UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized Indian tribe, Plaintiff, v. STATE OF SOUTH DAKOTA; et al., Defendants.	)	Civil No. 07-CV-04040

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND OPPOSITION TO THE DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Oral Argument Requested

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COMES NOW the Flandreau Santee Sioux Tribe (hereinafter "Tribe"), a federally-recognized Indian tribe, and files this Brief in Opposition to the Defendants State of South Dakota, et al.'s Motion for Judgment on the Pleadings and Request for Judicial Notice. For the reasons set forth below, the Tribe respectfully requests that the Court deny the Defendants' Motions.[1]

LEGAL STANDARDS

I. Standard For Motion for Judgment on the Pleadings, Fed. R. Civ. P. 12(c)

A motion for judgment on the pleadings is reviewed under the standard governing motions to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Thus, all well-pleaded factual allegations contained in the complaint are taken as true. *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992). A complaint may only be dismissed if it is blatantly clear that the plaintiff can prove no set of facts in support of the claims which would entitle the plaintiff to relief. *Id.*

II. Standard For Dismissal Pursuant to Fed. R. Civ. P. 12(b)(7)

Federal Rule of Civil Procedure 12(b)(7) provides that a party may move to dismiss a claim for failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7). Federal courts in the

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[1] In regard to the State's Request for Judicial Notice pursuant to Fed. R. Evid. 201, the Tribe disputes that Exhibits 9, 10 and 11, as set forth in Doc. 103, are encompassed by Rule 201 because they are not adjudicative facts. Rule 201, on its face, is limited to judicial notice of "adjudicative facts." Adjudicative facts are "the ultimate facts in the case, plus those evidential facts sufficiently central to the controversy that they should be left to the jury unless clearly indisputable." *Snell v. Suffolk County*, 782 F.2d 1094, 1105-06 (2d Cir. 1986).

Assuming *arguendo* that the Court takes judicial notice of Exhibits 9, 10 and 11, the Exhibits should be noticed "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mutual Ins. Co. v. Roches Port Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992). Thus, should the Court decide to take judicial notice of these Exhibits, the Court should specify that judicial notice is taken not for the truth of the matter asserted in the Exhibits, but rather to establish the fact of such other litigation.

Eighth Circuit have determined that "[t]he proponent of a motion to dismiss under Fed. R. Civ. P. 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *De Wit v. Firstar Corp*., 879 F.Supp. 947, 992 (N.D. Iowa 1995); *Sykes v. Hengel*, 220 F.R.D. 593, 595-96 (S.D. Iowa 2004); *cf. Pinson v. Depco*, 602 F.Supp. 27, 29 (D.S.D. 1985) (stating Rule 19 motion would be dismissed because the proponent of the motion did not meet its burden). This burden may be satisfied by bringing forth "affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." *De Wit*, 879 F.Supp. at 992.

BACKGROUND

The Tribe notes that the allegations contained in the Tribe's Complaint (Doc. 1 ¶¶ 13-47), must be taken as true. *McCormack v. Citibank, N.A*., 979 F.2d 643, 646 (8th Cir. 1992). However, for the Court's convenience, the Tribe recites the following pertinent facts and, thereafter, will clarify or dispute any assertions contained in the State's Motion that are incorrect or legally insufficient.

I. Facts and Procedural History

In approximately May 2005, the Tribe asked the State to engage in negotiations with it concerning the execution of a new Tribal-State Compact. (Doc. 1 ¶ 27.) From December 30, 2005 through January 11, 2007, the Tribe participated in six negotiation sessions with representatives of the Governor of the State of South Dakota. (Doc. 1 ¶ 28.) These representatives include members of the staff of Larry Long, the South Dakota Attorney General, and officials of and the Executive Director of the South Dakota Commission on Gaming, a division of the South Dakota Department of Commerce and Regulation, which is responsible for regulating the gaming industry in the State of South Dakota. (*See* Doc. 1 ¶¶ 10-12.)

Throughout the negotiations, the Tribe submitted evidence to establish that while the Tribe is limited to 250 slot machines, the State has authorized some 3,000 machines in the City of Deadwood and authorized the operation of more than 8,500 video lottery terminals throughout the State. (Doc. 1 ¶ 29.) The Tribe submitted evidence to establish that the State has declared it lawful for a single gaming facility—Deadwood Resorts, LLC—to operate 360 slot machines in addition to the 3,000 slot machines currently operated in Deadwood. (Doc. 1 ¶ 30.) However, based upon, *inter alia*, the State's unsupported assertions that South Dakota's public policy only authorizes limited gaming and that allowing the Tribe more than 250 slot machines would violate this public policy, the State has not agreed to eliminate or increase the slot machine limit. (Doc. 1 ¶ 31.) The State also has refused to negotiate a Compact for a term longer than six years based upon its unsupported assertion that a Compact of a longer term is not "consistent with our public policy" because "the policy of this as far as state government has been concerned through four administrations is that no governor was willing to bind a future governor to something that the next governor couldn't address at some point during his or her term in office and that's why it's [the Compact length] been limited at four." (Doc. 1 ¶ 28 at Ex. 6 at 44:5-11 and at Ex. 7 at 5:6-7; Doc. 1 ¶ 31.) As stated above, the Tribe's causes of action arise under the IGRA and the Equal Protection Clauses of the United States and South Dakota Constitutions.

II. Current Litigation

IGRA provides that upon an Indian tribe's request, "the State shall negotiate with the Indian tribe in good faith to enter into such [a Tribal-State Compact for the conduct of Class III gaming] a compact." 25 U.S.C. § 2710(d)(3)(A). While IGRA does not expressly define the term "good faith," or address the scope of discovery, IGRA's legislative history recognizes that "it is States, not tribes, that have crucial information in their possession that will prove or

disprove tribal allegation of failure to act in good faith." S.Rep. 100-446, at 14-15 (1988) (emphasis added), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084-85; *see In re Indian Gaming and Related Cases*, 331 F.3d 1094, 1108 (9th Cir. 2003).

Case law interpreting the National Labor Relations Act ("NLRA") may also be examined to determine whether a state negotiated in good faith and the scope of discovery. *In re Indian Gaming and Related Cases*, 147 F.Supp.2d 1011, 1020-21 (N.D. Cal. 2001). The NLRA, like IGRA, imposes a duty upon employers to negotiate in good faith, but does not define the term. *Id.* In the NLRA context, the Supreme Court has determined that the duty to negotiate in good faith "requires more than a willingness to enter upon a sterile discussion of the parties differences." *Id.* (quoting *NLRB v. Am. Nat'l Ins. Co*., 343 U.S. 395, 402 (1952)).

When reviewing a bad faith claim under the NLRA, courts "examine the entire conduct of the parties." *NLRB v. Coast Engraving Co., Inc.,* No. 87-7152, 1988 WL 111471, *1 (9th Cir. Oct. 13, 1998) (citing case); *NLRB v. Hardesty Co., Inc.*, 308 F.3d 859, 865 (8th Cir. 2002). Inquiry into the defendant's "motive or state of mind during the bargaining process" is usually required as well, because "it would be extraordinary for a party directly to admit a 'bad faith' intention" and motive "must be ascertained from circumstantial evidence." *Seattle-First Nat'l Bank v. NLRB*, 638 F.2d 1221, 1225 (9th Cir. 1981); *see, e.g., Hardesty*, 308 F.3d at 865-66.

As to the Tribe's equal protection claim, the Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. This is "essentially a direction that all persons similarly situated should be treated alike," and that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *City of Cleburne v. Cleburne Living Ctr*., 473

U.S. 432, 439 (1985). Likewise, the Equal Protection Clause of the South Dakota Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. Const. art. VI, § 18.

III. The State's Unsupported or Incorrect Assertions

First, the State alleges that the Tribe's Complaint is based primarily on IGRA. The State failed to mention that the Tribe also brought equal protection claims. (Doc. 1 ¶¶ 54-61.) Second, citing 25 U.S.C. § 2702, the State also asserts that "IGRA is also designed to provide a basis for state involvement in regulating Indian gaming . . . ." (Doc. 102 p.5.) However, there is no mention of state involvement in Section 2702.

Third, the Tribe disputes the State's recount of the history of gaming in South Dakota. Specifically, the Tribe disputes the State's assertion that "[t]oday, South Dakota permits limited state lotteries, video lottery, card games, slot machines, pari-mutuel dog and horse racing, and simulcasting." (Doc. 102 p.8.) The Tribe has specifically alleged that gaming in South Dakota is *not* limited.[2] (Doc. 1 ¶¶ 31, 37, 38.) In ruling on the State's Motion for Judgment on the Pleadings, this allegation must be taken as true.

Fourth, the State implies that throughout the compact negotiations, the only proposal that the Tribe submitted to the State was that it be allowed to operate an unlimited number of slot machines. (Doc. 102 p.10.) Not true. The Tribe has provided the State with numerous proposals, one of which being that the number of slot machines be tied to the Tribe's monetary investment. (Doc. 1 ¶¶ 34-35.) Therefore, the Tribe disputes the State's assertion that the Tribe

[2] Again, it is undisputable that the State has authorized some 3,000 machines in the City of Deadwood and authorized the operation of more than 8,500 video lottery terminals throughout the State. (Doc. 1 ¶ 29.)

"failed to provide the State with any meaningful justifications for its extraordinary claims and demands" (Doc. 102 p.11), and disputes the State's characterization of the Tribe's negotiating posture (Doc. 102 p.11). (Doc. 1 ¶¶ 34-35; *see generally* Doc. 1.)

Finally, the Tribe disputes the State's recitation of the so-called "limited" nature of gaming in South Dakota. (Doc. 102 p.11.) As to those assertions that are unsupported, those assertions must be disregarded if contrary to the Tribe's Complaint. Of particular note is the State's suggestion that the Tribe's casino does not have any competition. To the contrary, as alleged in the Tribe's Complaint, the Tribe competes with casinos in the bordering States of Iowa and Minnesota. (Doc. 1 ¶¶ 38, 40.) The Tribe also disputes the State's assertion and characterization of a "numerical" limitation on Deadwood gaming (Doc. 102 p.12). These assertions are contrary to the Tribe's Complaint and must be disregarded. (Doc. 1 ¶¶ 29, 30, 37, 38.)

ARGUMENT

I. Fed. R. Civ. P. 19 is Not Implicated in This Case

The State first moves to dismiss the Tribe's Complaint in its entirety on the ground that, pursuant to Fed. R. Civ. P. 19, the Tribe has failed to join the other federally-recognized Indian tribes that have gaming operations located in the State of South Dakota. As set forth below, the other Indian tribes, which the State terms "Gaming Tribes," are not necessary[3] parties and, therefore, cannot be indispensible parties.

[3] The Tribe acknowledges that the language of Fed. R. Civ. P. 19(a) refers to a necessary party as a "required party," but will continue to refer to the analysis under Rule 19(a) as "necessary" parties because the term "necessary party" is utilized in the case law discussed herein. Also, the Supreme Court has recognized that "necessary party" "is a term of art whose meaning parallels Rule 19(a)'s requirements." *Orff v. U.S.*, 545 U.S. 596, 602-03 (2005).

A Rule 19 challenge involves a two-step inquiry. *E.g., City of Marietta v. CSX Transp., Inc*., 196 F.3d 1300, 1305 (11th Cir. 1999). The Eighth Circuit has determined that the first step in ruling on a Rule 19 motion is to determine whether a party is "necessary." *Gwartz v. Jefferson Memorial Hosp. Ass'n,* 23 F.3d 1426 (8th Cir. 1994) ; *see, e.g., Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-118 & n.12 (1968). Only if a party is determined to be a "necessary" party *and* joinder is not feasible do courts proceed to determine the second step to determine whether the action may proceed in the party's absence under Rule 19(b). *Pujol v. Shearson Am. Ex., Inc*., 877 F.2d 132, 134 (1st Cir. 1989); *see, e.g., CSX Transp., Inc*., 196 F.3d at 1305; *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 789 F.Supp. 1201, 1207-08 (D.N.H. 1992).

A. The Gaming Tribes Are Not Necessary Parties Pursuant to Fed. R. Civ. P. 19(a)

A party is necessary pursuant to Rule 19(a) if it meets the following criteria:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action may;
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a). The State did not specifically enumerate the Rule 19(a) sections that it asserts are applicable.

i. The Gaming Tribes Have Not Claimed a Legally-Protected Interest in this Action

The State first appears to claim that the Gaming Tribes are necessary parties because they have an interest in this litigation and their existing gaming compacts would be "practically impaired by the relief sought by FSST [the Tribe]" (Doc. 102 at p.16.) This assertion appears to

be based on Rule 19(a)(1)(B)(i). However, that section is predicated on the necessary party "claim[ing] an interest relating to the subject of the action . . . ." Fed. R. Civ. P. 19(a)(1)(B)(i). Here, none of the Gaming Tribes have "claimed" a legally protected interest relating to the subject of this action, and the State has brought forth no evidence to indicate that the Gaming Tribes are unaware of this action. Thus, that section is not applicable in this case.

Moreover, the State's assertion regarding the Gaming Tribes' positions is unreliable and speculative, at best, because it is hearsay. There is no indication that *the State's position regarding the Gaming Tribes' position* is in fact the Gaming Tribes' position. Also, the State lacks standing to raise these claims on behalf of the Gaming Tribes. Even if the State had standing, the substantive claim that the State promotes—that this lawsuit impacts the other Gaming Tribes—is unsupported. It is highly doubtful that the Gaming Tribes' rights or obligations *will* be ultimately determined in this case. Also, any such interest must be more than a financial stake in the litigation and must be more than speculation about a future event. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Here, the State has brought forth no evidence to establish that such an interest exists. Nor has the State, even assuming that a legally-protected interest is found to exist, brought forth any evidence to establish that the Gaming Tribes will be "impaired or impeded" by this lawsuit. *Id.*

ii. Complete Relief May Be Accorded in the Gaming Tribes' Absence

The State also appears to assert that the Gaming Tribes are necessary parties pursuant to Rule 19(a)(1)(A) because, the State asserts, the relief the Tribe seeks "could leave the State subject to a substantial risk of inconsistent obligations." (Doc. 102 p.18.) The essence of the Tribe's action is that the State has bargained with *the Flandreau Santee Sioux Tribe* in bad faith and treated *the Flandreau Santee Sioux Tribe* differently than other non-Indian gaming operators

located in the State of South Dakota. While the Gaming Tribes may also possess such claims against the State, the evidence and result in this case is pertinent to the Flandreau Santee Sioux Tribe.

The State's assertion of inconsistent obligations is based on unsupported assumptions. The State hypothesizes that the Gaming Tribes would also seek the same Tribal-State Compact terms as the Tribe receives. But, in the next breath, the State concedes that each gaming compact "creates separate and distinct interests that each Gaming Tribe independently possesses." (Doc. 102 p.18.) The State's speculation about future events is not sufficient to render the Gaming Tribes necessary parties. *Northrop Corp. v. McDonnell Douglas Corp*., 705 F.2d 1030, 1046 (9th Cir. 1983). Also, the argument that the Gaming Tribes' rights and obligations under its compacts, which are separate agreements, may be affected by this action does not render the Gaming Tribes "necessary." *Ferrofluidics*, 789 F.Supp. at 1208-09.

Like many lawsuits, the Gaming Tribes may be interested in this litigation in the colloquial sense, unlike the legal sense, but complete relief may certainly be provided to the parties to this action without joining other parties. Accordingly, because the Court may fashion complete relief as to the existing parties in the Gaming Tribes' absence, the Gaming Tribes are not necessary parties. *Northrop Corp. v. McDonnell Douglas Corp*., 705 F.2d 1030, 1043 (9th Cir. 1983).

B. Rule 19(b) Need Not Be Examined and, in any Event, the Gaming Tribes are Not Indispensible

i. The State Has Not Met Its Burden of Establishing the Rule 19(b) Factors

A Rule 19(b) analysis is not required where Rule 19(a) is not satisfied. *E.g., Makah*, 910 F.2d at 559; *Pujol*, 877 F.2d at 134. Here, because the State has not met its burden of

demonstrating that the Gaming Tribes are necessary parties under Rule 19(a), an analysis of Rule 19(b) is unnecessary. However, even if Rule 19(a) were satisfied, the Gaming Tribes are not indispensible parties pursuant to Rule 19(b).

It is clear that none of the Gaming Tribes' rights and obligations will be determined in this action, to which they are not a party. *See Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc*., 564 F.2d 816, 819 (8th Cir. 1977). Thus, the Gaming Tribes cannot be prejudiced by the disposition of this case. *See* Fed. R. Civ. P. 19(b)(1). The State's argument to the contrary is based purely on speculation.

The State argues that the Gaming Tribes will be prejudiced because they will suffer a decrease in market share or diluted gaming device value if the Tribe prevails. (Doc. 102 p.20.) Any such assertion is disputed, and the Tribe has specifically alleged that the market can bear additional gaming devices. (Doc. 1 at ¶ 40.) Thus, the State's assertion of prejudice is unsupported and speculative and must be disregarded.

Also, as to the State, this litigation will not adjudicate the other Gaming Tribes' rights or obligations under their existing gaming compacts with the State. *Id.* Regarding the State's future compacts with the Gaming Tribes, any determination as to those compacts will be based upon negotiations between that particular tribe and the State and the parties' voluntary execution of that compact. *Id.* Thus, no prejudice results and, as such, the second factor need not be considered. *See Rishell v. Jane Phillips Episcopal Mem'l Med. Center*, 94 F.3d 1407, 1412 (10th Cir. 1996) (stating that the third factor need not be considered because the prejudice was minimal).

As to the third factor under Rule 19(b), it "allows the court to consider whether the relief it grants will prove an adequate remedy for the plaintiff." *General Refractories Co. v. First State*

Ins. Co., 500 F.3d 306, 320 (3rd Cir. 2007). In the absence of the Gaming Tribes, a judgment rendered as to the rights and obligations arising out of the State's negotiation of a gaming compact with the Flandreau Santee Sioux Tribe would be adequate. Fed. R. Civ. P. 19(b)(3); *see Helzberg's Diamond* Shops, 564 F.2d at 819. The State does not appear to argue to the contrary.[4] (*See* Doc. 102 pp.19-21.)

Finally, the fourth factor under Rule 19(b)—"whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder"—also weighs in the Tribe's favor. Should this action be dismissed, the Tribe has no other forum in which to bring its claim. The State's contention that the Tribe has an adequate remedy—continue to negotiate—is preposterous. As set forth in the Tribe's Complaint, the Tribe has engaged in negotiations with the State for years, to no avail. The Tribe also participated in Court-sponsored mediation in this Court on August 21 and 22, 2008. These mediation attempts were unsuccessful. Thus, any indication that further negotiations would be successful is highly unlikely.

Therefore, even if an analysis under Rule 19(b) were appropriate, the factors therein weigh in favor of the action proceeding.

ii. The California Cases to Which the State Cites are Inapposite

The State mistakenly relies upon three California district court cases to support its argument that the Rule 19(b) factors weigh in favor of dismissal. In so doing, the State disregards several crucial facts regarding those cases that distinguish them from the case at bar.

The statutory scheme concerning Class III gaming in California is quite unlike that in South Dakota. In California, in 1999, some fifty-eight Indian tribes executed model tribal-state

[4] The State's citation of the third factor varies from the text of Rule 19(b)(3). (*See* Doc. 102 p.19.) Rule 19(b)(3) states that the court should consider "whether a judgment rendered in the person's absence could be adequate."

compacts with the State of California governing Class III gaming. All of these compacts contain a provision setting forth a formula to calculate the maximum number of slot machines that the tribes are allowed to operate. Thus, approximately fifty-eight tribes are bound by a statewide aggregate number of slot machines. The formula for calculating the statewide aggregate number of slot machine device licenses available is as follows:

> (1). The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(Doc. 104-4 pp.6-7 at ¶ 16.)[5]

In 2004, five Indian tribes renegotiated their tribal-state compacts with the State of California. (Doc. 104-3 p.35.) As pertinent to this case, the five amended compacts contain no device limitation and, thus, those five tribes would be allowed to operate unlimited slot machines. *Id.*

The three cases to which the State cites involve cases wherein the Indian tribe plaintiff has a model compact with the State of California containing this statewide aggregate machine limitation. (Docs. 104-2 pp.4-6 at ¶¶ 7, 14, 15; 104-3 pp.7-8 at ¶¶ 28-30; see 104-4 p.3, 4 at ¶¶ 4, 8.) In *Cachil Dehe Band of Wintun Indians v. California*, No. 04-2265, 2006 WL 1328267, slip op. * 1 (E.D. Cal. May 16, 2006), the Cachil Band brought action against California challenging, *inter alia*, the number of device licenses to which it was entitled from the aggregate pool. *Id*. at slip op. *4. Thereafter, California brought a motion for judgment on the pleadings, alleging that some of the Band's claims should be dismissed for failure to join necessary and indispensible parties. Namely, California sought dismissal of the Band's claim seeking declaratory relief

[5] References to the pages numbers contained in Document numbers 104-2, 104-3 and 104-4, are to the ECF page numbers contained on the top right hand corner of the filed documents.

concerning the number of device licenses out of the statewide pool that should be allocated to the Band. *Id.*

The district court in that case determined that all of the fifty-six Indian tribes that had executed identical compacts as the Cachil Band that are bound by the statewide aggregate device license limit were necessary parties to the action. *Id*. In so holding, the district court found as follows:

> [P]laintiff requests the court allocate licenses from a finite number of available licenses. An order to issue any additional licenses to plaintiff would necessarily and practically impair the rights of the other Compact Tribes who would be deprived of those licenses and of the opportunity to obtain those licenses. Accordingly, all Compact Tribes are necessary parties to plaintiff's first and second claims for relief.

Id. The court also determined that the absent tribes were indispensible because, *inter alia*, the absent tribes would be prejudiced by the plaintiff's requested relief. *Id.* *6. The court reasoned that "[t]o the extent that plaintiff seeks the award of additional gaming device licenses, that award would come at the expense of the absent tribes because of the finite nature of the gaming devices that all tribes may license." *Id.* The Band appealed the district court's dismissal and that appeal is pending in the Ninth Circuit. *Cachil Dehe Band of Wintun Indians v. California*, Case No. 06-16145 (9th Cir.). The case was argued and submitted for the Ninth Circuit's consideration on April 9, 2008. *Id.*

Likewise, the *Rincon Band* and *San Pasqual Band* cases also involved, *inter alia*, Indian tribes that had executed the 1999 model compacts that contain the same statewide aggregate device clause as the Cachil Band's compact. (Docs. 104-3 pp.7-8, 18 at ¶¶ 28, 30, 87-89; 104-4 pp.2, 3 at ¶¶ 1, 4.) Both of those tribes also challenged California's calculation of the aggregate number of statewide licenses and sought a judicial determination as to the correct number of licenses to which it was entitled from the statewide pool, *inter alia*. (104-3 pp.10, 26 at ¶¶ 41,

131-32; Doc. 104-4 p.14.) Here again, in both cases, California sought to dismiss the complaints, arguing, *inter alia*, that the other Indian tribes located in the State of California were necessary and indispensible parties pursuant to Rule 19. (Docs. 104-3 p.31-32 at ¶¶ 2, 7, 10; 104-4 p.14.) In *Rincon*, the tribe also argued that the five tribes with the 2004 compacts, which contain no device limitation, will impair the tribe's existing compact. (Doc. 104-3 pp.24-25 at ¶¶ 115-120.) Thus, the Rincon Band also requested, *inter alia*, that the court declare the 2004 compacts to be void. (Doc. 104-3 p.27 at ¶ 1.)

In *Rincon*, the district court determined that the five tribes were necessary parties because their recently drafted 2004 compacts were the subject of the lawsuit and the suit's disposition impaired their ability to protect their interests. (Doc. 104-3 p.38.) Also, the district court found that the Rincon Band admittedly sought to invalidate the five tribes' compacts. *Id*. The court found that the five tribes could not be joined because of their sovereign immunity and that they were indispensible. *Id.* pp.40-41. In holding that the tribes were indispensible, the court found, *inter alia*, that the tribes would be prejudiced and that the prejudice could not be lessened. *Id.* p.42. For those reasons, the court dismissed the Rincon Band's fifth claim for relief (that claim sought a declaratory judgment that no tribe is entitled to an unlimited number of slot machines). (Doc. 104-3 p.36.) Likewise, pursuant to a Fed. R. Civ. P. 54(b) certification, the Rincon Band appealed the district court's Rule 19 ruling to the Ninth Circuit and that case was submitted to the Circuit Court on April 9, 2008. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, Case No. 06-55259 (9th Cir.).

However, the court allowed the Rincon Band's failure to negotiate a claim and others to proceed. (*See generally* Doc. 104-3 at pp.47-55.) On April 29, 2008, the district court issued an order finding, *inter alia*, that California negotiated in bad faith under IGRA. *Rincon Band of*

Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, No. 04cv1151, slip op. 1, 15 (S.D. Cal. Order April 29, 2008), attached hereto as "Exhibit A."

In *San Pasqual Band*, relying on *Cachil Band* and *Rincon Band*, the district court likewise dismissed the Band's complaint for failure to join the other tribes. *See generally, San Pasqual Band of Mission Indians v. California*, No. 06-0988, 2007 WL 935578, at *1 (S.D. Cal. March. 20, 2007). Here again, the court based its necessary party determination on the fact that all of the 1999 compacting tribes were collectively bound by an aggregate number of gaming devices. *Id.* at *7. Based upon the ramifications of the aggregate statewide gaming device limit, the court also determined that the absent tribes were indispensible. *Id.* at ** 11-13. This case is also presently on appeal before the Ninth Circuit. *San Pasqual Band of Mission Indians v. California*, Case No. 07-55536 (9th Cir.).

Although the State acknowledges in its Motion that the above cases concerned compacts containing "a statewide maximum on the aggregate number of gaming devices that all tribes may receive," (Doc. 102 p.21), the State fails to recognize the fatal dissimilarity between these cases and the case at bar. The tribes located in South Dakota are *not* bound by an aggregate maximum statewide number of gaming devices. Thus, the absent South Dakota tribes have no interest that would be impaired, and no rights that are adversely affected by this lawsuit. As was allegedly the case in the California cases, there is no finite number of resources (gaming device licenses) which this Court is being asked to allocate.

Furthermore, the specific claim at issue in the California cases is different than in the case at bar. In those cases, as set forth above, the claims that the courts dismissed pursuant to Rule 19 were based upon a construction of the State Aggregate Limit provision of the tribal-state compacts. And, the California tribes' claims based upon failure to negotiate in good faith under

IGRA, which claim is contained in the Tribe's Complaint in the case at bar, were *not* dismissed on Rule 19 grounds. (Doc. 104-2 pp.17, 32; Doc. 104-3 pp.49-50.) For this additional reason, the California cases are of no persuasive value to this Court.

II. The Tribe's Equal Protection Claims are Viable

The State appears to miscomprehend the Tribe's equal protection claims. First, the State argues that the Tribe's federal and state equal protection claims are foreclosed by the *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) case. However, the State has failed to recognize that the *Seminole* case did not involve an equal protection claim, which renders *Seminole* inapplicable to the case at bar. Also, the State long ago surrendered its common-law immunity from the Tribe's equal protection suit.

A. The *Seminole Tribe* Case is Inapplicable to the Case at Bar

The State has overlooked that *Seminole* is not an equal protection case and does not apply to the case at bar. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996); *Tworek v. U.S.*, 46 Fed. Cl. 82, 87 (Fed. Cl. 2000). The *Seminole* case is limited to two issues: (1) whether Congress, through IGRA, had authority to abrogate states' sovereign immunity, thereby allowing Indian tribes to sue states under 25 U.S.C. § 2710(d)(7) that have not consented to suit; and (2) whether *Ex parte Young* may be used to enforce 25 U.S.C. § 2710(d)(3) against a state official. *Id.* at 47. As distinguished from the case at bar, the IGRA claim was the only claim before the Court. *See generally, id*. The Court's holding regarding *Ex parte Young* is limited to IGRA, as follows: "We further hold that the doctrine of *Ex parte Young*, . . . may not be used to enforce § 2710(d)(3) against a state official." *Id*. at 47 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Contrary to IGRA, an equal protection clause claim is based on discrimination. *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987). Unlike IGRA, the equal protection clause

guarantees against "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In fact, the State appears to recognize the distinction between an IGRA and equal protection claim, as it specifically stated that the Tribe's equal protection claims "are not related to a specific IGRA provision nor are they aimed at clarification or enforceability of compact provisions." (Doc. 102 p.31.)

Here, the Tribe has alleged that the Defendants treat the Tribes differently than other gaming operators (Doc. 1 ¶¶ 36, 45), who are in the same class or are similarly situated to the Tribe (Doc. 1 ¶ 58); that the State has acted with discriminatory intent (Doc. 1 ¶ 45); and the Tribe has alleged specific injuries and harm as a result of the conduct (Doc. ¶¶ 59-60). Clearly, the Tribe has alleged an Equal Protection Clause claim, to which the *Seminole Tribe* case is inapplicable.

B. The Tribe's Equal Protection Claim is Not Foreclosed by the "Person" Language

Next, the State asserts that the Tribe's equal protection claim fails because the Tribe is not a "person." However, the case law to which the State cites to support its position is inapposite, as none of those courts were confronted with an equal protection claim by an Indian tribe. The language contained in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), to which the State quotes, refers to interpretation of the term "white persons" in a statute. *Id*. at 668. Also, the *U.S. v. Antelope*, 430 U.S. 641 (1977) case, to which the State cites, involves the issue of "whether . . . federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians." *Id.* at 642. Also, the *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) case did not deal with equal protection claims. Rather, under the facts of that case, the

Court held that the tribe was not a person under 42 U.S.C. § 1983. However, the Supreme Court in that case did not foreclose the possibility that an Indian tribe may be a "person" under 42 U.S.C. § 1983. The Court specifically noted that there are situations in which sovereigns may bring claims under Section 1983. *Id*. at 711. Thus, the cases that the State cites are inapplicable to the case at bar.

To the contrary, several federal cases, to which the State did not cite, have allowed Indian tribes to bring equal protection act claims. In *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202 (10th Cir. 2006), the Jicarilla Nation brought a complaint alleging, *inter alia*, a violation of the Nation's equal protection rights under the color of state law. *Id.* at 1206. Although the Nation's equal protection claim was ultimately dismissed because, *inter alia*, the Nation was not treated differently than a similarly situated class, the Nation was allowed to conduct discovery regarding discriminatory intent and there was no impediment to the Nation bringing a claim. *See id*. at 1206-07, 1214.

Similarly, the Narragansett Indian Tribe of Rhode Island was allowed to bring an equal protection claim challenging the constitutionality of legislation. *Narragansett Indian Tribe v. NIGC*, 158 F.3d 1335, 1336 (D.C. Cir. 1998). Here again, although the court ultimately determined that the Narragansett Tribe did not meet its burden, the tribe, as a sovereign, was not precluded from bringing suit. *See generally, id*.

In *Queets Band of Indians v. Washington*, 765 F.2d 1399 (9th Cir. 1985), *controversy rendered moot by legislative action*, 783 F.2d 154 (9th Cir. 1986), the tribe brought an equal protection challenge based upon Washington's reciprocity statutes concerning license and registration of automobiles. *Id.* at 1402. While the court found that Washington's reciprocity

statutes were not unconstitutional, there was no impediment in the tribe bringing the action because it was a federally-recognized Indian tribe. *See generally, id*.

Here, the Tribe brought its equal protection claim based upon racial disparity and/or as an aggrieved market participant. The Tribe's equal protection claim is not based upon sovereign rights. Accordingly, the Tribe should not be precluded from bringing its equal protection claim.[6]

C. By Adopting the Constitution, the State of South Dakota Waived Immunity as to Claims by Indian Tribes

In addition to the three exceptions to a state's sovereign immunity from suit, those being congressional abrogation, state waiver, suits against individual state officers for prospective relief, *see Papasan v. Allian*, 478 U.S. 265, 276 (1986), the Supreme Court has implied that there may be a fourth exception. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). This fourth exception concerns the states' surrender of immunity in adopting the federal Constitution. In *Blatchford*, the plaintiff tribes argued that "the States have consented to suits by tribes in the 'plan of the convention.'" *Id.* at 779. Therein, the tribes asserted that they were more like sister states than foreign nations. The Court rejected this argument, holding that "[w]hat makes the State's surrender of immunity from suit by sister States plausible is the mutuality of concession of immunity," and that there is no such mutuality with Indian tribes. *Id*. at 782. This is not the argument that the Tribe makes in connection with *Blatchford*.

Instead, the Tribe asserts that with ratification of the Constitution, the states surrendered all sovereignty over the entire subject area of Indian affairs. This complete surrender of sovereignty included a surrender of the states' ability to assert sovereign immunity. Although

[6] The Tribe firmly rejects the State's assertion that "the State actually provides FSST with *special treatment* regarding Class III gaming." Doc. 102 p.28. *The State* does not provide the Tribe with any special treatment. The Tribe's ability to conduct gaming is derived from its sovereign status and federal law. Nonetheless, the Tribe's equal protection claim does not pertain to its sovereign status. Clearly, the State misapprehends the nature of this claim.

courts have never addressed this issue, the Supreme Court has held that it is "free to address [an] issue on the merits," that it has "never squarely addressed." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see also Central Virginia Cmty College v. Katz*, 546 U.S. 356, 363 (2006) (stating that the Court is free to review its assumptions).

It is clear that prior to the states' adoption of the Constitution, colonists conducted relations with Indian tribes through treaties and by entering into contracts. *See generally* Felix S. Cohen, Handbook of Federal Indian Law ("Handbook"), pp. 46-67 (1942), attached hereto as "Exhibit B." Under the Articles of Confederation, each individual state had authority to act in its own sovereign capacity while treating, compacting, or contracting with the ancient sovereigns of America. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985). However, the Articles did not squarely address whether states or Congress had the power to deal with the sovereign Indian tribes. This issue was addressed at the Constitutional Convention and, thus, in Article I, Section 10 and Article II, Section 2, clause 2, of the Constitution, the individual states surrendered their former sovereign right to engage in treaty making with Indian Nations. States also surrendered the right to wage war and regulate commerce with Indian Nations. U.S. Const. art. I, § 8, cl. 3; *see generally*, U.S. Const. art. I, § 8. Since then, all three branches of government have recognized that the surrender to the federal government of sovereign power vis-à-vis Indian tribes is complete. *E.g., Rice v. Cayatano*, 528 U.S. 495, 532 (2000); *Morton v. Mancari*, 17 U.S. 535, 551-52 (1974).

The states' surrender of sovereignty in the plan of the Convention necessarily includes a concomitant surrender of sovereign immunity to suits by Indian tribes. When states surrendered their sovereignty over the entire field of Indian affairs, they necessarily surrendered the attributes of that sovereignty, including sovereign immunity. *See Seminole Tribe*, 517 U.S. at 68 (stating

immunity is an attribute of sovereignty). The Founding Fathers recognized the full extent of this surrender. *See* Federalist Number 32 (Hamilton), attached hereto as "Exhibit C" (stating that the states retained the rights of sovereignty which they had before the Convention that were not exclusively delegated to the United States). Federal courts routinely recognize states' complete lack of authority over Indian tribes—except where Congress provides otherwise. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1984). Thus, the State is unable to assert immunity as to the Tribe's claims.[7]

D. Dismissal of the Tribe's Federal Equal Protection Claim Does Not Affect the Court's Jurisdiction Over the State Law Claim

Next, the State asserts that the Tribe's state law claim must be dismissed because the Court lacks supplemental jurisdiction over this claim. In support of this argument, the State first incorrectly asserts that the Tribe "relies on 28 U.S.C. § 1343(3) and 28 U.S.C. § 1362 to provide federal jurisdiction." (Doc. 102 p.29.) The State ignores that the Tribe specifically asserted that federal jurisdiction is also based upon federal question jurisdiction, 28 U.S.C. § 1331. (Doc. 1 ¶ 3.) Regardless of whether the Tribe's equal protection claim survives, the State disregards that the Tribe has brought a claim that arises under a federal statute, 28 U.S.C. § 1331—IGRA. Thus, the State's assertion that the Tribe's "equal protection claim based on the Fourteenth Amendment eliminates the jurisdictional foundation for the remaining state law claims" (Doc. 102 p.30), is absolutely incorrect.

[7] Unlike the states, Indian tribes did not join the Union. Accordingly, unlike the states, the tribes did not surrender any aspect of their immunity in the plan of the Convention. With the exception of the greater authority of the United States, the tribes retained all aspects of their pre-existing sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

E. The Tribe's State Law Claim is Encompassed by 28 U.S.C. § 1367

The State also mistakenly argues that the Court does not have supplemental jurisdiction over the Tribe's state law claim because the Tribe's state law claim does not share a "common nucleus of operative fact" with the Tribe's IGRA claim. (Doc. 102 p.31.) A review of 28 U.S.C. § 1367 and the case law interpreting it, along with the Tribe's Complaint, demonstrates that supplemental jurisdiction exists over the Tribe's state law claim.

Section 1367 of United States Code, Title 28 provides as follows:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). The Eighth Circuit has noted that the word "shall" in the phrase "shall have supplemental jurisdiction" is a mandatory command. *McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994).

Claims are part of "the same case or controversy" if they "derive from a common nucleus of operative fact." *Onepoint Solutions, LLC v. Borchert*, 486 F.3d 342, 350 (8th Cir. 2007). The Supreme Court has stated that claims derive from a common nucleus of operative fact where the "claims are such that he would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Here, the Tribe's claims against the State would certainly be expected to be tried together and arise out of the same operative facts—the State's treatment of the Tribe concerning gaming. Although the Tribe's claims may require different burdens of proof, the claims still stem from a single wrong. *ITT Commercial Finance Corp. v. Unlimited Automotive, Inc.*, 814 F.Supp. 664, 669 (N.D. Ill. 1992). Thus, because the claims revolve around a single fact pattern, the claims satisfy 28 U.S.C. §

1367(a). *See White v. County of Newberry, S.C.*, 985 F.2d 168, 172 (4th Cir. 1993) (supplemental claims need only to revolve around a single fact pattern).

III. The Tribe's Federal Constitutional Claim May Proceed Against Defendants Rounds, Long and South Dakota Commission on Gaming Pursuant to *Ex Parte Young*

Finally, the State contends that Defendants Michael Rounds, Larry Long and the South Dakota Commission on Gaming ("SDCG") must be dismissed because the Tribe "has not alleged any specific action taken by these defendants that may be remedied in this action." (Doc. 102 p.32.) However, the State provides no support or further analysis of this assertion. (*See* Doc. 102 pp.32-34.) This lack of support renders the State's burden unsatisfied.

Instead, the State again reiterates that the *Seminole* case forecloses the Tribe from enforcing IGRA via *Ex parte Young*. The State disregards that state officials may be sued in their official capacity for *Equal Protection Clause* violations under *Ex parte Young*. The Supreme Court has determined that where officials act "in a manner that violates the Equal Protection Clause, such actions may be enjoined under *Ex parte Young*." *Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986).

Regarding the State's wholly unsupported assertion that the Tribe has not alleged any specific action taken by the Defendants, the Tribe refers the State to the following allegations in its Complaint. The Tribe has alleged that Michael Rounds, Larry Long and the SDCG are charged with the authority to enter into compacts involving gaming. (Doc. 1 ¶¶ 10-12.) The Tribe has alleged that SDCG has allowed a non-Indian gaming operator to operate 360 slot machines, while the Tribe is only allowed to operate 250. (Doc. ¶¶ 30, 31.) The Tribe also alleged that Governor Rounds has denied the Tribe equal treatment (by way of slot machine

numbers and compact length) based upon the pretext that gaming in the State of South Dakota is limited, *inter alia*. (Doc. 1 ¶¶ 31, 32, 42.)

Furthermore, the Tribe's equal protection claims specifically include Rounds, Long and SDCG, and the Tribe has alleged that each of these Defendants gives preferential treatment to gaming operators other than the Tribe. (Doc. 1 p.1 (stating that all Defendants may be collectively referred to as "the State"); Doc. 1. ¶¶ 54-61.) The Tribe's Complaint also sets forth the harm suffered by these Defendants' actions. (Doc. 1 ¶¶ 59-60.)

CONCLUSION

As to the State's Rule 19 claim, the State has not met its burden under Fed. R. Civ. P. 19 of establishing that the Gaming Tribes are necessary parties to this action, nor has it established that they are indispensible parties. Therefore, the State's claim that this action must be dismissed in its entirety should be denied. Second, the State has not met its burden of establishing that the Tribe can prove no set of facts that entitle it to relief on its equal protection claim. Furthermore, the Tribe's equal protection claim is viable and the doctrine of *Ex parte Young* may be utilized to enforce this claim against Larry Long, Michael Rounds and SDGC. For these reasons, the Tribe respectfully requests that the Court deny the State's Motion (Doc. 102) in its entirety.

DATED: June 16, 2008.

FLANDREAU SANTEE SIOUX TRIBE,
Plaintiff,

By /s/ Shane Thin Elk

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Brief In Opposition To Defendants' Motion For Judgment On The Pleadings And Opposition To The Defendants' Request For Judicial Notice was served via Notice of Electronic Filing on June 16, 2008 on:

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA,

Defendant.

CASE NO. 04cv1151 WMc

ORDER: DENYING IN PART AND GRANTING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT;[DOC. NOS. 173 and 176]

On June 1, 2007, the Rincon Band of Luiseno Indians ("Plaintiff" or "Rincon") and the State of California ("Defendant" or "State") filed cross motions for summary judgment. [Doc Nos. 173-183 and Doc. Nos. 186 and 187.] The parties each seek summary judgment with respect to breach of contract claims, both substantive and procedural, asserted in Plaintiff's First Amended Complaint.[1]

[1]The Federal District Court previously certified for interlocutory appeal the dismissal of two claims reasserted by Plaintiff in its First Amended Complaint solely for the purpose of "preserv[ing] these claims pending resolution at the Ninth Circuit Court of Appeals." [Doc. No. 108 at 4:3-12.] Accordingly, the Court does not consider Plaintiff's Fourth Claim (Declaratory Judgment - Cap of Gaming Device License) and Sixth Claim (Detrimental Reliance) for relief in its determination of the motions for summary judgment. In addition, Plaintiff's Third Claim for relief (Declaratory Judgment - Reversion of Licenses) is not under consideration by the Court as Judge Whelan previously ruled in this matter on

[Doc. No. 108.] Oral argument was held on August 13, 2007. [Minute Entry No. 184 on Docket.] On September 13, 2007, Rincon requested and received authorization to file supplemental briefing in support of its cross motion for summary judgment, and said supplemental briefing was filed on September 19, 2007. [Doc. No.186.] The State filed its reply to the supplemental brief on October 4, 2007. Doc. No. 187.] On February 22, 2008, the Court held a telephonic conference to request additional briefing from both parties regarding the impact, if any, of Propositions 94, 95, 96 and 97 on the issues presented in the parties' cross-motions for summary judgment. [Doc. No. 189.] The parties submitted briefing on the issue in accordance with the Court's request on March 7, 2008 and March 14, 2008.[2] [Doc. Nos. 190-195.]

For the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and Defendant's motion for summary judgment is granted in part.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Indian Gaming Regulatory Act: Class III Tribal-State Gaming Compacts

In 1988, Congress enacted the Indian Gaming Regulation Act ("IGRA" or the "Act"), which sets forth a statutory basis for Indian tribes to offer gaming as a way to encourage tribal economic development, tribal self-sufficiency, and strong tribal government. 25 U.S.C. § 2701(4). IGRA also grants states a role in the regulation of Indian gaming. *Artichoke Joe's v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). ("IGRA is an example of cooperative federalism in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.") (quoting *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1092 (E.D. Cal. 2002).

IGRA creates three classes of gaming. 25 U.S.C. § 2703(6)-(8). Class III gaming, at issue in

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September 21, 2004, that third-party tribes are necessary and indispensable parties to claims affecting other tribal compacts who cannot be joined due to sovereign immunity. [Doc No. 36 at 13:8.] The Court's prior Order is final and the law of the case "govern[ing] the same issue in subsequent stages of the same case." *Christianson v. Colt. Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

[2] After reviewing the supplemental briefing regarding Propositions 94, 95, 96 and 97 (the "Propositions"), the Court will not consider the outcome of the popular vote on the Propositions in the instant ruling. The Court finds that the Propositions are not a part of the administrative record and are irrelevant to the good faith determination to be made by the Court. Because of the Propositions' irrelevance to the determination of good faith, the Court further finds no need to expand the administrative record to include information concerning the Propositions.

the instant action, is the most heavily regulated. Under the Act, Class III gaming is lawful on Indian lands only if three conditions are met: (1) authorization by an ordinance or resolution of the governing body of the Indian tribe and the Chair of the National Indian Gaming Commission; (2) location in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) the existence of a Tribal-State compact approved by the Secretary of the Interior. *Id.* at § 2710(d)(1).

IGRA's Tribal-State compact requirement allows states to negotiate with tribes within the state on issues presented by Class III gaming that affect state interests. *Id.* at § 2710(d)(3)©). IGRA also requires states to negotiate in good faith. *Id.* at § 2710(d)(3)(A). Tribes are allowed under the statute to enforce the state's obligation in federal court. *Id.* at § 2710(d)(7)(A)(I) and (B)(I).[3]

Under IGRA, the court, in determining whether a State has negotiated in good faith:

- *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
- *shall* consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

Id. at § 2710(d)(7)(B)(iii)(I)-(II) (italics added).

If the court finds that the state has not negotiated in good faith, the court is required to order the State and the Indian tribe to conclude a compact within a 60-day period. *Id.* at § 2710(d)(7)(B)(iii). If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit to a court-appointed mediator a proposed compact that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA, Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

B. Tribal-State Compact Approval Process

In September 1999, former California Governor Gray Davis entered into Tribal-State Compacts with approximately 57 federally recognized California Indian tribes - including Rincon. These materially similar Compacts allowed the Tribes, consistent with IGRA, to engage in Class III

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[3]The state of California has consented to such suits by waiving sovereign immunity expressly under California Government Code § 98005. ("[T]he state of California hereby . . . submits to the jurisdiction of the court of the United States in any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations . . . or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment . . . .") Cal. Gov't Code § 98005.

gaming. In order for the Compacts to become effective, voters had to approve Proposition 1A, a voter initiative to amend the California Constitution to address the California Supreme Court's constitutionality concerns articulated in *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585 (1999).

On September 10, 1999, the California Legislature passed Proposition 1A. On March 7, 2000, California voters approved Proposition 1A, amending the California Constitution to provide:

> " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

Cal. Const. Art IV § 19(f); *see also* 25 U.S.C. § 2710(d)(8).

On May 5, 2000, the United States Secretary of the Interior approved the Compacts pursuant to 25 U.S.C. § 2710(d)(8)(A). The Compacts were then published in the Federal Register and took effect.[4] *See* Fed. Reg. 31189 (May 16, 2000); *See e.g. Indian Gaming Related Cases* (Coyote Valley II), 331 F.3d 1094, 1103 (9th Cir. 2003).

C. The Compact Amendment Process: Negotiations between the State and Rincon

Section 4.3.3 of Rincon's Compact with the State expressly states that either a Tribe or the State may request to renegotiate the Compact on the following issues: (1) the number of authorized gaming devices; (2) revenue sharing with non-gaming tribes; (3) the revenue sharing trust fund; and (4) the allocation of gaming device licenses. [Admin. Record, Exh. 42.]

On February 28, 2003, the Davis Administration sent a letter to Rincon and all the Tribes who were a party to the Tribal-State Class III gaming contracts in order to request negotiations to amend Section 10.8 of the Compact. Specifically, Section 10.8 [5] of the Compacts provides a mechanism for

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[4] An additional five compacts, also identical to the Proposition 1A Compacts, were executed before the Governor's submission of the Compacts to the Department of Interior for federal approval. *See* Federal Register March 16, 2000, July 6, 2000 and October 14, 2000.

[5] Section 10.8.3 of the Rincon Compact provides: "(a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated. (b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant

the State and the Tribes to periodically address the adverse effects of off-reservation environmental impacts. [Admin. Record, Exhs. 42 and 44.]

Section 4.3.3 [6] of Rincon's Compact provides the state and the Tribe with a mechanism for renegotiating the Compact on the issues of the authorized number of gaming devices and revenue sharing. [Admin. Record, Exh. 42.] A request for negotiation under Section 4.3.3 had to be made between March 7, 2003 and March 31, 2003. *Id.* On March 8, 2003, Rincon made a formal request to the Davis administration under Section 4.3.3 to negotiate provisions concerning the authorized number of gaming devices, revenue sharing and the allocation of licenses for additional gaming devices. [Admin. Record, Exh. 43.] On March 28, 2003, the Davis Administration also formally requested renegotiation of its Compact with Rincon over a variety of issues, including revenue sharing with the State and the authorized number of gaming devices. [Admin. Record, Exh. 45.]

In October 2003, the California electorate recalled Governor Gray Davis and elected Arnold Schwarzenegger as Governor. Due to the change in administrations, the Davis Administration withdrew its request for renegotiation of Section 10.8 on November 14, 2003. [Admin. Record, Exh. 1.]

On November 21, 2003, Rincon and nine other tribes wrote to the Schwarzenegger Administration to express an interest in continuing the Compact renegotiations previously undertaken with the Davis Administration. [Admin. Record, Exh. 2.] On December 16, 2003, the State of California wrote to Rincon and the nine additional tribes to acknowledge receipt of the November 21, 2003, letter. *Id.*

On January 7, 2004, the Governor appointed Daniel M. Kolkey as the State's compact

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adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith. ©) On or after January 1, 2004 the Tribe may bring an action in federal court under 25 U.S.C. Sec. 2710(d)(7)(A)(I) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith. If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. Sec.2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservations impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

[6] Section 4.3.3 of the Rincon Compact provides: "If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Section 4.3.1 and Section 4.3.2, and their subsections."

negotiator. [Admin Record, Exh. 9.] Shortly after his appointment, Mr. Kolkey commenced negotiations on behalf of the State with a group of five tribes (the "Five Tribes"), *not including* Rincon. The Five Tribes contacted Mr. Kolkey directly and sought amendments to their Compacts. *Id.*

On February 26, 2004, Rincon sent a meet-and-confer letter to the State in accordance with Section 9.1 [7] of the Compact to address the timing of negotiations, Section 10 of the Compact, licensing pool issues and the potential for off-track betting on Rincon's land. [Admin. Record, Exh. 3.]

On April 7, 2004, Rincon attended a negotiation session between the State's negotiator, Mr. Kolkey, and a coalition of various tribes. [Admin. Record, Exh. 9.] However, the April 7, 2004 session was limited to the issue of non-economic modifications to the compacts. *Id.* On April 21, 2004, Rincon requested separate compact negotiations with the State's negotiator. *Id.*

On or about May 12, 2004, the State replied telephonically to Rincon's February 26, 2004 request to meet-and-confer and proposed an available date of June 2, 2004 on which to meet. [Admin. Record, Exh. 4.] On June 2, 2004, Rincon participated in a meet-and-confer session pursuant to Section 9.1 of its Compact with the State's Chief Deputy of Legal Affairs Secretary, Paul Dobson. [Admin Record, Exhs. 7 and 48.] During the session, Rincon discussed its concerns with regard to: (1) the State's alleged failure to comply with Compact Section 4.3.3; (2) the impact of the Davis

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[7] Section 9.1 of the Rincon Compact provides in pertinent part: "Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve dispute that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact as follows: (a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved. (b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time. c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration. (d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact , or failure to negotiate in good faith as required by the terms of this Compact. . . ."

Administration's withdrawal of the request to renegotiate Compact Section 10 .8; (3) the number of gaming device licenses available under the 1999 Compacts; (4) administration of the licensing pool and (5) off-track wagering.[8] [Admin. Record, Exh. 7.]

On June 4, 2004, Mr. Kolkey held a compact negotiation session with Rincon. [Admin. Record, Exh. 9.] A date of July 1, 2004 or July 2, 2004 was proposed for Rincon to attend a further compact negotiation session; however, the meeting ultimately did not go forward. *Id., see also* Admin. Record, Exh.8.] On June 9, 2004, Rincon filed its original complaint in federal court. [Doc. No. 1.]

In a letter dated June 16, 2004 in response to Rincon's concerns about the withdrawal of the Davis Administration's renegotiation request under Compact Section 10.8, the State confirmed that "[it] will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©), on the ground that no agreement amending Section 10.8 has been concluded by the Band by January 1, 2005 as provided by that section." [Admin Record, Exh. 7.]

On November 4, 2005, the parties attended a settlement meeting in San Francisco. [Admin. Record, Exh. 16.] At that meeting, the State made an offer to Rincon to enter into an amendment to the existing Compact. The November 4, 2005 offer modified terms discussed at Rincon's first compact negotiation session with Mr. Kolkey on June 4, 2004. The new offer was as follows:

> "1. The State would agree to allow the Tribe to operate an additional 900 Gaming Devices outside of the licensing pool established in the Tribe's existing compact as long as the total number of Gaming Devices in operation by the Tribe do not exceed 2500 Gaming Devices;
>
> 2. The Tribe would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Tribe to the Revenue Sharing Trust Fund in connection therewith;
>
> 3. The Tribe would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, provided that the average net win is calculated on the basis of all Gaming Devices operated by the Tribe;
>
> 4. The Tribe would pay to the State, for the duration of the compact term, an annual fee equal to 15% of the net win in Fiscal Year 2004 from the Gaming Devices in operation at the Tribe's casino;

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[8] Rincon is no longer asserting a claim based on an alleged failure of the State to negotiate a codicil to the Compact regarding off-track betting. [Doc. No. 108, 4:13-14.]

> 5. The term of the amended compact would be the same as that of the existing compact;
>
> 6. A portion of the Tribe's payment to the State could be designated for San Diego County and CalTrans, which amount would be negotiated between the Tribe and the State. Your letter to Mr. Kolkey suggests that those payments to San Diego County and CalTrans would be pursuant to an intergovernmental agreement with each governmental entity. Although not part of our offer, we are open to negotiating such an arrangement;
>
> 7. Except as set forth in paragraphs 5 and 8, the amendment would contain the same non-economic provisions as the Pala Compact Amendment;
>
> 8. The Tribe will be afforded an exclusivity provision, the terms of which will be subject to further negotiation. Your letter suggests that the exclusivity provisions would be 'similar' to the Pala compact amendment. While we did not specifically offer that, we are open to negotiations on that point."

[Admin. Record, Exhs. 16, 50.]

On January 25, 2006, Rincon responded to the State's offer proposing an increase in gaming machines from 1,000 up to 2,500 with a fee of $4,350 per device. [Admin. Record. Exhs. 19, 20, 50 and 51.] In addition, Rincon proposed that such fees paid be disbursed as follows:

> "First, a portion of the fee representing the Tribe's proportional share of all actual and reasonable regulatory costs (the CGCC budget and the DGC budget) shall be deducted and disbursed to the appropriate State agency.
>
> Second, the remaining fees shall be deposited into an escrow account from which disbursements may only be made pursuant to intergovernmental agreements between the Tribe and eligible local governments and State agencies.
>
> Disbursements can only be made for purposes directly related to mitigation or infrastructure development.
>
> Intergovernmental agreements shall also allow for payment for tribally provided services directly related to additional mitigation, infrastructure development and problem gambling related services."

[Admin. Record, Exh. 19.]

To the extent devices exceeded 2,500, Rincon similarly proposed a $4,350 fee per device with an ability on behalf of the State to renegotiate for a higher rate if such fees were inadequate to cover costs directly related to Rincon Tribal gaming. Rincon also proposed "[c]larifying amendments to Section 4 consistent with CGCC interpretations regarding licenses for devices 351 through 1600." *Id.*

On January 27, 2006, the State informed Rincon by detailed letter that it could not accept its January 25, 2006 proposal. [Admin. Record, Exh. 20.] On May 5, 2006, Rincon submitted a revised offer to the State in response to the State's January 27, 2006 letter. [Admin. Record, Exh. 21.] In the

letter, Rincon identified the differences between the May 5, 2006 offer and the previous January 25, 2006 offer, writing: "The major changes in the offer from the offer on January 25, 2006 are:

> - The request for machine 1,601 to 2,500 @ $4,350 per device has been replaced with two tiers: (1) machines 1,601 to 2,000 @ $4,350 per device per year; and (2) machines 2,001 to 2,500 @ 6,000 per device per year. . . .
>
> - The provision that allows for the funds to be used to pay for or reimburse the Tribe for Tribally funded improvements and programs has been removed.

[Admin. Record, Exh. 21.]

On July 28, 2006, Rincon provided a further letter to the State setting forth additional topics for discussion and resolution between the parties which included the following issues: (1) dispute resolution, (2) local government mitigation of off reservation impacts, (3) tort liability, (4) patron disputes, (5) health and safety, building codes and inspection, (6) financing flexibility, (7) labor, (8) term of the compact, and (9) gaming device testing. [Admin. Record, Exh. 22.]

On September 12, 2006, Rincon attended a compact negotiation session with the State. [Admin. Record, Exh. 29.] Rincon and the State met again on October 5, 2006. [Admin. Record, Exh. 31.] On October 23, 2006, the State extended a revised offer to Rincon by letter indicating that "[t]he terms of this proposal are similar to those accepted by the Pauma and Pala Bands (tribes, like Rincon, that face similar competitive constraints given their location and proximity to the Pechanga band's casino complex) . . . .": [Admin. Record, Exh.35.]

> "A. The State would agree to allow the Band to operate an additional 900 Gaming Devices outside of the licensing pool established in the Band's existing compact as long as the total number of Gaming Devices in operation by the Band does not exceed 2,500 Gaming Devices.
>
> B. The Band would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Band to the RSTF in connection therewith.
>
> C. The Band would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, i.e., flat percentage, sliding scale based on the net win for certain numbers of devices, sliding scale based on levels of net win, etc. provided that the average net win is calculated on the basis of all Gaming Devices operated by the Band.
>
> D. The Band would pay to the State, for the duration of the compact term, an annual payment equal to approximately 10% of the net win in calendar year 2005 from the Gaming Devices in operation at the Band's casino.
>
> E. The term of the amended compact would be extended to December 31, 2025.
>
> F. The State would consider deducting from the Band's payment to the State a portion of such funds designated for San Diego County and/or the California Department of Transportation

for mitigation of off-reservation impacts, which amount would be negotiated between the Band and the State.

G. Except as set forth in paragraphs E and H, the amendment would contain non-economic provisions similar to those in the Pala Compact Amendment, with the understanding that the final terms of each provision shall be subject to negotiation by the Band and the State.

H. The Band would be afforded an exclusivity provision, the terms of which would be subject to further negotiation."

[Admin. Record, Exh.35.]

On October 31, 2006, the State submitted an alternative proposal to Rincon in response to an email inquiry made by Rincon on October 26, 2006. [Admin. Record, Exhs. 36 and 37.] The State offered:"[w]ith no extension of the term of the existing Compact and in consideration of the authorization to operate 400 additional Gaming Devices the Band is not authorized to operate under its existing Compact in order to assure the financial health of the RSTF, the Band would make a flat annual payment to the RSTF of $2,000,000 to maintain its existing 1,250 Gaming Device licenses. In addition, the Band would make an annual revenue sharing payment to the State of 25% of the net win on those 400 additional Gaming Devices." [Admin. Record, Exh. 37.] On November 3, 2006, Rincon informed the State by detailed letter that it could not accept its October 31, 2006 proposal. [Admin. Record, Exh. 38.]

II.

STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 (c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as matter of law. *See* Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Apaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden

in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.)

"The district court may limit its review to the document submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmonving party's position is not sufficient.") Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

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III.

DISCUSSION

A. Good Faith In Compact Amendment Negotiations - Procedural Issues

1. Delay In Responding To Rincon's Request To Meet-And-Confer

Rincon contends that, although it contacted the State to express an interest in negotiations in accordance with the procedure set forth in its Compact, the State was dilatory and cavalier in responding to Rincon even though the State initially acknowledged receipt of Rincon's request and indicated that a representative of the State would "contact you shortly to schedule a meeting." [Rincon Motion, 38-41; Rincon Opposition, 24:4-10; Admin. Record, Exh. 2.] During the period of delay, which lasted approximately three to four months, Rincon contends the landscape of gaming in California changed based on expansive compact amendments negotiated early on between the State and tribes with locations and markets unlike that of Rincon. (Rincon Motion, 38:15-21.)

2. Delay In Contacting The State And Responding To The State's Requests For Information

The State argues that Rincon is responsible for the delays in the negotiation process by failing to contact the State's newly appointed compact negotiator, failing to submit timely proposals and other information needed to hold a productive negotiation session and taking various three-month intervals in which to respond to the State's multiple offers. (State's Motion 16:16-17:25.)

3. No Procedural Breach Of The Duty To Negotiate In Good Faith

From a careful review of the total history of negotiations as documented by the joint administrative record, the Court does not find a procedural violation of the duty to negotiate in good faith. The record demonstrates that both parties were, at times, less than prompt in responding to each other as well as in providing background material to assist in the negotiations. Justifiable delays were caused in November and December of 2003 (a time when Rincon first made its request for negotiations to the Schwarzenegger Administration) due to the transition from the Davis Administration to the new regime. Moreover, Rincon's November 2003 request to negotiate, made under Section 4.3.3 of the Compacts, does not set forth a concrete time period in

which the parties must begin negotiations. Thus, although the Schwarzenegger Administration indicated in its December 16, 2003 letter that it would "shortly" schedule a negotiation meeting with Rincon and the other tribes who co-signed the November 21, 2003 request to negotiate, the Schwarzenegger Administration was under no specific deadline to respond. [Admin. Record, Exh. 2.]

With respect to Rincon's February 26, 2004 meet-and-confer letter to the State under Section 9.1 of the Compact, the State was required to respond to Rincon within 10 days, but apparently failed to do so until May 12, 2004. [Admin. Record, Exhs. 3-4.] From the joint administrative record, it appears the long delay resulted from the parties' mutual attempts to compile documents for the requested meet-and-confer session (Rincon's Motion, 7:5-9, State's Motion 6:7-14, Admin. Record, Exh. 47.) It is clear, however, that despite the delay, the parties did finally meet-and-confer on June 2, 2004. [Admin. Record, Exhs. 5-6.] Because the parties were able to meet and confer in June 2004, as well as meet with the state negotiator in the months and years thereafter, the Court does not find procedural bad faith on the part of the State.

Furthermore, there is no evidence to suggest that, even if the parties had met within 10 days of the February 26, 2004 request to meet and confer, their disagreements over the substantive issues that are the crux of the parties' present impasse would have been resolved. Indeed, because the heart of this litigation lies in the parties' failure to achieve agreement about substantive issues, the Court declines to find procedural bad faith based on the State's initial delay in responding to Rincon's meet-and-confer request under Section 9.1 of the Compact, especially when it appears from the Joint Administrative Record that the parties were communicating by telephone regarding the request and preparing materials necessary for the meet-and-confer session. [Admin. Record, Exh. 47.] *See e.g. Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094,1109-1110 (9th Cir. 2003) (declining to find procedural bad faith as a result of dilatory tactics where the substance of plaintiff's bad faith allegation lay in its objections to substantive compact provisions.)

B. Good Faith In Compact Amendment Negotiations - Substantive Issues

In determining whether a State has negotiated in good faith under IGRA, the Court: (1) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and (2) *shall* consider any demand by the State

for direct taxation of the Indian tribe or on any Indian lands as evidence that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I)-(II).

1. The State's Insistence On Additional Revenue Sharing With Its General Fund

The primary argument advanced by Rincon is that the substance of the offers made by the State during compact re-negotiations amount to an attempt to assess an illegal tax on the Tribe expressly prohibited by Section 2710 (d)(4) of the IGRA. Specifically, Rincon contends the State's insistence on revenue sharing is in bad faith because the State knowingly failed to offer meaningful concessions in exchange for an increased share of the Tribe's gaming revenue. (Rincon's Motion, 25:22-27:11.) Specifically, Rincon argues the State cannot contend it is giving the Tribe exclusivity in Class III gaming in return for revenue sharing because such exclusivity was already conferred by the State in exchange for revenue sharing through the Revenue Sharing Trust Fund and Special Distribution Fund *Id.* at 14:13-25. Rincon also argues the added exclusivity the State offered is not a meaningful concession as the Tribe, in its current compact, already has the option of terminating or renegotiating its Compact with respect to revenue sharing in the event Class III gaming is made available to non-Indian enterprises. *Id.* at 16:25-17:4. Moreover, Rincon asserts that even if the State has made a meaningful offer warranting revenue sharing, such shared revenue may not be directed to the State's general fund under the IGRA. (Rincon's Reply, 9:8-16.)

2. The State's Offers

The State argues its offers do indeed include meaningful concessions. Specifically, the State contends its ability to provide Rincon with an amendment to its current compact is a meaningful concession because without a compact Rincon is not entitled to offer Class III gaming. (State's Motion, 26:20-27:2.) Moreover, the State contends it is not precluded from requesting revenue contributions to the State's general fund if meaningful concessions have been given. *Id.* at 27:3-11. As further evidence of its good faith and its offer of a meaningful concession, the State argues it offered Rincon enhanced remedies to protect the Tribe's exclusivity, including the benefit of being excused from specific revenue sharing requirements in the event non-Indian gaming is allowed in California. *Id.* at 28:24-29:3.

3. The State's Insistence On Revenue Sharing With Its General Fund Was In Bad Faith

In *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, (9th Cir. 2003), the Ninth Circuit recognized the IGRA's legislative history provides guidance for courts determining whether a party has negotiated in good faith. It noted:

> "In the [Senate] Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. State and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens."

Id. at 1108-09.

The joint administrative record reveals that both Rincon and the State have held fast to their positions during the course of the negotiations. Despite the exchange of offers and information during the negotiation process, these two equal sovereigns have not been able to strike the right balance between the amount or type of benefits to flow between them in exchange for an amended compact.[9] *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Congress created the mechanism of Tribal-State compacts to resolve the conflicting interests of the tribes and the states, which it acknowledged as "two equal sovereigns.") As explained in detail below, this Court finds the State's insistence on an exchange of revenue *earmarked for the State's general fund* in return for an amended compact with Rincon was in bad faith.

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[9]This Court finds the case law involving good faith in the collective bargaining context is not instructive and only marginally helpful in that none of the cases cited by the parties involve negotiations between sovereigns. Employers and unions are not sovereigns; rather they are persons/entities within the meaning of the law who are both subject to the same sovereign, namely, the federal government. In those cases, the sovereign defines the lawful parameters of the negotiations. Each party has redress to the sovereign if the other party tries to impose an unlawful condition. The IGRA is a complicated statutory scheme which recognizes that states and tribes are equally sovereign. Accordingly, one sovereign cannot impose a tax on another sovereign. 25 U.S.C. § 2710(d)(4). Even if similarly situated sovereigns accept the tax, the tax is not permitted under the IGRA for any tribe which objects to it. *See e.g. Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006) ("The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the Tribes and Idaho [which retained the prohibition against taxes].")

a.) IGRA's Prohibition on Taxation, Directly or Indirectly

Section 2710 (d)(4) of the IGRA states in pertinent part: " Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id.* at § 2710(d)(4). The imposition of a tax by the State upon an Indian tribe engaged in gaming is a factor the Court may take into consideration when conducting its good faith inquiry. As the Ninth Circuit explained in *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, "[d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires." *Id.* at 1112 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)).

b.) A Meaningful Concession To Rincon Is Required In Return For An Amendment To The Current Compact Authorizing Revenue Sharing Directly With The State

A significant stumbling block for the parties has been each side's divergent interpretations of the effects of the exclusivity provision in the California Constitution which allows Class III gaming to be conducted by Indian Tribes on Indian lands. Rincon argues that the State cannot offer exclusivity as a meaningful concession for the grant of an amendment to the existing Compact because a monopoly over Class III gaming was already conveyed in exchange for the current Compact. (Rincon's Motion, 14:12-25.) In response, the State contends the constitutional exemption from California's prohibition on Class III gaming is not self-executing, but depends on the existence of a signed compact with the Governor and ratification by the legislature. Based on the fact that a compact is required before gaming may be conducted, the State argues that a meaningful concession is conveyed whenever the State offers a federally-recognized tribe the ability to provide additional games and machines for an extended period of time free from non-

Indian competition. (State's Motion, 26:7-27:11.)

Section 19(f) of the California Constitution states in pertinent part, " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." Cal. Const. Art. IV § 19(f). The plain language of the California Constitution makes clear that authorization is given to the governor of the state to negotiate and conclude tribal gaming compacts, and that tribal gaming may only be conducted *subject to* a compact. As the Court explained in *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca. 2002), "[t]he Tribal-State **compact is the key** to class III gaming under IGRA. Under such a compact, the federal government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. In this way, the state may gain the civil regulatory authority that it otherwise lacks, and a tribe gains the ability to offer class III gaming." *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca.. 2002) (emphasis added.).

Here, Rincon and the State already have an existing Compact that both Rincon and the State want to amend. Rincon seeks additional gaming machines and an extension of its Compact term by 25 years to year 2045, while the State seeks substantial revenue sharing directly from the Tribe to the State's general fund. The existing Compact does authorize revenue sharing. However, the shared revenue: (1) flows between gaming tribes and non-gaming tribes through the Revenue Sharing Trust Fund ("RSTF") and (2) is available for limited use by the state legislature through the Special Distribution Fund ("SDF") for gaming-related purposes including, (a) programs to address gambling addiction, (b) support for government agencies impacted by tribal gaming, ©) compensation for regulatory costs associated with the administration of the compact, (d) potential shortfalls in the RSTF and (e) other gaming related purposes identified by the legislature. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1106 (9th Cir.2003). All these purposes clearly comply with the IGRA and promote its objectives. Thus, the

existing Compact does *not* authorize a revenue stream from gaming tribes directly to the State's general fund for the State's use unrelated to: (1) compensating the State for regulatory costs associated with Indian gaming, (2) mitigating adverse social impacts of gaming or (3) economically benefitting non-gaming tribes.

In order to come to terms with the two revenue sharing provisions in the current Compact, the State had to provide meaningful concessions to avoid the IGRA's prohibition on direct taxation. Specifically, the Ninth Circuit found that "[i]n return for its insistence on the RSTF provision" during the initial negotiations for the current Compact, the State of California made two meaningful and real concessions: (1) the "amend[ment] [of] its constitution to grant a monopoly to tribal gaming establishments" and (2) the "offer [to] tribes [of] the right to operate Las Vegas-style slot machines and house-banked blackjack." *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) (explaining that "[a]s part of its negotiations with the tribes, the State offered to do both things.") Similarly, the Ninth Circuit found that the State's insistence on the inclusion of the SDF during negotiations for the current Compact was also in exchange for "an exclusive right to conduct class III gaming in the most populous State in the country." *Id.* at 1115. It is therefore clear that in exchange for revenue contributions to the RSTF and the SDF, which are provided for in the current Compact, the State has already given a monopoly to tribal gaming establishments, including Rincon. In light of the Ninth Circuit's analysis, this Court finds the consideration that was already given (exclusivity) for the mutual compact cannot be repeatedly reused as a basis for the State's desire for a new compact where the proposed terms of the new compact include an improper taxation to which the other sovereign (Rincon) objects. In this Court's view, the State has not offered exclusivity because exclusivity already exists. As discussed in detail below, the State has simply offered more devices and time in exchange for its revenue sharing request.

In order to amend the existing Compact to properly allow for the State's new revenue sharing proposal, the State must provide other meaningful concessions to Rincon. The need for

other meaningful concessions is not only required under basic contract law principles[10] governing modification, but required under the Ninth Circuit's interpretation of Section 2710(d). In short, the Ninth Circuit requires a meaningful concession in return for fee demands. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) ("We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise authority to impose anything. Instead, it exercises its authority to negotiate, which the IGRA clearly permits."); *see also Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("It is also true that, despite this statutory prohibition [Section 2710(d) in the IGRA], States and tribes have negotiated compacts that provided for payments by the tribes to the states. (citation omitted.) The theory on which such payments were allowed, however, was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.")(Emphasis in original.) Building on that analysis, it is clear that the failure to offer meaningful concessions causes a State to exceed its authority to negotiate and is, in fact, an attempt to impose a tax.

Although the State now argues in opposition to Rincon's motion that it could offer, for a second time, the exclusivity (already given in exchange for the RSTF and SDF) toward a *new* revenue sharing provision, it appears from the State's offers that the State was aware the monopoly it originally conferred could not again be considered a new and meaningful concession because the State offered Rincon a negotiable "exclusivity provision" in exchange for direct revenue sharing. [Admin. Record, Exhs. 16 and 35.] The additional exclusivity provision offered by the State did not have specific terms. However, the State explains in its motion that in general, the offered provision "provide[s] that if a non-Indian Individual or entity is allowed to operate class III

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[10] *See New York v. Oneida Indian Nation of New York*, 78 F. Supp.2d 49, 60-61 (N.D.N.Y. 1999) ("The Supreme Court has stated that a compact is akin to a contract. Thus, in interpreting the Compact, the Court is guided by ordinary principles of contract interpretation."); *See* 17A Am. Jur. 2d Contracts § 507 ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.")

gaming within a specified market area, the adversely affected tribe would be excused from specific revenue sharing requirements in the amended Compact." (State Opposition at 15, fn. 6.) The Court notes that the citizens of California would have to amend the State Constitution in order to allow non-Indian gaming.[11]

In conjunction with the modified exclusivity provision, the State offered Rincon: (1) the ability to provide more machines over and above the limit set in connection with the original Compact in furtherance of the State's public policy in favor of containing casino style gambling, and (2) a five-year extension of its current Compact term. [Admin. Record, Exhs. 16 and 35.] Other than the Ninth Circuit's pronouncement in *Idaho v. Shoshone-Bannock Tribes*, which found the grant of a "monopoly or other benefits" to be a meaningful concession, there is little authority available on the issue of what constitutes a meaningful concession. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). Thus, this Court is left to first decide whether the State's new offers of modified exclusivity, additional machines and a 5-year term extension constitute meaningful concessions. The State has made some concessions in that there is some benefit in the State's willingness to: (1) "lock in" reduced revenue sharing fees in advance of any future event that would erode the exclusivity presently enjoyed by gaming tribes; (2) expand the outlines of the State's long-standing public policy against casino-style gambling, and (3) provide Rincon with a longer Compact term, which gives the Tribe more time to operate its gaming facilities. However, the issue is whether, under the totality of the circumstances, the fees demanded in light of the concessions offered amount to the imposition of a fee. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112 ("Depending on *the nature of both the fees demanded and the concessions offered in return*, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State.") (italics added.) When the amount and type of fees demanded by the State are added to the equation, this Court finds the fees constitute an attempt to impose a tax in violation of Section 2710 (d)(4) of the

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[11] In order for non-Indian tribes to operate gaming devices in California, a new state Constitutional Amendment would have to pass requiring one of three of the following events: (1) a legislative proposal supported by a supermajority vote of the Legislature and a majority vote of the citizenry, (2) a constitutional convention, or (3) an initiative petition signed by eight percent of the voters and then a majority vote of the citizens of California. Cal. Const. Art. II § 8(b), art. 18 §§ 1, 2, 3, 4.

IGRA.

Specifically, on October 23, 2006, the Stated asked for an annual flat fee based on ten percent of gross gaming revenue on all gaming devices for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each gaming device over 1,600 machines. [Admin. Record, Exh. 35.] Under the analysis conducted by the State's own expert, Professor William Eadington, the State's October 23, 2006 offer allowing Rincon an additional 900 machines would provide the State with an unrestricted fee for use in its general fund of *$37.9 million dollars* while Rincon would make only *$1,716,000* from adding 900 machines to its current 1,600 machine operation. [Admin. Record., Exh. 37 at p. 5 of Exhibit B; State's Motion at 21:813; Rincon's Motion, 27:1-6.] This substantial fee, 37 times greater than what Rincon receives, is unreasonable compared to the balance struck in the first compact negotiation between the tribes and the State where an actual monopoly was conferred in exchange for millions of dollars of fees to be funneled to gaming-related impacts covered by the RSTF and SDF.[12] In the parties' newest negotiations for an amendment to the current Compact, the State demands 10 to 15 percent of revenue from Rincon's existing gaming devices as well as from the 900 new devices sought. In exchange for this estimated revenue stream of $37.9 million dollars, Rincon would not receive a monopoly, but an agreement to reduce its fee payment in the future should gaming one day be opened up to non-tribal gaming establishments (a scenario the Court finds speculative and unlikely given the State's established public policy against casino-style gaming), 900 more machines and five additional years to operate under its Compact. [Admin. Record, Exh. 35.]

In holding that the Special Distribution Fund did not violate the IGRA's prohibition against taxation of tribes or tribal lands, the Ninth Circuit found that limited revenue sharing for specific purposes related to tribal gaming was a reasonable exchange for the exclusivity granted to tribes. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115. ("We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specific purposes identified in the SDF

[12] Rincon currently pays a fee of $1.335 million per year into the RSTF. [Joint Admin. Record, Exh. 21 at p. 7.] Rincon does not contribute to the SDF because it was not conducting Class III gaming before September 1, 1999. [Defendant's Opp'n, p. 16, fn. 7.]

provision.") Here, however, the State has demanded Rincon pay a fee directly to the state that is unrelated to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly less value than the original exclusivity provision given to the tribes, which already provides a monopoly to tribal gaming interests. Such a fee demand falls outside the scope of 25 U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to defray the costs of regulating gaming activity.[13] The State has not only refused to connect the new revenue sharing provision to gaming-related interests, but provides no evidence to show that it needs the proposed additional revenues needed to regulate gaming activity or mitigate adverse impacts therefrom. Instead, the State argues additional revenue sharing is warranted to balance the economic interests between the Sate and the Tribe because the State is foregoing revenue it could have obtained from non-Indian gaming operators, if such non-Indian operators were allowed to game in California. (State's Opp'n at 10:19-11:5.) Furthermore, the State's rationale for requiring such a large revenue sharing fee is another indication to this Court that the State's fee demands constitute an improper attempt to impose a tax on Rincon in lieu of being able to levy a tax on non-existent non-Indian gaming operators. It is difficult to regard the State's proposed plan as anything more than a tax when it functions as a tax.[14]

The Court also notes that the increased fee demanded by the State will not benefit non-gaming tribes. Indeed, under the State's last offer, the parties would negotiate over the amount of the contributions made by Rincon to the RSTF, and Rincon would simply be required to maintain its current contribution of $1.335 million per year into the RSTF. [Admin. Record, Exhs.21 and 35.]

Without an acceptable nexus between the fee demanded and the IGRA-sanctioned uses to which it is put, this Court finds that the revenue sharing insisted upon by the State violates Section (d)(4), which prohibits states from taxing tribes. Accordingly, the Court finds that the State's insistence on the payment of such a large fee to its general fund in return for concessions of

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[13] Section 2710(d)(3)(C)(iii) of the IGRA provides that any Tribal-State compact negotiated under Section 2710(d)(3)(A) may include provisions relating to: "the assessment by the State of such activities in such amounts in such amounts as are necessary to defray the costs of regulating such [gaming] activity."

[14] As defined by Black's Law Dictionary, a tax is a "monetary charge *imposed* by the government on persons, entities, transactions, or property to yield *public revenue*." Black's Law Dictionary 1496 (18th ed. 2005) (emphasis added).

markedly lesser value was in bad faith in light of the prohibition against taxation set forth in the IGRA and the parameters discussed in the Ninth Circuit's *Coyote Valley II* decision, which only approved limited and reasonable revenue sharing and made no decision as to the legality of placing revenue derived from tribal gaming into a state's general fund. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115, fn. 17, (9th Cir. 2003).

C. Negotiations On Non-Economic Issues Under Section 10.8 Of The Compact

1. Section 10.8 Negotiations Were Not Concluded

Rincon contends that the State has not concluded section 10.8 negotiations in good faith despite the fact that: (1) former Governor Gray Davis withdrew his administration's request to negotiate before Governor Schwarzenegger took office; and (2) the State warranted in writing that it would not enforce the cease and desist provisions of section 10.8. [Admin. Record, Exhs. 1, 7 and 8.] Rincon insists that despite the doctrine of equitable estoppel, the Davis Administration's November 14, 2003 rescission letter and the State's June 16, 2004 letter indicating that "the State will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©)" are insufficient to protect it, should the State choose to disregard its statements. (Rincon Motion, 41:9-42:16.) Further, Rincon argues that because the State did not offer to: (1) amend the Compact to vacate the cease and desist date, or (2) stipulate to a judgment finding a failure to negotiate Section 10.8 in good faith, the State has revealed its bad faith. (*Id.* at 42:17-23.)

2. The Request for Negotiations Under Section 10.8 Were Not Concluded Because The Request Was Rescinded

The State argues there is nothing for the Court to adjudicate with respect to Section 10.8 of the Compact because: (1) the Davis Administration rescinded its request for negotiation, and (2) the Schwarzenegger Administration has repeatedly indicated in writing that it would not prevent Rincon from completing construction already in progress as of January 1, 2005 on the basis that the parties did not conclude negotiations triggered by Section 10.8. (State Motion, 41:10-20.) Further, the State contends that the Davis Administration's rescission and the State's agreement not to enforce the cease and desist provision of Section 10.8 are not evidence of bad faith negotiation in as far as the State has continued to negotiate and set forth offers with respect to non-

economic issues in its proposals of November 10, 2005, October 23, 2006 and October 31, 2006. (State's Reply Brief, 14:13-18; Admin. Record, Exhs. 16, 35 and 37.)

3. Failure to Conclude Negotiations On Non-Economic Issues Does Not Constitute Bad Faith On The Part Of The State

While the Court recognizes Rincon may be apprehensive about the future enforceability of the State's pronouncements that it will not act on the cease and desist provisions of Section 10.8, the Court finds the issue of whether estoppel would be applicable to prevent the State from invoking Section 10.8.3©) is not ripe for adjudication. As a general rule, "a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (breach of contract claim presented no live case or controversy where the claim hinged on future conduct by a party to the contract.) Here, the Davis Administration rescinded its request for renegotiation of non-economic terms and there has been no attempt by the present administration to enforce Section 10.8.3©). The effectiveness of equitable estoppel to prevent the State from seeking to enforce the cease and desist provisions of Section 10.8.3©) is too hypothetical and abstract at this time for evaluation.

The Court further finds that in light of the past administration's rescission letter, the current administration's multiple assurances that it would take no action under Section 10.8.3©) and the State's willingness to continue to negotiate over non-economic impacts without the benefit of Section 10.8.3(c)'s cease-and-desist provision does not constitute bad faith on the part of the State.

IV.

CONCLUSION AND ORDER THEREON

In light of the foregoing, the Court **DENIES in part and GRANTS in part,** the parties' cross-motions for summary judgment. **It is hereby ordered,** pursuant to the Indian Gaming Regulation Act, 25 U.S.C. § 2710(d)(7)(B)(iii), that the State and Rincon shall conclude an amended compact within 60 days from the date of this Court's Order. If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit a proposed compact to a court-appointed mediator that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA,

Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

It is further ordered that the Court will hold a Status Conference at the conclusion of the 60-day period on **July 1, 2008, at 2:00 p.m.** in the chambers of the Hon. William McCurine, Jr., United States Magistrate Judge, 940 Front St., San Diego, CA 92101.

IT IS SO ORDERED.

DATED: April 29, 2008

Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court

Copy to:

ALL PARTIES AND COUNSEL OF RECORD

lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *

Various other treaties contained similar pledges.[220] Some treaties contained specific guaranties against taxation.[221]

E. CONTROL OF TRIBAL AFFAIRS

From 1776 to 1849 we find no treaty provision which limits the powers of self-government of any tribe with respect to the internal affairs of the tribe. All limitations upon tribal power, during this period, are in some way related to intercourse with non-Indians. Even the sporadic treaty provisions authorizing allotment of tribal land either list, as part of the treaty itself, the individuals, or define the class of individuals, who are to receive allotments,[222] or provide for the issuance of patents by the authorities of the tribe.[223]

In the wake of the War with Mexico, several treaties were imposed upon tribes of the newly acquired territory in which the long-established distinction between internal and external affairs of the tribes was abandoned and the internal affairs of the tribes were declared subject to federal control.

The language contained in the Treaty of September 9, 1849, with the Navajo,[224] whereby that tribe agreed that the United States "shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians" [225] is symptomatic rather than legally important. It symbolizes a tendency to disregard the national character of the Indian tribes, a tendency that was perhaps stimulated by the loose organization and backward culture of the Southwestern nomadic tribes.

A year later, in 1850, began a series of treaties by which various tribes undertook to abandon their tribal existence.[226]

In 1851, a new breadth of authority was conferred upon the executive branch of the Federal Government by such clauses as the following:

> Rules and regulations to protect the rights of persons and property among the Indians, parties of this Treaty, and adapted to their condition and wants, may be prescribed and enforced in such manner as the President or the Congress of the United States, from time to time, shall direct.

This provision, taken from the Treaty of July 23, 1851, with the See-see-toan (Sisseton) and Way-pay-toan (Wahpeton) Sioux,[227] was copied bodily in several later treaties.[228]

The most important breach in the scope of tribal self-government made by treaty was made in 1854 and thereafter, by those treaties which conferred upon the President power to allot tribal lands to individual Indians.[229]

Along with this encroachment upon the powers of the tribes to apportion rights in tribal land among the members of the tribe, there came other extensions of federal authority over the handling and distribution of tribal funds and other incidental matters.[230]

The Civil War brought new occasions for the use of federal power in tribal affairs as a result of conflicts between different factions of a tribe. The Treaty of June 14, 1866, provided for "a general amnesty of all past offences against the laws of the United States, committed by any member of the Creek Nation * * *" and "an amnesty for all past offences against their government, * * *." [231]

Thus during the last decade or so of the treaty-making period, the basis upon which treaties had been made was gradually undermined by successive specific encroachments upon the autonomy of various tribes.

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[220] See, *e. g.*, Art. 14 of the Treaty of March 24, 1832, with the Creek Tribe, 7 Stat. 366, 368; Art. 11 of the Treaty of July 20, 1831, with the Wyandots, Senecas, and Shawnees, 7 Stat. 351, 353.

[221] For example, Treaty of September 29, 1817, with the Wyandots and others, Art. 15, 7 Stat. 160, 166.

[222] Treaty of August 9, 1814, with Creek Nation, 7 Stat. 120; Treaty of September 29, 1817, with the Wyandot, Seneca, Delaware, and other tribes, 7 Stat. 160.

[223] Treaty of November 6, 1838, with the Miami Tribe, 7 Stat. 569. And *cf.* Act of March 3, 1839, 5 Stat. 349 (Brothertown), providing for allotment by chiefs of tribe, who were to observe "the existing laws, customs, usages, or agreements of said tribe." *Accord:* Act of March 3, 1843, 5 Stat. 645 (Stockbridge).

[224] 9 Stat. 974.

[225] *Ibid.*, Art. 9. *Accord:* Art. 7 of Treaty of December 30, 1849, with the Utah Indians, 9 Stat. 984.

[226] Treaty of April 1, 1850, with the Wyandot Indians, 9 Stat. 987. And see Chapter 14, sec. 2.

[227] 10 Stat. 949, 950.

[228] *E. g.*, Treaty of August 5, 1851, with the Med-ay-wa-kan-toan, etc., Sioux, 10 Stat. 954.

[229] See Treaty of March 15, 1854, with the Ottoe and Missouria Indians, 10 Stat. 1038, and Treaty of March 16, 1854, with the Omaha Tribe, 10 Stat. 1043, discussed in sec. 4G, *infra*.

[230] See sec. 3B(5), *supra*.

[231] Art. 1, 14 Stat. 785. Also see Chapter 8, sec. 11. Also see the pre-Civil War Treaty of August 6, 1846, with the Cherokee Nation, "Treaty Party," and "Old Settlers," Art. 2, 9 Stat. 871, whereby the Cherokee Nation declared a general amnesty for all past offenses after a period of civil strife, and agreed to a bill of rights.

SECTION 4. A HISTORY OF INDIAN TREATIES

A. PRE-REVOLUTIONARY PRECEDENTS: 1532–1776

First mention of the necessity of a civilized nation treating with the Indian tribes to secure Indian consent to cessions of land or changes of political status [232] was made in 1532 by Franciscus de Victoria,[233] who had been invited by the Emperor of Spain to advise on the rights of Spain in the New World.

After considering in detail the argument that barbarians could not own land by reason of the sin of unbelief or other mortal sin, or by reason of "unsoundness of mind," Victoria reached the conclusion that:

> * * * the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view.[234]

Since the Indians were true owners, Victoria held, discovery could convey no title upon the Spaniards, for title by discovery can be justified only where property is ownerless.[235] Nor could Spanish title to Indian lands be validly based upon the divine rights of the Emperor or the Pope,[236] or upon the unbelief or sinfulness of the aborigines.[237] Thus, Victoria concluded, even the Pope had no right to partition the property of the Indians, and in the absence of a just war only the voluntary consent of the aborigines could justify the annexation of their territory.[238] No less than their property, the government of the aborigines was entitled to respect by the Spaniards, according to the view of Victoria. So long as the Indians respected the natural rights of Spaniards, recognized by the law of nations, to travel in their

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[232] Victoria, De Indis et De Jure Belli Relectiones (Trans. by John Pawley Bate, 1917), 1557, sec. 2, titles 6, 7.

[233] *Ibid.*, Introduction (Nys), p. 71.

[234] *Ibid.*, sec. 1, title 24, p. 128.

[235] *Ibid.*, sec. 2, p. 139.

[236] *Ibid.*, sec. 2, titles 1–6.

[237] *Ibid.*, sec. 2, titles 8–16.

[238] *Ibid.*

lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just war against the Indians,[239] and therefore could not claim any rights by conquest. In that situation, however, sovereign power over the Indians might be secured through the consent of the Indians themselves.

> Another possible title is by true and voluntary choice, as if the Indians, aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign. This could be done and would be a lawful title, by the law natural too, seeing that a State can appoint any one it will to be its lord, and herefor the consent of all is not necessary, but the consent of the majority suffices. For, as I have argued elsewhere, in matters touching the good of the State the decisions of the majority bind even when the rest are of a contrary mind; otherwise naught could be done for the welfare of the State, it being difficult to get all of the same way of thinking. Accordingly, if the majority of any city or province were Christians and they, in the interests of the faith and for the common weal, would have a prince who was a Christian, I think that they could elect him even against the wishes of the others and even if it meant the repudiation of other unbelieving rulers, and I assert that they could choose a prince not only for themselves, but for the whole State, just as the Franks for the good of their State changed their sovereigns and, deposing Childeric, put Pepin, the father of Charlemagne, in his place, a change which was approved by Pope Zacharias. This, then, can be put forward as a sixth title.[240]

The Emperors of Spain and their subordinate administrators, like many able administrators since, did not consistently carry out Fra Victoria's legal advice. They did, however, adopt many laws and issue many charters recognizing and guaranteeing the rights of Indian communities,[241] and the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights.[242]

The idea that land should be acquired from Indians by treaty involved three assumptions: (1) That both parties to the treaty are sovereign powers; (2) that the Indian tribe has a transferable title, of some sort, to the land in question; and (3) that the acquisition of Indian lands could not safely be left to individual colonists but must be controlled as a governmental monopoly. These three principles are embodied in the "New Project of Freedoms and Exemptions," drafted about 1630 for the guidance of officials of the Dutch West India Co., which declares:

> The Patroons of New Netherland, shall be bound to purchase from the Lords Sachems in New Netherland, the soil where they propose to plant their Colonies, and shall acquire such right thereunto as they will agree for with the said Sachems.[243]

The Dutch viewpoint was shared by some of the early English settlers. In the spring of 1636, Roger Williams, who insisted that the right of the natives to the soil could not be abrogated by an English patent, founded the Rhode Island Plantations.[244] This was the territory inhabited by the Narragansetts and for which Williams had treated.

[239] *Ibid.*, sec. 3, title 1, *et seq.*

[240] *Ibid.*, sec. 3, title 16, p. 159.

[241] See Chapter 20, sec. 1.

[242] Victoria, *supra*, Introduction (Nys). See also Vattel, Le Droit des Gens, vol. 1, bk. 1, c. 18, sec. 209, and other authorities cited by counsel for both parties in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823). And see Chapter 15, sec. 4.

[243] J. R. Brodhead, Documents Relative to the Colonial History of the State of New York (Holland Documents II, No. 27) (1855, O'Callaghan ed.), vol. 1, p. 99.

[244] Kinney, A Continent Lost—A Civilization Won (1937), pp. 11-12.

From time to time other British colonies became parties to treaties with the Indians.[245] Unauthorized treating for the purchase of Indian land by individual colonists was prohibited in Rhode Island as early as 1651.[246] By the middle of the eighteenth century, eight other colonies had laws forbidding such purchase unless approved by the constituted authorities.[247] The effect of such laws was to eliminate conflicts of land titles that otherwise resulted from overlapping grants by individual Indians or tribes, to protect the Indians, in some measure, against fraud, and to center in the colonial governments a valuable monopoly.

With the outbreak of the French and Indian War the problem of dealing with the natives which had been left largely to the individual colonies was temporarily returned to the control of the mother country.[248] Later, treaties with the Indians were again negotiated by the colonies.[249]

On several occasions the Crown indicated its belief in the sanctity of treaty obligations.[250] Some of the treaties contained definite stipulations regarding land tenure.[251]

B. THE REVOLUTIONARY WAR AND THE PEACE: 1776–83

From the first days of the organization of the Continental Congress great solicitude for the natives was evidenced. The Congress pledged itself to unusual exertions in securing and preserving the friendship of the Indian nations.[252] First fruit of this effort was the treaty of alliance with the Delaware Indians of September 17, 1778.[253] Its provisions are so significant that Chief Justice Marshall's analysis in this respect should be noted:

> The first treaty was made with the Delawares, in September 1778. The language of equality in which it is drawn, evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States. * * * 6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States, by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas, the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the states aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their terri-

[245] In Pennsylvania, in advance of settlement, William Penn sent several commissioners to confer with the Indians and conclude with them a treaty of peace (18th Annual Report, Bureau of Ethnology, 1896–97, pt. II, pp. 591–590). Also see Chapter 15, sec. 4.

[246] Kinney, *op. cit.*, p. 14. As early as 1609 English colonists in Virginia purchased land directly from the Indians in that territory. (P. 12.)

[247] *Ibid.* The colonies were Massachusetts, Virginia, New Jersey, Pennsylvania, Maryland, North Carolina, South Carolina, and Georgia.

[248] Mohr, Federal Indian Relations (1933), pp. 4–9.

[249] See, for example, the Treaty of Hard Labor on October 14, 1768, which defined the boundary of Virginia, and the Treaty of Fort Stanwix, November 5, 1768, defining the boundary of the northern district (Mohr, *op. cit.*, pp. 9–10).

[250] See, *e. g.*, *Worcester* v. *Georgia*, 6 Pet. 515, 546, 548 (1832).

[251] In 1783 Sir John Johnson, prominent representative of the British Government, referring to the boundaries established by the treaty of peace with the United States of that year, told the Six Nations:

> You are not to believe or even think that by the line which has been described it was meant to deprive you of an extent of country of which the right of soil belongs to you and is in yourselves as sole proprietors as far as the boundary line agreed upon [by treaty of 1768] and established in the most solemn and public manner in the presence and with the consent of the governors and commissioners deputed by the different colonies for that purpose * * * (Mohr, *op. cit.*, p. 118.)

[252] Jour. Cont. Cong. (Library of Congress ed.) 1775, vol. II, p. 174.

[253] Treaty of September 17, 1778, 7 Stat. 13.

torial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into." The parties further agree, that other tribes, friendly to the interest of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress. This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe. The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.[254]

Articles 4 and 5 are also noteworthy. By Article 4, any offenders of either party against the treaty of peace and friendship were not to be punished, except

> * * * by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice * * *.

Article 5[255] provided for a

> * * * well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate sallery, one more influenced by the love of his country, and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument * * *.

C. DEFINING A NATIONAL POLICY: 1783–1800

Following the close of the Revolutionary War the United States entered into a series of treaties with Indian tribes by which the "hatchet" was "forever buried."[256]

In the spring of 1784 Congress appointed commissioners to negotiate with the Indians. Full power was given them to draw boundary lines and conclude a peace, with the understanding that they would make clear that the Indian territory was forfeit as a result of the military victory.[257] This idea was not novel. General Washington, on September 7, 1783, had expressed himself as agreeable to regarding the territory held by the Indians as "conquered provinces," although opposed to driving them from the country altogether.[258] The commissioners met at Fort Stanwix and on October 22 concluded a treaty with the hostile tribes of the Six Nations.[259] In the opening paragraph the United States receives the Indians "into their protection." This has been cited as the source of the concept of the Federal Government as the guardian of Indian tribes.[260]

Article 2 provides that the "Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled." [261]

Article 4 orders

> * * * goods to be delivered to the said Six Nations for their use and comfort.

Thus began a practice which later developed into a comprehensive system of supplying promised goods and services to Indian tribes.[262]

Soon afterwards another treaty was agreed upon with the Wiandots, Delawares, Chippawas, and Ottawas at Fort McIntosh on January 21, 1785.[263] The next year the Shawnee chiefs signed a treaty at the mouth of the Miami.[264] These three treaties, which are the only ones entered into with the northern tribes before the adoption of the Constitution, are very similar in nature. All of them recite the conclusion of hostilities and the extension of the protective influence of the United States.[265]

In the Treaty of January 21, 1785, at Fort McIntosh,[266] and the Treaty of January 31, 1786, at the Miami,[267] the boundaries between the Indian nations and the United States are defined and the lands therein are allotted to the said nations to live and hunt on, with the provision that if any citizen of the United States should attempt to settle on their territory, he would forfeit the protection of the United States.[268] In addition both treaties[269] provided for the return to the United States of Indian robbers and murderers. In the treaty with the Shawnees[270] there is a similar provision with regard to United States offenders against the Indians.

Congress was slower in taking action regarding the southern tribes. It was not until March 15, 1785,[271] that a resolution was

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[254] *Worcester* v. *Georgia*, 6 Pet. 515, 548, 549 (1832). See also Art. 12. Treaty with the Cherokees of November 28, 1785. 7 Stat. 18, discussed below, which granted to the Cherokees the right to send a deputy of their own choice to Congress whenever they think fit. This, however, was never carried into effect. See also sec. 3B(3), *supra*.

[255] See Chapter 4, sec. 2, and Chapter 16.

[256] The phrase appears in the Treaties at Hopewell with the Cherokees, November 28, 1785, Art. 13, 7 Stat. 18; with the Choctaws, January 3, 1786, Art. 11, 7 Stat. 21; and with the Chickasaws, January 10, 1786, Art. 11, 7 Stat. 24.

This phrase was later supplanted by the phrase "all animosities for past grievances shall henceforth cease." See fn. 288, *infra*. As the disturbances caused by the Revolutionary War settled, this phrase disappeared.

[257] Mohr, *op. cit.*, p. 108. In 1786 the Continental Congress, through its chairman, David Ramsay, again tried to make it clear, this time to the Seneca Indian, Cornplanter, that

> * * * the United States alone possess the sovereign power within the limits described at the late Treaty of peace between them and the King of England. * * * You may also assure the Indians that they tell lies, who say that the King of England has not in his late Treaty with the United States given up, to them the lands of the Indians. (Jour. Cont. Cong., Library of Congress ed., 1786, vol. XXX, p. 235.)

[258] 10 Ford, Washington Writings, vol. X (1891), pp. 303–312.

[259] Treaty of October 22, 1784, 7 Stat. 15. The Treaty was construed in *New York Indians*, 5 Wall. 761 (1866) and in *Commonwealth* v. *Cowe*, 4 Dall. 170 (1800).

[260] *United States* v. *Douglas*, 190 Fed. 482 (C. C. A. 8. 1911).

[261] An illuminating statement regarding title claimed under the Treaty of Fort Stanwix is found in *Deere* v. *State of New York*, 22 F. 2d 851 (D. C. N. D. N. Y. 1927):

> * * * The source of title here is not letters patent or other form of grant by the federal government. Here the Indians claim immemorial rights, arising prior to white occupation, and recognized and protected by treaties between Great Britain and the United States and between the United States and the Indians. By the treaty of 1784 between the United States and the Six Nations of Indians, and the treaty of 1796 between the United States, the state of New York and the Seven Nations of Canada, the right of occupation of the lands in question by the St. Regis Indians, was not granted, but recognized and confirmed. (P. 854.)

[262] See, for a similar provision, the Treaty of Fort McIntosh with the Wiandots, Delawares, etc., January 21, 1785, 7 Stat. 16.

[263] Treaty of January 21, 1785, 7 Stat. 16. By this treaty the United States Supreme Court states, in *Jones* v. *Meehan*, 175 U. S. 1 (1899):

> * * * the United States relinquished and quitclaimed to the said nations respectively all the lands lying within certain limits, to live and hunt upon, and otherwise occupy as they saw fit; but the said nations, or either of them, were not to be at liberty to dispose of those lands, except to the United States. * * * (P. 9.)
>
> See also *Commonwealth* v. *Cowe*, 4 Dall. 170 (1800).

[264] Treaty of January 31, 1786, 7 Stat. 26.

[265] The Fort McIntosh treaty in its 10th article introduces a technique of giving presents upon the signing of the instrument which is soon to become standard practice in negotiating agreements with the Indians. Also to be noticed is the reserving for the first time of land within Indian boundaries for establishment of United States trading posts which is provided in Article 4 of the same treaty.

[266] Arts. 3, 4, 5, 7 Stat. 16.

[267] Arts. 6, 7, 7 Stat. 26.

[268] For a discussion of the significance of this stipulation see Treaty of July 2, 1791, with the Cherokees, 7 Stat. 39; and fn. 294 and 295, *infra*.

[269] Art. 9, 7 Stat. 16; Art. 3, 7 Stat. 26.

[270] Art. 3, Treaty of January 31, 1786, 7 Stat. 26. The Treaties at Hopewell, *infra*, contain a similar provision with the Cherokee, November 28, 1785, Art. 7, 7 Stat. 18; the Choctaw, January 3, 1786, Art. 6, 7 Stat. 21; the Chickasaw, January 10, 1786, Art. 6, 7 Stat. 24.

[271] Jour. Cont. Cong. (Library of Congress ed.), 1785, vol. XXVIII, pp. 160–162.

passed for the appointment of commissioners to deal with the Indian nations in the southern part of the country.

The federal commissioners met with the Cherokees at Hopewell on the Keowee, and concluded a treaty on November 28, 1785,[272] which declared that the United States "* * * give peace to all the Cherokees, and receive them into the favour and protection of the United States of America, on the following conditions." In *Worcester* v. *Georgia*,[273] Chief Justice Marshall gave the following answer to the argument that this language put the Indians in an inferior status:

> * * * When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us, that the United States were at least as anxious to obtain it as the Cherokees? We may ask further, did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give", then, has no real importance attached to it.

Marshall, at the same time, also called attention to Article 3 of the Hopewell agreement which acknowledges the Cherokees to be under the protection of no other power but the United States, saying:[274]

> The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things, in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands—no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character. This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made.

Article 9 of the Hopewell treaty with the Cherokees holds that

> * * * the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.

In *Worcester* v. *Georgia* it was argued that in this article the Indians had surrendered control over their internal affairs. This interpretation was vigorously rejected by the Supreme Court.

> To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands and security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.[275]

Article 12, permitting Cherokee representation in Congress, is of particular interest, although it was never fulfilled.[276]

During the last year of the Confederation the dissatisfaction among the Indians resulting from using the "conquered province" concept as the basis for treaty deliberations became apparent. The Secretary of War, therefore, on May 2, 1788,[277] recommended a change in policy which would permit the outright purchase of the soil of the western territories described in former treaties with such additions as might be affected by further negotiations.[278] Acting on this suggestion, Congress appropriated $20,000.00 on July 2, 1788,[279] which, together with the balance remaining from the sum allocated on October 22, 1787,[280] was earmarked for use in extinguishing Indian claims to land already ceded.

The immediate result of this step were the treaties of Fort Harmar with the Wiandot, Delaware, Chippewa, and Ottawa, Indians,[281] and with the Six Nations, entered into early in 1789,[282] which reaffirmed many of the original terms of the Fort Stanwix and Fort McIntosh treaties. Both of these agreements provide for the United States relinquishing and quitclaiming certain described territory to the Indian nations. However, article 3 of the Fort Harmar treaty with the Wyandots, Delawares, Chippewas, and Ottawas,[283] added that the said nations should not be at liberty

> * * * to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.

Article 7 also provided for the opening up of trade with Indians, establishing a system of licensing with guarantees of protection to certified traders, and a promise by the Indians to apprehend and deliver to the United States those individuals who intrude themselves without such authority. Article 6 makes first mention of depredations, and binds both parties to a method of handling claims arising therefrom.

Although the Fort Harmar conferences were held during the life of the Confederation, the report of the results obtained was received in the first months of the new government operating

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[272] 7 Stat. 18.
[273] 6 Pet. 515, 551 (1832).
[274] *Ibid.*, p. 551.
[275] Ibid., pp. 553–554.
[276] See Art. 6, Treaty with the Delawares of September 17, 1778, 7 Stat. 13, and fn. 254, *supra*.
[277] Mohr, *op. cit.*, p. 132.
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.*
[281] Treaty of January 9, 1789, 7 Stat. 28.
[282] Treaty of January 9, 1789 (unratified), 7 Stat. 33. See also fn. 263 *supra*, for interpretation of this treaty in *Jones* v. *Meehan*, 175 U. S. 1, 9 (1899).
[283] Treaty of January 9, 1789, 7 Stat. 28.

under the Constitution, and transmitted to the Senate of the United States on May 25, 1789, for its approval.[284]

Puzzled over the proper procedure, George Washington wrote to the Senate asking what it meant by advising him to "execute and enjoin" the observance of the treaties.

> It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers, as final and conclusive, until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians. * * *[285]

Not unmindful of the significance of the ratification of Indian treaties, the Senate appointed a special committee to investigate the matter. After several days of debate the Senate advised formal ratification.[286]

On August 22, 1789, George Washington appeared in the Senate Chamber to point out to the assembled group the gravity of the Indian situation in the South. North Carolina and Georgia, the President said, had not only protested against the treaties of Hopewell but had disregarded them. Moreover, open hostilities existed between Georgia and the Creek Nation. All of this, the President continued, involved so many complications that he wished to raise particular issues for the "advice and consent" of the Senate. Accordingly, he put seven questions which resulted in instructions to deal with the Creek situation first and, if need be, to use the whole amount of the current appropriation for Indian treaties for this purpose.[287]

On August 7, 1790, articles of agreement were concluded between the President of the United States and the kings, chiefs, and warriors of the Creek Nation.[288] Article 5 is a solemn guarantee to the Creeks of all their lands within certain described limits. Article 7 stipulated that—

> No citizen or inhabitant of the United States shall attempt to hunt or destroy the game on the Creek lands: Nor shall any such citizen or inhabitant go into the Creek country, without a passport first obtained from the Governor of some one of the United States. * * *

The obligation thus assumed by treaty the United States proceeded to implement in section 2 of the Indian Intercourse Act of May 19, 1796,[289] which made it a criminal offense for strangers to hunt, trap, or drive livestock in the Indian country.

It was found necessary to attach secret articles providing for transportation of merchandise duty free into the Creek Nation by the United States in the event of hostilities between the Creeks and Spaniards.[290]

In Article 5 of the secret treaty, the United States, for the first time,

> * * * agree to educate and clothe such of the Creek youth as shall be agreed upon, not exceeding four in number at any one time.[291]

In the following year, 1791, the commissioners turned their attention to the difficulties between the Cherokees and the State of Georgia. Finally, on July 2, near the junction of the Holston River and the French Broad, the Cherokee Nation abandoned its claims to certain territories in return for $1,000 annuity.[292] The instrument signed on that occasion was well described by the court in *Worcester* v. *Georgia:*

> The third article contains a perfectly equal stipulation for the surrender of prisoners. The fourth article declares, that "the boundary between the United States and the Cherokee nation shall be as follows, beginning," etc. We hear no more of "allotments" or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each—the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed, that it shall be plainly marked by commissioners, to be appointed by each party; and in order to extinguish forever all claims of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration, the Cherokees release all right to the ceded land, forever. By the fifth article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them. By the sixth article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it. By the seventh article, the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded. The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport. The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.[293]

This treaty of July 2, 1791, again includes a provision (Article 8) noticed before, viz: that any citizen settling on Indian land "* * * shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please."[294] This

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[284] The Debates and Proceedings in the Congress of the United States (1789–90), vol. 1, pp. 40–41. (Hereinafter referred to as Debates and Proceedings.)

[285] *Ibid.*, p. 83.

[286] *Ibid.*, p. 84. It is interesting to note that the committee report (p. 82) which was rejected drew a distinction between treaties with European powers and treaties with the aborigines insisting that solemnities were not necessary in the latter case.

[287] *Ibid.*, pp. 66–71. Washington asked the Senate "* * * if all offers should fail to induce the Creeks to make the desired cessions to Georgia, shall the Commissioners make it an ultimatum." (P. 70.) The Senate answered "No." (P. 71.)

[288] 7 Stat. 35. A recital often found in Indian treaties is the following, which appears in Art. 13: "All animosities for past grievances shall henceforth cease." (See also Treaty of July 2, 1791, Art. 15, 7 Stat. 39; Treaty of June 29, 1796, Art. 9, 7 Stat. 56.) It should be further noted that Art. 2 pledges the Creeks to refrain from treating with any individual State, or the individuals of any State. *Patterson* v. *Jenks*, 2 Pet. 216 (1829), construes provisions of this treaty relative to grants of land within the territorial limits of the State of Georgia.

[289] 1 Stat. 469.

[290] Treaty of August 7, 1790, Archives No. 17, Debates and Proceedings, vol. 1, p. 1029 (*supra*, fn. 284).

The Creek Treaty was amended on June 29, 1796, by a treaty which among other things provided that the United States give to the Creek Nation "goods to the value of six thousand dollars, and * * * send to the Indian nation, two blacksmiths, with strikers, to be employed for the upper and lower Creeks with the necessary tools." Art. 8, Treaty of June 29, 1796, 7 Stat. 56.

[291] See Art. 3, Treaty with the Kaskaskias, August 13, 1803, 7 Stat. 78, *infra*, for the first contribution by the United States for organized education in the support of a priest "* * * to instruct * * * in the rudiments of literature." See also Chapter 12, sec. 2.

[292] Art. 4, Treaty of July 2, 1791, 7 Stat. 39. This sum was increased later to $1,500 by the Treaty at Philadelphia of February 17, 1792, 7 Stat. 42. The Holston Treaty was further amended by the Treaty of Tellico of October 2, 1798, 7 Stat. 62, construed in *Preston* v. *Browder*, 1 Wheat. 115 (1816); *Lattimer* v. *Poteet*, 14 Pet. 4, 13 (1840).

[293] *Worcester* v. *Georgia*, 6 Pet. 515, 555–556 (1832).

[294] See fn. 268 *supra*. A similar provision appears in the Treaties of January 21, 1785, with the Wiandots, Delawares, Chippawas, and Otta-

article, the court in *Raymond* v. *Raymond*[295] cites as the basis for the lack of jurisdiction of the federal judiciary in suits between members of the Cherokee Nation, saying:

> It is not material to the present issue that this provision has been subsequently modified. It shows, as do subsequent treaties, that for more than a century this tribe of Indians had claimed and exercised, and the United States have guarantied and secured to it, the exclusive right to regulate its local affairs, to govern and protect the persons and property of its own people, and of those who join them, and to adjudicate and determine their reciprocal rights and duties. * * * (P. 722.)

Despite efforts at conciliation, dissatisfaction was spreading among the Indian tribes. Word was received that the Indians of the Northwest Territory were preparing to cooperate with the Six Nations in a major war. Washington dispatched instructions to Colonel Pickering to hold a council with the Six Nations. At the same time preparations were made to take military action on the western frontier and General Wayne, a Revolutionary War veteran, was put in charge of the troops, who on August 20, 1794, routed the natives in the battle of Fallen Timbers.

A new treaty was made with the Six Nations on November 11, 1794.[296] In this agreement the lands belonging to the Oneidas, Onondagas, Cayugas, and Senecas were described and acknowledged by the United States as the property of the aforementioned Indian nations and in addition the United States pledged to add the sum of $3,000 to the $1,500 annuity already allowed by the Treaty of April 23, 1792,[297] with the Five Nations.

Shortly thereafter, a treaty[298] was concluded with the nations which had participated in the ill-fated expedition against General Wayne. This agreement provides for the cession of an immensely important area which today comprises most of the State of Ohio and a portion of Indiana. At the same time the United States stipulates (Article 5):

> The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same.

The exact meaning of this recital was at issue in *Williams* v. *City of Chicago*. After examining the instrument in detail the court held:

> * * * We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end. * * *[299] (Pp. 437–438.)

The Seven Nations of Canada on May 31, 1796,[300] released all territorial claims within the State of New York, with the exception of a tract of land 6 miles square.[301]

D. EXTENDING THE NATIONAL DOMAIN: 1800–17

By 1800 the rapid growth of the nation had given impetus to the drive to add to the territory under federal ownership. This could be done effectively by extinguishing native title to desired lands. The treaty makers of this period may be said to have had a single objective—the acquisition of more land.

Success in this direction was almost immediate and by 1803 the President of the United States was able to report to Congress:

> The friendly tribe of Kaskaskia Indians * * * has transferred its country to the United States, reserving only for its members what is sufficient to maintain them in an agricultural way. * * * This country, among the most fertile within our limits, extending along the Mississippi from the mouth of the Illinois to and up the Ohio, though not so necessary as a barrier since the acquisition of the other bank, may yet be well worthy of being laid open to immediate settlement, as its inhabitants may descend with rapidity in support of the lower country, should future circumstances expose that to foreign enterprise.[302]

Article 3 of the Kaskaskia treaty[303] contains the first provision for contributions by the United States for organized education,[304] for the erection of a new church,[305] and for the building of a house for the chief as a gift.[306]

The Indians pledge themselves to refrain from waging war or giving any insult or offense to any other Indian tribe or to any foreign nation without first having obtained the approbation and consent of the United States (Art. 2). The United States in turn take the tribe under their immediate care and patronage, and guarantee a protection similar to that enjoyed by their own citizens. The United States also reserve the right to divide the annuity promised to the tribe "* * * amongst the several families thereof, reserving always a suitable sum for the great chief and his family." (Art. 4.)

President Jefferson selected William Henry Harrison, Governor of Indiana Territory, to represent the United States Government in its negotiations with the Indian tribes of the West.[307]

After protracted negotiations at Fort Wayne with the Delawares, Shawnees, and other tribes of the Northwest Territory, a substantial cession of territory was secured by the Treaty of June 7, 1803.[308]

An interesting provision is found in Article 3, whereby the United States guaranteed to deliver to the Indians annually salt

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was, Art. 5, 7 Stat. 16; November 28, 1785, with the Cherokees. Art. 5, 7 Stat. 18; January 3, 1786, with the Choctaws, Art. 4, 7 Stat. 21; January 10, 1786, with the Chickasaws, Art. 4, 7 Stat. 24; January 31, 1786, with the Shawnees, Art. 7, 7 Stat. 26; January 9, 1789, with the Wiandots, Delawares, Chippewas, and Ottawas, Art. 9, 7 Stat. 28; August 7, 1790, with the Creeks, Art. 6, 7 Stat. 35; August 3, 1795, with the Wyandots, Delawares, Chipewas, Ottawas, etc., Art. 6, 7 Stat. 49. See also Chapter 1, sec. 3.

[295] *Raymond* v. *Raymond*, 83 Fed. 721 (C. C. A. 8, 1897).

[296] 7 Stat. 44. An earlier treaty had been concluded October 22, 1784, 7 Stat. 15.

[297] Unpublished treaty (Archives No. 19).

[298] Treaty with the Wyandots, Delawares, Shawanoes, etc., August 3, 1795, at Greenville, 7 Stat. 49. "The ratification of this treaty is to be considered as the *terminus a quo* a man might safely begin a settlement on the Western frontier of Pennsylvania." *Morris's Lessee* v. *Neighman*, 4 Dall. 209, 210 (1800). For provisions under this treaty relating to disposal of land by Indians see *Patterson* v. *Jenks*, fn. 288, *supra*. Chippewa Indians were treated as a single tribe in this treaty. *Chippewa Indians of Minnesota* v. *United States*, 301 U. S. 358 (1937).

[299] 242 U. S. 434 (1917).

[300] Treaty of May 31, 1796, 7 Stat. 55. "The 7 tribes signified are the Skighquan (Nipissing), Estjage (Saulteurs), Assisagh (Missisauga), Karhadage, Adgenauwe, Karribaet, and Adirondax (Algonkins). The 4th, 5th, and 6th are unidentified." Bull. No. 30, Bureau of American Ethnology, Handbook of American Indians, pt. 2, p. 515.

[301] This tract was reserved for the Indians of St. Regis village, and is now the St. Regis Reservation. See Chapter 22, sec. 2C.

[302] Message of October 17, 1803, in Debates and Proceedings (1803–4), vol. 13, pp. 12–13.

[303] Treaty of August 13, 1803, 7 Stat. 78.

[304] See Unpublished Treaty of August 7, 1790 (Archives No. 17), fn. 290 *supra*, and Chapter 12, sec. 2.

[305] In 1794 the United States agreed to contribute $1,000 toward rebuilding a church for the Oneidas destroyed by the British in the Revolutionary War. Treaty of December 2, 1794, Art. 4, 7 Stat. 47.

[306] Gifts to the chief were continued in later treaties.

[307] Oskison, Tecumseh, and his Times (1938), p. 96.

[308] 7 Stat. 74. While certain commercial concessions have been noticed before this, for the first time the United States is granted (Art. 4) the

not to exceed 150 bushels from a salt spring which the Indians had ceded.

The next year another large area was secured from the Delawares.[309] In this treaty the United States expressly recognizes the Delaware Indians "as the rightful owners of all the country" specifically bounded (Art. 4).

Since the Piankishaw Tribe refused to recognize the title of the Delawares to the land ceded by this treaty,[310] Harrison negotiated a separate treaty.[311] It provided for land cessions and reserved the right to the United States of apportioning the annuity, "allowing always a due proportion for the chiefs." [312]

Harrison went to St. Louis to meet the chiefs of the Sacs and Foxes, and bargain for their land, which was rich in mineral deposits of copper and lead. There he succeeded in getting, on November 3, 1804,[313] as has been noted by his biographer Dawson, "the largest tract of land ever ceded in one treaty by the Indians since the settlement of North America * * *." [314]

In this agreement it is stipulated (Art. 8) that "the laws of the United States regulating trade and intercourse with the Indian tribes, are already extended to the country inhabited by the Saukes and Foxes." The tribes also promise to put an end (Art. 10) to the war which waged between them and the Great and Little Osages. Article 11 guarantees a safe and free passage through the Sac and Fox country to every person travelling under the authority of the United States.[315]

The conclusion of the treaty at St. Louis brings to an end for several years negotiations with the Indians of the West. However, treaty-making in other quarters continued and Jefferson was able to inform Congress in 1805:

> Since your last session, the northern tribes have sold [316] to us the land between the Connecticut Reserve and the former Indian boundary, and those on the Ohio, from the same boundary to the Rapids, and for a considerable depth inland. The Chickasaws and the Cherokees have sold [317] us the country between and adjacent to the two districts of Tennessee, and the Creeks [318] the residue of their lands in the fork of Ocumlgee up to the Ulcofauhatche. The three former purchases are important, inasmuch as they consolidate disjoined parts of our settled country, and render their intercourse secure; and the second particularly so, as, with the small point on the river, which we expect is by this time ceded by the Piankeshaws,[319] it completes our possession of the whole of both banks of the Ohio, from its source to near its mouth, and the navigation of that river is thereby rendered forever safe to our citizens settled and settling on its extensive waters. The purchase from the Creeks too has been for some time particularly interesting to the State of Georgia.[320]

A treaty negotiated with the Choctaws in November 16, 1805,[321] contained the first reservation of land for the use of individual Indians.[322]

Article 2 carries the significant provision of

> Forty eight thousand dollars to enable the Mingoes to discharge the debt due to their merchants and traders * * *.[323]

The treaty with the Great and Little Osages of November 10, 1808,[324] provided in addition to land cessions,[325] the pledge (Art. 12) that the Osages would not furnish "* * * any nation or tribe of Indians not in amity with the United States, with guns, ammunitions, or other implements of war."

In one of his last official messages to Congress on November 8, 1808, Jefferson observed:

> With our Indian neighbors the public peace has been steadily maintained. Some instances of individual wrong have, as at other times, taken place, but in no wise implicating the will of the nation. Beyond the Mississippi, the Iowas, the Sacs, and the Alabamas, have delivered up for trial and punishment individuals from among themselves, accused of murdering citizens of the United States. On this side of the Mississippi, the Creeks are exerting themselves to arrest offenders of the same kind; and the Choctaws have manifested their readiness and desire for amicable and just arrangements respecting depredations committed by disorderly persons of their tribe. * * * one of the two great divisions of the Cherokee nation have now under consideration to solicit the citizenship of the United States, and to be identified with us in laws and government, in such progressive manner as we shall think best.[326]

During this time there had come into power and influence among a great number of Indian tribes a Shawnee, Tecumseh, and his brother Laulewasikau called "The Prophet." When disturbing reports of the behavior of the two Shawnees reached Harrison, he resolved to press further before all Indian tribes were rendered unwilling to part with their land. Accordingly in September 1809, he convened the head men of the Delawares, Pottawatomies, Miamis, and Eel River Miamis and requested some 2,600,000 acres.[327] This they yielded.[328] A month later

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right to locate three tracts of land as sites for houses of entertainment. However, if ferries are esablished in connection therewith, the Indians are to cross said ferries toll free.

Six other treaties which need not be examined at length were negotiated during the first years of Jefferson's Administration: Chickasaws, Treaty of October 24, 1801, 7 Stat. 65; Choctaws, Treaty of December 17, 1801, 7 Stat. 66; Creeks, Treaty of June 16, 1802, 7 Stat. 68; Senecas, Treaty of June 30, 1802, 7 Stat. 72; Choctaws, Treaty of October 17, 1802, 7 Stat. 73; Choctaws, Treaty of August 31, 1803, 7 Stat. 80. These included two treaties for the building of roads through Indian territory, two treaties relinquishing areas of land to private individuals under the sanction of the United States, and two treaties for running boundary lines in accordance with previous negotiations, and two treaties providing for cessions of territory to the United States.

[309] Treaty of August 18, 1804, 7 Stat. 81.

[310] See Art. 6, Treaty of August 18, 1804, with the Delawares, 7 Stat. 81.

[311] August 27, 1804, 7 Stat. 83.

[312] *Ibid.*, Art. 4.

[313] Treaty of November 3, 1804, 7 Stat. 84, construed in *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma*, 220 U. S. 481 (1911).

[314] Oskison, *op. cit.* p. 105.

[315] An additional article provided that under certain conditions grants of land from the Spanish Government, not included within the treaty boundaries should not be invalidated. This particular provision was given application in a decision by the Supreme Court of the United States in *Marsh* v. *Brooks*, 14 How. 513 (1852).

[316] Treaty with the Wyandots, Ottawas, etc., of July 4, 1805, 7 Stat. 87; Treaty with the Delawares, Pottawatimies, etc., of August 21, 1805, 7 Stat. 91. In this last-mentioned treaty the United States agreed to consider (Art. 4) the Miamis, Eel River, and Wea Indians as "joint owners" of a certain area of land and for the first time agreed not to purchase said land without the consent of each of said tribes. In early treaties the Chippewas were dealt with as a single tribe. *Chippewa Indians of Minnesota* v. *United States*, 301 U. S. 358 (1937).

[317] Treaty with the Chickasaws of July 23, 1805, 7 Stat. 89; Treaties with the Cherokees of October 25 and 27, 1805, 7 Stat. 93, 95.

[318] Treaty of November 14, 1805, 7 Stat. 96, construed in *Coffee* v. *Groover*, 123 U. S. 1, 14 (1887).

[319] Treaty of December 30, 1805, 7 Stat. 100.

[320] Message of December 3, 1805, in Debates and Proceedings (1805–7), vol. 15, p. 15.

[321] Treaty of November 16, 1805, 7 Stat. 98.

[322] *Ibid.*, Art. 1. A tract of land was reserved for the use of Alzira and Sophia, daughters of a white man and Choctaw woman.

[323] This is not the first time that allusion to the distressed financial situation of the Indians was made in a treaty. Both the Treaty with the Creeks, June 16, 1802, Art. 2, 7 Stat. 68, and the Treaty with the Chickasaws, July 23, 1805, Art. 2, 7 Stat. 89, make mention of debts owed by the natives. Also see Chapter 8, sec. 7C.

[324] Treaty of November 10, 1808, 7 Stat. 107, construed in Hot Springs Cases, 92 U. S. 698, 704 (1875).

[325] Debates and Proceedings (1808–9), vol. 19, p. 13.

[326] *Ibid.* By the Treaty of Detroit, November 17, 1807, 7 Stat. 105, and the Treaty of Brownstown, November 25, 1808, 7 Stat. 112, less important territorial concessions were secured.

[327] Oskison, *op. cit.*, p. 106.

[328] Treaty of September 30, 1809, 7 Stat. 113.

Harrison concluded an agreement with the Weas recognizing their claim to the land just ceded and extinguishing it for an annuity and a cash gift; and promised additional money if the Kickapoos should agree to the cession.[329] Shortly thereafter, December 9, 1809, the Kickapoos capitulated and ceded some 256,000 acres for a $500 annuity plus $1,500 in goods.[330]

These cessions soon occasioned dissatisfaction among the Indians and, in the summer of 1810, with Indian war imminent in the Wabash valley, Harrison summoned Tecumseh and his warriors to a conference at Vincennes.[331] Here the Shawnee Chief delivered his ultimatum. Only with great regret would he consider hostilities against the United States, against whom land purchases were the only complaint. However, unless the treaties of the autumn of 1809 were rescinded, he would be compelled to enter into an English alliance.[332]

Upon being informed by the Governor that such conditions could not be accepted by the Government of the United States, Tecumseh proceeded to merge Indian antagonisms with those of a larger conflict—the War of 1812 with Great Britain. The only treaty of military alliance the United States was able to negotiate was that with the Wyandots, Delawares, Shawanoese, Senecas, and Miamies on July 22, 1814.[333]

In 1813 war broke out among the Upper Creek towns that had been aroused by the eloquence of Tecumseh several years before. Fort Mims near Mobile was burned, and the majority of its inhabitants killed.[334] Andrew Jackson, in charge of military operations in that quarter, launched an obstinate and successful campaign, leveling whole towns in the process.[335]

Since the Creeks were a nation, and the hostile Creeks could not make a separate peace, Jackson met with representatives of the nation, friendly for the most part, and presented his "Articles of Agreement and Capitulation."[336]

The General demanded the surrender of 23,000,000 acres,[337] half or more of the ancient Creek domain,[338] as an indemnity for war expenses. Failure to comply would be considered hostile.[339] A large part of this territory belonged to the loyal Creeks, but Jackson made no distinction. Under protest, the "Articles of Agreement and Capitulation" were signed August 9, 1814.[340]

Certain other provisions indicate the spirit of capitulation in which the treaty was negotiated. For example, Article 3 demands that all communication with the British and the Spanish be abandoned, and Article 6 provides that "all the prophets and instigators of the war * * * who have not submitted to the arms of the United States * * *" be surrendered.

The terms of the peace which brought to an end the War of 1812 provided for a general amnesty for the Indians,[341] and the Federal Government proceeded to come to terms of peace with the various tribes. Twenty treaties were negotiated in 2 years, providing chiefly for mutual forgiveness, perpetual peace, and delivering up of prisoners, the recognition of former treaties, and acknowledgment of the United States as sole protector.[342]

E. INDIAN REMOVAL WESTWARD: 1817–46

With the increasing reluctance of Indians to part with their lands by treaties of cession, the policy of removal westward was accelerated. The United States offered lands in the West for territory possessed by the Indians in the eastern part of the United States. This served the double purpose of making available for white settlement a vast area, and solving the problem of conflict of authority caused by the presence of Indian nations within state boundaries.

Although the program had been considered in certain quarters for some time, it was not until after the close of the War of 1812 that the first exchange treaty was concluded.[343] Then for al-

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[329] Treaty of October 26, 1809, 7 Stat. 116.

[330] Treaty of December 9, 1809, 7 Stat. 117. Acreage from Oskison, *op. cit.*, p. 107.

[331] Adams, History of the United States of America During the First Administration of James Madison (1890), vol. VI, p. 85.

[332] *Ibid.*, pp. 87–88.

[333] Treaty of July 22, 1814, 7 Stat. 118.

[334] Adams, *op. cit.*, vol. VII, pp. 228–231.

[335] *Ibid.*, vol. VII, pp. 255–257.

[336] *Ibid.*, vol. VII, pp. 259–260.

[337] James, Andrew Jackson (1933), p. 189.

[338] Adams, *op. cit.* vol. VII, p. 260. Adams estimates that two-thirds of the Creek land was demanded; James estimates one-half (*op. cit.* p. 189).

[339] James, *op. cit.* p. 190; Adams, *op. cit.* p. 260.

[340] 7 Stat. 120. "Title of the Creek Nation" to lands in Georgia "was extinguished throughout most of the southern part of the state by the treaties made with the nation in 1802, 1805, and 1814. 7 Stat. 68, 96, 120." *Coffee* v. *Groover*, 123 U. S. 1, 14 (1887). This land cession was the subject of much controversy for more than a century. After the passage of the so-called jurisdiction act (Act of May 24, 1924, 43 Stat. 139), giving jurisdiction to the Court of Claims to render judgment on claims arising out of Creek treaties, the Creek Nation filed a petition seeking payment for the twenty-three millions and more acres of land with interest, averring that—

> * * * the representatives of the Creek Nation met, all of them, with one exception, being friendly and not hostile to the United States, and protested to General Jackson that the lands were perpetually guaranteed to the Creek Nation by treaty, that the hostile Creeks had no interest in the fee to the lands, and that the treaty as drawn did not provide any compensation for the lands required to be ceded. * * * "that said Jackson represented to said council that he was without power to make any agreement to compensate them for their lands and that unless they signed the treaty as he had drawn it he would furnish the whole tribe with provisions and ammunition and that they could go down to Pensacola and join the Red Sticks and British and that, by the time they got there, he would be on their tracks and whip them and the British and drive them into the sea," and that driven to this extremity they submitted and signed the treaty. (Pp. 271–272.)

This petition was dismissed on March 7, 1927, the Court of Claims holding that the jurisdictional act does not give jurisdiction over a claim, the allowance of which involved the setting aside of a treaty on the ground that it was entered into under fraud. *Creek Nation* v. *United States*, 63 C. Cls. 270 (1927), cert. den. 274 U. S. 751.

[341] Ninth Article, Treaty of Ghent of December 24, 1814, 8 Stat. 218.

[342] Poutawatamie, July 18, 1815, 7 Stat. 123; Piankishaw, July 18, 1815, 7 Stat. 124; Teeton, July 19, 1815, 7 Stat. 125; Sioux of Lake, July 19, 1815, 7 Stat. 126; Sioux of the River of St. Peters, July 19, 1815, 7 Stat. 127; Yankton, July 19, 1815, 7 Stat. 128; Mahas, July 20, 1815, 7 Stat. 129; Kickapoos, September 2, 1815, 7 Stat. 130; Delawares, Wyandots, Senecas, etc., September 8, 1815, 7 Stat. 131; Great and Little Osage, September 12, 1815, 7 Stat. 133. The Supreme Court in construing the treaty with the Great and Little Osages, September 12, 1815, states: "peace was reestablished between the contracting parties, and former treaties were renewed * * *." *State of Missouri* v. *State of Iowa*, 7 How. 559, 668 (1849). Sac, September 13, 1815, 7 Stat. 134; Fox, September 14, 1815, 7 Stat. 135; Iaway, September 16, 1815, 7 Stat. 136; Kanzas, October 28, 1815, 7 Stat. 137; Sacs of Rock River, May 13, 1816, 7 Stat. 141; Sioux of the Leaf, Sioux of the Broad Leaf, and Sioux Who Shoot in the Pine Tops, June 1, 1816, 7 Stat. 143; Winnebago, June 3, 1816, 7 Stat. 144; Menomenee, March 30, 1817, 7 Stat. 153; Ottoes, June 24, 1817, 7 Stat. 154; Poncarar, June 25, 1817, 7 Stat. 155.

Five other treaties negotiated during this period provided for cessions of territory: Cherokees, March 22, 1816, 7 Stat. 138; Ottawas, Chipawas, etc., August 24, 1816, 7 Stat. 146; Cherokee, September 14, 1816, 7 Stat. 148; Chickasaws, September 20, 1816, 7 Stat. 150; Chactaw, October 24, 1816, 7 Stat. 152.

The Treaty of September 20, 1816, 7 Stat. 150, with the Chickasaws, made provision (Art. 6) for liberal presents to specified chiefs and individual Indians. Article 7 provided that no more licenses were to be granted to peddlers to traffic in goods in the Chickasaw Nation.

[343] Treaty of July 8, 1817, 7 Stat. 156. Construed in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 6 (1831); *Marsh* v. *Brooks*, 8 How. 223, 232 (1850); *Holden* v. *Joy*, 17 Wall. 211, 212 (1872). The Supreme Court again construed this treaty in *Heckman* v. *United States*, 224 U. S. 413, 429 (1912). "In 1817 * * * the Cherokee Nation ceded to the United States certain tracts which they formerly held, and in exchange the United States bound themselves to give to that branch of the Nation on the Arkansas as much land as they had received, or might thereafter

most 30 years thereafter Indian treaty making was concerned almost solely with removing certain tribes of natives to the vacant lands lying to the westward. The first and most significant of these treaties was concluded with the southern tribes later known as the "Five Civilized Tribes."

1. *Cherokees.*—In 1816 Andrew Jackson as Commissioner for the United States met with the Cherokees to discuss the proposition of exchanging lands. Many influential Cherokees were bitterly opposed to it, and the great majority of Indians were extremely dubious of the value of removing elsewhere.

However, the next year a treaty, prepared by Andrew Jackson, was accepted by representatives of the Cherokee Nation.[344] Its recitals include (Art. 5) a cession of the land occupied by the Cherokee Nation in return for a proportionate tract of country elsewhere, a stipulation (Art. 3) for the taking of a census of the Cherokee Nation in order to determine those emigrating and those remaining behind and thus divide the annuities between them; compensation for improvements (Arts. 6 and 7), and (Art. 8) reservations of 640 acres of Cherokee land in life estate with a reversion in fee simple to their children, to "each and every head of any Indian family residing on the east side of the Mississippi River * * * who may wish to become citizens * * *."[345] These "reservations" were the first allotments, and the idea of individual title with restrictions on alienation, as a basis of citizenship, was destined to play a major role in later Indian legislation.

When the attempt to execute the treaty was made, its weaknesses came to light. Removal was voluntary, and the national will to remove was lacking. In 1819 a delegation of Cherokees appeared in Washington and negotiated with Secretary Calhoun a new treaty,[346] which contemplated a cessation of migration.

The Cherokee Nation opposed removal and further cession of land, but once more the Federal Government sought to persuade them to move west. By the treaty of May 6, 1828,[347] made with that portion of the Cherokee Nation which had removed across the Mississippi pursuant to earlier treaties, another offer was made. Article 8 provides:

> * * * that their Brothers yet remaining in the States may be induced to join them * * *, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States.[348]

This treaty was negotiated to define the limits of the Cherokees' new home in the West—limits which were different from those contemplated by the treaty of 1817 and convention of 1819 and included the following promise:

> The United States agree to possess the Cherokee, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, * * *.[349]

Also interesting is the preamble wherein is stated:

> * * * the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians * * * a *permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *.[350] (P. 311.)

Article 6 provided that whenever the Cherokees desired it, a set of plain laws suited to their condition would be furnished.[351]

Confidential agents were then sent to the Cherokee Nation to renew efforts to secure immigrants to the west, but these efforts met with little success.[352] Obviously more forceful measures would have to be used, and the expansionists awaited eagerly the replacing of John Quincy Adams with a Chief Executive who would not hesitate to take such action.[353]

The election of 1828 supplied just such a President. Despite a conciliatory inaugural address,[354] Andrew Jackson immediately made it clear that the Indians must go West.[355] In this he was

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receive, east of the Mississippi. * * *" The tribe (Cherokee) was divided into two bodies, one of which remained where they were, east of the Mississippi, and the other settled themselves upon United States land in the country on the Arkansas and White rivers.

The effect of reserves to individual Indians of a mile square each, secured to heads of families by the Cherokee treaties of 1817 and 1819, is directly decided in the case of *Cornet* v. *Winton's Lessee*, 2 Yergers Ten. Rep. 143 (1826). The division of the Cherokee Nation into two parties is also discussed in *Old Settlers* v. *United States*, 148 U. S. 427, 435–436 (1893).

[344] Treaty of July 8, 1817, 7 Stat. 156. It is to be noted that in the preamble of the treaty the following quotation of President Madison is cited with approval:

> * * * when established in their new settlements, we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand.

[345] For opinions of the Attorney General on compensation provided by the sixth and seventh articles on rights of reservees and on descent of lands, see 3 Op. A. G. 326 (1838); 3 Op. A. G. 367 (1838); 4 Op. A. G. 110 (1842); 4 Op. A. G. 580 (1847).

[346] Treaty of February 27, 1819, 7 Stat. 195.

[347] 7 Stat. 311.

[348] The term "property which he may abandon" is construed as fixed property, "that which he could not take with him; in a word, the land and improvements which he had occupied" in 2 Op. A. G. 321 (1830).

[349] Treaty of May 6, 1828, Art. 2, 7 Stat. 311.

[350] This treaty was ratified with the proviso that it should not interfere with the lands assigned or to be assigned to the Creek Indians nor should it be construed to cede any lands heretofore ceded to any tribe by any treaty now in existence.

On February 14, 1833, a treaty (7 Stat. 414) to settle disputed Creek claims was negotiated with the Cherokee Nation west of the Mississippi. In addition to certain amendments to the preceding agreement, an outlet described as a

> * * * perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extend.

which had been guaranteed in Treaty of May 6, 1828, Art. 2, 7 Stat. 311, was reaffirmed.

[351] This article was canceled, at Cherokee request, by Treaty of February 14, 1833, Art. 3, 7 Stat. 414.

[352] Foreman, Indian Removal (1932), pp. 21, 231; Abel, Indian Consolidation, in Annual Report, American Historical Association (1906), vol. 1, p. 361.

[353] Abel, *op. cit.*, p. 370.

[354] In his speech of March 4, 1829, Jackson said:

> It will be my sincere and constant desire to observe toward the Indian tribes within our limits a just and liberal policy, and to give that humane and considerate attention to their rights and their wants which is consistent with the habits of our Government and the feelings of our people. (H. Misc. Doc., 53d Cong. 2d sess. (1893–94), vol. 37, pt. 2, p. 438.)

[355] See Abel *op. cit.*, p. 370, 378; Foreman, *op. cit.*, p. 21. In his first message to Congress of December 8, 1829, Jackson urged voluntary removal as a protection to the Indians and the states. (H. Misc. Doc., 53d Cong. 2d sess. (1893–04), vol. 37, pt. 2, p. 458.) On May 28, 1830, the Indian Removal Act (4 Stat. 411, 25 U. S. C. 174, R. S. § 2114) was passed. (Amendments guaranteeing protection to the Indians from the states and respect for treaty rights until removal were defeated (Abel, *op cit.*, p. 380).) It gave to President Jackson power to initiate proceedings for exchange of lands. This was begun, with requests for conferences, in August of 1830 (Foreman, *op. cit.*,

aided by the legislature of Georgia which had enacted laws to harrass and make intolerable the life of the Eastern Cherokee.[356]

When the objectives of the hostile legislation became evident the chief of the Cherokee Nation, John Ross, determined to seek relief and filed a motion in the Supreme Court of the United States to enjoin the execution of certain Georgia laws. The bill reviewed the various guarantees in the treaties between the Cherokee Nation and the United States and complained that the action of the Georgia legislature was in direct violation thereof.

While the jurisdiction of the Supreme Court was denied on the grounds that the Cherokee Nation was not a *foreign* state within the meaning of the Constitution, Chief Justice Marshall nevertheless gave utterance to a highly significant analysis—the first judicial analysis—of the effect of the various treaties upon the status of the Indian nation:

> * * * The numerous treaties made with them by the United States, recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognise the Cherokee nation as a state, and the courts are bound by those acts.[357]

Shortly thereafter, two missionaries, Worcester and Butler, were indicted in the Superior Court of Gwinnett County for residing in that part of the Cherokee country attached to Georgia by recent state laws, in violation of a legislative act which forbade the residence of whites in Cherokee country without an oath of allegiance to the state and a license to remain.[358] Mr. Worcester pleaded that the United States had acknowledged in its treaties with the Cherokees the latter's status as a sovereign nation and as a consequence the prosecution of state laws could not be maintained. He was tried, convicted and sentenced to 4 years in the penitentiary.

On a writ of error the case was carried to the Supreme Court of the United States, where the Court asserted its jurisdiction and reversed the judgment of the Superior Court for the County of Gwinnett in the State of Georgia, declaring that it had been pronounced under color of a law which was repugnant to the Constitution, laws and treaties of the United States. Chief Justice Marshall in delivering this opinion examined the recitals of the various treaties with the Cherokees and proceeded to point out:

> * * * They [state laws] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself. They are in hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties. * * *[359]

In September 1831, the President sent Benjamin F. Currey of Tennessee into the Cherokee country to superintend the work of enrolling the natives for the journey to the west.[360] Currey found the task difficult and slow, only 71 families enrolling by December.[361] The Cherokees were divided on removal, one group headed by John Ridge favorable to emigration, another faction remaining loyal to their chief, John Ross, and opposed to the program.[362] In 1834 the Ridge faction negotiated a sweeping treaty for removal which failed of ratification by the Cherokee council.[363]

In 1835, delegates from both factions were sent to Washington. After the Ross group had refused the President's terms, negotiations were opened with the opposing party, and on March 14 an agreement was drawn up which was not to be considered binding until it should receive the approval of the Cherokee people in full council.[364]

At a full council meeting in October 1835, at Red Clay, Tennessee, both factions, temporarily abandoning their quarrels, united in opposition to this treaty and rejected it.[365] Another meeting was then called at New Echota, and a new treaty was negotiated and signed.[366]

By Article 1, the Cherokee Nation ceded all their land east of the Mississippi River to the United States for $5,000,000.

Article 2 of this instrument recites that whereas by treaties with the Cherokees west of the Mississippi, the United States had guaranteed and secured to be conveyed by patent a certain territory as their permanent home, together with "a perpetual outlet west," provided that other tribes shall have access to saline deposits on said territory, it is now agreed "to convey to the said Indians, and their descendants by patent, in fee simple * * *" certain additional territory.

The estate of the Cherokees in their new homeland (by Art. 2, 7,000,000 acres and an additional 800,000 acres) has been variously called a fee simple,[367] an estate in fee upon a condition subsequent,[368] and a base, qualified or determinable fee.[369]

Article 5 provides that the new Cherokee land should not be included within any state or territory without their consent, and

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pp. 21–22). The Indians were advised that refusal meant end of federal protection and abandonment to state laws (Abel, *op. cit.*, p. 382; Foreman, *op. cit.*, pp. 231–232.)

[356] See *Worcester* v. *Georgia*, 6 Pet. 515 (1832). See also, Foreman, *op. cit.*, pp. 229–230.

[357] *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16 (1831). See Chapter 14, sec. 3.

[358] Foreman, *op. cit.* p. 235.

[359] *Worcester* v. *Georgia*, 6 Pet. 515, 561, 562, (1832). On the failure of Georgia to abide by the Supreme Court decision, see Chapter 7, sec. 2.

[360] The methods which were employed at this time have been described thus:

> Intrigue was met by intrigue. Currey secretly employed intelligent mixed-breeds for a liberal compensation to circulate among the Indians and advance arguments calculated to break down their resistance. * * * Plied with liquor, the Indians were charged with debts for which their property was taken with or without process of law. (*Foreman, op. cit.*, p. 236.)

[361] *Ibid.*, p. 241.

[362] Abel, *op. cit.* fn. 352 p. 403.

[363] Treaty of June 19, 1834 (unratified). This treaty ceded to the United States all the Cherokee land in Georgia, North Carolina, Tennessee, and Alabama, and the Indians agreed to move west. Abel, *op. cit.*, p. 403; Foreman, *op cit.*, pp. 264, 265.

[364] Treaty of March 14, 1835 (unratified). By this treaty the tribe ceded all its eastern territory and agreed to move west for $4,500,000. Foreman, *op cit.*, p. 266; Abel, *op. cit.* pp. 403, 404.

[365] Foreman, *op. cit.*, pp. 266–267.

[366] December 20, 1835, 7 Stat. 478, 488 (Supplement). The events leading to this treaty are analyzed in L. K. Cohen, The Treaty of New Echota (1936), 3 Indians at Work, No. 19.

[367] *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641 (1890). In *United States* v. *Rogers*, 23 Fed. 658, 664 (D. C. W. D. Ark. 1885), the court insisted:

> * * * By looking at the title of the Cherokees to their lands, we find that they hold them all by substantially the same kind of title, the only difference being that the outlet is incumbered with the stipulation that the United States is to permit other tribes to get salt on the Salt plains. With this exception, the title of the Cherokee Nation to the outlet is just as fixed, certain, extensive, and perpetual as the title to any of their lands.

The President and Senate in concluding a treaty, can lawfully covenant that a patent should issue to convey lands which belong to the United States. *Holden* v. *Joy*, 17 Wall. 211 (1872).

[368] *Holden* v. *Joy*, 17 Wall. 211 (1872).

[369] *United States* v. *Reese*, 27 Fed. Cas. No. 16,137 (D. C. Mass. 1868).

that their right to make laws not inconsistent with the Constitution or intercourse acts should be secured.[370]

The New Echota treaty also provided (Art. 12) under certain conditions, reservations of 160 acres for those who wished to remain east of the Mississippi [371] and for settlement of claims (Art. 13) for former reservations. In addition a commission was established (Art. 17) to adjudicate these claims.[372]

2. *Chickasaws.*—Although the domain of the Chickasaw Nation was considerably restricted by the treaties of 1816 [373] and 1818 [374] it was not until 1830 that the subject of "removal" was given serious consideration. During the summer of that year, the President met the principal chiefs of the Chickasaw Nation and warned them that they would be compelled either to migrate to the west or to submit to the laws of the state.[375] After several days of conference a provisional treaty [376] was signed. However, performance was conditional upon the Chickasaws being given a home in the West on the lands of the Choctaw Nation, and as the two nations could come to no agreement the treaty remained unfulfilled.[377] Nevertheless, white infiltration into Chickasaw land east of the Mississippi was accelerated, and the problem of removal became a pressing government problem.[378]

On October 20, 1832,[379] another treaty for removal was negotiated in which all of the land of the tribe east of the Mississippi was ceded to the United States [380] to be sold at public auction.[381] Article 4 provides:

> * * * that the Chickasaw people shall not deprive themselves of a comfortable home, in the country where they now are, untill they shall have provided a country in the west to remove to * * *. It is therefore agreed * * * that they will endeavor as soon as it may be in their power, after the ratification of this treaty, to hunt out and procure a home for their people, west of the Mississippi river, * * * they are to select out of the surveys, a comfortable settlement for every family in the Chickasaw nation, to include their present improvements, if the land is good for cultivation, and if not they may take it in any other place in the nation, which is unoccupied by any other person. * * * All of which tracts of land, so selected and retained, shall be held, and occupied by the Chickasaw people, uninterrupted until they shall find and obtain a country suited to their wants and condition. And the United States will guaranty to the Chickasaw nation, the quiet possession and uninterrupted use of the said reserved tracts of land, so long as they may live on and occupy the same. * * *

Despite the guarantee of the United States to the Chickasaws of the "quiet possession and uninterrupted use" of the reserved tracts,[382] white settlers continued to overrun and occupy their country unlawfully.[383] Furthermore, the problem of finding land in the West proved a difficult one. Finally convinced of the need for amending the treaty in certain particulars, the Government consented to the conclusion of another treaty on May 24, 1834.[384] This altered the program of removal, granted in fee certain reservations, while asserting that the Chickasaws "still hope to find a country, adequate to the wants and support of their people, somewhere west of the Mississippi * * *." [385]

By Article 2, the Chickasaws on their removal west were to be protected by the United States from the hostile prairie tribes. They pledged themselves never to make war on another tribe, or on whites, "unless they are so authorized by the United States." Article 4 set up a commission of Chickasaws to pass on the competency of members of the tribe to handle and sell their land. Articles 5 and 6 listed the cases in which reservations could be granted in fee, and determined the amount of land in each case.[386] Article 9 provided that funds from the sale of Chickasaw lands be used for schools, mills, blacksmith shops, etc.[387]

3. *Choctaws.*—By 1820 it was evident that the Choctaws, disturbed by the number of settlers who were pouring into the rich valleys of the Mississippi, would consent to "removal." Ac-

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[370] In *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641 (1890), the Supreme Court commented on this clause:

> * * * By the Treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;" * * *. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. * * * (P. 654.)

[371] The Indians who remained behind under this provision dissolved their connection with the Cherokee Nation (*Cherokee Trust Funds*, 117 U. S. 288 (1886)), without becoming citizens either of the United States or North Carolina. *United States* v. *Boyd*, 83 Fed. 547 (C. C. A. 4, 1897).

In later years some of the ceded Cherokee lands were bought back by Cherokees who resisted removal. In 1925 this land was reconveyed to the United States in trust by Indians for disposition under the Act of June 4, 1924, 43 Stat. 376. See Historical Note, 25 U. S. C. A. 331.

[372] That the President has power to appoint new commissioners there being no limitation to this authority, except the fulfillment of its purposes, but that the expenses cannot be defrayed out of the Cherokees' fund is the advice of the Attorney General. 16 Op. A. G. 300 (1879); 4 Op. A. G. 73 (1842). See also 5 Op. A. G. 268 (1850); H. Rept. No. 301, 28th Cong., 1st sess. (1844).

[373] Treaty of September 20, 1816, 7 Stat. 150. For certain ceded lands north and south of the Tennessee River, the Indians received $12,000 per annum for 10 years (Arts. 2 and 3).

Article 7 prohibits the licensing of peddlers to trade within the Chickasaw Nation and describes the activities of the trader as a disadvantage to the nation.

[374] Treaty of October 19, 1818, 7 Stat. 192, construed in *Porterfield* v. *Clark*, 2 How. 76, 83 (1844). All Chickasaw land north of the south boundary of Tennessee was ceded for $300,000—$20,000 annually for 15 years (Arts. 2 and 3).

[375] Foreman, *op. cit.*, p. 193. Each of the Chickasaw chiefs was to receive four sections of land if the treaty were ratified.

[376] Treaty of September 1, 1830 (unratified).

[377] Several official attempts were made by the Government to persuade the Chickasaws of the desirability of amalgamating with the Choctaws. Foreman, *op. cit.*, pp. 193–196.

[378] *Ibid.*, p. 197.

[379] 7 Stat. 381. Supplementary and explanatory articles (7 Stat. 388) adopted October 22, 1832. Art. 9 is of interest. The Chickasaws

> * * * will always need a friend to advise and direct them. * * * There shall be an agent kept with the Chickasaws as heretofore, so long as they live within the jurisdiction of the United States as a nation * * *. And whenever the office of agent shall be vacant, * * * the President will pay due respect to the wishes of the nation * * *.

[380] *Ibid.*, Art. 1.

[381] *Ibid.*, Art. 2.

[382] *Ibid.* See Arts. 4 and 15.

[383] Foreman, *op. cit.* p. 199.

[384] Treaty of May 24, 1834, 7 Stat. 450. It is of interest that in previous treaties the word "cede" was used. In this the phrase "abandon their homes" is used (Art. 2).

[385] Art. 2. Such land was not found until 1837, when the Chickasaws purchased a large tract of land from the Choctaws. Foreman, *op. cit.* p. 203.

[386] For opinion that a widow keeping house and having children or other persons residing with her, except slaves, is the head of a family unless said children or other persons are provided for under the sixth and eighth articles; that as many Indian wives as were living with their children apart from their husbands (though wives of the same Indian) are "heads of a family" within the meaning of the fifth article of the treaty, see 3 Op. A. G. 34, 41 (1836). And see, on the scope of investments under Art. 11, 3 Op. A. G. 170 (1837).

Title to reservations was complete when the locations were made to identify them. *Best* v. *Polk*, 18 Wall. 112 (1873).

For details concerning the number of claimants for lands; the number approved; and the names of the assignees of those Indians who obtained lands pursuant to the provisions of the Chickasaw treaty made at Washington in 1834, see H. Rept. No. 190, 29th Cong. 1st sess., vol. VI (1846).

[387] Also see sec. 3C3 of this Chapter.

cordingly negotiations were begun and on October 18, 1820,[388] the dians ceded to the United States the "coveted tract" in western ssissippi[389] for land west of the Mississippi between the Arkansas and Red rivers.[390]

Article 4 of the treaty contains the guarantee that the boundaries established should remain without alteration

> * * * until the period at which said nation shall become so civilized and enlightened as to be made citizens of the United States, and Congress shall lay off a limited parcel of land for the benefit of each family or individual in the nation.

Article 12 gives the agent full power to confiscate all whiskey except that brought under permit into the nation. This appears to be the first attempt by treaty to regulate traffic in liquor.

Shortly after the treaty was signed it was discovered that a part of Choctaw's new country was already occupied by white settlers.[391] The President called to Washington delegates from the Choctaw Nation to reconsider the matter and negotiate another treaty. This was done on January 20, 1825,[392] and the Choctaws for $6,000 a year for 16 years (Art. 3), and a permanent annuity of $6,000 (Art. 2), ceded back all the land lying east of a line which today is the boundary between Arkansas and Oklahoma. By Article 4 of the 1825 treaty it is also agreed that all those who have reservations under the preceding treaty "shall have power, with the consent of the President of the United States, to sell and convey the same in fee simple." Article 7 calls for the modification of Article 4 of the preceding treaty so that the Congress of the United States shall not exercise the power of allotting lands to individuals without the consent of the Choctaw Nation.

A few years later, federal agents, anxious to speed up the migration program under the Removal Act of 1830[393] held another ries of conferences in the Choctaw Nation.

At Dancing Rabbit Creek, at a conference characterized by generous present-giving,[394] a treaty was signed on September 27, 1830.[395] By this agreement the Choctaws ceded the remainder of their holdings east of the Mississippi to the United States Government in return for

> * * * a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it, * * *.[396]

This tract was the same as that in the Treaty of January 20, 1825.[397]

Provision is also made for reservations of land to individual Indians in Articles 14[398] and 19.[399] In Article 14, it is also stipulated that a grant in fee simple shall issue upon the fulfillment of certain conditions.[400]

Whether a true construction of Article 14 created a trust for the children of each reservee was one of the questions before the United States Supreme Court in *Wilson* v. *Wall*. Said the Court:

> The parties to this contract may justly be presumed to have had in view the previous custom and usages with regard to grants to persons "desirous to become citizens." The treaty suggests that they are "a people in a state of rapid advancement in education and refinement." But it does not follow that they were acquainted with the doctrine of trusts. * * *[401] (P. 87.)

The following provisions of Article 4 of the Treaty of Dancing Rabbit Creek deserve to be noted:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the Government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said Choctaw Nation from and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; * * *.[402]

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[388] Treaty of Doak's Stand of October 18, 1820, 7 Stat. 210. Construed in *Choctaw Nation* v. *United States*, 119 U. S. 1 (1886); *United States* v. *Choctaw Nation*, 179 U. S. 494, 507 (1900); *Mullen* v. *United States*, 224 U. S. 448, 450 (1912). In *Elk* v. *Wilkins*, 112 U. S. 94, 100 (1884), this treaty was cited in support of the statement that the alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. In *Fleming* v. *McCurtain*, 215 U. S. 56, 59 (1909), the Supreme Court declared that by this treaty the United States ceded certain lands to the Choctaw Nation with "no qualifying words."

[389] Abel, *op cit.* fn. 352, p. 286. The tract was coveted particularly by the state of Mississippi. See Art. 1.

[390] Art. 2.

[391] Abel, *op. cit.*, pp. 286–287.

[392] Treaty of January 20, 1825, 7 Stat. 234, construed in 2 Op. A. G. 465 (1831), and 3 Op. A. G. 48 (1836).

[393] Act of May 28, 1830, 4 Stat. 411, R. S. § 2114, 25 U. S. C. 174.

[394] The expense account for the negotiations of Dancing Rabbit Creek submitted by the federal commissioners included items of $1,409.84 for calicos, quilts, razors, soap, etc. Sen. Doc. No. 512, 23rd Cong. 1st sess., pp. 251–255.

[395] 7 Stat. 333. This was the first treaty made and ratified under the Removal Act of May 28, 1830, 4 Stat. 411.

[396] Art. 2. In 1909 the United States Supreme Court examined this particular provision and ruled that this was a grant to the Choctaw Nation and was not to be held in trust for members of the tribe, which upon dissolution of the tribal relationship would confer upon each individual absolute ownership as tenants in common. *Fleming* v. *McCurtain*, 215 U. S. 56 (1909). See Chapter 15, sec. 1A.

[397] 7 Stat. 234.

[398] Article 14 provided reservations of land for those electing to remain and become citizens of the states. Such persons retained their Choctaw citizenship, but lost their annuity if they removed. That in the event of the death of reservees under the fourteenth article of the treaty of 1830, before the fulfillment of the condition precedent to the grant in fee simple of the reserve, the interest thereby acquired passes to those persons who under state laws succeed to the inheritable interest of the individual in question. See 3 Op. A. G. 107 (1836).

If an Indian was prevented by the force or fraud of individuals having no authority from the Government from complying with the conditions of Article 14 of the treaty of Dancing Rabbit Creek, it is considered by the Attorney General that the remedy was against such individuals, although if permanent dispossession was produced by the sale of the land by the Government (even though he might have temporarily lost possession by such tortious acts) his claim is still valid. 4 Op. A. G. 513 (1846). And see, on eligibility to receive reservations, 5 Op. A. G. 251 (1850).

[399] No forfeiture has resulted from the fraudulent acts of the agent of the Government who induced claimants to apply for reserves under the nineteenth article, and which were located for them, but for which patents have not been demanded, nor issued. See 4 Op. A. G. 452 (1845).

To the effect that the essential provisions of the Choctaw treaty of 1830 must take precedence over any rights claimed under the preemption laws, but that regulations to carry treaty into effect need not be inflexible and may be modified in any way not inconsistent with the treaty. See 3 Op. A. G. 365 (1838).

[400] Residence for 5 years after ratification of the treaty with the intention of becoming a citizen, is a condition.

[401] *Wilson* v. *Wall*, 6 Wall. 83, 87–90 (1867).

[402] In a negligence action brought in error to the United States Court in the Indian Territory, the defense advanced was a general denial and a plea of the statute of limitations which, it was claimed, was in force in the Indian Territory when that country was a part of the territory of Missouri, and remained in force notwithstanding the separation of the territory. This Circuit Judge Caldwell denied, calling attention to the treaty with the Choctaw Nation of September 27, 1830, 7 Stat. 333, by which the United States Government "bound itself in the most solemn manner to exclude white people from the territory, and never to permit the laws of any state or territory to be extended over it." *St. Louis & S. F. R. Co.* v. *O'Loughlin*, 49 Fed. 440, 442 (C. C. A. 8, 1892).

That this does not empower the Choctaws to punish by their own laws white men who come into their nation, see 2 Op. A. G. 603 (1834). And see Chapter 7, sec. 9.

The nature and extent of the jurisdiction of the Choctaw Nation were reviewed by Attorney General Caleb Cushing in 1855:

> Now, among the provisions of the treaty of Dancing Rabbit Creek are several of a very significant character having exclusive reference to the question of *criminal* jurisdiction.
>
> In the first place, it provides that any Choctaw, committing acts of violence upon the person or property of "citizens of the United States," shall be delivered up for trial and punishment by the laws of the United States; by which also are to be punished all acts of violence committed upon persons or property of the Choctaw nation by "citizens of the United States." Provision less explicit, but apparently on the same principle, is made for the repression or punishment of theft. General engagement is made by the United States to prevent or punish the *intrusion* of their "citizens" into the territory of the nation. (Arts. 6, 7, 9, 12.)
>
> In the second place, the Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws, "any white man" who shall come into the nation, and infringe any of their national regulations (art. 4.) But Congress did not accede to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. (See act of June 30, 1834, iv Stat. at Large, p. 729, and act of June 17, 1844, v Stat. at Large, p. 680.) These acts cover, so far as they go, all crimes except those committed by Indian against Indian.
>
> But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case on any court of United States. * * *[403] (Pp. 174, 178–179.)

Before the Treaty of Dancing Rabbit Creek was proclaimed,[404] whites began to move into Choctaw country illegally,[405] and Indians, "ill-organized and inadequately provisioned" began to move west[406] under the aegis of Greenwood Le Flore, a mixed blood and former Choctaw chief.[407] President Jackson then ordered that removal be supervised by the Army.[408] Removal began on a large scale in the fall of 1831.[409] It had not been entirely completed at the end of the century.[410]

4. *Creeks.*—The cession[411] of land by the Creeks after the uprising of the "hostiles" in 1812 "was the first step in the direction of systematic removal."[412]

The Compact of 1802[413] became the source of constant agitation in Georgia for change in the Creek boundary line. On January 22, 1818, a redefinition of the boundary of the Creek Nation was secured,[414] but the lands obtained by this agreement were less fertile[415] than had been anticipated and another treaty was negotiated January 8, 1821.[416] Part of the consideration tendered the Creeks on this occasion (Art. 4) was the payment to the State of Georgia of "* * * whatever ballance may be found due by the Creek nation to the citizens of said state * * *." The value of the ceded land was placed at $450,000, of which not more than $250,000 was to be paid to settle the claims of Georgia citizens against the Creek Nation,[417] the exact amount of which is left to the decision of the President of the United States.

After the award had been made, Georgia asked that it be enlarged to cover other claims. The Attorney General, after advising that the award of President Monroe must be considered final and conclusive, reviewed the contents of the treaties between the United States and the Creek Nation and asserted:

> One head of these claims submitted for my opinion is the claim for *property destroyed*, and which the people of Georgia carry back to 1783, the date of the treaty of Augusta. How stands this claim under these treaties? There is not one treaty which contains any stipulation to answer for *property destroyed.* * * * what is the effect, in a *treaty of peace, of express provisions with regard to some past wrongs, and a total silence as to others?* Is it not a virtual extinguishment of all claims for antecedent wrongs with regard to which the treaty is silent?
>
> * * * * *
>
> It is further asked, why the Creek nation did not stipulate for the payment over to themselves of the large surplus that must inevitably remain, upon the supposition that the claim for property destroyed was not to be allowed? * * * They were at the feet of the white people, with whom they were treating. They saw a formidable array of claims, * * * and of the circumstances attending which, the living race of Creeks must have been wholly ignorant—and now dug up from the dead, by the State of Georgia, and presented and pressed as living and valid claims. * * * the alleged debtors were Indians, a conquered and despised race, for whom it was natural for them to suppose that no sympathy was left either by the creditor or the judge. Is it not probable that, under these circumstances, they were ignorant enough to think it probable that no surplus would remain, and that they were willing enough to surrender to the United States the whole $250,000, on the condition of their relieving them from claims to which there seemed to be no end, but which threatened to be immortal? * * *[418]

In 1824 commissioners from the United States Government arrived in the Creek Nation to negotiate for still another session. At Broken Arrow, in Alabama, they met with the Creeks and told them that the President had extensive holdings beyond the Mississippi which he wished to give them in exchange for the land they then occupied.[419]

The Creek chiefs replied:

> * * * ruin is the almost inevitable consequence of a removal beyond the Mississippi, we are convinced. It is true, very true, that "we are surrounded by white people," that there are encroachments made—what assurances have we that similar ones will not be made on us, should we deem it proper to accept your offer, and remove beyond

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[403] 7 Op. A. G. 174, 178–179 (1855). See Chapter 7, sec. 9.

[404] February 24, 1831.

[405] Foreman, *op. cit.*, p. 31.

[406] *Ibid.*, p. 38.

[407] *Ibid.*

[408] *Ibid.*, p. 42.

[409] *Ibid.*, pp. 48–49.

[410] *Ibid.*, p. 104.

[411] Treaty of August 9, 1814, 7 Stat. 120.

[412] Abel, *op. cit.* fn. 352, p. 278. See sec. 4D, *supra.*

[413] By that compact, Georgia ceded territory now part of Alabama and Mississippi in consideration of which the United States agreed to extinguish Indian title within the limits of Georgia as soon as it could be done "peaceably and on reasonable terms." Abel, *op cit.*, pp. 322, 323.

Ordinarily lands ceded to the United States become part of the public domain. By the Georgia pact, it became the property of the state. Hence, Georgia felt her failure to share sufficiently in previous land cessions was the result of national selfishness (Abel, *op. cit.*, p. 322).

[414] Treaty of January 22, 1818, 7 Stat. 171.

[415] Indian Office Letter Books, Series I. D., p. 224, cited in Abel, *op cit.*, pp. 322, 323.

[416] Treaty of January 8, 1821, 7 Stat. 215. Subsequent to this treaty, the question of whether the United States was keeping her part of the Georgia compact arose. A House committee reporting on January 7, 1822 (American State Papers, "Indian Affairs," II, p. 259), held that it was not. According to Abel, (*op. cit.*, p. 323), the constitutional significance of removal dates from that report.

[417] By the Treaty of August 7, 1790, 7 Stat. 35, the Creeks had undertaken responsibility to return prisoners, white or Negro, in any part of the nation (Art. 3). By that article, the Treaty of Indian Springs of January 8, 1821 (Art. 4), 7 Stat. 215, held them responsible for claims not exceeding $250,000 by the citizens of Georgia, for runaway slaves. Foreman, *op. cit.*, p. 317.

[418] 2 Op. A. G. 110, 129, 150–151 (1828).

[419] Talk, December 7, 1824, Journal of Proceedings at Broken Arrow (Indian Office MS. Records) cited in Abel, *op. cit.* fn. 352, p. 337.

the Mississippi; and how do we know that we would not be encroaching on the people of other nations? [420]

Finally after days of unavailing speech-making the conference was adjourned. However, one Commissioner, Duncan G. Campbell, aware that one faction in the Creek Nation headed by William McIntosh [421] favored migration, brought about the resumption of treaty negotiations at Indian Springs, its stronghold in Georgia.[422]

Significantly the Great Chief of the Creeks, Little Prince, and his second in command, Big Warrior, were absent, having dispatched a representative to the treaty council to protest against the lack of authority of those in attendance.[423] Undiscouraged, Campbell continued the negotiations and on February 12, 1825,[424] a treaty was concluded providing for the surrender of certain Creek holdings for $400,000 for lands of "like quantity, acre for acre, westward of the Mississippi." [425]

A year later a new treaty [426] was negotiated and referred to the Senate which refused its "advice and consent." [427] A few days later a supplementary article [428] providing for an additional cession of land was submitted and with this alteration, the treaty received Senate confirmation.[429]

Here, however, the matter did not end. Georgia now denied that treaties with the Indians had the same effect as those with civilized nations and asked that the whole question of claims under the Treaty of 1821 be reconsidered. This was refused by the Attorney General of the United States who declared:

> The matter of this objection requires to be coolly analyzed.
>
> First, they are an *uncivilized nation*. And what then? Are not the treaties which are made with them obligatory on both sides? It was made a question in the age of Grotius, whether treaties made by Christians with heathens were obligatory on the former. "This discussion," says Vattel (book ii, chap. xii, sec. 161), "might be necessary at a time when the madness of party still darkened those principles which it had long caused to be forgotten; but we may venture to believe it would be superfluous in our age. *The law of nature alone regulates the treaties of nations.* The difference of religion is a thing absolutely foreign to them. Different people treat with each other *in quality of men*, and not under the character of *Christians or of Mussulmans*. Their common safety requires that they should treat with each other, and treat with security. * * *
>
> What Vattel says of difference of religion is equally applicable to this objection * * *. And that civilization which should claim an exemption from the full obligations of a treaty, or seek to narrow it by construction, on the ground that the other party to the treaty was uncivilized, would be as little entitled to our respect as the religion which should claim the same consequences on the ground that the other treating party was a heathen.[430]

With the departure from the Presidency of John Quincy Adams the strict observance of treaty obligations with the Indian tribes ceased to be an accepted national policy. Henceforth the emphasis was to be on "removal," and a few days after his inauguration Andrew Jackson insisted that it was necessary for the Creeks to migrate as soon as possible.[431] In vain the Creeks protested.[432] Their delegation to Washington was granted an audience on the condition that they would be fully empowered to negotiate in conformity with the wishes of the Government.[433] Finally, a treaty was concluded March 24, 1832,[434] and all the Creek land east of the Mississippi passed into the possession of the Federal Government.

By article 14 of this agreement, the Unitd States solemnly promised tribal self-government to the Creeks. A number of years later this guarantee figured in a charge to the jury regarding robbery committed in the Indian country. The court in denying that the Indian country was under the sole and exclusive jurisdiction of the United States said:

> * * * A sole and exclusive jurisdiction would exclude all Indian laws and regulations, punish crimes committed by Indian on Indian, and regulate and govern property and contracts and the civil and political relations of the inhabitants, Indians and others, in that country. It would be wholly opposed to a self-government by any Indian tribe or nation. This self-government is expressly recognized and secured by several treaties between the United States and Indian tribes in the Indian country attached by the act of 1834 to Arkansas or Missouri District for certain purposes. This may be seen from the treaty with the Choctaws in 1830, and the treaty with the Creeks in 1832, and other Indian treaties. * * * [435] (P. 1094.)

For a number of years it was alleged that the United States had not fulfilled its obligations under this treaty. Suit was brought by the Creek Nation in the Court of Claims under the jurisdictional act of May 24, 1924,[436] The plaintiff sought to recover the 1837 value of the entire reserves except as to those sales for which it had been proved that the owners received the stipulated "fair consideration," alleging that the Government

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[420] Talk, December 8, 1824, Journal of Proceedings, cited in Abel, *op cit.*, p. 337.

[421] A mixed blood, cousin of Governor Troup of Georgia, and leader of the lower Creek towns (Abel, *op. cit.*, p. 335).

[422] Campbell had suggested various ways of securing the Creek signature to a "removal" treaty. Finally he was informed that the President would not countenance a treaty unless it were made "in the usual form, and upon the ordinary principles with which Treaties, are held with Indian tribes * * *." Indian Office Letter Books, Series II, No. 1, pp. 309–310, cited in Abel, *op. cit.*, p. 339.

[423] Abel, *op. cit.*, p. 340.

[424] 7 Stat. 237.

[425] Art. 2. All Creek holdings within the State of Georgia were included in the cession.

[426] Treaty of Washington of January 24, 1826, 7 Stat. 286.

[427] Abel, *op. cit.*, p. 352.

[428] Supplementary article of March 31, 1826, 7 Stat. 289.

[429] In the Committee of the Whole, Berrien of Georgia, asked that the first article be altered so that the Indian Spring Treaty could be abrogated without reflecting upon its negotiation. This was refused. Berrien and five others were the only members of the Senate who on the final vote refused to consent to ratification. Afterwards, Berrien admitted that he had voted against the treaty because he felt that it did not contain enough of an inducement to migration. American State Papers, Indian Affairs II, pp. 748–749, cited in Abel, *op. cit.*, p. 352.

Before the whole matter was settled to the satisfaction of Georgia, which claimed that more than the described territory should have been relinquished, another treaty of cession was negotiated. Treaty of November 15, 1827, 7 Stat. 307.

[430] 2 Op. A. G. 110, 135–136 (1828). See also sec. 1, *supra*, fn. 5.

[431] Indian Office Letter Books, Series II, No. 5, pp. 373–375, cited in Abel, *op. cit.* fn. 352, p. 370.

[432] On February 6, 1832, the Head Men and Warriors of the Creek Indians addressed the Congress of the United States entreating them not to insist on the program of removal pointing out "We are assured that, beyond the Mississippi, we shall be exempted from further exaction; * * * Can we obtain * * * assurances more distinct and positive, than those we have already received and trusted? Can their power exempt us from intrusion in our promised borders, if they are incompetent to our protection where we are? * * * H. Doc. No. 102, 22d Cong., 1st sess. (1832), vol. 3, pp. 1, 3.

[433] Indian Office Letter Books, Series II, No. 7, p. 422, cited in Abel, *op. cit.*, pp. 387–388.

[434] 7 Stat. 366. (This was amended in certain particulars by treaties of February 14, 1833, 7 Stat. 417, and November 23, 1838, 7 Stat. 574.) Article IV of the Treaty of February 14, 1833, 7 Stat. 417, expressly mentioned the Seminole Indians in Florida and provided for a permanent and comfortable home on the lands of the Creek Nation according to treaty negotiations with the Seminoles May 9, 1832, 7 Stat. 368.

[435] Anonymous, 1 Fed. Cas. No. 447 (C. C. Missouri 1843). And see *Atlantic and Pacific Railroad Co.* v. *Mingus*, 165 U. S. 413, 435,–436 (1897). See Chapter 23.

[436] C. 181, 43 Stat. 139.

failed to remove intruders from the country ceded as guaranteed by Article V of the treaty and that as a result it became impossible to fulfill Articles II and III involving the surveying and selection by the Indians, of reserved lands. While the Court of Claims found that the Creek Nation, with certain exceptions, had waived all claims and demands in a subsequent treaty, its holding on the execution of this treaty is illuminating:

> * * * While the record leaves no room for doubt that most dastardly frauds by impersonation were perpetrated upon the Indians in the sales of a large part of the reserves, the conclusion is justified, and we think inescapable, that because of repeated investigations prosecuted by the Government these frauds were largely eliminated. The investigations were conducted by able and fearless men and were most thorough. Every possible effort was exerted by them to have individual reservees who claimed they had been defrauded to present their claims. Chiefs of the nation were invited to bring to the attention of the investigators all claims of fraudulent practices upon the Indians, and were assured all claims would be considered and justice done. Hundreds of contracts upon investigation were found to have been fraudulently procured and their cancellation recommended by the investigating agents. While the identity of the particular cases investigated and found to have been fraudulent, and the final action of the Government on the agent's reports recommending the reversal of such cases are not disclosed, it is manifest their recommendations were in the main followed and new contracts of sales were made, certified to the President and approved by him. (Pp. 260–261.)[437]

5. *Florida Indians.*[438]—One of the problems arising from the treaty with Spain by which the Floridas[439] were acquired was that of the proper disposition[440] of the Indians who inhabited that region.[441] In some quarters it was insisted that the Indians had been living in the territory by sufferance only and even if this were not true their lands were now forfeit by conquest.[442] General Jackson in particular was outspoken in his opposition to treating with the Indians, asserting that if Congress were ever going to exercise its power over the natives it could not do better than to begin with these "conquered" natives.[443]

After 2 years of considering the various viewpoints, concentration in Florida was decided upon, and President Monroe appointed commissioners to treat with the Florida Indians. The result was the Treaty of Camp Moultrie of September 18, 1823.[444] Article 1 of this instrument recites that—

> The undersigned chiefs and warriors, for themselves and their tribes, have appealed to the humanity, and thrown themselves on, and have promised to continue under, the protection of the United States, and of no other nation, power, or sovereign; and, in consideration of the promises and stipulations hereinafter made, do cede and relinquish all claim or title which they may have to the whole territory of Florida * * *.

In return the United States (Art. 4) "assigned" land with a guarantee of peaceable possession, and gave them (Art. 3) in addition to implements, stock and an annuity, protection against all persons

> * * * provided they conform to the laws of the United States, and refrain from making war, or giving any insult to any foreign nation, without having first obtained the permission and consent of the United States.

An additional article granted to six chiefs permission to remain and large tracts of lands.

Soon it was obvious that the territory assigned was unsatisfactory. Agriculture was impossible in the swamps of the interior. Although as provided by Article 9 the boundary line was to be extended to find "good tillable land," it still failed to afford the tribe adequate means of support.[445]

Friction developed between Indians who remained and white settlers, and between the removed Indians and whites searching for runaway slaves. The plight of those who had removed grew steadily worse.[446]

In 1832 at Payne's Landing, they were persuaded to migrate, although the treaty[447] was not to be considered binding until an initial party explored the west and found a suitable home. However, in 1833 the chiefs who undertook this preliminary search, without authority to do so, signed another treaty[448] which was construed to make removal under the early treaty obligatory instead of conditional. This treaty was never accepted by the tribe, and large scale removal of Seminoles never took place.[449]

6. *Other tribes.*—In the Northwest Territory a treaty of removal was concluded with the Delaware Indians on October 3, 1818.[450] Article 2 of this agreement binds the United States in exchange for land in Indiana "* * * to provide for the Delawares a country to reside in, upon the west side of the Mississippi, and to guaranty to them the peaceable possession of the same."

The next year treaties signed at Edwardsville, Illinois,[451] and at Fort Harrison[452] provided for exchange of Kickapoo lands from Indiana and Illinois to Missouri territory. By the terms of the Edwardsville treaty (Art. 6) the United States ceded to the Indians and their heirs forever a certain tract of land in Missouri territory, provided that "the said tribe shall never sell the said land without the consent of the President of the United States." Article 4 of the Fort Harrison treaty refers to the contemplation by the tribe of Kickapoos of the Vermilion, of "removing from the country they now occupy * * *."

In 1824, a treaty[453] with the Quapaw Nation was concluded, whereby the Quapaws ceded all their land in Arkansas territory and agreed to remove to the land of the Caddo Indians (Art. 4).

These agreements were for a number of years the major attempts made by the United States to persuade the Indians of

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[437] *Creek Nation* v. *The United States*, 77 C. Cls. 226, 252, 260 (1933). On alleged diversion of Creek Orphan fund under Article II; distinctions as to issuing of patents on individual reserves under II, III, IV, as to state citizenship and right to patent, Art. 4. See 16 Op. A. G. 31 (1878); 3 Op. A. G. 288 (1837), 585 (1840).

[438] See fn. 417, *supra*.

[439] Treaty of February 22, 1819; October 29, 1820, with Spain, ratified by United States, February 18, 1821, 8 Stat. 252.

[440] In 1821, a subagent, Peniéres, was appointed for the Florida Indians by Jackson (then Governor) to explore the country, determine the number of Indians, and prepare them either for concentration in Florida or for removal elsewhere. Abel, *op. cit.*, p. 328.

[441] They were known as Seminoles ("separatist") and consisted of descendants of Creek Tribes, Hitchiti, Yamasee, Yuchi, and a Negro element. Foreman, *op. cit.*, p. 315.

[442] Abel, *op. cit.*, p. 328. The first Seminole War, with General Andrew Jackson in command, had ended in 1818, disastrously for the Indians. Escape by runaway slaves into their territory continued, as did the subsequent white raids. Foreman, *op. cit.*, p. 318.

[443] Abel, *op. cit.*, p. 329.

[444] 7 Stat. 224. For the first time (Art. 7) recognition is taken of the fugitive slave problem and the Indians agree to prevent such individuals from taking refuge, and to apprehend and return them for a compensation. See also Treaty of June 18, 1823, 7 Stat. 427, in which the Appalachicola Band of Indians relinquished all privileges to which they were entitled by this treaty (Art. 1).

[445] Abel, *op. cit.*, pp. 330–334; Foreman, *op. cit.*, pp. 318–319.

[446] Foreman, *op. cit.* pp. 318–320.

[447] Treaty of May 9, 1832, Preamble and Art. 1, 7 Stat. 368.

[448] Treaty of March 28, 1833, 7 Stat. 423. This treaty was the cause of the second Seminole War. Foreman, *op. cit.*, p. 321. Some of the Indians fled to the swamps where desultory fighting went on for years.

[449] Foreman, *op. cit.*, p. 323.

[450] Treaty of October 3, 1818, 7 Stat. 188. And see supplement to this treaty, September 24, 1829, 7 Stat. 327.

[451] Treaty of July 30, 1819, 7 Stat. 200.

[452] Treaty of August 30, 1819, 7 stat. 202.

[453] Treaty of November 15, 1824, 7 Stat. 232.

that region to exchange their holdings for land lying elsewhere.[454] Then, in the autumn of 1832 four treaties were negotiated at Castor Hill, Missouri, which assured the departure from Missouri of the remnants of the Kickapoos,[455] the Shawanoes and Delawares,[456] the Kaskaskias and Peorias,[457] and the Piankeshaws and Weas.[458] In the meantime other federal commissioners were negotiating with the bands of Pottawatomies, who inhabited Indiana, Illinois, and Michigan. Although a number of treaties[459] providing for cession of their land were concluded with them, it was not until late in 1834 that their signature was secured to the first of a series of "removal" treaties.[460] The treaty of February 11, 1837,[461] provided for final removal within 2 years.

For a number of years the white settlers in the Northwest and the Sacs and Foxes had clashed. In 1804[462] the United Tribes of Sac and Fox Indians had made a treaty of limits with the United States. The white settlers interpreted that to mean relinquishment of all claims east of the Mississippi. This cession the Sacs and Foxes never recognized.[463] Dissatisfaction was further increased by the treaties of August 4, 1824[464] August 19, 1825,[465] and July 15, 1830.[466] After the making of the last treaty, the Indians left on their winter hunt and upon returning discovered that their lands north of Rock River, which had been in dispute for some time, had been surveyed and sold during their absence. Hostilities ensued. At the battle of Bad Axe, August 2, 1832, the Winnebagoes and the Sacs and Foxes were defeated.[467] In the treaties of Fort Armstrong which resulted, the United States secured from the Winnebagoes all their claims east of the Mississippi,[468] and from the Sacs and Foxes nearly all of eastern Iowa with the exception of a small reserve on which they were concentrated.[469]

In the following year the Federal Government obtained the consent of the "United Nation of Chippewa, Ottowa and Potawatamie Indians" to a treaty at Chicago, Illinois. In this treaty[470] the United States, in exchange for the land the Indians held—about 5,000,000 acres including the western shore of Lake Michigan—granted to them (Art. 2) approximately the same amount of territory "to be held as other Indian lands are held."

At about the same time, the Quapaws were concentrated in the northeast corner of the Indian territory.[471] This was done because of the failure of the original plan[472] to confine them to lands occupied by the Caddo Indians.[473]

It is not to be assumed that during this period treaty-makers were occupied with "removal" to the exclusion of all else. In fact, until 1828, the number of treaties negotiated solely for the purpose of extinguishing aboriginal title to land predominated.[474] Even during the years 1828–40 when the migration program was at its height, treaties were concluded with the Otoes and Missourias,[475] Pawnees,[476] Menominees,[477] the Miamis,[478] (3 treaties) the Wyandots,[479] the United Nations of Chippewas, Ottawa, and Potawatamie Indians,[480] Ioways,[481] Yankton Sioux,[482] Sioux,[483] and

[454] Treaties of cession were common during this period, but outright removal to exchanged lands was not.

[455] Treaty of October 24, 1832, 7 Stat. 391.

[456] Treaty of October 26, 1832, 7 Stat. 397.

[457] Treaty of October 27, 1832, 7 Stat. 403.

[458] Treaty of October 29, 1832, 7 Stat. 410.

[459] Treaty of October 2, 1818, with the Potawatamie, 7 Stat. 185; Treaty of August 29, 1821, with the Ottawa, Chippewa, etc., 7 Stat. 218; Treaty of August 19, 1825, with the Sioux and Chippewa, etc., 7 Stat. 272; Treaty of October 16, 1826, with the Potawatamie, 7 Stat. 295; Treaty of September 19, 1827, with the Potawatamie, 7 Stat. 305; Treaty of August 25, 1828, with the United Tribes of Potawatamie, Chippewa, etc., 7 Stat. 315; Treaty of September 20, 1828, with the Potowatami, 7 Stat. 317; Treaty of July 29, 1829, with the United Nations of Chippewas, Ottawa, etc., 7 Stat. 320; Treaty of October 20, 1832, with the Potawatamie, 7 Stat. 378; Treaty of October 26, 1832, with the Pottawatimie, 7 Stat. 394; Treaty of October 27, 1832, with the Potowatomies, 7 Stat. 399; Treaty of December 4, 1834, with the Potawattimie, 7 Stat. 467; Treaty of December 16, 1834, with the Potawattamie, 7 Stat. 468.

[460] Treaty of December 17, 1834, 7 Stat. 469; Treaty of March 26, 1836, 7 Stat. 490; Treaty of March 29, 1836, 7 Stat. 498; Treaty of April 11, 1836, 7 Stat. 499; Treaty of April 22, 1836, 7 Stat. 500; Treaty of April 22, 1836, 7 Stat. 501; Treaty of August 5, 1836, 7 Stat. 505; Treaty of September 20, 1836, 7 Stat. 513; Treaty of September 22, 1836, 7 Stat. 514; Treaty of September 23, 1836, 7 Stat. 515; Treaty of February 11, 1837, 7 Stat. 532.

[461] 7 Stat. 532.

[462] Treaty of November 3, 1804, 7 Stat. 84.

[463] Abel, *op. cit.*, pp. 388–389.

[464] 7 Stat. 229. Interpreted in *Marsh* v. *Brooks*, 8 How. 223, 231, 232 (1850).

[465] 7 Stat. 272. Construed in *Beecher* v. *Wetherby*, 95 U. S. 517 (1877). To this treaty the Sioux and the Chippewas, Menominie, Ioway, Winnebagoe, and a portion of the Ottawa, Chippewa, and Potawattomie tribes were also parties.

On October 21, 1837, by a treaty with the Sacs and Foxes of Missouri, 7 Stat. 543, the right or interest to the country described in the second article and recognized in the third article of this treaty, was ceded to the United States together with all claims or interests under the treaties of November 3, 1804, 7 Stat. 84; August 4, 1824, 7 Stat. 229; July 15, 1830, 7 Stat. 328; and September 17, 1836, 7 Stat. 511.

[466] 7 Stat. 328.

[467] Abel, *op. cit.*, p. 391.

[468] Treaty of September 15, 1832, 7 Stat. 370.

[469] Treaty of September 21, 1832, 7 Stat. 374.

[470] Treaty of September 26, 1833, 7 Stat. 431.

[471] Treaty of May 13, 1833, 7 Stat. 424.

[472] Treaty of November 15, 1824, 7 Stat. 232.

[473] The lands given them by the Caddoes proved very poor, hence they returned to their old home in Arkansas. (Preamble, Treaty of May 13, 1833, 7 Stat. 424.)

It should be noted that by Treaty of July 1, 1835, the Caddo Indians (7 Stat. 470) agreed to removal in these terms: "* * * promise to remove at their own expense out of the boundaries of the United States * * * and never more return to live settle or establish themselves as a nation tribe or community of people within the same."

[474] There are 21 of these which have not been noted before: Treaty of September 29, 1817, with Wyandot, Seneca, etc., 7 Stat. 160; Treaty of September 17, 1818, with Wyandot, Seneca, etc., 7 Stat. 178; Treaty of September 20, 1818, with Wyandots, 7 Stat. 180; Treaty of October 2, 1818, with Wea Tribe, 7 Stat. 186 ("The United States, by treaty with the Delaware Indians in 1818, agreed to provide a country for them to reside in." *United States* v. *Stone*, 2 Wall. 525 (1864)); Treaty of October 6, 1818, with Miame Nation, 7 Stat. 189; Treaty of September 24, 1819, with Chippewa Nation, 7 Stat. 203; Treaty of June 16, 1820, with Chippeway Tribe, 7 Stat. 206 (7 Stat. 203 and 7 Stat. 206, construed in *Chippewa Indians of Minnesota* v. *United States*, 301 U. S. 358, 360 (1937)); *Spalding* v. *Chandler*, 160 U. S. 394, 403 (1896); Treaty of July 6, 1820, with Ottawa and Chippewa Nations, 7 Stat. 207; Treaty of August 11, 1820, with Wea Tribe, 7 Stat. 209; Treaty of August 5, 1826, with Chippewa Tribe, 7 Stat. 290; Treaty of October 23, 1826, with Miami Tribe, 7 Stat. 300; Treaty of August 11, 1827, with Chippewa, Menomonie, and Winebago Tribes, 7 Stat. 303; Treaty of August 24, 1818, with Quapaw Nation, 7 Stat. 176; Treaty of September 25, 1818, with Great and Little Osage Nation, 7 Stat. 183; Treaty of June 2, 1825, with Great and Little Osage Nation, 7 Stat. 240, construed in *Holden* v. *Joy*, 17 Wall. 211, 245 (1872); Treaty of August 10, 1825, with Great and Little Osage Nations, 7 Stat. 268; Treaty of June 3, 1825, with Kansas Nation, 7 Stat. 244 (construed in *Jones* v. *Meehan*, 175 U. S. 1 (1899); *Smith* v. *Stevens*, 10 Wall. 321, 325 (1870); *State of Missouri* v. *State of Iowa*, 7 How. 660 (1849)); Treaty of November 7, 1825, with Shawonee Nation, 7 Stat. 284; Treaty of September 25, 1818, with Peoria, Kaskaskia, etc., 7 Stat. 181; Treaty of February 11, 1828, with Eel River or Thorntown party of Miami Indians, 7 Stat. 309.

[475] Treaty of September 21, 1833, 7 Stat. 429.

[476] Treaty of October 9, 1833, 7 Stat. 448.

[477] Treaty of October 27, 1832, 7 Stat. 405. This modified the treaty concluded February 8, 1831, 7 Stat. 342, and provided for a grant of land to the Stockbridge, Munsee and Brothertown Indians, and New York Indians. Later the Stockbridge Indians migrated west under the terms of the Treaty of September 3, 1839, 7 Stat. 580.

[478] Treaty of October 23, 1834, 7 Stat. 458; Treaty of November 6, 1838, 7 Stat. 569; Treaty of November 28, 1840, 7 Stat. 582.

[479] Treaty of April 23, 1836, 7 Stat. 502.

[480] Treaty of July 29, 1829, 7 Stat. 320.

[481] Treaty of October 19, 1838, 7 Stat. 568.

[482] Treaty of October 21, 1837, 7 Stat. 542.

[483] Treaty of September 29, 1837, 7 Stat. 538.

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,[486] 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,[489] 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, Crow, 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, and 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 with 18 California tribes were negotiated by these federal agents in 1851. All of them provided for a surrender 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. 5) 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.[498]

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. 256; 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, 1825, 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, 9 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., on 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—the Assiniboines, the Arapahoes, and the Gros Ventres—were treating with the United States for the first time. See Rept. Comm. Ind. Aff. 1851, pp. 299–300.

[492] 15 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, 1854, 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 Band 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 Wahpeton Bands, 10 Stat. 949.

and 10 treaties[502] stipulating for removal of the Indians to unoccupied land were signed 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, with 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 the 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. Aff. (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. *Sutton*, 215 U. S. 291 (1909); *United States* v. *Payne*, 264 U. S. 446 (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. Construed 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.
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> 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.[509]

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 from 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 (1931).

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, 1854, Art. 3, 10 Stat. 1109. Construed in *Fee v. Brown*, 162 U. S. 602 (1896); *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 (1939).

The President is empowered by Art. 3 to issue patents with "such restrictions of the power of alienation as he 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 this Article. *United States v. Ratche*, 31 F. (2d) 624 (D. C. W. D. Wis., 1928). Moreover such restrictions extend to the timber on the land as well as the land itself. *Starr v. Campbell*, 208 U. S. 527 (1908).

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 *Gouge v. Heath*, 203 U. S. 146, 149 (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, 500, 501 (1913); *United States v. First National Bank*, 234 U. S. 245, 261 (1914) (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 (1926); and *Chippewa Indians of Minnesota v. United States*, 301 U. S. 358 (1937). Treaty of February 27, 1855, 10 Stat. 1172.

[513] 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. 1159; 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 9, 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, 1859, 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.[517]

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.[530]

While this treaty was never ratified, the principle announced undoubtedly colored subsequent negotiations and is reflected in the treaties of 1866 with the Seminoles,[531] 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,[535] 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. 1249; 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, and 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. 663.

[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. 521, *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.

[525] Treaty of October 14, 1864, with Klamath and Modoc Tribes and Yahooskin Band 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 Band of Sioux Indians, Treaty of October 19, 1865, 14 Stat. 723; Blackfeet Band of Sioux, Treaty of October 19, 1865, 14 Stat. 727; Sans Arc Band of Sioux, Treaty of October 20, 1865, 14 Stat. 731; Onkpahpah 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 May 7, 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, 1868. By summer the Navajo,[542] the eastern band of Shoshonee and the Bannock,[543] 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.

[542] Treaty of June 1, 1868, 15 Stat. 667. 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, the Supreme Court of Arizona in holding the 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 may disregard treaties, the executive branch of the government may not do so. The district court was in error in denying the writ of *habeas corpus*.

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

[543] 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 the 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.

[544] Treaty of August 13, 1868, 15 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[545] and attacks on the making of treaties grew in force.[546]

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, 1869, 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, 1867." 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).
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> 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.
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> 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

[545] See chapter 2, sec. 2, for excerpts from commissioners' reports advocating termination of the treaty system.

[546] *Ibid.*

[547] 15 Stat. 7, 9. Also see Act of April 10, 1869, sec. 5, 16 Stat. 13, 40. The first annual report of the 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, 159, 160.

[548] Act of July 20, 1867, 15 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. § 2079, 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. 579.

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. *Adams*, 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 stoppage 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 20, 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), 15 Am. L. Rev. 21, 25.

[551] Thus in *Dick* v. *United States*, 208 U. S. 340, 359 (1908), the Supreme Court upheld the constitutionality 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 (1937), said:

> * * * "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., 578; *Fong Yue Ting* v. *United States*, 149 U. S., 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. *Martin* v. *Lewallen*, 276 U. S. 58, 67 (1928). Accord: *Longest* v. *Langford*, 276 U. S. 69 (1928).

[553] *Choate* v. *Trapp*, 224 U. S. 665, 671 (1912).

[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.

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|| Federalist No. 32 ||

The Same Subject Continued: Concerning the General Power of Taxation
From the Daily Advertiser.
Thursday, January 3, 1788.

Author: **Alexander Hamilton**

To the People of the State of New York:

ALTHOUGH I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the POLICY of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise "EXCLUSIVE LEGISLATION" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS AND EXCISES"; and the second clause of the tenth section of the same article declares that, "NO STATE SHALL, without the consent of Congress, LAY ANY IMPOSTS OR DUTIES ON IMPORTS OR EXPORTS, except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification, it now only extends to the DUTIES ON IMPORTS. This answers to the second case. The third will be found in that clause which declares that Congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power EXCLUSIVE in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the States remains undiminished. In

any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT that is, a NEGATION of one thing, and an AFFIRMANCE of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them ABSOLUTELY from the imposition of taxes of the former kind, and to leave them at liberty to lay others SUBJECT TO THE CONTROL of the national legislature. The restraining or prohibitory clause only says, that they shall not, WITHOUT THE CONSENT OF CONGRESS, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, WITH THE CONSENT of the national legislature, might tax imports and exports; and that they might tax every other article, UNLESS CONTROLLED by the same body. If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it INEXPEDIENT that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary.

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