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STOLEN OR LAWFUL? A CASE REVIEW OF AN INDIAN TRIBE'S CLAIM TO ABORIGINAL LAND IN CALIFORNIA

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INTRODUCTION

This article summarizes a federal case involving an American Indian[1] Tribe's claim to more than 270,000 acres of California land. The plaintiff, the Kawaiisu Tribe of the Tejon, sought the right to occupy and use the land, claiming it held valid title. The Tribe contended the United States guaranteed the land to them both through the 1849 Treaty with the Utah and the Tejon Indian Reservation in 1853.[2] The Tribe's legal hurdle was the defendants' valid land patents from predecessors in title, originating from the end of the Mexican-American War. The case required examining California history, United States treaties with American Indians, the rights of land owners, and their intersection with American Indians. This article summarizes the parties' legal and factual arguments, and the Court's holdings in adjudicating the claims and rights to the land.[3]

1. While some people may be offended by the use of the word "Indian" when referring to Native Americans, the Kawaiisu Tribe, which is the subject of this article, refers to themselves as "Indian." Out of respect for the Kawaiisu Tribe, this article adopts the Tribe's chosen nomenclature.

2. The 270,000 acres is located off of Interstate 5, north of Los Angeles and before Bakersfield. The Tejon Pass is at elevation of about 4,000 feet, where the sign for the "Tejon Ranch" is located on Interstate 5, and the 270,000 acres partly borders Interstate 5 and continues east.

3. These legal issues were presented to the Court in the form of a series of motions under Fed. R. Civ. P. 12. The trial court rulings were upheld on appeal. More information about the Court's rulings and appeal by the parties can be found at: Robinson v. Salazar, 838 F. Supp. 2d 1006 *E.D. Cal. 2012); Robinson v. Salazar, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), *aff'd sub nom.* Robinson v. Jewell, 790 F.3d 910 (9th Cir. 2015).

I. THE PARTIES IN THE TRIBE'S CASE

The Kawaiisu Tribe of the Tejon ("Tribe" or "Kawaiisu") is an American Indian tribe that had "resided in the State of California since time immemorial." Plaintiff David Laughing Horse Robinson is the Chairman of the Kawaiisu Tribe of Tejon[4] and brought suit on behalf of the Tribe (collectively referred to as "Plaintiffs"). The Tribe contended it "descends from signatories to the 1849 Treaty with the Utah and the 'Utah tribe of Indians' that was recognized by the government of the United States in that treaty," and that they are descendants of the Indians for whom the 1853 Tejon/Sebastian Reservation was created.[5] The Kawaiisu claimed to be one of the ancient Great Basin Shoshone Paiute tribes whose pre-colonial territory extended from Utah to the Pacific Ocean.[6] The Kawaiisu has inhabited the Tejon area of California from "time immemorial."[7] Throughout history, Kawaiisu people have been called any one or more of the following names: Nochi, Cobaji, Cobajais, Covaji, Kahwissah, Kawiasuh, Kawishm, Kowasah, Kubakhye, Newooah, Noches Colteches, Tahichapahanna, Tahichp.[8] The Tribe has allegedly enrolled approximately 500 individuals who are all related either by blood or adoption.[9] They are the Kawaiisu Tribe's leaders' descendants who signed the Treaty with the Utah in 1849.[10] The Kawaiisu also descend from the American Indian tribe encountered by Father Garces in or about 1776.[11] Father Garces discussed the American Indian tribe in his

4. Robinson v. Salazar, 838 F. Supp. 2d 1006, 1012 n.1 (E.D. Cal. 2012). Note that during the litigation, and as will be continued in this article, the Court referred to the Kawaiisu as the "Tribe," for convenience. A major dispute between the parties in the case was whether, in fact, the Kawaiisu is a "Tribe."

5. *Id*. at 1012.

6. Plaintiff's Third Amended Complaint for: (1) Unlawful Possession, etc.; (2) Equitable Enforcement of Treaty; (3) Violation of Nagpra; (4) Deprivation of Property in Violation of the 5th Amendment; (5) Breach of Fiduciary Duty; (6) Non-Statutory Review; and (7) Denial of Equal Protection in Violation of the 5th Amendment ¶ 32, Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012) (No. 1:09-cv-01977), 2012 WL 12057256 [hereinafter Third Amended Complaint].

7. *Id*.

8. *Id*.

9. Third Amended Complaint, *supra* note 6, ¶ 15.

10. *Id*.

11. *Id*.

diary and noted it in his diseno maps as: Cobaji, Cobajaef, Cobajais, Covaji, Quabajai, Nochi, Nochis and Noches Colteches.[12]

The defendants in the Tribe's case, Tejon Mountain Village ("TMV") and Tejon Ranch Corporation ("TRC"), are private entities that claimed to hold valid land patents from predecessors in title and interest in the 270,000 acres of the Tribe's claimed portion of the reservation and its aboriginal lands.[13] The defendants intended to develop "Tejon Mountain Village" with commercial and residential development.

II. THE TRIBE'S CLAIMS TO THE LAND

The Tribe based its claim to the land on two theories: (1) the aboriginal right to occupy the land and (2) title to the land.[14]

A. The Tribe's Claims Regarding the Right to Occupy

The Tribe claimed a right to occupy some or all of the 270,000 acres based upon three asserted rights: (1) aboriginal rights, which is the right to occupy the land, (2) treaty rights, which purportedly granted the Kawaiisu the permissive right to occupy, and (3) reservation rights.[15]

First, the Tribe asserted its right to occupy the land based upon aboriginal rights, claiming it descended from the Shoshone Paiute tribes whose territory extended from Utah to the Pacific Ocean.[16] The Tribe claimed to have inhabited the area from time immemorial,[17] and that its

12. *Id*.

13. Third Amended Complaint, *supra* note 6, ¶ 257 ("[TMV and TRC] claim title to approximately 270,000 acres of land located in and around Kern County, California, commonly known as Tejon Ranch, based on four alleged Mexican land grants, for Rancho La Liebre, Rancho Los Alamos y Agua Caliente, Rancho El Tejon and Rancho Castac.").

14. *See* Third Amended Complaint, *supra* note 6, ¶ 283.

15. *See id*. ¶ 1 ("Plaintiffs bring this lawsuit to vindicate their rights to land . . . that the United States guaranteed their right to occupy and use pursuant to the 1849 Treaty with the Utahs and by establishing the Tejon Indian Reservation in 1853.").

16. *See id*. ¶ 32.

17. Third Amended Complaint, *supra* note 6, ¶ 32 ("[T]he KAWAIISU TRIBE OF TEJON is one of the ancient Great Basin Shoshone Paiute Tribes whose pre-European territory extended from Utah to the Pacific Ocean. They have inhabited this

aboriginal title had encompassed 270,000 acres or 49,000 acres, which comprised the 1858 Survey of the Tejon/Sebastian reservation.[18]

Second, the Tribe claimed it was granted treaty rights to occupy the land.[19] The Bureau of Indian Affairs did not federally-recognize the Tribe, but the Tribe claimed to be federally-recognized by virtue of the 1849 Treaty with the Utah, which was ratified by Congress[20] and by virtue of Treaty D.[21] The Tribe claimed to have descended from the "signatories to the Treaty with the Utah."[22] The Tribe entered into Treaty D with the United States in 1851 and agreed to cede large portions of its land in exchange for a reservation, among other things.[23] The Tribe believed the Senate secretly neglected to ratify Treaty D to allow American Indian territory to be exploited.[24]

Finally, the Tribe asserted its right to occupy the land by virtue of its reservation.[25] The Tribe claimed that on March 3, 1853, Congress authorized the United States President to create "five military

area from time immemorial. Since time immemorial, the Kawaiisu have been bound together by family, language, territory, trade and ceremonial practices.").

18. Plaintiff's Second Amended Complaint ¶¶ 34-35, Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012) (No. 1:09-cv-01977), ECF No. 133 [hereinafter Second Amended Complaint].

19. Third Amended Complaint, *supra* note 6, ¶ 89 ("Plaintiffs are informed and believe and thereon allege, before California was admitted to the Union, the Tribe's ancestors were signatories to the Treaty Between the United States of America and the Utah Indians, known as Treaty with the Utahs.").

20. Treaty with the Utah, Dec. 30, 1849, 9 Stat. 984, 1849 WL 7601.

21. Treaty Made and Concluded at Camp Persifer F. Smith, at the Texan Pass, State of California, June 10, 1851, between George W. Barbour United States Commissioner, and the Chiefs, Captains, and Head Men of the "Castake," "Texon," &c, Tribes of Indians, June 10, 1851, Hearings before the Comm. Indian Affairs, 66th Cong., 2nd Sess., at 18-19 (Mar. 23, 1920) [hereinafter Treaty D]; *see* CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES 1101 (1913-1927).

22. Second Amended Complaint, *supra* note 18, ¶ 20 ("The Tribe and its members are descendants of, among others, Acaguate nochi, Cobaxanor, Nochichigue and Panachi, signatories to the Treaty with the Utahs.").

23. Second Amended Complaint, *supra* note 18, ¶ 25.

24. *Id*. ("While at all times the Tribe relied upon this treaty as if it were in force, the Senate secretly neglected to ratify this treaty so that these lands could be open for exploitation, un-encumbered by claims of Indian title, for the hordes of settlers moving west for the gold-rush.").

25. *Id*. ¶ 25.

reservations for the protection of Indians" in the State of California.[26] In 1853, Congress established a reservation for the Kawaiisu's benefit.[27] The reservation was established at Tejon Pass for the Tejon Indians, and was resurveyed in 1858.[28] At one time, the Kawaiisu occupied 75,000 acres.[29] In 1858, the Tejon/Sebastian Reservation was resurveyed to 49,928 acres.[30]

The Tribe responded to the TRC and TMV's land patents by alleging that, in 1856, California Indian Superintendent Edward F. Beale falsified the land patents for the 270,000 acres, which now encompasses the Tejon Ranch and the Tribe's aboriginal land.[31] Then, the American Indians in the Tejon/Sebastian Reservation were forced to move to the Tule Reservation.[32] The Tribe alleged that, "[t]o the extent that any title descending from Beale's self-appointed patents has deprived the Tribe of lands, which the Tribe historically occupied or lands reserved pursuant to the 1853 executive order," the title is unlawful.[33] The Tribe argued only an act of Congress can terminate a reservation, and no act of Congress terminated the reservations established in 1853.[34]

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26. *Id.* ¶ 26; Act of Mar. 3, 1853, ch. 104, 10 Stat. 226 (appropriating for fulfilling Treaty Stipulations with various Indian Tribes).

27. *Id.* ¶¶ 26-27.

28. *Id.* ¶ 27 ("On September 30, 1853, California Indian Superintendent Edward F. Beale communicated to Commissioner of Indian Affairs, George W. Manypenny, that he had established a reservation at Tejon Pass for the Tejon Indians pursuant to the Act of March 3, 1853.").

29. *Id.*

30. *Id.*

31. *Id.* ¶ 28 ("To the extent that any title descending from Beale's self-appointed patents has deprived the Tribe of lands, which the Tribe historically occupied or lands reserved pursuant to the 1853 executive order, such deprivation was not approved by any action of either the United States or Congress and was therefore unlawful.").

32. *Id.* ("Plaintiffs are informed and believe and thereon allege that in or about 1856, ex-superintendent Beale and others drew up patents under old Spanish land grants for the approximately 270,000 acres that now comprises Tejon Ranch, all of which was within the Tribe's aboriginal land, including most or all of the land covered by the original Tejon/Sebastian Reservation. Some of the Indians located on the Tejon/Sebastian Reservation were then forcibly removed to the Tule Reservation.").

33. *Id.*

34. Second Amended Complaint, *supra* note 18, ¶ 29 ("Plaintiffs are informed and believe and thereon allege that no acts of termination with respect to the 1853

B. "Title" to the 270,000 Acres

As an alternative argument to its right to occupy, the Tribe claimed "ownership" or "title" to the 270,000 acres of land.[35] The Tribe claimed ownership based on treaty rights, which purportedly granted the Kawaiisu title to the land and reservation rights.[36] The Kawaiisu claimed title to Tejon Ranch through the Treaty with the Utah, which was signed on December 30, 1849, ratified by the Senate on September 9, 1850, and "elucidated" by Treaty D.[37] The Kawaiisu also claimed superior title to the Tejon/Sebastian Indian Reservation ("Tejon/Sebastian Reservation"), which encompasses approximately 49,000 acres, as shown on the 1858 Survey of the Reservation and constitutes a portion of Tejon Ranch.[38] Further, the Kawaiisu claimed title to the Tejon Reservation according to Congress' Act of March 3, 1853 (the "1853 Act"),[39] and the Tejon Reservation's establishment thereafter.[40]

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reservation as established by Beale have ever been affirmed, nor has there been an act of termination identifying the Tribe by any of its names.").

35. *Id*. ¶ 283.

36. *See id*. (explaining that the theories of (1) treaty rights and (2) reservation rights overlapped with the Tribe's' arguments that the Tribe had the "right to occupy" the land).

37. *Id*. ¶ 28; Third Amended Complaint, *supra* note 6, ¶¶ 89, 110-113; *see* Treaty D, *supra* note 21, at art 3-4; 4 CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES, 1101 (1913-1927); Second Amended Complaint, *supra* note 18, ¶ 20; *see also* H.R. DOC. NO. 736, at 782-83 (1899).

38. Memorandum in Opposition to Defendants Tejon Ranchcorp and Tejon Mountain Village LLC's Motion to Dismiss Plaintiff's Third Amended Complaint at 7, Robinson v. Salazar, 885 F. Supp. 2d 1002 (2012) (No. 1:09-cv-01977), 2012 WL 13035231 ("Federal Government did not issue patents for the all land that TRC claims to own, much less for the entire area of the Reservation, but rather that in 1865—after Beale established the Reservation—he and others forged patents for the land that TRC claims to own that this forged title to the land eventually passed to Tejon."); Third Amended Complaint, *supra* note 6, ¶¶ 294-304.

39. Act of Mar. 3, 1853, ch. 104, 10 Stat. 226, 238.

40. Third Amended Complaint, *supra* note 6, ¶¶ 128-133.

III. ABORIGINAL TITLE, THE ACT OF 1851, AND THE TREATY OF GUADALUPE HIDALGO

A. Aboriginal Title

The common view of aboriginal title recognizes the right of occupancy held by tribes.[41] American Indians' aboriginal title derives from their presence on the land before white settlers arrived.[42] It is well-settled that, in all States, the tribes who inhabited lands held claim to their lands after the arrival of white settlers, under what is sometimes termed "original Indian title" or "permission from the whites to occupy."[43] Fee title to the lands vested in the United States when the colonists arrived, but the tribes' right of occupancy remained.[44] However, Congress did not recognize American Indian tribes' mere land possession as land ownership. This means the American Indians did not hold a property right, but simply a right of occupancy, which the sovereign grants to protect against intrusion by third parties.[45] The sovereign may still terminate the right of occupancy and fully dispose of the lands without any legally enforceable obligation to compensate

41. *See, e.g.*, Oneida Indian Nation v. Cty. of Oneida, 414 U.S. 661, 667 (1974); United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989).

42. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

43. *Id*. ("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.").

44. *Oneida Indian Nation*, 414 U.S. at 667 ("It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land.").

45. *Id*.

American Indians.[46] The federal government may extinguish aboriginal title at any time, but such extinguishment will not be taken lightly.[47] Congress's power to extinguish aboriginal title is supreme, "whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . . ."[48]

B. Overview of the Treaty of Guadalupe Hidalgo and the 1851 Act

The Act of 1851 followed the cessation of hostilities with Mexico in the Mexican-American War and culminated in the Treaty of Guadalupe Hidalgo.[49] The Treaty of Guadalupe Hidalgo, signed and effectuated in 1848, signaled the formal end of the Mexican-American War.[50] In the Treaty of Guadalupe Hidalgo, Mexico ceded parts of present-day California to the United States.[51] United States courts have uniformly held that title to the land first passed to the United States government through the Treaty.[52]

To settle any land claims in the newly-acquired territory from Mexico, Congress passed the Act of March 3, 1851 ("1851 Act").[53] The 1851 Act created a Board of Commissioners to determine the validity of land claims, and required each person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim within two years.[54]

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46. *Tee-Hit-Ton Indians*, 348 U.S. at 279.

47. United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir. 1976), *cert. denied*, Wilson v. United States, 429 U.S. 982 (1976).

48. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

49. Treaty of Peace, Friendship, Limits, and Settlement Mex.-U.S., May 30, 1848, 9 Stat. 922, 1848 WL 6374 [hereinafter Treaty of Guadalupe Hidalgo].

50. *See id*. (showing that the Treaty of Guadalupe Hidalgo was signed by the United States and Mexico on February 2, 1848, and effectuated on May 30, 1848); *see also* United States *ex rel*. Chunie v. Ringrose, 788 F.2d 638, 641 (9th Cir. 1986).

51. Treaty of Guadalupe Hidalgo, *supra* note 49.

52. *See, e.g.*, United States v. California, 436 U.S. 32, 34 n.3 (1978) (stating that, under the Treaty, "all nongranted lands previously held by the Government of Mexico passed into the federal public domain").

53. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 (ascertaining private land claims in California).

54. Act of Mar. 3 1851, ch. 41, § 8, 9 Stat. 631; *Chunie*, 788 F.2d at 641.

The 1851 Act deemed any land not claimed within two years, and any land for which a claim was rejected, as "part of the public domain of the United States."[55] Under the 1851 Act, the purpose of the Board of Commissioners was to provide and grant clear title to land presented to it for resolution.[56] The Board's determinations regarding the issued land patents "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."[57]

C. Cases in Which American Indians Lost the Right of Occupancy Under the 1851 Act

It is against this backdrop that TMV and TRC argued the Tribe's claim to the land was barred.[58] TRC argued its title to the land is readily traceable from land grants made by the Mexican government to private parties before 1848.[59] Additionally, TRC claimed the land grants were confirmed by the United States after Mexico ceded the land; this is evidenced by a United States land patent.[60] TMV and TRC argued the Tribe had lost its aboriginal title by failing to comply with the requirements of the 1851 Act.[61] However, the Tribe claimed it is exempt from the 1851 Act by its aboriginal title.[62]

In *Barker v. Harvey*, the Supreme Court held Mission Indians lost their land claims because they failed to comply with the 1851 Act.[63] *Barker* involved a dispute between individuals and Mission Indians

55. Act of Mar. 3, 1851, ch. 41, § 13, 9 Stat. 631.

56. Act of Mar. 3 1851, ch. 41, § 8, 9 Stat. 631.

57. *See id*.

58. *Id*.

59. Tejon Defendants' Memorandum in support of Motion to Dismiss Plaintiff's Second Amended Complaint at 5, Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012) (No. 1:09-cv-01977), ECF No. 140. ("Plaintiffs are barred from challenging TRC's title under any legal theory. Consistent with Plaintiffs' allegations, title to TRC's land is readily traceable from land grants made by the Mexican government to private parties prior to 1848 and confirmed by the United States after the land was ceded by Mexico to United States, as evidenced by a United States patent.").

60. *Id*.

61. *Id*. at 7-8.

62. *Id*.

63. Barker v. Harvey, 181 U.S. 481, 490, 499 (1901).

claiming title to the same land.[64] The individuals claimed the land was ceded to the United States through the Treaty of Guadalupe Hidalgo and through a patent confirming the Mexican government's grants to the individuals' ancestor in title.[65] The Mission Indians argued the individuals' title was subject to the right of permanent occupancy because they believed the Mexican government recognized such a right long before the existence of the individuals' grants.[66] Further, the Mission Indians claimed the "government of Mexico had always recognized the lawfulness and permanence of their occupancy."[67] The Supreme Court upheld the individuals' land patents over the Mission Indians' pre-existing aboriginal title because the Mission Indians had not presented their claims to the 1851 Board of Commissioners.[68] The Court held the 1851 Act barred the Mission Indians' land claims because the Mission Indians failed to timely present their claims to the Board of Commissioners for consideration.[69] "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."[70]

Similarly, in *United States v. Title Ins. & Trust Co*., the Court held the Tejon Mission Indians lost their rights to land for failure to present their claim to the Board of Commissioners under the 1851 Act. [71] In 1843, the Mexican government of California granted a land grant to two Mexicans for El Tejon conditioned upon the protection of the American Indians residing in the land.[72] The laws of Spain and Mexico entitled the two Mexican citizens to undisturbed possession and use of the land they occupied.[73] After the Treaty of Guadalupe Hidalgo, the two

64. *Id*. at 482.
65. *Id*. at 482, 490.
66. *Id*. at 482, 491.
67. *Id*. at 482.
68. *Id*.
69. *Id*.
70. *Id*. at 491.
71. United States v. Title Ins. & Trust Co., 265 U.S. 472, 484 (1924) ("[A] right to permanent occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States.").
72. United States v. Title Ins. & Trust Co., 288 F. 821, 822 (9th Cir. 1923).
73. *Id*.

Mexicans petitioned the Board of Commissioners under the 1851 Act to settle their claim, and the Commissioners confirmed the two Mexicans' land patent.[74] Thereafter, in *Title Ins.*, the United States sued on behalf of the Tejon Mission Indians who occupied land in the El Tejon Rancho in Kern County.[75] The Tejon Mission Indians claimed that "[f]rom time immemorial the land has been continuously occupied by the Tejon Indians, who have resided thereon in permanent dwellings . . . ."[76] The Tejon Mission Indians were in open, notorious, and adverse occupancy of such lands at the date of the grant.[77] The United States' lawsuit, on behalf of the Tejon Mission Indians, sought to confirm the original title of occupancy and the Tejon Mission Indians' possession of the disputed land.[78] The Tejon Mission Indians argued the land was subject to their and their descendants' "perpetual right" to occupy and use the land.[79]

In *Title Ins.*, the Supreme Court based its prior decision on *Barker v. Harvey*, the Tejon Mission Indians lost their claim in *Title Ins.* because they failed to timely present their claims to the Board of Commissioners.[80] The two Mexicans citizens' patents "passed the full title, unencumbered by any right" of those Mission Indians.[81] After summarizing, quoting, and analogizing *Barker*, the Supreme Court determined the result in *Title Ins.* must be the same.[82] Accordingly, the Court affirmed the judgment against the Tejon Mission Indians.[83] The Court also said the United States would have been unable to grant the

74. *Id*.

75. *See* Corrected Memorandum in Opposition to Defendants Tejon Ranch Corporation and Tejon Mountain Village's Motion to Dismiss Plaintiff's Second Amended Complaint at 11 n.6., Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012) (No.1:09-cv-01977), 2011 WL 13239275 (claiming they are Tejon Mission Indians and are not related in any fashion to the Tejon Mission Indians).

76. *Title Ins. & Trust Co.*, 265 U.S. at 472.

77. *Id*.

78. United States v. Title Ins. & Trust Co., 288 F. 821, 822 (9th Cir. 1923).

79. United States v. Title Ins. & Trust Co., 265 U.S. 472, 482 (1924).

80. *Id*.; Barker v. Harvey, 181 U.S. 481, 491 (1901).

81. *Title Ins. & Trust Co.*, 265 U.S. at 481.

82. *Id*. at 485-86.

83. *Id*.

two Mexicans citizens' land patents if the Tejon Mission Indians had a claim of permanent occupancy.[84]

In *United States ex rel. Chunie v. Ringrose*, the Ninth Circuit held the Chumash Indian Tribe lost all of its aboriginal land rights by failing to present and confirm their land claims pursuant to the Treaty of Guadalupe Hidalgo and the 1851 Act.[85] The Chumash Indian Tribe claimed possession of islands off the Santa Barbara coast.[86] The Mexican government also granted these same islands to individuals who submitted claims to the Board of Commissioners, which the Board of Commissioners confirmed.[87] A century later, the Chumash Indian Tribe disputed the land patents and claimed the 1851 Act did not apply to American Indian claims based on aboriginal title.[88] Like the Kawaiisu's case, the Chumash Indian Tribe claimed it was exempt from the Board of Commissioner's confirmation proceedings, because it possessed the land "from time immemorial," and that it's aboriginal title had never been extinguished.[89] It also argued they had the right of occupancy notwithstanding the land patents, and it was not required to submit a land claim under the 1851 Act.[90] The Chumash Indian Tribe contended the 1851 Act only required persons claiming lands "by virtue of any right or title derived from the Spanish or Mexican government" to file claims and that the Chumash Indian Tribe was not required to file a claim under the 1851 Act, because aboriginal title is not "derived from the Spanish or Mexican government."[91]

84. *Id*. at 484 ("There is an essential difference between the power of the United States over lands to which it had had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.").

85. United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1986).

86. *Id*. at 641.

87. *Id*.

88. *Id*.

89. *Id*.

90. *Id*. at 645.

91. *Id*.

The Ninth Circuit acknowledged a claim of aboriginal title provided American Indians with a "right of occupancy."[92] But after reviewing Supreme Court precedent, which recognized the 1851 Act's "extensive reach," the Ninth Circuit disagreed with the Chumash Indian Tribe.[93] The Court held American Indians "claiming a right of occupancy based on aboriginal title, lost all rights in the land when they failed to present a claim to the commissioners."[94] The Court stated when the individuals' land claims derived from the Mexican government were "confirmed and received federal patents to their lands, [the individuals] were entitled to believe that adverse claims to their lands had been eliminated."[95] Thus, in *Ringrose*, the Court held aboriginal title had been extinguished because the Chumash Indian Tribe failed to present its claim for the islands with the Board of Commissioners pursuant to the 1851 Act.[96]

D. The Kawaiisu Lost the Right to Occupy Under the 1851 Act

Thus, case law holds that aboriginal title is lost when land patents are validly issued to predecessors in title.[97] The Kawaiissu's claims to occupancy are invalid because of validly-issued land patents by the Board of Commissioners under the 1851 Act.[98] As stated in *Title Ins.*, the United States would have been unable to grant the TMV and TRC's land patents had the Tribe timely claimed permanent occupancy.[99] "[A] claim of a right to permanent occupancy of land is one of far reaching

92. *Id*. at 642 ("Despite this right of occupancy, the conquering government acquires the exclusive right to extinguish Indian title.").

93. *Id*. at 646.

94. *Id*.

95. *Id*. ("This result comports with the overriding purpose of the Act of 1851 'to place the titles to land in California upon a stable foundation . . . in a manner and form that will prevent future controversy.'").

96. *Id*.; *see* Super v. Work, 3 F.2d 90, 91 (D.C. Cir. 1925); *see also* Super v. Work, 271 U.S. 643, 646 (1926) (explaining that because roving bands of Indians, who were not Mission Indians, did not make claim under the act of 1851, must therefore be treated as having lost, through abandonment, any claim which they may have had).

97. Barker v. Harvey, 181 U.S. 481 (1901); *see Ringrose*, 788 F.2d at 646; *see generally* United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924).

98. *Ringrose*, 788 F.2d at 646.

99. *Title Ins. & Trust Co.*, 265 U.S. at 484.

effect . . . ."[100] As the Supreme Court noted, there would be "little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy."[101] Thus, clear and unburdened title was granted by the 1851 Act's Board of Commissioners.

In the Tribe's case, the United States issued land patents to TMV and TRC's predecessors in title for the same land that the Tribe claimed.[102] The Supreme Court's holding in *Title Ins.* stated that such land patents provided clear title to TMV and TRC.[103] The Tribe could not challenge the validity of the land patents issued by the United States after more than a century of time has elapsed.[104] Thus, the Tribe lost any claims to its aboriginal title because it failed to submit a claim to the Board of Commissioners under the 1851 Act.

IV. TREATY WITH THE UTAH

The Tribe also alleged the Treaty with the Utah granted them vast land rights as "elucidated" by Treaty D.[105] The Tribe argued that the

100. *Id*.

101. *Id*.

102. *See* Third Amended Complaint, *supra* note 6 (plaintiffs acknowledged that land patents were issued to Tejon Defendants' predecessor by the United States for the land at issue); *id*. ¶ 25 ("Plaintiffs are informed and believe and thereon allege, the claim for Rancho El Tejon was ultimately confirmed and a patent was issued on May 9, 1863 to Aguirre and Del Valle for 97,616.78 acres."); *id*. ¶ 259 ("Plaintiffs are informed and believe and thereon allege, the claim for Rancho La Liebre was ultimately confirmed and a patent was issued on June 21, 1875 to J.M Flores for 48,799.59 acres."); *id*. ¶ 260 ("Plaintiffs are informed and believe and thereon allege, the claim for Rancho los Alamos y Agua Caliente was ultimately confirmed and a patent was issued on November 9, 1866 to A. Olevara and others for 26,626.23 acres."); *id.* ¶ 261 ("Plaintiffs are informed and believe and thereon allege, the claim for Rancho Castac was ultimately confirmed and a patent was issued on November 27, 1866 to J.M. Covarrubias for 22,178.28 acres.").

103. Robinson v. Salazar, 838 F. Supp. 2d 1006, 1019 (E.D. Cal. 2012); *see Title Ins. & Trust Co.*, 265 U.S. at 484.

104. *See id*. ("Where questions arise which affect titles to land, it is of great importance to the public that, when they are once decided, they should no longer be considered open.").

105. Treaty D, *supra* note 21, at art. 3, 4; *see* 4 CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES, 1101 (1913-1927).

Treaty with the Utah granted the Tribe both the right to occupy and title to land.[106]

A. Legal Framework - Treaties

Supreme Court jurisprudence teaches that American Indian treaties must be interpreted as the American Indians would have understood them.[107] A treaty between the United States and an American Indian tribe "is essentially a contract between two sovereign nations."[108] Treaties constitute the "supreme law of the land."[109] In *Choctaw Nation v. Oklahoma*, the United States Supreme Court stated:

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . .[110]

The United States Supreme Court has recognized that the United States has an obligation to carry out treaty terms, as the American Indians would have understood it, with "a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."[111] Any unclear Treaty provisions should be interpreted in favor of American Indians.[112]

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106. Third Amended Complaint, *supra* note 6, ¶ 258.

107. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).

108. *Id*. at 675.

109. Skokomish Indian Tribe v. United States, 410 F.3d 506, 512 (9th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1090 (2006).

110. *See* Choctaw Nation v. Oklahoma, 397 U.S. at 631.

111. Tulee v. Washington, 315 U.S. 681, 684-85 (1942); *see also* United States v. Winans, 198 U.S. 371, 380-81 (1905) ("[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand . . . .'").

112. *See* Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943) (a tribe may also have treaty rights which are independent of formal government recognition, as the Kawaiisu claimed); *see, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) ("Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no

B. Treaty with the Utah Neither Applied in California nor Reserved Land

In the Treaty with the Utah, the Utah Indians submitted to the jurisdiction, power, and authority of the United States.[113] The Treaty states: "The Utah Tribe of Indians do hereby acknowledge and declare they are lawfully and exclusively under the jurisdiction of the Government of said States."[114] In pertinent part, the Treaty provides that:

> [T]he aforesaid Government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries . . . . And the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specifically permitted by an agent of the aforesaid Government; and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits . . . and they now deliberately and considerately, pledge . . . to confine themselves strictly to the limits which may be assigned them . . . .[115]

In *Uintah Ute Indians of Utah v. United States*, the Court of Federal Claims provided a detailed opinion on the history of the Utah, aboriginal title and the Treaty with the Utah.[116] The term "Utah Indians" refers to "any and all Indians resident in Utah, in or around Salt Lake City," during the relevant time period.[117] The Court recognized that Article VII of the Treaty with the Utah, quoted above, does not recognize title because the boundaries of aboriginal lands were

impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine."); *see also* United States v. Washington, 520 F.2d 676, 692-93 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) ("Once a tribe is determined to be a party to a treaty, its rights under such a treaty may be lost only by unequivocal action of Congress."); *see* Greene v. Babbitt, 64 F.3d 1266, 1270 (9th Cir. 1995).

113. *See generally* Treaty with the Utah, art. I, Dec. 30, 1849, 9 Stat. 984.

114. *Id*.

115. *Id*. at art. VII.

116. Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768, 786 (1993).

117. *Id*. at 773 n.5.

to be settled in the future.[118] By its terms, the Treaty does not designate, settle, adjust, define, or assign limits or boundaries to the Indians; instead, it leaves such matters to the future.[119] "The ratified treaty allowed the Indians permissive occupation and reserved a final settlement sometime in the future."[120]

The Treaty with the Utah did not establish any reservation for American Indians, including the Tribe; instead, it left such matters to future decisions.[121] Consequently, the Treaty cannot be said to recognize American Indian title.[122] The Treaty was made with "Utah" tribes and involved no cession of California lands for reservations.[123] Thus, the Treaty did not establish any title or reservation to land, and the Treaty did not grant title to land.

C. Treaty with the Utah Is Not Self-Executing

The Treaty with the Utah's plain terms show that the Treaty was not self-executing.[124] As the Supreme Court has noted, treaties generally "do not create privately enforceable rights in the absence of express language to the contrary."[125] Whether a treaty is self-executing depends on whether "the treaty contains stipulations which . . . require no legislation to make them operative;" if so, "they have the force and effect of a legislative enactment."[126] To decide a dispute over whether a particular treaty is self-executing, courts "may look beyond the written words [of the treaty] to the history of the treaty, the negotiations,

118. *Id*. at 786-87; Robinson v. Salazar, 838 F. Supp. 2d 1006, 1018-19 (E.D. Cal. 2012).

119. Uintah Ute Indians of Utah v. United States, 28 Fed. Cl. 768, 786-87 (1993).

120. *Id*. at 789 (the express terms of the Treaty state that "Government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries.").

121. *See generally* Treaty with the Utah, Dec. 30, 1849, 9 Stat. 984, 1849 WL 7601.

122. Uintah Ute Indians, 28 Fed. Cl. at 786.

123. Treaty with the Utah, art. VII, December 30, 1849, 9 Stat. 984, 1849 WL 7601.

124. *See generally id*.

125. Medellin v. Texas, 552 U.S. 492, 505 n.3 (2008).

126. *Id*. at 505-06.

and the practical construction adopted by the parties."[127] But even American Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy an alleged injustice or to achieve the asserted understanding of the parties.[128]

As shown from the Treaty with the Utah's language, the government was to establish reservations in the future.[129] The Treaty with the Utah was a future commitment to set aside land for the signatory tribes.[130] Thus, the Treaty with the Utah did not grant land title or possession to the Kawaiisu.

V. TREATY D, AN UNRATIFIED TREATY THAT DOES NOT GRANT TITLE

The Tribe also relied on a grant of title in "Treaty D."[131] In 1848, the United States promised to honor Mexican land grants under the Treaty of Guadalupe Hidalgo.[132] As stated above, Congress established a Board of Commissioners through the 1851 Act to effectuate the Treaty of Guadalupe Hidalgo.[133] Treaty D was a promise that the United States would set apart, "for the sole use and occupancy," certain reservations for "various tribes of Indians in the State of California," and to provide tribes with goods, chattels, school houses, teachers, among other things.[134]

Unfortunately, the United States never carried out its promises. Congress never ratified Treaty D.[135] An unratified treaty has no force until ratified by a two-thirds vote of the Senate.[136] Furthermore, the Treaty D's particular terms stated that it must be ratified: "This treaty

127. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

128. *Id*. at 432.

129. *See* Treaty with the Utah, Dec. 30, 1849, 9 Stat. 984, 1849 WL 7601.

130. *See id*.

131. Treaty D, *supra* note 21, at art. 3, 4; 4 CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES, 1101 (1913-1927).

132. Treaty of Guadalupe Hidalgo, *supra* note 49, at art. V; *see also* United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638, 641-43 (9th Cir. 1986).

133. *Id*.; Act of Mar. 3, 1851, ch. 41, 9 Stat. 631; *Ringrose*, 788 F.2d at 641.

134. 4 CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES, 1101 (1913-1927).

135. Indians of Cal. by Webb v. United States, 98 Ct. Cl. 583, 585-586 (1942), *cert. denied*, 319 U.S. 764 (1943); *see generally* Treaty D, *supra* note 21, at art. V.

136. U.S. CONST., art. II, cl. 2; SEC v. Int'l Swiss Invs. Corp., 895 F.2d 1272, 1275 (9th Cir. 1990).

to be binding on the contracting parties when ratified and confirmed by the President and Senate of the United States of America."[137] Because Congress never ratified Treaty D, the Tribe claim to the disputed lands under Treaty D did not have any basis.[138]

Indeed, the descendants of tribes in Treaty D were compensated for Congress's failure to ratify the Treaty.[139] Treaty D was attached to the complaint in *Indians of California by Webb v. United States*,[140] which was brought by California's Attorney General under the "Indians of California Act" of May 18, 1928.[141] The Indians of California Act authorized "the [A]ttorney [G]eneral of the State of California to bring suit in the Court of Claims on behalf of the Indians of California," who were defined as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."[142] The Indians of California Act authorized the Attorney General to sue the United States on behalf of American Indians and to seek compensation for land taken in the unratified treaties, such as Treaty D.[143] The Attorney General filed the suit on August 14, 1929, and then in 1942.[144] The Court of Claims held the Indians of California were entitled to recover damages from the United States.[145] In *Round Valley Indian Tribes v. United States*,[146] the United States stipulated to a judgment on

137. *See generally* Treaty D, *supra* note 21, at art. V; 4 CHARLES J. KAPPLER, INDIAN AFFS. L. AND TREATIES, 1101 (1913-1927).

138. Robinson v. Salazar, 838 F. Supp. 2d 1006, 1019 (E.D. Cal. 2012).

139. *Indians of California by Webb*, 98 Ct. Cl. at 583.

140. *Id*.

141. Advisory Council on Cal. Indian Extension Pol'y Act of 1998, H.R. 3069, 105th Cong. § 1 (1998).

142. *Indians of Cal. by Webb*, 98 Ct. Cl. at 585 ("[P]laintiffs, herein designated as The Indians of California, comprise all those Indians of the various tribes, bands and rancherias who were living in the State of California on June 1, 1852, and their descendants living in the state on May 18, 1928-such definition and designation having been prescribed in the Jurisdictional Act [of 1928].").

143. *Id*. at 592 ("[These Indians] did not qualify before the Commission created by the Act of March 3, 1851, 9 Stat. 631, entitled 'An Act to ascertain and settle the private land claims in the State of California.' Therefore whatever lands they may have claimed became a part of the public domain of the United States.").

144. Round Valley Indian Tribes v. United States, 97 Fed. Cl. 500, 504 (2011).

145. *Indians of Cal. by Webb*, 98 Ct. Cl. at 583.

146. *Round Valley Indian Tribes*, 97 Fed. Cl. at 504.

October 30, 1944 in the amount of $5,024,842.34.[147] Therefore, Treaty D had no force and effect because it remained unratified, and its signatories were compensated by court judgment. Accordingly, Treaty D provided no authority for the Kawaiisu's claims to the land.

VI. THE TEJON/SEBASTIAN "RESERVATION" STATUTORY AND EXECUTIVE AUTHORITY

The Tribe also argued that its land claims, both right to occupy and title to property, arose from the creation of certain reservations in California.[148] The Tribe alleged the Tejon/Sebastian Reservation was established in September 1853 for the Tribe's benefit by Edward F. Beale, California's Superintendent of Indian Affairs acting on behalf of the United States.[149] The Tribe alleged the United States Congress directed General Beale to establish the Tejon/Sebastian Reservation for the Kawaiisu in 1853.[150] The Tribe cited to the Congressional Globe, which refers to the Tejon/Sebastian reservation.[151]

"The term 'Indian reservation' originally meant any land reserved from an Indian cession to the federal government regardless of the form of tenure."[152] In the 1850s, the federal government frequently began to reserve public lands from entry for American Indian use.[153] In 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes . . .

147. *Indians of Cal.*, 98 Ct. Cl. at 600; *Round Valley Indian Tribes*, 97 Fed. Cl. at 504 ("In fiscal year 1945, Congress appropriated $5,024,842.34 for 'Judgments, Court of Claims, Department of the Interior, Indians.'").

148. Second Amended Complaint, *supra* note 18, ¶ 27.

149. *Id*.

150. Third Amended Complaint, *supra* note 6, ¶ 15.

151. Second Amended Complaint, *supra* note 18, ¶ 27; Letter from Edward F. Beale to Hon. Geo. W. Maypenny (Sept. 30, 1853) (Doc. No. 92 of "Report of the Commissioner of Indian Affairs," September 30, 1853, 33 Cong., Sess. 1, Vol. 1, Part 1, Doc. 1, 469-472); *see* Act of Mar. 3, 1853, ch. 104, 10 Stat. 226, 238 ("That the president of the United States, if upon examination he shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby authorized to make five military reservations from the public domain the state of California….").

152. NELL JESSUP NEWTON, ET AL., COHEN'S, HANDBOOK OF FED. INDIAN L., § 3.04[2][c][ii] (2012).

153. *Id*.; Act of Mar. 3, 1853, ch. 104, 10 Stat. 226, § 1.

[p]rovided, [t]hat such reservations shall not contain more than twenty five thousand acres."[154] The 1853 Act permitted a reservation with a maximum size of 25,000 acres.[155] Congress has the power to diminish reservations unilaterally[156] as long as the decision to terminate a reservation is expressly stated in the text of the legislation or is clear from the legislative history and surrounding circumstances.[157]

Congress subsequently amended the 1853 Act to provide for two additional reservations on March 3, 1855.[158] The Act of March 3, 1855 (the "1855 Act") appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore . . . [p]rovided, [t]hat the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for."[159]

The Kawaiisu failed to identify any executive order establishing the Tejon/Sebastian Reservation under either the 1853 Act or the 1855 Act. But, in 1864, Congress passed "[a]n Act to provide for the Better Organization of Indian Affairs in California."[160] This legislation empowered the President to reserve four tracts of land:

> set apart . . . at his discretion, not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall

154. Act of Mar. 3, 1853, ch. 104, 10 Stat. 226, 238 ("President is . . . authorized to make five military reservations from the public domain in the State of California . . . for Indian purposes . . . reservations shall not contain more than twenty-five thousand acres in each.").

155. *Id*. ("[S]uch reservations shall not contain more than twenty- five thousand acres each [and] shall not be made on any lands inhabited by Citizens of California."). The Tribe claimed that their land encompasses 270,000. Given this express act of Congress to establish reservations in California for Indians of no more than 25,000, it was unclear how the Tribe claimed more acreage than that granted by Congress.

156. Solem v. Bartlett, 465 U.S. 463, 470 n.11 (1984).

157. Mattz v. Arnett, 412 U.S. 481, 505 (1973).

158. Act of Mar. 3, 1855, ch. 204, 10 Stat. 686, 699; *see* Shermoen v. United States, 982 F.2d 1312, 1315 n.1 (9th Cir. 1992), *cert. denied*, 509 U.S. 940 (1993).

159. Act of Mar. 3, 1855, ch. 204, 10 Stat. 686.

160. Act of Apr. 8, 1864, ch. 48, 13 Stat. 39.

> be located as remote from white settlements as may be found practicable . . . .[161]

The Act of April 8, 1864 (the "1864 Act") designated California as one American Indian superintendency and authorized the President to designate Indian reservations.[162] Further, the 1864 Act provided that unretained lands be surveyed and offered for sale.[163] In *Mattz*, the Supreme Court stated:

> [a]t the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River. It appears, also, that the President did not take immediate action, upon the passage of the Act, to recognize reservations in California.[164]

The 1864 Act superseded the 1853 Act by allowing only four reservations in California.[165] Established by Executive Order, the reservations were the Hoopa Reservation (established in 1876), the Mission Indian Reserve (established in 1870, and revised from 1877 to 1889), the Round Valley Reservation (established 1870), and the Tule River Reservation (established in 1873).[166]

The Tejon/Sebastian Reservation cannot provide land rights to the Tribe because the President did not establish the Reservation. There is no executive order establishing the Tejon/Sebastian Reservation under

161. *Id*. at ch. 48, § 2.

162. *Id*.

163. *Id*. at ch. 48, § 3; *see generally* Mattz v. Arnett, 412 U.S. 481, 490 (1973).

164. *Id*. at 489-90.

165. Sermon v. United States, 982 F.2d 1312, 1315 (9th Cir. 1992); *see* 4 CHARLES J. KAPPLER, INDIAN AFF. L. AND TREATIES, 1101 (1913-1927).

166. *See Mattz*, 412 U.S. at 494 ("The 1864 Act had authorized the President to 'set apart' no more than four tracts for Indian reservations in California."); *see also* Donnelly v. United States, 228 U.S. 243, 258-59 (1913) ("Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, successively, acted with respect to one or more of these reservations upon the theory that the Act of 1864 conferred a continuing discretion upon the Executive; orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made, and establishing others in their stead; and in numerous instances Congress in effect ratified such action.").

the 1853 Act or the 1855 Act.[167] The 1864 Act states, "all acts or parts of acts in conflict with the provisions of the act, be, and the same are hereby, repealed . . . ."[168] Also, the 1864 Act provides that "the several Indian reservations in California, which shall not be retained for the purposes of Indian reservations," shall be sold.[169] The drafters of the 1864 Act could not have written a more precise legislation to abolish prior reservations, even assuming the Tejon/Sebastian Reservation existed.[170] This means any prior act creating a reservation was repealed and any existing reservations, not acknowledged by the President, were to be sold. Thus, even if the Sebastian/Tejon reservation had been established in 1853, such establishment was repealed by the 1864 Act. Therefore, the Tejon/Sebastian Reservation was not properly established and did not provide the Tribe with land rights.

CONCLUSION

The Tribe failed to establish a valid claim to the 270,000 acres. It claimed rights to the land based on two theories: (1) aboriginal right to occupy and (2) title to the land. Typically, an aboriginal title claim provides American Indians with the "right of occupancy." However, case law holds aboriginal title is lost when the Board of Commissioners, under the 1851 Act, validly-issued land patents to predecessors in title. This meant American Indian claims to occupancy are invalid against validly-issued land patents. The 1851 Act followed the end of hostilities with Mexico, which culminated in the Treaty of Guadalupe

167. The Act of 1864 required that the President establish the California Reservations. To the extent that there is no Executive Order creating the "Tejon/Sebastian Reservation," the absence of an executive order nullifies the existence of such a reservation. The Act of 1864 superseded any prior act establishing a reservation and gave the authority to the President to create reservation. For instance, the Mendocino Reservation, which was established in 1856 pursuant to 1855 Act, was restored to the public domain by Congress on July 27, 1868, 15 Stat. 223. There simply was no Executive action creating the Tejon/Sebastian Reservation.

168. Act of Apr. 8, 1864, ch. 48, 13 Stat. 39, 41("An Act to provide for the Better Organization of Indian Affairs in California.").

169. *Id*. at ch. 48, § 3.

170. *See Mattz*, 412 U.S. at 505 n.22 ("Congress has used clear language of express termination when that result is desired," and quoting instances where acts declared a reservation "abolished," "discontinued," or "vacated and restored to the public domain.").

Hidalgo. The 1851 Act not only created a Board of Commissioners to determine the validity of claims but also required each person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim within two years. The Tribe's land claims were subject to validly-issued land patents and were granted to predecessors in title. Therefore, the Tribe lost any claim to aboriginal rights or to title, to the validly issued land patents, because it failed to submit a claim to the Board of Commissioners under the 1851 Act.

The Tribe alleged the Treaty with the Utah granted it vast land rights as "elucidated" by Treaty D. In *Uintah Ute Indians of Utah v. United States.*, the Court of Federal Claims wrote a detailed opinion on the history of the Utah, aboriginal title, and the Treaty with the Utah. "Utah Indians" referred to "any and all Indians resident in Utah, in or around Salt Lake City," during the relevant time period, and thus did not apply to the Kawaiisu. Further, the Treaty with the Utah was a future commitment to set aside land for the signatory tribes, not a document granting land title or possession. By its terms, the Treaty with the Utah did not designate, settle, adjust, define, or assign limits or boundaries to American Indians, because the treaty left such matters to the future. Treaty D did not alternatively grant land rights to the Tribe because Treaty D was not ratified by Congress, and its signatory tribes were compensated in *Indians of California by Webb v. United States*.

The Tribe tried to establish that its land claims arose from the creation of the Tejon/Sebastian Reservation in California. However, the Tejon/Sebastian Reservation was not a reservation established by any President. Therefore, the Tejon/Sebastian Reservation could not have provided land rights to the Tribe. Furthermore, there is no executive order establishing the Tejon/Sebastian Reservation. Thus, the Kawaiisu failed to establish a valid claim to the 270,000 acres.