3-26-1992

Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest

G. Emlen Hall

University of New Mexico - Main Campus

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THE INFLUENCE OF SPANISH LAW IN THE NEW WORLD

Thursday, March 26, 1992
8:30 a.m. to 5:00 p.m.
The UNM School of Law, Albuquerque, New Mexico
3.7 General MCLE Credits
CHAPTER 1
SHELL GAMES: THE CONTINUING LEGACY
OF RIGHTS TO MINERALS AND WATER
ON SPANISH AND MEXICAN LAND GRANTS
IN THE SOUTHWEST

G. Emlen Hall
University of New Mexico Law School
Albuquerque, New Mexico

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§ 1.01  Introduction

Title to large parts of the land base of the American Southwest, from Colorado on the north to Arizona on the south and from California on the west to Texas on the east, originates in the law of the United States' antecedent sovereigns. In California, approximately 8,850,000 acres of land stem from recognized Mexican land grants prior to the 1848 Treaty of Guadalupe Hidalgo which transferred sovereignty over the territory to the United States. In New Mexico, Colorado, and Arizona, the United States confirmed the validity of title to 12,170,002 land grant acres. In Texas, title to 26,280,000 acres owe their inception to Spanish or Mexican land grants.

By any measure, these acres are critical to the land base of the states that now contain them. Fifteen percent of New Mexico and Texas were privatized before either became a part of the United States. In the other areas that once belonged to Mexico, the percentages range downward from there. However, beyond their areal extent, the private grants are perhaps more important for the critical resources that their ancient locations command. Spanish and Mexicans sited their land grants for the grass, timber, minerals, and water that the sites offered. Naturally, the oldest grants commandeered the best that the natural world, as it was then understood, would yield.

5 J. Bowden, 8 Private Land Claims in the Southwest (LLM thesis, Southern Methodist University, 1969) (available in Rare Book Room, University of New Mexico Law Library).
Confirmation of those grants potentially carried rights to those incidental resources.\footnote{See, e.g., notes 60-72, 93-100, 158-165, 195 infra and accompanying text.}

Both because of the title to the land and the incidents that title controlled, Spanish and Mexican land grants always have provoked controversy. The pre-1848 archives of the American Southwest, particularly New Mexico, are full of protests to the making of and subsequent litigation over land grants.\footnote{Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922 (1848).} United States succession only intensified the battles.


The debates, then and now, focused on the problem of title to land. However, underlying the making of grants in the first place and overlaying the question of their adjudication by the United States, there lurked the equally important question of
what additional rights attached to recognized legal title. In particular, the adjudication of water and mineral rights that might have been appurtenant to or reserved from Spanish and Mexican land grants was as crucial to their value as the confirmation of their status as real property acquired prior to the change in sovereignty.

Spanish and Mexican law, in the grand civil law tradition, treated water and mineral rights as separate from the basic surface estate that land grants conveyed. Water rights arose by grant or by implication or by adjudication, but in all cases, as a separate added interest that required severance from the royal or public domain in order to rise to the status of a private "right." Mineral rights, on the other hand, were severed from the basic surface estate of which they were a part and "reserved" for separate disposition under different provisions of Spanish and Mexican law. In other words, water rights might be added to the pre-1846 land grant surface estate, but mineral rights were always subtracted from it.

In the name of adjudicating these Spanish and Mexican water and mineral rights, the United States took opposite approaches to the handling of these basic resources. On the one hand, while reserved under Spanish and Mexican law, mineral rights in confirmed Spanish and Mexican land grants became, by virtue of United States adjudication, an integral part of the confirmed estate. On the other hand, because they were separate estates under Spanish and Mexican law, the United States regarded the adjudication of rights to land as irrelevant to rights to water that might go with them.

Two Arizona cases near the turn of the 20th century, both involving the same land grant, illustrate the difference in treatment of the mineral estate and water rights. Under the 1891 Act establishing the Court of Private Land Claims, the

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15 See notes 32, 37, 139 infra and accompanying text.
16 See notes 35-39 infra and accompanying text.
17 See notes 139-144 infra and accompanying text.
18 See notes 72, 93 infra and accompanying text.
19 See note 22 infra and accompanying text.
United States had judicially recognized the validity of the 1832 San Juan de Boquillas y Nogales land grant in southern Arizona. But that recognition only began the battle over the water and mineral rights that attended the confirmed grant.

First the Arizona Territorial Supreme Court and then the United States Supreme Court had to determine the nature and extent of the water rights created by the Court of Private Land Claims confirmation of the grant and the subsequent patenting of it. The Supreme Court decided that federal patenting of the grant created no new water rights, but only confirmed the water rights that had existed on the land as of 1846. Without saying what those rights were, the Supreme Court established Spanish and Mexican water law as an open and continuing concern.

Within twenty years, the same land grant became embroiled in a battle over the effect of United States confirmation of the mineral resources on the grant. Had the water principle applied, the issue would have been left to Spanish and Mexican law and the answer would have been easy: the land grant took only the mineral resources specifically granted to it. Otherwise, those mineral resources were reserved for a different disposal, first to the Spanish and Mexican sovereigns and then to the United States as succeeding sovereign.

However, eventually United States adjudication reached a tortured compromise. First, the courts read restrictively the mineral reservation in the statute that authorized grant adjudication. Then Congress took it upon itself to pass directly on the parsed reading the Arizona courts had given the mineral reservation and further gutted it. As a result, the mineral and surface estates of the San Juan de Boquillas land grant in Arizona were merged, more or less, while the separate land and water rights were left for different, later determinations.

24 238 P. at 397, 399.
This paper explores generally this paradoxical approach to mineral and water rights on confirmed Spanish and Mexican land grants. The analysis treats mineral and water rights separately. For each critical land grant resource, the paper explicates basic law of the Southwest’s antecedent sovereigns. It then suggests how those Spanish and Mexican rights fit within the 1848 Treaty of Guadalupe Hidalgo guarantee of protection of “property rights.” It proceeds to analyze how the United States implemented those guarantees, suggesting that the treatment of the succeeding sovereign owed more to its own law than it did to the law of the antecedent sovereigns. Each section concludes with an analysis of the very different problems that the contradictory handling of mineral and water resources have left to the Southwest today. Finally, the paper ends considering mineral and water resources together and suggesting the continuing land grant legacy.

§ 1.02 The Mineral Resource Under Succeeding Sovereigns


From the beginning of Spain’s ultramarine activities near the turn of the 16th century, precious minerals provided the simultaneous impetus for further conquest and more refined legal control. Spain established its dominion over the new world and its putative gold and silver with both armies and lawyers. The nature and extent of rights to minerals preoccupied the Castillian monarchs for centuries. As the Crown struggled to line its coffers with New World gold and silver, it worked to forge a law of mining.

From the 15th to the 17th centuries, Royal lawyers struggled to create a uniform law governing mineral development in the New World. As with much of the special Spanish law


applicable in the Indies, the law of mining surfaced slowly. It rose out of particular edicts, delivered to different parts of the New World at different times. From time to time, Royal lawyers attempted to assemble and edit the disparate rulings into a more comprehensive code.29 Book IV, titles 18-22 of the 1680 Recopilacion de las Leyes del Reino de las Indias, including the 25 chapters of title 22 directed at mining in the Viceroyalty of Peru, dealt more completely with mining in the New World than any previous laws, but was still too incomplete and too specific to be called a “code.”30 These first compilations of Royal mining rules in the New World were supplemented by civil law commentators who performed the critical function of further synthesizing the fundamental principles of the law. In the area of the mining law, the mid-18th century work of Gamboa was particularly important in bringing together and filling in the gaps of previous efforts.31

In all of these efforts to forge a unified, comprehensive, systematic mining law for the New World, several underlying principles remained constant. In the first place, New World minerals belonged to the Royal Patrimony of the Crown of Castille. Secondly, other parties could acquire rights to those minerals only by a grant from the Crown and on the terms that it specified. Thirdly, the Crown separated entirely rights to minerals and rights to land so that land grants carried no right to the mineral estate which was governed by different laws.

By the late 18th century, these fundamental principles were embedded in the most complete formulation of mining law under Spanish or Mexican rule, the 1783 “Royal Ordinances for the Direction, Regulation, and Government of the Mine Proprietors of New Spain and of its Royal Tribunal General.”32 The justly famous 1783 Mining Ordinance provided for the

30 See Baade, supra note 28, at 30-31 notes 170-172.
31 F. Gamboa, Commentarios a las Ordenanzas de Minas (1761). There are various English translations, the most accessible of which is in J. Rockwell, Spanish and Mexican Law in Relation to Mines and Titles to Real Estate 113 (J. S. Voorhies 1851).
32 J. Rockwell, Spanish and Mexican Law in Relation to Mines 25-111.
search for, the discovery of, and the extraction of hard rock minerals in the Viceroyalty of New Spain, including those parts of the Southwest now in the United States. The 1783 Ordinance’s 19 chapters and 246 sections governed what the code itself called “the direction, regulation and government” of the miners of New Spain. The Ordinance covered everything from mine dewatering to beneficiation to miners’ working conditions and grievances and, perhaps most importantly, created a special “tribunal of miners,” an elaborate system of decentralized control over local mining affairs. But from the point of view of the subsequent acquisition of part of the Viceroyalty of New Spain by the United States and the guarantees of the 1848 Treaty of Guadalupe Hidalgo, two general aspects of the 1783 Ordinance are crucial.

First, the Ordinance’s particular focus indicated that minerals were a special prerogative of the sovereign Crown of Castile, wholly different from the regalia in land or water. Land grants had nothing to do with the mineral estate, although mineral grants might include an interest in the surface estate. Accordingly, land grant papers did not need to mention the reservation of minerals in order to accomplish the split in estates. Conversely, the 1783 Ordinance, based as it was on the law of discovery, permitted every Spaniard or foreigner to dig in search of minerals on his own land, the public domain, or on the land of another. In this respect, the 1783 Ordinance’s split estates resembled the balance struck by a variety of federal statutes including the 1916 Stock-Raising Homestead Act.

Actual discovery under the 1783 Ordinance’s broad permit to look led to a special, qualified right in the discoverer. Chapter V set out the nature of the private “right” that could be

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33 Id. at 25.
34 Id. ch. 1 at 27-33.
acquired in minerals. Section 1 declared unequivocally that minerals belonged to the Crown. Section 2 continued:

Without separating them from my Royal patrimony, I grant them (the minerals) to my subjects in property and possession in such manner that they may sell, exchange (pass by will, either in the way of inheritance or legacy) or in any other manner, dispose of all their property in them upon the terms on which they themselves possess it, and to persons legally capable of acquiring it.\footnote{37}

Those familiar with the United States' subsequent 1872 Mining Act will immediately recognize the similarity between these special rights recognized by the 1783 Spanish Mining Ordinance and the rights that attach to unpatented mining claims under the 1872 Act.\footnote{38} In this context, the similarity raises real questions about whether in actuality rights to mines acquired under the 1783 Ordinance rose to the level of "present perfected rights" entitled to protection under article 8 of the Treaty of Guadalupe Hidalgo.\footnote{39}

The 1783 Ordinance itself complicated that issue when it added in section 3 of chapter V two conditions to the qualified right which section 2 recognized. The first condition required payment to the Royal fisc of a percentage of the value of the minerals taken. The second imposed a requirement of not only diligence, but actual operation, as a condition of the continued recognition of the limited property right which discovery created.\footnote{40} Once again, both conditions foreshadowed different aspects of the subsequent mining law of the United States,\footnote{41} and

\footnote{37}Rockwell, \textit{supra} note 36, at 45.


\footnote{39}For example, \textit{Freese v. United States}, 639 F.2d 754 (Ct. Cl.), \textit{cert. denied}, 454 U.S. 287 (1981), suggests that a subsequent law which prevents an unpatented mining claim from going to patent is not a "taking." For the parallel treaty issue, see, e.g., \textit{Fremont v. United States}, 18 U.S. (17 How.) 541 (1854).

\footnote{40}Rockwell, \textit{supra} note 36 at 79.

\footnote{41}Compare the $100 per claim work obligation under the General Mining Law of 1872, 30 U.S.C. § 28, with the corresponding obligation under the Spanish code to keep a mine operating.
both conditions raised interesting theoretical issues under the Treaty which transferred sovereignty.\footnote{Compare Fremont v. United States, 18 U.S. (17 How.) 541 (1854) with Dent v. Emmeger, 81 U.S. (14 Wall.) 308, 312 (1871) for the Supreme Court’s treatment of conditions as imposed by the antecedent sovereign and inherited by the succeeding sovereign.}

In any case, the 1783 Ordinance itself survived the change in sovereignty in 1821 from Spain to Mexico with the Mexican Nation after 1824, if not before, succeeding to the rights of the Crown of Castille.\footnote{Baade, “The Historical Background of Texas Water Law,” 18 St. Mary’s L. J. 1, 26-36 (1986).} Mexico adopted the mining laws of Spain and applied them directly in the territories of what became New Mexico and, for a short period, indirectly in the Mexican states whose jurisdiction included parts of Texas and Arizona.\footnote{Id. at 29.}

Of course, after 1821, Mexico had full municipal authority over new mining claims on the public domain. In the exercise of that power, it only made explicit the implicit separation of mineral and surface estates that Spain previously had operated under. In a regulation adopted at nearly the same time as sovereignty over the southwest changed again, this time from Mexico to the United States, Mexico expressly excepted minerals from all lands granted for colonization.\footnote{Article 21 of Regulations of December 24, 1846 in Reynolds, Spanish and Mexican Land Laws; New Spain and Mexico 263 (1895).} This regulation may or may not have applied, but it only made explicit what the previous law had implied: the surface estate and the mineral estate were entirely distinct, with different sources: title to land came from land grants; claims to minerals came from the mining law.

Of course, Spanish and Mexican mining law in the southwest incidentally concerned itself with land and water, just as subsequent United States mining law allowed access to surface resources ancillary to the discovery and development of minerals.\footnote{See, e.g., Free Timber or Timber Cutting Act, Act of June 3, 1878, 20 Stat. 88; P. Gates, History of Public Land Law Development 552 (U.S.G.P.O. 1979).} Chapter 13, section 3 of the 1783 Mining Ordinance, for
example, allowed mineral discoverers a sufficient amount of grazing land to keep animals necessary for driving mining machinery and sufficient water for the continuous operation that the Ordinance contemplated. Apparently, the Ordinance made these uses paramount but limited in time. A miner could commandeer already privatized lands and water for these purposes, but only if he paid and only for the time the ancillary resources were needed in mining.\(^47\) Otherwise, the owner’s consent was required.

The requirements of the 1783 Ordinance were played out throughout the southwest prior to 1848, but the 1833 Ortiz Mine grant southeast of Santa Fe shows it in operation. Antonio Barreiro, a Chihuahua attorney on loan to Santa Fe in the 1830s, may have been correct when he bemoaned in his 1832 Ojeada Sobre Nuevo Mexico\(^48\) the woeful lack of legal knowledge on Mexico’s northern frontier, but Francisco Ortiz and Ignacio Cano knew the 1783 Ordinance chapter and verse when in November and December, 1833, they applied for and received the mine and supporting surface and water resources necessary for the continuous operation that the Ordinance contemplated.\(^49\)

The process began when Ortiz and Cano, who had purchased the interests of two earlier discoverers of a rich vein of gold in the Ortiz mountains, registered the claim before the Alcalde of Santa Fe on November 15, 1833, as the 1783 Ordinance said they should.\(^50\) In turn, the Alcalde directed the two registrants to open an exploratory shaft of specific size called for by the Ordinance along the vein and informed them that, if the shaft confirmed the discovery, he could give them possession of the mine. When, less than a month later, Ortiz and Cano informed the Alcalde that they had completed the exploratory work, the

\(^{47}\) Rockwell, *Spanish and Mexican Law in Relation to Mines* 79 (1783 Mining Ordinance).


\(^{49}\) J. Bowden, *Private Land Claims in the Southwest* 491 (the Ortiz Mine grant) (hereafter *Private Land Claims*).

\(^{50}\) Id. at 491-92.
Alcalde assembled the technical crew called for by the 1783 Ordinance, inspected the site and shaft, found both satisfactory, and put the applicants in possession of a tract of land surrounding the mine.\textsuperscript{51}

Two aspects of the Ortiz Mine grant deserve special attention. In the first place, officials and private parties alike followed precisely the procedures detailed by the formal law. Secondly, the grant of land connected with the gold discovery was limited in two important senses. It was limited in space to a small area of no more than five acres necessary for the working of the vein.\textsuperscript{52} It was limited in time to the period during which the actual mining operation continued.\textsuperscript{53} As such, the mining grant itself represented an areally small, resource-specific temporary privatization of the Mexican public domain.

However, the Ortiz Mine grant turned out to be as important for the incidental land and water resources it commandeered as it was for the direct claim it created on the nation's minerals. The original applicants, in addition to their mineral request, also petitioned local authorities for an exclusive grant to the water from springs near the mines necessary for the mining operation.\textsuperscript{54} Both the 1783 Ordinance and Ortiz and Cano saw water as the "necessary glove of water for the hand of mining," as the Ninth Circuit Court of Appeals said almost 200 years later in a mining case subsequently reversed by the United States Supreme Court.\textsuperscript{55} But the Spanish law applicable in Mexican New Mexico made it clear that the formal private right to that public water had to come from a separate, explicit water grant.\textsuperscript{56} The Alcalde of Santa Fe made it clear in December 1833 when, pursuant to chapter 13, section 3 of the 1783 Mining

\begin{itemize}
\item \textsuperscript{51} Id. at 492-93.
\item \textsuperscript{52} Rockwell, supra note 47, at 50.
\item \textsuperscript{54} Bowden, supra note 49, at 492-94.
\item \textsuperscript{55} Andrus v. Charlestone Stone Products Co., 553 F.2d 1209 (9th Cir. 1977), rev'd, 436 U.S. 604 (1978).
\item \textsuperscript{56} See notes 140-141 infra and accompanying text.
\end{itemize}
Ordinance, he granted the mining applicants the springs near the Ortiz Mine.  

In addition to the minerals and the waters, Ortiz and Cano also requested as part of their 1833 petition a grant of land to support the gold mining operation. At the same time that the Alcalde granted the applicants the mine and the water, he also granted them from the unappropriated public domain “four leagues square” in the vicinity for pasturing the animals necessary to work the mine. The area turned out to contain 69,000 acres.  

As of 1848, the Ortiz Mine grant represented a complex group of direct and ancillary claims to real property once a part of the Mexican public domain. The ore body represented the core of those rights. Even rights to it were conditional, both on mining operation and on payment of the governmental share. In addition, as ancillary rights, the Ortiz Mine carried with it separate grants of both land and water. These also may have been conditioned on the requirement of mining operations.


On the change from Mexican to United States sovereignty in 1848, it is doubtful that anyone fully understood how this congerie of rights and conditions fit into the property guarantee provisions of article 8 of the Treaty of Guadalupe Hidalgo. However, all Mexicans understood that land grants carried none of the mineral rights which were reserved for separate treatment. In the discharge of its rights as succeeding sovereign and its obligations to international treaty, the United States stood both of these principles on their heads. It recognized a complete right to minerals without condition and, in the name of the Treaty, it conveyed that complete right to the owners of the surface estates.  

57 Bowden, supra note 49, at 492-94.
60 See notes 70-75 infra and accompanying text.
The process of United States transformation in the name of confirmation began, appropriately enough, in California. In order to determine what land in that state belonged to the federal public domain and what land already had passed into private ownership under the laws of Spain and Mexico as guaranteed by the Treaty of Guadalupe Hidalgo, Congress established the California Lands Commission in 1851. That first step to the adjudication of rights to southwestern land originating in the law of the area’s antecedent sovereigns marked the beginning of federal transformation of Spanish and Mexican rights to minerals and land in the name of confirming them.

The 1851 Act began that process of transformation simply by its existence. The property guarantees of article 8 of the Treaty of Guadalupe Hidalgo might have been self-executing, thus carrying directly into United States sovereignty rights created under the antecedent sovereign without first filtering those rights through an adjudication by the succeeding sovereign. Obviously, the adjudication process established under the 1851 California Lands Commission Act belied that self-executing approach.

But the 1851 Act went farther. In addition to offering the imprimatur of federal recognition to rights to land originating under Spain and Mexico, the adjudications under the Act became both comprehensive and preclusive. In order to survive the change to United States sovereignty, claims to California property originating under the state’s antecedent sovereigns had to be presented within two years to the California Lands Commission and confirmed by it. Otherwise, the claims were barred, the alleged rights extinguished, and the land was available for disposal or retention as federal public domain. The obligation to file, and the penalty of forfeiture for failure to do so under the 1851 Act, extended to sovereign and private

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**Footnotes**


claimants alike and reached all manner of “possessory interests” in real property. No review by a succeeding sovereign of property rights guaranteed by a treaty or international law, before or since, went so far in remaking those rights in the image of the new government.

This exclusive federalization of Spanish and Mexican property rights had two critical effects on mineral rights in California originating under Spanish and Mexican law. The limited property in mines allowed under the 1783 Mining Ordinance may or may not have been sufficiently “perfected” to meet the subsequent tests for entitlement to Treaty protection. But, in any case, the Spanish and Mexican “property” in mines was sufficiently “possessory” to bring it within the 1851 Act’s exclusive and preclusive provisions.

However, no claim to a mine based on Spanish and Mexican law was finally confirmed under the procedures of the California Lands Commission Act. Recent decisions reaffirm the fact that mineral claims not presented to and confirmed by the Lands Commission cannot be resurrected now.

Paradoxically, under the 1851 Act for California, the adjudication of the separate and servient surface estate in lands had the most direct effect on the dominant and distinct mineral interest in lands. Early California courts recognized correctly that Spain and Mexico had reserved the mineral estate from

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65 Contrast, for example, treatment of the issue of acquired rights in United States v. Perchman, 32 U.S. 50 (1833).
66 See note 39 supra and accompanying text.
68 2 Am. L. of Mining § 13.02(2) (2d ed. 1984). The Supreme Court rejected the infamous California claim to the New Almaden Quicksilver Mine. See United States v. Castillero, 67 U.S. 396 (1864). The Ortiz Mine grant was a New Mexico mining grant that was confirmed as a surface grant which contained minerals. See notes 111-114 infra and accompanying text.
surface land grants and held them open for prospecting, discovery, and location even after the grant had been made. When this decision unleashed a horde of California prospectors onto private Spanish and Mexican land grants in the state, applying the rule of separate estates became a real problem. Courts solved it and did so in a way that sent Spanish and Mexican titles in the Southwest farther from their civil law origins and closer to their federal confirmations.

Under the 1851 California Lands Commission Act, an approved claim entitled the petitioner to a United States patent for the lands confirmed. Using federal patent law, United States courts reunited the surface and mineral estates that Spanish and Mexican law had severed. Early decisions made it clear that a federal patent confirming a Spanish and Mexican land grant functioned as both a federal recognition of the validity of the Spanish and Mexican rights and a quitclaim of all United States interest in the property. Even if the mineral estate had been reserved to the national sovereign under Spanish and Mexican law, the United States had succeeded to the rights so reserved and had transferred them for the first time to the land grant patentee when it issued its patent. In effect, the federal patent for land not only confirmed that the surface estate was private property, but also granted the mineral estate to the confirmee for the first time.

Then California, and subsequently United States, Supreme Court Chief Justice Steven Field had strong policy reasons for merging the surface and mineral estates on confirmed California land grants. But he knew that in the name of confirming rights acquired under the United States' antecedent sovereigns, he was adding to them. He found his authority to do so in the

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71 In effect, the patent passed the mineral estate de novo when the United States confirmed the limited Mexican estate. See Tameling v. United States Freehold & Emigration Co., 93 U.S. (3 Otto) 644, 663 (1876) for similar de novo construction of a confirmatory federal patent.
congressional language of the 1851 Act establishing the California Lands Commission. Specifically, when the Act spoke of "settling" claims originating under Spain and Mexico, it meant more than simply recognizing acquired rights. In fact, held Field, that language in the Act evidenced Congress' intent that the recognition should pass all interest of the federal government including the mineral estate which Spain and Mexico had reserved.

That view of the effect of the 1851 statute put the mineral estate on confirmed Spanish and Mexican land grants in California beyond the proprietary reach of the federal or state governments. The patents, including the mineral estate, are conclusive against any further claims of the United States or anyone claiming under it. Despite the fact that the patents' language purports to affect only the rights of the United States and those claiming under them and not other "third parties," the patent is also conclusive against all third parties except those who can trace a superior right stemming directly from a sovereign act of the antecedent sovereign.

The 1851 Act and the patents issued pursuant to it prevent challenge in California to the merged surface and mineral estates on confirmed Mexican land grants in one additional way. The 1851 Act established a two-year deadline for the filing of claims originating under Spanish and Mexican law. The United States Supreme Court recently has affirmed that the deadline applied to all possessory rights in California land originating under the law of the antecedent sovereigns and to all parties including the State of California.

Thus, under California law, continued and still unrecognized rights to minerals originating in Spanish and Mexican land grants have been cut off in three ways. The patents issued by

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the United States to confirm private ownership include the mineral estate despite the fact that under the law of the antecedent sovereigns that estate was severed and reserved. 77 Those United States patents are not subject to collateral attack by third parties despite the fact that the patents themselves state that they only affect the rights of the United States. 78 Those United States patents are final despite the fact that the Treaty of Guadalupe Hidalgo says that Mexican property of every kind shall be “inviolably” 79 respected. As a result, in California, the mineral examiner dealing with land whose title originates in a Mexican land grant faces the relatively mundane task of determining the state of the title since the issuance of the federal patent confirming the grant.


Every school boy (at least every Texas school boy) knows that the Republic of Texas succeeded directly to the Mexican public domain and did not cede that public domain to the United States when it joined the United States. 80 With respect to Spanish and Mexican land grants, Texas, not the United States, dealt with the problem of rights acquired or reserved under the law of the antecedent sovereigns. Texas did so in its own unique way, but, in the end, arrived at the same yoking of surface and mineral estates that Spain and Mexico had worked so hard to keep apart.

Texas adjudicated the validity of land grants and their associated mineral rights in a variety of ways. The 1836 Texas constitution declared invalid all Mexican grants made after November 13, 1835. 81 Thereafter, the republic, then state, either required title holders to register land claims originating under the antecedent sovereigns 82 or, in the area between the

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77 See notes 71-74 supra and accompanying text.
78 See note 75 supra and accompanying text.
79 See note 76 supra and accompanying text.
80 T. Miller, The Public Lands of Texas, 1519-1970 xi (1972); Act of Sept. 9, 1850, ch. 49, 9 Stat. 446.
81 Tex. Const., art. 13, § 2. See also 1 Gammel’s Laws of Texas 1081 (1836).
82 1 Gammel’s Laws of Texas 1324 (1836).
Nueces and Rio Grande Rivers covered by the 1848 Treaty of Guadalupe Hidalgo, established special land commissions to report land claims to the state legislature for its action. Still later, Texas passed acts waiving its sovereign immunity and permitting claimants under Spanish or Mexican grants made during specified times and in particular places to sue the state to establish the title. By whatever method of approval, Spanish and Mexican land titles were brought under Texas sovereignty.

Whatever mineral interests Spain and Mexico might have retained in these lands thus passed to the state of Texas. What the United States accomplished in California with its patents, Texas accomplished with its constitution. Under its 1866 constitution, the state of Texas released to surface owners, including grant owners, all its interest in mines and mineral substances. As a result, the grantee of any valid and recognized Spanish or Mexican land grant in Texas now owns the surface estate by virtue of the confirmation of the previous title he had acquired under the antecedent sovereign and the mineral estate he had acquired directly from the state of Texas.

Ironically, perhaps, Spanish and Mexican mining law continues to apply in Texas in a way that it does not in the rest of the Southwest, primarily now as a standard point of departure in the analysis of the extent of mineral rights created by subsequent grants from the Texas public domain. The Texas courts most recently had occasion to resort to this inherited sovereign interest in a 1986 case involving a 1947 state patent for a 1897 purchase of state land authorized by an 1895 Texas statute which "withheld" from conveyance and thus "reserved" in the state all minerals. In construing what minerals were

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65 Id. at 381, 1471. The acts waived sovereign immunity for grants made prior to December 19, 1836 and situated between the Nueces River and the Rio Grande, east of the mouth of Moros Creek. 2 Am. L. of Mining § 13.02[1][e] (2d ed. 1984).
66 5 Gammel's Laws of Texas 880 (1898).
thus reserved, the Texas courts refused to apply the usual “surface destruction” test applied in Texas. Instead, the Schwartz court held that in the initial transfer of public land into private ownership, a reservation of “all of the minerals” applied to all minerals “whether or not recovery of such would destroy or deplete the surface estate.” As “empirical evidence” supporting this interpretation, the Texas Supreme Court resorted to “applicable Mexican law . . . enacted long before either the Mexican or the Texan revolution.”

The holding and decision brought a sharp concurring opinion accusing the majority of the Schwartz court of continuing a “quagmire of fog . . . where nobody knows who owns what (not even a title examiner) until ownership has been litigated . . . .” However, the complaint was at least as much directed at the majority’s failure to clarify the Texas law of private mineral reservation as it was directed at the Schwartz court’s forging of a special rule for public mineral reservations. With respect to the latter, the law of Texas’ antecedent sovereigns requires an absolute separation of the two estates that the state did not recognize in its land grant confirmation.


In New Mexico, Arizona, and Colorado, the relationship of Spanish and Mexican mineral law to the current law of minerals on land grant lands arrives at practically the same place as it does in California. But the route to confirmation is both more circuitous and more complex than in California, and the final decision is not quite so cast in stone. As a result, the status of the present ownership of confirmed grants is more Byzantine. These added layers of complexity result partially from the longer and more intense history of land tenure, especially in New Mexico, prior to the change in sovereignty, and partially

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** Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977); Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980).

** Schwartz v. State, 703 S.W.2d at 189.

*** Id. at 193.

from the different methods that Congress authorized for the confirmation of property in the area.

Here Congress began with the 1854 Act establishing the office of the Surveyor General for New Mexico.\footnote{Act of July 22, 1854, ch. 103, § 8, 19 Stat. 308 (applicable only to New Mexico Territory which then included Colorado). Amendatory acts can be found in the Act of Feb. 28, 1861, 12 Stat. 172 (extending the 1854 Act to grants in Colorado and establishing the office of Surveyor General for Colorado), and Act of Feb. 24, 1863, 12 Stat. 664 (extending the 1854 Act to the Arizona Territory).} Section 8 directed that Surveyor General to investigate titles originating under the antecedent sovereigns. Specifically, he was to “ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico.” He was to report his findings to Congress itself for its final decision as to whether and on what terms the grant should be confirmed. Initial instructions from the Department of Interior to the first Surveyor General for New Mexico indicated that, in making his recommendations to Congress, the Surveyor General should place himself where Mexico would have been had sovereignty not changed, and honor only those property rights which Mexico would have been legally compelled to honor.\footnote{Instructions, Wilson, Commissioner of General Land Office to Pelham, Surveyor General for New Mexico, August 21, 1854, in Miscellaneous Records, Surveyor General for New Mexico (Santa Fe, New Mexico). See Hall, \textit{Four Leagues of Pecos} 79 n. 39 (U.N.M. Press 1984).} Obviously, Mexico would not have been obligated to recognize that bona fide land grants included the mineral estate and the Surveyor General for New Mexico would have violated his instructions had he recommended that land grants included minerals.

But like the 1851 Act for California, the 1854 Act for New Mexico (including Colorado and Arizona) failed to deal explicitly with the mineral aspect of Spanish and Mexican land grants. The 1854 Act did not specifically reserve from the surface estate the mineral estate that Spanish and Mexican law would have withheld from surface grants. In fact, both the 1851 and 1854 Acts said nothing about minerals and the land grants to which they were directed.\footnote{See \textit{Lockhardt v. Johnson}, 181 U.S. 516, 526 (1901).}
In other ways which bore indirectly on the problem of the mineral estate in confirmed grants, the procedures under the 1854 Act differed from those established under the 1851 Act. In California, the Lands Commission and then the courts on review were charged with determining the validity of claims originating under Spain and Mexico. The 1854 Act moved that final responsibility from the executive and judicial branches to the legislative branch and from the courts to Congress. The shift had important consequences on jurisdiction to review land grant determinations under the 1854 Act. In addition, the 1854 Act placed the burden of proceeding on the United States, not the claimants, and, unlike the 1851 Act, imposed no deadline on filing a claim. Finality under the 1854 Act would have to stem from a different source than it had in California.

The early course of the effect of United States confirmation of Spanish and Mexican land grants in the area covered by the 1854 Act paralleled the course of events in California. Initially, New Mexico courts, correctly interpreting Spanish and Mexican law, suggested in dicta that confirmed New Mexico land grants did not include the mineral estate because the antecedent sovereigns had reserved that for separate disposition. Shortly thereafter, the New Mexico courts decided it was the wiser course to reunite the estates that the law of the antecedent sovereigns so assiduously had kept apart. But because the process of confirmation of land grants was different under the 1854 Act than it had been under the 1851 Act, the constitutional route to the reunification under United States law was slightly different.

In the case of California, the courts had focussed on the patents in order to find that in confirming grants there, the 1851 Act had added the mineral estate to the surface estate of

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**Footnotes:**

95 Tameling v. United States Freehold & Emigration Co., 93 U.S. 644 (1876). See also n. 101 infra and accompanying text.

96 Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308. Besides imposing no deadline, the 1854 Act did not require submission of "perfect" grants for confirmation.


98 Catron v. Laughlin, 11 N.M. 604, 632, 72 P. 26 (1903).
confirmed grants. Now, in the southwest covered by the 1854 Act, the courts focused on the different process of confirmation in order to reach the same result. Specifically, the courts found that Congress itself had added the mineral estate to land grants and that that legislative decision was not reviewable by the judicial branch of government.

The seminal cases involved the quantity of land confirmed in the name of land grants, not the estates attached to them. In one instance, Congress directly had confirmed a grant, partly in New Mexico and partly in Colorado, that by universal admission was ten times as large as Mexican law would have allowed. When the size was challenged, the United States Supreme Court held that the direct congressional confirmation of the grant, even in its excessive size, could not be reviewed in the courts and that the title passed by that legislative act was as effective and complete “as a grant de novo.”

Of course, the land confirmed that exceeded the land allowed by Mexican law in fact was a grant de novo of the federal public domain. But by an analogy that the courts quickly adopted, legislative confirmations added the mineral estate to recognized land grants as surely as they had increased their size. The courts could correct neither incorrect interpretation of the law of the antecedent sovereign. With land grant confirmation under the 1854 Act, Congress had made a grant de novo of the mineral estate. The legislative branch of government, not the courts, had made the choice and only Congress, if anyone, could correct it.

Congress attempted to do so in the 1891 Act establishing the Court of Private Land Claims. Concerned with precisely the excesses that the unreviewable legislative grants de novo had

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99 See notes 71-72 supra and accompanying text.
100 United States v. Maxwell Land-Grant Case, 121 U.S. 325 (1887); Tameling v. United States Freehold & Emigration Co., 93 U.S. 644 (1876).
101 Tameling v. United States Freehold & Emigration Co., 93 U.S. 644, 663 (1876).
102 Id. at 663; Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 82-83 (1893); H.N.D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744 (1940); Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956).
led to, Congress reversed most of the procedures of the 1854 Act. Now Congress explicitly addressed not only the size of grants to be confirmed but the mineral estate attached to them. Specifically, Congress now stated that “allowance or confirmation of a land grant claim” under the 1891 Act would confer no “right or title to any gold, silver or quicksilver mines or minerals of the same.” Instead, “all such mines and minerals” would remain the property of the United States, subject to disposition according to special rules which the Act specified. In effect, the 1891 Act reinstituted the accurate view of the separation between mineral and surface estates that Spanish and Mexican law had imposed.

However, as soon as the effect of this specific legislative provision reached the judiciary for interpretation, the courts once again reunited as far as possible the split estates that now both the law of the antecedent and succeeding sovereigns imposed. As noted above, in the second of the Boquillas Land and Cattle Company cases involving mineral rights on the confirmed San Juan de las Boquillas grant, the Arizona Supreme Court held that the confirmation and patenting of the grant under the 1891 Act passed title to all minerals except gold, silver, and quicksilver specifically mentioned in the Act. With respect to those three named minerals, the patent under the Act reserved only actual mines or deposits known at the time of the patent “to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them, including the minerals of such mines.” Students of the United States’ hard rock mining law will recognize in this restrictive Arizona Supreme Court ruling something akin to the old Castle v. Womble test for the discovery of “valuable minerals” on the federal public domain.

107 238 P. at 399.
the reservation contemplated by section 13 of the Act of 1891, the Arizona court had gone as far as it could to minimize the split estates that the 1891 Act had created.

Congress had stood by while the courts rewrote Spanish and Mexican mining law to transfer reserved minerals to land grant confirmees under the 1851 California and 1854 New Mexico processes. In the 1891 Act, Congress acted prospectively only when it repealed the 1854 Act and established the Court of Private Land Claims. Now, however, in the face of the 1925 decision of the Arizona Supreme Court, Congress acted again. One year after the Gallagher decision and in response to it, Congress passed a statute authorizing the Secretary of the Interior to lease on a royalty basis to the land grant confirmee “all gold, silver, or quicksilver deposits or mines or minerals of the same.” The language of the 1926 statute tracked precisely the reservation imposed by section 13 of the 1891 Act. Neither the legislative history nor the subsequent administrative rulings show whether, in addition, Congress intended in the statute to adopt the parsed reading that the Arizona Supreme Court had given to the 1891 Act.

Once again, the adjudication of the Ortiz Mine grant under United States rule shows something of the tangled complexity that the 1854 and 1891 Acts added to the problem of mineral rights on Spanish and Mexican land grants in the territory covered by those Acts. Recall that under the Mexican law that applied in 1833 when the grant was made, the Ortiz Mine grant represented a congeries of direct but limited (both in space and time) rights to the gold vein discovered there and entirely ancillary rights to sufficient land and water necessary to exercise the primary rights. Theoretically, it is not even certain that the combination of rights and conditions and limitations that the grant represented rose to the level of what the United States courts would have regarded as “property” protected under article 8 of the Treaty of Guadalupe Hidalgo. Be that

111 See notes 48-58 supra and accompanying text.
112 See note 59 supra and accompanying text.
as it may, under the Act of 1854, Congress confirmed the Ortiz Mine grant as a land grant of 69,000 acres.113 Under the federal common law of land grants, confirmation of the Ortiz Mine grant incidentally carried with it title to all the minerals on it or under it, including the vein of gold, the discovery of which had allowed Ortiz into the limited world of mine grants authorized by the 1783 Mining Ordinance.114 Thus federal confirmation of the Ortiz grant in the name of the Treaty of Guadalupe Hidalgo dealt with the grant in terms of the wrong resource—the surface, not the mineral, estate—and in the wrong way—by including the minerals rather than reserving them for separate disposition.

The irony of this compounded error was that in the area covered by the 1854 Act, mineral problems became land problems. Many of the spectacular battles over the ownership of land grants that followed confirmation under either the 1854 or 1891 Acts masked a struggle over the minerals now for the first time a part of the surface estate. Land grant boundaries were stretched and altered to include lode deposits of valuable minerals.115 Parties jockeyed for the control of land grants knowing that ownership now commanded the mineral estate.116 Indeed, some of the largest and most controversial of the confirmed grants developed programs of their own allowing for the discovery and development of the minerals on the kingdoms of grass that Congress had confirmed in the grant.117

Some esoteric problems linger from the adjudications authorized by statute. No court or administrative agency has yet decided that in excepting certain minerals from grants confirmed under the 1891 Act, Congress intended to pass all others to the surface confirmees. Neither Congress nor the Department

113 Act of March 1, 1861 to Confirm Certain Private Land Claims in the Territory of New Mexico, ch. 66, 12 Stat. 887 (1861).
114 See notes 32-40 supra and accompanying text.
117 "Regulations for mineral prospectors and intending locators upon the Maxwell Land Grant," April 15, 1897, filed for record the same day in the Office of the County Clerk, Colfax County, Raton, New Mexico, in Mining Book I at page 389.
of Interior have further interpreted the 1926 statute which authorizes leasing of the excepted minerals to the surface owner.\textsuperscript{118}

Instead, the remaining problems of minerals on lands confirmed in private ownership under the 1854 or 1891 Acts primarily involve the continuing problem of land titles. Unlike the situation in California, neither the 1854 nor the 1891 Acts bars the assertion even today of a “perfect” right to land, including the mineral estate, under the Treaty of Guadalupe Hidalgo. Claims still arise.\textsuperscript{119}

However, a mineral title examiner will confront severe title problems when dealing even with confirmed land grants. With some, he (or she) will find that Congress patented a confirmed private land grant to the undetermined heirs of a person who died in the 18th century.\textsuperscript{120} In some instances, subsequent courts have determined who those heirs might have been at a particular time, but the ownership interests thereafter have slipped back into the obscurity of intestate succession, unprobated estates, and unrecorded deeds.\textsuperscript{121}

The problem becomes even more difficult with respect to so-called community land grants. In New Mexico, some community grants operate under specific statutes.\textsuperscript{122} A general statute governs others.\textsuperscript{123} And still others claim the status of community grants now even though they began as and were confirmed as private grants. In any case, the prospective developer of minerals on these lands must deal with the possible ownership interest of individual grant residents on the mineral resources of the community grant.\textsuperscript{124}

\textsuperscript{118} 2 Am. L. of Mining § 13.02[3][b][iii] (2d ed. 1984).
\textsuperscript{119} Ainsa v. New Mexico and Arizona Ry., 175 U.S. 76 (1899), rev'd 4 Ariz. 236, 36 P. 316 (1894).
\textsuperscript{120} See, e.g., Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P.2d 1237 (1911).
\textsuperscript{121} See, e.g., Apodaca v. Tome Land & Improvement Co. (NSC), 91 N.M. 591, 577 P.2d 1237 (1977).
\textsuperscript{123} Id. at § 49-2-1.
\textsuperscript{124} Kavanaugh v. Delgado, 35 N.M. 141, 290 P. 798 (1930).
In one sense, reuniting the mineral and surface estates of New Mexico land grants under United States law promised to simplify title to the resources and control over them. Ironically, however, combining title to land grant minerals and title to land grant lands only made access to minerals dependent on almost inscrutable title to New Mexico land grant lands. In California, the land title situation is much clearer and so too are mineral estates, as a result. In Texas, a blanket release cured whatever problems the severed mineral and surface estates might have caused.

The mineral problems are complex, but pale in comparison to the water problems. Remember that the 1833 Ortiz Mine grant included the explicit grant of springs in the area for a specific purpose and presumably a specific time. That grant of water lies at the core of Spanish and Mexican water rights that are very much at the center of current litigation, while mining rights continue to occupy an important, but sporadic, place at its edges.

§ 1.03 Water Rights on Spanish and Mexican Land Grants


In the 50 years immediately following the United States acquisition of the Southwest in 1848, land grants and their associated mineral rights rose together as the primary focus of the federal common and statutory law of acquired property rights under the Treaty of Guadalupe Hidalgo. “Land, not commerce, may have been the thing,” as one astute American businessman remarked on his arrival in the New Mexico of the 1880s, but the land was at least as valuable for the minerals it might contain as the surface area it might enclose. In the name of honoring rights to property acquired under the law of its antecedent sovereigns, the United States stood Spanish and

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126 See note 49 supra and accompanying text.
Mexican mining law on its head, creating a unified surface and mineral estate where Spain and Mexico had kept them apart. In that complex reversal, water as a related incident of land grant title took a back seat. Population increase had not yet made the water resource as scarce as it is today or as valuable as hard rock minerals.

Thus, the surface title adjudications of the succeeding sovereign paid little attention to the water rights that might result from the titles the sovereign confirmed. Except for the awkward rise of the “pueblo rights doctrine” in California, not much attention was paid to water. In its general land policy, Congress disclaimed any interest in defining western water rights. In their earliest legislation and decisions, western territories and states were inclined to view water rights as riparian, that is, as identical with and arising from title to land. As a result, in the United States, in the elegant phraseology of Professor Joseph McKnight, “the thread of Hispanic learning ... seems to have been lost.”

That benign neglect has only changed in the last decade as Spanish and Mexican water law has emerged as an area of critical concern in the western United States. Population growth has made 20th century water equivalent to the gold of the 19th century. In order to deal with the increased pressure on a more and more scarce resource, western states for the first time have tried to create the uniform, comprehensive, correlative public systems of private claims to water that are necessary to the functioning of any public system for the apportioning of scarce supplies. If recognized at all, Spanish and Mexican

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130 See, e.g., Moti v. Boyd, 116 Tex. 82, 286 S.W.2d 458 (1926); Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).
water rights must be included in those comprehensive decrees to make modern water systems work.\textsuperscript{133}

Hence, water rights created under Spain and Mexico and inherited by the United States, are not the subject of old lawsuits as the cases involving mineral rights are. Instead, courts today must decide for the first time the nature and extent of water rights created by the United States' antecedent sovereigns. In turn, those lawsuits have spawned a new history of old water rights.\textsuperscript{134}

The new lawsuits have not all ended and the new history has not always agreed, but the recent judicial and academic focus on Spanish and Mexican water rights has allowed certain principles to emerge. In the first place, everyone agrees that no comprehensive code such as the 1783 Mining Ordinance formally governed the acquisition of water in the American Southwest. As the Supreme Court of California recently said, the water law of the antecedent sovereigns "is essentially based on inferences from historical circumstances rather than any express provision of Spanish or Mexican law."\textsuperscript{135}

However, that is not to say that water did not command the attention of Spanish and Mexican authorities. Indeed, the formal law of Spain and Mexico dealt extensively with access to water.\textsuperscript{136} In addition, legal commentators, who performed

\textsuperscript{133} Baade, "The Historical Background of Texas Water Law," 18 St. Mary's L. J. 1, 8-11 (1986). Baade's Texas analysis applies equally to California, Arizona, New Mexico, and Colorado.


\textsuperscript{135} City of Los Angeles v. City of San Fernando, 537 P.2d 1250, 1275, 123 Cal. Rptr. 1 (1975).

a more elevated function in the civil law system than the common law one, wrote extensively, if without agreement, on the subject of water. 137 Finally, the Spanish and Mexican archives of various southwestern states, particularly New Mexico, contain the actual records of pre-1848 water disputes and their resolutions. 138

From these various sources, legal historians have arrived at a consensus as to the broadest outlines of Spanish and Mexican water law in the Southwest. They agree that water rights were an independent part first of the royal property of the Spanish Crown and then the public domain of the Mexican Nation. It followed that water rights were not riparian as the old common law used that term. In other words, the ownership of water did not follow automatically from the ownership of the land on which it ran. Instead, Spanish and Mexican water rights represented an estate separate from title to land and on a coordinate independent status with minerals. As a result, the legal historians now agree, some conveyance from the sovereign owner, whether the Crown under Spain or the Nation under Mexico, was prerequisite to establishing a private right to water. 139

From those basic points of agreement, the legal historians diverge, primarily on the problem of what Spanish and Mexican law required in order to perfect a private right to water as against initial sovereign ownership. One school hews to the view that the law of the antecedent sovereigns required an explicit grant, separate from land, in order to segregate water from sovereign ownership and transfer it to private ownership. 140

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137 See, e.g., J. Escriche y Martin, Diccionario Razonado de Legislacion y Jurisprudencia (1847 ed.); F. Galvan, Tratado de Legislacion y Jurisprudencia sobre Aguas (1849).


140 Baade, supra note 134 at 70-75.
this view, Spanish and Mexican law permitted residents to use sovereign water in common with all other residents and for certain purposes including irrigation. That permit, however, amounted only to a license, analogous to the implied right to graze on the United States federal public domain and always subject to continuous sovereign readjustment and even termination.141 A water grant was necessary to create a water right and those were few and far between.142

Other historians take an intermediate view of what Spanish and Mexican law required in order to turn a claim to water into a right to use it. While they agree that water began as separate sovereign property and that, therefore, a private claim to it as of right required a transfer from the sovereign, they are not so hidebound on what that transfer had to consist of. In addition to explicit water grants, some grants of land implied the right to use water from available supplies and some did not. Water rights were not riparian, but grants of land that designated a use that could not be accomplished without water carried with them a right to use that necessary water.143 According to this view, these water grants by implication were open-ended with respect to the actual quantity of water that they could command and were also subject to continual governmental control. Nevertheless, they did represent a permanent alienation of the sovereign domain and therefore amounted to private rights in water.144

Finally, the last school of legal historians holds that Spanish and Mexican water rights did not require either an explicit or implicit grant from governmental authority but arose from customary use. In this view, water rights originating under the Southwest's antecedent sovereigns find their source in the

141 Id. at 68-69 (analogizing the common use of waters to the implied license to graze the early public domain recognized in Buford v. Houts, 133 U.S. 320, 326 (1890)).
142 Another explicit grant of water involved the Arroyo Hondo grant in Taos County, New Mexico. See Meyer, Water in the Hispanic Southwest 126 (1984).
143 Id. at 126-31. For example, land grants designated as "regadios" (irrigated land) or "tierra de pan coger" (wheatland) required water to achieve their purpose whereas "tierra de ganados" (grazing land) or "temporale" (land supplied by natural rainfall) did not.
144 See Meyer, supra note 142, at 133-34.
ancient laws of prescription, good even as against the sovereign. These water rights by prescription resemble most closely and most ironically water rights under the system of prior appropriation which would become the law, at least in part, in all the southwestern states, in that water rights by prescription and by prior appropriation both arose by the private application of sovereign water to beneficial use.

Around each of these contradictory theories of the source of Spanish and Mexican water rights, there developed peripheral issues about their nature and extent. Those who follow either the explicit grant or the prescriptive view of the source of Spanish and Mexican water rights regard those rights as fixed in terms of both priority and quantity by virtue of either the grant or the use. Those who follow the looser implicit grant theory see Spanish and Mexican water rights as not limited in quantity and not apportioned by priority, but more closely resembling a right to an equitable portion of a common supply.

There is equal disagreement about the sources of water to which the basic Spanish and Mexican water law attached. Springs and wells specifically and groundwater in general add a layer of confusion. On this issue, the emerging debate focuses on the extent to which the law of the antecedent sovereigns treated this water differently from surface water. A related ambiguity involves whether Spanish and Mexican water law ranked water rights by the type of use, making paramount the domestic use of water and legally subordinating irrigation and industrial uses to them.

149 See, e.g., N.M. Const., art. XVI, § 4; Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).
147 Id.
148 Meyer, supra note 142, at 144-64.
All of these issues coalesce in the current debate about the extent to which Spanish and Mexican law recognized a prior and paramount right in certain settlements to the water that was needed to maintain the community as it grew. If it existed at all, the so-called “pueblo right” may have arisen by operation of Spanish and Mexican law or it may have been implied in the grant establishing a community, or finally, it may have had to have been explicit in the community’s grant. In any case, once established under the appropriate legal authority, the “pueblo right” involves historical questions about the nature and extent of that right which parallel the similar issues about Spanish and Mexican water rights in general.

Those emerging historical issues are only of academic interest in the pre-1848 context and are now practically important only insofar as they have been incorporated into the law of the succeeding sovereign. The property guarantees of the 1848 Treaty of Guadalupe Hidalgo provide the obvious avenue for this transfer of legal significance. However, serious issues involving the interaction between the nature of “rights” to water under Spanish and Mexican law and the nature of “property” guaranteed by the Treaty make this a troublesome issue. It suffices to suggest here that if water use under Spain and Mexico was, in the absence of a grant, by implied license, then that license might not have risen to the level of a “property” right protected by the Treaty. Similarly, if Spanish and Mexican water rights arose by use and were based on prescription, then those rights may not have been protected either.

Fortunately, these thorny treaty problems can be avoided by looking to a second, easier source for protection of water

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1. Baade, note 150 at 80–87 argues that the “pueblo right” never existed as a matter of law. Tyler, The Mythical Pueblo Rights Doctrine (1990), argues that it never existed in New Mexico as a matter of fact.
2. See notes 140-145 supra and accompanying text.
5. See note 42 supra.
“rights” acquired under the law of the southwest’s antecedent sovereigns: local law. The various constitutions and statutes of all states in the area acquired from Mexico recognize “prior rights” to water, usually without further defining them. Whatever ambiguity there is in the enforceability of strictly treaty guarantees may be cured by the acknowledgment of water rights in local law.

In contrast to rights to minerals, where federal courts and national laws have predominated, local laws and state courts have led the way in defining the nature and extent of Spanish and Mexican water rights applicable today. As usual, the states have taken radically different views on those rights.


Early on, the California courts had to deal with the problem of how to incorporate water rights brought into United States sovereignty from Mexico along with the property rights that federal and state law guaranteed. In 1886, *Lux v. Haggin* set California on a course fundamentally different from that taken in any other area covered by the Treaty of Guadalupe Hidalgo. In a case involving the rights of a downstream landowner through whose property a stream ran against an upstream appropriator of water, Judge McKinstry ruled that the ownership of land under Mexico carried with it by legal implication the riparian right to the continuous flow of water passing through the land. As part of that right, a downstream landowner could irrigate his land as could an upstream appropriator. But the upstream appropriator could not deprive the downstream property owner whose title originated under Mexican law of the reasonable flow of the river as it reached his land.156

This Mexican right to continuous reasonable flow did not originate in any expressed or implied grant of water. It was not based on the application of water to beneficial use and, indeed,

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157 N.M. Const., art. II, § 5; art. XVI, § 4.
156 *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886).
did not depend on the use of water flowing through the property at all. Instead, it inhered to Mexican title to land. Based on sources later discredited, the California riparian definition of Mexican water rights inherent in Mexican land grants had little authority in the law of the state's antecedent sovereigns but nevertheless entered California water law to stay, albeit awkwardly.

The view expressed in *Lux v. Haggin* contributed as well to another controversial version of Mexican water law, the so-called "pueblo right" by which Mexican communities acquired a treaty-protected prior and paramount right under the law of the antecedent sovereigns to all the water needed to sustain the community. In *Lux v. Haggin*, Judge McKinstry opened the door to this version of Mexican water rights when he opined:

> By analogy, and in conformity with the principles of [Hart v. Burnett] 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 [of the pueblo], and the lands originally set apart to the settlers, or subsequently granted by the municipal authorities.

From this dicta, "the pueblo rights doctrine," consistent at least with the California version of Mexican riparian water rights, became part of California water law. Always criticized as a fundamental distortion of Mexican water law, the "pueblo rights doctrine" was last attacked in *City of Los Angeles v. City of San Fernando*. After 70 days of trial on the basis for the

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3. *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250, 1265 (1975), offers the trial court's basic definition of the non-Indian pueblo right.


“pueblo right” in Mexican law as of 1848, and another 17 days devoted to the effect of California precedent on the issue, the trial court refused to follow the long line of cases in previous California law recognizing the “pueblo right” and ruled that the City of Los Angeles enjoyed no such right. Holding that the prior holdings of the California courts were not “palpably erroneous or unreasonable,” the state supreme court reversed and upheld the “pueblo right” of the City of Los Angeles.

For the moment, that aspect of Mexican water rights in present-day California has been laid to rest.

However, other relatively recent developments in California water law may place those long-recognized rights in a new perspective. In National Audubon Society v. Superior Court, the California Supreme Court applied the public trust doctrine to circumscribe and limit the City of Los Angeles’ appropriative rights acquired under state law in non-navigable tributaries to Mono Lake. In a nearly simultaneous decision, the United States Supreme Court held that the State of California could not assert its public trust easement against tidelands the private title to which had been perfected under Mexico and confirmed by the United States under the 1851 California Lands Act. Because Audubon involved state appropriative water rights and Summa Corp. involved confirmed Mexican rights, the two decisions do not conflict. But if Audubon had involved the kind of Mexican “riparian” water rights recognized in California since Lux v. Haggin, then California might have been barred as it was in Summa Corp. from now asserting a public trust interest in those rights.

As recognized in California, water rights that originated under Mexican sovereignty continue today as categorically

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164 Id. at 1265, n. 17 at 1274.
165 Id. at 1275.
different from either appropriative or riparian rights originating since 1848. Those Mexican water rights arise from Mexican land rights. Their nature and extent is different from other rights recognized in California. Now, in what may turn out to be the most important difference of all, those Mexican water rights may be insulated from the broadening overlay of public trust controls.


Of all the southwestern states, New Mexico had the most fully developed, deeply entrenched hydraulic society at the change of sovereignties in 1848. Legally and politically, New Mexico officials had to recognize the validity of water rights acquired prior to the change in sovereignty. They did so with their very first legislative enactments. However, the need to define the rights that the new New Mexico had recognized arose more slowly.

Beginning in 1898, the New Mexico courts suggested that Mexico had followed the doctrine of prior appropriation before 1848. Thereafter, every few years, the courts repeated the finding about the nature and extent of water rights inherited from New Mexico’s antecedent sovereigns until by 1938 the New Mexico courts had announced that New Mexico’s first sedentary settlers, the Pueblo Indians, had followed the doctrine of prior appropriation and that it applied both to surface and groundwater.

In holding that New Mexico’s earliest irrigators had acquired water rights under the doctrine of prior appropriation, the New Mexico courts ruled that the water law of the antecedent sovereigns was not riparian, thus contradicting the California decisions. Instead, New Mexico saw Spanish and Mexican

169 See notes 8, 9 above.
172 See, e.g., Hagerman Irr. Co. v. McMurry, 16 N.M. 172, 113 P. 823 (1911); Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).
173 Id.
water law as conferring rights based on and limited to use and apportioned by priority between users competing for scarce common supplies. In New Mexico’s view, there was no need for either an expressed or implied grant of water under Spanish and Mexican law, because it was the application of water to beneficial use which gave rise to the right.

This apparently small piece of historical alchemy yielded large benefits to New Mexico courts, busy since the mid-1960s in massive adjudication suits. These suits are aimed at bringing all New Mexico claims to water within the same decrees so that the administration of all claims to water relative to each other, the sine qua non of an administered prior appropriation system, can proceed. Since all water rights in New Mexico, both those originating prior to 1848, those originating between 1848 and 1907, when New Mexico instituted its state licensing system, and those originating since 1907 with licenses defining their elements were identical, it was easier to assemble them than in either Texas or California where comprehensive water decrees involved homogenizing prior appropriative and riparian rights recognized at different times in both states. At this writing, New Mexico state and federal courts have entered thousands of orders assigning pre-1848 priorities to individual water rights owners and adjudicating to those owners a specified quantity of water from a common source. Now the decrees have swallowed the history.

The imposition of the patina of the “Colorado doctrine” version of prior appropriation over the long course of New Mexico water use has tinted as well New Mexico’s own struggle with the “pueblo rights” doctrine. Unsure from the start about whether to adopt the California version of Mexican municipal

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174 See N.M. Const., art. XVI, § 4.
175 See note 146 supra and accompanying text.
178 See notes 158-162 supra and accompanying text and notes 188-189 infra and accompanying text. See also Baade, supra at note 134 at 11-21.
water rights, the New Mexico Supreme Court finally had to face the issue in a suit for private damages against the successor to an 1835 municipality which defended against the claim that it had misappropriated water by affirmatively asserting that it had a prior and paramount right to all the water just like the City of Los Angeles. A badly divided supreme court agreed and the “pueblo rights” became part of New Mexico law.

*Cartwright* turned on whether the “pueblo rights” doctrine was consistent with the underlying law of prior appropriation that New Mexico said had always governed the area. The majority argued that the “pueblo right” merely carried the “torch of priority” into Mexican municipal water law. The dissent complained that the reservation of water for unspecified future use violated the basic principle of prior appropriation law requiring actual application to beneficial use as requisite to establishing the right to a fixed quantity of water. No one questioned whether the doctrine of prior appropriation itself properly informed the debate.

Since 1959, the New Mexico Supreme Court has been reluctant to extend the “pueblo rights” doctrine to cities other than Las Vegas. Historians looking at the actual water administration practices of pre-1848 New Mexico find nothing resembling the “pueblo rights” doctrine there. Now the specific issue of the validity of the City of Las Vegas’ “pueblo right” is pending for the first time in a general stream adjudication. The New Mexico Court of Appeals has refused to give the *Cartwright* decision res judicata effect. If the ruling is upheld, the evidentiary hearing that will follow may repeat the 87-day...

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182 Id. at 88.
183 Id. at 87.
185 D. Tyler, The Mythical Pueblo Rights Doctrine.
nightmare involved in the 1975 case, City of Los Angeles v. City of San Fernando.\textsuperscript{186.1}


In the 20th century, Texas started down the California road toward recognizing water rights it had inherited from Mexico, and then in the last decade turned abruptly aside. In Motl v. Boyd,\textsuperscript{187} the Texas Supreme Court held that the Mexican irrigation system, prevailing in Texas under its antecedent sovereigns and continued for a short time after the transfer of sovereignty, had been riparian in nature. In other words, in Mexican Texas as in Mexican California under Lux v. Haggin, riparian owners could divert surface waters running through their lands and irrigate their lands with those waters, but the right to do so came from their ownership of the bordering lands, not some independent water right, and was limited not by the beneficial use limitation at the heart of the doctrine of prior appropriation, but by the reasonable use requirement of the riparian doctrine. In so deciding, Texas aligned itself with California and against New Mexico with respect to the fundamental attributes of the Mexican water rights each recognized.

Then, beginning in 1962, the Texas courts changed direction. First, in Valmont Plantations, the Texas Supreme Court reversed Motl and now rejected the riparian basis of that case for perennial surface waters.\textsuperscript{188} The contest in Valmont involved rights to Rio Grande water on the river’s north bank in Texas and was between riparians who claimed under Mexican period surface grants and appropriators under Texas legislation enacted after 1888. If the Motl view was correct, then the riparians holding under Mexican grants had riparian rights senior to the subsequent non-riparian appropriators. The Valmont court rejected the Motl view and awarded the riparian

\textsuperscript{186.1} City of Los Angeles v. City of San Fernando, 123 Cal. Rptr. 1, 537 P.2d 1250, 1274 n. 17 (1975).
\textsuperscript{187} 116 Tex. 82, 104, 107-08, 268 S.W. 458, 465, 467 (1926); Baade, supra note 134 at 18-19.
\textsuperscript{188} State v. Valmont Plantations, 163 Tex. 381, 355 S.W.2d 502 (1962).
owners only secondary "equitable" water rights under Texas law. The \textit{Valmont} court held that a right of irrigation was not an appurtenance to Mexican surface grants along the Rio Grande.

From that reversal, the remaining debates about the nature and extent of water rights acquired under Mexico and carried into Texas sovereignty lined up like ducks on a pond. In a series of contemporaneous opinions in the mid 1980s brought on by a state of Texas adjudication of water rights, the Texas courts brought Mexican water rights into line with the views expressed in \textit{Valmont Plantations} and extended and elaborated its basic holding.

First, the courts ruled that \textit{Valmont} applied to perennial waters throughout Mexican Texas. Then the Texas Supreme Court amplified its ruling when, in the Medina River adjudication, it held that a riparian owner along a non-perennial stream had no irrigation right under Mexican law in the absence of an express grant from the antecedent sovereign. In one fell swoop, Texas had extended its rule to all surface waters, confirmed its rejection of the California version of Mexican riparian rights, rejected New Mexico's version of Mexican rights arising by application of water to beneficial use, rejected the alternative theory that some rights to water arose by implication from the type of land grant, and adopted the view that only an expressed grant of water conveyed water rights would survive the change in sovereignties.

In that context, it was a much smaller step to Texas rejection of the "pueblo rights" doctrine that so worried California and New Mexico. Given its first opportunity, the Texas Supreme Court ruled that the successor to a Mexican Pueblo in Texas did not enjoy a prior and paramount right to the waters flowing

\begin{itemize}
\item \textsuperscript{190} 355 S.W.2d at 506. See Baade, \textit{supra} note 134 at 24 and notes 138-142. See also McKnight, "The Spanish Watercourses of Texas," in M. Forkosch, \textit{Essays in Legal History in Honor of Felix Frankfurter} 384 (Bobbs-Merrill 1966).
\item \textsuperscript{190} \textit{In re} Adjudication of the Water Rights of the Cibolo Creek Watershed of the San Antonio River Basin, 568 S.W.2d 155 (Tex. Civ. App. 1978).
\end{itemize}
through it by virtue of the town's establishment and by operation of Mexican law. Suggesting that the California doctrine as accepted by New Mexico had no basis in the historical law of Spain or Mexico, the court refused to recognize that a Mexican municipality had any special rights to water at all.

Thus on the specific issue of "pueblo rights," the Texas decision leaves those southwestern states brought into United States sovereignty by the 1848 Treaty of Guadalupe Hidalgo in complete disarray. California recognizes "pueblo rights." Texas rejects them. And poor New Mexico, so close to both neighbors, is reconsidering.

But the difference of opinion on the specific "pueblo rights" issue is paralleled by an equally profound difference about the nature and extent of water rights in general inherited from Mexican sovereignty and applied in the Southwest today. One legal history has given rise to three very different bodies of law. California says Mexican water rights inherited by it are riparian; New Mexico and Texas disagree. New Mexico says that the extensive Mexican water rights inherited by it are non-riparian and appropriative; California and Texas disagree. And Texas alone says Mexican water rights inherited by it come from neither land ownership nor water use but from an express grant from the antecedent sovereign.

Large issues remain to be forced through the different perspectives that these mutually exclusive interpretations provide. The most critical emerging one seems to involve the application of Mexican water law to groundwater. Some suggest that Spanish and Mexican law conferred the absolute right to it on the owner of the overlying estate. Others are more cautious. Obviously those who favor the riparian view of Mexican water rights will feel more comfortable with the idea that groundwa-

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193 Id. at 267-70.
ter belonged to the surface owner as well. But these are issues that remain to be worked out by the courts.195

§ 1.04 A Short Conclusion to a Long and Tangled Tale

What hard rock minerals were to the 19th century Southwest for the first time under United States rule, water is and will be to the area’s 20th and 21st centuries. The law of the region’s natural resources is as complex as its history is long. Federal and state law have always obligated succeeding sovereigns to respect the property rights acquired under the law of the antecedent sovereigns. In the case of minerals, the United States, in confirming those acquired rights, rearranged the basic structure of estates in Spanish and Mexican real property. Confirmation reunited the surface and mineral estates Spain and Mexico so assiduously had kept apart. However, only the United States as state successor to reserved minerals lost. In the case of water and land under Spanish and Mexican law, the stakes are much higher, the historical issues much more clouded, and the current state of the law much more unsettled.