

Legal History Seminar:
Law and the Development of the American West in the 19th Century

Instructor: Judge Karsten H. Rasmussen; MA, JD

Meeting Time/Room: Tuesday 5:30-7:20pm / Room 243

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Office hours: By appointment

CRN: 60219

FINAL: The final is a written paper of 20 pages or more in length on a topic related to the course and agreed to by the student and instructor.

Course Description

This seminar will examine the relationship between legal doctrine and the economic, political, social and environmental context within which it originates and evolves. This seminar is designed to explore how law develops in a "new," "frontier" setting, and hence to provide a better understanding of the extent to which law is proactive and aspirational or reactive and reflective with regard to the societal context within which it exists.

To focus our discussion, this seminar will emphasize the history and development of law in the American West in the 19th Century from approximately 1800 (roughly the beginning of the final American push westward) to 1890/1902 (the so-called "closing of the frontier" and the date of the Reclamation Act respectively). Throughout our exploration of the legal history of this period, students will gain a better understanding of the evolution of the American Law through the development of property rights and sovereignty.

Course Expectations and Grading

The course will be a combination of lecture and class discussion. Students are required to prepare for and attend class. In addition, students will be expected to closely read and think about all assigned course materials for each class and must be ready to participate fully in class discussions. Grades will be based on attendance and participation and a final paper. I reserve the right to adjust grades by half a grade for participation.

The timeline for the final paper, which can fulfill your graduation writing requirement, is as follows:

Topic approval _____	by week 5
Outline due _____	probably week 6
Rough draft due _____	probably week 10
Final drafts due _____	due on the date of the final, but the presentations are weeks 13 and 14)

1) for 2015 - send Qs at by email earlier

In addition to these writing deadlines, our week 8 class session will be devoted to open discussion of paper topics, and our final two class sessions will be devoted to presentations on student's final papers. I plan on providing feedback along the way both as to topic and at the outline and rough draft stages.

Required Materials

- Anderson, Terry L., and Hill, Peter J., The Not So Wild, Wild, West: Property Rights on the Frontier, Stanford University Press, 2004.
- Montoya, María E., Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900, University of California Press, 2005.
- Class Reading Supplement-available at the University of Oregon Law Bookstore or from the professor.

Reading Assignments

The reading for this course will include a variety of mostly secondary sources, which will provide diverse and potentially dissonant perspectives to our subject. The reading topics and mandatory weekly assignments follow (see also suggested readings listed at the end of the syllabus):

I. Introduction/Methodology

WEEK 1: INTRODUCTORY MATERIALS (1/14/14)

Textbook Readings:

1. The *Not So Wild, Wild West*
 - Chapter 1: Heroes, Villains, and Real Cowboys
2. The *Not So Wild, Wild West*
 - Chapter 2: The Institutions That Tamed the West
3. Translating Property
 - Introduction

Readings in Supplement:

1. Anderson, Terry L. and Shawn Regan, Cross Country: The War on Coal is Punishing Indian Country, The Wall Street Journal, 12 Oct. 2013. [Pages 1-2]
2. Murphy, Sean, Court Lets Slaves' Descendants Sue, The Oregonian, 14 Dec. 2012. [Page 3]
3. Milner, Clyde A., II, The Oxford History of the American West, Oxford University Press 1994. Chapter 5: National Initiatives. [Pages 4-25]
4. Bakken, Gordon Morris, Western Legal History: The State of the Field, Western Legal History, Vol. 20, 2007. [Pages 26-39]

II. Property

WEEK 2: LAW OF DISCOVERY AND EXPLORATION (1/21/14)

Textbook Readings:

1. Translating Property
 - Chapter 1: Contested Boundaries

Readings in Supplement:

1. Banner, Stuart, How the Indians Lost Their Land: Law and Power on the Frontier, The Belknap Press, April 2007. Chapter 1: Native Proprietors. [Pages 40-60]
2. Banner, Stuart, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska, Harvard University Press, 2007. Chapter 7: Oregon and Washington Compulsory Treaties. [Pages 61-72]

WEEK 3: EARLY PROPERTY RIGHTS, WHOSE LAND IS IT? (1/28/14)

Textbook Readings:

1. The *Not So Wild, Wild West*
 - Chapter 3: Property Rights in Indian Country

Readings in Supplement:

1. Limerick, Patricia, The Legacy of the Conquest, The Unbroken Past of the American West, Norton, 1987. Chapter 2: Property Values. [Pages 73-85]
2. Friedman, Lawrence M., A History of American Law, Touchstone, 1973.
 - Chapter 2: Outposts of the Law: The Frontier and The Civil Law Fringe. [Pages 86-91]
 - Chapter 5: An American Law of Property. [Pages 92-93]

WEEK 4: CONQUEST OR CONTRACT? (2/4/14)

Textbook Readings:

1. The *Not So Wild, Wild West*
 - Chapter 4: Might Takes Rights in Indian Country
2. Translating Property
 - Chapter 2: Regulating Land, Labor, and Bodies

Readings in Supplement:

1. Banner, Stuart, How the Indians Lost Their Land: Law and Power on the Frontier, The Belknap Press, April 2007. Chapter 2: Manhattan for Twenty-Four Dollars. [Pages 94-113]

WEEK 5: LAW OF THE TRAIL (2/11/14)

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Textbook Readings:

1. The *Not So Wild, Wild West*

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- Chapter 5: Soft Gold: Traders, Trappers, and Hunters
- Chapter 7: Wagon-Train Governments

WEEK 6: LAW OF THE TRAIL CONT. (2/18/14)

Readings in Supplement:

1. Reid, John Phillip, Law for the Elephant: Property and Social Behavior on the Overland Trail, Huntington Library Press, 1997. Introduction. [Pages 114-129]
2. Reid, John Phillip, Contested Empire: Peter Skene Ogden and the Snake River Expeditions, University of Oklahoma Press, 2002. Chapter 1: To Prevent Disputes and Differences. [Pages 130-137]

WEEK 7: LAW OF THE FRONTIER (2/25/14)

Textbook Readings:

1. The *Not So Wild, Wild West*
 - Chapter 6: There's Property Rights in Them Thar Hills
 - Chapter 8: Cowboys and Contracts
 - Chapter 9: Home on the Range
2. Translating Property
 - Chapter 3: From Hacienda to Colony

Readings in Supplement:

1. Bakken, Gordon Morris, Law in the Western United States, University of Oklahoma Press, 2000. Chapter 53: The Homestead Movement and the U.S. Supreme Court. [Pages 138-141]

WEEK 8: CLASS DISCUSSION OF PAPER TOPICS (3/4/14)

*No new reading. Open class discussion about previous readings and paper topics.

WEEK 9: WATER LAW AND PUBLIC LAND LAW (3/11/14)

3/10/14

Textbook Readings:

1. The *Not So Wild, Wild West*
 - Chapter 10: Making the Desert Bloom

Readings in Supplement:

1. Wilkinson, Charles F., Crossing the Next Meridian: Land, Water, and the Future of the West, Island Press, 1992. Chapter 6: Harvesting the April Rivers. [Pages 142-180]
2. Carlton, Jim, Oregon Water Fight Revives, The Wall Street Journal, 20 April, 2013. [Page 181]
3. *Fort Vannoy Irrigation District v. Water Resources Comm.*, 345 Or 56 (2008). [Westlaw]
4. *Klamath Irrigation District v. United States*, 348 Or 15 (2010). [Westlaw]

III. Sovereignty

WEEK 10: TRIBAL SOVEREIGNTY AND INDIAN RESERVED WATER RIGHTS

(3/18/14)

3/18/14

Readings in Supplement:

1. Hundley, Norris, Jr., The "Winters" Decision and Indian Water Rights: A Mystery Reexamined, Western Historical Quarterly Vol. 13, No. 1 (Jan., 1982). [Pages 182-208]
2. Shurts, John, Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s, University of Oklahoma Press, 2000. Chapter 6: Winters and Allotment: The Blackfeet Reservation Allotment Legislation and Water Rights. [Pages 209-221]

WEEK 11: STATE FORMATION (4/1/14)

Textbook Readings:

1. Translating Property
 - Chapter 5: The Law of the Land
 - Chapter 6: The Legacy of Land Grants

Readings in Supplement:

1. Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900 Book Review. [Pages 222-223]
2. *U.S. v. Maxwell Land Grant Company*, 121 U.S. 325 (1887). [Pages 224-237]

WEEK 12: CATCH UP AND MODERN CONTEXTS (4/8/14)

Readings in Supplement:

1. Harmon, Alexandra, The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest, University of Washington Press, 2008. Introduction: Pacific Northwest Indian Treaties in National and International Historical Perspective. [Pages 238-253]
2. Tribal Gaming
 - *Dewberry v. Kulongoski*, (Lane County Circuit Court, 2010). [Pages 254-281]
 - *Dewberry v. Kulongoski*, 406 F Supp 2d 1136 (2005). [Westlaw for reference.]

IV. Paper Presentations

WEEK 13: INDIVIDUAL STUDENT PRESENTATIONS (4/15/14)

WEEK 14: INDIVIDUAL STUDENT PRESENTATIONS CONT. (4/22/14)

Tues.

papers due May 12, 2014

5:00 pm

grades due May 29, 2014

commencement May 17

Suggested Further Readings

1. Ashes, Brad, Beyond the Reservation: Indian Settlers, and the Law in Washington Territory, 1853-1889, Norman: University of Oklahoma Press, 1999.
2. Bakken, Gordon, Law in the West: The American West, Routledge, Jan. 2001.
3. Bakken, Gordon, Practicing Law in Frontier California, University of Nebraska Press, March 2006.
4. Bakken, Gordon, The Development of Law on the Rocky Mountain Frontier, Praeger, 1983.
5. Banner, Stuart, How the Indians Lost Their Land: Law and Power on the Frontier, Belknap Press, April 2007.
6. Banner, Stuart, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska, Harvard University Press, 2007.
7. Beck, David R.M., Seeking Recognition: The Termination and Restoration of the Coos, Lower Umpqua, and Siuslaw Indians, 1855-1984, University of Nebraska Press, 2009.
8. Buan, Carolyn, The First Duty: A History of the U.S. District Court for Oregon, Oregon Historical Society Press, 1993.
9. Burns, John, ed., Taming the Elephant: Politics, Government, and Law in Pioneer California, 2003.
10. Cohen, Felix S., On Drafting Tribal Constitutions, University of Oklahoma Press, 2007.
11. Cutter, Charles R., The Legal Cultur of Northern New Spain 1700-1810, University of New Mexico Press, 1995.
12. Ebright, Malcolm, Land Grants and Lawsuits in Northern New Mexico, University of New Mexico Press, 1993.
13. Fixico, Donald L., Indian Resilience and Rebuilding: Indigenous Nations in the Modern American West, University of Arizona Press, 2013.
14. Frederick, David, Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941, University of California Press, 1994.
15. Friedman, Lawrence, A History of American Law, Touchstone, 1986.
16. Harmon, Alexandra ed., The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest, University of Washington Press, 2008.
17. Jones, Sondra, The Trial of Don Pedro Leon Lujan: The Attack Against Indian Slavery and Mexican Traders in Utah, University of Utah Press, 2000.
18. Karsten, Peter, Head versus Heart: Judge Made Law in Nineteenth-Century America, North Carolina University Press, 1993.
19. Kessell, John L. Miera y Pacheco: A Renaissance Spaniard in Eighteenth-Century New Mexico, University of Oklahoma Press, 2013.
20. Lansing, Ronald B., Juggernaut: The Whitman Massacre Trial 1850, Ninth Judicial Circuit, March 1993.
21. Laurson, Gary; and Seidman, Guy, The Constitution of Empire: Territorial Expansion and American Legal History, Yale University Press, Feb. 2004.
22. Littlefield, Douglas R., Conflict on the Rio Grande: Water and the Law, 1879-1939, University of Oklahoma Press, 2008.
23. McLaren, John; Foster, Hamar; Orloff, Chet eds., Law for the Elephant, Law for the Beaver: Essays in Legal History of the North American West, Canadian Plains Research Center, June 1992.

24. Miller, et. al., The Oxford History of the American West, Oxford University Press, 1994.
25. Miller, M. Catherine, Flooding the Courtrooms: Law and Water in the Far West, University of Nebraska Press, April 1993.
26. Reid, John Phillip, Contested Empire: Peter Skene Ogden and the Snake River Expeditions, University of Oklahoma Press, 2002.
27. Reid, John Phillip, Forging a Fur Empire: Expeditions in the Snake River County, 1809-1824, The Arthur H. Clark Company, 2011.
28. Reid, John Phillip, Law for the Elephant: Property and Social Behavior on the Overland Trail, Huntington Library Press, 1996.
29. Reid, John Phillip, Policing the Elephant: Crime, Punishment, and Social Behavior on the Overland Trail, Huntington Library Press, 1996.
30. Shurts, John, Indian Reserved Water Rights: The Winters Doctrine in Its Social and Legal Context, University of Oklahoma Press, 2000.
31. The *Not So Wild, Wild, West*, Chapter 11: New Frontiers.
32. Translating Property, Chapter 4: Prejudice, Confrontation, and Resistance.
33. Turner, Frederick; Faragher, John Mack ed., Rereading Frederick Jackson Turner: "The Significance of the Frontier in American History" and Other Essays, Yale University Press, 1999.
34. Venit-Shelton, Tamara, A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900, University of California Press, 2013.
35. Watson, Blake A, Buying America From the Indians, University of Oklahoma Press, 2007.
36. Webb, Prescott, The Great Plains, Chapter 9 ("New Laws for Land and Water" pp. 385-452).
37. White, Richard, "It's Your Misfortune and None of My Own": A New History of the American West, 1993.
38. Wilkinson, Charles, Crossing the Next Meridian: Land, Water, and the Future of the West, Island Press, 1993.

Possible Paper Topics

1. Slavery in the West
2. Indian Slavery in New Mexico
3. Mestizo Status in New Mexico
4. Women in the Law
5. Termination and Restoration
6. See Bakken, Gordon Morris, Law in the Western US, University of Oklahoma Press, 2006.
7. O&C Lands
8. Land Law and Specific Tracts of Land

- mining ?
- crime + punishment

- add Simpson
- add book from papers ?
2013 # 2014 ?