), 286, 320-21 (28 Stat., 320); *Congressional Record-Senate*, 53d Cong., 2d sess., vol. 26, part 8, July 18, 1894, 7629, provided the only reference in the *Congressional Record* to the ratification, which was merely to add a heading to the section dealing with the agreement. There was no debate in either house of Congress over ratification of the 1894 agreement.

Congress was the official notification by the commissioner of the General Land Office that the survey of the reservation had been rejected as "directly contrary to . . . instructions, and in variance with the description of the boundaries of said fishery."⁸⁹ Commissioner Lamoreux had demanded that the survey make "secure to the Indians ten miles or more of the Wenatchee River within its limits," but (despite the continuing controversy in the General Land Office over the fraudulent surveys of the Benson Syndicate) had waived the necessary field examination because, as he understood it, the reservation was to be ceded and "the object to be obtained by said survey will have been otherwise secured to the Indians."⁹⁰ In other words, since the Wenatchi were to receive between fourteen and twenty-nine thousand acres of allotments and the reservation was to be ceded, a field examination was unnecessary. However, even with those facts in mind, when Lamoreux finally saw the survey and reviewed the Iverson field notes, which were not submitted until May 1894,⁹¹ he rejected the survey. Not only had Erwin changed the location of the reservation; he had changed it so radically that the General Land Office completely rejected the survey.

Not surprisingly, the Great Northern Railway came to the defense of both the survey and Deputy Surveyor Iverson. The railroad's chief engineer, John F. Stevens, wrote to the surveyor general supporting Iverson's survey, and directed his chief draughtsman to submit letters. The railroad also submitted a detailed map of the area, showing its route through the Chiwaukum fishing grounds that Lynch had tried to make a

⁸⁹S.W. Lamoreux, commissioner, General Land Office to U.S. surveyor general, July 18, 1894, "Sale of Wenatshapam Fishery"; assistant commissioner, General Land Office to commissioner of Indian affairs, July 18, 1894, "Sale of Wenatshapam Fishery"; neither of these letters was forwarded to Congress for review prior to ratification of the 1894 agreement.

⁹⁰S.W. Lamoreux, commissioner of General Land Office, to surveyor general of Washington, April 30, 1894, RG 49, entry 478, Letters Sent to Surveyor General of Washington, vol. 76, 316-17, NA; commissioner of Indian affairs to secretary of the interior, April 25, 1894, RG 75, NA, also reported that "the object to be attained by said survey will have been otherwise secured to the Indians. . . ."

⁹¹Iverson, "Wenatchapam Fishery Reserve," plat, September 1, 1893, RG 75, CA 437, Cartographic Division, NA. Notations on the NA, final version of the Iverson plat map, suggest the map and field notes were forwarded to the General Land Office on May 18, 1894.

part of the reservation.⁹² Erwin, too, wrote to Commissioner Lamoreux, for the first time admitting he ordered the reservation moved, and defending that action on the basis of a supposed conflict with the railroad.⁹³

With congressional ratification of the Wenatchapam cession, and the receipt of the railroad letters in support of the misplaced survey, Commissioner Lamoreux yielded. In September he authorized payment to Iverson for the survey, but noted that his acceptance of the survey would "only extend to the payment of the account of the deputy."⁹⁴ Similarly, the plat filed with the surveyor general indicated that the map was "accepted only so far as payment of account," indicating that the lands had never been formally withdrawn from the public domain.⁹⁵ Thus, as far as the General Land Office was concerned, the United States had never complied with the 1855 treaty by setting aside the Wenatchapam Fishery Reserve, required under the terms of article 10.

The United States was fully aware of its obligations under the ratified agreement with the Yakima. The Indian Office directed Erwin to see to it that each Wenatchi Indian would receive an allotment of between 80 and 160 acres, depending on the percentage of grazing and agricultural land within the allotment boundaries, as provided for under the act passed by Congress ratifying the agreement. Erwin was given enough

⁹²John F. Stevens to William P. Watson, August 13, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA; A.B. Wilse to William P. Watson, August 16, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA; Wilse to Watson, August 29, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA, enclosing a tracing by J.H. Gault; Gault, "Map of the Wenatchee Valley," December 25, 1891. Also certified with statement Helena, Mont., March 5, 1892, HLH. Certified by S.G. Watson to be "a correct tracing of a blue print Map given me by E.H. Bickler Chief Engineer [sic] of the Pacific Extension of the Great Northern Ry." RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA.

⁹³L.T. Erwin to W.P. Watson, August 2, 1894, RG 49, entry 180, Records of the Mail and Files, Misc. Letters Received, 1801-1909, box 4037, 1894-96764, NA.

⁹⁴Lamoreux to surveyor general of Washington, September 21, 1894, RG 49, Letters Sent to the Surveyor General of Washington, vol. 76, 471-72, NA.

⁹⁵Iverson, "Wenatshapam Fishery Reserve," August 10-September 1, 1893. Map of survey filed with Washington surveyor general, copy of the Washington Surveyor General, Bureau of Land Management Archives, Portland, Wash.

blank allotment forms to provide for 24,000 acres of allotments and was told to see to it that the congressionally mandated allotments were made.⁹⁶

Erwin had intentionally misrepresented himself to both the Yakima and the Wenatchi, concealing information that was central to the Indians' understanding of their options, inducing them to rely on his statements when deciding whether to surrender their legal right to the Wenatchapam Fishery Reserve. Now he was being entrusted by the United States to see that the Wenatchi received an equivalent amount of allotted acres, where they lived, along the Wenatchee River. It is not surprising that he failed to make a single allotment.

Erwin's report to the commissioner again contained gross misrepresentations. He claimed that the lands demanded by the Wenatchi had "been settled and occupied by whites for more than twenty years."⁹⁷ In fact, no whites had made any legitimate entries in Wenatchi territory until 1884 (ten years earlier), and most of the land within the Wenatchapam fishery area remained open and unclaimed. Both Gordon and Streamer, in 1889 and 1890, reported very few whites in the valley and hardly any in the upper valley, not to mention the fact that the few whites who were actually homesteading in the lower valley were taking advantage of fraudulent surveys that had been conducted there.

Erwin reported that when the Wenatchi learned that the Yakima had ceded their reservation, they indignantly pointed out, "[I]t was their Fishery, and their property, and that the Yakima Nation of Indians, had absolutely no right nor title to any of it." He said that when the Wenatchi had been told all the details of the cession, they absolutely refused to deal with him, even to give him their names.⁹⁸ Erwin's dwindling credibility was further undermined by the submission of petitions containing the signatures of more than two hundred Yakima, who pointed out that the reservation had been surveyed in the wrong location, who claimed that Erwin had told them ten thousand acres would not be ceded and would be provided to the Wenatchi, and who asserted that Erwin had lied to them about the price that would be paid to them per

⁹⁶Acting commissioner of Indian affairs to Erwin, May 17, 1894, RG 75, NA; acting commissioner of Indian affairs to secretary of the interior, May 17, 1894, RG 75, NA.

⁹⁷Agent [Erwin] to Browning, January 22, 1895, RG 75, L-R, CIA NA.

⁹⁸Ibid.

acre. "We think," the Yakima concluded, "... our Agent should not be party to the fraud."⁹⁹

Chief Harmelt and the Wenatchi tried to explain their view of the situation to authorities in Washington, D.C. On September 4, 1894, Harmelt sought out F.D. Schnebly in Ellensburg and asked him to write another letter in behalf of the Wenatchi. In this letter, Schnebly wrote that, according to Harmelt's understanding of the 1894 agreement, Erwin was to have surveyed for the tribe an eight-square-mile reservation on the Wenatchee River (where they now lived), below the new town of Leavenworth. This reservation was to be in lieu of the one promised to them by Colonel Wright nearly forty years earlier.¹⁰⁰

With no allotments made, the Indian Office tried another approach. The commissioner authorized Erwin to pay each of the Wenatchi living in the Wenatchee Valley \$9.30 for their rights to the ceded reservation.¹⁰¹ Eventually, Erwin was able to furnish a census of 180 Wenatchi still living in the Wenatchee Valley.¹⁰² Chief Harmelt later provided a moving description of how Erwin had taken him into a stable and had tried to force him to take the \$9.30, which he refused.¹⁰³ Erwin's exceptionally venal efforts failed, and no allotments were made. Still the Wenatchi clung to their meager possessions and their handful of homesteads.

In 1897, Indian Inspector W.J. McConnell arrived at the Yakima Reservation to investigate complaints, including some regarding Erwin, from the Indians there. When the normally staid McConnell heard the story of the

⁹⁹Jay Lynch to Hon. Darwin R. James, December 26, 1893, petitions, and other correspondence, as found in SED67, 20-24. "Wenatshapam Fishery Reserve," special case 183, RG 75, NA, also has copies of the petitions.

¹⁰⁰Schnebly, Ellensburg, Wash., to post commander, Fort Vancouver, Wash., September 4, 1894, RG 94, Office of the Adjutant General, document file, 5607 AGO 1894, NA, Washington, D.C.

¹⁰¹Secretary of the interior to commissioner of Indian affairs, January 16, 1896, CCF 1907-1936, 22478-1915-115, RG75, NA. The commissioner approved payments of \$9.30 each to 150 Wenatchi.

¹⁰²Erwin to commissioner, April 29, 1896, enclosing the "Census of the Wenatchee Indians made by L.T. Erwin, April 16, 1896," RG 75, L-R, CIA, NA. Erwin reported that there were a total of 182 Wenatchi (the census actually seems to show 180).

¹⁰³Whitlock and Meyer to commissioner (1931—cover page missing), file no. 45335-1929, Yakima, RG 75, NA.

Wenatchapam Fishery Reserve, he blew up, writing directly to the secretary of the interior that the "Indians had just cause for complaint" against Erwin.¹⁰⁴ McConnell recounted the history of what he called an "outrageous" effort of the United States to obtain a cession of the Wenatchapam Fishery Reserve. He referred to a recent council where the Yakima Eneas summarized what had happened: "We have stole the money from the poor Indians of the Wenatchee and has made enemies between me and that man [Erwin]."¹⁰⁵ McConnell did not mince words in demanding that the United States be held accountable for its actions against both the Wenatchi and the Yakima.

Are we a nation of thieves and unmitigated scoundrels? Are we devoid of all sense of honor? Does seventy millions of people because of their superior numbers and intelligence propose, little by little to deprive the sorely depleted tribes in the West of the small patrimony their more magnanimous conquerors the early settlers in this country gave them? or more properly speaking allowed them to retain. After wresting from them the heritage which had descended to them from generation to generation.

Will the interest of private individuals or the greed of corporations be allowed to sully our nation's honor? Must men like myself who assisted in redeeming the wilderness and who are to-day powerless to undo the wrongs which were partially of our doing, bow our heads in humiliation at the recital of the falsity of the promises we have made?¹⁰⁶

The response from the Indian Office was that it was the Wenatchis' own fault that they had lost the reservation, as

¹⁰⁴McConnell to secretary of the interior, September 22, 1897, Reports of Inspection of Field Jurisdictions of the Office of Indian Affairs, 1873-1900, RG 75, Yakima Agency, 1886-1900, microfilm publication M1070, roll 59, NA.

¹⁰⁵Yakima Council 1897, RG75, Yakima Agency, box 284, NA, San Bruno.

¹⁰⁶McConnell to secretary of the interior, September 21, 1897, Reports of Inspection of Field Jurisdictions of the Office of Indian Affairs, 1873-1900, RG 75, Yakima Agency, 1886-1900, microfilm publication M1070, roll 59, NA. McConnell also reported serious grievances of the Yakima.

they had "slept upon their rights by failing to have said fishery definitely located. . . ." ¹⁰⁷

Although Erwin was replaced by former agent Lynch when the administration changed the following year, it would be two years before any effort was made to provide the tribe with their promised allotments. Chief Harmelt and several other Wenatchi leaders continued to protest their loss of land and rights, traveling to Washington, D.C. on at least two occasions to air grievances, and petitioning the government in 1899 and 1900.¹⁰⁸ In response to the work of Harmelt, as well as to the complaints from whites, who wanted the Indians removed from the valley altogether, early in 1900 the Department of the Interior finally sent an allotting agent, William E. Casson, to deal with the Wenatchi.

Between 1900 and 1902, Casson did his best to convince the Wenatchi not to take allotments in the Wenatchee Valley, but to move to either the Colville or the Yakima Reservation. The Wenatchi continued to resist, but more and more whites were moving into the valley, and good agricultural land was becoming more scarce. In the end, Casson added still more deceit to the government's treatment of the Wenatchi. Although the Indians were eligible for allotments of at least twenty-four thousand acres of grazing land, Casson arranged for only twenty-two allotments totaling about twenty-eight hundred acres. That might have been a small, positive step for the Wenatchi but for the fact that Casson and the Indian Office also allowed all of the twenty-eight hundred acres of Wenatchi homesteads to be converted from trust to fee patent status. Most of these patent conversions were done illegally, without the approval of the individual Indians. Within a few years, largely as a result of taxes and fees that were imposed, all of the Wenatchi homesteads were

¹⁰⁷A.G. Tonner, acting commissioner, to secretary of the interior, March 11, 1898, Reports of Field Jurisdictions of the Office of Indian Affairs, 1873-1900, Yakima Agency, 1886-1900, RG 75, microfilm publication M-1070, roll 59, NA.

¹⁰⁸See, for example, Chief John Harmelt and Louis J. Judge to the secretary of the interior, May 10, 1899, secretary of the interior, Letters-Received, RG 48, entry 653, box 254, 3317, NA, College Park, Md.; John Harmelt and Louis Judge to CIA, May 10, 1899, Miscellaneous Documents, Weissbrodt books 1-3, Colville History Office; John Harmelt, Louis Judge, Stevens Nason to commissioner of Indian affairs, February 7, 1900, RG 75, CIA-LR, 1883-1907, 7499-1900, Wenatchi Allotments, NA.

lost to whites. Although the Wenatchi were supposed to have gained twenty-four thousand acres of land, their net gain from Casson's work was zero.¹⁰⁹

Casson's repeated declarations that the amount of land was insufficient to provide the Wenatchi allotments were clearly in error. In 1905, more than half of the sixty-four square miles of reservation centering on Icicle was still unsurveyed and available for allotment. Only a handful of legal entries had been made by whites. At least 36 percent of the lands desired by the Wenatchi (more than fourteen thousand acres) were still available then. Today, 28 percent (more than eleven thousand acres) is still public land.¹¹⁰

Against overwhelming odds, Chief Harmelt remained in the Wenatchee Valley and continued to petition the government and protest the mistreatment of his people. In 1910,

¹⁰⁹Watkins, "Homesteads and Allotments of the Wenatchi," 4, 65, 104-106, 112; *Congressional Record-House*, 63d Cong., 3d sess., vol. 52, part 4, February 10, 1915, 3525-26; U.S. House of Representatives, "Patents Issued to Certain Indians," House Report No. 1246, 63d Cong., 3d sess. (Serial Set #6766), December 14, 1914; U.S. Senate, "Patents Issued to Indians in Washington," Senate Report No. 939, 63d Cong., 3d sess. (Serial Set #6762), January 26, 1915. Congress tried to remove the cloud over white title to these lands obtained from Wenatchi homesteads by attempting to pass acts in 1915, 1916, and passing an act in 1927. See the following:

Congressional Record-House, 63d Cong., 3d sess., vol. 52, part 5, March 4, 1915, 5522; Kemp to Johnson, March 22, 1916, Realty Branch, Confederated Tribes of the Colville Reservation, reporting on H.R. 8092 and S. 3251; Superintendent to Kemp and Baker, March 27, 1916, Realty Branch, Confederated Tribes of the Colville Reservation, noting he protested against passage of the two 1916 bills; superintendent to commissioner of Indian affairs, September 1, 1916, Realty Branch, Confederated Tribes of the Colville Reservation, noting that as Congress had rejected the bills, "the Indians should have a right of action . . ."; U.S. Senate, S. 3251, "A Bill Confirming patents heretofore issued to certain Indians in the State of Washington," January 6, 1916, Realty Branch, Confederated Tribes of the Colville Reservation; "An Act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States," *Statutes at Large*, vol. 44, part 2 (Washington, D.C., 1927), 1247 (44 Stat., 1247); *Wenatchee Advance*, Saturday, August 3, 1901, RG 75, BIA, Colville, LR, commissioner, "Land" 1900-1907, box 20, 1901, NA-PNW. In August 1901, the Superior Court for the state of Washington in Chelan County issued tax foreclosure notices on five Wenatchi homesteads. Potential buyers were informed that the homesteads were available for the cost of tax liens against the properties, which ranged from \$84 to \$220.

¹¹⁰Norman Plummer, "Appraisal Report," August 14, 1952, Indian Claims Commission, docket no. 162, Defendant's Exhibit 1, *The Yakima Tribe v. The United States*, University of Washington Law Library. This report concluded that there were few legal entries throughout the valley until after 1900.

he petitioned the commissioner of Indian affairs, asking for redress for the wrongs suffered by his people.¹¹¹ By the 1920s, the Wenatchi in the valley were nearly destitute and suffering from hunger and disease. Many families were forced to move to the Colville Reservation.¹¹² Still Harmelt clung to the belief that the United States would eventually respond to the tribe's claims. Finally, at a "Grand Pow-Wow" in 1931, nearly 250 Wenatchi voted to hire an attorney to pursue a claim against the United States.¹¹³ John Harmelt (who was now in his 80s) represented the Wenatchi at a major council in 1933, detailing the history of the Wenatchapam Reserve and demanding action from the superintendents of both the Yakima and Colville Reservations.¹¹⁴ Momentum built for a contract and the jurisdictional legislation necessary to file a lawsuit against the United States. In 1933, the Wenatchi retained attorney Frederick Kemp, who submitted a contract to the Indian Office for approval, stating:

The purported consent to the sale of this Wenatchee Fishery at a tribal meeting at Yakima was a pure fraud on the Wenatchee Indians to whom this fishery right and the township reservation was of special benefit.¹¹⁵

But no action was taken on the contract for two years. After Indian Commissioner John Collier learned that Wenatchi people at Colville opposed his Indian Reorganization Act

¹¹¹John Harmelt and Louis Judge to commissioner of Indian affairs, January 3, 1910, CCF 1907-1939, 5330-1910-300 Yakima, RG 75, N.A.; Judge, "Wenatchee Indians Ask Justice," 20-28.

¹¹²"Ask Aid for the Cashmere Indians," *Cashmere Valley Record*, March 24, 1927; Scheurman, *The Wenatchi Indians*, 154.

¹¹³Whitlock and Meyer to commissioner, [1931-cover page missing], file no. 45335-1929, Yakima, RG 75, NA.

¹¹⁴Meyer to Collier, "Minutes and Report of Meeting of Wenatchee (Wenatchapam Tribe) Indians Held at Cashmere, Washington, June 19, 1933," file no. 45335-1929, Yakima, RG 75, NA.

¹¹⁵Kemp to commissioner, June 2, 1932, file no. 45335-1929, Yakima, RG 75, NA, with the following enclosure:

John Harmelt, "Statement and Petition of Wenatchapam (Wenatchee) Indians, To the Commissioner of Indian Affairs . . . To our United States Senators, the Honorable Wesley L. Jones and the Honorable C.C. Dill, To our Congressman, the Honorable Sam B. Hill," September 10, 1931.



Chief John Harmelt, last chief of the P'squosa (Wenatchi) tribe, 1931.
(Courtesy of the North Central Washington Museum, Simmer 5763)

constitution, the department killed the proposed contract in 1935.¹¹⁶ Kemp shot back a furious letter to Collier:

Frankly, in my opinion the Government, itself, should have investigated this claim of the Indians by its own special agents and investigators many years ago, and made restitution for these Wenatchee Indians. For the Government was a party of the fraud that was practiced on them.¹¹⁷

It is tragically ironic that it was on Independence Day in 1937 that a fire destroyed John Harmelt's home in the Wenatchee Valley, killing both him and his wife.¹¹⁸ Only 480 acres of Wenatchi land remains in trust in the Wenatchee Valley today, out of what should have been at least twenty-four thousand acres. Yet, unbent by the failure of the United States government to honor its promises, the Wenatchi continue to press for recognition of their fishing, hunting, and gathering rights in the heartland of their aboriginal territory.¹¹⁹ Of greatest importance are their salmon fishing rights on the Wenatchee River near the Icicle forks.

* * *

Any measure of tribal life must also be a measure of tribal tradition, since that is the cement that holds tribal structure

¹¹⁶Sniffen, Indian rights associate, to Collier, August 28, 1935, RG 75, box 150, BIA-Colville, Correspondence of Meyer, NA-PNW, Seattle, reporting on the rejection of the constitution; Palmer, "Ethnohistorical Report," 9.11; Zimmerman to Kemp, June 26, 1935, file no. 45335-1929, Yakima, RG 75, NA.

¹¹⁷Kemp to commissioner, August 3, 1935, file no. 45335-1929, Yakima, RG 75, NA.

¹¹⁸Palmer, "Ethnohistorical Report," 3.32-3.35.

¹¹⁹In 1994, the Ninth Circuit Court of Appeals confirmed a decision by Judge Malcolm Marsh in *United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff Intervenor* (29 F.3d 481), which held that none of the Confederated Tribes of the Colville Reservation, including the Wenatchi Tribe, was entitled to the fishing rights guaranteed under the 1855 Yakima Treaty. The court said that only tribes that moved to the Yakama Reservation could have such rights. But under the 1855 treaty, the Wenatchi were to stay on the Wenatchapam Fishing Reservation, where they then lived, and were under no obligation to move to the Yakama Reservation. The decision thus seems fundamentally wrong as applied to the Wenatchi. At this writing, the Interior Department solicitor for the United States continues to interpret this decision as barring Wenatchi from fishing in the Wenatchapam fishery area. The Wenatchi, represented by the Confederated Tribes of the Colville Reservation, have asked for a review of that position, citing the importance of the 1894 agreement.

together. Among people of Wenatchi descent on the Colville Reservation today, tribal tradition continues at all levels of culture—social, religious, and political. The tribe is organized by mutually held customs and beliefs, which include cultural understandings of tribal philosophy, folklore, religious activity, and political structure. The Wenatchi continually work to retain the knowledge necessary for traditional subsistence survival, and they maintain a close attachment to and interrelationship with their aboriginal territory.

Wenatchi religious activities continue through all seasons of the year. The same songs that were sung by their ancestors in mat lodges on the banks of the Wenatchee River are still sung at winter dances and during stick games today. Other songs and prayers accompany the First Roots Feast, the First Salmon Feast, and the First Berry Feast each year. And children are still taught Wenatchi stories about Coyote, Kingfisher, and Mole.

Traditional hunting, fishing, and gathering practices are particularly important to the tribe. People dig camas and bitterroots in the spring. They hunt for deer and gather huckleberries in the mountains in the late summer. They clean and decorate the graves of their ancestors each year. To be able to fish at their centuries-old fishery at the forks of the Icicle and Wenatchee Rivers is central to tribal needs.

Far from pessimistic, the Wenatchi say their hard work and persistence in seeking recognition of their rights will pay off and that victory is now within sight. They say that the United States ultimately must recognize the rights that were guaranteed them in 1855 and again in 1894, the rights Chief Harmelt fought for, the rights Wenatchi people have asserted throughout the twentieth century.

CHINESE TONGS, HOMICIDE, AND JUSTICE IN NINETEENTH-CENTURY CALIFORNIA

CLARE V. MCKANNA, JR.

*The great majority of the Chinese in America know nothing about the laws of this country. On the other hand, they know that the Six Companies hire good American lawyers to advise them.*¹

—Walter N. Fong

This essay contends that in nineteenth-century California the interaction of racial groups acted both as a stimulus and an opportunity for lethal violence. During this era, a newly dominant white society struggled to define itself and tried to control the behavior of an ethnically diverse population. The whites had recently defeated Mexican armies and were pushing Indians off their land. While consolidating their hold on California, they also were trying to prevent "contamination" from Chinese immigrants who

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¹Walter N. Fong, "The Chinese Six Companies," *Overland Monthly* (May 1894): 525.

were arriving in California at an alarming rate. This attempt to control "undesirable" elements marks the criminal justice system; there is little doubt that race proved to be an important factor in murder trials. Surprisingly, Chinese defendants were confronted by fewer problems than other racial minorities. Unlike Indians and some Hispanics, the Chinese were part of a cohesive community sponsored by the Chinese Six Companies.

The Chinese arrived with a strong cultural tradition, including a powerful family-clan identity that demanded loyalty, either for the protection of the clan or the economic interests of the tong. Loyalty guaranteed housing, employment, medical benefits, and, most important, excellent legal counsel from the very beginning of the judicial process. The Chinese also brought with them a legal tradition that differed significantly from the white criminal justice system. Chinese tongs dominated Chinatowns where many killings involved tong rivalry and were accepted as blood feuds. This Chinese group solidarity explains why Chinese defendants fared well in the courts.

In nineteenth-century California, Chinese defendants were well represented by counsel in the courts. However, an important question needs to be asked: were Chinese who were accused of homicide treated the same way as other defendants? Recent research has opened a dialogue on the fairness accorded Chinese within criminal justice systems in the American West. John R. Wunder discovered that Chinese "lost seventy percent of their appeals in criminal cases and fifty-nine [percent] of their civil actions" in the Pacific Northwest.² Extensive scholarship exists concerning the physical abuse of Chinese in California, especially during the gold rush,³ and, to a lesser degree, their experience within the

²John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (May 1983): 208. See also Wunder, "Law and Chinese in Frontier Montana," *Montana, the Magazine of Western History* 30 (Spring 1981): 18-31.

³Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, 1971); David V. DuFault, "The Chinese in the Mining Camps," *Southern California Quarterly* 41 (1959): 155-70; Stanford M. Lyman, *Chinese Americans* (New York, 1974); Elmer C. Sandmeyer, *The Anti-Chinese Movement in California* (Urbana, Ill., 1939); and Robert F. Heizer and Alan F. Almquist, *The Other Californians* (Berkeley, 1971).

criminal justice system,⁴ but the treatment of Chinese accused of homicide during the nineteenth century remains largely undocumented.⁵ Although it is supported by statistical data and criminal case files collected from records in seven California counties, this case study will focus mainly on the experience of Chinese accused of homicide in Sacramento and Stockton.

RACE AND HOMICIDE

In California, Chinese were less likely than any other group to kill outside their own race. Clan solidarity and isolation within their Chinatowns help to explain this low interracial homicide rate. Chinese seldom mixed with whites in social situations; they preferred the company of their own countrymen in gambling parlors and brothels operated by Chinese businessmen. Of thirty-eight cases involving Chinese as killers in Sacramento County, only one involved a non-Chinese victim, and the murderer in that case was never identified.⁶ Fifty-eight Chinese were indicted for murder in these thirty-eight cases, but charges against twenty defendants were dismissed. This high number of indictments ending in dismissals reflects the tendency by law enforcement officials to "round up the usual suspects." Indictment information and newspaper accounts suggest that Sacramento police often arrested any "suspicious looking" Chinese in the vicinity of the crime.⁷

⁴Christian G. Fritz, *Federal Justice in California: The Court of Odgen Hoffman, 1851-1891* (Lincoln, Neb., 1991), 216-23; Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17 (January 1986): 25-41; Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870," *California Law Review* 72 (July 1984): 548-50; Paul Takagi and Tony Platt, "Behind the Gilded Ghetto: An Analysis of Race, Class and Crime in Chinatown," *Crime and Social Justice* 9 (Spring and Summer 1978): 2-25; and Charles A. Tracy, "Race, Crime and Social Policy: The Chinese in Oregon, 1871-1885," *Crime and Social Justice* 12 (Winter 1980): 11-25.

⁵Wunder, "Territory of New Mexico v. Yee Shun (1882): A Turning Point in Chinese Legal Relationships in the Trans-Mississippi West," *New Mexico Historical Review* 65 (July 1990): 305-18; Robert H. Tillman, "The Prosecution of Homicide in Sacramento, California, 1853-1900," *Southern California Quarterly* 68 (Summer 1986): 167-81; and Clare V. McKanna, Jr. and John R. Wunder, "The Chinese and California: A Torturous Legal Relationship," *California Supreme Court Historical Society Yearbook* 2 (1995): 195-214.

⁶*Sacramento Bee*, November 19, 1858.

⁷*Criminal Registers of Action, 1850-1900*, Sacramento County, SHSA.

The typical Chinese homicide in Sacramento almost always occurred in Chinatown, was an affair between two males,⁸ usually involved rival companies or tongs, and was accomplished with a handgun.⁹ For example, about 7 P.M. on July 16, 1862, Ah Yuen walked into a gambling parlor on I Street in Chinatown and fired several shots from a revolver into Ah Cow, the business manager for the See Yup Company in Folsom. During the coroner's inquest, one witness claimed that a rival group had hired Ah Yuen from San Francisco to assassinate Ah Cow.¹⁰ A similar shooting occurred in the same vicinity a decade later involving Ah Ow. In this case, one or more assailants met Ah Ow on I Street between 2nd and 3rd and fired several shots. They immediately turned and ran down I Street. Eventually, police arrested Ah Toy, Ah King, Ah Yan, and Ah Lue.¹¹ Although arrested and detained, none of the alleged assailants was indicted for the killing.

As will be seen, Chinese defendants had a distinctive experience before the bar of justice in California. Because they killed within their own racial group, Chinese defendants faced fewer difficulties than other minorities. Because of strong group solidarity and the support of legal representation, their journey through the criminal justice system proved to be unique.

WHITE PERCEPTIONS OF CHINESE

Throughout the nineteenth century, Chinese immigrants in the United States suffered a great deal of verbal and physical abuse from the white majority. Newspaper editors, city officials, and common citizens used a variety of stereotypes to label them and set them apart from white society. Nevertheless, some white citizens in nineteenth-century California had positive things to say about Chinese immigrants. For example, during an 1886 congressional hearing on Chinese behavior, the chair asked whether the "Chinaman" was equal in his civiliza-

⁸Only two Asian female victims and no female murderers appeared within the statistics. See *Sacramento Union*, February 9, 1856.

⁹Fifty percent of the Asian assailants used handguns in the commission of their crime, followed by 24 percent who employed knives in their attacks. See *Coroner's Inquests, 1850-1900*, Sacramento County, SHSA.

¹⁰*Sacramento Bee*, July 17, 1862.

¹¹*Ibid.*, April 15, 1873.

tion and morals to the European immigrant. Solomon Heydenfeldt, former justice of the California Supreme Court, replied, "In every respect." Heydenfeldt suggested that "the Chinese are something better" than many European immigrants; "they are more faithful, more reliable, and more intelligent."¹² Cornelius B.S. Gibbs, an insurance adjuster, believed that many Chinese were good businessmen who were very reputable in their dealings with others. They always paid their bills and treated customers with respect. Another businessman who operated the Pioneer Woolen Factory in San Francisco employed mostly Chinese labor, preferring Chinese because they were reliable. "I have found in our factory during the last fifteen years . . . all these Chinese laborers live on the premises . . . and we have not a single case of any kind before the Police Court of murder, or rows among themselves, or theft upon the proprietors. I think that speaks well for them."¹³ Another witness, a businessman, claimed, "I have dealt a great deal with Chinese merchants in this city. . . . I have always found them truthful, honorable, and perfectly reliable in all their business engagements."¹⁴

During the gold rush, thousands of men from Australia, Mexico, South America, Europe, and the eastern portion of the U.S. flooded into San Francisco and Sacramento on the way to the gold camps. The Chinese were no exception. They also came in search of riches or, at the very least, a better life. However, the Chinese immigrants encountered special problems, since they were easily identifiable because of their dress and hair style. An observer might have difficulty differentiating visually between Irish, French, or Australian miners, but there would be no doubt about the Chinese. With their cleanly shaved heads, queues, and blue pantaloons, one could easily identify them. Add to this the language barrier and their lifestyle, and you have a group that could readily be recognized and isolated.

A legislative committee investigation of the "Chinese problem" in Sacramento, completed in 1876, reveals some of the white attitudes about Chinese. The committee chair asked, "What proportion of the Chinese on I Street do you suppose belong to the criminal classes?" Policeman Charles

¹²Fred A. Bee, *The Other Side of the Chinese Question* (San Francisco, 1886), 29.

¹³*Ibid.*, 32.

¹⁴*Ibid.*, 33.

P. O'Neil replied, "On I Street there are from one hundred and fifty to two hundred of what we call 'highbinders' living off the houses of prostitution. . . . You might call them hoodlums."¹⁵ Asked whether he would accept a statement from a Chinese witness sworn under oath, O'Neil stated, "As a population the Chinese are largely criminal, when we consider perjury in the list."¹⁶ The chair asked a prosecutor, "Can you rely upon the oaths of Chinamen?" Charles T. Jones, district attorney of Sacramento, testified, "No, sir; not at all. . . . [T]hey will swear whichever way they may deem most advantageous, irrespective of truth, justice or honesty."¹⁷ Matt Karcher, chief of police, complained of vice problems among the Chinese in Sacramento and also testified that he "wouldn't take their word for anything."¹⁸ When asked about the difficulties in enforcing laws, Jones observed that ignorance of their language created problems, "and unless white witnesses are very familiar with Chinese faces, they have great trouble in identifying them."¹⁹

The Chinese-American experience, especially in California, has been characterized by racial prejudice, discriminatory legislation, and verbal and physical attacks by members of the dominant white population. "American historiography," argues Charles McClain, "bears a large part of the responsibility for this state of affairs. In the first place, most accounts of the great Chinese immigration to the United States in the nineteenth century have concentrated exclusively on the reaction it provoked in the white population; they have tended to ignore the Chinese and their perception of their experience in this country."²⁰

¹⁵Willard B. Farwell, *The Chinese at Home and Abroad* (San Francisco, 1885), 98.

¹⁶*Ibid.*, 99.

¹⁷*Ibid.*, 101–102.

¹⁸*Ibid.*, 105.

¹⁹*Ibid.*, 114.

²⁰McClain, "Chinese Struggle," 531. See also Stuart C. Miller, *The Unwelcome Immigrant: The American Image of the Chinese, 1785–1882* (Berkeley, Calif., 1959); Saxon, *The Indispensable Enemy*; Lyman, "Strangers in the Cities: The Chinese on the Urban Frontier," in *Ethnic Conflict in California History*, ed. Charles Wollenberg (Los Angeles, Calif., 1970); Victor G. Nee and Brett de Bary Nee, *Longtime Californ': A Documentary Study of An American Chinatown* (Boston, Mass., 1974).

CHINATOWNS

Chinese gained passage to California with the aid of one of the Chinese Six Companies, organized in Canton on the basis of clan affiliation. Originally they were the Ning Yung, Sam Yup, Kong Chow, Yong Wo, Yen Wo, and Hop Wah Societies.²¹ These associations provided transportation, employment, housing, health care, recreation, and legal representation. Entering a country dominated by a culture alien to their own, Chinese workers needed the protection provided by these benevolent societies. Otis Gibson, an observer fluent in the Chinese language, noted that "it is the universal custom of Chinese when emigrating to any new country, to at once form themselves into a guild."²² There is little doubt that these companies were the linchpin for Chinese immigration throughout the nineteenth century. Virtually every Chinese immigrant belonged to one of these benevolent societies. As historian Charles McClain observes, the Six Companies were "unquestionably the most important organization[s] in Chinese-American society" during the nineteenth century, and had a great influence on the development and control of Chinatowns in Sacramento and Stockton.²³

Both Sacramento and Stockton had relatively small and compact Chinatowns. I and J Streets, bounded by 2nd and 3rd Streets, provided the center of Sacramento's Chinatown. Within this tiny region stood benevolent association meeting-houses, restaurants, gambling halls, brothels, rooming houses, grocery stores, laundries, and a variety of other shops owned by Chinese merchants. Stockton actually had three small enclaves that could be labeled Chinatowns, but the one located on Washington Street between El Dorado and Sutter

²¹Bee, *The Other Side of the Chinese Question*, 19. The names of the companies vary a great deal in spelling. See also A.W. Loomis, "The Six Chinese Companies," *The Overland Monthly* 1 (September 1868): 221-27; Fong Kum Ngon, "The Chinese Six Companies," *The Overland Monthly* (May 1894): 518-26; Richard H. Dillon, *The Hatchet Men: The Story of the Tong Wars in San Francisco's Chinatown* (New York, 1962); and Lyman, "Conflict and the Web of Group Affiliation in San Francisco's Chinatown, 1850-1910," *Pacific Historical Review* 43 (October 1974): 473-99.

²²Bee, *The Other Side*, 22. See also Shih-shan Henry Tsai, *China and the Overseas Chinese in the United States, 1868-1911* (Fayetteville, Ark., 1983), 31-37.

²³McClain, "Chinese Struggle," 541.

Streets proved to be the largest and the center of Chinese activity. The other two were located on Channel Street between El Dorado and Hunter Streets, and on Mormon Slough at Scott's Street, bounded by Beaver and Center Streets.

Although little is known about the Chinese enclave in Sacramento, one historian, Sylvia Sun Minnick, has provided a partial reconstruction of Stockton's Chinatown centered on Washington Street. City directories seldom included Chinese businesses, viewing them "as a separate world from their own."²⁴ In a rare directory listing of Chinese businesses, the Tuck Fong Tai Kee and Company boarding house, seven grocery stores, a general merchandise store, two butcher shops, and a drug store appeared in the 1876 Stockton city directory.²⁵ Many of the Chinese merchants rented property owned by white landlords. Rooms within apartment buildings or boarding houses were small, some averaging "only twelve by nine feet. Overcrowding, however, was a way of life in Chinatown. Bunk beds were stacked to the ceiling; each room was crowded, uncomfortable, unsanitary and hot. But it was a place for the single men to sleep and it was cheap."²⁶ Gambling proved to be one of the most popular pastimes for Chinese, and many merchants provided gambling halls. At 104 East Washington, the You Lun Company served as a front for the Tai Sang Choy gambling hall. Three other gambling halls, the Ng Woo Tong, Tong King, and Chung Toh were located at 111, 117, and 121 East Washington Street.²⁷

Benevolent associations maintained headquarters on Washington Street to provide their members services that included employment, transportation back to China, medical treatment, and burial benefits. Associations such as Sam Yup, Sze Yup, and Heungshan were soon joined by Suey Sing Tong and Bing Kung Tong, all located on Washington Street. Attempts to control prostitution and gambling often led to feuds between these tongs that sometimes spilled into the streets and included shootings.

During the late nineteenth century, the populations of Sacramento and San Joaquin Counties included a significant segment of Chinese, while in the other five counties smaller

²⁴Sylvia Sun Minnick, *Samfow: The San Joaquin Chinese Legacy* (Fresno, Calif., 1988), 187–212.

²⁵*Ibid.*, 191–92.

²⁶*Ibid.*, 201.

²⁷*Ibid.*, 202–203.

numbers fluctuated with the ebb and flow of the gold mines and other commercial interests that attracted them. Although small in numbers during the first two decades, Chinese in Sacramento increased to 13.4 and 14.2 percent of the total population, respectively, for the decades 1870 and 1880, before declining to 9.7 percent by 1900. San Joaquin County's Chinese population averaged about 5.5 percent.

CHINESE LEGAL TRADITION

The Chinese who entered California brought with them a legal tradition that had begun as early as the Ch'in Dynasty (221–207 B.C.) The *Ta Ch'ing Lü Li* is commonly called the Chinese penal code of the Ch'ing (Manchu) Dynasty (1644–1911).²⁸ Unlike the nineteenth-century *California Penal Code*, which divides homicide into three basic categories—manslaughter and first- and second-degree murder—the *Ta Ch'ing Lü Li* contains a wide variety of homicide categories that take familial relationships into account, and include intentional, mistaken, accidental, and a variety of other forms of killings. Compared to European penal codes, it is much more complex, offering a series of punishment gradations based upon familial, class, and social-status relationships between victim and killer.

Unlike in our own legal system, the Chinese magistrate was required to investigate any petition presented by anyone in his local province (*hsien*) alleging a crime. Assisted by clerks with legal expertise, the magistrate, in effect, became the investigator, prosecutor, sheriff, jury, and judge while processing the case. After investigating the facts of the case, he consulted the *Ta Ch'ing Lü Li* to determine what punishment should be applied to the defendant. In cases involving capital offenses, there was an elaborate procedure of automatic appeal to the governor of the province, the Board of Punishments, the

²⁸*Lü* means statutes while *li* refers to substatutes that were developed to further interpret the law as codified within the *Ta Ch'ing Lü Li*. Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases* (Cambridge, Mass., 1967), 64–65. There are eight major divisions of the *Ta Ch'ing Lü Li*, but only Section VI, Penal Law, subsection B, Homicide (articles 282–301) is important for our discussion of Chinese law. See Sybille van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* (London, 1962), 56–57.

Supreme Court (San Fa Ssu), and finally to the emperor. On important occasions, the emperor might declare a general amnesty and release some condemned murderers from their death sentences. It was common to order "bambooning or branding" as "a substitute for the prescribed punishment" for death penalty cases.²⁹

"An indictment cannot be got up without a lie."³⁰ This famous Chinese proverb helps to explain Chinese attitudes toward perjury committed during trials. In China, the accused often paid witnesses to "testify to their innocence." It was common to avoid involvement as a witness against the accused, for fear of reprisals if the defendant was found guilty.³¹ In one inter-clan rivalry, the two parties chose not to take their complaint to the magistrate. A spokesperson for one of the groups said, "He might do us much greater harm. We prefer to decide the quarrel ourselves."³² Magistrates' staff members were often rewarded for arresting suspects who were eventually convicted. Consequently, constables were guilty of "loosely arresting the wrong person."³³ In other words, the phrase "round up the usual suspects" has a long tradition, at least in Chinese legal history.

Blood feuds appear to have been common in China, and the "right of revenge" posed a problem for legal authorities. These feuds began early in Chinese history (first century B.C. and A.D.). Huan T'an complained, "Now although those who have committed homicide are punished by the law, yet private hate between two parties still predominates, and revenge is exacted between them for generations."³⁴ One emperor declared, "Life and death depend upon the sentence given. How can a reckless person take revenge at his own volition? Once the law has already meted out justice, the personal enmity is at an end. Killing for revenge cannot be begun."³⁵ However, tongs, clans, and families believed that they had the right to avenge the

²⁹Van der Sprenkel, *Legal Institutions in Manchu China*, 68. See also Bodde and Morris, *Law in Imperial China*, 4-6.

³⁰From Scarborough-Allen, *A Collection of Chinese Proverbs*, as cited in Bodde and Morris, *Law in Imperial China*, 135.

³¹*Ibid.*, 71-73.

³²Van der Sprenkel, *Legal Institutions in Manchu China*, 77.

³³Bodde and Morris, *Law in Imperial China*, 75.

³⁴T'ung-tsu Ch'u, *Law and Society in Traditional China* (Paris, 1965), 80.

³⁵*Ibid.*, 82.

killing of one of their members. And, unfortunately, one murder led to another and another. One Chinese observer of this problem suggested, "To revenge is an expression of the true emotions of a human being. . . . If a wrong is not avenged, the human way would be destroyed and the heavenly way ruined."³⁶ There was no easy answer to this complex problem. As will be seen, examples exist among the homicide sample that suggest this Chinese tradition continued into nineteenth-century California. It should be noted that blood feuds are common across many cultural groups.³⁷

CHINESE TONG ORIGINS

Secret societies have a long historical tradition in China, probably originating during the Han dynasty (206 B.C.–A.D. 220). One of the most famous groups, the Triads, are usually traced from the seventeenth century and are based on the Hung.³⁸ Originally involved in attempts to overthrow the Manchu dynasty, Triads eventually established operations in the United States that included prostitution, opium smuggling, and gambling parlors. More important, they opened lodges and offered protection for their members "against outsiders, companionship in a hostile environment, and a sense of community."³⁹ They developed elaborate ritualistic ceremonies to initiate members. Most secret societies based on the Triads in California cities were called tongs.⁴⁰

Although tong refers to a hall or meeting place, Ko-lin Chin defines tongs as "fraternal associations" that were developed

³⁶Ibid., 86.

³⁷Earlier research revealed similar vendetta or blood feuds among Apache and Italian homicides committed in Gila County, Arizona, and Las Animas County, Colorado, during the nineteenth and early twentieth centuries. McKanna, *Homicide, Race, and Justice*, chs. 4 and 5.

³⁸Jean Chesneaux, *Secret Societies in China: In the Nineteenth and Twentieth Centuries* (London, 1971), 15. See also Mak Lau Fong, *The Sociology of Secret Societies: A Study of Chinese Secret Societies in Singapore and Peninsular Malaysia* (New York, 1981) and David Ownby and Mary Somers Heidhues, eds., *"Secret Societies" Reconsidered: Perspectives on the Social History of Modern South China and Southeast Asia* (New York, 1993).

³⁹L. Eve Armentrout Ma, "Chinatown Organizations and the Anti-Chinese Movement, 1882–1914," in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, ed. Sucheng Chan (Philadelphia, 1990), 148–49.

⁴⁰Ko-lin Chin, *Chinese Subculture and Criminality: Non-traditional Crime Groups in America* (New York, 1990), 13–14.

among Chinese immigrants "as self-help groups."⁴¹ Tongs appeared in Sacramento and Stockton within the first decade of Chinese immigration. Unlike the companies that often restricted membership to specific clan affiliation, tongs accepted any Chinese who wished to join. Lacking such clan restrictions, tongs grew rapidly, became numerous, and had larger membership than the six companies. Behaving similarly to the companies in exchange for a membership fee, tongs provided clients with housing, employment, medical care, and legal aid. Tongs quickly moved into such economic endeavors as gambling, opium dens, and prostitution.⁴² These enterprises became lucrative because of the large numbers of Chinese males seeking recreational outlets during leisure hours. The high demand for such pleasure-related businesses heightened the rivalry among tongs, companies, and other benevolent associations. To increase their economic power, tongs forced Chinese businessmen to join their association for protection. To protect their economic interests, tongs resorted to gunmen, called "hatchet men" by the local press. Enforcers who were caught committing crimes received full legal protection from the tong, which often included perjured testimony.⁴³

While discussing Chinese rivalry, historian Stanford M. Lyman, observes, "These wars did generate a widespread stereotype of Chinatown that included lurid stories about opium dens, sing-song girls, hatchet men, and tong wars. The real Chinese society was difficult to discern behind this kind of romantic illusion." Lyman suggests that "violent conflicts" occurred mainly because of attempts to control "illegal commerce in drugs, gambling, and prostitution."⁴⁴ Tongs tried to resolve their disputes with arbitration whenever possible, but sometimes they turned to gunmen to pressure rival tongs into settlement. Virtually all disputes between these secret societies occurred in local Chinatowns, and outsiders such as police or city officials had little impact on them. One exception was the bribing of police officers to gain an advantage over a rival

⁴¹Ko-lin Chin, *Chinatown Gangs: Extortion, Enterprise, and Ethnicity* (New York, 1996), 191.

⁴²C.N. Reynolds, "The Chinese Tongs," *The American Journal of Sociology* 40 (March 1935): 616–21.

⁴³Lyman, "Conflict and the Web of Group Affiliation in San Francisco's China Town, 1850–1910," 109, in Lyman, *The Asian in North America* (Santa Barbara, Calif., 1977) and Armentrout Ma, "Chinatown Organizations," 148–49.

⁴⁴Lyman, "Conflict and Group Affiliation," 113, 110.

tong.⁴⁵ This, however, had little long-term impact on tong rivalries. Throughout the nineteenth century, the benevolent associations controlled the destiny of Chinatowns in Sacramento and Stockton.

Tongs were usually perceived by Americans as organizations "associated with underworld criminal activity."⁴⁶ Speaking of Chinese rivalry in San Francisco's Chinatown, Stanford Lyman suggests that it was "remarkable for its fierce internal conflicts, its lack of solidarity, and its intensive disharmony."⁴⁷ He discovered rivalry between the Chinese Six Companies and newer groups who developed secret societies or tongs to compete for "control of vice" and attempted to gain political power at the expense of the clans and companies.⁴⁸ This helps to explain the numerous shootings.

CHINESE HOMICIDES

During the nineteenth century, California newspapers customarily labeled any violent behavior among Chinese as the work of "highbinders."⁴⁹ Originally used in the early nineteenth century to describe Irish immigrants accused of criminal activity in New York, "highbinder" first appeared as an epithet to characterize Chinese as criminals in the *San Francisco Call*. Newspaper editors used it to attack Chinese "secret societies." For example, on June 1, 1892, the headline of the *Sacramento Bee* blared, "A Highbinder War. Two Mongolians Laid Out In the Battle. The City Prison Filled with Murderous Mongols."⁵⁰ Such headlines partially reveal the racial prejudice harbored by newspaper editors, reporters,

⁴⁵Ibid., 113.

⁴⁶*Oxford English Dictionary*, 18: 221. Some writers compared them to modern-day criminal groups: "The famous Tongs were something else, more mysterious—secret societies similar to Mafia families."

⁴⁷Lyman, "Conflict and Group Affiliation," 103.

⁴⁸For a discussion of "tong wars," see C.Y. Lee, *Days of the Tong Wars* (New York, 1974), 31; Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850–1870* (Cambridge, Mass., 1964); Alexander McLeod, *Pigtails and Gold Dust* (Caldwell, Idaho, 1948), 226–37; Richard H. Dillon, *The Hatchetmen: The Story of the Tong Wars in San Francisco's Chinatown* (New York, 1962), 167–206 and 241–62; and Joseph Henry Jackson, *Anybody's Gold* (San Francisco, 1970), 218.

⁴⁹See *The Oxford English Dictionary* (Oxford, England, 1989), 7: 223.

⁵⁰*Sacramento Bee*, June 1, 1892.

and the general public toward the Chinese. Numerous racially charged headlines helped create a myth of the Chinese as a criminal class.⁵¹ Pejorative phrases such as "highbinder," "Mongolian Mafia," "Celestial," and "Murderous Mongols" turned the Chinese into caricatures, removed their humanity, created the image of a society to be feared, and made them objects to be controlled. To white observers, all of these benevolent societies automatically became "secret societies" that symbolized vice, corruption, and violent behavior.

The story that appeared in the June 1, 1892, *Sacramento Bee* suggested that the Chinese involved in a homicide that occurred on 3rd Street between I and J Streets were members of a secret society employed to kill two Chinese businessmen. Homicide seemed to be a common occurrence. In this case, a fight between two rival Chinese groups ended with Yee Kie and Lee Gong lying dead on a Sacramento street. This type of "secret society" killing was typical in both Sacramento and Stockton, California, during the nineteenth century; such murders were committed to protect the economic turf of the company, clan affiliation, or tong involved.⁵²

On October 10, 1881, a group of Chinese met at a house on 3rd Street, between I and J, to celebrate. During the party Yee Ah Gee threatened Yee Ah Pong with a knife. Confronted with an armed adversary, Yee Ah Pong pulled a revolver and killed

⁵¹The day after the first story, the *Bee* once again used bold type to headline the homicide that had occurred the previous day: "The Mongolian Mafia. The Insignia of a Highbinder's Headquarters." The story suggested that the police and the coroner had discovered records involving the "highbinders." The June 1, 1892, *Sacramento Daily Record-Union* trumpeted, "Shower of Bullets! Chinese Highbinders Fight a Battle in the Streets. About Fifty Shots Fired." See *Sacramento Bee*, November 12–14, 1883.

⁵²The next day the *Sacramento Bee* headline, "Coats of Mail. Formidable Shields Worn By Chinese Highbinders," reported that police had raided the Bing Ting Hong "secret society" and had captured trophies including "two ponderous coats of mail" weighing twenty pounds each. See *Sacramento Bee*, June 3, 1892. The following day the *Bee* changed the story, claiming that it was the Bang Kong Tong that had been raided. Court records indicate that the perpetrator belonged to the Bing Kong Tong. See *People v. Chin Hane and Hoey Yen Sing, Criminal Case Files, 1850–1900*, Superior Court, Sacramento County, Sacramento Historical Society Archives (hereinafter *Criminal Case Files*, SHSA). Lee Heong, the victim, was alleged to be a member of the Chee Hong Tong. In the daily coverage of the homicide, the *Bee* misspelled the assailant Chin Hane's name as Ching Hing, Ching Hing Hane, and Chin Hing. The language issue was indeed fuzzy. See also Lyman, "Chinese Secret Societies in the Occident: Notes and Suggestions for Research on the Sociology of Secrecy," *Canadian Review of Sociology and Anthropology* 1 (May 1964): 79–102.

him. During the trial, the issue of whether Yee Ah Pong acted from fear for his life or behaved rashly became paramount. Calling a large number of witnesses, the prosecutor was able to make a strong case that ended in the conviction of Yee Ah Pong.⁵³ In another case that occurred at 3rd and I Streets on August 8, 1889, Ah Heong and another, unnamed assailant allegedly accosted Suey Kay. When police arrived, Suey Kay claimed that he had been robbed and that Ah Heong had pulled a revolver and shot him twice. Witness testimony and a dying declaration by the victim enabled the prosecutors to gain a conviction and a life sentence for Ah Heong for killing Suey Kay. However, the governor and the pardons board apparently were not impressed with the evidence. With the aid of attorneys supplied by a Chinese company, Ah Heong was pardoned after serving only one year in San Quentin.⁵⁴

In Sacramento, cases that ended in conviction of Chinese defendants were the exception. In most of the homicides involving Chinese killers and victims, the prosecutors were unable to make their case. Police and prosecutors often encountered great difficulty in dealing with Chinese homicide cases because of the language barrier and the tendency for Chinese to deal internally with their own problems. Possibly fearing reprisals, and following their own legal tradition, many Chinese refused to testify against other Chinese accused of homicide. In some cases, Chinese victims were listed as killed by "persons unknown," a common euphemism used by the coroner when he was unable to locate eyewitnesses. Since most of these homicides with unknown assailants occurred within the Sacramento Chinatown section, it is probable that the killers were also Chinese.⁵⁵

With a significantly smaller Chinese population, San Joaquin County had fewer Chinese homicides; thirteen cases

⁵³*Sacramento Bee*, October 11, 1881 and *People v. Yee Ah Pong*, case #240, *Criminal Case Files, 1850–1900*, Superior Court, Sacramento County, SHSA.

⁵⁴*Sacramento Bee*, July 9, 1889 and *People v. Ah Heong*, *Criminal Case Files, 1850–1900*, Superior Court, Sacramento County, SHSA; and inmate Ah Heong, *San Quentin Prison Register, 1850–1900*, Prison Papers, Records of the Governor, Sacramento, California State Archives [hereinafter *San Quentin Prison Register*, CSA].

⁵⁵Farwell, *Chinese at Home and Abroad*, 101, 112–14. Five cases involving Asian victims killed by alleged Asian perpetrators occurred outside of the Chinatown section of Sacramento. Two were committed in Folsom Prison by Asian inmates, and the other three occurred in Asian mining camps. See bodies December 14, 1861, September 12, 1881, August 8, 1883, May 6, 1885, and August 9, 1892, *Coroner's Inquests*, Sacramento County, SHSA.



Ah Keong (Ah Heong), San Quentin no. 14009, was sentenced in Sacramento County to life in prison for first-degree murder but received a pardon after only one year. (Courtesy of the California State Archives)

involved Chinese murderers. The most celebrated homicide case involved Ah Mow, Ah Chung, and Ah Cheen, who were accused of killing Sam Gee, Ah Yup, and Ah Bow on September 10, 1876. The killings occurred in a gambling room on Washington Street between Hunter and Eldorado in Stockton's Chinatown. The prosecutor charged that Ah Mow and his accomplices attacked and killed the three victims during a dispute between two Chinese companies. Apparently a fight broke out while they were gambling, and several parties drew pistols and began to shoot. Only Chinese witnesses from the See Yup Company were called to testify

during the prosecution of the defendants, who were members of the Yung Wa Company. One witness claimed that a dispute over a bet occurred between Ah Yup, the dealer, and several men seated at the gambling table. Ah Chung drew a revolver and said, "God damn you I will kill you."⁵⁶ The pace of the battle soon quickened and spilled out onto Washington Street. A white witness, H.L. Farrington, recalled that a little past noon, people were coming from church when he saw a Chinese male start firing into a store. He believed that four or five shots were fired in quick succession. He could not identify the shooter. Two victims, Ah Yup and Ah Bow, died from gunfire, but Sam Gee expired from wounds suffered from a sharp object.⁵⁷

Juries found Ah Mow, Ah Chung, and Ah Cheen guilty of murder and sentenced them to life in prison. However, all three were pardoned and released from prison nine years later because of perjured testimony by several Chinese witnesses. William Gibson, a lawyer who had assisted the district attorney, claimed that after the trial he traveled to San Francisco to visit the See Yup Company. There he had a discussion with Ah Sing, one of the main witnesses in the case against the defendants, and asked him what had really happened in Stockton. In a moment of candor, Ah Sing related to Gibson "that when one Chinaman did another an injury or wrong, . . . if the friends of the one who had been injured or wronged could not get hold of the wrong-doer, . . . they sought out the nearest relative of the wrong-doer and tried to punish him."⁵⁸ Since the alleged killers had escaped arrest, Ah Sing testified against the defendants, who were also members of the Yung Wa Company. After hearing these comments, Gibson notified J.A. Hosmer, the San Joaquin County district attorney, and contacted the Yung Wa Company. Because the newly revealed evidence indicated perjury, Ah Cheen was pardoned. This particular case reveals that Chinese defendants who were represented by lawyers pro-

⁵⁶Testimony of former San Joaquin prosecutor J.A. Hosmer in pardon file #341, Applications for Pardon, CSA; and testimony of Ah Tschin, *People v. Ah Mow*, November 1876, Fifth Judicial District Court, San Joaquin County, County Courthouse (hereinafter San Joaquin County, SJCC).

⁵⁷Testimony of H.L. Farrington, SJCC, 75-76, 25-26.

⁵⁸Affidavit of William Gibson, March 16, 1885, in pardon file #341, Applications for Pardon, CSA. Also see the statement of J.J. Evans, deputy sheriff, in CSA, who was the first law enforcement officer to arrive at the scene. He was sure that the witnesses against the defendants perjured themselves.

vided by their company could eventually obtain some measure of justice.

TONG RIVALRY HOMICIDES

Competition for various economic enterprises occurred irregularly in the Chinatowns. Violent conflicts developed there periodically because of aspirations by rival groups to control commerce in gambling and prostitution. Most of the killings that occurred in Sacramento's Chinatown involved tong-controlled gambling and women. Many homicide cases did indeed indicate rivalry among the various benevolent organizations. For example, around 1 p.m. on March 1, 1873, Ah Fat and Ah Wee met Ah Quong on the southwest corner of I and 3rd Streets. After a brief argument, Ah Fat struck Ah Quong from behind with a hatchet and Ah Wee pulled a revolver and fired several quick shots at Ah Quong, who died within minutes. Police quickly apprehended Ah Fat and Ah Wee, seized their weapons, and jailed them. With the aid of eyewitnesses, a jury found Ah Fat and Ah Wee guilty and sentenced them to life in prison.⁵⁹

On the surface, this case appeared to be a simple quarrel between Chinese males, but underlying the newspaper reporter's description of the crime were indications of a rivalry between two business groups. During the trial, the prosecution explained that three men had been involved in the killing, Ah Fat, Ah Wee, and Ah May. An embarrassed prosecutor admitted that Ah May had been released inadvertently from jail and had fled. Members of the company to which the victim, Ah Quong, had belonged contributed a considerable effort to ensure the conviction of Ah Fat.⁶⁰ Court documents reveal that Ah Quong had been an important member of a Chinese company, frequently volunteering as an interpreter in numerous court cases involving Chinese defendants. Just prior to the shooting, Ah Quong had been acting as an interpreter in the alleged kidnapping of a

⁵⁹*People v. Ah Fat, Criminal Case Files, 1850-1900*, District Court, Sacramento County, SHSA.

⁶⁰*Pardon Application of Ah Fat*, June 13, 1893, pardon file #5935, Application for Pardon, CSA.



A typical cell in the Stones Cell Block, San Quentin Prison.
(Courtesy of the California History Room, California State Library,
Sacramento)

Chinese woman by two Chinese men. The police court had a packed house of Chinese men apparently divided between two factions and very excited about the trial. One side, apparently including Ah Quong, wanted the defendants convicted, while the other opposed the proceedings and made threats against Ah Quong. After the court adjourned around noon, the Chinese observers moved into the street

"greatly excited and talking loudly."⁶¹ Ah Quong stepped into the street and walked away from the court house. At the corner of I and 3rd Streets, less than two blocks away, he was accosted and killed, allegedly by Ah Fat, Ah Wee, and Ah May.

A decade later, a *Sacramento Bee* reporter covering a homicide story involving Chinese rivalry, complained that "armed gangs of Chinese highbinders parade" through the streets of Chinatown and they "all carry pistols." The reporter noted that a "celestial arrested by officer Ash" had been arraigned recently, and the judge had "fined him \$30 for carrying a pistol."⁶² But this was an exceptional case, the reporter claimed; they seldom were charged with carrying concealed weapons.

There is little doubt that many Chinese kept handguns on their persons. At a coroner's inquest, it was revealed that two men, Sing Due and Lung Yek, came to their deaths on Sunday, November 11, 1883, "at the hands of parties unknown."⁶³ The prosecutors had difficulty finding those responsible for the crimes, but they located members of the rival group who would cooperate even if it meant perjury. Constable George Rider arrested Mock Soon and found "a revolver, a hatchet and a pair of derringers." R.T. Devlin, an attorney for Mock Soon, admitted that when his client was arrested, he "was armed with a pistol" and "was ready to fight but was not actually engaged in battle."⁶⁴

During the trial, several witnesses claimed that there had been a riot in Chinatown at the corner of I and 3rd Streets on the day of the crime and that such chaotic conditions made it difficult to identify the killers. The witnesses for the prosecution also proved to be vexing. In a petition supporting the pardon of Mock Soon, R.M. Clarken stated that "the case was bitterly prosecuted by the company opposed to the defendant."

⁶¹Letter from S. Solon Hall to Governor H.H. Markham, December 16, 1892, CSA. Hall had assisted the prosecution in the Ah Fat and Ah Wee trials. Tongs, companies, and benevolent associations often retained lawyers to aid the prosecution, and in some cases hired investigators to gather evidence for either the defense or the prosecution. Michele Shover, "Fighting Back: The Chinese Influence on Chico Law and Politics, 1880-1886," *California History* 74 (Winter 1995-96): 408-33, 449-50.

⁶²*Sacramento Bee*, November 13, 1883.

⁶³*Ibid.*, November 15, 1883.

⁶⁴Letter from R.T. Devlin, November 16, 1894, in pardon file #5866, Application for Pardon, CSA. Devlin claimed that two rival societies, Tong Duck Tong and Hong Duck Tong, had participated in the fight.

All of the evidence against Mock Soon was "given entirely by Chinamen belonging to the rival faction." Clarken also pointed out that, of all those charged, only Mock Soon was prosecuted for the murders. This was especially troubling since "dozens of pistol shots were fired," and there was no proof that Mock Soon had even fired his revolver. Clarken concluded that "the animus exhibited on both sides showed a feverish anxiety to secure a victim on one side or the other and Mock Soon was selected."⁶⁵

On May 31, 1892, a rivalry between the Bing Kong Tong and the Chee Kong Tong ended with a gun battle on 3rd Street between I and J Streets in Sacramento's Chinatown. Lee Gong and Yee Kie were killed in the shootout. The local newspapers ran banner headlines declaring that a "Highbinder War" had ended with two dead and that the city jail was full of "Murderous Mongols."⁶⁶ Police arrested, and the prosecutor indicted, Chin Hane and Hoey Yen Sing for murder. The prosecution based its case on the testimony of Lee Gong's widow, Ah Wah, and Yee Chim. The prosecutor stated that Chin Hane had entered Lee Gong's store, pulled a pistol, and killed the victim. Both defendants were members of the Bing Kong Tong, and the witnesses against them belonged to the Chee Kong Tong. During cross-examination, one witness admitted that he worked for the Chee Kong Tong in dealing with criminal cases. A.L. Hart, attorney for the defendants, based his argument primarily on what occurred outside Lee Gong's store. Hart informed the jury that "we will show you that a great number of shots—nearly all of them were directed from the outside toward Lee Gong's store." The evidence collected included "bullet holes in the posts on the outside from Lee Gong's."⁶⁷ A streetcar conductor reported that a "great many shots were fired," about seventy to eighty. Two other observers said that "the firing was coming up 3rd Street and was followed down towards the Bing Kong Tong." The defense attorney argued that the "fight did not commence in Lee Gong's," but instead began on the street outside. Hart further claimed that the fight was started by members of the Chee Kong Tong who chased Bing Kong Tong members back to their

⁶⁵Letter from R.M. Clarken to Governor R.W. Waterman, November 11, 1890, CSA.

⁶⁶*Sacramento Bee*, June 1, 1892. The next day they became the "Mongolian Mafia."

⁶⁷*People v. Chin Hane and Hoey Yen Sing*, 1–7, 386–87, *Criminal Case Files, 1850–1900*, Superior Court, Sacramento County, SHSA.

hall.⁶⁸ The jury chose to believe the prosecution and found both defendants guilty of first-degree murder. They sentenced Chin Hane to death. Attorneys appealed to the California Supreme Court, but the justices affirmed the lower court's decision. The defendant was executed in Folsom Prison on December 13, 1895.⁶⁹

Other cases exhibited similar circumstances. For example, in 1897, Sacramento District Attorney Ryan, in a motion to dismiss a charge of murder against Ling Ying Toy, admitted that the jury was hopelessly deadlocked, seven to five, in favor of acquittal. He complained, "This case is what is known as a Chinese case. They are the most difficult to try, because they involve a character of witnesses that . . . makes it almost impossible to get a fair understanding of the testimony, because it necessarily has to come through an interpreter; and it has been my experience in Chinese murder cases, that, usually, it is one society or organization against another." Ryan believed it would be impossible to gain conviction in this case. "My experience has taught me that, in dealing with this class of people, the crime of murder is committed as a matter of revenge . . . and that the killing of one Chinaman usually results in the killing of another."⁷⁰ Further, Ryan candidly admitted that although he believed that the defendants knew something about the circumstances of the killing, he was not convinced of their guilt.

After hearing the motion by the prosecutor, Judge E.C. Hart, who had years of experience in the police court and on the Superior Court bench, commented, "We also know from common experience . . . that where a member of one of the 'tongs' has been killed, as a usual thing—and it is so generally—they are not satisfied until some member of the 'tong' to which the murderer belonged is punished for it."⁷¹ Judge Hart further observed, "In other words, it is a fight between the 'tongs,' and it matters little to them, as a rule, which one of the members is prosecuted and punished for it." He concluded, "I know that I would not . . . want to take any human being's life, whether he be a heathen, or a civilized person, or a savage, upon testimony

⁶⁸*Ibid.*, 388–95.

⁶⁹*People v. Chin Hane* 108 Cal 597–608 [1895]. See *Sacramento Union*, December 14, 1895.

⁷⁰Motion to Dismiss, 2–3, *People v. Ling Ying Toy (alias Quong Sing) and Ching Gow Duey (alias Chin Ah Gow Nuey)*, case #1710, August 1897, *Criminal Case Files, 1850–1900*, Superior Court, Sacramento County, SHSA.

⁷¹*Ibid.*, 5.

which is so conflicting, and particularly, coming from the source from which the testimony in this record came."⁷² He dismissed charges against the defendants. Other cases reveal similar complaints by the prosecution.⁷³

The data reveal that Chinese in Sacramento committed most of their homicides in a very small, highly concentrated area centered on the corner of I Street and 3rd Street. Thirteen killings occurred on this corner, and four more were recorded less than a block away on I Street between 3rd and 4th Streets. All of the other Chinese homicides except two occurred within a two-block radius. This region was the main cultural center of Sacramento's Chinatown. Both the Bing Kong Tong and Chee Kong Tong were located within the block bounded by I, J, 2nd, and 3rd Streets. Chinese societies, hotels, restaurants, laundries, and other businesses completely filled this block. Because of disputes involving economic territorial rivalries among Chinese societies, it became the homicide hot spot in Sacramento.

THE AH TON CASE

In California, Chinese rarely killed outside their racial group. The Ah Ton case is one exception. On the night of May 5, 1878, Henry Connolly became involved in a dispute with three or four Chinese about paying a toll to cross Connolly's bridge over the Calaveras River near San Andreas. After some heated discussion and some pushing and shoving, apparently one of the Chinese involved in the dispute pulled a knife and stabbed Connolly in the abdomen. He died the next day, and three suspects, Ah Ton, Ah Song, and Ah Kum, were charged with murder. Defense counsel entered a plea of guilty of second-degree murder for Ah Song and Ah Kum, and they were sentenced to life in prison. Ah Ton, who went to trial in January 1879, was convicted of murder in the first degree and sentenced to death.⁷⁴

⁷²*Ibid.*, 5-6.

⁷³In his opening statement in a murder case against Lee Dick Lung, prosecutor C.T. Jones, in referring to Chinese homicide cases, claimed that "they are divided into two sides; it is usually one 'Tong' or company, against another Tong or company." Defense counsel objected to the statement, but was overruled. See *People v. Lee Dick Lung*, pardon file #290, Applications for Pardon, CSA.

⁷⁴*The People v. Ah Ton*, pardon file #652, Applications for Pardon, CSA. The deceased's name has been spelled in a variety of ways in the court documents (Conely, Conley, Conoly, Coneley, and Conolly). For consistency I have chosen Connolly.

This case is intriguing because it involved a Chinese man killing a white man in a region with a long history of prejudice and abuse against Chinese. On the surface, this case would seem simple: identify the suspect, arrest and prosecute him, and justice would be served. But that is not what happened. The only eyewitness, Toby Flam, proved to be untrustworthy, and the victim was so much under the influence of alcohol that his "identification" of the killer was unreliable. That is precisely why this case is important. Moreover, the final outcome proves that a Chinese defendant could gain redress if he had good legal counsel.

The circumstances of the trial illuminate the problems encountered by Chinese defendants in California, where many white citizens harbored deep-seated anti-Chinese feelings. The facts of the crime seem fairly simple. Henry Connolly operated a toll bridge over the Calaveras River and charged fees to anyone who wanted to cross. He had a reputation for being a heavy drinker and abusing Chinese people. Toby Flam claimed that he saw the altercation between Connolly and the Chinese. Toby said that one assailant drew a pistol, but Connolly knocked it out of his hand. Another grabbed Connolly, and yet another attacker stabbed him with a knife. Toby stated, "I do not know the name of the Chinaman that stabbed him, but this is the man here." Toby Flam pointed to Ah Ton, the defendant, as the man who stabbed Connolly. Flam also testified, "I went [to] Connolly's about 2 o'clock. He was sober and continued sober. He did not have any liquor."⁷⁵ Testimony by various other witnesses make it clear that Flam was certainly lying about Connolly's drinking and most probably about the identity of the killers.

In a petition supporting a pardon for Ah Ton, several prominent citizens noted, "[W]e know from the general reputation of the deceased Henry Connolly, that he was a man of extremely intemperate habits and for years scarcely a day passed over his head that he was not intoxicated."⁷⁶ J. Salcido stated, "I saw Connolly on an average of 3 times a week and 9 times in 10 he was drunk." He also had a reputation for tormenting and physically attacking Chinese, who sometimes refused to pay

⁷⁵Testimony of Toby Flam, *People v. Ah Ton*, 2-4, District Court, Calaveras County, CSA.

⁷⁶Petition to Honorable William Gwin, governor of the state of California, from twenty citizens of San Andreas, Calaveras County, California, November 26, 1879, CSA. Petitioners included businessmen, the sheriff, the county treasurer, the deputy county clerk, the superintendent of schools, and the editor of the *Calaveras Advertiser*.

his toll and walked under the bridge. Salcido claimed that Connolly often threw rocks at Chinese who walked across "the creek instead of passing over on the bridge." While trying to caution against such behavior, "he became intensely abusive and declared his intense hostility to Chinamen."⁷⁷ William Lewis, a local attorney, claimed that "Connolly had for years kept up a steady persecution of Chinamen. He drank . . . and when drunk quarreled with them."⁷⁸ Toby Flam also disliked the Chinese. He testified, "I hate all Chinamen and have tried to kill two or three—tried to kill them with little rocks—rather see a Chinaman hang than not. If I had a good gun [I] would try to kill them."⁷⁹

After the trial, defense counsel hired private detective James Galbraith to investigate the circumstances of the case in order to submit information to the governor to secure a pardon for Ah Ton. Galbraith learned a great deal about the drinking habits of Connolly from J.B. Machavilli, a storekeeper in San Andreas. Just prior to the homicide, the victim had been drinking for several hours at Machavilli's store and had begun to abuse Ah Ton. Machavilli gave Connolly a full bottle of whiskey and helped him home to the bridge. "When he arrived at the bridge . . . between 11 and 12 o'clock a.m., he was in fact drunk."⁸⁰

The problem with identifying the killers suggests that those convicted were not the guilty parties. For example, Sheriff B.F. Haines testified that both Toby and Connolly recognized Ah Ton as the assailant.⁸¹ Dr. Robinson, the physician who attended the victim, claimed that when the suspects "were brought before

⁷⁷Affidavit of J. Salcido, CSA. Judge Reed said he passed Connolly's bridge and noticed that "Connolly was intoxicated." Salcido also said Connolly "was very much intoxicated." See Report of Detective James Galbraith, 10–12, CSA.

⁷⁸Affidavit from William Lewis, attorney, San Andreas, California, April 6, 1879, to F.A. Bee, consul general, San Francisco, CSA.

⁷⁹Testimony of Toby Flam, 2–4, *People v. Ah Ton*, District Court, Calaveras County, CSA.

⁸⁰Testimony of J.B. Machavilli, in Report of Detective James Galbraith to Colonel F.A. Bee, consul for Chinese, n.d., CSA.

⁸¹Machavilli suggested that Ah Ton "was not near the bridge at the time that fool boy says he was." Testimony of Sheriff B.F. Haines, 7, CSA. Research on eyewitness identification suggests that white witnesses were able to recognize white faces 68 percent of the time and Asian faces 45 percent of time. Alvin G. Goldstein, "The Fallibility of the Eyewitness: Psychological Evidence," in *Psychology in the Legal Process*, ed. Bruce Dennis Sales (New York, 1977), 230.

him [Connoly] for the purpose of Connoly's identifying these Chinamen, that he was too intoxicated to identify the Chinamen or tell one from another." The case hinged on only one eyewitness, and a bad one at that. J.B. Reddick claimed Toby was "less than *half witted*" and lying.⁸² During testimony, when asked about a document shown to him, Toby Flam admitted, "I can not read, do not know one paper from another."⁸³ His father, August Flam, stated, "Toby is not of sound mind and judgment. . . . [H]e is not to be believed in his statements."⁸⁴ Nevertheless, a jury convicted Ah Ton.

Unlike most Chinese defendants, Ah Ton did not receive good legal counsel. One trial observer, J.F. Washburn, declared that Ah Ton's "attorney was entirely incompetent; being too intoxicated to try any case whatever, much less a trial for life." Washburn indicated that "there were men on the jury who were known to have prejudices against the Chinese; and, after rendering their verdict, they went about the street boasting of what they had done."⁸⁵

After reviewing the case, California Attorney General E.C. Marshals informed Governor George Stoneman, "I am satisfied that a full and unconditional pardon should be granted to each of the parties [Ah Ton, Ah Song, and Ah Kum]. Only two witnesses testified to the fact of the killing. . . . [O]ne Toby Flam was a boy of 14 years old weak minded . . . the other witness was the man Connoly who was killed. His dying declaration was taken and on its face is inadmissible under the ruling of Supreme Court." The victim "was very drunk at the time his declaration was taken, and both the identification of the accused and the details of the fight are contradictory and improbable." Marshals strongly recommended a pardon.⁸⁶

⁸²Testimony of Dr. Robinson, CSA, 9. Detective Galbraith claimed that "the idea was also general that the boy Toby Flam who was with him [victim] all the time had put the thing up for Connoly." Letter from J.B. Reddick, San Andreas, California, to William Irwin, governor of California, November 26, 1879, CSA. Emphasis in the original.

⁸³Testimony of Toby Flam, *The People v. Ah Ton*, pardon file #652, Applications for Pardon, CSA.

⁸⁴Affidavit of August Flam, November 26, 1879, San Andreas, California, signed by August and Frances Flam, CSA.

⁸⁵Letter from J.F. Washburn, San Andreas, January 21, 1880, to George F. Wood, in CSA. J.B. Machavilli supported this view, stating that "the lawyer [for defense] had too much whiskey in him to try any case." See Report of Detective James Galbraith to Colonel F.A. Bee, consul for Chinese, n.d., CSA.

⁸⁶Letter from E.C. Marshals, attorney general, state of California, n.d., to George Stoneman, governor of California, CSA.

Three members of the California Supreme Court informed the governor that "the [court] record itself contains the suggestion that in some instances the defendant's rights may have been inadvertently stipulated away." The justices stated that on the basis of the briefs submitted by counsel, they could not reverse the judgment of the court. Nevertheless, they made it clear that if the defense counsel had provided the "statement of one Ah Yong" and if it had been "testified to and believed by the jury[, it] would have gone far to acquit the prisoner at a second trial." The justices also complained, "[W]e feel that the case taken altogether presents such doubts as to make it our duty as it is our pleasure, to call it to the attention of Your Excellency. . . . We think the circumstances could well be considered by Your Excellency in exercising the attributes of clemency."⁸⁷

Surprisingly, defense counsel had prevented Ah Song and Ah Kum from entering not-guilty pleas. William Lewis, lawyer for the defendants, admitted this but claimed, "I made them plead guilty to save their necks. I know they would hang the whole three of them if I went to trial."⁸⁸ He said if he were asked why, "I answer, owing to the prejudice existing at the time against the Chinese, it has grown into a common saying that when a Chinaman is to be prosecuted, 'it is an easy thing.'"⁸⁹ Chung Fun, the interpreter, noted that Lewis tried to convince his clients to plead guilty to a reduced charge of second-degree murder, but both defendants refused, insisting they were not guilty. At that point, Lewis asked the sheriff to remove them from the courtroom. Despite this maneuver, when asked by the court clerk to translate their pleas, Chung Fun repeated their statement: "You may hang me if you please, but I am not guilty." Chung Fun stated emphatically, "Ah Kum and Ah Song did not plead guilty when called upon by the court to answer to the charge of the murder of Connoly."⁹⁰ The attorney general concurred and informed the

⁸⁷Letter from William T. Wallace, E.W. McKinstry, and Addison C. Niles, Judicial Department, Supreme Court, state of California, November 20, 1879 to William Irwin, governor of California, CSA. See also *The People v. Ah Ton* 53 Cal 741-42 (1879).

⁸⁸Affidavit from William Lewis, attorney, San Andreas, April 6, 1879, to F.A. Bee, consul general, San Francisco, CSA.

⁸⁹Letter from William T. Lewis, attorney, San Andreas, November 26, 1879, to William Irwin, governor of California, CSA.

⁹⁰Affidavit of Chung Fun taken by F.A. Bee, Chinese consul, San Francisco, June 9, 1880, CSA.

governor that "two of the parties [Ah Song and Ah Kum] were sentenced on a plea of guilty which it is clearly established, they never consented to."⁹¹

Further investigation suggested that if the defense counsel had been competent, the defendants might have been acquitted. For example, in a deposition made later, Henry Bright stated that the "next morning after Connoly was stabbed two chinamen left Benson's [boardinghouse] and went west." Constable Driscoll talked to one of them, who claimed that "another Chinaman Ah Hing cut the bridge man" not Ah Ton.⁹² William O. Swenson, editor of the *Calaveras Advertiser*, called the trial a "farce." He said that if his son "had been properly examined [he] would have gone far to clear all the Chinamen as he met three Chinamen near the bridge coming from San Andreas" the next day. The manager of Benson's boardinghouse at San Andreas said that "Ah Hing and Lee Ah Hung, the two chinamen who fled," committed the crime. They had been living in his boardinghouse and had left quickly the morning after the crime.⁹³

This case demonstrates that it was possible to gain justice for unjustly accused Chinese in California. With support from the Chinese legal community in San Francisco, as well as from prominent citizens in San Andreas, the defendants were eventually able to gain redress for this miscarriage of justice. Ah Ton escaped execution and, after languishing in San Quentin for three years, received a full pardon from the governor. Ah Song and Ah Kum served six years each before receiving pardons.

OTHER CASES ON APPEAL

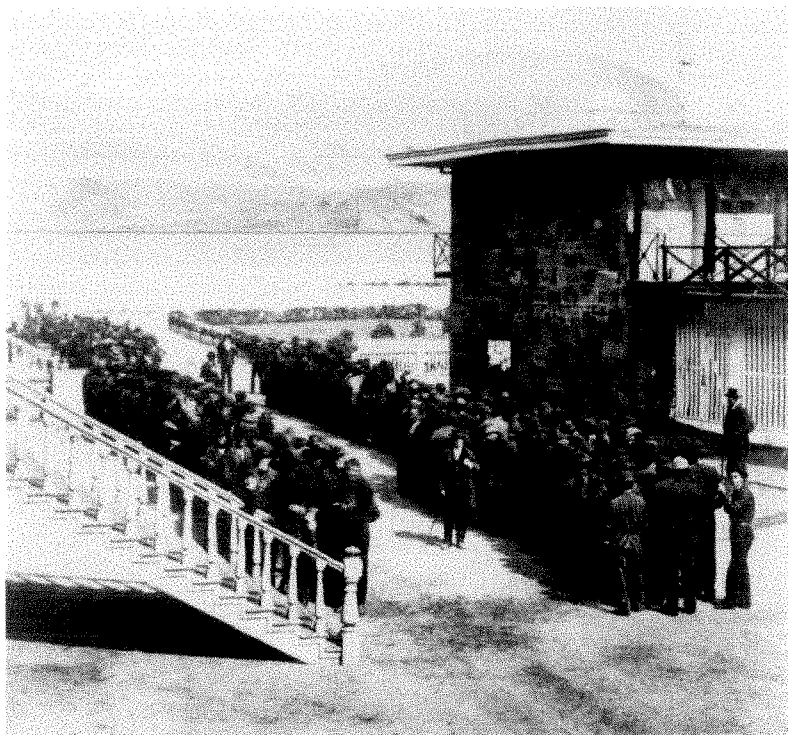
Some of these homicide cases provide important insights about rules of evidence and procedure practiced by attorneys and judges, while illuminating the appeals process available to Chinese defendants in nineteenth-century California. For example, on August 22, 1875, a little after 8 p.m., an argument between several Chinese males in San Luis Obispo

⁹¹Letter from E.C. Marshals, attorney general, state of California, n.d., to George Stoneman, governor of California, CSA.

⁹²Report of Detective Galbraith, 11-12, CSA.

⁹³*Ibid.*

⁹⁴*San Luis Obispo Tribune*, August 28, 1875.



Convicts assemble before the Stones Cell Block, San Quentin, ca. 1871. (Courtesy of the California History Room, California State Library, Sacramento)

ended with the shooting death of Captain Jack.⁹⁴ A.A. Oglesby, the district attorney, filed murder charges against Ah Sing, Ah Him, Ah You, Ah Loy, Ah On, Ah Charley, Al Look, and Ah Jim. Five days after the crime, a San Luis Obispo grand jury indicted all eight "suspects," and they were held for trial. After the jury heard the evidence, Judge Eugene Fawcett advised them to ignore charges against Ah Loy, Ah On, Ah Look, and Ah You because the evidence was insufficient "to warrant a conviction."⁹⁵

Lawyers who appealed the defendants' case to the California Supreme Court focused on Judge Fawcett's instructions to the

⁹⁵Transcript of *People v. Ah Sing, et al.* on appeal to the California Supreme Court, 11, pardon file #8742, Applications for Pardon, CSA.

jury, noting that three instructions requested by defense counsel were refused. Testimony revealed that Captain Jack had been "a quarrelsome person and a boisterous fighting man." Further, defense counsel claimed that the defendants "never instigated" the fight and "were acting in self defense."⁹⁶ The judge refused to admit this testimony and also refused to instruct the jury as to these facts. However, on appeal the jury instructions concerning reasonable doubt proved to be the most damaging issue to the prosecution and the court in this case. The California Supreme Court decision written by Chief Justice Wallace noted the failure to admit testimony by defense witnesses, but then turned to the more significant issue of reasonable doubt. In his instructions Judge Fawcett informed the jury, "*If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.*"⁹⁷ The justice noted, "It is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such 'that a man of prudence would act upon it in his own affairs of the greatest importance.'"⁹⁸ The judgment was reversed, and the case was sent back for a new trial. After reviewing the evidence, the district attorney dismissed charges against the defendants.⁹⁹

About 11 p.m. on a Saturday night in June 1860, Lum Sow, a twenty-year-old man, was assaulted by six Chinese males and stabbed to death outside a house of prostitution in Chinatown at Big Oak Flat, Tuolumne County. The dispute involved a woman who had left Le Chou, one of the defendants, and had gone off with Lum Sow. According to several witnesses, the four defendants, Chung Litt, Ah Hung, Ah Cum, and Le Chou, had threatened to kill Lum Sow. John LaCosta, a baker, heard loud noises being made by Chinese, so he stepped into the street to see what was going on. He observed Lum Sow standing at the door of a house and "another man trying to push him out." Then, suddenly, "a man stabbed him and he fell dead."¹⁰⁰ Deputy Constable E.M. Archer happened to be

⁹⁶Defendant's Bill of Exceptions, 24-25, CSA.

⁹⁷*People v. Ah Sing* 51 Cal 373 (1876). Emphasis in the original.

⁹⁸*Ibid.*, 374.

⁹⁹For a similar, improper instruction on reasonable doubt a decade later in San Luis Obispo County, see *People v. William Bushton* 80 Cal 162 (1889).

¹⁰⁰Testimony of John LaCosta, *People v. Chung Litt, et al.*, District Court, Tuolumne County, pardon file #1286, Applications for Pardon, CSA.

coming down the street when the homicide occurred. He said the victim "ran out of the alley and met me, and said Chinamen had killed him, he came with open hands. I caught hold of him, thought he was drunk. I then saw blood on him, laid him down and as I done so a knife dropped from his arm or side."¹⁰¹ True to form, Constable Thomas Corcoran "rounded up the usual suspects." Under cross-examination about the actual number of suspects arrested, Corcoran replied, "I first arrested, 8, 10, or 12. They were discharged that night after my return from Humbug."¹⁰²

Chu Sow, who was asked to identify the assailants, had known the defendants for a long time. He said that all of them "wanted to kill the boy." Chu Sow had witnessed the killing and testified, "I stood 3 feet from the killing, so close that blood squirted on me. The killing lasted 1 or 2 minutes."¹⁰³ Constables Archer and Corcoran, accompanied by Chu Sow, went to Little Humbug, about five miles away, where they identified and apprehended the suspects in a small cabin. Corcoran "picked a knife off of the head of Chung Litt's bed." After taking the knife out of its sheath and examining it, they noted that it was bloody. They arrested the four suspects at about 1 a.m. Chu Sow, who accompanied the constables to identify the suspects, said Corcoran discovered the knife in Chung Litt's bed. His co-defendants protested, "[W]hy did you not throw the knife away? What did you bring it back for?"¹⁰⁴

With such damaging evidence and open statements made by the defendants, the jury's guilty verdict is not surprising. The defendants were convicted of murder in the first degree and were sentenced to death. The California Supreme Court denied the defendants' appeals and let the sentence stand.¹⁰⁵ All four were hanged in Sonora on Friday, March 22, 1861. A newspaper account noted that "three of them protested their innocence of the crime of which they were convicted." Only Chung Litt "died stoically," while the others "made great lamentations."¹⁰⁶ These four, and one other defendant, were the only Chinese executed in the counties surveyed.

¹⁰¹Testimony of E.M. Archer, CSA.

¹⁰²Testimony of Constable Thomas Corcoran, CSA.

¹⁰³Testimony of Chu Sow, CSA.

¹⁰⁴Testimony of Chu Sow, CSA.

¹⁰⁵See *People v. Chung Lit et al.* 17 Cal 320-22 (1861).

¹⁰⁶*Alta California*, March 27, 1861.

DATA DISCUSSION

California authorities indicted a total of 103 Chinese men for murder or manslaughter in the seven counties. Not one woman was indicted for murder. This, of course, reflects the overwhelming gender imbalance that resulted from a virtually all-male immigration movement. Conviction rates for Chinese defendants averaged 40 percent for the seven counties, while 31 and 29 percent, respectively, were found not guilty or were dismissed.

Although Sacramento prosecutors indicted fifty-eight Chinese defendants involving thirty-eight actual homicide cases, they convicted only fourteen, or 24 percent. Thirty-eight percent of the Sacramento County defendants were found not guilty, and an additional 35 percent of cases were dismissed.¹⁰⁷ Equally interesting, with 35 and 30 percent, Chinese defendants had the highest dismissal rate for defendants indicted in Sacramento and San Joaquin Counties, respectively. In other words, 76 and 50 percent of those Chinese indicted in Sacramento and San Joaquin Counties were released from custody by the criminal justice system (60 percent for all counties). Calaveras County indicted twenty-two Chinese defendants involved in eleven actual homicides, while Tuolumne County authorities indicted only ten defendants involved in twenty-five homicides. Law enforcement officials were unable to identify suspects in six cases in Tuolumne County and five cases in Sacramento County.

The large number of indictments compared to the number of homicides reflects the police procedures of "rounding up the usual suspects." Since few officers understood Chinese, the police in Sacramento and Stockton, as well as law enforcement officers in the gold camps, often arrested anyone who was near the scene of the crime. Prior to trial, when it became clear to the prosecutors that they could not make a case against some of the Chinese suspects indicted for murder, the defendants were released. Only four cases were plea bargained, two each in Sacramento and Calaveras Counties.¹⁰⁸ The data also confirm

¹⁰⁷*Registers of Criminal Action, 1850–1900*, Sacramento County, SHSA.

¹⁰⁸With good legal counsel, Chinese defendants seldom plea-bargained the way Indians and Blacks did. See McKanna, "Seeds of Destruction," "Life Hangs in the Balance," Mark H. Haller, "Plea Bargaining: The Nineteenth Century Context," *Law & Society Review* 13 (Winter 1979): 273–80; and Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," *Law & Society Review* 13 (Winter 1979): 247–60.

that Chinese tended to kill almost exclusively within their own group; the vast majority of victims (98 percent) were Chinese.

FINAL OBSERVATIONS

What can we conclude from this discussion of the treatment of Chinese defendants in California during the last half of the nineteenth century? First, because the Chinese entered California with the solid support of clans and the Chinese Six Companies, they maintained a strong group solidarity that permeated their Chinatown communities. No matter what city these Chinese moved to, they could always find a Chinatown with Chinese organizations that would provide housing, food, employment, medical treatment, and legal defense if they were arrested. Second, because of protection provided by the Chinese Six Companies, tongs, and other benevolent societies, most Chinese defendants were well represented by legal counsel in court. They received crucial legal advice prior to and during the preliminary hearings, when defendants were "fair game" for aggressive sheriffs, police, and prosecutors anxious to gain a conviction. Third, although the intermixing of racial groups created tensions that were reflected by interracial slayings among whites, Indians, and Hispanics, Chinese tended to kill only within their own group. This meant that they were less likely to receive the death penalty for their crimes. Fourth, the failure of some Chinese witnesses to testify against other Chinese was an important factor in explaining the low conviction rates for Chinese defendants. This refusal to testify, of course, was deeply ingrained in the Chinese legal tradition. On the other hand, perjury by some witnesses intent on implicating members of other tongs created a problem for prosecutors and judges trying to sort out the facts of these cases. Consequently, a significant number of cases were overturned by review of the California Supreme Court. Finally, the Chinese legal tradition created significant problems for the California criminal justice systems. Failure to understand Chinese customs and legal traditions made it difficult or impossible for many prosecutors to prosecute Chinese defendants effectively; on occasion they convicted the wrong person.

But what accounts for the 60 percent release rate (not guilty, hung jury, and dismissed) of Chinese defendants from the seven county criminal justice systems? One explanation would be the legal representation available to Chinese defen-

dants from the Chinese Six Companies or the tongs.¹⁰⁹ These organizations created group solidarity in the Chinatowns of Sacramento and Stockton. When a Chinese member of a benevolent association became involved in legal difficulties, he was assured that the society would protect his rights. Unlike other minorities such as Indians and Hispanics, who had difficulty obtaining counsel, Chinese had immediate access to legal representation, which meant protection during the beginning stages of questioning and preliminary hearings before justices of the peace.¹¹⁰

The language barrier also helped Chinese defendants, because constables, sheriffs, and prosecutors could not sort out the facts of the homicide cases without great difficulty. Since they could not be sure who had committed the crime, the police often rounded up "the usual suspects," many of whom were not involved at all. Too long a delay might allow the guilty parties to escape; occasionally, the guilty were released and fled local legal jurisdiction. The data verify that despite verbal and physical mistreatment by the white majority, the speedy and effective legal representation provided by Chinese companies, associations, and tongs enabled at least some Chinese defendants to gain a reasonable form of justice in the criminal justice systems of these seven California counties.

¹⁰⁹See Mary Roberts Coolidge, *Chinese Immigration* (New York, 1909), 402–407; Shih-shan Henry Tsi, *China and the Overseas Chinese in the United States, 1868–1911* (Fayetteville, Ark., 1983), 124–29; and Chinese Consolidated Benevolent Association, California, *Memorial: Six Chinese Companies, An Address to the Senate and House of Representatives of the United States, December 8, 1877* (1877; reprint San Francisco, 1970).

¹¹⁰The absence of plea-bargaining among Chinese defendants indicates the advantages of having good legal representation. See Fritz, *Federal Justice in California*, 210–49.

WILLIAM H. CLAGETT AND THE YELLOWSTONE NATIONAL PARK BILL

DENNIS C. COLSON

"WHO ARE ENTITLED TO THE PRINCIPAL CREDIT?"

The act creating Yellowstone National Park was passed by the United States Senate on January 30, 1872 and by the House on February 27. It was signed by President Grant on March 1. The great natural wonders and curiosities of the region were thus "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people," protected "from injury or spoliation," and held "for retention in their natural condition." The fish and game within the park were protected from "wanton destruction" and "destruction for purposes of merchandise or profit."¹ This enactment was of monumental significance, spawning the creation of Yosemite National Park near the end of the century and the National Park Service in 1916.² By a century after its creation, Yellowstone had "become the mother of more than 1200 parks and preserves scattered over almost 100 nations."³

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¹*Congressional Globe*, 42d Cong., 2d sess., 1872, vol. 45, pt. 1, p. 697; pt. 2, p. 1243; 17 Stat. 32 (1872).

²26 Stat. 651 (1890); 39 Stat. 535 (1916).

³Joe B. Frantz, "The Meaning of Yellowstone: A Commentary," *Montana* (July 1972), 5-11.

In 1894, when William H. Clagett was asked, "Who are entitled to the principal credit for the passage of the act of Congress establishing the Yellowstone National Park?" he replied by recounting his own role. He began with the idea of a national park, which first occurred to him during a conversation with printers at the *New North-West* newspaper in Deer Lodge, Montana Territory, in the fall of 1870 or spring of 1871. The Yellowstone region was being discussed widely because of reports from the Folsom⁴-Cook expedition in 1869 and the Washburn-Doane expedition in 1870, which had explored the region. After his election as Montana's territorial delegate to Congress in August 1871, Clagett consulted with N.P. Langford⁵ and Cornelius Hedges⁶ in Helena, and the three agreed that every effort should be made to establish the park. Langford went to Washington during the congressional session, where he and Clagett continued to counsel about the park project. Then, according to Clagett's account in a letter to William R. Marshall, secretary of the Minnesota Historical Society:

⁴David E. Folsom arrived in Montana with the Fisk expedition in 1862. He was interested in gold but had turned to ranching by 1869, when he and two others risked trouble with Indians and explored the Yellowstone without a military escort. While hesitant to discuss what he saw because people would not believe him, Folsom did publish a description of his adventure in the July 1870 issue of *Western Monthly*. According to some, Folsom was the first to suggest that a public park be created. Louis C. Cramton, *Early History of Yellowstone National Park and Its Relation to National Park Policies* (Washington, D.C., 1932) 10-12.

⁵Nathaniel P. Langford, a native of New York, was appointed collector of internal revenue for the newly created Montana Territory in 1864. Langford served as collector until 1868, when he was nominated to be governor but was not confirmed. During this time he was also a prominent member of the Montana Vigilantes. Langford was a member of the Washburn-Doane expedition in 1870, and later published an account of a campfire proposal by Cornelius Hedges for making the Yellowstone region a public park. Langford did a great deal to promote the park legislation and served for five years as the park's first superintendent. *Ibid.*, 12.

⁶Cornelius Hedges graduated from Yale and the Harvard Law School before moving to the Bannack Mines of Montana Territory in 1864. According to Langford's account, it was Hedges who, during the Washburn-Doane expedition in 1870, made the first important suggestion for the creation of a national park. Hedges was appointed territorial superintendent of public schools in 1872 and was not further involved in the creation of the park. For years he was an editorial staff writer for the *Helena Daily Herald*. *Ibid.*, 13.

I drew the bill to establish the park [and after getting a boundary description from Dr. Hayden⁷ through Langford] then filled in the blank in the bill with the description. . . . After the bill was drawn, Langford stated to me that Senator Pomeroy of Kansas was very anxious to have the honor of introducing the bill in the Senate. . . . I had a clean copy made of the bill and on the first call day in the House introduced the original there, and then went over to the Senate Chamber and handed the copy to Senator Pomeroy, who immediately introduced it in the Senate.

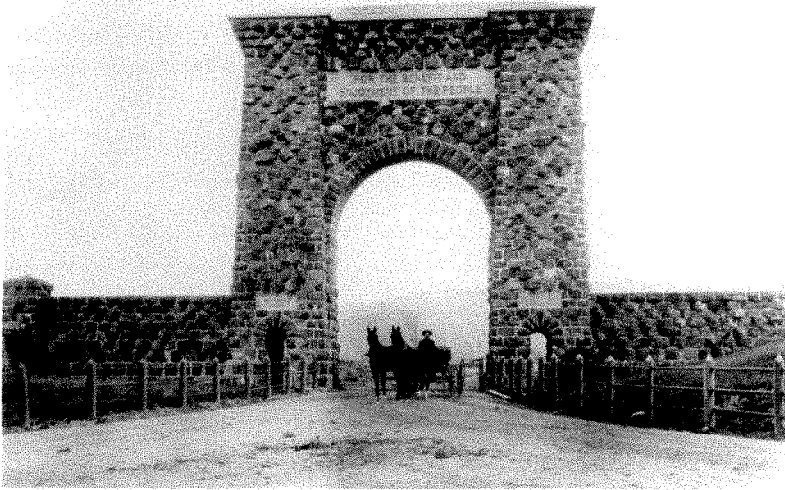
The Yellowstone Act was signed into law within eleven weeks of its introduction. By Clagett's estimate, he and Langford conducted "two-thirds if not three-fourths of all the work" connected with passage of the act. Either he, Professor Hayden, or Langford had fully posted every member of Congress in a personal interview.⁸

Clagett confided in his letter that so many had claimed exclusive credit for passage of the bill that he suffered "a chronic feeling of disgust whenever the subject was mentioned." He closed by hoping that his letter would correct, to some extent, "the misconceptions which the selfish vanity of some people has occasioned on the subject."⁹ Clagett had Professor Hayden, Senator Pomeroy, and Representative Dawes in mind when he complained about the many who had

⁷Dr. Ferdinand Vandever Hayden was a noted collector of rocks, fossils, and natural history specimens who headed a number of surveys in the West sponsored by the United States after the Civil War. Hayden was a member of the Washburn-Doane expedition of 1870, and, based on that work, he wrote a description of the boundaries of the park. The reports of his Yellowstone survey were widely published, creating interest in the Yellowstone region and support for the park bill. Mike Foster, *Strange Genius: The Life of Ferdinand Vandever Hayden* (Niwot, Colo., 1994).

⁸"William H. Clagett to Wm. R. Marshall, July 14, 1894," reprinted in Nathaniel Pitt Langford, *The Discovery of Yellowstone Park* (Lincoln, Neb., 1972) xlv-xlviii. On July 9, 1894, while preparing the *Discovery* manuscript, Langford wrote to Clagett asking who was entitled to the principal credit for passage of the Yellowstone Bill. Langford was uncomfortable publishing Clagett's response because it repeatedly referred to "you" rather than using Langford's name. To escape embarrassment, Langford had Clagett's letter retyped, substituting his (Langford's) name for "you." Langford then had Secretary Marshall write to Clagett posing the question and enclosing the retyped letter for Clagett's signature. This correspondence can be found at the Minnesota Historical Society.

⁹*Ibid.*, xlvii.



The Theodore Roosevelt Arch at the north entrance of Yellowstone National Park displays an excerpt from the park bill: "For the Benefit and Enjoyment of the People." (Photograph by F.J. Haynes, ca. 1903. Courtesy of the Haynes Foundation Collection, Montana Historical Society)

claimed principal credit for the park.¹⁰ Soon after the park was created, a circular promoting a summer expedition was distributed by a Leavenworth, Kansas, firm, stating that Senator Pomeroy, "in whose mind the idea was conceived," thought the park would be the "most frequented portion of the Great West."¹¹ Professor Hayden wrote a brief history of the park in 1878 in which he stated, "It is now acknowledged all over the civilized world that the existence of the National Park, by law, is due solely to my exertions during the sessions of 1871 and 1872."¹² Representative—and later Senator—Dawes stated on

¹⁰Clagett concluded his description of the origin of the park by stating, "It has always been a pleasure to me to give to Professor Hayden and to Senator Pomeroy, and Mr. Dawes of Mass. all of the credit which they deserve in connection with the passage of that measure, but the truth of the matter is that the origin of the movement which created the Park was with Hedges, Langford and myself. . . ." Ibid.

¹¹*Rocky Mountain Gazette*, April 7, 1872.

¹²*House Executive Documents*, no. 75, 45th Cong., 2d sess., 1878, p. 3. Mike Foster speculates that the bill was probably drafted in Pomeroy's committee in the first place, and he goes to considerable lengths to put Hayden's unfounded claim of authorship in the best light. Foster, *Strange Genius*, 199–239.

the floor of Congress in 1886, "I think I drew the bill."¹³ In 1892, Dawes was more certain: "I had the honor to write the bill."¹⁴ Clagett's hope of correcting the record proved futile. To this day there are misconceptions regarding passage of the bill, some as implausible as Professor Hayden's. Writing in 1934, Louis C. Cramton interpreted the letter to Langford as Clagett's own expression of selfish vanity, not as clarification of the misconceptions. Cramton took issue with the details of Clagett's account. He thought the Yellowstone Bill was so remarkable that it could not have been written by an "amateur who had only been a few weeks in Washington." In his search for the "real author," Cramton concluded that, while Henry Dawes "may not have written down the words, he undoubtedly shaped the lines of the draft." Clagett merely "had a part in drafting the bill" and "wrote out in his own hand the copy introduced by him in the House."¹⁵ According to Cramton's account, Clagett was the scrivener, not the author.

A succession of scholars has perpetuated Cramton's assessment. Some (W. Turrentine Jackson,¹⁶ H. Duane Hampton,¹⁷ Richard A. Bartlett,¹⁸ Mike Foster,¹⁹ Chris J. Magoc²⁰) have accepted Cramton's judgment without question. However,

¹³Congressional Record, 49th Cong., 1st sess., 1886, vol. 17, pt. 8, p. 7843.

¹⁴Congressional Record, 52d Cong., 1st sess., 1892, vol. 23, pt. 5, p. 4121.

¹⁵Cramton, *Early History*, 28–32.

¹⁶W. Turrentine Jackson, "The Creation of Yellowstone National Park," *Montana* 7 (July, 1957), 52–65.

¹⁷"Langford and Hedges had already enlisted the aid of William H. Clagett, newly elected Delegate from Montana Territory. Working under the guidance of Congressman Henry L. Dawes, Chairman of the Ways and Means Committee, these men began to frame legislation that would establish a national park in the Yellowstone region." H. Duane Hampton, *How the Cavalry Saved Our National Parks* (Bloomington, Ind., 1971), 27–28.

¹⁸"Clagett claims to have written the park bill, but the facts do not seem to agree with his memory. The Honorable William Clagett had sat for barely two weeks in Congress when he introduced the bill in the House on December 18, 1871. Clagett was clearly involved in pushing the bill through, however, and deserves credit for his work." Richard A. Bartlett, *Nature's Yellowstone, The Story of an American Wilderness that Became Yellowstone National Park in 1872* (Albuquerque, N.Mex., 1974), 188.

¹⁹Foster, *Strange Genius*.

²⁰"Shortly after the letter from Judge Kelly, in December 1871, Montana Congressional Delegate William H. Clagett introduced a bill in the House to create Yellowstone National Park; similar legislation was brought forward in the U.S. Senate by Samuel Clarke Pomeroy of Kansas." Chris Magoc, *Yellowstone: The Creation and Selling of an American Landscape* (Albuquerque, N.Mex., 1999), 17.

Aubrey L. Haines, picking up where Cramton ended, went to particular lengths to diminish the Clagett role. According to Haines, Clagett's claim of authorship is "ridiculous"; the bill did not represent original work because all Clagett did was alter the Yosemite Grant to fit new circumstances.²¹ Haines gave Dawes even more credit than Cramton had. Dawes "fathered our system of national parks in the sense that his Yosemite Grant legislation (1864) became the model for Yellowstone's organic act in 1872." Haines concludes that Clagett's "only service to the Park and what it represented lay in his introduction of a companion measure" that was "of no ultimate consequence." Haines pushed his criticism of Clagett beyond Yellowstone, and pronounced a final judgment: There was "no stuff of greatness anywhere" in Clagett's career; instead there was only "the type of restless, opportunistic politician so common in the West."²²

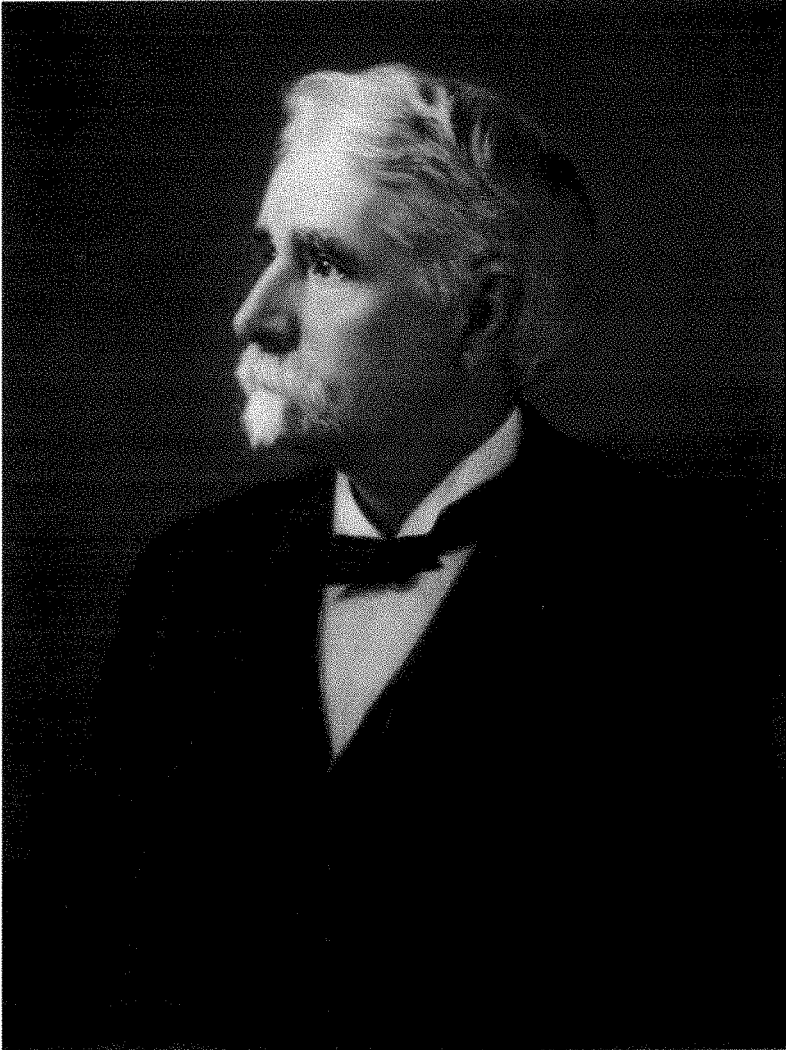
This essay takes a fresh look at William H. Clagett and his role in the creation of Yellowstone National Park. Was Clagett too much an amateur and novice to draft the bill? Did he simply copy the Yosemite Grant? Was Henry Dawes really the author? This investigation reveals that Clagett is entitled to far more credit as author, and far less disparagement. It also suggests that Clagett is the window through which we can most clearly see and understand the creation of Yellowstone National Park.

The story of Clagett and Yellowstone is intriguing and important. William H. Clagett was widely known in the mining camps of his day as the "silver-tongued orator of the West." Law and politics were, more than anything, venues for his great oratory. Clagett's career began in Nevada (1861–66), moved to Montana (1866–77), then to Dakota Territory and the Black Hills (1877–84), and ended in Idaho's Coeur d'Alenes (1884–1901). Clagett and the lawyers and politicians with whom he practiced built the legal and political foundations of the American West. Clagett was described by a contemporary as an "empire builder" who "used the human elements at his disposal as material from which to organize territories and bring them into statehood."²³ The Yellowstone story is a small but very important example.

²¹Aubrey L. Haines, *The Yellowstone Story, A History of Our First National Park* (Yellowstone National Park, Wyo., 1977) 166.

²²Haines, *Yellowstone Place Names* (Niwot, Colo., 1996), 157, 239.

²³*Daily News-Times and Democrat* (Goshen, Ind.), February 15, 1935.



William H. Clagett authored the Yellowstone National Park Bill and introduced it in the House of Representatives. (Portrait painted by P. Phillips. Courtesy of the University of Idaho College of Law Library)

Each generation must decide for itself the manner in which Yellowstone National Park, and the many national parks it has inspired, will be used and managed. The language of the Yellowstone Bill frames the discussions and decisions about the role of the parks. A more accurate and complete under-

standing of William H. Clagett and the circumstances under which he wrote that language will inform and enrich the debates.

TOO REMARKABLE FOR AN AMATEUR?

Clagett was elected Montana territorial delegate to Congress on August 7, 1871. The second session of the forty-second Congress convened on December 4, and Clagett was sworn in the next day. On December 18, he introduced the Yellowstone Bill, H.R. 764, in the House. Louis Cramton compared the handwriting and signature of H.R. 764 with that of H.R. 763, a bill Clagett introduced just prior to the Yellowstone Bill, providing for the removal of the Flathead Nation from the Bitterroot Valley. The writing was the same on both. Cramton concluded that the handwriting on the Yellowstone Bill was Clagett's, but he is unwilling to accept this as proof that Clagett authored the bill: "[T]his does not necessarily determine whether the original draft was by him or by someone else."²⁴

Cramton bases his contention that Clagett could not have authored the act on his belief that the act was too remarkable to be the work of an amateur.²⁵ Cramton recognizes that the bill is "a remarkably well-drawn piece of legislation, it being

²⁴Cramton, *Early History*, 30.

²⁵*Ibid.* Cramton also quibbles about one particular in Clagett's account. Clagett states that he drew the bill and, after getting a description from Hayden through Langford, "filled the blank in the bill." Cramton states, "The copy of the bill which Clagett used in introducing it in the House was manifestly not constituted in that fashion. It was all written at one time rather than a bill written at one time with a blank filled in later." This criticism is based on a misunderstanding of Clagett's meaning in "drew the bill" and "filled the blank." For Clagett, drawing the bill no doubt meant writing several drafts, making corrections to get the wording and composition right, and incorporating suggestions made by Langford and perhaps others. After the description was received from Professor Hayden, Clagett, working from the most recent draft, would have prepared a final copy for introduction, completing the drafting stage. Cramton offers a solution to the problem that his own misunderstanding has created: "It could, of course, have been what he calls 'clean copy' of such a bill." The solution compounds the problem. Clagett states, "After the bill was drawn . . . I had a clean copy made . . . and handed the clean copy to Senator Pomeroy." "Clean copy" was used by Clagett to describe a copy that was made from his final draft ("after the bill was drawn"). Clagett might have referred to the bill he introduced in the House as a "clean draft" or a "final draft," but he would not have referred to it as "clean copy" for the reason that it had not been copied from another document.

remembered that it was pioneering in a new field."²⁶ Three clauses are most notable: the purpose clause ("dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people"); the preservation clause ("the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities or wonders within said park and for retention in their natural condition"); and the game clause ("the wanton destruction of the fish and game . . . their capture or destruction for the purpose of merchandise or profit").

Rather than seeing these phrases as reason to praise Clagett, Cramton sees them as reason to discredit his authorship: "The bill does not seem to me the draft of an amateur who had only been a few weeks in Washington and had only served two weeks in Congress." In the end, Cramton was willing to say only that Clagett "had a part in drafting the bill" and "wrote out in his own hand the copy introduced by him in the House."²⁷

Haines gave Clagett even less credit as the author of the bill. Since the Senate bill eventually was signed into law, Clagett's "only service to the Park and what it represented lay in his introduction of a companion measure, H.R. 764, of no ultimate consequence."²⁸

Contrary to the speculation of Cramton and Haines that Clagett was too inexperienced to have written the remarkable Yellowstone Act, a great deal of evidence exists from the winter of 1872 attributing authorship to Clagett. N.P. Langford wrote to the *New North-West* in Deer Lodge on January 12, enclosing an article from the *Philadelphia Press*. Langford explained that the *Press* article gave him more credit for the bill than he deserved. Langford wrote, "Mr. Clagett drew the bill, after ascertaining the boundaries from Prof. Hayden and myself, and he should have the credit for the movement."²⁹ Langford continued to credit Clagett for authorship until the

²⁶Ibid.

²⁷Ibid., 30, 35.

²⁸Haines, *Yellowstone Place Names*, 157. Haines also writes that "there is no evidence that Clagett did anything beyond introduction of the House version of the bill [it was the Senate version—Samuel C. Pomeroy's S. 392—which passed both houses and was signed into law by President Ulysses S. Grant on March 1, 1872]."

²⁹The *New North-West* responded to Langford's letter, glad to see his generosity in crediting Clagett, but assured that some of Langford's friends "will more cheerfully accord Mr. L. that large portion he deserves than our Delegate in Congress." *New North-West*, January 27, 1872.

end.³⁰ It was Langford who, in 1894, solicited Clagett's assessment of who was entitled to the credit, and it was Langford who published Clagett's account with his own diaries in 1905. Langford's statements regarding authorship are particularly probative because he had been more involved in the creation of the park than any other person, and because he had actively participated in drafting the bill by getting the description from Professor Hayden.

The correspondent for the *New North-West* corroborated Langford's account from Washington on March 30. The correspondent was concerned that Senator Pomeroy, rather than Representative Clagett, would receive the credit. He wrote,

As there seems to be some misapprehension as to whom *entirely* the YELLOWSTONE PARK BILL owes its origin and passage, let me explain: The bill was drawn by Mr. Clagett; introduced in the House; subsequent to which Mr. C. made a copy of it, which he gave to Senator Pomeroy to introduce in the Senate. The Senate bill passed first. The House Committee on Public Lands unanimously agreed to recommend the bill introduced by Mr. Clagett, and three or four days ago on motion of Mr. Dunnell, of Minnesota, the Senate bill, which was the copy referred to above, was taken from the Speaker's table and passed. So the authorship of the bill which passed without amendment in the form drawn by him belongs entirely and solely to Clagett.³¹

In addition to these specific attributions, it is clear that, in 1872, Clagett was generally known to be the author of the bill

³⁰Langford was quick to challenge Clagett's account of the idea for the park, but left unchallenged the statements relating to drafting and passage of the bill. Clagett stated, "So far as my personal knowledge goes, the first idea of making it a public park occurred to myself: but from information received from Langford and others, it has always been my opinion that Hedges, Langford, and myself formed the same idea about the same time. . . ." In the paragraph following Clagett's letter, Langford wrote, "[N]o person can divide with Cornelius Hedges and David E. Folsom the honor of *originating the idea* of creating the Yellowstone Park." Langford, *The Discovery of Yellowstone*, xlvii-xlviii.

³¹*New North-West*, March 30, 1872. There is a very close parallel between the language of Clagett's account and that of Langford and the correspondent. Langford writes, "Mr. Clagett drew the bill . . ."; the correspondent writes, "The bill was drawn by Mr. Clagett"; Clagett writes, "I drew the bill." Langford mentions that the boundary was provided by Professor Hayden and himself. The correspondent describes how the bill was provided to Senator Pomeroy.

by the territorial newspapers, friends and foes alike. The *New North-West*, a Republican paper in Clagett's hometown, was an ardent supporter. It published reports of Clagett's introduction in the House, quoting the *Congressional Globe* on January 13, 1872; the full text of Clagett's bill on January 20; Langford's letter on January 27; an editorial defending Clagett and the park on March 9; and the correspondent's report on March 30.³² The Republican *Helena Daily Herald* reported on the progress of the Pomeroy and Clagett bills on January 31, 1872, and praised the bill and Clagett as "able, active, zealous, and untiring in his labors, as well as in political harmony with the General Government" on February 28. On March 1, and again on March 22, the *Herald* chided its Democratic counterpart, the *Rocky Mountain Gazette*, for underestimating Clagett's ability to "summon to his aid sufficient influence to secure the passage in the National Legislature of a bill so important as this one."³³ Even Clagett's critics attributed the park to him. During his campaign for re-election, the Democratic *Gazette* criticized Clagett's "public and political record." The *Gazette* complained that Clagett had not been able to get an assay office for Montana, a railroad terminating in Helena, or a bank charter for any responsible Democrat. Then the *Gazette* griped about what Clagett had succeeded in doing, beginning,

He passed an act (with all ease) laying off a grand park fifty miles square at the head of the Yellowstone, and had his personal and political friend, Langford, appointed Superintendent, with vast monied perquisites in prospect, and made stringent provisions that no miner, mechanic, hotel keeper, ranchman or stock raiser should set foot thereon.³⁴

Even Clagett's father, while chastising his son, attributed the bill to him. He wrote saying that he would think his son could find "something better to do with his time" than a national park bill.³⁵

Not only does the historical record credit Clagett with authoring the Yellowstone Bill; it also shows that he was a

³²*New North-West*, January 13, 20, and 27, 1872; March 9 and 30, 1872.

³³*Helena Daily Herald*, January 31, February 28, March 1, and March 22, 1872.

³⁴*Rocky Mountain Gazette*, quoted in *New North-West*, July 27, 1872.

³⁵Fred Clagett, interview with author, King City, Oregon, December 4, 2000.

talented and experienced legislator and lawyer, "a bright, if somewhat eccentric attorney and a 'marvelous orator,'"³⁶ easily capable of drafting a bill as remarkable as the Yellowstone Act.

William Horace Clagett was born at Weston, in Prince George's County, Maryland, on September 21, 1838, the third son of Thomas William and Susan Clagett.³⁷ Weston was an estate originally acquired by an earlier Thomas Clagett (called "the Emigrant") in 1671, and presided over thereafter by a long line of Clagetts active in law, politics, and military matters. By the Civil War, William's grandfather was one of the wealthiest men in Maryland, worth nearly a million dollars and holding twenty thousand acres of land and several hundred slaves. When William was twelve years old, his father and his grandfather suffered a strong disagreement over the slavery issue, and the son moved his family from Maryland to Keokuk, Iowa, in 1850. There Thomas practiced law, farmed, served on the bench, published newspapers, and made investments until his death in 1876.

William Horace attended the Keokuk public schools, then studied law in his father's office. He was joined in these studies by William Wirt Dixon, the son of his father's partner. In 1858, William passed an examination given by Judge Samuel Miller and was admitted to law practice. Judge Miller, who was appointed by President Lincoln to the U.S. Supreme Court in 1862, had moved to Keokuk in 1850 from Kentucky, where he had emancipated his own slaves and had played a prominent role in an attempt to amend the Kentucky constitution to abolish slavery. After William's admission to the bar, Thomas encouraged his son to attend the Albany Law School during the 1858-59 term.³⁸

³⁶Clark C. Spence, *Territorial Politics and Government in Montana 1864-89* (Urbana, Ill., 1975), 80.

³⁷The most detailed biographical information about William H. Clagett can be found in the following sources: Fred Clagett, "The Life of William H. Clagett" (paper presented at the Northwest History Conference, Boise, Idaho, 1990 [the Clagett Papers, College of Law Library, University of Idaho]); W.W. Dixon, "Sketch of the Life and Character of William H. Clagett," *Contributions IV* (Historical Society of Montana, 1904): 249-57; *Biographical Directory of the American Congress, 1774-1971* (Washington, D.C., 1971), 738; Rodman Wilson Paul, *Mining Frontiers of the Far West 1848-1880* (New York, 1963), 187-89; Samuel B. Pettengill (ed. Helen M. Pettengill), *My Story* (Lebanon, N.H., 1979), 35-48; William T. Stoll, as told to H.W. Whicker, *Silver Strike. The True Story of Silver Mining in the Coeur d'Alenes* (Moscow, Idaho, 1991), 14-19, 87-156.

³⁸*Circular and Catalogue of the Law School of the University of Albany, for the Year 1858-1859* (Albany, N.Y., 1859). The course of study at Albany lasted two semesters and included the common subjects: contracts, real property, personal property, constitutional law, corporations, etc. Procedure and pleading included common law, equity, and the New York Code. Clagett's dissertation was titled "Legal Anomalies."

After attending law school, Clagett returned to Keokuk in the spring of 1859 and joined his father's law practice. Like his father, Clagett became active in politics, campaigning with Henry Clay Dean on behalf of Democrat Stephen A. Douglas in his 1860 campaign against Abraham Lincoln. Dean, a Methodist minister and lawyer widely known for his speaking ability, no doubt greatly influenced Clagett's oratory. It was said by one who participated in this campaign that Dean was "eccentric in the extreme, and by sheer force of his eloquence and extraordinary personality carried everything before him."³⁹

Lincoln took office on March 4, 1861, and within six weeks the Civil War had begun with the firing on Fort Sumter. The Clagetts were Democrats but were unwilling to endorse slavery and secession; they were for the Union but critical of the unconstitutional acts of its agents and unwilling to join the Union army. While Keokuk prepared for war during April 1861, Clagett prepared to go west. He married Mary E. Hart on April 28, spent several days getting a wagon outfit together at the family farm, and departed with his brother George for California on May 1.

The Clagett brothers arrived in Carson, Nevada Territory, in September to find Keokuk friends Orion and Samuel Clemens already settling in and the first Nevada Territorial Legislature going into session. When Humboldt County was created and Unionville named the county seat, Clagett saw his opportunity and moved there to practice law in partnership with William Dixon. Humboldt County elected Clagett to represent it in the lower house of the second territorial legislature on September 3, 1862, and re-elected him to the third on September 2, 1863. When Nevada became a state, he moved to Virginia City, where he was elected to serve in the senate of the first state legislature on November 8, 1864.

Clagett forfeited his opportunity to run for re-election to the state senate in the fall of 1865 when he sought the Republican nomination to the U.S. House of Representatives. He was narrowly defeated. A witness later wrote, "The man nominated was a lawyer and in broad experience the superior of Claggett (sic), but none of us loved him so much. . . . [W]hen Claggett's (sic) defeat is thought of a feeling of sorrow is awakened yet in the hearts of the very few who are left of that convention."⁴⁰ During this time, the Comstock economy was fading, and in

³⁹Edward Holcomb Stiles, *Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa* (Des Moines, Iowa, 1916), 573-77.

⁴⁰C.C. Goodwin, *As I Remember Them* (Salt Lake City, Utah, 1913), 137-39.

March 1866 Clagett and Dixon headed for Montana with Clagett's family and their law practice. Clagett had arrived in Nevada a Democrat but departed a Republican. The partners were in Helena by the end of May and in Deer Lodge by August. During the next five years, Clagett practiced law and Republican politics in a Democratic territory. When the Missouri wing of the Democratic party angered the Irish wing by dumping James M. Cavanaugh in favor of E. Warren Toole in the summer of 1871, Clagett was able to fuse them with the Republicans and win the election as territorial delegate to Congress.⁴¹

Although Clagett was new to Congress, he was neither an amateur nor shy with regard to drafting legislation. During his first six months in Congress, he authored and introduced sixteen bills, including the Yellowstone Bill.⁴² During his second six months, he authored another seven bills.⁴³

⁴¹Stanley R. Davison, "1871: Montana's Year of Political Fusion," *Montana* 21 (April 1971): 44-55; Richard B. Roeder, "Electing Montana's Territorial Delegates: The Beginnings of a Political System," *Montana* 38 (Summer 1988): 58-68.

⁴²The following bills were introduced by Representative Clagett: H.R. 602 (to define the nature of certain courts in Montana, and for other purposes), December 4, 1871; H.R. 763 (to remove Flathead Indians from Bitterroot Valley), December 18, 1871; H.R. 764 (to create Yellowstone National Park), December 18, 1871; H.R. 1306 (to more clearly define the nature of certain courts in the territories), January 29, 1872; H.R. 1307 (to create assay office in Montana), January 29, 1872; H.R. 1527 (to enlarge and complete the penitentiary in Montana), February 12, 1872; H.R. 1528 (to audit and pay claims for Indian depredations), February 12, 1872; H.R. 1737 (to pay for Montana legislature deficiencies), February 27, 1872; H.R. 1912 (to provide for temporary government in Montana), March 11, 1872; H.R. 1934 (to allow the secretary of the interior to negotiate surrender of Crow Reservation), March 11, 1872; H.R. 1999 (to allow entry into public lands of territories), March 18, 1872; H.R. 2183 (to increase national bank notes in the territories by \$5 million), April 1, 1872; H.R. 2238 (to incorporate Helena and Northern Utah Railroad Company and grant right-of-way through public lands), April 1, 1872; H.R. 2239 (for relief of Michael M. McCauley), April 8, 1872; H.R. 2473 (to grant right-of-way for Utah, Idaho and Montana Railroad Company), April 24, 1872; H.R. 2567 (to ship arms to Montana), April 27, 1872; and H.R. 2687 (concerning courts and judiciary in territories), May 6, 1872. *Congressional Globe*, 42d Cong., 2d sess., 1872, index, pp. clxv-clxvi.

⁴³H.R. 3108 (to promote education in the several territories of the Union), December 9, 1872; H.R. 3109 (to secure a more efficient and honest administration of Indian affairs in the territories), December 9, 1872; H.R. 3110 (relating to the St. Mary's Missionary Station in the territory of Montana), December 9, 1872; H.R. 3111 (to cause removal of obstruction to the navigation of the upper Missouri River), December 9, 1872; H.R. 3236 (to grant to Salt Lake and Salina Railroad Company the right-of-way across the park lands), December 16, 1872; H.R. 3474 (to grant right-of-way to railroad companies in the several territories), January 13, 1873; H.R. 3695 (to provide money to remove and teach Indians new skills and hire new teachers), January 28, 1873; and H.R. 3708 (to grant right-of-way to railroad companies in the territories), July 27, 1873. *Congressional Globe*, 42d Cong., 3d sess., 1873, vol. 46, index, p. cciii.

Previously, he had authored twelve bills in the second session of the Nevada Territorial Legislature in 1862,⁴⁴ one in the third session in 1863,⁴⁵ and fourteen in the first state legislative session in 1864.⁴⁶

It appears that the bill that most interested Clagett during the congressional session, and to which he devoted a great deal of his time, was the 1872 Mining Act. On April 5, 1872, he wrote to the *Helena Daily Herald* enclosing a copy of the new quartz mining bill as passed in the House, and a copy as amended.⁴⁷ The House version effectively repealed the mining law bill passed in the previous session by the Montana Territorial Legislature. Clagett spent a "great deal of labor" in getting the bill amended, and faced "great opposition in getting it changed in the Senate." The most radical provisions in the bill required that quartz claims be either worked or abandoned, and that any co-owner who failed to do his share of the work forfeit his interests in favor of those

⁴⁴Clagett's bills were (1) to grant right to construct toll road from Bisbee's Forty Mile Desert to Humboldt Slough, (2) to provide for election of probate judges and prosecuting attorney, (3) to provide for appointment of a prosecuting attorney for Humboldt County, (4) to prohibit sale of ardent spirits, firearms, and ammunition to Indians, (5) to change name of town of Unionville in Humboldt County and incorporate it, (6) to partition mining claims, (7) to define duties of reporter of supreme court and fix compensation, (8) relating to sheriff's fees, (9) relating to manner of commencing civil actions, (10) relating to water power, (11) concerning possessory claims on public lands, which in a measure legalizes squatter claims, and (12) to incorporate Pyramid Lake Lumber Company. *Journals of the House of Representatives, Nevada Territory*, 2d sess., 1862.

⁴⁵A bill for the establishment and support of a polytechnic college in the territory of Nevada. *Ibid.*, 3d sess., 1864.

⁴⁶Clagett introduced bills (1) to establish terms of court and means of transacting business of First Judicial District, (2) concerning forcible entries and unlawful detainers, (3) regarding courts of justice and judicial officers, (4) regarding liens of mechanics and others, (5) to incorporate the Virginia & Truckee Railroad Company, (6) to compel owners of toll roads and bridges to keep them in repair, (7) to require property qualification for office as member of the legislature, (8) to fix time when laws and resolutions take effect, (9) to provide consolidated system of government for Storey County (Virginia City), (10) to instruct committee on ways and means to devise a financial plan to maintain credit of state, pay debts, etc., (11) to authorize the incorporation of rural cemetery associations, (12) concerning juries, (13) regarding forfeiture and abandonment of mining claims, and (14) relating to corporations. *Journal of the Senate*, 1st sess., 1864-65.

⁴⁷*Helena Daily Herald*, April 23, 1872.

owners who worked the claims. Anticipating criticism of these provisions,⁴⁸ Clagett defended the new bill:

[N]o one familiar with the condition of quartz mining districts all over the coast can contend that such a law is not absolutely necessary to settle titles to mining property, and cause the development of the country. It is a provision pre-eminently in the interest of the laborer, and adverse to that of the speculator, and I am persuaded intelligent discussion will justify the wisdom of the requirement.

Clagett gained notoriety during the last months of his term in 1873 for a spirited speech on the floor of the House during which he opposed Utah statehood and denounced the Church of Jesus Christ of Latter-Day Saints and the territorial government in Utah as a one-man theocratic despotism that "strikes down freedom of worship, strikes down freedom of business relations; in short, strikes down every one of the sacred rights which we are entitled to enjoy as American citizens."⁴⁹ William Dixon, Clagett's partner at the time and for many years to come, recalled that the speech "attracted much attention, and increased his reputation as an able public speaker," and that this speech and Clagett's arguments for stringent restrictions against polygamy during the Idaho Constitutional Convention in 1890 "were never forgotten nor forgiven by the Mormon people."⁵⁰

Clagett has often received high praise for his service as Montana's territorial delegate. N.P. Langford reported from Washington on January 12, 1872, that "Clagett is a host, doing more for Montana than I had believed any one from our Territory could."⁵¹ The *New North-West*, Clagett's strongest supporter in the re-election campaign, detailed his accom-

⁴⁸The *Rocky Mountain Gazette* leveled this complaint about Clagett during the 1872 re-election campaign: "He aided in the passage of the quartz mineral act, requiring miners, discoverers and owners to do a large amount of work every year, or in default thereof their property is to be forfeited to monopolists and shylocks who have plenty of money and are always mean enough to gobble up the property of poor men." Quoted in *New North-West*, July 27, 1872.

⁴⁹*Congressional Globe*, 42d Cong., 3d sess., 1873, vol. 46, pt. 2, pp. 920-22; 946-48.

⁵⁰W.W. Dixon, "Sketch of the Life and Character of William H. Clagett," 249-57.

⁵¹*New North-West*, January 27, 1872.

plishments during the first six months.⁵² Clagett had proven himself to be "the best Delegate Montana ever had or ever will have, a Delegate who has represented this people with ability, impartiality, efficiency and unparalleled success." The *New North-West* began its catalog of Clagett successes with Indian affairs. When the tribes in the Bitterroot Valley were removed, 350,000 acres of some of the best land in Montana were secured to the one thousand non-Indian people in the valley. The Crow Reservation in the Yellowstone Valley would soon be "surrendered to civilization." Settlers in Meagher and Gallatin Counties were armed with one thousand breech-loading rifles, and General Sheridan ordered increased patrols. The United States promised compensation to settlers for Indian depredations. Twenty new post offices were opened, and six new postal routes. Three national bank charters were secured for institutions owned by both Democrats and Republicans. An assay office and a penitentiary would be funded at the next session. The quartz mining law needed no defense because it "is accepted by the miners of Montana as the most generous and beneficial law ever framed on that subject." The president had agreed to appoint persons domiciled in the territories to territorial offices.

The *New North-West* made the national park an important part of Clagett's record: "He drew up and secured the passage of the National Park Bill." The park had done "more to make Montana famous throughout the intelligent world, has attracted more favorable attention from eminent men and journals, than any and all other influences combined." The park "will be recognized forever as wise and beneficial." George Bancroft was just as impressed with Clagett; he stated that the new territorial delegate was "doing more for Montana in the first eight months of his term than the two preceding delegates had done in seven years." Clagett had "won great praise, even from the opposite party, for his energy and ability in the delegateship."⁵³ When viewed as a whole, Clagett's record in Congress looks more like that of an intelligent, hard-working political pro than that of an incompetent, ineffectual amateur.

⁵²*New North-West*, July 27, 1872.

⁵³George Bancroft, *History of Washington, Idaho and Montana* (San Francisco, 1890), 676-77. Bancroft includes a detailed summary of Clagett's accomplishments, apparently relying heavily on the *New North-West* summary of 1872.

THE YOSEMITE PRECEDENT

In 1864, Congress granted the Yosemite Valley and the Mariposa Big Tree Grove to the state of California, subject to the condition that "the premises shall be held for public use, resort, and recreation."⁵⁴ Clagett lived in Nevada in 1864 and for several years thereafter, and he knew the early history of Yosemite. It was Yosemite, in fact, that first made him realize the need to create Yellowstone Park. Establishment of Yellowstone was urgent because Norton and Brown, the printers of the *New North-West*, planned to "fence in the tract of land containing the principal geysers, and hold possession for speculative purposes, as the Hutchins family so long held the Yosemite valley."⁵⁵

Clagett was not the only one influenced by the Yosemite experience. Representative Dawes began his speech supporting the park bill in the House with a comparison to the Yosemite Bill: "This bill follows the analogy of the bill passed by Congress six or eight years ago, setting apart the Yosemite valley and the 'big tree country.' . . ." He also compared the natural wonders, saying that Yellowstone contained "the most sublime scenery in the United States, except the Yosemite valley, and the most wonderful geysers ever found in the country."⁵⁶ Aubrey Haines uses the Yosemite experience in yet another attempt to discredit Clagett's claim to having written the Yellowstone Bill. While Cramton puzzled about how such an amateur could draft such remarkable legislation, Haines comes up with his own explanation: Clagett had not authored the Yellowstone Bill; he had simply copied the Yosemite Grant.

[Clagett's] work consisted in altering the earlier legislation to fit the new circumstances, which explains Louis Cramton's puzzlement as to how such a "remarkably well-drawn piece of legislation, it being remembered that it was pioneering in a new field," could be the "draft of an amateur who had only been a few weeks in Washington and had only served two weeks in Congress."⁵⁷

⁵⁴13 Stat. 325 (1864).

⁵⁵Clagett to Marshall, 1894.

⁵⁶*Congressional Globe*, 42d Cong., 2d sess., 1872, vol. 45, pt. 2, p. 1243.

⁵⁷Haines, *The Yellowstone Story*, 166. At another place, Haines states, "The draft bill prepared by Delegate Clagett from the Yosemite model, with whatever assistance he may have had . . ." Ibid.

On another occasion, Haines states that "the drafting of the bill was not an original work (it was drawn on the model of the 1864 Yosemite Grant legislation of Senator Dawes). . . ."⁵⁸

A close look at the record shows that Clagett's bill was an original work and not merely an alteration of earlier legislation. Although the Yosemite experience strongly influenced the creation of Yellowstone Park, the language of the Yosemite Grant played only a small role in the drafting of the Yellowstone Bill.⁵⁹ None of Clagett's phrases describing the essence of Yellowstone are present in the Yosemite Grant. In rich and eloquent language, Clagett wrote that Yellowstone was to be used as a "public park or pleasuring ground for the benefit and enjoyment of the people." In contrast, Yosemite's purpose was "public use, resort and recreation." The Yosemite Grant contains none of the preservation language of the Yellowstone Bill: "preservation from injury or spoliation, of all timber, mineral deposits, natural curiosities or wonders" and "against the wanton destruction of the fish and game." The Yosemite Grant includes no provision for the removal of trespassers. Clagett could not simply have altered the earlier legislation, because there was very little to work with in the Yosemite Grant.

Two parts of the Yosemite Grant and the Yellowstone Bill differ distinctly. Yosemite was a grant to a state, while

⁵⁸Haines, *Yellowstone Place Names*, 157. Even if Clagett did simply alter earlier legislation, he would still be the author of the bill, and that would be an important contribution. It is the nature of legal and political institutions to move forward by building on the experience of the past. The author of legislation is generally commended for the ingenious way in which the old shoe is fitted to the new foot, not dismissed for having copied the old style.

⁵⁹Aubrey Haines offers a "Parallelism of Acts" analysis to demonstrate that Clagett was merely "altering the earlier legislation." Haines, *The Yellowstone Story*, 167. "Parallelism" suggests that the acts are closely analogous or agree on the essential provisions. Haines' chart is unconvincing. It focuses on the leasing clause of the Yellowstone Bill, an important but not principal section, portions of which may very well have been taken from the Yosemite Grant. The chart simply ignores many of the essential Yellowstone sections relating to preservation of the natural wonders and the fish and game, the removal of trespassers, national ownership and management, and others which cannot be found in the Yosemite Grant. The chart does list the purpose clause from the two statutes as evidence of parallelism, but fails to recognize that none of the critical phrases from the Yellowstone clause can be found in the Yosemite Grant: "public park," "pleasuring ground," "benefit and enjoyment of the people." In statutes withdrawing lands from the public domain, Congress generally includes a statement of the purpose of the withdrawal. That practice, with nothing more, does not show that the Yellowstone Bill was modeled on the Yosemite Grant.

Specimen
 Bill of Law
 being near the head
 waters of the Yellowstone
 River as a public park
 H.R. 764
 Dec 16, 1871. Read twice, referred
 to the Committee on the Public
 Lands & ordered to be printed.
 X 575
 Mr. Clagett in House
 Wm. Clagett 1871
 Introduced by
 Wm. H. Clagett

William Clagett wrote, "I had a clean copy made of the bill and on the first call day in the House introduced the original there, and then went over to the Senate Chamber and handed the copy to Senator Pomeroy, who immediately introduced it in the Senate." (Photo of Clagett's bill courtesy of William H. and Brenda Clagett)

Yellowstone was a reservation to the United States; Yosemite was "inalienable for all time," while the Yellowstone Bill is silent regarding duration. The only clause of the Yellowstone Bill influenced by the Yosemite Grant is the authority to grant ten-year leases. But even here the phrasing regarding management and expenditure of the lease revenues differs distinctly. When the language of the Yellowstone Bill is compared to that of the Yosemite Grant, it is hard to see how Clagett was merely "altering the earlier legislation," or how his bill "was drawn on the model of the 1864 Yosemite Grant."

In 1890, Congress reserved from "settlement, occupancy or sale" 1,512 square miles of lands surrounding the Yosemite Grant.⁶⁰ While the Yellowstone reservation had been set aside for the purpose of a "public park or pleasuring ground for the benefit and enjoyment of the people," the 1890 Yosemite reservation was ostensibly for the purpose of "reserved forest lands." In actuality, however, the Yosemite reservation was to be managed for the same purposes as Yellowstone Park. In fact, section 2 of the 1890 act describing these purposes was taken nearly verbatim from section 2 of the Yellowstone Bill. In 1905, California re-ceded the 1864 Yosemite Grant, consolidating the entire region under national ownership and management.⁶¹ Given this record, it is more accurate to say that Clagett authored both the Yellowstone and the Yosemite National Park bills than it is to say that all he did was alter existing legislation.

THE POMEROY BILL

According to Clagett, "after the bill was drawn" he learned from Langford that Senator Pomeroy, chairman of the Senate Public Lands Committee, was anxious to introduce the bill in the Senate. Clagett states, "I had a clean copy made of the bill and on the first call day in the House, introduced the original there, and then went over to the Senate Chamber and handed the copy to Senator Pomeroy, who immediately introduced it in the Senate."⁶²

Cramton challenges Clagett's recollection, claiming that the proceedings as recorded in the *Congressional Globe* make

⁶⁰26 Stat. 651 (1890).

⁶¹34 Stat. 702 (1905).

⁶²Clagett to Marshall, 1894.

it "evident he could not have introduced the bill first and then gone over to the Senate to give a copy to Senator Pomeroy in time for Pomeroy to take the action he did." What is it about the *Globe* report that makes Cramton believe this? He writes,

Senator Pomeroy was the first one to introduce a bill that day in the Senate and the order of introduction of bills came very early in the day's proceedings. While that order of business likewise came early in the House, Mr. Clagett was not the first one to introduce a bill in the House, but followed quite a number of others.⁶³

The *Globe* records with some precision the moment Clagett introduced the Yellowstone Bill in the House on December 18.⁶⁴ The session opened at noon. The first order of business, which was the calling of the states and territories for introduction of bills and joint resolutions, began at fourteen minutes past twelve. Under the House rules, introduction meant handing the signed bill to the clerk, indicating the reference or disposition to be made of the bill.⁶⁵ After the third bill was introduced, Representative Platt asked that it be read at length. The Speaker of the House explained to Representative Platt the Monday morning hour rule. At the end of sixty minutes, any member could move to suspend the rules and cut off the opportunity for the introduction of bills. If bills were read at length, some states and territories would no doubt be denied the privilege of introducing bills on that day. Platt did not insist upon the reading.

Before the hour expired, eighty-eight additional bills were introduced. Clagett's Flathead bill was number eighty-three and the Yellowstone Bill number eighty-four. After the eighty-eighth bill, the Speaker announced that the morning hour had expired, meaning that Clagett had introduced the Yellowstone Bill at about 1:10 p.m. The *Globe's* report of the proceedings of the

⁶³Cramton, *Early History*, 29. The original Pomeroy Bill cannot be found. Oddly, Cramton speculates, "It would be interesting to see the copy, for, if Mr. Clagett's recollection is correct, it would be in Mr. Clagett's handwriting." Clagett stated, "I drew the bill" that was introduced in the House and "had a clean copy made of the bill" introduced by Senator Pomeroy. "Had a clean copy made" clearly suggests that, if the bill could be found, it would not be in Clagett's handwriting. Had Clagett prepared the clean copy, he would have said, "I made a clean copy."

⁶⁴*Congressional Globe*, 42d Cong., 2d sess., 1872, vol. 45, pt. 1, pp. 194-95.

⁶⁵Asher C. Hinds, *Precedents of the House of Representatives of the United States*, vol. 1 (Washington, D.C., 1889). The rules relating to territorial delegates are covered in volume 2, published in 1907.

House before Clagett's introduction filled roughly four columns.

The *Globe* fails to record the time at which the Senate convened or to make any other reference that would make it possible to fix the exact time at which Pomeroy introduced the Yellowstone Bill in the Senate. In contrast to the House, the Senate did not introduce bills as the first order of business. On December 18, the following items were taken up first: message from the House, executive communications, House bills referred, report on emigration, petitions and memorials, papers withdrawn and referred, reports of committees, report of Columbia institution, army register, and bills recommitted. Then Pomeroy introduced the first bill. The *Globe's* report of Senate proceedings that took place before Pomeroy's introduction filled six columns.⁶⁶

Cramton's account fails to describe the *Globe* record accurately, or to give the proceedings a reasonable interpretation. The *Globe's* story shows that, although introduction of bills was the first order of business in the House, ten or eleven matters preceded introduction of bills in the Senate. Cramton stated that introduction of bills "came very early" in the Senate's proceedings, and "likewise came early" in the House. Cramton places importance upon the fact that Pomeroy was the first to introduce a bill in the Senate that day, while Clagett "followed quite a number of others." Given the number of matters that preceded introduction of bills in the Senate, little can be inferred from the fact that Pomeroy was first and Clagett was eighty-fifth.

The *Globe* tends to confirm Clagett's account rather than Cramton's claim. Four *Globe* columns precede Clagett's introduction, while six precede Pomeroy's. Furthermore, Clagett's introduction occurred very early in the afternoon, not later than 1:10 p.m. No precise timeline can be established for the Senate proceedings, but the early action in the House suggests that Clagett would have had sufficient time to deliver the clean copy to Senator Pomeroy. Clagett's account is corroborated by the *New North-West* correspondent, who was concerned that there was "some misapprehension as to whom entirely the YELLOWSTONE PARK BILL owes its origin." To prevent this misapprehension, he filed a report dated March 30, 1872, clarifying the record: "The bill was drawn by Mr. Clagett; introduced in the House, subsequent to which Mr. C. made a copy of it, which he gave to Senator Pomeroy to introduce in the Senate."⁶⁷

⁶⁶*Congressional Globe*, 42d Cong., 2d sess., 1871, vol. 45, pt. 1, pp. 157-59.

⁶⁷*New North-West*, March 30, 1872.

No one has suggested that Senator Pomeroy had a hand in drafting the park bill. Neither has anyone given special praise for the manner in which he aggressively pushed the bill through the Senate . . . except Aubrey Haines, who thinks that because the bill was eventually signed into law, Pomeroy "deserved recognition on the Park map ahead of Clagett."⁶⁸ In reality, only months after passage of the Yellowstone Bill, Senator Pomeroy took a spectacular fall from political grace. He was seeking re-election before the Kansas legislature in January 1873, and his chances of winning seemed assured. Then Senator A.M. York took the floor and alleged that Senator Pomeroy had paid him a bribe for his vote. York laid seven thousand dollars in paper money on the table. After quickly moving to a vote and overwhelmingly defeating Pomeroy, the legislature conducted an investigation of Pomeroy and asked him to resign, but he served out his term until March 4 and then disappeared, "exposed, degraded, disgraced, and virtually exiled."⁶⁹ Mark Twain immortalized Pomeroy as Senator Dilworthy from the Happy Land of Canaan in *The Gilded Age*, and Clagett as Young Lawyer Clagett in *Roughing It*.

WAS HENRY DAWES THE AUTHOR?

Naturally, those who have dismissed Clagett have searched elsewhere for the author of this most remarkable legislation. Cramton has three reasons for thinking it was Henry Dawes: First, Dawes was interested in the Hayden survey. He had chaired the committee that funded the survey, and his son was employed by the survey. Second, Dawes was "one of the greatest powers in the House of Representatives." And third, there was "a definite and very public record in the Senate debates testifying to the claim of Dawes authorship." On February 17, 1883, Senator Vest referred to Dawes as "the father of the park . . . for he drew the law of designation." Three years later, Senator Dawes said, "I think I drew the

⁶⁸Haines, *Yellowstone Place Names*, 157.

⁶⁹Joseph G. Gambone, "Samuel C. Pomeroy and the Senatorial Election of 1861, Reconsidered," *Kansas Historical Quarterly* 37:1 (1971): 15-32. See also James C. Malin, "Some Reconsiderations of the Defeat of Senator Pomeroy of Kansas, 1873," *Mid-American* 48:1 (1966): 47-57.

bill." The following day, Senator Vest repeated, with more certainty than Dawes apparently felt, that Dawes was "the author of the law." Another six years later, Dawes became convinced, "I had the honor to write the bill." In his final assessment, Cramton states that "while his hand may not have written down the words, he undoubtedly shaped the lines of the draft and was the power behind the scenes that made things move."⁷⁰

Jackson thinks a committee authored the Yellowstone Bill. It "was not the work of any one man. . . . [S]everal individuals had made a definite contribution toward its preparation." Jackson mentions Langford, Dawes, Pomeroy, Clagett, and Hayden, with Clagett playing only a small part: "It was agreed that Clagett should sponsor the bill in the House. . . ." Relying on the work done by Cramton, Jackson gives Henry Dawes the lead role. Dawes was "in all probability the influential member of Congress who was assisting the Montana men in introducing the proposed legislation" and who "while he may not have actually written out the bill . . . undoubtedly wrote the outline for the draft and gave Clagett technical information concerning the proposed legislation."⁷¹ Francis Haines was willing to go even further and give Dawes credit for both Yellowstone and Yosemite. Henry Dawes "fathered our system of national parks in the sense that his Yosemite Grant legislation (1864) became the model for Yellowstone's organic act in 1872."⁷²

So did Henry Dawes draft the Yellowstone Bill? Prompted by the repeated suggestions of Senator Vest, Dawes began to recall that he indeed had written the Yellowstone Bill, and he became more certain as his age advanced and as time lapsed after creation of the park. When the bill was passed in 1872, Senator Vest was still practicing law in Sedalia, Missouri; he did not even arrive in the Senate until 1879.⁷³ Even those who admire Dawes' contribution do not believe his claim that he drew the bill. Instead, Dawes "shaped the lines of the draft," "wrote the outline for the draft," and "fathered" the national parks because "his Yosemite Grant legislation (1864) became the model for Yellowstone's organic act in 1872."

⁷⁰These various statements are collected and reviewed in Cramton, *Early History*, 32–35.

⁷¹Jackson, "The Creation of Yellowstone National Park," 53–59.

⁷²Haines, *Yellowstone Place Names*, 239.

⁷³*Biographical Directory of the American Congress*, 1857.

There is no doubt that Representative Dawes was interested in the Yellowstone Bill and that he used his considerable political influence to promote its passage. It was Dawes, not a member of the Public Lands Committee, who argued for passage of the bill on the House floor. However, this does not suggest he was the author. During his remarks, Dawes made no statement indicating that he drew the bill. Regarding Clagett, he stated that the bill "receives the urgent and ardent support of the Legislature of the Territory, and of the Delegate himself, who is unfortunately now absent, and of those who surveyed it. . . ." ⁷⁴ To date, no evidence has emerged showing that Representative Dawes drew the Yellowstone Bill; the most reasonable inference that can be drawn from the available evidence is that he did not. The same is true of the Yosemite Grant of 1864 and Yosemite Reservation of 1890. Henry Dawes' name has never been mentioned by those familiar with the history of the Yosemite legislation. ⁷⁵ If the "father" of Yellowstone and Yosemite National Parks is the man who drew the language of the organic acts that created them, the honor goes to William H. Clagett and not Henry Dawes.

CLAGETT AND THE YELLOWSTONE NATIONAL PARK BILL

As the record now stands, there is little doubt that William H. Clagett authored the Yellowstone Park Bill. The park was created for many reasons. Clagett was a Republican, the party in power. The Northern Pacific Railroad Company wanted the park. Important Congressmen like Senator Pomeroy and Representative Dawes took up the cause. Professor Hayden's work publicized the natural wonders in the park, and Nathaniel Langford promoted the plan. Still, it was Clagett who struck the phrases "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people" and "the preservation from injury or spoliation of all

⁷⁴*Congressional Globe*, 42d Cong., 2d sess., 1872, vol. 45, pt. 2, p. 1243.

⁷⁵Hans Huth, "Yosemite: The Story of an Idea," *Sierra Club Bulletin* 33 (March 1948): 63-76; Holway R. Jones, *John Muir and the Sierra Club: The Battle for Yosemite* (San Francisco, 1965); Richard J. Orsi, "'Wilderness Saint' and 'Robber Baron': The Anomalous Partnership of John Muir and the Southern Pacific Company for Preservation of Yosemite National Park," *Pacific Historian* 29 (Summer/Fall 1985): 136-56; Alfred Runte, *Yosemite: The Embattled Wilderness* (Lincoln, Neb., 1990).



Stagecoaches stand in front of the Mammoth Hotel, Yosemite National Park. (Photograph by F.J. Haynes, 1896. Courtesy of the Haynes Foundation Collection, Montana Historical Society)

timber, mineral deposits, natural curiosities or wonders within said park and for retention in their natural condition."

Important questions arise from the recognition that Clagett was so instrumental in the creation of Yellowstone. To many, the Yellowstone Act of 1872 exemplifies preservation and the Mining Act of 1872 represents rapacity. How could Clagett work so ardently for both? In his own words, he promoted them because both were against the interests of the speculators and for the interests of the laborer and the people. What harm did the creation of this great national park bring to the Crow and other Indian people who held aboriginal title to the region? When it came time, in Clagett's re-election campaign, for the *New North-West* to list his accomplishments during his first months in office, the paper gave the most prominent coverage to removal of the various tribes from their homelands. What effect did the creation of the park have on Clagett's career? Shortly after passage of the Yellowstone Bill, he became ill and discouraged, and wrote to friends in Montana saying that he found the office "a laborious, impoverish-

ing, and thankless position." He would give any man five hundred dollars to take the post off his hands, and he would not be a candidate for renomination or re-election.⁷⁶ By the time Clagett recanted, division had developed in the Republican party, and the division in the Democratic party that had boosted his election the year before had disappeared. During his re-election campaign, when the *Rocky Mountain Gazette* complained about what Clagett had done, the park was the first item on its list.

In his own time, Clagett was widely known as an orator. Many descriptions exist of the speeches he presented all over the West, but perhaps none is more admiring than William Stoll's account of his oration of January 1884, at Eagle City camp in northern Idaho:

The effect of William H. Clagett's personality upon the camp was electrical. . . . The next day two thousand miners, myself among them, men who had known Clagett in the Sierras, in Leadville, and in Deadwood, gathered beneath sombre pines heavily laden with snow, and he stood before us like a prophet. . . . I see him as I saw him then: the flashing eyes, the grace and proportion of his body, dressed in the camp fashion of that Idaho wilderness—in all, the personification of physical and intellectual power. I have heard other great voices—Bryan's, Garfield's, and Blaine's—but none were comparable to his; none approached its perfection; none were possessed of its appeal. His English was pure, his reasoning broad and extensive and his influence among his fellows at the bar and in public life immeasurable.

In Stoll's estimation, Clagett as an orator was so important to the mining camps because "he personified and vitalized our thought and refined our sentiment."⁷⁷ Clagett as author of the Yellowstone Act did for the nation what Clagett the orator did for the mining camps. He "personified and vitalized our thought and refined our sentiment."

⁷⁶*Helena Daily Herald*, June 17, 1872.

⁷⁷Stoll, *Silver Strike: The True Story of Silver Mining*, 14–20.

BOOK REVIEWS

Ali'iolani Hale: A Sentinel in Time, by Victoria Nalani Kneubuhl. Honolulu: Judiciary History Center, 2000; 120 pp., illustrations, bibliography, \$15.00, paper.

This historical monograph presents the history of Hawai'i through the birth, development, usage, and restoration of its principal government building, Ali'iolani Hale, more frequently referred to as the Judiciary Building because of its exclusive use by the judicial branch of Hawai'i's government after November 1926. In fact, the subtitle of this offering is *A History of the Events in the Life of Hawai'i's Historic Judiciary Building*.

The text is "profusely illustrated with vintage photographs" and interspersed with thumbnail biographies of selected individuals and summary coverage of associated matters. These include the story of the Kamehameha statues in front of the Judiciary Building and at Kohala, and of the first and second 'Iolani Palace.

Oldtimers are reminded of Jose de Medeiros who, for thirty-four years from 1896, made daily visits to the statue of King Kamehameha, usually sitting across King Street in quiet contemplation of his idol. The book also introduces readers to Emma Metcalf Beckley Nakuina who, among other achievements, was Hawai'i's first woman judge, presiding over the water court in her capacity as commissioner of private ways and water rights.

Kneubuhl's book presents the facts surrounding the conception, construction, renovation, addition, and restoration of Ali'iolani Hale in sufficient detail and authority for this work to be a useful reference for future historians. Kneubuhl notes that in 1938, the Territorial Planning Board suggested that Ali'iolani Hale be razed and a new judiciary building constructed. Eventually, an extension was added to the old building and a new building was constructed for the circuit courts, leaving only the Hawaii Supreme Court holding forth in the original building.

The several design diagrams are particularly helpful to an understanding of the construction projects. Especially inter-

esting is the list of items "to be preserved for future generations" that were deposited under the building's cornerstone on February 19, 1872. "Specimens of several Hawaiian postage stamps" must be worth a goodly sum of money in today's philatelic market.

Kneubuhl acknowledges her indebtedness to the historical consulting firm of Frost & Frost, who compiled a history of Ali'iolani Hale in the 1970s. Their "painstaking" study, published in 1977 and now out of print, is the definitive work on the subject. On the other hand, Kneubuhl's writing style is considerably more user friendly. She received the 1996 Hawai'i Award for Literature, the state's highest award for literary artists. She has written several plays and collaborated in other literary endeavors with themes from the history of Hawai'i. She also brings the story of Ali'iolani Hale up to date.

Kneubuhl's ventures into broader Hawai'ian history than that of Ali'iolani Hale fill out the monograph, but they are not as fully supported as her main subject. Chapter 1, which covers the period from "about 1600 years ago" to 1870 in some six pages of text, might well have been reduced to an introductory paragraph. The relevance of some of the additional material is not immediately apparent. For example, the biography of Joseph Nawahi, a legislator in the kingdom of Hawai'i, has no stated connection to the main subject, except perhaps for the unstated possibility that, as a member of the legislature, he attended meetings at Ali'iolani Hale.

Although *Ali'iolani Hale: A Sentinel in Time* may not be a "must have" for the serious historian, it is a useful and attractive addition to legal history in the Pacific Islands.

Samuel P. King

Senior U.S. District Judge for the District of Hawai'i

Indian Reserved Water Rights: The Winters Doctrine in Its Social and Legal Context, 1880s-1930s, by John Shurts.

Norman: University of Oklahoma Press, 2000; 352 pp., notes, bibliography, index; \$39.95, cloth.

Historians have long recognized that the case of *Winters v. United States* (1908) had an enormous but misunderstood impact on the relationship between Euro-Americans on the one hand and the public domain and Native American lands on the other. The decision created a reserved water right that left in question the laws of prior appropriation that states west

of the hundredth meridian had adopted to a greater or lesser degree. Until the publication of Shurts' book, however, we never really understood the case itself or the origins and application of the *Winters* doctrine.

We should recognize—as Shurts does—that his work on water law stands on the shoulders of a number of scholars whose previous studies laid the groundwork for his book. Robert G. Dunbar's *Forging New Rights in Western Waters* (Lincoln: University of Nebraska Press, 1983) showed us that even with the *Winters* ruling, the case law on the federal reserved right did not remain as secure as many have supposed. Most importantly, Donald Pisani's *To Reclaim a Divided West: Water, Law, and Public Policy, 1848–1902* (Albuquerque: University of New Mexico Press, 1992) showed us that the development of water law in the West is really much more complex than historians have previously believed. Some, like California, have mixed systems, some developed from Pueblo rights, and many recognize some vested rights.

Now Shurts shows us that far from simply pitting the West against the federal government, *Winters* represents a complex set of conditions that set up clashes of various interests throughout the West. Not all irrigators in Montana's Milk River Valley, where the case originated, regretted the decision. Some, who wanted to develop land below Chinook and Havre and had to battle their upstream neighbors for a scarce resource, welcomed the decision.

Nevertheless, in spite of the conflicting views among people of the Milk River Valley, Montana's congressional delegation tried to limit the scope of the decision through a legislative declaration of support for states' rights and prior appropriation. Though thwarted at first, the Montana representatives finally succeeded in limiting the reserved right during the allotment of the Blackfoot Reservation in a strange provision that required the appropriation of "all water . . . under the laws of the State of Montana by the United States in trust for the Indians" (p. 135). Congress never clarified just how a reserved right fell under the laws of Montana.

Shurts has shown also that the suit against *Winters* owed its success to a tenacious U.S. attorney, Carl Rasch. Rasch saw the possibility of defining "Indian Country" to include the Milk River as well as the land adjoining it by considering the river an integral part of the Fort Belknap Reservation. Moreover, in contrast with reservation Superintendent William Logan, Rasch recognized that both the Indian ownership of the river and the designation of the reservation implied a preservation of enough water to carry out the purposes of the reservation.

In some ways, Rasch's tenacity caused the greatest apoplexy in the Bureau of Reclamation (BOR), a sister agency to the Bureau of Indian Affairs (BIA) in the Interior Department. The decision seemed to undermine the doctrine of prior appropriation and with it the possibility of damming and diverting some of the West's major streams for the development of irrigated farms. Later, however, some BOR officials believed that they could use the federal reserved right doctrine to supply water for reclamation projects.

After outlining the complexity of the *Winters* case, Shurts offers a number of case studies of the application of the Indian reserved rights doctrine. Contrary to much of the literature, he finds that the BIA used the reserved right argument to secure for the Uintah Reservation "a settlement-based final decree of water rights that would not have had the content it had without the government's use of *Winters* as a sword and shield" (p. 170). He finds similar reliance on *Winters* in the management of a large number of other reservations throughout the West.

It is in the discussion of the Uintah Reservation that we find the one major lapse in Shurts' research. For some reason, he neglected to consult Craig Fuller's "Land Rush in Zion: Opening of the Uncompahgre and Uintah Indian Reservations" (Ph. D. dissertation, Brigham Young University, 1990), which would have helped in understanding the efforts of BIA officers to preserve water rights for the Indians.

Nevertheless, this is an excellent study that historians and others must consult as they continue their work on Native American and Western water law and rights.

Thomas G. Alexander
Brigham Young University

Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995, by Mark R. Scherer. Lincoln: University of Nebraska Press, 1999; 166 pp., illustrations, notes, index; \$35, cloth.

In *Imperfect Victories*, Mark Scherer provides a well-researched and well-presented outline of a small part of the fabulously complex legal and political morass that is the history of United States Indian policy. Unfortunately, the effectiveness of Scherer's analysis is limited by his failure to draw generalized and broadly applicable conclusions. His writing also suffers from a seeming lack of objectivity in dealing with the subject matter. Overall, *Imperfect Victories* is

a worthwhile read for a student of Omaha tribal history or for the reader with an interest in Indian law and the opportunity to supplement her investigation.

The reader cannot help but appreciate the minefield in which federal officials operated when crafting policies for dealings with Indians. Despite what must have been, in some instances at least, genuine and good-faith efforts toward development of Indian policy, government officials were destined to become history's pariahs, labeled misguided, terminationist, and betrayers of trust. Scherer's analysis of Public Law 280, under which the federal government abdicated its trust relationship with the Omaha and a handful of other tribes, ably demonstrates the failings of the "terminationist" approach to Indian affairs. The passage of legal jurisdiction over the Omaha's "Indian Country" to the state of Nebraska resulted, for a time, in a tragic increase in crime on the reservation. Scherer's discussion would be aided by a comparison of the Omaha's experience with that of other tribes subject to a similar change of sovereigns—were the Omaha's struggles unique, or a common and inevitable result of federal abdication?

Scherer's book continues with a discussion of the Indian Claims Commission (ICC) and the compensation awarded for lands to which the Omaha possessed historic title. Scherer's distaste for federal policy is apparent in his discussion of the procedures for defense of claims brought by the Omaha in ICC docket numbers 225 and 138, where he implicitly advocates the position that, in the proceedings before the ICC, the federal government should not have stated its strongest case. However, when reading that "the ICC decision [in docket number 138] was an unqualified victory for the Omaha's and their copetitioners," the reader wonders what complaint could be advanced regarding the fairness of the ICC proceedings. Does the result vindicate the actions of federal counsel in zealously advancing an adversarial position? At the end of the ICC section, Scherer comes to a positive conclusion: "The educational, economic and social improvement projects funded by the commission awards almost certainly would not have been possible without the ICC litigation." His view would be bolstered by a brief discussion of the success of these social programs—especially following his earlier position that abdication of federal responsibility for Omaha welfare was at times disastrous. If responsible use of federal funds was really a solution, perhaps the terminationist ideology was not so misguided as the reader is led to believe.

Scherer next discusses the "Blackbird Bend litigation" over lands lost or gained by changes in the course of the Missouri

River—"avulsion" and "accretion"—over more than a century following an 1854 land cession treaty. My major complaint with Scherer's treatment of the federal court litigation is his matter-of-fact statement about the Omaha's suspicions about bias on the part of federal district Judge McManus, without the simple follow-up statement that no evidence of misconduct existed. The entire discussion of the Blackbird Bend litigation states a case that the Omaha, as represented litigants, failed to manifest the slightest respect for federal judicial authority.

As a historical work, Scherer's text is right on the mark, with complete analyses of his subject matter. Perhaps my greatest complaint is the lack of conclusions: What was and is the proper role of the federal government in Omaha and other Indian tribal affairs? Did moneys and lands won in litigation have a positive effect on the Omaha tribe? How should such a positive effect be defined?

In spite of these flaws in the book, a reader with an interest in the peoples, the geography, or the legal issues departs Scherer's work in possession of a broad picture of the complex law and history.

Max Huffman
Washington, D.C.

Senator Thomas J. Walsh of Montana: Law and Public Affairs, from TR to FDR, by J. Leonard Bates. Champaign: University of Illinois Press, 1999; 412 pp., illustrations, notes, index; \$39.95, cloth.

The late Leonard Bates devoted his entire career as a scholar to the study of Thomas Walsh and the Progressive era. For the last twenty of those years, it is not unfair to say that he was obsessed by Walsh. The result of that obsession is an old-fashioned political biography.

Readers of this journal may find it disappointing that the book contains little about Walsh's legal career. Walsh was almost a textbook case of a frontier lawyer. The son of Irish immigrants, he had seven years of public schooling in Wisconsin and taught for eight years before reading law with a former teacher. After that, he did one year at the University of Wisconsin Law School. Upon graduation, he set out for the Dakota Territory, where he began to practice law with his older brother and became involved in Democratic politics. As Bates

points out, Walsh's law practice differed little from that of Abraham Lincoln forty years earlier in the then new state of Illinois. His cases involved "contracts, mortgages, property damage, nonpayment of wages, and the like" (p. 18). Walsh moved to Helena, Montana, in 1890. Originally a mining camp, Helena had emerged as a commercial and rail center by the time Walsh settled there. His law practice again revolved around litigation, and he won a reputation as a personal injury lawyer. By the late 1890s, he was able to brag that he earned a good living from his law practice without having to engage in real estate, collections, or other business.

Almost immediately upon arriving in Helena, Walsh plunged himself into Democratic politics. After an unsuccessful race for Congress, he won election to the Senate in 1912. In the Senate, Walsh virtually personified the progressive impulse, at least as it manifested itself in the Democratic party. He played a role in tariff reduction, the Federal Reserve Act, and antitrust legislation. Convinced that the conservation policies of Theodore Roosevelt and William Howard Taft had been too restrictive, Walsh joined with other Western Democrats in advocating the development of public lands and resources. He also supported women's suffrage and prohibition.

When World War I broke out in Europe, Walsh, despite some initial hesitation, fell into line with the Wilson administration's foreign policy. After the United States entered the war, Walsh helped to write the Espionage Act of 1917 and the Sedition Act of 1918, two of the most repressive measures ever enacted by Congress. To his credit, Bates provides an account of Walsh's role in securing passage of these acts. Nevertheless, Bates, who constantly touts Walsh's legal abilities and constitutional expertise, downplays Walsh's participation in these gross violations of constitutional liberties.

Moreover, the Espionage and Sedition Acts were not Walsh's only brush with repressive nationalism. He took part in the attempt to remove Robert M. LaFollette from the Senate for a speech in which LaFollette argued that the United States did not have sufficient reason to enter the war. After the war, Walsh urged the attorney general, A. Mitchell Palmer, to take action against radicals. Only after the fact did Walsh become a critic of the Palmer raids. It seems that the Montanan valued political expediency over civil liberties.

Walsh's greatest notoriety came as the intrepid investigator of the Teapot Dome scandal. Contrary to the accounts one finds in textbooks, Teapot Dome was anything but a simple morality play; Walsh, for example, had advocated leasing oil and mineral rights on federal land, the abuses of which ulti-

mately led to the scandal. Further, Walsh behaved in a partisan manner, for which Bates feels the need to offer apologies and rationalizations. Walsh, LaFollette, and others magnified unquestionably real wrongdoing out of proportion to serve their own political purposes.

Historians will find much to criticize in this volume. Bates adopts the old, simplistic account of the Anaconda Company's unlimited influence in Montana politics. David Emmons' work has provided an important corrective. Bates also falls into the classic biographer's trap and identifies entirely with Walsh and Walsh's political positions.

The book reads easily, but one cannot avoid the impression of note cards flipping over. Moreover, even though Bates cut his original manuscript by more than half for publication, many more note cards could have been discarded. In spite of that, the book occasionally omits important facts. This is a useful biography of a significant figure; it is not a great work of history.

Michael S. Mayer
University of Montana

Henry M. Jackson: A Life in Politics, by Robert G. Kaufman. Seattle: University of Washington Press, 2000; 548 pp., illustrations, notes, bibliography, index; \$30.00, cloth.

Henry M. Jackson and Warren G. Magnuson, Washington's Democratic senators from the early 1950s through the early 1980s, comprised a powerful combination in a state previously little known for national political clout. Large collections of papers for both men at the University of Washington have facilitated a recent biography of Magnuson and this comprehensive political portrait of Jackson by political scientist Robert G. Kaufman.

Henry "Scoop" Jackson, a native of Everett, served briefly as prosecuting attorney in his home county before winning the first of six terms to the United States House of Representatives in 1940 at the age of twenty-eight. After the 1952 election, he moved up to the Senate, where he remained until his death in 1983. His only close call came in the Republican sweep of 1946; thereafter he was never seriously challenged. Jackson epitomized what most Americans believed a political leader should be—honest, forthright, conscientious, dedicated, and committed to the interests of his constituents. His pro-military, strident anti-Communism, combined with a pro-

labor, free-spending stance for domestic programs, appealed to a broad political spectrum in Washington State.

Jackson's popularity at home did not translate well to national politics, as his failed runs at the presidential nomination in 1972 and 1976 attest. As Kaufman notes, few people ever associated the word "charisma" with Jackson, who was particularly ineffective speaking to large, unfamiliar audiences.

Kaufman is hardpressed to reveal much about Jackson aside from his political life. For this he cannot be faulted, since politics was Jackson's life, aside from the family that resulted from his marriage at the age of fifty-six. A telling photo shows a grim Jackson in heavy trousers, reluctantly at bat in a softball game with other senators.

Kaufman attempts to provide an intellectual, philosophical underpinning for his subject's political positions, but Jackson emerges as a man whose strongly held beliefs seemed to derive primarily from events early in his political career. The novels of Pearl Buck are credited with shaping his sympathetic view of China and a correspondingly negative one of Japan. His anti-Communism originated during a 1945 visit to Norway, the home of his ancestors, where citizens conveyed to him their fear that Soviet Russia posed as great a threat to democratic nations as had the recently vanquished fascists.

To the consternation of liberal Democrats, Jackson emerged as one of the most powerful voices of anti-Communism in Congress although, unlike Senator Joseph McCarthy, whom he disliked and helped bring down, he minimized the internal threat. During his career, he consistently supported programs that would strengthen the military and opposed those aimed at détente. It is perhaps ironic that Jackson—at times a lonely voice in his own party, particularly after Vietnam, railing at the "evil empire"—had, by the time of his death, passed the torch to the recently elected Republican president. Indeed, Kaufman argues that President Reagan's position on the Soviet Union encapsulated what Jackson had stood for for more than forty years.

Jackson believed the impact of New Deal programs during the 1930s Depression, as well as World War II defense spending, proved the necessity of federal largess for his state's continued economic health. Both Magnuson and Jackson seemingly never saw a domestic spending program they did not like. Kaufman points out that they adroitly divided the spoils, with Magnuson handling commerce, health, and fisheries, while Jackson held responsibility for the armed services, environment, and energy. For the notoriously frugal Jackson, this contrast between private and public actions is

striking. Obviously, many of these programs benefited the state, but Jackson apparently never calculated the fiscal burden falling to the nation's taxpayers. In any event, he played a significant role for three decades in formulating policies relating to atomic energy, power generation, oil, civil rights, and the environment, to name only some of the more important issues.

Kaufman is properly sympathetic to his subject and reasonably even-handed in noting Jackson's defects—such as his tendency to hold to beliefs even when facts proved him wrong. Kaufman castigates him for his attitude toward Japanese-Americans and for his support of internment during World War II. From the perspective of the present, it is certainly proper to note the violations of basic rights inherent in that policy, but Jackson, like others including the president and the Supreme Court, could see the enemy virtually at the nation's doorstep in Alaska.

Kaufman may go too far when he places Jackson in the same category with John Calhoun, Henry Clay, and Daniel Webster—powerful senators who tried but failed to attain the presidency. Nevertheless, this is a well-researched biography of an influential man that will provide the starting point for future assessments of Jackson's career.

Kent D. Richards
Central Washington University

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Banks, Christopher P. "The Politics of Court Reform in the U.S. Courts of Appeals," *Judicature* 84:1 (July–August 2000).

Carter, Nancy Carol. "American Tribal Governments, Law, and Courts," *Legal Reference Services Quarterly* 18:2 (2000).

Cheatham, Gary L. "'Shall Not Have the Right to Legislate Slavery Out': Slavery and the 1860 Antislavery Law," *Kansas History* 23:3 (Autumn 2000).

Cheek, Kyle, and Anthony Champagne. "Money in Texas Supreme Court Elections, 1980–1998," *Judicature* 84:1 (July–August 2000).

Everett, Robinson O. "The First Fifty Years of the Uniform Code of Military Justice," *Federal Lawyer* 47:10 (November–December 2000).

Gullett, Gayle. "Constructing the Woman Citizen and Struggling for the Vote in California, 1896–1911," *Pacific Historical Review* 69:4 (November 2000).

Hartnett, Edward A. "Questioning Certiorari: Some Reflections Seventy-five Years after the Judges' Bill," *Columbia Law Review* 100:7 (November 2000).

Hasday, Jill Elaine. "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 88:5 (October 2000).

Hug, Procter, Jr., and Carl Tobias. "A Preferable Approach for the Ninth Circuit," *California Law Review* 88:5 (October 2000).

Hutton, Paul Andrew. "In Search of Wyatt Earp: A Review Essay," *Journal of Arizona History* 41:2 (Summer 2000).

Korn, Harold L. "The Development of Judicial Jurisdiction in the United States: Part I," *Brooklyn Law Review* 65:4 (1999).

Noonan, John T., Jr. "Judges as Scholars: Are They? Should They Be?" *Judicature* 84:1 (July–August 2000).

O'Scannlain, Diarmuid F. "Order," *Loyola Law Review* 33:3 (April 2000).

Owens, John B. "The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919," *Northwestern University Law Review* 95:1 (Fall 2000).

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Symposium: "Race and the Law at the Turn of the Century," *UCLA Law Review* 47:6 (August 2000).

Symposium: "Restructuring Federal Courts," *Texas Law Review* 78:7 (June 2000).

Tobias, Carl. "The Next Step for the Ninth Circuit," *Southern California Law Review* 73:6 (September 2000).

Trott, Stephen. "Memories of the Ellsberg Break-in," *Hastings Law Journal* 51:4 (1999–2000).

Wiggins, Charles E. "'Not Yet Convinced,'" *Hastings Law Journal* 51:4 (1999–2000).

Wilson, Lydia E. "Here Comes the Judge! Who Is It? A Selective Review of Biographical and Directory Resources of the Judiciary," *Legal Reference Services Quarterly* 18:2 (2000).

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