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I. INTRODUCTION

Some 500 years have passed since the voyage of Columbus. Much has occurred since then to change the social and political landscape of the so-called "New World." However, some things that have not changed are legal principles originating in the law of Spain and brought here during the age of discovery. Little could Columbus have known that 25 generations after his passage, they would still play a role in governing the affairs of the Americas. An historical review recalls the circumstances by which this was to occur. In the year 1492, the Reconquest of Spain was nearing its end. The last Moorish kingdom to fall was Granada, site of the Moorish palace El Alhambra. In that year, Their Catholic Majesties, Ferdinand and Isabella, drove the Moorish ruler Boabdil from Granada into the Sierra Nevada mountains to the south.[1]

In the same year, Christopher Columbus petitioned the Spanish Crown to finance an expedition to the spice-rich "Indies" of the East. Convinced the earth was not flat, he argued that there had to be an alternative route. Perhaps emboldened by the Reconquest, where all others had said no, the Spanish Crown said yes. That

1. Legend has it Boabdil was twice unfortunate. As he and the fleeing Moors stopped at a mountain pass, he gazed back upon the city. It is said there is nothing so cruel in life as to be born blind in Granada. This saying must have been as true in his time as it is today, because Boabdil began to cry over what he had lost. Upon seeing him cry, Boabdil's mother berated him: "Fitting you should cry like a woman over what you could not defend like a man!" Thomas J. Abercrombie, *When the Moors Ruled Spain*, 174 NAT'L GEOGRAPHIC 86, 114 (1988).

decision led to the introduction of the law of Spain into the Americas, including the territory that would later become the United States.[2]

This Article will explore the efforts of early American jurists to resolve whether rights to water arose impliedly under the Spanish law, their resort to ancient legal texts to do so, and the validity of their findings. It will conclude that it was in disregard of some of these ancient texts that early American courts first attempted to ascertain the law of waters in New Spain, and in turn, the law of waters in the United States.

II. THE PRESERVATION AND ADOPTION OF SPANISH LAW IN THE UNITED STATES

Even one familiar with the history of the Americas might be surprised to learn that Spanish law influences the adjudication of certain legal issues in the United States some 500 years after the voyage of Columbus. With the exception of Louisiana, the United States follows the common law tradition of England, the country from which it undoubtedly derives many of its legal precedents and much of its legal heritage. However, other countries, including France and Spain, have also influenced American jurisprudence. To understand how the law of Spain continues to influence the law of the present-day United States, and why American courts look to it for guidance, one must recall the circumstances by which the United States grew as a nation. Prior to 1803, the United States was largely confined to territories east of the Mississippi River.

As Spanish lawyer and jurist José María Castán Vazquez noted:

> [W]ith the Treaty of Versailles in 1783 which reincorporated Florida, North America was divided into two large halves: Spanish and British. These halves were divided by the "father of the waters," the great Mississippi grave of the conqueror of tragic destiny—Hernando de Soto. Of these two great halves, the Spanish one was somewhat larger than the British, which means, naturally, that more than half of the U.S. territory—not taking into

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2. In the United States, various areas of law have been and are influenced by the Spanish law. *See generally* Succession of Henican, 248 So. 2d 385 (La. 1971) (inheritance and succession); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981) (wrongful death); Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24 (1959) (civil procedure); National Bond & Inv. Co. v. Atkinson, 254 S.W.2d 885 (Tex. Civ. App. 1952) (usury), Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App. 1950) (putative marriage). Some, such as putative marriage, are direct descendants. But perhaps the two areas most influenced by the Spanish law are those of land and water rights and community property. The latter is a direct descendant of Spanish law. *See generally* Walter Loewy, *The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32 (1912).

The concept of community property and its origin has been the subject of extensive scholarship. The Appendix to this Article lists the decisions of those states expounding upon its origin, and the propriety of resort to the Spanish law to assist in its proper application.

> consideration the present states of Alaska and the Islands of Hawaii—was Spanish.[3]

In 1803, the United States purchased the Louisiana territory, thereby nearly doubling in size. In 1825, responding to the invitation of the Mexican government, Stephen Austin led a group of settlers to Texas. In exchange for land and a better life, Austin and his followers became Mexican citizens and converted to Catholicism. Just eleven years later, those settlers engaged the Mexican general Santa Anna at the Alamo and at the battle of San Jacinto, and declared a republic.

In the late 1840s, the American administration unilaterally "annexed" Texas, leading to armed confrontation between the United States and Mexico. The conflict ended in 1848 with the signing of the Treaty of Guadalupe Hidalgo.[4] Under the treaty, the United States was ceded the territory comprising the present states of Arizona, California, Colorado, New Mexico, Nevada, Texas, Utah and Wyoming.[5] Although the treaty resulted in a change in sovereignty for territory previously held by Mexico, it provided solemn assurances the property rights of the citizens living there would be respected. Under the treaty:

> The property rights of Mexicans not established in the ceded area were to be "inviolably respected" [due to Mexico's insistence], while the property rights of Mexicans who remained in the affected area, whether or not they elected to retain their Mexican citizenship, were to be protected to the same extent as those of citizens of the United States.[6]

The United States Senate voted to delete portions of the treaty that sought to honor vested land claims and the property rights of the Catholic Church.[7] However, Mexico did not waver. It insisted upon "solemn assurances"[8] that vested claims be

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3. José María Castán Vazquez, *Reciprocal Influences Between the Law of Spain and Louisiana*, 42 LA. L. REV. 1473, 1475 (1982) (quoting D. FERNANDEZ FLORES, LA HERENCIA ESPANOLA EN LOS ESTADOS UNIDOS 150 (1981)).

4. J.J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 468 (1973).

5. *Id.*; Pleasant Valley Canal Co. v. Borror, 72 Cal. Rptr. 2d 1, 7 (1998).

6. Bowden, *supra* note 4, at 469.

7. *Id.* at 470. *See generally* Harry B. Morrison, *The Archbishop's Claim: The History of the Legal Claim of the Catholic Church Before the Federal Courts to the Property of the California Missions*, 47 JURIST 394 (1987).

8. Bowden, *supra* note 4, at 470.

recognized.[9] As a result of Mexico's persistence, a "Protocol" was adopted.[10] The Protocol provided:

> These grants, notwithstanding the suppression of the Article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.
> Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican laws in California and New Mexico up to the 13th [day] of May, 1846, and in Texas up to the 2nd of March, 1836.[11]

Accordingly, express provision was made for resort to the Mexican law in force at the time of the grant to resolve their validity. Similar assurances were made under the Gadsden Treaty of 1853. There, it was recognized that "[t]he United States was obligated under the universally accepted principles of international law, . . . to recognize the valid land grants made by Spain and Mexico prior to the changes in sovereignty."[12] In recognition of the Texas Constitution of 1836 and the Treaty, the early decisions of the state of Texas firmly established that "grants from Spain [and] Mexico . . . are governed by the law of the sovereigns when the grants were made. The law of those granting sovereigns is the law of Texas which it is [the courts'] duty to know and follow."[13] Pursuant to the Texas Relinquishment Act of 1852:

> Where rights accorded by the Spanish Law were more favorable to [a] riparian proprietor than they would have been at Common Law, the Spanish Law prevails. Adoption of the Common Law by the Republic of Texas could not, and did not, impair or diminish rights that had vested under the Spanish Law.[14]

Similar recognition was extended by the state of California. The early decisions of its courts confirmed "Spanish and Mexican laws governing property rights in California before the annexation remained in effect after the change of sovereignty unless duly repealed or altered, and [that the California courts were] required to take

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9. *Id.*
10. *Id.*
11. *Id.* at 470-71.
12. *Id.* at 473.
13. State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App. 1961). *See also In re* Contests of the City of Laredo, 675 S.W.2d 257, 259 (Tex. Ct. App. 1984).
14. Harbert Davenport & J.T. Canales, *The Texas Law of Flowing Waters with Special Reference to Irrigation from the Lower Rio Grande*, 8 BAYLOR L. REV. 138, 155 (1956).

judicial notice of such laws as part of the law of [their] state."[15] In other states in which the Spanish law had prevailed, the resolution of the validity of land grants and water rights appurtenant to them depended upon interpretation of the Spanish law in effect at the time of the grant.[16] In many instances, legislative or judicial action

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15. City of Los Angeles v. City of San Fernando, *as modified on denial of rehearing*, 537 P.2d 1250, 1274 (Cal. 1975) (citing Ohm v. San Francisco, 92 Cal. 437, 450 (1891)).

16. *See* Cartwright v. Public Serv. Co. of New Mexico, 343 P.2d 654, 659 (N.M. 1958). Spanish land grants in the Americas were often quite large. In the state of Texas alone, "Spanish and Mexican grants cover 26,280,000 acres." A.A. White & Will Wilson, *The Flow and Underflow of* Motl v. Boyd*: The Problem*, 9 SW. L.J. 1, 5 n.12 (1955) (citing REP. OF COMM'N OF GEN. LAND OFFICE (1930-32)). Such an area would span 41,062 square miles or approximately 16% of the state of Texas, and would equal in size the states of Tennessee (41,154 square miles) and Ohio (41,004 square miles). The following chart illustrates the relative size of some of these grants:

	Grant:	Date:	Location:	Acreage:
1.	*Jose de Leyba*	1728	Santa Fé, New Mexico	18,000 acres
2.	*Tomé*	1739	Valencia County, New Mexico	121,594 acres
3.	*Ojo del Espiritu Santo*	1766	New Mexico	382,849 acres
4.	*Potrero del Espiritu Santo*	1781	Texas	59 sq. leagues*
5.	*Cañon de San Diego*	1788	New Mexico	11 6,289 acres
6.	*San Miguel del Bado*	1794	New Mexico	315,300 acres
7.	*Rancho de las Pulgas*	1795	California	12 sq. leagues
8.	*Saint Anastasia Island*	1795	St. John's, Florida	1,465.15 acres
9.	*Mines of Spain*	1796	Dubuque, Iowa	150,000 acres
10.	*Cañon de Chama*	1808	New Mexico	500,000 acres**
11.	*Temescal*	1818	San Bernardino County, Calif.	5 sq. leagues
12.	*Vallecito de Lovato*	1824	New Mexico	114,000 acres
13.	*Rancho de San Jose de Sonoita*	1825	Arizona	Two sitios
14.	*San Lorenzo Arroyo*	1835	Socorro County, New Mexico	130,138 acres
15.	*Suisun*	1842	California	18,000 acres***
16.	*Sangre de Cristo*	1843	Castilla County, New Mexico	500,000 acres

*1 league equals 3 statute miles **alleged *** "four square Mexican leagues"

Sources: 1. Sena v. United States, 189 U.S. 233, 234 (1903), 2. Bond v. Unknown Heirs of Barela, 229 U.S. 488, 489 (1913), 3. Pueblo of Zia v. United States, 168 U.S. 198, 198 (1897), 4. Cavazos v. Trevino, 73 U.S. 773, 777 (1867), 5. Chaves v. United States, 168 U.S. 177, 178 (1897), 6. United States v. Sandoval, 167 U.S. 278, 278 (1897), 7. Maria de la Solidad de Arguello v. United States, 59 U.S. 539, 540 (1855), 8. Mitchell v. Furman, 180 U.S. 402, 403-04 (1901), 9. Chouteau v. Molony, 57 U.S. 203, 225-26 (1853), 10. Rio Arriba Land & Cattle Co. v. United States, 167 U.S. 298, 301-02 (1897), 11. Serrano v. United States, 72 U.S. 451, 459 (1866), 12. Peabody v. United States, 175 U.S. 546, 546 (1899), 13. Ely's Adm'r v. United States, 171 U.S. 220, 221-22 (1878), 14. Hayes v. United States, 170 U.S. 637, 638 (1898), 15. United States v. Ritchie, 58 U.S. 525, 531 (1854), 16. Tameling v. U.S. Freehold & Emigration Co., 93 U.S. 644, 644 (1876).

The largest of these grants, the *Sangre de Cristo*, would encompass an area 30 square miles in size, large enough to stretch from Glendale, California on the north to Long Beach on the south, and from the Pacific Ocean on the west to Fullerton on the east. One of the smallest, the *Suisun*, would cover nearly 60% of the city of San Francisco. Due to their size, judicial confirmation of their validity may have been viewed by some as detrimental to the interests of the new territories and settlers arriving from the east. The early American courts nonetheless displayed an exemplary respect for the proper resolution of their validity. They often adopted a very liberal view of whether certain requisite procedures had been followed when the land was allegedly granted. If they had, the grant was valid under the Spanish law, and in turn, under the Treaty of Guadalupe Hidalgo. *See* United States v. Elder, 177 U.S. 104, 118 (1900); Chaves v. United States, 168 U.S. 177, 188 (1897).

was taken to preserve the Spanish law in the newly acquired territories. This was especially true with respect to water rights.[17]

In addition to the foregoing, commentators have observed that the change in sovereignty did not necessarily operate to establish the common law exclusively in the new territories:

> Upon three different occasions, large additions have been made to the United States of territories which before the acquisition were not subject to the common law. The territory included in the Florida Purchase was subject to the Spanish law; . . . the territory acquired from Mexico had for the groundwork of its jurisprudence the civil law as developed in Spain and her colonies. When these lands were acquired, the mere act of acquisition did not give to them a United States system of laws. There was no such system.[18]

The Spanish law accordingly still influences the adjudication of certain issues in the United States and is looked to for guidance by American courts because express provision was made for resort to its precedents. In some cases, such provision was made due to the absence of any other system of laws; in others, it was due to a desire to protect rights deemed worthy of the deepest respect.[19]

III. THE SPANISH LAW OF WATERS IN THE AMERICAS AND THE CONCEPT OF IMPLICATION

Disregarding some important sources of Spanish law, early American courts first attempted to ascertain the law of waters in New Spain, and in turn the evolution of those principles into the law of the United States. One of the issues those courts attempted to resolve in light of the Spanish law was whether rights to water arose impliedly upon the granting of land, both for individual property owners and for municipalities.

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17. *See City of Los Angeles*, 537 P.2d at 1260-61; *In re* Determination of Relative Rights to Use of Waters of Pantano Creek, 41 P.2d 228, 233 (Ariz. 1935).

18. McCoy v. United States, 247 F. 861, 867 (5th Cir. 1918) (Batts, J., concurring). *See generally* Kathianne Knaup, *The Transition from Spanish Civil Law to English Common Law in Missouri*, 16 ST. LOUIS U. L.J. 218 (1971).

19. Robbins v. United States, 5 F.2d 690, 692-93 (N.D. Cal. 1925).

A. Implied Rights for Individual Property Owners

1. Texas

The courts of the state of Texas have undertaken the most extensive and thorough analysis of the Spanish law of waters of any state in the Union. As Texas was part of the territory ceded to the United States under the Treaty of Guadalupe Hidalgo, rights vested in Texas prior to the change in sovereignty were required to be honored. These included rights to land and water.

a. Motl v. Boyd

One of the earliest decisions from Texas addressing the issue of implied rights to water was *Motl v. Boyd*.[20] This decision was purported to be based on the Mexican law of irrigation. In retrospect, it appears to be based on what the court believed to be the Mexican law of irrigation. The *Motl v. Boyd* court did not refer to or analyze any of the Spanish legal codes, royal decrees or works of the commentators. Nonetheless, it determined under the Mexican or Spanish law, ownership of land abutting water automatically conferred rights upon the owner of the land to take or use the water.[21] This decision stood unchallenged for thirty-five years, when it was overturned in *State v. Valmont Plantations*.[22]

b. State v. Valmont Plantations

In the late 1950s, a dispute between appropriators and riparians over the right to the waters of the Rio Grande River resulted in litigation that presented the Texas courts with the opportunity to revisit the holding in *Motl v. Boyd*. In *State v. Valmont Plantations*,[23] owners of land abutting the Rio Grande River, granted by the Spanish and Mexican governments in the late 18th and early 19th centuries,[24] contended they had an implied right to use the waters of the river. They relied on the legal code *Las Siete Partidas* and two famous commentators, de la Vega and Escriche, to support their argument.[25]

The trial court concluded the holding in *Motl v. Boyd* was based on an incorrect interpretation of the Mexican law.[26] It nonetheless ruled in favor of the riparians, reasoning it was required to do so by the doctrine of *stare decisis*. On appeal, Justice Pope, who had owned property in the area the subject of the litigation shortly before

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20. 286 S.W. 458 (1926).
21. *Id.* at 467.
22. 346 S.W.2d 853 (Tex. Civ. App. 1961).
23. *Id.*
24. *Id.* at 854, 855 n.3.
25. *Id.* at 865-66.
26. *Id.* at 854, 854 nn.1-2.

it arose, took the opportunity to overturn *Motl v. Boyd*. He demonstrated that the dicta relied on in *Motl v. Boyd* was incorrect.[27] Unlike decisions from other states, the court in *State v. Valmont Plantations* did refer to the early Spanish commentators and to a host of other sources. It concluded that the Spanish law was not riparian in nature,[28] and that neither *Las Siete Partidas* nor the work of de la Vega and Escriche showed otherwise.[29]

To begin its analysis, the court turned back the pages of history to the century of El Cid and the Kings of Castile.[30] Under the guidance of King Alfonso X, the legal code *Las Siete Partidas* was published in 1263.[31] The court looked to this ancient legal text because the tribunals of New Spain relied on it to resolve legal issues. Its laws did not expressly prohibit the implication of irrigation rights. However, they did reflect the crown's intention that "waters of navigable rivers . . . be used by all persons in common."[32]

Aware that "'[a] royal order emanating from the king [of Spain was] a supreme law, superceding and repealing all other preceding ones inconsistent with it,'"[33] the court also looked to historical edicts that might illustrate the intent of the Spanish law. The decree of King Phillip V of 1717 similarly suggested that water rights could not arise by implication. In it he declared: "'authorization for the sale of public waters, because it is a prerogative of His Majesty, must be obtained precisely from His Royal Person. . . .'"[34]

The court also reviewed the decisions of the supreme judicial authority in Spain. According to those decisions, under *Las Siete Partidas*, "a permit to use water was necessary in Spain prior to 1845. . . ."[35] Still more support was found in the laws promulgated for New Spain. The *Recopilacion de las Indias*, Book IV, Title 17, Law 5, admonished that "'waters be common in the Indies, and this shall be observed wherever there shall be no title or authority from ourselves [the crown] by which a different disposition should be made.'"[36]

The redactors of the *Recopilacion* had provided ample discussion of the law of waters in New Spain.[37] In 1761, the Marquis of Cruillas, Viceroy of Mexico, decided to adopt the commentary of an early Spanish jurist as the law of his jurisdiction by publishing the jurist's work. The work was entitled "*Reglamentos General de las Medidas de Aguas*," or "General Regulations for the Measurement

27. *Id.* at 878-82.
28. *Id.* at 857-59.
29. *Id.* at 866-69.
30. *Id.* at 857, 857 n.4.
31. *Id.* at 857. *See infra* note 135.
32. *Id.* at 857.
33. *Id.* (quoting United States v. Arredondo, 31 U.S. (6 Pet.) 691, 714 (1832)).
34. *Id.* at 858-59 (quoting 2 AUTOS ACORDADOS 75 (Madrid, 1777)).
35. *Id.* at 859.
36. *Id.* at 860 n.14 (citing *Recopilacion de las Indias*, Book IV, Title 17, Law 5).
37. *Id.* at 860-61.

of Waters."[38] Its author, Don Domingo Lasso de la Vega, had referred to the works of the redactors of the *Recopilacion* in formulating his commentary. De la Vega emphasized repeatedly in his work that water rights were not to be implied in the Indies.[39] He wrote:

> And limiting myself to waters, as a guide and foundation of all this reglamento, I find that they are in the same manner of the Royal Patrimony . . . 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 . . . .[40]

In further support, he concluded:

> And limiting this dominion to that which appertains to our Indies, I conclude with the same words and doctrine of Juan de Solorzano on the cited laws, that our glorious and Catholic Kings have a royalty (regalia) in them. . . . [N]o one without permission of the Prince can conduct public waters to his lands for irrigation, especially in this New Spain . . . .[41]

The court next examined the laws and history of Mexico after its independence from Spain and the circumstances surrounding the "General Visits" (acts to place settlers in possession of their lands). The court found that they too did not recognize any implied right to waters.[42] Lastly, the court recalled the "practices of the time," meaning the time the grants were issued.[43] According to the local history of San Antonio, "[in] 1731, fifteen families from the Canary Islands arrived . . . and . . . were given lands situated between and fronting upon both the San Antonio River and San Pedro Creek."[44] A dispute over use of the water of the rivers arose between the settlers and mission churches that had been established before the settlers' arrival.[45]

On the instructions of Viceroy Casafuerte, the Governor ordered his lieutenant to place the Canary Islanders in possession of the waters.[46] When the settlers later

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38. *See* Davenport & Canales, *supra* note 14, at 168-69; State v. Valmont Plantations, 346 S.W.2d 853, 860-61 (Tex. Civ. App. 1961).

39. *Valmont*, 346 S.W.2d at 861.

40. *Id.* (quoting DE LA VEGA, REGLAMENTO GENERAL DE MEDIDAS DE LAS AGUAS, *reprinted in* GALVAN, ORDENANZAS DE TIERRAS Y AGUAS 155-57 (1844)).

41. *Id.*

42. *Id.* at 863-65, 870-74.

43. *Id.* at 876.

44. *Id.*

45. *See id.* at 876.

46. *Id.*

sought additional water from an *acequia* or irrigation ditch, they were required to exhibit title to the water before they were granted the right to take it.[47] Thus, the fact that the "Canary Islanders . . . received their irrigation rights by express grant[] . . . [even] though they were riparian to both the San Antonio River and San Pedro Creek . . . "[48] all but answered the question. If the settlers had acquired rights to the river waters simply by virtue of having been granted riparian land, why would there be a need to extend such rights by express grant? The court accordingly ruled that the owners of the land abutting the river did not possess an implied right to use the water of the river.

2. Arizona

When Coronado dispatched his captain, Garcia Lopez de Cárdenas, on an expedition to the Colorado River in 1540,[49] it is unlikely he expected him to report back he had discovered one of the natural wonders of the world. Cárdenas would be the first European to see the Grand Canyon,[50] a sight that eluded Fray Marcos de Niza. After reaching Arizona in 1539, de Niza returned to Mexico out of fear of losing his life.[51]

The grandeur of the Canyon was not enough to persuade settlers to stay. The Spaniards abandoned the region to concentrate their efforts on the more profitable territory of present-day New Mexico.[52] Consequently, few *pueblos* were established in Arizona, and its courts have had little occasion to explore whether rights to water could be implied under the Spanish law.[53] In *Slosser v. Salt River Valley Canal Co.*,[54] the Supreme Court of Arizona held that rights to water arose by virtue of the

47. *Id.* at 877.

48. *Id.*

49. Joseph Judge, *Retracing John Wesley Powell's Historic Voyage down the Grand Canyon*, 135 NAT'L GEOGRAPHIC 668, 698-99 (1969).

50. ORIGINAL NARRATIVES OF EARLY AMERICAN HISTORY: SPANISH EXPLORATION IN THE SOUTHWEST 1542-1706, at 5 (H. Bolton ed., 1908 & Reprint 1952) [hereinafter ORIGINAL NARRATIVES].

51. ADOLPH F. BANDELIER'S THE DISCOVERY OF NEW MEXICO BY THE FRANCISCAN MONK, FRIAR MARCOS DE NIZA IN 1539, at 88-89 (Madeleine Turrell Rodack trans., 1981).

52. ORIGINAL NARRATIVES, *supra* note 50, at 137.

53. Research of the decisions of Arizona reveals no cases other than *Slosser v. Salt River Valley Canal Co.*, 65 P. 332 (Ariz. 1901), and *In re Determination of Relative Rights to Use of Waters of Pantano Creek*, 41 P.2d 228 (Ariz. 1935), addressing the issue of whether water rights could be implied under the Spanish law, including whether towns alleged to have originated during the Spanish and Mexican periods had an implied, superior right to the waters flowing within their limits. *See* discussion at Part III.B, *infra*.

54. 65 P. 332 (Ariz. 1901).

holding of land.[55] The basis for its decision was the old Spanish law, which, the court explained, had been incorporated into the law of Arizona with the first legislation enacted in the territory.

> The first legislation by the territory followed closely the old Spanish and Mexican laws upon the subject of water rights, as these had been incorporated in the statutes of New Mexico. Under these Mexican and Spanish laws . . . the holding of land was the basis for any valid appropriation or use of water from a public stream.[56]

The *Slosser* case was allegedly instrumental in forming Arizona water law, having "laid down certain principles which have ever since been followed, both by the courts and the Legislatures of Arizona."[57] However instrumental it may have been, it was based on the erroneous impression that water rights were a concomitant part of any land grant under the Spanish law. This impression is supported neither by the legal codes governing the Americas nor by the works of the early Spanish commentators. Nonetheless, the assertion of such a right by towns founded during the Spanish and Mexican periods gave rise to what became known as the pueblo water rights doctrine.

B. *Implied Rights for Municipalities*

1. *The Origin of the Pueblo Water Rights Doctrine*

The origin of the pueblo water rights doctrine was somewhat humble. It had its beginning in a simple action for ejectment brought in California in the year 1851. The parties, Hart and Burnett, likely did not anticipate the debate that would ensue. In that year, the sheriff of San Francisco County, California, levied upon and sold "a number of" fifty vara lots in the City of San Francisco.[58] The plaintiff had purchased the lots at the sheriff's sale upon a judgment obtained by another party against the City.[59]

The court was quick to realize the significance of the issues raised by the case. It observed: "[a]lthough the property actually involved in this case is not very large, the question really to be decided affects property of immense value, and the right and title of the city of San Francisco to what is termed its municipal lands . . . ."[60]

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55. *Id.* at 338-39.
56. *Id.* at 334.
57. *Pantano Creek*, 41 P.2d at 233.
58. Hart v. Burnett, 15 Cal. 530, 537 (1860).
59. *Id.* at 530-31.
60. *Id.* at 537.

The question to be decided was whether under the Spanish law, a *pueblo*, or town, had been lawfully established at San Francisco.[61]

The irony posed by the issue was apparent. A community known as "San Francisco" had existed on the San Francisco Peninsula for many years. If anything, this circumstance was likely taken as confirmation of the city's legitimacy. Its residents were therefore understandably alarmed at the prospect that their city might possibly be illegitimate, as if the product of some grand oversight. Accordingly, once the issue of the city's legitimacy was raised, no effort was spared to resolve it. The court noted that "[p]robably no cause ever submitted to this court has been more thoroughly and learnedly discussed, both at the bar and in written and printed arguments."[62]

The court examined a wealth of materials and references including the *Recopilacion de Indias*. These materials indicated that provision had been made in the Spanish law for the granting of municipal lands to towns upon the fulfillment of certain obligations by the *poblador*, or founder.[63] Based on its examination, the court concluded that a *pueblo* had been lawfully founded at San Francisco, and accordingly succeeded to "the lands within its limits."[64] Since this land was to be held in trust for the community,[65] it was not subject to seizure or sale.[66]

Hart v. Burnett did not directly establish the pueblo water rights doctrine. Nonetheless, later cases would draw on it to do so. While *Hart v. Burnett* was probably decided correctly, whether the principles it articulated can be construed as support for the pueblo water rights doctrine is another matter. The first case to find such support and recognize the doctrine arose from a dispute over the waters of the Kern River in California.

2. *The Creation, Extension and Modification of the Pueblo Water Rights Doctrine in California*

a. Lux v. Haggin

In 1886, the Kern River Land and Canal Company diverted the waters of the Kern River for its own use. This action prevented the natural flow of such waters to the property of the plaintiffs.[67] Although the court refused to relieve the defendant of its burden of showing that the plaintiffs' rights to the water had been

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61. *Id.* at 537, 540, 546-47.

62. *Id.* at 537.

63. *See In re* Contests of the City of Laredo, 675 S.W.2d 257, 266 n.14 (Tex. Ct. App. 1984) (citing *Recopilacion*, Book IV, Title 6, Law 6); *see also* United States v. Santa Fé, 165 U.S. 675 (1897).

64. *Hart*, 15 Cal. at 564.

65. *Id.* at 564-69.

66. *Id.* at 530.

67. Lux v. Haggin, 10 P. 674, 675 (Cal. 1886).

extinguished,[68] by posing the question of whether "recognition of a doctrine of appropriation . . . would secure the greatest good to the greatest number. . . ,"[69] it suggested it might nonetheless disregard whether the plaintiffs had suffered injury and even extinguish any right they had to the unimpeded flow of water.

In answering this question, it referred to the decision in *Hart v. Burnett.*[70] Drawing an analogy to *Hart*, the court in *Lux v. Haggin* proceeded to imbue Spanish *pueblos* with "a species of property in the flowing waters within their limits, or a 'certain right or title' in their use . . . ."[71] With that fortuitous stroke, the pueblo water rights doctrine was established. It would be further extended for the next one hundred years.[72]

b. Vernon Irrigation Co. v. City of Los Angeles

The next case to advance the doctrine was *Vernon Irrigation Co. v. City of Los Angeles.*[73] In another dispute between riparians and prior appropriators, the court looked to the history of the founding of Los Angeles to render its decision:

> In 1779 it was determined to found a pueblo called "Reyna de Los Angeles. . . ." In 1781, Don Phillipe [sic] de Neve, governor, issued a decree providing for the founding of the pueblo in the immediate vicinity of the river Porcuncula. All the land capable of irrigation should be carefully examined, and a point selected for the erection of a dam which would insure the distribution of the water to the greater portion of the lands, and the site of the town should be as near the river as possible.[74]

The court found in this history an inference in favor of the doctrine. It found further support for the doctrine in anecdotal evidence, noting "in 1810 complaints were made to the commandante that the priests of San Fernando[75] had diverted the water on the Cahuenga ranch to the injury of the pueblo." The controversy was

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68. *Id.* at 696-97.

69. *Id.* at 702.

70. *Id.* at 714-15.

71. *Id.* at 715.

72. *See* Pleasant Valley Canal Co. v. Borror, 72 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998). In *Pleasant Valley*, the court noted "three species of water rights [are] still recognized in California: pueblo, riparian, and appropriative. We are not concerned here with pueblo water rights, which apply only to the municipal successors of the former Spanish and Mexican pueblos." *Id.* at 7.

73. 39 P. 762 (Cal. 1895).

74. *Id.* at 766.

75. The mission San Fernando, Rey de España was founded in 1797. City of Los Angeles v. City of San Fernando, *as modified on denial of rehearing*, 537 P.2d 1250, 1275 (Cal. 1975). "Mission settlements . . . were purely ecclesiastical foundations made or to be made in Alta California by monks or padres of the Franciscan Order, and existing and being conducted by these for the sole purpose of bringing the blessings and fruits of Christian civilization to the Indian population of Alta California . . . ." City of San Diego v. Cuyamaca Water Co., 287 P. 475, 485 (Cal. 1930).

settled when the priests acknowledged "the superior right of the pueblo" to the water.[76] The court accordingly concluded the City of Los Angeles possessed a superior right to the waters of the river. Based on the holdings in *Lux v. Haggin* and *Vernon Irrigation*, the cities of Los Angeles and San Diego were vested with a paramount and prior right to waters flowing within their limits.[77]

c. City of Los Angeles v. City of San Fernando

The modern inhabitants of San Fernando were more bold than the mission priests. In the early 1970s, the city of San Fernando, along with the cities of Glendale and Burbank, challenged the pueblo water right of the city of Los Angeles to the waters of the Los Angeles River by extracting water from areas where Los Angeles claimed to hold a superior or paramount right.[78] The city of Los Angeles sued the cities of San Fernando, Glendale and Burbank to enjoin them from taking the water. In defending their alleged right to the waters, the cities of San Fernando, Glendale and Burbank urged the Supreme Court of California to reconsider earlier decisions vesting in the city of Los Angeles a superior right to the waters.[79]

Arguably, *City of San Fernando* presented the Supreme Court with the perfect opportunity to re-examine the Spanish law and thereby remedy the effects of prior decisions conferring superior or paramount rights to water to the towns through which such waters flowed.[80] The court did not avail itself of the opportunity to do so. Neither the evidence offered by the defendant cities nor the provisions of the *Recopilacion* persuaded the court to reverse the earlier precedents.[81] Apparently unimpressed, it stated: "[t]he historical evidence . . . falls well short of demonstrating that our prior holdings upholding the right were palpably erroneous or unreasonable."[82] Instead, it proclaimed:

> Even assuming that the exhibits and expert testimony in the present record would have persuaded us to decide against the pueblo right as an original question, we should not now so rule if to do so would unjustly impair legitimate interests built up over the years in reliance on our former decisions.[83]

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76. Vernon Irrigation Co. v. Los Angeles, 39 P. 762, 766 (Cal. 1895).

77. Los Angeles v. Glendale, 142 P.2d 289, 292 (Cal. 1943); *Cuyamaca Water Co.*, 287 P. at 501; *Vernon Irrigation Co.*, 39 P. at 766.

78. City of Los Angeles v. City of San Fernando, *as modified on denial of rehearing*, 537 P.2d 1250, 1258-59 (Cal. 1975).

79. *Id.* at 1262-63.

80. *See* Anastasia S. Stevens, *Pueblo Water Rights in New Mexico*, 28 NAT. RESOURCES J. 535, 544 (1988).

81. *City of San Fernando*, 537 P.2d at 1275-76.

82. *Id.* at 1275.

83. *Id.* at 1274. The court explained that it "[h]as upheld, and now upholds, the existence of [the city of Los Angeles's pueblo water] right principally because of the pueblo successor's reliance on the right in planning and developing a municipal water supply." *Id.* at 1288.

The court accordingly ruled the pueblo water right of the city of Los Angeles attaching to the waters of the Los Angeles River extended to native ground water within areas hydrologically dependent on the area of the bed of the Los Angeles River.[84] However, the court refused to extend that right to ground water in basins hydrologically *independent* of the area of the bed of the river.[85] In support of its decision to preserve and extend the right, the court noted specific historical instances where rights were extended to the missions and others only after assurances had been received that the rights of the *pueblo* would not be injured.[86]

The court apparently saw this as historical affirmation of the *pueblo's* superior rights, as such assurances would presumably not be necessary if no superior right had ever attached. Of greater significance, the court concluded "the Laws of the Indies were not necessarily inconsistent with an *implied grant* to the Pueblo of Los Angeles of a prior right to use water from the river . . . , [nor] necessarily insonsistent [sic] with the establishment of a pueblo water right based on *usage*. . . ."[87]

3. *The Propagation of the Pueblo Water Rights Doctrine to New Mexico*

By the year 1540, reports of tremendous wealth "to the north"[88] had reached the Spaniards in Mexico City. Lured by these reports, Viceroy of Mexico Antonio de Mendoza formed an expedition to search for it and for the legendary Seven Cities of Gold, headed by Captain General Francisco Vazquez de Coronado.[89] Disenchanted with what proved to be a fruitless search, some of his soldiers deserted him in 1543. Refusing to accompany him back to Mexico, they remained and founded the city of Santa Fé, New Mexico.[90]

In the year 1680, an Indian insurrection resulted in the destruction of the town. However, it was re-established by Diego de Vargas in 1693.[91] Two centuries later, a dispute arose over the right of the city of Santa Fé to municipal lands allegedly granted by the King of Spain.[92] In this dispute, the United States Supreme Court concluded the Spanish law did not intend rights to land to arise by implication, and expressly rejected the City's contention that a specific historical source suggested otherwise.[93] The Supreme Court of New Mexico would later ignore these

84. *Id.* at 1288.
85. *Id.* at 1276.
86. *Id.* at 1275.
87. *Id.* at 1276.
88. THE CORONADO EXPEDITION TO TIERRA NUEVA: THE 1540-1542 ROUTE ACROSS THE SOUTHWEST 92 (Richard Flint & Shirley Cushing Flint eds., 1997).
89. THE JOURNEY OF FRANCISCO VAZQUEZ DE CORONADO vi (George Parker Winship trans., 1933); THE MAPPING OF THE ENTRADAS INTO THE GREATER SOUTHWEST 72 (Dennis Reinhartz & Gerald D. Saxon eds., 1998).
90. United States v. Santa Fé, 165 U.S. 675, 676 (1897).
91. *Id.*
92. *Id.* at 677.
93. *Id.* at 697.

conclusions and rely on the very same historical source to adopt the pueblo water rights doctrine as the law of New Mexico.

a. United States v. Santa Fé

In 1891, cognizant of the provisions of the Spanish law with respect to the granting of municipal lands to towns duly founded, "the probate judge of the county of Santa Fé presented to the surveyor general of New Mexico a claim on behalf of the city for four square leagues of land."[94] The surveyor general recommended confirmation of the city's claim to Congress. However, Congress did not act upon it with sufficient alacrity to please the city, which responded by bringing an action for the land in the Court of Private Land Claims.[95]

The city alleged in its action that it had been granted four square leagues of land by the King of Spain prior to the Indian insurrection of 1680. However, it could not produce proof of title because "the archives and records of the villa were destroyed in the . . . insurrection . . . ."[96] When others claiming title to the lands challenged the city's claim, the city again relied on the Indian insurrection. It amended its petition to aver that "'all the muniments of title of such municipal grant, *if any such existed*, were utterly destroyed by the hostile Indians engaged in such insurrection.'"[97]

The "insurrection" theory worked. The Court of Private Land Claims granted the city's petition. An appeal by the United States government followed, bringing the case before the United States Supreme Court.[98] This time the city sought to prove its claim to the land through reliance on the "Plan of Pitic." The "Plan of Pitic" had been issued by the King of Spain for the establishment of the town of Pitic in the state of Sonora, Mexico.[99] The Plan of Pitic made provision for a grant of four square leagues of land to the town. However, it was qualified as having application only in those instances where no contractor had agreed to establish a town, and was permissive in nature.[100]

The city nonetheless claimed the grant of land provided for in the Plan of Pitic evidenced the intent of the crown to impliedly grant to all Spanish towns such lands. The fallacy in this argument was evident. If all Spanish towns were automatically or impliedly bestowed with municipal lands, why was it necessary for the crown to expressly provide for such a grant in the Plan of Pitic?

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94. *Id.* at 677.
95. *Id.*
96. *Id.* at 677-78.
97. *Id.* at 678.
98. *Id.* at 676.
99. *Id.* at 696.
100. *Id.* at 697.

The fact the decree was issued accordingly negated the argument that the Spanish law impliedly granted to each town municipal lands. The Supreme Court observed that the making of the decree:

> demonstrate[d] . . . that the power thus given was not deemed theretofore to have existed by the specific terms of laws specially applicable to town settlements. For how can it be supposed that a solemn order would have been required from the King to sanction the doing of that which the law already expressly permitted.[101]

The city's failure to persuade the Supreme Court that it had been impliedly granted municipal lands through reference to the Plan of Pitic did little to quell the theory of implied rights to land and waters. In reliance on the very same Plan of Pitic, the Supreme Court of New Mexico adopted the pueblo water rights doctrine as the law of New Mexico.[102]

b. Cartwright v. Public Service Co. of New Mexico

In the 1950s a dispute over title to the waters of the Gallinas River arose in the town of Las Vegas, New Mexico. The town of Las Vegas claimed title to the waters as successor to the Spanish *pueblo, Nuestra Señora de las Dolores de Las Vegas.*[103] Extensive scholarship was apparently a luxury. Rather than engage in a detailed analysis of the Spanish law and its interpretive commentary, the court simply referred to an earlier decision in which it stated: "'in connection with our waters, . . . [we] have followed the Mexican or civil law, and what is called the Colorado doctrine . . . .'"[104]

Earlier decisions believed to rest on such Mexican or civil law suggested, without expressly deciding, that the "Plan of Pictic [sic][,] by which the doctrine was known[,] should be observed in the foundation of any new pueblos in the territory of . . . New Mexico . . . ."[105] The *Cartwright* court accordingly attached great weight to the Plan of Pitic, notwithstanding the finding in *United States v. Santa Fé* that it could not be construed as support for the concept of implication. After citing some legal encyclopedias and the works of modern commentators who had both recognized the "Colorado doctrine" and identified its source as the Plan of Pitic,[106] the court concluded that the town of Las Vegas did possess a superior and

101. *Id.*
102. Cartwright v. Public Serv. Co. of New Mexico, 343 P.2d 654, 665-669 (N.M. 1959).
103. *Id.* at 659-60.
104. *Id.* at 665 (quoting Martinez v. Cook, 244 P.2d 134, 138 (1952)).
105. *Id.* at 665.
106. *Id.* at 666.

paramount right to the waters of the river. No specific passages or other materials were offered by the court to support its decision.

Instead, the court simply declared that the King of Spain had created the pueblo water rights doctrine in establishing the town of Pitic,[107] and his plan was to be followed for subsequent *pueblos* in New Mexico. In so holding, the court claimed it was "unable to avoid the conclusion that the reasons which brought the Supreme Court of California to uphold and enforce the . . . doctrine apply with as much force in New Mexico as they do in California."[108] The court's holding was also premised on the belief that water is a precious, essential commodity for any community. This belief was thought to be shared by the King of Spain. "Either this is so, or [his] supposed benefaction . . . in inaugurating the Plan of Pictic [sic] became in reality an *obituary* instead."[109] To the court, the king could not possibly intend to establish a town without impliedly conferring upon it the right to water.

It is difficult to deny the appeal of this last observation by the court. Without people, a town cannot exist, and without water, there can be no people. Nonetheless, as will be shown below, the conclusions of the various commentators relied upon by the court in *Cartwright* did not rest on the Spanish law as it actually existed, but instead upon an erroneous perception of the Spanish law.[110] This erroneous perception was brought to light in a Texas decision that addressed the issue of whether the City of Laredo possessed an implied right under the Spanish law to the waters of the Rio Grande River.

4. The Rejection of the Pueblo Water Rights Doctrine in Texas

The well-reasoned decision in *Valmont Plantations* did not foreclose the issue of implied water rights in Texas. Twenty-three years after the decision in *Valmont*, the Texas Court of Appeal revisited the issue of implied water rights in a claim asserted by the city of Laredo.[111] In the year 1755, while France was marking the birth of Marie Antoinette, the West Indies that of Alexander Hamilton, and French forces were engaging the British at Fort Duquesne (Pittsburgh) during the French & Indian War,[112] the Spanish were pursuing the conquest of Texas in earnest. In that year, Tomás Sánchez founded the *pueblo* of Laredo "on the banks of the Rio Grande."[113]

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107. *Id.* at 668.
108. *Id.*
109. *Id.* at 669.
110. *Id.* at 666.
111. *In re* Contests of the City of Laredo, 675 S.W.2d 257 (Tex. Ct. App. 1984).
112. BERNARD GRUN, THE TIMETABLES OF HISTORY: A HORIZONTAL LINKAGE OF PEOPLE AND EVENTS 348 (1979).
113. *Laredo*, 675 S.W.2d at 262.

After a General Visit in 1767, the town was confirmed and received from the crown a grant of municipal lands abutting the Rio Grande River.[114] Two hundred seventeen years later, the modern city of Laredo claimed a pueblo water right to the waters of the river. The city argued the original city of Laredo had been granted a pueblo water right to the waters of the river "by the Spanish king in 1767 by virtue of the act of the General Visita."[115] The modern city asserted it was the "undisputed . . . direct successor of the pueblo of Laredo as confirmed by the General Visita" of 1767, and therefore succeeded to a pueblo water right to the waters of the river. Its claim was the first pueblo water rights claim to be litigated in any court in Texas.[116] It resulted in a decision equaling *Valmont* in scholarship and thoroughness.

The city hoped to persuade the court to disregard the findings in *Valmont* and to instead adopt the rulings of the courts in New Mexico and California upholding the doctrine of pueblo water rights.[117] However, it was not to be. The *Laredo* court could find no implied right to the waters of the river.[118] It stated:

> An examination of the Recopilacion [de Indias] and Las Siete Partidas does not [reveal such a grant], and the parties have not directed our attention to any indication or reference to a paramount water right of a Spanish pueblo. The act of the General Visita of 1767 did not purport expressly to grant such a water right to the Pueblo of Laredo. Accordingly, if such a right is to be recognized by this Court, it can only be through implication.[119]

The concept of implication had been rejected by the court in *Valmont*, and was further discredited in a later decision holding that grants crossed by non-perennial streams did not carry with them an implied right to the waters of such streams.[120] The *Laredo* court concluded it was precluded by these two decisions from recognizing an implied water right.[121] As to the city's request that the court re-consider the holding in *Valmont* in light of the decisions from California and New Mexico affirming the pueblo water rights doctrine, the court explained "decisions of sister states are important . . . in the resolution of the question in this appeal only to the extent . . . they illuminate the state of Spanish law at the time of the creation of the Pueblo of Laredo."[122]

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114. *Id.* For "[a] remarkable description of the 1767 'Visita-General' to Laredo," see Texas Mexican Ry. Co. v. Jarvis, 7 S.W. 210 (Tex. 1888). *Id.* at 263.

115. *Id.* at 259.

116. *Id.*

117. *Id.* at 267.

118. *Id.*

119. *Id.* at 266.

120. *In re* Adjudication of Water Rights in the Medina River Watershed, 670 S.W.2d 250, 254-55 (Tex. 1984); *Laredo*, 675 S.W.2d at 266-67.

121. *Laredo*, 675 S.W.2d at 270.

122. *Id.* at 268.

In the opinion of the *Laredo* court, such decisions did not illuminate the state of the Spanish law at the time of the creation of the city.[123] The *Laredo* court declined to accord any significance to the "Plan of Pitic" so heavily relied upon by the court in *Cartwright*. The *Laredo* court noted "the Plan of Pitic was only applicable to the Western Interior Province; the pueblo of Laredo was located in the Eastern Interior Province."[124] It also noted:

> For historical and practical reasons, any reliance on the Plan of Pitic should be sparing. The validity of the Plan may be doubtful, according to one commentator. "Modern history research, as yet unpublished, indicates that the document containing the 'Plan of Pitic' may be spurious, or at best a draft of a decree never adopted. No record of it can be found in the archives of Sante [sic] Fe, Mexico or Spain, and old translations of other pertinent Spanish and Mexican laws have been questioned. The City of Hermosillo, successor to the village of Pitic, neither claims nor exercises [a pueblo water right]."[125]

The *City of Laredo* case marks the most recent adjudication in Texas of water rights alleged to have originated during the Spanish and Mexican periods. At present, its effect may be seen in the lack of similar claims by other towns tracing their origins to those periods.[126] Having reviewed the above decisions addressing the issue of implied water rights under the Spanish law, this Article will re-explore the purpose behind settlement in New Spain, the manner in which the Spanish Crown viewed its new world possessions, and the legal texts governing the right to waters in both peninsular and New Spain. It will conclude from these factors that the concept of implication was unknown in the Spanish law, and accordingly in its territories in the Americas.

IV. SETTLEMENT IN NEW SPAIN

In the wake of Columbus's discovery, Spaniards ventured far into the north and south American continents. Into what is now the southeastern United States came Ponce de Leon, Juan Pardo, and Pedro Menéndez de Avilés.[127] Into the western

123. *See id.* at 269-70.

124. *Id.* at 269 n.17 (citing Greenleaf, *Land and Water in New Mexico 1700-1821*, 47 N. M. HIST. REV. 97, 104 (1972)).

125. *Id.* (quoting TRELEASE, WATER LAW CASES AND MATERIALS 230 (3d ed. 1979)).

126. Research of the decisions of Texas reveals no cases addressing the issue of pueblo water rights subsequent to 1984, the year of the *Laredo* decision.

127. Joseph Judge, *Between Columbus and Jamestown, Exploring Our Forgotten Century*, 173 NAT'L GEOGRAPHIC 330, 334-35 (1988).

United States came Coronado, Cabeza de Vaca, Cabrillo and Vizcaino.[128] After them came settlers. To tap the enormous resources that lay within the territory known as New Spain, the Spanish Crown fostered the same type of town settlement practiced during the Reconquest of Spain itself. "The Spanish system . . . encouraged the formation of villages, which by affording protection as well as religious privilege, would encourage settlement of the surrounding country."[129]

> The creating of Spanish towns and the endowing of them with large grants of land came into being as the progeny of eight centuries of warfare with the Moors. The expulsion by degrees of the invaders was a long and tedious task, and the town grants were made and men encouraged to settle on them in order to form outposts and barriers against reacquisition of the territory by the enemy. When America was discovered, the same system was inaugurated by the Spaniards for the same purpose . . . . Long lines of these Spanish towns extended across Texas and along its rivers, forming the vanguard of Spanish Civilization.[130]

In addition to establishing and maintaining control, the Crown sought to convert the native peoples. Accordingly, early legal texts provided towns were to be established near "Indians and natives to whom the word of God may be preached as the first motive of our intents."[131] Settlements were accordingly desired not only to

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128. ORIGINAL NARRATIVES, *supra* note 50, at 13-39, 52-103; Zuni Tribe of New Mexico v. United States, 12 Cl. Ct. 607, 618-19 (1987).

129. James R. Norvell, *A Primer of Spanish Towns in Southwestern United States*, 37 NOTRE DAME LAW. 630, 632 (1962) (quoting Vernon Irrigation Co. v. City of Los Angeles, 39 P. 762, 764-65 (Cal. 1895)).

130. Alexander v. Garcia, 168 S.W. 376, 378 (Tex. Civ. App. 1914).

131. *In re* Contests of the City of Laredo, 675 S.W.2d 257, 263 n.1 (Tex. Ct. App. 1984) (quoting *Recopilacion de las Indias* Book IV, Title 5, Law 1). Despite persistent accounts of "ruthless exploitation" of the Indians by the Spaniards, the priests and missionaries who accompanied the conquistadors to New Spain were utterly sincere about converting the Indians and providing them with religious training. Guillermo F. Margadant, *Spanish Colonial Policy Towards Indians: The Tlaxcalan Actas (1545-1627)*, 22 TEXAS INT'L L.J. 419, 421 (1987). The missionary priest Bartolomé de las Casas "waged such a fiery campaign that finally he obtained the ear of the king [causing a new set of laws to be enacted which] dealt sympathetically with the condition of the Indians, . . . prohibiting the colonists from forcing them to carry heavy loads [and prohibiting them from being enslaved.]" JOHN THOMAS VANCE, THE BACKGROUND OF HISPANIC-AMERICAN LAW 145-48 (1943). *See also* Byrne v. Alas, 16 P. 523 (Cal. 1888). In *Byrne*, the court remarked:

> The civilized and Christianized Indians of the Californias, and, indeed, of all the Spanish colonies, seem to have been treated as the special and favorite wards of the Spanish sovereigns. Their moral and spiritual welfare and improvement were regarded as matters of great interest to the country, and their personal security, peace, prosperity, and rights of property were most jealously guarded through legislation and by those in authority. In these respects the contrast between the policy of the Spanish and Mexican governments toward their aborigines, and that manifested in some of the English colonies during contemporaneous reigns, is quite marked.
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> . . . .
>
> Among all the sovereigns who established a foothold on this continent, none manifested so great an interest in the Indians, so great a solicitude for their welfare and happiness, as the Spaniards.

Id. at 524, 526. *See also* United States v. Title Ins. & Trust Co., 265 U.S. 472, 484 (1924); Chitimacha Tribe of La.

maintain the Crown's control over the territories of New Spain, but to also serve as a means for propagation of the faith. However, those goals were not possible without water to sustain the new settlements. New Spain did not possess it in abundance, especially in the more arid regions of the American southwest.

Although Ferdinand and Isabella had vigorously pursued the expulsion of the Moors, they were not blind to the benefits to be had from the methods the Moors had used to secure water. They accordingly took steps to preserve those methods, decreeing "water should be taken and used in the order that was established of old and was customary in the time of the Saracens."[132] These same methods would be employed by the Crown in New Spain to further foster its goals for settlement. By ensuring the beneficial distribution of water to its settlers, it hoped to ensure their survival, and in turn, its own hegemony over the region. Policies or legislation which would have interfered with or hindered the achievement of those goals were therefore not likely to succeed.

V. THE VIEW OF THE CROWN: NEW SPAIN AS THE KING'S PATRIMONY

The territories explored by the conquistadors were claimed in the name of the King of Spain.[133] The Castilian Kings of Spain treated their dominions in the New World as part of their royal patrimony, or personal property.[134] These lands

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v. Harry L. Laws Co., 690 F.2d 1157, 1167 (5th Cir. 1982) (citing Chouteau v. Molony, 57 U.S. (16 How.) 203, 229 (1853)); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 692-93 (1832); *In re* Contests of the City of Laredo, 675 S.W.2d 257, 266 nn.14-16 (Tex. Ct. App. 1984) (quoting *Recopilacion de las Indias*, Book IV, Title 5, Law 6; Book IV, Title 12, Law 18; Book VI, Title 3, Law 8).

132. State v. Valmont Plantations, 346 S.W.2d 853, 858 (Tex. Civ. App. 1961) (citing 1 KINNEY, IRRIGATION AND WATER RIGHTS 573 (1912)). *See also* Abercrombie, *supra* note 1, at 114.

133. The lands of the Indies, as they were known to the Spaniards, became the property of the Spanish King by Papal Bull, known as the Bull of Donation or the *Inter Cetera*, issued by Pope Alexander VI on 4 May 1493. *In re* Adjudication of the Water Rights in the Medina River Watershed, 670 S.W.2d 250, 253 (Tex. 1984).

134. State v. Valmont Plantations, 346 S.W.2d 853, 861 (Tex. Civ. App. 1961) (quoting DE LA VEGA, REGLAMENTO GENERAL DE LAS MEDIDAS DE AGUAS, *reprinted in* GALVAN, ORDENANZAS DE TIERRAS Y AGUAS 155-57 (1844)). *See* Sherry Lynn Peel, *Acquisition of Municipal Water Rights in Texas, A Conceptual Analysis*, 17 TEX. TECH. L. REV. 811, 813 n.14 (1986). The Bull of Donation of 1493 "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 . . . [so 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." Hans W. Baade, *The Historical Background of Texas Water Law—A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 33 (1986). The Recopilacion de Leyes de los Reinos de las Indias states, in addition to being premised on papal grant, its title to the lands of New Spain is based on "'other just and legitimate titles.'" *Id.* (citing *Recopilacion de las Indias*, Book 3, Title 1, Law 1).

De la Vega, in his commentary on the measurement of waters and their nature as part of the Royal Patrimony, wrote:

> For all of this, besides the titles of the volume, we have express and clear provisions in our laws and Partidas and Recopilacions, which regulations, in this point, show plainly all the power, hand and jurisdiction with which His Majesty acts in the servitude of water, not only in the cases of possession but also those of ownership.

belonged to the king as his "*realengo*," or private property, in order to effectuate those duties ascribed to him as king. This fundamental principle serves as one of the controlling premises governing all of the laws of the Indies.

The king's duties are set forth in the famous legal text "*Las Siete Partidas*," or "The Seven Parts."[135] Title X of the Second *Partida* recites the duties incumbent

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State v. Valmont Plantations, 346 S.W.2d 853, 861 (Tex. Civ. App. 1961) (quoting DE LA VEGA, REGLAMENTO GENERAL DE LAS MEDIDAS DE AGUAS, reprinted in GALVAN, ORDENANZAS DE TIERRAS Y AGUAS 155-57 (1844)).

> Arguably the Bull of Donation merely settled claims between two competing nations, Spain and Portugal, and as such would grant such rights to the respective sovereigns. In Spain, the King was the sovereign, and the King's statement that "[b]y grant of the Holy Apostolic See and other just and legitimate titles, we are Lords of the West Indies . . . and they are incorporated in our Royal Crown of Castille [sic]" demonstrates that the act of incorporation was more the act of the Spanish Crown itself rather than that of the Pope.

Peel, *supra*, at 813 n.15 (quoting *Recopilacion de Leyes de las Indias*, Book 3, Title 1, Law 1). *See also In re* the Adjudication of the Water Rights in the Medina River Watershed, 670 S.W.2d 250, 253 (Tex. 1984) ("[t]he motivating factor behind the Bull *Inter Cetera* was to bring Christianity to the New World").

Although the Crown held title to all lands in the Americas as part of the Royal Patrimony, certain lands and waters were held in trust for the use and benefit of all. LAS SIETE PARTIDAS 820 (Samuel Scott, trans., C.C.H. 1931), Law III, Title XXVIII, Third *Partida*. One of the areas so held were the tidelands and beaches, which "every man can use . . . for fishing or for navigation, and for doing everything there which he thinks may be to his advantage." *Id.* The public trust has been articulated in *Las Siete Partidas* as "[t]he things which belong in common to the creatures of this world are the following, namely; the sea and its shores, for every living creature can use each of these things, according as it has need of them." City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792,797 n.8 (Cal.1982) (quoting LAS SIETE PARTIDAS 820-21); United States v. Gerlach, 339 U.S. 725, 744-45 (1950); Baker v. Ore Ida Foods, Inc., 513 P.2d 627, 631 (Idaho 1937). "When the United States succeeded Mexico as sovereign, her states took, according to principles of international law, tidelands subject to the public trust, to be held for all." Dion G. Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571, 577 (1972) (citing G. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW 109 (1967)); Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 15 (1935).

More recently, the California Supreme Court upheld these principles, ruling the doctrine of the public trust applied to tidelands granted by Mexico near Marina del Rey, and relying on *Las Siete Partidas*, Law III, Title XXVIII, Third *Partida* as authority. City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 797 n.8 (Cal. 1982). The decision in *Venice Properties* was overruled by the United States Supreme Court in *Summa Corp. v. California ex rel. Land's Comm'n*, 466 U.S. 198 (1984), but only on procedural grounds relating to timeliness. *Id.* at 209. For other authority concerning the public trust in California and its genesis in the Mexican or Spanish Law, see *National Audubon Society v. Superior Court*, 658 P.2d 709, 718 n.15 (Cal. 1983). *See also* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197 n.11 (1980) (citing Knight v. United States Land Ass'n, 142 U.S. 161, 183-87 (1891); San Francisco v. LeRoy, 138 U.S. 656, 670-72 (1891)). *But see* Littoral Development Co. v. San Francisco Bay Conserv. & Dev. Comm'n, 29 Cal. Rptr. 2d 518, 524 (Cal. Ct. App. 1994) ("There is no public trust right or servitude over land above the level of mean high tide to 'the highest high water line' on a tidal parcel, since California now generally follows the common law, not a postulated civil law standard derived from Spanish and Mexican law." (citing Aptos Seascape Corp. v. County of Santa Cruz, 188 Cal. Rptr. 191, 204-05 (Cal. Ct. App. 1982))).

135. "*Las Siete Partidas*" or "The Seven Parts" was "compiled by order of Alfonso the Wise of Castile between 1256 and 1263 A.D. [and] was the embodiment of 'Spanish Civil Law,' particularly after enactment of Ordenamiento de Alcala of 1348." *In re* Contests of the City of Laredo, 675 S.W.2d 257, 260 (Tex. Ct. App. 1984). Judge Lobingier, Judge of the Court of First Instance, Territory of the Phillippines, 1909-1914, noted in his introduction to Scott's translation of *Las Siete Partidas* that:

> [I]t was only in the *Leyes de Toro*, promulgated at the Cortes of Toledo of 1505, that the *Partidas* acquired full force. Just a quarter of a century later, a Royal Decree provided:
>
> > 'We order and command that in all causes, suits and litigation in which the laws of this compilation do not provide for the manner of their decision, . . . then the laws of this our kingdom

upon the Spanish king.[136] Law II of Title X is entitled "The King Should Love, Honor, and Protect His People." It provides:

> The people should be greatly beloved by their king, and he should especially show his love for them in three ways. First, by conferring benefits upon them, and doing them favors when he understands that they have need of them . . . [s]econd, by showing compassion for them, [and] [t]hird by having pity on them, and remitting, at times, the penalty which they deserve on account of the offences which they committed.[137]

Law III of Title X is named "For What Reasons the King Should Love, Honor and Protect His People." For this title, its authors drew upon an analogy from the Greek philosopher Aristotle:

> *[T]he kingdom is like a garden*, and the people like trees, and the *king is the owner of it*, and his officers—whose duty it is to preside in court and to assist in seeing that justice is done—resemble laborers . . . . [The king should show] favor to every one according to his deserts, for, in this respect, he resembles water which causes everything to grow; and he thus enables the good to prosper by conferring benefits and honors upon them, and cuts off the wicked of the kingdom with the sword of justice, and roots out the wrongdoers, banishing them from the country, in order that they may not commit injury within its borders.
>
> . . . .
>
> When a king acts in this manner towards his people, he will have prosperity in this kingdom, and will become rich by means of it, and will be aided from its resources whenever he has need of them . . . .[138]

Law I of Title XI of the Second *Partida* provides:

> The king is bound not only to love, honor and protect his people, *but also the country itself to which he is lord; for since he and his people subsist on those things which are contained in it, and get from it all that they require,*

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of Castile shall be followed, in conformity with the law of Toro, both with respect to the procedure to be followed in such cases, suits and litigations, and with respect to the decisions of the same on the merits.'

This had the effect of extending the *Partidas* to the Spanish Colonies—that far flung empire which her *conquistadores* acquired for Spain in the western hemisphere as well as in Africa and Asia—and such extension gave the *Partidas* the widest territorial force ever enjoyed by any law book.

LAS SIETE PARTIDAS, *supra* note 134, at liii.

136. LAS SIETE PARTIDAS, *supra* note 134, at 332, Title X, Second *Partida*.

137. *Id.* at 332, Law II, Title X, Second *Partida*.

138. *Id.* at 333-34, Law III, Title X, Second *Partida* (emphasis added).

> *and with which they accomplish and perform all their acts*; it is just that they should love, honor and protect it. The love which the king should have for it is of two kinds. . . . The second, which is in deed, is manifested by causing [the land] to be settled by good people, . . . and by having it cultivated, in order that men may obtain its fruits more abundantly. . . .[139]

Title XVII of the Second *Partida* addresses the protection of the king's property. In Law I of this title, the authors explained why the people should protect the properties of the king and kingdom:

> There are others [lands] which belong to the kingdom, as for instance, towns, castles, and other public property which kings grant to noblemen as estates; wherefore the people should protect the king in the possession of all these things, so that no one may dare to take them by violence, or steal or conceal them. *For . . . [such stealing] . . . not only inflict[s] [injury] upon him [the King], but upon all those upon whom he is bound to confer benefits; for, since he has so much to accomplish, and much to bestow in many ways, it is also necessary that he have many resources to draw upon in order to be able to do this . . . .*[140]

These provisions suggest that land belonged to the king as his private property to enable him to fulfill his duty to properly administer it for the benefit of all. They accordingly support the conclusion that rights to land and water in New Spain could only be conferred by express grant from the Crown. Any other practice would interfere with the Crown's ability to observe that duty. These themes in *Las Siete Partidas* are important in assessing the viability of the concept of implication in New Spain. As will be shown below, the council formed to promulgate legislation for New Spain specifically identified *Las Siete Partidas* as one of the sources to be used for the resolution of legal issues not otherwise addressed by the council's enactments.

VI. LEGAL TEXTS FOR NEW SPAIN: THE COUNCIL OF THE INDIES AND THE *RECOPILACION* OF ITS LAWS

In the year 1520, King Charles I authorized the creation of the Council of the Indies to govern special problems arising in New Spain, and gave it "supreme jurisdiction" over all her territories.[141] "Laws poured from the Council in profusion and, from time to time partial collections were attempted."[142] It was not long before

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139. *Id.* at 335, Law I, Title XI, Second *Partida* (emphasis added).
140. *Id.* at 376, Law I, Title XVII, Second *Partida* (emphasis added).
141. State v. Valmont Plantations, 346 S.W.2d 853, 859 (Tex. Civ. App. (1961)).
142. *Id.* at 859; *see* VANCE, *supra* note 131, at 133-60.

"[t]he time had arrived when an adequate collection of laws and decrees relating to the government of the Indies was an imperative necessity. They were already great in number and contained many conflicting provisions."[143]

A. *The Undertaking of a Compilation*

The work of a compilation was ultimately taken up by Antonio de Leon Pinélo,[144] who devoted ten years to it before it was approved by the Council of the Indies.[145] Pinélo referred it to Don Juan de Solorzano y Pereyra, an early member of the Council,[146] who formally approved the compilation in 1636.[147] However, not until 1680 was the compilation (*Recopilacion*) decreed and printed, and earlier legislation abrogated thereby.[148] This compilation was known as the "*Recopilacion*

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143. VANCE, *supra* note 131, at 155-56.

144. *Id.* at 158-59.

145. *Id.* at 160.

146. *Id.*

147. *Id.*

148. *Id.* at 161. The *Recopilacion* referred to here and by the court in *Valmont Plantations* is one of three abridgements or collections of the laws of the Indies, all of which are cited by American courts. *See generally* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Arnett v. Reade, 220 U.S. 311 (1911); Cessna v. United States, 169 U.S. 165 (1898); United States v. Sandoval, 167 U.S. 278 (1897); United States v. City of Santa Fé, 165 U.S. 675 (1897); Maxwell Land Grant Co. v. Dawson, 151 U.S. 586 (1894); Dauterive v. United States, 101 U.S. 700 (1879); Thompson v. Maxwell, 95 U.S. 391 (1877); United States v. Rocha, 76 U.S. 639 (1869); Serrano v. United States, 72 U.S. 451 (1866); United States v. Castillero, 67 U.S. 17 (1862); Gaines v. Hennen, 65 U.S. 553 (1860); Meegan v. Boyle, 60 U.S. 130 (1856); United States v. Ritchie, 58 U.S. 525 (1853); Chouteau v. Molony, 57 U.S. 203 (1853); United States v. D'Auterieve, 56 U.S. 14 (1853); Gaines v. Relf, 53 U.S. 472 (1851); United States v. Philadelphia & New Orleans, 52 U.S. 609 (1850); League v. DeYoung, 52 U.S. 185 (1850); United States v. Boisdore, 52 U.S. 63 (1850); Villalobos v. United States, 51 U.S. 541 (1850); Hallett v. Collins, 51 U.S. 174 (1850); United States v. Reynes, 50 U.S. 127 (1850); United States v. King, 48 U.S. 833 (1849).

Although they may appear to be the same source because of the similarity in their names and the lack of careful citation, they are different. The one referred to in this Article and in *Valmont Plantations* is the "*Recopilacion de Las Leyes de Los Reinos Indias*," promulgated for "the good government and administration of justice by our Council of the Indies. . . ." *Valmont Plantations*, 346 S.W.2d at 859; VANCE, *supra* note 131, at 161-62. This work comprised nine books, two hundred eighteen titles, and over 6,377 laws. *Id.*

The other "*Recopilaciones*" cited by American authorities are *Recopilaciones* of the laws of Peninsular Spain. *Id.* at 121-27. The first of these is entitled "*Nueva Recopilacion de las Leyes de Espana*" (New Abridgement of the Laws of Spain), begun under the reign of Charles V by Pedro Lopez de Alcocer of the *Real Audiencia* of Valladolid, and completed by Bartolomé de Matienza in 1562 under the reign of Phillip II. *Id.* at 121. The second is entitled "*Novísima Recopilacion de Las Leyes de Espana*" (Newest Abridgement of the Laws of Spain), completed by Juan de la Reguera y Valdelomar in 1804. This second abridgement was given "precedence over all existing compilations," and was officially sanctioned by the *Cedula Real* or Royal Letters Patent of 1805. *Id.* at 125.

As set forth above, the *Recopilacion de las Leyes de las Indias* provided for resort to the laws of Peninsular Spain for those issues where the *Recopilacion* did not provide guidance. As a consequence, American courts have both consistently and frequently referred to those laws for assistance. The most famous of them is "*Las Siete Partidas*" (The Seven Parts), produced during the reign of Alfonso X (Alfonso the Wise of Castile) in 1265. *In re* Contests of the City of Laredo, 675 S.W.2d 257, 260 (Tex. Ct. App. 1984). *See also supra* note 135; *Valmont Plantations*, 346 S.W.2d at 857. In *Valmont Plantations*, the court observed that *Las Siete Partidas* "is recognized as the essence of the law of Peninsular Spain after 1348 . . . , [b]y force of Ordenamiento de Alcalá (1348)." *Valmont Plantations*, 346 S.W.2d at 857 n.5 (citing LAS SIETE PARTIDAS liii). Other works often mentioned by the American courts are the *Fuero Juzgo*, attributed to Visigothic origin, VANCE, *supra* note 131, at 54-55; the various

de las Leyes de Las Indias of 1680," meaning "Abridgement of the Laws of the Indies." Once decreed, only its laws, or "*cédulas and ordenanzas*" were to control.[149]

However, the laws and decrees passed by the Council did not address every possible legal question.[150] The *Recopilacion* specifically "provided that matters not covered in the edition nor by later decrees, were to be decided by recourse to the General Laws of Spain."[151] A hierarchy existed as to those general "laws of Spain, being first, the *Leyes de Toro*, second the *Ordenamiento de Alcalá*, third the *Fueros Municipales y Reales* and fourth *Las Siete Partidas*."[152] Although this hierarchy existed, the first three sources have seldom been referred to by American courts. Justice Pope, writing for the majority in *Valmont Plantations*, noted that this meant "[f]or the most part, . . . *Las Siete Partidas* was looked to if [the] *Recopilacion* was silent."[153]

B. *The* Recopilacion *and the Law of Waters*

Given its importance, the issue of water in relation to the formation of towns was addressed in the *Recopilacion*. Law 1 of Title 7, Book IV provided: "[in establishing a town,] [t]hey shall try to have their water close by . . . [so] that it can

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ordenamientos or ordinances, *Valmont Plantations*, 346 S.W.2d at 857 n.4, VANCE *supra* note 131, at 82-83, 108-16; the *Fuero Real* of 1255, *Valmont Plantations*, 346 S.W.2d at 857 n.4, VANCE, *supra* note 131, at 89-91; and the *Leyes de Toro* (Laws of Council) of 1505, *In re* Adjudication of Water Rights on the Medina River Watershed, 645 S.W.2d 596 (Tex. Ct. App. 1982).

149. VANCE, *supra* note 131, at 161.

150. *Valmont Plantations*, 346 S.W.2d at 859.

151. *Id.*

152. Baade, *supra* note 134, at 31.

153. *Valmont Plantations*, 346 S.W.2d at 859 n.13 (citing LAS SIETE PARTIDAS liii; 1 MOREAU & CARLETON, 1 PARTIDAS xvii-xviii (1820)). Research of the courts' resort to Spanish law in the United States reveals that the first three sources in the hierarchy have been cited to very infrequently, perhaps due to the lack of a modern, available text in which they could be found, while *Las Siete Partidas*, the last in the hierarchy, has been referred to quite often. Judicial decisions from the state of Louisiana interpreting the Spanish law and issued in the early 1800s show the work most referred to for authority was *Las Siete Partidas*, accounting for sixty percent of total citations. The *Recopilacion de Indias* accounted for only five percent of total citations. Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485, 1503 (1982). The study noted in Rabalais's article concluded that the "translation of *Las Siete Partidas* into English in 1820 resulted in a 100% increase in the frequency with which it was cited by the Louisiana courts." *Id.* at 1505. *See In re* Tidewater Marine Towing, Inc. v. Curran Houston, Inc., 785 F.2d 1317 (5th Cir. 1986). In *Tidewater Marine*, the court wrote:

> The law of Louisiana is not in dispute. Although it is commonly believed that the Louisiana Civil Code flows from and is patterned entirely on the *Code Napoleon*, in reality a large part of Louisiana's Code, including the section on domestic relations, derives from Spanish law through *las Siete Partidas*.

Id. at 1320.

An argument can be made for the premise that *Las Siete Partidas* is the definitive controlling source as to Spanish law in the United States precisely because the American courts have made it so by referring to and relying on it to reach decisions regarding matters dependent upon resolution of the Spanish law. *See* Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 797 (Cal. 1982).

be brought to the town and fields bringing it forth if possible, in order to make better use of it . . . ."[154] Law 1 of Title 5, Book IV called upon settlers to give due consideration to whether there was "plenty of water for drinking and for irrigation"[155] in deciding where to build new settlements.

The *Recopilacion* contains many other references to water. It also addresses the procedure for granting lands and rights to water.[156] Two recurrent themes surface regarding the establishment of towns and the granting to them of rights to land and water. The first theme concerned those who preceded the first explorers—the Indians. Towns were to be "occupied without prejudice to the Indians and natives. . . ."[157] Moreover, in "the sale, grant and composition of lands . . . the Indians shall be left in possession of the full amount of lands belonging to them . . . together with their rivers and waters . . . ."[158] Further, the *Recopilacion* provided the fixing of the location of a town should "cause no prejudice to any Indian tribe."[159]

The other theme concerned the rights of the Spanish settlers. It stressed "pastures, mountains, and waters, shall be common in the Indies. . . ."[160] It further stressed that the granting of lands and waters should "not [be] to the prejudice of any third person . . . ."[161] Finally, it stressed that the locating of a town should "cause no prejudice to . . . any private individual."[162] However, the redactors of the *Recopilacion* did not address in these passages whether water rights could be acquired impliedly, as a necessary and natural complement to a grant of land or the founding of a town. In the more arid regions of the American southwest, the answer to this question could have had far-reaching consequences.

VII. LEGAL TEXTS FOR PENINSULAR SPAIN: *LAS SIETE PARTIDAS*

As noted earlier, the *Recopilacion* provided for resort to the "general laws of Spain" for those matters not covered by its provisions. The absence of any direct provisions in the *Recopilacion* addressing implied rights to water accordingly permits recourse to the laws of peninsular Spain in ascertaining whether rights to water could be implied under the Spanish law. Although the *Recopilacion* placed the legal code *Las Siete Partidas* last in the hierarchy of the "General Laws of Spain" to be referred to where the *Recopilacion* was silent, *Las Siete Partidas* "is recognized as the essence of the law of Peninsular Spain after 1348 . . . , *by force of*

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154. *In re* Contests of the City of Laredo, 675 S.W.2d 257, 263 n.2 (Tex. Ct. App. 1984) (quoting *Recopilacion de las Leyes de los Reinos de las Indias*, Book IV, Title 7, Law 1).

155. *Id.* at 263 n.1 (quoting *Recopilacion*, Book IV, Title 5, Law 1).

156. *Id.* at 264-65 nn. 8-9 (quoting *Recopilacion*, Book IV, Title 12, Law 4; Book IV, Title 12, Law 8).

157. *Id.* at 263 n.2 (quoting *Recopilacion*, Book IV, Title 7, Law 1).

158. *Id.* at 266 n.15 (quoting *Recopilacion*, Book IV, Title 12, Law 18).

159. *Id.* at 266 n.14 (quoting *Recopilacion*, Book IV, Title 5, Law 6).

160. *Id.* at 265 n.12 (quoting *Recopilacion*, Book IV, Title 17, Law 5).

161. *Id.* at 264 n.8 (quoting *Recopilacion*, Book IV, Title 12, Law 4).

162. *Id.* at 266 n.14 (quoting *Recopilacion*, Book IV, Title 5, Law 6).

the Ordenamiento de Alcalá of 1348."[163] Accordingly, the *Ordenamiento de Alcalá*, the source placed second in the hierarchy by the *Recopilacion*, itself makes *Las Siete Partidas* the definitive source of Spanish peninsular law.

The provisions of *Las Siete Partidas* did not address whether rights to water could be acquired by implication. Similar to the *Recopilacion*, they decreed "[t]he things which belong in common to the creatures of this world . . . are: the air, the rain-water, and the sea and its shores . . . ."[164] They also provided "[r]ivers, harbors, and public highways belong to all persons in common. . ."[165] Similar to the *Recopilacion*, the provisions of *Las Siete Partidas* prohibited any use of a river that might cause prejudice to others or to the common use of a stream. They decreed: "it is not proper that the general benefit of all persons should be interfered with, for the profit of a few."[166]

However, *Las Siete Partidas* was promulgated as a code, and not a collection of statutes. Its provisions were accordingly intended to govern all legal questions, not strictly those specifically addressed. Similar to other codes, it provided that matters not specifically addressed were to be decided through reference to the whole code and to any express provisions similar to the issue at hand.[167] Those other provisions in the code suggest water rights were not to be implied or considered superior. Law XV of the Third *Partida* provides:

> Where a stream runs through the property of several persons, although none of them may have done anything to obstruct its current but the water does this naturally, . . . by bringing down trunks of trees, mud [or] stones, . . . so that the channel is cut off, and the water removed from the place where it formerly flowed; and any neighbor considers himself injured, . . . he can compel the party on whose property the water caused it to [be obstructed] . . . either to clean, or open the channel through which the water formerly ran and cause it to resume its accustomed course. . . . Where, however, the place where the water is obstructed is a canal belonging to several persons, every one on the boundary of said land is required to assist in restoring the channel, so that the water may flow as it was accustomed to do and they can make use of it.[168]

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163. VANCE, *supra* note 131, at 125 n.5 (emphasis added).

164. LAS SIETE PARTIDAS, *supra* note 134, at 820, Law III, Title XXVIII, Third *Partida*.

165. *Id.* at 821, Law VI, Title XXVIII, Third *Partida*.

166. *Id.* at 822, Law VIII, Title XXVIII, Third *Partida*.

167. Rule XXXVI, Title XXXIV of the Seventh Part of *Las Siete Partidas* is entitled "Laws Are Not Made with Reference to Matters Which Very Seldom Occur." It provides:

> [The ancients] declared that laws should not be made except with reference to matters which often happen; and therefore . . . [they] did not enact them concerning events of infrequent occurrence, for the reason that they concluded that these could be decided by other cases of the same kind contained in the law."

LAS SIETE PARTIDAS, *supra* note 134, at 1484, Rule XXXVI, Title XXXIV, Seventh *Partida*.

168. *Id.* at 872, Law XV, Title XXXII, Third *Partida*.

Nor was it permissible to create an impediment preventing the natural flow of waters:

> Where a man builds anything on his premises by means of which water is cut off or obstructed where it was formerly accustomed to flow through said premises, and another party who has land adjoining it suffers injury or loss through said structure, and he who suffered said injury sells said property to some other party, before a demand was made upon him to demolish said structure; we decree that the purchaser of said land can bring suit for the purpose of having said structure demolished . . . .[169]

Law XVII provides: "[w]here several persons build something new by means of which the water . . . is cut off or lost, he can make a demand upon each one of them or upon all of them . . . to remove whatever they have built . . . ."[170] Law XVIII is equally solicitous of the protection of rights to water. It provides:

> Where a man has a mill . . . or a machine propelled by water power . . . and any other person desires to build another mill or machine in the same stream . . . [t]he work should . . . be performed in such a way that the course of the water will not interfere with the other mill, but that the party may freely have it as it was formerly accustomed to run . . . .[171]

VIII. RECONSIDERATION OF THE THEORY OF IMPLICATION

Recalling the purpose behind settlement in New Spain, the manner in which the Spanish Crown viewed its new world possessions, and the provisions of the *Recopilacion* and *Las Siete Partidas* reveals that rights to water could not arise by implication or be deemed superior in New Spain. As argued below, the theory of implication is consistent with none of these factors.

A. *The Theory of Implied Superior Rights Is Inconsistent with the Accomplishment of the Goals Behind Settlement in New Spain*

Historical consideration of the purpose behind settlement in New Spain supports the view that rights to water could not arise by implication.[172] As illustrated above, the purpose behind the establishment of *pueblos* in New Spain was to foster

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169. *Id.*, Law XVI, Title XXXII, Third *Partida.*

170. *Id.*, Law XVII, Title XXXII, Third *Partida.*

171. *Id.* at 873, Law XXIII, Title XXXII, Third *Partida.*

172. Justice Norvell of Texas argued "Spanish law cannot be understood apart from Spanish history." Norvell, *supra* note 129, at 631.

settlement and conquest of the *surrounding territory*.[173] It is accordingly doubtful *pueblos* were entitled to an implied, superior, permanent, and paramount right to water under the Spanish law. Without water to sustain fields and livestock, no meaningful settlement of the territory surrounding the town could be accomplished.

Political considerations also support this view. The mayors of the early Spanish *pueblos* were elected by persons from the area surrounding the *pueblo* in addition to those living within the town's borders.[174] They "exercised political and judicial authority over much larger geographical districts" than just the *pueblos*.[175] Why then would a doctrine that would restrict rights to water to only a portion of the mayor's constituency exist? Whether the Spanish law would confer political and judicial authority to the mayor over those people living outside the town without requiring the mayor to make the town's waters available for their use seems unlikely.

The early decisions finding support for an implied, superior right may have overlooked some instructive observations made by the very court they credited with establishing the basis for the right. The *Hart v. Burnett* court noted that "[i]t was very natural that in founding a new pueblo, the inhabitants of the adjacent country should be called upon to assist in commencing a new settlement. . . . Where else were settlers to be looked for or obtained?"[176] It appears very unlikely those settlers would help to found something that might diminish or even take away their own right to water.[177]

B. *The Manner in Which the Spanish Crown Viewed Its New World Possessions Is Inconsistent with the Theory of Implication*

The manner in which the Spanish crown viewed its new world possessions demonstrates that rights to water could not arise by implication. As discussed earlier, the Spanish Crown treated all of its new world dominions as its personal property. Only the Crown could give it away, and only by express grant. The concept of implication is inconsistent with that requirement, not only because that which must be express cannot be implied, but also because the acquisition of rights by implication would interfere with the Crown's obligation to properly administer its

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173. *See supra* text accompanying notes 127-29.

174. Hart v. Burnett, 15 Cal. 530, 547-48 (1860).

175. *Id.* at 548. In *Hart*, the court noted "[i]t is shown in the official documents that the alcaldes of San Jose at one time exercised political and judicial jurisdiction . . . from the Pulgas Rancho to San Juan Bautista, and that the officers of the pueblo of Los Angeles . . . exercised jurisdiction from the Conejo Rancho to San Juan Capistrano." *Id.*

176. *Id.* at 547.

177. This would appear to be the result. Upon its founding, a town was normally granted municipal lands. The pueblo water right doctrine posits a superior, permanent and paramount right to the use of all waters flowing through those municipal lands was implicit in that grant. Settlers living outside the municipal lands would no longer be entitled to the unimpeded flow of the water, because the town would possess a superior and paramount right to it. The founding of the town could accordingly result in the diminishment or stoppage of the flow of water to the settlers' lands, depending on how much of the water the town appropriated for its own use.

possessions for the benefit of all. Were rights to water deemed to arise by mere implication, the Crown's control over its resources would quickly begin to erode.

C. *The* Recopilacion *Does Not Support the Theory of Implication*

The provisions of the *Recopilacion* do not support the theory of implication either. They forbade the appropriation of waters to the prejudice of others. This must have been true with respect to towns as well. The implication of superior and paramount rights to water is inconsistent with the dictate of the *Recopilacion* that water rights not be extended to the prejudice of others. Paramount, superior rights are essentially exclusive rights, and therefore run afoul of this theme.

Moreover, the absence of any provisions in the *Recopilacion* concerning implied rights to waters may point to the possibility that the redactors presumed it was so well known and understood such rights could not arise by implication that there was no need to include in the *Recopilacion* any provisions expressly forbiding them. One of the early Spanish commentators may have hinted as much. In his work *Politica Indiana*, published in 1647 approximately 33 years before the *Recopilacion* was compiled,[178] Don Juan de Solorzano y Pereyra observed:

> Another right of no less importance corresponds to and is reserved to the Kings and Sovereign Lords by virtue of the supreme power they have over their kingdoms and domains, to-wit: their right over all of the lands, fields, forests, pastures, rivers and public waters in all their kingdoms . . . .
>
> . . . .
>
> . . . And therefore, whenever litigation arises over these things, or any part of them, whether dealing with possessions or ownership, suit must be brought against any person who does not exhibit immediately legal titles and legitimate privileges by which they may own them.[179]

D. *The Provisions of* Las Siete Partidas *Suggest that Water Rights Could Not Be Implied or Made Superior*

The provisions of *Las Siete Partidas* are also silent on the issue of whether rights to water could be acquired impliedly. The recurrent theme in its passages is that no one could appropriate waters to the injury of another. The creation of a superior and paramount right to waters is inconsistent with that theme. It thus appears unlikely that towns were conferred superior and paramount rights to the waters flowing within their borders under the Spanish law.

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178. State v. Valmont Plantations, 346 S.W.2d 853, 861 n.18 (Tex. Civ. App. 1961).

179. *Id.* (citing SOLORZANO Y PEREYRA, POLITICA INDIANA bk. 6, ch. 12 (1647)).

This theme is supported by historical evidence. When Hernando Cortes stood to receive an exclusive grant of waters in connection with a large grant of land in Mexico in 1531, the Empress acquiesced in the protests raised by the *Audiencia* of New Spain.[180] Consistent with its request, she decreed that waters would be common in the Indies.[181]

IX. CONCLUSION

Re-exploration of the purpose behind settlement in New Spain, the manner in which the Spanish Crown viewed its new world possessions, and the legal texts governing the right to waters in both peninsular and New Spain shows that the concept of implication was unknown in the Spanish law and accordingly in New Spain. In disregard of both the true intent of these legal texts and the historical evidence, early American courts first attempted to interpret the Spanish law of waters.

By doing so, they established precedents in American law not supported by the law upon which they supposedly rested. Even when those precedents were called into question, they were often upheld on the basis of *stare decisis*, a hallmark of Anglo-American jurisprudence. Similar to the mixing of peoples and cultures that has taken place in the Americas for over five hundred years, legal principles from diverse legal traditions have been commingled, creating a uniquely American contribution to the law of waters.

180. Baade, *supra* note 134, at 68.
181. *Id.*

APPENDIX

This appendix collects the decisions of those states and federal courts expounding upon the origin of community property law in the Spanish law, and the propriety of resort to the Spanish law to assist in its proper application:

ARIZONA

Pendleton v. Brown, 221 P. 213 (Ariz. 1923). In *Pendleton*, the court noted that Spanish law is the "immediate source of our community property regulation," and upheld the tradition of extending recognition to the law of the former sovereign, stating "the terms in which the legislature has adopted the common law do not necessarily exclude the application of all principles of the Spanish law . . . ." *Id.* at 215, 216.

Hatch v. Hatch, 547 P.2d 1044 (Ariz. 1976). In *Hatch*, the court noted that "Arizona inherited the community property system which existed in Spain and Mexico." *Id.* at 1045. It held that the unequal distribution of property was an arbitrary, unreasonable and unconscionable deprivation of the wife's vested interest in community property, and based its holding on the fact that "[t]he Spanish law of community very plainly provided that '[e]verything the husband or wife may earn during union, let them both have it by halves.' " *Id.* (citing 1 DE FUNIAK & VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, 261-62 (2d ed. 1971)).

Flowers v. Flowers, 578 P.2d 1006 (Ariz. 1978). In determining whether different types of disability benefits were properly characterized as community assets, Judge Jacobsen wrote in *Flowers* that it was "necessary to re-examine some basic principles of community property law." He noted

> Spanish law, upon which . . . [Arizona's] community property system is based, made a distinction between property acquired by onerous title, being 'property acquired by the husband or wife during the marriage through their labors and industry or other valuable consideration;' and property acquired by lucrative title; 'being property acquired by gift, succession, inheritance or the like.' Property acquired by lucrative title is generally separate property.

Id. at 1010 (Jacobsen, J., concurring) (citing DE FUNIAK & VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§ 62, 127, AZO & MANUEL, INSTITUTES OF THE CIVIL LAW OF SPAIN, Book 1, Title VII, and WHITE, NEW RECOPILACION OF THE LAWS OF SPAIN AND THE INDIES (1839)). In his concurring opinion, Judge Jacobsen concluded "pure disability benefits after divorce are separate property of the disabled party," being not "the result of onerous title." *Id.* at 1011.

Nace v. Nace, 432 P.2d 896 (Ariz. Ct. App. 1967). In *Nace*, the court remarked that Arizona follows the rule that the husband's earnings are either all in the

community or all separate, "with a prescription in favor of the community," and that Arizona "adheres more closely to the original Spanish law system, under which all of the increment in property during marriage was regarded as community, even though such increment came from earnings of separate property." *Id.* at 902. The court also noted that "the law of Texas, Louisiana, and Idaho seems even more clearly to adhere to the original Spanish law concept . . . ." (citing 29 A.L.R. 2d 530, 534 (1953)).

Howe v. Haught, 462 P.2d 395 (Ariz. Ct. App. 1970). In *Howe*, the majority noted that the "Spanish law avoided the harshness of allowing a tortfeasor to claim all property was inside the community, by making his one-half liable." *Id.* at 398 n.2 (citing 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 182).

CALIFORNIA

Packard v. Arrellanes, 17 Cal. 525 (Cal. 1861). In *Packard*, the court stated:

> Our whole system by which the rights and property between husband and wife are regulated and determined is borrowed from the civil and Spanish laws, and we must look to these sources for the reasons which induced its adoption and the rules and principles which govern its operation and effect.

Id. at 537. *See also* Frankel v. Boyd, 39 P. 939, 941 (Cal. 1895); Dawes v. Rich, 70 Cal. Rptr. 2d 72, 75 (Cal. Ct. App. 1997) (citing to *Packard*).

In re Moffitt's Estate, 95 P. 653 (Cal. 1908). In *Moffitt's Estate*, the court observed that

> [t]he Spanish-Mexican civil law was . . . [the] law in force in California at the time of its cession by Mexico to the United States, and it was the design of the Constitution of 1849 to preserve so far as might be to the wives of the inhabitants of the new state (most of whom were at that time former citizens of Spain or Mexico) the rights to the community property they had enjoyed under the Mexican rule.

Id. at 654.

Roberts v. Wehmeyer, 218 P. 22 (Cal. 1923). The *Wehmeyer* court observed that the existence of the community title to the community property is vested in the husband, resting "upon sound authority and a proper interpretation of the Spanish law as incorporated in the statutes of this state through which the community property system was established." (rule subsequently changed by statute). *Id.* at 24.

Stewart v. Stewart, 249 P. 197 (Cal. 1926). In *Stewart*, the court confirmed that the interest of the wife in the "property of the community during the continuance of the marriage relation . . . is and always has been from a time reaching back into the

Spanish and Mexican originals of our community property laws, a much more definite and present interest than that of an ordinary heir." *Id.* at 207.

Siberell v. Siberell, 7 P.2d 1003 (Cal. 1932). The *Siberell* decision reaffirms that the community property system is derived from the Spanish law. *Id.* at 1004.

Zaragosa v. Craven, 202 P.2d 73 (Cal. 1949). In *Zaragosa*, Judge Carter dissented from the majority holding that a cause of action for injury to the wife is a community asset, citing DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 231-32, for the proposition that "[i]n the Spanish law, contributory negligence of the person injured defeated his or her right of recovery, but since the husband and wife were treated as separate individuals in their own right, the contributory negligence of one spouse could not defeat the other spouse's right of recovery." *Id.* at 81.

Kesler v. Pabst, 273 P.2d 257 (Cal. 1954). In *Kesler*, Judge Carter again dissented from the majority and cited the New Mexico case of *Soto v. Vandeventer*, 245 P.2d 826 (N.M. 1952), for the proposition that a cause of action for personal injury belongs to the person injured alone under the Spanish law, and not the community. *Id.* at 262.

Nevins v. Nevins, 276 P.2d 655 (Cal. Ct. App. 1954). The *Nevins* court emphasized that "from the earliest period of California history courts have adhered to the Spanish law rule accepted in community property states that the presumption attending the possession of property by either husband or wife is that it belongs to the community." *Id.* at 657.

In re Marriage of Baragry, 140 Cal. Rptr. 779 (Cal. Ct. App. 1977). The *Baragry* decision noted that the presumption that property acquired during marriage is strongly presumed to be community property is derived from Mexican-Spanish law treating community property as a partnership, and is "fundamental to the community property system." *Id.* at 781.

In re Marriage of Haines, 39 Cal. Rptr. 2d 672 (Cal. Ct. App. 1995). In *Haines*, the court observed that "California's status as a community property state dates back to the adoption of the state's first Constitution in 1849, when the constitutional convention opted to perpetuate the community property system of Spain and Mexico in the legal system of the new state." *Id.* at 680. *But see id.* ("Although California had opted for the community property system, the 1850 Legislature enacted implementing legislation that established a marital property law that comported with classic Spanish community property principles in some respects, but differed in others.").

LOUISIANA

Jermann v. Tenneas, 11 So. 80 (La. 1892). The *Jermann* court wrote: "guided by the Spanish laws . . . with which . . . our law was assimilated, [it is seen] that the second half [of the community assets] passes to the wife, because the husband by his misconduct, forfeits all his rights thereto in favor of the [putative] wife . . . ." *Id.* at 83.

Dayries v. Lindsly, 54 So. 791 (La. 1911). In *Lindsly*, the court traced the history of a Louisiana statute, observing that

> Article 2412 of the old code, 2398 of the present code (liability of married woman as to contractual arrangements) has a history. It goes back to the Spanish law and is written in the Novissima [sic] Recopilacion, 10113. It is traced to the law of Toro. With slight change it was incorporated in the act of 1825 (Civ. Code 1825, § 2412). Importance from the first was attached to the necessity, in order to hold the wife liable, of proving that the consideration inured to her benefit, then the contract was binding; not otherwise.

Id. at 792.

Succession of Dill, 98 So. 752 (La. 1923). In *Dill*, the court recognized "[u]nder the Spanish dominion, the community of acquests and gains in Louisiana was regulated by the provisions of the Fuero Real, being the promulgation by royal authority of the ancient customs of the Kingdom of Castile (A.D. 1255)." *Id.* at 753. Those provisions were: "[e]verything which the husband and wife may acquire while together, shall be equally divided between them." *Id.* (citing *Novísima Recopilacion*, Book 10, Title 4, Law 1). The *Dill* court adopted the reasoning of earlier cases interpreting the Act of 1852, which held "under the provisions of the Fuero Real . . . property acquired in . . . [Louisiana] by one of the married persons, who removed thereto alone, became community property, although the other spouse had never come into . . . [Louisiana]." *Id.* at 753-55 (citing R. Civil Code Art. 2329; Act 36 of 1910 at 400.)

Fazzio v. Krieger, 76 So. 2d 713 (La. 1954). In *Fazzio*, the court stated "Article 2403 of the Louisiana Civil Code is obviously Spanish in origin; which section provides that debts contracted during the marriage enter into the partnership or community of gains and must be acquitted out of the common fund, whilst the debts of both husband and wife anterior to the marriage must be acquitted out of their own personal effects. Research into the Spanish law of community property reveals that since the year 1255 A.D. the Spanish law had contained the provision that an antenuptial debt of one spouse is the liability of his separate property alone." *Id.* at 715 (citing 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 435-37, § 156 (1943)). The court also noted: "[m]oreover, in Louisiana law, as in Spanish law, the duty of a parent to support his children is an obligation imposed by law." *Id.* (citing Spanish Commentators Matienzo and Gutierrez from 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943)). *Fazzio v. Krieger* was overruled by the court in *Creech v. Capitol Mack*, 287 So. 2d 497 (La. 1973), "to the extent that . . . [it] limits the husband's antenuptial creditor's claim to the husband's one-half interest in the community . . . ." *Id.* at 510.

Creech v. Capitol Mack, 287 So. 2d 497 (La. 1973). In *Creech*, the court observed that provisions of the Louisiana Code (Article 2373) concerning whether the wife has a title during marriage to one-half of the acquests and gains "are the embodiment of the Spanish law on the subject without any change." *Id.* at 501. In *Creech*, the court undertook an extensive analysis of the Spanish law, and cited direct passages from early Spanish works, including FEBRERO, LIBRERIA DE ESCRIBANOS 504, 505 (1790), the *Novísima Recopilacion*, *Leyes del Estilo* (1310), and the *Fuero Real* (1255). *Id.* at 501-05.

Connell v. Connell, 331 So. 2d 4, 8 (1976). The *Connell* court noted that alimony and child support obligations "incurred prior to a second marriage" may become liabilities of the subsequent marital communion, despite the general rule antenuptial debts of either spouse must be satisfied out of their separate property, such exception being "always recognized by the Spanish law, the source of Louisiana's community property principles." *Id.* at 8 (citing Guiterrez [sic], *Quaestio* CXXIX, and the *Novísima Recopilacion*, Law 9).

MISSOURI

Hoffman v. Hoffman, 676 S.W.2d 817 (Mo. 1984). The *Hoffman* court confirmed that the theories on "inception of title" and "source of funds" are doctrines "premised upon community property concepts which are rooted in Spanish law." *Id.* at 823.

NEVADA

In re Condos' Estate, 266 P.2d 404 (Nev. 1954). In *Condos' Estate*, the court held that the "entire community . . . is subject to administration [after the death of the husband] to the extent necessary to settle the marital affairs and discharge the obligations against the community . . . ." *Id.* at 407-08 (citing 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 581 § 205 (1943), which, with reference to Spanish law, states that "administration of the community estate would have to be separate from, if not prior to the administration of the separate estate of the deceased husband").

NEW MEXICO

Laughlin v. Laughlin, 155 P.2d 1010 (N.M. 1944). In *Laughlin*, the court held "the community was entitled to the balance of the income [above rental value] produced from the lands by the labor, skill, and management of the parties" *Id.* at 1019. It did so after

> [l]ooking for interpretation to the Spanish law as it existed in Mexico at the time of the Conquest, . . . [and noting] it has been generally held that as the

> labor, management and skill of either or both spouses belonged to the community, that the change wrought by the innovation should be confined to that portion of the earnings and gains attributable to the use of the separate property. . . .

Id. at 1014. In comparing the common law with that of the Spanish, the court noted that under "common law, . . . the rents, issues and profits of the property of both the husband and wife belonged to the husband, whereas, under the Spanish-Mexican law, the rents, issues and profits of both separate and community property belonged to the community." *Id.* at 1015.

Langhurst v. Langhurst, 164 P.2d 204 (N.M. 1945). The *Langhurst* court concluded that under "the Spanish law . . . funeral expenses were chargeable only against the separate estate of the decedent," and therefore the community should not be subjected to charges for funeral expenses. *Id.* at 207-08.

McDonald v. Senn, 204 P.2d 990 (N.M. 1949). The *Senn* court wrote that the

> civil law of Spain . . . sets out the Spanish-Mexican laws in relation to the property of married persons . . . [wherein] income from separate property belongs to the community, and the husband can dispose of both the real and personal property without the wife's consent[; but is otherwise] substantially like that of New Mexico.

Id. at 992.

Soto v. Vandeventer, 245 P.2d 826 (N.M. 1952). In *Soto*, the court held that it is undisputed that under Spanish law the right of action for the violation of the wife's right of personal security, as well as the right to the proceeds of judgment were with the wife. *Id.* at 832.

In re Trimble's Estate, 253 P.2d 805 (N.M. 1953). In *Trimble's Estate*, the court observed that there is "no question in the Spanish law, . . . that [with respect to] the acquisition or purchase of other property through the use of community property, the property so acquired or purchased was also community property[,]" which is "a basic principle of community property [law]." *Id.* at 806.

Wiggins v. Rush, 489 P.2d 641 (N.M. 1971). In *Wiggins*, the court remarked that community property questions require referral to the Spanish-Mexican law for "definition and interpretations concerning the community estate." *Id.* at 645.

Portillo v. Shappie, 636 P.2d 878 (N.M. 1981). In *Portillo*, the court observed the community property scheme of New Mexico is "modeled after the civil law of Spain and Mexico," which laws are to be "looked to for definitions and interpretations." *Id.* at 881.

> The decisions of the New Mexico Supreme Court regarding apportionment of income and profits from separate property have done much to correct the inequities [of confusion produced by the mix of common law and civil,] and

> return us to the Spanish emphasis on community of property and use rather than ownership of separate property.

Id. at 882. Further, the "basic philosophy behind Spanish community property law . . . was the view of the family as an economic partnership." *Id.* (citing L. ROBBINS, COMMUNITY PROPERTY LAWS WITH TRANSLATION OF THE COMMENTARIES THEREON OF MATIENZO AZEVEDO AND GUTIERREZ (1940)).

OKLAHOMA

Swanda v. Swanda, 248 P.2d 575 (Okla. 1952). The *Swanda* decision noted that "the community property system of the several adopting states is derived from the law of Spain . . . the basic idea of . . . Spanish law . . . [being] that upon marriage[,] the husband and wife become partners as to subsequent 'gains and acquests' with the profits of the partnership to be divided equally upon its dissolution." *Id.* at 579.

Turner v. Oklahoma Tax Commission, 292 P.2d 153 (Okla. 1956). In *Turner*, the court concluded that the Oklahoma Legislature intended to incorporate the principles of Spanish community property law into the Community Property Act of 1945 when they enacted it, on such principle being "fundamental in the Spanish community property system, as would naturally be supposed in any community property system, that just as the gains and profits during marriage were shared between husband and wife, so were the losses and expenses incurred by reason of the conjugal partnership." *Id.* at 155 (quoting DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 159).

Turner v. First National Bank & Trust Co., 292 P.2d 1012 (Okla. 1955). In *Turner*, the court remarked that Oklahoma community property comes primarily from Texas, and "[u]nder the Spanish law of community property . . . the fruits and profits of . . . separate property were community property, belonging to both spouses by halves. . . ." *Id.* at 1014-15.

> This was based on the conception that, although each spouse retained ownership of his or her separate property, each unselfishly and unhesitatingly had at heart the success and well-being of the marital union and that, accordingly, the fruits and income of all property of each naturally were to be devoted to the benefit of the marital union. . . .

Id. The "same concept remains the law of . . . Idaho, Louisiana and Texas." *Id.* (citing 1 DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 71).

PENNSYLVANIA

Willcox v. Penn Mutual Life Insurance Co., 55 A.2d 521 (Pa. 1947). In *Willcox*, the court noted that "community property law emanates in its fundamental concepts from Spanish sources. . . ." *Id.* at 524. "Its construction under Spanish law naturally proceeds in harmony with the Spanish codes and the commentary of the Spanish jurisconsults . . . ." *Id.* Under "Spanish law, . . . dating back hundreds of years and still followed by the modern civil codes of Spain, any violation of the husband's duties in regard to the administration, control and disposition of the communal property gives rise to remedial relief in favor of the wife . . . ." *Id.* at 530. The court ruled the Pennsylvania Community Property Act of 1947 was invalid. *Id.* at 528.

TEXAS

McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961). The *McElreath* court reiterated that the Texas statutes concerning community property are based primarily on the Spanish law. *Id.* at 747.

Graham v. Franco, 488 S.W.2d 390 (Tex. 1972). The *Franco* court held that "in adopting the provisions of Section 15 of Article 16 of [the Texas] Constitution, the people [of Texas] did not intend to change . . . the Spanish law under which Texas operated so as to make a cause of action for [personal] injuries to the wife an asset of the community. . . . [this law provided that] an injury to the wife gave rise to rights in her for her separate estate, not to the community." *Id.* at 394-95.

Price v. Price, 718 S.W.2d 65 (Tex. 1986). In *Price*, the court stated that

> Texas is a community property state with recognition of the Spanish law . . . under [which] marriage was a species of partnership in which each might own and control a separate estate as well as a common interest in a community estate[,] [a] system opposed to the common law principle that marriage completed a merger of the women's individuality into that of her husband's with consequential inability to own or control separate property.

Id. at 67.

Jennings v. Wessely Energy Corp., 720 S.W.2d 811 (Tex. 1986). The *Jennings* court noted that a Texas "statute requiring the husband to join the wife in a conveyance of her separate property was . . . patterned after Spanish laws which required the husband's assent . . . ." *Id.* at 816.

WASHINGTON

deElche v. Jacobsen, 622 P.2d 835 (Wash. 1980). In *deElche*, the court stated that the Washington "system of community property evolved from the Spanish law, and [the] Spanish statutes . . . may at times aid in making difficult decisions." *Id.* at

839. "Spanish law allowed tort victims of married persons to recover from the wrongdoer's one-half interest in the community property." *Id.* (citing *Novísima Recopilacion*, 1805 A.D., Book 10, Title 4, *De Los Bienes Gananciales O Adquiridos en el Matrimonio*, Law 10). The court in *deElche* noted that the prevailing exception of safeguarding community property from liability for tort was inconsistent with the historical background of community property, and thus decided to adopt a rule consistent with that history. *Id.* That rule was (1) imposing liability on the community where the delict was done for the benefit of the community, yet (2) protecting the interest of the innocent spouse if the tort was separate. *Id.*

Estate of Salvini, 397 P.2d 811 (Wash. 1964). The *Salvini* court stated that "the principles of the Spanish law of community are equally applicable now, that is, that a gift, inheritance, devise or bequest to one spouse alone during the marriage is the separate property of that spouse, but if made to both spouses they both take it as community property." *Id.* at 814. After reciting from the *Fuero Real* that "if it is a gift of the King or other person, and given to both, let husband and wife have it, and if given to one, let that one alone have it to whom it may have been given. . . ." (originally Law 1, Title 3, Book 3, *Fuero Real*, promulgated in 1255, and continued into the *Nueva Recopilacion* in 1567 as Law 2, Title 9, Book 5), the court recognized that:

> [The] Constitutional and statutory provisions of our community property states have been most careful to specify, particularly as to the wife, that property acquired by her during the marriage by gift, inheritance, devise or bequest, shall be her separate property. These do nothing more, actually, than continue the well established principles of the Spanish community property system . . . .

Id.

Smith v. Retallick, 293 P.2d 745 (Wash. 1956). In *Retallick*, Justice Finley observed that the English theory of merger of the wife into the husband was non-existent in the "Spanish community property system . . . since not only was the wife viewed as a separate person in her own right[,] but also she had, or could have, her own separate property and owned an existing half share in the community property." *Id.* at 750 (Finley, J., dissenting). He accordingly argued for the implementation of principle of Spanish law that torts committed by a spouse may, under certain circumstances, be the liability of the community, a position which was later adopted in *deElche*, *supra*. *Id.* at 751.

FEDERAL COURTS

Although the state courts have traditionally undertaken the adjudication of marital rights, the federal courts have not been silent. They too have interpreted the concept of community property in light of the Spanish law. One of the most

elaborate opinions on community property, the nature of the parties' rights under the Spanish system, and how such system was adopted in California is *Robbins v. United States*, 5 F.2d 690 (N.D. Cal. 1925). In *Robbins*, Judge Partridge noted that, at the Constitutional Convention of California, it was "contended that, inasmuch as the 'Californians' . . . had lived under the [Spanish] law which gives the wife more extensive power over property, it was right in practice, as well as theoretically just and wise, to adopt that system." *Id.* at 692. Those "views prevailed, and . . . became a part of the Constitution." *Id.*

Other cases from the federal courts on the subject of community property and its derivation from the Spanish law are: Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Commissioner v. Harmon, 323 U.S. 44 (1944); United States v. Robbins, 269 U.S. 315 (1926); Arnett v. Reade, 220 U.S. 311 (1911); Lane-Burstem v. Commissioner, 659 F.2d 209 (D.C. Cir. 1981); United States v. Stapf, 309 F.2d 592 (5th Cir. 1962); Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958); Acme Dist. Co. v. Collins, 247 F.2d 607 (9th Cir. 1957); United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951); United States v. Burglass, 172 F.2d 960 (5th Cir. 1949); Commissioner v. Skaggs, 122 F.2d 721 (5th Cir. 1941); Sandoval v. Priest, 210 F. 814 (5th Cir. 1914); Buchser v. Morss et al., 202 F. 854 (9th Cir. 1913); *In re* Chavez, 149 F. 73 (8th Cir. 1906); Hebert v. United States, 68 F. Supp. 230 (E.D. La. 1946); Riggle v. Rogan, 37 F. Supp. 7 (S.D. Cal. 1941); Bank of America Nat'l Trust & Sav. Ass'n v. Rogan, 33 F. Supp. 183 (S.D. Cal. 1940); Sampson v. Welch, 23 F. Supp. 271 (S.D. Cal. 1938); Fish v. Helvering, 75 F.2d 769 (D.C. Cir. 1934); Pfaff v. Bender, 38 F.2d 642 (E.D. La. 1929); Mitchell v. Bowers, 9 F.2d 414 (S.D.N.Y. 1925); Commodores Point Terminal Co. v. Hudnall, 3 F.2d 841 (S.D. Fla. 1925); Kircher v. Murray, 54 F. 617 (W.D. Tex. 1893) *aff'd* 60 F. 48 (5th Cir. 1894).