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## Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850

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## MISSION REVIVAL JURISPRUDENCE: STATE COURTS AND HISPANIC WATER LAW SINCE 1850

Peter L. Reich\*

*Abstract:* In this Article, the author argues that after the United States' annexation of the Southwest, state judges in California, New Mexico, and Texas knowingly distorted the communal nature of applicable Spanish and Mexican water law. While previous scholars have acknowledged that courts misinterpreted municipal and riparian water rights originating in the Southwest's Hispanic period, most historians have attributed the distortion to ignorance rather than design. Using archival sources, the author demonstrates that American judges created an historical fiction of "Spanish" absolute water control, and intentionally disregarded actual law and custom dictating water apportionment. The resulting doctrines of pueblo water rights and riparian irrigation rights facilitated water monopoly and accumulation by cities and large landowners. This intentional manipulation of Hispanic law bears implications for legal historical debates and contemporary water allocation problems.

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*However much judges liked to clothe doctrine in history and in the costume of timeless values, doctrine was still at bottom flesh and blood, the flesh and blood of real, contemporary struggles over goods and positions and authority.*

*Lawrence M. Friedman, A History of American Law 342 (2d ed. 1985)*

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The Mission Inn in Riverside, California, is a luxury hotel constructed in 1902 to evoke “the Old California of missions and ranchos,” according to its promotional pamphlet.<sup>1</sup> Consistent with this image, the builders filled an entire city block with arches, bell towers, flying buttresses, domes, fountains, wrought-iron balconies, and Tiffany stained-glass windows.<sup>2</sup> An ornate, turn-of-the-century fantasy of Hispanic architecture, the Inn is completely unlike the unornamented adobe structures that existed in the Southwest before the Americans came.<sup>3</sup>

Similarly, late nineteenth- and early twentieth-century state courts developed elaborate theories of water rights ostensibly based on Hispanic law, but which bore no resemblance to actual Spanish and Mexican legal traditions. Despite their awareness of the historical reality of communal water-sharing practices, American judges asserted that municipal and riparian water rights originating in the Hispanic period were absolute and exclusive.<sup>4</sup> These doctrines of absolute water rights legitimated water monopoly and accumulation in the hands of a few cities and landowners. In some states, this version of Hispanic law persists: in 1975, the California Supreme Court reaffirmed Los Angeles’s paramount “pueblo water right” to its local watershed on the basis of *stare decisis*, despite extensive trial court findings that the right had no historical basis.<sup>5</sup>

In contrast to the common law water regime of riparian and prior appropriation rights emphasizing individual property interests,<sup>6</sup> a

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1. Mission Inn Foundation, *The Story of the Mission Inn 2* (1993).

2. Esther Klotz, *The Mission Inn: Its History and Artifacts 1* (1993).

3. Harold Kirker, *California’s Architectural Frontier 4, 9* (1960). See *infra* text accompanying notes 48–54 for discussion of the “mission revival” movement as an idealized myth about Spanish colonial civilization.

4. See discussion *infra* parts III and IV.

5. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250 (Cal. 1975). See discussion *infra* text accompanying notes 242–56.

6. Riparian doctrine, dominant in the eastern United States, provides that every landowner along a watercourse has an appurtenant right to reasonable use of the water. 6 Robert Beck, *Waters and Water Rights* 541 (1991). Appropriation doctrine, prevalent in the West, provides that water rights arise from prior diversion and application to beneficial use. *Id.* at 494. Compared to the riparian rule, prior appropriation is based on use rather than land ownership, and gives the first user an exclusive right to a constant amount of water. Sarah F. Bates et al., *Searching Out the Headwaters* 147 (1993). For historical analyses of the nineteenth-century replacement or supplementation of riparianism with appropriation in the western states, see Robert G. Dunbar, *The Adaptability of Water Law to the Aridity of the West*, 24 J.W. 57 (1985) (appropriation more adapted to arid climate), and Donald J. Pisani, *Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century*, 18 W. Hist. Q. 15 (1987) (appropriation met West’s economic development needs).

communal water system prevailed in the Hispanic Southwest.<sup>7</sup> Legal historians of the Spanish and Mexican periods have shown that far from being absolute and exclusive, water rights were shared between municipalities and other users, especially in times of shortage.<sup>8</sup> This communal water system also restricted the private sector, for riparian owners did not automatically have the right to irrigate their own property, but needed an express or implied grant of water in addition to land.<sup>9</sup> These communal water use patterns can be traced back to regional sharing arrangements in medieval Spain<sup>10</sup> and are still practiced in parts of the contemporary Southwest.<sup>11</sup> Based on this historical evidence, many scholars of western water law in the American period have criticized nineteenth- and twentieth-century state courts for distorting Hispanic traditions.<sup>12</sup> However, the legal historians who have attempted to explain this distortion have attributed it to a judicial “loss of Hispanic learning”<sup>13</sup> or to parties failing to present documents on Spanish and Mexican water law to the courts.<sup>14</sup> None of these scholars has examined the contemporary background of the key nineteenth- and early twentieth-

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7. An area embracing the present states of California, Arizona, New Mexico, Texas, Nevada, and Utah, and portions of Colorado, Oklahoma, Kansas, and Wyoming was governed successively by Spain from the sixteenth century to 1821, and by Mexico from 1821 to 1846 (to 1836 in the case of Texas). David J. Weber, *The Mexican Frontier, 1821–1846* xv (1982).

8. Norris Hundley, *The Great Thirst: Californians and Water, 1770s–1990s* 39 (1992); Michael C. Meyer, *Water in the Hispanic Southwest* 157 (1984); Daniel Tyler, *The Mythical Pueblo Rights Doctrine* 13, 44 (1990). See discussion *infra* text accompanying notes 87–89.

9. Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 St. Mary's L.J. 1, 64, 94–95 (1986); Betty Dobkins, *The Spanish Element in Texas Water Law* 143–44 (1959); Meyer, *supra* note 8, at 119–20. See discussion *infra* text accompanying notes 328–31.

10. Thomas F. Glick, *Irrigation and Society in Medieval Valencia* 118–31 (1970) [hereinafter Glick, *Valencia*]; Thomas F. Glick, *The Old World Background of the Irrigation System of San Antonio, Texas* (1972) [hereinafter Glick, *San Antonio*].

11. Stanley Crawford, *Mayordomo: Chronicle of an Acequia in Northern New Mexico* (1988). Crawford describes the governance of *acequias* (irrigation ditches) in northern New Mexico, by which local users receive a water share in exchange for contributing to ditch maintenance. *Id.*

12. Baade, *supra* note 9, at 24 n.142, 88, 91; David Chatfield & Bruce Bertram, *Water Rights of the City of Los Angeles: Power Politics and the Courts*, 6 San Fern. Valley L. Rev. 151, 153–76 (1978); Dobkins, *supra* note 9, at 139–58; G. Emlen Hall, *Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest*, 36 Rocky Mtn. Min. L. Inst. § 1.03 (1991); Hundley, *supra* note 8, at 126–35, 330–32; Wells A. Hutchins, *Pueblo Water Rights in the West*, 38 Tex. L. Rev. 748, 757–58 (1960); A.R. White & Will Wilson, *The Flow and Underflow of Motil v. Boyd—The Conclusion*, 9 Sw. L. J. 377, 431–32 (1955).

13. Baade, *supra* note 9, at 23, 87; Dobkins, *supra* note 9, at 133; Joseph W. McKnight, *The Spanish Watercourses of Texas*, in *Essays In Legal History in Honor of Felix Frankfurter* 373, 374, 386 (M. Forbosch ed., 1966).

14. Hundley, *supra* note 8, at 134; White & Wilson, *supra* note 12, at 433.

century cases to evaluate the context of these decisions, and none has researched court files to determine the extent to which judges knowingly misused Hispanic law.

Using previously untapped source material, especially court files, this Article explains the historical reasons for the nineteenth- and early twentieth-century judicial misinterpretation of Hispanic water law which still burdens western water policy. Part I considers how formalistic jurisprudence and notions of public rights influenced legal doctrine. Part II examines how American cultural myths about the Southwest's Spanish and Mexican past substituted images of a romantic arcadia for a more mundane reality and may have affected judicial thinking. Part III analyzes the adoption of the "pueblo water rights" doctrine by courts in California and New Mexico, despite judges' knowledge that absolute municipal water control was inconsistent with Hispanic water-sharing traditions. Part III also contrasts these decisions with a recent Texas decision that rejected the doctrine on the basis of historical evidence. Part IV explains why Texas recognized riparian irrigation rights for forty years despite courts' knowledge that such irrigation was not practiced during the Spanish and Mexican periods. In Part V, I conclude that American state courts knowingly distorted Hispanic law to justify exclusive water access by growing cities and large landowners. Finally, I explore how this misuse of historical authority casts doubt upon state courts' integrity and illuminates the development of current water policy.<sup>15</sup>

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15. This Article omits any discussion of Arizona water law because after the Arizona territorial legislature adopted prior appropriation in 1864, only a few subsequent courts claimed, in dicta, that this rule derived from Hispanic traditions. See *Clough v. Wing*, 17 P. 453, 455-56 (Ariz. 1888) (holding that prior appropriator could not claim more water than necessary for appropriation's purpose and stating in dicta that prior appropriation was practiced by Native American and Hispanic irrigators); *Biggs v. Utah Irrigating Ditch Co.*, 64 P. 494, 499 (Ariz. 1901) (holding that prior appropriator could lose priority by acquiescing in later use and noting in dicta that territorial code reenacted Spanish and Mexican water law); *Boquillas Land & Cattle Co. v. Curtis*, 89 P. 504, 508 (Ariz. 1907), *aff'd* 213 U.S. 339 (1909) (claiming that riparian rights are inconsistent with prior appropriation and stating in dicta that appropriation was traditional custom in the Mexican state of Sonora). Compare James M. Murphy, *The Spanish Legal Heritage in Arizona* 15 (1966) (asserting that prior appropriation followed Hispanic law) with Meyer, *supra* note 3, at 148 n.13 (criticizing Murphy and maintaining that priority was merely one consideration in Hispanic water allocation). The Arizona courts' lack of interest in Spanish or Mexican precedent may be due to the limited pre-Conquest Hispanic influence in the area (never exceeding a population of one thousand), compared to more densely settled California, New Mexico, and Texas. James E. Officer, *Hispanic Arizona, 1536-1856* 2-3 (1987).

I. JURISPRUDENTIAL FORMALISM AND THE DOCTRINE OF PUBLIC RIGHTS.

The search for reasons behind the judicial misinterpretation of Hispanic law should begin with a discussion of general doctrinal trends in late nineteenth- and early twentieth-century jurisprudence. Following the Civil War, America entered an era marked by rapid economic growth, the application of Darwinism to social theory, and government promotion of major private industries through subsidies and eminent domain.<sup>16</sup> In public opinion, the antebellum optimism about national development was replaced by a general cultural anxiety, with life being seen as a struggle for access to a limited pie.<sup>17</sup> Judges viewed their role as reconciling the often conflicting interests of corporate and legislative power.<sup>18</sup> Different legal historical schools have attempted to characterize the judicial decisions of this period, offering possible models for explaining the distortion of Hispanic law.

One group sees the era as being characterized by “formalism” or “classical legal consciousness,” a belief that case results were dictated by an abstract structure of private and public spheres, within which power could be exercised absolutely.<sup>19</sup> The absolute private sphere was delineated by such cases as *Lochner v. New York*,<sup>20</sup> which struck down maximum-hour legislation as interfering with contractual freedom.

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16. Kermit L. Hall, *The Magic Mirror: Law in American History 190–94* (1989).

17. Lawrence M. Friedman, *A History of American Law* 338 (2d ed. 1985).

18. Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* 350, 367 (1977).

19. Charles C. Goetsch, *The Future of Legal Formalism*, 24 Am. J. Legal Hist. 221 (1980); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, in 3 Res. L. & Soc’y 3 (1980); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law: A Progressive Critique* 13, 18–21 (David Kairys ed. 1990); Morton J. Horwitz, *The Transformation of American Law, 1870–1960* 9–31 (1992) [hereinafter Horwitz, *Transformation II*]. Morton Horwitz sees formalism originating as a reaction to antebellum judicial “instrumentalism,” by which pragmatic judges restricted vested rights in order to foster commercial and industrial development. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* 253–54 (1977) [hereinafter Horwitz, *Transformation I*]. Once wealth had been redistributed from farmers and workers to a new entrepreneurial elite, the latter group sought to justify their gains with the formalistic notion that legal rules were apolitical and inevitable. *Id.* at 254. William Nelson considers that instrumentalism was supplanted by formalism due to the antislavery movement’s promotion of a more principle-oriented jurisprudence. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974). At least one scholar, Harry Scheiber, has criticized the instrumentalism/formalism dichotomy as an oversimplification. Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American “Styles of Judicial Reasoning” in the 19th Century*, 1975 Wisc. L. Rev. 1.

20. 198 U.S. 45 (1905).

Decisions like *Mugler v. Kansas*,<sup>21</sup> which upheld uncompensated prohibitions on liquor sales as traditionally within a state's police power, illustrated the scope of the public realm.<sup>22</sup> Formalism conveyed the message that these spheres of power were objective rather than politically based, and that existing power relations were therefore legitimate while governmental resource redistribution was not.<sup>23</sup> Although southwestern state courts began to cite Hispanic law in support of absolute municipal water control during the late nineteenth century, scholars have not yet considered whether these cases might be characterized as formalistic.

Another group of legal historians focuses on the late nineteenth century as a period of emerging "public rights" concepts.<sup>24</sup> They view the judiciary as playing a key role in allocating natural resources for the general benefit<sup>25</sup> and in mobilizing the doctrines of police power, public trust, and public purpose to limit vested rights in favor of a broader community interest.<sup>26</sup> In California mining law, for example, the courts applied a "reasonable use" test to prevent water monopolization and pollution by prior appropriators<sup>27</sup> and invoked the public trust over navigable waters to enjoin hydraulic mining with its consequent flooding.<sup>28</sup> Unlike the analysts of formalism, some of the public rights

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21. 123 U.S. 623 (1887).

22. Horwitz, *Transformation II*, *supra* note 19, at 28–30. See also Mensch, *supra* note 19 at 20 (citing additional examples of absolute sphere analysis).

23. Mensch, *supra* note 19, at 21; Horwitz, *Transformation II*, *supra* note 19, at 10, 11, 16. In Horwitz's view, the purported objectivity of formalism was related to the ideal of a neutral state as psychologically reassuring in an era of social conflict and inequality. *Id.* at 20.

24. Friedman, *supra* note 17, at 340–41; Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850–1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 L. & Soc'y Rev. 235 (1976); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 Cal. L. Rev. 217 (1984); Molly Selvin, *This Tender and Delicate Business: The Public Trust Doctrine in American Law and Economic Policy, 1789–1920* 170–407 (1987).

25. Friedman, *supra* note 17, at 341; McCurdy, *supra* note 24.

26. Scheiber, *supra* note 24; Selvin, *supra* note 24. Although these three concepts overlap as developed by successive courts, Harry Scheiber generally uses "police power" to refer to government regulation of private property, "public trust" for government control of certain natural resources, and "public purpose" for the taking (through eminent domain) or taxation of property for the benefit of private instrumentalities having a public character, such as bridges or railroads. Scheiber, *supra* note 24, at 223–26.

27. See cases cited in McCurdy, *supra* note 24, at 260–62.

28. *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (9th Cir. 1884). See discussion in Scheiber, *supra* note 24, at 239–40. Arguably, the "public rights" rubric begs the question of who really benefited: the general population or selected large enterprises. See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789–1910, in American*

historians have discussed the judicial application of Hispanic law, viewing the California pueblo water right as a precursor to the modern public trust doctrine because both appear to be rooted in community access to resources.<sup>29</sup> However, they have uncritically assumed the pueblo right to be historically based,<sup>30</sup> and have not analyzed why judges used it so often to permit resource accumulation.

Thus, both of these interpretations of late nineteenth-century doctrinal trends offer possibilities for explaining the judicial use of Hispanic law.<sup>31</sup> The formalism model may be somewhat more promising than that of public rights to the extent that the Hispanic law decisions reflect an absolutist view of water control.<sup>32</sup> The public rights school has uncritically failed to see the Hispanic law cases as distortions, and although these rulings may have been perceived by some to be in the public interest, it is not clear that exclusive municipal water control and riparian irrigation necessarily benefited the general population.

Understanding the reasons for judicial misinterpretation of Hispanic water law requires examination of historical sources beyond the published opinions usually employed by those who have identified formalist and public rights rhetoric.<sup>33</sup> We need to look at attitudes towards Hispanic culture that may have influenced judges, and specifically the extent to which these notions can be found in arguments presented to the courts making the decisions.

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*Law and the Constitutional Order* 132, 138–40 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988) (railroads, mining companies, and irrigated farms were the primary beneficiaries of eminent domain devolution). See also Horwitz, *Transformation I*, *supra* note 19, at xiv (post–New Deal “consensus” historians, who argued that American history has been characterized far more by government intervention than laissez-faire, were uninterested in asking in whose interest regulation took place).

29. Scheiber, *supra* note 24, at 225, 240; Selvin, *supra* note 24, at 219–25.

30. Scheiber, *supra* note 24, at 225; Selvin, *supra* note 24, at 224. See also Scheiber’s assertion that the public trust doctrine was “imported out of Spanish law.” Gordon Bakken et al., *Western Legal History: Where Are We and Where Do We Go From Here?*, 3 W. Legal Hist. 115, 141 (1990).

31. Of course, some historians of American law in this period do not fall neatly into either of these theoretical schools, but present data eclectically without attempting to conform to any particular model. See, e.g., Gordon M. Bakken, *The Development of Law on the Rocky Mountain Frontier* (1983); Hall, *supra* note 16, at 189–246.

32. Along these lines, one scholar has explained current California water law as a result of a narrow, nineteenth-century concept of absolute riparian rights rather than a view of water as a discrete resource for allocation in society’s best interest. Eric T. Freyfogle, *Lux v. Haggin and the Common Law Burdens of Modern Water Law*, 57 Colo. L. Rev. 485 (1986).

33. One exception to this methodological limitation is Charles Goetsch, who uses unpublished journals and letters to elucidate the formalist thought of Connecticut Supreme Court Chief Justice Simeon Baldwin. Goetsch, *supra* note 19, at 224–25.



## II. SPANISH COLONIAL REVIVALISM AS A CULTURAL FANTASY

The cultural attitudes of American transplants to the late nineteenth-century Southwest may be a more specific source of judicial interpretations of Hispanic law. Many original Anglo travelers and settlers in the Mexican Southwest regarded Hispanic inhabitants with contempt.<sup>34</sup> After the American Conquest, the new Anglo elite idealized a romantic "Spanish" past through novels, promotional literature, public pageants, and real estate subdivisions, while contemporary Hispanic people remained economically and racially subordinated.<sup>35</sup> Historian Hubert Howe Bancroft captured this nostalgic view in 1888 when he wrote of pre-Gold Rush California that "[n]ever before or since was there a spot in America where life was a long happy holiday, where there was less labor, less care or trouble . . . the gathering of nature's fruits being the chief burden of life, and death coming without decay, like a gentle sleep."<sup>36</sup> A recent analysis summarizes the myth as one of "Old World aristocrats living the indolent, simple, and gracious life in an ambiance of casas and courtyards, mission bells and quaint adobe houses, halcyon days and starry nights; in places old—mission or small town or hacienda—populated with kindly friars, dashing caballeros, venerable dons and charming, beautiful señoritas and happy, childlike frolicking villagers."<sup>37</sup>

Scholars have ascribed the Anglo obsession with an imaginary Spanish heritage to transplants' need to establish cultural traditions as quickly as possible,<sup>38</sup> to the frustrated rejection by New England

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34. James D. Hart, *American Images of Spanish California* 5–22 (1960); David J. Langum, *From Condemnation to Praise*, 61 Cal. Hist. 282 (1983); Patricia Limerick, *The Legacy of Conquest* 240–41 (1987).

35. See James W. Byrkit, *Land, Sky, and People: The Southwest Defined*, 34 J. Sw. 257, 345, 355–56 (1992) (noting that novels and travel books promoted Southwest as exotic despite reality of the region's rapid industrialization); Carey McWilliams, *North From Mexico: The Spanish-Speaking People of The United States* 35–47 (1968) (contrasting Anglo-sponsored "Spanish fiestas" with the slight Hispanic civic representation as late as the 1940s); Earl Pomeroy, *The Pacific Slope* 388 (1965) (noting that fiestas and residential developments used "Castilian" imagery while actual Hispanics were subject to low wages and racially restrictive covenants).

36. Hubert Howe Bancroft, *California Pastoral, 1769–1848* 179–80 (1888).

37. Byrkit, *supra* note 35, at 352.

38. Franklin Walker, *A Literary History of Southern California* 121–23 (1950). Walker refers to this rapid process of creating a new past as "cultural hydroponics," analogizing to the agricultural method of growing crops quickly without any soil. *Id.* at 121.

“Mugwumps” of Gilded Age materialism,<sup>39</sup> and, particularly in Southern California, to the search by real estate and tourism boosters for an image of stability in the aftermath of the 1880s’ land boom and collapse.<sup>40</sup> Whatever their origins, these romantic notions bore little resemblance to historical reality.

The best known aspect of the Spanish myth was a preoccupation with eighteenth-century Catholic missions, particularly in California. The essence of this “mission myth” was that the missions were “spectacularly successful in Christianizing and civilizing a mass of stupid, ignorant, and savage Indians.”<sup>41</sup> Propagated by literature like the novel *Ramona* (1884),<sup>42</sup> the guidebook *In and Out of the Old Missions of California* (1905),<sup>43</sup> and the long-running theatrical production “The Mission Play” (1912-38),<sup>44</sup> the legend obscures the documented historical reality that Native Americans were treated cruelly and suffered a drastic population decline during Spanish and Mexican rule.<sup>45</sup> In the 1890s, California real estate and tourism boosters realized the missions’ commercial possibilities, and so launched a preservation movement to restore the now crumbling buildings.<sup>46</sup> Charles F. Lummis, promoter and president of the “Landmarks Club,” epitomized the cynicism of this effort when he

39. Byrkit, *supra* note 35, at 345-56. Byrkit defines “Mugwumps” as patrician descendants of old New England families who deplored the corruption of post-Civil War politics by industrialist “Robber Barons,” deserted the Republican party in 1884, and created an escapist literature idealizing the antebellum South and the Hispanic Southwest as genteel, pre-commercial societies. *Id.* The term “Mugwump” is thought to refer to a mythical bird who, like liberal Republicans unhappy with their own party, sat with his “mug” on one side of the fence and his “wump” on the other. *Id.* at 345.

40. John O. Pohlmann, *California’s Mission Myth* 8 (1974) (unpublished Ph.D. dissertation, U.C.L.A.).

41. *Id.* at 1.

42. Helen Hunt Jackson, *Ramona* (1884). The novel chronicles the dispossession and maltreatment of Native Americans and “old Spanish families” by greedy Anglo settlers. Other examples of fiction in this genre include Gertrude Atherton, *The Californians* (1898) [hereinafter *Californians*], and Gertrude Atherton, *The Splendid Idle Forties* (1902).

43. George Wharton James, *In and Out of the Old Missions of California* (1905). James extols the architectural and social virtues of the twenty-one California missions, praising their Franciscan founders for bringing civilization to the Pacific coast. *Id.*

44. The play is summarized, with quotations, in Marshall Breeden, *The Romantic Southland of California* 41-58 (1928). Set in San Diego and spanning the Hispanic period from 1769 through the 1840s, “The Mission Play” is a series of vignettes depicting kindly Franciscan friars and grateful Indians. *Id.* See also Kevin Starr, *Inventing the Dream* 87-89 (1985).

45. See James A. Sandos, *Junipero Serra’s Canonization and the Historical Record*, 93 *Am. Hist. Rev.* 1253, 1257-59, 1262-63 (1988) (summarizing anthropological literature on corporal punishment, poor diet, disease, and fugitivism in California missions). See also Hart, *supra* note 34, at 32 (noting parallel between late nineteenth-century images of chivalrous Hispanic protection of Indians and contemporaneous sentimentality about contented slaves in antebellum South).

46. Pohlmann, *supra* note 40, at 2.

wrote that “the old missions are worth more money, are a greater asset, to Southern California than our oil, our oranges, even our climate!” . . . [A] man is a poor fool who thinks he can do business without sentiment.”<sup>47</sup>

The idealization of the mission period was most tangibly embodied in the “mission revival” architecture prevalent in the Southwest from the 1880s through the present.<sup>48</sup> While the original missions were stark adobe structures with minimal ornamentation, architects now designed resort hotels, theaters, railroad depots, universities, and shopping centers with elaborate fountains, balconies, bell towers, curving stairways, domes, and red tile roofs.<sup>49</sup> The style began in California, Arizona, New Mexico, Texas and Florida, but ultimately became a nationwide phenomenon, even influencing areas with no Hispanic links like Massachusetts, Michigan, Minnesota, New Jersey, New York and Washington.<sup>50</sup> Mission revival was so influential that it became the basis for entire planned communities, some of which still mandate it by municipal ordinance.<sup>51</sup> In Santa Fe, New Mexico, an ironic conflict has ensued between the city’s rigid adobe-style zoning code and the nonconforming houses of working-class Hispanics.<sup>52</sup> As with other aspects of the Spanish myth, mission revival architecture was created by Anglo elites and served their economic desire to promote commercial growth as well as their psychological need to anchor themselves in a tradition.<sup>53</sup> Frank Miller, the proprietor of Riverside’s elaborate Mission

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47. Charles F. Lummis, *Stand Fast Santa Barbara!* 5 (1923) (quoting, in part, the president of the Los Angeles Chamber of Commerce, John S. Mitchell). See also Charles F. Lummis, *Preservation of Missions Neglected by State*, 8 *Touring Topics* 7 (1916). The standard work on Lummis and his promotional efforts is Edwin R. Bingham, *Charles F. Lummis, Editor of the Southwest* (1955).

48. Architectural historians technically divide the style into two phases, mission revival (approximately 1880s–1920s), and Spanish colonial revival (1910s–1930s), with New Mexico “Pueblo” and Pre-Columbian Maya offshoots. David Gebhard, *The Spanish Colonial Revival in Southern California (1895–1930)*, 26 *J. Soc’y Architectural Hist.* 131, 131–32, 145 (1967).

49. *Id.* at 131–32; Kirker, *supra* note 3, at 4, 9; Lawrence Cheek, *Taco Deco: Spanish Revival Revived*, 32 *J. Sw.* 491, 491–92; James W. Steely, *Spanish Mission Revival in Twentieth-Century Architecture*, in *Hispanic Texas: A Historical Guide* 95 (Helen Simons and Cathryn A. Hoyt eds., 1992).

50. Gebhard, *supra* note 48, at 134 n.14; David Gebhard, *Architectural Imagery, the Mission and California*, 1 *Harv. Architectural Rev.* 137, 139 (1980); David J. Weber, *The Spanish Frontier in North America* 353 (1992); Karen J. Weitze, *California’s Mission Revival* 103, 106, 124–26, 130 (1984).

51. Gebhard, *supra* note 48, at 131, 138. See, e.g., San Diego, Cal., Mun. Code § 103.028(A) (1990); Santa Barbara, Cal. Mun. Code § 22.22.104 (1993).

52. V.B. Price, *A City at the End of the World* 44 (1992).

53. Gebhard, *supra* note 50, at 138; Cheek, *supra* note 49, at 496–97.

Inn, expressed both goals when he said that “if you aren’t in some business that you can idealize, you’d better change your work or else jump off.”<sup>54</sup>

But the mission was not the only Hispanic institution subjected to romanticization. Contemporary cities were seen as heirs to Spanish towns, or “pueblos.”<sup>55</sup> Late nineteenth-century historians identified the founding of certain southwestern municipalities with “Spanish” or “Castilian” settlers, despite their knowledge that many early colonists were of mixed Indian and African-American, as well as of Hispanic, descent.<sup>56</sup> Towns throughout the Southwest took pride in their Spanish origins. The school superintendent of Ysleta, Texas, asserted in a letter to historian Hubert Howe Bancroft that his hamlet was “the oldest town in the United States,”<sup>57</sup> a title also claimed by boosters of Santa Fe, New Mexico for that city.<sup>58</sup> The 1871 official history of San Jose, California had to be content with describing it as “the most ancient pueblo in the state.”<sup>59</sup> Beginning in the 1890s, cities’ obsession with their Spanish (rather than Mexican) past was manifested in commercially sponsored “Spanish fiestas” lasting several days, with “Spanish” food being served, “Spanish” music being played, and “Spanish” costumes being worn.<sup>60</sup>

54. Frank Miller, *quoted in Zona Gale, Frank Miller of Mission Inn* 110 (1938).

55. A further image, not focused on here because of its only indirect relevance to the water cases, was that of the Mexican period stockraising ranch, or “rancho.” Novelists like Gertrude Atherton glorified the *ranchero* lifestyle as one of “Arcadian magnificence, troubled by few cares, a life of riding over vast estates clad in silk and lace, botas and sombrero, mounted on steeds as gorgeously caparisoned as themselves.” *Californians*, *supra* note 42, at 10. See also Tiry L. Ford, *Dawn and the Dons* 102–10 (1926). In fact, most rancho owners were not wealthy enough for ostentation, and generally worked long days alongside their families. Federico Sánchez, *Rancho Life in Alta California, in Regions of La Raza: Changing Interpretations of Mexican American Regional History and Culture* 213, 229–30 (Antonio Ríos-Bustamante et al. eds. 1993).

56. In 1886, Hubert Howe Bancroft described the 1781 founders of Los Angeles as “Indian and negro with here and there a trace of Spanish.” Hubert Howe Bancroft, 1 *History of California* 345 (1886). However, two years later, he considered that California towns were “peopled by the old Spanish or creole soldiers.” Bancroft, *supra* note 36, at 353. Frank Blackmar quoted Bancroft on the 1781 settlers, and then without any citation claimed that “there came to live in Los Angeles a better class of inhabitants, chiefly of old Castilian blood.” Frank W. Blackmar, *Spanish Institutions of the Southwest* 182–83 (1891).

57. Letter from D.E. Hunter to H.H. Bancroft (November 12, 1885) (Bancroft Library, U.C. Berkeley).

58. Ronald L. Grimes, *Symbol and Conquest: Public Ritual and Drama in Santa Fe* 186 (1976).

59. Frederic Hall, *The History of San Jose and Surroundings* iii (1871).

60. Carey McWilliams describes such celebrations in Los Angeles, Tucson, and Santa Barbara. McWilliams, *supra* note 35, at 36–40. “La Fiesta de Los Angeles” was launched in 1893 by the local Merchants Association in order to stimulate trade. Dudley Gordon, *Charles F. Lummis: Crusader In Corduroy* 298 (1972). Santa Fe’s fiesta was similarly begun as a promotion in 1919. See S. Omar Barker, *The End of the Trail Fiesta, When History Re-lives in Our Oldest Capital*, 81 Overland

The revision of history in these events was epitomized in 1963 when a "protector" of the Los Angeles Mexican-American community was chosen because his ancestor was Hernando Cortés, Spanish conqueror of Mexico.<sup>61</sup> According to one local leader, this was "like naming one of King George's descendants as a 'protector' of the descendants of American revolutionists."<sup>62</sup> As with architecture, the fiesta trend has even taken root in places with no Hispanic origins, such as Anglo-founded Phoenix.<sup>63</sup>

Paralleling the Anglo search for Spanish municipal traditions was the idea that Hispanic water systems provided a model for the development of cities and large-scale agriculture. In the late nineteenth and early twentieth centuries, promoters such as William Smythe argued for planned public works and irrigation as the key to making the arid West productive.<sup>64</sup> In an influential historical treatise, *Irrigation Development* (1886), California's State Engineer William Hammond Hall investigated comparative water use in the Mediterranean civilizations of France, Italy, and Spain, arguing that California could learn valuable lessons about the benefits of irrigation.<sup>65</sup> Hall claimed specifically that in medieval Spain, "waters were held by municipalities . . . and controlled by town officials," and further, that "running waters available for irrigation . . . belonged to the towns, notwithstanding apportionment."<sup>66</sup> Hall followed

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Monthly 9, 10 (1923) (quoting an eyewitness description of the Santa Fe Fiesta: "[O]nce again the old adobe walls of the Ancient Capital of the Kingdom and Provinces of New Mexico are shadowed by the waving of plumes and the passing of stiff-necked knights in shining armor . . .").

61. Ruben Salazar, *Spanish-Speaking Angelenos: A Culture in Search of a Name*, L.A. Times, Feb. 24, 1963, at C1, C3.

62. *Quoted in id.*

63. Work Projects Administration, *Arizona, A State Guide* 217 (1940).

64. Smythe edited a journal, *Irrigation Age*, from 1891 to 1895, authored *The Conquest of Arid America* (1899), and produced a column, "20th Century West" in Charles Lummis's magazines *Land of Sunshine* and *Out West* from 1901 to 1904. Bingham, *supra* note 47, at 144-51; Donald J. Pisani, *From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West, 1850-1931* 343-44 (1984). See also Henry A. Wallace, *Henry A. Wallace's Irrigation Frontier: On the Trail of the Corn Belt Farmer, 1909* (Richard Lowitt and Judith Fabry eds., 1991) (containing the future U.S. Secretary of Agriculture's observations on western irrigation and its potential for creating rural prosperity).

65. William Hammond Hall, *Irrigation Development* 15 (1886). Hall extolled "the charm of a life amidst a sub-tropical foliage which irrigation there supports in abundance." *Id.* at 6. See also Kevin Starr's analysis that Hall was making an "implicit cultural argument" that California could "transform itself through irrigation into a comparably civilized neo-Mediterranean commonwealth." Kevin Starr, *Material Dreams: Southern California Through the 1920s* 12 (1990).

66. *Id.* at 370-71. This description is contradicted by a thorough modern monograph, which maintains that medieval Spanish authorities apportioned water on a regional basis. Glick, *Valencia*, *supra* note 10, at 118-31.

up his historical study with a detailed report on public water works in Southern California, asserting that at its founding, Los Angeles was given “exclusive control” of the Los Angeles River,<sup>67</sup> and that other pueblos, such as San Juan Capistrano, possessed their own water titles as well.<sup>68</sup> Hubert Howe Bancroft echoed Hall’s conclusions when he stated that the pueblos were “entitled . . . to all needed wood and water.”<sup>69</sup>

In the late nineteenth-century popular mind, some of these Hispanic “water rights” began to take on legendary proportions. One speaker at an 1890 Los Angeles Historical Society event claimed that the city had “exercised and enjoyed exclusive control of all the water and all of the bed of the river within its limits so long that the memory of no living man runs to the contrary.”<sup>70</sup> In 1899 Los Angeles City Attorney H.T. Lee remarked that he was “impressed with the persistence and vehemence of the contention of the citizens of the old pueblo that they owned the water supplied to the city. The city has owned the water since the town was nothing but a Mexican village.”<sup>71</sup> Arizona’s irrigation laws were said to be derived from “the written and unwritten law of Mexico, handed down from the civilization of the Tigris, Euphrates and Nile.”<sup>72</sup> These ideas would become useful to city councils and agriculturists seeking secure water supplies for future development.<sup>73</sup>

In the context of Anglo elites’ romanticism about the Hispanic period, it is only natural that ideas about Spanish law were affected. Prior to the Conquest, Anglo immigrants to Mexican California criticized its legal system as corrupt and indulgent because of its mandatory *conciliación* (arbitration) and lack of statutory formality.<sup>74</sup> As with other Hispanic institutions, law was perceived differently once the Americans were in power, especially in the late nineteenth century. In an 1887 bibliographical survey, a member of the Los Angeles bar lauded the “wise code” of Spain’s medieval monarch Alfonso X, and urged lawyers

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67. William Hammond Hall, *Irrigation in California (Southern)* 558–59 (1888).

68. Hall considered San Juan Capistrano’s title to be “without flaw or blemish.” *Id.* at 643.

69. Bancroft, *supra* note 36, at 249.

70. C.P. Dorland, *The Los Angeles River—Its History and Ownership*, 3 Ann. Publication Hist. Soc’y S. Cal. 31 (1893).

71. Henry T. Lee, *quoted in* L.A. Times, Aug. 18, 1899, at 13.

72. Charles Trumbull Hayden, *quoted in* Phoenix Daily Herald, Feb. 9, 1891, at 3.

73. See Bates et al., *supra* note 6, at 32, 41 (western cities and large-scale irrigators required water for rapid expansion at turn of century).

74. David J. Langum, *Law and Community on the Mexican California Frontier* 146–51, 268–77 (1987). Langum’s monograph is a detailed study of California’s legal system during the Mexican period, focusing mainly on commercial law and procedure.

in the former Spanish possessions to study prior laws because they "affected to a certain extent the legislation of our own times."<sup>75</sup> A more panegyric account alleged that the informal courts run by *alcaldes* (mayors) were "honest in their administration of justice and sought to give every man his due."<sup>76</sup> On into the twentieth century, Hispanic law had its defenders in the bar, such as a prominent Dallas attorney who praised Texas's civil law heritage as "the product of the greatest lawyers of the ages," compared with the "crudities" of the common law.<sup>77</sup> Anglo lawyers themselves participated in the romantic revival, with some promoting Spanish pueblo origins in local histories<sup>78</sup> and others contributing to more general Hispanic cultural projects such as the Southwest Museum near Los Angeles.<sup>79</sup>

Thus, the Hispanic romantic revival in the Southwest encompassed ideas about missions, architecture, municipal origins, water control, and law. Especially given attorneys' participation in the movement, the judges deciding water cases may have been influenced by a cultural context in which everything "Spanish" was idealized. What is less immediately clear is the extent to which the courts knowingly distorted Hispanic law for policy purposes.

### III. PUEBLO WATER RIGHTS IN CALIFORNIA, NEW MEXICO, AND TEXAS

In the 1880s, Southwestern state courts began to incorporate romanticized ideas about Hispanic law into published decisions on municipal water rights and riparian irrigation. Examination of the case

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75. George Butler Griffin, *A Brief Bibliographical Sketch*, 1 Ann. Publication Hist. Soc'y S. Cal. 36, 45 (1887).

76. Nellie Van De Grift Sanchez, *Spanish Arcadia* 361 (1929).

77. Clarence Wharton, *Early Judicial History of Texas*, 12 Tex. L. Rev. 311 (1934). Wharton extolled civil law as "the finished system of the Romans, who ruled the world for centuries and were the greatest law givers this world has ever seen," while the common law was the product of "feudal barbarism," treated women as mere property, and was responsible for the "bunglesome and inefficient jury system." *Id.*

78. Hall, *supra* note 59, at 333-49; H.C. Hopkins, *History of San Diego, Its Pueblo Lands and Water* 217-61 (1929).

79. W.W. Robinson, *Lawyers of Los Angeles* 125 (1959). The museum, founded by Charles Lummis in 1912, was devoted to preserving Native American and colonial Spanish artifacts, and attracted the support of prominent attorneys such as Henry W. O'Melveny of the O'Melveny and Myers law firm. *Id.* at 125, 229-30. At least two contributors to the museum, Walter Van Dyke and H.T. Lee, figured in several Los Angeles pueblo water cases as judge and lawyer, respectively. See Letter from Charles F. Lummis to Judge Walter Van Dyke (November 21, 1905); Letter from H.T. Lee to Charles F. Lummis (May 24, 1907) (both in Southwest Museum Collection, Los Angeles).

files further reveals that state courts adopted these idealized notions despite the presentation by losing attorneys of historically accurate descriptions of water usage during the Hispanic period. That judges chose the romantic over the historical version can only lead to the conclusion that their misinterpretation was deliberate. The most dramatic of these distortions was the “pueblo water rights” doctrine, developed by the supreme courts of California and New Mexico.

Along with the mission and the military presidio (fort), the pueblo, or civil municipality, was a Spanish and Mexican institutional instrument for the colonization of the northern frontier.<sup>80</sup> Towns were usually laid out around a central plaza faced by official and church buildings, with surrounding lots distributed to the colonists, and private fields, common lands, and other municipal property placed on the fringes.<sup>81</sup> Some pueblos had an elaborate municipal government, including an *ayuntamiento* or *cabildo* (town council), *alcalde* (mayor), and *alcaldes ordinarios* (judges), while smaller, less formal settlements had a more abbreviated system.<sup>82</sup> Most of these communities were founded by the Spanish, including Santa Fe (1610), El Paso (1680), Albuquerque (1706), San Antonio (1731), Laredo (1767), San José (1777), and Los Angeles (1781).<sup>83</sup> Others originated during the Mexican period as presidial settlements such as Tucson (1825)<sup>84</sup> and San Diego (1835),<sup>85</sup> or community land grants such as Las Vegas, New Mexico (1835).<sup>86</sup>

Hispanic municipalities did not have absolute or exclusive water rights, but were required to share water with other users, especially in times of drought.<sup>87</sup> Since agriculture was crucial to overall development, the regional authorities did not allow towns to monopolize water for their own expansion.<sup>88</sup> Rather, provincial and territorial governors regularly

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80. Gilbert R. Cruz, *Let There Be Towns: Spanish Municipal Origins in the American Southwest, 1610–1810* 165 (1988). As a general term, “pueblo” was used to describe any town, but in a more limited sense implied certain jurisdictional and administrative rights. *Id.* at 201 n.7.

81. Weber, *supra* note 50, at 320. Weber notes that this orderly pattern was often modified on the frontier. *Id.*

82. Cruz provides an overview of town administration in its most complete version. Cruz, *supra* note 80, at 144–64. Some hamlets had only a justice of the peace and two other officials. Officer, *supra* note 15, at 118.

83. Cruz, *supra* note 80, at 25, 34, 47, 64, 96, 111, 117.

84. Officer, *supra* note 15, at 17.

85. Weber, *supra* note 7, at 30.

86. Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico* 171 (1994).

87. Hundley, *supra* note 8, at 39; Meyer, *supra* note 8, at 157; Tyler, *supra* note 8, at 13, 44.

88. Tyler, *supra* note 8, at 36.



apportioned water between pueblos and other consumers, such as missions and individual farmers.<sup>89</sup>

Struggles over water continued after the 1848 Treaty of Guadalupe Hidalgo transferred sovereignty over most of the Southwest to the United States.<sup>90</sup> The treaty's provision protecting property rights established under Mexican law<sup>91</sup> often resulted in successor cities to the Hispanic pueblos vying for water supplies against land grant holders, particularly in the rapidly growing state of California.<sup>92</sup> American courts, as we shall see, viewed water rights in far more absolute terms than had the Spanish and Mexican authorities.

### A. California

An 1860 visitor to Los Angeles remarked, "We are on this plain about twenty miles from the sea and fifteen from the mountains, a most lovely locality; all that is wanted naturally to make it a paradise is *water*, more *water*."<sup>93</sup> In the half-century following California's statehood in 1850, Los Angeles's population grew from 1610 to 102,000, and its area from twenty-eight to forty-three square miles, as the old Mexican ranching economy gradually gave way to commercial agriculture, real estate, light manufacturing, and service industries.<sup>94</sup> This expansion strained the traditional water supply, the Los Angeles River, especially because the

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89. For specific examples of accommodations, see Dobkins, *supra* note 9, at 115 (San Antonio settlers and nearby missions); Hundley, *supra* note 8, at 50–56 (Los Angeles and San Fernando mission); Meyer, *supra* note 8, at 159 (Monterrey and orchard owner); Officer, *supra* note 15, at 72–73 (Tucson and Indians); Tyler, *supra* note 8, at 35–36 (Taos and farmers). The criteria for the resolution of water disputes included just title, prior use, need, avoiding injury to third parties, reason for use, legal right, and the common good. Meyer, *supra* note 8, at 145–64.

90. By the treaty, ending the 1846–1848 Mexican War, the United States obtained the present states of California, Nevada, and Utah, most of Arizona, Colorado, and New Mexico, and the southern strip of Texas between the Nueces and Rio Grande rivers. 9 Stat. 922 (1848). See Richard Griswold Del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (1990) (analyzing the treaty and its ramifications).

91. Article VIII, 9 Stat. at 929–30. See Federico M. Cheever, Comment, *A New Approach to Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. Rev. 1364 (1986) (discussing the property interest protected by the treaty).

92. See discussion *infra* this part.

93. William H. Brewer, *Up and Down California in 1860–1864* 13 (Francis P. Farquhar ed., 1974) (emphasis in original).

94. Robert M. Fogelson, *The Fragmented Metropolis: Los Angeles, 1850–1930* 21–23, 78, 226 (1967).

city periodically experienced severe droughts<sup>95</sup> and needed adequate fire protection for the wood buildings that had replaced adobe brick structures.<sup>96</sup> Attempting to make water distribution more efficient, the city in 1868 leased its water system for thirty-three years to a private company, which began to replace the venerable *zanjas* (open water ditches) with larger reservoirs and iron pipes.<sup>97</sup>

But the city was not the only claimant to the river. By the 1870s, upstream landowners in the San Fernando Valley were diverting water, thus threatening Los Angeles's municipal supply and its revenue from selling surplus water to nonurban users.<sup>98</sup> In 1874, the city responded to this problem by convincing the state legislature to approve a charter amendment granting Los Angeles exclusive ownership of all the water flowing in the Los Angeles river.<sup>99</sup> Simultaneously, the city initiated the first of a series of lawsuits designed to elevate its water rights above those of all others.

In the 1879 decision of *City of Los Angeles v. Baldwin*,<sup>100</sup> the California Supreme Court rejected the city's initial attempt to establish an absolute and exclusive right to the river. *Baldwin* involved the owners of several portions of the former Rancho Los Feliz, upstream from Los Angeles, who were diverting water for irrigation.<sup>101</sup> The city sued to quiet title to the river, making the expansive claim that the Spanish pueblo "was, from its first settlement, the owner of . . . all of the water flowing in said river of Los Angeles," and that the American municipality had succeeded to this right.<sup>102</sup> In support of its position, Los Angeles produced documents from 1810 showing that, in a dispute between the pueblo and San Fernando Mission, the latter agreed to remove an irrigation dam it had placed upstream.<sup>103</sup> A repetition of this controversy in 1844 was resolved when the *alcalde* of Los Angeles and

95. Vincent Ostrom, *Water & Politics: A Study of Water Policies and Administration in the Development of Los Angeles* 38 (1953). See *Los Angeles Rainfall 1878–1993*, L.A. Times, Jan. 5, 1994, at B2 (detailing variation in annual rainfall totals).

96. Hundley, *supra* note 8, at 122; Ostrom, *supra* note 95, at 46.

97. Ostrom, *supra* note 95, at 44. The *zanjas* were satisfactory for a small Hispanic population of ranchers and agriculturalists but did not lend themselves to sanitation, flood control, or water preservation during drought. *Id.* at 37–40; Hundley, *supra* note 8, at 122.

98. Hundley, *supra* note 8, at 124.

99. 1874 Cal. Stat. ch. 447, art. 2, § 1. See Ostrom, *supra* note 95, at 33–34 (discussing the amendment).

100. 53 Cal. 469 (1879).

101. *Id.* at 470.

102. Transcript on Appeal from 17th Dist. Ct. at 89, *Baldwin* (No. 6040).

103. *Id.* at 46–47.

the mission's priest "drank some wine together . . . and arranged the matter," with the newer dam also being dismantled.<sup>104</sup> Baldwin and the other landowner defendants countered with eyewitness testimony that farmers had been irrigating the area of Rancho Los Feliz from the Spanish period onward, "without being molested by anyone," including city officials.<sup>105</sup> The trial court held for the defendants, finding that they were merely using an amount of water to which they were reasonably entitled as riparian proprietors, and that Los Angeles had shown no grant of ownership to the river's waters.<sup>106</sup>

On appeal, the city omitted mention of the 1844 "wine deal" (probably because such an ad hoc allocation undercut its claim of incontestable rights), and instead focused on hortatory official proclamations from the Spanish period. It cited a 1781 decree establishing the pueblo near the river to encourage irrigation,<sup>107</sup> and the later Plan of Pitic, which had set out the Spanish crown's pattern for the founding of new towns with sufficient water for their residents.<sup>108</sup> These documents, according to Los Angeles, showed that the pueblo had been located on the river "for the prosperity the waters of the stream would give," and that "the town owned it, as it did its other property."<sup>109</sup> Therefore the city should not now "be deprived of its ancient privileges."<sup>110</sup> The landowners contested this reading of the Plan of Pitic, quoting its specific provision requiring common water sharing between town residents and outsiders.<sup>111</sup>

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104. *Id.* at 70.

105. *Id.* at 109-10, 117.

106. *Id.* at 23, 25-26.

107. Appellant's Points and Authorities at 18, *Baldwin* (No. 6040).

108. *Id.* at 24-26. The Plan of Pitic was issued in 1789 by the military commander of New Spain's Internal Provinces (the northern frontier) as the founding document for a new pueblo, and became a model for water distribution in all subsequent settlements under Spanish rule. Meyer, *supra* note 8, at 30-37. In fact, the Plan provided for water sharing among town residents and non-residents. Plan of Pitic, art. 7 (1789), translated in John W. Dwinelle, *The Colonial History of San Francisco*, addenda VII (1867).

109. Appellant's Points and Authorities at 26, *Baldwin* (No. 6040).

110. *Id.* at 52.

111. The Plan provided that "the residents and natives should equally enjoy the woods, pastures, waters, privileges and other advantages of the royal and vacant lands that might be outside the land assigned to the new settlements in common with the residents of the adjoining Pueblos." Respondent's Points and Authorities at 20, *Baldwin* (No. 6,040) (quoting Plan of Pitic, art. 7 (1789)). The landowners' construction of the Plan is consistent with that of the professional historians who have analyzed it. Dobkins, *supra* note 9, at 101; Hundley, *supra* note 8, at 39-40; Meyer, *supra* note 8, at 35-36.

The California Supreme Court affirmed, holding squarely that the city was not the owner of the river's water.<sup>112</sup> The court also cited a prior judgment between the same parties, by which the upstream landowners, as riparians, had been permitted to divert the same amount.<sup>113</sup> In a concurring opinion, Justice Augustus Rhodes averred that it was unnecessary to determine the validity of the city's title because this prior ruling was dispositive on the permissible uses of the river.<sup>114</sup>

Thus, when first presented with Los Angeles's broad claim to a pueblo water right, the supreme court clearly held that the city owned no such interest. Los Angeles had attempted to extrapolate its absolute ownership from vague Spanish decrees promoting sufficient water access for residents of new towns, and had relied on romantic language about "ancient privileges." The upstream landowners responded with Hispanic customary and legal evidence demonstrating that upstream irrigation had often been permitted, and that the official policy had been one of water sharing. The view of Spanish and Mexican water rights as communal and subject to balancing is consistent with scholarly characterizations of the system that prevailed in the pre-Conquest Southwest.<sup>115</sup> In addition, the landowners' argument for a fair water share was supported by the "reasonable use" variant of riparian rights accepted by nineteenth-century American courts.<sup>116</sup>

One historian who has analyzed *Baldwin*, Norris Hundley, mistakes Rhodes's concurrence for the court's holding, and so believes the court did not reach the pueblo question.<sup>117</sup> In fact, the majority expressly found the evidence insufficient to support the city's assertion of title to the river.<sup>118</sup> Later courts, presented with identical evidence, would reverse direction, disregarding Hispanic law and validating Los Angeles's claim.

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112. *City of Los Angeles v. Baldwin*, 53 Cal. 469, 469 (1879).

113. *Id.* at 469–70.

114. *Id.* at 473–74 (Rhodes, J., concurring).

115. See sources cited *supra* note 88.

116. Traditional common law riparian doctrine strictly prohibited landowners from interfering with a river's natural flow, but by the mid-nineteenth century instrumentalist courts were allowing any "reasonable use," facilitating new activities such as intensive irrigation and mill dams. Horwitz, *Transformation I*, *supra* note 19, at 34–40. A reasonable use test was applied in California mining law to prevent water monopolization and degradation by prior appropriators. See *supra* note 27 and accompanying text.

117. Hundley, *supra* note 8, at 129–130. Hundley quotes from the concurrence, rather than the majority, regarding the lack of necessity for inquiry into the "source, nature, or extent" of the city's title. Compare *Baldwin*, 53 Cal. at 474 with Hundley, *supra* note 8, at 129–30.

118. *Baldwin*, 53 Cal. at 469.

The California Supreme Court next considered the extent of the pueblo water right two years later, in *Feliz v. City of Los Angeles*,<sup>119</sup> and a companion case, *Elms v. City of Los Angeles*.<sup>120</sup> Both cases concerned upstream landowners on the former Rancho Los Feliz who had not been involved in *Baldwin*, but similarly found themselves at odds with the city.<sup>121</sup> This time, Los Angeles officials entered the owners' land and blocked off their diversion ditches in order to prevent diminution of the river's flow.<sup>122</sup> The city then offered to sell back the water at the same price offered to other nonurban users.<sup>123</sup> When the landowners sued to enjoin Los Angeles from obstructing their ditches, maintaining that they had irrigated from the river without interference since the 1840s,<sup>124</sup> the city asserted its exclusive pueblo claim.<sup>125</sup> The trial court held, as in *Baldwin*, that all riparians were entitled to reasonable use of the river's water, and restrained Los Angeles from denying the landowners a reasonable amount.<sup>126</sup>

In the California Supreme Court, the city expanded the romantic arguments it had employed in *Baldwin*. Referring back to medieval Spain, it alleged, without citing any authority, that "[t]he idea of property under the Spanish laws is much more absolute than it is under the common laws. A man owned his property absolutely."<sup>127</sup> During oral argument, City Attorney John Godfrey extravagantly proclaimed that "so long as there is any water in the river, provided we require it, we have the first right to it," and that "the right of the city . . . to supply the people of this town has never been questioned."<sup>128</sup> The landowners countered that there was no exclusive pueblo right, because *Baldwin* was controlling<sup>129</sup> and Hispanic custom and law explicitly provided

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119. *Feliz v. City of Los Angeles*, 58 Cal. 73 (1881).

120. *Elms v. City of Los Angeles*, 58 Cal. 80 (1881).

121. Hundley, *supra* note 8, at 130.

122. *Feliz*, 58 Cal. at 75.

123. Transcript on Appeal at 72, *Feliz* (No. 7502).

124. *Id.* at 30-33.

125. *Id.* at 58.

126. *Id.* at 75-76.

127. Appellant's Brief at 18, *Feliz* (No. 7502) (quoting Appellants' Brief at 34, *Steinbach v. Moore*, 30 Cal. 498 (1866)). Los Angeles quoted the passage from the *Steinbach* brief, which itself cited nothing in support. *Id.*; see Appellants' Brief at 34, *Steinbach*. Several Spanish legal sources also cited by the city on page 18 of its brief correspond to issues other than the "absolute property" idea. See Appellant's Brief at 18, *Feliz* (No. 7502).

128. Arguments of Counsel for Appellants and Respondents at 8, 78, *Feliz* and *Elms* (Nos. 7502, 7501).

129. *Id.* at 56.

otherwise.<sup>130</sup> They discussed the evidence of long customary irrigation to which the city had never previously objected.<sup>131</sup> The owners also pointed out that the Plan of Pitic did not recognize a pueblo's right to irrigate all the land within its limits because not all tracts were deemed irrigable.<sup>132</sup> Los Angeles, they maintained, was now demanding water to irrigate a large amount of land which had not been intended for such use when the pueblo was founded.<sup>133</sup>

The supreme court reversed the trial court, finding that for more than one hundred years the city's claim to "all the waters of the Los Angeles River" had been recognized "by all persons interested from the head of the stream and along its banks."<sup>134</sup> The landowners and their grantors were among those acknowledging the city's exclusive right, according to the court, since they had used the river only with the municipal authorities' permission.<sup>135</sup> Thus Los Angeles could prevent the upstream diversions at issue because of this long-standing recognition, and not, the court added, based on Hispanic law.<sup>136</sup> The justices concluded that, "to the extent of the needs of its inhabitants," the city had "the paramount right to the use of the waters of the river,"<sup>137</sup> but could not sell water to outside users if such sales would injure riparians.<sup>138</sup>

The *Feliz* court thus reached a result contrary to that in *Baldwin*, but skirted the pueblo question by basing the city's water rights on past acknowledgment rather than Spanish or Mexican law. As it had done in *Baldwin*, Los Angeles made vague, often unsupported assertions, while the landowners cited specifically to Hispanic custom and law. This time, however, the justices accepted the city's position, although not its nostalgic arguments. The court may have been unwilling to overrule *Baldwin* directly by validating the pueblo right in the face of the

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130. *Id.* at 56–57; Respondents' Points and Authorities at 8, *Feliz* (No. 7502).

131. Respondents' Points and Authorities at 7, *Elms* (No. 7501).

132. *Id.* at 5–6. This view is consistent with that of modern legal historians. See Baade, *supra* note 9, at 63–64; Meyer, *supra* note 8, at 124–131 (discussing different water rights appurtenant to various land categories).

133. Arguments of Counsel for Appellants and Respondents at 34–35, *Feliz* and *Elms* (Nos. 7502, 7501).

134. *Feliz*, 58 Cal. at 78–79. The *Feliz* court's reasoning and result was adopted in *Elms*. *Elms*, 58 Cal. at 80.

135. *Feliz*, 58 Cal. at 79.

136. *Id.* The court stated that it had not examined the city's rights "as they existed under the Spanish and Mexican laws, applicable to pueblos, for the findings in this case render such examination unnecessary." *Id.*

137. *Id.* at 80.

138. *Id.* at 79–80.

diverters' historical evidence. In any event, *Feliz* represented a judicial move towards facilitating Los Angeles's control over the river, at the expense of the upstream farmers.

Following the *Feliz* decision, Southern California's rapid population growth and periodic droughts continued to impel the city to enlarge its water supply.<sup>139</sup> In 1886, the supreme court's *Lux v. Haggin*<sup>140</sup> opinion finally used language recognizing an historical pueblo water right. *Lux*, involving a conflict between riparian landowners and appropriators in the San Joaquin Valley, stood for the proposition that common law riparian rights were superior unless an appropriation antedated the riparian's ownership.<sup>141</sup> Buttressing its holding with references to Hispanic law, the *Lux* court stated in dicta that "the pueblos had a species of property in the flowing waters within their limits,"<sup>142</sup> which gave them "a preference or prior right to consume the waters, even as against an upper riparian proprietor."<sup>143</sup>

The court posited that the pueblo water right followed from its 1860 ruling in *Hart v. Burnett* that under Mexican law a pueblo "had a certain right or title to the lands within its general limits," which were "held in trust for the public use."<sup>144</sup> That *Hart* held pueblos to have merely a trust obligation rather than a vested land title, and referred only to land, not

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139. Hundley, *supra* note 8, at 132.

140. *Lux v. Haggin*, 10 P. 674 (Cal. 1886).

141. *Id.* at 731, 744. *Lux* established California's dual system of water rights, by which timing determined whether riparian or appropriative rights prevailed in a particular controversy. Hundley, *supra* note 8, at 95. The system tended to favor large riparian landowners because by the 1880s, most riverbank land in irrigable areas was already privately owned. *Id.* at 96. See also Freyfogle, *supra* note 32; M. Catherine Miller, *Flooding the Courtrooms* 10–20 (1993); Pisani, *supra* note 63, at 191–249 (analyzing the background and effects of the decision).

142. *Lux*, 10 P. at 715.

143. *Id.* at 716–17. These passages were *dicta* because, as the court acknowledged, "no pueblo existed on the water-course . . . which is the subject of the current controversy." *Id.* at 717.

144. *Id.* at 714 (quoting *Hart v. Burnett*, 15 Cal. 530, 616 (1860)). On this basis, *Hart* had confirmed land sales within the former Mexican settlement of San Francisco by its American successor city, but invalidated execution sales made to satisfy municipal debts. *Hart*, 15 Cal. at 616. Despite the belief of much of the San Francisco bar that all sales under "pueblo" authority were invalid because the city's predecessor was never officially a pueblo, the court had responded to local political pressure to stabilize land titles. See Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* 180–209 (1991). See also Selvin, *supra* note 24, at 170–277 (discussing *Hart* and its influence on the development of the modern "public trust" doctrine). Unlike Fritz, and consistent with her uncritical acceptance of Los Angeles's pueblo water right, Selvin does not question *Hart*'s assumptions that San Francisco was a Mexican pueblo, and that pueblos had the power to alienate land. Compare Fritz, *supra* this note, at 188–89, with Selvin, *supra* note 24, at 170–277.

appurtenant water rights, did not seem to bother the court.<sup>145</sup> In further support of its dicta, the *Lux* opinion quoted early nineteenth-century Spanish commentator Joaquín Escriche y Martín regarding non-navigable streams: “[T]he owners of the lands through which they pass may use the waters thereof for the utility of their farms or industry, without prejudice to the common use or destiny which the pueblos on their course shall have given them . . . .”<sup>146</sup> The court’s reference does not explain why a mere obligation of water users not to prejudice pueblos justifies giving priority to the latter. Though both sides in the *Baldwin* and *Feliz* litigation had mentioned these passages from *Hart* and Escriche, *Lux* now marshaled them as evidence that Hispanic law sanctioned the pueblo right.

Encouraged by the *Lux* decision, the Los Angeles City Council planned further expansion of the municipal water system, maintaining in an 1892 report that, according to Mexican law, any pueblo established on a river made all subsequent riparian owners subject to the pueblo’s appropriation.<sup>147</sup> The following year, a trial court stated in dicta that the pueblo’s right was not limited to its original needs, but expanded with any population increase, being “co-extensive with the wants of the prospective town or city,” and even included the Los Angeles River’s underground flow.<sup>148</sup> By the mid-1890s, the popular and judicial climate was ripe for a clear statement of the pueblo water right under Hispanic law.

The definitive ruling that the pueblo right existed came in the 1895 decision *Vernon Irrigation Co. v. City of Los Angeles*.<sup>149</sup> In *Vernon*, a downstream riparian owner sued to enjoin the city from diverting more

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145. Legal historian Hans Baade criticizes *Lux* for misstating *Hart* to stand for a vested municipal property right rather than a trust obligation, and then assuming that the municipality also had a vested right in water. Baade, *supra* note 9, at 86–87. Rather, Hispanic pueblos neither owned land nor had the right to alienate it. *Id.* at 87 n.460.

146. *Lux*, 10 P. at 716 (quoting 1 Joaquín Escriche y Martín, *Diccionario Razonado de Legislación y Jurisprudencia* 134 (1847)) (emphasis in original).

147. *Our Water Supply, The Report in Favor of City Ownership*, L.A. Express, Mar. 14, 1892. The city was building additional headworks, pumping stations, and a reservoir. *Id.*

148. *City of Los Angeles v. Crystal Springs Land & Water Co.* (L.A. Super. Ct. 1893), quoted in *Some Interesting Water Law*, L.A. Herald, Dec. 7, 1893. In *Crystal Springs*, a city suit to enjoin the use of piped municipal water was dismissed because the defendants never used nor intended to use the water. *Id.* The quoted passage was dicta because Los Angeles’s right to the water was not at issue. The judge in the case was Walter Van Dyke, who was involved in Spanish revival activities through Charles Lummis’s Southwest Society and later served on the California Supreme Court from 1899 to 1905. See Letter from Lummis to Van Dyke, *supra* note 79; Robinson, *supra* note 79, at 342.

149. 39 P. 762 (Cal. 1895).



water than necessary for municipal purposes and from selling the surplus to users outside the city limits.<sup>150</sup> Trial judge Lucien Shaw<sup>151</sup> broadly held that Los Angeles was “the exclusive owner of all the water flowing in the river . . . together with the right to control, divert, use, sell and dispose of the whole thereof for any and every purpose either inside or outside of said city.”<sup>152</sup> According to Shaw, this right had belonged to Los Angeles “from time immemorial,” and at least since the Spanish pueblo was founded.<sup>153</sup>

On appeal, Vernon presented the same documentary and testimonial evidence that had been before the Supreme Court in *Baldwin*, maintaining that the former determination of the city’s non-ownership should be binding.<sup>154</sup> The appellant specifically referred to eyewitness testimony that in the Mexican period, the pueblo never used all of the river’s water.<sup>155</sup> Vernon also argued that regardless of the Hispanic legal evidence, Los Angeles had failed to assert its water claim before the Board of Land Commissioners, established by Congress in 1851 to adjudicate Spanish and Mexican property rights protected by the Treaty of Guadalupe Hidalgo.<sup>156</sup> The Board had confirmed the city’s title to only four square leagues of land, so its alleged pueblo right to the entire river could not now be raised.<sup>157</sup>

Los Angeles replied that *Baldwin* was merely dicta as to river ownership,<sup>158</sup> and reiterated many of the arguments it had made in that case and *Feliz*. The city claimed again to be the “absolute owner of all the waters of the river,” and to have at least a vested right to use, control, and distribute the water.<sup>159</sup> As before, it justified these assertions with phrases about the pueblo’s “ancient origin,”<sup>160</sup> and with the sourceless

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150. *Id.* at 762–63.

151. Shaw later served on the California Supreme Court from 1903 to 1923, retiring as Chief Justice. Robinson, *supra* note 79, at 341.

152. Transcript on Appeal at 66, *Vernon* (No. 19,388).

153. *Id.* at 53.

154. Appellant’s Brief at 26–27, *Vernon* (No. 19,388). Vernon also introduced the transcript from *Feliz* and *Elms*. *Id.* at 27–28.

155. *Id.* at 34–35.

156. Appellant’s Closing Brief at 35–37, *Vernon* (No. 19,388). See Cheever, *supra* note 91, at 1382–83 (discussing establishment and jurisdiction of Board).

157. Appellant’s Brief at 21, *Vernon* (No. 19,388). See W.W. Robinson, *Land In California* 238–39, 242–43 (discussing the 1856 confirmation and 1866 patenting of Los Angeles’s title).

158. Respondent’s Brief at 75–76, *Vernon* (No. 19,388).

159. *Id.* at 5.

160. *Id.* at 8.

contention about absolute property in medieval Spain.<sup>161</sup> Los Angeles could now also quote *Lux*'s statement that "pueblos had a species of property in the flowing waters within their limits,"<sup>162</sup> commenting that although the passage was dicta, "the inference is that the city has such property."<sup>163</sup> The city never addressed its failure to obtain confirmation of its water claim.

Ignoring *Baldwin* and citing *Lux*, the California Supreme Court held that

pueblos had a right to the water which had been appropriated to the use of the inhabitants, similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water for its inhabitants and for municipal purposes is superior to the rights of plaintiff as a riparian owner.<sup>164</sup>

The sole limitation on Los Angeles's right was that it "could be asserted only to the amount needed to supply the wants of the inhabitants," thus barring sales of the surplus to outside parties.<sup>165</sup> Yet the court also pointed the way to future expansion of the pueblo right, suggesting that "the wants of a city naturally fluctuate, and on an emergency may be greatly increased beyond ordinary wants."<sup>166</sup>

For the first time, the state's highest court had held that Los Angeles had an absolute and exclusive pueblo water right, ostensibly based on Hispanic law. In the fourteen years since the *Feliz* decision, this result had been encouraged by the city's increasing need for water, the sentiments of municipal officials and trial judges, and the court's own dicta in *Lux*. The invention of a right allegedly sanctioned by history was an effective vehicle to elevate Los Angeles's interests above those of all other river users, upstream and down.

Historian Norris Hundley argues that the justices had little choice in their ruling because Vernon's attorneys introduced "almost no documentary evidence challenging the city's interpretation of the pueblo claim," and focused instead on the Land Commission issue.<sup>167</sup> But this analysis of judicial benignity overlooks the fact that the court was indeed

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161. *Id.* at 15.

162. *Id.* at 62 (quoting *Lux v. Haggin*, 10 P. 674, 715 (Cal. 1886)).

163. *Id.* at 62.

164. *Vernon*, 39 P. at 766.

165. *Id.* at 767.

166. *Id.* at 768.

167. Hundley, *supra* note 8, at 134.

presented with all the voluminous data on Hispanic custom and law from the *Baldwin* and *Feliz* records, including testimonial proof that the pueblo never monopolized all the river's water.<sup>168</sup> The justices chose to disregard this evidence and create an absolute right to the water, limited only by municipal needs. The reality of a completely result-oriented court is lent further credence by its failure to mention Los Angeles's lack of a confirmed water title.

*Vernon's* one qualification to the pueblo water right, the ban on outside sales, was rapidly rendered moot by events following the decision. While the city's revenue from such sales was slight,<sup>169</sup> they were crucial to the outlying communities, which lacked independent water resources.<sup>170</sup> In the five years following *Vernon*, several adjacent suburbs, including Highland Park, voted to annex themselves to Los Angeles, adding 14.05 square miles to the city's area for a total of 43.26 by 1900.<sup>171</sup>

The supreme court clarified and extended the pueblo doctrine in the 1899 *Los Angeles v. Pomeroy* decision.<sup>172</sup> *Pomeroy* concerned the city's suit to condemn the property of two upstream riparian landowners in order to construct waterworks.<sup>173</sup> The trial court permitted the condemnation, awarding compensation to the owners for their property but not for their claimed interest in underground water.<sup>174</sup> On appeal, the issues included whether the pueblo right entitled Los Angeles to supply newly annexed areas outside the original pueblo bounds, to maintain artificial lakes and fountains, and to claim ownership of the river's subsurface flow.

The landowners argued that even if the city had a pueblo water right, this did not authorize uses beyond the Spanish town limits or the maintenance of artificial lakes.<sup>175</sup> Further, they pointed out that Los Angeles had not requested confirmation of any groundwater rights before the Board of Land Commissioners.<sup>176</sup> The city, without any specific

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168. See *supra* notes 152–53 and accompanying text.

169. *The Vernon Water Case*, L.A. Times, Mar. 11, 1895, at 10.

170. Ostrom, *supra* note 95, at 146.

171. *Id.*

172. *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899).

173. *Id.* at 586. The works comprised an underground tunnel with lateral galleries to drain and filter water from saturated soil, a submerged dam, and storage reservoirs. *Id.* at 587.

174. *Id.* at 586, 591.

175. Appellants' Opening Brief at 27, *Pomeroy* (No. 419).

176. *Id.* at 124.

references to Hispanic custom or law, asserted that the pueblo doctrine extended to the annexed tracts and conferred title to the river's subterranean flow.<sup>177</sup> In support of the first proposition, Los Angeles was content to quote 1893 trial court dicta that the pueblo's founders "evidently contemplated that it would grow and foster and consequently increase in population and that the demand for the use of the water would correspondingly increase."<sup>178</sup> It also cited the same court's further dicta that subsurface flow was part of the river.<sup>179</sup> In closing its brief, Los Angeles employed the same romantic rhetoric about exclusive water rights it had used in previous cases, relating how the city was

attempting to carry out the policy of the Spanish government which was instituted on the establishment of the old pueblo, of controlling its own water supply, and thus utilizing the waters of the river, that priceless inheritance which she still retains intact and for which she is indebted to that beneficent policy.<sup>180</sup>

A five-justice majority held that the pueblo right expanded with the needs of Los Angeles's population, and thus should be extended to the supplying of the annexed areas.<sup>181</sup> Without providing any further authority on Hispanic custom or law than had the city's brief, the judges speculated that

[u]nquestionably it was contemplated and hoped that at least some of [the pueblos] would so prosper and outgrow the simple form of the rural village. It is in the nature of things that this might happen, and when it did, and the communal lands were required for house lots, we must presume that under Mexican and Spanish rule they could be so converted, and that, when the population increased so as to overflow the limits of the pueblo, such extension could be legally accomplished. Had this happened under Mexican rule, can it be doubted that the right vested in the pueblo would have been construed to be for the benefit of the population, however great the increase would be?<sup>182</sup>

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177. *Pomeroy*, 57 P. at 587.

178. Respondent's Brief at 92, *Pomeroy* (No. 419) (quoting *City of Los Angeles v. Crystal Springs Land & Water Co.* (L.A. Super. Ct. 1893)). See discussion *supra* note 146.

179. Respondent's Brief at 92, *Pomeroy* (No. 419).

180. *Id.* at 148.

181. *Pomeroy*, 57 P. at 586.

182. *Id.* at 604.

Therefore, if Los Angeles's needs increased with its population, the water right would expand with them, even beyond the original pueblo limits.<sup>183</sup>

The same majority also ruled that the city's use of water for artificial lakes, though possibly an "extravagance or waste," was nevertheless "clearly a municipal use which is familiar in municipal history."<sup>184</sup> The justices unanimously held that the pueblo right also applied to the Los Angeles River's subterranean flow, on a reliance theory that "[t]o hold otherwise would be destructive of rights long supposed to be certain and assured," i.e. "the faith that [the city] was secure of a supply of water for domestic and municipal purposes."<sup>185</sup> The court suggested that if any landowner could draw off the underground flow, no landowner would be secure, for "the man or corporation that can put in the largest tunnel at the lowest level will get the lion's share."<sup>186</sup>

In an eighteen-page concurrence, Chief Justice Beatty took a more limited, historical view of the legitimacy of certain water uses. He disputed the majority's stand on annexed areas, arguing that the pueblo right should not extend beyond the original pueblo's four-league territory.<sup>187</sup> Further, Beatty considered that artificial lakes were not consistent with Hispanic municipal policy, because such use was never "necessary for the support or health or convenience of the inhabitants of a pueblo, however much it may have contributed to their pleasure," and would have consumed water more needed for domestic uses, irrigation, and stock watering.<sup>188</sup>

Having created the pueblo water right out of whole cloth in *Vernon*, the California Supreme Court demonstrated in *Pomeroy* that it was willing to expand the right infinitely by speculating as to what Hispanic custom or law would have comprehended. The extension to annexed areas was based solely on the majority's assumption that the original right would have grown with the population. This ruling effectively rendered meaningless *Vernon*'s ban on outside sales.

Again indulging a presupposition about the original scope of the right and the pueblo's reliance, the justices unanimously gave the city exclusive control of the river's subsurface flow. This was inconsistent

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183. *Id.* at 586.

184. *Id.* at 605.

185. *Id.* at 599.

186. *Id.*

187. *Id.* at 600 (Beatty, C.J., concurring).

188. *Id.* at 601 (Beatty, C.J., concurring).

with Hispanic law as set forth by Escriche, who stated that groundwater was considered the private property of the surface owner, and that a pueblo had to compensate such owners for any use of subterranean water appurtenant to their land.<sup>189</sup> Escriche's discussion of underground water would have been familiar to the court because portions of it had already been cited by parties in the prior pueblo cases,<sup>190</sup> and it was translated in Frederic Hall's 1885 treatise, *The Laws of Mexico*.<sup>191</sup> As far as the artificial lakes were concerned, the majority did not even attempt an Hispanic legal justification, but merely asserted that this was a use "familiar in municipal history."<sup>192</sup> Justice Beatty's disagreement on this point was based on the historical reality, which must have been known to the justices, that prior to the American period purely ornamental water use was precluded by agricultural necessities.<sup>193</sup>

In linking the pueblo water right to the needs of an expanding population, did the *Pomeroy* majority distort history out of ignorance or by design? Given the justices' exposure as recently as four years before to voluminous documents showing the lack of any such absolute right and establishing that groundwater belonged to the surface owner, the likelihood is that they knew what they were doing. Furthermore, Justice Beatty's concurrence suggests that a more realistic historical assessment was possible. In any event, the decision's logical outcome was to facilitate almost infinite urban growth. As Beatty himself later observed, Los Angeles could now

annex all the lands between it and the ocean . . . and the inhabitants of this annexed territory immediately become vested with the paramount right to the water flowing in the tributaries of the river, whether above or below the ground, notwithstanding they have

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189. I Joaquín Escriche y Martín, *Diccionario Razonado de Legislación y Jurisprudencia* 134 (1847). See Michael C. Meyer, *The Living Legacy of Hispanic Groundwater Law in the Contemporary Southwest*, 31 J. Sw. 287, 297 (1989) (analyzing this passage).

190. See Respondent's Points and Authorities at 23, *City of Los Angeles v. Baldwin*, 53 Cal. 469 (1879) (No. 6040); Appellant's Brief at 41–42, *Feliz v. City of Los Angeles*, 58 Cal. 73 (1881) (No. 7502); Respondent's Brief at 39–40, *Vernon Irrigation Co. v. Los Angeles*, 39 P. 762 (Cal. 1895) (No. 19,388).

191. Frederic Hall, *The Laws of Mexico: A Compilation and Treatise* § 1387 (1885). As a matter of evidence law, the court could have taken judicial notice of the former laws of another sovereignty which had become a part of the law of the forum. 4 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2573(d) (1905).

192. *City of Los Angeles v. Pomeroy*, 57 P. 585, 605 (Cal. 1899).

193. Hundley, *supra* note 8, at 43, discusses the uses to which pueblos put water, including watering animals, irrigation and household needs, with artificial lakes not being among these.

been used for a hundred years by the grantees of Spain and Mexico.<sup>194</sup>

Indeed, from 1900 to 1930 the city expanded its area from forty-three to 442 square miles, almost entirely through the annexation of adjacent communities.<sup>195</sup>

Having knowingly based absolute municipal water control on an historical myth, it was not difficult for the court to dispose of contrary arguments and further expand the reach of the doctrine. In the 1908 case of *City of Los Angeles v. Los Angeles Farming & Milling Co.*,<sup>196</sup> the court finally addressed the question, raised and unresolved in *Vernon and Pomeroy*, of whether the city had waived its pueblo right by failing to obtain Land Commission confirmation.<sup>197</sup> The justices rejected this argument, holding that since Los Angeles's land rights had been confirmed, any appurtenant water rights should be determined by state law.<sup>198</sup> And in 1909, the court ruled in *City of Los Angeles v. Hunter*<sup>199</sup> that the pueblo water right extended to the San Fernando Valley's entire underground basin, which it described as "the great natural reservoir and supply of the Los Angeles River."<sup>200</sup> By the time of *Hunter*, the court no longer felt the necessity to justify the pueblo doctrine with any Hispanic law references, and was willing to extend it simply by expanding the river's hydrological definition.

The 1913 opening of the Los Angeles Aqueduct, bringing water from central California's Owens Valley, ended the city's sole reliance on the river for its development.<sup>201</sup> This new era was symbolized in *Hunter* by

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194. *City of Los Angeles v. Los Angeles Farming & Milling Co.*, 93 P. 1135 (Cal. 1908) (mem.) (Beatty, C.J. dissenting).

195. Fogelson, *supra* note 94, at 226–27.

196. 93 P. 869 (Cal. 1908), *appeal dismissed*, 217 U.S. 217 (1910).

197. *Id.* at 871.

198. *Id.*

199. 105 P. 755 (Cal. 1909).

200. *Id.* at 757. The connection between the subterranean basin and the river was established because "the cutting off of this supply would as completely destroy the Los Angeles River as would the cutting off of the Great Lakes destroy the St. Lawrence. San Fernando Valley may indeed be regarded as a great lake filled with loose detritus, into which the drainage from the neighboring mountains flows, and the outlet of which is the Los Angeles River." *Id.*

201. See Abraham Hoffman, *Vision or Villainy* 47–143 (1981); Hundley, *supra* note 8, at 139–68 (discussing Los Angeles's facilitation of the Owens Valley reservoir and aqueduct project through land purchases and bond issues). See also Hoffman, *supra* this note, at 125–28; Hundley, *supra* note 8, at 158–61 (evaluating the evidence that real estate investors took advantage of privileged city information to purchase San Fernando Valley land prior to the project's completion, a thesis advanced in the 1974 movie *Chinatown*).

the involvement of Los Angeles Water Superintendent William Mulholland, chief promoter of the aqueduct, who testified for the city on the extent of the San Fernando Valley watershed.<sup>202</sup> By this time the pueblo water right had served its purpose of assuring a local supply for Los Angeles upon which more imperial plans could be built. The city's brief in *Hunter* had acknowledged this relationship between doctrine and policy when it argued that the "ancient prior right in the waters of the river, more than anything else, is indispensable to [Los Angeles's] growth and prosperity."<sup>203</sup> The true nature of Hispanic municipal water rights having been suppressed, the pueblo right had also entered common law water jurisprudence, being explicated in Clesson Kinney's authoritative 1912 work, *A Treatise on the Law of Irrigation and Water Rights*.<sup>204</sup> As an established doctrine, it was available for courts to apply when other California cities needed water.

Like Los Angeles, San Diego was expanding rapidly during the late nineteenth and early twentieth centuries.<sup>205</sup> The primary water source in the area was the San Diego River, which became a subject of contention between San Diego and other municipalities such as El Cajon, La Mesa, and Lemon Grove.<sup>206</sup> In 1914, San Diego's City Attorney, T.B. Cosgrove, responded to a City Council request to investigate and report on the City's rights to the river.<sup>207</sup> Using language clearly borrowed from the Los Angeles pueblo decisions, he concluded that the "prior and paramount right to the use of the waters of the San Diego River is held by the City in trust for the use of the general public for all municipal purposes, and this right is to the waters of the entire river, from bed rock to surface, and from the tiny rivulet that trickles down from the rim of the great watershed, to the shimmering sands where the bed of the San Diego meets the sea."<sup>208</sup>

Despite Cosgrove's report, the city's Board of Water Commissioners rejected the paramount right theory in 1922 after an exhaustive

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202. *Hunter*, 105 P. at 758.

203. Brief for Respondent at 134, *Hunter* (No. 2140).

204. 3 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* 2590–93 (2d ed. 1912). Kinney described the right as "one of the strongest titles that a municipality may have." *Id.* at 2593.

205. San Diego's population grew from 17,000 in 1900 to 74,683 in 1920. Hopkins, *supra* note 78, at 348.

206. *Id.* at 293, 298; see *infra* note 212 and accompanying text.

207. T.B. Cosgrove, *An Opinion on the Rights of the City of San Diego to the Waters of the San Diego River* 1 (1914).

208. *Id.* at 22–23.



investigation.<sup>209</sup> In response, Mayor John L. Bacon, a supporter of the prior right, dismissed the entire Commission,<sup>210</sup> and shortly thereafter San Diego filed a quiet title suit against the Cuyamaca Water Company, an upstream riparian diverter and supplier of several smaller municipalities.<sup>211</sup> The city of El Cajon and the La Mesa, Lemon Grove & Spring Valley Irrigation District filed complaints in intervention, also alleging rights to the river.<sup>212</sup> The trial court held that as the successor to a Mexican pueblo, San Diego had a "right of priority" to all the river's water,<sup>213</sup> but conceded that, by allowing previous diversions, the city had created certain rights in defendant and interveners based on prescription, laches, and estoppel.<sup>214</sup>

On appeal, Cuyamaca and the intervenors made both historical and policy arguments against the recognition of any absolute pueblo water right. First, they contended that Spanish and Mexican pueblos and their successor cities had no such rights under Hispanic law.<sup>215</sup> Specifically concerning San Diego, the appellants alleged that the San Diego mission, whose 1769 founding long predated the 1834 establishment of the pueblo, had received a prior and exclusive royal grant to the river.<sup>216</sup> In support, they cited a 1773 document in which the Viceroy of New Spain granted the local waters to the mission to administer for the benefit of the local Native Americans.<sup>217</sup> Apart from disputing the validity of the pueblo title, the appellants claimed rights based on prescription and laches because the pueblo and city had never previously objected to their use of the river, and on estoppel because the city had affirmatively permitted other parties' diversions.<sup>218</sup> Finally, appellants made the policy argument that recognizing an exclusive water right in San Diego would

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209. Hopkins, *supra* note 78, at 306.

210. *Id.*

211. City of San Diego v. Cuyamaca Water Co., 287 P. 475, 478-479 (Cal. 1930). See also Shelley J. Higgins, *This Fantastic City San Diego* 1-119 (1956) (eyewitness account of San Diego pueblo litigation from perspective of City Attorney).

212. *Cuyamaca*, 287 P. at 479.

213. *Id.* at 481.

214. *Id.* at 486-95.

215. *Id.* at 483-84.

216. *Id.* at 484.

217. *Id.* According to the grant, the mission was given the water "for the common benefit of all the nation, whether Gentile or converted, who dwell today or in the future in the province of the Mission of San Diego de Acala. This concession and the fruits also shall be held (*ser tener*) as to these children and their children and successors forever." *Id.* (quoting grant from Viceroy of New Spain to Mission of San Diego, Dec. 17, 1773).

218. *Id.* at 486, 491.

have “disturbing and even disastrous consequences,” chiefly financial, for the upstream communities.<sup>219</sup>

Yet in the 1930 decision of *City of San Diego v. Cuyamaca Water Co.*,<sup>220</sup> the California Supreme Court upheld San Diego’s right, notwithstanding the contrary historical evidence and arguments. In broad language reminiscent of the Los Angeles pueblo decisions, the court decreed that the city was “the owner in fee simple of the prior and paramount right to the use of all the water (surface and underground) of the San Diego river, including its tributaries, from its source to its mouth, for the use of the said city of San Diego and of its inhabitants, for all purposes.”<sup>221</sup> The justices stated that the general question of pueblos’ water rights had been resolved by the Los Angeles cases, and under stare decisis had become “a rule of property.”<sup>222</sup> They disparaged the 1773 grant, considering it unlikely that the Viceroy intended to confer exclusive rights upon a “primitive and as yet largely experimental mission settlement.”<sup>223</sup>

The court even rejected the rights based on prescription and laches conceded below, holding that the city’s needs were always uncertain, and it could not have been expected to object previously to appellants’ diversions because they were not yet interfering with its own usage.<sup>224</sup> Nor did estoppel apply, for none of the city’s affirmative arrangements with diverters had been with appellants or their predecessors.<sup>225</sup> Finally, the justices brushed aside public policy considerations, holding that any adverse economic effect on the upstream communities was no reason to deprive the city of its “ancient, prior, and paramount right.”<sup>226</sup>

Thus, as it had done for Los Angeles, the California Supreme Court established an absolute and exclusive pueblo water right for San Diego. As before, the court made its decision in the face of solid adverse historical evidence and despite strong policy concerns. Like Los Angeles, San Diego now had a monopoly over its local water source, facilitating urban expansion. Indeed, following *Cuyamaca*, San Diego

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219. *Id.* at 495.

220. *Id.* at 475.

221. *Id.* at 496.

222. *Id.* at 484.

223. *Id.*

224. *Id.* at 489. This ruling was consistent with the court’s statement in *Vernon* that the water needs of a city fluctuate, thus making the pueblo water right impossible to quantify. *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762, 768 (Cal. 1895).

225. *Cuyamaca*, 287 P. at 491.

226. *Id.* at 495.

used its newly established right to obtain ownership of three upstream damsites from the La Mesa Irrigation District, one of the intervenors, by allowing it some water access in exchange.<sup>227</sup>

While *Cuyamaca* was being litigated, Los Angeles also continued to grow, its rivals for water now smaller cities rather than the landowners it had confronted in the nineteenth and early twentieth centuries.<sup>228</sup> Following the 1913 completion of the Los Angeles Aqueduct, the city no longer used all the groundwater in the San Fernando Valley, and other municipalities began to pump it for their needs.<sup>229</sup> Between 1914 and 1936, the cities of Glendale and Burbank spent \$5.6 and \$2.1 million, respectively, on land, wells, and distribution.<sup>230</sup> In 1936, Los Angeles sued to have its rights to Valley water declared prior to those of all other users.<sup>231</sup> At issue were four water sources: water normally present, floodwater reclaimed from Los Angeles River tributaries, stored Owens Valley water, and Owens water returned after use from agricultural purchasers.<sup>232</sup> The trial court held that the city's pueblo title applied to the normal groundwater, though not the reclaimed floodwater, and that the city also had a prior right to recapture the imported water.<sup>233</sup>

On appeal, Glendale and Burbank attacked the pueblo doctrine as "an attempt to clothe a right with immortality."<sup>234</sup> The appellant municipalities also claimed prescription, laches, and estoppel.<sup>235</sup> Despite appellants' arguments and their expenditures on water development, Chief Justice Roger Traynor and a unanimous court upheld the pueblo water right and extended it to the floodwater in the 1943 ruling of *City of Los Angeles v. City of Glendale*.<sup>236</sup> Since the reclaimed water was the product of overflow from the Los Angeles River, it was subject to the pueblo right under the previous cases, for "there is no reason to suppose that this right did not include the right to take from the river . . . when the flow of the river was at its peak as well as at any other time."<sup>237</sup> Nor

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227. William H. Jennings, *Water Lawyer* 14–15 (1967).

228. Between 1900 and 1930, the city's population increased from 102,000 to 2.3 million, and its area from 43 to 442 square miles. Fogelson, *supra* note 94, at 78, 226–27.

229. *City of Los Angeles v. City of Glendale*, 142 P.2d 289, 292 (Cal. 1943).

230. *Id.*

231. *Id.*

232. *Id.*

233. Appellants' Opening Brief at 23–25, *Glendale* (Nos. 18,154, 18,155).

234. *Id.* at 36.

235. *Id.*

236. *Glendale*, 142 P.2d at 293.

237. *Id.* at 293.

could Glendale and Burbank acquire access via prescription, laches, or estoppel, for under *Cuyamaca*, Los Angeles was not required to object to other uses.<sup>238</sup> As to the stored and returned Owens Valley water, the city's ownership was not lost simply because it was saved economically for future use or utilized for irrigation before coming back.<sup>239</sup>

In again upholding and extending the pueblo water right, the Supreme Court confirmed the appellants' gibe about immortality. Just as romanticized ideas about Hispanic municipal water control had seeped into jurisprudence, so in turn the long line of decisions reinforced it in the popular mind. Carey McWilliams's widely read survey, *Southern California Country*, originally published in 1946 and reprinted in 1973 as *Southern California: An Island on the Land*, accepted Los Angeles's right as historical truth, asserting that "[n]ever did an American City owe more to the fortuitous circumstance of Spanish settlement."<sup>240</sup> Practicing lawyers also assimilated this view, one referring in a 1965 oral history interview to "the old pueblo rights . . . from the king of Spain."<sup>241</sup> Given the persistence of its legal and popular image, it is not surprising that the pueblo water right was reaffirmed in 1975, despite a well-documented challenge and an adverse trial court ruling.

Because *Glendale* had only granted declaratory relief, the San Fernando Valley cities were allowed to continue some underground pumping.<sup>242</sup> After severe droughts in 1953 and 1955,<sup>243</sup> Los Angeles went to court again, seeking a declaration of its prior rights to the entire Los Angeles River watershed and an injunction barring extraction by Burbank, Glendale, San Fernando, a water district and several private parties, except in subordination to the city's prior rights.<sup>244</sup> The ensuing litigation lasted twenty years and involved extensive testimony by historical experts on both sides.<sup>245</sup> Framing the issue in romantic terms,

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238. *Id.* at 295–96.

239. *Id.* at 294–95.

240. Carey McWilliams, *Southern California: An Island on the Land* 186 (1973). Ironically, McWilliams was also a leading critic of the cultural myth of California's "Spanish" past. *Id.* at 70–83; McWilliams, *supra* note 35, at 35–47.

241. Jennings, *supra* note 227, at 142. According to Jennings, a water lawyer with thirty-five years' experience, the pueblo right "just basically provided that a little town got a charter from the king of Spain as a pueblo and acquired with that charter the use of the water from any streams that they were located on to the extent of whatever needs they had." *Id.*

242. Walter Secor, *Court to Test 1781 Gift of Water Rights*, L.A. Times, Feb. 27, 1966, at K1.

243. The 1953 rainfall was 4.08 inches, the lowest since recording began in 1878. *Los Angeles Rainfall, 1878–1993*, L.A. Times, Jan. 5, 1994, at B2.

244. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1258–59 (Cal. 1975).

245. Secor, *supra* note 242, at K1.

the Los Angeles Times reported that “[a] decree given 185 years ago by the King of Spain could in the near future force approximately 250,000 Valley area residents to pay more for water.”<sup>246</sup>

After a 181-day nonjury trial, the trial court rejected Los Angeles’ pueblo right to native groundwater and its prior right to reclaim imported Owens water sold to customers.<sup>247</sup> The judge decided to reexamine Hispanic law because of uncertainties in the prior cases, changed circumstances since they were decided, the inclusion of new parties not previously involved, and Los Angeles’s allegation that its rights were based on Spanish and Mexican precedent.<sup>248</sup> After defendants’ experts testified that “the pueblo water right was truly a myth,”<sup>249</sup> the trial court found that under Hispanic law, river waters were to be shared generally, with apportionment by the sovereign in times of shortage, and the pueblo could not take water beyond its boundaries in the absence of an express grant.<sup>250</sup> Even the city’s own expert admitted that water sharing was instituted in the event of drought.<sup>251</sup> As to the imported, returned water, the court held that Los Angeles had no prior right to it because once this was commingled with waters imported by other parties, the city had neither the capacity nor the intent to recapture it.<sup>252</sup>

In the 1975 decision of *City of Los Angeles v. City of San Fernando*,<sup>253</sup> the California Supreme Court unanimously reversed, upholding the pueblo right to the native water and the prior right to the imported water. The court framed the issue to be whether the historical data relied upon by the trial court was sufficient to overcome stare decisis as established by the prior pueblo cases, rather than the existence of the pueblo title as an original question.<sup>254</sup> The justices held that the data presented, “while not conclusively demonstrating the existence of the pueblo right, does

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246. *Id.*

247. *San Fernando*, 537 P.2d at 1265.

248. *Id.* at 1266.

249. Defendants’ Consolidated Trial Brief at XII-4, *City of Los Angeles v. City of San Fernando* (Cal. Super. Ct., L.A. County, Mar. 15, 1968) (No. 650,079).

250. *City of Los Angeles v. City of San Fernando*, 537 P. 2d 1250, 1266 (Cal. 1975).

251. Memorandum of Decision at 100-01, *City of Los Angeles v. City of San Fernando* (Cal. Super. Ct., L.A. County, Mar. 15, 1968) (No. 650,079). The witness, William B. Stern, testified that people shared water “as arranged by the authorities trying to do justice to everybody to the extent possible.” *Id.* at 100.

252. *San Fernando*, 537 P.2d at 1267.

253. *Id.* at 1250.

254. *Id.* at 1284. The court explained that it was willing to reconsider its prior rulings due to the quantity of historical evidence, the trial judge’s detailed findings, and the potential effects on major public entities. *Id.*

not conclusively demonstrate its non-existence but on the contrary provides a reasonable basis for a judicial determination that the right did and still does exist.<sup>255</sup> They found no serious discrepancies between the material presented in the previous cases and that now before them, nor any likelihood that past tribunals' consideration of the current data would have changed the results.<sup>256</sup> Regardless of the evidence, Los Angeles relied on the prior rulings when it brought in Owens water as a surplus, while the defendant cities had been on notice of the pueblo doctrine since they began extracting water at the turn of the century.<sup>257</sup> The court conceded one limitation on the pueblo right: that it did not apply to underground basins hydrologically independent of the Los Angeles River.<sup>258</sup> Finally, the justices ruled that the city retained its prior right in the imported water because it intended recapture, as had been found previously in *Glendale*.<sup>259</sup>

The *San Fernando* decision ignored the clear historical evidence of water apportionment that had convinced the trial court, resting instead on stare decisis and reliance. Its immediate effect was to force the Valley cities to replace the local water supply with water imported from Northern California's Feather River, at three times the cost.<sup>260</sup> After nearly twenty years of litigation, the state's highest court had again knowingly disregarded Hispanic custom and law in favor of Los Angeles's water monopoly.

California's pueblo water rights doctrine was fully developed after the *Glendale* case; *San Fernando* did not add to its essentials. To summarize the characteristics of the doctrine, an American successor municipality to a Spanish or Mexican pueblo has an absolute and exclusive right to all the surface and groundwater of a stream flowing through the original pueblo, including its peak floodflow and all its tributaries, from its source to its mouth.<sup>261</sup> The right of the successor city is superior to all other riparian and appropriative rights, and cannot be lost through

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255. *Id.*

256. *Id.* at 1284-85.

257. *Id.* at 1285.

258. *Id.* at 1288. There were three underground basins at issue in the case: the San Fernando, Sylmar, and Verdugo subareas. The Supreme Court upheld the trial judge's finding that the latter two subareas were not tributary to the river's subsurface flow. *Id.* at 1285.

259. *Id.* at 1297.

260. Daryl Lembke, *L.A. Wins 20-Year Fight on Disputed Water Rights*, L.A. Times, May 13, 1975, at 1.

261. This summary is based on my discussion of the cases, *supra* part III.A., with reference to the detailed description in Hutchins, *supra* note 12, at 751-52.

prescription, laches, or estoppel. The only limitation is that the water must be used for the needs of the city and its inhabitants, but these may expand with population growth and the annexation of new areas.

These broad elements were developed by successive courts in the face of contrary historical evidence and despite the deprivation of neighboring landowners and municipalities. Previous historians have considered the courts' distortion unintentional, attributing it to the failure of the pueblo doctrine's opponents to document their challenges, or simply to lack of historical knowledge on the part of judges.<sup>262</sup> The court files examined here show otherwise, leading to the conclusion that judges deliberately idealized Hispanic law to justify urban water monopolization. Its lack of historical basis obscured by repeated judicial invocations of tradition, the pueblo right was an established rule by the time of *Glendale*, and had to be confronted in other southwestern states where successor cities sought control over water.

### B. *New Mexico*

New Mexico and Texas provide contrasting examples of judicial treatment of the pueblo water right outside California. Like California, these states have several successor municipalities to Hispanic communities within their boundaries.<sup>263</sup> Also as in California, there is ample historical evidence that Hispanic water custom and law were characterized by communal water sharing, rather than any exclusive pueblo right.<sup>264</sup> But whereas New Mexico courts have until very recently followed California and accepted the pueblo water right in the face of the documentary record, Texas has rejected the doctrine.

Initially, New Mexico judges took a narrow view of the pueblo right's application. In the 1914 case of *State v. Tularosa Community Ditch*,<sup>265</sup> the New Mexico Supreme Court held that a town founded after annexation by the United States could not benefit from an exclusive right

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262. See Hundley, *supra* note 8, at 134 (asserting that plaintiff in *Vernon* did not present Spanish or Mexican legal evidence); and Baade, *supra* note 9, at 87 (claiming that California judges developing the doctrine lacked Hispanic learning).

263. Such cities include Santa Fe, N.M. (founded 1610); El Paso, Tex. (1680); Albuquerque, N.M. (1706); Las Vegas, N.M. (1835); San Antonio, Tex. (1731); and Laredo, Tex. (1767). See Cruz, *supra* note 80, at 19–104 (discussing these pueblos in the context of Iberian municipal traditions).

264. See Tyler, *supra* note 8, at 13, 44 (discussing water apportionment in New Mexico); Dobkins, *supra* note 9, at 121–22; Glick, *San Antonio*, *supra* note 10, at 26–49 (same in Texas).

265. *State v. Tularosa Community Ditch*, 143 P. 207 (N.M. 1914).

arising under Hispanic law.<sup>266</sup> The supreme court set out a further limitation in 1938, ruling in *New Mexico Products Co. v. New Mexico Power Co.*<sup>267</sup> that Santa Fe, a city established by the Spanish in 1610, had no pueblo right because it was not founded originally under a royal grant but rather as an informal “colony of deserters.”<sup>268</sup> Even given these restrictions, it was only a matter of time before a successor to an Hispanic municipality founded under a grant sought control of its local water supply.

Las Vegas, New Mexico originated in 1835 as a land grant from the Mexican government to a group of settlers wishing to colonize the area northeast of Santa Fe.<sup>269</sup> The community and its American successor municipalities, the town and city of Las Vegas, depended entirely for their water on the meager Gallinas River.<sup>270</sup> In the words of an early twentieth-century resident, the Gallinas “was called the ‘Chicken’ because a fowl could cross the stream without getting its feet wet.”<sup>271</sup> In 1955, when other users of the Gallinas sued Las Vegas’s supplier, the Public Service Company of New Mexico, for diverting the stream, the town filed an answer as intervenor.<sup>272</sup> The plaintiffs included the State Insane Asylum and numerous small landowners, who claimed that their crops were dying because Las Vegas was taking water for lawns and carwashes.<sup>273</sup> Some of the farmers claimed prior rights as inheritors of an 1821 Mexican land grant to Luis Cabeza de Baca.<sup>274</sup> After trial, the judge dismissed the complaint, holding that, as a successor to a Mexican pueblo, Las Vegas had a right to divert and use as much of the river as necessary for its inhabitants.<sup>275</sup>

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266. *Id.* at 215–16. This was true even though the community was founded by Hispanics, who established a traditional common irrigation system. *Id.* at 209. See also C.L. Sonnichsen, *Tularosa: Last of the Frontier West* 9–16 (1960) (describing the town’s early settlement).

267. *New Mexico Products Co. v. New Mexico Power Co.*, 77 P. 634 (N.M. 1937).

268. *Id.* at 639. The court contrasted its approach with that of California in *Los Angeles Farming & Milling Co.*, where a grant was presumed merely by virtue of a town’s having existed before the American period. *Id.* at 637–38.

269. Ebright, *supra* note 86, at 179–81. According to Ebright’s research, the grant was comprised of a series of small settlements rather than one compact pueblo. *Id.* at 182–83.

270. *Cartwright v. Public Service Co. of New Mexico*, 343 P. 2d 654, 656 (N.M. 1958).

271. Milton C. Nahm, *Las Vegas and Uncle Joe: The New Mexico I Remember* 45 (1964).

272. *Cartwright*, 343 P.2d at 655.

273. Transcript of Record at 1–2, 11–12, *Cartwright v. Public Service Co. of New Mexico* (N.M. Dist. Ct., San Miguel County, 1956) (No. 15,329).

274. *Cartwright*, 343 P.2d at 663.

275. *Id.* at 655, 658.



On appeal, the other water users made a number of legal, historical, and policy arguments against the applicability of the pueblo water right, most notably the following: First, they claimed that a 1933 Federal District Court adjudication of relative rights to the Gallinas, the "Hope Decree," was *res judicata* because the Public Service Company's predecessors were parties and because Las Vegas's attorneys appeared and did not object to the allocation, stating rather that the city, the town, and their inhabitants were "the real appropriators and entitled to the appropriation" decreed to the suppliers.<sup>276</sup> Next, appellants maintained that the town of Las Vegas obtained its 1860 title confirmation from the U.S. Congress only through the Baca heirs' waiver of their prior land grant, rather than via the pueblo right.<sup>277</sup> Finally, they argued that recognition of the doctrine and further pueblo grants would disrupt the water rights of thousands of people in the Rio Grande Valley.<sup>278</sup>

Nevertheless, in the 1958 decision of *Cartwright v. Public Service Co.*, a three-two majority of the New Mexico Supreme Court broadly upheld the town of Las Vegas's pueblo right to take as much water as it needed.<sup>279</sup> The justices ruled that the Hope Decree was not *res judicata* as to the town because it had not been properly served and its attorney's statements at the Hope hearing did not constitute an appearance.<sup>280</sup> The majority also sloughed off the 1821 Baca claim by asserting that congressional confirmation of the Las Vegas title was sufficient to establish its validity as a Mexican grant.<sup>281</sup> On the key issue, the court noted the pueblo doctrine's expansive scope and long duration in California and considered that the reasons for its application there applied with equal force in New Mexico.<sup>282</sup> The majority asserted that there were no questions of water priority when the colony was established because there were no other users.<sup>283</sup> Waxing poetic, the justices explained that as the settlement grew, the colonists "carried with them the torch of priority as long as there was available water to supply

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276. Appellants' Reply Brief at 5-7, 38, *Cartwright* (No. 6172). Appellants also made the related argument that the Public Service Company failed to mention the alleged pueblo title when applying to the State Engineer for a dam permit. *Id.* at 29-34, 37-38.

277. *Id.* at 10-15.

278. *Id.* at 39.

279. *Cartwright*, 343 P.2d at 654.

280. *Id.* at 660-62.

281. *Id.* at 664.

282. *Id.* at 668.

283. *Id.*

the life blood of the expanded community.”<sup>284</sup> The court credited the eighteenth-century Plan of Pitic with inaugurating pueblo rights under the King of Spain’s authority.<sup>285</sup> Its emphasis on applying the pueblo doctrine led the majority to neglect potential effects on other users; it was content to assert that the doctrine was justified under the police power as an “elevation of the public good over the claim of a private right.”<sup>286</sup>

Dissenting justices Federici and McGhee took the majority to task for distorting history and ignoring public policy. They viewed California pueblo rights as based on a stretching of Hispanic law, on land title decisions rather than on water precedent, and on legislative enactment.<sup>287</sup> Contrary to the assertion that Las Vegas had water use priority in an unoccupied area, the 1821 Baca grantees had preceded the pueblo’s founding by fourteen years.<sup>288</sup> Unlike the majority, the dissenters quoted the specific provisions of the Plan of Pitic requiring common water sharing between town residents and outsiders and barring use by any individual to the detriment of others.<sup>289</sup> Finally, the dissent criticized the court’s policy decision to ignore “the rural water users with older and prior rights which are just as vital to them as they may be to a growing metropolis that would snuff them out without reasonable compensation.”<sup>290</sup>

Both supporters and critics of the pueblo doctrine reacted quickly to the *Cartwright* decision. The city commission chairman of Albuquerque, a city founded via a 1706 Spanish grant, hailed the ruling as presaging future growth and commented that “Los Angeles and San Diego could never have grown to the metropolises they are if it had not been for the pueblo rights doctrine.”<sup>291</sup> On the other hand, law professor Robert Emmet Clark criticized the majority for relying on “uncertain historical

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284. *Id.*

285. *Id.* at 669. The 1789 Plan was the official Spanish model for new settlements on the northern frontier, and in fact provided for water sharing between town residents and non-residents. See discussion *supra* note 108.

286. *Cartwright*, 343 P.2d at 669.

287. *Id.* at 678. See generally *supra* note 144 (discussing the influence of *Hart v. Burnett*, the San Francisco land case, on *Lux v. Haggin*); *supra* text accompanying note 99 (discussing the 1874 legislation approving Los Angeles’s charter amendment granting an exclusive right to the Los Angeles River).

288. *Cartwright*, 343 P.2d at 675.

289. *Id.* at 676–77 (quoting Plan of Pitic, §§ 7, 19 (1789)). The dissent’s reading of the Plan is consistent with that of the professional historians who have analyzed it. See Dobkins, *supra* note 9, at 101; Hundley, *supra* note 8, at 39–40; Meyer, *supra* note 8, at 35–36.

290. *Cartwright*, 343 P.2d at 680.

291. *Sanchez Hails Court’s Water Rights Ruling*, Albuquerque J., Dec. 13, 1958, at 1, 4.

premises” and “hortatory expressions.”<sup>292</sup> Similarly, agricultural researcher Wells Hutchins criticized the decision for its “public good” rationale, writing that “[w]ater is no less the lifeblood of a small farming community or single establishment than of a growing city.”<sup>293</sup> More recent scholars have echoed Clark’s and Hutchins’s criticisms of *Cartwright* as historically flawed and harmful to other users.<sup>294</sup> In the latest study of the Las Vegas grant, Malcolm Ebright argues that the *Cartwright* majority unfairly exaggerated the contemporary municipality’s water rights because the justices were “misinformed” about the true nature of Hispanic settlement in the area.<sup>295</sup> Ebright shows that Las Vegas was not a discrete pueblo to which an exclusive right could attach, but rather a series of communities scattered along the Gallinas River.<sup>296</sup> However, the majority’s lack of access to this additional historical material does not explain its decision, for the case file and dissent demonstrate that the supreme court was presented with ample evidence contradicting any pueblo right, which the justices simply chose to disregard.

Possibly because of the ensuing controversy, New Mexico courts have not yet extended the doctrine to cities other than Las Vegas. When a trial court invoked the pueblo right to excuse Albuquerque from compliance with State Engineer groundwater appropriation regulations, the supreme court reversed, holding that there was no jurisdiction over the issue in a State Engineer proceeding.<sup>297</sup> Until 1994, *Cartwright* has remained good law as applied to Las Vegas. This year, a New Mexico appellate court declined to follow it, holding that Las Vegas has no pueblo right.<sup>298</sup> As this Article goes to press, the state supreme court has just granted Las

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292. Robert Emmet Clark, *The Pueblo Rights Doctrine in New Mexico*, 35 N.M. Hist. Rev. 265, 279 (1960).

293. Hutchins, *supra* note 12, at 762. Hutchins also noted that, traditionally, American cities acquired water rights by purchase or condemnation, rather than confiscation as here. *Id.* at 761.

294. See Anastasia S. Stevens, *Pueblo Water Rights in New Mexico*, 28 Nat. Resources J. 535, 581–83 (1988); Tyler, *supra* note 8, at 13; Ebright, *supra* note 86, at 196–200. See generally Iris H.W. Engstrand, *Introduction to Tyler, supra* note 8, at 9–10 (summarizing literature on the New Mexico pueblo water right).

295. Ebright, *supra* note 86, at 182.

296. *Id.* at 199.

297. *City of Albuquerque v. Reynolds*, 379 P.2d 73, 76–77 (N.M. 1962). The court reasoned that if the city really had an absolute right to the water which it had applied to appropriate, there was no action required on the State Engineer’s part. *Id.* at 76.

298. *State ex rel. Martinez v. City of Las Vegas*, No. 14,647, slip. op. at 16 (N.M. Ct. App., July 15, 1994). In a brief opinion, the court noted that recent scholarship had shown the pueblo doctrine to be historically invalid, there were practical difficulties in continuing to recognize it, and Las Vegas had not reasonably relied on *Cartwright* for any use to which it had put water. *Id.*

Vegas's petition for writ of certiorari.<sup>299</sup> Under New Mexico's water adjudication statute, all claims to a particular stream system must be comprehensively determined,<sup>300</sup> but because of the pueblo doctrine's absolute and expanding nature, most Gallinas users cannot receive an equitable distribution unless the supreme court affirms the appellate opinion, thus overruling *Cartwright*.<sup>301</sup>

With *Cartwright*, New Mexico entered the pueblo water rights debate on the California side. As in the Los Angeles and San Diego cases, the New Mexico Supreme Court knowingly ignored or distorted historical evidence, such as the Plan of Pitic. The court's hyperbolic language—for instance, “the torch of priority”—shows the persistence of an idealized notion of the Hispanic past. Also like the California pueblo decisions, *Cartwright* facilitated the urban accumulation of water resources at the expense of less powerful interests, in this case small farmers.<sup>302</sup> The extension of the doctrine beyond California can be seen as a legitimization of water monopolization by metropolitan areas.<sup>303</sup>

### C. Texas

Texas is the only state where pueblo water rights have never been recognized, providing a contrast to the lack of serious historical analysis by courts in California and New Mexico. The case repudiating pueblo water rights concerned the City of Laredo, officially established on the banks of the Rio Grande River in 1767.<sup>304</sup> When the Texas Water Commission adjudicated water rights to the Middle Rio Grande among various users in the 1970s, Laredo claimed a pueblo right superior to that

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299. *State ex rel. Martinez v. City of Las Vegas*, No. 14,647, slip op. (N.M. Ct. App., July 15, 1994), *cert. granted* (N.M. Aug. 26, 1994) (No. 22,283).

300. N.M. Stat. Ann. § 72-4-17 (Michie 1985).

301. Telephone Interviews with Peter White, Special Assistant Attorney General, New Mexico State Engineer Office (Feb. 4, 1994; Aug. 15, 1994; Aug. 29, 1994).

302. *See also* Ebright, *supra* note 86, at 200 (discussing the vulnerability of Gallinas irrigators to increases in Las Vegas's water consumption).

303. Between 1960 and 1980 the municipal share of total water consumption in the four Southwestern states of Arizona, Colorado, New Mexico, and Utah almost quadrupled, while irrigation and other rural uses remained approximately the same. F. Lee Brown & Helen M. Ingram, *Water and Poverty in the Southwest* 14-15 (1987).

304. Cruz, *supra* note 80, at 96. The town was originally settled in 1755, but its land title was not surveyed and confirmed by a Spanish royal commission until 1767. *Id.* at 93-98.

of any prior appropriator or riparian landowner.<sup>305</sup> The Commission refused to recognize Laredo's right, and a state trial court affirmed.<sup>306</sup>

In the Texas Court of Appeals, Laredo relied on the romanticized characterization of history that had been so successful in the California and New Mexico cases. The city maintained that the Spanish had given special prerogatives to towns "back to time immemorial,"<sup>307</sup> citing William Hammond Hall's assertion that Valencia traditionally had the right to limit water access by upstream users.<sup>308</sup> Laredo claimed that its 1767 land grant entitled it to a pueblo water right, and that its modern Public Service Board was "the direct lineal descendant from the earliest methods employed to obtain water from the Rio Grande."<sup>309</sup> It also referred to the Plan of Pitic, though omitting, as had the *Cartwright* majority, the provisions requiring apportionment.<sup>310</sup> As to legal precedent, the city noted that, while no case had yet ruled against the pueblo right, the California and New Mexico courts had consistently upheld it.<sup>311</sup> Since Laredo had been a pueblo similar to Los Angeles and subject to the same Hispanic laws, it arguably should also have a paramount and expanding right.<sup>312</sup>

Unlike previous courts, the Texas Court of Appeals emphatically rejected the pueblo doctrine in the 1984 case of *In re Contests of the City of Laredo*.<sup>313</sup> Examining the law applicable to New Spain, the justices found an emphasis on common water use by all inhabitants and no

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305. *In re Contests of City of Laredo*, 675 S.W.2d 257, 259 (Tex. Ct. App. 1984). Other water users in this area included the cities of Del Rio and Eagle Pass, several smaller communities, and those requiring water for industrial, irrigation, and recreational purposes. *Id.* See also Doug Caroom & Paul Elliott, *Water Rights Adjudication—Texas Style*, 44 Tex. B.J. 1183 (1981) (discussing water allocation under the Water Rights Adjudication Act of 1967, Tex. Water Code Ann. §§ 11.301–341 (West 1988)).

306. *Laredo*, 675 S.W.2d at 259.

307. Appellant's Brief at 9, *Laredo* (No. 13,917-B).

308. John Caughey, *The Pueblo Water Right of Laredo Historically Considered* at 16–17; *In re The Adjudication of Water Rights of the Middle Rio Grande and Contributing Texas Tributaries* (Tex. Dist. Ct. Nov. 19, 1982) (No. 233,018-93) (citing Hall, *supra* note 65, at 355–432). This account is inconsistent with Thomas Glick's painstaking research on the medieval water partition between Valencia and upstream villages on the Guadalaviar River. See Glick, *Valencia*, *supra* note 10, at 118–20.

309. Brief of Appellant-Claimant at 2–3, *Laredo* (No. 13,917-B).

310. *Id.* at 17–18. See discussion *supra* text accompanying note 289.

311. Appellant's Brief at 18–24, *Laredo* (No. 13,917-B).

312. *Id.* at 22–25.

313. *Laredo*, 675 S.W.2d at 257. The decision was made unanimously by a three-judge panel.

reference to any paramount water right.<sup>314</sup> Laredo's 1767 land grant did not purport expressly to grant any water right to the pueblo.<sup>315</sup> Nor under the Texas Supreme Court's 1962 decision in *State v. Valmont Plantations*<sup>316</sup> did the holder of an Hispanic riparian land grant have any implied irrigation right.<sup>317</sup> The court criticized the California and New Mexico decisions for their lack of historical basis, including their mischaracterization of the Plan of Pitic.<sup>318</sup> The court therefore held that Laredo had no pueblo water right, express or implied, and that the Commission's allocation was appropriate.<sup>319</sup>

Texas's clear rejection of the pueblo doctrine, despite appeals to an idealized tradition, sets it apart from California and New Mexico. Recent scholars of Hispanic water law in the Southwest have applauded the *Laredo* decision for more rigorously evaluating the historical evidence.<sup>320</sup> Though the court did not explicitly address policy issues, its ruling removed an obstacle to equitable apportionment among users in future water adjudications.

Our comparative discussion of the pueblo water right in three states suggests some observations about the doctrine's meaning in American legal history. As an absolute and exclusive power sphere, purportedly based on objective truth, the pueblo right fits the model of formalism used by some legal historians to describe late nineteenth-century jurisprudence. The fact that the doctrine was invented and expanded in the face of evidence documenting its historical falsity supports a formalist analysis that the courts deliberately fostered a myth to

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314. *Id.* at 265–66. In its argument to the court, the Texas Water Commission had utilized the testimony of historian Betty Dobkins, author of *The Spanish Element in Texas Water Law* (1959), to the effect that disputes between pueblos and other users, such as missions, were resolved “by deciding what was best for common good.” Appellees’ Reply at 11–13, *Laredo* (No. 13,917).

315. *Laredo*, 675 S.W.2d at 266. See also Hall, *supra* note 12, at 1-31 to 1-32 (discussing legal historians’ divergent views as to whether Hispanic water rights arose by explicit grant, implication, or custom).

316. *Valmont Plantations v. State*, 355 S.W.2d 502 (Tex. 1962).

317. *Laredo*, 675 S.W.2d at 266. Located on the banks of the Rio Grande, Laredo was of course a riparian owner. See also *infra* part IV (discussing riparian irrigation rights under Hispanic law and American judicial interpretation). The lack of any express or implied water right is consistent with Hans Baade’s scholarly conclusion that prior to Laredo’s founding the land allocated for the settlement had been determined unfit for irrigation. See Baade, *supra* note 9, at 82.

318. *Laredo*, 675 S.W.2d at 269–70. The justices quoted Wells Hutchins’s disapproval of the California cases for failing to cite historical authority, and of the New Mexico Supreme Court for following California uncritically in *Cartwright*. *Id.* (quoting Hutchins, *supra* note 12, at 757–60).

319. *Id.* at 270.

320. See Baade, *supra* note 9, at 82–83; Engstrand, *supra* note 294, at 2; Hall, *supra* note 12, at 1-31 to 1-32.

legitimate resource monopolization.<sup>321</sup> On the other hand, the theory that judges were attempting to protect public rights seems inapplicable.<sup>322</sup> Notwithstanding the New Mexico Supreme Court's invocation of the police power, *Cartwright* and the California decisions benefited only a limited sector of the public by preferring certain cities to all other users.

The pueblo right's survival, despite its historical inaccuracy and negative policy ramifications, attests to the durability of nineteenth-century cultural and legal constructs. For example, William Kahrl's otherwise comprehensive study of California's development, *Water and Power* (1982), uncritically accepts the doctrine as fact.<sup>323</sup> In 1993, San Juan Capistrano, California, filed a protest with the State Water Resources Control Board against a proposed desalting project which would draw from local streams supplying the city.<sup>324</sup> The city claimed potential injury to its pueblo water right as a successor to a Spanish mission and town, citing William Hammond Hall and the *San Fernando* case.<sup>325</sup> Though the Water Board has not yet ruled on the protest,<sup>326</sup> the persistence of these romantic images shows that a century of intentional judicial distortion of Hispanic law is not easily discarded.

#### IV. RIPARIAN IRRIGATION RIGHTS IN TEXAS

Like the pueblo doctrine, a riparian landowner's automatic right to irrigate from a stream abutting or within his property was a judicially idealized version of Hispanic law. Such a concept did not obtain in actual Spanish or Mexican law, which required an express or implied conveyance from the sovereign for any irrigation rights to exist.<sup>327</sup>

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321. This interpretation is clearly inconsistent with those of previous scholars who have attempted to explain the origins of the pueblo doctrine. See Hundley, *supra* note 8, at 134 (asserting that Hispanic legal documentation was not presented to the courts), and Baade, *supra* note 9, at 87 (claiming that American judges lacked Hispanic legal knowledge).

322. Cf. Scheiber, *supra* note 24, at 225, 240; Selvin, *supra* note 24, at 219-25 (describing the pueblo doctrine as exemplifying a judicial focus on public rights).

323. William L. Kahrl, *Water and Power* 7 (1982). Kahrl asserts that "[u]nder Spanish colonial policy, the pueblo was invested with an exclusive right to the water of the river." *Id.*

324. Capistrano Valley Water District, Protest Based on Injury to Vested Rights, Water Right Application No. 30,123 (Mar. 23, 1993).

325. Len Hall, *Town's Water Rights Claim Stirs Up Torrent of Anger*, L.A. Times, Feb. 23, 1993, at A3; Letter from Michele A. Staples, Esq. to Edward C. Anton, State Water Resources Control Board (Mar. 18, 1993).

326. See Letter from Edward C. Anton, State Water Resources Control Board, to Susan M. Trager, Esq. (Apr. 8, 1993) (requesting additional information to support the protest).

327. See discussion *infra* text accompanying notes 330-31.

Nevertheless, Texas precedent allowed riparian irrigation on former Hispanic land grants from 1926 to 1962, and court documents indicate that the judiciary was aware of the distortion. As with pueblo rights, the riparian irrigation doctrine facilitated water monopolization, in this case by the owners of large riparian estates. Ultimately, the Texas courts reversed direction with the use of more conscientious historical analysis.

Riparian irrigation in Texas is inextricably related to the history of Spanish and Mexican land grants. In the 1730s, Spain awarded the first such grants to the settlers of San Antonio, and the system was expanded to the Rio Grande Valley in 1750.<sup>328</sup> The Mexican government manifested its policy of encouraging frontier colonization through further alienation of the public domain, and by the time of Texas's independence from Mexico in 1836, some 26.2 million acres had been granted to private parties.<sup>329</sup> Land grants were classified for pricing purposes according to usage, with express or implied irrigation rights accompanying only certain agricultural plots (*tierras de pan llevar*), and not grazing (*tierras de ganado*) or dry farming lands (*tierras de temporal*).<sup>330</sup> Since future use rather than location determined whether irrigation would be permitted, a grant's riverfront site did not signify irrigation water rights.<sup>331</sup>

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328. See Gerald E. Poyo, *The Canary Islands Immigrants of San Antonio: From Ethnic Exclusivity to Community in Eighteenth-Century Béxar*, in *Tejano Origins in Eighteenth Century San Antonio* 41, 43–45 (Gerald L. Poyo & Gilberto M. Hinojosa eds., 1991) (discussing grants to soldiers and civilians around La Villa de San Fernando, San Antonio's predecessor pueblo. The deeds did not automatically include irrigation rights.); Herbert E. Bolton, *Texas in the Middle Eighteenth Century* 299–301 (1915) (discussing the first private Rio Grande grants, used primarily for stockraising).

329. Thomas Lloyd Miller, *The Public Lands of Texas, 1519–1970* 15–24 (1972). The acreage figure includes land granted both by the Spanish and Mexican governments, and constitutes approximately 11% of the modern state of Texas. *Id.* at 24.

330. Baade, *supra* note 9, at 63–64; Dobkins, *supra* note 9, at 125–30; Meyer, *supra* note 8, at 124–31; White & Wilson, *supra* note 12, at 389, 421. Baade and Dobkins argue that irrigation water rights could only be obtained by express sovereign grant, while Meyer maintains that grants within the limited category of irrigable cropland implied water rights even if they did not so specify. See also Hall, *supra* note 12, at 1-31 to 1-33 (usefully summarizing three scholarly interpretations of how water access was acquired: express sovereign grant; some other sovereign transfer, including implied irrigation rights; and customary use).

331. Baade, *supra* note 9, at 64; Dobkins, *supra* note 9, at 143–44; Meyer, *supra* note 8, at 119–20. According to Meyer, a riparian grant, without additional authorization, only entitled the owner to domestic water use. *Id.* at 120. A survey of Spanish and Mexican grant documents in the Texas General Land Office revealed that approximately 95% were classified as non-irrigable, even though situated on rivers or streams. White & Wilson, *supra* note 12, at 389, 392. Hans Baade provides an explanation for the lack of riparian irrigation: Hispanic period irrigation was only conducted by gravity, so water needed to be led to fields significantly lower than, and necessarily far from, the diversion point. Baade, *supra* note 9, at 58.



The independent Republic of Texas (1836-1845) adopted the common law in 1840, but specifically exempted land grant and colonization law from its operation.<sup>332</sup> Texas was annexed by the United States in 1845, and the land grant exception, together with the Treaty of Guadalupe Hidalgo's guarantee of property rights in the former Mexican territories,<sup>333</sup> established Hispanic law as governing pre-1840 land titles and any appurtenant water rights.<sup>334</sup> Between 1840 and 1889, land alienated from the public domain carried common-law riparian rights, and, after 1889, all unappropriated waters became subject to prior appropriation (after 1895 in non-arid areas).<sup>335</sup> As large-scale irrigation developed in the late nineteenth and early twentieth centuries, disputes ensued between riparian proprietors and prior appropriators, and the Texas judiciary was faced with the necessity of harmonizing the different water regimes.<sup>336</sup>

The Texas Supreme Court addressed this conflict in its 1926 *Motl v. Boyd* decision,<sup>337</sup> with significant consequences for Hispanic law interpretation. *Motl* involved prior appropriators (plaintiffs Motl and others) whose predecessors had been allowed by the predecessor of two riparian owners (defendants Boyd and White) to build a dam and reservoir for irrigation purposes on the riparian property.<sup>338</sup> In 1857, the state of Texas had granted the property to the predecessors of Boyd and White, and the dam was built in 1886.<sup>339</sup> When defendants purchased the

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332. Law of Jan. 20, 1840, § 2, 1840 Tex. Gen. Laws 3, 4, 2 H.P.N. Gammel, *The Laws of Texas* 177, 178 (1898).

333. Article VIII, Treaty of Guadalupe Hidalgo, 9 Stat. 922, 929-30 (1848).

334. Dobkins, *supra* note 9, at 27-28. As a result of the treaty, valid land claims had to be respected in the southern strip of Texas between the Nueces and Rio Grande rivers (including the Rio Grande Valley), an area which the Republic of Texas had claimed but never controlled. Galen D. Greaser & Jesus de la Teja, *Quieting Title to Spanish and Mexican Land Grants in the Trans-Nueces: The Bourland and Miller Commission, 1850-1852*, 45 Sw. Hist. Q. 445, 447 (1992). It should be noted that although Hispanic law now applied to pre-1840 titles, most of the original owners eventually lost their land to Anglos due to litigation expenses, taxation, and fluctuations in the cattle market. David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* 38, 51-53 (1987). See also Paul Taylor, *An American-Mexican Frontier, Nueces County, Texas 179-80* (1934) (noting that all fifteen Spanish and Mexican grants in Nueces County, constituting the county's entire land area, had been deeded to Americans by 1883).

335. Baade, *supra* note 9, at 4-8. Ultimately, the 1967 Water Rights Adjudication Act, Tex. Water Code Ann. §§ 11.303-.341 (West 1988) was passed to settle water claims comprehensively to all streams.

336. Dobkins, *supra* note 9, at 139-40.

337. *Motl v. Boyd*, 286 S.W.2d 458 (Tex. 1926).

338. *Id.* at 460.

339. *Id.*

tract in 1920, they applied to the state board of water engineers to divert storm waters from the dam in order to irrigate, but were denied permission.<sup>340</sup> They began pumping water anyway, and plaintiffs sued to enjoin any further diversions.<sup>341</sup>

The trial court granted an injunction against defendants, although it allowed them to take water running over plaintiffs' dam.<sup>342</sup> An intermediate appellate court reversed, holding that under riparian "reasonable use" doctrine a prior appropriator could not divest riparian rights without either condemning the riparian lands or paying compensation.<sup>343</sup> Neither the trial court nor the appellate court addressed the question of riparian irrigation under Hispanic law.<sup>344</sup>

On appeal to the Texas Supreme Court, the parties focused largely on the conflict between appropriative and riparian principles.<sup>345</sup> The plaintiffs, now appellants, argued that their appropriation was consistent with the state's sovereign power, delegated to the board of water engineers, to distribute water for irrigation and prevent diversions of already appropriated streams.<sup>346</sup> If only riparian landowners were allowed a property interest in abutting waters, the consequences would be alarming for the "thousands of acres" that had "been put into cultivation dependent upon water for irrigation."<sup>347</sup> Supporting this position in an amicus brief, the Markham Irrigation Company presented documentary evidence that water usage was communal under Hispanic law, and that neither Spanish nor Mexican legislation expressly granted riparian water rights.<sup>348</sup> Nor could any implied grant of irrigation be

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340. *Id.* at 462.

341. *Id.* at 460.

342. *Id.*

343. *Boyd v. Motl*, 236 S.W.2d 487, 494–95 (Tex. Ct. App. 1922). The court also found that the appropriation had never been properly noticed or filed, and that the state board's denial of defendants' diversion application could not preclude them from obtaining a judicial adjudication of their riparian rights. *Id.* at 493, 496.

344. This is perfectly explicable because the land in question was not a pre-1840 grant, but was held under an 1857 Texas patent. *Motl*, 286 S.W.2d at 460.

345. See Brief and Argument for Plaintiffs in Error at 7–15, *Motl* (No. 3740) (arguing for prior appropriation); and Brief and Argument for Defendants in Error at 6–11, *Motl* (No. 3740) (claiming riparian rights).

346. Brief and Argument for Plaintiffs in Error at 8, 10–11, *Motl* (No. 3740).

347. *Id.* at 61.

348. Argument on Behalf of Markham Irrigation Co. et al. at 4–5, *Motl* (No. 3740).

assumed, "because the present extent of irrigation could not have been comprehended."<sup>349</sup>

The defendants, now respondents, maintained that riparian principles, including irrigation "as a necessary natural use," were firmly established in Texas, and that the board of engineers could not divest them of rights they held by virtue of their 1857 patent.<sup>350</sup> Before the appellate court, the respondents had taken refuge in a romanticized riparianism, claiming to represent

those owners of yet unimproved lands, bordering on these beautiful streams, who dream of a time when in their old age they may come to this land, improve it and under the restful shade of the great pecans and in sight of this beautiful water, may build little homes where they can spend the evening of life beyond the strife and turmoil of the City and business cares.<sup>351</sup>

According to the respondents, all the non-riparian proprietors needing irrigation were mere "special interests."<sup>352</sup>

Chief Justice Calvin Cureton, writing the *Mott v. Boyd* opinion for a unanimous Supreme Court in 1926,<sup>353</sup> found a way to validate riparianism and even trace it back to Hispanic law, while still ruling for the appropriators.<sup>354</sup> The court held that all land grantees from the Mexican period until 1889 received appurtenant irrigation rights.<sup>355</sup> Cureton buttressed this position by quoting from Frederic Hall's 1885 treatise, *The Laws of Mexico*, which stated that non-navigable streams passing through properties could be used by the owners "for the utility of their farms or industry," and if passing between tracts could be used by each owner for "the irrigation of his estate or any other object."<sup>356</sup> The only limitation on riparian rights was that they did not attach to flood waters.<sup>357</sup> After pronouncing this broad riparian principle, the justices

349. *Id.* at 20. This description of Hispanic period irrigation realities is consistent with Hans Baade's technological explanation for the lack of riparian irrigation. See discussion *supra* note 331.

350. Brief and Argument for Defendants in Error at 7, 10, *Mott* (No. 3740).

351. Brief and Argument for Appellants at 43, *Boyd* (No. 6447).

352. Brief and Argument for Defendants in Error at 78, *Mott* (No. 3740).

353. As Attorney General of Texas, Cureton had represented the state in the Red River boundary dispute with Oklahoma, and then served as Chief Justice from 1921 to 1940. Dobkins, *supra* note 9, at 140-41 n.48.

354. *Mott*, 286 S.W. at 458.

355. *Id.* at 467. Cureton began with the Mexican regime because the 1823 Colonization Law specifically mentioned the distribution of lands suitable for irrigation. *Id.* at 463.

356. *Id.* at 465 (quoting Hall, *supra* note 191, §§ 1388, 1391).

357. *Id.* at 468.

nevertheless decided for appellants on an estoppel theory, because the respondents' predecessor "had in effect conveyed their riparian waters."<sup>358</sup> The court thus reinstated the trial court's ruling that the appellants were entitled to all of the stream's ordinary flow.<sup>359</sup>

Legal historians have criticized *Motl* for mischaracterizing Hispanic law and for its policy ramifications. In 1955, A.R. White and Will Wilson offered the first and most comprehensive argument, based on Spanish and Mexican documents, that no vested riparian irrigation right had ever existed.<sup>360</sup> White and Wilson noted that, when citing Hall's treatise, Chief Justice Cureton omitted passages requiring that any irrigation be "[w]ithout prejudice to the common use" and consistent with "ordinances and customs."<sup>361</sup> In any event, Cureton's holding was dicta on Hispanic law, because the land at issue was granted in 1857 under state rather than prior sovereign authority, and the estoppel point was ultimately controlling.<sup>362</sup> Finally, White and Wilson observed that the decision restricted water utilization and statewide prosperity.<sup>363</sup> More recent scholars have largely echoed these criticisms,<sup>364</sup> with Hans Baade buttressing them through additional documentary research.<sup>365</sup>

All of these critics have attributed *Motl*'s errors to the Texas judiciary's lack of Hispanic legal knowledge. According to White and Wilson, the court did not have before it "the applicable law and the facts necessary for its interpretation."<sup>366</sup> Betty Dobkins relates that "[b]y early statehood the pioneer spirit in Texas law was dying out, and familiarity with the Spanish law was declining."<sup>367</sup> Joseph McKnight similarly asserts that "[t]he thread of Hispanic learning, once gained, seems however to have been lost in the period following the Civil War."<sup>368</sup> As

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358. *Id.* at 476–77.

359. *Id.* at 477.

360. White & Wilson, *supra* note 12, at 389–92, 431–32. White and Wilson found that land was classified "irrigable" or "not irrigable" for pricing purposes, without regard to whether it was riparian. *Id.* at 421.

361. *Id.* at 382–83 (quoting Hall, *supra* note 189, §§ 1388, 1389). They also discredited all of the passages from Hall as translations from Escriche, who was reciting views derived from French rather than Spanish law. *Id.* at 383–84.

362. *Id.* at 427, 432.

363. *Id.* at 432.

364. See Dobkins, *supra* note 9, at 102–46; McKnight, *supra* note 13, at 380–86.

365. See Baade, *supra* note 9.

366. White & Wilson, *supra* note 12, at 433.

367. Dobkins, *supra* note 9, at 133.

368. McKnight, *supra* note 13, at 374.

recently as 1986, Hans Baade quoted McKnight's comment and applied it to the California courts as well.<sup>369</sup>

But the documentary evidence presented to the *Motl* court indicates that the Texas judiciary was well aware that it was inventing Hispanic law on riparian irrigation. Seen in this light, the court's disregard of key passages from Hall's treatise may demonstrate deliberate distortion as much as lack of knowledge. Though the justices' estoppel ruling was probably correct, their attempt to justify the decision by idealizing history prevented fair water adjudication in Texas for years to come.

Following the *Motl* decision, Texas courts and commentators enshrined the idea of Hispanic riparian irrigation. In *Manry v. Robison*<sup>370</sup> the Texas Supreme Court held that abandoned river beds were the property of the riparian owners,<sup>371</sup> citing *Motl* for the proposition that Mexican law guaranteed the riparian rights of land grant holders.<sup>372</sup> Other cases employed *Motl* to support the application of Hispanic law to pre-1840 grants<sup>373</sup> and the riparian owner's right to use his proportionate water share on his land.<sup>374</sup> A major treatise on Texas water law averred that *Motl* "correctly stated the Law of Riparian Rights as applied to navigable, or 'public' rivers as it has been recognized . . . by the Spanish law in America."<sup>375</sup> During the long-standing dispute between riparians and prior appropriators, *Motl* was so often quoted by riparian advocates that, according to one scholar, "the concept of a Spanish 'riparian right' had become ingrafted in the legal mind in Texas."<sup>376</sup>

This conflict came to a head in the late 1950s, with the massive *Valmont*<sup>377</sup> litigation over water rights to the lower Rio Grande River.<sup>378</sup>

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369. Baade, *supra* note 9, at 23, 87.

370. *Manry v. Robison*, 56 S.W.2d 438 (Tex. 1932).

371. *Id.* at 449.

372. *Id.* at 443 (citing *Motl v. Boyd*, 286 S.W.2d 458 (Tex. 1926)).

373. *Miller v. Letzerich*, 49 S.W.2d 404, 407 (Tex. 1932) (citing *Motl*, 286 S.W. at 458).

374. *Texas Co. v. Burkett*, 296 S.W. 273, 276 (Tex. 1927) (citing *Motl*, 286 S.W. at 458).

375. J. Harbert Davenport & J.T. Canales, *The Texas Law Of Flowing Waters* 64-65 (1949).

376. Garland F. Smith, *The Valley Water Suit and its Impact on Texas Water Policy: Some Practical Advice for the Future*, Tex. Tech L. Rev. 577, 590 (1977). Supporters of both positions presented papers on Hispanic riparian irrigation at a series of water law conferences held at the University of Texas in 1952, 1954, and 1955. *Id.* at 595-606. At the conferences, Davenport and Canales represented the extreme riparian position, and White and Wilson maintained, contrary to *Motl*, that no automatic irrigation right existed in the Hispanic period. Dobkins, *supra* note 9, at 148-155.

377. *State v. Valmont Plantations*, 346 S.W.2d 853, 878 (Tex. Ct. App. 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

378. See Smith, *supra* note 376, for an overview of these lawsuits.

The State of Texas and numerous water districts, as appropriators, sued landowners who were claiming riparian irrigation rights derived from Spanish and Mexican grants.<sup>379</sup> At stake was the water supply of cities, non-riparian proprietors, and two million acres of land abutting the river below the Falcon reservoir.<sup>380</sup> The plaintiffs argued that there were no appurtenant irrigation rights, while defendants contended that such rights arose under Hispanic law, Texas's patenting of grants, and *Motl*.<sup>381</sup>

In a ninety-six-page opinion, the trial court held that riparian irrigation rights attached to the lands in question under *Motl* and stare decisis.<sup>382</sup> Significantly, the judge issued this ruling despite his explicit factual finding that Hispanic law required a specific grant from the sovereign.<sup>383</sup> He conceded that he was obligated to abide by prior rulings, "regardless of whatever reasons may be assigned for such decisions."<sup>384</sup> Like the California Supreme Court in *San Fernando*, the *Valmont* trial judge viewed stare decisis as controlling, although he admitted he was contravening the documentary record.

In *State v. Valmont Plantations*, a panel of the Texas Court of Civil Appeals decided to reexamine Hispanic law, overrule *Motl*, and reverse.<sup>385</sup> Writing for the panel's majority, Justice Jack Pope squarely held that "the Spanish and Mexican grants along the lower Rio Grande did not carry with them appurtenant irrigation rights."<sup>386</sup> Through an analysis of Hispanic documents, the majority found that the grants did not expressly include irrigation access, and that from the land classifications, quantities granted, prices, and physical difficulty of riparian irrigation, there were no implied rights on the Rio Grande either.<sup>387</sup> Of all the sources, only Escriche suggested the possibility of riparian irrigation, but the court considered that he was merely airing his personal views and that his summary of the law was derived from French rather than Spanish water codes.<sup>388</sup> Though *Motl* cited many of the same documents and treatises analyzed in *Valmont*, the former court made

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379. *Valmont*, 346 S.W.2d at 854.

380. Smith, *supra* note 376, at 590.

381. Dobkins, *supra* note 9, at 159.

382. *Valmont*, 346 S.W.2d at 854 & n.2.

383. *Id.*

384. Opinion at 34, *State of Texas v. Valmont Plantations*, No. B-20791 (Hidalgo County Dist. Ct. 1959), *quoted in* Dobkins, *supra* note 9, at 161.

385. *Valmont*, 346 S.W.2d at 853.

386. *Id.* at 855.

387. *Id.* at 878.

388. *Id.* at 868-69.

erroneous assumptions about Hispanic law, and in any event these statements were dicta because the case involved only grantees of the state of Texas.<sup>389</sup> One justice dissented, maintaining that *Motl* was “one of the celebrated cases rendered by the Supreme Court and should not lightly be disregarded.”<sup>390</sup>

The Texas Supreme Court adopted the majority’s opinion, lauding Pope’s analysis as “exhaustive and well documented.”<sup>391</sup> Again one justice dissented, in language reminiscent of the pueblo decisions, referring to *Motl* as a “rule of property” upon which riparian owners had relied “to irrigate their fertile fields and orchards.”<sup>392</sup> But the days of romantic riparianism were over in Texas.

The *Valmont* decision had important ramifications for water policy and Hispanic law jurisprudence. In the lower Rio Grande controversy, the ruling removed the vested riparian rights that had obstructed fair allocation among all users, enabling later courts to establish a system of weighted priorities based on perfected filings and previous irrigation.<sup>393</sup> The Texas legislature also enacted the 1967 Water Rights Adjudication Act to allocate water access to whole streams and thus avoid piecemeal litigation.<sup>394</sup> Ultimately, the Texas courts extended *Valmont*’s conclusion beyond the Rio Grande to all perennial and then to all non-perennial streams.<sup>395</sup> *Valmont* also influenced the holding in *Laredo* that former Hispanic pueblos had no express or implied water rights.<sup>396</sup> Legal historians have acclaimed *Valmont* as a refreshing contrast to *Motl*, although they attribute the reversal to a renaissance of Hispanic legal learning without assessing the deliberateness of past distortions.<sup>397</sup>

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389. *Id.* at 879–81.

390. *Id.* at 883.

391. *Valmont Plantations v. State*, 355 S.W.2d 502, 503 (Tex. 1962).

392. *Id.* at 505.

393. *State v. Hidalgo County Water Control & Improvement Dist. No. 18*, 443 S.W.2d 728 (Tex. Ct. App. 1969). See also Smith, *supra* note 376, at 624–28 (discussing the weighted priority system).

394. Tex. Water Code Ann. §§ 11.301–341 (West 1988).

395. *In re Adjudication of Water Rights of Cibolo Creek*, 568 S.W.2d 155 (Tex. Ct. App. 1978); *In re Adjudication of Water Rights in Medina River Watershed of the Sar. Antonio River Basin*, 670 S.W.2d 250 (Tex. 1984).

396. *In re Contests of City of Laredo*, 675 S.W.2d 257, 266 (Tex. Ct. App. 1984). See discussion *supra* text accompanying notes 315–17.

397. According to Joseph McKnight, “the revival of learning has been most marked and productive, causing the state’s highest court to pierce the veil of *stare decisis* in the light of recent findings of historical research.” McKnight, *supra* note 13, at 374. Hans Baade similarly associates

The riparian irrigation right's similarities in origin and development to the pueblo water right make it susceptible to a like legal historical analysis. Consistent with the formalist model, the doctrine gave riparian landowners absolute power over their adjacent water, and was purportedly based on objective historical truth. The *Motl* court invented the concept despite the justices' awareness of its falsity, suggesting that it was deliberately created and maintained by later courts to justify resource accumulation. This interpretation is inconsistent with that of the scholars who believe the *Motl* court merely suffered from a benign ignorance of Hispanic law. The public rights model is inapplicable, because the doctrine only benefited large riverbank estates, and in fact obstructed broader public access until *Valmont* cleared the way for comprehensive stream adjudication. Of course, the pueblo and riparian irrigation stories end differently: California and (until recently) New Mexico courts have intentionally maintained an idealized jurisprudence having monopolistic effects, while the Texas judiciary has not.<sup>398</sup>

## V. CONCLUSION

In developing a jurisprudence of Hispanic water rights, southwestern state courts deliberately distorted historic communal water sharing in favor of municipal exclusivity and riparian irrigation. Beginning in the late nineteenth century, California courts elaborated an absolute, expanding pueblo water right that was also adopted in New Mexico. Similarly, Texas recognized an automatic riparian irrigation right from the 1926 *Motl* case until 1962, when the doctrine was ultimately rejected in *Valmont*. Although previous scholars have argued that these judicial misrepresentations took place because evidence was not presented or because judges lacked historical knowledge, review of the original case files reveals that courts repeatedly disregarded ample material on Hispanic law and custom. The effect of creating these absolute and exclusive rights was the concentration of water control by certain large cities and riparian landowners.

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the "revival" with the *Valmont* litigation, as well as with the University of Texas Water Law Conferences. Baade, *supra* note 9, at 24.

398. Indeed, the *San Fernando* trial court cited *Valmont* as an example of thorough investigation into Hispanic water law, but was overruled by the California Supreme Court on *stare decisis* grounds. Compare Memorandum of Decision at 101, *City of Los Angeles v. City of San Fernando* (Cal. Super. Ct., L.A. County, Mar. 15, 1968) (No. 650, 079) with *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1284 (1975).



Why did judges in these states so manipulate the historical record? In the first place, many of the case files and decisions reflect the influence of romantic ideas about the Spanish and Mexican past. Just as the Mission Inn's promoters and other tourism boosters used images of missions and ranchos to sell their products, so courts employed notions of a pueblo's "torch of priority"<sup>399</sup> and an expansive Hispanic riparianism to justify water monopolization. Legal formalism was also part of the late nineteenth-century cultural climate, and encouraged judges to think of municipal and riparian power as rigidly bounded, absolute constructs. The formalistic goal of preventing resource redistribution was certainly advanced by limiting water access to a few large entities. A public rights explanation is less applicable here, for these courts were focused on elevating some cities and landowners over all other users rather than on any general benefit. In this sense the Hispanic law rulings were consistent with the nineteenth- and early twentieth-century emphasis on water as an exclusive property right rather than as a resource to be allocated for the greater good.<sup>400</sup>

Why is it so important that southwestern courts deliberately misrepresented Hispanic law for water accumulation purposes? Legal historians as far back as Frederic Maitland and as recently as John Reid have distinguished the function of legal analysis from that of historical research, maintaining that selective use of documentary evidence is a well-established practice of lawyers and judges, and should not be subjected to the standards of professional historians.<sup>401</sup> This "forensic history," as John Reid has called it, uses the past as precedential authority rather than factual explanation.<sup>402</sup>

But in southwestern water law, historical accuracy is a legal question, and one of contemporary resource policy as well. Under the Treaty of

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399. *Cartwright v. Public Service Co.*, 343 P.2d 654, 668 (1958).

400. See Freyfogle, *supra* note 32, at 520–25 (noting that absolute riparian rights in California limited receptivity to administrative allocation); Pisani, *supra* note 6, at 37 (arguing that exclusive prior appropriation in many western states stimulated economic development but worked against equitable distribution). See also Frances Levine, *Dividing the Water: The Impact of Water Rights Adjudication on New Mexican Communities*, 32 J. Sw. 268, 277 (1990) ("The individualized focus of prior appropriation precludes the community basis for water . . .").

401. John Phillip Reid, *Law and History*, 27 Loy. L.A. L. Rev. 193, 202, 220 (1993). According to Maitland, "[t]hat process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding." Frederic William Maitland, *Why the History of English Law Is Not Written*, in 1 *The Collected Papers Of Frederic William Maitland* 480, 491 (H.A.L. Fisher ed. 1911).

402. Reid, *supra* note 401, at 217.

Guadalupe Hidalgo, the United States guaranteed that property rights established under Mexican sovereignty would be respected.<sup>403</sup> Legal historian Christian Fritz has asserted that American courts conscientiously attempted to enforce this provision with regard to land claims,<sup>404</sup> and various scholars cited throughout this Article similarly argue that Hispanic water law was misinterpreted through ignorance rather than by design. If the pueblo rights doctrine and riparian irrigation were deliberate distortions of Spanish and Mexican law, American courts knowingly flouted the treaty's guarantee, casting doubt on the conventional scholarly view of benign neglect.

Furthermore, the "forensic history" notion that judges can legitimately misrepresent the past has serious implications for contemporary water policy. Spanish and Mexican communal water sharing, by which the needs of various users were apportioned, was a system well-suited to the arid frontier.<sup>405</sup> Judicial hijacking of this tradition appeared to place the authority of history behind monopolization of a scarce resource by a few cities and landowners. Had the more accurate historical arguments presented to the courts prevailed, southwestern water law would not have been left a legacy of exclusive water rights that continues to trump fair distribution in California and New Mexico, as it did for so long in Texas. If judges had taken history more seriously, they would have been able to implement the lessons a previous civilization learned about environmental adaptation rather than indulging unlimited urban and agricultural expansion.<sup>406</sup>

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403. 9 Stat. 922, 929–30 (1848).

404. According to Fritz, judges "mangled the Mexican law," but "clearly were struggling with it, incorporating what they understood Mexican legal concepts to be, what a pueblo title meant and a whole variety of other ideas." Bakken et al., *supra* note 30, at 143. My own future research will examine U.S. judicial treatment of Hispanic land law.

405. Hundley, *supra* note 8, at 39, 62; Meyer, *supra* note 8, at 164.

406. See Bates et al., *supra* note 6, at 29–36, 40–42, 128 (chronicling how the rapid growth of cities and large-scale agriculture in the West has resulted in river depletion and degradation).