No. 19-820

In The Supreme Court of the United States

JOHN MCMAHON, in his official capacity as Sheriff of San Bernardino County, RONALD SINDELAR, in his official capacity as Deputy Sheriff for San Bernardino County,

Petitioners,

vs.

CHEMEHUEVI INDIAN TRIBE, on its own behalf and on behalf of its members parens patriae, and CHELSEA LYNN BUNIM, TOMMIE ROBERT OCHOA, JASMINE SANSOUCIE, NAOMI LOPEZ individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT AS WELL AS NINTH CIRCUIT DECISIONS HOLDING THAT FAILURE TO FILE A CLAIM UNDER THE 1851 ACT EXTINGUISHES A TRIBE'S CLAIM OF ABORIGINAL TITLE.

The petition established that in *Barker v. Harvey*, 181 U.S. 481 (1901) and *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), the Court expressly held that a tribe's failure to submit claims under the 1851 Act, 9 Stat. 631 (1851) extinguished any tribal rights in the land. (Pet. at 13-16.) In the Brief In Opposition ("BIO"), respondents argue that the Ninth Circuit decision is consistent with these decisions because those cases involved claims based on formal grants by the Spanish or Mexican governments and that in *Cramer v. United States*, 261 U.S. 219 (1923), the Court held that tribal claims based on occupancy, were not subject to the Act. (BIO at 14-15.) Not so.

In *Cramer*, the Court found that the tribe members asserting claims were not subject to the 1851 Act because they did not occupy the land in question at the time of the Treaty of Guadalupe Hidalgo. 261 U.S. at 231 ("The Indians here concerned do not belong to any of the classes described therein and their claims were in no way derived from the Spanish or Mexican governments. Moreover, it does not appear that these

Indians were occupying the lands in question when the act was passed.").

Respondents seem to suggest that claims based on occupancy at the time of the Treaty, as opposed to formal land grants from the Spanish or Mexican governments, are not subject to the 1851 Act. Yet, this Court and the Ninth Circuit have rejected that proposition.

In *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925), members of the Karok Tribe in California asserted land claims, contending that they were not required to have filed claims under the 1851 Act because they were not claiming entitlement to any rights by virtue of formal grants from the Mexican or Spanish governments, but by right of occupancy long before the Treaty of Guadalupe Hidalgo. *Id*. at 91. The court rejected the contention, holding that the 1851 Act extinguished all tribal land claims, absent the filing of a claim, citing *Barker* and *Title Insurance & Trust*. *Id*. ("These cases, like the present, involved the rights of Indians to occupy, use, and enjoy lands in California based upon their use and occupancy under the governments of Spain and Mexico, and their continued use and occupancy since the cession by Mexico to the United States.").

This Court then affirmed in a per curiam opinion, citing, among other decisions, *Barker* and *Title Insurance & Trust*. *Super v. Work*, 271 U.S. 643 (1926).

Contrary to the respondents' assertion, in *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986), the Chumash Indians did not assert rights based on a "patent issued in confirmation of grants

made by the Mexican government." (BIO at 14.) To the contrary—they disclaimed any such argument, instead contending that occupancy alone established rights to the land, and that they were exempt from the 1851 Act. 788 F.2d at 645 ("Because aboriginal title is not 'derived from the Spanish or Mexican government,' the Chumash argue that they were not required to file."). Citing *Barker, Title Insurance & Trust* and *Super v. Work*, the Ninth Circuit rejected the contention and held that failure to file claims under the Act was fatal to their action. *Id*. at 645-46.

In *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015), the Ninth Circuit reaffirmed *Chunie*, and citing *Barker*, *Title Insurance & Trust* and this Court's per curiam affirmance in *Super v. Work*,[1] rejected the Kawaiisu Tribe's argument that land claims based on occupancy at the time of the Treaty, as opposed to formal grants from the Mexican government, were not subject to the 1851 Act. *Id*. at 918.

The Ninth Circuit decision here cannot be reconciled with this Court's decisions in *Barker*, *Title Insurance & Trust* and *Super v. Work*, nor its own decisions in *Chunie* and *Robinson*.

Respondents' reliance on provisions of the Act of 1853 is misplaced. Review of the provisions and the legislative history belies respondents' construction as effectively giving tribes an open-ended right to

[1] The Ninth Circuit was required to follow the Court's per curiam affirmance on the merits in *Super*. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

occupancy wherever they were located at the time of the Act. Section 6 of the Act was not addressed to tribes claiming property rights arising from occupancy at the time of the Treaty; rather, it addressed tribes that had retreated from such lands in the face of settlement following the Treaty.

In response to the amendment proposed by Michigan Senator Felch which became Section 6, Senator Gwin from California noted that the rights of any Indians were merely possessory, and that many were placed on land they did not occupy before the Treaty. 24 Cong. Globe 1772 (32nd Cong. 1852). He observed that there were few such Indians in the agricultural districts, with the bulk of Indians in such areas—some 30,000—being affiliated with the missions. He identified such relocated Indians as being in "some few Indian Villages on the Sacramento and other rivers," and "one on Captain Sutter's possessions," and noted that "they are diminishing every year." *Id*. at 1772-73. As a result, though "unwilling to acknowledge any right of soil in these tribes," he would support the amendment insofar as it merely allowed those relocated tribes to "remain at the villages they now occupy." *Id*. at 1773.

Significantly, in response to a question from Senator Shield from Illinois as to claims by mission Indians occupying land at the time of the Treaty, Senator Gwin noted that the bill "has no reference to these claims whatever," and contemplated that any such claims would be submitted to the claims commissioners per the 1851 Act, or, if necessary, subject to separate congressional action. *Id*.

The Brief In Opposition omits Senator Felch's response to this line of discussion, wherein he makes it clear that the amendment only concerned possessory rights of relocated Indian tribes, not those claiming a right through possession as of the date of the Treaty:

> The truth is, that we have little actual knowledge on the subject of Indian tribes in that country. Officially, we have none, for I believe we have no treaties that were ever made with any of them. It is, however, understood, that a large portion of the country occupied by the whites *is relieved of the original inhabitants*. Still I understand that there are portions of the country *to which the Indians have retired*—perhaps mineral portions—and which they are occupying to a considerable extent. My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians.

Id. (emphasis added).

Thus, contrary to respondents' contention, the effect of the 1853 Act was extremely limited, granting some possessory rights to tribes who had relocated in the face of settlement following the Treaty of Guadalupe Hidalgo, but making it clear that the 1851 Act and its claims procedures applied to land claims based on a right of possession as of the time of the Treaty. This interpretation is consistent with the Court's decisions in *Barker*, *Title Insurance & Trust* and *Super v. Work*, all which recognized the need for tribes to file claims

under the 1851 Act in order to preserve any rights to property based on occupation or ownership at the time of the Treaty.

Here, at bottom, respondents' claim is based on occupation of the land in question not simply as of the time of the Treaty, but from "time immemorial," which, under this Court's decisions as well as those of the Ninth Circuit, meant that the Tribe was required to file a claim under the 1851 Act, and having failed to do so, had no rights of any kind in Section 36. The decision of the Ninth Circuit here cannot be reconciled with the controlling precedents of this Court, nor its own prior case law, and requires review by this Court to eliminate uncertainty in the important area of land title with respect to large tracts of land in California, which this Court has recognized warrants its intervention. (Pet. at 16 (citing *Title Ins. & Tr. Co.*, 265 U.S. at 486-87 and *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 344 (1941)).)

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE ENABLING ACT GRANTING TITLE TO SECTION 36 TO THE STATE OF CALIFORNIA UPON SURVEY, AND THE APPROPRIATION DOCTRINE AS INTERPRETED BY THIS COURT.

As established in the petition, the Enabling Act of 1853 granted California title to Section 36, and on upon survey in 1895, Section 36 became property of the State of California. (Pet. at 6.) Significantly,

respondents do not dispute that when Special Agent Kelsey made his recommendation in 1907 that Section 36 be included in land set aside for the Chemehuevi, he *mistakenly believed* that the land had not been surveyed. (Pet. at 8-9 (citing 3 ER 586).) In sum, Kelsey recommended, and the Secretary subsequently approved, allocating land to the Chemehuevi that had already been allocated to, and indeed title perfected by, the State of California.

Respondents do not dispute that under the governing decisions of this Court, and indeed of the Ninth Circuit, that under the Enabling Act, the State would take title to Section 36 without any limitation, absent some preexisting rights expressly granted to the Tribe by the federal government. (BIO at 16, acknowledging that *Lyon v. Gila River Indian Cmty*., 626 F.3d 1059 (9th Cir. 2010) was correctly decided.) Similarly, respondents do not dispute that under the Appropriation Doctrine, once the federal government appropriates property for one purpose, it cannot be reallocated by the federal government for another purpose. (BIO at 23-24.)

Respondents' argument rests upon the assumption that the Tribe was not required to file a claim under the 1851 Act, that it was granted at least possessory rights by the Act of 1853, and that the State took title to Section 36 in 1895 subject to the Tribe's possessory interest, which the Secretary could convert to a reservation, without regard to any formal patent. Yet, as noted, under the governing law as articulated by this Court, the Tribe's failure to file a claim under the 1851

Act meant that it had neither a possessory nor ownership interest in Section 36, and the Act of 1853 did not grant any such rights. As a result, the State took title without limitation upon approval of the survey in 1895, and any subsequent action by the Secretary to convert Section 36 to a portion of the Chemehuevi reservation runs afoul of this Court's decisions concerning the Enabling Acts and the Appropriation doctrine.

Minnesota v. Hitchcock, 185 U.S. 373 (1902) is not to the contrary. In *Hitchcock*, the Court held that because the federal government had recognized a right of tribal use and occupancy via treaty before the sections allocated to the state for school purposes were surveyed, the state subsequently took title subject to the right of possession granted by the treaty. *Id*. at 398-99 ("Before any survey of the lands, *before the state right had attached to any particular sections*, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the entire tract under a trust for its disposition in a particular way.") (emphasis added). That is not the case here. At the time the State took title to Section 36 via survey in 1895, as noted, the Tribe had no rights of any kind in the property.

Nor does *Arizona v. California*, 373 U.S. 546 (1963) support respondents' position. The case involved the question whether water rights could be created by secretarial order, not whether a secretarial order could appropriate land already allocated to a state for inclusion as part of a reservation. *Id*. at 598 ("Arizona also argues that, in any event, water rights cannot be

reserved by Executive Order."). The parties had no reason to address, nor the Court to decide, the scope of reservation property. That other parts of the Chemehuevi reservation might be validly created by the Secretarial Order of 1907 with appropriate water rights, is irrelevant to whether Section 36 could validly be included in the reservation given the absence of any preexisting tribal rights of any kind in the property prior to the State taking title by survey in 1895.

Finally, in arguing that title is irrelevant to determining whether property constitutes Indian country under 18 U.S.C. § 1151, respondents ignore the point made in the petition—that the rule is applicable when land that was once part of a reservation is subsequently sold to non-tribe members. (Pet. at 15-16 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).) However, it has no application when the property in question was never Indian country at any point. There is no concern about "checkerboard jurisdiction" (BIO at 28-30) because the property in question was never part of the "board" to begin with.

This Court has repeatedly recognized the unique nature of land grants in California, particularly in regard to apportionment of land between the State and Indian tribes, as well as the importance of setting down clear guidelines for adjudicating property disputes and providing stability in land ownership, possession and control. Both this Court and the Ninth Circuit have held that tribal property claims, including claims based on occupancy at the time of the Treaty of Guadalupe Hidalgo, are valid only if a claim was filed

in compliance with the 1851 Act. The Ninth Circuit's decision departs from this settled law and has created uncertainty in an area in which certainty is vital. The petition should be granted.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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