

BEFORE THE INDIAN CLAIMS COMMISSION

MOHAVE TRIBE OF INDIANS of Arizona, )  
 California, and Nevada; and )  
 ROBERT JENKINS, FRANCES STILLMAN, )  
 GEORGE WILSON, HAL O. DAVIDSON, )  
 CYRUS W. FIELDS, ARTHUR GOENAWEIN, )  
 and HARWOOD JENKINS, members of )  
 Tribal Council, )  
 Claimants, )  
 v. ) Docket No. 295  
 UNITED STATES OF AMERICA, )  
 Defendant. )

THE MOHAVE INDIANS who are members )  
 of the Colorado River Indian Tribes; )  
 and JAY GOULD, NORMAN SCOTT and )  
 MERRITT LAFOON, as representatives )  
 of such group, )  
 Petitioners, )  
 v. ) Docket No. 283  
 UNITED STATES, )  
 Defendant. ) (CONSOLIDATED)

Decided: March 19, 1959

Appearances:

Harold Payne  
 Attorney for Claimants  
 Docket No. 295

C. M. Wright  
 Attorney for Petitioners  
 Docket No. 283

Ralph A. Barney and Lester  
 Reynolds, with whom was  
 Mr. Assistant Attorney  
 General Perry W. Morton  
 Attorneys for Defendant

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The claim of the Mohave Tribe with respect to lands formerly held by said Indians by Indian title was timely filed with this Commission by two separate identifiable groups of Mohave Indians. In Docket 295 the petitioners are the Mohave Tribe of Indians and named individual members of the Tribal Council on behalf of the Mohave Tribe, and for themselves, and for all persons similarly situated as members of said tribe. Petitioners in Docket 295 are the Needles group of Mohave Indians living on or near the reservation in Mohave Valley, set aside by Executive Orders of August 22, 1890, December 1, 1910, and February 2, 1911. The petitioners in Docket 283, as amended, are The Mohave Indians who are members of The Colorado River Indian Tribes and named individual members alleged to be Mohave Indians. The original petition in Docket 283 was amended to present therein solely the claim of the Mohave as to aboriginal title. In Docket 295 all claims were severed except the first cause of action pertaining to aboriginal title. Both the Needles group and the Parker group, as those Mohave on the Colorado River Reservation are sometimes called, have the capacity to present the claim of the Mohave Tribe.

Since the claims as to aboriginal title set forth in Dockets 283 and 295 included lands in California, said dockets were consolidated for the purposes of trial with Docket numbers 31 and 37 in which cases were presented the claim of the "Indians of California" and certain other docket numbers seeking recovery for the value of lands allegedly held by aboriginal ownership in the respective petitioners (Order of Commission,

November 19, 1953). On January 20, 1958, this Commission held that the petitioners in Dockets 283 and 295 were entitled to present the claim of the Mohave Tribe relating to lands in California and that petitioners in Dockets 31 and 37 did not have the exclusive right to present claims relating to lands in that State (6 Ind. Cl. Comm. 86). While it was originally thought by the parties and the Commission (Order of the Commission, Nov. 16, 1956, as amended Nov. 20, 1956) that the hearings on the Mohave claim would be limited to proof as to aboriginal ownership to lands in California (as opposed to lands outside California) the nature of the proof as to Mohave land holdings necessarily had to include the evidence with respect to the alleged exclusive use and occupancy of the Mohave Indians of not only lands in California but in Arizona and Nevada as well. Since petitioners in both Docket 283 and Docket 295 were presenting the claim of the Mohave Tribe as to aboriginal lands, the dockets were consolidated to be prosecuted as a single claim (Tr. 20, Docket 283). It is this claim to aboriginal ownership of the Mohave Indians to lands in what are now the States of California, Arizona and Nevada, that is determined herein.

Following the hearings on the merits in the above cases, petitioners in Docket 295 filed a motion on April 5, 1957, "for leave to amend petition" on the grounds "that the issues raised by said amendments were tried at the hearing of the above matter at the consolidated trial thus far had, by consent of the parties"; and "that said amendments conform to the evidence which was offered and received at the trial thus far had, without objection; \* \* \*." On May 1, 1957, petitioners were permitted by

Commission's order to file the amended petition and defendant was granted time to answer or otherwise plead to said amended petition. Defendant thereupon filed a motion to vacate said Order of May 1, 1957 and to disallow or strike the amended petition. Defendant urged among other grounds in support of its motion that "the changes and additions proposed by the amended petition are not confirmed or supported by the evidence cited by claimants, or any other creditable evidence in the record." The amended petition set forth the claim on behalf of the Mohave Indians to large areas of land not included in the original petition. Since the petitioners in Docket 295 urged that this claim to additional land conformed to the evidence, it became incumbent upon the Commission to search the entire record to ascertain the validity of this contention, and action on defendant's motion to disallow or strike the amended petition was delayed until the Commission could determine the merits of the whole claim. The Commission has found no substantial evidence to support petitioners' claim to the additional large areas contended for in the amended petition. A thorough study of all the evidence, much of which is set forth in the findings of fact herein made, does not support petitioners' contention in Docket 295 that such amendment would conform to the evidence.

Briefly, the amended petition would add a large area of land in southwest Arizona, extending the claimed boundary eastward from the crests of the mountains bordering the Colorado River on the east (said crests being the eastern boundary claimed in the original petition) to the Hassayampa River Valley. The southern boundary west of the Colorado River originally

claimed would be extended by the amended petition to include the Colorado Desert area in California. The additional lands sought to be claimed by the Mohave by the amended petition, east of the Colorado River, would be added by petitioners in Docket 295 to the area claimed because, according to Mohave mythology and tradition, the Mohave were in the area for a period before settling in the Mohave Valley following their being compelled to withdraw from the Mohave Desert due to the changing climate and increasing aridity. The Yavapai, according to petitioners, who were located in historic times in at least a part of this additional area, "were aliens residing in Mohave territory having no claim to the land." There is no proof that in historic times, or at or near the time of the acquisition of these lands by the United States, the Mohave Indians exclusively used and occupied the additional lands in Arizona, which petitioners would now file claim to. Petitioners would add the lands west of the Colorado River, that is, the Colorado Desert area, to the description of the lands originally claimed because of some observations based on archeological investigations which have been called speculative by at least some authorities that the Mohave may have inhabited the Colorado Desert before increasing aridity made the desert uninhabitable. There is no evidence to support petitioners' contention of ownership in the Mohave of the Colorado Desert in historic times.

The Commission therefore sustains defendant's motion to vacate the Order of May 1, 1957, and to disallow or strike the First Amended Petition, and an order to this effect is this day made. It should be noted at this time also that petitioners' counsel in Docket 295 further intimated

in the briefs submitted that petitioners in said docket should be permitted to amend the petition to also include lands south of the Gila River and Chocolate Mountains and in the Imperial Valley of California. Petitioners' counsel urges that the petition in Docket 295 "sets forth a representative action adequate to represent the Mohave and also the Quechan [Yuma] and the Kamia, all of whom together made up the Mohavean Inner Group. \* \* \*" (Pet. Proposed Finding II (3), p. 32). Said counsel also contends (Claimants' First Supplemental Proposed Findings of Fact and Brief, at page 3):

\* \* \* These references make very clear why we can see that the Quechan and the Mohave (Amakhava) are actually one tribe, and why in the preparation of the Findings of Fact in this case it is often necessary to go beyond the testimony of the expert witnesses who have appeared herein, and to seek the answers in the documentary evidence and source material which appears in the record. Actually there are no overall experts on the Mohave. It is therefore necessary for the Counsel and the Commission to function as their own experts.

Although the Quechan (Yuma) Indians have their own claim pending before the Commission, able counsel for the Mohave would ingeniously substitute the Mohave Tribe as the proper party to sue for the Yuma lands. To do this counsel suggests that certain Yuman-speaking tribes, that is, the Mohave, Quechan, and Kamia were so closely allied that they formed his so-called Mohavean Inner Group, which functioned as a unit. While counsel admits that anthropologists have applied the word "Yumans" to include such Indians as the Mohave, Quechan (Yuma), Kamia, Diegueno, Cocopa, Maricopa, Halchidhoma, Kohuana, Walapai and Havasupai, he urges that "Mohavean" would be more appropriate for this linguistic group "because the Mohave are shown by the evidence to have been the most

prominent and central and progressive of all these people." These contentions are important not only because they are made with respect to the lands of the Yuma and Kamia tribes but also are urged as to other lands claimed in the petition but used and occupied by other Indian tribes. There is no substantial evidence to support the grandiose conception of petitioners' counsel in Docket 295 as to the existence of a land-holding entity or group known as the so-called Mohavean Inner Group. The documentary evidence, and the testimony of record, are all to the contrary. The Yuma Tribe and the Kamia Tribe, while allies of the Mohave, were separate and distinct entities. These contentions of counsel have been briefly discussed because they were presented in the briefs submitted but no consideration will be given to any further attempt to have rewritten the ethnological history of these Indian tribes as truly shown by the evidence of record.

The claim of the Mohave Indians as presented in Docket 295 alleges that the said Indians aboriginally owned a vast extent of territory stretching from the Colorado River and adjoining mountains in the east to the Sierra Nevada Mountains in the west and from Black Canyon on the Colorado River downstream to near the City of Blythe in California. The lands so claimed include not only the valley lands and adjoining mountains on the Colorado River but also the Mohave Desert. The amount of lands described in the petition in Docket 283 as Mohave territory is less pretentious but includes an area 200 miles long and 100 miles wide in and adjacent to the valley of the Colorado River from approximately Black Canyon to a point south half-way between Blythe, California, and Yuma, Arizona.

As previously stated, the Mohave belonged to the Yuman linguistic family. They have been known as Jam-a-jabs, Amacavas and other similar names. The Mohave Tribe was a tribe in the orthodox sense of the word. Since reservation days, however, part of the tribe has lived on the Mohave Reservation and is called the Needles group (petitioners in Docket 295), while a part also has lived on the Colorado River Indian Reservation and is known as the Parker group. Both are identifiable groups of Mohave Indians.

The Mohave Valley on the Colorado River is the historic core homeland of the Mohave Tribe. In or near this valley the Mohave Indians have been found in numbers since the first white contact by Onate, the Spaniard, in 1604-1605, and Padre Garces, the Spanish missionary, in 1776. In 1826, James Pattie an American trapper and his party were attacked by the Mohave Indians in the Great Colorado Valley, probably somewhere between Parker and Poston and again a few days later probably in Mohave Valley. Jedidiah Smith, in 1826 and 1827, found the Mohave living in large numbers in Mohave Valley. American officers, such as Sitgreaves in 1851, Whipple in 1854, and Ives and White in 1858, found large numbers of the Mohave Tribe in the Mohave Valley.

The Mohave Tribe may be considered predominately a sedentary people. They were mostly a farming people who planted their farms in the Mohave Valley, depending on the annual flood of the Colorado River which both irrigated their fields and fertilized them with a deposit of silt. They raised corn, melons, pumpkins, beans and other varieties from seed. It has been estimated the Mohave Indians obtained 50 to 60 per cent of their

subsistence by farming and perhaps 25 to 30 per cent was from the mesquite bean with the remainder of their food supply from other sources, mostly, however, fish. According to Doctor Alfred L. Kroeber, sometimes called the dean of American anthropologists, petitioners' expert in Docket 283, the Mohave hunted remarkably little for an Indian tribe. Doctor Kenneth Stewart, an expert for petitioners in Docket 295, stated the Mohave Tribe had 20 hunters in a tribe reportedly containing some 2000 to 3000 people. According to Doctor Kroeber, if the Mohave wandered "it was from curiosity or wanderlust or because there was a war on, or something of that sort." The Mohave were also traders and travelled far to the West Coast to trade for shells and far to the east to obtain goods. These Indians thought little of traveling hundreds of miles to carry warfare to their enemies or to join their allies the Yuma Tribe in warfare against enemies of the latter.

That the Mohave Tribe had Indian title to Mohave Valley at, and long prior to, the acquisition of said lands therein by the United States, is admitted by all authorities on the Mohave Indians. In order to properly and more readily describe the areas claimed by petitioners the Commission has found it convenient, in its findings of fact herein, to refer to the areas along the Colorado River as numbered and delineated on Doctor Kroeber's map, petitioners' Exhibit 2 in Docket 283. The Mohave Valley on said map is Area 1, and Indian title in said lands is found to have been in the Mohave Tribe. Area 2-A on said map is Cottonwood Valley, and this defendant's expert, Doctor Harold E. Driver, agrees was Mohave land and it has been so found by this Commission, Above the Bill Williams Fork

is a triangular-shaped area designated Area 2-B which all agree belonged to the Mohave Indians. On this map are other areas, that is, Area 3 (Chemehuevi Valley) and Areas 4-A, 4-B, and 4-C (Great Colorado Valley) with respect to which there is disagreement between the ethnologists.

Area 3 - Chemehuevi Valley

It is not known when the Chemehuevi Tribe began to use and occupy the Chemehuevi Valley of the Colorado River. The Chemehuevi, a band of Southern Paiute Indians, were met as early as 1776 in the Mohave Desert by Padre Garces west of the Whipple Mountains. According to Doctor Kroeber, the Chemehuevi Indians infiltrated Chemehuevi Valley between 1800(?) - 1850. While at one time Kroeber believed that the Chemehuevi were but squatters and the land belonged to the Mohave, he later said he felt 60-40 that the Chemehuevi had a better claim to it. Doctors Stewart and Harrington were of the opinion that the land belonged to the Mohave and that the Chemehuevi occupied it by sufferance. Doctor Driver, for the defendant, agreed with Doctor Kroeber. When the Chemehuevi reached the river from the desert is not definitely known. No mention of them is made in the valley until 1854 when Lieutenant Whipple noted some 200 Chemehuevi there, with their villages mostly on the west bank.

Petitioners in Dockets 283 and 295 contend that the Chemehuevi Valley belonged to the Mohave and that the Chemehuevi were there by sufferance of the Mohave or were merely tenants at will. Many arguments are made, especially in the proposed findings of fact and brief in Docket 295, to include as Mohave lands areas which were used and occupied by other tribes on the ground that such use and occupancy was by permission or sufferance

of the Mohave Tribe. The theory is actually one of sovereignty with the other tribes relegated to the roles of satellites of the allegedly dominant, more powerful Mohave Tribe. It is similar to saying that because one nation is powerful the lands of a smaller weaker nation belong to the former rather than the latter. It is more logical to say that the Mohave did not care if a smaller but friendly tribe located on unoccupied lands adjoining Mohave territory. As Doctor Kroeber states, the Chemehuevi felt the valley was theirs and the Mohave apparently recognized their rights therein. In any event, Indian title is based on exclusive use and occupancy in an Indian tribe. United States v. Santa Fe, 314 U. S. 339, 345. Far stronger evidence than the mere fact that the Mohave claimed Chemehuevi Valley to be Mohave lands would be needed to agree with petitioners' contentions when the lands in question are used and occupied by another independent tribe.

#### Areas 4-A, 4-B, 4-C; The Great Colorado Valley

In the days of Padre Garces, The Great Colorado Valley, which stretches along the Colorado River from about Parker, Arizona, downstream to near Picacho, California, was the home of the Halchidhoma Indians, a Yuman tribe. The Mohave Indians, who had been at war with the Halchidhoma for a number of years, attacked and defeated them in 1828. The Halchidhoma fled eastward from the river to escape the Yuma, allies of the Mohave, who blocked their escape downstream. The Mohave are said to have remained in the Great Colorado Valley for the winter to prevent a return of the Halchidhoma to the area. According to the ethnologists, a vacuum existed in the Great Colorado Valley from that time until 1859. According to Doctor

Harrington, the vacuum stretched for miles south of Parker and that although the Yuma occupied the valley up as far as present day Blythe, even this stretch was claimed by both Yuma and Mohave. Doctor Stewart testified that he assigned the whole valley (this is, Areas 4-A, 4-B, and 4-C) to the Mohave even though it was not continually inhabited by any tribe between 1828 and 1859, and that Mohave, Chemehuevi and Yuma were scattered through the valley. Doctor Stewart was of the opinion that the Mohave owned the land because they conquered it and regarded it as theirs. Petitioners' witness, Doctor Kroeber, was of the opinion that Area 4-C was Yuma territory and with this Doctor Driver, for the defendant, agreed. As to Areas 4-A and 4-B, Kroeber testified that although the Chemehuevi also infiltrated into these areas and Yumas were also found in the region, he was of the opinion that the lands in the Great Colorado Valley belonged to the Mohave and Yuma who did the conquering, and it was but a question of where to divide it between them. As previously stated, he assigned Area 4-C, that is, the lower part of the valley, to the Yuma and then decided that the Mohave owned the middle and head of the valley.

As is more fully set forth in the findings of fact, the expert witnesses agree that the Great Colorado Valley was not exclusively used and occupied by any one tribe. Petitioners' experts contend that the Yumas and the Chemehuevi in Areas 4-A and 4-B, especially, were squatters, or immigrants or aliens. While there is some proof that Mohaves did live in the Great Colorado Valley even before Irretiba, the Mohave Chief, moved into Area 4-A in 1859 with 77 families, there is substantial evidence that Chemehuevi and Yuma Indians were also occupying Areas 4-A and 4-B.

For the same reasons previously stated with respect to the Chemehuevi Valley the contentions of exclusive use and occupancy in the Mohave Indians to the Great Colorado Valley cannot be sustained by this Commission.

#### The Mohave Desert

The Mohave Desert extends west from the Colorado River opposite the Mohave Valley as far as the Tehachipi, San Gabriel, and San Bernardino Mountains which are part of the great range generally termed the Sierra Nevada. In the middle of the Mohave Desert the Mohave River rises in the San Bernardino Mountains and flows north and then east terminating in a sink which is known as Soda Lake. On the course of this river are located the modern cities of Victorville and Barstow. Soon after it emerges from the mountains its water disappears into the ground and only intermittently or upon seldom occasions of flood does water flow above ground in its bed. Crossing this desert was a trail or trade route which began just above Needles in the Mohave Valley, thence across the desert via Paiute Wash, Paiute Creek (Springs), Cedar Canyon through the Providence Range, Soda Lake, along the Mohave River Valley to Cajon Pass, and along the Santa Clara River to the coast.

This large desert area is claimed by the petitioners in Docket 295 to have been Mohave territory. Petitioners urge that although this region has mostly been so arid in the historic period as to be uninhabitable without artificial assistance except in a very few places along the Mohave River and the Paiute Wash, it was in recent prehistoric times perhaps down

to as late as the early sixteenth century more generally watered and supplied with vegetable and animal life so as to provide subsistence for habitation. Petitioners further contend that during this prehistoric time it was occupied, according to Mohave mythology and tradition, by the Mohave Tribe. This occupation, according to petitioners, continued until the gradually increasing aridity caused the Mohave to withdraw to the Mohave Valley. This occupation in prehistoric times, according to petitioners, is corroborated by archeological investigation. Doctor Kroeber, who appeared as a witness in Docket 283, did not believe that the desert area was ever Mohave territory but rather aboriginally the Mohave Desert was Chemehuevi and Vanyume territory. This witness stated that the purported occupation of the Mohave Desert in prehistoric times by Mohave Indians as reported by Malcolm Rogers was based on a series of fragments of pottery which Kroeber considered "highest speculative historical reconstruction" (Tr. 139, 158, Docket 283).

Petitioners contend that while the Mohave Indians removed from the Mohave desert when the changing climate made it undesirable or impossible for habitation purposes, such withdrawal was voluntary and the lands were theirs to return to whenever they should again become habitable. According to petitioner, the moving in to the desert lands by the Shoshonean or the Paiute Chemehuevi did not change the ownership of the land. Doctor Kroeber in his report states (Pet. Ex. 1, Docket 283), "It is now clear that the Mohave did not properly 'own' this desert in the parts more remote from the river, since we know that other tribes, desert-adapted, steadily lived hunted, and gathered in its various reaches: the Southern

Paiute, Chemehuevi, Desert Cahuilla, Mohineyam Serrano, Kawaiisu, Tejon Kitanemuk. \* \* \* While the Mohave used the desert in their travels to the West Coast, such use is not sufficient to have vested Indian title in the tribe since their use of the desert was not exclusive. Padre Garces in historic times found Chemehuevi in the desert and stated that the lands of the Beneme Nation began at a point near Marl Springs. Jedidiah Smith encountered Paiute lodges in the Mohave River Valley and later a few lodges of Serrano Indians in 1827. Whipple, too, in 1854, found Paiutes in the desert. The Mohave Indians made limited use of the Mohave Desert and such use was not exclusive. The Commission cannot find Indian title in the Mohave to this region merely because they claimed to own it, especially, when there is evidence of use of the arid area by others. It is also plain that the fact that in ancient times the Mohave allegedly lived on what is now the desert is not sufficient to give them Indian title especially since such occupation is questionable and even if it were a proven fact the Mohave Indians did voluntarily abandon the region because of increasing aridity (cf. Quapaw Tribe v. United States, 128 C. Cls. 14).

Defendant strongly urges several reasons why the Commission should find that the petitioner Mohave Tribe should not recover from the United States. Defendant contends that under the laws, usages and customs of either Spain or Mexico, which countries owned and governed the lands herein claimed for many years prior to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, there were no tribal rights of aboriginal use and occupancy recognized by those government. Defendant's position in this respect is that

the petitioner had no greater rights in the lands claimed as against the United States than they held under the sovereignties of Spain and Mexico. Defendant devotes a large portion of its brief and findings of fact to a thorough coverage of the laws, customs and usages respecting land title and treatment of Indians under Mexican and Spanish sovereignties. It is unnecessary, however, to dwell on this contention at any length since the Supreme Court of the United States has long ago decided adversely to defendant's contention that aboriginal rights of the Indians who inhabited lands in the cession obtained from Mexico in 1848 were to be treated differently by the United States from other Indian lands in this country. In United States v. Santa Fe Pacific Railroad Co., 314 U. S. 339, 86 L. ed. 260, at page 269, a landmark case in Indian law, the Supreme Court stated:

'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' Cramer v. United States, 261 US 219, 227, 67 L ed 622, 625, 43 S. Ct. 342. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. (US) 543, 5 L ed 681, and has been repeatedly reaffirmed. Worcester v. Georgia, 6 Pet. (US) 515, 8 L ed 483; (and citing other cases). As stated in Mitchel v. United States, supra, '9 Pet, (US) 746, 9 L ed 296), 'Indian right of occupancy is considered as sacred as the fee simple of the whites.' Whatever may have been the rights of the Walapais neighbors of the Mohave/under Spanish law, the Cramer Case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Through the Cramer Case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from 'the original nomadic tribal occupancy.' (261 US p. 227, 67 L ed 625, 43 S. Ct 342). Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession, was like the generalizations in Johnson v. M'Intosh, 8 Wheat. (US) 543,

5 L ed 681, supra, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land under the prior sovereignty of the various European nations including Spain, that like other rules governing titles to property (United States v. Title Ins. & T. Co. 265 US 472, 486, 487, 68 L ed 1110, 1114, 111 S Ct 261) they should now be considered no longer open. Furthermore treaties negotiated with Indian tribes, wholly or partially within the Mexican Cession for delimitation of their occupancy rights or for the settlement and adjustment of their boundaries, constitute clear recognition that no different policy as respects aboriginal possession obtained in this area than in other areas. (Underscoring supplied)

With respect to lands located in California, the defendant urges that under the Act of March 3, 1851, 9 Stat. 631, passed for the purpose of ascertaining the public domain in that State and to separate the lands held under private claims at the date of the 1848 treaty, "all persons, including Indians, claiming lands under any right derived either from the Spanish or Mexican governments were required to present them, together with the evidence thereof, before a board of commissioners established under said act; \* \* \*" and all lands, claims to which were not presented within two years of the date of passage of the act were deemed to be the public domain of the United States. Defendant contends that "having failed to establish a paper title to the lands so claimed derived directly from the Spanish or Mexican governments, and having failed to prove a formal recognition of any rights 'in community,' the petitioners have failed to prove any alleged right or title in the said claimed land upon which a recovery could be based." (Def. Req. Fdgs. 24).

Under the provisions of the 1851 act relating to lands in California the board of commissioners was required by sections 16 to report to the Secretary of the Interior (1) the tenure by which mission lands were held,

(2) the tenure by which lands were held by civilized Indians; (3) the tenure by which Indians engaged in agriculture or labor-held lands, and (4) the tenure by which Pueblo or Ranchero Indians occupied and cultivated lands. The purpose of the 1851 act was to ascertain and settle private land claims in California, based upon claimed right or title derived from the Spanish or Mexican Government. The claim made by petitioner herein is based upon aboriginal use and possession which is not a right or title to land which would be derived from either the Spanish or Mexican governments. Indian title, which is used synonymously with aboriginal use and occupancy, is difficult to define in terms of civilized concepts of land tenure. As Governor Cass said in 1827, "The tenure by which the primitive inhabitants of this continent held their land is a question of metaphysical speculation rather than one of practical right." It has long been determined, however, that aboriginal title existed before and after discovery of America by the Europeans. While the "right of discovery" gave title, as we know it, to the government making such discovery against all other European governments it did not "affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." Worcester v. Georgia, 6 Pet. 557, 8 L ed 499, 495. Indian title, or aboriginal use and occupancy, is a natural right, as distinguished from a property right, which remains in Indian tribes until extinguished or abandoned. This right of use and occupancy has been recognized as existing in Indians since the establishment of our Government and this policy has been held to apply to lands

acquired in the 1848 Mexican Cession in the Santa Fe case, supra. The 1851 act made no provision for the ascertainment of lands claimed to have been held by aboriginal possession when the United States acquired the lands from Mexico.

Defendant cites Barker v. Harvey, 181 U. S. 481 at p. 491, as authority for the proposition that "A claim of an alleged right acquired before 1848 to an area of the lands included in the cession of 1848 by reason of alleged aboriginal use and occupancy by the ancestors of the petitioners, is such a claim as contemplated by the statutes above set out for the purpose of a determination of such claimants as against the United States." Defendant urges that, under the holding of the Barker case, if the petitioners herein did not file a claim under the 1851 act, which they did not do, then the failure constituted an abandonment of their claim. The Barker case involved a claim on the part of Mission Indians claiming a right of permanent occupancy to lands granted to an individual by the Mexican Government. Since the Indians involved were Mission Indians and the lands were mission lands, the decision of the Supreme Court correctly held that "If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, \* \* \*." The Barker case is not authority for holding therefore that Indians who did not hold lands fitting the categories enumerated under Section 16 of the Act of 1851 abandoned their claims to land held by aboriginal possession. The Barker case involved the question of a claim or right to "lands which were subjected by the action of some prior government to a right of permanent

occupancy, \* \* \*." (cf *Gramer v. United States*, 261 U. S. 219). Such a right is one of "private property" according to the Supreme Court in the Barker case. Indian title has never been considered a property right in the strict sense of the term. (*Tee-hit-ton Indians v. United States*, 348 U. S. 272.

As to land claimed outside the State of California, defendant contends that the Act of July 22, 1854, 10 Stat. 308, pertaining to the areas of the 1848 Cession designated as New Mexico, including the present States of Nevada and Arizona, which required a report of the Surveyor General of the Territory of New Mexico as to the origin, nature, character and extent of all claims to lands under the laws, customs and usages of Spain and Mexico, also contemplated claims based upon alleged rights by reason of alleged aboriginal use and occupancy. An examination of this act shows, as with the 1851 act, that it involved a study of private land claims to be made "with a view to confirm bona fide grants, and give full effect to the treaty of 1848 between the United States and Mexico." For the reasons stated with regard to the 1851 act, the Act of July 22, 1854, did not apply to alleged claims or rights based on aboriginal possession. See also *Santa Fe* case, supra, 86 L ed 260, at p. 271.

While the Act of 1851 did not cover claims to aboriginal possession as distinguished from claims or rights derived from Spain or Mexico, the United States did consider for all intents and purposes that all lands in California not included in private grants were public lands of the United States at the end of the two-year period provided for in said act.

The result of this treatment of the lands as public lands effected an extinguishment of Indian title to lands in California as of March 3, 1853, The 1854 act, pertaining to lands outside California, has been held not to have extinguished Indian title, Santa Fe case, supra, 86 L ed 271.

The Commission concludes that the petitioners have proven aboriginal Indian title to have been in the Mohave Tribe to the lands described in Finding 23(a), (b) and (c), and as delineated as Areas 1, 2-A and 2-B on petitioners' Exhibit 2 in Docket 283. The Commission further concludes that the United States acquired the Indian title to those lands in California within the areas described above on March 3, 1853, and extinguished the Indian title to the lands within those areas which were in what are now the States of Nevada and Arizona, on March 3, 1865 (cf. United States v. Santa Fe Pacific R. Co., 314 U.S. 339).

Accordingly, an interlocutory order will be entered herein adjudging the defendant liable for the value of the lands described in Finding 23(a), (b) and (c) acquired by the United States without payment of compensation to petitioners, less such offsets, including money or property given to or funds expended gratuitously for petitioners, allowable under the Indian Claims Commission Act.

/s/ LOUIS J. O'MARR  
Associate Commissioner

We concur:

/s/ EDGAR E. WITT  
Chief Commissioner

/s/ WM. M. HOLT  
Associate Commissioner