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July 22, 2015

The Honorable Kevin Washburn
Assistant Secretary–Indian Affairs
MS-3642-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Paula Hart, Director
Office of Indian Gaming
1849 C Street, N.W.
Washington, DC 20240

Re: Tejon Request for Last Recognized Reservation Opinion

Dear Mr. Washburn and Ms. Hart:

On behalf of Stand Up for California! ("Stand Up!"), I would like to respond to the Tejon Indian Tribe's June 1, 2015 letter regarding its gaming eligibility request for certain property in Mettler, California (the "Mettler Parcels").[1]

First, I would like to call to your attention a recent Ninth Circuit decision—*Robinson v. Jewell*, —— F.3d ——, 2015 WL 3824658 (9th Cir. 2015)—which addresses a number of the authorities the Tejon have relied on in support of their request. Attachment 1. The decision confirms the arguments set forth in our initial letter of April 7, 2015 and contradict many of the claims that the Tejon make in their June 1, 2015 letter. The Tejon argue, for example, that Spanish land grants did not extinguish its aboriginal title. June 1, 2015 letter at 4-6. That is correct. *Spanish* grants did not extinguish aboriginal title. Rather, aboriginal title was extinguished under the Land Claims Act of 1851, which required that "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners...." 9 Stat. 631, § 8. The Tejon did not present any claim to any land to the Commission—which was "the only avenue allowed by the Act for preservation of claims and the issuance of a patent." *Robinson*, 2015 WL 3824658, *4. "[T]he Act of 1851 fully extinguished any existing aboriginal title or unregistered land grants." *Id.* at *6 (citing *Barker v. Harvey*, 181 U.S. 481 (1901)); *see also id.* (citing *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 646 (9th Cir. 1986) (holding that the Treaty of

[1] The Mettler Parcels, APN 238-204-02, -04, -07, and -14, are located in Kern County near the intersection of I-5 and Hwy. 99, approximately 24 miles south of Bakersfield.

Guadalupe Hidalgo did not convert tribe's aboriginal title into recognized title and that its aboriginal title was extinguished by its failure to present its claim under the Act of 1851)).

The Tejon also rely on the Department's effort to create the "Tejon/Sebastian Reserve" and assert that "nothing in the governing regulations conditions reservation status on a survey." June 1, 2015 letter at 2 n. 3. Boundaries, however, necessarily define any land that has been set aside and are particularly important when the only plausible statutory authority for the establishment of the Tejon/Sebastian Reserve limited the size of reservations to 25,000 acres. Act of March 3, 1853 (10 Stat. 238). In any case, the Ninth Circuit held that "there is no evidence that the President ever approved the creation of the Tejon Reservation," and accordingly it "'was not a reservation established by the President and therefore cannot provide legal rights.'" *Robinson*, 2015 WL 3824658, at *7 (quoting the district court's opinion). And for IGRA purposes, the legislative history of the Act confirms that "recognized reservations" must be "technically defined" and have "clear" boundaries.[2] Sen. Rpt. 99-493, at 10.

Second, the Tejon's arguments that the Mettler Parcels qualify as their "last recognized reservation" are not persuasive and seem to call into question the basis for their reaffirmation.[3] The Tejon make three basic arguments. First, the Tejon argue that their refusal to take up residence on the Tule River Reservation preclude the Department from finding that the Tejon have any rights to the Tule River Reservation. But the Executive Order establishing the Tule River Reservation expressly states that the reservation is for the Tejon Indians (among others). *See* Executive Order of January 9, 1873, I Kapp. 831 (establishing Tule River Reservation); *see also* Memorandum from Assistant Secretary - Indian Affairs to Regional Director, Pacific Region, "Reaffirmation of Federal Recognition of Tejon Indian Tribe" (April 24, 2012) ("2012 Reaffirmation Memo") at 8 ("In 1873, the Tule River Reservation was established by executive order for the Tejon (Manche Cajon) and other bands of Indians."). The Tule River Reservation still exists, without modification to its purpose. Thus, under the Executive Order, the Tejon Tribe has a reservation.

The Tejon erroneously claim that their failure to occupy the Tule River Reservation disqualify them from using it now and the Department from concluding that Tule River is their Reservation. But it is well established that disestablishment of a reservation cannot be presumed absent federal actions with the clear intent to effect such a result. *See South Dakota v. Yankton Sioux*

[2] Definite boundaries are obviously necessary to determine whether the Mettler Parcels are within any claimed "last recognized reservation."

[3] Although our April 7, 2015 comments did not address the legality of "reaffirmation," the Tejon's response also asserts that the legality of "reaffirmation" was upheld in *Muwekma Ohlone v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013). The legality of "reaffirmation," however, was not at issue in *Muwekma*. The plaintiff in that case was *seeking* recognition and challenged the Department's denial of recognition on various legal theories, including violation of equal protection because the Department had "reaffirmed" similarly situated groups. The D.C. Circuit concluded that the Muwekma was not similarly situated to the previous groups, but the court did not consider or address the legality of "reaffirmation."

Tribe, 522 U.S. 329, 343 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007-10 (8th Cir. 2010). And the United States' trust obligation to the Tejon prevents the Secretary from disallowing the Tejon from using the Reservation. Doing so would violate the plain terms of the Executive Order. A tribe may refrain from exercising rights to a reservation, but doing so does not result in its rights being automatically rescinded. The federal trust obligation obviously prevents that from occurring. It is also well established that a tribe cannot unilaterally terminate the trust relationship.[4] And if the United States terminated its relationship with the Tejon, such action would clearly preclude any subsequent "reaffirmation" of their status. *See* 2012 Reaffirmation Memo at 8.

Second, the Tejon argue that the establishment of the Tule River Reservation did not extinguish their rights and interests in that part of their aboriginal territory that they continued to occupy—Tejon Ranch. But as the Supreme Court held in *U.S. v. Title Insurance & Trust Co*., 265 U.S. 472 (1924), any aboriginal rights the Tejon may have had were extinguished under the 1851 Act. *See also Robinson*, 2015 WL 3824658, *4. The establishment of the Tule River Reservation had nothing to do with the extinguishment of the Tejon's aboriginal rights; the Act of 1851 did that. Accordingly, the United States' failed attempt in the 1920s to assert aboriginal land claims on behalf of Tejon Indians does not change the fact that the Tule River Reservation was created for the Tejon, among others.

Third, the Tejon argue that the Secretary's approval of the 1936 organization of the Tule River Tribe under the Indian Reorganization Act effectively revoked the rights of the Tejon to the Tule River Reservation by limiting "membership on that reservation" to Indians listed on the 1935 census of the reservation and their descendants. This is incorrect—the Secretary's decision addressing rights to membership in the Tule River *Tribe* has no bearing on the rights of the Tejon to occupy the Tule River *Reservation* under the Executive Order.[5] And if the Tejon's argument is correct, Secretarial approval of that Constitution would appear to violate the federal trust responsibility to the Tejon, would be indicative of an administrative termination, contrary to the "reaffirmation," or would constitute a membership dispute with Tule River Tribe.[6] These are the

[4] *See Kennerly v. District Court of 9th Judicial District of Montana*, 400 U.S. 423 (1971); *Joint Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

[5] *See* Constitution and Bylaws of the Tule River Indian Tribe (approved January 15, 1936), art. II (Membership), available at: http://www.tulerivertribe-nsn.gov/wp-content/uploads/2014/04/constitution-bylaws.pdf.

[6] The Tule River Tribe's Constitution, approved by the Secretary, appears to assign all unallotted lands on the Reservation, and jurisdiction over the entire Reservation, to the Tule River Tribe. *Id.* art. I (Territory) and VII (Tribal Lands). Secretarial approval of the Tule River Tribe's Constitution—if interpreted to strip the Tejon of their rights under the Executive Order—is in considerable tension with the Department's "reaffirmation" of the Tejon, which was based on the fact that "[t]here is no evidence of any affirmative action or declaration by either Congress or the Department to terminate the Tejon Indian Tribe or to cease recognition of the Tribe." 2012 Reaffirmation Memo at 8. The 2012 Reaffirmation Memo itself contains evidence of administrative termination of the Tribe. *See, e.g., id.* at 6 (after the 1952 earthquake devastated the Tejon Indians at Tejon Ranch, BIA "determined that Indian Services' appropriations could not be used for them.").

sorts of questions that arise when the Department resorts, not to the regulations that govern acknowledgment, but rather "other mechanisms" having no legal basis.

Conclusion

The day after submitting its June 1, 2015 letter—which is focused on defending the Tejon's arguments for application of the "last recognized reservation" exemption—the Tejon participated in a public meeting before the Kern County Board of Supervisors regarding their request for a cooperative agreement with the County.[7] During that meeting, the Tejon explained that they would need such an agreement in order to satisfy the two-part test, and the Tejon's attorney—Kevin Wadzinski—expressly stated that a two-part determination was necessary in this case for the lands under consideration.[8]

It is therefore not clear whether the Tejon intend to continue to pursue their request for a "last recognized reservation" determination by the Department, whether the Department rejected their request, or whether the Tejon's attorney erroneously provided the County incorrect information. Clearly, what was conveyed during the public hearing is not consistent with the Tejon's June 1, 2015 letter.

Accordingly, we ask that the Department clarify the status of the Tejon's request so that the public is informed about the processes that will apply under IGRA.

Sincerely,

Jena A. MacLean

[7] Board of Supervisors of Kern County, California, Regular Meeting PM (June 2, 2015) (minutes, video, and linked presentation materials), available at: http://www.co.kern.ca.us/bos/AgendaMinutesVideo.aspx.

[8] *Id.* (video available at: http://kern.granicus.com/MediaPlayer.php?view_id=33&clip_id=2980) at 1:43:59 - 1:50:35 (statement of Kevin Wadzinski, attorney for the Tribe) ("And in this particular case, in order for that land to be taken into trust and used for gaming purposes, the Secretary of the Department of the Interior needs to make what is called a two-part determination."). As set forth in detail in our April 7, 2015 letter, the Mettler Parcels do not qualify for the "last recognized reservation" exemption to the prohibition on off-reservation gaming, 25 C.F.R. § 2719(a)(2)(B), or any other exception. Accordingly, we agree with the Tejon's counsel's representation that the "two-part determination" process under 25 U.S.C. § 2719(b)(1)(A) applies.

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H

United States Court of Appeals,
Ninth Circuit.
David Laughing Horse ROBINSON, an individual and Chairman, Kawaiisu Tribe of Tejon; Kawaiisu Tribe of Tejon, Plaintiffs–Appellants,
v.
Sally JEWELL, Secretary, U.S. Department of the Interior; Tejon Mountain Village, LLC; County of Kern; Tejon Ranch Corporation; Tejon Ranchcorp, Defendants–Appellees.

No. 12–17151.
Argued and Submitted Nov. 20, 2014.
Filed June 22, 2015.

Background: Non-federally recognized Native American tribe and its elected chairperson sued Secretary of Department of Interior (DOI), county, and ranch owners asserting title to ranch. The United States District Court for the Eastern District of California, Barbara McAuliffe, United States Magistrate Judge, 885 F.Supp.2d 1002, dismissed complaint, and plaintiffs appealed.

Holdings: The Court of Appeals, Thomas, Chief Judge, held that:
(1) tribe's failure to present claim pursuant to California Land Claims Act of 1851 extinguished its title to property;
(2) Congress's ratification of 1849 Treaty with Utah did not give tribe any enforceable rights to property;
(3) treaty that was never ratified by Senate carried no legal effect;
(4) reservation for tribe was not created pursuant to Act of Congress of 1853; and
(5) any rights to property that tribe possessed as result of Acts of 1853 and 1855 were extinguished by Act of 1864.

Affirmed.

West Headnotes

[1] Indians 209 153

209 Indians
209IV Real Property
209k153 k. Loss or Termination of Rights in General; Extinguishment. Most Cited Cases

Kawaiisu tribe's failure to present claim pursuant to California Land Claims Act of 1851 extinguished its title to property based on its alleged receipt of Spanish land grant. 9 Stat. 631, § 8.

[2] Indians 209 153

209 Indians
209IV Real Property
209k153 k. Loss or Termination of Rights in General; Extinguishment. Most Cited Cases

Absent recognition by Congress, aboriginal right of occupancy can be terminated by sovereign at any time without any legally enforceable obligation to compensate Indians.

[3] Indians 209 151

209 Indians
209IV Real Property
209k151 k. Title and Rights to Indian Lands in General. Most Cited Cases

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Recognition of aboriginal title requires clear statement from Congress unequivocally granting legal rights.

[4] Indians 209 154

209 Indians
209IV Real Property
209k154 k. Treaties, Construction, and Operation in General. Most Cited Cases

Congress's ratification of 1849 Treaty with Utah did not give Kawaiisu tribe any enforceable rights to property; treaty's language indicated that any rights to land that Indians occupied at time of its execution were not recognized by United States government, but rather aimed at promoting peaceful relations and encouraging Indians to adopt more geographically constrained agrarian mode of living.

[5] Indians 209 154

209 Indians
209IV Real Property
209k154 k. Treaties, Construction, and Operation in General. Most Cited Cases

Kawaiisu tribe's participation in Treaty D, executed in 1851 by tribe and United States, did not constitute substantial compliance with California Land Claims Act of 1851, and thus did not perfect tribe's title to property, where treaty was never ratified by Senate. U.S.C.A. Const.Art. 2, § 2, cl. 2; 9 Stat. 631, § 8.

[6] Indians 209 157

209 Indians
209IV Real Property
209k156 Reservations or Grants to Indian Nations or Tribes
209k157 k. In General. Most Cited Cases

Reservation for Kawaiisu tribe was not created pursuant to Act of Congress of 1853, even though President subsequently directed his officers to execute plan for creating reservations in California, where that plan lacked specificity, and there was no evidence that President ever approved creation of reservation. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238.

[7] Indians 209 153

209 Indians
209IV Real Property
209k153 k. Loss or Termination of Rights in General; Extinguishment. Most Cited Cases

Any rights to property that Kawaiisu tribe possessed as result of Acts of Congress of 1853 and 1855 were extinguished by Act of 1864, which superseded Acts of 1853 and 1855 by allowing only four reservations in California. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238; Act of March 3, 1855, 10 Stat. 699; Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39.

[8] Indians 209 159

209 Indians
209IV Real Property
209k156 Reservations or Grants to Indian Nations or Tribes
209k159 k. Disestablishment and Termination. Most Cited Cases

Congressional determination to terminate Indian reservation must be expressed on face of Act or be clear from surrounding circumstances and legislative history.

Jeffrey M. Schwartz (argued), Schwartz Law, P.C., San Clemente, CA, for Plaintiffs–Appellants.

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Tamara N. Rountree (argued), Barbara M.R. Marvin, and William Lazarus, Attorneys, United States Department of Justice, Environment & Natural Resources Division, Appellate Section, Washington, D.C., Defendant–Appellee Secretary of Interior.

Eric D. Miller (argued), Perkins Coie LLP, Seattle, WA; Jennifer A. MacLean, Benjamin S. Sharp, and Elisabeth C. Frost, Perkins Coie LLP, Washington D.C., for Defendants–Appellees Tejon Mountain Village, LLC, Tejon Ranch Corporation, and Tejon Ranchcorp.

Charles F. Collins (argued) and Theresa A. Goldner, Kern County Administrative Center, Bakersfield, CA, for Defendant–Appellee Kern County.

Appeal from the United States District Court for the Eastern District of California, Barbara McAuliffe, Magistrate Judge, Presiding. D.C. No. 1:09–cv–01977–BAM.

Before: SIDNEY R. THOMAS, Chief Judge, and STEPHEN REINHARDT and MORGAN CHRISTEN, Circuit Judges.

OPINION

THOMAS, Chief Judge:

***1** In this appeal, the Kawaiisu, a non-federally recognized Native American group indigenous to the Tehachapi Mountains and the Southern Sierra Nevada ("the Tribe" or "the Kawaiisu"), and its elected chairperson, David Laughing Horse Robinson, appeal the dismissal of their claims asserting title to the Tejon Ranch, one of the largest continuous expanses of private land in California. We review *de novo* a district court's order granting a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), *Manzarek v. St. Paul Fire & Marine Ins., Co.*, 519 F.3d 1025, 1030 (9th Cir.2008), and we affirm the judgment of the district court.

I

As with most land disputes of this type, historical perspective is important in resolving the claims. During first the Spanish and then the Mexican occupations of what is now California, those governments encouraged settlement by issuing large land grants in the territory. At the conclusion of the Mexican–American War in 1848, the United States acquired California from Mexico through the Treaty of Guadalupe Hidalgo. The treaty promised to honor Spanish and Mexican land grants. Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic art. VIII–IX, Feb. 2, 1848, 9 Stat. 922 ("Treaty of Guadalupe Hidalgo").

The discovery of gold in California just eight days prior to the signing of the treaty, and the subsequent, unprecedented influx of settlers to the territory, placed a great deal of pressure on land claims. To resolve disputes over the validity of private title to land, Congress passed the Act of March 3, 1851, ch. 41, 9 Stat. 631 ("Act of 1851"), commonly known as the California Land Claims Act of 1851. The Act created a Board of Commissioners ("Commission") to evaluate claims and required that anyone claiming title derived from a Mexican or Spanish grant present a claim to the Commission within two years. *Id.* § 8. Any land not claimed within that period, or for which a claim was rejected, would be returned to "the public domain of the United States." *Id.* § 13.

No Indian groups, including the predecessors to the Kawaiisu, registered claims with the Commission during the two-year period. In addition, the United States Senate refused to ratify any of the eighteen treaties negotiated with California tribes between 1851 and 1852, a decision that was sealed until 1905. William C. Sturtevant, HANDBOOK OF NORTH AMERICAN INDIANS: CALIFORNIA 702–03 (1978).

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Following the cessation of hostilities with Mexico and the signing of the Treaty of Guadalupe Hidalgo, the United States entered into and ratified a treaty with an array of western Native American leaders collectively referred to as "the Utah." The Treaty with the Utah, signed in 1849 in Santa Fe, New Mexico, provided for an end to hostilities between the Utah tribes and the United States and stipulated that the Utahs accept and submit to the jurisdiction of the United States. Further, it stated:

> ***2** [The United States] shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries.... [a]nd the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specially permitted ... and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits, under pueblos, or to settle in such other manner as will enable them most successfully to cultivate the soil, and pursue such other industrial pursuits as will best promote their happiness and prosperity: and they now deliberately and considerately, pledge their existence as a distinct tribe, to abstain, for all time to come, from all depredations; to cease the roving and rambling habits which have hitherto marked them as a people; to confine themselves strictly to the limits which may be assigned them; and to support themselves by their own industry, aided and directed as it may be by the wisdom, justice, and humanity of the American people.

Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 984. The Kawaiisu allege that several of its leaders, including its head chief at the time, Acaguate Nochi, were among the signatories to the treaty.

The Kawaiisu identify themselves as "an Indian Tribe that has resided in and around Kern County, California since time immemorial." Plaintiff Robinson traces his lineage through multiple previous head chiefs of the Kawaiisu back to Acaguate Nochi. The Kawaiisu are not currently, and have never been, included on the official list of federally recognized tribes maintained by the Bureau of Indian Affairs at the Department of the Interior.

According to the Tribe's complaint, the Kawaiisu first appeared in the historical record in the 1776 diary of Father Francisco Garces. Father Garces' map of the following year notes the Tribe's presence according to a number of its historic names. While the name Kawaiisu derives linguistically from a tribe to the north in San Joaquin Valley, the Tribe identifies as "one of the ancient Great Basin Shoshone Paiute Tribes whose pre-European territory extended from Utah to the Pacific Ocean." The Kawaiisu's complaint lists an array of ethnographic accounts documenting its unique tribal identity, including the Bureau of American Ethnology's 1907 Handbook of American Indians North of Mexico.

In 1851—two years after the signing of the Treaty with the Utah and just a few months after the California Land Claims Act of 1851 went into effect—the United States executed a treaty with "various tribes of Indians in the State of California" in which the tribes agreed to cede large portions of land and the federal government promised to set aside reservations "for the sole use and occupancy" of the tribes and supply the Indians with goods and services, including schools. This treaty, known as "Treaty D," was submitted to Congress but never ratified by the Senate.[FN1]

In the absence of any ratified treaties with the Indians of California, the establishment of reservations in the state could only result from an act of Congress or from the President acting under delegation from Congress. Three acts of Congress—taking place in 1853, 1855, and 1864—are relevant here. The Act of 1853 authorized the President to create five "military reservations" no more than 25,000 acres in size in the state of California or the territories of Utah

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and New Mexico. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238. In 1855, Congress amended the Act of 1853 to provide funding and authorization for two additional reservations. Act of March 3, 1855, 10 Stat. 699.

***3** During the period prior to 1864, the President appears to have only officially created three reservations in California. *Mattz v. Arnett*, 412 U.S. 481, 489, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) ("At the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River."). The Tribe alleges that the Tejon/Sebastian Reservation was created pursuant to the Act of 1853, pointing to a letter from President Franklin Pierce to the Secretary of the Interior, Robert McClelland, and a subsequent letter from the Secretary to the Superintendent of Indian Affairs for California, Edward F. Beale, from that same year.

After quoting the paragraph of the 1853 Act authorizing creation of five reservations, President Pierce's letter states, "In the exercise of discretion vested in me by said act of Congress, I have examined and hereby approve the plan therein proposed for the protection of the Indians in California, and request that you will take the necessary steps for carrying the same into effect." Secretary McClelland's letter to Superintendent Beale repeats the language from the Act of 1853 and then states that:

> The President of the United States has examined and approved the plan provided for in said act, and directs that you be charged with the duty of carrying it into effect. For this purpose you will repair to California without delay, and by the most expeditious route. The selections of the military reservations are to be made by you in conjunction with the military commandant in California, or such officer as may be detailed for that purpose, in which case they must be sanctioned by the commandant. It is likewise the President's desire that, in all other matters connected with the execution of this "plan," you will, as far as may be practicable, act in concert with the commanding officer of that military department.

However, no Presidential proclamation or executive order was ever issued regarding the Tejon or Sebastian Reservation.

In 1864, Congress significantly reorganized management of reservations in California. The Act of 1864 consolidated California as one Indian superintendency, empowered the President to create no more than four reservations, and required that lands not retained as reservations under the Act be offered for public sale. Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39. The President eventually established four reservations by executive order. The Tejon/Sebastian Reservation was not among them.

The land at issue in the case—the 270,000 acres comprising Tejon Ranch and the 49,000 of those acres referred to as the Tejon or Sebastian Reservation—is made up of portions of four different Mexican land grants: Rancho El Tejon, Rancho los Alamos y Agua Caliente, Rancho Castac, and Rancho La Liebre. The various holders of those four grants submitted claims pursuant to the Act of 1851, all of which were confirmed by the Commission, which issued patents for the claims between 1863 and 1875. The rights to all four of these grants were acquired by Edward F. Beale between 1855 and 1866. Defendants Tejon Mountain Village, LLC, Tejon Ranch Corporation, and Tejon Ranchcorp (collectively, "Tejon Ranch Defendants") ultimately acquired title through transactions traceable to the patents. The Tejon Ranch Defendants propose a 3,450–home development named Tejon Mountain Village on the Tejon Ranch.

***4** The Tribe filed this action asserting title under a variety of theories ultimately asserting four claims against the Secretary of Interior,[FN2] two against the

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Tejon Ranch Defendants,[FN3] and one against Kern County, California.[FN4]

After dismissing two complaints with leave to amend, the district court dismissed the complaint with prejudice.

II

The Tribe has waived appeal of its claims against the Secretary by failing to "present a specific, cogent argument for our consideration." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir.1994); *see also* Fed. R.App. P. 28(a)(8)(A) (requiring that an appellant's brief must contain an argument section which includes their "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

On appeal, the Tribe asserts a new theory of estoppel against the Secretary and suggests that the United States violated its trust responsibility by failing to present or preserve the Tribe's claims before the Commission. Neither theory was presented to the district court. We decline to consider arguments raised for the first time on appeal. *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir.2007).

III

A

The Tribe claims ownership to the Tejon Ranch as against the Tejon Ranch Defendants on its alleged receipt of a Spanish land grant, its rights under the 1849 Treaty with the Utah, and its negotiation of Treaty D with the federal government. However, the district court correctly concluded that the Tribe's failure to present a claim to the Commission pursuant to the California Land Claims Act of 1851 extinguished its title, that the Treaty with the Utah did not convey land rights to the signatory tribes or recognize aboriginal title, and that Treaty D was never ratified and conveyed no rights.

[1] The Tribe asserts that "[i]n 1777, the Spanish government granted the Kawaiisu land in what would become the State of California." The only support for this assertion is its alleged presence on Diseno Maps from that year created by Father Francisco Garces.[FN5] Even assuming that the Kawaiisu possessed such a grant, the terms of the Treaty of Guadalupe Hidalgo alone were insufficient to preserve it. The Land Claims Act of 1851 required that "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners...." 9 Stat. 631, § 8. Presentation to the Commission was the only avenue allowed by the Act for preservation of claims and the issuance of a patent. Section 13 of the Act provides that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." *Id.* § 13. The Tribe concedes that it did not present any claims to the Commission within the statutory time frame.

***5** The Tribe claims land rights were bestowed by the subsequent Treaty with the Utah, or, alternatively, argues that its participation in Treaty D constituted substantial compliance with the Act of 1851. Neither argument is persuasive.

[2][3] The Treaty with the Utah did not grant the Tribe title to Tejon Ranch, nor did it recognize aboriginal title of any of the signatory tribes, including the Kawaiisu. Aboriginal title "means mere possession not specifically recognized as ownership by Congress." *Tee–Hit–Ton Indians v. United States*, 348 U.S. 272, 279, 75 S.Ct. 313, 99 L.Ed. 314 (1955). Absent such recognition by Congress, aboriginal right of occupancy can be terminated by the sovereign at any time "without any legally enforceable obligation to compensate the Indians." *Id.* Recognition of aboriginal title requires a clear statement from Congress unequivocally granting legal rights. *See Uintah Ute Indians of Utah v. United States*, 28 Fed.Cl. 768, 786

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(Fed.Cl.1993) ("Recognition of Indian title may take various forms, but such recognition must manifest a definite intention to accord legal rights."). "The Congress must affirmatively intend to grant the right to occupy and use the land permanently. By 'recognition,' the courts have meant that Congress intended to acknowledge ... to Indian tribes rights in land which were in addition to the Indians' traditional use and occupancy rights exercised only with the permission of the sovereign." *Sac & Fox Tribe v. United States,* 315 F.2d 896, 900 (Ct.Cl.1963) (internal quotation marks and citation omitted).

The question of whether the Treaty with the Utah created any enforceable property rights has been addressed by the Court of Federal Claims, which determined in 1993 that the 1849 treaty did not recognize Indian title. *Uintah Ute Indians,* 28 Fed.Cl. at 786. As that court observed, "Article VII of the 1849 treaty does not recognize title because the boundaries of aboriginal lands were to be settled in the future. By its terms the treaty does not designate, settle, adjust, define, or assign limits or boundaries to plaintiff; it leaves such matters to the future. Consequently, the treaty cannot be said to recognize Indian title."

[4] The district court correctly adopted the reasoning of *Uintah Ute Indians.* By referring to "limits which may be assigned [the Utahs]" that they would be "bound to confine themself to," the Treaty's language indicates that any rights to the land the Indians occupied at the time of its execution were not recognized by the United States government. Treaty with the Utah, art. VII. We cannot assume that Congress would have intended through its ratification of the Treaty with the Utah to grant title to the vast, then-indeterminate expanses of land occupied by the various signatory tribes. The Treaty's language points to its aims of promoting peaceful relations and encouraging the Indians to adopt a more geographically constrained agrarian mode of living. *Id.* [FN6]

***6** [5] Treaty D, executed in 1851 by the Kawaiisu and the United States, was never ratified by the Senate and thus carries no legal effect. *See* U.S. Const. Art. II, § 2, cl. 2. The treaty itself contained language to that effect, stating that it would "be binding on the contracting parties when ratified and confirmed by the President and Senate of the United States of America." The Kawaiisu argue that through its participation in Treaty D, the Tribe "substantially complied" with the Act of 1851 and thus perfected title tracing to its alleged Spanish land grant or the Treaty with the Utah. This argument also fails. The Act of 1851 provides for no alternative to presenting one's claims to the Commission.

Treaty D granted no land rights, nor did it create any other enforceable rights, as it was never ratified and is thus a legal nullity.[FN7] It was also insufficient for the purposes of the Act of 1851's requirement that any parties claiming title to land in California under Spanish or Mexican grants present their claims to the Commission.

Subsequent case law established that the Act of 1851 fully extinguished any existing aboriginal title or unregistered land grants. In 1901, the Supreme Court held in *Barker v. Harvey*, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963, that even perfect title was subject to the presentation requirement of the Act of 1851, as were claims by Mission Indians derived from Mexican land grants. *Id.* at 491, 21 S.Ct. 690 ("If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration."). The Court further suggested that the Act itself extinguished aboriginal title: "Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy." *Id.* at 492, 21 S.Ct. 690.

This construction was applied to extinguish aboriginal title in California. *Super v. Work* extended the

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rationale to nomadic, non-Mission Indians. *See* 3 F.2d 90 (D.C.Cir.1925), *aff'd per curiam*, 271 U.S. 643, 46 S.Ct. 481, 70 L.Ed. 1128 (1926). We declined to create an exception to the "extensive reach" of the Act for the indigenous occupants of the Santa Barbara Islands. *See United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 646 (9th Cir.1986) (holding that the Treaty of Guadalupe Hidalgo did not convert tribe's aboriginal title into recognized title and that its aboriginal title was extinguished by its failure to present its claim under the Act of 1851).

The Supreme Court in *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924), applied the rule to a dispute involving one of the very land patents at issue in this case. Despite the condition placed on an 1843 Mexican land that the Tejon Mission Indians would be allowed to continue to reside there under the protection of the grantees, the Court held that the land patent issued pursuant to the grantees' presentation to the Commission under the Act of 1851 "passed the full title, unincumbered [sic] by any right in the Indians" to occupy and use the lands. *Id.* at 482, 44 S.Ct. 621. The Court's opinion emphasized the especial importance of repose in matters involving land, where titles are "purchased on the faith of their stability." *Id.* at 487, 44 S.Ct. 621 ("Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." (internal quotation marks and citation omitted)).

***7** Thus, the district court correctly concluded that the Tribe has no cognizable ownership interest in the Tejon Ranch.

B

The Tribe also complains about numerous acts of alleged forgery and deception on the part of Edward F. Beale and others in obtaining patents for the four Mexican land grants comprising Tejon Ranch. On this basis, the Tribe contends that Tejon Ranch Defendants' title—acquired, ultimately, from Beale's patents—is defective. However, all the alleged acts occurred prior to the submission of the claims to the Commission pursuant to the Land Claims Act of 1851. The Commission confirmed all four of the claims, and at least one of the patents has survived a challenge in court. *See United States v. Title Ins. & Trust Co.*, 288 F. 821 (9th Cir.1923), *aff'd*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924). The district court, pointing to the value of stability identified by the Supreme Court in *Title Insurance*, 265 U.S. at 484, 44 S.Ct. 621, concluded that "Plaintiffs cannot now challenge the validity of United States issued land patents after over a century of time has elapsed."

IV

The Tribe also claims that it owns a 49,000–acre subset of Tejon Ranch, known historically as the Tejon or Sebastian Reservation ("Reservation"), alleging that a reservation reserved to the Tribe was established pursuant to the Act of 1853. The Tribe claims that the Reservation, once established, was never terminated and that it possesses superior title to the parcel. The district court properly rejected the claim.

[6] The Tribe argues that the Reservation was created pursuant to the Act of Congress of 1853 and that it survived a subsequent Act of Congress of 1864. In support of its claim, the Tribe cites two letters from the months immediately following the passage in 1853: one from President Franklin Pierce to Interior Secretary Robert McClelland, and a second from Secretary McClelland to Edward F. Beale, Superintendent of Indian Affairs for California and Nevada. While these letters certainly establish that the President directed his officers to execute a plan for creating reservations in California, that plan lacks specificity and there is no evidence that the President ever approved the creation of the Tejon Reservation. Thus, the district court properly concluded that it "was not a reservation established by the President and therefore cannot provide legal rights to plaintiffs."

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[7][8] Further, any rights that the Tribe possessed were extinguished by the Act of 1864, which superseded the Acts of 1853 and 1855 by allowing only four reservations in California. *Shermoen v. United States,* 982 F.2d 1312, 1315 (9th Cir.1992). *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), articulates a relatively high standard for Congressional termination of an Indian reservation: "A congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 505, 93 S.Ct. 2245. The district court properly rejected the Tribe's claims of ownership in the Reservation.

V

***8** The Tribe's claims against Kern County are contingent upon the establishment of ownership in the Tejon Ranch. Because its ownership claim fails, so do its claims against Kern County. Robinson's individual claims against Kern County are waived for failure to present a "specific, cogent argument for our consideration" on appeal. *Greenwood,* 28 F.3d at 977.

VI

The district court properly determined that the Tribe has no ownership interest in the Tejon Ranch and that no reservation was established. The claims against Kern County are subsumed into the ownership determination. The claims originally asserted against the Secretary, along with Robinson's individual claims, were waived for failure to assert on appeal. We decline to consider the Tribe's new arguments on appeal. We need not reach any other issue urged on appeal.[FN8]

AFFIRMED.

FN1. In 1927, the California legislature passed a statute authorizing the California Attorney General to bring suit on behalf of the tribes who were party to Treaty D and seventeen other unratified treaties. On May 18, 1928, Congress passed The Indians of California Act, 25 U.S.C. § 651, which granted jurisdiction to the Court of Claims to hear these cases. Earl Warren, representing "all those Indians of the various tribes, bands and rancherias who were living in the State of California on June 1, 1852, and their descendants living in the State," *Indians of California by Webb v. United States,* 98 Ct.Cl. 583, 585 (Ct.Cl.1942), negotiated a $5,024,842.34 judgment in favor of the Indians. *See Round Valley Indian Tribes v. United States,* 97 Fed.Cl. 500, 504 (Fed.Cl.2011).

FN2. The Tribe's claims against the Secretary are (1) deprivation of property without due process in violation of the Fifth Amendment by wrongfully omitting the Tribe from the list of federally recognized tribes and failing to correct that omission; (2) breach of fiduciary duty by not intervening on the Tribe's behalf to stop the proposed development of Tejon Mountain Village; (3) denial of equal protection in violation of the Fifth Amendment by extending benefits to other tribal groups while failing to recognize the Tribe; and (4) non-statutory review of the Secretary's failure to recognize the Tribe, based on federal recognition by virtue of the Act of Congress ratifying the 1849 Treaty with the Utah.

FN3. The Tribe's claims against the Tejon parties include unlawful possession of Tejon Ranch, trespass, violation of NAGPRA, and violation of the Non–Intercourse Act.

FN4. The Tribe's sole claim against Kern County is for equitable enforcement of treaty—essentially forcing the County to revoke its approval of permits for the development

of Tejon Mountain Village.

FN5. We note, however, that in its Second Amended Complaint, and in the Tribe's opposition to the Tejon Ranch Defendants' motion to dismiss the Third Amended Complaint, the Tribe argued that its land rights explicitly do *not* derive from any Spanish or Mexican grant.

FN6. The Tribe also contends that "the district court's interpretation of the Treaty with the Utahs was fatally flawed because the court failed to consider how the Kawaiisu interpreted the Treaty, as the Supreme Court requires." However, "[t]he interpretation of a treaty is a question of law and not a matter of fact." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986); *see also Sioux Tribe v. United States*, 205 Ct.Cl. 148, 158, 500 F.2d 458 (Ct.Cl.1974) ("We have repeatedly held that the interpretation of an Indian treaty is a question of law, not a matter of fact."). As in *Chunie*, the issue of whether the Treaty with the Utah granted any enforceable rights is relatively settled as a matter of law.

FN7. The district court and Tejon Defendants point out that the Kawaiisu were partially compensated for the failure of the United States to ratify Treaty D. A 1942 settlement negotiated by Earl Warren, then-Attorney General of California, obtained over five million dollars in compensation for "the Indians of California" for the federal government's failure to ratify eighteen treaties with Native Americans, including Treaty D. *See Indians of California by Webb v. United States*, 98 Ct.Cl. 583 (Ct.Cl.1942). This litigation was made possible by an Act of Congress in 1928 granting jurisdiction to the court of claims to hear such cases. The Indians of California Act, 25 U.S.C. § 651. The Court of Claims determined that the Act granted a right of action for an equitable claim, not a legal one, "allowing all the Indians of California to recover the amount specified in these unratified treaties, both in the value of the land promised to be set aside and the other compensation provided." *Indians of California*, 98 Ct.Cl. at 598.

FN8. The Tejon Ranch Defendants and Kern County contend that we lack jurisdiction, arguing that our Appellate Commissioner erroneously granted the Tribe's motion to reinstate the appeal. A motions panel of our court has already considered, and rejected, these arguments, and we conclude the Appellate Commissioner acted within his discretion in granting the reinstatement motion.

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