For Opinion See 75 S.Ct. 521 , 75 S.Ct. 313

U.S., 2006.

Supreme Court of the United States.
THE TEE-HIT-TON INDIANS, An Identifiable Group of Alaska Indians, Petitioner,
v.
THE UNITED STATES.
No. 43.
October Term, 1954.
September 21, 1954.

On Writ of Certiorari to the United States Court of Claims

Brief for the United States

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***1** OPINION BELOW

The opinion of the Court of Claims (R. 16-26) is reported at 120 F. Supp. 202.

JURISDICTION

The judgment of the Court of Claims was entered April 13, 1954 (R. 33). The petition for a writ of certiorari was filed April 19, 1954, and granted June 7, 1954 (R. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

***2** TREATY AND STATUTES INVOLVED

The Treaty of March 30, 1867, 15 Stat. 539; Sections 8 and 12 of the Act of May 17, 1884, 23 Stat. 24; Section 27 of the Act of June 6, 1900, 31 Stat. 321, 48 U. S. C. 356; and the Joint Resolution of August 8, 1947, 61 Stat. 920, are set out in the Appendix, *infra*, pp. 81-89.

QUESTIONS PRESENTED

1. Whether petitioner's alleged property interest in the Alaskan lands involved is anything more than "original Indian title."

2. Whether unrecognized "original Indian title" is a property interest the taking of which is compensable under the Fifth Amendment.

3. Whether petitioner's alleged property interest was ever "recognized" by the sovereign, either Russia or the United States.

4. Whether, in any event, petitioner's alleged property interest was extinguished by the 1867 treaty of cession of Alaska to the United States.

5. Whether certain evidence of recent less intensive use of the areas claimed by petitioner constitutes *prima face* evidence of termination or loss of whatever rights it may have, and whether execution of the timber sales contract involved here would constitute a taking of petitioner's rights if they were proved.[FN1]

FN1. We do not believe that the two issues stated in this question are ready for review by this Court. See *infra*, p. 79-80.

***3** STATEMENT

The Joint Resolution of August 8, 1947, 61 Stat. 920 (*infra*, pp. 88-89) authorized the Secretary of Agriculture to sell timber growing on any vacant, unappropriated, and unpatented lands within the boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. On August 20, 1951, acting pursuant to such authorization the Secretary entered into a contract for the sale to Ketchikan Pulp & Paper Company of all merchantable timber available to June 30, 2004, in a specified area of the Tongass National Forest (R. 31-32). Thereupon, this proceeding was instituted by petitioner on the theory that members of the tribe from "time immemorial continually used, occupied and claimed" the entire area covered by the contract "in their accustomed Indian manner;" that its rights to the land had been confirmed and recognized by Congress; and that the execution of the contract constituted a taking *pro tanto* of its asserted rights in the area (R. 1-3), which were alleged to be the "full proprietary ownership in fee simple" or, alternatively, "the right to unrestricted possession, occupation, and use" (R. 2). The prayer was for damages for the alleged taking, or, in the alternative, for an accounting (R. 3). The Government's answer (R. 3-6), *inter alia*, denied that petitioner had any collective or group rights in the area and ***4** asserted that its possession of the area, if it existed, was not of such nature as to give rise to a cause of action against the United States for a taking under the Constitution (R. 3-4).

Upon petitioner's motion and pursuant to that court's Rule 38 (b), the Court of Claims directed a separate trial as to six issues of law and any related issues of fact (R. 6-8), "the solution of which might make unnecessary the taking of voluminous evidence as to use, occupation, possession and value of large and remote areas in Alaska" (R. 17).[FN2] At the present time, the following three issues (R. 7) are of major significance:[FN3]

> FN2. The area claimed by petitioner comprised 352,800 acres of land and 150 square miles of water (R. 1, 27-28). There are approximately 60 members in the petitioning group (R. 2,30).
>
> FN3. In disposing of the first issue the Court of Claims held that petitioner was an "identifiable group" of Indians within the meaning of 28 U. S. C. 1505 (R. 17-18, 32). The fifth and sixth issues, involving the questions whether, assuming the establishment of property rights, such rights had been abandoned, or, if not, had been taken by the execution of the contract, were not answered by the Court of Claims in view of its disposition of the issues quoted above (R. 25-26, 32). Their disposition here is discussed *infra*, pp. 79-80.

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied***5** in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?
3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it ?
4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

Issue 2 was designed to test the Government's contention that whatever interest petitioner may have had in the lands during the Russian sovereignty had been extinguished by the 1867 treaty whereby Alaska was ceded to the United States. Being doubtful as to the effect of the treaty upon "original Indian title," the Court of Claims did not answer the question as posed (R. 19, 20-23, 32). Instead, it held that, even assuming a tribal property interest of petitioner survived the treaty, it was substantially identical in nature with "original Indian title" or "Indian right of occupancy," as those terms are understood in relation to the interests of Indian tribes residing within the 48 States (R. 18-19). And in reliance upon this Court's statement in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, and decision in *United States v. Tillamooks*, 341 U. S. 48, the court held ***6** that petitioner would still not have a right in the land, as against the United States, unless Congress had recognized petitioner's interest as a legal interest (R. 19-20, 32). It also concluded that the legislation relied upon by petitioner did not constitute a recognition by Congress of any legal rights in the petitioning tribe to the lands in controversy, but rather indicated only an awareness that there was a legal dispute as to the question of ownership (R. 22-25, 32). Consequently, upon the Government's motion (R. 32-33), the cause was dismissed (R. 33).

SUMMARY OF ARGUMENT

I

Petitioner's alleged property interest in the Alaskan lands involved here is nothing more than "original Indian title."

A. It is a well established principle of international law that with respect to the lands of this continent "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 8 Wheat. 543, 573. As is well illustrated by the proclamations of the various sovereigns, the enactments of the colonial legislatures, judicial opinions (including opinions of this Court), and other sources, the discovering nations asserted in themselves, by virtue of the principle of discovery, the complete and exclusive title to the land-subject only to a right of occupancy in the Indians, such right being retained by the Indians only by the grace of the sovereign.

B. This Indian right of occupancy, also known as

"original Indian title," is not a right in the soil itself, but is merely a usufructuary right, i. e., the right of using and enjoying the profits of a thing belonging to another, without impairing the substance. It is comparable to the right of a mere licensee.

C. As other European nations did with respect to their parts of the New World, Russia asserted complete title to Alaska by virtue of discovery. This is shown by various historical facts but particularly by the 1821 ukase of Emperor Alexander, claiming proprietary rights by virtue of first discovery, first occupation, and peaceable and uncontested occupation. Petitioner's arguments to the contrary are based upon erroneous conceptions as to the history and content of the doctrine of title by discovery, and its application by and to Russia, and are clearly without substance. Thus, with the coming of Russia petitioner's title to lands in Alaska, whatever it was prior thereto, was reduced to "original Indian title," and, absent any showing of a grant from the sovereign, petitioner's interest was no greater than conventional aboriginal title during Russian sovereignty or thereafter.

II

If unrecognized "original Indian title" is taken, the Fifth Amendment does not require compensation to be paid.

A. The Court having been evenly divided on the question, the decision in *United States v. Tillamooks,* 329 U. S. 40, was not a holding that the taking of "original Indian title" was compensable under the Fifth Amendment. However, the *per curiam* decision of the Court in the later *Tillamooks* case (*United States v. Tillamooks*, 341 U. S. 48) that interest was not payable as part of the award for the taking is a holding that the taking of "original Indian title" is not compensable under the Constitution.

B. Apart from the *Tillamooks* decisions, it is clear that, as against the United States, Indians do not possess the same rights under the unrecognized "original Indian title" as under a recognized title. Although mere unrecognized "Indian title," until extinguished by the sovereign, is protected against the acts of others, the United States can terminate it at will, and its power to terminate is not limited to a right to purchase. By discovery, the European nations claimed exclusive title to the New World subject only to a temporary right of Indian occupancy, and asserted the exclusive right and power to extinguish the "original Indian title" or temporary right of occupancy by purchase, by conquest, or in any other manner. The United States succeeded to the same title by discovery when it took over sovereignty, and its obligation upon taking Indian lands was understood at the time the Union was formed, and repeatedly characterized since, as being a political, not a legal, obligation. *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians v. United States*, 324 U. S. 335, 339.

C. That "Indian title" was not a property right for the extinguishment of which the sovereign was constitutionally liable is shown by the fact that, prior to and following the adoption of the Constitution and the Fifth Amendment, seven of the original States ceded lands occupied by Indians to the United States for the purpose of sale to create a fund for the common benefit of all the States. Clearly, it was the understanding of the States and the United States that there was no obligation to pay the value of the lands to the Indians when their occupancy was extinguished. The same view was reflected by the House Committee on Indian Affairs in 1830. H. Rept. No. 227, 21st Cong., 1st sess.

D. There is some language in the cases which, if taken to apply to "original Indian title," would support the view that the United States could not extinguish such title without incurring the obligation to pay just compensation. But when the distinctions between recognized and unrecognized "Indian title" and between the actions of the United States and others are kept in mind, it becomes clear that these cases are not contrary to the Government's position here.

The fact that the United States has elected to extinguish "Indian title" by treaty or agreement with the Indians, i. e., by resort to its right to purchase, does not create a constitutional obligation to compensate for "Indian title" otherwise extinguished. The practice of treating peaceably with the Indians was simply a legislative policy, dictated by expediency and humane motives. It was not a recognition of "Indian title" as a compensable property interest; nor was the practice of extinguishing "Indian title" by treaty or agreement inconsistent with the right of the Government to extinguish "Indian title" by any other means and on any other terms.

III

Petitioner cannot properly claim compensation on the ground that its "title" has been recognized. The recognition necessary to support constitutional liability for a taking must be such as to amount to a guarantee of a perpetual right of occupancy to the Indians. Petitioner disclaims that Russia so recognized its right of occupancy, and the few statutes relied upon as establishing recognition by the United States show at most only an intention to preserve the *status quo* in Alaska. They do not, therefore, furnish the necessary recognition.

IV

In any event, it has been correctly held that petitioner's Indian title was extinguished by the 1867 treaty of cession of Alaska. *Miller v. United States*, 159 F. 2d 997, 1001-1005 (C. A. 9). Such a holding is required by the plain language of the treaty that there was no obligation on the United States to protect the native tribes in the enjoyment of property and that the cession included title to all lands not "private individual property," free of encumbrances except those of "merely private individual property holders."

Furthermore, petitioner's reliance upon vacillating administrative interpretations as to the quantum of aboriginal rights in Alaska is not persuasive, especially since Congress is supreme in the sphere of the acquisition, control, and disposition of the territories of the United States, and Congress has not acceded to such views.

V

Petitioner also discusses the questions of whether there has been an abandonment of its alleged interest and of whether execution of the timber sales agreement involved here constituted a "taking" of petitioner's rights. The Court of Claims did not discuss or pass upon these issues, and in our view they are not ready for decision by this Court.

ARGUMENT

I. PETITIONER'S ALLEGED PROPERTY INTEREST IN THE ALASKAN LANDS INVOLVED IS NOTHING MORE THAN "ORIGINAL INDIAN TITLE"

Petitioner, a "clan" of Tlingit Indians of southeastern Alaska, claims the right of full proprietary ownership in fee simple in the area in question by virtue of the fact that its members have as a tribe, band, clan, or group from time immemorial continually used, occupied, and claimed the area in their accustomed Indian manner (R. 2). The gist of its argument in support of this claim is that its interest in the area was substantially different from the Indian title encountered within the area of the 48 States (Pet. Br. 7, 14-28). The court below agreed that petitioner's ancestors had "a species of ownership in the lands which they used for hunting, fishing, and berry picking" (R. 18), but held that such "interest was what is called, in relation to American Indians, 'original Indian title' or 'Indian right of occupancy,' with its weaknesses and imperfections" (R. 19). In this Point, we shall show that, at the time of the cession of Alaska to the United States in 1867, petitioner could have had no greater interest in the area at issue.

***13** A. *The discovering nations acquired absolute title to the lands of this continent subject only to the Indian right of occupancy.*-Prior to the great era of discovery beginning in the latter part of the fifteenth century, the Christian nations of Europe acquired jurisdiction over newly discovered lands by virtue of grants from the Popes, who claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 124-125. For example, in 1344, Clement VI had granted the Canary Islands to Louis of Spain upon his promise to lead the islanders to the worship of Christ, and, following the discovery of the New World by Columbus, Alexander VI in 1493 and 1494 issued bulls granting to Spain all lands not under Christian rule west of a line 100 leagues west of the Azores and Cape Verde Islands. *Ibid.*, p. 125; *Cambridge Modern History* (1934), Vol. 1, p. 23. The latter papal grant, because of the breaking down of the papal authority and the vastness of the territory covered, was not accepted by the other nations or even greatly relied upon by Spain, and it was necessary for the civilized, Christian nations of Europe to develop a new principle which all could acknowledge as the law by which they should regulate, as between themselves, the right of ***14** acquisition of territory in the New World, which they had found to be inhabited by

Indians who were heathens and uncivilized according to European standards. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 146-147; Lindley, *ibid.*, pp. 126-129.

At first, mere discovery was considered sufficient to create a good and complete title, but because of the extravagant, conflicting claims based upon discovery alone it was soon found that a more stringent basis was necessary. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 146-147. After a lapse of many years the principle was finally evolved "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 8 Wheat. 543, 573; *Martin v. Waddell*, 16 Pet. 367, 409-410; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 148-149; Moore, *International Law Digest* (1906), Vol. 1, pp. 258-259; Story, *Commentaries on the Constitution of the United States* (5th ed., 1891), pp. 106-107.

Although the nations of Europe thus ceased to recognize the Popes as the source of their titles to newly acquired lands, the new concept of title by discovery was based upon the same idea that lands occupied by heathens and infidels were open ***15** to acquisition by the Christian nations.[FN4] As stated in *Johnson v. McIntosh*, 8 Wheat. 543, 573:

> FN4. This is demonstrated by the fact that the English sovereign's grant of a commission to the Cabots was for the discovery of countries then unknown to Christian people and to take possession in the name of the English king. Similar commissions issued to Gilbert and Raleigh. See *Johnson v. McIntosh*, 8 Wheat. 543, 576-577.

* * * The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. * * *

The Indians retained certain rights of occupancy, but the discoverers asserted exclusive title in themselves, subject only to the right of occupancy. *Johnson v. McIntosh*, 8 Wheat. 543, 574.

That the discovering nations asserted complete title in themselves, even as against the heathen natives, is well illustrated by the enactments of the colonial legislatures. In Massachusetts, as early as the period 1633-1637, the General Court had declared (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), pp. 9-10):
That what lands any of the Indians in this jurisdiction have possessed and improved, by subduing the same, they have just right unto, according to that in Gen. 1, 28, and Chap. 9, 1, and Psal. 115, 16.[FN5]

> FN5. Gen. 1:28. "And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: * * *" Chap.9:1. "And God blessed Noah and his sons, and said unto them, Be fruitful, and multiply, and replenish the earth." Psal. 115:16. "The heaven, even the heavens, are the Lord's; but the earth hath he given to the children of men."

***16** And for the further encouragement of the hopeful work amongst them, for the civilizing and helping them forward to Christianity, if any of the Indians shall be brought to civility, and shall come among the English to inhabit, in any of their plantations, and shall there live civily and orderly, that such Indians shall have allotments amongst the English, according to the custom of the English in like case.

And further it is ordered by this Court * * * That all the tract of land within this jurisdiction, whether already granted to any English plantations or persons, or to be granted by this Court (not being under the qualifications of *right* to the Indians) is, and shall be accounted the just *right* of such English as already have, or hereafter shall have grant of lands from this Court, and the authority thereof, from that of Gen. 1. 28, and the invitation of the Indians.[FN6]

> FN6. Italics in original. Unless so noted, emphasis has been supplied throughout this brief.

In Maryland, in 1704, the Assembly, feeling that it was "most just that the Indians, the ancient inhabitants of this province, should have a convenient dwelling place in this their native ***17** country," granted to the Nanticoke Indians a tract of land, so long as they should occupy and live upon the same, "to be held of

the lord proprietary, and his heirs, * * * under the yearly rent of one beaver skin, to be paid to his said lordship, and his heirs, as other rents in this province by the English used to be paid." Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), pp. 140-141. And, in 1748, North Carolina granted to the Tuscarora Indians a described tract, "it being but just that the ancient inhabitants of this Province shall have and enjoy a quiet and convenient dwelling place in this their native country." Laws of thee Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 163.

The General Assembly of Virginia, in 1658, having received many complaints from the Indians of intrusion on lands occupied by the Indians, stated (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 149):
* * * which this Assemblie conceiving to be contrary to justice, and the true intent of the English plantation in this country, whereby the Indians might, by all just and fair waies, be reduced, to civillity, and the true worship of God, *have therefore thought fitt to ordaine and enact, and bee it hereby ordained and enacted,* That all the Indians of this collonie shall and may ***18** hold and keep those seates of land which they now have * * *.

Seldom was it considered necessary for the principle of ownership by the Crown or the proprietors to be set forth in so many words. But in the laws of Connecticut, as early as 1717, we find it declared by the Assembly (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 41):
That all lands in this Government are holden of the King of Great Britain, as the lord of the fee, and that no title to any lands in this Colony, can accrue by any purchase made of Indians, on pretence of their being native proprietors thereof, without the allowance and approbation of this Assembly.

And South Carolina, in 1739, prohibited the practice of purchasing lands from the Indians because "such practices tend to the manifest prejudice of his majesty's just right *and title to the soil* of this province."[FN7] Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 178.

FN7. Italics in original.

The principle that all lands belonged to the sovereign is further shown by the proclamation of George III of October 7, 1763, whereby he gave to the governors authority to grant lands ***19** Within their colonies, but stated (American State Papers, Public Lands, Vol. 1, pp. 30, 31):
And whereas it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their hunting grounds; we do, therefore, with the advice of our privy council, declare it to be our royal will and pleasure, that no governor or commander-in-chief in any of our colonies of Quebec, East Florida, or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described in their commissions; as also that no governor or commander-in-chief of other colonies or plantations in America, do presume for the present, and until our further pleasure be known, to grant warrant of survey, or pass patents for any lands beyond the heads or sources of any of the rivers. which fall into. the Atlantic ocean from the west or northwest; or upon any ***20** lands whatever, which, not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.

And we do further declare it to be our royal will and pleasure for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest, as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

It is clear that the King was here exercising complete

dominion over the whole area even to the extent of asserting that he was reserving "under our sovereignty, protection and dominion, for the use of said Indians, all the lands not included within the limits of our said three new governments."

This whole concept was set forth by Vattel when he said (Vattel, *Le Droit Des Gens* (Fenwick***21** translation of 1758 edition, Carnegie Institution (1916), pp. 85-86)):

There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. We have already pointed out (§ 81), in speaking of the obligation of cultivating the earth, that these tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.[FN8]

FN8. Vattel goes on to say:
"We have already said that the earth belongs to all mankind as a means of sustaining life. But if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it. Hence we are not departing from the intentions of nature when we restrict the savages within narrower bounds. However, we can not but admire the moderation of the English Puritans who were the first to settle in New England. Although they bore with them a charter from their sovereign, they bought from the savages the lands they wished to occupy. Their praise-worthy example was followed by William Penn and the colony of Quakers that he conducted into Pennsylvania."

***22** And although Chief Justice Marshall found it difficult (*Worcester v. Georgia*, 6 Pet. 515, 543)

to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied;

nevertheless it was precisely on this basis that he was to predicate his now universally accepted doctrine in *Johnson v. McIntosh*, 8 Wheat. 543, 587-589, that:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly ***23** over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[FN9]

FN9. The Chief Justice also said:
"We will not enter into the controversy, whether agriculturists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the

> chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the titles which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it."

Thus, it is abundantly clear that the sovereign's ownership of the lands on this continent came, not ***24** from any grants by the native Indians, but rather from the principle of discovery. And it is likewise plain that the Indians retained only a right of occupancy through the grace of the sovereign. *Johnson v. McIntosh*, 8 Wheat. 543, 573-574, 587-588; *Martin v. Waddell*, 16 Pet. 367, 409-410; *United States v. Tillamooks*, 329 U. S. 40, 46.

That this was also the view of the legislative branch of the Government is shown by the exhaustive report of the House Committee on Indian Affairs in 1830 on a bill authorizing the President to remove Indians from treaty reservations to lands west of the Mississippi River.[FN10] H. Rept. No. 227, 21st Cong., 1st sess. Especially pertinent portions of this report are as follows:

> FN10. This bill became the Act of May 28, 1830, 4 Stat. 411.

[p. 3] Principles of natural law, and abstract justice, are appealed to by some, to show that the Indian tribes within the territorial limits of the States, ought still to be regarded as the owners of the absolute property in the soil they occupy, and that they are to be regarded as independent communities, having all the attributes of sovereignty, except such as they have voluntarily surrendered. * * *
The foundations of the States which constitute this Confederacy were laid by the Christian and civilized nations, who were instructed or misled, as to the nature of their duties, by the precepts and examples ***25** contained in the volume which they acknowledged as the basis of their religious rites and [p. 4] creed. To go forth, to subdue and replenish the earth, were received as divine commands, or relied on as plausible pretexts to cover mercenary enterprises, by the governments which gave the authority, and the adventurers who first discovered and took possession of the new world. Whether they were right or wrong in their construction of the sacred text, or whether their conduct can, in every respect, be reconciled with their professed objects or not, it is certain that possession, actual or constructive, of the entire habitable portion of this continent, was taken by the nations of Europe, divided out, and held originally by the right of discovery as between themselves, and by the rights of discovery and conquest as against the aboriginal inhabitants. In the Spanish provinces, the Indians became the property of the grantee of the district of country which they inhabited; and this oppression was continued for a considerable period. Although the practice of the Crown of England was not marked by an equal disregard of the rights of personal liberty in the Indians, yet their pretensions to be the owners of any portion of the soil were wholly disregarded. * * *
[p. 5] * * * but in all the acts, first of the colonies, and afterwards by the States, the fundamental principle, that the Indians***26** had no rights, by virtue of their ancient possession, either of soil or sovereignty, has never been abandoned, either expressly or by implication.

The recognition of this principle by the Federal Government may be seen, at this day, in those small reservations which are made to individual Indians, or to the tribe itself, upon the relinquishment of the body of their lands. These reservations are made in deference to the principles of humanity, and because it has been found expedient to the interests of the Government making them. No respectable jurist has ever gravely contended, that the right of the Indians to hold their reserved lands, could be supported in the courts of the country, upon any other ground than the grant or permission of the sovereignty or State in which such lands lie. * * *
[p. 6] * * * But the most decisive evidence of the light in which these reservations have always been viewed, in regard to the question of title, is to be found in the fact, that the Crown or the proprietors of Provinces, before the Revolution, and the States, after that event, succeeding as they did to the sovereignty over all the lands within the limits of their respective charters, have asserted the exclusive right in themselves, to extinguish the title to lands reserved to the Indians, until the Constitution was adopted. Since that ***27** time, the Federal Government has acted upon the same principle, in regard to lands belonging to the

Government. If the principle upon which this right is asserted, and the effect it has had in practice, be examined, it will be found to be a complete recognition of the original rule which the nations of Europe acted upon in the first partition and settlement of the country. * * *

B. *The Indian right of occupancy, also called "original" or "aboriginal" Indian title, is merely a usufructuary right.*-*We* have shown (*supra*, pp. 12-27) that the sovereigns, the European nations and our own, have consistently claimed the absolute and complete title to the lands on this continent, subject only to the Indian right of occupancy. This right of occupancy based upon aboriginal possession has been called "Indian title" and, to distinguish it from a greater Indian title which has been formally acknowledged, recognized, or confirmed by the sovereign by treaty, agreement or statute, is also known as "original Indian title" or "aboriginal Indian title." *United States v. Tillamooks*, 329 U. S. 40, 46, dissenting opinion, pp. 57-58; *Shoshone Indians v. United States*, 324 U. S. 335, 338-339. This right of occupancy, known as original or aboriginal Indian title, was merely a usufructuary right or privilege.

***28** In the early case of *Fletcher v. Peck*, 6 Cranch 87, 121, part of the argument of the defendant in error is reported as follows:[FN11]

> FN11. John Quincy Adams and Joseph Story argued the case for defendant in error.

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, lib. 1, § 81, p. 37, and § 209; lib. 2, § 97; Montesquieu, lib. 18, c. 12; Smith's Wealth of Nations, b. 5, c. 1. It is a right not to be transferred, but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

In that case, the Court found it unnecessary to define with any degree of precision the nature of the Indian rights, but contented itself with the statement (6 Cranch at pp. 142-143) that "* * * the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state."

One of the earliest cases to define the right is that of *Cornett v. Winton's Lessee*, 2 Yerg. (10 Tenn.) 143, where Judge Catron said in 1826 (p. 144):
***29** And what is this Indian title It has been called by the courts of this State, a *usufructuary right*, nor will I call it by a different name, * * *.

And in *Blair v. The Pathkiller's Lessee*, 2 Yerg. (10 Tenn.) 407, the same judge said (p. 412):
* * * If our construction is right, so soon as the Indian title was extinguished, the sovereignty (Tennessee) to which the incumbered fee belonged, or an individual of that sovereignty to whom it had been granted, took the land disincumbered; because the Indians had no permanent interest in the soil, and nothing passed from them: the right of occupancy was a *usufructuary privilege* subject to extinction. This doctrine applies to all ordinary cases of Indian occupancy.

This description of the right of the Indians cannot be dismissed as merely the unsupported conception of a state court. For in 1850, the same judge, then a Justice of this Court, wrote the unanimous opinion in *Marsh v. Brooks*, 8 How. 223, in which the Court declared that (p. 232):
* * * This Indian title consisted of the *usufruct* and right of occupancy and enjoyment * * *.

And, in 1886, in *The Cherokee Trust Funds*, 117 U. S. 288, 294, speaking of the Cherokees, the Court said:
* * * They claimed the principal part of the country now composing the States of ***30** North and South Carolina, Georgia, Alabama, and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely *usufructuary*, affording protection against individual encroachment, but always subject to the control and disposition of those governments, at least so far as to prevent, without their consent, its acquisition by others. * * *

In the same year, Mr. Justice Field, in the case of *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, after referring to the decision in *Johnson v. McIntosh*, said (p. 67):
* * * Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a *usufructuary right* in the natives. * * *

A "usufructuary right" is ordinarily defined as the right or privilege of using and enjoying a thing which belongs to another, without impairing the substance-that is, the right to have the profits and use of the property but not its disposition or ownership. See, e. g., *Heintz??n v. Binninger*, 79 Cal. 5, 6, 21 Pac. 277; *Schwartz v. Gerhardt*, 44 Ore. 425, 429, 75 Pac. 698, 699.[FN12] It seems clear that this Court used the term in the same sense in referring to original Indian title.

FN12. See also *Kaiser Co. v. Reid*, 30 Cal. 2d 610, 621, 184 P. 2d 879, 886; *Clark v. Lindsay Light Co.*, 405 Ill. 139, 142, 89 N. E. 2d 900, 902; *Modern Music Shop, Inc. v. Concordia Fire Ins. Co.*, 131 Misc. 30, 308,226 N. Y. S. 630, 635.

***31** The Indians may roam over the land for their hunting, fishing and berrying, and may otherwise use the land to perpetuate their existence, but they have no right in themselves to dispose of the soil. *Johnson v. McIntosh*, 8 Wheat. 543, 574. Nor can they sell timber standing on the land. *United States v. Cook*, 19 Wall. 591; cf. *United States v. Paine Lumber Co.*, 206 U. S. 467, 472-473. Indeed, the right is comparable to that of a mere licensee, e. g., a squatter on the public lands. See the dissenting opinion in *United States v. Tillamooks*, 329 U. S. 40, 58.

C. *Petitioner's asserted right is no more than "original Indian title."*-Our argument has been (*supra*, pp. 12-13) that from the time of discovery by the European sovereign the "original Indian title" could not in any sense be compared with "full proprietary ownership." Whatever rights the natives had in the soil prior to discovery were thereafter "necessarily, to a considerable extent, impaired." *Johnson v. McIntosh*, 8 Wheat. 543, 574. As further stated in the same opinion (p. 588):

An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise***32** the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

It would be strange indeed if petitioner, alone of all the groups of natives in the New World, retained any greater rights in the soil as against the discoverers from Europe.

Petitioner contends, however, (Pet. Br. 14-28). that prior to the advent of Russia in Alaska it had the "full proprietary ownership" of its lands, and that such ownership was not impaired in any way throughout the period of Russian sovereignty. In so contending, petitioner asserts that its ancestors had a concept of land title somewhat akin to "full proprietary ownership" (Pet. Br. 9-11, 14-17),[FN13] but such assertion is of no avail to petitioner. For the fact remains that its title, if any, to the soil of Alaska was impaired by the coming of the Russians, just as in the case of the Indians in the 48 States the coming of other Europeans affected their "rights." After that ***33** time, petitioner had only a right of occupancy known as "original Indian title."

FN13. We do not in fact agree with petitioner's implication (Pet. Br. 9-11, 15-17) that the evidence establishes that it had reached such a degree of civilization that its concept of land title was similar to that of the discoverers. The excerpts quoted by petitioner do not present a complete picture. A survey of all the evidence will reveal that rather than any concept of title in soil, petitioner's concept of ownership was a mere right of exploitation. See Plaintiff's Exhibit No. 9, pp. 37-38; Defendant's Exhibit No. 3, pp. 18-23; Defendant's Exhibit No. 5, pp. 54-62; Defendant's Exhibit No. 6, pp. 11-19.

Petitioner's answer (Pet. Br. 22-28) is that the concept of "original Indian title" is not applicable in Alaska because Russia had not asserted title by discovery as had the other European nations. But, as stated by Charles Sumner, chairman of the Senate Committee on International Affairs, in advocating before the Senate the ratification of the Treaty of 1867 (H. Ex. Doc. No. 177, 40th Cong., 2nd sess., p. 125): "The title of Russia to all these possessions is derived from prior discovery, which is the admitted title by which all European powers have held in North and South America."

It is unnecessary to delve into the history of Russia's explorations in and occupation of Alaska to find

conclusive support for the Senator's statement.[FN14] In 1821, Emperor Alexander of Russia issued a ukase claiming an exclusive territorial right to the northwest coast of North America and the adjacent islands and prohibiting the navigation and fishery therein by all other nations, even to prohibiting approach within 100 miles. American State Papers, Foreign Relations, Vol. 4, pp. 857-861. The proprietary rights specified in this decree were based upon first discovery, first occupation, and peaceable and uncontested occupation ***34** for more than half a century. American State Papers, Foreign Relations, Vol. 4, pp. 861-862. Obviously, this ukase is irrebuttable proof that Russia subscribed to the same doctrine of title by discovery as the other European nations (see *supra*, pp. 13-27, 43 ff.). And all of petitioner's contentions to the contrary are wholly fallacious.

FN14. The story of Russia's explorations and occupation is set out in some detail in Senator Sumner's speech. H. Ex. Doe. No. 177, 40th Cong., 2nd sess., pp. 125-130, 143-154.

Petitioner first contends (Pet. Br. 22-23) that the doctrine of title by discovery had no application to the area it claims because Russia did not interfere with petitioner's use or ownership of the soil or make grants of interests in the soil, but rather cautioned its subjects to respect the Indians' rights. However, there were similar circumstances in the rest of the continent (see *supra*, pp. 15-20,24-27). The other European nations and our own did not seize all of the natives' lands in one fell swoop. For the preservation of the peace and other reasons of expediency it was customary to establish a temporary boundary beyond which the whites were forbidden to settle until more territory was needed for settlement, and it was usual to conciliate warlike tribes by leaving them to their own devices until control could be more readily exercised. H. Rept. No. 227, 21st Cong., 1st sess., pp. 6-7, 8-9.[FN15] But such cir-cumstances ***35** did not affect the title by discovery. "A State is not obliged to exercise all its rights of sovereignty at once; * * *. The policy of the country has always been to avoid provoking the Indians; and, even if it could be shewn, that the exercise of jurisdiction, in any case, was avoided, because the Indians objected, still the right could not be affected." H. Rept. No. 227, 21st Cong., 1st sess., pp. 9-10. Russia apparently followed the same policy in Alaska.[FN16]

FN15. For example, the Treaty of August 3, 1795, 7 Stat. 49, with the Wyandots and other tribes provides that the United States will protect the tribes in the quiet enjoyment of their lands against all citizens and all other whites who intrude thereon (Article V), and that the United States shall withdraw its protection from all such intruders (Article VI).

FN16. Russia did, however, assert complete dominion and control over the territory. In the words of the Court of Claims (R. 19); "Such land as the Russian Government wanted for its use or the use of its licensees it took." It took lands it desired for forts and public buildings, and titles in fee were granted to employees of the Russian American Company. H. Ex. Doc. 177, 40th Cong., 2nd sess., p. 23; *Kinkead v. United States*, 24 C. Cls. 459, 460-464. And the Russian American Company had sublet its franchises in southeastern Alaska to England's Hudson Bay Company. H. Ex. Doc. 177, 40th Cong., 2nd sess., pp. 122-123 All this was done without any indication of payment having been made to the natives or their consent having been obtained.

Indeed, it is clear that this contention of petitioner is based upon a misconception that the "possession" necessary to perfect the inchoate title which is derived from discovery alone implies occupation or settlement of the entire area. But the requirement of possession is satisfied by any acts indicating that the territory has been appropriated and by actual use or occupancy of a part of the whole. Twiss, *Law of Nations in Time of Peace* (1861), pp. 162-170; Hall, *International* ***36** *Law* (7th ed., 1917), pp. 103-108; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 147-153; cf. Petitioner's Brief, pp. 43-45, where the argument is made that "possession" does not imply actual occupancy.

Thus, the assertion of title made in the ukase of 1821 and the visits by traders (R. 29-30) were sufficient, under the established principle of international law, to support good title in Russia by discovery. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 151-152; Hall, *international Law* (7th ed., 1917), pp. 103-104. Indeed, the necessity for any greater proof

has been obviated by the fact that the only competing nations agreed to Russia's claim, the United States by the Treaty of April 5, 1824, 8 Stat. 302, and Great Britain by a similar treaty in 1825. Wheaton, *International Law* (6th English ed., 1929), Vol. 1, pp. 342-343. And since under the treaty with Great Britain "Prince of Wales Island shall belong wholly to Russia" (see Treaty of March 30, 1867, 15 Stat. 539, 540), it is immaterial that the findings of the Court of Claims "offer no suggestion that the Russians ever 'discovered' even the coast of Prince of Wales Island on which the area here in question is located" (Pet. Br. 26). Such a political question had long since been decided in the proper forum.

Likewise, it is unimportant, in this context, that Russia made no attempt to introduce any ***37** system of land ownership in the area claimed by petitioner (see Pet. Br. 23). Land titles were unknown among the peasants in the greater part of Russia (R. 30). Therefore, it is not strange that Russia did not treat the savage natives with any greater consideration. Moreover, it appears from the complete text of the Russian document of which petitioner has quoted an excerpt (Pet. Br. 23) that the chief reason for the lack of a system of land ownership was the savage character of the native inhabitants. H. Ex. Doc. No. 177, 40th Cong., 2nd sess., pp. 23-24; cf. Finding No. 16, R. 30. But, in any event, the quoted statement-"no attempts were made, and no necessity ever occurred, to introduce any system of land ownership" (Pet. Br. 23)--surely does not establish that petitioner had any greater interest than "original Indian title." Rather, it indicates that Russia did not grant to petitioner any greater interest in the lands.

Petitioner also argues (Pet. Br. 23-24) that Russia did not subscribe to the doctrine of title by discovery because it was not a Roman Catholic or maritime power, and was not actuated in its discovery by the need for territory. In view of the definite and conclusive proof that Russia did subscribe to the doctrine (*supra,* pp. 33-34), there is plainly no substance to the argument. But it may also be pointed out that the doctrine of title by discovery is not merely a *Roman* Catholic doctrine,***38** but rather a principle adhered to by all the Christian nations (see *supra,* pp. 13 ff.). It cannot be denied that at the pertinent time Russia was a Christian nation. Likewise, while Russia may not properly have been described as a maritime "power," petitioner cannot deny that Russians sailed over the seas from Siberia to Alaska and acquired territory. Nor is the need for territory to meet the requirements of an expanding population the only reason for acquiring territory. The occupation of territory necessary for title by discovery is satisfied not only by settlement, but also by "taking from it its natural products." Hall, *International Law* (7th ed., 1917), p. 104. History shows that Russia did just that, especially in its fur trade.

Petitioner also apparently relies (Pet. Br. 9-11, 16-17) upon its asserted "relatively higher culture" as having prevented Russia's acquisition of title by discovery. However, as stated in Lawrence, *Principles of International Law* (7th ed., 1923), p. 148:

Tracts roamed over by savage tribes have been again and again appropriated, and even the attainment by the original inhabitants of some slight degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy. All territory not in the possession of states who are members of the family of nations and subjects of International***39** Law must be considered as technically *res nullius* and therefore open to occupation.

Petitioner has not yet claimed to have been a member of the "family of nations."

Finally, petitioner contends (Pet. Br. 24-26) that by the time Russia had entered upon the scene the doctrine of title by discovery set out in *Johnson v. McIntosh* had been modified so that the bare fact of discovery was no longer sufficient to support a new title in the discovering nation. However, as we have shown, *supra,* pp. 13-15, the modification of the doctrine that discovery alone was sufficient came long before *Johnson v. McIntosh* and was recognized by Chief Justice Marshall's statement in 1823 (8 Wheat. at p. 573): "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made * * *, *which title might be consummated by possession.*" Indeed, the declaration in connection with the ukase of 1821 that Russia's title was based upon first discovery, first occupation, and peaceable and uncontested occupation for more than 50 years (American State Papers, Foreign Relations, Vol. 4, pp. 861862) proves that the Russian concept of title by discovery was exactly the same as that stated in the contemporaneous opinion in *Johnson v. McIntosh.* Hence, it is submitted that under the law of

nations Russia acquired the full title to Alaska, including the lands claimed by petitioner, by ***40** virtue of discovery and possession, and that consequently during the period of Russian sovereignty and thereafter petitioner had no greater right in the soil than a right of occupancy known as "original Indian title."

II. UNRECOGNIZED "ORIGINAL INDIAN TITLE" I NOT A PROPERTY INTEREST THE TAKING OF WHICH IS COMPENSABLE UNDER THE FIFTH AMENDMENT

We have shown (supra, pp. 12-40) that petitioner's interest in the claimed lands was during the Russian sovereignty at most a right of occupancy known as "original Indian title." If such title had ever been formally acknowledged, recognized, and confirmed by the sovereign, a taking of such "recognized" title by the United States would be compensable under the Fifth Amendment. *Shoshone Tribe v. United States*, 299 U. S. 476. However, in the absence of such recognition "original Indian title" is not so compensable.

A. *The Tillamooks case is a holding that "original Indian title" is not compensable under the Fifth Amendment.*--Prior to the case of *United States v. Tillamooks*, 329 U. S. 40, 44, this Court had never had the occasion to pass upon the precise question whether "original Indian title" was compensable under the Fifth Amendment. In that case the Court of Claims had held that the United States was liable to the Indians under the Fifth Amendment for a taking of lands held under original Indian title. ***41***Alcea Band of Tillamooks v. United States*, 103 C. Cls. 494, 59 F. Supp. 934. In this Court the judgment of liability was affirmed by a vote of five justices to three, Mr. Justice Jackson not participating in the decision of the case. Mr. Chief Justice Vinson, in an opinion joined in by Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy, held that the taking of original Indian title was compensable. Mr. Justice Black concurred in the affirmance of the judgment, but only because he was of the view that the special jurisdictional act under which the suit was brought "created an obligation" to make payment (329 U. S. at pp. 54-55). Mr. Justice Reed wrote a dissenting opinion, joined in by Mr. Justice Rut-ledge and Mr. Justice Burton, holding that the taking of unrecognized original Indian title was not compensable and that the jurisdictional act did not create any new obligation (329 U. S. at pp. 55-64). Thus, the Court was split four to four on the compensability of original Indian title, and the affirmance was on the ground that the Indians were "entitled to compensation under the jurisdictional act of 1935" (opinion of Mr. Chief Justice Vinson, 329 U. S. at p. 54).

The case was then remanded to the Court of Claims for a determination as to the amount of liability. While the *Tillamooks* case was pending in the Court of Claims, the Court of Appeals for the Ninth Circuit interpreted this Court's decision as a holding that original Indian title was ***42** compensable (*Miller v. United States*, 159 F. 2d 997, 1001), leading to the statement in this Court's opinion in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, footnote 28:

We have carefully considered the opinion in *Miller v. United States*, 159 F. 2d 997, where it is held, p. 1001, that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely, *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment.[FN17]

> FN17. It is to be noted that this Court's disagreement did not extend to the other holdings in the *Miller* case that original Indian title had been extinguished in Alaska by the 1867 treaty (159 F. 2d at pp. 1001-1002) (see *infra*, pp. 72-79) and that the only Indian possessory rights to lands in Alaska protected or recognized by Congress were individual rather than tribal (159 F. 2d at p. 1005).

Thereafter, the Court of Claims entered a money judgment in the *Tillamooks* case, including interest on the value of the lands since the taking. *Alcea Band of Tillamooks*, 115 C. Cls. 463, 87 F. Supp. 938. This Court granted certiorari limited to the question presented by the award of interest and reversed such award, stating in a *per curiam* opinion that none of the prior ***43** opinions had "expressed the view that recovery was grounded on a taking under the Fifth Amendment." *United States v. Tillamooks*, 341 U. S. 48, 49. Therefore, since interest is a part of the just

compensation payable under the Fifth Amendment for a taking (*Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299), it is clear that the final disposition of the *Tillamooks* case is a holding by this Court that the taking of original Indian title is not compensable in the absence of a special jurisdictional act directing such payment. And the Court of Claims so interpreted the decision in deciding this case (R. 1920), in which, of course, there is no special jurisdictional act upon which petitioner can rely (see Pet. Br. 12).[FN18]

> FN18. The jurisdiction of the Court of Claims in this case rests upon 28 U. S. C. 1505 (originally section 24 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1059), which provides:
> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."
> Obviously, this jurisdictional act can in no way be interpreted as "directing" payment for "Indian title."

Petitioner's brief (see especially Pet. Br. 5762) has completely ignored this Court's second ***44** opinion in the *Tillamooks* case (341 U. S. 48),[FN19] but apparently it would imply (Pet. Br. 12) that the holding in that case was influenced by the "item of interest looming up in astronomical amounts which overshadow that of the principal claim itself." But we shall show that, even if the *Tillamooks* decisions are laid aside, the law is that the taking of unrecognized "Indian title" is not compensable.

> FN19. The failure to notice that decision or even to brief the very point upon which the Court of Claims decided this case below (see Pet. Br. 61-62), i. e., the compensability of original Indian title, in petitioner's own words (Pet. Br. 28), "can not be explained away. *Avoidance on such a scale again can mean nothing less than a confession of inability to meet and answer*" the holding of the Court of Claims (italics in original).

B. *Other authorities establish that unrecognized "Indian title" is not a property interest the taking of which is compensable under the Fifth Amendment.*--To conclude that the liability of the United States for the taking of lands occupied by Indians under original "Indian title" is the same as when lands occupied under a title formally recognized by the Government are taken, is to reject the teachings of the decided cases and history. Principles of international law have always been deemed to require a sovereign to respect private rights in property when acquiring sovereignty over territory formerly occupied by another member of the family of nations. *Barker v. Harvey, 181* U. S. 481, 486. ***45** But, as we have already shown (*supra*, pp. 13-27, 38-39), all territory not in the possession of states which are members of the family of nations has been deemed open to occupation by the discovering nation, and title to such territory vests in the occupying nation by virtue of the discovery. Thus, when the European nations came to North America and found it inhabited by uncivilized Indians, it was agreed by those nations, in accordance with principles of international law as understood by the then civilized powers of Europe, that each should have exclusive title by discovery to all territory reduced to possession. *Johnson v. McIntosh*, 8 Wheat. 543, 572-592. Since the lands were occupied by the Indians, the title thus asserted was necessarily said to be subject to the Indians' right of occupancy. Until the "Indian title" was extinguished, the sovereign granted the fee of the lands subject to the Indian right of occupancy, the colonists were forbidden to take possession of lands occupied by Indians without tribal consent, and the natives were permitted to use such lands. *Fletcher v. Peck*, 6 Cranch 87, 141-142; *Johnson v. McIntosh*, *supra*, at pp. 572-584; *Martin v. Waddell*, 16 Pet. 367, 409-410. See also *supra*, pp. 15 ff. The privileges accorded the Indians were merely a reflection of the practical necessities of the situation at that time. The Indians were warlike and numerically superior to the whites, ***46** the sole power to extinguish the Indian occupancy resided in the sovereign, and it was important that the sovereign's hand in the execution of its power to extinguish the Indian right of occupancy should not be forced by third persons.

Though the Indian right of occupancy was thus protected against incursion by nonsovereign authority until extinguishment by the sovereign, that right was recognized as being only a *temporary* right. *Martin v. Waddell*, 16 Pet. 367, 409. There never has been any question as to the methods by which the United States could and did extinguish the Indian title. Both the very early decisions of this Court and the more recent ones contain explicit recognition of the paramount right of the United States to extinguish the Indian right of occupancy at will, by treaty, purchase, conquest, or the exercise of complete dominion adverse to the right of occupancy. *Fletcher v. Peck*, 6 Cranch 87, 142; *Johnson v. McIntosh*, 8 Wheat. 543, 587-592; *Clark v. Smith*, 13 Pet. 195, 201; *Martin v. Waddell*, 16 Pet. 367, 409; *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 66; *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians v. United States*, 324 U. S. 335, 339. Thus, in the relatively recent *Santa Fe Pacific* case, *supra* (314 U. S. at p. 347), this Court stated:

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in ***47** that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

And in the later *Shoshone* case the Court again stated (324 U. S. at p. 339):

Since *Johnson v. McIntosh*, 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss.

The plain meaning of these expressions is that the means used by, and the terms upon which, the United States chose to extinguish Indian title were political questions to be determined by Congress, and that the Indians had no legal claim to compensation save in those instances where Congress elected to purchase or expressly recognized the Indian title to a specific area by treaty, agreement or statute. Petitioner's rights are, of course, no greater than those of other Indians since the treaty of cession (Treaty of March 30, 1867, 15 Stat. 539, 542) provided:

The uncivilized tribes will be subject to such laws and regulations as the United ***48** States may, from time to time, adopt in regard to aboriginal tribes of that country.

The difference between recognized and unrecognized "Indian title" is made vivid in *Barker v. Harvey*, 181 U. S. 481, where claimants under a patent from the United States in confirmation of Mexican grants prevailed over Mission Indians of California who claimed rights by virtue of aboriginal possession. The decision being based, on the fact that Mexico had never recognized the Indian title (p. 499), it was stated (pp. 491-492):

* * * it could not well be said that lands which were burdened [by Mexican recognition] with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.

Here is a clear statement of the paramount distinction between recognized and unrecognized "Indian title." Aboriginal possession creates against the United States only a temporary right ***49** of occupancy which can be terminated at will without liability. It is a permissive right only. Title is in the United States with the Indians having a temporary possessory right terminable at will by the United States without Constitutional liability. *Sioux Tribe v. United States*, 316 U. S. 317; *Ute Indians v. United States*, 330 U. S. 169; *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 103-104. Only when a permanent right of occupancy is guaranteed by a treaty or act of Congress do the Indians acquire property rights entitled to protection by the Fifth Amendment.

This unprotected temporary right of occupancy might, of course, be ended by Congress by the payment of a sum of money, as a matter of grace. But the unquestioned power of the United States to extinguish unrecognized "Indian title" "by the sword" is an entirely independent and additional method of

extinguishing that "title." If the exercise of that right is regarded as creating a liability to compensate for a title so extinguished, the power to extinguish the Indian title is converted from "by purchase or by the sword" into "*by purchase or by the sword followed by purchase.*" In other words, the alternative rights always conceded the sovereign would be reduced to a sole right to purchase. But, "Conquest gives a title which the courts of the conqueror cannot deny." *Johnson v. McIntosh*, 8 Wheat. 543, 588. And to make compensation to ***50** the conquered mandatory is a denial of the conqueror's title. It is a denial of the principle recognized by the Court "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Johnson v. McIntosh*, 8 Wheat. 543, 587. See also 8 Wheat. at 590-591.

C. *The actions of the United States and Congress at the time the Union was formed and shortly thereafter disclose an understanding that unrecognized "Indian title" was not a property interest protected by the Fifth Amendment.*-- Apart from the decisions cited above, there are other materials showing that aboriginal "Indian title" was not recognized, prior to and after adoption of the Fifth Amendment, as a property right for which the Indians had to be paid upon its extinguishment. Following the American Revolution, seven of the original thirteen States claimed, as successors to the Colonies and Crown, the right to unappropriated or crown lands comprising vast areas to the west of their then recognized boundaries. Donaldson, *The Public Domain* (1883), p. 56. The claims of all seven, except New York, extended to the Mississippi River, then the international boundary (*ibid.*, p. 65). Dissatisfaction with the prospect of seven States having so much territory led to a demand by the States having no such claims, notably New Jersey, Delaware and Maryland, that the western territories should be held for the common ***51** good of all the States (*ibid.*, pp. 60-61). This led to a recommendation by the Congress established under the Articles of Confederation that the lands be ceded to the United States, and to passage of a resolution by that Congress on October 10, 1780, in which it was provided that the unappropriated public lands that may be ceded or relinquished to the United States by any particular State "shall be disposed of for the common benefit of the United States" (*ibid.*, p. 64). Thereafter, the seven States having such claims ceded their western lands to the United States. The deeds of cession are set out in Donaldson, *The Public Domain* (1883), pp. 65-81. The cession by New York in 1781 was of "all the right, title, interest, jurisdiction, and claim" to the ceded lands "for the only use and benefit of such of the States as are or shall become parties to the Articles of Confederation." To the same effect, substantially, were the cessions of Massachusetts (1785), Connecticut (1786), and South Carolina (1787). The cession by Virginia (1784) was of "all right, title and claim, as well of soil as jurisdiction" and further provided that the lands ceded "shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the Confederation or federal alliance of the said States, Virginia inclusive, * * * [and] shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose what-***52** soever." The cessions by North Carolina (1790) and Georgia (1802) were in substantially the same terms as those just quoted from the Virginia cession. The territories so ceded became the Northwest Territory.

This Court, at a very early date, in the case of *Johnson v. McIntosh*, 8 Wheat. 543, considered these cessions, and after noting that they were of lands "covered by Indians," said of the Virginia cession (p. 586):
* * * This grant contained reservations and stipulations, *which could only be made by the owners of the soil;* and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use, or purpose whatsoever." The ceded territory was occupied by numerous and warlike tribes of Indians; *but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.*

These historical facts make it clear that the States and the United States, in the period immediately preceding and following the adoption ***53** of the Constitution, were of a common view that "Indian title" was not a legally compensable property right. It follows that "Indian title" was not deemed to be "private property" within the purview of the Fifth Amendment when it was ratified in 1791. That amendment does not purport to define "private property" and does not make a compensable property right out of an "Indian title"

for which the Government was never legally liable to make payment. Certainly Georgia so understood the matter since her cession was *after* the ratification of the Fifth Amendment.

The view that the Indian right of occupancy was not made compensable by the Fifth Amendment was reflected in 1830 by the House Committee on Indian Affairs in a report on a bill (which became the Act of May 28, 1830, 4 Stat. 411) to authorize the President, by agreement, to remove Indians from treaty reservations to lands west of the Mississippi to be exchanged by the Government for reserved lands. The particular objective of the bill was to remove Indians from reservations in the Southern States, notably Georgia. While aboriginal "Indian title" was not actually involved, since the Indians were on treaty reservations, some opposition to the project was based on the view that the Indians originally owned the land and that they should not be removed. Thus it was that the House Committee on Indian Affairs dealt at length with the legal status of ***54** original "Indian title" in its report (H. Rep. No. 227, 21st Cong., 1st Sess.). After noting (p. 2) that the Indians "have been taught to have new views of their rights" the Committee proceeds to review the subject of Indian occupancy. Since the view thus articulated was that of persons to whom the Constitution was probably still a contemporary document, and was expressed at a time when the Indian problem was in sharp focus, a somewhat lengthy quotation therefrom is believed proper. The report stated (pp. 4-6):[FN20]

> FN20. Other quotations from this report are given above at pp. 24-27.

* * * Thus it happened, that in all the colonies, the maxims and conduct adopted and pursued in relation to the Indians, were substantially the same. Humanity, and the religious feeling of the early adventurers forbade that they should be thrust with violence out of the land. The trade with the great tribes of the interior was profitable, and the peculiar mode of warfare practised by the Indians, soon brought the colonists to perceive the advantage of cultivating peaceable relations with all of them. This interest, however, was found, in the progress of the new societies, to be opposed to another great interest, which was, that their resources should be increased, and the demands of the cultivator supplied, by appropriating the wild land within their limits as speedily as possible. The difficulty that was felt in reconciling these two ***55** interests, lies at the foundation of the policy which was adopted in relation to the Indians; and the expedients which were resorted to, in order to effect an object so important, constitute the evidence of what the policy of the country was, from that time up to the formation of the Constitution. One of those expedients was, to appear to do nothing, which concerned the Indians, either in the appropriation of their hunting grounds, or in controlling their conduct, without their consent. It is not intended to be asserted that this device was employed by all the colonies, from their first settlement. It came, however, to be a general principle of action, upon this subject, at some period or other of their progress, and was adhered to, when found practicable, and in any degree consistent with their interests; but, in several instances, some of which occurred at an early, and others at a later period, the public interests were believed to require a departure from it; *but in all the acts, first of the colonies, and afterwards by the States, the fundamental principle, that the Indians had no rights, by virtue of their ancient possession, either of soil or sovereignty, has never been abandoned, either expressly or by implication.*

The rigor of the rule of their exclusion from those rights, has been mitigated, in practice, in conformity with the doctrines of those writers upon natural law, who, while they admit the superior right of agriculturists***56** over the claims of savage tribes, in the appropriation of wild lands, yet, upon the principle that the earth was intended to be a provision for all mankind, assign to them such portion, as, when subdued by the arts of the husbandman, may be sufficient for their subsistence. To the operation of this rule of natural law may be traced all those small reservations to the Indian tribes within the limits of most of the old States. The General Court of Massachusetts fell short of coming up to the principle of natural law, but went beyond the general maxims of the period, when, in 1633, it declared, "that the Indians had the best right to such lands as they had actually subdued and improved." That Government, at the same time, asserted its right to all the rest of the lands within its charter, and actually parcelled them out by grant among the white inhabitants, leaving to them the discretionary duty of conciliating the Indians by purchasing their title. The General Assembly of Virginia asserted the unrestricted right of a conqueror, and, at the same time, conceded what the principles of natural law were supposed to require, when, in 1658, it enacted "that, for the future, no lands should be

patented until fifty acres had been first set apart to each warrior, or head of a family belonging to any tribe of Indians in the neighborhood."

The recognition of this principle by the Federal Government may be seen, at this day, ***57** in those small reservations which are made to individual Indians, or to the tribe itself, upon the relinquishment of the body of their lands. These reservations are made in deference to the principles of humanity, and because it has been found expedient to the interests of the Government making them. *No* respectable jurist has ever gravely contended, that the right of the Indians to hold their reserved lands, could be supported in the courts of the country, upon any other ground than the grant or permission of the sovereignty or State in which such lands lie. The province of Massachusetts Bay, besides the subdued lands already mentioned, during the early period of its history, granted other lands to various friendly tribes of Indians. Gookin, the great protector and friend of the Indians, about the time these grants were made, was asked, why he thought it necessary to procure a grant from the General Court for such lands as the Indians needed, seeing that "they were the original lords of the soil?" He replied, that "the English claim right to the land by patent from their King." No title to lands, that has ever been examined in the courts of the States, or of the United States, it is believed, has been admitted to depend upon any Indian deed of relinquishment, except in those cases where, for some meritorious service, grants have been made to individual Indians to hold in fee-simple.

***58** Some of the colonies found it necessary, for the preservation of peace upon their frontiers, to establish a general Indian boundary, beyond which the white inhabitants were forbidden to settle, until authorized by law. These lines were generally in advance of the settlements. They were also commonly established in conformity with the stipulations made with the Indians in conferences or treaties. That these Indian boundaries were regarded as temporary, and implied no abandonment of the principle upon which the country was settled, is clear from many circumstances attending them. In some cases, the laws by which these lines were established did not forbid the appropriation of the lands embraced in them by patent. Patents, in two or three of the colonies or States, did actually issue under such circumstances; yet, these acts, implying, as they do, a most important act of ownership and sovereignty, have been solemnly adjudged valid by the judicial tribunals of the country most distinguished for their learning. *But the most decisive evidence of the light in which these reservations have always been viewed, in regard to the question of title, is to be found in the fact, that the Crown or the proprietors of Provinces, before the Revolution, and the States, after that event, succeeding as they did to the sovereignty over all the lands within the limits of their respective charters, have asserted the exclusive right, in themselves, to extinguish* ***59** *the title to lands reserved to the Indians, until the Constitution was adopted. Since that time, the Federal Government has acted upon the same principle, in regard to lands belonging to the Government. If the principle upon which this right is as serted, and the effect it has had in practice, be examined, it will be found to be a complete recognition of the original rule which the nations of Europe acted upon in the first partition and settlement of the country. Some of the States have incorporated this right in their constitutions, as a principle of primary importance. Laws have been passed in all the rest, in which there are Indian reservations, granted by the States, declaring the same exclusive right.*

From this early authoritative survey, it appears that the Indians were recognized as having no property right in the lands which they occupied, that the practice of the Federal Government in setting aside specific lands for the Indians, either individually or in the form of tribal reservations, was not in recognition of any legal right in the Indians, but a continuation of a policy utilized by the colonies and later by the States in extinguishing "Indian title," and that such practice stemmed solely from humane motives and from expediency. A legal right in the Indians to compensation for lands occupied by them was never recognized.

***60** D. *The authorities do not support the conclusion that there is a constitutional right to compensation for the taking of original "Indian title."*--We have shown from the opinions of this Court prior to the *Tillamooks* case that while the United States could, if it chose, extinguish "Indian title" by agreement with, or purchase from, the Indians, it was under no legal obligation to do so. It also appears that, prior to and following adoption of the Constitution and the Fifth Amendment, under the law as established both by the States which formed the Union and the Union itself, no legal obligation was recognized as resting upon the United States to compensate for extinguishment of unrecognized "Indian title." The manner in which that "title" should be extinguished was for Congress to

determine, and compensation to the Indians, if any, was legally owing to them only if Congress determined to obligate the Government, either by agreement to purchase the "Indian title," or by having formally recognized and guaranteed the continuance of the "Indian title" by treaty, agreement, or statute prior to a taking.

Against this background, a conclusion that the same legal liability rests upon the United States for extinguishment of unrecognized "Indian title" as attaches in the case of a confirmed or recognized "Indian title" must fail. Such a conclusion misconceives the nature of the federal power to ***61** extinguish Indian title, and misapplies the authorities. Thus, the decision of this Court in *Worcester v. Georgia*, 6 Pet. 515, and the opinion of Attorney General Wirt, 1 Op. A. G. 465, did not involve the question here presented. Cf. *United States v. Tillamooks*, 329 U. S. 40, 47-48. In both instances, the existence of the Indian tribe and its right to a specified area of land had been recognized by treaties with the United States resulting in the conclusion that the States of Georgia and Massachusetts had no authority to intrude upon the reserved areas. While the opinion in the *Worcester* case contains some language which might indicate that the United States could extinguish "Indian title" only by purchase, the opinion also recognized the existence of the power, which Chief Justice Marshall had earlier defined in *Johnson v. McIntosh*, 8 Wheat. 543, 587, "to extinguish the Indian title of occupancy, either by purchase or by conquest", and referred to the latter as remaining "dormant" (6 Pet. at 544). To say that a power remains dormant or unexercised confirms its existence; it does not prove its absence.

The language in *United States v. Creek Nation*, 295 U. S. 103, 110, to the effect that the guardianship of the United States "did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation***62** to render, just compensation for them" likewise has no application here. Cf. *United States v. Tillamooks*, 329 U. S. 40, 54. For the language quoted appears in the last sentence of the paragraph in which it is pointed out, at the outset, that the "Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States." 295 U. S. at 109.

Johnson v. McIntosh, 8 Wheat. 543, upon which reliance has also been placed, held only that an Indian tribe could not convey a good title to third parties to lands which the Indians occupied, *without the consent of the sovereign.* Moreover, that is the leading case proclaiming the right of the United States to extinguish "Indian title," either by purchase or by the sword, at the election of the United States. Nor was the question of the right of the United States to extinguish "Indian title" involved in either *Cramer et al. v. United States*, 261 U. S. 219, or *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339. In both, the United States sued to protect an "Indian title" *not extinguished by the United States.* The right to extinguish "Indian title" rests solely with the United States. The Indians enjoy it at the will of the United States, subject to its being extinguished at any time. It does not follow from the fact that the United States sues to protect the Indians' possession against ***63** encroachments by third parties that "Indian title" is a property right against the United States. The Government in such instances is merely asserting its sovereign and exclusive right to extinguish "Indian title" and preserving for the Indians an occupancy which it has not itself seen fit to extinguish. In the two cases last cited, the question was not the power of the Government to extinguish "Indian title" or the terms on which it could do so, but whether that power had been exercised. In both cases, the answer was that it had not.

The language quoted in *United States v. Santa Fe Pacific Co.*, 314 U. S. 339, 345, from *Mitchel v. United States*, 9 Pet. 711, 746, that the Indian "right of occupancy is considered as sacred as the fee simple of the whites", does not stand in the way of the conclusion that a taking of unrecognized Indian title is not compensable. Similar expressions are to be found in *Cherokee Nation v. Georgia*, 5 Pet. 1, 48; *United States v. Cook*, 19 Wall. 591, 593; *Leavenworth &c. R. R. Co. v. United States*, 92 U. S. 733, 755; *Beecher v. Wetherby*, 95 U. S. 517, 526. However, in none of these cases was the present question involved, whether Indians have a legal right to be compensated by the United States for extinguishment of "Indian title." In none of them, save possibly the *Mitchel* case, was there involved a controversy between Indians and the United ***64** States. Reference was made, rather, to the Indian rights against others than the Federal Government, and treaty rights of occupancy were involved. Cf. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565. In the *Mitchcl* case, it was merely held that a

conveyance of lands by an Indian, having an occupancy right, *confirmed by Spain before the cession of Florida to the United States*, was valid under Spanish law, and that the United States did not acquire the property under the cession.

Moreover, references to its sanctity were not intended to convey the thought that the Indian right of occupancy was the equivalent of a fee simple estate. Thus, in the case of *United States v. Cook*, 19 Wall. 591, 593, it was stated that "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, *but it is only a right of occupancy."* It should also be noted that, notwithstanding this Court's use of such expressions in its decision in the *Santa Fe* case, the Court, in the same opinion, recognized their inapplicability to the present question when it stated (314 U. S. at 347):

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And whether it be done by treaty, by the sword, ***65** by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

It is true that, until extinguished by the sovereign, the "Indian title" is as sacred as the fee against encroachments by third parties. But when the controversy has been between the United States and the Indians, this Court has been careful to indicate that it is the "pledged" or "perpetual", i. e., the *recognized*, right of occupancy which is as sacred as the fee. *United States v. Shoshone Tribe*, 304 U. S. 111, 116; *Shoshone Tribe v. United States*, 299 U. S. 476, 497. It is clear, therefore, that there is nothing in the decided cases indicating that the United States would be liable for extinguishing original, unrecognized "Indian title" or right of occupancy. To the contrary, even apart from *United States v. Tillamooks*, 341 U. S. 48, all the indications are the other way.

Even more equivocal than the judicial language upon which reliance has been placed to establish a constitutional obligation to pay for the taking of original "Indian title" is the fact that the Government has entered into numerous treaties with the Indians. As has already been indicated (*supra*, pp. 49, 56-59), that fact is at least as consistent with the view, here pressed, that resort to treaties is but a utilization of the Government's optional right to purchase where such action is ***66** deemed more expedient or desirable than forcible acquisition. "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy," the extinguishment of which may or may not be compensable depending upon whether or not its permanency was guaranteed. *Shoshone Indians v. United States*, 324 U. S. 335, 338; *Barker v. Harvey*, 181 U. S. 481, 491-492.

Nor is support for the petitioner's position to be found in the fact that in the Ordinance of 1787, providing a government for the Northwest Territory, it was stipulated that "the utmost good faith shall always be observed towards the Indians; their land and property shall never he taken from them without their consent."[FN21] Cf. *United States v. Tillamooks*, 329 U. S. 40, 48. That provision did no more than protect the "Indian title" against encroachment by others than the United States. It does not deal with the question of what, if anything, the Indians were entitled to *as against the United States* when the latter undertook to extinguish "Indian title." For if anything is clear in this field, it is that the right of ***67** the United States to acquire Indian lands does not depend on the consent of the Indians; the sovereign possesses "exclusive power to extinguish the right of occupany at will." Chief Justice Vinson in *United States v. Tillamooks*, 329 U. S. 40, 46.

FN21. The balance of this article (Article *III*) reads "and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." The entire Ordinance appears in a footnote in 1 Stat. at pages 51-52.

III. PETITIONER'S ORIGINAL INDIAN TITLE WAS NEVER "RECOGNIZED" BY EITHER RUSSIA OR THE UNITED STATES

We have urged that petitioner's interest in the lands in Alaska was, after the advent of Russia, nothing more than original Indian title (*supra*, pp. 12-40) and that such an interest is not compensable under the Fifth

Amendment unless it has been "recognized" by the sovereign (*supra*, pp. 40-67). A mere recognition of the principle that the Indians had some rights flowing from their original Indian title, especially against private individuals, is not sufficient to impose the liability. There must be a specific recognition or confirmation of a specific claim by an Indian tribe to rights of occupancy in a definite area, such recognition being by treaty or Act of Congress. Cf. *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 107. Even a treaty must manifest an intention to do more than merely recognize the *status quo*--the mere fact of tribal occupancy and assertion of tribal rights. Cf. *Shoshone Indians v. United States*, 324 U. S. 335. Thus, before petitioner can be considered to have become vested with any ***68** property rights as against the United States, it must be shown that the sovereign, either Russia or the United States, has recognized the original Indian title to the extent of guaranteeing undisturbed, exclusive, and perpetual occupancy. Cf. *Shoshone Tribe v. United States*, 299 U. S. 476; *Barker v. Harvey*, 181 U. S. 481, 491-492. Such "recognition" has never been given to petitioner's asserted title.

Petitioner categorically disclaims (Pet. Br. 27) any reliance upon "recognition" by Russia. And well it might, since in answer to an inquiry by the Secretary of State in 1867, the Russian government answered, "* * * in this region no attempts were ever made, and no necessity ever occurred to introduce any system of land-ownership" (R. 30; see H. Ex. Doc. 177, 40th Cong., 2nd sess., pp. 22-24). The gist of petitioner's contention is, therefore, that Russia was content to preserve the *status quo*.

Petitioner relies (Pet. Br. 41-47) for the requisite "recognition" solely upon the Acts of May 17, 1884, 23 Stat. 24, 26, and of June 6, 1900, 31 Stat. 321, 330, both mentioned in the definition of possessory rights in section 1 of the Joint Resolution of August 8, 1947, 61 Stat. 920.[FN22] But neither statute purports to create any new rights.

> FN22. Petitioner disclaims (Pet. Br. 43) any reliance upon section 14 of the Act of March 3,1891, 26 Stat. 1095, 1100, which is also mentioned in the Joint Resolution. That section, in a statute entitled "An act to repeal timber-culture laws, and for other purposes," provides: "That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States * * * to which the natives of Alaska have prior rights by virtue of actual occupation * * *." The disclaimer (Pet. Br. 43). is on the ground that the section "is of little import in the present connection for it did not even purport to create any new rights."

***69** Section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, is a part of a statute providing a civil government for the newly acquired territory of Alaska. The particular Section sets up the district of Alaska as a land district and provides that the laws of the United States relating to mining claims shall be in effect in said land district. Then follow several provisos, the first of which, relied upon by petitioner as affording "recognition" of its Indian title, is:

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress * * *.

It may be noted in passing that this language expressly negates any idea that the "Indians or other persons" have any "title", since it contemplates the possible future acquisition of "title". Obviously, as the Court of Claims held (R. 23), this proviso means no more than that the physical ***70** *status quo* was to be preserved, but that the question of legal rights was reserved for future determination. That this is so is well supported by the legislative history. In offering an amendment, later adopted, for the inclusion of the words "or now claimed by them," Senator Plumb of Kansas said (15 Cong. Rec. 530-531):

I do not know by what tenure the Indians are there nor what ordinarily characterizes their claim of title, but it will be observed that the language of the proviso I propose to amend puts them into very small quarters. I think about 2 feet by 6 to each Indian would be the proper construction of the language "actually in their use or occupation." Under the general rule of occupation applied to an Indian by a white man, that would be a tolerably limited occupation and might possibly land them in the sea.

* * * Pending an investigation of this question I propose that the Indian shall at least have as many rights after the passage of this bill as he had before.

Senator Benjamin Harrison of Indiana, in charge of the bill, stated with respect to Senator Plumb's amendment (15 Cong. Rec. 531):

It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary ***71** of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use.

The section referred to by Senator Harrison was Section 12 of the 1884 Act (*infra*, p. 87), which in itself clearly demonstrates that Congress in Section 8 was merely preserving the *status quo* until a commission could examine into and report upon the condition of the Indians, "what lands, if any, should be reserved for their use, * * * what rights by occupation of settlers should be recognized." It is submitted, therefore, that the 1884 Act affords no basis for a finding of "recognition," i. e., a guarantee of exclusive and perpetual occupancy. Cf. *Shoshone Indians v. United States*, 324 U. S. 335, 340-346.

Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, can have no greater effect. That Act (*infra*, pp. 87-88) is not only subject to-the same infirmities as the 1884 Act, but in addition it apparently refers only to lands on which schools or missions are being conducted. Likewise, the Joint Resolution of August 8, 1947, 61 Stat. 920 (*infra*, pp. 88-89), is of no assistance to petitioner.[FN23] As the Court of Claims stated (R. 25): "All that Congress recognizes is that there is a legal dispute about the question of ownership." In the ***72** words of the statute itself, it is not to be "construed as recognizing or denying the validity of any claims of possessory rights."[FN24]

FN23. In arguing this point (Pet. Br. 41-47), petitioner does not profess to rely on the Joint Resolution. However, at a later point of its brief (Pet. Br. 59) it indicates reliance upon the Joint Resolution as strengthening its argument.

FN24. For the reasons stated in this Point, it is clear that the argument petitioner makes from the cases of *United States, v. Arredondo*, 6 Pet. 691, and *Kepner v. United States*, 195 U. S. 100 (see Pet. Br. 43-45), is entirely irrelevant. We, of course, have no quarrel with the principle stated in those cases as to the meaning of the term "possession" and have relied upon the same principle in another connection (*supra*, pp. 35-36).

IV. IN ANY EVENT, PETITIONER'S ALLEGED PROPERTY INTEREST, WHATEVER ITS NATURE, WAS EXTINGUISHED BY THE 1867 TREATY OF CESSION

We have now established, we believe, that petitioner's original Indian title has never been "recognized" by the sovereign and that a taking of its unrecognized interest would not be compensable under the Fifth Amendment. It follows, therefore, that the Court of Claims properly dismissed the suit as not stating a cause of action against the United States. But there is another, independent ground for decision, namely, that the United States acquired Alaska with the original Indian title extinguished.

The Ninth Circuit has held that whatever Indian title petitioner may have had under Russian rule was extinguished by the 1867 treaty of cession. *Miller v. United States*, 159 F. 2d 997, 10011002 (C. A. 9);[FN25] *cf.* ***73***Kinkead v. United States*, 150 U. S. 483. The Court of Claims expressed its doubt as to the effect of the provisions of the treaty relied upon by the Court of Appeals in the *Miller* case, and found it unnecessary to resolve the doubt (R. 20-22). In reaching this conclusion, the Court of Claims was influenced by a statement of Charles Sumner, Chairman of the Senate Committee on Foreign Relations, as to the reasons for the payment of an additional $200,000.00 by the United States, and by the reasoning that Russia could not be expected, for the consideration of $200,000.00, to "undertake the herculean task" of extinguishing Indian title (R. 20-22). However, granting that one of the reasons for the additional payment was to insure that the franchises of a fur company and ice company would be extinguished, this does not mean that there could not have been an additional reason, such as the extinguishment of original Indian title. And since Indian title could be extinguished in any manner at the will of the sovereign (*supra*, p. 46 ff.), it could be extinguished by the stroke of a pen as well as by more burdensome processes. Hence, the task of extinguishment was in no sense "herculean."[FN26] Indeed, the plain language***74** of the treaty can lead only to the conclusion that whatever tribal rights

existed in Alaska at the time were deliberately extinguished by the treaty.

FN25. This portion of the *Miller* decision was not disapproved in *Hynes v. Grimes Packing* Co., 337 U. S. 86,106. See *supra,* p. 42.

FN26. Indeed, the power to so extinguish "Indian title" in the treaty would be a matter of Russian rather than United States law. In finding it unnecessary to pass upon Russian law in a case arising under the same treaty, this Court said, "It is enough that the Emperor assumed to deal in this way with the property of his subjects." *Kinkead v. United States,* 150 U. S. 483,492.

Article II of the treaty (*infra,* pp. 83-84) recites that the cession of territory and dominion includes "the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not *private individual property.*" An exception was made in the case of churches which continued to be the property of the Greek Oriental Church, but the treaty made no exception in the case of *tribal* Indian property rights, which can by no stretch of the imagination be considered the equivalent of "private individual property." Cf. *Choate v. Trapp,* 224 U. S. 665, 671-672; *Cherokce Nation v. Hitchcock,* 187 U. S. 294, 307; *Cherokee Trust Funds,* 117 U. S. 288, 308-309. Article III (*infra,* p. 84) offers further evidence that tribal rights were to be thereafter non-existent. While providing that the inhabitants of the territory, with the exception of the uncivilized native tribes, were to be protected in the free enjoyment of their property, it was declared that the uncivilized tribes will be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." In other words, insofar as tribal Indians were concerned the United States was starting with a clean slate. Finally, Article VI (*infra,* ***75** p. 85) declared that the cession of territory was "*free* and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, *except merely private individual property holders.*" Clearly, this language is broad enough to include encumbrances flowing from the tribal right of occupancy. In view of the plain language used in the articles cited, it was unnecessary to declare any more specifically that Indian title was extinguished.

Petitioner's reliance (Pet. Br. 29-32) upon other treaties of cession and judicial decisions interpreting such treaties is entirely misplaced. We do not agree that the treaties relied upon show "recognition" of compensable interests in the Indians concerned. But in any event the language in such treaties is distinguishable from that of the 1867 treaty, which clearly denies the existence of tribal property interests. Whatever the term "private property" in the Louisiana Purchase Treaty of April 30, 1803 (8 Stat. at 202) and the Florida Purchase Treaty of February 22, 1819 (8 Stat. at 254), may include, the term "private individual property" used in the 1867 treaty with Russia clearly excludes tribal interests. Moreover, in Article VI of the 1803 treaty with France (8 Stat. 200, 202) the United States promised "to execute such treaties and articles as may have been agreed between Spain ***76** and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon."

On the other hand, other treaties of cession (to our knowledge) do not include provisions like those in the 1867 treaty excluding the Alaska natives from the guaranteed protection of property rights and declaring that they will be "subject to such laws and regulations" as the United States may adopt (Article III, *infra,* p. 84); granting all property not "private individual property", with a specific exception for property of the Greek Oriental Church, but none for the Indians (Article II, *infra,* p. 83); and declaring that the property ceded was encumbered only by "private individual property holders" (Article VI, *infra,* p. 85). Such. strange provisions demonstrate an intention that all tribal interests were to be extinguished by the treaty. Consequently, the United States by the 1867 treaty acquired full title to all lands in the territory not privately owned, unaffected by a tribal right of occupancy. *Miller v. United States,* 159 F. 2d 997, 1002 (C. A. 9); *United States v. Berrigan,* 2 Alaska 442, 448-449 (D. Alaska).

The reason for a different treatment of Indian tribes in 1867 over that previously accorded the Indians is not hard to find. Beginning at least with the period of the

War Between the States and extending to the enactment of the Act of ***77** March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. 71, which brought to an end the policy of entering into treaties with Indian tribes, there was strong sentiment for shifting our Indian policy from treating with Indians on a, tribal basis to assimilating the Indians as individuals. See Cohen, *Handbook of Federal Indian Law* (1942), pp. 14-20, 64-67. This changing policy must have had its impact upon our acquisition of Alaska.

In brief, it seems clear that tribal rights were deliberately terminated at the time of cession. Indeed, if any doubt as to the extinguishment of Indian title can arise from the 1867 treaty, that doubt is whether Indian title had not been extinguished long before. We have shown (*supra*, pp. 15-20, 24-27, 34-35) that the other European nations and our own had customarily forebade both their own subjects and particularly those of other nations from entering for any purpose into lands occupied by Indians. But in Article IV of the treaty of April 5, 1824, 8 Stat. 302, 304, Russia authorized the citizens of the United States to frequent the interior seas, gulfs, harbors, and creeks in Alaska for the purpose of fishing and trading with the natives. This grant of permission to invade the lands of the Indians and take therefrom the product of the waters indicates that even at that early date the Indian right of occupancy had considerably deteriorated.

***78** We should not bring this Point to a close without some comment on petitioner's references to administrative interpretation of the quality of aboriginal rights in Alaska (Pet. Br. 36-41, 59). Petitioner realizes that its discussion "may not actually rise to the full dignity of argument" (Pet. Br. 36), and that in the sphere of the control and disposition of the territories and other property of the United States Congress is supreme (Pet. Br. 33-34). No matter what are the views and vacillations of the executive branch of the Government, those views are not controlling. And it is clear that the judicial branch has in no way acceded to the administrative interpretations on which petitioner relies. To the contrary, this Court has held that Alaskan Indian reservations established under the authority of the Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. 358a, are "subject to the unfettered will of Congress." *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106. And the Hydaburg Reservation established by a former Secretary of the Interior under his interpretation of the quality of Indian rights (Pet. Br. 40-41) was declared to have been invalidly created because the Indians had no subsisting rights in the area. *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska). The administrative interpretations relied upon stand alone, without even unanimity within the executive branch. As pointed out in the Memorandum for the United States on the petition for certiorari ***79** (pp. 10, 14-18), there is now agreement among the interested executive departments that no compensable rights flow from unrecognized original Indian title in Alaska or elsewhere.

V. THE QUESTIONS OF WHETHER THERE HAS BEEN AN ABANDONMENT OF PETITIONER'S ALLEGED INTEREST AND WHETHER THE EXECUTION OF THE TIMBER SALE CONTRACT CONSTITUTED A TAKING OF THAT INTEREST ARE NOT READY FOR REVIEW BY THIS COURT

Petitioner (Pet. Br. 47-57) also discusses the questions of whether there has been an abandonment of its alleged interests by less intensive use of the areas claimed, and of whether the execution of the timber sales agreement in itself constitued a taking of petitioner's alleged rights in the area. In view of the discussion in the preceding points of this brief, we do not believe that these two issues will be reached in this Court. Moreover, since the Court of Claims has neither passed upon nor even discussed these questions (R. 25-26, 32), it appears more appropriate that, if it should develop that these questions are material in the decision of the case, they be remanded to the court below for the first determination. This is particularly so with reference to the question of abandonment. The very statement of the question by the Court of Claims (R. 7) indicates that it was to be answered only in the event of an answer favorable to the petitioner to the three preceding questions, and that ***80** even then the answer was to be only whether or not certain evidence constituted *prima facie* evidence of termination or loss of rights. Obviously, as petitioner recognizes (R. 9), there would necessarily be further proceedings under Rule 38(b) of the Court of Claims before any final determination on the issue of abandonment.

Under these circumstances, rather than extending an already lengthy brief, we have not briefed these questions. However, we would of course be pleased to

comply with any indication by this Court that such questions be briefed or argued.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the Court of Claims should be affirmed.

Appendix not available.

Tee-Hit-Ton Indians v. U.S.
1954 WL 72831 (U.S.) (Appellate Brief)

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