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BEFORE THE

Surveyor-General of California,

PUEBLO LANDS OF SAN DIEGO.

EXCEPTIONS.

Argument in favor of the Fitch Map
and Survey.

C. P. TAGGART,

COUNSEL FOR CITY.

SAN DIEGO :

SAN DIEGO UNION BOOK AND JOB PRINTING OFFICE.

1869.

EXCEPTIONS.

To the Honorable Sherman Day, U. S. Surveyor General of the State of California.

In the matter of the approval of the survey of the Pueblo Lands of the City of San Diego, made by John C. Hays, Deputy Surveyor of the United States, for the State of California, in July A. D. 1858.

Now comes Chas. P. Taggart, City Attorney of the City of San Diego, and on behalf of the President and Trustees of the said city, and respectfully protests and excepts to so much of said survey, as designates and delineates the water front of said city, commencing, at Point Loma and continuing along and around the Bay of San Diego to the South-West corner of the National Rancho, and to that portion *only of the said survey.*

In support of this protest the following facts are submitted :

1. That the Mexican Pueblo of San Diego was organized, according to the laws, rules and usages of Mexico in the year A. D. 1835, and continued to exist as a Pueblo until superceded by the present civil government of San Diego, under American authority. That the lands by the said Pueblo of San Diego were acquired as Pueblo lands, under the laws of Mexico and known as Pueblo Lands.

2. That said lands were surveyed and the boundaries fixed by metes and bounds and a map made of the same by Capt. Fitch, by the authorities of the said Pueblo in the year 1845, which said map was approved by the Governor of the Department and countersigned by the Secretary, as the official map of the Pueblo Lands, and deposited in the archives of the Department.

3. That by final decree of the Board of Land Commissioners of the United States made on the 8th day of June A. D. 1857, the Pueblo Lands, as described, designated and bounded by the survey and map aforesaid, were confirmed to the President and Trustees of the City of San Diego, successors in interest to the Mexican Pueblo of San Diego, for the use and benefit of the citizens of said city.

4. That by the boundaries as designated and described on the said Map, and which was referred to for a more particular description of the said lands, in the said final decree of confirmation all the lands bordering on the Bay of San Diego were included in the said survey and became Pueblo lands and belonged to the Pueblo of San Diego, and that the said City of San Diego and her grantees are now the true and lawful owners of the said tide lands and all the lands lying within the said limits and boundaries.

5. That in pursuance of such ownership the authorities of the Pueblo took possession of the said tide and other lands, exercised control and ownership over the same.

6. And in the year 1849 caused a survey to be made of a certain tract of the tide and other lands, lying within the lines confirmed as aforesaid, and in 1850 caused a certain other survey to be made of a certain other tract of said land on said Bay and called said surveyed tracts respectively "New San Diego" and "La Playa," and have granted to private proprietors certain portions of the lands thus surveyed for a valuable consideration, who have laid out town sites, made improvements and erected wharves upon the said lands.

7. That in the year 1856 the said city authorities caused a certain Map to be made by one Chas. H. Poole of the entire Pueblo lands confirmed as aforesaid, which map includes within the lines of the said Pueblo lands all the tide lands bordering on the said Bay of San Diego, and which said last mentioned map and survey follows the shore lines as laid down and designated on the map referred to in the decree of confirmation aforesaid, and has been adopted, used and referred to as the official map of the City of San Diego; and all grants of land made by the said city since the publication of the said map, correspond as regards the water front to the boundaries as laid down on the same; And the authorities of the said Pueblo and their successors in office and their grantees have been in the peaceable, quiet and undisturbed possession of the said lands, including the tide lands and water front along the shore of said Bay, from one to five hundred feet beyond low water mark, for more than

thirty years last past, next before the making of this protest.

8. That all the tide lands above referred to, including all the lands bordering on the Bay of San Diego, which lie between ordinary high and low tide are excluded from the said Pueblo Lands by the survey of the said Hays, Deputy as aforesaid, while the same lands are included and made part of the Pueblo lands by the map and survey of the said Capt. Fitch aforesaid.

All of which will more fully appear by the decree of confirmation made by the Board of Land Commissioners on the 8th day of June 1857, in the case of the President and Trustees of the City of San Diego vs. the United States, by the deposition of Santiago Arguello and the map or survey of Capt. Fitch attached thereto in the same case, copies of which are hereto attached and made part of this exception.

The President and Trustees of San Diego therefore pray that the said survey made by Capt. J. C. Hays, Deputy as aforesaid, be reformed as to its water front, bordering on the said Bay, so as to include and contain all the tide water property or lands that are included and contained in the aforesaid map of Capt. Fitch; and further pray that as to the other boundaries as laid down and designated on the said survey of the said Capt. Hays, Deputy as aforesaid, that they be approved and confirmed.

C. P. TAGGART,

Att'y. for Pres. and Trustees, San Diego.

B E F O R E
THE UNITED STATES SURVEYOR GENERAL
FOR THE STATE OF CALIFORNIA.

THE UNITED STATES, }

VS. }

THE PRESIDENT & TRUSTEES
OF THE CITY OF SAN DIEGO. }

*Pending on the Publication
of the Hays Survey, made in
July 1858.*

ARGUMENT FOR THE CITY.

The exceptions filed by the President and Trustees of the City of San Diego, to the survey of the Pueblo lands of San Diego, made by John C. Hays, Deputy U. S. Surveyor, in 1858, and the answer by them filed to the exceptions of Juan M. Luco to the same survey, clearly show the claim of the City of San Diego.

It is insisted by the City, that the Hays survey literally follows the lines established by the survey made by Capt. Henry D. Fitch in 1845, which was made at the instance and request of the Mexican Authorities of the Pueblo of San Diego, and was accepted by them and legally approved by the Governor of California, as the survey and location of the Pueblo or Town lands, acquired by the Pueblo, under the laws and usages of Spain and Mexico, except the shore line of the said survey,

that is, from Point Loma to the Chollas: that so far as this survey follows the lines of the Fitch survey and map, it should be approved, and as to that part of the survey which does not follow these lines, to that extent, it should be reformed by the Surveyor General.

The only part of the Hays survey which the City objects to, is the line fixing the water front on the Bay of San Diego. I do not propose to discuss, at this late day, whether San Diego was a Pueblo or not on the 7th day of July, 1846; that question has been passed upon by the Board of Land Commissioners appointed for that purpose. Their finding, and the dismissal of the appeal of the Pueblo case by the Attorney General of the United States, settled that question so far as this case is concerned.

The principal question to deal with now, is whether the survey of Hays follows the decree of confirmation made by the Board of Land Commissioners.

United States vs. Halleck, 1 Wall. p. 487. 55-

The 13th Sec. of the Act of 1851, provides "that it shall be the duty of the Surveyor General, to cause all private Land Claims, which shall be finally confirmed, *to be accurately surveyed*, and to furnish plats of the same."

9th Stat. at Large. p. 633.

United States vs. Fossatt, 21 How. 445.

The seventh Section of the law of Congress, passed July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of Cali-

fornia," provides "that it shall be the duty of the Surveyor General of California, in making surveys of the private Land Claims finally confirmed, to follow the decree of confirmation as closely as practicable, wherever such decree *designates* the specific boundaries of the Claim."

13 United States Statutes at Large, 334.

The decree in the case of the President and Trustees of the City of San Diego vs. The United States, No. 539, which was filed by the Land Commissioners Jan. 22, 1856, recites that "the land of which Confirmation is made, is situated in the County of San Diego, and is known as the Pueblo or Town Lands of San Diego, and is bounded as delineated on the Map filed in this case and marked Exhibit A G T B to the deposition of Santiago Arguello, to which Map reference is hereby made for a more particular description."

Have these laws of Congress been complied with, and has the decree of confirmation been followed in this case, are the simple questions of fact that must be considered and decided by the Surveyor General in disposing of these exceptions, protests and answers.

The Map attached to the deposition of Santiago Arguello, is the Fitch Map. It is the Map that was approved by the Governor of California and countersigned by the Secretary, and accepted by the Authorities of the Pueblo, as determining the quantity of Land owned by the Pueblo, long before the change of flags.

It is the Map that was presented to the Board

of Land Commissioners by the Trustees of the City of San Diego, as showing the quantity of Land claimed by them from the Government of the United States, and by it the City was decreed its Lands. It is the Map that the City Trustees now present to the Surveyor General, and ask him to be governed by in fixing the boundaries under the decree of confirmation.

This Map designates and traces the boundaries of the Pueblo lands, by lines so plain, that there can be no controversy or cavil. The Hays survey follows these lines, except the shore line, from Point Loma to Las Chollas. Will the Surveyor General reform this line, and locate it according to the Fitch Map? The Statute of 1864, says in direct and positive language, that it is HIS DUTY to do so. "Surveys of Lands embraced in Mexican Grants, should be made in the mode prescribed by the Laws of the United States."

Fremont vs. United States. 17 How. 542, 565.

"They must conform to the decree."

Fossatt Case, 2 Wall 649

The protestant, Luco, claims however, that the Surveyor General shall cut the Pueblo Lands of the City down to four square leagues. Who ever heard before that the Surveyor General had the right to determine the size of a Pueblo, after that fact had been settled by the Board of Land Commissioners?

The MEEK MODESTY of this man Luco, will next prompt him to ask the Surveyor General to grant him a few leagues of the public domain.

If the City of San Diego claimed too large a tract of land in its petition to the Board of Land Commissioners, then and there was the time and place to resist the claim and cut down the demand. It is now twelve years too late and before the wrong tribunal to try that question.

United States vs. Fossatt, 21 How. 445.

The Mexican Governor of California, declared by his approval of the Fitch Map, that the Pueblo was entitled, by the laws and usages of Spain and Mexico, to the land within the lines and boundaries designated on the Map approved. The Authorities of San Diego accepted the tract as the Pueblo or Town lands; all of which took place under the Mexican Government.

This was a segregation of the land, and no further act was necessary to perfect the title of the Pueblo to all the lands within the lines of the survey and Map.

It was not an imperfect or inchoate grant. It was perfect and complete, investing the Pueblo with the entire title to, and an absolute possession of the specified lands granted. It was not necessary to present the claim to the Board of Land Commissioners.

Minturn vs. Brown et al. 24 Cal. 664.

Steinbach vs. Moore 30 Cal. 507.

But this claim, defined by this map, was presented to the Board of Land Commissioners, especially appointed by the United States Government to determine and settle private land claims in this State, and after hearing all the testimony, it was

decreed that the claim of the City of San Diego was "valid to the land bounded as delineated in the Map filed in the case"—the Fitch Map—and reference is made thereto for a more particular description.

From this decision an appeal was taken by the United States, which was afterwards dismissed; and so far as the United States are concerned, the claim is forever settled in favor of the City, and can not now be attacked collaterally.

Beard vs. Federy, 3 Wall. 489.

It is however, contended by Luco, that the Surveyor General, at this late day, after all these acts by both Governments, can determine the quantity of land which San Diego is entitled to by the ancient laws of the Indies.

By what authority does the Surveyor General obtain this *judicial* power? What law of Congress gives it to him?

The only Statutes I have been able to find defining the duties of that officer in reference to this matter are the ones above referred to: and these positively say "that he shall survey the claim accurately and follow the decree of confirmation as closely as practicable, wherever such decree designates the specific boundaries of the claim."

The boundaries are specified in this decree, and the lines traced on the Map, and especial attention called to the Map for a more particular description of the land; and I most respectfully ask the Surveyor General to follow the laws of Congress and not go seeking for the laws of the Indies.

Although it is too late, and this is not the place to review the action of the Board of Land Commissioners, yet I will cite a few decisions to show that the decree was in strict conformity with the settled law.

Pueblos or Towns in Spanish America took municipal lands by the decree of the Spanish Monarch of 1523 & 1528.

Welch vs. Sullivan 10 Cal. 190.

Hart vs. Burnett 15 Cal. 541.

Townsend vs. Greely 5 Wall. 336.

It is said in the Supreme Court, in the case of Higuera vs. The United States, 5 Wall. 834, that Mexican concessions or grants were of three kinds:

1. "Concessions or grants by specific boundaries, where of course the donee is entitled to the entire tract or concession.

2. "Grants of quantity, as of one or more leagues of land situate at some designated place by what are called out boundaries, where the donee is entitled to the specified quantity and no more.

3. "Grants or concessions of a certain place by some particular name, either with or without specified boundaries, where the donee is entitled to the tract according to the boundaries, if boundaries are given."

The doctrine that land is assigned to Pueblos by "a specific designation of boundaries," is clearly recognized by the Supreme Court of this State, in the case of Hart vs. Burnett, 15 Cal. 573.

It has been shown that the Mexican Authorities approved the Map and survey of the Pueblo lands

by name—fixing the boundaries—as the Pueblo lands of San Diego.

The decree in the case before the Land Commissioners, was for land by a certain name—the Pueblo or town lands of San Diego—with certain specified boundaries, and lines traced in the Fitch Map, thereby fixing the quantity of land confirmed to the City

United States vs. D'Aguirre 1 Wall. 316.

In the United States vs. Halleck 1 Wall. p. 455, the Court says, "that where the decree gives the boundaries of the tract, the survey must conform to the lines designated in the decree, and that the decree is a finality, not only on the question of title but as to the boundaries which it specifies, if no appeal is taken in time. If erroneous in either particular the remedy was by appeal; but the appeal having been withdrawn by the Government the question of its correctness is forever closed."

The appeal having been withdrawn in this case, the decree forever settled, the quantity of land confirmed to the City. It is only necessary now for the Surveyor General to see that the survey made under his directions is in accordance with the lines designated on the Fitch Map.

"A Map referred to in a grant for the purpose of identifying the land is to be regarded as a part of the grant, as much as if incorporated into it."

Ferris vs. Coover, 10 Cal. p. 622.

Seeward vs. Malotte, 15 Cal. p. 306, and cases cited.

United States vs. Sutter, 21 Howard, p. 175.

An inspection of a true copy of the original Fitch Map which is filed herein, will show the lines as located by him. The line drawn from Point Loma to Las Chollas includes all the water front and tide lands of the said Bay. The survey made by Hays leaves these out. The Surveyor should reform this shore line.

The authorities cited by the Attorneys for the grantees of the City are so conclusive as to the right of the Mexican Authorities, to grant water front and tide land property, that nothing further need be added on this branch of the case.

The City of Mexico has fifteen leagues of land measured from the centre of the great plaza.

See note to case, Hart vs. Burnett, reported in book entitled Law Titles in San Francisco, and Briefs.

If the United States had held that city in 1848, as they did San Diego, would the citizens of that municipality have been required by the law of 1851 to produce a grant from the King of Spain, under the penalty of having their lands and city property preempted and sold, as a part of the public domain of the United States? Or would it have only been necessary to show that it was a city and was recognized as such with a *terminos* of fifteen leagues?

And after its size and extent had been passed upon under the law of 1851, could it again be passed upon?

Surely there is only one answer to these questions.

In the case of Lewis vs. San Antonio 7, Texas Rep. p. 321, the Court says: "It has been said that it is not reasonable to suppose the Government of Spain ever intended to grant so much land by perfect title to the corporation, and that a grant for more than four leagues is repugnant to the laws of the Indies. The counsel have not directed our attention to the particular laws of the Indies, restraining such grants; and a reference to the whole body of the common Law, or to all the reported cases would have been just as profitable.

"The policy of the King of Spain was to have his towns and villages founded with extensive exidos for pasturage and other purposes; and if he only granted or dedicated to the use of the town it would be such an appropriation, as we have seen, as would have removed it from commerce and individual appropriation. It appears too that San Antonio would be likely to receive most liberal and extensive privileges as it was regarded as the Mother City." The same language might with propriety be used in this case. The first landing of the Spaniards in California was at San Diego. The first Presidio was founded and the first Pueblo organized here. It was the Mother Settlement, and the most liberal privileges were given it. By reference to the testimony filed herein, and which is so aptly indexed in the brief of Messrs. Howard & Hayes, it will be seen that the pasture and field lands lying several miles from the centre of the plaza and within the lines of the Fitch Map were occupied and claimed

as town lands by the citizens of the Pueblo at a very early day. *La Soledad* Valley, Las Chollas Valley and Mission Valley—all out lands were so used and claimed. See index from p. 4. to p. 10 inclusive. There was good reason for this, as there was little good land for cultivation within the Pueblo except these Valleys.

As early as August 1843, there was an application for a grant of the Soledad Valley, and the Prefect endorsed the petition to the Alcalde as follows: "The place mentioned is vacant and belongs to the community; the citizens make their crops there."

Ibid p. 8.

Las Chollas were also cultivated.—Ibid.

On the 12th day of August 1850, Santiago Arguello filed a protest against the occupation of "La Posa," the well or pond, located near and inside the Pueblo line, between the Mission and the Pueblo lands, claiming that this pond was common property, and used for watering the stock of the Pueblo. Ibid p. 8.

On the 15th of the same month the citizens of the Pueblo joined in this protest. Ibid p. 8.

Santiago Arguello testifies that the Fitch Map was made by his direction, while Prefect, and that he approved it. The field notes of Hays show that this same Santiago Arguello accompanied him and showed him the lines and natural boundaries of the Pueblo lands in 1857. The same Santiago Arguello was the witness on whose testimony the decree of confirmation was made, and, yet, now

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when his lips are sealed in death the purchaser of an interest in his estate—the ex-Mission lands adjoining the Pueblo lands—claims that the lines are not properly established; and, he, a purchaser of an undetermined interest in a law suit knows more about the early history and usages of the Pueblo of San Diego than the man who was its trusted Prefect.

If Arguello did not object to the survey and location of the line between the ex-Mission and Pueblo tracts, it is too late now for his grantees to do so.

The survey must follow the decree of confirmation.

C. P. TAGGART,
Counsel for the City.