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William Wood

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# THE TRAJECTORY OF INDIAN COUNTRY IN CALIFORNIA: RANCHERÍAS, VILLAGES, PUEBLOS, MISSIONS, RANCHOS, RESERVATIONS, COLONIES, AND RANCHERIAS

William Wood\*

## I. INTRODUCTION

This article examines the path, or trajectory,<sup>1</sup> of Indian country in California. More precisely, it explores the origin and historical development over the last three centuries of a legal principle and practice under which a particular, protected status has been extended to land areas belonging to and occupied by indigenous peoples in what is now California. The examination shows that ever since the Spanish first established a continuing presence in California in 1769, the governing colonial regime has accorded Indian lands such status. Spanish, Mexican, and United States law have all, at various times and in various ways and under various names (and to varying degrees in practice), extended this status to Indian villages, colonies, reservations, and rancherías that were and are recognized as Indian country.

The laws recognizing and protecting Indian lands in California were, however, not always followed in practice, particularly after California came under United States rule in 1848. As a result, many areas that were recognized as Indian country under Spanish and Mexican (and American) law no longer have this status. Other areas, however, were formally set aside for Indian use and occupancy by the federal government; these areas today comprise the land in California that is “Indian country” under 18 U.S.C. § 1151, the Indian country statute, and case law interpreting it.<sup>2</sup> As a necessary part of its

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\* Associate, Holland & Knight, LLP. J.D., M.A., University of California–Los Angeles; M.P.P., Harvard University; M.S.E.L., Vermont Law School; B.A., Williams College. The author would like to thank Carole Goldberg, Colin Hampson, Frank Lawrence, Angela Riley, and Zehava Zevit for their contributions to this article. He would also like to acknowledge and thank the American Philosophical Society and UCLA Institute of American Cultures; both provided financial support that made the research for this article possible. And the author thanks the librarians and staff at the National Archives in Washington, D.C., the Bancroft Library, and the UC Berkeley Library at the University of California–Berkeley, and the libraries at the University of California–Los Angeles, all of whom kindly helped with accessing many of the sources relied on herein.

1. The word trajectory is defined as “the curved path of something hurtling through space, esp. that of a projectile from the time it leaves the muzzle of the gun.” Webster’s New World Dictionary of Am. English 1418 (Victoria Neufeldt & David B. Guralnik eds., 3d college ed., Webster’s New World Dictionaries 1988). I use this word to reflect that the concept of Indian country I examine came to California with the Spanish and their guns and that it has followed a less-than-straight (though perhaps not curved) path through Spanish, Mexican, and United States law.

2. When the term “Indian country” appears in quotes in this article, it is to denote a specific reference to the term “Indian country” as defined in 18 U.S.C. § 1151 (2000). Under section 1151, “Indian country” means:

examining the historical continuity of a legal concept of Indian country, this article traces the processes by which Indian lands went from being recognized and protected under Spanish and Mexican law to being set aside (or not set aside, as the case may be) as “Indian country” under U.S. law.<sup>3</sup>

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

*Id.* The Supreme Court has interpreted the statutory definition “to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.” *Okla. Tax Commn. v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). Lower courts have found that “official ‘reservation’ status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151.” *U.S. v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (classifying trust land at issue as a “*de facto* reservation”); *Santa Rosa Band of Indians v. Kings Co.*, 532 F.2d 655, 658–59 (9th Cir. 1975) (finding rancheria equivalent of reservation); *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999).

3. While case law on the subject is sparse, the United States District Court for the District of New Mexico in *N.M. v. Aamodi*, 618 F. Supp. 993, 996 (D.N.M. 1985), used the words “recognized and protected” to explain Spanish and Mexican’s laws relation to Indian lands, finding that “Spanish and Mexican law recognized that the lands and waters traditionally used and occupied by the [Indians], belong[ed] to them.” *Id.* at 998. These “lands and waters were expressly recognized and protected by Spanish [and Mexican] law.” *Id.* The *Aamodi* court set forth these findings as conclusions of law and in doing so modified earlier findings made by a special master that Indian lands were “reserved and granted” by these governments (as opposed to “recognized and protected”). *Id.* Explaining the reasoning behind its modification, the court stated that it modified the findings “to change the word ‘reserved’ to the word ‘recognized’ in reference to [Indian] lands and waters” because “[t]he word ‘reserved’ made the finding clearly erroneous, as it is a term of art in federal land law which applies to the federal government’s setting aside of particular land for a particular purpose, such as for . . . Indian Reservations.” *Id.* at 996. The court went on to explain that “[t]he Spanish government did not reserve Pueblo lands in the same way the United States reserves public land for use as an Indian reservation. It simply recognized them and protected them.” *Aamodi*, 618 F. Supp. at 996.

It is not clear to what extent jurisdictional consequences attached to Indian lands being “recognized and protected” under Spanish and Mexican law, or how these compare with consequences attaching to lands being “Indian country” within the meaning of federal law. *Cf. id.* at 998 (finding that the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque each “owned its land as a community or settlement” and, though “never formally chartered as municipalities under Spanish law, . . . had the status of municipalities under Spanish law”). This issue, however, is beyond the scope of this article. I wish to focus here on a broad concept of Indian country, and in doing so examine how Indian lands in California did—and did not—come to be set aside so as to be “Indian country” under U.S. law. But I do not wish to ignore either the importance or complexity issues surrounding jurisdiction, since much can turn on whether or not land is “Indian country” under 18 U.S.C. § 1151. “Although [the statute] by its terms relates only to federal criminal jurisdiction, . . . it also generally applies to questions of civil jurisdiction . . .” *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520, 527 (1998) (citations omitted). Whether land is “Indian country” determines which governments have jurisdiction, and thus, whether a tribal government has (and conversely, whether a state or a local government lacks) regulatory, adjudicatory, and criminal jurisdiction. *Id.* at 527 n. 1 (citations omitted). Because the State of California exercises, even within Indian country, civil jurisdiction over disputes between individual Indians under 28 U.S.C. § 1360(a) (2006), whether land is “Indian country” determines whether a tribe has jurisdiction, and whether the State lacks jurisdiction to regulate the activities of a tribe and its members. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (setting forth infringement test for whether California has jurisdiction in Indian country and holding that California law did not apply to tribal gaming activities, which tribes had an inherent sovereign right to conduct). It can determine for example, whether tribal courts and police have jurisdiction over activities on the land. *See e.g. Smith v. Cabazon Band of Mission Indians*, 388 F.3d 691 (9th Cir. 2004) (tribal public safety department providing civil and criminal law enforcement services on reservation lands). It can also determine whether a tribe can tax and otherwise regulate activities on the land (and whether a state cannot). *See e.g. California Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) (tribal cigarette tax imposed on sales to non-Indians); *Fort*

As the history examined herein shows, whether a particular area was formally set aside as “Indian country” depended as much—if not more—on the unfolding of historical circumstances than on the application of legal principles, and I employ the concept of a circumstantial trajectory of Indian country in California to emphasize this reality. Had events transpired differently following secularization of the missions under Mexican rule and after the U.S.-Mexican war in particular, the landscape of Indian country in California would be much different, and there would be much more of it. The U.S. Senate’s rejection of 18 treaties which would have set aside about a third of the State of California had a tremendous impact, but so did the unwillingness of the judicial branches of the California and United States governments to protect Indian land rights.

Today, “Indian country” comprises less than one percent of the total land acreage in California. And contests continue to be waged over efforts by California Indian peoples to defend the “Indian country” status of these few acres, to exercise their sovereignty over them, and to expand the amount of land set aside as “Indian country” in the state. These contests (which have received greater attention in recent years, in large part because of issues around gaming and other economic development activities on Indian lands), however, are better left as the subject of other works where they can receive a proper examination. This article is intended only as a starting point in exploring the history of Indian country in California and how its trajectory shaped the legal and physical landscape of California, including how, when, and why certain lands were (and were not) set aside as “Indian country” under 18 U.S.C. § 1151.

Because of the circumstantial trajectory of Indian country in California, different terms have been used to refer to the various—and sometimes the same—lands set aside as Indian country. I use the concept of interchangeability to refer to this phenomenon. The terms used for Indian country in California, and their interchangeable use both in the past and the present, are the product of the unique historical and linguistic landscape traversed by the trajectory of Indian country. At various times, the words *ranchería*, *mission*, *pueblo*, *rancho*, *village*, *reservation*, *farm*, *colony*, and *rancheria* have all been used to refer to the different California land areas that are or have been recognized as Indian country. Indeed, different terms have been, and still are, used to refer to the same place. “Rancheria,” which was used to refer to Indian lands recognized by Spain and Mexico and is still used (interchangeably with *reservation*) to refer to Indian country, is a term unique to California.

This article begins by examining, in Part II, the origin of the concept of Indian country and the practice of recognizing and protecting Indian lands under Spanish law. It then traces the concept’s development as the Spanish and then Mexican legal regimes evolved to deal with the issue of Indian rights and accommodate the presence of Indian villages, farms, gardens, orchards, and grazing lands. This examination is by necessity focused just as much, if not more, on historical events than on strictly legal

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*Mojave Tribe v. San Bernardino Co*, 543 F.2d 1253 (9th Cir. 1976) (tribal tax imposed on non-Indian lessor of trust land); California Bd. of Equalization Reg. 1616(d) (2003) (available at <http://www.boe.ca.gov/pdf/reg1616.pdf>) (state sales and use tax does not apply to certain transactions involving tribes and tribal members on reservation lands). And it can determine whether tribal and/or federal (as opposed to state and local) environmental and land use laws and standards apply. See e.g. *U. S. v. Co. of Humboldt*, 615 F.2d 1260 (9th Cir. 1980); *Santa Rosa Band of Indians*, 532 F.2d 655.

developments, because only a historical or historical-legal<sup>4</sup> analysis that looks at how the principle of recognizing Indian country was (and was not) implemented in practice can show just how circumstantial the trajectory of Indian country in California was.

Part III focuses on developments regarding Indian country after the United States extended its sovereignty over California in 1848. Although the California and United States governments passed various laws that, following their Spanish and Mexican predecessors, recognized Indian lands and extended a special status to them, these laws were ignored more often than they were followed. The result was a rather wholesale appropriation of Indian land. The United States government did, however, take some limited measures to set aside lands for Indians and through these measures a few land areas were set aside as “Indian country” under 18 U.S.C. § 1151. One sees in Part III not only how the circumstantial trajectory of Indian country in California left many land areas outside of its path, but also how this trajectory gave rise to the various and interchangeable terms used to refer to Indian country in California.

Part IV concludes.

## II. INDIAN COUNTRY UNDER SPAIN AND MEXICO

The concept of Indian country, and the practice of the governing colonial legal regime’s recognizing and extending a protected status to Indian lands, came to California with the Spanish, whose legal system first adopted and applied the concept in the Americas.<sup>5</sup> Spanish law governing Indian property rights and colonial land concessions was set forth in the Laws of the Indies, particularly the 1681 Recopilacion de Leyes de los Reinos de las Indias.<sup>6</sup> Indian property rights were respected under the Laws of the Indies generally and under the Recopilacion in particular:<sup>7</sup> “lands [were] not [to] be assigned to Spaniards ‘in a way that [was] “prejudicial to . . . Indians[,]””<sup>8</sup> and Indian lands could not “be sold or taken away from them.”<sup>9</sup> Thus, ever since the first colonial

4. With acknowledgement to Richard Carrico. See Richard L. Carrico, *Strangers in a Stolen Land: American Indians in San Diego 1850–1880* at 39 (Sierra Oaks Publ. 1987).

5. Indeed, much of United States law regarding Indian land rights, including the concept of Indian country, has its origins in Spanish law. E.g. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1, 12–15 (1942).

6. The Recopilacion was essentially a restatement of Spanish laws, practices of governance and settlement in the Americas dating back to the Inter Cetera Papal Bull of 1493 continuing through the 1512 Laws of Burgos and their 1513 amendments, the New Laws of 1542–43, the 1573 Ordinances for the New Discoveries, Conquests, and Pacifications, and the Compilation of 1571 promulgated under Philip II. See generally Am. W. Ctr., *Spanish Laws Concerning Discoveries, Pacifications and Settlements among the Indians* (S. Lyman Tyler ed., 1980); see also C.F. Seymour, *Relations between the United States Government and the Mission Indians of Southern California* 23–24 (M.A. thesis, U. Cal., 1906) (quoting from Spanish laws bearing on Indian land title).

7. Am. W. Ctr., *supra* n. 6, at 60.

8. *Id.* at 57 (quoting Bk. IV, Title 12 of the Recopilación).

9. *Aamodt*, 618 F. Supp. at 997 (quoting Bk. IV, Title 12, L. 18 of the Recopilacion as translated in Espinosa, *Translation into English of the Recopilacion de Leyes de los Reynos de las Indias*, U.S. Dept. of Int.). The Recopilacion provided that

the Indians shall be given all the land [and more, if possible] that belongs to them, both as to individuals and communities alike, and, specially those lands where they may have made ditches [acequias], or any other improvement . . . . And for no reason can these lands be sold or taken away from them.

*Id.* Compare Helen Hunt Jackson’s paraphrasing of the Recopilacion:

legal system arrived in California, a legal protection has been extended to Indian land areas. I discuss below the various land areas that were recognized and protected as Indian lands under Spanish and then Mexican law and explore their role in the development of—and their significance as places along the trajectory of—Indian country in California.

### A. Missions

Spanish colonization of California began in earnest in 1769 when the Mission of San Diego was established along with its adjoining presidio. Between 1769 and 1823, 21 missions were established in what is now California.<sup>10</sup> All but one of these missions were established under Spanish rule before it ended in 1822. The missions were intended to be only temporary, on the theory that Christianized Indians would become Spanish citizens and the missions would become Spanish pueblos.<sup>11</sup> (Religious pretensions aside, the missions functioned as places where Indians were enslaved to provide labor and produce goods for the Spanish presidios and economy.)<sup>12</sup>

“We command,” said the Spanish king, “that the sale, grant, and composition of lands be executed with such attention that the Indians be left in possession of the full amount of lands belonging to them, either sing[ular]ly or in communities, together with their rivers and waters; and the lands which they shall have drained or otherwise improved, whereby they may by their own industry have rendered them fertile, are reserved, in the first place, and can in no case be sold or alienated.”

Helen Jackson, *The Present Condition of the Mission Indians in Southern California*, in *Glimpses of Three Coasts* 78, 78 (Roberts Bros. 1886).

10. Missions were established at San Diego de Alcalá (1769), San Carlos Borromeo, or Carmelo (1770), San Antonio de Padua (1771), San Gabriel Arcángel (1771), San Luis Obispo (1772), San Francisco de Asís, or Dolores (1776), San Juan Capistrano (1776), Santa Clara de Asís (1777), San Buenaventura (1782), Santa Bárbara (1786), La Purísima Concepción (1787), Santa Cruz (1791), Nuestra Señora de la Soledad (1791), San José de Guadalupe (1797), San Juan Bautista (1797), San Miguel Arcángel (1797), San Fernando Rey de España (1797), San Luis Rey de Francia (1798), Santa Inés (1804), San Rafael Arcángel (1817), and San Francisco Solano (1823). Sherburne F. Cook & Cesare Marino, *Roman Catholic Missions in California and the Southwest*, in *Handbook of North American Indians* vol. 4, 475 (Wilcomb E. Washburn ed., Smithsonian Instn. 1988); W.W. Robinson, *Land in California: The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads* 31 n. 3 (U. Cal. Press 1948); Seymour, *supra* n. 6, at 6–7. The Spanish also established branch chapels within the respective jurisdictions of the missions, such as those at Pala and Santa Ysabel set up under the jurisdiction of the San Luis Rey Mission. *Id.* at 7; Cook & Marino, *supra* n. 10, at 475 (discussing satellite missions at Pala and San Bernardino).

11. Robinson, *supra* n. 10, at 24–25.

12. It has been estimated that “[t]he total average annual gains of the missions from sales and trade generally were more than two million dollars.” G. Wharton James, *Old Missions and Mission Indians of California* 25 (B. R. Baumgardt & Co. 1895) (quoting James Steele, *Old Californian Days* 45 (W.B. Conkey Co. 1893)). The missions provided “an economic base . . . for the Hispano ruling classes,” and the wealth generated by the missions was sent to Mexico, Spain, and Italy. Jack D. Forbes, *Native Americans of California and Nevada* 30 (Naturegraph Publishers 1969). “The Indians raised seven-eighths of the farm products, and . . . did practically all the manufacturing, weaving, tanning, leather work, milling, soap-making, and other work of the industries.” William Henry Ellison, *The Federal Indian Policy in California, 1846–1860* 24 (Ph.D. dissertation, U. Cal., 1918) (citing Bryan J. Clinch, *California and Its Missions: Their History to the Treaty of Guadalupe Hidalgo* vol. 2, 317 (Whitaker & Ray Co. 1904)); see C. Alan Hutchinson, *The Mexican Government and the Mission Indians of Upper California, 1821–1835* vol. XXI, 361 (Americas 1965) (“It was, in fact, the humble Indian who kept California going economically.”); see also Women’s Natl. Indian Assn., *The Ramona Mission and the Mission Indians* 3 (1889) (“The wealth of the Missions . . . had been . . . so large that Spain had paid her war-bills from them—Mexico doing the same at a later date . . .”).

I discuss Spanish and Mexican colonization primarily to give a background on how the earliest categories of Indian country arose in California and how they changed after the United States took over after 1848. See e.g. Jackson, *supra* n. 9, at 78 (“It is not until one studies these laws [of Spain], in connection with the . . . secularization period [of the Missions], and . . . the American conquest . . . that it becomes possible to

When first established, the missions “nominally occupied” the entire coast of California up to San Francisco<sup>13</sup>—the land areas allocated to each mission abutted one another, covering all lands except those occupied by military posts. The missions were “royal-governmental institutions, erected on land belonging (according to the Spanish viewpoint) ultimately to the Crown although reserved to the natives with the missionaries as trustees.”<sup>14</sup> Thus the missions never had formal titles or grants for the lands they encompassed; the lands were “held in trust for the Indians.”<sup>15</sup>

### B. *Rancherías*

The missions were built (by Indians) in areas near Indian population centers,<sup>16</sup> sometimes right next to Indian villages and towns. The Spanish called these Indian villages and towns *rancherías*. For example, in their first annual report to the viceroy the Spanish Franciscans wrote in 1773 that “[n]ear each mission, except San Luis, is a *ranchería* of gentiles.”<sup>17</sup> Although it is not clear from published historical sources which of these *rancherías* existed in those places before the missions were built and which

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understand how the . . . Mission Indians could have been left so absolutely unprotected . . . in the matter of ownership of the[ir] lands . . .”). However, other authors’ works on Spanish and Mexican colonization are insightful. See e.g. Edward D. Castillo, *The Impact of Euro-American Exploration and Settlement*, in *Handbook of North American Indians* vol. 8, 99, 101–07 (Robert F. Heizer ed., Smithsonian Instn. 1978); *Exterminate Them: Written Accounts of the Murder, Rape, and Slavery of Native Americans during the California Gold Rush, 1848–1868* 5–14 (Clifford E. Trafzer & Joel R. Hyer eds., Mich. St. U. Press 1999) [hereinafter *Exterminate Them*]; Robert F. Heizer & Alan F. Almquist, *The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920* 1–22 (U. Cal. Press 1971); Joel R. Hyer, “*We Are Not Savages*”: *Native Americans in Southern California and the Pala Reservation, 1840–1920* 24–25 (Mich. St. U. Press 2001); Florence Connolly Shipek, *Pushed into the Rocks: Southern California Indian Land Tenure 1769–1986* 23–28 (U. Neb. Press 1987); Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533–1960* 281–83 (U. Ariz. Press 1962). For a discussion of the impact of the missions on California Indians, see generally Robert H. Jackson & Edward D. Castillo, *Indians, Franciscans, and Spanish Colonization: The Impact of the Mission System on California Indians* (U.N.M. Press 1995).

13. Sen. Exec. Doc. 31-18 at 7 (Jan. 30, 1851).

14. Forbes, *supra* n. 12, at 28.

15. Seymour, *supra* n. 6, at 33 (“Indeed the Mission lands were never formally made over with an executed title, by either the Spanish or Mexican government, to either the Friars, the Church in general, or the [Indians], except in special cases to the latter.”). See also Sen. Exec. Doc 31-18 at 33 (“Agreeably to the theory and spirit of these laws [the Spanish Laws of the Indies], the Indians in California were always supposed to have a certain property or interest in the missions.”); Chauncey Shafter Goodrich, *The Legal Status of the California Indian*, 14 Cal. L. Rev. 83, 87 (1926) (“The Franciscans had in theory administered the properties surrounding the Missions not as owners, but as tutors for . . . [the Indians].”); Robinson, *supra* n. 10, at 25 (“The missions were permitted, under the Spanish and Mexican governments, to occupy and use certain lands for the benefit of the Indians, but not to own them. They were, in effect, trustees only.”) (emphasis in original); Charles A. Wetmore, *Report of Chas. A. Wetmore, Special U.S. Commissioner of Mission Indians in Southern California* 2 (Govt. Printing Off. 1875) (“Vast areas of the most fertile and best grazing lands were informally dedicated to the use of the missions, and held as common property by the neophytes under the direction and trusteeship of the missionaries.”) (emphasis omitted); cf. *Aamodt*, 618 F. Supp. at 1000 (noting that in New Mexico, where Spain also established missions in and near Indian settlements, “Spain considered the Pueblos as wards and sought to establish the rights of the Pueblos to use and live off lands with relatively certain boundaries which they occupied”).

16. “The Spanish settled, in part, where there was a ready-made population of potential Christian converts that would also supply labor for running the mission system that was their economic underpinning.” SDSU Lib. & Info. Access, *California Indians and Their Reservations: Missions*, <http://infodome.sdsu.edu/research/guides/calindians/calinddictmp.shtml#m> (accessed Apr. 7, 2009).

17. Hubert Howe Bancroft, *History of California: Vol. I 1542–1800*, in *The Works of Hubert Howe Bancroft* vol. 18, 202 (Wallace Heberd 1963).

might have been built after the missions were established, there were included within the land areas “nominally occupied” by the missions numerous towns and villages where Indian peoples had lived for tens of thousands of years.

The use of the word “ranchería” in the Franciscans’ 1773 report was not the first time it was used to refer to Indian villages. The word was in use at least four years earlier and is found in what Hubert Howe Bancroft calls the “diary of the first [Spanish] exploration of the California coast by land.”<sup>18</sup> This diary, as excerpted in Bancroft’s seminal work on California history, lists several entries where “ranchería” is used alongside “pueblo” to refer to Indian population centers the Spanish encountered.<sup>19</sup> The Franciscans’ report also used the word “ranchería” to refer to Indian villages further inland from the coastal areas where the missions were established.<sup>20</sup>

Bancroft himself used the term “ranchería” when talking about the Chumash towns and villages near what is now Santa Barbara, noting that Spanish soldiers “were not to visit the rancherías under severe penalties” and that “[t]he natives were to be interfered with in their ranchería life and government as little as was possible.”<sup>21</sup> Bancroft also used the term to refer to Indian villages that were visited by Spanish military expeditions—both villages near the Spanish missions<sup>22</sup> and villages in the “vast interior” that Bancroft calls the “*tierra incógnita*” because it was “frequently spoken of as such in official documents.”<sup>23</sup> Included among these is a “ranchería of Tualumne,” which Bancroft says is “doubtless the origin of Tuolumne,”<sup>24</sup> i.e., the Tuolumne Rancheria in east-central California that is home to the Tuolumne Band of Me-Wuk Indians.

Thus, early Spanish accounts show that the word “ranchería” was used to refer not only to Indian villages on or near the missions but also to Indian villages generally, and particularly to those of smaller size.<sup>25</sup> This usage would later be carried over into English and would be used to refer to Indian villages throughout California.<sup>26</sup>

18. *Id.* at 142 n. 4.

19. *Id.* (footnote 4 continues to page 146 of source).

20. *Id.* at 202 (noting that many Indians who came to the missions were “often those of more distant rancherías”).

21. *Id.* at 374.

22. See e.g. Hubert Howe Bancroft, *History of California: Vol. II 1801–1824*, in *The Works of Hubert Howe* vol. 19, 34–35 (Wallace Hebbert 1963) (discussing an attack on a native village by settlers from San José).

23. *Id.* at 43, 47 (discussing 1806 orders for an expedition to be sent out from the San Diego presidio “to obtain as much information as possible about the Indians and their rancherías”). See *id.* at 53 n. 11 (discussing an 1806 diary of expedition from San Juan Bautista in the area of the Kings River that visited “a ranchería . . . called Ayquiche, where they heard of 6 other rancherías” and visited another “3 rancherías” that were “[d]own the river” and other rancherías, including Telame and Cohochs); *id.* at 56 (referencing the diaries of Father Viader, who made two expeditions to the San Joaquin Valley with Alférez Moraga in 1810, and noting that these “diaries merit preservation by reason of the Indian names of rancherías and tribes”); *id.* at 131 (discussing Mission San José and noting that “[a]bout a hundred yards from the mission was the rancheria composed of eight long rows of dwellings for the Indian families”); Bancroft, *supra* n. 22, at 150 (mentioning a “Cholan ranchería fourteen leagues” from San Miguel). Bancroft lists at least 25 “rancherías visited by [the 1806 expedition from San Juan Bautista] and [another 1806 expedition].” *Id.* at 53 n. 11.

24. *Id.* at 54.

25. See generally e.g. C. Hart Merriam, *Village Names in Twelve California Mission Records*, Rpts. U. of Cal. Archaeological Survey No. 74 141–75 (Robert F. Heizer ed., 1968).

26. See e.g. A.L. Kroeber, *On the Evidence of the Occupation of Certain Regions by the Miwok Indians*, 6 U. of Cal. Publications in Am. Archaeology and Ethnology 369, 371, 374, 377 (1908) (using rancheria to refer to Indian villages in central California). The entry for “rancherías” in the SDSU Dictionary reads:



Following secularization, a policy under which mission lands were divided up into ranchos to which individual Mexican citizens held title, “ranchería” was used to refer to the Indian villages on these rancho lands.<sup>27</sup> Florence Shipek, for example, talks about “enclaved rancherías,” or “Indian villages and fields [enclosed] within [rancho] boundaries.”<sup>28</sup> Though there has been some scholarly debate over whether “ranchería” or another term is the more appropriate one to use when referring to specific Indian villages,<sup>29</sup> Darlene Suarez reminds that us that “ranchería” was not a term “used by the Indians [from these places] in the historical past,”<sup>30</sup> and thus that whether the use of “ranchería” or some other term is used to refer to particular areas of Indian country in California can change depending on who is choosing which label to apply.<sup>31</sup>

### C. Secularization—Pueblos and Ranchos

After California came under Mexican rule in 1822, the mission system continued to exist much as it had under Spanish rule, except that the Franciscans had to go farther inland to seek new converts.<sup>32</sup> The plan was for “[t]he missions in California and

The Spanish term for small Indian settlements. Rancherías are a particular California institution. A small area of land was set aside around an Indian settlement to create a ranchería. Some rancherías developed from small communities of Indians formed on the outskirts of American settlements who were fleeing Americans or avoiding removal to the reservations.

SDSU Lib. & Info. Access, *California Indians and Their Reservations: Rancherías*, <http://infodome.sdsu.edu/research/guides/calindians/calinddictqs.shtml#r> (accessed Apr. 19, 2009). See Forbes, *supra* n. 12, at 29 n. \* (“Ranchería refers to a small village, not large enough to be considered a pueblo.”); C.E. Kelsey, *Final Report to the Commissioner of Indian Affairs 3* (July 25, 1913) (copy on file with author) [hereinafter Kelsey, *Final Report*] (discussing “small Indian settlements, called in California, rancherías”). “In pre[colonial] times, native people had lived in semi-permanent villages . . . . These villages, numbering in excess of 80 throughout San Diego County, were scattered across the landscape. Generally, rancherías were located along or near major water courses, in temperate belts, in ecotones . . . and in well-drained protected valleys.” Richard L. Carrico, *supra* n. 4, at 17. See also *id.* at 15, 20, 27, 53 (discussing Cave J. Coutts in 1848 “camp[ing] near the ranchería of Vallecitos in the Anza-Borrego Desert,” “the Luiseno ranchería at Buena Vista,” “local Indian rancherías” in San Diego County, and “San Bernardo, a ranchería near present-day Rancho Bernardo”).

27. For example, William Carey Jones, sent by Congress to investigate land tenure in California, in his 1850 report discussed “Indian settlements or rancherías” upon Mexican ranchos. Sen. Exec. Doc 31-18 at 33.

28. Compare Shipek, *supra* n. 12, at 26; *id.* at 21 (discussing secularization); *infra* pt. II (C) with *Aamodt*, 618 F. Supp. at 1000 (noting that in New Mexico “land grants made to non-Pueblos” sometimes “overlapped Pueblo lands”).

29. William Hohenthal, who conducted fieldwork in Baja California between 1948 and 1951, referred to San José (also called Villareal San José), a Kumeyaay village there, as a “ranchería,” which he described as a “small settlement of Indians, from one to three families, usually in isolated canyons considered too poor for agriculture by the Mexicans, and to which land the Indians have no claim beyond squatters’ rights and the tolerance of the Mexican ranchers whose property usually includes these canyons.” William D. Hohenthal, Jr., *Tipai Ethnographic Notes: A Baja California Indian Community at Mid-Century* 96 (Thomas C. Blackburn ed., Ballena Press 2001). Hohenthal distinguished these “rancherías” from “reserva indígenas,” which he described as “a larger tract of land, not necessarily a canyon . . . where up to a dozen families or more may live.” *Id.* But even though Hohenthal considered San José a ranchería, neither rancherías nor reserva indígena was a term “used by the Indians [from these places] in the historical past,” and the areas were “simply known as villages.” Darlene Mary Suarez, *Gambling with Power: Race, Class, and Identity Politics on Indian Lands in Southern California* 119 n. 28 (Ph. D. dissertation, U.C. Riverside, 2003). Suarez also notes that many families at Jamul Indian Village in San Diego County moved there from San José Village. *Id.* at 121.

30. See Suarez, *supra* n. 29.

31. The concept of interchangeability—the use of different words to refer to different, and sometimes the same, areas of Indian country in California surfaces throughout the article but is explored separately in *infra* Pt. III (E).

32. See Forbes, *supra* n. 12, at 38–39 (“All of the coastal natives were missionized (or living in the towns) and it was necessary to reach out into the areas north of San Francisco Bay, to the Central Valley, and to the

elsewhere [in Mexico] . . . to [eventually] be abolished and the Indians granted [full] equality of citizenship.<sup>33</sup> The Mexican governor of California issued decrees in 1826 and 1831 to begin secularization, or the process of disestablishing the missions, but these decrees were not implemented.<sup>34</sup>

Secularization began at San Diego and San Luis Rey with Governor José Figueroa's "experimental emancipation" under the Mexican Secularization Act passed in August 1833.<sup>35</sup> Figueroa commenced "formal secularization" through an 1834 decree.<sup>36</sup> Figueroa's successor, Governor Pío Pico, "issued a proclamation which erroneously interpreted the law in such a way that . . . Indians were not 'only emancipated from the Missions, but were to be removed from the lands occupied by the Missions as having no right to them.'"<sup>37</sup> The Mexican government apparently tried to fix this "error," but "few of the Indians were willing to return to the Mission land because of their experiences there."<sup>38</sup> And thus the initial plan for the secularized missions to become Indian pueblos "with one-half of the property belonging to the natives and the other half being used for support of the priests and secular officials"<sup>39</sup> evolved into a "'sacking' of the missions" whereby "many missions were plundered of their resources . . . during the first few

mountain and desert areas for converts, the bulk of whom would appear to have been recruited by force."); see also Cook & Marino, *supra* n. 10, at 472 (discussing efforts "to obtain new converts" and noting that "[i]n these efforts the clergy were strongly assisted by the military, who organized repeated expeditions to the interior in the decades following the year 1800").

33. Forbes, *supra* n. 12, at 38; accord *Aamodt*, 618 F. Supp. at 1000 (noting that Indians "bec[a]me citizens of Mexico and were to be treated the same as all other citizens"); see also Edward Spicer, *Mexican Indian Policies*, in *Handbook of North American Indians* vol. 4, *supra* n. 10, at 103 (noting that Mexico's 1821 Plan of Iguala "did away with all legal distinctions regarding Indians" and that "[w]hen the Plan of Iguala was replaced with a republican constitution in 1824, the same principle of equality of citizenship was maintained").

34. Forbes, *supra* n. 12, at 39. Lt. Col. José María Echeandia, appointed as governor of California in 1825, issued decrees in July 1826 and January 1831 to "begin the process of 'secularizing' the missions, that is, to turn each mission into an Indian town," but "[t]hese decrees did not lead to any immediate formal change, because their intent was thwarted by the Franciscans and by a new governor, Lt. Col. Manuel Victoria." *Id.* The Spanish authorities had earlier decreed the secularization of the missions in 1813, but this decree "was not . . . carried into effect." Women's Natl. Indian Assn., *supra* n. 12, at 3 ("This by the usual irony of such robbery was said to be 'for the benefit of the Indians,' though by it one-half of the Mission lands were to be sold for the payment of Spanish debts.").

35. Hubert Howe Bancroft, *History of California: Vol. III 1825-1840*, in *The Works of Hubert Howe Bancroft* vol. XX, 623 (History Co. 1886); accord Hutchinson, *supra* n. 12, at 351. Governor Figueroa had in July of 1833 "issued 'provisional regulations for the emancipation of mission Indians.'" *Id.* at 349. See also Glenn Farris, *Captain Jose Panto and the San Pascual Indian Pueblo in San Diego County 1835-1878*, 43 J. San Diego History 117 n. 1 (Spring 1997).

36. See Larry E. Burgess, *Commission to the Mission Indians 1891*, 35 San Bernardino Co. Museum Assn. 1, 9 (Spring 1988). Women's Natl. Indian Assn., *supra* n. 12, at 3; see also Ellison, *supra* n. 12, at 26 ("By 1836, the reglamento [sic] was in force in sixteen missions, and it was finally extended to the other five also." (footnote omitted)).

37. Burgess, *supra* n. 36, at 10.

38. *Id.* See also Seymour, *supra* n. 6, at 12 (noting that "the Indians did not seem disposed to avail themselves of the opportunity of acquiring permanent homes on the old Mission lands"); Women's Natl. Indian Assn., *supra* n. 12, at 2 (stating that the 1834 edict of secularization "still compelled [Indians] to labor in the vineyards, gardens and fields not apportioned" and that "the reality of the seeming generosity was such that but ten out of one hundred and sixty families at San Diego accepted the emancipation").

39. Forbes, *supra* n. 12, at 39; accord Seymour, *supra* n. 6, at 11-12 (noting that under "provisional regulations" issued by Governor Figueroa in 1834 "converting ten of [the] Missions" into pueblos, individual Indians were to receive lands "not exceeding 400 varas square" but not less than 100 and "[o]ne half of the stock, seeds, and agricultural implements of the Missions" and that "[t]he emancipated Indians were to assist in the cultivation of the common grounds of the new pueblos"). Indians were supposed to have been "given priority over other claimants for these lands." Hutchinson, *supra* n. 12, at 352.

months.<sup>40</sup>

After secularization took effect in 1834 and “about 15,000 converted natives were released when the missions were disestablished,” many of these people moved into the interior of California.<sup>41</sup> Some stayed at or returned to villages that were on former mission lands,<sup>42</sup> or within the boundaries of Mexican rancho grants.<sup>43</sup> Some lived at various Indian pueblos that had been established,<sup>44</sup> and “[o]thers spread out into the local communities and ranches.”<sup>45</sup>

### 1. Pueblos

Early references to Indian “pueblos” appear in the diaries of Spanish expeditions,<sup>46</sup> but “pueblo” was also used in the Mexican period to refer to officially-recognized Indian towns.<sup>47</sup> There were at least five established Indian pueblos in Mexican California: Las Flores, Pala, San Dieguito, San Juan Capistrano, and San Pasqual.<sup>48</sup> As noted, some of

40. Forbes, *supra* n. 12, at 39–40. Forbes says that under secularization, “[t]he absolute rule of the priest was simply replaced by that of Mexican civilian officials (administrators and *mayordomos*) and virtually all of the elements of physical coercion were retained. [W]hat ensued was a ‘sacking’ of the missions by some of the more powerful Mexican families of California.” *Id.* at 39. Shipek describes secularization as “an excuse for the settlers and retired soldiers and their families to strip the missions of livestock, supplies, and lands, and to turn the Indians into peon villagers on the ranchos, which had formerly been mission properties supporting the Indians of each mission.” Shipek, *supra* n. 12, at 21 (footnote omitted); accord Cook & Marino, *supra* n. 10, at 478 (“Within a decade [of secularization] the administrators who were placed in charge of the establishments had sold or looted all available physical resources.”).

41. Robert F. Heizer, *Indian Servitude in California*, in *Handbook of North American Indians* vol. 4, *supra* n. 10, at 415; accord Cook & Marino, *supra* n. 10, at 478.

42. Discussing Mission San Luis Rey, where secularization began in 1834 and was completed in 1840, for example, Bancroft says that “[i]n 1840 there were about 1,000 of the ex-neophytes at [the] mission, pueblos [including Las Flores], and ranchos more or less under control of local authorities,” and that although post-secularization “decline in population was more rapid than that in wealth, the Indians succeeding in retaining partial control of the rich mission ranchos of Santa Margarita, Pala, Santa Isabel, Temécula, and San Jacinto throughout this decade, though not much longer.” Bancroft, *supra* n. 35, at 622–25. As for other areas of Southern California, Bancroft states that between 1830 and 1840 the Indian population in the Santa Bárbara district (not including San Fernando) “decreased from 4,400 to 1,550, the latter number including 750 in town and on the ranchos, in addition to 800 still living in the ex-mission communities.” *Id.* at 649. “Adding the totals of population for the three districts of San Diego, Los Angeles, and Santa Bárbara,” Bancroft calculated “that in Southern California . . . the Christianized Indians had decreased from 9,600 to 5,100, of which latter number only 2,250 were still living at the missions.” *Id.* at 649–50.

43. Heizer, *supra* n. 41, at 415; see also Cook & Marino, *supra* n. 10, at 478 (mentioning a “flight to the interior tribes”).

44. See Cook & Marino, *supra* n. 10, at 478.

45. Cook & Marino, *supra* n. 10, at 478. Cf. Heizer, *supra* n. 41, at 415 (discussing Indians who after secularization “voluntarily attached themselves, or were forced to do so, to ranches where they were subject to the conditions of peonage” (citation omitted)).

46. See e.g. Bancroft, *supra* n. 17, at 142 n. 4 (footnote 4 continues to page 146 of source).

47. Cf. *Aamodi*, 618 F. Supp. at 998 (noting that Indian pueblos in New Mexico “were never formally chartered as municipalities under Spanish law, but had the status of municipalities under Spanish law”). Both Spain and Mexico recognized and protected the lands and waters of Indian pueblos, that “this recognition by law was equivalent to legal ownership,” and that Spanish and Mexican law both prohibited the alienation of the pueblos’ communal lands and exempted Indian pueblo lands from adverse possession or prescription. *Id.* at 996, 998. Indian pueblos “ha[d] aboriginal title, Indian rights or original Indian rights to their lands and the use of them including appurtenances.” *Id.* at 1009.

48. See Cook & Marino, *supra* n. 10, at 478 (“[In [Southern California]] a series of small pueblos had been founded, populated by ex-neophytes who managed, with at least partial success, to operate independent communities.”); Robinson, *supra* n. 10, at 42; Shipek, *supra* n. 12, at 26–27 (referring also to records indicating that other Indian pueblos may have existed). See also Farris, *supra* n. 35, at 117 n. 2 (discussing Governor Figueroa’s announcing in May 1833 that pueblos had been formed at San Dieguito, Las Flores, and

these pueblos were established as part of secularization, but “began life at a considerable disadvantage” because they never got the ex-mission resources they were supposed to have received.<sup>49</sup> Las Flores and Pala were asistencia, or satellite, missions built in Luiseño (Puyumkowitchum) territory in 1810 that became pueblos after the secularization of the San Luis Rey mission.<sup>50</sup>

The descendants of these pueblos’ founders continued to live at Las Flores at least into the 1870s.<sup>51</sup> They continue to live at Pala, which is now a reservation,<sup>52</sup> and in and around San Juan Capistrano, which though organized as a “regular Indian pueblo” after secularization there in 1833<sup>53</sup> became a mixed Indian and Mexican pueblo and is now a California city.<sup>54</sup> The descendants from the pueblo of San Pasqual—which was also known as a rancheria<sup>55</sup>—live (among other places) on the San Pasqual Reservation that was established in 1891 after the inhabitants of the pueblo in the San Pasqual Valley were removed from their lands.<sup>56</sup> Pala, which is now called a reservation, is the only Indian pueblo land area still recognized as “Indian country” under federal law.<sup>57</sup>

San Juan Capistrano); Jackson, *supra* n. 9, at 79–80 (discussing 1834 address by Figueroa wherein he said that the pueblos of San Juan Capistrano, San Dieguito, and Las Flores “[we]re flourishing, and that the comparison between the condition of these Indians and that of the Spanish townsmen in the same region [was] altogether in favor of the Indians.”

49. Forbes, *supra* n. 12, at 40.

50. Casino Pauma, *The Pauma Yuima Band of Mission Indians*, <http://www.casinopauma.com/tribe.php> (accessed Apr. 14, 2009); see also Bancroft, *supra* n. 35, at 623.

51. Florence Shipek stated that “[b]y 1842, . . . many of the Las Flores Indians had been driven from their land by the harassment and legal machinations of Pio Pico.” Shipek, *supra* n. 12, at 27; see also Robinson, *supra* n. 10, at 42. However, W.W. Robinson notes that “[a]s late as 1873 a few Indians still remained at Las Flores.” *Id.* at 43.

52. Pala was set aside as a reservation by an executive order of 1875. Seymour, *supra* n. 6, at 64, 66–67. The larger Pala valley had been set aside in an 1870 executive order, but this order was rescinded and the valley (or at least parts thereof) was again set aside as a reservation by an executive order of 1875. *Id.*

53. Bancroft, *supra* n. 35, at 626.

54. Though Shipek says that San Juan Capistrano was “an ordinary pueblo,” Shipek, *supra* n. 12, at 27, others list it as an “established Indian pueblo.” Seymour, *supra* n. 6, at 66; see also Bancroft, *supra* n. 35, at 626 (“regular Indian pueblo”); Robinson, *supra* n. 10, at 42 (“Indian pueblo”). Indeed, San Juan Capistrano is perhaps the only place where secularization was fully implemented. See John G. Ames, *Report of Special Agent John G. Ames, in Regard to the Condition of the Mission Indians of California with Recommendations* 4 (1873) (“[I]t appears that the pueblo of San Juan Capistrano was in the year 1841 actually subdivided by the Mexican authorities among the inhabitants, the Indians sharing with the Mexicans in this distribution.”); see also Shipek, *supra* n. 12, at 21, 27 (noting that “[t]he village at Mission San Juan Capistrano was turned into a pueblo composed of both Indians and Mexican settlers from San Diego and Los Angeles” and that “both Indians and Mexicans receiv[ed] land within its boundaries” (citation omitted)).

55. See Carrico, *supra* n. 4, at 21 (mentioning Indian agent correspondence from the 1850s that referred to San Pasqual as “the Rancheria” (footnote omitted)); see generally Marjorie McMorrow Rustvold, *San Pasqual Valley: Rancheria to Greenbelt* (M.A. Thesis, San Diego St. College, 1968).

56. For a discussion of the removal from the San Pasqual Valley and the establishment of the San Pasqual Reservation, see *infra* notes 158, 183, 185.

57. Helen Hunt Jackson, writing in the 1880s, said that

[i]t is years since the last trace of the pueblos Las Flores and San Dieguito disappeared, and the San Pasqual valley is entirely taken up by white settlers, chiefly on preëmption claims. San Juan Capistrano is the only one of the four where are to be found any Indians’ homes.

Jackson, *supra* n. 9, at 80. Another writer has commented that

[d]uring the era of Juan Bautista de Alvarado (1836–1842) and thereafter, the Indian pueblos were largely destroyed . . . because the secular administrators managed to appropriate most of the mission wealth for themselves, while they and other Mexicans (usually their relatives) were granted the best lands formerly under mission control. And at the same time as this official looting was occurring, the Indians were still subject to forced labor for the support of church and state, physical

## 2. Ranchos (and Rancherías)

Under the 1833 Mexican Secularization Act, which “opened up the mission lands to general settlement for the first time,”<sup>58</sup> “mission Indians [had] . . . priority over other claimants for these lands.”<sup>59</sup> And although Indian individuals (who as citizens under Mexico’s 1821 Plan of Iguala and 1824 constitution could hold and sell property like all other Mexican citizens)<sup>60</sup> received grants for some of these lands,<sup>61</sup> the Mexican government “granted the better, more productive mission lands to Mexican individuals as ranchos.”<sup>62</sup> Other rancho grants were made outside of the ex-mission lands.<sup>63</sup> These grants, however, consistent with Mexican (and Spanish) law regarding Indian property rights, generally “included a statement that the grantee received all the bounded land described except for that occupied and used by the Indians”<sup>64</sup> and were always made subject to an Indian right of occupancy.<sup>65</sup>

punishment, and many of the irritants of the pre-1836 mission regime.  
Forbes, *supra* n. 12, at 40.

58. Hutchinson, *supra* n. 12, at 351.

59. *Id.* at 352. See also Larry E. Burgess, *Commission to the Mission Indians 1891*, 35 San Bernardino Co. Museum Assn. 1, 9 (Spring 1988); Hyer, *supra* n. 12, at 32 (noting that the secularization laws of 1833 provided for these lands to be distributed to Indian heads of families and adults who had been at the missions). Provisional regulations issued by Governor José Figueroa in July of 1833, before the Secularization Act was passed, also provided for Indians “to be given lots in the pueblos to be founded and fields outside them.” Hutchinson, *supra* n. 12, at 349.

60. See e.g. *U.S. v. Ritchie*, 58 U.S. 525, 538 (1854); Seymour, *supra* n. 6, at 15 (citing Mexican laws recognizing Indians as Mexican citizens); see also Spicer, *supra* n. 33, at 103; cf. *Aamodt*, 618 F. Supp. at 1000 (noting that Pueblo Indians in New Mexico were citizens of Mexico and, as such, “were to be treated the same as all other citizens”). Mexican law prohibited the alienation of Indian villages’ and pueblos’ communal land. *Id.* at 998.

The exact number of grants made to individual Indians is apparently unknown. Florence Shipek puts the figure at 20. Shipek, *supra* n. 12, at 27 (“Of the approximately twenty rancho grants made to Indians in Upper California, at least seven were made to San Luiseño Indians.” (citation omitted)). Charles Seymour’s research indicates that there were more than 20 and at least 40. Seymour, *supra* n. 6, at 34. Joel Hyer notes that, in 1852, “approximately fifty Native Americans possessed Mexican land titles in southern California.” Hyer, *supra* n. 12, at 33; accord *Exterminate Them*, *supra* n. 12, at 11 (“By 1852, at least fifty Native Americans had secured ‘legal’ land titles in southern California alone.” (footnote omitted)).

61. See Robinson, *supra* n. 10, at 13 (“On the secularization of the missions . . . some of the mission holdings were distributed among Indian heads of families and those more than twenty-one years of age.”); see also Bancroft, *supra* n. 35, at 624–25 (discussing secularization at San Luis Rey and Indians “retaining partial control of the rich mission ranchos of Santa Margarita, Pala, Santa Isabel, Temécula, and San Jacinto”); Carrico, *supra* n. 4, at 20 (land grant for Buena Vista Rancho); Helen Hunt Jackson & Abbot Kinney, *Report on the Condition and Needs of the Mission Indians of California, Made by Special Agents Helen Jackson and Abbot Kinney, to the Commissioner of Indian Affairs, in A Century of Dishonor: A Sketch of the United States Government’s Dealings With Some of the Indian Tribes* 458, 503 (Indian Head Bks. 1993) (grant for tract of land named La Jolla); Shipek, *supra* n. 12, at 27, 43 (discussing “the approximately twenty rancho grants made to Indians” and the Cuca rancho grant, which is the land that is now in between the Rincon and La Jolla reservations). One of these grants would become the subject of litigation that reached the United States Supreme Court. See *Ritchie*, 58 U.S. 525.

62. Shipek, *supra* n. 12, at 25–26. A brief summary of what became of the various mission properties after 1845 can be found in the report of William Carey Jones. Sen. Exec. Doc 31-18 at 14–18; see also Seymour, *supra* n. 6, at 13–14. Prominent Mexican citizens, who the recipients of most of these grants, had been calling for secularization so that they could “avail themselves of [the Indians’] lands and other property as well as of their persons.” Hutchinson, *supra* n. 12, at 351 (quoting a report from Father Narciso Durán, President of the missionaries, to Governor Figueroa).

63. For a map showing “the land included within the private land grants that were later confirmed by the United States,” most of which were ranchos, see Robinson, *supra* n. 10, at 68.

64. Shipek, *supra* n. 12, at 26.

65. See *Harvey v. Barker*, 58 P. 692, 699 (Cal. 1899) (McFarland, J., dissenting) (“[U]nder the general

The practice of issuing grants subject to an Indian right of occupancy—and thereby extending a particular, protected legal status to Indian village and farm and grazing lands—dates back to the first “grants”<sup>66</sup> made to individual Spaniards in 1784.<sup>67</sup> These grants, about 30 of which were made during the ensuing years,<sup>68</sup> were mostly ranch or cattle-grazing concessions made to Spanish army veterans.<sup>69</sup> Consistent with the principles respecting Indian property rights set forth in the Spanish Laws of the Indies and the Recopilacion,<sup>70</sup> the post-1784 grants typically provided that the grantee’s rights were conditioned on no harm being done to Indians living upon those lands (or to surrounding missions).<sup>71</sup>

After Mexico gained its independence from Spain in 1822, its government continued to follow Spanish legal principles regarding Indian lands.<sup>72</sup> Though early Mexican grants were, like those made under Spanish rule, “vague cattle-grazing permits,”<sup>73</sup> formal grants of title were issued pursuant to colonization laws passed by the Mexican Congress in 1824 and given effect in regulations enacted in 1828.<sup>74</sup> There

law . . . running back through Mexican and Spanish dominion to the sixteenth century, the legal title to the lands . . . always passed subject to the right of the Indians to occupy them as they had been accustomed to.”); see also *Aamodt*, 618 F. Supp. at 996, 1000 (noting that Spanish and Mexican law prohibited grants of land used and occupied by Indians to anyone else, required the revision of non-Indian grants if they impaired Indians’ rights); Sen. Exec. Doc 31-18 at 33 (“I understand the law to be, that whenever Indian settlements are established, and they till the ground, they have a right of occupancy in the land which they need and use; and whenever a grant is made which includes such settlements, the grant is subject to such occupancy.”); Burgess, *supra* n. 36, at 10 (“The grants . . . were made without prejudice to the rights of the Indians and were in fact supposed to protect them.”); Constance Goddard DuBois, *The Condition of the Mission Indians of Southern California* 4 (Off. Indian Rights Assn. 1901) (“Grants of land were made subject to the express stipulation that the Indians settled upon such land and their successors and heirs should never be molested.”); Jackson, *supra* n. 9, at 80 (noting that “many of these grants . . . incorporated a clause protecting [lands on which Indians lived]”); Ltr. from N. Cal. Indian Assn. to President Theodore Roosevelt, *Memorial* 1 (1903) (copy on file with author) (noting that Mexican law “imposed upon the land owner some obligations in the way of good treatment, etc., and also gave the tenant a certain fixity of tenure during good behavior”).

66. Though I use the term “grants” for purposes of simplicity, these instruments were not formal land grants, which could be made only by the King of Spain. W.W. Robinson notes that “[p]opular talk of ‘Spanish grants’ is often misinformed” and he uses the term “provisional concessions” instead. Robinson, *supra* n. 10, at 52. Similarly, Hubert Bancroft speaks of “farms . . . occupied under provisional licenses.” Hubert Howe Bancroft, *History of California: Vol. VI 1848–1859*, in *The Works of Hubert Howe Bancroft* vol. XXIII, 530 (History Co. 1888).

67. Robinson, *supra* n. 10, at 45–50.

68. The exact number of these grants (or, more properly, concessions) is not known. *Id.* at 55 (“No complete list of Spanish California land concessions is available.”). It is estimated there were about thirty. *Id.* at 55–57 (stating that there were “[a]t least thirty,” listing twenty-five, and discussing another three).

69. *Id.* at 45–58. After these grants had been made, the missions (and not the general government) collected taxes (or diezmo) from the cattle owners to pay “for the support and benefit of the clergy, and for the expense of the missions.” James, *supra* n. 12, at 25 (quoting William Heath Davis).

70. See *supra* Part II.

71. Robinson, *supra* n. 10, at 48–49 (quoting 1784 grant to Manuel Pérez Nieto by Governor Fages for lands near the San Gabriel Mission); compare Robinson, *supra* n. 10, at 48–49 with *Aamodt*, 618 F. Supp. at 996 (Spanish and Mexican law “required the revision of non-Indian grants if they impaired [Indian property] rights.”); *id.* at 1000 (Spanish and Mexican law prohibited non-Indians from interfering with Indian lands or using water to the detriment of Indian towns).

72. See Seymour, *supra* n. 6, at 24 (“It is clearly demonstrable that the Mexican government intended to maintain this Spanish policy [of respecting Indian title].”); see also *Aamodt*, 618 F. Supp. at 996, 998, 1000 (pointing out that Mexican law followed the same principles as Spanish law regarding Indian lands).

73. Robinson, *supra* n. 10, at 65; accord Forbes, *supra* n. 12, at 31 (noting that “title to the land always was retained by the Crown, Indian village rights were never quieted by a rancho grant, and the ranch owner almost always lived most of the year in town”).

74. Robinson, *supra* n. 10, at 65–66; see Bancroft, *supra* n. 66, at 530–32; see also Malcolm Ebright, *New*

were between 500 and 800 grants issued under these laws.<sup>75</sup> Though some were renewals of earlier Spanish grants,<sup>76</sup> the majority of Mexican grants were made between the secularization of the missions in 1833 and U.S. occupation in 1846 and were grants to Mexican citizens of ex-mission lands.<sup>77</sup>

Most of these grants were made for lands on which Indians were living,<sup>78</sup> including those to which Indians had migrated in the wake of events surrounding secularization.<sup>79</sup> Indians living on and near the ranchos in towns, villages, and other settlements provided the labor force for the rancho economy, just as they had for the mission economy.<sup>80</sup> As noted, however, Mexican law generally and the grants specifically (as had been the case under Spanish rule) recognized that Indians' houses, farms, orchards, and fields—in and surrounding villages that were called *rancherías*—were to be set aside for those Indians.<sup>81</sup>

*Mexican Land Grants: The Legal Background*, in *Land, Water, and Culture: New Perspectives on Hispanic Land Grants* 15, 22 (Charles L. Briggs & John R. Van Ness eds., U.N.M. Press 1987) (noting that the Colonization Law of 1824 and the regulations of 1828 “generally validated the customary procedure” that had developed under the Laws of the Indies).

75. The exact number of Mexican grants is, like the number of Spanish grants, apparently unknown. See Robinson, *supra* n. 10, at 55 (“No complete list of Spanish California land concessions is available.”). W.W. Robinson says that “more than 500 land grants were made” under the “colonization laws of 1824 and 1828 and . . . governmental decrees in 1845 and 1846.” *Id.* at 67. Hubert Bancroft says that the total number of land grants made under the Mexican colonization law of 1824 and the *reglamento* of 1828 totaled “nearly 800” but notes that his figures “are only approximately correct.” Bancroft, *supra* n. 66, at 530, 530 n. 2.

76. *Id.* at 530.

77. See *id.*; Robinson, *supra* n. 10, at 31, 67.

78. Jackson, *supra* n. 9, at 80 (“Most of the original Mexican grants included tracts of land on which Indians were living, sometimes large villages of them.”); Shipek, *supra* n. 12, at 25–26 (noting that the lands granted to Mexicans as ranchos often “enclosed Indian villages and fields within their boundaries”).

79. See e.g. Cook & Marino, *supra* n. 10, at 478; Heizer, *supra* n. 41, at 415. An observer writing in 1875 noted “that the period following the breakup of the mission system and that just prior to the American period was marked by the migration of large numbers of displaced Indians from the missions to Mexican ranchos.” Carrico, *supra* n. 4, at 15–16 (citing Wetmore Rpt. at 4). See also *id.* at 17 (“The Mexican period, circa 1821–1846, caused relatively greater displacement of native settlement patterns” than happened under Spanish rule.). According to Carrico, “[Charles] Wetmore found that [after secularization,] a form of the ancient *encomienda* . . . existed . . . [under which] ‘valleys which had been the property and homes for thousands of Indian families became the property of a few landlords.’” *Id.* at 15 (quoting Wetmore Rpt. at 4).

80. According to Jack Forbes, “[t]he rancho provided another means whereby Indian labor was integrated into the Hispano economy,” and “[t]he typical Mexican rancho was based, economically and socially, upon the exploitation of Indian labor, a labor which was virtually unpaid except in the sense of possessing a certain share in crops raised and meat slaughtered. On the other hand, native villages or settlements were able to survive within rancho boundaries because the rancho owners needed Indian house servants and agricultural laborers.” Forbes, *supra* n. 12, at 31, 40. See also Shipek, *supra* n. 12, at 21; SDSU Lib. & Info. Access, *California Indians and Their Reservations: Ranchos*, <http://infodome.sdsu.edu/research/guides/calindians/calinddictqs.shtml#r> (accessed Apr. 15, 2009) (“[T]he mission lands were divided into ranchos, or estates. Life on the ranchos was similar to the mission life, and many mission Indians worked for subsistence wages on the ranchos that were controlled by wealthy owners.”). This rancho labor system was apparently extended beyond the ex-mission lands. See Forbes, *supra* n. 12, at 45 (noting that “[b]y 1847 a number of [Anglo-American] ranchos existed [in the lower Sacramento Valley], almost all utilizing local Indian labor”).

81. According to Helen Hunt Jackson,

Most of the original Mexican grants included tracts of land on which Indians were living, sometimes large villages of them. In many of these grants, in accordance with the old Spanish law or custom, was incorporated a clause protecting the Indians. They were to be left undisturbed in their homes: the portion of the grant occupied by them did not belong to the grantee in any such sense as to entitle him to eject them. The land on which they were living, and the land they were cultivating at the time of the grant, belonged to them as long as they pleased to occupy it. In many of the grants, the boundaries of the Indians' reserved portion of the property were carefully marked off; and the instances were rare in which Mexican grantees disturbed or in any way interfered with

D. *A Concluding Note on Spanish and Mexican Indian Country*

One sees in the earliest Spanish laws governing non-Indian settlement in California, and continuing through Mexican rule, the application of a legal principle whereby land areas belonging to and occupied by indigenous peoples were recognized as having a particular, protected status. By the time of the United States' occupation in 1846, Indian land tenure in California vis-à-vis Europeans had come to take several forms. Many Indians lived outside of the areas covered by Spanish and Mexican grants in the remaining part of California and had experienced relatively little or no European intrusion on their lands.<sup>82</sup> Some were living in villages on lands for which Spain and Mexico had issued rancho grants to non-Indians from the ex-mission lands or on lands outside the missions for which such rancho grants had been made. Others were living on rancho lands for which they held individual titles, on lands to which the missions held title as trustee for the Indians, and in the Indian pueblos.

All of these areas were recognized and protected under Spanish and Mexican law. Some, including lands located within the boundaries of rancho grants, had been formally set apart for Indian use and occupancy.<sup>83</sup> The Anglo-American legal system continued to recognize and protect the various areas of Indian country that existed under Mexican law, though certainly less so in practice than on paper. Because the American laws protecting Indian lands were so rarely followed, much of what was Indian country in 1846 lost its status as such during the following decades and passed out of Indian possession, ownership, and control. Some of these lands, however, still exist as Indian country today, having survived both legal and non-legal efforts to make them otherwise, as discussed in the following Part III.

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Indians living on their estates.

Jackson, *supra* n. 9, at 80.

See also Forbes, *supra* n. 12, at 31 ("Indian village rights were never quieted by a rancho grant"). Though many rancho grantees "used the people of the enclaved rancherias as forced peon labor and restricted them in many ways," the grantees, "[u]nless the Indians left the land, . . . technically could not dispossess them of it." Shipek, *supra* n. 12, at 26 (citations omitted). Apparently not all grantees complied with the conditions of their grants and provisions of Mexican law:

The Mexican records . . . show that various Southern California Indian bands officially protested to the Mexican governor of California about intrusions upon their land and water rights, and about the other abuses of Indians committed by the appointed Mexican *mayordomos* and rancho grantees. . . .

These same records also show repeated and numerous uprisings and revolts against the Mexicans.

*Id.* (citations omitted); cf. *Aamodt*, 618 F. Supp. at 1000 ("There were encroachments during the Spanish and Mexican periods on [Indian] lands with the use of water, none of which had a legal basis. Upholding [Indian] rights was slow and tedious at best.").

82. For many of these peoples, their first contact with U.S. settlers would also be their first with non-Indians.

83. Although one court, while stating that Spanish and Mexican law's recognition of Indian land rights "was equivalent to legal ownership," *Aamodt*, 618 F. Supp. at 998, distinguished between the Spanish government's recognizing and protecting Indian lands and the United States government's "reserv[ing] . . . land for use as an Indian reservation." *Id.* at 996. The Court noted that "[t]he word 'reserved' . . . is a term of art in federal land law which applies to the federal government's setting aside of particular land for a particular purpose," and the Spanish and Mexican practice of explicitly setting apart these lands from settlement by the terms of the particular grants seems to constitute a clear example of these governments' taking formal, affirmative steps to reserve these lands for Indians, even if those governments did not set them apart as reservations per se. *Id.* For a discussion of Indian village areas lying within Mexican rancho grant boundaries that later were set aside as reservations by the United States government, see *infra* pt. III (C)(1)–(2).



## III. INDIAN COUNTRY UNDER CALIFORNIA AND THE UNITED STATES

1848, when Mexico formally ceded its claims over California to the United States, was a year that “altered the lives of California’s First Nations forever.”<sup>84</sup> Events following the end of the U.S. war against Mexico unfolded in what Edward Castillo has called “a twisted Darwinian laboratory showcasing the triumph of brute force aided by a pathogenic and technological assault on a native people unparalleled in Western hemispheric history.”<sup>85</sup> Although Indians, as former Mexican citizens, were supposed to be protected in the enjoyment of their property rights, civil freedoms, and religious freedoms under the Treaty of Guadalupe Hidalgo,<sup>86</sup> the “potent race complex of the average forty-niner”<sup>87</sup> together with greed for Indian lands and justifications afforded through the Doctrine of Discovery for occupying them<sup>88</sup> helped create a reality in which these property rights and freedoms were not respected.<sup>89</sup>

California Indian peoples experienced widespread massacres, kidnapping, enslavement, and land theft during the first several decades of American rule.<sup>90</sup> By the

84. *Exterminate Them*, *supra* n. 12, at 14.

85. Edward D. Castillo, *Foreword*, in *Exterminate Them*, *supra* n. 12, at x.

86. *Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico* art. VIII, IX (Feb. 2, 1848), 9 Stat. 922 (Treaty of Guadalupe Hidalgo). Indians were formally recognized as citizens of Mexico under the Plan of Iguala, adopted by the Mexican government February 24, 1821. *Ritchie*, 58 U.S. at 538; Spicer, *supra* n. 33, at 103. The recognition of Indians as citizens continued after a republican constitution replaced the Plan of Iguala in 1824. Spicer, *supra* n. 33, at 103; *see also* Seymour, *supra* n. 6, at 15 (citing Plan of Iguala and other Mexican laws recognizing Indians as Mexican citizens); Shipek, *supra* n. 12, at 28 (“Inasmuch as Mexican law considered settled Mission Indians as citizens, technically they were entitled [under the Treaty of Guadalupe Hidalgo] to all the rights and immunities of the citizens of the United States.” (citation omitted)); *cf. N.M. v. Aamodt*, 537 F.2d 1102, 1108–09, 1111 (10th Cir. 1976) (noting that the United States, in the Treaty of Guadalupe Hidalgo, agreed to protect Indian land rights that were recognized by the Mexican and Spanish governments); *Aamodt*, 618 F. Supp. at 1000 (discussing Indian citizenship status under the Treaty of Guadalupe Hidalgo).

The Treaty of Guadalupe Hidalgo was the instrument through the United States and Mexico ended the war that had begun in 1846, and through which the United States formally acquired title to California. The Treaty, which “Native Americans in California have contested . . . since its ratification,” was silent with regard to Indian land rights, except in so far as the property rights of Indians, as Mexican citizens, were to be respected. *Exterminate Them*, *supra* n. 12, at 14. In this sense it is like the Treaty of Paris and Treaty of Ghent wherein the United States received (from Great Britain) “formal” title to the lands and Britain’s power under the Doctrine of Discovery to extinguish Indians’ aboriginal title. *See e.g.* Vine Deloria, Jr. & Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* 2 (U. of Tex. Press 1998) (“The United States . . . claimed to inherit Great Britain’s right to buy the lands of the Indians . . .”). For an explanation regarding the Doctrine of Discovery, *see* note 88.

87. Goodrich, *supra* n. 15, at 89.

88. *See e.g.* Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* 246–49, 312, 316–17 (Oxford U. Press 1990); *see also* Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* 85–111 (U. Tex. Press 1985); *see generally* L.C. Green & Olive P. Dickason, *The Law of Nations and the New World* (U. Alb. Press 1989); Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (Yale U. Press 1995). Under the Doctrine of Discovery, the respective “discovering [European] nations held fee title to [Native] lands [in the Americas], subject to the Indians’ right of occupancy and use.” *Co. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234, 234 n. 3 (1985). The Doctrine’s principles also provided that Indian peoples could enter into treaties to cede their lands to European nations (or their successor settler-states), but only to the country claiming those lands under the Doctrine. *See generally* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1 (2005).

89. *See* Burgess, *supra* n. 36, at 11 (“As citizens of Mexico, the Indians had their protection guaranteed by the United States in the Treaty of Guadalupe-Hidalgo in 1848—an obligation which the United States government failed to meet.”).

90. *See generally* *The Destruction of California Indians: A Collection of Documents from the Period 1847*

turn of the twentieth century “California Indians [had been] reduced through starvation, disease and murder to a population of only about 17,000”<sup>91</sup>—representing a 90 percent decline in population from estimated 1848 figures. Intertwined with the loss of life was the loss of land, and thus the loss of Indian country, despite various legal actions taken (however half-heartedly) by the California and United States governments to recognize and protect it.

From the earliest days of California statehood, its governors and others were calling for “war[s] of extermination” against California Indians.<sup>92</sup> “[R]acism mixed with economic gain combined to cause a deadly mixture for native men, women, and children.”<sup>93</sup> The new settlers frequently engaged in “Indian hunting—the stalking and killing of human beings as if they were animals,”<sup>94</sup> and “white individuals and communities offered monetary rewards for the heads and scalps of Indian people.”<sup>95</sup>

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to 1865 in Which Are Described Some of the Things That Happened to Some of the Indians of California (Robert F. Heizer ed., U. Neb. Press 1993) [hereinafter *The Destruction of California Indians*]; *They Were Only Diggers: A Collection of Articles from California Newspapers, 1851–1866, on Indian and White Relations* (Robert F. Heizer, ed., Ballena Press 1974) [hereinafter *They Were Only Diggers*].

91. Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 P. L.J. 391, 406 (1985) (footnote omitted).

92. Castillo, *supra* n. 85, at x; accord Ellison, *supra* n. 12, at 98; Heizer & Almquist, *supra* n. 12, at 26; see also Ltr. from Gov. John Bigler to Gen. E. Hitchcock, Commander of U.S. Troops in Cal. (Apr. 8, 1852), in Heizer & Almquist, *supra* n. 12, at 207–09. Governor Burnett’s exact words were that

a war of extermination will continue to be waged between the two races until the Indian race becomes extinct, must be expected; while we cannot anticipate this result with but painful regret, the inevitable destiny of the [Indian] race is beyond the power and wisdom of man to avert.

Heizer & Almquist, *supra* n. 12, at 26 (quoting Governor Peter H. Burnett in his annual message, January 1851); accord Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians* 15 (Cal. Research Bureau 2002) (available at <http://www.library.ca.gov/crb/02/14/02-014.pdf>). See Cong. Globe, 32d Cong., 1st Sess. 2175 (1852) (Sen. Weller stated that “these Indians will in the end be exterminated. They must soon be crushed—they will be exterminated before the onward march of the white man.”).

Indeed, two of the earliest bills passed by the California legislature were to organize and fund militias to kill Indians. The militias were organized and funded under two laws passed in April 1850: An Act Concerning the Organization of the Militia, 1850 Cal. Stat. 76; An Act Concerning Volunteer or Independent Companies, 1850 Cal. Stat. 54. See Johnston-Dodds, *supra* n. 92, at 2 (“[T]otal expenditures related to the Expeditions against the Indians [between 1851 and 1859] . . . w[ere] \$1,293,179.20.”); see also Ellison, *supra* n. 12, at 246 n. 74 (noting that the U.S. government “appropriated \$924,259.65 to reimburse California for expenses incurred in Indian wars,” and appropriated another \$400,000 in 1861 for expenses incurred in “Indian wars” in California in 1854, 1855, 1856, 1858, and 1859). According to Edward Castillo, “[a]lmost any White man could raise a volunteer company, outfit it with guns, ammunition, horses, and supplies, and be reasonably sure that the state government would honor its vouchers.” Castillo, *supra* n. 12, at 108. See also *Exterminate Them*, *supra* n. 12, at 30 (“[V]olunteer militia units murdered thousands of Native Americans, and enslaved thousands more.”). “Many expeditions against the Indians were the result of local conspiracies to gain Indian property and political capital for ambitious office seekers.” Castillo, *supra* n. 12, at 108.

93. *Exterminate Them*, *supra* n. 12, at 28.

94. Hyer, *supra* n. 12, at 71 (quoting Richard White) (footnote omitted).

95. *Exterminate Them*, *supra* n. 12, at 28; accord *The Destruction of California Indians*, *supra* n. 90, at 267–69. According to *The Destruction of California Indians*, “[m]assacres, loosely defined . . . as mass killings of Indians, were common events.” *Id.* at 243. According to Jack Forbes,

Everywhere the miners went hostilities soon developed and understandably so, since the invaders refused to respect any native rights. Villages were uprooted, women were raped or carried into concubinage, men were casually murdered, and, everywhere, the native food supply was ruthlessly destroyed. The Indians responded with retaliatory attacks which almost always led to the organization of campaigns by irregular militia or vigilante-type units. These campaigns often resulted in the near-extermination of whatever Indians might be in the vicinity, including women and children.

Forbes, *supra* n. 12, at 54. Many contemporary newspaper accounts and editorials openly discussed and

Things were relatively less violent in southern California than in the northern and central parts of the state. As a result, Indian land tenure was more secure there, at least initially. However, an increasing number of white settlers poured into southern California after the U.S. Civil War and, through violence and intimidation, they began to take over Indian villages, houses, gardens, orchards and grazing lands in the following decades.<sup>96</sup> As these settlers occupied the best and most fertile lands, many Natives adapted by moving to less productive lands and supporting themselves by laboring on white farms and ranches.<sup>97</sup>

Thus, many of the Indian villages and other areas in southern and coastal California, including those within Mexican rancho boundaries that were recognized as Indian country under Mexico, came to lose this status under United States rule as the Indians living there were “driven out, year by year, by the white settlers.”<sup>98</sup> This loss of Indian country occurred not because the American legal system did not recognize these areas as Indian lands but rather because, as discussed below, the California and United States judges and others who were supposed to be enforcing these laws failed to follow

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celebrated what Edward Castillo calls “the heartless and methodical manner in which the aboriginal population of California was systematically dispossessed of its homeland and routinely oppressed, exploited, and terrorized.” Castillo, *supra* n. 85, at xi; *accord The Destruction of California Indians*, *supra* n. 90, at 35–36; *They Were Only Diggers*, *supra* n. 90, at 1–126; *see also Exterminate Them*, *supra* n. 12, 35–159 (reproduced newspaper accounts). An 1853 article in the Yreka Herald sums up the common public attitude at the time:

“[W]e hope that the Government will render such aid as will enable the citizens of the north to carry on a war of extermination until the last redskin of these tribes has been killed. Extermination is no longer a question of time—the time has arrived, the work has commenced, and let the first man that says treaty or peace be regarded as traitor.”

*California Indian Lands Office Policy Paper on the Need for Land by California Indian Tribes* 5 (Feb. 1998) (quoting a 1853 article in the Yreka Herald) [hereinafter *California Indian Lands*] (copy on file with author).

96. Jackson & Kinney, *supra* n. 61, at 459, 471, 472; *accord* Hyer, *supra* n. 12, at 85 (“Americans avariciously claimed rivers, streams, and Indian villages as well as improvements made by Native Americans, including irrigation ditches and cultivated fields. . . [and] stole lands and resources belonging to Indians.”); Charles F. Lummis, *The Right Hand of the Continent*, 18 *Out W.* 415, 422 (Apr. 1903) (referring to this “enormous [im]migration”); Shipek, *supra* n. 12, at 34 (“After 1865, increasing numbers of settlers entered Southern California looking for farmland. . . [and] began taking the best, well-watered Indian farmland and dispossessing the Indians, even taking their adobe homes.”). Several contemporaneous sources discuss these removals. *See e.g.* Philip C. Garrett et al., *The Mission Indians* 1–3 (copy on file with author) (discussing eviction at San Fernando, threatened eviction at Soboba, and other grant owners threatening to evict Indians); Jackson, *supra* n. 9, at 80–95 (discussing encroachments at San Pasqual, the eviction at Temecula, and threatened eviction at Soboba); Charles C. Painter, *A Visit to the Mission Indians of California* 6–12 (Indian Rights Assn. 1887) (discussing eviction at San Fernando, threatened evictions at San Ysabel and Warner’s Ranch, and encroachments at Maronge and Capitan Grande) [hereinafter *Painter, 1887 Visit*]; C.C. Painter, *A Visit to the Mission Indians of Southern California, and Other Western Tribes* 16–17 (Or. Exec. Bd. 1886), (discussing eviction at San Fernando and threats and threatened evictions at San Ysabel and Palma) [hereinafter *Painter, 1886 Visit*].

97. *See* Carrico, *supra* n. 4, at 29–33; Forbes, *supra* n. 12, at 60–61.

98. Jackson & Kinney, *supra* n. 61, at 459. *See also* Forbes, *supra* n. 12, at 61 (noting that even though “numerous villages . . . of ex-mission Indians . . . possessed property rights under Mexican law[] which . . . the United States was required to respect by the Treaty of Guadalupe Hidalgo . . . [t]he United States . . . chose not to recognize any such titles and, as a result, virtually every village was destroyed during the 1860s–1880s by aggressive Anglo entrepreneurs and ranchers.”); *id.* at 46 (“[A]lthough all of the Mexican grants . . . stipulated that Indian property rights had to be respected Anglo-Americans almost always ignored this fact.”); Ltr., N. Cal. Indian Assn., *supra* n. 65, at 1 (stating that because Mexican law recognized Indian villages as having a protected status “[a]s long as the Mexican retained the land the Indians upon it were safe[,]” but that “[a]s soon as the land was bought by an American, he usually appealed to the American law to eject the Indian, something he could not have done under Mexican law.”).

them.<sup>99</sup> This failure (or refusal, depending on one's view) on the part of the California and United States governments no doubt helped "white settlers feel themselves safe in trespassing on Indians' property or persons."<sup>100</sup>

A. *Early California Indian Policy—Indian Country under the Act for the Government and Protection of Indians*

In addition to funding military expeditions against Indians,<sup>101</sup> "[t]he California Legislature [was passing] laws [to] control[] California Indians' land, lives and livelihoods."<sup>102</sup> Since Indians could neither vote nor testify against those who enforced these laws, they had no say in the laws' adoption and implementation.<sup>103</sup> Thus, the first California legislature prevented Indians from participating in the government, despite the Treaty of Guadalupe Hidalgo's guarantees for their political rights and citizenship.<sup>104</sup>

The most significant law passed by the California legislature was *An Act for the Government and Protection of Indians* (hereinafter the 1850 California Act or 1850

99. According to Florence Shipek,

through a complex series of overlapping, confusing, and misunderstood events, deliberate misrepresentation, and inadequate instructions to local officials, the United States government failed to confirm legal title to the lands occupied and used by the Indians, with the exception of a few rancho grants to individual Indians. The scattered individual lots and small grants were ignored in the same fashion.

Shipek, *supra* n. 12, at 28 (citation omitted).

100. Jackson & Kinney, *supra* n. 61, at 470. Writing in 1883, Helen Hunt Jackson summarized the situation as follows:

From tract after tract of such lands they have been driven out, year by year, by the white settlers of the country, until they can retreat no farther; some of their villages being literally in the last tillable spot on the desert's edge or in mountain fastnesses. Yet there are in Southern California today many fertile valleys, which only thirty years ago were like garden spots with these same Indians' wheat-fields, orchards, and vineyards. Now, there is left in these valleys no trace of the Indians' occupation, except the ruins of their adobe houses; in some instance these houses, still standing, are occupied by the robber whites who drove them out. . . . Repeatedly, in the course of the last thirty years, both the regular agents in charge of the Mission Indians and special agents sent out to investigate their condition have made to the Indian Bureau full reports setting forth these facts.

*Id.* at 459. In some instances, it was the agents appointed to protect Indian lands (and mission property, as "federal officials were uncertain of the legal status of church real property and Indian rights therein") who "acquired title to land that had been legally owned and occupied by Indians under Mexican law." Shipek, *supra* n. 12, at 29 (citation omitted). See Jackson & Kinney, *supra* n. 61, at 503–04 (discussing La Jolla rancho).

101. For a discussion about military expeditions against Indians, see *supra* note 92.

102. Johnston-Dodds, *supra* n. 92, at 1.

103. See Civ. Pracs. Act § 394 (1850) ("No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party."); An Act Concerning Crimes and Punishments, 1850 Cal. Stat. 99 ("No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person."); cf. *People v. Hall*, 4 Cal. 399 (1854) (upholding both provisions and their application to persons of Chinese ancestry). The prohibitions on Indians' testifying against whites also meant that Indians were unable to get the courts to protect their property against thievery and their persons against violence. *The Destruction of California Indians*, *supra* n. 90, at 11 ("Hostile acts against Indians could not be redressed by legal means since Indians were prohibited from testifying against whites."); Hyer, *supra* n. 12, at 59 ("Although Anglos stole property and livestock as well as committed other crimes against indigenous peoples, Indians could not testify against them in a court of law. In short, California magistrates deemed native testimony to be worthless in such cases.").

104. *The Destruction of California Indians*, *supra* n. 90, at 11. For a discussion regarding the Treaty of Guadalupe Hidalgo, see *supra* note 86.

Act).<sup>105</sup> On the one hand, the Act allowed for and guaranteed labor contracts under which Indians remained in servitude for years,<sup>106</sup> and its abuse and manipulation led to “widespread enslavement” of California Natives in the 1850s and 1860s.<sup>107</sup> On the other hand, the 1850 Act provided (at least ostensibly) for the protection of Indian land rights.

Section 2 of the Act, following Mexican and Spanish practice of recognizing the rights of Indians in and on lands for which grants had been made to individuals—i.e., lands that had been set apart in the grants themselves—stated:

Persons and proprietors of lands on which Indians are residing, shall permit such Indians peaceably to reside on such lands, unmolested in the pursuit of their usual avocations for the maintenance of themselves and families: *Provided*, the white person or proprietor in possession of such lands may apply to a Justice of the Peace in the Township where the Indians reside, to set off to such Indians a certain amount of land, and, on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians, nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved, can appeal to the County Court from the decision of the Justice: and then divided, a record shall be made of the lands so set off in the Court so dividing them, and the Indians shall be permitted to remain thereon until otherwise provided for.<sup>108</sup>

105. 1850 Cal. Stat. 133.

106. Its Orwellian title notwithstanding, the Act has been described as “essentially a system of slavery.” Heizer & Almquist, *supra* n. 12, at 39 (footnote omitted); accord Ellison, *supra* n. 12, at 80 (noting that the Act “could and did in many cases, lead to practical slavery for the Indian”); cf. Carrico, *supra* n. 4, at 39 (“[I]t is instructive to read and compare the Black Codes of the American South with the various California Indian Acts to understand the malevolent nature of early California law in a broader historical-legal context.”).

Specifically, the law (1) “authorized law enforcement officers to [arrest] any Indian ‘found loitering and strolling about, or . . . begging’” and then auction him or her off “‘to the best bidder . . . for any term not exceeding four months’”; (2) provided that whites “could post bond for [any] Indian” who could not afford fines levied against him or her and “compel him or her to labor in order to settle the cost of bail”; and (3) allowed “whites [to] procure legal custody of native children” and indenture them as “servants and slaves.” Hyer, *supra* n. 12, at 59 (citing 1850 Cal. Stat. 133). Widespread kidnapping of Indian children occurred as a result of the Act. Castillo, *supra* n. 12, at 109; see also Forbes, *supra* n. 12, at 60 (discussing kidnappings and Indian slavery and labor exploitation).

107. Hyer, *supra* n. 12, at 59; accord Forbes, *supra* n. 12, at 60 (discussing Indian slavery and noting that “Northwestern California was . . . a center for Indian slavery” and that Indians were “purchased at auction in Los Angeles (as late as 1869)”; Heizer, *supra* n. 41, at 415. It has been estimated that some 10,000 Indians were indentured or openly sold as servants under this particular and local form of slavery through which “white slave dealers . . . did a thriving business providing ‘apprentices’ to farmers and miners, who in turn legitimized these indentures” with the permission and sanction of the local courts. Heizer & Almquist, *supra* n. 12, at 40. See Hyer, *supra* n. 12, at 59 (“[A]n astonishing degree of power resided at the municipal and county levels.”). Because the Act was written so that “judges could interpret words such as ‘loitering’ and ‘begging’ to mean almost anything,” whites were able to hold Indians in “servitude almost indefinitely” by “arresting and rearresting [them] for vagrancy . . . [and] post[ing] bail on them every four months.” *Id.* at 60–61. See Goodrich, *supra* n. 15, at 93–94; Robert F. Heizer, *Civil Rights in California in the 1850’s—A Case History*, 31 Kroeber Anthropological Socy. Papers 129, 129 (1964) (noting that the “period of service . . . could be many years”).

108. 1850 Cal. Stat. 133 (emphasis in original). The first section of the Act gave Justices of the Peace jurisdiction in “all cases of complaints by, for, or against Indians, in their respective Townships.” 1850 Cal. Stat. 133. See Shipek, *supra* n. 12, at 31 (“This act instructed local authorities to determine the lands occupied and used by Indians, mark their boundaries, and prevent settlers from entering upon such lands and disturbing the Indians.” (citation omitted)).

Thus California, in the 1850 Act, followed the Spanish and Mexican practice of protecting Indian lands by setting them apart from settlement. However, California's legal and political institutions responsible for implementing the 1850 Act's protections for Indian lands failed to follow the law.<sup>109</sup> But this failure to follow the law, of course, does not change the fact that it was on the books. On paper at least, California law, like Mexican and Spanish law before it, recognized Indian lands and extended a particular status and treatment to them. In this sense, the 1850 Act presaged later federal laws and policies regarding Indian lands in California which, however little enforced in practice, nonetheless embody a principle under which a particular status and treatment is given to Indian lands.

### *B. Early United States Indian Policy in California*

At the time the United States government took control over California, it had been pursuing elsewhere in North America an Indian policy of treaty making and removal. Under this policy, the federal government negotiated treaties with Indian nations whereby these nations ceded vast amounts of land to the United States, and it tried to remove many Indian peoples (especially those east of the Mississippi) to Indian Territory (what is now Oklahoma).<sup>110</sup>

This treaty and removal policy was also pursued in California, though in a slightly different manner. As it had done elsewhere in North America, the United States government sent emissaries to negotiate land cession and peace treaties with California Indian nations. There were initially attempts to confine and remove Indians to the lands set aside under the treaties, but after the treaties were rejected by the United States Senate in 1852 the federal government pursued a policy of attempting to remove Indians

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109. Seymour, *supra* n. 6, at 38 ("This act was never repealed, but neither were its provisions ever carried out."). In a report to the Commissioner of Indian Affairs made in 1883, Helen Hunt Jackson and Abbot Kinney would say that, as far as they could learn, the 1850 Act "ha[d] never been . . . complied with in a single instance" and that "it would be held as of no value in the California courts." Jackson & Kinney, *supra* n. 61, at 514. Indeed, none of the California Supreme Court cases dealing with Indian land rights even mentions the 1850 Act. Florence Shipek points to "some evidence to show that . . . for a short time, until 1865, some effort was made to protect Indian land use rights, at least in San Diego County." Shipek, *supra* n. 12, at 31 (citations omitted). However, there is also evidence from San Diego County indicating otherwise, including the following recommendation of a "San Diego Grand Jury" in 1852: "A removal of the numerous Rancherias (without exception) should be ordered, as they are not only an eyesore, but the hiding place of idle and pilfering Indians. None of these remnants of a degenerate age should be allowed on this side of the river." Carrico, *supra* n. 4, at 27 (footnote omitted). See also Forbes, *supra* n. 12, at 45 (noting that after the United States extended its jurisdiction over California, the "Mexican-style system rapidly gave way to an 'Indian removal' process more typically Anglo-American."). Although the 1850 Act nominally gave Indians the right to appeal to court, California law barred the testimony of Indians against white persons and made it discretionary for a court to take action on Indians' complaints, thereby rendering ineffective the provisions for the protection of Indian lands and property rights. See Civ. Pracs. Act § 394; 1850 Cal Stat. 99; cf. Hall, 4 Cal. 399. In *Harvey v. Barker*, 58 P. 692 (Cal. 1899), *aff'd*, 181 U.S. 481 (1901), for example, the San Diego County court refused to allow the testimony of Indians who had lived on their lands since time immemorial. 58 P. at 695. See Ellison, *supra* n. 12, at 80 (noting that because Indians were "practically powerless in the courts," the Act provided an "easy process" for taking Indian lands and was implemented "largely to benefit the white man rather than to serve the Indian."); Hyer, *supra* n. 12, at 59 ("Justices of the peace divested Indians of most of their lands, including choice land near San Francisco, Los Angeles, San Diego, and other communities that later arose as major cities.").

110. See e.g. Angie Debo, *A History of the Indians of the United States* 117–298 (U. of Okla. Press 1970).

to a series of military reservations established throughout the state.<sup>111</sup> Though some, including California's second governor, John McDougal, were calling for Indians to be removed from California through "federal military intervention,"<sup>112</sup> most removal efforts were to force Indians to areas in California.<sup>113</sup>

### 1. The 18 Treaties

One of the first acts the United States government took regarding Indian lands was Congress's passing legislation in September of 1850 that authorized the negotiation of treaties with California Indian peoples to extinguish aboriginal title to the lands ceded to the government—and to set aside as Indian country the lands Indians reserved to themselves.<sup>114</sup> The bill authorizing the negotiation of treaties was an amended version of a bill introduced by Senator John Fremont on September 11, 1850, the day after he took office,<sup>115</sup> and the three commissioners appointed to negotiate the treaties with

111. See Castillo, *supra* n. 12, at 109 (discussing "the state militia's punitive expeditions" and noting that "many times U.S. troops were not even contacted for aid" because "[t]he militia hoped to make financial and political capital by handling the situation themselves"); *California Indian Lands*, *supra* n. 95, at 5 (discussing the U.S. Army's "rounding up and force marching Indians in central and northern California to a prison camp in Round Valley").

112. Flushman & Barbieri, *supra* n. 91, at 404 (footnote omitted). McDougal stated as follows: "Our best policy, and perhaps that of the General Government, would be to remove them beyond the confines of the State." *Id.* at 404 n. 88 (quoting Governor McDougal, Cal. Sen. J., 3d Sess. 21 (1852)).

113. A notable exception is the Modoc people who were sent to Oklahoma as prisoners of war after military resistance against the United States in the early 1870s and now comprise the Modoc Tribe of Oklahoma. See Patricia Scruggs Trolinger, *The Modoc Tribe of Oklahoma*, <http://www.modoctribe.net/history.html> (accessed May 10, 2009).

114. See Pub. L. No. 31-91, 9 Stat. 544, 558 (1850); see also Cong. Globe, 31st Cong., 1st Sess. 1802–1803 (1850). Upon the passage of 18 U.S.C. § 1151 in 1948, lands that Indian nations had reserved to themselves in treaties, or reservations, became by definition "Indian country" under the statute. 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government.").

115. See Flushman & Barbieri, *supra* n. 91, at 403 (citing Cong. Globe, 31st Cong., 1st Sess. at 1816–17, 1828, 2008–09, app. 2, 1706–08); see also George E. Anderson, W.H. Ellison & Robert F. Heizer, *Treaty Making and Treaty Rejection by the Federal Government in California, 1850–1852*, at 11–13 (Ballena Press 1978). "Fremont's bill was reported back with an amendment that authorized the President to appoint agents for Indian tribes in California and appropriated money for [this purpose]." *Id.* at 402 (citing Cong. Globe, 31st Cong., 1st Sess. at 1816–17). Both of "California[']s Senators, John Fremont and William Gwin[,] introduced bills providing for the extinguishment of Indian territorial claims." Flushman & Barbieri, *supra* n. 91, at 402 (footnotes omitted). Fremont also said that he had introduced his bill to "render [the U.S.] occupation legal and equitable, and to preserve the peace," as "some particular provisions w[ould] be necessary in order to divest [the Indians] of the[ir] rights" since the United States held the lands "by strong hand alone" and "[t]he Indians dispute[d] [the United States'] right to be there." *Id.* (footnote omitted). During the debates on the bill, Fremont acknowledged that Mexican and Spanish law clearly recognized Indian lands rights. Holding in his hand "a volume of Spanish laws published in the city of Mexico in 1849, and purporting to contain all the legislation on this subject which was in force in Mexico up to that date," Senator Fremont said that "the Spanish law clearly and absolutely secured to Indians fixed rights of property in [their] lands . . . beyond what is admitted by this [United States] Government in its relations with its own domestic tribes." Cong. Globe, 31st Cong., 1st Sess. at 1816 (statement of Senator Fremont). Fremont also stated:

The general policy of Spain, in her Indian relations, was the same as that which was afterwards adopted by all Europe and recognized by the United States. The Indian right of occupation was respected, but the ultimate dominion remained in the Crown. Wherever the policy of Spain differed from that of the other European nations, it was always in favor of the Indians. Grants of lands were always made subject to their rights of occupancy, reserving to them the right to resume it even in cases where it had been abandoned at the time of the grant. But the Indian right to the lands in property, under the Spanish laws, consisted not merely in possession, but extended even to that of alienation; a right recognized and affirmed in the decisions of the Supreme Court of the United

Indian nations in California arrived in the state in 1851.<sup>116</sup>

Between March 1851 and January 1852, the United States negotiated eighteen treaties with more than a hundred Indian tribes and nations throughout the state, whose leaders represented between one-third and one-half of Indians then living in California.<sup>117</sup> All of these treaties were in central and northern California, save two negotiated in southern California in January of 1852.<sup>118</sup> Under the treaties, California's Native peoples were to retain (and the federal government was to set aside as Indian country) approximately 8.5 million acres, some one-seventh of the state of California.<sup>119</sup> The remaining 66.5 million acres were ceded to the United States.<sup>120</sup>

Despite these terms, California's citizenry and legislature opposed the treaties because they felt that the treaties left Indians with too much, and rather valuable, land that should instead have been "public lands" (i.e., white lands).<sup>121</sup> Acting on the requests of their constituents and the California legislature's formal opposition to the treaties,<sup>122</sup> California's Senators, who "held the balance of power" in the United States

States.

*Id.*

116. Ellison, *supra* n. 12, at 96–98; *Exterminate Them*, *supra* n. 12, at 21; Flushman & Barbieri, *supra* n. 91, at 403; Chad L. Hoopes, *Domesticate or Exterminate: California Indian Treaties Unratified and Made Secret in 1852* 2–76 (Redwood Coast Publications 1975); Hyer, *supra* n. 12, at 67; Robinson, *supra* n. 10, at 14.

117. *Exterminate Them*, *supra* n. 12, at 22; Flushman & Barbieri, *supra* n. 91, at 403.

118. See Ellison, *supra* n. 12, at 106–12, 120–25, 137–45, 159–66. The two treaties negotiated in the south were the Treaty of Temecula, negotiated January 5, 1852, and the Treaty of Santa Ysabel, negotiated on January 7, 1852. Hyer, *supra* n. 12, at 67–68; Shipek, *supra* n. 12, at 30. A treaty negotiated with Indians "living in the southern end of the San Joaquin Valley" in June of 1851 should perhaps also be included among the southern California treaties. See Hyer, *supra* n. 12, at 67.

119. *Exterminate Them*, *supra* n. 12, at 22; Flushman & Barbieri, *supra* n. 91, at 404; see also *California Indian Lands*, *supra* n. 95, at 4 ("The treaties would have established an Indian land base in California of approximately 8.5 million acres (about 7½% of California) and would have constituted formal recognition of most, if not all, of the present-day 'unacknowledged' . . . tribes."). Elsewhere it is stated that these treaties "reserved to the Indians approximately 11,700 square miles, or about 7.5 million acres of land. The total amount represented seven and a half percent of the State of California." Johnston-Dodds, *supra* n. 92, at 23 (footnote omitted). If correct, these figures place the actual acreage reserved well below the other figures. The discrepancy might be explained by the fact that the lands ceded in these treaties were unspecified. Maps showing the treaty lands can be found at *California Indian Lands*, *supra* n. 95, at app. A; Hoopes, *supra* n. 116 (map following page 76); Hyer, *supra* n. 12, at 69.

120. See Flushman & Barbieri, *supra* n. 91, at 403 ("At the time the treaties were negotiated, California Indians had aboriginal title to nearly 75,000,000 acres of the state." (footnote omitted)).

121. *Exterminate Them*, *supra* n. 12, at 22 (noting that most Californians opposed the treaties because they felt "that the commissioners set aside lands too valuable for Indian occupation"). See Hoopes, *supra* n. 116, at 82 ("[A] strong, vocal anti-treaty attitude . . . developed throughout the State."). A March 13, 1852 editorial in the *Los Angeles Star*, for example, complained not only that the treaties had reserved lands for the Indians but also that the treaties recognized Indian "rights of sovereignty" and "treated [Indians] as powerful and independent nations." Ellison, *supra* n. 12, at 187.

122. This opposition was formalized in a resolution of a special committee of the California Senate that objected to the treaties on the grounds that they reserved to Indians "a considerable portion of the richest mineral lands" in California and "rich agricultural lands, the value of which the Indians were unable to appreciate." *Id.* at 188 (citing the Majority Report of the Special Committee). The committee's resolution instructed California's U.S. Senators "to oppose the confirmation of any and all treaties with Indians of the State of California granting to Indian[s] an exclusive right to occupy any of the public lands in the State" and urged that Indians be removed from the state. *Id.* (footnote omitted). According to the Senate committee, "the policy . . . of removing the wild Indians beyond the jurisdiction of States, [was] conceived in wisdom and [dictated] by humanity, and [was] productive of tranquility and happiness to the whole country." *Id.* The California Senate did not pass the committee's resolution. See Seymour, *supra* n. 6, at 38. However, the California Assembly overwhelmingly passed an almost identical resolution (which estimated the value of the reserved lands at \$100,000,000). See Ellison, *supra* n. 12, at 189–91; see also Flushman & Barbieri, *supra* n.



Senate,<sup>123</sup> fought against ratification of the treaties.<sup>124</sup> In June 1852, the U.S. Senate formally rejected the treaties, classified them as secret, and had them sealed in a vault.<sup>125</sup> The lands that had been reserved by the Indians in the treaties were treated as part of the public domain.<sup>126</sup>

Maybe it was because no one wanted to attempt this rather uncomfortable explanation that the Indians, many of whom had relocated to the areas reserved in the treaties in compliance therewith,<sup>127</sup> were not informed of the Senate's refusal to ratify the treaties.<sup>128</sup> According to Robert Heizer, "[i]n the history of California Indians no other single event (that is 'nonevent') had a more rapid destructive effect on their population and culture than [this] about-face [by] the Senate."<sup>129</sup> Another commentator has said that "[t]he present status of the California Indian cannot be understood save in the light of this incident of the 'lost treaties.'"<sup>130</sup> The "incident of the 'lost treaties'" also helps one understand subsequent (including present) issues surrounding Indian

91, at 404–05, 405 n. 95; Robinson, *supra* n. 10, at 15 ("A special committee appointed by the California legislature reported against the policy followed by the commissioners, and the legislature, by an overwhelming vote, recommended that Congress be prevented from confirming the Indian reservations."). This resolution passed by a vote of 35 to 6. Ellison, *supra* n. 12, at 191. The California Senate's opposition to the treaties was given final expression in the form of a "memorial ask[ing] for an entire modification of the treaties" and proposing a system of missions for the Indians—a plan which the Senate felt "would do more to promote peace[] and satisfy [California's] citizens than the one proposed in the treaties." *Id.* at 191 (footnote omitted). This memorial "passed the Senate by a vote of 19 to 4." *Id.* at 192 (footnote omitted).

123. Goodrich, *supra* n. 15, at 96; *accord* Flushman & Barbieri, *supra* n. 91, at 405.

124. President Millard Fillmore and the Secretary of the Interior, however, both supported ratification. Flushman & Barbieri, *supra* n. 91, at 405; Hoopes, *supra* n. 116, at 101.

125. *Exterminate Them*, *supra* n. 12, at 22; Flushman & Barbieri, *supra* n. 91, at 406. These treaties were kept secret for more than fifty years, until archivists going through Senate records came across them in 1905. They were finally made public when the "injunction of secrecy" was removed on January 18, 1905. *See California Indian Lands*, *supra* n. 95, at 4; Ruth Caroline Dyer, *The Indians' Land Title in California: A Case in Federal Equity, 1851–1942* 4 (M.A. Thesis, U. Cal. 1945); Flushman & Barbieri, *supra* n. 91, at 409; Robinson, *supra* n. 10, at 19. Senator Weller, one of the California Senators who voted against the treaties, said that he was "compelled, from a sense of duty" and "stern necessity" to reject them. Cong. Globe, 32nd Cong., 1st Sess. at 2173. Weller explained that:

We who represent the State of California were compelled, from a sense of duty, to vote for the rejection of the treaties, because we knew it would be utterly impossible . . . to retain these Indians in the undisturbed possession of these reservations. Why, there were as many as six reservations made in a single county . . . and that one of the best mining counties in the State. [The commissioners] knew that those reservations included mineral lands, and that, just so soon as it became more profitable to dig upon the reservations . . . , the white man would go there, and that the whole Army of the United States could not expel the intruders.

It was, therefore, under this stern necessity that we were compelled to reject the treaties . . . . It will be hard indeed to explain to these Indians how it came [to be] that the formal treaty made with your accredited agents has been violated.

*Id.*

126. Goodrich, *supra* n. 15, at 96. The law opening up these lands to white settlement contained an express protection for Indian lands (again evidencing federal law's recognition of Indian country in California), though this provision was apparently ignored in practice. *Infra* nn. 142–43.

127. *See* Cong. Globe, 32nd Cong., 1st Sess. at 2173 (stating that the Indians "ha[d] done everything in their power to execute [the treaties] in good faith, by coming down out of their old homes and occupying the reservations") (quoting Senator Weller); *see also California Indian Lands*, *supra* n. 95, at 4 ("Many of the tribes, not being informed that the agreements would not be honored, relocated to the areas reserved under the treaties.").

128. Shipek, *supra* n. 12, at 31.

129. Robert F. Heizer, *Treaties*, in *Handbook of North American Indians* vol. 8, *supra* n. 12, at 704.

130. Goodrich, *supra* n. 15, at 97.

country in California and how they came about. It also provides a background against which to examine the various post-treaty developments (both in law and outside the law), discussed below, that shaped the trajectory of Indian country in California. Had the treaties been ratified, there would have been almost twenty times more Indian country in California than actually exists today.<sup>131</sup>

## 2. Indian Country under Early Federal Statutes—The 1851 and 1853 Acts

In addition to negotiating treaties with California Indian nations which, if ratified, would have set aside much of California as Indian country, the United States government also recognized and protected Indian lands when it passed laws governing individual private land titles in the state. Explicit provisions extending a particular status to Indian lands and setting them apart to be treated differently from other lands are found in both the *Act to Ascertain and Settle the Private Land Claims in the State of California*, passed on March 3, 1851 (hereinafter the “1851 Act”),<sup>132</sup> and the *Act to Provide for the Survey of the Public Lands in California, the Granting of Preëmption Rights Therein, and for Other Purposes*, passed on March 3, 1853 (hereinafter the “1853 Act”).<sup>133</sup>

The 1851 Act primarily addressed individual land rights existing under private Mexican and Spanish grants. It was passed after “careful” and “deliberate” consideration of a report commissioned by Congress which made it clear that Spanish and Mexican law had recognized and safeguarded the rights of Indians on the mission and rancho lands for which these Spanish and Mexican grants had been issued.<sup>134</sup> The Act’s only

131. This figure was obtained by dividing the approximately 450,000 acres of land presently recognized as “Indian country” (under both 18 U.S.C. § 1151 and the Supreme Court case law interpreting it) by the approximately 8.5 million acres that would have been set aside under these treaties. It also assumes that the boundaries of the treaty-established reservations would not have changed.

132. Pub. L. No. 31-41, 9 Stat. 631 (1851).

133. Pub. L. No. 32-145, 10 Stat. 244 (1853).

134. The 1851 Act was passed after the treaty commissioners had begun negotiating treaties with California Indian nations and after an “extended” and “deliberate” consideration of the report of William Carey Jones, whom Congress had sent to report on “all grants or claims derived from Spanish and Mexican authorities.” *Byrne v. Alas*, 16 P. 523, 525 (Cal. 1888); Robinson, *supra* n. 10, at 72, 92; Seymour, *supra* n. 6, at 28. Although Jones dedicated less than one-tenth of his report to the issue of Indian land title, he left no doubt that both Spanish and Mexican law recognized the rights of Indians on mission and rancho lands, stating as follows:

It is a principle constantly laid down in the Spanish colonial [i.e., Mexican] laws, that the Indians shall have a right to as much land as they need for their habitations, for tillage, and for the pasturage of their flocks. . . . The early laws were so tender of these rights of the Indians that they forbade the allotment of lands to the Spaniards, and especially the rearing of stock, where it might interfere with the tillage of the Indians. Special directions were also given for the selection of lands for the Indian villages in places suitable for agriculture, and having the necessary wood and water.

Agreeably to the theory and spirit of these laws, the Indians in California were always supposed to have a certain property or interest in the missions. . . . [A]part from any direct grant, they have been always reckoned to have a right of settlement; and we shall find that all the plans that have been adopted for the secularization of the establishments have been contemplated, recognised, and provided for this right. . . . We may say, therefore, that, however maladministration of the law may have destroyed its interest, the law itself has constantly asserted the rights of the Indians to habitations and sufficient fields for their support. The law always intended the Indians of the missions—all of them who remained there—to have homes upon the mission grounds. The same . . . may be said of the large ranchos—most or all of which were formerly mission ranchos—and of the Indian settlements or rancherias upon them. I understand the law to be, that whenever Indian settlements are established, and they till the ground, they have a right of occupancy in the

reference to Indians, in Section 16, provided:

That it shall be the duty of the commissioners [appointed to administer the law] . . . 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.<sup>135</sup>

Courts and others would later “assume” and/or “presume” that the commissioners performed their duty to ascertain and report on Indian land tenure,<sup>136</sup> but they offered no evidence to support this assumption. Indeed, it appears that no such report was ever made,<sup>137</sup> and that the Commissioners ignored even the documented evidence that was before them, as well as Mexican and Spanish laws concerning Indian land and land use rights.<sup>138</sup> Investigations were, however, made in at least two instances—at Pauma and

land which they need and use; and whenever a grant is made which includes such settlements, the grant is subject to such occupancy.

Sen. Exec. Doc. 31-18 at 32–33 (emphasis omitted) (footnote omitted).

The purpose of the Jones report was to catalog and categorize Spanish and Mexican laws and titles and to determine the validity of pre-existing land grants made under these laws. Jones’ report, like the one prepared earlier by California Secretary of State H.W. Halleck upon which Jones himself relied, focused almost entirely on “Spanish and Mexican laws relating to [rancho] land[s] and mission properties in California.” Robinson, *supra* n. 10, at 92–93. The new U.S. occupiers looked with skepticism upon many of the larger rancho grants and were especially leery of those made from ex-mission lands during the period of pre-Treaty U.S. occupation, several of which had been “fraudulently antedated” by Governor Pio Pico. Seymour, *supra* n. 6, at 14. “[A] number of [these] grants were made to the extent of the eleven-square-league limit (48,000 acres) of the Mexican Colonization Law of 1824. This was a far cry from the 640-acre grants the lawmakers were familiar with.” Ebright, *supra* n. 74, at 30.

Many of the Mexican land grants (and not only those made by Pico just before, during, or after the U.S. occupation) were “uncertain in extent,” “incomplete as to title,” and/or “of questionable validity.” Goodrich, *supra* n. 15, at 98; accord Ebright, *supra* n. 74, at 30–31. Jones concluded that it would be easy to detect “fraudulent last-minute Mexican [land] grants, and . . . that the grants of California were ‘mostly perfect titles.’” Robinson, *supra* n. 10, at 95. Halleck, on the other hand, questioned the validity of many of the pre-1846 Mexican grants, but he has been criticized for “emphasiz[ing] and magnif[y]ing title defects and title problems.” *Id.* at 97–98. See Seymour, *supra* n. 6, at 28 (“The difficulties are rather magnified by Halleck, who intimated that all the grants were imperfect.”). Also figuring into the equation was the fact that, “[w]hen the United States took possession in 1846, large portions of the best lands were . . . occupied by Mexican grantees.” Bancroft, *supra* n. 66, at 533. This fact may explain why some of the new occupiers questioned the validity of the rancho grants in their entirety.

135. 9 Stat. at 634; cf. Shipek, *supra* n. 12, at 31 (“[T]he act specifically required the commission to determine Indian claims . . .”).

136. *Barker v. Harvey*, 181 U.S. 481, 492 (1901) (“It is to be assumed that the commissioners performed that duty.”); *Harvey*, 58 P. at 698 (“The presumption is that the proper inquiry or investigation was had and reported by the proper officers, as required by law.”); Flushman & Barbieri, *supra* n. 91, at 407, 407 n. 112 (stating that “[t]his duty was presumably performed,” but also that “the authors have been unable to find any such report”); Hyer, *supra* n. 12, at 70 (In 1903, Frank Lewis (a member of the . . . California State Assembly) falsely assumed that the commissioners “performed the duty imposed upon them by the law.”) (quoting Frank D. Lewis, *The Warner Ranch Indians: And Why They Were Removed to Pala*, 42 *Overland Mthly.* 171, 173 (1903)); Seymour, *supra* n. 6, at 46 (calling “the presumption . . . that the proper inquiry and report had been made by the proper officers . . . an altogether gratuitous assumption”) (emphasis in original).

137. Flushman & Barbieri, *supra* n. 91, at 407 n. 112 (“[T]he authors have been unable to find any such report.”); Hyer, *supra* n. 12, at 69 (“No one has ever found this report.”); Seymour, *supra* n. 6, at 37 (noting that “[n]o such report was ever made to the secretary of the Interior”).

138. Shipek, *supra* n. 12, at 31–32. According to Shipek,

[e]xamination of the records demonstrates that the commissioners did not fulfill their duty to determine Indian land rights; instead, they ignored all the evidence that once existed. Thus, Indian villages within rancho range boundaries that had specified rights and that could not be dispossessed under Mexican law lost those rights because they were ignored by the federal land commissioners.

Santa Ynez, both of which were later set aside as reservations.<sup>139</sup>

Even though the commissioners did not carry out their duties, the 1851 Act's provision regarding Indian lands stands as another example of U.S. law extending a particular treatment to them, and following, at least on paper, Mexican and Spanish principles that protected Indian lands. Presumably, the commissioners were to investigate and report on Indians' land tenure so that their lands—many of which had been set apart from settlement under Spanish and Mexican law—could be set aside under U.S. law as well. It is perhaps no coincidence that the two places where investigations were made are now set aside as reservations and thus are “Indian country” under 18 U.S.C. § 1151.

As noted, the 1851 Act mainly addressed individual land rights, and its main purpose was to establish a procedure for individuals holding private Spanish and Mexican land grants to have those grants confirmed by the U.S. government.<sup>140</sup> Lands

The Indian pueblos, and the San Juan Capistrano Indians in the pueblo of San Juan Capistrano (who under Mexican law had documented rights to communal areas as well as individual land rights within the pueblos), had those rights ignored, even though evidence exists that the data on Indian pueblo rights was in the hands of the land commission. The commission also ignored the Mexican laws concerning basic legal use rights of other settled villages, those that were neither pueblos nor on rancho grants.

*Id.* at 31–32 (footnote omitted). See Federico M. Cheever, Student Author, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected By the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. Rev. 1364, 1374 (1986); Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 Am. J. Leg. Hist. 353, 369 (2001) (noting how Mexican and Spanish law regarding land title was “intentionally disregarded” in other contexts). The evidence ignored by the commissioners included not only information on the Indian pueblos, but also the express provisions in the Mexican grants confirmed by the commissioners stating that Indians were not to be prejudiced in the use and occupancy of their lands, waters, gardens, or grazing areas by any grantee or assuming grantee. See Shipek, *supra* n. 12, at 32; see also Forbes, *supra* n. 12, at 31; Robinson, *supra* n. 10, at 65–66.

139. See H.R. Subcomm. of the Comm. on Indian Affairs, *Indian Tribes of California*, 66th Cong. 117 (Mar. 23, 1920) (“Your special agent has found but two cases out of several hundred grants where this was done, Pauma and Santa Ynez.”) (quoting Charles E. Kelsey, Spec. Agent for Cal. Indians). Pauma and Santa Ynez are discussed in more detail *infra* at Parts III(2) and (4), respectively.

140. Indian tribes and villages who had aboriginal title to their lands were not required to go before the commission in order to preserve their land rights. The duties imposed between the commissioners and California Indians flowed one way—the commissioners were supposed to determine Indian claims, but Indians were not required to present any claims to the commission. *Cramer v. U.S.*, 261 U.S. 219, 231 (1923) (noting that the 1851 Act “plainly ha[d] no application” to Indians holding their lands under aboriginal title); *Byrne*, 16 P. at 527 (holding that “the rights of the Indians were preserved without presenting their claims” and that “patentee[s] took the [legal] title in fee, subject to the Indian right of occupancy”); Flushman & Barbieri, *supra* n. 91, at 429 (“[T]he requirement of section 16 . . . to report on Mission Indian title does not seem to support the conclusion that a direction to investigate tenure under Mission Indian title compelled the Indians, holding by right of possession under other laws, to present claims to the Land Commission.” (footnote omitted)); Painter, *1887 Visit*, *supra* n. 96, at 5–6 (“If this section has any meaning, it would seem to shift the responsibility from this class of claimants to the commission itself, Congress evidently considering it unjust and impracticable to require the Indians to appear in answer to a general notification through the public press.”); Shipek, *supra* n. 12, at 31. There is a prevailing misunderstanding, however, which holds that Indians were required to go before the commission in order to preserve their rights. See Flushman & Barbieri, *supra* n. 91, at 433–34, 434 n. 303 (discussing *Barker*, 181 U.S. 481; *U.S. v. Title Ins. & Trust Co.*, 265 U.S. 472 (1923) and citing *Indians of Cal. v. U.S.*, 98 Ct. Cl. 583, 592 (1942); *Donahue v. Butz*, 363 F. Supp. 1316, 1321 (N.D. Cal. 1973); Goodrich, *supra* n. 15, at 100; Robert W. Kenny, *History and Proposed Settlement, Claims of California Indians* 20 (St. Prtg. Off. 1944)); see also *Summa Corp. v. Cal. ex rel. St. Lands Comm.*, 466 U.S. 198, 209 (1984); *U.S. v. Santa Fe P. R.R. Co.*, 314 U.S. 339, 350 (1941); *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 645 (9th Cir. 1986); *Super v. Work*, 3 F.2d 90, 91 (D.C. Cir. 1925); Hyer, *supra* n. 12, at 70, 70 n. 88; Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. Rev. 201, 224–25 (1996); Robinson, *supra* n. 10, at 15–16. However, as evidenced by the 1851 Act's title, only persons “claiming lands in California by virtue of any right or title derived from the

to which private titles were not confirmed under the procedure set forth in the 1851 Act passed into the public domain on March 3, 1853, when Congress passed the 1853 Act.<sup>141</sup>

The 1853 Act governed the issuance of patents for these newly-declared public domain lands, and it expressly limited post-1853 settlement on Indian lands. Section 6 of the 1853 Act states: “[T]his act shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preëmption right to the same.”<sup>142</sup> But the 1853 Act’s provision protecting Indian lands and setting them apart from settlement was, like the provisions in the 1850 California Act and the 1851 Act, ignored.<sup>143</sup> As a result, lands throughout California that should have been protected and reserved for Indians under the 1853 Act were opened up to white settlement.<sup>144</sup>

Although the provisions that recognized and protected Indian lands in these early land statutes were not followed in practice, their inclusion in the statutes signifies important points along the trajectory of Indian country in California. So does their non-implementation: the fact that they were, with few exceptions, not implemented illustrates the circumstantial nature of Indian country’s trajectory in California. If the land commissioners had followed through on the 1851 Act’s mandate to investigate and report on Indian land tenure or if the provisions of the 1853 Act protecting Indian lands had been applied (with the result in both cases that Indian lands would have been set apart from settlement), the landscape of Indian country in California would be quite different today.

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Spanish or Mexican government” (i.e., individuals claiming title under a private grant titles, as opposed to Indian tribes and villages holding their lands under aboriginal title) were required to present claims before the commissioners. 9 Stat. at 632 (emphasis added). Cf. *Aamodt*, 618 F. Supp. at 1001 (discussing aboriginal title under Spanish and Mexican law and its continuation under U.S. law); *Aamodt*, 537 F.2d at 1105, 1108–09 (noting that Spain and Mexico recognized Indian land title and that the United States undertook the obligation to protect these rights).

141. 10 Stat. at 246–47; 9 Stat. at 633 (“[A]ll lands, the claims to which have been finally rejected by the commissioners . . . or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States.”). Though the Commission was originally to conclude its affairs by March 3, 1853, “[t]he duration of the Commission was twice extended, the final adjournment [o]ccurring March 1, 1856.” Seymour, *supra* n. 6, at 29.

142. 10 Stat. at 246–47.

143. See Jackson and Kinney, *supra* n. 61, at 471 (“Lands occupied by Indians or by Indian villages are held on for homestead entry precisely as if they were vacant lands.”); Forbes, *supra* n. 12, at 60 (“The white settlers and their governments adopted the . . . attitude that the Indians possessed no property rights whatsoever and that they were ‘trespassers on the public domain.’”). See generally *Thompson v. Doaksum*, 10 P. 199 (Cal. 1886) (a case decided by the California Supreme Court in 1886 involving the rights of the Nahkomas (also known as the Big Meadows Tribe) in lands for which the United States had issued a certificate of pre-emption and then a patent to a non-Indian homesteader under the 1853 Act). The case is illustrative, as it shows how the law was ignored both on the ground and in the courts. *Id.* at 202. The *Thompson* court ruled that the land “must be deemed and taken as having become a part of the public domain” because no claim was ever presented to the land commissioners pursuant to the 1851 Act on behalf of the Nahkomas. *Id.* But it conveniently failed to mention the 1853 Act’s provision stating that it “shall not be construed to authorize any settlement to be made on any tract of land in the occupation or possession of any Indian tribe, or to grant any preëmption right to the same.” 10 Stat. at 246–47.

144. *Supra* nn. 95–96 (describing the settlers’ takeover).

### 3. Military Reservations and Farms

The same day that it passed the 1853 Act, Congress also passed legislation authorizing the U.S. President to set aside some of the public domain lands as “military reservations” for Indians.<sup>145</sup> The reservation system was administered through the Office of Superintendent of Indian Affairs of California, which Congress had created in March of 1852, three months before the United States Senate rejected the 18 treaties.<sup>146</sup> Some of these reservations were lands that Indian tribes had reserved for themselves in the treaties. Others were places to which Indian peoples were removed, often by military force employed by the federal and state governments.<sup>147</sup>

These military reservations or “farms,” as they were called at the time, each consisted of “approximately seventy-five thousand acres” and were established “in areas not heavily populated by whites.”<sup>148</sup> Modeled after the Spanish missions, they were designed to function essentially as plantations that were to be funded by “the surplus produce of Indian labor.”<sup>149</sup> They were also “made with a view to a change in location when increase of white population may make it necessary [to remove the Indians].”<sup>150</sup>

145. Pub. L. No. 32-104, § 1, 10 Stat. 226, 238 (1853) (“authoriz[ing] [the President] to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes”). Legislation passed in 1855 provided for two more military reservations. Pub. L. No. 33-204, 10 Stat. 686, 699 (1855) (appropriating funds for “collecting, removing, and subsisting the Indians of California . . . on two additional military reservations” and authorizing the President to “enlarge the quantity of reservations heretofore selected, equal to those hereby provided for”).

146. Edward F. Beale, who was appointed as the first Superintendent, “established an Indian reservation system” and “created California’s first official reservation near Tejon Pass.” *Exterminate Them*, *supra* n. 12, at 26; *accord* Forbes, *supra* n. 12, at 64.

147. Castillo, *supra* n. 12, at 109 (discussing “the state militia’s punitive expeditions” and noting that “many times U.S. troops were not even contacted for aid” because “[t]he militia hoped to make financial and political capital by handling the situation themselves”); *Exterminate Them*, *supra* n. 12, at 23 (noting that “the California state legislature appropriated over \$1.5 million during the 1850s for local troops to fight indigenous peoples who were unwilling to remove to the reservations and live under federal domination” (footnote omitted)); *cf.* *California Indian Lands*, *supra* n. 95, at 5 (discussing the U.S. Army’s “rounding up and force marching Indians in central and northern California to a prison camp in Round Valley”). California’s governor John McDougal was at the same time calling for Indians to be removed from California through federal military intervention. Flushman & Barbieri, *supra* n. 91, at 404. McDougal stated as follows: “Our best policy, and perhaps that of the General Government, would be to remove them beyond the confines of the State.” *Id.* at 404 n. 88 (quoting Governor McDougal, Cal. Sen. J., 3d Sess. 21 (1852)).

148. *Exterminate Them*, *supra* n. 12, at 26. Farms were established at Tejon in the southeast San Joaquin Valley (1853), at Nome Lackee in Colusa County (1854), on the Fresno River (1854), on the Klamath River (1855), at Mendocino (1855), at Round Valley (Nome Cult) (1856), at Kings River (the Kings River Farm) (1856), on the Tule River (1858), on the Smith River in Del Norte County (the Smith River Farm) (1861). Castillo, *supra* n. 12, at 110, 112; Hyer, *supra* n. 12, at 69 (providing a map showing the location of the farms and the year of their establishment); *see also* Forbes, *supra* n. 12, at 64–65; Seymour, *supra* n. 6, at 59 (stating that the Tule River Farm was one of “several Farms in the San Joaquin Valley”).

149. Ellison, *supra* n. 12, at 207, 209 (citing Ltr. from E.F. Beale to L. Lea (Oct. 29, 1852) and Ltr. from E.F. Beale to L. Lea (Nov. 22, 1852) (letters reproduced in Sen. Exec. Doc. 33-4 at 374 (Mar. 17, 1853)). *See* Castillo, *supra* n. 12, at 111 (“Native people found themselves again used as forced labor to enrich their overseers.”). The military reservation system in California has been called “the prototype for future ‘modern’ reservations designed to ‘civilize’ Indians through agriculture and ranching regulated by agents of the Office of Indian Affairs.” *Exterminate Them*, *supra* n. 12, at 26.

150. Ellison, *supra* n. 12, at 207 (quoting Ltr. from E.F. Beale (Oct. 29, 1852). Superintendent Beale specifically asked that they be set aside as government reservations to which the United States held title “so that the Indians, holding it by no other title but the will of the government, might at any time be removed at the government’s pleasure.” Ellison, *supra* n. 12, at 210. *See Exterminate Them*, *supra* n. 12, at 28 (noting that whites viewed these reservations as places “to concentrate, confine, and control Indians so that non-native peoples could develop the state in a manner they saw fit.”); Seymour, *supra* n. 6, at 60 (discussing an 1857

In time, settlers collaborated with government officials to bring about an end to the reservation system,<sup>151</sup> and the Indian Service eventually “bowed to the state’s citizen pressures and . . . abandon[ed] the reservations.”<sup>152</sup> Though most of the farms passed out of federal ownership during the 1860s,<sup>153</sup> three of them exist today as reservations: Round Valley,<sup>154</sup> Tule River,<sup>155</sup> and Klamath River (Yurok).<sup>156</sup>

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“letter from the Department of the Interior, announcing the contemplated abandonment of all the Farms south of and including Fresno, together with Tejon Reservation, and concentrating all these Indians in the valley of the San Geronio Pass”).

151. See Castillo, *supra* n. 12, at 111–12. According to Edward Castillo, “[t]he dwindling Indian population surrounded by a hostile frontier society with its indenture laws and the continued profiteering in the Indian Service all contributed to a wholesale abandonment of several reservations and the ultimate failure of the entire reservation system.” *Id.* at 111 (citation omitted). “Although records are incomplete, there can be no doubt that the total number of Indians under federal supervision decreased from approximately 3,000 to slightly over 1,000 for this time period. Eventually it became apparent that the California reservation system . . . was becoming a monumental failure.” *Id.* One problem was that officials of the Indian Service were able to “gain control of lands surrounding and including portions of various reservations and Indian farms,” but the “most persistent and decisive element” contributing to the system’s failure was “the hostile frontier society” that bordered the reservations. *Id.* at 112. See also Forbes, *supra* n. 12, at 63 (describing a “pattern [of] . . . federal appointees who, almost without exception, used ‘the Indian business’ as a lucrative step towards wealth”). According to Jack Forbes,

One aspect of these years was that the reservation Indians were often forced to look for food on their own (in spite of rations—the latter were re-sold by the agents to whites) and their labor was also sold to whites by the government employees. The superintendent also allowed white squatters to gain footholds on many of the reserves.

*Id.* at 64.

152. Castillo, *supra* n. 12, at 112. See also Forbes, *supra* n. 12, at 65 (“In 1859 the federal government virtually abandoned the reservations, leaving the Indians more or less on their own and allowing white squatters to seize most of the improvements.”). Edward Castillo stated:

As early as 1861 the government abandoned Fresno and Kings River Indian Farms, transferring the few remaining families to the new Tule River Indian Farm. . . . In early 1863 the new superintendent in California found that at Nome Lackee the former agent had not paid the man in charge there who consequently sold all the movable property for back wages. The few remaining Indians scattered and the reservation was abandoned. Yielding to private interests Tejon Reserve was abandoned in 1864. Finally after eight years as a promising potential reservation Smith River Indian Farm north of Mendocino was abandoned in 1869.

Castillo, *supra* n. 12, at 112 (citation omitted). See also Pub. L. No. 40-248, 15 Stat. 198, 221 (1868) (“the Smith River reservation is hereby discontinued”). After the Tejon Ranch was abandoned, title wound up in the hands of Edward F. Beale, who was appointed as the first Superintendent of Indian Affairs for California and oversaw the administration of the reservations. See *Exterminate Them*, *supra* n. 12, at 26; Forbes, *supra* n. 12, at 64.

153. See Forbes, *supra* n. 12, at 65 (“Between 1860 and 1866 all of the reserves and farms, with the exception of Round Valley and Tule River, were extinguished or sold.”).

154. See *Indian Affairs: Laws and Treaties* vol. I, 824–29 (Charles J. Kappler ed., Govt. Printing. Off. 1904).

155. The land set aside as the present Tule River Reservation is not the same land that was set aside as the original Tule River Reservation in the 1850s. The original reservation, comprising 1,280 acres was established in 1856, but was abandoned in the 1870s. The current reservation was established by a January 1873 executive order and then enlarged by another executive order in November 1873, but an 1878 executive order reduced the reservation back to its January 1873 acreage. Tule River Tribe, *Historical Overview*, [http://www.tulrivertribe-bnsn.gov/Historical Overview.htm](http://www.tulrivertribe-bnsn.gov/Historical%20Overview.htm) (accessed Apr. 19, 2009); see also Castillo, *supra* n. 12, at 114; Kappler, *supra* n. 154, at 830–31.

156. The Klamath River Reservation, more commonly referred to as the Yurok Reservation, was established as a farm in 1855. Yurok, *History/Culture*, <http://www.yuroktribe.org/culture/culture.htm> (accessed Apr. 19, 2009). In 1891, the Klamath River Reservation was added to the Hoopa Valley Reservation via an executive order. *E.g. Mattz v. Arnett*, 412 U.S. 481, 493–94 (1973) (discussing Klamath River addition to Hoopa Valley Reservation through executive order); *Donnelly v. U.S.*, 228 U.S. 243, 253 (1913). See also Kappler, *supra* n. 154, at 815. In 1988, the Hoopa-Yurok Settlement Act (re)partitioned the Hoopa Valley Reservation into the Yurok Reservation and the Hoopa Valley Reservation. Pub. L. No. 100-580, 102 Stat. 2924 (1988).

The Hoopa Valley Reservation had been formally established under an 1876 executive order that was

### C. *Indian Country in Post-Civil War Southern California*

After the abandonment of the farms, the trajectory of Indian country in California would again change course and be shaped mostly by events in the southern part of the state over the next few decades.<sup>157</sup> The failure of government officials and institutions to follow the provisions of the 1850 California Act, the 1851 Act, or the 1853 Act that protected Indian lands meant that Indians in the south, like those elsewhere in the state, found themselves having to defend their lands, and sometimes their lives, against settlers. Oftentimes, these were lands that had been formally set apart from settlement under Mexican and Spanish law. Though Indians in southern California experienced significant loss of land in the middle and late 1800s, some land areas were set aside by the U.S. government. These land areas are now recognized as “Indian country” under 18 U.S.C. § 1151.

#### 1. Executive Order Reservations (Round 1)

After the negotiation of the treaties in the early 1850s, the federal government’s first formal acts to set aside land in southern California as Indian country were taken in a series of Presidential executive orders in the 1870s. These executive orders set aside small land areas, often surrounding Indian villages, as Indian reservations. While these reservations did include some of the lands that under Mexico and Spain were recognized as belonging to the Indians living there and set apart from settlement in Mexican and Spanish land grants, the new settlers wound up with most of the better lands.

The first executive order was passed in 1870 and set aside some of the lands of the Indian pueblos of Pala and San Pasqual along with other lands as the San Pasqual Pala Reservation, but it was withdrawn in 1871 after local citizens, their Congressmen, and San Diego newspapers lobbied to have the order revoked.<sup>158</sup> A new executive order was issued to set aside some of the lands at Pala as a reservation in 1875, after the *San Diego Union-Tribune* changed its longstanding position and “without explanation, endorsed a

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issued pursuant to an 1864 congressional act passed, at least in part, in response to military resistance by the Hupa. See Pub. L. No. 38-48, 13 Stat. 39 (1864); Forbes, *supra* n. 12, at 65 (“[I]n 1864 the Hoopa Valley Reservation was established to appease natives who had been at war for five years . . . .”); see also Castillo, *supra* n. 12, at 112; cf. Ltr. from C. E. Kelsey, Spec. Agent for the Cal. Indians, to Commr. Indian Affairs, *Northern Calif. Indians* 1 (Oct. 4, 1913) (copy in Natl. Archives, Rec. Group 75, C. Classified Files (1907–1939)) (discussing “a treaty . . . made with the Hoopas and Lower Klamaths by which these Indians were confirmed in the possession of their lands”). Though the Supreme Court has suggested that “the Tule River, Round Valley, and Mission Reservations” were established under the 1864 Act, there is no mention of the 1864 Act in the executive orders establishing these other reservations, as there is in the 1876 order establishing the Hoopa Valley Reservation. See Kappler, *supra* n. 154, at 815 (citing June 23, 1876 Executive Order).

157. Though most of the discussion here focuses on Indian country set aside in the late 1800s for “so-called Mission Indians” in southern California, lands further east in California, including lands along the Colorado River, were also set aside as reservations in the 1860s, 1870s, and 1880s. See *infra* n. 251 (discussing establishment of the Colorado River Indian Reservation (1865), Fort Mojave Indian Reservation (1870), Fort Yuma (Quechan) Reservation (1884), Chemehuevi Reservation (1907)).

158. Carrico, *supra* n. 4, at 65–66; Castillo, *supra* n. 12, at 114; Forbes, *supra* n. 12, at 61; Jackson, *supra* n. 9, at 86–88; Shipek, *supra* n. 12, at 35. Onell R. Soto, *Tribe Denies 50 Members Profits from Casinos: San Pasqual Band Says Some Lack Indian Blood*, *San Diego Union-Trib.* A1 (Jun. 28, 2008). This first reservation established at San Pasqual and Pala (a map of which can be seen in Carrico *supra* n. 4, at 64) “exclude[d] the portions of Mexican rancho grants within them . . . [and included] villages already in these locations—Pala, San Pasqual, and parts of Rincon and Mesa Grande.” Shipek, *supra* n. 12, at 35. The villages of Pala and San Pasqual had been recognized as Indian pueblos under Mexican rule. See *supra* nn. 48, 50, 52–56.



plan for a reservation system in San Diego County.”<sup>159</sup> Meanwhile, settlers had forced the San Pasqual Indians from their village following the 1871 executive order’s revocation,<sup>160</sup> and the land to which they had moved was not set aside for them until 1891.<sup>161</sup>

Other executive orders were issued between 1875 and 1877 to “create[] 13 separate reservations for the so-called Mission Indians.”<sup>162</sup> Among these reservations were those at Potrero (including Rincon, Gapiche, and La Joya), Coahuila (Cahuilla), Capitan Grande, Santa Ysabel (including Mesa Grande), Pala, Agua Caliente (Warner’s Hot Springs), Sycuan (Sequan), Minaja (Inaja), and Cosmit.<sup>163</sup> Interesting for purposes of this article’s analysis is the fact that historical documents referring to Capitan Grande, an area near San Diego to which a group of Indians was moved under military orders in 1853 and which then became an executive order reservation in 1876,<sup>164</sup> use the words “the Capitan Grande Rancheria” and “the Indians belonging to said Capitan Grande Rancheria,”<sup>165</sup> indicating that the words “rancheria” and “reservation” were used interchangeably to refer to these lands that were formally set aside as Indian country.<sup>166</sup> (Descendants from the Capitan Grande Reservation now live on the Barona and Viejas reservations, which were established next to Capitan Grande in the early 1900s following

159. Carrico, *supra* n. 4, at 83; Seymour, *supra* n. 6, at 66–67. 320 acres were set aside in the 1875 executive order, but subsequent orders of 1877 and 1882 reduced the reservation to 160 acres. *Id.* A number of acres were added to the reservation in 1903. Shipek, *supra* n. 12, at 44. *See infra* n. 163. *Cf.* Carrico, *supra* n. 4, at 83 (“For over twenty years, as Indians steadily lost acre after acre of prime land to Anglo squatters and settlers, the Union maintained a strong anti-reservation stance through editorials laced with the white man’s Manifest Destiny.”).

160. *See* Soto, *supra* n. 158. Lands in the San Pasqual Valley (east of what is now Escondido) from which these Indians were removed now make up part of the San Diego Wild Animal Park. *See id.*

161. *See infra* nn. 183–86 and accompanying text.

162. Castillo, *supra* n. 12, at 114; *accord* Seymour, *supra* n. 6, at 68 (listing seventeen reservations set aside under executive orders of 1875 and 1876 and noting that “[s]ome of them were from time to time altered or cancelled, while others were added”). Castillo uses the term “so-called Mission Indians” in reference to reservations made for the Ipai and Tipai, Luiseño, Serrano, Cupeño, and Cahuilla and says that “some of these peoples were never really missionized.” Castillo, *supra* n. 12, at 114.

163. Carrico, *supra* n. 4, at 84–85 (showing a map of these reservations); Shipek, *supra* n. 12, at 36, app. B, 163–64. Many of these reservations would subsequently experience changes in their boundaries and influxes of white settlers illegally squatting on their lands, and would be (mis)surveyed in such a way as to exclude not only many of the better land areas, but also Indians’ villages, orchards, fields, and grazing areas. *See* Carrico, *supra* n. 4, at 84, 89; Jackson & Kinney, *supra* n. 61, at 494 (“as usual, the villages were outside of the lines”); Shipek, *supra* n. 12, at app. B, 164.

The rancho owner of Warner’s Hot Springs, for example, “had the rancho resurveyed several times until he managed to include th[e] land [set aside by the 1875 executive order] inside his grant boundaries.” Shipek, *supra* n. 12, at app. B, 164 n. 3. Then, “[o]n January 17, 1880, President Rutherford B. Hayes issued an executive order, canceling the almost one thousand-acre reservation at Agua Caliente (Warner Hot Springs) that had been set aside in 1887 and removing nearly two thousand acres of the Santa Ysabel Reservation established in 1875.” Carrico, *supra* n. 4, at 89 (footnote omitted). Following the U.S. Supreme Court’s decision in *Barker v. Harvey*, Indians were removed from their villages on what had been the reservation at Warner’s Hot Springs.

164. Jackson & Kinney, *supra* n. 61, at 497.

165. Jackson & Kinney, *supra* n. 61, at 499 (reproducing affidavit of Anthony D. Ubach and deposition of J.S. Manasse in the matter of the Capitan Grande Indians and the application of Daniel Isham, James Meade, Mary A. Taylor, and Charles Hensley).

166. A more recent commentator also shows us the interchangeability of terms used to refer to Indian country in California when she notes that “[l]and for many lesser-known rancherias was not included in the[se] . . . executive order[s], and the loss of Indian farms and grazing lands continued.” Shipek, *supra* n. 12, at 37.

a forced removal.)<sup>167</sup>

Another five reservations were established by executive order for “Mission Indians” in the 1880s at Rincon (1881), Pechanga (1882), Mesa Grande (1883), San Jacinto (Soboba) (1883), and Los Coyotes (1889).<sup>168</sup> The reservation at Pechanga was set aside for Luiseño Indians who were removed from lands in the Temecula Valley in 1875 by a San Diego sheriff and his posse after a San Francisco court issued an ejectment order against these Indians without their knowledge.<sup>169</sup> The reservation at Soboba, on the other hand, was set aside after the Indians living there won a legal battle to remain on their lands.

The establishment of the reservation at Soboba is significant because it is perhaps the only instance where land recognized as Indian country under Mexican and Spanish law was set aside as a reservation by the United States after the Indians who lived there won a court case to defend against their removal.<sup>170</sup> The case, *Byrne v. Alas*, is also significant because it is the only case of which I am aware where a California or United States court correctly interpreted and applied the law regarding the property rights of Indians in rancho lands. In *Byrne*, the California Supreme Court held that Indian land rights continued in lands granted to Mexican citizens and later confirmed by the United States, notwithstanding the fact that Indians did not appear before or present any papers to the land commission established under the 1851 Act.<sup>171</sup> As a result of the court’s

167. Some 40 years after the Capitan Grande Reservation was formally set aside, Kumeyaay Indians living there were removed in the 1930s to make for a reservoir to supply water to the City of San Diego. See Shipek, *supra* n. 12, at 71–72; Steve Newcomb, *The Moral Stain of the Capitan Grande Indian Removal*, Indian Country Today 5 (Oct. 1 2008). After the removal, some of these Kumeyaay moved to the Viejas Indian Reservation (the Baron Long Reservation), which was purchased with monies paid by the City of San Diego for the lands taken for the reservoir and established under a 1934 executive order, and members of the Barona Band of Mission Indians used those monies to buy the Barona Ranch, which today is the Barona Indian Reservation. See Shipek, *supra* n. 12, at 71–72, 188, 290.

168. Seymour, *supra* n. 6, at 99–101. Parts of Rincon and Mesa Grande were included among the lands set aside as the San Pasqual Pala Reservation, but the executive order establishing this reservation had been revoked. See *supra* n. 158 and accompanying text.

169. Carrico, *supra* n. 4, at 78; Jackson & Kinney, *supra* n. 61, at 504–05; Tod Leonard, *Pechanga Course—A Journey Completed; Memorable Layout Offers Scenery and History*, San Diego Union-Trib. D4 (Nov. 18, 2008). The Luiseños had reserved the lands from which they were evicted, and on which they had lived “from time immemorial,” in the 1853 Treaty of Temecula. Jackson & Kinney, *supra* n. 61, at 504–05.

170. The case involving Soboba, *Byrne v. Alas*, was a test case brought in hopes of establishing a precedent recognizing the rights of Indians whose land rights had been guaranteed in grants issued to individual Mexican citizens. 16 P. at 526. After the land around the village of Soboba had been re-surveyed to include the village, the stream, and the Indians’ farms, a patent was issued to M.R. Byrnes (a purchaser from the original grantee), a San Bernardino merchant who wanted to sell the lands as part of a “colony scheme[.]” and was threatening to remove the Indians from their village, which occupied some 200 acres of choice lands. Jackson & Kinney, *supra* n. 61, at 479; Jackson, *supra* n. 9, at 93. At the urging and recommendation of Helen Hunt Jackson and Abbot Kinney, the United States appointed a law firm to argue the Indians’ case, but refused to compensate them. Garrett et al., *supra* n. 96, at 2. There was apparently an agreement by counsel on both sides to stay litigation pending negotiations, but the case was brought to trial, where a default judgment was rendered against the Indians because Mr. Wells made no appearance. Seymour, *supra* n. 6, at 41. The case was then restored to the calendar, and the United States appointed Shirley C. Ward to serve as special counsel for these and other Indians, but again without compensation. Painter, *1887 Visit*, *supra* n. 96, at 5; Seymour, *supra* n. 6, at 41–42. The Indian Rights Association then put up a security bond to secure the appeal and, with the “special gift of a Boston lady,” was able to guarantee Mr. Ward’s expenses, at which time he took up the case and brought it to trial. Garrett, et al., *supra* n. 96, at 2–3.

171. After discussing at some length Spanish and Mexican law and acknowledging that it afforded a great deal more protection for Indian land rights than did Anglo common law, the court held that Indians’ rights were not forfeited because they did not go before the land commission established under the 1851 Act. *Byrne*, 74

holding, the lands comprising the village at Soboba, lands to which Indian title was clearly recognized under Spanish and Mexican law, were set aside as Indian country by the federal government. Had the law been applied properly in other cases,<sup>172</sup> much more of California, especially in the southern part of the state, would be “Indian country” under 18 U.S.C. § 1151.

## 2. The Smiley Commission and More Executive Order Reservations (Round 2)

While the people at Soboba were able to defend their lands, removals continued elsewhere in southern California throughout the 1880s. In 1891, after more than two decades of receiving reports concerning white settlers who were filing claims upon Indians’ lands and rancho grantees who either had evicted or were threatening to evict Indians from their villages on rancho grants, Congress finally took action in the form of the Mission Indian Relief Act,<sup>173</sup> under which a Commission (named the Smiley Commission after its head Albert K. Smiley) was appointed to investigate conditions in southern California and select lands to be set aside as Indian reservations.<sup>174</sup>

Based on the Commission’s report to Congress,<sup>175</sup> ten reservations were established by executive order.<sup>176</sup> These reservations were established at Santa Rosa, Twenty-Nine Palms, Ramona, San Manuel, Augustine, Campo, Manzanita, La Posta, Laguna, and Cuyapipe (or Long Cañon).<sup>177</sup> The lands set aside, however, like those set

Cal. at 628, 631–35. Rather, according to the court, “[t]he [Commission’s] confirmation of the grant to [the original Mexican grantee] was also a confirmation of [Indians’] rights” and “[the grantee] took all he was entitled to, and no more,—the legal title” because “[t]hat was all the United States could give him.” *Id.* at 527. The court explicitly held that “*the rights of the Indians were preserved without presenting their claims*” and “[t]he patentee took the title in fee, *subject to the Indian right of occupancy.*” *Id.* (emphasis added).

172. See Jackson & Kinney, *supra* n. 61, at 471 (“In instances in which the Indians themselves have endeavored to get redress through the courts, they have in the majority of cases—to the shame of the Southern California bar be it spoken—been egregiously cheated.”); see also *supra* n. 169 and accompanying text (discussing Pechanga); *infra* n. 183 and accompanying text (discussing San Pasqual); *infra* pt. (III)(B)(3) (discussing Warner’s Ranch).

173. An Act for the Relief of the Mission Indians in the State of California, 26 Stat. 712 (1891). See Burgess, *supra* n. 59, at 7 (“Several bills were introduced into Congress in the mid-1880s for the relief of the Mission Indian, but they were defeated.”). Various agents sent by the United States to investigate conditions in Southern California had also made reports (which were relayed to Congress) of these same happenings. See e.g. Ames, *supra* n. 54; Jackson & Kinney, *supra* n. 61; Wetmore, *supra* n. 15.

174. See Burgess, *supra* n. 59, at 7. The act also provided for compensation to be paid to “[w]hite settlers who might need to be removed from Indian land” and that the reservations in southern California were to be allotted to individuals and families. *Id.* at 7–8; accord Castillo, *supra* n. 12, at 116. One commentator has noted that “[t]he commissioners believed that the Mission Indians wanted more land than could possibly be obtained for them at that late date” and that, upon the recommendations of the Commission, some reservations that had already been established were reduced in size. Burgess, *supra* n. 59, at 13, 33–34; accord Shipek, *supra* n. 12, at 40–41, 43 (noting that the Smiley Commission did not even bother to seek Congressional approval for purchases of rancho lands on which Indian villages existed because of the “outrageous prices” demanded by grant owners and did not visit “[s]ome Indian groups . . . known to the Mission Indian agents,” including “the San Juan Capistrano Indians” and “the Mission San Luis Rey Group.”).

175. H.R. Exec. Doc. 52-96 (Jan. 26, 1892).

176. Seymour, *supra* n. 6, at 101; but cf. Castillo, *supra* n. 12, at 116 (stating that the Mission Indian Relief Act was “responsible for the purchase of nearly all the 17 reservations established during this period [in the 1890s]” and that “[f]ourteen of the 17 reservations established were in the Mission Agency of southern California”).

177. Seymour, *supra* n. 6, at 101–02. “Between 1892 and 1910, officials of the Office of Indian Affairs . . . gradually surveyed the lands reserved by the Smiley Commission and then issued trust patents for the reservations . . .” Shipek, *supra* n. 12, at 40. The Ramona Reservation, in Riverside County, is also known as the Ramona Village. 73 Fed. Reg. 18553, 18555 (Apr. 4, 2008) (listing “Ramona Band or Village of Cahulla

aside in the other executive orders, were mostly desert and mountain land.<sup>178</sup> As a result, “[m]ost southern California reservations were barren and unable to support their populations.”<sup>179</sup>

The only rancho lands purchased by the Smiley Commission were at Pauma,<sup>180</sup> a traditional Luiseño village that is now part of the Pauma Reservation (or Pauma-Yuima Reservation) in northeastern San Diego County.<sup>181</sup> The “land was purchased from the Catholic bishop of the diocese, the owner of the rancho grant” at that time, and the “purchase included three plots of land and water rights.”<sup>182</sup>

Also established in 1891, though outside the auspices of the Smiley Commission, was the present San Pasqual Reservation. These lands were set aside for the Indians who in the 1870s had been driven from their village in the San Pasqual Valley,<sup>183</sup> which had been recognized as an Indian pueblo under Mexico<sup>184</sup> and was also known as a rancheria.<sup>185</sup> Thus San Pasqual offers an example of where pueblo and rancheria have

Mission Indians of California”).

178. See Burgess, *supra* n. 59, at 14 (“Such adjectives as ‘barren,’ [‘] ‘worthless,’ and ‘inaccessible’ are all liberally sprinkled throughout the [Commission’s] report.”).

179. Castillo, *supra* n. 12, at 116.

180. Shipek, *supra* n. 12, at 43. As noted, the Mission Indian Relief Act provided for compensation to be paid to white settlers “who might need to be removed from Indian land.” Burgess, *supra* n. 59, at 7. “[T]he Smiley Commission had received instructions to reserve land that the bands actually occupied and used wherever the lands were *unless* the land was already claimed by a non-Indian.” Shipek, *supra* n. 12, at 103 (emphasis added). These instructions perhaps reinforced the belief of the Commissioners that Congress would not approve purchases of rancho lands on which Indian villages existed (per the terms of the original Mexican land grants) “at the outrageous prices” demanded by the rancho owners. *Id.* at 43; see also Burgess, *supra* n. 59, at 13.

181. Casino Pauma, *supra* n. 50.

182. Shipek, *supra* n. 12, at 43. A dispute regarding title to the land at and around Pauma had apparently been ongoing since the days of Mexican rule. Shipek, for example, discussed an 1843 “*expediente*” to the Mexican governor requesting that the Indians of Paome (Pauma) receive “a legal grant of the lands upon which they had their livestock, fruit trees, and vines.” *Id.* at 27–28, 42 (discussing lawsuit filed on behalf of the Pauma Band in response to ejection proceedings brought by the grant owner). By 1883, the Catholic Church held the grant and was offering to sell it so that the Indians could stay there. Jackson & Kinney, *supra* n. 61, at 473–74 (referring to “the Pauma Ranch, now owned by Bishop Mora, of Los Angeles”); *id.* at 512 (excerpting May 14, 1883 letter from Bishop Francis Mora, offering to sell the three tracts of land at Pauma for \$31,000). See Shipek, *supra* n. 12, at 42 (mentioning countersuit filed on behalf of the Pauma Band to defend against eviction proceeding).

183. The San Pasqual valley had been set aside as an Indian reservation in 1870, at which time there were “between two and three hundred Indians” living there, some of whom were “members of the original pueblo established . . . in 1835.” Jackson, *supra* n. 9, at 86. This executive order was revoked in 1871 following “an outburst of virtuous indignation all along the coast.” *Id.* The “Indians were [then] driven into the hills” by white settlers who occupied their lands and in 1891, “were granted a reservation of 2000 acres.” Seymour, *supra* n. 6, at 67. See also Farris, *supra* n. 35, at 117 (describing the Pueblo of San Pascual as having been “overwhelmed by free-booters of various nationalities following the American takeover in California”); *id.* at 127, 127 n. 48 (describing removal of Indians from San Pasqual by the San Diego County deputy sheriff after the San Diego Superior Court, which excluded the testimony of the Indian defendants, issued a writ of ejection).

184. See *supra* nn. 48, 50, 52–56, 158 (discussing San Pasqual as an Indian pueblo).

185. Carrico, *supra* n. 4, at 21 (footnote omitted) (mentioning Indian agent correspondence from the 1860s that referred to San Pasqual as “the Rancheria”); see generally Rustvold, *supra* n. 55. The land set aside as the San Pasqual Reservation in 1891 “was considered so inhospitable” that only one family moved to the reservation at the time. Edward Sifuentes, *San Pasqual Tribe Could Expel about 80 Members*, N. Country Times (July 19, 2008) (available at <http://www.nctimes.com/articles/2008/07/19/news/sandiego/z78b94cf736d0586d882574880075ea73.txt>); accord Shipek, *supra* n. 12, at 40 (“[T]he San Pasqual reservation was located . . . where no San Pasqual Indians lived and that was one township north of the land on which band members sought refuge after losing the San Pasqual Pueblo land.”).

been used alongside reservation to refer to lands that were set aside for a particular group of Indians under both the Mexican and the United States governments.

And San Pasqual's history illustrates not just the interchangeability of the terms used to refer California Indian country, but also the circumstantial nature of the trajectory of Indian country in California. Had the United States government protected the rights of the pueblo that was established in 1835, what is now the San Diego Wild Animal Park might still be "Indian country."<sup>186</sup> On the other hand, no land at all could have been set aside for the Indians from San Pasqual (as happened with other Indians in southern California, including some who lived at pueblos), in which case the land comprising the current reservation would not be "Indian country."

### 3. Removal from the Villages at Warner's Ranch

One of the most infamous illustrations of the manner in which circumstances influenced the scope of Indian country in California (i.e., of the circumstantial trajectory of Indian country in California) can be seen in the case of—and the removal of Indians from—the villages of Cupa (also known as Agua Caliente), Los Tules, La Puerta de San Jose, Puerta Cruz, Buena Vista, Mataguay, Puerta Noria (also known as Puerta Ignoria or Janut), San Jose (or Kwawheer), and Tawhee in Cupa territory around Lake Henshaw in San Diego County. The Cupa (or Cupeño) had "always been [t]here" and "always lived [t]here,"<sup>187</sup> and small groups Luiseños and Kumeyaays had come to settle in some of the villages in the mid-1800s.<sup>188</sup>

These villages were on lands for which various Mexican grants had been issued in the 1830s and 1840s.<sup>189</sup> Since one of the grants was issued to a Juan José (or J.J.) Warner, the area became known in English as Warner's Hot Springs or Warner's Ranch. The Indians' land rights were recognized and safeguarded in these grants,<sup>190</sup> and the

186. *Cf.* Soto *supra* n. 158 (noting that the lands in the San Pasqual Valley, east of what is now Escondido, from which the San Pasqual Indians were removed now make up part of the San Diego Wild Animal Park).

187. Robinson, *supra* n. 10, at 21 (quoting Cecilio Blacktooth, Captain of Agua Caliente).

188. Although the lands were within Cupa aboriginal territory, Luiseños and Kumeyaays comprised the majority of the population in some villages. *See* Shipek, *supra* n. 12, at 43; *see also* Hyer, *supra* n. 12, at 112 ("Sometime between the 1830s and 1865, Cupeños permitted a few small groups of Luiseños and Kumeyaays to settle on some of the[ . . . ] lands."). "While Luiseños primarily lived at Puerta de la Cruz and Puerta Chiquita, Kumeyaays mainly dwelled at San José and Mataguay. Even those these Luiseños and Kumeyaays were not indigenous to the San José Valley, they nevertheless cherished the lands granted them by the Cupeños." *Id.* (footnote omitted).

189. The villages of Cupa (or Agua Caliente), Los Tules, La Puerta de San Jose, and Puerta La Cruz were included within Rancho San José del Valle, and those of Buena Vista, Mataguay, Puerta Noria (also known as Puerta Ignoria or Janut), San Jose (or Kwawheer), and Tawhee within Rancho Valle de San José. Seymour, *supra* n. 6, at 44 (noting that Helen Hunt Jackson recorded five Indian villages in 1883: Agua Caliente, Puerta de la Cruz, Puerta de San Jose, San Jose, and Mataguay); Shipek, *supra* n. 12, at 41 (showing a map of villages and rancho grant boundaries). According to Joel Hyer, "[a]t the commencement of the twentieth century, five Indian villages lay in the San José Valley . . . . By 1902, approximately 179 Native Americans resided in five villages: Agua Caliente, Puerta de la Cruz, Puerta Chiquita, San José, and Mataguay." Hyer, *supra* n. 12, at 112. The grant for Rancho Valle de San José was issued to Silvestre de Portilla in 1836, and the grant for the Rancho San José del Valle was issued to José Antonio Pico in 1840. *Id.* at 32–33. The grantees "were not welcomed guests but were trespassers." *Id.* at 42. Charles Seymour, writing in 1906, described Puerta Chiquita as a "neighboring village[ . . . ] on certain property belonging to Governor Gage." Seymour, *supra* n. 6, at 44. Joel Hyer, Florence Shipek, and the maps found in their books indicate that Puerta Chiquita lay within the Rancho Valle de San José grant. *See* Hyer, *supra* n. 12, at 125; *see also* Shipek, *supra* n. 12, at 41.

190. *See e.g.* Harvey, 58 P. at 692–93 (quoting from grant).

villages were also on lands that had been set aside under one of the 18 unratified treaties.<sup>191</sup> The lands were again set aside under an 1875 executive order, which established the 1,120-acre Agua Caliente Reservation,<sup>192</sup> but this reservation was cancelled in 1880 in part because John G. Downey, a former governor of California, claimed title to the lands.<sup>193</sup>

After the reservation was cancelled, ex-Governor Downey, who held title as a successor to the original Mexican grantees,<sup>194</sup> began threatening the Cupeños, Luiseños, and Kumeyaays with removal, and he and his heirs eventually brought suit for eviction in San Diego County Superior Court.<sup>195</sup> The Cupeños produced evidence showing that they had always been on the lands, and several elders testified that they had lived in the villages “for their entire lives.”<sup>196</sup> Downey’s heirs objected that “the evidence offered was incompetent, irrelevant, and immaterial, and that the patent was conclusive as to the title of the patentee,” and the trial court excluded the Cupeños’ evidence and testimony.<sup>197</sup> Judgment was then rendered in favor of Downey’s heirs, and, after the Indians’ motion for a new trial was denied, the case was appealed to the California Supreme Court.<sup>198</sup>

Because evidence showing longstanding and continuous Indian presence on the lands did not make it into the record, both the California and United States Supreme Courts were able to find that the Indians had no rights in the lands because the lands were “abandoned” when the original Mexican grants were issued.<sup>199</sup> The California

191. In January of 1852, just weeks after they had “expelled Americans from the San José Valley,” the Cupeños, along with Luiseños and Cahuillas and other peoples, negotiated and signed the Treaty of Temecula. Hyer, *supra* n. 12, at 67–68. The lands of the Cupeños, however, were mistakenly set aside by O.M. Wozencraft “as part of a Kumeyaay reservation . . . established in the Treaty of Santa Ysabel” that same month. *Id.* at 68 (footnote omitted). See also Ltr., Kelsey, *supra* n. 156, at 2 (quoting “Treaty ‘L’ [the Treaty of Santa Ysabel] contained Cuyamaca, Valle da San Felipe, San Jose del Valle and Valle de San Jose, the latter two constituting Warner’s Ranch.”). After the treaties were rejected, “Americans traveling through the homelands of . . . Cupeños . . . [and other signatories] became a frequent, though unwelcome, sight.” Hyer, *supra* n. 12, at 74.

192. See Seymour, *supra* n. 6, at 44; Shipek, *supra* n. 12, at 36, app. B, 163–64; see also Carrico, *supra* n. 4, at 84–85; Hyer, *supra* n. 12, at 94.

193. Hyer, *supra* n. 12, at 94; see Carrico, *supra* n. 4, at 89; cf. Shipek, *supra* n. 12, at app. B, 164 n. 3 (“The rancho owner [of Warner’s Hot Springs] had the rancho resurveyed several times until he managed to include this land [set aside by executive order as reservation] inside his grant boundaries.”).

194. See Kathleen Flanigan, *The Ranch House at Warner’s*, 42 J. San Diego History (1996) (available at <http://www.sandiegohistory.org/journal/96fall/warners.htm>). Downey and his heirs “claimed the property under two U.S. patents, based on [the] three Mexican grants.” Hyer, *supra* n. 12, at 109 (footnote omitted) (quoting Frank Lewis, California Legislator). There was “a compendium of documents resulting from an adjudicated conclusion of a long legal battle between the successor claimants of the Portilla grant of 1836 and the Juan José Warner grant of 1844.” Flanigan, *supra* n. 194 (footnote omitted).

195. Hyer, *supra* n. 12, at 108; Seymour, *supra* n. 6, at 45.

196. Hyer, *supra* n. 12, at 108 (footnote omitted); accord Harvey, 58 P. at 693–94.

197. Harvey, 58 P. at 694.

198. *Id.*

199. See *id.* at 692–95, 698; Barker, 181 U.S. at 499. The dissenting opinion from the California Supreme Court noted the trial court’s exclusion of evidence showing that the Cupa were in fact “established and living upon some, at least, of the lands in controversy, long before the date of the Warner grant.” Harvey, 58 P. at 698 (Beatty, C.J., dissenting).

Conventional legal wisdom (mis)understands these cases as holding that aboriginal title was extinguished in California because Indians did not go before the land commission established under the 1851 Act. See *supra* n. 140 (discussing the prevailing misunderstanding that holds that Indians were required to go before the commission in order to preserve their rights). However, the opinions’ holding turned on the finding

Supreme Court even characterized the Cupa as “mere strangers to the record.”<sup>200</sup>

After the United States Supreme Court issued its decision in *Barker v. Harvey* in 1901,<sup>201</sup> some effort was apparently made to buy the lands around the villages from the rancho grant owners, but then a special commission was appointed to locate other lands for the people from Warner’s Ranch and the neighboring San Felipe Rancho.<sup>202</sup> Land near the already-existing reservation at Pala was purchased in 1903,<sup>203</sup> and the Indians at Warner’s Ranch were forced to leave their villages at gunpoint.<sup>204</sup>

According to Florence Shipek,

The purchase of Pala and the forced migration of various villages essentially closed the period during which the federal government imposed its system of restricted land ownership on the Southern California Indians. The only exceptions were the purchases of some small pieces of slightly better agricultural land on the fringe of some reservations and the purchase of more adequate farmland for the Campo Band in about 1910 and small pieces at other dates for a few other reservations.<sup>205</sup>

Most of the focus on and activity around Indian country in California shifted to central and northern California in the early 1900s when the unratified treaties came back to the public’s attention and the federal government set aside more than 80 rancherias. Before turning to discuss the establishment of these rancherias, however, I examine the establishment of two other reservations in southern California.

that that the lands were abandoned at the time the Mexican grants were issued. *See Barker*, 181 U.S. at 499; *Harvey*, 58 P. at 692–95, 698; *see also* Indian Rights Assn., *The Pressing Needs of the Warner Ranch and Other Mission Indians in Southern California* 2–3 (1901) (noting that the Supreme Court found that “there was sufficient evidence to sustain the finding that as a matter of fact the Indians had abandoned their land before the cession by the Mexican government, and the only right, if any, was in the San Diego Mission”). “The Court’s holding was influenced strongly by the specific factual circumstances . . . under which admissible evidence suggested that the Indians had abandoned their occupancy of the claimed territory.” Klein, *supra* n. 140, at 224 (footnote omitted). *See Cramer*, 261 U.S. at 231 (noting that the 1851 Act “plainly ha[d] no application” to Indians holding their lands under aboriginal title).

200. *Harvey*, 58 P. at 698.

201. 181 U.S. 481.

202. Shipek, *supra* n. 12, at 43–44. According to Shipek:

In the case of villages on Warner’s Rancho (Cupeño, San Luiseño, and Kumeyaay), Mataguay Rancho (Kumeyaay), and San Felipe Rancho (Kumeyaay), the owners were asking an . . . inflated price for the entire ranchos and refused to sell only the portions used and occupied by the Indians . . . Therefore a special commission was appointed to examine lands offered to the government and charged with the selection of the best location for the government to purchase the lands for the Indians about to be evicted from these two ranchos.

*Id.*

203. Shipek, *supra* n. 12, at 44. 3,353 acres were added to the Pala Reservation, which had been an Indian pueblo under Mexico and then set aside as a reservation by an 1870 executive order that was rescinded in 1871 and then again set aside by executive order in 1875, after which time its boundaries had been changed. *See id.* (3,438 acres); H.R. Doc. 58-5 pt. 1 at 75–76 (1904) (Annual Report of the Commissioner of Indian Affairs); Hyer, *supra* n. 12, at 112–28.

204. For a contemporaneous account of the removal of the Indians whose lands were the subject of the litigation in *Harvey v. Barker* and others removed from neighboring ranchos as a result of the United States Supreme Court’s upholding the decision of the California Supreme Court, see generally Hyer, *supra* n. 12, at 113–28; Shipek, *supra* n. 12, at 42–45; *Turning a New Leaf*, 18 Out W. 441 (Charles F. Lummis ed., 1903). The descendants of those removed from Cupa following the *Harvey v. Barker* decision have recently been in talks to buy back their ancestral land. Onell R. Soto, *Pala Tribe Bids on Warner Springs Ranch*, San Diego Union-Trib. NI-1 (Jan. 8, 2009) (available at <http://www3.signonsandiego.com/stories/2009/jan/08/1mc8warner205328-pala-tribe-bids-warner-springs-ra/>).

205. Shipek, *supra* n. 12, at 45 (footnote omitted).

## 4. Other Southern California Indian Country

After the Smiley Commission concluded its work, some “scattered, small southern Kumeyaay groups [still] did not have lands reserved for them specifically.”<sup>206</sup> The same was true for Indian groups not visited by the Smiley Commission.<sup>207</sup>

One of these Kumeyaay villages, Jamul, was eventually set aside as Indian country, but not until the early 1980s, after the Jamul Band of Mission Indians was formally recognized by the United States government.<sup>208</sup> The Jamul Indian Village, a “small remaining portion of [the Jamul Band’s] aboriginal territory,” consists of land, which was part of a Mexican land grant (Rancho Jamul) and is now held in trust by the United States.<sup>209</sup>

Jamul is one of two areas of Indian country in southern California that Florence Shippek categorized as “[f]ormer [p]atronage [t]enure” since the “patronage of the Catholic church” played an instrumental role in setting the land aside.<sup>210</sup> The other is Santa Ynez in Santa Barbara County,<sup>211</sup> where a satellite mission called Santa Inés

206. Shippek, *supra* n. 12, at 40. Included among these were “Indian people near Mission San Diego, in Jamul, El Cajon Valley, Spring Valley, and in many small valleys of southern San Diego County.” *Id.* Shippek says that “Smiley’s intention was that they would move onto nearby large reservations, and some effort was apparently made to convince them to do so, but it was unsuccessful.” *Id.* (citations omitted).

207. “Some Indian groups, although known to the Mission Indian agents, had no provisions made for them, and no evidence exists that the Smiley Commission members visited such groups, . . . [which included] the San Juan Capistrano Indians . . . [and] the Mission San Luis Rey group . . .” Shippek, *supra* n. 12, at 40–41.

208. Chet Barfield, *Jamul Indians Divided on Tribal Membership: Eligibility Battles Are Nothing New to Tribes*, San Diego Union-Trib. B-4: S, C (Sept. 23, 2006) (available at <http://www.signonsandiego.com/news/metro/20060923-9999-7m23jamul.html>); see James P. Sweeney & Onell R. Soto, *Jamul’s Plan to Build a Casino May Not Stand Test of History*, San Diego Union-Trib. A1 (Mar. 30, 2009) but cf. Shippek, *supra* n. 12, at 104 (“[T]he band obtained federal recognition [via an act of Congress] in 1976.”).

209. Shippek, *supra* n. 12, at 104. According to Shippek,

Jamul was the only nonreservation village or band with land that survived until recently. . . . [The Smiley Commission] members . . . felt that they had neither the budget nor the time to locate the many small bands scattered throughout the southern part of [San Diego County]. The history of these small remnant bands is varied. A few persons slowly assimilated; some went across the border into Baja California, some married into other reservations, and some joined Jamul.

*Id.* at 103 (citation omitted). See also Suarez, *supra* n. 29, at 117 (noting that Delfina Cuero, whose family lived near El Cajon and Jamul and other places, describes in her biography how her and other families lived, worked, and traveled between these areas after they were removed from their lands at Mission Valley, which “their families and ancestors had always lived upon” (footnote omitted)).

210. Shippek, *supra* n. 12, at 102–03.

211. According to Shippek, the situations at Jamul and Santa Ynez “resulted in the formation of trust patent reservations due to the patronage of the Catholic church and, in the case of Jamul, the original patronage of a rancho grant owner.” *Id.* Regarding Jamul, Shippek states:

The Jamul Band was one of the bands contacted by the Spanish missionaries within a few years of the founding of Mission San Diego. By 1900 they were no longer living in their aboriginal village but were still within their band territory. The heart of their aboriginal territory had been granted as a rancho during the Mexican period, and the band had been forced to move to the edges of their Indian cemetery on the rancho grant, thus on a minute portion within their aboriginal territory. Most of the Indians were employed on the rancho grant or on other nearby ranches. By 1912, John D. Spreckles (the president of the Spreckles Sugar Company) had become, as head of the Coronado Beach Company, the owner of the rancho grant. Spreckles deeded title to 2.5 acres that ‘included an Indian Cemetery and the approaches thereto’ to the Catholic bishop of the Diocese of Los Angeles. Spreckles then told the Indians, who were his ranch hands, that they would always have this place to live, that they could not be evicted. Children who were present at this meeting with Spreckles were still alive in the 1950s, and they described the meeting.

*Id.* at 103–04.



(“often incorrectly written Santa Ynez or Santa Inez”) was established in Chumash country at a place called Alajulapu.<sup>212</sup> The Catholic Church had been issued a patent for the lands, and after the Church transferred the land to the United States government at the request of the Chumash at Santa Ynez, the lands became “a trust patented reservation under the Southern California Mission Indian Agency.”<sup>213</sup>

The account of the founding of Santa Inés (which is now the Santa Ynez Indian Reservation) given by Hubert Howe Bancroft suggests that it was established at or near an already-existing Indian village that the Spanish would have called a *ranchería*.<sup>214</sup> Evidence also suggests that Jamul was called a *ranchería*,<sup>215</sup> and it still is called both a village and a reservation.<sup>216</sup> That Santa Ynez is now called a reservation and Jamul is called a village and a reservation, and that both are “Indian country” within the meaning of 18 U.S.C. § 1151 and the case law interpreting it, illustrates the interchangeability of nomenclature for Indian country in California.<sup>217</sup> The examples of Santa Ynez and Jamul also illustrate that historical circumstances, as much or more so than any legal principle(s), played a decisive role in determining not only what an area of Indian country in California is called but even whether it exists. This concept of interchangeability, which I examine in more detail in Part II. E, is particularly important for understanding present-day issues surrounding *rancherías*, the establishment of which is discussed below.

#### D. *Rancherías*

The events surrounding—and consequences of—the 18 unratified treaties again came to the attention of the California and United States public in 1905, after archivists found the treaties while going through records of the United States Senate.<sup>218</sup> Renewed efforts were made to secure lands for Indians who remained “homeless” and

212. See Bancroft, *supra* n. 22, at 28 n. 21 (giving alternate spellings of Lajalupe, Majulapa, Majalapu, Alajulapa, and Lajulap and stating that “[t]he meaning of the word was *rincon*, or corner”).

213. Shipek, *supra* n. 12, at 103. *Cf. id.* at 102 (“Santa Inez in Santa Barbara County, was delayed in its establishment because of the commission’s inability to resolve the existing differences between the Indians and the landowner.”).

214. See Bancroft, *supra* n. 22, at 28 n. 20 (citing diaries of Spanish expeditions into the region).

215. Darlene Suarez, for example, notes that many families at Jamul Indian Village moved there from San José Village in Mexico. Suarez, *supra* n. 29, at 121. William Hohenthal, who conducted fieldwork in Baja California between 1948 and 1951, referred to San José (also called Villareal San José) as a “*reserva indígena*.” Hohenthal, *supra* n. 29, at 96.

216. Jamul is listed in the Federal Register on the List of Indian Entities Eligible to Receive Services from the Federal Government as the Jamul Indian Village of California. 73 Fed. Reg. at 18554. It is also referred to as the Jamul Indian Reservation. *E.g.* Barfield, *supra* n. 208; SDSU Lib. & Info. Access, *California Indians and Their Reservations: Jamul Indian Village (Reservation)*, <http://infodome.sdsu.edu/research/guides/calindians/calindictdl.shtml#j> (accessed Apr. 23, 2009).

217. The Capitan Grande Reservation established by executive order in 1876 was at the time also referred to as the Capitan Grande *Ranchería*. See Jackson & Kinney, *supra* n. 61, at 499 (reproducing affidavit of Anthony D. Ubach and deposition of J.S. Manasse in the matter of the Capitan Grande Indians and the application of Daniel Isham, James Meade, Mary A. Taylor, and Charles Hensley). The Ramona Indian Reservation is also referred to as the Ramona Indian Village. See 73 Fed. Reg. at 18555.

218. The treaties, which had been rejected in a special session of the United States Senate in June 1852, were found by archivists going through Senate records in 1904, and they were made public when the “injunction of secrecy” surrounding them was removed on January 18, 1905. See *California Indian Lands*, *supra* n. 95, at 4; Dyer, *supra* n. 125, at 4; Flushman & Barbieri, *supra* n. 91, at 409; Robinson, *supra* n. 10, at 19.

“landless,”<sup>219</sup> mainly in central and northern California. As a result of this attention, Congress authorized an investigation of the conditions of Indians in central and northern California and directed the Commissioner of Indian Affairs to report to Congress “some plan to improve the same.”<sup>220</sup> C.E. Kelsey was appointed in 1905 as Special Agent to the Commissioner to carry out Congress’ mandate.<sup>221</sup>

In his initial report back to the Commissioner in March 1906, Kelsey emphasized the need for immediate relief for Indians who were living in small settlements and villages in central and northern California.<sup>222</sup> After reviewing Kelsey’s report, Commissioner of Indian Affairs Francis Leupp recommended that Congress appropriate monies for carrying out Kelsey’s plans.<sup>223</sup> Acting on Leupp’s recommendation, Congress included in the Indian Office Appropriation Act of 1906 (the “1906 Act”) an appropriation of \$100,000 to purchase lands for homeless California Indians and to provide water and other improvements on Indian lands.<sup>224</sup> Kelsey was appointed “Purchasing and Allotting Agent of Lands, Water, Rights, etc., for the California Indians.”<sup>225</sup>

The appropriation in the 1906 Act was followed by a \$50,000 appropriation in 1908,<sup>226</sup> and by similar appropriations on an almost annual basis through 1933.<sup>227</sup> As a

219. Castillo, *supra* n. 12, at 118 (“[T]he Bureau of Indian Affairs was embarrassed into action.”); Dyer, *supra* n. 125, at 4, 29–30; Robinson, *supra* n. 10, at 19.

220. Pub. L. No. 58-1479, 33 Stat. 1048, 1058 (1905).

221. See Kelsey, *Final Report*, *supra* n. 26, at 2 (July 25, 1913) [hereinafter Kelsey, *Final Report*]. Mr. Kelsey was a San Jose attorney who served as Secretary of the Northern California Indian Association, which had been lobbying the Department of Interior, the President, and Congress to take action to secure land titles for Indian villages and families. See e.g. The N. Cal. Indian Assn., *Petition to Congress* (copy on file with author); Ltr., N. Cal. Indian Assn., *supra* n. 65; Ltr. from C.E. Kelsey, Spec. Agent Cal. Indians, to Commr. Indian Affairs (June 18, 1904); Ltr. from C.E. Kelsey, Spec. Agent to Cal. Indians, to Francis E. Leupp, U.S. Indian Commr. (Mar. 11, 1905).

222. C.E. Kelsey, *Report of Special Agent for California Indians* 15 (Mar. 21, 1906); Kelsey, *Final Report*, *supra* n. 26, at 3. In his final report to the Commissioner, Kelsey notes that his initial investigation showed that at the time of his appointment in 1905:

only about 5,200 Indians in the State had reservations, 1700 of whom were in Northern California and 3,500 in Southern California. The non-reservation Indian population of the State was estimated at about 12,000, nearly all north of Tehachapi. Of these about 2,800 were supposed to have allotments; about 1,000 were supposed to have land of their own or to live on land owned by whites, or churches or other associations. The remainder, numbering about 8,000, needed land, and it was estimated that for about three fourths of them the land would have to be purchased.

These 8,000 landless Indians were mostly found in small Indian settlements, called in California, rancherias. These were located usually upon the land of some complacent white man who allowed the Indians to live there temporarily. Evictions took place from time to time, and as few places were open to an evicted Indian, the only place they could go was to some rancheria as yet unevicted.

*Id.* at 3–4. See also Forbes, *supra* n. 12, at 60 (discussing Indian villages that “exist[ed] for years in . . . out-of-the-way or undesirable locations[s]”).

223. Ltr. From Frank R. Lawrence, Esq., Holland & Knight, LLP., to Hon. Bill Lockyer, Atty. Gen., St. of Cal., at 11 (June 26, 2002). See also Kelsey, *Final Report*, *supra* n. 26, at 4 (“On behalf of the [Northern California Indian] Association I appeared before both houses of Congress and an appropriation was made of \$100,000 for land, water and other things needed.”).

224. Pub. L. No. 59-258, 34 Stat. 325, 333 (1906).

225. Kelsey, *Final Report*, *supra* n. 26, at 1.

226. Pub. L. No. 60-104, 35 Stat. 70, 76–77 (1908).

227. See Indian Appropriation Act of May 18, 1916, Pub. L. No. 64-80, 39 Stat. 123, 132 (1916); Indian Appropriation Act of August 1, 1914, Pub. L. No. 63-159, 38 Stat. 582, 589 (1914); Indian Appropriation Act of June 30, 1913, Pub. L. No. 63-4, 38 Stat. 77, 86 (1913); Indian Appropriation Act of August 24, 1912, Pub. L. No. 62-335, 37 Stat. 518, 523 (1912); Indian Appropriation Act of March 3, 1911, Pub. L. No. 61-454, 36

result of these appropriations, numerous rancherias were set aside in central and northern California.<sup>228</sup> Ed Castillo describes the areas as “reservations scattered throughout 16 northern counties” and says that they “were mostly home sites or rancherias between five and a few hundred acres each.”<sup>229</sup> Florence Shipek says that the rancherias “were basically lands reserved for landless California Indians and generally small, relatively isolated house plots held in trust for one or more extended families.”<sup>230</sup> And Jack Forbes discusses “exceedingly small parcels [that] were occasionally purchased or set aside for ‘homeless’ Indians, especially between 1910 and 1929” and notes that “most of these ‘rancherias’ in California or ‘colonies’ in Nevada were designed to provide residential sites only.”<sup>231</sup>

Both “reservation” and “rancheria” were also used to refer to these land areas at the time of they were purchased. The 1906 Act itself authorized the Secretary of the Interior to “fence, survey, and mark the boundaries of such Indian Reservations” created under its auspices.<sup>232</sup> The fact that the terms have been used interchangeably for over a

Stat. 1058, 1062–6363 (1911); Indian Appropriation Act of April 4, 1910, Pub. L. No. 61-114, 36 Stat. 269, 273 (1910); Indian Appropriation Act of March 3, 1909, Pub. L. No. 60-316, 35 Stat. 781 (1909). Subsequent annual appropriations through 1933 totaled approximately \$290,000 for the purchase of land for California Indians. In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, which delegated specific authority to the Secretary of the Interior to acquire land for Indians so that annual appropriations for land acquisitions were not generally necessary thereafter.

228. Cf. Castillo, *supra* n. 12, at 118 (“By 1930, 36 reservations were set aside for native Californians.”); see generally *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977) (discussing history of establishment of rancherias in central and northern California). Many of these rancherias were terminated in the 1950s and 1960s under the California Rancheria Act, Public Law 85-671, 72 Stat. 619, Act of August 18, 1958 as amended by the Act of August 11, 1964, 78 Stat. 390. Some have been restored through subsequent Congressional legislation. See e.g. Graton Rancheria Restoration Act, Public Law No. 106-568 (codified at 25 U.S.C. §§ 1300n–1300n-6) (restoring the status of and authorizing the Secretary of the Interior to take land in trust for the Federated Indians of the Graton Rancheria); Paskenta Band Restoration Act, Pub. L. No. 103-454, 108 Stat. 4794 (codified at 25 U.S.C. §§ 1300m–1300m-7) (restoring the status of and authorizing the Secretary of the Interior to take land in trust for the Paskenta Band of Nornlaki Indians); Auburn Indian Restoration Act, Pub. L. 103-434 (codified at 25 U.S.C. §§ 1300l–1300l-7) (restoring the status of and authorizing the Secretary of the Interior to take land in trust for the United Auburn Indian Community). Others were restored through judicial decrees. See e.g. *Hardwick v. U.S.*, No. C-79-1910-SW (N.D. Cal. Dec. 22, 1983) (Final Judgment) (restoring the following rancherias: Big Valley, Blue Lake, Buena Vista, Chicken Ranch, Cloverdale, Elk Valley, Greenville, Mooretown, North Fork, Picayune, Pinoleville, Potter Valley, Quartz Valley, Redding, Redwood Valley, Rhonerville, Smith River); *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. U.S.*, No. C-86-3660-VRW (N.D. Cal. Apr. 17, 1992) (Final Judgment) (restoring the status but not the land bases of the Guidiville Band of Pomo Indians, the Mechoopda Indian Tribe of the Chico Rancheria, and the Scotts Valley Band of Pomo Indians). Some of the restored tribes are currently without a land base, and some of the terminated tribes have not been restored.

229. Castillo, *supra* n. 12, at 118. In southern California, monies “were used to enlarge existing reservations and improve water systems,” but “none of the many landless bands or individuals were provided with home sites as a result of these appropriations.” *Id.*

230. Shipek, *supra* n. 12, at 110. Jack Forbes has called them “‘postage stamp’ reserves.” Forbes, *supra* n. 12, at 69.

231. Forbes, *supra* n. 12, at 69. “By 1919 eleven-thousand California Indians were residing on federal ‘trust’ land (reservations or rancherias) with another 5,200 to 14,000 scattered elsewhere.” *Id.* at 73.

232. 34 Stat. at 333. There is other evidence that words “rancheria” and “reservation” were, during the early 1900s (as they are today), used interchangeably to refer to the areas set apart as “Indian country” in California under the 1906 Act and subsequent acts. See e.g. Forbes, *supra* n. 12, at 93 (citing *Fifty-First Annual Report of the Board of Indian Commissioners* 69 (1920) (using the term “rancheria Indians” in 1919 when referring to “the rancheria Indians . . . living in Mendocino, Lake, and Sonoma Counties . . . organiz[ing] themselves into an association under the name of the Society of Northern California Indians” and discussing a conference at Ukiah “where fourteen rancherias were represented” and which was attended also by “non reservation Indians—Pomos, Concows, Noyos, Sansels, Ukies, Wylackies, and Nomelackies—who, with some exceptions,

century, together with the fact that different names are used interchangeably to refer to lands set aside as “Indian country” under similar circumstances in other areas of California and outside of California (including the “colonies” discussed below),<sup>233</sup> shows that names differ depending on historical and linguistic circumstances. It also reminds us to be careful about attaching too much significance to the label used to refer to any particular area of Indian country.

The history surrounding the establishment of the rancherias also serves as yet another illustration of how, because of circumstances that had little or nothing to do with legal principles, some lands wound up being set aside by the U.S. government while others did not. A 1927 report to the Commissioner of Indian Affairs regarding the purchase of land for California Indians, for example, lists numerous bands, 222 in all, and noted that land had been purchased for only some of them as a result of the Congressional appropriations and the work of Mr. Kelsey and others.<sup>234</sup> This report concluded by saying that “[i]n conclusion, kindly be advised that it has not been physically possible to comply literally with . . . instructions [to investigate the land tenure of and secure land purchases for landless/homeless California Indians], and it is believed from the foregoing the magnitude of the undertaking will be realized, especially as census, so far as we are aware, is available for only seven counties.”<sup>235</sup>

Thus, we see in the 1906 Act and subsequent congressional appropriations and Indian agents’ work an effort to secure land titles for California Indians by setting aside lands as “Indian country” that was, like those made in the 1850 Act, the 1851 Act, the 1853 Act, and the Mission Indian Relief Act before, stymied by a lack of willingness and/or resources (the two are not unrelated; the latter are committed only if the former exists). The 1906 Act and subsequent congressional appropriations, like the previous legislation, shaped the circumstantial trajectory of Indian country and its impact on the legal and physical landscape in California. They all resulted in some but not other Indian country in California being set aside as “Indian country” under 18 U.S.C. § 1151, and the case law interpreting it.<sup>236</sup>

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live on tracts of land owned by the Government.”)).

233. See *infra* n. 257.

234. Ltr. from L.A. Dorrington, Superintendent, to Commr. Indian Affairs 24 (June 23, 1927) (copy on file with author). As of the letter’s date, land had been purchased or other arrangements had been made for only 51 of these bands. *Id.* Though some of the lands which Dorrington recommended be purchased were bought and set aside as “Indian country,” others were not. *Id.* at 24–25. Dorrington’s letter also mentioned seven bands about which the Indian Superintendent did not have sufficient information. *Id.* at 25. See Ltr. from C.E. Kelsey, Spec. Agent Cal. Indians, to Commr. Indian Affairs 1 (1903) (copy of file with author) (stating that the N. Cal. Indian Assn. “ha[d] located about one hundred sixty rancherias or villages of landless Indians, which are said to have a population of about nine thousand eight hundred souls” but also that “[s]ome of our members think we have not yet [located] half of them” and that they “ha[d] very scanty returns from some districts and none at all from the counties of Alpine, Mono, Siskiyou, Del Norte, and Humboldt.”).

235. Ltr., Dorrington, *supra* n. 234, at 27. Kelsey noted in his 1913 Final Report that his efforts were frustrated by, among other things, “the considerable increase in the value of real estate in California” and the tendency of owners to either “refuse point blank” to sell lands to the government or “put an impossible price on their land.” Kelsey, *Final Report*, *supra* n. 26, at 6–7.

236. Today there are many California Indian tribes—including those who were not visited by the treaty commissioners, the Mission Indian Commission, or Special Agent Kelsey (and including some who were)—who do not have an established land base and/or who are not formally acknowledged by the United States or California government. See e.g. Shipek, *supra* n. 12, at 40–41 (discussing Indians in southern California who remained without a recognized land base after the Mission Indian Relief Act).

*E. Other "Indian country" in California—and a Note on Interchangeability*

One of the areas of "Indian country" discussed in the 1927 report is the Jackson Rancheria near Jackson, California. Superintendent L.A. Dorrington, using the words "rancheria" and "reservation" interchangeably, wrote that "[a]t Jackson we have the former Digger or Mewuk Reservation, which is now being used as a rancheria. There are three families actually making their homes on this reservation for the present time."<sup>237</sup> Some 330 acres had been purchased as a home for Indians near Jackson by acts of Congress passed in 1893 and 1894.<sup>238</sup> Though it is not clear when (if ever) the lands at Jackson officially became a "rancheria,"<sup>239</sup> the fact that "rancheria" and "reservation" were both used to refer to the lands is another example of the interchangeability of these two terms and of the terms used to refer to Indian country in California generally.<sup>240</sup>

While "rancheria" is used interchangeably with "reservation" to refer to certain areas of Indian country in California, it is also used to refer to areas that have been called rancherias for hundreds of years. For example, Hubert Bancroft gives an account of a Spanish expedition that in the 1770s visited the "rancheria of Tahualamne," which Bancroft says is "doubtless the origin of Tuolumne."<sup>241</sup> Tuolumne, which is known today as the Tuolumne Rancheria, is the home of the "Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California."<sup>242</sup> And Tuolumne was referred to as "the Tuolumne colony" in the 1927 Dorrington report,<sup>243</sup> illustrating the interchangeability of "rancheria" with yet another term that is used to refer to Indian country in California. One also sees the interchangeable use of "rancheria" and "colony" in the case of the "Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California."<sup>244</sup>

One might infer from this last example that the term "colony" is used in reference to people and not to a land area, but "colony" is used with respect to land in other areas of Indian country in California.<sup>245</sup> For example, there exists near Bishop, California, the "Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony"<sup>246</sup> established in 1937 after a settlement was negotiated with the City of Los Angeles,

237. Ltr. from Dorrington, *supra* n. 234, at 2.

238. H.R. Doc. 54-5 at 90 (1896) (1895 Annual Report of the Commissioner of Indian Affairs) (citing 27 Stat. 612 (1893) and 28 Stat. 286 (1894)).

239. There is listed among the Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs the "Jackson Rancheria of Me-Wuk Indians of California." 73 Fed. Reg. at 18554.

240. See e.g. Jackson & Kinney, *supra* n. 61, at 497, 499 (discussing use of both "rancheria" and "reservation" to refer to lands set aside at Capitan Grande); 73 Fed. Reg. at 18555.

241. Bancroft, *supra* n. 22, at 56.

242. 73 Fed. Reg. at 18556.

243. Ltr. from Dorrington, *supra* n. 234, at 23.

244. 73 Fed. Reg. at 18554.

245. See SDSU Lib. & Info. Access, California Indians and Their Reservations: *Colony*, <http://infodome.sdsu.edu/research/guides/calindians/calinddict.shtml#c> (accessed Apr. 23, 2009) ("The term 'colony' is used for reservations with small land bases located near Euro-American towns. Colonies are such as the Bridgeport Paiute Indian Colony, the Elem Indian Colony of Pomo Indians, and the Woodfords Indian Colony.").

246. 73 Fed. Reg. at 18555 (emphasis added).

which had purchased “virtually all the land in [the surrounding] Owens Valley” in order to secure water for the City.<sup>247</sup>

Whereas Bishop is called a colony, Lone Pine and Big Pine, which were established pursuant to the same settlement agreement,<sup>248</sup> are called reservations—the “Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California” and the “Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California,” respectively.<sup>249</sup> Other areas set aside for Indians in the Owens Valley, and for Indians elsewhere in California (including those established on the Colorado River),<sup>250</sup> are, like Lone Pine, called “reservations.”<sup>251</sup>

And Bishop is not the only Paiute colony in California or in the United States. There are also the Bridgeport Paiute Indian Colony of California; the Las Vegas Paiute Tribe of Indians of the Las Vegas Indian Colony, Nevada; the Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada; the Reno-Sparks Indian Colony, Nevada; and the Paiute-Shoshone Indians of the Fallon Reservation and Colony, Nevada.<sup>252</sup> The interchangeable use of “reservation” and “colony” to refer to lands set aside for Paiutes and others is just one manifestation of the interchangeability of terms used to refer to

247. Diana Meyers Bahr, *Viola Martinez, California Paiute Living in Two Worlds* 23 (U. Okla. Press 2003). The Los Angeles aqueduct, which carries water from the Owens Valley to the City of Los Angeles, was completed in 1913, and the city had by 1933 bought “virtually all the land in Owens Valley.” *Id.* (citing *The Owens Irony: L.A. Water Grab May Have Saved What the Valley Values Most*, L.A. Times B7 (Jul. 25, 1998)). Approximately 800 Paiutes lived in the Owens Valley at the time, and they “suffered the greatest displacement” since these people depended on employment on white-owned ranches and farms and “[t]he purchase of Owens Valley by Los Angeles . . . reduced by more than one-half the sources of Indian income.” *Id.* at 24–25. Martinez describes the settlement and events leading up to it as follows:

After years of irresolution concerning ‘the Indian problem,’ the city finally recognized its obligation to the Indians and negotiated a settlement, providing the Paiutes with better lands and assured water rights. This agreement, the Land Exchange Act of 1937, created Paiute reservations at Bishop, Big Pine, and Lone Pine through a land trade between the U.S. Department of the Interior and the city of Los Angeles. The Bishop Paiute Indian reservation comprised 875 acres; Big Pine, 279 acres; and Lone Pine, 237 acres. All three reservations function under the Trust Agreement of 1 April 1939 and the Assignment Ordinance of April 1962.

*Id.* at 26 (footnotes omitted).

248. *Id.*

249. 73 Fed. Reg. at 18555, 18553.

250. The Colorado River Indian Reservation, which covers areas in both California and Arizona, was established on the Colorado River in 1865; the Fort Mojave Indian Reservation, which covers parts of California, Arizona, and Nevada was established in 1870; the Fort Yuma (or Quechan) Reservation was established in 1884; and the Chemehuevi Indian Reservation was established in 1907. H.R. Exec. Doc. 48-1 pt. 5 at 297 (1884) (1884 Annual Report of the Commissioner of Indian Affairs).

251. The Fort Independence Reservation, which is home to the Fort Independence Community of Paiute Indians, was established in 1915. Bahr, *supra* n. 247, at 26. “In 1859, some 22,300 acres near Independence, California, in the southern Owens Valley had been set aside as a possible reserve for the indigenous people of the area.” *Id.* at 10 (footnote omitted). However, after maintaining their homes and fields in the face of attempted removals, the Paiutes’ lands were homesteaded by whites in the 1860s. *Id.* at 11, 22 (noting also that the Paiute irrigation system in the Owens Valley is believed to have been constructed a millennium ago). *See id.* at 26 (“Reservations had not been established in Owens Valley until after 1900.”). In 1902, a section of Fort Independence had been set aside for local Indians, but a reservation was not established at this location until 1915, the same year in which a small reserve was established at Benton.”. *See Forbes, supra* n. 12, at 69 (“The Owens Valley Indians were to receive a large reservation (66,000 acres) suitable for grazing purposes in 1912 but for some reason the Indian Bureau never actually made it available to them.”).

252. 73 Fed. Reg. at 18553–18555. *See also Forbes, supra* n. 12, at 69 (discussing the purchase and/or setting aside of “exceedingly small parcels” of land for Indians in the early 1900s in Nevada in the form of “colonies”).

Indian country in California.

#### IV. CONCLUSION

The trajectory of Indian country in California followed in this article shows, on the one hand, a continuity through Spanish, Mexican, and United States rule of a legal principle and practice whereby Indian lands are accorded a particular, protected statute. On the other hand, it shows that these lands' status was not always recognized in practice (indeed, it seems that following the law was more the exception than the rule when it comes to Indian country in California). As a result, only some of the lands that over time had been accorded Indian country status under Spanish and Mexican (and United States) law have been set aside and recognized as "Indian country" under 18 U.S.C. § 1151 and the case law interpreting the statute.<sup>253</sup>

The circumstantial nature of the trajectory of Indian country in California cannot be understated. What if, for example, the trial court in the *Byrne v. Alas* litigation which resulted in the establishment of the Soboba Reservation had, like the trial courts in the cases involving San Pasqual and Warner's Ranch,<sup>254</sup> excluded evidence showing that the Indians at Soboba had always lived there? Would the Soboba Reservation exist today? What if money had not been raised to pay for an attorney or if the judge had entered a default judgment against the Indians' attorney for failing to appear at a trial of which he was not aware?<sup>255</sup> Or what if Indians had been successful in other litigation brought to defend their rights to their land—and to have these lands set aside such that they would be recognized today as "Indian country" under 11 U.S.C. § 1151?<sup>256</sup> Or if Congress had appropriated more resources for the purchase of—or used its power of eminent domain to secure—lands surrounding Indian villages throughout California, including through the Mission Indian Relief Act for lands in southern California and the 1906 and subsequent legislation for lands in central and northern California?

Due to the circumstantial trajectory of Indian country in California, different names are used—and used interchangeably (both historically and presently) in some cases—to refer to the various lands set aside as Indian country in California, and sometimes to the same land. This interchangeability is a product of the unique historical and linguistic environment through which Indian country has traveled in California. It is only in California that the words "ranchería," "village," "pueblo," "mission," "rancho," "reservation," "colony" and "rancheria" have all been used to describe Indian country.

In the past 75 years, "five rancherias, an 'Indian village,' an 'Indian community,' and four reservations have been established [in California]."<sup>257</sup> In addition, thousands of

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253. Today there are many California Indian tribes—including those who were not visited by the treaty commissioners, the Smiley Commission, or Special Agent Kelsey (and including some who were)—who do not have an established land base and/or who are not formally acknowledged by the United States or California government.

254. See *supra* n. 183 and accompanying text (discussing the litigation involving San Pasqual); *supra* n. 197-199 and accompanying text (discussing Warner's Ranch litigation).

255. Cf. *supra* n. 170 (discussing *Byrne* as "test case").

256. Cf. Jackson & Kinney, *supra* n. 61, at 471 (discussing settler occupation of Indian lands and noting that "[i]n instances in which the Indians themselves have endeavored to get redress through the courts they have in the majority of cases—to the shame of the Southern California bar be it spoken—been egregiously cheated.").

257. SDSU Lib. & Info. Access, *supra* n. 26.

acres have been added to areas that were initially set aside in the late 1800s and early 1900s. On the other hand, many of the rancherias established in the first part of the twentieth century were terminated in the late 1950s and 1960s. Some of these tribes have had both their political status as federally-recognized Indian tribes and (at least some of) their lands restored; some only their political status; and some neither.

Just as interchangeable terms were and are used for places set aside in the 1800s and early 1900s, lands more recently set aside as Indian country have been (and are) known by different names.<sup>258</sup> That being said, care should be taken to avoid placing too much emphasis on what are, after all, colonial terms and categories and not what Indian peoples in California called their lands and/or themselves.<sup>259</sup> The examination of the history of Indian country undertaken here is important in and of itself because this history is not well known and too often misunderstood. What is perhaps more important from a modern legal perspective is that, whatever name it's called, the land has been set aside as "Indian country" for purposes of 18 U.S.C. § 1151 and the cases interpreting it.

There are today some 450,000 acres of "Indian country" in California in the form of rancherias, reservations, colonies, villages, and allotments, comprising less than one percent of the total land acreage in California. Not surprisingly, Indian tribes in California have over the past centuries struggled to expand the amount of land set aside as Indian country, and to defend and exercise their sovereignty over what few lands retain "Indian country" status. Perhaps as equally unsurprising (given the history of Indian country in California) is the opposition to these efforts that California tribes have encountered from the State of California, local governments, and others. Though an analysis of these contests is beyond the scope of this article, it is my hope that this article aids in understanding the historical path, and in shaping the future path, of Indian country in California.

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258. For example, the 40-acre site in Death Valley that is now the Timbisha Shoshone Reservation (home of the Death Valley Timbi-Sha Shoshone Band of California, which gained official recognition from the federal government in 1994) is commonly known as "Indian Village." SDSU Lib. & Info. Access, *California Indians and Their Reservations: Timbi-Sha Band of Western Shoshone Indians*, <http://infodome.sdsu.edu/research/guides/calindians/calinddicty.shtml#t> (accessed Apr. 26, 2009). Another Indian tribe to receive official recognition from the federal government and have lands set aside on its behalf is the Jamul Indian Village, which is an example of the English "village" being used to an area that would have been (and probably was) called a rancheria in Spanish, just as rancheria is an example of an English word being used to refer to areas that would have been—and were—called rancherias in Spanish. The other Indian "Village" in California listed in the Federal Register is Ramona Village, which is also known as the Ramona Reservation. 73 Fed. Reg. at 18555. The term "community," though not used interchangeably, is used together with "rancheria" and "reservation" to refer to Indians in California. *E.g.* 73 Fed. Reg. at 18554, 18555 (listing "Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California" and "Quartz Valley Indian Community of the Quartz Valley Reservation of California"); SDSU Lib. & Info. Access, *California Indians and Their Reservations: Trinidad Rancheria*, <http://infodome.sdsu.edu/research/guides/calindians/calinddicty.shtml#t> (accessed Apr. 26, 2009) ("The full name of this reservation is the Cher-ae Heights Indian Community of the Trinidad Rancheria."). Although Quartz Valley is listed in the Federal Register as a reservation, it was terminated in the 1960s pursuant to the Rancheria Act. *See supra* n. 228.

259. *See* Suarez, *supra* n. 28, at 4. Indeed, even the English names and categories applied to Indian peoples and land areas in California have changed over the years and continues to change, as the history examined in Part II shows. The Pinoleville Pomo Nation, for example, was formerly the Pinoleville Rancheria of Pomo Indians of California, the Santa Rosa Band of Cahuilla Indians was formerly the Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation, and the Sycuan Band of the Kumeyaay Nation was formerly the Sycuan Band of Diegueno Mission Indians of California. 73 Fed. Reg. at 18555, 18556.



