IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

NOTICE AND MOTION FOR LEAVE TO INTERVENE, PETITION FOR INTERVENTION, AND MOTION FOR INJUNCTION AND APPOINTMENT OF RECEIVER.

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No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

NOTICE OF PETITION FOR LEAVE TO INTERVENE AND OF MOTION FOR INJUNCTION AND APPOINTMENT OF RECEIVER.

The United States of America, its Attorney General, the Honorable Tom C. Clark, and its Solicitor General, the Honorable Philip B. Perlman, the State of California and its Attorney General, the Honorable Fred N. Howser, will take notice that on April 19, 1948, at 12:00 o'clock noon, or as soon thereafter as may suit the convenience of the court, the following bands of Indians of California, namely, the Campo, El Capitan (Baron Long), Inaja, Ka-we-a (Cahuilla), La Jolla, Las Flores, Los Coyotes, Manzanita, Mesa Grande, Morongo, Old Campo, Pala, Pauma, Rincon, San Luis Rey, Santa Rosa, Santa Ysabel, Sequan, Soboba, Tores-Martinez and San Juan Capistrano bands, together

with Clarence Lobo, captain of the band of San Juan Capistrano, and F. L. Foussat, Captain of the band of San Luis Rey, as individuals, jointly and severally, on behalf of themselves and other bands and individual Indians of California similarly situated, appearing through their counsel Norman M. Littell, will present to the Supreme Court of the United States their motion for leave to intervene, and will file therewith their petition for intervention in the above-entitled cause, and if leave to intervene is granted, will forthwith present to the said court for hearing and determination their motion for injunction against the United States of America, its officers, agents and employees, the State of California, its officers, agents and employees, and all persons whomsoever purporting to claim an interest or interests in, through or under either the United States or the State of California or under the mineral laws of the United States, from trespassing upon the tidelands described in the intervenors' motions, and from exploring for or taking oil or gas therefrom, and for the appointment by the said court of a receiver or receivers to take possession and control of the said lands and all property situated thereon, and to manage and operate the existing facilities for the production of oil and gas on said properties under the direction and control of this honorable court, until such time as this court shall by appropriate orders or decrees fix and determine the respective interests of the United States of America, of the petitioners herein, and of any and all other bands of Indians or individual Indians similarly situated, claiming any right, title or interest in said tidelands.

NORMAN M. LITTELL,
Counsel for Intervenors.

April 16, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 12, Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

MOTION FOR LEAVE TO INTERVENE.

Come now the following bands of Indians of California, namely, the Campo, El Capitan (Baron Long), Inaja, Kawe-a (Cahuilla), La Jolla, Las Flores, Los Coyotes, Manzanita, Mesa Grande, Morongo, Old Campo, Pala, Pauma, Rincon, San Luis Rey, Santa Rosa, Santa Ysabel, Sequan, Soboba, Tores-Martinez and San Juan Capistrano bands, together with Clarence Lobo, captain of the band of San Juan Capistrano, and F. L. Foussat, captain of the band of San Luis Rey, as individuals, jointly and severally, through their counsel Norman M. Littell, and move this court for leave to intervene as parties defendant in the above-entitled cause, on behalf of themselves and other bands of Indians and individual California Indians similarly situated, with full right to participate as parties in the hearing

and disposition of the said cause in this court, but in subordination to all of the proceedings hereinbefore had in the said cause.

As cause, and in support of this motion, it is respectfully shown:

I.

That your petitioners, together with certain other bands and individual Indians of California, are jointly or severally, the owners in fee simple, and claim all the right, title and interest in and to substantial portions of the lands and areas underlying the Pacific Ocean described in the opinion in this cause announced on June 23, 1947, title to which tidelands is involved in the controversy herein. Both the United States of America and intervenors herein claim ownership of said tidelands, all of which more particularly appears from the petition for intervention filed herewith.

II.

Your petitioners had no notice of the proceedings in this cause until after argument was heard and a decision was handed down on June 23, 1947. Petitioners have endeavored for almost two years to employ private counsel of their own choosing, but not until March 29, 1948, were petitioners able to retain counsel. Petitioners now present themselves before any final decree is entered by this court.

III.

The cause involves the construction of a treaty fixing boundaries between the United States and a foreign nation, upon which treaty depend the property rights and interests of great value to the United States and its Indian wards, the petitioners herein, and other bands of Indians and individual Indians similarly situated, in the State of California.

IV.

Your petitioners have no plain, adequate, complete or sufficient remedy whereby their property rights and interest in and to the tidelands areas in controversy herein, and in the oil, gas, and products thereof now being taken from the tidelands, may be conserved and safeguarded other than by their becoming parties defendant in the above-entitled cause.

V.

Petitioners are informed and believe that the United States of America may have overlooked and is now uninformed as to the true rights and interests of the petitioners in and to the said tidelands, and that being uninformed, the legislative branch of the United States Government is now considering the passage of a bill which would seek to convey to the State of California all right, title and interest in and to said tidelands, to the great prejudice, injury and loss of the taxpayers of the United States in that such a grant to the State of California, if passed by Congress upon the mistaken assumption that all property rights in said lands are vested in the United States, would necessarily result in claims totaling many millions of dollars by these petitioners, and others similarly situated, against the United States. Such claims in law and good conscience would have to be paid from the Treasury of the United States if the honor and integrity of the United States in dealing with its citizens and its wards are to be preserved. The best interest of the people of the United States would be served by granting this petition to the end that many mixed questions of law and fact may be judicially examined, and the respective rights of the petitioners and of the United States in and to said tidelands would be duly and properly determined by this court under the laws and constitution of the United States.

VI.

In moving for leave to intervene, petitioners pray that they be permitted to appear in these proceedings and be heard in this cause as intervenors appearing herein by order of the court under Rule 24 (a) of the rules of civil procedure and under the decisions of this honorable court in *Oklahoma* v. *Texas,* 258 U.S. 574.

THE CAMPO, EL CAPITAN (Baron Long), INAJA, KA-WE-A (Cahuilla), LA JOLLA, LAS FLORES, LOS COYOTES, MANZANITA, MESA GRANDE, MORONGO, OLD CAMPO, PALA, PAUMA, RINCON, SAN LUIS REY, SANTA ROSA, SANTA YSABEL, SEQUAN, SOBOBA, TORES-MARTINEZ and SAN JUAN CAPISTRANO Bands of Indians of California, and CLARENCE LOBO, Captain of the San Juan Capistrano Band, and F. L. FOUSSAT, Captain of the San Luis Rey Band, individuals.

By NORMAN M. LITTELL, *Counsel.*

April 16, 1948.

IN THE

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UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA.

PETITION FOR INTERVENTION.

Come now the following bands of Indians of California, namely, the Campo, El Capitan (Baron Long), Inaja, Kawe-a (Cahuilla), La Jolla, Las Flores, Los Coyotes, Manzanita, Mesa Grande, Morongo, Old Campo, Pala, Pauma, Rincon, San Luis Rey, Santa Rosa, Santa Ysabel, Sequan, Soboba, Tores-Martinez and San Juan Capistrano bands, together with Clarence Lobo, captain of the band of San Juan Capistrano, and F. L. Foussat, Captain of the band of San Luis Rey, as individuals, jointly and severally, by their counsel Norman M. Littell, and by leave of the court first had and obtained, file this their petition for intervention in the above-entitled cause, alleging and showing as follows:

I.

The petitioner bands of Indians of California, which together with other bands and individual Indians of California, own title to substantial portions of the tidelands lying along the coast of California, described in the opinion of this court handed down on June 23, 1947. The said title and ownership of petitioners, and other California Indians similarly situated, is based upon one or more of the following grounds:

1. Petitioners, and other California Indians similarly situated, are the surviving descendants and heirs of the aboriginal occupants of the California coastal lands who owned, lived upon and exercised complete dominion and control over the said lands together with the adjacent tidelands hereinabove referred to. Before the coming of the white man, the coastal lands of California were thickly populated with native Indians. Members of the petitioners bands, and other California Indians similarly situated, are the descendants and heirs of these aboriginal occupants. The said predecessors of petitioners occupied the coastal lands, and in boats plied between the mainland of California and the islands for the purpose of catching seals, the skins of which were tanned for clothing, and to secure fish and crabs and other edible products of the sea, together with sea shells for decorative or utilitarian purposes. The use of the tidelands by the Indians from time immemorial was indissolubly linked with and concomitant to the occupation of the shorelands.

2. After the area of California occupied by petitioners' predecessors passed under the domination and control of Spain, the Indian occupants of the territory were, under Spanish law, left in full possession and ownership of the lands occupied by them, whether singly or in communities, together with the rivers and waters. The lands occupied by the Indians were as a matter of legal right confirmed to them and reserved for them and could not be sold or alien-

ated from the Indians by the white man. The said Indians had full legal title to said lands pursuant to the laws of Spain.

3. When Mexico became independent of Spain in 1824, the Recopilacion de los Leyes de Reynos de las Indias, 1572, was the prevailing law of the Mexican Republic (except for provisions repealed expressly or by implication), (See footnote 8, infra) protecting the title to Indian lands in the same manner as during the period of Spanish domination. And property rights of the Indians were even further extended and protected.

Under these and other laws, petitioners' predecessors held and owned all right, title and interest in and to the aforesaid lands in California and the tidelands abutting on or adjacent thereto. These holdings were enhanced upon the secularization of the Spanish missions in California in 1833-1834 when the mission lands were divided up and distributed in rancheriás, pueblos and villages, title to which lands was vested in the Indians.

4. Upon the acquisition of California from Mexico by the United States, pursuant to the Treaty of Guadalupe Hidalgo signed February 2, 1848, existing titles were confirmed by a specific provision of the treaty that "property already granted shall be inviolably respected." Existing titles were consistently and continuously recognized by American authorities, including the titles of petitioners' predecessors and titles derived therefrom, but after discovery of gold in California in 1848, and the concomitant influx of settlers, a period of brutal and ruthless diplacement of petitioners' predecessors ensued. The Indians were killed in such large numbers and so brutally beaten, tortured and otherwise mistreated and threatened with violence, that they were to a large extent driven from their properties back into the interior. Petitioner bands of Indians, and others similarly situated, thereafter resided and do now reside in scattered areas throughout southern California, some of them many miles from the coast lands of California which their

predecessors owned and occupied and to which title stood confirmed in petitioners' predecessors in interest at the time of the American occupation of California and the signing of the Treaty of Guadalupe Hidalgo.

Petitioners' predecessors on numerous occasions petitioned the duly authorized officers of the United States Government, both military and civil, to protect them from mistreatment and from expulsion from their lands and their properties, but the said officers failed and refused to carry out the terms of the Treaty of Guadalupe Hidalgo in respect to protecting the Indians in their property rights.

II.

Until the opinion of this court was handed down in this cause on June 23, 1947, the State of California, through its legal officers, did from time to time issue to divers and numerous persons patents, licenses, permits and leases, or other instruments purporting to grant and lease parts of the tidelands comprising the subject of this controversy, and its grantees and lessees have taken possession of said lands. Petitioners are informed and believe, and they so allege, that following the decision of this court on June 23, 1947, the State of California continued to issue patents, licenses, permits and leases for the development and exploitation of said tidelands for the production of oil and gas pursuant to a purported "operating stipulation" entered into by and between the Attorney General of the State of California and the Attorney General of the United States on July 26, 1947, and that the State of California will continue said activities unless restrained by orders and process of this court.

III.

The Attorneys General of the United States of America and of the State of California, respectively, representing the original parties in this cause, have misconstrued the directions contained in the decision of this court handed

down on June 23, 1947, and as a consequence undertook to dispose of the gas and oil rights in the ceded tidelands by executing the aforesaid "operating stipulation," the form and substance of which were rejected in toto by this court on October 27, 1947. Subsequently the Attorney General of the United States, in January, 1948, proposed a supplemental decree for the purpose of giving effect to the restrictions of this court as contained in its opinion of June 23, 1947, which proposed supplemental decree seeks to initiate proceedings under which boundaries of the tidelands areas in question "may be ascertained and made binding on all parties and interests."

In its answer to the aforesaid supplemental decree, the State of California questions the boundary determinations and claims that certain of the tidelands in question constitute inland waters of the State of California, and prays:

> 1. That a master in chancery be appointed to take evidence and make finding of fact and conclusions of law subject to review of this court with regard to boundaries of the lands in question, and
>
> 2. That all municipalities, corporations and individuals now in possession under grants, leases, or permits of the State of California of any portion of the areas claimed by the United States be made parties to this proceedings and be given an opportunity to be heard herein.

In truth and in fact the petitioners are still the owners in their own right, and free from any lawful claims of the United States of America or the State of California to substantial portions of the aforesaid tidelands underlying the Pacific Ocean. The respective interests of the petitioners, and other bands of Indians similarly situated, can only be determined, protected and preserved by the methods hereinafter prayed for and as set forth in an accompanying motion for appointment of a receiver or receivers.

Unless this petition is granted and petitioners are permitted to intervene as parties defendant, their rights, which in good conscience they believe to be paramount to that of both the United States of America and the State of California, would be finally adjudicated and destroyed without further opportunity for petitioners to be effectively heard.

THE CAMPO, EL CAPITAN (Baron Long), INAJA, KA-WE-A (Cahuilla), LA JOLLA, LAS FLORES, LOS COYOTES, MANZANITA, MESA GRANDE, MORONGO, OLD CAMPO, PALA, PAUMA, RINCON, SAN LUIS REY, SANTA ROSA, SANTA YSABEL, SEQUAN, SOBOBA, TORES-MARTINEZ and SAN JUAN CAPISTRANO Bands of Indians of California, and CLARENCE LOBO, Captain of the San Juan Capistrano Band, and F. L. FOUSSAT, Captain of the San Luis Rey Band, individuals.

By NORMAN M. LITTELL, *Counsel.*

April 16, 1948.

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State of California.

MOTION FOR INJUNCTION AND THE APPOINTMENT OF RECEIVER.

Come now the following bands of Indians of California, namely, the Campo, El Capitan (Baron Long), Inaja, Ka-we-a (Cahuilla), La Jolla, Las Flores, Los Coyotes, Manzanita, Mesa Grande, Morongo, Old Campo, Pala, Pauma, Rincon, San Luis Rey, Santa Rosa, Santa Ysabel Sequan, Soboba, Tores-Martinez and San Juan Capistrano bands, together with Clarence Lobo, captain of the band of San Juan Capistrano, and F. L. Foussat, Captain of the band of San Luis Rey, as individuals, jointly and severally, appearing by their counsel Norman M. Littell, and move the court as follows:

I.

That pending the final determination of this cause, the plaintiff, United States of America, its officers, agents, employees, grantees, licensees, permittees and all claimants thereunder, be enjoined from making any grants or conveyances covering or affecting any lands or islands or any part

of that area underlying the Pacific Ocean, described in the opinion of this court announced on June 23, 1947, in which the United States claims possession of paramount rights and full dominion and power and that land described in paragraph 1 of the proposed supplemental decree filed in this cause by the Attorney General of the United States on January 29, 1948, and from issuing any licenses or permits for the exploration, exploitation or development of any of the said lands for oil, gas or other minerals.

II.

That the defendant, State of California, and the plaintiff, United States of America, and their officers, agents, employees, grantees, licensees and permittees, and all claimants purporting to act under and pursuant to the mineral laws of the United States, and all other persons whomsoever, be enjoined from further trespassing on the said tidelands and from sinking any additional wells thereon, extracting any oil or gas therefrom and from removing therefrom any oil or gas, or any fixtures, structures, derricks, machinery, tools, pipe line, or other property of whatsoever character now thereon and used for, or in connection with, the production, storage or transportation of oil or gas; said lands hereinafter described being part of the lands affected by the title dispute in this cause, and described in more general terms in the bill of complaint and petition for intervention in this cause, and that upon the final disposition of this cause such injunctions be made perpetual.

III.

That a receiver or receivers be appointed to take charge forthwith of all of the aforesaid lands, together with all oil and gas found thereon, and all the improvements and properties, machinery and tools now located thereon and used in connection with the extraction, storage, transportation, refining or disposition of the oil and gas products of said lands, with authority to conserve and operate the same

under the supervision of the court, pending the final determination of this cause.

That the said receiver or receivers be directed to make a report to the court, within ninety days, of full and complete plans for prospecting for, developing and producing oil and gas from said lands, and until said recommendations are filed and acted upon by the court, the said receiver or receivers be directed to operate any oil or gas wells on said property or permit them to be operated by the persons now operating them, or to close said wells if they shall deem it advisable to do so; and that they be authorized in their discretion to sell at the true and full market value the oil and gas so produced, and be authorized to pay out of the proceeds thereof such costs and expenses as are necessary, reasonable and proper for the operation, care and preservation of the said properties, and for legal and other assistance needed in order to determine the respective interests of the parties, and to render account thereof to the court.

In support of the foregoing motion, the intervenors show to the court that there are numerous corporations, partnerships and individuals now engaged in drilling wells and extracting oil and gas from the said tidelands; that the lands are rapidly being exhausted of the oil and gas stored therein; that some of the corporations, partnerships and individuals engaged in the extraction and transportation of oil and gas therefrom are without tangible assets other than the lands and property involved in this proceeding and claimed by them; that these corporations, partnerships and individuals are liable to account to the intervenors for great quantities of oil and gas illegally removed from the lands described, amounting in value to many millions of dollars; and that unless the above relief be granted, the intervenors will be without effectual remedy for the injury and damage already suffered by and daily accruing to them, and their rights, which in good conscience they believe to be paramount to that of both the United States of

America and the State of California, would be finally dissipated and destroyed without further opportunity for petitioners to be effectively heard.

Respectfully submitted,

THE CAMPO, EL CAPITAN (Baron Long), INAJA, KA-WE-A (Cahuilla), LA JOLLA, LAS FLORES, LOS COYOTES, MANZANITA, MESA GRANDE, MORONGO, OLD CAMPO, PALA, PAUMA, RINCON, SAN LUIS REY, SANTA ROSA, SANTA YSABEL, SEQUAN, SOBOBA, TORES-MARTINEZ and SAN JUAN CAPISTRANO Bands of Indians of California, and CLARENCE LOBO, Captain of the San Juan Capistrano Band, and F. L. FOUSSAT, Captain of the San Luis Rey Band, individuals.

By NORMAN M. LITTELL, *Counsel.*

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STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR INTERVENTION.

I. THE BASIS FOR PETITIONERS' CLAIM OF TITLE.

The claims of the petitioners to substantial portion of the tidelands rest firmly on four principal grounds: (1) Original occupancy and ownership; (2) confirmation of Indian titles by the Spanish government; (3) confirmation of Indian titles by the Mexican government after Mexico attained independence in 1824; (4) confirmation and protection of property rights guaranteed by the United States Government pursuant to the Treaty of Guadalupe Hidalgo, proclaimed July 4, 1848.

1. Original Occupancy and Ownership.

Before the coming of the white man, the California coast was very thickly populated with native Indians. The

account of Cabrillo, the first white man to enter California waters, shows that there was a dense Indian settlement along the California shore when he sailed up the coast in September, 1542.[1] In 1603, Sebastian Vizcaíño was sent by the King of Spain on a voyage of exploration and demarcation of the coast of the Californias. In a letter to His Majesty on May 23 of that year, he wrote:

> * * * California has a genial climate * * * and it is thickly settled with people whom I find to be of a gentle disposition, peaceable and docile and who can be brought readily within the fold of the Holy Gospel and into subjection to the Crown of Your Majesty * * *. The clothing of the people of the coast land consists of the skins of the sea wolves (seals) abounding there which they tan and dress better than is done in Castile. * * *. They have vessels of pine wood very well made in which they go to sea with 14 paddle men on a side, with great dexterity even in stormy weather. I was informed by them, and by many others I met with in great numbers along more than 800 leagues of a thickly settled coast, that inland there are great communities which they invited me to visit with them.[2]

Vizcaíño states that his party landed on Santa Catalina Island (which he named for the saint of the day, St. Catherine) on November 28, 1603. A large number of Indians witnessed the performance of a mass which was ordered upon the landing of his party.

Vizcaíño says that inhabitants of the island communicated with the Indians on the mainland by means of large canoes. He makes perfectly clear the traffic between the islands and the mainland for the purposes of fishing, seal hunting and other purposes.

As Vizcaíño proceeded up the coast, he relates that near the site of what was later to become the mission of San

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[1] Bancroft's History of California, Volume I, page 70.

[2] Vizcaíño's Voyage—Historical Society of Southern California, 1891, Volume II, page 70.

Buenaventura on the coast, a canoe containing five Indians came from the mainland to Vizcaiño's ship, the "Capitana." One of the leaders of the group came aboard and, by means of sign language, invited the explorers to visit his rancherías (Indian villages or communities), where the visitors would be supplied with everything needed by them.

Viscaiño tells of many communities along the coast which was thickly populated with Indians. As the official cartographer of the King of Spain, sent out to make a map of the California coast, he made the first official maps of the area, and his maps as well as his reports show how numerous were the native rancherías, or settlements, on the coast.[3]

2. Confirmation of Indian Titles by the Spanish Government.

In the Recopilacion de los Leyes de Reynos de las Indias, 1572, which was the prevailing law in the governing of New Spain, the status of the Indian was defined as follows:[4]

> We command that the sale, grant, and composition of lands be executed with such attention, that the Indians shall be left in possession of the full amount of lands belonging to them, either singly or in communities, together with their rivers and waters; and the lands which they shall have drained or otherwise improved, whereby they may, by their own industry, have rendered them fertile, are reserved in the first place, and can in no case be sold or aliened. And the judges who shall have been sent thither, shall specify what Indians they may have found on the land, and what lands they shall have lent in possession of each of the elders of tribes, caciques, governors, or communities. Lib. IV, tit. 12, law 17 (18), vol. II, p. 44.

Many other early "audiencias" (royal ordinances) and decrees concerning the Indians show great care and con-

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[3] See also letter of Fr. Fermin de Lasuén in the Santa Barbara archives.

[4] Laws, U. S. Treaties Respecting Public Lands, Vol. II, 1836; Royce—Indian Land cessions in the U. S., U. S. Bureau of Am. Ethnology—18th Ann. Report, pt. 2—1896-97, p. 541.

cern for their protection in respect to title to their lands. Their equality with Spaniards as subjects of the King of Spain was also carefully secured. For example, extracts from the Recopilacion de los Leyes de Reynos de las Indias, relative to the mining laws of New Spain,[5] provide as follows:

> Book IV, Title XIX: Concerning the discovery and working of mines. Permitting all Spaniards and Indians, Vassals of the Crown, to discover and work mines. (Law 1st.) The Emperor Don Charles I, Grenada, sic December 9, 1526. Don Philip II, Madrid, 19 June 1568.
>
> It is our will and pleasure that all persons of whatever state, condition, rank, or dignity, *Spaniards or Indians,* who are our vassals, may search for gold, silver, quicksilver, or other metals either personally or by their servants or slaves, in all mines which they may discover, or wherever they may choose, and peaceably hold and take possession, and work them freely, without any obstacle of any kind whatever * * *.
>
> That Indians equally with Spaniards, may hold and work mines of gold and silver. (Law 14th.)
>
> Emperor Charles and Princess G. at Madrid, 17th December 1551. Philip II, 15th April 1563, 16th March 1575.
>
> We command that, in relation to the Indians, no restriction be imposed on their discovering, holding, and occupying mines of gold and silver or other metals, *or working them in the same manner as is done by Spaniards,* in conformity with the ordinances of each province, and may extract these metals for their own profit and for the payments of their personal tax. And no Spaniard or Cacique shall have part or control in the mines which the Indians shall have discovered, held and worked.
>
> * * * we command that in relation to the staking out of the mines which they (the Indians) may have discovered, *they shall be treated in the same manner as Spaniards, with no difference whatever.*

[5] J. A. Rockwell—"Compilation of Spanish and Mexican Law in Relation to Mines and Titles to Real Estate."

Spanish policy in general was much more concerned about the security and welfare of the Indians than our own, as reflected by the following provision:[6]

> Whereas some grazing farms, owned by Spaniards * * * have been productive of injury to the Indians, by being located upon their lands * * * we command that the judges who shall examine the land * * * ascertain whether any injury accrues therefrom to the Indians or their property; and if so, that, after due notice to the parties interested they * * * remove them to some other place * * *. (Lib. 2, tit. 31, law 13, vol. I, p. 484.)
>
> We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong. (Lib. 4, tit. 12, law 9, Vol. II, p. 41.)
>
> Whereas we have fully inherited the dominion of the Indies (Spanish dominion in the new world) and whereas the wastelands and soil which were not granted by the Kings, our predecessors, or by ourselves in our name, belong to our patrimony and royal crown * * * after distributing among the Indians whatever they may justly want to cultivate, sow and raise cattle, *confirming to them what they now hold,* and granting what they may want besides—all the remaining land may be reserved to us, * * * for the purpose of being given as rewards, or disposed of at our pleasure. (Lib. 4, tit. 12, law 14, Vol. II, p. 42) (Italics supplied)

That injuries were, in fact, committed against Indians by Spaniards is clear, but the Spanish law required that such injuries should be punished more severely than injuries against Spaniards.[7]

Overwhelming additional evidence could be cited of the protection and careful legal safeguards thrown around the

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[6] Recopilacion—Royce, supra, pp. 540, 541.

[7] The Law of December 19, 1593, provides: We ordain and command that Spaniards who injure or offend or maltreat Indians shall be punished with greater severity than if the same tortuous acts had been committed against Spaniards, and we declare such acts to be public offenses. 2 White's New Recopilacion, p. 34.

Indians and their property rights under the Spanish law. Throughout this period Spanish law recognized Indian property rights in land, anteceding Spanish sovereignty, as creating implied limitations upon Spanish grants. The Indians continued to hold title to their tribal lands.

3. Confirmation of Indian Titles by the Mexican Government After Mexico Attained Independence in 1824.

When Mexico became independent of Spain in 1824, the Recopilacion de los Leyes de Reynos de las Indias, 1572, was the law of the Mexican Republic, except as to any provisions which may have been repealed either expressly or by necessary implication.[8]

Another law of the land was the Plan of Iguala, adopted by the revolutionary government of Mexico on the 24th of February, 1821, and incorporated in the Mexican Declaration of Independence, October 6, 1821, a short time previous to the overthrow of the Spanish power, in which it is declared:[9]

> * * * all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues; * * * the person and property of every citizen will be respected and protected by the government.

There is also another act of the Mexican Congress on the 17th of September, 1822, carrying into practical effect this fundamental principle of the new government, as follows:[9]

> The sovereign Mexican constituent Congress, with a view to give due effect to the 12th article of the Plan of Iguala, as being one of those which form the social basis of the edifice of our independence, has determined to decree, and does decree, Article 1. That in

[8] From brief of Caleb Cushing, Attorney General of the United States, in U. S. v. Ritchie, 17 Howard 525.

[9] U. S. v. Ritchie, 17 Howard 525.

> every register and public and private document, on entering the name of citizens of this empire, *classification of them with regard to their origin shall be omitted.*

The treaty of Cordova, on the 24th of August, 1821, between the Spanish Viceroy and the revolutionary party, and the declaration of independence proclaimed the 28th of September, 1821, reaffirmed the principles of the Plan of Iguala.

The earliest decrees of the first Mexican Congress reaffirmed the equality of Indians with other inhabitants. The decree of February 24, 1822, stated:[10]

> The sovereign congress declares the equality of civil rights to all the free inhabitants of the Empire, whatever may be their origin in the four quarters of the earth.

As subsequently stated by the Supreme Court of the United States in *United States* v. *Ritchie,* 17 Howard 525, in sustaining the right of an Indian to own and convey title to land in California:

> The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. * * * These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the Declaration of Independence of the United States of 1776 to invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies.

There were two broad classes of Indians in California at the time of the Treaty of Guadalupe Hidalgo. The first

[10] U. S. v. Ritchie, 17 Howard 525.

were the Mission or Ranchero Indians, of whom the petitioners are heirs and successors, and the second the wild, uncivilized Indians of the interior. The Ranchero Indians were those living close to the missions along the coast and were either (a) baptized Christian Indians (neophytes), or (b) the vast majority who were living on their rancherías (Indian villages or communities) under the civilizing influence of the missions,[11] baptized and unbaptized. The Spanish law, and later the Mexican law, contemplated the progress of the Indian communities, as they continued under mission influence, towards incorporation into pueblos. As stated by "instructions to the commandant of the new establishments of San Diego and Monterey," given by Viceroy Bucareli, 17th August, 1773:

> Art. 15. When it shall happen that a mission is to be founded into a pueblo (or village,) the commandant will proceed to reduce it to the civil and economical government, which, according to the laws, is observed by other villages of this kingdom; then giving it a name, and declaring for its patron the saint under whose memory and protection the mission was founded.

The neophytes had the right, on becoming Christianized and civilized, to own land individually, described at common law as fee simple, but this did not vitiate their interest in the rancherías. (Law 8, tomo 3, Book 6 [Recopilacion], "Convert Indians must not be deprived of the land which they may have had before.")[12]

The neophytes were always numerically a small group in comparison with the great body of the Indian population scattered on rancherías and throughout the surrounding

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[11] The yearly register of the San Diego mission for the years 1771-1846 shows a total of 246,653 baptisms, yet the greatest number of neophytes for any given year (1824) was 1,820. Even allowing for an appallingly high death rate, most of the Indians were on rancherías. There were many more thousands who did not present themselves for baptism. Engelhardt, Mission San Diego, p. 300.

[12] Engelhardt, Mission San Buenaventura, p. 58.

countryside, where Indian ownership was recognized and protected under Spanish and Mexican law without a survey of the property involved and without defining boundaries.[13]

In 1848 the protective force of the Spanish and Mexican law is reflected in the fact that even the predatory Governor Pio Pico, the last governor of California before the American occupation, who brazenly issued a series of regulations for the alienation and renting of the missions, felt constrained to protect the Indians in their ownership of the land. This was during the last stage of the secularization of mission property which commenced in 1833-1834. Articles 18 and 20 of these regulations provide:

> The Indians radicated (rooted) in each mission shall appoint from amongst themselves * * * four overseers who will watch and take care of the preservation of public order * * * .[14]
>
> The Indians who possess portions of land in which they have their gardens and homes, will apply to this government for the respective title, in order that the ownership thereof may be adjudicated to them, *it being understood that they cannot alienate said lands, but they shall be hereditary amongst their relatives, according to the order established by the laws.* (Article 20.)[15]

On the other hand, the Indians who lived on their rancherías, or villages, held the land in absolute ownership as a community, and were never disturbed in the security

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[13] There were no surveys in California until after the American acquisition of California. See report of Carey Jones, special agent to examine the subject of land titles in California, U. S. Senate Executive Documents, Vol. 3, 31st Congress, 2nd sess., 1850-51, document No. 18, p. 5. See also U. S. v. Sutherland, 19 Howard 363 (1856).

[14] Rockwell, "Mission Laws of the Indians," pp. 458 ff; p. 475.

[15] Order of inheritance among Indians—Lands whose owners shall die without heirs shall revert to the possession of the [Indian] nation Article 19—Regulations for the secularization of the missions of Upper California promulgated by Governor Jose Figueroa, August 9, 1834.

of their tenure either by the Spanish or Mexican governments.

So firmly established were these property rights, that even Pio Pico, who lost no opportunity to derive personal profit from the secularization of the mission lands, on June 26, 1845, refused the request of Juan M. Pedrorena for the grant of the rancho Pala, where the Indians had maintained a granary as reported in 1810,[16] because this area belonged to the Indians of San Luis Rey.[17]

Again in 1846, the government refused a grant of land at Pascual on the grounds "that the land could not be given because it belonged to the Indians of San Pascual."[18]

4. Confirmation and Protection of Property Rights Guaranteed by the United States Government pursuant to the Treaty of Guadalupe Hidalgo, Proclaimed July 4, 1848.

a. *Decade of death; 1846 to 1856.*

California was in political turmoil after 1846, when our soldiers took control and Congress took no action in organizing a civilian government. President Taylor, in his message to Congress in 1849, pointed out to the Congress that nothing had been done by it to establish civilian rule in California. The Secretary of the Interior, Thomas Ewing, in his annual report of that year stated:

> No provision has yet been made to extend the laws for the disposition of the public lands into the territories of Oregon, California and New Mexico. The public interest would seem to require that this should be done at an early day. To carry it into effect the negotiation of treaties with the Indian tribes who claim title to the lands * * * will be necessary, accompanied with the usual appropriations for surveys.

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[16] Mission San Luis Rey, Engelhardt, p. 20.

[17] California Archives, state papers and col., vol. 2, page 416, Bancroft collection.

[18] Affidavit of S. Arguello to Captain H. S. Burton, U. S. A., Jan. 2, 1856, 34th Cong., 3rd sess., Executive Document No. 76.

That Indians were thickly settled along the coast lands has been well established by American army officers and others who made coastal reconnaissances ascertaining climate, topography and nature of inhabitants. The report of Lieutenant A. W. Whipple's expedition from San Diego on the coast to the Colorado River, made between September 11 and December 11, 1849, to the Secretary of War contains the following:

> Having engaged Tomaso as guide and Indian interpreter, on the 11th day of September, 1849, we started from the mission of San Diego for the junction of the Rio Gila with the Colorado.
>
> Tomaso is chief of the tribe of Indians called Llegeenos, or Diegeenos. Whether this was their original appellation, or they were so named by the Franciscans from San Diego, the principal mission among them, I could not learn. According to Tomaso, his tribe numbers about 8,800 persons, all speaking the same language, and occupying the territory from San Luis Rey to Agua Caliente. They possess no arms, and are very peaceable. Crimes, he says, are punished —theft and bigamy by whipping, and murder by death. They profess the greatest reverence for the church of Rome, and, glorying in a Christian name, look with disdain upon their Indian neighbors of the desert and the Rio Colorado, calling them miserable gentiles.[19]

Hugo Reid,[20] at the same period writes of the customs and habits of the Gabrielleno Indians. These lived around Los Angeles, which was then an obscure village or pueblo. Their area extended to and along the coast.

From 1848 until 1851, officials charged with the responsibility of dealing with the California land titles and with Indian titles, realized that the status of the California Indians was very different from that of other American Indians.

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[19] U. S. Senate Ex. Doc. 31st Cong., 2nd sess., 1850-1851, Doc. No. 19.

[20] Hugo Reid—Indians of Los Angeles County.

An earnest effort was made by the Congress and by the executive branch of the government to secure accurate information as to the state of land holdings in California, including Indian titles. Thomas Ewing, Secretary of the Interior, appointed Wm. Carey Jones, "adept in the Spanish language" and "a lawyer well skilled in the Spanish colonial titles," to examine into the land titles in California and Indian rights, "as existing under the Spanish and Mexican governments."[21] This was to serve as a basis for recommendations to Congress. The army sent Captain H. W. Halleck for somewhat similar purposes.

When Senator Atchison, chairman of the committee on Indian Affairs, was asked to prepare a bill authorizing the President to appoint three Indian agents to negotiate with the Indians, he stated that, "we do not know the number of tribes of Indians . . . in California, nor do we know the number of Indians, nor the kind of title by which they hold the lands." He asked for information from the senators from California, whereupon Senator Fremont of California made the following statement:[22]

> * * * Wherever the policy of Spain differed from that of the other European nations, it was always in favor of the Indians. Grants of land were always made subject to their rights of occupancy, reserving to them the right to resume it even in cases where it had been abandoned at the time of the grant. But the Indian right to the lands in property, under the Spanish law, consisted not merely in possession but extended even to that of alienation; a right recognized and affirmed in the decisions of the Supreme Court of the United States. * * *
>
> * * * In California we have both classes of Indians—the Christian or converted Indians collected together at the mission and in large villages of the sea coast, and the interior, and the wild Indians of the mountains who never were reduced to subjection.

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[21] Rockwell, supra, p. 147.

[22] Congressional Globe.

> The statements I have given, Mr. President, are sufficient to show that the Spanish law clearly and absolutely secured to Indians fixed rights of property in the lands they occupy, beyond what is admitted by this Government in its relations with its own domestic tribes, and that some particular provision will be necessary in order to divest them of these rights. In California, we are at this moment, invading these rights. We hold there by the strong hand alone. The Indians dispute our right to be there . . . Our occupation is in conflict with theirs, and it is to render this occupation legal and equitable and to preserve the peace that I have introduced this bill. * * * (Congressional Globe 31 Cong., 1st Sess. Sept. 14, 1850, p. 1816)

With the unprecedented influx of American settlers into California and the rush to acquire land, terrific pressure against the Indians was asserted. The newcomers, wholly unacquainted with the Civil law and unaware of Indian title or of the rights of these people which had been protected in a tranquil order for 300 years, were resentful of the very presence of the Indians. There was strong pressure in the legislature even to remove them from the state and any recognition of any claim of any kind was repugnant to the people of the new territory.[23]

In the California senate, February 11, 1852, a resolution was read requesting that the California delegation in Congress "use their best endeavors to induce the federal government to remove the Indians of this state beyond its jurisdiction."[24]

Even had the Indians relinquished their title and sought to claim a homestead on the very lands which they owned, they were precluded by American law because until March 3,

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[23] The constitutional convention for California at which the constitution was signed by delegates from all over the state in 1849, contained the names of 47 signatories. Only seven names were of Mexican or Spanish origin. The domination of the new occupants was sweeping and complete and, of course, the Indians had no representation whatever, even though under Mexican law they had the right to vote.

[24] California Senate Journal, February 11, 1852.

1875,[25] no Indian could take up a homestead on the public domain even though his ancestors had occupied the land before the coming of the white man and had been confirmed and protected in their ownership by the Spanish and Mexican governments.

It is needless to review here the complex history of the act of September 30, 1850,[26] authorizing the appointment of three commissioners for the purpose of conducting negotiations with the chiefs, captains and head men of the Indians of California in order to give other lands and properties to the Indians, for the 18 treaties which were negotiated pursuant to that act created so much resentment in California and aroused so many protests, that Congress subsequently repudiated these treaties—after many of the Indians had removed from their lands in reliance on the promises in those treaties. Many others, who refused to move, were slaughtered in the defense of their properties. Due in large measure to the unprecedented pressure from California, the treaties were rejected by the United States Senate on July 8, 1852, even though the full authority of the commissioners to make the treaties was admitted.

In the meantime, the impact between the whites and the Indians had reached violent proportions. Redick McKee, one of the three commissioners appointed by the President to negotiate the treaties which were subsequently repudiated by the Senate, protested to John Bigler, the Governor of California, on April 12, 1852, that cases had come to his attention in the Sacramento Valley on the San Joaquin and in the country back of Los Angeles, "in which Indians have been shot down like bullocks."[27]

In a letter to the Indian commissioner, Luke Lea, on July 1, 1852, (one week before repudiation of the treaties by the United States Senate) Redick McKee,[27] speaking in respect

[25] 18 Stat. 402.

[26] 9 Stat. 544.

[27] U. S. Senate Doc., 33rd Cong., Spec. sess., 1853, p. 316.

to the treaties which proposed reservations of Indian land for those to be surrendered by the Indians, said:

> In all the discussions which have arisen upon the subject in this country, in the legislature, or elsewhere, no attempt has been made to show any material defect in the plan, or to substitute a better. As to removing and colonizing the tribes of California, beyond the limits of the State, the idea is simply ridiculous. In the first place, we have no vacant district or territory to send them to. In the second place, all the white men in California, aided by the entire army of the United States, could not drive them out, or, if driven out, keep them from running back to their old hunting and fishing grounds. * * *[28]

Edward F. Beale, superintendent of Indian Affairs for California, had reported to Commissioner Lea by letter of May 11, 1852, that the proposed reservations were composed "of the most barren and sterile lands to be found in California," which in no case compared "favorably with the agricultural and valuable portions of the state." He said:

> * * * The necessity of reservations, and of protection to the Indians thus located, is strikingly set forth in a communication of a recent date from R. McKee, [one of the commissioners] * * * addressed to yourself, and to which I have had access, in which he refers to the recent massacre of two or three villages by the whites, in which neither age nor sex was spared in human butchery. * * *[28]

By the end of 1852, Beale describes the plight of the Indians in a letter of November 22, in language which is all too indelibly seared into American history:

> * * * Driven from their fishing and hunting grounds, hunted themselves like wild beasts, LASSOED, and torn from homes made miserable by want, and forced

[28] U. S. Senate Ex. Documents, 33rd Cong., Spec. sess. 1853 (p. 342 ff.

into slavery, the wretched remnant which escapes starvation on the one hand, and the relentless whites on the other, only do so to rot and die of a loathsome disease, the penalty of Indian association with frontier civilization. This is no idle declamation—I have seen it; and seeing all this, I cannot help them. I know that they starve; I know that they perish by hundreds; I know that they are fading away with a startling and shocking rapidity, but I cannot help them. Humanity must yield to necessity. They are not dangerous; therefore they must be neglected. I earnestly call the early attention of the government to this condition of affairs, and to a plan I have proposed in a previous letter for its relief. It is a crying sin that our government, so wealthy and so powerful, should shut its eyes to the miserable fate of these rightful owners of the soil. * * * [29]

b. *The lost appeal.*

It is impossible to review adequately here the tragic record[30] of the Indian appeal to legal processes and protection of the new sovereign power in California. While there were sporadic bursts of violence in a losing rear-guard action of a retreating race, the story is mainly one of a patient appeal to authority and faith in the ultimate justice of the United States.

The principal administrative officers of the United States Government were necessarily in the military arm of the government. Their confusion is typically reflected in a letter of February 11, 1853, to the Secretary of War from Colonel G. Wright, in command at Fort Reading, which read in part as follows:

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[29] U. S. Sen. Doc., 33rd Cong., Spec. sess., p. 378.

[30] See documents incorporated in message from the President of the United States, Franklin Pierce, in regard to Indian affairs on the Pacific, dated February 16, 1857, to the House of Representatives, with accompanying report from Jefferson Davis, Secretary of War, with covering letter from Winfield Scott; 34th Cong., 3rd sess., 1856-1857, Executive Documents Nos. 66 to 81.

I desire to obtain certain information from the headquarters of the division in relation to settlers on the public lands in California not surveyed. I speak of lands not surveyed by the general government, and not covered by any grant either before or after the acquisition of the country by the United States.

Is there any law authorizing persons to settle on such lands? Or are they not now considered as Indian reservations, and subject to the laws in relation thereto?

Has the general government transferred to the State of California the right to authorize settlements on such lands and to guarantee possession to the occupant?

* * * * * * * * *

I am far from wishing to throw any obstacles in the way of persons desirous of locating on lands in good faith, and for the purposes of cultivation and improvement; but the prohibitions contained in laws above referred to must be enforced if it is "Indian Country." (See footnote 30, where this letter and all others quoted in this section appear.)

The reply came from Assistant Adjutant General E. D. Townsend at the headquarters of the Pacific Division in San Francisco on March 1, 1853, advising as follows:

Your two letters of February 11 have been received. The commanding general desires me to say that the one inquiring as to the right of settling upon lands in California neither granted nor ceded in any way, presents the question in so clear a manner that it will be referred to Washington for a decision. In the meantime, *the general directs that no obstacle be made to the occupancy of the country by the citizens.* (Italics supplied.)

There are two points which may be borne in mind on this subject; one, that it may be claimed that California came into the Union with the usages of the Spanish and Mexican governments in regard to (or disregard of) Indians; the other, under existing laws, *it requires an order from the President of the United States to remove, by military force, intruders upon Indian lands.* (Italics supplied.)

With such abysmal ignorance of the true legal position of the Indians and of the obligations of the United States Government under the Treaty of Guadalupe Hidalgo, and handicapped as the Indians were even by lack of knowledge of the language of the newcomers, what chance was there for administrative relief? History does not record an instant in which one actually secured an order from the President of the United States to remove "by military force intruders upon Indian lands."

A letter of Major General Wool to Governor Johnson of California appealed for help for "friendly Indians," many of whom had been slaughtered. The general said:

> The superintendent of Indian affairs says he is not authorized to give assistance to any Indians who will not go upon reserves.
>
> All who are acquainted with the Indian character know that they cling with great pertinacity to the land of their forefathers and of their nativity, and these Indians, then, will not do the bidding of the superintendent so long as they can possibly exist without compliance.

In the south, among the so-called "Mission Indians," which were petitioners' predecessors, property rights were much more clearly defined, and a case for the Indians was ably and patiently stated by some of their own leaders. As reported in a letter from the mission of San Diego on January 27, 1856, by Captain H. S. Burton:

> I have the honor to report * * *. On my arrival at San Bernardo on the 17th inst., I sent for Panto Captain of the San Pascual Indians and during a long conversation with him he urged most forcibly the right to protection from our government against the encroachments of squatters upon the lands legally granted to his people.
>
> * * * * * * * * * *
>
> * * * the letter I now send you from Don Santiago Arguello (marked A) will give the reasons why Panto is so urgent in his wishes for protection against some 5 or 6 squatters, who are taking possession of the best

lands granted to his people. It appears to me that this is a very just and proper occasion for the personal interference of the superintendent of Indian Affairs.

The Indians of San Pascual are friendly and anxious to remain so, but if their lands are taken from them without scruple they must retire to the mountains, naturally discontented, and ready to join in any depredations upon the whites.

When I arrived at Temecula on the 19th, Manuel Cota, captain general of the San Luis Rey Indians and Juan Antonio * * * were sent for. Manuel presented himself to me on the 20th inst., and to my surprise, I met a very intelligent and well-informed man, for his class. * * * He very properly said: "let us have one agent and we shall know what to do, but as it is, we are in trouble, we do not know what to do, we do the best we can, but sometimes make mistakes; we wish the superintendent of Indians to visit that he may see how we are living, and tell him our wants, why does he not come to see us * * *?"

The number of Indians in the San Luis Rey tribe is 2,470 and of these nearly 600 are able bodied men. * * * I would recommend that 2 agents be appointed for this county; one for the San Luis Rey and one for the San Diego Indians entirely independent of each other.

This division among the Indians had its origin at the time the missions of San Luis Rey and San Diego were flourishing, and the descendants of the Indians belonging to these missions continue the same system.

* * * * * * * * *

Juan Antonio stated to me that he and his people wished to see the superintendent of Indian Affairs. They wish to have a long talk with him about their wants—about the 12 or 13 American families who have settled upon their lands; they wish to be furnished with ploughs, hoes, spades, cattle, etc., in compliance with the treaty made with them in 1852 by Indian Commissioner O. M. Wozencraft. *He was advised to go home to his people and to keep them quiet,* and probably something would be done for them; * * * *and that they would be punished if they caused difficulties.* (Italics supplied.)

The Don Santiago Arguello referred to by Captain Burton, whose affidavit was enclosed in Burton's letter, was the former commandant of San Diego, and later Prefect of Los Angeles under the Mexican government, who continued to live in California in retirement after the American occupation. Don Santiago Arguello, in all fairness, did his best for the Indians by submitting to Captain H. S. Burton an affidavit to the following effect:

> The undersigned certifies, on honor, that the pueblo of San Pascual in San Diego county, was founded by order of the superior government of Upper California, in consequence of the secularization law of the Missions, for which reason the parcel of land named San Pascual was granted to these same Indian families from the mission of San Diego, according to the regulation or order given by the government. At the same time were founded San Dieguito, Las Flores, etc., all by the same order; and the documents ought to exist in the archives, because these orders were sent to the undersigned, being then the authority of San Diego and its jurisdiction. In confirmation of the abovesaid, I will mention that, in the year 1846, Dr. Bonafacio Lopez made a petition for this same land, and the government (declared) decreed "that the land could not be given because it belonged to the Indians of San Pascual;" therefore it seems unjust to deprive them of their lands with the pretext that they have no titles, when it is so well known that, in foundations of this kind, they only report to the government, and place all the documents in the archives.
>
> This is all I can say for the sake of truth and at the request of the interested.
>
> Given in my rancho of San Antonio Abad a Ti Juan
>
> S. Arguello.
>
> January 2, 1856
>
> I certify that the above is correct.
>
> H. S. Burton
> Captain—3rd Artillery

The record is filled with reports and letters of fair-minded army officers, such as the letter of April 29, 1856, from Lieutenant William A. Winder, at the mission of San Diego, to Captain H. S. Burton, commandant at the mission of San Diego, as follows:

> In obedience to your instruction of April 21, I proceeded to the rancho of San Jacinto in the vicinity of San Gorgonia. On my arrival there I sent for Juan Antonio, the principal captain of the Carvilla Indians, from whom I learned the Indians were all quiet * * * but the whites were encroaching upon the lands now occupied by the Indians * * *.
>
> I ascertained from other sources that the whites were in the habit of taking the gardens or other lands from the Indians without paying them either for crops or improvements, and * * * the Indians, being without food, steal the cattle of the whites * * *.
>
> I would further suggest that measures be adopted to mark the boundaries of the Indian lands, and that the whites be prevented from encroaching further.
>
> I enclose herewith a letter * * * from which you will perceive that the San Luis Indians are also in destitute condition, and will therefore be compelled to steal cattle, in order to prevent starving; also the great danger of an outbreak should the threats of the whites be carried out.
>
> The foregoing facts will, I think, show the absolute necessity of adopting at an early day, some means for protecting the Indians from the whites, and to prevent the former from stealing the cattle of the latter.

The patient and futile appeals of the forefathers of some of the very petitioners appearing herein, are faithfully reported by the conscientious Captain H. S. Burton from San Diego, to the Assistant Adjutant General of the Department of the Pacific on June 15, 1856, and the patient, as yet undisillusioned faith in a treaty which had been repudiated by the United States Senate four years before is reflected in Captain Burton's letter:

> I have the honor to report that I left this post on the 26th of May * * * and visited the San Luis Rey and

Carvilla Indians. I arrived at San Timeteo, the village of Juan Antonio, Captain of the Carvilla Indians on the 29th of May. * * *

The day I arrived at San Timeteo, I met in council Juan Antonio, with all of his sub-captains * * * Juan Antonio, with the assent of his captains spoke to me as follows:

"In former years I lived at the rancho of San Bernardino when it belonged to the Luyo family. When the Mormons came there, I arranged with them to come and live here (San Timeteo). The Americans are now squatting here, and taking away my land, wood and water. We have not land enough to plant; my people are poor and hungry * * *. Some Americans tell us we must go away to the mountains to live; other Americans tell us we must all live together on some land. We do not understand it; we do not like it."

This speech I wrote in my note book as Juan Antonio delivered it, and I am satisfied he told the truth. Some Americans have squatted among these Indians, taking possession, as the Indian states, of a large portion of the lands formerly planted by the Indians * * *. I answered him as follows:

"I have heard you, and will relate what you have said to my general. If you have been wronged, he will endeavor to see you righted. You must remain quiet and keep your people so * * *. The government is watching you, and if you do wrong, you will be punished." * * *

On the 9th inst., a deputation from the San Diego Indians, headed by their Captain Tomas, visited me, and asked compliance with the terms contained in a document styled

"Treaty of peace and friendship with the Dieguino Indians, January 7, 1852." I send you a copy of this document. Tomas stated that the Dieguinos had always been friendly to the Americans, had never received anything * * *. The Dieguinos were poor, and wanted something to eat. I told him this treaty would not be complied with, but that I would report the matter to the general. In the meantime to go home and keep his people quiet. Tomas intimated his intention of visiting the general himself.

The reply of Assistant Adjutant General Jones shows that the Indians were already nearing the end of the trial as recipients of mere relief by act of grace:

> The general commanding directs that, in case the superintendent of Indian affairs does not attend to the wants of the Dieguino Indians, and should you deem it necessary, you will issue rations to them * * *. Occasionally, they may be allowed a beef.

Lieutenant LaRhett Livingston in command at Fort Miller, California, on August 17, 1856, wrote to the Assistant Adjutant General:

> * * * * * * * * *
>
> Many Indians have come into the fort and many more will come. There are not supplies here to feed them all * * *.
>
> I shall collect all the Indians living in the foothills and threatened by the whites, at the fort for protection, till instructions be received * * *.
>
> * * * The Indian agents have never fed or attended to one tenth part of the Indians here. Still the whites appropriate their country, and drive them from it.

The price to be paid for assistance from the Indian Bureau was abdication from all property rights and retirement to an Indian reservation. Thus, W. W. Mackall, Acting Adjutant General, wrote to the Superintendent of Indian Affairs in San Francisco on August 5, 1856, in regard to the decimated population of Indians:

> * * * It is said that there are 60,000 Indians in California, and not more than 2,000 of these are on reservations; and on these 2,000, and the employees of your department, the whole of the large appropriation for Indian affairs in this state is expended. To this state of affairs the general bids me call your attention * * *.

Driven back to the barren mountain tops and rocky valleys, unwanted by the white man after a losing battle with administrative inertia and sheer legal anarchy in frontier

territory, the Indians now emerge from these retreats to assert legal claims, which they most surely have to the only remaining portions of a vast empire of property, at the first opportunity they have had in 100 years, and for the first time in their history through private counsel of their own choosing.

c. *Obligations of the Treaty of Guadalupe Hidalgo.*

Against the foregoing tragic background of history, the true legal rights of property owners in California at the time of the American acquisition stand out in vivid contrast. The treaty was proclaimed by President Polk on July 4, 1848. Protection of existing property rights was one of the principal subjects of discussion in the drafting and consideration of the treaty.

The Senate rejected certain articles and a protocol was entered into at Querétaro May 26, 1848, between officials of the Mexican and American governments. Article 2, of that protocol reads:[31]

> Conformably to the law of the United States, legitimate title to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 3rd day of May, 1846. (Date of outbreak of Mexican-U. S. war.)

President Polk, in his message proclaiming the treaty, stated that the inhabitants were protected in their rights and property even if no article had been inserted.[32] The article as amended states:[31]

> The Mexicans who in the territories aforesaid shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article (1 year to declare their intention)

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[31] Treaty of Guadalupe Hildago, 30th Cong., 2d sess., 1848-49, Vol. 9, U. S. Stat. at Large, p. 927.

[32] Executive Documents No. 50, p. 8, 30th Cong., 2d sess., 1848-49.

shall be incorporated into the Union of the United States.

And in the meantime, [they] shall be maintained and protected in the free enjoyment of their liberty and property and secured in the free exercise of their religion without restriction.

The treaty also sets forth that "property granted shall be inviolably respected." (Vol. 9, U. S. Stat. at Large, p. 929.)

Mr. Justice Field, upholding a grant attacked as void and fraudulent, in *U. S.* v. *Auguisola,* 1 Wall p. 358, said:

* * * The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property to the inhabitants of the ceded territory or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

As to certain limitations, such as prohibition of alienation in grants, Mr. Justice Taney stated very clearly the force and effect of Mexican law in *Fremont* v. *U. S.,* 17 Howard, p. 565:

Two other objections on the part of the United States to the confirmation of this title remain to be noticed. The first condition annexed to the grants prohibited the grantee from selling, alienating, or mortgaging the

> property * * *. * * * this condition is in violation of the Mexican laws and could not, therefore, be annexed to this grant, for by the decree of the Mexican Congress of August 7, 1823, all property which had been at any time entailed, ceased to be so from the 20th September, 1820, and was declared to be and continue absolutely free and no one in future was permitted to entail it.

The United States Supreme Court in *U. S.* v. *Ritchie,* 17 Howard 525, recognized the right of an Indian to own and convey title to land. In this case the title claimed was derived from a grant by Juan B. Alvarado, Governor of California, to Francisco Solano, dated January 28, 1842. The commissioners appointed under the act of 1851 (9 Stat. 631) to investigate private land claims ordered that the title be confirmed (January 3, 1853). The Attorney General of the United States filed notice of appeal, one of the objections being that Solano, being an Indian, was not competent, according to the law of Mexico concerning the disposition of the public lands at the time of the grant to take and hold real property and hence that the grant by the governor was inoperative and void. After discussing at great length the status of Indians under Mexican law, the court held "that he [Solano] was one of the citizens of the Mexican government at the time of the grant to him and that as such he was competent to take, hold and convey real property, the same as any other citizen of the Republic."

Again in *U. S.* v. *Moreno,* 1 Wall. 400, the Supreme Court held:

> California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. That ces-

> sion did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations.

Under the treaty, the United States Government acquired from Mexico the *sovereignty* over all ceded territory, but *titles* remained vested in whosoever held them under Mexican law. Consequently, title to lands which have been granted or confirmed to the Indians prior to the acquisition of California by Mexico remained in the Indians.

II. INDIAN TITLE TO THE TIDELANDS.

1. Use of Tidelands Indissolubly Linked with Uplands.

The property rights of the Indians in the tidelands were from time immemorial, down through the gauntlet of civil and common law hazards, consistently recognized as concomitant to use of the uplands.

The mere fact that the common law might or might not recognize and protect fishing rights in ocean waters, or rights in lands below the high water mark, does not mean that such rights were or could be abolished by extension of American sovereignty over the waters in question. It is settled that Indian legal relations established by tribal laws or customs antedating American sovereignty are unaffected by the common law. As was said in Ex Parte Tiger, 2 Ind. T. 41, 47 S. W. 304, (1898):[33]

> * * * If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew. (p. 305.)

[33] See opinion of Secretary of the Interior, February 13, 1942, in regard to Indian fishing rights in Alaska.

In *Delaware Indians* v. *Cherokee Nation,* 38 Ct. Cls. 234 (1903), decree modified 193 U. S. 127 (1904), the plaintiff sought to establish certain rights in the property of the Cherokee Nation based upon common law rules respecting land conveyances. In reaching a conclusion that this claim could not be supported (later confirmed by the Supreme Court), the court of claims declared:

> The law of real property is to be found in the law of the situs. The law of real property in the Cherokee country therefore is to be found in the constitution and laws of the Cherokee Nation. (At p. 251.)

There could be no better illustration of the Indian use of tidelands than the facts of this case where continuous traffic in fishing, seal hunting and other pursuits, depended wholly upon full utilization of the tidelands. The official report of the mission of San Luis Rey to the Spanish Minister of Foreign Relations in 1814[34] said:

> [The Indians'] food consists at times of deer, rabbits squirrels * * *. It is to be observed, however, that among those who live near the seashore fishes form the more abundant food.

Another report from the head of the mission of San Luis Rey on November 22, 1822, in answer to a questionnaire from the Imperial Commissioner from Mexico City[35] said in regard to fisheries:

> This mission, although not more than a league and a half distant from the seashore, cannot be seen from there * * *. Nevertheless, the native citizens have various places where they fish, going out into the ocean even when the tide is running high. To date, however, no national or foreign ship has ventured to this point * * *.

As has already been pointed out, the Indians depended on the products of the tidelands for clothing as well as for

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[34] See "Missions and Missionaries of California," Engelhardt, Vol. III, pp. 10-11.

[35] Santa Barbara Archives, ad annum.

food, tanning seal skins most expertly. Rancherías on the outlying islands were a part of the network of traffic over the tidelands. They are found listed among rancherías which came under the influence of missions on the mainland. The mission at San Buenaventura, for example, listed rancherías on Santa Cruz and Isla de Frente.[36]

While the fishing practices and rights of Indians were aboriginal they continued down into the era of the common law, have been fully recognized and protected by this court. Mr. Justice Holmes said of aboriginal fishing rights in *Damon* v. *Hawaii,* 194 U. S. 154 (1904):

> This is an action at law, somewhat like a bill to quiet title, to establish the plaintiff's right to a several fishery of a peculiar sort, between the coral reef and the ahupuaa of Moanalua on the main land of the Island of Oahu. The organic act of the Territory of Hawaii repealed all laws of the Republic of Hawaii which conferred exclusive fishing rights, subject, however, to vested rights, and it required actions to be started within two years by those who claimed such rights. Act of April 30, 1900, c. 339, §§ 95, 96; 31 Stat. 141, 160. At the trial the presiding judge directed a verdict for the defendant. Exceptions were taken but were overruled by the Supreme Court of the Territory, and the case comes here by writ of error.
>
> The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. (At pp. 157, 158.)

[36] From the mission register and roll of the Mission San Buenaventura. See Engelhardt—"Mission San Buenaventura."

That the common law recognized no private rights of fishery distinct from the land ownership was held no obstacle to the native rights advanced in *Damon* v. *Hawaii.* The common law was equally irrelevant in interpreting the extent of those rights. The court said:

> * * * We assume that a mere grant of the ahupuaa without mention of the fishery would not convey the fishery. But it does not follow that any particular words are necessary to convey it when the intent is clear. * * * There is no technical rule which overrides the expressed intent, like that of the common law, which requires the mention of heirs in order to convey a fee. (At p. 161.)

Justice Holmes also delivered the opinion in *Carter* v. *Hawaii,* 200 U. S. 255 (1906), in which the above case was referred to. The court said:

> * * * They (the plaintiffs) offered evidence at the trial that, before the action of the king in 1839, those under whom the plaintiffs claim title had enjoyed from time immemorial rights similar to those set out in the statutes, and also that they had been in continuous, exclusive and notorious possession of the konohiki right for sixty years. They offered in short to prove that their predecessor in title was within the statutes and therefore owned the fishery, it not being disputed that if he did, the plaintiffs own it now. The judge rejected the evidence and entered judgment for the defendant, and on exceptions this judgment and that in *Damon* v. *Hawaii* were sustained at the same time in one opinion by the Supreme Court. 14 Hawaiian, 465.
>
> We deem it unnecessary to repeat the ground of our intimation in the former case, that the statutes there referred to created vested rights. We simply repeat that in our opinion such was their effect. The fact that they neither identified the specific grantees nor established the boundaries, is immaterial when their purport as a grant or confirmation is decided. It is enough that they afforded the means of identification, and that presumably the boundaries can be fixed by reference to existing facts, or the application or principles which

have been laid down in cases of more or less similar kind.

The omission of the plaintiffs' predecessor in title to establish his right to the fishery before the Land Commission does not prejudice their case. See *Kenoa* v. *Meek*, 6 Hawaiian, 63. That commission was established to determine the title to lands as against the Hawaiian Government. In practice it treated the fisheries as not within its jurisdiction, and it would seem to have been right in its view. See *Akeni* v. *Wong Ka Mau*, 5 Hawaiian, 91. (At pp. 256, 257.)

As recently as 1946, the Circuit Court of Appeals for the Ninth Circuit, in *Moore* v. *U. S.*, 1946, 157 Fed. Rep., 2d Series, 760, similarly protected the ancient rights of the Quillayute Indians of the northwestern side of the Olympic Peninsula in the State of Washington. An injunction was granted against the officers of the State of Washington from interfering in any manner or asserting jurisdiction or control over fishing activities of the tribe in the Quillayute River and the tidal waters thereof which bordered upon, or touched the lands of the Quillayute Indian reservation, or in the tidal waters of the Pacific Ocean bordering upon and touching the reservation described in an executive order of February 19, 1889. The circuit court said, in affirming the decision below:

> From time immemorial their home was the village at the mouth of the Quillayute River. When first visited by white men, a mound of shells showed that part of their diet was made up of the clams dug at the receding tides of the ocean beach of the sandspit and adjacent waters. They were then catching and smoking salmon, of which there was some commerce with other Indian people. A part of their food was the meat of the sea-going mammals, whales, the sea lions and the pelagic seals moving in the Pacific to and from the Pribilofs.

In construing the intention of the executive order, the circuit court quoted the Supreme Court of the United

States in the Alaska Pacific Fisheries case, 248 U. S., p. 89, 39 S. Ct. p. 42, which dealt with a reservation of navigable waters adjacent to the Annette islands. This court said:

> The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing ground was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs.

2. Forcible Separation of Indians from Tidelands—Not a Relinquishment.

It remains only to note that the forcible separation of the petitioners, and other California Indians similarly situated, from their property rights in the tidelands does not constitute a forfeiture or abandonment of them. No contention could be more tenuous in face of the tragic history of the expulsion of these people from their lands.

This court held in the case of *United States of America, as Guardian of the Walapai Indians of the State of Arizona* v. *Santa Fe Pacific Railroad Company,* 314 U. S. 339, 86 L. Ed. 260:

> * * * On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem. Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indian lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation unless we are to be in-

sensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly a forced abandonment of their ancestral home was not a "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866.[37]

III. CONCLUSION.

Petitioners stand at the end of a grueling trail of history, 100 years long. A rich and beautiful land has been wrested from them unlawfully and by force. The tidelands remain in a virgin state of title pursuant to the decision of this court on June 23, 1947, with the relationship between the Indians and the United States Government standing preserved in the legal status in which it was confirmed and protected by the Treaty of Guadalupe Hidalgo and the law of nations upon acquisition of California in 1848.

If, as Justinian said, "Justice is the set and constant purpose which gives to every man his due." [38] then, at long last, let justice be done as prayed for herein, firmly based upon uncounted years of aboriginal possession, over 300 years of Spanish law, [redacted] years of Mexican law, over 100 years of American law, and the law of nations.

Respectfully submitted,

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[37] The petitioners' case is distinguishable from Barker v. Harvey, 181 U. S. 481, for reasons which are so conclusive as to preclude the necessity of full discussion of Barker v. Harvey now.

[38] Institutes of Justinian, Book I, Title I.