IN THE

Supreme Court of the United States

October Term, 1947

No. ~~12~~ 6, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Answer to Petition for Intervention and to Motion for Injunction and Appointment of Receiver, Motion to Strike Said Petition and Motion, and Brief in Support of Answer and Motion.

FRED N. HOWSER,
Attorney General of the State of California,

EVERETT W. MATTOON,
Assistant Attorney General,
600 State Building, Los Angeles 12, California,
Counsel for California.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1947
No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Answer to Petition for Intervention and to Motion for Injunction and Appointment of Receiver, and Motion to Strike Said Petition and Motion.

The State of California, by way of answer to the Petition for Intervention and the Motion for Injunction and Appointment of Receiver filed on behalf of certain bands of Indians of California and of certain individual Indians of California and other bands of Indians and individual California Indians similarly situated, respectfully represents and alleges as follows:

1. This Court has no jurisdiction to entertain said petition and motion for the reason that the same constitute an unauthorized attempt by said petitioners to sue the United States and the State of California without their consent and for the further reason that this Court has no

jurisdiction to entertain such a suit as an original proceeding.

2. California denies that said petitioners or any of them are or ever have been the owners in fee simple or otherwise of any right, title or interest in or to substantial portions or any portions of the lands and areas underlying the Pacific Ocean described in the opinion in this cause announced on June 23, 1947. On the contrary, California alleges that said petitioners do not now own and never have owned, nor have their ancestors ever owned, any portion of said lands or any right, title or interest therein other than the right to use the waters of the ocean for the purposes of navigation and fisheries to the same extent as other members of the public, subject to the applicable laws of the United States and the State of California.

3. California denies that said cause or petitioners' petition and motion involve the construction of any treaty between the United States and foreign nations. On the contrary, the rights of petitioners depend solely upon the laws of the United States and of the State of California. Petitioners have shown no right whatever in or to said areas underlying the Pacific Ocean arising either under Federal or State law or under any treaty.

4. Petitioners, having shown no basis for any valid claim of right on behalf of petitioners in or to said lands, are not entitled either to an injunction or to the appointment of a receiver or receivers.

The State of California moves to strike said Petition for Intervention and Motion for Injunction and Appoint-

ment of Receiver from the files and records of said cause. Said motion to strike is predicated upon the ground that said Petition for Intervention and accompanying motions are not timely and will unduly delay and prejudice the adjudication of the rights of the original parties, and upon the further grounds set forth in the foregoing Answer and upon the matters contained in the following Brief.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

EVERETT W. MATTOON,
Assistant Attorney General,
600 State Building, Los Angeles 12, California,
Counsel for California.

IN THE

Supreme Court of the United States

October Term, 1947
No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA.

Brief in Support of Answer and Motion to Strike of State of California.

I.

The Court Has No Jurisdiction to Entertain the Petition and Motion.

It is a fundamental rule that an intervention in a pending lawsuit must be in subordination to the main case and to all proceedings had prior to such intervention. Counsel for petitioners apparently recognize the existence of this rule for, on pages 3 and 4 of the motion for leave to intervene, petitioners ask that they be allowed to participate as parties defendant "in subordination to all of the proceedings hereinbefore had in the said cause."

Notwithstanding the above language, petitioners' allegations are (p. 4) that they are

> "jointly and severally, the owners in fee simple, and claim *all* the right, title and interest in and to sub-

> stantial portions of the lands and areas underlying the Pacific Ocean described in the opinion in this cause announced on June 23, 1947."

In the petition for intervention, pages 11 and 12, petitioners make a similar assertion, in these words:

> ". . . 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[1] underlying the Pacific Ocean."

Petitioners then allege that they believe their rights "to be paramount to that of both the United States of America and the State of California."

Again, on page 15, petitioners allege their rights "to be paramount to both the United States of America and the State of California."

It is obvious from these allegations that petitioners are not claiming in subordination to the main case. They are in substance and effect endeavoring to sue the United States and the State of California to quiet titles to lands which they allege that they own in fee simple. This is a new cause of action and not an intervention.

Petitioners have no right in law to sue either the United States or the State of California without its consent, and no such consent has been given by either of said parties. Furthermore, even if the Federal Government or the State had consented to be sued by these Indians, such a suit

---

[1]Petitioners do not define the term "tidelands" but their reference to the area described in the Court's opinion indicates that they are using the term to describe the so-called three-mile belt within the boundaries of California but below low-water mark and outside of inland waters, ports, bays and harbors.

could not be brought as an original proceeding in the Supreme Court of the United States.

Petitioners refer to the case of *Oklahoma v. Texas,* 258 U. S. 574, in support of their motion for leave to intervene. This case in no way supports their petition. It involved a disputed boundary between the two states. The Court in a prior decision (256 U. S. 70 and 608) had determined that the true boundary as fixed by a treaty "is along the south bank of the [Red] river, as claimed by Oklahoma and the United States, and not along the medial line of the stream, as claimed by Texas, . . ." Interventions of private claimants were allowed in this case but the interventions were all subordinate to and in no way conflicted with the basic ruling above mentioned. Private parties intervened because the boundary line of their properties would be affected by the *location on the ground of the actual line* of the south bank of the river.

This, as we have pointed out previously, is comparable to the situation along the California coast. We have maintained and do now maintain that lessees and grantees of the State of California are indispensable parties to the proceeding now pending in this Court to establish the boundary line between the submerged lands over which it has been held that the Federal Government has paramount rights and the lands owned by the grantees and lessees of the State. We do not believe this Court can legally adjudicate the boundaries of lands which are in the possession, under claim of right, of persons who are not parties to this action, nor enjoin such persons from trespassing on lands of which they are now in possession.

However, the fact that these lessees and grantees will have to be made parties before their boundaries can be fixed and before injunctions can be issued against them

furnishes no basis for permitting intervention by new parties who seek to establish property rights which are alleged to be paramount and superior to those of both principal parties in the case.

For the foregoing reasons the petition and motions should be dismissed even if petitioners had any basis for their claim. This they do not have, as we shall show.

II.

Petitioners Do Not Own and Never Have Owned Any Portion of California's Three-Mile Submerged Coastal Belt.

Petitioners *allege,* as above set forth, that they are the owners in fee simple of substantial portions of the submerged coastal lands involved in the main case, but nowhere is there any statement of fact or of legal authority which would show that petitioners ever before had or even claimed any right in the lands below high-water mark, except the right exercised by their ancestors to use the waters covering such lands for purposes of navigation, fisheries, seal hunting and gathering shells. In other words, petitioners have shown nothing but a usufructuary right held in common not only by all Indians but by all persons—Spaniards, Mexicans and Americans—who might have occasion to use such waters.

It is asserted that "The *use* of the tidelands by the Indians from time immemorial was indissolubly linked with and concommitant to the *occupation* of the *shorelands*" (p. 8). There is not even any basis upon which it can be shown that the Indians ever *owned* the *shorelands* in private ownership, or if it could be conceived they did, what shorelands were owned. But, assuming that at some time in the past some of them did own portions of the

shorelands, there is nothing alleged anywhere in petitioners' motions or brief from which it can be shown that the ownership of the shorelands carried with it *ownership* of title in fee simple or otherwise to any portion of the submerged lands.

It must be borne in mind that petitioners' supposed chain of title begins with the "aboriginal possession" (p. 49) of the Indians, prior to the coming of the Spaniards in 1542. Petitioners have not shown and cannot show that any ownership either above or below high-water mark existed in the Indians prior to the coming of the Spaniards or, indeed, at any other time.

This Court, in its decision of June 23, 1947, stated:

> ". . . From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it."

If the thirteen colonies had not acquired ownership of the soil of the three-mile belt by 1776, it calls for some stretch of the imagination to assume that the California Indians owned fee simple title to the three-mile belt prior to 1542—or even prior to the first actual Spanish settlement, which occurred in 1769. And if the Indians did not own the three-mile belt prior to the discovery and conquest of California by Spain, it is certain that they do not own it now, for they never acquired it by grant from the Spanish or Mexican governments.

The fact of the matter is, the Indians never owned these lands at all. Indeed, it has long been settled that the Indians in this country (California included) never had fee title even to uplands. Indian rights in real property, both

before and after the discovery and conquest of America by the various European nations, were rights of occupancy only. This whole subject is discussed and the principles governing it settled in the leading case of *Johnson v. McIntosh,* 8 Wheat. 543 (1823). While of course this case was decided prior to the acquisition of California by the United States, the decision referred specifically to the titles of lands acquired in America by the various Eureopean nations, including Spain. The ruling principle is stated as follows:

> ". . . The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, . . ."

This rule was held to be applicable to

> "all European governments, from the first settlement of America." (p. 592)

It is quite true that the policy of the Spanish and Mexican law was to protect the Indians in the possession "of their gardens and homes," but neither Spanish nor Mexican law recognized any title to land in the Indians. So far as the three-mile belt is concerned, it would seem quite obvious that the Indians never "occupied" these submerged lands to the extent that would give them even the possessory right which was recognized by Spanish law. And even if it could be held that they acquired a possessory right to the three-mile belt under Spanish law, that right would not have been recognized by American law after the American conquest unless confirmed by the California Land Commission.

Petitioners name some twenty-one bands of Indians. The basis of their alleged title is that they occupied the shorelands and that the use of the tidelands was indissolubly linked to the occupancy of the shorelands. On this theory it would seem that only Indians who lived upon lands adjacent to the sea could have aquired any rights in the submerged lands. But petitioners do not allege that all of the twenty-one bands that are petitioners occupied "shorelands" and the fact is they did not. There were many bands that lived in the inland valleys and had no access to the ocean at all. Petitioners do not state upon what basis such bands of Indians could have any claim to the submerged lands.

Petitioners assert that they appear in behalf of all other bands of Indians and of individual Indians "similarly situated," but we are not told whether this refers only to bands of Indians who occupied shorelands prior to the time they were forceably separated from their lands and driven inland (as alleged by petitioners), or to all Indians in California.

Furthermore, although petitioners assert that they own "substantial portions of the lands," it is impossible to ascertain what submerged lands petitioners claim, or even what general basis or criterion exists upon which it could ever be ascertained what portions are claimed.

If petitioners' theory of *use* by the occupants of the shorelands be adopted, then those bands which did actually occupy the shorelands would presumably have rights only in the submerged lands adjacent to such shorelands.

There is not the remotest indication as to whether any particular band ever occupied particular land, and, if so, what band occupied what land. Nevertheless, out of California's 1200-mile coast line, petitioners have selected the three small areas in which oil has been discovered and assert that they own these three areas and ask the Court to appoint a receiver to operate the oil production in these three areas for their benefit. (Petitioners' Motion, p. 14.) These are the same three areas as to which the United States recently asked that the Court ascertain the dividing line between the lands which this Court has held to be subject to the paramount power of the United States and the lands which belong to the State and its grantees and lessees.

None of the bands of Indians referred to in the petition have actually lived upon "shorelands" for probably more than a hundred years. It would be a strange coincidence if the ancestors of all twenty-one of the particular bands of Indians petitioning here had lived in one or another of these three small areas where oil has been found—even if they could prove that in their aboriginal state they did have some actual property interest which was preserved to them through the long period of the Spanish and Mexican regimes, which, obviously, they cannot do.

As bearing on the question of ownership we think it is pertinent to call the Court's attention to the fact that in October, 1947, counsel for petitioners herein filed an *amicus curiae* brief in the pending cause on his own behalf, in which it was represented that the California submerged lands, and particularly those from which oil has been produced, are "lands of the United States." (P. 3, par. 5.)

III.

If the Indians Had Any Property Rights in the Three-Mile Belt They Should Have Been Presented to the California Land Commission of 1851.

It is well settled that all persons in California who had interests in real property which antedated the American conquest were required by law to present their claims to the California Land Commission of 1851 for adjudication. Failing to do so, their rights were lost. It has been said that this was a harsh rule to apply to Indians, who were unfamiliar with legal procedure and who had no title papers or other evidences of title such as are customary among Anglo-Saxon peoples. We do not think this question is relevant to the matter here before the Court. It is well settled that the duty of securing the rights of citizens of a conquered country "belonged to the political department of the government."[2]

It is quite true that the treaty of Guadalupe Hidalgo, in accordance with the law and custom of nations, provided that private property rights within the ceded territory would be protected by the new sovereign. But the manner in which those rights were to be protected was exclusively within the province of Congress to determine. Congress determined this question by passing the Act of 1851 creating the California Land Commission.[3] If that act perpetrated an injustice to the Indians, the remedy lies solely with Congress. Courts can only apply the law as it exists.

---

[2]*Barker v. Harvey*, 181 U. S. 481 (1901); *Mitchell v. Furman*, 180 U. S. 402, 437-438 (1900); *Botiller v. Dominguez*, 130 U. S. 238, 247 *et seq.* (1888).

[3]9 Stat. 631.

An example of the application of the Land Commission Act to California Indians is found in *Barker v. Harvey,* 181 U. S. 481. In this case a band of Indians occupying an inland valley of California, commonly known as Warner's Ranch, claimed rights of occupancy on this ranch after the ranch had been patented by the United States in confirmation of a prior Mexican grant. Warner's Ranch is in San Diego County, about 45 miles inland from the sea and separated from it by a mountain range.

It is important to note that in the *Barker* case the Indians did not claim fee title. The Indian right of occupation of Warner's Ranch was all that was asserted, but this Court held that this right must be presented to the Land Commission and if not so presented would lapse and that the patent from the United States conveyed fee simple title unburdened by any "Indian right of permanent occupancy." (P. 492.)

In this case it was also argued that the courts should protect the Indians from this harsh rule of law. On this point the decision of the Court is pertinent.

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. *But the obligation is one which rests upon the political department of the government, and this court has never*

assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action." (Pp. 492-3. Emphasis added.)

It will be pertinent to point out that after the decision in *Barker v. Harvey* there was considerable public protest in Southern California as to this alleged injustice to the Indians because it appeared that about 300 Indians were to be evicted from their ancestral homes in the Warner Valley. As a result of this agitation Congress passed an act[4] creating the Warner's Ranch Commission to select new lands for these Indians and appropriated funds for the purchase of such lands. This commission made an exhaustive examination of the territory in and around Warner's Ranch and selected a site now known as the

---

[4]32 Stat. 257.

Pala Valley. This site was purchased by the United States and the Indians were moved to Pala. The report of this Commission[5] shows that at their new home the Indians had more than twice as much good tillable land as they had before and far better water supply. They live in the Pala Valley today and are one of the bands who are petitioners in this case. It is obvious, from the case of *Barker v. Harvey* and the subsequent events, that these Indians never occupied any coastal lands but were an inland band; and that if an injustice was done, it was the result of an Act of Congress and was later corrected by Congress in a very generous manner. How it can be said that these Indians, whose ancestors probably never saw the sea, now own fee simple title to the particular areas of California's three-mile submerged belt within which oil has been discovered is a mystery which petitioners' counsel has not unfolded.

The history of the treatment of the Indians, not only in California but in other parts of the United States, is a long and complex one. This is not the place to elaborate on the subject. It is enough to say that such matters as the pressure exerted on the Indians by the California gold rush[6] or the massacre of Indians in the Sacramento Valley and on the San Joaquin (p. 30), or even the forceable separating of Indians from areas adjacent to the sea, if that could be proven, have not the remotest bearing on the ownership of the lands and minerals beneath the three-mile belt off the coast of California.

---

[5]Report of Commission.

[6]The influx caused by the gold rush was almost entirely in Northern California. The bands of Indians referred to in the present petition were in no way affected by it.

IV.

The Decisions Cited by Petitioners Do Not Support Their Claim.

In the final section of their brief (p. 43) petitioners undertake to support their alleged property rights by authorities holding that

> "Indian legal relations established by tribal laws or customs are unaffected by the common law."

If it be conceded for the purpose of argument that this is true for certain limited purposes, the argument proves nothing because petitioners have shown no tribal law or custom by which the Indians ever acquired any property rights in the three-mile coastal belt or the lands thereunder. The only tribal custom referred to by petitioners is that

> "among those who live near the seashore fishes form the more abundant food."

In support of the claim that the Indians' "fishing practices and rights" have been recognized by this Court, petitioners cite *Damon v. Hawaii,* 194 U. S. 154. But the case does not support petitioners' theory that the fishing practices of the California Indians carried with them any property rights or even any *exclusive* fishery rights. In the *Damon* case the plaintiff had been granted by "royal patent" exclusive fishing rights "within certain metes and bounds." In other words, there was a specific grant of the fishing rights over described lands made by a sovereign power and subsequently recognized by the Hawaiian stat-

utes. The court held that this created a recognized property right. The organic act of the Territory of Hawaii repealed all laws of the Republic of Hawaii which had conferred exclusive fishing rights, but this repeal was made subject to vested rights. However, this act, like the California Land Commission Act, required that those who had vested rights must start actions within two years to establish such rights. This Court held that the exclusive fishing rights acquired by plaintiff by royal patent did constitute such a vested right, notwithstanding that it differed somewhat from "those familiar to the common law."

Petitioners next cite *Carter v. Hawaii,* 200 U. S. 255 (1906). This case is almost identical with the *Damon* case and applies the same principles, the only difference being that in this case "the fishery is not described in the royal patent." However, the fishery claimed was accurately described "by metes and bounds" and it was found that plaintiffs "had been in continuous, *exclusive* and notorious possession . . . for sixty years."

Petitioners next cite the case of *Moore v. U. S.,* 157 F. (2d) 760 (1946), which involved a tribe of Indians in the State of Washington. Petitioners cite this case as showing that the court "protected the ancient rights" of the Indians in and to certain fishing grounds. However, petitioners failed to point out that these fishing grounds were "granted" to these Indians "by treaty and by presidential reservation pursuant thereto." The court upheld the rights of the Indians to this exclusive fishery and held that State Fish and Game Laws were not applicable in

that area. This is a far cry from the claim that petitioners have property rights in all or any part of the three-mile belt of California which entitle them to the oil which has been developed therein by lessees of the State of California.

Conclusion.

In conclusion it may be said that if there were the remotest legal basis for petitioners' claim, it would apply even more strongly to lands beneath inland waters, ports, bays and harbors, and, indeed, to the uplands as well. The Los Angeles Civic Center and the Federal Courts Building now stand where the Indians once had their homes and gardens. Similar conditions exist in most cities. If the petition of these Indians were granted it would cloud titles to all uplands which had ever been occupied by Indians.

It is safe to say that prior to the decision in this case no Indian and no defender of Indian rights ever dreamed that Indians owned any portion of California's three-mile belt or were entitled to the proceeds of oil developed therefrom. Nevertheless, this petition is an example of the type of claim which frequently is made to valuable land when titles which have long been considered as established and settled under rules of property law are suddenly disturbed by a decision like the present one which, if it does not actually reverse former decisions, distinguishes a long line of decisions by former judges of this Court, all of whom "believed," if they did not hold, that the

> "states not only owned tidelands and soil under navigable inland waters, but also owned soils under

all navigable waters within their territorial jurisdiction, whether inland or not." (67 S. Ct. 1658, at 1667.)

California incorporated this land within its "territory" by its Constitution of 1849, which was approved by the United States Congress. It declared its ownership by express statutory provision of its Civil Code as early as 1872[7] and by numerous other statutes. The land lies within its counties and cities and improvements upon it have been taxed by them. The "dicta" of the many former Supreme Court decisions have been uniformly relied upon by all State[8] and lower Federal courts and by all State and Federal officials (until after 1937) and by thousands of citizens who acquired interests in the submerged lands and made improvements thereon in reliance upon this rule. We respectfully call these matters to the Court's attention again because the petition now before the Court vividly illustrates how, when the long established foundations of real property titles are suddenly swept away, valuable properties which have been improved and developed by the State and its citizens in reliance upon those titles become the subject of every sort of fanciful and bizarre claim

---

[7]Civil Code, Sec. 670: "The state is the owner of all land below tidewater, and below ordinary high-water mark bordering upon tidewater, within the state; . . ."

[8]In *Boone v. Kingsbury,* 206 Cal. 148 (1928), the highest Court of California *held* the State to be the owner of the three-mile belt and all mineral rights therein basing its decision on the many pronouncements which this Court now says are *obiter dicta.* Extensive developments in submerged lands have been made in reliance on this decision.

which attorneys can think up and litigate on a contingent basis, on the "long shot" that a great fortune may be reaped as a result.

We use the terms "fanciful and bizarre" advisedly because we believe that the claim that there now exist within the boundaries of California and within the limits of its counties and cities large areas of valuable lands (some of which are filled and improved), title to which is in the same "virgin state"[9] that it was in before the coming of the Spaniards, clearly falls in these categories. Yet the Court's decision has opened the way for just such attacks.

It is because of the public necessity to stabilize titles to real property and to safeguard them from such attacks that this Court has never in its history, before the present case, overruled an established rule of property. We say "before the present case" because we believe, with all respect, that the present case, even if it may be said that in a rigid technical sense it has only overruled oft repeated dicta of this Court, has nevertheless in substance and in its actual results overruled a rule of property.

The results of this ruling are now beginning to be felt. And until the line of demarcation along the entire coast line of California is fixed and titles stabilized within the entire three-mile belt, all of which may take many years to accomplish, this huge and valuable area will be open to attacks of this character and endless litigation may be confidently expected.

---

[9]Brief in Support of Petition, p. 49.

This result can be avoided only by restoring the rule of state ownership under which these lands were held and administered by all our coastal states since the founding of the Republic.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

EVERETT W. MATTOON,
Assistant Attorney General,
Counsel for California.

Note.

We assume that counsel for petitioners have complied with the requirements of Title 25 U. S. C. A. 81 and 85 which provide that no lawyer is qualified to represent or file an action in behalf of a band of Indians or Indians individually until the agreement under which he is employed is signed before a Judge of "a court of record" and approved by the Secretary of the Interior and the Commissioner of Indian Affairs, although the petition contains no allegation to this effect. If counsel have not complied with these Federal statutes it is our understanding that they have no authority to file the foregoing petition and motions and the Court has no jurisdiction to entertain them.

May, 1948.