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CALIFORNIA BEACH ACCESS: THE MEXICAN LAW AND THE PUBLIC TRUST

The Mexican law has been consistently ignored as a source of law in the western United States. Yet, one of the basic precepts of international law is that upon the succession of sovereign nations the law of the former continues in effect. Although in many cases the Mexican law will have been superseded by legislation or by judicial adoption of common law principles, in many others, where for instance proprietary or trust interests under the Mexican law existed at the time of cession to the United States, the Mexican law may still be applicable today. The effect of the Mexican law is anticipated to be especially great in relation to land held by the government in trust for the public. In the formerly Mexican western states, recognition of our Mexican law heritage may require a redefinition of the government's obligation for former Indian lands and of the compass of our own public trust lands. The subject of this paper will be this latter aspect of the Mexican law: the influence of the Mexican law upon the public trust doctrine and its application to a current problem in California—that of providing public access to public tidelands.

If there were no other indicators, the great current interest in the public's rights in tidelands and beaches would be evidenced by the quantity of published material on the subject that has appeared in recent years. This material covers a full spectrum from newspapers and popular books, through technical journals, both scientific and legal, to new legislation and judicial opinions.¹

The basic concern of this recent interest has been to find a means of ensuring public access to the beaches and tidelands of California. For, although the tidelands are dedicated to the State² and held in

¹ See, e.g., materials cited notes 4, 6, 15, 16, 25, 30, and 45 infra.
² CAL. CIV. CODE § 670 (West Supp. 1970); see Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 22-23 (1935); CAL. CIV. CODE § 830 (West Supp. 1970); 3 AMERICAN LAW OF PROPERTY § 12.27 (Casner ed. 1952).

Technically, tidelands are comprised of only that narrow band of shoreline that is alternatively covered and uncovered by the ebb and flow of the tides. Marks v. Whitney, 6 Cal. 3d 251, 257-58, 491 P.2d 374, 378-79, 98 Cal. Rptr. 790, 794-95, 3 ERC 1437, 1439 (1971). That land which is permanently covered is properly "submerged land." Long Beach v. Mansell, 3 Cal. 3d 462, 478 n.13, 476 P.2d 423, 434 n.13, 91 Cal. Rptr. 23, 34 n.13 (1970). For the purposes of this paper it is not necessary to distinguish between them. The term "tidelands" will be used colloquially to refer to all lands lying below the line of ordinary or mean high tide.
trust for use by its inhabitants, the public is presently denied access to them along a substantial portion of the coast. Without access the public is unable to use the tidelands for recreational requirements or for any of the other public purposes for which they are set aside.

This lack of tideland access results from a combination of circumstances. Ownership reports indicate that a majority of the coastal littoral property, that is, upland fronting on tideland, is privately owned. Understandably, private owners make use of all available

It is significant to note, however, that the precise location of the line of mean high tide is subject to ambiguity. In California it is the line of the mean neap high tide [People v. Wm. Kent Estate Co., 242 Cal. App. 2d 156, 160-61, 51 Cal. Rptr. 215, 218-19 (1966)], while the common law calculation based on the mean of all high tides over a long period (3 months or more) has been utilized by the U.S. Supreme Court in Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 26 (1935). The Mexican tideland is even more extensive than that of the common law, extending on the beach to the line of highest or greatest high tide. See note 192 infra.

4. Fradkin, Fences Go Up to Keep Public From Beaches, L.A. Times, Mar. 21, 1971, § C, at 1, col. 6; see note 6 infra.
5. Although the traditional uses of tidelands are delineated in terms of navigation, commerce and fisheries [Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970)], pleasurable recreational uses are also considered appropriate. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970). It was noted in Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951), that appropriate uses were “for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.” Id. at 744, 238 P.2d at 133, citing Lamprey v. State, 52 Minn. 181, 200, 53 N.W. 1139, 1143 (1893). Today preservation of tidelands in natural ecological units is recognized as a valid use. Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796, 3 ERC 1437, 1439 (1971).
6. Of the total coastline only about 35 percent is in public ownership, and only about 25 percent is accessible to the public. Depending on the source of information and the means utilized for measuring bay shorelines, the length of California's tideland is 1272 miles, 1154 miles, or 1073 miles. The variation depends on whether the shorelines of San Francisco Bay and of several smaller harbors are included. Of these amounts 249, 414, or 408 miles respectively, are in public ownership, and 149, 290, or 306 miles, respectively, are accessible for public usage. This difference between the ownership and accessibility figures is due to land reserved for military, navigational aid, and other public purposes. Included in the 290 mile public accessibility figure are 55 miles of rocky shore with bluffs and headlands, which leaves only 235 miles of usable beach, of which a mere 108 miles is suitable for swimming. Private ownership, on the other hand, has landlocked an additional 179 miles of beachland suitable for swimming.

The figures cited above have been derived from analysis of three reports: (1) 4 U.S. OUTDOOR RECREATION RESOURCES REVIEW COMM’N REP., SHORELINE RECREATIONAL RESOURCES OF THE UNITED STATES (1962); (2) 18 RESOURCES AGENCY OF CALIFORNIA, COMM’N ON OCEAN RESOURCES REP., CALIFORNIA AND THE OCEAN (1966) [hereinafter cited as CALIFORNIA AND THE OCEAN]; and (3) 16 RESOURCES AGENCY OF CALIFORNIA, DEP’T OF PARKS AND RECREATION, CALIFORNIA COASTLINE PRESERVATION AND RECREATION PLAN (1971).
means, including state trespass laws, to prevent public passage over their littoral lands.

Upon attaining statehood California took title to the tidelands within her borders, subject to the public trust, as an incident of her sovereignty and in recognition of her status being equal to that of her sister states. Title to the uplands, however, remained in the United States as successor in sovereignty to the government of Mexico. Later dispositions of the littoral uplands by the federal government generally did not expressly reserve public access to the tidelands. Consequently, in most cases the means of access has been barred or lost.

Over time the access problem has improved somewhat in certain areas due to gifts, purchases, and eminent domain proceedings. The public has acquired access in many areas through prescriptive use, which in some cases has been given judicial recognition as an implied dedication of an access easement. In general, however, the advent of time has seen more public access rights lost than gained. There have been many instances in which developers and other private owners of littoral frontage have, either unknowingly or intentionally, blocked existing means of public access. This has been the case at the Sea Ranch development in Sonoma County, as well as at Laguna Niguel in Southern California's Orange County. Along the

8. New theories and doctrines of access, such as implied dedication [see note 20 infra], usually aggravate the problem by provoking littoral land owners to take extraordinary steps to protect their property. See Fradkin, supra note 4; note 21 and accompanying text infra.
9. See part I, B infra.
11. Id. at 15, cited at text accompanying note 172 infra.
14. See, e.g., Brief for Sierra Club as Amicus Curiae at 6, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) [hereinafter cited as Amicus Brief for Sierra Club].
15. Hearings on H.R. 143, Before the Subcomm. on Conservation and Beaches of the Assembly Comm. on Natural Resources, Planning, and Pub. Works, Cal. Leg., Reg. Sess. (March 30, 1968) (Sonoma Co. Coastal Property) [hereinafter cited as Hearings on H.R. 143]; Gilliam, A Thousand Miles of Shore & Coast, S.F. Chronicle, May 19, 1968 (This World), at 31, col. 1. The question in the Sea Ranch controversy was not whether the public rights of access were denied—the existence of access rights was neither proven nor disproven—but whether the county could trade away all prospective public rights to over ten miles of coast line for a 100 acre park. Now that the trade has been accomplished, the unresolved question is whether the county had the power to trade away any public access rights that may be appurtenant to the public trust of the state; see text accompanying notes 104-17 infra.
Palos Verdes Peninsula of southern Los Angeles County, developers and landowners along the seaside bluffs have been fencing and allegedly dynamiting cliff-side pathways, which have been used by the public to get to the sea for many years.\(^{17}\)

The ability of the public to obtain new means of access or even to protect its recognized rights over private lands grows weaker as time passes. This is not only the result of the actions taken by private owners, but also the result of increasing land values and recreational demand for littoral land in a rapidly growing state. The power of eminent domain becomes less effective as the price of coastal property skyrockets.\(^{18}\) This is sharply illustrated by Point Reyes National Seashore where the postponement of eminent domain purchases and the rising cost of land have necessitated the approval of new funding measures by Congress.\(^{19}\)

In addition, the recently established doctrine of implied dedication\(^ {20}\) is under attack. Not only have fences been erected by private landowners to prevent public use of their land, but also the California Legislature has considered bills which would greatly limit and even destroy rights established by dedication. One proposal, which was not enacted, would have given the property owner affected by implied dedication a right of prescription against the easement; if he could prevent public use for five years, the easement would be deemed aban-

17. See Fradkin, supra note 4.
18. CALIFORNIA AND THE OCEAN, supra note 6, at 24, 177.
20. The doctrine of implied dedication in relation to unenclosed private lands was only recently pronounced by the Supreme Court of California in Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). The case involved portions of the littoral upland which were used by the public for a long time, either as roadways and pathways for access to, or as a part of, the dry sand beach. The trial court found that a public easement had been created. The California Supreme Court affirmed, finding an implied easement by common law dedication. The easement was implied as a result of open and continuous use for the prescriptive period by the public in the belief that a public right existed. To contravene such a dedication, the owner had the burden of proving that he had granted the public a license or that he had made a significant attempt to prevent public use. The court indicated that acquiescence to the public's usage by any owner in the chain of title might be sufficient to imply a dedication in less than the five-year prescriptive period. In that case, however, the burden would shift to the public to prove actual consent to the dedication by showing circumstances sufficient to negate the idea that the use is under license. In order to apply the holding of Gion, therefore, there must have been at some time in the past actual public use for a period of time—either the prescriptive period or for some lesser time with acquiescence. Although it would undoubtedly apply in the Palos Verdes and Laguna Niguel situations previously noted [see text accompanying notes 16 & 17 supra], the potential area of its impact is not broad. The criteria stated by the court—five years' public use or proof of the owner's acquiescence to public use—are likely to occur with relative infrequency along a coast such as California's where littoral property is highly-valued and vigorously protected by private owners. See 2 Cal. 3d at 38-40, 465 P.2d at 57-58, 84 Cal. Rptr. at 169-70.
Various groups representing large coastal property owners are promoting other bills. One would impose a statute of limitation on the public; the public would have to claim its rights "within one to three years" or lose them. Another, which has been signed into law, prevents public recreational usage of private lands from ripening into an implied dedication in the future, although it does not affect public access rights created prior to its passage. As a consequence of this act, however, the theory of implied dedication will be of no assistance in the future in establishing public beach access rights.

Other means of acquiring such rights have been suggested. Most have involved some sort of legislation: the establishment of a multi-governmental coastal agency with broad powers over land planning and usage, the adoption of zoning legislation, as in Texas and Oregon.

A related provision of S.B. 1132, proposed Civil Code section 816, would have encountered similar objections. It provided for vacation of all or part of the impliedly dedicated easement upon a finding by the legislative body of the appropriate local government that the easement was "unnecessary for . . . public use." S.B. 1132, Cal. Leg., Reg. Sess. § 1(e) (1971). Such a finding, made by a local government body, would undoubtedly be subject to close judicial scrutiny because of the state-wide interest in access to public recreational lands. See Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MIC. L. REV. 471, 531-34 (1970). Even if the resolution of intent to vacate were made by a body with statewide authority, it is probable that that body might not entirely relinquish the public's rights. Rather, its authority would extend only to modifications and other incremental changes, not to complete abandonment. See id. at 536-38; text accompanying notes 73-82 & 98-100 infra.


Given the fact that access easements created by implied dedication are probably protected by Article XV, section 2 of the California Constitution, such a statute would be of doubtful validity. See text accompanying notes 44-46 infra. In addition, the close relationship between the tidelands and such easements and the provisions of Article XV should endow these easements with the characteristics of public trust lands or lands of public use. See part I, B, 3 infra. California law does not allow the prescription of lands of public use by private parties. Oakland v. Burns, 46 Cal. 2d 401, 296 P.2d 333 (1956); CAL. CIV. CODE § 1007 (West Supp. 1970). In Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), the California Supreme Court recently indicated that it makes no difference whether the property of public use is only an easement or full fee simple title. In either case the public property right is entitled to protection. Id. at 44-45 n.3, 465 P.2d at 60 n.3, 84 Cal. Rptr. at 172 n.3.

22. Fradkin, supra note 4.

23. Id. at 7, col. 2.


gon, or legislation that would give the State broader powers of eminent domain with respect to beaches. One proposal suggested the administrative use of exactions and compulsory dedications as a means of securing public access. The problem with all of these methods is, however, that they are subject to legislative attack, like that recently and successfully waged against implied dedication. Considering the difficulty that past and current bills have had in the California Legislature, it would seem that these proposals, if enacted, would be highly vulnerable to emasculation.

For these reasons, California is found in the uneasy position of having many broad rules of law which protect public tidelands, but which are largely ineffectual in providing public access to the tidelands. In spite of increasing demand for recreational land, or perhaps because of it, the State is unable to assure the availability of the tidelands. The premium values placed on the adjacent upland have made eminent domain acquisitions of access rights prohibitively expensive. These same values cause private owners to redouble their efforts to protect their private littoral property. Unfortunately, the body with the power to remedy this situation, the California Legislature, shows little propensity to do so. Instead of supporting the enactment of measures which would protect and enhance public rights, it has enacted a statute which Act along the lines of the aforementioned unsuccessful bills. Calif. Coastal Zone Conservation Act of 1972 (Proposition 20), to be codified at CAL. PUB. RES. CODE §§ 27000 et seq. See S.F. Chronicle, Nov. 9, 1972, at 1, col. 1.


27. ORE. REV. STAT. chs. 390.605-990 (Supp. 1970). The Oregon Beach Act, like the act adopted by Texas, declares that all land lying between the vegetation line, a surveyed meander line approximating the line of the highest high-tide, and the line of mean high-tide shall be held and administered in the same manner as the adjacent tidelands, that is, as public lands dedicated to the public's use and benefit. The constitutionality of this legislation was upheld by State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).


31. See note 30 supra.
abrogates the judicially evolved doctrine of implied dedication.\textsuperscript{32} What is lacking is a concept which would both guarantee public rights, where needed, along the entire coast and be relatively immune to legislative attack.

It is asserted here that such a concept exists currently in California law. Article XV, section 2 of the California Constitution provides on its face a constitutional right of public access to navigable waters and, consequently, to the tideland beaches. Although no common law foundation for this provision exists and it has never been enforced,\textsuperscript{33} sufficient support for its validity can be found in the Spanish-Mexican law of early California.

Very broad categories of public lands and easements were recognized under the Mexican law.\textsuperscript{34} Ways for access to the seashore were apparently implied whenever required.\textsuperscript{35} Under recognized principles of international law such easements would have carried over into California's law with the cession of Gudalupe Hidalgo\textsuperscript{36} and should exist in California today. The thesis of this paper is that the people of California today have a right derived from Mexican law for access to the seashore and that the right is protected by the California Constitution.

The question of whether these rights survived the cession of California by Mexico and afterward the enactment of the constitutional provision in 1879 is resolved by analysis of the public trust doctrine and relevant cases dealing with the continuance of prior law. A comparison shows that Mexican commons, including public access rights, are very similar to common law public trust properties and are treated with the same circumspection.\textsuperscript{37} In a common law jurisdiction they would be subject to the public trust. According to the case law, when such property was ceded to the United States, it became subject to a public trust held by the federal government.\textsuperscript{38} Consequently, the public rights in Mexican commons not only survived the cession of California, but since then have been protected by the public trust doc-
trine from both private incursions and governmental misfeasance. Today all that remains is for the courts to take in hand the diffuse pieces of this access concept and establish in California beach access rights in accord with those of the Mexican law.

The discussion of Mexican law will be delayed while several ancillary matters are considered which should enhance understanding by providing a frame of reference. First, the California constitutional provision is used to pinpoint the primary issue and show California's long concern with tidelands access. Second, the various aspects of the public trust doctrine are discussed, including the protection which the doctrine affords to public rights, in order to provide a basis for comparison with Mexican commons. Third, the nature and character of Mexican commons and the question of their survival in the common law are examined.

I

PUBLIC EASEMENTS FOR BEACH ACCESS IN CALIFORNIA LAW

A. California Constitution, Article XV, Section 2

Existing California law has the potential for protecting public access rights to the tidelands from both legislative onslaught and the predacity of private individuals. Article XV, section 2 of the California Constitution by its terms guarantees a way of access to the tidelands and protects the easement from the actions of private littoral owners. The essential part of Article XV, section 2 provides that "[n]o individual . . . possessing the frontage . . . [on] navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose. . . ."

As a constitutional provision, it provides practically invulnerable protection to public beach access rights, whatever their source. Unlike legislative solutions that have been suggested, it cannot be made ineffectual by weakening legislative amendment prior to becoming law, for it is, and has been since 1879, a part of California's law. Furthermore, being an existing part of the California Constitution, it is

39. The full section reads:
Access to Navigable Waters, Sec. 2. No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. XV, § 2.

40. See notes 25-29 and accompanying text supra.
relatively immune to attempts to amend or repeal its provisions, since a plebiscite would be required for such action.41

1. History

The whole of Article XV came into being as the result of the Constitutional Convention of 1878. The Article's purpose was to prevent further abuses wreaked upon the state tidelands as the result of freewheeling tactics of land speculators, by giving constitutional status to the public rights associated with the tidelands. At the convention, speaking against an attempt to delegate to the counties the power to lease tidelands, the delegate for San Francisco, Mr. Clitus Barbour, noted the purposes of Article XV:

It is to preserve the seashore of the State of California to free egress and ingress for purposes of commerce, and to protect that seashore from monopolies, of whatever character, sitting down there and levying toll upon the commerce of the world. The civil law system, in my opinion, is an improvement upon the common law system, or English system, which we have adopted in reference to the ownership of tide lands, and the tendency now is to retain within the control of the State this property. I maintain that that property never ought to be alienated from the State. It was a mistake that ever it was done, and it now ought to be put to a stop to [sic].42

Mr. Barbour and his associates were successful in their arguments. The proposal to delegate power to the counties was rejected by the convention, as was a previously proposed amendment that would have weakened section 2 by excepting from its coverage trust property that had been previously granted by the state to private individuals.43

When it was noted that section 2 was hardly more than a restatement of the navigation servitude, Mr. James Ayers, the chairman of the Committee on Harbors, Tidewaters, and Navigable Streams, replied:

The committee were well aware of that fact, but in order to make it doubly sure we inserted it there. The amendment will do no harm, and as a positive declaration may do a great deal of good in preventing unnecessary litigation.44

Obviously the convention was not just concerned with currently existing and recognized relationships, and the retention of the the status quo. By their rejection of the various amendments that would have weakened Article XV, the delegates indicated that their basic objective was to

41. CAL. CONST. art. XVIII, § 4.
42. 3 DEBATES AND PROCEEDINGS OF THE CALIFORNIA CONSTITUTIONAL CONVENTION OF 1878-1879, at 1480 (E. Willis & P. Stockton stenographers 1881).
43. Id. at 1478.
44. 2 id. at 1038.
To prevent the continuance of the existing abuses, they adopted a means which not only protected recognized public rights in the tidelands by restricting the private rights of land speculators and other private parties to tideland grants, but also provided a constitutional bulwark for any and all public rights that might ever exist in relation to the tidelands. Thus, newly recognized or developed rights, such as the recently evolved public access right by implied dedication, would be protected by the provision.

2. **Conflict with United States Constitution**

Article XV, section 2, by its terms, appears to create a new public access right. In practice, however, it seems never to have been used for this purpose because of doubts about its validity under the Federal Constitution. Even when it has been mentioned in support of access rights, independent facts have existed that kept the rights on constitutionally secure ground. The proposition that an access easement was created by the provision has been viewed as unlikely because of the suspicion that a taking of property without compensation or due process would result.

Most of the early decisions dealing with the public access problem made no mention of Article XV, section 2, although that is probably the fault of attorneys who may have doubted the validity of the provision, rather than of the courts' failing to recognize its existence. This skepticism as to its validity has carried forward to the present. In recent hearings regarding Sonoma County coastal property, the chairman of the Assembly Subcommittee on Conservation and Beaches expressed his doubts:

> The language of the [California] Constitution is pretty broad. Subsequent cases and legislation leave some doubt about this section. . . . But one of the reasons why we are here is to see whether we cannot more clearly define what . . . the Constitution says.

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45. This goal, however, was not actually achieved. It remained for the legislature later to end the abuses by enacting **Cal. Pub. Res. Code** § 7991 (West Supp. 1971), which banned further sale of fee simple title to the tidelands. Note, *California's Tideland Trust*, 22 Hast. L.J. 759, 764-65 nn. 46-48 (1971).

46. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); see note 20 supra.

47. **U.S. Const.** amend XIV, § 1; **see Cal. Const.** art. I, § 14.


49. *Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.

50. **See**, e.g., F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62 (1915); Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907).


In spite of the sweeping provisions of Article XV, section 2 of the Constitution, and the injunction therein to the Legislature to give its provisions
Also recently, the California Supreme Court, while expressing certain reservations with regard to the constitutional validity of Article XV, section 2, noted that the protection of the public use intended by the provision should be encouraged whenever possible:

Although article XV section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal Constitution.\(^5\)

But other than the application of implied dedication to shoreline areas by \textit{Gion v. City of Santa Cruz},\(^5\) little has been done to effectuate the purpose extolled in this statement.

The obvious intent of the California constitutional provision—to protect public access to tidelands and navigable waters—can be carried into effect, without raising federal constitutional doubts, if access rights can be shown to have existed prior to the enactment of the provision in 1879. An enactment based upon prior rights could not constitute a taking of private property; it would be no more than formal recognition and dedication of those prior rights,\(^5\) providing them with the greater degree of protection incumbent in constitutional status.

To have existed in California in 1879, prior rights of access would have had to have been: (1) a part of the common law that California inherited from the United States; (2) a part of California's decisional and statutory law; or (3) a part of the indigenous law existing in California prior to its cession by Mexico in 1848.\(^5\) Neither the American common law nor the statutory and case law of California provided for public easements for access to public tidelands in 1879.\(^5\) However, the Spanish-Mexican law which prevailed in California before statehood, and which, in part, continues to the present day, recognized very broad rights and easements for the public benefit. One of these legal servitudes, as they were called, undoubtedly provided public access to the tidelands whenever needed.\(^5\) Consequently, it is probable that since its inception, Article XV, section 2 has shel-


\(^{54}\) \textit{Broder v. Natoma Water & Mining Co.}, 101 U.S. 274 (1879); see \textit{Snyder v. Warford}, 11 Mo. 328 (1848).

\(^{55}\) \textit{Treaty with Mexico}, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207. As to the continuing force of the Mexican law in California after cession, see text accompanying notes 118-83 \textit{infra}.

\(^{56}\) See note 50 \textit{supra} and note 252 \textit{infra}.

\(^{57}\) See part II, \textit{D infra}.
tered under its constitutional cloak certain unrecognized access rights which existed in the early Mexican law, and those rights, in turn, provide the provision with sufficient basis in law to free it of constitutional doubts.

B. The Public Trust Doctrine

The character of the Mexican seashore access right, a right which would be subject to the public trust in a common law jurisdiction, requires its survival after the cession of California to the United States.\(^8\) For the purpose of providing a backdrop against which the public trust character of the Mexican right can be measured, the public trust doctrine will be considered at this point. A fact that further recommends this sequence is that the public trust concept enabled the public access rights which were inherited from the Mexican law to withstand and survive the many governmental and private assaults during the period between California's cession to the United States in 1848 and the enactment of Article XV, section 2 in 1879. An investigation of the public trust concept will help, moreover, to delineate the extent of limitations on the doctrine in California, and thus to indicate the scope and characteristics of the public access right.

The public trust doctrine is an area of law that gives substantial protection to public rights and to public property. Property which has been dedicated to the public use—such as roads, easements, parks, and tidelands—is said to be subject to a public trust.\(^9\) This is in contrast to proprietary property of the government—offices, municipal water works, etc.—which is generally used in the same manner and for the same functions as private property.\(^10\) Public trust property, on the other hand, "must be devoted to the [public] uses and purposes for which it was intended"\(^11\) and can not be absolutely alienated or otherwise disposed of. An attempt to do so would convey only nominal title subject to the trust.\(^12\) Moreover, a change in the use of public trust property which restricts the rights of the public may not be made without specific consideration of the extent of the public interest in such rights and without the express consent of the responsible governmental body.\(^13\)

Like the constitutional provision in Article XV, section 2, the public trust doctrine is relatively immune to attack, either from the legislature or by private parties. As a means of protecting public

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58. See text accompanying notes 161-83 infra.
60. See id. § 28.38a.
61. Id. § 28.37.
62. See notes 73 & 74 and accompanying text infra.
63. See text accompanying notes 75-82 & 99-100 infra.
rights in California, it has the advantage of presently being provided for under California case law. It benefits from the fact that it is judicially evolved, and is based on ancient laws relating to communal property and the seas. The doctrine has been suggested frequently as a means of protecting the environment in areas where specific protective legislation is lacking or is not enforced because of doubts concerning its validity. According to Professor Joseph Sax, "public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process." In light of this statement, resolving the question concerning the constitutional validity of Article XV, section 2 in order to make it a viable part of California's law is a legitimate application of the public trust doctrine.

1. Requirements of the Public Trust

The public trust doctrine in California requires that the trust res be held available to the people of the State for particular types of public uses. In the case of the tidelands, tradition has delineated these public uses in terms of navigation, commerce, and fisheries. More recently, recreation has been recognized as a valid use of the tidelands, although it must bow to the traditional uses when necessary.

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66. Professor Joseph Sax of the University of Michigan Law School has been one of the leading expositors of the public trust doctrine. His article The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, supra note 21, and his recent book, Defending the Environment (1971), have been major contributions to this subject. Considered with his other articles [Takings and the Police Power, 74 Yale L.J. 36 (1964) and Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971)], they give evidence of his continuing interest in, and contribution to, the law at the triple interface of public rights, governmental action, and private property.

67. Sax, supra note 21, at 509.

68. People v. California Fish Co., 166 Cal. 576, 596, 138 P. 79, 87 (1913).

69. Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970); see note 5 supra.

70. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796, 3 ERC 1437, 1439 (1971); see note 5 supra.

71. See Sax, supra note 21, at 539.
Where the traditional uses are not appropriate, as in marshy tidal areas and in some upland park areas, allowable uses are generally formulated as those which are of general state-wide interest or are natural uses of the variety of land involved. 72

Normally the State cannot convey trust lands into absolute private ownership since the State may not lawfully divest itself of its obligation as trustee. 73 Attempted alienation of the tidelands passes only bare legal title, the lands remaining subject to the public trust. 74 Without express legislative authorization of more extensive uses, the private grantee may use his land only in ways which do not interfere with public uses. 75

Only in circumstances where it is in accord with the proper administration of the trust may the State segregate tidelands from the trust and dispose of them "in such manner as the interests of navigation, commerce, and fisheries require." 76 This can be done by the legislative branch of the state government, which must first "find and determine that such lands are no longer useful for trust purposes." 77 However, in such cases the grant may not be of such magnitude that the State will effectively have given up its authority to administer the remaining trust lands. 78 As a consequence of these requirements of the public trust, courts have looked skeptically at tideland grants and, in the absence of explicit legislative statements of purpose, have interpreted them quite narrowly. 79 Many of the early tideland grants, for example, were nominally under the Federal Swamp Lands Act, 80 which authorized conveyance of tidal swamp lands by a state to private parties for the purpose of agricultural reclamation. In cases where the conveyed tidelands were not suitable for agricultural reclamation, the Supreme Court of California held the grants ineffective to terminate the trust. 81 The standard which developed was: "[in] instances

72. Id. at 477 & 534-538.
77. Id.
81. Kimball v. Macpherson, 46 Cal. 103 (1873).
of dubious governmental conduct . . . a court should look skeptically at programs which infringe broad public uses in favor of narrower ones . . . [and should impose] a special burden of justification on government." 82

2. Public Tidelands without Public Access?

As noted earlier, the distinction made between federal ownership of upland and state ownership of tidelands at the time California attained statehood has resulted in a dichotomy between private property rights in littoral lands and the state policy encouraging the public use of tidelands.83 This confrontation of law and policy has not only resulted in an actual denial of public access along much of California's shoreline, but has given a dual aspect to the application of Article XV, section 2 and the public trust doctrine.

Although the constitutional validity of the portion of Article XV, section 2 protecting public access has been questioned,84 the State has enforced the portions which deal with public rights in tidelands and navigable waters. The Supreme Court of California, in the frequently cited case Kimball v. Macpherson, stated that "[n]othing short of a very explicit provision . . . would justify us in holding that the Legislature intended to permit the shore of the ocean, between the high and low water mark, to be converted into private ownership."85 Furthermore, the court noted in Long Beach Land & Water Co. v. Richardson86 that the littoral owner's right to use the tidelands adjoining his property is not exclusive of the rights of the public to use those same tidelands. The littoral owner, however, as observed by the court in City of Los Angeles v. Aitkin,87 does have an exclusive right to approach those tidelands from his own property as against strangers to his title, that is, against members of the general public.

This situation when it involves only a single small landowner creates no inequity. The landowner is able to enjoy, free from interference, a private right of property in his littoral fee as well as his common right of use in the tidelands as a member of the public. On the other hand, the public, so long as it has alternative means of access, is able to enjoy its use of the tidelands. However, it is not an infrequent occurrence along the coast that a situation develops—like that in the Sea Ranch controversy88—where a single large land-

82. Sax, supra note 21, at 491.
83. See text accompanying notes 9-12 supra.
84. See notes 50-51 and accompanying text supra.
85. 46 Cal. 104, 108 (1873).
86. 70 Cal. 206, 11 P. 695 (1886).
88. See note 15 and accompanying text supra; part I, A, 4 infra.
holder, or each of several smaller neighboring littoral owners, exercises his individual exclusive right of access so as effectively to deny the public any right of access or use. The net result is that all of the littoral owners, through their control of the most direct and reasonable means of public access, obtain a *de facto* exclusive right to public tidelands. This exclusive right, exercised by a number of littoral owners, would not be interpreted to be usage by representative members of the public. Considering their unique situation, the littoral owners can by no stretch of the imagination be deemed to represent the public in their claim of right.

It is in such circumstances, where a large landholder, or littoral owners in concert, deny a public right, that public policy, as embodied in the public trust doctrine and the policy encouraging the use of public lands, should be used to encourage and support the finding of public easements. Vigorous enforcement of the public trust doctrine by the courts would make certain that "the purposes of the trust [are construed] with liberality to the end of benefiting all the people of the state and not only a select few." In this way *de facto* exclusive private use of public tidelands would be negated; the incidents of the public trust would be protected; a more uniform application of the principles behind Article XV, section 2 would be achieved; and the intent of the statement in *Kimball v. Macpherson* would be carried out.

3. *The Nebulous Duality of the Public Trust*

The public trust doctrine, although a single concept, has two practical aspects, depending on whether the trust property is tideland or upland. Unfortunately, a tendency has developed to treat the tideland trust—over property below the line of mean high tide—as distinctly different from the common law public trust—encumbering public parks and other lands of public use in the uplands. In fact, the essential,

89. See Amicus Brief for Sierra Club, *supra* note 14, at 7.

90. This reasoning is somewhat akin to that used to support implied easements—the genre that includes both easements by implication and easements by necessity. See *Restatement of Property* § 476, comment g at 2983 (1944). These easements arise out of unique circumstances which are sufficiently needful to invoke "considerations of the public policy in favor of land utilization." *Id.*

Later it will be demonstrated that the Mexican legal servitude occupies such a particularly unique relationship with respect to the tidelands, that its treatment in the common law as a third variety of implied easement appears justified. See part II, *D infra.*


albeit minor, difference is statutory, the common law tideland trust being today supplemented by the navigation servitude,\textsuperscript{93} and by state legislative\textsuperscript{94} and constitutional\textsuperscript{95} enactments. Although this gives a greater degree of protection to the tidelands than is provided by the common law concept alone, it does not justify a strict division in public trust law at the boundary between tideland and upland. The rationale supporting each aspect of the trust is practically identical. Article XV, section 2 suggests that statutory protection of the tidelands is not exclusive of all other areas. By its terms, protection under this constitutional provision extends to public access rights in the upland area as well as to public navigation and access across tidelands.\textsuperscript{96} That its protection extends equally to tidelands and to access rights suggests the obvious—that no distinctions should be drawn between the tideland trust and the upland trust, except those laid down by statute. It suggests further that so much blending has in fact occurred between the two aspects of the public trust, that, except for the statutory distinctions noted above,\textsuperscript{97} they are for practical purposes one and the same.

The statutory protections which the tidelands enjoy, in addition to the advantages of the common law public trust, are mainly the result of two provisions. All sales of tidelands within two miles of any incorporated city have been forbidden since 1879 by section 3 of Article XV of the California Constitution, which together with sections 1 and 2 was promulgated by the Constitutional Convention of 1878. And since 1909, all sales of tidelands have been absolutely prohibited by statute.\textsuperscript{98} As a result, attempted conveyances of tidelands into private ownership after that date are void \textit{ab initio}.

The California tideland trust has been the subject of much litigation and, consequently, is well defined. The common law public trust in upland property, on the other hand, suffers from a lack of definition. However, as has been noted, they are very similar. Thus, the rules which have been developed for the tideland trust are, for the most part, also applicable to property of public use, such as access easements, in the uplands. An investigation of public trust law in other states indicates that this is the case. For example, we find that

\textsuperscript{94} \textit{E.g.}, \textsc{Cal. Civ. Code} § 670 (West Supp. 1970) (property below high water mark belongs to state); \textsc{Cal. Pub. Res. Code} § 6302 (West Supp. 1971) (ejection of trespassers from tide and submerged lands); \textit{id.} § 6323 (forbidding structures on accretions); \textit{id.} § 7991 (forbidding sale of tidelands).
\textsuperscript{95} \textsc{Cal. Const. art. XV}.
\textsuperscript{96} \textit{Id.} § 2, reprinted at note 39 supra.
\textsuperscript{97} See note 94 supra. See also note 98 and accompanying text infra.
a legislative grant of authority will be narrowly construed when a state agency attempts to utilize its power to restrict the public availability of trust property. The highest court of Massachusetts, in dealing with this problem, has required a specific finding by the legislature that such a change in use is for the public benefit before granting its approval.99 Before trust land could be diverted to new and inconsistent uses . . . the Legislature [must] identify the land and . . . there [must] appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forego the existing use.100

Thus, although trust properties in the uplands do not have the advantage of the additional statutory protections afforded to the tidelands, it nevertheless appears that conveyances which would eliminate public rights in the uplands will be required to meet equally high standards of legislative intent and judicial scrutiny. In addition, the common law public trust in upland public property in California may be assisted by the California Environmental Quality Act of 1970,101 which requires a detailed environmental impact statement before any governmental action which significantly affects the environment, or, presumably, the status of public trust lands, may be undertaken.

As an incident of public use of the tidelands, a public right of access to the tidelands enjoys the substantial protections provided by the public trust doctrine. It makes little difference whether the easement is thought to be appurtenant to the dominant estate of the tidelands, or only an easement in gross encumbering upland. It is also insignificant whether the access easement was created by the Mexican law, by the common law trust, by the provisions of Article XV, section 2, or by some combination of these concepts. Except for a few statutory differences the public trust doctrine applies in all of these cases and the access right is protected by the public trust. As an incident of the trust, any infringement or restriction on the easement, whatever its nature, would be an attempt to free a portion of the res from trust purposes, which cannot be done without express legislative authority.102 Furthermore, as a right of public use in property, the easement is not subject to private prescription in California.103

102. See text accompanying notes 76-78 & 99-100 supra. See also Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 379, 98 Cal. Rptr. 790, 795, 3 ERC 1437, 1439 (1971).
103. Oakland v. Burns, 46 Cal. 2d 401, 296 P.2d 333 (1956); People v. Chambers, 37 Cal. 2d 552, 233 P.2d 557 (1951); People ex rel. Harbor Commrs v. Kerber,
4. Limitations Imposed upon Local Government

The circumstances of the Sea Ranch controversy provide a recent example of the problems of administering the various aspects of the tideland trust. But more important, it serves to illustrate the restrictions placed upon local legislative bodies in their dealings with the tidelands and the means of overcoming locally ratified private incursions against public tideland access rights.

The basic controversy arose from the Sea Ranch developer's desire to have the ten miles of coastline upon which his project fronted closed to all but the residents of the development. Consequently, it was proposed that the county exchange all prospective claims of public access for a 100 acre park to be dedicated by the developer. After substantial debate and public outcry, the proposal was accepted by the Sonoma County Board of Supervisors. The question which remains unresolved is whether the board of supervisors had the power to ratify an exchange of the public rights which are appurtenant to the public tidelands and which are protected by the public trust doctrine. Under the subdivision regulations of the State, they undoubtedly had the power to make subdivision exactions of fee land and to require dedication of easements for various purposes, including easements for access to the tidelands. However, whether the supervisors could take actions that compromised public rights in trust lands is entirely another matter.

The tidelands of the State are committed to administration by the legislature, which in turn has delegated its management responsibilities to the State Lands Commission. It has been noted that in any action that would "adversely affect traditional public rights in trust lands . . . full consideration of the state's public interest in the matter" must be given. Any decision must "be made in a public forum . . . as a part of a general public program" for dealing with public trust properties. Given the legislature's administrative responsibility and the requirement that full consideration be given to the

104. See note 15 supra.
106. Id. § 11610.5. See also CAL. PUB. RES. CODE §§ 6210.4-10.5 (West Supp. 1971); A.B. 1504, Cal. Leg., Reg. Sess. (1971).
109. Sax, supra note 21, at 531; see text accompanying notes 76-78 & 99-100 supra.
state's interest, the legislature appears to be the appropriate body to ratify the Sea Ranch exchange. Since legislative authorization was not given, the validity of the exchange must at least be considered in doubt.

This conclusion is supported by an examination of the California law on county governments. The counties, as legal subdivisions of the State, have only those subordinate powers necessary to carry out locally those police and public welfare functions of general statewide interest. Such powers may be expressly granted, or they may be implied, so long as they are not in conflict with the general laws of the State. As we have seen, all property in which the people of the State are especially interested—that is, property of public use, such as streets, roads, parks, commons, and seashores—is held in trust for trust purposes and cannot be disposed of without state legislative authorization. The county governments have neither the express nor the implied power to alienate such property. Any attempt to dispose of rights of public use in such property locally would, of course, run against that rule of law. Since no legislative authority was exercised at Sea Ranch, the public rights which formerly existed there must continue to exist and to be available for the uses and purposes of the public trust.

Two California cases which discuss the extent of county powers lend support to this conclusion. In Southern California Utilities v. City of Huntington Park, the county board of supervisors granted the plaintiff a franchise for public water distribution. When the city was incorporated by the State from county territory and later began to plan a municipal water system, the plaintiff sought judicial relief. The court observed, in dismissing the complaint, that the board of supervisors was "a mere agent of the state," and was "powerless to limit the authority of its principal." By analogy, it may be concluded that, absent express authorization by the legislature, county boards of supervisors throughout California lack the capacity to restrict public rights in trust lands. This conclusion is reinforced by the decision in County of San Diego v. California Water & Telephone

111. See 1 E. McQuilllin, Municipal Corps. § 2.45 (3d ed. 1949); 10 id. § 28.38 (3d ed. 1966); 17 id. § 48.18 (3d ed. 1968).
113. See text accompanying notes 76-78 & 99-100 supra. See also Los Angeles Co. v. Graves, 210 Cal. 21, 290 P. 444 (1930) (dicta); 10 E. McQuilllin, Municipal Corps. § 28.38 (3d ed. 1966).
114. 32 F.2d 868 (9th Cir. 1929), cert. denied, 280 U.S. 587 (1929).
115. 32 F.2d at 870.
which held that the county's agreement with the utility company to abandon a public roadway was void for its failure to comply with statutory requirements regarding abandonment. Although the county received the benefit of certain temporary rights of way dedicated by the company as a result of the agreement, the court rejected the company's estoppel argument. Furthermore, the court noted that enforcement of the promise to abandon would "be inconsistent with the additional policy against the making of contracts by a public body to exercise its discretionary governmental powers in a particular manner." This appears to be exactly what was done in the Sea Ranch case by the county's agreeing not to exact dedication of access easements. Consequently, the county's agreement with Sea Ranch, by which it attempted to restrict public access to the tidelands, would appear to be voidable, if not absolutely void, and will, in any event, not be binding upon the State.

5. Conclusion

The characteristics of the public trust, whether in regard to tidelands or the uplands, are such that the legislature has exclusive responsibility over the disposition of property of public use when it is of general statewide public interest. The legislature is not free to dispose of trust property at its whim, but must meet high standards of legislative integrity and intent. Public beach access rights are equally entitled to the benefit and protection of these exacting standards as is other property of public use. In addition, to the extent that access rights may be considered appurtenant to the tidelands, they appear also to qualify for the additional statutory protections provided to property subject to the tideland trust.

II
THE MEXICAN LAW

A. California's Mexican Law Heritage

Many provisions of Mexican law remain today as part of California law. The law of community property, of pueblo water rights, and remnants of appropriative water rights give evidence of this. One of the basic precepts of international law is that upon

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117. Id. at 826-27, 186 P.2d at 130.
118. See W. DeFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 1-69 (1943) (Spanish-Mexican origin of California community property law).
119. Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 244-50, 39 P. 762, 764-66 (1895).
120. Cf. id. (appropriative nature of pueblo water right).
the succession of sovereign nations the law of the former sovereignty continues in effect.\textsuperscript{121} In general, however, Mexican law has been largely ignored as a source of law in the western United States, even though it is universally recognized that the Mexican government reigned as sovereign over this area prior to its cession to the United States in 1848.

The continued force and effect of the Mexican law in California was recognized in 1849 shortly after cession, although this fact is not widely known. The Military Governor of California, Brigadier General Bennett Riley, promulgated in English a portion of the Mexican law\textsuperscript{122} as an aid to non-Spanish-speaking residents.\textsuperscript{123} In the preface to the translation it was noted that the law of California in force at that time was composed of the Mexican law prior to conquest.\textsuperscript{124} The only exceptions were for laws which were purely political or administrative in nature or which conflicted with paramount federal law.\textsuperscript{125} In ordering the promulgation of the Mexican law, General Riley followed an earlier decision of the United States Supreme Court which had recognized the continued force of the Spanish law in Florida after its cession by Spain.\textsuperscript{126}

Thus, when California was admitted to statehood in 1850, the greatest portion of its law was Mexican in origin. The Mexican law was to remain the law of California until changed by legislative act or judicial decision. The largest change occurred in 1850 when the first California legislature passed two statutes: the first statute repealed all prior laws\textsuperscript{127} and the second adopted the English common law as the rule of law in California.\textsuperscript{128} Both statutes, however, contained exceptions that allowed certain aspects of the Mexican law to remain in effect. The repealing statute stated:

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122. J. Halleck & W. Hartnell, \textit{Translation and Digest of Portions of the Mexican Laws of March 20 and May 23, 1837}, at 4 (1849) [hereinafter cited as \textit{Halleck & Hartnell}].


126. American & Ocean Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 544 (1828). \textit{See also} State v. Valmont Plantations, 346 S.W.2d 853, 855-56 (Tex. Civ. App. 1961) (Mexican land grants in Texas are governed by the law of the sovereign at the time the grants were made).


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All laws now in force in this State except such as have been passed or adopted by the Legislature are hereby repealed: Provided, however, that no rights acquired, contracts made, or suits pending shall be affected thereby . . . . 129

In the same year the legislature adopted "[t]he common law of England . . . [as] the rule of decision in all the courts of this State." 130 However, the adoption of the common law was effective only "so far as it is not repugnant to or inconsistent with the . . . laws of this State." 131 Certain provisions of the Mexican law, therefore, remained part of California's common law because of profound and irresolvable conflicts between analogous provisions of the Mexican law and common law, and due to the paramount requirements of treaties and the United States Constitution.

The retention of the Mexican law is most evident in relation to private land titles in the uplands. The continuance of the earlier law of land titles occurred because of the effect on property rights of the United States Constitution 132 and of the treaty with Mexico, which required that the property of Mexicans be "inviolably respected." 133 The result of these effects was that Mexican land grants, which in many instances would have been invalid at common law—for example, due to inadequate description of boundaries—were examined and confirmed according to the Mexican law.

A Federal Land Commission was established by act of Congress in 1951 134 to determine the extent of the federal public domain in California and to implement the provision of the treaty with Mexico requiring that the property of Mexican citizens in California be "inviolably respected." The act required that all titles in California be presented to the land commissioners within two years for confirmation or they would be forfeited and become a part of the public domain. Many land owners, confused by the provisions of the act, were uncertain whether valid Mexican titles had to be submitted. As a result, many bona fide titles were not presented. 135 In 1864, however, the California Supreme Court held, in Minturn v. Brower, 136 that titles which were perfect under the law of Mexico need not have been presented to, and confirmed by, the Federal Land Commission to have retained their validity. The effect of this decision was to establish a

131. Id.
132. U.S. CONST. amend. 5; see CAL. CONST. art. 1, § 8 (1849).
135. See W. COWLES, TREATIES & CONSTITUTIONAL LAW 241-43 (1941).
136. 24 Cal. 644 (1864).
dual system of land titles in California during the first decades of her statehood.

The measurement of old land grant titles by the Mexican law was of course inconsistent with the general statutes repealing all prior law and adopting the common law as the rule of decision in California, but it was necessary in order to comply with the requirements of the Constitution and the treaty with Mexico. The continued use of the Mexican law fell within the exceptions to the California statutes noted previously.

Reliance upon the Mexican law of land titles continued until 1888, when Bo
tiller v. Dominguez was decided by the United States Supreme Court. Although the effect of this decision was to end the dual system of private land titles, it did not cut off the continued applicability of other rules of Mexican law in California. In order to facilitate the survey of the public domain and to place land titles and the rights of homesteaders in California on a stable foundation, the Court did no more than hold invalid those titles which had not been submitted to and confirmed by the land commission.

It is thus clear that, in spite of the two 1850 statutes, at least that portion of the Mexican law dealing with private land titles continued in California until the Botiller decision in 1888. Other portions of the Mexican law are expected also to have carried over into California law; among these would be the law of Mexican public trust lands.

The law of Mexican trust lands has received much less attention than the law of private land titles. The effects of the Mexican law in this area are consequently not as clear. Given California's long history of protecting public trust rights, however, one effect is certain. Whatever the extent of the Mexican public trust rights existing prior to cession, they will have been protected to the present day by the combined effects of the common law public trust doctrine, legislative safeguards, and the California Constitution, in a manner analogous to the way in which private Mexican property rights were protected by the United States Constitution and the treaty with Mexico prior to the Botiller decision.

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137. 130 U.S. 238 (1888).
138. Id.
140. See part I, B supra.
141. See text accompanying notes 127-31 supra.
142. CAL. CONST. art. XV, § 2; see part I, A supra.
143. See part II, B infra.

The question of whether public rights may have been extinguished for lack of confirmation by the land commission is easily resolved. In general, public rights did not require confirmation. Consequently they were not affected by Botiller v. Domi-
Public trust property is treated by the Mexican law under the subject of public commons. This is a subject with which American courts have experienced considerable difficulties of interpretation. Consequently, it is helpful, indeed necessary, to look into these difficulties and to investigate the sources of the misunderstandings that have occurred.

B. Mexican Trust Lands in California

In dealing with questions involving title to land that is arguably public property, American courts have almost uniformly restricted themselves to consideration of questions of fee title. Equitable property interests have been largely ignored, even though the United States Supreme Court has recognized that the existence of prior foreign trusts would affect such titles.\textsuperscript{144} An older California Supreme Court case provides an example of this problem.

In \textit{F.A. Hihn Co. v. City of Santa Cruz}\textsuperscript{145} the city claimed title to a segment of dry sand beach which was above the line of the mean high tide, but below the line of the extraordinary high tide which was the limit of the Mexican "seashore."\textsuperscript{146} The plaintiff then sued to quiet his title. Three counter-arguments were utilized by the city in order to challenge his title claim: (1) the property had been adversely possessed by the city and impliedly dedicated to public use; (2) the lands were pueblo commons, title to which inured to the city as successor to the Mexican pueblo; and (3) by act of the state legislature, title to contiguous tidelands had devolved upon the city. Although the court upheld the city's argument based on adverse possession of that part of the contested property that had been improved and maintained as a public esplanade, the other arguments were dismissed.\textsuperscript{147}

\textsuperscript{144} See text accompanying notes 172 & 180 infra.
\textsuperscript{145} 170 Cal. 436, 150 P. 62 (1915).
\textsuperscript{146} See note 192 infra.
\textsuperscript{147} 170 Cal. at 443-46, 150 P. at 65-67.
The court held that public usage of unenclosed and unimproved land would not result in an implication of dedication, since the public's habit of going on the land "will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate." On the city's claim of pueblo rights, the court doubted that the city's predecessor was ever regarded as a pueblo in the Mexican law, and concluded that in any event the city had lost any such right which it may have had by its failure to present its claim for confirmation before the land commission. On the city's third claim, as successor to the State under the act of the state legislature, the court found that the act had only disposed of common law tidelands and, therefore, could not affect title to lands above the mean high tide line.

The circumstances surrounding this third claim present an interesting turnabout, in that the city asserted a claim under a state legislative act in order to nullify its own ill-advised grant to the plaintiff's predecessor in interest. This grant, dated December 7, 1869, from trustees of the inhabitants of Santa Cruz, was given under authority of an act of Congress, by virtue of which the United States had relinquished all right and title to the uplands within the corporate limits of the town of Santa Cruz and granted them to the corporate authorities of the town, and their successors, "in trust for and with authority to convey so much of said lands as are in the bona fide occupancy of parties upon the passage of this act by themselves or tenants, to such parties."

The act of the California Legislature, however, declared all the tidelands within the corporate limits of the town of Santa Cruz "between the line[s] of high and low tide . . . hereby dedicated as public grounds, and the title thereto . . . granted to the corporate authorities of the Town of Santa Cruz in trust for the use of the public . . . " The city asserted its claim on the grounds that the plaintiff's land was tideland, therefore title to it had been vested in the city by the state legislative act. The court answered:

The findings do not disclose that the property in dispute is tide-land within the meaning of that expression as used in the [state] act of

148. Id. at 448, 150 P. at 68. This has since been abrogated as a rule of law by the decisions of the California Supreme Court. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); O'Banion v. Borba, 32 Cal. 2d 145, 195 P.2d 10 (1948).
149. 170 Cal. at 444-45, 150 P. at 66.
150. Id. at 443, 150 P. at 66. See text accompanying notes 134-36 supra.
154. Id.
156. Id.
1872, or as understood in the decisions dealing with the rights of individual states in lands bordering upon or underlying navigable water.\textsuperscript{157}

To support its conclusion, the California Supreme Court noted the general relationship between title to the tidelands and title to the uplands upon the establishment of a state.

[T]he title which the Mexican government may have had in the land between the lines of ordinary and extreme high tides\textsuperscript{158} became vested in the United States and not in the state of California. Whatever may have been the extent of the sovereign rights of the Mexican government, those rights all passed, upon cession, to the United States. By the treaty of Guadalupe Hidalgo, the United States became vested with the title to all the lands in California not held in private ownership. The state of California, upon its organization, became vested with the rights incident to the sovereignty of the people of each state. The extent of those rights as between the United States and any state of the Union must be measured, not by the Mexican law, but by our own.\textsuperscript{159}

The court thus based its decision on a limited rationale flowing from the definition of common law tidelands\textsuperscript{160}—that area lying between the lines of mean high and mean low tides—and refused to consider the impact of the Mexican law. It apparently felt that the Mexican law was no longer of any effect in California and, consequently, ignored completely any application of the Mexican tidelands law to the case.

Under the Mexican law the seashore extended up to the line of extraordinary high tide\textsuperscript{161} and was burdened with a right of commons quite similar to our tideland trust.\textsuperscript{162} Consequently, one would have expected the court to treat the Mexican seashore similarly to common law tidelands so that any grant of these “public trust lands” on the authority of the United States would remain encumbered by the public servitude.\textsuperscript{163} Unfortunately, the Hihn court declined to recognize any such equitable public rights connected with the former Mexican tidelands.\textsuperscript{164}

\textsuperscript{157} 170 Cal. at 442, 150 P. at 65.
\textsuperscript{158} See note 2 \textit{supra} and note 192 \textit{infra}.
\textsuperscript{159} 170 Cal. at 443, 150 P. at 66 (citations omitted).
\textsuperscript{160} \textit{Id.} at 442, 150 P. at 65.
\textsuperscript{161} F. HALL, \textit{THE LAWS OF MEXICO} § 1409 (1885); see note 2 \textit{supra} and note 192 \textit{infra}.
\textsuperscript{162} See part III, C, 2 \textit{infra}. It is not unexpected that the Mexican seashore commons and our tideland trust are very similar. Both find their common origin in Roman law. See materials cited at note 64 \textit{supra}, and \textit{LAS SIETE PARTIDAS} lxv (S. Scott transl. 1931).
\textsuperscript{164} 170 Cal. at 443, 150 P. at 66.
The *Hihn* decision is particularly ironic. A comparison of the Mexican right of commons in the seashore with pueblo commons leads to the conclusion that the Mexican law goes to greater lengths to protect the seashore.\(^{165}\) In *Vernon Irrigation Co. v. City of Los Angeles*\(^{166}\) only twenty years earlier the California Supreme Court had recognized equitable rights of the public which required it to preserve and protect a pueblo water right: "Our courts have determined that the successors of these pueblos held the pueblo lands in trust for the inhabitants, and that the legislature can control the execution of this trust . . . ."\(^{167}\) Similarly, in *San Francisco v. LeRoy*\(^{168}\) the United States Supreme Court had protected the right of a pueblo's successor to the common property of the pueblo from an action brought to quiet title, although finding for the plaintiff on all other issues.

The trust upon which the city held the municipal lands it had acquired as successor of the Mexican pueblo, as declared in the decree of confirmation, was a public and municipal trust, to be exercised chiefly in the distribution of the lands to occupants and settlers and in the use of the remainder for the public purposes of the city; and the exercise was subject to the supervision and control of the legislative authority either of the State or of the United States . . . ."\(^{169}\)

A further indication that the consideration given to the tidelands trust in *Hihn* was too limited is found in *Borax Consolidated, Ltd. v. City of Los Angeles,*\(^{170}\) which suggests that Mexican trusts are an exception to the general rule noted in *Hihn.*\(^{171}\) Unlike the *Vernon Irrigation* and *LeRoy* cases, *Borax* dealt with tidelands, rather than pueblo rights.

Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjected to trusts which required a different disposition . . . .\(^{172}\)

Consequently, while California acquired no more in the way of fee title to the tidelands than did her sister states, it appears that the Mexican law had placed additional non-fee property rights and obligations

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\(^{165}\) Compare part II, C, 2 infra with text accompanying notes 218-27 infra. As to the protection afforded tidelands by California law, see text accompanying notes 39-54 & 68-82 supra. *See also* Sax, supra note 21, passim.

\(^{166}\) 106 Cal. 237, 39 P. 762 (1895).

\(^{167}\) *Id.* at 245, 39 P. at 765.

\(^{168}\) 138 U.S. 656 (1890).

\(^{169}\) *Id.* at 667 (emphasis added).

\(^{170}\) 296 U.S. 10 (1935).

\(^{171}\) *See* text accompanying note 159 supra.

\(^{172}\) 296 U.S. at 15 (citations omitted; emphasis added).
upon the public trust lands. Originally, the burden of the trust was held by the United States. But where these rights are similar to those of common law tidelands, or are appurtenant to such lands, as in the case of the Mexican seashore and access rights thereto, the title and the burden of administering the accompanying trust obligations would probably devolve upon the state at the time of its organization.

An example of the devolution of trust responsibilities upon the new sovereign as a result of the acquisition of new territory is found in New Orleans v. United States. That case involved a quay on the Mississippi River in New Orleans which the city wished to sell. Louisiana had retained much of the civil law of communal property as a part of its Spanish-French heritage. Under that law quays were considered a type of common property, not unlike public trust property in California. The United States Supreme Court observed that the quay could not be sold because title to the quay was vested in the United States as successor to the sovereignty of France, and, since the quay had been dedicated to the public use by the King of Spain, the United States acquired no right to dispose of it in the manner of other public lands. Moreover, the Court noted, "... the right to regulate this use, and to carry out the trust, belonged to the State of Louisiana and ... [its] people, such a right never having been delegated to the federal government."

It can be concluded, therefore, that while the United States acquired fee title to all uplands above the line of mean high tide, including portions of the Mexican "seashore," those lands continue to be subject to any trusts imposed upon them by prior law. The administrative burdens, as well as the beneficial interests, of such trusts devolved upon the State at the time of its formation and are currently held in trust for its inhabitants. It appears also that any grant or

173. Id.
174. See text accompanying notes 203-06 infra, and part II, D infra.
176. 35 U.S. (10 Pet.) 662 (1836).
180. Id. Accordingly, the Court held:
It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.
Id. at 437. Accord, Hart v. Burnett, 15 Cal. 530, 560 (1860).
181. Where the beneficial interests are not related to lands subject to municipal or state trusts, and therefore the obligation of "trustee" does not devolve upon the state, it is probable that the duties of administration become the responsibility of Congress. Cf. Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 15 (1935); San Francisco v. LeRoy, 138 U.S. 656, 667 (1890).
patent of the fee by or under the authority of the United States will not destroy or otherwise sever it from the encumbering trust, rather the fee will remain subject to the public servitude on upland property of public use. The Mexican seashore, and accompanying access rights, appear, moreover, to qualify for the additional protections provided by Article XV, section 2 of the California Constitution because of their close relationship to the common law tidelands.

Consequently, it must be concluded that the decision of F.A. Hihn Co. v. City of Santa Cruz requires re-evaluation. Since the case involved only the plaintiff, a private party, and the city, and dealt only with the question of fee title, it cannot be considered as having completely disposed of the controversy. The State today still holds title to a beneficial interest in trust over the plaintiff's land, and could at any time bring an action and establish an easement based upon Mexican commons.

C. The Mexican Law of Commons

In 1848 the body of Spanish and Mexican law in force in California was composed of Royal decrees, the orders and decrees of lesser officials (such as Viceroy and Governors-General), legislative enactments, and various compilations. Some of these laws repealed previous provisions regarding the same subject; some only modified prior law; and others supplemented former law or applied only to certain portions of the sovereign territory. Consequently, the law antedating the Civil Code of 1871 is vastly complex.
Apparently because of the complexity of the early Mexican law, as well as its being recorded in a foreign tongue, American courts have experienced an endemic failure to identify the various types of public commons recognized by Mexican law. The characteristics of Mexican commons are not significantly different from those of our public trust properties; however, the commons are of greater variety and serve a different function in the Mexican system. The influence of these differences on the methods used to settle undeveloped territory in the United States and Mexico is reflected in the following statement from *Vernon Irrigation Co. v. City of Los Angeles*:\(^{187}\)

Our plan has been to encourage settlement of the country by selling land in small tracts at a minimum price. When so settled, villages, cities, and towns have grown up as required to supply the wants of the settlers. They have been called into existence by the settlements, but, in the beginning, have not contributed much to cause the country to be settled.

The Spanish system was the opposite. They founded or encouraged the formation of villages which, by affording protection as well as educational and religious privileges, would encourage settlement of the neighboring country.

Perhaps the most important respect in which the pueblos and the habits of the inhabitants differed from our municipalities and the habits of our people is found in the extent to which individual wants were supplied from public or common lands. In this respect the difference is almost startling. Our practice is to reduce everything to private ownership from which a profit can be made; and, of course, the more essential it is to the members of the community, the more profit can be made from it. The rule of the pueblo was almost the reverse of this. So far as communal ownership would answer the purposes of the community it was preferred.\(^{188}\)

1. *Codigo Civil of 1871*

The Civil Code of 1871, although dating from a later period than that with which we are concerned, provides valuable insight into the treatment of common property in the Mexican law. Public property was first categorized as either *bienes*—property of common use—or *propios*—property of special use.\(^{189}\) The *propios* was similar to our public domain. It was retained by various governmental units as a

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188. *Id.* at 245-46, 39 P. at 764-65.
189. C. Civ. Dist. y Terr. Fed. art. 800 (1871), translated in L. Hamilton, *Mexican Law* art. 7, at 39 (1882) [hereinafter cited as Hamilton], as follows: "Property of public ownership, is divided into property (bienes) of common use and (bienes propios) property of special use." (italics in original); accord, F. Hall, *The Laws of Mexico* § 1618 (1885) [hereinafter cited as Hall].
source of revenue, and could be disposed of to encourage the development of the frontier area.¹⁹⁰

The property of common use or bienes closely approximates property which in the common law would be recognized as public trust lands.

Article 801. Property of common use are those things which may be used by all of the inhabitants, under the restrictions established by law, or by administrative regulations.¹⁹¹

Article 802. The foregoing article comprehends: 1st, The sea shore, which is understood to be that part of the land, which is covered by water at ordinary high tide;¹⁹² 2nd, Harbors, bays, anchoring grounds, and streams; 3rd, Rivers, navigable or not, their beds, mouths, and (esteros . . .) 4th, Bridges, highways, roads and canals, constructed and preserved at the expense of the State; 5th, Banks of navigable rivers, in so far as their use is indispensable for navigation; 6th, Lakes and lagoons, which do not belong to private individuals; 7th, Streets, plazas, fountains, and drives of the towns; 8th, Palaces, monuments and national edifices destined for offices and other public establishments.¹⁹³

Thus, in addition to common law public trust property, the Mexican law included in the category of bienes property which could be privately owned in this country. Both non-navigable and navigable rivers were property of common use, whereas in America, many jurisdictions allow private ownership of non-navigable streams and the non-navigable portions of navigable streams. This private ownership is subject to riparian and prior appropriative rights.¹⁹⁴ Furthermore, the common use concept in Mexican law extends to the shores of navi-

¹⁹⁰ See Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. at 247, 39 P. at 765; Hamilton, supra note 189, art. 10, at 40; Hall, supra note 189, at §§ 1622-23.
¹⁹¹ Hamilton, supra note 189, art. 8, at 39; accord, Hall, supra note 189, at § 1619.
¹⁹² Hamilton’s translation of article 802 says that the shore includes “that part of the land, which is covered by water at ordinary high tide,” whereas Hall translates this clause as “land which the water covers in its greatest ordinary flux.” Hamilton, supra note 189, art. 9, at 39-40; Hall, supra note 189, at § 1620. The Hamilton version appears to be an error in translation and the Hall version has been accepted as the rule in the Mexican law. See F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. at 438, 150 P. at 64; Luttes v. State, 289 S.W.2d 357 (Tex. Civ. App. 1956). See also Hall, supra, at § 1409 (defining banks relative to the periodical floodtide).
¹⁹³ Hamilton, supra note 189, art. 9, at 39-40; Hall, supra note 189, at § 1620. Hamilton notes that the foundation of article 802 is found in Las Siete Partidas, Partida 3, title 28, laws 9 & 10.
¹⁹⁴ See 1 Waters and Water Rights §§ 53.2-5 (R. Clark ed. 1967). In most states there is a property right in the usufruct which may be privately owned. In contrast, under the Mexican rule, “the waters of all rivers were . . . public property, to be administered and distributed for the use of the inhabitants.” Thus, “the water belonged to the nation.” Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. at 248, 39 P. at 766; see Hall, supra note 189, at § 1388.
gable rivers. For most of our states, the beds and banks of navigable waters are owned by the respective states. In a few jurisdictions, the shores of even navigable streams may be privately owned, and the public has no ownership rights therein,69 notwithstanding constitutional provisions to the contrary.105 In Mexico, however, the property of common use in the shores of navigable streams was a burden upon the underlying privately owned land, creating a public servitude for common use.107

The Codigo Civil thus recognized broad public rights in those properties offering communal utility and benefit. Although the codification was undoubtedly a restatement of pre-existing law, in many instances the older Mexican and Spanish laws were probably modified and improved to meet more nearly the demands of changed conditions and different circumstances in nineteenth century Mexico. Thus, the vast and complex labyrinth of this older body of law should be delved into to discover what the law was at the time of California's cession.

Las Siete Partidas198 treated the bienes (property of common use) of the Codigo Civil under three separate laws. The first described a kind of property the fee to which was owned by no one, but was available to the use of all. The second law referred to property which also could be used by anyone, but could be either publicly or privately owned. In the latter case the fee was burdened with a public servitude. The third law described municipal commons, the beneficial interest to which was held in trust by the town for its inhabitants. The use of municipal commons apparently could be restricted to residents of the town.200

195. See generally, 1 WATERS AND WATER RIGHTS §§ 42.2-.3 (R. Clark ed. 1967).
197. HALL, supra note 189, § 1409 at 419. "The banks of the rivers belong to the owners of the contiguous estates as to property, and to all men as to use." See also HALL, supra, §§ 1827, 1828, 1840 & 1906.
198. "The Seven Parts," the Spanish code prepared during the middle ages and promulgated in 1348, was described as "a full and exact exposition of the jurisprudence" of Spain. G. SCHMIDT, Historical Outline of the Laws of Spain, in THE CIVIL LAW OF SPAIN AND MEXICO 68 (1851). It was modeled on the Justinian Code (see LAS SIETE PARTIDAS lxv (S. Scott transl. 1931)), and remained in force until after the cession of California. See G. SCHMIDT, supra, at 93-102.
199. Partida 3, title 28, law 3, translated in HALL, supra note 189, at § 1465; see part II, C, 2 infra.
200. Partida 3, title 28, law 6, translated in HALL, supra note 189, at § 1468; see part II, C, 3 infra.
201. Partida 3, title 28, law 9, translated in HALL, supra note 189, at § 1471; see part II, C, 4 infra.
202. See text accompanying notes 228-30 infra.
2. Seashore Commons

Partida 3, title 28, law 3, says that "the air, rain, water, the sea and its shores ... belong in common to all the living creatures of this world."[203] This broad, figurative language can hardly be taken literally, but must have indicated a kind of property incapable of exclusive ownership as that term is understood in our law. As to these items the Mexican law apparently recognized a broad type of common ownership that transcended both national and private interests. Nevertheless, Frederic Hall[204] indicated that these properties were, in fact, owned by the national government. "The shores of the sea belong as to property to the nation that is owner of the country of which it is a part, and as to use, they belong to all men."[205] This change is perhaps due to practical considerations arising between the drafting of Las Siete Partidas in the thirteenth century and a more pragmatic political consciousness prevailing in the nineteenth century during the drafting of the Codigo Civil. The net effect was that the sovereign held these commons in trust[206] for the use of all persons. Thus, the Partida recognized a broad and inclusive public interest in the "sea and its shores" which could not be reduced to restrictive ownership.

As to use, the Partida notes that "every man may enjoy the use of the sea and its shores" for fishing, navigation or any purpose "advantageous to him."[207] One writer notes "that any one may fish or navigate on the sea, and on its shore."[208] From comparison with other provisions dealing with use,[209] it seems that any person, Mexi-

203. Translated in HALL, supra note 189, at § 1465:
What Are the Things Which Belong in Common to All Creatures Living.—
The things which belong in common to all the living creatures of this world are the air, rain, water, the sea and its shores; for every living creature may use them according to his wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing or navigation, or doing there whatever else he may conceive advantageous to him. Nevertheless, if there be a house on the seashore belonging to any one, it ought not to be pulled down or used in any manner without the consent of the builder or owner. If, however, it be destroyed by the sea or otherwise, or fail to ruin, then any person may build another in its place.

Id.

204. Hall was an early California attorney, the author of the highly acclaimed History of San Jose (1871), as well as counsel to Maximilian I, Emperor of Mexico, during the last days of his reign. His volume, The Laws of Mexico, has been described as "the most extensive treatment in English of Mexican laws that had yet appeared. ... The work is still valuable as a statement of Mexican law of the period." Johnson, Frederic Hall, 38 CAL. HIST. SOC'Y Q. 47, 55 (1959).

205. HALL, supra note 189, at § 1409.

206. See id. § 122.

207. Partida 3, title 28, law 3; translation cited in full at note 203 supra.

208. 2 J. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN 76 (1839).

can national or foreigner, could exercise a right to use these common properties subject only to the common good.\textsuperscript{210} The right of use in the seashore was non-exclusive, except that a "house" or "retreat"\textsuperscript{211} could be built on the shore so long as it did not interfere with the common right of use. No right of property to the underlying soil would accrue the owner of the dwelling, however;\textsuperscript{212} and such use most likely could be regulated by the governmental body charged with the administration of the seashore commons.\textsuperscript{213}

The use of the word "retreat" in Partida 3, title 28, law 4, as well as the broad language in law 3 "for the purpose of . . . doing there whatever else he may conceive advantageous to him," seems to indicate that, unlike early common law,\textsuperscript{214} the Spanish-Mexican law recognized that recreation was a legitimate use of the tidelands.

3. \textit{Public Commons}

With respect to the second kind of common property—rivers, ports, and public roads—the Partidas provided for restrictive public ownership.\textsuperscript{215} These properties were owned by "all men in common." The stipulation that "strangers . . . from foreign countries" could use them suggests that "all men" did not necessarily refer to human beings generally, regardless of their nationalities, but rather indicated that these properties were owned by the nation.

Although river banks could be privately owned, they were subjected to broad public rights of use, which limited the owner's right to

\begin{itemize}
\item \textsuperscript{210} Cf. Partida 3, title 28, law 8, translated in Hall, \textit{supra} note 189, at § 1470.
\item \textsuperscript{211} Partida 3, title 28, law 4, translated in \textit{HALL, supra} note 189, at § 1466.
\item \textsuperscript{212} Partida 3, title 28, laws 3 & 4, translated in \textit{HALL, supra} note 189, §§ 1465 & 1466.
\item \textsuperscript{213} See, e.g., text accompanying notes 219-20 infra.
\item \textsuperscript{215} Partida 3, title 28, law 6, translated in \textit{HALL, supra} note 189, at § 1468, as follows:
\begin{quote}
That Every One may Make Use of Ports, Rivers, and Public Roads.—Rivers, ports, and public roads belong to all men in common; so that strangers coming from foreign countries may make use of them, in the same manner as the inhabitants of the place where they are. And though the dominion or property (senorio) of the banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow there, or to refit his vessel, or to put his sails or merchandise there, So fishermen may put and expose their fish for sale there, and dry their nets, or make use of the banks for all like purposes which appertain to the art or trade by which they live.
\end{quote}
\textit{See also id.} § 1388; State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App. 1961) (riparian water rights were not appurtenant to Mexican land grants but required an express grant). Law 6 was incorporated into Louisiana law and codified at \textit{La. Rev. Civ. Code} § 455 (1870).
use and exploit that land.\textsuperscript{216} The rights to public use of river banks appear closely to have approximated those uses allowed to be made of the seashore:

The banks of the rivers belong to the owners of the contiguous estates as to property, and to all men as to use. Hence it is that, as on the shores of the sea as on those of rivers, anyone can build a house or cabin to take shelter, or other building which may suit him, provided that he does not embarrass the common use.\textsuperscript{217}

4. \textit{Municipal Commons}

The third type of common property, the municipal commons of cities and towns, was described in \textit{Partida} 3, title 28, law 9:

[T]he water-fountains, the places where fairs and markets are held, or where the city councils meet; the sandy places on the banks of rivers [apparently referring only to those banks within the city as opposed to banks located elsewhere]; the threshing and race grounds; the forests and pastures; and all other similar places which have been appropriated and granted for the common use . . . .\textsuperscript{218}

Although it might appear that the ownership of such commons rested with the city, the fee title actually remained in the sovereign,\textsuperscript{219} subject, however, to the management of, and disposition for specified purposes by, the \textit{ayuntamiento} or town council.\textsuperscript{220}

Dispositions expressly allowed were those for house lots and \textit{suertes} or farming lands.\textsuperscript{221} The \textit{ayuntamiento} could also lease the \textit{propios} (lands akin to public domain) to obtain revenue to support the municipal government.\textsuperscript{222} \textit{Exidos} were the lands set aside for recreation and common seasonal uses such as fairs, fiestas, and threshing. Like the other lands of common use, these lands were subject to a public trust requiring that they be retained for public use. They could be disposed of, however, when the supply of previously surveyed and

\textsuperscript{216} See \textit{Partida} 3, title 28, laws 6 & 7, translated in \textit{HALL, supra} note 189, at §§ 1468, 1469. See also \textit{Partida} 3, title 28, law 8 (structures in rivers or on their banks interfering with the common use ought to be destroyed), translated in \textit{HALL, supra}, at § 1470.

\textsuperscript{217} \textit{HALL, supra} note 189, at § 1409.

\textsuperscript{218} Translated in \textit{id.} § 1471. \textit{Compare with C. Civ. Dist. y Terr. Fed. art. 802 (1871), translated in \textit{HAMILTON, supra} note 189, art. 9, at 39-40, reprinted at text accompanying note 193 \textit{supra}.}

\textsuperscript{219} See \textit{HALL, supra} note 189, at § 122. \textit{Hall says that title to pueblo commons remained in the sovereign. Since the pueblo occupied a favorable position in the Mexican law (see text accompanying note 188 \textit{supra}), this would seem to indicate that title to the other varieties of commons known to the Mexican law was also vested in the sovereign.}

\textsuperscript{220} \textit{Id.; J. DWINELLE, THE COLONIAL HISTORY OF THE CITY OF SAN FRANCISCO §§ 83-84 (1863) [hereinafter cited as \textit{DWINELLE}].}

\textsuperscript{221} \textit{HALL, supra} note 189, at § 122; \textit{DWINELLE, supra} note 220.

\textsuperscript{222} \textit{HALL, supra} note 189, at § 122; \textit{DWINELLE, supra} note 220. \textit{See Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 247-48, 39 P. 762, 765-66 (1895).}
designated house lots was exhausted. In this instance, the ayuntamiento was required to make a finding, not unlike that recently urged by certain writers in this country and required by some courts, that "all the ground for house-lots was occupied" and there was no other means by which the town could expand. These priorities appear to be less an indication that the Mexican law held development and economic progress above park and recreational lands than of the particular means adopted by the Mexican and Spanish governments for the settlement of expansive and sparsely settled territory. It would have been easy in California at the time to substitute nearby unimproved lands for those consumed by the growth of a city—with no loss of benefit to the citizenry.

Another unique aspect of the municipal commons, as contrasted with the two previously-discussed types of commons, was the ability of inhabitants of a particular town to discriminate against non-inhabitants.

Every person living there may use these things, they being common alike to every man, to the poor as well as to the rich. But they who reside in other places can not use them against the consent or prohibition of those who live there.

This provision indicates that municipal commons were not truly property of general public use, but were reserved to the town's people for more restrictive municipal purposes. This was apparently a reflection in the Spanish law of the need to conserve scarce resources, such as water, in a naturally arid environment, and shows, in addition, that the title of the sovereign in the town commons was at best nominal. The true nature of these vital resources was their use for the common utility and public benefit, rather than as proprietary lands of the local or national government.

5. Conclusion

The preceeding discussion of Mexican commons makes it apparent that most varieties of the commons have counterparts in the com-

223. HALL, supra note 189, at § 116.
224. See text accompanying notes 61-63 supra. Before trust lands can be diverted to new uses inconsistent with a public trust, the legislature must specifically recognize the desirability of abandoning the old use. Sacco v. Dep't of Pub. Works, 352 Mass. 670, 227 N.E.2d 478 (1967). Sax has called this decision an "ingenious flick of the doctrinal wrist" which forces the "agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust." Sax, supra note 21, at 498.
225. HALL, supra note 189, at § 116.
227. Cf. DWINELLE, supra note 220, at § 16.
228. Partida 3, title 28, law 9, translated in HALL, supra note 189, at § 1471.
230. See note 219 supra.
mon law public trust. The seashore common and the tideland trust, encompassing the area between mean high and mean low tide, are practically identical—the only major differences being the greater breadth of the seashore common and the ability of persons to build "retreats" upon them. This later attribute has probably been abrogated in California and will not carry over into modern California law. Consequently, should it be held—as the previous analysis of F.A. Hihn Co. v. City of Santa Cruz has concluded—that the seashore above mean high tide to the line of the extraordinary tides is burdened by an easement in trust for the public use, the beach area available for public recreation can be said effectively to have been expanded to a breadth equivalent to that of the Mexican seashore common.

Other aspects of Mexican commons could be incorporated to add new dimensions to the common law public trust, several of which are important because of their relationship to the problem of access to public recreational lands and navigable waters. For example, the Mexican pueblo held in trust the banks of any rivers and the seashore within its limits. Such "beachland" could be as effectively protected by the common law public trust as by the Mexican law of commons, with the exception that the right to discriminate between residents and non-residents has been abrogated by statute in California.

The extension of the common use concept of the Mexican law to river banks generally, however, has no common law counterpart. The concept would make the shore of all California rivers subject to a public servitude, thus supplementing the constitutional right to fish by extending public use to privately owned river banks. The problem of access to such areas would prove no more difficult than that relating to access to public beach lands, and may also be solved by further reference to the Mexican law.

D. Mexican Legal Servitudes

The foregoing classification of lands of common use has demonstrated the all-inclusive nature of the Mexican law. This is seen

231. See text accompanying notes 211-14 supra.
233. 170 Cal. 436, 150 P. 62 (1915); see text accompanying notes 145-85 supra.
237. See text accompanying notes 194-97 supra.
239. See part I supra.
most clearly in the descriptions of the kinds and characteristics of property potentially includable as for the common use. Where the statutes lacked specificity, the void was filled by ordinances and decrees of the various legislative and executive authorities.240 There were no further enactments in some areas of the law, thus indicating that certain relationships and duties must have existed in order that the basic laws be effective at all.

The comprehensiveness of the Mexican law is important to resolving the remaining problem of access to the public commons. For instance, nowhere in Las Siete Partidas, nor in the other regulations relating to grants of pueblo lands,241 is there any statement requiring the reservation of public streets or roads. Yet, the granting body, the local ayuntamiento,242 must have been required to provide for streets and roads. To suggest that the grantees provided roads through dedication of a portion of their grants, as in the common law, would ignore the very comprehensiveness of the Mexican law, to say nothing of the fact of sovereign ownership of all lands not granted, subject to regulation and management by provincial or local governmental units.243

The Colonialization Law of 1813, although not dealing exclusively with pueblo lands, gives evidence of this. As a reward for those who fought for the Spanish crown during the tumultuous years of the early nineteenth century, the Spanish Cortes provided that "[a]ll public and crown lands . . . be reduced to private ownership,"244 subject only to certain specified exceptions. Among the lands reserved to public and private benefit alike were "the necessary commons of the towns"245 and the ways and servitudes246 which may exist or arise by law.247 Since public roads were regarded as commons in Las Siete Partidas,248 it is obvious that streets and roads must have been reserved from the grants. Moreover, other writings dealing with grants of pueblo lands249 indicate that only specific house lots and suertes (agricultural plots)

240. See G. Schmidt, supra note 186, at 93-102.
241. See, e.g., Hall, supra note 189, at §§ 115 & 120. See generally id. §§ 110-49.
242. See id. at § 122; Dwinelle, supra note 220, at §§ 83-84.
243. See note 219 and accompanying text supra.
244. Decree of the Fourth of January, 1813, § 1, translated in Spanish and Mexican Land Laws: New Spain and Mexico 83 (M. Reynolds, ed. 1895) [hereinafter cited as Reynolds]; Hall, supra note 182, at § 89.
245. Id.
246. Id. § 2, translated in Reynolds, supra note 244, at 83; Hall, supra note 189, at § 90.
249. Hall, supra note 189, at §§ 115, 120, 122.
were actually granted, with title to the surrounding street and commons remaining in the sovereign.

In the countryside, however, the problem was more complex. No planning authority existed to foresee the public need for rights of way. This problem was met by a special right of way by implication, the legal servitude. 250

The Siete Partidas noted that servitudes could be created only by grant, devise or prescription. 251 Moreover, in the Partidas it was unclear whether a servitude would lie in favor of governmental bodies or the public. 252 The Codigo Civil of 1871 noted the existence of a legal servitude which could be implied in favor of either—a legal servitude implied for “public or common utility . . . [or] for the benefit of private persons . . . as a natural consequence of the respective positions of the estates.” 253 It arose for the “subsistence or convenience” of the dominant estate, 254 subsistence apparently indicating the requirement of some degree of necessity. The creation of a servitude based upon convenience is a marked contrast to the common law which has required absolute necessity for an implied easement. 255

The legal servitude undoubtedly served the vital function in unsettled regions by providing a means for reserving necessary public roads and access routes to public commons. This would, of course, result in direct interference with private property rights. For this reason it is logical to assume that, to have been codified as part of the 1871 Codigo Civil of 1871, the legal servitude must have existed prior to that date. Otherwise such a major change in the law is not likely to have been tolerated. The reservation of the necessary town commons, as well as crossways and servitudes on public lands, in the 1813 Colonialization Law 256 suggests that roads may have been created by implication as early as that date.

Whether roads were created through reservation by governmental

250. C. Civ. Dist. y Terr. Fed. art. 1056 (1871), translated in Hamilton, supra note 189, at 43; Hall, supra note 189, at § 1840. Note that Hall has wrongly translated servidumbre as service rather than servitude; Las Siete Partidas lxv (S. Scott, transl. 1931).
251. Partida 3, title 31, law 14, translated in Hall, supra, at § 1424.
252. Id.; see generally Partida 3, title 31, laws 1-26, translated in Hall, supra note 189, at §§ 1411-35. There is some case law in this country that easements should be implied in favor of neither the government nor the public. See United States v. Rindge, 208 F. 611, 619 (S.D. Cal. 1913).
255. See, e.g., United States v. Rindge, 208 F. 611, 620 (S.D. Cal. 1913).
256. Decree of the Fourth of January, 1813, ¶¶ 1 & 2, translated in Reynolds, supra note 244, at 83; Hall, supra note 189, at §§ 89-90.
bodies or were implied as a legal servitude, the results were identical—they became public commons and were protected as such by the Mexican law. And for the reasons previously discussed, after the cession of California, they came under the protection of the common law public trust. Since no prescriptive rights could be obtained in Mexican commons, and public trust lands can not be freed of the trust servitude simply by diversion to other uses, it is here concluded that legal servitudes for access to public commons continue to exist today. Since such rights undoubtedly existed in 1879, the year of adoption of Article XV, section 2 of the California Constitution, doubts as to their constitutional validity are unsupportable.

CONCLUSION

Mexican law provides a vast, untapped resource for alleviating the problem of greatly increased demand for recreational land in California. Although Mexican law prevailed when California attained statehood, it has since been all but forgotten. This search through that long-ignored repository reveals a wealth of public property law, the application of which could result in increased areas of public recreational land in California.

Among the more important discoveries are: an extension of the beach areas subject to public use from the line of the mean high tide to the line of the extraordinary high tide; a “new” public right to the use of river banks; and a public easement which frees the California constitutional provision protecting access to navigable waters from due process objections. In turn, the state constitution, as well as the public trust doctrine, give substantial protection to the “common” of access.

The potential benefits of resurrecting the early Mexican law in California are great. All that remains is for the courts and the practicing bar to employ these new-found concepts adventurously in order to meet current social requirements.

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258. See part II, A supra.
261. CAL. CONST. art. XV, § 2.
262. See part I, A, 2 supra.
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