

BEFORE THE INDIAN CLAIMS COMMISSION

CLYDE F. THOMPSON, WILLIAM FULLER, )  
 HERBERT A. BELLAS, HENRY MILLER, )  
 MANUEL CORDOVA, ARCHIE McWHINNEY, )  
 LLOYD BARRINGTON, SATURNINO E. )  
 CALAG, W. G. WALKER, LAWRENCE )  
 BURCELL, FRANKIE MOOREHEAD and )  
 ARTHUR TREPPA, members, and as the )  
 representatives of, and on the re- )  
 lation of the Indians of California, )  
 )  
 ) Petitioner, )

v.

Docket No. 31

THE UNITED STATES OF AMERICA, )  
 )  
 ) Defendant. )

and

ERNEST RISLING, PETER MASTEN, )  
 MARY G. DORNBAUGH, as the repre- )  
 sentatives of, and on the relation )  
 of the Indians of California, )  
 )  
 ) Plaintiffs, )

v.

Docket No. 37

THE UNITED STATES OF AMERICA, )  
 )  
 ) Defendant. )

Decided: July 31, 1959

Appearances:

Ernest L. Wilkinson and Reginald E. Foster, with whom were Wilkinson,  
 Cragun, Barker & Hawkins, Thurman Arnold, Francis M. Goodwin, Walton  
 Hamilton, John W. Preston, Sam Clammer, Walter M. Gleason, A. Brooks  
 Berlin, Hartwell H. Linney, Frederic A. Baker, Paul M. Niebell and  
 Donald C. Gormley,

Attorneys for Petitioners and Plaintiffs.

Ralph A. Barney, with whom was associated Mr. Assistant Attorney General  
 Perry W. Morton,

Attorneys for the Defendant.

8 Ind. Cls. Com. 1 OPINION OF THE COMMISSION

6

O'Marr, Commissioner, rendered the opinion of the Commission. boundaries which were respected by other Indians and known by the whites

as tribes, bands, ~~and groups of individuals~~ these Indian groups or tribelets,

Parties as the witness, Dr. A. L. Kroeber, called them, developed their systems of

culture and economy, and subsisted individually, as ~~resources~~ resources of the

several of these Indians of California filed their petition with

the Commission and assigned Docket No. 31. And on April 28,

1949, the same petitioners filed an amended petition which was again

SPANISH AND MEXICAN LAND GRANTS

amended pursuant to the order of January 19, 1956.

6. During Spanish and Mexican sovereignty, many grants of large

And on March 24, 1949, another group of California Indians filed areas of land were made by those governments in the territory ceded by their amended petition as representatives of the Indians of California.

the treaty of Guadalupe Hidalgo (1848) of which several hundred grants This was again amended by order of January 19, 1956.

were for lands within the present boundaries of California.

The two amended petitions are substantially the same and for that

By Article VIII of the treaty of Guadalupe Hidalgo, the United States reason, on November 19, 1953, it was ordered that those amended pe-

agreed that property of every kind belonging to Mexicans established within titions be "consolidated in their entirety and tried as a single action."

the territory ceded by said treaty and the property of every kind belonging And by stipulation of the attorneys for the respective petitioners filed

to Mexicans not established in the ceded territory shall be retained by herein on December 13, 1954, it was agreed that said cases (Dockets Nos.

them and respected by the United States and by the 2d Article of the Proto- 31 and 37) "be consolidated in their entirety and for all purposes and

col of May 26, 1848, which was interpretative of the treaty, the United shall be prosecuted as one action."

States expressly recognized the land grants and agreed that the grantees

We shall hereinafter refer to the cases as though but a single

thereof "may cause their legitimate titles to be acknowledged before the action had been filed, except where it is deemed necessary to treat

American tribunals." By the second paragraph of that article, the titles them separately, and for convenience of reference will call them

to the grants in California were those that were legitimate under Mexican Indians of California.

law up to May 13, 1846.

The Indians of California base their right to maintain this

In order to carry out the obligations thus assumed, the United States action upon the Act of May 18, 1928, 45 Stat. 602, which they argue

passed the Act of March 3, 1851 (9 Stat. 631), and thereby created a Board

gives them the exclusive right to sue for all lands within the boundaries of California.

The 1928 Act defines the Indians of California as follows:

"That for the purposes of this Act the Indians of California shall be defined to be all Indians who were residing in California on June 1, 1852, and their descendants now living in said State." (Sec. 1).

By Section 7 of the Act, it was required that those Indians residing in California on June 1, 1852, and their descendants living in California on May 18, 1928, be enrolled. The enrollment was made and 23,380 Indians were placed on the roll. This section was amended by the Acts of June 30, 1948, 62 Stat. 1166, and May 24, 1950, 64 Stat. 189, and residence restrictions of the 1928 Act were eliminated and non-resident descendants of those Indians residing in California on June 1, 1852, were added to the rolls. So there are now 36,095 so-called Indians of California who were enrolled under the 1928 Act and its amendments. Obviously, the purpose of the enrollment was to determine the Indians who are entitled to benefit by the judgment contemplated by that Act.

It is the enrolled group, the petitioners in Dockets 31 and 37 contend, that was created a "legal statutory entity" by the 1928 Act "and under the provisions of that Act it is clearly and definitely authorized and empowered and has the sole right to assert and have determined the claims against the United States therein set out."

Of course there is no basis for such contentions. In the first place, the time for suing, by express limitation of Section 4 of the 1928 Act, expired on May 18, 1931, and secondly, when the Indians of

California obtained their judgment on December 4, 1924, (102 C. Cls. 837), they exhausted their rights and remedies under that Act; it had served its purpose insofar as presenting claims under it were concerned. Moreover, the Indian Claims Commission has been given no power by the 1928 Act to receive a claim under it. To be sure, the Indians of California, as defined in the 1928 Act -- and it makes no difference whether they be considered as a "legal statutory entity" or as the group enrolled under that Act -- could look to that Act for the handling and use of the judgment credit set up for their benefit, but there is nothing in that Act or the Indian Claims Commission Act which makes that a suing entity or the enrolled members thereof a suing group under the Indian Claims Commission Act.

The main reason, apparently, the claimants in Dockets Nos. 31 and 37 cling to the notion that the claimants under the 1928 Act are a suing entity is because they believe that by that Act the Indians of California have the exclusive right to maintain a suit for all the lands in the present state of California, including those covered by Spanish and Mexican grants. Since we have previously decided that other claimants of California lands may maintain actions for California lands (opinion of January 20, 1958) and since we are holding that the claimants in Dockets Nos. 31 and 37 have asserted and can maintain their claim under the Indian Claims Commission Act without regard to the 1928 Act and also hold that they cannot recover for the granted lands, further discussion of the effect of the 1928 Act seems unnecessary at this place in this opinion.

The Indian Claims Commission Act provides that an "identifiable group of American Indians" may present and have determined claims against the United States, but the phrase "identifiable group of American Indians" is not defined in the Act nor does it necessarily include a group of Indians created by a special statute for a special purpose which has been fulfilled, as was the case under the 1928 Act.

The Court of Claims has decided that the "Indians of California" are an identifiable group within the meaning of the Indian Claims Commission Act, but the Indians it referred to were those California Indians whose former group or community life was disrupted and the groups disbursed and scattered throughout California by the influx of white people after we formally acquired California from Mexico by the Treaty of Guadalupe Hidalgo proclaimed on July 4, 1848. Indians of California v. United States, 122 C. Cls. 349.

But the petitioners in Dockets 31 and 37 take the position -- a rather uneasy one, it seems to us -- that the Court of Claims held, in its decision cited above, that the group created by the 1928 Act is the group, and the only group, entitled to assert the instant claim under the Indian Claims Commission Act. We do not so understand the decision. The Court said:

"We believe this Act of 1928 and its history in connection with the history of the Indian Claims Commission Act has an important bearing upon the question of what Congress intended by the use of the term 'identifiable group of American Indians' in Secs. 2 and 10 of the Indian Claims Commission Act."

The Court there mentioned the Indians' loss of identity as distinct groups, etc., but at no place in the decision did the Court hold that

the entity created by the 1928 Act has the only right, or any right, to assert the instant claim. Furthermore, the reasoning of, and conclusions reached by, the Court of Claims in its decision of May 6, 1952, 122 C. Cls. 349, makes it plain beyond serious doubt that that court would have decided as it did if the 1928 Act had never been passed. In other words, the Court would have decided that the unorganized remnants of the aboriginal groups of California Indians constituted an "identifiable group" under the Indian Claims Commission Act; that the 1928 Act added nothing to the rights of such a collective group to maintain a claim or to our jurisdiction to hear and determine it.

While the petitioners in Dockets 31 and 37 seem to plead that the claim is presented by a "legal entity" recognized by the 1928 Act, the allegations of their petitions also state a claim that does not depend upon the 1928 Act for authority to sue but alleges a claim on behalf of all those California Indians who were residents of California at the time we acquired it, and their descendants. We are not to be understood as holding that the enrollment of Indians under the 1928 Act and its amendments is to be ignored for it might well be that, should an award be made, the Congress would order a distribution of the award on the basis of such enrollment as the only practical way of distributing an award after the lapse of over a century.

The Indian Claims Commission Act provides for the assertion of claims by an "identifiable group of American Indians" residing within the United States. The proof in this case shows beyond doubt that at

the time we acquired California, as a part of the lands formally ceded by Mexico on February 2, 1848, 9 Stat. 922, it was largely occupied by several hundred small autonomous Indian groups and that the ancestors of the members of such groups had occupied and used such lands in the same way for centuries.

The evidence is plain, and in fact not disputed, that after we acquired California, and as the result of a great influx of white people, the Indian communities were disrupted and destroyed, many of their members were killed and those remaining were largely scattered throughout the state and their tribal or band origin generally lost. It was because of this disruption of community life the Court of Claims concluded that those Indians remaining constituted an "identifiable group" within the purview of the Indian Claims Commission Act. Indians of California v. United States, 122 C. Cls. 349.

These disbanded aboriginal groups of Indians and their members became known and have been referred to by the administrative officers of defendant and in Congressional Acts by the appellation: "Indians of California." That collective name aptly designates the unorganized California Indian group, but there is nothing in the Indian Claims Commission Act that authorizes a suit in that name or makes it a legal entity for any purpose. A claim for such an unorganized identifiable group must be presented by individual members of the group as the representative of all its members. (Sec. 70i, U.S.C.A. Title 25). Since the Indians of California have no tribal organization authorized to present a claim for them and, since the Indian Claims Commission

Act does not create a suing entity for asserting a claim for such Indians, it was necessary to proceed as was done here, namely, to assert a claim by named individual members of the group known as the Indians of California. It was proper and helpful to give the group for which the claim is asserted a name for convenience of reference and the name used, as we have said, is appropriate for that purpose.

A reading of the petitions in Dockets Nos. 31 and 37 might well lead to the conclusion that the instant claim is asserted by an entity, the Indians of California, created by the 1928 Act, rather than the identifiable group authorized to sue by the Indian Claims Commission Act. The constant and vigorous arguments of the petitioners' attorneys adds support to that conclusion. We believe, though, that in spite of the allegations of the petition and the arguments giving support to that conclusion, there are also sufficient allegations in the petitions to bring the claim under the Indian Claims Commission Act, and we, accordingly, take the position that a claim is asserted under the latter Act for the benefit of the group generally known as the "Indians of California."

#### Lands Involved

The Indians of California, in their petitions, claim compensation for all lands in the State of California and in their briefs maintain that they have the exclusive right to assert a claim for such lands.

As the litigation progressed, the petitioner modified its claim as to the land area. On June 29, 1955, the attorneys for the Indians of California and the attorneys for Klamath, Modoc and Yahooskin

Tribes, petitioners in Docket No. 100, filed a stipulation by which the Indians of California (petitioners in Dockets Nos. 31 and 37) disclaimed

"any right, title, interest or claim in and to the lands within the present State of California, ceded by the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians under the treaty of October 14, 1864, II Kappler 865, 16 Stat. 707, and now claimed by the said Klamath and Modoc Tribes and Yahooskin in their petition in Docket No. 100 to the extent shown by the map prepared by Dr. Albert L. Kroeber as an exhibit in Dockets Nos. 31 and 37 . . ."

The map here referred to has been admitted in evidence as Exhibit ALK-1955 which is in two parts which divide California into the North and South sections. The California lands involved in the claim in Docket No. 100 are estimated to consist of 1,600,000 acres.

Again, and at the request and motion of the Indians of California, petitioners in Dockets Nos. 31 and 37, there was eliminated from the lands claimed in their petitions those California lands included in the separate claims of the tribes whose lands were separated from the lands claimed by the Indians of California by our order of October 6, 1958, and which lands are described in said order as Area A lands. That by virtue of such elimination the lands in California now claimed by said Indians of California are those referred to in said order as Area B lands.

As a result of the division of the California lands made by the order of October 6, 1958, our inquiry will be confined to the rights of the Indians of California to the lands included in the Area B division of lands mentioned above and defined by said order of October 6, 1958, which includes the lands of the Yokiah, Yana and Shasta tribes in

California which filed separate claims that were merged with the claim of the Indians of California by an order also dated October 6, 1958.

#### SPANISH AND MEXICAN GRANTS

The Indians of California contend that the Spanish and Mexican land grants were made subject to the Indians' right of occupancy, hence their rights were preserved under the Guadalupe Hidalgo treaty. Passing for the moment the possible effect of the Act of March 3, 1851, upon the question, we pass to the status of the Indian title on February 2, 1848, the date of the Treaty of Guadalupe Hidalgo.

It is plain that by the terms of the Treaty of Guadalupe Hidalgo, there passed to the United States full title to all the lands of the Republic of Mexico lying northerly of the boundary line between the United States and Mexico fixed by Article V of said treaty. And, as will be seen later, the Mexican Republic could not and did not cede to the United States lands which either it or the Spanish Crown had granted prior to May 13, 1846 (Art. 2d of the Protocol), so had the Mexican Republic recognized Indian right of occupancy in Spanish or Mexican grants it would have been necessary to require the United States to recognize and respect such Indian rights in the granted lands as it required our Government to respect and acknowledge the grantees' rights and titles in the granted lands. Since no such provision was made in the treaty, the Indians had no rights of occupancy in the granted lands that we are required to consider as obligations of the United States.

Under the law of nations, which the courts of this country have adopted, a conquered nation, as the Mexican Republic was, cedes only the territory which belongs to it, and such a cession is never understood as including the private property of the inhabitants. Pueblo de Cochiti v. United States, 7 Ind. Cl. Com. 437, 452; Strother v. Lucas, 9 L. Ed. 1137, 1148, 12 Peters 410, 438; United States v. Arredonde, 6 Peters 691, 735-6; Cesna v. United States, 169 U. S. 165, 186. Hence, when either Spain or Mexico granted the lands the titles passed to the grantees and such lands never passed to the United States under the Treaty of Guadalupe Hidalgo. Furthermore, if by the grants Spain or Mexico perpetrated a wrong upon the Indians this country was and is under no duty to right such wrong. Cesna v. United States, supra.

But the Indians of California maintain that since Section 15 of the Act of March 3, 1851, expressly provides that the final decrees of the Commissioners, or the District and Supreme Courts, or any patent issued under the act, shall be conclusive only between the United States and the claimants of lands derived from the Spanish or Mexican government and "shall not affect the interests of third persons," the Indians' rights of occupancy in the grants were not adjudicated but "saved to them, they being third parties to the transaction by this section."  
(Section 15)

The answer to the contention is not difficult. The Mexican Claims Act of March 3, 1851, did not create any rights of Indians in lands in California or in any other persons, for, as stated by the Supreme Court in United States v. O'Donnell, 303 U.S. 501, 512, 82 L. Ed. 981, 987:

"The primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants."

Nowhere in the Act of March 3, 1851, is there created or attempted to be created any Indian rights in the lands granted by either Spain or Mexico. A reading of the title of the Act as well as the text shows it was enacted to "ascertain and settle the private land claims in the State of California," the right or title to which was derived from the Spanish or Mexican government.

Counsel for the Indians of California seem to be of the opinion that the title of the grantees of Spain or Mexico was derived from the patents issued by the United States under Section 13 of the Act of March 3, 1851. The title of the grantees was clearly conveyed by the granting sovereigns; it was that title the treaty of Guadalupe Hidalgo required us to respect. This is made clear by the 2d Article of the protocol, in explanation of the treaty provisions, which expressly preserved the legitimate titles of the grantees and authorized them to be "acknowledged before American tribunals." The method by which such titles were to be acknowledged was left to the United States, but it was made plain that the titles to be confirmed "are those which were legitimate titles under the Mexican law in California . . . up to the 13th day of May, 1846 . . ."

Of course the titles to lands granted during Spanish sovereignty were respected by Mexico as they are by the United States by virtue of the Treaty of Guadalupe Hidalgo.

The 1851 Act was designed to identify and quiet the title to all lands in California which were the subject of grants from either Spain or Mexico. The issuance of patents for the lands determined by the Land Board or the courts to be valid was more in the nature of a confirmation of the existing titles than the actual conveyance of title. Moreover, the issuance of patents is our traditional way of showing individual rights within our borders. We believe the title of the grantee-claimants passed when the grants were complete under either Spanish or Mexican law and even though the wording of the patents (Pet. Ex. 6) might indicate a conveyance by the United States to the successful claimants, it amounted to nothing more than the confirmation of titles, conveyed by either Spain or Mexico prior to May 13, 1846.

We conclude, therefore, that the Indians of California have no compensable interest in any of the lands in Area B, fixed by the order of the Commission made and entered on October 6, 1958, which are included or covered by the grants or parts of grants shown on Petitioners' Exhibit ALK-13 (2 parts) and Defendant's Exhibit 160 (2 parts), said Area B shall be considered to include the lands of the Yokiah, Yana and Shasta tribes referred to in said order of October 6, 1958.

PRESENTATION OF LAND CLAIMS UNDER  
ACT OF MARCH 3, 1851, 9 Stat. 631

The defendant contends that because the petitioners failed to present their claim for land under the Act of March 3, 1851, 9 Stat. 631, they lost whatever rights they had to the California lands here involved.

Section 8 of the 1851 Act required "every person claiming lands in California by virtue of any right or title derived from the Spanish or

Mexican government" to present their claims therefor to the commission, created by that act, for settlement. Section 13 of the Act required such claimants, that is, claimants having rights derived from either Spain or Mexico, to present their claims therefor within two years after the date of the act, that is, by March 3, 1853, and all lands for which claims were not presented within that time "shall be deemed, held and considered as part of the public domain of the United States." It is conceded that no claim for the lands here involved was ever presented under the 1851 Act, so if such presentation was necessary under that Act, the petitioners abandoned their claim.

It was not every land right that had to be validated under the 1851 Act, but only those rights which were derived from either the Spanish or Mexican government. The statute was so interpreted by the Supreme Court in Botiller v. Dominguez, 130 U.S. 238, 249, 32 Law. Ed. 926, 929, in which it said:

"It is equally clear that the main purpose of the statute was to separate and distinguish the lands which the United States owned as property which could be sold to others, either absolutely or by permitting them to settle thereon with pre-emption rights, or which could be reserved from public sale entirely, from those lands which belonged, either equitable or legally, to private parties under a claim of right derived from the Spanish or Mexican governments. When this was done the aim of the statute was attained."

The claim here asserted is plainly not a "private land claim," nor one arising "by virtue of any right or title derived from the Spanish or Mexican government" which was required to be presented for confirmation and patent under the 1851 Act. On the contrary, the claim for our determination is one based upon original Indian title to the California lands

referred to later. Original Indian title had its latest definition in Tee-Hit-Ton Indians against United States, 99 L. Ed. 314, 320, 75 S. Ct. 313, 317, wherein it is said by the Supreme Court:

"II. INDIAN TITLE -- (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

See also Johnson v. McIntosh, 8 Wheat. 543; Worcester v. Georgia, 6 Pet. 515; Holden v. Joy, 84 U.S. 211.

These cases show that original Indian title is a mere right of occupancy not specifically recognized as ownership by Congress; it is a right that has the sanction of the law of nations. It is a right described in Worcester v. Georgia, 8 L. Ed. 483, 500, as follows:

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded from intercourse with any other European potentate than the first discoverer of the coast of that particular region claimed . . ."

See also Miami Tribe v. United States, 5 Ind. Cl. Com. 199, 212.

Obviously, a claim for lands based upon original Indian title does not come within the class of claimants covered by the 1851 Act since their rights are not derived from the Spanish or Mexican government.

In support of its position that the petitioners lost whatever land rights they may have had in California by neglecting to present them under the 1851 Act, the defendant relies upon two cases:

Barker v. Harvey, 181 U.S. 481, was a case in which Mission Indians claimed rights of occupancy to California lands derived from the Mexican government. They did not present their claims under the 1851 Act and in affirming the Supreme Court of California, 126 Cal. 262, the Supreme Court of the United States held the Indians abandoned whatever claims they may have had by failing to present them to the commission created by the 1851 Act for confirmation.

The other case the Government relies upon is United States v. Title Ins. & T. Co. 265 U.S. 472. In this case certain Mission Indians, represented by the United States as their guardian, sued to quiet in them a perpetual right to occupy part of a confirmed Mexican grant in California, the Indians claiming that under Mexican laws they were entitled to continuous use of that part of the grant they occupied before it was made. The lower Federal courts held that if the Indians had any rights under the Mexican laws, they were abandoned and lost by their failure to present them for settlement to the commission created by the 1851 Act.

In each of the cases just referred to, it was alleged and proof offered indicating that those claims were based on a right of occupancy derived from the Mexican government. As we have stated above, the claim

here asserted is not based upon any such right and therefore was not required to be presented for settlement under the 1851 Act.

In Cramer v. United States, 261 U.S. 219, 231, the Supreme Court distinguished the land claims requiring confirmation under the 1851 Act from those claims not requiring confirmation by its reference to Barker v. Harvey, supra:

"It is insisted that any rights these Indians might otherwise have had are barred by the provisions of the Act of March 3, 1851, 9 Stat. at L. 631, chap. 41. This statute required every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments to present the same for settlement to a commission created by the act. There was a provision directing the commission to ascertain and report the tenure by which the mission lands were held and those held by civilized Indians, and other Indians described. The act plainly has no application. The Indians here concerned do not belong to any of the classes described therein, and their claims were in no way derived from the Spanish or Mexican governments. Moreover, it does not appear that these Indians were occupying the lands in question when the act was passed.

"Barker v. Harvey, 181 U.S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690, does not support the defendant's contention. There the Indians whose claims were in dispute were Mission Indians, claiming a right of occupancy derived from the Mexican government. They had failed to present their claims to the commission, and this, it was held, constituted an abandonment. The Indians here concerned have no such claim, and are not shown to be within the terms of the Act of 1851 in any respect. It further appeared in that case that, prior to the cession to the United States, the Mexican authorities, upon examination, found that the Indians had abandoned the lands, and thereupon made an absolute grant to the plaintiff's predecessors, and, this grant having been confirmed by the commission, a patent for the lands had issued."

The same reasoning and conclusion would apply to United States v. Title Insurance etc., supra.

Accordingly, we are of the opinion the Indians of California were not required by the 1851 Act to present their present claim for confirmation and that they are not barred by such failure or said Act from asserting the present claim.

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INDIAN RESERVATION LANDS

Subsequent to the cession to the United States by the Treaty of Guadalupe Hidalgo of the California lands, the Government set aside for exclusive Indian use reservations with an aggregate acreage of 683,359. A large part of this reservation land is, according to the maps in evidence, located within Area B, but the evidence is insufficient to show the acreage or the location of such lands within Area B. Further proof must be made by the parties as to the location and acreage of the lands within Area B and the amount thereof should be excluded from the part of Area B for which the defendant is liable.

It appears from the proof and the evidence of which we may take notice, that 611,226 acres of the reservation lands, valued at \$1.25 per acre or \$764,032.50, were charged as offsets against the Indians of California, petitioners in the case brought under the Act of May 18, 1928. 102 C. Cls. 837, 839. Whether an adjustment of some kind should be made because of this offset does not appear necessary to determine at this time as it presents a problem that can better be submitted and determined at some future stage of the case.

UNCOMPENSATED TAKING OF INDIAN LANDS

It is an undisputed fact that the lands in California were taken from the Indians who occupied them, by the United States without compensating them for their original Indian rights therein, unless the judgment obtained by the "Indians of California" in 1944 under the Act of May 18, 1928, can be considered compensation.

Counsel for petitioners point to a number of events and acts on the part of the Government, such as the military occupation of California, the negotiation of the eighteen unratified treaties with certain Indian groups and the survey and granting of pre-emption rights to settlers on California lands by the Act of March 3, 1853, 10 Stat. 244 -- this Act also made large grants to the State of California for its common schools, a seminary of learning and for public buildings -- as indicating a taking of Indian lands. None of these acts can be considered a taking of Indian lands by defendant. The military occupation was obviously a temporary protective measure and no Indian lands were relinquished by the 18 treaties because they were rejected by the Senate. And the Act of March 3, 1853, operated only on those lands which had become public domain by the Act of March 3, 1851, 9 Stat. 631.

The Act of March 3, 1851, on the other hand, discloses a plain and definite purpose to terminate Indian titles to all California lands that were not finally decided by the Land Board created by that Act, or the Federal Courts on appeal, to be valid grants by either Spain or Mexico up to May 13, 1846. The pertinent provisions of the Act (Sec. 13) read:

"That all [California] lands, the claims to which have been finally rejected by the commissioners in manner herein, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this Act [March 3, 1851], shall be deemed, held, and considered as part of the public domain of the United States; . . ."

The plain effect of the quoted provisions of the 1851 Act, when read in connection with the other provisions of the Act, is that all lands in California not included in valid private land grants made by either Spain or Mexico up to May 13, 1846 (Art. 2d of Protocol, dated May 26, 1848) became vested in the United States free of Indian rights.

The Act of March 3, 1851, was primarily for the purpose of performance by the United States of its treaty obligations to settle the titles of grantees of private land grants made by Spain and Mexico for lands in California. United States v. O'Donnell, 303 U.S. 501, 512. But the Act went beyond that purpose for, as shown by the just quoted provision of Section 13, it declared, in effect, that all California lands not included in legitimate Spanish or Mexican grants confirmed ("acknowledged") by the Commission created for that purpose by the Act, or by the Federal Courts on appeal from the proceedings and decisions of the Commissioners, or for which claims were not presented within two years after the date of the Act, shall become part of the public domain. Since no provisions were made in the 1851 Act for presenting claims for lands in California held and occupied by the aboriginal inhabitants thereof, the Indians of California, the Indian lands became part of the public domain. And, as stated above, the Indians received no compensation for their aboriginal rights in said lands.

Mention was previously made of the case, Indians of California v. United States, 98 C. Cls. 583 and 102 C. Cls. 837. The case was brought in the Court of Claims by a claimant expressly defined in the Act as "Indians of California" and they obtained a gross judgment of \$17,058,941.98 from which was deducted certain offsets reducing the judgment to a net recovery of about \$5,000,000. The final award (102 C. Cls. 837) made by the Court of Claims cannot perhaps be considered as compensation for the lands taken by the 1851 Act for the award was made on the basis of the value of the lands included in the 18 unratified treaties; however, since the award was distributed to substantially the same Indians, or their descendants, who were living in California

at the time we acquired the lands, Congress may decide to deduct from any appropriation that may be made herein the amount of the judgment awarded in the former case.

#### LAND USE AND OCCUPANCY

One of the most difficult, if not the most difficult, questions we have to decide is what California lands the petitioners actually occupied and used for their subsistence, that is, the lands they exploited for their day to day existence.

We can proceed with our inquiry with the basic fact, which nobody questions that Indians occupied and used California lands from time immemorial and as the aboriginal inhabitants thereof. The native population is unknown, but estimates range from a high of 700,000 to 260,000 by Dr. Merriam and 133,000 by Dr. A. L. Kroeber. (Pet. Ex. RH-125, pp. 68- 71). These Indians were not an homogenous group, but were made up of many groups or tribelets which compose many linguistic divisions or nationalities in California. It has been estimated by Dr. Kroeber that there were 500 or more Indian groups in California about the time we acquired California from Mexico in 1848. (Record pp. 29-30, 129, 153 and 498). These tribelets occupied and used fairly well defined areas dependent in sizes upon the economic resources of the particular area and the population requirements of those living in it. Of course the degree of use of lands varies with conditions, as Dr. Beals, a witness for the defendant, described it:

"The evidence, it seems to me, shows clearly that there was a great deal of difference in the intensity of use. Some areas which had no economic resources were simply, if visited at all . . . traversed in getting from one place to another." (Trans. p. 1645).

And Dr. Kroeber (Def. Ex. 188), a witness for petitioners, states respecting land use by the Indians of California:

"Land 'actually used and occupied' by native groups is going to be hard to define because it slides off in a gradient. A site settled with houses is certainly both occupied and used. But the watershed ridge that bounds the valley of this group might never even be visited except in pursuit of a wounded deer, or perhaps chiefly at a gap through which a trail ran to the next valley harboring a distinct but friendly group. In between these extremes were all transitions of utilization; frequent, limited, occasional, rare; practically none."

The difference in use was caused, as the above statements imply, by variations in climate, topography, elevation, soil, vegetation, etc., all of which determine the quantity of economic resources in the various sections of the state. It is not necessary that the Indians prove that each of the 500 or more tribelets occupied and used every acre of the lands they claimed; that was not and cannot be done, as witnesses for the petitioners have frankly admitted. There is comparatively little proof of actual occupation and use of specific tribelet areas in California, and if proof of such use is necessary, the petitioners have failed in their proof, however, there is proof by noted anthropologists, based upon years of study of Indian culture, habitats and ways of providing their subsistence, that the Indian groups used and occupied the lands in accordance with the Indianway of life. It must be borne in mind that in aboriginal times these Indians obtained their subsistence from the natural products of the soil and waters of the areas they occupied. Such an economy did not require an intensive cultivation of the soil for the Indians of necessity exploited the places which provided the necessities of life. The resources the Indians relied upon for subsistence were not uniformly distributed; they were largely seasonal and in scattered places,

requiring travel of considerable distances in their gathering, fishing and hunting activities. Game animals moved from place to place in search of food and had to be followed. The importance of flora and fauna in all regions of the state cannot be gainsaid, and the search for such resources was continuous and covered areas that were unproductive as well as those that were, because of the variations in the production of the natural resources from year to year or even from season to season in many years.

Furthermore, it is plain that because of the uneven and rather sparse distribution of the available natural resources in the state, large areas of land were needed to provide subsistence. The Indians' permanent and main habitats were, in general, in locations which provided the greatest abundance of natural resources, but they were required, and generally did, extend their searches over large areas beyond their places of permanent settlement. The record is replete with proof of temporary camps occupied by the Indians in their seasonal gathering, fishing and hunting operations which covered large areas in the mountains, plains and deserts. It is no doubt true, as the Government contends, the higher elevations in the mountains and some large desert areas produced little of economic importance to the Indians, but such places had limited uses and were a part of the areas claimed and defended when necessary by the tribelet occupying it.

#### ECOLOGY OF CALIFORNIA

The Government has introduced into this case an ecological analysis of the natural resources of California available to the Indians and the way those resources affected the extent of the use of the lands by the Indian inhabitants. The petitioners condemn the ecological approach as

not only novel in Indian litigation but speculative. However, the Government has presented similar defenses in other cases heard by the Commission, although not labeled ecological analysis. See Coeur d'Alene Tribe v. United States, 4 Ind. Cls. Com. 1; Chinook Tribe v. United States, 6 Ind. Cls. Com. 177. There are several other cases in which the defendant presented testimony concerning "nuclear areas" and "primary subsistence areas" which are similar to the ecological approach.

The primary value of the ecologic approach to the problem of land use and occupancy by the Indians of California lies in the paucity of proof of actual use and occupancy of the lands, as we understand the Government's position. The proof of actual use is in the main based upon anthropological studies and research. Proof of actual use by Indians of given areas is of the most general character, and, considering it in the aggregate, the areas constitute but a relatively small part of the total lands involved in this case, Area B. We must, as the anthropologists did, reason and assume from our knowledge of the culture of these aborigines that they lived and had their permanent abodes in places best suited to their economic life and which they exploited as the primary sources of their subsistence and at the same time, or at least in connection therewith, they exploited the available resources in the less productive territory surrounding or in the vicinity of their settlements.

An ecologic analysis of the area here under study involved the division of the territory into a number of zones according to their economic importance: (1) those of intensive use -- these generally included the settlements or surrounding territory consisting of about one-fifth of a claimed area from

which as high as 80 per cent of the subsistence was derived; then follows, (2) zones of less intensive use; (3) seasonal use; (4) infrequent use; and (5) the least use of any but, nevertheless, used for crossing, trailing or occasional use of sacred places located therein, and perhaps, on occasion, to defend the more important areas. Obviously, the analysis above mentioned concerned the state as a whole in its general application, but it was applied to specific lands, some of which are in Area B.

We believe the study of the economic resources of the state and their relationship to the quantity of land required to support the Indians in their way of life has value in understanding the economic picture. However, we cannot accept the Government's thesis that the resources of the state or any part thereof can be determined mathematically by assigning a large percentage of subsistence derived from a small part of a given territory and reduced percentages of subsistence in other areas of a territory claimed by a particular tribelet. The testimony and the ethnographic literature, of which there are volumes in evidence, show that the Indian groups ranged throughout their respective territories in their gathering, hunting and fishing exertions. While these Indians were never considered nomads, their exploitation of the available resources in a given territory required frequent and extended traveling within the territories claimed. We believe it unrealistic and contrary to the Indian mode of life to restrict Indian territorial rights to the lands which would simply provide adequate subsistence and disallow their land claims to the areas which were of secondary importance or supplemental to the main sources of supplies. We suspect territorial expanse was as much the desire of these primitive peoples as it is characteristic of the white man for there

is much ethnographic evidence that the Indian groups in California moved about their respective domains gathering wild foods as they ripened or captured available wild game, and during a normal season would visit and use the whole territory to which they asserted ownership as their exclusive places of abode.

We know of no decision by the courts or the administrative officers of the Government which limited Indian land claims to those lands which provided them with the common necessities of life. The requirements of the Indians were so varied that they could only be obtained from a large area for salt, edible seeds and insects, flint and other important supplies were in most cases not available in the confined areas of valleys but obtainable from desert areas.

#### THE CALIFORNIA MISSION LANDS

Beginning in year 1769, the Spanish authorities began the establishment of Missions in California. The purpose of the Missions was for the spiritual and material betterment of the native Indians. Between that year and 1823, twenty-one Missions were established between San Diego on the south and San Francisco on the north. The Missions were generally located at places the Indians had previously found best suited to their needs. The so-called "Mission Lands" were of two types, according to the report of the Commissioners appointed under the Act of March 3, 1851, 9 Stat. 631, Section 16, "to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held . . . "; namely, those "consisting of the churches, cemeteries, certain gardens, etc." which was known as church property. We are not here concerned with this type of Mission property because it apparently

was considered as belonging to the Catholic Bishops as the representative of the Church. This property was confirmed to the Bishop by decrees of said Commission and is included in the grants listed and shown on Petitioners' Ex. ALK-13 and Defendant's Ex. 160. The confirmed acreage of Church Property comprised only about 42,469.73 acres (Defendant's Exs. 179, p. 2, and 230).

The second type of lands are described in said report as follows:

"The second, more properly designated as the Mission lands, comprises those larger tracts around, or in near proximity to, the mission buildings, which were used for cultivation and grazing by the Neophytes, under the superintendence of the priests in charge of the respective missions. As to these lands, the Mexican government evidently never recognized any title in the christianized Indians, who, connected with the missionary establishment, lived upon them. The regulations adopted under the colonization law on the 21st November, 1828, withheld them, for the time being, from grant, but after the secularization law of 1833 was enacted, grants were made of portions of these lands, from time to time, to individual applicants. The right of the christianized Indians residing upon them to preference, in their application to the government for grants, was repeatedly declared by the public officers, but no title was recognized as existing in them, without, or independent of, a specific grant by the competent authorities. Many of these Indians procured grants from the governor, which usually covered only small tracts, and claims founded on these grants have been presented to the Commission, and confirmed to the grantees or their legal representatives. With the exception of those claiming under such grants, therefore, this Commission is not aware of any title recognised by the Mexican nation by which any of these lands are held by the Indians, nor has any proof been presented to us, in the course of our investigations, which could authorize the recognition of title in them, except under specified grants."

As shown by the report and, as appears in other evidence, the area designated as "Mission Lands" was large for on these lands extensive farming and ranching operations by the Indian Neophytes were conducted under the

direction of the Mission Priests. Indians were recruited from those groups near the established Missions, and even from considerable distances, for instruction in Christianity and civilization and training in agricultural pursuits.

There is testimony and documentary evidence to the effect that as much as one-fourth to one-third of the lands in California were affected by the Mission activities. This may be true for the twenty-one Missions extended generally from the south to a distance of over 400 miles to the vicinity of San Francisco on the north and each Mission drew most of its converts from the areas surrounding the Mission. The Mission strip, defined by Dr. Cook (Def. Ex. 102, p. 3) as "the region from which Missions drew most of their converts" no doubt embraced a vast territory and might well, in the aggregate, cover as much as one-fourth of the state.

The Mission activities brought from surrounding areas to the Mission many Indians. The Government places the number of recruits at 64,000, a figure calculated by Dr. Kroeber, petitioners' witness, and concludes that that many Indians left their ancient abodes and settled permanently in the Mission establishments. We do not stop to question the figure, but it covers the total number of Indians coming from the Mission strip during the 64 years of the existence of the Missions. According to Dr. Cook (Def. Ex. 128, p. 12), the largest Mission population did not exceed 21,100, the 1820 figure, and had dropped to 15,000 at the time of secularization in 1833-1834. The extent of missionization of the Mission strip is conjectural. It was substantial in the areas where the Missions were established because those places were where the Indians lived when the Missions were located. It was less in the

areas more distant from the Missions. At any rate, we gather from the evidence that with few exceptions no tribelet voluntarily completely abandoned its tribal home and upon secularization many, if not a majority, of the missionized Indians returned to their ancient habitats. It is apparent that the Mission program made extensive inroads in the membership of the various groups, but by the time we acquired California -- about 25 years after the clerical establishments had been abolished -- the Indian groups had generally returned to their status as it existed prior to the Mission period.

The Commission therefore concludes that the Indians have proven aboriginal Indian title to all of said lands in Area B, except those Spanish or Mexican grants located therein. The Commission further concludes that the United States extinguished said Indian title to these lands by virtue of the provisions of Section 13 of the Act of March 3, 1851, and that the Indians received no compensation therefor. The case will now proceed to a determination of the acreage of said Area B, less the Spanish and Mexican land grants and the reservations set aside in Area B, the value thereof as of the date of acquisition by the United States, and the question of what offsets, if any, the United States may be entitled to under the provisions of the Indian Claims Commission Act.

Louis J. O'Marr  
Associate Commissioner

Concurring:

Edgar E. Witt  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner