CASES DECIDED

IN

THE COURT OF CLAIMS

July 1, 1944, to January 31, 1945

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. K-344. DECEMBER 4, 1944

The Indians of California.

Indian claims; special jurisdictional act; treaties not ratified; title under Mexican law; use and occupancy; cession.

Decided October 5, 1942; claimants entitled to recover, subject, however, to offsets, if any, and amount of recovery and offsets, if any, to be determined under Rule 39 (a), Opinion 98 C. Cls. 583. Motion for new trial overruled January 4, 1943.

Plaintiffs' petition for writ of certiorari denied by the Supreme Court June 7, 1943; 319 U. S. 764.

In accordance with the opinion of the court (98 C. Cls. 583) and the order of the Supreme Court denying certiorari (319 U. S. 764), the case having been referred to a commissioner of the court to ascertain values, a stipulation was filed by the parties, which in part is as follows:

II

That the area of land for which the plaintiff Indians are entitled to recover under the aforesaid jurisdictional act as found by this Court in its decision of October 5, 1942, is 8,518,900 acres; that the value of said land per acre as fixed by the aforesaid jurisdictional act is $1.25; that the total value of said land for which the plaintiff Indians are entitled to recover is the sum of $10,648,625.

III

That there has been set aside by the United States for the plaintiff Indians as reservations and otherwise, by

Executive Orders, acts of Congress or otherwise a total of 611,226 acres of land, which it is agreed had a value of $1.25 per acre, or a total value of $764,032.50; that the defendant is entitled to a credit or offset of said sum of $764,032.50 against plaintiffs' recovery on account of land; that plaintiffs' net recovery on account of land shall be $10,648,625, minus $764,032.50, or $9,884,592.50

IV

That the definite items provided for in the unratified treaties involved in this litigation, consisting of goods, wares, merchandise, and other chattels, which would have been furnished if the treaties referred to in Exhibit "A" to the petition herein had been ratified, were of the value of $1,407,149.48, which amount the plaintiffs are entitled to recover under the jurisdictional act and the aforesaid decision of this Court.

V

That the services and facilities which would have been supplied if the said treaties had been ratified would have been furnished for a period of twenty-five (25) years and would have cost the United States the sum of $5,762,200 to supply, which amount the plaintiffs are entitled to recover under the jurisdictional act and the aforesaid decision of this Court.

VI

That the total amount which it is agreed the plaintiffs are entitled to recover under the aforesaid jurisdictional act and the decision of this Court, subject however under the aforesaid act and decision to the offsets specified in the following paragraph No. VII of this stipulation, is as follows:

On account of land as specified in paragraphs II and III of this stipulation	$9,884,592.50
Definite treaty items as specified in paragraph IV of this stipulation	1,407,149.48
Services and facilities as specified in paragraph V of this stipulation	5,762,200.00
Total	17,053,941.98

VII

That the total amount available to the defendant in this action as offsets against the plaintiffs' recovery under the terms of the aforesaid jurisdictional act is made up of the following items:

Disbursements made out of "specific appropriations for the support, education, health, and civilization of Indians in California"	$5, 547, 805. 87
Disbursements made out of appropriations for the Indian Service generally but by the appropriation acts certain amounts were apportioned to the Indian Service in California	1, 573, 249. 66
Out of disbursements made for the support and maintenance of the non-reservation Indian schools at Fort Bidwell, Greenville, and Riverside, California	4, 908, 044. 11
Total	12, 029, 099. 64

VIII

That the aforesaid offsets in the total sum of $12,029,-099.64, as set out in paragraph VII above, shall be deducted from the total amount which the plaintiff is entitled to recover, as stated in paragraph VI above, namely, $17,053,941.98, making the net amount for which judgment may be entered by the Court the sum of $5,024,842.34.

Whereupon, following the filing of a report by the commissioner stating that "net recovery in favor of the plaintiffs is recommended in the sum of $5,024,842.34," it was ordered December 4, 1944, that judgment for the plaintiffs be entered in the net sum of $5,024,842.34.

No. 45950. OCTOBER 2, 1944

Huston St. Clair et al, trading as Virginia Smokeless Coal Company.

Government contract for coal. Upon a stipulation filed by the parties and agreement to comprise, and upon a memorandum report by a commissioner recommending that judgment be entered for the plaintiff in the agreed sum of $2,850.00, and on plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment for the plaintiff be entered in the sum of $2,850.00.

No. 45951. OCTOBER 2, 1944

Sovereign Pocahontas Company.

Government contract for coal. Upon a stipulation filed by the parties, and an agreement to compromise, and upon a memorandum report by a commissioner recommending

discussions bored some of the members, even made some of them sleepy, but then there was a fine, in addition to the dues, if they didn't attend the meetings.

While there were regular meetings, and in the circumstances, a rather full attendance, we do not see how that alters the fact that the social, athletic, and sporting features were a material part or purpose of the organization. In fact, it is doubtful if the club could have survived but for such activities. It cost the member $20 to get in, but he could get out for nothing, and many of them probably would have done so but for the activities mentioned. However, with almost every conceivable kind of social, athletic, and sporting undertaking, plus the fact that many of their neighbors belonged and the possibility of business advantage, it is not unnatural that they should remain as members.

One natural inquiry is: Why did men join this organization? It does not seem possible that commonplace discussions of well-known principles could have been the chief inducement. Looking at the entire set-up, it is inescapable that at least a material part of the attraction was the desire for social contact with their fellow men, the desire to see and take part in the athletic events and of visiting with each other at the picnics and dinners. These things, the chance of rubbing elbows, of conversation with different individuals at their frequent meetings, which were usually accompanied with food of some kind, afford a more plausible explanation of why men wished to belong to the club.

It was not a poor man's club. The dues, initiation fees, and penalties for failure to attend show that only a man of fair means could afford membership.

The minutes of the meetings show that some form of social gathering and athletic features were almost always announced, evidently for the purpose of keeping up interest and thereby retaining membership so that dues would be paid regularly. Without these social and athletic attractions the club could not have lasted. Those in charge evidently realized this fact, as is shown by the gradually increasing attention paid these activities.

The Commissioner of Internal Revenue having decided the issue adversely, the burden of proof is on plaintiff to show that these activities were not a material part or pur-

pose of the organization. It has not discharged this burden.

I would hold that the social, athletic, and sporting features are a material purpose of the organization, and that it is therefore subject to the tax.

WHALEY, *Chief Justice*, concurs in this opinion.

THE INDIANS OF CALIFORNIA, CLAIMANTS, BY U. S. WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA v. THE UNITED STATES

[No. K–344. Decided October 5, 1942. Plaintiff's motion and defendant's motion for a new trial overruled January 4, 1943.] *

On the Proofs

Indian claims; recovery under special jurisdictional act; lands promised under treaties not ratified.—Under the terms of the special jurisdictional act of May 18, 1925, 45 Stat. 602, as amended by the act of April 29, 1930, 46 Stat. 259, it is *held* that the plaintiffs are entitled to recover, subject, however, to the deduction of offsets, if any, and reserving the determination of the recovery and the amount of such offsets, if any, for further proceedings, as provided in Rule 39 (a) of the Court of Claims.

Same; title under Mexican law.—Where the Indians of California consisted of wandering bands, tribes, and small groups who had been roving over the same territory before such territory was acquired by the United States from Mexico; and where said Indians had no separate reservations and occupied and owned no permanent sections of land; it is *held* that said Indians possessed no title to any particular real property existing under the Mexican law in California. *Hayt, Admn.* v. *United States and Utah Indians*, 38 C. Cls. 455.

Same.—Where the Indians of California did not qualify before the Commission created by the act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California;" it is *held* that whatever lands they may have claimed became a part of the public domain of the United States. *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance & Trust Co., et al.*, 265 U. S. 472.

Same; claim of session; use and occupancy.—The establishment by the United States of a commission to negotiate treaties with the Indians of California, in order to localize said Indians on particular tracts and confine them in certain defined sections, was not the recognition of a claim of cession under the Mexican or Spanish law or the use and occupancy of any definite country.

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*Petition for writ of certiorari denied June 7, 1943.

Reporter's Statement of the Case

Same; promise made and not fulfilled.—In the negotiation of the 18 treaties with the Indians of California, which treaties were accepted by said Indians but were never ratified by the Senate of the United States, a promise was made to said Indians which was never fulfilled.

Same; moral claim; tort; plenary power of Congress.—Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim nor recognize a case sounding in tort but the Congress has repeatedly sent tort cases to said Court for adjudication under special jurisdictional acts, and Congress can confer on said Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action.

Same.—Congress in its plenary powers can recognize an equitable claim, a moral claim, or any claim on the conscience of the Nation. *United States* v. *Realty Company*, 163 U. S. 427, 440, 441.

Same.—In the instant case, the Congress not only has recognized an equitable claim but has gone further and has almost definitely defined the amount of recovery.

Same; legal claim.—No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained under the special jurisdictional act in the instant case.

Same; taking; interest.—There has been no taking which under the Constitution would require just compensation and which would involve interest.

Same; pleading; surplusage.—In construing a pleading, if the petition sets out a cause of action within the purview of the jurisdictional act and also contains other assertions or claims which do not fall within the rights conferred by the act, the latter can be excluded as surplusage and yet a good cause of action remains.

Same; special acts strictly construed; exception in Indian claims.—Special acts are strictly construed as a general rule but there are exceptions in Indian cases under the broad doctrine that the Indians are wards of the Nation. *Braden* v. *United States*, 16 C. Cls. 389, 411.

The Reporter's statement of the case:

Messrs. Earl Warren and *H. H. Linney* for the plaintiffs.

Messrs. Raymond T. Nagle and *George T. Stormont*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. This case is before the Court under the Jurisdictional Act of May 18, 1928 (45 Stat. 602) as amended by the Act

of April 29, 1930 (46 Stat. 259), which authorizes this Court to hear, adjudicate, and render final judgment, determining the equitable amount due from the United States on all claims of whatsoever nature the Indians of California, as defined in section 1 of the Jurisdictional Act above cited, may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in the state which the United States appropriated to its own purposes without the consent of said Indians; and to determine, adjudicate and render final decree in the matter of all equitable claims relating to the loss sustained by these Indians on account of their failure to secure and receive the lands, personal property, services, facilities, aids, improvements and compensation provided for or proposed in those certain eighteen unratified treaties executed by certain chiefs and headmen of the several tribes and bands of Indians of California and commissioners representing the United States, between March 19, 1851 and January 7, 1852.

2. The aforesaid eighteen treaties, on June 1, 1852, were transmitted by the President, Millard Fillmore, to the Senate of the United States for its constitutional action thereon. On June 28, 1852, the Senate, considering each of the treaties as in Committee of the Whole, unanimously refused to advise and consent to the ratification of all and several of the aforesaid eighteen treaties and ordered that the resolutions rejecting the treaties be laid before the President of the United States. The records of the United States Senate do not reveal the reasons for the adverse action on the aforesaid treaties.

3. The plaintiffs, herein designated as The Indians of California, comprise 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 on May 18, 1928—such definition and designation having been prescribed in the Jurisdictional Act.

In accordance with the provisions of sections 1 and 7 of the act, the Secretary of the Interior caused to be prepared a roll or census of the Indians of California which was finally

approved on May 17, 1933. The census roll is filed as a permanent record in the Bureau of Indian Affairs, Department of the Interior, Washington, D. C. It contains the names of 23,571 Indians who collectively under the appellation "The Indians of California" bring this suit.

4. Prior to May 14, 1769, the date of the arrival in the territory now comprised in the State of California of one of the first exploring expeditions of the Kingdom of Spain by way of Mexico, the Indians in the state lived in their primitive and aboriginal condition, divided into many separate and distinct bands, tribes and rancherias, enjoying the sole use, occupancy and possession of all the lands in the State of California, undisturbed by any European power. The Kingdom of Spain extended its dominion over what is now the State of California, and under its protection, the ecclesiastical authorities established Catholic missions, twenty-one in number, along the western coast of California from the city of San Diego to Sonoma, north of San Francisco, California, but leaving the greater part of the state to the free and undisturbed occupancy of the aboriginal inhabitants. In the year 1810, Mexico revolted and established its independence of the Kingdom of Spain in the year 1824. From that date the Indians of California were under the rule of the Mexican Republic. On May 13, 1846, a state of war was declared to exist between the United States and the Republic of Mexico. Peace between the two nations was re-established by the signing of the Treaty of Guadalupe Hidalgo, proclaimed by the President of the United States on July 4, 1848. All of the lands now included in the State of California were ceded to the United States by the Republic of Mexico in said treaty. Under and by the provisions of the first section of the protocol annexed to the Treaty of Guadalupe Hidalgo, which referred to and by reference adopted the third article of the Treaty of Louisiana, proclaimed October 21, 1803, the Government of the United States was required to maintain and protect the inhabitants of the State of California and other territory included in said treaty (a large part of the inhabitants of the State of California then being Indians in their aboriginal state) in the free enjoyment of their liberty, property and the religion which they profess.

5. Section 16 of the Act of March 3, 1851, 31st Congress, Session II, Chapter 41, (9 Stat. 631–634) entitled "An act to ascertain and settle Land Claims in the State of California," provided among other things as follows:

> SECTION 16. *And be it further enacted:* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

At the time of the passage of this act the greater portion of the Indian tribes and bands and rancherias in the State of California were uncivilized and earned their living, not by agriculture, but by fishing, hunting, and the gathering of seeds, acorns, and other nuts; fruits, roots, and the natural production of the soil, rivers, lakes, and streams of the State of California. The majority were untutored and illiterate and did not speak nor understand the English language. Lands occupied by the Indians had been invaded by thousands of white men who had come to California for the purpose of mining gold which had been discovered there in the year 1848. Lands occupied by the Indians were overrun; they were overwhelmed and surrounded by the invading host of white immigrants. The Indians of California did not present their claims before the commission created by the act above cited.

6. On or about March 18, 1851, and prior to the acquisition from Mexico of the territory now comprised within the State of California under the Treaty of Guadalupe Hidalgo, the tribes, bands, and rancherias of Indians then living in the State of California, including those named in the eighteen unratified treaties referred to and set forth in plaintiff's exhibit No. A, made a part hereof by reference, and the individual Indians comprised within said tribes, bands, and rancherias, and such individual Indians then living in the state as were not members of any such tribes, bands, and rancherias, lived on, occupied, used and possessed, by immemorial use after the manner and customs of Indians in the

aboriginal state, a vast area now comprised within the territorial limits of the State of California and estimated to contain more than 75,000,000 acres of land. The Indians, in large part, lived in a primitive condition, earning their living by hunting and fishing and the gathering of the natural products of the soil, the forest, streams, and lakes.

7. With the object in view of effecting a settlement with the Indians living in California of all their rights with reference to the occupancy and use of land in the state, the President of the United States, in accordance with the Act of September 30, 1850 (9 Stat. 544) appointed three commissioners for the purpose of conducting negotiations looking to the execution of treaties with the tribes, bands and rancherias of Indians in the State of California, acting through their chiefs, captains and head men representing them and acting in their behalf.

Between March 19, 1851, and January 7, 1852, both dates inclusive, the commissioners, acting under their special instructions from the Secretary of the Interior, met with the chiefs, captains and head men of the tribes, bands and rancherias of Indians in the State of California whose names are set forth in "Exhibit A" to the petition. At the special instance and request and upon the invitation of the aforesaid commissioners representing the United States, the chiefs, captains and head men made, entered into and executed a series of eighteen certain treaties with the United States of America, copies of which are attached to the petition and marked "Exhibit A," and made a part hereof by reference.

8. The aforesaid eighteen treaties provided in substance that the tribes, bands and rancherias, and the individual Indians comprised within them, acting through their chiefs, captains and head men, acknowledged the sovereignty of the United States; undertook and promised to live on terms of friendship with the Government of the United States and its citizens, and with each other and all Indian tribes; to forego private retaliation and to assist in maintaining peace.

They further agreed to forever quitclaim to the government of the United States any and all lands to which they may ever have had any claim or title.

The treaties provided that certain delimited areas of lands within the territorial boundaries of the State of California should be set aside as reservations and "forever held for the sole use and occupancy" of the Indians signing the respective treaties. In some instances hunting and fishing rights were guaranteed outside the boundaries of the reservations.

In addition to these promises it was further provided that the United States should furnish to the Indians mentioned in each treaty, certain goods, wares and merchandise, live stock, clothing, implements of husbandry, subsistence supplies, and various educational, industrial, health and other facilities, including buildings and a general plan of administration of their affairs, with the object in view of establishing them in a new habitat and encouraging them to adopt a civilized mode of life.

9. After the rejection of the eighteen treaties by the Senate of the United States no further governmental effort was made to negotiate treaties with the Indians of California. The policy was adopted of dealing directly with them by legislation of the Congress and through the instrumentality of Executive Orders of the President. Indian Affairs in California were placed under the supervision and control of agents and other employees of the Indian Bureau, Department of the Interior. Such limited rights in land as the Indians of California now possess and enjoy were given to them by Acts of Congress, special and general, by purchase and by Executive Orders of the President.

10. The lands which were proposed to be set aside as reservations for the sole perpetual use and occupancy of the tribes, bands and rancherias of the Indians of California, parties to the eighteen unratified treaties, are described therein by metes and bounds. They are shown on the official map prepared at the request of the Secretary of the Interior by the Commissioner of the General Land Office as a public document. These reservations were never set aside and reserved to the Indians of California, parties to the said treaties, in the manner and form provided for therein.

The total area in the aforesaid proposed reservations has been officially computed to be eight million, five hundred and eighteen thousand, nine hundred (8,518,900) acres, and in-

cludes a large acreage comprised within reservations subsequently established by the Government for the benefit of the Indians of California.

11. The Attorney General of the State of California, in presenting the amended petition, is acting by and with the consent and authority of the State of California, expressed in the act of the legislature of California, Chapter 643, Statutes 1927, page 1092, entitled "An Act authorizing the Attorney General to bring suit against the United States in the Court of Claims in behalf of the Indians of the State of California in the event that the Congress of the United States authorizes the same," which act reads:

> SEC. 1. In the event that congress of the United States by legislation has heretofore or may hereafter authorize the attorney general of this state to institute a suit or suits in the court of claims in behalf of the Indians of the State of California, the attorney general is hereby authorized with the approval of the governor of this state to cause suit or suits to be instituted and to employ special counsel to assist in the prosecution of suit or suits and to pay all necessary expenses incident thereto from moneys appropriated to, the attorney general; provided, that the congressional authority therefor shall provide that in the event the court shall render judgment against the United States the State of California shall be reimbursed for all necessary costs and expenses incurred by said state; provided, that no reimbursement shall be made to the State of California for the services rendered by its attorney general in person.

12. On November 8, 1938, Earl Warren was duly elected Attorney General of the State of California, and on January 2, 1939, entered upon the performance of his official duties, succeeding U. S. Webb in that office. As the duly elected, qualified and acting Attorney General of the State of California, he is now performing all the duties in connection with this suit devolved upon him by the Jurisdictional Act (45 Stat. 602) and authorized by the act of the legislature of the State of California as set forth in Chapter 643, Statutes 1927, page 1092, quoted in Finding 11, hereof.

The court decided that under the terms of the jurisdictional act the plaintiffs were entitled to recover, subject,

however, to the deduction of offsets, if any, and reserving the determination of the amount of recovery and the amount of such offsets, if any, for further proceedings, as provided in Rule 39 (a) of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court under a special private act of May 18, 1928, 45 Stat. 602, as amended by the act of April 29, 1930, 46 Stat. 259.

In 1850 the Congress passed an act carrying an appropriation "to enable the President to hold treaties with the various Indian tribes in the State of California." (9 Stat. 544,558.) Commissioners to negotiate treaties were appointed by the President and during the period from March 1851 to January 1852 negotiated eighteen separate treaties with some of the tribes and bands of Indians of California. These tribes and bands of Indians constituted about one-third to one-half of the total number of members of the tribes and bands in California at that time. The treaties were of the same general character. In each treaty there was set apart a certain district of country to be forever held for the sole use and occupancy of said tribes of Indians. The Indian tribes on their part agreed to forever quit claim to the United States any and all lands to which they or either of them now or may ever have had claim or title whatsoever. There were provisions made for the supplying by the United States to the Indians of cattle, farming implements, blacksmiths, and schools and teachers, to be maintained and paid for by the Government for a definite period. These treaties were transmitted to the Senate by President Fillmore. On June 28, 1852, the Senate refused to ratify all and several of the eighteen treaties.

The Indians of California consist of wandering bands, tribes, and small groups, who had been roving over the same territory during the period under the Spanish and Mexican ownership, before the treaty between Mexico and the United States whereby California was acquired by the United States. They had no separate reservations and occupied and owned no permanent sections of land. They and their forebears had roved over this country for centuries. They possessed

no title to any particular real property existing under the Mexican law in California. *Hoyt, Admn.* v. *United States and Utah Indians*, 38 C. Cls. 455. Ex. Doc. No. 50, H. R. 30th Cong. 2d Sess. p. 77.

These Indians did not qualify before the Commission created by the Act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California." Therefore whatever lands they may have claimed became a part of the public domain of the United States. *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance & Trust Co. et al.*, 265 U. S. 472.

However, these Indians were roving over the State of California when the "gold rush" began and the white men paid no attention to any claims the Indians asserted to any portion of this territory. This resulted in bloody clashes and reprisals.

The object of the National Government in providing a Commission to negotiate treaties with these Indians was to localize them on particular tracts and confine them in certain defined sections. There was no recognition of a claim of cession under the Mexican or Spanish law or the use and occupancy of any definite country. It was simply a fair and just solution of a very troublesome situation in a newly acquired territory and was to avoid clashes between the white and red men. The Government simply held out a promise to the Indians that certain territory would be ceded to them for their permanent residence and certain provisions were made to civilize what were considered uncivilized tribes, bands, and groups. The Indians, bands, and tribes, who signed these eighteen treaties, on their part agreed to move to these reservations, relinquish all claim to any and all other lands, and to abide in peace and harmony with the white man.

There was a promise made to these tribes and bands of Indians and accepted by them but the treaties were never ratified so the promise was never fulfilled.

From 1852 this matter lay dormant for almost eighty years. In 1928, Congress passed a private act, 45 Stat. 602, *supra*, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purposes of this act the Indians

of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State.

SEC. 2. All claims of whatsoever nature the Indians of California as defined in Section 1 of this act may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the Attorney General of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is hereby conferred upon the Court of Claims of the United States, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

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

SEC. 3. If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation or the fact that the said claim or claims have not been presented to any other tribunal, including the Commission created by the Act of March 3, 1851 (Ninth Statutes at Large, page 631): *Provided*, That any decree for said Indians shall be for an amount equal to the just value of the compensation provided or proposed for the Indians in those certain eighteen unratified treaties executed by the chiefs and head men of the several tribes and bands of Indians of California and submitted to the Senate of the United States by the President of the United States for ratification on the 1st day of June, 1852, including the lands described therein at $1.25 per acre. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the Indians of California, made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land, shall not be pleaded as an estoppel but may be pleaded by way of set-off.

SEC. 4. The claims of the Indians of California under the provisions of this act shall be presented by petition, which shall be filed within *three years* after the passage of this act. *Said petition shall be subject to amendment.* The petition shall be signed and verified by the Attorney General of the State of California. Verification may be upon information and belief as to the facts alleged. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give the said attorney access to such papers, correspondence, or furnish such certified copies of record as may be necessary in the premises free of cost.

SEC. 5. In the event that the Court renders judgment against the United States under the provisions of this Act, it shall decree such amount as it finds reasonable to be paid to the State of California to reimburse the State for all necessary costs and expenses incurred by said State, other than attorney fees: *Provided*, That no reimbursement shall be made to the State of California for the services rendered by its Attorney General.

SEC. 6. The amount of any judgment shall be placed in the Treasury of the United States to the credit of the Indians of California and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational, health, industrial, and other purposes for the benefit of said Indians, including the purchase of lands and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians: *Provided*, That the Secretary of the Treasury is authorized and directed to pay to the State of California, out of the proceeds of the judgment when appropriated, the amount decreed by the Court to be due said State, as provided in section 5 of this Act.

SEC. 7. For the purpose of determining who are entitled to be enrolled as Indians of California, as provided in section 1 hereof, the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause a roll to be made of persons entitled to enrollment. Any person claiming to be entitled to enrollment may within two years after the approval of this Act, make an application in writing to the Secretary of the Interior for enrollment. At any time within three years of the approval of this Act the Secretary shall have the right to alter and revise the roll, at the expiration of which time said roll shall be closed for all purposes and thereafter no additional names shall be added thereto: *Pro-*

vided, That the Secretary of the Interior, under such rules and regulations as he may prescribe, shall also cause to be made, within the specified time herein, a roll of all Indians in California other than Indians that come within the provisions of section 1 of this Act. [Italics ours.]

On August 14, 1929, the Attorney General of California, acting in his official capacity, duly filed in the Court of Claims of the United States a petition verified by him. The title of the case is "The Indians of California, claimants, by U. S. Webb, Attorney General of the State of California." A general traverse was filed by the Government.

After the period of three years, mentioned in the above act, in which a petition could be filed by the Attorney General of California, had expired, the Attorney General applied to the Court of Claims for leave to amend the original petition, which was granted and on March 14, 1932, an amended petition was filed. The defendant did not file a general traverse or other pleading to the amended petition. Both parties filed requests for findings of fact.

The plaintiffs' position is that, under the terms of the jurisdictional act, the Congress has admitted or assumed a limited liability arising out of the failure and refusal of the Senate to ratify the eighteen treaties, and the Court is only called upon to ascertain the amount due and enter a decree.

The defendant contends:

(1) That the original petition not being within the authorization expressed in the jurisdictional act, the Court is without jurisdiction of the amended petition, it having been filed after the expiration of the limitation contained in the jurisdictional act.

(2) That the claim arising out of the alleged failure of the United States to protect the asserted property rights of the plaintiff Indians under Spanish and Mexican law is without basis for the reason that they had no property rights as asserted.

(3) That the language of the jurisdictional act relied upon by the plaintiffs as creating a right of recovery through an implied ratification of the eighteen unratified treaties does not have that effect, but simply means that "equitable relief"

on the basis prescribed in the act shall be applied by this Court if the failure of the United States to perform its assumed obligation under the treaty of Guadelupe Hidalgo and protect the property rights of the Indians of California presents a basis for judicial relief.

(4) If the provision relied upon by the plaintiffs creates a liability out of an alleged moral obligation, power to adjudicate the claim arising thereunder is not conferred upon the Court by the terms of the jurisdictional act.

(5) The provision in question does not create or assume a liability but directs the Court to adjudicate a moral claim through the application of legal principles, and is therefore invalid.

The first contention of the defendant involves a question of pleading. It is asserted that the Attorney General of California, who, alone, was authorized and empowered to bring a suit in the Court of Claims for all the Indians of California, has failed to do so and has only sued for those bands and tribes mentioned in the eighteen unratified treaties and, as a consequence, a decree, if any, could only be entered in behalf of those bands and tribes.

In construing a pleading, the complaint as a whole must be considered and not particular and segregated sentences or paragraphs. The jurisdictional act which permits the suit to be brought must also be considered along with the claims made in the petition. If the petition sets out a cause of action within the purview of the jurisdictional act and also contains other assertions or claims which do not fall within the rights conferred by the act, the latter can be excluded as surplusage and yet a good cause of action remains. Special acts are strictly construed as a general rule but there are exceptions to the rule in Indian cases under the broad doctrine that the Indians are wards of the Nation. The well-established rule is that in construing a special act the Court will take into consideration the language of the act, the nature of the case, and the surrounding circumstances in order to ascertain and carry out the legislative intent. This rule goes back to the case of *Braden* v. *United States*, 16 C. Cls. 389, 411, and has been repeatedly followed in cases too numerous to cite.

The original complaint starts out by alleging that "the Indians of California, as hereinafter defined, acting herein by and through U. S. Webb, Attorney General of the State of California, * * * respectfully present the following facts."

There was no Nation, band, or tribe known or identified as the "Indians of California." As the defendant so aptly says, it is a term of art. But the jurisdictional act designates the Indians of California as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."

In Paragraph XV of the original petition it is alleged "this petition is presented by the Attorney General of the State of California in conformity with and under authority of that certain Act of Congress, Public Law No. 423, 70th Congress, First Session, approved May 18, 1928, *acting herein* for and on behalf of the Indians of California as defined in said Act, which Act is entitled and reads as follows." [Italics ours.]

The Indians of California, as defined in the jurisdictional act, are *all Indians* who were on June 1, 1852, residing in that State, and their living descendants. It is true that Paragraph XVII of the original petition alleges the claimants are those Indians mentioned in the eighteen treaties. But this allegation can be stricken from the petition and there still remains sufficient to show a good cause of action as granted by the jurisdictional act. This allegation is mere surplusage and under the terms of the special act could be given no application. The act would not permit these particular Indians alone to either maintain a suit or to recover should the Court decree an award. In our opinion, the petition, taken as a whole, presents a cause of action for all Indians of California.

It may be mentioned also that, after the three year limitation clause in which a petition shall be filed by the Attorney General in behalf of these Indians, there follows the clause "Said petition shall be subject to amendment." The Congress must have felt that amendments to the original petition might be necessary when this clause was inserted. The insertion of this sentence after the limitation in which a petition

should first be filed could only mean that after the petition had been filed within the three years it was subject to amendment.

The plaintiffs filed, after the three-year period had expired, a motion to amend, and the Court, after due consideration, granted the motion, and an amended petition was filed. The amended petition simply clarified certain doubtful allegations, and made them more definite. There was no enlargement of the amount sought to be recovered in the orginal petition.

A liberal rule should be applied when the defendant has notice from the beginning that the plaintiffs set up and are trying to enforce a claim against it because of special conduct. *N. Y. Central R. R.* v. *Kinney*, 260 U. S. 340, 346.

The cases cited by the defendant are inapposite.

In *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction, recognized without exception for over a century, has been "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

The second contention of the defendant is an assertion of law. It is contended that, as these Indians had no claim under Spanish and Mexican law, any claim arising out of the failure of the United States to protect their property rights would be futile. This would doubtless be true if any such claim were made, but none is made.

The claim sued on is one arising under an act of Congress that says the promise made to these Indians in negotiating treaties with them, and afterwards not carrying out that promise by ratification, is sufficient to constitute an equitable claim 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, and granted a right of action thereon.

Congress ripened the promise into an equitable claim. The failure of Congress to set apart certain reservations for these Indians in 1852, and its failure to provide the goods, chattels, school houses, teachers, etc. was recognized as a loss to these Indians and was made by the Congress an equitable claim to be paid in money value.

The act does not in any place set out a legal claim. It is the recognition of an equitable claim and is repeatedly so referred to in the jurisdictional act. Congress in its plenary powers can recognize an equitable, a moral claim, or any claim on the conscience of the nation. *United States* v. *Realty Company*, 163 U. S. 427, 440, 441.

In the instant case this is clearly admitted and recognized in the last paragraph of section 2 of the jurisdictional act which reads as follows:

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

It is in the power of Congress to grant any kind of relief which its wisdom dictates. There have been many instances of the recognition of moral claims, even gifts and bounties. Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim, nor can it recognize a case sounding in tort. *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816; *Mansfield et al.* v. *United States*, 89 C. Cls. 12; *Stubbs v. United States*, 86 C. Cls. 152. But the Congress has repeatedly sent tort cases to this Court for adjudication under special jurisdictional acts. The Congress can confer on this Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action. *United States* v. *Realty Co.*, *supra.*

In the instant case the Congress not only has recognized an equitable claim but has gone still further. The amount of recovery has been almost definitely defined. The land which is described in the respective treaties is to be valued at a fixed price. The chattels and other articles promised to be supplied are capable of having their value ascertained as of the date of the treaties. The value per acre is fixed in the jurisdictional act and it is only necessary to ascertain the number of acres in the reservations mentioned in the eighteen treaties. The chattels and services are named in the treaties so it is only necessary to ascertain the amount which would purchase them at the time when Congress failed to ratify the treaties.

As against this amount the jurisdictional act provides the Government may plead by way of set off "any payment which

may have been made by the United States or moneys heretofore or hereafter expended *to date of award* for the benefit of the Indians of California made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land." [Italics ours.]

There can be no denial of the fact that, when these Indians did not receive the eighteen separate tracts of land set aside for them in the treaties and the other perquisites therein mentioned, a loss was sustained by them which would not have happened if the Congress had carried out the promise by ratification of the treaties. Years afterward, the Congress recognized this loss to these Indians, and attempted to make restitution in money by converting this loss into an equitable claim and directing this Court to ascertain the amount in dollars and cents and enter a decree when the amount was ascertained.

This case does not involve the payment for land of which the Indians had a cession, or use and occupancy. No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained. The decree can only be for a fixed amount of compensation. There has been no taking which under the Constitution would require just compensation to be paid and therefore would involve interest. The amount awarded would only be in full settlement of a recognized equitable claim which the Congress has ordered the Court to ascertain, and, after ascertainment, to enter a decree. The amount so recovered is not to go to the Indians of California per capita nor is it to be disbursed in any other individual manner. Under the jurisdictional act it is to be placed under the care of the Secretary of the Treasury, and draw four percent interest. That is not all. The Congress alone can appropriate from the fund, so established for the Indians of California, from time to time, such sum as, in its discretion, seems wise, and even these appropriations are to be "for educational, health, industrial and other purposes for the benefit of said Indians including the purchase of lands and building of homes"—beneficial purposes for the elevation and progress of these Indians to better citizenship.

The other contentions of the defendant are answered

by what has been said above. Further observation is unnecessary.

As this case is brought under Rule 39 (a), which provides the Court should decide only the law and facts, a judgment cannot be entered.

The Court is of the opinion that the plaintiffs are entitled to recover the value of the land set out and described in the eighteen unratified treaties at the price per acre named in the jurisdictional act, and the value of the other articles, chattels, and services as of the date of the failure of the Senate to ratify the treaties. As this claim does not involve a taking of land by the Government for which just compensation shall be made, but only compensation for an equitable claim, no allowance of interest is permitted or allowable.

The case will be referred to a Commissioner of the Court to ascertain the values and report to the Court. If a stipulation cannot be entered into, both parties may take testimony on these issues.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JOHN M. WHELAN & SONS, INC., v. THE UNITED STATES

[No. 44022. Decided October 5, 1942. Plaintiffs' motion for new trial overruled February 1, 1943]*

On the Proofs

Government *contract; decision of contracting officer not arbitrary nor unreasonable.*—Where plaintiff, contractor, entered into a contract with the Government to furnish all materials and to perform all work for the construction of officers' quarters at Fort Monmouth, New Jersey, said work to be completed August 5, 1934; and where thereafter time for completion was extended, because of severe weather and extra work authorized by proper change order, until November 30, 1934, and the contract price was increased because of such extra work; and where on November 12, 1934,

*Petition for writ of certiorari denied June 14, 1943.