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Litigating Property under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case.

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LITIGATING PROPERTY UNDER THE GUADALUPE HIDALGO TREATY: THE SANGRE DE CRISTO LAND GRANT CASE

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I. INTRODUCTION

The background and details of the *Lobato* case have been well presented by Jeff Goldstein. I would now like to put the litigation in another context by discussing the *amicus* brief I filed on behalf of the Bi-National Human Rights Commission, the International Indian Treaty Council, the National Chicano Human Rights Council, and several other human rights groups. Jeff brought me into the case when the Colorado Supreme Court specifically requested briefing on the applicability of Spanish and Mexican property law in its order granting certiorari to the Colorado Court of Appeals.[1] In my brief for the petitioners, my objective was to demonstrate the relevance of Hispanic law to their grazing, wood-cutting, and other usufructuary rights on the Sangre de Cristo grant's former common lands.[2]

First, I will discuss the Spanish and Mexican legal issues I argued in the *Lobato amicus* brief, then compare the case to parallel indigenous rights

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1. *See* Order granting Petition for Writ of Certiorari, Lobato v. Taylor, 13 P.3d 821 (Colo. Ct. App. 2000), *cert. granted*, No. 00-SC-527, 2000 Colo. LEXIS 1351 (Colo. Dec. 4, 2000).

2. Brief of Amici Curiae Bi-National Human Rights Commission et al., Lobato v. Taylor, Case No. 00-SC-527, 2002 Colo. LEXIS 527 (Colo. June 24, 2002) [hereinafter Amici Curiae Brief].

disputes involving historical evidence, and finally, explain how I integrate traditional common use problems into my real property course. In the *amicus* brief, I maintained that the Sangre de Cristo successors-in-interest had the right to continue using their former common lands, based on Hispanic land use doctrine as understood in the 1840s, the time of the original grant.[3] These arguments are similar to the experiences of other conquered peoples attempting to preserve their traditional usufructuary rights in common law judicial fora. The paradigm of indigenous use confronted with modern notions of private property can also be an enlightening discussion in the law school teaching context.

II. Traditional Hispanic Use Rights in the Spanish, Mexican, and U.S. Southwest

During the Spanish period, the model regulation for colonization in northern New Spain (the current Mexican northern states and U.S. Southwest) was the 1781 *Reglamento para el Gobierno de la Provincia de Californias*, which detailed the requirements for establishing frontier communities.[4] The *Reglamento* required explicitly that "[t]he new colonists shall enjoy, for the purpose of maintaining their cattle, the common privilege of the water and pasturage, firewood and timber, of the common forest and pasturelands. . . ."[5] These principles of grant settlement were echoed in the 1789 *Plan of Pitic*, the founding document for Pitic, now Hermosillo, Sonora. The grant reserved common areas for pastures, fisheries, orchards, and other resources the settlers might need.[6]

After Mexico obtained its independence from Spain in 1821, it expanded upon the Spanish colonization policy by encouraging immigration agents, or *empresarios*, to obtain land grants and contract with families to settle on the northern frontier.[7] In an 1824 decree, the Mexican Congress stipulated that no individual colonist could receive more than a certain amount of land within specified categories necessary for subsistence, i.e.,

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3. *Id.*

4. H.W. Halleck, Report on the Laws and Regulations Relative to Grants or Sales of Public Lands in California 27-32 (1849) (translating and reprinting Felipe de Neve, Reglamento Para el Gobierno de la Pfovincia de Californias (1781)). Halleck, Acting Secretary of State for the U.S. military government of California, was charged with transmitting Spanish and Mexican laws relating to land in the newly annexed territory. *Id.* at 9.

5. *Id.* at 29.

6. Amici Curiae Brief, *supra* note 2, at 7.

7. David J. Weber, The Mexican Frontier, 1821-1846: The American Southwest Under Mexico, 163 (Ray Allen Billington et al. eds., 1982).

irrigable, seasonal, and grazing land.[8] In 1828, additional regulations stated that if the *empresario* did not allow the families to cultivate or occupy the land within a specified time, the grant was void.[9] The Congress later provided that vacant lands could be sold, leased, or mortgaged in order to stimulate further colonization.[10] As of 1844, the Spanish regulations regarding community settlements and the Mexican legislation promoting colonization were still in force in Mexico and its territories.[11] While it is unclear whether grants in northern New Mexico and southern Colorado, such as the Sangre de Cristo, were traditional community grants or based on the *empresario* system, both legal structures required that the settlers' needs for guaranteed access to natural resources be taken into account.[12]

Beyond statutory law, custom also governed land grant settlement rights on the mid-nineteenth century Mexican frontier.[13] Joaquín Escriche's *Diccionario Razonado de Legislación,* a work often cited during this period,[14] defined custom as "a practice very used and accepted that has acquired the force of law."[15] The customary practices of Mexican officials support the implication of settlement rights; these practices included granting areas comprising ecosystems diverse enough to support

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8. HALLECK, REPORT ON THE LAWS AND REGULATIONS RELATIVE TO GRANTS OR SALES OF PUBLIC LANDS IN CALIFORNIA, *supra* note 4, at 33-34; *see also* WEBER, *supra* note 7, at 162.

9. HALLECK, REPORT ON THE LAWS AND REGULATIONS RELATIVE TO GRANTS OR SALES OF PUBLIC LANDS IN CALIFORNIA, *supra* note 4, at 34-36 (translating and reprinting the General rules and regulations for the colonization of territories of the Republic, Nov. 21, 1828).

10. JOHN A. ROCKWELL, A COMPILATION OF SPANISH AND MEXICAN LAW IN RELATION TO MINES, AND TITLES TO REAL ESTATE, IN FORCE IN CALIFORNIA, TEXAS AND NEW MEXICO 627 (1851) (providing for rendering effective the colonization of the lands which are, or should be the Property of the Republic, 4th April, 1837).

11. *See* HALLECK, REPORT ON THE LAWS AND REGULATIONS RELATIVE TO GRANTS OR SALES OF PUBLIC LANDS IN CALIFORNIA, *supra* note 4, at 12 (considering Spanish and Mexican land laws "still in force" at the time of the Mexican-American War of 1846). *See generally* MARIANO GALVAN, ORDENANZAS DE TIERRAS Y AGUAS title, 44-52 (1844) (reprinting Mexican colonization decrees and characterizing them as "effective through the present day").

12. Marianne L. Stoller, *Grants of Desperation, Lands of Speculation: Mexican Period Land Grants in Colorado, in* SPANISH AND MEXICAN LAND GRANTS IN NEW MEXICO AND COLORADO 22, 24 (John R. & Christine M. Van Ness eds., 1980).

13. MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO 57-59 (1994).

14. *See* Joseph W. McKnight, *Law Books on the Hispanic Frontier*, 27 J.W. 74, 81 (1988).

15. JOAQUIN ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACION CIVIL, PENAL, Y FORENSE 165 (1837) (author translation).

various subsistence land uses,[16] ensuring that grants included *ejidos*, or common lands,[17] and requiring settlement and continuous occupation as conditions of grant validity.[18] Consistent with custom, the settlers on the Sangre de Cristo grant and their successors in interest settled on the grant and used the surrounding area for their resources beginning in the mid-1840s.[19]

The settlement rights on the Sangre de Cristo grant should also be understood in the context of the civil law doctrine of servitudes and usufruct applied on the Mexican frontier of the 1830s and 1840s. These doctrines were summarized in Eugenio de Tapia's *Febrero Mejicano*[20] and Escriche's *Diccionario razonado*,[21] the standard treatises used by attorneys, judges, and other legal officials in New Mexico, Texas, and California during this period.[22]

According to both of these sources, a *servidumbre* (servitude) could be created on behalf of a party in the land of another by means of inter vivos contract or grant, will, or prescription.[23] The subclass of *servidumbres rústicas* (rural servitudes) applied to agricultural land on which nobody lived and entitled the holder to graze cattle, use water, and remove non-precious minerals such as lime.[24] *Usufructo* (usufruct) was a related, though broader, privilege that allowed the use and enjoyment of "all the fruits" of the other's property, including natural and domestic products like deer, cattle, and grain.[25]

In 1844 Mariano Galvan summarized these principles for the benefit of Mexican settlers, stock-raisers, and landowners in his widely disseminated *Ordenanzas de Tierras y Agua*.[26] Galvan went beyond the prior treatises by providing legal forms to vindicate particular property rights, such as one "demanding a servitude in an estate," when a landowner prevented the holder from "cultivating, reaping and benefitting from its products."[27]

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16. *See* Stoller, *supra* note 12, at 25.

17. *See* Daniel Tyler, *Ejido Lands in New Mexico*, *in* SPANISH AND MEXICAN LAND GRANTS AND THE LAW 24 (Malcolm Ebright ed., 1989).

18. *See* EBRIGHT, *supra* note 13, at 93, 133.

19. *See* Marianne L. Stoller, Preliminary Manuscript on the History of the Sangre de Cristo Land Grant and the Claims of the People of the Culebra River Villages on Their Lands 26-33 (Unpublished manuscript, 1978) (on file with author).

20. EUGENIO DE TAPIA, FEBRERO MEJICANO, LA LIBRERIA DE JUECES, ABROGADOS Y ESCRIBANOS (9 vol. 1834).

21. ESCRICHE, *supra* note 15.

22. *See* McKnight, *supra* note 14, at 80-81.

23. DE TAPIA, *supra note* 20, at 358; ESCRICHE, *supra* note 15, at 640.

24. DE TAPIA, *supra note* 20, at 355; ESCRICHE, *supra* note 15, at 641.

25. DE TAPIA, *supra* note 20, at 355-56; ESCRICHE, *supra* note 15, at 701.

26. *See* GALVAN, *supra* note 11, at title, 14-17.

27. *Id.* at 138 (author translation).

After the U.S. annexation of the Southwest, these land-use doctrines were condensed for the Anglo-American legal community in Gustavus Schmidt's 1851 treatise, *The Civil Law of Spain and Mexico*,[28] which was cited in New Mexico, Texas, and California cases.[29]

When the United States occupied and annexed the Southwest as a consequence of the 1846-48 Mexican-American War, portions of Mexican law were incorporated into American law by proclamation and formal treaty. General Stephen Watts Kearny, military governor of New Mexico Territory during the war, promulgated the "Kearny Code," stipulating that "[t]he laws heretofore in force concerning water courses, stock marks, brands, horses, enclosures, commons, and arbitrations shall continue in force. . . ."[30]

The continuation and incorporation of Mexican property law was applied to all of the annexed territories in the 1848 Treaty of Guadalupe Hidalgo, article VIII, which guaranteed that Mexicans residing in the United States after the change of sovereignty would retain their property, and that the property of nonresident Mexican nationals would be "inviolably respected."[31] To enforce this broad property rights protection, Congress set up a land claim adjudication system (including a right of appeal to the federal courts), which confirmed title to 8,850,000 acres of Mexican grants in California and 12,170,002 acres in New Mexico, Colorado, and Arizona.[32] This process has been faulted for applying Spanish and Mexican law in an uneven manner that yielded inconsistent outcomes.[33] Nevertheless, the Treaty and subsequent grant confirmations provide a legal foundation for the recognition of property interests arising under Mexican law, such as settlement rights.

Since the signing of the Guadalupe Hidalgo Treaty, some state courts in the annexed area have misconstrued Mexican law in disputes over natural resources, but recent decisions have evaluated it more accurately. Beginning in the late nineteenth century, the California Supreme Court has held that Spanish and Mexican *pueblos* (municipalities), including Los Angeles and San Diego, have an absolute right to all water flowing

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28. *See* GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 54-60 (1851).

29. McKnight, *supra* note 14, at 81.

30. LAWS OF THE TERRITORY OF NEW MEXICO 114 (1846).

31. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mexico, art. 8, 9 Stat. 929.

32. *See* G. Emlen Hall, *Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest*, 36 ROCKY MTN. MIN. L. INST. 1-1, 1-2–1-3 (1991).

33. *See, e.g., id.* at 1-3; 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 U.C.L.A. L. REV. 1364 (1986).

within their limits, an interest which descended to their American successor cities and which can infinitely expand to meet the needs of city residents.[34] This "pueblo water right" has been criticized as a misinterpretation of Hispanic law by courts that were well aware of documentation proving that pre-annexation water allocation was based on equitable apportionment among all users.[35] Although New Mexico initially followed the "pueblo water right" doctrine with regard to that state's city of Las Vegas,[36] a 1994 court analyzed scholarship on Hispanic law and held that such an interpretation was historically invalid.[37] In a case involving claims of the city of Laredo to a paramount right to the Rio Grande, a Texas appellate court also rejected the doctrine after studying the 1789 *Plan of Pitic* and local customs.[38]

In a far-reaching decision on another area of water law, a Texas court found that historical sources undercut the "riparian irrigation rule," which from 1926 to 1962 had allowed riverbank landowners of former Spanish and Mexican land grants to irrigate extensively from streams abutting or within their properties. Ostensibly based on Hispanic law, the doctrine was actually at odds with the water system that had prevailed in Spanish and Mexican Texas, under which an express or implied grant from the sovereign, in addition to a land grant, was necessary for any irrigation rights to exist.[39] In the 1961 case of *State v. Valmont Plantations*, the Texas Court of Civil Appeals reexamined Hispanic law and held that "the Spanish and Mexican [land] grants along the lower Rio Grande did not carry with them appurtenant irrigation rights."[40] The court analyzed original documents and found that these grants did not expressly include irrigation access, and that judging from the land classifications, quantities granted, prices, and physical difficulty of riparian irrigation, there were no implied rights either.[41] The appellate opinion in *Valmont*

34. Vernon Irrigation Co. v. City of Los Angeles, 39 P. 762 (Cal. 1895) (holding that Los Angeles had a paramount right to the Los Angeles River); City of Los Angeles v. Pomeroy, 57 P. 585 (Cal. 1899) (holding that Los Angeles' water rights could expand infinitely); City of San Diego v. Cuyamaca Water Co., 287 P. 475 (Cal. 1930) (holding that San Diego had a paramount water right); City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (Cal. 1975) (rejecting historical evidence of water apportionment and holding that Los Angeles' paramount water right was justified by *stare decisis*).

35. *See* Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869, 882-906 (1994).

36. *See* Cartwright v. Public Service Co. of New Mexico, 343 P.2d 654 (N.M. 1958).

37. State ex rel. Martinez v. City of Las Vegas, 880 P.2d 868 (N.M. Ct. App. 1994).

38. *In re* Contests of City of Laredo, 675 S.W. 2d 257 (Tex. Ct. App. 1984).

39. *See* Reich, *supra* note 35, at 914-15.

40. State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App. 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

41. State v. Valmont, *supra* note 40, at 878.

was adopted by the Texas Supreme Court, which lauded it as "exhaustive and well documented."[42]

In the area of mineral rights, courts in California, New Mexico, and Arizona have given surface proprietors of former Hispanic land grants absolute subsurface ownership, despite various Spanish and Mexican statutes and custom providing that minerals belonged to the sovereign.[43] But in Texas, where the joinder of surface and subterranean estates occurred legislatively, at least two courts have cited Hispanic law in construing the state's relinquishment of mineral title narrowly, to exclude certain lands and substances.[44]

In *Lobato v. Taylor*, decided on June 14, 2002, the Colorado Supreme Court declined to address the Spanish and Mexican legal issues directly, resolving the case in favor of claimants on the grounds of prescription, prior use, and estoppel.[45] Yet the Court cited Mexican law throughout the opinion, stating that "Mexican land use and property law are highly relevant . . . in ascertaining the intentions of the parties involved."[46] These references suggest that tribunals addressing southwestern natural resource disputes may choose to rely to a greater extent on Hispanic law in the future.

III. INDIGENOUS USE RIGHTS COMPARISONS: NATIVE AMERICANS AND MAORIS

Outside of Colorado and the U.S. Southwest, other common law courts have confronted the conflict between indigenous usufructuary rights and modern concepts of private property. In the 1999 case of *Mille Lacs Band of Chippewa Indians v. Minnesota*, the U.S. Supreme Court upheld Native American hunting, fishing, and gathering rights against Minne-

42. Valmont Plantations v. State, 355 S.W.2d 502, 503 (Tex. 1962).

43. *See, e.g.*, Moore v. Smaw and Fremont v. Flower, 17 Cal. 199 (Cal. 1861); U.S. v. San Pedro & Canon del Agua Co., 17 P. 337 (N.M. 1888), *aff'd on other grounds* 146 U.S. 120 (1892); Gallagher v. Boquillas Land & Cattle Co., 238 P. 395 (Ariz. 1925); *see also* 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) (discussing state mineral privatization cases in light of the Guadalupe Hidalgo Treaty).

44. Cox v. Robison, 150 S.W. 1149, 1151-52 (Tex. 1912) (limiting state mineral relinquishment to past, not prospective conveyances of public domain); Schwarz v. State, 703 S.W.2d 187, 190 (Tex. 1986) (excluding coal and lignite from state relinquishment and holding that according to Hispanic law, sovereign mineral reservation did not need to be explicit).

45. Lobato v. Taylor, No. 00-SC-527, 2002 Colo. LEXIS 527, *13 -*16 (Colo. June 24, 2002).

46. *Id.* at *5.

sota's claim of treaty abrogation.[47] The state argued that the usufructuary rights were terminated by an executive order, a subsequent treaty, and Minnesota's admission to the union.[48] Writing for a 5-4 majority, Justice Sandra Day O'Connor ruled that Native American treaty rights were to be "interpreted liberally in favor of the Indians," and could not be abrogated in the absence of express congressional intent.[49]

Moving beyond U.S. boundaries to colonial New Zealand, the 1840 Treaty of Waitangi between the Maoris and the British presents another version of the common law-indigenous rights conflict. In the treaty, the British guaranteed the Maori people "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess. . . ."[50] Despite this promise that land and use rights would be maintained, in the late nineteenth century the New Zealand Supreme Court interpreted this provision narrowly, holding that Maori customary rights did not constitute title, and that settlers could hunt on native reserves.[51] The Crown also employed the Maori concept of *raupatu* (confiscation of land as punishment for rebellion) to justify expropriation.[52]

Ultimately, the contemporary New Zealand legislature established the Treaty of Waitangi Tribunal in 1975 to evaluate Maori claims.[53] Although the Tribunal was not given enforcement power, its reports and recommendations on matters such as fishing rights and waste outfalls have influenced public opinion and government actions.[54] As does the *Mille Lacs* case, the Waitangi Tribunal provides an example of how modern legal institutions can be used to restore traditional indigenous use rights.

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47. Minnesota et al. v. Mille Lacs Band of Chippewa Indians et al., 526 U.S. 172 (1999).

48. *Id.*

49. *Id.* at 200-02. *See generally* Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The* Mille Lacs *Case*, 21 PUB. LAND & RESOURCES L. REV. 169 (2000).

50. The Treaty of Waitangi (English text), *reprinted in* CLAUDIA ORANGE, THE TREATY OF WAITANGI 258-59 (1987).

51. PETER KARSTEN, BETWEEN LAW AND CUSTOM: "HIGH" AND "LOW" LEGAL CULTURES IN THE LANDS OF THE BRITISH DIASPORA – THE UNITED STATES, CANADA, AUSTRALIA, AND NEW ZEALAND, 1600-1900 90-91 (2002).

52. Bryan Gilling, Raupatu*: The Punitive Confiscation of Maori Land in the 1860s, in* LAND AND FREEDOM: LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA 117, 119-20 (A.R. Buck et al. eds., 2001).

53. ORANGE, *supra* note 50, at 249.

54. *Id.* at 250.

IV. USE RIGHTS IN THE REAL PROPERTY CLASSROOM

What does all this mean for law teachers? In first-year real property courses, casebooks begin conceptually, often covering communal use rights as well as the so-called "tragedy of the commons" notion popularized by Garrett Hardin and others.[55] But professors can point out that, contrary to Hardin's thesis that common access inevitably depletes resources, many traditional societies avoided depletion through strict limitations on grazing, planting, and leasing. This self-regulation has been documented for sixteenth-century Spain,[56] seventeenth and eighteenth-century England,[57] and contemporary contexts from fishing cooperatives to irrigation districts.[58] Rather than constituting a "tragedy," resource commons have been described by Carol Rose as a positive "social glue" promoting community cohesiveness.[59]

Beyond the introductory phase of the course, real property teachers can also relate communal usufructs to the common law servitude of *profit à prendre*, the right to enter and remove natural resources from the land of another.[60] Students will benefit from understanding the full range of property interests apart from absolute ownership found in various legal traditions.

Further, use rights held by groups or the general public are a feature of Anglo-American as well as of indigenous and civil law societies. Customary recreational servitudes created by prescription, and the public trust in navigable waterways and tidelands are now covered in property courses.[61] They can be studied as public property interests, and also as possible limitations on the application of the takings doctrine.[62]

Perhaps the most significant way law professors can employ the communal use-private property tension is to explain how in *Lobato, Mille Lacs*, and the Waitangi Tribunal, historical evidence of non-mainstream

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55. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968), *reprinted in* PROPERTY CASES AND MATERIALS 7 (John E. Cribbet et al. eds., 2002); *see also* Barton H. Thompson, *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 242, 242 (2000) (assuming the validity of Hardin's thesis and proposing solutions).

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

57. *See* E.P. THOMPSON, CUSTOMS IN COMMON 107-08, 128, 130-31, 138-39 (1991).

58. *See* EDWARD M. BARBANELL, COMMON-PROPERTY ARRANGEMENTS AND SCARCE RESOURCES 115 (2001).

59. CAROL ROSE, PROPERTY AND PERSUASION 124-25, 149 (1994).

60. PROPERTY CASES AND MATERIALS, *supra* note 55, at 493, 586-87.

61. *Id.* at 530-39, 654-63.

62. *See* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000) (discussing custom and public trust doctrines as possible government defenses to regulatory takings actions by private landowners).

traditions was marshaled in favor of altering the legal system. The notions that property rights are only absolute and attach only to individuals, already eroding in American law, evaporate when exposed to these examples of the vindication of indigenous rights. By crossing cultural and legal boundaries, we can teach students how to ensure greater public access to our common inheritance of natural resources.