Great and Little Osage Indians,[484] providing for a considerable restriction of their ancient domains. A series of treaties were also negotiated about 1825 by Brig. Gen. Henry Atkinson of the United States Army and Benjamin O'Fallon, Indian agent, which dealt only with problems of trade and friendship.^485

F. TRIBES OF THE FAR WEST: 1846-54

In the late summer of 1846, war having been declared with Mexico,* General Philip Kearney in command, the Army of the West advanced into New Mexico.

Without doing battle New Mexico's governor fled, leaving Kearney in control of the province.[487] Following the cession of the province to the United States by the Treaty of Guadalupe Hidalgo, of February 2, 1848,[487a] a treaty of peace with the Navaho Indians who inhabited that region was concluded in 1849.[488]

Two months later, December 30, 1849, another far western tribe, the Utahs, signed a treaty," and the period of negotiating with the Indians who roamed through the area acquired from Mexico and the Oregon Territory may be said to have opened.^490

To 'Fort Laramie in the early autumn of 1851 came a great number of Sioux, Cheyenne, Arapaho, Grow, Assiniboine, Gros Ventre, Mandan, and Aricara. After several days of conference, Indian agent Thomas Fitzpatrick secured their signatures to a treaty in which the natives promised peace, acknowledged certain boundaries and agreed to recognize the right of the United States to erect posts and maintain roads within their territory.[491]

This treaty 'was never formally proclaimed by the President and because of this its validity was challenged in Roy v. *United States and Ogallala Tribe of Sioux Indians.*[492] The Court of Claims examined the circumstances, found that the treaty had been acted upon by Congress, aud referred to in subsequent agreements, and held that proclamation was not necessary to give it effect and that both parties were bound by the covenant from the date of its signature.

In the meantime the discovery of gold in California had caused the migration westward to assume the proportions of a stampede. Soon this newly admitted state was faced with the familiar problem of keeping available for preemption purposes an ample supply of public land. An equally familiar solution was quickly decided upon. Congress appropriated $25,000 and dispatched commissioners to treat with the California Indians regarding the territory they occupied.[493]

Some 18 treaties witb 18 California tribes were negotiated by these federal agents in 1851. All of them provided for a smrrender of native holdings in return for small reservations of land elsewhere. Other stipulations made the Indians subject to state law.[494]

When the terms of these various agreements became known the California State Legislature formally protested the granting of any lands to the Indians. The reasons for this opposition were reviewed by the President and the Secretary of the Interior, and finally a number of months after the agreements had been negotiated they were submitted to the Senate of the United States for ratification. This was refused on July 8, 1852.[495]

The Indians, however, had already begun performance of their part of the agreement. Urged by government officials to anticipate the approval of the treaties they had started on the journey to the proposed reservations. Now they found themselves in the unfortunate position of having surrendered their homes for lands which were already occupied by settlers and regarding which, the Federal Government showed no willingness to take action. This situation was never remedied unless the creation in the 1920's of several small reservations for the use of these Indians can be said to have done so.[496]

In 1852 the Apaches, occupying portions of the territory relinquished by Mexico, were invited to a Treaty Council at Santa Fe, New Mexico. They came and duly promised perpetual peace (Art. 2) with the United States.[497] They also engaged (Art. 6) to refrain from warlike incursions into Mexico.

The following year the Comanches, Kiowas, and Apaches met at Fort Atkinson. An agreement very similar in substance to the Santa Fe Treaty was concluded July 27, 1853.'"

Although the number of families traveling the Oregon, trail had increased steadily during the 40's, no agreements were made with the Indians of the territory until 1853. Then, in September of that year, the Rogue River Indians signed a treaty with the United States providing for a substantial cession of land (Art. 1) from which a certain portion was to be reserved for a temporary home until such time as a permanent residence should be designated by the President of the United States (Art. 2).[499] A similar arrangement was made with another Oregon tribe, the Cow Creek Band, on September 19, 1853.[500]

While these first treaties were being signed with the Indian tribes of the Far West, agreements with other tribes were being negotiated. Eight treaties[501] providing for territorial cessions

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[484] Treaty of January. 11; 1839, 7 stat. 576.

[485] Treaty of June 9, 1825. with Poncar Tribe, 7 Stat. 247 : Treaty of June 22, 1825, with Teton. Yancton, and Yanctonies Bands of Sioux Tribe. 7 Stat. 250; Treaty of July 5, 1825, with Sioune and Ogallala Tribe, 7 Stat. 252; Treaty of July 6, 1825, with Chayenne Tribe, 7 Stat. 255 Treaty of July 16, 1825, with Hunkpapa Band of Sioux. 7 Stat. 257 Treaty of July 18, 1825, with Ricara Tribe, 7 Stat. 259; Treaty of July 30, 1825, with Belantse-etoa or Minnetsaree Tribe, 7 Stat. 261; Treaty of July 30, i825, with Mandan Tribe, 7 Stat. 264; Treaty of September 26 1825, with Ottoe and Missouri Tribe, 7 Stat. 277 ; Treaty of September 30 1825, with Pawnee Tribe, 7 Stat. 279; Treaty of October 6, 1825. with Maha Tribe. 7 Stat. 282.

[486] Act of May 13, 1846. 8 Stat. 9. and Presidential Proclamation Appendix No. 2. 9 Stat. 999.

[487] The province was taken in the name of the United States on August 22. 1846, and Kearney was made governor. Wise, The Red Man in the New World Drama (1931). p. 408.

[487a] 9 Stat. 922. See Chapter 20, sec. 3.

[488] Treaty of September 9, 1849. 9 Stat. 974. Article 2 states "That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist." * * * ■

[489] Treaty of December 30. 1849, 9 Stat. 984.

[490] An agreement with the Comanche, Ioni, Anadaca, Caddo, etc., of May 15, 1846. 9 Stat. 844, negotiated in Texas shortly after the Republic had become a member of the Union actually antedates these. The first articles of all three agreements acknowledge the jurisdiction of the United States.

[491] Treaty of September 17. 1851. 11 Stat. 749. Three of these tribes-tbe Assiniboines, the Arapahoes, and the Gros Ventres—were treating with the United States for the first time. See Rept. Comm. Ind. Aff. (1852), pp. 299-300.

[492] 45 c. Cls. 177 (1910).

[493] Act of September 30, 1850, 9 Stat. 544, 558.

[494] Wise, *op. cit.*, p. 419.

[495] *Ibid.*, pp. 421–425.

[496] *Ibid.*, p. 426. *Cf.* Act of May 18:1928, 45 Stat. 602. conferring jurisdiction over California Indian claims upon Court of Claims.

[497] Treaty of July 1, 1852, 10 Stat. 979.

[498] Treaty of July 27, 1853. 10 Stat. 1013.

[499] Treaty of September 10, 1853. 10 Stat. 1018. Construed in *Ross, Ex'r v. United States and Rogue River Indians,* 29 C. Cls. 176 (1894). By the treaty of November 15. 1864. 10 Stat. 1119, the Rogue River Indians agreed to permit other tribes and bands, under certain conditions, to reside on their reservation (Art. 1).

[500] Treaty of September 19, 1853, 10 Stat. 1027.

[501] Treaty of January 14. 1846, with Kansas Tribe, 9 Stat. 842 ; Treaty of August 2, 1847. with Chippewa of the Mississippi and Lake Superior. 9 Stat. 904 ; Treaty of August 21, 1847. with Pillager Baud of Chippewa Indians, 9 Stat. 908 ; Treaty of August 6, 1848. with Pawnees, 9 Stat. 949; Treaty of April 1. 1850. with Wyandot Nation of Indians, 9 Stat. 987 ; Treaty of July 23. 1851. with Sioux-Sisseton and Wabpeton Bands, 10 stat. 949.

and 10 treaties[502] stipulating for removal of the Indians to unoc cupied land weresigned during these years.

G. EXPERIMENTS IN ALLOTMENT:^503 1854–61

On March 24, 1853, George W. Manypenny, of Ohio, became Commissioner of Indian Affairs. The new official was designated by the President to enter into negotiations with the tribes west of the states of Missouri and Iowa for white settlement on their land, and extinguishment of their title.[504]

His first success in this connection was with the Ottoes and Missourias on March 15, 1854.[505] Article 6 of the instrument signed on that occasion provides:

> The President may, from time to time, at his discretion, cause the whole of the land herein reserved • • * to be surveyed off into lots, and assign to such Indian or Indians of said confederate tribes, as are willing to avail [themselves] of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one eighth of a section ; to each family of. two, one quarter section ; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section ; and to each family exceeding ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time in his discretion. after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a State constitution embracing such land within its boundaries shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the land assigned, and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, revoke the same, or if not issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry ; and in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of such confederate tribes, or disposed of as is provided for the disposal of the excess of said land. And the residue of the land hereby reserved, after all the Indian persons or families of such confederate tribes shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules, or regulations as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restriction herein provided for without the consent of Congress.

This treaty, like many other treaties negotiated during the administration of Commissioner Manypenny, included a clause (Art. 3) by which the Indians relinquished all claims to moneys due under earlier treaties. The policy of paying Indians for lands by means of permanent annuities, which had involved the conservation of the Indian estate, was thrown into discard, and there was substituted a policy of quick distribution of tribal funds, parallel to the quick distribution of tribal lands which allotment entailed. Underlying this policy of quick distribution was the assumption that tribal existence was to be brought to an end within a short time.

On March 16, 1854, an agreement similar in its recitals regarding allotments was concluded with the Omahas.[506]

A third treaty providing for the individualization of land holdings was signed by the Shawnee Indians on May 10, 1854.[507] The terminology used in this instrument varies somewhat from that of the preceding treaties. Instead of the provision that—

> "The President may, from time to time * * • cause * * * to be surveyed off into lots, and to assign",

article 2 holds that

> all Shawnees * * * shall be entitled to * * • two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family * * *.

Detailed provisions are also included for the assignment of individual holdings to intermarried persons, minors, orphans, adopted persons and incompetents, the latter to have the selection made by some disinterested person or persons appointed by the Shawnee Council and approved by the United States Commissioner. Further, article 8 provides that "competent" Shawnees shall receive their share of the annuity in money, but that that of the "incompetent" Indians "shall be disposed of by the President" in the manner best calculated to promote their interests, the Shawnee Council being first consulted with respect to such persons.

Six treaties[508] stipulating allotment of land in severalty were

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[502] Treaty of November 28, 1840, with Miami, 7 Stat. 582; Treaty of March 17. 1842. with Wyandot. 11 Stat. 581; Treaty of October 4, 1842. with Chippewa Indians of the Mississippi and Lake Superior, 7 Stat. 591; Treaty of October 11. 1842. with Sac and Foxes. 7 Stat. 596; Treaty of June 5 and 17.1846, with Pottowautomie. 9 Stat. 853; Treaty of October 18, 1848, wltb Menomonee, 9 Stat. 952: Treaty of November 24, 1848, with Stockbridge. 9 Stat. 955; Treaty of March 15, 1854, with Ottoes and Missourias, 10 Stat. 1038.

[503] Prior to 1854, several treaties were signed which provided for tbe allotment of lands. See Chapter 11. sec. 1A; Chapter 8. sec. 2A1. Several early treaties used the words "allot" and "allotted" but they referred to the assignment of lands to groups of Indians. Kinney, A Continent Lost-A Civilization Won (1937). pp. 82-83.

[504] Rept. of the Comm. of Ind. AR. (1853). p. 249.

[505] Treaty of March 15. 1854. 10 Stat. 1038.

[506] Treaty of March 16, 1854, 10 Stat. 1043. Construed in *United States* v. *Celestine,* 215 U. S. 278 (1909); *United States* v. Button, 215 U. S. 291 (1909); *United States* v. *Payne,* 264 U. S. 448 (1924). By the terms of this agreement the United States under certain conditions agreed to pay the Indians $881,000 for land ceded (Arts. 4 and 5). Later it was contended by the Omaha Tribe in a case argued before the Court of Claims in 1918 that although the cession had been made, the Government had failed to pay anything. This the Government admitted but contended that the Omaha Indians did not own and did not have the right to make a cession thereof. In finding for the plaintiff the court said: "At the time the treaty was made the United States recognized the Omahas as having title to this land north of the due-west line, and specifically promised to pay for it. * * * the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it." *Omaha Tribe* v. *United States,* 53 C. Cls. 549, 560 (1918), mod. 253 U. S. 275, 55 C. Cls. 521.

[507] Treaty of May 10, 1854, 10 Stat. 1053. Coostrued in *Walker* v. *Henshaw,* 16 Wall. 436 (1872); *United States* v. *Blackfeather,* 155 U. S. 180, 186–187 (1894); *Jones* v. *Meehan,* 175 U. S. 1 (1899); *Blackfeather* v. *United States,* 190 U. S. 368 (1903); and *Dunbar* v. *Greene,* 198 U. S. 166 (1905). Commenting on this treaty, the Supreme Court declared:

> The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. * * * While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

The *Kansas Indians,* 5 Wall. 737, 756–757 (1866).

[508] Delawares, Treaty of May 6, 1854, 10 Stat. 1048; Ioways, Treaty of May 17, 1854, 10 Stat. 1069; Sacs and Fox of the Missouri, Treaty of May 18, 1854, 10 Stat. 1074; Kickapoos, Treaty of May 18, 1854. 10 Stat. 1078; Kaskaskias. Peorias, etc., Treaty of May 30, 1854, 10 Stat. 1082; Miamis, Treaty of June 5, 1854, 10 Stat. 1093.

concluded by Commissioner Manypenny in the next 2 months. In one of these, provision is made for the setting up of a permanent fund with the proceeds from the sale of the lands ceded by the Indians. The United States is charged with the duty of administering this fund. The extent of this obligation was determined by the Court of Claims which held in the *Delaware Tribe v. The United States* that the intended trust related to the preservation of the principal received from the sale of the lands and could not be considered, as the Delaware Tribe claimed, an obligation to maintain unimpaired the face value of the securities in which the principal had been first invested."

In the autumn of 1854 the Chippewa of Lake Superior became a party to a treaty providing for the allotment of land to individual Indians by the President at his discretion, and with the power to make

> * * * rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them.[510]

Article 2 also provides for the patenting of 80 acres to each mixed blood over 21 years of age.

The Wyandot treaty concluded January 31, 1855[511] is particularly interesting; The first article stipulates that tribal bands are dissolved, declares the Indians to be citizens of the United States and subject to the laws thereof and of the territory of Kansas, although those who wish to be exempted from the immediate operation of such provisions shall have continued to them the assistance and protection of the United States. Article 2 provides for the cession of their holdings to the United States stipulating the "object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott nation, in severalty." Articles 4 and 5 provide for the most detailed method of allotment yet encountered, in which three commissioners, one from the United States and two fram the Wyandott nation, were to make a distribution of lands to certain specified classes of individuals. Patents are then to issue containing an absolute and unconditional grant of fee simple to those individuals listed as "competent" by the commissioners, but for those not so listed the patents will contain certain restrictions and may be withheld by the Commissioner of Indian Affairs. None of the land thus assigned and patented is subject to taxation for a period of 5 years.

In February of 1855 the Chippewa of Minnesota and the Winnebago signed treaties[512] ceding their territorial holdings but out of which there is "reserved" and "set apart" for the Chippewas and "granted" for the Winnebagos land for a permanent home. Further, the President is authorized whenever he deems it advisable to allot their lands in severalty.

The tribes of the Far West were not overlooked in this burst of treaty-making activity. In the closing months of 1854 and the opening days of the following year six treaties[513] were negotiated with the Indians of Oregon, the various tribes of the Puget Sound region, etc. All of these provided for the allotment of land in severalty and for reservations of territory described by such phrases as "such portions * * * as may be assigned to them," "shall be held * * * as an Indian reservation," and "district which shall be designated for permanent occupancy."

Seven more treaties providing for the assignment of land to individual Indians were negotiated during Commissioner Manypenny's administration, which ended in 1857. All of these feature extensive land cessions with certain areas either "set apart as a residence * * *" or "held and regarded as an Indian reservation" or "reserved * * * for the use and occupation."[514]

James W. Denver, Charles E. Mix, and Alfred B. Greenwood, who successively held the position of Commissioner of Indian Affairs until the outbreak of the Civil War, were likewise committed to a treaty policy providing for allotment in severalty. Under their auspices seven such agreements[515] were negotiated. These instruments in form and substance differ little from those of the Manypenny administration.

H. THE CIVIL WAR: 1861-65

The four years of conflict between the states had its effect on the various Indian tribes. Violence and bloodshed had become commonplace and several Indian tribes seized the occasion to accompany demands upon the Federal Government with a display of force.[516] This was particularly the case in Minnesota,

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[509] 72 *C. Cls. 483* (1031).

For opinion that a patent under Art. 13 should issue to Christian Indians but it may be restricted by act of Congress' after issue unless the effect would be to invalidate title of bona fide purchaser; that title of Christian Indians will not be vested in the Indians comprising the tribe called by that name as tenants in common. but in the tribe itself or the nation; see 9 Op. A. G. 24 (1857). And see Chapter 15. sec. 1A.

[510] Treaty of September 30. 1354, Art. 3. 10 Stat. 1109. Construed in *Fee* v. *Brown*, 162 U. S. 602 (1806) : Wisconsin v. *Hitchcock*, 201 U. S. *202* (1906) ; *Chippewa Indians of* Minnesota v. *United States*. 301 U. S. *358* (1937) : and *Minnesota* v. *United States, 305* U. S. 382 (1039).

The President is empowered by Art. 3 to issue patents with "such restrictions of the power of alienation as be may see fit to impose." A stipulation that the patentee and his heirs shall not sell, lease. or In any manner alienate said tract without the consent of the President of the United States is within the meaning of tbis Article. United *States* v. *Raiche*. 31 F. (2d) 624 (D. C. W. D. Wis., 19281. Moreover such restrictions extend to the timber on the land as well as the land itself. *Starr* v. *Campbell, 408* U. S. 527 (1008).

The court in holding that state fish and game laws have no application to the Bad River Reservation because federal laws are exclusive also called attention to Art. 11 of the above treaty which gave the right to hunt and fish on lands ceded until otherwise ordered by the President. *In re Blackbird*, 109 Fed. 139 (D. C. W. D. Wis.. 1901).

[511] Treaty of January 31. 1855. 10 Stat. 1159. Construed in *Goudy* v. *Meath*, 203 U. S. 146. 140 (1906) (power of voluntary sale granted; land withheld from taxation or forced alienation) ; *Walker* v. *Henshaw*, 16 Wall. 436. 441 (1872); *Schrimpscher* v. *Stockton*, 183 U. S. 290 (1902) ; *Conley* v. *Ballinger*, 216 U. S. 84 (1910).

[512] Treaty of February 22, 1855. 10 Stat. 1165. Construed in United *States* v. *Mille Lac Band of Chippewa Indians, 229* U. S. 498. 600. 501 (1913) ; *United States v. First National Bank, 234* U. S. 245. 261 (1014) (dealing with rights of mixed blood Chippewas) : *Johnson* v. *Gearlds, 234* U. S. 422, 437 (1914) (discussing liquor provisions) ; *United States* v. *Minnesota*, 270 U. S. 181 (1026) ; and *Chippewa Indians of Minnesota* v. *United States*, 301 U. S. 358 (1037). Treaty of February 27, 1855. 10 Stat. 1172.

"Treaty with the Umpqua, etc., of November 29, 1854. 10 Stat. 1125: Treaty with the Chasta, etc., of November 18, 1854. 10 Stat. 1122; Treaty with the Willamette, of January 22, 1855, 10 Stat. 1143; Treaty with the Wyandott, January 31. 1855, 10 Stat. 1150: Treaty with the Nisqually, etc., December 26, 1854, 10 Stat. 1132: Treaty with the Mississippi Chippewa. February 22, 1855, 10 Stat. 1165.

[514] Treaty of June 0. 1855, with Walla-Wallas, Cayuses, and Umatilla Tribes, 12 Stat. 945: Treaty of June 25. 1855, with Indians in middle Oregon. 12 Stat. 963; Treaty of June 9. 1855. with Yakamas. 12 Stat. 951: Treaty of June 11. 1855, with Nez Perces, 12 Stat. 957; Treaty of July 16. 1855. with Flatheads, etc.. 12 Stat. 975; Treaty of July 31. 1855, with Ottawas and Chippewas, 11 Stat. 621; Treaty of August 2. 1855. with Chippewas, 11 Stat. 633.

[515] Mendawakanton and Wahpakoota Bands of Sioux, Treaty of June 19. 1858. 12 Stat. 1031: Sisseeton and Wahpaton Bands of Sioux. Treaty of June 19, 1858. 12 Stat. 1037: Winnebago. Treaty of April 15, 1859. 12 Stat. 1101 : Swan Creek Chippewas and Christian Indians, Treaty of July 16. 1859. 12 Stat. 1105; Sacs and Foxes. Treaty of October 1. 1859, 15 Stat. 467 : Kansas Indians. Treaty of October 5, 1850. 12 Stat. 1111 : Delawares. Treaty of May 30, 1860. 12 Stat. 1129.

[516] However several treaties of allotment were negotiated during this period. Treaty of March 13. 1862. with Kansas Indians, 12 Stat. 1221: Treaty of June 24. 1862. with Ottawas. 12 Stat. 1237: Treaty of June 28, 1862 with Kickapoos, 13 Stat. 623; Treaty of June 9, 1863. with the Nez Perce, 14 Stat. 647: Treaty of October 14, 1864. with the

where in the summer of 1862, the Sioux of the Mississippi participated in a general unsuccessful uprising against the whites?"

While no treaty negotiations were attempted with the Sioux of that state, the Chippewas were called to a series of treaty councils in 1863 and 1864. Here their signatures were secured to treaties providing for removal and allotment of land in severalty.[518]

In the Far West the United States succeeded in making treaties at Fort Bridger,[519] Box Elder [520] and Tuilla Valley [521] in the Utah Territory and at Ruby Valley [522] in the Nevada Territory with the Shoshonees; at Lapwai in the Territory of Washington with the Nez Perce; [523] at Cosnejos in the Colorado Territory with the Utahs; [524] and at Klamath Lake in Oregon with the Klamath Indians.[525] The last mentioned were negotiating with the United States for the first time and Article 9 of the agreement signed by them included the very broad stipulation then being inserted in many treaties that

> * * * They will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

I. POST CIVIL WAR TREATIES: 1865-71

The years immediately after the close of the Civil War were filled with Indian councils and conferences. Usually these parleys resulted in the signing of treaties in which mutual pledges of amity and friendship were prominent and frequent.

In October of 1865 the Cheyenne and Arapaho,[526] the Apache, Cheyenne, and Arapaho,[527] the Comanche and Kiowa [528] met with Army officers Sanborn and Harney and signed treaties promising that peace would hereafter be maintained. A few days later eight tribes of Sioux at Fort Sully made the same promise.[529]

Immediately after the close of war, commissioners representing the President of the United States, appeared among the Five Civilized Tribes. Some of these Indians had been openly sympathetic with the rebel cause, even entering into treaties with the Confederacy. This action was seized upon by the commissioners as an indication of disloyalty; and a treaty negotiated in 1865 with the Creeks, Cherokees, Choctaws, Chickasaws, Osage, Seminoles, Senecas, Shawnee, and Quapaw tribes opens with the statement that the Indians by their defection had become liable to a forfeiture of all the guarantees which the United States had previously made to them,"

While this treaty was never ratified, the principle announced undoubtedly colored subsequent negotiations and is reflected in the treaties of 1866 with the Seminoles," Choctaws and Chickasaws,[532] Creeks,[533] and Cherokees.[534] These agreements provide, among other things, for the surrender of a considerable portion of the territory occupied by the Indians; they pledge peace, general amnesty, the abolition of slavery, and the assurance of civil and property rights to freedmen, and acknowledge a large measure of control by the Federal Government over the affairs of the tribes.

The summer of 1867 found the Plains still in the grip of the Sioux War. Moreover, the Cheyenne and Arapaho, the Comanche and Kiowa had joined the belligerents, carrying hostilities over a wide area.

The Indian Peace Commission,[536] composed of civilians and Army officers appointed "to investigate the cause of the war and to arrange for peace," [536] was successful in part- At Medicine Lodge Creek in Kansas, the Kiowa, Comanche, and Apache;[537] and the Arapaho and Cheyenne [538] promised peace, the abandonment of the chase, and the pursuit of the habits of civilized living.

In the summer of 1868, many Sioux, together with a scattering of Cheyenne and Arapaho warriors, renewed hostilities. which were terminated by the treaty of April 29, 1868.[539] A month later the Crows [540] and the Northern Arapaho and Cheyenne [541] put an end to hostilities in two agreements concluded' May 7, 1868, and

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Klamaths, 16 Stat. 707. In addition. an agreement amendatory of the Treaty of October 5, 1859. 12 Stat. 1111 was entered into with the Kansas Indians, Treaty of March 13. 1862, 12 Stat. 1221. Also see Chapter 8, sec. 11.

[517] Seymour, Story of the Red Man (1929) 268-287.

[518] Treaty of March 11. 1863, with Chippewa of the Mississippi and the Pillager and Lake Winibigoshish Bands, 12 Stat. 1219; Treaty of October 2, 1863, with Red Lake and Pembina Bands of Chippewa. 13 Stat. 667; Treaty of April 12. 1864, with Red Lake and Pembina Bands of Chippewa, 13 Stat. 689: Treaty of May 7, 1864. with Chippewa of the Mississippi and the Pillager and Winnebagoshish Bands. 13 Stat. 693; Treaty of October 18, 1864. with Chippewa of Saginaw, Swan Creek, nnd Black River. 14 Stat. 657.

[519] Treaty of July 2. 1863, with Eastern Bands of Shoshonee Indians, 18 Stat. 685.

[520] Treaty of July 30, 1863, with Northwestern Bands of Shoshonee Indians, 13 Stat. 668.

[521] Treaty of October 12. 1863. with Shoshone-Goship Bands, 13 Stat. 681.

[522] Treaty of October 1, 1863. with Western Bands of Shoshonee Indians, 18 Stat. 689. Art. 6 of the treaty recites:

> The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

Art. 6 of the treaty with the Shoshone-Goship Bands (see fn. 621, *supra*) is *similar.*

[523] Treaty of June 9. 1863, with the Nez Perce, 14 Stat. 647.

[524] Treaty of October 7, 1863. with Tabeguache Band of Utahs, 13 Stat. 673.

"Treaty of October 14. 1864, with Klamath and Moadoc tribes and Yahooskin Baud of Snake Indians, 16 Stat. 707.

[526] Treaty of October 14. 1865. 14' Stat. 703.

[527] Treaty of October 17. 1865. 14 stat. 713.

[528] Treaty of October 18. 1865. 14 Stat. 717.

[529] Two Kettles Bond of Sioux Indians. Treaty of October 19. 1865. 14 Stat. 723; Blackfeet Bond of Sioux, Treaty of October 19, 1865. 14 Stat. 727; Sans Arc Band of Sioux, Treaty of October 20, 1865, 14 Stat. 731; Onkpa' pah Band of Sioux, Treaty of October 20, 1865, 14 Stat. 739; Yanktonai Band of Sioux, Treaty of October 20, 1865, 14 Stat. 735; Upper Yanktonai Band of Sioux, Treaty of October 28, 1865, 14 Stat. 743; O'Gallala Band of Sioux, Treaty of October 28, 1865. 14 Stat. 747; Lower Brule Band of Sioux, Treaty of October 14, 1865. 14 Stat. 699.

The peace established by these agreements was a fleeting one. War continued with the Sioux save for a brief interruption for 2 years thereafter.

[530] Kinney, *op. cit.*, p. 157.

[531] Treaty of March 21, 1866, 14 Stat. 755.

[532] Treaty of April 28, 1866, 14 Stat. 769.

[533] Treaty of June 14, 1866, 14 Stat. 785.

[534] Treaty of July 19, 1866. 14 Stat. 799.

[535] Established by Act of July 20, 1867, 15 Stat. 17.

[536] Report of the Commissioner of Indian Affairs, 1868, p. 4.

[537] Treaty of October 21, 1867, 15 Stat. 581; Treaty of October 21, 1867, 15 Stat. 589.

[538] Treaty of October 28, 1867, 15 Stat. 593.

[539] Treaty of April 29, 1868, 15 Stat. 635. By the Sioux treaty, the United States agreed that for every 30 children (of the said Sioux tribe who can be induced or compelled to attend school) a house should be provided and a teacher competent to teach the elementary branches of our English education should be furnished. (*Quick Bear* v. *Leupp*, 210 U. S. 50, 80 (1908).)

[540] Treaty of May7, 1868, 15 Stat. 649. Construed in *Draper* v. *United States*, 164 U. S. 240 (1896); *United States* v. *Powers*, 305 U. S. 527, 529 (1939).

[541] Treaty of May 10 1868, 15 Stat. 655.

May 10, 1888. By summer the Navajo,[543] the eastern band of Shoshonee and the Bannock,[545] and the Nez Perce[544] had also become signatories to treaties of peace. These were the last treaties made by the United States with Indian tribes.

[543] Treaty of June 1, 1868. 15 Stat. 687. Provision for allotment of land in severalty to individuals wishing to farm is found in Art. 5 of this treaty. This agreement also contains in *Art.* 1 this familiar recital:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith. the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws * * *

In 1909, tbe Supreme Court of Arizona In holding tbe district court in error in denying to several Indians who had been imprisoned by the War Department a writ of habeas corpus called attention to this recital saying:

> * * * This stipulation amounts to a covenant that bad Indians shall not be punished by the United States, except pursuant to laws defining their offenses and prescribing the punishments therefor. While Congress by its legislation mny disregard treaties. the executive branch of the government may not do so. Tbe district court was In error In denying the writ of *habeas corpus.*

In re By-A-Lil-Le, 12 Ariz. 150, 155 (1909).

[544] Treaty of July 3, 1868, 15 Stat. 673. Construed in *Harkness* v. *Hyde,* 98 U. S. 476 (1878); *Marks* v. *United States,* 161 U. S. 297 (1896); and *Ward* v. *Race Horse,* 163 U. S. 504 (1896).

In *United States* v. *Shoshone Tribe of Indians,* 304 U. S. 111 (1938), it was held that the right of the Shoshone Tribe in the lands set apart for it, under the treaty of July 3, 1868, with the United States, included the mineral and timber resources of the reservation; and tbe value of these was properly included in fixing the amount of compensation due for so much of the lands as was taken by the United States.

[545] Treaty of August 13. 1868, 16 Stat. 693.

SECTION 5. THE END OF TREATY-MAKING

The advancing tide of settlement in the years following the close of the Civil War dispelled the belief that it would ever be possible to separate the Indians from the whites and thus give them an opportunity to work out their salvation alone. Assimilation, allotment, and citizenship became the watchwords of Indian administration [546] and attacks on the making of treaties grew in force."

The termination of the treaty-making period was presaged by section 6 of the Act of March 29, 1867,[547] which provided:

> And all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes are hereby repealed, and no expense shall hereafter be incurred in negotiating a treaty with any Indian tribe until an appropriation authorizing such expense shall be first made by law.

This provision marked the growing opposition of the House of Representatives to the practical exclusion. of that House from control over Indian affairs. The provision in question was repealed a few months later [548] but the House continued its struggle against the Indian treaty system. Schmeckebier recounts the incidents of that struggle in these terms:

> While the Indian Peace Commission succeeded in ending the Indian wars, the treaties negotiated by it and ratified by the Senate were not acceptable to the House of Representatives. As the Senate alone ratified the treaties, the House had no opportunity of expressing its opinion regarding them until the appropriation bill for the fiscal year 1870, making appropriations for carrying out the treaties, came before it for approval during the third session of the Fortieth Congress. The items providing funds for fulfilling the treaties were inserted by the Senate, but the House refused to agree to them, and the session expired on March 4, 1869, without any appropriations being made for the Indian Office for the fiscal year beginning July 1. When the first session of the Forty-first Congress convened in March, 1889, a bill was passed by the House in the same form as at the previous session. The Senate promptly amended it to include the sums needed to carry out the treaties negotiated by the Peace Commission. The House again refused to agree but a compromise was finally reached by which there was voted in addition to the usual appropriations a lump sum of two million dollars "to enable the President to maintain peace among and with the various tribes, bands, and parties of Indians, and to promote civilization among said Indians, bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self-support" (16 Stat. L., 40).
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> The House also insisted on the insertion of a section providing "That nothing in this act contained, or in any of the provisions thereof, shall be so construed as to ratify or approve any treaty made with any tribes, bands or parties of Indians since the twentieth day of July, 1887." This was rather a remarkable piece of legislation in that while it did not abrogate the treaties, it withheld its approval although the treaties had already been formally ratified and proclaimed. It had no legal effect, but merely wrote into the act the feeling of the House of Representatives. At the next session of Congress a similar section was added to the Indian appropriation act for the fiscal year 1871, with the additional provision that nothing in the act should ratify, approve, or disaffirm any treaty made since July 20, 1867, "or affirm or disaffirm any of the powers of the Executive and Senate over the subject." The entire section, however, was inadvertently omitted in the enrollment of the bill, and was not formally enacted until the passage of the appropriation act for the fiscal year 1872 (16 Stat. L., 570).
>
> Probably one of the reasons for the refusal of the House to agree to the treaty provisions was its distrust of the administration of the Office of Indian Affairs, for it was during the debate on this bill that General Garfield made his scathing indictment of that Office. * * * (PP. 55–56.)
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> *Discontinuance of treaty making, 1871.*—When the appropriation bill for the fiscal year 1871 came up in the second session of the Forty-first Congress the fight of the previous year was renewed, the Senate insisting on appropriations for carrying out the new treaties and the House refusing to grant any funds for that purpose. As the end of the session approached it appeared as if the bill would fail entirely, but after the President had called the attention of Congress to the necessity of making the appropriations, the two houses finally reconciled their differences.
>
> The strong fight made by the House and expressions of many members of the Senate made it evident that the treaty system had reached its end, and the Indian appropriation act for the fiscal year 1872, approved on March 3, 1871 (16 Stat. L., 566), contained the following clause, tacked on to a sentence making an appropriation for the Yankton Indians: "*Provided,* That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further,* That nothing herein

[546] See Chapter 2. sec. 2. for excerpts from commissioners' reports advocating termination of the treaty system.

[547] *Ibid.*

[548] 15 Stat. 7, 9. Also see Act of April 10. 1869. sec. 5. 16 Stat. 13, 46. Tbe first annual report of tbe Board of Indian Commissioners submitted late In 1869, and the annual report of the Commissioner of Indian Affairs for the same year recommended the abolition of the treaty system of dealing with the tribes. Kinney, A Continent Lost—A Civilization Won (1937), PP. 148. 169. 160.

[549] Act of July 20, 1867, 16 Stat. 18.

contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." (P. 58.)[549]

[549] Schmeckebier, Office of Indian Affairs, 1927, pp. 56–58, Act of March 3, 1871, 16 Stat. 544, 566, R. S. § 2075. 25 U. S. C. 71. See also the statement of former *Commissioner* of Indian Affairs, Francis *A.* Walker, who wrote in 1874:

> In 1871. however. the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate--of determining, in connection with the executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion. for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles, of the declaration * * * (pp. 11–12). that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty." (P. 5.) (Walker, The Indian Question. 1874.)

Following this enactment, a congressional committee was appointed to Prepare a compilation of treaties still in force. Act of March 3. 1873. 17 stat. 675.

SECTION 6. INDIAN AGREEMENTS

The substance of treaty-making was destined, however, to continue for many decades. For in substance a treaty was an agreement between the Federal Government and an Indian tribe. And so long as the Federal Government and the tribes continue to have common dealings, occasions for agreements are likely to recur. Thus the period of Indian land cessions was marked by the "agreements" through which such cessions were made.[550] These agreements differed from formal treaties only in that they were ratified by both houses of Congress instead of by the Senate alone.[551] Like treaties, these agreements can be modified,[552] except that rights created by carrying the agreement into effect cannot be impaired.[553] In referring to such an agreement, Justice Van Devanter said:[554]

> But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also of the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable, Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases, 203* U. S. 76, 93. It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. *Stephens v. Cherokee* Nation, 174 U. S. 445, 488; *Cherokee Nation v. Hitchcock,* 187 U. S. 294; Wallace v. *Adam.* 204 U. S. 415. 423. (P. 648.)

Legislation based upon Indian consent does not come to an end with the close of the period of Indian land cessions and the stop page of Indian land losses in 1934. For in that very year the underlying assumption of the treaty period that the Federal Government's relations with the Indian tribes should rest upon a basis of mutual consent was given new life in the mechanism of federally approved tribal constitutions and tribally approved federal charters established by the Act of June 18, 1934.[555] Thus, while the form of treaty-making no longer obtains, the fact that Indian tribes are governed primarily on a basis established by common agreement remains, and is likely to remain so long as the Indian tribes maintain their existence and the Federal Government maintains the traditional democratic faith that all Government derives its just powers from the consent of the governed.

[550] Such agreements are exemplified by the Act. of April 29, 1874, with the Utes, 18 *Stat.* 36; *Act* of July 10, 1882. with the Crows, 22 Stat. 157; Act of March 1, 1901, with the Cherokees, 31' Stat. 848. The propriety of legislation dependent upon Indian consent was questioned for a time but apparently doubts were set at rest, and the practice of legislating on the basis of Indian consent became solidly established. See G. F. Canfield, Legal Position of the Indian (1881). 16 Am. L. Rev. 21, 25.

[551] Thus In *Dick v. United States, 208* U. S. *340, 859* (1908). the Supreme Court upheld the constitutlouallty of a prohibition against introduction of liquor into certain ceded lands. which was contained in an agreement of 1893 with the Nez Perce Tribe. as "a valid regulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians."

Even the wording of statutes providing for the negotiation of agreements sometimes discloses their kinship with treaties For example, the Act of May 1, 1876, 19 Stat. 41.45. provides for the payment of a commission "to treat with the Sioux Indians for the relinquishment of the Black Hills country in Dakota Territory."

[552] The Supreme Court in the case of United *States v. Seminole Nation,* 299 U. S. 417, 428 (1537). said:

> * * * "That gre That Congress had the power to change the terms of the agreement and authorize these payments, is well established. * * *" *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564–567.

The Attorney General has said, 26 Op. *A.* G. 340. 347 (1907):

> . . . Certainly if, as has been often adjudged, Congress may abrogate a formal treaty with a sovereign nation (*Chinese Exclusion case,* 130 U. *S.*. 581: *Horner* v. *United States,* 143 U. S., 678: *Fong Yue Ting* v. *United States,* 149 U. 8.. 706; *La Abra Silver Mining* Co. v. United *States,* 175 U. S.. 460). it may alter or repeal an agreement of this kind with an Indian tribe.

In considering whether it has been superseded by a general law, an agreement has been accorded the same status as a special law. Marlin v. *Lewallen,* 270 U. S. 58. 67 (1928). Accord: *Longest* v. *Langford,* 276 U. S. 69 (1928).

[553] *Choate* v. *Trapp*, 224 U. S. 665. 671 (1512).

[554] *Gritts v. Fisher*, 224 U. S. 640. 648 (1912). quoted with approval *In Sizemore v. Brady*, 235 U. S. 441, 450 (1914).

[555] 48 Stat. 984, 25 U. S. C. 461. et seq., discussed in Chapter 4. sec 16.