

WHAT HAPPENED TO HISPANIC NATURAL RESOURCES LAW IN CALIFORNIA?

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INTRODUCTION

California has an elaborate statutory regime regulating the exploitation of natural resources, including water, minerals, land, and tidal areas, dating largely from the 1960s through the 1990s.¹ Yet this considerable body of legislation makes no mention of law originating under the Spanish and Mexican authorities governing the province in 1769–1821 and 1821–1848, respectively. Scholars of California history and geography have noted the relatively minimal environmental impact of pre-1848 European settlement, but have not asked whether the Hispanic tradition left any permanent footprints on legal development.² This gap is particularly evident compared to

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¹ See generally KENNETH MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE (2017). See also CALIFORNIA ATTORNEY GENERAL'S ENVIRONMENTAL TASK FORCES, PRIMER ON PUBLIC ENVIRONMENTAL LAW IN CALIFORNIA (1971).

² John W. Caughey, *The Californian and His Environment*, in ESSAYS AND ASSAYS: CALIFORNIA HISTORY REAPPRAISED 3 (George Knoles ed., 1973) (few effects other than sea otter and beaver hunting by Russian and U.S. poachers); WILLIAM A. SELBY, REDISCOVERING THE GOLDEN STATE: CALIFORNIA GEOGRAPHY 49–50, 136, 189–190 (2d ed. 2006) (overgrazing in some areas but little mining or water depletion). See also GREEN

researchers' documentation of Spanish and Mexican influences on contemporary resource law in other parts of the Southwest.³

When the United States succeeded to Mexican sovereignty in 1848, California courts were confronted with water, mining, and land disputes, and so had to interpret the laws and customs under which conflicting claims arose. As will be seen, in these decisions many judges heavily cited legal sources from Spain and Mexico, which described a system especially well adapted to the geography of the region. The presence in and suitability of the Hispanic natural resources tradition in these cases raise the question of why its traces are not more apparent in the state today. Synthesizing my research in a series of articles and a recent book, this essay explores the reasons for the eventual superseding of Spanish and Mexican natural resources law by common law and modern statutes.⁴

WATER ALLOCATION

Legal historians of the Hispanic Southwest, which included California, have shown that water rights during the Spanish and Mexican periods were communal. Water was allotted among users, especially during times

VERSUS GOLD: SOURCES IN CALIFORNIA ENVIRONMENTAL HISTORY (Carolyn Merchant ed., 1998) (contrasting Native American and Hispanic limited resource use with intensive post-1848 economic development).

³ See Michael M. Brescia & Michael C. Meyer, *Natural Resources and the Law in Hispanic Arizona: The Babocómari Ranch and the Living Legacies of the Gadsden Purchase*, 58 J. SW. 29 (2016) (Arizona land and irrigation rights); Michael C. Meyer & Michael M. Brescia, *The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico*, 73 N.M. HIST. REV. 321 (1998) (New Mexico grazing, wood-cutting, and water rights); CHARLES R. PORTER, JR., *SPANISH WATER, ANGLO WATER: EARLY DEVELOPMENT IN SAN ANTONIO* (2009) (Texas water allocation); Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case*, 5 SCHOLAR 217 (2003) (Colorado grazing, wood-cutting, and water access).

⁴ For more detailed exposition of the topics discussed *infra*, see Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994); Peter L. Reich, *Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title*, 23 COLUM. J. ENVTL. L. 57 (1998); Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 AM. J. LEGAL HIST. 353 (2001); PETER L. REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER: A CASEBOOK* 313–350 (2017).

of drought in this chronically arid region.⁵ Such rights were not absolute or exclusive as under Anglo-American common law, but were regularly apportioned by provincial and territorial governors between *pueblos* (towns) and other consumers like missions and individual farmers.⁶ When the 1848 Treaty of Guadalupe Hidalgo transferred sovereignty over most of the Southwest to the United States, the treaty's provision that preserved existing property rights often resulted in the pueblos' successor cities vying for water supplies against landowners.⁷

In the 1870s this conflict came to a head over the Los Angeles River. Upstream landowners in the San Fernando Valley diverted water from the river, threatening the growth of Los Angeles and the revenue it enjoyed from selling surplus water to other users.⁸ Initially, the California courts refused to grant the city an absolute right to the river, in accordance with Hispanic law's fair allocation principle.⁹ But in 1895 the California Supreme Court held that Los Angeles could monopolize its local water source based on a so-called "pueblo water right" supposedly originating in the Spanish period, though this theory is contradicted by the ample evidence of communal sharing presented in opposition to the city.¹⁰

In subsequent years the courts extended Los Angeles' right to water to supply its newly annexed areas, the river's subterranean flow, the entire aquifer underlying the San Fernando Valley, reclaimed floodwater, and

⁵ NORRIS C. HUNDLEY, *THE GREAT THIRST: CALIFORNIANS AND WATER — A HISTORY* 38–60 (rev'd ed. 2001); MICHAEL C. MEYER, *WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY, 1550–1850* 157 (1984).

⁶ For a specific example of this type of accommodation, see HUNDLEY, *supra* note 5, at 51–58 (water dispute resolved between Los Angeles and San Fernando mission).

⁷ Treaty of Guadalupe Hidalgo, Article VIII, 1848, 9 Stat. 922, 929–930. See Federico M. Cheever, Comment, *A New Approach to Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. REV. 1364 (1986) (discussing the scope of the treaty).

⁸ HUNDLEY, *supra* note 5, at 127.

⁹ *City of Los Angeles v. Baldwin*, 53 Cal. 469 (1879); *Feliz v. City of Los Angeles*, 58 Cal. 73 (1881); *Elms v. City of Los Angeles*, 58 Cal. 80 (1881).

¹⁰ *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762 (Cal. 1895). See also Reich, *Mission Revival Jurisprudence*, *supra* note 4, at 891–894 (detailing voluminous data on Hispanic custom and law, including testimonial proof that the pueblo never monopolized all the river's water, revealed in the manuscript *Vernon* case file).

surplus water from the Owens River.¹¹ The putative pueblo water right was also applied to give San Diego exclusive control over the San Diego River, and has been upheld regarding Los Angeles as recently as 1975, despite the contradictory evidence still before the court.¹² Texas and New Mexico state courts' explicit rejection of any purported pueblo water right vividly contrasts with California's refusal to follow the communal Hispanic water law tradition, so well adapted to a desert environment.¹³

MINERAL EXTRACTION

As with water, mining under the Hispanic legal regime differed markedly from the common law's individual property rights approach. Spanish and Mexican tradition held that the sovereign owned precious minerals and had the prerogative to distribute concessions through an elaborate process of discovery, official registration, and monitoring.¹⁴ This centralized control and system of allocation accorded with the communal Hispanic policy of exercising governmental power over natural resources for the common good.¹⁵

Paralleling the trajectory of water law development, U.S. courts in California initially followed Mexican law, holding that the state, as successor to the prior polity, owned all precious minerals despite some landowners' assertion that their surface property included an underground estate as well.¹⁶ The California Supreme Court upheld this precedent in 1858 in

¹¹ *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899); *City of Los Angeles v. City of Glendale, Same v. City of Burbank*, 142 P.2d 289 (Cal. 1943).

¹² *City of San Diego v. Cuyamaca Water Co.*, 287 P. 475 (Cal. 1930); *City of Los Angeles v. San Fernando*, 537 P.2d 1250 (Cal. 1975).

¹³ *In re Contests of City of Laredo*, 675 S.W.2d 257 (Tex. Ct. App. 1984); *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004). See also DANIEL TYLER, *THE MYTHICAL PUEBLO RIGHTS DOCTRINE* (1990) (elaborating on the concept's ahistorical nature).

¹⁴ REALES ORDENANZAS PARA LA DIRECCIÓN, RÉGIMEN Y GOBIERNO DEL IMPORTANTE CUERPO DE LA MINERÍA DE NUEVA ESPAÑA (1783); MARVIN D. BERNSTEIN, *THE MEXICAN MINING INDUSTRY* 11 (1964).

¹⁵ See LANE SIMONIAN, *DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO* 62 (1995).

¹⁶ *Hicks v. Bell*, 3 Cal. 219 (1853); *Stoakes v. Barrett*, 5 Cal. 37 (1855); *McClintock v. Bryden*, 5 Cal. 97 (1855).



MARIPOSA COUNTY COURTHOUSE — OLDEST COURTHOUSE IN CALIFORNIA, BUILT IN 1854; SITE OF THE 1857 TRIAL OF JOHN C. FRÉMONT'S CLAIM OF MINERAL RIGHTS IN HIS RANCHO LAS MARIPOSAS LAND GRANT PURCHASE (CONSTRUCTED ON LAND DONATED TO THE COUNTY BY FRÉMONT IN LIEU OF TAXES).

complex litigation between individual prospectors and explorer John C. Frémont, who claimed exclusive dominion over gold-bearing quartz on his land in the Sierra Nevada foothills.¹⁷

But a year later, two justices from the prior three-judge panel had been replaced, and the court reversed itself to side with Frémont concerning surface owners' subterranean rights. Disregarding the Merced Mining Company's extensive briefing on Hispanic mineral law, Chief Justice Stephen Field wrote for the majority that the state of California's regulatory power had not been exercised over minerals underneath private property.¹⁸ Going further in an 1861 decision, Field held explicitly that surface proprietors owned the precious metals underneath their land.¹⁹ He based his theory of

¹⁷ *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, 311–314 (1859).

¹⁸ *Id.* at 373–376.

¹⁹ *Moore v. Smaw and Frémont v. Flower*, 17 Cal. 199 (1861).

mineral privatization on the unsupported argument that the U.S. Congress, in establishing a confirmation process for land claims under the Guadalupe Hidalgo treaty (the 1851 California Land Act), impliedly conveyed both the surface and subsurface when it validated a grant.²⁰ These decisions constituted a clear rejection of Mexico's resource tradition, despite the lack of any evidence that either the treaty drafters or Congress ever meant to do so in settling land titles.²¹

Surface mineral proprietorship is still the rule in California, having been affirmed by a 1955 federal district court applying state law. Remarkably, the judge admitted that Hispanic law indicated otherwise, but considered that Field's version of the claim-resolution process should be paramount.²² Courts in New Mexico and Arizona, and legislators in Texas have all accepted California's privatization approach.²³ As a result of these decisions in California and other frontier regions, simple placer mining by individuals gave way to increasingly elaborate, expensive, and ecologically harmful extractive techniques, like the stamp mills used by Frémont and hydraulic mining.²⁴ It should be noted that Mexico's own late-nineteenth-century departure from the Hispanic tradition of close government supervision over mining, in favor of more intensive private exploitation, resulted in similar environmental destruction.²⁵

LAND USE PATTERNS

As with water and minerals, land use in Hispanic California followed a model of government control and distribution. The Spanish Crown promulgated the Laws of the Indies in 1513 and 1523 for the orderly settlement

²⁰ *Id.* at 124–125.

²¹ See Reich, *An Alchemy of Title*, *supra* note 4, at 71–78 (illuminating the extensive discussions of Hispanic mineral law in the *Biddle Boggs* and *Moore* appellate briefs).

²² *Blue v. McKay*, 136 F. Supp. 315 (D.D.C. 1955), *aff'd*, 232 F.2d 688 (D.C. Cir.), *cert. denied*, 352 U.S. 846 (1956).

²³ *Catron v. Laughlin*, 72 P. 26 (N.M. 1903); *Gallagher v. Boquillas Land & Cattle Co.*, 238 P. 395 (Ariz. 1925); TEX. CONST. of 1866, art. VII, § 39.

²⁴ DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT* 48 (1987); RODMAN W. PAUL, *MINING FRONTIERS OF THE FAR WEST: 1848–1880* 30–33 (1963).

²⁵ See BERNSTEIN, *supra* note 14, at 18–19, 27–29; SIMONIAN, *supra* note 15, at 54–55, 63, 245n.76.

of the New World. They specified that towns had to include a sufficient number of *solares* (residential lots) at the center, around which would be placed *ejidos* (commons) for various public uses, while beyond them would lie *dehesas y tierras de pasto* (grazing areas) and *propios* (municipal grounds) which could be leased to generate revenue.²⁶ Such communal uses were an inheritance from Spain, where strict limitations on grazing and selling land protected communities from resource exhaustion and thus avoided the “tragedy of the commons.”²⁷ *Propios* were never intended to be sold, and officials or individual citizens could sue municipal councils for alienating these lands.²⁸ In Mexican California, *ayuntamientos* (town councils) could only rent rather than sell pueblo land to individuals, and improvement requirements were imposed on lot owners.²⁹ As might be expected, when American political control was installed in 1846, land speculators and settlers pressured the new authorities to privatize the communal aspects of the Hispanic land system.

In a series of cases beginning in the 1850s, the California Supreme Court oscillated on the question of whether municipalities could sell public land to private purchasers. Initially, the court held that San Francisco’s U.S. *alcalde* (mayor), having the same power as his Mexican predecessor, could not alienate the city’s pueblo lands, and cited Hispanic legal treatises in support.³⁰ But several years later Justice Solomon Heydenfeldt wrote for the court in overruling these decisions, asserting without any basis that Mexican authorities had been allowed to sell municipal property.³¹ Yet by the end of the decade the court had reversed itself again, relying on Hispanic sources to find that pueblo lands had been held “in trust for

²⁶ *Fundación de Pueblos en el Siglo XVI*, 6 BOLETÍN DEL ARCHIVO GENERAL DE LA NACIÓN 321, 343–344, 346–347 (1935).

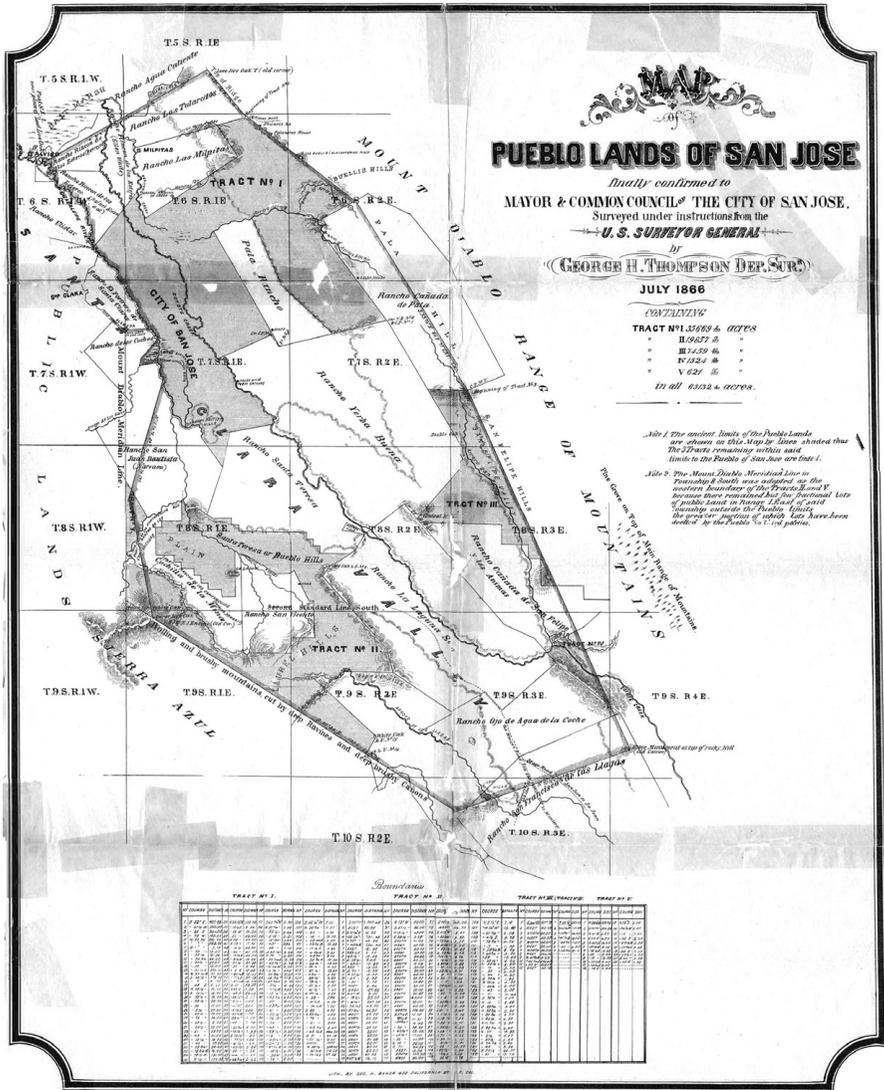
²⁷ See DAVID E. VASSBERG, *LAND AND SOCIETY IN GOLDEN AGE CASTILE* 21, 35–36 (1984).

²⁸ *Id.* at 24–25.

²⁹ José Figueroa, *Plan de propios y arbitrios . . .* August 8, 1834, Archives of California, State Papers, Missions and Colonization, v. II (original in Bancroft Library, UC Berkeley); Miroslava Chávez, *Women and the American Conquest in Los Angeles: From the Mexican Era to American Ascendancy* 22, 81–82 (Ph.D. dissertation, UCLA, 1998).

³⁰ *Ladd v. Stevenson and Parker*, 1 Cal. 18 (1850); *Woodworth v. Fulton*, 1 Cal. 295 (1850).

³¹ *Cohas v. Raisin*, 3 Cal. 443 (1853).



**PUEBLO LANDS OF SAN JOSÉ — 1866 U.S. GOVERNMENT
 MAP OF PUEBLO LANDS (IN GRAY) BELONGING TO THE
 PUEBLO OF SAN JOSÉ AND SOLD AFTER INCORPORATION BY
 THE CITY OF SAN JOSÉ TO PAY MUNICIPAL DEBTS
 (SEE FOOTNOTE 33 ON FACING PAGE).**

Published in FREDERIC HALL, THE HISTORY OF SAN JOSE AND SURROUNDINGS (1871).

the public use,” and so could not be sold at auction to satisfy city debts.³² In the 1860s and 1870s the court maintained this position, holding that these lands could not be mortgaged and that the public use dedication was permanent.³³

The California Supreme Court ultimately disregarded Hispanic law and returned to the privatization perspective, ruling in 1903 that Monterey could lawfully sell its pueblo lands to speculators.³⁴ Lower state courts likewise permitted the cities of Los Angeles and San Diego to alienate many acres of public property, markedly ignoring the historical limitation on municipal power.³⁵ The upshot of California cities’ sale of their pueblo lands was that large portions of the urban commons were eliminated. Even when cities retained parks or other public areas, they often located them asymmetrically in places inaccessible to the majority of residents — a policy exemplified by San Francisco’s Golden Gate Park and Griffith Park in Los Angeles.³⁶ This departure from the Spanish and Mexican tradition of reserving centrally located land for the public benefit constituted an opportunity lost for maintaining open space and keeping cities livable.³⁷

TIDELANDS ACCESS

A final topic wherein California courts have considered the impact of Hispanic law concerns public ownership of and access to tidelands. Under Roman law, “the sea-shore” up to the highest winter tide was common

³² *Hart v. Burnett*, 15 Cal. 530 (1860).

³³ *Branham v. Mayor and Common Council of San José*, 24 Cal. 585 (1864); *San Francisco v. Canavan*, 42 Cal. 541 (1872). See also Peter L. Reich, *Introduction to FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* (reprint 2016) (1885) (noting that *Branham* attorney was noted expert in Mexican law).

³⁴ *Monterey v. Jacks*, 73 P. 436 (1903).

³⁵ *Dunlop v. O’Donnell*, 6 Cal. App. 2d 1 (1935); *DeYoung v. City of San Diego*, 194 Cal. Rptr. 722 (1983).

³⁶ See MARY P. RYAN, *CIVIC WARS* 205–209 (1997); Mary Katherine Gibson, *The Changing Conception of the Urban Park in America: The City of Los Angeles as a Case Study* 32 (M.A. thesis, UCLA, 1977).

³⁷ See Reich, *Dismantling the Pueblo*, *supra* note 4 (discussing municipal land alienation validated by courts that knowingly overrode the Hispanic legal model).



§ 1466. *What Are the Things a Man may Do upon the Sea-shore.*—Every man who chooses may build a house or cabin upon the sea-shore as a retreat, and he may erect there any other edifice whatever to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build galleys there, or any other vessel whatever; or stretch and mend his nets; and when he is there, or employed for these or other purposes of a similar nature, no one has a right to disturb him. And by the sea-shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

SIETE PARTIDAS — COVER PAGE OF SPAIN'S MEDIEVAL
 LAW CODE (1565 EDITION) AND TRANSLATION BY
 FREDERIC HALL OF SECTION ON TIDELANDS ACCESS
 (SEE FOOTNOTE 39 ON FACING PAGE).

property, which could be used by all for fishing, shelter, and beaching boats.³⁸ Spain's medieval law code, the *Siete Partidas*, expressed this concept as royal sovereignty over the "highest swells of the sea."³⁹ Incorporating this principle, Spanish and Mexican land grants in California were bounded by the high tide line, although disputes emerged during the U.S. confirmation process regarding how far some parcels extended into navigable waters.⁴⁰ Scholars have noted this Hispanic legal antecedent to the modern public trust doctrine, which authorizes government regulatory power over waterways.⁴¹ Yet almost all California cases upholding government jurisdiction to manage access to tidelands have failed to cite Spanish or Mexican law in support.⁴²

In a striking exception to this trend, the California Supreme Court upheld Los Angeles' title to Ballona Lagoon, an arm of the Pacific Ocean subject to tidal influence and claimed by adjacent landowners under an 1839 grant from Mexico.⁴³ The city wished to dredge the lagoon, construct sea walls, and make other improvements without condemning any property by eminent domain. Writing for the majority, Justice Stanley Mosk

³⁸ J. INST. 2.1.1.; 2.1.3.; 2.1.5.

³⁹ FREDERIC HALL, *THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* § 1466 (reprint 2016) (1885) (translating Partida 3, Título 28). See also *Humble Oil & Refining Co., et al. v. Sun Oil Co., et al.*, 191 F.2d 705, 720 (5th Cir. 1951) (citing *id.*).

⁴⁰ ERNEST R. BARTLEY, *THE TIDELANDS OIL CONTROVERSY* 61n.8 (1953). See, e.g., *SISTER MARY STE. THÉRÈSE WITTENBURG, THE MACHADOS AND RANCHO BALLONA* 35 (1973) (arguments before the Land Commission whether a rancho's boundary reached the sea or ended at an inner, enclosed bay resolved in favor of the latter).

⁴¹ Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 225, 240 (1984); MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920* 219–225 (1987).

⁴² See, e.g., *Boone v. Kingsbury*, 273 P. 797 (Cal. 1928) (authorizing the "useful purpose" of oil drilling); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (filling of a bay restricted to protect ecology and recreation); *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (limiting municipal water rights when their exercise would eradicate natural habitat). Cf. *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) (construing federal tidelands reservation narrowly to block condemnation of island that was part of Mexican grant as confirmed).

⁴³ *City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792 (Cal. 1982).



BALLONA WETLANDS — ARTISTIC DEPICTION OF “WIYOT’S CHILDREN” AT THE EARLY TONGVA/GABRIELEÑO NATIVE-AMERICAN VILLAGE OF SA-ANGNA IN PRESENT-DAY PLAYA DEL REY

(detail of painting by Mary Leighton Thomson, available at <http://www.ballonafriends.org/history.html>).

ruled that the lagoon was subject to the public trust in tidelands, that the title of plaintiffs’ predecessors was limited by the trust according to Mexican law, and that by the Treaty of Guadalupe Hidalgo the U.S. government, the state, and the city succeeded to ownership of the public’s rights.⁴⁴ However, this recognition of the Hispanic basis for the public trust proved ephemeral, for the U.S. Supreme Court reversed the decision on the procedural ground of the state’s failure to assert its interest during the land grant confirmation proceedings.⁴⁵

⁴⁴ *Id.*

⁴⁵ *Summa Corp. v. California ex rel. State Lands Commission et al.*, 466 U.S. 198 (1984). See REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER*, *supra* note 4 (detailing U.S. courts’ use of Mexican law regarding the public trust and other doctrines). See also Cheever, *A New Approach*, *supra* note 7 (discussing the land grant–public trust relationship).

CONCLUSION

For a variety of reasons Hispanic natural resources law has not retained much of a presence in contemporary California jurisprudence. Many post-annexation judges considered Spanish and Mexican principles, but the overall trend was to reject these in favor of common law. In the words of legal historian Morton Horwitz, the mid-nineteenth-century perspective was one in which “[d]ominion over land began to be regarded as an absolute right to engage in any conduct on one’s property regardless of its economic value.”⁴⁶ In line with this historical process, the prior anti-developmental tradition was either distorted (as in the “pueblo water right”), overridden (as with minerals and land claims), or procedurally blocked (as with tidelands access). These decisions facilitated a degradation of resources that has been only partially reversed by California’s modern environmental regime.

After an intervening century of intensive exploitation, sustainability policies now echo much of the Hispanic legal approach to water, minerals, land, and coastal areas. But such enlightened regulation still exists uneasily with suburbanized planning. The contrast between fire management rules in Mexican Baja California and those in U.S. Southern California offers a clear example of how reclaiming parts of the traditional model can contribute to resource conservation and public safety. In Mexican Baja, restricting construction in wildlands while allowing periodic natural fires there limits fuel build-up, so that frequent but low-intensity burns affect few people or properties. But north of the border, private residential housing sprawling into increasingly remote areas is protected by fire suppression policies that allow chaparral to proliferate and thus feed far more destructive conflagrations.⁴⁷ The implication of this difference is that exerting greater control over where individuals

⁴⁶ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 102 (1977).

⁴⁷ RICHARD A. MINNICH & ERNESTO FRANCO VIZCAÍNO, *LAND OF CHAMISE AND PINES: HISTORICAL ACCOUNTS AND CURRENT STATUS OF NORTHERN BAJA CALIFORNIA’S VEGETATION* 136–138 (1998). See also Molly Hunter, *Wildland Fire Use in Southwestern Forests: An Underutilized Management Option?*, 47 NAT. RES. J. 257 (2007) (noting the ecological benefits to U.S. forests where the Mexican model is followed and resource managers do not suppress fires).

may live will save lives as well as landscapes. We cannot return wholesale to the communal natural resources laws of California's past, but we can implement aspects of that approach which have proved effective in this geographical setting.

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