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THE HISTORICAL BACKGROUND OF TEXAS WATER LAW— A TRIBUTE TO JACK POPE

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I. INTRODUCTION

Early in the sesquicentennial year of independence from Mexico, the Supreme Court of Texas has had occasion to resort to Spanish and Mexican law in aid of construction of Texas public land and mineral law. In *Schwarz v. State*,[1] the Court held that the reservation of "[a]ll of the minerals" in a 1947 patent for a 1907 purchase pursuant to an 1895 enactment[2] "withheld" from conveyance (and thus reserved to the State) "all of the coal or lignite located on or under the surface of the land granted, whether or not recovery of such would destroy or deplete the surface estate."[3]

While this holding was based directly on the familiar rule that grants out of the public domain are to be "construed strictly in favor of the State," it was also supported by other, "more empirical, evi-

1. 703 S.W.2d 187 (Tex. 1986).
2. *See id.* at 188.
3. *Id.* at 189.

dence" of legislative intent.[4] The Republic of Texas had "utilized the general laws of Mexico until 1840," and when adopting the common law at that time, the Congress of the Republic had expressly excepted from its application such laws as related to the reservation of "islands, and also of salt lakes, licks and salt springs, mines and minerals of every description."[5] The rest is familiar to readers of Walace Hawkins' charming account in "El Sal del Rey,"[6] and is even apparent from the work's very title: No minerals passed with surface grants under Mexican law, and the mineral release provisions enacted in and after 1866, in partial reversal of that rule,[7] obviously encompassed surface minerals as well. By parity of reasoning, mineral reservation acts, such as the 1895 statute under which appellant's predecessor in interest had made his purchase from the state, likewise encompassed surface minerals.[8]

Thus, Spanish and Mexican mineral law continues to be relevant even today for the construction of Texas statutes in a historical context. Spanish and Mexican water law, on the other hand, lacks this direct link to the present legal order of Texas. This is so because the act of the Fourth Congress of the Republic of Texas which introduced the common law of England as of March 16, 1840, preserved only the mining law but not the water law of New Spain.[9]

The retention of Spanish and Mexican mining law until 1866 meant

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4. *See id.* (quoting Empire Gas & Fuel Co. v. State, 121 Tex. 138, 158-59, 47 S.W.2d 265, 272 (1932)).

5. *Id.* at 189-90.

6. W. HAWKINS, EL SAL DEL REY (1947). The Mining Ordinances of New Spain, May 22, 1783, continued to apply in Texas under Mexican rule. *See* State of Coahuila y Texas, Decree No. 40 of June 22, 1827, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 60-61 (1839). Title 5, article 1 of the Ordinances specified minerals to be Crown property which were to be conceded for exploitation as further provided therein. *See* E. VENTURA BELEÑA, 2 RECOPILACIÓN SUMARIA DE TODOS LOS AUTOS ACORDADOS DE LA REAL AUDIENCIA Y SALA DEL CRIMEN DE ESTA NUEVA ESPAÑA 212, 235 (1981) (originally published 1787).

7. *See* Schwartz v. State, 703 S.W.2d 187, 190 (Tex. 1986) (citing numerous historical sources).

8. *See id.* at 188.

9. *See* Law of Jan. 20, 1840, §§ 1-2, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1898). Pursuant to section one of the Act of Jan. 16, 1840, enactments of the Republic of Texas generally became effective on the fortieth day after adjournment. *See* Law of Jan. 16, 1840, § 1, 1840 Tex. Gen. Laws 6, 7, 2 H. GAMMEL, LAWS OF TEXAS 180-81 (1898). The Fourth Congress of the Republic of Texas adjourned on February 5, 1840. *See* 1 JOURNAL OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS 356 (Smither ed. 1839-40).

that the relinquishment acts passed in that year and thereafter[10] were relinquishments of rights that were, and continued to be, part of the public domain by virtue of the mining law of the former sovereign. On the other hand, as will be seen presently, the current Texas system of state ownership and licensing of water rights is entirely the product of the legislative repudiation of the riparian rights system which had come to prevail in the latter half of the nineteenth century as a result of the reception of the common law by the Republic of Texas.

II. FROM "DUAL SYSTEM" TO STATE LICENSING

A. *The Common Law and the Riparian System*

The phases of the development of Texas water law from 1840 to the recent past are discussed in Chief Justice Pope's opinion in *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*,[11] and need little elaboration here. The starting point is *Haas v. Choussard*,[12] an 1856 decision by Chief Justice Hemphill which held that the "right to the use of the water adjacent to [one's] lots, as it flowed in its natural channel [was] a right inherent to and inseparably connected with the land itself."[13] In light of that decision, it is established that "Texas *judicially* adopted the riparian rights system, at least by 1856."[14] Nevertheless, there were an impressive number of *legislative* appropriations of the waters of major Texas rivers in the latter half of the last century.[15]

As early as 1868, it was well established that the Texas variant of the riparian system includes the reasonable use of waters by riparians for irrigation and is thus adaptable to the needs of semi-arid regions.[16] It is worth recalling, nevertheless, that in the 1872 case of *Fleming v.*

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10. *See* Schwartz v. State, 703 S.W.2d 187, 190 (Tex. 1986).

11. 642 S.W.2d 438 (Tex. 1982).

12. 17 Tex. 588 (1856).

13. *Id.* at 589. *See generally* Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19 (1927).

14. *In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 439 (Tex. 1982).

15. *See* A. W. Walker, Jr., *Legal History of the Riparian Right of Irrigation in Texas*, in PROCEEDINGS, WATER LAW CONFERENCE, UNIVERSITY OF TEXAS SCHOOL OF LAW 41 (1959).

16. *See* Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905); Tolle v. Correth, 31 Tex. 362, 364-65 (1868); Rhodes v. Whitehead, 27 Tex. 304, 310-11, 315-16 (1863). *See generally* Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19 (1927).

Davis,[17] the applicability of the riparian system was roundly challenged. On that occasion, the court was urged eloquently, but unsuccessfully, to judicially adopt the California prior appropriation system. The court, however, went on to inform the Legislature that "the wealth and comfort of our people throughout a large portion of the State might be greatly augmented by wise legislation on this subject."[18]

This message had the misfortune of coming not only from the "Semicolon Court" but also from the very same judge whose opinion in *Ex Parte Rodriguez*[19] gave it that name.[20] Small wonder, then, that it went unheeded for some considerable time. In 1889, however, the Legislature enacted an irrigation act declaring the unappropriated waters of every river or natural stream within the arid portions of the state to be the "property of the public."[21] Such waters were subject to appropriation on a first-in-time, first-in-right basis to be perfected by filing a sworn description thereof with the local county clerk. That system of prior appropriation did not apply, however, in derogation of prior existing riparian rights.[22]

The Irrigation Act of 1889 was primarily a statute for the protection of irrigation ditch companies. The majority of the seventeen sections dealt with such companies directly and the emergency clause stated "that irrigating canals should be built at once."[23] The key provision of the 1889 Irrigation Act was section 5 which authorized irrigation ditch companies to appropriate waters and thus reversed a then-recent decision to the contrary.[24]

This act was followed six years later by another, somewhat more detailed enactment of general applicability, which defined the cate-

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17. 37 Tex. 173 (1872).

18. *Id.* at 201-02.

19. 39 Tex. 706 (1873) (Walker, J.).

20. *See* Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEXAS L. REV. 279, 283-86 (1959).

21. Irrigation Act of Mar. 19, 1889, ch. 88, § 2, 1889 Tex. Gen. Laws 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

22. *See id.* § 1, 1889 Tex. Gen. Laws at 100, 9 H. GAMMEL, LAWS OF TEXAS at 1128.

23. *Id.* § 17, 1889 Tex. Gen. Laws at 103, 9 H. GAMMEL, LAWS OF TEXAS at 1131.

24. *See id.* § 5, 1889 Tex. Gen. Laws at 101, 9 H. GAMMEL, LAWS OF TEXAS at 1131; *see also* Mud Creek Irrigation, Agricultural, & Mfg. Co. v. Vivian, 74 Tex. 170, 173, 11 S.W. 1078, 1079 (1889) (sustained trial court's dismissal of action by irrigation company against upper-riparian owner whose diversion interfered with canal and ditch system).

gory of unappropriated waters much more comprehensively.[25] The acknowledged purpose of this act was to encourage the formation of irrigation ditch companies, which the act treated in considerable detail. Further, the emergency clause cited the immediate necessity of building irrigation canals.[26] An amendment, which passed at the same session at Populist insistence, was directed specifically at regulating irrigation ditch companies.[27]

B. *The "Dual System"*

It is well established now by legislative and judicial authority that the Irrigation Act of 1895 reserved to the State the unappropriated running waters at its effective date,[28] with the result that public lands granted thereafter do not carry riparian water rights.[29] The 1895 Act is, for that reason, the origin of the so-called dual system of Texas

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25. *Compare* Irrigation Act of Mar. 9, 1895, ch. 21, § 1, 1895 Tex. Gen. Laws 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898) ("[T]he unappropriated waters of the ordinary flow or underflow of every running or flowing river or natural stream, and the storm or rain waters of every river or natural stream, canyon, ravine, depression or watershed within those portions of the State of Texas in which by reason of the insufficient rainfall or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the project of the public") *with* Irrigation Act of Mar. 19, 1889, ch. 88, § 1, 1889 Tex. Gen. Laws 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898) ("[T]he unappropriated waters of every river or natural stream within the arid portions of the state of Texas, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses").

26. *See* Irrigation Act of Mar. 9, 1895, ch. 21, § 21, 1895 Tex. Gen. Laws 21, 26, 10 H. GAMMEL, LAWS OF TEXAS 751, 756 (1898).

27. *See id.* §§ 11, 19, 1895 Tex. Gen. Laws at 23-25, 10 H. GAMMEL, LAWS OF TEXAS at 753-55. House Bill No. 120 of the Twenty-Fourth Legislature was passed by the House of Representatives on February 18, 1895 and by the Senate on March 6, 1895. *See* Austin Daily Statesman, Mar. 7, 1895, at 6, col. 2. The bill was amended according to suggestions made by Govenor Culberson so as to limit the rate-making power of irrigating companies and to provide water for domestic purpose for riparian owners. *See* San Antonio Daily Express, Mar. 20, 1895, at 2, col. 1. Despite these amendments, the Populists voted solidly against the bill. Abilene Weekly Reporter, Apr. 5, 1895, editorial page, col. 2.

28. The effective date of this enactment is July 29, 1895, since the emergency clause (section 21) failed to be adopted by the requisite majority. *See* TEX. CONST. art. III, § 39; Irrigation Act of Mar. 9, 1895, ch. 21, § 21, 1895 Tex. Gen. Laws 21, 26, 10 H. GAMMEL, LAWS OF TEXAS 751, 756 (1898); Certificate of June 22, 1895, 1895 Tex. Gen. Laws 228, 229, 10 H. GAMMEL, LAWS OF TEXAS 958, 959 (1898).

29. *See* Irrigation Act of Apr. 9, 1913, ch. 171, § 97, 1913 Tex. Gen. Laws 358, 379. Nothing in the act was to be "construed as a recognition of any riparian right in the owner of any lands the title to which . . . passed out of the State . . . subsequent to [July 1] 1895." *See id.* § 97, 1913 Tex. Gen. Laws at 379; *see also In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 444 (Tex. 1982) (same cut off date used). With respect, the correct date is, as earlier stated in footnote 28, July

water law which prevailed until recently. "Historical" riparian rights attaching to lands granted previously were respected. Starting with 1895, waters not encumbered by such rights were declared to be public and were subjected to a legislatively created system of appropriation and, ultimately, licensing.

The next step in this development was taken by the Irrigation Act of 1913,[30] a comprehensive enactment of 140 sections which created the Board of Water Engineers.[31] The 1913 Act also centralized the licensing process by providing that waters belonging to the State could be appropriated only pursuant to permits issued by that board, to be granted for purposes and by procedures outlined in greater detail.[32] Certified copies of records of appropriations filed locally under the Acts of 1889 and 1895 had to be filed with the Board of Water Engineers. These were later known as "certified filings."[33]

Since the 1913 Act expressly provided that the "ordinary flow and underflow" of water courses could not be diverted to the prejudice of the "rights of any riparian owner" without his consent,[34] it further cemented the dual system of water law. Moreover, and crucially, it failed to provide a mechanism for the comprehensive ascertainment and adjudication of such "vested" riparian rights, which is the necessary precondition for rationally allocating the waters remaining for appropriation.

A revision of the irrigation laws enacted in 1917[35] sought to close this gap by providing for the adjudication of water rights on specific streams and water courses conclusively on all claimants. Four years after its enactment, the Supreme Court of Texas held this scheme to be unconstitutional because it delegated judicial powers to an administrative agency.[36] In the words of Chief Justice Pope, that decision

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29, 1895. *See* Certificate of June 22, 1895, 1895 Tex. Gen. Laws 228, 229, 10 H. GAMMEL, LAWS OF TEXAS 958, 959 (1898).

30. Ch. 171, 1913 Tex. Gen. Laws 358.

31. *See id.* §§ 7-11, 1913 Tex. Gen. Laws at 359-60.

32. *See id.* §§ 12-41, 1913 Tex. Gen. Laws at 360-68.

33. *See id.* §§ 12-14, 1913 Tex. Gen. Laws at 360-61; *In re* Adjudication of the Water Rights of the Upper Segment of the Guadalupe River Basin, 642 S.W.2d 438, 440 (Tex. 1982); Caroom & Elliott, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183, 1185 (1981).

34. Irrigation Act of Apr. 9, 1913, ch. 171, § 3, 1913 Tex. Gen. Laws 358, 359.

35. *See* Irrigation Act of Mar. 19, 1917, ch. 88, §§ 105-132, 1917 Tex. Gen. Laws 211, 235-42.

36. *See* Board of Water Engineers v. McKnight, 111 Tex. 82, 97, 229 S.W. 301, 307 (1921).

"ushered in a half century interregnum during which there was no inventory of available water and no record of the extent of claims upon the dwindling supply."[37]

C. *Comprehensive Adjudication and State Licensing*

Finally, in 1967, the Legislature adopted the Water Rights Adjudication Act, which was recently upheld as constitutional.[38] The central feature of this legislation is, of course, the comprehensive adjudication of quantified water rights on whole streams, or sections thereof, with conclusive effect on all claimants.[39] "Vested private rights to the use of water" are specifically declared not to be affected, but like all other water rights, they have to be recorded and, if need be, defended in stream or segment adjudication proceedings.[40] Riparian rights appurtenant to lands granted before July 1, 1895, are recognized only to the extent that they are reduced to "certificates of adjudication," quantitatively limited to maximum beneficial use during any calendar year between 1963 and 1967.[41]

These recent legislative developments have to be viewed against the background of the central principle of Texas water law that has prevailed since the Irrigation Act of 1913: State-owned water can be appropriated only pursuant to a permit issued by the competent central state agency.[42] That agency is now the Texas Water Commission, the statutory successor to the Board of Water Engineers.[43] Thus, Texas water law has become, in essence, the law of water permits as administered by the Texas Water Commission pursuant to the Water Code and as subject to judicial control as therein provided.

D. *A Question of Ancestry*

It is readily apparent from the above thumbnail sketch of the his-

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37. *In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 441 (Tex. 1982).

38. *See id.* at 441; *see also* TEX. REV. CIV. STAT. ANN. art. 7542a (Vernon 1967), *recodified as* TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1986).

39. *See* TEX. WATER CODE ANN. § 11.322(d) (Vernon Supp. 1986).

40. *See id.* § 11.001.

41. *See id.* § 11.303(a), (b).

42. *See* TEX. WATER CODE ANN. §§ 11.022, 11.026, 11.121 (Vernon Supp. 1986); Irrigation Act of Mar. 19, 1917, ch. 88, §§ 1, 15-32, 1917 Tex. Gen. Laws 211, 214-19; Irrigation Act of Apr. 9, 1913, ch. 171, §§ 1, 12-41, 1913 Tex. Gen. Laws 358, 360-68.

43. *See* TEX. WATER CODE ANN. § 5.051 (Vernon Supp. 1986).

tory of Texas water law since 1840 that the currently prevailing system of state ownership and administrative licensing is not linked historically to Spanish or Mexican law. Quite the contrary, the common law riparian system of water rights prevailed in Texas from 1840 to 1889 and, in parts of the state, until 1895. The public ownership and private appropriation system introduced in Texas towards the end of the last century was not a return to principles of pre-1840 Spanish and Mexican law. It was, rather, the first of a series of legislative steps towards what has been called "forging new rights in Western waters."[44]

As mentioned above, the Acts of 1889 and 1895 were to a large extent, if not primarily, designed to encourage the formation of irrigation canal companies. This connection is especially apparent in the latter of these two enactments, which was prompted by a biennial message of Governor Culberson. After recounting the widely held belief that the development of the arid regions of the state required the "artificial storage" of the storm waters and the flow of running streams, the governor maintained that improvements of such magnitude required the investment of large sums of money. He concluded that the interests of the arid regions of the State would be "materially aided by the passage of irrigation laws fair alike to capital and the consumer of water."[45]

Seen against this background, the prior-appropriation system first introduced into Texas by the Irrigation Acts of 1889 and 1895 appears to have been motivated to a considerable extent by the need to provide a reliable water supply to irrigation canal and ditch companies.[46] Such companies became "popular in the West" in the period from 1870 to 1890.[47] The regulation of the irrigation water rates charged by the companies can be traced to an 1879 Colorado statute which "became a model for similar legislation in many other western states."[48]

The legislative purpose of the Acts of 1913, 1917, and 1967, on the

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44. R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

45. Message from the Governor to the Senate and House of Representatives, Jan. 16, 1895, Austin Daily Statesman, Jan. 17, 1895, at 8, col. 4-5.

46. *See* Irrigation Act of Mar. 9, 1895, ch. 21, 1895 Tex. Gen. Laws 21, 10 H. GAMMEL, LAWS OF TEXAS 751 (1898); Irrigation Act of Mar. 19, 1889, ch. 88, 1889 Tex. Gen. Laws 100, 9 H. GAMMEL, LAWS OF TEXAS 1128 (1898).

47. R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 23 (1983).

48. *Id.* at 25.

other hand, is readily traceable to the fundamental insight that the prior appropriation system can only work if licenses are centrally administered and if quantified water rights in entire watercourses or major sections thereof are adjudicated *erga omnes*. This was apparently first seen by Elwood Mead, who became the first territorial engineer of Wyoming in 1888 after having served as the first professor of irrigation engineering in the United States at the Colorado Agricultural College.[49] Mead became the "architect of the Wyoming system of water rights enforcement," and the Wyoming system was adopted by both Nebraska and, with modifications, Oregon.[50]

The Texas Irrigation Acts of 1913 and 1917[51] are inspired by the Wyoming prototype in its Nebraska form.[52] As already mentioned, however, the Wyoming variant of final administrative adjudication was held to be unconstitutional in Texas as in violation of the separation of powers clause of the state constitution.[53] The Water Rights Adjudication Act of 1967 has successfully avoided this infirmity by following, in this respect, the Oregon variant of administrative adjudication contingent upon judicial approval.[54] Its enactment is due in good measure to Justice Pope's judicial lament about the "procedural problems of stream litigation occasioned by the absence of rules and statutes suited to this special class of case,"[55] and to a timely law re-

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49. *See id.* at 103-05.

50. *See id.* at 99, 113-14, 122-25.

51. *See* Irrigation Act of Mar. 19, 1917, ch. 88, 1917 Tex. Gen. Laws 211; Irrigation Act of Apr. 9, 1913, ch. 171, 1913 Tex. Gen. Laws 368.

52. *See* Irrigation Act of 1895, ch. 69, 1895 Neb. Laws 244; Supervision of Water Act of Dec. 22, 1890, ch. 8, 1890 Wyo. Session Laws 91, 94-106. It would be too much to say that the 1917 Texas Act was "copied" from the Nebraska Act. *See* Davenport, *Development of the Texas Laws of Waters*, TEX. REV. CIV. STAT. ANN. Vol. 21, at xiii-xxxiii (Vernon 1954) (superseded). A careful study of the relationship of these codes and those of other western states is needed. Unfortunately, Dean Hildebrand never accomplished his intention of writing an article on "the statutory laws of Texas relating to water rights" which would show that "our statutes were copied from those of some of the western states." Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19, 49 (1927). A search of his papers (University of Texas Law School Archives) has led to copious materials on Texas water law generally, but has failed to locate a manuscript directly in point.

53. *See* Board of Water Engineers v. McKnight, 111 Tex. 82, 97, 229 S.W. 301, 307 (1921).

54. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 443 (Tex. 1982); R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 128 (1983).

55. Maverick County Water Control & Improvement Dist. No. One v. City of Laredo, 346 S.W.2d 886, 887 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

view article by Professor Corwin Johnson on the adjudication of water rights.[56]

Thus, the present system of Texas water law is twice or perhaps even three times removed from the Spanish and Mexican law of water rights that had prevailed here until March 16, 1840. Nevertheless, and paradoxically, the ultimate stages of the historical process outlined above have served to enhance rather than to diminish the practical significance of water right claims based on Spanish and Mexican law. This is so for two reasons: First, all water rights outstanding had to be adjudicated in new-style comprehensive watershed or stream section adjudications. Secondly, the legislative reforms described above have always protected prior acquired rights.[57] Therefore, while Spanish and Mexican water *law* is entirely unrelated to the substantive contents of the Texas Water Code, water *rights* based on the law of the pre-Independence sovereigns of Texas not only continued to be valid, but indeed had to be ascertained, whenever or wherever there were Spanish or Mexican land grants within a stream or stream segment to be adjudicated.

III. HARMONIZATION AND VERIFICATION OF HISTORICAL WATER RIGHTS

A. *Harmonization of Common Law and Prior Appropriation Rights*

We have seen that Texas water law passed through three distinct stages between 1840 and the present: riparian rights (1840-1889/95), the "dual system" (1889/95 to 1967), and state licensing (1967 to the present). The riparian rights system was introduced through the legislative reception of the common law by the Republic of Texas.[58] The "dual system" was the result of the legislative adoption of the prior appropriation system coupled with the express preservation of prior acquired rights.[59] The state licensing system, finally, is premised on

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56. *See* Johnson, *Adjudication of Water Rights*, 42 TEXAS L. REV. 121 (1963).

57. *See* TEX. WATER CODE ANN. §§ 11.001(a), 11.303, 11.323 (Vernon Supp. 1986); Irrigation Act of Mar. 19, 1917, ch. 88, §§ 6-7, 1917 Tex. Gen. Laws 211, 212-13; Irrigation Act of Apr. 9, 1913, ch. 171, § 14, 1913 Tex. Gen. Laws 358, 361-62; Irrigation Act of Mar. 9, 1895, ch. 21, §§ 6-7, 1895 Tex. Gen. Laws 21, 22, 10 H. GAMMEL, LAWS OF TEXAS 751, 752 (1898); Irrigation Act of Mar. 19, 1889, ch. 88, § 5, 1889 Tex. Gen. Laws 100, 101, 9 H. GAMMEL, LAWS OF TEXAS 1128, 1129 (1898).

58. *See* Law of Jan. 20, 1840, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177 (1898).

59. *See* Irrigation Act of Mar. 19, 1917, ch. 88, §§ 5-7, 1917 Tex. Gen. Laws 211, 212-13;

the comprehensive verification and quantification of all existing water rights. The allocation of water rights by a specialized state agency pursuant to legislatively determined procedures and standards operates essentially *pro futuro, i.e.*, as to waters which have been judicially classified as "unappropriated" (and hence, public waters) after the process of stream or stream segment adjudication *erga omnes* is complete.[60]

The seeming paradox of the increased relevance of historical water rights in a public licensing system is a transitional phenomenon—a necessary concomitant of judicial inventories of the public water reserve. That explains much of the remarkable renaissance of interest in Spanish and Mexican water rights throughout the Hispanic Southwest, from Texas to California.[61] Even a cursory look at the more recent historic water rights cases shows, however, that water right claims based on Spanish and Mexican law have had a much greater potential significance in Texas within the last three decades than in California or New Mexico.

All three of these states have been confronted with claims of municipalities, or successors in interest of Mexican municipal corporations or communities, to paramount water rights in the streams on which such communities were founded.[62] In addition to this so-called pueblo water right, New Mexico has had to deal with a variant thereof which is peculiar to Indian pueblos recognized as such under Spanish rule.[63] The question of individual water rights based on the law of the former sovereigns has not, however, come up for judicial consideration outside of Texas within the last three decades, nor, indeed, within this century.

As is well known, Chief Justice Pope held, in his landmark opinion

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Irrigation Act of Apr. 9, 1913, ch. 171, §§ 5, 14, 1913 Tex. Gen. Laws 358, 359, 361-62; Irrigation Act of Mar. 9, 1895, ch. 21, §§ 5-6, 1895 Tex. Gen. Laws 21, 22, 10 H. GAMMEL, LAWS OF TEXAS 751, 752 (1898); Irrigation Act of Mar. 19, 1889, ch. 88, §§ 4-5, 1889 Tex. Gen. Laws 100, 101, 9 H. GAMMEL, LAWS OF TEXAS 1128, 1129 (1898).

60. *See* TEX. WATER CODE ANN. §§ 11.303, 11.304 (Vernon Supp. 1986).

61. *See* C. DUMARS, M. O'LEARY & A. UTTON, PUEBLO INDIAN WATER RIGHTS, STRUGGLE FOR A PRECIOUS RESOURCE (1984); M. MEYER, WATER RIGHTS IN THE HISPANIC SOUTHWEST, A SOCIAL AND LEGAL HISTORY, 1550-1850, at xii-xiii (1984).

62. *See* City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (Cal. 1975); *In re* Contests of Laredo to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.)*; *see also* New Mexico *ex rel.* Reynolds v. Lewis, No. 20294 and 22600 (N.M.) (pending).*

63. *See* New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985).*

in *State v. Valmont Plantations*,[64] that there were no riparian irrigation rights to perennial rivers under the law of the Mexican state of Tamaulipas, the former Spanish Colonia de Nuevo Santander.[65] In *In re Adjudication of the Water Rights of the Cibolo Creek Watershed of the San Antonio River Basin*,[66] the holding in *Valmont* was extended to perennial rivers in the Texas portion of the Mexican state of Coahuila y Texas.[67] In *In re Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin*,[68] finally, the Texas Supreme Court held that an encompassing landowner of a nonperennial stream section had no irrigation right to the waters of such stream in the absence of an express grant.[69]

The reasoning behind these decisions will be discussed in greater detail below. For present purposes, however, we are faced with a much more fundamental question: How could California, New Mexico, and Arizona[70] avoid the basic issue of whether or not, prior to the adoption of common law, the irrigation system prevailing in the Southwest, formerly Mexico, was a riparian system?[71]

The answer is as simple as it is absurd. Questions as to the nature of irrigation rights based on Spanish and Mexican law came up quite logically and necessarily whenever and wherever a discrete system of water law was introduced by the subsequent sovereign with a simultaneous express or implied guarantee of prior existing rights. All three states with major population settlements before independence from Mexico or annexation by the United States adopted the common law.[72] California and Texas interpreted the adoption of common law to have carried with it the riparian system, expansively interpreted to include reasonable correlative use of waters by riparians for irriga-

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64. 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

65. *See id.* at 878, 881-82.

66. 568 S.W.2d 155 (Tex.Civ.App.—San Antonio 1978, no writ).

67. *See id.* at 157.

68. 670 S.W.2d 250 (Tex. 1984).*

69. *See id.* at 252-54.

70. Boquillas Land & Cattle Co. v. Curtis, 89 P. 504 (Ariz. 1907), *aff'd*, 213 U.S. 339 (1909).

71. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

72. *See, e.g.*, Law of Jan. 20, 1840, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177 (1898).

tion.[73] New Mexico, on the other hand, held its variant of the common law to incorporate the prior appropriation system.[74]

This enabled all three states to avoid the potentially thorny issue of the accommodation of water rights acquired under Mexican rule with those subsequently created by virtue of the reception of the common law. Texas and California, predominantly "Anglo" states with some dry farming regions, held the Spanish and Mexican irrigation system to have been riparian in nature.[75] New Mexico, initially a predominantly Hispanic territory dependent entirely on irrigation farming,[76] came to the conclusion that its constitutionally mandated prior-appropriation system was declarative, not only of the common law, but of Spanish and Mexican law as well.[77]

In terms of judicial economy, the New Mexico approach had the most appeal. Spanish and Mexican law, the common law, and the prior appropriation system were declared to be identical, and entitlements asserted under any of them could be harmonized *inter se* by priority alone. Arguably, there was still room for pueblo water rights as vested rights *sui generis*, and the water claims of Indian pueblos had a penumbra of United States federal Indian law.[78] California and Texas, on the other hand, were left with the task of harmonizing riparian rights held to have vested under all sovereigns with water rights subsequently acquired through prior appropriation.[79]

It would serve little purpose to rehearse this process of harmonization in detail. In the case of California, it was complicated by the existence of prior appropriation rights which were acquired under

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73. *See* Lux v. Haggin, 10 P. 674, 675, 755-63 (Cal. 1886); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905); Tolle v. Correth, 31 Tex. 362, 364, 365 (1868); Rhodes v. Whitehead, 27 Tex. 304, 310-11, 315-16 (1863). *See generally* Motl v. Boyd, 116 Tex. 82, 108, 286 S.W. 458, 467 (1926); Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 1 (1927).

74. Yeo v. Tweedy, 286 P. 970, 972 (N.M. 1929); NEW MEXICO CONST. art. 16, § 2 (1911).

75. *See* Lux v. Haggin, 10 P. 674, 712 (Cal. 1886); Motl v. Boyd, 116 Tex. 82, 108, 286 S.W. 458, 467 (1926).

76. *See* P. B. PINO, NOTICIAS HISTÓRICAS Y ESTADÍSTICAS DE LA ANTIGUA PROVINCIA DEL NUEVO MEXICO (1972) (originally published 1812; annotated ed. 1849).

77. *See* Yeo v. Tweedy, 286 P. 970 (N.M. 1929).

78. *See* New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985); C. DUMARS, M. O'LEARY & A. UTTON, PUEBLO INDIAN WATER RIGHTS, STRUGGLE FOR A PRECIOUS RESOURCE 11-61 (1984).

79. *See* D. PISANI, FROM THE FAMILY FARM TO AGRIBUSINESS, THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931, at 191-282 (1984).

federal law and hence, were paramount by virtue of the supremacy clause.[80] For that reason, the Supreme Court of California, in effect, sandwiched riparian rights between superior federal and subordinate state created prior appropriation rights.[81]

Texas was spared this humbling complication, since the public domain of the Republic had passed virtually intact to the State of Texas upon union with the United States.[82] Instead, as is well known by the older generation of water lawyers, Texas divided water rights between riparians and appropriators through alchemy in reverse. In *Motl v. Boyd*,[83] Chief Justice Cureton held that riparian rights attached only to the normal and ordinary flow of streams, but not to the storm and flood waters running in them.[84] This distinction was to be troublesome for hydrologists.[85] Appropriators, however, were rewarded quite literally by gifts from heaven, since the "storm and flood waters" above the ordinary flow of Texas watercourses became available exclusively for prior appropriation.

Whatever the difficulties of the hydrographic classification in *Motl*, the question of the harmonization of the rights of riparians and appropriators has been rendered moot by the Water Rights Adjudication Act of 1967 as now codified in the Texas Water Code.[86] The operation of this act is conveniently described in a well known article entitled *Water Rights Adjudication—Texas Style*, by Doug Caroom and Paul Elliott.[87] The Code distinguishes between what the authors call

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80. *See* Lux v. Haggin, 10 P. 674, 721 (Cal. 1886). *See generally* D. PISANI, FROM THE FAMILY FARM TO AGRIBUSINESS, THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931, at 191-249 (1984). Henry Miller, a co-plaintiff, "estimated that he had amassed $100,000,000 in property and spent $25,000,000 in legal fees defending his empire." *See id.* at 243.

81. *See* Lux v. Haggin, 10 P. 674, 724-28 (Cal. 1886).

82. *See* United States v. 1,078.27 Acres of Land, 446 F.2d 1030, 1039 (5th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). Pursuant to the terms of the Joint Resolution of Mar. 1, 1845, 5 Stat. 797, accepted by Texas through joint resolution of June 23, 1845, the State of Texas as successor of the Republic retained "all vacant and unappropriated public lands lying within its limits," while the United States was ceded all military installations then extant. *See id.*

83. 116 Tex. 82, 286 S.W. 458 (1926).

84. *See id.* at 111, 286 S.W. at 468.

85. *See In re* Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 491 (Tex. 1982); Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19, 37 (1927).

86. *See* TEX. WATER CODE ANN. §§ 11.301-.341 (Vernon Supp. 1986).

87. Caroom & Elliott, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183 (1981). This article has been deservedly described as an "excellent discussion." *See In re* Adjudication

"non-statutory" and "statutory" water rights. The former include riparian rights, appropriation rights under the Irrigation Acts of 1889 and 1895 not reduced to "certified filings," and "other claims of water rights except claims under permits or certified findings."[88]

Claims to these non-statutory water rights had to be filed by September 1, 1969, and are recognized as valid "only to the extent of the maximum actual application of water to beneficial use without waste during any calendar year from 1963 to 1967."[89] Non-statutory water rights claims not filed and verified as prescribed in section 11.303 of the Texas Water Code are declared to be barred and extinguished.[90]

Permits under the Irrigation Act of 1913 as amended, and appropriations reduced to "certified filings" pursuant to that Act, are statutory rights, and require no verification through filing anew. Both their validity and their extent, however, are subject to reexamination in adjudication of the water rights of any "stream or segment of stream" as provided by the Act of 1967 and as now regulated in the Code.[91] Unlike non-statutory rights, these statutory rights are not limited to the maximum beneficial use in any calendar year between 1963 and 1967. They are, however, limited quantitatively to the amount which "can be beneficially used for the purposes specified in the appropriation."[92] As recently held in *In re Contest of Eagle Pass to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries*,[93] this limitation cuts down the entitlements of irrigation with certified filings to the ordinary burden of water for the acreage irrigated.[94]

The legislative framework just discussed has to be viewed against the background of a highly successful comprehensive stream and stream section adjudication process which was reported to be ninety-nine percent complete on February 29, 1984.[95] Thus, substantially all

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of the Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 251 n.4 (Tex. 1984).

88. TEX. WATER CODE ANN. § 11.303(a) (Vernon Supp. 1986).

89. *Id.* § 11.303(b).

90. *See id.* § 11.303(i).

91. *See id.* §§ 11.001, 11.304.

92. *Id.* § 11.025.

93. 680 S.W.2d 853 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

94. *See id.* at 858.

95. *See* Texas Department of Water Resources, 2 WATER FOR TEXAS 1-16 (1984). The adjudication process is virtually complete as of this writing. *See* Soward, *Introduction to St. Mary's Law Journal Water Law Conference*, 17 ST. MARY'S L.J. 1175, 1175 (1986).

riparian rights appurtenant to land patented between 1840 and 1895 have been harmonized with "non-statutory" prior appropriation rights acquired in 1889 and thereafter, and both of these classes of rights have been validated at maximum actual beneficial use between 1963 and 1967. Substantially all statutory water rights, which include rights specified in certified filings and permits from 1913 to the present, have been validated at the level of beneficial use for the purpose stated. Mercifully, this appears to have been accomplished without over appropriation, although the waters of some major streams are reported to have been wholly appropriated at the present.[96] Furthermore, the basic rule of "first in time is the first in right" still applies,[97] so that not all holders of the "certificates of adjudication" produced by the Water Rights Adjudication Act of 1967[98] will always be entitled to the full measure of the waters adjudicated to them.

B. *Validation of Water Rights Acquired Before Common Law Reception*

In terms of the currently prevailing system of Texas water rights adjudication as just described, claims based on laws in effect in Texas prior to the reception of the common law are "non-statutory" because they do not arise under permits or certified filings.[99] Such historical claims were therefore forfeited unless filed with the Texas Water Commission on or before September 1, 1969, and were additionally subject to the quantitative ceiling of maximum beneficial use in a calendar year between 1963 and 1967.[100] Leaving aside for a moment the question of the constitutionality of the latter limitation as applied to Spanish or Mexican fixed-quantity water rights in excess of riparian entitlements, we are thus dealing with a transitory phenomenon earmarked for extinction through assimilation or prescription.

The classification of Spanish and Mexican water rights within the category of non-statutory rights presents greater problems. *Motl*, we recall, had held the Spanish and Mexican irrigation system prevailing in Texas before the adoption of the common law to have been riparian

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96. *See* Lower Colorado River Auth. v. Texas Dep't of Water Resources, 689 S.W.2d 873 (Tex. 1984).

97. TEX. WATER CODE. ANN. § 11.027 (Vernon Supp. 1986).

98. *Id.* § 11.323.

99. *See* Caroom & Elliot, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183, 1185-86 (1981).

100. *See* TEX. WATER CODE ANN. § 11.303(b) (Vernon Supp. 1986).

in nature.[101] If that classification had continued to prevail, Spanish, Mexican, and Republic of Texas water rights vested as of March 16, 1840, would simply have been integrated into the category of riparian rights appurtenant to land passing out of the Texas public domain between that date and July 1, 1895.[102]

Valmont, we have already noted, reversed *Motl* in this respect, and held that the Spanish and Mexican irrigation system prevailing in trans-Nueces Texas until the introduction of the common law had *not* been riparian in nature.[103] That immediately raised the further question whether riparian rights automatically attached to *all* riparian lands in Texas when the common law was received, or whether such rights became appurtenant merely to lands which were still part of the public domain of the Republic of Texas on March 16, 1840.[104] This question had not been ventilated judicially before *Valmont* for the simple reason that if Spanish and Mexican water rights had been riparian before the introduction of the common law as stated in *Motl*,[105] their survival was assured in any event as vested property rights.[106]

There was, however, California authority in point. In *Lux v. Haggin*,[107] it had been held that the reception of the common law in California by legislative enactment dated April 13, 1850, "operated . . . a transfer or surrender, to all riparian proprietors, of the property of the state, if any she had, in innavigable streams, and the soils below them."[108] When Chief Justice Pope undertook to reexamine Chief Justice Cureton's assumption in *Motl* that the system of irrigation prevailing in Texas before the reception of the common law had been riparian in nature,[109] he was immediately faced with the question of

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101. *See Motl v. Boyd*, 116 Tex. 82, 104, 107-08, 268 S.W. 458, 465, 467 (1926).

102. Or, more accurately in my submission, as stated earlier in footnote 28, July 29, 1895.

103. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

104. *See supra* n.9.

105. *See* Motl v. Boyd, 116 Tex. 82, 104, 107-08, 286 S.W. 458, 465, 467 (1926).

106. *See* TEX. WATER CODE ANN. §§ 11.001(a), 11.303, 11.323 (Vernon Supp. 1986); Irrigation Act of Mar. 19, 1917, ch. 88, §§ 6-7, 1917 Tex. Gen. Laws 211, 212-13; Irrigation Act of Apr. 9, 1913, ch. 171, § 14, 1913 Tex. Gen. Laws 358, 361-62; Irrigation Act of Mar. 9, 1895, ch. 21, §§ 6-7, 1895 Tex. Gen. Laws 21, 22, 10 H. GAMMEL, LAWS OF TEXAS 751, 752 (1898); Irrigation Act of Mar. 19, 1889, ch. 88, § 5, 1889 Tex. Gen. Laws 100, 101, 9 H. GAMMEL, LAWS OF TEXAS 1128, 1129 (1898).

107. 10 P. 674 (Cal. 1886).

108. *Id.* at 721.

109. *See* Motl v. Boyd, 116 Tex. 82, 104, 107-08, 286 S.W. 458, 465, 467 (1926). *But see*

whether there had been a like "transfer or surrender" of public water rights in Texas.

The Republic, we recall, had received the common law by Act of Congress of January 20, 1840, effective March 16 of that year.[110] Since irrigation water rights were, by the common law as applied in Texas, automatically appurtenant to riparian land, surface grants of riparian lands patented by the Republic or the State of Texas on and after that date carried riparian water rights with them unless these rights had been severed from the fee estate and reserved to the public by statute or lawful stipulation. For this reason, and because riparian irrigation waters were not severed from the surface estate until 1889 to 1895, all Texas patents to riparian lands issued between 1840 and these latter dates carried riparian irrigation rights with them.

But if irrigation water rights were part and parcel of riparian lands under the common law, why did not the reception of the common law in Texas automatically attach such rights to *all* lands in private ownership in Texas at the common law reception date, irrespective of the date of their severance from the public domain? *Valmont* involved a variant of this argument, to the effect that the reception of the common law had operated as a "relinquishment of irrigation waters" by the Republic.[111] Chief Justice Pope rejected this proposition, and assigned two reasons for so doing. First, he said, a series of Texas decisions had established "the solid premise that grants from Spain, Mexico, and Tamaulipas are governed by the law of the sovereigns when the grants were made."[112] Secondly, he referred to another statute enacted by the same Congress which adopted the common law in 1840. That statute regulated actions of trespass to try title to land.[113] It provided that where disputes as to land rights arose "under the

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State v. Valmont Plantations, 346 S.W.2d 853, 881 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

110. Law of Jan. 20, 1840, §§ 1, 2, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1898).

111. State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

112. *Id.* at 855 (citing Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (1958); Rudder v. Ponder, 156 Tex. 185, 293 S.W.2d 736 (1956); State v. Balli, 144 Tex. 195, 190 S.W.2d 71 (1944); Manry v. Robison, 122 Tex. 213, 56 S.W.2d 438 (1932); Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932); State v. Grubstake Investment Ass'n, 117 Tex. 53, 297 S.W. 202 (1927); Mitchell v. Bass, 33 Tex. 260 (1870)).

113. Law of Feb. 5, 1840, 1840 Tex. Gen. Laws 136, 2 H. GAMMEL, LAWS OF TEXAS 310 (1898).

laws in force before the introduction of the common law," such disputes were to be resolved by "the principles of the law or laws under which the same accrued, or . . . were regulated, or in any matter affected."[114] Chief Justice Pope held these authorities to establish the general proposition that the law applicable to the water rights of Spanish and Mexican land grants in Texas is "[t]he law of Spain and Mexico at the time of each grant."[115] With respect, a further consideration tending in the same direction might be added.

The reception statute itself had exempted from its ambit "such [l]aws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas."[116] These laws were of course subject to *legislative* abrogation and modification as to post-independence grants, and they had been largely superseded by the Constitution[117] and laws of the Republic in 1840.[118] The reservation clause in the Texas common law reception statute was intended, therefore, not to affirm the continuing operation of the Coahuiltexan colonization laws as the legal basis for future grants, but to confirm their continued effectiveness as the legal measure of past ones. This further argument, which was not available in *Valmont* for geographic reasons, lends additional strength to Chief Justice Pope's holding that the irrigation rights of Spanish and Mexican grants in Texas are governed by the law of Spain and Mexico "at the time of each grant."[119]

It follows that the reception of the common law in 1840 did not, as such, confer riparian irrigation water rights on riparian land grants of the Spanish and Mexican era. For purposes of preservation through recordation as required by the Water Rights Adjudication Act,[120]

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114. *Id.* § 6, 1840 Tex. Gen. Laws at 137, 2 H. GAMMEL, LAWS OF TEXAS at 311.

115. State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

116. Law of Jan. 20, 1840, § 2, 1840 Tex. Gen. Laws 3, 4, 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1898).

117. *See* TEX. CONST., General Provisions § 10 (1836). This provided for the granting of one league and one labor of land to all married heads of families qualifying as citizens of Texas on March 2, 1836, and for lesser grants to single Texans. *See id.*

118. Indigenous Texas land grant legislation even antedates independence from Mexico. *See* Ordinance and Decree to Raise a Regular Army § 5, 1835 Tex. Gen. Laws 21, 22, 1 H. GAMMEL, LAWS OF TEXAS 925, 926 (1898); *see also* W. GOUGE, THE FISCAL HISTORY OF TEXAS 37-93 (1969) (originally published 1852) (caustic but not inaccurate account of early land grant policy and legislation of Republic of Texas).

119. State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

120. *See* TEX. WATER CODE. ANN. § 11.303(a)(4) (Vernon Supp. 1986).

water rights claimed to have arisen in the Spanish and Mexican eras had to be ascertained, even at this late date, in terms of the water law of Spain and Mexico prevailing at the time and place of the grant of the surface estate pertinent to them.

C. *Proving Spanish and Mexican Water Law in Texas*

As we have just seen, the water rights attaching to and arising out of grants of surface estates in Texas before the reception of the common law are governed by Spanish and Mexican law as it stood at the time and place of the grant. When adjudicating water rights which are claimed to have arisen before March 16, 1840, it is necessary, therefore, to determine the contents of Spanish and Mexican water law prevailing at the appropriate time and place.

Establishing the law of another country for the limited purpose of ascertaining rights claimed to have been acquired pursuant to grants made by prior territorial sovereigns is governed by rules that have developed independently of those regulating the proof of foreign country law in general.[121] As Chief Justice Roberts said in *State v. Sais*:[122] "Where one government succeeds another over the same territory, in which rights of real property have been acquired, the preceding government is not a foreign government, whose laws must be proved in the courts of the succeeding government."[123] When adjudicating rights claimed to have been acquired under the law of the former sovereign, he said, it was the duty of the *court* "to know and follow the law existing in any part of the present limits of this State, at the time, and under which, a title to land was acquired."[124]

The law of the former territorial sovereign is thus domestic law and within the judicial notice of the court.[125] It can be established, like domestic law in general, by brief and argument of counsel in combination with the judicial notice of the court, usually assisted by reliance on learned treatises. The antebellum Supreme Court of Texas, in particular, developed considerable familiarity with some aspects of Span-

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121. *See* FED. R. CIV. P. 44.1; TEX. R. CIV. P. 184a; TEX. R. EVID. 203; *see also* Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619, 621-25 (1978) (proof of law of former sovereign).

122. 47 Tex. 307, 318 (1877).

123. *Id.*

124. *Id.*

125. *See* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 201 n.1 (1984).*

ish and Mexican land law, and Chief Justice Hemphill was able to use Spanish language civil law authorities in the original.[126]

Additionally, Texas courts initially relied in this context on a humbler variant of expert testimony. To quote from another opinion by Chief Justice Roberts: "The practice has long prevailed in our courts, of receiving the evidence of intelligent Mexicans, who were not lawyers, in reference to the laws of Spain and Mexico, in litigation pertaining to lands."[127] The "Old Alcalde" went on to observe that such witnesses often evinced "a creditable intelligence relating to the laws, as deduced from the conduct of the officers who administered them," and that their testimony was therefore of value "in giving information as to the previous or contemporary construction given to the laws of Spain and Mexico, by the officers who executed them."[128] He declined, however, to accept such lay observer evidence of judicial and administrative behavior as proof of Spanish and Mexican law, "for it is the business of the courts of Texas to know and expound the laws pertaining to the rights to land situated in Texas."[129]

How, it might be asked in retrospect, were the courts to master that task? Testimony by Mexican professional lawyers with local experience was unavailable for the simple reason that there had never been a properly qualified Spanish or Mexican lawyer in residence in Spanish or Mexican Texas.[130] Securing such witnesses from Mexico itself was probably not feasible for reasons of litigation economy. Eyewitness lay testimony was, we have just seen, held to be of limited value. It was, furthermore, bound to become increasingly unavailable through the passage of time as first-hand judicial experience developed in the formative era of Texas law.

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126. *See* Trevino v. Fernandez, 13 Tex. 630, 654-60 (1855). In this opinion Chief Justice Hemphill corrected a serious error as to the nature of title by composition, committed by the Court in McMullen v. Hodge, 5 Tex. 34, 80 (1849). *See id.* at 654-60 (relying on faulty translation of Spanish law in 1839 text by J. White).

127. State v. Cuellar, 47 Tex. 295, 304-05 (1877).

128. *Id.* at 305.

129. *Id.*

130. *See* H. BAADE, *Numero de Abogados y Escribanos en la Nueva Espana, la Provincia de Texas y la Luisiana*, in MEMORIA DEL III CONGRESO DE HISTORIA DEL DERECHO MEXICANO 119, 125 (1984). Thomas Jefferson Chambers, the only duly licensed lawyer in Mexican Texas, was initially permitted by special act of the state legislature to take an examination for admission to the bar although he had no university degree, but was some three years later admitted to practice by another special act which dispensed with the examination requirement. *See* Decree No. 151, Sept. 22, 1830 and Decree No. 245, Jan. 4, 1834, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 162, 226 (1839).

It is surprising and disturbing, therefore, to find the "Old Alcalde" actually opposing Spanish and Mexican law as an academic subject at the University of Texas, which he was largely instrumental in founding in 1882.[131] Speaking as the senior professor of law at the annual meeting of the Texas Bar Association in November, 1884, he stated that "the Spanish civil law, so far as it enters into the rights of property in Texas, [will have] to be learned in the course of practice, as they might be practically required in attending to business in our Courts."[132] His own familiarity with the subject is further demonstrated by his detailed lecture notes, which have been preserved; however, Roberts' "list of books of authority to be studied for candidates for admission to practice before the state supreme court omits any text on Spanish or Mexican law, although several were available in the English language at the time."[133]

Whatever the motives for such an unhelpful attitude, its effects were soon manifest. As Professor McKnight has noted, "the thread of Hispanic learning, once gained, seems to have been lost in the period following the Civil War."[134] Even as recently as 1927, Dean Hildebrand did not devote more than a few lines of his study of riparian water rights in Texas to Spanish and Mexican water law.[135] Decisions continued to cite domestic judicial precedent which in turn relied on other decisions plus a few references to English language civil law texts.[136] The original sources were largely forgotten.

All of that, however, was to change completely after the second

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131. *See* Roberts, *A History of the Establishment of the University of Texas*, 1 SW. HIST. Q. 233 (1898).

132. Roberts, *Legal Education and Admission to the Bar*, PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE TEXAS BAR ASSOCIATION 43, 47 (1884).

133. *See* Baade, *Law at Texas: The Roberts-Gould Era (1883-1893)*, 86 SW. HIST. Q. 161, 180 n.49 (1982). The leading English language text on Spanish and Mexican law then in use was J. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES; TOGETHER WITH THE LAWS OF MEXICO AND TEXAS ON THE SAME SUBJECT. TO WHICH IS PREFIXED JUDGE JOHNSON'S TRANSLATION OF AZO AND MANUEL'S INSTITUTES OF THE CIVIL LAW OF SPAIN (1839) (mercifully known to lawyers as WHITE'S RECOPILACIÓN). A second classic reference work was G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO (1851).

134. McKnight, *The Spanish Water Courses in Texas*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 373, 374 (Forkosch ed. 1966).

135. *See* Hildebrand, *The Rights of Riparian Owners at Common Law in Texas*, 6 TEXAS L. REV. 19, 46 (1927).

136. *See* Motl v. Boyd, 116 Tex. 82, 100-11, 286 S.W. 458, 463-68 (1926).

world war, and by 1966, Professor McKnight was able to speak of a "revival of learning" on Spanish and Mexican water law in Texas jurisprudence.[137] This revival is due almost entirely to the "Valley Water Suit" which led to *Valmont* and which incidentally supplied much of the impetus for the Water Law Conferences at the University of Texas.[138] The course of that litigation has been meticulously chronicled by Garland Smith, who, as counsel for one of the major Lower Rio Grande water districts, had full access to the pertinent documentation.[139]

What was at stake there was the allocation of irrigation rights to the left-bank waters of the lower Rio Grande. The dispute was, in the main, between riparians who claimed under Spanish and Mexican surface grants and appropriators under Texas legislation enacted in and after 1889.[140] If Chief Justice Cureton had been correct when he said, in *Motl*, that the Spanish and Mexican irrigation system prevailing in Texas up to 1840 was riparian in nature,[141] riparians of the lower Rio Grande holding under Spanish or Mexican surface grants had riparian rights senior to non-riparian prior appropriators. The same conclusion would follow if *Motl* had in this respect congealed into a rule of property or was otherwise binding as precedent.[142]

If, on the other hand, Spanish and Mexican law had not been riparian, no riparian rights would attach to any lower Rio Grande lands granted before March 16, 1840. These lands would be entitled only to their water rights, if any, under Spanish and Mexican law, and to

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137. McKnight, *The Spanish Water Courses in Texas*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 373, 374 (Forkosch ed. 1966).

138. *See* Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 595-604 (1977) (annotated discussion of first three of these conferences, sponsored by University of Texas Law School).

139. *See id.* at 609, 620 n.139.

140. *See id.* at 612-14.

141. Motl v. Boyd, 116 Tex. 82, 108, 286 S.W. 458, 467 (1926).

142. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878-82 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962); Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 613 (1977). Fortunately for Texas (and for legal history), Chief Justice Pope did not accord *stare decisis* effects to Chief Justice Cureton's erroneous statements as to Spanish and Mexican water law in *Motl*. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878-82 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962). Bona fide riparian irrigators nevertheless received equitable consideration. *See* State v. Hidalgo County Water Control & Improvement Dist. No. Eighteen, 443 S.W.2d 728, 749 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).

such appropriative rights as had been perfected under Texas law in 1889 and thereafter. They would share these latter rights, according to the respective priorities, with non-riparian prior appropriators under the same laws.[143]

It seems difficult to believe, in retrospect, that a question of such significance should not have been presented promptly to Mexican counsel with special knowledge of, and experience in, historical water rights. Yet, according to Garland Smith, this was precisely what happened:

> There had been forty years of exhaustive research by Texas lawyers into Texas history, legal precedents and authorities, mostly in the nature of a poorly guided "paper chase" among Spanish language documents, to determine just what the Spanish-Mexican law on water was which ostensibly controlled the vast majority of the lands in and on the Texas side of the Rio Grande. There yet remained one undeveloped lead which might clarify Mexican law: one could ask a Mexican lawyer.[144]

The author goes on to narrate that in due course, the "anti-riparian" group in the Valley water litigation sent two attorneys to Mexico City to "seek out a competent Mexican attorney, who could state whether or not, under Mexican law, a right of irrigation was an appurtenance to Spanish and Mexican grants along the Rio Grande." Wisely, they chose Santiago Oñate,[145] and the rest is history.

We should add that *Valmont* is not the first case in which foreign legal experts were employed to establish the law of a former sovereign in Texas courts.[146] It is, however, the most prominent example of this mode of proof, which received judicial sanction in that very case.[147] As subsequent experience here and in other states has shown,[148] it

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143. Bona fide riparian irrigators received judicially created second-priority allocations, called "class B (equitable)" water rights. *See* State v. Hidalgo County Water Control & Improvement Dist. No. Eighteen, 443 S.W.2d 728, 749 (Tex. Civ. App.—Corpus Christi 1969, writ ref. n.r.e.); Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 618-27 (1977).

144. Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 614-15 (1977).

145. *See id.* at 615; *see also* State v. Valmont Plantations, No. B-20791 (Dist. Ct. of Hidalgo County, 93rd Judicial Dist. of Texas, Jan. 8, 1959) (2 Statement of Facts 594-786) (on file at University of Texas Law School, KF 228 T4 T41) (Oñate's testimony).

146. *See* McCurdy v. Morgan, 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ ref'd); State v. Sais, 47 Tex. 307, 318 (1877); State v. Cuellar, 47 Tex. 295, 304 (1877).

147. State v. Valmont Plantations, 346 S.W.2d 853, 878-82 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

148. *See, e.g.*, New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985);

would be quite unusual today not to employ legal experts, foreign and domestic, as well as legal and regional historians in test-case water litigation involving claims based on Spanish or Mexican law.

This new mode of establishing the water law of the former sovereigns in the Southwestern United States has produced a growing volume of legal and historical literature, frequently by authors who have served as experts or consultants in the more prominent recent cases.[149] The present study, too, must be acknowledged as partaking of that character. We will not, therefore, embark here upon a detailed discussion of the utility of the "new method" of establishing the law of the former Spanish and Mexican sovereigns in the United States. It is, however, the author's belief that the quality of legal discourse has—to say the least—not suffered by recent judicial efforts to focus, with expert assistance, more directly on the sources of Spanish and Mexican law in historical context.

IV. THE PUBLIC DOMAIN OF SPANISH AND MEXICAN TEXAS AND ITS DISPOSAL

A. *The Setting*

Spanish Texas was initially an extension of the Province of Coahuila within the Viceroyalty of New Spain. It achieved a degree of administrative automony from Coahuila in 1691 when the governor of that province received an additional appointment as governor of Texas. This personal union with Coahuila continued until 1722 when a separate governor was appointed for Texas.[150] For almost one century thereafter, Texas was a discrete administrative entity with its own governor and an ultramarine province of the Spanish Empire.

The Province of Texas was initially more or less rectangular in shape: a coastal strip along the Gulf of Mexico from present-day Corpus Christi to Lake Charles in Louisiana, bounded by the Nueces and the Calcasieu Rivers and extending inland from the Medina River slightly west of San Antonio to the Arroyo Hondo a few miles west of

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City of Los Angeles v. City of San Fernando, 537 P.2d 1250, 1274 (Cal. 1975); *In re* Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252-54 (Tex. 1984).

149. *See* M. MEYER, WATER RIGHTS IN THE HISPANIC SOUTHWEST, A SOCIAL AND LEGAL HISTORY, 1550—1850, at xii-xiii (1984); Taylor, *Land and Water Rights in the Viceroyalty of New Spain*, 50 N.M. HIST. REV. 189 (1975).

150. *See* V. ROBLES, COAHUILA Y TEXAS EN LA ÉPOCA COLONIAL 4, 473-74 (1938).

Natchitoches. Its first capital was actually the *presidio* (fort) of Los Adaes, in what is now Louisiana.[151] The Hispanic population of this relatively narrow strip of Gulf hinterland never rose much above 3,000 and was substantially below that figure at various times.[152] In 1746, when José de Escandón commenced the settlement of the Colony of Nuevo Santander, the northern boundaries of his colony were established at the Nueces River, and Texas expanded accordingly to the left bank of that river.[153]

There were only three population centers in Spanish Texas: Nacogdoches, San Antonio, and Bahía de Espíritu Santo (now Goliad).[154] Laredo, on the left bank of the Rio Grande, was part of the Colony of Nuevo Santander.[155] The El Paso region, to the West, came partly under the jurisdiction of Nueva Viscaya and partly under that of Nuevo México.[156] Some permanent settlements north of the area here described were attempted, but none survived.

With the exception of Laredo and the "Nueces Strip" which were directly subject to the Viceroy and to the Audiencia of New Spain in Mexico City,[157] Texas belonged, for the last half century of Spanish rule, to the Internal Provinces of New Spain. This was an organizational framework established in 1776 primarily for the coordination of the security and defense of the sparsely settled territories of the Mexican Northeast and Northwest. The Internal Provinces were governed, as to military and political matters, by a Commandant General in direct communication with the Council of the Indies and were thus

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151. *See id.* at 8-9, 514; H. BOLTON, TEXAS IN THE MIDDLE EIGHTEENTH CENTURY 4-5 (1970) (originally published 1915).

152. *See* V. ROBLES, COAHUILA Y TEXAS EN LA ÉPOCA COLONIAL 528 (1938); *see also* Tjarks, *Comparative Demographic Analysis of Texas, 1777-1793*, 77 SW. HIST. Q. 291, 329 (1974).

153. *See* V. ROBLES, COAHUILA Y TEXAS EN LA ÉPOCA COLONIAL 7-8 (1938).

154. *See id.* at 528; G. HINOJOSA, A BORDERLANDS TOWN IN TRANSITION, LAREDO, 1755-1870, at 3-7 (1983).

155. *See* H. BOLTON, TEXAS IN THE MIDDLE EIGHTEENTH CENTURY 59 (1970) (originally published 1915); V. ROBLES, COAHUILA Y TEXAS EN LA ÉPOCA COLONIAL 3 (1938).

156. *See* J. BOWDEN, SPANISH AND MEXICAN LAND GRANTS IN THE CHIHUAHUAN ACQUISITION 157 (1971); *see also* Owen v. Presidio Mining Co., 61 F. 6 (5th Cir. 1893).

157. The *cédula* of September 5, 1791, on clandestine sales and cessions in defeat of the *alcabala*, for instance, was sent to Laredo by order of Viceroy Revilla Gigedo, without the intermediacy of the Commandant General of the Internal Provinces. *See* 4 SPANISH ARCHIVE TRANSCRIPTS OF LAREDO 1033-41 (typescript copy, St. Mary's University, San Antonio, Texas). Other legislative instruments in the Laredo Archives appear to conform to this pattern without exception. *See generally* Wilcox, *The Spanish Archives of Laredo*, 49 SW. HIST. Q. 341 (1946).

independent, at least in principle, of the Viceroy of New Spain.[158] Exceptions were made from this rule as to individual Viceroys with Northern experience.

The Commandant General of the Internal Provinces resided at Chihuahua City, with interims in Arizpe; however, due to the predominantly military character of his office, his headquarters did not develop into a regional capital. He exercised appellate jurisdiction from the governors' courts in military matters, but with that exception, the appellate tribunal of the Internal Provinces in civil and criminal matters was the Audiencia of Guadalajara.[159] A member of Audiencia also had exclusive jurisdiction to make land grants in Texas until this function shifted to the Intendant of San Luis Potosí after 1786.[160]

Mexico achieved independence from Spain in 1821 and initially preserved the centralized form of government inherited from the mother country.[161] After an episodic phase of monarchy under Emperor Itúrbide,[162] however, it adopted a federal form of government under the Constitution in 1824.[163] In the federal period, Texas was united once more with its mother province as the State of Coahuila y

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158. *See generally* M. SIMMONS, SPANISH GOVERNMENT IN NEW MEXICO 9-50 (1968); Loomis, *Commandant of the Internal Provinces: A Preliminary List*, 11 ARIZ. AND THE WEST 261 (1961).

159. *See* Royal Order and Instructions of Aug. 22, 1776, §§ 8-9, *reprinted in* 1 R. VELASCO CEBALLOS, LA ADMINISTRACIÓN DE D. FREY ANTONIO MARÍA DE BUCARELI Y URSÚA 332, 335-36 (Publicaciones del Archivo General de la Nación, vol. 29, 1936); *see also* T. de la Croix, Proclamation of Aug. 13, 1777 (Bexar Archives, General Governmental Publications, 1730-1799, filed according to date at University of Texas, Austin).

160. Royal Instruction of Oct. 15, 1754, § 1, and Intendancy Ordinance of Dec. 4, 1786, art. 81, in M. GALVÁN, ORDENANZAS DE TIERRAS Y AGUAS 29, 30, 35-36 (2d ed. 1844). Texas, along with Coahuila, had not been assigned to an intendancy district initially. On December 27, 1789, Viceroy Revilla Gigedo ordered these two provinces to be included in the Intendancy of San Luis Potosí. *See* H. PIETSCHMANN, DIE EINFÜHRUNG DES INTENDANTENSYSTEMS IN NEU-SPANIEN 122 n.10 (1972); *see also* Saberiego v. Maverick, 124 U.S. 261, 285-89 (1888).

161. *See* F. TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808-1973, at 107-09, 120-22 (1973); *see also id.* at 113-16 (Plan of Iguala).

162. *See id.* at 120-22; *see also id.* 124-44 (Constitutional Bases and Provisional Political Regulations of the Mexican Empire, Feb. 24 and Dec. 18, 1822); S. Austin, Laws, Orders and Contracts for Austin's Colony, Introduction, 1829 Tex. Gen. Laws 3, 8-9, 1 H. GAMMEL, LAWS OF TEXAS 3, 8-9 (1898) (originally written in 1829), *reprinted in* D. B. GRACY, ESTABLISHING AUSTIN'S COLONY 7-9 (1970).

163. *See* Federal Constitution of the United Mexican States, 1824 Tex. Gen. Laws 72, 1 H. GAMMEL, LAWS OF TEXAS 72 (1898).

Texas,[164] which broke apart in 1836 when Texas achieved independence. The Texas Revolution was to a considerable extent a reaction to the renewal of centralism in Mexico, and thus, the centralist Mexican Constitution of December 30, 1836, did not become effective in Texas.[165]

It follows that surface land titles and water rights in Texas were subject to three different legal systems in Spanish and Mexican times: the law of Spanish Texas, later of the State of Coahuila y Texas in the area described above as the Spanish Province of Texas; the law of Nuevo Santander and later, of the State of Tamaulipas, in the area between the Nueces and the Rio Grande; and the law of Nuevo México or of Nueva Viscaya (later the State of Chihuahua) in the West. These geographical divisions are of some significance for water rights adjudications even today primarily because, due to the enactment of state colonization legislation in the federal period (1824-35), the laws governing the disposition of the public domain diverged from each other. As will be seen, however, Mexican colonization legislation of this era was not a comprehensive codification of public land and water law but was an organic extension of the pre-existing system inherited from the Spanish period.[166]

We will start, therefore, with a discussion of the nature and sources of the legal system of Spanish Mexico (and hence, of Texas while under Spanish rule). This will be followed by a description of Spanish and Mexican law relating to the disposition of the public domain in the Mexican Northeast, including but not limited to the colonization legislation of the Mexican Empire and Republic, and of the Mexican states of Coahuila y Texas and Tamaulipas. To the extent possible, we will focus on legal provisions relating to the allocation of water rights incident to the granting of land and the establishment of population settlements. Finally, in a separate part of this study, we will discuss the public water law, the water grants law, and the water

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164. *See* V. ROBLES, COAHUILA Y TEXAS DESDE LA CONSUMACIÓN DE LA INDEPENDENCIA HASTA EL TRATADO DE PAZ DE GUADALUPE HIDALGO 167-68 (1945).

165. *See* Texas Declaration of Independence of Mar. 2, 1836, 1836 Tex. Gen. Laws 3, 1 H. GAMMEL, LAWS OF TEXAS 1063 (1898).

166. Article 2 of Provisional Political Regulations of the Mexican Empire had confirmed the continued applicability of Spanish law and legislation proclaimed in Mexico until February 24, 1821, unless or until repealed subsequently thereto. *See* F. TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808-1973 (1973).

rights law of the Mexican North from the first settlement of Texas to the Texas Revolution of 1835 and 1836.

B. *Spanish and Mexican Law*

The law of New Spain, pre-1821 Spanish law in effect in Mexico, is generally referred to as the law of Castile and of the Indies. The latter term refers to the ultramarine possessions of the Spanish Crown, including those in the Americas and the Philippines but excluding some islands. Constitutionally, these ultramarine possessions were part of the Crown of Castile,[167] and their legal orders were derived from Castilian law to the exclusion of other peninsular *fueros*, or systems of law of local applicability.[168]

Nevertheless, Spanish ultramarine law, the law of the Indies, was not at any given time necessarily identical with Castilian law. Substantial identity of norms of general applicability can be assumed until 1614, but pursuant to a royal *cédula* (decree) dated December 15 of that year,[169] Peninsular legislation thereafter became effective overseas only if enacted (or reenacted) by the Council of the Indies. This *cédula* is but one manifestation of the geographical division of governmental, judicial, and legislative powers between the Councils of Castile and of the Indies which eventually led to the development of a special corpus of "Indian" law that was peninsular (metropolitan) in origin but applicable only overseas.

The chief repository of this "law of the Indies" is the *Recopilación de Leyes de los Reynos de las Indias* (R.I.), a selective and systematic rearrangement of the major relevant texts up to 1680. The R.I. contains some 6,385 provisions, representing a composite edition of about twice as many enactments, and these, in turn, were selected from over 400,000 *cédulas* or other legislative instruments pertaining to the Indies.[170] As will be seen, it is frequently possible to reconstruct the "legislative history" of a *recopilada*, *i.e.*, of an enactment incorporated into the R.I. and hence effective throughout the Indies, by tracing its legislative antecedents.

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167. Bull of Donation of May 4, 1493, RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS [R. I.] Book 3, Title 1, Law 1 (1681 ed).

168. The 1493 cession was made specifically to the Castilian Crown. *See* R.I. Book 3, Title 1, Law 1. Thus, only Castilian law applied. *See* R.I. Book 2, Title 15, Law 66.

169. *See* Decree of December 15, 1614, R.I. Book 2, Title 1, Laws 39-40.

170. *See* C. García Gallo, *La Legislación Indiana de 1636 a 1680 y La Recopilación de 1680*, 9 BOLETÍN MEXICANO DE DERECHO COMPARADO 297, 298-99 (1976).

The R.I. is divided into nine books, and covers mainly what would now be considered public law. Various titles of the fourth book, dealing with population settlements, land grants, and public places, are of central importance for present purposes, and will be discussed below where appropriate. The sixth book relates to Indians, and will also require brief attention below. More fundamentally, however, the R.I. also contains a key provision designating the sources of law to be resorted to for the resolution of disputes and, incidentally, the relation of these sources to each other. These are, in the order of precedence, the *Recopilación* of the Indies, prior "Indian" legislation not repealed, and the laws of the kingdom of Castile in conformity with the *Leyes de Toro*. Subsequent legislation takes precedence over the R.I. whenever pertinent.[171]

The reference to the *Leyes de Toro* establishes, again by indirection, the sources and the precedence of pre-1680 Castilian private law so far as applicable in the Indies. These are, again in the order of precedence, the *Leyes de Toro* themselves, the *Ordenamiento de Alcalá*, the *Fueros Municipales y Reales*, and, finally, the *Siete Partidas*. As a practical matter, however, the reference to legislation not repealed by the *Recopilación* of the Indies included the *Nueva Recopilación* of the kingdom of Castile, which was adopted in 1567 and thus needed no separate approval by the Council of the Indies.[172] Without sacrifice of accuracy, these ground rules can be summarized in two basic propositions: the law of the Indies prevailed over Castilian law in Spanish America, and later law prevailed over earlier law but usually did so without express repeal.

Justinian's codification of the Roman law, the *Corpus Iuris Civilis* of 533 A.D., was not a formal source of the law of the Indies, either directly or by reference to Castilian law. The reason for this is in part historical: In 533 A.D., the Western empire had been lost, and the *Corpus Iuris Civilis* could not be formally enacted in the Iberian Peninsula. Nevertheless, Roman law is reflected in many rules of Castilian law, including some key provisions of the *Siete Partidas* relating to the ownership of beds of public streams.[173]

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171. *See* R.I. Book 2, Title 1, Laws 1-2; *id.* Book 2, Title 15, Law 66.

172. *See* G. MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 48 (1971).

173. *See* R.I. Book 3, Title 28, Law 31 (Siete Partidas). This provision is almost literally copied from Justinian's Institutes (J. INST. 2.1.23).

Even more importantly, until about the middle of the eighteenth century, Latin was the language, and Roman law the substance, of civil law instruction at the Spanish and ultramarine universities. Justinian's codification furnished the text, and the professor occasionally referred to the *derecho real*, *i.e.*, the Royal law sanctioned by the King of Spain (also called *derecho patrio*, or law of the country), by way of illustration. The standard book of instruction in use in Peninsular law faculties was *Institutionum Imperialium Commentarius*, by A. Vinnius, a four-volume commentary on Justinian's Institutions written by a Netherlands scholar.[174]

All this changed in the latter half of the eighteenth century. At a transitory stage, commentaries of Justinian's *Institutes* were expanded through the inclusion of references to the *derecho real* (or *patrio*), which in Peninsular editions did not include the legislation of the Indies. An exception in this respect is *Elucidationes ad Quatuor Libros Institutionum Imperatoris Justiniani Opportune Locupletatae Legibus, Decisionibusque Juris Hispani* by J. Magro, posthumously completed by E. Bentura Belaña and published in Mexico in 1787 with some annotations to the law of the Indies which, however, their author judged to be insufficient.[175] This was one of the two sources on the "civil law" cited in the opinion of Justice Norvell in *McCurdy v. Morgan*.[176]

By the end of the eighteenth century, Royal insistence on teaching in the *derecho patrio* had brought about a fundamental change. The order of instruction was almost exactly reversed, with the *derecho patrio* (in Castilian) furnishing the text, and Roman law supplying the occasional examples. A Castilian-language work, Juan Sala's *Ilustración del Derecho Real de Espana*, which first appeared in 1803, became the standard book of instruction as well as one of the leading sources for practitioners.[177] A Mexican edition of this work is the other "civil law" authority cited in *McCurdy*.[178] After setting forth

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174. *See* Perset Reig, *Derecho Romano y Derecho Patrio en Las Universidades del Siglo XVIII*, 45 ANUARIO DE HISTORIA DEL DERECHO ESPAÑO 349, 456 (1970).

175. *See* 1 J. MAGRO, ELUCIDATIONES AD QUATUOR LIBROS INSTITUTIONUM IMPERATORIS JUSTINIANI OPPORTUNE LOCUPLETATAE LEGIBUS, DECIONIBUSQUE JURIS HISPANI (1787).

176. 265 S.W.2d 269, 271 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

177. *See* Perset Reig, *Derecho Romano y Derecho Patrio en Las Universidades del Siglo XVIII*, 45 ANUARIO DE HISTORIA DEL DERECHO ESPAÑO 336-38, 468 (1970).

178. *See* McCurdy v. Morgan, 265 S.W.2d 269, 271 (Tex. Civ. App.—San Antonio 1954, writ ref'd).

the relation of Mexican, "Indian," and Castilian law as outlined above, the 1845 edition of the "Sala Mexicano" states, with respect to Roman law:

> The Roman laws are not, and may not be called, laws in Spain. They are learned opinions, which may only be followed where there is a gap in the law, and to the extent that they are inspired by natural law and follow the Royal law (*derecho real*). The latter, not Roman law, is the *derecho común*, and neither the laws of the Romans nor those of other foreigners are to be used and observed.[179]

C. *The Public Domain and Its Disposal*

As just seen, the Indies were, constitutionally speaking, part of the Crown of Castile. This rule is codified in the R.I. As there stated, it rests on papal grant, and on "other just and legitimate titles."[180] The papal grant thus referred to was made by the Bull of Donation, or *Inter cetera*, of Pope Alexander VI, dated May 4, 1493.[181] It conferred upon the Kings of Castile and Leon, and upon their heirs and successors in perpetuity, dominion over the Indies beyond the so-called Tordesillas line. A legal consequence of this grant was that all territory in the Indies reduced to Spanish rule was Crown property, with the further consequence that all territory in the Indies not conceded by Royal grant pertained to the patrimony of the King, and to the Royal Crown.[182]

This Royal patrimony was abolished by the Spanish Constitution of 1812, which left the King merely a dotation out of public revenues and the ownership of the Royal palaces.[183] All other formerly Royal property was, by implication, merged with the general public domain, termed *bienes nacionales*.[184] Since this constitution (usually called the Cádiz Constitution) also applied throughout the Spanish Empire and,

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179. 1 SALA MEXICANO 159 (1845) (footnote omitted).

180. R.I. Book 3, Title 1, Law 1.

181. *See* Bull of Donation, May 4, 1493, *translated in* 1 J. SOLORZANO PEREYRA, POLITICA INDIANA ch. 10, §§ 23-24 (F. de Valenzuela ed. 1776); *see also id.* ch. 10-12 (discussing papal grant).

182. *See* R.I. Book 4, Title 12, Law 14.

183. *See* CÁDIZ CONSTITUTION OF 1812 arts. 213-14, *reprinted in* F. TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808-1973, at 60, 86 (1973).

184. *Id.* arts. 131-XVIII and 172-VII, *reprinted in* F. TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808-1973, at 75-76, 81-82 (1973).

specifically, in New Spain,[185] the Royal domain of New Spain was merged into the Spanish national domain. After the achievement of Mexican independence in September, 1821, the Spanish national domain situated in that country became part of the Mexican public domain. In the initial period following independence from Spain, Mexico had a centralist form of government and was even for a short time a monarchy. Although this centralist phase proved to be ephemeral, it was of considerable significance for Texas, since Austin's colony was established pursuant to Mexican Imperial legislation.

The Federal Constitution of the United Mexican States of October 4, 1824, did not contain express provisions as to the attribution of jurisdiction over the public domain.[186] A Federal Decree of August 4, 1824, dividing the public revenues between the federation and the states had, in effect, given the states the revenues derived from the public domain located in their respective territories, and Article 3 of the (Federal) General Colonization Law of August 18, 1824, empowered the states to enact laws and regulations for the colonization of lands which "appertain to them."[187]

As this legislation was adopted almost contemporaneously with the Federal Constitution itself, it was universally assumed at the time, and is held in retrospect, that under the federal form of government prevailing in Mexico between 1824 and 1837, the states were generally competent to regulate, and to dispose of, the public domain located within their borders, subject to a few restrictions.[188] State competence over the public domain included, specifically, the power to make grants of water for irrigation purposes.[189]

1. Disposal Under Spanish Rule

The legal characterization of the territories of the Indies as pertain-

185. *Id.* art. 10, *reprinted in* F. TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO, 1808-1973, at 61 (1973); *see also* T. ANNA, THE FALL OF ROYAL GOVERNMENT IN MEXICO CITY (1978); T. ANNA, SPAIN AND THE LOSS OF AMERICA (1983).

186. *See* Federal Constitution of the United Mexican States, 1824 Tex. Gen. Laws 66, 1 H. GAMMEL, LAWS OF TEXAS 66 (1898).

187. *See* 1 M. DUBLÁN & M. LOZANO, LEGISLACIÓN MEXICANA 710; *General Colonization Law* of Aug. 18, 1824, 1824 Tex. Gen. Laws 97, 1 H. GAMMEL, LAWS OF TEXAS 97 (1898).

188. *See* Republic v. Thorn, 3 Tex. 499, 505, 508-09 (1849) (Hemphill, C. J.); PALLARES, LEGISLACIÓN FEDERAL COMPLEMENTARIA DEL DERECHO CIVIL MEXICANO at xiv (1897).

189. *See* E. Baz, *Algunas Questiones Juridicas Sobre Concesiones de Aguas*, 27 DIARIO DE JURISPRUDENCIA 637, 688 (1912).

ing to the Royal domain of the Kings of Castile gave rise to the fundamental rule of Spanish legislation on territorial property in Mexico that nobody could be a lawful owner without an original concession from the Crown.[190] While there were some exceptions to this rule, mainly in favor of sedentary Indians, post-1700 non-Indian surface land titles and water rights in the Mexican North under Spanish rule had to be based on grants from the Crown. With the nation or the appropriate state substituted for the Kings of Castile, the same rule applied under Mexican colonization legislation.

When examining the Spanish and Mexican law of land and water rights grants as it prevailed in the Southwestern United States before Texas Independence or annexation by the United States, it is necessary at the outset to abandon a fundamental misconception as to Spanish land grant policy that is deeply ingrained in mid-nineteenth century American judicial perceptions of this subject. To quote Justice M'Lean, speaking for a unanimous Supreme Court in *New Orleans v. United States*:

> It is well known that the policy of Spain in regard to a disposition of her public domain, is entirely different to that which has been adopted by the United States. We dispose of our public lands by sale; but Spain has uniformly bestowed her domain in reward for meritorious services, or to encourage some enterprise deemed of public utility.[191]

Nothing can be further from the truth. The Crown normally expected (and exacted) payment for grants out of the public domain, while donation land grants were available only under narrowly circumscribed conditions.

The basic rules on the disposition of the public domain in the ultramarine possessions of the Spanish Empire (the "Indies") are contained in Book 4, Title 12 of the *Recopilación* of the Indies, which is entitled "De la venta, composición y repartimiento de tierras, solares y aguas" (Of the sale, amicable compromise, and distribution of lands, lots, and waters). Especially as regards the donative distribution of lands, these rules are supplemented by other provisions of that codification, and by nineteenth-century Spanish as well as Mexican enactments cited and discussed below as appropriate. The sale and "*composición*" of public lands, on the other hand, was regulated in

190. *See* 1 J. L. MORA, MEXICO Y SUS REVOLUCIONES 207 (1836).
191. 35 U.S. (10 Pet.) 662, 735 (1836).

further detail by the Royal Instructions of October 15, 1754, and by regulations adopted subsequent thereto.[192]

a. Sales and "Compositions"

The caption of Book 4, Title 12 of the *Recopilación* of the Indies lists the sale and the amicable composition of public land and water rights before referring to gratuitous distributions. This evidences a central fact in the legal development of the Indies in general and of New Spain (Mexico) in particular: By the date of that compilation, 1680, the era of generous bounties out of the public domain to the conquistadores and their descendants was at an end. Once the conquest had been accomplished, the Crown came to regard the public domain as, in essence, another source of revenue.

In the initial period of settlement of the Mexican North, cattle and sheep raising lands were not granted as exclusive property, that is, without control over entries and exits. Even at that stage, however, it was a fairly typical tactic of large-scale cattle ranchers to usurp, as it were, the watering places within their grants and to deny competing cattlemen access to these. The classic description of this process of "squatting by ranchers" is F. Chevalier's seminal study on "Land and Society in Colonial Mexico."[193]

As Dr. Chevalier notes, the struggle for watering places was particularly vehement in the semi-arid North. Indian pueblo water rights were frequently threatened by the cattle and sheep grazing interests, and there are even some instances of diversions of creeks and rivers from irrigation lands to cattle ranches. The authorities frequently intervened, ordering restitution, and in some instances, the diverters were imprisoned. In general terms, however, the Royal authorities were powerless to stop this *de facto* division of the land and of its water resources between the "rich and powerful men of the North."[194]

The way out of this increasingly unmanageable *de facto* situation was the so-called process of "composition," the regularization of *de facto* land and water rights by application for formal titles which were

192. *See* M. GALVÁN, ORDENANZAS DE TIERRAS Y AQUAS 29-36 (2d ed. 1844).

193. *See* F. CHEVALIER, LA FORMATION DES GRANDS DOMAINES AU MEXIQUE, TERRE ET SOCIÉTÉ AUX XVIe-XVIIe SIÉCLES (1952), *translated as* LAND AND SOCIETY IN COLONIAL MEXICO, THE GREAT HACIENDA (1963) (without annotations). The references herein are to the French original.

194. *Id.* at 288.

routinely granted upon payment of a more or less substantial fee. That process was started in 1591.[195]

At the time of the initiation of this vast transformation of property rights in the Americas, the Viceroys and presidents of the Audiencias already had authority to make grants of land and water rights to private parties.[196] What followed was the large-scale adjudication of water rights, parallel to surface rights, in the process of composition. Such grants were sometimes made in general terms, to the waters (*aguas*) along with the lands (*tierras*); sometimes in the traditional terms of hydromeasure; and sometimes to the waters in place, such as all the sources encompassed by a stock ranch (*estancia*).[197]

Even where water rights were not adjudicated expressly, the adjudication of exclusive surface estates in individual property was to prove ultimately fatal to the water rights of the general public, and even of Indians, within the lands thus granted out of the Royal domains. The Law of the Indies, as we shall see in further detail below, provided expressly that the waters, pastures, and mountains (woods) of the Indies were to be common to Spaniard and Indian alike.[198] As recounted in a precedential decision (*acordado*) of the Audiencia of New Spain of May 22, 1756, "absolute ownership" rights were being used by the landowners to deny the Indians access to the pastures and mountains located in their *estancias*, and this had given rise to "repeated and frequent" litigation.[199]

The Audiencia now decided to reconcile these conflicting rights so as to prevent further expense and inconvenience. It ordered the lower courts to no longer permit the owners of stock ranches to be prejudiced in their mountains and pastures, while at the same time granting the Indians continued access to the forests for cutting such wood as was needed for their own home use.[200] Thus, as of 1756, the composition of cattle ranches even without express water rights effec-

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195. *See generally* de Solano, *El Régimen de Tierras y la Significación de la Composición de 1591*, in MEMORIA DEL IV CONGRESO INTERNACIONAL DE HISTORIA DEL DERECHO INDIANO 649 (1976). The basic *cédulas* are reproduced in this source. *See id.* at 661-62; *see also* R.I. Book 4, Title 12, Law 14 (*cédulas* codified).

196. *See* R.I. Book 4, Title 12, Law 8.

197. *See* F. CHEVALIER, LA FORMATION DES GRANDS DOMAINES AU MEXIQUE, TERRE ET SOCIÉTÉ AUX XVIe-XVIIe SIÉCLES, 356-61 (1952).

198. *See* R.I. Book 4, Title 17, Law 7.

199. Audiencia of México, Acordado of May 22, 1756, *reprinted in* J. RODRÍGUEZ DE SAN MIGUEL, 2 PANDECTAS HISPANO-MEXICANAS 301-02 (1980) (originally published 1840).

200. *Id. See generally* J. M. Martínez Urquijo, *La Comunidad de Montes y Pastos en el*

tively closed the range and its watering places, *pro tanto*, to the general public, to competing ranchers, and even to Indians.

The prime motive behind the decision to "compose" squatters' holdings was the desperate financial need of the Spanish Crown towards the end of the sixteenth century. The monies to be taken in through the process of composition were openly designated as a contribution to the costs of governing and defending the Spanish Empire.[201]

The operation of this process in the Mexican North may be illustrated by two eighteenth-century *composiciones* in provinces in the Mexican North bordering upon Nuevo Mexico. On February 23, 1730, the Marquess of Aguayo (a former Governor of Texas) applied for the grant of formal title to some 115 *sitios de ganado menor*, or sheep-raising lots, in what were then the Provinces of Coahuila and Sonora.[202] These lands were then within the jurisdiction of the *Audiencia* of Guadalajara, a regional appellate tribunal, which exercised jurisdiction over land and water rights.[203]

After delimitation and attempted valuation *in loco*, the lands were placed at auction in the city of Guadalajara, and the bid of the Marquess at two pesos per *sitio* was increased by the representative of the Crown to a total of 250 pesos, plus tax. At that price, the sale was confirmed, and title was issued, with judicial possession following on April 18, 1731.[204] The low bid was justified by typical references to Indian depredations.[205] The title expressly included "*todas las aguas del río charcos chupaderos y ojos de aguas*" (all the waters of the river [Nazas], ponds, water ducts and springs) within the surface grant area.[206]

Our second example is from Texas: the Domingo Castelo *expediente*, recorded in the General Land Office. On February 9, 1764,

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Derecho Indiano, 23 REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO RICARDO LEVENE 93, 95-98 n.23 (1972).

201. *See* de Solano, *El Régimen de Tierras y la Significación de la Composición de 1591*, in MEMORIA DEL IV CONGRESO INTERNACIONAL DE HISTORIA DEL DERECHO INDIANO 649-51 (1976).

202. *See* E. GUERRA, TORREÓN, SU ORIGEN Y SUS FUNDADORES 7, 10 (1932).

203. *See* M. SIMMONS, SPANISH GOVERNMENT IN NEW MEXICO 9-50 (1968); Loomis, *Commandant of the Internal Provinces: A Preliminary List*, 11 ARIZ. AND THE WEST 261 (1961).

204. *See* E. GUERRA, TORREÓN, SU ORIGEN Y SUS FUNDADORES 9 (1932).

205. *See id.* at 17.

206. *See id.* at 23.

Domingo Castelo, self-described as a city councillor (*regidor*) of San Antonio, applied for a grant of a tract of ranch land called San Lucas, which was asserted to be vacant. After recording some *ex parte* evidence to the effect that these lands were in fact vacant, the petition was forwarded to the competent land judge, who was the senior justice of the Audiencia of Mexico. At the instruction of his office, formal proceedings for the adjudication of the lands were instituted. These included three public announcements of the intended sale, a proper survey, and a public auction.[207]

Once the matter had become one of public record, the President of the San Antonio Missions intervened, asserting the lands in question to be in use by Mission Indians.[208] In order to protect the rights of these Indians, he had his agent bid 100 pesos for the lands, surveyed as consisting of eleven *sitios*.[209] Domingo Castelo was unable to top this bid. The land judge and the Audiencia of Mexico confirmed the sale after raising the price *ex officio* to 150 pesos.[210]

The following should serve to translate the quantities of land here involved into today's terms. A *sitio de ganado menor*, or sheep-grazing grant, measured 3,333⅓ *varas* square, while a *sitio de ganado mayor*, or cattle-raising grant, was a square league, or 25 million square *varas*. The latter unit, the square league which could be divided conveniently into 25 *labores* of 1,000 *varas* square, became the standard measurement for Spanish grazing grants by the end of the eighteenth century, and was adopted as the standard unit for such grants by Mexican colonization legislation. One such "*sitio*," "league," or "headright," as it was known to "Anglo" settlers, was the equivalent of 4,428 acres, while a *labor* measured about 177.1 acres—slightly more than the 160-acre "quarter section" of United States homestead law.

Manifestly dissatisfied by the returns obtained through large-scale sales and "compositions" of the public domain, such as the ones just described, the Crown reorganized the public land sale system in 1754 and placed its administration under the Intendancy when that organization was created in 1786.[211] Soon after the latter reform, there was

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207. *See* General Land Office, Austin, Texas, 50 Spanish Collection 50-95.

208. *See id.* at 66v-68v.

209. *See id.* at 72-74v; 75v-76.

210. *See id.* at 66v; 89-94v; *see also* McMullen v. Hodge, 5 Tex. 34 (1849).

211. *See* Royal Instruction of Oct. 15, 1754 and Intendancy Ordinance of Dec. 4, 1786,

a detailed reexamination of public land sales in the jurisdiction of the Audiencia of Guadalajara, which at that time had acquired jurisdiction over Texas as well.[212] As a result of that investigation, the Crown ordered, by *cédula* dated February 14, 1805, that minimum prices be obtained for the sale of public lands. These were ten pesos per *sitio* for lands "without water, thirty for lands irrigable by means of wells, and sixty for those capable of regular irrigation."[213] That *cédula* marks the beginnings of the classification and pricing of land grants in terms of irrigability, which was later adopted by Coahuiltexan colonization legislation.

As has been indicated, the Marquess of Aguayo had bid 230 pesos for the equivalent of fifty-one *sitios* in 1731, and the San Antonio Mission Indians had bid one hundred pesos for eleven *sitios* in 1765. While neither of these bids had been upset at auction, both were raised by government action. This illustrates a central fact of the Spanish and Mexican borderlands at the times here material: In a subsistence economy, even the local squirarchy had no ready cash for the purchase of land.

In 1765, Domingo Castelo, a *regidor* of San Antonio, was unable to protect his land claim against a bid at nine pesos, one *real per sitio.* Almost four decades later, two members of the prominent San Antonio Isleño family of Arocha petitioned for a quantity of *sitios de ganado mayor* but had to desist from carrying their petition to title before the Royal authorities since they lacked the pesos to pay for eight such *sitios.*[214] Few, if any, grants of land in the size of a square league or more were ever made validly in Spanish Texas, for the simple reason that almost no one could pay the appraised value of the land.[215] Even more significantly for present purposes, the Texas records do not appear to contain any purchases in either of the two

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art. 81, *translated in* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 50-57, 59-61 (1895).

212. *See* M.G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 65 (1895).

213. *Cédula* of Feb. 14, 1805, *translated in* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 68, 72 (1895); *see also* Reloj Cattle Co. v. United States, 184 U.S. 624, 627-32, 637 (1902) (illustrating composition pursuant to that legislation in what is now southern Arizona).

214. *See* Francisco de Arocha to Governor Salcedo, Feb. 28, 1809, Bexar County Archives, LOBC-2, at 14-15 of typescript copy.

215. I respectfully disagree with V. TAYLOR, THE SPANISH ARCHIVES OF THE GENERAL LAND OFFICE OF TEXAS 27 (1955), as to the validity of the Menchaca-Hernández "grant" of

categories of land classified as irrigable by the *cédula* of February 14, 1805.[216]

b. Donative Distributions for Settlement

The first law of Book 4, Title 12 of the *Recopilación* of the Indies proclaims the general principle that the discoverers and settlers of the Indies are to be rewarded by grants of homes, lots, and lands so that they can live in comfort and convenience.[217] Other laws codified in that title stipulate that no land is to be granted to settlers who have abandoned prior settlements after residing therein for less than four years, that no lands granted to discoverers and *pobladores* are to be sold to churches, monasteries, or ecclesiastical entities; that applications of land grants are to be directed, at first instance, to municipal *cabildos*; that land grants are forfeited unless settled within statutory or contractual time periods; and that Indian rights are to be respected.[218] The remainder of Title 12 regulates the composition and sale of the public domain through appraisal and auction.[219]

Except as thus indicated, the basic rules relating to donation land grants and to municipal and communal property rights were codified in other titles of Book 4 of the *Recopilación* of the Indies, especially those dealing with the establishment of population settlements[220] and the governance of municipalities.[221] These two complexes of rules were causally interrelated, since donative grants to settlers and communal property rights were conditioned upon the existence of a lawful settlement.

New settlements could be established in two basic manners: by government decision,[222] or by contract (*capitulación*; *asiento*) with a colonizer.[223] San Antonio, Texas is the prime example of the former

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April 12, 1758, under Spanish law. This grant has been upheld by presumption based on undisputed possession. *See* Herndon v. Casiano, 7 Tex. 322, 336 (1851).

216. *See Cédula* of Feb. 14, 1805, *translated in* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 68, 72 (1895). The Arizona composition sale referred to in *Reloj Cattle Co. v. United States* included three *sitios* with running water. *See* Reloj Cattle Co. v. United States, 184 U.S. 624 (1902).

217. *See* R.I. Book 4, Title 12, Law 1.

218. *See id.* at Book 4, Title 12, Laws 2-3, 7-8, 10-11.

219. *See id.* at Book 4, Title 12, Laws 14-17.

220. *See id.* at Book 4, Title 5.

221. *See id.* at Book 4, Title 7.

222. *See id.* at Book 4, Title 7, Laws 1-2.

223. *See id.* at Book 4, Title 5, Law 6.

type of settlement. Escandón's *entradas* in Nuevo Santander (Tamaulipas) illustrate the latter. The minimum requirements for the granting of a contract of *asiento* were the obligation to provide at least ten settlers, with livestock as specified, the duty to appoint a priest and to equip the church with ornaments, and the necessity of providing security for the fulfilment of these contractual obligations.[224] Such contracts of *asiento* were well beyond the means of even most wealthy persons, and were in disuse in the late eighteenth century although they soon resurfaced as *empresario* contracts in Mexican colonization legislation. A third device for colonization, which was in effect a scaled-down model of the *asiento* (contractual) prototype[225] was widely used in New Mexico[226] but is of no significance for Texas.

The layout of new settlements and the distribution of lands within them were regulated in considerable detail by the *Recopilación* of the Indies. The starting point was the *plaza major* which in inland settlements was to be laid out in the center of the new community.[227] Lots for public buildings were to be set aside around the plaza, and streets laid out at right angles in all four directions.[228]

Once the site for the plaza and the public buildings had been chosen and the streets had been mapped, residential plots (*solares*) were to be laid out adjacent thereto, and distributed to the original settlers according to need and by lot or luck (*suerte*).[229] Next, a commons of appropriate size was to be laid on all four sides around these residences. This commons (*exido*) was to serve three purposes: the recreation of the settlers, the marshalling of their cattle for pasture, and the granting of lands to additional settlers in the future.[230]

In a like manner, a cow pasture (*dehessa*; *pasto boyal*) was to be laid out for field oxen and beef cattle. This pasture was to consist of

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224. *See id.*

225. *See id.* at Book 4, Title 5, Law 10.

226. *See* N.M. Stat. Ann. §§ 49-1-1; 49-7-1 to 49-10-6 (1978). This statute deals with the management of "grants of land in the state of New Mexico made by the government of Spain or by the government of Mexico to any community, town or pueblo." *Id.* § 49-1-1. Subchapters thereof contain special rules for seven expressly named "community" land grants. *See id.* at 49-7-1 to 49-10-6; *see also* United States v. Sandoval, 167 U.S. 278 (1897).

227. *See* R.I. Book 4, Title 7, Law 9.

228. *See id.*

229. *See id.* at Book 4, Title 7, Law 11.

230. *See id.* at Book 4, Title 7, Laws 7, 13-14. As employed here, "commons" refers to commonly-used lands generally. Unlike the *exido*, the English common lay beyond the arable lands and thus corresponded more nearly to the *realengos*.

low quality lands unfit for the raising of wheat or other useful fruit or vegetables.[231] *Dehessas boyales*, as the *Recopilación* of the Indies calls them, were the "common property" of the local inhabitants in the sense that the cattle of nonresidents could have been kept out of these pastures even after the harvest. The *Recopilación* also authorized the allotment of *dehessas*, or surplus lands, to new population settlements as part of their *propios*, or municipal endowment.[232]

After these allotments for the commons and the cow pasture had been made, the remaining lands within the *término*, or settlement area, were to be surveyed as to their suitability for irrigation or, in the alternative, for dry farming (*temporal*). Lands of both classes were then to be divided into *suertes*. Irrigable *suertes* were to be distributed to the original settlers, but a number of these were to be retained for the *propios*, or municipal fund, of the settlement.[233] The agricultural lands left over after this division were to be held in reserve for new settlers.

The *Recopilación* of the Indies provided expressly that these lands reserved for expansion of the community were to remain *baldías*, or part of the public domain, and subject to grant by Royal authority.[234] That rule was spelled out, in so many words, in the distribution of public lands at San Antonio in 1730-1731 and at Laredo in 1767.[235]

Historians and land grant lawyers in the Southwestern United States will have little difficulty in following the above scheme, since the pertinent rules of the *Recopilación* of the Indies as just summarized were routinely applied throughout that area. Perhaps the best illustration is Lota Spell's platting of the original plan of San Fernando de Bexar, as actually surveyed in July, 1731:[236]

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231. *See id.* at Book 4, Title 7, Law 14; *see also id.* Book 4, Title 12, Law 13 (directing cattle to be excluded from irrigable lands so as to promote wheat planting).

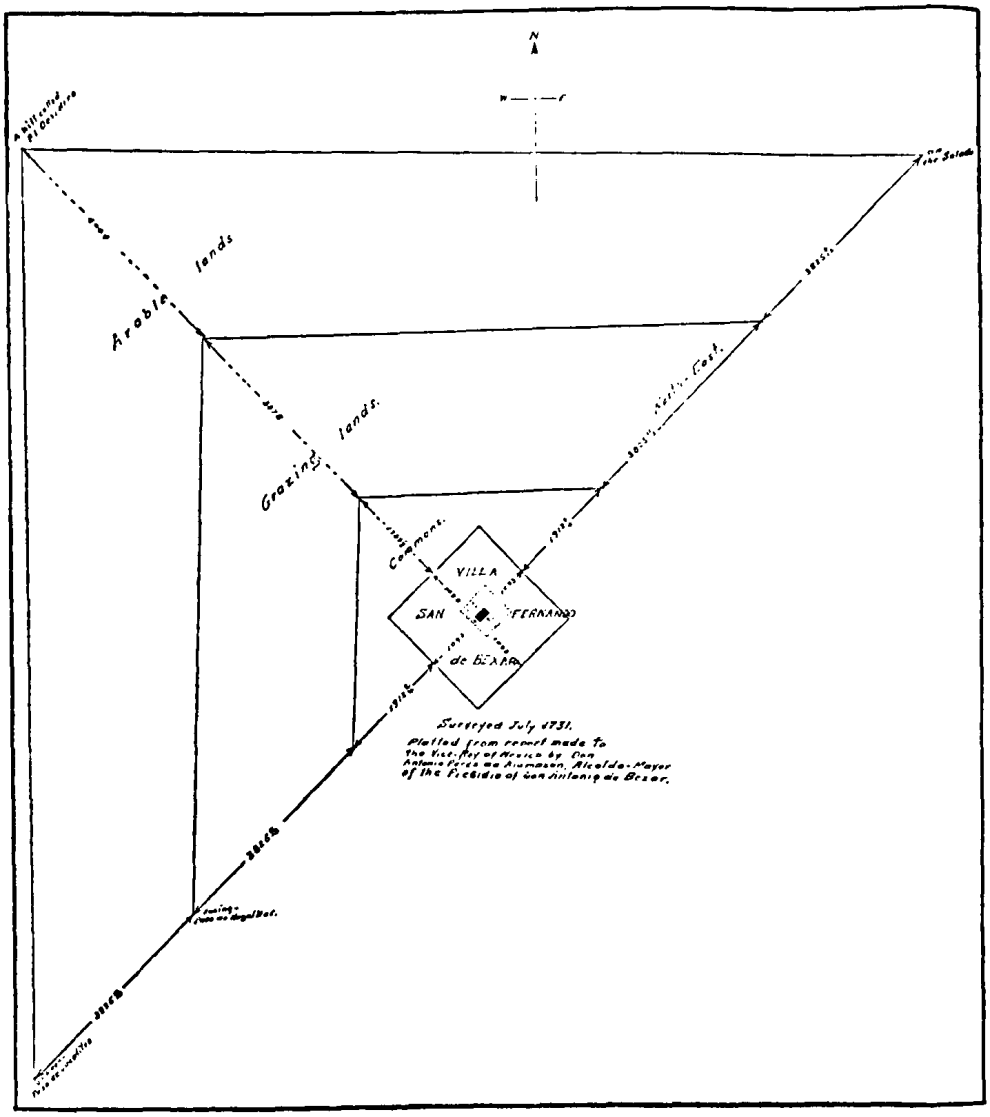
232. *See id.* at Book 4, Title 7, Laws 7, 14.

233. *See id.* at Book 4, Title 7, Law 14.

234. *See id.*

235. *See* Viceregal Instructions to Governor of Texas, Nov. 20, 1730, 84 Archivo General de la Nación, Mexico, Historia, 17, 20 (Hackett Transcripts, Texas Historical Collection), *translated in* M. Austin, *The Municipal Government of San Fernando de Bexar, 1730-1800*, 8 SW. HIST. Q. 277, 338 at 343 (1905). The Viceroy used the term "*baldías*" for the unappropriated lands, literally following R.I. Book 4, Title 7, Law 14. *See also* Actas de Visita General de la Villa de San Agustín de Laredo, Año de 1767, *transcribed and translated in* General Land Office, Austin, Texas, Spanish Collection, Vol. 112, at 63.

236. Spell, *The Grant and First Survey of the City of San Antonio*, 66 SW. HIST. Q. 73, 80 (1962).



San Antonio as actually surveyed in July, 1731, by Juan Antonio Pérez de Almazán

As there reported, Juan Antonio Pérez de Almazán, who was at the time captain of the Presidio of San Antonio, commenced his survey by designating the center of the new settlement and laying out the plaza. This was followed by the selection of sites for the public buildings and the assigning of residential plots to the original Isleño settler families.[237]

237. *See id.* at 84 (report of presidio captain, Juan Antonio Pérez de Almazán). *See*

Next came the laying out of the commons around the periphery of the residential plots, and after that, the demarcation of the pasture and grazing lands. One-fifth of these lands were immediately set apart for the town lands (*propios*) of the new settlement.[238] Finally, starting at the outer limit of the pasture lands, Captain Pérez laid out the irrigable farming lands. Again, he reserved one-fifth of these lands for the municipal *propios* and then proceeded to lay out and to distribute sixteen *suertes* to the original settlers by lot.[239] The triangular shape of the survey is explained by the presence of the San Antonio missions, which had claims to land on behalf of their Indian charges.[240]

The distribution of lands at Laredo some thirty-five years thereafter followed the same basic lines, but was different in respects that were to be crucial on the issue of water rights. As already mentioned, Laredo was settled in conjunction with the colonization of Nuevo Santander by José de Escandón pursuant to Royal authority.[241] A small settlement was established at Laredo in May, 1755, but no lands were granted in private property at the time.[242] This was due to Escandón's policy of favoring communal landholding over individual ownership in the initial phase of colonization. That policy, in turn, reflected his belief that pioneer ranchers might not be able to defend their frontier holdings if they did not live in village communities.[243]

In 1757, there was an official inquiry (*visita*) into Escandón's Nuevo Santander venture.[244] It was determined on that occasion that Laredo

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generally M. Austin, *The Municipal Government of San Fernando de Bexar, 1730-1800*, 8 SW. HIST. Q. 277, 338 app. (1905).

238. *See* Spell, *The Grant and First Survey of the City of San Antonio*, 66 SW. HIST. Q. 73, 84 (1962).

239. *See id.* at 88; M. Austin, *The Municipal Government of San Fernando de Bexar, 1730-1800*, 8 SW. HIST. Q. 277, 343, 344 (1905).

240. *See* Spell, *The Grant and First Survey of the City of San Antonio*, 66 SW. HIST. Q. 73, 78, 86 (1962).

241. *See* 2 ESTADO GENERAL DE LAS FUNDACIONES HECHAS POR D. JOSÉ DE ESCANDÓN EN LA COLONIA DE NUEVO SANTANDER 123 (Publicaciones del Archivo General de la Nación, XIV-XV) (R. López, ed. 1930). *See generally* H. BOLTON, TEXAS IN THE MIDDLE EIGHTEENTH CENTURY 291-302 (1970) (originally published 1915).

242. *See* 2 ESTADO GENERAL DE LAS FUNDACIONES HECHAS POR D. JOSÉ DE ESCANDÓN EN LA COLONIA DE NUEVO SANTANDER 123 (Publicaciones del Archivo General de la Nación, XIV-XV) (R. López, ed. 1930); 1 *id.* at 446 (testimony of Tomás Sánchez, July 22, 1757).

243. *See* 2 *id.* at 215-16.

244. *See* 1 *id.* at 10-530 (documentation of *visita* made by José Tienda de Cuervo as judicial inspector on behalf of Viceroy of New Spain).

had good pastures and over nine thousand sheep, but no practicable means of gravity irrigation by means of a ditch (*acequia*). Dry (*temporal*) farming was also regarded as impracticable, since prolonged droughts tended to ruin crops before harvest.[245]

In the light of the findings and recommendations of the *visita* of 1757, the Crown ordered, by *cédula* dated March 29, 1763, the distribution of the lands assigned to each settlement. Settlers were to receive lands in proportion to their merits and capabilities, and commons, pastures, and municipal lands (*egidos, dehesas y tierras para propios*) were to be assigned to the respective settlements.[246]

These distributions and assignments were duly made at a subsequent *visita* of Laredo in 1767. The site received an allocation of six square leagues, from which the various grants and designations were carved out. The entire site was surveyed by locally appointed experts, who decided it to be completely unfit for irrigation farming.[247] The first allocation made thereafter consisted of setting aside a square league of land surrounding the village center for commons, pastures, and municipal property endowment.[248] Further allocations within that square league were left to a later stage.

It was then decided to treat all original settlers as equally meritorious, and to reward each of them with two sheep-raising tracts as well as a dozen *caballerías*[249] of land. These sizeable allotments were deemed justifiable in the light of the "dryness and aridity" of the land and the fact that the settlers had received no public funds for their colonization venture.[250] On the recommendation of the experts and in order to assure the livestock of each settler access to the only locally available watering place, these composite tracts of slightly less than thirty million square *varas*[251] were laid out with a thousand-*vara* frontage on the Rio Grande and a depth of thirty-thousand *varas*. Be-

245. *See id.* at 444-49.

246. *See* 2 *id.* at 179-88.

247. *See* Actas de Visita General de la Villa de San Augustín de Laredo, Año de 1767, *transcribed and translated in* General Land Office, Austin, Texas, 112 Spanish Collection 64.

248. *Id.* at 83.

249. *See* M. GALVAN, ORDENANZAS DE TIERRAS Y AGUAS 73-74 (2d ed. 1844) (*caballería* is equal to 609,408 *varas* square).

250. Actas de Visita General de la Villa de San Augustín de Laredo, Año de 1767, *transcribed and translated in* General Land Office, Austin, Texas, 112 Spanish Collection 11, 19, 22-23.

251. A *sitio de ganado menor* measures 11,111,111 *varas* square, and a *caballería* 609,408. $(11,111,111 \times 2) + (609,408 \times 12) = 29,535,118$.

cause each original settler received one of these baconstrip tracts as his portion, they were called *porciones*.[252] That expression, which is not otherwise a term of art, continues to be used in reference to such river-frontage grazing and dry farming grants along the Lower Rio Grande.[253]

2. Disposal After Mexican Independence

a. Colonization Legislation

Mexican independence from Spain was officially proclaimed on September 28, 1821.[254] Before considering the imperial, federal, and state colonization legislation enacted after that date, however, a brief account has to be taken of a Decree (Law) of the Spanish Cortes, or parliament, on January 4, 1813.[255] This enactment was intermittently in force in Mexico, since Spanish peninsular legislation of the constitutional period (1810-14 and 1820-21) applied throughout the Empire.[256]

The Decree of January 4, 1813, was essentially a war measure which directed the distribution of one-half of the vacant and Crown lands, reserving the remainder for a war mortgage. Lands were to be awarded preferentially to the military as "patriotic rewards," and secondarily to landless persons. The unit was one *suerte* sufficient to support one grantee.[257] All grants were to be processed free of charge by

252. Actas de Visita General de la Villa de San Augustín de Laredo, Año de 1767, *transcribed and translated in* General Land Office, Austin, Texas, 112 Spanish Collection 22-23.

253. Hill, *Spanish and Mexican Land Grants Between the Nueces and Rio Grande*, 5 SO. TEX. L.J. 47, 49 (1960).

254. *See* Act of Independence of Sept. 28, 1821, TENA RAMÍREZ, LEYES FUNDAMENTALES DE MEXICO, 1808-1973, at 122-23 (1973).

255. *See* Decree of Jan. 4, 1813, *translated in* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 83-87 (1895).

256. *See id.* at 83 (article 1 of decree expressly provided that it applied in ultramarine provinces); *see also* Sheldon v. Milmo, 90 Tex. 1, 13-17, 36 S.W. 413, 415-17 (1896).

257. *See* Decree of Jan. 4, 1813, arts. 6, 10, 12, *translated in* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 84-85 (1895). The English translation of article 10 in M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO leaves out the last half sentence thereof, which directs the division of *suertes* to be made in such a manner as to "provide, if possible, that every *suerte* be such that if regularly cultivated, it suffices for the support of one individual." *See* W. OROZCO, 1 LEGISLACION Y JURISPRUDENCIA SOBRE TERRENOS BALDIOS 106, 110 (1975) (originally published 1895).

the appropriate municipal and governmental authorities.[258] These provisions serve to remind us of a consistent feature of Spanish land grant policy: Subsistence farm tracts, or *suertes*, were granted by donation to deserving individuals.

The first Mexican land-grant law enacted after independence from Spain is the Colonization Law of the Mexican Empire of January 4, 1823.[259] Although short-lived like the Empire, this law introduced what were to become standard terms for "Anglo" colonization, especially in Texas: *empresario* contracts, with premium lands for the *empresario*;[260] and the division of surface land grants into square-league *sitios* and thousand-*vara* irrigable *labores*, with the former the basic unit for grazing grants and the latter for farming grants.[261] While the government expressly reserved the right to sell or lease public lands as it saw fit,[262] grants under this law were not expressly subject to any charge.

Although the 1823 Colonization Law of the Mexican Empire was to be of short duration, it is one of the more important enactments in Texas history. Stephen Austin, who was in Mexico City at the time, obtained the Emperor's approval for his Austin Colony *empresario* contract on February 18, 1823. He was able to secure the confirmation of this contract by the successor government even after the colonization law itself had been suspended less than two months after its enactment.[263] In line with the distinction drawn by that law between irrigated farming grants of one *labor* (177.1 acres) and grazing grants of one league (4,428 acres), Austin's *empresario* contract authorized him to grant each of his colonists, "agreeable to the occupation he may profess," either one league or four per cent thereof.[264] Unsurprisingly, the Original Three Hundred turned out to be cattle ranchers rather than irrigation farmers, and the one-league grants in

258. *See* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 86 (1895).

259. *See* Colonization Law of 1823, 1823 Tex. Gen. Laws 27, 27-30, 1 H. GAMMEL, LAWS OF TEXAS 27, 27-30 (1898).

260. *See id.* art. 19, 1823 Tex. Gen. Laws at 29, 1 H. GAMMEL, LAWS OF TEXAS at 29.

261. *See id.* arts. 5, 7, 1823 Tex. Gen. Laws at 28, 1 H. GAMMEL, LAWS OF TEXAS at 28.

262. *See id.* art. 11, 1823 Tex. Gen. Laws at 28, 1 H. GAMMEL, LAWS OF TEXAS at 28.

263. *See* S. AUSTIN, LAWS, ORDERS, AND CONTRACTS FOR AUSTIN'S COLONY, 1821 Tex. Gen. Laws 3, 1 H. GAMMEL, LAWS OF TEXAS 12 (1898); *see also* M. GALVAN, ORDENANZAS DE TIERRAS Y AGUAS 40 (2d ed. 1844).

264. *See* Imperial Decree of Feb. 18, 1823, 1823 Tex. Gen. Laws 31, 1 H. GAMMEL, LAWS OF TEXAS 31 (1898).

Austin's colony were regularly specified as being without the facilities of irrigation.

As just noted, the Colonization Law of 1823 was suspended within months of its enactment, and remained operative only for Austin's colony. It was replaced soon thereafter by the Colonization Law of August 18, 1824.[265] At the time of the adoption of the latter statute, Mexico had become a federal republic, and the Mexican, formerly Spanish, public domain outside of the federal territories had passed to the states. Accordingly, the 1824 law was, under article 3, a framework for colonization legislation directed to be enacted by the states. The best-known provisions of the 1824 law are article 4, which excluded alien land ownership along the borders and the coast (which is now reflected in article 27 of the Constitution of the United Mexican States of 1917),[266] and article 12, which limited land grants to a maximum of eleven square leagues. Only one of these could consist of irrigation land.[267]

In response to the directive of the federal law of 1824, the State of Coahuila y Texas enacted its own Colonization Law on March 24, 1825.[268] Tamaulipas (formerly Nuevo Santander) followed suit on December 15, 1826.[269] In practically identical language, these enactments defined the two basic alternative units of surface land grants: square-league *sitios* of twenty-five million square *varas* for grazing, and *labores* of one million square *varas* for irrigated or dry farming.[270] Again, along virtually identical lines, the colonization laws of these two states made provision for grazing grants of one square league to ranchers, and farming grants of one *labor* to farmers.[271]

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265. *See* Colonization Law of Aug. 18, 1824, 1824 Tex. Gen. Laws 97, 1 H. GAMMEL, LAWS OF TEXAS 97 (1898).

266. *See* Wong v. Tenneco, Inc., 702 P.2d 570, 571 n.2 (Cal. 1985); Goode v. McQueen's Heirs, 3 Tex. 241, 251 (1849).

267. *See* Colonization Law of Aug. 18, 1824, 1824 Tex. Gen. Laws 97, 98, 1 H. GAMMEL, LAWS OF TEXAS 97, 98 (1898); Maxwell Land-Grant Case, 121 U.S. 325, 329, 366 (1887).

268. *See* Decree No. 16, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 15-23 (1839).

269. *See id.* at 344-49.

270. *See* Coahuiltexan Colonization Law of 1825, art. 11, and Tamaulipas Colonization Law of 1826, art. 14, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 17, 345-46 (1839).

271. *See* Coahuiltexan Colonization Law of 1825, art. 14 and Tamaulipas Colonization Law of 1826, art. 16, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 17, 346 (1839).

These distinctions between livestock grazing (*agostadero*), dry farming (*temporal*), and irrigated farming (*riego*) lands determined not only the size of the surface grant in each category, but also its price. Both Coahuila y Texas and Tamaulipas sold, rather than donated, their colonization lands to settlers.

The basic price for one square-league *sitio* of grazing lands was the same in both states: thirty pesos. Coahuila y Texas charged 2.5 pesos for one *labor* (1/25 square league) *de temporal*, and 3.5 pesos for one *labor de riego*.[272] Tamaulipas left the price for lands with running or stagnant waters to be determined by experts.[273] It also provided expressly that standing waters contained in surface grant areas were to be adjudicated along with them.[274] The Coahuiltexan colonization law contained no corresponding provision, and neither enactment addressed the adjudication of water rights as such.

Almost exactly seven years after its adoption, the Coahuiltexan Colonization Law of 1825 was repealed and replaced by the Colonization Law of April 28, 1832.[275] This was a comprehensive statute of thirty-eight sections, regulating in detail both the establishment of new population settlements and the sale of public lands. It drew clear distinctions between those two modes of alienation of the public domain, employing in this connection the traditional land and water rights terminology and categories of the Mexican Northeast. In view of the importance of this enactment in Texas history, it seems justified to leave aside for later study the post-1826 history of Tamaulipas colonization legislation[276] and to focus entirely on the Coahuiltexan enactment.

Turning now to the text of the State Colonization Law of April 28, 1832, we see that the initial emphasis is on the establishment of new populations through *empresario* contracts. Although Mexicans were

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272. *See* Coahuiltexan Colonization Law of 1825, art. 22, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 19 (1839).

273. *See* Tamaulipas Colonization Law of 1826, art. 23, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 347 (1839).

274. *See* Tamaulipas Colonization Law of 1826, art. 20, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 347 (1839).

275. Colonization Law of 1832, Decree No. 190, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 189 (1839).

276. The Colonization Law of 1826 was repealed by section 21 of the Decree of Colonization of November 17, 1833, article 91. *See* 1 SAYLES, EARLY LAWS OF TEXAS 138, 140 (1888) (further Tamaulipas legislation listed). No attempt has been made here to consult the original Tamaulipas sources.

preferred both as *empresarios* and as settlers, properly qualified foreigners were also eligible for the benefits of the law, subject to limitations to be mentioned below. The minimum number of families to be brought in for settlement at the *empresario's* expense was ninety, but the establishment of new populations could commence after the arrival of thirty families.[277]

At that stage, a Mexican citizen without jurisdictional immunities, one who was neither an officer nor a member of the clergy,[278] was to be appointed as commissioner. His first act, not surprisingly, was to lay out a population site of four square leagues.[279] After that, the commissioner was to proceed with the "exact distribution of land, lots, and water" (*tierra, solares y agua*) in the new settlements to be established.[280] Water diversions (*sacas de agua*) were to be made at the settlers' expense where locally possible. The commissioner was directed to divide these into three irrigation ditches (*azequias*). One of these latter was to be reserved for the use of the settlement itself, and the rest were to be for the fields of cultivation.[281]

Each of the new families was to receive, along with a town lot (*solar*), a *labor* of land and a day of water or, in the alterative, two *labores de temporal*. Families with the requisite heads of livestock were also given one *sitio* of grazing land (*agostadero*).[282] These allotments were donative for Mexicans, and subject only to commissioners' and surveyors' fees.[283] Foreign settlers, however, were classified as purchasers in this connection, and had to pay two-thirds of the

277. *See* Colonization Law of 1832, Decree No. 190, arts. 2, 3, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 189 (1839).

278. *See id.* art. 5, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 189 ("[que] no disfrute de fuero privilegiado" ((that) he not enjoy a privileged forum) omitted in the English version). The clergy and the military were exempt from general jurisdiction at the time.

279. *See id.* art. 3, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 189. *Cf.* R.I. Book 4, Title 5, Law 6.

280. *See* Colonization Law of 1832, Decree 190, art. 5, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 189 (1839).

281. *See id.* art. 6, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 189.

282. *See id.* art. 8, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 189.

283. *See id.* art. 7, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 189.

statutory price for public land sales.[284] *Empresarios* received four *sitios de agostadero*, plus four days of water from each of the water diversions within the *empresario* grant for every ninety families settled.[285]

The distributions of lands and waters just described were only available in conjunction with the contractual establishment of new populations. Additionally, the 1832 law provided for the sale of public lands independent of colonization settlement. Such sales could be made to Mexican citizens only. In accordance with the limits imposed by federal law, not more than eleven square-league *sitios* could be held by any one person.[286]

The price for such lands varied according to classification but was also different for various regions of the state. Grazing land cost two hundred pesos per *sitio* within a ten-league coastal strip, one hundred pesos in the non-coastal portions of the Department of Bexar (San Antonio), and fifteen pesos elsewhere in the state.[287] There was a similar sliding scale for square-league grants of dry farming (*de temporal*) lands.[288]

Special provision was made for lands whose local situation permits water diversions. These were to be sold, if not earmarked for population settlement, to Mexicans only for a price of three hundred pesos per *sitio* in the Department of Bexar and for two hundred pesos elsewhere in the state.[289] Thus, potentially irrigable land outside of the District of Bexar and the coastal strip cost exactly ten times as much as grazing land in the same location.[290]

Two other provisions of the Colonization Law of 1832 require special mention for present purposes. Article 19 prohibited settlers, both

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284. *See id.* art. 21, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 191.

285. *See id.* art. 10, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

286. *See id.* art. 13, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

287. *See id.* art. 14, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

288. The scale was 300, 150, and 20 pesos, respectively. *See id.* art. 14, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

289. *See id.* art. 15, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

290. *See id.* arts. 14, 15, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

Mexican and foreign, from selling or alienating in any manner or under any pretext, within six years after taking possession, "*either the water or the land*" which had been granted to them.[291] This underlines once more the basic concept of water rights as distinct from the surface estate and as capable of separate conveyance.

b. Riparian Land Grants

Article 29 of the 1832 law was to be of more fundamental importance. It provided that surveys of vacant lands upon the shores of any river, running *arroyo*, or lake, were not to exceed one-fourth of the depth of the land granted where this was physically possible.[292] In *Motl v. Boyd*,[293] Chief Justice Cureton referred to this provision, along with those stipulating a higher price for irrigated lands and those limiting the quantity of irrigable land grants, as proof of legislative intent to grant riparian irrigation rights.[294] Later in his opinion, he again made mention of the legislative policy of the State of Coahuila y Texas of "limiting the frontage of land grants on rivers and streams."[295]

This argument was pivotal to Chief Justice Cureton's conclusion that the Mexican irrigation law applicable in Texas before the reception of the common law "distinctly recognized the rights of riparian owners of land."[296] It was, however, tenable only if the competent authorities of the States of Coahuila y Texas and Tamaulipas had actually classified surface estates located along rivers, running *arroyos*, or lakes as irrigable and had accordingly sold or granted these in lesser quantity or at higher price.[297] In a famous article published some four decades after *Motl*, Dean White and Justice Wilson at long last undertook a survey of actual Mexican land grant practice in

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291. *See id.* art. 19, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 191 (emphasis supplied).

292. *See id.* art. 29, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 190.

293. 116 Tex. 82, 286 S.W. 458 (1926).

294. *See id.* at 102, 286 S.W. at 464.

295. *Id.* at 105, 286 S.W. at 466.

296. *Id.* at 104, 286 S.W. at 465.

297. *See* State v. Valmont Plantations, 346 S.W.2d 853, 880-81 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962) (gap in Chief Justice Cureton's historical analysis pointed out by Chief Justice Pope).

Texas.[298] They demonstrated conclusively that this practice was almost exactly the opposite of what had been assumed by Chief Justice Cureton: Land granted along rivers and running creeks in the Mexican era was, as a rule, classified and sold or granted as grazing (*de agostadero*) or, occasionally, dry farming (*de temporal*) but seldom if ever as irrigable (*de riego*).[299]

As we shall see below, this was a vital point, going to the fundamental question whether there were *any* implied-in-law water rights under Coahuiltexan law. For present purposes, however, we are concerned with a related, but much narrower, issue of legislative intent. What did the Congress of the State of Coahuila y Texas intend to achieve, or to avoid, when it decreed that surveys made along rivers, running *arroyos*, or creeks should not exceed one-fourth of the depth of the land granted?[300]

Fortunately, the legislative history of article 29 of the Coahuiltexan Colonization Law of 1832 can be reconstructed with compelling accuracy. The prior colonization law of the state did not contain any provisions as to surveys of riparian lands, and the official instructions to surveyors issued in 1827 in implementation of the law were also silent in this respect.[301] The problem arising in the absence of such instructions was eloquently explained by Ramón Músquiz, the Political Chief of Bexar, in a communication to Governor Letona, dated April 25, 1831:

> I understand that the State necessarily will turn out to be harmed in the distribution of lands if we do not define the part that is to be given to the grantees along the banks of streams, for, since these are the most desirable for agriculture and the raising of livestock, and the richest in timber, the colonist, the Mexican settler, or the purchaser, all are most eager, in surveying the land which they have obtained, to make sure that it contains one or more leagues along a stream. Hence it turns out that all the stream banks are going to be occupied by just a few individuals, and consequently that is going to decrease the value of the pasture

298. *See* White & Wilson, *The Flow and Underflow of Motl v. Boyd—The Conclusion*, 9 SW. L.J. 377 (1955).

299. *See id.* at 431-32.

300. Colonization Law of 1832, art. 29, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 192 (1839).

301. *See* Colonization Law of 1825, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 70-73 (1839) (instructions from commissioner for distribution of lands to new colonists who present themselves to settle in state, according to colonization law of March 24, 1825).

> lands because they are going to be isolated and cut off from the watering places. Consequently for this reason they will turn out to be useless for the State because there will not be any settlers or purchasers who will be interested in them.[302]

After duly stressing his concern for the public interest, Músquiz recommended governmental action to cope with such harmful practices: "[A]s a general rule, Your Excellency, if you consider appropriate, should order that, both within the colonies and elsewhere, along the margins and banks of rivers, creeks, or lagoons containing permanent water, not more than a fourth part of what has been granted shall be received [in frontage]."[303]

This recommendation was accepted by the governor of the state. On May 14 of that year, he informed the Political Chief of Bexar that in view of the "well founded reasons" set forth in the letter quoted above, he had "seen fit to order, as a general rule, that the commissioners for the distribution of lands from the public domain shall be extremely careful to make sure that any survey that borders on a river, creek of running water, or lagoon, shall not exceed one-fourth part of the concession granted."[304] The Spanish original of this order is virtually identical with article 29 of the Colonization Law enacted less than a year later.[305]

Even after the legislative enactment of Governor Letona's order of May 14, 1831, the question of riparian grants had not been completely settled. On June 19, 1833, the *jefe político* once more requested instruction regarding these grants.[306] Was article 29 of the 1832 enactment applicable to concessions granted under the 1825 law but prior to the Governor's order? The political chief solicited an affirmative response, stressing the inconvenience of elongated grants which might cross several watercourses and also conflict with other grants. He referred, in this connection, to the incovenience of baconstrip grants to cattle ranchers who would have to drive their livestock "such enormous distances to water," and once more to the "great distance that the livestock would have to be brought to water when they are pas-

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302. Bexar Archives, Manuscript Series, Apr. 25, 1831, *translated in* 6 M. MCLEAN, PAPERS CONCERNING ROBERTSON'S COLONY IN TEXAS 200 (1979).

303. *Id.* at 201.

304. *Id.* at 230.

305. *See* General Land Office, Austin, Texas, 51 Spanish Collection 94.

306. *See id.* at 110.

tured at the opposite end" of the grant.[307]

The Governor of Coahuila y Texas referred this inquiry to the Executive Council of the State for an advisory opinion.[308] The opinion of that council, dated August 9, 1833,[309] is the only known reasoned legal opinion of a Mexican governmental authority on Texas public land law. It proceeds from the premise that the Law of 1832 is, in principle, only applicable to concessions granted subsequent to its publication, so that the question of water course frontage would again be regulated by the Colonization Law of 1825. Since the latter did not contain any provisions in point, however, resort was to be had to "*las leyes comúnes vigentes o a la usada y bien recibida de aquel departmento*," that is, the general law, usage, and practice prevailing in the Department of Bexar.[310] That, in turn, brought into operation an instruction by the Governor of the State to the Political Chief of Bexar, dated May 14, 1831,[311] which provided that surveys along "*algún ríó, arroyo de agua corriente o laguna no ecceda una quarta parte de la concesión otorgada*"—words almost exactly corresponding to article 29 of the Law of 1832. The Executive Council noted the substantial identity of the two provisions, and concluded that "*debe observarse en ambas concesiones la misma practica que ella establece*;" that is, that article 29 of the Law of 1832 was, after all, applicable to concessions granted prior to the enactment of that statute.[312] The advisory opinion of the Executive Council was forwarded by the governor to the Political Chief at Bexar for compliance.[313] Reference to it appears routinely thereafter in commissioners' instructions to surveyors in Texas.[314]

In the light of the above, it is clear that article 29 of the Coloniza-

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307. *Id.* at 110-11.

308. Pursuant to article 127 of the state constitution of March 11, 1827, the Executive Council had the duty of giving written reports to the governor on matters of state at his request. *See* Constitution of the State of Coahuila and Texas, 1827 Tex. Gen. Laws 313, 332, 1 H. GAMMEL, LAWS OF TEXAS 423, 442 (1898).

309. *See* General Land Office, Austin, Texas, 51 Spanish Collection 105.

310. *Id.* at 105, 106, 106v.

311. *See* Bexar Archives, Manuscript Series, Apr. 25, 1831, *translated in* 6 M. MCLEAN, PAPERS CONCERNING ROBERTSON'S COLONY IN TEXAS 230 (1979).

312. *See* General Land Office, Austin, Texas, 51 Spanish Collection 105v.

313. *See id.* at 107 (Aug. 9, 1833).

314. *See* Francisco Ricardo (Hernandez) Grant, General Land Office, Austin, Texas, 31 Spanish Collection 34 at 37; *see also In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 645 S.W.2d 596, 600 (Tex. App.—San Antonio 1982), *rev'd*, 670 S.W.2d 250 (Tex. 1984).

tion Law of 1832 was *not* intended to express, confirm, or to establish riparian irrigation water rights.[315] Its original purpose was to direct the laying out of surveys to assure as many grants as possible of access to flowing or standing water. In particular, such access was deemed necessary for grazing grants of one or more square-league *sitios*, since a grazing grant without access to water was worthless. By 1833, the Political Chief of Bexar had found another justification for his one-quarter frontage formula proposed in 1831 and enacted into law in 1832: Allotting *less* than one-fourth in frontage would result in baconstrip tracts with "enormous" distances between pastures and cattle watering places.

It is also apparent, however, that the watering of cattle along rivers, running creeks, and lakes was regarded as a natural entitlement of abutting grantees. Plainly, the same view prevailed when the *porciones* fronting on the Lower Rio Grande were laid out. As the locally appointed experts said at the *visita* of Mier in 1767, each *porcion* should be laid out "so that a watering place at the rivers be given to everyone, otherwise the cattle will certainly perish and the *porciones* of land become useless."[316] As we will see in the next part of the present study, this concept of entitlement to the use of public waters for cattle watering is basic to Spanish and Mexican water law in the New World. It is, nevertheless, quite unrelated to riparian theories of water rights.

V. THE WATER LAW OF SPANISH AND MEXICAN TEXAS

A. *Land and Water*

As we have just seen, grazing land without access to watering places was considered to be "useless" in Mexican Texas.[317] If a ranching grant fronted on running water or on a lake, however, the rancher could water his livestock there even if he had paid for, or been granted, only a grazing estate. As shown by the 1767 *visitas* along the Lower Rio Grande, this was also the rule in Spanish Nuevo

315. *But see* Motl v. Boyd, 116 Tex. 82, 103, 286 S.W. 438, 465 (1926).

316. Actas de Visita General Mier, 1767, *quoted in* B. DOBBINS, THE SPANISH ELEMENT IN TEXAS WATER LAW 129 (1959).

317. Letter from Musquiz to Letona (Apr. 25, 1831), Bexar Archives, Manuscript Series, *translated in* 6 M. MCLEAN, PAPERS CONCERNING ROBERTSON'S COLONY IN TEXAS 200 (1979).

Santander.[318]

We will discuss further below whether this entitlement to water one's cattle on lakeshores and river banks accessible without trespass on other grants amounted to more than an implied license for common use of the public domain. At this point, our focus is on the practicalities of farming and ranching in Spanish and Mexican Texas or, more precisely, in present-day geographic terms in the Southwestern and South-Central portions of the state.

The trans-Pecos area formed the northern tip of the "Bolsón de Mapimí", which were desert badlands used by warlike Indian tribes for their invasions into the Mexican North. Except for the environs of present-day El Paso, these lands were uninhabited until well after the changes of sovereignty in the last century. The West Texas referred to by Governors Sul Ross and Culberson in support of irrigation legislation in 1889 and 1895 is not the West Texas of 1731 or even 1836. The road from San Antonio to present-day Goliad was, more or less, the extreme western boundary of the settled portions of Mexican Texas.[319]

It should also be kept in mind that applied steam power was slow in coming to the Mexican Northeast. Irrigation was by gravity only and almost invariably non-riparian, if only for technological reasons. (Water could be led by gravity only to fields substantially lower than, and distant from, the point of diversion). Navigation, too, was mainly downstream: Until the advent of steam power, rivers were deemed navigable if they were "floatable," that is, if they permitted downstream transport by means of rafts.[320]

In this setting, there were three main areas for legal regulation and, hence, dispute. First and foremost, there was the construction and administration of irrigation systems wherever such systems were feasible and needed. Secondly, there was the problem on monopolization through impoundment by dams, especially of watercourses traversing surface estates. Thirdly, and applying to both of these categories of water use, there was the issue of interference with navigation (or,

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318. *See* B. DOBBINS, THE SPANISH ELEMENT IN TEXAS WATER LAW 129 (1959).

319. *See* Lipan Apache Tribe v. United States, 36 Ind. Cl. Com. 7, 23, 30-38 (1975).

320. *See* Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 Sess. Cas. 30, 114-69 (H.L.) (discussing this issue and citing civil law authority pertaining thereto); *see also id.* at 137, 141-42 (discussing downstream flotation on European rivers before advent of steam).

more realistically, downstream rafting) through man-made obstructions to the free flow of watercourses.

Obstruction of navigability does not appear to have been an issue in either Spanish or Mexican Texas (or Nuevo Santander/Tamaulipas).[321] Irrigation regulation and stock pond impoundment, on the other hand, presented radically different questions. Extensive irrigation systems, with ditches (*acequias*), allocations, and regulations, were in place in San Fernando (San Antonio), from the beginnings of municipal settlement in 1731 to the end of Mexican rule, and well beyond it in both directions.[322] Another such system existed in Ysleta near present-day El Paso.[323] The San Antonio irrigation system was the subject of legal disputes practically from its inception, when the missions laid claim to all of the waters of the San Antonio River and the San Pedro spring for their Indians.[324] More recently, the Supreme Court of Texas had to decide, in *San Antonio River Authority v. Lewis*, whether the water right attaching to an irrigable San Antonio *suerte* included, as a proprietary element, the right to gravity flow from the original irrigation ditch, or *acequia*.[325]

That case serves well to illustrate the typical features of the irrigation rights attaching to *suertes*, or subsistence farming tracts, granted to the *pobladores* of municipal settlements in the Mexican North. The plaintiffs in *Lewis* traced their entitlements to grants made by the government in 1824, on occasion of the secularization of the San Antonio missions.[326] One such grant, treated as representative by the Court, conferred upon Francisco Maynez "two dulas of irrigation water with the accompanying land for cultivation; the water to be taken from the

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321. The State of Coahuila y Texas granted exclusive steam and horse-drawn navigation concessions for the Rio del Norte and the Trinity in 1828 and 1833, and an exclusive steam navigation concession for the Colorado in 1835. *See* Decrees No. 49, 218, 302, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 100, 209, 292 (1839). Legislative concern was with natural rather than man-made obstructions to navigation. *See* Decree No. 218, art. 1 and Decree No. 302, art. 1, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 209, 292 (1839).

322. *See* State v. Valmont Plantations, 346 S.W.2d 853, 876-77 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W. 2d 502 (Tex. 1962); B. DOBBINS, THE SPANISH ELEMENT IN TEXAS WATER LAW 113-22 (1959).

323. *See* City of Ysleta v. Babbitt, 28 S.W. 702, 703 (Tex. Civ. App. 1894, no writ).

324. *See* State v. Valmont Plantations, 346 S.W.2d 853, 876-77 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W. 2d 502 (Tex. 1962).

325. *See* San Antonio River Auth. v. Lewis, 363 S.W.2d 444, 449 (Tex. 1962).

326. *See id.* at 445-47.

irrigation conduit of the Mission of San Juan Capistrano."[327] The act of possession described the surface estate as consisting of two *suertes* with 200 *varas* on each frontage.[328] The "dulas" of irrigation water referred to in the grant were one-day entitlements within an irrigation cycle of twenty-five days.[329]

As shown by this example, water rights attaching to the irrigation systems of population settlements in Spanish and Mexican Texas had four characteristics which set them apart from both the riparian and the prior appropriation systems. They were created by express grant, quantified by time-cycle, and limited to small tracts of irrigable farm lands used for subsistence agriculture. Finally, they were necessarily "riparian" to the irrigation ditch, or *acequia*, but not to the natural stream which served as the source of the water supply.[330] These entitlements to irrigation water were clearly recognized as property rights in Spanish and Mexican San Antonio. They were bought, sold, and leased together with, or apart from, the *suertes* to which they attached when granted.[331]

The *acequia* system itself was recognized as continuing in effect by the Act Concerning Irrigation Property of February 10, 1852.[332] The statute empowered the respective county courts to "establish all needful police government and civil control over . . . irrigation farms and property . . . consistent with ancient usage and the law of the State."[333] The term "farm," as there used, refers to the entire tract set aside for irrigated farming. An individually owned "subdivision lot" thereof is denominated "*suerte*" in the alternative.[334] Unsurprisingly, the Irrigation Property Act of 1852 was sponsored in the Legislature by the representatives of Bexar and El Paso Counties—the two areas

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327. *See* Lewis v. San Antonio River Auth., 343 S.W.2d 475, 478-79, n.1 (Tex. Civ. App.—San Antonio 1960), *aff'd*, 363 S.W.2d 444 (Tex. 1962) (grant reproduced).

328. *See id.* at 479 n.1.

329. *See* San Antonio River Auth. v. Lewis, 363 S.W.2d 444, 446 n.3 (Tex. 1962).

330. *See* White & Wilson, *The Flow and Underflow of Motl v. Boyd—The Conclusion*, 9 SW. L.J. 377, 393-97 (1955).

331. *See* State v. Valmont Plantations, 346 S.W.2d 853, 876 n.58 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962) (citing C. CASTANEDA, REPORT ON THE SPANISH ARCHIVES AT SAN ANTONIO (1937)). The conveyances listed by the latter are archived in the Bexar County Records.

332. *See* Law of Feb. 10, 1852, ch. 74, 1852 Tex. Gen. Laws 80, 3 H. GAMMEL, LAWS OF TEXAS 958 (1898).

333. *Id.* art. 2, 1852 Tex. Gen. Laws at 80, 3 H. GAMMEL, LAWS OF TEXAS at 958.

334. *See id.* art. 3, 1852 Tex. Gen. Laws at 80, 3 H. GAMMEL, LAWS OF TEXAS at 958.

within Texas with *acequias* established under Spanish or Mexican rule.[335]

The *suertes* thus recognized legislatively as farm land subdivisions with irrigation rights under the "ancient" usages of Texas were, to repeat, small tracts of agricultural land gratuitously bestowed upon the pioneer *pobladores* of officially approved new settlements in the Mexican North. The *suertes* granted to the original Isleño settlers of San Antonio in July, 1731, measured 105 *varas* in frontage and "in length the distance between the San Pedro Creek and the San Antonio River."[336] Later in the eighteenth century, the standard measure for *suertes* in the Mexican North came to be established at 200 *varas* square, and this was the unit employed for the Maynez *suertes* in San Antonio in 1824.[337]

The Regulations issued by the Mexican federal government in 1828 for the colonization of the federal territories[338] were not in effect in Texas, but they are nevertheless illustrative of official thinking as to the quanities of land to be granted. They, too, used the basic unit of two hundred *varas* square, but as a minimum, rather than a maximum, standard for irrigable land grants.[339] The Imperial Colonization Law of 1823 and the state colonization laws of Tamaulipas and Texas, we have seen, employed the standard unit of *labores* (one thousand *varas* square) for lands *de riego*.

The irrigable *suerte* donatively awarded to the *pobladores* of the Spanish North can thus be defined as a unit of about two hundred *varas* square: 40,000 square *varas*, or about seven acres. A single *labor* of one thousand square *varas* (one million *varas* square) could in ideal circumstances be subdivided into twenty-five *suertes*. Starting with the Imperial Colonization Laws of 1823, the *suerte* began to disappear as a measure of surface grants to colonists, and the standard unit for irrigable land grants in the states of Tamaulipas as well as

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335. *See* White & Wilson, *The Flow and Underflow of Motl v. Boyd—The Conclusion*, 9 SW. L.J. 377, 403-04 (1955).

336. Record of division made by Capt. J. A. Pérez de Almazán on July 11, 1731, *translated in* M. AUSTIN, THE MUNICIPAL GOVERNMENT OF SAN FERNANDO DE BEXAR, 1730-1800, 8 SW. HIST. Q. 277, 343, 345 (1905).

337. *See* Redding v. White, 27 Calif. 282, 286 (1865) (Governor de Neve's Regulations of June 1, 1779 for government of California).

338. *See* M. G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS: NEW SPAIN AND NEW MEXICO 141-45 (1895).

339. *See id.* at 143.

Coahuila y Texas was the *labor de riego*. That latter unit was twenty-five times as large as the standard *suerte*. It was, nevertheless, but one-twenty-fifth of a square-league *sitio* and—most importantly for "Anglo" settlers—only a few acres larger than a "quarter section" of United States federal lands.[340]

The magnitude of the disparity in size between irrigable and grazing land grants becomes apparent when the San Antonio *suertes* are compared with the *porciones* of the original settlers of the Lower Rio Grande and the square-league grazing grants made to ranchers under the imperial and state colonization laws. The *pobladores* of Laredo received allotments of thirty *million* square *varas* in 1767, or 750 times as much as the Isleño settlers of San Antonio had obtained three dozen years earlier, precisely *because* their lands were judged to be non-irrigable and fit chiefly for sheep ranching.[341]

Slightly more than half a century after the *visitas* in Nuevo Santander, Stephen Austin established his colony at San Felipe. Under the Imperial Colonization Law of 1823, the colonists could elect to receive one *labor* (177.1 acres) of irrigated land as farmers or one *sitio* (4,428 acres) as ranchers. They uniformly chose to be classified as ranchers, and consequently received square-league grants for cattle grazing, without irrigation water rights. The grants to the "First Three Hundred" were executed by the "Baron" of Bastrop[342] as *comisionado*, and by Stephen Austin as *empresario*. The grants almost uniformly contain, in the *habendum* clause, the words, "*sin proporción de regadío*," usually with the addition, "*solamente con el uso de agua permanente*" on the margins of a river. Additionally, many grants qualify for this formula by stipulating that the land granted is "*para cría de ganado*," or for the raising of cattle.[343] This formula occurs

340. A *labor* measures 177.1 acres, as against the "quarter section" of 160 acres, which was introduced as the minimum unit of federal public land sales by the Act of March 26, 1804. *See generally* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 121-43 (1968).

341. *See* State v. Valmont Plantations, 346 S.W.2d 853, 872-74, 880-81 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

342. *See* Bacarisse, *Baron de Bastrop*, 58 SW. HIST. Q. 319, 320-22 (1955) (conclusively identifies the "Baron" as commoner by name of Bögel, born in Dutch West Indies); *see also* C. HARRIS, A MEXICAN FAMILY EMPIRE, THE LATIFUNDIO OF THE SANCHEZ NAVARROS 1765-1867, at 129-35 (1975) (Baron's role in deception and capture of Allende and Hidalgo in 1811).

343. *See* General Land Office, Austin, Texas, 1 Spanish Collection 19 at 20 (Grant to Silvanus (Sylvanus) Castleman, July 6, 1824); *id.* 23 at 4 (Grant to Samuel Kennedy, July 6, 1824).

not only when lands are granted on rivers (*ríos*), but also when they are granted on *arroyos*.[344]

The one exception from this pattern is one of the two grants received by James Cummins (Cummings) on August 9, 1824. The first of these was to one *sitio* on the east bank of the Arroyo San Bernardo. This grant was, in the usual manner, stipulated to be "*sin proporción de regadío*," that is, without the benefit of irrigation. Secondly, in the same instrument, he received a hacienda of no less than five square leagues on the Palmito Arroyo, this time "with the use of all of the water of the said arroyo."[345] The reason for the munificent grant of land and water was that James Cummins had undertaken to build a grist mill on the Palmito Arroyo.[346]

The qualitative difference between grazing and irrigated farming grants is apparent once again in the pricing of these two categories of lands. Since the *cédula* of 1805, irrigable land purchased from the public domain cost more than dry farming land, which in turn was priced at more than grazing land. In the last years of Spanish rule, the Crown set a minimum price of sixty pesos per *sitio* of irrigable lands, as against thirty pesos for lands irrigable by wells, and ten pesos for grazing lands. The Coahuiltexan Colonization Law of 1825 employed a similar price scale for lands classified as *de agostadero* (grazing), *de temporal* (dry farming), and *de riego* (irrigable). The price difference between grazing and irrigable lands was 57.5 pesos.[347] Under the Colonization Law of 1832, irrigated land in the District of Bexar (San Antonio) was sold at three hundred pesos per *sitio*, as against one hundred and fifty pesos for dry farming land and one hundred pesos for grazing land.

It is thus quite clear that in eighteenth-century Spanish Texas, irrigated land was granted expressly with water rights, and in surface units that were exponentially smaller than those used for grazing grants. It is also abundantly plain that in nineteenth-century Spanish and Mexican Texas, donative grants of public lands classified as irrigable were exponentially smaller than donative grants of grazing

344. *See id.* 31 at 32 (Grant to Asa Mitchell, July 6, 1824); *see also id.* 35 at 36 (Grant to Frederick Rankin, July, 1824); *id.* 39 at 40 (Grant to Thomas Earle, July, 1824); *id.* 43 at 44 (Grant to Freeman George, July, 1824); and *id.* 47 at 48 (Grant to Juan Andrews, July, 1824).

345. *See* General Land Office, Austin, Texas, 2 Spanish Collection 301 at 302.

346. *See id.* at 302 (application of Aug. 7, 1824).

347. A *sitio* of 25 *labores* of grazing lands cost 30 pesos; one *labor* of irrigable lands cost 3.5 pesos: $25 \times 3.5 = 87.5$.

lands. Finally, it is clear beyond peradventure that, since 1805 at the latest, irrigation land bought from the Crown or the State of Coahuila y Texas cost several times as much as grazing land.

These blunt realities have to be viewed together with another one: Even grazing land was "useless" without some access to water, so that all grazing grants were "riparian" to some water source — a stream, a lake, or a spring. Austin's colonists at San Felipe, for instance, were routinely assured of the "use" of the river or creek riparian to their grants for cattle watering and at the same time expressly denied irrigation rights to the same waters.[348]

If riparian location conferred irrigation water rights automatically under Spanish and Mexican water law, the whole system set forth at such length above would be meaningless. Those who elected to receive square-league grazing grants instead of irrigable 177-acre homesteads would end up with irrigable plantations of 4,428 acres. Those who were donated thirty million square *varas* for sheep grazing precisely because irrigable subsistence farming plots of forty thousand *varas* were not available would become river barons with ducal irrigated estates. Prudent purchasers of grazing lands at one-third or perhaps even one-sixth of the price for irrigable lands would find out (no doubt to their satisfaction) that they had, after all, bought the high-price spread at the cost of the lowest-priced one.

A legal system tolerating such results would rather closely resemble a monetary system employing coins of copper, silver, and gold, while at the same time undertaking to honor copper coins, ounce for ounce or coin for coin, for conversion into gold. With grazing land substituted for copper, dry farming acreage for silver, and irrigated land for gold, the result would be that a pocketful of coppers, perhaps with a few pieces of silver added, would fetch its weight or count in gold.

As has already been mentioned, the Texas courts came to a different conclusion about the basic rules of Spanish and Mexican water law in force here before independence from Mexico. They held, first in *Valmont* and then again in *Medina*, that there were no implied-in-law riparian irrigation water rights under the laws of these two former sovereigns, and that every such water right had to be derived from express sovereign grant.[349]

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348. *See* General Land Office, Austin, Texas, 1 Spanish Collection 19 at 20 (Grant to Silvanus (Sylvanus) Castleman, July 6, 1824).

349. *See In re* Adjudication of Water Rights in Medina River Watershed of the San

Before turning to this ultimate question of whether there were any implied, appurtenant, or accessory irrigation water rights attaching to Spanish or Mexican land grants in Texas, it seems appropriate to take up another issue only tangentially mentioned in *Valmont*: The matter of non-irrigation water rights, especially the all-important right to water one's cattle at sources that could be reached without trespass on lands in exclusive private ownership.[350] That subject is one of the facets of the more general topic of public, private, and common waters.

B. *Public, Private, and Common Waters*

In our discussion of Spanish and Mexican public land and land grant law, we have not considered the use of hydrological and maritime features in the measurement of surface estates, since it does not relate to water rights either directly or by necessary implication. To give some examples: In 1959, the Supreme Court held that the delimitation of the maritime bounds of a Mexican grant on the Texas gulf coast had to be drawn pursuant to Spanish and Mexican law in effect at the time of the grant.[351] Earlier, in *Heard v. Refugio*,[352] the court had held that Mexican grants encompassing the beds of *navigable* streams did not carry with them title to the bed of such streams.[353]

Conversely, in the more recent landmark case of *McCurdy v. Morgan*,[354] it was held that a Mexican land grant of October 3, 1834, carried with it the bed of the Chiltipin Creek, a nonperennial stream lying within the boundaries of the grant, with the result that a subsequent oil and gas lease granted by the State of Texas in respect to the creek bed was invalid. That creek is described, in Justice Norvell's opinion, as a " 'dry creek' which never contains water, save for a few holes shaded by trees, except during periods of heavy rain."[355]

Justice Norvell held that the Chiltipin Creek was in 1834, and con-

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Antonio River Basin, 670 S.W.2d 250, 253 (Tex. 1984); State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

350. State v. Valmont Plantations, 346 S.W.2d 853, 860 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

351. *See* Luttes v. Texas, 159 Tex. 500, 513, 324 S.W.2d 167, 176 (1959).

352. 129 Tex. 349, 103 S.W.2d 728 (1937).

353. *See id.* at 359, 103 S.W.2d at 733.

354. 265 S.W.2d 269 (Tex.Civ.App.—San Antonio 1954, writ ref'd).

355. *Id.* at 271.

tinued to be at the present, "a dry creek or 'torrent' to which the doctrine of sovereign ownership of stream beds had no application."[356] That holding is based, in part, on prior Texas decisions,[357] and in part on Mexican and civil law authorities. These latter had been brought to the court's attention by means of two opinions submitted by counsel for the landowner.[358] The experts concluded that under the civil law, including the civil law as received in Spain and Mexico, the bed, or *alveus* of nonperennial rivers was "private" rather than "public," with the result that title to such beds was granted, or conveyed, along with the surface estate encompassing them.[359]

It will be noted that Justice Norvell was careful to hold only that the doctrine of sovereign ownership did not apply to the beds of dry creeks or "torrents," which are "private" streams under Roman law.[360] Since mineral rights rather than water rights were at issue, he did not have to address the further question whether the nonperennial *waters* running in such dry creeks or "torrents" (*arroyos*) were similarly private under Roman law, and if so, whether that rule also applied in Spanish and Mexican Texas.

Medina[361] raised precisely these questions. On March 8, 1830, the landowner's predecessor-in-title had purchased from the state one square league of land encompassing a segment of the Medio (or Middle) Creek which was nonperennial at the time. The *sitio* was classified as consisting of 22 *labores* of grazing land and three *labores* of dry farming land, and the purchase price was assessed on the basis of that classification.[362] The grant itself made no mention of irrigation rights. In the Medina watershed adjudication proceedings, the current landowner asserted, nevertheless, that he was entitled to the waters of the Medio Creek since these, being private, belonged to him along with

356. *Id.* at 272.

357. *See id.* at 270-71.

358. *See id.* at 271; *see also* Brief for Appellees at app., McCurdy v. Morgan, 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (opinions of Professors F. Sanchez Roman and Ramon Martinez Lopez).

359. *See* Brief for Appellees at 1-26, 73-74, McCurdy v. Morgan, 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.).

360. For a more recent discussion of the Roman law authorities in point, see Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 Sess. Cas. 30, 116-17 (H.L.) (Lord Wilberforce); *id.* at 141-42 (Lord Hailsham).

361. 670 S.W.2d 250 (Tex. 1984).

362. General Land Office, Austin, Texas, 31 Spanish Collection 34 (Grant to Francisco Ricardo (Hernández)).

the bed of the creek section traversing his land.[363]

This claim was ultimately bound to fail for two reasons. First, as will be seen presently, the distinction between "private" and "public" waters developed by Roman lawyers was inapplicable in Spanish America. Secondly, and remarkably, it was possible to establish, that the term "waters" as used in the legislation of the Indies encompassed "private" as well as "public" waters.

1. The Private/Public Distinction

We have seen much further above that Spanish America was, in the constitutional law of the Spanish Empire, property of the Crown of Castile in its corporate capacity.[364] The chief consequence of the direct proprietary title of the Kings of Castile to the territories of the Spanish Indies was, quite simply, that there was no immediate need for distinguishing between public and private watercourses. The King owned the former as genuine regalia (*realengos*) in his traditional capacity as Sovereign,[365] but he also owned the latter, again as *realengos*, by virtue of his above-described papal and other titles to the Indies.[366]

As reported by a leading Mexican authority in 1895, all national (Mexican) lawyers were agreed, that as regards the use and the appropriation of waters, the laws and doctrinal classifications observed in Metropolitan Spain were "never in effect" in these colonies.[367] As stated forty years earlier in a leading authority, the Laws of the Indies classify waters as "part of the Royal domain, which can be acquired by grant or denunication in the same manner as lands."[368]

2. Common Rights to Water in the Public Domain

Thus, all waters within the Spanish possessions in the New World were originally the property of the Crown of Castile in its corporate capacity, regardless of whether such waters would have been classified as "public" or "private" under Peninsular or Roman law. This was,

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363. *See In re* Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 252 (Tex. 1984).

364. *See* R.I. Book 3, Title 1, Law 1.

365. *See* 6 J. SOLÓRZANO PEREYRA, POLÍTICA INDIANA, ch. 12, § 1.

366. *See id.* § 3.

367. *See* Dallares, *Aguas-Consultas*, 9 REVISTA DE LEGISLACIÓN Y JURISPRUDENCIA 7-8.

368. 2 SALA MEXICANO 13 (M. Galván Rivera ed. 1845).

moreover, expressly spelled out in a well-documented controversy between the Audiencia of New Spain and none other than Hernando Cortes himself.

By Royal *merced* (donative grant) of July 6, 1529, the Conquistador of Mexico received a vast territorial grant in central Mexico, plus the title of the first Marques del Valle and various privileges, later much in dispute. The habendum clause of the grant included, in addition to lands, "*montes y prados y pastos y aguas corrientes, estantes y manantes*," that is, woods, pastures, and *running, stagnant, and percolating waters*.[369] This grant gave rise to a protest of the Audiencia of New Spain, which maintained, in 1531, that in "new lands" such as those of New Spain, things that were of such public interest should not be the objects of exclusive private rights.[370] The Empress thereupon instructed the Audiencia to propose the appropriate solution.[371]

The solution proposed by the Audiencia of New Spain, and approved by the Empress and the Council of the Indies by *cédula* of April 20, 1533,[372] is the one later codified in a famous passage of the *Recopilación* of the Indies which provides that the woods, pastures, and waters of places and forests conceded, or to be conceded, in *seigeurial* estates in the Indies, were to be common to Spaniards and Indians.[373] This was followed in 1541 by another *cédula*, providing more comprehensively that "*los pastos, montes, y aguas sean comunes en las Indias.*"[374] Pasture lands, woods, and waters were thus generally declared to be common in Spanish America.

The enactments just referred to were quite general in terms, and as shown by their legislative history, they were designed to cover running waters, stagnant waters, and even springs.[375] Thus, as of 1541 at the latest, waters of whatever description in New Spain were a sub-

369. B. GARCÍA MARTÍNEZ, EL MARQUESADO DEL VALLE 51, 93 (1969) (emphasis added).

370. *See* J. M. Martinez Urquijo, *El Concepto de Tierra Nueva en la Fundamentacion de la Peculiaridad Indiana*, in MEMORIA DEL IV CONGRESO INTERNACIONAL DE HISTORIA DEL DERECHO INDIANO 389, 397 (1976).

371. *See* 1 D. DE ENCINAS, CEDULARIO INDIANO 62 (A. Garcia Gallo ed. 1945) (originally published 1596).

372. *See id.* at 63.

373. *See* R.I. Book 4, Title 17, Law 7.

374. *See id.* Book 4, Title 17, Law 5.

375. *See* J. M. Martínez Urquijo, *La Comunidad de Montes y Pastos en el Derecho Indiano*, in REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO RICARDO LEVENE 93, 95-98 (1972).

category of the Royal domain dedicated to common use, and the public domain was open to Spaniard and Indian alike for the pasturing and watering of cattle.

This legal situation should be compared with the status of pastures and watering places on the United States federal public domain throughout much of American history. As the United States Supreme Court said, in *Buford v. Houtz*:

> We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.[376]

The difference between the "open range" rule of United States public land law and the principle of common non-consumptive use of the pastures and watering places in the ultramarine Spanish Empire is thus quite narrow. The cattlemen of the late nineteenth century and the sheepherders of Territorial New Mexico[377] had *implied* license to use the public domain for grazing. Their Latin American equivalents enjoyed the same benefit, but by *express* sixteenth-century Royal grant. This explains the ready assumption of Spanish and Mexican governmental authorities in eighteenth and nineteenth-century Nuevo Santander and Texas that stream or lake frontage automatically included the right to water cattle.

Such non-irrigation water rights could be exercised, however, only where there was access to water without trespass. In New Spain, as later in the United States, the open range gradually succumbed to exclusive surface land grants, and non-riparian cattlemen were deprived of access to watering places.[378] Even the Coahuiltexan location policy limiting water frontage to one-fourth of the land granted

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376. 133 U.S. 320, 326 (1890).

377. *See* W. PARISH, THE CHARLES ILFELD COMPANY, A STUDY OF THE RISE AND DECLINE OF MERCANTILE CAPITALISM IN NEW MEXICO 152-73 (1961) (late nineteenth-century New Mexico sheep ranching). *See generally* E. OSGOOD, THE DAY OF THE CATTLEMAN (1929) ("open range" on United States public domain).

378. *See* F. CHEVALIER, LA FORMATION DES GRANDS DOMAINES AU MEXIQUE, TERRE ET SOCIÉTÉ AUX XVIE - XVIIE SIÉCLES (1952) (classic description of "old" Mexico); W. PARISH, THE CHARLES ILFELD COMPANY, A STUDY OF THE RISE AND DECLINE OF MERCANTILE CAPITALISM IN NEW MEXICO 174-91 (New Mexico under United States rule); ERICKSON, *Of Horse and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (present day example of closing of range).

could only reduce the incidence of "useless" pasture lands. It could not, and was not intended to, prevent the closing of the range.

C. *Express and Implied Water Rights*

We have just seen that while in the United States the principle of the "open range" was based on implied license by the sovereign, the Spanish and Mexican equivalent of the same principle was spelled out expressly in Royal legislation. This difference is of some significance. It reflects, once again, the pervasive strength of the fundamental principle of the Law of the Indies that through and upon the Conquest, all lands and waters of Spanish America became the property of the Crown of Castile in its corporate capacity.[379] Entitlements by others to any part of this Royal domain would only exist pursuant to Royal authority. Nobody could acquire property to part of the public domain without an original concession from the Crown.[380]

The Royal declaration designating the pastures, woods, and waters of the Indies to be "common" was an express license to the public at large to use the public domain for grazing and for livestock watering, but it did not confer definitive property rights valid against the Crown. Quite the contrary, both pastures and waters remained part of the *realengos*, or Crown properties, available for grant, sale, or, if need be, composition as above described. The grant or sale of pasture lands in property removed these lands from the public domain accessible to all, and the grant of water rights deprived the general public of the use of these waters.

We are not at this place concerned with express grants of water rights, since these were undoubtedly valid and speak for themselves.[381] The persistent question in Texas, now put at rest by the *Valmont-Medina-Laredo* trilogy, was whether and if so, to what extent Spanish or Mexican grants of land without express irrigation rights carried irrigation water rights with them. Once it is established that all of Spanish America was within the patrimony of the Crown of Castile, that private property rights could exist only by virtue of

379. *See* R.I. Book 3, Title 1, Law 1.

380. *See* 1 J. M. MORA, MEXICO Y SUS REVOLUCIONES 207 (1836), *quoted in* 9 REVISTA DE LEGISLACIÓN Y JURISPRUDENCIA 9; *see also* R.I. Book 4, Title 12, Law 14.

381. Within the current framework of Texas water law, these are nonstatutory water rights. *See* Caroom & Elliott, *Water Rights Adjudication—Texas Style*, 44 TEX. B.J. 1183, 1186 (1981).

Royal concession, sale, donation, or composition, and that water rights are a category separate and apart from surface land rights, the general answer is obvious. Thus, Lasso De La Vega stated in his General Regulations of Water Surveys[382] which was quoted in *Valmont*:

> [A]nd limiting myself to waters, as a guide and foundation of all this reglamento, I find that they are in the same manner part of the Royal Patrimony, as the other things mentioned, that as such they are annexed to or incorporated in his Royal Crown, and therefore are called realengos, to such an extent that to possess them it is necessary that the private possessor allege and prove that these things have been conceded to them by a special grant (merced) from the same king and Catholic Masters, or in their name; because the law says: Only the Prince and no one else has the right to grant water, and so we must consider null and void the quasi-possession to which we find regalia, be they by measure or in other form, if the Royal Hand has had no part in the distribution.[383]

Along with copious other authorities referred to in *Valmont*,[384] De La Vega's regulations supported the Court's conclusion that Lower Rio Grande riparians holding under Nuevo Santander or Tamaulipas surface grazing and/or dry farming grants had no riparian irrigation rights in and to the waters of that river.[385] In *Cibolo*, that holding was extended to perennial streams in Coahuila y Texas proper.[386]

Even in more general terms of European public law, *Valmont* would not have been decided differently. The Lower Rio Grande was, after all, navigable or at least floatable at the time of the grants under which irrigation water rights were asserted. For almost two milennia, such waters had been deemed public, and obstructions to navigability had been prohibited.[387] In the late Middle Ages and the early modern era, the right to police and control public streams had been classified by feudal lawyers as part of the *Regalia Maiora*, or the inherently

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382. *See* 2 SALA MEXICANO 155, 156 (1845).

383. State v. Valmont Plantations, 346 S.W.2d 853, 861 n.17 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962) (translation has minor variations from original).

384. *See id.* at 861-63.

385. *See id.* at 878.

386. *See In re* Adjudication of the Water Rights of the Cibolo Creek Watershed of the San Antonio River Basin, 568 S.W.2d 155, 157 (Tex. Civ. App.—San Antonio 1978, no writ).

387. *See* DIG. 43.12.1 pr. (Ulpian) (cites praetorian edict to that effect); *see also* Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 Sess. Cas. 30 (H.L.); T. LARES, DERECHO ADMINISTRATIVO 78 (1852).

sovereign proprietary attributes of the Crown.[388] The rules just stated were reflected both in the *Siete Partidas*, applicable in Spanish America Indies as suppletory law,[389] and in Solorzono's magisterial treatise on the law of the Indies.[390]

These auxiliary considerations were not available in *Medina*. It will be recalled that the grant there involved encompassed a section of the bed of the Medio (or Middle) Creek. That creek flows into the Medina River, and both the Medina and the Medio were nonperennial.[391] That double classification precluded reliance on the rule developed by medieval Roman-law authors for the primary tributaries of non-navigable rivers. As set forth in a printed but otherwise apparently unnoticed opinion by Mexico's leading nineteenth-century jurist, Ignacio Vallarta, such primary tributaries of navigable or floatable rivers are classified as "public," and the removal of their waters is subject to public license.[392]

Thus, *Medina* posed the ultimate question as to Spanish and Mexican water law in Texas: Did the ownership of a surface estate encompassing a section of traversing nonperennial waters carry with it irrigation rights in and to these waters? Such rights could exist, if at all, only by operation or implication of law, since the classification of the grant as grazing land with a few *labores* fit for dry farming[393] directly contradicted any implied factual intent to grant irrigation rights.

The present author will not burden these pages with his views on this issue, which are felicitously summed up in the dissenting opinion of Justice Blair Reeves in *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*.[394] That

388. *See* Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 Sess. Cas. 30, 116-17 (H.L.) (Lord Wilberforce).

389. *See* Siete Partidas Book 3, Title 28, Law 8.

390. *See* 6 J. SOLORZANO PEREYRA, POLÍTICA INDIANA ch. 12, § 1.

391. *See In re* Adjudication of the Water Rights in the Medina River Watershed of the San Antonio River Basin, 670 S.W.2d 250, 251 (Tex. 1984).

392. *See* LOS AFLUENTES DE LOS RÍOS NAVEGABLES Y FLOTANTES 3-7 (1897).

393. *See* General Land Office, Austin, Texas, 31 Spanish Collection 34 at 43v (Grant of Francisco Ricardo (Hernandez)) ("There are three labors of land within the above tract fit for cultivation but with out the facilities of irrigation"); *see also In re* Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin, 645 S.W.2d 596 (Tex. App.—San Antonio 1982), *rev'd*, 670 S.W.2d 250 (Tex. 1984).

394. 645 S.W.2d 596, 612-14 (Tex. App.—San Antonio 1982), *rev'd*, 670 S.W.2d 250 (Tex. 1984).

opinion, in substance, came to prevail on further appeal to the Supreme Court of Texas. The Court had to decide, in essence, whether to distinguish Chief Justice Pope's opinion in *Valmont* as *dictum*. A fair reading of that opinion, and of the Mexican authorities quoted in it, was that the Spanish and Mexican system of water law in Texas "required a specific grant."[395]

Two authorities referred to by Chief Justice Pope in *Valmont* deserve specific mention and quotation here. The first is Luis Cabrera, a leading authority on Mexican agrarian law. The second authority is Andres Molina Enríquez. Cabrera had been called upon to represent the Tlahualilo Company in a historical water-rights controversy relating to the Nazas River, which is traceable to a composition made with the Marquess of Aguayo, a governor of Texas, in 1731. Cabrera later revised his brief for inclusion in *Los Grandes Problemas Nacionales*.[396] After setting forth his findings and detailed conclusions, as relied upon in *Valmont*,[397] he went on to say:

> The above annotations lead us to the conclusion that once the Conquest was effected, all of the lands and waters fell into the private domain of the king. Waters were therefore, like land, *regalía*, and there was no room for a distinction between public and private waters because since all belonged to the Crown, all were private. Therefore, every particular property in waters had to be derived from a grant made by the King; and such a grant was indispensable for the creation of individual property in such a manner that without it, there were no water rights. The riparian character which a surface property might have, or the mere existence of running waters within a property, were not sufficient titles to confer water rights, if the grant did not expressly declare that the property of the land had been conceded with that of the waters. In sum, there was no accession of the waters to the land.[398]

In Santiago Oñate's Memorandum on Water Rights in the Lower Rio Grande in the Spanish Colonial and Early Mexican Periods, which acquainted the Texas courts with many of the authorities ultimately reflected in *Valmont*, he refers to Don Andres as "a specialist

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395. *See* F. J. TRELEASE, CASES AND MATERIALS ON WATER LAW 23 (3d ed. 1979).

396. *See* A. MOLINA ENRÍQUEZ, LAS GRANDES PROBLEMAS NACIONALES 165-73 (1909). The Cabrera consultation is published in full in L. CABRERA, OBRAS COMPLETAS 327-588 (1972).

397. 346 S.W.2d 853, 861-63 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

398. *See* A. MOLINA ENRÍQUEZ, LAS GRANDES PROBLEMAS NACIONALES 169 (1909).

on Colonial law and rural property."[399] We may be permitted to add the following: *Los Grandes Problemas Nacionales* was the most widely discussed book in Mexico at the time, and its author was to become the draftsman of article 27 of the Mexican Constitution of 1917, the famous key provision of that Constitution relating to public property. Furthermore, Molina Enríquez later served, among other things, as legal adviser to the Division of Waters and to the Irrigation Loan Fund of the Mexican Federal Department of Development.[400]

Molina discusses the question of water rights in a chapter of the second part of his work entitled, "*El problema de la irrigación*."[401] The consultation of Luis Cabrera on water rights in the Nazas, as already mentioned, appears in that chapter.[402] It is prefaced by a remark of Molina Enríquez stating the author's entire agreement with the portions of the Cabrera consultation there set forth.[403] (There is a reservation as to Cabrera's forensic submissions at the very end of his consultation, which were not, however, reprinted).[404] Immediately after having reproduced those portions of Cabrera's consultation with which he was in full agreement, Molina Enríquez set forth his own views on the legal condition of waters. As regards accession, he wrote the following:

> When rain waters enter a visible and fixed channel in which they run periodically, they then cease being definitely *communal*, because the bed is already part of their condition, and they are transformed into creeks (arroyos), whose total and definitive appropriation is now possible. Nevertheless, there still is no *accession* between the waters and the source: First, because no statute and no principle of our National Law has established such *accession*. Secondly, because the constant movement of the waters and the immobility of the channel combine to repudiate any idea of permanent union between the former and the latter. Thus, only when dealing with a creek (*arroyo*) that rises and terminates

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399. S. OÑATE, MEMORANDUM ON RIGHTS IN WATERS OF THE LOWER RIO GRANDE IN THE SPANISH COLONIAL AND EARLY MEXICAN PERIODS (1959), *reprinted* (*with omissions*) *in* Brief for Appellants at 15 app., State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962) (on file in University of Texas Law Library, KF228 T4 T41).

400. *See* A. MOLINA ENRÍQUEZ, ANTOLOGIA DE ANDRÉS MOLINA ENRÍQUEZ 11-24 (1969).

401. *See id.* at 161.

402. *See id.* at 165-73.

403. *See id.* at 165.

404. *See id.* at 165, 173.

> within the same estate can the landowner consider the creek (*arroyo*) to be his. Beyond that case, the *accession* of the waters of a creek (*arroyo*) to the land in which it rises or to the lands through which it passes, is an absurdity rejected by common sense.[405]

The concluding statement in that passage was to find its way into the opinion of Justice Spears in *Medina*.[406]

As held in *Medina*, the grantee of a Coahuiltexan surface estate encompassing a nonperennial creek section had no proprietary irrigation water rights to the waters of that creek by virtue of riparian location, accession, or other implication of law.[407] Thus, the view of historical Spanish and Mexican irrigation water rights now prevailing in Texas is, quite simply, that such rights existed as vested property rights currently entitled to recognition only where expressly granted by Spanish or Mexican authority.

D. *Pueblo Indian and Municipal Pueblo Water Rights*

Two additional questions deserve brief mention. These concern the water rights of sedentary Indian pueblos recognized by Spanish authority, and the municipal water rights of cities, towns, and villages established under Spanish rule. Perversely, the term "pueblo water rights" is uniformly used to describe the latter.[408] No distinct terminology has as yet developed to describe the water rights of sedentary Indian agricultural communities colloquially known as "pueblos." The word "pueblo" as such has no racial overtones and was used in the Mexican north to describe both villages and towns, whether Spanish or Indian.

1. Indian Pueblo Water Rights

We have already seen that pursuant to a *cédula* of April 20, 1533, later codified in the *Recopilación* of the Indies, the woods, pastures, and forests of the Indies were declared to be common to Spaniards and Indians.[409] Thus, Indians had, in theory, the same access to the

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405. *See id.* at 175.

406. *See* 670 S.W.2d 250, 254 (Tex. 1984).

407. *See id.* at 253, 254-55.

408. *See In re* Contest of Laredo to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257, 267-70 (Tex.App.—Austin 1984, writ ref'd n.r.e.); Hutchins, *Pueblo Water Rights in the West*, 38 TEXAS L. REV. 748, 748 (1960).

409. *See* R.I. Book 4, Title 17, Law 7.

waters of the public domain as had Spanish cattlemen and sheep ranchers. In practice, nomadic Indians had few if any cattle, and sedentary Indians saw their cornfields invaded by Spanish-owned livestock.

The Crown sought to protect its Indian subjects, mainly by keeping Spaniards out of Indian villages. The devices used in this connection are described in further detail by Magnus Mörner.[410] They included the recognition of Indian self-government,[411] the prohibition of the granting, composition, or unsupervised "voluntary" sale of Indian lands to Spaniards,[412] the ban on residence by Spaniards in Indian villages,[413] and, as a first line of defense, the prohibition of the pasturing of Spanish-owned livestock within a specified distance from Indian pueblos.[414] In time, that protective zone was enlarged to include a one-square-league commons, or *fondo legal*, centered on the cross of the village cemetery.[415]

The legislative scheme just outlined above presupposed that the Indians protected by it would follow agricultural pursuits requiring irrigation. Indeed, the rudimentary rules of the *Recopilación* of the Indies on the distribution of irrigation waters are expressly borrowed from Indian communal customs.[416] The *Recopilación* specifically provided that individual and communal Indian lands, waters, and irrigation, "*con sobre*," were to remain unaffected by the distribution of lands through sales, donations, or composition.[417] The somewhat obscure words "*con sobre*" were understood by contemporary commentators to signify the needs of the respective Indian communities for subsistence agriculture.[418]

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410. *See* M. MÖRNER, LA CORONA ESPAÑOLA Y LOS FORANEOS EN LOS PUEBLOS DE INDIOS DE AMÉRICA 61-257 (1970).

411. *See id.* at 171.

412. *See* R.I. Book 4, Title 12, Laws 16-18.

413. *See id.* Book 6, Title 3, Laws 21-24; *see also* M. MORNER, LA CORONA ESPAÑOLA Y LOS FORÁNEOS EN LOS PUEBLOS DE INDIOS DE AMÉRICA 125-34 (1970).

414. *See* M. MÖRNER, LA CORONA ESPAÑOLA Y LOS FORÁNEOS EN LOS PUEBLOS DE INDIOS DE AMÉRICA 169 (1970) (gradual expansion of "security zone" well illustrated).

415. *See* R.I. Book 6, Title 3, Law 8; Royal *cédula* of Oct. 15, 1713, in W. OROZCO, LOS EJIDOS DE LOS PUEBLOS 78-79 (1975) (originally published 1895).

416. *See* R.I. Book 4, Title 17, Law 11.

417. *See id.* Book 4, Title 12, Law 18.

418. *See* P. DE PALACIOS, NOTAS A LA RECOPILACIÓN DE LEYES DE INDIAS (B. Bernal ed. 1979) (originally published 1735) (explains words "con sobre" in R.I. Book 4, Title 12, Law 18 by referring to R.I. Book 4, Title 12, Law 5, which provides that Indians should be given lands, homes, and pastures in such manner that would not lack necessaries, and would

These guarantees of Indian irrigation water rights were tied to the existence of Indian sedentary communities, and thus inapplicable to nomadic, tribal Indians. Unlike New Mexico, Spanish Texas proper did not have recognized, settled Indian pueblos or villages. There were, however, the beginnings of such communities at various missions in the San Antonio area, and it was indeed quite literally the mission of these institutions of the regular clergy to domesticate tribal Indians while at the same time converting them to Christianity.[419]

Since the San Antonio missions were established before the civilian Isleño settlement of San Antonio in 1731, they initally claimed superior and even exclusive water rights to the San Antonio River and the San Pedro Spring on behalf of their Indian charges.[420] That claim was opposed by General Pedro de Rivera, a former Inspector of the presidio of San Antonio, to whom the Viceroy referred the matter for advice. As the general pointed out, the real purpose of the missionaries was to obstruct civilian settlement at San Antonio, which had been expressly sanctioned and financed by Royal authority.[421] In a final decision dated May 12, 1733, the Viceroy accepted General (now Marshal) Rivera's recommendations, stating:

> I do hereby order the governor of the Province of Texas to make the distribution of the waters of the San Antonio River and Arroyo de San Pedro to the missionary fathers, the soldiers, and the citizens and first

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have nourishment and living space sufficient for houses and families). In the British Museum variant of the Palacios Manuscript, there is a reference to Escalona, lib. 2, cap. 20 *in fine* and cap. 21, no. 3. *See id.* at 278 n.193; *see also* 2 G. ESCALONA DE AGUERO, GAZOPHILATEIUM REGIUM PERUBICUM (1775) ("con sobre" signifies that Indians be given waters and irrigation "necesarios de ellas para su labor, y cultura"). Another eighteenth century commentator noted, in connection with R.I. Book 4, Title 12, Law 18, that by *cédula* of June 4, 1687, it had been ordered that the Indians were to be given 600 *varas* of *fondo legal* "or more if they needed." *See* C. García Gallo & José Lebrón y Cuervo, *Notas a la Recopilación de Leyes de Indias*, 40 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 349, 456 (1970).

419. A report on the status of the San Antonio missions, dated March 6, 1762, used the term "pueblo" for the living accommodations of the neophyte Indians of each mission. *See* DOCUMENTOS PARA LA HISTORIA ECLESIÁSTICA Y CIVIL DE LA PROVINCIA DE TEXAS O NUEVAS PHILIPINAS 1720-1779, at 245, 248, 254, 257, 259 (J. Porrúa Turanzas ed. 1961); Bolton, *The Mission as a Frontier Institution in the Spanish American Colonies*, 23 AM. HIST. REV. 42 (1917), *reprinted in* J. BANNON, BOLTON AND THE SPANISH BORDERLANDS 187, 200 (1974 ed.) (functions of missions in Mexican North).

420. *See* Letter from Viceroy Casafuerte to Fr. de Vergara, Bexar Archives, General Manuscript Series, Dec. 25, 1731 (summarizes missions' position).

421. *See* Letter from Rivera to Casafuerte, Dec. 10, 1731, *translated in* 3 A STUDY OF LAWS AND CUSTOMS PERTAINING TO THE USE OF WATER IN CALIFORNIA UNDER SPAIN AND MEXICO 3-10.

> settlers of the Villa de San Fernando, in the manner said Marshal proposes, and in such a way that all may enjoy its benefits without the Indians being deprived of the necessary water for their towns. . . . In regard to the distribution of the water, it shall be done with the clear understanding that in case there is an insufficient supply for continuous utilization, it shall be used by turns, according to law eleven, chapter seventeen, book four, of the *Recopilación de Indias*, so that in case that *villa* and other settlements grow and the number of settlers increase there will be no scarcity of water and everyone may enjoy its benefits.[422]

As shown by this incident and the Viceroy's decision, the charges (or "neophytes") of the San Antonio missions were assimilated to sedentary Indians, and their settlements were accorded possessory irrigation water rights as provided by the *Recopilación* of the Indies for Indian communities or pueblos. It is also clear that the Viceregal authorities rejected as unfounded the claim of the missions to what in modern parlance are prior and expanding rights of Indian pueblos over Spanish settlers.[423] Towards the end of the century, in the *de la Mora-Jamay* case, the Audiencia of Guadalajara rejected a similar claim to expanding and paramount water rights asserted on behalf of an Indian pueblo.[424]

We may conclude, therefore, that in the Spanish era, there were some communities of neophyte Indians attached to the San Antonio missions which enjoyed irrigation water rights comparable to those of the formally recognized Indian pueblos. This was, however, a fleeting phenomenon. The Indian communities declined without attaining independent legal status.[425] When the missions were secularized in the

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422. *See* Order of the Viceroy, May 12, 1733, *translated in* 3 A STUDY OF LAWS AND CUSTOMS PERTAINING TO THE USE OF WATER IN CALIFORNIA UNDER SPAIN AND MEXICO 15, 22. This order reproduces a second recommendation by Rivera having the same effect as the first one. *See id.* at 16-19.

423. The Viceregal Order of 1733 was reconfirmed in 1736. *See* Bexar Archives, General Manuscript Series, Jan. 24, 1736, at 7v.

424. *See* J. J. & A. de la Mora v. Pueblo of Jamay (Audiencia of Guadalajara, Apr. 25 and July 3, 1799) (Bibliotheca Publica del Estado de Jalisco, in Guadalajara, Mexico, file number C.188.3.2242). In that case, the pueblo was ordered to desist from replacing a stick-and-stone dam on the *arroyo de Chacale*. That *arroyo* rose on the plaintiffs' hacienda above the Indians' *fondo legal*, flowed through it, and continued into the portion of the plaintiffs' hacienda located below the pueblo of Jamay. The *fiscal*, in his capacity as Protector of the Indians, had expressly relied on a preferential right of the Indians, "*con sobras*," to the waters of the *arroyo*.

425. *See* McMullen v. Hodge, 5 Tex. 34, 81-83 (1849) (San Jose Missions). *See generally* M. SCHUETZ, THE INDIANS OF THE SAN ANTONIO MISSIONS 1718-1821, at 254-67, 313-21 (doctoral dissertation, University of Texas 1980).

initial years of the Mexican period, the lands and waters used by the San Antonio mission Indian communities were granted to the remaining Indians, and to others, individually in property as irrigable *suertes*[426] with express water rights. The water rights at issue in *San Antonio River Authority v. Lewis*[427] are the products of these twin processes of the secularization of the missions and the privatization of Indian communal landholdings.

More fundamentally, the special legal status of Indians was formally abolished in the initial years of Mexican independence, and even the use of the term "Indian" in legal documents and proceedings was prohibited in 1822.[428] The imperial order embodying this prohibition in Coahuila y Texas seems to have been the result of a petition by the Tlaxcaltec Indians of Parras in Coahuila, dated February 20, 1822, to Emperor Itúrbide. The petition alleged various acts of land and water theft and other oppression practiced by locally resident Spaniards upon Indians. The Regency Council decided on April 10 of that year that the inhabitants of Parras were to be told that "the odious distinctions between Indians and Spaniards must be banished," and this was duly communicated to the Indians.[429] Thus, as of 1822, Indian status could no longer be formally raised in land and water disputes.

Five years later, the State of Coahuila y Texas took the further step of formally abolishing separate Indian communities and commuting their communal land and water entitlements into individual property rights. Article 137 of the Regulations for the Political and Economic Government of the State of June 15, 1827,[430] provided that Indian pueblos were to be converted into *ayuntamientos*, or general munici-

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426. McMullen v. Hodge, 5 Tex. 34, 81-83 (1849).

427. 363 S.W.2d 444 (Tex. 1962).

428. *See* Margadant, *Official Mexican Attitudes Towards the Indians: An Historical Essay*, 54 TULANE L. REV. 964, 976 (1980); *see also* Sovereign Disposition (order) of May 31, 1822, 1 M. DUBLÁN & J. LOZANO, LEGISLACIÓN MEXICANA 617. This order directed compliance with the decisions in point of the Spanish Cortes of August 12 and October 8, 1812, which mandated the use of the terminology of the Cadiz Constitution in ultramarine matters as well. Article 12 the Cadiz Constitution had declared all free persons born within the Spanish dominions to be españoles (Spaniards). *See* 2 M. DUBLÁN & J. LOZANO, LEGISLACIÓN MEXICANA 98, 99.

429. Lemoine Villicaña, *Relación de Agravios cometidos durante la Epoca Colonial contra el Común de Naturales Tlaxcaltecas del Pueblo de Parras, Coahuila (1822)*, 4 BOLETIN DEL ARCHIVO GENERAL DE LA NACIÓN 213, 231-53, 254 (1963) (2d series) (reproduction of petition and resolution of Regency Council).

430. Reglamento para el Gobierno Politico Economico del Estado Libre de Coahuila y

palities, and that the land held by Indians in usufruct was to be deeded to them in absolute title. Article 138 laid some additional rules as to *solares*, or town lots, which were to pass to their Indian occupants in absolute property. Article 139, finally, went on to provide:

> According to the numbers of these [the town lots] there shall also be adjudicated to them, in absolute dominion and ownership, by days or hours per month, the waters which appertained to the said pueblos by the same method as the lands to which the prior articles refer, and as to the former as well as to the latter, the alcaldes shall issue the appropriate títulos of property (charging only the fees for stamped paper and for the scribe).[431]

Thus, by mid-1827, all communal land and water rights of Indian pueblos in Coahuila y Texas had been ordered to be commuted into individual property. (The implementation of this legislative directive appears to have required additional legislation for some localities in the Coahuilan parts of the State.)[432]

2. "Pueblo Water Rights" of Spanish and Mexican Municipalities

We have just seen that the *Recopilación* of the Indies expressly recognized, "*con sobre*," the irrigation water rights of communities of Indians.[433] Did Spanish or Mexican law also guarantee, in some manner, the water rights of "Spanish" (*i.e.*, non-Indian) municipalities in their corporate capacities? In *In re Contest of Laredo to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries*,[434] the Austin court of appeals answered that question in the negative, thus rejecting the notion of so-called pueblo water rights in Texas.[435]

That decision was surely correct in terms of the law of the Indies. The *Indian* "communities" were guaranteed their traditional water

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Texas of June 15, 1827 (Decree No. 37), Bexar Archives, Coahuila y Texas, Official Publications, 1826-1835, June 15, 1827.

431. *See id.*

432. *See* Decree No. 37 of Nov. 26, 1827, Decree No. 150 of Sept. 21, 1830, and Decree No. 269 of Mar. 11, 1834, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 93, 161, 244 (1839).

433. R.I. Book 4, Title 12, Law 18.

434. 675 S.W.2d 257 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

435. *See id.* at 270.

rights for the simple reason that they engaged in agricultural pursuits collectively, or in a communal manner. Hence the term *comúnidad* was used in reference to land and water rights held collectively by them.[436] The guarantee of Indian communal water rights was thus nothing more than the recognition and protection of collective irrigation agriculture customs in recognized settlements of sedentary Indians.

When the sedentary Indians of Mexican Texas were integrated legally into society at large, the collective irrigation water rights of their former communities were commuted into quantified, individually held water rights attached to individually-owned *suertes*. In San Antonio, the *ayuntamiento* (or municipal government) was initially allotted the lands of the San Jose Mission as a source of municipal funds, but these lands as well were granted in private property by the central authorities to individual inhabitants in units of one *dula* (day of water) per *suerte*, at a charge of five pesos per *dula* for initial four years.[437] The Coahuiltexan legislation of 1827 was more generous in this respect: The Indian communities were transmuted into Mexican *ayuntamientos*, but their communal water rights were adjudicated, along with their communal lands, to individual Indians in private property without major change.

These commutation and transmutation processes reflect a further, rather obvious, point: Irrigable *suertes* with quantified irrigation water rights in private ownership are incompatible, *pro tanto*, with "paramount" municipal water rights. The City of San Antonio, obviously, did not have *any* proprietary rights to the waters of the Maynez *suerte* which were at issue in *Lewis*.[438]

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436. *See* R.I. Book 4, Title 12, Law 18.

437. *See* Decision of the Provincial Deputation of Texas, Oct. 22, 1823, Bexar Archives, General Manuscript Series, Oct. 22, 1823; Brief for Appellant at 97-117, State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962) (on file in the University of Texas Law Library, KF 228 T4 T41) (memorandum on the Spanish and Mexican irrigation system in San Antonio).

438. *See* San Antonio River Auth. v. Lewis, 363 S.W.2d 444, 449 (Tex. 1962). Article 49, section 13 of the Municipal Ordinances of San Antonio spoke of the "proprietary owners" (*dueños propietarios*) of the "days of water" into which the various water conduits of the municipality had been divided. *See* State of Coahuila y Texas, Decree No. 98, June 6, 1829, Barker Texas History Center Collections, University of Texas (T22 352, Sa. 510, 1829). This section was later repealed by articles 2 and 3 of Decree No. 198 of April 30, 1832, which lowered the municipal water tax from one peso to two *reales* per year for each day of water within the municipality itself, and exempted the outlying lands from this tax. *See* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 198 (1839).

As recounted above, the *ayuntamiento* of San Antonio received, in 1731, one-fifth of the irrigable lands and appurtenant irrigation water rights distributed at that time. These lands, and the irrigation rights appurtenant thereto, were granted to the municipality as *propios*. *Propios* were productive municipal endowment designed to produce revenue for the operation of local government. The town's waters were "rented out" routinely with the *propio* lands to produce municipal revenue.[439] Nothing suggests that they were, in some way, of higher quality or dignity than other water rights routinely sold or leased in Spanish San Antonio.

There are some fundamental differences between the early histories of San Antonio and Laredo. The latter municipality, we have seen, was established in the course of the *visita* of 1767, and endowed on that occasion with one square mile of lands for commons, pastures, and municipal property endowment. The entire area of six square leagues allocated for the Laredo settlement had previously been determined to be unfit for irrigation, and the town's square league had been carved out of that site. Consequently, neither the town of Laredo nor any of its *pobladores* were granted irrigable *suertes* or irrigation water rights.

Faced with this forbidding record, the City of Laredo did not claim any irrigation water rights when its section of the Rio Grande came to be adjudicated. It asserted, instead, a "superior" right to use as much of the waters of the Rio Grande as was "necessary for domestic and municipal purposes."[440] Given the high priority of these purposes,[441] that claim seems neither implausible nor inequitable. It could not, however, be supported by an express grant or by direct Spanish or Mexican authority in point. The City of Laredo therefore based its case on the "pueblo water rights" doctrine developed especially by the

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439. Article 47 of the Municipal Ordinances provided that the (irrigable) lots of the city's "one-fifth" of *propios* were to be rented out at one peso per year, "in the same manner as has been observed until now." State of Coahuila y Texas, Decree No. 98, June 6, 1829, Barker Texas History Center Collections, University of Texas (T22 352, Sa. 510, 1829). Article 45 defined the *propios* of the municipality to include the "civic properties, the lands, water, solares and other farms (*fincas*)" of the town and the proceeds of leases thereof. *See id.*

440. *In re* Contest of Laredo to the Adjudication of the Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257, 259 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

441. *See* TEX. WATER CODE § 11.123 (Vernon Supp. 1986) (domestic and municipal are first-preference use).

California courts.[442]

The Water Rights Commission rejected this claim to open-ended water rights for domestic and municipal purposes, and the appeals of the City of Laredo against that decision were unsuccessful. The Austin court of appeals, in particular, failed to be impressed by the California decisions relied on in this connection.[443] Writing for a unanimous court, Justice Shannon said, in concluding:

> The law of New Spain did not expressly create a municipal water right in the nature of a pueblo water right. No such municipal water right was expressly granted to Laredo at its founding. The reasoning of the courts in *Valmont Plantations* and *Medina River Watershed* precludes recognition of an implied water right. Accordingly, this Court overrules Laredo's point of error.[444]

With respect, the present author could not have chosen a better conclusion for the present chapter than the above passage. It felicitously reflects the author's own views as set forth further above, and as communicated to the Court in *Medina* on behalf of the State of Texas. We may be permitted, however, to make a few additional observations.

First, the issue of non-irrigation water rights, especially of water rights for domestic and municipal uses, is complicated by Mexican legislation enacted within a few years before and after Texas independence. As we have seen, the Colonization Law of 1832 provided for the setting aside, in new municipal colonization settlements, of one irrigation ditch "for the use of the town."[445] Since the remaining irrigation ditches were expressly intended "for the *labores*,"[446] it seems reasonable to assume that municipalities established under the Colonization Law of 1832 were to receive one of three *acequias*, and the waters corresponding thereto, for municipal purposes.

This contradicts rather than supports the notion of *paramount* municipal water rights, for there was no indication that the rights attaching to the municipal *acequia* were to be in any way superior to those

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442. *See In re* Contest of Laredo to the Adjudication of the Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257, 259 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

443. *See id.* at 267-70.

444. *Id.* at 270.

445. Colonization Law of 1832, Decree 190, art. 6, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 189 (1839).

446. *Id.*

of the two others. On the other hand, the unrestricted assignment of an entire *acequia* to new population settlements was hardly without significance. In the past, newly established municipalities—such as San Antonio—had received water rights as appendages to the irrigable *suertes* set aside for them as *propios*, or income-producing municipal endowment. An *acequia* not specifically tied to the municipal farm, on the other hand, could provide not merely municipal revenues, but also municipal services.

The differences between these two categories emerged clearly in the last years of Mexican rule in Texas. A state enactment of April 27, 1833, ordered the sale and reduction to private ownership of all municipal *propios*, excepting buildings leased at over five percent return on capital, municipal and school buildings, and flour mills.[447] Another exemption applied to "waters known to pertain to municipal funds (*propios*) in the Department of Monclova."[448] Thus, by clear implication, *all* municipal water rights other than the ones just mentioned were to be turned into cash.

Fortunately for Texas, this legislative mandate was modified exactly ten months thereafter. A one-paragraph enactment of February 27, 1834, provided that the Law of April 27, 1833, "does not comprise the waters appropriated to the domestic use and convenience of the inhabitants of the towns, or those which serve for their decoration (*ornato*) and cleanliness."[449] Thus, municipal and domestic use of waters was recognized as a separate category, and the Coahuiltexan municipalities were permitted or perhaps even encouraged not to sell that part of their *propio* waters which served these purposes.

This Coahuiltexan legislation was not, of course, applicable to Laredo, which was located in Tamaulipas, and was in any event neither a new municipality nor one endowed with water rights as *propios*. There was, however, another Mexican enactment potentially in point. On December 30, 1836, Mexico adopted a centralist constitution, which transformed the State of Tamaulipas, along with other Mexican states and territories, into a "Department" ultimately depen-

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447. *See* Decree No. 229, arts. 1, 2, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS 213 (1839). The English translation renders *finca* (farm) as "security."

448. *Id.* art. 3, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 213 (1839).

449. Decree No. 261, *reprinted in* J. P. KIMBALL, LAWS AND DECREES OF THE STATE OF COAHUILA AND TEXAS at 236.

dent upon the federal government.[450]

The adoption of the so-called Seven Laws embodying this centralist constitution was followed, on March 20, 1837, by the enactment of the Provisional Regulations on the Internal Government of the Departments.[451] Article 146 of these Provisional Regulations provided, in terms, that it was the duty of the *ayuntamientos* to take care of the conservation of the public *fuentes* (sources; fountains), "assuring that there will be abundant water for people and cattle."[452] Whether this enactment was sufficient to constitute authority to appropriate flowing as well as percolating water for municipal purposes seems doubtful.

In any event, the Republic of Texas had defined its boundaries, by Act of December 19, 1836, to include the "Nueces Strip" and with it, Laredo,[453] so that the applicability of the legislation just referred to is, to say the least, questionable as seen from Texas.[454] These doubts are enhanced substantially when it is recalled that the Texas Revolution

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450. The Constitutional Laws of December 30, 1836 organized the Republic into Departments, and the implementing act of the same date transformed the states then existing into Departments. *See* TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO 1808-1973 at 204, 239, 247 (1973).

451. *See* 3 M. DUBLÁN & J. LOZANO, LEGISLACIÓN MEXICANA 323.

452. *Id.* at 334-35.

453. *See* Act of Dec. 19, 1836, 1836 Tex. Gen. Laws 133, 1 H. GAMMEL, LAWS OF TEXAS 1193-94 (1898). This act defined the boundaries of the Republic of Texas as "beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain to the beginning. . . ." *Id.* This included not only the controversial strip between the Nueces and the Rio Grande, but also most of the present state of New Mexico, as well as portions of the present states of Oklahoma, Kansas, Colorado, and Wyoming. *See* W. BINKLEY, THE EXPANSIONIST MOVEMENT IN TEXAS 24-25 (1925) (map 2); C. PAULLIN, ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES pl. 46c (J. Wright ed. 1932). The present boundaries of Texas were proposed by the United States in the Act of September 9, 1850, and accepted by Texas through the Act of November 25, 1850. *See* 9 Stat. 446 (1850); 1850 Tex. Gen. Laws 3, 3 H. GAMMEL, LAWS OF TEXAS 831, 832 (1898); *see also* Presidential Proclamation of Dec. 13, 1850, 9 Stat. 1005.

454. Before the War of 1846-48, Mexico exercised sovereign authority in the "Nueces Strip" more often than not. *See* State v. Cardinas, 47 Tex. 250, 258-66 (1877); *see also* State v. Sais, 47 Tex. 307, 309-10 (1877); Trevino v. Fernandez, 13 Tex. 630, 662-63 (1855) (legal consequences of de facto situation). As seen from Mexico, the State of Coahuila and Texas was dissolved by the implementing act to the Constitutional Laws of 1836. Article 2 of that act divided Coahuila and Texas into separate Departments, and article 4 thereof postponed the organization of the latter until the "re-establishment of order" in Texas. *See* TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO 1808-1973, at 247 (1973).

was fought, in part, against the centralizing anti-federal tendencies culminating in the suppression of the states (including Texas) by the centralist Constitution of 1836.[455] Even in the face of these doubts, however, it bears pointing out that by the fourth decade of the last century, Mexican legislation (both central and state) had begun to concern itself with assuring adequate municipal water supply systems.

Finally, a few concluding words about the "pueblo water rights" doctrines as developed by the California courts are in order. These doctrines are traceable to *Lux v. Haggin*.[456] A reading of the pertinent passage of Judge McKinstry's opinion will quickly reveal where the court went astray. The Supreme Court of California had previously held, in *Cohas v. Raisin*[457] and elsewhere that the so-called pueblo of San Francisco had the power to dispose of public lands within its (supposed) general limits.[458] That line of decisions had become an article of faith in California, since title to the so-called "American alcalde" town lots (and with them, to much of San Francisco real estate) depended on it.[459]

In *Lux*, Judge McKinstry restated *Hart v. Burnett* to stand for the proposition "that the pueblo authorities were more than mere agents of the government to dispose of the lands as public lands, but the pueblo itself had a vested interest in the lands, and that the portions of

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455. Texas Declaration of Independence of Mar. 2, 1936, Preamble, 1 H. GAMMEL, LAWS OF TEXAS 1063 (1878).

456. 10 P. 674 (Cal. 1886).

457. 3 Cal. 443 (1853).

458. *See* Hart v. Burnett, 15 Cal. 530, 533, 616-19 (1860).

459. *See* Woodworth v. Fulton, 1 Cal. 295, 307, 308 (1850). A divided court held that San Francisco *solares*, not as yet assigned before the military occupation of California, became part of the United States public domain, and that "grants" of such lots made by locally elected "American alcaldes" were void. *See id.* at 308. The author of that opinion, Justice Bennett, reputedly the "strong man on the court," was induced by the holders of such lots to resign and to leave California for the remainder of his unexpired term in exchange for a "large sum of money" equal to the emoluments foregone. *See* J. JOHNSON, 1 HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA 36, 40 (1963). Later, the court duly reversed itself, and upheld the American alcalde town lot grants. *See* Cohas v. Raisin, 3 Cal. 443, 453 (1853); *see also* Hart v. Burnett, 15 Cal. 530 (1860); Welch v. Sullivan, 8 Cal. 165 (1857). The City of San Francisco and the state legislature ultimately confirmed the "American alcalde" grants, and Congress ratified this action by special legislation. *See* Act of Mar. 8, 1866, 1866 Stat. 4; Act of July 1, 1864, § 5, 1864 Stat. 332, 333; Ch. 66, 1858 Cal. Stat. 55. The enactment of March 8, 1866 confirmed Justice Field's decree in City of San Francisco v. United States, 4 Sawyer 553 (C.N.D. Cal. 1864); *see also* United States v. Sante Fe, 165 U.S. 675, 692-706 (1897). *See generally* Fritz, *Politics and the Courts: The Struggle Over Land in San Francisco 1846-1866*, 26 SANTA CLARA L. REV. 127 (1986).

such lands not set aside or dedicated to common uses, or for special purposes, could be granted in lots by the municipal officers to private persons, in full ownership."[460] Proceeding from this grossly distorted view of Spanish and Mexican municipal property law, Judge McKinstry went on to say:

> By analogy, and in conformity with the principles of that decision, we hold the pueblos had a species of property in the flowing waters within their limits, or 'a certain right or title' in their use, in trust, to be distributed to the common lands, and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities.[461]

That, in brief, is the origin of the "pueblo water rights" doctrine. It dates from a time when Texas courts, in Professor McKnight's words, had lost the "thread of Hispanic learning."[462] Their California colleagues, one gathers, were more fortunate in that respect, since they had so much less to lose.[463]

VI. SUMMARY AND CONCLUSIONS

A. *The Common Law Era*

Chief Justice Pope's opinion in the *Upper Guadalupe River Adjudication*[464] provides an accurate thumbnail sketch of the development of Texas water law since 1840. The adoption of the common law by the Republic of Texas in that year brought with it the riparian system, modified to include reasonable riparian use for irrigation purposes. In 1889, the Legislature enacted the prior-appropriation system while at the same time confirming previously acquired riparian water rights.[465]

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460. Lux v. Haggin, 10 P. 674, 714-15 (Cal. 1886). It is abundantly clear, and was expressly spelled out in the founding of San Antonio and the Laredo *visita*, that a pueblo did *not* own the lands with "its" *término*, and that it could not on its own authority make grants out of the public domain. *See* United States v. Sandoval, 167 U.S. 278 (1897); United States v. Santa Fe, 165 U.S. 675 (1897); State v. Gallardo, 106 Tex. 274, 287-88, 166 S.W. 369, 372-73 (1914).

461. Lux v. Haggin, 10 P. 674, 715 (Cal. 1886).

462. McKnight, *The Spanish Watercourses of Texas*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 373, 374 (M. Forbosch ed. 1966). This time has been referred to as a "dark period of ignorance before the bar redisovered the Spanish law." *Id.* at 379.

463. *See* R. POWELL, COMPROMISES OF CONFLICTING CLAIMS: A CENTURY OF CALIFORNIA LAW, 1760 TO 1860, at 127-32 (1977) (unflattering account of initial efforts of California judiciary to cope with Spanish and Mexican law); *see also* Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1, 78-79 (1975).

464. 642 S.W.2d 438 (Tex. 1982).

465. *See id.* at 439-40.

For well-known reasons summarized in felicitous language,[466] the "dual system" thus created was inherently nonworkable. Early attempts at quantification of existing entitlements through stream-section adjudication *erga omnes* failed for constitutional reasons, but the water rights adjudication system enacted in 1967 was upheld as constitutional.[467] We have rounded out this thumbnail sketch by adding that the process of water rights adjudication *erga omnes* is now complete, and that Texas water law has become the law of water licenses as administered by the Texas Water Commission, subject to judicial supervision and control. For reasons so well described by Professor Moses Lasky more than half a century ago, that is a natural consequence of the prior-appropriation system.[468]

Our own retracing of the history of Texas water law since the adoption of the common law in 1840 has shown that the presently prevailing system of water rights is not in any way traceable to the Spanish and Mexican law of water rights which prevailed in Texas through March 15, 1840.[469] The Western United States variant of the riparian system, with reasonable correlative irrigation rights, is an Anglo-American judicial improvement on the common law "of England" formally received by the Congress of the Republic.[470] Prior-appropriation as well as administrative stream section adjudication *erga omnes* subject to judicial confirmation are legislative borrowings from Wyoming, Nebraska, and Oregon.

While confirming this distinctly "Western" flavor of modern Texas water law, our research casts considerable doubt on the "Webb thesis" and its judicial echoes and antecedents, which characterize the prior-appropriation system as a response of American judicial creativity to the facts of nature west of the hundredth meridian.[471] To be sure, such judicial creativity has not been wanting,[472] and was indeed eloquently but unsuccessfully urged upon the Texas court in the quite

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466. *See id.* at 441.

467. *See id.* at 442.

468. *See* Lasky, *From Prior Appropriation to Economic Distribution of Water by the State—Via Irrigation Administration*, 1 ROCKY MTN. L. REV. 161, 248 (1929).

469. *See supra* n.9.

470. Act of Jan. 20, 1840, § 1, 1840 Tex. Gen. Laws 3, 2 H. GAMMEL, LAWS OF TEXAS 177, 178 (1898). This reflects the mandate of the Constitution of the Republic. *See* TEX. CONST. art. IV, § 13 (1836).

471. *See* W. WEBB, THE GREAT PLAINS 431-52 (1931).

472. *See* R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 59-85 (1983).

inappropriately neglected case of *Fleming v. Davis*.[473] It is clear, nevertheless, that the prior-appropriation system came to "arid" West Texas in 1889 because the irrigation canal industry convinced the Governor as well as the Legislature of the reasonableness of its demand for secure water supplies as a precondition of capital expenditure in such ventures. It is also clear that prior appropriation came to the remaining parts of Texas six years later (on July 29, 1895, to be exact)[474] because the irrigation canal companies demanded, and everybody but the Populists was willing to concede, secure crop liens from their prospective customers.

It is tempting to pursue this line of inquiry somewhat further. Walter Prescrott Webb wrote in his classic study, *The Great Plains*, that the law brought to America from England in the seventeenth century was "the law of the kingdom and not of the empire": For well-known geophysical reasons, the English common law "had not developed to meet the needs of the institution of irrigation."[475] Yet on February 25, 1895, twenty-two citizens of El Paso County presented a petition to the Texas House of Representatives "condemning the irrigation bill introduced by their representative," and "praying the Legislature not to pass a measure slyly through the House in the interests of an English syndicate and against the interests of the people."[476] The prior-appropriation system might well have been adopted in Texas at the behest of British irrigation canal companies, which were at that time extending the techniques of the Empire, developed in India and Egypt, to Mexico and the United States.[477]

Turning to more practical matters, we recall two factors which, in this combination, are unique to Texas. First, the Texas public domain passed from Mexico to the Republic of Texas by state succession, and was retained by the State of Texas pursuant to the terms of union with the United States. Texas land and water rights are therefore totally independent of United States public land law. This condition prevails

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473. 37 Tex. 173 (1872).

474. *See supra* n.28.

475. W. WEBB, THE GREAT PLAINS 432 (1931).

476. H.J. of Tex., 24th Leg. Sess. 365 (1895). This is likely to have been the Rio Grande Irrigation and Land Company, Ltd. *See* Rio Grande Irrigation and Land Co., Ltd. v. United States, 6 Rep. Int'l Arb. Awards 131, 132-33 (1923).

477. *See* ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 24-26 (1983) (example of British owners' Northern Colorado Irrigation Company in 1880's).

nowhere else in this country west of the Mississippi.[478]

Secondly, both the Republic and the State of Texas have had a strong tradition of respect for vested rights. The 1836 Constitution of the Republic of Texas proscribed retrospective civil as well as criminal legislation and so does the present state constitution.[479] The original trespass-to-try-title statute of February 5, 1840, expressly preserved rights acquired "under the laws in force before the introduction of the common law"—an event decided upon slightly more than two weeks prior thereto.[480] The present Texas Property Code, which became effective on January 1, 1984, still carries on that tradition, and stipulates—one hundred forty three years, two months, and sixteen days after the event—that its trespass-to-try title chapter "does not affect rights that existed before the introduction of the common law in this state."[481]

In a like manner, every legislative revision of Texas water law since 1889 has expressly protected water rights previously acquired.[482] Wherever stream or stream segment adjudication involved the rivers or creeks of what is now Southern and South-Central Texas, it became necessary, therefore, to pass upon the nature and extent of water rights vested under the laws of the prior sovereigns, Spain and Mexico. The first such adjudication, which produced *Valmont*,[483] preceded the Water Rights Adjudication Act and in fact supplied a major impetus for its enactment in 1967. The two remaining parts of the Texas trilogy of Spanish and Mexican water rights opinions, *Medina* and *Laredo*, arose under the 1967 Act but were shaped to a considerable extent by Jack Pope's deep-searching and scholarly opinion in *Valmont*.

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478. *See id.* at 73-85.

479. *See* TEX. CONST., Declaration of Rights (1836); *see also* TEX. CONST., art. I, § 16 (1876).

480. Law of Feb. 5, 1840, 1840 Tex. Gen. Laws 136, 2 H. GAMMEL, LAWS OF TEXAS 310 (1898).

481. TEX. PROP. CODE ANN. § 22.004 (Vernon 1984).

482. *See* TEX. WATER CODE ANN. §§ 11.001(a), 11.303, 11.323 (Vernon Supp. 1986); Irrigation Act of Mar. 19, 1917, ch. 88, §§ 6-7, 1917 Tex. Gen. Laws 211, 212-13; Irrigation Act of Apr. 9, 1913, ch. 171, § 14, 1913 Tex. Gen. Laws 358, 361-62; Irrigation Act of Mar. 9, 1895, ch. 21, §§ 6-7, 1895 Tex. Gen. Laws 21, 22, 10 H. GAMMEL, LAWS OF TEXAS 751, 752 (1898); Irrigation Act of Mar. 19, 1889, ch. 88, § 5, 1889 Tex. Gen. Laws 100, 101, 9 H. GAMMEL, LAWS OF TEXAS 1128, 1129 (1898).

483. 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

B. *Spanish and Mexican Water Rights*

From the latter part of the nineteenth century until a very few years ago,[484] water rights in the Southwestern United States have been virtually a synonym for the right to irrigate. Of the four states with substantial settlements in the Spanish and Mexican periods, New Mexico and Arizona adopted the prior-appropriation system, and California and Texas, the riparian system modified to include reasonable correlative irrigation rights. The assimilation of water rights acquired under the former sovereign was accomplished with dazzling ease: California and Texas held the Spanish and Mexican system to have been riparian in nature, while Arizona and New Mexico came to the conclusion that it had been one of prior appropriation.

Valmont and its progeny establish that in this process of jurisprudential miscegenation, Clio was raped not twice, but four times. As Chief Justice Pope held, in *Valmont*: "The Spanish and Mexican irrigation system was not a riparian system."[485] But neither, as his opinion in that case demonstrated, was it one of prior appropriation. There was a general license, to Spaniard and Indian alike, to use the waters of the public domain for domestic and cattle watering purposes.[486] Beyond that, all water rights, like all other grants out of the Royal (and later, the public) domain had to be express: There were no implied water rights.[487]

The Spanish and Mexican system of water rights prevailing in the Southwestern United States until the changes of sovereignty in 1836 and 1846 is understood best when viewed against the background of three centuries of public land law and land disposition policy. The point of departure is the conquest and the proprietary right of the Crown of Castile to the entire public domain of the Spanish Americas: the surface, the minerals, and the waters. Nothing could pass out of this domain without Royal grant or license.[488]

Two categories of entitlements to parts of the public domain of the

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484. The Laredo case appears to be the first major water rights case expressly *not* involving a claim to irrigation waters. *See In re* the Contest of Laredo to the Adjudication of the Water Rights in the Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257, 259 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

485. *See* State v. Valmont Plantations, 346 S.W.2d 853, 877 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

486. *See id.* at 860.

487. *See id.* at 864.

488. *See id.* at 859-63.

Spanish Americas were recognized or created by general license. First, sedentary, civilized Indian communities were confirmed in their homes, lands, and water rights. Secondly, and more importantly, the waters, pastures, woods, and mountains of the Royal domain were declared to be common to Spaniard and Indian alike.[489] Potential conflicts between these two sets of rules were sought to be minimized by protective zones around Indian settlements in which Spaniards were not allowed to graze their cattle.

Grants of surface estates, as well, came in two basic categories. First, there were donative grants in connection with the estabishment of new population settlements. Individual settlers received in rough approximation half-acre dwelling lots (*solares*) and seven-acre farming tracts (*suertes*). The latter were usually connected with a communal irrigation ditch system (*acequia*) and carried irrigation rights.

The municipalities received the plaza, lots for public buildings, and a share of the *suertes* reserved for them as income-producing municipal endowment, or *propios*. Land was also usually, though not invariably, set aside as commons (*exidos*) and community pastures (*dehessas*). *Exidos* were, among other things, a reserve for future growth but could be awarded as *solares* or *suertes* to new settlers only by or pursuant to Crown authority.

In Texas, the establishment of San Antonio conforms to this pattern. That municipality received income-producing portions of the *exido*, the *dehessas*, and the *suertes*.[490] Laredo (located not in Texas but in the Colonia de Nuevo Santander, the later Mexican State of Tamaulipas) was settled pursuant to allotments of different size, since the entire tract set aside for settlement was determined to be unfit for irrigation. The municipality was allotted a square league, and the colonists received baconstrip grants: 30,000 *varas* in depth, with a river frontage of 1,000 *varas*. Neither the municipal lands nor the individual tracts (called *porciones*) carried irrigation rights, but the river frontage of the latter was, of course, designed to facilitate the watering of cattle on the Rio Grande.

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489. R.I. Book 4, Title 17, Law 7.

490. Later, the term *exidos* seems to have been used by laypersons to describe income-producing lands generally. *See* Lewis v. San Antonio, 7 Tex. 288, 301-02 (1851) (account of witnesses' testimony as to location of San Antonio "exidos"). In 1829, San Antonio received a legislative grant of two square leagues of lands as *exidos* on the stated supposition that it had not held such lands since its establishment. *See* Decree No. 98, State of Coahuila y Texas, July 6, 1829, art. 47, Texas History Collection, University of Texas (T2 352, Sa. 510, 1829).

The second category of disposals of the Royal domain comprised sales and compositions. The latter were sales to squatters, or trespassers on the public domains, who were required to regularize their holdings by purchase at auction. Much of the Mexican North (but very little of Texas) passed into private ownership in this manner.[491] Sales or compositions of part of the Royal domain were typically made to ranchers in several units of square-league *sitios* (or about 4,428 acres), with or without express mention of water rights. In 1805, a minimum price scale was established, which ranged from ten to sixty pesos per *sitio*, depending on the availability of water.

The granting of surface estates in property was bound to conflict with the right of Spaniards (and of Indians) to the use of the waters, pastures, woods, and mountains of the Royal domain—a process known later as the "closing of the range." By mid-eighteenth century, this conflict was resolved by excluding the outsiders from pastures on surface estates granted in property. This event was, however, of little significance in Spanish Texas, where there were few, if any, valid ranching grants.[492]

In short, the Spanish Crown *donated* irrigable lands to pioneer settlers in units of one seven-acre *suerte*—in the picturesque and, for once, not inaccurate language of the Supreme Court of California, "a small, or middling sized lot, suitable for a garden, vineyard, or orchard."[493] Larger lots were *sold* to ranchers in units of one *sitio*, or 4,428 acres, and irrigation rights for such grants had to be purchased at a higher price. The pastures and watering places of the public domain were open to all, but, within surface states granted by the Crown in individual property, only the owner could use the pasture and the cattle watering places inaccessible to others without trespass to his land.

Little will be gained by a detailed summary of the colonization legislation of the Mexican period, which builds upon this model. The Imperial colonization law of 1823 set the new scales: irrigable or dry-farming *labores* for farmers, or square-league *sitios* for ranchers:

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491. *See generally* F. CHEVALIER, LA FORMATION DES GRANDS DOMAINES AU MEXIQUE, TERRE ET SOCIÉTÉ AUX XVIE - XVIIE SIÉCLES (1952), *translated as* Land and Society in Colonial Mexico, the Great Hacienda (1963) (without annotations). The ranchers of Spanish Texas had possessory pretentions only. *See* J. JACKSON, LOS MESTENOS, SPANISH RANCHING IN TEXAS, 1721-1821, at 153, 163-64, 285 (1986).

492. *See* J. JACKSON, LOS MESTENOS, SPANISH RANCHING IN TEXAS, 1721-1821 (1986).

493. Redding v. White, 27 Cal. 282, 286 (1865).

177.1 as against 4,428 acres, English measure. Since these lands were given donatively and in the alternative, depending on the occupation of the grantee, Stephen Austin's original Three Hundred all elected to be ranchers. As he observed in the last year of his life, these were the only colonists who were "granted or given" land by the Mexican government.[494]

State colonization legislation, adopted pursuant to the directives of the federal colonization law of 1824, reflected the quantitative units of the Imperial enactment but returned to the Spanish scheme of sale according to a price schedule progressing from a minimum price for grazing lands (*agostadero*) through a somewhat larger one for dry-farming lots (*de temporal*) to irrigable (*regadío*) lands as the highest and the most expensive category. To quote Stephen Austin again, the State of Coahuila y Texas "*sold* the lands of Texas at from thirty to fifty dollars per square league, Mexican measure." While we may query his assertion that these sums constituted "a high price and full value,"[495] Texas land records show that virtually all lands sold during the Mexican period were bought as grazing lands, perhaps including a few *labores de temporal*.[496] The location of these lands on watercourses is readily explained, for grazing land was uniformly considered to be "useless" unless it had some access to water.[497] Cattle, too, must drink in order to survive.

There remains the task of classifying the Spanish and Mexican system of water law which prevailed in Texas before independence from Mexico. Its twin elements, as a system of water law, were a general license to the public to use the waters and pastures of the public domain, and the requirement that all grants of irrigation water rights be express. This system was qualified by a more general rule of ranchers' law, established by the middle of the eighteenth century: Owners of surface estates had the exclusive use of the pastures and watering places enclosed within their grants. It is this last factor which precludes ready classification of the system in conventional terms, for the

494. Address by Stephen Austin in Louisville, Kentucky, Mar. 7, 1836, *reprinted in* M. AUSTIN HOLLEY, TEXAS 253, 272 (1985) (originally published 1836).

495. *See id.* at 272-73.

496. *See* White & Wilson, *The Flow and Underflow of Motl v. Boyd—The Conclusion*, 9 SW. L.J. 377, 391-93 (1955) (reporting on inspection of over 750 grants).

497. *See* E. OSGOOD, THE DAY OF THE CATTLEMAN 116-17 (1929) (On the American frontier, allotments along the waterfront gave "control over grazing, which was valueless to anyone who did not have access to the water.").

rancher-owners' cattle watering monopoly was not a water right but a consequence of private ownership of the surface estate.

Whatever terms might eventually be chosen to describe this system, its basic rules were clear. The watering places on the public domain were open to all, the watering places on private property could be used only by (or with the permission of) the landowner, and all irrigation water rights had to be express.

Even today, the application of these rules presents some difficulties. For one thing, it is quite clear that municipalities *as such* had only those water rights which they received expressly as *propios*. Their inhabitants, however, had access to the watering places of the public domain. No provision was needed for municipal water supplies as such. With the closing of the public domain and the growth of urban populations, however, the system became unworkable. The solution must be provided by the new law, not squeezed from distorted and self-serving versions of the old.

Water rights cannot, however, be reallocated legislatively without condemnation and compensation to the extent that they are vested property rights. This brings us to what is hoped to be the final question to be discussed here. To what extent were Spanish and Mexican water rights vested rights in property?

Part of the answer is provided by the closing of the public domain. Obviously the general license of the public to use the waters and pastures of the public lands was subject to diminution and eventual destruction as parts of the desirable public domain continued to be sold in private ownership. Express irrigation rights, like those of Fr. Maynez to his *suertes* in San Antonio, or general water rights, like those of the Marquess of Aguayo to the waters of the Nazas, present more difficult questions.

It is believed that an express irrigation right for a *suerte* or, later, a *labor*, was a right to what would now be the ordinary burden of water.[498] While this was surely a vested property right, it is believed to have been subject to readjustment in accordance with subsequent requirements. In the absence of reliable evidence of consistent practice, it seems difficult to determine whether such readjustments could be made by majority decision of the *acequia* users, and to what extent (if any) minority users could obtain judicial protection against the

498. *See* R.I. Book 4, Title 17, Law 11.

diminution of their irrigation water rights. It is submitted, nevertheless, that the uncompromising "vested property" position taken even as to the incidentals of express Spanish irrigation rights in *San Antonio River Authority v. Lewis*[499] cannot be generalized beyond the facts of that case (if no mechanical pumps were available at the time, the property owner would have lost his irrigation right entirely when the ditch was relocated).

The doubts just expressed derive, to a considerable extent, from the continuing mystery of the Nazas River controversy, which involved conflicting claims to the waters originally granted to the Marquess of Aguayo in 1731. The lands of the original *marquesado*, through a series of mesne conveyances, and the waters of the Nazas River, form the basis of the economy of the City of Torreon and of the cotton industry in the so-called Laguna district of Durango.[500] In the late nineteenth century, British and United States financial interests organized the Tlahualilo Company, an irrigation and land company, which embarked on extensive operations in the Laguna district. The company was dependent upon a constant supply of water, which was guaranteed by a contract with the Mexican Government approved by Congress.[501]

Subsequently, it floated a bond issue in London and New York, secured by a mortgage on the corporate properties and franchise. Years later, the Mexican Government issued new water supply regulations greatly reducing the Company's supply. The validity of these regulations was upheld by the Mexican Supreme Court.[502] Great Britain termed the water supply regulations "confiscation" and demanded "due, proper, and full compensation" for the British interests involved. The Mexican Government denied liability, but a settlement of the matter was reached in April, 1913, by a contract between the Government of Mexico on one part and the Company and the bondholders on the other.[503]

The guarantee of water rights to the Tlahualilo Company by the Mexican federal government was the reason for the enactment of the

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499. 363 S.W.2d 444, 449 (Tex. 1962) (irrigation rights would have been entirely lost since no mechanical pumps available).

500. *See* CABRERA, 1 OBRAS COMPLETAS 330 (1972); 1913 U. S. For. Rel. 993-1010.

501. *See* 5 ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA (MEXICO) 622-27 (1888).

502. *See* Compañia de Tlahualilo v. El Gobierno Federal, Sentencia de la Tercera Sala de la Corte Suprema de Justicia, Feb. 2, 1911 (separately published, Mexico 1911).

503. *See* 1913 U. S. For. Rel. 1008-1010.

first Federal Water Law of that country,[504] and the later dispute between the government and the company gave rise to a substantial body of contemporary legal literature. This includes, in particular, Cabrera's brief on behalf of the company, later incorporated in part into Molina Enríquez' book. Remarkably, nevertheless, the question as to the quantitative extent and proprietary nature of the original express water grant to the Marquess of Aguayo was answered, at best, by indirection. The Supreme Court of Mexico held the legislative modification, in the public interest, of water rights originally granted in unquantified general terms not to be an unconstitutional taking of property.[505] Why this was so, however, remains doubtful.

C. *Outlook*

In his commentaries on the Pretorian Edict, a leading third-century Roman lawyer casually referred to persons drawing water from the same watercourse (*riva*) as "rivals."[506] That terminology is surely still apt today. Water is the lifeblood of arid and semi-arid regions, and water law must control its allocation between rival claimants.

Texas, as we have seen, witnessed four phases of water law: the Spanish and Mexican system prevailing until 1840; the "Western" variant of the riparian system until 1889; a "dual system" tortuously combining riparianism with prior appropriation; and finally, a centrally administered licensing system subject to judicial approval and control. Since the Texas public domain belonged to the Republic and later, the State, and since, moreover, it is Texas legal tradition to respect acquired rights, these transitions have not been easy. They have, however, been aided by the Texas judiciary, and especially by the jurist to whom this study is dedicated.

In the *Upper Guadalupe River Adjudication* case, Chief Justice Pope summarized the course of Texas water law history, drawing on his sovereign knowledge of the events described. He sustained the Water Rights Adjudication Act of 1967, which offered the only fair and rational solution to one of the most urgent problems of the time. Some two decades earlier, as Chief Justice of another court, he had

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504. *See* Mexican Federal Water Law of June 5, 1888, 5 ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA (MEXICO) 608-09 (1888).

505. *See* Compañia de Tlahualilo v. El Gobierno Federal, Sentencia de la Tercera Sala de la Corte Supreme de Justicia, Feb. 2, 1911, at 137-38 (separately published, Mexico 1911).

506. DIG. 43.20.1, 26 (Ulpian).

written his masterpiece on the water law of the Spanish and Mexican eras. His conclusion in *Valmont* that this had not been a riparian system[507] seems obvious and beyond dispute today, but it is well to remember now the fierce determination with which the "riparian party" had waged its campaign—aided, let it also be recalled, by appeals to *dicta* of a court then his superior.[508]

At the present, we see that another, more central conclusion in Chief Justice Pope's opinion in *Valmont* is also reaching general acceptance: The water law of New Spain and of the Mexican North recognized irrigation water rights only if expressly granted. Texas courts have followed this conclusion in *Cibolo*, *Medina*, and, most recently, *Laredo*. Proceeding from the firm basis of Jack Pope's scholarly research and analysis, they have been able to reconcile past rights with present needs, and thus to keep open the way to a promising future.

507. *See* State v. Valmont Plantations, 346 S.W.2d 853, 878 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962).

508. *See* Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926); Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 585-617 (1977). In *Valmont*, the trial court actually felt constrained by the dicta in *Motl* to hold (concededly against better knowledge) that the Spanish and Mexican irrigation law prevailing along the Lower Rio Grande had been riparian in nature. *See* State v. Valmont Plantations, 346 S.W.2d 853 (Tex. Civ. App.—San Antonio 1961), *opinion adopted*, 355 S.W.2d 502 (Tex. 1962)