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*The Living Legacy
of Hispanic Groundwater Law
in the Contemporary Southwest*

MICHAEL C. MEYER

As the world prepares to commemorate the Columbus Quincentennial in the year 1992 there is a renewed scholarly interest in rummaging through the cultural and intellectual baggage carried by the Spaniards to America at the end of the fifteenth century. It is merely one part of that grand process of discovering the meaning of the discovery, of encountering immutable truths in the historical process of that first encounter of two worlds. What did the Spaniards bring with them on those first small caravels which plied the 2,700 miles of Atlantic waters between the Canary Islands and the Caribbean? Material culture and cultural material; hardtack, spurs, nails, and gunpowder; language, religion, values, and laws.

To some, probing the contents of Spain's cultural and intellectual cargo will be of little more than fleeting interest and to others a simple venture in esoteric futility. But for those of us who reside in the Southwest, the legacy of that early Hispanic freight is more pervasive than even we at times are wont to acknowledge. Spanish land and water law is an important case in point, one which commands more than antiquarian interest as it is not only an eloquent testimony to the nature of conflict resolution in the distant past but has direct applicability to current and contemplated litigation in the courts of the Southwest today.

The Spanish legal system as we know it today began to develop in the fifth century A.D., not long after the fall of the Roman Empire. The Iberian Peninsula fell victim to a series of invasions, most from the north (the Vandals, Alans, Suevians, and Visigoths) but one extremely important one from the south (the Moors). Each successive conquering group left permanent imprints of its culture, its heritage,

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and its ethos in those kingdoms that dotted Iberia and that were later to form the nations of Spain and Portugal. It is not surprising then that the system of Hispanic jurisprudence that emerged in the centuries following the disparate invasions constituted a genuine amalgam of Roman, Germanic, and Moorish law.

Like most judicial systems the Spanish legal code, within the context of Spanish medieval absolutism, concerned itself with balancing competing interests, and ultimately developed a system which disentangled the separate rights of the individual from the common rights of the community. For the first time in Spanish history clear distinctions were made between private and public property. The judicial code distinguished between superior and inferior possessory rights. Property rights were recognized as absolute, *propiedad perfecta*, as long as they did not infringe on the rights of others, in which case they were considered *propiedad imperfecta* and were subject to limitations imposed by the state.¹ Just as in Roman law ownership (*dominium*) resulted from either inheritance or acquisition.

Only in the last ten or fifteen years have legal historians set themselves to the task of isolating Hispanic land and water law from the general corpus of Spanish jurisprudence and analyzing it with some degree of precision.² Much of the impetus to the recent legal scholarship stems from an accident of nineteenth-century history. In 1848, at the conclusion of the war between the United States and Mexico, the two countries negotiated and ratified the Treaty of Guadalupe-Hidalgo, a document which protected property rights, including land and water rights, then existing under Mexican law.

1. The early history of Spanish law, especially the efforts of codification, can be traced in *Las siete partidas del rey don Alfonso el Sabio*, 4 vols. (Madrid: n.p., 1789); Joaquín Escriche, *Elementos de derecho español* (Paris: Librería de D. Vincente Salvá, 1840); Juan de Solórzano Pereira, *Política Indiana*, 5 vols. (Madrid: Compañía Ibero-Americana de Publicaciones, 1930); and Helen L. Clagett, "The Siete Partidas," *The Quarterly Journal of the Library of Congress* 22 (October 1965): 341-46.

2. See, for example, Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850* (Tucson: University of Arizona Press, 1984), and by the same author, "The Legal Relationship of Land to Water in Northern Mexico and the Hispanic Southwest," *New Mexico Historical Review* 60 (January 1985): 61-79. Others who have contributed to the expanding Hispanic water historiography include Charles T. DuMars, Marilyn O'Leary, and Albert E. Utton, *Pueblo Indian Water Rights: Struggle for a Precious Resource* (Tucson: University of Arizona Press, 1984); William B. Taylor, "Land and Water Rights in the Viceroyalty of New Spain," *New Mexico Historical Review* 50 (July 1975): 189-212; Richard E. Greenleaf, "Land and Water in Mexico and New Mexico, 1700-1821," *New Mexico Historical Review* 47 (April 1972): 85-112; and Malcolm Ebright, "Manuel Martínez Ditch Dispute: A Study in Mexican Period Custom and Justice," *New Mexico Historical Review* 54 (January 1979): 21-34.

The principle that an area's change of sovereignty alters its public law but leaves intact its private law, including property law, has deep roots in the American historical experience.³ When the United States acquired Louisiana from France in 1803, former citizens of that territory continued to enjoy their property as before. Chief Justice John Marshall concluded that the property guarantees afforded individuals apply equally if the territory in question was acquired amicably or by conquest.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated . . . if private property rights should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed.⁴

Following the general principle articulated by Chief Justice Marshall, the Treaty of Guadalupe-Hidalgo provided ample protection for the property rights of Mexicans who, at the conclusion of the war in 1848, found that the international boundary had suddenly moved south. Although they had not moved, they were now residing in the United States. The Treaty which brought an end to the hostilities and reestablished peace is a classic example of applying the law of prior sovereigns to citizens innocently prejudiced by a change of territorial possession. Article VIII of that document states:

Mexicans now established in the territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account to any contribution, tax, or

3. A full, scholarly discussion of the general principle is found in Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law*, 2 vols. (London: Cambridge University Press, 1967).

4. *United States vs. Percheman*, 7 Pet. 51, at 86.

charge whatever . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.⁵

In the years following ratification of the treaty, state and federal courts, including the United States Supreme Court, heard innumerable cases emanating from the change of territorial sovereignty. Repeatedly the courts upheld the doctrine that the treaty obligations of the United States bound the government to protect all legitimate Spanish colonial and Mexican land titles while guarding against fraudulent claims. Supreme Court Justice Stephen J. Field summarized the position of the court when he noted in 1863:

the United States have never sought by their legislation to evade the obligation devolved upon them by the Treaty of Guadalupe-Hidalgo to protect the rights of property of the inhabitants of the ceded territory . . . They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the Treaty, the laws of nations, [and] the laws, usages and customs of the former government . . .⁶

In the twentieth century the focus of much of the litigation emanating from the Treaty of Guadalupe-Hidalgo has not been land but rather the water that sometimes went with that land. Numerous water rights cases in Texas, New Mexico, Arizona, and California have been adjudicated, and in the process of securing expert witness reports and testimony the historiography of Hispanic water law has come of age.⁷ The expert witnesses recognized that it would be in-

5. United States Senate, *The Treaty Between the United States and Mexico*, 30th Congress, 1st Session, Executive Document 52 (Washington, D.C., 1848), p. 47.

6. *United States vs. Anguisola*, 68 U.S. 613, 616 (1863).

7. See, for example, Special Master's Hearing at 16 (January 3, 1980), *New Mexico vs. Aamodt*, No. 6639, D.N.M.; Michael C. Meyer and Susan M. Deeds, "Land, Water and Equity in Spanish Colonial and Mexican Law: Historical Evidence for the Court in the Case of the State of New Mexico vs. R. Lee Aamodt, et al." (Unpublished manuscript, August 1979); William B. Taylor, "Colonial Land and Water Rights of New Mexico Pueblo Indians" (Unpublished manuscript prepared for the State of New Mexico vs. R. Lee Aamodt et al., n.d.); William B. Taylor, "A Response to Michael Meyer's 'Land, Water and Equity in Spanish Colonial and Mexican Law,' n.d.;" Michael C. Meyer, "Commentary on William B. Taylor's 'Colonial Law and Water Rights of the New Mexico Pueblo Indians,'" n.d.

sufficient simply to extrapolate from the general treatises on Spanish colonial law. The comprehensive body of water law itself had to be examined as well as the application of the legislation in specific water controversies. As that tedious process unfolded, previous disagreements on the nature of Hispanic water rights were put to rest for the most part.

Today legal historians have a much firmer grasp on questions such as the relationship of land to water, the methods for securing water rights, the nature of the implied water grant, and the roles of compromise, equity, and the common good in adjudicating water disputes. Scholars now understand the role that ethnicity played in water allocations and how disputes were resolved when community needs were pitted against long established or recently acquired individual water rights. Moreover, there is no longer any doubt concerning the elasticity of the Hispanic water rights; they could be expanded or contracted depending on changing conditions or they could be revoked altogether in a few unusual cases such as abandonment with the intent to abandon.⁸ Without question the progress made in understanding the fundamentals of Hispanic water law has been substantial, but the research to date has focused almost entirely on surface water law. Hispanic groundwater law has not been analyzed with the same intellectual vigor. This task will undoubtedly command the attention of legal historians in the years ahead.

Initial research on groundwater indicates that it was treated very differently than perennially running surface water in the Hispanic legal system. The differences begin with the most fundamental issue of all, the manner in which one acquired the right to use the water in question. The law concerning surface water was clear enough. With but few exceptions a general grant of land not containing reference to water entitled the owner to the use of its perennially running water only for very limited domestic needs. He could drink the water from a perennial stream, could bathe and wash his clothes in it, and could even water his sheep or cows. He could not, however, irrigate his fields or divert any water for industrial purposes, such as powering a mill. This water was not considered *res nullius* which could be acquired simply by the act of taking possession. In order to use any-

8. "Abandonment with the intent to abandon" had a specific meaning in Spanish jurisprudence. An individual could not lose a water right if, for example, he was driven off of his land by hostile Indians. In such a case he would have abandoned his right, but not with the *intent* to abandon it.

thing but relatively small amounts the landowner needed to obtain a special water right that could be acquired through purchase, through grant, or by means of some type of legal conveyance in a judicial award.⁹

Hispanic groundwater law did not follow the same principle. Water that originated on a piece of land, that ran solely within its confines, or that lay under it was automatically alienated from state ownership with the sale or grant of the land. It was appurtenant to land ownership. No special water right or additional permission was required to use it and no limits were set on the amounts that might be used.

Spanish groundwater law in this respect is thus a direct legacy of its Roman predecessor. In the Roman legal system, water that ran perennially from one property to another (*agua profluens*) was in the public domain (*res communes*). On the other hand, spring water or percolating water (*agua viva*) and rainwater (*agua pluviae*) were considered part of the land.¹⁰ Roman law privatized groundwater to the extent that it could be used exclusively by the owner, even causing damage to a neighbor, unless there was a conscious and malicious intent to damage that neighbor (*damnum absque injuria*).¹¹ Because it inhered in land ownership, the right to continued use of groundwater was in no way dependent upon its regular use.

The various kingdoms of the Iberian peninsula began to define their own jurisprudence in the early middle ages, shortly after the fall of the Roman Empire. In the thirteenth century King Alfonso X, a ruler of remarkable intelligence and an unrelenting foe of jurisprudential chaos, ordered a major codification of Iberian law in his attempt to foster the process of national unification. He believed it crucial, if the law was to have meaning, that a basic reference or encyclopedia be compiled. It was to include not only written law but

9. Water purchases were the most common method of acquiring the right. Examples of water purchases in northern New Spain can be traced in the following manuscript sources: José Gerónimo Huizar to Jefe Político, Jan. 5, 1824, Bexar Archives, Reel 76; Francisco del Prado y Arze to Juan Bautista Elquezabal, Apr. 8, 1805, Bexar Archives, Reel 33; Aviso al Público, Monclova, June 4, 1834, Bexar Archives, Reel 6; and En el real y Minas de San José del Parral, Nov. 25, 1783, Archivo Hidalgo de Parral, Reel 1783B.

10. *Portio enim agri videtur aqua viva* (Spring water is regarded as a portion of the field). See Alfredo Gallego Anabitarte, et al., *El Derecho de Aguas en España*, vol. I, pp. 415-16 and Ana Hederra Donoso, *Comentarios al Código de Aguas* (Santiago: Editorial Jurídica de Chile, 1960), p. 5.

11. Gallego Anabitarte, et al., *El Derecho de Aguas en España* I, p. 416. In this particular matter, at least, the common law and civil law were similar indeed.

legal custom and practice as well. The effort occupied Spain's leading jurists for the better part of nine years and culminated in 1265 with the completion of the famous *Siete Partidas*, a study that formed the basis for the entire legal system later to be introduced in the New World. Although traces of Germanic and Arabic influences are to be found in the *Siete Partidas*, that work is much more obviously the adaptation of Roman Law, especially Justinian's imposing *Corpus Iuris Civilis* (533 A.D.) and Canon Law, to a medieval Iberian reality.¹² The water law defined in arid Iberia is an excellent point in illustration.

The *Siete Partidas* declared that groundwater and other diffused surface water originating on a piece of land or running solely within its confines (including wells and springs) belonged to the owner of the land on which it rose (Partida 3, Título 32, Ley 19).¹³ Rainwater or snowmelt that flowed in an intermittent stream or arroyo could be impounded by the landowner in reservoirs, dams, cisterns, storage tanks, or any other device and put to subsequent beneficial use without permission because it was considered private water.¹⁴ The *Siete Partidas*, in fact, specified that it was an obligation of all inhabitants to make their land productive¹⁵ and it further indicated that "man has the power to do as he sees fit with those things that belong to him according to the laws of God and man."¹⁶

Did the landowner actually own the groundwater, spring water, and intermittent stream water or did he merely enjoy the use of that

12. An excellent but brief introduction to the evolution of Spanish law is found in Colin M. MacLachlan, *Criminal Justice in Eighteenth Century Mexico* (Berkeley: University of California Press, 1974), pp. 1-14. A more comprehensive theoretical treatment is contained in Guillermo Floris Margadant S., *Introducción a la Historia del Derecho Mexicano* (Mexico City: Universidad Nacional Autónoma de México, 1971).

13. The basic statement on the private ownership of groundwater reads: "Fuente o pozo de agua auiendo algun ome en su casa si algun su vezino quissiese fazer otro en la suya para auer agua e para aprouecharse del: puedelo fazer, e non selo puede el otro deuedar, como quier que menquasse por ende el agua de la fuente, o del su pozo. Fuera ende si este que lo quissiese fazer: non lo ouiesse menester más se mouiesse maliciosamente por fazer mal, o engaño al otro con intención de destajar." The English translation is as follows: "Where a man has a spring or well on his property and his neighbor wishes to make one on his property, in order to procure water for his use, the latter may do it, and the former cannot prevent him, notwithstanding the water in the first spring or well may be thereby diminished, unless the person wishing to make the new well has no need of it and acts maliciously, with the intention of doing harm to the other." *Siete Partidas*, Partida 3, Título 32, Ley 19.

14. *Siete Partidas*, Partida 2, Título 20, Ley 4.

15. Hederra Donoso, *Código de Aguas*, p. 6; Betty Eakle Dobkins, *The Spanish Element in Texas Water Law* (Austin: University of Texas Press, 1959), pp. 80-82.

16. *Siete Partidas*, Partida 3, Título 28, Ley 1.

water without any additional authorization from the Crown? The best evidence argues forcefully that the landowner's exclusive right to water originating on or underlying his property was not simply to usufruct of that water but was a vested right of ownership of the water itself. It was possessed in *dominium*. While perennially running water was *propiedad imperfecta* of which one could enjoy usufruct, groundwater was *propiedad perfecta*, the property of the landowner. Moreover, the ownership did not have to be obtained by separate purchase, grant, or judicial decision; it was conveyed by the same title as the surface of the land. In comparison with perennially running surface water, groundwater was at one and the same time more easily privatizable and more totally privatized.

The principle of the private ownership of groundwater was carried to the New World in the late fifteenth and early sixteenth centuries as part of the Spaniards' cultural baggage and became part of the legal tradition which Spanish colonists carried to the northern frontier of New Spain. Certainly this same water law was important throughout the vast dominions of the Spanish empire in America but nowhere was it more important than in northern Mexico. There the Spaniards observed how the summer sun could blister the desert landscape and crack the soil. It was there too that human ingenuity had to cope with the timeless quandaries of water: too little or too much, too dirty or too salty, too inaccessible, too stagnant, too hot or too cold. While surface water law was designed, in part, to check monopoly and foster the common good, groundwater law was designed to encourage development and protect individual rights.

The Hispanic groundwater tradition in Mexico was articulated most clearly in 1761 when D. Lasso de la Vega issued his famous water regulations, "De las Medidas de Aguas," for Mexican officials and quoted Avendaño's *Thesaurus Indico* on this issue: "Springs and water sources belong to those who own the land on which they originate, and they are part and fruit of the land, and for this reason are granted together with the land."¹⁷ Lasso de la Vega's water regulations were endorsed and circulated by the highest official in New Spain, Viceroy Joaquín Monserrat, the Marqués de Cruillas.

The principle of the private ownership of groundwater was reaffirmed by Joaquín Escriche, Spain's leading nineteenth-century legal

17. See Mariano Galván Rivero, *Ordenanzas de tierras y aguas: o sea formulario geográfico-judicial* (Mexico: n.p., 1849), pp. 157-61.

scholar, who stated in his legislative dictionary that: "The owner of a piece of property can, at his own discretion, dispose of the water from a source that rises on that property, and can divert it from the property of a neighbor where it ran previously because the water source forms part of the land on which it rises and therefore is part of the property of the owner of the land."¹⁸ Essentially the same principle was expressed in nineteenth-century Spain shortly after the adoption of a new mining code reinforcing the state's ownership of sub-soil mineral wealth. A royal decree of December 5, 1876, stated that the mining code of 1868 did not alter the private ownership of groundwater because the code "could not affect *property* [emphasis mine] acquired under all previous water legislation, nor was there any reason to assume that this was the intent of the legislators."¹⁹ The owner of the surface of the land was thus the owner of the water beneath that land. He could not lose his ownership by reason of abandonment unless he had the clear intention to abandon it²⁰ or unless he lost his land grant by reason of abandonment.

A landowner could also obtain the right to groundwater, spring water, or well water from neighboring land. If the neighboring land was privately owned he could purchase or lease groundwater or simply be extended the right to use. If the neighboring land constituted part of the public domain he could petition local authorities for a water grant. In New Mexico in 1715, for example, Captain Diego Arias de Quiros petitioned Governor Juan Ygnacio Flores Magollón for spring water on public land near his own land. The governor responded positively to the request and informed the petitioner that: "being in the royal patrimony, as it is, I make you a grant in the name of His Majesty of the above mentioned spring of water."²¹ Had the spring arisen on Captain Arias de Quiros' own land, rather than on crown land, it would not have been necessary for him to request the water grant. The water would have been his.

The distinct ownership pattern between surface and subsurface water can be explained on several grounds. At the time Spanish water

18. Joaquín Escriche y Martín, *Diccionario Razonado de Legislación Civil, Penal, Comercial y Forense* (Madrid: Calleja e Hijos, 1842), p. 408.

19. Gallego Anabitarte, et al., *El Derecho de Aguas en España*, vol. I, p. 429.

20. "When a man has once acquired possession of a thing, he is presumed to be always in possession whether he holds it corporally or otherwise until he abandons it with the intention no longer to retain it." *Siete Partidas*, Partida 3, Título 30, Ley 12.

21. Merced to Capitán Diego Arias de Quiros by Governor Juan Ygnacio Flores Mogollón, July 30, 1715, Spanish Archives of New Mexico, I, 8.

law evolved, the science of hydrology was still in its infancy and knowledge of aquifers was quite rudimentary. This law took little or no cognizance of the percolation process by which underground water could pass from one piece of property to another nor did it distinguish between confined (artesian) and unconfined aquifers. The source of underground water was unknown²² and the supply certainly seemed limitless. Moreover, there was no appreciation of the fact that aquifers could be hydraulically connected to form a groundwater basin and that depleting an underground reserve on a given piece of property could have a direct impact on the supply of a non-adjacent neighbor or even on the flow of a perennial stream. In any event the technology for the pumping of groundwater was so primitive that depletion of the aquifer was never an issue to be addressed.

Given this imperfect understanding and rudimentary technology, a person could pump water from a well or channel spring water to his fields without special permission or limitation of amount.²³ In surface water disputes Spanish colonial and Mexican law was very concerned with the principles of compromise and equity,²⁴ but the relative paucity of groundwater disputes among the generally litigious citizens of northern New Spain suggests that groundwater was not viewed primarily as an issue of competing interests. It was widely understood that groundwater belonged to the landowner and in most cases it was not practical to contest this principle with a formal hearing in the courts of the northern frontier.²⁵

Only a few caveats limited the private use of water originating on or underlying a piece of property, but the caveats were important

22. In 1674 French scientist Pierre Perrault posited that springs were originally fed by earthly precipitation, but his finding was not acknowledged in the corpus of the civil law of his age.

23. Spain's groundwater laws were debated vigorously in the nineteenth century, but ultimately the Roman tradition, as embraced by the *Siete Partidas* carried the day. A royal order of December 5, 1876, reaffirmed the private ownership of groundwater and this order was incorporated into Spain's general Ley de Aguas of 1879. See Gallego Anabitarte, et al., *El Derecho de Aguas en España*, vol. I, pp. 418-19.

24. See, as examples, Juan Antonio Lobato, Oct. 30, 1823, Spanish Archives of New Mexico, I, 1292 and Auto de Declaración de la agua y su Repartimiento, July 13, 1731, Archivo General de la Nación, Provincias Internas, Vol. 163, Exp. 3.

25. Professor William B. Taylor reached a similar conclusion in his examination of water disputes in southern New Spain: "Provision for the use of groundwater is notably absent from the mercedes records, the adjudication cases and the composición record of land ownership and water use . . . the absence of grants and formal adjudication certainly suggests that landowners had undisputed use of wells within their recognized boundaries . . ." Taylor, "Land and Water Rights," p. 205.

ones as they bridged the antithesis of the surface and groundwater systems. Although groundwater was private property it could not be used maliciously simply to deny access to a neighbor. It could not be denied to a neighbor who had previously been given a legal right to use it through either title, prescription, or legal servitude (*servidumbre*). If through contamination or stagnation it caused a public health hazard it could be regulated by the state. And, finally, it could not be denied to the inhabitants of an incorporated town which had no other adequate water source ("un pueblo que no tiene otro medio para proveer de este artículo tan enecessario").²⁶ This last concept not only has within it the seeds of what would later become the doctrine of eminent domain, but provides additional evidence that groundwater was property, not simply usufruct. If the common good dictated that the inhabitants of a town had to take precedence over private use of underground water, that water was still considered private property and the owner was entitled to just compensation for the use of "his property."²⁷

Exactly the same principle applied to underground water sources that were in close proximity to the mines. The mine owners were entitled by law to water from privately owned lands for their work animals, but they were required to pay the owners for this water.²⁸ The principle was clearly that one who suffers the deprivation of property by action of the state must be indemnified directly or indirectly by the state.²⁹ Indemnification could take the form of compensation in kind (another grant) or in an actual payment.

26. Examples of these types of limitations of the private use of groundwater are skillfully examined in an unpublished report by Daniel Tyler, "Underground Water in Hispanic New Mexico: An Analysis of Laws, Customs, and Disputes," December 1986.

27. ". . . como nadie puede ser despojado de sus cosas ni de sus derechos, ni aun por causa de utilidad pública, sin que primero se le dé competente indemnización . . . puede el dueño de la fuente pedir que se le se le resarza por el pueblo del perjuicio que se le causare, si es que es que el pueblo no se ha libertado de la obligación del resarcimiento por haber adquerido el uso del agua mediante título o prescripción. Además el dueño conserva siempre la propiedad [emphasis mine] de la fuente . . ." Gallego Anabitarte, et al., quoting Escriche, *El Derecho de Aguas en España*, vol. II, p. 135.

28. See Chapter XIII, Section III of the 1783 Royal Ordinance on Mining. John A. Rockwell, *A Compilation of Spanish and Mexican Law in Relation to Mines and Title to Real Estate* (New York: John S. Voorhies, 1851), p. 79.

29. I have seen only one exception written into the Mexican law. In 1833, when Mexico City was experiencing a severe drought, surrounding landowners, with or without water rights, were ordered to allow water carriers to come on to their property and to take water without charge to the inhabitant of Mexico City. Providencia del Exmo. Ayuntamiento de México, April 15, 1833, Juan N. Rodríguez de San Miguel, *Pandectas Hispano-Mexicanas*, 3 vols. (Mexico City: Universidad Nacional Autónoma de México, 1980), vol. I, p. 775.

As an increasingly large number of groundwater cases work their way through Southwestern courts in the years ahead one would anticipate a heightened interest in Hispanic groundwater law. Just as the earlier surface water cases stimulated meticulous historical research on that topic, the groundwater cases will surely do the same. It is clear that Hispanic groundwater law is very different from surface water law, but the principle of its judicial applicability in American courts is identical.

The Treaty of Guadalupe-Hidalgo was intended to ensure that the property rights of Mexican citizens in 1848 and their heirs and successors in interest would be fully recognized and protected by the United States government. That treaty cannot be summoned to imply that Spanish colonial and Mexican law should apply to all of the territory ceded from Mexico to the United States. The United States government and its territorial and state agents, as proprietors of the public domain, had the right to dispose of and regulate, as they saw fit, all lands and waters, surface and underground, which had not been privatized by the prior sovereigns. The Treaty did clearly direct that the law of prior sovereigns be applied to determine the scope of property rights already recognized by those sovereigns, and further directed that those property rights must be respected by the United States.

Treaties of the United States, as the Constitution itself, are the supreme law of the land and, according to Article VI, Section 2 of the Constitution, judges in every state are bound to respect them, "the laws of any State to the contrary notwithstanding."³⁰ The implication of Article VI, Section 2 is clear. If any state law conflicts with the treaty obligations of the United States, it is the treaty that is to take precedence. Spanish colonial and Mexican land and water law was no longer to be considered foreign law, it was to be considered American law.³¹ The living legacy of the Treaty of Guadalupe-

30. *Constitution of the United States*, Article VI, Section 2.

31. The Texas Supreme Court reaffirmed this principle in the 1984 adjudication of the Water Rights in the Medina River Water Shed of the San Antonio River Basin. "In applying law of granting sovereign to determine water rights conferred under 1833 Mexican land grant, Mexican law is not foreign law; as the law of former sovereign, it is Texas law which Texas courts have every duty to know and to follow." 670 South Western Reporter, 2d Series. The Arizona Courts reached the same conclusion in the 1907 Boquillas case. "The owner of a Mexican land grant . . . retained all vested rights of property to which he was entitled under the laws of Mexico, and the legislature of Arizona has no power or authority to deprive any such owner of any such rights, at least without due compensation . . ." *Boquillas Land and Cattle Co. vs. St. David Coop.*, Civil No. 988, 89 Pge. 504. For more on this point see Hans W. Baade, "The Historical Background of Texas Water Law: A Tribute to Jack Pope," *St. Mary's Law Journal* 18, 1 (1986): 21-22.

Hidalgo and the Constitution is unequivocal. Water law on what were once valid Spanish or Mexican land grants will continue to be Hispanic water law and, as a result, American courts of the twentieth century will continue, as they have in the past, to act as surrogates of Mexican courts of the nineteenth century. ❖