No. 12-17151

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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DAVID LAUGHING HORSE ROBINSON, an individual and Chairman, Kawaiisu Tribe of Tejon, and KAWAIISU TRIBE OF TEJON,

*Plaintiffs-Appellants,*

v.

SALLY JEWELL, Secretary, U.S. Department of the Interior, et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the
Eastern District of California, Fresno
No. 1:09-CV-01977-BAM

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# BRIEF FOR DEFENDANTS-APPELLEES TEJON MOUNTAIN VILLAGE, LLC, TEJON RANCHCORP, AND TEJON RANCH COMPANY

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees Tejon Mountain Village, LLC, Tejon Ranchcorp, and Tejon Ranch Company ("Tejon") hereby certify as follows:

- Tejon Mountain Village is a joint venture between Tejon Ranchcorp and DMB TMV LLC. DMB TMV LLC is a wholly owned subsidiary of DMB Associates Inc., a privately held company founded by Drew Brown, Mark Sklar and Bennett Dorrance.

- Tejon Ranchcorp is 100% owned by Tejon Ranch Company.

- Tejon Ranch Company is a publicly traded company. No publicly traded company owns more than 10% of its stock.

Dated: August 27, 2013

Respectfully Submitted,
PERKINS COIE LLP
Eric D. Miller

By: */s/ Eric D. Miller*
Eric D. Miller
Attorney for Defendants-Appellees Tejon Mountain Village, LLC, Tejon Ranchcorp, and Tejon Ranch Company

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## STATEMENT OF JURISDICTION

Appellants invoked the jurisdiction of the district court under 28 U.S.C. § 1331, but the district court determined that it lacked subject-matter jurisdiction. E.R. 45. On August 7, 2012, the district court entered a final judgment dismissing all of appellants' claims with prejudice. Supp. E.R. 1; *see also* E.R. 45. Appellants filed a notice of appeal on September 24, 2012, E.R. 1-2, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

On February 26, 2013, this Court dismissed the appeal for failure to prosecute, and the Court's mandate issued at that time. Appellants later sought reinstatement of the appeal, and the Appellate Commissioner granted reinstatement. Because appellants have failed to demonstrate extraordinary circumstances justifying recall of the mandate, reinstatement of the appeal was improper, and this Court lacks jurisdiction.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction over this appeal, when the appeal was dismissed for failure to prosecute and the mandate was issued, and appellants' only argument for recall of the mandate is that they failed to file a timely opening brief because of counsel's oversight?

2. Did the district court correctly conclude that appellants' land claims failed, when those claims were based on (1) Spanish land grants that were not

confirmed as required by statute, (2) a treaty that did not specify any land to be set aside for appellants, and (3) another treaty that was never ratified?

3. Did the district court correctly conclude that appellants do not have an Indian reservation, when the President never set aside a reservation, and a later Act of Congress terminating all but four reservations in the State of California would have terminated the claimed reservation had it existed?

## STATUTORY ADDENDUM

Pertinent constitutional provisions, treaties, and statutes are set forth in an addendum bound with this brief.

## STATEMENT OF THE CASE

Appellants are the Kawaiisu Tribe of Tejon, allegedly an Indian Tribe, and David Laughing Horse Robinson, allegedly the group's chairman (collectively, "Kawaiisu"). Kawaiisu filed a complaint in the United States District Court for the Eastern District of California, alleging a legal interest in land owned by Tejon Mountain Village, LLC, Tejon Ranch Corporation, and Tejon Ranchcorp (collectively, "Tejon") in Kern County, California. After the defendants moved to dismiss, Kawaiisu filed an amended complaint. The district court dismissed that complaint with leave to amend, and Kawaiisu filed a second amended complaint, which the district court also dismissed with leave to amend. Finally, Kawaiisu

filed a third amended complaint, which the district court dismissed with prejudice and without leave to amend.

Kawaiisu filed a notice of appeal, but after the case was docketed in this Court, it did not file an opening brief. Almost two months after the deadline for its brief, Kawaiisu still had not filed a brief, and this Court dismissed the appeal and issued the mandate. More than a month later, Kawaiisu moved to reinstate the appeal. The Appellate Commissioner granted the motion for reinstatement, and a motions panel denied reconsideration.

## STATEMENT OF FACTS

### A. Tejon's title

In 1848, the United States acquired California from Mexico by signing the Treaty of Guadalupe Hidalgo, which ended the Mexican War. Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207 (1850). In 1851, Congress created a board of three commissioners to determine the validity of California land claims based on Spanish or Mexican grants. Act of Mar. 3, 1851, ch. 41, § 1, 9 Stat. 631 ("1851 Act"). The statute required "every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present his or her claim to the commissioners within two years. *Id.* §§ 8, 13, 9 Stat. at 632, 633. Claimants could appeal the commissioners'

decisions to Federal district court, and, ultimately, to the Supreme Court. *Id.* §§ 9, 10, 9 Stat. at 632, 633. When a land claim was confirmed, the United States issued the claimant a federal patent. *Id.* § 13, 9 Stat. at 633.

Tejon owns Tejon Ranch, which comprises 270,000 acres of land in Kern County, California. E.R. 4. It traces its title to land grants issued by the Mexican government when California was part of Mexico; those grants were confirmed in four patents issued under the 1851 Act. E.R. 15. In the 1920s, the Tejon Mission Indians challenged the validity of one of the patents covering the Tejon ranch, arguing that they held aboriginal title to the patented land. The Supreme Court rejected that challenge and confirmed the validity of the patent. *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924).

**B. Kawaiisu's claims**

The Kawaiisu Tribe of Tejon is not a federally recognized Indian Tribe. According to the complaint, however, it is an Indian Tribe that "has resided in or around what is today" Kern County "since time immemorial." Supp. E.R. 29. Kawaiisu alleges that various treaties and statutes have recognized its title to the land at issue in this case. Three are of particular relevance here.

First, in 1849, the United States executed a treaty with the Utah Indians, in which it committed "at its earliest convenience" to designating, settling and adjusting the territorial boundaries of the Utah Indians. Treaty with the Utah, art.

VII, Dec. 30, 1849, 9 Stat. 985. Kawaiisu alleges that its ancestors were signatories to that treaty.

Second, in 1851, the United States executed a treaty known as "Treaty D" with "various tribes of Indians in the State of California" in which it agreed to set aside a parcel of land encompassing Tejon ranch "for the sole use and occupancy" of those tribes. Treaty with the Castake, Texon, etc., arts. 3, 4, June 10, 1851 (unratified) (reprinted in S. Doc. No. 53, 70th Cong., 1st Sess. 1101 (1929)). By its terms, the treaty was to become effective only "when ratified and confirmed by the President and Senate of the United States of America." *Id.* art. 5 (S. Doc. No. 53 at 1102). The Senate never ratified Treaty D. Instead, Congress ultimately granted the Court of Federal Claims jurisdiction to hear claims asserted by "the Indians of California" for the "loss . . . on account of their failure to secure the lands and compensation provided for in . . . unratified treaties." Act of May 18, 1928, ch. 624, § 2, 45 Stat. 602 (codified at 25 U.S.C. § 652). Kawaiisu alleges that its ancestors were signatories to Treaty D.

Third, in 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes: *Provided,* That such reservations shall not contain more than twenty-five thousand acres." Act of March 3, 1853, ch. 104, 10 Stat. 226, 238. Two years later, Congress

provided for two additional reservations. Act of March 3, 1855, ch. 204, 10 Stat. 686, 699. Although the Superintendent of Indian Affairs for California established the Tejon/Sebastian Reserve on Tejon Ranch, the land was never formally set aside as a reservation by Executive Order.

In 1864, Congress enacted a statute that limited to four the number of reservations in the State of California. Act of April 8, 1864, ch. 48, §§ 2, 3, 13 Stat. 39, 40 ("1864 Act"). Under that statute, the President established four reservations that did not include the Tejon/Sebastian Reserve. *See* 1 *Indian Affairs: Laws and Treaties* 815-31 (Charles J. Kappler ed., 1902). The Tejon/Sebastian Reserve was ordered closed in 1864. H.R. Doc. No. 736, 56th Cong., 1st Sess. 789 (1899).

### C. Proceedings below

In 2009, Robinson filed a pro se complaint on behalf of himself, on behalf of a group of individuals identifying themselves as the Kawaiisu Tribe, and as a "Representative of the Class of Kawaiisu Tribe of Tejon Persons." Supp. E.R. 279-371. In the complaint, Robinson alleged that Tejon was wrongfully occupying and using the Tejon Ranch. *Id*. Also named as defendants were the Secretary of the Interior and Kern County. *Id.* After the defendants moved to dismiss, Kawaiisu, by then represented by counsel, filed an untimely opposition in which it conceded that the initial pleading was deficient and requested additional time to

file an amended complaint. Supp. E.R. 277-78. The district court granted leave to amend. Supp. E.R. 276.

Kawaiisu then filed a first amended complaint. E.R. 117; Supp. E.R. 252-73. Among other claims, that complaint alleged that Tejon and the other defendants had violated the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*, the Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*, and the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000 *et seq.* Supp. E.R. 267-69. Kawaiisu abandoned the suggestion in the original complaint that Tejon, or any entity associated with Tejon, is in unlawful possession of Tejon Ranch.

The defendants again moved to dismiss to dismiss. E.R. 116. In response, Kawaiisu argued that the first amended complaint could be read to assert land claims. It asked the Court to address those claims, Supp. E.R. 250 (stating that "[i]n many respects, [Kawaiisu's] land claims can be viewed as an action to quiet title against [Tejon]"), and it sought permission to file an amended complaint alleging them, Supp. E.R. 240. The district court dismissed the first amended complaint but granted leave to amend within fifteen days to provide "the opportunity to assert a land-based claim for enforcement of aboriginal title." E.R. 111; Supp. E.R. 247.

More than two months passed before Kawaiisu filed a second amended complaint. E.R. 110; Supp. E.R. 198-222. That complaint asserted claims against Tejon for unlawful possession of Tejon Ranch under common law, trespass, accounting, violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177, violation of NAGPRA, and violation of CEQA. Supp. E.R. 209-19. At a hearing, Kawaiisu argued that an unspecified portion of Tejon Ranch was a de facto reservation, a claim that had not been asserted in the second amended complaint. Supp. E.R. 173-74. The district court again dismissed with leave to amend. E.R. 103; Supp. E.R. 197.

Finally, Kawaiisu filed a third amended complaint. E.R. 102; Supp. E.R. 28-152. It realleged the claims against Tejon that were presented in the second amended complaint, including unlawful possession of Tejon Ranch under common law, violation of the Non-Intercourse Act, trespass, and accounting, and it restated the claim that Tejon violated NAGPRA. Supp. E.R. 117-26. The complaint did not assert that Tejon Ranch was a de facto reservation. Tejon again moved to dismiss. E.R. 101.

The district court dismissed the third amended complaint with prejudice. E.R. 3-45. The court concluded that "the Treaty with the Utah did not grant land title or possession" to Kawaiisu, E.R. 13, that Treaty D "has no force and effect" because it was never ratified, E.R. 17, and that even if a reservation had been

established, it was terminated by subsequent legislation, E.R. 20. The court also rejected Kawaiisu's claims against the Secretary of the Interior and Kern County. E.R. 20-44. Noting that "plaintiffs have been granted four opportunities to amend the complaint to state a claim for relief for which this Court has jurisdiction," the court declined to grant further leave to amend. E.R. 45.

**D. Proceedings on appeal**

Two days after Kawaiisu filed a Notice of Appeal, this Court issued a scheduling order. Dkt. Entry 1-4 at 2-3. That order warned appellants, in bold, that "**Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.**" *Id.* at 3. The order was accompanied by a letter to Kawaiisu's counsel that included a similar warning. *Id.* at 1.

The scheduling order directed Kawaiisu to file a mediation questionnaire by October 3, 2012. *Id.* at 2. That deadline came and went, and a week later, the clerk issued an order directing Kawaiisu to file a questionnaire within seven days, or the case would be dismissed under Circuit Rule 42-1 for failure to prosecute. Dkt. Entry 7. The day after that new deadline, Kawaiisu filed the questionnaire, and the Court accepted the late filing. Dkt. Entry 8.

The scheduling order set a deadline of January 2, 2013 for Kawaiisu to file its opening brief. Dkt. Entry 1-4 at 3. That deadline also passed without a filing of

any sort from Kawaiisu. When, almost two months later, Kawaiisu still had not filed a brief, the Court dismissed the appeal for failure to prosecute. Dkt. Entry 12 at 1. The order, which was entered on February 26, 2013, stated that service of the order of dismissal "shall constitute the mandate of this court." *Id.*. The district court's docket shows that the order was filed below on the same day it was issued by this Court. E.R. 98.

On April 12, 2013—that is, 45 days after the case was dismissed, three months after Kawaiisu's brief was due, and almost seven months after the notice of appeal was filed—Kawaiisu filed a motion seeking reinstatement of the appeal. Dkt. Entry 13-1. In that motion, which relied on Federal Rule of Civil Procedure 60(b), Kawaiisu attributed its failure to file a timely brief to its counsel's "novice mistake" and "inadvertent error." *Id.* at 3. In a declaration accompanying the motion, Kawaiisu's counsel suggested that he had been unaware that the Court had issued a scheduling order, stating that he had "assumed, without justification, that this Court would not issue the briefing schedule until the appeal was perfected, as in state courts." *Id.* at 4. Counsel further stated that, "[a]fter receiving the Order of Dismissal," he had searched his files "and found the Time Schedule Order stuck within other documents." *Id.* Counsel offered no explanation for waiting 45 days after the issuance of that order to seek reinstatement, nor did he argue that extraordinary or compelling circumstances justified reinstatement. Tejon and Kern

County both filed responses in opposition to the motion, arguing that Kawaiisu's submission failed to meet the standard for reinstatement. The Appellate Commissioner granted appellants' motion and directed the Clerk to file the opening brief. Dkt. Entry 16.

A motions panel denied reconsideration of the Appellate Commissioner's order. Dkt. Entry 25.

## SUMMARY OF ARGUMENT

I. When this Court issues its mandate, the Court's appellate jurisdiction comes to an end, and jurisdiction returns to the district court. In this case, the Court issued its mandate when it dismissed the appeal for failure to prosecute after Kawaiisu missed the deadline for filing an opening brief by nearly two months. The Court therefore lacks appellate jurisdiction.

Although the Court does have the authority to recall its mandate, the Supreme Court has held that that authority may be exercised "only in extraordinary circumstances" involving "grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Kawaiisu has not come close to showing that such circumstances exist. To the contrary, it admits that its failure to file a timely brief was attributable to nothing other than counsel's garden-variety neglect. For that reason, the Appellate Commissioner erred in reinstating the appeal. Although a motions panel denied a motion to reconsider the Appellate

Commissioner's order, the merits panel has an independent obligation to determine its own jurisdiction. It should vacate the Appellate Commissioner's order and dismiss the appeal for lack of jurisdiction.

II. If the Court does reach the merits, it should affirm the judgment of the district court. Despite being given multiple opportunities to amend its complaint, Kawaiisu has not succeeded in articulating any legal basis for challenging Tejon's title to Tejon Ranch, which rests on patents issued by the United States more than 150 years ago.

Kawaiisu's claims founder on the procedural requirements set out in the Act of March 3, 1851, ch. 41, 9 Stat. 631. Enacted in the wake of the Mexican War, that statute required that anyone claiming title to land in California under a grant of the Spanish or Mexican government present his or her claim to a board of commissioners established by Congress. While Tejon's predecessors in interest presented their claims and were then issued patents by the United States, Kawaiisu never did so. Under the terms of the statute, as interpreted by the Supreme Court, its claims are therefore forfeited.

In an effort to identify some alternative basis for its claims, Kawaiisu turns to a treaty with the Utah Indians. As the district court explained, however, that treaty authorized the government to set aside lands at some future date, but it did not itself vest title in anyone. Similarly unavailing is Kawaiisu's reliance on the

treaty known as "Treaty D," which was never ratified by the Senate and thus has no legal effect at all. Nor is there any merit to Kawaiisu's claim of a de facto reservation. No reservation was ever established on the land at issue in this case, and even if one had been established, subsequent legislation abolished it.

## STANDARD OF REVIEW

This Court reviews the district court's dismissal of the complaint de novo. *See Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The district court's denial of leave to amend the complaint is reviewed for abuse of discretion, and its "discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1072 (9th Cir. 2008) (internal quotation marks omitted).

## ARGUMENT

### I. THIS COURT LACKS JURISDICTION

After the appeal was dismissed for lack of prosecution, this Court issued its mandate. That action divested this Court of jurisdiction and returned jurisdiction to the district court. *United States v. Pete*, 525 F.3d 844, 853 (9th Cir. 2008). This Court therefore lacks jurisdiction over this appeal. It can exercise jurisdiction only by recalling the mandate, but there is no basis for taking that extraordinary step.

Because recalling a mandate upsets "the profound interests in repose" associated with a final judgment, it is an extraordinary remedy that may be granted only in the most exceptional of cases. *Calderon v. Thompson*, 523 U.S. 538, 550, 551 (1998) (internal quotation marks omitted). The Supreme Court has emphasized that the power of a court to recall its mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies," and that it "can be exercised only in extraordinary circumstances." *Id.* at 550; *see* 16 Charles A. Wright et al., *Federal Practice and Procedure* § 3938, at 862 (3d ed. 2012) (explaining that "the power is exercised sparingly" because "[f]ree exercise of the power to recall would interfere with the more profound interests in repose if proceedings had apparently been terminated by the appellate decision"). In *Calderon*, the Supreme Court illustrated that principle in dramatic fashion, reversing this Court's decision to recall a mandate that had been issued because of an oversight by two circuit judges—not, as here, through any fault of a litigant—in a case where the party seeking recall of the mandate was a prisoner under sentence of death. The Supreme Court stated that even if the case were one "implicating no more than ordinary concerns of finality, we would have grave doubts about the action taken by the Court of Appeals." 523 U.S. at 552-53. In other words, to justify recalling a mandate, the circumstances must be truly extraordinary. *See Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007).

In its motion for reinstatement of the appeal, Kawaiisu candidly admitted that the reason for its failure to file a timely brief was its counsel's "novice mistake" and "inadvertent error" in failing to read the scheduling order he received or to familiarize himself with the rules governing practice in this Court. Dkt. Entry 13-1, at 3. This Court has repeatedly held that counsel's "simple negligence" is not an extraordinary circumstance. *See, e.g.*, *Towery v. Ryan*, 673 F.3d 933, 942-43 (9th Cir. 2012) (ignorance of a filing deadline is not extraordinary circumstance warranting equitable tolling); *Miranda v. Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002) (attorney's miscalculation of limitations period and general negligence do not constitute extraordinary circumstances warranting equitable tolling); *Allmerica Financial Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) (holding that "[n]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)," which requires a showing of extraordinary circumstances) (quoting *Engleson v. Burlington Northern R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992)).

Kawaiisu's lack of diligence is greater than its counsel admits. First, although counsel asserts that he was unaware of the issuance of the scheduling order, he was previously warned, by order of the Clerk, that he missed the first scheduling deadline in this very case by failing to file his mediation statement on time. *See* Dkt. Entry 7. Thus, counsel was on notice of a schedule governing these

proceedings, which should have prompted him to see whether there were any other pending deadlines. In fact, counsel admits that he had the schedule in his files. Second, Kawaiisu has offered no explanation at all for why it waited 45 days after the dismissal of the appeal to file a motion for reinstatement. Kawaiisu has identified nothing extraordinary or compelling here; what it describes is run-of-the-mill carelessness.

Unless timely filing was somehow prevented by some unusual circumstance—something Kawaiisu has not alleged—a party's failure to file on time cannot plausibly be described as a "grave, unforeseen contingenc[y]." *Calderon*, 523 U.S. at 550. Thus, as this Court and other courts of appeals have recognized, "the recall power may not be used simply as a device for granting late rehearing." *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986); *accord Moran v. McDaniel*, 80 F.3d 1261, 1267 (9th Cir. 1996); *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993). Far from constituting an "unforeseen contingenc[y]," the possibility that this appeal would be dismissed if Kawaiisu failed to comply with the scheduling order was set forth in bold in the first papers issued by the Court in this case. Dkt. Entry 1-4.

The Appellate Commissioner did not address *Calderon* in his order reinstating the appeal. And although the motions panel denied a motion for reconsideration of the order reinstating the appeal, that ruling does not bind the

merits panel, which "has an independent duty to examine jurisdictional questions." *United States v. Arevalo*, 408 F.3d 1233, 1237 n.2 (9th Cir. 2005) (quoting *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989)). Because there is no basis for recalling the mandate in this case, the order reinstating the appeal should be vacated, and the appeal should be dismissed for lack of jurisdiction.

## II. THE DISTRICT COURT CORRECTLY HELD THAT KAWAIISU'S COMPLAINT FAILED TO STATE A CLAIM

### A. Kawaiisu has not identified a valid claim to Tejon Ranch, whether based on a Spanish land grant, a treaty, or a statute

The district court correctly concluded that Kawaiisu has not established a cognizable legal theory under any of the authorities it cites. Kawaiisu asserts inconsistent legal bases purportedly underlying its right to Tejon Ranch, including Spanish land grants, a treaty that is not applicable here, another treaty that was never ratified, and statutes that have been superseded. As the district court held, there is no basis for any of those claims.

#### 1. Kawaiisu forfeited its claim based on an alleged Spanish land grant by failing to present it under the 1851 Act

Accepting as true the allegation that Kawaiisu's claim to Tejon Ranch was originally based upon a Spanish land grant, the district court correctly held that the failure to present that claim to the United States land commission is fatal to the claim. E.R. 13-15; Supp. E.R. 161-64.

At the conclusion of the Mexican War in 1848, Mexico ceded to the United States much of what is now the southwestern United States, including all of the present-day State of California. Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., May 30, 1848, 9 Stat. 922, T.S. No. 207 (1850). Soon thereafter, Congress enacted a statute to settle land claims in the newly acquired territory. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631. The 1851 Act created a board of commissioners to determine the validity of all claims, and it required every person "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present the claim within two years. 1851 Act § 8, 9 Stat. at 632; *see U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641 (9th Cir. 1986). Any land not claimed within two years, and any land for which a claim was finally rejected, was to be deemed "part of the public domain of the United States." 1851 Act § 13, 9 Stat. at 633. *See United States v. California*, 436 U.S. 32, 34 n.3 (1978) (stating that, under the Treaty, "all nongranted lands previously held by the Government of Mexico passed into the federal public domain").

The requirements of the 1851 Act were applicable to all claimants, including those asserting sovereign or quasi-sovereign interests. In *Barker v. Harvey*, 181 U.S. 481 (1901), for example, the Supreme Court held that Indians who asserted "claims founded on the action of the Mexican government" had "abandoned them by not presenting them to the commission for consideration." *Id.* at 491. Indeed,

in light of Congress's overriding objective of "plac[ing] the titles to land in California upon a stable foundation," the Court has held that even a State's interest is extinguished if it was not presented to the commission under the terms of the 1851 Act. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 206 (1984) (quoting *Fremont v. United States*, 58 U.S. (17 How.) 542, 553-554 (1854)); *accord Chunie*, 788 F.2d at 646 (explaining that when individuals who presented claims to the commission had their claims "confirmed and received federal patents to their lands, they were entitled to believe that adverse claims to their lands had been eliminated"). And the Court has applied that principle to the very land at issue here, holding that the Tejon Mission Indians lost their rights to a portion of Rancho El Tejon, one of the four Ranchos that make up Tejon Ranch, by failing to present their claim to the commission. *See United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924).

Kawaiisu suggests that it "substantially complied with the 1851 Act" (Br. 15), but it acknowledges that it did not comply with the statute by submitting its claim to the commission. It therefore makes no difference whether its claim to Tejon Ranch is predicated on an alleged Spanish land grant or on aboriginal title. Because Kawaiisu did not present its claim to the commission, the land in question became "part of the public domain of the United States" and could be allocated to other claimants. 1851 Act § 13, 9 Stat. at 633.

By contrast, Tejon Ranch's predecessors-in-interest did present their claims and were issued patents for the four Ranchos making up Tejon Ranch.[1] Kawaiisu has failed to allege any factual basis for challenging the validity of those patents; to the contrary, it has acknowledged that the patents existed. Supp. E.R. 110 (alleging the existence of Tejon Ranch patents). Those patents are conclusive, and the district court correctly concluded that Kawaiisu "cannot now challenge the validity of United States issued land patents after over a century of time has elapsed." E.R. 16; *see Title Ins. & Trust. Co.*, 265 U.S. at 486 ("Where questions arise which affect titles to land, it is of great importance to the public that, when they are once decided, they should no longer be considered open.").

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[1] The patents to Tejon Ranch and underlying cases are public record, available at the Bancroft Library at the University at California, Berkeley. *See* http://www.oac.cdlib.org/view?docId=hb109nb422;query=;style=oac4;doc.view=entire_text.

- *José Antonio Aguirre and Ygnacio del Valle v. United States*, for the Place Named "Tejon," 327 SD Cal. (Dkt. 240) (1843), Patent Issued May 9, 1863 (BLM Serial Nr. CACAAA 075551);
- *Jose Maria Covarrubias v. United States*, for the Place Named "Castac," 349 SD Cal. (Dkt. 536) (1843), Patent Issued November 27, 1866 (BLM Serial Nr. CACAAA 076142);
- *Jose Maria Flores v. United States*, for the Place Named "La Liebre," 170 SD Cal. (Dkt. 429) (1846), Patent Issued June 21, 1875 (BLM Serial Nr. CACAAA 075191);
- *Pedro C. Carrillo v. United States*, for the Place Named "Los Alamos y Agua Caliente," 236 SD Cal. (Dkt. 498) (1855) (appeal dismissed for want of prosecution, 1860) and *Augustin Olivera et al. v. United States*, for the Place Named "Los Alamos y Agua Caliente," 183 SD Cal. (Dkt. 428) (1846), Patent Issued November 9, 1866 (BLM Serial Nr. CACAA 075832).

(Reply Br. in Support of Mot. to Dismiss Third Am. Compl. of Def. Tejon Ranchcorp & Tejon Mountain Village, LLC 4 n.4 (June 22, 2012) (citing patents to the district court)).

### 2. The Treaty with the Utah did not grant Kawaiisu title to Tejon Ranch

1. Kawaiisu argues (Br. 15) that it was not obligated to present its Spanish land grant to the land commission because the Treaty with the Utah superseded the land grant. Kawaiisu cites no authority to support that argument, and there is none. The Treaty with the Utah says nothing about Kawaiisu or any alleged Spanish land grant. Indeed, as the district court observed, the treaty does not grant or confirm anyone's title to land but instead provides that the government shall, "at its earliest convenience, designate, settle, and adjust [the Utah Tribe's] territorial boundaries." Treaty with the Utah, art. VII, Dec. 30, 1849, 9 Stat. 985; E.R. 11; *see also Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (noting the presumption "that treaties do not create privately enforceable rights in the absence of express language to the contrary").

The district court's decision accords with the decision of the Court of Federal Claims in *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768 (1993), which rejected a legal theory similar to the one Kawaiisu advances. In that case, the plaintiffs argued the Treaty with the Utah recognized aboriginal title. The court disagreed, observing that, while the treaty does "state that the Utah tribe occupies some land, . . . the boundaries and location of that territory are not defined" and thus the treaty "cannot be said to recognize Indian title." *Id.* at 786.

The court concluded that the treaty did not create a trust relationship as to land conveyed by the State of Utah. *Id.* at 789.

Because the treaty did not recognize aboriginal title, it cannot be the case that it "superseded" an alleged Spanish land grant, which specifically identified a parcel of land, and implicitly excused Kawaiisu from complying with the 1851 Act. Nor, contrary to Kawaiisu's suggestion (Br. 15), did the Treaty with the Utah create a trust relationship with respect to Tejon Ranch or obligate the United States to present Kawaiisu's alleged land grant to the commission under the 1851 Act.[2] That obligation was Kawaiisu's, and it failed to carry it out.

2. Kawaiisu argues (Br. 11) that the district court improperly "construed the treaties with the Kawaiisu strictly, . . . and never even considered how the Kawaiisu would naturally have understood them." In fact, the court correctly recognized that the Supreme Court "has often held that treaties with the Indians must be interpreted as they would have understood them." Supp. E.R. 166 (quoting *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970) (citations omitted)). Even after taking that principle into account, however, the court concluded that the Treaty with the Utah "did not establish any title or reservation

[2] Even if the United States did have an obligation to act on behalf of the Kawaiisu, it is the United States that would have breached that obligation, not Tejon Ranch. As the Supreme Court made clear in *City of Sherrill v. Oneida Indian Nation of New York*, the long lapse of time between the 1851 Act and Kawaiisu's effort to regain Tejon Ranch is itself a barrier to the disruptive remedy that it seeks. 544 U.S. 197, 216-27 (2005).

to land, and the treaty did not benefit tribes other than those in the Utah area." Supp. E.R. 168. As the court observed, "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." E.R. 12 (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943)). Kawaiisu's claims failed not because the court failed to consider "how the Kawaiisu would naturally have understood" the treaties (Br. 11), but rather because the Treaty does not support Kawaiisu's claims under any reasonable interpretation. Even now, Kawaiisu has not identified any provision of the Treaty that could plausibly be construed as a self-executing grant of title to the land at issue in this case.

### 3. Treaty D was not ratified by the Senate, and it therefore has no legal effect

Kawaiisu also relies on Treaty D, but as the district court correctly held, that treaty is a legal nullity because the United States Senate never ratified it. E.R. 16; *see* U.S. Const., art. II, § 2, cl. 2. For the first time on appeal, Kawaiisu argues (Br. 16-17) that, because the United States allegedly concealed the non-ratification of Treaty D, and Kawaiisu allegedly relied on Treaty D to its detriment, the United States is estopped from arguing that Treaty D was not ratified. Because that argument was forfeited in the district court, it is not properly before this Court. *AlohaCare v. State of Hawaii*, 572 F.3d 740, 744 (9th Cir. 2009). In any event, the argument lacks merit.

The Supreme Court has held that principles of estoppel do not apply to the United States in the same manner as other litigants. *See OPM v. Richmond*, 496 U.S. 414 (1990). Kawaiisu cites no authority for the proposition that the government's conduct can estop the government from asserting the non-existence of a treaty, thus binding the United States to comply with a treaty that has not been ratified by the constitutionally required two-thirds vote of the Senate. Still less is there any basis for believing that the conduct of the government could estop Tejon Ranch—a non-governmental party—from arguing that Treaty D is a legal nullity because it was never ratified.

In any event, even ordinary principles of estoppel would not aid Kawaiisu here. The treaty itself stated that it would take effect only "when ratified and confirmed by the President and Senate of the United States of America." Treaty with the Castake, Texon, etc., art. 5 (June 10, 1851) (unratified) (reprinted in S. Doc. No. 53, 70th Cong., 1st Sess. 1102 (1929)). While Kawaiisu alleges (Br. 16) that the government "concealed" the treaty's non-ratification, it does not suggest that the government falsely represented that the treaty had been ratified. To the contrary, the government's conduct made clear that the treaty was not in force. In 1864, Congress reduced the number of reservations in California and relocated the Indians from Tejon Ranch to the Tule Reservation. Act of April 8, 1864, ch. 48, §§ 2, 3, 13 Stat. 39, 40; H.R. Doc. No. 736, 56th Cong., 1st Sess., at 789 (1899).

After that action, which was clearly inconsistent with Treaty D's provisions, any further reliance on the supposed existence of the treaty would not have been reasonable. Moreover, in 1928, the United States compensated the Indians of California for its failure to ratify Treaty D and 17 other Indian treaties. *See* Act of May 18, 1928, ch. 624, § 2, 45 Stat. 602 (codified at 25 U.S.C. § 652); *Indians of California by Webb v. United States*, 98 Ct. Cl. 583, 598 (1942) ("The failure of Congress to set apart certain reservations for these Indians in 1852, and its failure to provide the goods, chattels, school houses, teachers, etc. was recognized as a loss to these Indians and was made by the Congress an equitable claim to be paid in money value."). As the district court correctly determined, that action by Congress further demonstrates that Treaty D has no force or effect. E.R. 17.

**B. The Kawaiisu's claim of a de facto reservation lacks merit**

Kawaiisu alleges (Br. 17) that its "reservation survived the 1851 and 1864 Acts *de facto*." Although that allegation was mentioned at a hearing on the motion to dismiss the second amended complaint, Supp. E.R. 173, Kawaiisu did not include it in the third amended complaint, and it has therefore forfeited it. Kawaiisu does not argue that the district court abused its discretion in denying leave to amend, yet again, to add such an allegation. In any event, the claim of a de facto reservation fails for two independent reasons. First, Kawaiisu has not

established that it ever had any reservation. Second, if there ever was a reservation, Congress terminated it.

**1. No reservation was ever established at Tejon Ranch**

In 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes: *Provided*, That such reservations shall not contain more than twenty-five thousand acres." Act of March 3, 1853, ch. 104, 10 Stat. 226, 238. Congress subsequently amended the statute to provide for two additional reservations. Act of Mar. 3, 1855, ch. 204, 10 Stat. 686, 699.

The United States did not establish a reservation at Tejon Ranch under those statutes. Kawaiisu cites (Br. 18-19) various communications to the Superintendent of Indian Affairs, prior to the 1864 Act, that refer to the Tejon or Sebastian Reservation and to the existence of Indians living on the land. In fact, the cited sources demonstrate that the government was *not* able to establish a reservation there because the land was subject to Mexican land grants that were in the process of being reviewed by the land commission under the 1851 Act. *See Report of the Commissioner of Indian Affairs for the Year 1864*, at 125-26 (1865) (quoting letters to the Commissioner of Indian Affairs, stating that "[i]t is much to be regretted that government could not have held possession of the Tejon ranches for

reservation purposes," and noting that "E.F. Beale . . . holds possession of the entire ranch under government patent"); *see also* H.R. Doc. No. 736, 56th Cong., 1st Sess. 789 (1899) (noting that "[t]he boundaries of the reduced reserve were never surveyed" and that "ex-superintendent Beale and others obtained patents under old Spanish grants for most of the land covered by the original reserve," after which "[m]easures were therefore taken to remove the Indians and to abandon the reserve"); Reply of Teton Defs. in Supp. of Mot. to Dismiss Pls.' Second Am. Compl. 10-11 (July 18, 2011) (discussing both documents).

In any event, as the district court explained, the statutes required the President to approve the establishment of any reservation, and he never did so. E.R. 18 ("The Tejon/Sebastian Reservation was not a reservation established by the President and therefore cannot provide land rights to plaintiffs."). Even accepting Kawaiisu's allegations as true, the court correctly held that the absence of an executive order formally establishing a reservation was fatal to any claim that a reservation was ever established at Tejon Ranch.[3]

Kawaiisu also relies on allotments to individual Indians to establish a de facto reservation. That claim was forfeited below because, although Kawaiisu included information about allotments in the third amended complaint, Supp. E.R.

[3] The district court also noted that there is a significant discrepancy between the 25,000-acre reservation that Congress authorized and Kawaiisu's claims in this litigation, which cover a much larger tract of land. E.R. 18.

103, it did not base any claim to land on those allegations.[4] Having had multiple opportunities to squarely address this claim, Kawaiisu cannot now assert it on appeal. *See AlohaCare*, 572 F.3d at 744; *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996) ("To have been properly raised below, the argument must be raised sufficiently for the trial court to rule on it.") (internal quotation marks omitted).

Even if Kawaiisu were permitted to make this argument now, the argument would fail. First, allotments to individual Indians are not evidence of the establishment of a reservation. Second, Kawaiisu's current suggestion (Br. 22) that the "land grants are part of the subject land" is not a plausible inference from any of the facts alleged in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 570 (2007)). To the contrary, it is directly contradicted by the allegation in the complaint that "the

[4] When the district court questioned the significance of the allotments, counsel for Kawaiisu stated that "I think what the complaint was trying to do was show that there are actually three different 25,000-acre reserves," and that the "subject of the allotments was just showing that there were more—because at one point, Tejon did ask in their reply brief, you know, how we were claiming more than 25,000 acres." E.R. 57-58. At no point did Kawaiisu allege in the complaint, Supp. E.R. 28-152, opposition to motion to dismiss, Supp. E.R. 2-26, or at oral argument that the allotments were evidence of a de facto reservation.

allotments gave the Kawaiisu the ability to live *off* of the Tejon Reservation." Supp. E.R. 103 (emphasis added).

Indeed, a close examination of the map of the allotments, E.R. 88, shows that the allotments Kawaiisu has identified are located not on Tejon Ranch, but rather northeast of Tejon Ranch and northeast of Bakersfield, surrounding Lake Isabella. That conclusion is supported by Kawaiisu's map of the area covered by Treaty D. Supp. E.R. 27. Shaded in grey on that map is the area occupied by Tejon Ranch, which at its farthest northeast corner reaches into Township 030S, Range 031E, west of Caliente, California. Kawaiisu has not alleged that any of the patents it cites are within that area.[5]

**2. Even if a reservation once existed, no reservation currently exists, de facto or otherwise**

For a court to conclude that there is a de facto reservation, there must be evidence that the federal government treated Indians as being on a reservation,

[5] Kawaiisu lists ten patents as evidence of a de facto reservation, and it refers to a Bureau of Land Management web site as evidence of the patents. Searches on the same web site reveal that the patents are located two to five ranges east of Tejon Ranch, or six to 30 miles east of Tejon Ranch. *See* http://www.glorecords.blm.gov/search/default.aspx (Aug. 7, 1893, Patent to Amanda Ann Willy (030S - 035E); Aug. 9, 1916, Patent to Marie Setamore (029S - 033E); Nov. 12, 1919, Patent to Santos Phillips (029S - 033E); Nov. 21, 1921, Patent to Jimmy Manwell (030S - 033E); Nov. 13, 1922, Patent to Manuel Calsetta (030S - 034E); Mar. 5, 1925, Patent to Frank Chico (025S - 035E); Sept. 29, 1943, Patent to Martha Miranda (026S - 034E); Jan. 21, 1953, Patent to Mariano Phillips, (029S - 034E); Jan. 21, 1953, Patent to Marie Girado (029S - 033E); Jan. 22, 1962, Patent to Caroline Liebel Houser (025S - 036E)).

such as by providing services to Indians on the land, *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 149-50 (8th Cir. 1978), by holding the land in trust near an existing reservation, *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986), or by failing to sell the reservation, providing protection against trespass, and proposing allotments, *Mattz v. Arnett*, 412 U.S. 481, 490-91 (1973). Here, the land is privately owned. The government does not treat the land as a reservation, does not provide services to Indians on the land, does not hold any land in trust, has not granted allotments on the land, and does not provide protection against trespass. The United States abandoned all efforts to create a reservation on the land in 1864, at the latest, when it relocated the Indians from the area of Tejon Ranch to the Tule reservation. *See* 1864 Act §§ 2, 3, 13 Stat. at 40. It is difficult to imagine clearer evidence that the United States did not view the land as a reservation than its issuance of four patents to non-Indians for the land. Thus, even if Kawaiisu could establish that it once had a reservation—which it cannot—subsequent congressional action has terminated that reservation. The supposed reservation therefore provides no basis for a claim of title to the land at issue here.

### C. The district court correctly dismissed the claims under NAGPRA and the other claims that are derivative of Kawaiisu's claim of title

Kawaiisu also asserts (Br. 23) claims under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*, as well as trespass and

related claims. As Kawaiisu appears to recognize, however, all of those claims are derivative of its claim of title to Tejon Ranch. The district court correctly held that those claims fail. E.R. 41-42. Contrary to Kawaiisu's suggestion (Br. 23), that holding does not reflect the resolution of a "factual dispute as to whether the subject land belongs to the Kawaiisu," but rather a determination that Kawaiisu has established no legal basis for a claim of title.

## CONCLUSION

The order of the Appellate Commissioner reinstating the appeal should be vacated, and the appeal should be dismissed. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Counsel is not aware of any pending related cases within the meaning of Ninth Circuit Rule 28-2.6.

*/s/ Eric D. Miller*
Eric D. Miller

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

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Dated: August 27, 2013

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# STATUTORY ADDENDUM

## U.S. CONSTITUTION



## TREATIES



## STATUTES

## U.S. CONSTITUTION

### U.S. Const. art. II, § 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

## TREATIES

### Treaty with the Castake, Texon, etc. (June 10, 1851) (unratified) (reprinted in S. Doc. No. 53, 70th Cong., 1st Sess. 1101 (1929))

Treaty Made and Concluded at Camp Persifer F. Smith, at the Texan Pass, State of California, June 10, 1851, Between George W. Barbour United States Commissioner, and the Chiefs, Captains and Head Men of the "Castake," "Texon," &c., Tribes of Indians.

A treaty of peace and friendship made and entered into at Camp Persifer F. Smith at the Texon pass, in the State of California, on the tenth day of June, eighteen hundred and fifty-one, between George W. Barbour, one of the commissioners appointed by the President of the United States to make treaties with the various Indian tribes in the State of California, and having full authority to act, of the first part, and the chiefs, captains and head men of the following tribes of Indians, to wit: Castake, Texon, San Imirio, Uvas, Carises, Buena Vista, Sena-hu-ow, Holo-cla-me, Soho-nuts, To-ci-a, and Hol-mi-uh, of the second part.

Art. 1. The said tribes of Indians jointly and severally acknowledge themselves to be under the exclusive jurisdiction, control, and management of the government of the United States, and undertake and promise on their part, to live on terms of peace and friendship with the government of the United States and the citizens thereof, with each other, and with all Indian tribes at peace with the United States.

Art. 2. It is agreed between the contracting parties, that for any wrong or injury done individuals of either party, to the person or property of those of the other, no

personal or individual retaliation shall be attempted, but in all such cases the party aggrieved shall apply to the proper civil authorities for a redress of such wrong or injury; and to enable the civil authorities more effectively to suppress crime and punish guilty offenders, the said Indian tribes jointly and severally promise to aid and assist in bringing to justice any person or persons that may be found at any time among them, and who shall be charged with the commission of any crime or misdemeanor.

Art. 3. It is agreed between the parties that the following district of country be set apart and forever held for the sole use and occupancy of said tribes of Indians, to wit: beginning at the first forks of Kern river, above the Tar springs, near which the road travelled by the military escort, accompanying said commissioner to this camp crosses said river, thence down the middle of said river to the Carises lake, thence to Buena Vista lake, thence a straight line from the most westerly point of said Buena Vista lake to the nearest point of the Coast range of mountains, thence along the base of said range to the mouth or westerly terminus of the Texon pass or Canon, and from thence a straight line to the beginning; reserving to the government of the United States and to the State of California, the right of way over said territory, and the right to erect any military post or posts, houses for agents, officers and others in the service or employment of the government of said territory. In consideration of the foregoing, the said tribes of Indians, jointly and severally, forever quit claim to the government of the United States to any and all other lands to which they or either of them now have or may ever had any claim or title whatsoever.

Art. 4. In further consideration of the premises and for the purpose of aiding in the subsistence of said tribes of Indians for the period of two years from this date, it is agreed by the party of the first part to furnish said tribes jointly, (to be distributed in proper proportions among them,) with one hundred and fifty beef cattle, to average five hundred pounds each, for each year. It is further agreed that as soon after the ratification of this treaty by the President and Senate of the United States, as may be practicable and convenient, the said tribes shall be furnished jointly (to be distributed as aforesaid) and free of charge, with the following articles of property, to wit: six large and six small ploughs, twelve sets of harness complete, twelve work mules or horses, twelve yoke of California oxen, fifty axes, one hundred hoes, fifty spades or shovels, fifty mattocks or picks, all necessary seeds for sowing and planting for one year, one thousand pounds of iron, two hundred pounds of steel, five hundred blankets, two pairs of coarse pantaloons and two flannel shirts for each man and boy over fifteen years old, one thousand yards of linsey cloth, same of cotton cloth, and the same of coarse calico, for clothing for

the women and children, twenty-five pounds of threat, three thousand needles, two hundred thimbles, six dozen pairs of scissors, and six grindstones.

Art. 5. The United States agree further to furnish a man skilled in the business of farming, to instruct said tribes and such others as may be placed under him, in the business of farming; one blacksmith, and one man skilled in working wood, (wagon maker or rough carpenter;) one superior and such assistant school-teachers as may be necessary; all to live among, work for, and teach said tribes and such others as they may be required to work for and teach. Said farmer, blacksmith, worker in wood and teachers to be supplied to said tribes, and continued only so long as the President of the United States shall deem advisable; a school house and other buildings necessary for the persons mentioned in this article, to be erected at the cost of the government of the United States.

This treaty to be binding on the contracting parties when ratified and confirmed by the President and Senate of the United States of America.

In testimony whereof, the parties have hereto signed their names, and affixed their seals, this the day and year first written.

**Treaty with the Utah, Dec. 30, 1849, 9 Stat. 985**

Treaty Between the United States of America and the Utah Indians.

The following articles have been duly considered and solemnly adopted by the undersigned—that is to say, James S. Calhoun, Indian Agent, residing at Santa Fe, acting as commissioner on the part of the United States of America, and Quixiachigiate, Nanito, Nincocunachi, Abaganixe, Ramahi, Subleta, Rupallachi, Saguasoxego, Paguisachi, Cobaxanor, Amuche, Puigniachi, Panachi, Sichuga, Uvicaxinape, Cuchuticay, Nachitope, Pueguate, Guano Juas, Pacachi, Saguanchi, Acaguate nochi, Puibuquiacte, Quixache tuate, Saxiabe, Pichiute, Nochichigue, Uvive, principal and subordinate chiefs, representing the Utah tribe of Indians.

I. The Utah tribe of Indians do hereby acknowledge and declare, they are lawfully and exclusively under the jurisdiction of the government of said States: and to its power and authority they now unconditionally submit.

II: From and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and amity shall exist, the said tribe hereby binding themselves most solemnly never to associate with, or give countenance or

aid to, any tribe or band of Indians, or other persons or powers, who may be, at any time, at enmity with the people or government of said States; and that they will, in all future time, treat honestly and humanely every citizen of the United States, and all persons and powers at peace with the said States, and all cases of aggression against said Utahs shall be referred to the aforesaid government for adjustment and settlement.

III. All American and Mexican captives, and others, taken from persons or powers at peace with the said States, shall be restored and delivered by said Utahs to an authorized officer or agent of said States, at Abiquin, on or before the first day of March, in the year of our Lord one thousand eight hundred and fifty. And, in like manner, all stolen property, of every description, shall be restored by or before the aforesaid first day of March, 1850. In the event such stolen property shall have been consumed or destroyed, the said Utah Indians do agree, and are hereby bound, to make such restitution and under such circumstances as the government of the United States may order and prescribe. But this article is not to be so construed, or understood, as to create a claim against said States, for any losses depredations committed by said Utahs.

IV. The contracting parties agree that the laws now in force, and such others as may be passed, regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the government of the United States, shall be as binding and obligatory upon the said Utahs as if said laws had been enacted for their sole benefit and protection. And that said laws may be duly executed, and for all other useful purposes, the territory occupied by the Utahs is hereby annexed to New Mexico as now organized, or as it may be organized, or until the government of the United States shall otherwise order.

V. The people of the United States, and all others in amity with the United States, shall have free passage through the territory of said Utahs, under such rules and regulations as may be adopted by authority of said States.

VI. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

VII. Relying confidently upon the justice and liberality of the United States, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the Utahs that the aforesaid government shall, at its earliest

convenience, designate, settle, and adjust their territorial boundaries, and pass and execute such laws, in their territory, as the government of said States may deem conducive to the happiness and prosperity of said Indians. And the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specially permitted by an agent of the aforesaid government; and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits, under such rules as the said government may prescribe, and to build up pueblos, or to settle in such other manner as will enable them most successfully to cultivate the soil, and pursue such other industrial pursuits as will best promote their happiness and prosperity: and they now, deliberately and considerately, pledge their existence, as a distinct tribe, to abstain, for all time to come, from all depredations; to cease the roving and rambling habits which have hitherto marked them as a people; to confine themselves strictly to the limits which may be assigned them; and to support themselves by their own industry, aided and directed as it may be by the wisdom, justice, and humanity of the American people.

VIII. For, and in consideration of the faithful performance of all the stipulations contained in this treaty by the said Utahs, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

IX. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject, in the first place, to the approval of the civil and military governor of New Mexico, and to such other modifications, amendments, and orders as may be adopted by the government of the United States.

In faith whereof, the undersigned have signed this treaty, and affixed thereunto their seals, at Abiquin, in New Mexico, this the thirtieth day of December, in the year of our Lord one thousand eight hundred and forty-nine.

## STATUTES

### Act of April 8, 1864, ch. 48, §§ 2, 3, 13 Stat. 39

Sec. 2. *And be it further enacted*, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable,

having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further*, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

Sec. 3. *And be it further enacted*, That the several Indian reservations in California which shall not be retained for the purposes of Indian reservations under the provisions of the preceding section of this act, shall, by the commissioner of the general land-office, under the direction of the Secretary of the Interior, be surveyed into lots or parcels of suitable size, and as far as practicable in conformity to the surveys of the public lands, which said lots shall, under his direction, be appraised by disinterested persons at their chase value, and shall thereupon, after due advertisement, as now provided by law in case of other public lands, be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry, according to such regulations as the Secretary of the Interior may prescribe: *Provided*, That no lot shall be disposed of at less than the appraised value, nor at less than one dollar and twenty-five cents per acre: *And provided, further*, That said sale shall be conducted by the register and receiver of the land-office in the district in which such reservation or reservations may be situated, in accordance with the instructions of the department regulating the sale of public lands.

**Act of Mar. 3, 1851, ch. 41, 9 Stat. 631**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby,

constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

Sec. 2. *And be it further enacted*, That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

Sec. 3. *And be it further enacted*, That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

Sec. 4. *And be it further enacted*, That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the timing of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

Sec. 5. *And be it further enacted*, That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

Sec. 6.. *And be it further enacted*, That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending

before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

Sec. 7. *And be it further enacted*, That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

Sec. 8. *And be it further enacted*, That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision .is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

Sec. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and sha1l contain a deraignment of the claimant’s title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present

claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

Sec. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

Sec. 11. *And be it further enacted*, That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Sec.12. *And be it further enacted*, That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

Sec. 13. *And be it further enacted*, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause

all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the and office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always*, That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a. petition to the district judge of the United States for the district in which lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further*, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Sec. 14. *And be it further enacted*, That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individua1, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

Sec. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any

patent to be issued under this act, all be conclusive between the United States and the said claims only, and shall not affect the interest of third persons.

Sec. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for 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 are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

Sec. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; the aforesaid salaries to commence form the day of notification by the commissioners of the first meeting of the board.

Sec. 18. *And be it further enacted*, That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

**Act of March 3, 1853, ch. 104, 10 Stat. 226**

An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the year ending June thirtieth, one thousand eight hundred and fifty-four.

*Be it enacted by the Senate and use of Representatives of the United States of America in Congress assembled*, That the following sums be and they are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes.

* * * * *

*Miscellaneous*. – For payment of the third of ten instalments in provisions, merchandise, etc., and the transportation of the same to certain tribes of Indians, per seventh article of the treaty of Fort Laramie, of seventeenth of September, one

thousand eight hundred and fifty-one, sixty thousand dollars; *Provided*, That the same shall not be paid until the said tribes of Indians shall have assented to the amendments of the Senate of the United States to the above recited treaty;

For continuing the collection and for publishing the statistics and other information, authorized by the act of third March, eighteen hundred and forty-seven, and subsequent acts, seventeen thousand six hundred and twenty dollars and fifty cents;

For the payment of the accounts of Governor John P. Gaines and Courtney N. Walker, for expenses incurred by them in quelling the difficulties with the Rogue River Indians of Oregon, in the year eighteen hundred and fifty-one, four thousand nine hundred and seventy-nine dollars;

To enable the Department to procure the medals of the next President of the United States for presentation to Chiefs and Headmen of the Indian tribes, twenty-five hundred dollars;

That the President of the United States, if upon examination be shall approve of the plan hereinafter provided for the protection of the Indians, be and he is hereby authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes: *Provided*, That such reservations shall not contain more than twenty five thousand acres in each: *And provided further*, That said reservation shall not be made upon any lands inhabited by citizens of California, and the sum of two hundred and fifty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to defray the expense of subsisting the Indians in California and removing them to said reservations for protection : *Provided*, *further*, if the foregoing plan shall be adopted by the President, the three Indian agencies in California shall be thereupon abolished.

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**Act of March 3, 1855, ch. 204, 10 Stat. 686**

An Act making Appropriation for the current and Contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the year ending June thirtieth, one thousand eight hundred and fifty-six, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in congress assemble, That the following sums be, and they are hereby, appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes.

* * * * *

For collecting, removing, and subsisting the Indians of California, (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each, in or near the State of California, the sum of one hundred and fifty thousand dollars: *Provided*, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not expend the amount herein appropriated unless, in his opinion, the same shall-be expedient; and the last proviso to the authority for five military reservations in California, per act of third of March, eighteen hundred and fifty-three, be, and the same is hereby, repealed: *Provided*, That so much of the act approved on the thirty-first of July last, as requires that no more than twenty thousand dollars shall be drawn by the Superintendent of Indian Affairs, or be in his hands unexpended at one and the same time, be, and the same is hereby, repealed.

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**Act of May 18, 1928, ch. 624, § 2, 45 Stat. 602 (codified at 25 U.S.C. § 652)**

All claims of whatsoever nature the Indians of California as defined in section 1 of this Act [codified at 25 U.S.C. § 651] may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is hereby conferred upon the Court of Claims of the United States, with the right of either party to appeal to the Supreme Court of the United States, to bear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief.

No. 12-17151

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Eric D. Miller*
Eric D. Miller