

Case No. 15,362.
[1 Cal. Law J. 372.]

UNITED STATES V. HIGNERA.

District Court, N. D. California.

Nov. 25, 1861.¹

MEXICAN LAND GRANTS—LOCATION OF LINES—OBJECTIONS TO SURVEY.

This was a claim by Antonio Hignera and others, heirs of Jose Hignera, claimants for Los Tularcitos, described by boundaries; granted October 4, 1821, by P. V. de Sola to Jose Hignera; claim filed April 1, 1852; confirmed by the commission November 28, 1854; and appeal dismissed December 12, 1856,—containing 4,394.35 acres.

OPINION OF THE COURT. In 1821, Jose Hignera obtained from Governor Sola an order that he be put in possession of a tract of land which he had applied for under the name of "Los Tularcitos." Possession was accordingly given to him by Luis Peralta, whose report and description of the tract measured are found in the expediente. In 1839, Hignera petitioned Governor Alvarado for ratification of the grant made by Sola, together with an augmentation, as represented on the diseno annexed to his petition. This application was granted by the governor, but the formal title does not appear to have been issued. The decree of the board confirming the claim was founded on the order of Alvarado. In their opinion they state: "On examination we are satisfied that the decree of Alvarado must be construed to be a recognition of the right of the grantee previously existing in the premises claimed under Sola's grant as well as a grant of the augmentation solicited. Both are embraced in one description and delineated on the same map, which was presented with the petition to Alvarado, and now constitutes a part of the expediente, without giving any description to distinguish the portion of the premises claimed under Sola's decree from that solicited as an addition." The claim was accordingly confirmed to the land delineated on the diseno, oral testimony being received to explain by evidence of the actual occupation, and generally recognized boundaries of Hignera's rancho, such indications of the diseno as were uncertain or obscure.

The appeal from the decree of the board having been dismissed, a survey was made by the surveyor-general, which is now brought into court on objections filed on the part of the claimant. The only question presented relates to the location of the eastern boundary of the tract. On the part of the United States it is contended that the survey properly bounds the land by the range of hills which separate the valley of the Tularcitos and the plain to the west of it from the valley of the Calaveras, while the claimants maintain that this last-mentioned valley should be included, and the eastern line run between certain points on the sierra beyond it.

In ascertaining the true boundaries of the land conceded to Hignera, it is evident that the diseno presented by him to Alvarado is our chief, if not our only, guide. Neither his

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original petition to Sola, nor the order of the latter, nor the petition to Alvarado, nor the concession that followed, mention any boundaries, or even the extent of land granted. The measurement made by Peralta, under Governor Sola's order, which might have enabled us to identify the tract of which Hignera was originally put in possession, is wholly unintelligible. It merely states that he, Peralta, gave possession of the tract called "Tularcitos," to Jose Hignera, "designating for him on the south, 600 varas; on the north, the same; on the west, 1,400 varas; and on the east, 6,050 varas,—which ambit embraces the said tract De los Tularcitos." No beginning point is mentioned, and it is evident that lines of the lengths designated cannot be connected so as to enclose any parcel of land. We must therefore look to the diseno, which represents as well the tract originally conceded as the aumento, solicited of Alvarado, to ascertain the boundaries. Nor ought parol testimony as to the boundaries as claimed by Hignera, or as understood by his neighbors, be received to extend the tract beyond the limits designated in the diseno. On the north and south, the rancho of Los Tularcitos was bounded by lands of other proprietors; but on the east there was no colindante, and the cattle of Hignera might have roamed without molestation far beyond the boundaries of the lands really conceded. The fact, then, that rodeos were given, and even a house built in the Calaveras valley by

Hignera or his sons, though not without some significance, is yet far from conclusive as to the true limits of the grant. Nor should it have any weight whatever, except as explaining and making clear what may be obscure in the indications of the diseno.

The diseno represents a tract of land lying between two arroyos, which issue from a range of hills on the east; on the north is the Arroyo de Calera; on the south, that of Los Coches. On the west, the land is bounded by the Arroyo de la Penitencia. The identity of these streams is not disputed, although but one of them has its name inscribed upon it on the diseno. On the diseno are also represented the houses of Hignera and of Alvisu, the former on the Calera and the latter on the Coches; and both situated at the base of the hills, a little below the points where the streams emerge into the open plain. A short distance above the base of the hills, and about midway between the northern and southern boundaries, there is marked on the diseno the word, "Tularcitos," and a small square, inscribed "Vina"; while, still higher up, and in what is apparently intended to represent a narrow valley, a "Sausal" and a "Posa" are designated. Beyond this, in a range of hills to the east, is a solitary tree, marked "Chemisal," and along the base of the ridge the word "Calabera" is written.

It is contended by the claimants that the narrow valley represented on the diseno is the valley of the Calaveras creek; and that therefore the eastern boundary is the ridge of the main sierra beyond that stream. The only indications of the diseno which might seem to support this view, are the positions of the Tularcitos and the Vina, at the base of the first range of hills, and the word "Calaberas" on the second range. If the spot marked "Tularcitos," in green crayon, on the map of Stratton, were clearly shown to be identical with the Tularcitos of the diseno, there might be some reason to contend that the valley represented on the diseno as lying to the east of it, and beyond an intervening range of hills, must be the valley of the Calaveras. For the place marked "Tularcitos," on Stratton's map, is situated at the base of a range of hills which forms the western boundary of the Calaveras valley. The valley, therefore, represented on the diseno as lying to the eastward of those, might well be supposed to be the valley of the Calaveras, for none other exists.

I think it sufficiently established by the evidence that at the point marked "Tularcitos" on Stratton's map some houses were erected, and, perhaps, some cultivation made by Hignera. It is also shown that there exist at the place some tulares and a small lagoon. But it nevertheless appears to me plain that this place was not the one intended to be represented on the diseno. The tract delineated on the diseno is a rectangular piece of land, of which about two-thirds is plain or level land, and one-third hilly or broken. The topographical map of Stratton accurately exhibits the line where the hills begin, towards the eastern portion. It also, indicates the points where the creeks issue from the hills, and the houses of Alvisu and Hignera, which still exist upon the ground. They are situated,

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as before remarked, on the level land, but immediately at the base of the first hills, and at or very near the points where the creeks come down into the plain.

The position of these houses, as shown on the topographical map, precisely corresponds with their position as indicated on the diseno, and it serves to identify with entire certainty the range of hills at the base of which the diseno represents them as situated. That range is, beyond doubt, the first hills which rise from the plain to the east. The "Tularcitos" of the diseno is represented as situated at a short distance to the east of the base of this range, "about midway between the creeks, and very little to the eastward of a line drawn between the houses. But the point marked in green, "Tularcitos," on Stratton's map, in no respect corresponds to these indications. It is situated at a little more than one-fifth the distance between the creeks, and far to the eastward of the base of the first hills, or of a line drawn between the two houses. No inaccuracy which we can attribute to the draughtsman of the diseno will justify us in supposing that by the Tularcitos of the diseno the "Tularcitos" of Stratton's map was intended to be designated. But, near the base of the first hills, about midway between the creeks, and a little to the eastward of a line drawn between the houses, a laguna and tulares are found in all respects corresponding to the position of the "Tularcitos" of the diseno. It cannot, I think, be doubted that these latter were intended.

Reliance is also placed on the word "Calabera," as indicating the Calaveras valley. But it is impossible to regard the narrow valley or level place between the hills represented on the diseno as intended to designate the valley of the Calaveras, situated far to the eastward, and through a part of which flows the large stream called the Calaveras river. No such stream is represented on the diseno, and if the hills marked on the diseno as lying to the eastward of the small valley were intended for the sierra, which lies beyond the Calaveras valley, we must suppose a mistake as to the situation of that valley, and its extent, to have been committed, which is hardly conceivable. The whole extent of hilly land represented on the diseno, from the base of the hills at which the houses are situated to the extreme eastern portion of the map, is not quite one-half the distance from the Penitencia creek to the commencement of the hills; in other words, about two-thirds

of the tract is level land to the west, and one-third hilly land to the east.

But, if the hills of the diseno are the range of mountains beyond the Calaveras valley, the level land will constitute but little more than one-quarter of the whole tract; three-quarters of it lying to the east of the first hills and of the houses. Such a mistake is too gross to have been committed even by the draughtsman of a Mexican diseno. But it is shown in evidence that the name "Cala-bera" was applied to a high peak in the range of hills between the Calaveras valley and the plain, and situated directly on the eastern side of a small valley, lying between the first and second range of hills, which was undoubtedly intended to be represented on the diseno. In this valley are the remains of a willow thicket or "sausal," entirely corresponding in situation with the spot marked "Sausal" on the diseno; while, in the Calaveras valley beyond no similar thicket is found. But the most conclusive indication is the "chemisal," or lone tree, marked on the diseno, as situated on the hills to the eastward of the small valley. This tree, which is a noted and conspicuous landmark for miles around, is identified with great certainty, and its position determines beyond dispute, what range of hills was intended to be represented on the diseno.

In the map of the pueblo lands of San Jose, which is evidently prepared with unusual care and skill, the same tree is represented as standing on the eastern boundary line of Hignera, while behind it, and beyond the ridge on which it stands, the "Plan de las Calaveras," or plain of the Calaveras, is distinctly delineated. The indication, therefore, afforded by the position of the chemisal, appears to me conclusive. For the diseno plainly represents it as situated on the hills to the eastward of the small valley delineated upon it. It is found to the eastward of a small valley in the hills, but far to the westward of the valley of the Calaveras. The valley intended to be represented cannot, therefore, be the valley of the Calaveras.

The decree of the board confirmed the claimants to a tract of land the description of the boundaries of which were derived from the diseno, and the testimony of witnesses produced by the claimants themselves. Those boundaries are described as "beginning at the back side of the principal house on said rancho at the foot of the hill; running thence northwardly to a lone tree on the top of the sierra (known as a landmark); thence east, along the sierra to the line of the land known as the 'Rancho of Jose M. Alvisu,'" etc.

The courses of these lines are evidently incorrect, probably through a clerical error. For a line from the house to the tree will run in a nearly easterly direction; and a line along the sierra, from the tree to the land of Alvisu, will run in a southerly or southeasterly direction. But the location of the lines intended by the decree cannot be mistaken. The first is to be run from Hignera's house to the tree, and the second from the tree along the sierra, and at right angles to the first line, to the lands of Alvisu. A line run east from the tree would merely be the production of the first line. It would not "run along the sierra," but over it. Nor would it reach the lands of Alvisu, which lie to the south.

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It is clear that the board intended to fix the boundaries precisely as they have been established in the official survey. No appeal was taken from this decree, and in approving the survey there is given to the claimants the very tract confirmed to them by the decree of the board, founded on their own testimony, and with which, at the time, they seem to have been entirely satisfied.

{NOTE. Upon rehearing, the decree confirming the official survey was affirmed. Case No. 15,363. The claimants then took an appeal to the supreme court where the decree was finally affirmed. 5 Wall. (72 U. S.) 827.}

¹ {Affirmed in 5 Wall. (72 U. S.) 827.}