

# The California Indian Treaty Myth

by HARRY KELSEY

Once upon a time there were three commissioners, appointed by the President of the United States, with the approval of Congress. At that time all the land in California legally belonged to the Indians. The commissioners were sent to negotiate treaties and purchase this Indian land. The Indians signed eighteen treaties, giving up their land for a fraction of its value. But evil men in California forced Congress to reject the treaties, though the Indians had already kept their part of the bargain. These same men then conspired to keep the treaties secret, so they were hidden for more than half a century, and only the Indians remembered the broken promises made to them by the commissioners. Then more than fifty years later the treaties were found tucked away in the Senate archives. Shocked and horrified, Congress lifted the ban of secrecy and told the Indians to sue in federal court for the payment they had been promised so many years ago. But wily bureaucrats fought the suit, and the Indians received only a small part of the \$1.25 an acre the land was originally worth.

This is a fable, as the introductory phrase implies. Like every fable, it contains a measure of truth, but also a goodly portion of fiction. It is a composite of the stories told in most of the current scholarly accounts. But contrary to those accounts, Congress did not approve the appointment of commissioners; the men were not told to negotiate land cessions; the Indians were not considered to have a legal title to land in California; there was no conspiracy to keep the treaties secret; and finally, both Congress and the courts have approved very generous settlements on aboriginal land claims. There are other versions of the story, each with errors peculiar to itself, but the truth is both more interesting and more illuminating than the myths circulated in current historical studies. It all started about the time of the Mexican War.

From 1845 to 1848 Texas, Oregon, and the vast country in between were added to the western reaches of the United States. Totally unsurveyed and largely unexplored, this new territory contained more than a million square miles of mountains, deserts, lakes, and rivers. No

*The Historical Society of Southern California*

one knows how many people lived there. The best guess places California's population at less than 20,000, plus several times as many Indians, or about one person for every two square miles of land. By any definition this was frontier country.<sup>1</sup>

The challenge of governing this distant Pacific slope was so nearly overwhelming that Congress simply refused to do much about it for the first few years. Exasperated California citizens finally took matters into their own hands, organized a state government, selected men to represent them in Washington, and got Congress to agree to the new arrangement.

Indian affairs in the new West were equally baffling to the federal government. In 1849, after several fruitless attempts to convince Congress that more agents were needed to deal with Indians in this region, the commissioner of Indian affairs took matters into his own hands. An obscure section of the 1834 Indian Bureau Act authorized the commissioner to move agencies as necessary. He therefore closed down two agencies on the Upper Missouri and created new ones in Santa Fe, New Mexico, and at "Salt Lake, California." But when the old politician appointed to head the Salt Lake agency found that his territory was not in the gold fields, he promptly moved to San Francisco at government expense, resigned his commission as Indian agent, and wangled a new but retroactive appointment as government naval agent in the city by the Golden Gate. In the meantime, a subagent was appointed to handle Indian matters in California, but this lone functionary could hardly handle the reports required by the Indian Bureau, much less manage relations with the thousands of Indians scattered about the state.<sup>2</sup>

Reports by two special emissaries, plus pressure by key senators, finally brought some results. In April 1849, Thomas Butler King was dispatched to California on a special mission for President Polk. A short time later William Carey Jones went to California on a similar errand. Both men reported back to Washington in the spring of 1850. King's brief report to Congress stated flatly that the California Indians "never pretended to hold any interest in the soil" and that no such right was ever recognized by the Mexican government. Jones gave the same sort of report. In his view Mission Indians probably had some legal title to land, as did any others who were engaged in agriculture. But Spanish law stopped there. "In the wild or wandering tribes," Jones wrote, "the Spanish law does not recognize any title whatever." To a Congress weary of Indian treaties this was good news indeed.<sup>3</sup>

### *The California Indian Treaty Myth*

Perhaps Jones' report on Indian land titles was prejudiced to some extent by the views of his father-in-law, Thomas Hart Benton. Before Jones left on his trip to the West, Benton delivered a long speech to the Senate, condemning the land cession system and strongly suggesting that Congress was under no obligation to quiet the Indian title before allowing settlers to take up claims. Heretofore Congress had assumed the Indians had a right to occupy any lands they actually used. Their right was not the fee-simple title hallowed in Anglo-Saxon law, but simply a right to use the fruits of the land. This aboriginal title was valid as long as the Indians occupied the land, but the title vanished when they left. The Indian usufruct right was buttressed by a long series of laws and court decisions, in which the Indians were held to possess an easement on such lands, with ultimate title vested in the federal government. Before 1850 it was customary to "extinguish" this Indian claim by a treaty of purchase, which sometimes included a clause giving Indians a fee-simple title to small parcels of land in unsettled areas. The accelerating advance of white settlement increasingly forced Congress to buy back lands granted to Indians by treaty, but if King and Jones were right, such tedious and embarrassing negotiations would not be necessary in California. With considerable relief Congress took another look at the question of Indian land titles in California as well as the rest of the new western territories.<sup>4</sup>

Early in January 1850, Stephen A. Douglas, chairman of the Senate Committee on Territories, pushed through a resolution calling for a thorough examination into the question of extinguishing Indian land titles in California and elsewhere in the West. In due course a bill emerged authorizing the President to appoint three commissioners to deal with the tribes in western Oregon, purchase their lands, and, if at all possible, resettle the Indians somewhere to the East. The bill won easy approval, and soon was signed into law. But no action was taken in the California case until September 1850, when California's new senators, John C. Frémont and William M. Gwin, took their seats in the Capitol.<sup>5</sup>

By some strange chance Frémont and Gwin represented the two extremes of opinion on California land titles. Frémont was owner of the huge Mariposa Grant, and he argued fiercely for quick confirmation of all private land claims in the state, whether from Spain, Mexico, or the American military authorities. Gwin was a more recent newcomer

*The Historical Society of Southern California*

who looked with suspicion on all the old grants and demanded they be given the closest scrutiny.<sup>6</sup>

As soon as his oath was administered, Frémont announced a series of bills he wanted to introduce to benefit his constituents. One of these was "A Bill to preserve peace with the Indian tribes in California by extinguishing their territorial claims in the gold mine districts."<sup>7</sup>

This new bill drew heavily on the Oregon law approved by Congress and the President a few months earlier. Frémont's proposal would authorize the President to appoint three special commissioners "to treat with the Indian tribes of California having territorial claims in the State of California and to extinguish their land claims." A second section would appropriate \$100,000 to pay expenses of the treaty negotiations. Referred to the Committee on Indian Affairs, the bill emerged a few days later with everything changed but the title. The committee version said nothing about Indian land claims, but simply authorized the President to send three Indian agents to California. A second section appropriating \$25,000 for expenses of holding treaties with the California Indians was dropped from the bill after a brief debate, but more about that later.<sup>8</sup>

Why the change? Senator David R. Atchison of Missouri, chairman of the Committee on Indian Affairs, said the committee simply did not know whether the California Indians had any sort of legal land title or not. Frémont felt they did and cited Spanish law and Indian policy to prove his case. Contrary to the U. S. practice of moving Indians away from the populated areas, said Frémont, Spain kept them "among their civilized neighbors, having always in view the leading object of converting them to the Christian religion." Standing on the Senate floor with a Spanish law book in his hand, Frémont cited various royal decrees to show that Spain recognized a stronger Indian land title than that customarily recognized by the United States. "In California we are at this moment invading these rights," said Frémont. "We hold there by the strong hand alone."<sup>9</sup>

Senator Gwin, an old hand at Indian claims, spoke for the opposition. "With regard to the title which Indians may have to tracts of land in California," he said, "they are disputed. They are not recognized as having any titles there by the Mexican law. That is the impression of the population of California." Gwin's arguments prevailed. Even Frémont's title was changed, so that the bill finally approved on September 28, 1850, was called "An Act to authorize the appointment of Indian Agents

### *The California Indian Treaty Myth*

in California." Congress was beginning to accept the idea that California Indians had no valid land claims, but Indian Office bureaucrats were less alert than usual, for they seem at first to have missed this key point in the debate.<sup>10</sup>

There was good reason for confusion in the Indian Bureau. Little more than a year earlier the bureau was transferred from the War Department to the brand new Department of Interior. Thomas Ewing, the first Secretary of Interior, was an accomplished politician but a poor administrator, as an investigating committee had recently discovered. In the party turmoil that followed the sudden death of President Zachary Taylor, Ewing resigned, and four different men were named to head the department within the brief span of two months. A new chief appointed to head the Indian Bureau was absent from Washington during September 1850, when the important Indian Bureau bills were moving through Congress. Nearly a year later the chief clerk of the Indian Bureau confessed to an agent in the field that the office still had not recovered from the turmoil of reorganization.<sup>11</sup>

With this state of affairs, no one was really surprised to discover early in October 1850, that no money had been appropriated to pay the newly-appointed California Indian agents. In altering Frémont's Indian treaty bill, Gwin and his supporters had changed the job title from treaty commissioner to Indian agent. Meanwhile, the second section of the bill, appropriating money for treaty expenses (including commission salaries), was transferred from the authorization bill to the appropriation bill, where it properly belonged. But in the process someone forgot to change the wording in the appropriation to match the companion bill that bore the new title, "An Act to authorize the appointment of Indian Agents in California." As a result, three agency appointments were authorized, but there was no money to pay the agents. There was an appropriation to pay treaty expenses, but no authorization for the appointment of treaty commissioners.<sup>12</sup>

What to do? In early October 1850, the acting commissioner of Indian affairs—Commissioner Luke Lea was still absent from his post—wrote to Secretary of Interior A. H. H. Stuart, suggesting a temporary solution. The men appointed as California Indian agents would be given the additional responsibility of negotiating treaties with their Indian charges. Their expenses could then be paid out of the \$25,000 appropriated for treaty expenses, and in the meantime the bureau could ask Congress for a deficiency appropriation to cover

*The Historical Society of Southern California*

salaries. Secretary Stuart preferred Frémont's original idea. He ordered the bureau to suspend the agent appointments and name the men as special treaty commissioners, with salaries of eight dollars a day, plus expenses.<sup>13</sup>

So it was done, and the commissioner-agents were bundled off to California with written instructions that, in view of the pointed debate just ended in Congress, can only be described as astonishingly vague. They were "to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them, towards the government and each other." Their instructions seemed to describe treaties of peace and friendship. By the time they arrived in California, however, the three men—Redick McKee, George W. Barbour, and Oliver M. Wozencraft—began to wonder whether it might not be a good idea to include land cessions. In February 1851, they dispatched a letter to Indian Commissioner Luke Lea, asking "as regards the Indian title to lands in this country: whether we are to recognize even a possessory or usufructuary right in them or not."<sup>14</sup>

The question was never answered, but the commissioners, in any case, did not wait for a reply. On March 19 they signed the first of eighteen treaties with what they thought were leaders of major California Indian tribes. Two months later, acknowledging receipt of this first treaty, Lea told the three men: "The department . . . is highly gratified with the results you have thus far achieved."<sup>15</sup>

The Indians proved to be tenacious negotiators. "We gave them all the land they asked for," reported commissioner-agent Redick McKee, who also opined that "Indians in this portion of California have . . . been greatly underrated, both as to . . . shrewdness and enterprise."<sup>16</sup>

As news of their negotiations spread through the state, the three men became the targets of bitter attacks from local newspapers and politicians, who favored removal of the California tribes. This was also the feeling in Oregon, where Congress had directed the treaty commissioners to get the Indians to agree to removal if at all possible. Citizens in Santa Fe soon began to worry that New Mexico might become a dumping ground for unwanted Pacific Coast Indians.<sup>17</sup>

Meanwhile debates continued in Congress on the question of California land titles. A law finally emerged creating a board of commissioners to review all California land claims. Senator Benton, seeming now to support the Indian case, argued the California land law would require Indians as well as whites to come before the board for a decision

### *The California Indian Treaty Myth*

on the validity of their claims. Benton was right. Though a special section of the law required the board to investigate and report on certain California Indian land claims, this was never done. None of the California tribes presented claims to the board, and as a consequence, the courts later held, "whatever lands they may have claimed became a part of the public domain."<sup>18</sup>

In the spring of 1852, the California and Oregon Indian treaties came before the Senate, where they were bitterly denounced from all sides. Some of the treaties were foolish, having been signed with small bands or even single families. The main complaint about the Oregon treaties was the failure to remove Indians from the settled areas. This was also a source of dissatisfaction in California, but Congress had more serious reservations about the California documents. According to Senator David A. Atchison, chairman of the Committee on Indian Affairs, the California commissioner-agents "well knew that they had no power to make and execute a treaty."<sup>19</sup>

The California agents had done more than make treaties. They had also contracted with California merchants and growers for the delivery of nearly a million dollars worth of goods, as stipulated in the unratified treaties. Thus the California congressmen had the precarious task of denouncing the treaties as illegal while insisting that the contracts were valid claims against the government. Representative Harry Hibbard of New Hampshire, unimpressed by the California arguments, summed up the case as most congressmen saw it: "There was no statute authorizing these negotiations, except the appropriation for that purpose. The beginning and the end, the fountain of their whole power to act, was that appropriation of \$25,000; yet the commissioners have gone on and expended over \$500,000."<sup>20</sup>

None of the treaties was ratified, either for California or Oregon. The nineteen Oregon treaties were sent to the Senate on August 3, 1852, and ordered printed in confidence for Senate use, as was required by Senate rules. Ultimately they were tabled and allowed to die quietly. The eighteen California treaties arrived in the Senate on June 7, 1852. A few copies were printed in confidence for Senate use, then after discussion the treaties were rejected without a dissenting vote. What Congress and the citizens of California really wanted was Indian removal without the need to negotiate for Indian land claims.<sup>21</sup>

New treaties were ultimately approved for most of the Oregon tribes, but Congress had evolved another policy for the territories recently

*The Historical Society of Southern California*

acquired from Mexico. Whether right or wrong, Congress in the 1850s did not consider these Indians to have legal land claims. However, Congress did recognize a moral obligation to the California Indians, and moved them onto temporary reservations, where it was hoped they would learn the skills of farming and stockraising and soon be absorbed into the general population. But there were no more treaties and for nearly a century no payments for California Indian land.<sup>22</sup>

This attitude changed in the twentieth century, as reformers besieged Congress for justice for the Indians. A long series of court decisions held that Indians abandoned any claims they might have had, simply by failing to present them before the land commission established in 1851. Other decisions held that Mexican law did not recognize aboriginal titles, and therefore most Indians in the Mexican Cession came under U. S. sovereignty with no legal claims to land. As late as 1890 the Bureau of Indian Affairs lamented this sad fact in commenting on the poverty of the Indians of California.<sup>23</sup>

Gradually a change occurred. In the early 1900s Congress began a thorough investigation of Indian claims. In 1928 a law was finally passed declaring that the loss to the Indians as a result of the failure of the eighteen California treaties was "sufficient ground for equitable relief," regardless of any failure to present claims before the land commission. The case was heard in the Court of Claims, where it dragged on for a number of years. Then in 1944 the court awarded several million dollars to the Indians of California.<sup>24</sup>

By that time a landmark court decision had changed the whole perspective of California Indian land titles. In the 1941 *Walapai* case, the Supreme Court reversed earlier decisions and held that Indians in former Spanish territory enjoyed the same legal position with regard to land rights as any other Indians. The Santa Fe Railroad had argued on the basis of prior court decisions that most Indians in the Mexican Cession came under the dominion of the United States without any land rights whatsoever. In overturning this doctrine, the Supreme Court declared that there was a definite derivative relationship between Spanish and American legal doctrine on this point. A few years later, Congress established the Indian Claims Commission to settle claims Indians might bring against the government. As a result of all this, the California Indians have received not only the five-million-dollar award from the 1944 court decision but an additional twenty-nine million dollars awarded in the sixties by the Indian Claims Commission.<sup>25</sup>



### *The California Indian Treaty Myth*

The story of the California Indian treaties is relatively simple, but over the years it has become unusually muddled in scholarly literature. Hubert Howe Bancroft's account of the affair is an early exception. In his brief, factual, and well-documented study, Bancroft summarized Senate action on the treaties in a single sentence: "The treaties were rejected, chiefly on the ground that under the acquisition of California from Mexico the natives had no right to the soil, and consequently no claims upon the United States government."<sup>26</sup>

Though Bancroft did not use the original treaties in his research, at least two other scholars did. Charles C. Royce and Cyrus Thomas consulted them at some length in the eighties and nineties, while preparing their summary of *Indian Land Cessions in the United States*, which was published in the 1899 annual report of the Bureau of American Ethnology. In spite of such easy access to the treaties, recent historians have continually asserted that a conspiracy of silence held the treaties secret from the American public.<sup>27</sup>

This idea of a conspiracy to hide the existence of the California Indian treaties seems to have originated in a misleading sentence from the *Congressional Record*: "The injunction of secrecy was removed January 18, 1905 from the eighteen treaties with Indian tribes in California, sent to the Senate by President Fillmore June 7, 1852."<sup>28</sup>

The statement is literally true, but open to serious misinterpretation. In accordance with Senate rules in 1852 the treaties were considered in executive session, then unanimously rejected by the Senate on July 8. The next day they were returned to the Department of Interior. On July 10, 1852, the treaties reached the Bureau of Indian Affairs, where they were filed, along with all the other unratified Indian treaties.<sup>29</sup>

The brief statement in the *Congressional Record* for January 18, 1905 simply meant that the confidential Senate version of the treaties printed in 1852 could be reprinted for public use. The treaty documents were never "placed under an official ban of secrecy" or "held secret after their rejection until January 18, 1905," or "hidden away in Senate files." Rather, they were returned to the Department of Interior, as provided in Senate rules, and there were available to anyone who might have reason to consult them.<sup>30</sup>

Although there was a growing movement in 1905 to discard the secrecy rule in Senate treaty deliberations, such a change was not even considered in 1852. Senate rules then held that "all treaties which may be laid before the Senate . . . shall . . . be kept secret, until the Senate

*The Historical Society of Southern California*

shall, by their resolution, take off the injunction of secrecy." This rule dated from the earliest years of the Republic and was founded on the concept that the Senate would serve as a body of confidential advisers to the President on treaty matters. No senator was allowed to discuss details of treaty deliberations or even the fact that a treaty was being discussed. In 1852, when the chairman of the Committee on Indian Affairs made a guarded reference in public session to the Treaty of Fort Laramie, the presiding officer administered a stinging rebuke.<sup>31</sup>

The question of a conspiracy of silence has largely an emotional appeal, and that undoubtedly accounts for its enduring popularity in history texts. A more basic error, however, is the mistaken assumption that Congress did authorize land negotiations, when in fact the negotiations were started primarily as a result of bureaucratic bungling in the Department of Interior, coupled with some inept legislative manipulations in Congress. In spite of this, Congress still could have approved the treaties, had it chosen to do so. Some of the reasons for not doing so have been clearly identified by scholars.

In his studies of 1922 and 1925 William H. Ellison rightly called attention to the grand public clamor raised against the treaties in California. Professor Ellison used most of the available published sources to document his account of the effect this had on Congress, but missed the significance of the 1850-1851 congressional debates about California Indian land titles and Indian treaties in general.<sup>32</sup>

Most current accounts accept Professor Ellison's conclusion that the public outcry in California as well as the huge bills run up by the commissioners tipped the balance against the treaties in the Senate. There is an infrequent acknowledgment that many Americans thought Indians in the Mexican Cession had no valid claims to land. But no contemporary historians list this as a major reason for rejection of the treaties. None of the accounts seem aware that the Senate held this view in 1850, before the treaties were negotiated, nor is there a general realization that the Senate in 1850 had deliberately refused to authorize land negotiations with the California Indians.

Congress in 1850 was in the throes of evolving a new policy for dealing with American Indians. The treaty system simply did not work. Indians certainly had valid claims against the government for the lands they occupied. But many men in the government were beginning to realize that the treaty system did not meet the legal or the moral demands of either party. In 1871 Congress finally terminated the treaty system and

*The California Indian Treaty Myth*

began dealing with Indians in other ways. The rejection of the California Indian treaties in 1852 was one of several earlier attempts by Congress to end the treaty system and find a new method for conducting Indian affairs.

## NOTES

<sup>1</sup> U.S., Department of Interior, *Seventh Census: Report of the Superintendent of the Census for December 1, 1852, to Which Is Appended the Report for December 1, 1851* (Washington: Robert Armstrong, 1853), pp. 128-29, 134-35. S. F. Cook, *The Conflict between the California Indians and White Civilization*, Part I: *The Indian Versus the Spanish Mission*, Ibero-Americana: 21 (Berkeley: University of California Press, 1943), p. 5.

<sup>2</sup> *Annual Report of the Commissioner of Indian Affairs, 1849* (Washington: Gideon & Co., 1850), pp. 16-17, 66-68 (referred to hereafter as *RCIA*, 1849). William McKendree Gwin, *Speech of Hon. Wm. M. Gwin of California on Government Expenditures in California, Delivered in the Senate of the United States, April 30, 1852* (Washington: Congressional Globe Office, 1852). *Journal of the Executive Proceedings of the Senate of the United States of America, from December 4, 1848, to August 31, 1852, Inclusive* (Washington: G.P.O., 1887), VIII, 106-108, 121, 130, 151, 253. Indian Bureau Miscellaneous Records, Vol. 7, Jan. 1848 to March 1852, p. 107, National Archives, Washington, D.C.

<sup>3</sup> Thomas Butler King, *Report of Hon. T. Butler King on California* (Washington: Gideon & Co., 1850), p. 17. William Carey Jones, *Report on the Subject of Land Titles in California* (Washington: Gideon & Co., 1850), pp. 35-37.

<sup>4</sup> *Congressional Globe*, 30 Cong., 2 Sess., Jan. 15, 1849, p. 259. James Bradley Thayer, *Legal Essays* (Boston: Boston Book Co., 1908), p. 109. Richard Peters, "Indian Treaties," in U.S., *Statutes at Large: Treaties between the United States and the Indian Tribes* (Boston: Charles C. Little and James Brown, 1846), pp. 1-11.

<sup>5</sup> *Congressional Globe*, 31 Cong., 1 Sess., Jan. 7, 1850, p. 111. Senate Bill No. 90, 30 Cong., 1 Sess., 1850, National Archives, Washington, D.C. U.S., *Statutes at Large*, IX, 437.

<sup>6</sup> *Congressional Globe*, 31 Cong., 1 Sess., Sept. 27, 1850, pp. 2045-46. William H. Ellison (ed.), "Memoirs of Hon. William M. Gwin," *California Historical Society Quarterly*, XIX (March 1940), 19.

<sup>7</sup> Senate Bill No. 332, 31 Cong., 1 Sess., 1850, National Archives, Washington, D.C.

<sup>8</sup> *Ibid.* *Congressional Globe*, 31 Cong., 1 Sess., Sept. 14, 1850, p. 1816.

<sup>9</sup> *Congressional Globe*, 31 Cong., 1 Sess., Sept. 14, 1850, p. 1816.

<sup>10</sup> *Ibid.*, pp. 1816-17, Sept. 28, 1850, pp. 2016, 2019, 2023. U.S., *Statutes at Large*, X, 519.

<sup>11</sup> Alexander F. Robertson, *Alexander Hugh Holmes Stuart, 1807-1891* (Richmond, Va.: Wm. Byrd Press, Inc., 1925), pp. 51-55. U.S., Congress, House, *Ewing Investigation*, 31 Cong., 1 Sess., 1850, House Report No. 489, Serial 585, pp. 188 ff., 217-25. *Congressional Globe*, 31 Cong., 1 Sess., Sept. 11, 1850, pp. 1800, 1802, 1805. Robert Brent Mosher, *Executive Register of the United States, 1789-1902* (Washington: G.P.O., 1905), p. 152. *Journal of the Executive Proceedings of the Senate*, VIII, 193-94, 200, 241, 250. Charles E. Mix to Redick McKee, Aug. 9, 1851, in U.S., Congress, Senate, *Report of the Secretary of the Interior, Communicating, in Compliance with a Resolution of the Senate, a Copy of the Correspondence between the Department of the Interior and the Indian Agents and Commissioners in California*, 33 Cong., Special Sess., 1853, Sen. Ex. Doc. No. 4, Serial 688, pp. 19-20 (referred to hereafter as *Indian Agents and Commissioners in California*).

<sup>12</sup> *Congressional Globe*, 31 Cong., 1 Sess. Sept. 10, 1850, p. 1793; Sept. 14, 1850, p. 1816; Sept. 28, 1850, p. 2016, 2023. U.S., *Statutes at Large*, IX, 519, 558.

<sup>13</sup> A. S. Loughery to Secretary of Interior, Oct. 8(?), 1850, Indian Office Report Book No. 6, pp. 369-72, National Archives, Washington, D.C. A. H. H. Stuart to Commissioner of Indian Affairs, Oct. 9, 1850, and Stuart to Redick McKee, George W. Barbour, and O. M. Wozencraft, Oct. 9, 1850, Department of Interior, Letters Sent, Indian Affairs, Vol. I, pp. 71-72, National Archives. Loughery to McKee, Barbour, and Wozencraft, Oct. 15, 1850, in *RCIA*, 1850, pp. 121-22.

<sup>14</sup> Loughery to McKee, Barbour, and Wozencraft, Oct. 15, 1850, in *Indian Agents and Commissioners in California*, pp. 8-9. Barbour, McKee, and Wozencraft to Lea, Feb. 17, 1851, *Ibid.*, pp. 56-59.

<sup>15</sup> Lea to McKee, Barbour, and Wozencraft, May 22, 1851, *Ibid.*, pp. 15-16.

## The California Indian Treaty Myth

<sup>16</sup> McKee to Lea, March 24, 1851, *Ibid.*, pp. 67-69.

<sup>17</sup> Gwin endorsement of July 10, 1851, *Ibid.*, pp. 119-20. Typescripts of letters from McKee to Lea, Jan. 31, 1852, and from James M. Crane to A. H. H. Stuart, Feb. 2, 1852; typescripts of letters from *Alta California*, Feb. 24, 1852, and *Evening Picayune*, Feb. 25, 1852, in Annie H. Abel-Henderson Papers, Box 17, file 89, Archives, Washington State University Library, Pullman, Washington. William H. Ellison covers the California reaction to the treaties very thoroughly in his "Rejection of California Indian Treaties: A Study of Local Influence on National Policy," *The Grizzly Bear*, XXXVII (May 1925), 4-5, 86; (June 1925), 4-5, Suppl. 7; (July 1925), 6-7. "A Memorial Adopted at a Public Meeting of the Citizens of Santa Fe, New Mexico, May 30, 1853," broadside, Office of Indian Affairs, New Mexico Superintendency, Letters Received, 1849-53, microcopy 234, Roll 546, National Archives.

<sup>18</sup> *Congressional Globe*, 31 Cong., 2 Sess., Jan. 8, 1851, p. 61; Jan. 28, 1851, p. 362. U.S., *Statutes at Large*, IX, 631-34. 98 Ct. Cl. 591, 592 (1942). *Barker v. Harvey*, 181 U.S. 481 (1900). Chauncey S. Goodrich, "The Legal Status of the California Indian," *California Law Review*, XIV (January 1926), 98-99.

<sup>19</sup> *Congressional Globe*, 32 Cong., 1 Sess., March 26, 1852, pp. 889-891; August 6, 1852, pp. 1082, 2103-05. Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico, and the United States to 1920* (Berkeley: University of California Press, 1971), pp. 76-77.

<sup>20</sup> *Congressional Globe*, 32 Cong., 1 Sess., March 26, 1852, pp. 889-91.

<sup>21</sup> *Journal of the Executive Proceedings of the Senate*, VIII, 290-94, 409-10, 417-20, 434, 452. Teller list of nays, July 8, 1852, Records of the Senate Committee on Indian Affairs, 32 Cong., 1 Sess., 1852, National Archives, Washington, D.C.

<sup>22</sup> U.S., Congress, Senate, *Treaties with Certain Indian Tribes in Oregon*, 57 Cong., 1 Sess., Sen. Ex. Doc. No. 340, 1902, pp. 6-12. *RCIA*, 1858, p. 7. Edward F. Beale to Lea, Oct. 29, 1852, in *Indian Agents and Commissioners in California*, pp. 373-74. *Congressional Globe*, 35 Cong., 2 Sess., Jan. 31, 1859, pp. 696-97. Henry Martyn Flynt, *Life of Stephen A. Douglas, United States Senator from Illinois, with His Most Important Speeches and Reports* (New York: Derby and Jackson Publ., 1860), pp. 43-44. U.S., *Statutes at Large*, X, 56.

<sup>23</sup> *Barker v. Harvey*, 181 U.S. 481 (1900). 98 Ct. Cl. 583, 592 (1942). Felix S. Cohen, *Handbook of Federal Indian Law, with Reference Tables and Index* (Washington: G.P.O., 1942), p. 304. *RCIA*, 1890, xxx.

<sup>24</sup> 98 Ct. Cl. 583, 592-93, citing 45 Stat. 602 (1928). 102 Ct. Cl., 837, 839.

<sup>25</sup> *U.S. v Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). Heizer and Almquist *The Other Californians*, p. 136. Felix S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," *Georgetown Law Journal*, XXXI (Nov. 1942), 19.

<sup>26</sup> Hubert Howe Bancroft, *History of California*, Vol. XXIV of *The Works of Hubert Howe Bancroft* (San Francisco: History Company, 1890), VII, 482-89.

<sup>27</sup> J. W. Powell, *Sixteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1894-95* (Washington: G.P.O., 1897), XXXV, LV; *Seventeenth Annual Report . . . 1895-96* (Washington: G.P.O., 1898), Part I, XLIX; *Eighteenth Annual Report . . . 1896-97* (Washington: G.P.O., 1899), Part I, LIV-LVII. Charles C. Royce, *Indian Land Cessions in the United States*, Part II of *Eighteenth Annual Report . . . 1896-97*, pp. 780-89.

<sup>28</sup> *Congressional Record*, 58 Cong., 3 Sess., Jan. 18, 1905, Vol. 39, Part I, p. 1021,

<sup>29</sup> *Journal of the Executive Proceedings of the Senate*, VIII, pp. 417-20. A. H. H. Stuart to Commissioner of Indian Affairs, July 9, 1852, Department of Interior, Letters Sent, Indian Affairs, Vol. I, p. 119, National Archives, Washington, D.C. Indian Affairs, Register of Letters Received, Vol. 40, "I," item 76, National Archives.

<sup>30</sup> *Checklist of United States Public Documents, 1789-1909*, Vol. I: *Lists of Congressional and Departmental Publications* (3rd ed.; Washington: G.P.O., 1911), pp. 1475-76; this reprint is the first document listed in the "Confidential" series. Annie Rosalind Mitchell, *Jim Savage and the Tulareno Indians* (Los Angeles: Westernlore Press, 1957), p. 107. Edward Everett Dale, *The Indians of the Southwest: A Century of Development under the United States* (Norman: Univ. of Okla. Press, 1949), p. 27. Omer C. Stewart, "Kroeber and the Indian Claims Commission Cases," *Kroeber Anthropological Society Papers*, No. 25 (1961), p. 182.

*The Historical Society of Southern California*

<sup>31</sup> U.S., Congress, Senate, *Journal of the Senate*, 40 Cong., 2 Sess., 1868, Serial 1315, p. 345. The best discussion of the Senate secrecy rule for treaties is in George H. Haynes, *The Senate of the United States, Its History and Practice* (Boston: Houghton Mifflin Company, 1938), II, 665-70. *Congressional Globe*, 32 Cong., 1 Sess., May 21, 1852, p. 1419.

<sup>32</sup> William H. Ellison, "The Federal Indian Policy in California," *Mississippi Valley Historical Review*, IX (June 1922), 57-58; "Rejection of California Indian Treaties: A Study in Local Influence on National Policy," *Grizzly Bear*, XXXVII (May 1925), 4-5, 86; (June 1925), 4-5, Suppl. 7; (July 1925), 6-7.